A Lawyer's Guide: How to Avoid Pitfalls When Dealing with Alien Clients

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A Lawyer's Guide:
How to Avoid Pitfalls
When Dealing with Alien Clients

BY KELLY KAISER*

I. INTRODUCTION

Many attorneys feel that they need not delve into the abyss of immigration law. There is a very real misconception in the legal community that "immigration matters" affect only those attorneys who specialize in the immigration field. However, Congress recently created many drastic changes in the immigration law arena that may have a severe impact on attorneys practicing outside this specific area of the law. As the number of immigrants in the United States continues to increase, it is imperative that attorneys are made aware of potential consequences arising from an ignorance of immigration law when dealing with clients who may be non-citizens.

Part I of this Note gives a brief survey of the history of immigration law in the United States. Part II examines the interrelationship between immigration law and criminal law and emphasizes problem areas that

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attorneys should avoid in order to better serve their non-citizen clients. Part III illustrates the salient issue of how to effectively provide interpretive services for a non-English-speaking client in order to secure for him or her rights protected by the United States Constitution. This Note concludes that it is essential for criminal defense attorneys to educate themselves about the immigration consequences that accompany guilty pleas and verdicts in order to provide “effective assistance of counsel” to their clients. This Note also suggests that without adequate safeguards to ensure that interpretive services are adequate and accurate, the constitutional rights of a non-English-speaking criminal defendant may be violated.

The United States Constitution grants Congress the power to make all laws governing immigration and naturalization matters. Throughout history, Congress has utilized its textually demonstrated power regarding immigration law to alter, amend, and add to existing immigration laws. Before 1940, immigration laws called for the automatic deportation of any undocumented alien living within the borders of the United States. The Alien Registration Act of 1940 created an exception to the automatic deportation of undocumented aliens. This exception allowed the Attorney General to suspend deportation proceedings for an alien who had lived in the United States for five or more years, had “good moral character,” and had a spouse or child who was a United States citizen or lawful permanent resident and who would suffer economically if the alien were to be deported. Congress significantly narrowed this exception in 1952. The exception was limited to aliens who could demonstrate that deportation would cause an “exceptional and extremely unusual hardship to the alien or his spouse, parent or child, who is a citizen or alien lawfully admitted for permanent residence.” Congress again changed the exception in 1962 alleviating its harsh result on non-citizens, by expanding the exception to aliens committing less serious crimes if they could prove that deportation would cause an “extreme hardship” to their spouses, parents, or children.

3 See U.S. CONST. art. I, § 8, cl. 4.
6 Id.
7 See id. (citing Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214 (1952) (codified in scattered sections of 8 U.S.C.)).
9 See Underwood, supra note 4, at 889.
In 1994, the exception was broadened even further, allowing the Attorney General to suspend the deportation of victims of severe domestic violence at the hands of their spouses or parents who are United States citizens or lawful permanent residents.\(^\text{10}\)

Given this history of continuous revision of immigration laws, it comes as no surprise that in 1996 Congress enacted comprehensive immigration reform in response to the growing concern over United States immigration matters. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),\(^\text{11}\) which has broad-sweeping implications for all immigrants and immigration law practitioners. The IIRIRA merged the waiver-of-deportation and suspension-of-deportation methods of relief, consolidating them into "cancellation of removal."\(^\text{12}\) The IIRIRA also serves as a "war on illegal immigration" in response to public concerns over the number of undocumented aliens in the United States: It increased the number of border patrol officers at the United States-Mexico border,\(^\text{13}\) increased penalties for alien-smuggling and fraudulent documentation,\(^\text{14}\) and facilitated the removal of inadmissible and deportable aliens.\(^\text{15}\)

The area of immigration law is extremely complex and ever-evolving. Therefore, the practitioner may be tempted to leave these thorny issues to the immigration specialist. "[A]s with other collateral consequences of crime – license revocation from professionals, debarment of contractors, school discipline of students, disenfranchisement of voters, etc. – the immigration-related issues are generally deemed irrelevant to the criminal justice process."\(^\text{16}\) However, with the passage of the IIRIRA, the once-isolated area of immigration law has begun to become integrated into other

\(^{10}\) See id.

\(^{11}\) IIRIRA, supra note 1.

\(^{12}\) See id. § 240A (to be codified at 8 U.S.C. § 1229b).

\(^{13}\) See id. § 101 (to be codified at 8 U.S.C. § 1101).

\(^{14}\) See id. § 203 (to be codified at 8 U.S.C. § 1324). Within the Hispanic community, an alien illegally smuggled across the United States border is commonly referred to as brought by a "coyote." Coyotes smuggle aliens across the border for a fee. Many undocumented aliens claim to have been smuggled across the border, free, by friends and family members. See generally Alexandra Marks, Tight Border Aids People-Smuggling: Case in New York Shows How a Tighter Mexican Border May Lead to Exploitation, CHRISTIAN SCI. MONITOR, July 24, 1997


areas of the law. Criminal law, in particular, has become a battleground for immigration issues. Attorneys practicing criminal law should familiarize themselves with the relevant provisions.

II. THE INTERMINGLING OF IMMIGRATION LAW AND CRIMINAL LAW

It is critical for criminal defense attorneys to educate themselves about the manner in which immigration law and criminal law have become intertwined. An alien’s eligibility to remain in the United States may be destroyed by a criminal conviction in certain circumstances. Therefore, in order to avoid unforeseen deportation proceedings, attorneys must arm themselves with knowledge about immigration law. Recent legislation has granted judges the discretion to issue orders of deportation concurrently with judicial sentencing, provided that the judge holds a mini-deportation hearing. Exercising this discretion undoubtedly would greatly increase any court’s work load, because immigration hearings entail their own procedures, issues, and evidence.

While immigration issues have always been considered a civil matter, the close relationship that has developed between criminal and immigration matters raises numerous questions and concerns. It is theoretically possible that the traditional rights of aliens in immigration proceedings will be expanded due to the intimate coexistence of immigration and criminal proceedings. “[A]liens may be entitled to more expansive procedural rights; effective defense representation will likely require counsel on immigration matters; and the ethical obligations of all criminal justice practitioners will likely broaden to encompass immigration-related concerns.” The process of encouraging prompt and efficient removal of aliens convicted of certain criminal offenses is commonly referred to as “expedited removal.” Aliens are subject to “expedited removal” if they are convicted of, or plead guilty to, “aggravated felonies,” “controlled

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17 See infra notes 21-25 and accompanying text.
18 See Pilcher, supra note 16, at 273 (citing 8 U.S.C. § 1228(c) (Supp. 1997)).
19 The author believes that it is unlikely that a judge would take such an additional burden upon himself or herself when court dockets are already overcrowded, but it does exist as an option.
20 Pilcher, supra note 16, at 276.
21 Id. at 286.
22 Id. (citing 8 U.S.C. § 1101(a)(43) (Supp. 1997), which contains a list of crimes designated as “aggravated felonies.” The list includes, but is not limited to,
substance offenses,"23 or crimes of "moral turpitude,"24 to name a few. Although these aliens are automatically "deportable," they will not necessarily be deported.25 There are two exceptions under which a convicted alien may, with difficulty, obtain a cancellation of removal under the IIRIRA.26 First, the Attorney General has the discretionary power to refrain from deporting an alien who has been a lawful permanent resident for a minimum of five years and a continuous resident in the United States for seven years.27 This remedy, however, is not available for an alien who has been convicted of an aggravated felony.28 The second avenue for cancellation of removal provides relief to aliens who are not lawful permanent residents but have been residents of the United States for at least ten continuous years, have exhibited "good moral character" during their stay in the United States, and present evidence that their removal would


24 See id. (citing 8 U.S.C. § 1227(2)(A) (Supp. 1997)). A crime of moral turpitude is "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between men." A.L.R. Fed. 480, § 3 (1975). Some, but not all, of the offenses interpreted to be crimes of moral turpitude are murder, rape, bigamy, tax evasion, and violation of immigration laws. See id.

25 These provisions of the IIRIRA became controversial when Dateline NBC (a television news program) ran a feature on Jesus Collado, 43, who was taken into custody by the Immigration and Naturalization Service ("INS"). He had been convicted of statutory rape when he was nineteen years old because he had sex with his underage girlfriend. See Dateline NBC (NBC television broadcast). Collado had lived in the United States for over twenty years, raised a family, and started a thriving restaurant business, and had had no other brushes with the law. The retroactive nature of the IIRIRA and its harsh consequences for people like Collado caused outrage across the country. Dateline’s broadcast and the public outcry following it may have been the impetus for Collado’s release from prison on October 24, 1997. Mr. Collado, however, remains a defendant in INS deportation proceedings. See In re Jesus Collado, BIA 3333, 1998 WL 95929 (Feb. 26, 1998).

26 See 8 U.S.C. § 1229b(a) & (b) (Supp. 1997).

27 See id. § 1229b(a)(1)-(2).

28 See id. § 1229b(a)(3).
create an “exceptional and extremely unusual hardship”\textsuperscript{29} for themselves or their spouse, parents, or children who are U.S. citizens or aliens “lawfully admitted for permanent residence.”\textsuperscript{30} While these two avenues for “cancellation of removal” may allow some aliens to remain within the United States, very few will successfully obtain these remedies. Moreover, Congress has put an annual limit of 4000 on the number of applications for adjustment of status of lawful permanent residents that may be granted.\textsuperscript{31} Both avenues for recommending cancellation of removal fall squarely within the discretionary powers of the judge overseeing the case.\textsuperscript{32} It is difficult to persuade a judge that a particular alien is deserving of one of the few available grants of cancellation of removal, especially when that alien client is a convicted criminal. Furthermore, there are no appellate processes for review of a judge’s denial of an application for cancellation of removal.\textsuperscript{33}

A. Responsibilities of Legal Players When Dealing with Alien Criminal Defendants

The significant link between the criminal justice system and immigration procedures affect all actors in the criminal process. Judges, prosecu-

\textsuperscript{29} The United States Court of Appeals for the Sixth Circuit has construed “extreme hardship” in a very narrow sense. The Board of Immigration Appeals determines whether the alien has proven “extreme hardship,” and the courts of appeals give great deference to these Board determinations. \textit{See generally} Hamdan v. I.N.S., No. 95-3701, 1996 WL 382261 (6th Cir. July 5, 1996). “[T]he common results of deportation, such as separation from family and financial difficulties, are insufficient to establish extreme hardship. [P]etitioner must make a showing of ‘at least hardship substantially different from and more severe than that suffered by the ordinary alien who is deported.’” \textit{Id.} at *2 (quoting Sanchez v I.N.S., 755 F.2d 1158, 1161 (5th Cir. 1985)). The \textit{Hamdan} decision indicates the Sixth Circuit’s reluctance to overturn denials of deportation suspension by the Board. Therefore, unless an alien can illustrate very severe and quite unusual circumstances surrounding his or her deportation, it seems that he or she will not prevail in seeking reversal of the Board’s denial of deportation. However, if the Board fails to consider all relevant factors in determining whether “extreme hardship” exists, the court will reverse the determination as an abuse of discretion. \textit{See} Silva-Oliva v I.N.S., No. 86-3199, 1987 WL 35871 (6th Cir. Jan. 21, 1987).

\textsuperscript{30} \textit{See} 8 U.S.C § 1229b(1) (Supp. 1997).

\textsuperscript{31} \textit{See id.} § 1229b(e)(1)-(2).

\textsuperscript{32} \textit{See} Casem v I.N.S., 8 F.3d 700 (9th Cir. 1993).

tors, and defense attorneys must acknowledge and deal with the immigration questions presented in any criminal trial for an alien; otherwise, the alien's future in the United States will essentially be decided by the luck of the draw. This immense power to control an alien's future as a United States resident "carries with it the obligation to exercise the power fairly and responsibly." All actors within the criminal justice system have a great deal of control regarding how the case will affect the defendant alien's immigration status. A criminal defense attorney must take great care to explain the consequences of an "aggravated felony" conviction to his or her client, because ignorance of the possible deportation consequences will put the defendant at a severely crippling disadvantage in deciding whether to plead guilty. Since a prosecutor has significant discretion in determining what charges will be pursued, he or she may be persuaded to pursue criminal charges that do not trigger expedited removal. It may, therefore, be beneficial for the alien defendant to plead guilty to several lesser offenses in lieu of pleading guilty to a felony that may render him or her deportable. Likewise, the judge has the ability to tailor sentencing, by limiting the sentence to under one year, to avoid classifying an alien defendant as an "aggravated felon."

B. Guilty Pleas and "Effective Counsel"

In light of the fact that alien defendants have so much at stake when they face criminal charges, one subject of considerable controversy arises regarding a defense attorney's duty to a client. The salient issue is whether a defense attorney who fails to inform an alien defendant of possible deportation consequences in a criminal case constitutes ineffective counsel. A determination of ineffective counsel would demand that the conviction or guilty plea be reversed, so the issue is a critical one for alien defendants. In Strickland v. Washington, the United States Supreme Court articulated a test for determining whether counsel is "ineffective" in violation of the

34 Pilcher, supra note 16, at 299.
35 See supra note 22 and accompanying text.
Sixth Amendment of the United States Constitution. The Strickland test has two components. First, the defendant must prove that the attorney’s performance was deficient to the point of being unreasonable. The basis for this determination is derived from an assessment of whether the attorney’s behavior is within the standard range of professional norms for other defense attorneys. The second prong of the Strickland test requires the defendant to prove that the attorney’s deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Strickland poses yet another hurdle to defendants because it creates a strong presumption that counsel’s conduct is within the range of competent and reasonable professional assistance. Courts throughout the United States have reached differing conclusions as to whether failure to advise alien defendants of possible deportation consequences constitutes ineffective counsel. The United States Supreme Court has yet to decide this issue.

C. Immigration Consequences – Collateral or Direct Consequences?

Many jurisdictions have held that an attorney’s failure to discuss deportation consequences with an alien defendant does not constitute ineffective counsel for Sixth Amendment purposes. Courts have emphasized the fact that immigration consequences arising from a guilty plea are considered to be collateral consequences. These courts have held that a defendant’s attorney need not disclose immigration consequences for the defendant’s plea to qualify as voluntary. For example, in State v.

See id. at 668 (denying petition for habeas corpus and ruling that even assuming defendant’s counsel conducted himself unreasonably in that he failed to investigate all mitigating factors, the defendant suffered insufficient prejudice to set aside his conviction); U.S. CONST. amend IV

See Strickland, 466 U.S. at 686.

See id.

See id.

See id. at 689.

See, e.g., United States v. Quin, 836 F.2d 654 (1st Cir. 1987) (holding that failure to advise client constituted ineffective counsel); United States ex rel. Potts v. Chrans, 700 F. Supp. 1505 (N.D. Ill. 1988) (holding that failure to advise client did not constitute ineffective counsel).

See, e.g., United States v. Banda, 1 F.3d 354 (5th Cir. 1993); United States v. George, 869 F.2d 333 (7th Cir. 1989); State v. Ginebra, 511 So. 2d 960 ( Fla. 1987); In re Peters, 750 P.2d 643 (Wash. Ct. App. 1988).
Ginebra, the Supreme Court of Florida held that defense counsel is not required to inform an alien defendant of immigration consequences that may accompany a guilty plea.\(^{45}\) Rather, the court noted, defense counsel is bound only to advise his or her client of the "direct consequences" of a guilty plea.\(^{47}\) The court noted that immigration consequences are similar to other collateral consequences in that the trial court judge is not responsible for imposing such consequences upon the defendant.\(^{48}\) The INS, an independent government agency, assumes responsibility for the immigration aspects of the defendant’s conviction.\(^{49}\) The United States Court of Appeals for the Seventh Circuit reached a decision very similar to Ginebra in United States v. George.\(^{50}\) Like the Florida state court, the Seventh Circuit refused to acknowledge lack of disclosure regarding immigration consequences as ineffective counsel.\(^{51}\) The court held that

actual knowledge of consequences which are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea. A deportation proceeding is a civil proceeding which may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding.\(^{52}\)

Similarly, a Washington state court placed substantial weight on the distinction between direct and collateral consequences in In re Peters.\(^{53}\) The opinion noted that a defendant must be informed of all direct consequences of a guilty plea in order for the plea to be fully voluntary, but that he or she need not be informed of all collateral consequences that may arise.\(^{54}\) The court classified immigration consequences as collateral consequences because the results are administered by the INS rather than the court system.\(^{55}\) Distinctions between direct and collateral consequences depend on whether ‘‘the result represents a definite, immediate and largely

\(^{45}\) State v. Ginebra, 511 So. 2d 960 (Fla. 1987).
\(^{46}\) See id. at 962.
\(^{47}\) See id. at 960.
\(^{48}\) See id. at 961.
\(^{49}\) See Underwood, supra note 4, at 895.
\(^{50}\) United States v. George, 869 F.2d 333 (7th Cir. 1989).
\(^{51}\) See id. at 338.
\(^{52}\) Id. at 337
\(^{54}\) See id. at 645.
\(^{55}\) See id.
automatic effect on the range of the defendant’s punishment.” This principle was convincingly stated in *United States v. Banda*, in which the Fifth Circuit noted that it had previously “nailed the door shut on any due process claim based on counsel’s failure to warn the criminal defendant of possible deportation.” The court emphasized that although deportation is a harsh collateral consequence, other collateral consequences, such as abrogation of the rights to vote and travel, are equally harsh, and these warrant no special consideration. Therefore, the court ruled that no “ineffective counsel” claim based on an attorney’s failure to disclose possible deportation consequences to a client would prevail. Other jurisdictions holding that an attorney’s failure to warn alien defendants of immigration consequences constitutes ineffective assistance of counsel concede that immigration matters are collateral in criminal cases. However, in holding that nondisclosure constitutes “ineffective counsel,” these jurisdictions typically emphasize the extraordinarily harsh nature of immigration consequences triggered by conviction or a plea of guilty. Subjecting a criminal defendant to deportation proceedings is equivalent to the “loss of both property and life; or of all that makes life worth living.” With begrudging attitudes, these courts classify immigration proceedings as a collateral consequence.

Practitioners in Kentucky face a troubling lack of case law on the issue of immigration consequences stemming from guilty pleas. Kentucky courts have never directly ruled on the issue of whether immigration consequences constitute collateral or direct consequences of a guilty plea. Therefore, accurately predicting the response of Kentucky courts to this question remains an exercise in guesswork. However, the issue has arisen before the Sixth Circuit, which may present useful insight into how the Supreme Court of Kentucky would classify immigration consequences in the context of claims of ineffective assistance of counsel. In *Ogunbase v.*

56 Id. (quoting Cuthrell v Director, 475 F.2d 1364, 1366 (4th Cir. 1973)).
57 *United States v Banda*, 1 F.3d 354 (5th Cir. 1993).
58 Id. at 355. The court was referring to *United States v. Gavilan*, 761 F.2d 226, 228 (5th Cir. 1985), which held that defendants have no due process right to be notified of any collateral consequences of a guilty plea or conviction.
59 See *Banda*, 1 F.3d at 356.
60 See id. at 355.
61 See People v Superior Court, 523 P.2d 636, 639-40 (Cal. 1974).
63 Ng Fung Ho v White, 259 U.S. 276, 284 (1922).
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United States, the Sixth Circuit summarily denied Ogunbase’s motion alleging that his guilty plea was involuntary because his counsel neglected to warn him of the potential immigration consequences of such a plea. The Sixth Circuit’s position appears to be that immigration consequences do not have a sufficient nexus to guilty pleas to warrant classification as direct consequences. Therefore, assuming that Kentucky courts would follow the analysis of Ogunbase, it appears unlikely that defendants will succeed in persuading courts that their guilty pleas should be withdrawn on the basis of ineffective assistance of counsel.

Another useful way to determine how Kentucky courts would respond to the issue of ineffective counsel is to observe how other jurisdictions have treated this issue. For example, State v. Aravanitis, a decision by the Ohio Court of Appeals, serves as an excellent example of the calculated analysis in which a court must engage when determining how to dispose of a new or novel issue of law. There, the court looked to federal courts and other state courts for guidance on how to classify the immigration consequences of a guilty plea.

More recent federal decisions hold that mere failure to advise of deportation consequences, without any affirmative misrepresentation, does not state a claim for ineffective assistance of counsel. The court then proceeded to summarize varying approaches taken by other state courts on this issue, recognizing the often striking

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64 Ogunbase v. United States, No. 90-1781, 1991 WL 11619 (Feb. 5, 1991) (holding that deportation is a collateral consequence of a guilty plea, and therefore counsel’s failure to warn defendant about deportation did not constitute ineffective assistance of counsel).

65 See id. at *3.

66 See Nagaro-Garbin v. United States, No. 87-1148, 1987 WL 44483 (6th Cir. Oct. 20, 1987) (holding that deportation is a collateral consequence of a guilty plea and need not be explained to a defendant in order to preserve the voluntary nature of the plea, and that counsel is not constitutionally ineffective due to this failure to advise); United States v. Daas, No. 95-3310, 1995 WL 583384 (6th Cir. Oct. 3, 1995) (listing deportation as one of many examples of collateral consequences of guilty pleas that need not be explained to a defendant in order for plea to be voluntary). Both of these cases are unpublished dispositions, and Sixth Circuit Rule 24(c) states that citation of such cases is disfavored.

67 State v. Aravanitis, 522 N.E.2d 1089 (Ohio Ct. App. 1986) (holding that a determination of whether defense counsel’s failure to warn of deportation consequences of a guilty plea constitutes ineffective counsel must be determined on a case-by-case basis, rather than according to a per se rule).

68 See id. at 1091.

69 Id. (citing United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975)).
disparities in decisions in different states. Upon careful scrutiny of the federal and state court approaches to immigration consequences of guilty pleas, the court adopted a case-by-case approach for determining whether an alien’s guilty plea should be withdrawn due to his or her lack of full information about the possible deportation consequences when entering the plea. The court ultimately did not find ineffective assistance of counsel, but it successfully avoided creation of a rigid rule and left the door open for the exercise of discretion in future cases. This case presents an approach that Kentucky courts may adopt when presented by this issue.

D. Misinformation Given by Attorney Regarding Immigration Consequences

Of pivotal importance in some jurisdictions is whether the defense counsel actually gave his or her client poor legal advice about the immigration consequences of the criminal proceeding. If an alien defendant asks his or her attorney about deportation possibilities, and the attorney reassures the client that no such dangers exist, this may very well

70 See generally id. at 1091-95.
71 See id.
72 See id. at 1095.
73 See id. at 1094-95 ("[W]e are not disposed to announce a hard and fast rule as to whether counsel’s failure to inform an alien defendant of deportation consequences of a guilty plea is ‘a substantial violation of any of defense counsel’s essential duties to his client’ so as to render counsel’s assistance ineffective.” Id. (quoting State v Lytle, 358 N.E.2d 623, 627 (Ohio 1976)).
74 Another useful method of predicting how state and federal courts would address the issue of whether immigration consequences are direct or collateral is to analogize the issue to similar issues. In Xie v. Edwards, No. 93-4385, 1994 WL 462143 (6th Cir. Aug. 25, 1994), the court held that counsel’s erroneous information given to a defendant regarding parole eligibility issues did not constitute ineffective assistance of counsel. The court held that “[p]arole eligibility is not a ‘direct consequence’ of a conviction, and a defendant need not be informed of it.” Id. at *2 (quoting Brown v Perini, 718 F.2d 784, 788 (6th Cir. 1983)). Since the court found parole eligibility to be a collateral consequence, it may also find deportation to be collateral. This is because parole eligibility, like deportation, is a huge factor for defendants to consider when deciding whether to plead guilty. Therefore, the court’s refusal to categorize parole eligibility as a direct consequence indicates that it would probably refuse to classify the severe immigration consequences of a guilty plea as direct.
75 See, e.g., People v Correa, 485 N.E.2d 307 (Ill. 1985).
constitute "ineffective counsel." The leading case promoting this school of thought is People v. Correa. In Correa, the defendant's attorney recommended that he plead guilty, and the defendant in return inquired as to the possible deportation consequences of such a plea. Upon learning that the defendant's wife was a United States citizen, the attorney reassured the defendant by saying, "I don't think you have anything to worry about. Your record, you should get the benefit she is an American citizen. I don't think you will be deported." Following these assurances, the defendant entered a guilty plea, and later faced deportation proceedings due to his conviction of a drug-related felony. The Correa court emphasized that when a defendant reasonably relies upon his or her attorney's legal advice in order to determine whether or not to plead guilty, and this legal advice is later deemed to have been incompetent when given, the defendant's guilty plea could not have been voluntary. The court in Correa also noted that counsel did not merely fail to warn an alien defendant of potential deportation consequences; rather, the defendant specifically inquired of his attorney as to the possible immigration consequences, and in response, counsel answered with an inaccurate, unresearched, and entirely unsubstantiated.

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76 See Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988) (holding that grossly incorrect advice concerning parol eligibility, a collateral consequence, may affect the voluntary nature of the guilty plea). But see Xie v. Edwards, No. 93-4385, 1993 WL 462143 (6th Cir. Aug. 25, 1994). The court held that counsel's erroneous information given to a defendant regarding parole eligibility issues did not constitute ineffective assistance of counsel. Therefore, if Kentucky courts and the Sixth Circuit categorize immigration consequences of a guilty plea as collateral consequences, Xie suggests that even misinformation given to clients regarding immigration consequences would not constitute ineffective assistance of counsel.

Another issue that may arise is whether misinformation given to alien defendants regarding guilty pleas violates due process requirements. In Brown v. Perma, 718 F.2d 784, 789 (6th Cir. 1983), the court held that misinformation given by a trial judge regarding the collateral consequences of a guilty plea does not constitute a due process violation and, therefore, the guilty plea remained valid.

78 See id. at 309.
79 Id. (quoting unnamed defense attorney).
80 See id. at 310.
81 See id. This conclusion is based upon the premise of Brady v. United States, 397 U.S. 742 (1970), in which the United States Supreme Court held that a waiver of one's constitutional rights must be knowingly and voluntarily made, and must be done with substantial awareness of the probable outcome and the circumstances surrounding the waiver. See id. at 748.
82 See Correa, 485 N.E.2d at 311.
tiated attempt to give the client legal advice. Thus, the issue presented in Correa was transformed from whether failure to advise a client of immigration consequences is deemed ineffective counsel to whether affirmatively misleading the client with false assurances regarding immigration consequences constitute, "ineffective counsel."83

The court likened this situation to other cases in which attorneys had engaged in misrepresentation to their clients that resulted in guilty pleas.84 Even courts that decline to find a valid claim of ineffective assistance of counsel when defense attorneys failed to disclose deportation consequences to clients have acknowledged that the result reached may differ in cases where affirmative misrepresentations of fact were given to the client. In Villavende v. State,85 the court held that defense counsel's failure to discuss collateral consequences regarding immigration with his client did not constitute ineffective assistance.86 This decision was partly based on the fact that the defendant never informed his counsel that he was a foreign national.87 However, the crux of the court's opinion was rooted in the notion that counsel did not give inaccurate legal advice. The court noted that had inaccurate legal advice been given, the result may have been different.88 Misleading representations by prosecutors may also require withdrawal of a guilty plea elicited by such misrepresentations. The court in United States v. Russell89 stated that judges must consider several factors when determining whether to allow a withdrawal of a guilty plea.90 When a defendant misunderstands the collateral consequences of a plea due to misleading statements by the prosecuting attorney, this weighs heavily in favor of withdrawing the guilty plea.91 "[A] plea that has been induced by inaccurate prosecutorial suggestions about its consequences cannot be considered voluntary and must be vacated."92

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83 See id.
84 Cf. People v Morreale, 107 N.E.2d 721 (Ill. 1952) (holding that defendant may withdraw guilty plea based on his attorney's misrepresentation that he would only be sentenced to probation); People v Owsley, 383 N.E.2d 271 (Ill. 1978) (holding defendant's guilty pleas were involuntary and unknowing due to her attorney's misrepresentation of minimum time eligible for parole).
86 See id. at 456.
87 See id.
88 See id. at 456-57
89 United States v. Russell, 686 F.2d 35 (D.C. Cir. 1982) (permitting defendant to withdraw guilty plea because the prosecutor failed to warn him of the possibility of deportation upon conviction).
90 See id. at 39.
91 See id. at 41.
92 Id. at 42.
E. What Does Failure to Warn of Immigration Consequences Really Mean?

A criminal defense attorney who represents aliens must familiarize himself or herself with relevant case law and statutes in his or her own jurisdiction. Various courts can reach drastically different results regarding the same issue. Many factors warrant attention in assessing how one’s jurisdiction would treat similar issues. The jurisdiction’s case law approach to ineffective-assistance-of-counsel arguments regarding immigration proceedings merits analysis. As discussed above, many jurisdictions essentially dismiss any and all claims of ineffective counsel for failure to warn of immigration consequences simply because the immigration aspect of criminal law has been firmly established as a collateral consequence of trial.93 Other courts have refused to allow the classification of immigration issues as “collateral consequences.” In People v. Padilla,94 the defendant’s attorney knew from the beginning of the attorney-client relationship that the defendant was an alien.95 The attorney never mentioned the possibility of deportation despite his admitted knowledge about immigration law and its possible consequences in the defendant’s case.96 The defendant claimed that he repeatedly inquired of his counsel as to whether there might be immigration consequences, and he maintained that the attorney responded in the negative.97 The court held that if the client’s version of what transpired was an accurate portrayal of the facts, then the attorney had made affirmative misrepresentations to the defendant and thereby destroyed the voluntary nature of the guilty plea.98 In fact, even if these allegations of misrepresentation were false, the court found counsel to be ineffective. The court relied on the Correa decision in holding that despite the collateral nature of immigration proceedings, counsel had a duty to discuss them with his or her client because of the incredibly harsh nature of deportation as a collateral consequence of a conviction.99 The court elaborated by stating, “The overall trend in state courts favors finding ineffective assistance rendering a guilty plea involuntary, where counsel

93 See, e.g., United States v. Banda, 1 F.3d 354 (5th Cir. 1993); United States v. George, 869 F.2d 333 (7th Cir. 1989); State v. Ginebra, 511 So. 2d 960 (Fla. 1987); In re Peters, 750 P.2d 643 (Wash. Ct. App. 1988).
95 See id.
96 See id. at 1183.
97 See id.
98 See id. at 1186.
99 See id. at 1185.
knows his client is an alien and does nothing to inform him of possible deportation consequences. While many other jurisdictions may disagree with the comment regarding the “trend” in state courts, it cannot be denied that a very real gulf exists between courts that will find ineffective assistance of counsel in such cases and those that will not. Correa stands for the proposition that when an attorney gives legal advice to a client regarding immigration consequences, he or she must be cautious. Under Correa, advice that is an inaccurate misrepresentation of the law constitutes ineffective assistance of counsel.

The obvious conclusion is that it is better to err on the side of caution by inquiring into the immigration status of a client before giving legal advice regarding a guilty plea. A zealous advocate will better serve his or her client by discussing all potential consequences, whether direct or collateral, with a client. This empowers the client to make a more fully informed decision regarding whether to enter a guilty plea, and it may eliminate litigation regarding the issue of ineffective assistance of counsel. An attorney will more fully comply with the American Bar Association’s Standards for Criminal Justice by discussing all potential consequences with a client and by taking the time to fully investigate the pertinent immigration law provisions. The ABA standards regarding plea agreements state, “To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision.”

Statutory Requirements that Courts Inform Defendants of Deportation Consequences

Statutory authority is another critical area to research in determining how one’s jurisdiction regards failure to disclose deportation consequences to a client. The general rule dictates that trial courts, absent a court rule or statute to the contrary, have no duty to advise criminal defendants of related immigration issues before entry of a guilty plea. However, since 1986, six states have enacted statutes that require trial courts to inform

100 Id. at 1186.
102 Soriano, 240 Cal. Rptr. at 335 (quoting 3 ABA STANDARDS FOR CRIMINAL JUSTICE, std. 14-3.2, at 73 (2d ed. 1980)).
alien defendants of any potential deportation consequences that may result from a guilty plea. These six states are California, Connecticut, Massachusetts, Oregon, Texas, and Washington. If the trial court fails to warn a defendant of the possible immigration consequences before he or she enters a guilty plea, reversible error results. In a jurisdiction that finds immigration consequences so important as to compel trial judges to disclose the existence of such consequences to alien defendants, defense counsel probably will be expected to discuss these collateral consequences with alien defendants as well.

Kentucky does not have a statute requiring trial judges to inform alien defendants of possible deportation consequences of a guilty plea. Additionally, in Boscan v. United States, the Sixth Circuit held that trial judges do not have a duty to advise alien defendants of the possible deportation consequences of a guilty plea. In these circumstances, the role of counsel as sole advisor is even more critical.

III. NON-ENGLISH-SPEAKING ALIEN DEFENDANTS AND COURT INTERPRETERS

A. The Right to an Interpreter in Federal Courts

The law entitles non-English-speaking defendants in criminal proceedings to a qualified interpreter in both the federal court system and most, if not all, state court systems. However, vast differences exist between the federal system and most state court systems with regard to interpreters. The federal court system is governed by the Court Interpreters Act, which secures a non-English-speaking defendant the right to an interpreter in United States district courts whenever litigation is initiated by the United States. The Act's relevant provision states:

> The presiding judicial officer shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services

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106 See id. at *2.
of an otherwise qualified interpreter, in judicial proceedings instituted by
the United States, if the presiding judicial officer determines on such
officer's own motion or on the motion of a party that such party (includ-
ing a defendant in a criminal case), or a witness who may present
testimony in such judicial proceedings speaks only or primarily a
language other than the English language so as to inhibit such party's
comprehension of the proceedings or communication with counsel or the
presiding judicial officer, or so as to inhibit such witness's comprehension
of questions and the presentation of such testimony.110

In order to qualify as a certified interpreter of a foreign language under
this Act, a candidate must take a federal examination in that language.111
An oral component and a written component comprise the examination,
and the potential interpreter must pass the test in both English and the
foreign language.112 The interpreter examination is challenging; however,
a candidate may pass the examination with an eighty percent score.113
When one considers the importance of a court interpreter's function –
translating every word spoken within the confines of the courtroom for a
non-English-speaking defendant – the possibility for error is awesome.114

While the federal court system has stringent standards governing who
qualifies as a court interpreter, other impediments must be overcome in
order to facilitate the goal of equality of justice. First and foremost, the
presiding judge must be made aware of the need for an interpreter. Many
disincentives might tempt a judge to dismiss the idea of a need for an
interpreter. For example, trials that require an interpreter take longer to
conduct because the communication process is invariably slowed down.
Additionally, hiring an interpreter becomes expensive in a trial of any

110 Id. § 1827(d)(2).
111 See Michael B. Shulman, No Hablo Inglés: Court Interpretation as a Major
Obstacle to Fairness for Non-English Speaking Defendants, 46 VAND. L. REV 175,
112 See id.
113 See id. at 181.
114 All languages have colloquialisms that are difficult to comprehend. In order
to function effectively as an interpreter, one must have some cultural understanding
and an appreciation for the various colloquialisms present in the language. For
each, the term “mueble” in Spanish is taught in classrooms as meaning
“furniture.” OXFORD POCKET DICCIONARIO ESTUDIANTES DE INGLES 195 (Patrick
Goldsmith & M. Angeles Perez eds., 1995). However, in rural Mexico, residents
use “mueble” to indicate “automobile.” (This example is from the author's own
experience.) The potential for error based on such differences alarms advocates for
immigrants.
substantial length, as the interpreter must be compensated for his or her
time.\textsuperscript{115} However, it may be easier to persuade a judge to obtain an
interpreter by simply hinting at the possibility for an appeal on the basis of
the judge's denial of an interpreter.\textsuperscript{116} Another problem arises because the
Court Interpreters Act only requires appointment of a certified interpreter
when one is "reasonably available."\textsuperscript{117} Some judges may find this to require
a good faith effort to obtain a certified interpreter, while others may find
that any inconvenience exceeds the scope of "reasonably available."\textsuperscript{118}

B. The Right to an Interpreter in State Courts

Most states acknowledge that a criminal defendant who does not speak
English has the right to an interpreter.\textsuperscript{119} Some states simply require that an
interpreter be appointed "when necessary," while other states specifically
spell out circumstances under which an interpreter is needed.\textsuperscript{120} Unlike the
federal court system, no uniform mechanism for testing, certifying, and
selecting interpreters controls the realm of state courts. Therefore, even
greater guarantees as to the quality of interpretive skills protect the integrity
of the state court systems than in the federal court system.

Kentucky has passed statutes regarding the right to an interpreter in its
state courts.\textsuperscript{121} The Kentucky statutes, which apply to both civil and
criminal cases, explain that a court must appoint an interpreter when
necessary.\textsuperscript{122} An interpreter must be provided when a key participant in the
proceeding is unable to understand the events transpiring during the
proceeding without interpretive services.\textsuperscript{123}

The court in any matter, criminal or civil, shall appoint a qualified
interpreter or interpreters for the following categories of persons,
whether they are parties, jurors, or witnesses:

(b) Persons who cannot communicate in English; and

\textsuperscript{115} See Shulman, supra note 111, at 184. Kentucky pays interpreters’ fees from
the state treasury according to the “Pay Schedule of the Judicial Personnel System.”
\textsuperscript{116} See Shulman, supra note 111, at 182.
\textsuperscript{118} See Shulman, supra note 111, at 182-83.
\textsuperscript{119} See id. at 178.
\textsuperscript{120} See id. at 179.
\textsuperscript{121} See K.R.S. §§ 30A.400- 435 (Banks-Baldwin 1996).
\textsuperscript{122} See id. § 30A.410.
\textsuperscript{123} See id.
Any other person who has, in the opinion of the court, another type of disability which will prevent him from properly understanding the nature of the proceedings or substantially prejudice his rights.

The use of the word "shall" indicates that judges may not ignore an obvious need for an interpreter simply because the use of an interpreter may prolong the proceeding. Kentucky clearly realizes that an injustice will result if a key participant in a trial cannot comprehend the substance of the trial. Despite this great stride toward procuring justice for alien defendants, this rule does not eliminate the difficulty of convincing a judge that an individual does in fact need an interpreter. An impatient judge with a pressing court docket may exercise his or her wide discretion regarding the need for an interpreter irresponsibly. A judge may find that the interest in a fair, speedy proceeding outweighs the need for an interpreter because of the slow and tedious pace of court proceedings with an interpreter.

In Kentucky, legislators have attempted to establish a system to ensure that interpreters chosen to serve in judicial proceedings are qualified. "Any person appointed as interpreter shall be qualified by training or experience to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary." Furthermore, the legislature has placed the responsibility of creating standards to govern a qualification or certification procedure with the Kentucky Supreme Court. While this statute recognizes the need for a screening process for potential court interpreters, the Kentucky Supreme Court has yet to set forth the standards for carrying out the legislative policy of providing qualified interpreters to those who need them.

C. Constitutional Right to an Interpreter

Do non-English-speaking criminal defendants have a constitutional right to an interpreter during criminal proceedings? The United States Supreme Court has never answered this question directly. However, lower

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124 Id. § 30A.410(1).
125 The vast majority of judges take their responsibilities seriously and use whatever measures are necessary to secure a just trial. However, there is great risk inherent in a decision regarding the need for an interpreter. If a judge were to disregard the evidence that a trial participant needed an interpreter, it would severely undercut the justice of our system.
126 K.R.S. § 30A.405(1).
127 See id. § 30A.405(2).
courts have held that the United States Constitution does secure this right. *United States ex rel. Negron v. State* presents a compelling argument that the right to an interpreter does indeed fall within the rights secured to all criminal defendants under the Constitution. The Sixth Amendment provides to all criminal defendants the same rights, regardless of their immigration status. The Sixth Amendment also gives a defendant the right to confront witnesses against him or her. It can easily be argued that by denying a non-English-speaking defendant the right to an interpreter, the judicial system would essentially be denying the defendant the ability to confront those witnesses against him. This conclusion follows as a logical extension of the Sixth Amendment because it is true to the spirit of the text. Clearly, by guaranteeing defendants the right to confront witnesses against them, the Framers intended that this not be limited to a physical, visible interaction. In order to do justice to the spirit of the Sixth Amendment, it is necessary to interpret it as granting a defendant the right to understand the witnesses testifying against him or her. Otherwise, the defendant would not have an opportunity to point out inaccurate testimony, respond to allegations made by witnesses, or discuss the weight of such testimony with his attorney. These opportunities are critical for a criminal defendant. Likewise, the Sixth Amendment right to assistance of counsel does not merely guarantee the physical presence of an attorney sitting next to a defendant at the defense table. Rather, the Supreme Court has held that assistance of counsel requires “effective assistance of counsel,” so that every defendant has access to a reasonably competent attorney. Additionally, the Sixth Amendment secures the right of a criminal defendant to participate in his own defense. This is impossible when a language barrier exists between the attorney and client and there is no one available to bridge the interpretation gap.

*Negron* established many protections for non-English-speaking defendants. At issue in the case was whether the court’s failure to provide a translator for a non-English-speaking criminal defendant violated his

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129 See id.
130 U.S. CONST. amend. VI.
131 “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.” Id.
132 See id.
133 See id.
135 See U.S. CONST. amend. VI.
The trial court had provided no interpretive services for the defendant, and neither the defendant nor his attorney ever requested such services. Due to the fact that Negron spoke no English and his attorney spoke no Spanish, the court held that it was impossible for Negron to have actively participated in his own defense despite his legal right to do so. Additionally, the court held that Negron was unable to confront adverse witnesses, a right secured by the Sixth Amendment, as he was entirely without ability to understand what they were saying. The court held that the Sixth Amendment "includes the right to cross-examine those witnesses as an 'essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal," and concluded that for a non-English-speaking defendant to be able to cross-examine adverse witnesses, a qualified interpreter must necessarily be provided. The court analogized Negron's inability to understand his trial to a criminal defendant not being permitted to appear at his own trial. "Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial. If a criminal defendant chooses to waive his or her right to be present at trial, no constitutional violation exists. However, the court summarily dismissed any argument that Negron had waived his right to an interpreter, or that his counsel had in effect waived that right for him. The court acknowledged that in 1970, the law had not conclusively settled whether the right to an interpreter prevailed, and so it would not have been surprising if Negron's attorney was unaware of his client's right to have an interpreter present. The court, by rejecting the state's argument that Negron waived his right to an interpreter, followed the United States Supreme Court's logic in Pate v. Robinson when it held that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive

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137 An interpreter employed on behalf of the prosecution translated for the defendant the trial judge's voir dire instructions and briefly summarized for him the testimony of some English-speaking witnesses. Otherwise, the trial was just a "babble of voices." Id. at 388.
138 See id. at 389.
139 See id.
140 Id. (quoting Pointer v. Texas, 380 U.S. 400, 405 (1965)).
141 See id.
142 Id.
143 See id.
144 See id. at 390.
his right to have the court determine his capacity to stand trial. It is
difficult to conceive of a justice system that presumes that a criminal
defendant waived his or her opportunity to understand what transpired
during his or her trial because he or she did not request an interpreter, when
the defendant had no way of knowing that he or she was indeed entitled to
this service.

D. Problem Areas that Accompany Use of an Interpreter in Criminal
Proceedings

Court interpreters hold a staggering amount of power over a non-
English-speaking defendant. No one in the courtroom, except for the
interpreter, truly knows what the defendant is saying. Every word that he
or she speaks must be channeled through and translated by a virtual
stranger. The court record cannot reflect what the defendant actually said
in open court because no court reporters are there to transcribe the
testimony in the defendant's native tongue. Rather, the court record reflects
only what the interpreter believes and perceives to be the actual words of
the defendant. This opens up a myriad of possibilities. A qualified
interpreter may still make a grave error regarding what the defendant
actually said or actually meant due to a wide divergence of expressions
solely reserved to specific cultures or regions. However, even if the
interpreter were to make a significant error, it would stand uncorrected
because there is no actual record of what the defendant said in his or her
native language on the day in question. An interpreter's job is challenging
and difficult. Language is an imprecise art and many words do not literally
translate from one language to the next. In addition to this obstacle, many
bilingual individuals lack sufficient skills to accurately translate the legal
terminology that permeates a criminal proceeding. Therefore, even the
defendant who has access to a translator runs a grave risk of being
misunderstood, with no mechanism of correcting the error or even knowing
that it exists until it is too late. What can be done to improve the imperfect
nature of language interpretation? Many suggestions are made in No Hablo
Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-
English Speaking Defendants. The author, Michael Shulman, suggests
that courts utilize two interpreters at one time to enable the two translators
to notice and correct any errors they may make. However, this could pose

146 United States ex rel. Negron v State, 434 F.2d 386, 390 (2d Cir. 1970)
quoting Pate, 383 U.S. at 384).
147 See Shulman, supra note 111, at 191-95.
148 See id. at 193.
a financial difficulty for many jurisdictions, and it is unlikely that states with small immigrant populations would have a sufficient pool of qualified interpreters to make this goal a reality. Additionally, some errors may not be detected even in the presence of two interpreters because dialect, colloquialisms, and regional terminology may not be fully understood by either of the interpreters due to the imprecise nature of language interpretation. Another suggestion includes audiotaping the entire proceedings, so that any serious interpretation errors noted later could be proven. Videotaping the proceeding would give even more insight into what the defendant said and meant by providing reviewing authorities an opportunity to see his or her facial expression and body language. However, one potential problem with either of these two methods of avoiding interpretive errors is the fear that appellate courts would be swamped with audio and videotapes subject to review based on claims of incorrect interpretation.

Analogous case precedent and persuasively compelling arguments indicate that the United States Constitution secures the right to an interpreter by a non-English-speaking criminal defendant. However, even with this protection in place, many other dangers threaten to undermine any attempts to level the playing field for non-English speakers. The interpretive process is riddled with ambiguities and doubt, but as of yet no successful mechanism for avoiding these dangers has been constructed.

CONCLUSION

A brief analysis of the current state of immigration law in the United States makes it abundantly clear that many changes pose grave dangers to non-citizen criminal defendants. Equally clear is the need for criminal defense attorneys to make informed decisions before giving legal advice to such clients. Unfortunately, many defense attorneys do not have an understanding of the IIRIRA sufficient to offer their non-citizen clients an accurate portrayal of the possible immigration consequences facing them. In order to provide effective assistance of counsel, criminal defense attorneys must arm themselves with knowledge about the immigration consequences that may affect their clients. Alternatively, they must decline to accept these cases and refer the clients to an attorney with a working

149 See id.
150 See id. at 193-94.
151 See id. at 194.
152 See id.
154 See supra note 1.
knowledge of current immigration laws. Giving misleading or inaccurate advice to a client regarding possible immigration consequences may not only constitute ineffective counsel but may also open the door to possible lawsuits for attorney malpractice.\textsuperscript{155} To proceed in the face of ignorance is a disservice to both the alien client and the integrity of the justice system.

Trends in the federal and state court systems evidence a recognition of the necessity of providing an interpreter for non-English-speaking clients in the justice system. The federal system has created a mechanism for ensuring that interpreters meet at least minimum standards of competency before they are able to serve. However, many state court systems do not have such a screening mechanism available. The possibility of having unqualified interpreters functioning within the judicial system raises questions of constitutional significance. If a criminal defendant depends entirely on another human being as his or her only means of communication with the attorney and the judge, then the testimony is essentially not his or her own. Rather, a type of “filtration system” takes the non-English-speaking person’s words and attempts to fit them into an entirely different language. The danger of human error on the part of the interpreter could create immense problems for the criminal defendant. A qualification system must be established in the state courts in order to ensure that alien defendants receive the fairest trial possible, in spite of the numerous other obstacles facing them in the justice system.

\textsuperscript{155} The concept of attorney malpractice exceeds the scope of this Note. For a more detailed discussion, see F. Scott Pfeiffer, \textit{Does Failure to Advise Clients of Immigration Consequences of Guilty Pleas Constitute Malpractice?}, 9 S.C. LAW 32 (1997).