ILLINOIS STATE
BAR ASSOCIATION

Assembly Meeting
December 10, 2016

Agenda Item 13A
Legislation
(Sponsored Legislation)

ILLINOIS STATE
BAR ASSOCIATION

MEMORANDUM

To: ISBA Assembly

From: Jim Covington

Date: November 9, 2016

In re: ISBA Proposed Package

This memo will summarize the proposals for legislation that have been suggested by an ISBA section or committee and recommended by the Legislation Committee and the Board of Governors. Also attached is the background materials for each proposal.

(1) 100-2. Life insurance policies in dissolution cases. (From Trusts and Estates) ISBA Legislative Proposal 100-2 is from Trusts and Estates and amends the Illinois Marriage and Dissolution of Marriage Act. It eliminates life insurance benefits from being paid to a former spouse after a judgment of dissolution of marriage unless there is a specific reference in the judgment to the contrary.

In 2012, Florida enacted a similar statute for the same reasons. It may be found here at 732.703.

This was sent to the following sections and committees:

- Elder Law—support.

- Family Law—support.

- General Practice, Solo & Small Firm—support the concept but it is written too narrowly because does not address security of obligations interest (for example: maintenance, child support, ERISA). It's very complicated and needs to be sent back to drafters to study more regarding the scope of this amendment. *(Please note that 750 ILCS 5/504(f) specifically addresses how the court may apportion existing life insurance policies or require new life insurance policies.)*

- Insurance Law—support.

- Women and the Law—oppose.

The Legislation Committee approved this proposal in concept and asked Gary Gehlbach from Trusts and Estates to work on curative language to address General Practice's concern, which he now is doing.

(2) 100-3. Changes in criminal sentencing. (From Corrections and Sentencing)
ISBA Legislative Proposal 100-3 is a proposal from Corrections and Sentencing Section Council that does three things.

(a) Current law allows a defendant to receive $5 a day credit toward fines for time served in custody prior to the sentencing. For instance, if a defendant was incarcerated in jail for 30 days before sentencing, they would receive a $150 credit toward any fines that are imposed by the court. This would increase it to $20 a day.

There are two reasons for this proposal. First, this level of $5 a day was established in about 1964 and has not been adjusted for inflation. Second, the types of fines and the amount of fines have consistently been increasing over the past few decades, making it more difficult for defendants to pay.

(b) Current law requires the court to consider at sentencing the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections.[1] Most judges do not mention this fact at sentencing, perhaps because they do not know how much it costs to incarcerate a person in prison per year. When asked, judges vary widely on what they believe the amount is. Since the court is required to consider the financial impact, it makes sense to put the official amount in a presentence report.

(c) Several of the first-time drug offender statutes and the supervision statute provide that a court will defer proceedings and then dismiss the matter if a person successfully completed the terms of the supervision.[2] There are many judges throughout the State who do not set court dates at the conclusion of the

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[1] 730 ILCS 5/5-4-1.

[2] Supervision 730 ILCS 5/5-6-3.1; cannabis (720 ILCS 550/10); controlled substances (720 ILCS 570/410); and methamphetamine (720 ILCS 646/70).

period of supervision to determine whether the person completed the conditions and to dismiss the case. Because of this fact, defendants still have cases on their record that could affect employment and housing.

This proposal includes two changes to each of these statutes: First, it requires the court to set a date at the conclusion of the period to determine whether person has complied with the terms and conditions of supervision or probation. Second, it requires the court to determine that the defendant has fulfilled the terms and conditions of probation at the conclusion of the period of supervision or probation.

This was sent to the following sections and committees:

- Bench and Bar—no position.

- Criminal Justice—support.

- Racial and Ethnic Minorities and the Law—support.

- General Practice—supported everything except court supervision provision. But they could support that provision if amended to read that the case is to be automatically dismissed upon termination of supervision unless State raises an objection. *(Corrections amended the proposal after General Practice took this position to delete any requirement or suggestion that it had to be a contested proceeding or that the defendant had to appear.)*

(3) 100-6. Guilty pleas and immigration consequences. (International and Immigration Section Council)) ISBA Legislative Proposal 100-6 is a proposal from International and Immigration to improve judicial compliance with the current law that requires judicial notification of the immigration consequences of guilty pleas.

In January 2004, the Illinois General Assembly passed an amendment to the Code of Criminal Procedure that states:

> Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court *shall* give the following advisement to the defendant in open court:
>
> If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to

> the United States or denial of naturalization under the laws of the United States. (725 ILCS 5/113-8; emphasis added)

Prior to that time, persons who were not U.S. citizens sometimes accepted guilty pleas without understanding that they could face deportation from the United States in addition to the agreed upon criminal sanctions. The defendant was then unpleasantly surprised when, after having completed his criminal sentence, he was taken into immigration custody and placed in deportation proceedings. Many defendants claimed they would not have pleaded guilty if they had known it would mean almost certain deportation from the country, separating them from their families, jobs, and homes.

For some time, members of the trial bar pushed for this legislation (Moran and Kinnally, "Aliens, Guilty Pleas and the Risk of Deportation: Time for Legislative Action," *Illinois Bar Journal* (2001) Vol. 89, pp.194-198). As a result of the amendment to 725 ILCS 5/113-8, this warning is now posted on many courtroom walls or in hallways in circuit courts around the state.

Yet not all trial judges are giving this required admonition. Some judges may believe the posting of the notice of this advisement in courtrooms is sufficient. Other judges may be relying on written agreements in court orders signed by the accused.

Immigration and International believe that the language denotes it must be given, and believes, much like the waiver of a jury trial, that it must be announced in open court when the accused is present. (*People v. Thornton,* (2nd Dist. 2006) 363 Ill.App.3d 481.)

Unfortunately, the Supreme Court of Illinois arrived at a different conclusion in a bifurcated analysis predicated on a thirty-year-old California Supreme Court opinion. The Illinois Supreme Court said the admonition statute posed two questions: (a) whether the statute is mandatory or permissive; and (b) whether the statute is mandatory or directory. (*People v. Del Villar*, 236 Ill.2d 507 (2009))

The court said that even though the initial inquiry may find a statue to incorporate an obligatory duty (*i.e.*, "the trial court shall give the advisement"), according to the Illinois Supreme Court, it is the resolution of the second question that determines whether a statute is truly mandatory. Thus, if the statute does not contain a provision that dictates a particular consequence for noncompliance by the governmental actor, it is directory in nature.

Thus, this bill inserts a consequence for noncompliance with this statute so that this admonition is given in open court just as the Illinois General Assembly intended for it to be given.

Text of the proposed amendment (new language is underlined)

725 ILCS 5/133-8

Advisement concerning status as an alien. (a) Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:

If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States.

(b) If the defendant is arraigned on or after the effective date of this amendatory Act of the 100th General Assembly and the court fails to advise the defendant as required by subsection (a) of this Section and the defendant shows that conviction of the offense to which the defendant pleaded guilty, guilty but mentally ill, or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty, guilty but mentally ill, or nolo contendere, and enter a plea of not guilty.

This was sent to the following section council:

- Criminal Justice—supported with proposed language that is now reflected in the proposal in the paragraph above.

Please call if you have any questions. Thank you.

PROPOSAL NO. 100-2

LRB10000024HEP10025b

100TH GENERAL ASSEMBLY

State of Illinois

2017 and 2018

INTRODUCED ___________________, BY

SYNOPSIS AS INTRODUCED:

750 ILCS 5/503 from Ch. 40, par. 503

Amends the Illinois Marriage and Dissolution of Marriage Act. Provides that as to any policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes non-marital property, or constitutes marital property but was not specifically allocated between the parties as provided in the Act, a beneficiary designation made by or on behalf of the decedent prior to the entry of the judgment for dissolution or declaration of invalidity of marriage that provides for the payment or transfer at death of any of the proceeds of the policy to or for the benefit of the decedent's former spouse is void as of the time of the judgment for dissolution or declaration of invalidity of marriage and the policy proceeds shall pass as if the decedent's former spouse predeceased the decedent.

LRB100 00024 HEP 10025 b

A BILL FOR

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Marriage and Dissolution of Marriage Act is amended by changing Section 503 as follows:

(750 ILCS 5/503) (from Ch. 40, par. 503)

(Text of Section before amendment by P.A. 99-763)

Sec. 503. Disposition of property and debts.

(a) For purposes of this Act, "marital property" means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent or property acquired in exchange for such property;

(2) property acquired in exchange for property acquired before the marriage;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties, including a premarital agreement or a postnuptial agreement;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however,

when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property;

(6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;

(6.5) all property acquired by a spouse by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage; to the extent that the marital estate repays any portion of the loan, it shall be considered a contribution from the marital estate to the non-marital estate subject to reimbursement;

(7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

Property acquired prior to a marriage that would otherwise be non-marital property shall not be deemed to be marital property solely because the property was acquired in contemplation of marriage.

The court shall make specific factual findings as to its classification of assets as marital or non-marital property, values, and other factual findings supporting its property award.

(b)(1) For purposes of distribution of property, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed marital property. This presumption includes non-marital property transferred into some form of co-ownership between the spouses, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. A spouse may overcome the presumption of marital property by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section or was done for estate or tax planning purposes or for other reasons that establish that the transfer was not intended to be a gift.

(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, defined benefit plans, defined contribution plans and accounts, individual retirement accounts, and non-qualified plans) acquired by or participated in by either spouse after the marriage and before a judgment of

dissolution of marriage or legal separation or declaration of invalidity of the marriage are presumed to be marital property. A spouse may overcome the presumption that these pension benefits are marital property by showing through clear and convincing evidence that the pension benefits were acquired by a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

(3) For purposes of distribution of property under this Section, all stock options and restricted stock or similar form of benefit granted to either spouse after the marriage and before a judgment of dissolution of marriage or legal separation or declaration of invalidity of marriage, whether vested or non-vested or whether their value is ascertainable, are presumed to be marital property. This presumption of

marital property is overcome by a showing that the stock options or restricted stock or similar form of benefit were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options and restricted stock or similar form of benefit between the parties at the time of the judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options and restricted stock or similar form of benefit may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option and restricted stock or similar form of benefit including but not limited to the vesting schedule, whether the grant was for past, present, or future efforts, whether the grant is designed to promote future performance or employment, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable.

(b-5)<u>(1)</u> As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes marital property, whether whole life, term life, group term life, universal life, or other form of life insurance policy, and whether or not the value is ascertainable, the court shall allocate ownership, death benefits or the right to assign death benefits, and the obligation for premium payments, if any, equitably between the parties at the time of the judgment for dissolution or declaration of invalidity of marriage.

(2) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes non-marital property, or constitutes marital property but was not specifically allocated between the parties as provided in paragraph (1) of this subsection, a beneficiary designation made by or on behalf of the decedent prior to the entry of the judgment for dissolution or declaration of invalidity of marriage that provides for the payment or transfer at death of any of the proceeds of the policy to or for the benefit of the decedent's former spouse is void as of the time of the judgment for dissolution or declaration of invalidity of marriage and the policy proceeds shall pass as if the decedent's former spouse predeceased the decedent.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

(1)(A) If marital and non-marital property are commingled by one estate being contributed into the other, the following shall apply:

(i) If the contributed property loses its identity, the contributed property transmutes to the estate receiving the property, subject to the provisions of paragraph (2) of this subsection (c).

(ii) If the contributed property retains its identity, it does not transmute and remains property of the contributing estate.

(B) If marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection (c).

(2)(A) When one estate of property makes a contribution to another estate of property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation. No such reimbursement shall be made with respect to a contribution that is not traceable by clear and convincing evidence or that was a gift. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property that received the contribution.

(B) When a spouse contributes personal effort to non-marital property, it shall be deemed a contribution from the marital estate, which shall receive reimbursement for the efforts if the efforts are significant and result in substantial appreciation to the non-marital property except that if the marital estate reasonably has been compensated for his or her efforts, it shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) each party's contribution to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any decrease attributable to an advance from the parties' marital estate under subsection (c-1)(2) of Section 501; (ii) the contribution of a spouse as a homemaker or to the family unit; and (iii) whether the contribution is after the commencement of a proceeding for dissolution of marriage or declaration of invalidity of marriage;

(2) the dissipation by each party of the marital

property, provided that a party's claim of dissipation is subject to the following conditions:

(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;

(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) a certificate or service of the notice of intent to claim dissipation shall be filed with the clerk of the court and be served pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the

spouse having the primary residence of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any prenuptial or postnuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties.

(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.

(f) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, in determining the value of the marital and non-marital property for purposes of dividing the property, has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties. In making a determination under this subsection, the court may consider, among other things, the conviction of a party of any of the offenses set forth in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-13, 12-14, 12-14.1, 12-15, or 12-16, or Section 12-3.05 except for subdivision (a)(4) or (g)(1), of the Criminal Code of 1961 or the Criminal Code of 2012 if the victim is a child of one or both of the parties, and there is a need for, and cost of, care, healing and counseling for the child who is the victim of the crime.

(h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

(i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.

(j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 14 days after the closing of proofs in the final hearing or within such other period as the court orders.

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

(3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or

former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation on contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.

(4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508.

(5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.

(6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508.

(k) In determining the value of assets or property under this Section, the court shall employ a fair market value standard. The date of valuation for the purposes of division of assets shall be the date of trial or such other date as agreed by the parties or ordered by the court, within its discretion. If the court grants a petition brought under Section 2-1401 of the Code of Civil Procedure, then the court has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(l) The court may seek the advice of financial experts or other professionals, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine as a witness any professional consulted by the court designated as the court's witness. Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate, and the allocation is subject to reallocation under subsection (a) of Section 508. Upon the request of any party or upon the court's own motion, the court may conduct a hearing as to the reasonableness of those fees and costs.

(m) The changes made to this Section by Public Act 97-941 apply only to petitions for dissolution of marriage filed on or after January 1, 2013 (the effective date of Public Act 97-941).

(Source: P.A. 99-78, eff. 7-20-15; 99-90, eff. 1-1-16.)

(Text of Section after amendment by P.A. 99-763)

Sec. 503. Disposition of property and debts.

(a) For purposes of this Act, "marital property" means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent or property acquired in exchange for such property;

(2) property acquired in exchange for property acquired before the marriage;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties, including a premarital agreement or a postnuptial agreement;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse except, however, when a spouse is required to sue the other spouse in order to obtain insurance coverage or otherwise recover from a third party and the recovery is directly related to amounts advanced by the marital estate, the judgment shall be considered marital property;

(6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;

(6.5) all property acquired by a spouse by the sole use of non-marital property as collateral for a loan that then is used to acquire property during the marriage; to the extent that the marital estate repays any portion of the loan, it shall be considered a contribution from the marital estate to the non-marital estate subject to reimbursement;

(7) the increase in value of non-marital property, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

Property acquired prior to a marriage that would otherwise be non-marital property shall not be deemed to be marital property solely because the property was acquired in contemplation of marriage.

The court shall make specific factual findings as to its classification of assets as marital or non-marital property, values, and other factual findings supporting its property award.

(b)(1) For purposes of distribution of property, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed marital property. This presumption includes non-marital property transferred into some form of co-ownership between the spouses, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section or was done for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift.

(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, defined benefit plans, defined contribution plans and accounts, individual retirement accounts, and non-qualified plans) acquired by or participated in by either spouse after the marriage and before a judgment of dissolution of marriage or legal separation or declaration of invalidity of the marriage are presumed to be marital property. A spouse may overcome the presumption that these pension benefits are marital property by showing through clear and convincing evidence that the pension benefits were acquired by

a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code.

The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

(3) For purposes of distribution of property under this Section, all stock options and restricted stock or similar form of benefit granted to either spouse after the marriage and before a judgment of dissolution of marriage or legal separation or declaration of invalidity of marriage, whether vested or non-vested or whether their value is ascertainable, are presumed to be marital property. This presumption of marital property is overcome by a showing that the stock options or restricted stock or similar form of benefit were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options and restricted stock or similar form of benefit between the parties at the time of the

judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options and restricted stock or similar form of benefit may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option and restricted stock or similar form of benefit including but not limited to the vesting schedule, whether the grant was for past, present, or future efforts, whether the grant is designed to promote future performance or employment, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable.

(b-5)(1) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes marital property, whether whole life, term life, group term life, universal life, or other form of life insurance policy, and whether or not the value is ascertainable, the court shall allocate ownership, death benefits or the right to assign death benefits, and the obligation for premium payments, if any, equitably between the parties at the time of the judgment for dissolution or declaration of invalidity of marriage.

<u>(2) As to any existing policy of life insurance insuring the life of either spouse, or any interest in such policy, that constitutes non-marital property, or constitutes marital property but was not specifically allocated between the parties as provided in paragraph (1) of this subsection, a beneficiary designation made by or on behalf of the decedent prior to the entry of the judgment for dissolution or declaration of invalidity of marriage that provides for the payment or transfer at death of any of the proceeds of the policy to or for the benefit of the decedent's former spouse is void as of the time of the judgment for dissolution or declaration of invalidity of marriage and the policy proceeds shall pass as if the decedent's former spouse predeceased the decedent.</u>

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

(1)(A) If marital and non-marital property are commingled by one estate being contributed into the other, the following shall apply:

(i) If the contributed property loses its identity, the contributed property transmutes to the estate receiving the property, subject to the provisions of paragraph (2) of this subsection (c).

(ii) If the contributed property retains its identity, it does not transmute and remains property of the contributing estate.

(B) If marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection (c).

(2)(A) When one estate of property makes a contribution to another estate of property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation. No such reimbursement shall be made with respect to a contribution that is not traceable by clear and convincing evidence or that was a gift. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property that received the contribution.

(B) When a spouse contributes personal effort to non-marital property, it shall be deemed a contribution from the marital estate, which shall receive reimbursement for the efforts if the efforts are significant and result in substantial appreciation to the non-marital property except that if the marital estate reasonably has been compensated for his or her efforts, it shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution.

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) each party's contribution to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any decrease attributable to an advance from the parties' marital estate under subsection (c-1)(2) of Section 501; (ii) the contribution of a spouse as a homemaker or to the family unit; and (iii) whether the contribution is after the commencement of a proceeding for dissolution of marriage or declaration of invalidity of marriage;

(2) the dissipation by each party of the marital property, provided that a party's claim of dissipation is subject to the following conditions:

(i) a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later;

(ii) the notice of intent to claim dissipation shall contain, at a minimum, a date or period of time during which the marriage began undergoing an irretrievable breakdown, an identification of the property dissipated, and a date or period of time during which the dissipation occurred;

(iii) a certificate or service of the notice of intent to claim dissipation shall be filed with the clerk of the court and be served pursuant to applicable rules;

(iv) no dissipation shall be deemed to have occurred prior to 3 years after the party claiming dissipation knew or should have known of the dissipation, but in no event prior to 5 years before the filing of the petition for dissolution of marriage;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having the primary residence of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any prenuptial or postnuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties.

(e) Each spouse has a species of common ownership in the marital property which vests at the time dissolution proceedings are commenced and continues only during the pendency of the action. Any such interest in marital property shall not encumber that property so as to restrict its transfer, assignment or conveyance by the title holder unless such title holder is specifically enjoined from making such transfer, assignment or conveyance.

(f) In a proceeding for dissolution of marriage or declaration of invalidity of marriage or in a proceeding for disposition of property following dissolution of marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, in determining the value of the marital and non-marital property for purposes of dividing the property, has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(g) The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, physical and mental health, and general welfare of any minor, dependent, or incompetent child of the parties. In making a determination under this subsection, the court may consider, among other things, the conviction of a party of any of the offenses set forth in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-3.3, 12-4, 12-4.1, 12-4.2, 12-4.3, 12-13, 12-14, 12-14.1, 12-15, or 12-16, or Section 12-3.05 except for subdivision (a)(4) or (g)(1), of the Criminal Code of 1961 or the Criminal Code of 2012 if the victim is a child of one or both of the parties, and there is a need for, and cost of, care, healing and counseling for the child who is the victim of the crime.

(h) Unless specifically directed by a reviewing court, or upon good cause shown, the court shall not on remand consider any increase or decrease in the value of any "marital" or "non-marital" property occurring since the assessment of such property at the original trial or hearing, but shall use only that assessment made at the original trial or hearing.

(i) The court may make such judgments affecting the marital property as may be just and may enforce such judgments by ordering a sale of marital property, with proceeds therefrom to be applied as determined by the court.

(j) After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 14 days after the closing of proofs in the final hearing or within such other period as the court orders.

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.

(3) The filing of a petition for contribution shall not be deemed to constitute a waiver of the attorney-client privilege between the petitioning party and current or former counsel; and such a waiver shall not constitute a prerequisite to a hearing for contribution. If either party's presentation on contribution, however, includes evidence within the scope of the attorney-client privilege, the disclosure or disclosures shall be narrowly

construed and shall not be deemed by the court to constitute a general waiver of the privilege as to matters beyond the scope of the presentation.

(4) No finding on which a contribution award is based or denied shall be asserted against counsel or former counsel for purposes of any hearing under subsection (c) or (e) of Section 508.

(5) A contribution award (payable to either the petitioning party or the party's counsel, or jointly, as the court determines) may be in the form of either a set dollar amount or a percentage of fees and costs (or a portion of fees and costs) to be subsequently agreed upon by the petitioning party and counsel or, alternatively, thereafter determined in a hearing pursuant to subsection (c) of Section 508 or previously or thereafter determined in an independent proceeding under subsection (e) of Section 508.

(6) The changes to this Section 503 made by this amendatory Act of 1996 apply to cases pending on or after June 1, 1997, except as otherwise provided in Section 508.

(k) In determining the value of assets or property under this Section, the court shall employ a fair market value standard. The date of valuation for the purposes of division of assets shall be the date of trial or such other date as agreed by the parties or ordered by the court, within its discretion. If the court grants a petition brought under Section 2-1401 of the Code of Civil Procedure, then the court has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property.

(l) The court may seek the advice of financial experts or other professionals, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine as a witness any professional consulted by the court designated as the court's witness. Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate, and the allocation is subject to reallocation under subsection (a) of Section 508. Upon the request of any party or upon the court's own motion, the court may conduct a hearing as to the reasonableness of those fees and costs.

(m) The changes made to this Section by Public Act 97-941 apply only to petitions for dissolution of marriage filed on or after January 1, 2013 (the effective date of Public Act 97-941).

(Source: P.A. 99-78, eff. 7-20-15; 99-90, eff. 1-1-16; 99-763, eff. 1-1-17.)

Section 95. No acceleration or delay. Where this Act makes changes in a statute that is represented in this Act by text that is not yet or no longer in effect (for example, a Section represented by multiple versions), the use of that text does not accelerate or delay the taking effect of (i) the changes made by this Act or (ii) provisions derived from any other Public Act.

Select Year: 2016 Go

The 2016 Florida Statutes

Title XLII ESTATES AND TRUSTS	Chapter 732 PROBATE CODE: INTESTATE SUCCESSION AND WILLS	View Entire Chapter

732.703 Effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death.—

(1) As used in this section, unless the context requires otherwise, the term:

(a) "Asset," when not modified by other words or phrases, means an asset described in subsection (3), except as provided in paragraph (4)(j).

(b) "Beneficiary" means any person designated in a governing instrument to receive an interest in an asset upon the death of the decedent.

(c) "Death certificate" means a certified copy of a death certificate issued by an official or agency for the place where the decedent's death occurred.

(d) "Employee benefit plan" means any funded or unfunded plan, program, or fund established by an employer to provide an employee's beneficiaries with benefits that may be payable on the employee's death.

(e) "Governing instrument" means any writing or contract governing the disposition of all or any part of an asset upon the death of the decedent.

(f) "Payor" means any person obligated to make payment of the decedent's interest in an asset upon the death of the decedent, and any other person who is in control or possession of an asset.

(g) "Primary beneficiary" means a beneficiary designated under the governing instrument to receive an interest in an asset upon the death of the decedent who is not a secondary beneficiary. A person who receives an interest in the asset upon the death of the decedent due to the death of another beneficiary prior to the decedent's death is also a primary beneficiary.

(h) "Secondary beneficiary" means a beneficiary designated under the governing instrument who will receive an interest in an asset if the designation of the primary beneficiary is revoked or otherwise cannot be given effect.

(2) A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent. An individual retirement account described in s. 408 or s. 408A of the Internal Revenue Code of 1986, or an employee benefit plan, may not be treated as a trust for purposes of this section.

(3) Subsection (2) applies to the following assets in which a resident of this state has an interest at the time of the resident's death:

(a) A life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan.

(b) An employee benefit plan.

(c) An individual retirement account described in s. 408 or s. 408A of the Internal Revenue Code of 1986, including an individual retirement annuity described in s. 408(b) of the Internal Revenue Code of 1986.

(d) A payable-on-death account.

(e) A security or other account registered in a transfer-on-death form.

(f) A life insurance policy, annuity, or other similar contract that is not held within an employee benefit plan or a tax-qualified retirement account.

(4) Subsection (2) does not apply:

(a) To the extent that controlling federal law provides otherwise;

(b) If the governing instrument is signed by the decedent, or on behalf of the decedent, after the order of dissolution or order declaring the marriage invalid and such governing instrument expressly provides that benefits will be payable to the decedent's former spouse;

(c) To the extent a will or trust governs the disposition of the assets and s. 732.507(2) or s. 736.1105 applies;

(d) If the order of dissolution or order declaring the marriage invalid requires that the decedent acquire or maintain the asset for the benefit of a former spouse or children of the marriage, payable upon the death of the decedent either outright or in trust, only if other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist upon the death of the decedent;

(e) If, under the terms of the order of dissolution or order declaring the marriage invalid, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent;

(f) If the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law;

(g) If the governing instrument is governed by the laws of a state other than this state;

(h) To an asset held in two or more names as to which the death of one coowner vests ownership of the asset in the surviving coowner or coowners;

(i) If the decedent remarries the person whose interest would otherwise have been revoked under this section and the decedent and that person are married to one another at the time of the decedent's death; or

(j) To state-administered retirement plans under chapter 121.

(5) In the case of an asset described in paragraph (3)(a), paragraph (3)(b), or paragraph (3)(c), unless payment or transfer would violate a court order directed to, and served as required by law on, the payor:

(a) If the governing instrument does not explicitly specify the relationship of the beneficiary to the decedent or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment on account of, or transferring any interest in, the asset to the beneficiary.

(b) As to any portion of the asset required by the governing instrument to be paid after the decedent's death to a primary beneficiary explicitly designated in the governing instrument as the decedent's spouse:

1. If the death certificate states that the decedent was married at the time of his or her death to that spouse, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to such primary beneficiary.

2. If the death certificate states that the decedent was not married at the time of his or her death, or if the death certificate states that the decedent was married to a person other than the spouse designated as the primary beneficiary at the time of his or her death, the payor is not liable for making a payment on

account of, or for transferring an interest in, that portion of the asset to a secondary beneficiary under the governing instrument.

3. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the primary beneficiary upon delivery to the payor of an affidavit validly executed by the primary beneficiary in substantially the following form:

STATE OF
COUNTY OF

Before me, the undersigned authority, personally appeared (type or print Affiant's name) ("Affiant"), who swore or affirmed that:

1. (Type or print name of Decedent) ("Decedent") died on (type or print the date of the Decedent's death).

2. Affiant is a "primary beneficiary" as that term is defined in Section 732.703, Florida Statutes. Affiant and Decedent were married on (type or print the date of marriage), and were legally married to one another on the date of the Decedent's death.

(Affiant)

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced (state type of identification) as identification this day of (month), (year).

(Signature of Officer)

(Print, Type, or Stamp Commissioned name of Notary Public)

4. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the secondary beneficiary upon delivery to the payor of an affidavit validly executed by the secondary beneficiary affidavit in substantially the following form:

STATE OF
COUNTY OF

Before me, the undersigned authority, personally appeared (type or print Affiant's name) ("Affiant"), who swore or affirmed that:

1. (Type or print name of Decedent) ("Decedent") died on (type or print the date of the Decedent's death).

2. Affiant is a "secondary beneficiary" as that term is defined in Section 732.703, Florida Statutes. On the date of the Decedent's death, the Decedent was not legally married to the spouse designated as the "primary beneficiary" as that term is defined in Section 732.703, Florida Statutes.

Sworn to or affirmed before me by the affiant who is personally known to me or who has produced (state type of identification) as identification this day of (month), (year).

(Signature of Officer)

(Print, Type, or Stamp Commissioned name of Notary Public)

(6) In the case of an asset described in paragraph (3)(d), paragraph (3)(e), or paragraph (3)(f), the payor is not liable for making any payment on account of, or transferring any interest in, the asset to any beneficiary.

(7) Subsections (5) and (6) apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest pursuant to subsection (2).

(8) This section does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest by operation of this section, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to

such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator, or other third party.

(9) This section applies to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

History.—s. 1, ch. 2012-148; s. 6, ch. 2013-172.

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PROPOSAL NO. 100-3

LRB100000022RLC10023b

100TH GENERAL ASSEMBLY

State of Illinois

2017 and 2018

INTRODUCED _________________, BY

SYNOPSIS AS INTRODUCED:

720 ILCS 550/10	from Ch. 56 1/2, par. 710
720 ILCS 570/410	from Ch. 56 1/2, par. 1410
720 ILCS 646/70	
725 ILCS 5/110-14	from Ch. 38, par. 110-14
730 ILCS 5/5-3-2	from Ch. 38, par. 1005-3-2
730 ILCS 5/5-6-3.1	from Ch. 38, par. 1005-6-3.1

Amends the Cannabis Control Act, the Illinois Controlled Substances Act, and the Methamphetamine Control and Community Protection Act. Provides that at the time a defendant is placed on probation, the court shall set a date at the conclusion of the period to determine whether the defendant has complied with the terms and conditions of probation. Amends the Code of Criminal Procedure of 1963. Provides that a person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense shall be allowed a credit of $20 (rather than $5) for each day the person is incarcerated toward any fine imposed. Amends the Unified Code of Corrections. Provides that in felony cases, the presentence report shall set forth the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections. Provides that at the time a defendant is placed on supervision, the court shall set a date at the conclusion of the period to determine whether the defendant has complied with the terms and conditions of supervision.

LRB100 00022 RLC 10023 b

FISCAL NOTE ACT
MAY APPLY

A BILL FOR

AN ACT concerning criminal law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Cannabis Control Act is amended by changing Section 10 as follows:

(720 ILCS 550/10) (from Ch. 56 1/2, par. 710)

Sec. 10. (a) Whenever any person who has not previously been convicted of, or placed on probation or court supervision for, any offense under this Act or any law of the United States or of any State relating to cannabis, or controlled substances as defined in the Illinois Controlled Substances Act, pleads guilty to or is found guilty of violating Sections 4(a), 4(b), 4(c), 5(a), 5(b), 5(c) or 8 of this Act, the court may, without entering a judgment and with the consent of such person, sentence him to probation.

(b) When a person is placed on probation, the court shall enter an order specifying a period of probation of 24 months, and shall defer further proceedings in the case until the conclusion of the period or until the filing of a petition alleging violation of a term or condition of probation. <u>At the time the person is placed on probation, the court shall set a date at the conclusion of the period to determine whether the person has complied with the terms and conditions of probation.</u>

(c) The conditions of probation shall be that the person: (1) not violate any criminal statute of any jurisdiction; (2) refrain from possession of a firearm or other dangerous weapon; (3) submit to periodic drug testing at a time and in a manner as ordered by the court, but no less than 3 times during the period of the probation, with the cost of the testing to be paid by the probationer; and (4) perform no less than 30 hours of community service, provided community service is available in the jurisdiction and is funded and approved by the county board.

(d) The court may, in addition to other conditions, require that the person:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of probation;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical or psychiatric treatment; or treatment for drug addiction or alcoholism;

(5) attend or reside in a facility established for the instruction or residence of defendants on probation;

(6) support his dependents;

(7) refrain from possessing a firearm or other dangerous weapon;

(7-5) refrain from having in his or her body the presence of any illicit drug prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, unless prescribed by a physician, and submit samples of his or her blood or urine or both for tests to determine the presence of any illicit drug;

(8) and in addition, if a minor:

(i) reside with his parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth;

(iv) contribute to his own support at home or in a foster home.

(e) Upon violation of a term or condition of probation, the court may enter a judgment on its original finding of guilt and proceed as otherwise provided.

(f) At the conclusion of the period of probation, if the court determines that the person has complied with ~~Upon fulfillment of~~ the terms and conditions of probation, the court shall discharge the ~~such~~ person and dismiss the proceedings against him or her.

(g) A disposition of probation is considered to be a conviction for the purposes of imposing the conditions of probation and for appeal, however, discharge and dismissal under this Section is not a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime (including the additional penalty imposed for subsequent offenses under Section 4(c), 4(d), 5(c) or 5(d) of this Act).

(h) Discharge and dismissal under this Section, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 5-6-3.3 or 5-6-3.4 of the Unified Code of Corrections, or subsection (c) of Section 11-14 of the Criminal Code of 1961 or the Criminal Code of 2012 may occur only once with respect to any person.

(i) If a person is convicted of an offense under this Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act within 5 years subsequent to a discharge and dismissal under this Section, the discharge and dismissal under this Section shall be admissible in the sentencing proceeding for that conviction as a factor in aggravation.

(j) Notwithstanding subsection (a), before a person is sentenced to probation under this Section, the court may refer the person to the drug court established in that judicial circuit pursuant to Section 15 of the Drug Court Treatment Act. The drug court team shall evaluate the person's likelihood of successfully completing a sentence of probation under this Section and shall report the results of its evaluation to the court. If the drug court team finds that the person suffers from a substance abuse problem that makes him or her substantially unlikely to successfully complete a sentence of probation under this Section, then the drug court shall set forth its findings in the form of a written order, and the person shall not be sentenced to probation under this Section, but may be considered for the drug court program.

(Source: P.A. 98-164, eff. 1-1-14; 99-480, eff. 9-9-15.)

Section 10. The Illinois Controlled Substances Act is amended by changing Section 410 as follows:

(720 ILCS 570/410) (from Ch. 56 1/2, par. 1410)

Sec. 410. (a) Whenever any person who has not previously been convicted of, or placed on probation or court supervision for any offense under this Act or any law of the United States or of any State relating to cannabis or controlled substances, pleads guilty to or is found guilty of possession of a controlled or counterfeit substance under subsection (c) of Section 402 or of unauthorized possession of prescription form under Section 406.2, the court, without entering a judgment and with the consent of such person, may sentence him or her to probation.

(b) When a person is placed on probation, the court shall enter an order specifying a period of probation of 24 months and shall defer further proceedings in the case until the conclusion of the period or until the filing of a petition alleging violation of a term or condition of probation. <u>At the</u>

time the person is placed on probation, the court shall set a date at the conclusion of the period to determine whether the person has complied with the terms and conditions of probation.

(c) The conditions of probation shall be that the person: (1) not violate any criminal statute of any jurisdiction; (2) refrain from possessing a firearm or other dangerous weapon; (3) submit to periodic drug testing at a time and in a manner as ordered by the court, but no less than 3 times during the period of the probation, with the cost of the testing to be paid by the probationer; and (4) perform no less than 30 hours of community service, provided community service is available in the jurisdiction and is funded and approved by the county board.

(d) The court may, in addition to other conditions, require that the person:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of probation;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical or psychiatric treatment; or treatment or rehabilitation approved by the Illinois Department of Human Services;

(5) attend or reside in a facility established for the

instruction or residence of defendants on probation;

(6) support his or her dependents;

(6-5) refrain from having in his or her body the presence of any illicit drug prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, unless prescribed by a physician, and submit samples of his or her blood or urine or both for tests to determine the presence of any illicit drug;

(7) and in addition, if a minor:

(i) reside with his or her parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth;

(iv) contribute to his or her own support at home or in a foster home.

(e) Upon violation of a term or condition of probation, the court may enter a judgment on its original finding of guilt and proceed as otherwise provided.

(f) <u>At the conclusion of the period of probation, if the court determines that the person has complied with</u> ~~Upon fulfillment of~~ the terms and conditions of probation, the court shall discharge the person and dismiss the proceedings against him or her.

(g) A disposition of probation is considered to be a conviction for the purposes of imposing the conditions of probation and for appeal, however, discharge and dismissal under this Section is not a conviction for purposes of this Act or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

(h) There may be only one discharge and dismissal under this Section, Section 10 of the Cannabis Control Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 5-6-3.3 or 5-6-3.4 of the Unified Code of Corrections, or subsection (c) of Section 11-14 of the Criminal Code of 1961 or the Criminal Code of 2012 with respect to any person.

(i) If a person is convicted of an offense under this Act, the Cannabis Control Act, or the Methamphetamine Control and Community Protection Act within 5 years subsequent to a discharge and dismissal under this Section, the discharge and dismissal under this Section shall be admissible in the sentencing proceeding for that conviction as evidence in aggravation.

(j) Notwithstanding subsection (a), before a person is sentenced to probation under this Section, the court may refer the person to the drug court established in that judicial circuit pursuant to Section 15 of the Drug Court Treatment Act. The drug court team shall evaluate the person's likelihood of successfully completing a sentence of probation under this Section and shall report the results of its evaluation to the court. If the drug court team finds that the person suffers from a substance abuse problem that makes him or her substantially unlikely to successfully complete a sentence of probation under this Section, then the drug court shall set forth its findings in the form of a written order, and the person shall not be sentenced to probation under this Section, but may be considered for the drug court program.

(Source: P.A. 98-164, eff. 1-1-14; 99-480, eff. 9-9-15.)

Section 15. The Methamphetamine Control and Community Protection Act is amended by changing Section 70 as follows:

(720 ILCS 646/70)

Sec. 70. Probation.

(a) Whenever any person who has not previously been convicted of, or placed on probation or court supervision for any offense under this Act, the Illinois Controlled Substances Act, the Cannabis Control Act, or any law of the United States or of any state relating to cannabis or controlled substances, pleads guilty to or is found guilty of possession of less than 15 grams of methamphetamine under paragraph (1) or (2) of subsection (b) of Section 60 of this Act, the court, without entering a judgment and with the consent of the person, may sentence him or her to probation.

(b) When a person is placed on probation, the court shall enter an order specifying a period of probation of 24 months and shall defer further proceedings in the case until the conclusion of the period or until the filing of a petition alleging violation of a term or condition of probation. <u>At the time the person is placed on probation, the court shall set a date at the conclusion of the period to determine whether the person has complied with the terms and conditions of probation.</u>

(c) The conditions of probation shall be that the person:

(1) not violate any criminal statute of any jurisdiction;

(2) refrain from possessing a firearm or other dangerous weapon;

(3) submit to periodic drug testing at a time and in a manner as ordered by the court, but no less than 3 times during the period of the probation, with the cost of the testing to be paid by the probationer; and

(4) perform no less than 30 hours of community service, if community service is available in the jurisdiction and is funded and approved by the county board.

(d) The court may, in addition to other conditions, require that the person take one or more of the following actions:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of probation;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical or psychiatric treatment; or

treatment or rehabilitation approved by the Illinois Department of Human Services;

(5) attend or reside in a facility established for the instruction or residence of defendants on probation;

(6) support his or her dependents;

(7) refrain from having in his or her body the presence of any illicit drug prohibited by this Act, the Cannabis Control Act, or the Illinois Controlled Substances Act, unless prescribed by a physician, and submit samples of his or her blood or urine or both for tests to determine the presence of any illicit drug; or

(8) if a minor:

(i) reside with his or her parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth; or

(iv) contribute to his or her own support at home or in a foster home.

(e) Upon violation of a term or condition of probation, the court may enter a judgment on its original finding of guilt and proceed as otherwise provided.

(f) At the conclusion of the period of probation, if the court determines that the person has complied with ~~Upon fulfillment of~~ the terms and conditions of probation, the court shall discharge the person and dismiss the proceedings against the person.

(g) A disposition of probation is considered to be a conviction for the purposes of imposing the conditions of probation and for appeal, however, discharge and dismissal under this Section is not a conviction for purposes of this Act or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

(h) There may be only one discharge and dismissal under this Section, Section 410 of the Illinois Controlled Substances Act, Section 10 of the Cannabis Control Act, Section 5-6-3.3 or 5-6-3.4 of the Unified Code of Corrections, or subsection (c) of Section 11-14 of the Criminal Code of 1961 or the Criminal Code of 2012 with respect to any person.

(i) If a person is convicted of an offense under this Act, the Cannabis Control Act, or the Illinois Controlled Substances Act within 5 years subsequent to a discharge and dismissal under this Section, the discharge and dismissal under this Section are admissible in the sentencing proceeding for that conviction as evidence in aggravation.

(j) Notwithstanding subsection (a), before a person is sentenced to probation under this Section, the court may refer the person to the drug court established in that judicial circuit pursuant to Section 15 of the Drug Court Treatment Act. The drug court team shall evaluate the person's likelihood of successfully completing a sentence of probation under this Section and shall report the results of its evaluation to the

court. If the drug court team finds that the person suffers from a substance abuse problem that makes him or her substantially unlikely to successfully complete a sentence of probation under this Section, then the drug court shall set forth its findings in the form of a written order, and the person shall not be sentenced to probation under this Section, but may be considered for the drug court program.
(Source: P.A. 98-164, eff. 1-1-14; 99-480, eff. 9-9-15.)

Section 20. The Code of Criminal Procedure of 1963 is amended by changing Section 110-14 as follows:

(725 ILCS 5/110-14) (from Ch. 38, par. 110-14)

Sec. 110-14. Credit for Incarceration on Bailable Offense.

(a) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $20 ~~$5~~ for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine.

(b) Subsection (a) does not apply to a person incarcerated for sexual assault as defined in paragraph (1) of subsection (a) of Section 5-9-1.7 of the Unified Code of Corrections.
(Source: P.A. 93-699, eff. 1-1-05.)

Section 25. The Unified Code of Corrections is amended by changing Sections 5-3-2 and 5-6-3.1 as follows:

(730 ILCS 5/5-3-2) (from Ch. 38, par. 1005-3-2)

Sec. 5-3-2. Presentence Report.

(a) In felony cases, the presentence report shall set forth:

(1) the defendant's history of delinquency or criminality, physical and mental history and condition, family situation and background, economic status, education, occupation and personal habits;

(2) information about special resources within the community which might be available to assist the defendant's rehabilitation, including treatment centers, residential facilities, vocational training services, correctional manpower programs, employment opportunities, special educational programs, alcohol and drug abuse programming, psychiatric and marriage counseling, and other programs and facilities which could aid the defendant's successful reintegration into society;

(3) the effect the offense committed has had upon the victim or victims thereof, and any compensatory benefit that various sentencing alternatives would confer on such victim or victims;

(3.5) information provided by the victim's spouse, guardian, parent, grandparent, and other immediate family and household members about the effect the offense committed has had on the victim and on the person providing the information; if the victim's spouse, guardian, parent, grandparent, or other immediate family or household member has provided a written statement, the statement shall be attached to the report;

(4) information concerning the defendant's status since arrest, including his record if released on his own recognizance, or the defendant's achievement record if released on a conditional pre-trial supervision program;

(5) when appropriate, a plan, based upon the personal, economic and social adjustment needs of the defendant, utilizing public and private community resources as an alternative to institutional sentencing;

(6) any other matters that the investigatory officer deems relevant or the court directs to be included; ~~and~~

(7) information concerning defendant's eligibility for a sentence to a county impact incarceration program under Section 5-8-1.2 of this Code; and ~~.~~

(8) the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections.

(b) The investigation shall include a physical and mental examination of the defendant when so ordered by the court. If the court determines that such an examination should be made, it shall issue an order that the defendant submit to examination at such time and place as designated by the court and that such examination be conducted by a physician, psychologist or psychiatrist designated by the court. Such an examination may be conducted in a court clinic if so ordered by the court. The cost of such examination shall be paid by the county in which the trial is held.

(b-5) In cases involving felony sex offenses in which the offender is being considered for probation only or any felony offense that is sexually motivated as defined in the Sex Offender Management Board Act in which the offender is being considered for probation only, the investigation shall include a sex offender evaluation by an evaluator approved by the Board and conducted in conformance with the standards developed under the Sex Offender Management Board Act. In cases in which the offender is being considered for any mandatory prison sentence, the investigation shall not include a sex offender evaluation.

(c) In misdemeanor, business offense or petty offense cases, except as specified in subsection (d) of this Section, when a presentence report has been ordered by the court, such presentence report shall contain information on the defendant's history of delinquency or criminality and shall further contain only those matters listed in any of paragraphs (1) through (6) of subsection (a) or in subsection (b) of this Section as are specified by the court in its order for the report.

(d) In cases under Sections 11-1.50, 12-15, and 12-3.4 or 12-30 of the Criminal Code of 1961 or the Criminal Code of

2012, the presentence report shall set forth information about alcohol, drug abuse, psychiatric, and marriage counseling or other treatment programs and facilities, information on the defendant's history of delinquency or criminality, and shall contain those additional matters listed in any of paragraphs (1) through (6) of subsection (a) or in subsection (b) of this Section as are specified by the court.

(e) Nothing in this Section shall cause the defendant to be held without bail or to have his bail revoked for the purpose of preparing the presentence report or making an examination.
(Source: P.A. 97-1109, eff. 1-1-13; 97-1150, eff. 1-25-13; 98-372, eff. 1-1-14.)

(730 ILCS 5/5-6-3.1) (from Ch. 38, par. 1005-6-3.1)

Sec. 5-6-3.1. Incidents and conditions of supervision.

(a) When a defendant is placed on supervision, the court shall enter an order for supervision specifying the period of such supervision, and shall defer further proceedings in the case until the conclusion of the period. <u>At the time a defendant is placed on supervision, the court shall set a date at the conclusion of the period to determine whether the defendant has complied with the conditions of supervision.</u>

(b) The period of supervision shall be reasonable under all of the circumstances of the case, but may not be longer than 2 years, unless the defendant has failed to pay the assessment required by Section 10.3 of the Cannabis Control Act, Section

411.2 of the Illinois Controlled Substances Act, or Section 80 of the Methamphetamine Control and Community Protection Act, in which case the court may extend supervision beyond 2 years. Additionally, the court shall order the defendant to perform no less than 30 hours of community service and not more than 120 hours of community service, if community service is available in the jurisdiction and is funded and approved by the county board where the offense was committed, when the offense (1) was related to or in furtherance of the criminal activities of an organized gang or was motivated by the defendant's membership in or allegiance to an organized gang; or (2) is a violation of any Section of Article 24 of the Criminal Code of 1961 or the Criminal Code of 2012 where a disposition of supervision is not prohibited by Section 5-6-1 of this Code. The community service shall include, but not be limited to, the cleanup and repair of any damage caused by violation of Section 21-1.3 of the Criminal Code of 1961 or the Criminal Code of 2012 and similar damages to property located within the municipality or county in which the violation occurred. Where possible and reasonable, the community service should be performed in the offender's neighborhood.

For the purposes of this Section, "organized gang" has the meaning ascribed to it in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act.

(c) The court may in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the court require that the person:

(1) make a report to and appear in person before or participate with the court or such courts, person, or social service agency as directed by the court in the order of supervision;

(2) pay a fine and costs;

(3) work or pursue a course of study or vocational training;

(4) undergo medical, psychological or psychiatric treatment; or treatment for drug addiction or alcoholism;

(5) attend or reside in a facility established for the instruction or residence of defendants on probation;

(6) support his dependents;

(7) refrain from possessing a firearm or other dangerous weapon;

(8) and in addition, if a minor:

(i) reside with his parents or in a foster home;

(ii) attend school;

(iii) attend a non-residential program for youth;

(iv) contribute to his own support at home or in a foster home; or

(v) with the consent of the superintendent of the facility, attend an educational program at a facility other than the school in which the offense was committed if he or she is placed on supervision for a crime of violence as defined in Section 2 of the Crime Victims Compensation Act committed in a school, on the real property comprising a school, or within 1,000 feet of the real property comprising a school;

(9) make restitution or reparation in an amount not to exceed actual loss or damage to property and pecuniary loss or make restitution under Section 5-5-6 to a domestic violence shelter. The court shall determine the amount and conditions of payment;

(10) perform some reasonable public or community service;

(11) comply with the terms and conditions of an order of protection issued by the court pursuant to the Illinois Domestic Violence Act of 1986 or an order of protection issued by the court of another state, tribe, or United States territory. If the court has ordered the defendant to make a report and appear in person under paragraph (1) of this subsection, a copy of the order of protection shall be transmitted to the person or agency so designated by the court;

(12) reimburse any "local anti-crime program" as defined in Section 7 of the Anti-Crime Advisory Council Act for any reasonable expenses incurred by the program on the offender's case, not to exceed the maximum amount of the fine authorized for the offense for which the defendant was

sentenced;

(13) contribute a reasonable sum of money, not to exceed the maximum amount of the fine authorized for the offense for which the defendant was sentenced, (i) to a "local anti-crime program", as defined in Section 7 of the Anti-Crime Advisory Council Act, or (ii) for offenses under the jurisdiction of the Department of Natural Resources, to the fund established by the Department of Natural Resources for the purchase of evidence for investigation purposes and to conduct investigations as outlined in Section 805-105 of the Department of Natural Resources (Conservation) Law;

(14) refrain from entering into a designated geographic area except upon such terms as the court finds appropriate. Such terms may include consideration of the purpose of the entry, the time of day, other persons accompanying the defendant, and advance approval by a probation officer;

(15) refrain from having any contact, directly or indirectly, with certain specified persons or particular types of person, including but not limited to members of street gangs and drug users or dealers;

(16) refrain from having in his or her body the presence of any illicit drug prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, unless prescribed by a physician, and submit samples of his

or her blood or urine or both for tests to determine the presence of any illicit drug;

(17) refrain from operating any motor vehicle not equipped with an ignition interlock device as defined in Section 1-129.1 of the Illinois Vehicle Code; under this condition the court may allow a defendant who is not self-employed to operate a vehicle owned by the defendant's employer that is not equipped with an ignition interlock device in the course and scope of the defendant's employment; and

(18) if placed on supervision for a sex offense as defined in subsection (a-5) of Section 3-1-2 of this Code, unless the offender is a parent or guardian of the person under 18 years of age present in the home and no non-familial minors are present, not participate in a holiday event involving children under 18 years of age, such as distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter.

(c-5) If payment of restitution as ordered has not been made, the victim shall file a petition notifying the sentencing court, any other person to whom restitution is owed, and the State's Attorney of the status of the ordered restitution payments unpaid at least 90 days before the supervision expiration date. If payment as ordered has not been made, the court shall hold a review hearing prior to the expiration date, unless the hearing is voluntarily waived by the defendant with the knowledge that waiver may result in an extension of the supervision period or in a revocation of supervision. If the court does not extend supervision, it shall issue a judgment for the unpaid restitution and direct the clerk of the circuit court to file and enter the judgment in the judgment and lien docket, without fee, unless it finds that the victim has recovered a judgment against the defendant for the amount covered by the restitution order. If the court issues a judgment for the unpaid restitution, the court shall send to the defendant at his or her last known address written notification that a civil judgment has been issued for the unpaid restitution.

(d) The court shall defer entering any judgment on the charges until the conclusion of the supervision.

(e) At the conclusion of the period of supervision, if the court determines that the defendant has successfully complied with all of the conditions of supervision, the court shall discharge the defendant and enter a judgment dismissing the charges.

(f) Discharge and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime. Two years after the discharge and dismissal under this Section, unless the disposition of supervision was for a violation of Sections 3-707, 3-708, 3-710, 5-401.3, or 11-503 of the Illinois Vehicle Code or a similar provision of a local ordinance, or for a violation of Sections 12-3.2, 16-25, or 16A-3 of the Criminal Code of 1961 or the Criminal Code of 2012, in which case it shall be 5 years after discharge and dismissal, a person may have his record of arrest sealed or expunged as may be provided by law. However, any defendant placed on supervision before January 1, 1980, may move for sealing or expungement of his arrest record, as provided by law, at any time after discharge and dismissal under this Section. A person placed on supervision for a sexual offense committed against a minor as defined in clause (a)(1)(L) of Section 5.2 of the Criminal Identification Act or for a violation of Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance shall not have his or her record of arrest sealed or expunged.

(g) A defendant placed on supervision and who during the period of supervision undergoes mandatory drug or alcohol testing, or both, or is assigned to be placed on an approved electronic monitoring device, shall be ordered to pay the costs incidental to such mandatory drug or alcohol testing, or both, and costs incidental to such approved electronic monitoring in accordance with the defendant's ability to pay those costs. The county board with the concurrence of the Chief Judge of the judicial circuit in which the county is located shall establish reasonable fees for the cost of maintenance, testing, and incidental expenses related to the mandatory drug or alcohol testing, or both, and all costs incidental to approved electronic monitoring, of all defendants placed on supervision. The concurrence of the Chief Judge shall be in the form of an administrative order. The fees shall be collected by the clerk of the circuit court, except as provided in an administrative order of the Chief Judge of the circuit court. The clerk of the circuit court shall pay all moneys collected from these fees to the county treasurer who shall use the moneys collected to defray the costs of drug testing, alcohol testing, and electronic monitoring. The county treasurer shall deposit the fees collected in the county working cash fund under Section 6-27001 or Section 6-29002 of the Counties Code, as the case may be.

The Chief Judge of the circuit court of the county may by administrative order establish a program for electronic monitoring of offenders, in which a vendor supplies and monitors the operation of the electronic monitoring device, and collects the fees on behalf of the county. The program shall include provisions for indigent offenders and the collection of unpaid fees. The program shall not unduly burden the offender and shall be subject to review by the Chief Judge.

The Chief Judge of the circuit court may suspend any additional charges or fees for late payment, interest, or damage to any device.

(h) A disposition of supervision is a final order for the purposes of appeal.

(i) The court shall impose upon a defendant placed on supervision after January 1, 1992 or to community service under the supervision of a probation or court services department after January 1, 2004, as a condition of supervision or supervised community service, a fee of $50 for each month of supervision or supervised community service ordered by the court, unless after determining the inability of the person placed on supervision or supervised community service to pay the fee, the court assesses a lesser fee. The court may not impose the fee on a minor who is made a ward of the State under the Juvenile Court Act of 1987 while the minor is in placement. The fee shall be imposed only upon a defendant who is actively supervised by the probation and court services department. The fee shall be collected by the clerk of the circuit court. The clerk of the circuit court shall pay all monies collected from this fee to the county treasurer for deposit in the probation and court services fund pursuant to Section 15.1 of the Probation and Probation Officers Act.

A circuit court may not impose a probation fee in excess of $25 per month unless the circuit court has adopted, by administrative order issued by the chief judge, a standard probation fee guide determining an offender's ability to pay. Of the amount collected as a probation fee, not to exceed $5 of that fee collected per month may be used to provide services to crime victims and their families.

The Court may only waive probation fees based on an offender's ability to pay. The probation department may re-evaluate an offender's ability to pay every 6 months, and, with the approval of the Director of Court Services or the Chief Probation Officer, adjust the monthly fee amount. An offender may elect to pay probation fees due in a lump sum. Any offender that has been assigned to the supervision of a probation department, or has been transferred either under subsection (h) of this Section or under any interstate compact, shall be required to pay probation fees to the department supervising the offender, based on the offender's ability to pay.

(j) All fines and costs imposed under this Section for any violation of Chapters 3, 4, 6, and 11 of the Illinois Vehicle Code, or a similar provision of a local ordinance, and any violation of the Child Passenger Protection Act, or a similar provision of a local ordinance, shall be collected and disbursed by the circuit clerk as provided under Section 27.5 of the Clerks of Courts Act.

(k) A defendant at least 17 years of age who is placed on supervision for a misdemeanor in a county of 3,000,000 or more inhabitants and who has not been previously convicted of a misdemeanor or felony may as a condition of his or her supervision be required by the court to attend educational courses designed to prepare the defendant for a high school diploma and to work toward a high school diploma or to work toward passing high school equivalency testing or to work toward completing a vocational training program approved by the court. The defendant placed on supervision must attend a public institution of education to obtain the educational or vocational training required by this subsection (k). The defendant placed on supervision shall be required to pay for the cost of the educational courses or high school equivalency testing if a fee is charged for those courses or testing. The court shall revoke the supervision of a person who wilfully fails to comply with this subsection (k). The court shall resentence the defendant upon revocation of supervision as provided in Section 5-6-4. This subsection (k) does not apply to a defendant who has a high school diploma or has successfully passed high school equivalency testing. This subsection (k) does not apply to a defendant who is determined by the court to be a person with a developmental disability or otherwise mentally incapable of completing the educational or vocational program.

(l) The court shall require a defendant placed on supervision for possession of a substance prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act after a previous conviction or disposition of supervision for possession of a substance prohibited by the Cannabis Control

Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act or a sentence of probation under Section 10 of the Cannabis Control Act or Section 410 of the Illinois Controlled Substances Act and after a finding by the court that the person is addicted, to undergo treatment at a substance abuse program approved by the court.

(m) The Secretary of State shall require anyone placed on court supervision for a violation of Section 3-707 of the Illinois Vehicle Code or a similar provision of a local ordinance to give proof of his or her financial responsibility as defined in Section 7-315 of the Illinois Vehicle Code. The proof shall be maintained by the individual in a manner satisfactory to the Secretary of State for a minimum period of 3 years after the date the proof is first filed. The proof shall be limited to a single action per arrest and may not be affected by any post-sentence disposition. The Secretary of State shall suspend the driver's license of any person determined by the Secretary to be in violation of this subsection.

(n) Any offender placed on supervision for any offense that the court or probation department has determined to be sexually motivated as defined in the Sex Offender Management Board Act shall be required to refrain from any contact, directly or indirectly, with any persons specified by the court and shall be available for all evaluations and treatment programs required by the court or the probation department.

(o) An offender placed on supervision for a sex offense as defined in the Sex Offender Management Board Act shall refrain from residing at the same address or in the same condominium unit or apartment unit or in the same condominium complex or apartment complex with another person he or she knows or reasonably should know is a convicted sex offender or has been placed on supervision for a sex offense. The provisions of this subsection (o) do not apply to a person convicted of a sex offense who is placed in a Department of Corrections licensed transitional housing facility for sex offenders.

(p) An offender placed on supervision for an offense committed on or after June 1, 2008 (the effective date of Public Act 95-464) that would qualify the accused as a child sex offender as defined in Section 11-9.3 or 11-9.4 of the Criminal Code of 1961 or the Criminal Code of 2012 shall refrain from communicating with or contacting, by means of the Internet, a person who is not related to the accused and whom the accused reasonably believes to be under 18 years of age. For purposes of this subsection (p), "Internet" has the meaning ascribed to it in Section 16-0.1 of the Criminal Code of 2012; and a person is not related to the accused if the person is not: (i) the spouse, brother, or sister of the accused; (ii) a descendant of the accused; (iii) a first or second cousin of the accused; or (iv) a step-child or adopted child of the accused.

(q) An offender placed on supervision for an offense committed on or after June 1, 2008 (the effective date of Public Act 95-464) that would qualify the accused as a child sex offender as defined in Section 11-9.3 or 11-9.4 of the Criminal Code of 1961 or the Criminal Code of 2012 shall, if so ordered by the court, refrain from communicating with or contacting, by means of the Internet, a person who is related to the accused and whom the accused reasonably believes to be under 18 years of age. For purposes of this subsection (q), "Internet" has the meaning ascribed to it in Section 16-0.1 of the Criminal Code of 2012; and a person is related to the accused if the person is: (i) the spouse, brother, or sister of the accused; (ii) a descendant of the accused; (iii) a first or second cousin of the accused; or (iv) a step-child or adopted child of the accused.

(r) An offender placed on supervision for an offense under Section 11-6, 11-9.1, 11-14.4 that involves soliciting for a juvenile prostitute, 11-15.1, 11-20.1, 11-20.1B, 11-20.3, or 11-21 of the Criminal Code of 1961 or the Criminal Code of 2012, or any attempt to commit any of these offenses, committed on or after June 1, 2009 (the effective date of Public Act 95-983) ~~this amendatory Act of the 95th General Assembly~~ shall:

(i) not access or use a computer or any other device with Internet capability without the prior written approval of the court, except in connection with the offender's employment or search for employment with the prior approval of the court;

(ii) submit to periodic unannounced examinations of the offender's computer or any other device with Internet capability by the offender's probation officer, a law enforcement officer, or assigned computer or information technology specialist, including the retrieval and copying of all data from the computer or device and any internal or external peripherals and removal of such information, equipment, or device to conduct a more thorough inspection;

(iii) submit to the installation on the offender's computer or device with Internet capability, at the offender's expense, of one or more hardware or software systems to monitor the Internet use; and

(iv) submit to any other appropriate restrictions concerning the offender's use of or access to a computer or any other device with Internet capability imposed by the court.

(s) An offender placed on supervision for an offense that is a sex offense as defined in Section 2 of the Sex Offender Registration Act that is committed on or after January 1, 2010 (the effective date of Public Act 96-362) that requires the person to register as a sex offender under that Act, may not knowingly use any computer scrub software on any computer that the sex offender uses.

(t) An offender placed on supervision for a sex offense as defined in the Sex Offender Registration Act committed on or after January 1, 2010 (the effective date of Public Act 96-262) shall refrain from accessing or using a social networking website as defined in Section 17-0.5 of the Criminal Code of 2012.

(u) Jurisdiction over an offender may be transferred from the sentencing court to the court of another circuit with the concurrence of both courts. Further transfers or retransfers of jurisdiction are also authorized in the same manner. The court to which jurisdiction has been transferred shall have the same powers as the sentencing court. The probation department within the circuit to which jurisdiction has been transferred may impose probation fees upon receiving the transferred offender, as provided in subsection (i). The probation department from the original sentencing court shall retain all probation fees collected prior to the transfer.

(Source: P.A. 98-718, eff. 1-1-15; 98-940, eff. 1-1-15; 99-78, eff. 7-20-15; 99-143, eff. 7-27-15; 99-642, eff. 7-28-16; 99-797, eff. 8-12-16; revised 9-1-16.)

PROPOSAL NO. 100-6

Memo

TO: ISBA Committees and Section Councils

FROM: International and Immigration Law Section Council
Patrick M. Kinnally, Chair
Cindy G. Buys, Legislative Liaison

DATE: August --, 2016

RE: 725 ILCS 5/113-8

The International and Immigration Law Section Council urges the Illinois State Bar Association to support an amendment to 725 ILSC 5/113-8 relating to guilty pleas to improve compliance with judicial notification of the immigration consequences of guilty pleas.

Text of the proposed amendment (new language is underlined)

> Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:
>
> "If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States."
>
> Any plea accepted by the court without the benefit of this advisement shall be a nullity and shall have no consequences [if challenged/if the defendant so requests].

Background

In January 2004, the Illinois General Assembly passed an amendment to the Illinois Criminal Statute which says:

> Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony offense, the court shall give the following advisement to the defendant in open court:
>
> "If you are not a citizen of the United States, you are hereby advised that

> conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States."
>
> * * *
>
> 725 ILCS 5/113-8 (emphasis added)

Prior to that time, persons who were not U.S. citizens sometimes accepted guilty pleas without understanding that they could face deportation from the United States in addition to the agreed upon criminal sanctions. The defendant was then unpleasantly surprised when, after having completed his criminal sentence, he was taken into immigration custody and placed in deportation proceedings. Many defendants claimed they would not have pled guilty if they had known it would mean almost certain deportation from the country, separating them from their families, jobs and homes. For some time, members of the trial bar pushed for this legislation (Moran and Kinnally, "Aliens, Guilty Pleas and the Risk of Deportation: Time for Legislative Action," Illinois Bar Journal (2001) Vol. 89, pp.194-198). As a result of the amendment to 725 ILCS 5/113-8, this warning is now posted on many courtroom walls or in hallways in circuit courts around the state.

Interpretation of 725 ILCS 5/113-8 by Illinois Courts

Despite the mandatory language of the statute, some trial judges are not giving this required admonition. Some judges may believe the posting of the notice of this advisement in court rooms is sufficient. Other judges may be relying on written agreements in court orders signed by the accused. But this is not what the law requires. Quite plainly, it directs:

***

"*the court shall give the following advisement to the defendant in open court*".

***

That language denotes it must be given, and insists, much like the waiver of a jury trial, it be announced in open court when the accused is present. See People v. Thornton, (2nd Dist. 2006) 363 Ill.App.3d 481.

Moreover, the statute says the court "shall" give the advisement as to a "misdemeanor or felony offense" in "open court". Since this statutory requirement is mandatory, a cogent argument can be made that such warning must be given orally by the trial court in open court. It does not suffice merely to have placards attached to courtroom walls which state such a caveat.

Lower courts in Illinois split on the issue of whether the failure to provide the admonishment would result in vacation of a guilty plea. One division of the First District Appellate Court held the trial court's failure to give the admonishment did not permit the defendant to vacate his guilty plea. See People v. Bilelgene (2008) 381 Ill.App.3d 292. But in People v. Del Villar (2008) 383 Ill.App.3d 80, another division vacated a plea where the admonishment was not announced in open court.

The Second District joined the Bilelgene majority opinion in concluding the language of the statute, even though it says the trial court "shall" give the admonishment, does not mean a trial judge has to do that. People v. Leon (2009) 387 Ill. App. 3d 1035 (Ill.App. 2d Dist.). This ruling ignores the definite requirement of a statute in the guise of what the court decrees as statutory interpretation. The Leon court found that even though the legislature said a trial judge shall give the admonition, the word "shall" does not mean "shall." And, because it did not, the imperative of giving the admonition was not mandatory but only directory.

To get to this result, the Leon court noted there was no statement in the legislation which indicated that any consequence would ensue if the trial judge failed to obey the statute. (People v. Robinson (2005) 217 Ill.43). It is true, as the Leon court observed, that whether a statute is mandatory or directory is a question of legislative intent. However, Leon fails to focus on what consequences flow from the failure to give the admonition. It seems quite obvious that the General Assembly was concerned that unknowing defendants, not judges, prosecutors, or defense attorneys, were entering into plea arguments – contracts with the government – that were not undertaken with full knowledge of the consequences of the deal they were making. See People v. Reed (1997) 177 Ill.2d 389; People v. Youngbey (1980) 82 Ill.2d 556 The Leon tribunal ignored the fact that plea agreements are contracts that require the parties who enter into them must do so with full knowledge of all the terms of such a pact.

Instead, the Leon court focused on the "type of plea" which dictates whether the admonition must be given. Apparently, the variety of a plea only applies to people who are immigrants, whether documented or otherwise. The court observed the statute would also apply to every citizen, which the legislature could never have intended. This is odd logic for two reasons: although there may be different kinds of plea agreements (Alford, etc.) such contracts are not generally classified on citizenship status (or lack thereof). The statute does not classify whether a person is a permanent resident alien, is undocumented, or is a citizen. It applies to all defendants. Next, the legislature did say trial courts need to give the admonishment to every defendant in plain and concise terms and in "open court". The legislature did not say you only give such a warning to non-citizens in some other venue such as chambers.

In reversing the Appellate Court in Del Villar, the Supreme Court effectively has rendered the Illinois guilty plea admonishment statute toothless. (People v. Del Villar, 235 Ill. 2d. 507 (2009) ("Del Villar").

Leobardo Del Villar, at a circuit court hearing on November 2, 2005, pleaded guilty to aggravated unlawful use of a weapon by a felon. Before doing so, the trial judge asked him whether he was entering into the plea agreement in return for a sentence recommendation, freely and voluntarily. He answered affirmatively. The trial court next asked, "Are you a citizen of the United States?" and Del Villar said, "Yes." Sentencing was deferred until the end of November, when a term of four years imprisonment was to be imposed.

Two weeks later, Del Villar asked the trial court to vacate his plea stating he was a legal permanent resident alien, not a United States citizen, and the trial court failed to admonish him consistent with 725 ILCS 5/113-8. The trial court refused the request because Del Villar had lied to the court in November about his citizenship status. The Appellate Court reversed, stating the trial court was required by the statute to warn Del Villar based on the statute's plain and mandatory language. The Supreme Court disagreed, and reinstated Del Villar's plea based on the guilty plea he sought to withdraw in the trial court.

The plain language of the statute says, "The trial court shall give the following advisement to the defendant in open court". This would seem to be a straightforward command that a lay person reading the statute would understand. However, in a bifurcated analysis predicated on a thirty-year-old California Supreme Court opinion (Morris v. County of Marin, (1977) 18 Cal. 3d 901, 908) (Marin), the Illinois Supreme Court said the admonition statute posed two questions: (a) whether the statute is mandatory or permissive; and (b) whether the statute is mandatory or directory. (see, e.g., People v. Robinson (2005) 217 Ill. 2d 43). Even though the initial inquiry may find a statue to incorporate an obligatory duty (*i.e.*, "the trial court shall give the advisement"), according to the Supreme Court, it is the resolution of the second question that determines whether a statute is truly mandatory. Thus, if the statute does not contain a provision which dictates a particular consequence for noncompliance by the governmental actor, it is directory in nature. The upshot being, in Del Villar's situation, there is no consequence for the trial court's failure to admonish him.

This interpretation of a legislative decree is remiss for various reasons. It relies on People v. Huante (1991) 143 Ill.2d 61, for the proposition that immigration consequences relating to a guilty plea and subsequent conviction are collateral to that process. Huante did not involve a legislative decree. Rather, Huante involved a claim of ineffective assistance of counsel under the Sixth Amendment due to the attorney's failure to properly advise his client of the immigration consequences regarding entering a plea consistent. The admonishment statute is not an interaction between a client and a lawyer: it is a governmental duty, the work of a trial judge, which has been created by the legislature.

In addition, the issue in Del Villar is one of procedural default: namely, the trial court's failure to do what that statue requires. Indeed, the trial court asked Del Villar if he was a United States citizen. Later, when the trial court learned Del Villar was a non-citizen, he refused to admonish him because of his prior prevarication. The fact remains, however, he is still a non-citizen and the consequences which flow from that status are the ones the statute sought to address at the time the plea was entered, whether or not he lied about his immigration status.

Understandably, the trial court was concerned, as it should be, that Del Villar lied to the court. Yet, this does not diminish the court's responsibility to comply with the statute, and ensure the plea Del Villar was agreeing to was knowing and voluntary.

Lastly, the court's reliance on Marin, a decision of the California Supreme Court, is troubling. Procedurally, it is very doubtful that members of our Illinois General Assembly were reading California jurisprudence as to how the statutes they enact should be interpreted at the time the admonition statute was drafted. Also, the court's mandatory/directory analysis in People v. Robinson postdates the admonition statute's effective date.

On substantive level, as Justice Freeman observed in his concurring opinion in Del Villar, the majority opinion's two-part test for determining when a statute is mandatory is confusing to say the least. Although the Marin court acknowledged the interpretive dichotomy of mandatory/permissive and mandatory/directory, it rejected its application to the facts of the case before it. Marin had nothing to do admonishing defendants in Illinois trial courts or California tribunals.

Whether one agrees with the requirement of advising any defendant, citizen or otherwise, of the consequences relating to a plea of guilty is not the issue, but the law. 725 ILCS 5/113-8 is not a Supreme Court Rule, but a law enacted by the Illinois legislature. Where the purpose of such legislation is to ensure that a defendant "knowingly and voluntarily" makes an agreement (*i.e.*, guilty plea), then the analysis cannot proceed based on statutory interpretation alone. The statute's purpose, as it states, is that a trial judge is to advise the defendant of the potential consequences a conviction may create with respect to "deportation, exclusion from the United States or denial of naturalization under the laws of the United States." This is not a passive role, but one that ensures a guilty plea is knowing, voluntary and informed. It cannot be collateral to a conviction when it is the judge's job to ensure the plea is knowing and voluntary and the admonition is the means to that end. The consequences of not complying with the statute must be the focus, and for non-citizens that consequence may be banishment to a country they never knew.

The purpose of the proposal is to make plain what the General Assembly stated over a decade ago, i.e., what 725 ILCS 5/113-8 means. The consequence of failing to give admonishment by a trial judge should denote the plea is a nullity; alternatively, it should accord the defendant the right to withdraw the guilty plea.

Accordingly, the International and Immigration Law Section Council requests that the ISBA support an amendment to 725 ILCS 5/113-8 to provide the specific consequence of nullification of a guilty plea entered without the benefit of a judicial admonishment regarding potential immigration consequences to ensure that this admonishment is considered mandatory by the Illinois courts.

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Trial Briefs

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What does "shall" mean?

BY PATRICK M. KINNALLY

People v. Geiler, 2016 IL 119095

At an early age, studying a Baltimore *Catechism* at Holy Angels grammar school, certain maxims were taught like, "Thou shall not steal," "Thou shall not commit adultery," "Thou shall not covet a neighbor's goods" (or a wife, for that matter). These tenets comprised, in part, the Ten Commandments. A juridical text of significant import we know. It seemed pretty clear what was declared. No wiggle room in that credo. Mandatory directives, moral imperatives, perhaps, but surely not permissive ones. Later, as an English major, I learned "shall" was largely an auxiliary verb, depending on the tense, which included certainty. Sometimes it could be modal with reference to what might happen in the future like, "I shall see you next week". Notwithstanding, the word even in law school, had inevitability. It denoted a directive, a compulsory meaning or an obligation.

American *jurisprudence* seems to have turned these concepts around. *People v. Geiler*, 2016 IL 1199095 ("*Geiler*"). The use of the word "shall" in a statute, apparently, is not dispositive of legislative intent, it seems. See, *Gananian v. Wagstaffe*, 199 Cal.

Continued on next page

Serving a dissolved company: *Isfan v. Longwood Tower*

BY HON. DANIEL T. GILLESPIE AND DANIEL BURLEY

When companies dissolve, creditors flock to collect their unpaid balances. But how does a party serve a dissolved entity? It depends on whether the company is a limited liability entity or a corporation. The distinction is important, as improperly serving a dissolved entity can scuttle a case.

Serving a dissolved limited liability company – rather than a dissolved corporation – was at the heart of *John Isfan Const. Inc. v. Longwood Towers, LLC.*[1] Isfan, a construction company, sued Longwood, a developer, for an alleged unpaid balance of $789,835. Isfan had performed remodeling work at the developer's 80-unit condominium complex on South Longwood Drive in Chicago.

Longwood, an Illinois limited

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What does "shall" mean?

CONTINUED FROM PAGE 1

App.4th 1532 (2011).

Geiler is a run-of-the-mill case brought by Christopher Geiler ("Chris") a *pro se* defendant, involved in a traffic citation proceeding. Allegedly, he was driving 80 m.p.h. in a 65 m.p.h. speed zone. He was ticketed by a Troy, Illinois, police officer. Illinois Supreme Court Rule 552 said:

* * *

> The arresting officer *shall* complete the form or ticket, and within 48 hours after the arrest, *shall* transmit the portions entitled "Complaint" and "Disposition Report," and where appropriate "Report of Conviction" either in person or by mail to the Clerk of the Circuit court of the county in which the violation occurred.

* * *

Chris received his traffic citation on May 5, 2014. The arresting officer did not transmit it to the circuit court clerk until May 9, 2014. May 5, 2014, was a Monday. Clearly, the Supreme Court Rule was violated. The Trial and Appellate Courts found the rule was abrogated and dismissed the citation.

In its appeal, the State of Illinois argued the temporal requirement contained in Rule 552 is a directory, not a mandatory precept; and, unless Chris was prejudiced by the police officer's non-compliance, the mandatory character of the rule is permissive. But, compare *People v. Hanna*, 185 Ill.App.3d 404 (1989); *Geiler*, 2016 IL 1199095, (sl.op., pp. 4-5).

This argument is mistaken for two reasons. First, Chris will be prejudiced by the government's non-compliance with the Supreme Court Rule. He will likely have to pay a fine, if convicted. Because the government actor failed to do what the rule required; Chris suffers the consequence. Call it nonfeasance or misfeasance, the result inures to Chris. Next, the rule states the government actor *shall* make the transmission of the records: that never happened. If the government gets to make the rules, it should follow them. Citizens, of course, must follow the rules; so should the government. Official conduct should be held to a higher standard, not a lesser one.

Our Supreme Court did not see it that way. The Supreme Court relied on the mandatory-directory distinction of what "shall" means to determine the consequences of a failure by the government to fulfill a statutory obligation. In so doing, it told Chris "shall" does not denote the government actor had to comply with what the rule commanded. See, *People v.* Ziobro, 242 Ill.2d 34 (2011) *("Ziobro"); People v. Delvillar*, 235 Ill.2d 507 (2009) (*"Delvillar"*); *People v. Robinson*, 217 Ill.2d 43 (2005) (*"Robinson"*). These precedents hold that a failure to comply with a procedural step by a government official will not have the result of invalidating the rule's operation. *Geiler*, 2016 IL 1199095, sl.op. at p. 5, citing *Morris v. County of Marin*, 559 P.2d 606 (Cal. 1977) (*"Marin"*).

The Supreme Court opined that procedural commands to government officials are presumed to be directory, not substantive. This seems unique. If a government actor *shall* perform an act that is an obligation, not a discretionary function, then that actor should be charged with the effect of his/her non-compliance. Relying on *Delvillar*, the Court concluded the act the rule requires only becomes mandatory if: negative language in the statute or rule prohibits further action if noncompliance ensues, (*i.e.*, a consequence); or the right the statute is designed to protect would generally be injured under a directory reading.

The Court concluded that the right Rule 552 is designed to protect is its own Rule, which is to ensure judicial uniformity and efficiency, as well as to expedite the handling of traffic cases. It found that judicial efficiency would not be injured under a directory reading of the rule. Finally, it observed that violation of the rule would not prejudice the rights of Chris. *Geiler*, sl.op. at p. 6. Evidently, since the

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rule contained no consequence if violated, "shall" did not mean it was obligatory.

Let's look at this protocol from a citizen's perspective. A rule created by the government says you cannot drive 80 mph in a 65 mph traffic zone. If you do, you violate the rule. Next, the rule says the person who enforces the rule shall transmit his report of the violation to the circuit clerk. He fails to do that. He infringes the rule, has knowledge of it; and is charged with performing the act(s) the rule requires. His transgression of the rule does not matter. In other words, the entity that makes the rule, and is to implement the rule, suffers no consequence for failing to do its job. Of course, this promotes citizen mistrust in government. That is not good policy, regardless of whether judicial efficiency is a paramount concern for traffic citations.

With respect, this decision is misguided. Its reliance on *Robinson, Delvillar* and *Ziobro* should be reconsidered. In *Robinson*, the issue was whether a circuit clerk served an order on time (s/he did not); in *Delvillar*, the issue was whether a circuit judge failed to admonish an immigrant defendant consistent with 725 ICLS 5/113-8 (he did not); in *Ziobro*, the issue was whether the arresting officer complied with Supreme Court Rule 504 (he did not).

In today's world, words denote what every man and woman understand them to announce. "Shall" means "shall", not "would", "should" or "may". And, it means much more to our citizens, like Chris, whom read what the law states to them in plain words we all comprehend.

In *Geiler, Robinson, Delvillar and Ziobro*, our Supreme Court relied on *Morris v. County of Marin* 136 Cal.Rptr. 251, 559 P.2d 606 (1977), a California Supreme Court precedent authored 40 years ago. Let's see what this opinion actually declares.

In 1972, Marin County had a rule which said to get a building permit, a contractor had to have a certificate of workers' compensation insurance. Marin County issued a permit to Guy Cahoon, a contractor, to perform construction work. Cahoon never had the insurance. After work commenced, Cahoon's employee, Morris, was severely injured on the job. Morris sued Marin County for failure to fulfill its statutory obligation to require workers' compensation insurance, and such failure proximately caused his uncompensated injuries.

Marin claimed the statute requiring it to ensure Cahoon had the insurance was not a mandatory duty. The statute said:

* * *

> Every county which requires the issuance of a permit as a condition precedent to construction . . . shall require that each applicant for such permit have on file . . . a certificate of insurance . . . of workers' compensation insurance. . . .

* * *

Marin, 559 P.2d 606, 610.

Marin claimed this statutory command was directory in nature. The statute did not provide any effect if the contractor, like Cahoon, did not have insurance. Nevertheless, the statute was held to be mandatory, not directory.

The distinction between what constitutes a mandatory duty of a government actor as opposed to what constitutes the directory or mandatory legal doctrine in statutory interpretation seems not only clumsy, but more of a means to get to what is perceived as to be an acceptable legislative intent. The doctrine goes like this. The directory or mandatory designation does not refer to whether a particular statutory requirement is "permissible" or obligatory" but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of abrogating the governmental action upon which the procedural requirement relates. *Marin*, 559 P.3d 611. Thus, in *Delvillar*, the trial court's procedural failure to admonish the accused in open court was not substantively mandatory since the statute carried no consequence for non-performance.

The holdings in *Delvillar, Ziobro, Robinson and Geiler* seem wrong. On what objective criteria will a decisionmaker rely to determine whether the statutory requirement of a government actor is truly mandatory? It seems that if the statute is silent, then the intent should focus on the character of the act to be done and whether it serves a public purpose, as well as the language the statute employs. And, in *Marin*, that is exactly what happened. Morris was allowed to seek compensation because Marin County failed to follow the statutory edict. The statute did not dictate any consequence if the contractor failed to have workers' compensation insurance. That Court refused to follow the mandatory-directory distinction to accomplish the correct result. Contrariwise, *Robinson, Delvillar, Ziobro* and *Geiler* do the direct opposite. In each opinion, the Supreme Court held for the government actor in the face of mandatory language to which the actor failed to adhere. The process needs to mean what it plainly proclaims.

In his special concurrence in *Delvillar*, 235 Ill.2d 507 (2009), Justice Freeman opined that the analysis of courts seeking to classify statutes as mandatory or directory has resulted in confusion. He stated:

* * *

> The ordinary meaning of language should always be favored and the form of a verb used in a statute such as "shall" or "may" is the single most important textual consideration determining whether a statute is mandatory or directory. (Citing *Singer, Sutherland on Statutory Construction*, Sec. 57:3 at 13-14 (6th Rev. Ed. 2001).

* * *

Doesn't that observation make sense for anyone reading court rules or Illinois statutes? I submit, most people think so. Christopher Geiler did.

Traffic citations, post conviction petitions, admonishment of the accused as to immigration consequences are important to a large segment of our communities. Rules that pertain to those statutory topics where fines, imprisonment or deportation may result should be enforced in the plain language the statutes declare. That promotes trust in our government. A policy we, as judges and lawyers, *should* seek to achieve. ■

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The Magazine of Illinois Lawyers

Immigration Law

Aliens, Guilty Pleas, and the Risk of Deportation: Time for Legislative Action

By Moira K. Moran and Patrick M. Kinnally

The authors recommend that the General Assembly require judges to admonish noncitizen defendants who could be deported if they plead guilty.

Roberto has been arrested for possessing cocaine. He is a permanent resident alien but not a citizen. His arrest report reveals his birth in Mexico.

His lawyer negotiates with the prosecutor on the drug charge, stipulating that if Roberto pleads guilty he will receive a reduced sentence. Roberto agrees, and the parties set a court date. Roberto never asks about whether he might be removed or deported if convicted. At the plea hearing, the judge accepts Roberto's plea and admonishes the defendant.

These admonishments include a myriad of repercussions stemming from Roberto's guilty plea. Even though all three professionals dealing with Roberto in effectuating his plea know he will probably be deported at the conclusion of his sentence, no one tells him. Even though Roberto is the only one in the courtroom who does not know his likely fate, the plea proceeds in accordance with Illinois law.

This article proposes that the Illinois General Assembly require judges to admonish aliens when pleading guilty to an offense that carries with it the possibility of removal upon conviction. A legislative response would produce a benefit far outweighing the slight burden it imposes.

I. Guilty Pleas and Aliens: The Process

In the typical scenario, the alien defendant pleads guilty to the crime. The court's job in part is to determine that defendants' waivers of their constitutional rights are knowing and freely given and to admonish defendants about the direct consequences of their crimes. Unfortunately, in Illinois, unlike in many other states, the trial judge's advisory need not include information to the noncitizen defendant that his or her plea could result in removal.[1] Once the court accepts the plea, the alien is sentenced.

Upon incarceration, the penal institution notifies the Immigration and Naturalization Service ("INS") of the defendant's noncitizen status. In turn, the INS serves a detainer on the jailkeeper, who releases the alien defendant to the custody of the INS. The INS may proceed with removal hearings while the alien defendant serves his or her sentence or when he or she is released from jail into INS custody. For certain aggravated felons who are aliens, upon release from incarceration for their criminal sentences the INS may take them into custody pending a removal hearing and not authorize bail.[2]

An immigration judge convenes removal hearings, which are initiated by the INS by issuing a notice to appear to the alien.[3] In certain cases, the INS will permit release of the alien prior to the hearing only upon posting cash delivery bonds.[4] Ten percent of the face amount, a standard requirement in criminal cases, is not enough. The full amount must be posted. The alien defendant is entitled to an administrative hearing before an immigration judge, who determines whether the alien is removable. Proof the state criminal felony conviction often results in banishment at the culmination of such a hearing.[5]

INS rules challenge the most seasoned attorney. With so many confusing caveats to the Immigration and Nationality Act, made even more forbidding by recent amendments (see sidebar), alien defendants must be made aware that a guilty plea may send them to a land they do not know and from which they cannot return. For aliens, a removal order is the equivalent of forced exile. Ironically, the alien defendants may be unaware this action could be a consequence of their guilty pleas. It is anomalous that no one has to tell the defendant about the most serious "punishment" for his or her crime.

II. Duty to the Defendant in Guilty Pleas

Although neither judges nor attorneys are required to inform noncitizen defendants that they may be deported, both must inform the defendant of certain factors so that the plea comports with constitutional standards. Both the court and the attorney have a duty to advise the criminal defendant of the direct consequences of pleading guilty.[6]

For a consequence to be direct, however, it must affect the case in which the defendant enters the plea. A future or contemplated, but uncertain, result is irrelevant to the validity of the guilty plea in the eyes of the judiciary. The judiciary need neither foresee nor explain every ramification of a guilty plea.

To require state trial court judges to imagine every possible consequence of a guilty plea and then inform every defendant about each is probably impractical. Yet this does not mean that requiring the court to admonish a noncitizen defendant of something so obvious and significant as the possibility of removal to a foreign land is unduly burdensome. Many states require it.[7]

Under the Illinois Supreme Court Rules, court and counsel have the obligation to ensure that a defendant who pleads guilty does so knowingly and voluntarily.[8] Part of satisfying the "knowingly and voluntarily" standard is informing the defendant of the direct consequences of his guilty plea.

According to the Illinois Supreme Court, however, failure of the defendant's counsel to inform the defendant of the collateral consequence of a guilty plea is not enough to constitute a basis for withdrawal of the guilty plea.[9] Instead, counsel must have actively misrepresented whether the guilty plea could result in removal.[10]

Clients depend on their attorneys and the court to inform them of the full ramifications of a guilty plea. Although technically removal is not considered a punishment, the consequences of being forced to leave the United States may be more punitive than time served in jail. Long-term residents are separated from their families. Others are sent to countries where they have no relationships, personal or business, and may not even speak the language.

Because the consequence of removal is so severe, courts began deciding on Fifth and Sixth Amendment grounds that lawyers were ineffective in assisting their clients if they failed to recognize that they were aliens and neglected to inform them of the effect of a guilty plea on their right to remain in this country.[11] Thus, courts in many states placed the burden on the attorney to inform his or her client of the collateral consequences of a guilty plea. But, as the following review of Illinois case law shows, our courts have imposed no such requirement on either lawyers or judges.

III. Illinois Case Law Involving Guilty Pleas

In *People v Correa*,[12] *People v Huante*,[13] and, most recently, *People v Williams*,[14] the Illinois Supreme Court discussed forewarning the alien defendant in cases of possible removal, ultimately opting not to require such admonishments of lawyers and judges.

***A.* People v Correa**

In *Correa*, the defendant was denied effective assistance of counsel when his attorney specifically misrepresented to him the effect of his guilty plea upon his immigrant status in response to the defendant's direct inquiry.[15] In other words, counsel incorrectly informed the defendant that a guilty plea would not affect his status as an immigrant when in fact it did.

In its decision, the court hinted that the judicial trend tended to favor holding counsel responsible for informing clients of the collateral consequence of deportation because of its severity. However, the court ultimately avoided discussing the passive conduct of an attorney who fails to inform the client of the consequences of a guilty plea. Based on the successful ineffective assistance of counsel claim waged against his attorney, Correa was entitled to withdraw his plea in a post-conviction setting, effectively keeping the INS out of his life.

FYI ...

Side Bar

• Recent Changes to the Immigration and Nationality Act Raise Stakes for Alien Defendants

Subsequent appellate courts interpreted *Correa* as suggesting that an attorney has a duty to inform a noncitizen client of the possibility of deportation in response to a guilty plea even if the defendant does not raise the issue.[16] These courts, extrapolating from *Correa*, found no difference between passively or actively misrepresenting the possibility of removal to a client. But the supreme court would soon prove these courts mistaken.

***B.* People v Huante**

In the wake of these post-*Correa* appellate court rulings, the Illinois Supreme Court ultimately opted not to require an admonishment in the 1991 case of *People v Huante*.[17] In *Huante*, the defendant pled guilty to felony drug charges. He filed a post-conviction petition to set aside the guilty plea based on ineffective assistance of counsel, claiming that he would not have pled guilty had his attorney first determined his noncitizen status and advised him that he would be subject to deportation as a result of his convictions.

The defendant had been a lawful permanent resident for 13 years at the time of his arrest. His attorney never questioned him about his citizenship status, and the defendant never divulged that he was a noncitizen. The attorney testified that he was not aware of the defendant's status.

The *Huante* court noted that it was being asked to address an attorney's failure to inform a noncitizen client, which the *Correa* court declined to address previously. The court determined that a defendant did not have to be informed of the collateral consequences of a plea for it to be "knowing and voluntary," the standard that a guilty plea must meet to comply with Supreme Court Rule 402.[18] Rule 402 does not require that the judge inform the criminal defendant of the collateral consequences of a guilty plea, including the possibility of deportation upon the entry of that plea.

Once again, the court noted that neither counsel nor the court had the responsibility to the defendant to inform him of the collateral consequences of his guilty plea.[19] As the court stated in *Correa* and *Huante*, only active misrepresentation of a collateral consequence, like deportation, constituted ineffective assistance of counsel.

In the *Huante* decision, the supreme court specifically overruled appellate court decisions that granted a defendant's claim for ineffective assistance of counsel because the attorney did not make himself aware of the client's immigrant status,[20] finding that such a consequence is only collateral. Accordingly, counsel and court need only admonish the defendant of the direct consequences of a guilty plea even though the attorney can still not actively misrepresent the implications of pleading guilty.

The result, although perhaps legally sound, makes little practical sense. If lawyers and the government negotiate plea agreements, the defendant who enters into that contract has an expectation about what the performance entails. That expectation is hardly realized when the performance of the contract results in deportation.

***C.* People v Williams**

In November 1999, the Illinois Supreme Court addressed a judge's duty in *People v Williams*.[21] In this decision, the court emphasized that a judge must admonish a defendant pleading guilty of the direct consequences of his or her guilty plea. If, however, a consequence of the plea is collateral, then the defendant does not have a right to be advised of it before entering the plea. In other words, a defendant can enter a knowing and intelligent guilty plea without being advised of its collateral consequences.

Jettie Williams claimed that his original guilty plea to the attempted murder of Leroy Wade could not be used against him when he was retried for the murder of Wade. Wade died five years after Williams' original plea to the attempt charge. His attorney moved, in limine, to bar use of the former plea when the state sought to try Williams for Wade's murder. In reversing the trial and appellate courts, the supreme court concluded that the original plea was admissible in the murder trial.

The court concluded that it would be too unwieldy to require that the defendant be informed of every foreseeable consequence stemming from a plea of guilty. The trial court's obligation to inform encompasses only direct consequences of the sentence, i.e., those that the trial judge can impose.

A collateral consequence is not defined by the length or nature of the sentence imposed on the basis of the plea. Generally, a collateral consequence results from action taken by an agency that the trial court does not control. "Collateral consequences include, 'loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, or anything else.'"[22]

The direct consequences of the plea are limited to its penal consequences, the court found. Deportation cannot be a penal consequence because it is not criminal punishment.

IV. Legislative Response

The judiciary has clearly delineated its duty to defendants in terms of collateral and direct consequences. Simply stated, no matter the significance of the collateral consequence, the judiciary and the attorneys who represent the defendant have no duty to inform the defendant about it.

Because the judiciary has refused to do so, the Illinois General Assembly should require judges to admonish alien defendants when they plead guilty that deportation is a retributive consequence. The need for an admonishment requirement is greater than ever, because removal for an aggravated felony is effectively a lifetime ban from the United States.

The state and federal criminal trial judge typically asks a set of standard questions to elicit whether a defendant's plea is knowing and voluntary. A simple judicial admonishment concerning deportation consequences surely would not be burdensome.

Other states and the District of Columbia have concluded that the collateral consequence of removal is important enough to require that the court and counsel advise the noncitizen defendant that he or she may suffer immigration consequences as a result of a plea bargain or conviction.[23] Some of those states, like Illinois, have large noncitizen populations.

The legislatures from these states, in their service to the state's residents, recognized the need to inform defendants in view of the serious adverse consequences a removal order entails. With the recent amendments to the INA, the need is even greater. The alien defendant's only real chance to avoid removal is largely in the state criminal trial court, not the immigration court. The trial court is the place where the parties agree to the plea. A simple statement, such as the one mandated by the California penal code, is sufficient to allow a defendant to plea knowingly and voluntarily:

> 1016.5(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
>
> (b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section.[24]

This is hardly burdensome. As a state resident, the noncitizen should be afforded this important constitutional guarantee.

Now that a commission is being appointed to rewrite the Illinois Criminal Code, this problem should be considered. Alien defendants deserve such a law and the information it would provide. In the meantime, however, lawyers and judges should, in the name of basic fairness and justice, assume this responsibility of their own volition.

Recent Changes to the Immigration and Nationality Act Raise Stakes for Alien Defendants

In a nutshell, recent amendments to the INA have increased the number of crimes for which defendants can be deported, apply retroactively to crimes committed before the enactment of such amendments, and apply to many types of convictions. *Matter of Lettman,* Int Dec 3370 (BIA 1998) aff'd, *Lettman v Reno,* 207 F3d 1368 (11th Cir 2000); see also *Lewis v INS,* 194 F3d 539 (4th Cir 1999). Because of all of the recent changes, noncitizens have an even greater need than before to be admonished before entering a plea to a criminal charge.

Crimes of moral turpitude. Noncitizens "convicted of a crime involving moral turpitude" within five years of the date of admission "for which a sentence of one year or longer may be imposed" are removable. 8 USC § 1227(a)(2)(A)(i). The maximum sentence possible for the crime controls, not the actual sentence the alien received. 8 USC § 1227(a)(2)(A)(ii).

Also, aliens "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct" are removable regardless of the sentence and whether the convictions resulted from a single trial. 8 USC § 1227(a)(2)(A)(ii). Two shoplifting convictions, one in 1988 and another in 1998, might be enough.

Retroactivity. Moreover, an alien is subject to removal for convictions regardless of when they occurred. New amendments to the INA apply to a criminal conviction on, before, or after the passage of such amendments. 8 USC § 1101(a)(43) (see *Matter of Truong,* Int Dec 3416 (BIA 1999)).

Also, such amendments may act as a bar to obtaining citizenship. (But see 8 CFR§ 316.10(b)(1)(ii), which does not bar obtaining naturalization if the aggravated felony conviction occurred prior to November 29, 1990.) This repercussion is a serious concern for lawful permanent residents who want to travel outside the United States, since it may make them inadmissible upon return.

Aggravated felonies. Most aliens, whether lawful permanent residents or otherwise, are removed because of convictions for "aggravated felonies." The INA defines an aggravated felony by reference to more than 20 separate subdivisions and at least 50 federal statutes. 8 USC § 1101(a)(43).

Aggravated felonies are of two types: character and punishment. The former are aggravated felonies regardless of the term of imprisonment. A domestic violence assault conviction; a misdemeanor; may be an aggravated felony. 8 USC § 1227(a)(2)(E). Certain driving-while-intoxicated convictions may also be considered aggravated felonies. *Matter of Magallanes,* Int Dec 3341 (BIA 1998); *Matter of Puente,* Int Dec 3412 (BIA 1999); but see *U.S. v Chapa-Garza,* 99-51199 (5th Cir March 1, 2001); *United States v Rutherford,* 54 F3d 370 (7th Cir 1995).

Indecency with a child by exposure is an aggravated felony. *Matter of Rodriguez,* Int Dec 3411 (BIA 1999). An attempted fraud conviction and the "crime of stalking" are also considered aggravated felonies under the INA's definition.

Punishment crimes, on the other hand, are aggravated felonies that require an ordered sentence of at least one year and include crimes of violence. 18 USC § 16; *Xiong v INS,* 173 F3d 601, 604 (7th Cir 1999). In determining whether a crime of violence is tantamount to an aggravated felony under the INA, one must analyze the state statute upon which the conviction rests. *Solorzano-Patlan v INS,* 207 F 3d 869 (7th Cir 2000). In any crime defined or interpreted as an aggravated felony under the INA, an alien is removable and is conclusively presumed to be deportable. 8 USC § 1227(a)(2)(A)(iii); *Matter of Sweetser,* Int Dec 3390 (BIA 1999).

Convictions. If defining a deportable crime under immigration law appears daunting, determining what constitutes a conviction under the INA can be equally difficult. A conviction for immigration purposes occurs when a defendant pleads guilty or nolo contendere. In immigration parlance, a conviction is a formal judgment of guilt of the noncitizen entered by a court.

A conviction for INA purposes results when the defendant admits facts sufficient to warrant a finding of guilt and the judge orders some form of punishment, penalty, or restraint on the noncitizen's liberty. *Matter of Roldan-Santoyo,* Int Dec 3377 (BIA 1999), rev'd, sub nom, *Lujan-Armendariz v INS,* 222 F3d 728 (9th Cir 2000).

If the noncitizen evades removal upon conviction, he or she must still pass the hurdle of the sentencing element of a conviction. This component, depending on its length, may be determinative as to whether that conviction results in removal.

Remedies. The INA has rendered the ameliorative sentencing schemes of deferred adjudication, conditional discharge alternatives, and their counterparts largely illusory. The INA states succinctly that "[a]ny reference to a term of imprisonment of a sentence with respect to an offense [includes] the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or part." 8 USC § 1101 (a)(48)(B); see *Matter of Punu,* Int Dec 3364 (BIA 1998).

For example, a judge may sentence a noncitizen defendant to two years in prison. Subsequently, the sentence is probated for two years in lieu of imprisonment. This is a two-year sentence for immigration purposes.

Historically, the INA provided a multitude of remedies in deportation hearings. These remedies might have cured a noncitizen's criminal conviction. They were known as waivers. An immigration judge had discretion in granting these waivers, depending on factors that tended to show the alien's ties to the United States.

The recent amendments to the INA have curtailed and eliminated the authority of an immigration judge to grant such waivers. For the most part, noncitizens convicted of an aggravated felony are not eligible for such remedies.

1. See Cal Penal Code §1016.5; Conn Gen Stat 54-1j; DC Code Ann §16-713; Fla R Crim P Rule 3.172; Haw Rev Stat § 802E-2; Mass Gen L ch 278, § 29D; Mont Stat § 46-12-210; Ohio Rev Code Ann § 2943.031; Or Rev Stat § 135.385; RI Gen Law § 12-12-22; Tex Crim Pro Code Ann § 26.13.

2. 8 USC § 1226; 8 CFR § 236.1(c). The INS bail bond program is currently under attack because it is incarcerating noncitizens indefinitely who may be removable. *Phan v Reno,* 56 F Supp 2d 1149 (WD Wa 1999) aff'd, sub nom, *Ma v Reno,* 208 F3d 815 (9th Cir 2000); 8 USC § 1231; cert granted, *Reno v Ma,* 121 S Ct 297 (2000).

3. 8 USC §§ 1229(d), 1229a.

4. 8 CFR § 236.1(c).

5. 8 USC § 1229a(c)(3)(B).

6. *People v Williams,* 188 Ill 2d 365, 370-71, 721 NE2d 539 (1999).

7. See note 1 above.

8. SCR 402.

9. *Williams,* 721 NE2d at 543-44. Note that this article does not address a lawyer's duty to his or her immigrant client under the Rules of Professional Conduct, nor does it speak to potential malpractice liability for failing to accurately represent the consequences of a guilty plea.

10. Id, 485 NE2d at 312.

11. Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies,* 51 Okla L Rev 697, 711 (1998); *Strickland v Washington,* 466 US 668 (1984); *People v Albanese,* 104 Ill 2d 504, 473 NE2d 1246 (1984).

12. *Correa,* 485 NE2d 307.

13. *People v Huante,* 143 Ill 2d 61, 71, 571 NE2d 736, 741 (1991).

14. *Williams*, 721 NE2d at 543-44.

15. *Correa*, 485 NE2d at 312.

16. See *People v Padilla*, 151 Ill App 3d 297, 502 NE2d 1182 (1st D 1986); *People v Sak*, 186 Ill App 3d 816, 542 NE2d 1155 (1st D 1989); *People v Miranda*, 184 Ill App 3d 718, 540 NE2d 1008 (2d D 1989); *People v Rodriguez*, 202 Ill App 3d 839, 841, 560 NE2d 434, 436 (3d D 1990); *People v Maranovic*, 201 Ill App 3d 492, 559 NE2d 126 (1st D 1990); and *People v Luna*, 211 Ill App 3d 390, 570 NE2d 404 (1st D 1991).

17. 571 NE2d 736.

18. Id, 571 NE2d at 740-41.

19. See *United States v George*, 869 F2d 333, 336-37 (7th Cir 1989), where the seventh circuit interpreting Illinois law also concluded that the consequence of possible deportation upon an alien who pled guilty to a criminal charge which rendered him deportable was collateral in nature.

20. *Huante*, 571 NE2d at 742, overruling *Padilla*, 502 NE2d 1182; *Miranda*, 540 NE2d 1008; and *Maranovic*, 559 NE2d 126.

21. *Williams*, 721 NE2d 539.

22. Id, 721 NE2d at 544.

23. See note 1 above.

24. Cal Penal Code § 1016.5.

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Member Comments

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922 N.E.2d 330
235 Ill.2d 507
337 Ill. Dec. 207
The PEOPLE of the State of Illinois, Appellant,
v.
Leobardo DELVILLAR, Appellee.
No. 106909.
Supreme Court of Illinois.
December 17, 2009.

[922 N.E.2d 332]

Lisa Madigan, Attorney General, Springfield, Richard A. Devine and Anita Alvarez, State's Attorneys, Chicago (James E. Fitzgerald, Annette Collins and Mary L. Boland, Assistant State's Attorneys, of counsel), for the People.

Abishi C. Cunningham, Jr., Public Defender, Chicago (Michael Davidson, of counsel), for appellee.

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Scott D. Pollock, Kathryn R. Weber, and Christina J. Murdoch, of Scott D. Pollock & Associates, P.C., and Stephen L. Tyma, all of Chicago, for amici curiae Chicago Chapter of the American Immigration Lawyers Association et al.

OPINION

Justice GARMAN delivered the judgment of the court, with opinion.

Defendant, Leobardo Delvillar, was charged with several weapons violations. Defendant agreed to plead guilty to one count of aggravated unlawful use of a weapon by a felon in return for a sentence recommendation. Defendant later filed a motion to withdraw his guilty plea on the grounds that he is a resident alien, and not a United States citizen, and that the circuit court failed to admonish him of the potential immigration consequences of his plea. The circuit court denied defendant's motion. The appellate court reversed and remanded for further proceedings. 383 Ill.App.3d 80, 321 Ill.Dec. 958, 890 N.E.2d 680. The State then petitioned this court for leave to appeal, which we allowed pursuant to Supreme Court Rule 315 (210 Ill.2d R. 315(a)).

BACKGROUND

Defendant was arrested and charged in July 2003 with three counts of aggravated unlawful use of a weapon by a felon (720 ILCS 5/24-1.6(a)(1) (West 2002)) and two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2002)). Defendant and the State reached a plea agreement on these charges under which defendant pled guilty to one count of aggravated unlawful use of a weapon. As agreed, the prosecutor recommended a sentence of four years in the Department of Corrections. The prosecutor also recommended the Department of Corrections' impact incarceration program, commonly referred to as "boot camp."

The plea hearing took place on November 2, 2005. The court first asked defendant if he was being forced or coerced into giving up the right to remain silent and to enter a guilty plea. Defendant answered "no." The court also asked defendant whether he was entering his plea freely and voluntarily. He answered "yes." Next, the court asked defendant whether he was a United States citizen. Defendant replied "yes." Based in part on this response, the court did not admonish defendant of any potential immigration consequences that might be imposed on a noncitizen as a result of a guilty plea. The court then accepted defendant's guilty plea. The court did not proceed to sentencing, however. Instead, in response to the request by defendant that he be permitted to finish a construction job, the court agreed to hold sentencing until a later court date.

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At the sentencing hearing on November 30, 2005, the court ordered defendant to serve four years' imprisonment and recommended boot camp in accordance with the State's plea agreement offer. The court also advised defendant of his right to appeal, informing defendant that if he wished to appeal, he first had to file a motion to withdraw his guilty plea. The court admonished defendant that in his motion he would have to state all reasons for wanting to withdraw his guilty plea. Defendant indicated he had no questions about that requirement.

On December 15, 2005, defendant filed a motion to withdraw his guilty plea and vacate his conviction, asserting that he did not knowingly, intelligently, or voluntarily waive his right to trial or fully understand or comprehend the admonishments of the court at the time of his guilty plea. In his motion, defendant noted that at the time of

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his plea defense counsel was not aware of defendant's immigration status. The motion stated that defendant is not a United States citizen, but a resident alien. Defendant also contended that the court was required to advise him of the immigration consequences of his guilty plea and that the court failed to do so.

In a hearing on defendant's motion, the court reviewed the transcripts of defendant's plea hearing and confirmed that he had stated he was a United States citizen. In response, defense counsel suggested that defendant was a resident alien and that was the source of defendant's confusion at the plea hearing. The court stated, "he [defendant] lied to the court." The court then denied defendant's motion to withdraw his guilty plea. Defendant appealed.

The appellate court reversed, holding that the circuit court was required to admonish defendant of the potential immigration consequences of a guilty plea. The State filed a petition for leave to appeal, which this court granted pursuant to Supreme Court Rule 315 (210 Ill.2d R. 315(a)). We then allowed the Chicago Chapter of the American Immigration Lawyers Association, the Legal Assistance Foundation of Chicago, the National Immigrant Justice Center, the Illinois Coalition for Immigrant and Refugee Rights, and the Immigration Project to file a joint brief *amicus curiae* in support of defendant. 210 Ill.2d R. 345.

The question presented to this court is whether the failure to admonish defendant of the possible immigration consequences of his guilty plea, pursuant to section 113-8 of the Code of Criminal Procedure of 1963, required the circuit court to grant defendant's subsequent motion to withdraw his guilty plea and vacate a defendant's conviction. For the reasons that follow, we conclude that the failure to admonish did not require the circuit court to allow defendant's motion. We, therefore, reverse the decision of the appellate court and affirm the judgment of the circuit court.

ANALYSIS

Defendant's argument in the appellate court and the appellate court decision itself rely on a particular interpretation of a provision within the Code of Criminal Procedure. The relevant provision is as follows:

> "Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or felony offense, the court shall give the following advisement to the defendant in open court:
>
> `If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been

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> charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.'" 725 ILCS 5/113-8 (West 2006).

The appellate court concluded that the above admonishment is mandatory and that the circuit court's failure to admonish defendant in accordance with section 113-8 required a reversal, regardless of defendant's immigration status. 383 Ill.App.3d at 88-89, 321 Ill.Dec. 958, 890 N.E.2d 680. The appellate court also acknowledged that another appellate court decision, *People v. Bilelegne,* 381 Ill.App.3d 292, 320 Ill.Dec. 420, 887 N.E.2d 564 (2008), came to a different conclusion. The *Bilelegne* court held that this section is directory, and that the circuit court did not err in denying the defendant's motion to withdraw his guilty plea. *Bilelegne,* 381 Ill. App.3d at 297, 320 Ill.Dec. 420, 887 N.E.2d 564.

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Before this court, the State argues that the *Bilelegne* court was correct in holding that section 113-8 is directory in nature and does not require the circuit court to allow a motion to withdraw a guilty plea in all cases. In response, defendant again argues that the appellate court correctly held that section 113-8 is mandatory and the failure to give the admonishment requires the court to allow withdrawal of defendant's guilty plea. Resolution of this issue requires an explanation of two distinct questions that are, as this court has acknowledged, easily confused because they both contain the term "mandatory."

One question asks whether a statute is mandatory or permissive. In answering this question, the term mandatory "`refers to an obligatory duty which a governmental entity is required to perform.'" *People v. Robinson,* 217 Ill.2d 43, 51, 298 Ill.Dec. 37, 838 N.E.2d 930 (2005), quoting *Morris v. County of Marin,* 18 Cal.3d 901, 908, 559 P.2d 606, 610-11, 136 Cal.Rptr. 251, 255-56 (1977). The term permissive refers to a discretionary power, which a governmental entity "`may exercise or not as it chooses.'" *Robinson,* 217 Ill.2d at 51, 298 Ill.Dec. 37, 838 N.E.2d 930, quoting *Morris,* 18 Cal.3d at 908, 559 P.2d at 610-11, 136 Cal.Rptr. at 255-56.

The second question asks whether a statutory provision is mandatory or directory. Under this question, statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision. *Pullen v. Mulligan,* 138 Ill.2d 21, 46, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990). In the absence of such intent the statute is directory and no particular consequence flows from noncompliance. That is not to say, however, that there are *no* consequences. A directory reading acknowledges only that no specific consequence is triggered by the failure to comply with the statute. *Carr v. Board of Education of Homewood-Flossmoor Community High School District No. 233,* 14 Ill.2d 40, 44, 150 N.E.2d 583 (1958) (reading as directory a provision requiring execution of affidavits of qualifications during an election, where statute did not expressly void ballots cast without such affidavits).

The facts of *People v. Robinson,* 217 Ill.2d 43, 298 Ill.Dec. 37, 838 N.E.2d 930 (2005), serve to clarify the distinction between these two dichotomies. In *Robinson* this court was asked to interpret a provision of the Post-Conviction Hearing Act that addresses the procedures governing the circuit court when it determines that a postconviction petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000). The statute provides that the circuit court "`shall dismiss the petition in a written order * * *. Such order of dismissal is final and shall be served upon the petitioner by certified mail within 10 days of its entry.'"

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Robinson, 217 Ill.2d at 50, 298 Ill.Dec. 37, 838 N.E.2d 930, quoting 725 ILCS 5/122-2.1(a)(2) (West 2000).

After Robinson's petition was summarily dismissed by the circuit court, the clerk failed to serve Robinson with the order of dismissal until 12 days after the court entered the order. This service clearly did not comply with the language of the statute requiring service within 10 days of the judgment. Robinson argued on appeal that the language of the statute is mandatory and that, therefore, the appellate court should remand his case for further proceedings under the Post-Conviction Hearing Act. The appellate court agreed and directed the circuit court to conduct further proceedings.

This court reversed the appellate court. In considering the distinction between mandatory and directory provisions, this court first pointed out "there is no genuine

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dispute that the 10-day notice requirement has the force of a command and that it imposed a mandatory obligation on the clerk." *Robinson,* 217 Ill.2d at 50, 298 Ill.Dec. 37, 838 N.E.2d 930. It was clear the legislature did not intend the provision to be a mere suggestion to the clerk of the court. The real issue in *Robinson* was determining the consequence of the clerk's noncompliance. *Robinson,* 217 Ill.2d at 51-52, 298 Ill.Dec. 37, 838 N.E.2d 930.

Like the provision in *Robinson,* the admonishment informing defendants of immigration consequences in the present case is mandatory in the sense that the circuit court does not have discretion in giving the admonishment. That is, the statute is mandatory with respect to the mandatory/permissive question. The statute imposes an obligation on the court to give the admonishment. The admonishment must be given regardless of whether a defendant has indicated he is a United States citizen or whether a defendant acknowledges a lack of citizenship. Thus, to the extent that defendant argues a mandatory reading leads to the conclusion that the circuit court was required to give the admonishment, he is correct.

However, this court recognizes, as we did in *Robinson,* that the dispositive issue in this case is not whether the statute is mandatory or permissive. Rather, the issue here is the second question, whether the statute is mandatory or directory. This separate dichotomy determines the consequences of a failure to give the admonishment. See *Robinson,* 217 Ill.2d at 52, 298 Ill.Dec. 37, 838 N.E.2d 930. To reiterate, the mandatory/directory dichotomy "`simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.'" *Robinson,* 217 Ill.2d at 51-52, 298 Ill.Dec. 37, 838 N.E.2d 930, quoting *Morris v. County of Marin,* 18 Cal.3d 901, 908, 559 P.2d 606, 610-11, 136 Cal.Rptr. 251, 255-56 (1977). In considering this question, the *Robinson* court set out the applicable framework for evaluating a statute.

Whether a statute is mandatory or directory is a question of statutory construction, which we review *de novo.* *Robinson,* 217 Ill.2d at 54, 298 Ill.Dec. 37, 838 N.E.2d 930. The statutory language is the most reliable evidence of the legislature's intent. *Pullen v. Mulligan,* 138 Ill.2d 21, 46, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990). With respect to the mandatory/directory dichotomy, we presume that language issuing a procedural command to a government official indicates an intent that the statute is directory. *Robinson,* 217 Ill.2d at 58, 298 Ill.Dec. 37, 838 N.E.2d 930. This presumption is overcome under either of two conditions. A provision is mandatory under this dichotomy when there is negative language prohibiting further action in the case of noncompliance or when the right the provision is designed to protect would generally be injured under a directory reading. *Robinson,* 217 Ill.2d at 58, 298 Ill.Dec. 37, 838 N.E.2d 930.

Neither condition applies in this case. Section 113-8 lacks any negative language prohibiting further action. For example, the statute does not prevent the circuit court from accepting defendant's guilty plea if the court fails to give the section 113-8 admonishment. At one point in the legislative process, the proposed section 113-8 did include such additional language providing a remedy for failure to give the admonishment. That version of the legislation indicated that the circuit court "shall vacate the judgment and permit the defendant to withdraw the plea of guilty" if the defendant demonstrated that his conviction of the offense to which he pleaded guilty may have immigration consequences. 93d

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Ill. Gen. Assem., Senate Bill 43, 2003 Sess. (as introduced). The legislature affirmatively chose, however, to eliminate this provision before passage. The presumption we recognized in *Robinson,* that procedural commands are directory, cannot be overcome by the enacted language of section 113-8.

With respect to the other condition identified in *Robinson,* we must first identify the right the statute was intended to protect. The right to be protected here is the right of a defendant to intelligently waive a jury trial and enter a guilty plea. Section 113-8 attempts to protect this right by informing defendants that there could be potential immigration consequences to entering a guilty plea. The legislature clearly thought this information is important to a defendant when making his decision to plead guilty.

We next ask whether the right that the statute intends to protect would be generally injured by a directory reading of the statute.

In *Robinson,* we noted that the right to appeal might be injured by untimely service in a given case. *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930. However, we noted there is no reason to believe that it generally would be. *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930. This was because even in cases where notice was several days late, there would often remain sufficient time within which the defendant could file a notice of appeal and therefore preserve his right to appeal.

In this case, we cannot say that the right the legislature intended to protect would generally be injured. Although an individual defendant's right to waive a trial might be injured by the failure to give the admonishment required by section 113-8, it cannot be said that it generally would be so. Immigration consequences—in particular, deportation—are not applicable to United States citizens. See *Oforji v. Ashcroft,* 354 F.3d 609, 619 (7th Cir.2003) (Posner, J., concurring). Citizens accordingly face no immigration consequences as a result of entering a guilty plea. Therefore, the presence or absence of the admonishment in a case involving a United States citizen does not affect a defendant's right to waive his or her trial, as the information intended to be provided by the statute is not useful to that defendant.

A defendant's right to intelligently waive a jury trial and plead guilty might be affected in a case where the defendant is not a United States citizen, and where the crime for which the defendant is entering a plea is one that could trigger immigration consequences. However, in another case a defendant may have reasons for pleading guilty even in the face of such consequences. Thus, because a defendant's right to waive a jury trial and enter a guilty plea will not necessarily be harmed in the absence of the admonishment, we conclude that the presumption of a directory reading of section 113-8 is not overcome. As neither condition articulated in

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Robinson serves to overcome the presumption of a directory reading in this case, we conclude that the legislature intended such a reading.

In summary, we conclude that section 113-8 is mandatory in that it imposes an obligation on the circuit court to admonish all defendants of the potential immigration consequences of a guilty plea. However, the admonishment is not mandatory with respect to the mandatory-directory dichotomy. Thus, failing to issue the admonishment does not automatically require the court to allow a motion to withdraw a guilty plea. Rather, the failure to admonish a defendant of the potential immigration consequences of a guilty plea is

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but one factor to be considered by the court when ruling on a defendant's motion to withdraw a guilty plea.

The decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the circuit court and, as such, is reviewed for abuse of discretion. *People v. Walston,* 38 Ill.2d 39, 42, 230 N.E.2d 233 (1967). An abuse of discretion will be found only where the court's ruling is arbitrary, fanciful, unreasonable, or no reasonable person would take the view adopted by the trial court. *People v. Patrick,* 233 Ill.2d 62, 68, 330 Ill.Dec. 149, 908 N.E.2d 1 (2009), quoting *People v. Hall,* 195 Ill.2d 1, 20, 252 Ill.Dec. 552, 743 N.E.2d 126 (2000). A defendant does not have an automatic right to withdraw a plea of guilty. *People v. Jamison,* 197 Ill.2d 135, 163, 258 Ill.Dec. 514, 756 N.E.2d 788 (2001). Rather, defendant must show a manifest injustice under the facts involved. *Jamison,* 197 Ill.2d at 163, 258 Ill.Dec. 514, 756 N.E.2d 788. The decision of the trial court will not be disturbed unless the plea was entered through a misapprehension of the facts or of the law, or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial. *Jamison,* 197 Ill.2d at 163, 258 Ill.Dec. 514, 756 N.E.2d 788. Where the defendant has claimed a misapprehension of the facts or of the law, the misapprehension must be shown by the defendant. *Walston,* 38 Ill.2d at 44, 230 N.E.2d 233.

With regard to inadequate admonishments, the failure to properly admonish a defendant, standing alone, does not automatically establish grounds for reversing the judgment or vacating the plea. *People v. Fuller,* 205 Ill.2d 308, 323, 275 Ill.Dec. 755, 793 N.E.2d 526 (2002). Rather, a reviewing court focuses on whether the guilty plea was affirmatively shown to have been made voluntarily and intelligently. *Fuller,* 205 Ill.2d at 322, 275 Ill.Dec. 755, 793 N.E.2d 526.

This court has long established that, with respect to voluntariness, the pertinent knowledge to be provided by the court prior to accepting a guilty plea includes only the direct consequences of the defendant's plea. *People v. Manning,* 227 Ill.2d 403, 415, 318 Ill.Dec. 261, 883 N.E.2d 492 (2008). Direct consequences of a plea are those consequences affecting the defendant's sentence and other punishment that the circuit court may impose. *People v. Williams,* 188 Ill.2d 365, 372, 242 Ill. Dec. 260, 721 N.E.2d 539 (1999).

Collateral consequences, on the other hand, are effects upon the defendant that the circuit court has no authority to impose. A collateral consequence is one that results from an action that may or may not be taken by an agency that the trial court does not control. *Williams,* 188 Ill.2d at 372, 242 Ill.Dec. 260, 721 N.E.2d 539. Due process does not require that the defendant be informed of the collateral consequences of a guilty plea. *Williams,* 188 Ill.2d at 371, 242 Ill.Dec. 260, 721 N.E.2d 539 ("the defendant's knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent guilty plea").

Immigration consequences are collateral consequences. *Williams,* 188 Ill.2d at 372, 242 Ill.Dec. 260, 721 N.E.2d 539; *People v. Huante,* 143 Ill.2d 61, 71, 156 Ill.Dec. 756, 571 N.E.2d 736 (1991). As such, the failure to admonish a defendant of potential immigration consequences does not affect the voluntariness of the plea. Defendant argues that section 113-8 was intended to correct a deficiency in guilty plea admonishments that courts were not required to inform defendants of immigration consequences. Defendant correctly states the legislature's intent.

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As discussed above, section 113-8 changed what is required of the circuit court in accepting a defendant's guilty plea to include an admonition about the potential immigration consequences of that plea. However, the change in law reflected in section 113-8 cannot elevate potential immigration actions from collateral consequences to direct consequences. It is well established that a legislature cannot, without a constitutional amendment, deprive a defendant of a constitutionally protected right. *People ex rel. Daley v. Joyce,* 126 Ill.2d 209, 222, 127 Ill.Dec. 791, 533 N.E.2d 873 (1988). Likewise, although the legislature intended to further protect a defendant's right to voluntarily enter a guilty plea, the legislature cannot by statute alone add to what is constitutionally required of the circuit court. See *Tappy v. State ex rel. Byington,* 82 So.2d 161, 172 (Fla.1955) (Terrell, J., dissenting, joined by Thomas, J.) (noting that a legislature cannot expand, contract or modify constitutional requirements for holding elective office). Here, the effect of the statute is to require that defendants be informed of this one particular collateral consequence as well as the direct consequences of a guilty plea. In this case, because such consequences remain collateral, the failure to admonish defendant of such consequences does not call into question the constitutional voluntariness of his guilty plea.

However, as with other imperfect admonishments, although the failure to admonish a defendant of potential immigration consequences does not rise to a constitutional violation, reversal may yet be required if real justice has been denied or if the defendant has been prejudiced by the inadequate admonishment. *Fuller,* 205 Ill.2d at 323, 275 Ill.Dec. 755, 793 N.E.2d 526. Prejudice was a critical question considered by this court in *Robinson.* As noted above, we concluded that the statute in that case was directory. The clerk of the court in *Robinson* had a statutory duty to serve timely notice on petitioner. We recognized that the petitioner possessed a right to timely service that corresponds with the clerk's duty to provide it. However, we also concluded that the petitioner was not entitled to a remedy because, even without being timely served, he filed his notice of appeal on time. As such, the petitioner was not prejudiced by the clerk's error. *Robinson,* 217 Ill.2d at 47, 298 Ill.Dec. 37, 838 N.E.2d 930.

Again, it is defendant who must demonstrate that he has been prejudiced by the improper admonishment. *Walston,* 38 Ill.2d at 44, 230 N.E.2d 233. In this case defendant has not done so. In his motion to withdraw his guilty plea and at argument on the motion, defendant failed to demonstrate that he was subject to any potential immigration penalties or that he would have pleaded not guilty had he been admonished of those potential consequences. After having answered "yes" to the question whether he was a United States citizen in a previous hearing, defendant made no attempt to prove his resident alien status to the court in the subsequent hearing on his motion.

Further, although the *amici* have presented this court with several possible immigration consequences for noncitizens convicted of weapons felonies, we reiterate

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that defendant failed to show the circuit court, in his motion or argument, that any of those consequences have been or will be applied to him. The circuit court was left to decide, based solely on defendant's conflicting assertions, whether defendant had told the truth at the guilty plea hearing, or was telling the truth at the hearing on his motion to withdraw that plea.

Nor did defendant demonstrate that he misunderstood the court's admonishments. In trying to explain why he told the court

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he was a United States citizen, defendant offered only the bare assertion that he had misunderstood the court when it asked about his citizenship. Defendant did not establish that he had difficulty hearing or understanding the court's admonishments in English.

Indeed, the record reflects that defendant understood the court's questions. At one point in the proceedings, counsel for defendant asked that the court postpone sentencing until defendant was able to complete a construction job. Counsel suggested that defendant could provide verification, at which point defendant interjected, "I have a contract." The court accepted defendant's word that he was engaged in the construction job, and asked defendant whether four weeks would be enough time. To this defendant responded, "[s]hould be fine, your Honor." Throughout the proceedings, defendant demonstrated an understanding of what the court was asking him. Based on these responses, a reasonable person could conclude that defendant understood the court when it asked whether defendant was a United States citizen.

In his motion to withdraw his guilty plea, defendant claims only that the circuit court failed to give the section 113-8 admonishment and that he is a resident alien, and not a United States citizen. These claims alone fall short of meeting defendant's burden to show that he suffered prejudice as a result of the circuit court's failure to admonish him. We therefore conclude that the circuit court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the appellate court, vacating denial of defendant's motion to withdraw his guilty plea, and affirm the judgment of the circuit court.

Appellate court judgment reversed; circuit court judgment affirmed.

Chief Justice FITZGERALD and Justices THOMAS, KARMEIER, and BURKE concurred in the judgment and opinion.

Justice FREEMAN specially concurred, with opinion.

Justice KILBRIDE specially concurred, with opinion.

Justice FREEMAN, specially concurring:

I joined fully in this court's decision in *People v. Robinson,* 217 Ill.2d 43, 298 Ill. Dec. 37, 838 N.E.2d 930 (2005), because I believed at the time that the analysis contained in it would ease the confusion that arises when courts seek to classify statutes as mandatory or directory. However, in the time since we filed our decision in *Robinson,* the confusion appears to be unabated. See *People v. Garstecki,* 234 Ill.2d 430, 435-36, 334 Ill.Dec. 639, 917 N.E.2d 465 (2009) (explaining split in appellate court over the classification of Supreme Court Rule 431); *People v. Ousley,* 235 Ill.2d 299, 311, 335 Ill.Dec. 850, 919 N.E.2d 875 (2009) (noting that "confusion still persists" post-*Robinson).* Because of this, I am convinced that the analysis used in *Robinson* is no longer helpful. So, while I agree with the result reached in today's opinion, I write separately to express my views on the mandatory/directory question.

The issue in this case can be stated simply as: What are the consequences when the trial court fails to give an admonishment to a defendant in open court that the General Assembly indicated "shall" be given in section 113-8? Generally, the

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legislature does not intend its statutory provisions to be disregarded, but "not all directives and requirements declared in statute law should be understood to have equal force." 3 N. Singer, Sutherland on Statutory Construction § 57:1, at 6 (6th rev. ed.2001). I am no longer confident that the resolution of the mandatory/directory issue requires a discussion of two "distinct" questions that are "easily confused" because they both contain the term "mandatory." 235 Ill.2d at 514, 337 Ill.Dec. at 212, 922 N.E.2d at 335. I think the use of the two questions, as set forth in today's opinion, further confuses the issue because "[a]s a matter of terminology, mandatory statutes are usually said to be imperative and directory statutes permissive." 3 N. Singer § 57:1, at 4. Yet, under this court's analysis a statute found to be permissive under the first question may, under the second question, still be mandatory. That is confusing since permissive statutes are, by their nature, directory.

The question of whether a statutory provision has a mandatory or directory character is one of statutory construction. *Pullen v. Mulligan,* 138 Ill.2d 21, 46, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990). The ordinary meaning of the language should always be favored, and the form of the verb used in a statute, such as "shall" or "may," is "the single most important textual consideration determining whether a statute is mandatory or directory." 3 N. Singer § 57:3, at 13-14. However, even that is "still not the sole determinant, and what it naturally connotes can be overcome by other considerations." 3 N. Singer § 57:3, at 14. In this way, "[a]ll pertinent intrinsic and extrinsic aids to construction are applicable when determining whether statutory provisions are mandatory or directory." 3 N. Singer § 57:3, at 11. For this reason, "shall" can be construed as directory (see, *e.g., United Illuminating Co. v. City of New Haven,* 240 Conn. 422, 692 A.2d 742 (1997)), while "may" can be construed as mandatory (see, *e.g., T.W. Morton Builders, Inc. v. von Buedingen,* 316 S.C. 388, 450 S.E.2d 87 (1994)). Whether language in a statute is mandatory or directory must be determined "on a case by case basis" with "the criterion whether such requirement is mandatory or directory is whether such requirement is essential to preserve the rights of the parties." 3 N. Singer § 57:3, at 21-22.

Here, although the General Assembly used "shall" in section 113-8, it did not set forth any specific consequences for the failure to follow the directive. Generally, "[w]hen a statute specifies what result will ensue if its terms are not complied with, the statute is deemed mandatory * * *; [h]owever, if it merely requires certain things to be done and nowhere prescribes results that follow, such a statute is merely directory." 3 N. Singer § 57:3, at 23-24. This same rule finds support in our case law:

> "The general rule in determining whether a statute is mandatory or advisory is as follows: `Where the terms of a statute are preemptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory.'" *Tuthill v. Rendelman,* 387 Ill. 321, 350,

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> 56 N.E.2d 375 (1944), quoting *Clark v. Quick*, 377 Ill. 424, 430, 36 N.E.2d 563 (1941).

A corollary of this rule is that the lack of consequences for noncompliance "leads to a directory construction." 3 N. Singer § 57:8, at 35. Indeed, this court has held that the lack of specific consequences for noncompliance following a statutory command results in a directory construction. See *Carrigan v. Illinois Liquor Control Comm'n*, 19 Ill.2d 230, 233-34, 166 N.E.2d

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574 (1960). This is so as long as the rights sought to be protected are not affected by the failure to act. *Carrigan*, 19 Ill.2d at 233, 166 N.E.2d 574. In this case, the failure to act does not render defendant unable to challenge the validity of his guilty plea. Defendant, like any other defendant, has the ability to seek to withdraw his guilty plea on the basis of the imperfect admonishment. As Justice Kilbride points out, defendant has failed to establish in his motion that the trial court's failure to admonish him under section 113-8 injured the right the General Assembly sought to protect. 235 Ill.2d at 530, 337 Ill.Dec. at 220-21, 922 N.E.2d at 343-44 (Kilbride, J., specially concurring).

I believe the mandatory/directory analysis set forth above is more clear than that employed in today's opinion. The majority notes that the dispositive issue in this case is not whether the statute is "mandatory or permissive," but whether the statute is "mandatory or directory." 235 Ill.2d at 516, 337 Ill.Dec. at 213, 922 N.E.2d at 336. I am not sure what that means because if a statute is permissive, it is directory. *People v. Reed*, 177 Ill.2d 389, 393, 226 Ill.Dec. 801, 686 N.E.2d 584 (1997). To discern whether the statute is "mandatory or directory," the court then states that the statutory language is the most reliable evidence of the legislature's intent, and that "we presume that language issuing a procedural command to a government official indicates an intent that the statute is directory." 235 Ill.2d at 517, 337 Ill.Dec. at 213, 922 N.E.2d at 336. This presumption is overcome under either of two conditions: (1) when negative language prohibiting further action in the case of noncompliance or (2) when the right the provision is designed to protect would generally be injured under a directory reading. 235 Ill.2d at 517, 337 Ill.Dec. at 213-14, 922 N.E.2d at 336-37. I find the use of a presumption unnecessary. Consider the following hypothetical. Suppose the statute at issue had contained the following sentence after the "command"; Failure to so advise a defendant invalidates a plea of guilty. According to the analysis set forth in the majority opinion, rather than give immediate effect to that language (invalidate the plea), a court of review must first "presume" that there are no mandated consequences except if negative language appears. I fail to see why the court's presumption would arise if the statute expressly states the consequences.

In all other respects, I join in the majority's opinion.

Justice KILBRIDE, also specially concurring:

While I agree with both the judgment and the majority of this court's analysis, I disagree with its definition of the right section 113-8 was intended to protect, and consequently, with a portion of the subsequent analysis. Therefore, I specially concur in the opinion.

The majority relies heavily on the analysis in *People v. Robinson*, 217 Ill.2d 43, 298 Ill.Dec. 37, 838 N.E.2d 930 (2005). In *Robinson*, this court examined a statute requiring orders dismissing petitions for postconviction relief to be served on the petitioners within 10 days. 235 Ill.2d at 515, 337 Ill.Dec. at 212, 922 N.E.2d at 335; *Robinson*, 217 Ill.2d at 50, 298 Ill.Dec. 37, 838 N.E.2d 930. We determined that the right the legislature intended to protect could be broadly defined as the right to appeal. 235 Ill.2d at 518, 337 Ill.Dec. at 213-14, 922 N.E.2d at 336-37; *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930. We reasoned that the right to appeal was not generally injured by service at a later date because sufficient time would, nonetheless, often remain for defendants to file a timely notice of appeal. We then

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concluded that the statute was directory, despite the potential harm statutory violations could cause to the appeal rights of *all* postconviction petitioners. 235 Ill.2d at 518, 337 Ill.Dec. at 213-14, 922 N.E.2d at 336-37; *Robinson,* 217 Ill.2d at 57, 298 Ill.Dec. 37, 838 N.E.2d 930.

In contrast, a violation of section 113-8 is not potentially harmful to *all* defendants. Indeed, noncompliance with section 113-8 is not potentially harmful to the rights of the vast majority of Illinois defendants because "[i]mmigration consequences—in particular, deportation—are not applicable to United States citizens." 235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337. As the majority recognizes, our legislature "clearly thought" that information "informing defendants that there could be potential immigration consequences to entering a guilty plea" was "important to a defendant when making his decision to plead guilty." 235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337. Implicit in this recognition is the fact that only defendants who are not United States citizens would find this information important in their decision-making. Unlike the statute in *Robinson,* the legislature did not intend section 113-8 to protect a broadly applicable right. Rather, the legislature intentionally targeted the statute to protect the rights of a select group of defendants, namely those whose immigration status could be affected by entering a guilty plea. Thus, the right the legislature intended section 113-8 to protect is not properly defined as the broad right of *all* defendants "to intelligently waive a jury trial and enter a guilty plea" (235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337), but rather as the right of noncitizen defendants to be informed that a guilty plea could result in negative immigration consequences.

Applying that definition of the protected right, we would next consider "whether the right that the statute intends to protect would be generally injured by a directory reading of the statute." 235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337. Instead of concluding that the protected right would not generally be injured because most defendants are citizens who are not subject to potential immigration consequences (235 Ill.2d at 518, 337 Ill.Dec. at 214, 922 N.E.2d at 337), however, this court should review defendant's conduct at the guilty plea hearing and the allegations in his motion to withdraw the guilty plea and vacate his conviction. Based on those factors, we would then decide whether defendant has adequately established that he "is not a United States citizen" and that "the crime for which [he] is entering a plea is one that could trigger immigration consequences." 235 Ill.2d at 519, 337 Ill.Dec. at 214, 922 N.E.2d at 337.

Here, defendant's motion alleged that "[a]t the time of his plea, defense counsel was unaware of defendant's immigration status. Defendant is not a United States Citizen but is a resident alien" and that "[n]either defense counsel nor the State made the court aware of the above facts concerning defendant's immigration status." During the trial court's questioning at defendant's plea hearing, however, defendant's response indicated that he was a United States citizen, creating a conflict with the allegations in the motion. No documents were attached to the motion to establish defendant's immigration status definitively. Nor did defendant's motion contain any allegation that a guilty plea to the charged offense could trigger negative

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immigration consequences. Defendant has not met his burden of showing that the trial court's failure to admonish him under section 113-8 generally injured the right our legislature intended to protect.

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Consequently, I agree with the majority's conclusion that defendant has not overcome the presumption that the legislature intended a directory reading of section 113-8. 235 Ill.2d at 519, 337 Ill.Dec. at 214, 922 N.E.2d at 337. Because I respectfully disagree with the majority's definition of the right the legislature intended to protect by enacting section 113-8 and a portion of the following analysis, however, I specially concur in the opinion.