

>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
PLEASE, BE SEATED.
>> NOW COME TO THE THIRD CASE ON
OUR DOCKET TODAY, IT IS CASTANO
V. THE STATE OF FLORIDA.
>> GOOD MORNING, YOUR HONORS.
MAY IT PLEASE THE COURT, MY NAME
IS H. MANUEL HERNANDEZ, AND I
REPRESENT --
>> MR. HERNANDEZ, AS YOU START
OFF, IN GOING THROUGH THE
BRIEFING AND TRYING TO BE SURE I
REALLY UNDERSTOOD WHAT, TRYING
TO UNDERSTAND THIS CASE IT
SEEMED A LITTLE DIFFERENT
BECAUSE OF THE PRESCHOOL, THE
CARETAKING SITUATION AND THE
CHILD, THE CHILD NEGLECT CHARGE.
IS IT AGREED WITH ALL THE
PARTIES, THE STATE AND THE
DEFENDANT, THAT THIS IMMIGRATION
STATUS OF THIS PERSON IS SUCH
THAT IT FALLS INTO THE PADILLA
CATEGORY?
>> I'M SORRY, YOUR HONOR, I
DON'T UNDERSTAND THE QUESTION.
CAN YOU SAY IT AGAIN?
>> WELL, BECAUSE THIS IS A
DIFFERENT CHARGE, CONVICTION OF
CHILD NEGLECT, IT WAS A FELONY
AS I UNDERSTAND IT, CORRECT?
>> YES.
>> IS THIS CHARGE THAT SHE WAS
FACING WITHIN THE SAME CATEGORY
OF DEPORTABLE --
>> YES --
>> -- BEHAVIOR --
>> ABSOLUTELY.
>> AND WITH HER MARRIAGE STATUS
AS IT WAS, IS SHE IN THIS
CATEGORY?
>> YES.
>> OKAY.
IT JUST WAS NOT AS CLEAR TO ME
AS THE OTHERS WE'VE DISCUSSED
THIS MORNING, SO I WANTED TO
MAKE SURE --
>> IN MY BRIEF AND IN MY REPLY
BRIEF I'VE LAID OUT CASES,
MARTINEZ, IT'S AN 11TH CIRCUIT
CASE WHICH SPECIFICALLY
ADDRESSES THE CASE.
IT'S A FEDERAL APPENDIX CASE,
BUT IT'S UNDER THE VERY SAME

STATUTE CASTA~~T~~O --

>> WHILE YOU HAVEN'T STARTED
YET, THIS ALSO SEEMS TO BE IN A
DIFFERENT POSTURE BECAUSE SHE
PLED GUILTY IN MARCH 2009, AND
SHE MOVED TO SET ASIDE HER PLEA
BASED ON AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM IN
NOVEMBER.

SO SHE WAS WITHIN THE TWO YEARS.
PADILLA CAME OUT BEFORE THE
ORDER.

SO I WOULD ASK, I'M GOING TO ASK
THE STATE THIS, I DON'T THINK
THIS IS A RETROACTIVITY ISSUE
BECAUSE SHE RAISED AN
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM TIMELY, AND
PADILLA WAS PENDING, YOU KNOW,
IT'S A PIPELINE CASE.

SO WE DON'T HAVE A RETROACTIVITY
ISSUE HERE, CORRECT?

>> UM, IN PADILLA THE DECISION
CAME OUT, I BELIEVE, MARCH
31ST -- IF I'M NOT MISTAKEN --
OF 2010, AND THE JUDGE'S ORDER
DENYING WAS MARCH 10TH, 2010 --
>> YEAH.

BUT THE ISSUE IS -- THIS IS A
FRIENDLY QUESTION FOR YOU.
WHEN THERE'S A PIPELINE CASE
WHICH IS, IT WAS PLED THAT
COUNSEL WAS INEFFECTIVE BASED ON
NOT --

>> YES.

>> DESPITE GENEVRA.

WERE YOU HER ATTORNEY?

>> NO.

>> HER ATTORNEY FILED A MOTION
TO SET IT ASIDE ONCE SHE FOUND
OUT --

>> WHETHER --

>> -- DEPORTATION.

>> YES.

>> ALL RIGHT.

SO WE DON'T HAVE THE
RETROACTIVITY ISSUE HERE.
BUT ISN'T THIS DIFFERENT BECAUSE
WHAT DOES THE RECORD REFLECT
ABOUT WHAT HER ATTORNEY TOLD
HER?

>> SHE WAS CHARGED WITH THE
CHILD FELONY CHILD NEGLECT, AND
SHE CLAIMED HER INNOCENCE,
ALTHOUGH I DON'T BELIEVE WHEN

YOU ASKED QUESTIONS IN THE
PREVIOUS CASE REGARDING
INNOCENCE THE SUPREME COURT --
AND I THINK THE CASE LAW IS
CLEAR -- I'VE CITED IN MY BRIEF
ON PAGE 19 KILMER V. MORRISON.
GUILT OR INNOCENCE REALLY ISN'T
THE CONTROLLING FACTORS ON THESE
PARTICULAR ISSUES OF RIGHT TO
INEFFECTIVE --

>> NO, I UNDERSTAND THAT.
I WAS RAISING IT MORE ABOUT
WHETHER THERE'S AN INJUSTICE AND
WHEN YOU GO BACK 20 YEARS.

>> YES.

AND I'LL ANSWER YOUR QUESTION,
BUT SHE, SHE FILED WITHIN EIGHT
MONTHS AFTER THE PLEA AND
SENTENCE.

SHE IMMEDIATELY FILED AN APPEAL.
THAT'S WHEN I CAME INTO THE
CASE.

WHEN THE APPEAL WAS LOST, WE
IMMEDIATELY ASKED FOR -- ONCE WE
ASKED THE FIFTH DCA TO CORRECT
ITS OPINION, TO CLEAR UP THE
"MAY" AND THE "IS" ISSUE
REQUIRED BY PADILLA AND THEY
DENIED THAT REQUEST, THEN WE
FILED INVOKING THIS COURT'S
JURISDICTION.

SO THE RECORD IS VERY CLEAR THAT
MS. CASTAÑO HAS PROSECUTED THIS
CASE AND MOVED AS QUICKLY AS
POSSIBLE, AND I WOULD
RESPECTFULLY SUBMIT THAT SHOWS
HER BELIEF IN HER INNOCENCE AND
THE FACT SHE DIDN'T REALIZE THE
IMMIGRATION CONSEQUENCES.

>> WELL, WHAT ABOUT -- I THOUGHT
YOUR QUESTION -- I THOUGHT
JUSTICE PARIENTE'S QUESTION
REALLY WAS, WASN'T YOUR CLIENT
TOLD BY THE ATTORNEY THAT SHE
ACTUALLY SHOULD CONSULT WITH AN
IMMIGRATION ATTORNEY --

>> YES.

>> -- ON THIS CASE?

>> AND THAT'S NOT ENOUGH.

>> YEAH.

>> ON PADILLA, THAT'S NOT ENOUGH
TO JUST SAY GO TALK TO AN
IMMIGRATION LAWYER.

WHEN THE CONSEQUENCES ARE CLEAR,
TRULY CLEAR --

>> BUT THAT MAKES THIS CASE
SOMEWHAT DIFFERENT FROM THESE
OTHER CASES?
I MEAN, SHE -- HE OBVIOUSLY TOLD
HER THERE POSSIBLY WERE
IMMIGRATION CONSEQUENCES.
HE MAY HAVE SAID I DON'T KNOW
THAT THE IMMIGRATION LAWS, YOU
SHOULD CONSULT WITH AN
IMMIGRATION ATTORNEY.
SEEMS TO ME THAT DOES MAKE A
DIFFERENCE IN THIS CASE AS TO
WHETHER OR NOT, YOU KNOW,
COUNSEL AT LEAST ATTEMPTED TO
GIVE HER SOME INFORMATION ABOUT
IMMIGRATION.
>> WELL, THE INFORMATION IN THIS
CASE, IT IS DIFFERENT TO THE
EXTENT THE COURT HAS A FULL
RECORD.
YOU HAVE A TRANSCRIPT OF A FULL
HEARING THAT WAS HELD, AND YOU
HAVE THE TESTIMONY OF
MS. CASTA~~TO~~ DENYING SHE WAS TOLD
ANYTHING ABOUT IMMIGRATION
CONSEQUENCES, THAT SHE WAS
SUMMONED TO COURT, DIDN'T KNOW
WHY SHE WAS GOING TO COURT, AND
THAT'S UNREBUTTED.
AND WHEN SHE SHOWS UP, SHE GOT
THERE EARLY.
HER ATTORNEY SHOWS UP LATE, AT
THE LAST MINUTE, GIVES HER THIS
PLEA FORM TO SIGN --
>> SO IS THIS A PLEA OF
CONVENIENCE?
DID SHE PLEAD GUILTY OR DID SHE
PLEAD NO CONTEST, OR WHAT WAS
THIS?
>> ONE SECOND, JUDGE.
I JUST -- SHE PLED GUILTY.
>> CAN I GO BACK TO WHAT JUSTICE
LEWIS BEGAN WITH?
ON THIS WHOLE QUESTION OF
WHETHER THIS PARTICULAR CRIME
FALLS UNDER THE MANDATORY
DEPORTATION CATEGORY?
>> YES, YOUR HONOR.
>> IN THE IMMIGRATION WORLD,
THIS SO-CALLED MANDATORY
DEPORTATION, IS THERE ANY
LEEWAY, ANY DISCRETION AT ALL?
BECAUSE WE HAVE HERE A LADY WHO
WAS RUNNING, I BELIEVE, A
DAYCARE CENTER.

SHE HAD A BUSINESS, SOMETHING WE WANT PEOPLE TO DO IN THIS COUNTRY, HAVE A BUSINESS. AND SHE HAD A BUNCH OF CHILDREN, AND I BELIEVE THE ALLEGATION IS THAT ONE OF THE CHILDREN GOT AWAY.

I MEAN, THAT HARDLY SEEMS TO ME TO BE THE TYPE OF CRIME THAT WE WOULD INCLUDE IN THIS LIST OF MANDATORY DEPORTATION BECAUSE THEY CREATE THIS DANGER TO THIS COUNTRY.

IS THERE ANY ROOM, ANY MANEUVERING ROOM AT ALL IN THE IMMIGRATION WORLD?

>> THERE USED TO BE.

PADILLA TALKS ABOUT IT.

I THINK THIS COURT AND GREEN AND PERT HAS RECOGNIZED THE DRASTIC CONSEQUENCES TO IMMIGRATION STATUS THESE DAYS FOR CONVICTION.

AND I CITED IN MY BRIEF THE VARIOUS CASES.

THE REALITY IS, NO.

THE STATUTES NOW, IF YOU FALL WITHIN ONE OF THESE STATUTORY CATEGORIES THAT YOU'RE SUBJECT TO DEPORTATION, IT'S PRETTY MUCH AUTOMATIC.

NOW, WHETHER THEY GET TO YOU TODAY, THIS YEAR, NEXT YEAR LIKE JUSTICE PARIENTE TALKED ABOUT, YOU HAVE THE SORT OF DAMOCLES HUNG OVER YOU.

THE BIGGER PROBLEM ASIDE FROM THE FACT THAT UNDER IMMIGRATION LAW THERE'S NO DISCRETION, JUDGES DON'T HAVE DISCRETION.

IN THE OLD DAYS, YOU COULD GO TO A FEDERAL JUDGE, YOU CAN GO TO THE 11TH CIRCUIT AND TRY AND LOOK AT THE FACTS AS YOU JUST, JUSTICE LABARGA, DISCUSSED.

AND PERHAPS, YOU KNOW, TRY TO TEMPER THE IMMIGRATION LAWS WITH JUSTICE AND TRY TO BE FAIR DEPENDING ON FACTS OF THE CASE. CONGRESS TOOK THAT POWER AWAY FROM THEM COMPLETELY NOW.

THEY DON'T HAVE IT.

AND THAT'S WHY THIS IS SUCH AN IMPORTANT CASE AND WHY THIS IS SO IMPORTANT FOR THIS COURT TO

HAVE TO DEAL WITH.
THEY DON'T HAVE IT.
SO YOU GET CONVICTED, AND NOW
THEY GO BACK TOO.
IT'S NOT ONLY, YOU KNOW, WE'RE
TALKING ABOUT RETROACTIVITY.
THIS LAW APPLIES, THE
IMMIGRATION LAW APPLIES
RETROACTIVE.
SO BACK 20 YEARS AGO YOU GOT IN
TROUBLE WHEN YOU WERE A KID FOR
SELLING A FEW PILLS, BACK THEN
THERE WAS NO PROBLEM.
YOU KNOW, YOU WEREN'T GOING TO
GET DEPORTED FOR THAT.
NOW IT IS.
AND WHEN IMMIGRATION GETS TO YOU
AND YOU'VE GOT THAT CONVICTION,
THEY GO AFTER THOSE PEOPLE, AND
THEY DEPORT THEM FOR SOMETHING
THEY DID 20 YEARS AGO.
>> HOW WOULD THAT WORK?
BECAUSE NO LAWYER COULD HAVE
ADVISED THEM ABOUT THE FUTURE
ACTION OF CONGRESS THAT WAS
GOING TO BE RETROACTIVE.
I MEAN, HOW --
>> THAT'S THE IMMIGRATION LAW AS
IT STANDS IN THIS COUNTRY TODAY
IN TERMS OF --
>> BUT I'M ASKING HOW WOULD THAT
FIGURE INTO OUR ANALYSIS OF THE
INEFFECTIVE ASSISTANCE OF
COUNSEL?
EVEN IF WE APPLIED ALL OF THIS
RETROACTIVELY, WE APPLIED
PADILLA RETROACTIVELY, HOW WOULD
IT DEAL WITH CIRCUMSTANCES LIKE
THAT THAT AROSE BEFORE THOSE
CHANGES TO THE LAW, I THINK,
WERE IN '97 --
>> IT WOULD, IT WOULD GIVE YOU
THE OPPORTUNITY OR A JUDGE THE
OPPORTUNITY TO DO WHAT FEDERAL
JUDGES USED TO DO, LOOK AT THE
INDIVIDUAL CASES AND CONSIDER
THAT FACTOR.
AND CONSIDER THE FACTOR THAT 20
YEARS AGO THAT PARTICULAR
DEFENDANT WITH THAT PARTICULAR
CRIME WOULD HAVE BEEN ABLE TO
GET SOME TYPE OF A RELIEF FROM A
FEDERAL JUDGE.
AND NOW 20 YEARS LATER, 30 YEARS
LATER HAS A FULL FAMILY HERE,

HAS CHILDREN IN SCHOOL, THEY WANT TO DEPORT THEM TO A COUNTRY THEY'VE NEVER BEEN IN SINCE HE WAS A CHILD.

IT'S A TRAGIC SITUATION THAT WE'RE IN.

IT'S UNFAIR, IT'S UNJUST, BUT THAT'S WHERE WE'RE AT.

>> WHAT HE'S REALLY TALKING ABOUT IS WHETHER THIS, YOUR CLIENT MS. CASTA~~T~~O, IS ENTITLED TO RELIEF.

NOW, YOU SAID THERE WAS A FULL EVIDENTIARY HEARING --

>> YES.

>> DID THE JUDGE NOT REACH THE ISSUE OF THE STRICKLAND CLAIM? I MEAN, IN OTHER WORDS, YOU SAID SHE, SHE TESTIFIED THAT HER ATTORNEY DIDN'T TELL HER ANYTHING.

DID HE RESOLVE OR SHE RESOLVE THE CREDIBILITY OF THAT TESTIMONY?

>> THE JUDGE IN HER ORDER BASICALLY RELIED ALMOST EXCLUSIVELY ON THE, WHAT HAD TRANSPIRED AT THE CHANGE OF PLEA HEARING ON --

>> COLLOQUY.

>> 317--

>> SO, IN THIS CASE --

>> AND I APOLOGIZE FOR INTERRUPTING YOU.

THERE IS SOME LANGUAGE THAT'S CONFUSING AT THE END SAYING NOTHING HAPPENING AT THE HEARING CHANGES MY POSITION, BUT SHE'S TALKING ABOUT A DIFFERENT ISSUE, ABOUT THE ADVISEMENT ABOUT DCF CONSEQUENCES.

>> ISN'T THAT -- I WAS JUST GOING TO ASK YOU THAT.

SHE OWNED AND OPERATED A DAYCARE CENTER, SO SHE'S CHARGED WITH CHILD NEGLECT.

DOESN'T SHE END UP UNDER THE STATE RULES LOSING HER LICENSE FOR HAVING A FELONY CHILD NEGLECT?

>> SHE DID, AND THEN SHE GOT IT BACK.

AS I RECALL, SHE GOT IT BACK. THAT WAS ONE OF THE ISSUES -- NOT BEFORE THIS COURT, BUT THAT

WAS ONE OF THE ISSUES SHE RAISED
ON A 3850.

NOBODY TOLD HER THAT.

AND SHE THOUGHT -- GOING BACK TO
YOUR ORIGINAL QUESTION, JUSTICE
PARIENTE, THE LAWYER DID SAY GO
TALK TO AN IMMIGRATION LAWYER,
AND HE GAVE HER BASICALLY GOSSIP
ON THE STREET.

I HEAR THAT EVERYBODY'S BEING
DEPORTED THESE DAYS.

THAT'S WHAT HE TESTIFIED,
BASICALLY, IS WHAT HE TOLD HER.

>> IS THIS A PRIVATELY-RETAINED
LAWYER?

>> YES, YOUR HONOR.

BUT HE ALSO SAID, AT LEAST
ACCORDING TO HER TESTIMONY AND
IT WAS UNREBUTTED, HE ALSO TOLD
HER SHE HAD NOTHING TO WORRY
ABOUT, ALL SHE WAS GOING TO DO
WAS PAY SOME MONEY, AND
EVERYTHING WOULD BE JUST FINE.
HE SAID HER CONCERN WAS NOT
GOING TO JAIL, OKAY?

AND, AGAIN, BASED ON THE FACT OF
HOW QUICKLY SHE'S MOVED AND HOW
SHE'S GONE SITTING FOR THE
HIGHEST COURT IN THE STATE AND
SHE'S WANTED TO PROSECUTE THIS,
YOU KNOW, MAKES VERY CLEAR SHE
DID NOT FULLY UNDERSTAND.

>> ON MANDATORY CHARGES ARE
THERE UNDER IMMIGRATION LAW
ANYTHING THAT WOULD CHANGE THE
MANDATORY NATURE OF THOSE
OFFENSES?

FOR EXAMPLE, DIFFERENCES IN
STATUS OR DIFFERENT
CLASSIFICATIONS SOMEHOW IN
IMMIGRATION LAW, OR IS THERE
ANYTHING THAT COULD CHANGE THAT?

>> I DON'T BELIEVE IN TERMS OF
MS. CASTAÑO, NO.

NO.

IT'S MY UNDERSTANDING, NO.

I'M A CRIMINAL DEFENSE LAWYER,
YOU KNOW, AND I'M NOT AN
IMMIGRATION LAWYER, BUT MY
UNDERSTANDING AS FAR AS
MS. CASTAÑO, NO, THERE IS
NOTHING.

>> WHAT ABOUT GENERALLY?

>> GENERALLY, THERE ARE CERTAIN
CASES AND CERTAIN SITUATIONS

DEPENDING HOW LONG YOU'VE BEEN
IN THE COUNTRY, BUT WHEN IT
COMES TO AGGRAVATED FELONIES AND
THESE MANDATORY DEPORTATION
STATUTES, MY UNDERSTANDING IS
THE ANSWER IS, NO.

IF YOU FALL UNDER THAT, IF
YOU'RE SELLING DRUGS, YOU'RE
DEPORTED.

I, AS A CRIMINAL DEFENSE
LAWYER -- AND I APPRECIATE THE
STATE'S GREAT CONCERN THAT I'M
NOT GOING TO BE ABLE TO FIGURE
THIS OUT -- BUT I KNOW AND HAVE
KNOWN FOR MANY YEARS THAT IF,
YOU KNOW, YOU GET CONVICTED OF A
CRIME OF SELLING DRUGS, YOU'RE
GONE.

I DON'T CARE WHO YOU GET AS YOUR
IMMIGRATION LAWYER --

>> THERE'S NO DIFFERENCE, THE
STATUS OF THE DEFENDANTS THAT
COULD SOMEHOW ALTER THAT IN ANY
WAY?

>> NO.

THE FACT THAT YOU'VE BEEN -- AND
I'VE HAD CLIENTS THAT HAVE BEEN
HERE FOR 30 YEARS AND BEEN
DEPORTED DEPENDING ON THEIR
CONVICTION.

THEIR WIFE'S AMERICAN, THEIR
DAUGHTERS AND SONS ARE
AMERICANS, AND THIS WAS THEIR
FIRST CRIMINAL CONVICTION.

THEY'RE GONE.

IF IT'S AN AGGRAVATED FELONY,
OVER \$10,000 AND A FRAUD, A SEX
OFFENSE, YOU KNOW, THERE ARE ALL
TYPES OF THESE STATUTES.

AS I SAY THAT, IT'S NOT, IT'S
NOT SOMETHING THAT CRIMINAL
DEFENSE LAWYERS ARE NOT GOING TO
BE ABLE TO DEAL WITH.

AND, AGAIN, I STAND BEFORE YOU,
AGAIN, AS A CRIMINAL DEFENSE
LAWYER FROM THE BOTTOM OF MY
FLAT FEET TO THE TOP OF MY
POINTY HEAD.

THAT'S WHAT I DO EVERY DAY.

SO WHEN I LOOK AT THIS
PARTICULAR SITUATION AND WHAT
PADILLA CITED, IT CAUSES ME SOME
CONCERN.

WE LEARN.

WE HAVE TO KNOW MINIMUM

MANDATORIES.

IF YOU LOOK AT THE STATUTE,
THAT'S A COMPLICATED STATUTE.
THERE ARE ALL TYPES OF OTHER
CONSEQUENCES WE HAVE TO KNOW.
THIS IS WHAT LAWYERS DO.
THERE'LL BE TRAINING, THERE'LL
BE, AS JUSTICE LABARGA TALKED
ABOUT, THERE ALREADY IS.
THERE ARE ALREADY SEMINARS WHERE
YOU GET HANDOUTS.

THESE ARE THESE OFFENSES.
IMMIGRATION LAWYERS COME IN.
>> SO WHAT DO YOU TELL YOUR
CLIENTS, THE CLIENT WHO IS
CHARGED WITH, SAY, SELLING LSD,
AND HE'S OFFERED A ONE-YEAR
PROBATION AND A WITHHOLD, WAIVE
COST OF SUPERVISION, WAIVE
EVERYTHING, JUST PLEAD.
HE'S OFFERED THAT AT A BOND
ARRAIGNMENT, WHAT DO YOU TELL
HIM?

>> I'VE TOLD HIM, I HAD A GUY
FACING 25 YEARS MINIMUM
MANDATORY, AND THEY OFFERED HIM
PROBATION.
PLEAD GUILTY, GET OUT TODAY.
AND I TOLD HIM, YOU CAN DO THAT,
YOU GET OUT.
YOU'RE GOING TO BE DEPORTED.
AND HE STUCK AROUND FOR FIVE OR
SIX YEARS AND CALLED ME, HEY,
THEY WANT TO DEPORT ME.
WELL, THAT'S WHAT I TOLD YOU,
AND YOU HAD TO MAKE A DECISION.
IN THAT CASE WE CAN WIN THE
TRIAL.

>> BUT DO YOU MAKE THAT, DO YOU
GIVE THAT ADVICE BASED ON THE
FACT THAT YOU KNOW THAT SELLING
LSD IS A MANDATORY DEPORTABLE?
WHAT ABOUT THE CASES THAT FALL
IN THE CRACK THAT YOU DON'T
KNOW?

WHAT DO YOU TELL --

>> ADDRESSED THAT AND SAID IN
THAT CASE THE WARNING THAT WE
USE NOW THAT YOU MAY IS
SUFFICIENT.

PADILLA AND THE SUPREME COURT
RECOGNIZE THERE ARE GOING TO BE
CASES.
AND THAT'S WHERE IT BECOMES
DICEY.

AND I DON'T KNOW MANDATORY.
MANDATORY, NO MATTER HOW LONG
THAT LIST IS, CAN BE DETERMINED,
AND WE CAN LEARN IT RELATIVELY
QUICK.

CRIMINAL DEFENSE LAWYERS, YOU
KNOW, CAN BE FAIRLY BRIGHT AT
TIMES.

BUT IT'S THAT DICEY PART WHERE
WE DON'T KNOW, THAT'S WHEN IT
GETS -- AND THAT'S WHEN YOU HAVE
TO GO TO AN IMMIGRATION LAWYER.
SO MY ADVICE TO EVERYBODY IS,
YOU KNOW, IF I KNOW
AGGRAVATED -- YOU STOLE A
MILLION DOLLARS FROM THE
GOVERNMENT, YOU'RE DEPORTED.
IT'S OVER, OKAY?

IF YOU GET CONVICTED OF THIS
WHETHER WE GO TO TRIAL, YOU
PLEAD GUILTY, YOU'RE GOING TO BE
DEPORTED.

YOU KNOW, I TELL THEM THAT.
AND I TELL THEM, GO TALK TO AN
IMMIGRATION LAWYER JUST TO MAKE
SURE.

BUT IF THEY DON'T -- AND HALF
THE TIME THEY DON'T -- THEY HAVE
TO MAKE THAT DECISION.

AND THE REALITY IS MANY OF THEM
ARE GOING TO ENTER THEIR PLEA
BECAUSE THEY WANT TO AVOID JAIL.

>> BUT HERE LET ME JUST MAKE
SURE, WITH MS. CASTAÑO -- I
THINK YOU ANSWERED THIS -- THAT
THE CHILD NEGLECT, A
THIRD-DEGREE FELONY, THERE'S NO
QUESTION IN THE RECORD THAT
THAT'S A MANDATORY DEPORTABLE
OFFENSE?

>> AGAIN, PADILLA WAS NOT
DECIDED AT THE TIME OF THAT
PARTICULAR HEARING.

UM, YET, I MEAN, THERE'S NO
QUESTION IN THE RECORD.

HE'S PUT, I BELIEVE, IN THE
PETITION -- MR. RODRIGUEZ WHO
REPRESENTED HER -- PUT THE
SUBJECT THAT SHE'S NOW SUBJECT
TO MANDATORY DEPORTATION.

>> WELL, YOU'RE BEING VERY
FORTHRIGHT, THAT'S AN EQUIVOCAL
ANSWER.

>> THAT'S THE FIRST QUESTION I
ASKED OUT OF THE BOX.

>> THERE'S NO QUESTION SHE'S DEPORTABLE.

>> WELL, THEN WHY DON'T YOU --

>> THAT'S A QUESTION OF FEDERAL LAWS.

THAT'S, IF MY UNDERSTANDING OF THE QUESTION, IT'S A QUESTION OF FEDERAL LAW WHETHER SHE IS SUBJECT TO DEPORTATION IN THE SAME WAY THAT THE DEFENDANT IN PADILLA WAS SUBJECTED TO DEPORTATION.

I MEAN, YOU KNOW, THIS IS SOMETHING THAT'S MANDATORY. THERE'S, IF THERE'S ANY OUT, IT'S VERY LIMITED, AND IF THEY DECIDE THEY WANT TO DEPORT YOU, IF THEY GET AROUND TO YOU, YOU'RE GONE.

IS SHE IN THAT SAME CATEGORY?

>> SHE IS --

>> UNDER FEDERAL?

DEPORTATION IN THE SAME WAY THAT THE DEFENDANT AND PADILLA WAS SUBJECTED TO DEPORTATION. THIS IS SOMETHING THAT IS MANDATORY.

THERE IS, IF THERE IS ANY OUT, IT IS VERY LIMITED AND IF THEY DECIDE THEY WANTED DEPORTATION, IF THEY GET AROUND TO YOU, YOU'RE GONE.

IS SHE IN THAT SAME CATEGORY?

>> SHE IS.

>> UNDER FEDERAL LAW.

>> MANDATORY DEPORTABLE UNDER FEDERAL LAW AND MY DUTY UNDER PADILLA AS A CRIMINAL DEFENSE LAWYER IS TO TELL HER THAT. YOU HAVE TO --

>> IF WE GO AND LOOK, AT THE FEDERAL LAW WE'LL FIND THIS DEFENSE IN THE CATEGORY WHERE THE SAME CATEGORY THAT PADILLA DEFENSE IS IN?

SAME LIST OF CATEGORIES.

>> YES. 8 USC, 1252,

PAGE 27 OF MY BRIEF I CITED THE STATUTE THAT SAYS IT. I CITED THE MARTINEZ DECISION AND SORAM DECISION, MATTER OF SORAM IMMIGRATION DECISION AND MARTINEZ VERSUS ATTORNEY GENERAL. THAT IS PAGE 29 OF MY BRIEF.

AND U.S. VERSUS ATTORNEY
GENERAL IS RIGHT ON POINT.
IN TERMS OF SHE IS
DEPORTABLE.
SHE BELIEVED IN HER INNOCENCE.
I'M RUNNING OUT OF TIME.
>> YOU ARE.
>> SHE BELIEVED IN HER
INNOCENCE.
SHE DID NOT WANT TO, I BELIEVE
THAT IS UNREBUTTED IN RECORD.
SHE WAS NOT GIVEN REAL ADVICE
IN TERMS OF IMMIGRATION
CONSEQUENCES.
SHE WAS GIVEN LEGAL GOSSIP AND
CONFUSING, AND THAT'S IMPORTANT,
CONFUSING ADVICE IN TERMS OF
NOTHING'S GOING TO HAPPEN AND
YOU JUST PAY SOME MONEY.
SHE MOVED QUICKLY.
WAS DETERMINED. SHE GOT A NEW
LAWYER AND CAME BEFORE THE
COURT AND CERTAINLY FELL WITHIN
THE TWO YEARS.
I HAVE 30 SECONDS TO COME BACK
UP I GUESS.
TRY TO SNEAK IN 40 SECONDS.
>> MAY IT PLEASE THE COURT.
FIRST OF ALL, IN MY OPINION
THIS DOES REQUIRE THAT PADILLA
BE FOUND RETROACTIVELY.
THE CONVICTION WAS FINAL.
>> I THOUGHT OF THIS.
AND I KNOW WE HAVE CASES ON IT.
>> YEAH.
>> WHEN PADILLA FILED HIS
MOTION FOR POST-CONVICTION
RELIEF WHICH IS WITHIN TWO
YEARS PRESUMABLY OF THIS
CONVICTION.
>> RIGHT.
>> PADILLA HADN'T BEEN DECIDED.
>> RIGHT.
>> WHEN WE CALLED THESE
PIPELINES LINE CASES, WHEN,
THIS WOMAN, MISS CASTANO
FILED HER MOTION WITHIN A FEW
MONTHS AFTER HER CONVICTION,
SHE RAISED THE IDENTICAL
ISSUES.
SHE JUST WAS OTHERWISE BOUND BY
GINEBRA.
>> RIGHT.
>> THEREFORE, BEFORE THE
JUDGE'S ORDER EVEN CAME OUT AND

BEFORE IT WENT ON APPEAL
PADILLA HAD BEEN DECIDED.
MY BELIEF IS, AND AGAIN, THAT
IS NOT A RETROACTIVITY ISSUE.
THAT IS THE LAW THAT WAS, FIRST
OF ALL THE JUDGE COULD HAVE
APPLIED THAT LAW BUT CERTAINLY
THE FIFTH DISTRICT WOULD HAVE
BEEN APPROPRIATE IF THEY HADN'T
DECIDED ON THE OTHER ISSUE IN
APPLYING PADILLA.
I DON'T SEE HOW THAT, SHE'S IN
THE EXACT SITUATION AS
MR.^ PADILLA IS.
>> WELL, THIS WASN'T ARGUED BY
THE DEFENDANT SO I'M NOT
POSITIVE ABOUT THIS BUT --
>> THINK ABOUT IT
LOGICALLY.
>> MY UNDERSTANDING IS PIPELINE
CASES ARE CASES THAT AREN'T
FINAL YET AND HER CASE WAS
FINAL.
>> SO IT WAS DECIDED, THE
APPEAL --
>> THERE WASN'T A DIRECT
APPEAL.
IT WAS A POST-CONVICTION
MOTION.
>> YOU WOULDN'T RAISE AN
INEFFECTIVE ASSISTANCE OF
COUNSEL CASE FOR A CONVICTION.
NOTHING CHANGED ABOUT THE
VALIDITY OF THE CONVICTION.
WHAT CHANGED WAS THE LAW ON
POST-CONVICTION RELIEF, NOT ON
THE TRIAL OR THE GUILTY PLEA.
>> RIGHT.
>> YOU SEE WHAT I'M SAYING?
>> I SEE WHAT YOU'RE SAYING AND
I APOLOGIZE, I'M NOT SURE WHAT
THE ANSWER IS.
I -- PIPELINE CASES WERE CASES
THAT WERE NOT FINAL AND --
>> INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM FOR
POST-CONVICTION BUT I THINK
THIS IS, THIS WOULD BE, IF SHE
IS REALLY IN THE PIPELINE,
REALLY NOT WOULD BE A FAIR
THING TO NOT, NOT TO, IF
PADILLA, SHOULD APPLY.
CAN YOU TELL US --
>> IF SHE'S IN THE PIPELINE,
I'M NOT SURE SHE IS IN THE

PIPELINE AS DEFINED BUT I'M NOT
SURE SHE IS NOT EITHER.
THIS WASN'T ARGUED EITHER.

>> WHAT WOULD BE YOUR ARGUMENT
AS TO, IS THIS ONE OF THESE
MANDATORY DEFENSES OR IS THIS
DIFFERENT?

>> THIS AGAIN ILLUSTRATES HOW
DIFFICULT IMMIGRATION LAW IS.
THIS IS SUPPOSEDLY A CRIME OF
MORAL TURPITUDE, A CRIME OF
MORAL TURPITUDE IS DEPORTATION
PROCEEDINGS ARE INITIATED THEN
THERE IS NO ESCAPE FROM THAT.
IF THEY'RE INITIATED.

>> AGAIN, NOW WE TALK ABOUT HOW
DIFFICULT THIS IS, AND I THINK
THAT, IT WAS, IT WAS VERY
ILLUMINATING TO HEAR FROM
MR. ^HERNANDEZ.

WE, MAYBE WE DO EXPECT A LOT
OUT OF CRIMINAL DEFENSE
ATTORNEYS AND SOME OF THEM GET
PAID THE BIG BUCKS AND SOME OF
THEM DON'T.

AND WE DON'T MAKE A DISTINCTION
ABOUT INEFFECTIVE ASSISTANCE OF
COUNSEL.

WE ALL GET THE SAME WHETHER
THEY GIVE IT TO THE HIGHEST
PAID, YOU KNOW, THE ATTORNEYS
AS FAR AS 100,000 AND, THIS AND
NEXT WEEK.

IT IS, IT IS, IT WOULD BE A SAD
FACT IF MISS CASTANO, SHE
WAS -- THIS ONE SEEMS TO
BE, TO BE AT LEAST HAVE TO GO
BACK AND LOOK AT WHETHER THERE
IS SUFFICIENCY.

THIS SEEMS TO BE BASED ON, BUT
THEN ON THE IS THERE A,
UNDERMINES OUR CONFIDENCE, WELL
THAT IS NOT EVEN QUITE HOW YOU
SAY IT, WOULD YOU NOT HAVE
PLEADED IF YOU KNEW THAT SHE
COULD BE DEPORTED.

AND SHE SAID, SHE WOULD NOT
PLEAD IT.

SHE SAID I WAS INNOCENT.
HOW DO WE NOT GRANT HER RELIEF
IN LIGHT OF PADILLA?

>> BECAUSE WE DON'T JUST GRANT
WE REMAND FOR A HEARING.

SHE HAD A HEARING.

>> DID THE JUDGE DECIDE THE

INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM?

>> YES AND REJECTED IT.

THEY DIDN'T REJECT IT BASED ON
GINEBRA AND THEY COULD HAVE.

I'M SURPRISED THEY DID IT.

IT IS INTERESTING WHEN

MR.^HERNANDEZ SAID WHAT HE TOLD
HER AND WHAT THE ATTORNEY
TESTIFIED HE TOLD HER ARE
ALMOST IDENTICAL.

THE ATTORNEY TESTIFIED HE IS
NOT A IMMIGRATION LAWYER BUT
HE HAD HEARD, IT WAS HIS
EDUCATED OPINION EVEN WITH THE
GOVERNMENT WAS ACTIVELY SEEKING
TO DEPORT.

THAT IS WHAT HE TESTIFIED HE
TOLD HER. HE ALSO --

>> QUESTION ABOUT WHAT DEFENSE
ATTORNEYS ARE GOING TO DO,
GOING IN.

YOU THINK IT IS, THAT IS A, I
MIGHT KNOW IF THE PERSON ON THE
STREET THAT INS IS GETTING
TOUGH, AND AN ATTORNEY IS
SAYING, NOT MY RESPONSIBILITY,
GO FIND SOMEBODY THAT KNOWS
THIS EVEN THOUGH I'M CHARGING
YOU?

THAT IS, THAT IS WHAT PADILLA
SAYS IS APPROPRIATE FOR AN
ATTORNEY WHEN IT IS A MANDATORY
DEPORTABLE OFFENSE TO SAY, I
HEAR ON THE STREET THAT THE
INS IS GETTING TOUGH?

>> AGAIN, WHAT IS A MANDATORY
DEPORTABLE OFFENSE?

AND I KNOW WE KEEP COMING BACK
TO THIS PREJUDICE CLAUSE.
BUT LET ME FINISH WHAT HE SAID.
HE SAID, I'M NOT AN IMMIGRATION
LAWYER.

IN OTHER WORDS THIS IS NOT MY
AREA OF EXPERTISE.

THIS IS COMPLICATED BY THE FACT
WHAT IS A CRIME OF MORAL
TURPITUDE IS NOT OBVIOUS TO ME.
YOU CAN LOOK AT IT AS THE KID
WAS WANDERING IN THE STREETS,
BIG DEAL.

YOU CAN LOOK AT IT AS CHILD
NEGLECT.

THAT'S A FELONY.

THAT REQUIRES SOME LEGAL

RESEARCH TO FIGURE THAT OUT.
THERE MIGHT NOT BE AN ANSWER IN
EVERY CASE.
NOW HE CITED CASES THAT SEEMED
LIKE THEY WERE RIGHT ON POINT.
SO IF THERE IS AN ANSWER IN
THIS CASE.
SO HE SAID, HE, --
>> WE'RE REALLY TALKING ABOUT
THIS CASE.
>> RIGHT.
>> WE'RE GOING TO HAVE TO, THIS
IS SOMETHING I CAN SEE
SEMINARS.
I CAN SEE MAYBE ALL KINDS OF
THINGS.
AND MAYBE THE, AT LEAST LIFT
THE MANDATORY DEPORTABLE
OFFENSES BUT WE'RE, AT THE
LEAST HERE SHOULDN'T IT GO
BACK FOR A EVIDENTIARY HEARING
OR A REWEIGH ON THE ,IN LIGHT OF
PADILLA?
>> WE ALREADY HAD A HEARING.
I'M, UNLIKE THE EARLIER CASES
ALL WE HAD WERE ALLEGATIONS.
SOMEBODY ALLEGED HE DIDN'T TELL
ME.
WE DON'T KNOW IF THAT ACTUALLY
HAPPENED.
BUT YOU CAN'T EVALUATE
DEFICIENT PERFORMANCE
WITHOUT --.
IN THIS CASE WE DON'T HAVE TO
ASSUME HER ALLEGATIONS ARE TRUE
BECAUSE WE HAD A HEARING ON
THIS ISSUE.
WHY THE TRIAL JUDGE ORDERED
THAT I DON'T UNDERSTAND.
YOU WOULD THINK THEY PROFFERED
GINEBRA.
THEY DIDN'T.
TRIAL JUDGE HAD A HEARING,
ASKED WHAT WAS SAID ABOUT
IMMIGRATION CONSEQUENCES.
THIS COUNSEL SAID ALMOST
EXACTLY WHAT MR.^HERNANDEZ WHAT
HE WOULD HAVE TOLD THIS PERSON.
YOU SHOULD CONSULT WITH AN
IMMIGRATION LAWYER.
THIS IS VERY COMPLICATED.
I HEAR WHAT YOUR CONCERN IS.
THEY'RE ACTIVELY SEEKING TO
DEPORT PEOPLE.
SHE WAS TOLD BY HER COUNSEL,

SHE IS NOT ONLY DEPORTABLE BUT
THEY'RE PROBABLY GOING TO COME
AFTER YOU FOR OFFENSES --
>> RIGHT.
>> SINCE YOU SAID IT RELATES TO
MORAL TURPITUDE PADILLA TALKS
ABOUT WHAT YOU CAN LOOK AT THE
FACE OF THE STATUTE TO SEE WHAT
IS A MANDATORY DEPORTABLE.
IF YOU CAN NOT LOOK AT THE FACE
OF THE STATUTE AND FIGURE THAT
OUT, IS A CLAIM FOR MORAL
TURPITUDE ONE IN WHICH IS
UNCLEAR, THEREFORE, YOU DON'T
HAVE TO GIVE THAT INSTRUCTION?
>> THAT'S EXACTLY RIGHT, YOUR
HONOR. MORAL TURPITUDE, WHAT THAT
MEANS GOES WELL BEYOND THE FACE
OF THE STATUTE.
>> WHAT WOULD HAVE TO DO TO
FIGURE THAT OUT?
>> HAVE TO DO RESEARCH AND CASE
LAW ON MORAL TURPITUDE AND TRY
TO FIND A CASE THAT LINED UP
FACTUALLY.
>> UNDER FEDERAL LAW OR FLORIDA
LAW?
>> FEDERAL LAW.
THIS IS A FEDERAL CASE.
IMMIGRATION IS FEDERAL MATTER.
HE ALL OF SUDDEN WOULD HAVE TO
START RESEARCH FEDERAL
CASES ON THIS ISSUE.
NOT APPARENT ON THE FACE OF
STATUTE.
YOU'RE EXACTLY RIGHT PADILLA
DREW THE DISTINCTION SAID YOU
DON'T HAVE TO GO FURTHER.
TELL THEM ABOUT THE RISK WHICH
IS EXACTLY WHAT HE DID.
IF ANYTHING HE WENT A STEP
FURTHER THAN THAT.
THE TRIAL COURT TOLD HER YOU
CAN BE DEPORTED.
GET BACK TO THE TRIAL COURT SO
THERE IS NO PREJUDICE.
BUT THE ATTORNEY HIMSELF HAS TO
FIND IT AT HEARING.
>> WHAT THE ATTORNEY SAID, EVEN
IF WE WERE TO DECIDE THAT THAT
IS SOMEHOW DEFICIENT, THAT
QUESTION, BUT IF WE DID DECIDE
THAT WOULDN'T THAT ALSO WEIGH
ON SCALES SCALES OF PREJUDICE?
>> EXACTLY.

>> ATTORNEYS SAY, THEY'RE
DEPORTING PEOPLE,
AGGRESSIVELY DEPORTING PEOPLE
OR SOMETHING ALONG THOSE LINES.
>> RIGHT.
>> SEEMS LIKE THAT IS ENOUGH,
THAT IS NOT JUST, WELL, YOU MAY
BE DEPORTED.
THAT IS MORE OF A WAKE-UP CALL
WOULD OUTWEIGH IN FAVOR
OF FINDING THERE WAS NO
PREJUDICE.
>> EXACTLY.
BECAUSE SHE HAS TO DEMONSTRATE,
BUT FOR COUNSEL'S MISADVICE, I
WOULD SUBMIT THERE IS NO
MISADVICE HERE.
APPARENTLY, SOME ASSERT THAT
UNDER PADILLA YOU HAVE TO USE
THE WORDS MANDATORY DEPORTATION
BUT LET ME SAY IF I'M A CLIENT
AND I HEAR MANDATORY
DEPORTATION, MY RESPONSE IS
GOING TO BE, WHAT DOES THAT
MEAN?
AND THE ANSWER IS, WELL, RIGHT
NOW THIS ADMINISTRATION, AS
THIS GUY TOLD MISS CASTANO,
IS ACTIVELY SEEKING TO
DEPORT PEOPLE EVEN WITH A
HOLD.
MISS CASTANO THEY COULD
TAKE OUT MORAL TURPITUDE AND
FIND IT -- THERE IS NO IPSO
FACTO CLAIM.
CONGRESS CAN CHANGE THE LAW.
CONGRESS CAN CHANGE ALLOCATION
OF RESOURCES.
THE PRESIDENT CAN CHANGE HOW
THEY'RE FOCUSING THE
IMMIGRATION ENFORCEMENT.
THEIR RELATIONSHIP WITH THEIR
COUNTRY.
>> MOST RESPECTFULLY, THIS
REALLY SEEMS YOU'RE TRYING TO
DEBATE THE PADILLA ISSUE AGAIN.
THAT IS NOT FOR US, WE, WELL
WHAT WE HAVE TO DO, YOU
UNDERSTAND THAT.
>> RIGHT.
>> IS READ THIS OPINION.
>> RIGHT.
>> AND APPLY IT TO OUR VERY,
TO, AS HUMANLY AS POSSIBLE, AS
BEST WE CAN.

>> RIGHT.
>> AND IT JUST DOESN'T GET INTO ALL THIS KIND OF STUFF, DOES IT?
>> WELL --
>> WHAT IT TELLS US IF A LAWYER LOOKS AT THE FEDERAL STATUTE AND THAT STATUTE SAYS THAT IT'S, AS I'M READING IT, SAYS IT IS MANDATORY THAT YOU BE DEPORTED BECAUSE IT IS IN THE STATUTE, IT DOESN'T SAY YOU GOT -- IF IT'S IN THERE, THEN THAT'S WHAT A LAWYER IS SUPPOSED TO DO.
IT COULD HAVE GONE INTO AND DID NOT, YOU HAVE TO READ ALL THE CASE LAW, YOU KNOW, AS A LAWYER, YOU THINK YOU WOULD ANYWAY, BUT DOESN'T SAY THAT. IT TALKS ABOUT CLEARLY ON THE FACE OF THE STATUTE, DOES IT NOT?
>> IT DOES BUT HERE'S THE CAVEAT.
NUMBER ONE, THE SITUATION THEY WERE FACED WITH, THAT IS THE ONLY INFORMATION HE HAD, WAS BLATANTLY INACCURATE, WHICH IS NOT THE CASE OF --
>> I UNDERSTAND ALL THAT.
>> HERE'S THE OTHER THING.
PADILLA DIDN'T HAVE IT SO I WOULD SUBMIT THE COURT IS SILENT ON WHAT HAPPENS IN A SITUATION LIKE FLORIDA WHERE WE ARE ALREADY TELLING THEM ABOUT THE RISK.
THE ONLY THINGS WE HAVE ON THAT, WE HAVE FOOTNOTE 15 WHERE THEY CITE OUR RULE WITH FAVOR AND SAY, THIS TELLS THEM ABOUT IT ALREADY.
SEE, WE'RE NOT GOING OUT ON A LIMB HERE.
THAT IS IN EFFECTIVE ASSISTANCE TOO.
SO WE HAVE THAT, BUT THEY ALSO HAVE, MISSOURI VERSUS FREY AND THERE IS LANGUAGE IN THAT CASE THAT TALKS ABOUT WHAT PADILLA SAID.
AND PARDON ME WHILE I READ IT.
IT SAYS PADILLA ILLUSTRATES WHERE CLAIMS OF INEFFECTIVE

ASSISTANCE CAN ARISE AFTER
CONVICTION IS ENTERED.
THAT IS TALKING ABOUT PLEA
BARGAINING DISCONTINUED BY
ESTABLISHING AT THE PLEA ENTRY,
PROCEEDINGS THAT THE DEFENDANT
HAS BEEN GIVEN PROPER ADVICE OR
IF THE ADVICE RECEIVED APPEARS
TO BE INADEQUATE TO REMEDY THAT
DEFICIENCY BEFORE THE PLEA IS
ACCEPTED AND CONVICTION
ENTERED.

THAT IS LANGUAGE TALKING ABOUT
HOW PADILLA IS GOING TO WORK,
HOW PLEA BARGAINS WORK AND THAT
CAME OUT AFTER PADILLA.

I WOULD SUBMIT THAT SUPPORTS
THE STATE'S POSITION THAT I CAN
FIX THIS IN A PLEA COLIQUY AT
LEAST AS FAR AS PREJUDICE.

>> LET ME ASK YOU ABOUT THIS
CASE.

>> OKAY.

>> THIS CASE YOU ALREADY HAVE
SAID, WE HAD EVIDENTIARY
HEARING ON IT.

>> YES.

>> WAS THE ARGUMENT MADE,
BECAUSE IT SEEMS TO ME NOW YOU
HAVE, MADE THE ARGUMENT THAT
SINCE THIS IS A MORAL TURPITUDE
IT ISN'T SO CLEAR ON THE FACE
OF THE STATUTE WHETHER OR NOT
THIS IS A MANDATORY
DEPORTATION.

THAT'S WHAT YOU'RE SAYING
TODAY, CORRECT?

>> YES.

>> WAS THAT THE ARGUMENT THAT
WAS MADE BEFORE THE TRIAL JUDGE
IN THE EVIDENTIARY HEARING?

>> WELL, THE TRIAL JUDGE DIDN'T
HAVE A BENEFIT OF PADILLA.

SO WE DIDN'T GET INTO WHAT IS,
MANDATORY DEPORTATION AND --

>> WAS THERE A REQUEST FOR
REHEARING AFTER PADILLA CAME
OUT?

>> NO.

>> PADILLA CAME OUT WHILE THIS
WAS STILL SPENDING, CORRECT?

>> YES.

>> AND SO --

>> IT WAS AFTER THE TRIAL
COURT'S ORDER BUT BEFORE THE

FIFTH DCA --

>> THERE WAS NO REQUEST FOR
ANYTHING, ANY KIND OF RELIEF,
ONCE PADILLA CAME OUT?

>> NO. AND, THEY, THEY

NEVER REQUESTED

IN THE FIFTH THAT THIS BE
REMANDED FOR ANOTHER HEARING.

>> BUT WHAT WOULD THE PURPOSE BE
OF ANOTHER HEARING?

BECAUSE WE ALREADY KNOW WHAT
COUNSEL TOLD THE DEFENDANT.

THAT'S WHY WE HAVE THESE
HEARINGS.

WHAT DID COUNSEL REALLY SAY?

>> FIRST OF ALL, WE HAVE THE
FIFTH DISTRICT OPINION.

THE FIFTH DISTRICT OPINION SAYS
THAT THIS COURT PREVIOUSLY

ALIGNED ITSELF WITH THE FOURTH
DISTRICT WHICH HELD THAT

PREJUDICE ARISING FROM

COUNSEL'S MISADVICE, REGARDING
IMMIGRATION CONSEQUENCES IS

CURED WHEN THE TRIAL COURT

GIVES THE DEPORTATION WARNING

IN FLORIDA RULES OF CIVIL

PROCEDURE DURING THE COLIQUY.

>> RIGHT.

>> IF WE DISAGREE WITH THAT AND
AGREE WITH THE HERNANDEZ

DECISION, OKAY?

THEN AS A MATTER OF FACT

PREJUDICE IS ISN'T ESTABLISHED.

AND WHAT I DON'T KNOW AND I

HAVE TO LOOK AT THE TRIAL

JUDGE'S ORDER IS THE JUDGE MADE

A CREDIBILITY FINDING AS TO THE

TRIAL LAWYER SAID HAPPENED AND

WHAT MISS CASTANO SAID

HAPPENED HAPPENED.

SO WAS THERE A CREDIBILITY

DETERMINATION MADE?

>> THERE WAS REJECTION OF THE

CLAIM AND THE STATEMENT THAT

NOTHING AT THE HEARING CHANGES

MY OPINION ON THIS ISSUE.

AND --

>> I GUESS EXPRESSLY.

>> SAID I BELIEVE THE ATTORNEY
AND NOT HER.

>> SO IT DOES SEEM TO ME AND

MAYBE THEY HAVE WAIVED THIS BY

NOT RAISING THE ISSUE THAT IT'S

PADILLA APPLIES BUT WHAT WE

EXPECT IN AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM
BECAUSE PREJUDICE IS A QUESTION
OF LAW AND FACT, IS THAT IF WE
HAVE A DISPUTE AS TO WHAT MISS
CASTANO WAS TOLD, AND THE
ATTORNEY SAYS, ONE THING AND
SHE SAYS ANOTHER, THAT IS WHAT
THE TRIAL JUDGE DOES IS RESOLVE
THAT DISPUTE.

>> RIGHT.

>> AND IT DOESN'T SEEM THAT
BECAUSE THE TRIAL JUDGE AND THE
MORE IMPORTANTLY THE FIFTH
DISTRICT RELIED ON THE PLEA
COLIQUY, AND AS HAVING, AS A
MATTER OF LAW, REFUTED
PREJUDICE.

>> WELL, THE FIFTH DISTRICT,
THE APPELLATE COURT WAS
REQUIRED TO AFFIRM THE TRIAL
COURT'S ORDER.

IF THERE WAS FACTUAL SUPPORT IN
THE RECORD.

SO UNLESS THE APPELLATE COURT
SAYS WE BELIEVE THE DEFENDANT
OVER THE ATTORNEY THEY CAN'T
REVERSE THAT FINDING.

>> THANK YOU.

THAT WOULD BE TRUE IF THAT'S
HOW THEY WERE DECIDING THE CASE
BUT I JUST READ FROM YOU, WHAT
THEY DECIDED IT BASED ON IS
THAT THEY ALIGNED THEMSELVES
WITH FLORES.

WE'RE HERE BECAUSE OF CONFLICT
WITH THE APPELLATE COURTS.

>> RIGHT.

>> IF YOU'RE THE STATE AND YOU
HAVE BEEN CONSISTENT YOU WOULD
LIKE US TO ANNOUNCE A RULE AS A
MATTER OF LAW THAT IF YOU GET
THE PLEA COLIQUY THAT SAYS YOU
MAY BE SUBJECT TO DEPORTATION
EVEN IN A CASE LIKE PADILLA
WHERE.

THAT'S WHAT YOU WANT?

>> THAT IS EXACTLY.

>> THAT'S WHAT THE FIFTH
DISTRICT RULED.

>> RIGHT.

>> BUT IF WE DECIDE THAT IT IS,
THAT PADILLA IS CLEAR THAT IF
IT IS MANDATORILY DEPORTABLE
MAY BE SUBJECT TO DEPORTATION,

IS NOT ENOUGH, THEN WE'VE GOT
TO GO BACK IN THIS CASE WE HAVE
TO GO BACK IN THIS CASE AND
SEE WHETHER THE JUDGE ACTUALLY
DID NOT, HAVING THE BENEFIT OF
PADILLA AT THE EVIDENTIARY
HEARING, NEEDS TO REWEIGH IT IN
LIGHT OF PADILLA.

>> WELL, NO. AND HERE'S WHY.
BECAUSE PADILLA, WHATEVER IT
SAYS ABOUT MANDATORY
DEPORTATION, ALSO SAYS WHERE IT
IS NOT CLEAR ON THE FACE OF THE
STATUTE, YOU HAVE TO TELL THEM
THERE'S A RISK.

SO WHATEVER WE DO WITH DRUG
OFFENSES, WHEN YOU HAVE A CRIME
LIKE THIS, WHICH IS A CRIME OF
MORAL TURPITUDE, THAT IS NOT
CLEAR ON THE FACE OF THE
STATUTE AND PADILLA ITSELF
SAYS, DEFERING TO JUSTICE ALITO
FRANKLY AND HIS CONCERNS ABOUT
DEFENSE LAWYERS BECOMING
IMMIGRATION LAWYERS, THEY SAY
IF IT'S NOT CLEAR OF COURSE
WE'RE NOT REQUIRING YOU TO GO
ABOVE AND BEYOND.
YOU HAVE TO TELL THEM ABOUT THE
RISK.

>> I THOUGHT YOU SAID THAT YOU
CONCEDED IN THIS CASE, IF,
SOMEBODY LOOKED AT THE LAW,
THERE'S A CASE CLEARLY ON POINT
OUT OF THE, --

>> 11th CIRCUIT.

>> 11th CIRCUIT.

>> THAT IS NOT THE FACE OF THE
STATUTE.

>> ARE YOU SAYING GOING FORWARD
THAT AN ATTORNEY FACED WITH
THIS CASE TOMORROW IS GOING TO
BE ABLE TO IGNORE THE 11th
CIRCUIT CASE SAY I HEAR ON THE
STREET THAT THIS IS OR ISN'T
AFFORDABLE?

>> I'M SAYING WHERE PADILLA
SAID, WHERE YOU HAVE TO GO
BEYOND THE FACE OF THE STATUTE
AND START TRYING TO FIGURE THIS
OUT, AND REMEMBER THIS IS
COMPLICATED FURTHER BECAUSE
SHE TOLD
HIM SHE WAS MARRIED TO AN
AMERICAN CITIZEN. THIS IS

PADILLA, NOT ME, SAYS ON THE
FACE OF THE STATUTE YOU CAN'T
TELL, YOU NEED TO TELL THEM
ABOUT THE RISK.
AND SHE WAS TOLD ABOUT THE RISK
BY HER ATTORNEY.
SHE WAS TOLD ABOUT THE RISK BY
THE TRIAL COURT.
THAT IS ALL YOU NEED FOR
PADILLA.

SO EVEN IF THIS COURT FINDS
OTHERWISE IN DRUG CASES OR
THINGS WHERE THE FACE OF THE
STATUTE MAKES IT MORE APPARENT,
IT'S CLEARLY ENOUGH UNDER THE
PADILLA DECISION ITSELF BECAUSE
IT'S AN AMORPHOUS CONCEPT AND
IT IS NOT ON THE FACE OF THE
STATUTE.

>> THANK YOU.

>> THANK YOU.

>> I WILL GIVE YOU AN
ADDITIONAL 40 SECONDS BECAUSE
OPPOSING COUNSEL GOT ADDITIONAL
40 SECONDS.

>> THANK YOU, YOUR HONOR.
IN REGARDS TO JUSTICE LEWIS'S
QUESTION ON PAGE 69, HE DID
ALLEGE IT WAS MANDATORY
DEPORTATION AND WITHOUT
EQUIVOCATING I MAY HAVE DONE
SOMETHING UNINTENTIONAL I
APOLOGIZE.

I WANT TO CORRECT THIS IDEA
SOME -- KENTUCKY AND FLORIDA
ARE DIFFERENT.

AND I PUT THIS IN MY REPLY
BRIEF AND I ATTACHED IT FOR
IT IS ALMOST IDENTICAL AND
UNITED STATES SUPREME COURT
BASICALLY REJECTED WHAT
KENTUCKY DID BASED ON SAME
ADVISEMENTS.

AS THIS COURT NOTED DURING YOUR
QUESTIONING --

>> WHAT DO YOU SAY TO THIS
ARGUMENT JUST BEING MADE ABOUT
THIS CATEGORY OF MORAL
TURPITUDE?

THAT IS THE CATEGORY HERE WE
ARE APPLYING.

NOT BEING SOMETHING THAT WOULD
BE OBVIOUS ON THE FACE OF
STATUTE?

>> I DON'T RECALL ANYWHERE,

THEY MAY TALK ABOUT THE FACE OF THE STATUTE BUT I DO NOT BELIEVE THE STANDARD IN PADILLA IS YOU LOOK AT FACE OF THE STATUTE, AUTOMATICALLY THAT IS MANDATORY DEPORTATION.

NO FACE OF ANY STATUTE IS GOING TO TELL YOU THAT.

YOU'RE GOING TO HAVE TO, YOUR LAWYER, YOU NEED TO GO TO THE NEXT STEP. FIND A CASE.

IN THE 11th CIRCUIT, GO TO 8 U.S. CODE, 1227.

LOOK AT LIST OF OFFENSES.

TAKES 15 MINUTES.

FIVE MINUTES AND IT REQUIRES SOMETHING MORE.

THAT'S WHY WE'RE LAWYERS.

THAT'S WHY PEOPLE COME TO US AND PAY US TO REPRESENT THEM OR WE GET APPOINTED BY THE COURT TO GIVE THEM LEGAL ADVICE AND REQUIRES MORE THAN JUST -- I DON'T THINK ANY LAWYER, I DON'T THINK AN IMMIGRATION LAWYER CAN JUST LOOK AT FACE OF THE STATUTE AND STUDY IT AND KNOW IT LIKE I KNOW IT.

TRAFFICKING IN DRUGS YOU'RE GOING TO BE DEPORTED.

DON'T HAVE TO LOOK AT FACE OF THE STATUTE.

>> DOESN'T THE STATUTE HAVE A LIST OF, I THOUGHT IT WAS, ABOUT 20 OF THEM, THAT DO INDICATE THAT THIS, THESE ARE MANDATORY, THESE ARE OFFENSES WHERE YOU WOULD HAVE MANDATORY DEPORTATION?

>> YES.

>> OKAY. SO ISN'T THAT WHAT THE SUPREME COURT WAS TALKING ABOUT WHEN THEY WERE TALKING ABOUT LOOKING AT THE FACE OF THE STATUTE?

>> YOUR HONOR --

>> THAT IS THE LANGUAGE THAT THEY USED, ISN'T IT?

>> IF THEY'RE TALKING ABOUT LOOKING AT TITLE 8 AND BEING ABLE TO FIGURE OUT FAIRLY EASILY, YES, I WOULD AGREE WITH THAT.

>> OKAY.

>> I DON'T AGREE IF I

UNDERSTOOD JUSTICE POLSTON'S
QUESTION YOU LOOK AT FACE OF A
STATUTE CHARGING FELONY CHILD
ABUSE OR CHILD NEGLECT AND
YOU'RE GOING TO KNOW JUST BY
LOOKING AT FACE OF THE STATUTE
THAT IS AUTOMATICALLY
DEPORTATION.

PERHAPS I MISUNDERSTOOD THE
QUESTION.

>> THAT IS MY UNDERSTANDING OF
PADILLA.

I THOUGHT THAT WHAT THEY WERE
REQUIRING THAT YOU ADVISE A
CLIENT OF THE MANDATORY
IMPLICATION OF A STATUTE.
THAT IS WHAT IT SAID ON THE
FACE OF THE STATUTE AND I AGREE
THAT ALL DEFENSE LAWYERS CAN
AND MAYBE UNDER PADILLA WILL
HAVE TO BECOME TRUE EXPERTS IN
IMMIGRATION LAW BUT I DIDN'T
THAT'S WHAT THE MAJORITY
OPINION IN PADILLA WAS
REQUIRING.

>> IF IT'S TRULY CLEAR,
CRIMINAL DEFENSE LAWYERS NOW
HAVE TO EDUCATE THEMSELVES AND
BECOME AWARE OF THAT.

IF IT IS NOT TRULY CLEAR THEN
THE WARNINGS THAT WE HAVE RIGHT
NOW ARE SUFFICIENT.

TELLING SOMEBODY WHAT IS GOING
ON THE STREET IS NOT, CHIEF
JUSTICE CANADY.

I RESPECTFULLY DISAGREE.

>> THANK YOU BOTH FOR YOUR
ARGUMENT.

THIS IS THE LAST CASE TODAY.
THE COURT IS NOW ADJOURNED.

>> ALL RISE.