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Immigration Consequences of Guilty Pleas: What State v. Paredez Means to New Mexico Criminal Defendants and Defense Attorneys

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I. INTRODUCTION

The recent trend toward stricter federal immigration policies has sparked a highly partisan national dialogue. Arguments from both sides have given rise to a wide array of legal questions at both the federal and the state level. In particular, cases dealing with the failure of counsel to advise non-citizens of immigration consequences of guilty pleas have received a great deal of judicial attention. The courts that have considered this issue are not in complete agreement about the scope of defendants’ constitutional rights, but the majority rule is that “attorneys are not required to address immigration consequences with their clients at all.”

In State v. Paredez, the New Mexico Supreme Court unequivocally rejected the majority rule. It held that defense counsel’s failure to inform clients about the immigration consequences of guilty pleas “will be ineffective assistance of counsel if the defendant suffers prejudice by the attorney’s omission.” The court further clarified that “[Paredez’s] attorney had an affirmative duty to determine his immigration status and advise him that he almost certainly would be deported if he pleaded guilty to criminal sexual contact of a minor.” The court’s decision was both progressive and rightfully sensitive to the pitfalls of being a non-citizen inhabitant of the United States.

This Note examines the background of the issues presented in Paredez and pays careful attention to how other jurisdictions have treated immigration consequences of guilty pleas. Additionally, it discusses the New Mexico Supreme Court’s rationale for coming to its decision and argues that the court’s conclusion may be viewed as a workable compromise for trial judges and defense attorneys. It warns, however, that, because the decision in Paredez was based on federal law, it runs the risk of being overruled by the U.S. Supreme Court. Finally, this Note considers the implications of the Paredez decision for New Mexico criminal defense attorneys.
II. BACKGROUND

In 1990, the New Mexico rules of criminal procedure were amended to include a provision that prohibited district courts from accepting guilty or no contest pleas unless the defendant was made aware that such pleas "may have an effect upon" his or her immigration or naturalization status. However, prior to the Paredez decision there was no rule regarding the New Mexico criminal defense attorney's role in advising his or her client about the potential immigration consequences of guilty or no contest pleas.

The crux of the problem presented in Paredez was whether a defendant's Sixth Amendment right to assistance of counsel is violated when he or she accepts a guilty plea without first being made aware of its immigration consequences. Immigration consequences, because they are not determined by the district court, are collateral and not direct consequences. However, because recent changes in federal immigration law make certain crimes per se deportable offenses, many criminal defendants have argued that they have a constitutional right to be informed of the immigration consequences of guilty pleas.

A. Recent Changes in Immigration Law

The likelihood of deportation consequences following a conviction or a plea has increased dramatically in recent years. Prior to the 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), deportation procedures applicable to permanent resident aliens convicted of criminal offenses typically operated in two stages. At the first stage, the immigration judge decided whether the person could be deported. At the second stage, the person, if deportable, could seek relief based on his or her personal circumstances. After the enactment of the IIRIRA and the AEDPA, however, more people are considered deportable at the

7. Rule 5-303(E)(5) NMRA (emphasis added). This provision is only applicable to the court itself and merely requires that the court inform the defendant that a guilty or no contest plea will possibly affect the defendant's immigration or naturalization status.
8. Prior to the Paredez decision, Rule 5-303(5)(E) provided New Mexico judges with guidance regarding their duty to inform defendants of possible immigration consequences stemming from guilty or no contest pleas, but neither this rule nor any other rule placed any specific obligation on the shoulders of New Mexico defense attorneys. See supra note 7.
10. See infra Part II.B (explaining that direct consequences are those punishments determined by the criminal trial court, whereas collateral consequences are civil penalties that stem from direct consequences). Several courts have adopted this rationale in determining that counsel's failure to advise a defendant of immigration consequences does not violate a defendant's constitutional rights. See, e.g., Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004).
11. See infra Parts II.A, II.D.
12. See infra notes 19–26 and accompanying text.
15. Francis, supra note 1, at 701.
16. Id.
17. Id.
first stage, and relief that used to be available at the second stage "has been all but eliminated."18

Such a radical difference in procedure can be attributed to the changes these acts made to the statutory definition of deportable "aggravated felony" offenses as used by immigration officials.19 In 1988, eight years prior to the passage of the IIRIRA and the AEDPA, aggravated felonies were initially introduced as grounds for removal and referred exclusively to murder, drug trafficking, and trafficking in firearms.20 In 1996, the IIRIRA and the AEDPA dramatically broadened the scope of deportable aggravated felony offenses.21 Today there are numerous offenses, some more unexpected than others, classified as aggravated felonies that expose non-citizens to the imminent threat of deportation.22 Seemingly minor offenses for which non-citizens have faced the threat of deportation as a result of the "inexorable machinery of the IIRIRA" include stealing a chicken sandwich, stealing two boxes of donuts, stealing a fifteen dollar piece of clothing for a baby, and pulling a woman's hair in a fight over a man.23 Under these provisions of federal law, the mere commission of a crime that "result[s] in a 12 month sentence, served or suspended," triggers virtually per se deportation.24 Because the list of potential aggravated felonies is so expansive, often neither a criminal defendant nor his or her defense counsel is aware that a guilty or no contest plea will lead the defendant directly to the chambers of an immigration judge for a deportation hearing.25 As a result of this federal legislation, a conviction of, or a guilty plea to, an "aggravated felony" by a non-citizen leads today to nearly per se deportation with virtually no possibility of relief.26

18. Id. Many crimes are now comparable to strict liability offenses that result in immediate deportation. See id.

19. Id. "[O]perative definitions used in criminal courts do not necessarily apply in the immigration context." Id. at 704. The definition of an "aggravated felony" for federal immigration purposes is entirely distinct from the term's meaning under state penal codes. See id. See generally 8 U.S.C. § 1227 (2000) (describing the circumstances under which non-citizens may be deported).


22. ROBERT JAMES McWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS § 5.23 (2d ed. 2005) (explaining that courts have found non-citizens subject to deportation for convictions of drug trafficking; crimes of violence, theft, and burglary; alien smuggling; crimes of fraud or deceit; bribery; counterfeiting; trafficking in vehicles with altered identification numbers; obstruction of justice; and perjury); accord 8 U.S.C. § 1101(a)(43) (2000) (listing all crimes included in the definition of "aggravated felony").


24. Id.; accord 8 U.S.C § 1227(a)(2)(A)(i)(II) (2000) (stating that a non-citizen may be deported when he or she is convicted of a crime for which a sentence of one year or longer may be imposed).

25. See, e.g., State v. Paredez, 2004-NMSC-036, 101 P.3d 799. Presumably, both Mr. Paredez and his attorney felt that three years of supervised probation was a favorable plea deal and were not aware that a guilty plea to criminal sexual contact of a minor that did not result in incarceration would lead to deportation. See id. ¶ 2, 101 P.3d at 801.

26. See Taylor & Wright, supra note 21, at 1137 (stating that a conviction of an aggravated felony bars discretionary relief for deportation under current law).
B. The Doctrine of Collateral Consequences

A criminal defendant who is not a U.S. citizen would not likely plead guilty to an aggravated felony if he or she were cognizant of the fact that deportation would almost certainly result. A long-standing norm in the U.S. criminal justice system is that a criminal defendant who decides to plead guilty or no contest must do so "with sufficient awareness of the relevant circumstances and likely consequences" of the plea. Such awareness does not normally include the recognition of civil penalties, such as deportation, that stem from criminal consequences, also known as collateral consequences. As a result, plea offers that initially seem exceedingly fair to a criminal defendant may, in reality, lead to extremely harsh civil penalties. Such unexpected consequences raise the question "of whether pleas taken under such circumstances are knowingly and voluntarily entered."

Although the U.S. criminal justice system recognizes the constitutional necessity of assuring that criminal defendants understand the direct consequences of guilty pleas, a similar necessity is not normally extended to collateral consequences. Such a requirement does not typically exist despite the fact that collateral consequences have the potential to appear in almost every criminal case and often affect criminal defendants' lives more profoundly than the direct consequences of a conviction or plea. Deportation is arguably the most extreme collateral consequence because of its potential to completely uproot lives and to tear families apart.

Because deportation consequences are determined at immigration hearings and not at criminal trials, they must be considered civil penalties that stem from criminal penalties. Therefore, in most jurisdictions neither trial courts nor criminal defense

27. See infra notes 29–30 and accompanying text.
29. Collateral consequences have been defined as those consequences that remain "beyond the control and responsibility of the district court in which that conviction was entered." United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000).
30. Francis, supra note 1, at 693–94 (listing deportation and extended exclusion from the United States as examples of collateral consequences of guilty pleas).
31. Id. at 694.
32. Id. at 709. Direct consequences are those that are directly linked to a defendant's criminal trial, such as imprisonment or probation. See id. at 710.
33. The U.S. Supreme Court has ruled that the Due Process Clause only requires the trial court to explain the direct consequences of a conviction or a guilty plea. Gabriel J. Chin & Richard W. Holnes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 706 (2002). Even though the Court has never expressly extended the affirmative duty to inform regarding direct consequences to defense counsel, it is one of the "most widely recognized rules of American law." Id.
34. See id. at 705–06 (listing the following potential collateral consequences of convictions or guilty pleas: effects on custody, parole ineligibility, civil commitment, registration requirements, disenfranchisement, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the military, loss of business or professional licenses, and deportation).
36. Id. Deportation has the potential to force people to leave family members behind that happen to be U.S. citizens. Id. Also, it is not uncommon for deportees to be removed to their countries of legal citizenship where they do not know anyone or do not even speak the language. Id.
37. See Francis, supra note 1, at 694.
attorneys are required to inform clients about the potential collateral immigration consequences of guilty or no contest pleas.38

C. Constitutional Considerations and the Strickland Standard for Effective Assistance of Counsel

The root of the problem presented in Paredez begins with whether the criminal defendant sufficiently understands the consequences of pleading guilty.39 Such an understanding must at least partially come from both the trial judge and the defendant’s counsel. Because the U.S. Supreme Court has discussed these issues at length, an overview may reasonably begin at the national level.

1. Sixth Amendment Effective Assistance of Counsel

In Boykin v. Alabama,40 the U.S. Supreme Court held that a plea must be both voluntary and knowing in order for it to be constitutional.41 The Court reasoned that the requirement of knowledge and volition was crucial because upon entering a guilty plea a criminal defendant waives a number of fundamental constitutional rights.42 The following Term, in Brady v. United States,43 the Court reinforced its holding in Boykin by stating that waiving these rights must not only be voluntary and knowing but must also be intelligent and “done with sufficient awareness of the relevant circumstances and likely consequences.”44

Because the trial process and procedure can be quite complicated, a criminal defendant’s “sufficient awareness of the relevant circumstances and likely consequences”45 must, in large part, come from the advice of his or her counsel.46 The Sixth Amendment to the U.S. Constitution assures criminal defendants the right to “have the Assistance of Counsel for his defence.”47 At face value, this provision merely guarantees the right to representation at a criminal trial, but the U.S. Supreme Court has interpreted it to guarantee a general right to “effective” assistance of counsel.48

38. See supra note 2 and accompanying text.
41. Id. at 242.
42. Id. at 243 (explaining that, upon pleading guilty to a crime, a defendant waives his or her Sixth Amendment right to a jury trial, Sixth Amendment right of confrontation, and Fifth Amendment privilege against compulsory self-incrimination).
44. Id. at 748; accord Rule 5-303(E)-(F) NMRA (requiring that pleas in New Mexico district courts be both voluntary and knowing). The problem that Paredez and similar cases encounter is whether virtually per se deportation stemming from guilty pleas can be considered the type of “likely consequence” discussed in Brady. For a discussion of the difference between direct and collateral consequences, see supra Part II.B.
45. Brady, 397 U.S. at 748.
47. U.S. CONST. amend. VI.
48. See McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).
In *Strickland v. Washington*, the Court created a standard designed to protect this constitutional right to effective assistance of counsel in criminal trials. The standard consists of a two-prong test. The first prong of the test requires the defendant to show that "counsel's performance was deficient"; the second prong requires a showing that "the deficient performance prejudiced the defense." If successful in a *Strickland* claim, the defendant that had previously entered a guilty plea is allowed to withdraw his or her plea and have a trial by jury.

In order to satisfy the first prong, a defendant must demonstrate that defense counsel did not function in accordance with the defendant's Sixth Amendment guarantee of counsel. In making this showing, a defendant must prove that counsel's performance "fell below an objective standard of reasonableness." When an ineffective assistance of counsel claim is brought, the general presumption is that counsel has not fallen below this standard. Such a presumption exists to avoid "the distorting effects of hindsight" and to avoid the litigation of frivolous ineffective assistance of counsel claims.

If a defendant is able to satisfy the first prong of the test, the focus moves to the second prong: the prejudice prong. This prong aims "not to grade counsel's performance," but rather, to determine whether the deficient performance unfairly affected the outcome of the proceeding. In essence, this prong becomes a "but for" test that requires a defendant to prove that, in the absence of counsel's performance, the outcome of the proceeding would have been different. The standard of proof to make such a showing is one of "reasonable probability," which the Court

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50. *Id.* at 687. The *Strickland* right to effective assistance of counsel at trial was extended to similar claims arising out of a plea agreement in *Hill*, 474 U.S. at 58.
51. *Strickland*, 466 U.S. at 687 ("This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").
52. *Id.* ("This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").
55. *Id.* at 688.
56. Elizabeth Gable & Tyler Green, *Current Developments 2003-2004: Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland*, 17 GEO. J. LEGAL ETHICS 755, 758 (2004). Courts "grant a great deal of deference to decisions made by counsel during the course of a trial." *Id.* Strategic choices made by counsel are not judged on appeal unless they are unreasonable. *See id.*
58. *Id.* at 690 ("The availability of intrusive post-trial inquiry into attorney performance...would encourage the proliferation of ineffectiveness challenges.").
59. See supra note 52 and accompanying text.
60. *Strickland*, 466 U.S. at 697.
61. *Id.* at 694.
62. *Id.* ("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."); see also Gable & Green, supra note 56, at 759.
63. *Strickland*, 466 U.S. at 694.
defined as "a probability sufficient to undermine confidence in the outcome." If such a showing is made the defendant is entitled to the appropriate relief.  

2. Effective Assistance Under the New Mexico Constitution

Apart from the Sixth Amendment, a New Mexico criminal defendant can also bring a claim of ineffective assistance of counsel under article II, section 14 of the state constitution. U.S. Supreme Court Justice Brennan has stated that "one of the strengths of [the] federal system is that it provides a double source of protection for the rights of [its] citizens." The federalist system was founded largely on the division of powers between the state and national governments to defend the rights of citizens. James Madison himself indicated that, in order to maintain the "double security" of the federal system, the federal courts must be careful not to undercut state protections of rights.

While it is true that "state constitutions may always be used to supplement or expand federally guaranteed constitutional rights," it is also true that "the federal courts' reading of federal law...is decisive." The U.S. Supreme Court is the ultimate arbiter of federal constitutional questions, but the principles of federalism preclude it from reviewing decisions resting on state constitutional law that is more liberal than its federal counterpart.

The states have developed three different approaches to independent constitutional interpretation: the primacy approach, the lockstep approach, and the interstitial approach. In State v. Gomez, New Mexico adopted the interstitial approach. As a result of accepting this approach, the New Mexico courts may now "diverge from federal precedent for three reasons: a flawed federal analysis,

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64. Id. The Strickland prejudice prong has been criticized for placing "substantial emphasis on whether the defendant was factually culpable and insufficient emphasis on whether the defendant received a fair trial and was legally guilty." Jeffrey L. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement, 75 NEB. L. REV. 425, 439 (1996).
65. See Strickland, 466 U.S. at 687.
66. N.M. CONST. art. II, § 14 ("In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel....").
69. See id. (citing THE FEDERALIST No. 51, at 357 (James Madison) (Benjamin Wright ed., 1961)).
70. Id. at 1334 ("Federal law sets a minimum floor of rights below which state courts cannot slip.").
71. Id. at 1333.
72. See id.; see also supra notes 67–69 and accompanying text.
73. State v. Gomez, 1997-NMSC-006, ¶ 18, 932 P.2d 1, 7. State courts that utilize the primacy model "consider assertions of federal constitutional rights only after all claims resting on state law have failed to provide the requested protections." Developments in the Law, supra note 68, at 1356. These courts rely on the principle that "the states are the primary sovereigns and that state constitutions are the basic charters of individual liberties and of the limits of governmental authority," Id. at 1357. Other state courts opt for the opposite extreme and take the lockstep approach to state constitutional interpretation. James A. Gardner, Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix, 46 WM. & MARY L. REV. 1245, 1262 (2005). These courts "construe provisions of state constitutions to have precisely the same meaning as similar provisions of the U.S. Constitution." Id.
structural differences between state and federal government, or distinctive state characteristics.\textsuperscript{76}

Under this approach it must first be determined whether the U.S. Constitution protects the right being asserted.\textsuperscript{77} If it does, there is no need for the analysis to continue, but if not, the state constitution must be examined to determine whether the right asserted is protected there.\textsuperscript{78} If there is established precedent that would construe the state provision to provide more protection than its federal counterpart, "the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue."\textsuperscript{79}

However, in order to preserve a claim in which there is no precedent differentiating a state constitutional provision from its federal counterpart, "a party also must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision."\textsuperscript{80} This was the step that should have been taken, but was not, in Paredez to protect defendants' right to be informed of the immigration consequences of guilty pleas under the New Mexico Constitution.\textsuperscript{81}

\textbf{D. Different Jurisdictions' Interpretation of Collateral Immigration Consequences}

Many defendants that have faced deportation consequences resulting from guilty pleas to aggravated felonies have claimed that their constitutional rights were violated when they were not adequately informed of the near certainty of deportation.\textsuperscript{82} They maintained that they were victims of ineffective assistance of counsel based on Strickland in hopes of withdrawing their guilty or no contest pleas.\textsuperscript{83} Courts analyzing this issue have consistently considered deportation a collateral consequence of a guilty or no contest plea to an aggravated felony.\textsuperscript{84} However, courts must now, after the passage of the IIRIRA and AEDPA, take into account the fact that, "while deportation and exclusion from the United States may not fit the technical definition of a direct consequence of a conviction,...deportation [is] a near certainty for convictions of a broad class of offenses."\textsuperscript{85}

Despite the veritable certainty of deportation in many cases, federal courts have overwhelmingly rejected the contention that trial judges have an affirmative duty to

\begin{itemize}
  \item \textsuperscript{76} Id. \textsuperscript{2} ¶ 19, 932 P.2d at 7.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} See id.
  \item \textsuperscript{79} Id. \textsuperscript{2} ¶ 22, 932 P.2d at 8.
  \item \textsuperscript{80} Id. \textsuperscript{2} ¶ 23, 932 P.2d at 8.
  \item \textsuperscript{81} For a discussion of the potential ramifications of protecting the rule in Paredez under the U.S. Constitution but not under the New Mexico Constitution, see infra Part V.C.
  \item \textsuperscript{82} E.g., United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004); United States v. Couto, 311 F.3d 179 (2d Cir. 2002); State v. Murithi, 46 P.3d 1145 (Kan. 2002); Gonzalez v. State, 83 P.3d 921 (Or. Ct. App. 2004), rev'd, 134 P.3d 955 (Or. 2006).
  \item \textsuperscript{83} See supra note 82.
  \item \textsuperscript{84} See Francis, supra note 1, at 709 ("[T]here is no universal belief that non-citizens must be informed of the immigration consequences stemming from their pleas.").
  \item \textsuperscript{85} Id. at 694–95.
\end{itemize}
inform defendants of the immigration consequences of a guilty plea.\textsuperscript{86} Many state courts require trial judges to inform criminal defendants that immigration consequences \textit{may} result from a plea.\textsuperscript{87} But even in these courts, the requirement is merely to generally advise every defendant that there may be possible consequences.\textsuperscript{88} The argument that the trial court should inform each and every criminal defendant about specific immigration consequences to pleas has overwhelmingly failed.\textsuperscript{89}

Despite the fact that trial courts generally do not have the burden of warning non-citizen defendants about deportation consequences, many jurisdictions treat defense counsel’s responsibilities differently.\textsuperscript{90} Since defense counsel has a greater duty than citizen defendants about deportation consequences, many jurisdictions treat defense specific immigration consequences to pleas has overwhelmingly argument that the trial court should inform each and every criminal defendant about generally advise every defendant that there may be possible consequences.\textsuperscript{92} (2) when counsel affirmatively misrepresents immigration consequences,\textsuperscript{93} and (3) when counsel gives vague warnings about possible consequences.\textsuperscript{94}

Despite the changes that the IIRIRA and the AEDPA have created, many courts are hesitant to stray from a strict reading of the collateral consequences doctrine.\textsuperscript{95}

\textsuperscript{86} See El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Amador-Leal, 276 F.3d 511, 517 (9th Cir. 2002); United States v. Gonzalez, 202 F.3d 20, 27–28 (1st Cir. 2000); United States v. Osiemi, 980 F.2d 344, 349 (5th Cir. 1993); United States v. Montoya, 891 F.2d 1273, 1292–93 (7th Cir. 1989).


\textsuperscript{88} See, e.g., CAL. PENAL CODE § 1016.5(a) (West 2002); OR. REV. STAT. § 135.385(2)(d) (2003); WIS. STAT. § 971.08(1)(c) (2004). Jennifer Welch questions the effectiveness of the “generalized, late warning[s]” that this model offers. Jennifer Welch, Comment, \textit{Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively}, 92 CAL. L. REV. 541, 555 (2004). This model offers criminal defendants the same warning regardless of their personal circumstances. \textit{See id.} Because such a warning becomes a mere formality to the trial judge, often the criminal defendant is not able to properly consider its weight. \textit{See id.}

\textsuperscript{89} \textit{See supra} note 86. The court in \textit{State v. Paredes} noted that “it certainly would have been prudent for the district court to have been more specific in its admonition,” but that such a specific advisement was not required by either the court rules or the U.S. Constitution. 2004-NMSC-036, ¶ 11, 101 P.3d 799, 803.

\textsuperscript{90} \textit{See infra} notes 93–94.

\textsuperscript{91} \textit{See MODEL RULES OF PROF'L CONDUCT R. 1.1} (2002) (“A lawyer shall provide competent representation to a client.”); \textit{id.} R. 1.3 cmt. 1 (“A lawyer must...act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”). However, ethical duties must be distinguished from the constitutional rights of defendants to effective assistance of counsel. \textit{See infra} Part VI.B.

\textsuperscript{92} \textit{See, e.g.,} Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004) (holding that failure to advise a non-citizen of the possibility of deportation as a collateral consequence does not result in Sixth Amendment deprivation); United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003) (holding that failing to advise a client of the immigration consequences of a guilty plea, without more, does not render defense counsel’s assistance ineffective).

\textsuperscript{93} \textit{See, e.g.,} United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) (holding that counsel’s affirmative misrepresentations about immigration consequences rendered a non-citizen defendant’s plea involuntary by counsel’s ineffective assistance).

\textsuperscript{94} \textit{See, e.g.,} Gonzalez v. State, 83 P.3d 921, 925 (Or. Ct. App. 2004) (holding that by informing a non-citizen defendant that a guilty plea to drug charges “may” make him deportable was ineffective assistance of counsel because deportation was certain), \textit{rev'd,} 134 P.3d 955 (Or. 2006); State v. Rojas-Martinez, 73 P.3d 967, 970 (Utah Ct. App. 2003) (holding that by advising the non-citizen defendant that he “might or might not” be deported after pleading guilty to sexual battery, defense counsel’s performance was ineffective), \textit{rev'd,} 125 P.3d 930 (Utah 2005).

\textsuperscript{95} For a general discussion on whether deportation should be considered a direct or collateral consequence, \textit{see Couto,} 311 F.3d at 188–90.
These courts maintain that, regardless of the certain result of deportation, it is still a collateral consequence because the criminal trial court does not, itself, dole out deportation sanctions. Concluding that counsel's performance is not deficient when completely failing to inform his or her client that he or she would be deported after pleading guilty is, therefore, the outcome in these jurisdictions.

Although some courts consider a failure to advise about immigration consequences to be effective assistance, a distinction must be made between providing no advice and faulty advice. Some courts have held that affirmative misrepresentations by counsel regarding immigration consequences of guilty pleas meet the first-prong (deficient performance) of the Strickland test. Conversely, the same courts that consider counsel's performance deficient via misinformation may consider a complete lack of information regarding immigration consequences sufficient.

Under this rule, the burden is on the client to inquire about possible immigration consequences that could stem from guilty or no contest pleas. Consequently, the defense attorney is free to ignore the possible immigration consequence without any possibility of a future ineffective assistance of counsel claim.

Finally, the gray area of this issue involves those instances where counsel informs a client that deportation is "possible," when it is virtually certain under federal statutory law. Counsel is arguably wrong, or at least inaccurate, when advising that deportation may follow from a guilty plea to an aggravated felony. But the ultimate question is whether this type of advice constitutes ineffective assistance of counsel.

This was the exact issue that faced the New Mexico Supreme Court in Paredez.

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96. See, e.g., Broomes, 358 F.3d at 1256–57 (explaining that counsel's performance cannot be considered deficient for failing to advise a client about collateral consequences).

97. See, e.g., id. at 1257.

98. In United States v. Kwan, the Ninth Circuit held that defense counsel's assistance was ineffective. 407 F.3d 1005, 1018 (9th Cir. 2005). In that case, the defendant asked counsel about immigration consequences of a guilty plea. Id. at 1015–16. Counsel made a faulty affirmative representation that a guilty plea would not lead to deportation, which the defendant trusted and, as a result, ultimately entered into a guilty plea. Id. at 1016.

99. See, e.g., Couto, 311 F.3d at 184, 188 (holding that counsel's performance was deficient when he advised his client, who was charged with an aggravated felony, to take care of her criminal problems first and then concern herself with potential immigration problems). For a general discussion of the Strickland test, see supra notes 49–65.

100. See, e.g., Couto, 311 F.3d at 187–88 (distinguishing between the reasonableness of failing to inform regarding collateral consequences and making affirmative misrepresentations regarding the same consequences).

101. See Kwan, 407 F.3d at 1015–16 (stressing the defendant's affirmative inquiry regarding possible immigration consequences and counsel's subsequent misrepresentation).

102. In this type of circumstance, the defendant is warned that deportation might occur but that it is not certain. This could be construed as faulty advice if the non-U.S. citizen defendant pleads guilty or no contest to an aggravated felony. See supra notes 21–26 and accompanying text. However, the defendant is not explicitly told that deportation will not result from a plea. This puts the defendant on notice that his or her immigration status could be in jeopardy. At least one other court before Paredez has held that this type of attorney advisement is not sufficient. Gonzalez v. State, 83 P.3d 921, 925 (Or. Ct. App. 2004) (holding that advisement that a person "may" be subject to immigration consequences after a guilty plea to drug charges is faulty because it falsely implies that there is a potentially good chance that the person will not be deported), rev'd, 134 P.3d 955 (Or. 2006).
III. STATEMENT OF THE CASE

In October 2002, Ramón Paredez, a lawful permanent resident from Guatemala, was charged with criminal sexual contact of a minor in the third degree. Several months later, in February 2003, Mr. Paredez entered a plea agreement with the district court. At the plea hearing, both the court and Mr. Paredez’s counsel informed him that a guilty plea “could” affect his immigration status. Despite the warning, Mr. Paredez proceeded with the plea agreement, which assured him a suspended sentence. One week after sentencing, on March 3, 2003, Mr. Paredez filed a motion to withdraw his plea, alleging that neither the trial court nor his attorney adequately informed him about the consequences that his plea would have on his immigration status. The district court held a hearing to decide the matter and ultimately issued an order denying the motion. Mr. Paredez appealed the decision.

The New Mexico Court of Appeals rejected both arguments and affirmed the district court’s decision. First, the appellate court held that the district court was not required to give a specific explanation about the possible immigration consequences of Mr. Paredez’s plea. Second, the court held that the record was insufficient to address the issue of ineffective assistance of counsel. Further, it would not remand the case for a hearing on that issue.

The New Mexico Supreme Court granted certiorari review and remanded the case to the district court for an evidentiary hearing on the issue of Mr. Paredez’s ineffective assistance of counsel claim. The court held that Mr. Paredez’s counsel had an affirmative duty to inform Mr. Paredez of the specific immigration consequences of his guilty plea.

103. A “lawful permanent resident alien” is “a person who has immigrated lawfully to the United States.” Bill Ong Hing, Immigration and the Law: A Dictionary 188 (1999). Lawful permanent residents are issued alien registration receipt cards, commonly referred to as “green cards.” Id.


106. Id.

107. Id. Mr. Paredez was sentenced to three years of incarceration, but, “[c]onsistent with the plea agreement, he received a suspended sentence and was placed on supervised probation for a period of three years.” Id.

108. Id. Mr. Paredez faced almost certain deportation upon pleading guilty to criminal sexual contact of a minor (a third degree felony). See 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) (stating that one class of deportable aliens includes those who commit an “aggravated felony”). For background information about this issue, see discussion in Part II.A, supra.


110. Id.

111. Id. ¶ 3, 101 P.3d at 801.

112. Id.

113. Id.

114. Id.

115. Id. ¶ 25, 101 P.3d at 806.

116. Id. ¶ 19, 101 P.3d at 805. The court explained that counsel’s explanation that the plea “could” affect the immigration status of Mr. Paredez was far different from advising him that his plea would “almost certainly” result in deportation. Id. ¶ 21, 101 P.3d at 805-06. However, the district court’s similar explanation did not, on its own, render the defendant’s plea constitutionally defective. See discussion in Part IV.A, infra.
IV. RATIONALE

In reaching its conclusion in State v. Paredez, the New Mexico Supreme Court considered two distinct issues: (1) "the district court’s role in informing criminal defendants of the immigration consequences of a guilty plea," and (2) "the role of criminal defense attorneys in informing their clients of the immigration consequences of a guilty plea."

A. The Trial Court’s Role in Informing Defendants

The court began its analysis of the district court’s role in informing Mr. Paredez of the immigration consequences of his guilty plea by considering whether the district court’s actions (or inactions) complied with the state court rules. Specifically, the court analyzed the district court’s duty, under the New Mexico rules, to offer advice to criminal defendants. Under the New Mexico rules, "the court shall not accept a plea of guilty...without first, by addressing the defendant personally in open court, informing the defendant" that if "convicted of a crime, it may have an effect upon [his or her] immigration or naturalization status." The court concluded that the district court’s warning that Mr. Paredez’s guilty plea "could" affect his immigration status complied with the specific wording of the applicable New Mexico court rule.

The next step in resolving the first issue involved considering whether the district court’s actions violated the defendant’s right to due process of the law. The court stated that the trial court has the duty to ensure that criminal defendants understand the direct consequences of a guilty plea but does not have the duty to ensure that defendants understand the collateral consequences of such a plea. Furthermore, the court explained that each federal circuit has either held that deportation is a collateral consequence or has indicated that it would hold accordingly. The court concluded that, although it certainly would have been prudent for the district court to have been more specific in its admonition to [Mr. Paredez] or to inquire into [his] understanding of the deportation consequences of his plea,...the district court was not

118. Id. ¶ 12, 101 P.3d at 804.
119. Id. ¶ 8, 101 P.3d at 802-03.
120. Id.
121. Rule 5-303(E) NMRA.
122. Rule 5-303(E)(5) NMRA.
123. Paredez, 2004-NMSC-036, ¶ 8, 101 P.3d at 802-03.
124. The court noted that a Federal Due Process Clause analysis was proper and that Mr. Paredez "[did] not provide any reason for interpreting our state due process clause...differently from its federal counterpart." Id. ¶ 6, 101 P.3d at 802. Compare U.S. CONST. amend. XIV, § 1 (forbidding the states to "deprive any person of life, liberty, or property without due process of law"), with N.M. CONST. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law...").
126. Id. For example, the Sixth Circuit Court has explained that, because deportation is not within the direct control of the district court, it is a collateral consequence. El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002).
constitutionally required to advise [him] that his guilty plea...certainly would result in his deportation.\textsuperscript{127}

\section*{B. Counsel's Duty to Inform}

After holding that the district court did not have an obligation to inform Mr. Paredez of the specific immigration consequences of his guilty plea, the court examined the attorney's role in informing him of those consequences.\textsuperscript{128} Ultimately, the court decided that the respective duties of the trial court and the defense attorney are very different.\textsuperscript{129} Unlike the trial court, Mr. Paredez's attorney had an affirmative duty to inform him of the specific deportation consequences of his guilty plea.\textsuperscript{130}

The court's analysis began with the examination of the protocol for ineffective assistance of counsel claims.\textsuperscript{131} In order to establish such a claim, a defendant must show that "'counsel's performance was deficient'" and that "'the deficient performance prejudiced the defense.'"\textsuperscript{132} In discussing the first prong of this test (the \textit{Strickland} test),\textsuperscript{133} the court stated that it agreed with the jurisdictions that had held that affirmative misrepresentations and faulty advice regarding immigration consequences of guilty pleas were "misleading and thus deficient."\textsuperscript{134} Additionally, the court held that there could be no "distinction between misadvice and non-advice."\textsuperscript{135}

The court supported this holding by explaining that, first, there is only a tenuous distinction between misadvice and non-advice.\textsuperscript{136} Second, distinguishing between misadvice and non-advice would tend to encourage attorneys not to give any advice at all.\textsuperscript{137} Finally, not requiring an attorney to advise a client on specific issues would place a large burden on the client to make sense of complex legal concepts.\textsuperscript{138} For those reasons, the court held that, assuming that the prejudice prong of the \textit{Strickland} test is met,\textsuperscript{139} a criminal defense attorney's failure to provide advice to a non-citizen client regarding specific immigration consequences of a guilty plea constitutes ineffective assistance of counsel.\textsuperscript{140}

\begin{thebibliography}{99}
\bibitem{127} Paredez, 2004-NMSC-036, ¶ 11, 101 P.3d at 803.
\bibitem{128} Id. ¶¶ 12–24, 101 P.3d at 803–06.
\bibitem{129} Id. ¶ 25, 101 P.3d at 806.
\bibitem{130} Id. ¶ 19, 101 P.3d at 805.
\bibitem{131} Id. ¶¶ 13–14, 101 P.3d at 804.
\bibitem{132} Id. ¶ 13, 101 P.3d at 804 (quoting \textit{Strickland} v. \textit{Washington}, 466 U.S. 668, 687 (1984)).
\bibitem{133} For background information regarding the \textit{Strickland} test, see \textit{supra} notes 49–65 and accompanying text.
\bibitem{134} Paredez, 2004-NMSC-036, ¶ 15, 101 P.3d at 804.
\bibitem{135} Id. ¶ 16, 101 P.3d at 804. The holding directly and purposefully contradicts the Tenth Circuit's interpretation of the issue. \textit{Compare id.} with Broomes v. Ashcroft, 358 F.3d 1251, 1258 (10th Cir. 2004) (holding that failure to advise a non-citizen of the possibility of deportation as a collateral consequence does not result in Sixth Amendment deprivation).
\bibitem{136} Paredez, 2004-NMSC-036, ¶ 17, 101 P.3d at 804–05.
\bibitem{137} Id. ¶ 17, 101 P.3d at 805.
\bibitem{138} Id.
\bibitem{139} To prove the prejudice prong of the \textit{Strickland} test, the defendant must show that "'he would not have entered into the plea agreement if he had been given constitutionally adequate advice about the effect that his guilty plea would have on his immigration status.'" Id. ¶ 20, 101 P.3d at 805 (quoting Gonzalez v. State, 83 P.3d 921, 925 (Or. Ct. App. 2004), rev'd, 134 P.3d 955 (Or. 2006)).
\bibitem{140} Id. ¶ 19, 101 P.3d at 805. To reach this conclusion the court relied on a federal Sixth Amendment analysis. \textit{Id.} This leaves the rule vulnerable to being overruled by the U.S. Supreme Court. \textit{See infra} Part V.C.
\end{thebibliography}
Next, the court applied these rules to the facts of the case. The court explained that counsel had informed Mr. Paredez that his guilty plea “could” affect his immigration status but failed to inform him that he “almost certainly would be deported if the district court accepted his plea agreement.” Furthermore, the court concluded that Mr. Paredez “would not have pleaded guilty if he had known beforehand of this dire consequence.” The court therefore determined that Mr. Paredez had established a prima facie claim of ineffective assistance of counsel and subsequently remanded his case to the district court for an evidentiary hearing.

V. ANALYSIS

New Mexico’s newly adopted standard of advising non-citizens as to the immigration consequences of guilty pleas is more liberal than the majority of other jurisdictions. Despite the admittedly collateral nature of deportation consequences of guilty pleas, the New Mexico Supreme Court appropriately likened them to the direct consequences in requiring defense counsel to advise non-citizen clients of the immigration consequences of a guilty plea. However, instead of simply shifting the entire burden to defense counsel, the court might have also heightened the duty of the trial court to inform.

A. No Requirement for Trial Court to Specifically Inform

In Paredez, the New Mexico Supreme Court acknowledged that deportation is generally considered a collateral consequence of a guilty plea. While this classification is fundamentally correct, the extreme severity of deportation makes a more delicate treatment of the issue necessary. Upon making this bright-line distinction between direct and collateral consequences, trial courts are relieved of the “responsibility to advise a defendant of every possible negative [collateral] consequence that may result [from a guilty plea],” including the severe consequence of deportation. This denial of the responsibility to advise defendants of immigration consequences stemming from guilty pleas reflects the opinion of many jurisdictions in the United States.

142. Id. ¶ 21, 101 P.3d at 805–06.
143. Id. ¶ 22, 101 P.3d at 806.
144. Id. ¶ 24, 101 P.3d at 806.
145. See, e.g., Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004) (holding that deportation is a collateral consequence and that defense counsel’s performance is not deficient in the absence of affirmative advice); State v. Muriithi, 46 P.3d 1145, 1152 (Kan. 2002) (holding that a defense attorney’s failure to advise his non-citizen client of the deportation consequences of his nolo contendere plea did not amount to ineffective assistance of counsel).
147. See supra Part II.B.
148. See Francis, supra note 1, at 714 (arguing that, despite the classification of deportation as either direct or collateral, it has a profound impact upon the non-citizen defendant’s life and should be treated with great care).
150. Paredez, 2004-NMSC-036, ¶ 9, 101 P.3d at 803 (“Each federal circuit that has directly considered the
The argument in favor of not requiring trial courts to advise non-citizen criminal defendants of immigration consequences revolves around a "slippery slope" rationale. This argument focuses on the plethora of potential collateral consequences that exist and the impossibility of the trial judge to warn defendants about all of them. Such a requirement would essentially require the trial judge to thoroughly research and analyze each defendant's individual situation carefully. The question regarding Paredez becomes whether it is too great a burden for a trial judge to simply determine each criminal defendant's immigration status.

New Mexico trial judges are required to inform all criminal defendants that a conviction may affect his or her immigration status. However, they are not required to advise defendants with any further precision, despite the fact that under current immigration law deportation is often "a near certainty for convictions of a broad class of offenses." One possible solution to bridge the gap between such boilerplate warnings and a more effective inquiry would be to amend the New Mexico court rules to require a more specific line of questioning. The warning that is currently required is one in a long list that is likely to be overlooked by the defendant who believes he or she has negotiated a good deal with the prosecutor. A more effective inquiry would specifically ask the defendant about his or her immigration status and whether he or she has discussed possible deportation consequences with counsel. That way the defendant and the defendant's counsel are put on notice as to possible deportation consequences that the guilty plea may trigger. However, even if more rigorous requirements regarding these types of warnings were in place, there would undoubtedly remain cases in which problems similar to the one in Paredez could arise.

Ideally, to provide an additional safety net for criminal defendants, New Mexico trial judges would be able to adequately assess all of the possible consequences of guilty pleas, including immigration consequences. However, Paredez expressly
denied the claim that the district court must specifically advise defendants of immigration consequences. In doing so, the court did not overlook the problem, but rather, shifted the entire burden to determine such consequences to defense counsel.\(^6\)

**B. New Mexico Defense Counsel’s Duties**

Although the court in *Paredez* refused to broaden the trial court’s duty to inform,\(^6\) it created strict guidelines pertaining to defense counsel’s duties.\(^6\) After *Paredez*, New Mexico defense attorneys are forbidden from giving faulty advice regarding immigration consequences and from giving no advice at all.\(^6\) In choosing to require such an affirmative duty, the court created a workable rule that should serve as a model for other jurisdictions. It is far from unreasonable to require defense counsel to inform clients of possible harsh immigration penalties such as deportation.\(^6\) This is especially true in states like New Mexico with high populations of non-citizens.

The distrust of a broad rule such as the one in New Mexico after *Paredez* revolves around the “slippery slope” argument.\(^6\) However, by requiring only a “manageable amount of basic spadework,”\(^6\) a defense attorney can nearly guarantee the constitutionality of guilty pleas.\(^6\) With regard to the decision in *Paredez*, this “spadework” would begin with one simple question: are you a U.S. citizen, a lawful permanent resident, or an undocumented immigrant? If the client answers that he or she is not a U.S. citizen, the attorney would then be required to research applicable immigration law and to effectively communicate the findings to the client.

1. Requirement Against Giving Faulty Advice

In considering the issue of informing non-citizen defendants about immigration consequences, several courts have vacated guilty pleas when defendants were affirmatively misinformed by counsel.\(^6\) This type of an approach certainly seems like a step in the right direction even though it neglects to consider the severity of harm that a defense attorney’s silence could trigger.\(^7\)

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161. It might be argued that the “slippery slope” rationale is more persuasive regarding the trial court than defense counsel because of the latter’s general role in personally protecting the interests of the defendant. See Chin & Holmes, *supra* note 33, at 737.
163. *Id.* ¶ 19, 101 P.3d at 805.
164. *Id.*
166. Gabriel Chin and Richard Holmes refer to this argument as the “‘floodgates’ objection.” Chin & Holmes, *supra* note 33, at 736; see also People v. Pozo, 746 P.2d 525, 532–33 (Colo. 1987) (Rovira, J., dissenting) (stating that allowing deportation as an exception to the collateral consequences doctrine “opens the door to innumerable challenges to pleas based on the defendant’s ignorance of other serious collateral consequences”).
168. *Id.*
169. See *supra* notes 98–101 and accompanying text.
170. McDermid, *supra* note 35, at 754. A duty not to misinform is not the same thing as a duty to inform. A vast majority of courts do not require defense counsel to inform non-citizens at all regarding immigration consequences. *Id.* at 751–52. Others only recognize ineffective assistance when defense counsel’s misinformation affects the volition and knowledge of guilty pleas. *Id.* at 751–54.
Paredez appropriately followed this line of thinking in determining that a defense attorney’s affirmative misrepresentation regarding the deportation consequences of a guilty plea can be considered manifestly deficient. The court in Paredez relied principally on the Second Circuit Court’s reasoning in United States v. Couto. Couto held that defense counsel’s performance was “objectively unreasonable” and thus deficient when the immigration consequences of a guilty plea were affirmatively misrepresented to the defendant. Similarly, a year after Couto was decided, the Utah Court of Appeals, in State v. Rojas-Martinez, held that “by advising Defendant he ‘might or might not’ be deported, Defendant’s counsel affirmatively misrepresented the deportation consequences of Defendant’s plea,” and thus satisfied the first (performance) prong of the Strickland test. However, Rojas-Martinez was reversed by the Utah Supreme Court on appeal in November 2005.

Paredez appropriately applied and accepted the logic set forth in Couto and by the Utah Court of Appeals in Rojas-Martinez regarding the issue of misinformation. More importantly, Paredez determined that this limitation on defense attorneys by itself is not enough. The misinformation rule alone “entitles defendants to effective representation of their interests as noncitizens, but only if they ask for it.” Taking this logic into account, Paredez continued past the isolated issue of misinformation to completely eliminate the gap between faulty advice and non-advice.

2. Affirmative Obligation to Give Advice

The “misinformation only” approach is essentially a “don’t ask—don’t tell” policy. The major concern with such a policy is that it tends to dissuade attorneys from rendering any advice at all in fear that giving bad advice will result in a claim of ineffective assistance of counsel. This approach “discourages attorneys from offering [crucial] advice” to non-citizen criminal defendants at critical times. The

172. 311 F.3d 179 (2d Cir. 2002); see Paredez, 2004-NMSC-036, ¶ 15, 101 P.3d at 804.
173. Couto, 311 F.3d at 188. In Couto, the defendant’s attorney erroneously informed her that “there were many things that could be done to prevent her from being deported” after agreeing to a guilty plea. Id. at 183. However, due to the nature of the crime committed, the acceptance of the plea meant that she would almost certainly be deported. Id. at 183–84; accord United States v. Kwan, 407 F.3d 1005, 1017 (9th Cir. 2005) (holding that defense counsel’s performance was deficient when he claimed to understand immigration law, gave erroneous advice regarding deportation consequences, and failed to correct his misleading representations in a timely manner).
174. 73 P.3d 967 (Utah Ct. App. 2003), rev’d, 125 P.3d 930 (Utah 2005).
175. Id. at 970; see also Gonzalez v. State, 83 P.3d 921, 925 (Or. Ct. App. 2004) (stating that the use of the word “may” in advising about deportation consequences implies that deportation will not be almost certain), rev’d, 134 P.3d 955 (Or. 2006).
177. See supra notes 174, 176 and accompanying text.
179. Id. ¶ 16, 101 P.3d at 804.
180. McDermid, supra note 35, at 754. This type of policy does not place any affirmative obligation on attorneys to advise clients. However, if they choose to say anything at all they may not give faulty or misleading advice without the possibility of an ineffective assistance of counsel claim. See Francis, supra note 1, at 726.
182. Francis, supra note 1, at 726.
183. Id.
184. Id. If an attorney is discouraged from offering immigration advice to non-citizen clients regarding
New Mexico Supreme Court in *Paredez* analyzed these concerns in coming to its conclusion that faulty advice and no advice are not distinguishable.185

Jurisdictions that do not consider failing to advise about deportation consequences as ineffective assistance of counsel generally rely on the fact that deportation is fundamentally a collateral consequence.186 The Tenth Circuit has followed this line of thinking since its 1992 decision in *Varela v. Kaiser*.187 *Varela* held that “deportation is a collateral consequence of the criminal proceeding and therefore the failure to advise does not amount to ineffective assistance of counsel.”188 Twelve years later, in 2004, *Varela* was reaffirmed in *Broomes v. Ashcroft*.189 *Broomes*, unlike *Varela*, was decided after both the AEDPA and the IIRIRA had passed through Congress, making deportation an inevitable consequence stemming from the conviction of a broad range of crimes.190 Despite the new post-1996 inevitability of deportation, the Tenth Circuit affirmed its outdated line of reasoning.191

The passage of the IIRIRA and the AEDPA has immensely increased the likelihood of the deportation of criminal defendants convicted of or pleading guilty to “aggravated felonies.”192 A non-citizen’s guilty plea to an aggravated felony now leads almost automatically to immediate deportation.193 The argument logically follows that because of its close connection to the guilty plea and the overall severity of the consequence, deportation should be treated as if it were a direct consequence.194 Treating deportation this way would require non-citizens’ defense attorneys to affirmatively advise them of deportation consequences so that they can knowingly and voluntarily make plea agreements.195 This is exactly the rule that came out of *Paredez*.196

The rule in *Paredez* that requires affirmative advisement from defense counsel is quite revolutionary.197 Of the very few jurisdictions that require some type of possible deportation consequences, the clients are forced to “discern complex legal issues” on their own. Id. Non-citizen clients are likely to have economic and linguistic barriers and may find it extremely difficult to find a way to make sense of complicated federal immigration law. See id.


186. See, e.g., United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000) (explaining that a consequence is collateral if it is not explicitly within the control of the trial court).

187. 976 F.2d 1357 (10th Cir. 1992).

188. Id. at 1358.

189. 358 F.3d 1251, 1256–57 (10th Cir. 2004) (“Accordingly, deportation remains a collateral consequence of a criminal conviction, and counsel’s failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation.”). *Paredez* directly departed from the Tenth Circuit’s holding in *Broomes* by refusing to draw a distinction between faulty advice and no advice. *Paredez*, 2004-NMSC-036, ¶ 16, 101 P.3d at 804.

190. See supra Part II.A.

191. *Broomes*, 358 F.3d at 1256 (“[W]e summarily reject Mr. Broomes’ claim that *Varela* was wrongly decided.”).


193. Id. This applies to both undocumented immigrants and legal permanent residents (that is, green card holders). See, e.g., *Paredez*, 2004-NMSC-036, ¶ 2, 101 P.3d at 801 (classifying the defendant as a “permanent resident alien from Guatemala”).

194. See McDermid, supra note 35, at 763.

195. See id. at 763–64.

196. *Paredez*, 2004-NMSC-036, ¶ 19, 101 P.3d at 805 (“If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain.”).

197. The vast majority of jurisdictions in the United States either do not require any type of requirement to
affirmative duty (California and Colorado), none have developed such a clear-cut and straightforward rule as the New Mexico rule in *Paredez*. The number of jurisdictions that require defense counsel to affirmatively advise clients of immigration consequences is surprisingly small despite the general support from several major legal organizations, namely the American Bar Association and the National Association of Criminal Defense Lawyers. Despite the general trend toward not requiring affirmative advice from attorneys, *Paredez* thoughtfully incorporated the minority rule and should serve as a model for other jurisdictions.

C. A Potential Problem: Failure to Analyze the Claim Under the New Mexico Constitution

Despite the workable and conscientious result that *Paredez* reached, one specific potential problem remains: the failure of the New Mexico Supreme Court to analyze the issue in terms of the state constitution. Such a failure has left the *Paredez* decision vulnerable to being overruled by the U.S. Supreme Court.

In *Pruneyard Shopping Center v. Robins*, the U.S. Supreme Court explained that each state of the union has a “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” This right essentially leaves each state free to interpret the provisions of its own constitution without having to strictly adhere to a more conservative interpretation of the U.S. Supreme Court regarding a parallel provision in the Federal Constitution. Because the Court’s decisions regarding the Constitution are not “mechanically applicable to state law issues,” each state supreme court must individually decide upon a method of interpreting its own constitution.

Seven years after the *Gomez* decision accepted the interstitial approach in New Mexico, the question of preserving a state constitutional claim never arose in *State

address immigration concerns stemming from guilty pleas or only establish a duty for defense attorneys not to misinform their clients regarding these concerns. Francis, *supra* note 1, at 724–25.

198. California requires that once an attorney is aware of his or her client’s nationality, the attorney must research how immigration laws will affect criminal cases. People v. Soriano, 240 Cal. Rptr. 328, 336 (Ct. App. 1987). Similar to California, Colorado obligates defense attorneys to inform non-citizen clients about immigration consequences only if he or she has knowledge that the defendant is not a U.S. citizen. People v. Pozo, 746 P.2d 523, 529 (Colo. 1987).

199. The American Bar Association’s Standards for Criminal Justice advise practitioners to fully inform non-citizens of the possible immigration consequences of guilty pleas. Francis, *supra* note 1, at 724; *see Paredez*, 2004-NMSC-036, ¶ 18, 101 P.3d at 805. The National Association of Criminal Defense Lawyers recognizes the importance of determining the immigration status of all clients and encourages attorneys to conform to professional standards in researching any possible immigration consequences to guilty pleas. *See* Francis, *supra* note 1, at 723–24.


201. 447 U.S. 74 (1980).

202. *Id.* at 81.

203. *See id.; see also* Brennan, *supra* note 67, at 502 (“[T]he decisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”).

204. Brennan, *supra* note 67, at 502. Brennan continued by warning practitioners that, “although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not to raise the state constitutional questions.” *Id.*

205. *See generally* Developments in the Law, *supra* note 68, at 1331–67 (providing a history and analysis of the various methods of state constitutional interpretation).

206. *See supra* notes 74–81 and accompanying text.
v. Paredez. 207 The reasoning in Paredez focused exclusively on the federal constitutional right to counsel (Sixth Amendment) and failed to mention its parallel provision in the New Mexico Constitution (article II, section 14). 208 In Paredez, the court appropriately looked to federal case law to determine whether the right to be warned of immigration consequences to guilty pleas was protected by the Federal Constitution. 209 However, because the U.S. Supreme Court has never explicitly established such a right, 210 it would have been prudent to assert the defendant’s rights on state constitutional grounds in the trial court. 211 The interstitial approach requires a showing that either the New Mexico Constitution already offers such a protection or a description as to why the New Mexico constitutional right to counsel should be interpreted more liberally than its federal counterpart. 212 Because neither of these assertions were made in Paredez, it is uncertain if the right of defendants in New Mexico to be affirmatively advised of the risk of deportation upon entering a guilty plea is protected by the New Mexico Constitution.

Had the Paredez court made its decision on state constitutional grounds that the right to counsel includes being informed of immigration consequences to guilty pleas, the principles of federalism would have precluded the U.S. Supreme Court from ever second guessing the decision. 213 However, since the court made the decision under a federal constitutional approach, Paredez can potentially be overruled sub silentio if the U.S. Supreme Court ever makes a decision on the issue that is in conflict with the New Mexico decision. 214

207. However, the Gomez decision has been cited and applied in a large number of New Mexico Supreme Court decisions since 1997. See, e.g., State v. Lynch, 2003-NMSC-020, ¶ 13, 74 P.3d 73, 77 (applying the Gomez interstitial approach to a question of double jeopardy); State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 14, 25 P.3d 225, 230–31 (applying the Gomez approach in determining the legality of a stop at a U.S. border checkpoint); N.M. Right to Choose v. Johnson, 1999-NMSC-005, ¶ 25, 975 P.2d 841, 850 (examining whether the New Mexico Constitution afforded greater protection than the U.S. Constitution regarding state funding for medically necessary abortions); State v. Vallejos, 1997-NMSC-040, ¶ 35, 945 P.2d 957, 967 (applying the Gomez interstitial approach to a case involving a question of due process arising from alleged police entrapment).

208. See State v. Paredez, 2004-NMSC-036, ¶¶ 13–14, 101 P.3d 799, 804. Compare N.M. Const. art. II, ¶ 14 (“In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel...”), with U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence.”). The defendant-petitioner’s brief in chief did not address either Gomez or issues pertaining to the New Mexico Constitution. Brief of Defendant-Petitioner, State v. Paredez, No. 28,270 (N.M. 2004). However, the amicus brief, while neglecting to mention Gomez, briefly discusses the New Mexico constitutional guarantee to counsel and a single state case that addresses the issue of ineffective assistance of counsel. Brief for New Mexico Criminal Defense Lawyers Ass’n et al. as Amici Curiae Supporting Defendant-Petitioner at 7, State v. Paredez, 2004-NMSC-036, 101 P.3d 799 (No. 28,270) (citing State v. Lopez, 1996-NMSC-036, 920 P.2d 1017 (1996)).

209. See supra note 77 and accompanying text.

210. Although the U.S. Supreme Court has never ruled on the issue of whether defendants have the right to be informed of immigration consequences to guilty pleas, several circuits have held that such a right does not exist under the Sixth Amendment. See, e.g., Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004).

211. See supra note 78 and accompanying text.

212. See supra notes 79–80 and accompanying text.

213. See supra notes 67–69 and accompanying text.

214. In 1983, in Michigan v. Long, the U.S. Supreme Court held that when a state court opinion appears to rest primarily on federal law,...and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. 1032, 1040–41 (1983). Thirteen years later, this line of thinking led the Court to overturn a decision of
Currently, *Paredez* is good law that is based on the New Mexico Supreme Court’s interpretation of federal constitutional law. However, should the U.S. Supreme Court ever decide to rule in favor of not granting defendants the right to be informed in another case, *Paredez* would disappear. If this were to happen, the *Paredez* rule could later be reestablished via a different case under the New Mexico Constitution.

VI. IMPLICATIONS

Aside from the potential problems that the *Paredez* decision could face in the future, its present impact on the New Mexico bar is quite strong. *Paredez* newly requires three distinct things of criminal defense attorneys. First, a good faith effort must be made to understand the immigration status of each and every client. Second, thorough research must be conducted to determine the potential effects that a guilty or no contest plea would have on that status. Finally, the attorney must adequately communicate all pertinent findings to the client. These requirements are quite similar to the normal ethical duties that an attorney is expected to fulfill.

A. New Requirements of Criminal Defense Attorneys After Paredez

The first step of this process, requiring criminal defense attorneys to “gather basic information about the client’s immigration status and the offense charged,” consists of a simple line of questioning. Essentially, the New Mexico criminal defense attorney must ask the client whether he or she is a U.S. citizen, a lawful permanent resident, or an undocumented alien. If the client answers affirmatively to either of the latter two, the attorney must then determine the possible immigration ramifications of a potential plea.
The second step of this process, provided that the client is not a U.S. citizen, is to research the applicable immigration law. Some non-immigration specialists will find this body of administrative law particularly difficult to interpret.\(^{225}\) However, this process should not be considered an undue burden on New Mexico defense attorneys. On the contrary, the option to consult an immigration specialist can be both time and cost effective.\(^{226}\) Most importantly, it may save the client the possibility of mistakenly agreeing to permanent banishment from the United States and separation from his or her family.

The final step of this process is to communicate potential immigration consequences to non-citizen criminal defendants so that they can "make intelligent decisions about their own fates."\(^{227}\) At this step, the New Mexico criminal defense attorney must affirmatively advise his or her client as to potential immigration consequences of guilty pleas.\(^{228}\) Such an advisement aims to achieve a knowing and intelligent plea agreement.\(^{229}\) This information relayed from attorney to client aims to ensure that the defendant does not waive his or her right to a trial "without first knowing that doing so can separate them from their families and the country they know of as home."\(^{230}\)

B. Disciplinary Ramifications of Paredez Violations

After Paredez, if a New Mexico criminal defense attorney neglects to advise his or her client of the specific risk of deportation from entering a guilty plea, the defendant will have a very strong ineffective assistance of counsel claim.\(^{231}\) If such a claim is ultimately successful, the defendant will be allowed to withdraw his or her plea.\(^{232}\) This constitutional right to effective assistance of counsel should not be confused with the attorney's role in providing effective assistance.\(^{233}\) The Sixth

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\(^{225}\) See generally Francis, supra note 1, at 697-707 (explaining the intricacies of the evolution of immigration law since the mid-1980s pertaining to its impact on non-citizens convicted of crimes).

\(^{226}\) See generally Francis, supra note 1, at 697-707 (explaining the intricacies of the evolution of immigration law since the mid-1980s pertaining to its impact on non-citizens convicted of crimes).

\(^{227}\) See Bogdan, supra note 154, at 66.

\(^{228}\) Francis, supra note 1, at 735. Under federal law, a person "whose removal was subsequent to a conviction for commission of an aggravated felony...shall be...imprisoned not more than 20 years [for illegal reentry]." 8 U.S.C. § 1326(b)(2) (2000). Such a harsh punishment for reentry following deportation for a guilty plea to an aggravated felony is quite significant for the deportee whose entire family is located in the United States or who came to the United States at a young age and has no meaningful personal, cultural, or linguistic connection to his or her country of citizenship.

\(^{229}\) See Bogdan, supra note 154, at 66.

\(^{230}\) Because of the language used in Paredez, the affirmative obligations placed on criminal defense attorneys might be facially confused with an attorney's ethical obligations. See id. § 19, 101 P.3d at 805. However, the case does not explicitly have to do with attorneys' ethical obligations; rather, it has to do with defendants' constitutional rights. Id. ("An attorney's failure to provide the required advice regarding immigration consequences will be ineffective assistance of counsel....") (emphasis added). Therefore, if an attorney violates his or her Paredez obligation, there is not necessarily an ethical violation.
Amendment simply grants rights to the defendant; it does not mandate certain behavior of attorneys.234

It may be argued that when a defendant makes a claim of ineffective assistance of counsel, he or she is making two fundamental complaints.235 First, that the state has “abandon[ed] its constitutional obligation to exercise its police powers,”236 and second, that “the legal community has failed to control its own members.”237 The former complaint seeks to assure that the defendant’s constitutional rights are protected; the latter seeks to punish the attorney for breaching ethical duties. The two complaints may seem similar, but in reality they have no formal relationship to each other.238

Although the identical triggering misconduct by a criminal defense attorney might give rise to a disciplinary complaint resulting in a disciplinary sanction, a successful legal malpractice action, and/or a reversal of a criminal conviction based upon a finding of ineffective assistance of counsel, each of these proceedings is separate, each relies upon the satisfaction of different legal tests, and the fact that a criminal defense attorney’s misconduct has been conclusively established in one setting will not inevitably dictate the same result in a proceeding in one of the other venues.239

Today, if a New Mexico criminal defense attorney violates the rule in Paredez there is no absolute guarantee that he or she will face disciplinary sanctions.240 If a complaint is made and there is a disciplinary hearing, a finding of ineffective assistance of counsel may be considered as a factor, but is not, by itself, dispositive of a finding of ethical misconduct.241 Overall, it is highly unlikely that a finding of ineffective assistance of counsel in violation of Paredez could be considered heinous enough to constitute an ethical violation without other accompanying ethical violations.242

234. See U.S. CONST. amend. VI (“[T]he accused shall enjoy the right...to have the Assistance of Counsel for his defence.”) (emphasis added).
236. Id.
237. Id. In New Mexico, the rules of professional conduct are promulgated, defined, and regulated by the New Mexico Supreme Court. NMSA 1978, § 36-2-1 (1941).
238. JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 1:8 (2d ed. 2005) (“Professional disciplinary proceedings have no formal relationship to judicial proceedings, civil or criminal, which might also touch upon questions of the propriety of a criminal defense attorney’s conduct.”).
239. Id.
240. Given the ease of complying with the obligation, it might be argued that disciplinary sanctions should follow a Paredez violation. See supra Part VI.A.
241. See In re Reif, 121 N.M. 758, 761, 918 P.2d 344, 347 (1996) (considering a finding of ineffective assistance of counsel as merely one factor in determining whether to sanction an attorney facing disciplinary complaints). Arizona has directly considered this issue and has refused to adopt a per se rule that equates a finding of ineffective assistance of counsel with an ethical violation. In re Wolfram, 847 P.2d 94, 98 (Ariz. 1993). Additionally, Wolfram explained that a finding that assistance of counsel at trial was effective would not per se protect an attorney from professional discipline. Id.; see also Ariz. Ethics Opinion, Op. 98-02 (1998) (“Not every instance of ineffective assistance will amount to a disciplinary violation.”).
242. See, e.g., In re Reif, 121 N.M. 758, 918 P.2d 344 (issuing an attorney a twelve month suspension for failing to act with reasonable diligence and promptness, failing to provide competent representation, failing to comply with procedural rules in six different cases, and failing to provide effective assistance to a criminal defendant); see also Fla. Bar v. Sandstrom, 609 So. 2d 583, 584 n.1 (Fla. 1992) (“We note that most cases of
C. The Scope of the Decision

Apart from these direct implications of the Paredez decision, there is one final and more abstract concern: the peripheral scope of the decision. This concern deals with the "slippery slope" objection and whether ineffective assistance of counsel claims could arise from collateral consequences to guilty pleas other than immigration consequences. The Paredez decision has the potential to open the door to arguments that counsel was ineffective by not advising clients of all possible collateral consequences prior to entering a guilty plea. However, such an argument would almost certainly be rejected given the specific language of the Paredez holding. Paredez specifically applies only to immigration consequences of pleading guilty and not to collateral consequences in general. Overall, it is clear that the New Mexico Supreme Court intended for the rule in Paredez to apply only to the harshest of all collateral consequences: deportation.

VII. CONCLUSION

New Mexico criminal defense attorneys must now affirmatively advise each and every non-citizen client of the specific immigration consequences that a guilty or no contest plea will trigger. If a defendant is not properly advised, he or she will be able to withdraw his or her guilty plea. The requirement on criminal defense attorneys takes a large step in assuring that the rights of New Mexicans who are not U.S. citizens are protected. Deportation, although collateral to a guilty plea, is often much harsher than any criminal penalty. The need for the criminal defendant to be aware of the possibility of deportation is absolutely essential. Ultimately, as a result of Paredez, there is a greater assurance that non-citizen defendants will enter guilty or no contest pleas both knowingly and voluntarily and fully aware of the real consequences of that action.