REJECTING THE COLLATERAL CONSEQUENCES DOCTRINE: SILENCE ABOUT DEPORTATION *MAY* OR *MAY NOT* VIOLATE *STRICKLAND*'S PERFORMANCE PRONG

INTRODUCTION

Every fall, it happens in America. A college freshman, on his own for the first time, busts "the dope moves;" he "bust[s] the stupid moves."[1] And he is busted with a thirty-five gram bag of marijuana.

The state charges this student with class A misdemeanor possession of marijuana.[2] If convicted, his sentence could be a year in prison.[3] To avoid prison time, his attorney works out a deal: he pleads guilty and in exchange receives a suspended imposition of sentence and one year of probation.[4] Before accepting the plea, the court runs through its normal questions to ensure that his plea is knowing, voluntary, and intelligently made as required by the Due Process Clause of the U.S. Constitution.[5]

After this young man completes his probation, the court then terminates the case pursuant to a rehabilitative statute.[6] For most, the matter would be closed. But this young man's attorney busted some really stupid moves. Although she knew her client was a Canadian citizen and a U.S. Lawful Permanent Resident (LPR)[7] alien, she never bothered to check or advise her client about the immigration consequences of his guilty plea. Her client will now certainly be removed; he just pled guilty to a deportable offense.[8]

1. FRESH (Miramax Films 1994). During the last five years for which statistics are available, more than one-third of college students reported having used marijuana in the last year. U.S. Dept. of Justice, Bureau of Justice Statistics, Drug Use, http://www.ojp.usdoj.gov/bjs/dcf/du.htm (last visited Nov. 12, 2006).

2. *See*, *e.g.*, MO. REV. STAT. § 195.202.3 (2000).

3. *See, e.g.*, *id.* § 558.011.1(5) (2000 & Supp. 2005).

4. § 195.017.2(4)(u)(2000 & Supp. 2005); § 195.202.2–3 (2000). Instead of sentencing a defendant, a court may suspend the sentence and place the accused on probation. § 557.011.2(3) (2000).

5. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

6. *See*, *e.g.*, MO. REV. STAT. § 610.105 (2000 & Supp. 2005).

7. A "green card" holder. United States Citizenship and Immigration Services, Green Card (LPR), http://www.uscis.gov/portal/site/uscis (Follow "Permanent Residence (green card)" hyperlink) (last visited Nov. 12, 2006).

8. 8 U.S.C. § 1227(a)(2)(B)(i) (2000). Throughout this note, "deportation" and "removal" are used interchangeably. Most people are more familiar with the term "deportation proceedings," but the correct term is "removal proceedings." 8 U.S.C. § 1229 (2000).

Aliens who unknowingly pled guilty to deportable offenses have generally pursued two lines of attack. Some attempt to withdraw their guilty pleas by asserting that due process required the trial court to question and inform them about the immigration consequences of the pleas.[9] Others challenge their convictions by alleging ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution.[10]

The first line of attack has always failed—no jurisdiction has ever held that trial courts must inform defendants about any "collateral consequences" of their pleas, including deportation.[11] Similarly, in most jurisdictions, an attorney's failure to advise her client is not a cognizable claim either.[12] Only one jurisdiction, New Mexico, has departed from this line of reasoning and concluded that an attorney's failure to advise an alien defendant of the immigration consequences of his guilty plea may violate his Sixth Amendment right to effective assistance of counsel.[13]

Recently, the New Mexico Supreme Court disentangled the collateral consequences doctrine's due process origins from the Sixth Amendment analysis.[14] In *State v. Paredez*, the court determined that deportation continues to be a collateral consequence of conviction that trial courts need not address.[15] According to New Mexico's high court, however, a collateral consequence exception to ineffective assistance of counsel claims is inconsistent with Supreme Court precedent.[16] Ironically, the court failed to follow that same precedent when it announced the bright-line rule that an attorney's failure to advise her client about the immigration consequences of a guilty plea is categorically unreasonable.[17] Instead, the New Mexico Supreme Court should have found that an attorney acts unreasonably when she does not inform her client about immigration consequences *that might influence* his decision to plead guilty or go to trial.

This Comment first explains the immigration consequences of guilty pleas. Part II discusses the due process requirement that a plea be voluntary and intelligent and the emergence of the collateral consequences doctrine as an exception to that rule. Part III then examines the Sixth Amendment's requirement that all criminal defendants be provided with effective assistance

9. *Cf.* Boykin v. Alabama, 395 U.S. 238, 242−43 (1969) (noting that courts should make sure the accused fully understands the consequences of a plea).

10. *Cf.* Hill v. Lockhart, 474 U.S. 52, 53, 58 (1985); Strickland v. Washington, 466 U.S. 668, 671, 687 (1984).

11. *See infra* notes 40−52 and accompanying text.

12. *See infra* notes 70−76 and accompanying text.

13. State v. Paredez, 101 P.3d 799, 804 (N.M. 2004).

14. *Id.* at 803–04.

15. *Id.* at 803.

16. *Id.* at 804.

17. *Id.*

of counsel, observing that many courts apply the collateral consequences doctrine to ineffective assistance of counsel claims, but several include exceptions for misadvice or equivocal advice. Part IV describes *State v. Paredez*, which evaluates the collateral consequences doctrine in both the due process and ineffective assistance of counsel contexts. Part V asserts that New Mexico correctly determined that deportation follows criminal conviction as a collateral, rather than direct, consequence. The Comment then argues that courts, including the New Mexico Supreme Court, have illegitimately replaced *Strickland*'s case-by-case reasonableness analysis with bright-line rules. The author then proposes a workable standard and evaluates three scenarios facing criminal defendants using that standard.

I. THE IMMIGRATION CONSEQUENCES OF GUILTY PLEAS

More than twenty million aliens live in the United States.[18] While the overwhelming majority of aliens are law-abiding members of society, tens of thousands brush with the law each year. As a result, the government currently removes (deports) almost ninety thousand "criminal aliens" a year.[19] Over eighty thousand of them plead guilty to deportable offenses.[20]

From 1984 to 2002, the number of deportations for criminal convictions increased seventy-one times.[21] This rapid increase is due, in part, to draconian

18. As of 2003, the government estimated that 11.5 million Lawful Permanent Residents resided in the United States. NANCY F. RYTINA, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION AND POPULATION ELIGIBLE TO NATURALIZE IN 2003 3 (Jan. 2005), *available at* http://uscis.gov/graphics/shared/statistics/publications/EstimateLPR2003.pdf. The government estimates that an additional seven million aliens resided in the United States illegally. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 1 (2003), *available at* http://uscis.gov/graphics/shared/statistics/publications/Ill_Report_1211.pdf. The U.S. Census Bureau estimates that an additional 500,000 illegal immigrants enter the country each year. Center for Immigration Studies, Current Numbers, http://www.cis.org/topics/currentnumbers.html (last visited Nov. 12, 2006).

19. MARY DOUGHERTY ET AL., U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2004 1 (Nov. 2005), *available at* http://uscis.gov/graphics/shared/statistics/publications/AnnualReportEnforcement2004.pdf.

20. In 2002, ninety-five percent of criminal convictions in state courts were obtained through guilty pleas. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2002 1 (Dec. 2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf. In federal court during 2003, ninety-six percent of convictions resulted from guilty pleas. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2, 59 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs03.pdf.

21. Anne M. Gallagher, *Immigration Consequences of Criminal Convictions: A Primer on What Crimes Can Get Your Client Into Trouble*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 166, 166 (2004–2005).

changes in the immigration laws. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[22] and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[23] greatly expanded the list of deportable offenses.[24] Crimes of moral turpitude,[25] aggravated felonies,[26] certain firearm offenses,[27] and crimes of domestic violence[28] are among the offenses that warrant deportation. Conviction for all drug crimes,[29] except possession of thirty grams or less of marijuana,[30] also results in an alien's removal, even if he has been a lawful resident of the United States since infancy.[31]

At the same time AEDPA and IIRIRA broadened the class of deportable crimes, the laws eliminated all discretion that immigration judges previously had to waive deportation for many offenses; removal now follows as a matter of course.[32] An alien may only prevent removal by vacating his conviction based on a procedural or substantive flaw in the underlying proceedings.[33] Convictions vacated on ameliorative (i.e., to avoid deportation) or rehabilitative (i.e., probation completed) grounds remain "convictions" for immigration purposes and therefore continue to warrant deportation.[34]

22. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

23. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

24. Gallagher, *supra* note 21, at 166.

25. 8 U.S.C. § 1227(a)(2)(A)(i)–(ii) (2000). A crime of moral turpitude involves "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality." Matter of Franklin, 20 I. & N. Dec. 867, 868 (BIA 1994), *aff'd* 72 F.3d 571 (8th Cir. 1995). Such crimes include aggravated assault, child abuse, rape, statutory rape, arson, fraud, receipt of stolen property, and bribery. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 52−57 (8th ed. 2002).

26. 8 U.S.C. § 1227(a)(2)(A)(iii) (2000). Aggravated felonies include murder, rape or sexual abuse of a minor, trafficking in controlled substances, offenses relating to explosives and firearms, theft or burglary offenses in which the term of imprisonment imposed is at least one year, fraud or deceit in which the victim's loss exceeds $10,000, and crimes of violence for which the term of imprisonment imposed, regardless of any suspension of sentence, is at least one year. § 1101(a)(43)(A)–(G); KURZBAN, *supra* note 25, at 122−33.

27. § 1227(a)(2)(C).

28. § 1227(a)(2)(E).

29. § 1227(a)(2)(B)(i).

30. *Id.*

31. Rob A. Justman, Comment, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony"*, 2004 UTAH L. REV. 701, 731 (2004).

32. *See id.* at 701–08 (discussing how AEDPA and IIRIRA eliminated discretionary relief for aliens convicted of aggravated felonies under section 212(c) of the Immigration and Nationality Act). Under pre-AEDPA law, aliens convicted of drug offenses were also eligible for a discretionary waiver of deportation. I.N.S. v. St. Cyr, 533 U.S. 289, 293 (2001).

33. *In re* Pickering, 23 I. & N. Dec. 621, 624 (BIA 2003).

34. Mark T. Kenmore, *Getting Comfortable with Post-Conviction Relief*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK 197, 202 (2004). A narrow exception exists for aliens placed

II. DUE PROCESS REQUIRES THAT A GUILTY PLEA BE VOLUNTARY, KNOWING, AND INTELLIGENTLY MADE

Due process[35] requires trial courts to explain certain consequences of criminal convictions to the defendant and ensure that all pleas are entered voluntarily.[36] This is necessary because when a defendant pleads guilty, he waives several constitutional rights.[37] For a waiver of these rights to be constitutionally valid, the waiver must be "an intentional relinquishment or abandonment of a known right or privilege."[38] Therefore, the waiver must be voluntary, knowing, and intelligent.[39]

A. The Development of the Collateral Consequences Doctrine

A waiver qualifies as voluntary, knowing, and intelligent only if it was made "with sufficient awareness of the relevant circumstances and likely

into immigration proceedings in the Ninth Circuit. *Id.* at 200; *see also* Lujan-Armendariz v. I.N.S., 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug offenders who take advantage of state rehabilitative schemes and would otherwise be eligible for relief under the Federal First Offender Act are not "convicted" for purposes of deportation). The Board of Immigration Appeals and each other circuit to address the issue have rejected the Ninth Circuit's approach. *See, e.g.*, Resendiz-Alcaraz v. Ashcroft, 383 F.3d 1262, 1271 (11th Cir. 2004); Acosta v. Ashcroft, 341 F.3d 218, 226 (3d Cir. 2003); *In re* Salazar, 23 I. & N. Dec. 223, 235 (BIA 2002).

35. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment states that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, §1.

36. *See, e.g.*, McCarthy v. United States, 394 U.S. 459 (1969) (vacating defendant's conviction because the trial judge did not question the defendant as to the voluntary nature of his plea). In *McCarthy*, the Court based its decision on Rule 11 of the Federal Rules of Criminal Procedure and explained that those rules exist to protect the defendant's due process rights. Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 166 (1981); Guy Cohen, Note, *Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas*, 16 FORDHAM INT'L L.J. 1094, 1105 (1993); *see also* Boykin v. Alabama, 395 U.S. 238 (1969) (reversing defendant's conviction because the record contained no evidence that defendant intelligently and knowingly pled guilty).

37. *Boykin*, 395 U.S. at 243. By admitting guilt, the defendant waives his Fifth Amendment right against compulsory self incrimination. *Id.* This Fifth Amendment right applies to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). The defendant also waives his Sixth Amendment rights to be tried by a jury and to confront his accusers. *Boykin*, 395 U.S. at 243. Trial by jury and the right to confront the witnesses against the defendant are so fundamental to the American system of justice that the Fourteenth Amendment protects these rights in state courts. Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Pointer v. Texas, 380 U.S. 400, 403 (1965).

38. *McCarthy*, 394 U.S. at 466 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

39. *Boykin*, 395 U.S. at 243–44; Brady v. United States, 397 U.S. 742, 748 (1970); FED. R. CRIM. P. 11(b) (2005); Budeiri, *supra* note 36, at 165–66; Cohen, *supra* note 36, at 1105–06.

consequences."[40] Not every circumstance or consequence appears to be relevant—the Supreme Court stated that a defendant must be "fully aware of the *direct* consequences" of his plea.[41] Most courts have interpreted this language to mean that the defendant need know only the "direct" consequences of his plea; he need not know about any "collateral" consequences.[42]

Direct consequences have "a definite, immediate and largely automatic effect on the range of the defendant's punishment."[43] Consequences affecting the maximum term of imprisonment, such as when a sentence commences and ineligibility for parole or mandatory special parole terms, are deemed "direct."[44] Unlike direct consequences, "collateral" consequences remain "beyond the control and responsibility of the district court in which [the] conviction was entered."[45] Collateral consequences are not necessarily minor consequences. They include loss of the right to obtain a passport, to serve on a jury, loss of business licenses, deportation, and civil commitment.[46] Frequently, collateral consequences result in more significant hardship than direct consequences.[47] For example, most people would probably consider certain collateral consequences such as indefinite civil commitment[48] or permanent removal from the United States[49] to be more severe than a short prison sentence.

40. *Brady*, 397 U.S. at 748.

41. *Id.* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (rev'd on confession of error on other grounds, 356 U.S. 26 (1958)) (emphasis added); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 728 (2002).

42. Chin & Holmes, *supra* note 41, at 728; *see, e.g.*, United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (per curium) (It is "well settled that, before pleading, the defendant need not be advised of all collateral consequences of his plea."); Johnson v. United States, 460 F.2d 1203, 1204 (9th Cir. 1972) ("We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences."); Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1365 (4th Cir. 1973).

43. United States v. Amador-Leal, 276 F.3d 511, 515 (9th Cir. 2002) (quoting Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988)).

44. Budeiri, *supra* note 36, at 181–86.

45. *See, e.g.*, El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) (quoting United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)); *accord* State v. Aquino, 873 A.2d 1075, 1082 (Conn. Ct. App. 2005); State v. Paredez, 101 P.3d 799, 803 (N.M. 2004).

46. Budeiri, *supra* note 36, at 170–77. For an exhaustive list of collateral consequences, see Chin & Holmes, *supra* note 41, at 705–06.

47. Chin & Holmes, *supra* note 41, at 699–700; Steve Colella, *"Guilty, Your Honor": The Direct and Collateral Consequences of Guilty Pleas and the Courts that Inconsistently Interpret Them*, 26 WHITTIER L. REV. 305, 309 (2004).

48. Kansas v. Hendricks, 521 U.S. 346, 362−63 (1997); Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

49. Budeiri, *supra* note 36, at 171; Chin & Holmes, *supra* note 41, at 705–06.

Despite deportation's severity, each federal circuit court to consider the issue has found it a collateral, rather than direct, consequence of a guilty plea.[50] The federal circuits that have not yet directly considered the issue generally indicate that they too would reach the same holding.[51] Similarly, state courts have reached the same conclusion.[52]

III. THE SIXTH AMENDMENT GUARANTEES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL TRIALS

The Sixth Amendment to the United States Constitution guarantees that in all criminal trials, "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[53] Although initially it only applied to federal trials,[54] the Sixth Amendment right to counsel now also attaches to state prosecutions.[55] The Sixth Amendment guarantees not only the right to representation during critical stages of a criminal prosecution,[56] it also guarantees "*effective* assistance of counsel."[57]

Actions taken by both the state and counsel may deprive a criminal defendant of his Sixth Amendment right to counsel. The government violates this right when it interferes with the attorney's ability to conduct the defense or independent decision-making.[58] An attorney deprives her clients of their Sixth Amendment rights when she fails to provide "adequate legal assistance."[59]

In *Strickland v. Washington*, the Supreme Court introduced a two-prong test to determine if an attorney's assistance of counsel was so defective that a Sixth Amendment violation occurred.[60] First, the defendant must show that his attorney's performance fell below that of an objectively reasonably competent

50. *Paredez*, 101 P.3d at 803.

51. *Id.*; s*ee, e.g.*, Broomes v. Ashcroft, 358 F.3d 1251, 1257 n.4 (10th Cir. 2004); Kandiel v. United States, 964 F.2d 794, 796 (8th Cir. 1992). *But see* United States v. Couto, 311 F.3d 179, 190–91 (2d Cir. 2002) (indicating that arguments that deportation is no longer collateral in light of the fact that changes in the immigration laws are "persuasive").

52. Commonwealth v. Tahmas, Nos. 105254, 105255, 2005 WL 2249587, at *2 n.5 (Va. Cir. Ct. July 26, 2005).

53. U.S. CONST. amend. VI. The Supreme Court considers assistance of counsel as a safeguard "necessary to insure fundamental human rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

54. Betts v. Brady, 316 U.S. 455, 461 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

55. U.S. CONST. amend. XIV, §1; *Gideon*, 372 U.S. at 335.

56. United States v. Cronic, 466 U.S. 648, 659 (1984).

57. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

58. Strickland v. Washington, 466 U.S. 668, 686 (1984).

59. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). For example, a conflict of interest between the attorney and her client could so adversely affect the adequacy of counsel's representation as to constitute ineffective assistance of counsel. *Id.* at 359; Wood v. Georgia, 450 U.S. 261, 272–74 (1981).

60. *Strickland*, 466 U.S. at 687.

attorney considering all the circumstances.[61] When evaluating reasonableness, standards reflected by professional organizations and bar associations are probative but not dispositive.[62] The Court explained that "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel."[63] Although counsel enjoys a strong presumption that her behavior is reasonable, a defendant can overcome this presumption.[64]

If the defendant can establish that his attorney's representation was objectively unreasonable, he must then establish that his attorney's deficient performance prejudiced him in some way.[65] To establish prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[66]

The *Strickland* test also applies when a defendant alleges ineffective assistance of counsel after a guilty plea.[67] In *Hill v. Lockhart*, the Court explained that the defendant must first "attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was objectively unreasonable.[68] Then to establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[69]

A. Application of the Collateral Consequences Doctrine to Ineffective Assistance of Counsel

Most courts extend the collateral consequences doctrine (relating to the trial court's duty to inform a defendant about the consequences of his plea) to ineffective assistance of counsel claims.[70] In most jurisdictions, an attorney's failure to advise her client about the collateral consequences of a guilty plea cannot constitute ineffective assistance of counsel.[71] Those jurisdictions hold

61. *Id.* at 687–88. The reasonableness of the attorney is based on an objective standard. *Id.*

62. *Id.* at 688.

63. *Id.* at 688−89.

64. *Id.* at 688.

65. *Strickland*, 466 U.S. at 687, 692.

66. *Id*. at 694. Prejudice is presumed in certain circumstances such as "[a]ctual or constructive denial of the assistance of counsel." *Id.* at 692.

67. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

68. *Id*. at 56–57.

69. *Id.* at 59.

70. Cohen, *supra* note 36, at 1109.

71. Chin & Holmes, *supra* note 41, at 703–04; Cohen, *supra* note 36, at 1109. Professors Chin and Holmes state "all courts." Chin & Holmes, *supra* note 41, at 703–04. *Paredez* creates an exception to this rule. *See infra* notes 105–128.

that the Sixth Amendment requires defense counsel to explain only the direct consequences of a guilty plea.[72]

B. Ineffective Assistance and Advice Regarding Immigration Consequences

Deportation is possibly the harshest consequence of a guilty plea.[73] It may cause "loss of both property or life, or of all that makes life worth living."[74] In many cases, the immigration consequence of a guilty plea—deportation—far outweighs the criminal consequences.[75] For example, in the scenario in the introduction, the youth would serve no jail time but would be separated from his family and friends with no way back, ever.

Despite the severity of deportation, the majority of courts apply the collateral consequences doctrine to ineffective assistance of counsel claims where the attorney failed to advise her alien client about the risk of deportation upon entering a guilty plea.[76] Only New Mexico recognizes that an attorney's silence may violate the Sixth Amendment.[77] Several jurisdictions do, however, recognize that immigration consequences may form part of the bargain.

1. The Misadvice Exception

In some jurisdictions, attorneys are not completely relieved from all obligations regarding the immigration consequences of guilty pleas.[78] The courts that adopt the "middle ground" find ineffective assistance of counsel when attorneys misadvise their clients, leading them to believe that deportation will not follow.[79] In these jurisdictions, defense attorneys have no affirmative obligation to advise defendants that a plea will result in deportation, but advice, if offered, must be accurate.[80]

72. Chin & Holmes, *supra* note 41, at 703.

73. Justman, *supra* note 31, at 732.

74. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

75. Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CAL. L. Rev. 541, 545 (2004).

76. Lea McDermid, Comment, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. Rev. 741, 751 (2001); *see, e.g.*, United States v. Banda, 1 F.3d 354 (5th Cir. 1993); Varela v. Kaiser, 976 F.2d 1357 (10th Cir. 1992); United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990); Santos v. Kolb, 880 F.2d 941 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); Nikolaev v. Webber, 705 N.W.2d 72 (S.D. 2005); State v. Santos, 401 N.W.2d 856 (Wis. Ct. App. 1987).

77. State v. Paredez, 101 P.3d 799, 804 (N.M. 2004).

78. John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 724–25 (2003).

79. McDermid, *supra* note 76, at 754.

80. Francis, *supra* note 78, at 726; *see*, *e.g.*, United States v. Couto, 311 F.3d 179, 187–88 (2d Cir. 2002); Downs-Morgan v. United States, 765 F.2d 1534, 1540–41 (11th Cir. 1985);

This distinction between nonadvice and affirmative misadvice is problematic because ineffective assistance of counsel claims can only be brought with respect to proceedings that are covered by the right to counsel, and the courts that adopt the collateral consequence doctrine consider deportation outside the scope of ineffective assistance of counsel.[81] One possible explanation is that courts might justify the distinction on practical considerations because it is "easier to prove that misadvice, rather than non-advice" caused the alien to plead guilty.[82]

2. The "Maybe" Exception

Recently, a few jurisdictions have recognized a second exception to the "no obligation" rule.[83] In the "maybe" exception group, an attorney's performance is objectively unreasonable when she tells her client that a *possibility* of deportation exists but, in fact, deportation is a *certainty*.[84] For example, the Ninth Circuit found defense counsel's performance to have been deficient when he informed the defendant that deportation was "technically a possibility," but "not a serious possibility."[85] Likewise, the New Mexico Supreme Court has held that when deportation will "almost certainly" follow as a consequence of a guilty plea, counsel's advice that the plea "could" result in deportation was "misleading and thus deficient."[86]

IV. A NEW BRIGHT-LINE: *STATE V. PAREDEZ*

In *State v. Paredez*,[87] the New Mexico Supreme Court disentangled ineffective assistance of counsel from the collateral consequences doctrine.[88] In doing so, *Paredez* broke ground as the first case in which an attorney's

Commonwealth v. Tahmas, Nos. 105254, 105255, 2005 WL 2249587, at *3 (Va. Cir. Ct. July 26, 2005); Rollins v. State, 591 S.E.2d 796 (Ga. 2004).

81. Chin & Holmes, *supra* note 41, at 735.

82. *Id.* at 736. This author suggests that the only possible reasonable justification for this distinction could be that counsel is required as a "special circumstance" under the Fourteenth and Fifth Amendment Due Process Clauses. *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (concluding that due process requires appointing counsel at *some* parole and probation revocation hearings).

83. Some jurisdictions have rejected the "maybe" exception. For example, in *State v. Rojas-Martinez*, advice that pleading guilty to an aggravated felony "might or might not" lead to deportation did not qualify as misadvice. 125 P.3d 930, 933 (Utah 2005); *see also* Gonzalez v. State, 134 P.3d 955 (Or. 2006) (holding that counsel is required to advise alien clients that a criminal conviction could result in deportation).

84. *Rojas-Martinez*, 125 P.3d at 934.

85. United States v. Kwan, 407 F.3d 1005, 1008 (9th Cir. 2005).

86. State v. Paredez, 101 P.3d 799, 804 (N.M. 2004).

87. *Id.*

88. *Id.*

failure to advise her client about the immigration consequences of a plea violated the Sixth Amendment's guarantee to effective assistance of counsel.[89]

A. Background

Ramon Paredez pled guilty to criminal sexual contact of a minor on a child thirteen to eighteen years of age.[90] At the plea hearing, the defendant's attorney informed the court that the defendant was a Guatemalan citizen and lawful permanent resident alien.[91] His attorney also told the court that he had advised the defendant that the plea "could" have immigration consequences.[92] The district court then informed the defendant that his plea "could" affect his immigration status.[93] The court sentenced the defendant to three years, but suspended the sentence and placed the defendant on probation for three years.[94] Immediately thereafter, the defendant moved to withdraw his guilty plea because he had not been fully informed of the immigration consequences of his plea.[95] The district court denied the defendant's motion, and the Court of Appeals affirmed, holding that the district court was not "required to provide a more specific explanation of the immigration consequences of the defendant's guilty plea" and that the record was "insufficient to address on direct appeal the issue of ineffective assistance of counsel."[96]

On appeal, the New Mexico Supreme Court first noted that the defendant "almost certainly will be deported back to Guatemala" as an aggravated felon without any opportunity for discretionary relief.[97] The court observed that neither the district court nor defense counsel informed him that his plea would result in "virtually automatic deportation."[98]

B. The Court's Duty to Inform a Criminal Defendant of the Immigration Consequences of a Guilty Plea

In *Paredez*, the court first examined the trial court's duty to inform criminal defendants about the immigration consequences of their guilty pleas.[99] The court concluded that the district court complied with the state's rules of

89. *Id.* at 803–04.
90. *Id.* at 800–01.
91. *Paredez*, 101 P.3d at 801.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Paredez*, 101 P.3d at 801.
97. *Id.* "Aggravated felon" is the term used for an alien convicted of an aggravated felony. *See* Justman, *supra* note 31, at 704.
98. *Paredez*, 101 P.3d at 801.
99. *Id.* at 802.

criminal procedure[100] when it told the defendant that his plea "could" result in his deportation.[101] The court then considered whether the Due Process Clause of the U.S. Constitution required the district court to specifically inform the defendant that his plea *would* result in his deportation rather than that it *could* result in his deportation.[102]

Noting the *Boykin* and *Brady* standards that a plea must be voluntary, knowing, and intelligently made, the New Mexico Supreme Court observed that the trial court has a duty only to ensure that a criminal defendant comprehends the "direct" consequences of his guilty plea; it has no duty to inform him of the "collateral" consequences.[103] Citing the First Circuit's decision in *United States v. Gonzalez*,[104] the court explained:

> What renders [a] plea's immigration effects "collateral" is not that they arise "virtually by operation of law," but the fact that deportation is "not the sentence of the court which accept[s] the plea but of another agency over which the trial judge has no control and for which he [or she] has no responsibility.[105]

The court explained that although changes in immigration law made deportation virtually automatic rather than merely possible, it continues to follow as a collateral consequence.[106] The court concluded that because due process does not require that the trial court inform the defendant about collateral consequences, due process did not require the trial court to inform the defendant that his plea "almost certainly" would result in his deportation.[107]

C. An Attorney's Duty to Inform Clients of the Immigration Consequences of a Guilty Plea

The court's decision in *Paredez* that due process imposed no duty on the trial court did not necessarily mean that the Sixth Amendment similarly imposed no duty on counsel.[108] The court proceeded to analyze whether defense counsel's failure to inform the defendant that his plea would "almost certainly" result in his deportation constituted ineffective assistance of counsel.[109]

100. N.M. RULES ANN. 5-303 (2004).

101. *Paredez*, 101 P.3d at 802–03.

102. *Id.* at 803. The court declined to consider an argument based on the due process clause of the New Mexico constitution because Paredez did not argue that the state due process clause should be interpreted differently than the federal due process clause. *Id.* at 802.

103. *Id.* at 802–03.

104. United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000).

105. *Paredez*, 101 P.3d at 803 (citing *Gonzalez*, 202 F.3d at 27 (citation omitted)).

106. *Id.* at 803.

107. *Id.*

108. *Id.* at 803–04.

109. *Id.* at 804.

After outlining the *Strickland* two-part test, the court first addressed the deficient performance prong.[110] The court agreed with the jurisdictions that recognize "affirmative misrepresentation[s]" as objectively unreasonable.[111] Further, if deportation is almost certain, an attorney's advice that he "could" or "might" be deported misleads the client into believing he possesses some chance of remaining in the United States.[112] Therefore, such statements also fall below objective standards of reasonableness.[113] Instead of merely adopting the "maybe" exception, the court went "one step further" and announced a new bright-line rule: "an attorney's non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance."[114]

The court acknowledged and rejected the Tenth Circuit's holding in *Broomes v. Ashcroft*[115] that defense counsel's failure to advise a criminal defendant about the possibility of deportation cannot be ineffective assistance of counsel because deportation remains a collateral consequence of conviction.[116] The New Mexico Supreme Court rested its decision on three grounds. First, the court found a tenuous distinction between nonadvice and misadvice.[117] Misadvice that a guilty plea "might," "may," or "could" result in deportation and nonadvice regarding the immigration consequences both result in a defendant deciding whether to plead guilty without sufficient information to make an informed decision.[118] Second, citing Professor John Francis's article,[119] the court observed that distinguishing between nonadvice and misadvice would "create a chilling effect on the attorney's decision to offer advice."[120] Attorneys would risk being deemed "ineffective" if they chose to advise their clients at all.[121] Finally, the court recognized that not requiring lawyers to advise their clients of the specific immigration consequences of their guilty pleas will shift the burden "to discern complex legal issues on a class of clients least able to handle that duty."[122] As additional support, the court described the American Bar Association standards for criminal defense

110. *Paredez*, 101 P.3d at 804.
111. *Id.*
112. *Id.*
113. *Id.* at 803–04.
114. *Id.* at 804.
115. 358 F.3d 1251 (10th Cir. 2004).
116. *Paredez*, 101 P.3d at 804.
117. *Id.*
118. *Id.* at 804–05.
119. Francis, *supra* note 78.
120. *Paredez*, 101 P.3d at 805.
121. *Id.* at 805.
122. *Id.* (quoting Francis, *supra* note 78, at 726).

attorneys[123] and determined that attorneys offer deficient performance unless they: 1) "determine the immigration status of their clients;" and 2) advise them "of the specific immigration consequences of pleading guilty."[124]

To prevail on an ineffective assistance of counsel claim, the defendant must also satisfy the *Strickland* "prejudice" prong.[125] In *Paredez*, the defendant needed to show that he would not have pled guilty had he been "given constitutionally adequate advice" about the immigration consequences of his plea.[126] Although the court found a "strong inference" that the defendant would not have pled guilty had his attorney properly advised him, the court found the record insufficiently developed to make that determination.[127] The court remanded the case for an evidentiary hearing on that issue.[128]

V. *PAREDEZ* REACHED THE RIGHT RESULT, BUT ANNOUNCED THE WRONG RULE

New Mexico's *Paredez* decision is likely to draw criticism from all sides. Immigrant advocates may criticize the *Paredez* decision because courts have no duty to inform defendants about the immigration consequences of their guilty pleas. Anti-immigrant groups may criticize it because it means a court's non-duty does not relieve attorneys from their own independent duties.

A. Deportation is a Collateral Consequence

The *Paredez* decision correctly applied the Supreme Court's rule that due process requires that a defendant know the "direct" consequence of his plea.[129] Courts should not have to be aware of every possible consequence, and even though deportation ranks among the most draconian punishments, it still remains outside the scope of criminal proceedings.

Several authors have criticized the collateral consequences doctrine's application to deportation because, post-IIRIRA, deportation follows conviction as a matter of course.[130] These arguments assert that even if deportation were a collateral consequence prior to 1996, IIRIRA and AEDPA so greatly changed the nature of deportation proceedings that it is no longer

123. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, standard § 14-3.2 (3d ed. 1999).

124. *Paredez*, 101 P.3d at 805.

125. Strickland v. Washington, 466 U.S. 668, 687−88 (1984).

126. *Paredez*, 101 P.3d at 805 (citing Gonzalez v. Oregon, 83 P.3d 921, 925 (2004)).

127. *Id.* at 805–06.

128. *Id.* at 806.

129. Brady v. United States, 397 U.S. 742, 755 (1970).

130. Melissa L. Castillo, Comment, *A Duty to Warn: Representing the Non-Citizen in a Criminal Case [*State v. Muriithi, *46 P.3d 1145 (Kan. 2002)]*, 44 WASHBURN L.J. 627, 649–51 (2005); Colella, *supra* note 47, at 323; McDermid, *supra* note 76, at 762.

collateral.[131] Because immigration judges no longer have discretion to suspend or cancel removal proceedings, some argue that deportation follows as an automatic, immediate and definite consequence of a guilty plea—that deportation is a direct consequence.[132]

There is no doubt that the 1996 laws moved deportation from a possible consequence to a certain or definite consequence. The Supreme Court recognized this in *Immigration and Naturalization Services v. St. Cyr*.[133] However, *St. Cyr* does not support arguments that the definite or certain nature of deportation moved it into the "direct" category. While the Court noted the "clear difference . . . between facing possible deportation and facing certain deportation," the Court identified the distinction "for the purposes of retroactivity analysis," and made no mention of the direct-collateral distinction.[134]

While deportation is a definite result of a guilty plea, it is neither automatic nor immediate. "Automatic" consequences require no further action from any government agent.[135] For example, ineligibility for welfare benefits qualifies as automatic because the government need not take any action to suspend or deny an individual those benefits.[136] An alien's removal does not automatically follow a criminal conviction. Instead, the alien must be issued a Notice to Appear,[137] placed in removal proceedings,[138] and ordered removed by an immigration judge.[139]

After pleading guilty to a removable offense, deportation is a near certainty,[140] but it does not necessarily follow immediately. United States Immigration and Customs Enforcement agents have the power to issue detainers to other law enforcement agencies for the purpose of holding and arresting criminal aliens.[141] In many cases, years pass between the entry of a guilty plea and the initiation of removal proceedings.[142]

131. Castillo, *supra* note 130, at 649–50; Colella, *supra* note 47, at 323; McDermid, *supra*, note 76, at 762.

132. Castillo, *supra* note 130, at 649–50; Colella, *supra* note 47, at 323; McDermid, *supra*, note 76, at 762.

133. 533 U.S. 289, 325 (2001).

134. *Id.*

135. United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000).

136. United States v. Littlejohn, 224 F.3d 960, 966–67 (9th Cir. 2000).

137. The Notice to Appear is the immigration charging document. 8 U.S.C. § 1229(a) (2000).

138. 8 C.F.R. § 238.1 (2006).

139. § 1240.12(c).

140. *See supra* notes 22−34 and accompanying text.

141. § 287.2. A "detainer" requests that an agency hold an alien until the Department of Homeland Security can assume custody. *Id.*

142. *See*, *e.g.*, Guaylupo-Moya v. Gonzales, 423 F.3d 121, 127 (2d Cir. 2005) (over two years between plea and initiation of proceedings); United States v. Kwan, 407 F.3d 1005, 1108−09 (9th Cir. 2005) (over three years between plea and initiation of proceedings); United States v. Fry, 322

Even assuming these arguments were correct as to the automatic and immediate nature of deportation, they overlook the nature of the direct-collateral distinction. As the court in *Paredez* pointed out, the direct-collateral distinction rests not on whether the effect occurs "virtually by operation of law," but instead on whether the issuing court has control over the consequence in question.[143] The First,[144] Sixth,[145] Ninth,[146] and Tenth[147] Circuits, as well as several state courts,[148] have reiterated that regardless of how automatic a consequence, if it "remains beyond the control and responsibility" of the sentencing court, it "remains a collateral consequence."[149] As the Ninth Circuit explained, "no matter what changes have been wrought by AEDPA and IIRIRA, removal remains the result of another governmental agency's subsequent actions."[150]

B. Failure to Advise of the Immigration Consequences of a Guilty Plea May Be Ineffective Assistance of Counsel

When evaluating whether Mr. Paredez's attorney provided ineffective assistance, the New Mexico Supreme Court properly focused on whether his counsel's conduct was objectively reasonable rather than whether deportation is collateral or direct. Yet the court adopted another bright-line rule: an attorney's silence about the possibility of deportation is categorically unreasonable. Like the direct-collateral distinction, this rule is inconsistent with *Strickland*'s case-by-case approach to evaluating ineffective assistance of counsel claims. Instead, the court should have adopted a uniform standard that satisfies *Strickland* and yields the proper result in the nonadvice, misadvice, and equivocal advice categories.

F.3d 1198, 1199 (9th Cir. 2003) (same). In other cases, the delay is several months. *See*, *e.g.*, El-Nobani v. United States, 287 F.3d 417, 420 (6th Cir. 2002) (three months).

143. State v. Paredez, 101 P.3d 799, 803 (N.M. 2004) (quoting U.S. v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)).

144. *Gonzalez*, 202 F.3d at 27.

145. *El-Nobani*, 287 F.3d at 421.

146. United States v. Amador-Leal, 276 F.3d 511, 515–16 (9th Cir. 2002).

147. Broomes v. Ashcroft, 358 F.3d 1251, 1256 (10th Cir. 2004).

148. *See*, *e.g.*, Rumpel v. State, 847 So. 2d 399, 403 (Ala. Crim. App. 2002); State v. Abdullahi, 607 N.W.2d 561, 567 (N.D. 2000).

149. *Gonzalez*, 202 F.3d at 27. *But cf.* United States v. Couto, 311 F.3d 179, 190 (2nd Cir. 2002) (finding arguments that deportation is no longer collateral "persuasive" and deserving of "careful consideration").

150. *Amador-Leal*, 276 F.3d at 516.

1. The Collateral Consequences Doctrine Cannot Exist Outside of *Strickland*

Many critics correctly identify the collateral consequences doctrine as inconsistent with *Strickland*.[151] In the two decades since the Supreme Court decided *Strickland*[152] and *Hill*,[153] the Court has heard many ineffective assistance claims. The Supreme Court has never distinguished between collateral and direct consequences when evaluating those claims.[154] In fact, in *Hill*, the Court declined to adopt the Eighth Circuit's direct-collateral distinction and instead reiterated that the *Strickland* test applies to all ineffective assistance claims.[155] In *Hill*, the Supreme Court did not affirm the Eighth Circuit's decision on the basis of the direct-collateral distinction, as announced by the Court of Appeals, but rather because petitioner Hill failed to satisfy the *Strickland* test, which also applies to ineffective assistance of counsel claims relating to guilty pleas.[156]

Unlike other areas, such as administrative law or dormant commerce clause analysis where different tests exist for different situations,[157] the Supreme Court applies only the *Strickland* test to determine whether an attorney provided ineffective assistance following both trials and guilty pleas.[158] While the Court has, at times, indicated that certain attorney acts or omissions are professionally unreasonable,[159] *Strickland* requires a

151. Some criticize the use of the doctrine in general. *See*, *e.g.*, Castillo, *supra* note 130, at 653; Chin & Holmes, *supra* note 41, at 709–12; Cohen, *supra* note 36, at 1135–36, 1143–45. Others criticize only its application in immigration cases. *See*, *e.g.*, Francis, *supra* note 78, at 725–29; Justman, *supra* note 31, at 731–32, 734–36; McDermid, *supra* note 76, at 763.

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

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

154. The Court only mentions "collateral consequences" in two decisions; neither decision discusses an attorney's obligations relating to collateral consequences of a guilty plea. Evitts v. Lucey, 469 U.S. 387, 391 n.4 (1985); Argersinger v. Hamlin, 407 U.S. 25, 48 n.11 (1972).

155. 474 U.S. 52, 55, 58 (1985). The Eighth Circuit rejected Mr. Hill's claims of ineffective assistance of counsel, in part because parole eligibility is a "collateral rather than direct consequence . . . of which a defendant need not be informed." Hill v. Lockhart, 731 F.2d 568, 570 (8th Cir. 1984), *aff'd*, 764 F.2d 1279 (8th Cir. 1984), *aff'd*, 474 U.S. 52 (1985).

156. *Hill*, 474 U.S. at 55, 58.

157. Certain administrative actions receive deference under the standard announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), while others deserve deference under the standard explained in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). United States v. Mead Corp., 533 U.S. 218, 226−27 (2001). When evaluating dormant commerce clause issues, the Supreme Court applies a strict-scrutiny test for discriminatory laws and the *Pike* balancing test to nondiscriminatory statutes. NORMAN REDLICH ET. AL, UNDERSTANDING CONSTITUTIONAL LAW 191, 200−04 (2005). Special thanks to Professor Frederic Bloom for helping the author with this analogy.

158. *Hill*, 474 U.S. at 52, 57 (1985).

159. *E.g.*, Rodriguez v. United States, 395 U.S. 327 (1969) (where the attorney disregarded specific instructions to file notice of appeal).

"circumstance-specific" inquiry.[160] *Per se* bright-line rules are inconsistent with *Strickland*.[161] Instead, courts must determine the reasonableness of an attorney's conduct in light of the circumstances of the particular case at the time of the act or omission.[162]

2. Is Attorney Silence Categorically Reasonable?

The collateral consequences doctrine illegitimately replaces the case-by-case analysis required under S*trickland*'s performance prong. This bright-line refusal to consider collateral consequences must mean that courts find an attorney's silence categorically reasonable.[163] Some collateral consequences may be reasonably excluded from defense counsel's radar because a reasonably competent attorney need not be aware of *every* possible consequence of a guilty plea.[164] Others, however, are of such overriding importance that they cannot reasonably be ignored.

a. Silence About Restraints on Liberty Can Be Unreasonable

The Supreme Court has attached special significance to consequences that result in restraints on liberty.[165] This significance is not limited to only *some* restraints on liberty—"*any* deprivation of liberty is a serious matter."[166] For example, the Sixth Amendment guarantees the right to counsel in all criminal

160. Roe v. Lucio Flores-Ortega, 528 U.S. 470, 478 (2000).

161. *Id.*

162. *Id.*; Strickland v. Washington, 466 U.S. 668, 688−90 (1984).

163. For example, Utah "adopt[ed] the collateral consequence rule and the affirmative misrepresentation exception to it" without analyzing the misrepresentation under the performance prong of the *Strickland* test. State v. Rojas-Martinez, 125 P.3d 930, 934 (Utah 2005).

164. The Sixth Amendment does not guarantee perfect advocacy; it guarantees only reasonable competence judged according to "prevailing professional norms." Yarborough v. Gentry, 540 U.S. 1, 8 (2003); *Strickland*, 466 U.S. at 687. For example, a reasonably competent defense counsel might not be aware that a conviction might result in the loss of her client's business license. Budeiri, *supra* note 36, at 171. Furthermore, some collateral consequences, such as disenfranchisement, vary by jurisdiction. In thirty-six states, convicted felons are disenfranchised while on parole or probation; eleven states permit lifetime disenfranchisement. The Sentencing Project, Felony Disenfranchisement, http://www.sentencingproject.org/issues_03.cfm (last visited Nov. 12, 2006). Assigned counsel in rural areas should not be expected to know every collateral consequence. In nearly half of the states, assigned counsel, rather than the Public Defender, represent indigent defendants at criminal trial. U.S. DEPT. OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEFENSE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS, app. 6 (1999). Overall, more than half of the counties nationwide rely on the assigned counsel model. *Id.* at 19. For a list of collateral consequences, see Chin & Holmes, *supra* note 41, at 705−06.

165. Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).

166. Scott v. Illinois, 440 U.S. 367, 373−74 (1979) (quoting *Argersinger*, 407 U.S. at 41 (Burger, C.J., concurring)) (emphasis added).

proceedings,[167] yet an indigent defendant has the right to appointed counsel only when "the accused is deprived of his liberty."[168] In *Argersinger v. Hamlin*, the Supreme Court described the needs of indigent defendants when they plead guilty:

> Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison.[169]

An attorney performs in an objectively unreasonable manner when she fails to inform her client about restraints on liberty that are penal in nature, be they collateral or direct.[170] While deportation is collateral in the sense that it remains outside the sentencing court's control or responsibility,[171] the possibility of deportation remains part of the bargain. In *Argersinger*, the Court underscored that counsel is necessary for the defendant to be "fully aware" of the prospect of prison or jail time.[172] Although deportation is not

167. U.S. CONST. amend VI ("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

168. *Argersinger*, 407 U.S. at 32. The right to appointed counsel attaches only when the defendant has actually been sentenced to imprisonment, and not when fines or other punishment are imposed. *Scott*, 440 U.S. at 373−74.

169. 407 U.S. at 34.

170. Of the numerous collateral consequences, the author believes that only civil commitment and deportation constitute significant restraints on liberty. The Court considers civil commitment to be non-punitive because it does not implicate retribution or deterrence. Kansas v. Hendricks, 521 U.S. 346, 361−62 (1997). Although the Supreme Court has never held that deportation is penal in nature, the author believes it has a more penal nature than civil commitment because it is so severe and sufficiently similar to the criminal sanctions of banishment and transportation.

The Supreme Court uses seven factors as guideposts to evaluate whether a consequence is penal in nature. Smith v. Doe, 538 U.S. 84, 97 (2003). Generally, a law is penal in nature when it imposes a "disability for the purposes of punishment, . . . to reprimand the wrongdoer, [or] to deter others." Trop v. Dulles, 356 U.S. 86, 96 (1958).

Among the factors is whether the law has historically been regarded as punishment. *Smith*, 538 U.S. at 97. Deportation, although not technically a criminal punishment, is the equivalent of "banishment" or "exile," and as such, constitutes a "penalty." Barber v. Gonzales, 347 U.S. 637, 642 (1954); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Bridges v. Wixton, 326 U.S. 135, 154 (1945); United States v. Ju Toy, 198 U.S. 253, 269 (1905) (Brewer, J., dissenting). The Supreme Court has acknowledged that the view of deportation as non-penal may be "highly fictional." *Trop*, 356 U.S. at 98. It constitutes an "additional punishment" for the same criminal conviction. Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting). Like denaturalization, the fact that deportation "may be imposed for purposes other than punishment affords no basis" for saying deportation is not, in some cases, a punishment. *Trop*, 356 U.S. at 98–99. For example, in addition to the criminal convictions discussed in Part I, aliens may also be removed for their mere presence in the United States. 8 U.S.C. § 1227(a)(1)(B) (2000).

171. *See supra* notes 129−150 and accompanying text.

172. 407 U.S. at 34.

actual imprisonment, the "central premise" is the same: deprivation of liberty is different from other penalties.[173] Deportation "deprives an [individual] of the right to stay and work in this land of freedom."[174] In other words, it restrains a person's liberty.[175]

b. The Supreme Court Hinted that Silence May Be Unreasonable

The Supreme Court has hinted that failure to advise a client regarding the immigration consequences of a guilty plea may fall below normal levels of attorney competence.[176] The Court acknowledged "little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."[177] The Court then underscored the importance by explaining that, in the immediate case, "[e]ven if the defendant were not initially aware of [immigration law], *competent defense* counsel . . . would have advised him" concerning the law's importance.[178]

c. American Bar Association Standards Suggest Silence May Be Unreasonable

The *Strickland* decision explained that in determining what is reasonable, standards reflected by professional organizations and bar associations may act as guides.[179] Both the American Bar Association (ABA) Standards for Criminal Justice and the Model Rules of Professional Conduct suggest that a reasonably competent attorney would inform her client about the immigration

173. Scott v. Illinois, 440 U.S. 367, 373 (1979).

174. *Bridges*, 326 U.S. at 154.

175. *Id.*

176. I.N.S. v. St. Cyr, 533 U.S. 289, 323 n.50 (2001). Federal circuit courts have discussed *St. Cyr* when deciding standards of attorney competence. United States v. Fry, 322 F.3d 1198, 1200–01 (9th Cir. 2003); United States v. Couto, 311 F.3d 179, 187–88 (2d Cir. 2002). For example, in *Couto*, the Second Circuit recently noted the Supreme Court's "broader view of attorney responsibility" in *St. Cyr*. 311 F.3d at 187–88. In *Couto*, the court did not reconsider the standards of attorney competence relating to failure to inform a defendant of the immigration consequences; however, instead, it found counsel's performance objectively unreasonable for affirmatively misleading the defendant. *Id.* at 188. In contrast, the Ninth Circuit reaffirmed its position that a Sixth Amendment violation does not occur when counsel fails to advise a defendant of collateral immigration consequences. *Fry*, 322 F.3d at 1200–01 (2003). In *Fry*, the court concluded that the *St. Cyr* decision had no effect on the application of the collateral consequences doctrine to ineffective assistance claims because "*St. Cyr* did not involve the effectiveness of counsel's representation." *Id.* The court stated that whether or not alien defendants "are acutely aware of the immigration consequences of their convictions," deportation remains collateral. *Id.* at 1201.

177. *St. Cyr*, 533 U.S. at 322.

178. *Id.* at 323 n.50 (emphasis added).

179. Strickland v. Washington, 466 U.S. 668, 688 (1984). *Strickland* cautioned that these are guides, and only guides. *Id.*

consequences of a guilty plea.[180] This is especially true because "the most fundamental legal skill consists of determining what kind of legal problems a situation may involve."[181]

The ABA Criminal Justice standards for guilty pleas state that "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."[182] The comments to the standard acknowledge that attorneys may not be able to inform clients about every probable effect of a plea, but that many times a client's "greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client."[183] The comments identify other serious collateral consequences, but cite deportation as the "greatest potential difficulty" resulting from a guilty plea.[184]

d. Reasonable Attorneys Inform Clients About the Essential Terms of the Bargain

Fundamental fairness requires that the alien know the essential terms of his bargain.[185] A plea bargain is just that—a bargain. The parties, the state and the defendant bargain for a mutually beneficial arrangement. The state avoids the cost of going to trial and the defendant receives a more predictable outcome.[186] For an alien defendant, the bargain may involve the immigration consequences of the plea. An attorney cannot be said to have acted reasonably if she failed to bargain for the most important term or, even worse, failed to inform her client that a material term was included in the bargain. For example, if a defendant is bargaining to remain with his family, and his attorney works out a deal that avoids jail time but includes an additional term

180. ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation."); ABA STANDARDS FOR CRIM. JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(f) (3d ed. 1999).

181. ABA MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt 2 (2004).

182. ABA STANDARDS FOR CRIM. JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(f) (3d ed. 1999).

183. *Id*.

184. *Id.*

185. *See* Powell v. Alabama, 287 U.S. 45, 67−68, 70 (1932).

186. Fed. R. Crim. P. 11(c)(1)(C). Judicial economy also encourages pleas. *See* Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 552–64 (1988).

(deportation), the attorney does not act reasonably if she does not advise her client about the material terms of the bargain.

Nothing in Supreme Court precedent suggests that an attorney's silence about the possibility of deportation is *categorically* reasonable. Instead, the Court's focus on the importance of counsel when liberty is at stake, its hint about reasonableness in the *St. Cyr* decision, and its reliance on ABA standards as guides all indicate that an attorney's silence is not categorically reasonable. Additionally, the very nature of the plea bargain suggests that silence about certain terms may not be reasonable.

3. Is Nonadvice, Misadvice, or Equivocal Advice Categorically Unreasonable?

Like the jurisdictions that have made a categorical determination that attorney silence is reasonable,[187] the jurisdictions that recognize the "misadvice" and "maybe" exceptions[188] have made categorical determinations that affirmative misadvice or equivocal advice are objectively unreasonable. Academic scholarship has encouraged the extension of this categorical determination to cover nonadvice as well,[189] and New Mexico adopted this standard in *Paredez*.[190] Such an extension, however, simply replaces one bright-line for another. Instead of a categorical determination that silence is reasonable, silence is categorically unreasonable.

While in some circumstances, such as the example in the introduction, an attorney's silence is unreasonable for the reasons set forth above, in others, defense counsel's silence about deportation can be a "legitimate" decision within the standard set by *Strickland*. Justice O'Connor explained that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal

187. *See supra* note 163 and accompanying text.

188. *See supra* notes 78−86 and accompanying text.

189. *See, e.g.*, Castillo, *supra* note 130, at 652 (asserting that an attorney's failure to advise her client of the collateral consequences "violates the competence prong of the *Strickland* test"); Cohen, *supra* note 36, at 1134 (stating that an attorney's failure to inform a defendant of the immigration consequences is "objectively unreasonable"); Francis, *supra* note 78, at 733 (proposing that "all defense attorneys determine the citizenship of all clients and inform non-citizens of potential immigration consequences" and failure to conform would satisfy the *Strickland* prejudice prong); McDermid, *supra* note 76, at 769 (arguing that the correct standard to satisfy *Strickland*'s performance prong is that "counsel failed to investigate the immigration status of the client or the actual immigration consequences that are likely to flow from the conviction, or counsel did not adequately advise the client of those consequences").

190. State v. Paredez, 101 P.3d 799, 804 (N.M. 2004).

defendant."[191] This leeway allows defense counsel to use her judgment about tactical decisions and how to offer the best representation.[192]

4. A Proposal for a Workable Standard

As described above, failure to advise aliens about the immigration consequences from a guilty plea can constitute ineffective assistance of counsel. The standard adopted by New Mexico comes to the proper result in all instances, but through the wrong methodology. The *Paredez* standard suggests that an attorney always fails the performance prong when she does not advise her client about the immigration consequences of a guilty plea,[193] but the prejudice prong would catch situations where an attorney's nonadvice would be reasonable because deportation would not have been an "important consideration."[194]

The *Paredez* rule does not satisfy *Strickland*'s admonition that the "performance inquiry must be whether counsel's assistance was reasonable considering *all* the circumstances."[195] Instead, the standard for analyzing the performance prong should be that if the possibility of deportation *could have played any part in a defendant's decision* to plead guilty or go to trial, an attorney acts unreasonably when she fails to advise him. Under this standard, an attorney would be objectively unreasonable when she fails to investigate the immigration consequences and inform her client of the possibility of deportation only if they would affect the decision-making process. If the possibility of deportation would play no role in the process, the attorney would have no obligation to inform the client of the immigration consequences.

This analysis is distinct from that in the prejudice prong, which continues to be whether the defendant would not have pled guilty and would have insisted on going to trial. To establish ineffective assistance of counsel, the defendant would have to establish that both: 1) the possibility of deportation would have played a role in the decision-making process; and 2) he would not have pled guilty had he known about the immigration consequences. The possibility of deportation could play a role in the decision to plead guilty, but should not be the ultimate factor.

a. The Capital Murder Scenario

Would an attorney fail the performance prong if she failed to investigate and advise her client about the immigration consequences of a guilty plea that

191. Strickland v. Washington, 466 U.S. 668, 688−89 (1984).

192. *Id.* at 689.

193. See *supra* note 189 and accompanying text.

194. Castillo, *supra* note 130, at 654–55; *see also* Chin & Holmes, *supra* note 41, at 737; Francis, *supra* note 78, at 733; McDermid, *supra* note 76, at 769.

195. *Strickland*, 466 U.S. at 688 (emphasis added).

avoids the death penalty? Under the *Paredez* standard, an attorney would act unreasonably if she failed to advise her client about the immigration consequences of pleading guilty to second degree murder to avoid the death penalty, but the client would suffer no prejudice by his attorney's nonadvice. Under the author's proposed standard, the defendant would not be able to establish deficient performance so a court would never reach the prejudice prong.

In this situation, the attorney's decision not to discuss deportation is objectively reasonable within "the range of legitimate decisions regarding how best to represent" the defendant.[196] When facing a capital murder charge, defense counsel's primary and perhaps only mission is to avoid the death sentence. To suggest that counsel would act unreasonably if she failed to advise her client about the immigration consequences is illogical.

b. The Sex Crime Scenario

Would an attorney fail the performance prong if she failed to investigate and advise her client about the immigration consequences of a guilty plea to a sexual assault which results in no jail time? Under the *Paredez* standard, an attorney, regardless of the specific facts of the case, would act unreasonably if she did not advise her client.[197] Under the author's proposed standard, the answer depends on the circumstances of the particular case.

If the state's case is strong and there is a likelihood of conviction at trial for forcible rape,[198] which may result in a life sentence,[199] the attorney's decision not to investigate the immigration consequences of pleading guilty to sexual assault, which may result in no jail time,[200] is not unreasonable because her main concern is to avoid life imprisonment.

However, if the state's case is weak and there may be a possibility of entering a plea to a lesser charge such as sexual misconduct,[201] the attorney

196. *Id.* at 689.

197. State v. Paredez, 101 P.3d 799, 805 (N.M. 2004).

198. *See, e.g.*, MO. REV. STAT. § 566.030 (2000) ("A person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion. Forcible compulsion includes the use of a substance administered without a victim's knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.").

199. *Id.* The penalty for forcible rape ranges from five years to life. *Id.*

200. *See, e.g.*, § 566.040 (2000) ("A person commits the crime of sexual assault if he has sexual intercourse with another person knowing that he does so without that person's consent."). The penalty for sexual assault, a class C felony, may be up to seven years. § 558.011.1(3) (2000 & Sup. 2005). Unlike forcible rape, there is no minimum so conceivably the defendant could receive no jail time.

201. *See, e.g.*, § 566.093.1(1) (2000 & Supp. 2005) ("A person commits the crime of sexual misconduct in the second degree if such person: exposes his or her genitals under circumstances in which he or she knows that such conduct is likely to cause affront or alarm."). The penalty for

may be acting unreasonably. Even if the sexual assault conviction avoids prison time, it would lead to the alien's deportation[202] whereas a plea to sexual misconduct, even if the alien serves actual prison time, could avoid deportation.[203] For an alien in this situation, the attorney's decision not to investigate the possibility of deportation would be unreasonable.

c. The Drug Offense Scenario

Did the attorney in the example described in the introduction fail the performance prong when she failed to investigate and advise her client about the immigration consequences of a guilty plea? Under both the *Paredez* and the author's standards, she did. The youth in the introduction bargained for a conviction that resulted in no jail time but received a surprise additional term: deportation.[204] Had his attorney informed him that a guilty plea to this charge would lead to deportation, he might have attempted to work out another bargain where he pled guilty to possession of thirty grams of marijuana, served actual prison time, and avoided deportation.[205]

In each of the above scenarios, the author's proposed standard reaches the same conclusion as the *Paredez* standard: an attorney provides ineffective assistance of counsel when she fails to tell her client about the immigration consequences *if they matter*. But only the author's approach satisfies *Strickland*'s case-by-case analysis by allowing attorneys to use their judgment about how to best represent their clients.

CONCLUSION

Despite the changes that AEDPA and IIRIRA made to immigration law, deportation continues to be a collateral consequence of conviction. As such, courts are relieved of any obligation to inform alien defendants that a guilty plea may or will result in removal. The collateral consequences doctrine, however, is inconsistent with the case-sensitive rule established in *Strickland v.*

sexual misconduct, a class B misdemeanor, shall not exceed six months. § 558.011.1(6) (2000 & Supp. 2005).

202. For immigration purposes, sexual assault is the equivalent of rape. *In re* Haravasu Fifta, No. A90-001-497, 2005 WL 649147 (BIA Jan. 18, 2005) unpublished decision. Rape is a deportable crime of moral turpitude if committed within five years of admission and a sentence of one year may be imposed. KURZBAN, *supra* note 25, at 54, 120.

203. Even if sexual misconduct qualifies as a crime involving moral turpitude, the alien would qualify for the "petty exception" because the maximum sentence is six months. 8 U.S.C. § 1227(a)(2)(A)(i) (2000); MO. REV. STAT. §§ 558.011.1(6), 566.093 (2000 & Supp. 2005). Missouri's definition of sexual misconduct would not qualify as an aggravated felony either. §§ 558.011.1(6) (2000 & Supp. 2005), 566.093 (2000); *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

204. *See supra* notes 2−8 and accompanying text.

205. 8 U.S.C. § 1227(a)(2)(B)(i) (2000).

Washington. The alternative rule, suggested by most commentators and adopted in *State v. Paredez*, that an attorney's failure to advise her client about the immigration consequences of a guilty plea is categorically unreasonable, is equally inconsistent with the case-by-case analysis required by *Strickland*. Instead, when analyzing *Strickland*'s performance prong, courts should conclude that an attorney acts unreasonably when she fails to advise her client only where the possibility of deportation *could have played any part in a defendant's decision* to plead guilty or go to trial. The prejudice prong should remain unchanged: the defendant must show that but for the attorney's act or omission, he would *not have* pled guilty.

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