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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 211

FELIX HERNANDEZ,

Appellant.

PEOPLE,

Respondent,

-against-

No. 163

JUAN JOSE PEQUE

a/k/a JUAN JOSE PEQUE SICAJIAN,

Appellant.

PEOPLE,

Respondent,

-against-

No. 164

RICHARD DIAZ,

Appellant.

PEOPLE,

Respondent,

-against-

No. 165

MICHAEL THOMAS, a/k/a NEIL ADAMS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 11, 2013

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Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 211, 163, 164 and
2 165. And we're going to start with 211.

3 Okay, counsel. So you're on Hernandez,
4 right?

5 MS. BRENNAN: Yes, I am, Your Honor.

6 CHIEF JUDGE LIPPMAN: For the appellant?
7 Go ahead.

8 MS. BRENNAN: I am. And I'm requesting one
9 minute for rebuttal, if I may.

10 CHIEF JUDGE LIPPMAN: One minute. You have
11 it. Go ahead - - -

12 MS. BRENNAN: Thank you so much.

13 CHIEF JUDGE LIPPMAN: - - - counsel.

14 MS. BRENNAN: I would like to begin by
15 noting that - - -

16 CHIEF JUDGE LIPPMAN: Yours is a straight
17 ineffective counsel case, right?

18 MS. BRENNAN: That is correct, Your Honor.

19 CHIEF JUDGE LIPPMAN: Okay. On what basis
20 do you - - - do you seek relief? What's the legal
21 underpinnings of it?

22 MS. BRENNAN: All righty. I just wanted to
23 note that the People had raised LaFontaine and
24 Concepcion, and I was prepared to argue that, if you
25 were interested. If not, I will - - -

1 CHIEF JUDGE LIPPMAN: Yeah, go ahead.
2 First tell us the theory of your - - - how you're
3 entitled to reverse the - - -

4 MS. BRENNAN: All righty.

5 CHIEF JUDGE LIPPMAN: - - - Appellate
6 Division?

7 MS. BRENNAN: Okay. So I believe that it's
8 clear from the briefing that the central question, at
9 least from appellant's point of view, before this
10 court today, is what the correct standard is for the
11 assessment of prejudice under Padilla. It will be
12 recalled that Padilla instructed that to prove
13 prejudice in the event that plea counsel had failed
14 adequately to inform her client of the immigration
15 consequences of his plea, the demon - - - the
16 defendant had to demonstrate that a decision to
17 reject the plea bargain would have been rational
18 under the circumstances and - - -

19 JUDGE SMITH: Then as - - -

20 MS. BRENNAN: - - - we believe that's the
21 key word.

22 JUDGE SMITH: - - - as you read it - - - as
23 you read it, that was an overruling of Hill? I mean,
24 that was a rather dramatic change in U.S. Supreme
25 Court law?

1 MS. BRENNAN: Actually, interestingly
2 enough, I came prepared to answer that precise
3 question.

4 JUDGE SMITH: How nice.

5 MS. BRENNAN: Under Hill, where a plea
6 rather than a trial is at issue, Hill specifically
7 states that the prejudice prong should focus on
8 whether counsel's Constitutionally ineffective
9 performance affected the outcome of the plea process.

10 However, in the years since Hill, the
11 Supreme Court has further modified the Strickland
12 test as it has - - - as applied to the defective
13 performance of counsel during plea proceedings. Two
14 recent cases of which you are surely aware: Missouri
15 v. Frye and Lafler v. Cooper, both decided in 2012,
16 establish that the appropriate factors to be
17 considered with the prejudice prong of Strickland,
18 where counsel's deficient performance took place
19 during the plea process, must be adjusted to fit the
20 particular nature of the defective - - -

21 JUDGE GRAFFEO: What do we - - -

22 MS. BRENNAN: - - - performance.

23 JUDGE GRAFFEO: - - - do with the fact that
24 the Supreme Court here found your client's testimony
25 to be incredible?

1 MS. BRENNAN: Well, Your Honor, if I may
2 say - - - if I may go on with - - -

3 JUDGE GRAFFEO: As - - -

4 MS. BRENNAN: - - - the - - -

5 JUDGE GRAFFEO: - - - as to the
6 consequences. So could you address this case?

7 MS. BRENNAN: Sure. Specifically this
8 case. I should note that - - - just briefly, that a
9 case cited by the People, Roe v. Flores-Ortega, makes
10 clear that they do not believe that they have
11 departed from the Hill standard by - - - by
12 introducing a rational objective - - -

13 JUDGE GRAFFEO: I understand - - -

14 MS. BRENNAN: - - - correct.

15 JUDGE GRAFFEO: - - - the standard.

16 MS. BRENNAN: Right.

17 JUDGE GRAFFEO: But here there's a finding,
18 I guess if you want to call it credibility or
19 whatever, that the - - - that the trial judge did - -
20 - basically did not believe the defendant's
21 explanation.

22 MS. BRENNAN: Well, Your Honor - - -

23 JUDGE GRAFFEO: So what do we do with that?

24 MS. BRENNAN: - - - Your Honor, as
25 certainly discussed in our brief and reply brief, the

1 focus of the hearing court was on factors which we
2 argue are not germane to the present analysis.

3 JUDGE SMITH: Are you - - - are you
4 essentially saying your client's credibility is
5 irrelevant, because under your reading of Padilla,
6 you don't have to show that he would have - - - he
7 would have turned down the plea?

8 MS. BRENNAN: No, Your Honor, absolutely
9 not. What we - - -

10 JUDGE SMITH: You mean, that's not your
11 argument, or you don't have to show it?

12 MS. BRENNAN: My argument is, is that the
13 factors that are supposed to be assessed under
14 Padilla and the more recent line of cases addressing
15 the plea process and ineffective assistance of
16 counsel, suggests that what we're looking at is the
17 rationality of a decision. Would it have been
18 rational. And the way - - -

19 JUDGE SMITH: I guess - - - I guess I'm
20 trying to - - - is your answer to Judge Graffeo, it
21 doesn't matter if my client was credible because even
22 if he would have taken the plea anyway, he can
23 prevail under Padilla?

24 MS. BRENNAN: My argument here, Your Honor,
25 is that at the time that he was negotiating the plea,

1 he had six children. Two of those children's mother
2 had died. Four of those children were under the care
3 of a woman - - -

4 JUDGE SMITH: But could you try - - -

5 MS. BRENNAN: - - - who would - - -

6 JUDGE SMITH: - - - yes or no to the
7 question. Is your client's - - - is your client's
8 credibility determinate of this case or not?

9 MS. BRENNAN: What my - - - what I would
10 like to say, Your Honor, is that in this - - - in
11 this set of circumstances, if the client had known
12 that he would be permanently separated from his
13 children in the event that he took this plea and was
14 ultimately subject to deportation - - -

15 JUDGE SMITH: One more try. Could you tell
16 me whether your - - - whether this case turns on your
17 client's credibility or not?

18 MS. BRENNAN: I do not believe in the sense
19 of subjective credib - - - of subjective credibility
20 - - -

21 CHIEF JUDGE LIPPMAN: So what - - -

22 MS. BRENNAN: - - - of - - -

23 CHIEF JUDGE LIPPMAN: - - - is the test?
24 An objective - - -

25 MS. BRENNAN: I believe, yes, Your Honor,

1 that it is an objective credibility assessment.

2 CHIEF JUDGE LIPPMAN: That if it was
3 rational, given his attachment to the children - - -

4 MS. BRENNAN: And to - - -

5 CHIEF JUDGE LIPPMAN: - - - or whatever the
6 particulars are - - -

7 MS. BRENNAN: Right.

8 CHIEF JUDGE LIPPMAN: - - - your argument
9 is then he's not bound?

10 MS. BRENNAN: I'm sorry?

11 CHIEF JUDGE LIPPMAN: Then your argument is
12 - - -

13 MS. BRENNAN: That we should vacate the
14 plea?

15 CHIEF JUDGE LIPPMAN: - - - at this point,
16 you have an ineffective - - -

17 MS. BRENNAN: Well, we have - - - we have
18 clear prejudice, yes, Your Honor. Had - - -

19 CHIEF JUDGE LIPPMAN: The judge did also
20 acknowledge that counsel did not tell him about the
21 consequences, right?

22 MS. BRENNAN: Absolutely. And the judge
23 also - - -

24 CHIEF JUDGE LIPPMAN: So then it turns on
25 what Judge Smith was asking you and Judge Graffeo was

1 asking you - - - Judge McLaughlin says, you know, he
2 wouldn't have - - - that's not what he would have
3 done. He would have, you know - - - he would have
4 done this no matter what. So your answer, it doesn't
5 matter, it's a rational test?

6 MS. BRENNAN: Well, actually, if you want
7 me - - -

8 CHIEF JUDGE LIPPMAN: Given his ties to the
9 community, is that your argument?

10 MS. BRENNAN: Well, given his ties to the
11 community - - -

12 CHIEF JUDGE LIPPMAN: To his family,
13 whatever.

14 MS. BRENNAN: - - - to his family. He has
15 - - - as I said, he has six - - -

16 CHIEF JUDGE LIPPMAN: We're just trying to
17 understand the different - - -

18 MS. BRENNAN: Yes, Your Honor.

19 CHIEF JUDGE LIPPMAN: - - - your argument.
20 Where you stand.

21 MS. BRENNAN: Absolutely. I mean, and I
22 should note, in terms of this credibility assessment
23 that the judge made, and certainly the reality was
24 that - - - the dissent also addressed this - - - the
25 reality was is that he made a speculative assessment

1 of why my client declined - - - or excuse me - - -
2 took the plea. It was premised on the - - -

3 JUDGE PIGOTT: Yeah, but two judges - - -

4 MS. BRENNAN: - - - timing that - - -

5 JUDGE PIGOTT: - - - agreed with that and
6 the rest of them didn't, so - - -

7 JUDGE READ: But you're saying it's
8 irrelevant?

9 MS. BRENNAN: The time - - - well, it's not
10 - - - there's no foundation in the record for making
11 - - -

12 JUDGE PIGOTT: But that's the point. The
13 point - - - the point is that you should not - - - we
14 should not be dealing with whether it's speculative
15 or not. The simple fact of the matter is that under
16 all the circumstances, it's fair to say he would not
17 have taken the plea?

18 MS. BRENNAN: I think that is true. Yes,
19 Your Honor.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.
21 Okay.

22 JUDGE ABDUS-SALAAM: Could I just - - -

23 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
24 Abdus-Salaam?

25 JUDGE ABDUS-SALAAM: If - - - assuming that

1 the trial court got it or the hearing court got the
2 standard wrong, and the Appellate Division might have
3 gotten it right, which decision should we look at?
4 Should it be the trial court's decision or the
5 Appellate Division's decision?

6 MS. BRENNAN: I believe that in at least
7 this instance the hearing court did not apply the
8 appropriate standard.

9 JUDGE ABDUS-SALAAM: Yeah, but if - - -
10 assuming the hearing court did not. I'm not saying
11 it did or didn't. But assuming he didn't, and the
12 Appellate Division did apply the correct standard,
13 which decision should we be focused on?

14 MS. BRENNAN: Well, Your Honor, the case -
15 - - the case was before the hearing court. Certainly
16 we brought this before them on the basis of Padilla.
17 Certainly, the language that we rely upon was in
18 Padilla. Certainly we brought forward evidence that
19 - - - as to specific factors that we - - - especially
20 his family ties to the United States at the hearing
21 court level. And certainly, you know - - -

22 JUDGE ABDUS-SALAAM: So, can you - - -
23 you're not - - - I don't think - - -

24 CHIEF JUDGE LIPPMAN: So your answer is - -
25 -

1 JUDGE ABDUS-SALAAM: - - - you're answering
2 the question.

3 CHIEF JUDGE LIPPMAN: - - - which for the
4 judge? Is it the hearing court? Is that what you
5 said?

6 JUDGE ABDUS-SALAAM: Or the Appellate
7 Division?

8 MS. BRENNAN: I guess I'm not understanding
9 the question, Your Honor.

10 JUDGE ABDUS-SALAAM: If the hearing court
11 did impose the wrong standard - - -

12 MS. BRENNAN: Yes.

13 JUDGE ABDUS-SALAAM: - - - and the
14 Appellate Division, in affirming the hearing court,
15 imposed the correct standard, which decision should
16 we focus on, the hearing court or the Appellate
17 Division?

18 MS. BRENNAN: Well, Your Honor, in the
19 event that the Appellate Division has - - - has said
20 that in fact the court was rely - - - had
21 misinterpreted the law, then the Appellate Division
22 would have remanded it, I presume to the hearing
23 court, for application of the correct standard, which
24 is - - - I should pause to note that it is our hope,
25 however, that since the record is fully complete here

1 that you will not find - - -

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MS. BRENNAN: - - - a need to remand.

4 CHIEF JUDGE LIPPMAN: Thanks, counsel.

5 MS. BRENNAN: Thank you.

6 CHIEF JUDGE LIPPMAN: Okay, rebuttal?

7 Not rebuttal, but go ahead. Respondent.

8 I'm sorry.

9 MS. KORENSTEIN: Good afternoon. Hope
10 Korenstein for the People of the State of New York.

11 CHIEF JUDGE LIPPMAN: Go ahead.

12 MS. KORENSTEIN: Respondent in this case.

13 CHIEF JUDGE LIPPMAN: What's the test? Is
14 it a credibility matter?

15 MS. KORENSTEIN: Of course credibility
16 matters.

17 CHIEF JUDGE LIPPMAN: The judge's
18 credibility?

19 MS. KORENSTEIN: Of course credibility
20 matters.

21 CHIEF JUDGE LIPPMAN: Why? How did you
22 come to that determination? Why does it matter? Is
23 it a rational test? Is it a subjective test? What's
24 important?

25 MS. KORENSTEIN: Well, first of all, this

1 whole "rational under the circumstances" came about
2 in Padilla, as you all know. And when Justice
3 Stevens used the language "rational under the
4 circumstances", he was specifically discussing how
5 there would not be a flood of litigation in the wake
6 of their holding. And if, in fact, he were lowering
7 the standard for evaluating prejudice under Padilla,
8 he wouldn't be saying that the new standard would not
9 result in a flood of litigation.

10 Moreover, if Justice Stevens had announced
11 - - -

12 JUDGE READ: Because that's a very easy
13 standard to meet? If it's ra - - - just rational?

14 MS. KORENSTEIN: As this defendant sees it,
15 it is a very easy standard to meet.

16 CHIEF JUDGE LIPPMAN: Why isn't it the
17 right standard?

18 MS. KORENSTEIN: I'm sorry?

19 CHIEF JUDGE LIPPMAN: Why isn't it the
20 right standard in terms of what Padilla was trying to
21 say? Why isn't the rational test the right test?

22 MS. KORENSTEIN: Well, first of all, I
23 don't think - - - I don't think the rational under
24 the circumstances - - -

25 CHIEF JUDGE LIPPMAN: I'm asking you what's

1 wrong - - -

2 MS. KORENSTEIN: - - - test - - -

3 CHIEF JUDGE LIPPMAN: - - - with the
4 rational test? Why isn't that a good - - -

5 MS. KORENSTEIN: Nothing is wrong with it.
6 I don't think that it's incompatible with - - -

7 CHIEF JUDGE LIPPMAN: That's what I'm
8 saying.

9 MS. KORENSTEIN: - - - with the test that
10 the Supreme Court has been using, which is - - -

11 CHIEF JUDGE LIPPMAN: No.

12 MS. KORENSTEIN: - - - the reasonable
13 probability that, you know, if - - -

14 JUDGE SMITH: Is - - - isn't there a
15 difference between saying it's reasonably probable he
16 would have taken the plea - - - he would have
17 rejected the plea, or it would have been irrational
18 to reject the plea? Those are different things,
19 aren't they?

20 MS. KORENSTEIN: I think that they are
21 different things. But I think the bottom line here
22 is that defendant would have us ignore the "under the
23 circumstances" part of that language. And you still
24 need credible evidence about what those circumstances
25 were surrounding his taking of the plea.

1 JUDGE PIGOTT: Would that - - - would that
2 include the objective factors that were out there,
3 you know, the number of kids, the fact that, you know
4 - - - the circumstances under which the crime was
5 committed, and - - -

6 MS. KORENSTEIN: I think - - -

7 JUDGE PIGOTT: - - - the fact that he
8 couldn't speak English. Do we take all that into
9 consideration?

10 MS. KORENSTEIN: I think that it would
11 include those objective and subjective factors.
12 Because I think it has to focus on this particular
13 individual in his particular circumstances in his
14 particular viewpoint. And I'm not sure that - - -

15 JUDGE SMITH: Why did - - -

16 MS. KORENSTEIN: - - - that is - - -

17 JUDGE SMITH: - - - why did - - -

18 MS. KORENSTEIN: - - - objective. I think
19 it's subjective.

20 JUDGE SMITH: - - - Justice Stev - - - what
21 did Justice Stevens mean when he said what he said,
22 in your judgment?

23 MS. KORENSTEIN: I think - - - I think that
24 Justice Stevens was actually talking about whether it
25 would have been rational - - - I think he was talking

1 about prong 1 actually, because I think the entire
2 opinion, all of Padilla, is focused on the
3 performance prong of Strickland. And repeatedly they
4 say we're going to leave the - - - all of the
5 prejudice - - -

6 JUDGE SMITH: How can - - - how can whether
7 it would have been rational to take the - - - to
8 reject the plea offer have anything to do with prong
9 1?

10 MS. KORENSTEIN: I think there could be an
11 interpretation that - - - that they were referencing
12 whether it would have been rational for the attorney
13 to even bring it up in the first place, given the
14 defendant that he had. Was it rational for the
15 attorney to believe that this information would have
16 been relevant to this particular defendant.

17 I don't have - - - you know, I don't
18 exactly know if that's - - - that's what he meant.
19 But - - - but I think the point is, he's talking
20 about there's not going to be a flood of litigation
21 here, because you have to see if it's rational under
22 the circumstances.

23 CHIEF JUDGE LIPPMAN: Because he says
24 there's not going to be - - -

25 MS. KORENSTEIN: I'm not talking about - -

1 -

2 CHIEF JUDGE LIPPMAN: - - - a flood of
3 litigation, that tells us what he means?

4 MS. KORENSTEIN: It tells us that he's not
5 - - -

6 CHIEF JUDGE LIPPMAN: Sometimes we make
7 mistakes as to whether there's going to be a flood of
8 litigation. We know that in this court, you know.

9 MS. KORENSTEIN: I think he did not mean
10 to lower the standard in the way that defendant is
11 talking about, if he's talking - - - if he's saying
12 that there's not going to be a flood of litigation.

13 JUDGE SMITH: You're saying it would be
14 strange to interpret him as saying there's not going
15 to be a flood of litigation immediately inviting a
16 flood of litigation?

17 MS. KORENSTEIN: Yes, Your Honor, that is
18 what I'm saying.

19 JUDGE GRAFFEO: So what precisely is the
20 analytical construct that you're suggesting has to be
21 applied in these ineffective assistance cases - - -

22 MS. KORENSTEIN: With respect to - - -

23 JUDGE GRAFFEO: - - - that involve - - -

24 MS. KORENSTEIN: - - - with respect to
25 prejudice, I don't think it's any different. I don't

1 think - - - if you're looking at prejudice under
2 Padilla, you know, if you're looking at prejudice in
3 the context of immigration, that there's some new
4 gloss that differs from Hill and Strickland. I think
5 it's the same - - - it's the same test that has been
6 used over and over under Hill and under Strickland.
7 And in fact, in - - - my adversary talked about
8 Lafler v. Cooper, which was decided after Padilla.
9 The Supreme Court repeated the Hill language, that to
10 prove prejudice, defendant has the burden of showing
11 a reasonable probability that but for counsel's
12 errors, the defendant would not have pleaded guilty
13 and would have insisted on going to trial.

14 And I can't imagine that simply when you're
15 applying the test - - -

16 JUDGE GRAFFEO: And how does - - - and how
17 does the trial judge determine reasonable - - - or
18 the appellate courts determine reasonable
19 probability?

20 MS. KORENSTEIN: Oh, I think precisely the
21 way this judge here. This judge held a hearing.
22 This judge heard the testimony of this defendant and
23 - - - as well as his son and as well as his plea
24 counsel. And this judge found, based on the totality
25 of the record that defendant did not meet his burden

1 of proving prejudice under Padilla. And - - -

2 JUDGE READ: He basically made a
3 credibility determination?

4 MS. KORENSTEIN: Absolutely. And his
5 adverse credibility determination had abundant
6 support in the record, because this defendant said a
7 number of things at the 440 hearing that were
8 demonstrably untrue. And in fact, the judge pointed
9 to several of those lies when he rendered his
10 decision denying defendant's motion.

11 In particular defendant had a fight with
12 his brother-in-law, Christopher Hernandez, was
13 convicted of second degree assault, which was a
14 violent felony, yet he claimed that his brother-in-
15 law, that Christopher Hernandez hit himself against
16 the wall with his head.

17 There were orders of protection in favor of
18 defendant's - - -

19 JUDGE PIGOTT: But wasn't - - - wasn't the
20 point of bringing that up the fact that he had taken
21 a plea and had not been deported, and so he didn't
22 think that in taking the second plea he would be
23 deported? It wasn't so much the underlying facts of
24 the plea - - - of the event, it was the fact that one
25 of the reasons why I took this plea was I had taken a

1 plea in a previous case, a felony, and I didn't get
2 deported, so I didn't think I was going to get
3 deported in this one.

4 MS. KORENSTEIN: I think it's also
5 important for showing that this defendant has an
6 enormous capacity for saying things that aren't - - -
7 that are - - -

8 JUDGE SMITH: Apart from - - -

9 MS. KORENSTEIN: - - - you know, patently
10 untrue.

11 JUDGE SMITH: - - - apart from the fact
12 that defendant - - - perhaps defendant is not utterly
13 devoted to the truth at all times, is there any other
14 evidence that he - - - that he was not telling the
15 truth this time when he said he would have rejected
16 the plea?

17 MS. KORENSTEIN: I think that the judge's
18 findings of fact also had a lot of record support. I
19 think that the fact that he pled guilty in the middle
20 of a hearing which was to be immediately followed by
21 a trial, he was at the point where he either had to
22 take the guilty plea or go to trial. The rubber had
23 hit the road.

24 And I think that the timing of the plea is
25 - - - is a factor that has record support. I think

1 that the fact that he received a favorable plea deal
2 of only five years in prison when he was facing up to
3 fifteen years on the attempted first-degree rape
4 count, is a finding of fact with record support
5 showing he denied the motion.

6 He had the benefit of the Rosario material
7 which showed - - - which gave him some idea of the
8 People's proof. Moreover, at that point, he had the
9 benefit of the People's witness list. On that
10 witness list was not only the victim, who was
11 eighteen years old at the time that he attempted to
12 rape her, [REDACTED]; also defendant's estranged
13 wife, also his eight-year-old daughter who was in the
14 room when defendant allegedly attempted to rape
15 [REDACTED], and who obviously was testifying - - -
16 you know, who had seen something and was prepared to
17 testify on behalf of the People.

18 At the end of the day, there was record
19 support for the judge's credibility determinations
20 and factual findings, and it's beyond the power of
21 this court's review. Thank you very much.

22 CHIEF JUDGE LIPPMAN: Okay, counselor.

23 Counselor, rebuttal?

24 MS. BRENNAN: Yes. I just want to remind
25 you that a reasonable probability is not reasonable

1 doubt, and it is also not even preponderance of the
2 evidence. And that is the standard - - - the burden
3 of proof that he was supposed to meet.

4 I also want to underscore - - -

5 CHIEF JUDGE LIPPMAN: But that's not the
6 test in your mind, right?

7 MS. BRENNAN: Yes, Your Honor. I would
8 also like to underscore that in Roe v. Flores-Ortega,
9 the Supreme Court openly discussed the introduction
10 of a rational objective standard, and even claims
11 that it has not departed from Hill. And - - -

12 JUDGE PIGOTT: Wasn't Ms. Korenstein right?
13 I mean, the judge made these factual determinations,
14 and where do we go with that?

15 MS. BRENNAN: This - - - this judge made
16 these factual determinations. As I said, they were
17 largely speculative. There was no evidence that the
18 complainant - - - there had never been any evidence
19 that the complainant was not going to appear to
20 testify. There was no evidence - - - physical
21 evidence to demonstrate that, in fact, there had been
22 an attempted rape in the first degree - - -

23 JUDGE PIGOTT: Well, you're going to the
24 merits. I - - -

25 MS. BRENNAN: Yes, Your Honor.

1 JUDGE PIGOTT: - - - what she was pointing
2 out is you got a judge who's sitting here, four or
3 five years after the plea, and he's saying X, Y, and
4 Z. And the judge is saying I don't buy it. You
5 know, I know when you took the plea; I know why you
6 took the plea; and I'm not buying your argument.

7 Having said that, where do we go?

8 MS. BRENNAN: Your Honor, I think that we -
9 - - that where this court should go is to the germane
10 factors that the Padilla court has laid out,
11 especially if you will look at the last page of
12 Padilla opinion - - -

13 CHIEF JUDGE LIPPMAN: That's your objective
14 fact - - - is that what you're saying?

15 MS. BRENNAN: Yes, Your Honor.

16 CHIEF JUDGE LIPPMAN: And if - - - I guess
17 - - -

18 MS. BRENNAN: They were - - - they were - -
19 -

20 CHIEF JUDGE LIPPMAN: - - - what Judge - -
21 -

22 MS. BRENNAN: - - - trying - - -

23 CHIEF JUDGE LIPPMAN: - - - Pigott is
24 asking you, assume the judge is wrong, dead wrong - -
25 -

1 MS. BRENNAN: Okay.

2 CHIEF JUDGE LIPPMAN: - - - what
3 significance does that have for us?

4 MS. BRENNAN: I - - -

5 CHIEF JUDGE LIPPMAN: Can we just put it
6 aside and say the test is an objective rational test
7 and not - - -

8 MS. BRENNAN: Your Honor, I think not only
9 - - -

10 CHIEF JUDGE LIPPMAN: - - - is that what
11 you're arguing?

12 MS. BRENNAN: Your Honor, not only do I
13 think that you can do that, I think that you are
14 compelled to do so by Padilla.

15 CHIEF JUDGE LIPPMAN: Okay. Thank you
16 both. Appreciate it.

17 Okay, so now we're going to go to 163,
18 Peque. Is that the way you pronounce it?

19 MS. LATINO: Yes, [Pe-kyu].

20 CHIEF JUDGE LIPPMAN: Okay, go ahead,
21 counsel.

22 MS. LATINO: May it please the court, I'm
23 Melissa Latino. I'm the counsel for appellant Juan
24 Jose Peque.

25 CHIEF JUDGE LIPPMAN: Do you want - - -

1 Peque. Do you want any rebuttal time, counselor?

2 MS. LATINO: Yes, please, Your Honor. Two
3 minutes.

4 CHIEF JUDGE LIPPMAN: Two minutes, go
5 ahead. Start.

6 MS. LATINO: And I'd like to start by first
7 addressing why deportation should be considered treat

8 - - -

9 CHIEF JUDGE LIPPMAN: Well, let me ask you
10 a question about your particular case. Didn't your
11 client say here, ask the judge to deport him after
12 five - - - was it after five years or within five
13 years?

14 MS. LATINO: Yes, he did, Judge. But the -
15 - -

16 CHIEF JUDGE LIPPMAN: What - - - what
17 impact does that have?

18 MS. LATINO: Well, I don't think it has any
19 impact at all. The motive behind that statement is
20 really not known at this time. I respectfully submit
21 that he did not want to be deported. If he had known
22 that he would be deported at the time he pled, he
23 wouldn't have taken seventeen and a half years. It
24 probably took seventeen and a half years so he could
25 avoid deportation.

1 I also want to point out, he didn't know
2 that he'd be denied readmission into this country.

3 JUDGE SMITH: But aren't you - - - I mean,
4 isn't your basic theory of this case that it's a
5 direct - - - that deportation's a direct consequence,
6 so it doesn't matter what your - - - what your client
7 was thinking. He had - - - he had to be warned on
8 the record?

9 MS. LATINO: Yes, absolutely. I'm also
10 arguing that defense counsel didn't advise him of the
11 consequences of deportation as well as the trial
12 court unequivocally did not advise him of the
13 consequences of deportation when he, in fact, pled
14 guilty. What he said at sentencing, we really don't
15 know why - - -

16 CHIEF JUDGE LIPPMAN: But you think that's
17 irrelevant, really? That he said he wanted to be
18 deported?

19 MS. LATINO: Well, I don't believe he
20 wanted to be deported.

21 CHIEF JUDGE LIPPMAN: I know. You're
22 saying - - -

23 MS. LATINO: If he could - - -

24 CHIEF JUDGE LIPPMAN: - - - it doesn't
25 matter what he said?

1 MS. LATINO: I'm saying it doesn't matter.
2 But I'd also just like to point out on that issue
3 that he could have used that as a bargaining chip - -
4 -

5 CHIEF JUDGE LIPPMAN: As a strategic
6 reason, maybe.

7 MS. LATINO: - - - exactly.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MS. LATINO: But moving on, as to why
10 deportation should be considered a direct consequence
11 where the trial court had a duty to notify the
12 defendant before he pled guilty.

13 CHIEF JUDGE LIPPMAN: But wait. Is this
14 direct-collateral issue, is that the right way to
15 view this in light of Padilla?

16 MS. LATINO: I do. I absolutely think it
17 should be considered a direct consequence, because -
18 - -

19 CHIEF JUDGE LIPPMAN: No, no, that's not
20 what I'm asking you. I'm asking you is that - - -
21 the way to weigh this direct versus collateral?

22 MS. LATINO: I don't - - -

23 CHIEF JUDGE LIPPMAN: You know, Padilla
24 talks about that not - - -

25 MS. LATINO: Right.

1 CHIEF JUDGE LIPPMAN: - - - being the
2 paradigm that maybe makes sense.

3 MS. LATINO: I think it's - - -

4 JUDGE READ: Padilla talks about "unique".

5 MS. LATINO: Right. I think it's such a
6 unique and a severe consequence, deportation is
7 essentially like banishment and exile. It's an
8 additional penalty. It's punitive. And it's
9 directly related to the plea - - -

10 CHIEF JUDGE LIPPMAN: So you're arguing
11 it's a direct consequence?

12 MS. LATINO: Absolutely, yes.

13 CHIEF JUDGE LIPPMAN: Okay.

14 JUDGE SMITH: And we were wrong in People
15 v. Ford when we decided otherwise?

16 MS. LATINO: Yes. I feel that this is also
17 a definite, immediate, and automatic - - -

18 JUDGE SMITH: And you - - -

19 MS. LATINO: - - - consequence.

20 JUDGE SMITH: - - - you think Padilla,
21 basically - - - obviously Padilla undermines part of
22 Ford. But you think it undermines even that part of
23 Ford?

24 MS. LATINO: Yes, I do. Basically, when a
25 judge signs an order of conviction, they're

1 essentially signing an order of detainment.

2 JUDGE PIGOTT: Well, didn't - - -

3 MS. LATINO: And they're signing and
4 sealing that defendant's fate to be deported.

5 JUDGE READ: Well, that's not absolutely
6 certain, is it?

7 MS. LATINO: It pretty much is. Under the
8 Immigration and Naturalization Act, if you're a
9 noncitizen and you commit an aggravated felony, you
10 are automatic - - - automatically and mandatorily
11 deported.

12 JUDGE SMITH: So - - - and if they - - -

13 MS. LATINO: There's no - - -

14 JUDGE SMITH: - - - if they amend - - - if
15 they amend the federal statute to make deportation in
16 some cases discretionary rather than mandatory, they
17 put it back the way it used to be to make it
18 discretionary in many cases, would then it no longer
19 be a direct consequence?

20 MS. LATINO: Well, I would respectfully
21 submit to you that that's not the facts that we're
22 here today to discuss. I mean, today there is such a
23 large, broad class of aggravated felonies and other
24 crimes that make you automatically deportable, that
25 the court doesn't have to ask a question.

1 attorney about it.

2 JUDGE RIVERA: - - - what are you arguing
3 the court should have done?

4 MS. LATINO: The trial court had a
5 Constitutional duty to notify him. And only - - -

6 JUDGE RIVERA: But notify him - - -

7 MS. LATINO: - - - to notify - - -

8 JUDGE RIVERA: - - - of what?

9 MS. LATINO: Notify him that, hey, if you
10 are a noncitizen and you're pleading to this crime,
11 you may be deported and you better want to talk to
12 your defense counsel about it.

13 JUDGE PIGOTT: Well, he might be - - - get
14 deported even if he's acquitted, right? I mean, he
15 doesn't belong in this country. He's an illegal
16 alien.

17 MS. LATINO: But that doesn't really
18 matter, because he's going to be denied readmission
19 back into this country.

20 JUDGE PIGOTT: That's a - - - more
21 collateral. I give you. But - - -

22 MS. LATINO: Right.

23 JUDGE PIGOTT: - - - as some point, when he
24 comes up for sentencing, he doesn't say I
25 misunderstood this. All - - - you know, now you're

1 telling me I might get deported? I want to take back
2 my plea. He says, how about if we do five years and
3 I'll go back.

4 MS. LATINO: Well, first I'd just like to
5 point out that the Fifth Amendment and Sixth
6 Amendment is a right afforded to all noncitizens
7 regardless of their exact immigration status. It's
8 to ensure that they make a knowing, voluntary, and
9 intelligent plea, before they waive their right to
10 self-incrimination - - -

11 JUDGE SMITH: But why - - - why don't - - -

12 JUDGE RIVERA: Pursuant to your - - -
13 excuse me. Pursuant to your argument, if a judge had
14 said basically what the New York statute says, would
15 that have been enough?

16 MS. LATINO: It would have been enough - -
17 -

18 JUDGE RIVERA: Or does the judge - - -

19 MS. LATINO: - - - to say yes you may - - -

20 JUDGE RIVERA: - - - have to tailor it
21 specifically to the particular - - -

22 MS. LATINO: No. That's - - -

23 JUDGE RIVERA: - - - individual.

24 MS. LATINO: - - - that's not my position.

25 JUDGE GRAFFEO: So tell us - - -

1 MS. LATINO: My position is that - - -

2 JUDGE GRAFFEO: - - - tell us what the
3 judge should have said here?

4 MS. LATINO: The judge only had - - -

5 JUDGE GRAFFEO: At the time of the - - - at
6 the time of the plea, I presume, you're saying?

7 MS. LATINO: Correct. At the time of the
8 plea, to notify him, they should have said, you're a
9 noncitizen, this may affect your immigration status.
10 You may be deported if you plead guilty. They didn't
11 have to explain exactly - - -

12 JUDGE PIGOTT: So you want to say something
13 more, I think. Because he's probably on his way out
14 of the country anyway, because he's illegal. You
15 want to say you're on your way back to Guatemala,
16 because you shouldn't be here. Understand that in
17 taking this plea, you're guaranteed never to get
18 back, because you can't even get back under the DREAM
19 Act or any other amendment to the immigration laws
20 that may occur.

21 MS. LATINO: Well, correct. And C.P.L.
22 220.50 does state that - - -

23 JUDGE SMITH: Does the judge really have to
24 say all of that?

25 JUDGE RIVERA: All of that? Yeah.

1 MS. LATINO: Well, they should also
2 probably point out that they - - - that there's also
3 consequences of not only deportation but denial of
4 readmission. But no, I don't think it has to be - -
5 -

6 JUDGE GRAFFEO: That's why I'm asking you -
7 - -

8 MS. LATINO: - - - tailored to the
9 individual.

10 JUDGE GRAFFEO: - - - what the judge has to
11 say. Because - - -

12 MS. LATINO: I think they have to - - -

13 JUDGE GRAFFEO: - - - if we agree with you
14 and we write an opinion here, we're telling hundreds
15 of judges in New York State what to say. So what is
16 it precisely you want us - - -

17 MS. LATINO: I don't think they need to say
18 anything - - -

19 JUDGE GRAFFEO: - - - to say?

20 MS. LATINO: - - - differently than by - -
21 - by pleading guilty you're waiving your right to a
22 jury trial. They're notifying you of the rights that
23 you're waiving. They need to let them know, if
24 you're a noncitizen, you may be subject to
25 deportation and you may not be allowed back into this

1 country.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. LATINO: Go and talk to your - - -

4 JUDGE SMITH: Just following on - - - from
5 something you said earlier, I got the impression, you
6 also say that your guy wasn't advised by counsel? In
7 other words, you have what I might call a pure
8 Padilla claim here?

9 MS. LATINO: Absolutely. That's - - -
10 that's - - -

11 JUDGE SMITH: Where in the record is that?

12 MS. LATINO: The record - - - well, the
13 defense counsel basically said to the trial court I
14 don't know how his conviction and his deportation are
15 interrelated, but I brushed him off and I told him to
16 go talk to the Guatemalan consulate, which my client
17 didn't do.

18 Clearly, if he had known the law and
19 advised my client what to do, he would have said
20 you're automatically and mandatorily deported.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.

22 MS. LATINO: The client didn't know that.

23 CHIEF JUDGE LIPPMAN: Thanks, counselor.

24 MS. RIDER-ULACCO: May it please the court,
25 Susan Rider-Ulacco on behalf of the People.

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MS. RIDER-ULACCO: Your Honor, there are
3 two issues this court does need to decide, and that's
4 whether the trial court properly accepted defendant's
5 guilty plea in this matter. The second issue is
6 whether the defendant received effective assistance
7 of counsel. And I submit to you that both - - -

8 JUDGE RIVERA: Can silence by the judge
9 now, post-Padilla, survive?

10 MS. RIDER-ULACCO: I'm sorry?

11 JUDGE RIVERA: Can that Ford decision that
12 it's collateral survive post-Padilla, in your
13 opinion? For the judge to not say anything about
14 this.

15 CHIEF JUDGE LIPPMAN: For the judge's
16 action, in addition for the lawyer - - - to the
17 lawyer, post-Padilla, does Ford survive as to the
18 judge?

19 MS. RIDER-ULACCO: Yes. I don't think that
20 the judge has any obligation. I don't think that
21 this court - - -

22 CHIEF JUDGE LIPPMAN: The judge has no
23 obligation as to Padilla?

24 MS. RIDER-ULACCO: I think - - - no. I
25 think - - -

1 JUDGE RIVERA: With respect to immigration?
2 Absolutely no responsibility or duty?

3 MS. RIDER-ULACCO: I think the defense
4 counsel has an obligation to the defendant, not the
5 judge. I think the - - -

6 CHIEF JUDGE LIPPMAN: Did you - - - okay,
7 go ahead.

8 MS. RIDER-ULACCO: I think that the - - -
9 keeping it as a collateral consequence, at least as
10 far as - - -

11 CHIEF JUDGE LIPPMAN: Let me ask you the
12 same question I asked your adversary.

13 MS. RIDER-ULACCO: Um-hum. Sure.

14 CHIEF JUDGE LIPPMAN: Does the - - - does
15 the - - - does that collateral-direct weighing work
16 here in the context of deportation after Padilla?

17 MS. RIDER-ULACCO: Well, Padilla basically
18 just concentrated on whether or not the defendant
19 received effective assistance of counsel, not whether
20 or not the plea - - -

21 CHIEF JUDGE LIPPMAN: You think it has no
22 application to the judge?

23 MS. RIDER-ULACCO: Well, I think it does to
24 the degree that the ineffective advocate on behalf of
25 your client, they have to be able to give a knowing,

1 voluntary, and intelligent plea.

2 CHIEF JUDGE LIPPMAN: Yes. Can they do
3 that if the judge does not raise anything to do with
4 the deportation consequences?

5 MS. RIDER-ULACCO: I think so, because I
6 think it's up to defense counsel to do that.

7 JUDGE SMITH: You're saying that if defense
8 counsel does what he's supposed to do under Padilla,
9 then anything the judge says is redundant?

10 MS. RIDER-ULACCO: I don't think that the
11 judge is obligated to tell - - -

12 CHIEF JUDGE LIPPMAN: And if the judge - -
13 - if defense counsel doesn't do what he's supposed to
14 do, the judge has no responsibility?

15 MS. RIDER-ULACCO: I think, yes. I - - -

16 CHIEF JUDGE LIPPMAN: Don't we have the
17 statute - - -

18 JUDGE RIVERA: But isn't the judge - - -

19 CHIEF JUDGE LIPPMAN: - - - from the state
20 that says that the judge has a responsibility?

21 MS. RIDER-ULACCO: Under 220.50 subdivision
22 7, it does say that the judge must inform a defendant
23 - - -

24 CHIEF JUDGE LIPPMAN: The judge has some
25 responsibility. Your argument is, it doesn't have to

1 do with the voluntariness.

2 MS. RIDER-ULACCO: Well, in that very same

3 - - -

4 CHIEF JUDGE LIPPMAN: What is your
5 argument?

6 MS. RIDER-ULACCO: In that very same
7 statute it says but the failure of the judge to do so

8 - - -

9 CHIEF JUDGE LIPPMAN: Yeah.

10 MS. RIDER-ULACCO: - - - to warn the
11 defendant, doesn't affect the voluntariness of the
12 plea or the validity of the conviction.

13 CHIEF JUDGE LIPPMAN: Okay. So you're
14 saying he has - - - he or she has an obligation, but
15 that it's not going to affect - - -

16 MS. RIDER-ULACCO: Yes.

17 JUDGE PIGOTT: Does that mean - - - does
18 that mean, in your view - - -

19 MS. RIDER-ULACCO: Yes.

20 JUDGE PIGOTT: - - - that while it does not
21 affect the plea, it may affect the sentence?

22 MS. RIDER-ULACCO: No. I think really it
23 has no affect at all. I think that that legislation
24 is there really, and the purpose of the legislation -

25 - -

1 CHIEF JUDGE LIPPMAN: Wasn't that
2 legislation pre-Padilla? Padilla has no effect on
3 that?

4 MS. RIDER-ULACCO: The legislation was 1995
5 is when it started. Padilla is 2010.

6 CHIEF JUDGE LIPPMAN: I know. It's the
7 same year as Ford, right?

8 MS. RIDER-ULACCO: Right.

9 CHIEF JUDGE LIPPMAN: But Padilla had no
10 effect on the statute or on Ford in relation to the
11 judge's actions? That's a yes or no, whatever you
12 think.

13 MS. RIDER-ULACCO: No. No.

14 CHIEF JUDGE LIPPMAN: Okay.

15 JUDGE RIVERA: Why, in your opinion - - - I
16 think is what you're saying - - - why post-Padilla is
17 - - - are immigration matters or deportation
18 specifically, if we want to stay with that, is still
19 collateral. How does that holding in Ford survive
20 post-Padilla?

21 MS. RIDER-ULACCO: I think that it survives
22 because they don't really necessar - - - they don't
23 direct - - - excuse me - - - they don't address
24 whether it's a direct or collateral consequence.
25 They just leave that - - -

1 JUDGE RIVERA: Who's "they"? The Supreme
2 Court?

3 MS. RIDER-ULACCO: The Supreme Court. They
4 said, listen, this is not fitting - - -

5 JUDGE RIVERA: But they rejected that - - -

6 MS. RIDER-ULACCO: - - - if its direct and
7 collateral - - -

8 JUDGE RIVERA: - - - framework.

9 MS. RIDER-ULACCO: They did. So they went
10 to the Strickland standard and said, for effective
11 assistance of counsel, when it comes to these types
12 of questions, you're to use the two-prong test,
13 basically. And whether - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but what's the
15 significance of the Supreme Court rejecting the
16 direct-collateral framework? What - - - does that
17 matter? And we still use it here?

18 JUDGE RIVERA: But isn't what drove the
19 decision also - - - I'm sorry - - - isn't what drove
20 the decision in Padilla the fact that deportation now
21 is automatic and is of such tremendous significance
22 that under our framework, it would even fit - - - if
23 we kept this framework - - - that it's direct?

24 MS. RIDER-ULACCO: But I think that
25 deportation hasn't changed as far as it's not within

1 the court's control. So to put that burden on the
2 court, to say, hey, listen court, now you must inform
3 every single person that comes before you, first find
4 out if they're a citizen or not, find out the
5 particular circumstances of that person - - - it's
6 putting a large burden on our court system - - -

7 JUDGE ABDUS-SALAAM: Is it such an onerous
8 burden that it couldn't be accomplished? It's just
9 another one or two sentences that the Court would
10 pronounce at some point, just like PRS or something
11 else.

12 MS. RIDER-ULACCO: I think that it's enough
13 where - - - that a defense attorney is more in a
14 better place to discuss that with their client.
15 They're the ones that are going to be learning about
16 the client. I don't think that the courts
17 necessarily should be that intimately involved with
18 each defendant. They're not going to be for the most
19 part.

20 JUDGE RIVERA: But those - - - but you may
21 not think so, but the New York State legislature
22 thinks so, because they mandated judges to do it.
23 Doesn't a judge violate their ethical - - -

24 JUDGE GRAFFEO: Did that - - -

25 JUDGE RIVERA: - - - obligations not to do

1 it?

2 JUDGE GRAFFEO: - - - did that statute
3 sunset on September 1st - - - it had a sunset date of
4 September 1st this year. Was the statute - - -

5 MS. RIDER-ULACCO: They extended it to
6 2105, Your Honor.

7 JUDGE GRAFFEO: Okay. I just wanted to be
8 sure. Okay.

9 JUDGE ABDUS-SALAAM: Could I just ask - - -

10 JUDGE RIVERA: I'm sorry, I'm not clear how
11 a judge can avoid the statutory requirement on what
12 seems to be at least the argument here, that Padilla
13 now makes Ford's determination on deportation no
14 longer sustainable. It's just not good law.

15 MS. RIDER-ULACCO: I think they're two
16 different things. I think we're mixing two different
17 things. I think that Ford addresses - - - strictly
18 addresses knowing, voluntary, and intelligent plea.
19 Okay? That's what Ford addressed and said, hey, a
20 judge is obligated to tell a defendant in front of
21 them the direct consequences of a plea.

22 JUDGE SMITH: A - - - I'm sorry. I'm
23 sorry.

24 CHIEF JUDGE LIPPMAN: Isn't there a due
25 process issue after Padilla?

1 MS. RIDER-ULACCO: I think - - - no, I
2 think - - -

3 CHIEF JUDGE LIPPMAN: In relation to this?
4 In relation to the very issue in your case? I mean,
5 we thought - - - we think that PRS, we've said that
6 that - - - you know, there's a due process issue and
7 you have to have notice. Isn't this pretty
8 important; deportation?

9 MS. RIDER-ULACCO: Absolutely. Deportation
10 is very important. It's not a matter of - - -

11 CHIEF JUDGE LIPPMAN: It's critically
12 important.

13 MS. RIDER-ULACCO: It can be. But it is
14 not - - - but because it's important, hasn't been the
15 standard that the courts have applied. What they've
16 applied is saying, listen, a direct consequences is a
17 component of sentence, a term of probation, a term of
18 incarceration, a fine, post-release supervision out
19 of Catu.

20 CHIEF JUDGE LIPPMAN: Yeah, but doesn't
21 Padilla really take this direct collateral business
22 almost out of the picture altogether? Deportation is
23 you're gone. You know, it is what it is. It's a - -
24 -

25 MS. RIDER-ULACCO: I don't think it does.

1 I still - - -

2 JUDGE ABDUS-SALAAM: Could I ask another
3 question that hasn't come up yet? Is there a
4 preservation issue in any of these cases?

5 MS. RIDER-ULACCO: There absolutely is. In
6 our case there is a preservation issue. The
7 defendant never objected - - - never made any
8 objections on the record. He never made a motion to
9 withdraw his plea. He never filed a 440 motion
10 asking for the - - -

11 JUDGE SMITH: Of course, usually - - -

12 JUDGE ABDUS-SALAAM: Did he make a - - -

13 JUDGE SMITH: - - - that happens - - -
14 usually, when the claim is I wasn't warned, you can't
15 really expect him to make the objection. But you're
16 saying he knew at a point when he could have made the
17 objection?

18 MS. RIDER-ULACCO: I think certainly at
19 sentencing he knew about the issue as far as the - -
20 - that he was going to be deported, because his
21 attorney says to him, Mr. Sicajian is subject to
22 deportation following the completion of his sentence.
23 The only thing that counsel was confused about - - -
24 and he does say in the next sentence, he goes, I'm
25 not exactly sure what that will - - - how that will

1 due process right?

2 MS. LATINO: Well, it says that a trial
3 judge has a Constitutional duty to advise you of the
4 consequences. It says the trial - - -

5 JUDGE SMITH: The statute says there's a
6 Constitutional duty?

7 MS. LATINO: Well, the trial - - - well the
8 statute says the trial court must advise a defendant
9 of the consequences of deportation before accepting
10 his plea, to ensure that it's knowing, voluntary, and
11 intelligent. I'm submitting to you that it's a
12 Constitutional duty.

13 And the trial courts are incorrectly
14 interpreting that provision. It's either
15 unconstitutional or they're not interpreting it
16 correctly.

17 CHIEF JUDGE LIPPMAN: Well, are you talking
18 post-Padilla? Is that what you're saying?

19 MS. LATINO: Well - - -

20 CHIEF JUDGE LIPPMAN: Looking at the
21 statute post-Padilla, is that your - - -

22 MS. LATINO: No, I think the statute was
23 unconstitutional even pre-Padilla, it just - - - it
24 didn't make any sense. And - - -

25 JUDGE SMITH: But you - - - you say - - - I

1 mean, as I understand your argument, it's that in
2 every case in which the defendant is not warned on
3 the record of deportation consequences - - - that is
4 assuming he's deportable, he gets his plea back?

5 MS. LATINO: I think that would be a way to
6 look at it, if we're treating it as a direct
7 consequence. And yes, the due - - - the trial court
8 has a duty to at least - - -

9 JUDGE SMITH: Isn't that - - -

10 MS. LATINO: - - - advise - - -

11 JUDGE SMITH: - - - isn't that - - -

12 JUDGE GRAFFEO: Regardless of preservation
13 whether they ever moved to withdraw their plea?

14 MS. LATINO: I don't think there's a
15 preservation issue. The court is well-established
16 that on illegality of sentences and the voluntariness
17 of a plea, that you don't have to move to vacate. My
18 client had no idea. He had a defense counsel that
19 didn't advise him, and the trial court didn't advise
20 him.

21 JUDGE SMITH: Well, I mean - - -

22 MS. LATINO: He didn't know.

23 JUDGE SMITH: - - - assume you're right
24 about preservation. Isn't the rule you're looking
25 for kind of overkill? We already have the obligation

1 of the defense lawyer to advise him. Let's assume
2 that at least once in a while the defense lawyer will
3 carry out his function and will advise him. What's
4 the point of requiring the court to do the same thing
5 and invalidating every plea where the court doesn't
6 do it?

7 MS. LATINO: Well, and we don't know in
8 every case whether defense counsel has accurately
9 advised him.

10 JUDGE SMITH: Yeah, but I grant that you
11 don't. But where he hasn't, presumably, you get
12 relief under Padilla.

13 MS. LATINO: Well, but the trial court
14 still has a due process - - - there's still a due
15 process right, the Fifth Amendment - - -

16 JUDGE SMITH: I guess what I'm saying is,
17 what's the point of ma - - - what's the point of
18 requiring the defendant to be told the same thing
19 twice and getting - - - and giving his plea back if
20 he's only told once?

21 MS. LATINO: It's to ensure that at that
22 very time of making the plea, the court has notified
23 them that if you haven't already done so, you may
24 want to look into whether you're going to be
25 deported. That's a separate due process Fifth

1 Amendment right. And under Missouri v. Frye, the
2 court has decided that they're separate and distinct
3 rights, and compliance with one doesn't necessarily
4 right the wrong - - -

5 CHIEF JUDGE LIPPMAN: Okay, counselor.

6 MS. LATINO: - - - of another.

7 JUDGE RIVERA: Well, of course - - -

8 CHIEF JUDGE LIPPMAN: Judge Rivera.

9 JUDGE RIVERA: - - - a lawyer - - - a
10 lawyer has to tell their client the sentence and we
11 expect the judge to inquire about the sentence, do we
12 not? That he understands the sentence when he takes
13 the plea and the rights they're going to give up?

14 MS. LATINO: I think the trial court only
15 has to notify them that there might be consequences.
16 The defense counsel has to give them specific
17 information and explain how it's - - -

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 Thanks.

20 MS. LATINO: - - - going to affect them.

21 JUDGE RIVERA: Thank you.

22 CHIEF JUDGE LIPPMAN: Let's go to People v.
23 Diaz.

24 Counselor, do you want any rebuttal time?

25 MS. HERBERT: Yes, Your Honor. Two

1 minutes, please.

2 CHIEF JUDGE LIPPMAN: Okay.

3 Counselor, in your case, the judge said
4 that if you're not here illegally, there's a - - - if
5 you're not here legally there's a problem. And your
6 argument centers around the fact that he was here
7 illegally. Is that right?

8 MS. HERBERT: Your Honor, my client,
9 Richard Diaz, was a legal permanent resident of the
10 United States - - -

11 CHIEF JUDGE LIPPMAN: Right, but the judge
12 said - - -

13 MS. HERBERT: - - - with no prior - - -

14 CHIEF JUDGE LIPPMAN: - - - if you're not
15 here legally, you've got a problem.

16 MS. HERBERT: Right. What the judge - - -

17 JUDGE GRAFFEO: But the judge also said, if
18 you have immigration issues, correct?

19 MS. HERBERT: And my client had no
20 immigration issues prior to this plea. This plea
21 resulted in the only immigration issue that he had,
22 the most serious immigration (sic), which his that
23 he's deportable. So in other words, the judge
24 basically - - -

25 JUDGE GRAFFEO: So - - - so why don't you

1 tell us what you think the judges have to say?

2 MS. HERBERT: The judges have to say - - -

3 JUDGE GRAFFEO: Because obviously, looking
4 at these four cases, in some of these cases, the
5 judges are mentioning something about immigration
6 status. That apparently - - -

7 MS. HERBERT: That's right, Your Honor.

8 JUDGE GRAFFEO: - - - is insufficient in
9 the most of your view.

10 MS. HERBERT: Yes, Your Honor. The - - -
11 all the judge need do is comply with what is already
12 in the statute - - -

13 JUDGE GRAFFEO: Which is what? What would
14 - - - if you were on the bench, what do you say to
15 the defendant?

16 MS. HERBERT: What - - - exactly what the
17 statute - - - the statute requires. Before the court
18 accepts the plea, it must advise the defendant on the
19 record that if you are not a citizen - - - and that's
20 the critical defining characteristic here - - - your
21 plea of guilty and the court's acceptance thereof may
22 result in your deportation, exclusion from admission
23 to the United States, or denial of naturalization.

24 In other words what - - - here the judge
25 identified two conditions to what the judge referred

1 to as adverse immigration consequences: that you're
2 here illegally, which my client was not; or that you
3 have immigration issues, presumably pre-existing
4 immigration - - -

5 CHIEF JUDGE LIPPMAN: So he didn't give the
6 right instruction under the statute?

7 MS. HERBERT: Not at all. In other words,
8 the - - - the critical - - -

9 JUDGE RIVERA: So your concern is not only
10 that it's not the right instruction, but that in
11 reality it was misleading?

12 MS. HERBERT: Correct.

13 JUDGE RIVERA: It led him to believe that
14 there would be no consequences - - -

15 MS. HERBERT: The only thing - - - exactly.

16 JUDGE RIVERA: - - - under the - - -

17 MS. HERBERT: The only thing someone could
18 have taken away from this was, in effect, if you've
19 got a Green Card, you're okay from this plea. And
20 remember, there were two people pleading guilty. One
21 of them was not similarly situated to my client. But
22 for Mr. Diaz, who was here legally, a Green Card
23 holder with a citizen who's a - - - I'm sorry - - -
24 with a daughter who's a citizen - - - he could only
25 have understood from the court's statement that he -

1 - - that this would not have an adverse immigration
2 consequence for him.

3 JUDGE ABDUS-SALAAM: And that would - - -
4 counsel, and that would be whether or not he had
5 advice from his own lawyer about the deportation
6 consequences?

7 MS. HERBERT: Yes. Based on some of the
8 other questions. I mean, I think what's going on
9 here are two very different things. It's the court's
10 obligation, according to the statute, to alert the
11 defendant to the existence of these very serious
12 immigration consequences. It is counsel's obligation
13 to provide information, to provide guidance about
14 whether, given those consequences, he's - - - this is
15 - - - this is something that he would want to do.

16 JUDGE PIGOTT: We're pretty strict, you
17 know, on taking pleas and what the judge is and isn't
18 supposed to do. Are we getting to the point, with
19 all of these arguments, that if you're an illegal
20 alien or if you're a Green Card or something, you are
21 in far better shape than a citizen, because maybe the
22 judge will screw up, in which case you could move to
23 vacate it; and even if the judge doesn't screw up,
24 you can say my lawyer screwed up and he didn't advise
25 me; so I got a Padilla claim.

1 MS. HERBERT: Well - - -

2 JUDGE PIGOTT: And if the judge even tries,
3 but then says oh, you didn't - - - you didn't
4 indicate that he was illegal, because he was legal,
5 and his immigration problems didn't start until after
6 he took the plea, and therefore, you know, we get
7 about three strikes here to upset a plea, that may be
8 four, five, six, ten years old.

9 MS. HERBERT: Again, I think compliance
10 with the statutory requirement would merely ensure
11 that the plea is knowing, intelligent, and voluntary,
12 which is what the due process clause requires. The
13 fact that for somebody facing what the Supreme Court
14 has referred to as sort of the drastic sanction of
15 immigration, might have rights if that was - - -

16 CHIEF JUDGE LIPPMAN: Post - - - counsel -
17 - -

18 MS. HERBERT: - - - not complied with.

19 CHIEF JUDGE LIPPMAN: - - - post-Padilla,
20 what's the consequence of the judge not giving an
21 appropriate instruction?

22 MS. HERBERT: I think there's two ways of
23 looking at it. I think Padilla must be recognized as
24 having worked a sea-change in the law here.

25 CHIEF JUDGE LIPPMAN: Including the

1 statute? It changed - - -

2 MS. HERBERT: Well, the statute was enacted

3 - - -

4 CHIEF JUDGE LIPPMAN: I understand that.

5 MS. HERBERT: - - - prior to Padilla.

6 CHIEF JUDGE LIPPMAN: I'm asking you, post-

7 Padilla - - -

8 MS. HERBERT: In terms - - -

9 CHIEF JUDGE LIPPMAN: - - - that changes -

10 - -

11 MS. HERBERT: I think - - -

12 CHIEF JUDGE LIPPMAN: - - - the validity or

13 the credi - - - of that - - -

14 MS. HERBERT: Well, I think, again, the

15 statutory requirement was always the statutory

16 requirement.

17 CHIEF JUDGE LIPPMAN: Yeah, yeah. But the

18 consequence - - -

19 MS. HERBERT: After - - - right.

20 CHIEF JUDGE LIPPMAN: - - - the

21 consequence?

22 MS. HERBERT: After Padilla, I think it's

23 very clear that the final language in the statute,

24 that the - - - basically this - - -

25 CHIEF JUDGE LIPPMAN: That's what I'm

1 asking.

2 MS. HERBERT: - - - that that is no longer
3 valid. In other words, the legislature cannot say
4 that a violation of the due process clause cannot be
5 remedied, that this has no effect.

6 JUDGE READ: I thought you were saying if -
7 - - I'm sorry, excuse me, but I thought you were
8 arguing that it would be adequate for the judge to
9 recite in haec verba, the words in the statute?

10 MS. HERBERT: Yes, I am. I'm referring to
11 - - - and again, I may have been using a shorthand -
12 - - that it's the last portion of the statute that
13 says "the failure to advise the defendant pursuant to
14 this subdivision" - - -

15 JUDGE READ: Oh, okay.

16 CHIEF JUDGE LIPPMAN: The voluntary - - -

17 JUDGE READ: Okay.

18 MS. HERBERT: That is what I'm referring to
19 that - - -

20 JUDGE READ: Okay.

21 MS. HERBERT: - - - after Padilla, that can
22 no longer be viewed as good law.

23 JUDGE SMITH: The - - - as I understand it,
24 your client - - - in a 440, your client attempted to
25 rely on what I'll call a simple Padilla claim, and it

1 was rejected on the ground that he hadn't shown he
2 wouldn't have taken his plea back, and the Appellate
3 Division denied leave to appeal.

4 Why - - - I mean, assume - - - assume he's
5 - - - assume we're - - - that you're bound by that
6 finding that he wouldn't have - - - that he wouldn't
7 have rejected his plea - - - the plea deal anyway.
8 Do you say that - - - you say the plea is invalid
9 even if the warning would have had no effect?

10 MS. HERBERT: Well, again, I think by
11 analogy to the line of cases involving PRS, because
12 the plea was involuntary, you do not have to
13 demonstrate prejudice. It is just not part of the -
14 - -

15 JUDGE SMITH: So the answer is yes - - -
16 yes. He gets his plea back even - - -

17 MS. HERBERT: He does get his plea - - -

18 JUDGE SMITH: - - - if the warning would -
19 - -

20 MS. HERBERT: - - - back.

21 JUDGE SMITH: - - - have been a completely
22 empty record.

23 MS. HERBERT: And of course, we sought to
24 challenge that determination by the trial court. We
25 were simply not permitted to do so.

1 JUDGE SMITH: I understand. But even - - -
2 whether you can challenge - - - challenge it now I'm
3 not debating. But hypothetically, even if the
4 warning from the judge would have been an utterly
5 empty ritual, and the defendant would - - - was
6 determined to take the deal and wasn't even thinking
7 about rejecting it, still, the absence of that
8 warning invalidates the plea.

9 MS. HERBERT: That's correct. And I think
10 that was the situation confronted by the court in the
11 post-release supervision cases, where it could very
12 well be in those cases that the judge - - - in fact,
13 several of the cases, I think - - -

14 JUDGE SMITH: The resemblance - - - the
15 resemblance strikes me too. But I'm not sure that we
16 want another round of these.

17 CHIEF JUDGE LIPPMAN: Okay, counselor,
18 thanks.

19 MS. HERBERT: Thank you.

20 CHIEF JUDGE LIPPMAN: You'll have your
21 rebuttal.

22 Go ahead.

23 MS. HERBERT: Thank you.

24 MR. RIVELLESE: May it please the court - -

25 -

1 CHIEF JUDGE LIPPMAN: Counselor.

2 MS. HERBERT: - - - Vincent Rivellese for
3 the People.

4 I think Judge Smith's last question is a
5 good place to start. With post-release supervision
6 and the sentencing components that are the direct
7 consequences of a criminal plea, those must be told
8 to a defendant. And the failure to - - -

9 CHIEF JUDGE LIPPMAN: Counsel, PRS is a
10 direct consequence.

11 MR. RIVELLESE: Yes.

12 CHIEF JUDGE LIPPMAN: Deportation is not?

13 MR. RIVELLESE: It's not. And that's - - -

14 CHIEF JUDGE LIPPMAN: Because that's what
15 you - - - how, from a - - - the effect on the
16 individual, how is deportation not and PRS is?

17 MR. RIVELLESE: A particular - - -

18 CHIEF JUDGE LIPPMAN: How do you get there?

19 MR. RIVELLESE: A particular individual
20 who's deported will be affected by his deportation
21 more than somebody serving PRS. That's true. So
22 when you phrase it that way - - -

23 CHIEF JUDGE LIPPMAN: So - - -

24 MR. RIVELLESE: - - - it's not a direct
25 consequence of a conviction, because it's not

1 something within the control of the court. The court
2 is not imposing deportation on a defendant. The
3 court is imposing the sentencing on the defendant.
4 And this court has said the core components of a
5 sentence are those direct consequences that you must
6 be - - -

7 CHIEF JUDGE LIPPMAN: This direct-
8 collateral business, is that the way to evaluate this
9 post-Padilla?

10 MR. RIVELLESE: Yes. Because Padilla is an
11 ineffective assistance case. And Padilla is - - -

12 CHIEF JUDGE LIPPMAN: Doesn't affect the
13 judge at all?

14 MR. RIVELLESE: It doesn't affect whether a
15 judge needs, for due process purposes, to say more
16 things than the direct consequences.

17 CHIEF JUDGE LIPPMAN: Does it affect the
18 second part of the statute which directs the judge to
19 give a deportation warning?

20 MR. RIVELLESE: Padilla does not affect
21 that. And I think I can tell you why this is
22 something - - -

23 CHIEF JUDGE LIPPMAN: How not? How does it
24 not affect it?

25 MR. RIVELLESE: What hasn't been discussed

1 yet is that this statute was 1995. It was during
2 sentencing reform. And this was a way to take two
3 classes of people, nonviolent offenders and people
4 who were going to be deported based on their
5 convictions, and allow for them to be deported
6 earlier, before serving their sentences, instead of
7 having to wait until the end of their sentences and
8 then be deported.

9 It provided for the early release of
10 deportable people. Not - - - it did not provide for
11 the early release of - - -

12 JUDGE SMITH: How does the warning work
13 with that? How is the - - - you're saying that the
14 judge's warning is part of that structure?

15 MR. RIVELLESE: Correct.

16 JUDGE SMITH: Why? How does it work?

17 MR. RIVELLESE: Because in the same
18 legislation that said that judges must inform people
19 that if they're not citizens, they could face
20 immigration consequences, that same legislation also
21 said that those people could be deported before they
22 serve their entire sentences if they were nonviolent
23 - - -

24 JUDGE SMITH: I understanding you're saying
25 they're in the same statute. I guess I'm saying, how

1 does the first one effectuate the same purpose as the
2 second?

3 MR. RIVELLESE: Well, there may be - - -
4 the idea that if they're told, they'll understand
5 that there may be a removal that happens before they
6 complete their sentence.

7 JUDGE SMITH: Is the - - - is it part of
8 the purpose to prevent the problems in the
9 deportation proceeding to make sure that the
10 defendant didn't say, what do you mean deport me?
11 Nobody told me this.

12 MR. RIVELLESE: That could be Professor
13 Price's interpretation. Because in his commentary to
14 that statute, he said that the reason was to make it
15 easier for those proceedings. But it was not
16 something that the trial judge is ordering. The
17 trial judge does not order the deportation, and the
18 deportation is something that was contemplated as
19 potentially going to happen to certain defendants but
20 not all of them, especially in 1995 at the time - - -
21 there was not the same immigration law.

22 So the people enacting the statute were not
23 acting under the presumption that this had anything
24 to do with the voluntariness of the plea. This was
25 based on budget reform. This was based on trying to

1 empty out the prisons from nonviolent - - -

2 JUDGE PIGOTT: You're saying - - -

3 MR. RIVELLESE: - - - offenders.

4 JUDGE PIGOTT: - - - this was more a
5 directive than - - -

6 MR. RIVELLESE: Yes. And that's why you
7 have that provision saying that this does not affect
8 the validity of the plea. Because a convenient time
9 to tell the defendants that they might face
10 deportation is the plea. But that does not mean that
11 at the time the legislature thought this was relevant
12 to the voluntariness of the plea. So that provision
13 makes that clear.

14 CHIEF JUDGE LIPPMAN: But post-Padilla, is
15 it relevant to the voluntariness of the plea?

16 MR. RIVELLESE: Well, it was Your Honors
17 who said in Gravino and Harnett, it could be a
18 circumstance that matters to an individual defendant
19 in his plea. So if he is misinformed, misadvised,
20 under a misimpression, that could affect the
21 voluntariness of his plea. But it's not something
22 that's - - -

23 CHIEF JUDGE LIPPMAN: In your case, was
24 there a - - - was there a - - - was he misadvised?

25 MR. RIVELLESE: No, in our case he wasn't

1 the judge has to say, as comparable to PRS or a
2 component of the sentence, for it to be per se
3 involuntary, even if the defendant knew all about
4 deportation, for it to be involuntary just because
5 the judge didn't say it, then it has to be considered
6 a direct consequence. That's what direct
7 consequences are.

8 JUDGE GRAFFEO: Let me ask you - - -

9 JUDGE RIVERA: But if he's thinking about
10 it - - -

11 JUDGE GRAFFEO: - - - a question - - -

12 JUDGE RIVERA: - - - and the judge says
13 this sentence, and then the person says, oh, okay, I
14 don't have to worry about it. No problem.

15 MR. RIVELLESE: That would be - - -

16 JUDGE RIVERA: I think I'll take the plea.

17 MR. RIVELLESE: That would be for the 440,
18 because then he can say so. He can testify to that
19 and the judge can make a credibility finding.

20 JUDGE GRAFFEO: Let me ask you about the
21 440s. From a policy standpoint or court
22 administration standpoint, if we accept your posture,
23 aren't we going to face a flood of 440s on
24 ineffective counsel? Would it be wiser for us to
25 require the judges to give an appropriate litany at

1 the time of the plea to avoid all these 440s?

2 MR. RIVELLESE: An appropriate litany is
3 certainly always helpful. I mean, there's no reason
4 not to say what the statute says. If you're a judge,
5 you may as well say what the statute tells you to
6 say, and that might stop some defendants from saying
7 that they were never told. That's true. But that's
8 separate from it being a direct consequence versus a
9 collateral consequence.

10 JUDGE SMITH: Well, if you - - - if your
11 adversary prevails in this case, is that going to
12 produce a flood of plea withdrawals?

13 MR. RIVELLESE: Well, yeah, I would think
14 so, because there would be all of these pleas where
15 nothing was said and anyone could just bring the
16 motion, then.

17 There - - - and of course - - -

18 JUDGE SMITH: You - - - you're saying we'd
19 have another Catu on our hands?

20 MR. RIVELLESE: Or PRS, or - - - right,
21 exactly, or Sparber, et cetera.

22 The only other point I wanted to make was
23 as to Judge Abdus-Salaam before asked about
24 preservation. In this case, when the judge
25 essentially rang the bell by mentioning immigration

1 issues, the defendant, whose lawyer knew that he was
2 as resident alien and had a Green Card, and therefore
3 not a citizen, defendant could have asked for any
4 kind of clarification as to what immigration issues
5 means, how does this apply to me, does this apply to
6 me, I'm not sure if this applies to me. Any of that
7 could have been said at that time. So - - -

8 JUDGE ABDUS-SALAAM: And you're saying
9 because he didn't, he just waived it now?

10 MR. RIVELLESE: Excuse me, Judge?

11 JUDGE ABDUS-SALAAM: And you're saying
12 because he did not inquire further about what the
13 judge meant - - -

14 MR. RIVELLESE: He hasn't preserved an
15 argument - - -

16 JUDGE ABDUS-SALAAM: - - - preserved it.

17 MR. RIVELLESE: - - - that he took it a
18 certain way or it should have been said a certain
19 way. His attorney could have read 220.50 and said,
20 Judge you didn't say 220.50, you said something else,
21 and that's wrong; you have to say what the statute
22 says.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 Thanks.

25 MR. RIVELLESE: Thank you.

1 CHIEF JUDGE LIPPMAN: Rebuttal, counselor?

2 MS. HERBERT: Yes, Your Honor. With
3 respect to preservation, the fact that some reference
4 to immigration consequences was made is certainly not
5 sufficient to require preservation. That very same
6 argument was rejected by this court multiple times.
7 I think, and the Boyd case is the most directly on
8 point, where at the time of the plea, the judge
9 mentioned PRS, but just said, oh, I'm supposed to
10 tell you about PRS. And a similar preservation
11 argument was made, and this court rejected it. And
12 that's because claims challenging the voluntariness
13 of a plea do not require preservation.

14 The court has repeatedly reviewed such - -
15 -

16 JUDGE SMITH: Once again, you're
17 essentially analogizing this to the PRS situation?

18 MS. HERBERT: Well, but to - - - right.
19 Even, for instance, in Harnett, there was no - - - no
20 motion, no 440 motion, no motion to withdraw the
21 plea. This court reviewed the voluntariness claim on
22 the merits. Admittedly it rejected it, but it did
23 not require preservation in that case. In the pres -
24 - -

25 JUDGE ABDUS-SALAAM: Is that what you're

1 suggesting now, that even if there might be a
2 preservation problem, we should just go to the merits
3 and - - -

4 MS. HERBERT: Well, I'm suggesting there is
5 no preservation problem, because when the claim is
6 the plea was involuntary, the court does not look to
7 preservation.

8 JUDGE ABDUS-SALAAM: Well, if there were -
9 - - if there were a preservation problem, should we
10 just go to the merits or worry about - - -

11 MS. HERBERT: Well, I think we certainly -
12 - - you certainly should go to the merits. But I
13 think, as I said, for this type of claim,
14 preservation is not required. This court has
15 rejected the Lopez-type argument when not dealing
16 with the factual sufficiency of a plea allocution.

17 If I might very briefly address, I think
18 the court is - - - not only does Padilla make a
19 significant change in the analysis this court should
20 apply, but also, Padilla chronicled, and I think it's
21 a fact of the significant and extremely harsh changes
22 in immigration law that have occurred, since Ford was
23 decided.

24 Virtually all remnants of discretion have
25 been eliminated. And the court referenced this in

1 Padilla. I think the final changes that did that
2 were in 1996. And under those circumstances, I think
3 the legal landscape is very different from it was - -
4 - the time it was in Ford in 1995.

5 I think there's also one other aspect is,
6 this court can certainly consider this a direct
7 consequence and should consider it a direct
8 consequence. But there's also a category of cases
9 that the court alluded to in Harnett, and I think
10 Gravino as well, where the information is just too
11 important to be left out of the plea. And I think
12 this also falls very - - -

13 JUDGE SMITH: That's a case - - - that's a
14 case-by-case decision, though, isn't it?

15 MS. HERBERT: Well, no. In - - - in
16 Harnett, in dealing with the commitment, the SOMTA
17 legislation, the court referred to this type of a
18 challenge, and referred to a New Jersey case,
19 Bellamy, where in that case, it was a similar type of
20 statute, confinement for sexually dangerous
21 offenders, and in that case, apparently, a plea had
22 been entered into with no mention of these
23 consequences, and essentially immediately after the
24 plea, confinement proceedings were initiated.

25 And the court said that would be a very

1 different situation. Well, that is the type of
2 situation we have - - - we have here. In other
3 words, in Harnett, the court was saying that's too
4 speculative. We don't even know if this is going to
5 apply to you. But if we had a case where it was not
6 speculative, we might - - -

7 JUDGE SMITH: Well, of course - - -

8 MS. HERBERT: - - - view it differently.

9 JUDGE SMITH: - - - on the other - - - we
10 know it's going to apply in most cases to the
11 defendant. We don't always know how - - - how
12 critical it is to him. He's cons - - - yeah, some
13 people would be willing to do another few years in
14 jail rather than get deported. I would think most
15 people say, you know, I love the United States, but
16 for three years in jail, I'll go back to the
17 Dominican Republic. Wouldn't that be at least a
18 fairly common reaction?

19 MS. HERBERT: That may or may not be the
20 reaction.

21 JUDGE SMITH: So why - - - why can't - - -
22 why doesn't - - -

23 MS. HERBERT: I hate - - -

24 JUDGE SMITH: - - - it have to be
25 determined - - -

1 MS. HERBERT: - - - to - - - hate to bring
2 up - - -

3 JUDGE SMITH: - - - on a case-by-case
4 basis?

5 MS. HERBERT: - - - the same - - - the same
6 response. But the same would be true in the PRS line
7 of cases. For some people entering a guilty plea,
8 that would be critically important, for others, not
9 at all. And yet, the court held because it's so
10 important, so much a part of the information that
11 somebody needs - - -

12 CHIEF JUDGE LIPPMAN: You're saying within
13 our jurisprudence, you could fit this in - - -

14 MS. HERBERT: Absolutely, Your Honor.

15 CHIEF JUDGE LIPPMAN: - - - this situation.

16 JUDGE GRAFFEO: I have one practical - - -

17 CHIEF JUDGE LIPPMAN: Post-Padilla, yeah.

18 JUDGE GRAFFEO: - - - question - - -

19 MS. HERBERT: Yes.

20 JUDGE GRAFFEO: - - - to ask you. How does
21 the trial judge know who to give this warning to, or
22 are you saying - - -

23 MS. HERBERT: Well - - -

24 JUDGE GRAFFEO: - - - every - - - at every
25 plea they give it. I mean - - -

1 MS. HERBERT: Well, the statute - - -

2 JUDGE GRAFFEO: - - - the judge may not
3 have any idea who has a Green Card, who has
4 immigration status - - -

5 MS. HERBERT: Absolutely. And the statute
6 doesn't - - - the statute basically says the judge is
7 supposed to say "if you aren't" - - - in other words,
8 it's not supposed to make the determination of
9 citizenship.

10 JUDGE GRAFFEO: So this is something that's
11 going to be said at every - - -

12 MS. HERBERT: Right.

13 JUDGE GRAFFEO: - - - plea proceeding.

14 MS. HERBERT: But of course, only somebody
15 who is, in fact, subject to these consequences, will
16 have a problem with it. Only for that person is
17 there a problem with the voluntariness of the plea.

18 CHIEF JUDGE LIPPMAN: Okay, counselor,
19 thanks.

20 MS. HERBERT: Thank you, Your Honor.

21 CHIEF JUDGE LIPPMAN: Okay. Let's go to
22 People v. Thomas.

23 Counsel - - -

24 MS. FAHEY: Good afternoon.

25 CHIEF JUDGE LIPPMAN: - - - do you want any

1 rebuttal time, counselor?

2 MS. FAHEY: Two minutes, please.

3 CHIEF JUDGE LIPPMAN: Sure. How does your
4 case fit into this - - -

5 MS. FAHEY: Okay.

6 CHIEF JUDGE LIPPMAN: - - - series of cases
7 on this issue.

8 MS. FAHEY: Well, I - - -

9 CHIEF JUDGE LIPPMAN: You had the least
10 significant sentence here, right?

11 MS. FAHEY: I - - - yes.

12 CHIEF JUDGE LIPPMAN: But you have sort of
13 other - - -

14 MS. FAHEY: Right.

15 CHIEF JUDGE LIPPMAN: - - - unusual
16 circumstances.

17 MS. FAHEY: And I -- and I - - - think my
18 case - - - the facts of my case are a good
19 illustration of the basic problem. When my client
20 pled guilty, there was nothing whatsoever to suggest
21 that this could be a life-changing event for him.

22 JUDGE PIGOTT: Life-changing?

23 MS. FAHEY: Well, yes, life-changing.

24 JUDGE ABDUS-SALAAM: At that time, though,
25 counsel, it wasn't, wasn't it? Because the attorney

1 - - -

2 MS. FAHEY: It was absolutely.

3 JUDGE ABDUS-SALAAM: - - - general - - -

4 but the attorney general had discretion at that point

5 in 1992 to - - -

6 MS. FAHEY: Only for someone who had been

7 in the country steadily for seven years. My client

8 had been - - -

9 JUDGE ABDUS-SALAAM: Oh, he had not?

10 MS. FAHEY: - - - here three years. As to

11 him, nothing has changed since 1992. He was just as

12 automatically deportable then as he is today.

13 JUDGE RIVERA: But the reality is - - -

14 MS. FAHEY: Nothing changed.

15 JUDGE RIVERA: - - - the way deportation

16 works out, that is one of the factors that the court

17 considered in Padilla. It's just not the same world

18 that it was in 1992 - - -

19 MS. FAHEY: It's not the same world.

20 JUDGE RIVERA: - - - you concede that.

21 MS. FAHEY: But as to - - - well, but as to

22 my client, it really was the same world. And let me

23 just explain.

24 JUDGE GRAFFEO: But was your client really

25 deserving here of this kind of relief? I mean - - -

1 MS. FAHEY: Well, Your - - -

2 JUDGE GRAFFEO: - - - there's quite a bit -

3 - -

4 MS. FAHEY: - - - well, Your Honor - - -

5 JUDGE GRAFFEO: - - - of fraud on the court
6 here.

7 MS. FAHEY: Well, Your Honor, a plea is
8 either knowing, intelligent, and voluntary when it's
9 entered, or it isn't. Later misbehavior doesn't
10 somehow retroactively make an - - -

11 JUDGE GRAFFEO: Do we want to - - -

12 MS. FAHEY: - - - involuntary plea
13 voluntary.

14 JUDGE GRAFFEO: - - - do we want to
15 encourage this and give this extraordinary remedy - -
16 -

17 MS. FAHEY: No, of course we don't want to
18 encourage it.

19 JUDGE GRAFFEO: - - - now. I mean, in
20 1992, the immigration statutes weren't what they are
21 today.

22 MS. FAHEY: As to him, they were. As to
23 him they were. So - - -

24 JUDGE SMITH: But - - -

25 MS. FAHEY: - - - let me just try to - - -

1 JUDGE GRAFFEO: But there wasn't a
2 recognition - - -

3 MS. FAHEY: - - - explain a little bit - -
4 -

5 JUDGE GRAFFEO: - - - we didn't have - - -

6 JUDGE RIVERA: The level of enforcement was
7 not the same. Do you concede that?

8 MS. FAHEY: I concede the level of
9 enforcement - - - the chance that someone could slip
10 through the cracks was greater. So - - -

11 JUDGE GRAFFEO: So every - - -

12 MS. FAHEY: - - - yes, but the law was the
13 same.

14 JUDGE GRAFFEO: - - - one with a conviction
15 going back to, what, 1950, or I mean, how far are we
16 going to take this back?

17 MS. FAHEY: Well, Your Honor, it would seem
18 to me, in 1990, judicial discretion was eliminated.
19 So that might be a natural point.

20 But let me just try to sort of put myself
21 in the shoes of my client for a moment, because I
22 think this is important. He takes the plea; he's
23 twenty-one; he's never been arrested before. He
24 takes the plea only five days after the arrest. He
25 has not been indicted. It's not a violent felony.

1 And he's told - - -

2 CHIEF JUDGE LIPPMAN: It's a very short - -
3 - short - - - right.

4 MS. FAHEY: Very short - - -

5 CHIEF JUDGE LIPPMAN: Thirty-day, yeah.

6 MS. FAHEY: - - - period of time. And he's
7 - - - and he's told that he's going to get thirty
8 days and probation. Why in the world would this
9 young man, not the brightest young man, according to
10 the pre-sentence report - - - why would he think this
11 is going to dramatically alter my life? Especially -
12 - -

13 JUDGE SMITH: So you're saying - - -

14 JUDGE RIVERA: But he did think to fake his
15 death.

16 JUDGE READ: He faked his death, yeah.

17 JUDGE RIVERA: Why would he think to do
18 that?

19 MS. FAHEY: Well, for all - - - we don't -
20 - - the record doesn't show that - - -

21 JUDGE SMITH: It looks like he found
22 something out after he pleaded, doesn't it.

23 MS. FAHEY: I think that's what happened,
24 Judge. I think that's what happened. I think he
25 pled, and then he found out, oh, yikes, they're going

1 to send me back because of this - - - I'm facing
2 deporta - - - and that's what he did.

3 JUDGE SMITH: But aren't you - - - I mean,
4 aren't you - - -

5 MS. FAHEY: But we don't know from the
6 record.

7 JUDGE SMITH: - - - and aren't you, in
8 effect, in this case - - - if you get rel - - - I
9 mean, for some - - - as I understand it, you really
10 do have what I keep calling the pure Padilla claim.
11 You - - -

12 MS. FAHEY: Yes.

13 JUDGE SMITH: - - - you have - - -

14 MS. FAHEY: We have everything.

15 JUDGE SMITH: - - - in fact, the Appellate
16 Division, as I read it, said that they're not
17 following Padilla.

18 MS. FAHEY: Pretty much. Yeah.

19 JUDGE SMITH: But if we apply Padilla - - -
20 and I'm talking about the ineffective assistance
21 branch of Padilla - - -

22 MS. FAHEY: Right.

23 JUDGE SMITH: - - - maybe that's the only
24 branch there is - - -

25 MS. FAHEY: Right.

1 JUDGE SMITH: - - - if we apply Padilla to
2 your case, aren't you virtually getting
3 retroactivity, even though the Supreme Court has held
4 it's not - - - I know it's formally not retroactive,
5 but this was - - - this was in another century all
6 this happened.

7 MS. FAHEY: Well, it was a long time ago.
8 On the other hand, the rule has always been - - - and
9 in Chaidez the Supreme Court basically applies this
10 rule to Padilla claims - - - it's whatever law - - -
11 whatever the law is while you're case is on direct
12 appeal. Now, sometimes, so - - - so in quirky
13 circumstances - - -

14 JUDGE SMITH: Is there any - - -

15 MS. FAHEY: - - - that's what happens.

16 JUDGE SMITH: - - - is there any merit to
17 suggest that in a case like this maybe we make a - -
18 - we say, oh, come on, you fa - - - you strung out a
19 case for twenty years by faking a death certificate;
20 we're not going to give you the benefit of being - -
21 - of that - - - of that delay?

22 MS. FAHEY: Your Honor, I don't think
23 there's any legal basis for doing that. And I think
24 if the court did that, you would be starting down a
25 slippery slope of there's a delay - - - you know,

1 there's the Martinez case that the court decided a
2 few years ago in which there was - - - there was a
3 long delay, something like seventeen years, and on
4 direct appeal - - -

5 JUDGE SMITH: No indication - - -

6 MS. FAHEY: - - - the new - - -

7 JUDGE SMITH: - - - there that it was
8 defendant's fault.

9 MS. FAHEY: No. It's unclear - - - unclear
10 what happened there. But the depraved indifference
11 law that - - -

12 CHIEF JUDGE LIPPMAN: But you're saying - -
13 -

14 MS. FAHEY: - - - had developed - - -

15 CHIEF JUDGE LIPPMAN: - - - his conduct - -
16 -

17 MS. FAHEY: - - - applied.

18 CHIEF JUDGE LIPPMAN: - - - has nothing to
19 do with what we do here, the final result?

20 MS. FAHEY: I think it has nothing to do
21 with whether the plea was - - -

22 CHIEF JUDGE LIPPMAN: Even though you would
23 - - -

24 MS. FAHEY: - - - knowing and voluntary -
25 - -

1 CHIEF JUDGE LIPPMAN: - - - you would agree
2 - - -

3 MS. FAHEY: - - - initially.

4 CHIEF JUDGE LIPPMAN: - - - that it wasn't
5 exemplary conduct?

6 MS. FAHEY: Oh, of course it wasn't
7 exemplary conduct. I mean, I'm not defending his
8 conduct.

9 CHIEF JUDGE LIPPMAN: Right.

10 MS. FAHEY: I mean - - -

11 CHIEF JUDGE LIPPMAN: But the result is the
12 same, is what you're - - -

13 MS. FAHEY: - - - but the result is the
14 same. And I think if a judge has an obligation to
15 give some basic, minimal record assurance - - -

16 CHIEF JUDGE LIPPMAN: What is the judge's
17 obligation to you post-Padilla - - -

18 MS. FAHEY: I think the ju - - -

19 CHIEF JUDGE LIPPMAN: - - - or pre-Padilla,
20 for that matter.

21 MS. FAHEY: Pre-Padilla. I think - - -
22 well, here, you had a particular circumstance in that
23 the defendant said on the record he's not a citizen.
24 And everyone just ignored that and went on and took
25 his plea.

1 CHIEF JUDGE LIPPMAN: What is the judge
2 obligated to do?

3 MS. FAHEY: I think the judge is obligated
4 to say what the statute requires him to say, or in
5 simpler words, you're pleading to a drug felony, if
6 you are not a citizen, this may subject you to
7 adverse immigration consequences - - -

8 JUDGE ABDUS-SALAAM: Was that - - - was
9 that a 19 - - - your client took the plea in 1992.
10 That - - -

11 MS. FAHEY: That's right.

12 JUDGE ABDUS-SALAAM: - - - statute came
13 into existence in 1995?

14 MS. FAHEY: That's right. But - - -

15 JUDGE ABDUS-SALAAM: And was there even - -
16 - in addition to that, was there even any obligation
17 by his counsel, at that time? Didn't everybody
18 consider - - - virtually everybody consider
19 immigration consequences collateral at the time that
20 your client took the plea?

21 MS. FAHEY: Well, I don't - - -

22 JUDGE ABDUS-SALAAM: In '92?

23 MS. FAHEY: - - - I don't know that the
24 collateral-direct distinction arose until Ford, which
25 was - - - which was 1995 or '6.

1 CHIEF JUDGE LIPPMAN: '5.

2 MS. FAHEY: 1995.

3 JUDGE ABDUS-SALAAM: But basically, nobody
4 was really focused on the immigration consequences at
5 the time your client took the plea in 1992.

6 MS. FAHEY: That's - - - that's right.

7 That's the problem. For him - - -

8 JUDGE ABDUS-SALAAM: Why is it a problem if
9 - - - if the general norm was that it wasn't seen as
10 a problem, why is it a problem?

11 MS. FAHEY: Well, it's not really accurate
12 to say that the norm was not - - - the American Bar
13 Association standards from - - - dating from the
14 early 60s, I believe, or sometime in - - - or the
15 late 60s, required defendants to be - - - to be given
16 the information.

17 JUDGE READ: Is that - - -

18 MS. FAHEY: There were lots of standards
19 that said defense counsel should be advising about
20 this.

21 JUDGE READ: Well, we were - - -

22 MS. FAHEY: And there were lots of st - - -
23 and there were quite a few states by then that
24 required the court to advise. That was the
25 developing trend.

1 court doing thirty-thirty without the benefit of the
2 thirty-thirty set.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 JUDGE GRAFFEO: But when you were - - -

5 CHIEF JUDGE LIPPMAN: Judge Graffeo.

6 JUDGE GRAFFEO: - - - asked what the judge
7 has to say, you said less than what one of the co-
8 counsels here said.

9 MS. FAHEY: Well, I - - -

10 JUDGE GRAFFEO: Do you want the exact
11 language of the statute or what you said?

12 MS. FAHEY: Well, I think the judge, with
13 the benefit of the statute, should be giving the
14 exact language of the statute. That's easy.

15 JUDGE GRAFFEO: Okay. That's why - - -

16 MS. FAHEY: Really easy - - -

17 JUDGE GRAFFEO: - - - that's why I asked -
18 - -

19 MS. FAHEY: Right.

20 JUDGE GRAFFEO: - - - because I thought
21 what you said was less than what we heard before.

22 MS. FAHEY: Really, easy; really simple.
23 Granted, though, in 1992, we didn't have the benefit
24 of the statute yet.

25 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank

1 you.

2 MS. FAHEY: So something simpler, but can -

3 - -

4 CHIEF JUDGE LIPPMAN: You'll have - - -

5 MS. FAHEY: - - - say the same thing.

6 CHIEF JUDGE LIPPMAN: - - - rebuttal,

7 counsel.

8 MS. FAHEY: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks.

10 Counsel?

11 MS. HAGAN: Good afternoon. May it please
12 the court, my name is Jennifer Hagan, and I'm arguing
13 on behalf of the respondent.

14 JUDGE SMITH: The Appellate Division here
15 says that the Supreme - - - the court's failure to
16 advise the defendant of his - - - of the possible
17 immigration consequences of pleading guilty did not
18 render his plea involuntary. Compare Padilla v.
19 Kentucky. Are they - - - are they not - - - but
20 here, they - - - she has a claim - - - her client has
21 a claim that the lawyer didn't advise him either.
22 How - - - isn't Padilla squarely controlling on that?

23 MS. HAGAN: Your Honor, excuse me, Padilla
24 does control Sixth Amendment claims that a noncitizen
25 was not advised of immigration consequences.

1 JUDGE SMITH: And he made that claim,
2 didn't he?

3 MS. HAGAN: Well, to be - - - he did make
4 that claim. To begin, in this case, this court
5 should not even apply Padilla to the Fifth Amendment
6 or Sixth Amendment claim that the defendant is trying
7 to raise, because the defendant forfeited his right
8 to any development in the law.

9 JUDGE SMITH: Okay. And if we disagree
10 with you on that, we've got to - - - we've got to at
11 least send it back for a factual determination on the
12 - - - on the Sixth Amendment aspect, don't we?

13 MS. HAGAN: No, Your Honor. This court
14 does not have to send this case back for any such
15 factual determination. The defendant, at the time of
16 his motion to withdraw the plea was given a full and
17 fair opportunity to present all of the facts that he
18 had in relation to his Sixth Amendment right.

19 JUDGE SMITH: Okay. Well, he - - - yes.
20 And he presented the facts. And the judge found that
21 every word out of his mouth was a lie and rejected
22 the claim that he was given false advice.

23 MS. HAGAN: Yes.

24 JUDGE SMITH: But has anyone ever rejected
25 the claim that he was not advised at all?

1 MS. HAGAN: Your Honor, I - - - the court
2 orally rejected the claim that the defendant wasn't
3 advised at all, because - - -

4 JUDGE SMITH: What did the judge say?

5 MS. HAGAN: He said, at that time, it was
6 not a cognizable claim, because the case was in front
7 of the - - -

8 JUDGE SMITH: Okay.

9 MS. HAGAN: - - - trial court before
10 Padilla.

11 JUDGE SMITH: But he was wrong about that.
12 And - - -

13 MS. HAGAN: But he was wrong because - - -

14 JUDGE SMITH: - - - pre-Padilla - - -

15 MS. HAGAN: - - - because Padilla hadn't
16 been handed - - - hadn't come down yet. But in this
17 case, the defendant never, below, alleged adequate
18 facts to get a hearing on a no-advice claim. The
19 defendant - - -

20 JUDGE SMITH: But his lawyer - - - his
21 lawyer says - - - his lawyer says he was not - - - in
22 his affirmation, says exactly what you're supposed to
23 say under Padilla. Nobody - - - nobody told - - -
24 nobody told the client he was going to be subject to
25 immigration consequences.

1 MS. HAGAN: Yes. But it would be very
2 bizarre for this court to parse up the defendant's
3 motion to withdraw the plea into two separate parts,
4 just the attorney - - - what the attorney's saying
5 and what the - - -

6 JUDGE SMITH: Well, in common sense,
7 suppose - - - is it ridiculous to suppose that the
8 facts are that back in 1992, nobody - - - nobody told
9 this man word-one about immigration, neither the
10 lawyer nor the court; that Mr. Thomas, thinking that
11 was not enough, decided to lie and to say that the -
12 - - that his lawyer had told him wrong. If those are
13 the facts, he still gets relief under Padilla,
14 doesn't he?

15 MS. HAGAN: I don't see how the defendant
16 could allege those facts under these circumstances,
17 where he's already alleged very specifically that he
18 specifically asked - - -

19 JUDGE SMITH: But isn't it - - - isn't it
20 entirely plausible that those facts are true?

21 MS. HAGAN: I don't believe so. Really, I
22 guess there are too - - -

23 JUDGE SMITH: I mean, obviously he's not -
24 - - he wasn't going to allege yeah, he misadvised me
25 and I'm lying. But if - - - but he - - - unless the

1 judge finds that he was given correct advice, there's
2 been a Padilla violation.

3 MS. HAGAN: If the defendant is now
4 alleging that he did not receive advice, it should be
5 evaluated in a separate motion, a 440 motion, not in
6 the context of a motion to - - -

7 CHIEF JUDGE LIPPMAN: Counsel, what's the -
8 - -

9 MS. HAGAN: - - - withdraw a plea.

10 CHIEF JUDGE LIPPMAN: - - - prejudice to
11 the People here? He's already served his time,
12 hasn't he?

13 MS. HAGAN: What's the prejudice to the
14 People?

15 CHIEF JUDGE LIPPMAN: Yeah.

16 MS. HAGAN: I don't understand that
17 question. The prejudice - - -

18 CHIEF JUDGE LIPPMAN: He already served his
19 time. Why wouldn't we apply the law the way it is
20 now? What's the problem with this?

21 MS. HAGAN: The problem is that - - -

22 CHIEF JUDGE LIPPMAN: Why are you objecting
23 to this? On the - - - based on the disappearance? I
24 mean, that's - - -

25 MS. HAGAN: We're objecting based on the

1 disappearance - - - based on his disappearance.

2 CHIEF JUDGE LIPPMAN: So he doesn't get his
3 Padilla rights based on his disappearance? At this
4 point after he's already served time, right?

5 MS. HAGAN: No, I'm not saying that the - -
6 - well, yes. I'm saying he forfeited his - - - his
7 right to any development in the law.

8 CHIEF JUDGE LIPPMAN: Under what law does
9 he forfeit his right?

10 MS. HAGAN: Under the doctrine of
11 forfeiture by wrongdoing.

12 JUDGE SMITH: You got any - - - you got any
13 cases where's been applied in a situation like this?

14 MS. HAGAN: No, but I have cases where it's
15 been applied in situations far more serious than this
16 to very, very basic and very serious Constitutional
17 rights, like the right to be present at your own
18 trial, the right to an attorney, the right to an
19 appeal. It's been applied to a defendant's right to
20 - - -

21 JUDGE SMITH: It's not - - -

22 MS. HAGAN: - - - confront witnesses.

23 JUDGE SMITH: - - - it's not - - - it's not
24 generally the law that you forfeit your rights by
25 lying?

1 MS. HAGAN: No, it's certainly not
2 generally the law, but it would be well within this
3 court's discretion to apply that doctrine, and it
4 would be more fair to apply that doctrine in this
5 case, because it would be bad from a public policy
6 standpoint to - - -

7 JUDGE SMITH: And if I - - -

8 MS. HAGAN: - - - allow this defendant - -
9 -

10 JUDGE SMITH: - - -if I commit a vicious
11 murder, and I lie and say I was nowhere near the
12 scene of the crime, and it's overwhelmingly proved
13 that that was lie, and if the statute of limita - - -
14 well, in murder there's no statute on murder - - -
15 but a vicious rape, if you like - - - and the statute
16 of limitations has run, I haven't forfeited that
17 defense, have I?

18 MS. HAGAN: Can you repeat that question?
19 I'm sorry, Your Honor.

20 JUDGE SMITH: I lie - - - a defendant
21 commits a crime, the statute of limitations runs, he
22 lies about the - - - he lies about it, he says he
23 never did it. He's proven to be a liar, he still has
24 his statute of limitations defense?

25 MS. HAGAN: Yes. Here, however, it's well

1 within this court's discretion to apply forfeiture,
2 and that is what the court should do.

3 And with respect to your concern that the
4 defendant doesn't have his no-advice Padilla claim
5 fully litigated, it would not be proper for this
6 court to send this case back for a hearing on the
7 motion to withdraw the plea, because the facts that
8 the defendant actually alleged in connection with his
9 motion to withdraw the plea was misadvice. If he now
10 wants to raise a contradictory no-advice claim, it
11 should be raised in a 400 where he would have an
12 opportunity to bring those facts before the court.

13 With respect to the general court's advice
14 claim, obviously I'm arguing forfeiture with respect
15 to that claim as well. In any event, this court
16 should evaluate this - - - the court's advice claim
17 under the law as it existed in 1992, because 1992
18 immigration law is the law that will also apply to
19 the defendant's case.

20 JUDGE SMITH: You're also arguing, I
21 assume, as your co-counsel are, that the collateral-
22 direct branch of Ford is unaffected by Padilla?

23 MS. HAGAN: The collateral - - - the
24 collateral and direct distinction still survives.
25 And this court has, in fact, applied it at least four

1 separate times since the Padilla decision was handed
2 down. That distinction is appropriate. It's the
3 only workable - - -

4 JUDGE SMITH: We haven't applied it in the
5 immigration context, though, have we?

6 MS. HAGAN: Not specifically to
7 immigration. However, Ford's holding - - -

8 CHIEF JUDGE LIPPMAN: Isn't immigration
9 different to some degree? No?

10 MS. HAGAN: No, Your Honor. Immigration -
11 - -

12 CHIEF JUDGE LIPPMAN: No different?

13 MS. HAGAN: - - - is no different.

14 CHIEF JUDGE LIPPMAN: Not important you're
15 being deported?

16 MS. HAGAN: Excuse me?

17 CHIEF JUDGE LIPPMAN: Not important that
18 you're being deported?

19 MS. HAGAN: It's abso - - -

20 CHIEF JUDGE LIPPMAN: It's almost automatic
21 to them?

22 MS. HAGAN: - - - it's important. But
23 important is not the standard.

24 CHIEF JUDGE LIPPMAN: In comparison to the
25 other cases and what was involved - - -

1 MS. HAGAN: Excuse me - - -

2 CHIEF JUDGE LIPPMAN: - - - deportation
3 doesn't seem more significant?

4 MS. HAGAN: The signifi - - -

5 CHIEF JUDGE LIPPMAN: More direct? More
6 whatever you want to call it?

7 MS. HAGAN: It's not more direct. It's not
8 part of the sentence. The court can't possibly
9 impose it as part of the sentence. It still turns on
10 - - -

11 CHIEF JUDGE LIPPMAN: You're leaving the
12 country, it's not - - - it's not a direct
13 consequence? Assume for the sake of argument that
14 it's automatic?

15 MS. HAGAN: Even if it's automatic. Just
16 like SORA is automatic, just like consecutive
17 sentences when you have an undischarged sentence is
18 automatic - - -

19 CHIEF JUDGE LIPPMAN: Yes. But that's what
20 I'm asking you.

21 MS. HAGAN: Right.

22 CHIEF JUDGE LIPPMAN: Compared to that
23 whole run of cases, isn't deportation different?

24 MS. HAGAN: It's no different - - - it's
25 still not part of the core component. It's not a

1 core component of the defendant's sentence. It's not
2 a factor that the district court - - -

3 CHIEF JUDGE LIPPMAN: Despite Padilla
4 saying - - -

5 MS. HAGAN: - - - has any - - -

6 CHIEF JUDGE LIPPMAN: - - - that it is so
7 important?

8 MS. HAGAN: It's important. Padilla says
9 it's important for a defendant to have accurate
10 advice. And the People agree with that. And the
11 defendants now have accurate, detailed, tailored
12 advice that's provided by their defense attorney, who
13 is the only - - -

14 CHIEF JUDGE LIPPMAN: And the judge - - -
15 and the judge - - -

16 MS. HAGAN: - - - person - - -

17 CHIEF JUDGE LIPPMAN: - - - doesn't have an
18 obligation?

19 MS. HAGAN: No obligation at all. The
20 judge has no Constitutional obligation - - -

21 CHIEF JUDGE LIPPMAN: You agree that he has
22 a statutory obligation?

23 MS. HAGAN: In - - - not in 1992, he
24 didn't. In 1995, there's a statutory obligation, I
25 do agree.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 MS. HAGAN: I see that my time is up.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 MS. HAGAN: Thank you.

5 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

6 MS. FAHEY: Yes, thank you.

7 Let me first address the People's
8 forfeiture argument. The forfeiture cases they cite
9 are something that's done that has a very direct
10 consequence. So if you threaten the witness and the
11 witness disappears, you can lose your right to
12 confront that - - -

13 CHIEF JUDGE LIPPMAN: You'll get punished
14 in effect - - -

15 MS. FAHEY: - - - that witness.

16 CHIEF JUDGE LIPPMAN: - - - for doing that.

17 MS. FAHEY: You're punished in a way that
18 connects directly.

19 JUDGE SMITH: So you delay - - - you delay
20 a case and the law changes in your favor, why isn't
21 that a direct - - - why aren't you getting advantage
22 from the delay?

23 MS. FAHEY: Well, Your Honor, I don't think
24 that's the same. You have a - - - you have a right
25 to appeal. You have the fundamental right to appeal.

1 JUDGE SMITH: Yeah, but you don't have a
2 right to fake your death certificate.

3 MS. FAHEY: No, of course you don't. Of
4 course you don't.

5 JUDGE GRAFFEO: What about the fact that
6 the other - - - there could be other similarly
7 situated defendants who pled in 1992, and their
8 appeals are done. And they could have had the same
9 absence of warnings that this - - -

10 MS. FAHEY: Right.

11 JUDGE GRAFFEO: - - - defendant had.

12 MS. FAHEY: Right.

13 JUDGE GRAFFEO: They're stuck, right?

14 MS. FAHEY: Well, they're stuck. But
15 that's - - -

16 JUDGE GRAFFEO: And - - - and he isn't. Is
17 - - -

18 MS. FAHEY: But that's - - -

19 JUDGE GRAFFEO: - - - fair?

20 MS. FAHEY: - - - exactly the same as what
21 - - - all the depraved indifference cases you've
22 decided. The guys whose direct appeal was long
23 delayed, and then like Martinez, he had the appeal in
24 front of you after the sea-change of depraved
25 indifference - - -

1 JUDGE SMITH: But might - - - might that
2 have come - - -

3 MS. FAHEY: - - - and he got the benefit.
4 Other people - - -

5 JUDGE SMITH: - - - - - might that have
6 come out differently, if Martinez had delayed his
7 appeal by committing fraud on the court?

8 MS. FAHEY: Well, Your Honor, he - - - you
9 know, you would have to get into how much of the
10 delay is due to what, and exactly what happened - - -

11 JUDGE READ: This - - - this case is pretty
12 clear - - -

13 MS. FAHEY: - - - in every case.

14 JUDGE READ: - - - though. I mean, we
15 don't have to get into much here. This is pretty
16 clear.

17 MS. FAHEY: Well, Your Honor, he was
18 punished for what he did. Instead of doing thirty
19 days, which he had basically done, he - - - he was
20 sentenced to two to six years. He served the two to
21 six years, and then he spent three and a half years
22 in ICE detention - - -

23 JUDGE PIGOTT: Ms. Fahey?

24 MS. FAHEY: - - - waiting for this case to
25 - - - to - - - you know, waiting for - - -

1 JUDGE SMITH: I mean, let me - - -

2 MS. FAHEY: - - - resolution now.

3 JUDGE SMITH: - - - let me suggest
4 something you might like. Isn't the forfeiture
5 argument barred by LaFontaine?

6 MS. FAHEY: Well, it's certainly - - -

7 JUDGE PIGOTT: Say yes.

8 MS. FAHEY: - - - it's certainly
9 unpreserved.

10 CHIEF JUDGE LIPPMAN: Say, yes; you're
11 good.

12 MS. FAHEY: LaFontaine - - -

13 JUDGE SMITH: My favorite case.

14 MS. FAHEY: - - - my head spins when I hear
15 LaFontaine.

16 CHIEF JUDGE LIPPMAN: We - - - all of our
17 heads spin - - -

18 MS. FAHEY: Right.

19 CHIEF JUDGE LIPPMAN: - - - when we hear La
20 - - - but go ahead.

21 MS. FAHEY: It's certainly unpreserved.

22 The People did - - - never argued below that he had
23 forfeited - - -

24 JUDGE SMITH: Well, he hadn't - - -

25 MS. FAHEY: - - - and he wasn't entitled to

1 the - - -

2 JUDGE SMITH: - - - at that point.

3 MS. FAHEY: - - - law.

4 JUDGE PIGOTT: Ms. Fahey, I don't know the
5 answer to this question I'm about to ask you. Do you
6 think there are circumstances under which a person
7 may have immigration issues that they do not want the
8 court to know about?

9 MS. FAHEY: Sure. Not a problem.

10 JUDGE PIGOTT: All right.

11 MS. FAHEY: Not a problem because what the
12 court - - - the court is not supposed to say are you
13 a citizen and then give a warning if the guy says no,
14 I'm not. The court, under the - - - under the
15 statute is supposed - - - the court must advise the
16 defendant on the record that if you are not a
17 citizen, then this may happen to you.

18 JUDGE PIGOTT: Right.

19 MS. FAHEY: So - - -

20 JUDGE PIGOTT: And does the - - - does the
21 corollary to that then be, does the defense lawyer
22 have an obligation to advise the court, or can he
23 sometimes keep it secret?

24 MS. FAHEY: Advise the court or advise the
25 client?

1 JUDGE PIGOTT: Well, obviously, the
2 client's going to advise him, I presume, that he - -
3 -

4 MS. FAHEY: Well, clients don't always know
5 - - -

6 JUDGE PIGOTT: - - - that he doesn't - - -

7 MS. FAHEY: - - - what their status is.

8 JUDGE PIGOTT: But let's assume that the
9 two of them do know.

10 MS. FAHEY: Right.

11 JUDGE PIGOTT: Are they obliged to then
12 tell the court?

13 MS. FAHEY: No. I think the court has to
14 give this general warning, and if - - -

15 JUDGE SMITH: So as you read the statute,
16 it says you read these words at every case. If you
17 or I are the defendant, the judge has to read it?

18 MS. FAHEY: Easy. Easy.

19 JUDGE SMITH: Does that - - - does that
20 happen? Has it ever happened?

21 MS. FAHEY: Sure, it hap - - - I mean,
22 yeah, there - - -

23 JUDGE SMITH: Are there judges who do this
24 in every case?

25 MS. FAHEY: Oh, I think there are judges

1 who do this in every case. Because the statute says
2 they have to do it. I don't think we can assume that
3 all judges - - -

4 JUDGE SMITH: And I guess - - -

5 MS. FAHEY: - - - ignore the statute.

6 JUDGE SMITH: - - - I seem to remember
7 reading a lot of sentencing transcripts, and I don't
8 - - - these aren't familiar words to me.

9 MS. FAHEY: Well, they don't always do it
10 in exactly - - -

11 JUDGE SMITH: Well, if it's a plea, I guess
12 plea transcripts.

13 MS. FAHEY: - - - these words, as you
14 should.

15 JUDGE GRAFFEO: The allocation.

16 MS. FAHEY: But it's a statutory
17 obligation, and it's been that way for a long time
18 now.

19 CHIEF JUDGE LIPPMAN: 1995.

20 MS. FAHEY: I don't think we can assume
21 that no judge does it when statutorily, they're
22 obligated - - -

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 MS. FAHEY: - - - to do it.

25 CHIEF JUDGE LIPPMAN: Thanks.

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MS. FAHEY: Thank you.

CHIEF JUDGE LIPPMAN: Thank you all.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Felix Hernandez, No. 211; People v. Juan Jose Peque, No. 163; People v. Richard Diaz, No. 164; People v. Michael Thomas, No. 165 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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