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# Proposed Timing Requirements for the Common-Law Motion to Withdraw a Plea: The Creation of a New Procedure in *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013)

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Note*

# Proposed Timing Requirements for the Common-Law Motion to Withdraw a Plea: The Creation of a New Procedure in *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013)

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## I. INTRODUCTION

In 2013, the Nebraska Supreme Court created a new procedure by which defendants can move to withdraw their guilty pleas after their conviction has become final—the common-law motion to withdraw a plea.[1] In *State v. Gonzalez* (*Gonzalez II*), Alma Gonzalez moved to



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1. State v. Gonzalez (*Gonzalez II*), 285 Neb. 940, 830 N.W.2d 505 (2013).

withdraw her no contest plea, alleging that she had received ineffective assistance of counsel because her attorney had not explained the immigration consequences of her conviction.[2] The court looked at the two existing methods by which Gonzalez could withdraw her plea and determined that neither applied.[3] The court then concluded that there was another method that might have been available to Gonzalez—a common-law motion.[4] The court had alluded to the possibility of such a procedure in a previous case,[5] but never actually recognized a common-law motion to withdraw a plea as a valid procedure, nor had the court articulated the "scope and parameters" governing when defendants could bring such a motion.[6] In *Gonzalez II*, the court briefly articulated the scope and parameters of the common-law motion. The procedure "is available in extremely limited circumstances."[7] It is only available in cases where "(1) the [Postconviction] Act is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea and (2) a constitutional right is at issue."[8]

Because the common-law motion was not available to Gonzalez, the court did not explain the details of the procedure.[9] Since *Gonza-*

2. *Id.* at 940, 830 N.W.2d at 505. Nebraska statutes allowing the entry of such a plea refer to a plea of "nolo contendere." *See* NEB. REV. STAT. §§ 29-1819 to 29-1819.03 (Reissue 2008). Trial courts sometimes refer to pleas of nolo contendere as "no contest" pleas. State v. Obst, 12 Neb. Ct. App. 189, 191, 669 N.W.2d 688, 691 (2003). The terms can be used interchangeably because they "have the same meaning, with no difference in their connotation, and both terms are regularly used to convey the same concept." *Id.* (citing BLACK'S LAW DICTIONARY 1069, 1070 (7th ed. 1999)).

3. *Gonzalez II*, 285 Neb. at 944–46, 830 N.W.2d at 507–09.

4. *Id*. at 948, 830 N.W.2d at 510.

5. *Id.*; *see* State v. Yos-Chiguil, 278 Neb. 591, 595, 772 N.W.2d 574, 578 (2009) ("Because the issue was not presented to us [in *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008)], we did not address whether a common-law remedy existed for withdrawal of the plea in that circumstance."). The Court did not reference such a procedure in *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977), but later concluded the case also supported a common-law motion to withdraw a plea by addressing the defendant's argument on its merits even though it was a collateral attack on his conviction. *See Gonzalez II*, 285 Neb. at 947, 830 N.W.2d at 509–10 (recalling that in *Kluge* the court had noted the American Bar Association Standards Relating to Pleas of Guilty allowed a defendant to withdraw his or her plea *whenever* the defendant filed a timely motion proving that withdrawal was necessary to correct a manifest injustice).

6. *Gonzalez II*, 285 Neb. at 948, 830 N.W.2d at 510 (observing that neither *Kluge* nor *Yos-Chiguil* explained the "scope and parameters" of the common-law procedure).

7. *Id.*

8. *Id.* at 949–50, 830 N.W.2d at 511.

9. *Id.* at 950, 830 N.W.2d at 511.

*lez*, the court has only addressed the procedure four times[10] and has not yet clearly defined how long after conviction defendants may move to withdraw their plea using the common-law procedure. This Note will propose that Nebraska courts apply the timing requirements from the Nebraska Postconviction Act (the Act),[11] because the common-law procedure was created as an alternative for defendants who could not bring postconviction motions under the Act.[12] Part II will provide background on how defendants could withdraw their pleas in Nebraska prior to the creation of the common-law motion. Part III will discuss *Gonzalez* and the limitations the opinion placed on the common-law motion to withdraw a plea. Part IV will discuss cases involving common law motions to withdraw pleas since *Gonzalez*—none of which include a discussion on when a motion is considered timely—and will propose timing requirements that should guide when defendants can raise common law motions. Part V will conclude the Note.

## II. BACKGROUND

Nebraska allows defendants to withdraw their guilty or no contest plea prior to sentencing.[13] Defendants may withdraw their pleas, at the court's discretion, "for any fair and just reason" if the prosecution has not and would not be "substantially prejudiced by its reliance on the plea."[14] Defendants may also move to withdraw their plea after sentencing, but before the judgment becomes final for purposes of a collateral attack.[15] Judges shall only allow defendants to withdraw their plea if the defendant proves that withdrawal is necessary to "correct a manifest injustice" and establishes the grounds for withdrawal by clear and convincing evidence.[16]

After a defendant has been sentenced, however, the primary method for withdrawing a plea is the Nebraska Postconviction Act.[17] A prisoner in custody may file a verified motion asking the court to vacate or set aside his or her sentence on the ground that the prisoner's rights were denied or infringed to an extent that would render

10. *See generally* State v. Merheb, 290 Neb. 83, 858 N.W. 2d 226 (2015); State v. Mamer, 289 Neb. 92, 853 N.W.2d 517 (2014); State v. Osorio, 286 Neb. 384, 837 N.W.2d 66 (2013); State v. Yuma, 286 Neb. 244, 835 N.W.2d 679 (2013).
11. NEB. REV. STAT. § 29-3001 (Cum. Supp. 2012).
12. *Gonzalez II,* 285 Neb. at 948–49, 830 N.W.2d at 511.
13. State v. Minshall, 227 Neb. 210, 214, 416 N.W.2d 585, 588 (1987).
14. *Id.*; *see, e.g.*, State v. Roeder, 262 Neb. 951, 959, 636 N.W.2d 870, 877 (2001); State v. Carlson, 260 Neb. 815, 821, 619 N.W.2d 832, 837 (2000).
15. State v. Kluge, 198 Neb. 115, 119, 251 N.W.2d 737, 740 (1977).
16. *Id.*; *see, e.g.*, State v. Holtan, 216 Neb. 594, 599, 344 N.W.2d 661, 665 (1984); State v. Lewis, 192 Neb. 518, 522, 222 N.W.2d 815, 818 (1974). For a discussion of what constitutes a manifest injustice, see *infra* note 58.
17. NEB. REV. STAT. § 29-3001 (Cum. Supp. 2012).

the judgment void.[18] A prisoner has one year to file his or her motion for postconviction relief.[19] The one-year period runs from one of four dates: (1) "[t]he date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal,"[20] (2) "[t]he date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence,"[21] (3) "the date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of the state, is removed, if the prisoner was prevented from filing a verified motion by such state action,"[22] or (4) "[t]he date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review."[23] Additionally, a defendant cannot use a postconviction motion to secure review of issues of which the defendant knew about and could have litigated at the time of his or her direct appeal.[24]

Sections 29-1819.02 and 29-1819.03 provide an alternative method for a defendant to withdraw a plea after his or her conviction becomes final.[25] Section 29-1819.02 requires that the trial court warn defendants that a conviction might have negative immigration consequences.[26] If the court fails to do so, and the defendant shows that that conviction may result in his or her removal from the United States, the trial court must vacate the judgment and allow the defendant to withdraw his or her plea and enter a plea of not guilty.[27] To withdraw a plea pursuant to Section 29-1819.02, a defendant must show only "(1) that the court failed to give all or part of the advisement

18. *Id.* § 29-3001(1).
19. *Id.* § 29-3001(4).
20. *Id.* § 29-3001(4)(a).
21. *Id.* § 29-3001(4)(b).
22. *Id.* § 29-3001(4)(c).
23. *Id.* § 29-3001(4)(d).
24. State v. Lotter, 278 Neb. 466, 478, 771 N.W.2d 551, 561 (2009).
25. NEB. REV. STAT. §§ 29-1819.02, 29-1819.03 (Reissue 2008).
26. *Id.* § 29-1819.02(1). The section provides that before a judge accepts a guilty or no contest plea from a defendant, the judge must issue the following advisement: "IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES." *Id.*
27. *Id.* Section 29.1819.03 provides the legislative intent behind Section 29-1819.02, recognizing that often defendants plead guilty or no contest to offenses without knowing that a conviction for the offense is grounds for removal from the United States or denial of naturalization. Requiring that judges warn the defendant of the possible immigration consequences of their plea "promote[s] fairness." *Id.*

[required by section 29-1819.02(1)] and (2) that the defendant faces an immigration consequence which was not included in the advisement he or she received."[28] The defendant is not required to show that he or she was prejudiced as a result of the plea.[29]

## III. THE *GONZALEZ* OPINIONS

### A. *Gonzalez I*

In 2007, Alma Gonzalez was arrested for fraudulently obtaining public assistance benefits in an amount greater than $500, a Class IV felony carrying a possible penalty of up to five years in prison or a $10,000 fine.[30] Prior to her arrest, the federal government had initiated deportation proceedings against Gonzalez, who was living in the country illegally.[31] Gonzalez pled no contest in early 2008 in exchange for the State recommending a term of probation at sentencing and Gonzalez's agreement to pay restitution for the benefits that she had illegally obtained.[32] Before accepting her plea, the court warned her that conviction for the offense could lead to her deportation or denial of her naturalization requests.[33] Prior to entering her plea, Gonzalez was eligible for a "cancellation of removal,"[34] but she became ineligible as a result of her conviction.[35]

Gonzalez subsequently filed a "Motion to Withdraw Plea and Vacate Judgment" on July 14, 2010, alleging that she had received ineffective assistance of counsel.[36] At an evidentiary hearing, Gonzalez testified that she had not discussed the immigration consequences of her plea with her trial counsel.[37] Gonzalez testified that her trial counsel knew she was not a United States citizen, but that she had not

28. State v. Medina-Liborio, 285 Neb. 626, 630, 829 N.W.2d 96, 99 (2013).
29. *Id.*
30. State v. Gonzalez (*Gonzalez I*), 283 Neb. 1, 807 N.W.2d 759 (2012), *withdrawn*, 285 Neb. 940, 830 N.W.2d 504 (2013).
31. *Id.* at 3, 807 N.W.2d at 763.
32. *Id.*
33. *Id.*
34. *See* 8 U.S.C. § 1229b(b) (2012). The Attorney General may cancel the removal of a nonpermanent resident alien and change the alien's status to permanent resident if the alien (a) has been "physically present in the United States for a continuous period" of at least ten years, (b) has been a person of good moral character during that time, (c) has not been convicted of certain enumerated crimes, and (d) "establishes that removal would result in exceptional and extremely unusual hardship" for the individual's "spouse, parent, or child" if the spouse, parent, or child is a United States citizen or permanent resident alien. *Id.* Had she not been convicted, Gonzalez would have been eligible for a cancellation of removal because she had relatives in the United States and had been living in the country for at least ten years. *Gonzalez I*, 283 Neb. at 4, 807 N.W.2d at 764.
35. *Gonzalez I*, 283 Neb. at 4, 807 N.W.2d at 764.
36. *Id.*
37. *Id.*

informed her counsel of her ongoing immigration case.[38] Gonzalez said that she would have "looked into other solutions" had she known that her plea might have immigration consequences.[39] However, Gonzalez also admitted that she never asked her attorney whether her plea might cause problems with her immigration status, even though the immigration consequences of her plea were "very important to her."[40] Gonzalez stated that she did not learn the consequences of her plea until she was told by the attorney representing her in her immigration proceedings, about five months before she filed her motion to withdraw her plea.[41] The district court denied Gonzalez's motion, finding that her assertion that she would have looked for a different solution did not satisfy her burden of showing that she was prejudiced by her counsel's performance, because finding a different solution was not in her control.[42] The trial court also noted that although Gonzalez had two attorneys at the time of her plea—her trial counsel and her immigration attorney—she did not ask either of them about the specific immigration consequences of her plea, despite her awareness that her plea might affect her immigration status.[43] The district court found that Gonzalez had failed to prove that she was prejudiced as a result of her counsel's failure to warn her about the immigration consequences of her plea and denied her motion.[44]

On appeal, the Nebraska Supreme Court concluded that there are three avenues generally available to defendants who claim that they were not properly advised of the immigration consequences their plea: (1) a motion for postconviction relief under the Nebraska Postconviction Act, (2) withdrawing the plea pursuant to Sections 29-1819.02 and 29-1819.03, and (3) a common-law motion to withdraw a plea.[45]

Only the third option was available to Gonzalez. Although a defendant can file a postconviction motion alleging ineffective assistance of

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 4–5, 807 N.W.2d at 764. To determine whether a defendant received ineffective assistance of counsel, Nebraska courts use the two-pronged test articulated by the United States Supreme Court in *Strickland. v. Washington*, 466 U.S. 668 (1984). Defendants must show that (1) their counsel's performance was deficient—that is, "counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area," and (2) their counsel's deficient performance actually prejudiced the defendant in his case—that is, "but for counsel's deficient performance, the result of the proceeding would have been different." State v. Davlin, 277 Neb. 972, 976–77, 766 N.W.2d 370, 376 (2009).
43. *Gonzalez I*, 283 Neb. at 5, 807 N.W.2d at 764.
44. *Id.*
45. *Gonzalez I*, 283 Neb. at 5–6, 807 N.W.2d at 765; NEB. REV. STAT. § 29-3001. For a discussion of withdrawing pleas pursuant to the Act, see *supra* notes 15–24 and accompanying text; for a discussion of withdrawing pleas pursuant Sections 29-1819.02 and 29-1819.03, see *supra* notes 26–30 and accompanying text.

counsel when his or her attorney fails to advise him or her of the immigration consequences of his or her plea, Gonzalez did not cite to or rely on the Act in her motion, nor did she verify her motion as required by the Act.[46] Nor was relief available to Gonzalez under Sections 29-1819.02 and 29-1819.03, because she received the advisement required by statute.[47] However, the fact that Gonzalez received the required advisement did not foreclose a common-law remedy of withdrawal of a plea.[48]

Prior to *Gonzalez I*, the Nebraska Supreme Court had never explicitly recognized a common-law motion to withdraw a plea. However, the court recognized that while it held in *State v. Rodriguez-Torres*[49] that section 29-1819.02 did not create a statutory procedure pursuant to which a plea entered before the statute was enacted could be withdrawn after the person convicted of the crime had already served his sentence, it had also clarified in *State v. Yos-Chiguil*[50] that *Rodriguez-Torres* did not foreclose a common-law remedy for withdrawal of a plea.[51]

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46. *Gonzales I*, 283 Neb. at 6, 807 N.W.2d at 765. A motion is "verified" if one "confirm[s] or substantiates[s] by oath or affidavit," or "swear[s] to the truth of" the motion. BLACK'S LAW DICTIONARY 1698 (9th ed. 2009).

47. *Gonzalez I,* 283 Neb. at 6, 807 N.W.2d at 765.

48. *Id.*

49. 275 Neb. 363, 746 N.W.2d 686 (2008). Rodriguez-Torres pled guilty to possession of a controlled substance in 1997 and was sentenced to two years of supervised probation. *Id.* at 364, 747 N.W.2d at 688. Rodriguez-Torres later pled guilty to a probation violation and was sentenced to a year in prison. *Id.* As a result of these pleas, Rodriguez-Torres became subject to deportation, so he filed a motion to withdraw his guilty pleas pursuant to NEB. REV. STAT. § 29-1819.02 in 2006. *Id.* at 365, 746 N.W.2d at 688. The court recognized that while Section 29-1819.02 gives courts discretion to vacate a judgment or withdraw a plea where the court failed to give the advisement required for pleas made prior to July 20, 2002, the statute does not authorize a court to do so when the defendant has already completed his sentence. *Id.* at 367, 746 N.W.2d at 689. Rodriguez-Torres failed to directly appeal his convictions or seek postconviction relief, and sought to withdraw his pleas years after he had already served his sentence. *Id.* The court found that, absent a legislatively authorized procedure allowing Rodriguez-Torres to withdraw his plea, he had no recourse to do so. *Id.*

50. 278 Neb. 591, 772 N.W.2d 574 (2009). The court recalled its decision in *Rodriguez-Torres* that NEB. REV. STAT. § 29-1819.02 did not create a statutory procedure pursuant to which a plea entered before July 2, 2002, could be withdrawn after the individual convicted of the crime had already served his or her sentence—"[b]ecause the issue was not presented to us, we did not address whether a common-law remedy existed for withdrawal of the plea in that circumstance." *Id.* at 595, 772 N.W.2d at 578. The court did not address whether a common-law remedy was available to Yos-Chiguil, instead finding that Yos-Chiguil did not allege an essential fact necessary to trigger the remedy provided by Section 29-1819.02 because he did not allege that he faced the prospect of his application for naturalization being denied based solely on his conviction that he sought to vacate. *Id.* at 598–99, 772 N.W.2d at 580.

51. *Gonzalez I,* 283 Neb. at 6–7, 807 N.W.2d at 765.

The court then observed that it is "well established that a defendant may move to withdraw a plea, even after final judgment," although it is "quite difficult" for a defendant to prove the grounds for removal.[52] When a defendant moves to withdraw a plea before sentencing, the trial court may allow a defendant to withdraw his or her plea for any fair or just reason,[53] "[b]ut with respect to withdrawal of a plea of guilty or no contest made *after* sentencing, withdrawal is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice."[54] The court stated that this "standard applies even where a motion to withdraw a plea has been made after the sentencing court's judgment has become final."[55] Such a motion is timely "if made with due diligence, considering the nature of the allegations therein and is not necessarily barred because it was made subsequent to a judgment or sentence."[56]

The court concluded that although Gonzalez could have filed a motion for postconviction relief, she was also permitted to move to withdraw her plea.[57] The court then had to determine whether Gonzalez had adduced clear and convincing evidence of manifest injustice necessary to justify withdrawing her plea.[58]

The Nebraska Supreme Court agreed with the district court's finding that Gonzalez did not prove she was prejudiced by her attorney's ineffective assistance in not warning her of the immigration consequences of her plea.[59] Most importantly, the court observed, Gonzalez did not testify that she would have insisted on going to trial had she

52. *Id.* at 7, 807 N.W.2d at 766.

53. *See supra* note 14 and accompanying text.

54. *Gonzalez I,* 283 Neb. at 7, 807 N.W.2d at 766 (emphasis added).

55. *Id.* (citing State v. Holtan, 216 Neb. 594, 344 N.W.2d 661 (1984); State v. Kluge, 198 Neb. 115, 251 N.W.2d 737 (1977)).

56. *Id.*

57. *Id*. at 8, 807 N.W.2d at 766.

58. *Id.* Gonzalez made her motion with due diligence—she filed it shortly after the U.S. Supreme Court decided *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that a claim for ineffective assistance of counsel is available based upon the immigration consequences of a plea). *Gonzalez I*, 283 Neb. at 8, 807 N.W.2d at 766. A defendant may demonstrate manifest injustice in one of four ways, by proving that: (1) the defendant was denied effective assistance of counsel guaranteed under the law, (2) the defendant (or a person authorized to act on his or her behalf) did not enter or ratify the plea, (3) the plea was involuntary, or the defendant entered it without knowing the charge or sentence that could actually be imposed, or (4) the defendant did not did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecutor failed to seek or not to oppose the concessions promised in the plea agreement. *Id.* at 8, 807 N.W.2d at 766–67. The defendant must also plead and prove that the error resulted in prejudice. *Id.*

59. *Id.* at 10, 807 N.W.2d at 768; *see supra* notes 41–43 and accompanying text.

known that she could be deported.[60] Although Gonzalez testified she would have looked for another solution, she presented no evidence as to what potential solutions would have been available to her.[61] Under the Immigration and Nationality Act, cancellation of removal is unavailable to any alien who has committed an "aggravated felony."[62] An offense involving "fraud or deceit in which the loss to the victim . . . exceeds $10,000" is an aggravated felony.[63] The court concluded there was "no dispute"[64] that Gonzalez committed the crime of which she was accused or that her conduct fit the description of an aggravated felony, and could see no way that she could have resolved her case to avoid the negative immigration consequences of her plea.[65] Further, Gonzalez faced a possibility of up to five years in prison, making the State's recommendation that she receive probation a favorable outcome—one that would be rational for a defendant to accept.[66] Gonzalez presented no evidence that, absent her counsel's allegedly deficient performance, she would have insisted on going to trial.[67] Therefore, Gonzalez could not prove the prejudice prong of *Strickland*'s ineffective assistance test, and while the district court had jurisdiction to consider her motion, it did not err in overruling it.[68]

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60. *Gonzalez I*, 283 Neb. at 11, 807 N.W.2d at 768.
61. *Id.*
62. The statute provides "any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). 8 U.S.C. § 1229b(b)(1)(C) (2012) gives the Attorney General the authority to cancel the removal of an alien who meets certain conditions. To be eligible for a cancellation of removal, however, the alien cannot have been convicted of an offense under 8 U.S.C. § 1227(a)(2), including that of "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). See *supra* note 34 for the four requirements an alien must meet to be eligible for a cancelation of removal under 8 U.S.C. § 1229b(b)(1).
63. 8 U.S.C. § 1101(a)(43)(M)(i) (2012).
64. *Gonzalez I*, 283 Neb. at 11, 807 N.W.2d at 768. This seems to imply that a defendant must show he or she is actually innocent of the crime in order to demonstrate prejudice—a proposition that the Nebraska Supreme Court has implied in other cases as well. In *State v. Krug*, 187 Neb. 551, 192 N.W.2d 163 (1971), the court refused to allow a defendant to withdraw his plea, noting both that the defendant had not shown with clear and convincing evidence that the prosecutor had failed to keep a promise regarding a sentencing recommendation and that "the defendant [had] ma[de] no showing that he was innocent." *Id.* at 553–54, 192 N.W.2d at 165. *See also* State v. Lopez, 274 Neb. 756, 764, 743 N.W.2d 351, 358 (2008) (assuming that defendant's trial counsel was ineffective in failing to object to the State's comment on the defendant's silence during an interview, but observing that the defendant still could not establish prejudice where the defendant herself made certain statements suggesting her guilt).
65. *Gonzalez I*, 283 Neb. at 11, 807 N.W.2d at 768 (noting Gonzalez's argument that the State might have been willing to craft a creative plea bargain was mere speculation).
66. *Id.* at 11, 807 N.W.2d at 769.
67. *Id.* at 11–12, 807 N.W.2d at 768–69.
68. *Id.* at 12, 807 N.W.2d at 769.

### B. *Gonzalez II*

Although the State's argument prevailed in *Gonzalez I*, the Nebraska Attorney General's Office filed a motion for rehearing.[69] The State questioned the court's conclusion that Gonzalez's motion was procedurally proper, specifically the court's decision that there is a common-law procedure by which a defendant whose sentence has become final may move to withdraw his or her plea.[70] After the court granted the motion for rehearing, the United States Supreme Court decided *Chaidez v. United States*,[71] which held that *Padilla*'s rule was not retroactive. *Chaidez* made it clear that Gonzalez's motion had absolutely no merit, but the court issued its opinion in *Gonzalez II* to address the issue of whether her motion was procedurally proper.[72]

The court withdrew its opinion in *Gonzalez I* and substituted its opinion issued in *Gonzalez II*, concluding that "although a very limited common-law procedure exists, it was unavailable to Gonzalez because she could have raised an ineffective assistance of counsel claim under the Nebraska Postconviction Act."[73] Therefore, the district court lacked jurisdiction to hear Gonzalez's motion and the Nebraska Supreme Court lacked jurisdiction to hear her appeal.[74]

In deciding whether the common-law motion was available to Gonzalez, the court considered alternative methods she could have used to

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69. *Gonzalez II*, 285 Neb. 940, 943, 830 N.W.2d 504, 507 (2013).
70. *Id.*
71. 133 S. Ct. 1103 (2013). Jose Padilla pled guilty to drug-distribution charges without being warned that he could be deported as a result of his plea. *Padilla v. Kentucky*, 559 U.S. 356 (2010). In his postconviction motion, Padilla alleged that his counsel not only failed to advise him of the immigration consequences of his plea, but also incorrectly assured him that he "did not have to worry about his immigration status since he had been in the country so long." *Id.* at 359. Under United States immigration laws, a defendant's removal is "practically inevitable" if he commits a removable offense (such as a narcotics offense). *Id.* at 364. Although the United States Attorney General sometimes has discretion to cancel removable proceedings, such discretionary relief is generally not available for defendants convicted of trafficking a controlled substance. *Id.* The United States Supreme Court found that the consequences of Padilla's plea could have easily been determined by reading the removal statute and his counsel gave him incorrect advice by falsely assuring him that his conviction would not result in his removal from the country. *Id.* at 368–69. The Court concluded that "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that the pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in [Padilla's] case, the duty to give correct advice is equally clear." *Id.* at 369. Of course, this only satisfies *Strickland*'s first prong—that the defendant's counsel was deficient. *Id.* at 369. The defendant still needs to show that he was prejudiced as a result of his counsel failing to warn him about the immigration consequences of his plea. *Id.*
72. *Gonzalez II,* 285 Neb. at 943, 830 N.W.2d at 507.
73. *Id.*
74. *Id.*

withdraw her plea. There are two statutory avenues available for defendants wishing to withdraw their pleas: the Act and section 29-1819.02.[75] Gonzalez did not bring her motion under the Act and contended that the Act was not available to her because she was not "in custody."[76] However, the Nebraska Supreme Court has held that a prisoner is "in custody" for purposes of the Act not only when they are incarcerated, but also while on parole[77] or while serving a term of court-ordered probation.[78] Because Gonzalez was still serving her five-year term of probation when she filed her motion, she was in custody for purposes of the Act.[79] Because Gonzalez did not show that she could not have raised her ineffective assistance of counsel claim under the Act, the court presumed the Act was available to her.[80]

The State argued that there was no common-law procedure authorizing a defendant to withdraw a plea after the conviction had become final and that the court's first opinion had incorrectly recognized one.[81] The court agreed that all of the cases it had cited in its original opinion dealt with motions to withdraw pleas made after sentencing but before the judgment became final for purposes of a collateral attack, and therefore did not support a finding that a common-law procedure exists allowing a defendant to move to withdraw a plea after the conviction has become final.[82] However, *State v. Kluge* still supported the court's proposition that the manifest injustice standard applies even when a defendant motions to withdraw a plea after the sentencing court's judgment has become final.[83]

In *Kluge*, the defendant filed a motion to withdraw his guilty plea after he unsuccessfully filed a direct appeal.[84] The motion was a collateral attack on his conviction, and although a concurring opinion challenged the procedural validity of the motion, the court addressed it on its merits.[85] In doing so, the court cited the American Bar Asso-

75. NEB. REV. STAT. § 29-1819.02 (Reissue 2008); *see supra* notes 11–14 and accompanying text.
76. *Gonzalez II*, 285 Neb. at 945, 830 N.W.2d at 508.
77. State v. Thomas, 236 Neb. 553, 462 N.W.2d 862 (1990).
78. State v. Styskal, 242 Neb. 26, 493 N.W.2d 313 (1992).
79. *Gonzalez II*, 285 Neb. at 945–46, 830 N.W.2d at 508. Gonzalez argued that she was in federal custody when she filed her motion and thus, the Act was unavailable to her. *Id.* at 946, 830 N.W.2d at 508. Declining to decide whether a defendant can bring a state postconviction action while in federal custody, the court found it did not matter because Gonzalez neither pled nor proved she was in federal custody for the entire one-year period following *Padilla v. Kentucky*, 559 U.S. 356 (2010). *Gonzalez II*, 285 Neb. at 946, 830 N.W.2d at 509.
80. *Gonzalez II*, 285 Neb. at 946, 830 N.W.2d at 509.
81. *Id.*
82. *Id.*
83. *Id.* at 947, 830 N.W.2d at 509 (citing State v. Kluge, 198 Neb. 115, 251 N.W.2d 737 (1977)).
84. *Kluge*, 198 Neb. 115, 251 N.W.2d 737.
85. *Id.*

ciation Standards Relating to Pleas of Guilty, noting that Standard 14-2.1(b) allowed a defendant to withdraw a guilty plea "*whenever*" he or she "upon timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice."[86] Further, the court had more recently alluded to a common-law procedure in *Yos-Chiguil*.[87] The court then concluded that *Kluge* and *Yos-Chiguil* recognize a common-law procedure for withdrawing a plea after a conviction has become final, and explained the scope and parameters of that procedure.[88]

First, the procedure is civil, not criminal, and is available "in extremely limited circumstances."[89] The court reasoned that the Legislature intended the Act to be the primary procedure for bringing collateral attacks based on constitutional principles.[90] This intent is evidenced by the Legislature's statement that the Act is "not intended to be concurrent with any other remedy existing in the courts of the state" and any postconviction motion "which states facts which if true would constitute grounds for relief under another remedy shall be dismissed with prejudice."[91] Therefore, the court concluded, a defendant may invoke the common-law procedure and move to withdraw his or her plea after the conviction has become final only if the defendant "does not and never could have asserted the basis of his or her collateral attack under the Act."[92]

The court further explained the defendants could only withdraw their plea when their collateral attack is based on a constitutional issue.[93] Although in the past, the court refused to create or recognize a non-statutory procedure by which defendants could raise claims related to criminal cases, such situations were different because the procedures at issue were "not constitutionally mandated."[94] The right to effective assistance of counsel, however, is granted by the Sixth Amendment and the court refused to deny defendants due process of law "when such a right is at issue and there is no other means of vindicating it."[95] The court then held:

86. *Id.* at 118, 251 N.W.2d at 739 (emphasis added).
87. *Gonzalez II*, 285 Neb. 940, 947–48, 830 N.W.2d at 510 (citing State v. Yos-Chiguil, 278 Neb. 591, 596, 772 N.W.2d 574, 578 (2009)) (noting that the court would not address whether a common-law remedy for withdrawing a plea existed because the issues was not presented to it).
88. *Id.* at 948–49, 830 N.W.2d at 510.
89. *Id.*
90. *Id.*
91. *Id.* at 948–49, 830 N.W.2d at 510 (citing NEB REV. STAT. § 29-3003 (Reissue 2008)).
92. *Id.* at 949, 830 N.W.2d at 510.
93. *Id.*
94. *Id.* at 949, 830 N.W.2d at 511 (citing State v. El-Tabech, 259 Neb. 509, 610 N.W.2d 737 (2000); State v. Louthan, 257 Neb. 174, 595 N.W.2d 917 (1999)).
95. *Id.*

> [T]here is a Nebraska common-law procedure under which a defendant may move to withdraw a plea after his conviction has become final. This procedure is available only when (1) the Act is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea and (2) a constitutional right is at issue. In sum, this common-law procedure exists to safeguard a defendant's rights in the very rare circumstance where due process principles require a forum for the vindication of a constitutional right and no other forum is provided by Nebraska law.[96]

Because Gonzalez was "in custody" while serving her probation and she did not show that the Act was unavailable to her in the one-year period following *Padilla*, Gonzalez's sole remedy for withdrawing her plea was to do so pursuant to the Act.[97] As a result, the newly recognized common-law procedure was not available to Gonzalez, and the district court lacked jurisdiction to consider her motion.[98]

## IV. ANALYSIS

### A. Subsequent Common-Law Motions

The Nebraska Supreme Court has addressed the common-law procedure by which defendants can withdraw their pleas on only two occasions since *Gonzalez II*. In *State v. Osorio*,[99] the court held that, because *Padilla* is not retroactive,[100] defendants cannot use common-law motions to withdraw pleas made before *Padilla* was decided.[101] Osorio made his plea almost ten years before *Padilla* and therefore, the constitutional right under which he claimed manifest injustice was inapplicable as a matter of law.[102]

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96. *Id.* at 949–50, 830 N.W.2d at 511.
97. *Id.* at 950, 830 N.W.2d at 511.
98. *Id.*
99. 286 Neb. 384, 837 N.W.2d 66 (2013).
100. In *Chaidez v. United States*, 133 S. Ct. 1103 (2013) the United States Supreme Court held *Padilla*'s requirement that defense counsel advise defendants of the risk of deportation arising from a guilty plea did not apply retroactively to cases already final on direct review because *Padilla* announced a new rule under *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, cases announce new rules when they "break[ ] new ground or impose[ ] a new obligation on [the government]" and those rules do not apply retroactively. 489 U.S. at 301. When a case does not announce a new rule and is "'merely an application of the principle that governed' a prior decision to a different set of facts," the case applies retroactively. *Chaidez*, 133 S. Ct. at 1107 (quoting *Teague*, 489 U.S. at 307); *see also* State v. Merheb, 290 Neb. 83, 858 N.W.2d 226 (2015) (holding that *Padilla* is not retroactive, and therefore defendant did not have a claim for manifest injustice when his conviction became final over a year before the United States Supreme Court decided *Padilla*).
101. Osorio sought to withdraw his plea from a 2002 conviction, which was made prior to both the application of section 29-1819.02 and *Padilla*. *Osorio*, 286 Neb. at 384, 837 N.W.2d 66. Osorio was deported as a result of his plea and sought to withdraw it after he returned to the United States and learned that he again faced deportation as a result of his conviction. *Id.* at 385, 837 N.W.2d at 67.
102. *Id.* at 389, 837 N.W.2d at 70.

In contrast, in *State v. Yuma*[103] the court concluded that *Padilla* applied to the defendant's plea.[104] Yannick Yuma was granted asylum and immigrated to the United States from Zaire in 2001.[105] In August 2009, Yuma was charged with one count of strangulation, a Class IV felony, and one count of domestic assault in the first degree, a Class III felony.[106] In March 2010, pursuant to a plea agreement, Yuma pled no contest to one count of attempted strangulation and one count of domestic assault in the third degree, both Class I misdemeanors.[107] Before accepting Yuma's plea, the trial court gave him the statutorily required advisement that his conviction may have negative immigration consequences, and Yuma acknowledged that he understood.[108] On April 7, Yuma was sentenced to a year in prison on each count, to be served concurrently, and given credit for 247 days served, which resulted in Yuma being released from custody the same day he was sentenced.[109]

In September 2011, Yuma filed a petition for writ of *error coram nobis*.[110] Before the court ruled on his petition, Yuma obtained leave

103. 286 Neb. 244, 835 N.W.2d 679 (2013).
104. *Id.*
105. *Id.* at 244, 835 N.W.2d at 681.
106. *Id.* at 245, 835 N.W.2d at 681.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* A writ of *error coram nobis* exists in Nebraska under Chapter 49, Section 49-101 of the Nebraska Revised Statutes, which adopts English common law to the extent that it is not inconsistent with the United States Constitution, the Nebraska Constitution, or any law passed by the Nebraska Legislature. NEB. REV. STAT. § 49-101 (Reissue 2010); State v. Sandoval, 288 Neb. 754, 757, 851 N.W.2d 656, 659 (2014). Its purpose is to "bring before the court . . . matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition." *Id.* "The writ reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of the nature that, if known by the court, would have prevented entry of judgment." *Id.* Since Yuma filed his writ, the Nebraska Supreme Court has held that a writ of *error coram nobis* is not an appropriate method for a defendant to raise ineffective assistance of counsel due to his counsel's failure to advise him of the immigration consequences of his plea. State v. Diaz, 283 Neb. 414, 80 N.W.2d 891 (2012). An ineffective assistance claim raises questions of fact and questions of law, and a writ of *error coram n*obis cannot be used to address questions of law. *Id.* at 431, 808 N.W.2d at 896. Further, whether or not a defendant's counsel has properly advised him or her of immigration consequences of his or her plea does not prevent the court from rendering judgment. *Id.* at 422, 808 N.W.2d at 897. Likewise, in *Sandoval*, the court concluded that a writ of *error coram nobis* is not an appropriate method for a defendant to challenge the trial court's failure to properly advise the defendant as to the immigration consequences of his plea. 288 Neb. at 758, 851 N.W.2d at 659. A district court's failure to advise a defendant of the immigration consequences of his plea does not prevent a court from accepting the defendant's plea and entering a judgment of conviction; it provides a basis for the defendant to later move to vacate the judgment

to amend and filed a common-law motion to withdraw his pleas and vacate his convictions.[111] Yuma alleged that he was denied ineffective assistance under *Padilla* because his lawyer never asked him about his citizenship or immigration status or informed him of the immigration consequences of his plea, "despite the fact that deportation [was] presumptively mandatory."[112] Yuma also alleged that he was facing deportation proceedings as a result of his convictions and that his counsel's ineffective assistance constituted a "manifest injustice" which entitled him to withdraw his plea.[113]

The court denied Yuma's motion after an evidentiary hearing, because Yuma was released from custody before seeking to withdraw his plea.[114] The district court questioned "whether a common-law Motion to Withdraw Plea [was] available to a defendant whose sentence [had] been completed."[115] The district court was unsure whether it had jurisdiction to hear the motion, and therefore denied it.[116] Yuma appealed, arguing that the district court erred in concluding it lacked jurisdiction to consider his motion.[117]

The Nebraska Supreme Court reversed the district court's finding, concluding that the court did have jurisdiction to consider Yuma's motion. The Act was not, and never was, available to Yuma, because he was sentenced to time served and immediately released.[118] Further, a constitutional right was at issue—Yuma entered his plea on March 9, 2010, before *Padilla* was decided, but was not sentenced until April 7, 2010, about a week after the *Padilla* decision.[119] Because Yuma's convictions were not final when *Padilla* was decided, *Padilla*'s rule that defense counsel must inform a defendant when his or her conviction carries a risk of deportation applied to Yuma.[120] The court remanded Yuma's case to the district court to determine whether Yuma's motion was timely and whether he had established by clear and convincing evidence that withdrawing his plea was necessary to correct a manifest injustice.[121] However, the court did not define when such a motion is timely.

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and withdraw his or her plea if the defendant shows that the advisement was not given, and the defendant faces an immigration consequence as a result of the plea and subsequent conviction. *Id.* at 758, 851 N.W.2d at 659–60.

111. *Yuma*, 286 Neb. at 245, 835 N.W.2d at 681.
112. *Id.* (internal quotation marks omitted).
113. *Id.*
114. *Id.*
115. *Id.* at 246, 835 N.W.2d at 681 (internal quotation marks omitted).
116. *Id.* at 246, 835 N.W.2d at 682.
117. *Id.*
118. *Id.* at 247, 835 N.W.2d at 682.
119. *Id.* at 249, 835 N.W.2d at 684.
120. *Id.* at 248–49, 835 N.W.2d at 683–84.
121. *Id.* at 249, 835 N.W.2d at 684.

### B. The Timeliness Inquiry

The Nebraska Supreme Court has not specified how long after conviction defendants may raise common-law motions to withdraw their pleas. The court did not specify a timing requirement in *Gonzalez II* and only briefly alluded to one in *Gonzalez I*, stating that, "[a] motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because it was made subsequent to judgment or sentence."[122] Whether this "due diligence" requirement is good law is unclear. First, the rule is dicta in an opinion that has since been withdrawn.[123] Second, the court's only citation for this proposition was *State v. Evans*, which is also no longer good law.[124]

In *Evans*, the Nebraska Supreme Court applied the American Bar Association Standards Relating to Pleas of Guilty, including 2.1(i), which provides that a motion for withdrawal is timely if made with due diligence.[125] In *State v. Minshall*, however, the court expressly disapproved any statements appearing in prior opinions of the court that the ABA standards govern disposition of a defendant's request to withdraw a plea before sentencing.[126] Although the court clarified "the correct standard in Nebraska," it discussed only guilty pleas made prior to sentencing, not pleas made after sentencing like in *Evans*.[127] *Gonzalez I* is the only case since *Minshall* disavowed the ABA standards where the court has referenced the "due diligence" requirement, and the court withdrew that opinion in *Gonzalez II*. In *Gonzalez II*, the court did not discuss when a common-law motion must be filed to be considered timely, although it remanded Yuma's case to the district court with directions to consider whether his motion was timely. The district court looked to *Gonzalez I* and used *Gonzalez I*'s "due diligence" requirement as a "touchstone" for its analysis of whether Yuma's motion was timely.[128] Even accepting "due diligence" as the requirement for when a common-law motion is timely filed, the question remains as to what constitutes "due diligence."[129]

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122. *Gonzalez I*, 283 Neb. 1, 7, 807 N.W.2d 759, 766 (2012), *withdrawn*, 285 Neb. 940, 830 N.W.2d 504 (2013).
123. *Id.*
124. State v. Evans, 194 Neb. 559, 234 N.W.2d 199 (1975), *abrogated by* State v. Minshall, 227 Neb. 210, 416 N.W.2d 585 (1987).
125. *Id.* at 562, 234 N.W.2d at 201.
126. *Minshall*, 227 Neb. at 214, 416 N.W.2d at 588.
127. *Id.*
128. Order at 3, State v. Yuma, No. CR09-818 (Dist. Ct. of Lancaster Cnty., Neb. Mar. 11, 2014).
129. Although the "due diligence" standard has been referenced in cases where the defendant sought to withdraw a plea after sentencing but before the judgment became final for purposes of collateral attack, the Nebraska Supreme Court has not defined exactly what constitutes due diligence. In *Evans*, the Court did not address whether the defendant's motion was timely because he had not demon-

The court has recognized that there are three methods by which a defendant may move to withdraw his plea after his or her conviction has become final: Section 29-1819.02, a postconviction motion pursuant to the Act, or a common-law motion to withdraw a plea.[130] The time limitations imposed by either Section 29-1819.02 or the Act could inform a court's analysis of whether a common-law motion to withdraw a plea is timely, but the timing requirements of the Act should apply to common-law motions because the common-law remedy is intended as an alternative to the Act.

*1. Time Limitations Under Neb. Rev. Stat. § 29-1819.02*

The Legislature did not specify how long a defendant has to withdraw his or her plea under Section 29-1819.02. In *State v. Rodriguez*, the Nebraska Supreme Court recently suggested that there is no time limit on withdrawing pleas under the statute.[131] On March 23, 2004, Rodriguez pleaded guilty to attempted possession of a controlled substance—a Class I misdemeanor—pursuant to a plea agreement.[132] Before the court accepted his plea, it gave the following warning:

> [I]f a plea . . . is entered to a felony, besides the maximum sentence, there are indirect consequences that will follow you the rest of your life . . . . If you are not a United States citizen, a plea of guilty may subject you to deportation. There are any other number of those indirect consequences that may occur if you plead guilty to a felony.[133]

Rodriguez did not move to withdraw his plea until February 2013, shortly after he learned the immigration consequences of his plea when immigration authorities took him into custody.[134]

The district court determined it did not have jurisdiction because Rodriguez filed his motion after his sentence had been completed.[135] The court relied on *Rodriguez-Torres*,[136] explaining the Nebraska Su-

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strated with clear and convincing evidence that he has suffered a manifest injustice. 194 Neb. at 562, 234 N.W.2d at 201; *see also* State v. Copple, 218 Neb. 837, 359 N.W.2d 782 (1984) (concluding that the defendant failed to establish manifest injustice by clear and convincing evidence and never addressing whether the defendant's motion was timely); State v. Kluge, 198 Neb. 115, 251 N.W.2d 737 (1977) (finding the defendant had not proved that withdrawal was necessary to correct a manifest injustice and not addressing whether the defendant's motion was timely). However, since these cases were always filed before the sentence became final for purposes of a collateral attack, it seems reasonable that filing a motion before the sentence is final constitutes due diligence. This is not helpful in determining whether a motion to withdraw a plea filed after the sentence has become final is timely.

130. *Gonzalez II*, 285 Neb. 940, 830 N.W.2d 504 (2013).
131. State v. Rodriguez, 288 Neb. 714, 850 N.W.2d 788 (2014).
132. *Id.* at 716, 850 N.W.2d at 790.
133. *Id.*
134. *Id.* at 716–17, 850 N.W.2d at 790–91.
135. *Id.* at 717, 850 N.W.2d at 791.
136. 275 Neb. 363, 746 N.W.2d 686 (2008).

preme Court's decision in *Yos-Chiguil*[137] did not overrule *Rodriguez-Torres*, stating that section 29-1819.02 "'does not convey upon a court jurisdiction' to vacate a judgment or withdraw a plea to do 'where a party has already completed his or her sentence.'"[138]

The Nebraska Supreme Court determined that the district court did in fact have jurisdiction and remanded the case for further proceedings.[139] The situation in *Rodriguez-Torres* was different from Rodriguez's case, because Rodriguez-Torres entered his plea before June 20, 2002, while Rodriguez entered his plea after that date. Section 29-1819.02(3) does not create a procedure for withdrawing a plea entered before July 20, 2002.[140] As long as the plea was entered after July 20, 2002, all a defendant must show to withdraw a plea under the statute is "(1) that the court failed to give all or part of the advisement and (2) that a defendant faces an immigration consequence which was not included in the advisement given."[141] The court defining these two elements as the sole requirements for withdrawing a plea, combined with the fact that Rodriguez sought to withdraw his plea nine years after he originally entered it, suggests that defendants can raise claims under section 29-1819.02 indefinitely.[142]

### *2. Timing Requirements of the Nebraska Postconviction Act*

In contrast, the Nebraska Postconviction Act contains very specific limitations on when defendants can file motions.[143] In *Gonzalez II,* the Nebraska Supreme Court made clear that the common-law procedure is an alternative to the Act. The district court did not have jurisdiction over Gonzalez's common-law motion because she could have raised the claim under the Act.[144] It was the Legislature's intent in passing the Act that "if a defendant had a collateral attack that could be asserted under the Act, that Act is his or her sole remedy."[145] One of the two requirements for a defendant bringing a common-law motion is that the Act "is not, and never was," available to the defendant as a means of asserting the grounds justifying withdrawal of his or her

137. 278 Neb. 591, 722 N.W.2d 574 (2009).
138. *Rodriguez*, 288 Neb. at 717, 850 N.W.2d at 791 (quoting *Rodriguez-Torres*, 275 Neb. at 367, 746 N.W.2d at 689).
139. *Id.* at 721, 850 N.W.2d at 793–94.
140. *Id.*
141. *Id.* (citing State v. Medina-Liborio, 285 Neb. 636, 829 N.W.2d 96 (2013)).
142. *See also* State v. Chojolan, 288 Neb. 760, 851 N.W. 2d 661 (2014) (finding that the district court had jurisdiction to consider the defendant's motion to withdraw a plea made in 2006).
143. See *supra* notes 19–23 and accompanying text.
144. *Gonzalez II*, 285 Neb. 940, 946, 830 N.W.2d 504, 509 (2013).
145. *Id.* at 949, 830 N.W.2d at 510. It is "[o]nly if a defendant does not and never could have asserted the basis of his or her collateral attack under the Act may he or she invoke the common-law procedure and move to withdraw a plea after the conviction has become final." *Id.*

plea.[146] Because the common-law motion is an alternative that is available only when the Act is not available (unlike motions to withdraw pleas pursuant to Section 29-1918.02 which are completely separate from both postconviction and common-law motions), the same timing requirements should apply.

The District Court of Lancaster County, Nebraska, agreed when considering Yuma's motion on remand. The court noted that "[t]he Legislature intended 'that the Act [be] the primary procedure for bringing collateral attacks based upon constitutional principles'"[147] and the "presence of the 'due diligence' requirement in subparagraph (4)(b) of the Postconviction Act makes it a meaningful guidepost in determining the timeliness of Yuma's motion to withdraw plea."[148] The court held that to be considered timely, a motion to withdraw a plea must be filed within one year from the later of:

> (1) The date the judgment or conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (2) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence; or
>
> (3) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review . . . .[149]

The district court also declined to adopt Yuma's proposed "tolling rule"—that is, a "timeliness rule which is triggered by the occurrence of actual immigration consequences" and permits defendants to withdraw their pleas within a year of immigration consequences materializing, even if they were warned of the possibility of such consequences before pleading guilty.[150]

Although Yuma's conviction became final on May 7, 2010, he did not file his motion until September 2011—two months after he was detained by Immigration and Customs Enforcement (ICE) but more than a year after his conviction became final.[151] The U.S. Supreme Court decided *Padilla* on March 31, 2010, shortly after Yuma entered

146. *Id.* at 940, 830 N.W.2d at 505.

147. Order at 4, State v. Yuma, No. CR09-818 (Dist. Ct. of Lancaster Cnty., Neb. Mar. 11, 2014) (quoting *Gonzalez II*, 285 Neb. at 949, 830 N.W.2d at 509).

148. *Id.* (recalling *Gonzalez I*'s original requirement that timely motions for withdrawal be made with due diligence). *See also Gonzalez I*, 283 Neb. 1, 1, 807 N.W.2d 759, 760 (2012) ("[A] motion for withdrawal of a plea of guilty or no contest is timely if made with due diligence, considering the nature of the allegations therein . . . .").

149. Order at 6, State v. Yuma, No. CR09-818 (numbers added).

150. *Id.* at 5. Yuma based this argument on the fact that while he was advised that his pleas *could* result in his removal from the United States, he was not advised that the convictions *would* result in his removal. *Id.* at 4.

151. *Id.* at 5, 8.

his plea on March 9, but Yuma did not file his initial writ of *error coram nobis* until approximately one year and six months after *Padilla*.[152] Yuma argued that he did not discover the immigration consequences of his plea and his trial counsel's ineffectiveness until he was detained by ICE.[153] At the time of his plea, Yuma had several misdemeanor convictions that had not resulted in removal proceedings.[154] Each time, Yuma received the standard warnings that deportation may occur as a result of his convictions, so he argued that he did not fail to exercise due diligence "because experience taught him no immigration consequences would materialize."[155]

Yuma argued that *Yos-Chiguil* supported his tolling argument, because the Nebraska Supreme Court "recognized that a defendant who was not advised 'of the immigration consequences of a plea-based conviction may not be aware of those consequences until after the conviction becomes final and the consequences materialize.'"[156] The district court was not persuaded by this argument, noting that Yos-Chiguil had not received the advisement required by Section 29-1819.02(1), whereas Yuma received the advisement "but he assumed . . . such consequences would not materialize because . . . the consequences had not materialized following past advisements and convictions."[157] The court concluded, "[a] timeliness rule which is tolled until actual immigration consequences materialize . . . is difficult to reconcile with the 'due diligence' requirement and would render superfluous the notice-based statutory advisement on immigration consequences."[158]

The Nebraska Supreme Court recently rejected a similar argument in *State v. Mamer*.[159] Mamer argued that he could not have raised his claim of ineffective assistance of counsel under the Act because he was

152. *Id.* at 7.
153. *Id.* at 5.
154. *Id.*
155. *Id.*
156. *Id.* (citing State v. Yos-Chiguil, 278 Neb. 591, 596, 772 N.W.2d 574, 579 (2009)).
157. *Id.*
158. *Id.* at 5–6.
159. 289 Neb. 92, 853 N.W.2d 517 (2014). The defendant, Malual Mamer, pleaded guilty to attempted sexual assault in the first degree and was sentenced to 12–18 months in prison with credit for 248 days served. *Id.* at 93, 853 N.W.2d at 520. As a result, Mamer was only incarcerated for three weeks following his conviction and was discharged on October 7, 2011. *Id.* at 94, 853 N.W.2d at 520. Mamer filed a motion to withdraw his plea on February 9, 2012. *Id.* In his motion, Mamer alleged that his trial counsel was ineffective in failing to advise him that deportation was presumptively mandatory for a conviction of attempted first degree sexual assault under 8 U.S.C. § 1227(a)(2)(A)(iii). *Id.* Mamer alleged that he pleaded guilty without knowing the presumptively mandatory deportation consequences of his conviction and that it would have been rational for him to reject such a plea had he been properly advised of the immigration consequences. *Id.* at 94, 853 N.W.2d at 521. Mamer alleged that his plea resulted in the initiation of removal proceedings against him, as the U.S. Department of Homeland

no longer in custody by the time the U.S. Department of Homeland Security informed him of its intention to begin removal proceedings.[160] Mamer argued that his claim did not arise until after he was released from custody and learned that he would be deported.[161] The court observed that Mamer "view[ed] the factual predicate as including the actual commencement of removal proceedings"[162] but that he could have discovered the immigration consequences of his plea while incarcerated.[163]

The court distinguished between discovering the *facts* underlying a postconviction claim and discovering that those facts are actionable.[164] Mamer's ignorance of the *Padilla* decision did "not concern the factual predicate for his ineffective assistance claim" but instead "concern[ed] only the legal significance of the relevant objective facts."[165] It was the existence of the deportation law—*not* the immigration officials' execution of that law—that formed the factual predicate for Mamer's ineffective assistance of counsel claim.[166] *Padilla* does not require trial counsel to "predict the future execution of existing law" or "whether the law will change," but only to advise clients of what the law currently states.[167]

The court determined that Mamer could have discovered the applicable deportation law with due diligence during his brief incarceration.[168] Mamer received the advisement required by Section 29-1819.02 and acknowledged that he understood it.[169] This advisement "put Mamer on notice of potential deportation laws" that he could have discovered with due diligence while he was in custody.[170]

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Security sent him a notice to appear on October 7, 2011, two days before Mamer moved to withdraw his plea. *Id.*

160. *Id.* at 97, 853 N.W.2d at 522–23.
161. *Id.* at 97–98, 853 N.W.2d at 523.
162. *Id.* at 98, 853 N.W.2d at 523.
163. *Id.* at 99, 853 N.W.2d at 523. The fact that the defendant did not have an attorney while in custody did not change the court's conclusion that the defendant could have discovered the immigration consequences of his plea with due diligence. *Id.* Pro se inmates are held to the same standards as inmates represented by new counsel in exercising due diligence in discovering potential claims. *Id.* at 99, 853 N.W.2d at 523 (citing State v. Sums, 277 Neb. 192, 761 N.W.2d 527 (2009)).
164. *Id.* The court used the timing requirements of the Act because the common-law procedure did not apply since the defendant could have discovered the facts underlying his claim while in custody and thus, the common-law procedure was never available to him. *Id.* at 98–100, 853 N.W.2d at 523–24.
165. *Id.* at 100, 853 N.W.2d at 524.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 100, 853 N.W.2d at 525.
170. *Id.* Because Mamer could have discovered his claim with due diligence while incarcerated, Mamer could have raised his claim under the Act, and therefore the common-law motion was not available to him. *Id.* at 101, 853 N.W.2d at 525.

*Mamer* indicates that Yuma's claim was not tolled until he learned that his plea would result in *actual* immigration consequences but instead arose when Yuma was warned by the court that immigration consequences *may* arise and failed to investigate those consequences until after they materialized.

In Yuma's case, the district court correctly determined that the timing requirements of the Act should apply. If a defendant does not receive the statutory advisement required by Section 29-1819.02, the defendant should be able to withdraw his or her plea whenever the immigration consequences apply. In fact, the occurrence of negative immigration consequences of which the defendant was not warned is a prerequisite for bringing such a claim.[171] There are only two requirements for withdrawing a plea under Section 29-1819.02 and one is that the defendant faces immigration consequences that he or she was not warned about in the advisement given pursuant to Section 29-1819.02.[172] Therefore, a defendant cannot move to withdraw a plea under Section 29-1819.02 *until* the negative immigration consequences materialize, whether those consequences materialize a year after the defendant's plea or ten years after the defendant's plea.

This indefinite period in which defendants can raise their claims is supported by the Legislature's intent that Section 29-1819.02 "promote fairness" for defendants whose convictions may result in their removal from the United States.[173] "This objective would not be achieved by limiting the application of Section 29-1819.02 to those defendants whose sentences have not been completed and excluding those who had completed their sentences."[174] The statute "was enacted to address immigration consequences that could arise subsequent to a plea of guilty regardless of whether the sentence imposed as a result of the guilty plea has been completed."[175] As a result, the Nebraska Supreme Court appears to have concluded that there is no limit on when a motion to withdraw a plea pursuant to Section 29-1819.02 can be filed, as long as the trial court failed to give all or part of the required advisement before accepting the defendant's plea and the defendant faces an immigration consequence that was not included in the advisement given by the court.[176]

Defendants seeking to withdraw their plea using a common-law motion, however, do not allege that the trial court failed to warn them of the immigration consequences.[177] Instead, a common-law motion,

171. State v. Rodriguez, 288 Neb. 714, 723, 850 N.W.2d 788, 794 (2014).
172. *Id.*
173. NEB. REV. STAT. § 29-1819.03 (Reissue 2008).
174. *Rodriguez*, 288 Neb. at 725, 850 N.W.2d at 795.
175. *Id.*
176. *Id.* at 723, 850 N.W.2d at 794.
177. *See id.* at 726, 850 N.W.2d at 796 (stating that because the court had jurisdiction to consider Rodriguez's motion under Section 29-1819.02, the court did not need

as it has been used so far,[178] is based on trial counsel's ineffectiveness in warning a defendant of the immigration consequences of his or her plea.[179] Normally, such claims would be brought under the Act, but claims of ineffective assistance of counsel can only be raised in a common-law motion when the Act is not, and never was, available to the defendant.[180] The common-law motion is clearly a substitute to the Act and therefore, the same timing requirements should apply.

Defendants may argue that, similar to claims raised under Section 29-1819.02, they should be able to bring their common-law motion whenever the negative immigration consequences of their plea materialize.[181] However, defendants bringing common-law motions do not allege that *no one* ever warned them of the possible immigration consequences of their plea, merely that their *trial counsel* did not warn them of the possible immigration consequences of their plea. Unlike a scenario where the court did not give the advisement required by Section 29-1819.02, when there is no record that the defendant was ever warned about the possible immigration consequences, the record shows that the trial court warned Yuma of the immigration consequences.[182] Unlike defendants who did not receive warnings from the court, defendants alleging ineffective assistance of counsel knew the immigration consequences of their plea when they pleaded and did not first become aware of possibility that they could be deported when ICE initiated deportation proceedings.[183]

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to consider whether the common-law remedy was available to Rodriguez*); see also Gonzalez II*, 285 Neb. 940, 945, 830 N.W.2d 504, 507 (2013) (finding that Gonzalez was advised of her rights as required by Section 29-1819.02 and thus she did not and could not move to withdraw her plea pursuant to Section 29-1819.02).

178. Although all of the cases in which defendants have sought to use the common-law procedure to withdraw their plea involve ineffective assistance of counsel based on trial counsel's failure to advise the defendant of the immigration consequences of his or her plea, defendants could use a common-law motion for any "constitutional right at issue" as long as they could have never raised the claim under the Act. *See Gonzalez II*, at 949–50, 830 N.W.2d at 511.

179. Effective assistance of counsel is a constitutional right. *See, e.g.*, State v. Lotter, 255 Neb. 456, 586 N.W.2d 591 (1998) (reinforcing that the Sixth Amendment guarantees every criminal defendant the right to effective assistance of counsel).

180. *See supra* note 93 and accompanying text.

181. Mamer made this argument in *State v. Mamer*, 289 Neb. 92, 97, 853 N.W.2d 517, 523 (2014) to justify why he did not file a postconviction motion while in custody. Yuma tried to make a similar argument by arguing that the Act's timing requirements should apply to common-law motions but that the one-year period under which defendants could bring claims should be tolled until the defendant discovers the actual immigration consequences of his plea. Order at 5, State v. Yuma, No. CR09-818 (Dist. Ct. of Lancaster Cnty., Neb. Mar. 11, 2014).

182. Yuma admitted he had received the standard warnings that his convictions may result in removal from the United States, but ignored them "because experience taught him no immigration consequences would materialize." Order at 5, State v. Yuma, No. CR09-818.

183. The district court wrote:

Allowing defendants to file motions—whether postconviction or common-law—indefinitely "frustrates case finality and allows for abuses where . . . motions are filed after important parties relevant to the issues raised are no longer available"[184] To decide a motion to withdraw a plea under Section 29-1819.02, the court merely needs to look back at the record to see the contents of the immigration advisement given to the defendant before his plea. Resolving postconviction and common-law motions, in contrast, may require the court to look beyond the record in an evidentiary hearing with the defendant's counsel to determine what warnings were given. Allowing defendants an indefinite period under which to assert their claims disadvantages the State since evidence or witnesses may be lost.[185] This interest in finality motivated the legislature to limit the time in which a defendant can file a postconviction motion and should similarly limit when a defendant can file a common-law motion to withdraw a plea.

## V. CONCLUSION

In recognizing a common-law procedure under which defendants can withdraw their pleas, the Nebraska Supreme Court recognized a limited procedure, available in very limited circumstances.[186] The procedure is only available when the Postconviction Act is not, and never was, available to the defendant.[187] The Nebraska Supreme Court has not yet determined when common-law motions must be

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> Clearly, Yuma was advised that his convictions could result in his removal from the United States, but he assumed such consequences would not materialize because—as he admits—the consequences had not materialized following past advisements and convictions. This is not a case where Yuma received no warnings or advisements regarding possible adverse immigration consequences, nor is it a case where Yuma received false assurances he would not be deported by pleading no contest to a misdemeanor.

*Id.* The Nebraska Supreme Court dismissed Yuma's appeal without writing an opinion. State v. Yuma, No. S-14-308 (dismissed Nov. 14, 2014). Similarly, in *Mamer*, 289 Neb. at 100, 853 N.W.2d at 525, the court concluded that "[t]he advisement [required by section 29-1819.02], which Mamer acknowledged he understood, put Mamer on notice of potential deportation laws." *Id.*

184. INTRODUCER'S STATEMENT OF INTENT: LB 137, 102nd Neb. Leg., 1st Sess. (Feb. 2, 2011). Prior to LB 137 imposing a one-year limitation on a defendant's ability to file a postconviction motion, there was no limitation. *Id.* The district court recognized that the State's interest in finality is just as strong in common-law motions as in the postconviction motions to which LB 137 referred. Order at 6, n.4, State v. Yuma, No. CR09-818.

185. See State v. Louthan, 257 Neb. 174, 183–84, 595 N.W.2d 917, 924 (1999), where the court noted that "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice," and that "the concern with finality served by the limitation on collateral attack has special force." *Id.*

186. *See supra* note 91 and accompanying text.

187. *See supra* note 94 and accompanying text.

filed, mentioning "due diligence" only in passing in a decision that the Court has since withdrawn.[188] Whether the timing for bringing such a motion is "due diligence" or something else, Nebraska courts should look to the Nebraska Postconviction Act to decide whether defendants have timely filed their motions. The common-law motion is a substitute available to defendants only when they cannot raise their claims in a postconviction motion, and therefore the same timing requirements should apply. Accordingly, defendants should be required to file their motion within one year of:

> 1) The date the judgment or conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> 2) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence; or
>
> 3) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review.[189]

This one-year rule should apply regardless of whether the defendant actually faces negative immigration consequences as a result of his or conviction, because the defendant was warned that such immigration consequences could result. The interest of promoting fairness is not as strong as when the court did not warn a defendant and the interest in finality weighs heavily on imposing some limitations on when defendants can withdraw their pleas.

188. *See Gonzalez I*, 283 Neb. 1, 807 N.W.2d 759 (2012), *withdrawn*, 285 Neb. 940, 830 N.W.2d 504 (2013).

189. Order at 6, State v. Yuma, No. CR09-818 (Dist. Ct. of Lancaster Cnty, Neb. Mar. 11, 2014) (numbers added).