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DEPORTATION AS A COLLATERAL CONSEQUENCE OF A GUILTY PLEA: WHY THE FEDERAL PRECEDENT SHOULD BE REEVALUATED

INTRODUCTION

Section 1251 of the Immigration and Nationality Act currently mandates the deportation of aliens convicted of violating any law or regulation relating to narcotics or moral turpitude offenses. The language of section 1251(a) is

1. United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990), was selected to exemplify the typical hardship encountered by aliens in deportation scenarios resulting from 8 U.S.C. § 1251. In 1987, Sabino Del Rosario pleaded guilty upon advice of counsel to one count of possession of cocaine with intent to distribute. He is a resident of the Dominican Republic and was living in the District of Columbia at that time. During his sentencing hearing, Rosario's court appointed attorney and the prosecutor discussed the possibility of deportation as a result of the alien's guilty plea, but the defendant was never advised of any such consequences. As a result, Del Rosario served a ten month jail sentence. He did not become aware of his immigration problems until the Immigration and Naturalization Service (INS) moved to deport him. Immediately upon discovering the intentions of the INS, Del Rosario filed a Pro Se Motion for Court Appointed Counsel to Withdraw Guilty Plea and to Vacate Sentence, but evidently his efforts were futile. The District Court rejected the motion after reviewing the claim of ineffective assistance of counsel. Id. at 56. Subsequently, the Court of Appeals for the District of Columbia found insufficient "miscarriage of justice" to overturn the District Court's holding, and no relief was given. Id.

In Del Rosario and many other cases, aliens facing drug charges have pleaded guilty based on the advice of their attorneys as to the consequences. Frequently, such defendants are indigent who are uneducated and represented by court appointed counsel. The degree of unfairness in each situation varies, but irrespective of these recurring inequitable scenarios, perhaps the most troublesome aspect of the federal court precedent in this area is that aliens are given two sentences: a jail term assessed by the court and then a life sentence in exile imposed by the INS.

2. The pertinent language of 8 U.S.C. § 1251 is as follows:

(a) Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is deportable as being within one or more of the following classes of aliens:

(2)(A)(i) Any alien who —

(I) [i]s convicted of a crime involving moral turpitude committed within five years after the date of entry, and

(II) either is sentenced to confinement or is confined therefore in a prison or correctional institution for one year or longer, is deportable.

(ii) Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether the convictions were in a single trial, is deportable.

(iii) Any alien who is convicted of an aggravated felony at any time after entry is deportable.
mandatory; once the Attorney General orders the deportation proceeding to be commenced, the presiding judge must order the alien deported if the evidence supports a finding of a violation under this section. The Immigration and Nationality Act applies to any person who is not a citizen or national of the United States, including people lawfully residing in this country.

What Congress has failed to realize and many federal courts blatantly ignore is that legal resident aliens, who are often unfamiliar with their rights in the United States, rely on their lawyers, who are their advocates and experts in the law, to insure the aliens' resident status in such situations. Thus, aliens frequently plead guilty to lesser offenses upon advice of counsel without being properly informed of the potential drastic immigration ramifications. Aliens plead guilty believing that the sentence imposed by the court is the full punishment that will be imposed by the government of the United States. Subsequently, such defendants must ask the courts to withdraw guilty pleas and

(B)(i) Any alien who at any time after entry 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 102 of the Controlled Substance Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

Although section 1251 references a number of other reasons for deporting aliens, this Note concentrates on subsection (a)(2)(B) because this subsection vividly illustrates the inequity that aliens are forced to endure under the collateral consequence doctrine.

The term "deportation", when used in this Note and the referenced materials, is defined as "the removal or return of an alien to the country from which he or she has come because the alien's presence has been deemed by the United States, to be inconsistent with the public welfare." Mark E. Roseman, The Alien and the Guilty Plea: Caveat to the Defense, 12 W. St. U.L. Rev. 155, 163 (1984).

3. Guan Chow Tok v. Immigration and Naturalization Service, 538 F.2d 36, 38 (2d Cir. 1976), articulates this idea very concisely. The court in Guan Chow Tok stated, "while we may be concerned at the hardship it imposes on the minor offender, we must nevertheless follow its strictures. The same also applies to the immigration judge who cannot exercise discretion and withhold deportation in contravention of the statute [8 U.S.C. § 1251(a)(11)]."

4. See Roseman, supra note 2, at 155 n.5, stating, "[t]he United States Constitution does not distinguish between rights afforded to citizens or aliens. Likewise, there is no distinction made between citizens and aliens in the Bill of Rights."

5. See generally Edward Bendik & Patricia Cardoso, Immigration Law Consequences for the Criminal Defense Attorney, 61 N.Y. St. B.J. 35 (1989). "Many [actions] are being brought by aliens legally in this country who have pleaded guilty to criminal charges on advice of counsel and have thereby subjected themselves to possible serious immigration consequences." Id. at 34.

6. United States v. Russell, 685 F.2d 35, 41 (D.C. Cir. 1982). "They [aliens] are deported by the same branch of government that brings criminal charges against them . . . ." Id. Thus, when the aliens plead guilty to certain crimes for a specified sentence, they logically assume that the government imposed sentences represent the complete penalty.
vacate judgments to retain their right to remain in this country.\(^7\)

In combating the unfair conditions under which guilty pleas are sustained, aliens have directed the courts' attention to two constitutional guarantees. First, alien defendants have argued that defense attorneys' erroneous advice and/or lack of advice regarding deportation consequences constitutes ineffective assistance of counsel in violation of the Sixth Amendment.\(^8\) Second, aliens have challenged the validity of their guilty pleas [asserting that the pleas were neither knowingly nor voluntarily obtained, thus infringing on Due Process guarantees].\(^9\) Similarly, in challenging the voluntariness and intelligence of

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7. There are a number of manners in which the process occurs. The Supreme Court held that a violation of Due Process or other constitutional guarantees could render a guilty plea invalid. Violation of a constitutional guarantee is the most obvious way to invalidate a prior guilty plea. United States v. Santellises, 476 F.2d 787, 789 (2d Cir. 1973).

However, Rule 32(d) of the Federal Rules of Criminal Procedure also requires that a judgment be vacated in certain circumstances, United States v. Parrino, 212 F.2d 919, 921 (2d Cir. 1954). Rule 32(d) provides for the withdrawal of pleas both before and after sentencing, and the practice is liberal. Russell, 686 F.2d at 37. Yet, withdrawal is never a matter of right and is allowed after sentencing only to correct manifest injustice. \textit{Id.}

In addition, the provisions of Rule 11 of the Federal Rules of Criminal Procedure require the court to scrutinize the intelligence and voluntariness of the plea before acceptance. The requirements of Rule 11 are separate and distinct from those of Rule 32(d). If Rule 11 requirements are not met, a previously entered guilty plea may also be vacated under Rule 11. \textit{See infra} note 54 and accompanying text.

Finally, post conviction relief is available to persons in custody under sentence of a court by virtue of 28 U.S.C. § 2255 through a habeas corpus petition, and by virtue of 28 U.S.C. § 1651 after the sentence has expired. United States v. Nagaro-Garbin, 653 F. Supp. 586, 587 (E.D. Mich. 1987). Under the latter section, relief may be granted only if a Constitutional right is at stake. \textit{Id.}

8. The text of the Sixth Amendment to the United States Constitution reads as follows:

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.

\textit{U.S. CONST.} amend. VI (emphasis added). \textit{See also infra} note 20.

9. This Due Process argument is based on Boykin v. Alabama, 395 U.S. 238, 243 (1969), which mandates that any simultaneous waiver of multiple constitutional rights such as the rights to avoid self-incrimination and to a trial by jury requires a knowing and voluntary relinquishment by the defendant. Under this analysis, the defendant must possess an understanding of the law in relation to the facts in order to waive his rights voluntarily. \textit{Id.}

The Supreme Court interpreted the Fifth and Fourteenth Amendments of the United States Constitution to embody this right to make only knowing and voluntary waivers. \textit{Id.} The applicable portions of text from these respective Amendments read: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." \textit{U.S. CONST.} amend. V. "No State shall . . . deprive any person of life, liberty, or property, without due process of law, . . ." \textit{U.S. CONST.} amend. XIV, § 1.

The Supreme Court further expanded on the due process issue in \textit{Hill} v. \textit{Lockhart}, 474 U.S. 52 (1985). In \textit{Hill}, the Court held that neither the Constitution nor Rule 11 of the Federal Rules of
their pleas, aliens have alleged violations of Rule 11 of the Federal Rules of Criminal Procedure.\textsuperscript{10} The constitutional dimensions of such scenarios are apparent,\textsuperscript{11} and aliens subjected to the current federal court precedent desperately need the attention of the United States Supreme Court to insure the protection of their constitutional rights.\textsuperscript{12}

This Note will begin by examining the contexts of these two types of constitutional claims for relief. Next, the reasons for the federal court precedent and its harshness in this area will be demonstrated. In discussing the federal court precedent, this Note will define the parameters of the collateral consequence test that generally determine the outcome in actions alleging ineffective representation or involuntary pleas.\textsuperscript{13} This Note will illustrate how

Criminal Procedure required that the states give the defendant information about the collateral consequence of parole eligibility in order for the plea to be voluntary. \textit{Id.} at 56. The Sixth Circuit has held that if the procedures mandated by Congress do not provide an alien with Due Process protection during the deportation process, the procedures must yield Aguilar v. Immigration and Naturalization Service, 517 F.2d 565 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). \textit{Id.} at 568. The Sixth Circuit’s holding in \textit{Enriquez} is in accordance with the United State’s Supreme Court case of Yamataya v. Fisher, 189 U.S. 86 (1903), which established that aliens are entitled to Due Process protection. \textit{Id.} at 100. \textit{See also} James Marx, \textit{Comment, Legalization Under the Immigration Reform and Control Act of 1986; Scope of Confidentiality Provisions and Problems in Proving Residence}, 41 U. MIAMI L. REV. 1077, 1102 (1987).

By contrast, the Second Circuit has held that the lack of knowledge regarding deportation resulting in a guilty plea does not violate Due Process. United States v. Santelises, 476 F.2d 787, 789 (2d Cir. 1973).

10. United States v. Russell, 686 F.2d 42 (D.C. Cir. 1982). \textit{See also supra} note 7 and infra note 54 and accompanying text.

11. \textit{See infra} notes 20 and 46.

12. In United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990), Judge Mikva concurred explaining the necessity of a revision to Rule 11 of the Federal Rules of Criminal Procedure. Judge Mikva’s views focused on insuring aliens the right to be informed of possible deportation resulting from a guilty plea. \textit{Id.}

This Note concentrates on securing precisely these rights. Yet, in addition to the protections afforded to defendants through court rules suggested by Judge Mikva, this Note contends that the right to be fully informed of all “material and substantial” consequences raises constitutional questions, in requiring a change in the present consequence advisement test: the collateral consequence doctrine.

13. The doctrine of collateral consequences was created by the United States Supreme Court in \textit{Carafas} v. Lavalle, 391 U.S. 234 (1968). In \textit{Carafas}, the Court applied the doctrine to find lack of mootness in a case where a habeas corpus petitioner had been released from prison, but still desired to pursue his habeas corpus action. \textit{Id.} at 237. The Court described the situation as follows:

\begin{quote}
[In consequence of his [the petitioner’s] conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these “disabilities or burdens which may flow from” petitioner’s conviction, he has a “substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.” \textit{Id.}
\end{quote}
federal courts determine which consequences of guilty pleas are collateral and not an automatic result of the plea and which consequences are direct.\textsuperscript{14} Then, the inappropriateness of the current federal doctrine that makes such a distinction between consequences will be shown where aliens are subjected to a life sentence in exile as a result.\textsuperscript{15}

Finally, this Note will explore the alternatives to using the collateral consequence test for ineffective assistance of counsel claims and claims of involuntary and unintelligent pleas by aliens whose lawyers failed to properly advise them of the possibility of deportation. The possible alternatives range from maintaining the collateral/direct dichotomy and merely creating a tangent to the test for extremely material and substantial consequences, to abandoning the current test altogether for a materiality based standard. This Note concludes by reiterating the constitutional magnitude of the rights to effective assistance of counsel and voluntary and intelligent pleas, and argues that a corollary to the present federal consequence test is required to insure these constitutional rights. Only by making aliens aware of the possible deportation consequences of a guilty plea can justice be served.

II. THE STRUCTURE OF TYPICAL CONSTITUTIONAL CLAIMS FOR RELIEF IN VACATING ALIEN DEFENDANTS' GUILTY PLEAS

When an alien is charged with a narcotics-related offense, aliens, like most people, generally seek advice of counsel to discover their alternatives under the laws of the United States and any other applicable jurisdiction.\textsuperscript{16} Frequently, these defendants enter guilty pleas after consulting with their attorneys.\textsuperscript{17} To

\textsuperscript{14} See infra notes 62-87 and accompanying text.
\textsuperscript{15} See infra note 80 and accompanying text where the court used this language to describe deportation.
\textsuperscript{16} An article in Volume 79 of the Illinois Bar Journal offers a hypothetical factual scenario of the typical developments in a drug case involving an alien. Mary L. Sfasciotti, Representing Aliens in Criminal Cases - Recent Amendments to the Immigration and Naturalization Act, 79 ILL. B.J. 78, 78 (1991). In this factual depiction, the alien is a first time offender who has been in the United States for four years and is married to an American citizen. Id. The alien pleads guilty to a reduced charge and a lesser sentence upon advice of counsel who was unaware of the immigration ramifications. Id. Consequently, when the alien discovers the INS has lodged a detainer against him with the prison authorities where he is serving his sentence, the alien seeks to vacate his conviction. Id.

Mary Sfasciotti analyzes the hypothetical situation under both the federal Immigration and Nationality Act and Illinois state law. For purposes of this Note, the scenario offers a vivid illustration of developments in a case involving an alien charged with a narcotics offense. The outcome of the alien's plight under Illinois law has little relevance here.

\textsuperscript{17} Priscilla Budeiri, Comment, Collateral Consequences of Guilty Pleas In the Federal Criminal Justice System, 16 HARV. C.R.-C.L. L. REV. 157 (1981) citing E.R. Shipp, Criminal Court Seeks Relief on Worsening Caseload, N.Y. TIMES, Feb. 28, 1981, at A1; to demonstrate the
their dismay, by pleading guilty, these aliens expose themselves to deportation consequences under the Immigration and Nationality Act through the Attorney General’s office.\textsuperscript{18} Due to the surprising effect of the plea on the duration of these individuals’ lives, many alien defendants have raised constitutional challenges to the validity of their guilty pleas.\textsuperscript{19}

A. Ineffective Assistance of Counsel

The typical constitutional challenges that aliens wield in attacking their previous pleas of guilty are grounded in the Sixth Amendment.\textsuperscript{20} The Sixth Amendment entitles all criminal defendants to a trial and to be represented at that trial by counsel.\textsuperscript{21} The federal courts have generally extended such rights to aliens.\textsuperscript{22} In order to give the right to counsel significance, the United States Supreme Court has interpreted these Sixth Amendment guarantees to include the right to “effective” assistance of counsel.\textsuperscript{23} In McMann v. Richardson, the Court emphasized that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.\textsuperscript{24}

To ascertain when counsel’s performance rises to a level on incompetence such that it violates the defendant’s right to effective assistance of counsel, the Court devised a two-pronged standard in Strickland v. Washington.\textsuperscript{25} The defendant initially must demonstrate that his counsel’s performance fell below an objective standard of reasonableness.\textsuperscript{26} In attempting to satisfy this first requirement, aliens have based their claims on both affirmative

point that most criminal defendants enter guilty pleas after plea bargaining with the prosecution. Using the New York courts as an example, Shipp reports, “[t]o keep their calendars manageable, judges try to dispose of as many cases as possible each week. The most common method of accomplishing this is plea bargaining.” Id. Because defendants with counsel always enter plea bargains through their counsel, or at least become aware of such deals by way of counsel, the defense attorney must necessarily convey some information to the defendant about the plea.

\textsuperscript{18} See supra notes 2-4 and accompanying text. 
\textsuperscript{19} See infra notes 20 and 46 and accompanying text. 
\textsuperscript{20} “[I]n the last four years, there has been a noticeable increase in the number of motions to vacate judgments based on claims of ineffective assistance of counsel [Sixth Amendment]. Many are being brought by aliens who have pleaded guilty to criminal charges on advice of counsel and have, thereby, subjected themselves to possible serious immigration ramifications.” Edward Bendik & Patricia Cardoso, Immigration Law Considerations for the Criminal Defense Attorney, 61 N.Y. St. B.J. 33 (1989).

\textsuperscript{22} Santos v. Kolb, 880 F.2d 941 (7th Cir. 1989). But see Lavoie v. Immigration & Naturalization Serv., 418 F.2d 732, 734 (9th Cir. 1969).


\textsuperscript{24} Id. at 760.

\textsuperscript{25} 466 U.S. 668 (1984); See infra note 38 and accompanying text.

\textsuperscript{26} Id. at 687.
misrepresentations by their attorneys concerning deportation consequences and the passive conduct of their attorneys in failing to give advice regarding the likelihood of deportation. In order to fulfill the first part of this standard the defendant alien must show that his or her lawyer acted unprofessionally.

Aliens have had minimal success in vacating guilty pleas with these arguments, but absent any particularizing facts in a given case, the federal courts generally provide relief with less reluctance where the lawyer gave erroneous advice to the defendant. Even in situations where the attorney has clearly given the alien incorrect information pertaining to deportation, relief has been denied. In general, reaction of the federal courts to motions by aliens to withdraw guilty pleas or vacate judgments has been mixed and often contradictory in response.

In addition, the Supreme Court has implemented a heavy presumption that defense counsel’s performance was reasonable. Not only must the first prong of the Strickland test be met, but the alien defendant carries an “extra”—heavy

27. This is an instance where the attorney actually tells the defendant something or gives the defendant inaccurate information on which the defendant relies. United States v. Briscoe, 432 F.2d 1351 (D.C. Cir. 1970).


29. See supra notes 25-26 and accompanying text.


31. “Even where an affirmative misrepresentation has been made and the defendant has a colorable claim of innocence, the counsel may not have been constitutionally ineffective.” Downs-Morgan v. United States, 765 F.2d 1534, 1540-41 (11th Cir. 1985). As a result, a guilty plea need not be vacated despite erroneous statements by counsel to a defendant.

32. Gregory G. Sarno, Annotation, Ineffective Assistance of Counsel: Misrepresentation, or Failure to Advise, of Immigration Consequences of Guilty Plea - Federal Cases, 90 A.L.R. FED. 748 (1990 & Supp. 1991). The annotation illustrates that in cases where aliens attempted to withdraw their guilty pleas because they were unaware of the deportation consequences, the courts have reached differing results on whether, under particular circumstances involved, a convicted alien defendant was denied effective assistance by defense counsel’s misrepresentation or nonrepresentation of the immigration consequences of a guilty plea. Thus, in some federal decisions the courts have remanded for an evidentiary hearing on whether defense counsel’s alleged misrepresentation of such consequences constituted inadequate representation. However, in other federal cases, the courts have rejected a contention or apparent contention that defense counsel’s misrepresentation of the immigration consequences of a guilty plea amounted to incompetent representation. Id. at 749. In Downs-Morgan, the court described the appellant’s arguments and summarized the applicable case law in the same manner as accomplished above. Downs-Morgan, 765 F.2d at 1537. “Both parties rely on cases involving counsel’s failure to inform the accused of the immigration consequences of his guilty plea. The courts that consider whether such an omission constitutes ineffective assistance of counsel are divided on the issue.” Id.

33. The Supreme Court has held that the defense counsel’s actions are presumed to be professional, and when seeking relief, defendants carry a heavy burden in proving that the attorney acted unreasonably, Strickland v. Washington, 466 U.S. 668, 689 (1984).
burden of proof in such cases. Consequently, the alien faces a serious battle in seeking to retract a prior guilty plea.

The District Court in Janvier v. United States employed perhaps the most impartial measurement of attorneys' conduct to date when it held that a failure to investigate the applicable law of a case cannot be considered adequate under prevailing norms of professional competency. This appears to be a specific method that can be used to determine the effectiveness of an attorney's representation. Under this test, courts would seemingly vacate all guilty pleas where the defense attorney has not researched, discovered, and informed the defendant about deportation consequences.

In Janvier, the court relied on the rationale of Strickland in scrutinizing whether the defense attorney's decisions were made after a thorough investigation of the law and facts. To this author, a lawyer is acting unreasonably when he fails to investigate the citizenship of his client, regardless of the factual setting of the case. Clearly, an attorney acts unprofessionally when he fails to research and discuss with his client the law of a guilty plea in relation to a basic fact of the case, his client's citizenship.

The second prong of the Strickland test for ineffective assistance of counsel requires the defendant to establish that but for counsel's unprofessional errors, the results of the proceeding would have been different. Hill v. Lockhart applied the Strickland test directly to an ineffective assistance claim arising out of the plea process. In Hill, the Court found that the second prong of the analysis would be satisfied by showing that but for counsel's errors, he [the alien] would not have plead guilty and would have insisted on going to trial.

After Hill, aliens could easily satisfy the second prong of the Strickland test. An alien can comply with the second prong by offering a specific

34. Id. See also Montgomery v. Peterson, 846 F.2d 407, 412 (7th Cir. 1988) (supporting the same proposition).
35. Although the court in Janvier was dealing with the failure of an alien's defense counsel to seek a recommendation against deportation from the court, the criteria used to judge the adequacy of counsel's behavior is extremely applicable. Janvier v. United States, 659 F. Supp. 827 (N.D.N.Y. 1987).
36. Id. at 829.
37. Strickland, 466 U.S. at 694.
39. Id. at 59.
40. Although Hill was decided on the ground that the second prong of Strickland (prejudice) was lacking, the method of scrutinizing for prejudice in Hill provided trial courts with a lower threshold for finding the second prong to be satisfied. The second prong could be considered first in order to dispose of a case, but a reasonable claim that the defendant would have otherwise sought a trial satisfies the prejudice prong. Hill, 474 U.S. at 53.
An even greater obstacle to relief in such actions is that most courts dealing with ineffective assistance claims tend to apply the collateral consequence doctrine; where counsel’s representation was allegedly inadequate, the voluntariness of the plea becomes an issue. The problems encountered because of involuntariness in the plea are discussed in detail in the next section of this Note.

Still, ineffective assistance claims arguably remain viable because of the inconsistent results in the lower federal courts that have heard such challenges by aliens. Consequently, the difficulty of persuading federal courts that counsel acted unprofessionally in such situations suggests that a change in the system that governs such actions is desperately needed.

B. The Intelligence and Voluntariness of the Plea

In numerous ineffective assistance challenges raised by aliens against the validity of their guilty pleas, an intimately related argument has also been presented. In addition to the Sixth Amendment ineffective assistance claim, most defendants argue that their pleas were not entered voluntarily and intelligently. To avoid violating current federal standards of Fourteenth Amendment Due Process, courts must insure that defendants fully understand

41. Key v. United States, 806 F.2d 133, 138 (7th Cir. 1986).
43. See United States v. George, 869 F.2d 333 (7th Cir. 1989) (outlining a typical rejection of a Sixth Amendment challenge to a guilty plea due to a lack of effective assistance of counsel). The last few sentences of the opinion, citing Strickland, state this proposition clearly: “[C]onsequently, 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 professional competent assistance’.” Id. at 338. See also supra note 31.
44. See infra notes 46-48.
45. See supra note 32 and accompanying text.
the consequences of their pleas.\textsuperscript{47} Even where the defendant has not argued that the plea was involuntary, if counsel was alleged to be ineffective, courts will often decide the voluntariness issue.\textsuperscript{48}

The interrelation of the ineffective assistance claims and the involuntary plea claims is exemplified by \textit{Hill v. Lockard}.\textsuperscript{49} In claiming that counsel rendered insufficient assistance, aliens are almost automatically, though indirectly, arguing that they could not have entered guilty pleas voluntarily and intelligently.\textsuperscript{50} This interrelation of challenges should not detract from the fact that aliens' rights are affected in more than one respect.

\textit{Hill} may also suggest that the Supreme Court agrees with the lower federal courts because it has rejected any notion of court duty to advise defendants about collateral consequences of pleas.\textsuperscript{51} Yet, \textit{Hill} dealt solely with parole eligibility,\textsuperscript{52} and the Supreme Court has not heard a case dealing specifically with an alien's right to be advised about deportation consequences.\textsuperscript{53} Thus, \textit{Hill} may discount a Due Process challenge based on involuntary and unintelligent pleading, but it does not wholly discredit such an action.

To a great extent, Federal Rule of Criminal Procedure 11 safeguards the intelligence and voluntariness of the plea.\textsuperscript{54} Under Rule 11, the trial court has

\textsuperscript{47} In United States v. Santelises, 476 F.2d 787 (2d Cir. 1973), the alien defendant unsuccessfully raised a challenge to the validity of his prior guilty plea under the Due Process clause based on the lack of knowledge regarding the likelihood of deportation as a collateral consequence of the plea. However, this case was heard prior to the amendment of 8 U.S.C § 1251(a) making deportation mandatory under specific subsections. See \textit{supra} note 3. Section 701 of the Immigration Reform and Control Act may well have legislatively reversed the holding in \textit{Santelises} by making deportation mandatory. See Bendik & Cardoso, \textit{supra} note 20, at 34.

\textsuperscript{48} "An accused who has not received reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by his plea because a plea of guilty is valid only if made intelligently and voluntarily." Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984).

\textsuperscript{49} In Houston v. Lack, 625 F. Supp. 785, 786-88 (W.D. Tenn. 1986), the court interpreted the reasoning of \textit{Hill v. Lockhart}, 474 U.S. 52 (1985). The court characterized \textit{Hill} as a case where "the voluntariness of a guilty plea was at issue in the context of a claim of ineffective assistance of counsel." \textit{Id.} at 78. More directly, the court was deciphering \textit{Hill} as an allegation of inadequate counsel which, in turn, made the defendant's plea invalid. \textit{Id.} at 789.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} See \textit{supra} note 9 and accompanying text.


\textsuperscript{53} Sarno, \textit{supra} note 32, at 748-50.

\textsuperscript{54} In pertinent part, Rule 11 of the Federal Rules of Criminal Procedure, reads as follows:

\begin{itemize}
  \item [(a)] A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead . . . the court shall enter a plea of not guilty.
  \item [(b)] Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
\end{itemize}
a duty to advise the defendant of the consequences of a guilty plea.\textsuperscript{55} This advisement is done by the court personally addressing the defendant in open court and determining that the plea is based on facts known to the defendant.\textsuperscript{56} If a court fails to comply with the terms of Rule 11, a plea may be withdrawn or a judgment may be vacated.\textsuperscript{57} Federal courts have generally not vacated judgments or allowed aliens to withdraw guilty pleas under Rule 11 due to lack of knowledge concerning deportation.\textsuperscript{58} Furthermore, the Supreme Court has held that due process does not require Rule 11 admonishments.\textsuperscript{59}

Many courts require aliens to show a direct consequence of the plea that was not explained before a plea is invalidated because a lack of information made that plea involuntary under due process or Rule 11.\textsuperscript{60} Therefore, by characterizing deportation as a collateral consequence, the federal courts have taken the punch out of any resistance that aliens could have offered to unforeseen deportation possibilities. For all practical purposes, once a plea is entered, the defendant aliens incur a risk of deportation regardless of their

\begin{flushleft}
(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term . . .; and

(2) the right to be represented by an attorney . . .; and

(3) the right to plead not guilty . . ., the right to be tried by a jury . . ., the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind . . .

(d) The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary.

(f) Notwithstanding the acceptance of a plea of guilty, the court should not enter judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

\textbf{FED. R. CRIM. P. 11.}

\textsuperscript{55} Id. at subsection (d).


\textsuperscript{57} See supra note 7.

\textsuperscript{58} "Defendant's first argument in support of his motion [for post conviction relief] is that his plea was involuntary because the court failed to inform him of all the consequences of his guilty plea . . . It is well settled that the trial judge is not required to inform a defendant of possible immigration consequences pursuant to a Rule 11 plea agreement." United States v. Nagaro-Garbin, 653 F. Supp. 586, 589 (E.D. Mich. 1987). But see United States v. Russell, 686 F.2d 35, 41-42 (D.C. Cir. 1982) (court granted relief based on Rule 32(d)).

\textsuperscript{59} United States v. Timmreck, 441 U.S. 780, 782 (1979), stands for the proposition that failure to comply with Rule 11 is not a failure to comply with The Due Process Clause. See infra note 92 and accompanying text.

\textsuperscript{60} Fruchtmann v. Kenton, 531 F.2d 946, 948-49 (9th Cir. 1976), cert. denied, 429 U.S. 895 (1976); Sanchez v. United States, 572 F.2d 210 (9th Cir. 1977).
naivete. This risk seems extremely unfair and suggests that some type of modification in the present doctrine governing these actions is required.

C. The Collateral Versus Direct Dichotomy

The doctrine that controls the outcome of ineffective assistance challenges and involuntary plea arguments is the collateral consequence standard. Defining the terms “collateral” and “direct” is difficult, and as one court noted, “[t]he distinction between a collateral and a direct consequence, like many of the lines drawn in legal analysis, is obvious at the extremes and subtle at the margin.” However, what is important for purposes of this Note is that the federal courts have overwhelmingly held that deportation is collateral to criminal convictions.

To begin, the test for making this distinction should first be explained. A number of methods have been used to determine whether a particular consequence is direct or collateral. In United States v. Parrino, the Second Circuit attempted to explain why deportation is collateral to a criminal

62. Maryellen Fullerton & Noah Kingstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide For Defense Attorneys, 23 AM. CRIM. L. REV. 425, 429 (1985-86), gives a brief overview of the collateral consequence doctrine and its effect on aliens’ attempts to invalidate guilty pleas. It reads as follows:

[T]he courts generally view deportation as a “collateral” rather than “direct” consequence of a guilty plea. Most courts are not affirmatively required to inform an alien defendant that a guilty plea may result in deportation. If an alien defendant pleads guilty to a crime without knowledge that such a plea could lead to deportation, the resulting deportation will not invalidate the guilty plea. Relief from deportation ordinarily will not be provided, even where an alien has clearly relied on the erroneous advice of an attorney.

Id.

63. United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982), demonstrates the imprecision of the federal collateral consequence doctrine and the difficulty of applying it to aliens in this situation. The court illustrates the ambiguity of the doctrine by referencing the division of authorities on the subject. Id. In Russell, the court said that the collateral consequence doctrine is difficult to apply because courts have merely defined the parameters of the doctrine by examining its prior applications. Id.

64. United States v. George, 869 F.2d 333, 337 (7th Cir. 1989), summarized the positions of a number of circuits regarding the classification of deportation as a collateral rather than direct consequence. The court in George stated that, “[v]arious circuits have addressed the issue of failure of counsel to inform an accused of the likely deportation consequences arising out of a guilty plea, and have determined that deportation is a collateral consequence of the criminal proceeding and therefore no ineffective assistance of counsel was found.” Id. In arriving at this sweeping conclusion the court cited to the following decisions: United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226 (5th Cir. 1985); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975).

65. See supra note 64 and infra notes 66-70 and accompanying text.
conviction in the context of a motion to withdraw a guilty plea. 66

Deportation here . . . was not the sentence of the court which accepted the plea but of another agency [the INS] over which the trial judge has no responsibility . . . We do not think that the distinction between a direct and collateral consequence depends upon the degree of certainty with which the sanction will be visited upon the defendant . . . [the trial judge] must assure himself only that the punishment that "he" is meting out is understood . . . 67

Utilizing the above stated analysis for the purpose of avoiding "manifest injustice," 68 the Second Circuit appeared to be determining whether a consequence is collateral by asking the question: Did the lower court judge impose a consequence that was unknown to the defendant? Yet, this method of distinguishing between collateral and direct consequences is not followed universally by all federal courts. 69

In a later case, even the Second Circuit has seemingly used a different approach to distinguish collateral consequences from direct consequences. 70 Indeed, other circuits, such as the Fourth Circuit, have offered opinions that flagrantly contradict the Second Circuit's analysis in Parrino. The Fourth Circuit in Cuthrell v. Patuxent Institution stated that the distinction between collateral and direct consequences of a plea, while sometimes shaded in relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment. 71 Generally, judicial interpretations of the terms "collateral" and "direct" have

66. Budeiri, Comment, supra note 17, at 171-73 rationalizes, "[D]espite criticism of the Second Circuit's treatment of the case, Parrino has not been reversed. Indeed, it has been referred to frequently in cases in which the collateral consequences of guilty pleas were at issue."


68. Under Rule 32(d) of the Federal Rules of Criminal Procedure, the standard to vacate a conviction and withdraw a guilty plea is a showing by the defendant of manifest injustice. Parrino, 212 F.2d at 921. Violation of Rule 32(d) was alleged by the defendant in Parrino, but the court found no such violation. Id.

69. Compare supra note 67 with infra note 70.

70. United States v. Santelises, 476 F.2d 787, 790 (2d Cir. 1973), looks to whether the consequence automatically resulted from the conviction rather than inquiring whether the lower court judge imposed deportation as part of the sentence. But see Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974), where the Second Circuit again changed its position and held that only a consequence imposed by the lower court as part of the sentence is a direct consequence.

71. This analysis by the Fourth Circuit in Cuthrell v. Patuxent Institute, 475 F.2d 1364 (4th Cir.), cert. denied, 414 U.S. 1005 (1973), was explained in Budeiri, Comment, supra note 17. Cuthrell involved civil commitment as a collateral consequence, but the analysis with which the court determined that this consequence was collateral contrasts sharply with the rationale of Parrino.
occasionally varied among the circuits and changed over time.\textsuperscript{72}

In contrast to that of deportation, other examples of consequences resulting from guilty pleas that have been held by the federal courts to be collateral and insufficient to make the plea invalid include: separate civil proceedings against the defendant for commitment to a mental health facility;\textsuperscript{73} the possibility of imposition of consecutive sentences;\textsuperscript{74} the deprivation of the right to vote, hold public office, and travel abroad;\textsuperscript{75} and the possibility of dishonorable discharge from the armed forces.\textsuperscript{76}

Still, such other consequences can easily be distinguished from deportation. One who is civilly committed, for instance, is afforded periodic reevaluations by medical personnel.\textsuperscript{77} To distinguish another consequence, where consecutive sentences are given for multiple convictions in a single trial, the defendant has already been given separate explanations by the court regarding the possible sentences for each count.\textsuperscript{78} Thus, defendants are given some information about the consequences of pleading guilty in multiple conviction cases, and the lack of awareness in such cases is clearly distinguished from deportation scenarios. Finally, the right to vote, to hold public office, and to travel abroad are merely "civic" rights\textsuperscript{79} that are simply not as harsh as a life sentence in exile.\textsuperscript{80} Also, in many cases deportation is a more direct and automatic consequence than any other sanction.\textsuperscript{81}

To evaluate the compelling need for change in the federal collateral consequence doctrine, a brief survey of the repercussions held to be direct is necessary. In one case, the Ninth Circuit held that a defendant must be advised

\begin{itemize}
  \item 72. Budeiri, Comment, supra note 17, at 169.
  \item 73. Cuthrell, 475 F.2d at 1366.
  \item 74. United States v. Vermeulen, 436 F.2d 72, 75 (2d Cir. 1970).
  \item 75. Meaton v. United States, 328 F.2d 379 (5th Cir. 1963).
  \item 76. Redwine v. Zuchert, 317 F.2d 336 (D.C. Cir. 1963).
  \item 77. Budeiri, Comment, supra note 17, at 176.
  \item 78. Villarreal v. United States, 508 F.2d 1132, 1133 (9th Cir. 1974), held that due to the defendant's knowledge of the possibility for twenty-five year sentences on each count, he was effectively on notice that he could receive fifty years altogether.
  \item 79. The Fifth Circuit denied withdrawal of the defendant's guilty plea because certain individual rights, such as voting and passport eligibility, were merely "civic" in nature. Meaton v. United States, 328 F.2d 379 (5th Cir. 1964). The clear distinction between "civic" rights and other rights was not explained, but the line of distinction seemed to hinge on the importance of such rights. Id.
  \item 80. Jordan v. DeGeorge, 341 U.S. 223, 243 (1951), used this precise language to describe deportation. See also Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (holding that deportation is a penalty and a drastic measure and at times the equivalent of banishment or exile); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (acknowledging that "everyone knows that to be forcibly taken away from your home, and family, and friends, and business, and property, and sent across the ocean to a distant land is punishment; and that oftentimes most severe and cruel.").
  \item 81. United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982).
\end{itemize}
that time served in a state penitentiary prior to transfer to federal prison will not
be subtracted from a federal sentence.82 Thus, time served in a state prison
before federal sentencing was found to be a direct factor relating to the decision
to plead guilty. In another case, the Second Circuit held that parole eligibility
is a direct consequence of a guilty plea because it has a definite effect on the
length of the defendant's prison term.83 In these decisions, direct consequences
were found and the guilty pleas were vacated, but courts do not always allow
defendants to withdraw guilty pleas even where the defendant was ignorant of
a direct consequence.84

Consequently, after considering the ambiguity of the terms "collateral" and
"direct", and the inconsistency of their uses, would not be completely fair or
accurate to unequivocally declare deportation to be collateral to a guilty plea.85
Deportation has been shown to be an automatic result of a guilty plea under 8
U.S.C. § 1251(a) and the harshness of such a consequence is undisputed.86
Under the current collateral consequence doctrine, aliens have clearly relied on
the erroneous advice of their attorneys, and yet the federal courts have denied
relief.87 Thus, some type of change in the present system is required.

82. United States v. Myers, 451 F.2d 402, 403-04 (9th Cir. 1972). In Myers, the court found
that the defendant involuntarily pleaded guilty. Thus, the court granted relief to the defendant when
the consequence was held to be direct. Id.

83. In Bye v. United States, 435 F.2d 177, 180 (2d Cir. 1970), the Second Circuit found parole
eligibility to be a direct consequence when it stated, "the unavailability of parole directly affects the
length of time an accused will have to serve in prison." But see Trujillo v. United States, 377 F.2d
266 (5th Cir.), cert. denied, 389 U.S. 899 (1967), Smith v. United States, 324 F.2d 436 (D.C. Cir.
1963), cert. denied, 376 U.S. 957 (1964) (demonstrating that there is a minority view holding
ineligibility for parole to be a collateral consequence).

84. Budeiri, Comment, supra note 17, at 194. "Although ineligibility for parole and mandatory
special parole terms are considered direct consequences in the majority view, courts do not always
allow defendants to withdraw guilty pleas, even if they prove that they were not advised of the direct
consequence." Id.

85. Budeiri summarizes the unfairness in this manner:
In sum, the rationales posited to justify the distinction between collateral and direct
consequences are neither persuasive nor consistent. If a defendant suffers an unexpected
deprivation because of his guilty plea, his plea was not informed. The proper inquiry
is whether this lack of information is serious enough to violate due process, not what
label should be attached to the consequence.
Budeiri, Comment, supra note 17, at 194.

86. The United States Supreme Court has held that deportation may result in loss of all that
makes life worth living. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). See also supra note
80 and accompanying text.

87. United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985); United States v. Parrino, 212
F.2d 919, 921 (2d Cir. 1954).
III. AVOIDING THE INEQUITIES AND WHY

A variety of avenues are available to insure that aliens are informed of the likelihood of deportation when pleading guilty to any offense enumerated in section 1251, but particularly subsection (a)(2)(B). 88 Each of the following alternatives entails amelioration of the federal collateral consequence doctrine to some extent. These particular solutions focus on insuring that aliens submit voluntary and intelligent pleas and that their constitutional right to effective assistance of counsel is safeguarded. However, each proposed change could have a distinct impact on other consequences of guilty pleas.

A. Deportation as a Direct Consequence

The classification of deportation as collateral has been sharply criticized by numerous judicial opinions and other authorities. 89 As a result, many authorities have contemplated the possibility of a Supreme Court decision establishing deportation as a direct consequence of a guilty plea. 90 Such a holding would obviously guarantee aliens the right to enter a voluntary and intelligent guilty plea if the trial court’s instruction on deportation effects of the plea were consequently mandated under Rule 11 or the Due Process Clause. Supreme Court precedent with this holding would also render ineffective assistance of counsel challenges unnecessary by eliminating the need for a formal advisement from defense counsel about the immigration effects of a guilty plea.

However, the problem is that defendants are not even assured of the right to be informed by the court of all direct consequences. 91 In other words, when the trial court fails to advise the defendant of certain direct consequences, the

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88. "The Immigration and Nationality Act, as implemented and made instructive by the Code of Federal Regulations and the Immigration and Naturalization Service Operating Instructions, are specific as to the laws, regulations and procedures pertaining to non-citizens who are convicted of a crime." Roseman, Comment, supra note 2, at 160. See generally supra note 2.

89. Parrino, 212 F.2d at 921. See also infra notes 90 and 113.

90. The United States Court of Appeals for the District of Columbia Circuit considered a challenge to a guilty plea in United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982), and despite relying on prosecutorial misrepresentations in its reasoning, the court stated, "[i]t is extremely troublesome that deportation has never been considered a direct consequence of guilty pleas of the sort that must be brought to the defendant's attention before his plea may be considered voluntary under Rule 11."

Also, in a state court decision, People v. Luna, 570 N.E.2d 404 (Ill. App. Ct. 1991), the Illinois Appellate Court, illustrated how finding deportation to be a direct consequence of a guilty plea could be a functional solution to protect the rights of aliens. By determining deportation to be a direct rather than collateral consequence, the need for applying the collateral consequence doctrine is removed.

91. See supra note 84.
error may be held harmless. Thus, it is unlikely that finding deportation to be a direct consequence will adequately protect defendants' constitutional rights.

Many courts base their decisions regarding the alien's right to be advised of deportation on the fact that deportation is a collateral consequence of a guilty plea. The unfair conditions that aliens are exposed to in similar cases involving aliens, could be removed by a Supreme Court decision holding deportation to be a direct consequence of pleading guilty. Still, even for consequences deemed direct, the common law, the Due Process Clause, and Rule 11 guidelines for advisement are extremely vague. Therefore, other alternatives for protecting aliens' constitutional rights may be more effective.

B. Consequences That Substantially and Materially Affect the Defendant's Life

Much of the contradiction and indefiniteness of the collateral consequence doctrine exists because the federal courts are attempting to be fair in their applications of the standard. By creating an exception to the current federal collateral consequence test for those consequences of guilty pleas that substantially and materially affect defendants' lives, the Supreme Court would sufficiently protect defendants' constitutional rights to enter knowing and voluntary guilty pleas. By requiring trial courts to examine defendants'...
awareness of immigration consequences, the Supreme Court would eliminate the need for courts to twist and strain the collateral consequence test in the interests of justice.\textsuperscript{96} Furthermore, this exception would eradicate the need for counsel to advise the defendant of deportation consequences to effectively represent the client.

The Court could implement this modification utilizing the original rationale of the collateral consequence doctrine.\textsuperscript{97} The duty of trial courts to determine if pleas are entered voluntarily by defendants and with a full understanding of the law in relation to facts, as required by Due Process,\textsuperscript{96} would merely be clarified. District courts would be required, as always, to make clear determinations on the record that defendants were given fair notice of all direct consequences of the guilty plea. Yet, consequences of the plea that substantially and materially affect a person’s life, like deportation, would also be explained.

Some federal courts have argued that imposing a duty on trial courts to advise defendants of immigration consequences places an unmanageable burden on trial judges.\textsuperscript{99} Yet, if such a requirement were mandated by the Supreme Court, a mere statement by trial judges to defendants as follows would suffice to insure aliens of their constitutional rights:

\begin{quote}
IF YOU ARE NOT A CITIZEN OF THE UNITED STATES, A GUILTY PLEA IN THIS COURT MAY CAUSE YOU TO BE DEPORTED. DO YOU UNDERSTAND?
\end{quote}

The feasibility of scrapping the collateral consequence doctrine altogether for a materiality based standard will be evaluated in the next section of this Note.

\textsuperscript{96} See supra note 93 and accompanying text.

\textsuperscript{97} In the case first elaborating on the collateral consequence doctrine, Carafas v. Lavalle, 391 U.S. 234 (1969), the Court noted why the petitioner was entitled to relief. The Court stated: [petitioner] is entitled to consideration of his application for relief on its merits. He is suffering, and will continue to suffer, serious disabilities because of the law’s complexities and not because of his [own] fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court.\textsuperscript{\textit{Id.}} at 239.

\textsuperscript{98} Johnson v. Zerbst, 304 U.S. 458, 465 (1938), characterizes the due process criteria required of trial courts to insure the validity of guilty pleas. The Court stated, “if a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” \textsuperscript{\textit{Id.}}

\textsuperscript{99} United States v. Garrett, 680 F.2d 64 (9th Cir. 1982), offers such an opinion. In Garrett, the court declared, “[t]he fact that the deportation proceeding was one over which the trial judge had no control and no responsibility was important to the analysis of whether it was a direct or a collateral consequence. We decline to impose on the trial judge what would become an unmanageable burden of advising the defendant of such a consequence.” \textsuperscript{\textit{Id.}} at 66.
This seems like a small price to pay for protecting the constitutional rights of individuals in this country. Yet even a judicial admonishment is unnecessary if the alien has, in some manner, demonstrated to the judge that he is aware of the likelihood of deportation. Thus, if the trial judge determines, either at trial through testimony of the alien himself, or at a hearing on a motion to withdraw the guilty plea through evidence such as the defense attorney’s testimony, that the alien knows the deportation consequences of pleading guilty, then no relief would be granted. This finding must be achieved for the record to avoid further complication. Where the judge decides that the alien is aware of the deportation consequences, the judge would merely have to state aloud before entering judgment as follows:

I FIND THE DEFENDANT AWARE OF THE DEPORTATION CONSEQUENCES OF HIS PLEA.

To give trial courts a measuring stick in deciding which consequences are so “substantial” that they qualify for such judicial cognizance, the Supreme Court has already provided some direction. As early as 1922, the Court characterized deportation as a “loss of all . . . that makes life worth living.”100 Where a consequence of a guilty plea will permanently and irreparably alter a person’s life as deportation does, defendants should at least be told of the consequence before they decide to plead guilty.

The “materiality” requirement for judging the applicability of the standard to a particular consequence also has previously established foundations in the common law. Courts frequently deal with the materiality of facts in actions involving motions to reopen deportation proceedings.101 One court characterized the Supreme Court’s interpretation of this requirement in the context of a motion to reopen deportation proceedings as “evidence tending to

100. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
101. 8 C.F.R. § 3.2 (1991) reads:
   The Board [of Immigration Appeals] may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner [of the Immigration and Naturalization Service] or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is “material” and was not available and could not have been made discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien’s right to apply for such relief was fully explained to him . . . at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

For application of this standard by a judicial forum, see infra note 102.
strengthen the alien's claim for relief."^{102} Furthermore, at least one state
court has seemingly utilized a materiality standard to rate the importance of
court advisement about deportation consequences.\textsuperscript{103} Thus, this element would
be relatively easy to implement in conjunction with the federal collateral
consequence doctrine.

A trial court determination that the defendant had notice of the deportation
consequences is a finding of fact. Therefore, a highly deferential degree of
scrutiny would be afforded to the federal district courts on this issue.\textsuperscript{104} A
district court determination that an alien knew the deportation consequences of
pleading guilty would only be overturned on appeal if the finding was clearly
erroneous.\textsuperscript{105}

Looking to Congressional intent, the United States Congress has expressly
provided that deportation must be withheld under § 8 U.S.C. 1253(h) where the
alien's life or freedom would be threatened by deportation.\textsuperscript{106} This section
implies a congressional desire to protect the interests of deportable aliens facing
deportation. In fact, a House Report on the legislative history of section 1253(h)
explains that deportation should be prohibited to avoid severe economic
disadvantage and deprivation of liberty, as well as physical harm.\textsuperscript{107}
Consequently, modification of the collateral consequence doctrine to protect
aliens' interests flows smoothly with the currents of congressional design.

\textsuperscript{102} Zacarias v. United States, 921 F.2d 844, 853 (9th Cir. 1990), examined the Supreme
Court's opinion in INS v. Abudu, 485 U.S. 94 (1988), to define the term material in relation to a
motion to reopen a deportation proceeding against an alien.

\textsuperscript{103} In People v. Huante, 550 N.E.2d 1155, 1159 (Ill. App. Ct. 1990), the court said, "[i]n
view of these factors, our courts have concluded that the potential deportation consequences of guilty
pleas in criminal proceedings brought against alien defendants are material to critical phases of such
proceedings."

\textsuperscript{104} The appellate court standard for reviewing the lower court's findings of fact and states
that such findings will be overturned only upon a showing that such findings are clearly erroneous.

\textsuperscript{105} Id.

\textsuperscript{106} The pertinent language of 8 U.S.C. § 1253(h)(1992) is as follows:

(h)(1) The Attorney General shall not deport or return any alien (other than an alien
described in 8 USC § 1251(a)(4)(D) to a country if the Attorney General determines that
such alien's life or freedom would be threatened in such country on account of race,
religion, nationality, membership in a particular social group, or political opinion.

\textsuperscript{107} "The harm or suffering need not be physical, but may take other forms, such as the
deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing,
employment, or other essentials of life." AMENDING THE IMMIGRATION AND NATIONALITY ACT;
C. Discarding the Collateral Consequence Doctrine Completely for a Materiality Based Standard

One possible solution that would guarantee defendants’ awareness of all consequences that might be pivotal in their decisions to plead guilty, thus insuring voluntariness, would be to replace the collateral consequence test with a materiality standard. Yet, problems arise with completely discarding the current federal consequence test. As developed by the common law, the collateral/direct dichotomy provides the federal courts with a uniform initial inquiry. The doctrine provides a screening mechanism for insuring defendants’ awareness of the significant effects of their guilty pleas, and without such a device district courts would be extremely burdened. Judicial efficiency would also be jeopardized as many courts feared, and the number of defendants alleging invalidity of their guilty pleas for failure to be informed of all “material” consequences would be unmanageable. To avoid such problems, courts should first evaluate the consequences under the collateral consequence doctrine, and then ask whether there may be other substantial and material consequences of which the defendant should be given notice.

Another foreseeable problem in converting from the collateral/direct test to a materiality standard is that courts would be treading in new frontiers. With absolutely no guidance from prior decisions, courts will be forced to select...
consequences thought to be "material" in order to advise defendants and insure due process of law. Federal court precedent already provides trial courts with a list of consequences deemed collateral and a list determined to be direct. Thus, replacing the federal collateral consequence doctrine completely with a materiality based standard would likely open up a Pandora’s box of complications.

D. Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure

As explained earlier, Rule 11 of the Federal Rules of Criminal Procedure is designed to insure intelligence and voluntariness of defendants when pleading guilty. Arguing that defendants cannot knowingly plead guilty without information about immigration ramifications, Judge Mikva contemplated the necessity of an amendment to Rule 11 in his United States v. Del Rosario concurrence. Judge Mikva concluded that where a trial judge has reason to believe a defendant is an alien, the judge should be required to make the defendant aware of the major consequence of deportation.

However, the requirements of Rule 11 are not constitutionally mandated, and formal violations of the Rule do not provide grounds for invalidating a guilty plea. Rule 11 admonishments are viewed only as instruments that help to protect defendants’ due process rights. In some cases, due process

111. See supra notes 62-82 and accompanying text.
112. See supra notes 7, 54 and accompanying text.
113. Judge Mikva, concurring in United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) stated:
Because deportation is in a category so obviously distinct from other collateral consequences enumerated by the majority, I have some difficulty crediting the fiction that the defendant has knowingly pled when he is not provided meaningful information about the relevant deportation consequences of his plea.

I would hope that the Rules Committee of the Judicial Conference would consider amending Rule 11 of the [Federal] Rules of Criminal Procedure to require a judge taking a guilty plea to inform an alien that pleading guilty might result in deportation - at least when the judge is aware of the defendant’s alien status before accepting his plea. I do not seek to frustrate the undeniable benefits of resolving prosecutions through a streamlined and efficient Rule 11 proceeding. Yet, the validity of such proceedings is unequivocally premised upon the defendant’s knowing the most significant consequences of his plea. Rule 11 requires that a defendant be told the punishment allowed under the guilty plea; it should similarly require that such a major consequence as deportation also be put in the praecognita.

Id.

114. Id.
115. See generally United States v. Montoya, 891 F.2d 1273 (7th Cir. 1989); Poerio v. United States, 405 F. Supp. 1258 (E.D.N.Y. 1975) (explaining that literal violations of Rule 11 may result in non-reversible harmless error).
116. Montoya, 891 F.2d at 1292.
of law has been found to be satisfied despite the failure of trial court adherence to Rule 11 directives.\textsuperscript{117} Adequate adherence to Rule 11 guidelines is not guaranteed.\textsuperscript{118} Because failure to advise defendants may be considered harmless error, the voluntariness and intelligence of the plea is not insured by Rule 11 criteria alone.\textsuperscript{119}

Furthermore, viable claims of ineffective assistance and involuntary guilty pleas have constitutional depth.\textsuperscript{120} To resolve these claims, the Supreme Court must act. An amendment to the Federal Rules of Criminal Procedure will not alleviate the constitutional questions. Even if such an amendment is passed, failure to advise aliens of deportation under the proposed rule could still be deemed harmless error.

Consequently, amending Rule 11 of the Federal Rules of Criminal Procedure to include trial court advice about deportation would only guarantee that pleas are voluntary and intelligent if the Supreme Court were to recognize that this admonishment is constitutionally mandated. With Supreme Court recognition, the constitutional rights of aliens would be insured, and the lower federal courts would have a clear standard to meet in advising defendants about deportation consequences. Without constitutional protection, Rule 11 could be discarded at any future time, and failure to provide the defendant with adequate information could be considered harmless error.

IV. CONCLUSION

Under the current federal collateral consequence doctrine, alien defendants are particularly subject to unfair conditions and loss of constitutional rights. A number of options are open to the United States Supreme Court to remove these hardships, but obstacles exist to implementing each of these proposals. An amendment to Rule 11 of the Federal Rules of Criminal Procedure would eradicate the need for a radical change in the collateral consequence doctrine. This solution is potentially the best one. However, the commands of Rule 11 are not constitutionally required, and without further direction from the Supreme Court, defendants may still be deprived of constitutional rights. Furthermore, completely replacing the collateral consequence doctrine with a materiality

\textsuperscript{117} Id.

\textsuperscript{118} Comment, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1989-1990, 79 Geo. L.J. 591, 892-94 (1991), explains that Rule 11 admonishments are not constitutionally mandated. Furthermore, the author explains that a violation of Rule 11 may amount to harmless error. Id. at 898. See also United States v. Pinto, 838 F.2d 1566, 1569 (11th Cir. 1988); United States v. Stead, 746 F.2d 355, 356-57 (6th Cir. 1984).

\textsuperscript{119} See generally United States v. Montoya, 891 F.2d 1273 (7th Cir. 1989).

\textsuperscript{120} See supra notes 8-9 and accompanying text.
standard would create extreme burdens on trial court judges and raise judicial efficiency concerns. Consequently, adding a tangent to the collateral consequence test by requiring trial courts to advise defendants of all substantial and material consequences would best insure defendants' rights to plead intelligently and voluntarily. This addition would eliminate the need to invalidate guilty pleas based on ineffective assistance of counsel.

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