

**HB**

**142**

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2

CS HOUSE BILL NO. 142

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6

For an Act entitled: "An Act amending Rule 5(c) of the Alaska

7

Rules of Criminal Procedure to require

8

court instruction on possible immigration

9

and naturalization consequences of guilty

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or no contest pleas."

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA;

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\* Section 1. Rule 5(c), Alaska Rules of Criminal Procedure,

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is amended to read:

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(c) STATEMENT BY JUDGE OR MAGISTRATE--RIGHT TO COUNSEL--BAIL.

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The judge or magistrate

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(1) shall inform the defendant of the complaint against

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him and of any affidavit filed herewith, and

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(2) shall require that a copy of the complaint and of

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any affidavit filed therewith be delivered to the defendant if

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this has not already been done, and

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(3) shall inform the defendant

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(i) of his right to retain counsel, and

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(ii) of his right to request the assignment of

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counsel if he is unable to obtain counsel, and

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(iii) of his right to have a preliminary

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examination, and

1                    (iv) that, if the defendant is not a citizen of the  
2 United States, a conviction may result in deportation, exclusion  
3 from admission to the United States, or denial of naturalization  
4 under federal law, and

5                    (4) shall inform the defendant that he is not required  
6 to make a statement and that any statement may be used against  
7 him. The judge or magistrate shall allow the defendant  
8 reasonable time and opportunity to consult counsel and shall  
9 admit the defendant to bail as provided by law and by these  
10 rules.

11                    \* Section 2. This Act takes effect on January 15, 1990.

Item 2

STATE OF ALASKA 1989 LEGISLATIVE SESSION  
FISCAL NOTE

Bill Version: HB 142  
 Publish Date: 2/3/89

REQUEST:

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Revision Date:  
 Title: An act amending Rule 11 of  
 Alaska Rules of Criminal Procedure...  
 Sponsor: Judiciary  
 Requestor: State Affairs

Agency Affected: Alaska Court System  
 BRU: Trial Courts  
 Components:

EXPENDITURES/REVENUES:		(Thousands of Dollars)					
OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	

CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
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REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
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FUNDING:		(Thousands of Dollars)					
General Funds	0.0	0.0	0.0	0.0	0.0	0.0	
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	

POSITIONS:		(Thousands of Dollars)					
Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .	

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: *Janna Stewart*  
 Janna Stewart, Magistrate Educ. Coordinator Phone: 264-8228  
 Division: Alaska Court System Date: 02/21/89

Approved by: *Stephanie Cole, for -*  
 Arthur H. Snowden, II, Administrative Director Date: 02/21/89  
 Agency: Alaska Court System

- Distribution (by preparer):
- Legislative Finance
  - Legislative Sponsor
  - Requestor
  - Office of Management & Budget
  - Impacted Agency(ies)
  - Senate Secretary

# State of Alaska

House Majority Leader

COMMITTEES

HOUSE HEALTH, EDUCATION  
AND SOCIAL SERVICES  
HOUSE JUDICIARY  
HOUSE RULES



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Representative Max F. Gruenberg, Jr.  
District 11  
Spenard, Upper Midtown Anchorage

February 7, 1989

MEMORANDUM

To: Rep. H.A. "Red" Boucher  
Chair, House State Affairs

From: Rep. Max F. Gruenberg, Jr. *MF*

Re: HB 142, "An Act amending Rule 11 of the Alaska Rules of Criminal Procedure to require court instructions on possible immigration and naturalization consequences of guilty or no contest pleas."

I would very much appreciate it if you would schedule a hearing for HB 142 as soon as it is possible.

The bill requires a judge to advise a defendant that conviction of a crime may result in deportation or denial of naturalization before the judge accepts a plea of guilty or no contest. Aliens may suffer deportation by pleading guilty to certain offenses. This bill simply requires judges to warn defendants of these possible consequences.

If you have any problems with or questions about this bill, please contact me or my staff attorney, Mark Handley.

Item 4

TAFUYA v. STATE

Alaska 247

Cite as, Alaska, 500 P.2d 247

BOOCHEVER, Justice (concurring).

I concur for the reasons stated in my concurring opinion in Taggard v. State, supra.

3. Criminal Law §641.13(5)

Failure of defense counsel to inform guilty pleading defendant of possibility of deportation as collateral consequence of conviction did not constitute denial of right to effective assistance of counsel as guaranteed by Federal and State Constitutions. Const. art. 1, § 11; U.S.C.A. Const. Amends. 6, 14.

4. Criminal Law §641.13(1)

Standard to test competency of counsel is whether his conduct was so incompetent as to deprive his client of a trial in genuine sense by making the trial a mockery and a farce.

5. Criminal Law §641.13(1)

In determining competency of defense counsel, entire proceedings and whole record must be considered to decide whether his conduct fell short of test of making trial a mockery and a farce, and the only workable standard is to determine whether the proceedings as a whole have judicial character; particular errors or claimed errors of counsel are not enough, and the proceedings must be so tainted that there was an absence of a general trial in any reasonable sense.

6. Criminal Law §641.13(5)

Standard, establishing that defense counsel is considered to have been incompetent if his conduct made trial a mockery and farce, applies to counsel representing a defendant entering a guilty plea as well as counsel representing a defendant at trial.

7. Criminal Law §641.13(1)

Not every error by counsel constitutes incompetent representation.

Stanley P. Cornelius, Anchorage, for appellant.

Seaborn J. Buckalew, Jr., Dist. Atty., Anchorage, John E. Havelock, Atty. Gen., Juneau, Robert L. Eastaugh, Asst. Dist. Atty., Anchorage, for appellee.

Before BONEY, C. J., and CONNOR and ERWIN, JJ.



Not a comment on Requirement

Francisco TAFUYA, Appellant, v. STATE of Alaska, Appellee. No. 1429.

Supreme Court of Alaska. Aug. 11, 1972.

Appeal by defendant from a decision of the Superior Court, Third Judicial District, Anchorage, Ralph E. Mood, J., denying his postconviction application to withdraw guilty plea. The Supreme Court, Boney, C. J., held that defendant's ignorance of deportation possibility which was collateral consequence of conviction did not render his plea involuntary, and that failure of defense counsel to inform defendant of such possibility did not constitute denial of right to effective assistance of counsel as guaranteed by Federal and State Constitutions.

Affirmed.

Rabinowitz, J., dissented and filed opinion.

Boochener, J., not participating.

1. Criminal Law §264

Accused need not be informed about every conceivable collateral effect the conviction might have prior to acceptance of a guilty plea.

2. Criminal Law §273

Guilty pleading defendant's ignorance of deportation possibility which was collateral consequence of conviction did not render his plea involuntary.

10.2(2) appear before officer who testified informant had from defendant sale, conviction from an in-ive because of vidence which

efender, Mere- J. Kulik, Asst. ge, for appel-

Gen., Juneau, ty., Fairbanks,

nd RABINO- and BOOCH-

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) stated in my v. State, su-

OPINION

. BONEY, Chief Justice.

Francisco Tafoya appeals from the denial of his motion to withdraw his guilty plea.

On December 30, 1965, Tafoya, together with his codefendant Alberto Castro, pleaded not guilty to charges of kidnap and rape. Almost a year later, as a result of plea bargaining, they were permitted to withdraw their pleas. The kidnap charge was then dismissed, and they pleaded guilty to rape. The court followed the prosecutor's recommendation that Tafoya be sentenced to three years, suspended, and that he serve two years on probation.

Tafoya is an alien, a Mexican citizen. He is thus deportable for conviction of a crime involving moral turpitude under 8 U.S.C. § 1251(a) (4).<sup>1</sup> However, such a conviction will not furnish grounds for deportation if the sentencing court, at the time of sentencing or within 30 days thereof, makes a recommendation to the Attorney General of the United States that the alien not be deported.<sup>2</sup>

From the record it is apparent that the attorneys then representing Tafoya and

Castro knew that their clients were aliens. A recommendation against deportation was not sought either during plea bargaining or at the time that the guilty pleas were entered apparently neither attorney was aware either of the possibility of deportation or of the means to forestall such a possibility. Counsel for Castro was first informed of the threat of deportation by Castro and Tafoya on December 1, 1966, twenty-seven days after they had pleaded guilty.

Counsel for Castro immediately moved to amend the judgments to include a recommendation that neither Castro nor Tafoya be deported.<sup>3</sup> The superior court denied the motion to amend the sentences of Tafoya and his codefendant. In so ruling, the court specifically declined to recommend either that Tafoya be deported or that he not be deported. Approximately two months later, Tafoya, through his own attorney, again sought to amend the sentence by having the trial court make a recommendation to the Attorney General against deportation. Contrary to the state's earlier position, on this occasion it did not oppose Tafoya's motion. Apparently, because of the lack of opposition the

- 1. 8 U.S.C. § 1251(n) (4) provides:
  - (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial . . . .

- 2. 8 U.S.C. § 1251(b) provides:
  - The provisions of subsection (a) (4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and un-

conditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the [Immigration and Naturalization Service], and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a) (11) of this section.

- 3. Counsel for Castro represented both men because counsel for Tafoya was then out of town.

Assumption by Boney 2/1/67

superior court granted Tafoya's motion to amend the sentence.<sup>4</sup>

Tafoya's two-year probationary period expired in November 1968, at which time the Division of Corrections recommended that his probation be terminated. The recommendation that probation be terminated was approved by the sentencing judge. One year later, when Tafoya's three-year suspended sentence was completed, he moved to withdraw his plea of guilty and to vacate the sentence he had fully served.<sup>5</sup> The reasons advanced for taking this action were that he had been ordered to leave the United States as a result of his conviction of the crime of rape and that he would not have pleaded guilty had he known of the possibility of deportation. After the hearing, Tafoya's petition for post-conviction relief was denied. Tafoya brings this appeal from the superior court's denial of his application for post-conviction relief.

4. The amended judgment reads in part as follows:

IT IS FURTHER RECOMMENDED BY THE COURT to the Attorney General of the United States of America that the above-named defendant, who is an alien, not be deported from the United States of America, such recommendation being made by the Court pursuant to the provisions of Title 8, U.S.C., Section 1251(a) (4) and (b).

IT IS FURTHER ORDERED AND ADJUDGED that the foregoing amendment provisions shall be considered for all purposes as having been included in the original Judgment and Order of Probation rendered and entered in the above-entitled case.

From the record it is unclear what effect this nunc pro tunc recommendation has for purposes of 8 U.S.C. § 1251(b). Since Tafoya's deportation is still being sought, we assume that the nunc pro tunc recommendation against deportation was not given any consideration by the Attorney General of the United States.

5. Tafoya's motion to withdraw his guilty plea was made under Alaska R.Crim.P. 35(b) which provides generally for post-conviction relief rather than under Alaska R.Crim.P. 32(d) which provides as follows for the withdrawal of guilty pleas:

A motion to withdraw a plea of

Tafoya argues first that his unawareness of all of the consequences of a guilty plea renders his plea involuntary and that therefore he must be allowed to withdraw it.

Alaska Rule of Criminal Procedure 11 provides in pertinent part that:

A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.

Unlike Federal Rule of Criminal Procedure 11, the federal counterpart to our rule, Alaska Rule of Criminal Procedure 11 does not explicitly require that the trial court first address the defendant personally to determine whether the plea is made voluntarily and with understanding of the nature of the charge and "the consequences of the plea."<sup>6</sup> In *Ingram v. State*<sup>7</sup> this

guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea.

We decline, however, to dispose of this appeal on the basis of this procedural error. We recognize that Tafoya's present counsel could reasonably have read *Nichols v. State*, 425 P.2d 247 (Alaska 1967), and *Thompson v. State*, 412 P.2d 628 (Alaska 1966), as approving the use of Rule 35(b) as a vehicle for the post-conviction withdrawal of a guilty plea.

In future cases, when a defendant wishes to withdraw a plea of guilty or of nolo contendere after the imposition of sentence, he should seek his relief under Alaska R.Crim.P. 32(d). Alaska R.Crim.P. 35(b) is not to be used as a substitute for Alaska R.Crim.P. 32(d).

6. At the time Tafoya withdrew his not guilty plea and entered his plea of guilty, the trial court made what was at best only a perfunctory inquiry as to whether Tafoya's plea was made "voluntarily with understanding of the nature of the charge."

7. 450 P.2d 161 (Alaska 1969).

court construed Alaska's Rule 11 in a manner which in effect brought our Rule 11 into conformity with the provision found in Federal Rule 11, which conditions the voluntariness of a guilty plea on the accused's understanding of the nature of the charge and the consequences of the plea. As we stated in *Ingram*:

We need not explore here the scope of the term 'consequences'. Suffice it to say that an 'understanding of the nature of the charge', within the meaning of Criminal Rule 11, encompasses an awareness of the consequences of a guilty plea, that one of the consequences an accused must have knowledge of, gained either from his counsel or the court, is not only the maximum sentence that might be imposed, but the mandatory minimum sentence as well. . . .<sup>8</sup>

In reaching this interpretation in *Ingram*, we relied in part on *Kercheval v. United States*, where the Court said:

Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.<sup>9</sup>

We are thus faced with the necessity of exploring the scope of the term "consequences," as used in this court's interpretation in *Ingram*, of Alaska Rule of Crimi-

nal Procedure 11 in order to reach the ultimate question whether Tafoya has made a sufficient showing of manifest injustice under Rule 32(d) to warrant relief.<sup>10</sup> As in *Ingram*, we turn to federal law.

In *United States v. Cariola*,<sup>11</sup> which we cited in *Ingram*, the defendant discovered, sixteen years after entering his guilty plea, that his conviction disenfranchised him in a state to which he had moved. The court rejected his application to withdraw his plea, stating that:

[U]nsolicited advice concerning the collateral consequences of a plea which necessitates judicial clairvoyance of a superhuman kind can be neither expected nor required.<sup>12</sup>

[1] Federal judicial precedent, in line with *Cariola*, has established that an accused need not be informed about every conceivable collateral effect the conviction might have prior to the acceptance of a plea of guilty.<sup>13</sup> The leading federal case concerning deportation as a consequence of a guilty plea is *United States v. Parrino*.<sup>14</sup> Like Tafoya, Parrino had fully served his sentence and was faced with deportation as a result of his conviction when he attempted to withdraw his guilty plea. The court denied Parrino's request, holding that the possibility of deportation was a collateral consequence.<sup>15</sup>

8. *Id.* at 165 (footnotes omitted).

9. 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009, 1012 (1927).

10. Wright states that "[a]lthough somewhat different considerations may be involved, the factors relevant on a motion to withdraw a plea of guilty are closely related to those the court must examine before accepting such a plea in the first instance." 2 C. Wright, *Federal Practice and Procedure* § 537, at 465 (1969) (footnote omitted). *Kadwell v. United States*, 315 F.2d 667, 669 n. 6 (9th Cir. 1963); *United States v. Mack*, 240 F.2d 421 (7th Cir. 1957).

11. 323 F.2d 180 (3d Cir. 1963).

12. *Id.* at 186. The distinction between collateral and direct consequences for the purposes of Fed.R.Crim.P. 11 has been

implicitly recognized by the United States Supreme Court. See *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747, 760 (1970).

13. See, e.g., *Meaton v. United States*, 328 F.2d 370 (5th Cir. 1964), cert. denied, 380 U.S. 916, 85 S.Ct. 902, 13 L.Ed.2d 801 (1965) (conviction might result in loss of voting rights and right to travel abroad); *Redwine v. Zuckert*, 115 U.S. App.D.C. 130, 317 F.2d 336 (1963) (conviction might result in an undesirable dis-

14. 212 F.2d 919 (2d Cir. 1954). charge from the Air Force).

15. *Parrino* presents a situation even more sympathetic than the instant case. Parrino's counsel specifically, but erroneously, informed him that his conviction would not lead to deportation. Tafoya's counsel offered no such misinformation.

The *Parrino* rule has been consistently followed in the federal courts.<sup>16</sup> In *Joseph v. Esperdy*<sup>17</sup> the defendant argued that the federal court should vacate his state conviction because the failure of the state judge to advise him that his conviction would subject him to deportation made his plea involuntary. The court denied him relief, explaining its reliance on the direct-collateral consequences dichotomy as follows:

[E]ven in this Court, where it is mandated that the full range of consequences be set out [citation to Federal Rule of Criminal Procedure 11] it seems onerous and absurd to expect a judge to explain to each and every defendant who pleads guilty the full range of collateral consequences of his plea and, indeed, to anticipate what those collateral consequences are.<sup>18</sup>

We agree. It would indeed be onerous and absurd to require the trial judge to delve into all the peculiarities of each defendant's birth, nationality, occupation, and other circumstances, and to apprise him of all the collateral consequences possibly flowing therefrom. That burden should properly fall on the defendant and his counsel.

[2] We therefore hold that the possibility of deportation is a collateral consequence of conviction, Tafuya's ignorance of which did not render his plea involuntary.

[3] Having concluded that the burden of advising a defendant of collateral con-

sequences falls not on the court, but on the defendant's counsel, we must now consider Tafuya's argument that he was denied adequate assistance of counsel. The essence of his argument is that the failure of his counsel to advise him of the possibility of deportation constituted a deprivation of the effective assistance of counsel as guaranteed him by the United States<sup>19</sup> and Alaska Constitutions.<sup>20</sup>

[4-6] The standard employed in Alaska to test the competency of counsel is well settled. As we stated in *White v. State*:

The criterion employed is that if the conduct of counsel was so incompetent as to deprive his client of a trial in any genuine sense—making that trial a mockery and a farce—then the defendant is entitled to a new trial . . . .

The 'mockery and farce' test is a relatively stringent one. . . . [W]e must consider the entire proceedings and the whole record to decide whether counsel's conduct fell short of the mark. The only workable standard is to determine whether the proceedings as a whole have judicial character. Particular errors or claimed errors of counsel are not enough. The proceedings must be so tainted that there was an absence of a genuine trial in any reasonable sense.<sup>21</sup>

The standard was further elaborated upon by this court in *Dimmick v. State*:

The right to the effective assistance of counsel requires only that counsel be conscientious and diligent in assisting a de-

16. *E. g.* *United States v. Sambro*, 454 F.2d 918 (D.C.Cir. 1971); *United States ex rel. Durante v. Holton*, 228 F.2d 827 (7th Cir.), cert. denied, 351 U.S. 963, 76 S.Ct. 1027, 100 L.Ed. 1484 (1956); *Joseph v. Esperdy*, 267 F.Supp. 492 (S.D. N.Y.1966); cf. *United States v. Briscoe*, 130 U.S.App.D.C. 289, 432 F.2d 1351 (1970).

17. 267 F.Supp. 492 (S.D.N.Y.1966).

18. *Id.* at 494 (emphasis in original).

19. Amends. VI, XIV.

20. Art. I, § 11.

21. 457 P.2d 650, 653 (Alaska 1969); accord, *Condon v. State*, Op.No. 802, 498 P.2d 276 (Alaska 1972); *Thessen v. State*, 454 P.2d 341, 352 (Alaska 1969), cert. denied, 396 U.S. 1029, 60 S.Ct. 588, 24 L.Ed.2d 525 (1970); *Mend v. State*, 445 P.2d 229, 233 (Alaska 1968); *Anderson v. State*, 438 P.2d 228, 230-231 (Alaska 1968). See also *Johnson v. State*, 486 P.2d 379, 380 (Alaska 1971); *Dimmick v. State*, 473 P.2d 616, 618 (Alaska 1970); *Lewis v. State*, 469 P.2d 689, 692 n. 3 (Alaska 1970).

order to reach the other Tafuya has owing of manifest 32(d) to warrant . we turn to federal

Cariola,<sup>11</sup> which we fendant discovered, ring his guilty plea, nfranchised him in moved. The court 1 to withdraw his

concerning the col- of a plea which clairvoyance of a be neither expected

precedent, in line lished that an ac- rmed about every fect the conviction e acceptance of a ading federal case s a consequence of tates v. Parrino.<sup>14</sup> d fully served his with deportation tion when he at- guilty plea. The quest, holding that ation was a col-

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tion even more ant case. Par- but erroneous- onviction would 'afuya's counsel mation.

501

defendant in having a genuine trial in a reasonable sense. . . .<sup>22</sup>

The same "mockery and farce" standard applies to counsel representing a defendant entering a guilty plea.<sup>23</sup>

We thus must determine if Tafoya was provided genuine proceedings in a reasonable sense and if those proceedings were of a judicial character. Indirectly, the dichotomy between direct and collateral consequences again enters into our consideration. Our focus in examining the proceedings below must be on those facets intrinsic to the proceedings themselves. Thus if counsel had failed to warn Tafoya of certain direct consequences of his plea, we would not only have concluded above that his plea was involuntary, but we would also conclude now that he had not been provided with a genuine proceeding and therefore that he had been denied the effective assistance of counsel. However, error on counsel's part with regard to collateral consequences cannot be said to have infected the proceedings to such an extent as to have prevented their being either genuine or of a judicial character. We therefore agree with the federal courts<sup>24</sup> that failure of counsel to inform of the possibility of deportation does not constitute denial of the right to the effective assistance of counsel.

22. 473 P.2d 616, 618 (Alaska 1970) (footnote omitted).

23. *United States v. Wight*, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 850, 70 S.Ct. 478, 94 L.Ed. 586 (1950).

24. *United States v. Sambro*, 454 F.2d 918 (D.C.Cir. 1971); *United States v. Briscoe*, 139 U.S.App.D.C. 289, 432 F.2d 1351 (1970); *United States v. Parrino*, 212 F.2d 919 (2d Cir. 1954).

25. We do not discuss, for we consider unfounded, Tafoya's third argument, that he was deprived of due process by virtue of the superior court's refusal to determine whether or not he should be deported. 8 U.S.C. § 1251(b) allows, but does not require, the sentencing court to recommend either for or against deportation. Moreover, here the superior court considered the motion to add a recommendation to the judgment. In denying

[7] Superficially, there may appear to be an anomaly in holding both that defense counsel has the burden of informing his client of collateral consequences and that failure to inform of such consequences does not constitute denial of the effective assistance of counsel. The appearance of anomaly results from the collateral character of the consequence of deportation. Not every error by counsel constitutes incompetent representation. While we may sympathize with Tafoya, we cannot accept either of his arguments discussed above.<sup>25</sup>

The decision of the superior court denying Tafoya's application for post-conviction relief is affirmed.

BOOCHEVER, J., not participating.

RABINOWITZ, Justice (dissenting).

In my view, the central issue in this appeal is whether Tafoya has made a sufficient showing of "manifest injustice" under Criminal Rule 32(d) to warrant the setting aside of the judgment of conviction which was entered against him and to permit him to withdraw his guilty plea.<sup>1</sup> Criminal Rule 32(d) provides:

A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court, after sentence,

that motion, the superior court judge stated that he thought that the possibility of deportation was an appropriate element of judgment and that the court would have been more comfortable with the light sentence imposed had the judge known deportation was a possibility.

1. Federal authority has established that, prior to imposition of sentence, withdrawal of a plea of guilty should be allowed if it was induced by fraud, mistake, imposition, misrepresentation, or misapprehension by the defendant of his legal rights. *Kienlen v. United States*, 379 F.2d 20 (10th Cir. 1967); *Williams v. United States*, 192 F.2d 39 (5th Cir. 1951).

In *Kereheval v. United States*, 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009, 1012 (1927), the Supreme Court said:

[O]n timely application, the court will vacate a plea of guilty shown to have

there may appear to  
ing both that defense  
en of informing his  
nsequences and that  
f such consequences  
nial of the effective  
The appearance of  
the collateral char-  
ence of deportation.  
ounsel constitutes in-  
ion. While we may  
ya, we cannot accept  
ts discussed above.<sup>25</sup>  
superior court deny-  
n for post-conviction

not participating.

Justice (dissenting).  
The central issue in this  
case is whether the  
Court has made a suf-  
ficiently "manifest  
injustice" under Rule  
(d) to warrant the  
reversal of conviction  
against him and to  
allow his guilty plea.<sup>1</sup>  
The Court provides:

"To allow a plea of guilty  
to be entered only before sen-  
tencing and the imposi-  
tion of sentence, and  
then to correct mani-  
fest injustice, after sentence,

is not the sounder view  
of the possibility  
that the possibility  
of an appropriate ele-  
ment at the court would  
be available with the light  
of a judge known de-  
ficiency.

It is established that,  
if withdrawal  
should be allowed  
and, mistake, in-  
accuracy, or misappre-  
hension of his legal rights,  
see, 370 F.2d 20  
Williams v. United  
States, 274 U.S.  
583, 71 L.Ed.  
Supreme Court

the court will  
be shown to have

may set aside the judgment of conviction  
and permit the defendant to withdraw  
his plea.

Resolution of this Criminal Rule 32(d) is-  
sue turns on whether the possibility of  
Tafoya's deportation was one of the con-  
sequences of his guilty plea of which he  
must have had knowledge in order to have  
pled "voluntarily" to the rape charge.

In my view, the court's reliance upon the  
majority opinion in *United States v. Par-  
rino*, 212 F.2d 919 (2d Cir. 1954), is mis-  
placed. In *Parrino*, the defendant had  
fully served a two-year sentence and was  
faced with deportation as a result of his  
conviction when he attempted to withdraw  
his guilty plea. Withdrawal was not al-  
lowed because

[g]enerally . . . the defendant's  
surprise as to the severity of sentence  
imposed after a plea of guilty, standing  
alone, is not such manifest injustice as  
to require vacation of the judgment.  
. . . 212 F.2d at 921.

been unfairly obtained or given through  
ignorance, fear or inadvertence. Such  
an application does not involve any ques-  
tion of guilt or innocence. The court  
in exercise of its discretion will permit  
one accused to substitute a plea of not  
guilty and have a trial if for any reason  
the granting of the privilege seems fair  
and just. (citation omitted.)

According to Professor Wright, the  
sounder view "supported both by the lan-  
guage of the rule and by the reasons for  
it, would be to allow withdrawal of the  
plea prior to sentencing unless the prose-  
cution has been substantially prejudiced  
by reliance upon the defendant's plea."  
2 C. Wright, *Federal Practice and Pro-  
cedure* § 538, at 4474-75 (1969) (foot-  
note omitted); See *United States v. Sta-  
yton*, 408 F.2d 559 (3rd Cir. 1969).

After sentence has been imposed, Crim.  
R. 32(d) provides that withdrawal of a  
plea of guilty or nolo contendere will be  
allowed only "to correct manifest injus-  
tice." The grounds for the presentence  
post sentence distinction drawn by the  
rule was explained in *Kadwell v. United  
States*, 315 F.2d 667, 670 (9th Cir. 1963):

This distinction rests upon practical  
considerations important to the proper  
administration of justice. Before sen-  
tencing, the inconvenience to court and  
prosecution resulting from a change of

plea is ordinarily slight as compared  
with the public interest in protecting  
the right of the accused to trial by jury.  
But if a plea of guilty could be retracted  
with ease after sentence, the accused  
might be encouraged to plead guilty to  
test the weight of potential punishment,  
and withdraw the plea if the sentence  
were unexpectedly severe. The result  
would be to undermine respect for the  
courts and fritter away the time and  
painstaking effort devoted to the sen-  
tencing process. (emphasis in original)  
(footnotes omitted)

2. Judge Frank goes on to say:  
For the Supreme Court has said that  
"deportation is a drastic measure, at  
times the equivalent of banishment or  
exile" and "is a penalty." Mr. Jus-  
tice Jackson has described it as "a life  
sentence of banishment". I cannot be-  
lieve that no "manifest injustice" exists  
merely because of the sentence of ban-  
ishment for life was not imposed di-  
rectly by the judge.

*United States v. Parrino*, 212 F.2d 919,  
924 (2d Cir. 1954) (dissenting opinion)  
(footnotes omitted).

3. Alaska's Crim.R. 32(d) is identical to  
Fed.R.Crim.P. 32(d).

4. SA J. Moore, *Federal Practice* § 32.07  
[3], at 32-106 (2d ed. 1972) (footnotes

omitted).

5. See also *United States v. Parrino*, 212 F.2d 919,  
924 (2d Cir. 1954) (dissenting opinion) (footnotes omitted).

the other hand, most federal decisions on the point have held that the possibility of deportation is not a *direct* consequence of a guilty plea, and therefore it is not necessary that the accused be informed of the likelihood of deportation prior to acceptance of his plea. *See, e. g.*, United States ex rel. Durante v. Holton, 228 F.2d 827 (7th Cir.), cert. denied, 351 U.S. 963, 76 S.Ct. 1027, 100 L.Ed. 1484 (1956); Joseph v. Esperdy, 267 F.Supp. 492 (S.D.N.Y.1966). The only explanation for these deportation decisions is found in the *Joseph* case where it is stated:

[I]n this Court, where it is mandated that the full range of consequences be set out . . . it seems onerous and absurd to expect a judge to explain to each and every defendant who pleads guilty the full range of *collateral* consequences of his plea . . . .<sup>5</sup>

I do not find such reasoning persuasive. On the particular facts of this record, I would hold that Tafoya has made out a case of "manifest injustice" under Criminal

Rule 32(d), which showing requires that his judgment of conviction be set aside and that he be permitted to withdraw his plea of guilty to the charge of rape.<sup>6</sup> Here Tafoya's own counsel, as well as counsel for his codefendant, although aware that Tafoya and his codefendant were aliens, did not at any time prior to the change of plea advise Tafoya that he was subject to deportation as a possible consequence of his pleading guilty to the rape count. Nothing in the record before us contradicts Tafoya's assertion that it was only after he was sentenced upon his plea of guilty that he first learned deportation proceedings against him were being contemplated because of his conviction of rape. In such circumstances, I think the stringent "manifest injustice" standard of Criminal Rule 32(d) was met. I am not persuaded that the *Parrino* line of federal authority, which holds that the possibility of deportation is only a collateral consequence for purposes of determining whether the plea is voluntary, should be followed.<sup>7</sup> In light of the

omitted). *See also* United States v. Briscoe, 130 U.S.App.D.C. 289, 432 F.2d 1351, 1353 (1970).

Legal commentary, to the limited extent it addresses itself to the consequences of deportation, favors the approach taken by Judge Frank in his *Parrino* dissent. A Note in the Yale Law Journal concluded:

[A] defendant who is able to establish that his plea was entered because of mistake as to consequences should be allowed withdrawal . . . . [T]here still exists the possibility of a guilty plea being entered by an innocent person relying on the security of a known outcome. This possibility is present whether the mistake concerns 'collateral' or 'direct' consequences. Note, 64 Yale L.J. 590, 599 (1955) (footnotes omitted).

A Note in 55 Colum.L.Rev. 360, 378 (1955), concluded that its argument against allowing withdrawal "is less persuasive where serious consequences, like deportation or expatriation, are involved." A Note in the Wash. University Law Quarterly states in part that although it is clear that the collateral consequences of a conviction need not be understood by the defendant about to plead guilty "[w]hat constitutes a 'collateral' conse-

quence remains obscure." The Note then states:

For example, parole ineligibility is now characterized as a direct consequence, although one classified as a collateral consequence about which a defendant need not be informed. Other collateral consequences, deportation conspicuously have chimerical characteristics of 'directness' which may eventually lead to a similar shift in dissatisfaction. Note, 1970 Wash.U.L.Q. 289, 320.

5. Joseph v. Esperdy, 267 F.Supp. 492, 494 (S.D.N.Y.1966) (emphasis in original).
6. In my view, the accused's guilt or innocence is not relevant in regard to a motion to withdraw a guilty plea under Crim. R. 32(d). Kercheval v. United States, 274 U.S. 220, 224, 47 S.Ct. 592, 71 L.Ed. 1009, 1012 (1927); 2 C. Wright, Federal Practice and Procedure § 537, at 469-71 (1969). A.B.A. Minimum Standards on Pleas of Guilty § 2.1(a) (iii) (approved Draft, 1968).
7. I do not necessarily find that Tafoya's plea of guilty was involuntary in the Crim.R. 11 sense, for a Crim.R. 32(d) motion to withdraw a guilty plea need not assert that the trial court failed to comply

foregoing, I would reach the conclusion that under the circumstances of this record the "manifest injustice" criterion of Criminal Rule 32(d) has been satisfied. For here Tafoya would not have pled guilty to the charge of rape were it not for the fact that neither his counsel nor co-defendant's counsel advised him that he was deportable if he entered such plea.

My analysis of the case at bar necessarily involves an assessment of the record as well as application of Criminal Rule 32(d) to the pertinent portions of the record. In making this analysis, I have taken into consideration the roles played by plea bargaining and guilty pleas in the administration of criminal justice in the federal and various state systems, as well as in Alaska's system of criminal justice. A high percentage of all criminal cases are disposed of on guilty pleas.<sup>8</sup> Professor Moore notes:

Were the proportion of pleas to trials reduced, the machinery of justice . . . would break down. These facts of judicial life are worth emphasizing on

with the provisions of Crim.R. 11. *United States v. Sambro*, 454 F.2d 918, 925-926 (D.C.Cir. 1971) (separate opinion of Chief Judge Bazelon); *Pilkington v. United States*, 315 F.2d 204, 209 (4th Cir. 1963). In *Pilkington*, the court stated:

While there may be a considerable overlap, the concept of 'manifest injustice' under Rule 32(d) permits the judge a greater latitude than the requirements of constitutional 'due process.' The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done. 315 F.2d at 209. (citations omitted)

Compare Professor Wright's statement that

[t]here is one apparent exception to the 'manifest injustice' standard. This is that if the court has failed to scrutinize a guilty plea properly, as required by Rule 11, before accepting it, an application after sentencing to withdraw the plea must be judged by the same liberal standard that applies before sentence has been imposed.

occasions when the courts express irritation with alleged abuse of post-conviction remedies.<sup>9</sup>

Given the dependence of our system of criminal justice upon waivers by defendants of their constitutional rights, embodied in jury trial determinations of their innocence or guilt, our courts have the concomitant obligation to insure that a guilty plea is "made voluntarily after proper advice and with full understanding of the consequences."<sup>10</sup>

Criminal Rule 32(d) affords the accused the procedural vehicle for withdrawal from plea bargains which were entered into without the necessary information to make an intelligent decision.<sup>11</sup> Prior to imposition of sentence, "[t]he court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."<sup>12</sup> After sentencing, the defendant must surmount the more stringent standard of "manifest injustice." The reasons for the higher standard after sentence appear to

2 C. Wright, *Federal Practice and Procedure* § 539, at 476 (1969) (footnote omitted). In support of the text, Professor Wright cites *United States v. Cody*, 438 F.2d 287 (8th Cir. 1971), and *Bishop v. United States*, 121 U.S.App.D.C. 243, 349 F.2d 220 (1965).

8. SA J. Moore, *Federal Practice* ¶ 32.07 [3], at 32-97 (2d ed. 1972); President's Commission on Law Enforcement and The Administration of Justice, Task Force Report: *The Courts*, at 9 (1967); Note, *Plea Bargaining: A Model Court Rule*, 4 J. L. Reform 487 (1971).

9. SA J. Moore, *Federal Practice* ¶ 32.07 [3], at 32-97 (2d ed. 1972) (footnotes omitted).

10. *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009, 1012 (1927).

11. *United States v. Sambro*, 454 F.2d 918, 925 (D.C.Cir. 1971) (separate opinion of Chief Judge Bazelon).

12. *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009, 1012 (1927).

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be considerations of judicial economy and a reluctance to let the defendant have two chances to secure favorable disposition of his case.<sup>13</sup> Neither consideration is particularly relevant to the case at bar. The superior court time expended in securing Tafoya's guilty plea has not been wasted under my analysis since the sentence imposed has been fully served. Moreover, it cannot be said that Tafoya, having heard his sentence, is attempting a second go around at sentencing. Here Tafoya has not only heard his sentence but has served it fully.<sup>14</sup>

In regard to the question as to precisely what an accused should be advised of by the court in order for the court to determine whether the plea of guilty is made with an understanding of its consequences as required by Criminal Rule 11,<sup>15</sup> I think that this is a matter which should be referred to this court's Standing Advisory Committee on Criminal Rules for study and recommendation to this court. In the interim, I would require that an alien be informed of the possibility of deportation before he will be considered to have pled voluntarily with an understanding of the consequences of a guilty plea. For I do not think it too onerous a burden to determine prior to acceptance of a guilty plea whether an accused is an alien, and if

he is, to inform him that he may face deportation as a result of his plea and conviction in a given case.

I also cannot agree with the court's holding that Tafoya was accorded effective assistance of counsel as guaranteed him by the United States<sup>16</sup> and Alaska Constitutions.<sup>17</sup> Tafoya's showing remains uncontradicted that prior to pleading guilty both his own attorney and counsel for his codefendant knew that Tafoya and his codefendant were aliens. But at no time preceding the entry of his guilty plea was Tafoya advised that because of his alien status he was subject to deportation upon conviction of a crime involving moral turpitude. Both counsel for Tafoya and his codefendant admit they were unaware that Tafoya was deportable under 8 U.S.C. Section 1251(a) (4) if he pled guilty to the crime of rape.

In order to reach the conclusion that deportation of an alien is merely a collateral consequence of his guilty plea, one must necessarily view the right to live in the United States of America, as well as banishment therefrom, as matters of small moment. I am not prepared to mute the drastic ramifications deportation can have for the individual involved. In my view, effective assistance of counsel in the circumstances of this case required Tafoya's

13. See discussion in note 1, *supra*.

14. A procedural problem should be mentioned in my view. In the superior court, Tafoya denominated his application seeking leave to withdraw his guilty plea as an application for post-conviction relief. My study of this application and the relief sought therein suggests that procedurally Tafoya should have moved pursuant to Crim.R. 32(d), which governs withdrawals of guilty pleas, rather than under Crim.R. 35(b), which generally governs post-conviction relief matters.

Since counsel for Tafoya could have reasonably read *Nichols v. State*, 425 P.2d 247 (Alaska 1967), and *Thompson v. State*, 412 P.2d 628 (Alaska 1966), as approving use of Crim.R. 35(b) as the proper procedural vehicle for seeking withdrawal of a guilty plea after sentence had been imposed, I think the matter should be

considered as properly before us in the procedural sense. In future cases where a defendant desires to withdraw a plea of guilty or of *nolo contendere* after imposition of sentence, such relief should be sought by way of motion made, pursuant to Crim.R. 32(d).

15. *McCarthy v. United States*, 394 U.S. 459, 465, 89 S.Ct. 1160, 1170, 22 L.Ed.2d 418, 425 (1969) (footnote omitted):

[T]he more meticulously the Rule [Rule 11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

16. Amends. VI, XIV.

17. Art. I, § 11.

attorney to acquaint himself with the federal law governing convictions of aliens and to inform Tafoya of deportation possibilities arising from his plea. Absent any such minimal legal assistance, I cannot join in this court's conclusion that Tafoya received competent legal representation prior to and at the time he pled guilty.<sup>20</sup>

For the foregoing reasons I would reverse the superior court's order denying Tafoya post-conviction relief and remand the case with directions to set aside Tafoya's judgment of conviction and, pursuant to Criminal Rule 32(d), to permit Tafoya to withdraw his guilty plea to the charge of rape.

20. Nor can I find that through the conscientious and diligent efforts of his trial counsel Tafoya was given effective assistance of counsel in accordance with 500 P.2d—17

established notions of fair play and substantial justice. Condon v. State, Opinion No. 802, 498 P.2d 276 (Alaska 1972).

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L. EDWARDS

## THE RIGHT OF THE ALIEN TO BE INFORMED OF DEPORTATION CONSEQUENCES BEFORE ENTERING A PLEA OF GUILTY OR NOLO CONTENDERE

*The Immigration and Nationality Act provides for deportation of aliens convicted of specified crimes. Frequently, alien defendants offer guilty pleas unaware—or misinformed—that they thereby subject themselves to potential deportation. Traditionally, courts have not had to inform defendants of deportation consequences. Deportation, however, can be devastating to the alien and his family. This Comment suggests that a plea is not fully voluntary if offered unaware of such serious implications. Courts should be required to inform alien defendants of deportation consequences before accepting pleas of guilty.*

### INTRODUCTION

Alien residents<sup>1</sup> of the United States encounter two separate modes of punishment when convicted of certain crimes. They, as all citizens, are first subject to the criminal sentence meted out by the criminal justice system. In addition, they then become vulnerable to the myriad consequences that arise from various specified convictions, chief of which for the alien is deportation.<sup>2</sup> Given the enormous consequences for the alien and his family that result from such convictions,<sup>3</sup> it is anomalous to the American judicial system that the alien, his attorney, and even the court frequently are unaware of the resultant and often inevitable deportation proceeding that arises from the alien's conviction.<sup>4</sup>

1. The Immigration and Nationality Act defines an alien as "any person not a citizen or national of the United States." Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1982).

2. Immigration and Nationality Act § 241(a), 8 U.S.C. § 1251(a) (1982).

3. For example, upon conviction of a crime involving moral turpitude, such as petty theft or simple fraud, an alien can be subject to near imminent deportation, even though the actual sentence is slight, or even suspended.

4. For a discussion of the alien facing criminal charges see generally Bastone, *What Every Attorney Who Defends a Criminal Case Should Know—and Usually Doesn't—About the Immigration and Nationality Act*, 22 B.B.J. 3, 17 (1978); Hol-lander, *Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation*, 9 N.M.L. REV. 45 (1978-1979).

The alien's plea to a criminal charge assumes critical dimensions for three primary reasons. First, a plea of guilty or nolo contendere is itself a conviction.<sup>5</sup> Second, an overwhelming number of convictions arise not from actual trial proceedings, but from offered and accepted pleas of guilty.<sup>6</sup> Third, aliens commonly offer pleas of guilty without any awareness that they are thereby subjecting themselves to possible deportation.

Studies have estimated that as many as ninety-five percent of all criminal cases result in guilty pleas,<sup>7</sup> a substantial number of which are induced by plea bargains or discussions.<sup>8</sup> Moreover, defendants frequently plead guilty while believing in or maintaining their innocence.<sup>9</sup> The evidence against an accused can be so considerable that the offer of a lesser charge or the likelihood of a reduced or suspended sentence appears to be in his best interest.<sup>10</sup> The United States Supreme Court, in *North Carolina v. Alford*,<sup>11</sup> has held that

5. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." See *infra* note 134 (plea of nolo contendere tantamount to conviction).

6. See, e.g., FED. R. CRIM. P. 11 advisory committee notes [hereinafter cited as Advisory Notes]: "Administratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions;" BOND, PLEA BARGAINING AND GUILTY PLEAS, § 1.2 (2d ed. 1983); NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

7. E.g., STANDARDS RELATING TO PLEAS OF GUILTY, 1-2 (Approved Draft 1968); 1976 DIRECTOR OF THE AD. OFF. OF THE U.S. CTS. ANN. REP. 360 table D-4 (of 40,112 convictions, 34,041 were by pleas of guilty or nolo contendere).

8. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE AD. OF JUST.—TASK FORCE ON THE AD. OF JUST., TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as PRESIDENT'S COMM'N].

The question of guilt or innocence is not contested in the overwhelming majority of criminal cases. A recent estimate is that guilty pleas account for 90 percent of all convictions; and perhaps as high as 95 percent of misdemeanor convictions.

\*\*\*\*\*  
A substantial percentage of guilty pleas are the product of negotiations between prosecutor and defense counsel or the accused.

*Id.*

9. PRESIDENT'S COMM'N *supra* note 8, at 11. "The most troublesome problem is the possibility that an innocent defendant may plead guilty because of the fear that he will be sentenced more harshly if he is convicted after trial or that he will be subjected to damaging publicity of a repugnant charge."

10. FED. R. CRIM. P. 11(e)(1)(A)-(C) provides that the government, in exchange for a plea of guilty or nolo contendere, can (1) move for dismissal of other charges; (2) make a recommendation or agree not to oppose the defendant's request for a particular sentence; or (3) agree that a specific sentence is the appropriate disposition of a given case.

11. 400 U.S. 25, 37 (1970). *But cf.* *United States v. Russell*, 686 F.2d 35, 41 (D.C. Cir. 1982) which says:

The serious consequences of involuntary deportation . . . clearly [demonstrate] how the threat of deportation could be abused during plea negotiations. It can readily be imagined that some resident aliens might prefer to avoid even the risk of deportation rather than stand trial for crimes of which they believe them-

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- 14. *Id.* at § 1
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- 19. 344 F.2d
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it is not a denial of due process for a defendant to offer a plea of guilty while maintaining his innocence. The Court, however, has not yet specifically addressed the unique problem faced by aliens who offer pleas of guilty or nolo contendere in ignorance of potential deportation consequences resulting from their plea.

### *Conduct Leading to Deportation*

The United States Immigration and Nationality Act specifies nineteen grounds for deporting aliens.<sup>12</sup> For purposes of this Comment, several are especially relevant since convictions for conduct in these delineated areas may cause the alien to be susceptible to later deportation proceedings with sometimes certain deportation consequences. These areas include crimes involving moral turpitude,<sup>13</sup> crimes relating to narcotic drugs,<sup>14</sup> crimes involving the illegal entry or the smuggling of aliens into the United States,<sup>15</sup> crimes connected with prostitution,<sup>16</sup> and certain weapons violations.<sup>17</sup>

When deportation does follow from a violation of one of the enumerated grounds, the ramifications for the alien can be severe, if not devastating. Justice Black, for example, emphasized that the alien "loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country."<sup>18</sup> An illustrative case is *Garcia-Consalez v. Immigration and Naturalization Service*.<sup>19</sup> The defendant, a self-supporting Mexican woman, had lived in the United States for nearly fifty years, having come to America when she was only nine years old. She pleaded guilty to a charge of unlawful possession of heroin and was sentenced to three years probation, six months incarceration and a fine of \$1,000, an inconsequential penalty in light of the ensuing deportation order.<sup>20</sup>

selves innocent.

12. Immigration and Nationality Act § 241(a)(1)-(19), 8 U.S.C. § 1251(a)(1)-(19) (1982).

13. 8 U.S.C. § 1251(a)(4) (1982).

14. *Id.* at § 1251(a)(11).

15. *Id.* at § 1251(a)(2), (13).

16. *Id.* at § 1251(a)(12).

17. *Id.* at § 1251(a)(14).

18. *Galvar v. Press*, 347 U.S. 522, 533 (1954) (Black, J., dissenting).

19. 344 F.2d 804 (9th Cir.), *cert. denied*, 382 U.S. 840 (1965).

20. *Id.* at 805. The deportation order was upheld even though section 1203.4 of the California Penal Code allowed her to withdraw her guilty plea upon completion of the probation sentence, and provided for dismissal of the accusation and release from all penalties and disabilities resulting from the offense. *Id.* at 806. See also *United States ex rel. Klonis v. Davis*, 13 F.2d 630 (2d Cir. 1926), in which an alien was deported to Poland after spending the greater part of his life in the United States, even though he

Given the frequency of guilty pleas and the often harsh resulting consequences, several concerns unique to the alien defendant emerge. First, how should courts treat those instances when the alien, unaware of potential deportation consequences, offers a plea of guilty or nolo contendere? Second, how should courts approach those cases in which the alien has been misadvised or misinformed by his counsel regarding the deportation consequences of his plea? Five basic factors are involved in dealing with these two questions of increasing national concern: (1) the common law understanding of what constitutes a voluntary plea, (2) the requisites of a voluntary plea under the constitutional safeguard of due process, (3) the effect of direct and indirect consequences upon the voluntariness of the plea, (4) the possible manifest injustice in not allowing withdrawal of the plea, and (5) the constitutional entitlement to effective assistance of counsel. Unfortunately, American jurisdictions disagree as to the appropriate approach to take when confronted by an alien facing criminal charges. Moreover, considerable lack of consensus exists regarding the very nature of these factors themselves. This Comment will examine whether the alien's plea made without full information is truly voluntary, as well as the factors involved in allowing withdrawal of the plea when offered by an uninformed or misinformed defendant alien.

VOLUNTARINESS OF THE PLEA

Rule 11

In *Kercheval v. United States*,<sup>21</sup> the United States Supreme Court posited the oft-cited standard for the voluntariness of the guilty plea. The Court explained: "[O]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."<sup>22</sup> However, the Court provided the lower courts neither specific guidelines regarding what advice was required nor of what consequences the defendant needed an understanding. In *McCarthy v. United States*,<sup>23</sup> the Court pronounced its endorsement of the requirements of Federal Rules of Criminal

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had no friends in that country and could not speak the language.

21. 274 U.S. 220 (1927).

22. *Id.* at 223. See also *Brady v. United States*, 397 U.S. 742, 748 (1970): "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. . . . Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Footnotes omitted).

23. 394 U.S. 459, 465 (1969).

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Procedure Rule 11, as they existed under the 1966 amendment, which compelled the trial judge to personally address the defendant in ascertaining whether he understood the consequences of the plea. However, it was not until *Boykin v. Alabama*<sup>24</sup> that the Court gave constitutional dimensions to the minimum information a defendant had to be given before his plea could be accepted by a state trial court. Explaining that courts must exercise the greatest care to assure that the accused has a full understanding of the plea's implications and consequences,<sup>25</sup> the *Boykin* Court enumerated three basic constitutional rights waived by offering a plea of guilty: first is the privilege against self-incrimination; second, the right to trial by jury; and third, the right to confront one's accusers.<sup>26</sup> The requirement of *Boykin* that a defendant must be apprised that a plea of guilty waives these rights was subsequently codified by the 1975 amendment to the Federal Rules of Criminal Procedure, Rule 11(c).<sup>27</sup>

Rule 11(c) thus delineates the minimum advice a court must provide the defendant before accepting his plea. This minimum does not encompass, however, collateral consequences such as deportation. Indeed, the Advisory Notes to Rule 11 directly reject imposing a duty upon the trial courts to inform defendants of collateral consequences. Citing parole eligibility as an example, the Advisory Committee commented that it would be unrealistic to expect a judge to have a basis for advice regarding such collateral consequences of a guilty plea in a given case.<sup>28</sup> The Committee did, however, recognize the

24. 395 U.S. 238, 243 (1969).

25. *Id.* at 243-44.

26. *Id.* at 243.

27. Advisory Notes, *supra* note 6, commenting on Rule 11(c), state: "The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirement of *Boykin v. Alabama* which held that a defendant must be apprised of the fact he relinquishes certain constitutional rights by pleading guilty." (Citation omitted).

Rule 11(c) requires the trial court to inform the defendant of, and ascertain that he understands, five specific points before accepting a plea of guilty or nolo contendere: (1) the nature of the charge and the maximum and minimum penalty possible, (2) the right of the defendant to be represented by counsel, who, if necessary, may be appointed by the court, (3) the right of a defendant to plead not guilty, the right to a trial by jury, and the right to confront and cross-examine witnesses against him, (4) the waiver of the right to a trial if the defendant so pleads, and (5) the right of the court to question the accused, and the possibility that the answers to any court questions may be used against him in prosecution for perjury or false statement. Section (d) requires the court to ascertain that the plea is voluntary; section (f) compels the court, before accepting a plea of guilty, to be satisfied that there is a factual basis for the plea; and section (g) requires a verbatim record of the court's advice and inquiry. FED. R. CRIM. P. 11(c), (d), (f), (g).

28. *Id.*

critical nature of some collateral consequences and added that what was required to conform to *Boykin* "is left to future case-law development."<sup>20</sup>

More problematic is section (d) of Rule 11, which requires the accused's plea to be fully voluntary. The language of the rule is vague and has generated much discussion regarding the requisites of a voluntary plea. *Brady v. United States*<sup>20</sup> formulated the presently well-accepted standard among the federal courts as to the parameters of voluntariness: a plea is voluntary if the defendant is "fully aware of the direct consequences."<sup>21</sup> On this basis, a trial court must advise the accused of all direct consequences, but has no such obligation to inform of collateral consequences. This, of course, does not resolve the problem, for no concise formulation exists concerning what constitutes a "direct consequence" and what constitutes a "collateral consequence."

Collateral consequences, of which a defendant need not be apprised to offer a valid plea, have variously included suspension from

29. *Id.* See also *Federal Rules of Criminal Procedure: Hearing on Federal Rules and Criminal Procedure Amendments Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 151-52 (1975) (statement of Prof. Wayne LeFave, on behalf of the Judicial Conference of the United States):

The more fundamental point is that advice to the defendant at the time of his plea, in terms of its length and character, should be stated in a way which will be most meaningful to the defendant. *Boykin* mentions but three constitutional rights, but there are a great many more which are waived by a plea of guilty. . . . It is to be doubted that a litany of all these rights would be meaningful to the typical defendant. In the view of the Advisory Committee it is not desirable to mandate a judge to go through a long ritual which tends to get automatic and routine. Rather, within the limits allowed by the law, a judge should be given flexibility to accomplish the objective of the rule, namely, that of ensuring that the defendant is making an informed plea. In almost all cases, defendants are represented by counsel who should share with the judge the responsibility for informing the defendant of the consequences of his action. In the event that a judge, in an individual case, fails to inform a defendant on an important consequence of his plea, there is opportunity to raise the issue in the court of appeals. There is nothing in the rule, as proposed, which prevents the judge from adding other advice in appropriate cases. Indeed, the advisory note states: "What is required, in this respect, to conform to *Boykin* is left to future case-law development."

(Emphasis added).

30. 397 U.S. 742 (1970).

31. The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats . . . misrepresentations . . . or perhaps promises that are by their nature improper as having no relationship to the prosecutor's business.

*Id.* at 755 (quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957), *rev'd*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958)).

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one's position as a firefighter,<sup>32</sup> commitment to a mental institution,<sup>33</sup> possible imposition of consecutive sentences,<sup>34</sup> loss of the right to vote and to obtain a passport to travel abroad,<sup>35</sup> loss of voting rights in another state,<sup>36</sup> possible undesirable discharge from military service,<sup>37</sup> sentence enhancements,<sup>38</sup> and loss of good time credits.<sup>39</sup>

#### *The Federal Standard: United States v. Parrino*

Since 1954, *United States v. Parrino*<sup>40</sup> has been the controlling case on the right of aliens to be informed of possible deportation consequences arising from a conviction. From this case emerged two elemental principles that have had an enormous impact on the fate and lives of aliens: First, defendants need not be apprised of collateral consequences, such as deportation. Second, misadvice or misinformation by defense counsel regarding such consequences does not constitute an injustice such as would require a post-conviction withdrawal of the plea.<sup>41</sup>

In *Parrino*, the defendant pleaded guilty to a charge of conspiracy to kidnap in reliance on the assurance of his counsel, a former Commissioner of Immigration, that his plea would not subject him to deportation. Following his conviction, however, a deportation proceeding was initiated against him. Consequently, he filed a post-sentence motion under Rule 32(d) of the Federal Rules of Criminal Procedure to vacate the judgment and withdraw his earlier plea. The *Parrino* court rejected this claim, stating that a defendant's mere surprise at the severity of the sentence imposed after the plea does not present a manifest injustice that requires a court to vacate the judgment and to allow the defendant to withdraw the guilty plea.<sup>42</sup> Moreover, in this instance, the nature of the surprise was not the

32. *United States v. Crowley*, 529 F.2d 1066 (3d Cir. 1976), *cert. denied*, 425 U.S. 995 (1976).

33. *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005 (1973).

34. *United States v. Vermeulen*, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

35. *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965).

36. *United States v. Casiola*, 323 F.2d 180 (3d Cir. 1963).

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

38. *United States v. Garrett*, 680 F.2d 64 (9th Cir. 1982).

39. *Hutchison v. United States*, 450 F.2d 930 (10th Cir. 1971).

40. 212 F.2d 919 (2d Cir. 1954), *cert. denied*, 348 U.S. 840 (1954).

41. *Id.* at 921-22. See *infra* note 77 for the text of Federal Rule of Criminal Procedure 32(d) and discussion of the withdrawal of a guilty plea.

42. *Id.*

severity of the sentence directly flowing from the judgment of the trial court, but a collateral consequence of the judgment—deportation.<sup>43</sup> This reasoning assumes the alien's plea to be voluntary, even though he relied on the erroneous advice of his attorney, a presumed expert on immigration matters, that his plea would not result in deportation. The court, in rejecting both severity and surprise as factors to be considered, based its conclusion on the "collateralness" of a deportation proceeding. Indeed, the majority did not even discuss the issue of voluntariness. Nevertheless, *Parrino* has been controlling for the past thirty years.

Judge Frank, in his noted dissent, argued that the classification "collateral consequence" was rather arbitrarily employed.<sup>44</sup> His position was that while deportation was not technically a criminal punishment, it may nevertheless be more devastating upon the defendant than the actual sentence: "For all practical purposes, the court sentenced him to serve (a) two years in jail and (b) the rest of his life in exile."<sup>45</sup> The Judge even averred that Rule 32(d) might apply to such instances of deportation, even though such a penalty was not imposed directly by the judge in the criminal proceeding. This fact should not preclude, according to Frank, the existence of a "manifest injustice."<sup>46</sup>

The majority in *Parrino* conceded that deportation can have a severe impact on the defendant's life and family, but it drew a distinction between the criminal proceeding and the separate civil proceeding initiated under the Immigration and Nationality Act.<sup>47</sup> The *Parrino* majority insisted that notwithstanding the harsh inflexibility of the Act, it could not let sympathy encroach into the field of the criminal process.<sup>48</sup> Judge Frank responded that when a rule such as Rule 32(d) suggests in plain words to avoid "manifest injustice," courts should embrace the opportunity and "not extend earlier decisions to escape it."<sup>49</sup>

Judge Frank's second objection to the majority decision in *Parrino* was its failure to recognize a manifest injustice when the defendant entered his plea under misinformation provided him by his attorney. The majority held that surprise resulting from the defendant's own attorney did not constitute manifest injustice absent any clear show-

43. *Id.*

44. *Id.* at 924 (Frank, J., dissenting). "It has been said that (what my colleagues term) 'collateral consequences,' if of importance, constitute such injustice. My colleagues dispose of those statements as dicta. I am not sure of the propriety of that characterization." *Id.* (footnote omitted).

45. *Id.*

46. *Id.*

47. *Id.* at 922.

48. *Id.*

49. *Id.* at 926 (Frank, J., dissenting).

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50. *Id.* at 5  
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ing of unprofessional conduct.<sup>50</sup> Judge Frank took exception to this position, asserting that courts have reversed convictions when a defendant's counsel has been incompetent and when that incompetence has seriously prejudiced the defendant.<sup>51</sup> In the *Parrino* circumstance, Judge Frank regarded the defense counsel, who might easily have checked the appropriate statutes regarding deportation, as “egregiously derelict in the discharge of his duty to his client.”<sup>52</sup>

Finally, the dissent questioned the value of a constitutional requirement that a defendant have counsel before pleading guilty if that counsel can then be utterly without legal competence to guide his client. Judge Frank considered the giving of an erroneous opinion by an attorney and the client's reliance on it in pleading guilty to be an obvious “manifest injustice.”<sup>53</sup> Professor Moore concurs in this position and notes that “the vigorous dissent of Judge Frank more likely reflects the present attitude of the federal judiciary.”<sup>54</sup> As is subsequently discussed in this paper, Judge Frank's views are currently embraced in many state and federal court opinions, as well as in legal commentary.<sup>55</sup>

50. *Id.* at 921. *Contra*, Legomsky, *The Allen Defendant: Sentencing Considerations*, 15 SAN DIEGO L. REV. 105, 136-37 (1977).

51. 212 F.2d at 925 (Frank, J., dissenting).

52. *Id.*

53. *Id.* at 926. *See also* Legomsky, *supra* note 50 at 136-37.

54. 8A J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE*, ¶ 32.07[3], (2d ed. 1983). Addressing the question of misinformation provided a defendant by his attorney, Professor Moore writes:

[T]here is some confusion whether misrepresentations or misstatements of defense counsel including a plea, not chargeable to the court or prosecution, may justify withdrawal (though not serious enough to constitute ineffective assistance of counsel under the Sixth Amendment). Since a determination of voluntariness involves a subjective inquiry into the defendant's state of mind, the better rule would permit withdrawal in the case of defense counsel's misrepresentations, provided defendant reasonably relied upon them.

55. The small number of legal commentators that have dealt with deportation as a consequence of the guilty plea invariably distinguish the seriousness of deportation from lesser collateral consequences. *See, e.g.*, Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366, 376 (1955): “A rarely litigated, though frequent, problem arises when counsel fails to warn the defendant of collateral consequences of conviction such as loss of civil rights . . . and, perhaps more seriously, deportation or expatriation.” (Footnotes omitted). The same article takes issue with the *Parrino* decision, noting that “[n]either the court nor [sic] the dissent saw a constitutional issue in the case, but it seems that perhaps counsel was so incompetent that his client was denied the constitutionally guaranteed minimum due process.” *Id.* at 377 (footnotes omitted). With regard to the burden of warning the defendant of collateral consequences, the same writer states, “This argument, however, is less persuasive where serious consequences, like deportation or expatriation, are involved.” *Id.* at 378. Another author states:

Collateral consequences, on the other hand, need not be understood for the entry of a voluntary plea. . . . The non-necessity of inquiry regarding a defendant's

The *Parrino* position has been followed steadfastly in several circuits. For example, in the Second Circuit this is demonstrated most notably by *United States v. Santelises*<sup>56</sup> and *Michel v. United States*.<sup>57</sup> *Michel*, following *Parrino*, considered it unrealistic to compel a trial court judge to compile a list of possible consequences or to anticipate the multifarious contingencies which may affect one's civil liberties. The *Michel* court, however, made no distinction between the deprivation of one's various societal benefits and the loss of the right to remain in the United States, but rather classified both as peripheral contingencies.<sup>58</sup>

The Seventh Circuit, in an older case, not only held that the court is not obligated to inform a defendant of possible deportation arising from a guilty plea, but also found the alien defendant's contention to the contrary "remarkable."<sup>59</sup> The Third Circuit, while not dealing directly with the question of deportation, has similarly referred to deportation as a collateral consequence.<sup>60</sup> Relying on *Parrino*, the court remarked that it would be impractical to compel a trial judge to inform an accused of such collateral eventualities.<sup>61</sup> Also, the Fourth Circuit, in its most recent decision in this area, has followed *Parrino* and *Michel* in calling deportation a civil consequence which is entirely collateral to the conviction.<sup>62</sup> The court stressed defense counsel's responsibility to inform the defendant of indirect and collateral consequences. The court did not, however, address the ques-

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appreciation for the collateral consequences of his plea seems well settled. What constitutes a 'collateral' consequence remains obscure. For example, parole eligibility is now characterized as a direct consequence, although once classified as a collateral consequence about which a defendant need not be informed. *Other collateral consequences, deportation conspicuously, have chimerical characteristics of 'directness' which may eventually lead to a similar shift in classification.*

Note, *The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas*, 1970 WASH. U.L.Q. 289, 320-21 (1970) (footnotes omitted) (emphasis added).

56. 476 F.2d 787 (2d Cir. 1973).

57. 507 F.2d 461 (2d Cir. 1974).

58. *Id.* at 466.

59. *United States ex rel. Durante v. Holton*, 228 F.2d 827, 830 (7th Cir. 1956), *cert. denied*, 351 U.S. 963 (1956).

60. *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1956).

61. *Id.* The facts of this case are arguably distinguishable from those involving deportation. Here, the defendant learned only after sixteen years that he would be deprived of the right to vote when he moved to a different jurisdiction. One can understand, under these circumstances, the court's rationale for exclaiming that "unsolicited advice concerning the collateral consequences of a plea which necessitates judicial clairvoyance of a superhuman kind can be neither expected nor required." *Id.* Deportation, though, is hardly a peripheral contingency nor does it require clairvoyance or superhuman foresight to envisage such a possibility. See *infra* note 99.

62. *United States v. Hillick*, No. 75-1036, slip op. (4th Cir. Aug. 25, 1975) (available on LEXIS, Genfed Library, Cir file).

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63. 475 F.2d 1000 (5th Cir. 1973). *Cuthrell* did not inform an accused of potential consequences of a guilty plea to render the plea intelligent.

64. *Id.* at 1001.

65. See *supra* note 63.

66. 507 F.2d 461 (2d Cir. 1974).

had claimed that deportation was a collateral consequence of a conviction because (1) deportation was not automatic because of the defendant's "non-priority status" or (2) deportation was a collateral consequence of a conviction because of the defendant's status in the United States. The court's rationale in such instances is distinguishable from that in *Michel* to as "non-priority status" and, also, provided that the case was handled as a collateral consequence of a conviction in the *Priority Program of*

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Because the entire question of the voluntariness of the plea appears to depend on whether a consequence is characterized as direct or collateral, the Fourth Circuit's attempt to define what constitutes a direct consequence is instructive. In *Cuthrell v. Director, Patuxent Institution*,<sup>63</sup> the court stated that the distinction "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."<sup>64</sup> The *Cuthrell* court, however, made no attempt to reconcile its rejection of deportation as a collateral consequence with its own definition, for, as demonstrated, section 1251(a) of the Immigration and Nationality Act provides for what is often tantamount to definite, automatic and immediate deportation in a number of circumstances.<sup>65</sup> If the "largely automatic effect" or certainty were determining factors in characterizing a consequence as direct, courts would necessarily have to reclassify deportation—as well as other "so-called" collateral consequences—as direct consequences. The confusion in ascertaining what comprises a direct consequence is vividly reflected by the *Michel* court's explicit rejection of the *Cuthrell* court's definition. Although not referring to *Cuthrell* specifically, the Second Circuit indicated it did not think the distinction between a direct and a collateral consequence should depend upon the certainty with which the sanction is meted out to the defendant.<sup>66</sup>

63. 475 F.2d 1364 (4th Cir. 1973), cert. denied, 414 U.S. 1005 (1973). Though *Cuthrell* did not involve a deportation, the court noted that the failure to inform an accused of potential deportation consequences is merely a collateral factor which does not render the plea invalid.

64. *Id.* at 1366.

65. See *supra* notes 13-17 and accompanying text.

66. 507 F.2d at 466. The court probably took this position because the defendant had claimed that his deportation was, in fact, a direct consequence, not collateral. The government, in refuting this argument, responded that it was not a direct consequence because (1) deportation required a separate civil proceeding, and (2) deportation was not automatic because 8 U.S.C. § 1254(a)(2) provided that an alien could apply for "non-priority status" on the basis of humanitarian factors which might thus result in suspension of deportation. Because 8 U.S.C. § 1254(a)(2) requires that the alien have lived in the United States for a period of at least ten years following the deportable act, this eventuality suggested by the government is rather limited. It is not, therefore, surprising that the court in *Michel* rejected the "certainty" of the sanction criterion; deportation in such instances is a near certainty. It should be noted that what the government referred to as "non-priority status" is an entirely different remedy from 8 U.S.C. § 1254(a)(2), and it, also, provides only limited relief. See, e.g., Hollander, *supra* note 4, at 65: "It [deferred or nonpriority status] is a little used and little known remedy which is generally handled as an internal matter within the INS." See generally Wildes, *The Nonpriority Program of the Immigration and Naturalization Services Goes Public: The Litiga-*

The question of deportation was one of first impression in *Fruchtman v. Kenton*,<sup>67</sup> a Ninth Circuit case. Attempting to provide some guidelines, the *Fruchtman* court reasoned that a consequence was direct if the actual sentence emanated from the court which had accepted the plea originally. Conversely, a collateral consequence was one originating under a different agency, beyond the control and responsibility of the trial court judge.<sup>68</sup> Accordingly, the Ninth Circuit held deportation a collateral consequence of which the trial court has no obligation to inform an accused.<sup>69</sup> Applying this standard, neither the severity nor the certainty of the consequence would be essential components affecting the voluntariness of the guilty plea. This fact poignantly illustrates the danger in placing too great an emphasis on the formal rubric under which specific consequences should fall, and too little on the effect these consequences have upon the voluntariness of the plea, which is, ultimately, the issue at hand.

The most recent decision holding against a defendant's right to be advised of potential deportation is a Fifth Circuit case, *Garcia-Trigo v. United States*.<sup>70</sup> The facts of the case are significant because of the severity of the "civil" consequences. On Friday, September 5, 1980, Fidel Garcia-Trigo was arrested by the United States Border Patrol while driving a vehicle in which several other aliens were passengers. On the following Monday, September 8, he was told he was to be charged only with the petty offense of "unlawfully entering the United States by wading the river,"<sup>71</sup> in violation of 8 U.S.C. § 1325, rather than the more serious offense of transporting undocumented aliens, which the officials had initially considered at the time of the defendant's arrest. Garcia-Trigo pleaded guilty to this lesser offense and was sentenced to sixty days in jail. The day after he entered his plea of guilty, his wife informed the Border Patrol that her husband was not an undocumented alien, but rather an authorized permanent resident who had lived in the United States for ten years. Nevertheless, he was subject to deportation under 8 U.S.C. § 1251(a)(2) which provides for deportation of any alien who enters the United States without inspection.

After serving his two month sentence, Garcia-Trigo sought to have

*ive Use of the Freedom Act*, 14 SAN DIEGO L. REV. 42 (1976).

67. 531 F.2d 946 (9th Cir. 1976), cert. denied, 429 U.S. 893 (1976).

68. *Id.* at 949.

69. *Id.* The Ninth Circuit has recently reiterated this position in *United States v. Garrett*, 680 F.2d 64 (9th Cir. 1982) (enhancement of sentence by another court was a collateral consequence of a guilty plea).

70. 671 F.2d 147 (5th Cir. 1982). See *United States v. Dayton*, 604 F.2d 931, 935 (5th Cir. 1979) (voicing strong opposition to informing defendants of collateral consequences beyond those specifically enumerated by Rule 11, and holding Rule 11 requirements to be both "exclusive" and "inclusive").

71. 671 F.2d at 149.

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74. *Id.*  
75. *Id.*  
76. *Id.*

his conviction vacated by way of a Writ of Error Coram Nobis,<sup>72</sup> asserting that the court had not strictly complied with the mandates of Rule 11. He specifically claimed that the nature of the offense had not been explained to him and that he had not been told of the consequences of his guilty plea. The record indicated, however, that the court had explained to him the dictates of Rule 11, translating them into Spanish.<sup>73</sup> The court rejected his arguments, asserting that collateral attacks must show that one's fundamental rights were violated and also that there existed some present or prospective adverse effect.<sup>74</sup> The court found that the defendant's rights were not violated, nor, presumably, did separation from his spouse constitute the requisite adverse effect. The court concluded that there had been neither a complete miscarriage of justice nor a result inconsistent with the rudimentary demands of fair procedure such as is required for collateral relief.<sup>75</sup> It held that Garcia-Trigo's rights were not seriously prejudiced and that "the possible effect that his conviction of this petty offense may have upon his immigration status is a collateral 'consequence' that need not have been the subject of an explanation to appellant at the time of arraignment and guilty plea."<sup>76</sup>

72. The 1948 amendment to Rule 60(b) of the Federal Rules of Civil Procedure eliminated the use of the Writ of Error Coram Nobis in civil cases. Nevertheless, this writ is still employed in criminal cases, and may provide the alien defendant an avenue of attack in moving to withdraw an earlier guilty plea. See, e.g., *United States v. Taylor*, 648 F.2d 565, 570 n.14 (9th Cir. 1981), cert. denied, 454 U.S. 866 (1981), which states: "The common-law writ of error *coram nobis* is available by statute, 28 U.S.C. § 1651(a) (1976) (All Writs Statute), to correct errors of fact of such fundamental character as to render the proceeding itself irregular and invalid." In *Cline v. United States*, 453 F.2d 873, 874 (5th Cir. 1972) the court said, "As we indicated in *United States v. Morgan*, a writ of error *coram nobis* is an available remedy to correct fundamental errors in a criminal case, even though the sentence imposed has been served." In contrast to *Garcia-Trigo*, this writ was successfully employed in *People v. Wiedersperg*, 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975) where the defendant was not aware that deportation would result from her plea. The court indicated that a Writ of Error Coram Nobis may be available when three requirements are met: (1) when there exists some fact, not presented to the court on its merits, where such facts would prevent such judgment, (2) when the newly discovered evidence does not go to the merits of the issues tried earlier, and (3) when this evidence was neither known to the defendant, nor could have been known at the time of making the plea. The court held that in the case of this Austrian alien, all three factors applied; the motion for withdrawal of the pleas was granted.

73. Mr. Garcia-Trigo conceded that the court had explained various rights to him, but because of confusion and embarrassment, he had not fully understood the nature of the rights he was waiving. 671 F.2d at 149.

74. *Id.*

75. *Id.* at 149.

76. *Id.* at 150.

## RECENT EROSION OF THE FEDERAL POSITION

(VOL. 21: 19)

### *Withdrawal of the Plea: Rule 32(d) and 28 U.S.C. § 2255*

Although *Parrino* and its progeny held defendants need not be informed of deportation consequences prior to offering a plea, this stance has been recently challenged in several federal circuits. The greatest signs of erosion appear, however, not within the requirement of Rule 11 itself (although concerns are evident here also) but from the application of Rule 32(d) and 28 U.S.C. § 2255, which allow for withdrawal of pleas and vacating of judgments, respectively.<sup>77</sup>

77. Rule 32(d) of the Federal Rules of Criminal Procedure provides: "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." (Emphasis added).

Professor Wright notes that there is little difference between these two remedies:

There is considerable overlap between a post-sentence motion to withdraw a plea of guilty for manifest injustice under Rule 32(d) and a motion to vacate a sentence under 28 U.S.C. § 2255. Motions under the statute have been treated as if they were under the rule, and the standard for relief is usually treated as being the same. Although there are cases that suggest that relief might be available under the rule when it would not be granted under the statute, there is no indication that there is any actual difference in results.

3 WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 539 (2d ed. 1982) (footnotes omitted).

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in its preliminary draft, concurred with Wright's observation: "Indeed, it may more generally be said that the results in § 2255 and 32(d) guilty plea cases have been for the most part the same. Relief has often been granted or recognized as available via either of these routes for essentially the same reasons . . ." THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (October, 1981), reprinted in 91 F.R.D. 289, 354 (1982). The Committee proposed the following amendment to Rule 32(d):

PLEA WITHDRAWAL . . . If a motion . . . for withdrawal of a plea of guilty or . . . nolo contendere . . . is made . . . before sentence is imposed, . . . imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason . . . At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

*Id.* at 348-49. (Ellipses represent Committee's proposed deletions from present rule).

The amendment would eliminate the "manifest injustice" standard and make applicable the standard that was formulated in *Hill v. United States*, 368 U.S. 424 (1962). 91 F.R.D. at 353. Accordingly, the standard for post-sentence withdrawal of the guilty plea would be, under *Hill*, if it is "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with rudimentary demands of fair procedure." *Id.* at 354 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

The standard for withdrawing a plea before sentence is imposed would be, by this amendment, if it is "fair and just," which generally is the standard applied today. Professor Wright notes:

All agree that withdrawal of a guilty plea, even before sentencing, is not an absolute right, but there is some disagreement on the standard to be applied at that stage. Many cases teach that leave to withdraw should be freely granted if it is before sentencing. This is often qualified, however, by saying that there must be a 'fair and just' reason for withdrawing the plea.

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78. 533 F.2d  
79. *Id.* at 72  
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In a 1976 First Circuit case, *Cordero v. United States*,<sup>78</sup> the defendant sought to withdraw his guilty plea, claiming he did not know deportation would follow, and that his attorney had told him he was not guilty of the federal offense. The court regarded the standard for withdrawing a pre-sentence plea to be whether there existed a fair and just reason, and whether the trial court had abused its discretion in denying the withdrawal under that standard. Deportation, the court concluded, presented a close question and it thus expressed a willingness to consider two factors: First, there was here no indication that the defendant was simply testing the weight of his potential judgment; and second, there was a lack of evidence that the government had been prejudiced by reliance on the earlier plea. The First Circuit, in line with the *Parrino*, *Michel*, and *Fruchtman* courts, still denoted deportation a collateral consequence, the potential of which the court had no obligation to inform an accused, but, it stressed, grounds might nevertheless be present which would constitute a fair and just reason for withdrawing the plea. Accordingly, the *Cordero* court acknowledged that a trial court, in its discretion, could properly grant leave to withdraw the plea when, as here, the defendant was unaware of the ensuing deportation possibility.<sup>79</sup> At the same time, this court was cautious not to mandate a withdrawal, recognizing that in so doing, it would necessarily be adding a requirement to the judicial proceeding—namely, warning defendants of possible deportation—thereby diluting the effect of Rule 11.<sup>80</sup>

The most significant departure from *Parrino* has occurred in the District of Columbia Circuit, a change that has evolved perceptibly over the past thirteen years. In a case often cited by other circuits, *United States v. Sambro*,<sup>81</sup> both the defendant and his attorney drew erroneous conclusions concerning the potential consequences of deportation. The *Sambro* court followed *Parrino* and held that possible ancillary or consequential results flowing from a conviction on a guilty plea did not require a later withdrawal of that plea.<sup>82</sup> The defendant's erroneous conclusions about the effect probation would have on deportation did not alter the voluntariness of his plea.<sup>83</sup> Im-

Wright, *supra* at 198-99 (footnotes omitted).

78. 533 F.2d 723 (1st Cir. 1976).

79. *Id.* at 725-26.

80. *Id.* See *Infra* note 355.

81. 454 F.2d 918 (D.C. Cir. 1971).

82. *Id.* at 920.

83. *Id.* at 921. The *Sambro* majority considered it important that the defendant and his counsel were aware of deportation consequences prior to making the plea, but

portant, however, because it presents a position recently embraced by this same circuit,<sup>84</sup> is the vigorous dissent by Judge Bazelon. He considered the denial of the defendant's motion to withdraw his guilty plea a clear abuse of discretion. Emphasizing the American criminal justice system's dependence on guilty pleas, which largely come from plea bargains, the judge commented:

So long as we depend on a system that encourages defendants to waive their constitutional rights, we have an obligation at least to ensure that defendants do not waive their rights through ignorance, without full understanding of the consequences. Surely poor, uneducated, or inexperienced people are entitled to at least as much protection in negotiating pleas to criminal charges, when liberty is at stake, as they are in negotiating ordinary commercial transactions.<sup>85</sup>

Judge Bazelon recognized that courts have distinguished, for purposes of Rule 11, between direct and collateral consequences and that deportation might be appropriately classified as collateral.<sup>86</sup> He asserted, however, that it was a close question whether a plea could be voluntary within the meaning of Rule 11 if the defendant did not understand the deportation consequences of his plea.<sup>87</sup> Consequently, even if no specific advisement were required because of deportation's collateralness, a court should still grant withdrawal of the plea under Rule 32(d) if the "interest of justice so required."<sup>88</sup> Agreeing with Judge Frank and Professor Moore, Judge Bazelon considered defense counsel's misinformation to his client regarding deportation consequences to present just such an interest of justice requiring withdrawal of the guilty plea.<sup>89</sup>

A year earlier, in *United States v. Briscoe*,<sup>90</sup> the same circuit addressed the question of misadvice by government counsel, but in that discussion, the *Briscoe* court created the strong inference that misinformation by defense counsel could subject the guilty plea to a collateral attack as well.<sup>91</sup> Citing the drastic measures involved in deportation, the *Briscoe* court concluded that considerations of such severe consequences may rightfully be included in one's decision to

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had merely drawn wrong conclusions; that the defendant did not claim innocence, rather a technical deficiency in the proceeding—lack of awareness of the deportation consequences; and that the decision by a trial court to grant withdrawal of a plea is discretionary. In this instance, no abuse of discretion was manifest.

84. See *United States v. Russell*, 686 F.2d 35 (D.C. Cir. 1982).

85. 454 F.2d at 925 (Bazelon, J., dissenting).

86. *Id.* at 925-26.

87. *Id.* at 925.

88. See *id.* at 925-26.

89. *Id.* at 926-27.

90. 432 F.2d 1351 (D.C. Cir. 1970).

91. In *Briscoe v. United States*, 391 F.2d 984, 988 n.2 (D.C. Cir. 1968) (*Briscoe I*), the court noted, without deciding, that a mistake attributable to defense counsel might provide for a plea's withdrawal on the basis that the defendant had been denied his constitutional right to effective assistance of counsel.

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plead guilty.<sup>92</sup> The court held that a plea offered by a defendant misled regarding deportation consequences may in appropriate circumstances be subject to attack.<sup>93</sup> Concurring with both Judge Frank and Professor Moore—a fact Judge Bazon noted in his *Sambro* dissent<sup>94</sup>—the *Briscoe* court expressly rejected the *Parrino* decision: "Insofar as a contrary view may be inferred from *United States v. Parrino* on the ground that deportability is only a 'collateral consequence' of conviction, we agree with Professor Moore: 'the vigorous dissent of Judge Frank [in *Parrino*] more likely reflects the present attitude of the federal judiciary.'"<sup>95</sup>

DRAMATIC SHIFT FROM THE *Parrino* TRADITION:  
*United States v. Russell*

The Bazon dissent in *Sambro* and the *Briscoe* discussion provide a backdrop for *United States v. Russell*,<sup>96</sup> the most recent federal case dealing with deportation as a collateral issue. It also represents the most decided shift to date away from the *Parrino*-based holdings. The defendant in this case pleaded guilty to two misdemeanor counts in response to the government's agreement to drop two felony charges. He was subsequently sentenced to concurrent one-year jail terms and three years probation, with all but one month of incarceration being suspended.<sup>97</sup> One month after sentencing, the Immigration and Naturalization Service initiated deportation proceedings against him under 8 U.S.C. § 1251(a)(11).<sup>98</sup> The defendant immediately moved to have his sentence vacated and to withdraw his guilty plea under Rule 32(d). He argued that he had not understood the consequences of his plea, namely, that he would be subject to depor-

92. 432 F.2d at 1354.

93. *Id.* at 1353.

94. 454 F.2d at 926 (Bazon, J., dissenting).

95. 432 F.2d at 1353-54 (citations omitted). Although this case appears to represent a dramatic shift away from the *Parrino* reasoning, the holding was limited because the misrepresentation came, in part, from the government's counsel and there was no showing that the defendant significantly relied upon the prosecutor's remarks regarding deportation. Moreover, the court noted, when the misadvice has come from his counsel, defendant cannot later claim involuntariness as long as the erroneous advice was "within the general bounds of reasonable competence." *Id.* at 1353. This conclusion produces the further problem of ascertaining what comprises "reasonable competence." *But see supra* text accompanying notes 50-51; *see also* Legomsky, *supra* note 50, at 136-37 which states: "Such findings [*Parrino*] are inexcusable. In an adversary system it is the obligation of the attorney to assure the client the best defense possible under the law."

96. 686 F.2d 35 (D.C. Cir. 1982).

97. *Id.* at 37.

98. *See supra* note 14 and accompanying text.

tation based on the misdemeanor convictions.

The *Russell* court pointed out that American jurists are sharply divided in their views concerning the penal nature of deportation.<sup>99</sup> The court also noted that similar tensions exist regarding the classification of deportation as a direct or collateral consequence.<sup>100</sup> The D.C. Circuit conceded that well-established Rule 11 principles do not require a court to inform a defendant of possible deportation. But, it added, decisions guided by Rule 11 have improperly influenced the application of Rule 32(d), which should be employed to withdraw a plea in the interest of justice, even if the plea is validly offered under the formal requirement of Rule 11.<sup>101</sup>

The court, in *Russell*, identified several considerations that should guide district courts in their exercise of discretion in applying Rule 32(d).<sup>102</sup> The first is whether the defendant is attacking the earlier plea on its merits, that is, whether the defendant is actually asserting

99. 686 F.2d at 38. See, e.g., *Mahler v. Eby*, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (Deportation "is not a punishment."); *Contra Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families."); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (Deportation is "close to punishment."); *Jordan v. De George*, 341 U.S. 223, 231 (1951) (Deportation is a "drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty."); *Fong Tan v. Phelan*, 333 U.S. 6, 10 (1948) (Deportation is a "penalty."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Deportation is the equivalent to the "loss of property and life; or all that makes life worth living."); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel."); *United States ex rel. Brancato v. Lehmann*, 239 F.2d 663, 666 (6th Cir. 1956) ("Although it is not penal in character . . . deportation is a drastic measure at times the equivalent of banishment or exile . . ."). Perhaps the most poignant description comes from Judge Learned Hand, who in *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630-31 (2d Cir. 1926) wrote:

However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.

100. 686 F.2d at 38-39.

101. *Id.* at 39. Interestingly, the *Russell* court need not have addressed this question, for it was able to resolve the case by finding a core violation of Rule 11 itself, which requires that a defendant's plea be voluntary and not the product of misrepresentation by the prosecution. In *Russell*, the prosecutor had explained to the court that the defendant would not be subject to deportation if he pleaded guilty to the misdemeanor. *Id.* at 41. Nevertheless, the *Russell* court chose to address specifically the interrelationship of Rule 11 to Rule 32(d) and the issue of manifest injustice as it relates to deportation consequences. *Id.* at 40-41. See also *Brady v. United States*, 397 U.S. 742, 755 (1969) (misrepresentation included as a factor invalidating the voluntariness of a guilty plea); cited *supra* note 31.

102. 686 F.2d at 40-41.

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his innocence or a mere formal technicality of the rule's application. The second is whether a withdrawal of the plea and a subsequent trial would prejudice the government's case; for example, key government witnesses may no longer be available. Third is whether the government had any role in contributing to the defendant's misunderstanding of the consequences. While this final point repeats the already mandated non-misrepresentation on the part of the prosecution, further discussion by the *Russell* court reveals a willingness to designate as a "manifest injustice" even an accused's simple unawareness of the deportation consequences of his plea.<sup>103</sup>

Additionally, the *Russell* court suggested that lower courts, in considering withdrawal of pleas under Rule 32(d), should be sensitive to the possibility that the defendant has not received effective assistance of counsel.<sup>104</sup> In contrast to *Parrino* and its progeny, the *Russell* court questioned whether a defendant who enters a plea of guilty is actually "voluntarily" waiving his right to trial by jury. Such a defendant has a compelling reason to stand trial when all the consequences of his plea are known; a plea is voluntary only when such defendants know the "pandects under which they plead."<sup>105</sup> "Pandects" thus supplants the traditional classification of "direct" and "collateral" and includes, for this circuit at least, the consequence of deportation.

The *Russell* court went even one step further in its dictum. Accepting the uniqueness of deportation among the consequences of convictions, it questioned classifying deportation as a collateral consequence, saying:

It is extremely troublesome that deportation has never been considered a direct consequence of guilty pleas of the sort that must be brought to the defendant's attention before his plea may be considered voluntary under Rule 11. Aliens form a discrete, easily recognized class of defendants. They are deported by the same branch of government that brings criminal charges against them, and in many cases their deportation is a more direct and automatic consequence of conviction than any other sanction. District courts need to remember that although they are not required to explain the possibility of deportation to alien defendants before accepting a plea under

103. *Id.* at 40. "Finally, although deportation is not a 'direct' consequence of a plea for purposes of Rule 11, it is difficult to imagine a collateral consequence that would be more compelling for purposes of showing the 'manifest injustice' required by Rule 32(d)." *Id.*

104. *Id.* at 40 n.6.

105. *Id.* at 42. See also C. WHITEHEAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 410 (1980) ("Under the federal rule the judge is not required to inform a defendant about these matters, but for a plea to be intelligently given in any meaningful sense, it seems that all significant collateral consequences of the plea should be mentioned.") (Emphasis added).

Rule 11, nothing prohibits them from doing so. *The distribution of justice to alien defendants can only be enhanced if the trial courts make sure such defendants know the pandects under which they plead.*<sup>106</sup>

### Further Federal Erosion—Attorney Misinformation

Recent erosion of the *Parrino* tradition has also occurred in the Fourth Circuit. In *Strader v. Garrison*,<sup>107</sup> the defendant was misinformed by his attorney about the effect of a guilty plea upon his parole eligibility date. Although parole is a collateral consequence, the court considered defense counsel's failure to apprise his client accurately of this eventuality to be a violation of his constitutional right, and it expressly rebuffed the *Sambro* and *Parrino* holdings for having ignored the constitutional issues involved. The court stated: "We regard those cases [*Sambro* and *Parrino*] as aberrations. In neither case was the problem approached in terms of the constitutional entitlement to the effective assistance of counsel."<sup>108</sup> *Strader* required the judgment of conviction to be vacated, when it was shown, as here, that the guilty plea would never have been tendered had the defendant been properly advised by his attorney.<sup>109</sup> When ignorance and misadvice by an accused's counsel improvidently lead him to enter a plea of guilty, the appropriate remedy is withdrawal of the plea.<sup>110</sup> The *Strader* court also pointed out that the Second Circuit itself came to the same conclusion in *Hill v. Ternullo*,<sup>111</sup> notwithstanding and without reference to *Parrino*, when it noted that the defense counsel was so ineffective as to amount to a denial of the constitutional right to counsel.<sup>112</sup>

### STATE EXPANSION OF ALIEN'S DUE PROCESS RIGHTS

#### Recent Statutory Trend

The status of the alien's right to be informed of possible deportation consequences is even more divergent among the states than it is at the federal level. Strong evidence is appearing to indicate a trend has begun on the state level to require warning defendants of possible deportation before courts accept guilty pleas. Since 1977 four states have enacted statutes—strikingly similar in wording—requiring the alien defendant to be advised of deportation consequences by trial courts. These states are California (1977),<sup>113</sup> Massachusetts

106. *Id.* at 41-42 (emphasis added).

107. 611 F.2d 61 (4th Cir. 1979).

108. *Id.* at 64 (emphasis added).

109. *Id.* at 65.

110. *Id.*

111. *United States ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975).

112. 611 F.2d at 64.

113. CAL. PENAL CODE § 1016.5 (Decring 1983).

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(1978),<sup>114</sup> Oregon (1979),<sup>115</sup> and Connecticut (1982).<sup>116</sup> Typical of the four is section 1016.5(a) of the California Penal Code, which reads:

Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime 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.<sup>117</sup>

As the text of the statute indicates, the court is required to establish in the record that such a warning has been given to the defendant. Absent this record, the defendant is to be presumed not to have received the required advisement.<sup>118</sup>

Three of these four statutes—California, Massachusetts and Connecticut—go further than Rule 11 by explicitly providing for a remedy if the defendant is not given the warning by the court. California, for example, requires that when the defendant is not afforded this warning and demonstrates that the conviction of the offense to which he pleaded guilty or nolo contendere may have the consequence of deportation, exclusion, or denial of naturalization, the court shall, on his motion, vacate the judgment and permit the defendant to withdraw the guilty plea and to enter one of not guilty.<sup>119</sup>

114. MASS. GEN. LAWS ANN. ch. 278 § 29D (West 1981).

115. OR. REV. STAT. § 135.385 (1981-1982).

116. CONN. LEGIS. SERV. § 82-177 (West 1982).

117. CAL. PENAL CODE § 1016.5(a) (Deering 1983).

118. CAL. PENAL CODE § 1016.5(b) (Deering 1983). A statement of legislative intent is included in the statute. The statement is important for its understanding and appreciation of the alien defendant's unique plight. It postulates that deportation is serious in nature, and that many aliens do, in fact, offer guilty pleas fully unaware of the dire consequences of deportation. Subsection (d) of section 1016.5 of the California Penal Code provides in pertinent part:

The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.

CAL. PENAL CODE § 1016.5(d) (Deering 1983).

119. CAL. PENAL CODE § 1016.5(b). Connecticut and Massachusetts have identical provisions. See CONN. LEGIS. SERV. § 82-177(c) (West 1982); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 1981).

None of these statutes requires the defendant to make a claim of innocence prior to withdrawing the guilty plea.<sup>120</sup> In addition, each of the three aforementioned statutes is drafted to avoid the danger of opening a floodgate of post-sentence appeals or collateral attacks. Although the statutes require the warning be given to each defendant, a remedy is available solely to those defendants who would actually be affected by one of the enumerated consequences. In practical terms, other non-alien defendants would have no basis for an attack if the court were technically remiss in offering the required advice.

The California case of *People v. Gloria* demonstrates this safeguard of judicial efficiency.<sup>121</sup> Here, the defendant pleaded guilty and then sought to have the judgment vacated because the court had not informed him of the consequences under Penal Code section 1016.5. The court ruled that this provision did not apply to such a defendant because he was not subject to deportation. In contrast, in *People v. Guzman*,<sup>122</sup> the defendant had not been appropriately advised of the possible deportation consequences. Though the government maintained the defendant failed to establish he would not have pleaded guilty had he been aware of the consequences, it was held a court cannot assume a defendant would or would not admit the truth of the allegations were he properly advised of the consequences. In this instance, there was no evidence that the defendant had been given the required warning and it was clear he was deportable as a consequence of his conviction. The defendant, therefore, was allowed to withdraw his guilty plea and enter one of not guilty.<sup>123</sup>

#### *Legal Dilemmas Avoided by Statutory Provisions*

These state statutes provide significant safeguards to aliens who, as the California Legislature noted,<sup>124</sup> frequently are unaware of deportation consequences of their plea. Judge Bazelon, in his *Sambro* dissent, similarly urged protection of this group who, through igno-

120. *E.g.*, *Kercheval v. United States*, 274 U.S. 220, 224 (1927), which, on the federal level, provides for withdrawal regardless of one's assertion of innocence:

But on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. . . . The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just.

(Footnotes omitted). *See infra* note 126 and accompanying text (Court's acceptance of nolo contendere plea when defendant asserted innocence).

121. 108 Cal. App. 3d 50, 166 Cal. Rptr. 138 (1980).

122. 116 Cal. App. 3d 186, 172 Cal. Rptr. 34 (1981).

123. *Id.* at 192, 172 Cal. Rptr. at 38.

124. CAL. PENAL CODE § 1016.5(d) (Deering 1983). *See supra* note 118 for the text of this section.

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range of the laws and without fully understanding the consequences of their actions, waive their rights; such typically poor and uneducated people, he urged, are entitled to protection.<sup>125</sup> Moreover, providing such critical information to this discrete class of persons requires, at best, a mere few minutes of the court's time.

Other reasons exist, however, that warrant such statutory safeguards. For example in *North Carolina v. Alford*, the Court candidly conceded that it sometimes lies in one's best interest to plead guilty while asserting innocence, and that a court's acceptance of such a plea does not violate the defendant's right of due process guaranteed by the Constitution.<sup>126</sup> The likelihood of a suspended sentence might induce an alien to plead guilty or *nolo contendere*, especially if he or she is unaware of deportation eventualities.<sup>127</sup> The possibility thus arises that an alien—though innocent of any wrongdoing—may be banished from his home for life as the result of a plea, the ramifications of which he possessed little or no understanding. Such eventualities must create serious misgivings about the voluntariness of a plea so offered.<sup>128</sup>

Exacerbating the entire dilemma for the alien, federal deportation statute 8 U.S.C. § 1251(a)(4), predicated upon "moral turpitude," does not indicate precisely what constitutes moral turpitude,<sup>129</sup> leav-

125. *United States v. Sambro*, 455 F.2d 918, 925 (D.C. Cir. 1971) (Bazelon, J., dissenting).

126. 400 U.S. 25 (1970). See also *Brady v. United States*, 397 U.S. 742 (1970) in which the court stated:

We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

*Id.* at 751. See also *United States v. Bucio-Reyes*, No. 80-3744, slip op. (6th Cir. June 11, 1981), cert. denied, 454 U.S. 941 (1981) (the Court refused to reconsider the alien's conviction which was based on a *nolo contendere* plea, although the defendant had asserted his innocence while offering the plea).

127. See *supra* note 9.

128. See generally Note, *Withdrawal of Guilty Pleas under Rule 32(d)*, 64 *YALE L.J.* 590 (1955).

[T]here still exists the possibility of a guilty plea being entered by an innocent person relying on the security of a known outcome. This possibility is present whether the mistake concerns 'collateral' or 'direct' consequences. When the accused can prove that his counsel made conclusive statements to him about material consequences, it is reasonable to infer that these assertions were the cause of the plea. Hence, if it develops that the lawyer was wrong, withdrawal should be allowed.

*Id.* at 599 (footnotes omitted).

129. 8 U.S.C. § 1251(a)(4) (1976). For a compilation of what has been construed as a crime of moral turpitude, see I.A.C. GORDON & H. ROSENFIELD, *IMMIGRATION*

ing considerable ambiguity as to which crimes may lead to deportation. An alien might conceivably plead guilty to a crime either he, or his attorney, felt was not one of moral turpitude, only later to learn that it had been so construed. In addition, whether a violation constitutes moral turpitude is solely a federal question, not to be determined by state interpretation.<sup>130</sup> Consequently, one must look to how specific crimes have been defined in federal cases.<sup>131</sup> This presents a difficult task for the attorney. It is not, therefore, surprising that alien defendants, as well as defense counsel—and even judges themselves—are frequently unaware of the deportation consequences that may arise from a guilty plea.<sup>132</sup> It seems unfair to hold the alien to such strict degrees of punishment when the legal system he encounters is fraught with such ambiguous complexities. Statutes, such as those implemented by the aforementioned states, eliminate the disturbing problems that arise from these gray areas of the legal system.

An additional complication faced by the alien is the *nolo contendere* plea. This plea is not regarded as an express admission of guilt, but as a consent by the defendant to be punished as if he were guilty; it is a prayer for leniency.<sup>133</sup> For deportation purposes, however, the plea of *nolo contendere* is the equivalent of a guilty plea.<sup>134</sup>

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LAW AND PROCEDURE § 4.14(a)-(e) (rev. ed. 1982).

130. See Hollander, *supra* note 4, 48-49.

131. *Id.*

132. See Legomsky, *supra* note 50, at 105-06:

It is an anomaly of American immigration law that the sentencing judge—in federal and state courts alike—frequently makes the real decision on whether an alien convict is to be deported. Because the anomaly is largely unrecognized, this decision is often made unwittingly, without regard to whether such a sanction is desirable in the individual case.

Professor Legomsky also points out that deportation law itself possesses anomalies that are sometimes surprising, if not startling. For example, he notes, possession of one "joint of marijuana" may lead to deportation, whereas a conviction for first degree murder may not. *Id.* at 62 n.6. Bastone relates an equally troubling hypothetical situation:

[U]nder § 1251(a)(4) a non-citizen defendant convicted of a brutal rape-kidnapping may not incur the collateral consequences of vulnerability to deportation . . . [while] another non-citizen defendant, after pleading *nolo contendere* and being only minimally fined following each of two unsuccessful and unpremeditated attempts at shoplifting items of marginal value, could be the subject of deportation proceedings, notwithstanding long-term residence and otherwise exemplary conduct in the community.

Bastone, *supra* note 4 at 19.

133. *North Carolina v. Alford*, 400 U.S. 25, 36 n.8 (1970). Troublesome, too, is that while Rule 11(f) of the Federal Rules of Criminal Procedure requires the court to satisfy itself that there is a factual basis for the guilty plea, it makes no such demand for the acceptance of the plea of *nolo contendere*.

134. "It is settled that a plea of *nolo contendere*, when accepted by the court, becomes for all practical purposes the full equivalent of a plea of guilty . . ." *In re Fortis*, 14 I. & N. Dec. 576, 577 (1974). See also *Rubis-Rubio v. INS*:

While it may be true . . . that a guilty judgment following a *nolo contendere* plea cannot be used as an admission in a subsequent action, it has been held

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Difficulties can thus arise in this area depending on how a particular state employs the plea. California, for example, provides that guilty and *nolo contendere* pleas have the same legal effect in regard to felonies, but when the charge is a non-felony, the plea cannot be used against the defendant as an admission in any civil suit.<sup>135</sup> This can present a portentous conflict between jurisdictions, because an alien defendant, as well as his counsel, might be induced to offer a *nolo contendere* plea to a charge of some non-felony, in reliance on the state statute ensuring no civil ramifications, such as deportation. Nevertheless, the alien may be subject to a deportation proceeding, because 8 U.S.C. § 1251(a) becomes effective by virtue of a conviction, regardless of whether it stems from a plea of guilty or *nolo contendere*.<sup>136</sup> Again, the recent state statutes avoid this problem by requiring the defendant charged with any crime to be notified of potential deportation consequences whether offering a plea of guilty or *nolo contendere*. The alien defendant is safeguarded from any federal contingency, known or unknown.

#### *Expansion of Aliens' Due Process Rights by State Case Law*

In addition to the growing legislative trend among states to provide alien defendants greater safeguards from the hazards of unexpected deportation, recent state case law also reflects a trend in granting withdrawals of guilty pleas when the consequences of deportation were not known at the time the plea was offered. *Parrino*, however, is still followed in some jurisdictions, and is relied on especially in those cases where deportation is not the actual consequence at issue.<sup>137</sup> In a 1972 Indiana case,<sup>138</sup> for example, the defendant

that the conviction may be noticed for purposes of deportation where the fact of the conviction is itself the only thing that is relevant.

380 F.2d 29, 29-30 (9th Cir. 1967), *cert. denied*, 389 U.S. 944 (1976); *Farrington v. King*, 128 F.2d 785, 786 (8th Cir. 1942). (Though the defendant alleged that he accompanied his plea of *nolo contendere* with an explanation that he was innocent of the charge, the court held that the "plea of *nolo contendere* was, for all practical purposes, the full equivalent of a plea of guilty"). See *supra* note 5 (guilty plea is a conviction).

135. CAL. PENAL CODE § 1016 (Deering 1983).

136. See *supra* note 134 (*nolo contendere* as the equivalent of conviction for deportation purposes).

137. See *People v. Thomas*, 42 Ill. 2d 122, 242 N.E.2d 177 (1968) (addressing specifically the failure of a judge to inform the defendant that his conviction would deprive him of the right to vote and hold public office); *Peoponte v. State*, 57 Hawaii 354, 556 P.2d 577 (1976) (defendant unaware at the time of his plea that he would thereby lose the right to hunt or hold a gun).

138. *Lovera v. People*, 152 Ind. App. 377, 283 N.E.2d 795 (1972); *accord* *People v. Garcia*, 53 Misc. 2d 303, 279 N.Y.S.2d 288 (1967).

pleaded guilty to possession of marijuana and was sentenced to *five days* in jail and fined \$300. Although the trial court judge himself admitted that he was unaware that deportation would follow the defendant's conviction,<sup>139</sup> the court ruled that a trial judge has neither an obligation to determine that a defendant is an alien nor to advise him of the effect of his plea regarding deportation.<sup>140</sup>

One of the strongest positions taken among the states (along with an equally forceful dissent) is *Tafoya v. State*.<sup>141</sup> In deciding whether to allow the defendant to withdraw his guilty plea because of his unawareness of the deportation consequences at the time the plea was made, the Alaska court in this case followed *Parrino*, holding deportation to be merely a collateral consequence. The defendant's ignorance of this consequence did not render his plea void.<sup>142</sup> The court also addressed the question of whether the defense attorney's failure to inform the accused of the potential deportation constituted a deprivation of effective counsel such as is guaranteed by the Constitution. In contrast to a similar and more recent Pennsylvania decision,<sup>143</sup> the Alaska court agreed with the majority of the federal circuits that the failure of counsel to inform the accused of possible deportation did not constitute a denial of the right to effective assistance of counsel.<sup>144</sup> The applicable standard in determining whether the defendant has had effective counsel, the court asserted, was whether the counsel was so incompetent as to make the trial a mockery and a farce. Only then would the defendant be entitled to a new trial.<sup>145</sup>

Judge Rabinowitz, agreeing with Judge Frank, strongly dissented on two major issues: First, he rebutted the view that deportation was "only" a collateral consequence; and second, he expressed satisfaction that under the circumstances of this case, the "manifest injustice" criterion of Rule 32(d) had been met.<sup>146</sup> He felt the defendant Tafoya would not have pled guilty to the charge of rape had counsel advised him that he was deportable by virtue of his plea.<sup>147</sup> He also

139. If judges themselves are unaware of deportation consequences, it is not surprising that attorneys, not to mention their clients, are also frequently unaware. On the one hand this supports the position that judges can't be accountable to foresee such remote consequences—at least from their perspective; on the other hand, it demonstrates the necessity of compelling dissemination of such critical information. The resolution must center around the quintessential issue of the voluntariness of the alien defendant's plea.

140. 152 Ind. App. at 379, 283 N.E.2d at 798.

141. 500 P.2d 247 (Alaska 1972), *cert. denied*, 410 U.S. 945 (1973).

142. *Id.* at 250-51.

143. *Commonwealth v. Wellington*, 451 A.2d 223 (Pa. Super. 1982).

144. 500 P.2d at 252.

145. *Id.* at 251.

146. *Id.* at 254 (Rabinowitz, J., dissenting). Alaska's Criminal Rule 32(d) is identical to Rule 32(d) of the Federal Rules of Criminal Procedure. *Id.* at 253 n.3.

147. *Id.* at 255.

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posited what the District of Columbia Circuit later pronounced in *Russell* and what state court decisions have recently held, namely, that though a court's failure to advise a defendant of deportation consequences does not technically violate Rule 11, there need be no violation of this rule to invoke Rule 32(d).<sup>148</sup>

The two most recent state decisions dealing with notification to aliens of the consequences of their pleas reflect the reasoning of the *Russell* court and mark a dramatic turn from the *Parrino* holdings. In *Commonwealth v. Wellington*,<sup>149</sup> the Pennsylvania court conceded that a trial judge has no obligation to advise a defendant of the collateral consequences, and thus on this basis a plea could not be withdrawn. However, when defense counsel fails to advise the accused of such a consequence, a plea is not knowingly and intelligently offered. Describing deportation as a significant consequence of certain convictions, this court explained, "Counsel's ineffectiveness in failing to advise a defendant before a guilty plea of the significant legal consequences may therefore require that the plea be withdrawn."<sup>150</sup>

This holding does not compel a trial court itself to inform an accused of the deportation consequences; rather, it considers this to be the obligation of defendant's counsel.<sup>151</sup> Lack of such information, this Pennsylvania court asserts, affects the voluntariness of the alien's plea, as well as denies him the constitutionally guaranteed effective assistance of counsel. Consequently, breach of this duty by defense counsel requires the guilty plea to be withdrawn.<sup>152</sup> The practical effect of this holding, then, logically suggests that a guilty plea offered by a defendant alien unaware of deportation consequences—albeit as a result of his own counsel's ineffectiveness—is

148. Judge Rabinowitz asserted:

While there may be considerable overlap, the concept of 'manifest injustice' under Rule 32(d) permits the judge greater latitude than the requirements of constitutional 'due process.' The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done. *Id.* at 255 n.7 (quoting *Pitkington v. United States*, 315 F.2d 204, 209 (4th Cir. 1963)) (footnotes omitted).

149. 451 A.2d 223, 224 (Pa. Super. 1982).

150. *Id.* at 224.

151. *Id.* at 225.

152. The *Wellington* court stated:

Consequently, we now hold that counsel has a duty to an alien client to inquire and advise her of the possible deportation consequences of a contemplated plea. Because counsel's failure to undertake such actions could have no reasonable basis designed to effectuate appellant's interests he was ineffective, and appellant must be permitted to withdraw her guilty plea.

*Id.* (citations omitted).

rendered invalid because involuntarily made.

In a 1981 Florida case, *Edwards v. State*,<sup>153</sup> the court took this same position. Here the defendant claimed his plea of guilty was involuntary because (1) the trial judge had failed to inform him of possible deportation, and (2) his attorney had failed to advise him of such consequences. Relying on *Fruchtman* and *Michel*, the Florida court here, too, held that the trial court is not required to advise the defendant of federal consequences before accepting a guilty plea. However, a court could not accept a plea that is not offered voluntarily and knowingly, "that is, upon advice which enables the accused to make an informed, intelligent, and conscious choice to plead guilty or not."<sup>154</sup> The court in *Edwards* emphasized that for a waiver of constitutional rights to be acceptable, the plea must be made with an awareness of the relevant circumstances and likely result.<sup>155</sup> It then concluded that "ignorance of the potential consequences of deportation cannot, in our view, make for an intelligent waiver."<sup>156</sup> This view comports fully with the mandates of *Kercheval*<sup>157</sup> and *Boykin*<sup>158</sup> that a defendant be made aware of the implications and

153. *Edwards v. State*, 393 So. 2d 597 (Fla. 1981).

154. *Id.* at 599.

155. *Id.* The *Edwards* dissent accurately pointed out that by requiring counsel to advise the client of deportation possibilities, it, in effect, places the burden back upon the court to be satisfied that the defendant has been so advised, since if the defense attorney is remiss in his obligation, the judgment becomes subject to appeal or collateral attack. The point is well taken. Judicial efficiency speaks in favor of a rule requiring the court to inform the defendant of such consequences prior to accepting the plea, for as courts increasingly allow withdrawal of pleas under Rule 32(d), the frequency of collateral attacks necessarily increases. In California, for example, prior to the legislative enactment requiring courts to advise defendant aliens of deportation consequences, the state supreme court held the lack of defendant's awareness of potential deportation to be grounds for withdrawing the earlier plea. In *People v. Giron*, the California Supreme Court held that a court could grant a motion to withdraw a plea when justice would be promoted: "[W]here an extrinsic fact operated so as to cause an over-reaching of the free will and judgment of the accused so as to deny him a trial on the merits . . . the court may, even after judgment, permit him to withdraw the plea and stand trial." 11 Cal. 3d 793, 797 n.5, 523 P.2d 636, 639, n.5, 114 Cal. Rptr. 596, 599 n.5 (1974) (quoting *People v. Savin*, 37 Cal. App. 2d 105, 108, 98 P.2d 773, 774 (1940)). The *Giron* court also recognized that ignorance about deportation consequences was a constriction of the defendant's voluntary plea, saying, "As a general rule, a plea of guilty may be withdrawn for mistake, ignorance or inadvertence or any other factor over-reaching the defendant's free and clear judgment." *Id.* at 797, 523 P.2d at 639, 114 Cal. Rptr. at 599. See also *People v. Wiedersperg*, 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975) (withdrawal of the plea granted because both counsel and court were unaware of the deportation potentiality); but cf. *People v. Flores*, 38 Cal. App. 3d 484, 113 Cal. Rptr. 272 (1974) (no abuse of discretion); *People v. Martinez*, 154 Cal. App. 2d 233, 316 P.2d 14 (1957) (due process met, defendant fully represented by counsel, court had no responsibility to see that accused received sound advice from his attorney).

156. 393 So. 2d at 599. "While we may not impose upon the trial court the obligation to advise the accused of this consequence because 'collateral,' its 'collateralness' is immaterial in measuring the effective assistance of counsel." *Id.*

157. See *supra* text accompanying note 21 and note 22.

158. See *supra* text accompanying note 25.

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consequences of his guilty plea, thereby facilitating the constitutionally guaranteed voluntariness of that plea.

### CONCLUSION

The standard to be applied in the United States to alien defendants who offer pleas of guilty or nolo contendere while unaware of possible deportation consequences is unsettled. While some disagreement exists as to its nature, it is mere rhetoric to deny the penal aspect of deportation. All, in fact, do agree that the ultimate consequences of deportation are often considerably more severe than the actual punishment meted out by the trial court. Deportation can and does have a most devastating impact not only on the alien himself, but also on spouses, children, relatives, friends, and on other ancillary benefits such as employment, property, responsibilities, and contract benefits and obligations. Indeed, possibly the most traumatic impact is the deprivation of what to the alien has become home and fatherland.

The major objection to providing the alien defendant with notice regarding possible deportation appears to be the fear of burdening trial courts by requiring them to inform defendants of numerous and often unforeseeable collateral consequences.<sup>159</sup> There is, of course, considerable merit to these fears, for the entire gamut of collateral consequences is certainly not ascertainable. Deportation, however, is not only ascertainable, it is a common and predictable eventuality, singular in import among the various collateral consequences. In the words of Judge Learned Hand, it would be a "national reproach"<sup>160</sup> not to make this distinction.

Requiring courts to advise alien defendants of possible deportation would not impinge on judicial efficiency; rather it would enhance it by reducing the number of potential collateral attacks. The United States Supreme Court in *McCarthy v. United States* emphasized this by remarking: "Thus the more meticulously the Rule [Rule 11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous

159. *Joseph v. Esperdy*, 267 F. Supp. 492, 494 (S.D.N.Y. 1966) reflects this in summation: "[I]t seems onerous and absurd to expect a judge to explain to each and every defendant who pleads guilty the full range of collateral consequences of his plea, and indeed, to anticipate what those collateral consequences are." The *Cariola* court in *United States v. Cariola*, 323 F.2d 180, 182 (3d Cir. 1963), echoes a similar fear when it decried placing burdensome demands on the trial courts requiring clairvoyance of a superhuman kind. See *supra* note 61.

160. See *supra* note 99.

post-conviction attacks on the constitutional validity of guilty pleas."<sup>161</sup>

In reality, very little court time is required to advise a defendant of the pertinent consequences of his plea.<sup>162</sup> The *McCarthy* Court stressed: "It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking."<sup>163</sup>

The recently enacted statutes by California, Oregon, Massachusetts and Connecticut, as well as the increasing number of judicial decisions, both state and federal, reflect a growing willingness to extend to the alien defendant a due process that is more appropriate to his unique plight. From the standpoint of fairness and justice this is a commendable and necessary trend. Both judicial efficiency and the special circumstances presented by the alien defendant call for a national standard for determining the voluntariness of entering a plea of guilty or nolo contendere—one that is not enmeshed in the definitional confusion of directness and collateralness. Courts should be required to make the relatively simple effort of assuring themselves that the alien understands that deportation may result from his plea, thereby mooted the controversy surrounding the nebulous concepts of manifest injustice and effective assistance of counsel. Only then can an alien's plea be regarded as voluntary.

DAVID M. MCKINNEY

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161. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

162. *Proposed Amendments to Fed. Rules of Criminal Procedure: Hearing Before the Subcomm. on Criminal Justice of the Comm. of the Judiciary*, 93rd Cong., 2d Sess. 188 (1974) (Statement of Herbert Semmel, on behalf of the Nat'l Assn. of Criminal Defense Lawyers and the Wash. Council of Lawyers). "The entire process [Rule 11 warnings] usually takes about five minutes, particularly if the defense counsel has discussed these matters with his client in advance of the hearings . . ."

163. 394 U.S. at 472.

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b. Example / Checklist Contact Sheet

LEGISLATIVE SPONSOR: House State Affairs  
Pub. Hear Work Ses. Inv. Hear  
LEGISLATIVE REFERENCE: HB142  
SUBJECT: Consequence of Guilty Pleas by Aliens  
CONTACT: Ann PH: 4931

TC DATE/DAY: Wed, Feb 22  
TIME: 8:30-10:00  
JUNEAU ROOM: C-102  
BRIDGE: \_\_\_\_\_  
# OF PORTS: \_\_\_\_\_  
DATE TAKEN/BY: 2/17 Peggy

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TELECONFERENCE SITES:

LIO'S

- Anchorage
- Barrow \*
- Bethel
- Delta Junction \*
- Dillingham \*
- Fairbanks
- Glennallen \*
- Juneau
- Ketchikan
- Kodiak
- Kotzebue
- Mat-Su
- Nome
- Petersburg \*
- Sitka
- Soldotna
- Valdez \*

LTC'S

- Homer
- Wrangell

VTS'S

See List on Reverse Side

ALL LIO'S

OTHER SITES WELCOME WITH PRIOR NOTIFICATION

CHAIRING SITE: Juneau

CHAIRPERSON: Rep. Brucher

[ ] CCNFORMS TO LEGISLATIVE COUNCIL POLICY 4/85

SIGNATURE OF SPONSOR/CONTACT PERSON

DATE

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SPECIAL INSTRUCTIONS

OFFNETS: Jana Stewart  
(calling in from her office)  
Wants to keep listening - LIO will call her.  
Court System  
264-8237