Please rise.
Hear ye, hear ye, hear ye.
The Supreme Court of Florida is
now in session.
All who have cause to plea, draw
near, give attention, and you
shall be heard.
God save these United States,
the great state of Florida, and
this honorable court.
Ladies and Gentlemen, the
Florida Supreme Court.
Please be seated.
>> Good morning and welcome to
the Florida Supreme Court.
We have three cases on our
docket that are related.
The first case is Hernandez
versus the state of Florida.
>> Good morning, may it please
the court.
Michael Vastine, co-counsel for
Gabriel Hernandez.
The petitioner in this case
received ineffective assistance
of counsel in violation of his
Sixth Amendment rights.
>> Before we get to the
substance, of your argument,
your case hinges on there being
retroactive correct?
>> Yes, it does.
>> This is a 2001 guilty plea?
>> Yes, it was.
>> Just a point, and maybe in
the record shows it or not,
since he had that guilty plea,
he was employed as a computer
network administrator?
>> Yes, he is.
>> So at this point he has not
been deported?
>> Right --
>> But what you say is
mandatory.
>> Yes it is, Judge.
>> Had they started the
pleading?
>> I can answer a lot of this --
>> Maybe you could, because my
concern about getting to a
post-Padilla world and yours may
not have been there is that he
was facing 15 years in prison,
correct?

>> Yes.
>> And he got a plea to what?
>> Probation.
>> Probation so if the lawyer were to say, you will be deported, if you plead, but if you don't plead and you are guilty, you could be spending the next 15 years in prison. So, wouldn't part of the duty of trial counsel always be -- We are talking about he may in fact be guilty, or may not, that here is the risk.
The risk is you go to trial and you will get 15 years so in this situation it the lawyer said listen, if you plead to this, you are subject to presumptively mandatory deportation and I can't tell you whether it will happen or when it will happen. But, on the other hand if you do not plead, and you go to trial, you are subject to 15 years. Is that what you would say if you were rolling back the clock and going forward?
The lawyer would have to talk about the consequences of going to trial and what the maximum sentence is?
The first is the reality of the deportation.
>> Yes, Judge.
I think the issue is -- It goes to the reasonableness -- whatever would be reasonableness for him to have an objective plea and in this case the benefit of evidentiary hearing should explore that but I think what you are getting at is what is the council's role to evaluate all the factors.
I'm sorry.
>> No, that's okay.
Go ahead.
I will catch up with you later.
>> They are in the proper place to evaluate all the motivations for the defendant as well as to evaluate the case against them. Of course the state office is in the initial founding hearing.

There is nothing in the record, yet there was maximum possible sentence of 15 years and there's nothing in the record to show that is the likely outcome for this case given that de minimus amount involved in many other factors.
Again it would go more to the reasonableness.
>> Can INS, let's say --
I used to do a lot of these cases.
I used to represent people with immigration problem so I had been in this area before.
Now, let's say that he chooses to go to trial and he is acquitted of the criminal charges.
My understanding is that the Immigration Department can still pursue a deportation because they can do a different standard.
It is not reasonable doubt, is that correct?
>> I can be very specific about that.
It's an unusual circumstance.
Again, it's outside and to take your question, any person that is charged and the Department of Homeland Security has a reason to believe that there is a drug trafficking offense can be charged with being an admissible to the country if they travel abroad and are returning to the country, then they are subjected to that standard.
Yes it's below the reasonable doubt standard.
However that becomes the subject of the hearing regarding reasonableness and having prevailed at trial would be highly -- the ultimate facts of the case would have been resolved.
>> Again, he said that is not grounds for deportation.
>> No, if that would arise in context, if this was litigated in a criminal context and he was

found in innocent, DHS would be extraordinarily unlikely to prevail at trial in the immigration court contact's.
>> So we are at a stage here that if we accept that counsel in this case was ineffective because he did not in this case, find the immigration consequences.
My question is this, what is the prejudice prong of this case? I believe you have got deficiency but what is the real prejudice?
>> Mr. Hernandez is barred from any --
He is deportable because events considered an aggregated felony which is post-1996, is the worst under the Immigration and Nationality Act.
>> This is 12, 11 years now. Has he been subject to anything from INS?
>> He has not to this time, but again the Supreme Court, this is convenient because this is the same issue that arose in Padilla and the same deportation ground as aggravated felony.
The court ruled it was a clear consequence.
>> They remanded the case so they prejudice determination could be made, so what would be the prejudice that could be demonstrated in this particular case, other than he may not have pled guilty?
>> Because this is an aggravated felony, he is far from --
There are generally two forms of discretionary relief that a deportable person may consider if they are eligible for an immigration court and his crime is considered an aggravated felony.
There for at the time he entered his guilty plea, the guilty plea combined with the immigration law, he became mandatorily deportable.
The action did not happen yet

but he is --
>> Had one of those forms been filled out to determine what would have been the allowable sentence if he was convicted of this crime?
Do you know the form you fill out and you go through all those numbers and figure out what is the sentencing range for a particular defendant?
Had that been done in this case, so do we have any idea of what sentence he would have gotten or been subject to had he gone to trial?
>> I am not aware of that. Again that would go to the reasonableness of course, that would be more reasonable to the client to accept the plea.
>> Did he allege in his motion a plea of convenience?
In other words that he was not guilty of selling LSD to an undercover agent, but that he was told by his attorney, you can get on with your life by probation.
He had to allege for setting aside the plea and the prejudice prong for Strickland something more than pled guilty where he would have to say either I would not have pled guilty, but then don't we have to also show that there would be a reasonable chance that he would have been convicted of a lesser offense or acquitted?
>> Well, he does allege that he would have, regarding the first part of your question, he does state and has sworn motion that he would have pursued any and all other defenses available to him.
>> Do Justice really talked about the fact that a council knows about this being a mandatory deportable offense, that they could negotiate a plea to another lesser -- lesser included offense that would not be a mandatorily deportable

defense so that would be part of the prejudice prong, correct?
One other thing before we get into retroactivity which I think is your big hurdle here, I have struggled, because I've been I have been on this court and major and all those cases, that we have seems to tie what is a proper plea colloquy for would have trial judge has to do with with what competent counsel has to do.
As I have read all of these cases that have come up, there is no attack at this time on the court colloquy which is, you may be deported because it's a generic one-size-fits-all and nobody is suggesting the trial judge should be schooled in the nuances, which are mandatorily deportable offenses.
Is that correct first of all that you are not attacking it the trial judge's colloquy?
>> Right.
What we believe as a result of this case, the colloquy has both no utility as far as counsel and perhaps limited utility in general.
>> Well do you see then that, going forward, that we would have to receive from several of our cases where we have tied what is a proper colloquy, a direct collateral offense for a trial judge, untie it from what would constitute effective assistance council.
In other words, because there is a greater duty on the part of counsel, whatever, serious consequences because I think the Supreme Court has said we are not talking about a direct, that we have to explicitly say that those two duties are different?
>> Yes, I think they are distinct.
>> Have we seen which cases we would have to recede from in order to make that statement?
>> I'm sorry?

>> What case from this court over the last 20 years would you have to recede from an order to make that statement because this is deportable defenses and tomorrow it is sex offender registration and the next day its driver's license revocation, all those cases that we have found to be serious but not direct consequences.
None of those talk in terms of the separate duty on the part of the trial lawyer from the trial judge.
>> Right, and I think it's important as responsibility properly lie with the attorney and the judge can provide a safeguard that these discussions have taken place.
Normally the right to counsel is a right to effective counsel in these issues to the extent that it is a constitutionally protected right as Padilla saw this one, we know that this is something that must be covered.
>> Now let's go back to the Padilla issue.
Mr. Padilla brought his challenge with his conviction.
Your client pled guilty in 2001, 11 years ago.
Why should we, this court, or why should we not wait until the U.S. Supreme Court decides the issue, or second of all, say that there was nothing preventing your client from raising a separate, ineffective assistance of counsel claim within two years on this precise issue when at some point, when your client is presumably an intelligent person, realized he pled guilty to a mandatorily deportable--
To say wait a second, I had a public defender that told me none of this and attended a session.
The judge said me and I figured, I'm okay with me but you are not telling us he could not have

figured that out in the two years after his plea was entered?
>> Well, again I don't want to talk to far out of the record that you are right, as an intelligent person and a defendant would weigh their options but his claim was previously barred by Genebra which was directly on point. And therefore he would have known and did know in fact that any claim if he brought it would have been met with summary denial by the courts.
In related issues such as the Puritan and the Green case, those cases came and went but none of them are applicable. In Genebra, his claim could not be brought previously.
>> Let me ask you a procedural question as to how it is that the case is here.
My understanding of what you are saying is the immigration department did not seek to deport.
He has not been placed on notice that he is going to be deported because of what happened 11 years ago, am I correct?
Your client is doing basically a preemptive strike.
He is pretty much trying to undo and start over again, correct?
>> What we have learned from green is that this court has acknowledge that immigration consequences are certain whether or not the proceedings or -- has started being affected.
>> Understand about your client waited so long and which to start this process because also, I am concerned of the prejudice. If his plea is vacated I just don't see how they can proceed. The drugs are gone and the agents are gone, everybody is gone.
How is the state going to prove its case?
Should they decide to refile it

and continue with the
prosecution?
There is prejudice there as
well.
>> There is, but I think it's
two-sided.
A concern we had with the
decision below it is that it
really was the prosecutorial
concern of the state without
equally if not exceedingly
countering the interest of the
petitioner, who we argue in the
course of this neutral party
would have no interest in
maintaining a conviction that by
all accounts seems that it was
likely achieved through a
violation of Sixth Amendment
right to effective counsel so
yes, there are balancing
concerns but again, going back,
it ties in with the issue of
reasonableness.
We don't know how this case
would have played out at trial.
To pursue a 15 year sentence --
>> But I think this goes back to
the retroactivity and I'd share
Justice Labarga's concern, which
is, following Witt, this plea
colloguey has existed for over
22 years and we have, I don't
know what the numbers are this
is 2001 but this could have been
30 years ago and I have some
great concern, I mean I feel for
your client.
I understand the realities and
maybe if we stayed in cases
where the crime was relatively
weak and make a decision to
allow you to vacate the plea
just by the way people do
things, the concern with the
bank and he is gainfully
employed would be a tragedy.
But we are here to really look
at what the effect would be on
the administration of Justice.
Do we know how many cases?
Do we have any numbers of how
many cases with the subject to
motions for post-conviction
relief?

Lawyers that will no longer remember or not alive who have state evidence?
Do we know if it is 10, 20, 100, a thousand?
5000?
>> I think it's difficult to speculate.
What we do know is how many cases have been written so far and in one of the briefs we decided the briefs I got to the third DCA which of the timely filed a brief and 55 cases.
>> You would assume, the reality is the majority would be in the third district or the fourth district?
>> Numbers and demographics, I suppose.
>> Is that a relevant concern? In other words do we do that in a Witt analysis?
Do we look at how many convictions we are talking about?
>> There is a concern as a factual matter, but the floodgate issue was discussed at length and Justice Stevens --
>> That was not retroactivity. We have a different issue for retroactivity.
>> But Stevens said we don't expect this decision will ring a flood of old cases that have already been resolved because these professional norms have been in place for so long that post-counsel should have known.
>> That is where the rail at the of the U.S. Supreme Court is, the reality of what goes to the Public Defender's Office in Miami are worlds apart, correct?
>> That is true and it's partially a product of Genebra. They didn't have to be proactive and it's unfortunate that when we apply this to the Witt task it puts us in a difficult argument.
So much, assuming there is a large number of cases which is not an overwhelming number of

cases but assuming there is a large number of cases that is because the Florida court unfortunately got Genebra wrong as Padilla.
The issue becomes, so many people have been harmed that we can't help any of them so the violation is so great that we must ignore it because of deficiency concerns, which I don't think obviously is the proper way to proceed, because under Witt we must consider what was the impact of -- we have to be concerned with fundamentally fair proceedings.
Is there a question of the fairness of the proceedings in the actions of counsel to undermine the confidence in this proceeding?
>> You have exhausted your time.
>> Thank you.
>> May may it please the court.
My name is Kris Davenport and I represent the state of Florida.
First of all, let me say this court could eliminate this Padilla problem completely by holding as a matter of law, you cannot demonstrate prejudice with a plea colloquy followed by this court 20 years ago.
>> Could you clarify something?
That came from Kentucky.
Apparently they have a plea colloquy in that state, and a record of the lower court of the Supreme Court records show what the colloquy was that they were given at the time?
>> The Kentucky courts have a colloquy now.
It looks, from footnote 15 in the Padilla opinion, they cite that Kentucky currently covers the plea colloquy.
They cited a 2003 form.
Mr. Padilla played before that.
When you look at the lower court opinions out of Kentucky and the oral argument from Padilla itself, there is never any mention of a court covering this

at all, so the only thing we can glean from that is that Mr. Padilla was not given that information by the court.
>> The problem I have with that is that we have one-size-fits-all and you can't expect a trial judge -- They have to decide whether he's a citizen or noncitizen and they don't have the trial judge saying, let me ask you this. So it's a cookie-cutter colloquy and it's adequate but it says that you may be subject to deportation.
This case seems, other than the issue of the retroactivity, which I am sure you will address, the precisely same problem, which is that this is a presumptively mandatory deportation effect.
Does the state agree with that?
>> I would agree that if deportation proceedings are initiated that it would be mandatory deportation.
>> But we have already said and green that we are not going to say somebody can wait it out for 30 or 40 years and apparently grandparents are deported until the United States gets around to deporting somebody.
We say it starts from, in Green, the day of the plea.
So the issue is it would be wrong to say, you will be deported within the next year. I mean we can't say that, but the issue is, you have the risk that the United States will go against you, but it is certain if they go against you, you'll be subject to mandatory deportation.
That is not what the trial judge would say but that is really what Padilla is explaining -- that trial lawyers need to either get themselves knowledgeable about the certainty and the clarity of whether the offenses are

deportable and advise clients appropriately.
So, I have a problem I guess in saying that in all cases, that you may be deported, which is what this court, the colloquy currently, is going to obviate ineffective the counsel claim.
So explain why that would be, that the council's duty is greater knowing their client having to counsel them in a plea deal, then what it trial judge is going to do in each and every case?
>> Well obviously the trial court's colloquy is going to be more generic by counsel, but the trial court statement is also coming from the court, so it's not something to be taken real lightly.
I would submit that is an accurate reflection of every situation, because Mr. Hernandez is here 10 years later.
Trial counsel had said, you'll be deported if you take this plea, he could have come back and said, you know I am not offered probation for a pretty serious crime.
>> Now I think you are wanting to rewrite Padilla because Padilla, they could have said the Kentucky colloquy would now be adequate but they go to great lengths to talk about trial counsel obligations and so you know, I just don't think that we can say that it may be a prejudice issue which is what Justice Quince was asking about, which is that the trial judge is told the defendant you may be subject to deportation.
You are in this country and you are not an American citizen.
That should raise a red flag.
Hold it a second.
What do you mean I may be subject to deportation?
Explain it to me, the trial lawyer or the trial judge so it may be an intelligent person is

going to know enough there to stop the proceedings and say, I didn't realize that.
But that goes to the prejudice, whether they would have pled anyway, not in a deficiency.
>> It does for -- but it is a two two-prong test.
>> But we didn't have an evidentiary hearing.
>> Prejudice on the face of its record, prejudice is refuted because of the Senate can possibly show that counsel is silent, I would not have taken this plea when he specifically acknowledged under oath to the trial court that, I faced the risk of deportation and I understand that.
That is accurate information from a trial court and that is why it these cases in Florida, assuming the rule is properly followed, the cases in Florida are different from Padilla.
Mr. Padilla wasn't told anything by the court.
The only information Mr. Padilla had was his trial counsel who said don't worry about deportation.
You have been here long enough.
Is not going to happen and that's inaccurate.
>> It seems to me the argument, the Supreme Court seems to have taken pains to say two things, that generic kind of thing that we have in our plea colloquy would be fine under some circumstances, but if it is plain from the face of the immigration law, that deportation would be mandatory, the court seems to say that you need to do more than what is done and are plea colloquy.
So that is the dilemma I think that at least I think --
>> Well there is certainly language and Padilla that you could interpret it if you think it is the extreme that we need immigration lawyers on staff in

the public defender defenders
office.
>> Let me ask this question
then.
Doesn't it seem as though you
can interpret it to the extreme?
It seems to me a fair reasoning
of Padilla.
It's not an interpretation or
extreme but saying that if you
fall within this category of
mandatory deportation, that it's
not enough.
That's not an interpretation or
a stretch or in extreme.
Is that the state's position
that Padilla does not say that?
>> It is the state's position
that is Padilla is a little bit
all over the board.
When you look at we hold that
the defendant must be informed
of the risk of deportation.
We have been warning them about
the risk of deportation for 20
years.
Kentucky does not.
>> Does it indicate a difference
between mandatory and those that
are not?
I mean is that not really part
of this Padilla decision?
That is what I think creates the
real dilemma.
I mean certainly, that broad
generic could apply to
everything.
>> But may is the most accurate
advice you can possibly give.
>> It seems to me the Supreme
Court is saying it's not.
It is broad to this day, that is
not sufficient so the state
disagrees with that rating of
Padilla.
>> The state submits that
reading is taking some of the
more extreme language and
Padilla and exploiting it to
every case.
>> It seems to me, when you read
Padilla, that the judges are
saying that is exactly what the
majority is saying, that if it
falls under that mandatory

requirement that you have to take that step and tell them that, but if it's not so clear than the generic kind of language will suffice.
It is certainly the concurrence of justices, that is what the majority opinion is.
>> The concurrent justices, Justice Alito does say that and in the majority decision he says we understand immigration laws complicated and we are not saying it has to become -- you have to become an expert in it.
>> When it is plain and a mandatory deportation consequence, then you have got to tell them that.
I don't see how you get around that language.
>> Again, and I appreciate and I think it's important for everybody to understand when this court is charged with interpreting a United States Supreme Court opinion, we can't go and make a decision that is something differently than it says.
I read it and I read it over and first it says that in the case, the terms of relevant immigration status are succinct, clear and explicit and removal of the Padilla conviction.
And then they go on and say that, and let me just make sure --
I found the other part where it says that it may be that in some cases, it is not as clear but in this case it is specifically clear.
>> It is, yes, it does say that.
>> That is what Justice Lewis asked you about.
In this case we are talking about a mandatorily deportable offense.
I was frankly surprised to learn that something like this would mean there is no discretion on the part of the INS when they decide to institute it so it is

like -- hanging over
Mr. Hernandez's head for the
rest of his life, correct?
They made a decision to come so
public that INS must know that
he is there and he may be the
next to go.
>> That is certainly possible.
It's also possible that he will
live out the rest of his life in
this country with no problems at
all.
>> Why would that be?
He should rely on the fact that
the United States of America
will not enforce their
immigration laws?
>> Not that they won't enforce
them but they can't enforce them
against everybody so by
definition you know, some people
would be.
>> I'm not sure I understand
this.
I know we have a lot of illegal
immigrants in this country but I
thought this was a legal
immigrant who now has a B.A. and
has employment and there is
no --
Do we have millions of these
people who have been convicted
of mandatory drug offenses that
are just going to live the rest
of their lives and never be
deported?
>> The fact that he is here 10
years later illustrates that
this is not a sure thing.
I wouldn't bet any money that
he's going to be deported and I
wouldn't bet any money that he
won't be.
>> Let me ask you this
Ms. Davenport, if you were the
lawyer of Mr. Hernandez, at the
age of 19, who had sold LSD to
one undercover officer and you
nailed that the offense that you
are going to have your client
pleads to resulted in mandatory
deportation, and you knew as
apparently they asked the lawyer
in oral argument in Padilla,
that if he were to be deported

to his native country, that he faced a likelihood of being killed?
Would you think that by saying you know, you might be deported, that you would have had fulfilled your obligations as a lawyer to this clients to say I got you a great plea deal?
You are not going to serve time in prison, but you have to -- for the rest of your life, you will never know when the INS is coming to get you and if they come and get you I know and you severe albums in your home country.
Is there any of that that should be part of the discussion?
That is what Padilla seems to be saying, that defense lawyers, not trial judges but defense lawyers cannot escape that responsibility.
>> Right, that is right and let me say the state is not advocating that he is trying to overrule Padilla.
We understand that.
My point is there is language flowing both ways and there.
Justice Stevens acknowledges that immigration law is not clear-cut in all situations and from a realistic standpoint, Mr. Padilla was in a very different situation from Mr. Hernandez, and when they review that case, they took it in the context of the only thing that he was told was don't worry about it.
That it was the only information he got and in that was improper.
>> He headnote six says when the deportation consequences are truly clear, as it was in this case, you need to give correct advice that is equally clear.
>> Right, also I would quote, we are must hold that counsel must tell the client that they would risk deportation.
If this was the reason they plea, if but for this issue I

would not have entered the plea that he had an obligation to stand up and say, risk of deportation?
What are you talking about here and then we can send them back to counsel and they can explore that further.
But for that, I would not enter the plea and I would submit that colloquy admits prejudice and we don't need a hearing in this case.
Let me quote from footnote 15. The only mention we have of states that have this plea colloquy --
Kentucky didn't have it at the time Mr. Padilla enters his plea from everything we find.
They have it now and they had it shortly after he entered his plea but in footnote 15, the Supreme Court cites the Florida rule that requires the trial courts to tell the defendant about this risk and they say, you know this is in fact not as big of a deal.
Many states comply possible immigration consequences.
They don't say they don't go far enough in council needs to go further.
They said we are to have this in a lot of states and the floodgate argument is not the problem that the state asserted in there.
>> It seems to me, your argument would be a good one, because Padilla was basically misadvise
>> Yes.
>> The court could have gone off on that instead because he was given this advice, he might be entitled to a plea but the court didn't do that.
They actually said he had to be given affirmative information by the trial counsel.
So what in this case was the affirmative information by trial counsel?
>> If you believe trial counsel,

he says I told them about a risk but you of course have to assume the allegations of 38.50 her true purpose allegations were, they didn't tell me anything at all.
We didn't mention it and we have a plea colloquy that says he knew about the risk of deportation.
He didn't apparently know the details, but he is under oath in an important proceeding.
He is waiving 100 constitutional rights.
The trial court says, do you understand that this could result and could be used against you in deportation.
If this is news to him and but for that lack of information he would not applied, he has an obligation to not to say yes Your Honor I understand that and 10 years later says wait a minute.
>> I know you spend a lot of time on the merit but don't you want to talk about retroactivity?
>> I would like to talk about retroactivity.
>> The U.S. Supreme Court Second Circuit decided this.
Is there something you think about this case that would somehow help the court on the issue of retroactivity or should we wait until the ruling?
>> This court certainly could wait.
>> Do you say it should or should not wait?
>> I would submit that you can hold now that it is not retroactive and stop the floodgate in the court.
This is needing to be --
There are a dozen briefs on this or you could see with the U.S. Supreme Court does.
This court will analyze it under different standards so in that sense not to take the other side that you could find it for

attractive and the U.S. Supreme Court doesn't find it retroactive.
Now I don't think you should do that.
I think that would be a big mistake and I think this case clearly falls under the non-retroactivity under the Witt case.
This court has already addressed a similar situation in Green.
We used to require them to wait to bring these claims and in green, this court said that is really unworkable.
We cannot have the stale immigration cases coming up 10 or 15 years later.
We don't have plea colloquy is any more.
Nobody's going to remember this.
They can't retry this guy anymore and the court recognized stale immigration deportation claims will be burdensome on the court.
All of the factors weigh against the claiming of retroactivity.
This is a classic example of an evolutionary refinement and it's not a dramatic right to counsel that you didn't have before.
It refines the duties of counsel in the context.
Florida was ahead of this and was already telling these guys something whether sufficient or not, it's certainly debatable here today.
But it is an evolutionary refinement and we can't have this, the stale claims and he was they would submit it is not retroactive which -- excuse me -- would correspond with Mr. Hernandez's claim.
This was 10 years ago.
>> We thank you both for your arguments.