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Finally, appellants cite cases from other jurisdictions in support of their argument that reinstatement of an appeal following dismissal necessarily cures a jurisdictional defect. We need not discuss those cases, because the question of appellate jurisdiction in the cases before us is necessarily dependent upon the provisions of Nebraska statutes as interpreted and applied by the appellate courts of this state. We conclude that the reasoning of the Nebraska Court of Appeals in *Ferer* is correct and directly applicable to the jurisdictional issue presented in these appeals. Notices of appeal were not filed within 30 days after entry of the final orders on March 19, 2010, as required by § 25-1912(1), and therefore we do not have appellate jurisdiction.

CONCLUSION

[5] When an appellate court is without jurisdiction to act, the appeal must be dismissed.[11] Accordingly, we dismiss these appeals.

APPEALS DISMISSED.

[11] *Malolepszy v. State, supra* note 3; *In re Guardianship & Conservatorship of Woltemath, supra* note 3.

STATE OF NEBRASKA, APPELLEE, V.
WILMAR A. MENA-RIVERA, APPELLANT.
791 N.W.2d 613

Filed December 17, 2010. No. S-10-112.

1. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
2. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute. And, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
3. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.
4. **Statutes: Legislature: Intent.** When construing a statute, a court's objective is to determine and give effect to the legislative intent of the enactment.

5. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
6. ____: ____. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
7. ____: ____. An appellate court will not read into a statute a meaning that is not there.
8. **Words and Phrases.** The word "prior" is generally understood to mean preceding in time or in order.
9. **Pleas: Legislature: Intent: Words and Phrases.** Interpreting "prior" to mean "immediately before" the entering of a plea of guilty or nolo contendere better reflects the legislative intent of Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).
10. **Criminal Law: Pleas: Proof.** To withdraw a plea under Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), all a defendant must show is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given.
11. **Criminal Law: Pleas.** Neb. Rev. Stat. § 29-1819.02 (Reissue 2008) does not require that the immigration consequences of a conviction be an absolute certainty before a defendant may withdraw his plea.
12. **Words and Phrases.** "May" is used to connote a contingency or a possibility. "Will," on the other hand, conveys futurity and carries with it certainty that the event will happen.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Reversed.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Under Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), the trial court—before accepting a guilty plea or a nolo contendere plea—must advise a defendant that the plea could result in removal from the United States or a denial of naturalization. The court gave the advisement to Wilmar A. Mena-Rivera before accepting a not guilty plea at his arraignment. But later, when under a plea bargain he pleaded guilty to a lesser

offense, the court failed to repeat the advisement. May Mena-Rivera withdraw his guilty plea because the court did not repeat the advisement? We conclude that he may. We reverse the district court's order denying his motion to withdraw his guilty plea.

BACKGROUND

At his arraignment on December 17, 2008, Mena-Rivera, a lawful resident originally from El Salvador, pleaded not guilty to child abuse, at the time a Class III felony,[1] after first receiving an advisement required by § 29-1819.02. Section 29-1819.02 requires a court to advise a defendant, before accepting a plea of guilty or nolo contendere, that a conviction for the crime charged may have adverse immigration consequences. After receiving the advisement, Mena-Rivera stated that he understood it.

Later, under a plea agreement, Mena-Rivera appeared before the court and pleaded guilty to one count of attempted child abuse, a Class IIIA felony.[2] During this appearance, the court did not repeat the immigration advisement. Mena-Rivera, however, acknowledged that the court had arraigned him previously and that he understood his rights.

On June 3, 2009, Mena-Rivera moved to withdraw his plea. He claimed that because the court failed to reread the advisement, his plea was involuntary. The court noted that it had not given him the advisement before he entered his guilty plea. But then it ruled that to have his plea withdrawn, he must demonstrate two things. First, he must show that he was prejudiced by the nonadvisement. According to the district court, to demonstrate prejudice, the defendant must show that it is "'reasonably probable he would not have pleaded guilty or nolo contendere if properly advised.'" Second, the court required that Mena-Rivera show that there is more than a remote possibility that the conviction would have adverse immigration consequences. To allow the defendant to show this, the trial court ordered an evidentiary hearing.

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[1] Neb. Rev. Stat. § 28-707(5) (Reissue 2008).

[2] See Neb. Rev. Stat. § 28-201(4)(c) (Reissue 2008).

At the evidentiary hearing, Mena-Rivera introduced an immigration detainer from the U.S. Department of Homeland Security (DHS). The detainer stated that DHS had commenced an investigation to determine whether Mena-Rivera is subject to removal from the United States. He introduced this to show that his conviction would have the adverse immigration consequences required by the statute. Mena-Rivera, however, declined to adduce any evidence concerning prejudice. He argued that doing so would violate his attorney-client privilege. Because he failed to show prejudice, the court overruled his motion to withdraw his plea. Later, the court sentenced Mena-Rivera to a term of 20 to 48 months in prison, with credit for 352 days served.

ASSIGNMENTS OF ERROR

Mena-Rivera claims as error the following:

1. The court erred in refusing to allow Mena-Rivera to withdraw his plea.

2. The court erred in not warning him of the immigration consequences of his plea as required by § 29-1819.02.

3. The court erred in requiring Mena-Rivera to show prejudice from the court's failure to advise under § 29-1819.02.

4. The court erred in accepting his plea without establishing the voluntary and intelligent nature of the guilty plea before accepting it.

5. Mena-Rivera was denied his right to effective assistance of counsel under the Sixth Amendment.

STANDARD OF REVIEW

[1,2] The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.[3] The right to withdraw a plea previously entered is not absolute. And, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.[4]

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[3] *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

[4] See *id.*

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.[5]

ANALYSIS

The Court Was Required to Give Mena-Rivera the Warning at the Time of the Guilty Plea

Mena-Rivera argues that the lower court was required to reread him the warning before it accepted his plea on attempted child abuse. It is not enough, Mena-Rivera argues, that the trial court warned him when it arraigned him on the initial charge of child abuse. The State, of course, views it differently. It argues that this earlier warning was sufficient. And if it was not, Mena-Rivera must show that he was prejudiced by the court's failure to repeat the warning.

Section 29-1819.02 states in part:

> (1) 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 UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.

[4-7] In construing § 29-1819.02, our objective is to determine and give effect to the legislative intent of the enactment.[6] When construing a statute, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which

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[5] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[6] See, *State v. Lebeau, ante* p. 238, 784 N.W.2d 921 (2010); *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007); *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989).

would defeat it.[7] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[8] And we will not read into a statute a meaning that is not there.[9]

[8] Here, the result hinges on the meaning of the word "prior." The word "prior" is generally understood to mean "preceding in time or in order."[10] It is true that giving the advisement at a defendant's initial arraignment would be prior to the defendant's entering a plea. But when we consider the legislative intent behind § 29-1819.02, we conclude that "prior" should be read to entail more immediacy.

In enacting § 29-1819.02, the Legislature was clearly concerned with the unfairness of pleas that defendants enter without full knowledge of their consequences.[11] We believe that reading "prior" to mean that the court should give the advisement immediately before the defendant enters a guilty plea or nolo contendere plea better promotes the Legislature's intent. In contrast, to read "prior" to mean that the court can give the advisement at any time before a defendant enters a plea could undermine the Legislature's intent.

First, weeks or months may often pass between when a court initially arraigns a defendant and when the defendant enters his plea of guilty or nolo contendere. During this time, the defendant may forget what the court advised him of at his initial arraignment. In such a case, the Legislature's intent of ensuring that the defendant knew the immigration consequences of his plea could be frustrated.

Second, the Legislature's intent could be frustrated because defendants often plead to a lesser charge than what they were initially arraigned on. Mena-Rivera is one such defendant.

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[7] *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010); *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010).

[8] See, *In re Estate of Fries, supra* note 7; *Herrington v. P.R. Ventures, supra* note 7.

[9] *In re Estate of Fries, supra* note 7; *In re Adoption of Kailynn D., supra* note 6.

[10] Webster's Encyclopedic Unabridged Dictionary of the English Language 1145 (1994).

[11] See Neb. Rev. Stat. § 29-1819.03 (Reissue 2008).

A layperson could reasonably expect less severe penalties to flow from a less severe charge. If a defendant who pleads guilty to a lesser charge than what he was arraigned on is not read the immigration advisement when he enters his plea of guilty or nolo contendere, he may believe that the prior advisement does not apply. This uncertainty, however, is the mischief that the Legislature wished to combat when it enacted § 29-1819.02.

[9] We conclude that interpreting "prior" to mean "immediately before" the entering of a plea of guilty or nolo contendere better reflects the legislative intent of § 29-1819.02.

The State argues that even if the lower court erred in not rereading the advisement to Mena-Rivera, the court should not allow him to withdraw his plea unless he can show prejudice. Our case law involving § 29-1819.02, however, has made clear that only two elements must be met before a defendant can withdraw his or her plea; and prejudice is not one of them.

[10] Recently, in *State v. Yos-Chiguil*,[12] we stated that all a defendant must show to withdraw a plea under § 29-1819.02 is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given.

The court had advised the defendant in *Yos-Chiguil* that a "conviction could adversely affect his ability to remain or work in the United States."[13] The court did not, however, warn the defendant that he could lose the opportunity to one day acquire citizenship. We decided that the defendant in *Yos-Chiguil* could not withdraw his plea because he had made no allegations that "he faces the prospect of denial of an application for naturalization based solely upon the conviction which he seeks to vacate."[14] We did not require the defendant in *Yos-Chiguil* to show prejudice apart from the two elements that appear in the text of the statute. This was so even though the defendant

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[12] *State v. Yos-Chiguil, supra* note 5.

[13] *Id.* at 597, 772 N.W.2d at 579.

[14] *Id.* at 599, 772 N.W.2d at 580.

already knew that some immigration consequences would flow from his plea.

Having established that § 29-1819.02 required the court to reread the immigration advisement to Mena-Rivera when he entered his guilty plea—which it failed to do—we now examine the second element: whether Mena-Rivera faces an immigration consequence of which the court did not warn him. We stated in *Yos-Chiguil* that a "defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given."[15]

Here, Mena-Rivera introduced into evidence a detainer from DHS. It stated that DHS had initiated an investigation to determine whether he is subject to removal from the United States.

[11,12] We do not read *Yos-Chiguil*'s language that a defendant "actually face[]" immigration consequences as saying that the consequences must be an absolute certainty before the defendant may withdraw his plea under § 29-1819.02. The statute uses the word "may" as opposed to "will." "May" is used to connote a contingency or a possibility.[16] "Will," on the other hand, conveys futurity[17] and carries with it certainty that the event will happen. Also, immigration law can be complex and the exact consequences for any individual defendant can be difficult to forecast. We do not believe it is wise to require our trial court judges to wade into this complex area of law, in which most judges have little expertise. Nor should we require judges to wait so long to see the results of deportation that it may be too late for defendants to effectively avail themselves of § 29-1819.02. We conclude that when DHS places an immigration detainer on an individual, that person "actually faces" immigration consequences so that he may claim the protections of § 29-1819.02. Mena-Rivera has thus satisfied the second element of the statute.

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[15] *Id.* at 598, 772 N.W.2d at 580.

[16] See Webster's Encyclopedic Unabridged Dictionary of the English Language, *supra* note 10 at 886.

[17] *Id.* at 1634.

Because the court did not read the immigration advisement to Mena-Rivera when it took his plea and he has shown that he faces immigration consequences, we conclude that it was error for the court not to allow Mena-Rivera to withdraw his plea.

Mena-Rivera's Other Claims

Because we have determined that Mena-Rivera is entitled to withdraw his plea based on § 29-1819.02, we need not consider his other assignments of error.[18]

CONCLUSION

Mena-Rivera was entitled to withdraw his plea under § 29-1819.02. The court erred in concluding that the advisement at the arraignment satisfied the statute and in requiring Mena-Rivera to establish prejudice to withdraw his plea. We reverse, and remand with directions to the district court to allow Mena-Rivera to withdraw his plea.

Reversed.

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[18] *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

Heavican, C.J., dissenting.

I concur with the majority's holding that Mena-Rivera has demonstrated that he faces an adverse immigration consequence. I respectfully disagree with the decision that the district court did not meet the requirements of Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), however, because the district court did read the advisement "prior to" accepting Mena-Rivera's plea of guilty.

During the arraignment on December 17, 2008, the district court advised Mena-Rivera of the charges against him, his possible pleas, and his rights in relation to those pleas. During that advisement, the district court stated:

> I am required by state statute to advise you that if you are not a citizen of the United States and you are convicted of this charge, a conviction could result in either your deportation from the United States or the denial of any application which you may have pending to become a citizen of the United States.

Mena-Rivera stated he understood that consequence and entered a plea of not guilty. The advisement complied with the requirements of § 29-1819.02.

On February 11, 2009, less than 2 months later, Mena-Rivera changed his plea to guilty. The following colloquy took place:

> THE COURT: My record shows to me that you appeared before the Court on December 17th of last year. At that time, I told you about your rights, the pleas that were pending against you, the penalties in the event you were convicted, and the rights — the rights, the pleas, the charges, and penalties. You told me you understood all of those things; is that correct?
>
> [Mena-Rivera]: Yes Your Honor.
>
> THE COURT: When you were here on December 17th, you told me that you understood the rights that you had. You also told me that you understood the pleas that you could enter; is that correct?
>
> [Mena-Rivera]: Yes, Your Honor.
>
> THE COURT: Is there anything that I told you about with respect to either your rights or the pleas that you would like for me to tell you about again?
>
> [Mena-Rivera]: No, Your Honor.
>
> THE COURT: And you feel comfortable as you sit here today that you understand those things; is that correct?
>
> [Mena-Rivera]: Yes, Your Honor.

Section 29-1819.02 requires that the district court read the advisement "[p]rior to acceptance of a plea of guilty or nolo contendere." The district court gave the advisement to Mena-Rivera at his arraignment, and during the plea hearing asked if Mena-Rivera remembered his rights or had any questions regarding those rights. We have previously held that adverse immigration consequences are collateral to a guilty plea and that trial courts are only obligated to advise defendants of "direct" consequences.[1] Therefore, while the district court was statutorily obligated to read the advisement "prior

[1] *State v. Zarate*, 264 Neb. 690, 695, 651 N.W.2d 215, 222 (2002).

to acceptance" of a plea of guilty or no contest, Mena-Rivera's constitutional rights were not implicated. Given the facts of this case, I believe the district court met the requirements of the statute, and Mena-Rivera should not be entitled to withdraw his plea of guilty. I would therefore affirm the decision of the district court denying Mena-Rivera's motion to withdraw his guilty plea.

TIMOTHY MEYERS, APPELLANT, V. NEBRASKA STATE PENITENTIARY OF THE NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, AND COMMISSIONER OF LABOR OF THE STATE OF NEBRASKA, APPELLEES.

791 N.W.2d 607

Filed December 17, 2010. No. S-10-267.

1. **Employment Security: Judgments: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Employment Security.** Under Neb. Rev. Stat. § 48-628(2) (Cum. Supp. 2008), an individual shall be disqualified for unemployment benefits for misconduct related to his work.
4. **Employment Security: Words and Phrases.** Misconduct related to work is defined as behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.
5. **Employment Security.** An employee's actions do not rise to the level of misconduct if the individual is merely unable to perform the duties of the job.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded with directions.

Kevin Ruser and Patricia A. Knapp, of University of Nebraska Civil Clinical Law Program, and Clint Cadwallader, Kurt