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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Mr. Lee's counsel erroneously advised Mr. Lee he would not be deported for accepting the government's plea offer. Had Mr. Lee understood that accepting the plea would actually result in his permanent banishment from the United States, no one seriously doubts Lee would have directed his counsel to seek a different plea, or else proceed with trial. Counsel's deficient advice deprived Mr. Lee of that choice, which is exactly what *Padilla* sought to avoid. Yet, the government sees nothing wrong with that result.

The main problem with the government's view is that it conflates the prejudice standard for deficient advice at trial with the standard at the plea stage. U.S. Br. 16–32. When counsel's trial performance is deficient, a defendant must show that performance "prejudiced the defense." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). But when deficient advice affects the acceptance of a plea, the inquiry changes: a 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." *Hill* v. *Lockhart*, 474 U.S. 59 (1985). In other words, the defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010).

To make that evaluation, a court considers the "totality of the evidence." *Strickland*, 466 U.S. at 695–96. And all the relevant evidence here—including Mr. Lee's longtime familial and business ties to this country—shows there is not just a reasonable probability but a virtual certainty that, but for his counsel's errors, Lee would not have accepted the government's plea offer. Lee Br. 29–36.

The Sixth Circuit erred by reducing the totality-of-the-circumstances analysis to a single factor: the strength of the government's evidence. Pet. App. 4a (quoting *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012) ("[N]o rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence.")). The government makes the same error. *E.g.*, U.S. Br. 12 ("A defendant cannot establish prejudice from deficient advice about the immigration consequences of a guilty plea when overwhelming evidence makes a favorable *trial* outcome unrealistic . . . .") (emphasis added).

The reality is that a defendant will sometimes rationally reject a plea offer no matter the odds of prevailing at trial—consider the defendant who faces certain death if a plea results in mandatory deportation. In other situations, a defendant will rationally *accept* a plea offer no matters the odds of prevailing at trial—consider a legal permanent resident with longtime ties to the U.S. who is offered a modest sentence in exchange for no risk of deportation. The strength of the government's evidence is just one factor of many that a defendant rationally considers before deciding to accept a plea.

Accordingly, this Court should reject the Sixth Circuit's categorical test and affirm the government's initial *Strickland* assessment in this case: Mr. Lee was prejudiced by his attorney's ineffective assistance because he "*would not have pleaded guilty*" but for his attorney's backwards advice about the deportation consequences of his plea. Lee Br. 14 (citation omitted, emphasis added). The court of appeals should be reversed.

REPLY ARGUMENT

I. *Strickland* prejudice at the plea stage does not depend exclusively on a defendant's odds of prevailing at trial.

The government cites *Strickland* and argues that a defendant can only show prejudice where "attorney error adversely affected a viable defense strategy." U.S. Br. 16. That is true when attorney error relates to the substantive trial defense, *e.g.*, a decision not to call a witness or pursue a certain defense strategy. In that context, a defendant demonstrates prejudice by showing that counsel's deficient performance changed "the result of the proceeding." *Strickland*, 466 U.S. at 694. That is because counsel's misadvice "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect *on the judgment*." *Id.* at 691 (emphasis added).

In *Hill*, this Court clarified the *Strickland* standard for ineffective assistance at the plea stage. The first prong, regarding attorney performance, remains the same. *Hill*, 474 U.S. at 59. "The second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Ibid.* "In other words, in order to satisfy the 'prejudice' requirement, 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*." *Ibid.* (emphasis added).

The petitioner in *Hill* was unable to show prejudice based on his attorney's erroneous advice about the petitioner's parole eligibility date. *Id.* at 60. That outcome had nothing to do with the petitioner's

inability to prove that misadvice adversely affected a viable defense strategy. Contra U.S. Br. 16–26; Ala. *Amici* Br. 5–10. The petitioner could not show prejudice because 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." *Hill*, 474 U.S. at 60. The petitioner "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Ibid*

Here, the objective evidence shows that deportation consequences were critical to any decision to plead guilty. Pet. App. 56a; J.A. 132. In fact, Mr. Lee's attorney understood that his erroneous advice was not just influential, but dispositive; had Mr. Lee known a guilty plea would result in deportation, the attorney testified, Lee would have chosen to go to trial, and the attorney *would have advised him to do so*. Pet. App. 56a; J.A. 244.

This Court in *Padilla* reiterated the plea-stage prejudice standard established in *Hill*. Rejecting the government's concerns about finality and opening the "floodgates" of ineffective-assistance claims, the Court emphasized that a petitioner misadvised about deportation consequences at the plea stage "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372 (citing *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)). Noting that pleas account "for nearly 95% of all criminal convictions," the Court observed that "informed consideration of possible deportation can only benefit *both* the State and noncitizen defendants during the plea-bargaining process." *Id.* at 373 (emphasis

added). And the Court confirmed that the "severity of deportation—'the equivalent of banishment or exile,'—only underscores how critical it is for counsel to [correctly] inform her noncitizen client" about deportation consequences. *Id.* at 373–74 (quoting *Delgadillo* v. *Carmichael*, 332 U.S. 388, 390–91 (1947)). As the government acknowledged at the *Padilla* oral argument, when a lawyer provides deportation misadvice, he "has used his professional skills to undermine a personal decision that belongs to the defendant alone." *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), 10/13/09 Oral Arg. Tr., p. 24.

In his *Padilla* concurrence, Justice Alito emphasized the relationship between plea-stage prejudice and an attorney's affirmative misadvice regarding a conviction's removal consequences. "[I]ncompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." *Padilla*, 559 U.S. at 385 (Alito, J., dissenting) (citation omitted). "When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk." *Ibid.* But "[t]hat is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable." *Ibid.* Then, "it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—*or that it embodies a voluntary and intelligent decision to forsake constitutional rights*." *Id.* at 385–86 (emphasis added). In other words, the yardstick for evaluating prejudice in the context of an accepted plea based on affirmative misadvice is whether the process resulted in the defendant's knowing waiver of his constitutional right to trial.

Nothing in *Strickland*, *Hill*, or *Padilla* suggests that this objective, plea-stage prejudice inquiry allows a defendant to show prejudice simply by asserting that, but for his counsel's ineffective assistance, he would have chosen trial. Contra U.S. Br. 18. Nor do severe deportation consequences mean a defendant misadvised about those consequences can *per se* establish prejudice. Contra U.S. Br. 25; Ala. *Amici* Br. 4. Consider a defendant who is a brand new legal permanent resident. Assume he is offered a plea that will result in a significantly reduced incarceration period, and assume further that all of his significant familial and financial ties are to his country of origin rather than the United States. Even if the defendant's attorney misadvises him about the deportation consequences of the plea, it is not possible to say that it was reasonably probable that, but for the misadvice, the defendant would have rejected the plea.

In other situations, objective evidence of a defendant's connections to the United States will be a significant factor in the prejudice inquiry. *E.g., United States* v. *Rodriguez-Vega*, 797 F.3d 781, 785 (9th Cir. 2015). That is why courts consider the totality of the circumstances. And as explained in Mr. Lee's initial brief and reiterated below, the strength of the government's evidence here is outweighed by the other factors that a defendant in Mr. Lee's position would rationally consider in deciding whether to accept a plea that would—with 100% certainty—result in permanent banishment from the only home Mr. Lee has ever known.

II. There are numerous reasons why a defendant would rationally reject a plea to take his chances at trial.

The government's primary contention is that no rational person would go to trial if he is likely to be convicted. U.S. Br. 22–32. That categorical position unfairly discounts the rational reasons why some defendants with deep and longstanding ties to the United States might prefer trial to a plea. It also overstates the certainty of the litigation process.

1. The Sixth Circuit's categorical approach discounts the many reasons a defendant might prefer trial to a plea. As explained in Mr. Lee's opening brief, a rational defendant might actually prefer a longer sentence served in the United States than a shorter sentence followed by mandatory, permanent deportation because of possible changes in legal or prosecutorial discretion or a desire to be close to family. Lee Br. 26–27; accord *DeBartolo* v. *United States*, 790 F.3d 775, 779–80 (7th Cir. 2015); *State* v. *Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011).

The government discounts a desire to remain close to family members as "not reasonable." U.S. Br. 30. But this Court posited that very reason in a question at the *Padilla* oral argument. *Padilla* v. *Kentucky* 10/13/09 Oral Arg. Tr., p. 50 ("[T]he defendant might say: I have been in the United States for 40 years. I have a family. I'd rather take my chances with a jury and get put away for a longer time because at least I'll be in prison where my children can visit me."); contra Ala. *Amicus* Br. 10 (arguing that a longer sentence, served in the U.S., "is the worst of all worlds"). Lee has proven he falls into this category by choosing to spend six additional years in custody to fight his deportation. Lee Br. 4.

Much more significant, the disparity between a defendant's plea sentence and likely sentence following a trial will always be a key factor. Had Mr. Lee been offered a year-and-a-day sentence in a plea offer while facing a possible life sentence, a court might reasonably conclude that it would be irrational to reject the plea despite compelling evidence of a desire to remain in the United States. But in reality, Mr. Lee received almost no tangible benefit from his plea. Contra U.S. Br. 10.

With no adjustments, Mr. Lee's "Guidelines range would have been 33 to 41 months." U.S. Br. 6. With the plea, that range drops to "24 to 30 months." *Ibid.* (The district court exercised its discretion to impose a lesser sentence that was not the result of the plea-bargaining process. J.A. 124–25.) So in exchange for a mere 9 to 11 months, Mr. Lee unknowingly gave up *any* possibility of remaining in the United States. Mr. Lee would have accepted the risk of going to trial if he had known the plea resulted in deportation. Pet. App. 56a. And it is why Mr. Lee's lawyer "would have advised him to" "take[ ] the chance of going to trial" if he had known the plea would result in deportation. Pet. App. 56a; J.A. 244.

Mr. Lee is *not* arguing "that subjective removal concerns should override all objective considerations of litigation strategy." Contra U.S. Br. 28; Ala. *Amicus* Br. 12. Nor is he arguing for a *Padilla*-specific exception to the *Strickland* standard. Contra U.S. Br. 28–29. Lee simply asks that all relevant circumstances be considered. And here, those objective circumstances demonstrate it would have been rational for Mr. Lee to risk adding 9 to 11 months to his sentence in exchange for the possibility he could avoid permanent expulsion from the United States.

Contrary to the government's claim, it is not Mr. Lee but the government who asks for a special, categorical rule: that a defendant who accepts a plea based on ineffective assistance can *never* be prejudiced when faced with purported strong evidence of guilt. Such a *per se* rule is contrary to this Court's admonition that the *Strickland* prejudice analysis does not "establish mechanical rules" but instead "guide[s] the process" for determining whether the result of a "particular proceeding is unreliable" by considering "the totality of the evidence." *Strickland*, 466 U.S. at 695–96. Focusing on a single factor—as the Sixth Circuit did and the government advocates—contradicts that approach. Const. Accountability Ctr. *Amicus* Br. 19–23. Unsurprisingly, "[n]o other circuit has made this mistake." *Id.* at 22–23 (citing decisions from the Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh circuits).

2. The Sixth Circuit's categorical approach also overstates the certainty of the litigation process. Evidence that appears strong on an undeveloped record (such as a police report, or an indictment untested by cross-exam) is often not so strong at trial. "[T]there is no such thing as a sure winner," because evidence is tested at trial, and "juries are inherently unpredictable." *Miller UK Ltd.* v. *Caterpillar, Inc.*, 17 F. Supp. 3d 711, 739–40 (N.D. Ill. 2014). Data and results demonstrate time and again that pre-trial perceptions of a trial's likely outcome can be upended by the jury's ultimate decision. See Nat'l Ass'n of Crim. Def. Lawyers *Amicus* Br. 9–15; Cato Inst. *Amicus* Br. 14–21; Lee Br. 25–26.

Consider the circumstances here. The government relies heavily on a confidential informant. U.S. Br. 38 (referencing alleged past CI purchases, the CI's testimony, and the CI's controlled buy). But the government did not disclose the informant's recorded conversations with Lee in its Rule 16 discovery response letter, J.A. 18, 32, 75–82; Presentence Investigation Report (PSR) 4, as Federal Rule of Criminal Procedure 16(a)(1)(B)(i) requires. See *United States* v. *Blueford*, 312 F.3d 962, 965 (9th Cir. 2002); *United States* v. *James*, 495 F.2d 434, 435 (5th Cir. 1974). Information about the informant appeared for the first time in the presentence investigation report. PSR 4. Mr. Lee believed the informant had become problematic and unreliable. J.A. 20 n.2. Regardless, the government's ability to call the informant to testify is at least in question. See Fed. R. Crim. P. 16(d)(2)(C) (if a party fails to comply with Rule 16 disclosure obligations, the court may "prohibit that party from introducing the undisclosed evidence"); *United States* v. *Hardy*, 586 F.3d 1040, 1044 (6th Cir. 2009) ("A proper sanction for failure to disclose under rule 16, is exclusion of the evidence.").

Without the informant, the government's ability to prove intent to distribute becomes considerably more difficult. J.A. 34–35 n.8. And even if the informant was available, Mr. Lee had an entrapment defense based on the informant's chicanery, see J.A. 36–40, a defense which may have been corroborated by an audio recording that the government failed to mention in its Rule 16 letter or otherwise provide to Mr. Lee, J.A. 20. Moreover, if the government had issues with its confidential informant, it might have also had problems with its search warrant, which the government admits was grounded on the informant's testimony. U.S. Br. 38.

Having considered all the evidence actually available to him, Mr. Lee's counsel believed "the best thing that could have come out of [trial] was maybe a possession." J.A. 238. Such a conviction would have been sufficient for Mr. Lee to seek cancellation of removal. 8 U.S.C. § 1229b(a); *In re C-V-T*, 22 I&N Dec. 7 (BIA, 1998). It was no slam dunk that going to trial would have resulted in Mr. Lee's mandatory deportation. Contra U.S. Br. 15.

3. To support its categorical rule, the government invokes the importance of finality and the difficulty in taking a case to trial after the passage of time. U.S. Br. 23–24, 26. To begin, Congress has already addressed the relative weight to be given the finality interest by imposing a one-year limitation period for filing a § 2255 motion. 28 U.S.C. § 2255(f). Here, for example, Mr. Lee contacted his attorney immediately upon learning he was scheduled to be deported. J.A. 137. And despite his attorney's significant delays in providing necessary information, Mr. Lee filed his *pro se* petition less than one year after his sentencing hearing. Pet. App. 57a, 58a–59a.

Seven years have elapsed since the sentencing hearing, but that is no fault of Mr. Lee's. Rather, the delay resulted from the government's decision to flip flop on whether Mr. Lee suffered prejudice. R. 40 Resp. of the U.S. to Pet'r's Post Hr'g Br. in Supp. of Mot. Pursuant to 28 U.S.C. § 2255, pp. 2–3 (explaining the government's previous concession, since withdrawn, that Mr. Lee's counsel was ineffective *and* that Mr. Lee was prejudiced by the deficiency).

In addition, finality and the passage of time are implicated in every case where a defendant seeks post-conviction relief based on ineffective assistance. This Court has consistently upheld the right to

effective assistance over such concerns because "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker." *Strickland*, 466 U.S. at 694; accord *Padilla*, 559 U.S. at 371 (rejecting similar finality argument).

Given "the frequently drastic consequences of deportation for a long-time resident of this country, it is reasonable for certain defendants to reject a deportation-enabling plea deal." Asian Ams. Advancing Justice & Other Immigrants' Rights Grps. *Amici* Br. 10, 11–18. This does not require the Court to adopt a *per se* rule, but it does require rejection of the Sixth Circuit's categorical rule. Where a defendant claims ineffective assistance in the acceptance of a plea offer with deportation consequences, the courts should consider the totality of the circumstances, including not only the strength of the prosecution's evidence, but also the strength and length of the defendant's ties to the United States, the length of imprisonment, the type of penalty and conditions of confinement, fines, and other consequences.

Here, after serving his year-and-a-day sentence, Mr. Lee has remained in detention for an additional six years, even though he could have allowed himself to be deported and thus obtained his freedom. There should be no doubt that Mr. Lee would have been rationally willing to risk a nominal 9 to 11 months of additional incarceration for the chance of an acquittal or even a conviction of possession only. In fact, most rational individuals in Mr. Lee's circumstances would jump if offered that same tradeoff.

In sum, a district court's assessment of a defendant's likelihood of success at trial is not always the determinative consideration in guilty-plea cases. *Gonzales* v. *United States*, 722 F.3d 118, 132–33 (2d Cir. 2013). This is particularly true with regard to the immigration consequences of a plea. *INS* v. *St. Cyr*, 533 U.S. 289, 321–23 (2001).

This Court should reject a categorical approach to proving *Strickland* prejudice simply because the prosecution possesses strong evidence of guilt at the outset of a case. The Court should reverse the Sixth Circuit's minority position on that issue. And the Court should grant Mr. Lee's § 2255 petition so he may re-engage in plea negotiations while properly advised and, if necessary, invoke his constitutional right to a trial.

III. There are also numerous reasons why a defendant would rationally reject a plea and take his chances at obtaining a different plea, one with lesser immigration consequences.

The government repeatedly says there is "no evidence" Mr. Lee could have persuaded the prosecution to offer a plea that would avoid mandatory, permanent deportation, and that absent such evidence, Mr. Lee is not entitled to relief. U.S. Br. 32–36 (citing *Lafler* v. *Cooper*, 566 U.S. 156 (2012); *Missouri* v. *Frye*, 566 U.S. 134 (2012); and *Premo* v. *Moore*, 562 U.S. 115 (2011)). But the reason there is no evidence is because Mr. Lee's attorney believed he had *already* obtained a plea that would not result in deportation; as a result, he did not even ask for an alternative deal. Pet. App. 55a; J.A. 131.

This is a fact pattern that will appear in virtually every case where a defendant's lawyer misadvises about a plea's deportation consequences. So accepting the government's argument would effectively create a categorical rule that a defendant misadvised about deportation consequences can never show prejudice, even in a context where a defendant could have easily obtained a plea that did not result in mandatory deportation. *Lafler*, *Frye*, and *Premo* did not so hold, and as discussed above, see *supra* § II.1 this Court should continue to eschew categorical prejudice tests. It is true a defendant has no right to a plea. U.S. Br. 35. But it is also true that a defendant has the right to counsel who understands a potential plea's deportation consequences and who bargains effectively to meet the defendant's goals, including the goal of avoiding deportation. *Padilla*, 559 U.S. at 375–76.

A competent lawyer properly informed by the numerous resources available to advise a non-citizen client, see Immigrant Def. Project, et al. *Amici* Br. 21–25, would have attempted to negotiate an alternative plea for Mr. Lee that would have avoided deportation (or at least avoided mandatory removal and permanent exile). And prosecutors have an obligation to consider these alternatives in the interest of justice and judicial efficiency. The Am. Bar Assoc. *Amicus* Br. 19–21; Lee Br. 23. Mr. Lee should not be subjected to a Catch 22 where his lawyer's ineffective assistance deprived him not only of a different plea, but also the evidence to prove that he could have obtained one.

The government makes several additional arguments about pleas; none justifies punishing Mr. Lee for having a bad lawyer.

1. The government calls Mr. Lee's discussion of possible alternative pleas, see Lee Br. 31–33, "sheer speculation" that "falls well short of establishing the requisite 'reasonable probability' of a different outcome." U.S. Br. 42. But actual, documented cases show that these pleas are anything but speculative:

- A legal immigrant from Sudan charged with felony marijuana trafficking rejected a misdemeanor facilitation-of-sale plea that would have resulted in mandatory deportation. After serving eight months, he obtained a dismissal. Immigrant Def. Project, et al. *Amici* Br. 17.
- A lawful permanent resident was caught with 3.2 kilograms of crystal methamphetamine and charged with possession with the intent to distribute a controlled substance. She ultimately pled to making a false statement to a federal officer under 18 U.S.C. § 1001 and was sentenced to probation, a plea that avoided deportability. Immigrant Def. Project, et al. *Amici* Br. 18–19.
- A lawful permanent resident was caught with 89 pounds of marijuana and charged with federal drug offenses under 21 U.S.C. §§ 952 & 960. He negotiated a plea under 18 U.S.C. § 4 for misprision of felony and served four months in jail with two years of supervised release, a plea that avoided aggravated felony status and thus the harshest immigration consequences. Immigrant Def. Project, et al. *Amici* Br. 19–20.

- *Amici* identify many other examples of defendants avoiding mandatory deportation, in a broad variety of contexts. Immigrant Def. Project, et al. *Amici* Br. 11–15. For example, Baindu Marian Mando was a legal permanent resident arrested for attempting to rob a bank. Her attorney consulted an immigration treatise and confirmed that his client would be deported if convicted of robbery and sentenced to one or more years in prison. The federal government was unwilling to negotiate a plea to a misdemeanor, so Mando pled guilty to attempted bank robbery in violation of 18 U.S.C. § 2113(a) and moved for a downward departure. The judge sentenced her to eleven months, time served, thus avoiding aggravated-felony mandatory deportation consequences. *United States* v. *Mando*, No. 3:06-cr-00018-1 (M.D. Tenn.).

These examples are just a sample of what is possible. In many cases, the public will never know how or why a particular plea deal was struck. And in the case of Ms. Mando, it was not the prosecutor but the judge who provided the solution to a thorny deportation problem. This illustrates something judges do often—avoid unintended or overly harsh consequences while still fulfilling the purpose of punishment. (The district court's selection here of a year-and-a-day as Mr. Lee's sentence was likely the result of the court's intent that Mr. Lee be eligible for earlier release for good behavior. See 18 U.S.C. § 3624(b).) Sometimes nominal sentencing changes have substantial immigration consequences. Denying a defendant the opportunity to prove prejudice in such circumstances is jurisprudentially unsound and unjust.

2. The government also says that each plea in Mr. Lee's "extensive list of hypothetical alternative plea deals" is "more favorable to him on *every* dimension than the plea deal he was actually offered." U.S. Br. 44. That is not accurate. A conviction for misprision of a felony under 18 U.S.C. § 4 can result in imprisonment of up to three years, two years longer than Mr. Lee's actual sentence, yet does not have mandatory deportation consequences. A plea to making a false statement under 18 U.S.C. § 1001 (noted above) can result in imprisonment of up to five years. Mr. Lee also could have pled guilty to multiple simple-possession misdemeanor offenses—or a misdemeanor offense plus a guilty plea to being an accessory after the fact under 18 U.S.C. § 3—with consecutive prison sentences running longer *in toto* than the sentence he actually received but without the mandatory deportation consequences. There are numerous options. And that Mr. Lee has been willing to spend seven years in detention leaves no doubt he would have been willing to accept even a much longer sentence in exchange for remaining in the country where he has lived since childhood.

3. The government also suggests that the district court considered Mr. Lee's offense to be serious, and that any leniency would be unlikely. U.S. Br. 6–7, 45–46. But after weighing all the sentencing factors listed in 18 U.S.C. § 3553(a)(2)—including Mr. Lee's gainful employment in an "entrepreneurial capacity," his lack of a criminal record, his lack of a violent history, and his lack of danger to the community—the sentencing judge concluded that a below-Guidelines sentence was appropriate. J.A. 125. It cannot be said that Mr. Lee had no possibility of obtaining a plea that would have satisfied his goal of avoiding deportation.

4. Finally, the government says that Mr. Lee's proposed alternative pleas are dispositions "that *any* defendant, not just an alien, would have preferred." U.S. Br. 44. Again, that is not accurate. A citizen defendant with no deportation concerns would never accept a plea that results in a longer sentence, yet that is an outcome Mr. Lee would happily accept if it meant reduced deportation consequences. In fact, Mr. Lee is in a very different position than millions of other non-citizens. As a legal permanent resident with over seven years of residence in the country, he may seek cancellation of removal under 8 U.S.C. § 1229b(a) so long as he is not convicted for an "aggravated felony" drug offense. Accordingly, Mr. Lee would accept virtually *any* plea offense that did not trigger aggravated-felony mandatory deportation consequences. Yet a plea that resulted in mandatory deportation is the only plea Mr. Lee's own attorney recommended.

Given all the relevant circumstances, it is objectively rational for Mr. Lee to reject a plea that guaranteed the only consequence he sought to avoid. The court of appeals should be reversed and Mr. Lee's § 2255 petition granted.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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