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Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas

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Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas

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Abstract

This Note argues that attorneys have an affirmative duty to inform defendants of the immigration ramifications of guilty please. Part I analyzes the general test for ineffective assistance of counsel, the rules and standards related to guilty please and the overlap between criminal law and immigration law. Part II examines the split of authority in the lower courts over whether misinforming or failing to inform defendants about immigration reprecussions should result in reversal of guilty pleas. Part III argues that attorneys have a duty to inform aliens of the deportation possibilities of guilty pleas.

NOTES

WEAKNESS OF THE COLLATERAL CONSEQUENCES DOCTRINE: COUNSEL'S DUTY TO INFORM ALIENS OF THE DEPORTATION CONSEQUENCES OF GUILTY PLEAS

INTRODUCTION

The Sixth Amendment[1] to the U.S. Constitution guarantees that defendants in criminal trials have the right to the effective assistance of counsel.[2] Ineffective assistance of counsel occurs when attorneys' representations drop below an objective standard of reasonableness and such representations result in prejudice to defendants' cases.[3] Frequently, defendants seek to have their guilty pleas vacated based on ineffective assistance of counsel.[4] In order to establish ineffective assistance, defendants first must prove that their attorneys' representations were objectively unreasonable.[5] Second, they must show prejudice by proving that they would not have entered guilty pleas and would have insisted on going to trial if their attorneys had behaved reasonably.[6]

Frequently, aliens[7] attempt to have their guilty pleas reversed due to ineffective assistance of counsel because their attorneys either misinformed or failed to inform them that their

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1. U.S. CONST. amend. VI. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

2. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (defining right to counsel as right to effective assistance of counsel).

3. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (setting forth modern standard for ineffective assistance of counsel).

4. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 55 (1985) (describing and rejecting defendant's argument that counsel was ineffective because he misinformed defendant about parole eligibility).

5. *Id.* at 58-59 (setting forth modern standard for ineffective assistance of counsel related to guilty pleas).

6. *Id.* at 59.

7. 8 U.S.C. § 1101(a)(3) (1988 & Supp. III 1991). Section 1101(a)(3) defines an alien as "any person not a citizen or national of the United States." *Id.* The Government estimates that approximately 630,000 aliens move permanently to the United States each year and that as many as 3,000,000 undocumented aliens live in the United States. 66 Interpreter Rels. 534-35 (May 15, 1989) (digesting "The President's Comprehensive Triennial Report on Immigration 1989").

convictions[8] could result in deportation.[9] Under U.S. immigration law, many criminal convictions can result in deportation of non-U.S. citizens.[10] Convictions that are relatively minor for citizens can lead to deportation for non-citizens.[11] Aliens often plead guilty to criminal charges, however, after consulting with counsel, unaware of the potential immigration ramifications.[12]

Courts disagree over the right of aliens to have guilty pleas set aside due to counsels' failure to inform defendants about deportation consequences of guilty pleas.[13] Although a

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8. 8 U.S.C. § 1251(a)(2) (1988 & Supp. III 1991). Section 1251(a)(2) provides for deportation based on convictions. *Id.* For immigration purposes, convictions will be found where

> (1) a judge or jury has found the alien guilty or [the alien] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
> (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and
> (3) a judgment or adjudication of guilt may be entered if the person violates the terms of [the alien's] probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding [the alien's] guilt or innocence of the original charge.

Matter of Ozkok, 19 I&N Dec. 546, 551-52 (BIA 1988).

9. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990) (describing defendant's argument that court should permit him to withdraw his guilty plea because his attorney failed to inform him that conviction might result in deportation).

10. 8 U.S.C. § 1251(a)(1)-(5) (1988 & Supp. III 1991). Sections 1251(a)(1)-(5) delineate the crimes that potentially subject aliens to deportation. *Id.*

11. *See, e.g.*, United States v. Campbell, 778 F.2d 764 (11th Cir. 1985). In *Campbell*, a Jamaican national and permanent resident of the United States entered a guilty plea to possession of marijuana and received a sentence of two years probation. *Id.* at 765-66. Mrs. Campbell was the wife of a U.S. citizen and the mother of three minor children who were also U.S. citizens. *Id.* at 766. Following her conviction, the Immigration and Naturalization Service brought deportation proceedings against her. *Id.* She attempted unsuccessfully to have her guilty plea vacated as involuntary because she was unaware of the deportation consequences of such a plea. *Id.*

12. *See, e.g.*, *Campbell*, 778 F.2d at 765-66 (describing defendant's argument that entry of guilty plea took place after consultation with counsel, without awareness of potential deportation consequences); Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985) (same).

13. *Compare* State v. Malik, 680 P.2d 770, 771-72 (Wash. Ct. App.) (holding that counsel has no duty to inform defendant of deportation consequences), *appeal denied*, 102 Wash. 2d 1023 (1984) *with* People v. Pozo, 746 P.2d 523 (Colo. 1987) (en banc) (holding that counsel's representation is ineffective if counsel fails to investigate rele-

majority of courts hold that attorneys have no affirmative duty to inform defendants about potential immigration problems,[14] some courts hold that attorneys have an affirmative duty to inform defendants about such possibilities.[15] Other courts hold that under certain circumstances providing misinformation about deportation possibilities, as opposed to failure to inform, render counsels' assistance ineffective.[16]

This Note argues that attorneys have an affirmative duty to inform defendants of the immigration ramifications of guilty pleas. Part I analyzes the general test for ineffective assistance of counsel, the rules and standards related to guilty pleas and the overlap between criminal law and immigration law. Part II examines the split of authority in the lower courts over whether misinforming or failing to inform defendants about immigration repercussions should result in reversal of guilty pleas. Part III argues that attorneys have a duty to inform aliens of the deportation possibilities of guilty pleas. This Note concludes that attorneys should have an affirmative duty to warn aliens of the deportation ramifications of guilty pleas,

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vant areas of law, including immigration law when defendant is alien) *and* United States v. Nagaro-Garbin, 653 F. Supp. 586, 590 (E.D. Mich.) (holding that representation may be ineffective under certain circumstances if counsel misinforms defendant about deportation consequences) *aff'd*, 831 F.2d 296 (6th Cir. 1987).

14. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990) (holding that counsel has no duty to inform defendants about deportation consequences of guilty pleas); United States v. George, 869 F.2d 333 (7th Cir. 1989) (same); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988) (same); *Campbell*, 778 F.2d at 768 (same); *Malik*, 680 P.2d 770 (same); Tafoya v. State, 500 P.2d 247 (Alaska) (same), *cert. denied*, 410 U.S. 945 (1972).

15. *See, e.g.*, *Pozo*, 746 P.2d 523 (holding that counsel has affirmative duty to inform defendants of relevant consequences of guilty pleas including deportation consequences, when defendants are known to be aliens); People v. Soriano, 240 Cal. Rptr. 328 (Cal. Ct. App. 1987) (same); *see also* People v. Ford, 290 N.Y. L.J. 24 (Mar. 31, 1993) (N.Y. Sup. Ct. 1993) (holding that trial judge has duty to inform defendant of deportation consequences of guilty plea if defendant could not reasonably expect that a plea of guilty "involves an admission of grossly immoral activity").

16. *See, e.g.*, *Downs-Morgan*, 765 F.2d at 1541 (holding narrowly that representation is ineffective if counsel misinforms defendant about deportation consequences of guilty plea, if defendant has colorable claim of innocence, and defendant faces execution upon returning to native country); *Nagaro-Garbin*, 653 F. Supp. at 591 (holding that representation is ineffective if counsel misinforms defendant about deportation consequences of guilty plea and defendant has colorable claim of innocence); People v. Correa, 465 N.E.2d 507 (Ill. App. Ct.) (holding that representation is ineffective if counsel misinforms defendant about deportation consequences of guilty plea), *aff'd*, 485 N.E.2d 307 (Ill. 1984).

and that failure to inform, when it prejudices defendants' cases, constitutes ineffective assistance of counsel.

I. *BACKGROUND INFORMATION REGARDING THE SIXTH AMENDMENT RIGHT TO COUNSEL, THE RULES GOVERNING GUILTY PLEAS AND THE OVERLAP BETWEEN CRIMINAL LAW AND IMMIGRATION LAW*

Three major areas of law are involved when aliens attempt to have guilty pleas set aside due to ineffective assistance of counsel based on attorney misinformation or failure to inform regarding the potential deportation ramifications of their pleas: the Sixth Amendment right to counsel, the rules and standards relating to guilty pleas, and the overlap between criminal law and immigration law. In contesting such guilty pleas, aliens generally invoke the Sixth Amendment right to counsel, arguing that counsels' representations were constitutionally ineffective.[17] Because of counsels' ineffective representations, aliens argue that their convictions should be vacated and their guilty pleas set aside because such pleas were involuntary and not made intelligently as required by the rules governing guilty pleas.[18] These arguments address the overlap between criminal law and immigration law,[19] and often involve the "collateral consequences" doctrine,[20] which states

17. *See, e.g.*, *Campbell*, 778 F.2d at 766 (describing defendant's argument that counsel's failure to inform defendant of deportation consequences of guilty plea constitutes ineffective assistance of counsel); United States v. Gavilan, 761 F.2d 226, 227 (5th Cir. 1985) (same); *Pozo*, 746 P.2d at 525-26 (same).

18. *See, e.g.*, *Campbell*, 778 F.2d at 766 (describing defendant's argument that guilty plea was not voluntarily and intelligently made due to counsel's failure to inform defendant about deportation consequences of guilty plea); *Gavilan*, 761 F.2d at 227-28 (same); *Pozo*, 746 P.2d at 526 (same).

19. *See, e.g.*, *Campbell*, 778 F.2d at 766. The Immigration and Naturalization Service [hereinafter INS] sought the defendant's deportation pursuant to what is now 8 U.S.C. § 1251 (a)(2)(B)(i) (1988 & Supp. III 1991) (formerly 8 U.S.C. § 1251 (a)(11) (1970 & Supp. 1985)) after defendant received two years probation for possession of marijuana. *Id.*; *Pozo*, 746 P.2d at 525. In *Pozo*, the INS sought the defendant's deportation pursuant to what is now 8 U.S.C. § 1251(a)(2)(A)(i) (1988 & Supp. III 1991) (formerly 8 U.S.C. 1251 (a)(4) (1982)) after the defendant received a sentence of two years for escape and two years and six months for sexual assault. *Id.*

20. *See, e.g.*, *Campbell*, 778 F.2d at 768 (holding that possibility of deportation is collateral consequence that defendant need not be informed of prior to pleading guilty); *Gavilan*, 761 F.2d at 228 (same); State v. Malik, 680 P.2d 770, 772 (Wash. Ct. App.) (same), *appeal denied*, 102 Wash.2d. 1023 (Wash. 1984).

that defendants have no right, prior to pleading guilty, to learn about certain consequences of convictions that are not direct consequences of the sentences imposed by the trial judges.[21]

A. *Right to Counsel*

The Sixth Amendment guarantees that in criminal prosecutions defendants have the right to the assistance of counsel.[22] Originally, the Sixth Amendment did not mandate the appointment of counsel, but guaranteed that the government would not deny assistance to defendants who retained their own counsel.[23] Beginning in the 1930s, the U.S. Supreme Court started to reinterpret the Sixth Amendment, requiring the appointment of counsel in certain situations.[24] In federal

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21. *See, e.g.*, Moore v. Hinton, 513 F.2d 781, 782-83 (5th Cir. 1975) (holding that possibility of losing driver's license is collateral consequence that defendant need not be informed of prior to pleading guilty); Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963) (holding that possibility of discharge from armed forces following conviction is collateral consequence that defendant need not be informed of prior to pleading guilty).

22. *See supra* note 1 (setting forth text of Sixth Amendment).

23. *See, e.g.*, Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 7-8 (1944). Mr. Holtzoff argues that the Sixth Amendment did not impose upon judges the duty to appoint counsel to indigent defendants. *Id.* at 8. It only provided the right to counsel if retained by the defendant, placing no affirmative duty upon the state. *Id.* After the Bill of Rights was proposed, Congress, on April 3, 1790, passed an act that required the appointment of counsel in capital cases. *Id.* According to Mr. Holtzoff, this statutory provision would be superfluous if the Sixth Amendment imposed an affirmative duty to assign counsel. *Id.* In addition, because the statutory mandate applied only to capital cases, the act implied that in non-capital cases, no such duty to assign counsel existed. *Id.*

Prior to 1938, many federal courts, as a matter of practice, appointed counsel to defendants accused of grave offenses. *Id.* Other courts only appointed counsel if defendants specifically requested such appointments. *Id.* Counsel was not appointed to defendants who intended to plead guilty. *Id.* None of these practices was based on any constitutional duty until the Supreme Court's decision in *Johnson v. Zerbst*. *Id.* at 9. *See* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (holding that absent a valid waiver, counsel must be provided to defendants who cannot or do not secure counsel).

24. *Zerbst*, 304 U.S. at 468. The Supreme Court construed the Sixth Amendment to require not only that the assistance of counsel not be denied to those who are able to retain counsel, but that courts must provide counsel to defendants who, absent a valid waiver, cannot or do not secure counsel. *Id.* The Supreme Court stated that

> [i]f the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial

criminal proceedings, the Court required appointment of attorneys absent a waiver of that right.[25] In state courts, the doctrine was slower to develop, but in 1979 the Supreme Court held that the state must appoint attorneys in cases where imprisonment results, absent a valid waiver, if defendants cannot or do not retain their own attorneys.[26]

1. Effective Assistance of Counsel

The right to assistance of counsel stems from the belief

> may be lost "in the course of the proceedings" due to failure to complete the court — as the Sixth Amendment requires — by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed.

Id.

25. *Id.*; *see* Faretta v. California, 422 U.S. 806 (1975) (holding that defendant has constitutional right to proceed without counsel if defendant voluntarily and intelligently elects to do so and that state may not force defendant to be represented by counsel).

26. Scott v. Illinois, 440 U.S. 367, 373-74 (1979). Shortly after *Zerbst*, the Supreme Court held, in Betts v. Brady, 316 U.S. 455, 461-62 (1942), that the due process clause of the Fourteenth Amendment does not incorporate the guarantees of the Sixth Amendment. *Id.* Thus, defendants did not have a constitutional right to counsel in all state court proceedings. *Id.* The Court held that due process required an inquiry into the fundamental fairness of any given proceeding, but the Sixth Amendment was not the appropriate vehicle for relief. *Id.* The Court found that an adult man of ordinary intelligence was competent to represent himself where the trial involved a relatively simple issue, and they refused to find a violation of fundamental fairness in the trial court's refusal to grant him counsel. *Id.* at 472-73.

Over the next 20 years, the Court found many special circumstances that required appointment of counsel in order to satisfy due process. *See, e.g.*, Chewning v. Cunningham, 368 U.S. 443 (1962) (holding that because charge was serious and legal questions presented were complex, great potential for prejudice to defendant existed without assistance of counsel); Hamilton v. Alabama, 368 U.S. 52 (1961) (holding that defendants have unqualified right to counsel in capital cases); Hudson v. North Carolina, 363 U.S. 697 (1960) (holding that counsel is necessary to protect against prejudicial effect of co-defendant's plea in presence of jury); *see generally* Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962). Finally, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Court overruled *Betts*, holding that the Sixth Amendment right to counsel applies to the states through the due process clause of the Fourteenth Amendment. *Id.* at 341-45.

After *Gideon*, a felony case, the Court held in Argersinger v. Hamlin, 407 U.S. 25 (1972) that absent a waiver, defendants may not be imprisoned for any offense, whether petty, misdemeanor or felony, unless represented by counsel. *Id.* at 36-37. Finally, in *Scott*, 440 U.S. 367, the Court refused to extend *Argersinger*, holding that defendants are not entitled to representation unless the trial actually results in imprisonment. *Id.* at 373-74.

that legal assistance is necessary to ensure a fair trial.[27] Professional prosecutors represent the state, while professional defense attorneys help to minimize any imbalance in representation by adequately defending against the prosecution's case.[28] Ineffective assistance of counsel, however, reduces the likelihood of a just result.[29]

Although the U.S. Constitution does not refer to a right to effective counsel, the U.S. Supreme Court found that the Sixth Amendment right to counsel encompasses the right to the effective assistance of counsel.[30] The Court first articulated the right to effective assistance in *Powell v. Alabama*,[31] holding that a trial judge violated the defendants' due process rights because he did not appoint effective counsel.[32] The Court held that the defendants could not have received effective assistance in the trial of their case because they did not receive representation until the morning of their trial.[33]

In the years following the *Powell* decision, the Supreme Court expressed heightened concern for defendants' Sixth Amendment rights.[34] In *Avery v. Alabama*,[35] for example, the defendant argued that he had been denied effective assistance of counsel because the trial judge refused to grant him a continuance that would enable his attorneys to prepare his de-

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27. *See, e.g.*, *Gideon*, 372 U.S. at 344 (stating that counsel is necessary to ensure fair trial); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (same).

28. Strickland v. Washington, 466 U.S. 668, 685 (1984).

29. *Id.* at 686.

30. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

31. 287 U.S. 45 (1932). In *Powell*, a group of young African-American men were tried for the rape of two white girls aboard a train. *Id.* at 49. The men were nonresidents of Alabama, and the record did not indicate that they were given an opportunity to contact friends or employ counsel. *Id.* at 52. They were not provided an attorney until the morning of their trial. *Id.* at 53. The attorney did no investigation and did not prepare for the trial. *Id.* at 58.

32. *Id.* The Court stated that the defendants had been denied the right to counsel "in any real sense." *Id.*

33. *Id.*

34. *See, e.g.*, Avery v. Alabama, 308 U.S. 444 (1940) (holding that mere appointment of counsel was not enough to satisfy constitutional guarantee of assistance of counsel); Glasser v. United States, 315 U.S. 60 (1942) (holding that trial court may not appoint same attorney to represent defendant and co-defendant who have conflicting interests); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (defining right to assistance of counsel as right to effective assistance of counsel). *See generally* STEPHEN SALTZBURG & DANIEL CAPRA, AMERICAN CRIMINAL PROCEDURE 1023-49 (4th ed. 1992) (analyzing development of right to effective assistance of counsel).

35. 308 U.S. 444 (1940).

fense.[36] The Court held that the defendant's attorneys had represented him effectively, but stated that the mere appointment of counsel was not enough to satisfy the constitutional guarantee of effective assistance of counsel.[37] The Court noted that denial of the opportunity to confer, consult and prepare could turn the appointment of counsel into a sham.[38]

In *Glasser v. United States*,[39] the Supreme Court held that a defendant did not receive effective assistance where the trial judge appointed the same attorney to represent both the defendant and a co-defendant.[40] The Supreme Court held that the lower court violated the defendant's Sixth Amendment right to assistance of counsel by permitting this conflict of interest.[41] The Court also held that the right to counsel is too important to allow courts to make fine distinctions regarding the amount of prejudice arising from the denial of the right.[42]

Finally, in *McMann v. Richardson*,[43] the Supreme Court defined the right to counsel as the right to the effective assistance of counsel.[44] In *McMann*, three separate defendants claimed that they were convicted on the basis of coerced confessions.[45] They sought reversal of their guilty pleas by arguing ineffective assistance of counsel because their attorneys were mistaken

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36. *Id.* at 445-50. In *Avery*, the defendant was arraigned on murder charges. *Id.* at 447. His trial was called for three days later. *Id.* The defendant's court appointed attorneys filed for a continuance arguing that they did not have time to prepare and investigate the defendant's case. *Id.* No ruling on the motion appeared in the record, but the defendant was convicted and sentenced to death. *Id.* at 448. Subsequently, the defendant moved for a new trial and the motion was denied. *Id.* at 450. The Supreme Court affirmed the denial of this motion, holding that the defendant's attorneys, despite having little time to prepare, performed their duties properly. *Id.*

37. *Id.* at 446.

38. *Id.*

39. 315 U.S. 60 (1942).

40. *Id.* at 76. In *Glasser*, Mr. Glasser and four other defendants were convicted of conspiracy to defraud the United States. *Id.* at 63. The court appointed Mr. Glasser's attorney to also represent a co-defendant. *Id.* at 69. The Supreme Court agreed with the defendant's argument that such appointment created a conflict of interest that inhibited the conduct of the defense, preventing the defense attorney from excluding evidence and cross examining witnesses. *Id.* at 76.

41. *Id.*; *see also* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (holding that defendant must establish that actual conflict of interest adversely affected lawyer's performance).

42. *Glasser*, 315 U.S. at 76.

43. 397 U.S. 759 (1970).

44. *Id.* at 771 n.14.

45. *Id.* at 761-64.

about the admissibility of the confessions.[46] Their attorneys had not informed them that their confessions might be inadmissible.[47] The Court stated that whether guilty pleas are voluntary depends on whether counsels' advice falls within the range of advice given by competent attorneys.[48] The Court held that counsels' advice was not ineffective simply because the attorneys misjudged the admissibility of confessions.[49] Although the Court held that the defendants were not denied their right to counsel, it established a defendant's right to effective assistance of counsel.[50]

2. The Modern Standard for Ineffective Assistance of Counsel: *Strickland v. Washington*

In *Strickland v. Washington*,[51] the Supreme Court held that persons seeking to establish violations of the Sixth Amendment right to counsel must show objectively unreasonable attorney behavior and prejudice to the defense.[52] First, defendants must show that their attorneys' mistakes were so egregious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.[53] The Court did not set forth specific parameters for determining effective assistance of counsel, but relied instead on the objective standards of the legal community.[54] Thus, the measure of attorney perform-

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46. *Id.*
47. *Id.*
48. *Id.* at 770-71.
49. *Id.*
50. *Id.* at 771.
51. 466 U.S. 668 (1984). In *Strickland*, the defendant pleaded guilty to various charges, including three counts of murder. *Id.* at 672. Prior to sentencing, counsel spoke with the defendant but did not interview character witnesses, nor did he request a psychiatric examination or a pre-sentence report. *Id.* at 672-73. Counsel claimed that he did not undertake these matters because he did not want the state to present counter evidence concerning these matters and he felt that the trial judge might spare the defendant the death penalty if the defendant took responsibility for his actions. *Id.* The defendant, however, was sentenced to death. *Id.* at 675. The defendant argued that counsel had represented him ineffectively by not interviewing character witnesses, not requesting a psychiatric examination, and not requesting a pre-sentence report. *Id.* The Supreme Court held that such choices were within the range of reasonable assistance and did not constitute ineffective assistance of counsel. *Id.* at 699.
52. *Id.* at 687.
53. *Id.*
54. *Id.* at 688.

ance is "reasonableness under prevailing professional norms."[55] The Court stated that courts must view behavior from the attorneys' perspectives at the time of the trials or at the entry of the pleas so that hindsight does not distort their evaluations.[56] In addition, defendants must specifically identify the acts or omissions giving rise to their claims, and overcome the presumption that counsels' assistance was consistent with reasonable professional standards.[57]

Second, defendants must show that counsels' errors prejudiced the defendants' cases, depriving them of fair trials.[58] Judgments will not be set aside unless defendants show a reasonable probability that counsels' errors altered the results.[59] In certain settings, such as conflicts of interest, courts presume prejudice to the defense.[60] Generally, however, defendants have the burden of affirmatively establishing prejudice.[61] Therefore, courts will uphold convictions unless defendants prove that their attorneys acted in an unreasonable manner and that their attorneys' actions prejudiced their defense.[62]

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55. *Id.*
56. *Id.* at 689.
57. *Id.* at 695.
58. *Id.* at 687.
59. *Id.* at 694.
60. *Id.* at 692.
61. *Id.* at 693.
62. *Id.* at 687. States may, pursuant to their respective constitutions, provide broader protection against ineffective assistance of counsel than *Strickland*, which represents the minimum national standards. *See* United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985) ("The states are free to impose higher standards than those required under the federal Constitution and statutes."). Although many states have adopted *Strickland* as the appropriate standard under both the federal and state constitutions, *see, e.g.*, People v. Albanese, 473 N.E.2d 1246 (Ill. 1984), *cert. denied*, 471 U.S. 1044 (1985); Hernandez v. State, 726 S.W.2d 53 (Tex. 1986); Chamberlain v. State, 694 P.2d 468 (Kan. 1985), some states have provided greater protection. *See, e.g.*, Jackson v. State, 750 P.2d 821, 823-824 (Alaska 1988), *cert. denied*, 488 U.S. 861 (1988) (holding that defendant must prove unreasonable attorney behavior and create reasonable doubt that lack of competency contributed to conviction). In *Jackson*, the court stated that "[a]lthough the Federal and Alaska tests for obtaining relief . . . are similar, the defendant has a lesser burden of showing prejudice under the Alaska test." 750 P.2d at 823-24; *see* People v. White, 370 N.W.2d 405, 408-09 (Mich. Ct. App. 1985) (holding that even if attorney performs as well as lawyer with ordinary skill in criminal law, defendant may establish ineffective assistance by proving that but for attorney's act or omission defendant would have had reasonable chance of acquittal); People v. Wilson, 406 N.W.2d 294, 297-98 (Mich. Ct. App. 1987) (same); People v. Dombrowski, 163 A.D.2d 873 (N.Y. App. Div. 1990) (using totality of cir-

B. *Guilty Pleas*

Defendants who argue that their attorneys represented them ineffectively claim that courts should vacate their sentences and set aside their guilty pleas because such pleas were not voluntarily and intelligently made.[63] Guilty pleas result in waivers of certain constitutional rights including the right to trials by jury and the right to be confronted by witnesses.[64] The Supreme Court has stated that an estimated ninety percent of all criminal convictions, and seventy to eighty-five percent of all felony convictions, are entered through guilty pleas.[65] Recently, these percentages have risen due to increasingly congested court dockets.[66] If pleas are not entered into voluntarily and intelligently, such pleas violate defendants' due process rights.[67]

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cumstances to determine whether defendant received meaningful representation); People v. Baldi, 429 N.E.2d 400, 405 (N.Y. 1981) (same).

63. *See, e.g.*, People v. Pozo, 746 P.2d 523, 525-26 (Colo. 1987) (en banc) (describing defendant's argument that guilty plea was not voluntarily and intelligently made due to counsel's failure to inform defendant about deportation consequences of guilty plea); United States v. Campbell, 778 F.2d 764, 766 (11th Cir. 1985) (same); United States v. Gavilan, 761 F.2d 226, 227-28 (5th Cir. 1985) (same).

64. Brady v. United States, 397 U.S. 742, 748 (1970). In *Brady*, the defendant pleaded guilty to kidnapping charges and was sentenced to fifty years in prison, which was later reduced to thirty years. *Id.* He entered a guilty plea because he feared the death penalty, which was authorized for kidnapping pursuant to 18 U.S.C. § 1201(a). *Id.* The portion of 18 U.S.C. that authorized the death penalty was subsequently held to be unconstitutional. United States v. Jackson, 390 U.S. 570 (1968). The defendant attempted to withdraw his guilty plea, claiming that it was involuntary because it was coerced out of the fear of greater punishment and because the punishment that he feared was subsequently invalidated. *Brady*, 397 U.S. at 749-55. The court held that the defendant was fully aware of the consequences of his plea. *Id.* at 755. According to the Court, guilty pleas are not invalid because they are made out of fear of greater punishment. *Id.* Pleas are also not invalid when made based on consequences that are later invalidated. *Id.*

65. *Brady*, 397 U.S. at 752 n.10.

66. *See* U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 528-29, tbl. 5.36 (Timothy J. Flanagan & Kathleen Maguire eds., 1991). In 1989, 87% of all federal criminal convictions were obtained through pleas of guilty or nolo contendere. *Id.* In 1988, 91% of state felony convictions in a survey of 300 counties were obtained through plea bargaining. *Id.* at 545, tbl. 5.48.

67. *See* Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (holding that defendant's guilty plea was constitutionally invalid because trial judge asked no questions to determine whether guilty plea was voluntary). A plea of guilty will not be considered voluntary if it is the product of government threats or government coercion. Brady v. United States, 397 U.S. 742, 750 (1970). A plea of guilty will not be considered intelligent if the defendant is not aware of important elements of the offense or of the direct consequences of the offense. *See* Henderson v. Morgan, 426 U.S. 637 (1976)

1. Constitutional and Federal Standards for Vacating Guilty Pleas

In the 1960s, the Supreme Court began to scrutinize lower court decisions to ensure that guilty pleas were entered into voluntarily and intelligently.[68] In *McCarthy v. United States*,[69] the Supreme Court vacated a defendant's sentence and reversed his guilty plea because the trial judge had not taken appropriate steps to ensure that the plea was knowing and voluntary.[70] The trial judge had not inquired to determine whether the plea was voluntary and had not asked the defendant whether he understood the nature of the charge against him.[71] The Court discussed the due process requirements of guilty pleas, but based its decision on Rule 11 of the Federal Rules of Criminal Procedure (the "FRCP").[72]

The FRCP and related state statutes[73] delineate, among

(holding that defendant's plea of guilty to second degree murder was not intelligently entered because defendant was not aware that intent was a crucial element of the offense); United States v. Richardson, 483 F.2d 516 (8th Cir. 1973) (holding that plea was not entered intelligently because defendant was not sufficiently apprised of mandatory special parole term considered to be direct consequence of guilty plea); *see generally* STEPHEN SALTZBURG & DANIEL CAPRA, AMERICAN CRIMINAL PROCEDURE 802-21 (4th ed. 1992) (analyzing requirements for valid guilty pleas).

68. *See, e.g.*, McCarthy v. United States, 394 U.S. 459 (1969) (reversing defendant's guilty plea pursuant to Rule 11 of Federal Rules of Criminal Procedure because trial judge did not inquire into whether the defendant's plea was voluntary); *Boykin*, 395 U.S. 238 (holding that defendant's guilty plea was constitutionally invalid because trial judge asked no questions to determine whether the defendant's plea was voluntary).

69. 394 U.S. 459 (1969).

70. *Id.* at 464-65. In *McCarthy*, the defendant pleaded guilty to tax evasion. *Id.* at 461. Before he entered a plea, the judge asked the defendant if he desired to plead guilty, if he understood that he was waiving his right to a trial by jury, if he realized that a plea subjected him to imprisonment of up to five years and a fine as high as $10,000 and whether his plea was induced by threats or promises. *Id.* The judge did not inquire into the defendant's understanding of the nature of the charge. *Id.*

71. *Id.* at 464-67.

72. *Id.* Rule 11(c) of the Federal Rules of Criminal Procedure provides, in pertinent part, that

> [b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term . . . .

FED. R. CRIM. P. 11(c).

73. *See, e.g.*, N.Y. CRIM. P. LAW §§ 220.10-220.60 (McKinney 1992) (setting forth New York rules governing guilty pleas).

other things, the responsibilities of the judiciary and the rights of defendants regarding guilty pleas.[74] Rule 11(c) of the FRCP requires that judges ensure that defendants understand the charges to which pleas are offered and the accompanying mandatory minimum penalties provided by law, before accepting guilty pleas.[75] Thus, courts will vacate guilty pleas if they are not entered into voluntarily and intelligently in accordance with Rule 11 or related state statutes, based on either constitutional or non-constitutional grounds. Rule 32(d) of the FRCP provides that defendants may withdraw pleas before the imposition of sentence for any fair and just reason, and after sentencing through direct appeals or habeas corpus proceedings.[76] Therefore, courts may also permit withdrawal of guilty pleas under the less stringent "fair and just" standard of Rule 32(d) and similar state statutes. Prior to 1983, Rule 32(d) authorized judges to allow defendants to withdraw pleas after

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74. *See, e.g.*, FED. R. CRIM. P. 11 and 32 (outlining rules and responsibilities regarding guilty pleas in federal court).

75. *See supra* note 72 (setting forth language of Rule 11(c)).

76. FED. R. CRIM. P. 32(d). Rule 32(d) states that

> [i]f a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

Id. Section 2255 of Title 28 of the United States Code permits defendants to submit habeas corpus motions to federal court. 28 U.S.C. § 2255 (1988 & Supp. III 1991). A number of cases cited herein, *see, e.g.*, Sambro v. United States, 454 F.2d 918 (D.C. Cir. 1971) (per curiam), *motion for rehearing en banc denied*, 454 F.2d 924 (D.C. Cir. 1971) (per curiam); Parrino v. United States, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954), refer to the former Rule 32(d) which stated that "[a] motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." Former FED. R. CRIM. P. 32(d).

The former Rule 32(d) did not establish the standard for pre-sentencing withdrawal of guilty pleas. FED. R. CRIM. P. 32(d) advisory committee's note. The amended rule established the "fair and just" standard. *Id.* The "manifest injustice" standard for post-sentencing relief was repealed because it was found to be essentially the same as the standard of relief already available under 28 U.S.C. § 2255 (1988 & Supp. III 1991), the federal habeas corpus statute. *Id.* Pleas may only be vacated under this standard if permitting them to remain constitutes "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424 (1962). Thus, cases formerly decided pursuant to the manifest injustice standard would today be resolved through habeas corpus proceedings. FED. R. CRIM. P. 32(d) advisory committee's note.

sentencing to correct "manifest injustice."[77] The manifest injustice standard was repealed because it was found to be essentially the same as the standard of relief already available through habeas corpus proceedings,[78] although state courts continue to permit withdrawal of guilty pleas after sentencing to prevent miscarriages of justice.[79] These rules serve to protect defendants' due process rights.[80]

In addition to the FRCP, due process rights are implicated when defendants enter guilty pleas.[81] In *Boykin v. Alabama*,[82] the Supreme Court held that the State of Alabama did not show a constitutionally valid waiver of the right to a trial by jury where the record did not indicate that the defendant's guilty plea was voluntary and intelligent.[83] Therefore, the Court found a due process violation and held that the defendant's guilty plea was void.[84]

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77. *See supra* note 76 (setting forth text of former Federal Rule of Criminal Procedure 32(d)).

78. *See supra* note 76 (setting forth standard of relief for habeas corpus proceedings).

79. *See, e.g.*, People v. Kadadu, 425 N.W.2d 784, 787 (Mich. App. 1988) (holding that trial court did not abuse its discretion in permitting alien who entered guilty plea without awareness of deportation consequences to withdraw plea to prevent miscarriage of justice).

80. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (holding that guilty plea entered into pursuant to Rule 11 must be voluntary and knowing or it is obtained in violation of defendant's due process rights).

81. Boykin v. Alabama, 395 U.S. 238, 243 (1969) .

82. *Id.* The defendant was arrested for common law robbery, an offense punishable in Alabama, at that time, by death. *Id.* at 239. At his arraignment, the defendant pleaded guilty. *Id.* The record did not indicate that the judge had asked any questions of the defendant to ensure that the plea was entered voluntarily and intelligently. *Id.* Because the record was wholly silent, the Supreme Court held that the plea could not be considered voluntary. *Id.* at 242.

83. *Id.*

84. *Id.* at 243. Justice John M. Harlan dissented, stating that the majority changed Rule 11 of the FRCP, which requires that judges ensure that pleas are entered into knowingly and voluntarily, from a statutory to a constitutional standard by finding a due process violation. *Id.* at 246-47 (Harlan, J., dissenting). The Supreme Court recently elaborated on the *Boykin* standard in Parke v. Raley, 113 S. Ct. 517, 523-24 (1992), upholding a state persistent felony offender sentencing statute that attaches a presumption of regularity to judgments once the state proves their existence. *Id.* In *Parke*, the Court refused to invalidate a statute that places the ultimate burden of persuasion upon the state, but once the state proves the existence of the convictions, shifts the burden to the defendants to produce evidence of their invalidity. *Id.* The Court further held that in collateral attacks of prior convictions, it is not assumed from the unavailability of transcripts that defendants were not advised of their rights prior to entering guilty pleas. *Id.*

2. Ineffective Assistance of Counsel Relating to Guilty Pleas: *Hill v. Lockhart*

The Supreme Court established constitutional standards for ineffective assistance of counsel claims with respect to guilty pleas in *Hill v. Lockhart*.[85] In *Hill*, the Court stated that the professional competence tier of the *Strickland* test remains the same for ineffective assistance of counsel claims based on guilty pleas.[86] Attorney performance must be below an objectively reasonable standard.[87] Under the second, or prejudice tier, defendants must demonstrate that counsels' constitutionally unreasonable assistance adversely affected the outcome of the plea process.[88] Defendants must establish that, but for counsels' errors, they would not have entered guilty pleas and would have insisted on going to trial.[89]

In *Hill*, the defendant claimed that counsel's assistance was constitutionally ineffective because counsel gave erroneous advice about parole eligibility.[90] The Court refused to determine whether misinformation regarding parole eligibility constitutes constitutionally ineffective assistance of counsel because the defendant failed to establish prejudice.[91] The petitioner did not allege special circumstances supporting the conclusion that he would not have pleaded guilty had counsel correctly informed him about his parole eligibility date.[92]

3. The Collateral Consequences Doctrine

Frequently, courts refuse to reverse defendants' guilty pleas despite their lack of awareness of certain results of conviction that are deemed to be "collateral consequences," which are beyond the scope of trial counsels' responsibilities.[93] Col-

85. 474 U.S. 52 (1985). In *Hill*, the defendant pleaded guilty to charges of first degree murder and theft of property. *Id.* at 53. The trial court sentenced him to concurrent prison terms of thirty-five years and ten years. *Id.* at 54. The defendant's attorney informed him that he would be eligible for parole after serving one-third of his term, when in fact he had to serve one-half of his sentence. *Id.* at 55.

86. *Id.* at 58-59.

87. *Id.* at 57-58.

88. *Id.* at 59.

89. *Id.*

90. *Id.* at 53.

91. *Id.* at 60.

92. *Id.*

93. *See, e.g.*, United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985); Tafoya

lateral consequences are results of criminal convictions that are not considered direct consequences and are not imposed by the sentencing judge.[94] Courts generally do not find ineffective assistance of counsel when attorneys fail to inform defendants about collateral consequences.[95]

The collateral consequences doctrine originally stated that trial judges did not have to inform defendants of all the possible effects of criminal convictions, but only the direct consequences.[96] This doctrine was based on the rationale that because such a wide variety of potential consequences exist, one could not expect judges to warn defendants about every possible result of conviction.[97] Many later courts, pursuant to the collateral consequences doctrine, ruled that attorneys also have no duty to inform defendants about collateral consequences.[98]

Courts have refused to reverse defendants guilty pleas in a variety of circumstances, holding that lack of information about collateral consequences does not provide a basis for relief.[99] These circumstances include loss of the right to a driver's license[100] and the possibility of increased punishment

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v. State, 500 P.2d 247, 252 (Ala. 1972), *cert. denied*, 410 U.S. 945 (1973). For a complete analysis of collateral consequences, *see* Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157 (1981). Ms. Budeiri argues that judges should be required to present defendants with lists of all possible legal consequences stemming from guilty pleas. *Id.* at 199-203. This requirement, according to Ms. Budeiri, would place a minimal burden on the courts and would guarantee that defendants are aware of the consequences of their pleas. *Id.* at 202-03.

94. Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974).

95. *See, e.g.*, State v. Malik, 680 P.2d 770, 772 (Wash. App.) (holding that attorneys do not provide ineffective assistance of counsel when they fail to inform defendants of collateral consequences of criminal convictions), *appeal denied*, 102 Wash.2d 1023 (1984).

96. *See, e.g.*, *Malik*, 680 P.2d at 772 (holding that attorneys must only inform defendants of direct consequences of criminal convictions).

97. *Id.*

98. *See, e.g.*, Tafoya v. State, 500 P.2d 247 (Alaska 1972) (holding that attorneys have no duty to inform defendants about deportation possibilities, which it deemed a collateral consequence), *cert. denied*, 410 U.S. 945 (1973).

99. *See* Paradiso v. United States, 482 F.2d 409, 415 (3d Cir. 1973) (holding that imposition of consecutive rather than concurrent prison terms for plea on more than one charge is collateral consequence); Meaton v. United States, 328 F.2d 379, 380-81 (5th Cir. 1964) (holding that loss of right to vote and to travel abroad is collateral consequence).

100. Moore v. Hinton, 513 F.2d 781, 782-83 (5th Cir. 1975).

for subsequent offenses.[101] In some situations, however, courts vacate guilty pleas when attorneys fail to make certain consequences known.[102] Courts have found these consequences to be direct results of conviction, rather than collateral consequences.[103] Such consequences include failure to inform the defendant that a federal sentence will not begin to run until the defendant is released from state custody,[104] failure to inform the defendant of a mandatory special parole term[105] and failure to inform the defendant of ineligibility for parole.[106]

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101. *See* Wright v. United States, 624 F.2d 557, 561 (5th Cir. 1980); Dorrough v. United States, 385 F.2d 887, 893 (5th Cir. 1967), *cert. denied*, 394 U.S. 1019 (1969); Fee v. United States, 207 F. Supp. 674, 677-78 (W.D. Va. 1962); *see also* 18 U.S.C. § 922(g) (1988 & Supp. III 1991) (stating that persons convicted of certain crimes lose right to possess firearms); United States v. Crowley, 529 F.2d 1066 (3d Cir.) (holding that loss of civil service employment is collateral consequence), *cert. denied*, 425 U.S. 995 (1976); *Paradiso*, 482 F.2d at 415 (holding that imposition of consecutive rather than concurrent prison terms for plea on more than one charge is collateral consequence); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir.) (holding that possibility of civil proceeding for commitment to state mental institution is collateral consequence), *cert. denied*, 414 U.S. 1005 (1973); Hutchison v. United States, 450 F.2d 930, 931 (10th Cir. 1971) (holding that loss of good time credit is collateral consequence); Waddy v. Davis, 445 F.2d 1, 3 (5th Cir. 1971) (holding that disenfranchisement is collateral consequence); *Meaton*, 328 F.2d 379, 380-81 (holding that loss of right to vote and to travel abroad is collateral consequence); Redwine v. Zuckert, 317 F.2d 336, 337-38 (D.C. Cir. 1963) (holding that possibility of discharge from armed forces is collateral consequence); United States v. Casanova's, Inc., 350 F. Supp. 291, 292 (E.D. Wis. 1972) (holding that loss of business license to sell firearms is collateral consequence).

102. *See* United States v. Richardson, 483 F.2d 516, 519-20 (8th Cir. 1973) (holding that mandatory special parole term is direct consequence); United States v. Myers, 451 F.2d 402, 404-05 (9th Cir. 1972) (holding that knowledge that federal sentence will not begin to run until defendant is released from state custody is direct consequence).

103. *See Richardson*, 483 F.2d at 519-20 (holding that mandatory parole term is direct consequence); *Myers*, 451 F.2d at 404-05 (holding that knowledge that federal sentence will not begin to run until defendant is released from state custody is direct consequence).

104. *Myers*, 451 F.2d at 404-05.

105. *Richardson*, 483 F.2d at 519-20.

106. Bye v. United States, 435 F.2d 177, 179 (2d Cir. 1970); Berry v. United States, 412 F.2d 189, 192 (3d Cir. 1969); Durant v. United States, 410 F.2d 689, 693 (1st Cir. 1969). A minority view finds ineligibility for parole to be a collateral consequence. Trujillo v. United States, 377 F.2d 266, 269 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967); Smith v. United States, 324 F.2d 436, 441 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 957 (1964).

C. *Overlap Between Criminal Law and Immigration Law*

There is extensive overlap between criminal law and immigration law.[107] Although aliens share many of the same rights and privileges that citizens enjoy, certain criminal convictions can result in deportation for aliens.[108] Therefore, dispositions of criminal cases that do not represent convictions under the immigration laws are preferable to aliens, because deportation often flows from such convictions.[109] Aliens convicted of crimes who are faced with deportation, however, may be eligible for relief, such as pardons[110] and discretionary relief from the Attorney General.[111]

1. Crimes That Expose Aliens to Potential Deportation

Many types of criminal convictions expose aliens to potential deportation.[112] Often the convictions themselves, not the severity of the criminal sentences, have immigration repercussions.[113] For example, convictions for most minor narcotics offenses, which often result in suspended prison sentences, can result in deportation for aliens.[114]

Aliens may be deported from the United States if convicted of a crime involving moral turpitude and sentenced to imprisonment or imprisoned for one year or longer, within five years of entering the United States.[115] Aliens may also be de-

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107. 8 U.S.C. § 1251(a)(2) (1988 & Supp. III 1991). Section 1251(a)(2) delineates the crimes that potentially subject aliens to deportation. *Id.*

108. *Id.* Certain behavior that is not associated with criminal convictions can also have deportation consequences. *See, e.g.*, 8 U.S.C. § 1251(a)(2)(B)(ii) (1988 & Supp. III 1991) (stating that drug addicts and drug abusers are deportable).

109. 8 U.S.C. § 1251(a)(2)(B)(ii) (1988 & Supp. III 1991).

110. 8 U.S.C. 1251(a)(2)(A)(iv) (1988 & Supp. III 1991) (authorizing pardons to aliens who are deportable due to convictions for crimes of moral turpitude and aggravated felonies).

111. 8 U.S.C. § 1182(c) (1988 & Supp. III 1991).

112. 8 U.S.C. § 1251(a)(2) (1988 & Supp. III 1991) (delineating crimes that potentially subject aliens to deportation).

113. *Id.* Aliens who are convicted of crimes involving moral turpitude, within five years of entering the country and are sentenced to confinement or are confined for one year or more may be deported. 8 U.S.C. § 1251(a)(2)(A)(i) (1988 & Supp. III 1991). All other convictions that potentially subject aliens to deportation do not consider the length of imprisonment. 8 U.S.C. § 1251(a)(2) (1988 & Supp. III 1991).

114. *See supra* note 11 (describing case where deportation proceedings were instituted following minor narcotics conviction).

115. 8 U.S.C. § 1251(a)(2)(A)(i) (1988 & Supp. III 1991). Moral turpitude has never been comprehensively defined, but the Board of Immigration Appeals (the

ported, at any time after entry, if convicted of two crimes involving moral turpitude, not arising out of the same "scheme of misconduct."[116] Such aliens may be deported regardless of the sentences imposed as a result of the convictions.[117] In addition, aliens convicted of aggravated felonies are subject to deportation.[118]

Violations of various other statutes make aliens eligible for deportation as well.[119] Generally, aliens may be deported for any violation of, or conspiracy to violate, U.S. narcotics laws.[120] Aliens may be deported following convictions under any law related to purchase, possession or sale of firearms or destructive devices.[121] Finally, aliens may be deported for convictions under certain federal statutes related to sedition, sabotage, treason, espionage or certain violations of the Military Selective Service Act or the Trading with the Enemy Act.[122]

2. Relief from Deportation

Despite the consequences of the immigration laws, some

"Board") has described it as "conduct that shocks the public conscience as being inherently base, vile or depraved, contrary to the rules of morality and the duties owed to one's fellow man or society in general." Matter of Danesh, 19 I&N 669, 670 (BIA 1988). To determine whether a particular crime involves moral turpitude, the Board examines, on a case-by-case basis, the statute violated and the defendant's record of convictions. Matter of Esfandiary, 16 I&N 659 (BIA 1979). For a list of crimes that have been found to entail moral turpitude, *see* RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 11.03(a) (2d ed. 1992).

116. 8 U.S.C. § 1251(a)(2)(A)(ii) (1988 & Supp. III 1991).

117. *Id.*

118. 8 U.S.C. § 1251(a)(2)(A)(iii) (1988 & Supp. III 1991). The Immigration and Naturalization Service may deport any alien convicted of an aggravated felony, at any time after the alien enters the United States. *Id.* Immigration law defines aggravated felonies to include murder, drug or firearms trafficking or conspiracy or attempt to commit such crimes. 8 U.S.C. § 1101(a)(43) (1988 & Supp. III 1991).

119. 8 U.S.C. § 1251(a)(2)(C) and (D) (1988 & Supp. III 1991).

120. 8 U.S.C. § 1251(a)(2)(B)(i) (1988 & Supp. III 1991). Aliens, however, are not subject to deportation for a single offense of possession for one's own use of thirty grams or less of marijuana. *Id.* They may be deported for multiple offenses involving less than thirty grams of marijuana or possession other than for one's own use. *Id.* Also, aliens may be deported if they are, or at any time after entry to the United States become, drug abusers or drug addicts. 8 U.S.C. § 1251(a)(2)(B)(ii) (1988 & Supp. III 1991).

121. 8 U.S.C. § 1251(a)(2)(C) (1988 & Supp. III 1991).

122. 8 U.S.C. § 1251(a)(2)(D) (1988 & Supp. III 1991). The Trading with the Enemy Act is found at 50 U.S.C. App. §§ 1-44 (1988 & Supp. II 1990). The Military Selective Service Act is found at 50 U.S.C. App. §§ 451-73 (1988 & Supp. II 1990).

relief is available for aliens faced with deportation.[123] Aliens who may be deported because of convictions for crimes of moral turpitude or aggravated felonies may apply for full and unconditional pardons from the President of the United States or a Governor of one of the states.[124] In addition, permanent residents[125] of seven or more consecutive years may have deportation proceedings waived at the discretion of the Attorney General.[126]

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123. *See, e.g.*, 8 U.S.C. § 1251(a)(2)(A)(iv) (1988 & Supp. III 1991) (authorizing presidential or gubernatorial pardons in certain situations). Immigration law distinguishes between deportation and exclusion. *Compare* 8 U.S.C. § 1182 (1988 & Supp. III 1991) (listing grounds for exclusion) *with* 8 U.S.C. § 1251 (1988 & Supp. III 1991) (listing grounds for deportation). Critical to this distinction is whether the alien has made an "entry," defined as any "coming" into the United States, lawful or unlawful. 8 U.S.C. § 1101(a)(13) (1988 & Supp. III 1991). Frequently, aliens are paroled into the United States by the INS. 8 U.S.C. § 1182(d)(5) (1988 & Supp. III 1991). Such aliens are permitted into the United States if the Attorney General finds that it is in the public interest to do so, and they are not deemed to have made an entry into the United States. *Id.* Aliens who have made an entry may be subject to deportation proceedings. 8 U.S.C. § 1251 (1988 & Supp. III 1991). Aliens who have not made an entry may be subject to exclusion proceedings. 8 U.S.C. § 1182 (1988 & Supp. III 1991). Although many grounds for exclusion are also grounds for deportation, *see, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i) (1988 & Supp. III 1991) (permitting exclusion of aliens convicted of crimes involving moral turpitude) and 8 U.S.C. § 1251(a)(2)(A)(i) (1988 & Supp. III 1991) (permitting deportation of aliens convicted of crimes involving moral turpitude), many grounds for exclusion are not also grounds for deportation. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i) (1988 & Supp. III 1991)(permitting exclusion of aliens who admit having committed or admit having committed acts that constitute the essential elements of crimes of moral turpitude); 8 U.S.C. § 1182(a)(1)(A)(i) (1988 & Supp. III 1991) (permitting exclusion of aliens who have communicable diseases of public health significance); 8 U.S.C. § 1182(a)(1)(A)(ii) (1988 & Supp. III 1991) (permitting exclusion of aliens with physical or mental disorders that may pose threats property, safety or welfare of aliens or others).

124. 8 U.S.C. § 1251(a)(2)(A)(iv) (1988 & Supp. III 1991).

125. *See* STEEL, *supra* note 115, § 2.08 (stating that permanent resident is person intending to, and granted permission by INS to remain in United States on permanent basis). For a discussion of the requirements for permanent resident status, *see* STEEL, *supra* note 115, §§ 4.01-4.19, §§ 5.01-5.27.

126. 8 U.S.C. § 1182(c) (1988 & Supp. III 1991). This relief is unavailable to aliens convicted of aggravated felonies who have served at least five years in prison. *Id.* Section 1182(c) provides that the Attorney General may waive grounds of excludability for permanent residents of seven or more consecutive years who are returning from temporary trips abroad. *Id.* Although the provision applies only to aliens who are returning to the United States, courts have applied the provision to deportation proceedings, holding that no rational basis exists for applying it solely to exclusion proceedings. *See, e.g.*, Francis v. Immigration & Naturalization Service, 532 F.2d 268 (2d Cir. 1976); Matter of Hernandez-Casillas, Interim Dec. 3147 (BIA 1990); Matter of Silva, 16 I&N 26 (BIA 1976). Such relief is only available if aliens are found deportable on grounds for which there are comparable grounds of exclusion. *See, e.g.*,

Aliens may also have deportation suspended under certain circumstances.[127] Deportation may be suspended if aliens have lived in the United States for seven or ten years depending upon the crime, show good moral character, and if deportation would result in extreme hardship to themselves, or to relatives who are citizens or permanent residents.[128] If suspension of deportation is granted, aliens are thereby converted to permanent residents.[129]

Aliens may also be granted voluntary departure in lieu of deportation proceedings.[130] Aliens who are granted voluntary departure are not barred from returning to the United States as lawful immigrants.[131] The disadvantage for aliens who are granted voluntary departure, of course, is that they must immediately leave the United States.

Aliens who are faced with deportation have several other possible sources of relief. By proving a possibility of persecution upon being deported, they may receive asylum[132] or they may be granted withholding of deportation.[133] Also, immigration judges have discretion to terminate deportation proceedings to permit aliens to proceed to final naturalization hearings, if such aliens show a likelihood of success and if humanitarian factors make termination appropriate.[134] Finally, under

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Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988); Matter of Hernandez-Casillas, Interim Dec. 3147 (BIA 1990).

127. 8 U.S.C. § 1254(a) (1988 & Supp. III 1991).

128. *Id.* Suspension of deportation may be rescinded under certain circumstances. 8 U.S.C. § 1256 (1988 & Supp. III 1991). In the ten year cases, the hardship necessary for suspension of deportation must be "exceptional and extremely unusual." 8 U.S.C. § 1254(a) (1988 & Supp. III 1991).

129. 8 U.S.C. § 1254(a) (1988 & Supp. III 1991).

130. 8 U.S.C. § 1254(e) (1988 & Supp. III 1991). The vast majority (97.5%) of aliens who are detained by the INS opt for voluntary departure. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984) (stating that majority of aliens who are faced with deportation proceedings opt for voluntary departure).

131. 8 U.S.C. § 1182(a)(6)(A-B) (1988 & Supp. III 1991). Deportation precludes aliens from returning to the United States for five years, or twenty years for aliens convicted of aggravated felonies. 8 U.S.C. § 1182(a)(6)(B)(iv) (1988 & Supp. III 1991).

132. 8 U.S.C. § 1158 (1988 & Supp. III 1991); *see* STEEL, *supra* note 115, § 8.07(a) (analyzing requirements for granting of asylum).

133. 8 U.S.C. § 1253(h) (1988 & Supp. III 1991); *see* STEEL, *supra* note 115 § 14.35 (analyzing requirements for withholding of deportation).

134. 8 C.F.R. § 242.7(e) (1992). Aliens must establish prima facie eligibility for naturalization and case must involve "exceptionally appealing or humanitarian factors." *Id.*

exceptional circumstances, Congress may enact legislation permitting aliens to remain in the United States as permanent residents.[135]

Prior to the 1990 amendment to the Immigration and Nationalization Act, aliens who were deportable because of convictions for crimes of moral turpitude or aggravated felonies had one additional avenue of relief.[136] They were permitted to apply for Judicial Recommendations Against Deportation ("JRADs").[137] Sentencing judges, following application by defendants, had the power to issue orders, binding upon the Immigration and Naturalization Service, that the convictions not be used for deportation purposes.[138]

As a result, in *Janvier v. United States*,[139] an attorney's failure to apply for a JRAD resulted in a successful charge of ineffective assistance of counsel.[140] In *Janvier*, the court vacated the guilty plea of a Haitian citizen, and permanent resident of the United States, who had pleaded guilty to smuggling counterfeit currency into the United States.[141] The defendant claimed that counsel's representation did not meet the constitutional minimum required by *Strickland* because counsel failed to request a JRAD after sentencing.[142] Counsel admitted that he was unaware of the deportation consequences and that he made no effort to determine if such circumstances existed.[143] The court stated that this failure to investigate applicable law could not be considered adequate attorney behavior under prevailing professional norms, and thus vacated the defendant's guilty plea based on ineffective assistance of counsel.[144] In 1990, however, Congress repealed the Judicial Recommen-

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135. *See* STEEL, *supra* note 115, § 14.37(d) (stating that Congress may enact legislation permitting aliens to remain in the United States).

136. 8 U.S.C. § 1251(b)(2) (1988).

137. *Id.*

138. *Id.* If, however, defendants did not apply for JRADs within 30 days, any subsequent judicial orders were not binding upon the Immigration and Naturalization Service. Matter of Tafoya-Gutierrez, 13 I&N 342 (BIA, 1969).

139. 659 F. Supp. 827 (N.D.N.Y. 1987), *on remand from*, 793 F.2d 447 (2d Cir. 1986).

140. *Id.* at 828-29.

141. *Id.* at 829.

142. *Id.*

143. *Id.* at 829.

144. *Id.* The court stated that although failure to seek a JRAD could conceivably serve a strategic purpose, such circumstances were not present. *Id.* at 828-29.

dation Against Deportation provision[145] because it felt that sentencing judges who have expertise regarding criminal law issues should not pass binding judgments concerning immigration issues.[146]

II. *SPLIT OF AUTHORITY CONCERNING COUNSEL'S DUTY TO INFORM ALIENS OF THE DEPORTATION CONSEQUENCES OF GUILTY PLEAS*

Courts are split over whether failure to inform defendants of the deportation consequences of criminal convictions by trial counsel necessitates reversal of guilty pleas.[147] A majority of federal and state courts hold that counsels' failure to inform defendants of these consequences does not necessitate reversal of guilty pleas. Most of these courts hold that such behavior does not constitute ineffective assistance of counsel.[148] On the other hand, some state courts have vacated guilty pleas, holding that counsel have an affirmative duty to warn about deportation possibilities.[149] To prevent miscarriages of jus-

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145. 8 U.S.C. § 1254(a) (1988 & Supp. III 1991).

146. Comprehensive Crime Control Act of 1990, H.R. REP. No. 681(I), 101st Cong., 2d Sess. (1990).

147. *Compare, e.g.*, State v. Malik, 680 P.2d 770, 771-72 (Wash. App.) (holding that counsel has no duty to inform defendant of deportation consequences), *appeal denied*, 102 Wash.2d 1023 (1984) *with* United States v. Nagaro-Garbin, 653 F. Supp. 586, 591 (E.D. Mich. 1987) (holding that misinformation about deportation consequences under certain circumstances renders counsel's assistance ineffective), *aff'd*, 831 F.2d 296 (6th Cir. 1987) *and* People v. Pozo, 746 P.2d 523 (Colo. 1987) (en banc) (holding that counsel has affirmative duty to inform defendants of relevant consequences of guilty pleas including deportation consequences, when defendants are aliens).

148. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990) (holding that counsel's failure to inform defendant about deportation consequences of guilty pleas does not constitute ineffective assistance of counsel); United States v. George, 869 F.2d 333 (7th Cir. 1989) (same); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988) (same); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985) (same); United States v. Gavilan, 761 F.2d 226 (5th Cir. 1985) (same); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975) (same); Government of Virgin Islands v. Pamphile, 604 F. Supp. 753 (D.V.I. 1985) (same); State v. Ginebra, 511 So.2d 960 (Fla. 1987) (same); State v. Fundora, 513 So.2d 122 (Fla. 1987) (same); Mott v. State 407 N.W.2d 581 (Iowa 1987) (same); People v. Dor, 505 N.Y.S.2d 317 (1986) (same); *Malik*, 680 P.2d 770 (same); Tafoya v. State, 500 P.2d 247 (Alaska) (same), *cert. denied*, 410 U.S. 945 (1972).

149. *See, e.g.*, *Pozo*, 746 P.2d 523 (holding that counsel has affirmative duty to inform defendants of relevant consequences of guilty pleas including deportation consequences, when defendants are known to be aliens); People v. Soriano, 240 Cal. Rptr. 328 (Cal. Ct. App. 1987) (same).

tice, some state courts have permitted defendants to withdraw guilty pleas because they were unaware of deportation possibilities.[150] Alternatively, other state and federal courts have held that misinforming defendants about immigration ramifications may render counsels' assistance ineffective, although failure to inform of these ramifications does not.[151]

A. *Courts Refusing to Vacate or Permit Withdrawal of Guilty Pleas When Counsel Fails to Inform Aliens of Deportation Possibilities*

A majority of courts refuse to vacate or permit withdrawal of guilty pleas when counsel fails to inform defendants about immigration consequences of guilty pleas.[152] Although earlier decisions base their findings on the Federal Rules of Criminal Procedure that govern guilty pleas, most later cases base their decisions on the Sixth Amendment right to counsel, holding that counsels' failure to inform does not result in ineffective assistance of counsel.[153] Most courts that refuse to set aside

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150. *See* People v. Kadadu, 425 N.W.2d 784, 787 (Mich. 1988) (holding that trial court did not abuse its discretion in permitting alien who entered guilty plea without awareness of deportation possibilities to withdraw guilty plea); People v. Giron, 523 P.2d 636, 639-40 (Cal. 1974) (same). Although courts may vacate guilty pleas because of constitutional violations or because defendants' pleas were not entered into voluntarily and intelligently pursuant to the rules governing guilty pleas, *see, e.g.*, FED. R. CRIM. P. 11(c), courts also have discretion to permit defendants to withdraw guilty pleas pursuant to the looser "miscarriage of justice" standard. *Kadadu*, 425 N.W.2d at 787.

151. *See, e.g.*, Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985) (holding narrowly that representation may be ineffective if counsel misinforms, rather than fails to inform, defendant about deportation consequences of guilty plea, if defendant has colorable claim of innocence, and defendant faces execution upon returning to native country); United States v. Nagaro-Garbin, 653 F. Supp. 586 (E.D. Mich. 1987) (holding that representation is ineffective if counsel misinforms defendant about deportation consequences of guilty plea and defendant has colorable claim of innocence, although failure to inform does not constitute ineffective assistance), *aff'd*, 831 F.2d 296 (6th Cir. 1987); People v. Correa, 465 N.E.2d 507 (Ill. App.) (holding that representation is ineffective if counsel misinforms defendant about deportation consequences of guilty plea), *aff'd*, 485 N.E. 2d 307 (Ill. 1984).

152. *See supra* note 148 (listing courts that refused to find ineffective assistance of counsel for failing to inform aliens about deportation possibilities.)

153. *Compare* United States v. Parrino, 212 F.2d 919 (2d Cir. 1954) (holding that lack of knowledge of deportation consequences does not necessitate withdrawal of guilty plea pursuant to Rule 32(d) of Federal Rules of Criminal Procedure), *cert. denied*, 348 U.S. 840 (1954) *and* United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971) (per curiam) (holding that lack of knowledge of deportation consequences does not necessitate withdrawal of guilty plea pursuant to Rule 11 and Rule 32(d) of Federal Rules of Criminal Procedure), *motion for hearing en banc denied*, 454 F.2d 924 (D.C. Cir.

guilty pleas hold that attorneys have no duty to warn defendants about immigration ramifications because such possibilities are collateral consequences.[154] Therefore, these courts hold that information about deportation is beyond the scope of trial counsels' duties, and counsels' failure to warn does not fail to satisfy the professional competence tier of *Strickland*.[155] Other courts, evaluating defendants' ineffective assistance of counsel claims, refuse to vacate guilty pleas because the defendants failed to establish prejudice.[156]

1. Courts Relying on Collateral Consequences Doctrine When Refusing to Grant Relief

In *United States v. Parrino*,[157] the U.S. Court of Appeals for the Second Circuit, though not addressing the Sixth Amendment right to effective assistance of counsel, became the first court to state that deportation consequences are collateral.[158] In *Parrino*, the defendant alleged that he entered a guilty plea based on counsel's assurance that the plea would not result in deportation.[159] The defendant claimed that he would not have entered the plea if counsel had not misinformed him about these consequences.[160] He sought to withdraw his plea, claiming "manifest injustice," pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure.[161] The court, rejecting the defendant's claim, held that only lack of awareness of a direct result of a conviction provides a basis for retraction of a guilty

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1971) (per curiam) *with Malik*, 680 P.2d 770 (holding that counsel's failure to inform defendant of deportation possibilities does not constitute ineffective assistance of counsel pursuant to the Sixth Amendment) *and Tafoya*, 500 P.2d 247 (same).

154. *See supra* text accompanying notes 93-106 (analyzing collateral consequences doctrine.)

155. *See, e.g.*, United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985) (holding that counsels' behavior is reasonable despite failure to inform defendants about deportation consequences of guilty pleas).

156. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990) (refusing to find ineffective assistance of counsel because defendant failed to establish prejudice); United States v. Nino, 878 F.2d 101 (3d Cir. 1989) (same).

157. *Parrino*, 212 F.2d 919.

158. *Id.* at 922.

159. *Id.* at 921.

160. *Id.*

161. *Id.* at 920-21. The "manifest injustice" standard has been repealed. *See supra* note 76 and accompanying text (setting forth original manifest injustice standard and modern standard).

plea.[162] The court found that immigration proceedings, although potentially more damaging, were collateral civil proceedings and therefore did not provide a basis for retraction.[163] The court also stated that lack of awareness of deportation possibilities, resulting from erroneous information received from the defendant's own attorney, without a showing of unprofessional conduct, does not merit withdrawal of the defendant's plea.[164] The court noted that if the defendant was misled by statements made by the judge or by the United States Attorney, then relief would be possible.[165] In *Parrino*, however, such facts did not exist.[166]

In dissent, Judge Frank disputed the classification of deportation as a collateral consequence.[167] He noted that deportation, though not a criminal punishment, may have more severe effects than a criminal sentence.[168] He described the court's sentence as two years in prison and the rest of the defendant's life in exile.[169] Therefore, he reasoned that the defendant's lack of knowledge of deportation consequences constituted manifest injustice.[170]

In *United States v. Sambro*,[171] the U.S. Court of Appeals for the District of Columbia Circuit expanded upon the holding in *Parrino*, but also did not address the Sixth Amendment right to

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162. *Parrino*, 212 F.2d at 921-22.

163. *Id.* at 922. The court stated that

> [w]e do not fail to recognize the terrific impact on the defendant's life and family of the collateral consequence of deportation. But deportability is determined by the Immigration and Nationality Act . . . [a]nd even if we felt that the inflexibility of that Act was unduly harsh in its application to this particular defendant or to others, we may not properly let sympathy, thus engendered, by intrusion into the field of criminal administration disturb the finality of criminal process and thus undermine effective law enforcement.

Id.

164. *Id.* at 921.

165. *Id.*

166. *Id.*

167. *Id.* at 924 (Frank, J., dissenting).

168. *Id.* (Frank, J., dissenting).

169. *Id.* (Frank, J., dissenting).

170. *Id.* (Frank, J., dissenting). Judge Frank stated that he "cannot believe that no 'manifest injustice' exists merely because the sentence of banishment for life was not imposed directly by the judge." *Id.*

171. 454 F.2d 918 (D.C. Cir.) (per curiam), *motion for hearing en banc denied*, 454 F.2d 924 (D.C. Cir. 1971) (per curiam).

effective assistance of counsel.[172] In *Sambro*, the defendant had moved to withdraw his plea, pursuant to the manifest injustice standard of Rule 32(d), due to lack of knowledge of deportation ramifications, and the trial court had denied the motion.[173] On appeal, the defendant claimed that the trial court had abused its discretion in denying this motion, and that his plea was not voluntary and intelligent pursuant to Rule 11.[174] The record indicated that both the defendant and his attorney erroneously believed that the plea would not result in deportation.[175] The D.C. Circuit, citing *Parrino*, refused to permit withdrawal of the plea pursuant to Rule 32(d) and refused to find that the guilty plea was not entered into voluntarily and intelligently pursuant to Rule 11 simply because the defendant did not understand or foresee a collateral consequence.[176] The *Sambro* court did not distinguish between the defense attorney's failure to warn about deportation possibilities and the court's failure to warn, stating only that lack of knowledge of the consequence does not necessitate withdrawal of the plea.[177] Federal courts continue to hold that Rule 11 is not violated if aliens enter guilty pleas without awareness of deportation possibilities.[178]

In *United States v. Santelises*,[179] the Second Circuit elaborated on the difference between direct and collateral consequences.[180] The court stated that the distinction depends upon the degree of certainty with which the sanctions will af-

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172. *Id.*

173. *Id.* at 919-20.

174. *Id.*; *see supra* note 72 and accompanying text (setting forth courts' duties pursuant to Rule 11 of Federal Rules of Criminal Procedure).

175. *Sambro*, 454 F.2d at 921.

176. *Id.* at 922-23. Chief Judge Bazelon moved for a rehearing en banc and the motion was denied. *Id.* at 924. Chief Judge Bazelon dissented from the denial. *Id.* (Bazelon, J., dissenting from denial of motion for rehearing en banc). He considered it a "close question" whether a plea is involuntary pursuant to Rule 11 if the defendant lacks knowledge of deportation possibilities, though he did not decide the question. *Id.* at 925. Chief Judge Bazelon stated, however, citing Judge Frank's dissent in Parrino v. United States, 212 F.2d 919, 924 (2d Cir. 1954) (Frank, J., dissenting), *cert. denied*, 348 U.S. 840 (1954), that such lack of knowledge is sufficient to find manifest injustice pursuant to Rule 32(d). *Id.* at 926-27.

177. *Sambro*, 454 F.2d at 922.

178. Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir.), *cert. den.*, 429 U.S. 895 (1976); Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974).

179. 476 F.2d 787 (2d Cir. 1973), *later appeal*, 509 F.2d 703 (2d Cir. 1975).

180. *Id.* at 789-90.

fect defendants.[181] In *Santelises*, the defendant pleaded guilty to various charges related to the preparation of false immigration documents.[182] He was sentenced to concurrent one-year terms of probation.[183] During this probationary period, the Immigration and Naturalization Service brought discretionary deportation proceedings against him.[184] The court, invoking the collateral consequences doctrine, held that although convictions may lead to deportation, deportation is not such an absolute consequence of a conviction that due process requires judges to warn defendants of this possibility before accepting pleas.[185] Therefore, the court refused to vacate the defendant's plea.[186] The Second Circuit did not address the level of certainty necessary to make a consequence direct rather than collateral. It stated, however, that deportation, under the facts in *Santelises*, is not such an absolute consequence that it must be considered direct.[187]

In *Michel v. United States*,[188] however, the Second Circuit revised the formulation of collateral consequences espoused in *Santelises*.[189] The court held that Rule 11 of the Federal Rules of Criminal Procedure only requires that judges ensure that defendants understand the consequences of the sentence imposed in that specific criminal proceeding.[190] Therefore, under *Michel*, even if deportation following criminal convictions amounts to an absolute certainty, because it is punishment meted out by another agency, judges need not inform defendants of such possibilities.[191]

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181. *Id.*
182. *Id.* at 788.
183. *Id.*
184. *Id.*
185. *Id.* at 790. The court stated that deportation results
> only upon 'order of the Attorney General' who retains discretion whether or not to institute such proceedings. Deportation then, serious sanction though it may be, is not such an absolute consequence of conviction that we are mandated to read into traditional notions of due process a requirement that a district judge must warn each defendant of the possibility of deportation before accepting his plea.

Id.
186. *Id.* at 789-90.
187. *Id.* at 790.
188. 507 F.2d 461, 466 (2d Cir. 1974).
189. *Id.* at 465-66.
190. *Id.*
191. *Id.*

In *Michel*, the Second Circuit, elaborating upon *Parrino* and *Sambro*, refused to grant relief when a judge failed to inform a defendant about a collateral consequence.[192] The court held that judges have no duty to warn about deportation possibilities under Rule 11, stating that the judiciary has never been required to anticipate the "multifarious peripheral contingencies" that may effect defendants.[193] In fact, only one court has required that judges, under certain circumstances, inform defendants about deportation possibilities,[194] although

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192. *Id.*

193. *Id.*

194. *See* People v. Ford, 290 N.Y. L.J. 24 (Mar. 31, 1993) (N.Y. Sup. Ct. 1993). In *Ford*, the Supreme Court of New York became the first court to hold that, under certain circumstances, the trial judge has an affirmative duty, in order to satisfy due process, to inform aliens of the deportation ramifications of guilty pleas. *Id.* In *Ford*, a Jamaican citizen and permanent resident of the United States entered a guilty plea to reckless manslaughter and was sentenced to two to six years in jail. *Id.* The defendant, who was nineteen at the time, killed his girlfriend using a gun that he believed to be unloaded. *Id.* The judge stated that all parties to the incident agreed that the shooting was a tragic accident. *Id.* The defendant was released from prison on his first eligible parole date, but was subsequently moved to a deportation center after the Immigration and Naturalization Service initiated deportation proceedings against him because reckless manslaughter is considered a crime involving moral turpitude. *Id.*; *see supra* note 115 (defining moral turpitude).

The judge in *Ford* stated that although deportation is a collateral consequence that defendants normally need not be informed of in order to enter valid guilty pleas, such rules must be viewed against the "factual background" of the cases. People v. Ford, 290 N.Y. L.J. 24 (Mar. 31, 1993) (N.Y. Sup. Ct. 1993). The judge stated that in prior cases in which the collateral consequences doctrine was applied, the defendants had either intentionally committed a crime or had committed acts that were "intrinsically immoral". *Id.* Therefore, these defendants should have had the reasonable expectation that "serious consequences" might flow from the plea. *Id.*

But, according to the court, a different standard should apply in the case of an unintentional act committed by a nineteen year old, that did not actually involve moral turpitude. *Id.* The court stated that the trial judge, in order to satisfy due process, must ensure that the defendant understands the consequences of a guilty plea. *Id.*; *see supra* text accompanying notes 63-84 (setting forth standards for valid guilty pleas). Therefore, the judge vacated the defendant's guilty plea, holding that failure to inform a nineteen year old who pleaded guilty to a terrible accident that this admission could result in deportation does not meet constitutional muster. People v. Ford, 290 N.Y. L.J. 24 (Mar. 31, 1993) (N.Y. Sup. Ct. 1993). The judge further stated that not every defendant need be informed of deportation possibilities. *Id.* Rather, the court held narrowly that in cases where a reasonable person would not realize that the plea involves an admission of an act of moral turpitude, the court must inform the defendant of this fact. *Id.*

See also, David M. McKinney, Note, *The Right of the Alien To be Informed of Deportation Consequences Before Entering a Plea of Guilty or Nolo Contendere*, 21 SAN DIEGO L. REV. 195, 223-24 (1983) (arguing that because deportation can have devastating effects on aliens and their families, and because it is relatively simple for courts to ensure that

seven states have enacted statutes requiring judges to inform aliens about such possibilities before accepting their guilty pleas.[195] In *Michel*, the Second Circuit referred only to judges' duties, noting that Rule 11 was not intended to relieve attorneys of their responsibility to their clients.[196] The court emphasized that attorneys, not courts, have an affirmative duty to apprise defendants of potential immigration proceedings.[197] The court in *Michel* also did not address whether the attorney's failure to inform the defendant of deportation possibilities violated the Sixth Amendment right to effective assistance of counsel.[198]

In *Tafoya v. State*,[199] the Supreme Court of Alaska, citing *Parrino* and *Sambro*, held that counsel's representation was constitutionally sufficient despite failure to warn the defendant of the possibility of deportation.[200] Unlike previous decisions,

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aliens are aware of potential deportation consequences of their pleas, courts must inform defendants of deportation possibilities in order to satisfy defendant's Fifth Amendment due process rights). Despite the persuasiveness of the argument, courts generally have held that deportation consequences are collateral to the criminal charges, and have found that imposing a duty to inform defendants of all the collateral consequences of convictions places an unmanageable burden on trial judges. *See, e.g.*, Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (holding that judges have no duty to warn defendants about deportation consequences); Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir.) (same), *cert. den.*, 429 U.S. 895 (1976); State v. Malik, 680 P.2d 770, 772 (same), *appeal denied*, 102 Wash. 2d 1023 (1984).

195. *See* WASH. REV. CODE ANN. § 10.40.200 (West 1990) (imposing statutory duty upon judiciary to warn aliens about deportation possibilities before accepting guilty pleas); CAL. PENAL CODE § 1016.5 (West 1985) (same); CONN. GEN. STAT. ANN. § 54-1j (West 1985) (same); MASS. ANN. LAWS. ch. 278, § 29D (Law. Co-op 1992) (same); OR. REV. STAT. ANN. § 135.385 (1984) (same); TEX. CRIM. PROC. CODE ANN. § 26.13 (West 1992 & Supp. IV 1993) (same); OHIO REV. CODE ANN. § 2943.03.1 (Anderson 1993) (same).

196. *Michel*, 507 F.2d at 466. The court stated that "[d]efense counsel is in a much better position to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger. Rule 11, in our view, was not intended to relieve counsel of his responsibilities to his client." *Id.*

197. *Id.*

198. *Id.* Failure to address the Sixth Amendment right to effective assistance of counsel prompted the court, in Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979), to describe *Parrino* and *Sambro* as "aberrations." *Id.* at 64. The court stated that "[s]urely when ineffective assistance of counsel and prejudice are both established relief is routinely granted." *Id.* Thus, according to the court in *Strader*, the *Parrino* and *Sambro* courts should have viewed the cases as Sixth Amendment questions, and granted relief accordingly. *Id.*

199. 500 P.2d 247 (Alaska), *cert. den.*, 410 U.S. 945 (1972).

200. *Id.* at 252.

the court in *Tafoya* discussed the Sixth Amendment right to counsel.[201] The court held that defense attorneys have the burden of informing their clients of collateral consequences, but that failure to inform defendants of such consequences does not constitute ineffective assistance of counsel.[202] The court stated that although attorneys have the duty to inform defendants about deportation possibilities, certain attorney errors, including failure to inform of a collateral consequence, are not significant enough to warrant reversal of guilty pleas as violations of the Sixth Amendment right to the effective assistance of counsel.[203]

Today, most courts that refuse to reverse guilty pleas when attorneys fail to inform defendants of immigration ramifications rely on the collateral consequences doctrine as originally expressed in *Parrino*, *Sambro* and *Michel*.[204] In *State v. Malik*,[205] for example, the Washington Court of Appeals held that potential immigration problems are beyond the scope of trial counsels' responsibilities because they are collateral consequences.[206] The court held that counsels' duties are to aid defendants in evaluating prosecution evidence and to discuss potential direct consequences of guilty pleas.[207] In *Malik*, the court held that counsel offered constitutionally effective assistance by discussing the direct consequences of a guilty plea, and urging the defendant to seek the advice of an immigration lawyer.[208] Most courts that deny relief hold that counsels' omissions do not result in unreasonable assistance pursuant to the professional competence prong of *Strickland*.[209]

2. Courts Relying on Prejudice Tier of *Strickland* When Refusing to Grant Relief

Although most courts that refuse to vacate guilty pleas

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201. *Id.*
202. *Id.*
203. *Id.*
204. *See, e.g.*, United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985) (holding, through reliance on *Parrino* and *Santelises*, that failure to inform defendants about deportation consequences does not warrant revocation of guilty pleas).
205. 680 P.2d 770 (Wash. Ct. App.), *appeal denied*, 102 Wash 2d 1023 (1984).
206. *Id.* at 772.
207. *Id.*
208. *Id.*
209. *See, e.g.*, United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985); United States v. Campbell, 778 F.2d 764, 766 (11th Cir. 1985).

when attorneys fail to inform defendants of deportation possibilities base their denial on the professional competence tier of *Strickland*,[210] some courts base their refusal to vacate on the prejudice tier of *Strickland*.[211] In *United States v. Del Rosario*,[212] the U.S. Court of Appeals for the D.C. Circuit, while also citing the collateral consequences doctrine, focused its argument on the prejudice issue.[213] The court stated that the defendant was not able to show that he would not have entered a guilty plea and would have insisted on going to trial if his attorney had advised him of potential deportation consequences.[214] The court did not find any evidence indicating that the defendant would have placed any particular importance on deportation and cited evidence to the contrary.[215] In *Del Rosario*, the defense attorney, the trial judge and the defendant had discussed the fact that deportation was a possibility, though none purported to know for certain whether deportation would result from the conviction.[216] The defendant did not, at that time, express concern about deportation.[217] Holding that the defendant failed to show prejudice, the court emphasized that the evidence against the defendant was strong, that he admitted that he had "made a mistake" and that his desire to enter a plea of "not guilty" only arose seventeen months after his guilty plea and several months after he was served with a notice of deportation.[218] Based on this evidence, the court refused to find that the defendant established prejudice.[219]

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210. *See, e.g.*, *Gavilan*, 761 F.2d at 228; *Campbell*, 778 F.2d at 766.

211. *See* United States v. Del Rosario, 902 F.2d 55, 58 (D.C. Cir. 1990); United States v. Nino, 878 F.2d 101, 103 (3d. Cir. 1989).

212. *Del Rosario*, 902 F.2d 55.

213. *Id.* at 57-58.

214. *Id.*

215. *Id.* at 57.

216. *Id.*

217. *Id.*

218. *Id.* at 58.

219. *Id.*; *see* United States v. Nino, 878 F.2d 101 (3d Cir. 1989). In *Nino*, the U.S. Court of Appeals for the Third Circuit did not decide whether counsel's failure to inform the defendant of the deportation ramification of a plea constituted unreasonable attorney behavior because it determined that, even if such omission constituted unreasonable attorney behavior, the defendant still failed to establish prejudice. *Id.* at 105. The court stated that the defendant was caught with twenty-five pounds of cocaine in a car that he was driving and he discussed his knowledge of the cocaine with two Drug Enforcement Administration officers. *Id.* Thus, according to the court, the defendant would have pleaded guilty anyway, or if he did not plead

Concurring in the judgment, Judge Mikva expressed his concern that, under existing law, defendants who are entirely ignorant of deportation possibilities nonetheless will be held to their pleas.[220] Judge Mikva stated that deportation is entirely unlike losing one's driver's license or losing the right to a government job, and should not be treated like other collateral consequences.[221] In addition, Judge Mikva asserted that the court's decision allows the district court, when weighing prejudice claims, to serve as "Maximum Juror" by determining whether defendants would have succeeded at trial through a "guesstimate" of what a jury would have decided.[222] Judge Mikva stated that no judge can be comfortable with such a role.[223] He further recommended that Rule 11 should be amended to require judges to inform alien defendants that their guilty pleas may lead to deportation.[224]

B. *Courts Vacating or Permitting Withdrawal of Guilty Pleas When Counsel Fails to Inform Aliens About Deportation Possibilities*

Some state courts have recently vacated guilty pleas or permitted withdrawal of guilty pleas[225] when counsel failed to inform aliens of deportation possibilities.[226] Some of these de-

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guilty, he would have been found guilty at trial. *Id.* Therefore, the court refused to accept the defendant's claim of prejudice, finding unpersuasive the defendant's claim that he would not have pleaded guilty if he had been aware of the deportation ramifications. *Id.*

220. *Del Rosario*, 902 F.2d at 61 (Mikva, J., concurring in the judgment).

221. *Id.* (Mikva, J., concurring in the judgment).

222. *Id.* (Mikva, J., concurring in the judgment).

223. *Id.* (Mikva, J., concurring in the judgment).

224. *Id.* (Mikva, J., concurring in the judgment).

225. *See supra* text accompanying notes 74-79 (describing difference between vacating guilty pleas and permitting withdrawal of guilty pleas).

226. *See, e.g.*, People v. Pozo, 746 P.2d 523, 527-28 (Colo. 1987) (en banc) (holding that counsel has affirmative duty to inform defendants of areas of law that are crucial to defendants' cases, including deportation possibilities when defendants are aliens); People v. Soriano, 240 Cal. Rptr. 328, 335-36 (Cal. Ct. App. 1987) (same); People v. Kadadu, 425 N.W.2d 784, 787 (Mich. App. 1988) (holding that trial court did not abuse its discretion in permitting alien who entered guilty plea without awareness of deportation possibilities to withdraw guilty plea); People v. Giron, 523 P.2d 636 (Cal. 1974) (same). A number of other state courts have held that counsels' failure to inform aliens of deportation possibilities constitutes ineffective assistance of counsel pursuant to their state constitutions, but these decisions have subsequently been overruled. *See, e.g.*, People v. Padilla, 502 N.E.2d 1182 (Ill. App. 1987), *overruled by*, People v. Huante, 571 N.E.2d 736 (Ill. 1991); People v. Edwards, 393 So.2d 597 (Fla. 1981), *overruled by*, People v. Ginebra, 511 So.2d 960 (Fla. 1987);

cisions, recognizing that deportation consequences are unique and severe, hold that trial attorneys must inform aliens of potential deportation consequences prior to entering guilty pleas.[227] Failure to do so renders counsels' assistance constitutionally ineffective pursuant to the federal and state constitutions.[228] These courts have vacated guilty pleas, holding that attorneys have an affirmative duty to investigate bodies of law that are crucial to their clients' defenses, including deportation possibilities when the defendants are aliens.[229] Other state courts have held that it is within the discretion of trial judges to permit defendants to withdraw guilty pleas if defendants were not aware of deportation possibilities.[230]

1. Courts Holding That Counsel Has an Affirmative Duty to Inform Aliens of Deportation Possibilities

Some courts have recognized counsels' duty to inform aliens of deportation possibilities to ensure that aliens enter valid guilty pleas.[231] In *People v. Pozo*,[232] for example, the Supreme Court of Colorado held that counsels' assistance is ineffective, and thus defendants' guilty pleas may be vacated, if counsel fails to investigate and research those bodies of law that are crucial to their clients' defenses, which includes immigration law when their clients are aliens.[233] In *Pozo*, a Cuban citizen attempted to have his guilty plea vacated based on ineffective assistance of counsel because his attorney had not informed him that his plea might result in deportation.[234]

The court stated that in order for pleas to be knowing, voluntary and intelligent, counsels' assistance must have been reasonable.[235] The court refused to hold that attorneys have

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Commonwealth v. Wellington, 451 A.2d 223 (Pa. 1982), *overruled by*, Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989).

227. *See Pozo*, 746 P.2d at 527-28; *Soriano*, 240 Cal. Rptr. at 335-36.

228. *See Pozo*, 746 P.2d at 527-28; *Soriano*, 240 Cal. Rptr. at 335-36.

229. *See, e.g, Pozo*, 746 P.2d at 529.

230. *See Kadadu*, 425 N.W.2d at 787; *Giron*, 523 P.2d at 639-40.

231. *See Pozo*, 746 P.2d at 526; People v. Soriano, 240 Cal. Rptr. 328, 335-36 (Cal. Ct. App. 1987).

232. *Pozo*, 746 P.2d 523.

233. *Id.* at 527-28.

234. *Id.* at 525. The defendant had entered two guilty pleas, receiving a two year prison sentence for his escape conviction and a concurrent two years and six months sentence for his sexual assault conviction. *Id.*

235. *Id.* at 526.

an absolute duty to advise aliens of the deportation consequences of their pleas, but stated that assistance is unreasonable if attorneys fail to investigate relevant areas of law.[236] Criminal proceedings can result in deportation for aliens, a result that is "unique, severe, and worthy of recognition."[237] As a result, if attorneys fail to investigate immigration law when their clients are aliens, their representation is unreasonable and thus the aliens' pleas are deemed involuntary. Therefore, in order for counsels' representations to be ineffective, pursuant to the federal and Colorado constitutions, defendants must establish that the attorneys knew or had reason to know that their clients would be affected by the immigration laws.[238]

As mentioned earlier, some states require judges to inform defendants about deportation consequences.[239] In *People v. Soriano*,[240] however, the California Court of Appeal expanded counsels' duty to warn aliens of immigration consequences beyond the duty required of judges pursuant to California law.[241] In *Soriano*, a defendant, who entered a guilty plea for assault with a firearm and served one year in jail, sought and received a reversal of his plea on ineffective assistance of counsel.[242] The defendant had asked his attorney whether he would be deported if convicted.[243] His attorney claimed that she had informed him in a general sense that immigration consequences might exist.[244] Pursuant to California law, the defendant had also been informed of the potential immigration consequences by the trial judge.[245] The defendant argued that if he had served one day short of one year in jail,

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236. *Id.* at 527.

237. People v. Pozo, 712 P.2d 1044, 1047 (Colo. 1986), *aff'd*, *Pozo*, 746 P.2d 523.

238. *Pozo*, 746 P.2d 523. In *Pozo*, the record did not indicate whether the defendant had satisfied this burden. *Id.* at 529-30. Therefore, the court remanded the case to the trial court to determine whether the attorney was aware of the defendant's alien status. *Id.* at 530.

239. *See supra* note 195 (listing states that require judges to inform alien defendants that conviction may result in deportation).

240. 240 Cal. Rptr. 328 (Cal. Ct. App. 1987).

241. *Soriano*, 240 Cal. Rptr. at 336. CAL. § 1016.5(a) requires judges to inform defendants that conviction might result in deportation. CAL. § 1016.5(a) (West 1993).

242. *Soriano*, 240 Cal. Rptr. at 336.

243. *Id.* at 333-34.

244. *Id.*

245. *Id.* at 331.

he would not have been subject to deportation proceedings under the relevant statute.[246] Counsel admitted that although she felt she had achieved the most advantageous criminal disposition, she had not considered whether it was the best possible immigration disposition.[247] Therefore, the court vacated the defendant's guilty plea, holding that counsel's advice was not based on an adequate investigation of immigration law, and therefore constituted ineffective assistance of counsel pursuant to the federal and California constitutions.[248] The court imposed upon attorneys a duty to warn aliens of immigration consequences that exceeds the general warning that judges must give to alien defendants under California law.[249] In addition, the court noted that the American Bar Association's Standards for Criminal Justice provide that defense attorneys, after appropriate investigation, should advise defendants of considerations that are important to the defendant, including collateral consequences.[250]

2. Courts Holding That It Is Within Trial Judges' Discretion to Permit Withdrawal of Guilty Pleas When Aliens Are Unaware of Deportation Consequences

Some courts have held that it is within the trial judge's discretion to permit withdrawal of guilty pleas when defendants enter guilty pleas without knowledge of the deportation

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246. *Id.* at 334-35. Immigration law permits deportation of any alien convicted of a crime of moral turpitude within five years of entering the United States, if such alien was either sentenced to confinement or confined for one year or more. 8 U.S.C. § 1251(a)(2)(A) (1988 & Supp. III 1991). The defendant pleaded guilty within five years of entry and served one year in prison. *Soriano*, 240 Cal. Rptr. at 336.

247. *Soriano*, 240 Cal. Rptr. at 335.

248. *Id.* at 336.

249. *Id.*

250. *Id.* A.B.A. STANDARDS FOR CRIMINAL JUSTICE 14-3.2(b) (1980) states that "defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision." A.B.A. STANDARDS FOR CRIMINAL JUSTICE 14-3.2(b) (1980). The commentary following the standard states that "where the defendant raises a specific question concerning collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences." A.B.A. STANDARDS FOR CRIMINAL JUSTICE 14-3.2(b) cmt. (1980).

ramifications.[251] In *People v. Kadadu*, for example, the Court of Appeals of Michigan stated that the trial court did not abuse its discretion in determining that refusing to permit withdrawal of the defendant's plea would constitute a miscarriage of justice.[252] The court, noting the severity of deportation and the importance of knowledge of this possibility, found no abuse where the trial judge decided that it would be more equitable to permit the case to go to trial, where there was no showing of prejudice to the prosecution.[253]

C. *Courts Permitting Reversal of Guilty Pleas When Counsel Misinforms Aliens About Deportation Possibilities*

Some courts state that guilty pleas may be vacated when defendants' attorneys affirmatively misinform defendants about the immigration repercussions of guilty pleas.[254] In *People v. Correa*,[255] the Appellate Court of Illinois held that erroneous advice, which altered the defendant's plea, renders counsel's assistance ineffective.[256] In *Correa*, the defense attorney wrongly informed the defendant that he would not be deported as a result of his conviction because his wife was a U.S. citizen.[257] The court did not consider whether failure to advise would result in ineffective assistance because the defense attorney made unequivocal, erroneous, misleading representations in response to specific questions about deportability.[258] The

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251. *See* People v. Kadadu, 425 N.W.2d 784, 787 (Mich. App. 1988); People v. Giron, 523 P.2d 636, 639-40 (Cal. 1974).

252. *Kadadu*, 425 N.W.2d at 787.

253. *Id.* at 786-87. Decisions such as *Kadadu*, which rely on the trial court's discretion, do not conflict with the federal cases that deny relief because they merely show, without implicating any constitutional rights, that judges have broad discretion to ensure that the ends of justice are served. *Id.* But the *Pozo* and *Soriano* decisions, which found constitutionally ineffective assistance of counsel pursuant to the federal and state constitutions due to failure to inform aliens of the deportation consequences of entering guilty pleas, do create a split of authority. *Compare* United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990) (holding that failure to inform aliens of deportation consequences of entering guilty pleas does not constitute constitutionally ineffective assistance of counsel).

254. *See, e.g.*, People v. Correa, 465 N.E.2d 507, 512 (Ill. 1985) (holding that erroneous advice about deportation possibilities necessitates revocation of guilty pleas due to ineffective assistance of counsel).

255. *Id.*

256. *Id.* at 512.

257. *Id.* at 509-10.

258. *Id.* at 512.

court stated that it will find guilty pleas involuntary if counsels' advice is not within the range of competence demanded of attorneys in criminal cases.[259] Such erroneous advice is objectively unreasonable.[260]

Similarly, in *Downs-Morgan v. United States*,[261] the U.S. Court of Appeals for the Eleventh Circuit stated that when attorneys provide erroneous information, in certain narrow situations, such behavior may constitute ineffective assistance of counsel.[262] In *Downs-Morgan*, a Nicaraguan citizen sought reversal of his guilty plea based on ineffective assistance of counsel, claiming that he did not know that a conviction would result in deportation, and that he feared he would be executed upon returning to Nicaragua.[263] The Eleventh Circuit held that ineffective assistance could be found if the defendant established the possibility of execution upon returning to Nicaragua, combined with misrepresentations by counsel about deportation consequences and a colorable claim of innocence.[264] The court held that, although deportation is a collateral consequence, under extreme circumstances attorneys may be held responsible for misinforming aliens about the deportation consequences of pleading guilty.[265] The court remanded the case to determine whether the defendant was indeed misinformed by his attorney and thus was entitled to withdraw his plea.[266] Although the court held that attorney misinformation may constitute ineffective assistance of counsel under certain circumstances, it made clear that this was the exception, not the rule.[267] In so doing, the court rejected the reasoning of the *Correa* court, which stated that attorneys' misrepresentations about deportation possibilities necessarily constitute ineffective assistance.[268]

In *United States v. Nagaro-Garbin*,[269] the United States Dis-

259. *Id.*
260. *Id.*
261. 765 F.2d 1534 (11th Cir. 1985).
262. *Id.* at 1541.
263. *Id.* at 1536.
264. *Id.* at 1541.
265. *Id.*
266. *Id.*
267. *Id.* at 1540-41.
268. *Id.*
269. 653 F. Supp. 586 (E.D. Mich. 1987), *aff'd*, 831 F.2d 296 (6th Cir. 1987).

trict Court for the Eastern District of Michigan also stated that ineffective assistance may be found if counsel misinform defendants about deportation possibilities.[270] The court held that if attorneys misinform defendants about deportation possibilities, such defendants may have claims of ineffective assistance of counsel if they have colorable claims of innocence, but counsels' simple failure to inform defendants of these possibilities is not enough.[271] Under the court's holding, counsel may not provide erroneous information about deportation, even though the information is collateral.[272] In *Nagaro-Garbin*, the court remanded the case for an evidentiary hearing to determine whether counsel had affirmatively misled the defendant and whether the defendant had a colorable claim of innocence.[273]

III. *COUNSELS' FAILURE TO INFORM ALIENS OF DEPORTATION CONSEQUENCES OF GUILTY PLEAS, WHEN IT PREJUDICES DEFENDANTS' CASES, CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL*

Failure to inform alien defendants about the deportation consequences of guilty pleas, when it prejudices their cases, should constitute ineffective assistance of counsel.[274] Often criminal defense attorneys, unaware of the provisions of the immigration law dealing with criminal conduct, seek only the best disposition of criminal charges without regard to the immigration ramifications.[275] This behavior can result in unnecessary deportations as well as charges of ineffective assistance of counsel that attorneys could easily avoid. Attorneys should have an affirmative duty to inform alien defendants of the po-

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270. *Id.*

271. *Id.* at 591.

272. *Id.*

273. *Id.* at 590-91. On remand, the lower court held that counsel had not misled the defendant and, accordingly, it dismissed the defendant's claim of ineffective assistance of counsel. *Id.*

274. *See supra* text accompanying notes 226-53 (analyzing cases that require attorneys to inform alien defendants of deportation possibilities).

275. *See supra* text accompanying notes 152-273 (analyzing different stances taken by courts when aliens attempt to have guilty pleas vacated for ineffective assistance of counsel when attorneys fail to inform or misinform alien defendants of deportation possibilities).

tential deportation ramifications of guilty pleas.[276] Failure to inform aliens of deportation possibilities necessarily drops attorneys' representations below the objective standard of reasonableness required by the professional competence tier of the Supreme Court's test that was articulated in *Strickland v. Washington*.[277] Courts must assess the prejudice tier of *Strickland* on a case-by-case basis.

A. *Failure to Advise Defendants of Deportation Possibilities Renders Counsel's Representation Objectively Unreasonable*

In *Strickland*, the Supreme Court set forth a two-tiered test for ineffective assistance of counsel claims.[278] Aliens satisfy the professional competence tier by proving that their attorneys knew, or should have known, that they were aliens, and failed to inform or misinformed them about the immigration ramifications of their guilty pleas.[279] This failure necessarily lowers their attorneys' representations below an objectively reasonable level.[280]

Recently, the rights of aliens have expanded in a number of areas of law, including the right to effective assistance of counsel.[281] These changes reflect a growing awareness by the U.S. judiciary that millions of aliens live in the United States,[282] and that deportation, as stated by Justice Louis Brandeis, can result in loss of property, life and all that makes life

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276. *See supra* text accompanying notes 226-53 (analyzing cases that require attorneys to inform alien defendants of deportation possibilities).

277. *See supra* text accompanying notes 51-57 (explaining professional competence tier of *Strickland* test for ineffective assistance of counsel).

278. *See supra* text accompanying notes 51-62 (analyzing *Strickland* test for ineffective assistance of counsel).

279. *See supra* text accompanying notes 51-57 (analyzing professional competence tier of *Strickland* test for ineffective assistance of counsel).

280. *See* People v. Pozo, 746 P.2d 523 (Colo. 1987) (en banc) (holding that counsel's representations were unreasonable because alien defendant was not informed of possibility of deportation following conviction).

281. *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) [hereinafter *Procedural Surrogates*] (analyzing rapid development of procedural due process for aliens over the past twenty years); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990) (arguing that over last thirty years, judges who are reluctant to hold that government immigration decisions are unconstitutional have sometimes used statutory interpretation to strike down these decisions).

282. *See supra* note 7 (setting forth immigration statistics).

worth living.[283] Congressional power over immigration is plenary, but courts must interpret Congressional mandates in a manner that treats aliens fairly.[284]

Some courts have begun to recognize that deportation is a drastic measure, often more severe than the direct results of conviction, and thus is too extreme to be labelled a collateral consequence.[285] These decisions hold that knowledge of deportation consequences is crucial to aliens, and without such knowledge subsequent guilty pleas are not voluntary, informed and intelligent.[286] Defense attorneys have an affirmative duty to investigate and research all bodies of law that are crucial to defendants' cases.[287] Therefore, if attorneys know or have reason to know that defendants are aliens, they must inform defendants of the immigration ramifications.[288] Failure to do so reduces counsels' representations to an objectively unreasona-

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283. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (holding that persons who are admitted to United States by immigration authorities and afterwards are held for deportation, who claim to be citizens of the United States, are entitled to judicial hearing of such claims). Justice Brandeis stated that deportation can result in "loss of both property and life; or of all that makes life worth living." *Id.*

284. The plenary power doctrine, which has existed since the nineteenth century, grants exclusive power over immigration decisions to the executive and legislative branches of government. *See, e.g.*, Lees v. United States, 150 U.S. 476, 480 (1893) (holding that Congressional exclusion power is "not open to challenge in the courts"); Fong Yue Ting v. United States, 149 U.S. 698, 706 (1893) (holding that immigration decisions are "conclusive upon the judiciary"); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (same). The rationale for denying judicial review of immigration decisions has been the legal fiction that deportation is not punishment, but merely the government's decision not "to harbor persons whom it does not want." Bugajewitz v. Adams, 228 U.S. 585, 591 (1913). The plenary power doctrine has been used repeatedly to deny judicial review of substantive constitutional issues. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 797-800 (1977) (refusing to intervene where law discriminated against aliens based on gender and illegitimacy).

The doctrine has been widely criticized for stunting the development of constitutional law in the immigration area. *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 34 (1984) (listing judicial deference associated with plenary power doctrine as one factor that has helped to shelter immigration law from developments elsewhere in legal culture). In recent years federal courts have fashioned important exceptions to its application. *See* Motomura, *Procedural Surrogates*, *supra* note 281 (tracing rapid development of procedural due process rights for aliens over last twenty years).

285. *See supra* text accompanying notes 226-53 (analyzing decisions that required attorneys to inform aliens of deportation consequences of guilty pleas).

286. *See* People v. Pozo, 746 P.2d 523, 528-29 (Colo. 1987) (en banc).

287. *Id.*

288. *Id.*

ble level.[289] Thus, assuming that this failure to inform the defendants prejudices their cases pursuant to the prejudice tier of *Strickland*, such failure should constitute ineffective assistance of counsel.[290]

B. *Weaknesses in the Collateral Consequences Doctrine*

Pursuant to the collateral consequences doctrine, defendants need not be informed of deportation consequences, despite their severity, because they are collateral. Opponents of the doctrine argue that defendants must be informed of deportation consequences, despite being collateral, because of their severity. Both arguments use equally conclusory logic. But the rationale for the latter argument, that defendants cannot truly make informed, intelligent pleas without being aware of a consequence as significant as deportation, withstands analysis. Courts applying the collateral consequences doctrine to deportation cases, however, rely on reasoning that fails for a number of reasons. First, although most courts state that the court should not be burdened with informing aliens about deportation consequences, requiring that aliens be informed of deportation consequences places little, if any, burden on trial courts.[291] Second, the fact that deportation is often a possibility, but not an absolute certainty, does not justify failing to inform aliens about deportation possibilities. Third, courts applying the collateral consequences doctrine to deportation possibilities rely on outdated precedent that fails to take into account the severity of deportation.[292] Fourth, courts applying the collateral consequences doctrine misrepresent the jurisprudence upon which they rely.[293] The collateral conse-

289. *Id.*

290. *Id.*

291. *See* McKinney, *supra* note 194, at 224 (arguing that little court time is required to advise defendants of relevant consequences of their pleas). *But see* Michel v. United States, 507 F.2d 461, 465-66 (2d Cir. 1974) (holding that requiring judges to inform defendants of collateral consequences of guilty pleas places unmanageable burden on trial courts).

292. *See supra* text accompanying notes 226-38 (arguing that deportation is too severe to be beyond scope of trial counsels' responsibilities).

293. *Compare, e.g.*, Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974) (holding that judges have no duty to inform defendants about deportation possibilities because deportation is a collateral consequences, while placing responsibility, although not Sixth Amendment possibility, of informing defendants about deportation consequences upon attorneys) *with* State v. Malik, 680 P.2d 770, 771-72 (holding

quences doctrine, as applied to deportation, originally stated that judges have no duty to inform defendants about deportation ramifications.[294] Subsequent decisions have altered the doctrine so that attorneys also have no duty to inform aliens of such possibilities.[295]

1. Requiring That Aliens Be Informed of Deportation Consequences Places Little Burden Upon Trial Judges

The primary justification for the collateral consequences doctrine that courts have offered stresses that it would be unduly burdensome to require judges to inform defendants of all the many potential collateral consequences of entering guilty pleas.[296] Thus, most courts have granted defendants little leeway regarding pleas, requiring that defendants be on notice of only the criminal justice consequences of guilty pleas.[297] But the burden need not be placed on trial judges because defense attorneys, who have a Sixth Amendment duty to render effective assistance, should have the duty to inform defendants of such consequences.[298] If defense attorneys have this responsibility, no burden falls upon the court. Even if the burden were placed on judges, arguments in favor of informing defendants about deportation possibilities emphasize that deportation is far more severe than other collateral consequences, and is therefore *sui generis*.[299] Thus, even if judges cannot be ex-

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that attorneys have no duty to inform defendants because of collateral consequences rule), *appeal denied*, 102 Wash 2d 1023 (1984).

294. *See, e.g.*, *Michel*, 507 F.2d at 466 (holding that collateral consequences rule applies to judges, placing duty to inform defendant of deportation consequences upon attorneys).

295. *See, e.g.*, *Malik*, 680 P.2d at 771-72 (holding that attorneys have no duty to inform defendants because of collateral consequences rule).

296. *See, e.g.*, Michel v. United States, 507 F.2d 461, 465-66 (2d Cir. 1974) (holding that judges need not inform defendants of many potential collateral consequences of guilty pleas).

297. *Id.* But the line between direct, criminal justice consequences and collateral consequences is unclear. For example, failing to inform defendants about ineligibility for parole has been considered a direct consequence, *see, e.g.*, Berry v. United States, 412 F.2d 189, 192 (3d Cir. 1969), while failure to inform defendants that they may receive consecutive rather than concurrent sentences has been considered a collateral consequence, *see* Paradiso v. United States, 482 F.2d 409, 415 (3d Cir. 1973), yet both are criminal justice consequences of entering guilty pleas.

298. *See* People v. Pozo, 746 P.2d 523, 527-28 (Colo. 1987).

299. *See* United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring in the judgment).

pected to inform defendants of all collateral consequences, they should inform defendants about the collateral consequence of deportation. Such a responsibility would place only a minimal burden upon trial judges. This goal could be accomplished by amending Rule 11 of the Federal Rules of Civil Procedure ("FRCP") and related state statutes, requiring judges to simply state that entering a guilty plea may result in deportation for aliens.[300] Reciting this warning to defendants would place little burden on trial judges because it would not add more than a minute to Rule 11 guilty plea proceedings.

Several jurists have recommended such an amendment to Rule 11 of the FRCP. Concurring in *Del Rosario*, Judge Mikva recommended that the Rules Committee of the Judicial Conference make such an amendment. While agreeing that Rule 11 guilty plea proceedings should be streamlined, Judge Mikva stated that such proceedings are based upon the defendant's knowledge of the most significant consequences of the plea, and deportation should be among those consequences. One court has stated that although Rule 11 does not require judges to inform aliens of deportation possibilities, nothing prohibits them from doing so, and providing such information would serve the interests of justice.[301] Thus, the primary justification for the collateral consequences doctrine, requiring judges to inform defendants of such consequences would unduly burden trial courts, does not stand up to analysis. Requiring that alien defendants be informed of deportation consequences, either by defense counsel fulfilling their Sixth Amendment duty of effective assistance or by trial judges fulfilling their duty under Rule 11 to ensure that guilty pleas are entered into voluntarily and intelligently, would place little, if any, burden upon courts.

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300. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-1j(a) (West 1985). Connecticut's statute requires the judge to state that

> [i]f 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 consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

Id.

301. United States v. Russell, 686 F.2d 35, 39 (D.C. Cir. 1982).

2. Aliens Must Be Informed of Deportation Possibilities Despite the Fact That Deportation Is Not a Certainty

Another possible explanation for the collateral consequences doctrine, as applied to deportation, concerns the fact that although deportation may occur following conviction, it is far from automatic.[302] The Immigration and Naturalization Service ("INS") will not necessarily initiate deportation proceedings following conviction. Even assuming the INS does initiate such proceedings, any number of equitable considerations may prevent deportation from occurring.[303] The Second Circuit in *Michel v. United States* stated that the degree of certainty with which the consequence will be visited upon the defendant is not a factor to be considered in deeming a consequence to be collateral.[304] When pleading guilty without knowledge of deportation possibilities, however, defendants are not entering pleas unaware that they *will* be deported. They are pleading guilty unaware that they *may* be deported. The uncertainty of subsequent deportation proceedings stemming from guilty pleas may be an underlying rationale for the collateral consequences doctrine.

Even assuming such a rationale, this basis for the doctrine fails for two reasons. First, it would require courts to establish a threshold level of certainty beyond which consequences become direct. Courts would need to state, for example, that consequences become direct if there is a ninety percent possibility that the consequence will occur. Then, attorneys would be required to inform defendants about consequences that reach this threshold level of certainty. Such a system would be unmanageable, if not unworkable. Second, defendants have a right to be informed of significant consequences and significant potential consequences of their pleas.[305] Even if the consequence is relatively unlikely, defendants should have a right

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302. *See* United States v. Santelises, 476 F.2d 787, 789-90 (2d Cir. 1973) (holding that deportation is not direct consequence of conviction because deportation is not certain to occur), *later appeal*, 509 F.2d 703 (2d Cir. 1975).

303. *See supra* text accompanying notes 123-46 (setting forth avenues for relief from deportation).

304. Michel v. United States, 507 F.2d 461, 465-66 (2d Cir. 1974).

305. *See supra* text accompanying notes 63-84 (setting forth standards for valid guilty pleas).

to be informed of the possibility of deportation, so that they can make their decisions about whether to enter pleas in an informed and intelligent fashion.

3. The Collateral Consequences Doctrine Is Outdated Precedent That Fails to Recognize the Severity of Deportation

Despite the weaknesses in the arguments supporting the collateral consequences doctrine, the doctrine still retains considerable precedential support.[306] The collateral consequences doctrine, however, as applied to deportation, is more amenable to historical than legal analysis. The doctrine developed during the 1950s when the rights of aliens were less of a concern to the judiciary than they are today.[307] The small value placed on the rights of aliens by the U.S. court system in the 1950s is perhaps best conveyed by a 1950 Supreme Court decision. In this decision, the Court held, in response to an alien's argument that he had been denied due process of law, that as far as aliens are concerned, due process is nothing more or less than the procedure that Congress authorizes.[308] In recent years, the Supreme Court has taken a somewhat more expansive view of the rights of aliens, but the collateral consequences doctrine, as applied to deportation proceedings, still remains from an earlier era.[309]

Because the arguments regarding the burden on the judiciary and the uncertainty of deportation do not withstand analysis, no legitimate rationale underlies the collateral consequences doctrine as applied to deportation proceedings. The doctrine fails to recognize that immigration consequences of

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306. *See supra* text accompanying notes 152-208 (describing cases that rely on collateral consequences doctrine).

307. *See* United States v. Parrino, 212 F.2d 919 (2d Cir. 1954) (holding that deportation is a collateral consequence that aliens need not be aware of before entering guilty pleas), *cert. denied*, 348 U.S. 840 (1954).

308. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). The Supreme Court held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.*

309. *See* Ardestani v. INS, 112 S. Ct. 515, 521 (1991). The Supreme Court stated that "[w]e are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important." *Id.*; *see also* Motomura, *supra* note 281 (tracing rapid development of procedural due process rights for aliens over last twenty years).

criminal convictions are "unique, severe, and worthy of recognition."[310] Labeling the consequence of deportation as collateral does not diminish its significance, especially because in many immigration cases the collateral consequence is more severe than the penalty imposed.[311] Although many collateral consequences do not merit retraction of guilty pleas, deportation is far more significant than other consequences, such as losing one's driver's license or losing the right to vote.[312] In order for pleas to be voluntary, defendants must be aware of any and all significant consequences. Therefore, if deportation is a possible result from entering guilty pleas, attorneys must inform defendants of this possibility prior to their pleas, or such pleas are not intelligently made, despite the collateral nature of the deportation proceedings.[313]

Applying the definition of collateral consequences espoused in *Michel v. United States*, any consequences not meted out by sentencing courts, no matter how severe and no matter how likely to follow from the sentencing courts' decisions, are

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310. People v. Pozo, 712 P.2d 1044, 1047 (Colo. 1986), *aff'd*, 746 P.2d 523 (Colo. 1987) (en banc).

311. *See, e.g.*, United States v. Parrino, 212 F.2d 919, 924 (2d Cir. 1954) (Frank, J., dissenting).

312. *See* United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring in the judgment); *see supra*, notes 220-24 and accompanying text (analyzing *United States v. Del Rosario*). This recognition of the distinction between deportation and other collateral consequences was perhaps best stated by Judge Mikva in his concurrence in *Del Rosario*. United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring in the judgment). Judge Mikva stated that deportation

> is unlike losing one's driver's license, or the right to own firearms, or the right to a government job — each of which the majority describes as a similarly weighty deprivation. The possibility of being deported can be — and frequently is — the most important factor in a criminal defendant's decision how to plead. Because deportation is in a category so obviously distinct from the other collateral consequences enumerated by the majority, I have sore difficulty crediting the fiction that the defendant has knowingly pled when he is not provided meaningful information about the relevant deportation consequences of his plea.

Id. This argument does not preclude the possibility that failure to inform defendants of other collateral consequences, which are not as distinct and severe as deportation, such as forfeiture of assets or civil liability that may lead to bankruptcy, may also result in ineffective assistance of counsel.

313. *See* People v. Pozo, 746 P.2d 523 (Colo. 1987) (en banc) (holding that attorneys must inform defendants of possibility of deportation in order for pleas to be intelligently made).

collateral.[314] Therefore, defendants need not be informed of these consequences by the courts or by their attorneys.[315] This narrow approach preserves the definition of collateral consequences, while limiting the importance of the right of defendants to be aware of relevant consequences of guilty pleas.[316] The defendant suffers harmful consequences irrespective of the proceeding from which the consequences stem.[317] Unquestioning allegiance to precedent explains the continued vitality of the collateral consequences doctrine. Relying on precedent, cases that deny aliens claims of ineffective assistance of counsel merely state that deportation is a collateral consequence and thus defendants need not be informed of the possibility.[318] Scant consideration is given to whether the precedent is one that merits adherence.

Although centering its argument on the prejudice tier of *Strickland*, the court, in *United States v. Del Rosario*, for example, followed the precedent of most federal courts by endorsing the collateral consequences doctrine.[319] The court stated that although deportation may be harsh, other collateral consequences are also harsh.[320] It offered no further explanation. The court did not refute the analysis of cases that required attorneys to inform defendants of deportation possibilities, but merely stated that such cases were not controlling.[321]

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314. Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974).

315. *Id.*

316. *See* Tafoya v. State, 500 P.2d 247, 256 (Alaska), *cert. denied*, 410 U.S. 945 (1972) (Rabinowitz, J., dissenting).

317. *See Parrino*, 212 F.2d at 924 (Frank, J., dissenting).

318. *See, e.g.*, *Del Rosario*, 912 F.2d at 58-59 (holding that deportation is collateral consequence that alien defendants need not be informed of prior to entering guilty pleas).

319. *Id.*

320. *Id.*

321. *Id.* It seems evident that the court's emphasis on the prejudice tier of *Strickland* reflects discontent with the collateral consequences doctrine. Past cases merely held that counsel's failure to advise does not constitute unreasonable attorney behavior, not addressing the issue of prejudice. *See, e.g.*, United States v. Campbell, 778 F.2d 764, 766 (11th Cir. 1985) (holding that counsel's representation was reasonable pursuant to professional competence prong of *Strickland* despite failure to inform defendant of deportation possibilities) Because the D.C. Circuit centered its argument on prejudice, following this extended discussion with a brief discussion of collateral consequences, one senses that the reason is the court's realization of the lack of doctrinal support for the collateral consequences rule. *See also* United States v. Nino, 878 F.2d 101 (3d Cir. 1989) (denying relief based on prejudice prong of *Strickland* test, while declining to rule on professional competence prong of).

Justice Oliver Wendell Holmes has stated that there is no worse reason for the continuation of a law than that it has existed for a great number of years.[322] He stated that this proposition is particularly true when the grounds for the law have vanished and it continues to be employed through blind imitation of the past.[323] Justice Holmes's position is especially accurate with respect to the collateral consequences doctrine as applied to deportation.[324] The collateral consequences doctrine developed in an era that was harshly insensitive to the rights of aliens.[325] Today, although the judiciary is somewhat more sensitive to the rights of aliens, allegiance to precedent has perpetuated a doctrine that does not reflect current judicial thinking. The better view, stated by Justice Rabinowitz of the Supreme Court of Alaska, dissenting in *Tafoya v. State*,[326] stressed that attorneys should have an affirmative duty to research federal law governing convictions of aliens and to inform defendants of potential deportation possibilities stem-

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Although the Supreme Court in *Strickland* stated that courts need not discuss both tiers of *Strickland* if the case is more easily disposed of through reliance on one tier, *Strickland v. Washington*, 466 U.S. 668, 697 (1984), this possibility does not adequately account for the court's reliance on the prejudice prong. If the court was merely concerned with disposing of the case using the prong that provided the simpler solution, it would have relied solely on the professional competence prong because the decision was obvious in light of the applicable federal precedent. *See supra* note 184 (listing decisions that have held that attorney's representation is effective despite failure to inform alien of deportation consequences).

322. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Justice Holmes stated

> [i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id.; *see* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (criticizing the majority's reliance on the historic existence of sodomy laws for refusing to find a sodomy statute unconstitutional.)

323. Holmes, *supra* note 322, at 469.

324. *See supra* notes 306-21 and accompanying text (stating that collateral consequences doctrine developed during 1950s when rights of aliens were less important to judiciary than today and no legitimate rationale supports doctrine's continued vitality).

325. *See supra* notes 307-08 and accompanying text (describing judicial view of rights of aliens during 1950s). The Second Circuit decided *United States v. Parrino*, the first decision to hold that deportation is a collateral consequence of conviction, in 1954. United States v. Parrino, 212 F.2d 919 (2d Cir.), *cert. den.*, 348 U.S. 840 (1954).

326. 500 P.2d 247, 257 (Alaska) (Rabinowitz, J., dissenting), *cert. den.*, 410 U.S. 945 (1972).

ming from guilty pleas.[327] He further stated that if one reaches the conclusion that deportation of aliens is merely a collateral consequence of their guilty pleas, one must view the right to live in, as well as banishment from the United States, as matters of little consequence.[328]

4. The Collateral Consequences Doctrine, Applied to Deportation, Misrepresents the Jurisprudence on Which It Is Based

Even assuming that the justifications for the collateral consequences doctrine as applied to deportation proceedings withstand analysis, the doctrine still distorts the jurisprudence upon which it is based. As originally set forth in *Parrino* and *Sambro*, the rule stated that defendants need not be aware of potential immigration ramifications due to the collateral nature of deportation proceedings.[329] The courts, in *Parrino* and *Sambro*, did not distinguish between the judge's failure to inform the defendant about deportation consequences and the defense attorney's failure to inform.[330] Thus, these decisions are unhelpful because they fail to evaluate counsel's representations in terms of a defendant's Sixth Amendment right to counsel.

In *Michel*, the Second Circuit elaborated upon the reasoning behind the collateral consequences doctrine, stating that it is beyond the scope of trial judges to consider the many contingencies of convictions.[331] Thus, even assuming that deportation constitutes a collateral consequence of conviction, the *Michel* court only applied the collateral consequences doctrine to judges' duties.[332] Furthermore, the *Michel* court stated that defense attorneys, not judges, have a duty to advise defendants of deportation possibilities.[333] According to the *Michel* court, judges must deal with overburdened dockets and thus lack the time to sort through every contingency, but attorneys have a

327. *Id.*

328. *Id.* (Rabinowitz, J., dissenting).

329. *Parrino*, 212 F.2d at 921-22; United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971) (per curiam), *motion for rehearing en banc denied*, 454 F.2d 924 (D.C. Cir. 1971) (per curiam).

330. *Parrino*, 212 F.2d at 921-22; *Sambro*, 454 F.2d at 922-23.

331. United States v. Michel, 507 F.2d 461, 466 (2d Cir. 1974).

332. *Id.*

333. *Id.*

duty to represent clients zealously.[334] Attorneys do not satisfy this duty of zealous representation when they fail to research relevant bodies of law.[335]

In *Michel*, the court justified its refusal to impose an affirmative duty upon judges by placing the responsibility to warn defendants upon defense attorneys.[336] The weakness in the court's analysis, as in *Parrino* and *Sambro*, is its failure to address whether counsel's representation was constitutionally ineffective pursuant to the Sixth Amendment right to counsel. Still, the Second Circuit, in *Michel*, placed an affirmative duty upon defense attorneys to warn defendants about deportation possibilities.[337] Subsequently, courts espousing the collateral consequences doctrine have relied on *Michel* for the proposition that defense attorneys have no duty to warn their clients of these consequences,[338] though *Michel* stated just the opposite, that attorneys have the responsibility to inform defendants about potential deportation problems.[339] These courts have altered the application of the collateral consequences doctrine, as originally applied in *Parrino*, *Sambro* and *Michel*, leaving aliens without any means of learning about the potential effects of guilty pleas.[340] Although the court in *Michel* did not state that defense counsel's failure to inform provides the defendant with an avenue for relief, the court's primary justification for not placing responsibility upon the trial judge was its statement of the responsibility of trial counsel.[341] This justification is hollow if defendants lack the right to enforce trial counsel's duty.

Tafoya is one of the few decisions where a court attempted to justify this leap in reasoning. The Supreme Court of Alaska stated that the appearance of anomaly is due to the collateral

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334. *Id.*; *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1992) (stating that "[t]he duty of a lawyer . . . is to represent his client zealously within the bounds of the law . . .).

335. People v. Pozo, 746 P.2d 523, 529 (Colo. 1987) (en banc).

336. *Michel*, 507 F.2d at 466.

337. *Id.*

338. *See, e.g.*, Tafoya v. State, 500 P.2d 247, 252 (Alaska), *cert. denied*, 410 U.S. 945 (1972); State v. Malik, 680 P.2d. 770, 771-72 (Wash. Ct. App.), *appeal denied*, 102 Wash.2d 1023 (Wash. 1984).

339. Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974).

340. *See, e.g.*, *Tafoya*, 500 P.2d at 252; *Malik*, 680 P.2d at 771-72.

341. *Michel*, 507 F.2d at 466.

nature of the deportation proceedings.[342] Although attorneys have the duty to warn aliens of deportation possibilities, failure to inform defendants of these possibilities is not a ground for vacating guilty pleas because these consequences are collateral.[343] This decision recognizes the leap in reasoning made by other courts, but the court in *Tafoya* unjustifiably dismisses the importance of deportation by summarily labelling it a collateral consequence.[344] In addition, the court stated that alien defendants have the right to be informed of deportation consequences, but eliminated their ability to receive remedies for violations of their rights by refusing to grant relief based on the attorney's failure to warn about such consequences.[345]

5. Problems with Inflexibility of the Collateral Consequences Doctrine

The inflexibility of the collateral consequences doctrine, which prevails in most federal courts, has forced courts to create strained exceptions to the rule.[346] In some cases, federal courts have ignored the doctrine's existence in reaching their conclusions.[347] Despite the persuasive arguments of courts that permit reversal of guilty pleas due to counsels' failure to warn about immigration ramifications, the majority of courts, hesitant to overrule precedent, have not adopted this stance.[348] As a result, a number of courts have forged logically inconsistent exceptions to the collateral consequences doc-

342. *Tafoya*, 500 P.2d at 252.

343. *Id.*

344. *See id.* at 256 (Rabinowitz, J., dissenting) (arguing that deportation is not merely collateral consequence of criminal convictions).

345. *Id.* at 252.

346. *See, e.g.*, Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985) (holding that representation may be ineffective if counsel misinforms defendant about deportation consequences, if defendant has colorable claim of innocence, and defendant faces execution upon returning to native country); United States v. Nagaro-Garbin, 653 F. Supp. 586, 591 (E.D. Mich. 1987) (holding that representation is ineffective if counsel misinforms defendant about deportation consequences of guilty plea and defendant has colorable claim of innocence), *aff'd*, 831 F.2d 296 (6th Cir. 1987).

347. Janvier v. United States, 659 F. Supp. 827 (N.D.N.Y. 1987), *on remand from*, 793 F.2d 447 (2d Cir. 1986) (holding that counsel's failure to request Judicial Recommendation Against Deportation constituted ineffective assistance of counsel while not addressing fact that deportation is collateral consequence of criminal conviction).

348. *See supra* note 148 (listing courts that have refused to permit withdrawal of guilty pleas because of collateral consequences doctrine).

trine.[349]

In *Downs-Morgan*,[350] the U.S. Court of Appeals for the Eleventh Circuit, apparently hesitant to overrule precedent, created an extremely limited exception to the collateral consequences doctrine.[351] The court stated that the attorney's misrepresentation, combined with the possibility of imprisonment and execution upon the alien's return to Nicaragua, in addition to a colorable claim of innocence, may be sufficient for a finding of ineffective assistance.[352] Thus, the court created an exception to the collateral consequences doctrine, because the jurisdiction usually considers deportation a collateral consequence.

Courts adhering to the collateral consequences doctrine cannot logically support such a holding. If attorneys have no duty to research deportation repercussions, their duty cannot change based on the severity of their clients' situations upon returning to their native lands.[353] Attorneys' freedom from investigating collateral consequences is absolute, allowing no leeway for the severity of defendants' plights.[354] Although the court was sympathetic to the Nicaraguan citizen's situation, courts espousing the collateral consequences doctrine have determined that, while immigration consequences may be harsh, relief is not possible because of the collateral nature of the proceedings.[355] Therefore, the court's logical choices were either adherence to the doctrine, resulting in deportation of the Nicaraguan citizen, or rejection of the doctrine, which would grant him the right to a jury trial.[356]

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349. *See supra* notes 226-38 and accompanying text (analyzing decisions that have permitted withdrawal of guilty pleas where counsel misinformed defendants about deportation consequences of guilty pleas).

350. 765 F.2d 1534 (11th Cir. 1985); *see supra* notes 261-67 and accompanying text (analyzing *Downs-Morgan v. United States*).

351. Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985).

352. *Id.* at 1541.

353. *See supra* note 163 (stating that severity of deportation cannot disturb finality of guilty pleas).

354. *Id.*

355. *Id.*

356. *See also* United States v. George, 676 F. Supp. 863 (N.D. Ill. 1988), *rev'd*, 869 F.2d 333 (7th Cir. 1989). The decision in *George* provides another example of a decision creating an inconsistent exception to the collateral consequences doctrine. Although it was reversed on appeal, the decision of the U.S. District Court for the Northern District of Illinois is clearly another strained attempt to reach a just deci-

In *United States v. Nagaro-Garbin*, the U.S. District Court for

sion when faced with the inflexibility of the collateral consequences doctrine. In *George*, a permanent resident was ineligible for discretionary relief from the Attorney General because the date of his deportation order was ten days short of the seven year period required for such relief. *Id.* at 867. If the defendant had not pleaded guilty, the delay would most likely have resulted in the completion of the seven year period and he would have been eligible for discretionary relief. *Id.* The court held, therefore, that defendant's attorney, an immigration lawyer, had represented him incompetently. *Id.* at 868. The court found that where counsel knows, or should know, the immigration consequences of a plea, no legitimate difference exists between active misrepresentation and passive failure to advise. *Id.*

This holding correctly recognized the importance of knowledge of deportation possibilities, but it did not go far enough. Courts should not inquire into whether defense attorneys are immigration law practitioners. Many criminal defendants, including aliens, are not able to choose their own counsel and they should not be disadvantaged based on the specialties of the attorneys that represent them. Therefore, attorneys for alien defendants should have a duty to investigate immigration repercussions regardless of whether they are immigration law practitioners. *See* People v. Soriano, 240 Cal Rptr. 328, 335-336 (Cal. Ct. App. 1987) (holding that counsel, though not immigration law practitioner, had duty to familiarize herself with immigration law in order to represent her client effectively).

But despite the strained reasoning of the district court, it seems that the court, in order to reach a just result, had no option because the collateral consequences doctrine as applied to deportation possibilities does not allow for exceptions. *See supra* note 163 (stating that severity of deportation cannot disturb finality of guilty pleas). On appeal, however, the U.S. Court of Appeals for the Seventh Circuit reversed the district court's decision, though not for the reasons discussed here. United States v. George, 869 F.2d 333, 337-38 (7th Cir. 1989). The Seventh Circuit held that the defendant's attorney had no duty to inform him about deportation possibilities because such possibilities are collateral consequences. *Id.*

The court's decision in People v. Ford, 290 N.Y. L.J. 24 (Mar. 31, 1993) (N.Y. Sup. Ct. 1993), *see supra* note 194, which held that the collateral consequences doctrine does not apply in certain narrow, fact specific situations, is similarly flawed. *Id.* The court held that in cases where a reasonable person would not be aware that a guilty plea suggests an "admission of grossly immoral activity," the trial judge must inform the defendant that this plea might result in deportation as a crime of moral turpitude. *Id.* Pursuant to the collateral consequences doctrine, judges are not expected to inform defendants of all the contingencies associated with conviction but merely those directly associated with that specific criminal proceeding. *See* Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974) (holding that, pursuant to collateral consequences doctrine, judges have no duty to inform defendants about deportation consequences) One cannot logically impose a greater duty on judges in cases where the defendant might not be aware that conviction involves an admission of moral turpitude. As in *Downs-Morgan*, the court's logical choices were either acceptance of the collateral consequences doctrine, resulting in the defendant's deportation, or rejection of the doctrine, which would permit the court to hold that the trial judge has an affirmative duty to inform the defendant about deportation possibilities.

Although the decision in *Ford* may reach a just result, it does so in an illogical manner. The court should have rejected the collateral consequences doctrine, because any attempt to create exceptions to the doctrine, directly contravenes its supposed purpose, which is to minimize the burden on trial judges. *Id.* Although the

the Eastern District of Michigan also created a strained excep-

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decision only requires judges to inform a small group of defendants of deportation possibilities, it nevertheless places a large burden on the court. In order to determine which aliens may not be aware that admission of guilt constitutes an admission of grossly immoral activity, the trial judge must take three steps. First, the court must determine whether each defendant is an alien. Then, the court must become familiar with immigration law in order to determine whether the crime being pleaded to involves moral turpitude. Finally, if the defendant is an alien who is guilty of a crime of moral turpitude, the judge must determine whether the defendant should reasonably be aware that entering a guilty plea involves an admission of grossly immoral activity. Placing such a severe burden on the trial judge cannot be squared with the collateral consequences doctrine. *Id.* Requiring trial judges to inform all defendants that if they are aliens they may be deported as a result of pleading guilty places a far smaller burden upon trial judges. *See supra* text accompanying notes 299-301 (arguing that requiring judges to inform defendants that if they are aliens they may be deported if they plead guilty places minimal burden upon trial judges).

But even if this narrow exception to the collateral consequences doctrine were logically supportable, it would more appropriately place the duty to inform upon defense attorneys rather than judges. While strong arguments support placing a duty upon judges to inform aliens about the possibility of deportation, *see* McKinney, *supra* note 194 (arguing that judges should have duty to inform defendants about deportation possibilities), any greater duty to research the likelihood of deportation should be placed on defense attorneys who have a greater responsibility toward defendants. *See People v. Soriano*, 194 Cal. App. 3d 1470 (1987) (placing greater duty upon attorney to warn defendant about deportation possibilities than that required pursuant to California law).

But the *Ford* court's decision suffers from a greater flaw. It appears to support the right of a sympathetic defendant to be informed of deportation consequences, while rejecting the right of less sympathetic defendants to be aware of such consequences. The court makes the somewhat incredible assertion that

> [i]t is one thing not to tell a drug dealer or a person who intentionally causes serious injury that the plea may involve other serious consequences such as deportation, but it is quite another thing not to tell a nineteen year old who thought . . . that he was admitting to a terrible accident, that consequences of the plea would result in deportation . . . certainly a major consequence to a nineteen year old whose family lives in New York.

People v. Ford, 290 N.Y. L.J. 24 (Mar. 31, 1993) (N.Y. Sup. Ct. 1993). The court supports this assertion by stating that drug dealers and persons who intentionally cause serious injury

> would have had the reasonable expectation that since the episode to which [they] pled involved the intentional breaking of the law or an act universally recognized as involving intrinsic immorality that serious consequences might flow from the plea.

Id.

These assertions suffer from three errors. First, courts that apply the collateral consequences doctrine have never assumed that defendants reasonably expect that certain consequences, such as deportation, might occur, but rather that regardless of awareness of the consequence, the guilty plea will be considered valid because of the collateral nature of the consequence. *See Michel*, 507 F.2d at 466 (holding that judge need not inform defendant about deportation possibilities because deportation is collateral consequence, not because defendant should have reasonable expectation

tion to the collateral consequences doctrine.[357] The court held that if attorneys misinform aliens about deportation consequences, as opposed to simply failing to inform, and defendants present colorable claims of innocence, courts may vacate guilty pleas based on ineffective assistance of counsel.[358] The distinction that the court drew between misinforming defendants and failing to inform defendants is specious because in either case defendants lack relevant information about deportation possibilities. Thus, if deportation is merely a collateral consequence, misinformation provided by attorneys is still collateral and courts should not consider these errors to constitute unreasonable attorney behavior.[359] The more persuasive view states that whether misinformed or uninformed, attorneys' representations should be deemed unreasonable if alien defendants lack knowledge of immigration consequences.[360]

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that deportation might result). Second, due process requires that judges ensure that defendants are aware of the consequences of their pleas. *See supra* text accompanying notes 63-84 (setting forth due process requirements for valid guilty pleas). It does not permit judges to presume knowledge based on a "reasonable expectation" of "severe consequences". *See* Boykin v. Alabama, 395 U.S. 238 (1969) (permitting withdrawal of guilty plea because judge did not take affirmative steps to ensure that plea was entered into voluntarily and intelligently). If the court is willing to acknowledge that a plea cannot be valid without knowledge of deportation possibilities, then the court must take affirmative steps to ensure that the defendant is aware of the possibilities. *Id.*

Finally, even if judges could presume that certain defendants have a reasonable expectation that deportation might result from entering guilty pleas, no rational basis supports the court's statement that "drug dealers" are more likely to be aware of this possibility than a young man convicted of manslaughter, accidental or otherwise. Just as Mr. Ford was unaware that he might be deported, many individuals who plead guilty to drug offenses are equally unaware. *See, e.g.*, United States v. Campbell, 778 F.2d 764 (11th Cir. 1986) (rejecting defendant's argument that she should be permitted to withdraw guilty plea to possession of marijuana because she was unaware that her conviction, which resulted in a sentence of two years probation, would result in deportation). Many drug offenses result in short prison terms or probation. *Id.* One would not necessarily expect that a crime that is treated relatively leniently under the penal law would have such drastic deportation ramifications.

357. United States v. Nagaro-Garbin, 653 F. Supp. 586 (E.D. Mich. 1987), *aff'd*, 831 F.2d 296 (6th Cir. 1987); *see supra* text accompanying notes 269-73 (analyzing *United States v. Nagaro-Garbin*).

358. United States v. Nagaro-Garbin, 653 F. Supp. 586 (E.D. Mich. 1987), *aff'd*, 831 F.2d 296 (6th Cir. 1987); *see supra* text accompanying notes 269-73 (analyzing *United States v. Nagaro-Garbin*).

359. *See supra* note 163 (stating that severity of collateral consequence is not taken into account).

360. *See supra* notes 275-345 and accompanying text (arguing that attorneys must inform aliens of deportation consequences of guilty pleas).

The holding in *Janvier v. United States* is also inconsistent with the collateral consequences doctrine.[361] In *Janvier*, the court reversed the defendant's plea, holding that the attorney's failure to request a JRAD, and to investigate applicable law was inadequate under prevailing professional norms.[362] *Janvier* is irreconcilable with the prevailing doctrine of collateral consequences.[363] If applying for a JRAD only had repercussions in a collateral civil deportation proceeding, then it was necessarily beyond the scope of counsel's responsibilities, according to the collateral consequences doctrine.[364] Attorneys must only inform defendants of direct consequences and, according most federal courts, deportation is collateral.[365] Therefore, counsels' failure to inform cannot drop the attorneys' representations below an objectively unreasonable level. In *Janvier*, the court may not have discussed the collateral consequences doctrine, because recognition of the doctrine, which prevails in most federal courts, would have necessitated a holding of reasonable attorney behavior, conflicting with the equitable disposition of the case.

The cases that have granted relief by creating strained exceptions to the collateral consequences doctrine share two characteristics. First, they are cases in which the consequence of deportation is especially severe and unjust.[366] As stated previously, however, the severity of the consequences surrounding deportation is irrelevant if courts purport to employ the collateral consequences doctrine.[367] Furthermore, these courts create exceptions to the collateral consequences rule

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361. *See supra* notes 139-46 and accompanying text (analyzing *Janvier v. United States*).

362. Janvier v. United States, 659 F. Supp. 827, 829 (N.D.N.Y. 1987), *on remand from*, 793 F.2d 449 (2d Cir. 1986).

363. *See supra* text accompanying notes 93-106 (analyzing collateral consequences doctrine).

364. *Id.*

365. *Id.*

366. *See* Downs-Morgan v. United States, 765 F.2d 1534, 1536 (11th Cir. 1985) (stating that defendant was subject to imprisonment and possible execution upon returning to Nicaragua); United States v. Nagaro-Garbin, 653 F. Supp. 586 (E.D. Mich. 1987) (stating that defendant was subject to fifteen year prison term upon returning to Peru), *aff'd*, 831 F.2d 296 (6th Cir. 1987); United States v. George, 676 F. Supp. 863, 867 (N.D. Ill. 1988), *rev'd*, 869 F.2d 333 (7th Cir. 1989) (stating that defendant was ten days short of eligibility for discretionary relief).

367. *See supra* note 163 (stating that severity of collateral consequence is not taken into account).

that are not logically consistent.[368] This effort underscores discontent and disagreement with a rule that is inelastic, severe, and unjust to aliens. But the collateral consequences doctrine is at odds with placing any duty on attorneys to inform defendants about deportation effects, regardless of their severity.[369] As a result, courts have had no option but to fashion strained exceptions and inconsistent judgments.[370] Rather than continuing to employ a doctrine that lacks any legitimate rationale and persists only through imitation of the past, courts must reject the collateral consequences doctrine as applied to deportation proceedings and recognize the right of aliens to be aware of the immigration ramifications of guilty pleas.[371]

C. *The Prejudice Tier of* Strickland *in Deportation Cases*

Although courts should find that failing to inform or misinforming aliens about the deportation consequences of guilty pleas is objectively unreasonable attorney behavior, thus satisfying the professional competence tier of the *Strickland* test, courts should assess prejudice on a case-by-case basis, pursuant to tier two of *Strickland*.[372] To satisfy this tier, defendants must show that counsels' objectively unreasonable behavior resulted in prejudice to their cases. This tier requires a case-by-case analysis, where defendants must show that if their attorneys had behaved reasonably, they would not have entered guilty pleas and would have insisted on going to trial.[373]

1. The General Test for Prejudice Pursuant to Tier Two of *Strickland*

Courts must balance the severity of the criminal sentences

368. *See supra* text accompanying notes 346-65 (analyzing inconsistencies in decisions that permit withdrawal of guilty pleas when attorneys misinform defendants about deportation consequences of guilty pleas).

369. *See supra* note 163 (stating that severity of collateral consequence is not taken into account).

370. *See supra* text accompanying notes 346-65 (discussing inconsistencies in decisions that permit aliens to withdraw guilty pleas when attorneys misinform them about deportation consequences).

371. *See, e.g.*, People v. Pozo, 746 P.2d 523 (Colo. 1987) (en banc); People v. Soriano, 240 Cal. Rptr. 328 (Cal. Ct. App. 1987).

372. *See supra* text accompanying notes 58-62 (analyzing prejudice tier of *Strickland* test for ineffective assistance of counsel).

373. *Id.*

against the severity of the punishment of deportation in order to determine whether it is plausible that defendants would have insisted on going to trial if aware of the deportation possibilities.[374] The determination of prejudice depends on the nature of the charge of ineffectiveness.[375] For example, in *Hill v. Lockhart*,[376] the court explained that if the defendant pleaded guilty because counsel impermissibly failed to discover exculpatory evidence, the court must determine whether the addition of that evidence would have affected the outcome of the trial, and therefore the defendant's plea.[377] Similarly, if counsel had failed to put forth an affirmative defense, the court must determine whether that defense would have affected the outcome.[378] These situations both relate to substantive aspects of the trial, and hinge on whether the outcome at trial would have been effected if counsel had not erred.[379]

In contrast, when defendants seek to have guilty pleas set aside due to ineffective assistance of counsel because counsel did not inform the defendants of the repercussions of their pleas, these defendants claim that if made aware of the repercussions, they would not have entered guilty pleas, thereby waiving their constitutional right to trials by jury.[380] They claim that the drastic nature of the potential penalties would have induced them to proceed to trial.[381] Therefore, to satisfy the prejudice tier of *Strickland*, defendants must show, using specific circumstances, that they would not have entered guilty pleas had they been aware of the potential consequences.

2. The Prejudice Tier of *Strickland* in *Del Rosario v. United States*

When weighing prejudice, courts should not rely upon

374. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55, 57-58 (D.C. Cir. 1990) (holding that defendant did not establish prejudice); United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989) (same).

375. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

376. *Id.*; *see supra* text accompanying notes 85-92 (analyzing *Hill v. Lockhart*).

377. *Hill*, 474 U.S. at 59.

378. *Id.*

379. *Id.*

380. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55, 56-57 (D.C. Cir. 1990) (stating defendant's argument that he would not have entered guilty had he been aware of deportation consequences).

381. *Id.*

their own determinations of the defendants' chances of succeeding at trial. Rather than focusing on whether defendants have colorable claims of innocence, the more appropriate inquiry is whether defendants would have entered guilty pleas if they had been aware of the deportation possibilities. The guilt or innocence of defendants is certainly a factor considered by defendants when deciding whether to plead, but it is an inappropriate determination for judges to make.[382] Such inquiries give judges the right to unfairly eliminate defendants' constitutional right to trials by jury based on personal determinations of guilt.

Unlike most cases that refuse to find ineffective assistance of counsel based on the collateral consequences doctrine, the court in *Del Rosario* explained why the defendant failed to meet his burden of proof under the prejudice tier of *Strickland*.[383] Although the court may have reached the proper result, its analysis is flawed in several respects. Most notably, the court relied upon its own determination of the defendant's chances of succeeding at trial, holding that the defendant did not have a colorable claim of innocence.[384] Judge Mikva's concurrence correctly criticizes the court for relying on its own "guesstimate" of what a jury would have held if the case had gone to trial.[385] Such determinations should not be viewed as "finding[s] of fact."[386] Trial judges should not attempt to determine what juries would have decided, especially because cases where the evidence appears overwhelming frequently result in jury acquittals.

Another error made by the court in *Del Rosario* in determining prejudice was its apparent reliance solely on the trial record.[387] The court found evidence in the transcript supporting the conclusion that the defendant placed no particular emphasis on deportation. Additionally, the court found no evi-

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382. *See id.* at 61 (Mikva, J., concurring in the judgment) (stating that judges cannot be comfortable with role of determining what juries would have decided had case gone to trial).

383. *Del Rosario*, 902 F.2d at 56; *see supra* notes 211-19 and accompanying text (describing treatment of prejudice tier of *Strickland* test for ineffective assistance of counsel in *United States v. Del Rosario*).

384. *Del Rosario*, 902 F.2d at 58.

385. *Id.* at 61 (Mikva, J., concurring in the judgment).

386. *Id.*

387. *Id.* at 57.

dence supporting the defendant's contention that he would not have entered a guilty plea had he been aware of the potential deportation consequences.[388] Certainly the transcript may be used to refute the defendant's assertions. Extrinsic evidence, however, should also be admissible because deportation was not an issue at the time the defendant entered a plea. Therefore, defendants will not be able to support their claims without the admission of extrinsic evidence, because the record will not generally support the defendants' contentions.

The court's third error in rating prejudice was its determination that the defendant delayed his motion to vacate his plea and must therefore have stronger reasons in support of his claim than he would have needed had he moved to vacate his plea earlier.[389] First, it is irrelevant that the defendant did not challenge the assistance of his attorney until seventeen months after his plea,[390] because any charge of delay could only begin to run after the defendant was informed that deportation proceedings were being instituted against him. Second, the court stated that the defendant waited "some months" after he had received notice of the deportation action before claiming ineffective assistance of counsel.[391] It may take "some months," however, for a prisoner to research and file an action once made aware of the deportation proceeding.

Judges instead should inquire as to whether the severity of the initial punishments are so harsh as to make the added penalty of deportation insignificant, and the defendants' claims that they would not have entered guilty pleas had they known about deportation possibilities implausible. Application of this prejudice standard to *Del Rosario* could potentially support the court's holding, but it could also support a holding of prejudice. The defendant was sentenced to four to twelve months in prison, a relatively short sentence. The court's opinion in *Del Rosario* does not indicate whether the defendant had strong ties to the United States, but the severity of deportation certainly could have swayed his decision to plead guilty in light of the relatively light prison sentence.[392] On the other hand, the

388. *Id.*
389. *Id.* at 58.
390. *Id.*
391. *Id.*
392. *Id.*

conversation about deportation at trial is, arguably, strong enough evidence to deny the defendant's claim, because if deportation was particularly important to him, he probably would have stated so when the issue arose prior to his plea.[393]

3. Advantages of Focusing on Prejudice Tier of *Strickland v. Washington*

Strickland v. Washington created a severe doctrine, which only permits reversal of guilty pleas after satisfaction of a two-tiered analysis that has been compared to the "eye of the needle."[394] This approach, which places the burden of proof on defendants, is an almost insurmountable barrier. Courts are obviously reluctant to accept ineffective assistance claims, made clear by the fact that courts have rejected more than ninety-five percent of ineffective assistance claims since the Supreme Court decided *Strickland* in May 1984.[395] The small percentage of successful claims of ineffective assistance of counsel evidences a reluctance on the part of the judiciary to permit defendants, sometimes years after their pleas or trials, to start the trial process over again. This reluctance is no doubt due in part to the fact that as time passes, memories fade, evidence disappears, and criminal cases become harder to prove. It also reflects a belief that convicted criminals should not escape justice due to what are perceived as technicalities. And perhaps most of all, it reflects a belief that convicted criminals will not hesitate to lie in order to get released from prison.

The collateral consequences doctrine was undoubtedly fashioned in a similar spirit. The problem with the doctrine, as seen in *Downs-Morgan* and *Nagaro-Garbin*, is its severity.[396] It makes no exception for cases that are meritorious, and courts

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393. *Id.*

394. Sullivan v. Fairman, 819 F.2d 1382, 1391 (7th Cir. 1987). The court stated that "we expect that few petitioners will be able to pass through the 'eye of the needle' created by *Strickland*." *Id.*

395. *See* Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard For Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L. J. 413, 458 app. I (1988) (stating that as of May 30, 1988, only 4.3% of ineffective assistance of counsel claims had been successful in federal circuit courts).

396. *See supra* text accompanying notes 346-71 (arguing that courts have used strained reasoning to reach just results because of fear of overruling established precedent).

are forced to create strained exceptions or accept the limitations of the doctrine.

Elimination of the collateral consequences doctrine as applied to deportation cases, with a shift in focus onto the prejudice tier of the *Strickland* test, grants courts the flexibility to vacate guilty pleas when the facts of the case so require, and the ability to refuse to vacate pleas when the facts indicate that deportation would not have altered the original plea.[397] The small percentage of cases that succeed under *Strickland* ensures that elimination of the collateral consequences will not create a deluge of vacated guilty pleas.[398] Relying on the prejudice tier of *Strickland*, courts have the discretion to deny relief to defendants with minor ties to the United States who plead guilty to serious crimes with lengthy prison sentences.[399] On the other hand, courts may vacate the pleas of defendants who have strong ties to the United States and have pleaded guilty to minor offenses.[400]

One might argue that this Sixth Amendment approach will fail to solve the problem of defendant ignorance regarding deportation possibilities because it essentially limits relief to petitions for habeas corpus. Because defendants often have the same lawyers during the direct appeal process, these lawyers are unlikely to raise the issue of ineffective assistance of counsel against themselves. Thus, relief will only occur through habeas corpus petitions, which rely heavily on the defendant's credibility in establishing both unreasonable assistance and prejudice, and seldom result reversal of guilty pleas.[401] But, as stated previously, the purpose of this analysis is not to produce a deluge of plea reversals, but merely to provide an avenue for relief in extreme cases. Therefore, the probability of only a small percentage of plea reversals is not troubling.

The more significant effect that this Sixth Amendment

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397. *See supra* text accompanying notes 58-62 (analyzing prejudice tier of *Strickland* test).

398. *See supra* note 395 (noting small percentage of cases that succeed under *Strickland* test).

399. *See supra* text accompanying notes 85-92 (describing application of prejudice tier of *Strickland* test to cases where defendants have pleaded guilty based on counsels' unreasonable representations).

400. *Id.*

401. *See* Calhoun, *supra* note 395 (noting small percentage of cases that succeed under *Strickland* test).

analysis should provide is increased awareness among defense attorneys that they have an affirmative duty to inform aliens about deportation possibilities, and that failure to do so renders their representations ineffective. This awareness will lead to a great percentage of defense attorneys taking steps to ensure that their clients are aware of deportation possibilities.

One might further argue that a Rule 11 approach, requiring judges to inform defendants about the possibility of deportation, would be more effective in ensuring that defendants receive the relevant information.[402] If trial judges simply raise the issue, defense attorneys would be sure to cover the subject with their clients prior to their plea allocutions. Although this argument may be correct, amendment of Rule 11 seems unlikely, and, in addition, a Sixth Amendment analysis provides broader relief than a Rule 11 approach.

Under a Rule 11 approach, the judge merely informs the defendant about the possibility of deportation. Any further research into the matter must be done by the defendant or by counsel. Without this Sixth Amendment analysis, a defendant who is informed of the possibility of deportation by the trial judge, but subsequently receives erroneous or insufficient advice from counsel regarding the specifics of immigration law, would not be able to obtain relief.[403]

Applying the prejudice tier of the *Strickland* test, rather than the professional competence tier of *Strickland*, to cases that created strained exceptions to the collateral consequences doctrine produces far more logical and consistent results than the decisions themselves reached. In *Downs-Morgan*, the court held that the possibility of execution upon returning to Nicaragua, combined with misrepresentations by the defense attorney and a colorable claim of innocence may justify vacating a guilty plea for ineffective assistance of counsel.[404] The threat of execution is extremely persuasive on the issue of prejudice.

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402. *See supra* text accompanying notes 296-301 (describing possible amendment of rule 11).

403. *See* People v. Soriano, 240 Cal. Rptr. 328, 335-36 (Cal. Ct. App. 1987) (holding that defendant received ineffective assistance, despite being informed of possibility of deportation by trial judge, because counsel did not research immigration law and therefore failed to inform defendant that sentence of one year subjected him to deportation, but sentence of one day short of one year would not subject him to deportation).

404. Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985).

A defendant is unlikely to plead guilty if the plea would result in execution. Thus, the attorney's failure to inform the defendant of deportation possibilities renders his representation unreasonable, and the possibility of execution upon returning to Nicaragua satisfies the prejudice tier of *Strickland*, establishing the defendant's claim of ineffective assistance of counsel.[405]

Similarly, in *Nagaro-Garbin*, focusing on the prejudice tier of *Strickland* could result in vacating the defendant's guilty plea due to ineffective assistance of counsel.[406] The defendant in *Nagaro-Garbin* was subject to a fifteen year prison term upon returning to Peru.[407] To reach the court's desired result, it could have held that this impending prison sentence would have induced the defendant to plead not guilty, thereby satisfying the prejudice tier.

Because guilty pleas result in the waiver of important constitutional rights, courts must view the prejudice tier of the *Strickland* test as one that favors defendants. Courts must take

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405. *Id.* Focusing on the prejudice tier of *Strickland* in United States v. George, 676 F. Supp. 863 (N.D. Ill. 1988), *rev'd*, 869 F.2d 333 (7th Cir. 1989), *see supra* note 356 (analyzing *United States v. George*) provides a more logically consistent decision than the district court reached and a more just decision that the Seventh Circuit reached. In *George*, the defendant would clearly be permitted to withdraw his guilty plea because he satisfies the prejudice tier. If the defendant had not pleaded guilty, the delay involved in going to trial would have resulted in the defendant accumulating seven years of permanent residency, making him eligible for discretionary relief. *George*, 676 F. Supp. at 867. It is extremely unlikely that any defendant would plead guilty when simply delaying conviction would result in the defendant becoming eligible for relief from deportation.

Similarly, in People v. Ford, 290 N.Y. L.J. 24 (Mar. 31, 1993) (N.Y. Sup. Ct. 1993), *see supra* note 194, reliance on the prejudice tier of *Strickland* would permit the judge to vacate the defendant's guilty plea. In *Ford*, it was apparent that the district attorney arranged a lenient plea because of the accidental nature of the crime committed. *Id.* If the defendant's attorney had informed him of the deportation possibilities of a guilty plea, it is likely that he would not have pleaded guilty, but would have attempted to plead to a reduced charge that is not considered to involve moral turpitude. *Id.* Because the district attorney offered a lenient plea, it is quite plausible that he would have agreed to a further reduced charge that would permit the defendant to avoid deportation. Therefore, the attorney's failure to inform the defendant of deportation possibilities renders his representation unreasonable, and the strong possibility that the district attorney would have permitted him to plead to a reduced charge that would eliminate the possibility of deportation satisfies the prejudice tier of *Strickland*.

406. United States v. Nagaro-Garbin, 653 F. Supp. 586 (E.D. Mich. 1987), *aff'd*, 831 F.2d 296 (6th Cir. 1987).

407. *Id.* at 588.

precautions against weighing heavily the guilt or innocence of defendants, and must only refuse to vacate pleas when it is overwhelmingly clear that the defendants' pleas would not have been different had they been informed of the deportation consequences. Applying the test in this way ensures that unmeritorious claims do not result in reversal of pleas, while meritorious claims have an appropriate avenue for relief.

CONCLUSION

The collateral consequences doctrine, as applied to deportation proceedings, is precedent that lacks any supportable rationale. Created during the 1950s, when the rights of aliens were even less important to the judiciary than they are today, the doctrine effectively eliminated any remedy for aliens who pleaded guilty to crimes without being aware that they might be deported as a result.[408] Attorneys have an affirmative duty to research all significant ramifications of guilty pleas, and failure to research and inform defendants about deportation ramifications is inconsistent with basic, objective standards of reasonable attorney behavior. For pleas to be voluntary and intelligent, they must be made with sufficient awareness of all important ramifications. Courts must weigh ineffective assistance claims on a case-by-case basis to determine the importance of such knowledge. Courts must balance the severity of deportation to defendants against the severity of the crimes committed and the punishments imposed to determine whether such knowledge would have been significant. If courts determine that such knowledge was significant, prejudicing the defendants' cases, then courts must vacate defendants' pleas due to ineffective assistance of counsel.

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408. *See supra* note 163 (stating that severity of collateral consequence not taken into account).

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