

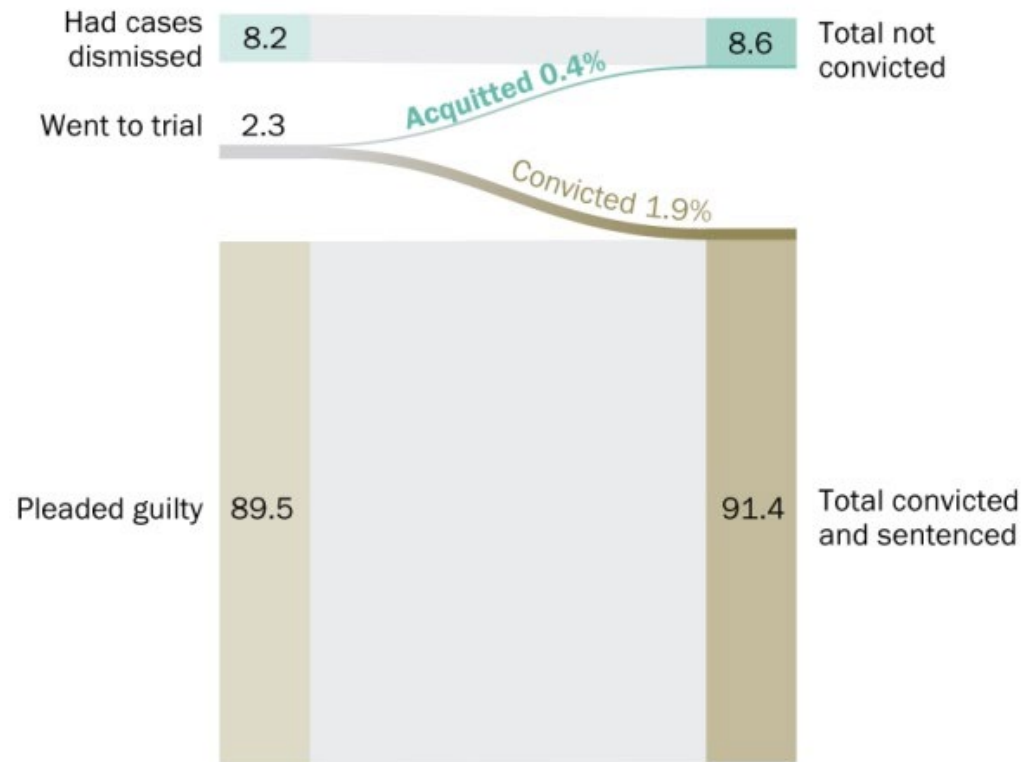


ETHICS: Guilty Pleas

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Trials are rare in the federal criminal justice system, and acquittals are even rarer

% of federal defendants who _____ in fiscal 2022



Note: Includes all defendants charged in U.S. district courts with felonies and serious misdemeanors, as well as petty offense cases assigned to district judges. Excludes defendants whose cases were handled by magistrate judges and those who entered pleas of “no contest.”

Source: Administrative Office of the U.S. Courts.

PEW RESEARCH CENTER

BE A TRIAL LAWYER FIRST



"Sustained. Prosecution will refrain from going 'dun dun *dunnnnnnn*...' during the witness' testimony."

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.



COUNT 1

All in violation of Title 18, United States Code, Sections 1028(a)(4) and (b)(2)(B).

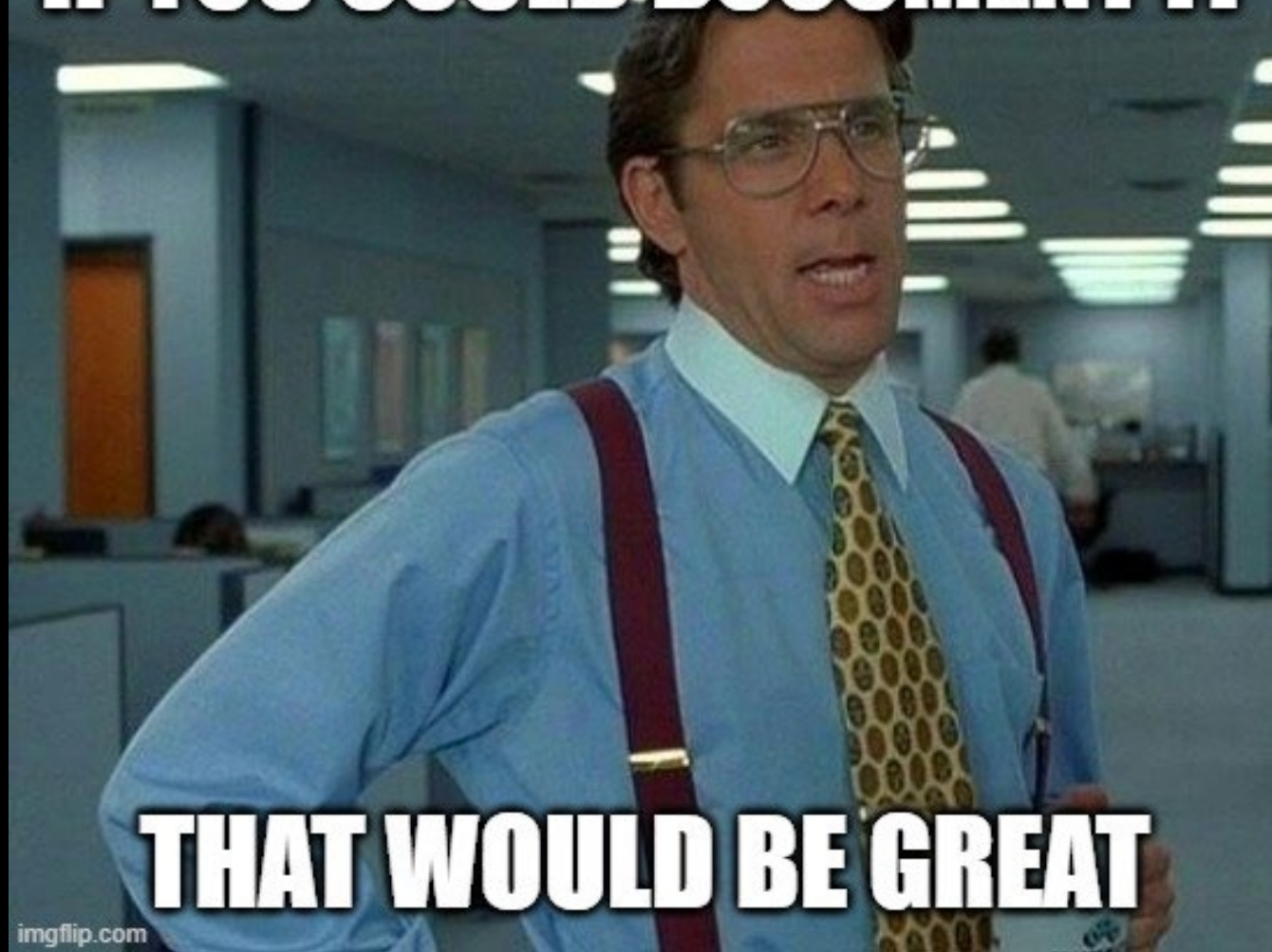
42 U.S.C. § 1028

(b)The punishment for an offense under subsection (a) of this section is –

(2) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 5 years, or both, if the offense is –

(B) an offense under paragraph (3) or (7) of such subsection;

IF YOU COULD DOCUMENT IT



THAT WOULD BE GREAT

RULE 1.2(a): SCOPE OF REPRESENTATION

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. **In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**

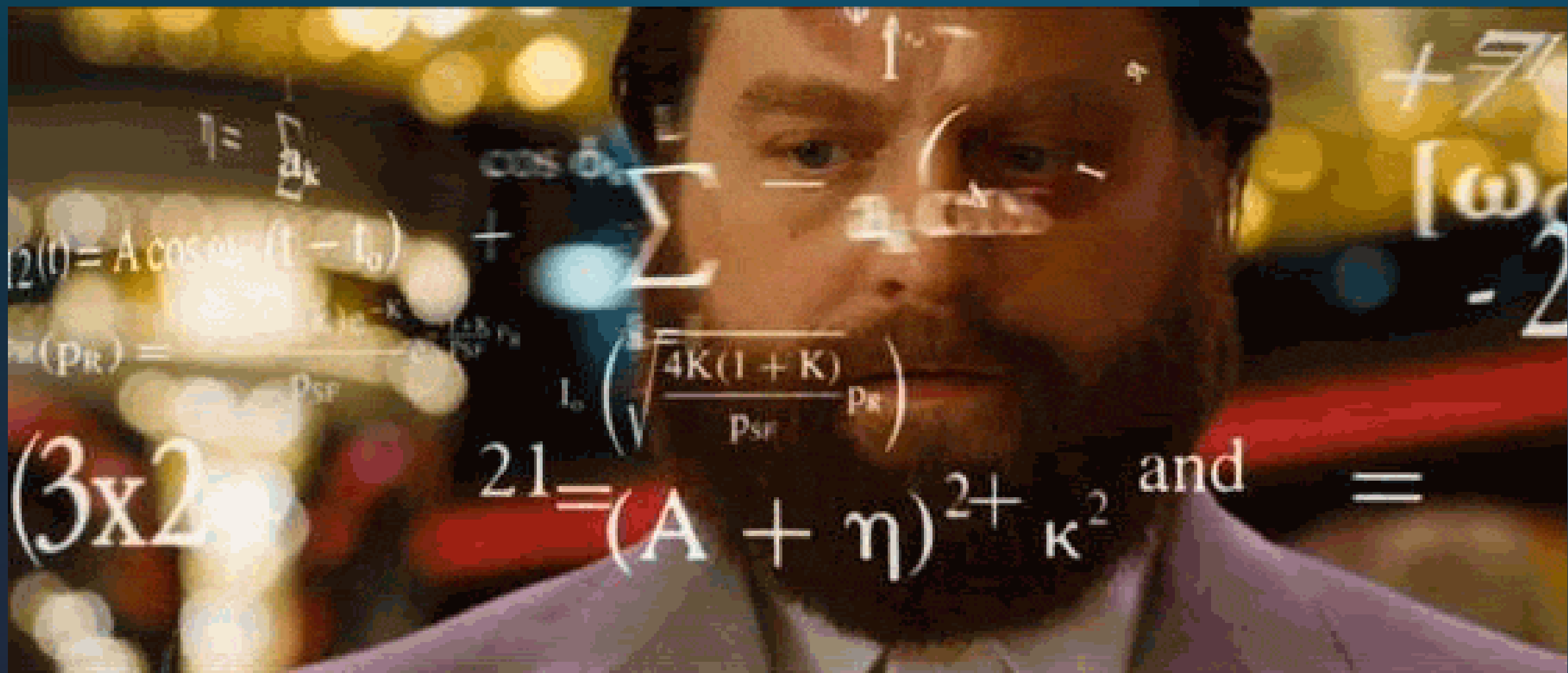
(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Federal System vs. State System

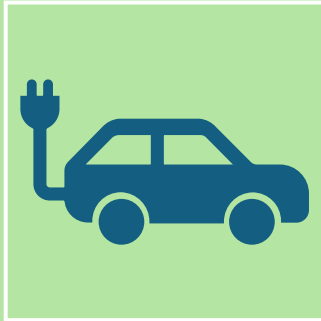
- Differences in procedure
- Differences in sentencing
- Plea agreements and sentencing recommendations (specific v. % of guidelines)





United States v. Armendariz
80 F.4th 546 (5th Cir. 2023)

Client = Lawful Permanent Resident of U.S.



Charge: Importation of Controlled Substance, 21 U.S.C. § 952(a)



If client pleads guilty, it is “very likely” client will be deported.

- advice from client’s lawyer.



Automatically Deportable

After Ms. Armendariz pled guilty, she “learned that her offense did not just possibly make her deportable, it automatically did so.” *Amendariz*, 80 F.4th at 548 (citing 8 U.S.C. § 1227(a)(2)(B)(i)).

Query: Does “very likely” satisfy the right to effective assistance of counsel?



Padilla v. Kentucky, **559 U.S. 356 (2010)**

- “[W]hen the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear.”
- “*Padilla* demands [] putting noncitizen clients on notice that their conviction could have an important impact on their immigration status.” *Amendariz*, 80 F.4th at 554.



Compare

- ***Padilla***, 559 U.S. at 359: Defense lawyer “not only failed to advise [the client] of [the deportation consequences]” but “also told [the client] that he ‘did not have to worry about immigration status since he had been in the country so long.’” - WRONG ADVICE
- ***Lee v. United States***, 582 U.S. 357 (2017): Lawful permanent resident pled guilty to offense that made him automatically deportable after lawyer told the client that “the government would not deport him if he pleaded guilty.” - WRONG ADVICE
- ***United States v. Kayode***, 777 F.3d 719 (5th Cir. 2014): Naturalized citizen pled guilty to deportable and naturalization-stripping offense because “his attorneys never warned him prior to his sentencing hearing that he could lose his citizenship . . . and never indicated that he might be deported.” - NO ADVICE
- ***United States v. Urias-Marrufo***, 744 F.3d 361 (5th Cir. 2014): Alien subject to presumptive deportation after guilty plea only discussed “the *possible* adverse consequences of pleading guilty.” Defendant correctly argued that, under *Padilla*, “she was required to be advised of the certain deportation consequences of her plea prior to her plea hearing.” - WEAK/MEDDLING ADVICE

Certainly *Deportable*



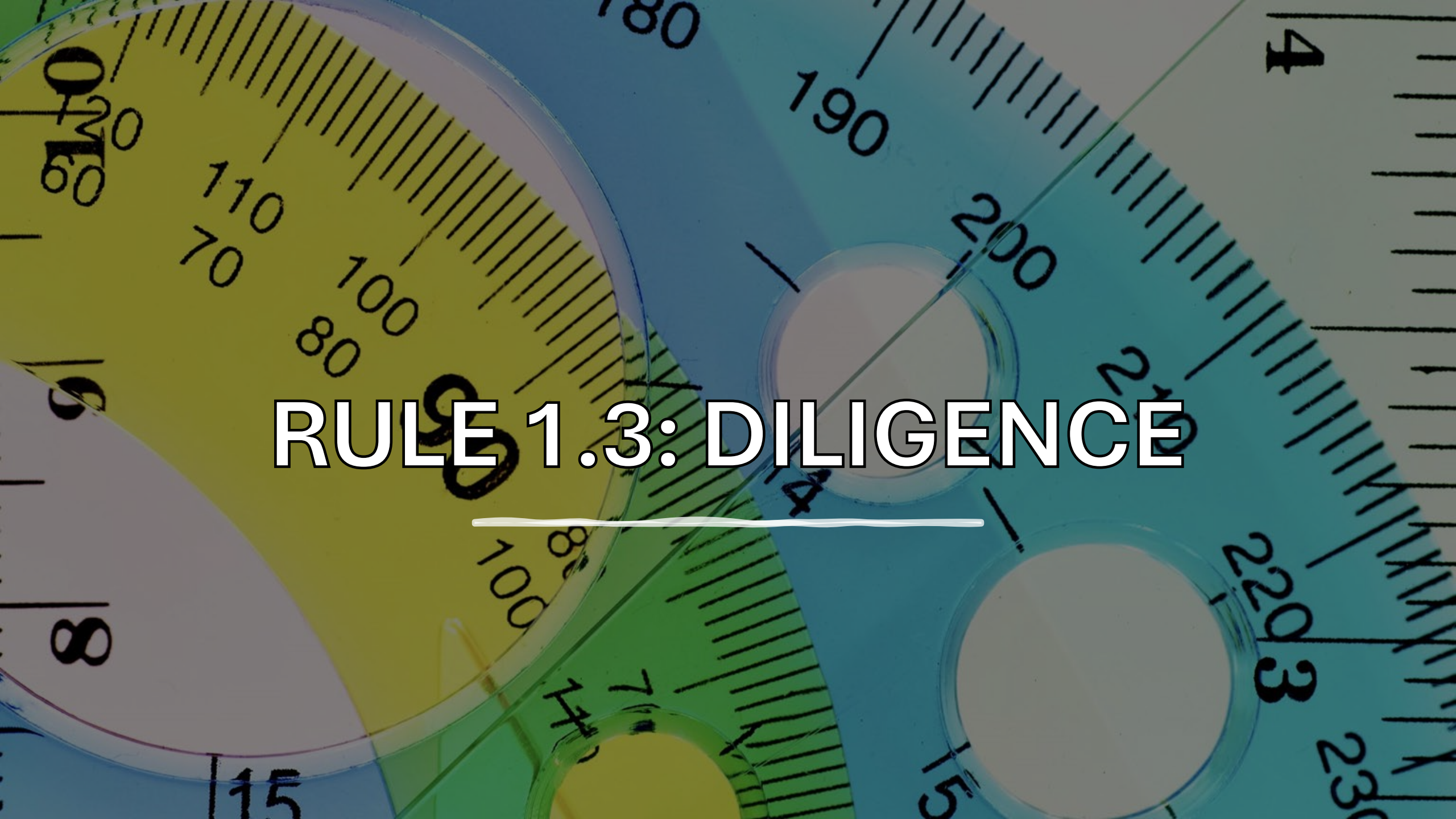
Certainly *Deported*

United States v. Chezan, 829 F.3d 785, 787 (7th Cir. 2016): Not all aliens convicted of aggravated felonies are deported.

United States v. Texas, 599 U.S. 670 (2023): Executive branch “retains discretion over whether to remove a noncitizen from the United States.”



We are Lawyers We are not Wizards



RULE 1.3: DILIGENCE

Standard 14-3.2

Responsibilities of Defense Counsel

- (a) Defense counsel should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney.

Standard 14-3.2

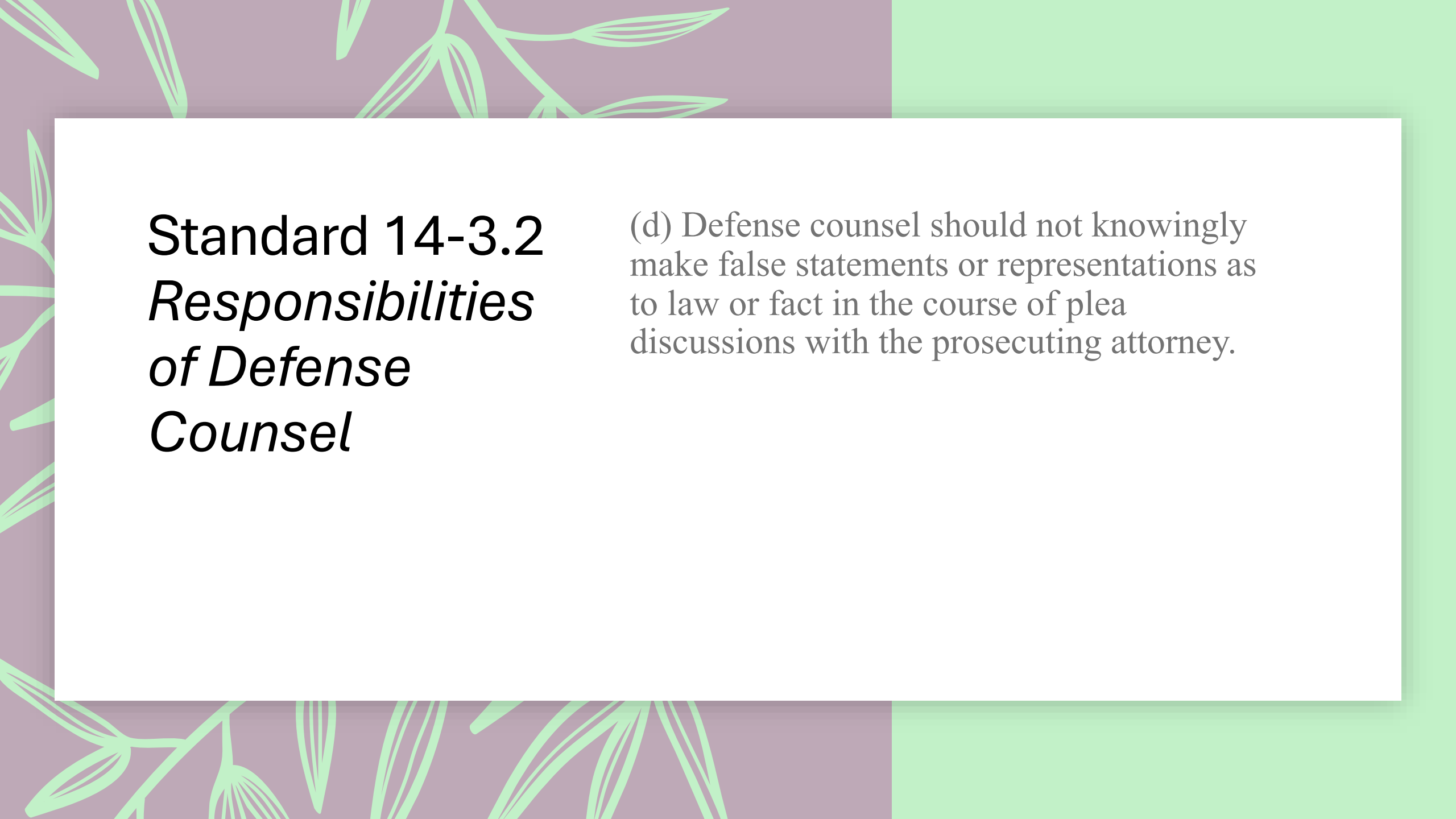
Responsibilities of Defense Counsel

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.

Standard 14-3.2

Responsibilities of Defense Counsel

(c) Defense counsel should conclude a plea agreement only with the consent of the defendant and should ensure that the decision whether to enter a plea of guilty or *nolo contendere* is ultimately made by the defendant.



Standard 14-3.2

Responsibilities of Defense Counsel

(d) Defense counsel should not knowingly make false statements or representations as to law or fact in the course of plea discussions with the prosecuting attorney.

Standard 14-3.2

Responsibilities of Defense Counsel

(e) At the outset of the case, and whenever the law, nature and circumstances of a case permit, defense counsel should explore the possibility of diversion of the case from the criminal process.

Standard 14-3.2

Responsibilities of Defense Counsel

(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Hill v. Lockhart, 474 U.S. 52 (1985)

When a defendant attacks the voluntariness of a guilty plea based on counsel's alleged deficient performance, the standard is the same as the standard in *Strickland v. Washington*, 466 U.S. 688 (1984):

1. Counsel's representation fell below an objective standard of reasonableness; and
2. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Guilty Pleas and Appeals

Roe v. Flores-Ortega, 528 U.S. 470 (2000): Defense counsel has an ethical – and constitutional – obligation to file a notice of appeal when requested by the client.

United States v. Tapp, 491 F.3d 263, 266 (5th Cir. 2007): *Flores-Ortega* applies even when a defendant has waived the right to direct appeal and collateral review in a plea agreement.

United States v. Harger, 354 Fed.Appx. 151 (5th Cir. 2009): “If a defendant requests that counsel file a notice of appeal, counsel’s failure to do so constitutes ineffective assistance even without a showing that the appeal would be meritorious.”

THE END

