>> The next case on our docket is Diaz versus the state of Florida.
>> Good morning.
May it please the court.
Mr. Angel Arias from a Miami firm in the Miranda case on behalf of Diaz.
The retroactivity question asks this court whether it is going to hold Mr. Diaz and other post-conviction noncitizen defendants to their involuntary and in valid plea.
On the wall outside of the lawyer's lounge there's a quote from Justice Terrell, one of the great justices from this court who said in one of his opinions that it is better to eat crow than to perpetuate error.
That really answers the question before this court.
The court said it to be the exact same way in Witt.
I recognize there is some importance to finality in criminal conviction adjudications but those interests have to give way when a process that is no longer acceptable and is no longer applicable in indistinguishable cases, deprives people of their life and their liberty.
And that is precisely what would happen if this court did not award the relief to these defendants, whose please are involuntary and invalid, but yet are five debt relief to all defendants going forward.
>> Let me ask you this.
You're now making a statement that the plea was involuntary.
Are you suggesting going forward that the court standard colloquy needs to be changed?
Do we need to change that colloquy in light of Padilla?
>> No comment I don't think the court has to recede.
>> But the voluntariness and -- the trial judge has an obligation and we are in a

unique situation because clearly going forward we have to go back to Genebra.
>> Padilla abrogated that.
>> We have to recede from now but do let's go over the Witt factor that we consider and I think that the one that concerns me is -- it meets the first two requirements -- the extent of reliance on the old rule and the effect of the administrative justice of the retroactive application of the new rule. Are those two of the factors? Do they address the extent of the reliance of the old rule?
>> The way I see it is the old rule is really Edwards, which was the case out of the Third DCA in 1981 that recognize precisely the very Sixth Amendment rights that are recognized in Padilla and that in fact was from 1981 to 1987. Than this court decided Genebra and it's now clear that decision was erroneous.
It did not afford the full scope of counsel that Padilla makes clear exists, so I think it's a little bit of a strange situation because we did have the law correct and therefore, that factor in terms of all the factors, is not as significant as the others.
>> Are you telling me that a 25-year period of time is not significant time in criminal law?
>> What I am saying is that we have identified three factors. One, the court has to look at the importance or the purpose of the rule that is at hand, the purpose of Padillo.
One factor is the extent of the reliance and the third is the administrative justice.
What I'm suggesting in this context that middle factors not as important as the first factor and the middle factor.
The administration of justice

was directly addressed by Padilla where the court said it should have a modest effect on the administration of Justice because again, these approvals that require defense counsel to provide this very advice to their noncitizen defendants has been in existence for at least 15 years and in fact some of the law review articles, some of the standards that were cited both in Padilla and Cincere said defense counsel indeed has some obligation.
>> Can you go back as far as the 80's, and certainly from the time that 3.172 started including that generic information about deportation, couldn't those defendants now bring 3.850 challenges to the effectiveness of their attorney?
>> I think that they can.
>> Do we know how many defendants are out there in the universe that would fall into the category of being able to bring those kinds of claims?
>> No, and there is no way, as was said there is no way to put a number on this but what we can do is examine the circumstances that can give us some sense of what that would look like and again, in Padilla the court did just that and said, attorneys have been doing what we are saying, what we are now confirming his old law that Strickland requires reasonable counsel to provide advice and under Hill, including pre-plea about the circumstances, that it needs to consider in order to make a voluntary plea and knowingly and intelligently waive those rights.
>> It seems to me that we have some idea that there is a pretty large universe of defendants who might fall into this category just from the number of cases we have gotten since Mr. Diaz's trial.

>> I think unfortunately that is the result of the fact that these people have been unable to bring verifiable claims of involuntary please as a result of the erroneous decision in Genebra and that is why the words of Justice Terrell are so fresh and because he said, better to correct this and eat crow than to protect perpetuate error and the error that is perpetuated is that we would have however many, whether 15 defendants were before the court today or whether there are more who had entered involuntary, invalid please.
And there is no question --
>> It is my concern.
I come from a practical world and I did this as a lawyer. What happens in big metropolitan areas like Miami, Jacksonville and Tampa, Orlando, is you have upon arraignment and at that on arraignment the prosecutor will offer a plea to the defense lawyer who will meet his client and the public defender maybe that day.
The plea will be open only for that day and they may not be available three months later because the prosecutor by that time would have discovered far more things about it that he or she did not know at the time.
So what you are saying is don't take the plea that day.
Take the time to explain to your client the immigration problems and then later on, six months later or whatever, suddenly he or she is facing an additional 15 years or maybe life in prison.
You have got all of these balancing things and I think what you're expecting lawyers to do is to just meet with the client, like you would a privately-retained client in your office and then you would write your client a nice long

letter telling them, this is what is going to happen if you take this plea and you need to make this decision.
That is not the real world.
So what is a lawyer to do?
What is the public defender to do when he or she is facing 20, 30, 40 cases on bond arraignment?
>> The public defender is bound by the same counsel standard that everyone else is and the team doesn't have to be in my office.
It doesn't have to be in writing but it has to be meaningful where the attorney has an opportunity to fully explore with the defendant all of the circumstances that defendant needs to contemplate if they are going to stand in front of the cord and enter what this court demands, which is a voluntary plea and that they make a knowing and intelligent waiver of the constitutional trial rights and if that conversation cannot occur, then all of those please are going to be in valid.
>> I mean but here's the deal.
Whether the Supreme Court understood the reality and what goes on in the courtroom in Miami, we are bound by what goes forward so the public defender's office in Miami whether they have an immigration specialist, that issue is settled but let's go back again to the question of the 25 years that there has been settled expectation that the colloquy that included maybe deportation was sufficient to make the plea knowingly and involuntary.
I asked you and you responded yes that it was not necessary to change the plea colloquy.
Seems like you're saying two separate things which is that the judge does what he or she is supposed to do but that is not going to make the plea colloquy,

the plea voluntary unless the lawyer gives additional information.
So this going forward, I don't see how we can get around not having some change in the plea colloquy of the issue is involuntariness.
What is your response to that?
>> The plea colloquy is ultimately a safeguard.
It's a safety net to ensure what the Sixth Amendment demands which is where the real discussion and exploration goes on, that has happened so the court is always going to have to take a leap of faith at some level that the attorney is doing what Strickland says, what all of our standards of a professional engagement say -- that they are supposed to do, so in the end, the court can't absolutely guarantee the voluntariness of the plea.
What they can do is to take certain steps to ensure that if something may have been missed or perhaps in response to that warning, someone is going to say, wait a minute, I never talked about that with my attorney and at that point the court can say counsel, you need to have that discussion with your client.
>> I'm still not sure that you have actually responded to this issue about retroactivity.
Give me, under Witt, the best case where they applied something retroactively and the case that was most difficult for you to get around.
In other words, I know we been through retroactivity lots of times.
This seems to me more like the cases where we have until the new development being retroactive.
>> The first thing I would say, Padilla is old law.
Padilla is old law in the  state

of Florida, so really the court never needs to reach Witt because Witt has to do with new law and whether we will apply new law retroactively.
An old law is always applied to old cases that were contemporaneous with that law.
>> Wait, wait, wait.
>> Are you conceding that this is further refinement?
>> Again, it's a rather unique situation Justice Lewis because on the one hand it is old law. It is simply a restatement of Edwards and the law that was absolutely the law in this state prior to Genebra but yet with regard to Genebra, there is no question that this is not simply some evolutionary refinement. It directly conflicts with Genebra and says that is not the law.
We don't define the scope of sixth Amendment counsel by determining whether a consequence is direct or collateral, so it is a rather unique situation that perhaps does not fall into any of the other cases that the court has looked at.
>> IN OTHER WORDS, GIVE US -- BECAUSE I KNOW WE'VE BEEN THROUGH RETROACTIVITY LOTS OF TIMES, NOT RECENTLY.
THIS IS NOT -- THIS IS, SEEMS TO ME, MORE LIKE THE CASES WHERE WE HAVEN'T HELD THE NEW DEVELOPMENT TO BE RETROACTIVE.
>> FIRST, I WOULD SAY THAT PADILLA IS OLD LAW.
PADILLA IS OLD LAW IN THE STATE OF FLORIDA, AND SO REALLY THE COURT NEVER EVEN NEEDS TO REACH WIT BECAUSE WIT HAS TO DO WITH NEW LAW AND WHETHER WE'RE GOING TO APPLY NEW LAW RETROACTIVELY.
AN OLD LAW IS ALWAYS APPLIED TO OLD CASES THAT WERE CONTEMPORANEOUS WITH THAT LAW.
>> WAIT, WAIT, WAIT --
>> ARE YOU CONCEDING THAT THIS IS JUST A FURTHER REFINEMENT

SOMETHING  THAT ALREADY EXISTED?
>> IT'S, AGAIN, IT'S A RATHER UNIQUE SITUATION, JUSTICE LEWIS, BECAUSE ON THE ONE HAND IT'S OLD LAW, IT'S SIMPLY A RESTATEMENT OF EDWARDS AND THE LAW THAT WAS ABSOLUTELY THE LAW IN THIS STATE PRIOR TO GENEVRA.
BUT YET WITH REGARD TO GENEVRA, THERE'S NO QUESTION THAT THIS IS NOT SIMPLY SOME EVOLUTIONARY REFINEMENT.
IT DIRECTLY CONFLICTS AND SAID THAT'S NOT THE LAW.
WE DON'T, WE DON'T DEFINE THE SCOPE OF SIXTH AMENDMENT COUNSEL BY DETERMINING WHETHER A CONSEQUENCE IS DIRECT OR COLLATERAL.
AND SO IT'S A RATHER UNIQUE SITUATION THAT PERHAPS DOES NOT FALL INTO ANY OF THE OTHER CASES THAT THE COURT HAS LOOKED AT.
UNQUESTIONABLY, THERE HAVE BEEN VERY FEW CASES THAT THIS COURT HAS FOUND TO BE RETROACTIVE UNDER THE WIT ANALYSIS, BUT WHAT I WOULD SUGGEST IS THAT IN THIS CASE WHERE THE VERY PURPOSE OF PADILLA IS TO INSURE THE INTEGRITY AND THE RELIABILITY OF THE PLEA PROCESS, THE PROCESS THAT THIS STATE USES TO RESOLVE 98% OF CRIMINAL CASES IN THE STATE, THAT THAT IS A CORE CONCERN THAT WARRANTS TAKING WHAT JUSTICE PARIENTE CORRECTLY NOTES MAY BE CHANGING HOW THINGS HAVE BEEN DONE FOR A GOOD NUMBER OF YEARS.
>> AS WE GET INTO THE PROCESS, WE RUN THE SCOPE FROM HAVING COUNSEL AT ALL TO WHAT COUNSEL MUST DO TO WHAT ELEMENTS COUNSEL MUST TOUCH UPON, AND I THINK THAT'S WHERE THE QUESTION WAS GOING AS TO WHICH OF THESE FALL INTO THE CATEGORY OF WIT TO BECOME RETROACTIVE.
AND I THINK YOU REALLY NEED TO ADDRESS THAT THIS MORNING BECAUSE I THINK THAT'S WHERE THE ISSUE IS REALLY COMING UP.
SO YOU REALLY HAVE TO GIVE IT YOUR VERY BEST CASES THAT YOU

HAVE TO SAY, TO DEMONSTRATE WHY
THAT WIT ELEMENT, THE ONE THAT
SAYS IF IT'S A MERE REFINEMENT
AS THE STATE HAS ARGUED, IT'S
NOT APPLICABLE HERE.
>> UNQUESTIONABLY, WHAT THIS
COURT HAS RECOGNIZED IN GENEVRA,
WHAT PADILLA RECOGNIZES IS FOR
NONCITIZEN DEFENDANTS, KNOW WHAT
THE CLEAR AND VIRTUALLY
INEVITABLE DEPORTATION
CONSEQUENCES ARE, PERHAPS, EVEN
MORE IMPORTANT THAN KNOWING WHAT
THE JAIL SENTENCE IS THAT THE
PLEA EXPOSES THEM TO.
THIS COURT HAS RECOGNIZED THAT
IN GENEVRA, AND THAT'S WHAT THE
UNITED STATES SUPREME COURT
RECOGNIZES IN PADILLA.
AND THAT'S WHY THIS IS SUCH AN
IMPORTANT RIGHT.
I CAN'T POINT THE COURT TO A
SPECIFIC DECISION.
AGAIN, THERE'S BUT A HANDFUL, IF
THAT, AND THE CLASSIC KIND OF
PARADIGMATIC CASE THAT THE
COURTS TALK ABOUT IS GIDEON, AND
IT'S INTERESTING THAT GIDEON HAS
TO DO WITH AFFORDING SIXTH
AMENDMENT COUNSEL AS DOES THIS
CASE.
AND IN A CASE OUT OF THE THIRD
DCA, AN OLD CASE CALLED BLATCH
WHICH IS CITED IN OUR BRIEF, THE
COURT SAID ALL CASES DEALING
WITH THE RIGHT OF COUNSEL SHOULD
BE RETROACTIVE BECAUSE IT IS
SUCH A CORE CONCERN OF THE
CRIMINAL JUSTICE SYSTEM SUCH
THAT WE'RE WILLING TO EAT CROW
AND DEAL WITH THE PEOPLE WHOSE
RIGHTS HAVE BEEN VIOLATED UP
UNTIL THAT POINT IN TIME BECAUSE
IT'S WHAT'S, IT'S WHAT'S CENTRAL
TO WHAT THIS COURT AND WHAT OUR
CONSTITUTION HOLDS AS SACRED TO
THESE PARTICULAR PROCEEDINGS.
WITH REGARD TO THE --
>> AS YOU'RE GOING THROUGH THIS,
THOUGH, ISN'T THE PROBLEM THAT
IT'S NOT LIKE IN EVERY CASE
SOMEONE'S GOING TO GET RELIEF.
AND IT'S GOING TO BE AN
EVIDENTIARY, IT HAS TO BE AN
EVIDENTIARY HEARING?

IT'S NOT A SLAM DUNK, CORRECT?
>> ABSOLUTELY.
>> WELL, HOW DO YOU EXPECT THE PROSECUTOR, THE PUBLIC DEFENDER, THE CRIMINAL LAWYER TO REMEMBER SOMETHING THAT HAPPENED 20 YEARS BEFORE TO BE ABLE TO SAY, WELL, I KNOW I COUNSELED THIS PERSON OR NOT?
AND ISN'T THAT A CONCERN?
IN OTHER WORDS, THE RELIABILITY OF THE PROCEEDING THAT, YOU KNOW, THESE ARE NOT PEOPLE, BY AND LARGE, THAT ARE INNOCENT.
MOST OF THEM, I'M ASSUMING, HAVE COMMITTED CRIMES.
AND THAT'S THE MISCARRIAGE OF JUSTICE.
SO THEY COMMITTED A CRIME, AND NOW 20 YEARS LATER THEY WANT TO GET OUT OF THE DEPORTATIONS WITH NO OTHER CONSEQUENCE.
AND I'VE GOT, AGAIN, I'M UNDERSTANDING WHAT YOU'RE SAYING, BUT IT'S NOT HITTING THE -- YOU'RE NOT ADDRESSING THE EFFECT ON THE ADMINISTRATION OF JUSTICE BY SOMEBODY WHO VALIDLY PLED GUILTY, IS NOT SAYING THEY'RE INNOCENT WHO IS, THEREFORE, GOING TO BE, HAVE NOBODY WHO REMEMBERS THE OTHER SIDE OF THE STORY.
>> I GUESS WHAT THE COURT SAID SOMEONE WHO VALIDLY PLED GUILTY, AND THAT'S FUNDAMENTALLY NOT WHAT WE HAVE HERE.
THESE ARE PEOPLE WHO DID NOT VALIDLY PLEAD GUILTY --
>> WELL, HAVE YOU ASSERTED YOUR CLIENT'S INNOCENT?
I DON'T KNOW WHAT YOUR CRIME IS.
HAS HE PLEADED INNOCENT?
>> THAT'S NOT IN THE RECORD.
WHAT'S IN THE RECORD IS THAT THIS IS, THIS IS A DEFENDANT WHO HAD VIRTUALLY AUTOMATIC AND CLEAR DEPORTATION CONSEQUENCES AND, INDEED, WAS IN DEPORTATION PROCEEDINGS AT THE TIME THAT HE FILED THE MOTION.
AND OFTENTIMES THAT'S WHAT TRIGGERS THE BELL BECAUSE THAT'S WHEN PEOPLE LEARN THIS.
BUT IF THE BOTTOM --

>> IS THERE A PUBLICATION OR
LIST OF OFFENSES IN FLORIDA LAW
THAT CLASSIFY OR QUALIFY FOR
MANDATORY DEPORTATION THAT CAN
ASSIST THESE PUBLIC DEFENDERS IN
REALIZING THAT WHAT HIS CLIENT
IS ABOUT TO PLEAD TO WILL
SUBJECT HIM OR HER TO --
>> ABSOLUTELY.
IT'S ALL IN TITLE 8 OF THE
UNITED STATES CODE, AND IT
DEFINES VERY CLEARLY WHAT ARE
INADMISSIBLE, WHAT RENDERS A
NONCITIZEN INADMISSIBLE AND WHAT
RENDERS A NON--
>> WELL, PERHAPS AN IMMIGRATION
LAWYER WHO'S AN EXPERT IN THE
AREA CAN COMPILE THE FLORIDA
CRIMES IN THIS STATE THAT WOULD
QUALIFY AS A MANDATORY
DEPORTATION AND CIRCULATE THOSE
SO LAWYERS CAN HAVE THEM.
>> I THINK THAT THAT KIND OF
THING SHOULD HAVE BEEN GOING ON,
IN FACT, HAS BEEN GOING ON, AND
PADILLA STATES ABSOLUTELY NEEDS
TO GO ON.
CRIMINAL DEFENSE ATTORNEYS NEED
TO BE SUFFICIENTLY FAMILIAR WITH
THE IMMIGRATION CODE TO BE ABLE
TO ADVISE THEIR CLIENT THAT THIS
PARTICULAR PLEA WILL RENDER YOU
DEPORTABLE SO THAT THE DEFENDANT
CAN MAKE THAT KNOWING AND
INTELLIGENT DECISION.
>> COUNSEL, YOU HAVE EXHAUSTED
YOUR TIME.
>> THANK YOU.
>> MAY IT PLEASE THE COURT --
>> MS. DAVENPORT, LET ME ASK YOU
THIS, BECAUSE THIS CASE STRUCK
ME AS EVEN MORE LIKE PADILLA
BECAUSE WASN'T MR. DIAZ
BASICALLY TOLD THAT IF WE COULD
GET A WITHHOLD OF ADJUDICATION
OR SOMETHING THAT WOULD SOLVE
YOUR DEPORTATION PROBLEMS?
>> THAT'S WHAT HE ALLEGES HE WAS
TOLD, YES.
>> OKAY.
ALL RIGHT.
IS THAT MISADVICE?
>> THAT WOULD BE MISADVICE.
>> OKAY.
SO THIS CASE REALLY, IN MY MIND,

FALLS SQUARELY WITHIN THE
PARAMETERS OF PADILLA.
>> HERE'S WHY IT'S DIFFERENT
FROM PADILLA.
THAT'S THE ONLY THING PADILLA
HEARD ABOUT DEPORTATION WAS,
DON'T WORRY ABOUT IT.
THIS PERSON WAS TOLD UNDER OATH
I UNDERSTAND --
>> ALL RIGHT.
>> -- THAT THIS CAN BE USED AND
I AM AT RISK OF DEPORTATION.
AND LET ME GET BACK TO WHY
THAT'S ACCURATE, AND THE ONLY
POSSIBLE ADVICE HE CAN REALLY BE
GIVEN.
I UNDERSTAND THAT THERE'S THIS
MANDATORY DEPORTATION, AND RIGHT
NOW IT'S MY UNDERSTANDING THAT
THIS ADMINISTRATION IS GOING
AFTER PEOPLE WHO COMMIT CRIMES.
THAT'S WHERE THEY'RE TARGETING
THEIR RESOURCES.
>> AND THIS ONE REALLY IS AN
AGGRAVATED CRIME.
SEE, IT'S A BURGLARY AND
AGGRAVATED ASSAULT.
>> RIGHT.
SO THE IMMIGRATION SPECIALISTS
REPRESENTING HIM NOW SAY THAT'S
AN AGGRAVATED FELONY.
I DON'T KNOW.
I'M NOT AN IMMIGRATION LAWYER.
THEY SAY IT IS, I HAVE NO REASON
TO DOUBT THAT.
THE POINT IS IT'S NOT -- THIS
ADMINISTRATION IS GOING AFTER
PEOPLE WHO COMMIT CRIMES, AND
MAYBE THAT'S HOW MR. DIAZ GOT
CAUGHT UP IN THAT NET.
THIS ADMINISTRATION, WILL THE
NEXT ADMINISTRATION DO THAT?
WE HAVE NO IDEA.
>> SO IT'S ACTUALLY IN
IMMIGRATION PROCEEDINGS NOW,
MR. DIAZ?
>> THAT'S WHAT HE ALLEGES, YES.
MR. HERNANDEZ WAS NOT.
>> WHETHER SOMEONE'S ADJUDICATED
OR NOT ADJUDICATED HAS NO
SIGNIFICANCE IN THE IMMIGRATION
WORLD?
>> ACCORDING TO THE IMMIGRATION
SPECIALISTS HERE, YOU CAN STILL
BE DEPORTED.

>> I'VE GOT TO TELL YOU, I WAS
ON THE CRIMINAL BENCH FOR FIVE
YEARS, AND THAT'S A MAJOR
MISCONCEPTION AMONG CRIMINAL
DEFENSE LAWYERS.
THEY FEEL THAT IF THERE'S A
WITHHOLD, THAT SOMEHOW
IMMIGRATION WILL NOT PURSUE
THAT.
>> RIGHT.
AND I DON'T KNOW THE ANSWER.
AGAIN, FROM THEIR CASE LAW IT
SOUNDS LIKE THAT IS, IS
INACCURATE, AND WE CERTAINLY
CAN'T CONTRADICT THEIR OPINION
THAT THAT IS INACCURATE.
AND WE DON'T KNOW IF THAT'S WHAT
HE WAS REALLY TOLD.
AGAIN, WE'RE GOING ON
ALLEGATIONS IN A PLEADING.
WE HAVEN'T HAD A HEARING.
BUT UNLIKE MR. PADILLA, MR. DIAZ
WAS TOLD BY THE TRIAL COURT THAT
THE PLEA CAN BE USED IN
DEPORTATION PROCEEDINGS AFTER
EVERYBODY KNEW WE WERE GOING TO
WITHHOLD ADJUDICATION, IT CAN BE
USED AGAINST HIM --
>> BUT IT WOULD BE PRETTY
CONFUSING IF HIS LAWYERS SAID IT
CAN'T BE, AND I HAVEN'T HAD THE
BENEFIT OF JUSTICE LABARGA'S
EXPERIENCE, BUT MY SENSES ABOUT
HOW THESE PLEAS WORK ESPECIALLY
IF THERE'S ONE AFTER ANOTHER IS
THAT THEY MAY BE IN A BIT OF A
FOG WHEN THEY'RE LISTENING TO
THE JUDGE.
AND SO YOU REALLY WANT TO HAVE
THE LAWYER AS THE BACKUP.
BUT LET'S GO BACK TO THIS
RETROACTIVITY ISSUE.
>> OKAY.
>> BECAUSE REALLY AND TRULY I
THINK THAT UNDER PADILLA YOUR
ARGUMENT THAT A MAIN SUBJECT TO
DEPORTATION IS IN A MANDATORY
DEPORTATION OFFENSE IS PROBABLY
NOT GOING TO BE ENOUGH FOR THE
TRIAL LAWYER TO ESCAPE AN
ARGUMENT OF DEFICIENCY.
I THINK YOUR BETTER ARGUMENT,
REALLY, IS THE WIT ANALYSIS.
TELL ME HONESTLY, FIRST OF ALL,
ARE WE TALKING ABOUT AN

EVOLUTIONARY REFINEMENT OR A
CHANGE OF FUNDAMENTAL
SIGNIFICANCE?
>> WE'RE TALKING ABOUT AN
EVOLUTIONARY REFINEMENT.
>> AND IT'S HARD FOR ME TO THINK
IT IS THAT SEEING THAT WE SAID
IN GENEVRA THAT THERE IS NO
INEFFECTIVE ASSISTANCE OF
COUNSEL, AND WE SAID THESE WERE
COLLATERAL CONSEQUENCES, AND NOW
THE U.S. SUPREME COURT IS
SAYING, NOPE, THERE'S NO SUCH --
YOU KNOW, WE HAVE NEVER APPLIED
A DIRECT COLLATERAL.
WE ARE TALKING ABOUT SERIOUS
CONSEQUENCES.
I MEAN, FOR 14 YEARS I'VE
RELIED -- NOT WHETHER I'VE
AGREED OR NOT -- ON THE DIRECT
COLLATERAL CONSEQUENCE.
THEY'RE SAYING, NOPE, IT'S A NEW
DAY.
AND I -- SO IF -- BUT IF WE
DECIDE IT'S EVOLUTIONARY
REFINEMENT, THEN THERE IS NO
RETROACTIVITY ANALYSIS?
IS THAT THE -- SO, IF IT'S
NOT --
>> NO, EVOLUTIONARY REFINEMENT
WOULD BE ONE OF THE THREE
FACTORS IN CONSIDERING WHETHER
IT'S A DEVELOPMENT OF
FUNDAMENTAL SIGNIFICANCE.
>> OKAY.
SO IT'S AN EVOLUTIONARY
REFINEMENT, BUT THEN THE NEXT
QUESTION IS, IS IT A FUNDAMENTAL
SIGNIFICANCE?
>> EVOLUTIONARY REFINEMENT IS
ONE OF THE FACTORS IN ANALYZING
WHETHER IT'S OF FUNDAMENTAL
SIGNIFICANCE.
>> WELL, CAN YOU REALLY -- TO
ME -- SO DOES THE STATE CONCEDE
OR AGREE THAT THIS IS A
FUNDAMENTAL SIGNIFICANCE THAT IT
GOES TO THE ESSENCE -- NOPE,
THEY DON'T?
>> NO.
FUNDAMENTAL SIGNIFICANCE IS THE
BIG PICTURE, THE THREE FACTORS
GO INTO THAT.
BUT HERE'S WHY WE DON'T CONCEDE
THAT IT'S EVEN AN EVOLUTIONARY

REFINEMENT OR WHY WE DON'T
CONCEDE IT'S NOT AN EVOLUTIONARY
REFINEMENT.
BECAUSE GENEVRA WASN'T THE END
OF THIS.
THE NEXT YEAR WE SAID, OKAY,
TRIAL COUNSEL ISN'T OBLIGATED TO
BECOME AN IMMIGRATION LAWYER AND
TELL THEIR CLIENTS THE DETAILS
OF THIS.
BUT YOU KNOW WHAT?
WE'RE GOING TO HAVE THE TRIAL
JUDGES GO IN THERE AND MAKE SURE
THESE GUYS ARE AWARE THAT THE
RISK IS OUT THERE.
AND ALL OF A SUDDEN IT CHANGES
WHO HAS TO TELL THEM.
>> EXCEPT THAT, AND I'VE ALWAYS
THOUGHT IT WAS IRONIC THAT WE
WERE HAVING THE SAME PLEA
COLLOQUY UP IN THE PANHANDLE,
YOU KNOW, THEY DON'T ASK WHETHER
SOMEONE IS AN AMERICAN CITIZEN
OR NOT, THEY GO WHETHER OR NOT
YOU ARE, HERE IT IS.
SO FOR 98% -- I'M JUST GIVING A
PERCENTAGE, I HAVE NO IDEA -- OF
THE CRIMINAL DEFENDANTS, THEY
ARE AMERICAN CITIZENS.
SO THAT GOES OVER THEIR, THEIR
HEAD.
I GUESS WE DON'T ASK THE
QUESTION, WELL, ARE YOU AN
AMERICAN CITIZEN BECAUSE MAYBE
THE CRIMINAL DEFENSE LAWYERS
DON'T WANT THAT SIGNAL --
>> EXACTLY.
>> SO WE HAVE THE SAME COLLOQUY
IN PENSACOLA AS WE DO IN
MIAMI-DADE.
AS A PRACTICAL MATTER,
THEREFORE, WHAT YOU CALL THE
GENERIC ONE BECOMES ALMOST LIKE
ONE OF THOSE, YOU KNOW, GIVE
YOUR CAR TO SOMEBODY, AND THEY
SAY THEY'RE NOT RESPONSIBLE.
IT KIND OF JUST GOES OVER YOU.
SO IT SEEMS THAT'S WHY IT'S
UNIQUELY APPROPRIATE FOR THE
TRIAL LAWYER TO ASK THE
QUESTION, FIRST OF ALL, ARE
YOU -- ATTORNEY/CLIENT
PRIVILEGE, ARE YOU A CITIZEN,
AND IF THEY'RE NOT, NOW YOU'RE
GOING TO START TO HAVE SOME

FURTHER QUESTIONS ASKED.
>> RIGHT.
>> IT SEEMS THE ISSUE IF YOU HAVE LIVED IN THIS COUNTRY AND YOU ARE GOING TO BE DEPORTED OR PRESUMPTIVELY DEPORTED AS A RESULT OF THE PLEA, THAT GOES TO THE ESSENCE OF WHETHER YOU ARE GOING TO WANT TO TAKE THIS PLEA OR NOT.
AND I GUESS I HAVE TROUBLE THINKING THIS IS LIKE JUST BECAUSE WE GAVE THAT COLLOQUY THAT SOMEHOW IT CHANGES THE SIGNIFICANCE OF WHAT HAPPENED IN, YOU KNOW, WHAT THE PADILLA CASE IS ABOUT.
>> WELL, FIRST OF ALL, AND AGAIN, THIS GOES BACK TO THE MERITS.
INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT IF YOU'RE DEFICIENT, BOOM, WE'RE DONE.
THERE IS A PREJUDICE ASPECT TO THIS TOO.
AND FOR THEM TO DEMONSTRATE PREJUDICE, THEY HAVE TO SHOW BUT FOR COUNSEL'S MISADVICE OR IN HERNANDEZ'S CASE BUT FOR COUNSEL'S SILENCE ON THIS ISSUE, I WOULDN'T HAVE ENTERED THIS PLEA, I WOULD HAVE GONE TO TRIAL, AND THAT WOULD HAVE BEEN A RATIONAL DECISION BASED ON THE FACTS THEY HAD, THE EVIDENCE THEY HAD, THE SENTENCE THAT WAS OFFERED.
AND HERE'S WHY THEY CAN NEVER SHOW THIS IN FLORIDA AND WHY PADILLA SHOULDN'T BE --
>> I FEEL LIKE YOU'RE GOING BACK TO, LIKE, GOING FORWARD IF COLLOQUY IS GIVEN THAT THERE WON'T BE INEFFECTIVE ASSISTANCE, AND I WISH YOU WOULD JUST STAY ON THE RETROACTIVITY PART OF WHY WE SHOULDN'T GIVE IT RETROACTIVE EFFECT.
>> OKAY.
LET ME GO BACK TO THE RETROACTIVITY.
IT'S TIED TOGETHER IN THE SENSE OF AN EVOLUTIONARY REFINEMENT.
THE DEFENDANTS IN FLORIDA WERE NEVER COMPLETELY IN THE DARK

LIKE MR. PADILLA WAS.
SINCE 1989 THE DEFENDANTS IN
FLORIDA, INCLUDING MR. DIAZ,
WERE TOLD BY THE TRIAL COURT
THAT THERE IS A RISK.
NOW, WHETHER UNDER PADILLA
THAT'S SUFFICIENT, CURRENTLY
THERE'S DEBATE ABOUT THAT, BUT
BE THAT AS IT MAY, NOW INSTEAD
OF GENEVRA WHERE WE SAID COUNSEL
DOESN'T HAVE TO TALK ABOUT THIS,
NOW THEY DO, BUT THE
INFORMATION'S GOING TO COME FROM
COUNSEL RATHER THAN JUST FROM
THE TRIAL COURT, THAT'S THE
CHANGE IN THE LAW AFTER PADILLA,
AND THAT'S CLEARLY AN
EVOLUTIONARY REFINEMENT.
IT'S IN FLORIDA BECAUSE WE WERE
ALREADY TELLING THEM SOMETHING
WHETHER THAT WAS SUFFICIENT, WE
WOULD SUBMIT IT WAS, BUT IT'S
CLEARLY, YOU KNOW, WE'VE TAKEN
ANOTHER PROCEDURAL PROTECTION.
COUNSEL NEEDS TO GO FURTHER.
SO THAT'S AN EVOLUTIONARY
REFINEMENT.
SO THAT'S THE FIRST FACTOR THAT
SHOWS THIS IS NOT A DEVELOPMENT
OF FUNDAMENTAL SIGNIFICANCE AS
THAT TERM HAS BEEN DEFINED BY
THIS COURT.
>> WHAT ABOUT THE PIECE ON THE
AFFIRMATIVE MISADVICE?
UNDER FLORIDA LAW BEFORE
PADILLA, WOULD THAT STATE A
CLAIM FOR INEFFECTIVE ASSISTANCE
OF COUNSEL?
>> NO.
BECAUSE IT'S AFFIRMATIVE
MISADVICE ABOUT WHAT WE DEEM TO
BE A COLLATERAL CONSEQUENCE, AND
THERE WAS NO DUTY TO GIVE ADVICE
ABOUT THAT.
THERE IS NO CASE OUT OF THIS
COURT SAYING AFFIRMATIVE
MISADVICE ON WHETHER OR NOT
YOU'RE GOING TO GET YOUR
DRIVER'S LICENSE IS DEFICIENT
PERFORMANCE BECAUSE IT'S OUTSIDE
THE SCOPE.
IN FACT, THE ONLY LAW WE HAD
HERE WAS GENEVRA WHERE THEY SAID
HE DIDN'T TELL ME ABOUT THIS, HE
HAD A DUTY TO.

AND THIS COURT SAID WE'RE NOT
GOING TO HAVE THOSE COMING UP,
YOU ONLY HAVE TO BE EFFECTIVE AS
TO THESE DIRECT CONSEQUENCES.
OKAY?
SO THIS IS THE FIST TIME THAT A
COURT HAS SAID COUNSEL CAN
PERFORM DEFICIENTLY IN FLORIDA
BY NOT TALKING ABOUT IMMIGRATION
CONSEQUENCES.
THAT'S AN EVOLUTIONARY
REFINEMENT.
THE SECOND FACTOR IS THE EXTENT
OF RELIANCE ON THE OLD RULE.
THIS RULE HAS BEEN IN PLACE
SINCE 1989, AND THAT'S A LONG
TIME THAT THIS COURT HAS ALLOWED
THESE CASES TO GO FORWARD.
THERE'S, YOU KNOW, WE DON'T HAVE
STATISTICS.
I DON'T KNOW HOW WE COULD
POSSIBLY COME UP WITH
STATISTICS, BUT JUST FROM A
COMMON SENSE UNDERSTANDING OF
HOW THINGS WORK AND THE NATURE
OF THE PEOPLE IN FLORIDA,
THERE'S A LOT OF ALIENS HERE,
YOU KNOW, THAT WAS A LONG TIME
TO RELY ON THIS RULE.
WE'RE TALKING ABOUT A LOT OF
CASES.
>> REALLY, AND I APPRECIATE YOUR
REPRESENTING THE ATTORNEY
GENERAL'S OFFICE FOR THE ENTIRE
STATE ON THIS.
JUSTICE STEVENS, IN HIS MAJORITY
OPINION, TALKED ABOUT HIS ONLY,
YOU KNOW, IF THERE'S 100% CASES
AND THIS IS HOW MANY ARE GUILTY
PLEAS AND HABEAS ONLY COME UP
WITH A CERTAIN PERCENTAGE, DO WE
HAVE NO IDEA?
WHEN WE HELD HAGUES, WE HAD THE
HAGUES CASES, WE HAD -- WELL,
MAYBE WE DIDN'T HAVE AN IDEA
WHAT WE WERE TALKING ABOUT
BECAUSE WE WERE TALKING ABOUT
ALMOST EVERY CONVICTION, BUT
HERE WE'VE GOT PADILLA'S BEEN
AROUND FOR TWO YEARS.
NOW, THAT DOESN'T MEAN EVERYBODY
THAT MUST HAVE THOUGHT THEY HAD
RELIEF FILED --
>> RIGHT.
>> BUT DO WE KNOW JUST IN CASES

IN THE DISTRICT COURTS OF APPEAL
THAT'S BEEN TWO YEARS WHETHER
WE'RE TALKING ABOUT THOUSANDS OR
HUNDREDS OR UNDER A HUNDRED?
AND IF THAT IS ALL, THE IDEA
THAT FLOODGATES FOR
RETROACTIVITY IS A FINITE NUMBER
WHEN WE'RE TALKING ABOUT
SOMEBODY'S ABILITY TO STAY IN
THIS COUNTRY, IT'S OF, YOU KNOW,
COULDN'T BE OF BIGGER IMPORTANCE
YOU KNOW, DEPENDING ON WHERE
THEY WOULD BE DEPORTED TO.
SO SHOULD WE KNOW THAT, OR IS
THERE A WAY TO FIND OUT SOME
ESTIMATE OF THE NUMBERS?
>> THE ONLY THING THAT I COULD
FIND OUT EASILY WAS AS OF LAST
WEEK THERE WERE 47 DISTRICT
COURT OPINIONS MENTIONING
PADILLA.
>> NOW, YOU WOULD NOT -- IF WE
WERE TALKING ABOUT UNDER A
HUNDRED CASES, WOULD YOU THINK
THAT THAT IS -- I GUESS THE
THIRD ONE IS THE EFFECT --
>> EFFECT ON ADMINISTRATION.
>> THAT UNDER A HUNDRED CASES OF
PEOPLE THAT EITHER WERE
MISINFORMED OR DID NOT REALIZE
THEY WERE SUBJECT TO MANDATORY
DEPORTATION.
BECAUSE, AGAIN, IF IT'S NOT
MANDATORY, THEN THE "MAY" MAY BE
ENOUGH.
THAT WE HAVE IF IT WAS UNDER A
HUNDRED, THEN THAT WOULD BE THE
KIND OF EFFECT ON THE
ADMINISTRATION OF JUSTICE THAT
WOULD MILITATE AGAINST
RETROACTIVE APPLICATION?
>> IF WE COULD REALISTICALLY SAY
THAT THIS WOULD EFFECT UNDER A
HUNDRED DEFENDANTS, I WOULD SAY
THAT THAT FACTOR WOULD WEIGH IN
FAVOR OF A FINDING OF
RETROACTIVITY.
BUT LET ME SAY THIS --
>> AND I APPRECIATE, YOU KNOW, I
APPRECIATE THE STATE'S CANDOR
AND YOUR CANDOR IN THIS BECAUSE
WE'RE, YOU KNOW, THIS IS A
DIFFICULT BALANCING THAT WE'RE
DOING, AND WE'RE DOING IT AS A
RESULT OF THE U.S. SUPREME COURT

MAKING A CHANGE IN THE LAW, NOT
THIS COURT MAKING A CHANGE.
>> RIGHT.
SO THERE'S 47 DISTRICT COURT
OPINIONS.
THAT DOESN'T COUNT THE PCA, THAT
DOESN'T ACCOUNT THE CASES THAT
HAVE BEEN STAYED BEFORE
BRIEFING.
WE'RE TALKING 47 OPINIONS AS OF
LAST WEEK.
I WOULD SUBMIT THAT IS THE TIP
OF THE ICEBERG.
WHEN YOU'RE TALKING ABOUT
APPLYING THIS RETROACTIVELY,
THAT WOULD MEAN 50 YEARS AGO I
ENTERED A PLEA, I'M STILL IN
THIS COUNTRY, YOU KNOW WHAT?
I CAN BRING THAT CLAIM.
BECAUSE --
>> BUT YOU KNOW WHAT?
IF YOU'VE BEEN IN THE COUNTRY
FOR 50 YEARS AND YOU PUT YOUR
NAME UP IN A CASE, YOU KNOW, IF
I WERE THAT PERSON, I MIGHT
THINK, YOU KNOW, I'VE BEEN IN
THIS COUNTRY 50 YEARS, I'VE
GOT -- I THINK I'M ALMOST TO THE
POINT WHERE I MAY LIVE MY LIFE
HERE, I DON'T THINK I WANT TO
HAVE MY NAME IN LIGHTS IN A
DISTRICT COURT OF APPEAL
OPINION --
>> WELL --
>> -- SO THAT I'M THE NEXT IN
LINE FOR THE INS TO COME GET ME.
>> THAT'S TRUE, AND CAN I JUST
SAY THAT ILLUSTRATES THE
DIFFICULT OF PREDICTING WHETHER
OR NOT SOMEBODY IS GOING TO BE
DEPORTED, THIS MANDATORY
DEPORTATION.
IT ILLUSTRATES WHY THE RISK THAT
WE TALK ABOUT IN THE PLEA
COLLOQUY IS REALLY ACCURATE,
BECAUSE SOME PEOPLE HAVE BEEN
HERE 50 YEARS --
>> WELL, WE'RE GOING TO KEEP ON
GOING AROUND, BUT
MANDATORILY-DEPORTABLE OFFENSES,
I THINK THE U.S. SUPREME COURT
WAS VERY CLEAR THAT YOU REALLY
NEED TO TELL THE PERSON AS THE
LAWYER GOING FORWARD --
>> RIGHT.

>> -- THAT THIS IS A
PRESUMPTIVELY MANDATORY,
DEPORTABLE OFFENSE.
I CANNOT TELL YOU WHEN YOU WILL
BE DEPORTED OR IF --
>> OR IF.
>> IT IS A RISK THAT YOU HAVE TO
DECIDE IN IN DECIDING WHETHER TO
PLEAD GUILTY.
>> I WOULD AGREE THAT IS EXACTLY
WHAT COUNSEL IS REQUIRED TO DO
NOW, AND I WOULD SUBMIT THAT'S
ALSO WHAT THE TRIAL COURT HAS
BEEN DOING IN FLORIDA FOR 20
YEARS.
BUT GOING BACK TO THE WIT
QUESTION, THE EFFECT ON THE
ADMINISTRATION OF JUDGES -- OF
JUSTICE, I'M SORRY.
THERE ARE, YOU KNOW, WHEN YOU
CONSIDER THE NUMBER OF PLEAS IN
FLORIDA, THE NUMBER OF ALIENS
WHO LIVE IN FLORIDA, THE NUMBER
OF PEOPLE WHO ARE POTENTIALLY
DEPORTABLE AS THE STATUTE STANDS
TODAY, I MEAN, WE ARE TALKING
ABOUT A MYRIAD OF CASES.
I DON'T HAVE THE STATISTICS, I
DON'T KNOW HOW I COULD, HOW WE
COULD ACCUMULATE THAT STATISTIC.
BUT JUST FROM A COMMON SENSE
PERSPECTIVE IF YOU OPEN THIS UP,
EVERY ONE, UNLESS THIS COURT
HOLDS THAT PREJUDICE CANNOT BE
DEMONSTRATED WHICH WOULD
ELIMINATE THIS PADILLA PROBLEM,
EVERY ONE OF THESE GUYS WOULD BE
ABLE TO BRING A PLEADING, AND
THEY WOULD HAVE TO HAVE AN
EVIDENTIARY HEARING.
WE'D HAVE TO TRACK DOWN COUNSEL,
COUNSEL IS NOT GOING TO REMEMBER
REALISTICALLY WHAT THEY TOLD
THIS CLIENT WHO ENTERED A PLEA
TO 20 YEARS AGO.
WE'RE NOT GOING TO BE ABLE TO
PROSECUTE THEM AGAIN IF THEY
INVALIDATE THE PLEAS.
THIS IS STALE CLAIMS.
THIS IS EXACTLY WHAT THIS COURT
ALREADY ADDRESSED IN GREEN WHEN
WE TRIED THIS LITTLE EXPERIMENT
OF HAVING THESE GUYS COME UP
YEARS LATER AFTER THEIR PLEAS
AND WE'LL ADDRESS IT THEN, AND

THAT WAS PLEA COLLOQUIES WHICH
IS A RECORD.
HERE WE HAVE, WE'RE COUNTING ON
THEIR REMEMBERING BY DEFENSE
COUNSEL.
SO THAT'S A LOT MORE ONEROUS TO
THE STATE.
NOBODY'S GOING TO REMEMBER THESE
THINGS.
IN GREEN THIS COURT SAID THAT IS
COMPLETELY UNWORKABLE.
WE NEED TO HAVE THIS WITHIN TWO
YEARS SO THAT WE HAVE A WINDOW,
AND THAT'S EXACTLY WHAT SHOULD
HAPPEN HERE.
THIS SHOULD NOT BE APPLIED
RETROACTIVELY.
ALL THREE FACTORS WEIGH
AGAINST -- ALL THREE OF THE WIT
FACTORS WEIGH AGAINST THE
FINDING THAT THIS WAS OF
DEVELOPMENTAL SIGNIFICANCE.
IF YOU LOOK AT THE CASES WHERE
THIS COURT IS FROM THAT WIT DOES
NOT REQUIRE RETROACTIVITY, IT'S
BIG CASES, IT'S IMPORTANT CASES,
AND WE AREN'T SAYING WHAT IS
HAPPENING TO THIS DEFENDANT
ISN'T IMPORTANT TO THIS
DEFENDANT.
WE'RE TALKING ABOUT CRAWFORD,
PRENDI, RING.
THOSE ARE BIG DECISIONS.
THEY ARE IMPORTANT TO CERTAIN
DEFENDANTS, BUT UNDER WIT WE
DON'T APPLY THEM RETROACTIVELY.
IN A PERFECT WORLD, EVERYBODY
WOULD HAVE THE DECISION THAT
COMES OUT IF IT HELPS THEM, THEY
WOULD BE ABLE TO BRING THAT, BUT
THAT IS NOT REALISTIC.
YOU HAVE TO BALANCE THIS.
YOU HAVE TO CONSIDER THAT THERE
IS A NEED FOR FINALITY IN THESE
CASES, YOU HAVE TO CONSIDER THAT
IT DOESN'T DO DEFENDANTS ANY
GOOD IF THEIR CASES AREN'T FINAL
EITHER.
IT'S NOT GOOD FOR THE VICTIMS,
AND IT'S REALLY NOT GOOD FOR THE
SYSTEM.
SO THERE IS AN INTEREST IN
FINALITY THAT OVERRIDES THE
INTERESTS OF AN INDIVIDUAL
DEFENDANT.

HE KEEPS SAYING THAT THE PLEA
WAS INVOLUNTARY.
AGAIN, WE HAD A PLEA COLLOQUY
WHERE HE KNEW ABOUT THIS.
WE WOULD SUBMIT THEY CAN'T EVEN
SHOW INEFFECTIVE ASSISTANCE OF
COUNSEL BECAUSE THEY CAN'T SHOW
PREJUDICE.
BUT BE THAT AS IT MAY, IT
CERTAINLY SHOULD NOT APPLY
RETROACTIVELY.
GENEVRA CONTROLLED THIS CASE,
COUNSEL WAS NOT REQUIRED TO GIVE
ADVICE, PADILLA DOES NOT APPLY
TO HIM, IT WAS TEN YEARS AGO.
IT'S TIME FOR THIS TO BE FINAL.
THANK YOU.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
I'M SORRY, COUNSEL, YOU HAD
EXHAUSTED YOUR TIME.
I'M SORRY, YOU'VE EXHAUSTED YOUR
TIME.
I'M SORRY, YOU HAD EXHAUSTED
YOUR TIME.
>> I'M SORRY.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENT, AND THE COURT WILL NOW
STAND IN RECESS FOR TEN MINUTES.
>> ALL RISE.