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Morning Keynote Address II: Padilla v. Kentucky: Defending an Immigrant's Right to Competent Representation

Timothy Arnold

MORNING KEYNOTE ADDRESS II: *PADILLA V. KENTUCKY*: DEFENDING AN IMMIGRANT'S RIGHT TO COMPETENT REPRESENTATION

Timothy Arnold

MS. SWIFT: Good morning, everyone. We here at the *TJLP* are delighted to have this next speaker. We are delighted because this next speaker will be talking from personal experience, his personal experience of representing Mr. Padilla. This next speaker, Mr. Tim Arnold, has been involved in *Padilla v. Kentucky* from nearly the beginning, all the way from nearly the beginning to the United States Supreme Court and back to the state on remand. So Mr. Arnold has quite a bit to say, like the previous speaker, about *Padilla v. Kentucky.*

Now, even though Mr. Arnold has been involved with this case from nearly the beginning, he shared with me that he didn't actually foresee himself becoming involved in such a case, and that's because Mr. Arnold didn't start out practicing immigration and criminal law. Rather, he started out in the Juvenile Post Dispositional Branch of the Kentucky Department of Public Advocacy, which is that state's public defender system. A few years later he became manager, and now he serves as the post-trial diversion director. So Mr. Arnold has had quite a career, has received quite a number of awards, including the Kentucky Association of Criminal Defense Lawyers Juvenile Justice Award, the *In Re* Gault Award for excellence in juvenile representation, the *Furman v. Georgia* award for excellence in death penalty representation, and most recently the American Immigration Lawyers Association Jack Wasserman Memorial Award for Excellence in Litigation in the field of immigration law.

So once again, Mr. Arnold has some very valuable information to share. Without further ado, Mr. Arnold.

TIMOTHY ARNOLD: Thank you very much for that very gracious introduction. I'm certain not to live up to the expectations that have been created.

I want to thank the University of Tennessee for inviting me and inviting Mr. Long as guests to speak to you about this case. I want to be clear before we begin, in light of some of the other questions, this was sort of mentioned in the introduction, it would not be fair to say that the *Padilla v. Kentucky* that all of us are here to talk about is somehow my doing. The person who is responsible for this more than anybody else would be Steve Kinnaird and then Stephanos Bibas of Penn. We wrote the cert petition. I'm sure it was okay. They got involved in the reply stage, wrote a reply that was exceptional, and I think made it really possible for the court to grant cert, and then they were responsible for the briefing and for the argument. They allowed us to participate, and I had a wonderful experience. And I'm grateful for them everyday. But they — it's really their case in terms of what happened there. And I wanted to make that clear. As much as I would like to take credit for it, I really can't.

So we're experiencing minor, technical difficulties. Ninety seconds. Seriously, could you tell that? So I'll tell a story. Could the court reporter stop for a second?

(COLLOQUY OFF THE RECORD)

I am a criminal defense lawyer first and foremost. I learned some immigration law because of this case, but I am not an immigration lawyer and didn't take immigration courses in law school. To this day, I would not be probably the first person you would turn to for immigration advice on a criminal case. I probably could give some advice without completely screwing it up but not a lot. So this has always seemed to me like this sort of situation. This slide is apropos for two reasons. First, *Padilla* is sort of a collision of two different universes of law; you have the criminal law on the one hand, which I'm familiar with, and the

immigration law on the other hand, and those two things are sort of colliding in this case in a big way. The other is, people really did think the world was ending when the case was decided in some circles because suddenly there was all these additional obligations that were going to be expected.

For me, where I want to start is with criminal law since that's the area I'm the most comfortable with. And my journey with this starts with this guy. Does anybody know who this is? Gideon, that's right. Clarence Earl Gideon, who was alleged to have stolen fifty dollars in coins and some — he was acquitted, so we could not say he did it. Was alleged to have stolen fifty dollars in coins and some liquor from a liquor shop in Florida, went to trial, didn't have a lawyer, was convicted, sent a letter to the Supreme Court of the United States, who took that as a cert. Goodness knows that wouldn't happen today. An assigned attorney argued the case, established *Gideon v. Wainwright*, and of course, he comes back, tries the case. It turns out that the taxi driver who sort of was seeming to give damning evidence, for him to say he wanted to keep the ride a secret also, could say — well, he said it was because he was in trouble with his wife, that he didn't have liquor or anything with him or any of the proceeds of the crime, and was able to demonstrate that there was some possibility that the person who was the principal eyewitness in the case was actually a lookout for a gang of other people who might have done the robbery. And as a result of that, he was acquitted. I think at the time of *Gideon*, when *Gideon* was decided, people really thought this was going to solve the problem. Like we had a system where people were coming to court, and they didn't have the advice and the assistance of counsel. And we would be better off if now everybody has a lawyer, so it's all going to be okay. And I think that hasn't really proved to be the case.

I won't ask you what this is. This is the — why is it yellow? Okay. The slide on my computer looks nice, this

slide looks like it's radioactive. This is the Florida electric chair. The reason that I'm putting this up is I couldn't find a mug shot of the next person, which is David Leroy Washington, who was really involved in three separate murders in Florida. He pled guilty to those offenses. He confessed to the crimes. His lawyer was sort of flummoxed by the absence of any kind of factual defense of the crime. And instead of — it was a miserable investigation. He talked to his client's mother about his family history but did not investigate that much further. Advised his client to plead guilty, and believing that the judge had indicated at some point in the past that she would be reluctant to impose a death sentence on somebody who really expressed remorse for the crime, told him to go in, express remorse for the crime, and that was it. Did not conduct a sentencing hearing at all, waived the sentencing hearing, relied on the testimony of the (inaudible). He was, of course, sentenced to death.

The United States Supreme Court heard this case and for the first time sort of established what counsel's duty toward the case was, what was the obligation that counsel had in terms of representing a client. The Eleventh Circuit had found that whatever that rule was, that his lawyer hadn't met it. The United States Supreme Court found that the obligation basically fell into two categories; deficient performance, which is sort of acts or omissions that fall below prevailing professional norms — to apply an objective standard of reasonableness and prejudice, which is that, but for counsel's errors, there is a reasonable probability the result would be different.

In doing that, in reaching that holding they, I think, really — and this is my opinion — really substantially impaired what the right to counsel represented because now there was no real incentive for states to fund counsel systems, there was no means to ensure that counsel was not merely sort of the person with the law degree standing next

to their lawyer but that they were actually performing the essential functions of representation. Because most convictions are going to be sustained under the standard. Almost all convictions are going to be sustained under the standard because it's very hard to prove that the result would be different once — I get a counter-factual, Mr. Long gets a counter-factual. His counter-factual is going to be, well, if they had done this, then this would have happened or this would have happened or this would have happened, and those are all reasonable. And so it's very difficult to ever say that there's a reasonable probability of a different result under those circumstances. And the standard itself is not judged by what counsel was doing in reference to his clients so much as it is whether counsel had a notion that this was a good idea that was reasonable. It was more about judging the attorney than judging the effect of the attorney's involvement on a case.

So what happened with Mr. Washington was that the Supreme Court found that because his lawyer did have a notion about what he was doing and he was doing this for a reason that he could articulate and that that reason was not insane, that he was — that that was sufficient. His case was remanded, and Mr. Washington was the twenty-second person executed after the reinstatement of the death penalty. To me, the significance of — so I've been practicing law, and I've been practicing doing post-conviction cases for much of my career. That standard has been a real impediment to dealing with cases where there really does appear that the attorney's errors are significant in terms of the outcome of the case. An attorney's function as an attorney has been somehow — that the attorney has not functioned in a manner that counsel really ought to be working for their client.

You fixed it. It's like the magic of the internet or something.

So for those who can't see in the back, the caption is "Here Are Your Choices," you can plead guilty. In the system that we have these days, it's been commented that we have such a thing as the incredible, disappearing American jury trial. Courts have estimated, although there is no clear data on this, that about ninety-five percent of cases end in a plea. I think that actually that number may be a little higher. However, this is for illustrative purposes only, I don't know if that second bar is really truly accurate. The Supreme Court in terms of its decisions regarding ineffective assistance of counsel and its description of how that is, was it ruling on that? If you look at the cases, they were dealing with a variety of areas, but there was only one case that dealt with guilty pleas specifically in regards to counsel's involvement in the guilty plea. And in that case, for the most part, they passed on the question. What they said in *Hill v. Lockhart* is, in a guilty plea case, the test for whether the result would be different is whether, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial, which is a little bit of a different formulation than a different result. And that's the only case where they were dealing with a guilty plea specifically in terms of a guilty plea. *Strickland*'s, they were talking about the sentencing hearing. *In Flores-Ortega*, they were talking about the right to appeal. Those were cases that had guilty pleas, but there was no guilty plea discussion.

So this is — the Supreme Court was talking a lot about what the obligations of counsel were, and as time was going on, they were raising the bar a little bit. I'm not sure that *Strickland*'s facts, were they to be presented today, would be considered satisfactory under the Supreme Court precedent that exists now. But they weren't dealing with guilty pleas, and guilty pleas were most of what we were doing. So that is some — if you're looking for context about what this case was like, part of it is — this is part of the

significance of *Padilla*, from a criminal law perspective is, it's really the first time the Court has dug into what it means for a lawyer to be involved in a guilty plea. That's the first time that that happened.

So now we're talking about criminal law a little bit. The other side of this equation is immigration law. For those that can't read it, that is Sandy trying to climb over the wall on immigration law. The little caption down there, "Some of you yelled either higher or higher." The immigration system that we have been focused — has become increasingly a function of — it's increasingly focused on criminal action as a basis for deportation. This is a chart from the Immigration and Custody Enforcement, Customs Enforcement, Homeland Security. This is the chart of deportations based on criminal convictions. And as you can see, this is 2010 that this case is decided. These cases were probably in the process further back. As I understand this chart, this is a chart showing when individuals were actually deported. So, obviously, the deportation process takes a second, and so there is — these charts have sort of shifted. But as you can see, as *Padilla* is being decided, there's a real growth in how deportation cases are being used and how the law is being used now to affect a person's status. And so this has become a more and more important issue. I think that some of this can be explained by better record keeping and better communication, interaction between state and federal authorities. I think that there was a long time when you could be convicted in a lot of jurisdictions, and nobody would ever know about it. And so there would not be an actual threat of deportation simply because the relevant authority wouldn't know that you had been convicted. As time has gone forward, I think that's been largely eliminated, and so we're seeing that.

Which brings us to this handsome, young fellow. This is Mr. Padilla's green card. I hope I've eliminated all the relevant numbers. Yes, this is — his case, the facts of

his case were fairly significant to how this case proceeded. He came to this country — I think Mr. Long mentioned some of this but just to flesh a few of them out — he came to this country as a teenager, I think he was thirteen. He joined the military. Upon graduation from high school, served in combat; volunteered to serve in combat because, as a non-citizen he could not be required to serve in combat, but elected to stay with his platoon; served in combat in Vietnam; was honorably discharged as a result of that; in fact, was decorated. He then got married, lived a life in California. During the hearing the circuit judge asked him, "Why didn't you just become a citizen after this," and his response was, "Well, this was the Vietnam War, and nobody liked that I was involved in this," "And the government was a pretty bad actor, and I just didn't want to have anything to do with them." It wasn't important to me, I always thought I was going to be here. I never thought I was going to go anywhere else, but I just didn't want to have to go through the process of having to interact with this government that I was so frustrated with. And so he doesn't seek citizenship upon his return. He continues to work and live in California. He becomes a truck driver. He is carrying a load. His testimony was and would be that he was carrying a load of candy bars that he had been asked to carry. He was not a long-haul truck driver in general, but a friend had asked him to carry this load. The load was not sufficient to fill his truck, so he asked the agent for a second load. He picked up the second load. When he was apprehended, that second load, which was packaged to resemble legitimate freight, was, in fact, marijuana. Mr. Long mentioned that it was about a thousand pounds of marijuana, which is what we, being a defense attorney, the defense community, like to call a modest quantity of marijuana. I think it's not really. My view is, it's not even really a crime, he was bringing happiness to college students across the Midwest.

But the principal fact that I know was argued about in the Supreme Court was, this was a lot of marijuana, and so what would be the effect of this if he was to go to trial? He made an agreement with the DA to deliver his load and complete his delivery so they could apprehend the people to whom it was going. The DA in return agreed he would not be prosecuted federally. He was prosecuted in the state court, and his lawyer advised him that he had looked into it. And his lawyer had been specifically directed, in fact, to look into immigration consequences because, as he was prosecuted, it was being reported in the local paper that he was an illegal immigrant, meaning that he was undocumented, which was not true, he had his green card. He was then — so they approached the attorney and asked, "Can you research deportation?" Consequently, he had a little note in his file saying — he then turns around and advises his client — and this is disputed, what was the attorney's advice was disputed. His family believed in his claim that the advice was, "I'm sure you won't be deported because you've been in the country so long." He says that the advice was, "I thought you may have a problem, but you have been in the country a long time." "Maybe you can work that out because of your service or because you've been in the country," which was well short of what the actual truth was, which was that he was pleading guilty to an aggravated felony, deportation was mandatory, nobody in the Department of Justice really had the power to stop that train once it started to roll, which is unlike other cases. If you're familiar with immigration law, you know immigration offenses fall into a number of different categories, and the most severe of them, they are aggravated felonies, which cannot be canceled. Some lesser offenses, some lesser categories are sort of crimes involving moral turpitude or other things where the Department of Justice does have some authority to cancel deportation if they find under the circumstances that the individual is not somebody

for whom deportation is appropriate. That's not always an easy thing to accomplish, but it is at least a possibility. And his case would be a particularly strong case for it. He had served in the military, he had lived in this country for a long time, he was married, he had several children, some of whom were disabled and would not be able to travel with him. This was going to be an extremely big hardship for him, and it was not going to be — he had demonstrated a pretty strong commitment to being in the country, and he had, in fact, served the country. So under the circumstances we thought, if we can get it to that, that would significantly improve his chances of remaining here.

How I ended up getting involved in the case is, he was — it requires a little bit of understanding of where Kentucky was at the time. In the case that preceded *Padilla*, *Fuartado*, the chief judge of the court of appeals, who I think was something of an advocate for — well, I don't think it, I know she said it — something of an advocate for the rights of immigrants in the criminal justice process, had rendered a decision that suggested that counsel had a duty to advise clients about immigration consequences. And the Kentucky Supreme Court had accepted review of that case and reversed it and said that there was no duty. And so this opinion comes along a few weeks after the supreme court opinion is final, and the court of appeals, again, same judge from the court of appeals, writes this opinion. It says, "We understand *Fuartado*, but this is different because this was flagrant mis-advice." And there was a body of law within the circuits and throughout the country that, while you didn't have to advise of collateral consequences, if your advice was flagrantly wrong, that that might be a basis for an ineffective assistance of counsel claim. And so that was the authority that they were relying on.

The Commonwealth sought discretionary review of that case, and at that point I was not on it when the discretionary review was being pled. I got on it — the

attorney who had been on it in the court of appeals was Rick Neal, who got back on the case for the cert and the Supreme Court stuff, but he was joining a private practice. He gave it to me, so far as I know, because I was a juvenile lawyer and juvenile law is crazy and immigration law is crazy. And so it kind of works, so I'm crazy, he's crazy, and we'll be okay.

The first order I get in the case is an order granting discretionary review and in the order denying oral argument, which I had never seen before in years of practice before the Kentucky Supreme Court and which I could understand completely as, "We believe Judge Combs has gone crazy again," "You're welcome to have your brief, but we know what we're doing with this case"— Like it was not — whenever the Supreme Court is denying oral argument as part of the order granting discretionary review, they are communicating that at the very least they don't think this was a hard issue and they have an opinion because, if they didn't, they would have oral argument.

We briefed the case, the Supreme Court rendered its decision. Ironically, about, I want to say about two weeks, three weeks after the decision was rendered, before a rehearing was even due, we had an appellate conference in my office, and we had invited some judges to speak. And among them were a couple of Justices from the Supreme Court, who I will not name, and the chief judge of the court of appeals who had written *Padilla*. So the chief judge stands up and says, "So I'm here to talk to you about whatever you want to talk about." Before we do, I've got these Justices over here, what's up with this *Padilla* case? And so the Justices — one Justice was in the dissent and one Justice was in the majority — the dissenting Justice said, "I was in the dissent," and sat down. Like I had nothing to do with it, it's not me, and sat down. The other Justice said, "Well, the reason we were concerned about this case" — and I think you've heard Mr. Long express some of that concern — "is because of you all." We're concerned

that public defenders are not going to be able to do this, and so we didn't want to put that on you. And that drove me insane because my view is, What's the point of having a lawyer if not to do this? Why have a lawyer except to deal with the complexity of the law and to figure out the things that are hard to figure out and to make it possible for the person who is being accused, who is facing all of these consequences, to make an intelligent and informed decision about what to do in a court of law? What's the point of it? So to me, that was, I think it was, a telling expression of where people were at and what people — I don't want to say, I don't want to imply that that Justice's comments were not kindly expressed or that they were not meant kindly, they were all that. The reality is, though, I think it speaks to me that it is a failure of our system to achieve what we thought we were going to achieve when *Gideon* was decided, that we have to make that kind of decision that says we are more comfortable with a person pleading guilty and not being aware of significant adverse effects associated with that plea than we are requiring attorneys to actually advise on that. That is a failure. So they make this decision, obviously. I think that we looked at that and thought it had potential. Rick Neal and I filed a petition. Steve Kinnaird then got involved, filed a reply, and the rest is history.

In terms of what the decision actually was, I'm not sure if I completely share Mr. Long's interpretation of what the Court was doing.

WILLIAM ROBERT LONG, JR.: I'm confident you don't.

TIMOTHY ARNOLD: Among the things that they said was that they've never applied distinctions between direct and collateral consequences. They concluded the advice regarding deportation is not categorically removed from the ambient of the Sixth Amendment right to counsel and therefore *Strickland* applies. That the weight of prevailing

professional norms supports the view that counsel must advise their client regarding the risk of deportation. I think what the Supreme Court was doing was saying that here we have this basic Strickland standard, and as time has gone on, as I said, they've sort of been raising what that means. And now they're saying, there is no magic to its direct or it's collateral. The magic is what would reasonable attorneys be expected to do in this context, and did you get that? That's the standard. And that's the only standard, and we don't need to have any other funky tests than that. And that under the circumstances this is — by that point, the Supreme Court had said in *St. Cyr*, an immigration case, that any reasonably competent defense attorney would, of course, advise their clients of the immigration consequences. There was a clearly established body of authority within the defense bar, the NOAGA standards, the ABA standards, that had said counsel's duty included the duty to advise on all consequences, including immigration. And so that was already a well-established principle that ought to be accepted. Now, I think that a lot of people in the defense community probably regarded that as a surprise. There was not a lot of advice and a lot of words about immigration. And in fact, immigration was one of these things that we all sort of felt like we knew we had to be aware of, but getting aware of it was difficult. And that was going to cause problems. But I think that, in terms of what the duty ought to be, they were darn right. The duty ought to be to make sure that your client knows what they're doing when they plead guilty. The reason we have attorneys in courts more than anything else is because the law should not be a black box to your client. I'm pleading guilty to a crime, and there are many consequences that flow from that. Some of those consequences are not going to be consequences that the state imposes, and I can't as an attorney advise on every possibility. But I can if the state is going to choose to do something to you because you've pled guilty, you're entitled

to know it before you plead guilty. That would be my position. And while *Padilla*, I don't think, went as far as to say that that is always going to be the case in every case, it did take a step by saying it is the case some of the time when the penalty is especially severe.

What it means for the non-citizen clients for today, I think that, generally, in terms of your professional ethics, you obviously have a duty of competence, you have a duty to provide reasonable advice to your client about all matters that they are concerned about. In terms of what the Constitution is going to require and what will be sufficient for a guilty plea to remain valid, it needs to be, either you tell your client specifically what the consequence is or, if the consequence is in some form or fashion unknown to you because it is complicated, you need to give the complicated answer. You need to say, "Deportation is a possibility," "I have looked at the law," "It's not clear to me whether it's there or not," and "It's complicated." I would say going forward, now that that's the standard, that whether or not this is going to result in a finding of deficient performance, maybe it won't, but that as an ethical matter, I think it's our obligation, now that a button has been placed on this particular issue, to try to make sure that we're making reasonable efforts to identify with the consequences specifically. So that means that we need to become more acquainted with the immigration bar and the people in the immigration bar who can offer us assistance in trying to figure this out. Because, honestly, my experience with the Immigration Department is that they are generally a pretty helpful group. There are various immigration organizations, LL (inaudible) being one of them, where there are — most of their practice is in immigration law and that — if they get a call from somebody saying, "Can you help me figure this out," they're generally willing to try to the extent that they can do so and still have a practice. And that is something that we as criminal defense lawyers need to be taking more

advantage of. In our system we're trying to create that in-house as well. We're trying to create a position of somebody who is basically an immigration lawyer within the public defender system so that they can receive those calls and be able to answer those questions so that we can give specific advice about what that means because we think that's our obligation. In twenty years, the next *Padilla* may be a case where somebody didn't do that. But for the moment, I think it's a matter of our professional responsibility to our clients in achieving the vision that *Padilla* had for us, we need to be pursuing that.

What it means for other cases, there are a lot of collateral consequences. And I think that one of the things that is significant to me about this case that I learned from practicing this case is that for people who are lawmakers and for people who are policy makers and people who advise on policy, you need to recognize that collateral consequences are not free, there's not a free lunch to give somebody collateral consequence, we tack on this thing and "don't be convicted." And we don't do anything to make that really work for the people that it will apply to. Like I said at the beginning, there were some people who sort of felt like the world was going to end because we had to advise on this. My feeling is, the blame for all of that really doesn't lie at the feet of me or Mr. Long or the Commonwealth of Kentucky or Steve Kinnaird or the Supreme Court of the United States but lies at the foot of Congress, who created a law that was extraordinarily difficult to manage and never asked the question about how that would be managed. We need to be better as rule makers in understanding what those are and finding ways to make sure that that is something that can be communicated to somebody who is facing it so that they understand what they're doing, not — Mr. Long's point is a fair one. We want the system to be final. We want decisions to be made that are made, we don't want to be reopening convictions,

we don't want to be reopening pleas, but I think it's important that as part of that that we are doing everything we can to make sure that the people who are entering those pleas know what they're doing when they do it and are making decisions that are intelligent and informed because why would we expect anything else.

The only other points I wanted to make before I conclude are these: First, I think it's important to keep in mind as you're thinking about this case that this case very much is a function of and controlled by its facts. Mr. Long alluded to this when he was talking, and I agree with it. If Mr. Padilla had been a college student from London, this case would never have been granted anyway, no matter — even if the consequences were about the same, it wouldn't have been the same. The reason why this case was chosen was in part because virtually everybody who looks at it thinks, "I kind of feel uncomfortable about deporting that guy because he served his country, because he served this country, because this is his country, because his family is here, because his children are here, because he's made a life here." And in general, we give people a second chance in this country when they've made mistakes, and we don't want to do that here. But that ties into a second point, which is, if you are looking to be in the business of representing criminal defendants in general, but if you're looking to be in the business of representing immigrants in particular, I think it's important to keep in mind that the category of immigrants is not a single homogenous group. It is not the case that all of your immigrant clients speak Spanish. It's not the case that all of your immigrant clients have a darker skin tone or that all of them are from Mexico or some other country. They are a group that is highly diverse. They are diverse in a lot of ways. And they are diverse particularly in how their story relates to what they're facing. So if you are Mr. Padilla and you've been in this country a long time, there is — this is a highly significant thing to you. Our laws

right now don't recognize that, and I think that they should. And I hope — they're talking about reforming immigration, God help me. I hope they do something about that. I'm not optimistic, but I hope for it. But it's also the case that when you are representing them, you can't treat them as a homogenous group. That's true in general for public defender work, that's true in general for criminal defense work. Your clients come from a variety of circumstances. You should try to refrain from making assumptions about any of them. But in particular with this category, I think the tendency has been to talk about representing your immigrant client, and that is not a group that is easily labeled or described.

With that in mind, I think that concludes my remarks. Does anybody have any questions?

UNIDENTIFIED SPEAKER: Mr. Long had indicated that Kentucky's values in the written plea that has some brief immigration and advisal in it, that that had not been challenged. And I just wondered if you have any thoughts about that, if it 's sufficient, do you see a challenge?

TIMOTHY ARNOLD: I don't know that any of the — the advising form says that you are not a citizen, you understand that the plea may carry consequences related to immigration. It has not been challenged that I'm aware of in a particular case. I'm not sure — I think there have been some cases where there was some element of that advice in the form where it was also not raised as a defense to the challenge that was based on immigration advice, so it thus far hasn't risen to be the issue.

In terms of its sufficiency, I think, again, it's going to depend on the facts of the case. If this was a case that falls into the sort of second category that Stevens was talking about, a case where the immigration consequences are unclear, the advice and the form is consistent with the

advice that you would be expected to give as an attorney, maybe in those cases it would be considered sufficient. If it is, however, a case where immigration consequences were reasonably easy to ascertain and were mandatory or presumptively so, that isn't sufficient because now you haven't told them that. So to me, it's going to be sort of a fact question as to what you're looking at. I think it's one of these things — I have a mixed feeling about that form. On the one hand, I like that they're trying to make an effort to be more inclusive. I do care that people are informed. More than anything else, I think somebody should know what they're doing if they're going to plead guilty, it's a serious decision. At the same time, I worry about situations where I give specific advice on something and the judge sort of seems to be overruling my advice incorrectly. I don't mind it if they're saying the same thing I'm saying, that's fine. But if he's overruling my advice and saying something that I think is wrong, that's now a difficult situation for the client to work out because the judge is wearing the black robe and presumably knows and I'm not, and that creates an issue. But so far that issue hasn't presented itself.

UNIDENTIFIED SPEAKER: Do you get a sense that defense counsel is really engaging in the issue, or are they relying on the form to —

TIMOTHY ARNOLD: Well, my agency is. We're the state public defender system, we have created the whole chart of immigration law. We're — charge related statutes to immigration consequences for those particular convictions. We identify the person to provide specific advice on immigration issues. We are trying our best to make sure that we are living up to everything that is expected of us. There are other jurisdictions that are doing the same. There are some jurisdictions that are not. Certainly, I think within the private bar in Kentucky, I think that there is a recognition

that there's some need to do something, but I don't think that there's necessarily the same degree of concerted efforts because the private bar itself is not as concerted in its approach to that. So, I don't know if — you're going to find private attorneys who do a very good job of it, and you're going to find private attorneys who don't.

(Whereupon, a break was taken.)