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Guilty Pleas and the Hidden Minefield of Immigration Consequences for Alien Defendants: Achieving a "Just Result" by Adjusting Maine's Rule 11 Procedure

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GUILTY PLEAS AND THE HIDDEN MINEFIELD OF IMMIGRATION CONSEQUENCES FOR ALIEN DEFENDANTS: ACHIEVING A "JUST RESULT" BY ADJUSTING MAINE'S RULE 11 PROCEDURE

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I. INTRODUCTION

STATE V. ALDUS, DISTRICT COURT, HEARING TRANSCRIPT, P. 7:

COURT: And, Counsel, you're satisfied that she's doing this of her own free will?
[COUNSEL]: Yes, your Honor. We have discussed it quite a bit, and she—although it was for today only, we've gone over every facet of this case.
COURT: Okay.
[COUNSEL]: —and her possibilities and options. She—I think she understands.
COURT: Are you satisfied that any plea entered is knowingly and intelligently done?
[COUNSEL]: Absolutely.
Hearing Transcript, p. 21:
[PROSECUTOR]: Thank you very much, your Honor.
[COUNSEL]: Thank you for staying late, your Honor.
COURT: You're welcome.
[COUNSEL] [to defendant]: Okay. Now, you're doing time—
COURT OFFICER: Rise, please.
[COUNSEL] [to defendant]: —for these charges.[1]

On August 19, 1998, Defendant Awralla Aldus pleaded guilty to an aggravated assault charge and other charges pursuant to counsel's advice.[2] As a result of a plea bargain, the defendant received a sentence of five years in prison, with all but 90 days suspended.[3] In addition, she received four years of probation resulting from the aggravated assault charge and concurrent sentences of 60 days for the other charges.[4]

Despite covering "every facet of the case,"[5] however, counsel was completely unaware that his client's three months in jail would be followed by the threat of removal from the United States.[6] In 1996, Congress passed laws making aliens "conclusively presumed to be deportable" as a result of any "aggravated felony" conviction in state or federal courts.[7] Previously, the term "aggravated felony"

1. Trial transcript at 7, 21, State v. Aldus, Docket Nos. 98-2443-48, (Me. Dist. Ct., N. Ken., Aug. 19, 1998).

2. Aldus v. State, No. CR-98-414, slip op. at 3 (Me. Super. Ct., Ken. Cty., Mar. 23, 1999).

3. *Id.*

4. *Id.*

5. Trial transcript, 7, State v. Aldus, Docket Nos. 98-2443-48, (Me. Dist. Ct., N. Ken., Aug. 19, 1998).

6. Aldus v. State, No. CR-98-414, slip op. at 9. (Super. Ct. Ken. Cty., Mar. 23, 1999).

7. 8 U.S.C. § 1228 (2000) (commonly known as the Immigration and Nationality Act § 238(c) (2000)) ("An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.").

related to criminal convictions with a sentence of more than one year, but the laws passed in 1996 have greatly expanded the scope of the term to include crimes that are not felonies.[8] The new laws also require suspended sentences to be treated as time actually served in prison, making it much easier to render an alien deportable.[9] Because the defendant's suspended sentence exceeded one year, her conviction made her subject to removal procedures.

To say that the 1996 laws have created confusion and heartache in courts would be a gross understatement. State courts, in particular, have seen a marked increase in litigation resulting from the peculiar interplay of state and federal laws.[10] State criminal cases are entirely distinct from federal deportation proceedings, which are civil in nature. Yet, most state courts are aware that a conviction for an aggravated felony in state court will automatically trigger federal deportation proceedings for an alien defendant. As such, federal deportation consequences are often the most important factor informing an alien defendant's decision to plead guilty or go to trial in a state criminal case.

Although it is clear that immigration consequences matter a great deal to an alien defendant, the question remains; should they matter at all to a court in a state criminal proceeding? Confusion over the materiality of immigration consequences has been most acute in two areas of law in which defendants have constitutionally mandated protections: cases involving the Sixth Amendment right to effective counsel and cases involving Rule 11 protections, which aim to ensure that a defendant's guilty plea is knowing, voluntary, and based in fact.

The right to effective counsel is guaranteed by the United States Constitution.[11] As such, a defendant may challenge a conviction by alleging deprivation of effective counsel. "Effective counsel," however, does not require that assistance

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8. Thomas Alexander Aleinikoff, et al., IMMIGRATION AND CITIZENSHIP, 738 (4th ed. 1998). Black's Law Dictionary defines the term "felony" as "[a] serious crime usu. Punishable by imprisonment for more than one year or by death." BLACK'S LAW DICTIONARY 633 (7th ed. 1999). Federal criminal law defines a felony as an offense that has a maximum sentence of *more than* one year. 18 U.S.C. § 3559(a) (2001) (emphasis added). Under INA § 101(a)(43), however, the term "aggravated felony" is defined to include offenses for which the term of imprisonment is "*at least* one year." INA § 101(a)(43) [8 U.S.C. 1101(a)(43] (emphasis added). Hence, even if a state defines a crime with a one-year maximum sentence as a misdemeanor, it can still qualify as an "aggravated felony" under INA § 101(a)(43). In Maine, Class C crimes (other than murder) can qualify as "aggravated felonies" since they relate to crimes that carry a sentence of one year or more. 17-A M.R.S.A. § 1252.

9. Immigration and Nationality Act § 101(48)(B) (2000) [8 U.S.C. § 1101(48)(B) (2000)]. This statute provides the following:

> Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Id.

10. *See, e.g.*, De De Chiem v. Wells, No. 00-394-P-C, 2001 U.S. Dist. LEXIS 8365 (D. Me. June 21, 1991) (U.S. District Court's denial of habeas corpus petition filed by alien claiming that his state criminal conviction was constitutionally defective because his attorney and interpreter did not inform him of the immigration consequences of his guilty plea).

11. U.S. CONST. amend. VI.

of counsel be free of errors.[12] Rather, the United States Supreme Court has held that assistance of counsel is constitutionally adequate if it falls within the range of a "reasonably competent attorney."[13] Accordingly, ineffective counsel cases inquire into the reasonableness of counsel's performance and whether the defendant was prejudiced by counsel's errors.[14] A court's view on the materiality of deportation consequences is extremely important because it will likely inform its assessment of whether an attorney's conduct was reasonable under the circumstances and whether counsel's errors prejudiced the defendant.[15]

Rule 11 procedures, which also implicate constitutional rights, are used by state and federal courts to affirmatively confirm that a defendant's guilty plea is knowing, voluntary, and has a basis in fact.[16] To this end, the court must personally address the defendant to confirm his or her state of mind on the record. Implicit in the Rule 11 inquiry is the notion that a guilty plea without a complete understanding of the direct consequences of conviction is inherently unreliable. Once again, a court's view of the materiality of immigration consequences has an enormous impact on its assessment of the Rule 11 requirement of a plea that is knowing, voluntary, and has a basis in fact.[17]

Ineffective counsel and Rule 11 cases are closely related because they draw on similar facts and themes. If a court views immigration consequences as immaterial to a guilty plea, it will likely find that counsel has no duty to inform an alien client of the threat of deportation.[18] As such, counsel's failure to inform an alien defendant of immigration consequences would not be deemed constitutionally ineffective pursuant to the Sixth Amendment right to effective counsel. Similarly, a guilty plea to an aggravated felony would be not be deficient under Rule 11 because the inquiry into the knowing and voluntary nature of a plea only extends to "direct" consequences of the plea, and not to "collateral" consequences such as deportation.[19]

Though the case law on ineffective counsel and Rule 11 cases is fairly extensive, it is important to note that the progression of the common law is like a river that is never at rest. Sweeping changes accompanying recent immigration laws have led some state courts to adjust the substantive law to reflect the idea that immigration consequences can be material to a guilty plea in certain circum-

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12. McMann v. Richardson, 397 U.S. 759, 774 (1970). In McMann, the court stated the following:

> It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.

Id.

13. *Id.* at 770.

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

15. *See, e.g.*, U.S. v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990).

16. *See infra* note 115.

17. United States v. Del Rosario, 902 F.2d at 59.

18. *Id.*

19. *See, e.g.*, Nunez Cordero v. United States, 533 F.2d 723, 726 (1st Cir. 1976).

stances.[20] By examining the facts and holdings of new cases in relation to those of the prior case law, it is possible to obtain a "functional definition" of the law—a window into the meaning and scope of the law. Functionally defining the law in a single jurisdiction is particularly instructive because it provides an opportunity to assess the law in a real context. Because a description of the law should precede a prescription for changing the law, this Comment focuses on the single jurisdiction of Maine, describing its case law and proposing changes aimed at enhancing judicial procedures.

The above exchange between Awralla Aldus and her court-appointed attorney sets the stage for an inquiry into the respective duties of counsel and the court in cases involving guilty pleas and severe immigration consequences. Part II of this Comment examines ineffective counsel cases in federal and Maine state courts, providing a functional definition of the constitutionally mandated duties of counsel. Part III of this Comment centers on Rule 11 protections in federal and Maine state courts, functionally defining the duties of the court and the meaning of a plea that is knowing, voluntary, and based in fact. Part IV of this Comment delves into the unique interplay of federal and state laws in such cases when they result in unexpected immigration consequences, such as removal.

What happens when an alien defendant, counsel, and the court are totally unaware that a guilty plea in state court will set into motion federal deportation proceedings? Are immigration consequences material to a decision to plead guilty or is deportation a "collateral" consequence of no legal significance to the underlying state charge?

Part IV of this Comment analyzes cases that examine the materiality of immigration consequences through the prism of the collateral consequences doctrine—the principle that courts need only concern themselves with "direct" consequences of a guilty plea or conviction. In addition, this Comment analyzes *Aldus v. State,*[21] the key decision in which the Maine Supreme Judicial Court, sitting as the Law Court, addressed immigration consequences while attempting to steer clear of the collateral consequences doctrine. Although the court's holding in *Aldus* alludes to limited circumstances in which immigration consequences may be material to a defendant's decision to plead guilty, further probing into its analysis reveals that the court's overall approach is consistent with the view that immigration consequences are "collateral" to a guilty plea.[22] One point of particularly great concern is that *Aldus* suggests that there is little recourse available when procedural safeguards are most needed: when the alien defendant, counsel, and the court are unaware that conviction could lead to deportation.

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20. People v. Pozo, 746 P.2d 523, 529 (Colo. 1987). The court stated the following:

> When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law. This duty stems not from a duty to advise specifically of deportation consequences, but rather from the more fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients. In cases involving alien criminal defendants, for example, thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies.

Id. (citations omitted).

21. Aldus v. State, 2000 ME 47, 748 A.2d 463.

22. *Id.* at ¶ 17, 748 A.2d at 469. ("As the [Superior] court acknowledged, th[e] fact [that Aldus was an alien] . . . alone would not require any particular action or advice by counsel.").

Part V of this Comment is a proposal to amend Maine's Rule 11 to include a limited inquiry by the court to determine whether the defendant is an alien and whether potential immigration consequences have been investigated. Such an inquiry would serve only as a warning on the potential for immigration consequences, while the duty of investigation would remain entirely with counsel. This modest expansion in Rule 11 would improve judicial procedures by providing an alien defendant and counsel with notice of the potential for serious immigration consequences resulting from a guilty plea. In addition, it would also provide an opportunity for an alien defendant to request a continuance if counsel is unaware of potential immigration consequences or unwilling to investigate them.

Although narrow in scope, the proposed amendment would serve as an important procedural safeguard for alien defendants and counsel when they are unaware that a decision to plead guilty could lead to life-shattering consequences. Modestly expanding the court's duties in the Rule 11 inquiry would provide counsel and an alien defendant with notice of the hidden legal minefields while alerting them to their formal and informal duties. To the extent that an amended Rule 11 would reduce the occurrence of serious immigration consequences that are entirely unanticipated by the alien defendant, counsel, and the court, such procedures would represent an important step toward ensuring a "just result," the principle guiding Rule 11 procedures.[23]

II. INEFFECTIVE COUNSEL

A. The Sixth Amendment

The right to effective assistance of counsel is rooted in the Sixth Amendment of the United States Constitution, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[24]

Ratified in 1791, the Sixth Amendment was introduced at a time when the nation had fresh memories of British oppression before the American Revolution. Judicial proceedings during the colonial period were notorious for the pervasive lack of impartiality by British tribunals, with conviction a foregone conclusion for many accused of wrongdoing.[25] The ratification of the Sixth Amendment was

23. Aldus v. State, 2000 ME 47, ¶ 15, 748 A.2d 463. ("In Laferriere we noted that our inquiry is whether the plea proceeding produced a just result which is 'the knowing and voluntary entry of a guilty plea by a guilty party.'") (citations omitted).

24. U.S. CONST. amend. VI.

25. FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, 109 (Greenwood Press 1969). Heller states the following:

> At the time of the American Revolution the law of England permitted a prisoner to be heard by counsel in misdemeanor and treason cases only. *In ordinary felony cases the participation of counsel was prohibited.* It is necessary to recall, however, that in England the criminal defendant as a rule was confronted not by a public prosecutor

aimed at ending such abuses through the introduction of procedural safeguards, such as the right to assistance of counsel.[26]

In its modern jurisprudence, the United States Supreme Court has interpreted this right broadly. In *McMann v. Richardson*,[27] the Court made an early attempt to quantify the scope of Sixth Amendment rights, stating that "the right to counsel is the right to the *effective* assistance of counsel."[28] The Court held that a claim of ineffective legal assistance could not stand without counsel's performance falling below that of a "reasonably competent attorney."[29]

B. The Strickland *Test: Ineffective Counsel in Criminal Trials*

Through the introduction of specific tests for judging ineffective counsel claims, the Court further elaborated on the meaning and scope of Sixth Amendment rights. In *Strickland v. Washington*,[30] the Court unveiled its current test for determining ineffective assistance of counsel. In that case, a defendant on trial for murder claimed that counsel's assistance was constitutionally ineffective because he cut short his efforts after the defendant ignored his advice and confessed to the crimes.[31]

The Court first stated that the Sixth Amendment right to counsel exists for the fundamental purpose of ensuring a fair trial.[32] "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[33] Guided by the purpose of ensuring a fair trial, the Court stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[34]

> but by the injured or some other interested party. In the colonies, on the other hand, the early eighteenth century had seen the establishment of full-time government officials with the duty of prosecuting crime. The English practice, which Blackstone had denounced as 'not all of a piece with the rest of the humane treatment of prisoners by the English law,' was therefore even more inequitable under colonial conditions . . . .

Id. (emphasis added).

26. MELVYN ZARR, THE BILL OF RIGHTS AND THE POLICE, 1 Oceana Publications (1970). Professor Zarr writes:

> Our Bill of Rights—our balance [between collective security and personal liberty]—was struck in reaction to the balance struck in 18th Century England. That society opted for order and security by, among other things, punishing hundreds of crimes by death and by empowering its constabulary to search and seize at will under the authority of general warrants.
>
> To the Framers of our Constitution, liberty was poorly weighted in that balance. They recognized the tendency of even well-meaning officials, once caught up in the excitement of pursuit of suspected criminals, to use whatever short-cut seemed most effective and to ignore the liberties of the citizenry. The police cure, they thought, could often be worse than the social ill.

Id.

27. 397 U.S. 759 (1970).
28. *Id.* at 771 n.14 (emphasis added).
29. *Id.* at 770-71.
30. 466 U.S. at 668.
31. *Id.* at 672-75.
32. *Id.* at 684.
33. *Id.* at 685.
34. *Id.* at 686.

The Court then introduced the two-part test to be used to determine whether the performance of counsel fell short of that benchmark.[35] "First, the defendant must show that counsel's performance was *deficient*. . . . Second, the defendant must show that deficient performance *prejudiced* the defense."[36]

Regarding the first prong of the test, the Court stated that a finding of deficient performance required a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[37] Attempting to put meat on the bones of this statement, the Court held that attorney performance in reference to the first prong should be measured against the performance of a "reasonably competent attorney."[38] The Court stated that this objective standard of reasonableness should be used to judge effectiveness under prevailing professional norms.[39] The reasonableness of counsel's conduct is to be assessed according to the specific facts of the case, viewed at the time of counsel's conduct.[40]

Acknowledging the temptation to second-guess counsel's assistance after an adverse result, the Court stated that counsel enjoys a presumption of adequate assistance that must be rebutted by the defendant in order to claim inadequate assistance.[41] As long as counsel's conduct was professionally reasonable, strategic choices by counsel would be "virtually unchallengeable."[42]

The Court noted, however, that reasonable conduct included a duty of counsel to investigate.[43] "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[44] Thus, while counsel is presumed to have provided adequate assistance, this presumption may be rebutted by a showing that the attorney's decision not to investigate fell below that of a reasonably competent attorney.[45] Such a showing depends on the particular facts of the case, with "inquiry into counsel's conversations with the defendant . . . critical to a proper assessment of counsel's investigation decisions . . . [and] other litigation decisions."[46]

The second prong of the *Strickland* test requires a showing of prejudice sufficient to demonstrate that counsel's errors deprived the defendant of a fair trial.[47] "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[48] A finding of prejudice requires that the fact finder would have found, with reasonable probability that, absent counsel's errors, a reasonable doubt of guilt would have existed.[49] In other words, prejudice can only be found if a defen-

35. *Id.* at 687.
36. 466 U.S. at 687 (emphasis added).
37. *Id.*
38. *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 770-71 (1970)).
39. *Id.* at 688.
40. *Id.* at 690.
41. *Id.* at 690-91.
42. Strickland v. Washington, 466 U.S. at 690-91.
43. *Id.* at 691.
44. *Id.*
45. *Id.* at 689.
46. *Id.*
47. *Id.* at 687.
48. *Id.* at 694.
49. *Id.* at 695.

dant demonstrates, with reasonable probability, that it was the attorney's error that caused him to lose his case.[50]

The Court's rationale for requiring prejudice was based on the Sixth Amendment.[51] "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[52] Because the Sixth Amendment's guiding purpose is ensuring a just result, a defendant suffers no injustice when his conviction would have resulted regardless of counsel's errors.[53] As such, no claim for ineffective assistance of counsel can exist without a showing of prejudice.[54] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[55]

The Court held that the defendant's claim of ineffective assistance of counsel was without merit because he failed to establish both prongs.[56] It noted, however, that the failure of just one prong would be sufficient to defeat the claim.[57] "Failure to make the required showing of *either* deficient performance *or* sufficient prejudice defeats the ineffectiveness claim."[58]

Because failure to meet either prong can defeat the whole claim, the Court emphasized that courts were free to analyze the prongs in whichever order they desired.[59] "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be often so, that course should be followed."[60] As a result, an ineffective assistance of counsel claim may be disposed of without ever looking at the reasonable competence of counsel's representation.[61]

C. The Hill *Test: Ineffective Counsel and Guilty Pleas*

In *Hill v. Lockhart*,[62] the Court applied the *Strickland* test to a situation in which a defendant pleaded guilty. In that case, the defendant pleaded guilty to charges of murder and theft, but later sought post-judgment relief on grounds of ineffective assistance of counsel.[63] The defendant charged that his attorney misinformed him that he would be required to serve one-third of his sentence before becoming eligible for parole.[64] In fact, the defendant's prior convictions required him to serve one-half of his sentence before parole eligibility.[65] The defendant

50. *Id.*
51. *Id.* at 692.
52. *Id.* at 691-92.
53. *Id.* at 691.
54. *Id.* at 691.
55. *Id.*
56. *Id.* at 700.
57. *Id.*
58. *Id.* (emphasis added).
59. *Id.* at 697.
60. *Id.* at 697.
61. *Id.* at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").
62. 474 U.S. 52 (1985).
63. *Id.* at 53.
64. *Id.* at 55.
65. *Id.*

claimed that counsel's error entitled him to a reduction of sentence in proportion to his attorney-induced expectations.[66]

The Court held that *Strickland*'s two-prong test applied to challenges of guilty pleas based on grounds of ineffective assistance of counsel.[67] The first prong of deficient counsel was identical to *Strickland*'s inquiry into the reasonable competence of representation.[68] The second prong of prejudice, however, was slightly modified to take into account the difference in the settings for a guilty plea and a case that goes to trial.[69] The Court wrote:

> The second, or "prejudice," requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.[70]

The Court essentially applied the same methodology to its ineffective counsel inquiry, but made adjustments in view of the different setting.

While the outcome of a trial could be a guilty verdict, the outcome of a plea bargain is a guilty verdict and a waiver of trial. As such, the Court tailored the *Strickland* prejudice inquiry to take into account the waiver of trial.[71] Thus, in a guilty plea setting, the prejudice inquiry requires a showing that counsel's error is the sole reason the defendant pleaded guilty and waived trial.[72] The weight accorded to counsel errors depends largely on "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea."[73]

Applying the *Strickland* test, the Court held that the defendant made no showing of prejudice because he failed to allege that, but for the attorney's error, he would have pleaded not guilty and elected to go to trial.[74] Because the defendant failed to satisfy *Strickland's* second prong of prejudice, the Court found it unnecessary to inquire into the first prong of deficient performance by counsel.[75] As such, the defendant's claim of ineffective counsel was disposed of without ever inquiring into the reasonableness of attorney conduct.[76]

D. Foundation of the Right to Effective Counsel in State Courts

The right to effective counsel also exists in state courts. In *Powell v. Alabama,*[77] the United States Supreme Court held that the Constitution required states to provide a fair opportunity to defendants charged with a capital crime to secure counsel when that right to counsel was already conceded by state law.[78] The Court

66. *Id.*
67. Hill v. Lockhart, 474 U.S. at 58.
68. *Id.* at 58-59.
69. *Id.* at 59.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 59.
74. *Id.* at 60.
75. *Id.*
76. *Id.*
77. 287 U.S. 45 (1932).
78. *Id.* at 53.

noted that it was not concerned with alleged errors of state law in state courts.[79] Rather, its inquiry focused on whether due process was violated when the state provided insufficient time for the defendants to secure counsel, a state right that was enshrined in Alabama law.[80] The Court stated that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."[81] Accordingly, the Court held that it is "the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him," establishing a Constitutional basis for the right to counsel in state court proceedings.[82]

In *Gideon v. Wainwright*,[83] the Court addressed confusion over the scope of the right to counsel by unambiguously declaring that the Sixth Amendment right to counsel applies equally in state courts by virtue of the Fourteenth Amendment.[84] The Court stated that the right to counsel was a fundamental right that was essential to a fair trial: "While the Court at the close of its Powell opinion did by its language . . . limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable."[85] The Court concluded that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[86] Accordingly, the Court held that the Sixth Amendment right to counsel applied equally in state courts and also included the right to appointed counsel if an indigent defendant could not afford an attorney.[87]

E. Ineffective Counsel in State Courts

Though cases like *Strickland*, *Hill*, *Powell*, and *Gideon* are the rosetta stone for ineffective counsel cases, it bears noting that individual states, and not federal courts, have the power to prescribe their own standards for reasonable professional conduct through the adoption of their own model rules of conduct. The Court has acknowledged that "[s]tates are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake."[88] Thus, while the preemption clause ensures that the Supreme Court may set standards in reference to constitutional requirements, states have the ability to expand on these minimum constitutional requirements through the adoption of stricter state standards.[89] In *Nix v. Whiteside*,[90] for instance, the

79. *Id.* at 52.
80. *Id.* at 52-53.
81. *Id.* at 71.
82. *Id.* at 73.
83. 372 U.S. 335 (1963).
84. *Id.* at 342-43.
85. *Id.* at 343.
86. *Id.* at 344.
87. *Id.* at 343-44.
88. Lego v. Twomey, 404 U.S. 477, 489 (1972).
89. In *State v. Collins*, 297 A.2d 620 (Me. 1972), for instance, the Law Court held that the Maine Constitution's guarantee against self-incrimination was stricter than the analogous Fifth Amendment right guaranteed by the United States Constitution. *Id.* at 627. The court has held

Court jostled over the scope of the *Strickland/Hill* test, acknowledging that the reasonableness of attorney conduct is to be guided by "prevailing norms of practice."[91] Two vocal concurrences emphasized that prevailing norms of practice in state courts may differ from norms in federal courts.[92] "[T]he Court *cannot* tell the States or the lawyers in the States how to behave in their courts, unless and until federal rights are violated."[93] Justice Brennan emphasized that the issue before the Court was whether the defendant's Sixth Amendment rights had been violated, not whether counsel's conduct measured up to that of a reasonably competent attorney.[94] Because the defendant already failed to satisfy the second prong of prejudice, there was no reason to delve into the "thorny" issue of whether counsel's conduct met the Court's view of reasonable professional conduct.[95]

F. Ineffective Counsel in Maine: The Lang *Test for Criminal Trials*

In the State of Maine, the "thorny" problem of differing state and federal standards has been largely obviated by the Law Court's adoption of an ineffective counsel test that is "virtually identical" to the *Strickland* test.[96] The current standard of review was first established in *Lang v. Murch,*[97] a pre-*Strickland* case in which the defendant sought post-judgment relief on grounds of ineffective assistance of counsel.[98] In that case, the defendant asserted that his conviction for unlawful sexual conduct was tainted by jury prejudice because four members of his jury had participated in a similar trial on the previous day.[99] The defendant argued that his attorney's failure to object to the selection of jury members during voir dire was a denial of his right to effective counsel.[100] The Law Court established a new standard of review for ineffective counsel claims using a two-prong inquiry:

> (1) Has there been serious incompetency, inefficiency, or inattention of counsel—performance by counsel which falls measurably below that which might be expected from an ordinary fallible attorney? (2) Has such ineffective representation by counsel likely deprived the defendant of an otherwise available substantial ground of defense?[101]

The Law Court's two-prong inquiry represented a departure from the previous

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that the Maine Constitution requires the prosecution to prove that confession was voluntary by "proof beyond a reasonable doubt." *Id.* The U.S. Supreme Court has held that the Fifth Amendment requires that the prosecution prove the voluntariness of confession by a "preponderance of the evidence." Lego v. Twomey, 404 U.S. at 489.

90. 475 U.S. 157 (1986).

91. *Id.* at 165 (quoting Strickland v. Washington, 466 U.S. at 668).

92. *Id.* at 176-78.

93. *Id.* at 177 (Brennan, J., concurring).

94. *Id.*

95. *Id.*

96. Kimball v. State, 490 A.2d 653, 656 (Me. 1985).

97. 438 A.2d 914 (Me. 1981).

98. *Id.* at 914-15.

99. *Id.* at 915.

100. *Id.*

101. *Id.* The word "measurably" was subsequently removed from the inquiry in *State v. Brewer*, 1997 ME 177, ¶ 17, 699 A.2d 1139. The Law Court eliminated the term because it confused courts and added nothing to the inquiry. *Id.*

"mockery-of-justice" standard, which was arguably more subjective in nature.[102] The court stated that a standard of "reasonably competent assistance" was required by the Maine Constitution and the United States Constitution.[103] As a result, the court vacated the defendant's conviction and remanded the case to have the Superior Court apply the new two-prong test to the facts of the defendant's case.[104]

G. *The* Laferriere *Test for Guilty Pleas*

In *Laferriere v. State,*[105] the Law Court applied the *Strickland* two-prong test to an ineffective assistance claim stemming from a guilty plea, a procedural posture similar to the *Hill* case. The defendant in *Laferriere* sought post-conviction relief based on several claims, alleging a violation of his Sixth Amendment right to effective assistance of counsel.[106] Among other charges, the defendant claimed that his rights were violated by his attorney's incorrect advice during the plea proceedings that he would be able to serve his fifty-five year sentence for murder in a state nursing home rather than in a prison.[107]

Reiterating that its inquiry and *Strickland* test were "virtually identical," the Law Court applied the *Strickland* test to the defendant's claims.[108] The court elected to analyze the second prong of prejudice.[109] Tracking *Hill*'s adaptation of the *Strickland* test, the court stated the defendant had to show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[110] The court emphasized that a showing of prejudice was indispensable to prove ineffective counsel because it would be a windfall for the defendant to reverse a guilty plea that was valid, save counsel's error.[111] Because the defendant offered no evidence to show that counsel's error led him to plead guilty, the court held that he failed to satisfy *Strickland's* second prong requirement of prejudice.[112] As such, the defendant's claim for ineffective assistance of counsel was disposed of without having to delve into *Strickland's* first prong of whether counsel's assistance was reasonably competent.[113]

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102. Bennett v. State, 161 Me. 488, 499, 214 A.2d 667, 674 (1965). The court stated:
> Where accused was represented by counsel of his own selection, he cannot complain of counsel's incompetence, errors of judgment or mismanagement of his defense unless the representation was of such poor calibre as to reduce the proceedings to a farce and a sham, as where the representation was so ineffective as to make the conviction a mockery or manifest miscarriage of justice.

103. Lang v. Murch, 438 A.2d at 916. The Maine Constitution Article I, Section 6, guarantees the right of representation by counsel to a defendant in a criminal trial, just like the Sixth Amendment of the United States Constitution. ME. CONST. art. I, § 6. In *State v. Cook*, 1998 ME 40, 706 A.2d 603, the court held that "an indigent misdemeanor defendant in Maine has a right to counsel under [Article I, section 6] of the Maine Constitution when imprisonment will actually be imposed," consistent with the U.S. Supreme Court's decision in *Scott v. Illinois*, 440 U.S. 367, 373 (1979), a post-*Gideon* case that held that the right to counsel exists if there is a threat of incarceration. State v. Cook, 1998 ME 40, ¶ 6, 706 A.2d at 605.

104. Lang v. Murch, 438 A.2d at 916.

105. 1997 ME 169, 697 A.2d 1301.

106. *Id.* ¶ 4, 697 A.2d 1301.

107. *Id.*

108. *Id.* ¶ 6, 697 A.2d 1301 (quoting Kimball v. State, 490 A.2d 653, 656 (Me. 1985)).

109. *Id.*

110. *Id.* ¶ 7, 697 A.2d 1301 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

111. *Id.* ¶ 8, 697 A.2d 1301.

112. *Id.* ¶ 10, 697 A.2d 1301.

113. *Id.* ¶ 19, 697 A.2d 1301.

III. RULE 11 PROTECTIONS

A. Rule 11 in Federal and State Cases

Like the constitutional right to effective counsel, Rule 11 procedures serve as an essential protection of a defendant's rights, ensuring that a guilty plea is given knowingly and voluntarily.[114] State court proceedings are governed by each state's version of Rule 11, while federal proceedings are governed by Rule 11 of the Federal Rules of Criminal Procedure.[115] Although the federal requirement has long been a fixture in federal criminal trials, it was not until 1969 that split circuits were informed of the precise requirements for ensuring that a plea was knowing and voluntary.[116] Rule 11, in its 1966 form, provided:

> 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 or a plea of *nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.* If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant

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114. *See, e.g.*, United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000).

115. Rule 11 of the Federal Rules of Criminal Procedure provides:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and
> (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and
> (4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and
> (5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and
> (6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.
> (d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney. Fed. R. Crim. P. 11 (2000).

116. McCarthy v. United States, 394 U.S. 459, 468-69 (1969).

> corporation fails to appear, the court shall enter a plea of not guilty. *The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*[117]

The Ninth Circuit held that anything short of full compliance with Rule 11 required a setting aside of the guilty plea and a new trial.[118] Other circuits, however, held that Rule 11 did not necessarily require a new pleading, but only a remand for an evidentiary hearing if the voluntariness of a plea could not be determined from the record.[119]

In *McCarthy v. United States*, the Court resolved the split among circuits when it held that non-compliance with Rule 11 required a setting aside of the guilty plea and a new trial.[120] The petitioner in that case was an elderly man charged with three counts of "wilfuly and knowingly" evading taxes.[121] At his initial arraignment, he pleaded not guilty to each count.[122] Several weeks later, defense counsel moved to withdraw the not-guilty plea for one of the counts, while the government agreed to dismiss the other counts.[123] Before accepting the guilty plea, the presiding judge inquired into the petitioner's decision to change his plea.[124] The Court wrote:

> The District Judge asked petitioner if he desired to plead guilty and if he understood that such a plea [of guilty] waived his right to a jury trial and subjected him to imprisonment for as long as five years and to a fine as high as $10,000. Petitioner stated that he understood these consequences and wanted to plead guilty. . . . Before the plea was accepted, however, the prosecutor asked the judge to inquire whether it had been induced by any threats or promises. In response to the judge's inquiry, petitioner replied that his plea was not the product of either. He stated that it was entered of his "own volition." The court ordered a presentence investigation and continued the case. . . .[125]

At the sentencing hearing, however, the petitioner revealed that his failure to pay taxes had not been deliberate and that he would have paid them had he not been in poor health.[126] Counsel for the petitioner stated that his tax evasion resulted from his "neglectful" and "inadvertent" bookkeeping during a period of serious drinking problems.[127] As such, the petitioner stated that "there was never any disposition to deprive the United States of its due."[128] The judge, however, relied on the pre-sentencing report as the record to determine that the petitioner's bookkeeping "was not inadvertent."[129] As such, the petitioner was sentenced to one year in jail and fined $2,500.[130]

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117. *Id.* at 462-63, n.4 (quoting Fed. R. Crim. P. 11 and emphasizing new amendments to Rule 11 that became effective on July 1, 1966) (emphasis in original).
118. *Id.* at 468 (discussing Heiden v. United States, 353 F.2d 53 (9th Cir. 1965)).
119. *Id.* at 468-69 (discussing Kennedy v. United States, 397 F.2d 16, 17 (6th Cir. 1968)).
120. *Id.* at 468-69.
121. *Id.* at 460.
122. *Id.* at 461.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 462.
128. *Id.*
129. *Id.*
130. *Id.*

The petitioner appealed the decision, asserting that the district judge's inquiry violated Rule 11.[131] The petitioner charged "(1) that the District Court had accepted his plea 'without first addressing [him] . . . personally and determining the plea [was] . . . made voluntarily with an understanding of the charge,' and (2) that the court had entered judgment without determining 'that there [was] a . . . factual basis for the plea.'"[132]

Affirming the District Court, the Court of Appeals held that Rule 11 was satisfied, implying that the rule did not require a judge to personally address the petitioner to determine that he understood the nature of the charge.[133] In addition, the court stated that reliance on the pre-sentence report was sufficient to determine that the plea had a factual basis.[134]

The Court granted certiorari to end confusion among the circuits on the proper implementation of Rule 11.[135] Although it acknowledged that Rule 11 proceedings implicated constitutional rights, the Court based its ruling strictly on its textual construction of Rule 11 and its inherent power to supervise all lower federal courts.[136] As such, the Court warned that "we do not reach any . . . constitutional arguments."[137]

The Court noted that "Rule 11 expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea."[138] Because the district judge did not personally address the defendant on his understanding of the charges, the Court held that Rule 11 had been violated.[139] The Court wrote:

> [T]he Government argues that since petitioner stated his desire to plead guilty, and since he was informed of the consequences of his plea, the District Court "could properly *assume* that petitioner was entering that plea with a complete understanding of the charge against him." We cannot accept this argument.[140]

The Court held that Rule 11's requirement of a knowing and voluntary plea made it necessary for a judge to personally "inquire into the defendant's understanding of the nature of the charge and the consequences of his plea . . . [and] to satisfy himself that there is a factual basis for the plea."[141]

The Court discussed the policy rationale requiring that a guilty plea be given voluntarily. The Court stated the following:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege."[142]

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131. *Id.*
132. *Id.*
133. *Id.* at 463.
134. *Id.*
135. *Id.* at 462.
136. *Id.* at 464.
137. *Id.*
138. *Id.*
139. *Id.* at 471-72.
140. *Id.* at 464.
141. *Id.* at 467.
142. *Id.* at 466.

Though Rule 11 was not then constitutionally mandated, the Court stated that it assisted judges "in making the constitutionally required determination that a defendant's guilty plea is truly voluntary."[143]

The Court also addressed the policy purpose behind Rule 11's requirement that the defendant understands the nature of the charge. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[144]

Finally, the Court discussed the rationale behind the Rule 11 requirement that the judge satisfy himself that factual basis exists for the guilty plea.[145] The Court wrote:

> Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."[146]

The Court's ruling essentially increased the government's burden, requiring a court to personally address the defendant to determine if his plea was voluntary and knowing, and had a factual basis.[147] To that end, the Court required that defendant's understanding of the nature of the charge must be "*in the record at the time the plea is entered.*"[148]

In short, a court may not assume that a guilty plea is voluntary just because such a plea has been entered by the defendant.[149] Personal inquiry by the judge is required to "expose the defendant's state of mind on the record . . . [to] facilitate his own determination of a guilty plea's voluntariness."[150] Accordingly, the Court held that the district judge's failure to inquire into the defendant's understanding of the charge deprived him of the Rule 11 procedural safeguard of creating a proper record to confirm the voluntariness of his plea.[151] The defendant's guilty plea was set aside and his case was remanded for a different trial where he could offer a new plea.[152]

In subsequent cases, the Court expanded on the scope and meaning of Rule 11. In *Boykin v. Alabama,*[153] the Court held that the State of Alabama violated the petitioner's constitutional rights because there was nothing in the record to demonstrate that the petitioner's guilty plea was voluntary and knowing.[154] The Court wrote:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege

143. *Id.* at 465.
144. *Id.* at 466.
145. *Id.* at 467.
146. *Id.*
147. *Id.*
148. *Id.* at 470.
149. *Id.* at 467.
150. *Id.*
151. *Id.* at 472.
152. *Id.*
153. 395 U.S. 238 (1969).
154. *Id.* at 243 (citations omitted).

> against compulsory self-incrimination guaranteed by the Fifth Amendment, and applicable to the States by reason of the Fourteenth Amendment. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these important federal rights from a silent record.[155]

The Court's ruling enshrined federal Rule 11 protections as a *constitutional* right applicable to state criminal proceedings, representing a huge expansion over *McCarthy* because the scope of that ruling was limited to federal courts.[156] The *Boykin* majority held that the rights enumerated in *McCarthy*—identified in that case as Rule 11 protections—were protected by the Constitution.[157] This was because a guilty plea and its accompanying waiver of rights "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."[158] Just as the Constitution prohibits the waiver of the Sixth Amendment right to counsel on a silent record, it also prohibits courts from accepting a defendant's guilty plea without determining that his rights were waived voluntarily.[159] As a result, the Court stated that "[t]he question of an effective waiver of a federal constitutional right in a [state criminal] proceeding is of course governed by federal standards."[160]

In a vigorous dissent, Justice Harlan protested the majority's use of constitutional rights to extend the protections enumerated in *McCarthy* to state proceedings.[161] He noted that *McCarthy* applied only to *federal* district courts because it was based "solely upon [the Court's] construction of Rule 11" and its supervisory authority over lower federal courts.[162] Notwithstanding Justice Harlan's concerns, the majority reversed the Supreme Court of Alabama, holding that it was reversible error for the court to accept the petitioner's guilty plea when the record did not disclose whether he knowingly and voluntarily entered his plea.[163]

In *Brady v. United States*,[164] the Court elaborated on the meaning of Rule 11 protections when it held that a guilty plea was still knowingly and voluntarily entered even though it was motivated by the defendant's fear of receiving the death penalty.[165] The petitioner in that case claimed that his guilty plea was not voluntary because his fear of receiving the death penalty effectively forced him to plead guilty to mitigate this risk.[166] He contended that the threat of the death penalty violated his Fifth Amendment right against compelled self-incrimination.[167]

Analyzing the petitioner's claims, the Court adopted the Fifth Circuit's standard for assessing the voluntariness of a guilty plea.[168] The Court wrote:

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155. *Id.*
156. *Id.* at 242.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 243.
161. *Id.* at 247.
162. *Id.* (quoting McCarthy v. United States, 394 U.S. 459, 464 (1969)).
163. *Id.* at 244.
164. 397 U.S. 742 (1970).
165. *Id.* at 749-55.
166. *Id.* at 750.
167. *Id.*
168. *Id.* at 755.

> [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 (or promises to discontinue improper harassment), misrepresention (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[169]

Using the new standard of voluntariness, the Court held that his guilty plea was voluntary because the state's offer of a more lenient sentence in exchange for the plea was not compelled self-incrimination.[170] "[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."[171] Accordingly, the petitioner's guilty plea did not violate the Fifth Amendment right against compelled self-incrimination.[172]

The Court also noted that the record affirmatively reflected that the petitioner's guilty plea was knowingly made with awareness of the charges and that he had assistance of competent counsel.[173] The Court stated that reasonable miscalculations in defense strategy could not be used to transform a knowing and voluntary plea into an unknowing and involuntary plea.[174] The Court wrote:

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise [by the defense].[175]

As such, the petitioner's request for post-judgment relief was denied.[176]

In *McMann v. Richardson*,[177] the Court expanded on this key distinction between correct advice from counsel and a knowing plea, holding that ordinary errors by counsel do not render a plea "unknowing" as long as they are within the range of performance of a "reasonably competent attorney."[178]

The defendant in *McMann* claimed that his attorney's mistaken judgment on the admissibility of his client's confession amounted to ineffective assistance of counsel, in violation of the Sixth Amendment.[179] The Court acknowledged that all defendants pleading guilty to felonies are entitled assistance of counsel.[180] It also stated that the right to counsel was the right to *effective* assistance of coun-

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169. *Id.* (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on confession of error on other grounds,* 356 U.S. 26 (1958) (emphasis added)).

170. *Id.* at 751-52.

171. *Id.* at 755.

172. *Id.*

173. *Id.* at 756.

174. *Id.* at 756-57.

175. *Id.* at 757 (citations omitted).

176. *Id.* at 758.

177. 397 U.S. 759 (1970).

178. *Id.* at 769-70.

179. *Id.* at 768-69.

180. *Id.* at 771 n.14 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

sel.[181] The Court noted, however, that effective assistance of counsel did not require that every judgment by counsel be correct.[182] It only required that the assistance offered by counsel be within the range of a "reasonably competent attorney."[183] The Court wrote:

> [T]he decision to plead guilty . . . frequently involves the making of difficult judgments. . . . In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. . . .
>
> Questions . . . cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what the court's judgment might be on given facts.[184]

The Court thus concluded that incorrect advice by counsel does not necessarily render his assistance constitutionally ineffective.[185] Accordingly, the Court held that a guilty plea is not rendered "unknowing" just because it is based on incorrect advice that is still nonetheless within the range of assistance that a reasonably competent attorney would provide.[186] Because the petitioner failed to show attorney incompetence and could not contradict the record's showing that his guilty plea had been knowingly given, the Court denied his motion for post-judgment relief.[187]

In sum, the progression in Rule 11 case law reflects a recognition of constitutionally protected rights, with clarification on the meaning of those rights emerging from later cases. *McCarthy* and *Boykin* together stand for the proposition that a court may not assume that a defendant pleading guilty understands the charge.[188] The record must affirmatively show that a defendant's plea is given knowingly and voluntarily.[189] To this end, *McCarthy* requires federal courts to personally address the defendant at the time the plea is entered to determine whether it conformed to Rule 11 requirements.[190] *Boykin*, which enshrined *McCarthy*'s Rule 11 protections as constitutional rights, imposes on states the duty to create an affirmative record disclosing that the defendant's plea was voluntary, knowing, and had a factual basis.[191]

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181. *Id.* (emphasis added).
182. *Id.* at 770.
183. *Id.*
184. *Id.* at 769-70.
185. *Id.* at 770.
186. *Id.* The Court wrote:

> [T]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.
>
> . . .
>
> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession.

Id.
187. *Id.* at 774.
188. McCarthy v. United States, 394 U.S. at 464-65; Boykin v. Alabama, 395 U.S. at 242.
189. Boykin v. Alabama, 395 U.S. at 242.
190. McCarthy v. United States, 394 U.S. at 470.
191. Boykin v. Alabama, 395 U.S. at 243.

In subsequent cases like *Brady* and *McMann*, however, the Court placed limits on the scope of the terms "knowing" and "voluntary." In *Brady*, for instance, the Court stated that "voluntariness" is to be assessed according to whether the defendant was aware of the "*direct* consequences" of the plea.[192] In *McMann*, the Court held that a "knowing" plea could be based on incorrect advice from counsel as long as it was within the range of judgment of a "reasonably competent attorney."[193] As such, it is important to note that the Rule 11 requirement of a knowing and voluntary plea is not designed to generate new litigation into the "knowing and voluntary" nature of guilty pleas. On the contrary, the purpose of Rule 11 is to prevent such litigation by creating a record so as to "forestall [] the spin-off of collateral proceedings that seek to probe murky memories."[194]

B. Rule 11 in Maine

The State of Maine in 1976 amended its Rule 11 procedure, eliminating ambiguity and adopting new practices. The amendments introduced significant changes in Rule 11 procedures, including the requirement that (1) the court conduct a *personal* inquiry of the defendant in open court (2) *before* accepting a plea of guilty or nolo contendre.[195]

The Law Court's rulings in Rule 11 cases have offered insight into the meaning of such protections, such as the requirement of a "voluntary" plea. In *Wellman v. State*,[196] the court held that the defendant's guilty plea was not involuntary even though it was based on the incorrect expectation that pre-trial incarceration time would be credited toward his eventual prison sentence.[197] In that case, the defendant previously had been credited 686 days for pre-trial detention until the Maine State Prison realized that his detention in Maine was concurrent to a New Hampshire sentence, reducing his eligibility for such credit.[198] Although pre-trial detention credit was not part of the plea agreement, the defendant claimed that his incorrect expectation of pre-trial detention credit rendered his plea involuntary, in violation of Rule 11.[199]

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192. Brady v United States, 397 U.S. at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)) (emphasis added).

193. McMann v. Richardson, 397 U.S. at 770.

194. Boykin v. Alabama, 395 U.S. at 244.

195. M.R. Crim. P. 11 (as amended in 1976).

> Rule 11. Pleas and Negotiated Pleas
>
> (a) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty, or, with the consent of the court, nolo contendere. A defendant may plead both not guilty and not guilty by reason of insanity to the same charge. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere in any felony proceeding *without first* (a) making such inquiry as may satisfy it that the defendant in fact committed the crime charged, and, (b) *addressing the defendant personally* and determining that the plea is made voluntarily with understanding of the nature of the charge. If the defendant refuses to plead, or if the court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Id. (emphasis added).

196. 588 A.2d 1178 (Me. 1991).

197. *Id.* at 1181.

198. *Id.* at 1179.

199. *Id.*

The Law Court rejected this argument, holding that his guilty plea satisfied Rule 11 requirements.[200] The court based its ruling on the fact that the defendant's expectation of pre-trial detention credit was collateral to his sentence, having no basis in the plea agreement itself.[201] The Law Court noted the following:

> The court informed Wellman of the direct sentencing consequences of his pleas and later imposed a sentence consistent with the plea agreement. There is no requirement under Rule 11 that the court inform the defendant of each and every *collateral* consequence of his plea and resulting sentence, such as where he is to be incarcerated, what good time credits he may be entitled to earn, or to what pretrial detention credit he may be entitled.[202]

Holding that the defendant's guilty plea was voluntary, the court functionally defined that term by stating that "collateral" consequences of a plea and sentence were not relevant to the Rule 11 inquiry. Accordingly, the Rule 11 requirement of a "knowing" plea calls for an inquiry into the defendant's knowledge of the "*direct*" consequences of his plea and sentence. The Rule 11 inquiry into whether the plea was voluntary and based in fact is similarly confined to "direct" consequences of the plea and sentence.

In *Laferriere v. State*,[203] the Law Court provided further insight into the difference between "direct" and "collateral" consequences of guilty pleas.[204] The court analyzed the defendant's claim that his guilty plea was involuntary under Rule 11 because it was based on incorrect advice that his sentence would be served in a nursing home.[205] The court stated that a guilty plea is considered reliable if it is the "knowing and voluntary choice of a guilty person."[206] Noting that defendant had been "meticulous[ly] question[ed] by the court to ensure that . . . [he] understood the consequences of his plea," the court stated that the defendant "faces a difficult task in convincing us that his plea was not the voluntary and knowing choice of a guilty person."[207] In light of *Wellman*, the court's reference to an understanding of the "consequences" is strictly limited to an understanding of the "direct" consequences.[208]

Although the court did not discuss the reasoning behind labeling a particular consequence "direct" or "collateral," its discussion of Rule 11 offered a window into the labeling of such consequences.[209] The court stated that "[a] plea is valid if it is made voluntarily with knowledge of the elements of the crime, the penalty that might be imposed and the constitutional rights relinquished by foregoing trial."[210]

The defendant's incorrect belief that he would be able to serve his sentence in a nursing home rather than prison did not render his plea involuntary under Rule 11.[211] The court's conclusion that this consequence was immaterial to his guilty

200. *Id.* at 1181.
201. *Id.* at 1180.
202. *Id.* at 1181.
203. 1997 ME 169, 697 A.2d 1301.
204. Laferriere v. State 1997 ME 169, ¶ 15, 697 A.2d 1301.
205. *Id.* ¶ 4, 697 A.2d 1301.
206. *Id.* ¶ 8, 697 A.2d 1301.
207. *Id.* ¶ 9, 697 A.2d 1301.
208. Wellman v. State, 588 A.2d at 1181.
209. Laferriere v. State, 1997 ME 169, ¶ 15, 697 A.2d 1301.
210. *Id.* ¶ 9, 697 A.2d 1301 (quoting State v. Comer, 584 A.2d 638, 640 (Me. 1990)).
211. *Id.* ¶ 15, 697 A.2d 1301.

plea suggests that it was not a "direct" consequence of the plea. The court explained its rationale as follows:

> Laferriere's expectation as to where he would serve his sentence is a collateral consequence of his plea and does not render it involuntary. There is no evidence that Laferriere did not understand the length of the sentence he faced as a consequence of his plea, and his dissatisfaction with the sentence to which he agreed does not render his decision to agree involuntary.[212]

The court thus concluded that an understanding of the *length* of a sentence was a "direct" consequence of a guilty plea, while an understanding of the *location* of the sentence was a "collateral" consequence.

Construing *Laferriere* in light of *Wellman*, it is possible to further illustrate the court's approach. Although *Laferriere* held that the length of a sentence is a direct consequence of a plea agreement, *Wellman* provides an important qualification: self-induced expectations about the length of a sentence are not "direct" consequences for purposes of a Rule 11 challenge. Thus, a plea that is knowing and voluntary in reference to the length of the sentence cannot become an involuntary plea just because the defendant is dissatisfied with the sentence or had his personal expectations thwarted. "Direct" consequences of guilty pleas are largely confined to rights that have a basis in law or in the plea agreement itself.

IV. THE COLLATERAL CONSEQUENCES DOCTRINE AND FEDERAL IMMIGRATION LAWS

A. The Collateral Consequences Doctrine

The collateral consequences doctrine holds that trial courts have no duty to inform a defendant of the collateral consequences of his guilty plea because they would lead to an unmanageable burden and sow the seeds of collateral attack.[213] The collateral consequences doctrine is a prominent feature in both ineffective counsel cases and Rule 11 cases because they often turn on the same issues and facts. *Laferriere*, for example, demonstrates how the doctrine of collateral consequences informs the analysis of ineffective counsel and Rule 11 cases, which often have overlapping issues. In that case, the defendant alleged that assistance of counsel was ineffective because he received incorrect advice that he would be able to serve his sentence at a nursing home.[214] The defendant also said that his guilty plea was not knowing and voluntary under Rule 11 because it was based on counsel's incorrect advice.[215] Ruling that the location of a sentence was a "collateral" consequence of a plea agreement, the court held that assistance of counsel was constitutionally adequate because the defendant's plea had been knowing and voluntary.[216]

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212. *Id.* (citing Wellman v. State, 588 A.2d at 1180-81).
213. State v. Malik, 680 P.2d 770, 772 (Wash. Ct. App. 1984).
214. Laferriere v. State, 1997 ME 169, ¶ 4, 697 A.2d 1301.
215. *Id.* ¶¶ 9, 15, 697 A.2d 1301.
216. *Id.* ¶ 15, 697 A.2d 1301.

B. State Cases Involving Immigration Consequences

State cases involving immigration consequences, however, are much more complex because a state criminal proceeding can automatically set in motion w*holly separate* federal proceedings to deport an alien defendant.[217] A conviction in state court may qualify under federal law as a deportable offense under Immigration and Naturalization Act (INA) section 237, which classifies the various grounds for removal of aliens who have legally entered into the United States.[218] The categories for deportation grounds can be generally classified into the two groups of immigration violations[219] and criminal offenses.[220]

Under the criminal offense category, the most common grounds of deportation are crimes of moral turpitude,[221] controlled substances offenses,[222] and ag-

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217. 8 U.S.C. § 1227 (2000) [INA § 237].

218. *Id.*

219. For an eye-opening account of how federal laws regarding immigration violations have caused great hardship to Maine families, see Meredith Goad, *Question of U.S. Citizenship Surprises Canadian-born Mainers*, PORTLAND PRESS HERALD, April 29, 2001, at A1, *available at* 2001 WL648868. In the article, the author describes how expectant mothers in northern Maine were routinely advised to drive across the border to the nearest hospitals in New Brunswick, Canada to give birth to children. *Id.* Several decades later, the Canadian-born children of Maine residents were shocked to learn that they not only were ineligible for Social Security benefits, but actually faced deportation as illegal immigrants. *Id.* Renee Drake, for example, is a 52-year-old nurse whose family lived in Madawaska, Maine. *Id.* Ms. Drake was born in Edmundston, New Brunswick, Canada because the hospital there was only one mile from her home, compared with 65 miles for the closest hospital in Maine. *Id.* She recently was informed by the INS that she was an illegal alien and had to prove citizenship or face deportation. *Id.* However, because of a quirk in the INS laws that were in effect at the time of her birth, her mother is ineligible to pass on U.S. citizenship to her because she was 18 years old when she had Ms. Drake. *Id.* The law governing her case required her mother to be 19 years old in order to pass on U.S. citizenship to her daughter. *Id.* Ms. Drake's case had yet to be resolved, but her prospects are not hopeful. *Id.* In reference to her case, a spokesperson for the INS in Portland correctly but tragically stated, "But that's the law. We don't have any discretion when it comes to the law." *Id.*

220. ALEINIKOFF, *supra* note 8, at 721-26.

221. INA 237(a)(2)(A)(i)(I) (2000) [8 U.S.C. 1227(a)(2)(A)(i)(I) (2000)] states:

> (A) General crimes
> (i) Crimes of moral turpitude
> Any alien who—
> (I) is convicted of a crime of involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) [8 U.S.C.A. § 1255(j)]) after the date of admission, and
> (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

Id. Though the term "crime of moral turpitude" has been used for decades, the INA does not define the term and it has been criticized for being vague. The common law approach to defining the term has focused on (1) the "inherent nature" of the crime, rather than the specific conduct and (2) whether an element of fraud was present in the crime. ALIENIKOFF, *supra* note 8, at 730.

222. INA 237(a)(2)(B)(i),(ii) (2000) [8 U.S.C. § 1227(a)(2)(B)(i), (ii) (2000)] states:

> (B) Controlled substances
> (i) Conviction
> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.
> (ii) Drug abusers and addicts

gravated felonies.[223] Although the term "aggravated felony" includes well-known felonies such as murder, rape, and trafficking in controlled substances or firearms, it also includes crimes that are not felonies.[224] A single crime of moral turpitude also requires a sentence of one year or more to trigger deportation, but two separate convictions for a crime of moral turpitude triggers deportation regardless of the length of sentence imposed.[225] Convictions for a "controlled substances violation" render an alien deportable regardless of the length of sentence.[226] Under all three of the categories mentioned, it is possible for an alien defendant to be deported because of a guilty plea to certain types of misdemeanors.[227]

For an American citizen in Maine, for example, possession of 31 grams of marijuana could result in a civil violation with a fine of not more than $400 for the first offense.[228] Depending on the circumstances, conviction could conceivably result in collateral consequences, such as the loss of driving privileges.

For a legal alien, however, the same state violation would qualify as a "controlled substances violation" under INA section 237(a)(2)(B).[229] After paying the fine, a legal alien convicted of this "controlled substances violation" would be

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> Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

Id.

223. INA 237(a)(2)(A)(iii) [8 U.S.C. 1227(a)(2)(A)(iii) (2000)] states: "(iii) Aggravated felony[.] Any alien who is convicted of an aggravated felony at any time after admission is deportable." *Id.*

224. The term "aggravated felony" includes in its definition "more general" crimes. ALEINIKOFF, *supra* note 8, at 738; *see also supra* text accompanying note 8. INA § 101(a)(43)(G) defines as an aggravated felony a theft or burglary offense, including the receipt of stolen property, for which the term of imprisonment is at least one year. INA § 101(a)(43)(G) (2000) [8 U.S.C. § 1101(a)(43)(G) (2000)]. INA § 101(a)(43)(R) defines as an aggravated felony offenses related to commercial bribery, counterfeiting, forgery or trafficking in vehicles where the identification numbers have been altered for which the term of imprisonment is for at least one year. INA § 101(a)(43)(R) (2000) [8 U.S.C. § 1101(a)(43)(R) (2000)]. INA § 101(a)(43)(S) defines as an aggravated felony, offenses relating to obstruction of justice, perjury, or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year. INA § 101(a)(43)(S) (2000) [8 U.S.C. § 1101(a)(43)(S) (2000)]. INA § 101(a)(43)(U) defines as an aggravated felony an attempt or conspiracy to commit an aggravated felony. INA § 101(a)(43)(U) (2000) [8 U.S.C. § 1101(a)(43)(U) (2000)].

225. INA § 237(a)(2)(A)(i)(II) (2000); [8 U.S.C. § 1227(a)(2)(A)(i)(II) (2000)] states:

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

Id.

226. *See* INA § 237(a)(2)(B)(i)(ii) (2000) [8 U.S.C. § 1227(a)(2)(B)(i)(ii) (2000)].

227. ALEINIKOFF, *supra* note 8, at 738.

228. *See, e.g.*, 22 M.R.S.A. § 2383 (2000). "[P]ossession of a usable amount of marijuana is a civil violation for which a forfeiture of not less than $200 nor more than $400 must be adjudged for the first offense. A forfeiture of $400 must be adjudged for the second and subsequent offenses within a 6-year period." *Id.* Under Maine law, possession of more than $1\frac{1}{4}$ ounces of marijuana (about 36 grams) also creates a presumption of furnishing marijuana, a separate offense under 17-A M.R.S.A. § 1106. State v. Deering, 1998 ME 23, ¶ 7, 706 A.2d 582. Notwithstanding this presumption, however, there is "no minimum amount of marijuana [needed] to be guilty of furnishing." State v. Deering, 1998 ME 23, ¶ 8, 706 A.2d at 584. Possession with intent to transfer of 19 grams of marijuana, roughly two-thirds of an ounce, has been found to be sufficient to uphold conviction for furnishing marijuana under 17-A M.R.S.A. § 1106. State v. Deering, 1998 ME 23, ¶¶ 3, 10; 706 A.2d at 583, 585.

229. *See supra* text accompanying note 221.

taken into Immigration and Naturalization Service (INS) custody to commence removal procedures, a collateral consequence of conviction.[230] Although the conduct in the two examples is identical, their starkly different outcomes demonstrate how crucial distinctions, such as the "direct" or "collateral" nature of deportation consequences, tend to be blurred in cases involving alien defendants.

C. Immigration Consequences as Collateral but Material to a Guilty Plea.

Because the collateral consequences doctrine is a settled fixture in American jurisprudence, most courts have resigned themselves to pinching their noses while meting out its harsh effects in cases involving immigration consequences. A minority of courts, however, has held that immigration consequences can be *material* to a guilty plea, even though they remain a "collateral" consequence.[231] Such cases find that immigration consequences can be essential to an informed decision on whether to plead guilty or go to trial.[232] As such, a failure to investigate immi-

230. The repercussions of removal are as diverse as they are severe. Until recently, an alien convicted of a deportable offense faced indefinite detention if he was a national of a country with which the United States did not have diplomatic relations, such as Vietnam, Cambodia, Cuba and others. Zadvydas v. Underdown, 185 F.3d 279, 284-85 (5th Cir. 1999) (*vacated*, 121 S. Ct. 2491 (2001)). Because such countries do not accept their citizens facing removal from the United States, aliens in this class previously faced indefinite and potentially permanent imprisonment, barring any thaw in diplomatic relations.

In 2001, however, the U.S. Supreme Court overturned this precedent, holding that removable aliens could not be detained indefinitely if they could not be returned to their home country after serving their sentence. Zadvydas v. Davis, 121 S. Ct. 2491, 2498 (2001). Although deportation is a civil and non-punitive proceeding, the Court noted that the only procedural protection available to indefinitely detained aliens was administrative proceedings without significant judicial review. *Id.* at 2499-50. Citing the Fifth Amendment, the Court stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." *Id.* at 2500. As such, the Court held that post-removal detention of an alien must be limited to a "reasonable" time necessary to secure deportation, with a rebuttable presumption that detention beyond six months is unreasonable. *Id.* at 2504-05.

The Court's decision to extend constitutional protections to aliens who are present in the United States represented an important departure from older precedents that were informed by shameful assumptions. From the late 19th century to 1943, for instance, Chinese nationals were not allowed to become American citizens. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 412 n.1. (1948). In *Justice for Takuji*, reporter Rebecca Cook examined the life of Takuji Yamashita, a legal alien from Japan who graduated from the University of Washington School of Law. Rebecca Cook, *Justice for Takuji*, PORTLAND PRESS HERALD, Feb. 25, 2001, at 2. Even though Yamashita obtained his law degree, the Supreme Court of Washington denied his bar application, stating that just as the law excluded Chinese nationals, Hawaiians, and a "half Indian and half white [from British Columbia]," it also barred Japanese nationals from applying for citizenship. In re Yamashita, 70 P. 482, 483 (1902). As such, Yamashita was refused admission to the bar. *Id.*. Adding insult to injury, the United States Supreme Court in 1922 held that Yamashita was barred from applying to form a corporation to own real estate because his racial profile made him ineligible to become a citizen. Yamashita v. Hinkle, 260 U.S. 199, 200 (1922).

Social attitudes in recent decades have shifted toward a more inclusive approach. In 1973, the United States Supreme Court ruled that the exclusion of non-citizens from the bar violated the Fourteenth Amendment. Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973). In 2001, the Supreme Court of Washington granted a motion to admit Takuji Yamashita to the bar posthumously. Rebecca Cook, *Justice for Takuji*, PORTLAND PRESS HERALD, Feb. 25, 2001, at 2.

231. *See, e.g.*, People v. Soriano, 240 Cal. Rptr. 328 (Cal. Ct. App. 1987).

232. *Id.* at 336.

gration consequences could result in assistance of counsel that falls below constitutionally required standards.[233]

In *People v. Pozo*,[234] the Supreme Court of Colorado examined an alien defendant's claim that he received ineffective assistance of counsel because he was not informed of possible deportation consequences of his guilty plea.[235] In a nod to the collateral consequences doctrine, the court noted that *trial courts* have no particular duty to inform a defendant of the collateral deportation consequences of a guilty plea.[236]

Although finding no duty for the trial court, the court held that the *counsel's* duties could extend beyond the "direct" consequences of his client's plea to include the collateral consequence of deportation.[237] "In cases involving alien criminal defendants, . . . thorough knowledge of fundamental principals of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies."[238]

Because immigration consequences can be *material* to a defendant's decision to plead guilty, the court held that counsel may have an affirmative duty to investigate immigration law, even though such consequences are "collateral" to the plea.[239] The court stated that the existence or non-existence of the duty to investigate immigration consequences depends on whether counsel had reason to know that the client was an alien.[240] The court wrote:

> The determination of whether the failure to investigate those consequences constitutes ineffective assistance of counsel turns to a significant degree upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien. When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law.[241]

While the court acknowledged a duty to investigate immigration consequences, it is important to note that this duty was not unqualified. The court stated that the duty to investigate immigration consequences is part of a broad "fundamental principle that attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients."[242] As such, the

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233. *Id.*

234. 746 P.2d 523 (Colo. 1987).

235. *Id.* at 525.

236. *Id.* at 526.

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

Id. (citations omitted).

237. *See id.* at 529.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

court in *Pozo* did not create a *per se* requirement that counsel must always investigate immigration consequences. Instead, it stated counsel's duty to investigate depended on the particular circumstances of his client. The court held that a defendant's alien status could render immigration consequences material to his decision to plead guilty. As such, counsel's knowledge of a client's alien status can create an affirmative duty to research immigration consequences, while a failure to do so can result in ineffective assistance of counsel because such consequences are material legal principles that will significantly affect his client.[243]

Despite its qualifications, *Pozo* is significant because it held immigration consequences can be material to a defendant's decision to plead guilty, even when they are a "collateral" consequence.[244] When counsel has reason to know his client is an alien, he may have an affirmative duty to investigate immigration consequences in order to satisfy the Sixth Amendment right to effective counsel.[245] The court remanded the case to the trial court so it could make specific findings whether counsel knew his client was an alien so that the defendant's claim of ineffective counsel could be considered.[246]

D. Immigration Consequences as Collateral and Immaterial to a Guilty Plea.

Notwithstanding harsh outcomes, most courts view deportation as immaterial to a state proceeding because deportation is a "collateral" consequence of a guilty plea, holding that only the "direct" consequences of a guilty plea are material. [247]

In *United States v. Del Rosario*,[248] the U.S. Court of Appeals for the District of Columbia Circuit examined a defendant's ineffective assistance claim stemming from counsel's failure to inform him of deportation consequences.[249] In that case, the defendant received a sentence of 10 months in prison and 3 years of special parole for drug charges.[250] The trial court did not inform the defendant of possible deportation consequences of his guilty plea.[251] In addition, the defendant's attorney had only "inconclusive discussion" on deportation because he did not definitively know the deportation consequences of his plea.[252] After the defendant served his ten-month term in prison, the INS moved to deport him pursuant to 8 U.S.C. § 1251(a)(11).[253] The defendant claimed that counsel's failure to investigate deportation consequences of his guilty plea violated his Sixth Amendment right to effective counsel.[254] Affirming the trial court, the Court of Appeals held that counsel's failure to inform the defendant of deportation consequences did not amount to ineffective assistance of counsel because such consequences are "collateral" to a decision to plead guilty.[255]

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243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 530.
247. *See, e.g.*, Nunez Cordero v. United States, 533 F.2d 723 at 726.
248. 902 F.2d 55 (D.C. Cir. 1990).
249. *Id.* at 56.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*

The court analyzed the defendant's claim under the two prongs of the *Strickland/Hill* test.[256] The court noted that the second prong of prejudice required a showing that, but for counsel's failure, the defendant would have pleaded not guilty and insisted on a trial.[257] The court stated that there was "no evidence supporting a conclusion that . . . [the defendant] would have placed any particular emphasis on the danger of deportation at the time of the plea decision."[258] In addition, counsel's inconclusive conversation with the defendant on immigration issues did not reflect any particular concern with deportation consequences.[259] Because the danger of deportation consequences was not emphasized by the defendant at the time of the plea, the court was unconvinced that the defendant would have withheld his guilty plea had counsel advised him that a guilty plea could result in deportation.[260] As such, the court held that the defendant suffered no prejudice from counsel's failure to inform him of deportation consequences, satisfying the *Strickland/Hill* standard for effective counsel.[261]

Although the *Strickland/Hill* test only requires satisfying one prong to defeat a claim of ineffective counsel, the court also noted that *Strickland/Hill*'s first-prong inquiry into "reasonably competent assistance was also satisfied."[262] The court concluded that assistance of counsel was not substandard because "counsel's failure to advise the defendant of the collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance."[263] The court acknowledged that "[d]eportation is a harsh collateral consequence," but it stated that guilty pleas give rise to many other harsh "collateral" consequences, such as the loss of voting rights, driving privileges, civil service employment, and the right to possess firearms.[264] Accordingly, the court held that deportation was not "so unique as to warrant an exception to the general rule that a defendant need not be advised of the [collateral] consequences of a guilty plea."[265]

In a vocal concurrence, Circuit Judge Mikva stated that he found the majority's treatment of deportation consequences "extremely troubling."[266] Judge Mikva took issue with the majority's characterization of deportation as a "collateral" consequence like any other, stating that

> [deportation] is unlike losing one's driver's license, or the right to own firearms, or the right to a government job—each of which the majority describes as a similarly weighty deprivation. The possibility of being deported can be—and frequently is—*the most important factor* in a criminal's decision on how to plead.[267]

Because deportation consequences are often the main consideration for an alien defendant, Judge Mikva rejected the legal fiction that they were immaterial to the

256. *Id.* at 57. *See supra* text accompanying note 35.
257. *Id.* at 57.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 58.
262. *Id.* at 57-58.
263. *Id.* at 59 (quoting United States v. Campbell, 778 F.2d 764 (11th Cir. 1985)).
264. *Id.*
265. *Id.* (quoting United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985)).
266. *Id.* at 61 (Mikva, J. concurring).
267. *Id.* (emphasis added).

decision whether or not to plead guilty.[268]

Judge Mikva also took exception to the majority's finding a lack of prejudice based on the notion that the defendant still would have pleaded guilty, even if counsel had informed him of deportation consequences.[269] "Because deportation is a category so obviously distinct from the other collateral consequences enumerated by the majority, I have sore difficulty crediting the fiction that the defendant has knowingly pled when he is not provided meaningful information about the relevant deportation consequences of his plea."[270]

Noting that deportation consequences—if known by the defendant—are often the most important factor in a decision to plead guilty, Judge Mikva stated that Rule 11 should be amended to include an inquiry into the defendant's knowledge of deportation consequences.[271] He wrote:

> I would hope that the Rules Committee . . . would consider amending Rule 11 of the Rules of Criminal Procedure to require a judge taking a guilty plea to inform an alien that pleading guilty might result in deportation. . . . I do not seek to frustrate the undeniable benefits of resolving prosecutions through a streamlined and efficient Rule 11 proceeding. Yet, the validity of such proceedings is unequivocally premised upon the defendant's knowing the most significant consequences of his plea.[272]

Judge Mikva's proposal to amend Rule 11 was aimed at acknowledging the reality that an alien defendant's decision to plead guilty often turns on deportation consequences. In his view, deportation is a "collateral" consequence *unlike any other* because it can result "in loss . . . of all that makes life worth living."[273] Accordingly, he believed that an inquiry into the severe consequence of deportation should be incorporated into Rule 11 proceedings.

E. Maine Cases Involving Immigration Consequences.

Unlike other jurisdictions, Maine has yet to formally settle whether immigration consequences are "collateral" to a state proceeding. The Law Court, however, has ruled on the issue of ineffective counsel in the context of serious immigration consequences. In *Aldus v. State,*[274] the Law Court affirmed a Superior Court judgment granting post-conviction relief for ineffective assistance of counsel, holding that the defendant's conviction should be vacated because the *Strickland/Hill* test's two prongs of deficient counsel and prejudice were satisfied.[275]

Like most ineffective counsel cases, the *Aldus* decision turned on an intricate fact pattern. The defendant, Awralla H. Aldus, was not an American citizen, but had been living in the United States as a legal alien for 12 years.[276] On July 3, 1998, the defendant confronted her husband and allegedly struck him with a knife, resulting in wounds that were not serious and required no medical attention.[277]

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268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).
274. 2000 ME 47, 748 A.2d 463.
275. *Id.* ¶ 19, ¶ 21, 748 A.2d 463.
276. Aldus v. State, No. CR-98-414, slip op. at 2 (Super. Ct. Ken. Cty., Mar. 23, 1999).
277. *Id.* at 2.

The defendant was charged with aggravated assault for attacking her husband with a knife, as well as assault, violation of protective order, and terrorizing.[278] On July 6, 1998, the defendant pleaded not guilty to the charges and posted bail.[279]

On August 19, 1998, a trial was scheduled for the defendant's Class D and E charges, while a bind-over hearing was scheduled for her aggravated assault charge.[280] After conflicts caused the defendant's initial attorney to withdraw from representation, new counsel[281] was appointed to represent the defendant.[282] Spending approximately one hour with the defendant to review the charges, counsel testified that the defendant was upset during their consultation and said she "just wanted to get it over."[283] The defendant testified that she told counsel that she had been drinking the night of the incident and could not remember everything, but she remembered that she did not stab her husband.[284]

Counsel knew that the defendant was not an American citizen.[285] An Assistant District Attorney testified that while discussing a possible stay of execution, he told counsel that the INS was interested in the case.[286] Counsel testified that he told the defendant that the INS was looking for her.[287] The defendant asked, "What does that mean?"[288] and counsel responded, "I have no idea."[289] The matter was not discussed further.[290]

Although counsel initially asked for a continuance, he later informed the judge that the defendant would plead guilty to the aggravated assault charge and other charges.[291] As a result of the plea bargain, the defendant received a sentence of five years in prison, with all but ninety days suspended, four years probation resulting from the aggravated assault charge and sixty day concurrent sentences for the other charges.[292] The defendant later learned that her guilty plea for aggravated assault threatened her immigration status in the United States, as an alien convicted of an aggravated felony is "conclusively presumed" to be deportable.[293] At the time of the post-conviction hearing, the INS had taken Aldus into custody.[294]

Because of the imminent threat of deportation, the defendant petitioned the Superior Court to grant post-conviction relief based on ineffective assistance of counsel.[295] The Superior Court held that the defendant was entitled to post-conviction relief because the *Laferriere* (*Strickland/Hill*) test's two prongs of deficient counsel and prejudice had been satisfied.[296] The State of Maine appealed

278. *Id.*
279. *Id.*
280. *Id.* at 3.
281. The defendant's attorney hereinafter will be referred to as "counsel."
282. Aldus v. State, 2000 ME 47, ¶ 4, 748 A.2d at 463.
283. *Id.* ¶ 5, 748 A.2d 463.
284. *Id.*
285. *Id.* ¶ 6, 748 A.2d 463.
286. Aldus v. State, No. CR-98-414, slip op. at 9 (Super. Ct. Ken. Cty., Mar. 23, 1999).
287. *Id.*
288. *Id.* at 10.
289. Aldus v. State, 2000 ME 47, ¶ 6, 748 A.2d 463.
290. Aldus v. State, No. CR-98-414, slip op. at 9 (Super. Ct. Ken. Cty., Mar. 23, 1999).
291. *Id.* at 3.
292. *Id.*
293. *Id.* at 9; *see supra* note 222.
294. Aldus v. State, 2000 ME 47, ¶ 2, 748 A.2d 463.
295. Aldus v. State, No. CR-98-414, slip op. at 1 (Super. Ct. Ken. Cty., Mar. 23, 1999).
296. *Id.* at 8. The inquiries under *Lang* and *Laferriere* are "virtually identical" to those of *Strickland* and *Hill*. *See supra* text accompanying note 107.

the Superior Court judgment vacating the defendant's conviction for aggravated assault.[297] The appeal provided an important opportunity for the Maine Supreme Judicial Court to prescribe limits on the minimum standard for effective counsel when there are serious immigration consequences.

The Law Court affirmed the Superior Court, holding that the two prongs of the *Strickland/Hill* test had been met because (1) counsel's assistance fell below that of an ordinary fallible attorney, and (2) but for counsel's error, the defendant would not have pleaded guilty and would have insisted on having a trial.[298]

The court noted that the *Strickland/Hill* test's two prongs of deficient performance and prejudice were questions of fact.[299] As such, the court applied a deferential standard of review, stating that it would "not overturn a post-conviction court's determination as to the effectiveness of trial counsel unless it is clearly erroneous and there is no competent evidence in the record to support it."[300] In addition, the court emphasized that the fact-specific nature of ineffective counsel cases required the *Strickland/Hill* test to be applied "on a case-by-case basis," rather than according to "categorical rules."[301] Because the constitutional requirement of effective counsel is aimed at ensuring a fair trial, the court stated that its ineffective counsel inquiry "must be guided by the overall justness and fairness of the proceeding."[302]

The court commenced its *Strickland/Hill* inquiry by examining the first prong of whether counsel's performance "fell below that of an ordinary fallible attorney."[303] Although rulings in other jurisdictions have turned on the crucial determination of whether deportation is a "collateral" or "direct" consequence, the court stated that "it is not necessary for us to address the collateral consequence doctrine in order to decide Aldus's case."[304] The court instead focused on the overall factual circumstances, holding that a combination of factors rendered counsel's performance below that of an "ordinary fallible attorney."[305] While some individual elements on a stand-alone basis raised no ineffective counsel concerns, the convergence of elements as a whole led to substandard assistance of counsel.[306]

The first element analyzed by the court was counsel's knowledge that the defendant was not born in the United States.[3067] The Law Court agreed with the Superior Court's finding that an attorney had no affirmative duty to his client by virtue of his knowledge of a client's status as a foreigner.[308] The court wrote: "As the [Superior] [C]ourt acknowledged, th[e] fact [that Aldus was an alien] . . . alone would not require any particular action or advice by counsel."[309]

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297. Aldus v. State, 2000 ME 47, ¶ 1, 748 A.2d 463.
298. *Id.* ¶ 19, ¶ 21, 748 A.2d 463.
299. *Id.* ¶ 14, 748 A.2d 463.
300. *Id.* (quoting Tribou v. State, 552 A.2d 1262, 1265 (Me. 1989)).
301. *Id.* (quoting True v. State, 457 A.2d 793, 795 (Me. 1983)).
302. *Id.* ¶ 15, 748 A.2d 463.
303. *Id.*
304. *Id.* ¶ 18, 748 A.2d 463.
305. *Id.*
306. *Id.* ¶ 17, 748 A.2d 463.
307. *Id.*
308. *Id.* The Superior Court stated that mere knowledge of alien status "might have led to further questions, but standing alone would not necessarily require any particular action." Aldus v. State, No. CR-98-414, slip op. at 10 (Super. Ct. Ken. Cty., Mar. 23, 1999).
309 . Aldus v. State, 2000 ME 47, ¶ 17, 748 A.2d 463.

The second element that the court analyzed was counsel being alerted by the prosecution that the INS was looking for the defendant.[310] The court agreed with the Superior Court that immigration law was a specialized field of law that is not familiar to ordinary criminal defense lawyers.[311] The court acknowledged that counsel was "alerted, or should have [been] alerted . . . to a potential problem with immigration authorities," because he knew that the defendant was an alien and that the INS was looking for her.[312]

Nevertheless, the Law Court agreed with the Superior Court's assessment that this state of alert would not lead to any affirmative duties for counsel.[313] "The court indicated that if the situation consisted solely of [counsel's] knowledge that Aldus was an alien and that the INS was looking for her, it would not find that counsel was inadequate."[314] As such, no affirmative duties for counsel arose from his knowledge of his client's alien status and the INS's interest in her case.[315]

The court, however, did find that counsel's performance fell below that of an "ordinary fallible attorney," owing to the crucial addition of a third factual element.[316] After telling Aldus that the INS was looking for her, the defendant asked counsel, "What does that mean?"[317] In response, counsel said, "I have no idea," and did not pursue the matter any further.[318] The court held that the element of counsel inaction in response to the defendant's request for advice—in conjunction with counsel's knowledge that the defendant was an alien and that the INS was looking for her—rendered his assistance below that of an "ordinary fallible attorney."[319]

The court specifically faulted counsel's decision to blindly pursue the plea agreement in the face of uncertainty without advising the defendant of her options.[320] These options included the possibility of a continuance to defer her decision because counsel could not answer the defendant's question on why the INS was interested in her case.[321] The court wrote:

> [W]e conclude that the ordinary fallible attorney is expected to advise a defendant, when that client has a question about a serious consequence of a plea agreement, that the plea need not be entered that day. The attorney should advise the

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310. *Id.*

311. *Id.* The Superior Court stated that "[t]he court takes judicial notice of the fact that immigration law is quite specialized. The ordinary, fallible attorney cannot be held to a standard of knowledge one would expect of an immigration specialist." Aldus v. State, No. CR-98-414, slip op. at 10 (Super. Ct. Ken. Cty., Mar. 23, 1999).

312. Aldus v. State, 2000 ME 47, ¶ 17, 748 A.2d 463.

313. *Id.*

314. *Id.* The Superior Court stated that "[t]he mere fact of jeopardy to immigration status, standing alone, is not sufficient grounds for post-judgment relief." Aldus v. State, No. CR-98-414, slip op. at 9 (Super. Ct. Ken. Cty., Mar. 23, 1999).

315. Despite knowing that his client was an alien and that the INS was in pursuit, counsel took no affirmative steps to investigate immigration consequences. These facts alone, however, would not be enough for the Law Court to find ineffective assistance of counsel. Accordingly, it is reasonable to state that no special duties exist for counsel when he is aware that his client is an alien and that the INS is in pursuit.

316. Aldus v. State, 2000 ME 47, ¶ 17, 748 A.2d 463.

317. *Id.*

318. *Id.* ¶ 6, 748 A.2d 463.

319. *Id.* ¶ 19, 748 A.2d 463.

320. *Id.* ¶ 18, 748 A.2d 463.

321. *Id.*

> defendant about the ramifications of delay and the possibility of obtaining a continuance of any matters scheduled that day so that the defendant can obtain information concerning the consequences of the plea and better evaluate her position.[322]

Because counsel did not advise the defendant of her options when he could not answer her question on a serious consequence of her plea agreement, his assistance fell below that of an "ordinary fallible attorney," thus satisfying the first prong of the *Strickland/Hill* test.[323]

Regarding *Strickland/Hill*'s second prong of prejudice, the court held that there was a reasonable probability that the defendant "would have insisted on going to trial if she had not received ineffective counsel."[324] Drawing from testimony and facts taken from the post-conviction record, the court inferred that the defendant would not have pleaded guilty but for counsel's errors.[325] The court noted that counsel's error was his failure to request a continuance to answer Aldus's question about why the INS was looking for her.[326] At her post-conviction hearing, the defendant testified that counsel did not inform her that a continuance was possible and that she would have requested one had she known.[327] In addition, the post-conviction record reflected that she did not believe she would be found guilty at trial.[328] By allowing the use of post-conviction testimony, the court distinguished ineffective counsel cases from Rule 11 proceedings, which turn on the record of hearing in which the guilty plea was entered.[329] Using inferences drawn from the post-conviction record, the court held that the defendant was prejudiced by counsel's errors.[330] With both prongs of the *Strickland/Hill* test satisfied, the court ruled that the defendant was deprived of effective assistance of counsel.[331]

F. Duties of Counsel in Maine Cases Involving Immigration Consequences

Did *Aldus* create any new affirmative duties for counsel in cases involving serious immigration consequences? By analyzing the Law Court's statements on separate aspects of the case, it is possible to piece together a mosaic that provides a window into the meaning of its ruling.

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322. *Id.* The Superior Court stated the following: "[P]etitioner's question—'What does that mean?'—and her attorney's inability to answer, clearly would call for at least a request for a continuance to find an answer. By failing to stop and obtain the information requested by the petitioner, her attorney's performance fell below that of an ordinary, fallible attorney." Aldus v. State, No. CR-98-414, slip op. at 10 (Super. Ct. Ken. Cty., Mar. 23, 1999).

323. *Id.* ¶ 19, 748 A.2d 463.

324. *Id.* ¶ 20, 748 A.2d 463.

325. *Id.*

326. *Id.* ¶ 21, 748 A.2d 463.

327. *Id.*

328. *Id.*

329. Rule 11 requires that the court *personally* inquire into the knowing and voluntary nature of a guilty plea *before* a plea is entered. *See* Me. R. Crim. P. 11. Consequently, use of only a post-conviction record *after* a plea has been entered to confirm its knowing and voluntary nature violates Rule 11. As such, the record of the plea hearing is indispensable to a Rule 11 proceeding. Whether the "total record" of trial and post-conviction hearings can be used is an open question, but it is clear that use of the post-conviction record alone is impermissible under Rule 11. In contrast, ineffective counsel cases can make use of the "total record" in any way the court deems appropriate. This includes drawing inferences from only the post-conviction record, as the court did in *Aldus*. *Id.* ¶ 21, 748 A.2d 463.

330. Aldus v. State, 2000 ME 47, ¶ 21, 748 A.2d 463.

331. *Id.* ¶ 1, 748 A.2d 463.

From the court's opinion, one can infer that no affirmative duties exist for an attorney who merely knows that (1) his client was an alien, and (2) that the INS was looking for her.[332] Affirming the trial court's ruling that "it would not find that counsel was inadequate" under such facts, the court offered a partial definition of the substantive law: even if counsel knows that his client is an alien and that the INS is looking for her, he has no affirmative duty to warn her of the consequences of a guilty plea, regardless of whether it leads to deportation.[333]

Under *Aldus*'s full fact pattern, however, the court seemed to recognize new duties for counsel in the context of cases involving immigration consequences. The full fact pattern in *Aldus* contained a third crucial element of counsel inaction following the client's request for legal advice on immigration consequences.[334] Analyzing the first prong of the *Strickland/Hill* test, the court held that counsel's performance fell below that of an ordinary, fallible attorney.[335] This ruling in itself was a determination that counsel failed to meet his affirmative duties to the client. The trigger giving rise to counsel's duties was his client's question on the meaning of INS's interest in her case and counsel's inability to answer her.[336] The court wrote:

> [I]t was the fact that Aldus asked, "What does this mean?" when told that the INS was looking for her and the fact that counsel did nothing to answer that question or advise Aldus that she could defer the proceeding to another day to get more information, that prompted the court to find that counsel had crossed the boundary line between "ordinary fallible counsel" and "below ordinary fallible counsel."[337]

Because counsel did nothing in response to his client's request for legal advice, his assistance fell below that of an ordinary fallible attorney.

The court's ruling that assistance of counsel fell below that of an ordinary fallible attorney provided a functional definition of the duties of counsel in cases with immigration consequences, such as *Aldus*. When a client requests advice on a serious consequence of a plea agreement—when counsel is aware of her alien status and INS's pursuit[338]—counsel must either (1) actively offer advice on the question, or (2) advise the client that she can seek a continuance so that more information can be obtained to inform the client prior to her decision on the plea.[339] Because the court stated that an ordinary criminal defense lawyer is not expected to have specialized knowledge of immigration law, it can be inferred that the duty to seek a continuance is aimed at allowing enough time for counsel to investigate the issue or to permit the defendant to seek the counsel of a qualified specialist in immigration law.

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332. *Id.* ¶ 17, 748 A.2d 463.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. It is unclear whether the third element *standing alone* basis could trigger counsel's duties. The third element was the defendant's request for advice on a significant consequence of her guilty plea. Because the other two elements of counsel's knowledge of his client's alien status and INS pursuit are relevant, they have been included in the analysis defining new duties for counsel in cases involving immigration consequences.
339. *Id.*, ¶ 18, 748 A.2d 463.

G. The Materiality of Deportation Consequences in Maine

When the court in *Aldus* ruled that counsel had no duty to warn of immigration consequences amid counsel's awareness of his client's alien status and INS pursuit, it strained to avoid using the collateral consequences doctrine as the basis for its decision. The court stated that "it is not necessary for us to address the collateral consequences doctrine in order to decide Aldus's case."[340]

The court's ruling on these limited facts, however, actually revealed an endorsement of the collateral consequences doctrine. A finding of no duty when counsel has (1) knowledge of his client's alien status, and (2) knowledge of INS pursuit can only be reconciled with the idea that deportation consequences are "collateral" and immaterial to a plea agreement.[341] If the court viewed immigration consequences as material to a plea agreement, it would have been impossible for it to find no duty to inform a client when counsel is aware of her alien status and INS's pursuit. As such, it would be reasonable to infer that the court under these limited facts not only embraces the collateral consequences doctrine, but it also deems deportation consequences as immaterial to a guilty plea.

The court's holding on the full fact pattern of *Aldus*, however, suggests that there are situations when deportation consequences can be material to a guilty plea. If, hypothetically, counsel had done nothing after a defendant's request for advice on the *location* of the prison, it is virtually certain that the court would not hold such inaction to be ineffective counsel because such matters have been defined as "collateral" and immaterial to a guilty plea.[342] In *Aldus*, however, the court specifically took issue with counsel's inaction after the defendant requested advice on a "serious consequence" of the plea agreement.[343] That serious consequence was deportation and attorney inaction following the request for advice on this consequence was deemed ineffective counsel. The contrast between the hypothesis and *Aldus* illustrates that the court has functionally defined immigration consequences as material when counsel does nothing following a request for advice on the "serious consequence" of deportation, possibly subject to the further limitation of counsel's awareness of his client's alien status and INS's pursuit.[344]

Thus, the court in *Aldus* seemed to put forth the view that deportation consequences are generally immaterial to a guilty plea, but can be material under certain limited circumstances. If this duality is difficult to reconcile, it must be noted that the court emphasized that its inquiry would be conducted with an understanding that "the purpose of the constitutional requirement of effective counsel is 'to ensure a fair trial.'"[345] Invoking Rule 11 themes, the court stated that the "voluntariness of the plea hinges upon whether the advice is that of an ordinary competent attorney."[346] The court defined its inquiry as "whether the plea proceeding produced a just result which is 'the knowing and voluntary entry of a

340. *Id.* ¶ 18, 748 A.2d 463.

341. Although the Court in *Aldus* stated that it did not need to address the collateral consequence doctrine to decide the case, it functionally defined immigration consequences as "collateral" to a guilty plea when it stated that "th[e] fact [that Aldus was an alien] . . . alone would not require any particular action or advice by counsel." *Id.* ¶ 17, 748 A.2d 463.

342. *See* Laferriere v. State, 1997 ME 169, ¶ 15, 697 A.2d 1301.

343. Aldus v. State, 2000 ME 47, ¶ 17, 748 A.2d 463.

344. *See id.*

345. *Id.* ¶ 15, 748 A.2d 463 (quoting Strickland v. Washington, 466 U.S. at 686).

346. *Id.* (citing Hill v. Lockhart, 474 U.S. at 56-67).

guilty plea by a guilty party.'"[347] As a result, the court stated that its determination on ineffective counsel "must be guided by the overall justness and fairness of the proceeding."[348]

V. PROPOSAL FOR AMENDING MAINE'S RULE 11

In rendering the *Aldus* decision, the court was wise to avoid excessive reliance on labeling consequences as "direct" or "collateral." Although many Rule 11 cases are often driven by such labeling, the practice has the potential to obscure the real issues to be addressed. Immigration consequences are a "collateral" consequence unlike any other because they have life-shattering results and are often the most important factor in an alien defendant's decision to plead guilty. To view such consequences as immaterial to a guilty plea is to turn a blind eye to their serious ramifications. There is no other area of the law where a misdemeanor conviction can result in permanent separation from an adopted home and family.

Given the serious consequences of removal, what procedural safeguards should there be to prevent a plea in which counsel, the alien defendant, and the court do not know about the existence of serious immigration consequences? Under *Aldus*, this situation is without recourse unless the alien defendant already knows enough to ask for specific advice on immigration consequences.[349] As such, there is currently no remedy available in Maine when counsel, the alien defendant, and the court are completely unaware that conviction could lead to deportation.

Maine's Rule 11 should be amended to include a limited inquiry by the court to determine whether counsel knew that the defendant was an alien. After warning alien defendants that a plea of guilty or nolo contendere could result in serious immigration consequences, the court should inquire of counsel whether potential immigration consequences have been investigated.[350]

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347. *Id.* (quoting Laferriere v. State, 1997 ME 169, ¶ 18, 697 A.2d 1301).

348. *Id.*

349. Aldus v. State, 2000 ME 47, ¶ 17, 748 A.2d 463.

350. A proposed version of Rule 11, including a warning on immigration consequences, is as follows:

> RULE 11. PLEAS; ACCEPTANCE OF A PLEA TO A CHARGE OF A CLASS C OR HIGHER CRIME
>
> (a) PLEAS.
>
> (1) *In General.* A defendant may plead not guilty, not criminally responsible by reason of insanity, guilty, or nolo contendere. A defendant may plead both not guilty and not criminally responsible by reason of insanity to the same charge.
>
> The court may refuse to accept a plea of guilty or nolo contendere.
>
> If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or nolo contendere, the court shall enter a plea of not guilty.
>
> (2) *Conditional Guilty Plea.* With the approval of the court and the consent of the attorney for the state, a defendant may enter a conditional guilty plea. A conditional guilty plea shall be in writing. It shall specifically state any pretrial motion and the ruling thereon to be preserved for appellate review. If the court approves and the attorney for the state consents to entry of the conditional guilty plea, they shall file a written certification that the record is adequate for appellate review and that the case is not appropriate for application of the harmless error doctrine. Appellate review of any specified ruling shall not be barred by the entry of the plea.
>
> If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.

(3) *Fine on Acceptance of Guilty Plea in District Court.* The District Court clerk may, at the signed request of the defendant, accept a guilty plea upon payment of a fine as set by the judge in the particular case or as set by the judge in accordance with a schedule of fines established by the judge with the approval of the Chief Judge for various categories of such offenses.

(b) PREREQUISITES TO ACCEPTING A PLEA OF GUILTY OR NOLO CONTENDERE TO A CLASS C OR HIGHER CRIME. In all proceedings in which the offense charged is murder or a Class A, Class B, or Class C crime, before accepting a plea of guilty or nolo contendere, the court shall insure:

(1) That the plea is made with knowledge of the matters set forth in subdivision (c); and

(2) That the plea is voluntary within the meaning of subdivision (d); and

(3) That there is a factual basis for the charge, as provided in subdivision (e); and

(4) That an unrepresented defendant has waived the defendant's right to counsel.

(5) That an alien defendant understands the immigration consequences of the plea, as provided in subdivision (h).

(c) INSURING THAT THE PLEA IS MADE KNOWINGLY. Before accepting a plea of guilty or nolo contendere, the court shall address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The elements of the crime charged, the maximum possible sentence and any mandatory minimum sentence; and

(2) That by pleading guilty or nolo contendere the defendant is relinquishing the right to a trial, at which the defendant would have the following rights:

(A) The right to be considered innocent until proven guilty by the state beyond a reasonable doubt; and

(B) The right to a speedy and public trial by the court or by a jury; and

(C) The right to confront and cross-examine witnesses against the defendant; and

(D) The right to present witnesses on the defendant's behalf and the right to either be or decline to be a witness on the defendant's behalf.

(d) INSURING THAT THE PLEA IS VOLUNTARY. Before accepting a plea of guilty or nolo contendere, the court shall determine that the plea is the product of the defendant's free choice and not the result of force, threats or promises other than those in connection with a plea agreement.

The court shall make this determination by addressing the defendant personally in open court.

The court shall inquire as to the existence and terms of a plea agreement, as provided in Rule 11A.

(e) INSURING THAT THERE IS A FACTUAL BASIS FOR THE PLEA. Before accepting a plea of guilty or nolo contendere, the court shall make such inquiry of the attorney for the state as shall satisfy it that the state has a factual basis for the charge.

(f) ACCEPTANCE OF A PLEA OF GUILTY TO A CLASS C OR HIGHER CRIME IN DISTRICT COURT. A defendant who, prior to indictment, desires to enter a plea of guilty in the District Court to a charge of a Class A, B, or C crime may in writing waive the defendant's right to appearance and trial in the Superior Court and may waive indictment as provided in Rule 7(b).

If the court refuses to accept the plea or the defendant, after executing the waivers, declines to plead guilty or if a plea of guilty is set aside, the waivers shall be considered withdrawn and the case shall proceed in accordance with these rules as if no waivers had been filed.

All proceedings in the District Court shall be reported in such manner that an accurate transcript of the proceedings can be made. Such reporting may be done by means of electronic recording equipment.

Though the Law Court's analysis in *Aldus* suggests that immigration consequences are "collateral,"[351] it is important to remember that the term "collateral" is merely a label used by courts when no policy choice has been made to address the issue under Rule 11. By addressing immigration consequences in Rule 11, they no longer would be considered "collateral" *to the extent permitted by the rule*. An amended Rule 11, however, could be narrowly tailored to serve the particular values that the State of Maine finds at stake.[352]

The amended version of Rule 11 proposed in this Comment is narrow in scope. The court's inquiry into immigration consequences would serve only as a red flag to counsel and an alien defendant, an invaluable safeguard when neither is aware of serious immigration consequences. The court would have no duty to investigate the precise immigration consequences because the duty of investigation would remain entirely with counsel. Meanwhile, the proposed amendment to Rule 11 would not alter counsel's duty to investigate immigration consequences, as the extent of such duties would continue to be defined by case law. At present, no court has held that counsel has an absolute duty to investigate immigration consequences, although many jurisdictions have introduced non-binding directives that track the American Bar Association's guidelines calling for counsel to investigate immigration consequences.[353]

(g) TRANSFER FOR PLEA AND SENTENCE. The defendant may, in writing, if a criminal charge is currently pending in a court, request permission to plead guilty or nolo contendere to any other offense the defendant has committed in the state, subject to the written approval of the attorneys for the state, if more than one. Upon receipt of the defendant's written statement and of the written approval of the attorneys for the state the clerk of the court in which a complaint, an indictment or an information is pending shall transmit the papers in the proceeding to the clerk of courts for the court in which the defendant is held, and the prosecution shall continue in that court. The defendant's plea of guilty or nolo contendere constitutes a waiver of venue.

The court receiving a case transferred for plea and sentence shall issue an order that either requires the case to remain in the sentencing court or requires the case to be returned to the originating court.

(h) Before accepting a plea of guilty or nolo contendere, the court shall ascertain whether the defendant is an alien. If the defendant is an alien, the court shall warn the defendant that a plea of guilty or nolo contendere could have serious immigration consequences and shall inquire of defense counsel whether potential immigration consequences resulting from the plea have been investigated (proposed amendment).

Me. R. Crim. P. 11 (2000) (with proposed amendments).

351. *See supra* note 331 and accompanying text.

352. In attempting to address the problem of hidden immigration consequences, an amended Rule 11 could be drafted to serve the needs of Maine's judiciary while striving toward a just result for alien defendants. An amended version of Rule 11 could be drafted broadly, elevating immigration consequences as "direct" consequences of a guilty plea, or narrowly, such that immigration consequences would remain "collateral." In the latter case, the amendment would primarily serve as a preventive tool aimed at alerting alien defendants and counsel that serious immigration consequences could result from a guilty plea. A version of Rule 11 that treats immigration consequences as "collateral" to a guilty plea could not serve as ground for collateral attack.

353. *See, e.g.*, People v. Soriano, 240 Cal. Rptr. at 335. In Soriano, the court wrote:

The American Bar Association's Standards for Criminal Justice, standard 14-3.2, which discusses plea agreements, provides, in pertinent part, that

"(b) To aid the defendant in reaching a decision, defense counsel, after appropriate

Regardless of whether or not case law requires counsel to investigate immigration consequences, an alien defendant should be warned that a guilty plea could potentially result in serious immigration consequences. An alien defendant also should be entitled to learn whether counsel investigated the possibility of such consequences, either through counsel's own research or through consultation with an immigration specialist.

The proposed amendment to Rule 11 would achieve this goal, improving judicial procedures by giving counsel and an alien defendant notice of the hidden minefields involved with a plea. In addition, it would provide a meaningful opportunity for the defendant to request a continuance if counsel is unaware of potential immigration consequences or unwilling to investigate them.

This proposal does not address the *adequacy* of counsel's investigation of immigration consequences, as that is a matter for case law to define. A "knowing" plea under the proposed amendment to Rule 11 is one in which an alien defendant knows that his plea *could* result in serious immigration consequences and is aware of whether *or not* such consequences have been investigated by his attorney or an immigration specialist. Thus, the goal of the amended Rule 11 procedure is not to prescribe new duties of counsel, but rather to give notice to alien defendants of the possibility of deportation while aiding them in determining whether counsel addressed these hidden risks in some manner.

Although some might argue that an expanded Rule 11 inquiry would unduly burden courts, it is important to remember that the Rule 11 inquiry has always aimed to enhance judicial economy by creating a clear record to avoid spin-off post-conviction hearings, such as those for ineffective counsel. In addition, although judicial economy is an important consideration, it is undisputed that Rule 11 is merely a means to the end of a "just result."[354] As a matter of basic fairness aimed at a just result, "[i]t is . . . 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."[355] The same approach should apply when an alien defendant faces banishment from "home, family and adopted country," a sanction that Justice Black has called a "punishment of the most drastic kind."[356]

The United States Supreme Court has stated that in Rule 11 procedures, "[m]atters of reality, and not mere ritual, should be controlling."[357] In the wake of sweeping changes in federal immigration policy, courts, counsel, and alien defendants have experienced a great deal of confusion in trying to navigate the com-

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investigation, should advise the defendant of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision." (3 ABA Standards for Criminal Justice, std. 14-3.2 (2d ed. 1980) p. 73.) The commentary to the standard notes the importance of advising a client of collateral consequences which may follow his conviction. *"[Where] the defendant raises a specific question concerning collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences."* (*Id.* at p. 75.)

Id. (emphasis added).

354. Aldus v. State, 2000 ME 47, ¶ 15, 748 A.2d 463.

355. McCarthy v. United States, 394 U.S. at 472.

356. Lehmann v. United States, 353 U.S. 685, 691 (1957) (Black, J., concurring).

357. McCarthy v. United States, 394 U.S. at 467, n.20 (quoting Kennedy v. United States, 397 F.2d 16, 17 (C.A. 6th Cir. 1968)).

plexities of new immigration statutes. In response, at least fourteen states have passed laws requiring state courts to issue warnings to alien defendants.[358] Although a statutory approach would not be out of step with the national trend, Maine's judiciary would be better served if it adjusted judicial procedures itself by amending Rule 11. Adjusting the process to introduce important safeguards would provide notice to counsel and alien defendants of harsh new "matters of reality." This, in turn, would be an important step toward ensuring a "just result."

VI. APPENDIX

In 2001, the Maine Supreme Judicial Court amended Rule 11 to provide notice to alien defendants that there may be immigration consequences to a plea of guilty or nolo contendere.[359] With the introduction of the amendment, Maine has become the first state in the nation to address immigration consequences through Rule 11 procedures rather than through positive statutes, which can be less flexible and prone to collateral attack.

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358. *See* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 319, n.217, (1997), citing the following statutes: CAL. PENAL CODE 1016.5 (1985); CONN. GEN. STAT. ANN. 54-1j (1994); D.C. CODE ANN. 16-713 (1989); FLA. R. CRIM. P. 3.172(c)(viii) (1989); HAW. REV. STAT. 802E-1 to -3 (1995); MASS. GEN. LAWS ANN. ch. 278, 29D (1992); MONT. CODE ANN. 46-12-210(1)(f) (1995); N.Y. CRIM. P. LAW 22.50(7) (1992); N.C. GEN. STAT. 15A-1022(a)(7) (1996); OHIO REV. CODE ANN. 46-12-210(1)(f) (1994); OR. REV. STAT. 135.385(2)(d) (1990); TEX. CODE CRIM. P. art. 26.13(a)(4) (1989); WASH. REV. CODE ANN. 10.40.200 (1990); WIS. STAT. 971.08(1)(c)-(3) (Supp. 1996).

359. *See* Maine Supreme Judicial Court, Amendments to Maine Rules of Criminal Procedure, Docket No. SJC-21. The Court wrote:

> Rule 11(b) of the Maine Rules of Criminal Procedure is amended to read as follows:
>
> (b) Prerequisites to Accepting a Plea of Guilty or Nolo Contendere to a Class C or Higher Crime. In all proceedings in which the offense charged is murder or a Class A, Class B, or Class C crime, before accepting a plea of guilty or nolo contendere, the court shall insure:
>
> (1) That the plea is made with knowledge of the matters set forth in subdivision (c); and
>
> (2) That the plea is voluntary within the meaning of subdivision (d); and
>
> (3) That there is a factual basis for the charge, as provided in subdivision (e); and
>
> (4) That an unrepresented defendant has waived the defendant's right to counsel.
>
> (5) That a defendant who is not a United States citizen has been notified that there may be immigration consequences of the plea, as provided in subdivision (h). The court is not required or expected to inform the defendant of the nature of any consequences, but may consider a brief continuance to permit the defendant to make inquiry.

Id.

> Rule 11(h) of the Maine Rules of Criminal Procedure is added to read as follows:
>
> (h) Immigration consequences of the plea. Before accepting a plea of guilty or nolo contendere, the court shall inquire whether the defendant is a United States citizen. If the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been notified that there may be immigration consequences of the plea. If no such notification has been made, or if the defendant is unrepresented, the court shall notify the defendant that there may be immigration consequences of the plea and may continue the proceeding for investigation and consideration of the consequences.

Id. (underlining new amendments).

Aimed at fairness and finality, the amended Rule 11 "seeks both to prevent an improvident plea and to prevent the burdens of post-conviction review."[360] To this end, the amendment to Rule 11 "builds into the guilty plea proceeding a pause—a 'stop-look-and-listen'—to ponder whether there may be serious immigration consequences of the plea."[361] It is noteworthy, however, that the amendment appears to treat immigration consequences as "collateral" to a plea. Accordingly, failure to comply with the provision on immigration consequences "is not intended as a ground for collateral attack."[362]

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360. *Id.* at 3 (Advisory Committee Note).
361. *Id.*
362. *Id.*