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Lindsay VanGilder

INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *PEOPLE V. POZO*: ADVISING NON-CITIZEN CRIMINAL DEFENDANTS OF POSSIBLE IMMIGRATION CONSEQUENCES IN CRIMINAL PLEA AGREEMENTS

LINDSAY VANGILDER*

Tens of thousands of non-citizen criminal defendants are removed from the United States each year. The Sixth Amendment of the United States Constitution and United States Supreme Court jurisprudence guarantee that these non-citizen criminal defendants will have effective assistance of criminal defense counsel, whether they elect to proceed to trial or decide to plead guilty. Although prevailing professional norms require that criminal defense counsel advise non-citizen defendants of possible immigration consequences of plea agreements, many courts do not impose a duty to advise on defense counsel. In fact, many courts deem immigration consequences to be collateral consequences rather than direct consequences of plea bargains and, therefore, hold that the failure to advise non-citizen criminal defendants of possible deportation consequences does not constitute ineffective assistance of counsel. Colorado stands as an important exception to the majority rule. In People v. Pozo, *the Colorado Supreme Court recognized that criminal defense counsel may be required to investigate relevant immigration law and advise non-citizen clients of potential deportation consequences of guilty pleas to avoid facing ineffective assistance of counsel claims. This Note argues that, like Colorado, every jurisdiction should recognize that an attorney's failure to advise a non-citizen criminal defendant of the potential immigration and deportation consequences of a guilty plea may constitute ineffective assistance of counsel. Colorado's rule is more consistent with United States Supreme Court*

* J.D., University of Colorado Law School, 2009; Bachelor of Arts in Criminology and Spanish, University of Denver, *summa cum laude*, 2006. Thank you to the *University of Colorado Law Review* staff for your insightful comments and suggestions during the entire publication process. Thank you also to Professor Clare Huntington for your help during the formative stages of this Note. Finally, thank you Mike for all your love and support—this Note would not have been possible without you.

precedent and prevailing professional norms than the collateral consequences doctrine adopted in other jurisdictions. Colorado's rule also takes a more realistic approach to the concerns and interests of non-citizen criminal defendants.

INTRODUCTION

> "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."[1]

In 2005 alone, 40,018 aliens were removed[2] from the United States for criminal violations.[3] That number accounts for approximately nineteen percent of the 208,521 total removals in 2005[4] but does not include aliens who are criminals and are removed under a different administrative reason for the convenience of the government.[5] The Department of Homeland Security estimates that it removed 89,406 total criminal aliens from the United States in 2005, which accounts for forty-three percent of the total removals in 2005.[6]

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1. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-1.2(b) (1993).

2. It is important to note, for clarity, that "removal" is the current term of art used in the Immigration and Nationality Act. Prior to 1996, individuals present in the United States were subject to deportation, and foreign nationals trying to gain admission into the United States were subject to exclusion; following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), both deportation and exclusion are now referred to as "removal" proceedings. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996) (codified in various sections of 8 and 18 U.S.C.); *see also* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 289 n.2 (2008) (explaining the historical transition from "deportation" and "exclusion" proceedings to the single "removal" proceeding). Since the term "deportation" is often used in colloquial language, case law, and other scholarship, deportation, exclusion, and removal will be used interchangeably throughout this Note and will often be collectively referred to as "immigration consequences."

3. OFFICE OF IMMIGRATION STATISTICS, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, 2005 YEARBOOK OF IMMIGRATION STATISTICS, Table 40, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/table 40.xls.

4. *Id.*

5. *Id.* Other administrative reasons may include, but are not limited to, national security, attempted entry through fraud or misrepresentation, previously removed and ineligible for reentry, and public charge. *Id.*

6. MARY DOUGHERTY ET AL., UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 1

Despite these numbers, constitutional protections for aliens in removal proceedings in the United States are relatively limited.[7] The United States Supreme Court has long held that deportation is not punishment, and, therefore, an alien is not entitled to state-provided counsel in removal proceedings.[8] However, the United States Supreme Court has extended Constitutional protections to aliens in criminal proceedings, including the Sixth Amendment right to assistance of counsel.[9] In *McMann v. Richardson*, the Supreme Court defined this right to require the *effective* assistance of counsel.[10] The Court then set forth the modern two-prong standard for ineffective assistance of counsel claims in *Strickland v. Wash-*

(2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf. A criminal alien "may not have a criminal charge as the [stated] reason for removal if, for example, the immigration judge did not have appropriate documents from the relevant criminal justice system." *Id.* at 5. Therefore, the administrative reason for removal may be listed as something else, even though the alien has an underlying criminal charge as well.

7. *See, e.g.*, Abel v. United States, 362 U.S. 217, 237 (1960) ("According to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions.").

8. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for a crime. . . . He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, [including] securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application."); *see also* 8 U.S.C. § 1229a(b)(4)(A) ("In proceedings under this section, . . . the alien shall have the privilege of being represented, *at no expense to the Government*, by counsel of the alien's choosing who is authorized to practice in such proceedings." (emphasis added)).

9. The Constitution protects an alien's right to counsel:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

10. 397 U.S. 759, 771 n.14 (1970).

ington[11] and applied that test to plea bargaining in *Hill v. Lockhart*.[12]

However, because immigration consequences have often been deemed indirect, "collateral consequences" of plea bargains, rather than "direct consequences," many courts have held that the failure to advise a non-citizen[13] criminal defendant of possible deportation consequences does not constitute ineffective assistance of counsel.[14] New Mexico, California, and Colorado, on the other hand, stand as important exceptions.[15] In *People v. Pozo*, the Colorado Supreme Court held that when defense counsel in a criminal case is aware that his client is a non-citizen, "he may reasonably be required to investigate relevant immigration law" and advise the client of potential deportation consequences of a guilty plea to avoid facing an ineffective assistance of counsel claim.[16] This obligation emanates from a lawyer's general duty to be informed of material legal principles relevant to a client's case.[17]

This Note argues that, like Colorado, every jurisdiction should recognize that an attorney's failure to advise a non-citizen criminal defendant of the potential immigration and deportation consequences of a guilty plea may constitute ineffective assistance of counsel. Not only is Colorado's rule more

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11. 466 U.S. 668, 687 (1984) ("First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

12. 474 U.S. 52, 58 (1985).

13. It is important to note that the term "non-citizen" includes defendants that are in the United States legally and illegally. "Non-citizen" includes immigrants (legal permanent resident green-card holders), refugees, asylees, and non-immigrants (tourists, students, etc.).

14. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990) (holding that " 'counsel's failure to advise the defendant of the collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance' " (quoting United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985))).

15. *See* State v. Paredez, 101 P.3d 799 (N.M. 2004); *In re* Resendiz, 19 P.3d 1171 (Cal. 2001); People v. Pozo, 746 P.2d 523 (Colo. 1987); *see also* Edwards v. State, 393 So. 2d 597 (Fla. Dist. Ct. App. 1981), *overruled by* State v. Ginebra, 511 So. 2d 960 (Fla. 1987). In fact, New Mexico went one step further than Colorado by imposing an affirmative duty on defense counsel to determine clients' immigration status and provide specific advice regarding the impact of guilty pleas on immigration status. *Paredez*, 101 P.3d at 805.

16. *See Pozo*, 746 P.2d at 529.

17. *Id.*

consistent with United States Supreme Court precedent and prevailing professional norms than the collateral consequences doctrine adopted by other jurisdictions, but Colorado's rule also takes a more realistic approach to the concerns and interests of non-citizen criminal defendants. Thus, this Note argues that the relevant inquiry should look at prevailing professional norms to determine whether the Sixth Amendment and ineffective assistance of counsel jurisprudence require advisement of possible deportation consequences, rather than at whether immigration consequence are collateral or direct.

In an attempt to adopt a bright-line rule, the collateral consequences doctrine ignores the reality that immigration penalties are a serious concern for at least 89,406 non-citizen criminal defendants each year[18] and that deportation is distinguishable from other indirect consequences. Advising non-citizen criminal defendants of possible immigration consequences of guilty pleas is already part of the prevailing standards of professional conduct for criminal defense attorneys.[19] Therefore, it follows that failure to advise a non-citizen criminal defendant of those consequences should establish deficient performance under the first prong of the *Strickland* test and be grounds for an ineffective assistance of counsel claim, provided the non-citizen criminal defendant can also demonstrate prejudice under the second prong.[20]

In addition to being more consistent with Supreme Court jurisprudence than the collateral consequences dichotomy, Colorado's experience demonstrates that many of the concerns that other jurisdictions voice about imposing a duty to advise simply have not come to fruition. Admittedly, the argument against imposing a duty to advise non-citizen criminal defendants of possible immigration consequences of a guilty plea is multi-faceted. This Note will use Colorado's experience to answer concerns voiced by other jurisdictions and to counter many of the arguments against imposing a duty to advise non-citizen criminal defendants of potential deportation consequences in criminal plea bargaining. In the last twenty years, Colorado has neither overturned nor limited the ruling in *Pozo*.

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18. *See supra* notes 2–6 and accompanying text. Undoubtedly, there are non-citizen criminal defendants who are concerned about immigration consequences of a guilty plea but who are not ultimately removed.

19. *See infra* Part IV.A.2.

20. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Thus, Colorado's long-standing success offers a hopeful argument for implementing a wide-spread duty to advise.

Part I of this Note discusses United States Supreme Court jurisprudence in the context of plea bargaining and the Sixth Amendment's guarantee of effective assistance of counsel. Part II analyzes the collateral consequences doctrine, its origins, and cases that rely on the characterization of deportation as a collateral consequence to deny ineffective assistance of counsel claims. Part III discusses the standard the Colorado Supreme Court set forth in *People v. Pozo*. Finally, Part IV delineates positive arguments for imposing a duty to advise and counters the concerns that other jurisdictions have voiced when failing to impose a duty to advise.

I. CONSTITUTIONAL STANDARDS: PLEA BARGAINING AND EFFECTIVE ASSISTANCE OF COUNSEL

This Part analyzes the constitutional standards that the United States Supreme Court has elicited in the context of plea bargaining and the Sixth Amendment's guarantee of assistance of counsel. First, the Unites States Supreme Court has held that because a guilty plea waives many of a defendant's constitutional rights, the plea must be voluntary and intelligent. Second, the Sixth Amendment's guarantee of assistance of counsel requires that counsel is *effective*; for a defendant to make a colorable claim of ineffective assistance, he must show that his attorney's performance fell below an objective standard of reasonableness and, as a result, he was prejudiced. Finally, the ineffective assistance of counsel standard applies in the context of plea bargaining in a slightly modified form.

A. *Intelligent and Voluntary Plea Bargaining:* Boykin v. Alabama *and* Brady v. United States

The United States Supreme Court has consistently held, as a basic tenet of criminal constitutional law, that guilty pleas must be intelligent and voluntary.[21] The Court considers these requirements to be necessary because a guilty plea waives a defendant's[22] constitutional right to a jury trial, the right to con-

21. Boykin v. Alabama, 395 U.S. 238, 242–43 (1969).

22. Although both men and women can be criminal defendants and may have concerns about immigration consequences of plea agreements, this Note will consistently refer to defendants with masculine pronouns ("his" and "he").

front his accusers, and the privilege against compulsory self-incrimination.[23] More specifically, the Court has articulated that "[w]aivers of constitutional rights [under guilty pleas] not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[24] Although the Court did not initially define "consequences," it emphasized the importance of a defendant understanding the possible impact of his guilty plea before that plea could be knowing and intelligent.[25] The test to determine the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[26]

B. *Effective Assistance of Counsel:* Strickland v. Washington

In the 1970 case of *McMann v. Richardson*, the United States Supreme Court defined the Sixth Amendment right to counsel as the right to *effective* assistance of counsel.[27] Fourteen years later, in *Strickland v. Washington*, the Supreme Court established a two-prong test for evaluating ineffective assistance of counsel claims under the Sixth Amendment.[28] When a defendant makes a claim of ineffective assistance of counsel, he must first show that his attorney's performance was somehow deficient.[29] To do so, the defendant may point to prevailing professional norms or argue that the attorney's performance was objectively unreasonable or incompetent under the circumstances.[30] Because a "fair assessment of attorney performance requires that every effort be made to eliminate the

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23. *Boykin*, 395 U.S. at 242-43.

24. Brady v. United States, 397 U.S. 742, 748 (1970).

25. *Id.* at 748 n.6 ("The importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea was at the heart of our recent decisions" in *McCarthy v. United States*, 394 U.S. 459 (1969), and *Boykin v. Alabama*, 395 U.S. 238 (1969).).

26. North Carolina v. Alford, 400 U.S. 25, 31 (1970).

27. 397 U.S. 759, 771 n.14 (1970).

28. 466 U.S. 668, 687 (1984).

29. *Id.* at 687–88 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.").

30. *Id.* at 688 (stating that the first prong of the ineffective assistance claim relies on "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions").

distorting effects of hindsight," this inquiry requires a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance."[31] That is, "the defendant must overcome the presumption that, under the circumstances the challenged action 'might be considered sound trial strategy.' "[32]

The second prong of the *Strickland* test requires the defendant to show that his counsel's poor performance resulted in prejudice to his defense.[33] To meet this burden, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[34] More specifically, a "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceedings.[35]

C. *The* Strickland *Test Applied to Plea Bargaining in* Hill v. Lockhart

In 1985, the United States Supreme Court held that *Strickland*'s two-part test applies, in a slightly modified form, to challenges of guilty pleas.[36] When a defendant challenges a guilty plea based on ineffective assistance of counsel, he essentially alleges that the plea was involuntary due to counsel's deficient performance and its subsequent effect on his plea.[37]

Under *Hill v. Lockhart*, the deficient performance prong remains the same as that in *Strickland*: an inquiry into the attorney's reasonableness and competence under prevailing professional norms.[38] However, to satisfy the prejudice prong, 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."[39] Thus, the Court found that guilty pleas can be considered involuntary due to ineffective assistance of counsel when counsel's advice falls outside "the range of competence demanded of attorneys in

31. *Id.* at 689.
32. *Id.* (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).
33. *Id.* at 687.
34. *Id.* at 694.
35. *Id.*
36. Hill v. Lockhart, 474 U.S. 52, 58 (1985).
37. *See id.* at 56.
38. *Id.* at 58.
39. *Id.* at 59.

criminal cases"[40] and when counsel's "constitutionally ineffective performance affect[s] the outcome of the plea process."[41]

II. THE COLLATERAL CONSEQUENCES DOCTRINE (AND ITS SHORTCOMINGS)

This Part analyzes the collateral consequences doctrine and its inadequacies. It begins by demonstrating that the collateral consequences doctrine is not founded in United States Supreme Court jurisprudence. Rather, the doctrine is a circuit court creation that categorizes immigration consequences as the collateral and indirect result of a guilty plea. This Part next discusses the rationale in cases that deny ineffective assistance of counsel claims based on counsel's failure to advise a non-citizen criminal defendant of potential deportation consequences of his plea. This Part concludes by discussing cases where courts hold that failing to advise is non-actionable, but providing incorrect advice about possible immigration consequences can rise to the level of ineffective assistance.

A. Background and Supreme Court Jurisprudence

The United States Supreme Court has never adopted the collateral consequences doctrine and has never developed a clear framework for determining which consequences can be the basis for an ineffective assistance of counsel claim. Rather, circuit courts have extrapolated the collateral consequences concept from a single line of Supreme Court reasoning. In the 1970 case of *Brady v. United States*, when discussing the standard for voluntariness of a guilty plea, the Court stated that a guilty plea "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand" unless the plea is induced by threats, bribes, improper promises, or misrepresentations.[42]

In the years since *Brady*, the Court has not clearly expanded on what the definition of direct consequences includes or whether collateral consequences can render a guilty plea in-

40. *Id.* at 56 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)) (internal quotations omitted).

41. *Id.* at 59.

42. 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

valid. In fact, the 1985 *Hill* decision left that exact question unanswered.[43] Moreover, until recently the Court repeatedly denied certiorari in cases that would potentially settle whether lack of knowledge or misinformation about collateral consequences can constitute ineffective assistance of counsel and render a guilty plea involuntary.[44] The Court will finally address the validity of the collateral consequences doctrine during the October 2009 term.[45]

Finally, when the Court extended the Sixth Amendment right to counsel to prosecutions for petty offenses where imprisonment is possible,[46] Justice Powell, in a concurring opinion, noted that "[s]erious consequences also may result from convictions not punishable by imprisonment."[47] Despite this recognition, the United States Supreme Court has never developed a clear doctrine for determining which consequences are vital to the determination of an ineffective of assistance of counsel claim.

B. Circuit Courts' Development of the Collateral Consequences Doctrine and the Categorization of Deportation as a Collateral Consequence

Even though the Supreme Court has not done so, circuit courts have universally developed their own dichotomy between direct and collateral consequences and have thereby in-

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43. *See Hill*, 474 U.S. at 60 (holding that it was "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel" because the petitioner's allegations were insufficient to satisfy the prejudice requirement of *Strickland v. Washington*—petitioner did not allege that "had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial").

44. *See, e.g.*, Montalban v. Louisiana, 537 U.S. 887 (2002) (denying certiorari on the issue of whether an attorney provided ineffective assistance of counsel when he failed to advise Mr. Montalban of the immigration consequences of his guilty plea); Colorado v. Garcia, 502 U.S. 1121 (1992) (denying certiorari on the issue of whether criminal defense attorneys are ineffective under the federal constitution for misadvising their clients about the effect of a guilty plea on unfiled civil litigation, a collateral consequence of a guilty plea).

45. Padilla v. Kentucky, No. 08-651, 2009 WL 425077 (U.S. Feb. 23, 2009); United States Supreme Court, Questions Presented Report, No. 08-651, *available at* http://origin.www.supremecourtus.gov/qp/08-00651qp.pdf; *see also infra* notes 209–12 and accompanying text.

46. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

47. *Id.* at 48 & n.11 (Powell, J. concurring) (discussing stigma, loss of a driver's license, forfeiture of public office, disqualification for a licensed profession, loss of pension rights, and other civil consequences).

vented a bright-line distinction.[48] By extrapolating from a few lines of Supreme Court precedent, circuit courts have created a doctrine that is only loosely based on the Court's ineffective assistance of counsel jurisprudence. Neither *Strickland* nor *Hill* mentions the dichotomy between direct and indirect consequences of a guilty plea.[49] Nevertheless, circuit courts have reasoned that by using the word "direct," the *Brady* Court intended to exclude collateral consequences.[50] Based on this reasoning, circuit courts have distinguished between direct and collateral consequences and have held that direct consequences are only those results which represent "definite, immediate, and largely automatic effect[s] on the range of the defendant's punishment."[51] All other consequences are deemed "collateral."[52] Collateral consequences are those "possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty."[53] While a defendant must be advised of all direct consequences of a guilty plea for it to be voluntary, the doctrine states that failure to

48. *See* Broomes v. Ashcroft, 358 F.3d 1251, 1256–57 (10th Cir. 2004); El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Amador-Leal, 276 F.3d 511, 514–17 (9th Cir. 2002); United States v. Gonzalez, 202 F.3d 20, 25–27 (1st Cir. 2000); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); United States v. George, 869 F.2d 333, 336–38 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6, 7–8 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 768–69 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226, 227–28 (5th Cir. 1985); United States v. Santelises, 509 F.2d 703, 703–04 (2d Cir. 1975) (per curiam) (all holding that deportation is a collateral consequence, and therefore, counsel's failure to advise is not a basis for an ineffective assistance claim). The Third and Eighth Circuits have not addressed whether failure to advise of deportation consequences constitutes an ineffective assistance claim, but have held that deportation is considered a collateral consequence. *See* United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989) (declining to decide "whether counsel's failure to advise a client about the deportation consequences of a guilty plea can constitute deficient representation absent special circumstances"); United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988) (holding that potential deportation is a collateral consequence of a guilty plea); Bruno v. United States, 474 F.2d 1261, 1262 (8th Cir. 1973) (per curiam) (dictum) (indicating that deportation proceedings are merely a collateral consequence of a conviction).

49. *See generally* Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52 (1985).

50. *E.g.* United States v. Krejcarek, 453 F.3d 1290, 1297 (10th Cir. 2006) (stating that by using the word "direct," the Court in *Brady v. United States*, 397 U.S. 742, 755 (1970), excluded collateral consequences); United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971).

51. *See, e.g.*, Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

52. *See id.*

53. *See id.* at 1365–66 (quoting *Sambro*, 454 F.2d at 920).

advise a client of any collateral consequences is not ineffective assistance of counsel.[54]

Under the circuit courts' collateral consequences doctrine, a defendant's lack of knowledge as to the immigration consequences of a guilty plea is insufficient to require vacating the judgment and withdrawing a guilty plea because deportation does not directly result from a criminal conviction.[55] Because the actual consequence of deportation is imposed by a different court, it " 'remains beyond the control and responsibility of the district court in which that conviction was entered,' " and is therefore considered collateral.[56] Thus, many courts have held that it is not ineffective assistance of counsel to fail to advise a non-citizen criminal defendant of possible deportation consequences stemming from a guilty plea.[57]

C. *Rationale in Cases that Improperly Denied Ineffective Assistance of Counsel Claims Based on Failure to Advise of Possible Immigration Consequences*

Many jurisdictions have held that there is no duty to advise a non-citizen criminal defendant of possible immigration consequences to a guilty plea because those consequences are collateral consequences.[58] The rationale for denying relief for

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54. *See, e.g.*, *Krejcarek*, 453 F.3d at 1297 (" 'While the Sixth Amendment assures an accused of effective assistance of counsel 'in criminal prosecutions,' this assurance does not extend to collateral aspects of the prosecution.' " (quoting Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992))).

55. United States v. Parrino, 212 F.2d 919, 921 (2d Cir. 1954) (holding that a defendant's surprise as to deportation consequences of his guilty plea, resulting from erroneous information from his attorney, was not sufficient for post-conviction relief). "[T]he subject-matter of the claimed surprise was not the severity of the sentence directly flowing from the judgment but a collateral consequence thereof, namely, deportability." *Id.*

56. Broomes v. Ashcroft, 358 F.3d 1251, 1256 (10th Cir. 2004) (quoting United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)).

57. *See infra* note 58.

58. *See, e.g.*, *Gonzalez*, 202 F.3d at 25–27; United States v. Banda, 1 F.3d 354, 355–56 (5th Cir. 1993); *Varela*, 976 F.2d at 1357–58; United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); United States v. George, 869 F.2d 333, 336–38 (7th Cir. 1989); Santos v. Kolb, 880 F.2d 941, 944–45 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6, 7–8 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 768–69 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226, 227–28 (5th Cir. 1985); United States v. Santelises, 509 F.2d 703, 703–04 (2d Cir. 1975) (per curiam); United States v. Santelises, 476 F.2d 787, 790 (2d Cir. 1973); *Parrino*, 212 F.2d at 921–22; United States v. Nagaro-Garbin, 653 F. Supp. 586, 590 (E.D. Mich. 1987) (mem.), *aff'd* 831 F.2d 296 (6th Cir. 1987) (unpublished table opinion); Gov't of the Virgin Is. v. Pamphile, 604 F. Supp. 753, 756–57 (D.V.I.

ineffective assistance claims based on the collateral consequences doctrine is multifaceted, but concerns include undermining the finality of criminal convictions, overburdening criminal defense attorneys, and following *stare decisis*.

First, some courts and commentators express concern that that allowing non-citizen criminal defendants to challenge guilty pleas based on the collateral consequence of deportation will "open[ ] the door to innumerable challenges to pleas based on the defendant's ignorance of other serious collateral consequences."[59] This concern stems from the apprehension that allowing defendants to challenge guilty pleas is an unnecessary "inroad on the concept of finality" that "undermines confidence in the integrity of [criminal] procedures."[60] This slippery-slope argument is often characterized by a concern that if guilty pleas can be challenged on the basis of deportation consequences, then challenges based on other collateral consequences, such as the suspension of a driver's license,[61] the deprivation of the right to vote and to travel abroad,[62] the loss of civil service jobs[63] and other employment, and the possibility of undesirable discharge from the armed forces[64] would also have to be allowed, and the criminal justice system would become over-burdened.[65]

1985); Oyekoya v. State, 558 So. 2d 990, 990–91 (Ala. Crim. App. 1989); Tafoya v. State, 500 P.2d 247, 251–52 (Alaska 1972); State v. Rosas, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995); Matos v. United States, 631 A.2d 28, 31–32 (D.C. 1993); Major v. State, 511 So. 2d 424, 427 (Fla. 2002); People v. Huante, 571 N.E.2d 736, 740–41 (Ill. 1991); State v. Ramirez, 636 N.W.2d 740, 746 (Iowa 2001); Mott v. State, 407 N.W.2d 581, 583 (Iowa 1987); State v. Muriithi, 46 P.3d 1145, 1152 (Kan. 2002); State v. Montalban, 810 So. 2d 1106, 1110 (La. 2002); People v. Davidovich, 606 N.W.2d 387, 390 (Mich. Ct. App. 1999); State v. Zarate, 651 N.W.2d 215, 223 (Neb. 2002); State v. Chung, 510 A.2d 72, 76–77 (N.J. Super. Ct. App. Div. 1986); People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995); State v. Dalman, 520 N.W.2d 860, 863–64 (N.D. 1994); Commonwealth v. Frometa, 555 A.2d 92, 93 (Pa. 1989); State v. Figueroa, 639 A.2d 495, 499 (R.I. 1994); State v. McFadden, 884 P.2d 1303, 1305 (Utah Ct. App. 1994); State v. Martinez-Lazo, 999 P.2d 1275, 1279 (Wash. Ct. App. 2000); State v. Santos, 401 N.W.2d 856, 858 (Wis. Ct. App. 1987).

59. People v. Pozo, 746 P.2d 523, 532 (Colo. 1987) (Erickson, J., dissenting).

60. United States v. Timmreck, 441 U.S. 780, 784 (1978) (denying a defendant's habeas corpus petition which alleged that his guilty plea was involuntary because he was unaware of the mandatory parole term that would result from his conviction).

61. *See, e.g.*, Moore v. Hinton, 513 F.2d 781, 782 (5th Cir. 1975).

62. *See, e.g.*, Meaton v. United States, 328 F.2d 379, 380 (5th Cir. 1964).

63. *See, e.g.*, United States v. Crowley, 529 F.2d 1066, 1072 (3d Cir. 1976).

64. *See* Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963).

65. *See* People v. Pozo, 746 P.2d 523, 533 (Colo. 1987) (Erickson, J., dissenting); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of*

Second, courts express concern that a duty to advise non-citizen criminal defendants of possible immigration consequences will be burdensome for attorneys and for the reviewing court. As the dissenting judge in *Pozo* noted, immigration law is complex and "represent[s] a body of knowledge to which some attorneys devote their full time and attention."[66] Moreover, courts express concern that a normal level of competency by an attorney cannot require anticipation of all possible collateral consequences: "[c]ounsel can hardly conceive all possible collateral consequences of a guilty plea and need not be a crystal gazer."[67] Requiring criminal defense counsel to advise non-citizen criminal defendants of possible immigration consequences of guilty pleas would be especially burdensome for public defenders who often have large caseloads and little time to devote to getting to know individual clients.[68] Also, courts are concerned that this duty would place an onerous burden on trial courts in reviewing whether an attorney reasonably investigated relevant immigration law.[69]

Finally, some circuit courts rely on *stare decisis* to summarily reject the defendant's claim that failure to advise of possible deportation consequences amounts to ineffective assistance of counsel: "one appellate panel cannot disturb the decision of another panel 'absent en banc reconsideration or a superseding contrary decision by the Supreme Court.' "[70]

Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 699–700 (2002) (discussing, in a general manner, the collateral consequences of guilty pleas).

66. *Pozo*, 746 P.2d at 533 (Erickson, J., dissenting).

67. *See, e.g.*, Mott v. State, 407 N.W.2d 581, 584 (Iowa 1987) (quoting Saadiq v. State, 387 N.W.2d 315, 325 (Iowa 1986)).

68. *See* The Spangenberg Group, *Keeping Defender Workloads Manageable*, INDIGENT DEFENSE SERIES #4 (Bureau of Justice Assistance, U.S. Department of Justice), Jan. 2001, at iii, *available at* http://www.ncjrs.gov/pdffiles1/bja/185632.pdf ("Every day, defender offices and assigned counsel are forced to manage too many clients with inadequate resources. Too often, the quality of service suffers, jeopardizing one of our most important constitutional rights: the right to effective counsel.").

69. *Pozo*, 746 P.2d at 533 (Erickson, J., dissenting).

70. Broomes v. Ashcroft, 358 F.3d 1251, 1256 (10th Cir. 2004) (quoting *In re* Smith, 10 F.3d 723, 724 (10th Cir. 1993)) (per curiam) (discussing how the Tenth Circuit panel in the instant case cannot disturb the decision of the panel in *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1992)).

D. Rationale in Cases that Granted Ineffective Assistance of Counsel Relief Based on Misrepresentations or Mistaken Advice About Immigration Consequences

Although many courts hold that there is not an affirmative duty to advise non-citizen clients of possible immigration consequences stemming from guilty pleas, some of those same courts have held that affirmative misrepresentations by counsel can constitute ineffective assistance.[71] Under these mistaken advice cases, "an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is . . . objectively unreasonable," and it, therefore, "meets the first prong of the *Strickland* test."[72] Thus, "if the defendant can also establish that there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial, then, the guilty plea is invalid."[73] Essentially, under this rule, the burden is on the client

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71. *See* United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) (holding that affirmative misrepresentation is objectively unreasonable and satisfies the first prong of an ineffective assistance claim); United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982); People v. Correa, 485 N.E.2d 307, 310–12 (Ill. 1985) ("The advice counsel gave the defendant was erroneous and misleading and, under the facts of this case, was not within the range of competence required of counsel in such situations. It is obvious from the defendant's questions to his counsel that the effect of his pleas of guilty on his status as a immigrant was a prime factor in making his decision whether to plead guilty. . . . In view of the erroneous and misleading advice on the crucial consequence of deportation, the defendant's pleas of guilty were not intelligently and knowingly made and therefore were not voluntary."); *see also* Downs-Morgan v. United States, 765 F.2d 1534, 1540–41 & n.15 (11th Cir. 1985) (holding that "an affirmative misrepresentation by counsel in response to a specific inquiry about the possibility of deportation or exclusion" combined with additional factors of imprisonment and execution upon return to the defendant's home country "is sufficient to warrant collateral relief"); United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975) (per curiam) (same); United States v. Santelises, 476 F.2d 787, 789 (2d Cir. 1973) (alluding to the idea that mistaken advice is different than failure to advise); State v. Nichols, 365 A.2d 467, 468 (N.J. 1976) ("In these circumstances, where the [judge and prosecutor], together with defendant's own counsel, have misinformed him as to a material element of a plea negotiation, which the defendant has relied thereon in entering his plea, . . . it would be manifestly unjust to hold the defendant to his plea.").

72. *Couto*, 311 F.3d at 188 ("Because in the instant case Defendant was affirmatively misled by her attorney, we need not, however, reconsider whether the standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable. We believe that an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.").

73. *Id.* (internal quotations and citation omitted).

to inquire about possible immigration consequences.[74] If the client asks, and the attorney makes a faulty representation about the possibility of deportation, then there may be a claim for ineffective assistance of counsel; conversely, if the client does not ask, then there is a strong incentive for the defense attorney to ignore the possibility of immigration consequences and avoid any future ineffective assistance claims.[75] In other words, allowing ineffective assistance claims when defense attorneys incorrectly advise non-citizen criminal defendants of potential deportation consequences, but striking down claims when defense attorneys fail to advise, creates an undesirable incentive for defense attorneys to avoid the issue of immigration consequences altogether.

III. THE COLORADO STANDARD: *PEOPLE V. POZO*

Although the wording in article II, section 16 of the Colorado Constitution[76] differs slightly from the Sixth Amendment of the United States Constitution,[77] the Colorado Supreme Court has held that the two-prong *Strickland* test applies to ineffective assistance of counsel claims based on the Colorado Constitution.[78] Thus, to satisfy an ineffective assistance of

74. *See* United States v. Kwan, 407 F.3d 1005, 1015 (9th Cir. 2005). The Ninth Circuit noted that "an attorney's failure to advise a client of the immigration consequences of a conviction, without more, does not constitute ineffective assistance of counsel under *Strickland*." *Id.* (citing United States v. Fry, 332 F.3d 1198, 1200 (9th Cir. 2003)). However, the court stated that *Fry* is not dispositive "where counsel did not merely refrain from advising Kwan regarding the immigration consequences of his conviction, but, instead, responded to Kwan's specific inquiries regarding the immigration consequences of pleading guilty and purported to have the requisite expertise to advise Kwan on such matters." *Id.* (holding that "counsel's performance is objectively unreasonable under contemporary standards for attorney competence" because "counsel has not merely failed to inform, but has effectively misled[ ] his client about the immigration consequences of a conviction"). Because of the distinction between non-advice and mis-advice, this reasoning invites defense counsel to "refrain from advising" a non-citizen criminal defendant of possible immigration consequences, thereby avoiding an ineffective assistance claim.

75. Tyler Atkins, *Immigration Consequences of Guilty Pleas: What* State v. Paredez *Means to New Mexico Criminal Defendants and Defense Attorneys*, 36 N.M. L. REV. 603, 612 (2006) (discussing cases, like *Couto* and *Kwan*, that adopt the mistaken advice distinction).

76. COLO. CONST. art. II, § 16 ("In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . .").

77. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

78. Hutchinson v. People, 742 P.2d 875, 886 (Colo. 1987).

counsel claim in Colorado, a defendant must show deficient performance and prejudice.[79]

In *People v. Pozo*, the defendant alleged that he did not receive effective assistance of counsel because his attorney did not advise him of possible deportation consequences of pleading guilty to second degree sexual assault and escape.[80] Defendant's counsel signed an affidavit stating he had not discussed possible immigration consequences with his client, and the trial court found that the defendant was not aware of such possible consequences.[81] Nevertheless, the trial court concluded the defendant's counsel was competent and effective.[82]

On appeal, the Colorado Supreme Court recognized that it is well settled that a *trial court* does not have to advise a defendant of potential collateral consequences of a guilty plea for it to be knowing and voluntary; however, the court noted that the standard for *counsel* involves completely different considerations.[83] In reaching this conclusion, the court reasoned that "[o]ne who relies on the advice of a legally trained representative when answering criminal charges is entitled to assume that the attorney will provide sufficiently accurate evidence to enable the defendant to fully understand and assess the serious legal proceedings in which he is involved."[84]

Despite recognizing that deportation may be considered a so-called collateral consequence of a guilty plea, the Colorado Supreme Court was unwilling to conclude that attorneys never have a duty to inform non-citizen criminal defendants of possible deportation consequences of guilty pleas.[85] Rather, the court stated that "the conduct of attorneys must by necessity be considered on a case-by-case basis in light of objective standards of minimally acceptable levels of professional performance."[86] Citing *Strickland*, the court continued by stating that "questions regarding the type of conduct or communication required of an attorney representing a client can rarely be answered by abstract concepts."[87] Thus, the court rejected the

79. Strickland v. Washington, 466 U.S. 668, 688 (1984); *Hutchinson*, 742 P.2d at 886.
80. People v. Pozo, 746 P.2d 523, 525 (Colo. 1987).
81. *Id.*
82. *Id.*
83. *Id.* at 526.
84. *Id.*
85. *Id.* at 527.
86. *Id.*
87. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984)).

bright-line collateral consequences doctrine in favor of a rule that would take into consideration the specific concerns of the non-citizen client on a case-by-case basis.[88] The Colorado Supreme Court remanded the case to the trial court because the record before the court did not establish whether Mr. Pozo's attorney had reason to know that his client was a non-citizen, the standards of minimally acceptable professional conduct, or whether the defendant had shown there was a reasonable probability that but for his attorney's errors he would not have pleaded guilty and would have insisted on going to trial.[89]

As a result of *People v. Pozo*, criminal defense attorneys in Colorado must advise non-citizen clients of possible immigration consequences when "the body of law [is] relevant to the circumstances of the client and the matters for which the attorney [is] retained" and "the attorney ha[s] reason to believe that the area of law in question [is] relevant to the client and the client's legal problems."[90] Thus, when an attorney has "sufficient information to form a reasonable belief that the client [is] in fact an alien. . . . he may reasonably be required to investigate relevant immigration law" because "the potential deportation consequences of guilty pleas . . . are material to critical phases of [criminal] proceedings."[91] The court was concerned about "counsel's failure to engage in rudimentary legal investigation" that is relevant to a particular client's case.[92]

In sum, the current state of the law in Colorado requires attorneys to investigate and advise non-citizen criminal defendants of potential immigration consequences of guilty pleas to avoid facing ineffective assistance of counsel claims. The court noted that "[t]his duty stems not from a duty to advise specifically of deportation consequences, but rather from the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the

88. *Id.*; *see also* People v. Walford, 746 P.2d 945, 946 (Colo. 1987) (remanding to the trial court because the record did not contain sufficient evidence "bearing on the question of whether [the defendant's] attorneys had reason to believe their client was an alien," which would provide impetus under "prevailing standards of minimally acceptable professional conduct" for "a duty to become familiar with this area of immigration law").

89. *Pozo*, 746 P.2d at 530.

90. *Id.* at 527–28.

91. *Id.* at 529.

92. *Id.* at 528.

particular circumstances of their clients."[93] The court went on to explain that, in cases involving non-citizen criminal defendants, the potential deportation consequences of guilty pleas are materially important, and "thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies."[94]

IV. ARGUMENTS IN FAVOR OF FOLLOWING COLORADO'S STANDARD

First, this Part delineates arguments for following Colorado's lead and allowing a colorable ineffective assistance of counsel claim when criminal defense counsel unreasonably fail to advise non-citizen defendants of potential immigration consequences of their guilty pleas. This Part also counters the concerns that other jurisdictions have voiced in defense of not imposing a duty to advise.

A. Positive Arguments for Imposing a Duty to Advise

This Section outlines the arguments in favor of requiring criminal defense counsel to advise their non-citizen clients of possible immigration consequences of a guilty plea. First, the Colorado standard delineated in *People v. Pozo* is more consistent with United States Supreme Court jurisprudence than the collateral consequences doctrine. Colorado's test comports with the ineffective assistance of counsel standard set forth in *Strickland* and *Hill* because it looks to the prevailing standards of professional performance to determine the objective reasonableness of counsel's assistance. The bright-line collateral consequences doctrine ignores the different roles of courts and counsel by denying the fact that defense counsel is the defendant's advisor and advocate. Finally, Colorado's rule properly recognizes that deportation is qualitatively different than other collateral consequences.

93. *Id.* at 529; *see also* Strickland v. Washington, 466 U.S. 668, 690 (1984) ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

94. *Pozo*, 746 P.2d at 529.

1. The Colorado Standard is More Consistent with *Strickland* and *Hill* than the Collateral Consequences Doctrine

United States Supreme Court jurisprudence under *Strickland* and *Hill* dictates that the relevant inquiry for ineffective assistance of counsel claims looks at prevailing professional norms to determine whether the Sixth Amendment requires defense counsel to advise non-citizen criminal defendants of possible immigration consequences of guilty pleas, not whether the consequence is collateral or direct. Although the circuit courts' collateral consequences doctrine is loosely extrapolated from the "direct consequences" language of *Brady*,[95] the bright-line distinction between direct and collateral consequences in the context of ineffective assistance of counsel claims has never been endorsed by the United States Supreme Court. Rather, the Supreme Court's focus has been on ensuring that attorneys provide competent representation by informing themselves of the legal principles and law pertinent to a specific client's case so that the client knows and understands exactly what he is doing when he pleads guilty. The Supreme Court's standard for evaluating ineffective assistance of counsel claims is whether "counsel's representation fell below an objective standard of reasonableness."[96] Moreover, the *Strickland* Court made it clear that "[m]ore specific guidelines are not appropriate" because "[t]he Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance."[97]

Thus, "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms" and does not call for a dichotomy between direct and collateral consequences.[98] The *Strickland* Court "made unmistakably clear that bright-line rules for representation were not

95. A guilty plea "entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand" unless the plea is induced by threats, bribes, or misrepresentations. Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

96. *Strickland*, 466 U.S. at 688; Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that the *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel, and the first prong, deficient performance, is not modified and remains as an inquiry into the attorney's reasonableness and competence under prevailing professional norms).

97. *Strickland*, 466 U.S. at 688.

98. *Id.*

part of the Sixth Amendment"[99] analysis because the Sixth Amendment relies on " 'the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.' "[100] In other words, the standard for effective assistance of counsel is constantly evolving, and the bright-line dichotomy between direct and collateral consequences is an insufficient analysis under *Strickland*. Rather, the relevant inquiry should look at prevailing professional norms, not whether the consequence is collateral or direct, to determine whether the Sixth Amendment requires advisement of possible deportation consequences.

The rule that the Colorado Supreme Court set forth in *People v. Pozo* is more consistent with the *Strickland* standard than is the collateral consequences doctrine because it focuses on prevailing professional norms rather than a bright-line rule: "the conduct of attorneys must by necessity be considered on a case-by-case basis in light of objective standards of minimally acceptable levels of professional performance prevailing at the time of the challenged conduct."[101] Thus, the Colorado Supreme Court continued, "questions regarding the type of conduct or communication required of an attorney representing a client can rarely be answered by abstract concepts" such as the collateral consequences doctrine.[102] Instead, "the reasonableness of the attorney's conduct [must be judged] on the basis of all of the factual circumstances of the particular case, viewed in light of the prevailing standards of minimally acceptable professional conduct as of the time of the challenged conduct."[103] Applying *Strickland*, the Colorado Supreme Court held that this inquiry

> must include an initial determination of whether the body of law was relevant to the circumstances of the client and the matters for which the attorney was retained. The inquiry must also include a determination of whether the attorney

99. Chin & Holmes, *supra* note 65, at 711.

100. *Id.* (quoting *Strickland*, 466 U.S. at 688).

101. People v. Pozo, 746 P.2d 523, 527 (Colo. 1987); *see also* Hutchinson v. People, 742 P.2d 875, 886 (Colo. 1987) ("Further, we recognize and accept the view of the [United States] Supreme Court that inquiries into claims of ineffective assistance of counsel should ordinarily focus on the facts of individual cases." (citing *Strickland*, 466 U.S. at 684–98)).

102. *Pozo*, 746 P.2d at 527 (citing *Strickland*, 466 U.S. at 668).

103. *Id.* (citing *Strickland*, 466 U.S. at 690).

> had reason to believe that the area of law in question was relevant to the client and the client's legal problems.[104]

Although the collateral consequences doctrine may provide a bright-line rule that is more straightforward for courts to apply, a case-by-case analysis is more consistent with the constitutional protections set forth by the United States Supreme Court in *Strickland*.

2. The Colorado Standard is More Consistent with the Prevailing Standard of Professional Performance

In *Strickland*, the United States Supreme Court stated that when evaluating counsel's performance for an ineffectiveness claim, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."[105] Despite this directive, many courts incorrectly apply the first prong of *Strickland*. Some courts do not clearly delineate which standard of professional performance they are applying, some courts fail to discuss prevailing professional norms altogether, and other courts recognize the desirability of an advisement but do not discuss whether prevailing norms of practice make it a constitutional mandate.

Some circuit courts have summarily dismissed defendants' claims of ineffective assistance by simply stating that failure to advise defendants of collateral consequences of guilty pleas does not fall outside the reasonable performance required by *Strickland*. These courts fail to state what objective standard of reasonableness they are applying, or the origin of the objective standard.[106]

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104. *Id.* at 527–28 (citing *Strickland*, 466 U.S. at 691).

105. *Strickland*, 466 U.S. at 688.

106. *See, e.g.*, United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990) ("We therefore conclude that, nothing else appearing, trial counsel's failure to advise a defendant of the collateral consequence of a plea of guilty affecting the possibility of the deportation of the defendant, does not fall short of the 'objective standard of reasonableness,' testing the adequacy of counsel's representation under *Strickland*."); United States v. George, 869 F.2d 333, 338 (7th Cir. 1989) ("Consequently, we decline to hold as a matter of law that counsel's failure to inform a client as to the immigration consequences which may result from a guilty plea, without more, is 'outside the wide range of professionally competent assistance.' " (quoting *Strickland*, 466 U.S. at 691)); United States v. Yearwood, 863 F.2d 6, 7–8 (4th Cir. 1988) ("[A]n attorney's failure to advise a client that deporta-

Without addressing the *Strickland* requirement that the attorney's performance be reasonable under prevailing professional norms, other circuit courts simply state that, as a general rule, the federal Constitution does not require counsel to advise the defendant of collateral consequences.[107] These circuits blindly apply the collateral consequences doctrine without inquiring whether it is objectively reasonable to require attorneys to advise defendants of possible immigration penalties associated with pleading guilty.[108] By replacing an inquiry into the objective norms of criminal defense counsels' performances with a doctrine fabricated by circuit courts, these jurisdictions are straying from the original intent of the United States Supreme Court in *Strickland* to ensure that each criminal defendant receives a fair trial.[109]

Some jurisdictions note that it is " 'highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty,' "[110] but they are unwilling to recognize that doing so should be a part of a criminal defendant's constitutional right to effective assistance of counsel under the Sixth Amendment. However, if advising non-citizen criminal defendants of possible immigration consequences of guilty pleas is a part of the prevailing standard of professional conduct, even if those consequences are collateral, then failure to advise of those consequences should establish the first prong of the *Strickland* test and be grounds for an ineffective assistance of counsel claim if

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tion may result from a conviction does not constitute ineffective assistance of counsel. To hold otherwise would place the unreasonable burden on defense counsel to ascertain and advise of the collateral consequences of a guilty plea which courts have uniformly held is not ineffective assistance of counsel." (internal citations omitted)).

107. *See, e.g.*, United States v. Campbell, 778 F.2d 764, 768–69 (11th Cir. 1985) ("[W]e do not find deportation so unique as to warrant an exception to the general rule that a defendant need not be advised of the deportation consequences of a guilty plea. The states are free to impose higher standards than those required under the federal Constitution and statutes. It is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty; what is desirable is not the issue before us." (internal footnote omitted)); United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985) ("Indeed, a defendant's misunderstanding about the prospect of deportation, without more, has been repeatedly viewed as insufficient to render a guilty plea involuntary.").

108. *See, e.g.*, *Campbell*, 778 F.2d at 768–69; *Gavilan*, 761 F.2d at 228.

109. *See Strickland*, 466 U.S. at 689.

110. *See, e.g.*, State v. Ginebra, 511 So. 2d 960, 962 (Fla. 1987) (agreeing with *Campbell*, 778 F.2d at 769).

the non-citizen criminal defendant can also demonstrate the second prong, prejudice.

In order to determine what would be required under prevailing standards of professional performance and *Strickland*, it is helpful to look to the standards set forth for criminal defense attorneys in the *American Bar Association Standards for Criminal Justice*.[111] Those standards 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."[112] The commentary to this rule also notes that

> counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces. For example, depending on the jurisdiction, it may well be that many clients' greatest potential difficulty, and 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.[113]

Thus, the ABA expects that criminal defense counsel will be mindful of the fact that some criminal defendants will be concerned about the possibility of deportation and that criminal attorneys will be sufficiently knowledgeable about immigration laws to be able to competently advise non-citizen criminal defendants.

Further, the American Bar Association Model Rules of Professional Conduct also provide some indication of prevailing standards of professional performance. Rule 1.1 requires that counsel "provide competent representation to a client. . . . [which is] the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[114] Rule 1.4(a) requires that a lawyer "(1) promptly inform the client of

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111. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, PLEA DISCUSSIONS AND PLEA AGREEMENTS, RESPONSIBILITIES OF DEFENSE COUNSEL, Standard 14-3.2(f) (1999).

112. *See id.*

113. *See id.*

114. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006).

any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules; [and] (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished . . . ."[115] Rule 1.4(b) requires that a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[116] A comment to this model rule explains that the client

> should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement.[117]

Implicit in these rules " 'is the recognition that a client makes decisions regarding his representation based upon the information which he receives from his attorney regarding the legal consequences of the various choices which he may make.' "[118] The possibility of deportation is certainly a consequence which would be important to a non-citizen criminal defendant in deciding whether to take a plea bargain.[119] While these ABA Standards are not binding in any jurisdiction, they do give some indication of the prevailing standards of conduct and what criminal defense counsel should be striving to accomplish in the representation of a non-citizen criminal defendant.

Although the ABA Standards for Criminal Justice may be considered aspirational goals of professional conduct, they are also the norm by which to judge lawyers' performance in applying the first prong of the *Strickland* test. This is especially true in light of the fact that the United States Supreme Court has expressed approval of the use of these standards of professional conduct for evaluating attorney competence and performance. In the 2001 case of *Immigration and Naturalization*

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115. *Id.* R. 1.4(a)(1)–(2).
116. *Id.* R. 1.4(b).
117. *Id.* R. 1.4, cmt. 5.
118. Williams v. State, 641 N.E.2d 44, 48 (Ind. Ct. App. 1994) (quoting Smith v. State, 565 N.E.2d 1114, 1117 (Ind. Ct. App. 1991)).
119. *Id.*

Service v. St. Cyr, the Court recognized that "[t]here can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions"[120] and that " '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.' "[121] Thus, the Court noted that competent defense counsel, following the advice of numerous practice guides and the ABA's Standards for Criminal Justice, would advise non-citizen criminal defendants of immigration consequences.[122]

Based on these prevailing professional norms, it should not be sufficient for counsel to only generally advise a non-citizen criminal defendant that the guilty plea may have unspecified immigration consequences. Rather, defense counsel should specifically investigate the facts and law relevant to the particular client.[123] A "formulaic warning" or a "pro forma caution" that a plea *might* have immigration consequences is not "an adequate effort to advise a criminal defendant of the possible consequences of his plea."[124] "Strategic choices made after inadequate investigation fall short of providing effective assistance if 'reasonable professional judgment' would not support the limitation on investigation."[125] The responsibilities of defense counsel delineated in the ABA Standards for Criminal Justice include the requirement that "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."[126] The Standards do not indicate that defense counsel should only be required to generally notify a non-citizen criminal defendant

120. Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 322 (2001) (analyzing whether, after the repeal of a discretionary relief immigration statute, Immigration and Nationality Act ("INA") § 212(c), in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), discretionary relief should remain available for aliens whose convictions were obtained through plea agreements and who were eligible for § 212(c) relief at the time of their plea).

121. *Id.* (quotation omitted).

122. *See id.* at 323 & n.48 (citing the ABA Standards with approval).

123. Admittedly, this duty would impose additional burdens on private criminal defense counsel and public defenders. *See infra* Part IV.B for a discussion of some of the practical consequences of imposing a duty to advise.

124. People v. Soriano, 240 Cal. Rptr. 328, 336 (Ct. App. 1987).

125. *Id.* at 1479 (quoting Strickland v. Washington, 466 U.S. 668, 690–91 (1984)) (internal citation omitted).

126. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, *supra* note 111, at 14-3.2(f).

that there could be a possibility of unknown immigration consequences.

While bright-line rules are more efficient in application, Colorado's case-by-case approach to analyzing whether criminal defense counsel has a duty to advise a particular non-citizen criminal defendant of possible deportation ramifications is more consistent with the approach envisioned by the *Strickland* Court: "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct *on the facts of the particular case*, viewed as of the time of counsel's conduct."[127] The bright-line collateral consequences doctrine is likely to deny ineffective assistance claims in situations where, based on the facts of a particular defendant's case, it was reasonable and consistent with prevailing professional norms that counsel would have known the defendant was a non-citizen, would have known that possible immigration ramifications were important to that client, and nevertheless failed to adequately advise.

Evaluating the prevailing standards of professional norms demonstrates that it is reasonable and desirable for criminal defense counsel to advise non-citizen criminal defendants of possible immigration consequences of guilty pleas. "Proper advice [about immigration consequences] will allow the defendant to make a knowing and voluntary decision to plead guilty."[128] Furthermore, "not requiring the attorney to specifically advise the defendant of the immigration consequences of pleading guilty would 'place[ ] an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty.' "[129] The importance of this duty to advise should not be disregarded simply because immigration consequences are deemed to be collateral consequences of the criminal proceeding.

3. The Collateral Consequences Doctrine Should Apply Only to Courts, Not to Counsel

Even if one were to recognize that a basic distinction exists between direct and collateral consequences and accept the

127. *See Strickland*, 466 U.S. at 690 (emphasis added).

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

129. *Id.* (quoting 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, 726 (2003)).

definitional differences outlined by the circuit courts, it does not automatically follow that the dichotomy should be the foundation for determining whether a defendant has a colorable ineffective assistance claim. Because of the constitutional differences between the duties of trial courts and criminal defense counsel, the collateral consequences doctrine makes more sense when applied to courts. If anything, the doctrine should only be used to define constitutional limits on trial judges' duties to advise defendants. The dichotomy should not be the basis for determining counsel's responsibilities to non-citizen criminal defendants.

When faced with the issue of whether a plea was involuntary, the Supreme Court, in *Brady v. United States*, did not explicitly differentiate between the role of the trial court in accepting a guilty plea and the role of criminal defense counsel in advising a client about a guilty plea.[130] However, the trial court judge and criminal defense counsel play tremendously different roles in the criminal justice system. Recognizing these differences can help make sense of the collateral consequences doctrine.

Federal and Colorado Rule of Criminal Procedure 11 delineate specific duties the trial court must fulfill before accepting a plea of guilty to ensure the defendant understands his rights and is making the plea voluntarily.[131] These duties include advising a defendant of the nature of the charge and the minimum and maximum penalties for that charge,[132] the right to be represented by an attorney at every stage of the proceedings and to have an attorney appointed,[133] and the right to plead not guilty and be tried by a jury.[134] However, "[t]he trial judge is obligated under the rule to personally disclose only those consequences of a guilty plea specifically set forth in the rule."[135] Thus, as the Colorado Supreme Court noted in *Pozo*,

130. *See generally* Brady v. United States, 397 U.S. 742 (1970).

131. FED. R. CRIM. P. 11(b); COLO. R. CRIM. P. 11(b) (noting that before accepting a guilty plea, the trial court must also determine that the defendant has been advised of all the rights set forth in Rule 5(a)(2)).

132. FED. R. CRIM. P. 11(b)(1)(G)–(I); COLO. R. CRIM. P. 11(b)(1), (4); COLO. R. CRIM. P. 5(a)(2)(VI).

133. FED. R. CRIM. P. 11(b)(1)(D); COLO. R. CRIM. P. 5(a)(2)(II)–(III).

134. FED. R. CRIM. P. 11(b)(1)(B)–(C); COLO R. CRIM. P. 11(b)(3), 5(a)(2)(VII).

135. Downs-Morgan v. United States, 765 F.2d 1534, 1537 (11th Cir. 1985) (citing United States v. Dayton, 604 F.2d 931, 937 (5th Cir. 1979) (en banc) (holding that the consequences listed in Rule 11 are "inclusive and exclusive")).

> [i]t is well settled that a trial court is not required to advise a defendant *sua sponte* of potential federal deportation consequences of a plea of guilty to a felony charge when accepting such plea. This rule is grounded in the notion that in accepting a plea of guilty a trial court is not required to ascertain the defendant's knowledge or understanding of collateral consequences of the conviction. The trial court is required to advise the defendant only of the direct consequences of the conviction to satisfy the due process concerns that a plea be made knowingly and with full understanding of the consequences thereof.[136]

The possibility of deportation is not included in the Federal or Colorado Rule 11 lists[137] and is not interpreted to be part of the maximum penalty language under Federal Rule 11 because immigration consequences are considered civil remedies, and the criminal sentencing judge does not impose the immigration consequences.[138] This reasoning is consistent with the general dichotomy between direct and collateral consequences. Nevertheless, state legislatures are free to add to the list of Rule 11 advisements those consequences they deem essential to the voluntariness of a guilty plea.[139]

Although the trial court judge may have no obligation to discuss the collateral consequences of a criminal conviction with a defendant before accepting a guilty plea, criminal defense counsel should have an affirmative duty to advise his client of the collateral consequences of a plea. Consistent with the duties of competence and communication,[140] criminal defense counsel should provide clients with all the information they need to make informed decisions about their legal representations and the outcomes of their criminal cases. As the Colorado Supreme Court noted in *Pozo*, "constitutional standards requiring effective assistance of counsel involve examina-

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136. People v. Pozo, 746 P.2d 523, 526 (Colo. 1987) (internal citations omitted).

137. *See generally* FED. R. CRIM. P. 11(b); COLO. R. CRIM. P. 11(b).

138. *See Downs-Morgan*, 765 F.2d at 1537; Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974).

139. *See, e.g.*, HAW. R. PENAL P. 11(c)(5) ("The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the defendant understands the following: . . . that if the defendant is not a citizen of the United State, entry of a plea to an offense for which the defendant has 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.").

140. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.4 (2006).

tion of quite different considerations, however."[141] This is because a defendant "who relies on the advice of a legally trained representative when answering criminal charges is entitled to assume that the attorney will provide sufficiently accurate advice to enable the defendant to fully understand and assess the serious legal proceedings in which he is involved."[142] As a criminal defendant's advisor and advocate, defense counsel should inform his client of the circumstances and factors that affect the defendant's best interest.

Even though a trial judge's failure to advise a non-citizen criminal defendant of the immigration consequences of a guilty plea will not invalidate the plea, criminal defense counsel's failure to advise a client of such collateral consequences should constitute ineffective representation.[143] An Indiana Court of Appeals noted:

> Unlike the trial court, whose responsibilities in accepting a guilty plea are set forth with great specificity, an attorney is under a general duty "to ascertain that his client's plea of guilty is entered voluntarily and knowingly, that is, upon advice which enables the accused to make an informed, intelligent, and conscious choice whether to plead guilty or not."[144]

This court thus recognized that a defendant is more likely to rely upon the specific advice of counsel when making a decision whether to plead guilty than on the more general Rule 11 advisement by the court.

In *Michel v. United States*, the Second Circuit recognized the different roles of courts and counsel when it noted the unique responsibilities of counsel in advising a non-citizen criminal defendant of the collateral consequences of a guilty plea:

> We hold that Rule 11 does not affect the long-standing rule in this as well as other circuits that the trial judge when accepting a plea of guilty is not bound to inquire whether a defendant is aware of the collateral effects of his plea. . . . The district judge, in our view, has the obligation to ascertain that the consequences of the sentence *he* imposes are under-

141. *Pozo*, 746 P.2d at 526.
142. *Id.*
143. *See, e.g.*, Williams v. State, 641 N.E.2d 44, 48 (Ind. App. 1994).
144. *Id.* at 48–49 (internal quotation omitted).

> stood. Deportation here, as before, was not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility. We have insisted that even the indigent be represented by counsel, and we cannot seriously expect that . . . Rule 11 was intended to relieve counsel of his responsibility to his client. *Where his client is an alien, counsel and not the court has the obligation of advising him of his particular position as a consequence of his plea.*[145]

The court went on to note 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.*"[146] In a seemingly inconsistent ruling a year later, the Second Circuit held that the defendant failed to state a claim for ineffective assistance because he did not aver that his counsel made an affirmative misrepresentation as to the possible deportation consequences.[147] The court reaffirmed that it was not the trial judge's duty to inform the defendant of possible immigration penalties, but it made no mention as to its language in *Michel* about counsel's duty to advise.[148] Almost twenty years later, the Second Circuit reconciled its precedent, when it held that affirmative misrepresentation as to possible immigration consequences of a guilty plea is unreasonable under the first prong of *Strickland*.[149] The court also suggested that because of evolving standards of attorney competence, complete failure to advise may also constitute grounds for an ineffective assistance of counsel claim.[150]

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145. Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (internal footnote omitted) (second emphasis added).

146. *Id.* at 466 (emphasis added).

147. United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975) (per curiam).

148. *Id.*

149. United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) ("We believe that an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable. We therefore hold that such a misrepresentation meets the first prong of the *Strickland* test.").

150. *Id.* at 187–88 ("[O]n some occasions, we have suggested that an attorney does have a duty to provide that information [regarding potential deportation consequences]. Moreover, recent Supreme Court authority supports this broader view of attorney responsibility as well. Because in the instant case Defendant was affirmatively misled by her attorney, we need not, however, reconsider whether the standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable." (internal citations to *Michel v. United*

In short, although a trial court's duties may be limited to advising the defendant of direct consequences of a guilty plea, a criminal defense attorney's duties should not be "limited by a bright-line drawn between the direct consequences of a guilty plea and those consequences considered collateral."[151] Rather, criminal defense counsel should have an affirmative duty to advise a non-citizen criminal defendant of potential immigration consequences of a guilty plea.

4. Deportation is Qualitatively Different from Other Collateral Consequences

Deportation is qualitatively different from other collateral consequences for two main reasons. First, changes in immigration law have increased the immigration consequences of criminal convictions such that deportation is often an automatic consequence of pleading guilty to certain crimes. Second, deportation is a serious concern for many non-citizen criminal defendants because of the profound impact it can have on their lives. Deportation is more extreme and more severe than other collateral consequences.

a. 1996 Changes in Immigration Law Make Deportation Functionally Automatic

The applicability of the collateral consequences doctrine to criminal defense counsel notwithstanding, deportation should be understood as a direct consequence of a guilty plea. Courts typically define direct consequences of a conviction to include those consequences which have a " 'definite, immediate and largely automatic effect on the range of the defendant's punishment.' "[152] Direct consequences are usually interpreted to include those that have an effect on the length or nature of the sentence.[153] While the classification of deportation as a collateral consequence may have been persuasive under the old im-

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States, 507 F.2d 461, 466 (2d Cir. 1974) & *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 323 (2001) omitted)).

151. Williams v. State, 641 N.E.2d 44, 49 (Ind. App. 1994).

152. *See, e.g.*, Wilson v. McGinnis, 413 F.3d 196, 199 (2d Cir. 2005) (quoting United States v. United States Currency, 895 F.2d 908, 915 (2d Cir. 1990)); *see also* United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000).

153. *See, e.g.*, United States v. Jordan, 870 F.2d 1310, 1317 (7th Cir. 1989) (quotation omitted).

migration laws, changes in 1996 eliminated this justification for not requiring defense counsel to advise non-citizen clients of possible deportation consequences of guilty pleas.

As a result of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")[154] and the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[155] passed by Congress in 1996, deportation has become an automatic and certain consequence of many criminal convictions.[156] IIRIRA and AEDPA enhanced the immigration penalties for criminal conduct, broadened the list of deportable crimes, and removed the discretion of the criminal trial court judge to recommend that the alien not be deported.[157]

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154. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in various sections of 8 and 18 U.S.C.).

155. Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in various sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

156. *See, e.g.*, INA § 237(a), 8 U.S.C. § 1227(a) (2000) ("Any alien . . . *shall*, upon order of the Attorney General, be removed" if the alien is within a statutorily defined class of deportable aliens. (emphasis added)). One statutorily defined class of deportable aliens are those who are convicted of an "aggravated felony" under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). *See also* Rob A. Justman, *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 (2004).

157. *See* Justman, *supra* note 156, at 706–07. *United States v. El-Nobani* also discussed the automatic and certain nature of immigration consequences due to a criminal conviction:

> The enactments of AEDPA and IIRIRA have eliminated virtually all discretion on the part of the INS and, under the current state of the law, deportation is often a direct and inevitable result of an alien defendant's conviction. Prior to AEDPA and IIRIRA, any legally admitted alien resident who had not committed an "aggravated felony" *and* had not served a prison term of five years or more, could apply to the INS for discretionary relief from deportation (" § 212(c) relief"). While § 212(c) relief was "discretionary" in nature, it is well documented . . . that such relief was substantive, and that a first time offender, serving a minimal sentence, with extenuating circumstances (such as a natural born spouse and children) would be all but guaranteed relief from deportation. . . . Thus, under the earlier laws, deportation was rarely a direct result of conviction and its determination was in the hands of an agency over which the trial court had no control.
>
> AEDPA and IIRIRA have changed this dynamic. Prior to these laws, "aggravated felonies" were serious crimes, such as murder, drug and weapon trafficking, money laundering, and other crimes of violence. After AEDPA and IIRIRA, the definition of aggravated felony has been expanded to include fraud, alien smuggling, tax evasion, perjury, bribery, failure to appear before a court, forgery, and other crimes that are surprisingly now defined as "aggravated" felonies. Further, IIRIRA elimi-

Moreover, low-level misdemeanors and crimes that do not even result in incarceration can also result in federal immigration consequences.[158] For example, the federal immigration code states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[159] However, the definition of "aggravated felony" includes theft offenses,[160] falsification of documents,[161] failures to appear,[162] and obstruction of justice.[163] Other deportable crimes include crimes of moral turpitude[164] and crimes relating to a controlled substance and drug addiction.[165] Moreover, the definition of "conviction" includes any circumstance where the alien has been

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> nated the provision that only defendant aliens who were required to serve a five year prison sentence were ineligible for discretionary relief. Under the current law [AEDPA and IIRIRA], the only aliens eligible for any discretionary relief are those who have fulfilled residency requirements and have not committed any of the new long list of aggravated felonies, regardless of time served . . . .

145 F. Supp. 2d 906, 913–14 (N.D. Ohio 2001) (citations omitted), *rev'd*, 287 F.3d 417 (6th Cir. 2002).

158. *See* Justman, *supra* note 156, at 706–07.

159. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000).

160. INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2000) ("a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year").

161. INA § 101(a)(43)(P), 8 U.S.C. § 1101(a)(43)(P) (2000) ("an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument . . .").

162. INA § 101(a)(43)(Q), 8 U.S.C. § 1101(a)(43)(Q) & (T) (2000) ("(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more; . . . (T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed").

163. INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S) (2000) ("an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year").

164. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2000) ("Crimes of moral turpitude[:] Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.").

165. INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2000) ("Controlled substances[:] (i) Conviction[:] Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable. (ii) Drug abusers and addicts[:] Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

found guilty, pleaded guilty, entered a plea of nolo contendere, or admitted sufficient facts to warrant a finding of guilt, as well as where the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty.[166] The phrase "term of imprisonment" includes any period of incarceration or confinement ordered regardless of any suspension of the imposition or execution of that imprisonment in whole or in part.[167] Thus, many minor offenses and suspended sentences can trigger deportation of a non-citizen criminal defendant. Because of the complexities in the definitions and application of the federal immigration code, plea offers that initially appear attractive to non-citizen criminal defendants may eventually lead to deportation.[168]

As one commentator noted, the automatic certainty of immigration consequences combined with a lack of advisement about these consequences "raises the question of whether pleas taken under such circumstances are knowingly and voluntarily entered."[169] Another commentator has argued "that the more certain quality of deportation as a consequence of conviction may call for a higher standard for effective assistance of counsel."[170] Because of the 1996 changes in the immigration law, courts must begin to recognize that although immigration consequences may not fit within the technical definition of a direct consequence, deportations based on criminal convictions are essentially and functionally automatic.

As a result of the 1996 changes in immigration law, at least one court has been persuaded to consider immigration consequences to be direct consequences of a criminal guilty plea:

> Consequently, under the current state of the law, deportation is a direct and inevitable result of conviction for alien residents in the majority (if not the vast majority) of cases. It can no longer be claimed that deportation is a conse-

166. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2000).
167. INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2000).
168. Francis, *supra* note 129, at 693 n.5.
169. *Id.* at 694; *see also* Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969).
170. Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701, 710 (2006).

> quence that will be determined by an agency outside of the trial court's control.[171]

Ultimately, this district court's decision to recognize deportation as a direct consequence of a guilty plea was overturned by the Sixth Circuit in *El-Nobani v. United States*.[172] However, the Sixth Circuit's reasoning fails to address the fact that, despite being outside the technical control of the trial court, deportation is a significantly serious concern for many non-citizen criminal defendants. As the district court in the underlying *El Nobani* case recognized, deportation "is often a more severe punishment than any sentence imposed by the court and, since deportation is now automatic for a whole host of minor crimes, it will likely be a significantly harsher punishment than the judge's sentence in many, if not most, cases in the future."[173] The district court also found that "[h]olding that deportation is not a 'direct consequence' of conviction, solely on the basis that it is technically not a punishment imposed by the court, is a semantical parsing of form over substance that this Court finds abhorrent."[174] The reality that deportation is a certain and direct result of many criminal convictions, combined with the fact that immigration consequences are of a serious and unique nature, make it unjust for trial courts to not impose a constitutional requirement on defense counsel to advise non-citizen criminal defendants of possible immigration ramifications of guilty pleas.

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171. United States v. El-Nobani, 145 F. Supp. 2d 906, 914 (N.D. Ohio 2001) (holding deportation is now a direct consequence of a non-citizen criminal defendant's conviction) (internal citations omitted), *rev'd*, 287 F.3d 417 (6th Cir. 2002) (holding deportation is still a collateral consequence) ("[T]he automatic nature of the deportation proceeding does not necessarily make deportation a direct consequence of the guilty plea. A collateral consequence is one that 'remains beyond the control and responsibility of the district court in which that conviction was entered.' ").

172. *El-Nobani*, 287 F.3d 417 (quoting United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)).

173. *El-Nobani*, 145 F. Supp. 2d at 915; *see also* Justman, *supra* note 156, at 727–29.

174. *El-Nobani*, 145 F. Supp. 2d at 915; *see also* Justman, *supra* note 156, at 727–29.

b. *More Extreme and More Severe: Profound Impact on Defendants*

The United States Supreme Court has long held that deportation is not punishment, but rather a civil remedy.[175] Because of this, advocates urging that immigration consequences are collateral argue that the Court has already settled the issue. However, the Court's conception of immigration consequences is not entirely clear, as the Court has recognized that deportation is "a penalty" and "a drastic measure and at times the equivalent of banishment or exile."[176] At other times the Court has recognized that deportation can result in the division of families and in "loss of . . . all that makes life worth living."[177] To many non-citizen criminal defendants, deportation is the most serious consequence that results from any criminal conviction or guilty plea.

After the changes in the immigration laws after AEDPA and IIRIRA, non-citizen criminal defendants can be deported for many minor misdemeanor offenses, even if the defendant is sentenced to suspended jail time or probation.[178] This is true even if the defendant has lived in the United States since childhood; even if the defendant has a job or career in the United States; even if the defendant will leave behind his wife, children, family, or friends; and even if the defendant will be deported to a country entirely foreign to him.[179] Thus, the possibility of deportation is often more serious and will have a more profound impact than any actual criminal sentence.

Deportation simply cannot be compared to other collateral consequences of a guilty plea. Courts have held that collateral consequences of conviction include revocation of a driver's license, the ineligibility to vote or serve on a jury, the inability to own or possess firearms, disqualification from public benefits, loss of a job, dishonorable discharge from the armed forces, and registration requirements for convicted sex offenders.[180] While many of these other collateral consequences of a conviction or guilty plea may result in mild or even great inconvenience to the defendant, deportation is unique in that it requires a de-

175. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).
176. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).
177. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
178. *See* INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2000).
179. *See, e.g.*, Berkow v. State, 583 N.W.2d 562 (Minn. 1998).
180. *See* Justman, *supra* note 156, at 710–11.

fendant to uproot and leave the United States. As one commentator has noted, "[a]mong various collateral consequences of convictions, deportation stands alone in its detrimental impact, separating families, impeding liberty, and eliminating much of what makes one's life precious."[181]

5. Distinguishing Between Mistaken Advice and Non-Advice is Nonsensical

Some courts have held that a defendant can only establish an ineffective assistance claim by showing that his counsel gave incorrect or bad advice about the possibility of immigration consequences; on the other hand, if the defendant avers that his counsel completely failed to advise, that is not sufficient to state a claim for relief.[182] The problem with distinguishing between an attorney that gives misinformation and an attorney that simply says nothing is two-fold: (1) making this distinction takes the focus off the true issue—whether counsel's actions were reasonably in accordance with prevailing professional norms, and (2) differentiating between mistaken advice and no advice may give criminal defense counsel incentive to simply say nothing—failure to advise does not create a colorable ineffectiveness claim while active misrepresentation does.

In 2004, the New Mexico Supreme Court went one step further than Colorado, actually imposing an affirmative duty on defense counsel to determine clients' immigration status and provide specific advice regarding the impact guilty pleas will have on immigration status.[183] In doing so, the court refused to distinguish between mistaken advice and no advice.[184] First, the court reasoned that there is only a "tenuous distinction" between mistaken advice and no advice: providing no advice or only very general advice leaves the defendant in the position of not receiving sufficient information to make an

181. Francis, *supra* note 129, at 720.

182. *See, e.g.*, United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975) (per curiam) (holding that counsel's failure to inform the defendant of immigration consequences did not establish a claim for ineffective assistance because counsel did not "aver that he made an affirmative misrepresentation"); United States v. Santelises, 476 F.2d 787, 789–90 (2d Cir. 1973) (holding that the defendant did not have an ineffective assistance claim where he "[did] not allege that he was affirmatively misled by counsel").

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

184. *Id.* at 804.

informed decision regarding his or her plea.[185] Second, distinguishing between the two would " 'naturally create a chilling effect on the attorney's decision to offer advice,' because if the attorney's advice regarding immigration consequences is incorrect, the attorney's representation may be deemed 'ineffective.' "[186]

Courts that address ineffective assistance of counsel claims based on mistaken advice should recognize that it does not make logical sense to differentiate between defense counsel who fails to give any advice, defense counsel who only gives very general advice, and defense counsel who misinforms a non-citizen criminal defendant of possible immigration consequences. Not differentiating between mistaken advice and no advice is also more consistent with United States Supreme Court precedent: "Whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases."[187] Thus, the focus should return to the first prong of the *Strickland* test: whether counsel's actions fell below an objective standard of reasonableness.[188]

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185. *Id.*

186. *Id.* at 805 (quoting Francis, *supra* note 129, at 726).

187. McMann v. Richardson, 397 U.S. 759, 770–71 (1970) (holding that a "defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession"); *see also* United States v. Briscoe, 432 F.2d 1351, 1353 (D.C. Cir. 1970) (citing McMann v. Richardson, 397 U.S. 759 (1970) ("Moreover, in weighing the factors inherent in the difficult judgment on whether to plead guilty, defendant cannot later claim involuntariness merely because the advice of his counsel involving a question of law proves wrong, so long as such advice is within the general bounds of reasonable competence.")).

188. *See, e.g.*, United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) (holding that affirmative misrepresentation is unreasonable, but also suggesting that failure to inform could be objectively unreasonable: "Because in the instant case Defendant was affirmatively misled by her attorney, we need not, however, reconsider whether the standards of attorney competence have evolved to the point that a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable. We believe that an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable. We therefore hold that such a misrepresentation meets the first prong of the *Strickland* test.").

B. *Countering the Arguments Against Imposing a Duty to Advise*

Colorado's experience can serve as a hopeful vision for protecting the constitutional rights of non-citizen criminal defendants and can address many of the concerns voiced by other jurisdictions in hesitating to impose a duty to advise non-citizen defendants of the immigration consequences of guilty pleas. Colorado has not encountered a flood of ineffective assistance of counsel claims after *People v. Pozo*, and the duty to advise has not proven to be an overly burdensome task for criminal defense counsel.

1. Colorado Has Not Encountered a "Floodgate" of Ineffective Assistance of Counsel Claims After *People v. Pozo*

First, there are some rudimentary indications that Colorado has not encountered a flood of ineffective assistance of counsel claims based on a failure to advise of immigration consequences after the 1987 *Pozo* decision. Short of conducting an in-depth, empirical statistical analysis, it is difficult to determine how many ineffective assistance claims were brought prior to *People v. Pozo* and how many have been brought since. In order to evaluate the statistical effect the *Pozo* decision has had on the frequency of ineffective assistance claims, researchers would need to undertake a comprehensive analysis of court pleadings. Such a study would undoubtedly be a valuable contribution to scholarship on this topic, but it is outside of the scope of this Note. Nevertheless, there is some indication that the number of ineffective assistance claims in Colorado has not become unmanageable: only eleven ineffective assistance of counsel claims bearing some relation to immigration or deportation have made it to Colorado appellate courts in the twenty-two years since the *Pozo* decision.[189]

189. A Westlaw search of ("ineffective assistance" & "immigration" "deportation") in all Colorado state cases provides thirteen results, two of which are the Colorado Court of Appeals and Colorado Supreme Court *Pozo* decisions. Unfortunately, this does not provide a clear indication of how many ineffective assistance claims have been *filed* during that time period. Undoubtedly, only a fraction of ineffective assistance cases filed will reach the Colorado appellate courts. A search for "ineffective assistance" in the Colorado Trial Orders database on Westlaw results in only three cases. However, this database is not at all comprehensive. It only covers orders handed down since 2001, and only some orders are cho-

Second, and more importantly, *People v. Pozo* has not created a flood of other "collateral consequences" that suffice to constitute grounds for ineffective assistance claims. Rather, in the twenty-two years since the *Pozo* decision, it has not been cited in a single case outside of the context of immigration consequences.[190] This demonstrates the inherent falsity in the perception that opening the door to ineffective assistance claims based on collateral immigration consequences will give rise to a multitude of other collateral consequences serving as the basis for ineffective assistance of counsel claims.

2. The Duty to Advise Has Not Been an Overly Burdensome Task for Defense Counsel in Colorado

In Colorado, the practical implication of *People v. Pozo* was that the "front line in immigration defense has shifted from the immigration bar to the criminal defense bar. Now, more than ever, it is up to criminal defense attorneys to ensure that their noncitizen clients are properly advised so as to prevent the immigration consequences of a criminal plea."[191] Thus, a number of immigration attorneys in Colorado (or criminal defense attorneys familiar with the complexities of immigration law) have published overviews of the immigration issues a criminal defense attorney must consider when representing a non-citizen criminal defendant. While some of these are formal books published by the ABA[192] or formal articles published in sources such as the Colorado Lawyer,[193] others are informal guides that circulate in the Public Defender's Offices around

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sen for the database. To conduct this search follow these instructions: from the Westlaw homepage, go to the left side of the screen; in the "search for a database" window, type "CO-TrialOrders"; search "ineffective assistance" in the search box.

190. The Westlaw KeyCite history shows five cases that have cited *People v. Pozo*, 746 P.2d 523 (Colo. 1987). All five of these cases are in the context of ineffective assistance of counsel claims based on a failure to advise a non-citizen defendant of the immigration consequences of a guilty plea. A review of the Westlaw KeyCite history for *State v. Paredez*, 101 P.3d 799 (N.M. 2004), reveals the same findings.

191. Jeff Joseph, *Immigration Consequences of Criminal Pleas and Convictions*, 35 COLO. LAW. 55, 55 (Oct. 2006).

192. ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS (2d ed. 2006).

193. *See, e.g.*, Joseph, *supra* note 191; *see also* Daniel M. Kowalski & Daniel C. Horne, *Defending the Noncitizen*, 24 COLO. LAW. 2177 (Sept. 1995).

the state.[194] There are also frequent Continuing Legal Education seminars ("CLEs") that address the overlap between immigration and criminal law.[195]

These articles, informal guides, and CLEs outline the basic considerations a criminal defense attorney must consider when undertaking the representation of any criminal defendant. First, the intake process should clearly ascertain the client's immigration status.[196] Second, the articles discuss the term "conviction," as defined by the Immigration and Nationality Act.[197] This is important because deferred judgments, suspended sentences, and probation are all considered "convictions" under immigration law and can result in deportation for a non-citizen criminal defendant.[198] Third, the articles explain the definitions of "aggravated felony" and "crime of moral turpitude" and discuss other categories of crimes that may render non-citizen criminal defendants deportable.[199] Finally, the informal guides provide quick references for "safe haven pleas," "safe pleas if defense counsel controls the record of conviction," "arguably safe pleas only if none other available," and "big dangers."[200] In other words, these reference guides give defense counsel a good idea of which pleas will likely avoid immigration consequences altogether, which pleas will avoid immigration consequences if the factual basis for the plea is limited, which pleas may be safe if there are no other alternatives, and which pleas will almost certainly result in serious immigration consequences. In addition to books, articles, informal guides, and CLEs that help criminal defense attorneys learn how to advise non-citizen criminal defendants of potential immigration consequences of guilty pleas, attorneys are always free to consult with local immigration attorneys or criminal defense attorneys that are well-versed in federal deportation laws before advising their clients whether to take plea bargains.

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194. Deputy Public Defender Hans Meyer, *Immigration Consequences of Misdemeanor Offenses in County Court for Immigrant Clients with Green Cards or Lawful Admissions (Grounds of Deportability)* and *Immigration Consequences of Misdemeanor Offenses in County Court for Undocumented Clients (Grounds of Inadmissibility)*, Aug. 30, 2006 (on file with author).

195. *E.g.*, ABA-CLE: What All Attorneys Should Know About Immigration Consequences of Criminal Convictions for Non-Citizen Clients (Jan. 29, 2009), http://www.abanet.org/cle/programs/t09waa1.html.

196. Joseph, *supra* note 191, at 55.

197. *Id.* at 55.

198. *Id.* at 55–56.

199. *Id.* at 58–59.

200. Meyer, *supra* note 194.

Moreover, the idea that criminal defense attorneys should have a duty to advise non-citizen criminal defendants of possible immigration penalties associated with plea bargaining finds support from the American Bar Association and the Criminal Defense Bar. On multiple occasions, these types of organizations have filed amicus briefs supporting the defendant's ineffective assistance claim.[201] These amicus briefs provide strong evidence that criminal defense attorneys themselves do not feel that creating an affirmative duty to advise would be overly burdensome.

Finally, it is interesting to note that Colorado and New Mexico, two states with relatively high immigrant populations, have the most immigrant-friendly court rulings on ineffective assistance of counsel claims.[202] According to the 2000 United States census, Colorado's non-citizen population totals 253,028, or 5.88% of the state's population, and New Mexico's non-citizen population totals 97,503, or 5.36%.[203] Colorado and New Mexico have the fourteenth and seventeenth highest non-citizen populations in the United States, respectively.[204] According to the Pew Hispanic Center, Colorado and New Mexico are also among the states with the highest percentage of unauthorized immigrants.[205] Additionally, the public defender

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201. *See, e.g.*, People v. Pozo, 746 P.2d 523, 525 n.1 (Colo. 1987) ("The American Civil Liberties Union, the Colorado Criminal Defense Bar and the American Immigration Lawyers Association filed briefs as amici curiae urging affirmance of the judgment of the Court of Appeals [which found that the defendant was not afforded effective assistance of counsel].").

202. *See, e.g.*, *Pozo*, 746 P.2d 523; State v. Paredez, 101 P.3d 799 (N.M. 2004).

203. U.S. Census Bureau: 2000 Census, State and County QuickFacts (for Colorado: http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF3_U_DP2&ds_name=DEC_2000_SF3_U&geo_id=04000US0; for New Mexico: http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF3_U_DP2&ds_name=DEC_2000_SF3_U&geo_id=04000US35) (last visited Mar. 31, 2009).

204. *Id.* The top twenty states with the highest percentage of non-citizen populations are: California (15.92%), New York (10.98%), Nevada (10.00%), Texas (9.52%), New Jersey (9.44%), Florida (9.16%), Arizona (9.01%), District of Columbia (9.00%), Illinois (7.45%), Hawaii (6.99%), Massachusetts (6.86%), Washington (6.05%), Rhode Island (6.02%), Colorado (5.88%), Oregon (5.62%), Connecticut (5.57%), New Mexico (5.36%), Maryland (5.35%), Georgia (4.98%), and Utah (4.85%). The three lowest non-citizen populations are in West Virginia (0.49%), Montana (0.77%), and Mississippi (0.84%). *Id.* (computation table on file with author).

205. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CENTER, June 14, 2005, at 13–15, *available at* http://pewhispanic.org/files/reports/46.pdf (providing charts showing that from 2002 to 2004, Colorado had an unauthorized immigrant population between 200,000 and 250,000, and New Mexico had an unauthorized population between

caseloads in Colorado and New Mexico are not significantly lighter than other states in the nation.[206] In other words, public defenders in Colorado and New Mexico are not any more capable of taking on the duty to advise than public defenders elsewhere in the country. Finally, and perhaps not surprisingly, non-citizen defendants prosecuted in United States federal district courts "were primarily concentrated in the judicial districts near the Southwestern border."[207] In fact, New Mexico had the sixth highest concentration of non-citizen defendants in federal district courts.[208] These statistics provide some indication that the burden on criminal defense counsel is manageable.

CONCLUSION

A guilty plea can have many serious consequences for a criminal defendant, including the possibility of deportation if the defendant is a non-citizen. The gravity of the consequence is not mitigated simply because it may be deemed collateral to the criminal proceeding. Before a non-citizen criminal defendant takes a plea bargain, he has the right to make the decision knowingly and intelligently, with a full understanding of the ramifications of that guilty plea. When immigration consequences are a concern for a non-citizen criminal defendant, the defense attorney should have a responsibility to advise the cli-

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55,000 and 85,000. These numbers account for forty to fifty-four percent of the total foreign born population in Colorado and New Mexico.).

206. *See* CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, STATE FUNDED INDIGENT DEFENSE SERVICES, 1999, at 6 tbl.6, 7 tbl.7 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf. This report covers state-funded public defender offices. Table 6 provides the number of staff in each office. Table 7 provides the number of cases received by each office. I divided the total number of cases received by the total number of assistant public defenders and supervisory attorneys (because these are the attorneys who litigate cases) to get an estimated caseload. The average caseload for those states with data was 324.82 cases per attorney, per year. The caseloads ranged from 57.60 (Massachusetts) to 625.69 (Delaware). Colorado's caseload was 259.83 and New Mexico's was 434.38. Thus, Colorado and New Mexico's caseloads both hover around the average.

207. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, NONCITIZENS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 1984–94, at 6 (1996), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/nifcjs.pdf (referring to figure one on page six).

208. *Id.* ("The District of Arizona (15.3% of all noncitizens prosecuted), the Southern District of Californial (10.0%), the Southern District of Texas (9.4%), the Western District of Texas (7.2%), the Central District of California (7.1%), and the District of New Mexico (4.0%) together accounted for more than half of the total noncitizen federal caseload during 1994.").

ent about whether the plea deal will trigger deportation. If counsel fails to advise, and the defendant can show that counsel's performance was unreasonable and that deficiency resulted in prejudice, that defendant should have the basis for an ineffective assistance of counsel claim.

The collateral consequences doctrine does not adequately evaluate the proper role of defense counsel in criminal proceedings, and it gives short shrift to the *Strickland* and *Hill* standards for evaluating ineffective assistance claims. A bright-line distinction between direct and collateral consequences should not form the basis for evaluating the reasonableness of an attorney's conduct; rather, courts should look to prevailing standards of professional performance.

On February 23, 2009, the United States Supreme Court granted certiorari in *Padilla v. Kentucky*, a case that has the potential to put an end to the collateral consequences doctrine and preclude courts from continuing to improperly analyze ineffective assistance of counsel claims.[209] José Padilla, a native of Honduras who served in the United States Army during the Vietnam War, has lived as legal permanent resident in the United States for nearly forty years.[210] In 2001, he was charged with trafficking in marijuana, possession of marijuana, and possession of drug paraphernalia.[211] When Mr. Padilla decided to plead guilty, his attorney incorrectly advised him that the plea would not affect his immigration status; however, trafficking in marijuana is an offense designated as an "aggravated felony" under the INA and requires mandatory deportation.[212]

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209. Padilla v. Kentucky, No. 08-651, 2009 WL 425077 (U.S. Feb. 23, 2009). The questions presented are:

> 1. Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the INA, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise; and
>
> 2. Assuming immigration consequences are "collateral," whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice.

United States Supreme Court, Questions Presented Report, No. 08-651, *available at* http://origin.www. supremecourtus.gov/qp/08-00651qp.pdf.

210. Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *cert. granted*, 77 U.S.L.W. 3326 (U.S. Feb. 23, 2009) (No. 08-651); United States Supreme Court, Questions Presented Report, No. 08-651, *available at* http://origin. www.supremecourtus.gov/qp/08-00651qp.pdf.

211. *Padilla*, 253 S.W.3d at 483.

212. United States Supreme Court, Questions Presented Report, No. 08-651, *available at* http://origin.www.supremecourtus.gov/qp/08-00651qp.pdf.

Although the Kentucky Supreme Court held that "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel," the United States Supreme Court now has the opportunity to put an end to the collateral consequences doctrine once and for all.

Currently, non-citizens are not entitled to state-provided counsel in deportation proceedings. By requiring criminal defense counsel to investigate and advise non-citizen criminal defendants of potential immigration consequences of guilty pleas, non-citizens like Mr. Padilla become aware of what to expect in subsequent deportation proceedings. From the perspective of the defendant, criminal defense counsel is not a substitute for counsel in immigration proceedings, but at least the non-citizen criminal defendant will not feel blindsided when he walks in front of an immigration judge and is told that his criminal conviction will result in his deportation. Adequate advice in a criminal proceeding may make a cognizable difference in deportation proceedings by making non-citizens who are facing removal better equipped to face the immigration judges who will seal their fate. Requiring defense counsel to advise a non-citizen criminal defendant, like Mr. Padilla, of the immigration consequences of a guilty plea is an important step toward protecting the defendant's Sixth Amendment right to effective assistance of counsel.