

A Duty to Warn: Representing the Non-Citizen in a Criminal Case **[*State v. Muriithi*, 46 P.3d 1145 (Kan. 2002)]**

Melissa L. Castillo*

*Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land,
Here at our sea-washed, sunset-gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome, her mild eyes command
The air-bridged harbor that twin-cities frame.*

*“Keep, ancient lands, your storied pomp!” cries she,
With silent lips. “Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore;
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!”¹*

I. INTRODUCTION

These words, inscribed in bronze at the base of the Statue of Liberty, welcomed millions of immigrants to the United States.² Since colonial times, people seeking a better life have been freely received into the United States.³ However, “[s]treams of nativism and xenophobia have percolated and bubbled-up, typically in reaction to waves of immigration responding to demands for labor, based on unfounded fears about the criminality or inferiority of new immigrants.”⁴ In response, Congress began enacting laws aimed at stemming immigration as early as 1789.⁵ At first, the laws were designed primarily to exclude certain aliens from entering the country.⁶ Over time the laws devel-

* B.S. 2001, Kansas State University; B.A. 2001, Kansas State University; J.D. Candidate 2006, Washburn University School of Law. I thank my sister, Jennifer Conkling, for inspiring me to become a lawyer and for shortening the title of this comment. I also thank my husband, Carlos Castillo, for sparking my passion for immigrants’ rights.

1. Emma Lazarus, *The New Colossus* (1883), available at <http://www.nps.gov/stli/newcolossus/index.html> (last visited March 20, 2005).

2. Marian L. Smith, *Overview of INS History*, in *A HISTORICAL GUIDE TO THE U.S. GOVERNMENT* (George T. Kurian ed., 1998), available at <http://uscis.gov/graphics/aboutus/history/articles/OVIEW.htm> (last modified Dec. 7, 2004) (noting that Ellis Island was the largest and busiest port of entry to the United States for decades).

3. *Mojica v. Reno*, 970 F. Supp. 130, 143 (E.D.N.Y. 1997).

4. *Id.* at 144.

5. *See, e.g.*, Alien Act, ch. 58, §§ 1-6, 1 Stat. 570 (1798) (expired 1800).

6. *See, e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

oped not only to exclude entry, but also to provide for deportation of immigrants already admitted.⁷

Deportation has historically been viewed as a harsh penalty. The United States Supreme Court has commented that deportation “is the forfeiture for misconduct of a residence in this country,” and that “[s]uch a forfeiture is a penalty.”⁸ Deportation is the modern day “equivalent of banishment or exile.”⁹ In fact, “[i]t may deprive the alien of all that makes life worth living.”¹⁰

Interestingly, although deportation is usually the result of a criminal conviction, it has been generally considered a collateral consequence of the criminal proceeding.¹¹ As a result, failure to inform criminal defendants of immigration consequences, such as deportation, resulting from their convictions (or guilty or no contest pleas) has historically not been considered ineffective assistance of counsel.¹² Similarly, courts have had no duty to warn alien criminal defendants of immigration consequences.¹³

Notwithstanding historical precedent, an increasing number of jurisdictions have held that under certain circumstances defense attorneys have a duty to advise alien criminal defendants of the immigration consequences of their criminal proceedings.¹⁴ Moreover, at least twenty states and the District of Columbia have enacted legislation requiring either the court or defense counsel to advise alien defendants of the possibility of deportation because of their pleas.¹⁵

In *State v. Muriithi*,¹⁶ the Kansas Supreme Court held that the failure to advise an alien criminal defendant of the deportation consequences of his no contest plea “does not amount to ineffective assis-

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

8. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

9. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

10. *Wallace v. Reno*, 24 F. Supp. 2d 104, 112 (D. Mass. 1998) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

11. See, e.g., *United States v. Parrino*, 212 F.2d 919, 921-22 (2d Cir. 1954).

12. See, e.g., *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992).

13. See, e.g., *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974).

14. See *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *People v. Soriano*, 240 Cal. Rptr. 328 (Cal. Ct. App. 1987); *People v. Correa*, 465 N.E.2d 507 (Ill. App. Ct. 1985); *Castellanos v. State*, 100 P.3d 756 (Or. Ct. App. 2004).

15. CAL. PENAL CODE § 1016.5(a) (West 1985); CONN. GEN. STAT. § 54-1j(a) (Supp. 2005); D.C. CODE ANN. § 16-713(a) (2001); FLA. R. CRIM. P. 3.172(c)(8); GA. CODE ANN. § 17-7-93(c) (2004); HAW. REV. STAT. § 802E-2 (Supp. 1993); 725 ILL. COMP. STAT. ANN. 5/113-8 (West Supp. 2004); MD. R. ANN. 4-242(e); MASS. ANN. LAWS ch. 278, § 29D (Law. Co-op. 2002); MINN. R. CRIM. P. 15.01; MONT. CODE ANN. § 46-12-210 (2003); NEB. REV. STAT. § 29-1819.02 (1) (Supp. 2004); N.M. R. ANN. 9-406; N.Y. CRIM. PROC. LAW § 220.50 (McKinney 2002); N.C. GEN. STAT. § 15A-1022(a)(7) (2002); OHIO REV. CODE ANN. § 2943.031(A) (West 1997); OR. REV. STAT. § 135.385(2)(d) (2003); R.I. GEN. LAWS § 12-12-22(a)-(b) (Supp. 2003); TEX. CRIM. PROC. CODE ANN. § 26.13(a)(4) (Vernon Supp. 2005); WASH. REV. CODE ANN. § 10.40.200(2) (West 2002); WIS. STAT. ANN. § 971.08(1)(c) (West 1998).

16. 46 P.3d 1145 (Kan. 2002).

tance of counsel,” and that courts likewise have no duty to advise an alien criminal defendant of immigration consequences.¹⁷ The court in *Muriithi* relied on *Varela v. Kaiser*,¹⁸ a Tenth Circuit Court of Appeals case, which held “that deportation is a collateral consequence of the criminal proceeding and therefore the failure to advise does not amount to ineffective assistance of counsel.”¹⁹ In turn, the court in *Varela* relied on the fact that other circuits had also held that deportation is a collateral consequence.²⁰

The court in *Muriithi* also emphasized that the Seventh Circuit Court of Appeals in *Santos v. Kolb*²¹ had polled other circuits and concluded “that deportation is a collateral consequence of the criminal proceeding and therefore no ineffective assistance of counsel was found.”²² The Kansas Supreme Court, as well as the United States Courts of Appeals for the Tenth and Seventh Circuits, failed to analyze the issue and merely adopted historical precedent because it “seems to be that deportation consequences are considered . . . collateral.”²³

The Kansas Supreme Court should have fully analyzed whether immigration consequences should be considered collateral, and as a separate issue whether defense counsel’s duties should include advising defendants of both collateral and direct consequences. Furthermore, the court should have analyzed whether a guilty or no contest plea given without knowledge of deportation consequences can truly be “knowing and voluntary” as required by the United States Supreme Court to satisfy the Due Process Clause of the Fourteenth Amendment.²⁴ The court’s lack of analysis is especially troubling considering that the United States Supreme Court has never held that immigration consequences are collateral, nor that defense counsel has no duty to inform alien clients of possible immigration consequences of their pleas. The precedent relied on is not binding, was faulty, and has been weakened dramatically by changes in immigration laws.²⁵

The Kansas Supreme Court should have found that the failure to inform an alien criminal defendant of immigration consequences of his plea constitutes ineffective assistance of counsel. In addition, it should have found that Muriithi’s no contest plea was neither volun-

17. *Muriithi*, 46 P.3d at 1152, 1155.

18. 976 F.2d 1357 (10th Cir. 1992).

19. *Varela*, 976 F.2d at 1358.

20. *Id.*

21. 880 F.2d 941 (7th Cir. 1989).

22. *Muriithi*, 46 P.3d at 1152 (quoting *Santos*, 880 F.2d at 944).

23. *Id.*

24. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

25. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.) (creating broader grounds for deportation).

tary nor knowing, as he received ineffective assistance of counsel when he was not informed of the likely event of his deportation as a result of his plea. In the alternative, the court could have found that since immigration consequences are more akin to direct criminal consequences than to speculative civil consequences, the court has a duty to ensure that defendants are aware of immigration consequences before accepting their pleas.

II. CASE DESCRIPTION

Antony Muriithi, a citizen of Kenya, arrived in the United States in 1993 on a student visa.²⁶ Five years later, in 1998, Muriithi's son was born.²⁷ Muriithi was granted custody.²⁸ Sixteen days after the birth of his son, Muriithi was involved in a minor domestic altercation²⁹ with a former girlfriend who is also the mother of his child.³⁰ As a result, the state brought seven misdemeanor charges.³¹ At his plea proceeding, Muriithi appeared without representation and was immediately offered a plea agreement by the Shawnee County District Attorney.³² Since he did not understand the agreement, he requested that he be allowed to speak with someone.³³ The judge determined that Muriithi was indigent and appointed counsel to represent him.³⁴ The attorney who represented Muriithi was already present in the courtroom.³⁵ After the attorney was appointed, and in her presence, the judge asked Muriithi where he was from.³⁶ Muriithi replied, "Kenya."³⁷ "The trial court then asked, 'Oh, you are from Kenya?,' and Muriithi answered, 'Yes.'"³⁸

26. Brief for Appellant at 1, *Muriithi* (No. 01-87213-A).

27. *Id.* at 1-2.

28. *Id.* at 2.

29. *Muriithi*, 46 P.3d at 1147. According to the affidavit filed with the original complaint, Muriithi went to an apartment where his son, his son's mother, another woman, and her two children were sleeping. *Id.* It is not apparent whose apartment it was or why he was there. He argued with the mother of his son, slapped her, and then slapped the other woman and pulled her hair when she tried to call the police. *Id.* The count of endangering a child was in reference to his own child, yet the facts mention only that Muriithi swung the two-year old child of the other woman by her arm, and they say nothing about how Muriithi's child was endangered. *Id.* It is important to note that these facts were taken from the affidavit filed with the complaint, and that Muriithi's attorney agreed to stipulate to the facts without discussing the contents of the affidavit with Muriithi. *Id.* at 1149.

30. *Id.* at 1147 (showing that the altercation occurred sixteen days after the birth of Muriithi's child); Brief for Appellant at 1-2, *Muriithi* (No. 01-87213-A) (showing that Dena Yoakum is the mother of Muriithi's child).

31. Brief of Appellant at 2, *Muriithi* (No. 01-87213-A).

32. *Id.* at 2-3.

33. *Id.* at 3.

34. *Id.*

35. *Muriithi*, 46 P.3d at 1151.

36. Brief of Appellant at 3, *Muriithi* (No. 01-87213-A).

37. *Muriithi*, 46 P.3d at 1151.

38. *Id.*

Muriithi consulted with his counsel for approximately five to ten minutes.³⁹ They did not discuss the charges against him and he was not shown the affidavit that accompanied the complaint, yet his counsel agreed to stipulate to the facts contained therein.⁴⁰ On his counsel's advice, Muriithi pleaded no contest to one count of domestic battery and one count of endangering a child.⁴¹ Those counts constituted Class B and Class A Misdemeanors, respectively.⁴² Muriithi's counsel never asked him whether he was a citizen, and never advised him that his plea would make him deportable.⁴³ Muriithi was sentenced to twelve months of supervised probation.⁴⁴ His appointed counsel requested that her attorney's fees be waived.⁴⁵

As a result of Muriithi's conviction, the Immigration and Naturalization Service (INS) initiated deportation proceedings against him.⁴⁶ The proceedings concluded in March 2000 with an order of removal to Kenya.⁴⁷ Muriithi appealed the deportation order, but his appeal was dismissed in September 2000.⁴⁸ He then motioned the trial court to allow him to "withdraw his pleas and set aside his convictions," arguing that he would have pleaded otherwise if he had known that to plead as he did would result in his deportation.⁴⁹ An evidentiary hearing on the motion occurred in March 2001,⁵⁰ but the trial judge denied the motion.⁵¹ Muriithi appealed, and his appeal was transferred to the Kansas Supreme Court.⁵²

III. BACKGROUND

In Kansas, a court may allow a defendant to withdraw his guilty or no contest plea and set aside his conviction to correct "manifest injustice."⁵³ Manifest injustice would result if a plea were entered unknowingly or involuntarily due to ineffective assistance of counsel.⁵⁴

39. *Id.* at 1149.

40. *Id.*

41. *Id.*

42. Brief of Appellant at 3, *Muriithi* (No. 01-87213-A).

43. *Muriithi*, 46 P.3d at 1149.

44. *Id.* at 1148.

45. *Id.* She stated to the court, "I spoke to Mr. Muriithi very briefly regarding this case and I would ask that you consider either waiving the attorney's fees or at least paroling [*sic*] them down since, really, I really didn't have to do very much, Judge." *Id.*

46. *Id.* The deportation proceedings were also based in part on Mr. Muriithi's failure to maintain student status, in keeping with his student visa. *Id.* However, Muriithi's appellate counsel argued that the non-student status was curable and deportation might have been avoided if not for the domestic violence conviction. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1147.

52. *Id.*

53. KAN. STAT. ANN. § 22-3210(d) (2003).

54. *State v. Cramer*, 841 P.2d 1111, 1119 (Kan. Ct. App. 1992) (noting that the legislature had not defined "manifest injustice," and adopting the definition that manifest injustice is that

The decision to set aside a conviction is at the discretion of the trial court, and will be overturned on appeal only if an abuse of discretion is found.⁵⁵

A. Constitutional Law

In 1969, the United States Supreme Court held in *Boykin v. Alabama*⁵⁶ that for a plea to be constitutional it must be voluntary and knowing.⁵⁷ An involuntary or unknowing plea would violate due process.⁵⁸ One year later in *Brady v. United States*,⁵⁹ the Court held that “[w]aivers of constitutional rights [resulting from guilty pleas] not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”⁶⁰ The same day the Court decided *McMann v. Richardson*.⁶¹ In *McMann*, the Court concluded that “whether a plea of guilty is unintelligent” depends on “whether [counsel’s] advice was within the range of competence demanded of attorneys in criminal cases.”⁶²

The Sixth Amendment to the United States Constitution generally guarantees the assistance of counsel in criminal prosecutions.⁶³ The United States Supreme Court has further recognized that “the right to counsel is the right to the *effective* assistance of counsel.”⁶⁴ In 1973, the Court began to define ineffective assistance of counsel. In *Tollett v. Henderson*,⁶⁵ it found that “[c]ounsel’s concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law.”⁶⁶

Finally, in the landmark case *Strickland v. Washington*,⁶⁷ the Court outlined a two-part test to determine whether assistance of

which is “obviously unfair and shocks the conscience of the court”). An unknowing and involuntary plea would violate due process as required by *Boykin v. Alabama* and as codified in section 22-3210 of the Kansas Statutes Annotated, and would therefore be “unfair” and “shocking.” KAN. STAT. ANN. § 22-3210; *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

55. *Muriithi*, 46 P.3d at 1148.

56. 395 U.S. 238 (1969).

57. *Id.* at 242.

58. *Id.* at 243 n.5 (reasoning that because a guilty plea entails a waiver of the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers, it must be given voluntarily and knowingly or a violation of due process would occur).

59. 397 U.S. 742 (1970).

60. *Id.* at 748.

61. 397 U.S. 759 (1970). *Brady* and *McMann* were both decided on May 4, 1970.

62. *Id.* at 770-71.

63. U.S. CONST. amend. VI. The Sixth Amendment right to counsel is limited to certain critical stages and is guaranteed only to defendants facing incarceration. *Iowa v. Tovar*, 541 U.S. 77, 87 (2004).

64. *McMann*, 397 U.S. at 771 n.14 (emphasis added).

65. 411 U.S. 258 (1973).

66. *Id.* at 268.

67. 466 U.S. 668 (1984).

counsel was effective.⁶⁸ First, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.”⁶⁹ Second, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁷⁰ The two parts of the test are respectively referred to as the “competence” prong and the “prejudice” prong.⁷¹

In *Hill v. Lockhart*,⁷² the Court held that “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.”⁷³ “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”⁷⁴

Ineffective assistance of counsel not only would render a guilty plea unknowing and involuntary, resulting in manifest injustice, but also would violate the defendant’s due process rights.⁷⁵ The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees due process of law.⁷⁶ To ensure due process, a defendant’s waiver of constitutional rights, through pleading guilty or no contest, must be intelligent and with understanding, and the waiver must be recorded.⁷⁷ In addition, aliens are protected under the Due Process Clause.⁷⁸ The protections apply to all aliens regardless of “whether their presence here is lawful, unlawful, temporary, or permanent.”⁷⁹

B. Immigration Law

Under the United States Constitution, Congress has the power to create immigration legislation.⁸⁰ Therefore, immigration law “reflects that branch’s view of political reform and national security at the time

68. *Id.* at 687.

69. *Id.* at 687-88.

70. *Id.* at 694.

71. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); Guy Cohen, Note, *Weakness of the Collateral Consequences Doctrine: Counsel’s Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas*, 16 FORDHAM INT’L L.J. 1094, 1108 (1993).

72. 474 U.S. 52 (1985).

73. *Id.* at 58.

74. *Id.* at 59.

75. *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970); *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); see also *State v. Shaw*, 910 P.2d 809, 817 (Kan. 1996).

76. U.S. CONST. amend. XIV, § 1.

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

78. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

79. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

80. U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 9, cl. 1; Hon. Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 203-04 (2004) (noting that because immigration is not directly mentioned in the Constitution, “immigration law is the product of the United States Congress.”).

of an act's passage."⁸¹ Throughout the history of the United States, the tension between national security and individual human rights has manifested itself in the nation's immigration laws and policies.⁸² As early as 1798, with the Alien Act, Congress has enacted laws restricting immigration.⁸³ The Alien Act allowed the President "to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States."⁸⁴ An alien who was ordered to depart, but failed to do so, was subject to three years in prison, and could never thereafter become a citizen.⁸⁵ An alien who departed, but then returned surreptitiously, was subject to imprisonment for as long as public safety required.⁸⁶

In addition to removing alien immigrants from the country, Congress also made it harder for the remaining immigrants to become naturalized citizens.⁸⁷ For example, the Naturalization Act had lengthy residence requirements and strict registration procedures, which effectively prohibited non-white immigrants from becoming naturalized citizens.⁸⁸

Despite Congress' early attempts to deport some immigrants, the eighteenth century and the first half of the nineteenth century were notable for encouraging immigration.⁸⁹ In 1849, Justice McLean of the United States Supreme Court first mentioned the "cherished policy" in the United States of encouraging foreign immigration.⁹⁰ The United States entered into a friendship treaty with China in 1844, which was amended in 1868 to make immigration voluntary between the two nations.⁹¹ It specifically "recognized the 'inherent and inalienable right of man to change his home and allegiance.'"⁹²

As more Chinese laborers immigrated to the United States, however, the prejudices against them grew.⁹³ As a result, Congress enacted the Chinese Exclusion Act of 1888, which disregarded the prior treaties and prohibited Chinese immigration for ten years, clearly dis-

81. Brickner & Hanson, *supra* note 80, at 204.

82. *Id.* at 203.

83. Alien Act, ch. 58, §§ 1-6, 1 Stat. 570 (1798) (expired 1800). This Act was passed in reaction to a perceived threat of war with France. Steven R. Shapiro, *The Role of the Courts in the War Against Terrorism: A Preliminary Assessment*, 29 FLETCHER F. OF WORLD AFF. 103, 104 (2005).

84. Alien Act, ch. 58, § 1, 1 Stat. 570 (1798) (expired 1800) (emphasis in original).

85. *Id.*

86. *Id.* § 2.

87. Naturalization Act of 1798, ch. 54, §§ 1-7, 1 Stat. 566 (1798) (repealed 1802).

88. *Id.* §§ 1, 4, 6.

89. Brickner & Hanson, *supra* note 80, at 204.

90. *Id.* at 208 (quoting Paul Brickner, *The Passenger Cases (1849) Justice John McLean's "Cherished Policy" as the First of Three Phases of American Immigration Law*, 10 SW. J. L. & TRADE AM. 63 (2004)).

91. *Id.* at 218-19.

92. *Id.*

93. *Id.*

criminating on the basis of race and national origin.⁹⁴ In upholding the Act, the United States Supreme Court “agreed that the right to exclude was an absolute power granted in Congress.”⁹⁵ The Immigration and Nationality Act of 1917 went a step further and prohibited the immigration of anyone whose ancestry was traceable to a barred zone of Asiatic countries.⁹⁶ It also added the commission of crimes of “moral turpitude” as further grounds for exclusion.⁹⁷

A facially-neutral quota system for immigration was established in the Immigration Act of 1924.⁹⁸ “[T]he quotas were established to maintain the mix of peoples that occupied America in 1890.”⁹⁹ However, since most non-western European immigrants arrived after 1890, the new system favored western Europeans, who were predominantly white and Protestant.¹⁰⁰

The landmark Immigration and Nationality Act of 1952 is the main statute in force today, albeit with many amendments.¹⁰¹ The 1965 amendments abolished the quota system based on national origin, and instead allowed each nation an annual limit of twenty thousand immigrants.¹⁰² In 1978, the twenty thousand per country limit was changed to a worldwide limit of 290,000.¹⁰³

In modern times, immigration law has focused on excluding and removing undesirable aliens based more on their occupations and criminal history than on their national origins.¹⁰⁴ The Immigration and Nationality Act is multi-layered, and in addition there are many other statutes, treaties, regulations, and case law which must be considered together to understand the bases for admission, exclusion, and deportation.¹⁰⁵

Deportable offenses were historically defined very broadly.¹⁰⁶ In 1988, Congress passed the Anti-Drug Abuse Act, which “specified

94. *Id.* at 220-22.

95. *Id.* at 222 (commenting on two cases that challenged the Act: *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

96. *Id.* at 223.

97. *INS v. St. Cyr*, 533 U.S. 289, 294 (2001). Moral turpitude is still a ground of exclusion today. 8 U.S.C. § 1182(a)(2)(A) (2000).

98. Brickner & Hanson, *supra* note 80, at 226.

99. *Id.*

100. *Id.* at 226-27 (“82% of the quota was designated to northern and western Europeans, where as 14% was designated to southern and eastern Europeans. The remaining 4% went to the rest of the world.”).

101. STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE: DESK EDITION, § 1.02[3][c] (2004).

102. Brickner & Hanson, *supra* note 80, at 228; MAILMAN, *supra* note 101, § 1.01 n.1 (noting that President Kennedy had called for elimination of the quota system, and that President Johnson helped make that happen in the Act of 1965).

103. Brickner & Hanson, *supra* note 80, at 228 (suggesting that while facially neutral, the worldwide limit adversely “impacted poorer countries because of their higher immigration rates”).

104. *See id.* at 216.

105. MAILMAN, *supra* note 101, § 1.02[3][a].

106. *INS v. St. Cyr*, 533 U.S. 289, 295 (2001).

that an alien is deportable upon conviction for any ‘aggravated felony.’”¹⁰⁷ From 1917 until 1990, even if an alien was convicted of a deportable crime, the trial court judge could issue a judicial recommendation against deportation (JRAD), which prevented the INS from deporting an alien on the basis of the conviction.¹⁰⁸ In 1990, Congress took away the power of courts to issue JRADs.¹⁰⁹

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) broadened the definition of deportable offenses even further.¹¹⁰ More crimes with lesser penalties were included.¹¹¹ A misdemeanor under state law can now be characterized under these laws as an aggravated felony, a deportable offense.¹¹² There is no longer any discretionary relief from deportation under these circumstances.¹¹³ The alien convicted of these crimes is *per se* deportable.¹¹⁴

The USA PATRIOT Act further expanded the definition of deportable and excludable offenses.¹¹⁵ The Act not only expands the definitions relating to terrorism, but also “mandates obligatory detention of anyone reasonably suspected of being a terrorist or engaged in terrorist activity.”¹¹⁶ Furthermore, the Act allows heightened secrecy, to the point that many suspected terrorists have been detained and questioned without being able to contact their families.¹¹⁷ In addition to the USA PATRIOT Act, the September 11, 2001 terrorist attacks on the United States resulted in further changes to immigration law. In 2003, the Immigration and Naturalization Service (INS) was replaced by three new bureaus, which operate under the newly created Department of Homeland Security (DHS).¹¹⁸

The 2003 reorganization was not the first time INS has been renamed or moved from one government agency to another. In fact,

107. *Id.*

108. 8 U.S.C. § 1251(b) (1988), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 5050.

109. Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 5050.

110. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

111. John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 701 (2003).

112. *Id.*

113. *Id.* at 702.

114. *Id.*

115. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

116. Brickner & Hanson, *supra* note 80, at 232.

117. *Id.*

118. MAILMAN, *supra* note 101, at SA-1. The Homeland Security Act officially abolished the INS and created in its place the Bureau of Citizenship and Immigration Services (BCIS), the Bureau of Customs and Border Protection (BCBP), and the Bureau of Immigration and Customs Enforcement (BICE). *See id.* § 1.06.

immigration benefits and enforcement have moved from a purely civil arena to an increasingly criminal one. The forerunner of the INS was created by Congress in 1821 and was located in the Treasury Department.¹¹⁹ Congress enacted legislation in 1903 that transferred it “from the Treasury Department to the newly created Department of Commerce and Labor.”¹²⁰ There it remained until 1940, when “the President’s Reorganization Plan . . . moved the INS from the Department of Labor to the Department of Justice.”¹²¹ The discretion to admit excludable aliens was likewise transferred from the Secretary of Labor to the Attorney General.¹²²

C. *The Collateral Consequences Doctrine*

For purposes of determining whether a trial court has complied with its duty under the Due Process Clause to ensure that a guilty plea is knowing, voluntary, and intelligent, the Supreme Court has distinguished between direct consequences, which must be explained to the defendant, and collateral consequences, which the plea court has no duty to explore.¹²³

Courts have a duty to ensure that criminal defendants are informed of the direct consequences of their pleas, but not the collateral consequences. The notion that defendants need not be informed of collateral consequences is known as the collateral consequences rule. The justification for the rule has been that courts should not have to explain every conceivable consequence that may result from a conviction, but only consequences that are automatic, and hence, “direct.”¹²⁴ Some examples of direct consequences include length of imprisonment and amount of fine.¹²⁵

Collateral consequences, on the other hand, have been viewed as those that are speculative or under the control of an entity other than the sentencing court.¹²⁶ “The determination that a particular consequence is collateral has, in many cases, turned on whether the consequence was in the hands of another government agency or under the control of the defendant himself.”¹²⁷ Some examples of collateral consequences include

119. Smith, *supra* note 2.

120. *Id.*

121. *Id.* (commenting that the move was a result of immigration being viewed as a national security issue rather than an economic one).

122. *INS v. St. Cyr*, 533 U.S. 289, 294 n.2 (2001).

123. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 704 (2002).

124. *Id.*

125. *Id.* at 703.

126. *Id.* at 704.

127. Steve Colella, “Guilty, Your Honor”: *The Direct and Collateral Consequences of Guilty Pleas and the Courts That Inconsistently Interpret Them*, 26 WHITTIER L. REV. 305, 309 (2004).

revocation of parole or probation, ineligibility for parole, civil commitment, civil forfeiture, consecutive rather than concurrent sentencing, higher penalties based on repeat offender laws, . . . registration requirements[,] . . . disenfranchisement, ineligibility to serve on a jury, disqualification from public benefits, . . . ineligibility to possess firearms[,] . . . deportation, dishonorable discharge from the armed services, and loss of business or professional licenses.¹²⁸

In order to understand the collateral consequences rule, it can be helpful to categorize certain consequences as either collateral or direct. However, “[t]he distinction between a collateral and a direct consequence of a criminal conviction . . . is obvious at the extremes and often subtle at the margin.”¹²⁹ Deportation is a consequence that, for different reasons, can be placed in either category.¹³⁰

While the United States Supreme Court has defined the trial court’s duties in accepting a guilty plea in terms of direct and collateral consequences, it has never defined the duties of defense counsel in those terms.¹³¹ Despite the Court’s having never maintained that defense attorneys have no duty to advise their clients of collateral consequences, that view is widely accepted in American courts.¹³²

D. *Kansas Law*

Section 22-3210 of the Kansas Statutes Annotated lists the requirements that must be met before the trial court may accept a guilty or no contest plea, and does not address the duties of defense counsel.¹³³ For example, the court must determine that “the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.”¹³⁴ If the requirements of section 22-3210 were not met, and manifest injustice resulted, the court may allow a defendant to withdraw his guilty or no contest plea and set aside his conviction.¹³⁵ “Manifest injustice” is not defined in the statute, but case law has interpreted it to mean shocking and obviously unfair.¹³⁶

Section 22-3210 is modeled after Rule 11 of the Federal Rules of Criminal Procedure, which applies only to federal courts.¹³⁷ The

128. Chin & Holmes, *supra* note 123, at 705-06 (citations omitted).

129. *Id.* at 705 (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)); Colella, *supra* note 127, at 308 (quoting *Russell*, 686 F.2d at 38).

130. Chin & Holmes, *supra* note 123, at 708; Colella, *supra* note 127, at 310.

131. Chin & Holmes, *supra* note 123, at 706.

132. *Id.*

133. KAN. STAT. ANN. § 22-3210 (2003) (requiring that the plea be entered by the defendant or counsel in open court; that the court inform the defendant of the consequences of the plea in felony cases; that the court personally address the defendant and determine that the plea is voluntary and knowing; that the court be satisfied that a factual basis exists for the plea; that defendant appear personally in felony cases; and that a verbatim record be made in felony cases).

134. *Id.* § 22-3210(a)(3).

135. *Id.* § 22-3210(d).

136. *State v. Cramer*, 841 P.2d 1111, 1119 (Kan. Ct. App. 1992).

137. *State v. Cox*, 819 P.2d 1241, 1243 (Kan. Ct. App. 1991).

Rules seek to ensure that a defendant's plea is given knowingly and voluntarily.¹³⁸ The Kansas Supreme Court has stated that section 22-3210 “embodies due process requirements as set out by the United States Supreme Court in *Boykin v. Alabama*.”¹³⁹ The statute thus requires that the court inform the defendant of the consequences of his plea.¹⁴⁰

In *State v. Cox*,¹⁴¹ the Kansas Court of Appeals followed the United States Court of Appeals for the Ninth Circuit in interpreting “consequences” to mean only direct consequences and not collateral consequences.¹⁴² The court in *Cox* then looked to other jurisdictions to determine what kinds of consequences are collateral and compiled a list that includes loss of employment, possibility of revocation of parole, possibility of deportation, undesirable military discharge, voting rights, and driver's license suspension.¹⁴³

The court in *Cox* overlooked the holding in *State v. Bowser*.¹⁴⁴ In *Bowser*, the Kansas Supreme Court allowed a defendant to withdraw his guilty plea when both his counsel and the trial judge mistakenly informed him that the crime was a misdemeanor and not a felony.¹⁴⁵ The serious error, or manifest injustice, was the fact that the defendant could have lost his funeral director's license as a result of a felony conviction.¹⁴⁶ Therefore, the Kansas Supreme Court allowed the defendant to withdraw his plea based on the failure to inform him of a collateral consequence to that plea, namely the loss of employment, because it was a matter vital to his interests.¹⁴⁷

In Kansas, direct consequences resulting from a plea are “definite, immediate, and largely automatic.”¹⁴⁸ The Kansas Court of Appeals in *State v. Bussell*¹⁴⁹ determined that involuntary civil commitment for certain sex offenders under the Kansas Sexually Violent Predators Act (KSVPA) is collateral to the conviction, and thus not a direct consequence.¹⁵⁰ Under the KSVPA, a convicted sex criminal may be civilly committed after serving his criminal sentence.¹⁵¹ The court in *Bussell* found that civil commitment under the KSVPA

138. FED. R. CRIM. P. 11(b)(1), (2); KAN. STAT. ANN. § 22-3210(a)(3).

139. *State v. Shaw*, 910 P.2d 809, 814 (Kan. 1996).

140. KAN. STAT. ANN. § 22-3210(a)(2).

141. 819 P.2d 1241 (Kan. Ct. App. 1991).

142. *Id.* at 1243 (quoting *United States v. King*, 618 F.2d 550, 552 (9th Cir. 1980)).

143. *Id.*

144. 129 P.2d 268 (Kan. 1942).

145. *Id.* at 269 (noting that defendant was charged with fourth degree manslaughter and leaving the scene of an accident).

146. *Id.* at 270.

147. *Id.*

148. *In re J.C.*, 925 P.2d 415, 419 (Kan. 1996) (quoting *United States v. Lott*, 630 F. Supp. 611, 612 (E.D. Va.), *aff'd*, 795 F.2d 82 (4th Cir. 1986)).

149. 963 P.2d 1250 (Kan. Ct. App. 1998).

150. *Id.* at 1253.

151. KAN. STAT. ANN. § 59-29a05(a) (1994).

“is neither inevitable nor automatic,” but rather “is simply a matter of discretion to be exercised by the State.”¹⁵²

While the court in *Cox* analyzed “consequences” within the meaning of section 22-3210 to determine whether collateral or direct consequences were intended, the court’s decision was concerned only with the duties of the court in accepting pleas and did not discuss the duty of counsel in advising defendants how to plead.¹⁵³ Similarly, the Kansas Supreme Court explained in *State v. Shaw*¹⁵⁴ that “[t]he purpose of 22-3210(a) is to require the *trial court* to satisfy itself that the defendant’s plea is made voluntarily and understandingly”¹⁵⁵

In *State v. Chamberlain*,¹⁵⁶ the Kansas Supreme Court adopted the United States Supreme Court’s two-pronged test established in *Strickland v. Washington* for determining ineffective assistance of counsel.¹⁵⁷ The court in *Chamberlain* stated that in Kansas a rebuttable presumption exists that counsel is effective.¹⁵⁸ Synthesizing *Strickland* with Kansas cases, including *State v. Schoonover*,¹⁵⁹ the court stated that “[j]udicial scrutiny of counsel’s performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”¹⁶⁰ In *Schoonover*, the Kansas Court of Appeals stated, “We cannot believe our Supreme Court would ever find counsel ‘effective’ in a constitutional sense where his malpractice . . . has been the cause of his client’s conviction or otherwise worked to the client’s substantial detriment.”¹⁶¹ The Kansas Supreme Court noted in *State v. Solomon*¹⁶² that “defense counsel has an obligation to advise a defendant as to the range of permissible penalties and to discuss the possible choices available to the defendant.”¹⁶³

When the Kansas Supreme Court decided *State v. Muriithi*, there were no Kansas cases directly on point. However, other jurisdictions close to Kansas had decided cases concerning duties of the court and counsel regarding notification of the immigration consequences of guilty pleas, and the court in *Muriithi* relied on them as persuasive

152. *Bussell*, 963 P.2d at 1252.

153. *State v. Cox*, 819 P.2d 1241, 1243 (Kan. Ct. App. 1991).

154. 910 P.2d 809 (Kan. 1996).

155. *Id.* at 817 (emphasis added).

156. 694 P.2d 468 (Kan. 1985).

157. *Id.* at 472.

158. *Id.*

159. 582 P.2d 292 (Kan. 1978).

160. *Chamberlain*, 694 P.2d at 475.

161. *Schoonover*, 582 P.2d at 299.

162. 891 P.2d 407 (Kan. 1995).

163. *Id.* at 414.

precedent.¹⁶⁴ The Tenth Circuit Court of Appeals in *Varela v. Kaiser* held that defendants do not need to be advised of the collateral consequence of deportation prior to pleading guilty.¹⁶⁵ Moreover, the court stated that “an attorney’s failure to advise an alien client that deportation may result from a guilty plea does not constitute ineffective assistance of counsel.”¹⁶⁶ In reaching its conclusion, the court in *Varela* relied heavily, if not exclusively, on similar determinations of other federal circuit courts of appeals.¹⁶⁷

In *United States v. Corona-Maldonado*,¹⁶⁸ the United States District Court for the District of Kansas created an exception to the collateral consequences rule adopted in *Varela* and held that “although an attorney’s failure to inform his or her client about the possibility of being deported may not amount to ineffective assistance of counsel, providing incorrect information about being deported following specific inquiry may render the defendant’s plea involuntary.”¹⁶⁹ According to the court’s rationale, commission amounts to ineffective assistance of counsel, whereas omission does not. In drawing the distinction, the court in *Corona-Maldonado* followed the Eleventh Circuit’s decision in *Downs-Morgan v. United States*.¹⁷⁰

E. Other Jurisdictions

Essentially, each jurisdiction falls into one of three groups. The largest follows the classic collateral consequences rule. This group includes the United States Courts of Appeals for the District of Columbia Circuit, the Fourth Circuit, the Fifth Circuit, and the Seventh Circuit, as well as the state courts of Alaska, Iowa, Pennsylvania and Maryland.¹⁷¹ These jurisdictions hold that immigration consequences are collateral, so neither courts nor defense attorneys have a duty to advise alien criminal defendants of the possibility of deportation resulting from their guilty pleas.¹⁷²

The second group also follows the collateral consequences rule, but has carved out an exception. These jurisdictions hold that *misinforming* alien criminal defendants about the possible immigration consequences of a guilty plea results in ineffective assistance of coun-

164. *State v. Muriithi*, 46 P.3d 1145, 1150 (Kan. 2002).

165. *Varela v. Kaiser*, 976 F.2d 1357, 1357 (10th Cir. 1992).

166. *Id.*

167. *Id.* at 1358.

168. 46 F. Supp. 2d 1171 (D. Kan. 1999).

169. *Id.* at 1173.

170. *Id.* (relying on *Downs-Morgan v. United States*, 765 F.2d 1534, 1538 (11th Cir. 1985)).

171. *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990); *Santos v. Kolb*, 880 F.2d 941 (7th Cir. 1989); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Gavilan*, 761 F.2d 226 (5th Cir. 1985); *State v. Tafoya*, 500 P.2d 247 (Alaska 1972), *cert. denied*, 410 U.S. 945 (1972); *State v. Mott*, 407 N.W.2d 581 (Iowa 1987); *State v. Daley*, 487 A.2d 320 (Md. Ct. Spec. App. 1985); *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989).

172. See cases cited *supra* note 171.

sel, allowing a defendant to withdraw his guilty plea. These jurisdictions hold, however, that failure to inform altogether does not amount to ineffectiveness of counsel, and will not allow a defendant to withdraw his guilty plea. This group includes the United States Courts of Appeals for the Eleventh Circuit and the Sixth Circuit, the United States District Court for the District of Kansas, and the state courts of Illinois.¹⁷³

The United States Court of Appeals for the Second Circuit could be considered to be in the second group as well. In *Michel v. United States*,¹⁷⁴ the court stated that the trial judge does not have a duty to “inquire whether a defendant is aware of the collateral effects of his plea,” but that if “his client is an alien, counsel and not the court has the obligation of advising him of his particular position as a consequence of his plea.”¹⁷⁵ However, the court was analyzing not a claim of ineffective assistance of counsel, but only whether the plea was voluntary.¹⁷⁶ The court held that it was voluntary because the trial judge did not have a duty to advise the defendant of deportation as a result of his guilty plea.¹⁷⁷ More recently, the court held that JRADs are part of the sentencing process, which means that the Sixth Amendment right to effective assistance of counsel applies.¹⁷⁸ Therefore, a criminal defense attorney who knew her client was an alien, yet failed to request a JRAD (when JRADs were still available) would have offered ineffective assistance, and her client would be able to later vacate his guilty plea.¹⁷⁹

The third group does not focus on the collateral consequences rule, but instead recognizes a distinction between the duty of the court in accepting a plea and the duty of counsel in advising the client how to plead.¹⁸⁰ At the time *Muriithi* was decided, only Colorado fell into this group.¹⁸¹ In *People v. Pozo*,¹⁸² the Colorado Supreme Court noted that while “[t]he trial court is required to advise the defendant only of the direct consequences of the conviction to satisfy . . . due process concerns[,] . . . sixth amendment constitutional standards requiring effective assistance of counsel involve examination of quite different considerations.”¹⁸³ The court in *Pozo* did not state that de-

173. *Downs-Morgan*, 765 F.2d 1534; *Corona-Maldonado*, 46 F. Supp. 2d 1171; *United States v. Nagaro-Garbin*, 653 F. Supp. 586 (E.D. Mich.), *aff'd*, 831 F.2d 296 (6th Cir. 1987); *People v. Correa*, 465 N.E.2d 507 (Ill. App. Ct. 1984), *aff'd*, 485 N.E.2d 307 (Ill. 1985).

174. 507 F.2d 461 (2d Cir. 1974).

175. *Id.* at 465.

176. *Id.*

177. *Id.* at 466.

178. *Janvier v. United States*, 793 F.2d 449, 455 (2d Cir. 1986).

179. *Id.* at 456.

180. *See, e.g., People v. Pozo*, 746 P.2d 523, 526 (Colo. 1987).

181. *Id.*

182. 746 P.2d 523 (Colo. 1987).

183. *Id.* at 526.

fense counsel always has a duty to advise alien clients of deportation consequences of their guilty pleas.¹⁸⁴ Instead, the court realized that rather than using a bright-line rule, “the conduct of attorneys must by necessity be considered on a case-by-case basis in light of objective standards of minimally acceptable levels of professional performance prevailing at the time of the challenged conduct.”¹⁸⁵ The court in *Pozo* held that

the potential deportation consequences of guilty pleas in criminal proceedings brought against alien defendants are material to critical phases of such proceedings. The determination of whether the failure to investigate those consequences constitutes ineffective assistance of counsel turns to a significant degree upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien. When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law.¹⁸⁶

In addition to the three main groups, some jurisdictions fall somewhere in between. California is one example. In *In re Resendiz*,¹⁸⁷ the Supreme Court of California adopted the misinformation rule and held that “affirmative misadvice regarding immigration consequences can in certain circumstances constitute ineffective assistance of counsel.”¹⁸⁸ The court in *Resendiz* refused to hold that failure to advise would constitute ineffective assistance of counsel.¹⁸⁹ However, in *People v. Soriano*,¹⁹⁰ the California Court of Appeal went further and held that a formulaic warning from defense counsel was not an adequate effort to advise a defendant of the immigration consequences of his guilty plea.¹⁹¹ Since the attorney in *Soriano* knew the defendant was an alien, and because Soriano had asked the attorney specifically about immigration consequences, the attorney had an affirmative duty to research those consequences, and not merely inform him that “his plea *might* have immigration consequences.”¹⁹² Therefore, California falls somewhere between groups two and three.

Other states, like Florida, do not fall neatly into an established group because they have enacted statutes requiring the court to warn all criminal defendants that immigration consequences including deportation could result from their guilty pleas.¹⁹³ Therefore, due to the statute, a defendant will be able to vacate his plea if the requisite

184. *Id.* at 527.

185. *Id.*

186. *Id.* at 529.

187. 19 P.3d 1171 (Cal. 2001).

188. *Id.* at 1177.

189. *Id.*

190. 240 Cal. Rptr. 328 (Ct. App. 1987).

191. *Id.* at 335.

192. *Id.* at 336 (emphasis added).

193. FLA. R. CRIM. P. 3.172(c)(8).

warning was not given, and prejudice to the defendant resulted.¹⁹⁴ States with similar statutes include California, Connecticut, the District of Columbia, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Texas, Washington, and Wisconsin.¹⁹⁵ While these jurisdictions have similar statutes, they do not fall neatly into one group, because each state still analyzes the role of defense counsel under the statutes and under applicable case law differently.

IV. ANALYSIS

A. Parties' Arguments

Muriithi argued that his plea was neither voluntary nor knowing because if he had known he would be deported for pleading no contest, he would have pleaded innocent and insisted on going to trial.¹⁹⁶ The State argued that Muriithi's pleas were knowing and voluntary because he understood all direct consequences to his pleas, and was not required to understand collateral consequences.¹⁹⁷

1. Antony Muriithi, Appellant

Muriithi contended that his no contest plea may be withdrawn to correct a manifest injustice, namely that he was subject to deportation upon entering a plea on the advice of his attorney, which he argued was ineffective assistance of counsel.¹⁹⁸ He contended that his attorney's representation fell below an objective standard of reasonableness when she failed to inform him of the immigration consequences of his plea, thereby satisfying the first prong of the *Strickland* test.¹⁹⁹ He argued that the second prong was met as well, since "if he had known at the time of entering the no contest plea that he could be subject to deportation, he would not have pled no contest."²⁰⁰ To support his argument that competent counsel would have advised him of

194. See, e.g., *Peart v. State*, 756 So. 2d 42, 45 (Fla. 2000).

195. CAL. PENAL CODE § 1016.5(a) (West 1985); CONN. GEN. STAT. § 54-1j(a) (Supp. 2005); D.C. CODE ANN. § 16-713(a) (2001); GA. CODE ANN. § 17-7-93(c) (2004); HAW. REV. STAT. § 802E-2 (Supp. 1993); 725 ILL. COMP. STAT. ANN. 5/113-8 (West Supp. 2004); MD. R. ANN. 4-242(e); MASS. ANN. LAWS ch. 278, § 29D (Law. Co-op. 2002); MINN. R. CRIM. P. 15.01; MONT. CODE ANN. § 46-12-210 (2003); NEB. REV. STAT. § 29-1819.02(1) (Supp. 2004); N.M. R. ANN. 9-406; N.Y. CRIM. PROC. LAW § 220.50 (McKinney 2002); N.C. GEN. STAT. § 15A-1022(a)(7) (2002); OHIO REV. CODE ANN. § 2943.031(A) (West 1997); OR. REV. STAT. § 135.385(2)(d) (2003); R.I. GEN. LAWS § 12-12-22(a)-(b) (Supp. 2003); TEX. CRIM. PROC. CODE ANN. § 26.13(a)(4) (Vernon Supp. 2005); WASH. REV. CODE ANN. § 10.40.200(2) (West 2002); WIS. STAT. ANN. § 971.08(1)(c) (West 1998).

196. *State v. Muriithi*, 46 P.3d 1145, 1148 (Kan. 2002).

197. *Id.* at 1155.

198. Brief of Appellant at 7, *Muriithi* (No. 01-87213-A).

199. *Id.* at 9.

200. *Id.* at 24.

the immigration consequences of his plea, Muriithi relied on *INS v. St. Cyr*,²⁰¹ in which the United States Supreme Court stated that “[e]ven if the defendant were not initially aware of [a certain immigration provision], competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.”²⁰² Moreover, Muriithi argued that the Court in *St. Cyr* pointed to defense practice manuals showing that the right to stay in the United States may outweigh the possibility of any jail sentence.²⁰³

Muriithi argued that while Kansas had no case law on the issue, other jurisdictions “recognize the responsibility of counsel to accurately advise non-citizen defendants of deportation consequences.”²⁰⁴ He noted that the United States District Court for the District of Kansas in *Corona-Maldonado* held that misinforming an alien client about immigration consequences constitutes ineffective assistance of counsel.²⁰⁵ He also referred to the decisions in *Pozo* and *State v. Daley*²⁰⁶ to show that courts in Colorado and Maryland have held that failure to inform an alien defendant of immigration consequences is considered ineffective assistance of counsel if the attorney knew or should have known that the defendant was not a citizen of the United States.²⁰⁷

Muriithi maintained that this exception to the collateral consequences rule should apply to him, since his appointed attorney knew or should have known that he was not a United States citizen.²⁰⁸ Not only does he speak with a noticeable foreign accent, but also immediately after his attorney was appointed to represent him, the judge asked him where he was from, and Muriithi informed the court he was from Kenya.²⁰⁹ Therefore, Muriithi argued that his attorney “should not be able to claim that she had insufficient information to form a reasonable belief that the defendant was from another country.”²¹⁰

Muriithi also argued that his “due process rights were violated when the trial judge did not inform [him] of the immigration consequences to his plea of no contest.”²¹¹ He claimed that the violation of due process made his plea unknowing and involuntary.²¹² Furthermore, Muriithi argued that for an alien’s guilty or no contest plea to

201. 533 U.S. 289 (2001).

202. *Id.* at 323 n.50; Brief of Appellant at 14, *Muriithi* (No. 01-87213-A).

203. Brief of Appellant at 15, *Muriithi* (No. 01-87213-A).

204. *Id.* at 19.

205. *Id.*

206. 487 A.2d 320 (Md. Ct. Spec. App. 1985).

207. Brief of Appellant at 20, *Muriithi* (No. 01-87213-A).

208. *See id.*

209. *Id.*

210. *Id.* at 21.

211. *Id.* at 27.

212. *Id.* at 28.

be knowing and voluntary, immigration consequences cannot be considered collateral, but must be addressed at the pleading stage.²¹³ He stated, “Since an alien defendant is essentially waiving the right to remain in this country by pleading guilty or no contest to certain charges, the Court should require trial judges to warn alien defendants of the possible immigration consequences of their plea.”²¹⁴ He supported his argument by noting that “the Kansas Supreme Court has recognized that a defendant is entitled to withdraw a guilty plea if he is not advised of a collateral consequence that is of great importance.”²¹⁵

Finally, Muriithi argued that deportation alone creates a manifest injustice.²¹⁶ He relied on United States Supreme Court cases that note the severity of deportation.²¹⁷ Muriithi “spent more time in jail fighting” his deportation than he would have if he had received the maximum sentences for the misdemeanors for which he was charged.²¹⁸ Furthermore, if deported he would be barred for twenty years from reentering the United States, making the maintenance of a relationship with his son impossible.²¹⁹ Muriithi argued that result would be manifestly unjust.²²⁰

2. State of Kansas, Appellee

The State argued that the “failure to advise Muriithi of a collateral consequence of his no contest plea was not constitutionally ineffective performance.”²²¹ Accordingly, the State contended that deportation is a collateral consequence of a plea.²²² It argued that to hold otherwise would expand the Sixth Amendment.²²³

The State contended that Muriithi’s counsel had no reason to know Muriithi was not a citizen, and that her lack of knowledge released her from any obligation to inform him of possible deportation as a result of his plea.²²⁴ The State noted that because Muriithi’s counsel was attending to other clients and because the docket was crowded, she might not have heard the colloquy with the judge con-

213. *Id.* at 41.

214. *Id.* at 29.

215. *Id.* at 41. Muriithi was referring to *State v. Bowser*, 129 P.2d 268 (Kan. 1942), which held that a defendant may withdraw his plea of guilty where he was not informed that pleading guilty to manslaughter in the fourth degree would make him a felon, and he would thereby lose his funeral director’s license. *Id.*

216. *Id.* at 35.

217. *Id.*

218. *Id.* at 37.

219. *Id.* at 36.

220. *Id.* at 37.

221. Brief of Appellee at 10, *Muriithi* (No. 01-87213-A).

222. *Id.* at 12.

223. *Id.* at 14.

224. *Id.* at 18.

cerning the fact that Muriithi was from Kenya.²²⁵ Despite Muriithi's foreign accent, the State concluded that to require attorneys to question the citizenship of persons who speak with an accent would require "unpleasant determinations as to what extent certain stereotypical attributes trigger an obligation to assume alien status."²²⁶

The State noted that Muriithi's deportation order was only partially based on his convictions.²²⁷ In addition, he was out of student status because he was not actively enrolled at a university.²²⁸ The State concluded that counsel's failure to advise Muriithi of immigration consequences of his plea was not ineffective assistance, and that the trial court was not required to inform him of any collateral consequences resulting from his plea.²²⁹

B. *The Court's Opinion*

In an opinion authored by Justice Donald L. Allegrucci, the Kansas Supreme Court unanimously held that "the failure to advise Muriithi of the deportation consequences does not amount to ineffective assistance of counsel, rendering his plea manifestly unjust."²³⁰ The court noted that the appropriate test for determining counsel effectiveness is the *Strickland* test, and that the first prong of the test is "nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*."²³¹ In *Tollett*, the United States Supreme Court explained that "[c]ounsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law."²³²

The court distinguished the cases from other jurisdictions upon which Muriithi relied in his brief when he argued that defense counsel's failure to advise him concerning deportation consequences amounted to ineffective assistance.²³³ The court distinguished *St. Cyr* as concerning a narrower issue than the possibility of deportation.²³⁴ *St. Cyr* concerned whether a waiver of deportation was available after the enactment of AEDPA and IIRIRA to criminal defendants who pled guilty to deportable crimes before the laws were enacted, since they might have pled guilty in reliance on the availability of a

225. *Id.*

226. *Id.* at 19.

227. *Id.* at 21.

228. *Id.*

229. *Id.* at 22, 25.

230. *Muriithi*, 46 P.3d at 1152.

231. *Id.* at 1149.

232. *Id.* (quoting *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973)).

233. *Id.* at 1149-51.

234. *Id.* at 1149.

waiver.²³⁵ In addition, the court distinguished *Corona-Maldonado*, which held that misinformation concerning immigration consequences is ineffective assistance of counsel, because Muriithi did not specifically ask about immigration consequences.²³⁶ The court observed that both *Pozo* and *Daley* stand for the principle that if counsel knows or has reason to know that her client is not a United States citizen and does not inform him as to the immigration consequences of his plea, he can later withdraw his guilty plea due to the ineffective assistance of counsel.²³⁷ The court in *Muriithi* distinguished those cases by claiming that Muriithi's appointed counsel had no reason to know Muriithi was not a citizen of the United States.²³⁸ The court noted, "We cannot tell from the record whether counsel overheard the trial court's question and Muriithi's response."²³⁹

Furthermore, the court noted that "[w]e cannot say the trial court abused its discretion based upon counsel's representation or upon the totality of the circumstances."²⁴⁰ Finally, the court stated that "[a]bsent a statute requiring the trial court to do so, it has no duty to advise a defendant of the immigration consequences of a plea of [no contest] to a misdemeanor charge."²⁴¹ The court concluded that it has no duty because "the general rule seems to be that deportation consequences are considered a collateral consequence of a criminal proceeding."²⁴² The court relied on persuasive precedent from the United States Courts of Appeals for the Seventh and Tenth Circuits in reaching its conclusion.²⁴³

C. Commentary

In *State v. Muriithi*, the Kansas Supreme Court incorrectly held that the failure to advise an alien criminal defendant of the deportation consequences of his no contest plea does not constitute ineffective assistance of counsel, and that the court likewise has no duty to advise an alien criminal defendant of immigration consequences.²⁴⁴ The court reached its conclusion by considering deportation a collateral consequence, and by expanding the collateral consequences doctrine to apply not only to the court, but also to defense counsel.²⁴⁵

235. *Id.*

236. *Id.* at 1150.

237. *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *State v. Daley*, 487 A.2d 320, 322-23 (Md. Ct. Spec. App. 1985).

238. *Muriithi*, 46 P.3d at 1151.

239. *Id.*

240. *Id.* at 1153.

241. *Id.* at 1155.

242. *Id.* at 1152.

243. *Id.* Specifically, the court relied on *Santos v. Kolb*, 880 F.2d 941 (7th Cir. 1989), and *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1992). *Id.*

244. *Id.* at 1152, 1155.

245. *Id.* at 1152.

1. Deportation Is a Direct Consequence

The United States Supreme Court has not decided whether deportation is a collateral or direct consequence. The traditional test for determining whether a particular consequence is direct is if it is immediate and automatic, whereas a collateral consequence is more speculative.²⁴⁶ Courts have also distinguished collateral consequences as those that are enforced by another agency, not the sentencing court.²⁴⁷ The distinction grew out of the notion that courts are responsible only for ensuring that criminal defendants are informed of criminal punishments and not of civil penalties. Indeed, the court in *Muriithi* commented that “[t]he trial court is not required to inform a defendant of the collateral consequences of a guilty plea, including the loss of certain civil rights or privileges.”²⁴⁸

The court’s line of reasoning seems to stem from cases dating back as far as 1893.²⁴⁹ Characterizing deportation as a civil consequence would have made sense in 1893 because the INS and its predecessors were located within the Treasury Department, the Department of Commerce and Labor, and the Department of Labor.²⁵⁰ After 1940, however, the INS was moved to the Department of Justice, and the Attorney General received the authority to detain and deport aliens.²⁵¹ The historical basis for labeling immigration as a civil matter is no longer viable, and it should no longer be relied on to characterize deportation as a collateral consequence. The foundation upon which the collateral consequences rule was built has crumbled away.

The only other leg that the collateral consequence rule can stand on is the “immediate and automatic” test. It might have kept immigration in the collateral consequence category before 1996, when there were fewer deportable offenses and more waivers available, but after IIRIRA and AEDPA, deportation is immediate and automatic.²⁵² Those laws expanded the definition of “conviction,” increased the number of deportable offenses, and took away judicial

246. Colella, *supra* note 127, at 309.

247. *Id.*

248. *Muriithi*, 46 P.3d at 1154 (quoting *State v. Cox*, 819 P.2d 1241, 1242 Syl. ¶ 1 (Kan. Ct. App. 1991)).

249. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) ([Deportation] “is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime.”).

250. *See Smith*, *supra* note 2.

251. *INS v. St. Cyr*, 533 U.S. 289, 294 (2001).

252. Lea McDermid, *Deportation Is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741, 762 (2001).

relief.²⁵³ In many cases deportation is now a mandatory, automatic punishment for which the alien can receive no relief.²⁵⁴

In addition, for aliens ordered deported based on a criminal conviction, the Attorney General “shall” detain them, and “under no circumstances . . . shall the Attorney General release” them.²⁵⁵ As a result, in many cases the alien will spend more time in jail fighting his deportation than he would have spent if he had been sentenced to the maximum penalty for the crime with which he was charged. Muriithi did just that; he spent more than two years in jail fighting his deportation, yet the maximum sentence he could have received was one year and six months.²⁵⁶ In Muriithi’s case, deportation was a criminal punishment that was definite and automatic.

By analyzing other collateral consequences, one can see that deportation does not belong in the same category. When compared to having one’s driver’s license suspended, deportation is in a class of its own. Therefore, it should not be lumped together with other fairly insignificant collateral consequences, but should be regarded as a direct consequence of the criminal proceeding. No other collateral consequence can come close to the severity of deportation.

As a result, it is especially important to look to the totality of the circumstances when a guilty or no contest plea is attacked as involuntary and unknowing, because defendants often have a citizen family here in the United States, and may have no contact or relationship with the country to which they are being deported. For example, Muriithi has a son who is a U.S. citizen, and as a result of his deportation he is unable to visit or form a relationship with his own child. He was not only deported, but also barred for at least ten years, and maybe twenty, from reentering the United States legally.²⁵⁷ Because of a public defender’s inattention, Muriithi’s son will grow up without his father.

One reason courts may have been reluctant to label deportation as a direct consequence is the fear of overburdening the courts with increased duties. However, the courts would be required not to fully inform defendants of the specific immigration consequences that will

253. *Id.* at 772; Francis, *supra* note 111, at 701.

254. *See, e.g.*, State v. Muriithi, 46 P.3d 1145 (Kan. 2002).

255. 8 U.S.C. § 1231(a)(2) (2000).

256. Brief of Appellant at 36-37, *Muriithi* (No. 01-87213-A); *see also Muriithi*, 46 P.3d at 1147 (noting that the maximum penalty for the domestic battery count was six months and the maximum penalty for the child endangerment count was one year).

257. 8 U.S.C. § 1182(a)(9)(A)(ii) (2000). Whether the bar to reentry is ten or twenty years depends on whether Muriithi was ultimately deported for committing an aggravated felony or not. *Id.* The definition of aggravated felony under immigration law includes, *inter alia*, a crime of violence, as defined in § 16 of Title 18 of United States Code. 8 U.S.C. § 1101(a)(43) (2000). If either of the crimes for which Muriithi was convicted were considered by the immigration court to be aggravated felonies, then he would be barred for twenty years from reentering the United States. 8 U.S.C. § 1182(a)(9)(A)(ii). Otherwise, the bar would only be ten years. *Id.*

result in their particular cases, but only to ensure upon accepting their pleas that they have been informed by counsel as to immigration consequences. The court's duty in accepting a plea is merely to ensure that it is informed and voluntarily given.²⁵⁸

It is understandable that the Kansas Supreme Court did not decide to label deportation as a direct consequence. Despite the lack of a United States Supreme Court ruling, every jurisdiction to consider the issue has found that deportation is a collateral consequence.²⁵⁹ Those courts all relied on the same faulty precedent as the court in *Muriithi*, but nonetheless, they agree.²⁶⁰ Moreover, if courts were to consider deportation a direct consequence based on IIRIRA and AEDPA, problems could arise in the future if the laws are repealed or if new laws creating waivers and judicial relief from deportation are added.

The best reason for refusing to label deportation as a direct consequence is that it would put the burden on the court to ensure the defendant understands the immigration consequences of his plea, when the real burden should lie on defense counsel. Unfortunately, that is not the reason the Kansas Supreme Court relied on in *Muriithi*. The Kansas Supreme Court should have found that deportation was a direct consequence of Muriithi's no contest plea, and that the trial court had a duty to ensure Muriithi understood the consequences before accepting his plea. By not doing so, manifest injustice resulted. Muriithi should have been allowed to withdraw his plea and plead again.

2. Failure to Inform Non-Citizen Defendants of the Immigration Consequences of Their Pleas Is Ineffective Assistance of Counsel

Failure to advise a non-citizen criminal defendant of the immigration consequences that could result from his guilty or no contest plea is ineffective assistance of counsel. Such a failure violates not only the defendant's constitutional rights to effective assistance of counsel under the Sixth Amendment, but also the defendant's due process rights under the Fourteenth Amendment.²⁶¹ The United States Supreme Court in *Boykin* addressed the court's duty in accepting a plea.²⁶² Due process requires that when a defendant waives a constitutional right, he does so knowingly and voluntarily.²⁶³ In pleading

258. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

259. Chin & Holmes, *supra* note 123, at 699.

260. *Id.*

261. U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1.

262. *Boykin*, 395 U.S. 238.

263. *Id.* at 242-43.

guilty or no contest, the defendant is waiving various constitutional rights, so before a court can accept a guilty or no contest plea, it must ensure the plea was given intelligently and voluntarily.²⁶⁴

Defense counsel's duty in advising a defendant how he should plead is another matter. The United States Supreme Court has not decided whether the failure to advise alien defendants of the immigration consequences of their pleas constitutes ineffective assistance of counsel, but has outlined a test to determine if counsel was ineffective. In *Strickland v. Washington*, the Court developed a two-pronged test under which a claim of ineffective assistance of counsel should be measured.²⁶⁵ The competence prong requires counsel's representation to meet an objective standard of reasonableness, and the Court suggested using practical guides, such as the American Bar Association (ABA) Standards for Criminal Justice, to determine what level of representation is reasonable.²⁶⁶ Under the section entitled "Responsibilities of Defense Counsel," the ABA Standards for Criminal Justice provide,

To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.²⁶⁷

The same section addresses collateral consequences, and states that "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."²⁶⁸ In the eyes of the legal community, defense attorneys have a duty to inform their clients of collateral consequences, including deportation.²⁶⁹ Failing to do so violates the competence prong of the *Strickland* test, and opens the door for the defendant to be able to collaterally attack his conviction and withdraw his plea. When Muriithi's counsel failed to determine his immigration status, investigate the immigration consequences that would result from his plea, and inform him of those consequences, the competence prong of the test was satisfied.

264. *Id.* at 243 n.5.

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

266. *Id.* at 688.

267. AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(b) (3d ed. 1999).

268. *Id.* § 14-3.2(f).

269. See, e.g., Kathleen A. Harvey et al., *Disaster on the Horizon: It's Post-"Conviction" Time; Do You Know Where Your Alien Client Is?*, 73 J. KAN. B. ASS'N 16, 19 (Feb. 2004) ("If your first question to your new criminal defense client is not 'where were you born?' you may be committing malpractice in your initial consultation.").

The prejudice prong of the *Strickland* test in the plea situation requires only that the defendant show “that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”²⁷⁰ It means not that the defendant must prove he would have prevailed at trial, but only that he would have insisted on going to trial.²⁷¹ Muriithi satisfied the prejudice prong when he stated that he would not have pleaded no contest if he had known at the time that he would be deported.²⁷² Even without his express statement, by virtue of the fact that the sentences for the charges to which he pleaded no contest were so slight in comparison to permanent removal from this country, it is very probable that he would have chosen to fight the charges and go to trial. It is even more probable, since deportation would have effectively ended his relationship with his son.

Both prongs of the *Strickland* test were met. Why did the court in *Muriithi* find that counsel was not ineffective? The court, relying on faulty precedent, misapplied the collateral consequences rule. The collateral consequences rule evolved from cases describing the obligations of the *court* in accepting guilty pleas.²⁷³ Many of those cases were decided prior to *Strickland*, and yet are still being used to define counsel’s duties in representing clients.²⁷⁴ The majority of jurisdictions have concluded that deportation consequences are collateral, and therefore, that defense attorneys have no duty to advise their clients of deportation as a result of their pleas.²⁷⁵ In effect, those jurisdictions are saying that a defendant’s counsel owes him no greater duty of care than what the court owes him. Ours is an adversarial system, in which attorneys advocate on their clients’ behalf, and the court remains impartial. The roles of court and counsel are necessarily very different.²⁷⁶ To extend the collateral consequences rule to defense counsel undermines the entire system and “holds attorneys to an unacceptably low standard of practice.”²⁷⁷

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

271. *Id.*

272. State v. Muriithi, 46 P.3d 1145, 1151 (Kan. 2002).

273. See, e.g., Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974); Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989).

274. Chin & Holmes, *supra* note 123, at 702.

275. United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990); Santos v. Kolb, 880 F.2d 941 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); United States v. Gavilan, 761 F.2d 226 (5th Cir. 1985); State v. Tafoya, 500 P.2d 247 (Alaska 1972), *cert. denied*, 410 U.S. 945 (1972); State v. Mott, 407 N.W.2d 581 (Iowa 1987); State v. Daley, 487 A.2d 320 (Md. Ct. Spec. App. 1985); Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989).

276. Chin & Holmes, *supra* note 123, at 727 (noting that “defense counsel and the court have different duties of loyalty, investigation, and legal research as a result of their distinct roles as advocate and decisionmaker”).

277. Francis, *supra* note 111, at 725.

Courts may be reluctant to hold that defense attorneys have an affirmative duty to advise their clients of collateral consequences because they think it will create an unreasonable burden on defense counsel. They might fear that it would require defense counsel to look into the future and speculate about all possible consequences that could arise from the conviction or plea, no matter how far-fetched or unrealistic. For those reasons, courts have preferred the bright-line rule that counsel has no duty to inform clients of collateral consequences. However, that reasoning contradicts the Supreme Court's test for evaluating a claim of ineffective assistance of counsel. The Court noted in *Roe v. Flores-Ortega*²⁷⁸ that "[a]s with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the facts of a particular case."²⁷⁹

Likewise, courts may fear that requiring defense counsel to advise clients of collateral consequences will open the floodgates and allow more claims of ineffective assistance of counsel to be brought, as well as allow more defendants to collaterally attack their convictions. Courts fear a vast number of guilty pleas will be overturned, and that they will be burdened with too many claims of ineffective assistance of counsel.²⁸⁰ In addition, they argue that more defendants will argue ineffective assistance of counsel for receiving the wrong advice.²⁸¹ This argument that the litigation floodgates will open is flawed. The defendant still has to clear the competence and prejudice prong hurdles. Even if defense counsel failed to advise on a particular collateral consequence, if the standards of attorney conduct do not include the duty to inform of that consequence, then the defendant will have a hard time meeting the competence prong. Even if the defendant meets the competence prong, the prejudice prong hurdle must still be cleared. In a plea situation, the defendant must prove that but for counsel's errors, he would have pleaded differently, and in a trial situation must prove that the outcome would have been different. Frivolous claims, even if brought, will be quickly dismissed for failure to satisfy the test. As commentators on this issue have noted, "[T]he greater the direct consequences, the less likely it is that collateral consequences would make a difference."²⁸² For instance, a defendant who faces the death penalty will likely not be too concerned about

278. 528 U.S. 470 (2000).

279. *Id.* at 485.

280. *See, e.g., In re Resendiz*, 19 P.3d 1171, 1191 (Cal. 2001) (Brown, J., concurring and dissenting) (claiming that to allow an ineffective assistance claim for failure to advise of a collateral consequence will "cast a cloud on the validity of hundreds—perhaps thousands—of guilty pleas").

281. *See, e.g., People v. Williams*, 721 N.E.2d 539, 544 (Ill. 1999).

282. Chin & Holmes, *supra* note 123, at 737.

being deported, whereas for someone charged with a simple misdemeanor, like *Muriithi*, it might be the most important consideration.

Moreover, while there are numerous collateral consequences, only a handful are harsh enough to warrant a finding that defense counsel was unreasonable in failing to inform her client of them. Two commentators have noted,

Indeed, a defense lawyer could consider a very limited number of issues that will cover the vast majority of collateral consequences.

The client could be asked three questions:

Are you an alien or a United States Citizen?

Do you have any prior convictions or pending charges?

*Do you have any government licenses, permits, employment, or benefits?*²⁸³

Notwithstanding the widely accepted collateral consequences precedent and the fears of opening the floodgates, some courts have found ways to render justice when a non-citizen defendant is threatened with deportation as a result of his plea. These courts have carved out exceptions to the general rule. One example is the misinformation exception, which states that while *failure* to inform an alien defendant of immigration consequences of his plea does not constitute ineffective assistance of counsel, *misinforming* him does.²⁸⁴ The court in *Muriithi* approved of the exception, but noted that *Muriithi* had not made a specific inquiry about deportation consequences.²⁸⁵ One of the problems with this exception, and courts' reliance on it, is that it places the burden on the defendant to understand how his criminal proceeding will impact his life. That would be difficult for the average layperson to do, but would be much more difficult for alien defendants who may not "be familiar with the United States justice system and may not speak English."²⁸⁶ In essence, this exception "turns the attorney-client relationship on its head."²⁸⁷

The second problem with the misinformation exception is that it has a chilling effect on attorneys.²⁸⁸ Knowing that their representation will be considered ineffective if they give the wrong advice, but effective if they say nothing, simply discourages them from investigating the issues and thoroughly advising their clients. As a consequence,

283. *Id.* at 738; see also Colella, *supra* note 127, at 330 (suggesting that five questions should be asked, including the above-mentioned three as well as what the collateral consequences are relating to felonies within the jurisdiction and what the collateral consequences are for drug or sex-related offenses, if involved in the case).

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

285. *State v. Muriithi*, 46 P.3d 1145, 1150 (Kan. 2002).

286. McDermid, *supra* note 252, at 768 (noting that a non-citizen criminal defendant "may have an even greater expectation of [his] attorney" because he may lack familiarity with the United States system and may not be a native English speaker).

287. Francis, *supra* note 111, at 726 (commenting that the misinformation exception "places an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty").

288. *Id.*

even though the misinformation exception might help a few defendants receive justice, it does far more damage by inhibiting the attorneys on which they rely to guide them through their proceedings.

In addition to the misinformation exception, some courts have created a knowledge exception, meaning that if defense counsel knew or should have known that her client was an alien, then failure to advise him of immigration consequences of his plea would constitute ineffective assistance of counsel. The court in *Muriithi* acknowledged this exception, but found that Muriithi's defense counsel had no reason to know that he was not a citizen, despite the fact that she was present in the courtroom during the exchange between Muriithi and the trial judge, when Muriithi stated that he was from Kenya.²⁸⁹ According to the court, "[a]lthough counsel was present in the courtroom, she had not yet been appointed as Muriithi's counsel or talked to him. . . . It cannot be reasonably inferred from the 'Kenya exchange' that defense counsel was in position to hear what defendant said."²⁹⁰ However, the record clearly shows that defense counsel was appointed *before* the "Kenya exchange," and in fact, Muriithi's appellate counsel submitted a motion for modification of the court's opinion to correct that error in the decision.²⁹¹

In defense of Muriithi's attorney, as a public defender in a crowded and noisy courtroom it is possible that she might not have heard the "Kenya exchange." However, Muriithi spoke English with a very noticeable accent.²⁹² While an accent in and of itself is not enough to conclude a person's citizenship, it is enough to put an attorney on notice that her client was probably born in another country, and might not be a United States citizen. The court refused to acknowledge that fact, and once again placed the entire burden on Muriithi to inform his counsel that he was not a citizen of the United States.²⁹³ The court might have been hoping to create a bright-line rule, requiring unequivocal evidence that the defendant is a non-citizen. However, it is clear from what the United States Supreme Court has said regarding ineffective assistance of counsel that case-by-case factual determinations need to be made.²⁹⁴

Remarkably, the court in *Muriithi* adopted the knowledge exception from *People v. Pozo* but failed to recognize its larger holding.²⁹⁵

289. *Muriithi*, 46 P.3d at 1151.

290. *Id.*

291. Appellant's Motion for Modification of the Court's Opinion, *Muriithi* (No. 01-87213-AS) (on file with author).

292. Brief for Appellant at 20, *Muriithi* (No. 01-87213-A).

293. *Muriithi*, 46 P.3d at 1151 (noting that "[the Kenya] exchange was not a basis for concluding that counsel knew he was an alien because Muriithi did not mention citizenship").

294. *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000).

295. *Muriithi*, 46 P.3d at 1151.

In *Pozo*, the Colorado Supreme Court disregarded the collateral consequence rule and held that defense counsel and the court have different responsibilities, and that each claim of attorney ineffectiveness must be viewed on a case-by-case basis, considering the totality of the circumstances.²⁹⁶ The court in *Muriithi* should have done in 2002 what the court in *Pozo* did in 1987. Interestingly, the Kansas Supreme Court chose to rely on the faulty precedent of the collateral consequences rule, but not on the well-reasoned analysis in *Pozo*.

The legislatures of many states, upon realizing that the courts were not finding any affirmative duty to inform alien criminal defendants of the immigration consequences of their pleas, enacted statutes requiring that either the court or counsel inform criminal defendants of the possibility of adverse immigration consequences resulting from their guilty or no contest pleas.²⁹⁷ While the case law of many states and federal circuits seems to show that there is no duty for attorneys or the court to inform defendants regarding immigration consequences, many of those states recognize a statutory duty to inform the client.²⁹⁸

Taken at face value, these statutes appear to solve the problem because they circumvent the collateral consequences rule. For the most part, however, they put the burden on the court to inform the defendant.²⁹⁹ They consist of a one-sentence warning that is given to the defendant immediately before the plea is taken, and cannot suffice for the thorough investigation and advice of defense counsel.³⁰⁰ The courts in some of those states recognize that a formulaic warning is not adequate “to advise a criminal defendant of the possible consequences of his plea,” and continue to allow defendants to collaterally

296. *People v. Pozo*, 746 P.2d 523, 527 (Colo. 1987).

297. *See, e.g.*, CAL. PENAL CODE § 1016.5(a) (West 1985).

298. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/113-8 (West Supp. 2004); *People v. Williams*, 721 N.E.2d 539, 544 (Ill. 1999).

299. CAL. PENAL CODE § 1016.5(a) (West 1985); CONN. GEN. STAT. § 54-1j(a) (Supp. 2005); D.C. CODE ANN. § 16-713(a) (2001); FLA. R. CRIM. P. 3.172(c)(8); GA. CODE ANN. § 17-7-93(c) (2004); HAW. REV. STAT. § 802E-2 (Supp. 1993); 725 ILL. COMP. STAT. ANN. 5/113-8 (West Supp. 2004); MD. R. ANN. 4-242(e); MASS. ANN. LAWS ch. 278, § 29D (Law. Co-op. 2002); MINN. R. CRIM. P. 15.01; MONT. CODE ANN. § 46-12-210 (2003); NEB. REV. STAT. § 29-1819.02 (1) (Supp. 2004); N.M. R. ANN. 9-406; N.Y. CRIM. PROC. LAW § 220.50 (McKinney 2002); N.C. GEN. STAT. § 15A-1022(a)(7) (2002); OHIO REV. CODE ANN. § 2943.031(A) (West 1997); OR. REV. STAT. § 135.385(2)(d) (2003); R.I. GEN. LAWS § 12-12-22(a)-(b) (Supp. 2003); TEX. CRIM. PROC. CODE ANN. § 26.13(a)(4) (Vernon Supp. 2005); WASH. REV. CODE ANN. § 10.40.200(2) (West 2002); WIS. STAT. ANN. § 971.08(1)(c) (West 1998).

300. *See, e.g.*, CAL. PENAL CODE § 1016.5(a) (West 1985).

Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Id.

attack their convictions and withdraw their pleas based on ineffective assistance of counsel.³⁰¹

The California Court of Appeal in *People v. Soriano* allowed the defendant to withdraw his plea even though he was given the formulaic warning by the trial court *and* by his defense attorney.³⁰² The court reasoned that counsel's representation was ineffective because even though she "warned defendant that his plea might have immigration consequences," she did not research the relevant immigration law and did not advise the defendant that conviction of the charges against him would make him deportable.³⁰³ While *Soriano* still falls into the misinformation exception, that is not what the court primarily relied on, but instead relied on the duty of counsel to adequately advise her client.³⁰⁴

In *Lyons v. Pearce*,³⁰⁵ the Oregon Court of Appeals held that "the failure [of the court] to advise a defendant of possible deportation does not violate either the state or federal constitutions," because the failure is merely a violation of a statutory requirement, not a constitutional mandate.³⁰⁶ However, the court remanded the case to address the defendant's allegation of ineffective assistance of counsel based on his attorney's failure to advise him that his plea would result in his deportation, because effective assistance of counsel is a constitutional mandate.³⁰⁷ Both *Lyons* and *Soriano* recognize that the court and defense attorneys have different roles, even with statutory requirements that the trial court warn defendants that their pleas could have immigration consequences.

3. Modern Trends in Kansas and the United States Court of Appeals for the Tenth Circuit

Twelve years after *Varela*, in *Broomes v. Ashcroft*,³⁰⁸ an alien criminal defendant subjected to deportation because of his guilty plea argued to the United States Court of Appeals for the Tenth Circuit that he received ineffective assistance of counsel.³⁰⁹ The defendant in *Broomes* argued that *Varela* was wrongly decided, but that even if it were correctly decided, subsequent changes in immigration law, including passage of AEDPA and IIRIRA, made possible deportation more akin to a direct consequence than to a collateral one.³¹⁰ The

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

302. *Id.*

303. *Id.* at 335, 336.

304. *Id.* at 336.

305. 676 P.2d 905 (Or. Ct. App. 1984).

306. *Id.* at 908-09.

307. *Id.* at 909.

308. 358 F.3d 1251 (10th Cir. 2004).

309. *Id.* at 1253.

310. *Id.* at 1256.

court discounted Broomes' argument and held that deportation remains a collateral consequence of guilty pleas.³¹¹ The court expanded its previous definition of "collateral consequence" to include consequences that "remain[] beyond the control and responsibility of the district court in which that conviction was entered."³¹² Furthermore, the court clung to the reasoning behind the *Varela* decision, stating that "one appellate panel cannot disturb the decision of another panel absent en banc reconsideration or a superseding contrary decision by the Supreme Court."³¹³

In addition to the misinformation exception to the general collateral consequences rule, the Court of Appeals of Kansas noted another exception in *State v. Chavez-Hernandez*.³¹⁴ The court held that "[w]hether an attorney's failure to inform a client of possible deportation consequences of a nolo contendere plea constitutes ineffective assistance of counsel depends upon whether the attorney knew or should have known that the defendant was not a citizen of the United States."³¹⁵ Therefore, counsel will be found ineffective not only for giving misinformation concerning immigration consequences to her client, but also for failing to inform her client of the immigration consequences of the plea if she knew or had reason to know that her client was not a citizen of the United States.³¹⁶

While deportation consequences have been deemed "collateral" in Kansas, the United States District Court for the District of Kansas in *United States v. Puente-Parga*³¹⁷ held that defense counsel can argue a defendant's deportable status as grounds for a downward departure of defendant's sentence, and the sentencing court can consider it.³¹⁸ *Puente-Parga* further blurs the line between direct and collateral consequences, since now the "collateral" consequence can be used to determine a defendant's sentence, which has always been considered a direct consequence.³¹⁹

These cases show a trend in Kansas to allow more exceptions to the collateral consequences rule. Kansas courts are increasingly unhappy with the harsh result of deportation, but are now bound by *Muriithi*. However, the Kansas Supreme Court and the United States Court of Appeals for the Tenth Circuit are not bound by precedent,

311. *Id.*

312. *Id.*

313. *Id.*

314. No. 91,019 2004 WL 1176690, at *3 (Kan. Ct. App. May 21, 2004) (per curiam).

315. *Id.* (quoting *State v. Muriithi*, 46 P.3d 1145, syl. ¶ 3 (Kan. 2002)). *Chavez-Hernandez* was decided after *Muriithi* and relies on *Muriithi* for the knowledge exception to the collateral consequences rule. *Id.*

316. *Id.*

317. Nos. 02-3364, 01-4024-03 2003 WL 22213131 (D. Kan. Aug. 7, 2003).

318. *Id.* at *2.

319. *Id.*

and should reverse themselves and allow criminal defendants to withdraw their pleas based on ineffective assistance of counsel, in spite of the collateral consequences rule.

4. Modern Trends in Other Jurisdictions

The Oregon Court of Appeals in *Gonzalez v. State*³²⁰ continued to hold that defendants may withdraw their pleas if they were misinformed by defense counsel concerning immigration consequences.³²¹ In *Gonzalez*, the trial court complied with Oregon's statute and told the petitioner "that a guilty plea might affect his immigration status," and at the hearing the petitioner's counsel informed him "that entering a guilty plea 'may [have] an impact' on his immigration status."³²² As the appellate court in *Gonzalez* noted, "[S]tating that a person 'may' be subject to deportation implies that there is some chance, potentially a good chance, that the person will not be deported. That is an incomplete and therefore inaccurate statement if made to an alien considering whether to plead guilty."³²³ The court looked at current immigration law, which showed that the petitioner would be deported unless he could bring a successful collateral attack.³²⁴ Accordingly, the court concluded, "Counsel's failure to give petitioner that information before petitioner pleaded guilty constituted a failure to provide petitioner with constitutionally adequate legal assistance"³²⁵

It is interesting to note that while the court in *Gonzalez* applied the misinformation exception to the facts of the case, it used the word "failure" when referring to counsel's representation.³²⁶ The court expanded the misinformation rule, and other courts will also expand it to fit the facts of the cases before them. The misinformation exception has the potential to completely swallow the collateral consequences rule. The exception used to apply only if defense counsel informed the defendant that he would not be deported, and deportation proceedings were later initiated.³²⁷ Now, it is misinformation to inform a defendant that he may be deported if his deportation is extremely likely or definite.³²⁸ One can see how the misinformation exception could be stretched even further to cover the situation in which counsel informs the defendant that he will be deportable if he pleads

320. 83 P.3d 921 (Or. Ct. App. 2004).

321. *Id.* at 925.

322. *Id.* at 922.

323. *Id.* at 925.

324. *Id.* at 924 n.8.

325. *Id.* at 925.

326. *Id.*

327. *See, e.g.,* Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985).

328. *Gonzalez*, 83 P.3d at 925.

guilty, but fails to inform him that there are no waivers available, or fails to inform him that once deported he faces a ten-year, twenty-year, or permanent bar to re-entry into the United States.

The Supreme Court of New Mexico recently issued a decision that went further than any case previously decided, and expressly rejected the United States Court of Appeals for the Tenth Circuit's holding in *Broomes* that an attorney's failure to advise a defendant of a collateral consequence does not constitute ineffective assistance of counsel.³²⁹ In *State v. Paredes*,³³⁰ the New Mexico Supreme Court held that

the district court's admonition to Defendant that his guilty plea "could" affect his immigration status was sufficient advice to satisfy federal due process . . . ; however, Defendant's attorney had an affirmative duty to determine his immigration status and provide him specific advice regarding the impact a guilty plea would have on his immigration status.³³¹

The court then agreed with the jurisdictions that allow the misinformation exception, and agreed with the expanded version of the exception, whereby an admonition that a defendant "might" be deported would be inaccurate and therefore fit into the misinformation exception.³³² For the court in *Paredes*, however, that was not enough. The court stated, "We go one step further, though, and hold that an attorney's non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance."³³³ Noting that it was departing from the holdings of the Tenth Circuit, the court stated, "We refuse to draw a distinction between misadvice and non-advice."³³⁴ The court then gave three reasons for failing to draw that distinction. The first was that there is only a "tenuous distinction between the two," as "the consequence is the same."³³⁵ The second was that "distinguishing between misadvice and non-advice would 'naturally create a chilling effect on the attorney's decision to offer advice.'"³³⁶ Finally, "not requiring the attorney to specifically advise the defendant of the immigration consequences of pleading guilty would 'place [] an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty.'"³³⁷

The New Mexico Supreme Court did exactly what the Kansas Supreme Court should have done in *Muriithi*. The same tools were

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

330. 101 P.3d 799 (N.M. 2004).

331. *Id.* at 801.

332. *Id.* at 804.

333. *Id.*

334. *Id.*

335. *Id.* at 804-05.

336. *Id.* at 805 (quoting Francis, *supra* note 111, at 726).

337. *Id.* (quoting Francis, *supra* note 111, at 726).

available to both courts: the New Mexico Supreme Court relied on *Strickland, Michel, Hill, Gonzalez*, current immigration law such as IIRIRA and AEDPA, and the ABA Standards for Criminal Justice.³³⁸ The New Mexico Supreme Court also looked at the collateral consequences rule and cases from jurisdictions that applied the rule to the duties of defense counsel.³³⁹ The difference is that the court fully analyzed the issue, looked to the reasoning and history behind the previous decisions, and came to the correct conclusion, rather than simply continuing to misapply faulty precedent.

These recent trends show a willingness of courts to appropriately apply precedent from the United States Supreme Court, rather than apply faulty persuasive authority from other jurisdictions. Hopefully it will combat the trends in the political climate since September 11, 2001, which center on nativism and xenophobia, and will allow non-citizen criminal defendants to exercise their constitutional rights to effective assistance of counsel.

V. CONCLUSION

In *State v. Muriithi*, the Kansas Supreme Court incorrectly held that deportation is a collateral consequence of pleading no contest, and that as a result, failure to inform an alien criminal defendant of possible deportation does not constitute ineffective assistance of counsel.³⁴⁰ Deportation is a harsh penalty, and in many cases is a much harsher penalty than the punishment for violating the law that gave rise to the deportation.³⁴¹ According to one judge, "It is unlike losing one's driver's license, or the right to own firearms, or the right to a government job—each of which . . . [has been] describe[d] as a similarly weighty deprivation."³⁴² In order for a plea to be knowing, informed, and voluntary, a criminal defendant must be informed that if he is a non-citizen, his plea could result in his deportation from the United States. Failure to inform him of the consequence of deportation should be considered ineffective assistance of counsel, and failure of the court to verify that the defendant has been so informed should constitute a violation of defendant's right to due process. The Kansas

338. *Id.* at 801, 803-05.

339. *Id.* at 803.

340. *State v. Muriithi*, 46 P.3d 1145, 1152, 1155 (Kan. 2002).

341. *Id.* at 1147 (noting that the maximum penalty Muriithi could receive for the two counts with which he was charged was eighteen months in jail). As a result of his deportation, he must spend not only eighteen months away from his family, but at the very least ten years. *Id.*; 8 U.S.C. § 1182(a)(9)(A)(ii) (2000). Furthermore, because of the considerable distance between Kenya and the United States, it is not likely that his son could ever visit him in Kenya. Deportation is a harsh penalty as evidenced by Muriithi spending more than two years in jail fighting his deportation. Brief of Appellant at 36-37, *Muriithi* (No. 01-87213-A).

342. *United States v. Del Rosario*, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring).

2005]

Comment

663

Supreme Court failed to analyze the issue properly, and as a result Muriithi's constitutional rights were violated.

