





conviction on which the order of removal depends. Even if a deportable alien could challenge the deportation-causing conviction in a § 2241 proceeding brought after final deportation

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deportable defense. The validity vel non of the removal-causing conviction is not within the purview of the question of whether the alien is subject to removal. To allow a § 2241 proceeding involving an alien in INS custody to serve as the vehicle for a collateral attack to a state court conviction would require involvement of the state court prosecutors. Because the sentence for the underlying conviction has been fully served, state court prosecutors may have no incentive to litigate their convictions. Congressional policy to remove from the United States those who have committed serious crimes may thus be thwarted. Finally, the strong congressional incentive to streamline the removal process would be circumvented by allowing § 2241 to be the avenue for a collateral challenge to an underlying state court conviction.

There are, however, countervailing considerations. Deportation is a drastic sanction. As described by Judge Gertner in Wallace v. Reno, 24 F. Supp. 2d 104, 112 (D. Mass. 1998):

Deportation, in the words of the Supreme Court, is 'at times equivalent of banishment or exile . . . .' Perhaps nowhere outside of the criminal law are the consequences for the individual so serious. It may deprive the alien of 'all that makes life worth living,' including the 'right to stay and live and work in this land of freedom,' or the possibility of living with her immediate family, 'a right that ranks high among the individual's rights.' [Citations omitted.]

Courts should be reluctant to permit the bare fact of conviction to result in removal where there may not have been an opportunity to mount an attack on a constitutionally-suspect conviction.

This may be especially true where, as here, a defendant pleads guilty to a crime (see 90.9200 0.0000 TD) on a source (sen



lurking in the background. The fact that a removal order could impose on state prosecutors the burden of defending the constitutionality of their conviction should not mean that an individual



of state court remedies.



deportation consequences of a plea constitutes ineffective assistance of counsel, see United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989), the New York Court of Appeals has explicitly rejected the contention advanced by Taveras-Lopez. In People v. Ford, the Court of Appeals held that, in the absence of affirmative misstatements by defense counsel, failure to advise of the deportation consequences of a conviction does not constitute ineffective assistance of counsel.<sup>6</sup> The Second Circuit, United States v. Santelises, 509 F.2d at 704, and other federal courts have reached the same ruling. See, e.g., United States v. Banda

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<sup>6</sup>Taveras-Lopez does not contend that his lawyer affirmatively misled him as to the deportation consequences of a guilty plea.

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<sup>7</sup>Section 1182(h), while granting the Attorney General discretionary authority to waive the exclusionary effect of certain criminal convictions, provides that “[n]o waiver shall be granted . . . in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if since the date of such admission the alien has been convicted of an aggravated felony . . . .”

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<sup>8</sup>In pertinent part, § 1182(h)(2)(F)(i)(I), (B), (D).





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<sup>9</sup>Any claim that equal protection is offended because the exclusionary effect may be waived with respect to some aggravated felonies, but not cocaine trafficking, is without merit. The pertinent analytical framework was articulated in DeSousa v. Reno, 190 F.3d 175, 184 (3d Cir. 1999):

[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. Under this minimal standard of review, a classification is accorded 'a strong presumption of validity' and the government has no obligation to produce evidence to sustain its rationality. Indeed, such a classification can be upheld as constitutional even when it is based upon rational speculation rather than on empirical data. Once a facially legitimate classification is established, the government is presumed to be acting rationally.







[;i]f it chooses to do so, it may legislate [contrary to] the limits posed by international law"); In re

few such norms. The Restatement (Third) of Foreign Relations Law

IN THE UNITED STATES DISTRICT COURT