NON-CITIZENS, GUILTY PLEAS, AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE ARIZONA CONSTITUTION

Timothy B. Jafek

I. INTRODUCTION

The criminal justice system today bears more resemblance to a middle eastern market place than a thoughtful system for determining the truth. Plea bargaining has replaced adjudication. This unfortunate phenomena permeates the entire criminal justice process....[1]

The above quotation characterizes some criticisms of the current system of plea bargaining in Arizona's Superior Court by a committee appointed by the Arizona Supreme Court.[2] If Arizona's courts find it so difficult to mete out justice in criminal proceedings which rely so heavily on plea bargaining, it must be even more difficult for the courts to proceed in a just manner against non-citizens. Non-citizens are less likely to be familiar with Arizona's criminal justice system and, furthermore, face removal from the United States, a punishment qualitatively different than that faced by others who appear before Arizona's courts.

Consider the following hypothetical: Roberto, a legal permanent resident, has lived in Arizona for twenty years. He is married to a U.S. citizen with whom he has three U.S. citizen children. He owns a business which employs U.S. workers. Roberto has no criminal record. One night, Roberto gets into a fight at a bar. He allegedly threatens his attacker with a knife. The police respond. Roberto pushes one of the police officers.

The prosecutor charges Roberto with two counts of aggravated assault. The first count arises out of allegedly threatening his attacker with a knife,[3] a class

---

1. A SYSTEM IN CRISIS: THE REPORT OF THE COMMITTEE TO STUDY THE CRIMINAL JUSTICE SYSTEM IN THE ARIZONA SUPERIOR COURT 28 (1993). The Arizona Supreme Court charged the committee with "identify[ing] significant problems and recommend[ing] solutions" regarding six specific areas in which the Arizona Superior Court faced challenges. *Id.* at 11–13.

2. *See id.* at 11–13.

3. *See* ARIZ. REV. STAT. ANN. § 13-1204(A)(2) (West Supp. 1999).

three felony.[4] If convicted, Roberto faces three and one-half years in prison.[5] The second count is based on the assault of the police officer,[6] a class six felony.[7] If convicted, Roberto would be imprisoned for one year.[8]

The prosecutor offers Roberto a deal. She will drop the count of assaulting the police officer and only recommend thirteen months of jail for the count of assault with a deadly weapon.

Roberto's main concern is remaining in the United States with his wife and family. He asks his public defender what would happen to his immigration status if he were to accept the plea bargain. Since Roberto has U.S. citizen children, a U.S. citizen wife, no criminal record, and contributes to the economy, his public defender tells him that she cannot imagine that Roberto would be removed.

Unfortunately, Roberto's public defender has misinformed him. If Roberto accepts the plea, he will be convicted of an aggravated felony and removed from the United States.[9] He will never be able to return to the United States unless the Attorney General exercises discretion in his favor.[10] If Roberto returns illegally, he could serve twenty years in federal prison for illegal re-entry.[11]

If Roberto's public defender is aware of the immigration consequences of the plea bargain offered, she may be able to reach a compromise which would not affect his immigration status. For example, Roberto could plead guilty to three counts of simple assault.[12] These would be class one misdemeanors,[13] with consecutive sentences of six months for each count.[14] Although Roberto would be imprisoned for eighteen months, he would not be an aggravated felon.[15]

If Roberto relies on his public defender's erroneous advice, accepts the plea bargain, and later learns that relying on this misinformation insures the very outcome he most sought to avoid, has his right to effective assistance of counsel under the Arizona Constitution been violated?

---

4. *See id.* § 13-1204(B) (West Supp. 1999).
5. *See id.* § 13-701(C)(2)) (West Supp. 1999).
6. *See id.* § 13-1204(A)(5) (West Supp. 1999).
7. *See id.* § 13-1204(B) (West Supp. 1999).
8. *See id.* § 13-701(C)(5) (West Supp. 1999).
9. *See infra* notes 70–87 and accompanying text.
10. *See infra* note 57 and accompanying text.
11. *See* 8 U.S.C. § 1182(a)(9)(A)(i), (ii) (Supp. IV 1998) (INA § 212(a)(9)(A)(i), (ii)). Citations to immigration laws include references to the U.S. Code and the Immigration and Naturalization Act ("INA"). Because most immigration practitioners rely on INA citations, *see* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: POLICY AND PROCESS xi (4th ed. 1998), those citations are included here.
12. *See* ARIZ. REV. STAT. ANN. § 13-1203(A) (West 1989).
13. *See id.* § 13-1203(B) (West 1989).
14. *See id.* § 13-707(A)(1) (West 1989).
15. *See infra* notes 70–83 and accompanying text.

This Note argues that the Arizona Constitution's right to assistance of counsel[16] should provide non-citizens with important protections regarding plea bargaining. In short, the Arizona Constitution should be interpreted to allow a non-citizen to withdraw her guilty plea if her defense attorney knew or should have known that the defendant was a non-citizen, and the defense attorney gave the non-citizen misleading or no information in regard to the immigration consequences of that guilty plea.

This Note is organized in the following fashion: Part I describes the scope and nature of the problem non-citizens confront when they face criminal charges in Arizona's courts. This Part documents Arizona's large non-citizen population, the very high percentage of criminal cases which are resolved through guilty pleas, and crimes for which a non-citizen may be removed from the United States. It demonstrates how the dangerous intersection of criminal and immigration law often results in unintended outcomes, at least from the point of view of the non-citizen. Part II details federal case law on the issue. Most federal courts reject the idea that the U.S. Constitution creates a duty for defense counsel to inform non-citizens of the consequences of guilty pleas on their immigration status. A minority of federal courts have held, however, that attorneys do have such a duty. Part III considers Arizona case law on the same issue. Arizona courts have followed the federal majority position. Part IV describes the decisions of state courts which have come to the opposite conclusion, holding that, in some cases, defense counsel has an obligation to inform non-citizen defendants of the immigration consequences of a guilty plea. Part V argues that Arizona should follow the lead of other state courts and find that the Arizona Constitution effective assistance of counsel clause requires that a defense attorney inform a non-citizen client when a guilty plea may affect her immigration status.

II. SCOPE AND NATURE OF THE PROBLEM

This Part explores the challenges a non-citizen charged with a criminal offense faces in Arizona's courts on account of the systematic bias towards pleading cases and the effects guilty pleas have on a non-citizen's immigration status. First, it documents the large size of Arizona's non-citizen population. Second, it shows that the vast majority of criminal cases in Arizona end in plea bargains. Third, it briefly discusses why so many criminal cases end in plea bargains and how the plea bargaining process works to the disadvantage of defendants. Fourth, it considers the characteristics of non-citizens which make them especially vulnerable to a criminal justice system which relies so heavily on plea bargains. Fifth, it details the immigration consequences of criminal convictions on non-citizens and the broad range of crimes for which a non-citizen's immigration status may be jeopardized.

16. *See* ARIZ. CONST. art. II, § 24.

A. The Size of Arizona's Non-Citizen Population

Arizona's non-citizen population numbers several hundred thousand. This population consists of documented and undocumented non-citizens. Documented non-citizens include two categories: (1) legal permanent residents, and (2) legal non-immigrants. Legal permanent residents in Arizona numbered about 144,000 in April 1996.[17] In fiscal years 1997 and 1998, 14,843 more legal immigrants claimed Arizona as their state of intended residence.[18] Legal non-immigrants who claimed during fiscal year 1996 that Arizona was their destination at their point of entry to the United States numbered 155,024.[19] Undocumented non-citizens in Arizona numbered about 115,000.[20] None of the counts for documented or non-documented non-citizens are exact, but taken together show that several hundred thousand people of Arizona's population are non-citizens who could potentially face removal for certain criminal offenses.

B. The Predominant Role of Plea Bargaining in Arizona's Courts

The vast majority of criminal cases in Arizona courts[21] end in guilty pleas which are the result of plea bargains.[22] From 1985 to 1994 only 5.3% of criminal

---

17. Immigration & Naturalization Serv., U.S. Dep't of Justice, *State Population Estimates: Legal Permanent Residents and Aliens Eligible to Apply for Naturalization* (visited Feb. 22, 2000) <http://www.ins.usdoj.gov/graphics/aboutins/statistics/lprest.htm>.

18. IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, LEGAL IMMIGRATION, FISCAL YEAR 1998, at 9 tbl.3 (1999).

19. IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE INS 1997, at 132 tbl.43 (1999). Of these, 36,076 were temporary visitors for business and 102,471 were temporary visitors for pleasure. *See id.* These non-immigrants stay from a few hours to a few years. In addition to these documented temporary visitors admitted in 1996, thousands more, admitted in 1995, potentially could have stayed in Arizona through 1996. Because of such inexactness, the numbers cited in this Note are not meant to be definite but only to suggest the magnitude of the population.

20. *Id.*at 200 tbl.N (1999).

21. Arizona has three courts of first instance that consider criminal cases: Superior Court, Municipal Courts, and Justice of the Peace Courts. The Superior Court is a court of general jurisdiction. *See* ARIZ. CONST., art. VI, § 14. Municipal Courts have a jurisdiction limited to traffic cases and offenses committed within the municipality. *See* ARIZ. REV. STAT. ANN. § 22-402 (West Supp. 1999). Justice of the Peace Courts have jurisdiction to limited traffic cases, civil cases of less than $5000 and criminal jurisdiction including petty offenses, misdemeanors, assault or battery, willful injury to property, and felonies for the purpose of initial procedural steps. *See* ARIZ. REV. STAT. ANN. § 22-201 (West Supp. 1999) (civil jurisdiction); ARIZ. REV. STAT. ANN. § 22-301 (West Supp. 1999) (criminal jurisdiction). The majority of cases for which a non-citizen could be deported are handled by the Superior Court.

22. Plea bargaining can be explicit or implicit. In an explicit plea bargain, "the defendant enters a plea of guilty only after a commitment has been made that concessions will be granted (or at least sought) in his particular case." WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 21.1(a), at 5 (1999). An implicit plea bargain is not the result of actual bargain between the defendant or his or her attorney and the prosecutor or judge but

cases in Arizona Superior Court went to trial.[23] In fiscal year 1998, only 4.5% went to trial.[24] The available statistics do not separate the crimes for which a non-citizen can be removed from the other criminal cases before these courts.[25] However, given the available data, one can safely conclude that the vast majority of criminal cases concerning crimes for which a non-citizen can be deported end in guilty pleas, not trials.

Many dynamics push the criminal justice system toward a high rate of plea bargains. High case loads and inadequate funding make plea bargaining a practical necessity.[26] An attorney's desire to maximize his or her income[27] and political co-option[28] may also contribute to the high rate of plea bargains. Public defenders also may support plea bargains, not in the interest of their clients, but

---

rather of a decision by the defendant to enter his or her plea because it is generally known that a guilty plea results in a lesser sentence. *See* Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y. REV. 247, 253 (1979). High rates of guilty pleas are indirect evidence of high rates of plea bargaining, whether explicit or implicit. *See id.* at 255.

23. ARIZONA CRIM. JUST. COMM'N, CRIME AND THE CRIMINAL JUSTICE SYSTEM IN ARIZONA: THE 1995 WHITE PAPER 23 tbl.1-17 (1995). Of the 264,484 criminal cases filed during this time, 41,090 were dismissed. *See id.* at 25 tbl.1-18. Of the remaining 223,394 cases, only 11,930 went to trial. *See id.*at 23 tbl.1-17.

24. *See* ARIZONA SUP. CT., THE ARIZONA COURTS: DATA REPORT FOR FY 1998, APPELLATE AND GENERAL JURISDICTION 61, 62 (1998). In fiscal year 1998, Arizona Superior Courts commenced 1735 criminal trials, 127 non-jury and 1608 jury trials. *See id.* at 61. The court terminated 38, 604 cases, excluding those which were transferred out and those which were appeals from courts of limited jurisdiction. *See id.* at 62.

25. For crimes for which a non-immigrant can be deported, see *infra* notes 35–75 and accompanying text.

26. *See* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 60–61 (1986) ("The crushing caseloads of public defenders and the cut-rate fees for appointed counsel...promote lackluster performance by discouraging careful investigation and making the bargained-for guilty plea an attractive option that counsel (perhaps more than clients) find extremely hard to refuse."). *See also* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180, 1262–67 (1975) (arguing that the compensation system for appointed counsel encourages defense attorneys to recommend guilty pleas, even if it not in their clients' best interests); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendents*, 31 AM. CRIM. L. REV. 73, 85 (1993) ("[T]he great majority of defender systems are understaffed and underfunded; they cannot provide their clients with even the basic services that a nonindigent defendant would consider necessary for a minimally tolerable defense.").

27. *See* Alschuler, *supra* note 26, at 1181–1206.

28. *See* Schulhofer & Friedman, *supra* note 26, at 85 ("[M]ost Chief Defenders temper their zeal with pragmatic instincts for bureaucratic survival; if they did not, they could not keep their jobs.").

because they serve the public defenders' interest in preserving a cooperative relationship with other members of the court system.[29]

In fact, the Arizona Supreme Court has found that an Arizona county's system for representing indigent defendants suffered from some of these flaws and was, therefore, unconstitutional.[30] Mohave County operated a low-bid contract system to handle all of its defense of indigents.[31] The bid letter stated that contract attorneys could receive additional compensation for unusually complex or time-consuming cases.[32] However, the letter noted that in the past fourteen years there had never been a case that merited extra funds.[33] In three of four years examined by the court, the county awarded the contract to the lowest bidder.[34] In 1981, the Superior Court convicted Joe Smith of burglary, aggravated assault, and sexual assault.[35] He was sentenced to thirty-six consecutive years in prison.[36] On appeal, Smith argued that the low-bid contract system denied him effective assistance of counsel.[37] Smith alleged that, due to an excessive caseload, his contract attorney only spent two to three hours interviewing him and six to eight hours of other work on the case.[38] The Arizona Supreme Court agreed, holding that the Mohave County system violated Smith's right to due process and effective assistance of counsel.[39] The excessive caseloads prevented contract attorneys from providing adequate representation to indigent defendants.[40]

Even more than other criminal defendants, non-citizens may be at a disadvantage in the criminal justice system because of their special characteristics. First, because they come from other countries, their knowledge of the legal systems of Arizona and the United States may be more limited than that of citizens.[41] Second, the legal complexities of non-citizens' concerns depend on the

29. *See id.* at 78 ("If the attorney wishes future cases, she must indeed maintain her reputation, but only with those who provide her business, not with potential defendants themselves."). *But see* Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 L. & SOC. INQUIRY 927, 927–28 (1997) (citing studies that conclude that "legal ideals play a fundamental role in plea bargaining").

30. *See* State v. Smith, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984).

31. *See id.* at 360, 681 P.2d at 1379.

32. *See id.*

33. *See id.*

34. *See id.* In the fourth year, the court noted that the lowest bid was entered by an attorney who was the subject of repeated complaints and a contempt violation. *See id.*

35. *See id.* at 357, 681 P.2d at 1376.

36. *See id.*

37. *See id.*

38. *See id.* at 359–60, 681 P.2d at 1378–79.

39. *See id.* at 362, 681 P.2d at 1381.

40. *See id.*

41. *See* Lisa A. Rosenmertz, Note, *Attorney Misconduct: An Attempt at Legalization May Lead to Regret*, 4 GEO. IMMIGR. L.J. 63, 63–64 (1990). Immigrants to Arizona also come from countries with a wide range of legal traditions. For example, the top five nationalities of immigrants to Arizona in fiscal year 1997 included Mexican, Canadian, Chinese, Filipino, Indian, and Vietnamese immigrants, in that order.

intersection of criminal and immigration law. Much to non-citizens' disappointment, however, criminal defense attorneys are often ignorant of the relationship between these bodies of law.[42] Furthermore, even immigration attorneys may misrepresent their clients in this complex and constantly changing area of law.[43] Third, since non-citizens are, on average, poorer than citizens,[44] they rely more heavily on public defenders, who are under greater pressure to plea bargain than private defense attorneys.[45]

C. The Consequences of Criminal Convictions on Non-Citizens

Non-citizens convicted of a broad range of crimes may be removed from the United States.[46] Removal from the United States goes beyond the penalties which may be imposed on a citizen.[47] The basis of removal and the procedure to remove depend on the status of the non-citizen. A non-citizen who has not been

---

IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE INS 1997, at 60–62 tbl.17 (1999).

42. For collections of cases in which non-citizens claimed that their defense attorney was ignorant of the relationship between criminal and immigration law, see generally Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Mispresentation, or Failure to Advise of Immigration Consequences of Guilty Plea–Federal Cases*, 90 A.L.R. FED. 748 (1988 & Supp. Oct. 1999) [hereinafter Sarno, *Federal Cases*]; Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Mispresentation, or Failure to Advise, of Immigration Consequences of Guilty Plea–State Cases*, 65 A.L.R. 4th 719 (1989 & Supp. Aug. 1999).

43. *See* Rosenmertz, *supra* note 41, at 64, 74 (citing a "trend towards misrepresentation of aliens" by immigration lawyers due in part to the frequent change in immigration laws). *But see* Bruce A. Hake, *"Attorney Misconduct"—A Rebuttal*, 4 GEO. IMMIGR. L.J. 727, 729 (1990) ("It is simply not true that immigration lawyers are generally—much less increasingly—unethical. The great majority of immigration lawyers practice ethically and professionally." (footnotes omitted)).

44. Fifty-four percent of non-citizen households have incomes below 200% of poverty, compared with 31% of citizen households. *See* Michael Fix & Jeffrey S. Powell, The Urban Institute, *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994–97* (visited Feb. 22, 2000) <http://www.urban.org/immig/trends.html>.

45. *See* Schulhofer & Friedman, *supra* note 26, at 85.

46. *See* 8 U.S.C. § 1229a (Supp. IV 1998) (INA § 240).

47. The Supreme Court has long recognized this principle. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." (citation omitted)); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile. The stakes are indeed high and momentous for the alien who has acquired his residence here." (citation omitted)); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) ("To deport [a non-citizen] obviously deprives him of liberty.... It may result also in loss of both property and life, or of all that makes life worth living." (citation omitted)). *See also* Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) ("Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties.").

formally admitted to the United States may be found inadmissable and removed.[48] Non-admitted non-citizens are commonly called 'illegal aliens' or 'undocumented aliens.' With certain important exceptions, a non-citizen is admitted to the United States if she makes a lawful entry after "inspection and authorization by an immigration officer."[49] Admitted non-citizens fall into many classifications, including legal permanent residents,[50] tourists,[51] non-immigrant businesspeople,[52] students,[53] and treaty investors.[54] Non-citizens who have been admitted to the United States may be found deportable and removed.[55]

In addition to removal, a non-citizen convicted of a criminal offense may be barred from re-entering the United States. A non-citizen who is convicted of an aggravated felony[56] and removed on that basis may not re-enter the United States within twenty years without the consent of the Attorney General.[57] Removal for other crimes also triggers a bar to re-entry.[58] If the convicted non-citizen leaves the United States without an order of removal being issued, he or she still must obtain the discretionary waiver of the Attorney General to re-enter the United States.[59]

D. Crimes Which Affect Non-Citizens' Immigration Status

Criminal convictions are the most common reason that the INS removes non-citizens.[60] Most of these crimes involve drugs.[61] Criminal convictions fall

---

48. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (Supp. IV 1998) (INA § 212(a)(6)(A)(i)).

49. *Id.* § 1101(a)(13)(A) (Supp. IV 1998) (INA § 101(a)(13)(A)). For a legal permanent resident these exceptions include one who has been out of the United States for more that 180 continuous days, if he or she has engaged in any illegal activity since leaving the United States, committing a crime of moral turpitude, or attempting to enter in an unauthorized manner, among others. *See id.* § 1101(a)(13)(C) (INA § 101(a)(13)(C)).

50. *See id.* § 1101(a)(20) (1994) (INA § 101(a)(20)).

51. *See id.* § 1101(a)(15)(B) (1994) (INA § 101(a)(15)(B)).

52. *See id.*

53. *See id.* § 1101(a)(15)(F) (Supp. IV 1998) (INA § 101(a)(15)(F)).

54. *See id.* § 1101(a)(15)(E) (1994) (INA § 101(a)(15)(E)).

55. *Id.* § 1227(a) (Supp. IV 1998) (INA § 237(a)).

56. *See infra* at notes 70–83 and accompanying text (describing aggravated felonies).

57. *See* 8 U.S.C. § 1182(a)(9)(A)(ii), (iii) (Supp. IV 1998) (INA § 212 (a)(9)(A)(ii), (iii)).

58. *See id.*

59. *See id.* § 1182(d)(3) (1994 & Supp. IV 1998) (INA § 212(d)(3)) (non-immigrants); *id.* § 1182(h) (1994 & Supp. IV 1998) (INA § 212(h)) (immigrants).

60. In 1996, of 50,064 individuals found deportable, 32,869 were deportable for criminal or narcotics violations. *See* IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE INS 1996, at 183 tbl.66. In 1996, of the 18,593 individuals refused admission, 4040 were refused admission for criminal or narcotics violations. *See id.* at 175 tbl.61.

61. In fiscal year 1997, 26,366 non-citizens were removed due to convictions for "dangerous drugs." IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE INS 1997, at 167 (1999). This was the most common type

primarily into two broad categories: crimes of moral turpitude[62] and aggravated felonies.[63] "Crime of moral turpitude" is defined by case law.[64] A typical definition of moral turpitude is "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[65] Courts determine whether a crime is one of moral turpitude on a case by case basis in accordance with the statutory basis of the crime.[66] A non-admitted non-citizen may be found inadmissible and removed if he or she is convicted of a crime of moral turpitude or admits to committing such a crime or its essential elements.[67] Certain exceptions to this rule apply, most notably if the non-admitted non-citizen committed only one crime for which the maximum possible penalty did not exceed one year and was not sentenced to more than six months of imprisonment.[68] Note that, even if the crime was committed outside of the United States and before the non-admitted non-alien arrived in this county, she would be inadmissible and hence removable on account of the offense.[69] Admitted non-citizens may be found deportable and removed for a crime of moral turpitude if: (1) the crime is committed within five years of the date of admission, and (2) a sentence of one year or longer may be imposed.[70]

Admitted non-citizens may be found deportable and removed for aggravated felonies.[71] The term "aggravated felony" originated in the Anti-Drug Abuse Act of 1988.[72] The Immigration Act of 1990[73] expanded the definition of

---

of crime for which non-citizens were removed and comprised 52% of the total crimes for which non-citizens were removed. *See id.*

62. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1994 & Supp. IV 1998) (INA § 212 (a)(2)(A)(i)(I)).

63. *See id.* § 1227(a)(2)(A)(iii) (Supp. IV 1998) (INA § 237 (a)(2)(A)(iii)). "Aggravated felony" is defined at 8 U.S.C. § 1101(a)(43) (1994 & Supp. IV 1998) (INA § 101(a)(43)).

64. *See* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 311–12 (1997).

65. *In re* Fualaau, Int. Dec. 3285 at 4 (BIA 1996) (quoting Matter of Franklin, 20 I & N Dec. 867, 868 (BIA 1994), *aff'd* 72 F.3d 571 (8th Cir. 1995)).

66. For summaries of what crimes have been determined to involve moral turpitude, see DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 6.2 & app.E (1999) and 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05(1)(d)(iii) (rev. ed. 1998).

67. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (1994 & Supp. IV 1998) (INA § 212(a)(2)(A)(i)(I)).

68. *See id.* § 1182(a)(2)(A)(ii)(II) (1994 & Supp. IV 1998) (INA § 212(a)(2)(A)(ii)(II)).

69. *See* Chiaramonte v. INS, 626 F.2d 1093, 1097–98 (2d Cir. 1980).

70. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(I) (1994 & Supp. IV 1998) (INA § 237 (a)(2)(A)(i)(I)).

71. *See id.* § 1227(a)(2)(A)(iii) (Supp. IV 1998) (INA § 237(a)(2)(A)(iii)). "Aggravated felony" is defined at 8 U.S.C. § 1101(a)(43) (1994 & Supp. IV 1998) (INA § 101(a)(43)).

72. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988) (codified in scattered sections of 15, 29, & 42 U.S.C.).

aggravated felony[74] while further restricting possible relief for those convicted of aggravated felonies.[75] Examples of the diverse crimes now included under the umbrella of aggravated felonies include: murder, rape, or sexual abuse of a minor;[76] illicit trafficking in drugs,[77] firearms, or explosives;[78] theft or burglary which carries a sentence of at least one year;[79] involvement in prostitution;[80] tax evasion of over $10,000;[81] perjury and similar offenses for which a term of imprisonment of over one year may be imposed;[82] and attempt or conspiracy to commit any aggravated felony.[83] A crime of moral turpitude may also be classified as an aggravated felony.[84]

A conviction for an aggravated felony serves as the basis for other harsh immigration consequences. Aggravated felons are not eligible for most forms of relief from deportation,[85] are not entitled to judicial review of deportation orders

---

73. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

74. The Immigration Act of 1990 added, *inter alia*, the following to the definition of aggravated felon: (1) any illicit trafficing in any controlled substance, (2) any offense relating to money laundering, and (3) any crime of violence for which the term of imprisonment is at least five years. *See* Immigration Act of 1990 § 501, Pub. L. No. 101-649, 104 Stat. 4979, 5048 (1990). The 1990 Act also expanded the scope of aggravated felony to apply to crimes committed outside the United States. *See id.* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *inter alia*, amended the definition of aggravated felon as follows: (1) added rape or sexual abuse of a minor, (2) lowered the amount of money laundering which triggers the definition from $100,000 to $10,000, (3) reduced the terms of imprisonment which trigger the definition in various subparagraphs from five years to one year, and (4) reduced the monetary loss for fraud, deceit, or tax evasion which triggers the definition from $200,000 to $10,000. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 (1996). The 1996 Act also applied its provisions retroactively to cover crimes committed before the effective date of the legislation. *See id.*

75. *See infra* notes 84–87 and accompanying text.

76. *See* 8 U.S.C. § 1101(a)(43)(A) (1994 & Supp. IV 1998) (INA § 101(a)(43)(A)).

77. *See id.* § 1101(a)(43)(B) (1994) (INA § 101(a)(43)(B)).

78. *See id.* § 1101(a)(43)(C) (1994) (INA § 101(a)(43)(C)).

79. *See id.* § 1101(a)(43)(G) (1994 & Supp. IV 1998) (INA § 101(a)(43)(G)).

80. *See id.* § 1101(a)(43)(K) (1994 & Supp. IV 1998) (INA § 101(a)(43)(K)).

81. *See id.* § 1101(a)(43)(M)(ii) (1994 & Supp. IV 1998) (INA § 101(a)(43)(M)(ii)).

82. *See id.* § 1101(a)(43)(S) (Supp. IV 1998) (INA § 101(a)(43)(S)).

83. *See id.* § 1101(a)(43)(U) (Supp. IV 1998) (INA § 101(a)(43)(U)).

84. For example, alien smuggling has been held to be a crime of moral turpitude. *See* United States v. Raghunandan, 587 F. Supp. 423, 426 (W.D.N.Y. 1984). It is also an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(N) (1994 & Supp. IV 1998) (INA § 101(a)(43)(N)).

85. Such as asylum, *see* 8 U.S.C. § 1158(b)(2)(B)(i) (Supp. IV 1998) (INA § 208(b)(2)(B)(i)); cancellation of removal, *see id.* § 1229b(a)(3) (Supp. IV 1998) (INA § 240A(a)(3)); and voluntary departure, *see id.* § 1229c (a)(1),(b)(1)(c) (Supp. IV 1998) (INA § 240B(a)(1), (b)(1)(c)).

based on convictions of aggravated felonies,[86] and are barred from re-entering the United States for twenty years unless the Attorney General consents to reapplication for admission.[87] Administrative removal of non-legal permanent resident aggravated felons also is accelerated and their rights are limited.[88]

Non-admitted and admitted non-citizens may be removed for drug violations. While many drug violations fall into the categories of crimes of moral turpitude and aggravated felonies, grounds of removal for independent drug violations reach more broadly. A non-admitted non-citizen may be removed for the violation of any state, federal, or foreign law relating to controlled substances.[89] In addition, a non-admitted non-citizen may be inadmissible and removable if a consular or immigration official "knows or has reason to believe" that the alien has been involved in drug trafficking.[90] Admitted non-citizens may be deportable and removed for the violation of any state, federal, or foreign law relating to controlled substances other than a single offense of possession for one's own use of thirty grams or less of marijuana.[91] They may also be removed for being a drug abuser or addict.[92] .

Admitted non-citizens may be found deportable and removed for crimes of domestic violence, stalking, violations of protective orders, and child abuse.[93] These grounds are independent of grounds of deportability based on crimes or moral turpitude or aggravated felonies. "Crime of domestic violence" is defined broadly and includes crimes against property.[94]

This review of the immigration consequences of criminal convictions is not intended to be comprehensive.[95] Indeed, if a brief synthesis were possible, there would be little reason for criminal lawyers not to be intimately familiar with its provisions and hence be able to effectively represent the interests of non-citizens. The complex crossroads between criminal and immigration law,

---

86. *See id.* § 1252(a)(2)(C) (Supp. IV 1998) (INA § 242(a)(2)(C)).

87. *See id.* § 1182(a)(9)(A) (1994 & Supp. IV 1998) (INA § 212(a)(9)(A)).

88. *See id.* § 1228(b) (INA § 238(b)) (Supp. IV 1998).

89. *See id.* § 1182(a)(2)(A)(i)(II) (1994 & Supp. IV 1998) (INA § 212(a)(2)(A)(i)(II)). This ground may be waived for an immigrant at the discretion of the Attorney General only under certain restrictive conditions. *See id.* § 1182(h) (1994 & Supp. IV 1998) (INA § 212(h)). Non-immigrants may be granted a waiver of this drug offense ground at the discretion of the Attorney General. *See id.* § 1182(d)(3) (1994 & Supp. IV 1998) (INA § 212(d)(3)).

90. *Id.* § 1182(a)(2)(C) (1994 & Supp. IV 1998) (INA § 212(a)(2)(C)).

91. *See id.* § 1227(a)(2)(B)(i) (Supp. IV 1998) (INA § 237(a)(2)(B)(i)).

92. *See id.* § 1227(a)(2)(B)(ii) (Supp. II 1996) (INA § 237(a)(2)(B)(ii)).

93. *See id.* § 1227(a)(2)(E) (Supp. IV 1998) (INA § 237(a)(2)(E)).

94. *See* 18 U.S.C. § 16 (1994). *See also* 8 U.S.C. § 1227(a)(2)(E) (Supp. IV 1998) (INA § 237(a)(2)(E)) (defining "crime of violence" by reference to 18 U.S.C. § 16).

95. For a comprehensive practitioner's guide to the immigration consequences of criminal convictions, see generally KESSELBRENNER & ROSENBERG, *supra* note 51. For a comprehensive practitioner's guide to the relationship of immigration law and the criminal law of California, see generally KATHERINE A. BRADY, CALIFORNIA CRIMINAL LAW AND IMMIGRATION (1997).

occurring more likely than not in the context of plea-bargaining, presents difficult issues. Effective assistance of counsel under the Arizona Constitution should, at a minimum, guarantee that an attorney advise his or her non-citizen client of the possible effect of a guilty plea on that non-citizen's immigration status.

E. Plea-Bargaining and Immigrants—A Dangerous Mix

The intersection of ubiquitous plea-bargaining and harsh immigration consequences for certain criminal violations, especially drug-related ones, creates a volatile mix for the hundreds of thousands of non-citizens in Arizona. Arizona courts resolve the vast majority of criminal cases which may have immigration consequences through plea-bargaining.[96] However, in this rush to judgment, neither the lawyer representing the immigrant nor the immigrant may understand the stakes of a criminal conviction. The lawyer may lack an understanding of the complex, constantly changing relationship between criminal and immigration law.[97] The foremost goal for the immigrant may be avoiding removal from the United States.[98] But if the lawyer does not understand how to seek this goal, she will be unable to represent the immigrant effectively. And if the immigrant does not understand the immigration consequences of his or her guilty plea, such a plea will not be voluntarily and knowingly made. After an immigrant learns of the unfortunate unintended consequence of her guilty plea, she may seek to withdraw the guilty plea by claiming ineffective assistance of counsel. Under current federal and Arizona case law, however, the non-citizen's arguments will fall on deaf ears, as the following Parts of this Note explain.

III. FEDERAL CASE LAW

A non-citizen whose defense attorney did not adequately inform her of the deportation consequences of her guilty plea may argue that her right to "the Assistance of Counsel,"[99] guaranteed by the Federal Constitution, has been violated. Claims generally fall into one of two categories. The first category may be termed failure to advise claims.[100] In these cases, defense counsel fails to advise the non-citizen of the immigration consequences of the guilty plea. The second category may be termed misrepresentation claims.[101] In these cases, defense counsel gives erroneous information about the immigration conseqences of a guilty plea.

---

96. *See supra* notes 21–25 and accompanying text.

97. One federal judge called the INA an example of "Congress's ingenuity in passing statutes certain to accelerate the aging process of judges." Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (Kaufman, C.J.).

98. *See* Franco Capriotti et al., *Small-Time Crime Big-Time Trouble: The New Immigration Laws*, 13 CRIM. JUST. Summer 1998, at 4, 5 ("Many aliens would rather go to trial with a bad case than plead to a crime that will subject them to removal.").

99. U.S. CONST. amend. VI.

100. *See, e.g.*, Sarno, *Federal Cases*, *supra* note 42, at 756–62.

101. *See, e.g.*, *id.* 752–56.

Although the U.S. Supreme Court has not directly addressed an ineffective assistance of counsel claim arising out of the unforeseen immigration consequences of a guilty plea,[102] a large majority of federal courts have rejected this argument, holding that deportation consequences are collateral to the guilty plea and thus do not have to be taken into account when considering an effective assistance of counsel claim.[103] This Part analyzes the reasoning of federal courts holding this majority view, as well as that of federal courts which reach contrary conclusions.

Assistance of counsel must be effective in order to meet this constitutional standard.[104] The Supreme Court, in *Strickland v. Washington*,[105] constructed a two-pronged test to measure claims alleging a violation of this right. To be constitutionally ineffective, counsel's performance must have: (1) fallen below a standard of "reasonableness under prevailing professional norms,"[106] and (2) prejudiced the functioning of the judicial process to such an extent that the result cannot be relied upon.[107]

The question as to whether aliens' claims meet this first prong was succinctly stated by the Seventh Circuit: "[W]e 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

---

102. The Supreme Court declined to rule directly on this issue in spite of conflicts between and within state and federal courts when it denied certiorari to *Rodriguez v. State*, 572 N.E.2d 961 (Ill. 1991), *cert. denied*, 522 U.S. 1066 (1992). The Court declined to resolve the issue again when it denied certiorari to *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1992), *cert. denied*, 507 U.S. 1039 (1993). *See also* Sarno, *Federal Cases*, *supra* note 42, 750–51.

> The Supreme Court of the United States has not yet ruled on whether or under what circumstances a defense lawyer's misrepresentation or nonrepresentation to an alien defendant of the immigration consequences of pleading guilty to a criminal charge constitutes inadequate, incompetent, or ineffective assistance or otherwise warrants the setting aside, vacating, or withdrawing of the alien's guilty plea.

Id.

103. *See* Varela v. Kaiser, 976 F.2d 1357, 1357 (10th Cir. 1992) (finding no ineffective assistance of counsel where defense counsel failed to inform defendant of immigration consequences of plea); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990) (same); United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989) (same); United States v. Yearwood, 863 F.2d 6, 7 (4th Cir. 1988) (same); United States v. George, 869 F.2d 333, 338 (7th Cir. 1988) (same); United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985) (same); United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985) (same); Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977) (recognizing same); United States v. Santelises, 509 F.2d 703, 703 (2d Cir. 1975) (same).

104. *See* McMahan v. Richardson, 397 U.S. 759, 771 n.14 (1970) (citations omitted).

105. 466 U.S. 668 (1984).

106. *Id.* at 688.

107. *See id.* at 694.

professionally competent assistance'."[108] Most courts hold to this precedent,[109] made even stronger by *Strickland*'s presumption of competence,[110] in failure to advise claims.

Courts have been more willing to find ineffective assistance of counsel in misrepresentation claims. In some cases, courts have remanded for evidentiary hearings on the specific circumstances in each case.[111] In at least one case, the court found that a non-citizen whose defense attorney misinformed him about the consequences of a guilty plea provided ineffective assistance of counsel.[112] In sum, most federal courts have not been receptive to this claim but have not held that an alien presenting an ineffective assistance of counsel claim based on deportation consequences has no claim per se.

The second prong of the *Strickland* test presents a lower burden for non-citizens making an ineffective assistance of counsel claim. In *Hill v. Lockhart*, the Supreme Court considered an ineffective assistance of counsel claim arising out of the plea process.[113] The Court found that this second prong would be satisfied if there is a reasonable probability that, but for defense counsel's misinformation, the accused would have pleaded not guilty and insisted on standing trial.[114] A non-citizen may meet this standard by offering a concrete explanation of why he or she would have pled not guilty and gone to trial had his or her defense counsel not erred.[115] Some courts require a higher standard, insisting that the alien also have a colorable claim to innocence.[116] Meeting this second prong is small consolation, however, to the non-citizen whose claim fails because it does not meet the first prong.

Many non-citizens who present a claim of ineffective assistance of counsel also make the related claim of violation of due process[117] because their

---

108. *George*, 869 F.2d at 338 (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)).

109. *See supra* note 103 and accompanying text.

110. *See Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

111. *See* Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985) (finding a close issue considering totality of circumstances and remanding to determine counsel's statements to alien); United States v. Nagaro-Garbin, 653 F. Supp. 586, 589–90 (E.D. Mich. 1987) (holding that if counsel made affirmative misrepresentations in response to a specific inquiry from the defendant, he "may" have a claim for ineffective assistance of counsel), *aff'd*, 831 F.2d 296 (6th Cir. 1987).

112. *See* United States v. Corona-Maldonado, 46 F. Supp. 2d 1171, 1173 (D. Kan. 1999).

113. Hill v. Lockhart, 474 U.S. 52, 52–53 (1985).

114. *See id.* at 59.

115. *See* Key v. United States, 806 F.2d 133, 138 (7th Cir. 1986).

116. *See* United States v. Del Rosario, 902 F.2d 55, 58 (D.C. Cir. 1990).

117. Due process applies both to actions by the federal government, *see* U.S. CONST. amend. V, and to actions by states, *see* U.S. CONST. amend. XIV, § 1.

pleas were not entered voluntarily and intelligently.[118] This claim follows logically; if the defense attorney failed to inform or misinformed the non-citizen about the effect of a guilty plea on his or her immigration status, then the non-citizen lacked a key piece of information when deciding whether to plead guilty. This claim rests on a distinct constitutional ground, due process, and must be adjudicated separately.[119] Federal courts also have rejected due process claims, however, reasoning that deportation is a collateral consequence, as opposed to a direct consequence.[120]

The collateral consequences doctrine underlies the reluctance of federal courts to grant relief based on ineffective assistance of counsel or due process violations. Simply put, since deportation is a collateral consequence of the guilty plea, no constitutional harm is done by not informing or misinforming a non-citizen about removal. This precedent was established in *United States v. Parrino*.[121] The Second Circuit refused to allow a non-citizen defendant to withdraw his guilty plea despite the fact that he had relied on his attorney's erroneous counsel that the guilty plea would not subject him to removal.[122] The court reasoned that deportation was collateral because deportation resulted from a different statute than the one to which the defendant pled guilty.[123]

In the nearly half century since *Parrino* was decided, it has been criticized but continues to be authority that deportation is a collateral consequence. However, only one year after *Parrino*, a district court case from the Seventh Circuit established the opposing minority view that deportation is not merely a collateral consequence of a guilty plea.[124] In that case the defendant, unaware of any question of his citizenship status, pled nolo contendere to a tax violation in exchange for which the U.S. government dropped a similar charge against his

---

118. *See* United States v. Alvarez-Quiroga, 901 F.2d 1433, 1436 (7th Cir. 1990); Downs-Morgan v. United States, 765 F.2d 1534, 1536 (11th Cir. 1984).

119. *See* Kimmelman v. Morrison, 477 U.S. 365, 374–75 & n.1 (1986) (giving separate consideration to Fourth and Sixth Amendment claims).

120. *See, e.g.*, Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (holdling that deportation is collateral consequence because judge accepting criminal plea has no control or responsibility over agency administering deportation); United States v. Parrino, 212 F.2d 919, 922 (2d Cir. 1954) (holding that deportation is collateral consequence of guilty plea because deportation and criminal penalty based on different statutes). In short, a consequence is collateral instead of direct if if results from a law different from the one under which the defendant was convicted or if it is imposed by a body other than the one which received the guilty plea. *See infra* notes 109–111 and accompanying text.

121. *See Parrino*, 212 F.2d at 922.

122. *See id.*

123. *See id.* The Second Circuit later reiterated this reasoning and stated it in slightly different terms: "Deportation here ... 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." *Michel*, 507 F.2d at 465.

124. United States v. Shapiro, 16 F.R.D. 499, 501 (E.D. Wis. 1955).

wife, who was in very precarious health.[125] Only one year after he was sentenced, when the government served a warrant for deportation, did the defendant learn that his plea might subject him to deportation.[126] In order to avoid a "manifest injustice" under Rule 32(d) of the Federal Rules of Criminal Procedure, the judge allowed the defendant to withdraw his plea.[127]

Federal courts have not used a consistent rationale to distinguish between collateral and direct consequences. In labeling certain consequences collateral, the most common factor courts consider is whether the consequence results from a law different from the one under which the defendant was charged,[128] or if the consequence is meted out by a body other than the court receiving the guilty plea.[129] On the other hand, federal courts find consequences to be direct if they increase the defendant's punishment[130] or deprive a defendant of something she assumed that she would receive.[131] For example, the Fourth Circuit stated that a consequence is direct if it represents a "definite, immediate, and largely automatic effect" on the defendant's punishment.[132] One commentator sums up these murky distinctions by stating, "the rationales posited to justify the distinction between collateral and direct consequences are neither persuasive nor consistent."[133]

The harsh results produced by classifying deportation consequences as collateral, and thus sharply undermining an alien's possible claim of ineffective assistance of counsel and violation of due process, has provoked strong criticism

---

125. *See id.* at 500.

126. *See id.* at 501.

127. *See id.*

> The effect of the deportation order filed against this defendant expands and increases the sentence imposed on him by this court by adding thereto the further punishment by banishing him in exile from this country to Russia for the rest of his life. This court is not here to administer injustice. To prevent this manifest injustice the defendant's motion to vacate and set aside the judgment heretofore entered and to permit the defendant to withdraw his plea of nolo contendere is granted.

Id.

128. *See Parrino*, 212 F.2d at 920, 922 (stating that deportation was collateral because it results the INA, a statute different from the one under which the defendant was charged for conspiracy to kidnap).

129. *See Michel*, 507 F.2d at 465 (stating that deportation was collateral because it "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").

130. *See* United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972) (defining direct consequence as "any factor that necessarily affects the maximum term of imprisonment").

131. *See* Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969) (reasoning that defendants assume that they will be eligible for parole, but because statute under which defendant pled guilty eliminated eligibility of parole, court must inform defendant of that direct consequence).

132. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

133. Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 194 (1981).

from courts and commentators. While hewing to precedent, the D.C. Circuit nevertheless stated that, "[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...."[134] Some commentators have suggested that classifying deportation as a collateral consequence is a flawed approach.[135] To alleviate its draconian effects on non-citizens, they have suggested a number of reforms, such as classifying deportation as a non-collateral consequence,[136] using a standard other than the collateral/non-collateral dichotomy to evaluate ineffective assistance of counsel cases in the immigration context,[137] or amending the Federal Rules of Criminal Procedure to require judges to advise defendants of the potential immigration consequences of guilty pleas.[138] Less attention has been paid, however, to how non-citizens may vindicate their rights with state constitutional or statutory remedies.

IV. ARIZONA'S CURRENT CASE LAW

Only a few Arizona courts have faced the issue of whether a claim of ineffective assistance of counsel may be made by a non-citizen who is not informed of the immigration consequences of a guilty plea. The paucity of judicial consideration of this issue is surprising given the large number of non-citizens who live in Arizona. This meager line of cases begins with *State v. Rodriguez.*[139] A defendant who pled guilty to possession of marijuana for sale moved to vacate or withdraw his plea on the basis that he had not been informed that he would be deported as a consequence of his guilty plea.[140] The court of appeals rejected his claim, holding that "the possibility of deportation was not a 'consequence' as to which there was a duty [of the court] to inform appellant before acceptance of his plea of guilty."[141]

In *State v. Vera,* the Arizona Court of Appeals affirmed and expanded *Rodriguez,* holding that "[a] trial judge is not required under the Arizona Rules of Criminal Procedure or as a matter of due process to advise a defendant who pleads guilty...that he may be subject to deportation."[142] In *Vera* a non-citizen who plead guilty to arson petitioned the court to withdraw that plea.[143] The court considered

134. United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982).

135. *See* Scott A. Kozlov, Note, *Deportation as a Collateral Consequence of a Guilty Plea: Why the Federal Precedent Should be Reevaluated,* 26 VAL. U. L. REV 895, 910–12 (1992); Griffin Tyndall, Note, *"You Won't be Deported...Trust Me!": Ineffective Assistance of Counsel and the Duty to Advise Alien Defendants of the Immigration Consequences of Guilty Pleas,* 19 AM. J. TRIAL ADVOC. 653, 671–72 (1996).

136. *See* Koslov, *supra* note 135, at 910–11; Tyndall, *supra* note 135, at 671–72.

137. *See* Koslov, *supra* note 135, at 915–16; Tyndall, *supra* note 135, at 672–74.

138. *See* Koslov, *supra* note 135, at 916–17; Tyndall, *supra* note 135, at 674.

139. 17 Ariz. App. 553, 499 P.2d 167 (1972).

140. *See id.* at 553–54, 499 P.2d at 168.

141. *Id.* at 555, 499 P.2d at 169.

142. State v. Vera, 159 Ariz. 237, 239, 776 P.2d 110, 112 (Ct. App. 1988) (citing ARIZ. R. CRIM. P. 17.1).

143. *See id.* at 237–38, 776 P.2d at 110–11.

Vera's claim that the trial court was required to inform him of immigration consequences of a guilty plea in light of the Arizona Rules of Criminal Procedure and the Federal Constitution,[144] but did not consider a state constitutional claim. Because Vera made no claim at the trial court level that his *counsel* failed to inform him of the immigration consequences of a guilty plea, the court explicitly refrained from ruling on that issue.[145]

In *State v. Rosas*, the Arizona Court of Appeals reached the issue of informing non-citizens about potential deportation proceedings which may result from a guilty plea and held that "[t]he failure of counsel to provide such information to defendants does not constitute ineffective assistance of counsel."[146] The court used the *Strickland* two-pronged test for ineffective assistance of counsel, as adopted by Arizona courts.[147] The failure of defendant's counsel to inform him of the immigration consequences of his guilty plea failed the first prong of the ineffective assistance of counsel test,[148] i.e., such failure was not "deficient under all the circumstances."[149] However, even had defense counsel's performance been deficient, the court found that the defendant suffered no prejudice because "[n]owhere in any of his pleadings did Petitioner allege that he had a defense to the charges against him."[150]

This line of cases leaves at least two important issues unresolved. First, some common factual situations remain unexamined by Arizona courts. For example, does a non-citizen have a claim to ineffective assistance of counsel based on misinformation, i.e., if that non-citizen asks his or her attorney about the immigration consequences of a guilty plea and the attorney responds with erroneous information? Second, since the Arizona cases appear to rely on federal courts' interpretations of the federal Constitution, might the Arizona constitution offer greater protection to non-citizens?

V. STATE COURT DECISIONS HOLDING THAT DEFENSE COUNSEL HAS A DUTY TO INFORM NON-CITIZEN DEFENDANTS OF THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA

While Arizona courts look to the Arizona Constitution to determine its citizens' rights, other states' courts' experience in interpreting state and federal constitutional provisions can provide some guidance. State courts are more likely

144. *See id.* at 238–39, 776 P.2d at 111–12.

145. *See id.* at 239, 776 P.2d at 112.

146. State v. Rosas, 183 Ariz. 421, 423, 904 P.2d 1245, 1247 (Ct. App. 1995).

147. *See id.* at 422, 904 P.2d at 1246. The Arizona Supreme Court adopted *Strickland*'s first prong in *State v. Nash*, 143 Ariz. 392, 399, 694 P.2d 222, 229 (1985). It adopted *Strickland*'s second prong in *State v. Lee*, 142 Ariz. 210, 213–14, 689 P.2d 153, 156–57 (1984).

148. *Rosas*, 183 Ariz. at 424, 904 P.2d at 1248.

149. *Id.* at 422, 904 P.2d at 1246 (citing State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985)).

150. *Id.* at 424, 904 P.2d at 1248.

than federal courts to impose a duty on defense counsel to inform, or inform accurately, clients in regard to the deportation consequences of a guilty plea.[151] As one treatise stated:

> State courts have paved the way for development of jurisprudence which imposes the responsibility on defense counsel for researching and advising clients facing criminal proceedings of the collateral, but prejudicial, immigration consequences which may well be implicated. While there is no unanimity in state court decisions, these decisions increasingly have found a remedy for noncitizen defendants able to demonstrate ineffective assistance of counsel.[152]

State courts have found these obligations under both state[153] and federal[154] constitutional provisions.

The Supreme Court of Illinois allowed a non-citizen defendant who received misleading advice from his attorney about the deportation consequences of pleading guilty to withdraw his guilty plea.[155] After the defendant was arrested and charged with three offenses of delivery of a controlled substance (less than 30 grams of cocaine), he entered into plea negotiations with an Assistant State Attorney.[156] Before accepting the plea bargain, the defendant asked his attorney how the guilty plea would affect his immigration status.[157] The attorney said that he did not know but that he had represented many non-citizens, none of whom had been deported.[158] The defendant then told his attorney that his wife was a U.S. citizen. The attorney testified that he then responded that, "If your wife is an American citizen, then a plea of guilty would not affect your [immigration] status."[159] On cross-examination the attorney further testified that he told the defendant, "I don't think you will be deported."[160] The court found that, because of the misleading advice, the attorney's performance was "not within the range of competence demanded of attorneys."[161] Furthermore, because of misleading advice

---

151. *See* KESSELBRENNER & ROSENBERG, *supra* note 66, § 4.2(a)(4)(ii).

152. *Id.*

153. *See* People v. Soriano, 240 Cal. Rptr. 328, 334 (Ct. App. 1987) (holding that criminal defendant has right to assistance of counsel under CAL. CONST. art. II, § 16); People v. Pozo, 746 P.2d 523, 526 (Colo. 1987) (holding that voluntariness of guilty plea depends in part on whether counsel's advice "was within range of competence demanded of attorneys in criminal cases" under COLO. CONST. art. II, § 16); People v. Padilla, 502 N.E.2d 1182, 1186 (Ill. App. Ct. 1986) (noting that the "overall trend in state courts favors finding ineffective assistance rendering a guilty plea involuntary, where counsel knows his client is an alien and does nothing to inform him of possible deportation consequences").

154. *See* People v. Correa, 485 N.E.2d 307, 312 (Ill. 1985).

155. *See id.*

156. *See id.* at 307, 309.

157. *See id.* at 309.

158. *See id.*

159. *See id.*

160. *Id.*

161. *Id.* at 312.

the defendant's pleas "were not intelligently and knowingly made and therefore were not voluntary."[162]

A California appeals court reached a similar conclusion.[163] A citizen of the Philippines who was a legal permanent resident of the United States was charged with assault with a deadly weapon and a related enhancement for firearm use.[164] Before the defendant accepted the guilty plea, he asked his attorney whether he would be deported if he pled guilty. She answered that he would not be.[165] The court found that the defendant's right to effective assistance of counsel, under both the California and federal Constitutions, had been violated because the attorney failed to investigate the immigration consequences of a guilty plea.[166] In sum, an attorney who fails to investigate how immigration law will impact her client falls short of the objective standard of reasonableness under prevailing professional norms which *Strickland* requires.[167] The court considered the fact that the defendant asked his attorney a specific question as to the immigration consequences and that the attorney did no follow up research.[168] It also considered the practice of public defenders in the area, who do consider a defendant's immigration status in plea bargaining, and American Bar Association Standards for Criminal Justice, which also indicate that an attorney should inform a defendant of the immigration consequences of a guilty plea if the defendant inquires.[169]

The Supreme Court of Colorado reached a similar conclusion, holding that the Colorado and federal Constitutions impose a qualified duty on defense counsel to advise clients of deportation consequences of guilty pleas.[170] In *People v. Pozo*, a Cuban legal permanent resident pled guilty to second degree sexual assault and escape and was sentenced to two-and-one-half years in prison.[171] After the INS initiated deportation proceedings against him, the defendant moved to

---

162. *Id.* The court briefly addressed the issue of whether deportation is a collateral consequence but avoided confronting it directly by citing a federal case, *United States v. Briscoe*, 432 F.2d 1351, 1353 (D.C. Cir. 1970), that criticized *United States v. Parrino*, 212 F.2d 919, 922 (2d Cir. 1954), and held that, under certain circumstances, a defendant who has received misleading information as to the effect of a guilty plea on his immigration status may challenge the validity of this plea. *Correa*, 485 N.E.2d at 311.

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

164. *See id.* at 330.

165. *See id.* at 333. The defendant testified that his attorney told him that the guilty plea would have no immigration consequences. *See id.* However, the attorney testified that she gave the defendant a general warning that the plea may have consequences on his immigration status. *See id.* at 334.

166. *See id.* at 336.

167. *See id.*

168. *See id.* at 334.

169. *See id.* at 335–36 (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 14-3.2 commentary (2d ed. 1980)).

170. People v. Pozo, 746 P.2d 523, 529 (Colo. 1987).

171. *See id.* at 525.

vacate the conviction and withdraw his guilty plea.[172] The court considered whether, given defense counsel's advice, the defendant made his guilty plea knowingly, intelligently, and voluntarily. The court held that the defendant was entitled to withdraw his guilty plea if: (1) defense counsel knew or should have known that defendant was an alien, (2) counsel did not advise the client of deportation consequences, and (3) prejudice resulted.[173] The court did not base this holding on the idea that a defense attorney must inform his or her client of deportation consequences but rather on the "fundamental principle that attorneys must inform themselves of material legal principals that may significantly impact the particular circumstances of their clients."[174] The court held that failure to adequately research the relevant legal principals renders an attorney's assistance unconstitutionally deficient under the *Strickland* test.[175]

In summary, these cases show a willingness by some state courts to follow the minority federal position that defense attorneys who fail to advise their clients of the immigration consequences of a guilty plea fail to render effective assistance of counsel. In each case, the court considered the collateral consequences doctrine but that doctrine did not dictate the outcome of their decisions.[176]

VI. AN ARIZONA CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL FOR NON-CITIZEN DEFENDANTS

The Arizona Constitution may serve as a basis for the right of a non-citizen to receive accurate information from his or her defense attorney regarding the immigration consequences of a guilty plea. Although a majority of federal courts have found no such right in the federal Constitution, Arizona may provide such protection through its own constitution. This Part of the Note examines the source of these rights in the Arizona Constitution, explains why the Arizona Constitution should be construed to guarantee different rights, and demonstrates why the scope of the right of effective assistance of counsel may be interpreted more broadly under the state constitution.

A. The Arizona Constitution as a Source of the Right of Effective Assistance of Counsel for Non-Citizens

The right to assistance of counsel clause in the Arizona Constitution reads, "In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel...in all cases."[177] Rights grounded in the Arizona

172. *See id.*

173. *See id.* at 529.

174. *Id.*

175. *See id.* The record did not reflect whether Pozo was an alien so the court remanded the case to determine that fact. *See id.* at 529–30.

176. People v. Soriano, 240 Cal. Rptr. 328, 335 (Ct. App. 1987); *Pozo*, 746 P.2d at 526; People v. Correa, 485 N.E.2d 307, 310 (Ill. 1985).

177. ARIZ. CONST. art. II, § 24, which reads in full,

Constitution should be construed differently from those of their federal counterparts for historical, jurisdictional, and jurisprudential reasons. Justice Stanley Feldman of the Arizona Supreme Court and David Abney argue that the Arizona Constitution, in certain cases, should be interpreted differently from the federal constitution for at least three reasons.[178] First, the historical context of the origins of the Arizona Constitution supports the conclusion that its provisions should be interpreted distinctly from those of its federal counterparts.[179] At the time Arizona's constitutional convention met in 1910, only one of the provisions of the federal Bill of Rights, the Fifth Amendment's Takings Clause, applied to action by state governments.[180] Not until 1927 did the Court apply another Bill of Rights provision to state governmental action.[181] Thus, since the federal Bill of Rights did not offer protection from state governmental action, the framers of the Arizona Constitution "clearly intended that the state constitutional guarantees would be the solitary, fundamental rules shielding our people from governmental power."[182] Thus, a jurisprudence of original intent must consider state constitutional guarantees independently from those emanating from the Bill of Rights.[183]

Second, federalism dictates that sole reliance on the Federal Constitution's guarentee will not provide adequate protections or allow for the continuing vitality of constitutional law. Our system of government relies on two distinct levels of government, federal and state. If the state constitutional guarantees are limited by the federal Bill of Rights, then, "we destroy the 'double

---

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Id.

178. *See* Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 115–18 (1988).

179. *See id.* at 115–17.

180. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897). *See also* Feldman & Abney, *supra* note 178, at 116.

181. *See* Fiske v. Kansas, 274 U.S. 380, 387 (1927) (applying First Amendment freedom of speech to action by states through Fourteenth Amendment's Due Process Clause). *See also* Feldman & Abney, *supra* note 178, at 116.

182. Feldman & Abney, *supra* note 178, at 116. *See also id.* at 116–17 (noting that Arizona residents who approved the state constitution "must have intended that the state constitution would basically limit government action and intrusion into the lives of the people").

183. *See id.* at 117.

security' [of federalism] designed to protect our citizens."[184] The federal Constitution and its interpreters, separated geographically, politically, and socially from Arizona's citizens, would be the sole guarantor of the rights of Arizona's residents. Limiting interpretation of the state constitution to that imposed on the federal Constitution would also eliminate the function of states as semi-independent laboratories of government and as contributors to the evolution of constitutional law in general.[185]

Third, jurisprudential considerations dictate that the Arizona Constitution be interpreted independently from the federal Bill of Rights. Through their "populist, progressive, and democratic vision" the framers of the Arizona Constitution "sought to build a modern state in the western desert, not a pale reflection of the traditional eastern states."[186] Just as the state constitution originated in Arizona's unique social, moral, and geographical climate, it should continue to "be shaped by Arizona's unique needs."[187]

Feldman and Abney, after surveying how Arizona's constitutional rights have been interpreted, urge Arizona's judges to seriously consider the rights the Arizona Constitution provides.[188] They conclude that "[i]f the record raises a state constitutional issue, and the text of the applicable state provision is significantly different from the analogous federal clause, Arizona judges must confront the challenge."[189] To confront this challenge of interpretation, judges should look to the original intent of the framers of the Arizona constitution, consider the origin of the language, examine what the state of origin has done with that constitutional language, consider why past decisions have overlooked the plain meaning of the Arizona provision, and finally, decide whether there is "room for 'interpretation'[.]"[190]

Pool v. Superior Court provides a model for how the Arizona Constitution may be interpreted differently from the federal Constitution even when, textually, the constitutional provisions are nearly identical.[191] In *Pool*, the defendant claimed that his right against double jeopardy had been violated.[192] The defendant, Pool, was charged with theft for stealing jewelry.[193] It became clear as the case progressed, however, that the evidence did not support that charge.[194] When Pool took the witness stand, the prosecutor asked him a series of improper

184. *Id.* (quoting Alderwood Assocs. v. Washington Envtl. Council, 635 P.2d 108, 113 (Wash. 1981) ("[W]hen a state court neglects its duty to evaluate and apply its state constitution it deprives people of their 'double security.'")).

185. *See id.* at 117–18.

186. *Id.* at 117.

187. *Id.* at 118.

188. *See id.* at 145–46.

189. *Id.* at 146.

190. *Id.*

191. Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984).

192. *See id.* at 100, 677 P.2d at 263.

193. *See id.*

194. *See id.* at 100–01, 677 P.2d at 263–64.

questions.[195] The judge granted the defendant a mistrial.[196] Then the prosecutor obtained another indictment from the grand jury.[197] The defendant moved to dismiss the case based on double jeopardy.[198] He argued that the prosecutor, in order to prevent an acquittal, asked improper questions to provoke a mistrial.[199] The federal constitutional rights were narrow and may have provided no protection because they required that the prosecutor intended that his conduct would provoke the defendant into moving for a mistrial.[200] The prosecutor's misconduct in this case may not have risen to intentional misconduct.[201]

Pool, however, appealed instead to the Arizona Constitution.[202] Despite the fact that the federal and state constitutional rights against double jeopardy were nearly identical in wording, the Arizona Supreme Court found that the Arizona Constitution protected Pool.[203] The court held that Arizona's constitutional bar against double jeopardy reached not only cases in which the prosecutor intended to cause a mistrial but also where she engaged in improper conduct and was indifferent to the possibility of a mistrial.[204] The court fashioned this interpretation of Arizona's double jeopardy clause by relying on reasoning from the Oregon Supreme Court, Justice Steven's minority opinion in the U.S. Supreme Court decision which established the federal double-jeopardy standard, and its own previous holdings in the area.[205] It stated that despite the fact that its holding conflicted with the U.S. Supreme Court's interpretation of the nearly identical federal constitutional provision, "the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law. With all deference, therefore, we cannot and should not follow federal precedent blindly."[206] In short, the Arizona Supreme Court rejected limiting the interpretation of the state constitution to the meanings given by the federal Constitution.

The Arizona Supreme Court's adoption of the *Strickland* two-pronged test for ineffective assistance of counsel also shows that the court has rejected "follow[ing] federal precedent blindly" in evaluating effective assistance of counsel claims. The court did not immediately accept the entire *Stickland* test. The court initially adopted *Strickland*'s second prong in *State v. Lee*.[207] One year later it adopted *Strickland*'s first prong in *State v. Nash*.[208] The special care with

195. *See id.* at 101, 110, 677 P.2d at 264, 273.
196. *See id.* at 101, 677 P.2d at 264.
197. *See id.* at 102, 677 P.2d at 265.
198. *See id.*
199. *See id.*
200. *See id.* at 105, 677 P.2d at 268 (citing Oregon v. Kennedy, 456 U.S. 667, 679 (1982) (Rehnquist, J., plurality opinion)).
201. *See id.* at 108, 677 P.2d at 272.
202. *See id.* at 108, 677 P.2d at 271.
203. *See id.* at 109, 677 P.2d at 272.
204. *See id.* at 108–09, 677 P.2d at 271–72.
205. *See id.*
206. *Id.* at 108, 677 P.2d at 271.
207. *See* State v. Lee, 142 Ariz. 210, 213–14, 689 P.2d 153, 156–57 (1984).
208. *See* State v. Nash, 143 Ariz. 392, 399, 694 P.2d 222, 229 (1985).

which the Arizona Supreme Court has applied federal precedent to claims of ineffective assistance of counsel supports the conclusion that Arizona courts must carefully evaluate a non-citizen's claim to ineffective assistance of counsel arising from the misinformation or lack of information from his or her defense attorney relating to the immigration consequences of a guilty plea.

B. Ineffective Assistance of Counsel

The rationale courts use in holding that defense counsel must inform non-citizens of the potential consequences of guilty pleas is persuasive because it focuses on defendants' rights in the criminal trial process. The first prong of the *Strickland* test is that counsel's performance must have fallen below an objective standard of reasonableness under prevailing professional norms.[209] The majority federal position holds that, since deportation is a collateral consequence, no professional duty attaches to inform a non-citizen of such consequences, whether or not the non-citizen asks the attorney for such information.[210] However, whether deportation is a collateral consequence or not is beside the point. The real issue, on which the minority position focuses, is that the defendant, in facing the power of the state to convict and punish her, should have all the information necessary to decide whether to submit to that power without protest, or to force the state to prove his or her guilt beyond a reasonable doubt.[211]

The Arizona Supreme Court, in adopting the first prong of the *Strickland* test, specified that reasonableness must satisfy two tests. First counsel's assistance must be reasonable "considering all the circumstances." Second, the assistance must be reasonable considering "the professional norms in the community."[212]

1. "Circumstances" Test

The *Strickland* "circumstances" test depends in large part on the relationship between the defendant and his or her attorney. "[T]he reasonableness of counsel's actions may be determined or substantially influenced by defendant's own statements or actions. Counsel's actions are usually based, quite properly, on

---

209. Strickland v. Washington, 466 U.S. 668, 688 (1984).

210. *See* United States v. George, 869, F.2d 333, 337 (7th Cir. 1989) (citing cases); cases cited *supra* note 103.

211. *See* People v. Pozo, 746 P.2d 523, 526–27 (Colo. 1957).

> Sixth amendment constitutional standards requiring effective assistance of counsel involve examination of quite different considerations [from whether a consequence is direct or collateral], however. One who relies on the advice of a legally trained representative 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. attorneys must satisfy minimal standards of competency to render effective, and, therefore, constitutionally acceptable representation.

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

212. *Nash*, 143 Ariz. at 397, 694 P.2d at 227.

informed strategic choices made by the defendant and on information supplied by the defendant."[213] These strategic choices must be made after "thorough investigation of law and facts" although a "reasonable decision [may make] particular investigations unnecessary."[214]

Failing to inform a non-citizen of the immigration consequences of a guilty plea deprives the non-citizen of making a fundamental "strategic choice." The *Strickland* "circumstances" test rightly focuses on the defendant and her choices. The attorney merely acts as the defendant's agent.[215] If a non-citizen defendant asks about the immigration consequences of a guilty plea and her attorney gives misinformation, the non-citizen has been blocked from making a "strategic choice." The non-citizen indicated a desire to act based on her attorney's expertise, but was stymied by ineffective assistance of counsel. The attorney failed in her duty to investigate the law as it related to the non-citizen defendant. This duty to investigate is the central rationale of the Colorado and California courts' holdings.[216] As the Colorado court stated, "This 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 particular circumstances of their clients."[217]

Even if a non-citizen defendant does not specifically ask her attorney about the immigration consequences of a guilty plea, a defense attorney renders ineffective assistance of counsel if she knows or should know that the defendant is a non-citizen.[218] The duty to investigate should attach regardless of whether a non-citizen asks about specific immigration consequences. Arizona courts should presume that a non-citizen desires to avoid negative immigration consequences.[219]

---

213. *Strickland*, 466 U.S. at 691.

214. *Id.* at 690–91.

215. *See id.* at 688.

216. *See supra* notes 162–174 and accompanying text.

217. People v. Pozo, 746 P.2d 523, 529 (Colo. 1987).

218. *See id.*

219. This presumption may be grounded on the multitude of proactive steps which a non-citizen must take in order to gain and maintain a valid immigration status. For example, a legal permanent resident must apply for such a status. *See* 8 U.S.C. § 1154 (1994 & Supp. IV 1998) (INA § 204). She must pass the close scrutiny of the INS. *See id.* § 1154(b) (1994) (INA § 204(b)). To maintain her immigrant status she must limit her stays outside of the United States. *See id.* § 1101(a)(13)(C)(ii) (1994 & Supp. IV 1998) (INA § 101(a)(13)(C)(ii). She must also inform the INS of any change of residency. *See id.* § 1305 (1994) (INA § 265). These active steps by non-citizens ground a presumption that a non-citizen defendant would desire to avoid the negative immigration consequences of a guilty plea.

2. 'Prevailing Professional Norms' Test

Counsel is ineffective if it falls below the "professional norms in the community."[220] In adopting this test, the Arizona Supreme Court recognized that the American Bar Association *Standards for Criminal Justice* "provide guides to what is reasonable."[221] The ABA Standards specifically state that defense counsel should advise the defendant on "considerations deemed important by defense counsel *or the defendant* in reaching a decision."[222] Thus, under the ABA standards, defense counsel's duty to advise the defendant extends to collateral consequences. The *Standards'* commentary makes clear that, "[w]here from the nature of the case it is apparent that these [collateral] consequences may follow...or where the defendant raises a specific question concerning collateral consequences (*as where the defendant inquires about the possibility of deportation*), counsel should fully advise the defendant of these consequences."[223]

The National Legal Aid and Defender Association ("NLADA") also advises criminal defense lawyers to be aware of and counsel their clients regarding the immigration consequences of criminal convictions.[224] NLADA states that, in the plea bargaining process, defense counsel should "be fully aware of, and make sure the client is fully aware of...consequences of conviction such as deportation."[225] These standards are not merely idle words but rather are "reflected in the training and daily practice of criminal defense lawyers and organizations."[226]

3. Prejudice to the Defendant

As explained in Part II discussing the federal standard for ineffective assistance of counsel, the second prong of the *Strickland* test for ineffective assistance of counsel is met if, but for her attorney's misinformation, the defendant

---

220. State v. Nash, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

221. *Id.* (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE (3d ed. 1997)).

222. AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 14-3.2(b) (3d ed. 1997) (emphasis added). Defense attorneys are subject to this standard by reference from at least two provisions of Chapter 4, "The Defense Function." *See id.* at § 4-1.2(e) ("Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct."); *id.* at § 4-5.1 ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.").

223. *Id.* at § 14-3.2 commentary (emphasis added).

224. *See* NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 6.2(a)(3) & commentary (1995).

225. *Id.*

226. Mojica v. Reno, 970 F. Supp. 130, 177 (E.D.N.Y. 1997) ("For example, The Legal Aid Society routinely instructs its attorneys to inquire as to the citizenship status of their clients and to advise non-citizen clients of immigration consequences."), *aff'd in part sub nom.* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998).

would have pleaded not guilty and insisted on standing trial.[227] A non-citizen defendant may meet this standard by offering a concrete explanation of why, had her attorney not erred, she would have pled not guilty and insisted on going to trial.[228] In such a case, this burden should be met by an allegation that, but for the non-citizen defendant's counsel's silence or misinformation, she would have gone to trial.

C. Revisiting the Collateral Consequences Doctrine Under the Changed Circumstances of New Immigration Laws

Immigration consequences should be considered a direct result of a guilty plea because of the inevitability of such consequences. The inevitability and harshness of these consequences have been increased by recent changes to immigration law. Previously, most courts found that immigration consequences were collateral because they did not result in a "definite, immediate, and largely automatic effect on the range of the defendant's punishment."[229] This classification of deportation as a collateral consequence of guilty pleas has been soundly criticized by some commentators.[230] Courts have also expressed doubt as to the wisdom of considering deportation to be a collateral consequence.[231] Most significantly for Arizona, the Presiding Judge of the Arizona Court of Appeals, which established the precedent that a trial court is under no due process obligation to inform a defendant that his guilty plea may subject him to deportation, stated in a special concurrence that, "[w]hether deportation can be dismissed as merely a 'collateral consequence' which need not be anticipated by a knowing pleader or whether it is so important a consequence that its risk must be explained is, in my view, so significant a question as to require eventual reexamination of [Arizona precedent]."[232] The judge stated that prerequisite to such a reexamination, however, would be a showing that the defendant did not know of the consequence of deportation from his counsel or any other source.[233]

Recent fundamental changes in immigration law make the immigration consequences of a guilty plea in state court more definite, immediate, and

---

227. *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985).

228. *See* Key v. United States, 806 F.2d 133, 138 (7th Cir. 1986).

229. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1365 (4th Cir. 1973).

230. *See* Budieri, *supra* note 133, at 198–99; Kozlov, *supra* note 135, at 908–09.

231. *See* United States v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring) ("Because deportation is in a category so obviously distinct from other collateral consequences enumerated by the majority, I have sore difficulty crediting the fiction that the defendant has knowingly pled when he is not provided meaningful information about the relevant deportation consequences of his plea."); United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982) ("It is extremely troublesome that deportation has never been classified as 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....").

232. State v. Vera, 159 Ariz. 237, 240, 766 P.2d 110, 113 (Ct. App. 1989) (Fidel, J., specially concurring) (citation omitted).

233. *See id.*

automatic.[234] Immigration consequences of guilty pleas now appear to be direct. These tighter interconnections between criminal and immigration law result, in large part, from two acts of Congress: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[235] and the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[236] First, these acts substantially expanded the definitions of "aggravated felony"[237] and the crimes of moral turpitude[238] which trigger removal, and applied these new standards of removability retroactively.[239] Second, a non-citizen convicted of an aggravated felony is "conclusively presumed to be deportable from the United States."[240] Third, non-citizens convicted of aggravated felonies are now subject to expedited removal.[241] Congress directed the Attorney General to initiate and complete removal proceedings before the non-citizen is released from incarceration.[242] The non-citizen may be removed even if she is still challenging the conviction through a discretionary appeal or habeas corpus proceeding.[243] Fourth, the Attorney General may not exercise her discretion to grant any relief from removal in the case of a non-citizen who is not a permanent resident.[244] Congress also limited the jurisdiction of courts. For example, prior to the IIRIRA, non-citizens subject to

---

234. *See* Pilcher, *supra* note 64, at 273 ("Substantively, immigration rights and consequences flow directly from specific features of the criminal conviction and sentence; the record of conviction is generally dispositive on the matter of deportability. Beyond becoming more closely related in substance, however, immigration and criminal justice procedures have in some instances literally merged."). Immigration and criminal law have merged even more explicitly in federal courts. Congress authorized federal district court judges to issue deportation orders concurrently with, or as a part of, the judgement of sentence. *See* 8 U.S.C. § 1228(c)(1) (Supp. IV 1998) (INA § 238(c)(1)). Deportation may also be a stipulated part of a plea agreement, probation, or supervised release. *See id.* § 1228(c)(5) (Supp. IV 1998) (INA § 238(c)(5)).

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

236. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C.).

237. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 (amending 8 U.S.C. 1101 § (a)(43) (INA § 101(a)(43)); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (amending 8 U.S.C. 1101 § (a)(43) (INA § 101(a)(43)).

238. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1274 (codified at 8 U.S.C. § 1227(a)(2)(A)(i)(II) (Supp. IV 1998) (INA § 237 (a)(2)(A)(i)(II)).

239. *See* 8 U.S.C. § 1228(a)(1) (Supp. IV 1998) (INA § 238(a)(1)). Applying grounds of removability retroactively has been criticized by commentators and challenged in litigation. *See, e.g.*, Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 *passim* (1998).

240. *See* 8 U.S.C. § 1228(c) (Supp. IV 1998) (INA § 238(c)).

241. *See id.* § 1228(a)(3) (Supp. IV 1998) (INA § 238(a)(3)).

242. *See id.*

243. *See* Morales-Alvarado v. INS, 655 F.2d 172, 175 (9th Cir. 1981).

244. *See* 8 U.S.C. § 1228(b)(5) (Supp. IV 1998) (INA § 238(b)(5)).

deportation were better able to seek relief from deportation through the federal courts.[245] Federal courts now no longer have jurisdiction to review final orders of deportation based on criminal convictions.[246] Fifth, Congress provided for the possibility of deportation as a stipulation of a state criminal trial.[247]

In conclusion, the classification of deportation as a collateral consequence rested on shaky grounds before 1996. However, now that reforms to immigration law have made the immigration consequences of a criminal conviction harsher and more certain, the persuasiveness of the previous rationale fades.[248] Removal should now be seen as a direct consequence of certain guilty pleas. Attorneys should be held responsible to warn their clients of those consequences.

VII. CONCLUSION

The way is clear for Arizona courts to hold that effective assistance of counsel requires that a non-citizen's attorney inform her of the immigration consequences of a guilty plea. The U.S. Supreme Court has not ruled on this issue and the decisions of other federal courts are equivocal—although most have not held that misinformation or no information about the immigration consequences of a guilty plea constitutes ineffective assistance of counsel, a minority of federal courts have found counsel's conduct to be deficient in such cases. Even if federal law were settled on this issue, however, the Arizona Constitution provides an independent source for the right of effective assistance of counsel.

Analyzing the issue according to the Arizona Constitution, a claim for ineffective assistance of counsel may be made by a non-citizen whose attorney misinforms, or fails to inform, of the immigration consequences of a guilty plea. First, following the federal minority position, and the holdings of state courts of California, Illinois, and Colorado, attorney failures in this regard constitute ineffective assistance of counsel under the *Strickland* standard. Second, the harsher and less discretionary immigration laws make the classification of immigration consequences as collateral less tenable. If immigration consequences are direct, then the linchpin of the majority position that misinformation or lack of information by defense attorneys does not constitute ineffective assistance of counsel fails, and the minority position becomes even more persuasive. Given Arizona courts' inherent power to interpret the Arizona Constitution, they should

245. *See id.* § 1105a (1994) (repealed 1996); Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 233 (1998) ("[P]erhaps the most important change [brought about by IIRIRA] is the Congressional attempt to eliminate or severely curtail judicial review of immigration decisions.").

246. *See* 8 U.S.C. § 1252(a)(2)(C) (Supp. IV 1998) (INA § 242(a)(2)(C)).

247. *See id.* § 1326(b) (Supp. IV 1998) (INA § 276(b)) ("For the purposes of this subsection, the term 'removal' includes an agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State Law.").

248. At least one court has rejected this argument. *See* United States v. Gonzalez, 202 F.3d 20, 26–28 (1st Cir. 2000) ("IIRIRA did not so substantially alter the treatment of individuals in his situation as to warrant reconsideration of whether deportation is still a collateral consequence of conviction.").

hold that effective assistance of counsel requires informing non-citizens of the effect of a guilty plea on their immigration status.