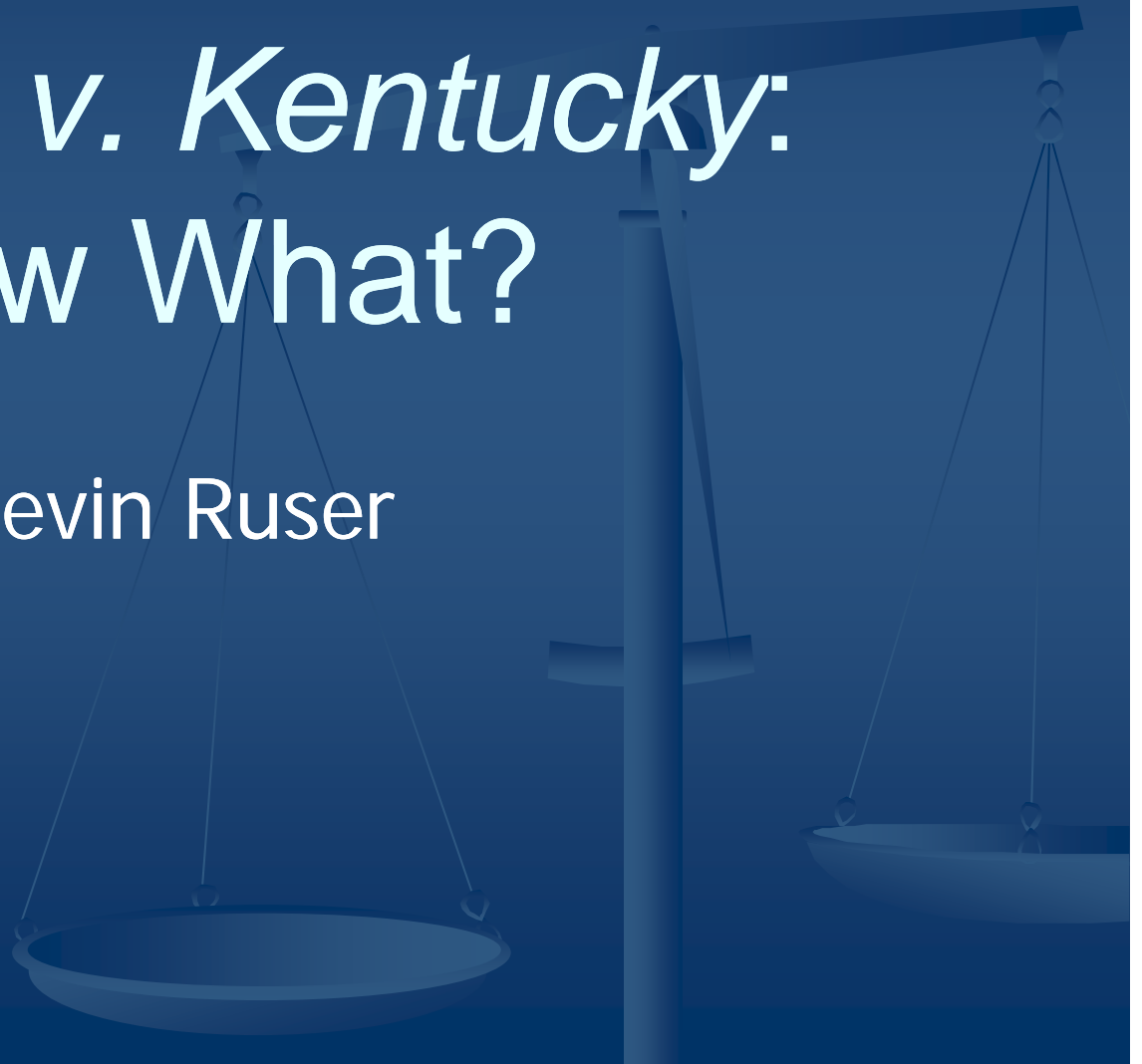


Padilla v. Kentucky: Now What?

Kevin Ruser



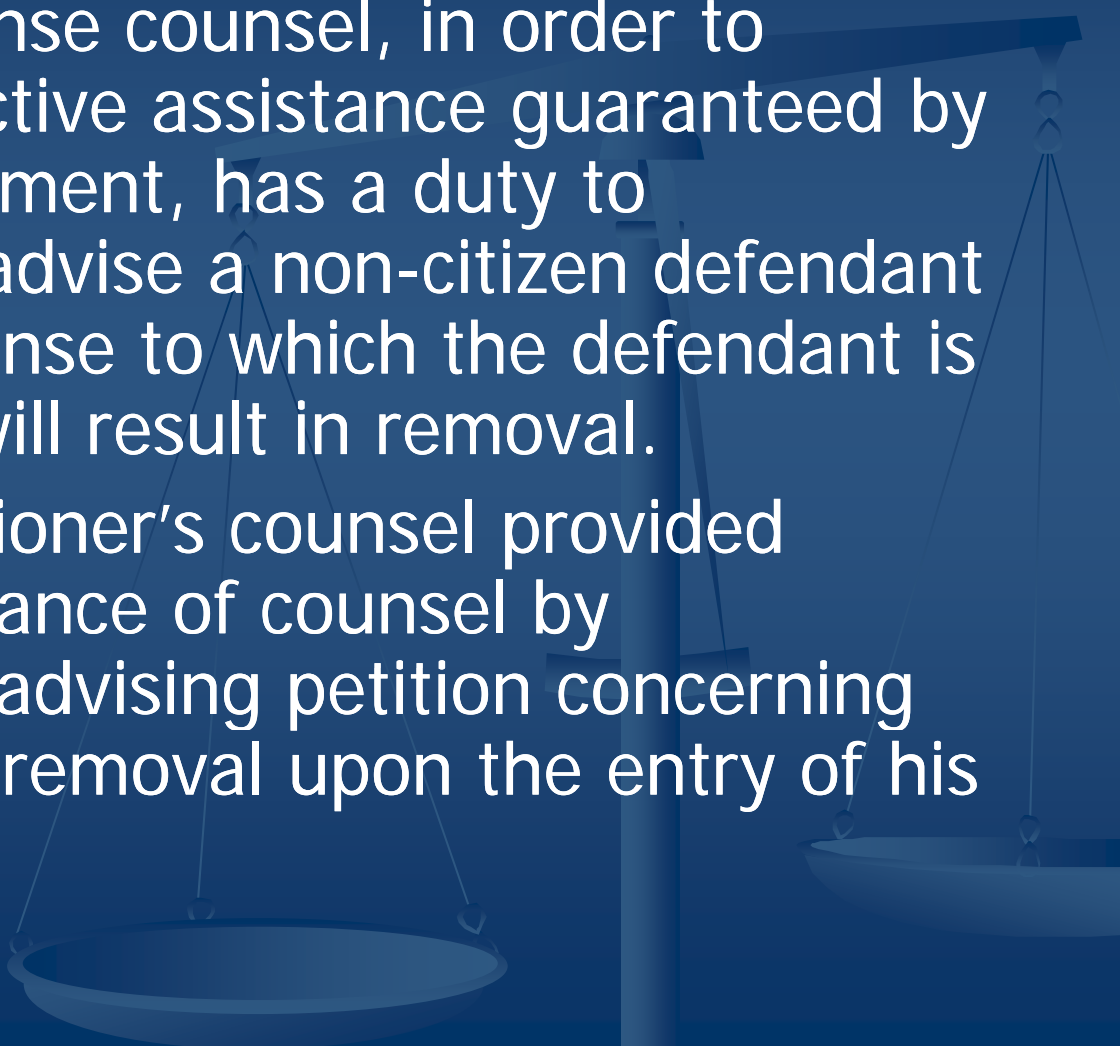
The Basics



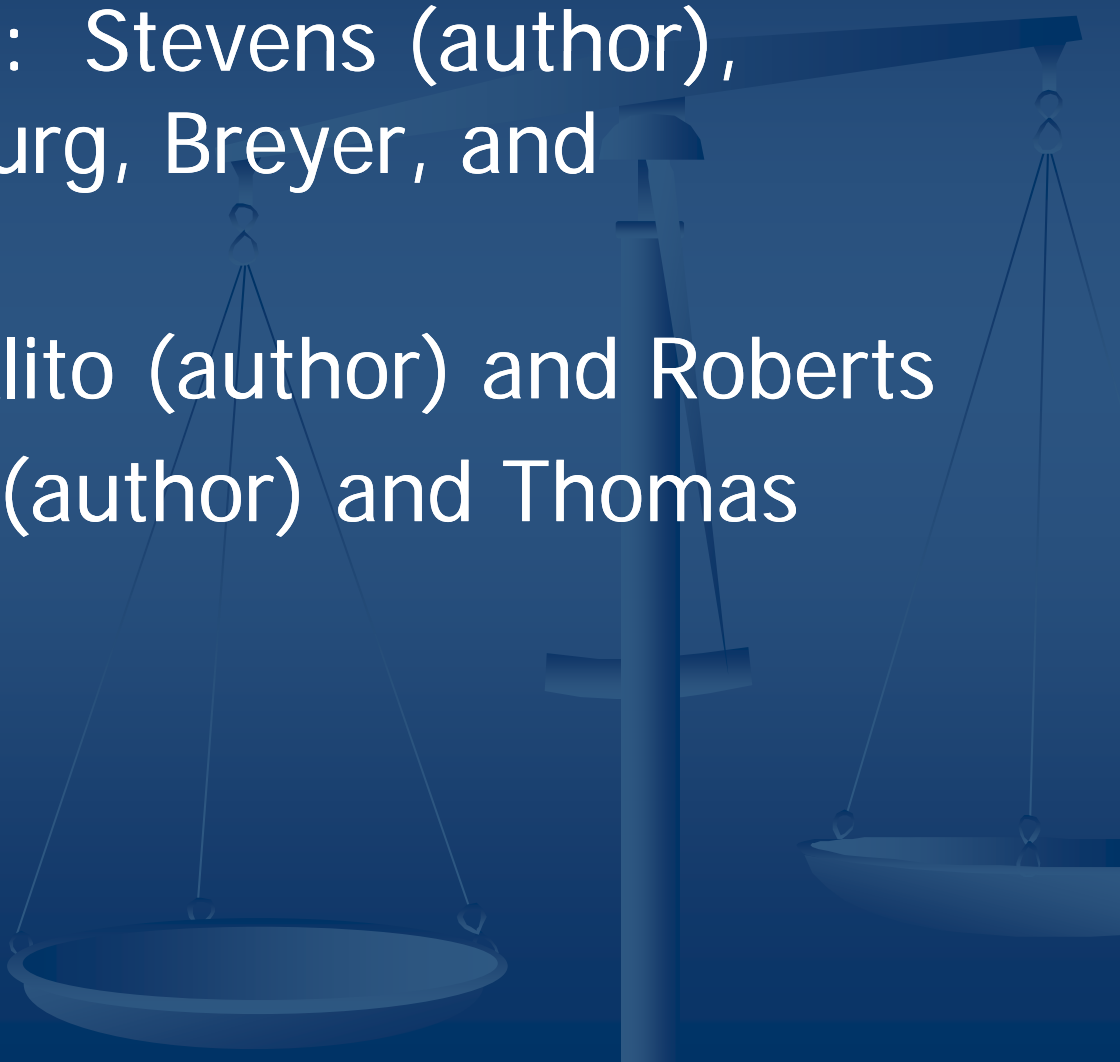
- Facts:

- Padilla was a 40-year LPR and Vietnam vet
- Pled guilty to 3 state crimes related to his transporting around ½ ton of marijuana in a tractor-trailer
- Most serious offense was a drug trafficking offense that netted him a 5-year prison sentence followed by 5 years of probation
- Criminal defense lawyer told Padilla he “did not have to worry about immigration status since he had been in the country so long”

Issues On Which the Supreme Court Granted Cert.

- 1. Whether defense counsel, in order to provide the effective assistance guaranteed by the Sixth Amendment, has a duty to investigate and advise a non-citizen defendant whether the offense to which the defendant is pleading guilty will result in removal.
 - 2. Whether petitioner's counsel provided ineffective assistance of counsel by affirmatively misadvising petition concerning the likelihood of removal upon the entry of his guilty plea.
- 

How They Voted

- Majority opinion: Stevens (author), Kennedy, Ginsburg, Breyer, and Sotomayor
 - Concurrence: Alito (author) and Roberts
 - Dissent: Scalia (author) and Thomas
- 

What The Court Held

- 1. Defense counsel must inform his or her client whether a guilty plea carries a risk of deportation. (slip op. at 17)
- Constitutionally competent counsel would have advised Padilla that his drug conviction made him subject to automatic deportation (p. 2)
- Remanded to Ky. Sup. Ct. to determine if Padilla can demonstrate prejudice under *Strickland's* second prong

How Detailed Must The Immigration Advice Be?

- The bare minimum → advise that pending criminal charges may carry a risk of adverse immigration consequences (p. 12)
 - Alito and Roberts concur
- This case → competent counsel would have advised Padilla that conviction would make him deportable (p. 11)
 - Why more than the bare minimum here? Because this is an easy case given the nature of Padilla's conviction – drug trafficking (p. 11)

How Detailed? (cont.)

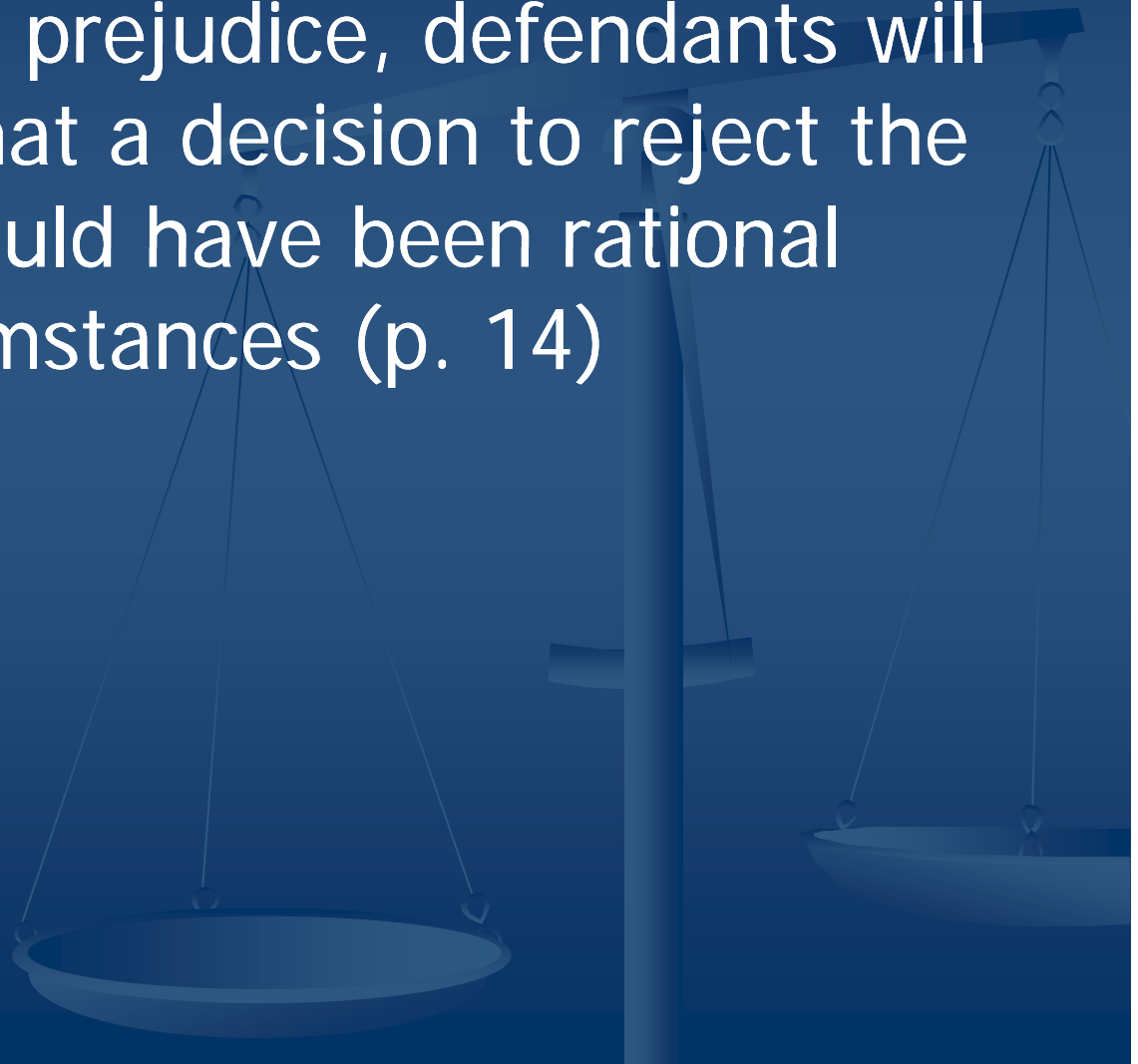
- Prevailing norms of practice as set forth in ABA standards, etc., are guides to determining whether counsel's advice is competent → weight of these norms require counsel to advise the client "regarding the risk of deportation" (p.9)
 - Alito's interpretation – this requires defense counsel to explain what immigration consequences attach to a plea, at least in an "easy" case (concurrency, p. 1)

Miscellaneous Notes

- Court held that deportation is an “integral part” of the **penalty** imposed on non-citizen defendants (p. 6). This is so primarily because relief from removal has been so restricted by Congress and now removal is nearly automatic in some cases (p. 2)
- Court rejected a rule that would have penalized only affirmative misadvice (p. 12)
- Court dismisses “floodgates” concern because of *Strickland* prejudice prong (p. 14)

Miscellaneous Notes (cont.)

- To demonstrate prejudice, defendants will have to show that a decision to reject the plea bargain would have been rational under the circumstances (p. 14)



Concurrence

- Alito and Roberts

- Majority opinion goes too far

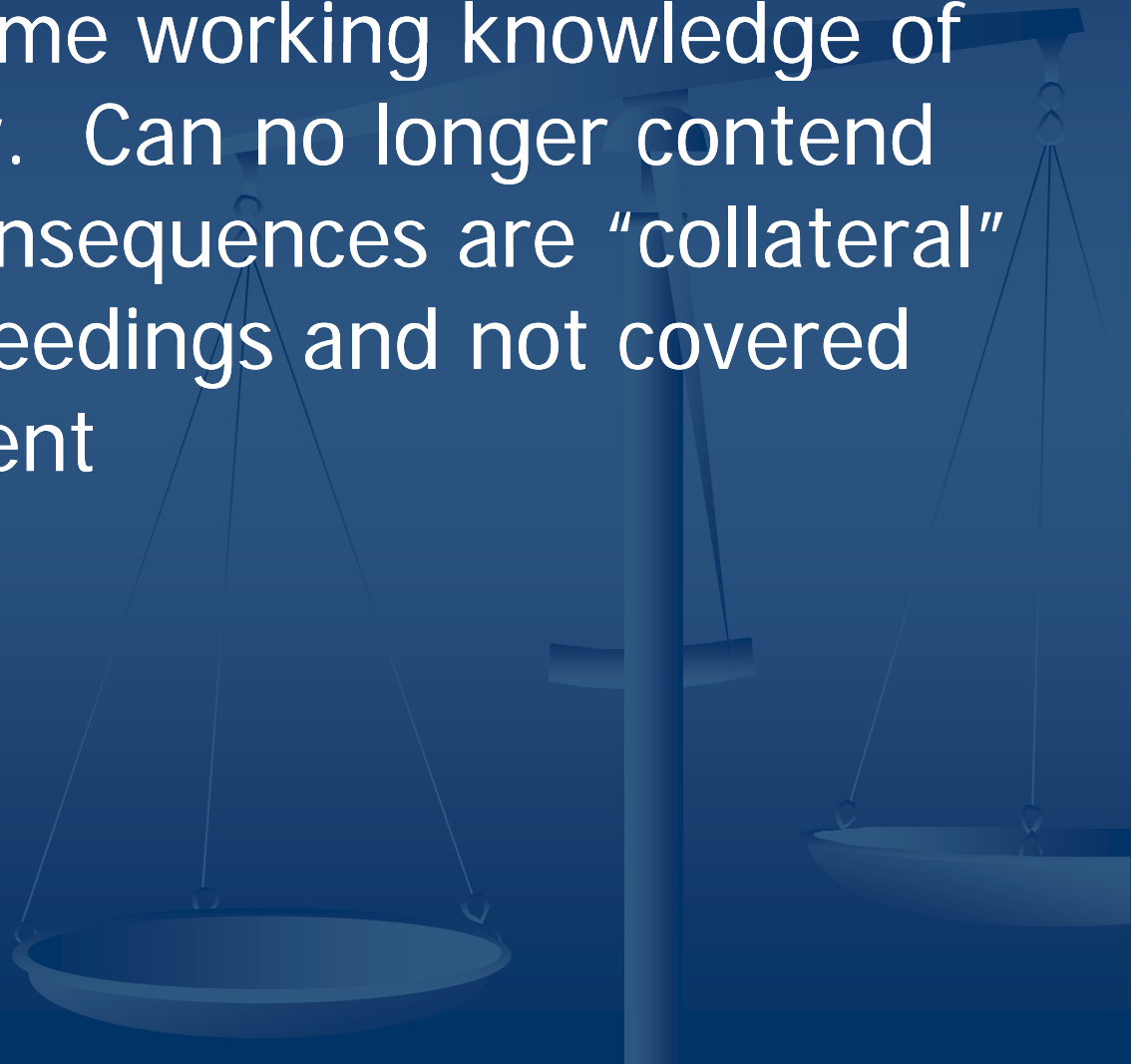
- 6th Amendment only requires:

- (1) Refraining from giving “unreasonably incorrect advice”; and

- (2) Counsel must tell defendant that conviction may have adverse immigration consequences and refer client to immigration lawyer if client wants more details

What To Do?

- Must acquire some working knowledge of immigration law. Can no longer contend that removal consequences are “collateral” to criminal proceedings and not covered by 6th Amendment

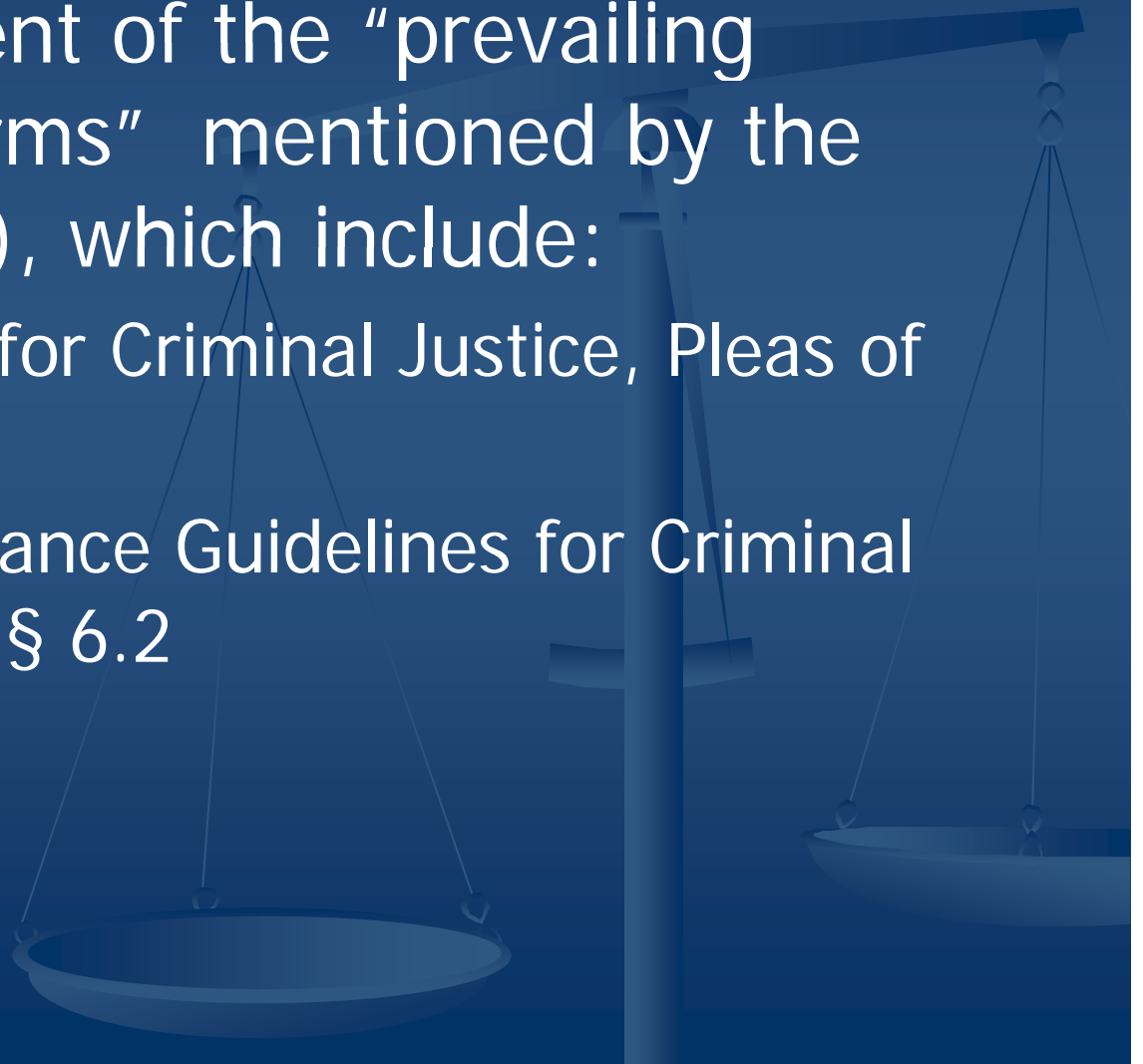


What To Do? (cont.)

- Get some resources to background you:
 - Nebraska state court – Ruser’s Immigration Guide
 - Federal court – Mary Kramer’s book
 - Practice advisories
 - Immigrant Defense Project (www.immigrantdefenseproject.org)
 - Immigrant Legal Resource Center (www.ilrc.org)
 - National Immigration Project of the National Lawyers Guild (www.nationalimmigrationproject.org)

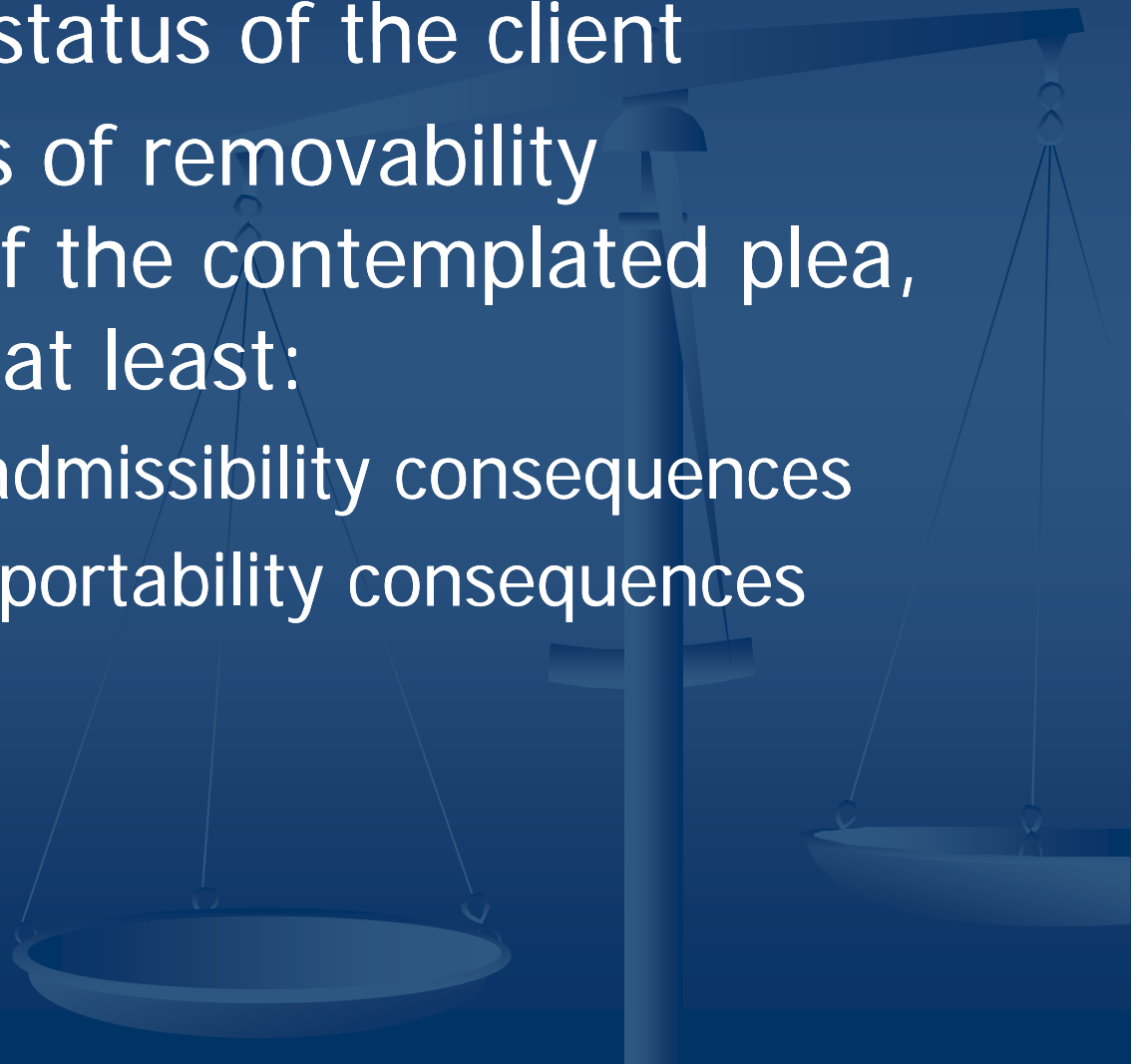
What To Do? (cont.)

- Check the content of the “prevailing professional norms” mentioned by the Court (pp. 9-10), which include:
 - ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f)
 - NLADA Performance Guidelines for Criminal Representation § 6.2



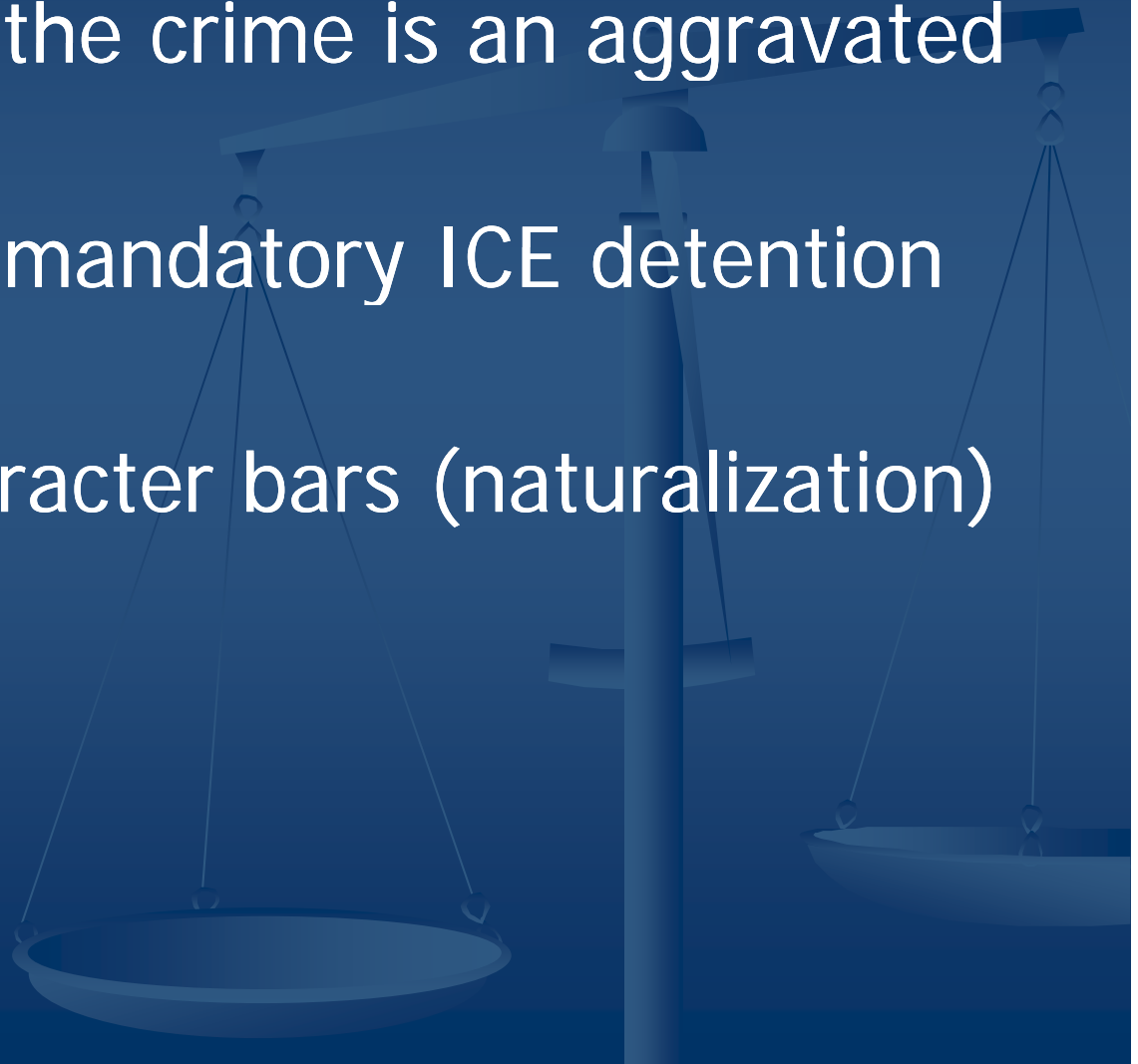
What Do I Need To Know?

- 1. Immigration status of the client
- 2. Basic analysis of removability consequences of the contemplated plea, which includes, at least:
 - (a) Potential inadmissibility consequences
 - (b) Potential deportability consequences

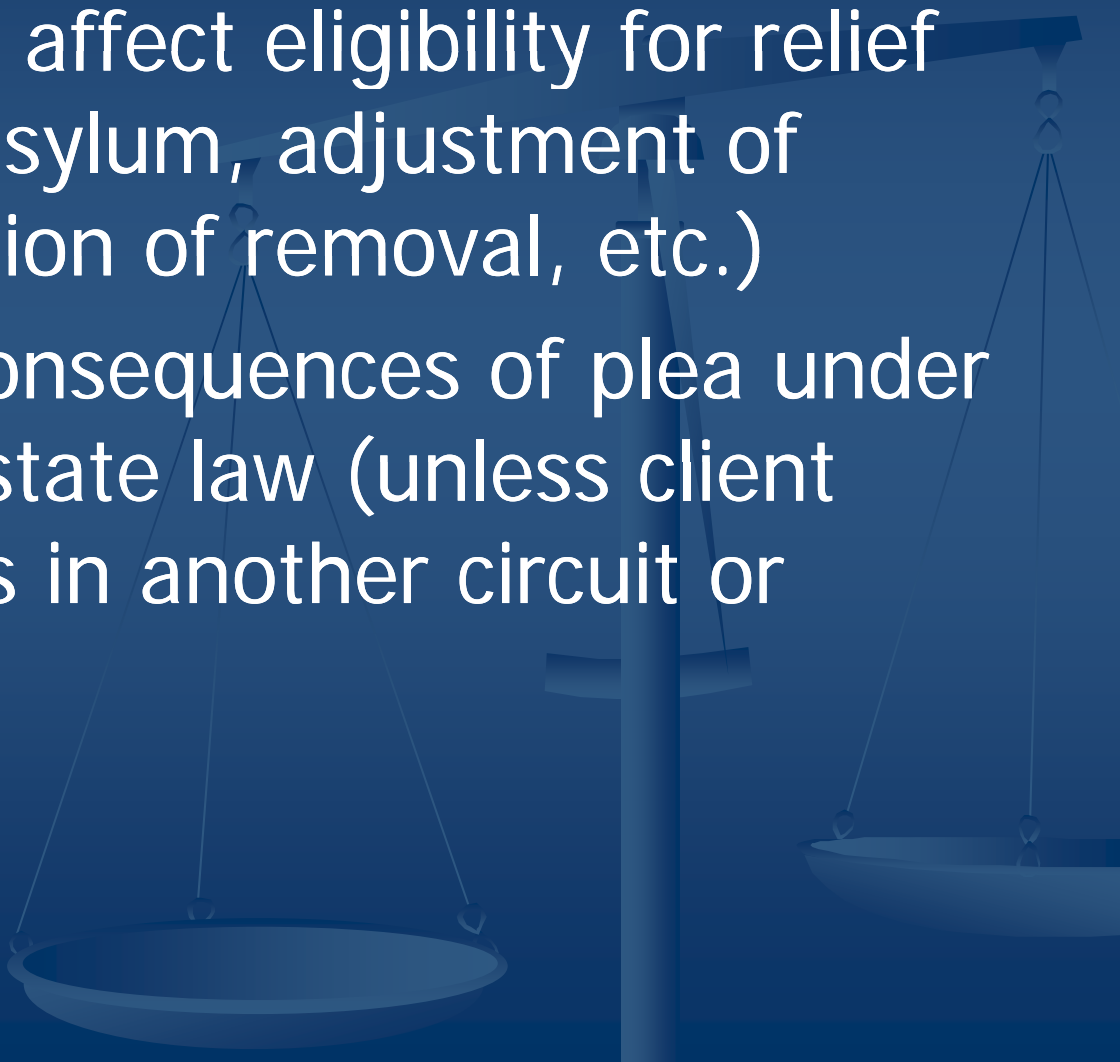


What Else Would Be Good To Know?

- Whether or not the crime is an aggravated felony
- Whether or not mandatory ICE detention will result
- Good moral character bars (naturalization)



Knowledge Likely Not Required Under *Padilla*

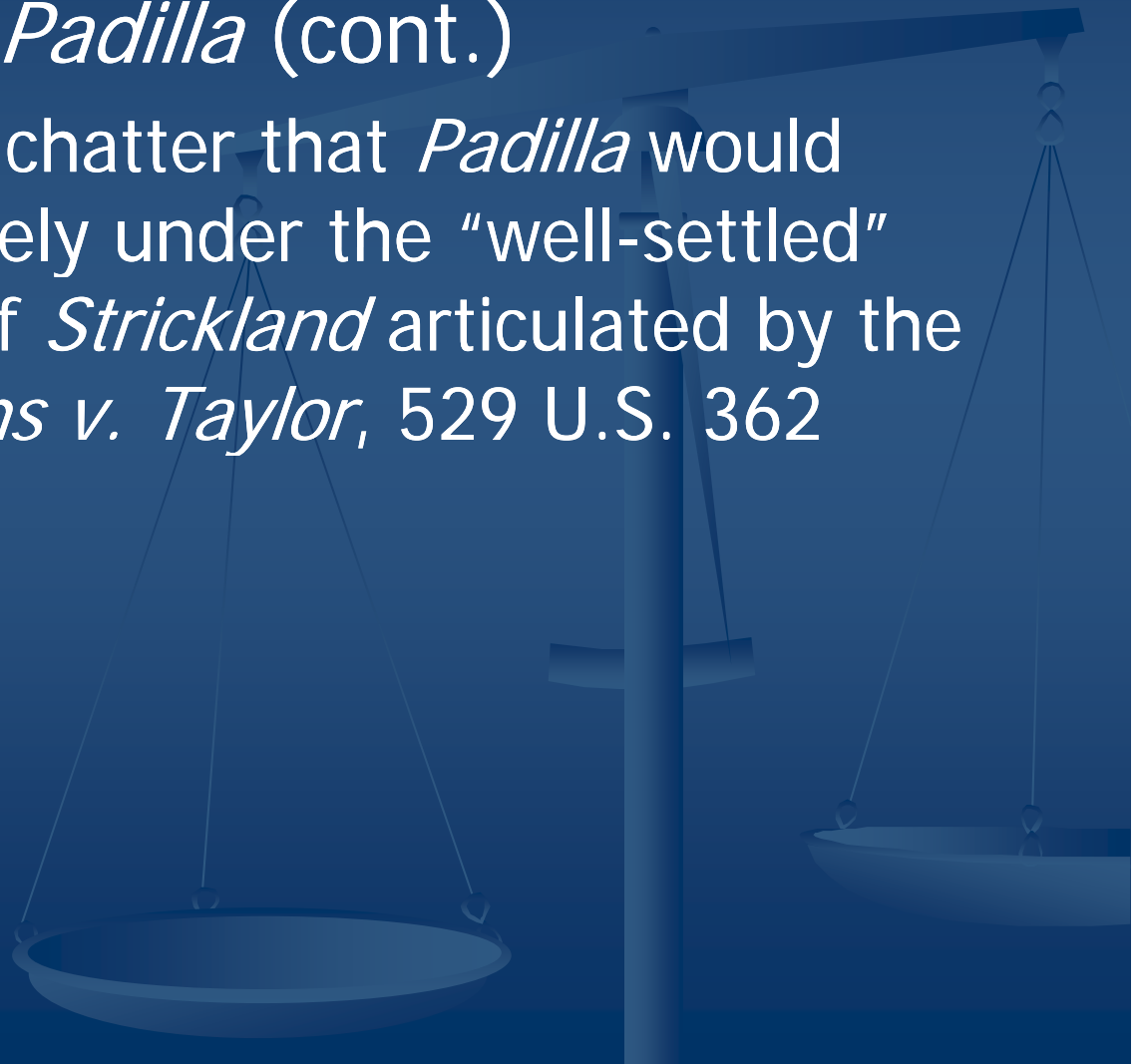
- How plea would affect eligibility for relief from removal (asylum, adjustment of status, cancellation of removal, etc.)
 - Knowledge of consequences of plea under other circuit or state law (unless client currently resides in another circuit or state)
- 

Questions To Consider

- Under what circumstances can a client raise a *Padilla* claim to attack his conviction collaterally?
 - *Teague v. Lane* rule on retroactive application, second exception:
 - Is the right to know of possible immigration consequences “implicit in the concept of ordered liberty”? Does this require a showing that the plea is not voluntary and knowing if the client was not advised of potential immigration consequences?

Questions To Consider (cont.)

- Retroactivity of *Padilla* (cont.)
 - I've seen some chatter that *Padilla* would apply retroactively under the "well-settled" interpretation of *Strickland* articulated by the Court in *Williams v. Taylor*, 529 U.S. 362 (2000).



Questions To Consider (cont.)

- What must a client show to demonstrate prejudice? Is it enough to say “had I known the immigration consequences, I would have gone to trial?”
 - Probably not – have to show that a decision to reject the plea would have been objectively rational and reasonable under the circumstances (pp. 14-15)

Questions To Consider (cont.)

- Does an advisal by a court under statutes such as Neb. Rev. Stat. § 29-1819.02 cure any failure of counsel to advise?
 - No, because this deals with duty of counsel under the 6th Amendment
 - “The court’s warning comes just before the plea is taken, and may not afford time for mature reflection.” ABA Standard 14-3.2(f), comment