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ALABAMA FILES SUPREME COURT BRIEF OPPOSING IMMIGRANT'S ATTEMPT TO VACATE HIS CONVICTION BECAUSE HIS GUILTY PLEA LED TO HIS DEPORTATION

Immigrant's Claim of Bad Advice from Lawyer, Which Led to His Deportation, Does Not Override Overwhelming of Evidence of His Guilt

(MONTGOMERY) – Alabama Attorney General Steven T. Marshall filed a brief with the United States Supreme Court Monday opposing an immigrant's motion to vacate his conviction on drug charges because he claimed to receive bad advice from his attorney, which led to his deportation.

Alabama led 19 other States today in filing an amicus brief in the case *Lee v United States of America* which will be heard by the Supreme Court on March 28, 2017. Alabama and the other States argued that an immigrant defendant who is clearly guilty of a crime should not be able to vacate his conviction merely because he was misinformed about whether he would be deported.

"The federal government needs to incarcerate and deport immigrants who commit serious crimes," said Attorney General Marshall. "An immigrant defendant who pleads guilty should not have his conviction vacated simply because he did not know he would be deported, as long as there is overwhelming evidence of his guilt.

"Those who support this case seek a radical departure from existing legal precedent which allows a guilty plea to be vacated only if the evidence in the case casts doubt on whether the defendant would be convicted in a new trial.

"By ruling in favor of the defendant, the Supreme Court would unleash a torrent of court challenges upon the federal government and the States, forcing prosecutors to relitigate pleas years after the fact in cases where the ultimate outcome would not have changed," he added.

Joining Alabama in filing the amicus brief were Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Ohio, Oklahoma, South Dakota, Texas, Tennessee, West Virginia, Wisconsin and Wyoming.

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A copy of the 30-page multi-state brief filed by Alabama is attached

No. 16-327

IN THE
Supreme Court of the United States

JAE LEE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, TENNESSEE, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Can a defendant who was misadvised as to his plea's deportation consequences demonstrate prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), where there is no evidence that his counsel's misadvice caused him to forgo a reasonable probability of obtaining a more favorable outcome to his criminal proceedings that would have avoided deportation?

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INTEREST OF AMICI CURIAE

As this Court has acknowledged, the reality in today's world is "that plea bargains have become . . . central to the administration of the criminal justice system." *Missouri* v. *Frye*, 566 U.S. 133, 143 (2012). Pleas account for more than ninety percent of all state and federal convictions, *id.*, and the *amici* states thus have a compelling interest in ensuring the validity, reliability, and fairness of every plea agreement negotiated by state prosecutors, and in protecting the finality of every resulting conviction.

At issue in this case is how prejudice should be assessed when defense counsel misadvises her client on the deportation consequences of a plea. Petitioner Jae Lee proposes what amounts to a virtual *per se* rule of prejudice that would dramatically depart from the established approach for determining when ineffective assistance of counsel is prejudicial to the defense. If adopted, it would impose tremendous burdens on state resources, both prosecutorial and judicial, years after the original plea was entered, and would impair the states' interest in the orderly and efficient operation of state criminal justice systems.

SUMMARY OF THE ARGUMENT

A defendant who pleads guilty after receiving misadvice regarding the deportation consequences of conviction can obtain relief only if he shows he was prejudiced by the misadvice. Where the evidence of guilt was overwhelming and the defendant had no *bona fide* defenses, he cannot make that showing.

1. In *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), this Court held that the Sixth Amendment guarantees criminal defendants the right to competent advice about the deportation consequences associated with their conviction. But *Padilla* did not resolve when such an error would be prejudicial to the defense, thus entitling the defendant to new trial. Well-established law provides the framework for that prejudice inquiry.

Deficient advice that precedes a plea agreement is prejudicial only where the defendant can "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). In making that determination, courts objectively assess the likely outcome of the trial that would have taken place had the defendant not accepted the plea. *Id.* at 59-60; *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (prejudice inquiry must be objective). A defendant who would have had little chance of "succeed[ing] at trial" will therefore not be able to show prejudice. *Hill*, 474 U.S. at 59.

Padilla did not alter that test. To the contrary, it embraced the *Strickland* standard, stating that "lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." 559 U.S. at 372. Showing prejudice remains a "high bar" for defendants who pleaded guilty following misadvice regarding deportation. *Id.* at 371.

2. Lee nonetheless asks this Court to adopt an entirely new regime when counsel's deficient performance involved misadvice about the deportation consequences of a conviction. In his view, such a defendant is entitled to withdraw his plea whenever he can show that deportation consequences were very important to him. That is because, Lee first maintains, such a defendant would have rolled the dice and gone to trial even where the evidence of his guilt was overwhelming and he had no *bona fide* defenses.

But a rational defendant in such a case would not forgo the plea and proceed to trial because the reasonably probable outcome at trial would be a conviction for the charged offense—which would not avoid mandatory deportation and would result in a longer prison sentence. Allowing defendants to obtain relief in that situation effectively eliminates the objective inquiry. If it is rational to go to trial in the face of overwhelming evidence and no defenses, it is rational in every case. To establish prejudice, a defendant would only need to convince the court that, subjectively, he would have been willing to go to trial. That would be a stark departure from the rule adopted in *Strickland* and *Hill*.

3. Lee alternatively asserts that he was prejudiced because the prosecution might have offered him a better plea deal, with lesser deportation consequences. But this Court has never held that a defendant can show prejudice based on pleas he *might* have negotiated absent his counsel's misadvice, for obvious reasons. Unless a better offer was actually on the table at some point during the

negotiations, any suggestion that the defendant might have negotiated a better plea is sheer speculation. And it is sheer speculation that every defendant can assert in every case, collapsing the test *for* prejudice into a *per se* rule *of* prejudice.

Making matters worse, that speculation incorrectly assumes that prosecutors are exercising their discretion by taking immigration consequences into account during plea negotiations. To the contrary, many prosecutors do not. They question whether it is fair to enter plea agreements with noncitizen defendants that they would not offer to citizens charged with the exact same crime. And, because *Padilla* imposes additional burdens only on defense counsel, they are under no obligation to develop expert knowledge of the complicated field of immigration law. This Court should reject Lee's novel, unwieldy theory of prejudice.

ARGUMENT

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Hill* v. *Lockhart*, 474 U.S. 52 (1985), this Court adopted an objective test for prejudice under which courts assess the likely outcome of the trial that would have taken place had the defendant not accepted the plea. Lee cannot prevail under that test. He therefore proposes an alternative approach to prejudice for cases involving deportation consequences. That approach is deeply flawed.

Lee's proposal eliminates the objective component of the prejudice inquiry, entitles a defendant to a new trial even when he cannot show that a trial would have produced a better result than the plea,

and improperly presumes that all prosecutors would exercise their discretion by offering noncitizens better plea deals than they would offer similarly situated citizens. Operationally, it would quickly devolve into a virtual *per se* rule of prejudice that cannot be reconciled with this Court's precedents and would not further the ends of justice.

I. To establish prejudice arising from counsel's misadvice regarding deportation consequences, a defendant must show a reasonable probability that he would have secured a more favorable outcome for himself, but for counsel's misadvice.

1. When this Court adopted the modern test for assessing ineffective-assistance-of-counsel claims, it recognized the competing interests at play. On one hand, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. On the other hand, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Because "[a]ttorney errors come in an infinite variety, and are as likely to be utterly harmless in a particular case as they are to be prejudicial," our criminal justice system could not survive if every deficient act by counsel entitled the defendant to a new trial. *Id.* at 693. For that reason, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

The prejudice inquiry is an objective one: An "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Id.* at 695. A court may not consider irrational outcomes, for "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.* Instead, a reviewing court "should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id*. What matters are objective considerations, such as "the totality of the evidence before the judge or jury," whether "factual findings [were] unaffected by the errors," whether "a verdict or conclusion [was] weakly supported by the record," and so on. *Id*. at 695-96.

2. The "justifications for imposing the 'prejudice' requirement in *Strickland* v. *Washington* are also relevant in the context of guilty pleas." *Hill*, 474 U.S. at 57. Indeed, the prejudice requirement is especially important when "defendants challenge the validity of their guilty pleas" because such challenges undermine "the fundamental interest in the finality of guilty pleas." *Id*. at 58. As this Court explained,

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of

> judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved, because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

Id. at 58 (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (quoting *United States* v. *Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting)).

Of course, the prejudice inquiry in guilty plea cases necessarily differs from cases in which a trial was held. To demonstrate prejudice in the plea context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. As this Court explained, that inquiry often "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Id.* Where, for example, counsel's error was in failing to discover exculpatory evidence or failing to advise the defendant about a potential affirmative defense, "whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend . . . in large part on a prediction whether" the evidence or affirmative defense would have produced a not-guilty verdict. *Id.* at 59. And the test remains objective: "[P]redictions of the outcome at a possible trial,

where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 60-61 (quoting *Strickland*, 466 U.S. at 695).

The misadvice in *Hill* concerned parole eligibility. Hill alleged that counsel told him he would be eligible for parole after serving one-third of his sentence when in fact—because he had a prior felony conviction—he had to serve half of his sentence before becoming eligible for parole. *Id.* at 54-55. The Court held that Hill was not prejudiced for two reasons. First, he failed to allege that "had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. Second, there was no objective basis to believe he would have gone to trial, for his mistaken belief "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted." *Id.* at 60.

A defendant who wishes to withdraw a guilty plea based on misadvice that did not relate to the likelihood of conviction must therefore make two independent showings. He must first demonstrate that, subjectively, the misadvice mattered to him—that he sufficiently conveyed to counsel his desire to avoid deportation, and that he would not have accepted the plea had he received correct advice as to its deportation consequences. Second, he must demonstrate, objectively, "that a decision to reject the plea bargain would have been rational under the

circumstances." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000). The latter inquiry principally asks what the "likely" result would have been "if he went to trial and were convicted." *Hill*, 474 U.S. at 60.

Critically, a defendant cannot show prejudice solely by showing how much he "cared" about a particular consequence. *But see* Pet. Br. 19, 27. As the Court stated in *Flores-Ortega* (in the context of counsel who failed to file an appeal), "[t]o prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel, . . . he would have instructed his counsel to file an appeal." 528 U.S. at 486.

3. The Court's decision in *Padilla* v. *Kentucky* did not change the basic showing required to establish prejudice. To the contrary, *Padilla* dismissed "floodgates" concerns raised by the United States and state amici because it saw "no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." 559 U.S. at 372.

Padilla also reiterated the objective requirement that the defendant show that his decision to forego his plea deal was "'rational under the circumstances.'" *Id*. (quoting *Flores-Ortega*, 528 U.S. at 486). All told, the Court observed, "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." *Id*. at 371 n.12. The standard for showing prejudice

therefore remained a "high bar" for Padilla to surmount on remand, even after prevailing on the deficient performance prong of the test. *Id.* at 371. That would not have been the case if he merely had to show, subjectively, that deportation consequences mattered a great deal to him.

II. A rational defendant would not reject a plea in favor of proceeding to trial where there was overwhelming evidence of guilt and he had no *bona fide* defense.

Because *Padilla* did not alter the objective nature of the prejudice test, a defendant seeking to overturn his plea agreement based on a *Padilla* claim must demonstrate that it would have been "rational under the circumstances" for him to have declined the plea in favor of going to trial. It is *not* objectively rational for a defendant to forego a plea offer that would significantly reduce his sentence where the evidence against him is overwhelming and he has no *bona fide* defenses.

1. A rational defendant considers the likelihood, based on the evidence then known, of the jury returning a guilty verdict on the charged offenses. That result is the worst of all worlds—the defendant gets a longer prison sentence than he would have received under the plea offer, and he is still subject to mandatory removal. *See Hill*, 474 U.S. at 60 (finding no objective prejudice where the likely conviction would have produced the same negative consequence as the plea the defendant accepted based on deficient advice).

A rational defendant might be willing to take his chances at trial where the evidence is circumstantial, there are holes in the government's case, some of the prosecution witnesses have contradicted themselves, strong arguments exist for the suppression of important evidence, or he has viable affirmative defenses. For instance, in *Kovacs* v. *United States*, 744 F.3d 44, 48 (2d Cir. 2014), the Second Circuit found prejudice based on misadvice about deportation consequences where the defendant sacrificed a colorable statute of limitations defense by accepting a plea agreement. The court found that the defendant could have rationally taken the case to trial because there was a reasonable probability his statute of limitations defense would have succeeded, allowing him to "avoid immigration consequences." *Id.* at 53.

Where no such favorable circumstances exist, and the evidence is overwhelmingly stacked against the defendant, it cannot be said—objectively—that a rational defendant would choose to go to trial. That calculus is not changed when the misadvice concerns deportation. As Judge Batchelder recognized, "deportation would have flowed just as readily from a jury conviction as from a guilty plea." Pet. App. 3a.

2. In arguing to the contrary, Lee effectively seeks to eliminate all objective considerations from the prejudice inquiry. According to Lee, a rational defendant might want to roll the dice at trial even though the odds seem hopeless (Pet. Br. 25-26); might actually prefer the longer prison term that would flow from conviction after trial (*id.* at 26-27); or might bank on "the disarray in the enforcement of

U.S. immigration law" (*id.* at 27 (internal quotation marks omitted)). But a defendant can assert those reasons for wanting to go to trial—which are "easy to allege and hard to disprove," *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998)—in *every* case. If courts do not take into account the likelihood of success at trial, defendants will be entitled to "do-overs" in every case where the court finds credible the defendant's subjective and self-serving claim that he would have been willing to go to trial notwithstanding immensely long odds.

By removing all objective considerations from the prejudice inquiry, Lee's approach conflicts with *Padilla*'s express retention of the prejudice standard from *Strickland* and *Hill*. As explained in § I, *supra*, *Strickland* and *Hill* clearly state that prejudice must be *objectively* shown. Their tests ask what a "rational" person would have done, not what the particular defendant subjectively would have done. For that very reason, the prejudice inquiry "exclude[s] the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 695. Yet Lee's version of prejudice depends on the possibility of arbitrariness and nullification. Instead of "assum[ing] that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision," *id.*, his theory banks on a decisionmaker who opts to ignore the overwhelming evidence and instead acts irrationally. Unless this Court is to adopt an entirely new prejudice regime for deportation consequences, that approach must be rejected.

Lee also posits that he might have caught some breaks had he declined the plea offer. Pet. Br. 25. Maybe a witness would have failed to show up at trial or evidence would have been suppressed. This argument, too, eliminates the objective inquiry. Every defendant in every case can claim that luck would have been on his side had he only declined to plead guilty. And the government can never disprove such a claim. For good reason, then, this Court has held that "[t]he added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance." *Premo* v. *Moore*, 562 U.S. 115, 132 (2011). Whether it would have been rational for a defendant to go to trial can only be assessed by the state of the case at the time of the plea. Where "the evidence of guilt was 'overwhelming'" and the defendant "has no *bona fide* defense," Pet. App. 3a, 10a, it would not have been rational to take the case to trial.

3. One reason *Hill* adopted a demanding prejudice requirement was because "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." 474 U.S. at 58 (internal quotation marks omitted). This case vividly illustrates that fact. There is no genuine dispute that Lee committed the crime to which he pleaded guilty. It should therefore come as no surprise that the objective inquiry adopted in *Hill* provides no relief to Lee. By contrast, an actually innocent noncitizen defendant who pleaded guilty

based on misadvice regarding deportation will almost certainly be able to show that it would have been rational for him to have gone to trial.

Lee's approach also clashes with *Lafler* v. *Cooper*, 566 U.S. 156 (2012). *Cooper* held that a defendant who declined a plea offer due to his attorney's misadvice can maintain an ineffective-assistance claim when the "conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that were in fact imposed" after trial. *Id.* at 164. That is precisely the prejudice showing that Lee wishes to avoid. He insists that he can show prejudice *without* showing that the option he passed up would have produced a better result. This Court should not adopt that anomalous rule.

III. There is not a reasonable probability that a defendant could have obtained a plea with lesser deportation consequences absent specific evidence to that effect in the record.

This Court has never suggested that a defendant who entered a plea agreement based on the ineffective assistance of counsel could show prejudice simply by claiming he might have obtained a better plea, and for good reason. Except where the better offer was actually on the table, any suggestion that the defendant might have negotiated a better plea is sheer speculation—speculation that every defendant in every case can make. Lee's approach effectively amounts to *per se* prejudice whenever a defendant shows misadvice based on deportation consequences.

1. As discussed in § I, *infra*, the Court in *Hill* held that a defendant must make two showings to establish prejudice in the plea context. First, he must allege that he would have gone to trial had counsel provided him the correct advice. 474 U.S. at 59. Second, he must show a reasonable probability that going to trial would have produced a better outcome for him. *Id.* (the inquiry often "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial"); *id.* at 60 (Hill's mistaken belief about parole eligibility "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted"). *Hill* did not even hint that a defendant could show prejudice by claiming that the government might have offered him a better plea deal had he rejected the initial offer. The Court had ample reason not to go down that road.

The Sixth Circuit was surely correct when it described "the possibility that the prosecutor might have agreed" to a plea agreement with lesser deportation consequences as "sheer speculation." Pet. App. 7a-8a. Absent an actual offer that was on the table, how can we ever know whether the prosecution might have lowered its asking price for an admission of guilt? It is easy enough to posit, as Lee does (Pet. Br. 20-23), better deals with lesser deportation consequences. But a court will never know, with any acceptable measure of confidence,

whether the prosecution would in fact have acceded to such an agreement.

Even where the prosecution's case is relatively weak and the evidence perhaps only justifies conviction for a lesser offense with lesser deportation consequences, we cannot know whether the prosecution would have offered a plea to that lesser offense. What counts as a relatively weak case is in the eye of the beholder, and there are as many different views regarding when to reduce charges as there are prosecutors.

The present case, of course, is just the opposite. "A government witness was prepared to testify that he had purchased ecstasy from Lee on a number of occasions, dozens of pills were discovered during a lawful search of Lee's home, and Lee himself admitted not only that he had possessed ecstasy, but also that he had distributed the drug to his friends." Pet. App. 2a. The notion that the prosecution would have offered Lee pretrial diversion after going to the trouble to indict him (*see* U.S. Dep't of Justice, *United States Attorneys Manual*, *Pretrial Diversion Program*, § 9-22.010 ("in the majority of cases, offenders are diverted at the pre-charge stage")) or reduced the charge to failure to pay taxes, keep records, or some violation of the Food, Drug, and Cosmetics Act strains credulity. *But see* Pet. Br. 20-22. Nor is there any basis to believe the prosecution would have agreed to charge Lee merely with simple possession, given that Lee's own attorney believed conviction for simple possession to be a long shot at trial. J.A. 218-19, 238.

We cannot, of course, be certain that the prosecutors would not have made such an offer. But that is precisely the point. Unless a specific offer of a reduced charge was on the table, it is simply unknowable. And as Justice O'Connor wrote in a different context, "[i]t challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (quoting Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67 (1956)).

To be sure, this Court in *Missouri* v. *Frye*, 566 U.S. 133 (2012), tolerated a measure of speculation regarding plea offers—but of a different type than what Lee invites this Court to embrace. There, the Court held that defendants can maintain a Sixth Amendment claim based on "ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance." *Id*. at 147. To show prejudice, a defendant must (among other things) "demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id*. As the Court explained, however, "in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Id*. at 149. By contrast, there is no measurable way to gauge whether a prosecutor would have offered an

altogether different plea agreement that never previously existed.

2. Finding prejudice based on speculation about imagined plea offers suffers from an additional infirmity: It wrongly assumes that prosecutors around the nation are uniformly exercising their discretion by taking immigration consequences into account during plea negotiations. Yet while certain states and localities have imposed affirmative duties on prosecutors to consider immigration consequences during plea negotiations with noncitizens, *see, e.g.,* CAL. PENAL CODE § 1016.3(b), many have not. *See* Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L. J. 1, 26 (2012).

Lee's test creates an entitlement to a favorable exercise of prosecutorial discretion, but no legal principle prescribes that such discretion be exercised in any particular way in this context. And prosecutors have weighty reasons for choosing *not* to take deportation consequences into account during plea negotiations.

First, doing so means prosecutors would be reducing charges against noncitizens in circumstances where they would not reduce charges against citizens charged with the exact same crime. Many prosecutors are understandably reluctant to follow that course, believing it amounts to preferential treatment, undermining notions of fairness and equity. *See* Altman, *supra*, at 2, 30-31. A survey about the role immigration consequences should play in plea negotiations showed that nearly half of those prosecutors who generally favored

consideration of immigration consequences as part of the process nonetheless "rarely" or "never" altered plea offers in light of immigration consequences. *See id.* at 29.

Indeed, it is difficult to imagine a prosecutor offering a citizen any of the proposed alternatives Lee suggests, which (as the United States notes) are "more favorable to him on every dimension than the plea deal he was actually offered" and therefore amount to "unilateral concessions by the government." U.S. Br. 44. And it is far from clear that a court would accept a hypothetical "creative" deal under which the defendant would plead guilty to a lesser offense with lesser deportation consequences, but would agree to an unusually high sentence for that lesser offense.

Second, that approach imposes upon prosecutors the burden of becoming experts in one of the most complicated areas of the law. As illustrated by the plethora of cases before this Court concerning whether a particular offense results in deportation under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, it is exceedingly difficult for a non-expert to determine the immigration consequences of state convictions. *See, e.g.*, *Esquival-Quintana* v. *Sessions*, No. 16-54 (argued Feb. 27, 2017) (addressing whether California conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator" is grounds for mandatory removal); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015) (holding that conviction for Kansas state law crime of possession of drug paraphernalia not a deportable offense);

Gonzalez v. *Duenas-Alvarez*, 549 U.S. 183 (2007) (holding that California state law crime of taking vehicle without consent is removable offense); *Torres* v. *Lynch*, 136 S. Ct. 1619 (2016) (holding that New York state law offense constituted aggravated felony under INA even though it did not include interstate commerce element); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013) (holding that alien's conviction under Georgia state law for possession with intent to distribute marijuana did not constitute aggravated felony under INA).

Padilla imposed the burden of learning immigration consequences on *defense* counsel, not the prosecution. 559 U.S. at 367 ("counsel must advise her client regarding the risk of deportation"). That was appropriate, for the Sixth Amendment concerns the relationship between the defendant and his counsel, not between either of them and the prosecution. Lee's "maybe the prosecutor would have offered a better deal" approach turns that division of responsibilities on its head, implicitly assuming that prosecutors have the duty to take defendants' immigration consequences into account. They do not.

3. Finally, Lee's proposed approach also fails because it amounts to a *per se* rule of prejudice. *Every* defendant can claim that his counsel *might* have been able to extract a better offer and that he would, of course, have gladly accepted that offer. Such a *per se* rule cannot, however, be reconciled with *Padilla*'s recognition that "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong," 559

U.S. at 371 n.12, and its recognition that the standard for showing prejudice is a "high bar" for defendants to surmount. *Id.* at 371. This Court has presumed prejudice from deficient performance only where the defendant "was—either actually or constructively—denied the assistance of counsel altogether." *Flores-Ortega*, 528 U.S. at 483. Counsel who provides misadvice as to deportation consequences does not fit within that category.

* * *

Crediting Lee's subjective desire to avoid deportation as sufficient to demonstrate prejudice under *Strickland* and *Hill* would be a radical departure from existing Sixth Amendment jurisprudence, and would result in a presumption of prejudice anytime a defendant successfully showed that his counsel had misadvised him as to a plea's deportation consequences. This would burst open the floodgates that *Padilla* purported to keep in check with the lower courts' "experienced" application of *Strickland*'s objective test. It would also leave state and federal prosecutors with the burden of relitigating cases or renegotiating pleas years after the fact in cases where the ultimate outcome would not have changed had defense counsel *not* provided erroneous advice as to the negotiated plea's deportation consequences in the first place. This Court should reject Lee's proposed reworking of the prejudice inquiry, maintain its objective component, and hold that Lee failed to show a reasonable probability that he would have secured a more favorable outcome but for counsel's misadvice.

CONCLUSION

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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