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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:09 a.m.

16 JOHN J. BURSCH, ESQ., Caledonia, Mich.; on behalf of
17 the Petitioner.

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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in case 16-327, Lee v. United States.

5 Mr. Bursch.

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 Jae Lee accepted a plea based on his
11 counsel's assurance he would not be deported. Counsel
12 had it exactly backward. The plea resulted in mandatory
13 banishment from the United States.

14 No one seriously doubts that if Mr. Lee knew
15 the truth about his plea, he would have rejected it, had
16 the Sixth Circuit dispensed with this Court's totality
17 of the circumstances test for proving prejudice and
18 created a categorical rule.

19 JUSTICE KENNEDY: In -- in State courts, do
20 State -- are State courts mandated to follow what we do
21 in the Federal courts under Rule 11; that is to say,
22 before the guilty plea is accepted, to advise the
23 defendant of all of his rights? I'm sure they are.

24 MR. BURSCH: Yeah. I think in most State
25 courts they do follow that procedure.

1 JUSTICE KENNEDY: Do -- do they also tell --
2 advise the defendant that if he or she is an alien,
3 there may be certain consequences to the plea? In State
4 courts, do you happen to know?

5 MR. BURSCH: I mean, in State courts, every
6 court would have their own version of Rule 11, and so
7 they're going to have some colloquy, and -- and I
8 believe those colloquies have changed somewhat since
9 Padilla.

10 I -- you know, and so one of the problems
11 here, if you look at what happened during the -- the
12 withdrawal of the plea, everyone in the court, including
13 the judge, thought that Mr. Lee was going to remain in
14 the United States after he served his sentence.

15 JUSTICE KENNEDY: But I -- I don't quite see
16 that in -- in --

17 MR. BURSCH: Let -- let me walk you through
18 that.

19 JUSTICE KENNEDY: -- at -- at 103 of -- of
20 the Joint Appendix, which is the beginning --

21 MR. BURSCH: Yes.

22 JUSTICE KENNEDY: The judge, after advising
23 him of many of his rights, says: Are you a U.S.
24 citizen?

25 No, your Honor.

1 Okay. A conviction on this charge then
2 could result in your being deported. Does that at all
3 affect your decision about whether you want to plead
4 guilty or not?

5 Yes, your Honor.

6 Okay. How does it affect your decision?

7 I don't understand.

8 And then -- and then he talks about it
9 again.

10 MR. BURSCH: Right. And -- and then we find
11 out later, at the 2255 evidentiary hearing,
12 Justice Kennedy, that when he said I don't understand,
13 he then turned to his attorney, Mr. Fitzgerald, and
14 Mr. Fitzgerald said: Don't worry. This is a standard
15 warning that everybody gets. If the deportation
16 consequences are not in the plea agreement itself --

17 JUSTICE KENNEDY: Well, except --

18 MR. BURSCH: -- you will not be deported.

19 JUSTICE KENNEDY: -- I'm -- I'm not sure how
20 much more the judge can do, and that at least argues for
21 our accepting midway ground of requiring Strickland
22 conspiracy -- Strickland -- Strickland doubt,
23 reasonable -- reasonable probability of -- of success if
24 you go to a jury.

25 MR. BURSCH: Well -- well, two -- two points

1 on that, Justice Kennedy.

2 First, with respect to what he heard from
3 the judges, what I would really like the Court to focus
4 on is the sentencing hearing colloquy, which is at pages
5 124 to 127 of the Joint Appendix. And there, it's clear
6 that everyone, even the Federal District Court judge,
7 believed that he was going to be released back into the
8 United States after his one year was over. She even put
9 him on three years of supervised release and told him to
10 give the probation officer his address once he was
11 released.

12 CHIEF JUSTICE ROBERTS: Well, that's --

13 MR. BURSCH: -- and that --

14 CHIEF JUSTICE ROBERTS: That goes to
15 deficient performance. I think we're beyond that, and
16 the question is -- is prejudice.

17 MR. BURSCH: Well, but -- but the question
18 there, at the colloquy, was whether he was informed at
19 all and how that prejudice -- to kind of combine the
20 response to yours and Justice Kennedy's question, what's
21 the standard that we have here?

22 And we -- we start with the baseline, which
23 is Strickland, is there a reasonable probability of a
24 different outcome, but that was refined by this Court in
25 Hill. And as we explain at length in the reply brief,

1 the Hill test is whether there a reasonable probability
2 the defendant would not have pleaded guilty. And
3 here --

4 JUSTICE ALITO: But is that --

5 CHIEF JUSTICE ROBERTS: On that point, you
6 say the facts here support that -- that conclusion and
7 go through them all, but I don't understand how you'll
8 be able to distinguish any case in the future.

9 You say: Well, here, he's been here a long
10 time, hasn't gone back to South Korea, has he started --
11 but I think someone who's just arrived might say: You
12 know, this has been my passion my whole life to come to
13 the United States; I don't want to go back.

14 You know, it -- it -- I'm not sure how, at
15 the outset, a judge can simply say: Oh, we don't need
16 to have a hearing in a case like this.

17 It seems to me that there would necessarily
18 have to be a hearing in every case.

19 MR. BURSCH: Well, there would at least have
20 to be a 2255 hearing to get those facts on the table.
21 But, Mr. Chief justice, what I want to emphasize is that
22 this is an objective test, not a subjective test. And
23 so it's not enough for a defendant simply to say: Well,
24 had I known, I would have rejected my plea.

25 CHIEF JUSTICE ROBERTS: Well, it sounds like

1 a subjective test. I mean -- I don't know if it's
2 hypothetically, or we can assume it's actually, the idea
3 is that, even though the result of a trial is going to
4 be exactly the same, there's no reasonable probability
5 that he won't be deported, he nonetheless wants to go
6 through the trial.

7 Now that could be certainly characterized as
8 a subjective wish, not an objective. An objective
9 person would say: Well, it's going to come out the same
10 anyway.

11 MR. BURSCH: Well -- well, first, let's talk
12 about an example where you can see where the outcome
13 would be different based on objective, and then let's go
14 back to the facts of this case and show why it's
15 objectively rational here.

16 I -- consider a case where a defendant is
17 new to the country. He has no familial or business ties
18 to the United States; they're all to his country of
19 origin, and the sentencing disparity between the plea
20 that was offered and what could happen to him if he went
21 to trial is enormous. Say it's 50 years. It would not
22 be rational for that person to choose to go to trial,
23 because they don't have the connections.

24 But what we're talking about here --

25 JUSTICE SOTOMAYOR: What does rationality

1 have to do with this, Mr. Bursch?

2 MR. BURSCH: Well --

3 JUSTICE SOTOMAYOR: We often get people who
4 come in and say I wasn't told about a plea, and I would
5 have pled guilty. And judges then look at the facts and
6 find out that the defendant was claiming he was
7 innocent, despite overwhelming evidence that he or she
8 was guilty.

9 MR. BURSCH: Yes.

10 JUSTICE SOTOMAYOR: Rock solid evidence. I
11 mean, not only is there a video, there's witnesses,
12 there's fingerprints, you name it, they're there, and
13 defendants will come in and say I'm not guilty. And we
14 say, you know, he's foolish, he's irrational. No
15 rational human being would not take this plea, the
16 difference between 50 years and five years, and yet, we
17 deny their motion to undo their plea because we
18 basically say it's subjective. This foolish defendant
19 wanted to go to trial.

20 I'm not quite sure what objectivity has to
21 do with making a judgment whether this particular
22 person, under their particular circumstances, would have
23 or would not have gone to trial.

24 Now, the factors you point to can support
25 that subjective wish. If the difference between going

1 to jail or not is only nine months, I might say: Hmm,
2 hundred percent chance I'm going to be deported. And
3 the only benefit I get is nine months in my plea, which
4 is what happened here.

5 MR. BURSCH: Yes.

6 JUSTICE SOTOMAYOR: And there's even a one
7 percent chance that I might be found not guilty, or at
8 least found guilty of possession and not something else.
9 I think I'm going to roll the dice.

10 MR. BURSCH: Exactly. And that's why,
11 here --

12 JUSTICE SOTOMAYOR: It's not irrational.

13 MR. BURSCH: It -- it --

14 JUSTICE SOTOMAYOR: But I don't know whether
15 --

16 MR. BURSCH: It's irrational, and it's
17 reasonably probable that that's the decision he would
18 have made if properly informed. And I --

19 JUSTICE ALITO: I don't think that's --
20 Mr. Bursch, I don't think that's a manageable standard.
21 I -- I see a number of possible standards that could be
22 used here. One is purely subjective: What would this
23 defendant have done? I understand the concept; it
24 creates a lot of practical difficulties.

25 Another objective standard would be, is

1 there a reasonable probability of a better outcome if
2 the defendant had gone to trial? That's manageable.
3 That's standard Strickland.

4 But if the test is, would a rational
5 defendant have in -- have gone to trial given the -- the
6 sentence that would be -- that the defendant might face
7 if convicted discounted by the probability of conviction
8 versus the consequences of -- of deportation, I -- I
9 don't know how to do that. It's -- it's -- because
10 it -- it depends on how a particular person values those
11 two things.

12 MR. BURSCH: Well --

13 JUSTICE ALITO: Isn't it -- is it irrational
14 to try to climb Mount Everest without oxygen? I mean,
15 is it irrational to swim with sharks or perform on a
16 tightrope without a net? I mean, I wouldn't do those
17 things, but people do it. I can't say they're
18 irrational. They're much less risk averse and they
19 value things differently. I -- I think --

20 MR. BURSCH: Right.

21 JUSTICE ALITO: -- it's an unmanageable
22 standard.

23 MR. BURSCH: Well, I -- I think that the
24 rationality standard, which you articulated in Padilla
25 but not Hill, is supposed to be a low standard. It's a

1 backstop to prevent the person from making the crazy
2 decision like Justice Sotomayor was suggesting, where if
3 the consequences of going to trial were the death
4 penalty and they had a plea on the table where they
5 could serve 12 months and then -- then be out, you know,
6 true irrationality. In most cases, like this one,
7 you're going to be dealing with a defendant who acts
8 rational, and -- and it's simply a backstop.

9 And when you're talking about giving up any
10 chance to stay in this country versus a 9- to 11-month
11 diminution in the sentencing guidelines range, I -- I
12 think that's not only rational for Mr. Lee or for you
13 and me, but for almost anyone.

14 JUSTICE ALITO: Well, I -- you have very
15 sympathetic facts, but suppose we change the variables a
16 bit. You know, they both can -- they both are a sliding
17 scale.

18 MR. BURSCH: Yes.

19 JUSTICE ALITO: So you have a much more
20 serious -- the potential for a much more serious
21 sentence. Let's say, if the person is convicted, the
22 person will serve eight years. And you have a person
23 who has many more ties to the country to which the
24 person would be removed.

25 Now, how do you make that -- how do you

1 decide whether that's rational?

2 MR. BURSCH: Well --

3 JUSTICE ALITO: At what point does it become
4 irrational?

5 MR. BURSCH: Well, I think the starting
6 point is the Hill test: Is there a reasonable
7 probability the defendant, given all the objective
8 circumstances, would have pleaded guilty? And once
9 you've satisfied that, then you say, well, was this a
10 rational thing to do? And the Court shouldn't guess in
11 close cases. Again, it's a backstop to prevent the life
12 sentence versus a 12-month sentence defendant from doing
13 something irrational. In a case like this one, it's
14 easy.

15 But courts have to do this balancing all the
16 time. And the genius of Strickland was that we didn't
17 take any of those factors and say we're not going to
18 consider those, which is what the Sixth Circuit did. We
19 said, you're going to look at all the circumstances.
20 And so in your hypothetical, the length of the sentence
21 matters and the consequences matter.

22 Now, I want to take your --

23 JUSTICE GINSBURG: Isn't this case, Mr. --
24 Mr. -- is unlike Strickland in this sense? In
25 Strickland, so it's a trial error and the Court can --

1 can determine whether it's harmless.

2 MR. BURSCH: Yes.

3 JUSTICE GINSBURG: But here, the plea is --
4 is a different thing. The plea -- there is no trial
5 error. And the defendant says, if I were properly
6 informed, I would exercise my constitutional right to a
7 jury trial. And it doesn't -- the Constitution doesn't
8 say I have to be rational in making that choice. I have
9 a right to a jury trial.

10 MR. BURSCH: Yeah. We agree with that,
11 because what -- what Hill made clear is that the trial
12 process and the plea process are two different things.
13 And I'll quote from Hill. This is 474 U.S. at 59.
14 Whether ineffective performance affected the outcome of
15 the plea process. Misadvice, as you're indicating,
16 Justice Ginsburg, causes a defendant to forsake their
17 constitutional right to choose a trial.

18 So it's a prejudice to the decision, Justice
19 Alito, whether to invoke their right to trial in the
20 first instance.

21 JUSTICE ALITO: But that points to a purely
22 subjective test, which, as I said, is conceptually
23 coherent, but creates a lot of practical difficulties,
24 because then the Court is going to have to try to
25 recreate what the defendant would have done. And, of

1 course, after the defendant has been in prison for a
2 while and is facing deportation, the person -- the
3 person, I mean, I don't know, may have second thoughts.
4 It's very hard to recreate that.

5 MR. BURSCH: Well, it's not so hard, because
6 under the Federal statute for filing a 2255 petition,
7 you've got to do it within a year. You know, what
8 happened here is Mr. Lee found out, essentially the day
9 that he was assigned to a facility, that it was a
10 detention facility.

11 JUSTICE ALITO: But is that what you're
12 asking us to do, to adopt a purely subjective standard?
13 You say no.

14 MR. BURSCH: No, absolutely not.

15 JUSTICE KENNEDY: What is --

16 JUSTICE ALITO: What is --

17 JUSTICE KENNEDY: What is your standard?

18 MR. BURSCH: Our standard is the same
19 objective standard you articulated in Hill, and that is
20 whether there was a reasonable probability the defendant
21 would not have pleaded guilty.

22 JUSTICE BREYER: All right. So -- so wait.
23 You -- even if it's irrational?

24 MR. BURSCH: Well, we're -- we're -- we're
25 willing to live with the Padilla language that the

1 decision --

2 JUSTICE BREYER: Well --

3 MR. BURSCH: -- can be completely
4 irrational.

5 JUSTICE BREYER: -- it's the same question
6 differently, but it's meant to be the same question.
7 What is the precise mistake of law that you think that
8 the Sixth -- that the Sixth Circuit -- that Judge
9 Batchelder made?

10 MR. BURSCH: Yes. Judge Batchelder in the
11 Sixth Circuit made the mistake of having a categorical
12 test, where instead of considering all the circumstances
13 objectively, she looked only at the likelihood of
14 success at trial to the exclusion of everything else.

15 JUSTICE BREYER: Well, I'm not sure she did
16 that. I thought that she said -- my reading of it was
17 she tried to follow what we've said.

18 MR. BURSCH: Well, if you look --

19 JUSTICE BREYER: And -- and in particular --
20 in particular, she said, look, this person would have
21 been faced with a choice. So you started with your
22 example. In your example, it would have been nuts to
23 reject the plea bargain. The guy would have ended up in
24 the same place, deported, and he would have been in jail
25 for a lot more time.

1 She says, here it's the same. He would have
2 ended up being deported anyway. The lawyer would have
3 had to tell him, your chance of winning this trial is
4 zero, near zero, close to zero, and you'll have served
5 an extra -- at least an extra 9 to 11 months because
6 you'll be in jail for 9 to 11 months more, and the same
7 thing will happen to you anyway. Who would want that?
8 It might be more than 9 to 11 months, because the
9 chances of departure are smaller.

10 Okay. So now I can repeat, and you started
11 in answering the Chief Justice: What's different about
12 this case? And I'd say there are factual differences
13 and there are legal differences. Start with the legal
14 differences --

15 MR. BURSCH: Well --

16 JUSTICE BREYER: -- and then tell us the
17 factual differences, why they matter.

18 MR. BURSCH: Starting with the -- the legal,
19 on page 4A of the Petition Appendix, that's where Judge
20 Batchelder reaffirms the Sixth Circuit decision in
21 Pilla, P-i-l-l-a, which says: If a defendant is facing
22 overwhelming evidence of guilt, then it's not rational
23 for them to do anything other than to take the best --

24 JUSTICE BREYER: I thought she said only if
25 the only hope for him is jury nullification.

1 MR. BURSCH: Well, she went on about jury
2 nullification, but the test in Pilla that she followed,
3 because it was Sixth Circuit precedent, was you only
4 consider overwhelming evidence --

5 JUSTICE BREYER: All right.

6 MR. BURSCH: -- in that --

7 JUSTICE BREYER: So what we -- what you want
8 us to do is to add to what she said. And what you have
9 to mean by that is it would have been no hope for you at
10 trial. That's the reason.

11 MR. BURSCH: That's not really --

12 JUSTICE BREYER: No hope for you. Well,
13 what do you want us to do?

14 MR. BURSCH: That's -- that's not the point
15 that we're making.

16 JUSTICE BREYER: What is the --

17 MR. BURSCH: The point is you should never
18 focus just on one piece of the circumstances, the
19 likelihood of success at trial. You should consider all
20 the circumstances, like you said in --

21 JUSTICE BREYER: Let's consider them all.

22 MR. BURSCH: And -- and --

23 JUSTICE BREYER: And suppose one of them is
24 there's no hope of success at trial except jury
25 nullification.

1 MR. BURSCH: Right. And -- and there's two
2 responses to that --

3 JUSTICE BREYER: Right.

4 MR. BURSCH: -- which are kind of legal and
5 factual. The first is that even a -- a defendant who
6 has virtually no hope at trial -- we don't concede
7 that's the case --

8 JUSTICE BREYER: Uh-huh.

9 MR. BURSCH: -- may still choose to invoke
10 their right to trial rather than take certain mandatory
11 banishment from the United States for the benefit of
12 only a 9- to 11-month reduction in their sentencing
13 range. That is both reasonable and rational.

14 The second is that there's a possibility
15 that with informed counsel, he would be able to bargain
16 for a plea that has lesser deportation consequences.
17 And we know that, again, Justice Kennedy, going back to
18 124 to 127 of the Joint Appendix, the sentencing hearing
19 colloquy, even the government thought that this plea was
20 going to result in Mr. Lee going back to his restaurant
21 business after his sentence was concluded. If the
22 government --

23 JUSTICE BREYER: All Right. That was a good
24 point. So imagine that your lawyers below in this very
25 case went to the government and said, look, everybody

1 was under a mistake here. Why don't you go to the
2 district court with me.

3 MR. BURSCH: We --

4 JUSTICE BREYER: We jointly will tell them,
5 the judge, that not -- what would have happened if he'd
6 gotten good advice, is the government would have figured
7 something out to help him. The government would have
8 charged him with a -- a lesser crime. And my guess is
9 you did that, and my guess is the government wouldn't do
10 it.

11 MR. BURSCH: My -- my understanding is that
12 that hasn't happened, that the government took the
13 position that because there was no likelihood of success
14 at trial, game over. The Sixth Circuit got it right.

15 We would love to have that opportunity. And
16 the fact that we haven't had it is exactly why there's
17 prejudice in this case.

18 JUSTICE KENNEDY: But your -- your -- but
19 your -- your rational defendant rule that you suggest
20 sounds almost like a jury question. What were -- did he
21 have lots of ties? Did he have lots of families, to
22 Korea? He had none? I just don't see how, A, a -- a
23 trial judge can do that other than on a strictly
24 case-by-case basis, which is nonreviewable. This is
25 just like a jury question.

1 MR. BURSCH: Well, Justice Kennedy, the --
2 the reasonable probability and rational bases tests
3 are -- are not our tests; they're your tests in Hill and
4 Padilla. And lower courts have been applying them
5 without any difficulty --

6 JUSTICE KENNEDY: But -- but --

7 MR. BURSCH: -- for many years.

8 JUSTICE KENNEDY: But -- but as Justice
9 Ginsburg pointed out, we have in -- in those contexts,
10 we -- we have -- we have a trial, and -- and Padilla --
11 Padilla, I understand is different, but -- but it seems
12 to me that your -- you have so many subjective factors
13 that you endanger the system by having second --
14 second -- second thoughts, people who want the second
15 bite of the apple.

16 MR. BURSCH: But like in any Strickland
17 case, when you consider all the circumstances, you have
18 individualized facts, not subjective facts, but
19 individualized facts that must then be looked at
20 objectively.

21 And -- and let's think about Hill and what
22 happened there. In -- in Hill, you had attorney who
23 gave affirmative misadvice to his counsel about parole
24 conditions, and that was enough for this Court to say
25 there was ineffective assistance, but no prejudice there

1 because he was unable to show a reasonable probability,
2 that had he known the proper parole conditions he would
3 be facing, that he would have rejected the plea.

4 But we have the exact opposite here. No one
5 denies that if Mr. Lee understood the mandatory
6 banishment that he was facing, of course he would have
7 rejected the plea and taken his chances at trial, even
8 if they were slim.

9 CHIEF JUSTICE ROBERTS: No -- but I think
10 several times in your brief and here today, you talk
11 about -- you say well, who knows what will happen at
12 trial. Well, that can't be the right test because
13 otherwise, there'd never be prejudice in a Strickland
14 situation.

15 MR. BURSCH: Well, but --

16 CHIEF JUSTICE ROBERTS: I mean, who knows
17 what will happen? Maybe the jury won't convict because
18 they get -- get it wrong. Maybe there'll be a case of
19 jury nullification. You say in your brief maybe the
20 government witness will die. I mean, it's all -- yeah,
21 of course you can't be certain about what's going to
22 happen, but if your test is right, then all the
23 Strickland cases come out the other way.

24 MR. BURSCH: No -- no, Mr. Chief Justice, I
25 want to draw a bright line, again, between posttrial

1 claims of ineffective assistance and plea-stage
2 ineffective assistance. Because after you've had a
3 trial, you can already see what the government's theory
4 is, what the defense theory -- theories were, whether
5 motions to suppress were granted or denied, how the
6 witnesses responded under the fire of cross-examination.
7 You have all that data and there --

8 CHIEF JUSTICE ROBERTS: Right.

9 MR. BURSCH: -- and the defendant --

10 CHIEF JUSTICE ROBERTS: But you don't know
11 what would have happened if the attorney had not been
12 incompetent.

13 MR. BURSCH: But --

14 CHIEF JUSTICE ROBERTS: You don't know what
15 would have happened if the attorney hadn't, you know,
16 not called the witness or not presented this evidence,
17 who knows what would have happened.

18 MR. BURSCH: But -- but you have this large
19 data set. And district courts are fully capable of
20 saying: Okay, what if this witness hadn't testified?
21 Would that have changed the course of the proceeding?
22 Yes or no?

23 But at the plea stage, you don't know any of
24 that. You don't know what's going to happen to the
25 motion to suppress. You don't know what's going to

1 happen on cross-examination. Now --

2 JUSTICE KAGAN: I would have thought that
3 the -- that -- that the difference is more fundamental,
4 which is that usually in Strickland, we are asking what
5 was going to happen at trial.

6 MR. BURSCH: Yes.

7 JUSTICE KAGAN: And we don't think, well,
8 there was this 1 percent chance that the witness would
9 drop dead. We put that to the side.

10 MR. BURSCH: Correct.

11 JUSTICE KAGAN: But here, the inquiry is
12 different. The inquiry is not the outcome of the trial.
13 The inquiry is the outcome of the plea proceeding.

14 MR. BURSCH: Exactly.

15 JUSTICE KAGAN: And the plea proceeding
16 might be very affected by somebody saying, you know,
17 given my ties to this country, given my negative ties to
18 any other country, given the fact that this is only a
19 nine-month difference in prison term, I'm going to roll
20 the dice for that 1 percent chance.

21 MR. BURSCH: Exactly.

22 JUSTICE KAGAN: And that would be a
23 completely reasonable thing to do, a thing that many
24 people would do.

25 MR. BURSCH: Absolutely. Because that's the

1 kind of risk calculus that rational people --

2 JUSTICE KAGAN: But the key is that the
3 outcome of the proceeding here is not the outcome of the
4 trial, as it usually is in a Strickland case. The
5 outcome of the proceeding here is the outcome of the
6 plea negotiation.

7 MR. BURSCH: Exactly. Just -- just like
8 that quote that I read from Hill. It's about --

9 JUSTICE ALITO: All of that --

10 MR. BURSCH: -- that process -- the due
11 process.

12 JUSTICE ALITO: -- all of that is true on
13 the facts of this case. But I have to ask the same
14 question -- I don't want to beat a dead horse, but you
15 can change the facts. So you have a defendant with more
16 ties to Korea. He didn't come here as a young man. He
17 came here when he was 25 years old.

18 MR. BURSCH: Yeah.

19 JUSTICE ALITO: He still has some relatives
20 and friends in Korea. The sentence that he faces here
21 is much higher. Let's say it's five years or it's eight
22 years or it's ten years. At what point -- how do you
23 decide whether it's rational.

24 MR. BURSCH: Well, that's the job of the
25 district courts applying all the circumstances.

1 JUSTICE ALITO: Well --

2 MR. BURSCH: I hate to keep repeating that.

3 JUSTICE ALITO: Well, what would you do as a
4 district -- how would you evaluate that as a district
5 court judge?

6 MR. BURSCH: Well, the -- the -- the first
7 question I would do is I would ask the Hill test: Is
8 there a reasonable probability that this defendant would
9 not have pleaded guilty? And if I thought the answer to
10 that question was no, then that's the end of the game.

11 JUSTICE KAGAN: And that is the Hill test,
12 right?

13 MR. BURSCH: It is.

14 JUSTICE KAGAN: We've said that.

15 MR. BURSCH: Right. And it's been in place
16 for years.

17 JUSTICE KAGAN: I mean, this is not your
18 test.

19 MR. BURSCH: No.

20 JUSTICE KAGAN: This is a test that's
21 staring at me on page 59 of volume 474.

22 MR. BURSCH: That's right.

23 JUSTICE ALITO: Well, that --

24 JUSTICE SOTOMAYOR: There's always --

25 JUSTICE ALITO: That's a purely subjective

1 test.

2 JUSTICE SOTOMAYOR: There's always --
3 there's always a set of degrees. I mean, whether or not
4 we talk about this rational person would have accepted,
5 how much of a defense and how viable is the defense?
6 Would 1 percent defense versus 20 percent defense,
7 30 percent defense? At some point the district court is
8 going to draw a rationality line that they think is
9 reasonable, correct?

10 MR. BURSCH: Correct. And -- and it's a
11 series of levers. Every one of those factors --

12 JUSTICE SOTOMAYOR: So if -- if there -- if
13 there's a defense that has a 1 percent chance, is that
14 okay, versus one that has a 20 percent chance? Or how
15 do you even measure how rational a potential defense may
16 be --

17 MR. BURSCH: Well, the --

18 JUSTICE SOTOMAYOR: -- if the inquiry is how
19 much do we know he would or would not have taken this
20 plea?

21 MR. BURSCH: We -- we think that is the Hill
22 test, correct. And I don't think anyone doubts, the
23 government or even the -- the district court judge
24 doubts, that had he known, he would have rejected it.

25 JUSTICE SOTOMAYOR: There's no question --

1 JUSTICE KENNEDY: All right. But -- but --
2 let's -- the question -- but the question that was --
3 was -- was put to you with reference to Strickland was
4 in the context of what might happen at a trial with
5 different evidence, with different arguments. We know
6 how to do that. Judges know how to do that.

7 You're asking us how -- how to assess the
8 mindset of -- of the defendant when -- when he or she
9 makes the plea. That's very different.

10 MR. BURSCH: Well, I -- I wouldn't say,
11 because it's an objective test, not the mindset of the
12 defendant, but the mindset of a defendant in this
13 particular instance --

14 JUSTICE KENNEDY: Well, I -- I understand
15 you -- you call your test an objective test. You --
16 you --

17 MR. BURSCH: Yes.

18 JUSTICE KENNEDY: I -- I understand that.
19 But the question is whether or not it isn't so distinct
20 from Strickland as to be unworkable.

21 MR. BURSCH: I don't think it's so distinct
22 as to be unworkable. In fact, I think, for the reasons
23 Justice Sotomayor and Justice Kagan have articulated,
24 it's actually much easier here. Because --

25 JUSTICE KENNEDY: All right. One more --

1 JUSTICE GINSBURG: Justice Kagan pointed out
2 that the test that you're asking us to apply is the test
3 that this Court says is applicable at the plea stage.
4 Is there a reasonable probability, but for counsel's
5 error, defendant would not have pleaded guilty, but
6 would have insisted on his right to trial?

7 MR. BURSCH: Correct.

8 JUSTICE GINSBURG: That's exactly what we
9 said the standard is, and I think you're just asking us
10 to -- to adhere to that standard.

11 MR. BURSCH: I'm asking you to -- to
12 re-adhere to that standard, but also to reaffirm the
13 Strickland totality of the circumstances --

14 JUSTICE BREYER: All right. So -- so is
15 this the mistake you say that Judge Batchelder made is
16 she said: I will assume, at least, that your client
17 would have said I want to go to trial.

18 Question: Would that have been a rational
19 decision? Some circuits say if there is overwhelming
20 evidence of guilt, it's never a rational decision. And
21 that's what we say. And you want us to say that's where
22 she was wrong.

23 MR. BURSCH: Correct.

24 JUSTICE BREYER: And so send it back with
25 the knowledge that sometimes it could be rational for a

1 person to want to go to trial, even not hoping
2 necessarily for jury nullification. But sometimes it
3 could be, and my client's the guy.

4 MR. BURSCH: Yeah. And, Justice Breyer --

5 JUSTICE BREYER: And so judges go back to
6 the district court, do it over again, knowing that
7 overwhelming evidence is not always the end of the case.

8 MR. BURSCH: Yeah. Justice Breyer,
9 that's --

10 JUSTICE BREYER: Is that right?

11 MR. BURSCH: -- that's perfect, with one
12 caveat.

13 JUSTICE BREYER: Yeah.

14 MR. BURSCH: I would not send it back. I
15 think, given on these facts here, that you could --

16 JUSTICE BREYER: We can't do that. I mean,
17 I don't see --

18 MR. BURSCH: Oh, yeah, absolutely --

19 JUSTICE BREYER: I mean, the others, for
20 myself, I don't see how we don't send it back. I'm not
21 a trial judge. I don't really know how trial defendants
22 react, and -- and a trial judge does know that much
23 better than I.

24 MR. BURSCH: I -- I think given these
25 extreme facts, you could conclude there's a reasonable

1 probability he would have rejected it.

2 JUSTICE SOTOMAYOR: I think the district
3 court said here that this defendant would have gone to
4 trial.

5 MR. BURSCH: Absolutely. That's --

6 JUSTICE SOTOMAYOR: And what they said was
7 the absolute rule of this circuit is --

8 MR. BURSCH: Correct.

9 JUSTICE SOTOMAYOR: -- what led this
10 district court judge to say I believe this person would
11 have gone to trial, but this rule doesn't permit me to
12 rule in his favor.

13 MR. BURSCH: That's exactly right, Justice
14 Sotomayor.

15 JUSTICE ALITO: What happens if there's
16 overwhelming evidence that this defendant, that the
17 defendant in the case would have gone to trial if the
18 defendant knew about the deportation consequences,
19 overwhelming subjective evidence, statements before the
20 plea was entered, but also, virtually no chance of
21 acquittal had the defendant gone to trial. What happens
22 then?

23 MR. BURSCH: I think the defendant still
24 gets to assert his constitutional right to trial and
25 can't be deprived of that by ineffective lawyering.

1 JUSTICE GINSBURG: Is there a possibility --

2 MR. BURSCH: If there are no further
3 questions, I'll --

4 JUSTICE GINSBURG: I mean, this is a
5 possession-with-intent-to-distribute. Suppose the
6 defendant asks the judge, please charge the lesser
7 offense of possession.

8 MR. BURSCH: Yes.

9 JUSTICE GINSBURG: And if the -- the
10 defense -- the offense of possession does not carry
11 adverse deportation consequences. So is it -- is that
12 determination whether to charge the lesser -- give the
13 jury the choice between with intent to distribute and a
14 plain possession -- is that in the -- in the discretion
15 of the judge?

16 MR. BURSCH: Well, the -- the charges to
17 bring are in the discretion of the prosecutor, and that
18 goes not only to what charges are given to the jury, but
19 also what pleas are possible. And here --

20 JUSTICE GINSBURG: So if the prosecutor
21 doesn't want to do possession, the -- the trial court
22 can't do it?

23 MR. BURSCH: The -- the trial can't -- can't
24 force it, but all the -- the guides at the Federal and
25 State level encourage the government to consider

1 deportation consequences, and here the government
2 thought there would be no deportation consequences.

3 I reserve the balance of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Feigin.

6 ORAL ARGUMENT OF ERIC J. FEIGIN

7 ON BEHALF OF THE RESPONDENT

8 MR. FEIGIN: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 The crux of a Padilla claim is the
11 defendant's contention that if he had constitutionally
12 competent counsel, that counsel could have given him a
13 legitimate chance at avoiding a removal with
14 particular -- avoiding a conviction with particular
15 removal consequences.

16 A defendant can't prevail on that kind of
17 claim if there's nothing constitutionally competent
18 counsel could have done to create that chance. And
19 that's the case here where the lower courts found, in
20 the words of the court of appeals, that Petitioner had
21 no bona fide defense, not even a weak one, and stood to
22 gain nothing from going to trial aside from a longer
23 prison sentence, except for the off chance of jury
24 nullification --

25 CHIEF JUSTICE ROBERTS: But you --

1 MR. FEIGIN: -- or the like.

2 CHIEF JUSTICE ROBERTS: -- you'll agree that
3 there are many possibilities where it would nonetheless
4 be rational for him to choose -- where -- where it would
5 make sense for him to want a longer prison sentence,
6 right? Let's say that there -- he has a serious medical
7 condition. The medical care he's going to get at
8 Millington is better than what he's going to get
9 wherever he's going. He may get no medical care where
10 he's being removed to.

11 Isn't that rational for him to want to go to
12 trial with the expectation that he'll get a longer
13 prison sentence?

14 MR. FEIGIN: Well, two points on that, Your
15 Honor. First, when I think the Court is using the term
16 "rational" here, and where it uses it in Padilla as a
17 supplement to the "would the defendant go to trial" test
18 and says that the defendant has to convince the court
19 that it would be rational under the circumstances to
20 reject the plea, the Court is using the term "rational"
21 in its traditional legal sense. When we talk about a
22 rational jury and the result a rational jury would
23 reach, we're thinking of a jury that applies the law to
24 the facts and doesn't think about results like jury
25 nullification or happenstance.

1 As to your particular question about whether
2 it would be rational, I think in a more common sense
3 way, to want that, that might well be true, Mr. Chief
4 Justice, but that's not the kind of thing that we
5 consider to be prejudice for Sixth Amendment purposes
6 understand Strickland.

7 CHIEF JUSTICE ROBERTS: Under Strickland, in
8 the typical Strickland case where you're talking about
9 the outcome of a trial, I understand that. But we're
10 talking about something different here. We're talking
11 about reasonable probability that he would or would not
12 have accepted the -- the plea agreement.

13 MR. FEIGIN: So, Your Honor, I'm not aware
14 of this Court ever accepting a claim that the
15 defendant's counsel was deficient because he didn't get
16 more prison time. And I don't think that's the kind
17 of --

18 CHIEF JUSTICE ROBERTS: Yeah. But I mean,
19 you know, that's funny, but the -- the fact is this is a
20 situation where he might well have elected to have more
21 prison time because it would keep him in -- in
22 Tennessee, close to his family, where he would be able
23 to visit his children, where he could even, as I think
24 the judge suggested, have some role in continuing to --
25 to run the restaurant.

1 What is -- what is like life at FPC
2 Millington? I take it it's not Alcatraz, right?

3 MR. FEIGIN: I'm not sure what level
4 security is at that facility. It is -- so I don't think
5 I could accurately answer your question, Mr. Chief
6 Justice.

7 CHIEF JUSTICE ROBERTS: Well, what is --
8 what is life like at a minimum security federal prison?
9 I mean, the judge here recommended a particular facility
10 close to Tennessee. I assume he -- he didn't seem to
11 want to sort of throw the book at the -- the defendant.

12 MR. FEIGIN: Well, Your Honor, I think --

13 CHIEF JUSTICE ROBERTS: There's visitation,
14 right?

15 MR. FEIGIN: I think the premise that
16 someone is entitled to counsel who will keep him
17 incarcerated in the United States is not only contrary
18 to anything the courts recognize under Strickland, but
19 also contrary to our criminal immigration laws where
20 incarceration in the United States is the penalty for
21 reentry.

22 I also the -- say -- would want to make
23 clear that there's nothing in the record to suggest that
24 this particular Petitioner, had he known that removal
25 was inevitable for conviction, would nevertheless have

1 opted for a conviction that would give him a longer
2 prison sentence.

3 JUSTICE BREYER: Well, that might --

4 MR. FEIGIN: What we were discussing is the
5 rest --

6 JUSTICE BREYER: What about murder? Suppose
7 he thinks he's going to be murdered if he's sent abroad.
8 Same problem.

9 MR. FEIGIN: Well --

10 JUSTICE BREYER: But, I mean, I -- the
11 problem is that he -- which you can read Judge
12 Batchelder's opinion. I mean, it could be read, as he
13 says, that -- that if the evidence is overwhelming,
14 that's the end of the matter, and it wouldn't have been
15 rational to -- to ask for a trial. And now all we've
16 done is think of situations where it might be. I mean,
17 he thinks he's going to be sent back to some country in
18 the world and it's going to end up he's dead, as is his
19 family. He'd rather be in jail.

20 Now, we're not supposed to take that into
21 account? Why not?

22 MR. FEIGIN: Well, Your Honor, there's a
23 real disconnect between the claim the Petitioner is
24 bringing and the relief that he's seeking. The reason
25 that he is subject to removal is not because of any

1 misadvice counsel made. It's because a rational -- any
2 rational jury, the lower courts found, applying the law
3 to the facts, would have convicted him --

4 JUSTICE KAGAN: You see --

5 MR. FEIGIN: -- of dealing drugs --

6 JUSTICE KAGAN: -- that's confusing two
7 things. And this goes back to the point that the Chief
8 Justice made, is that you keep on saying what's the
9 probability that the jury wouldn't have convicted him,
10 but that's not the question, and we made this clear in
11 Hill and in other cases.

12 The question is: What's the -- what's the
13 -- what's the probability that the relevant proceeding
14 would have been different? And here the relevant
15 proceeding is the plea negotiation and the plea
16 agreement. And that's the thing that we're looking at
17 is did this deficient performance lead to a different
18 decision by this -- by Mr. Lee to go to trial or not, to
19 plea or not. And that's all we're supposed to be
20 looking at here, according to Hill.

21 Now, that has its difficulties, as
22 Justice Alito said. What exactly do we look to? How do
23 we draw lines? There's no question that this is, in
24 some cases, an uncomfortable inquiry. But that's the
25 inquiry we're supposed to be making, isn't it? And you

1 keep flipping it to a different inquiry, which is the
2 inquiry in a trial context, but not in a plea context.

3 MR. FEIGIN: That's because, Justice Kagan,
4 I -- I don't actually think that's purely the inquiry
5 we're supposed to be making here. I don't think Hill or
6 any other case in this Court's Strickland line values
7 the right to go to trial --

8 JUSTICE SOTOMAYOR: I'm sorry --

9 MR. FEIGIN: -- early in the --

10 JUSTICE SOTOMAYOR: I'm sorry --

11 JUSTICE KAGAN: This is what -- this is what
12 Hill says, Mr. Feigin. It just says, here's the
13 standard: The defendant must show that there's a
14 reasonable probability that but for counsel's errors, he
15 would not have pleaded guilty and would have insisted on
16 going to trial.

17 That's what we're trying to determine,
18 whether he would have insisted on going to trial.

19 MR. FEIGIN: Well, let me say a few things
20 about that. First, right after that, Hill looks at the
21 right to go to trial through the lens of an attorney,
22 and whether the reasonable attorney, who's just looking
23 at the outcome of the trial, would have advised the
24 defendant to go to trial. But also --

25 JUSTICE KAGAN: So to the contrary, when

1 Hill keeps on going, it says, you know, this -- this
2 defendant didn't care about his parole eligibility, so
3 we shouldn't -- we shouldn't look at the fact that
4 the -- the parole eligibility was a bad deal for him
5 because he didn't care.

6 So the emphasis clearly in Hill is -- is
7 what are the things that would have made a difference --

8 MR. FEIGIN: Well --

9 JUSTICE KAGAN: -- in the plea negotiation?

10 MR. FEIGIN: Your Honor, the particular
11 defendant in Hill didn't even get to the objective part
12 of the inquiry we're discussing today because he failed
13 at the outset. There wasn't even an allegation that he
14 subjectively would have selected a trial.

15 But I also point the Court to Padilla where
16 it lays out the test from Hill and says, moreover, a
17 defendant in these circumstances needs to convince the
18 court that it would be rational under the circumstances
19 to reject the plea.

20 And finally, another good place to look
21 would be --

22 JUSTICE KAGAN: What Padilla is saying,
23 isn't it, Mr. Feigin, is essentially, look, this is not
24 going to be a case where somebody can just get up and
25 say this is what I would have done and the court has to

1 accept it.

2 No, Padilla says. The court doesn't have to
3 accept every claim that a defendant makes. A court can
4 test those claims against a notion of rationality,
5 against a notion of what reasonable people would do.
6 But still, the -- the essence of the inquiry is what
7 would -- what would have happened at the plea
8 negotiation, not what would have happened at the trial.

9 MR. FEIGIN: Well, with respect, Justice
10 Kagan, I think, as the discussion when my friend was up
11 here demonstrated, I don't think a court can reasonably
12 do that. As the Chief Justice pointed out, there might
13 be somebody who hasn't been in the United States very
14 long and doesn't have the ties that this defendant has
15 who says, well, all my life I've been waiting to come to
16 the United States, and so it's perfectly rational for me
17 to roll the dice.

18 The -- the last place I would look -- point
19 you to for the fact that trials are treated as
20 instrumental under Strickland, not as ends in and of
21 themselves, is the Court's most recent Strickland
22 decisions in Cooper and Frye, which look to the outcome
23 of what would have happened in the combined trial/plea
24 process, and in fact, find the defendant's election to
25 go to trial was prejudicial where there was a plea offer

1 on the table before he went to trial that would have
2 given him a better overall outcome.

3 I think this makes a great deal of sense,
4 because if you're granting relief to defendants in
5 circumstances where a rational jury would have convicted
6 them had they gone to trial, you're giving them windfall
7 relief that they couldn't reasonably have expected at
8 the time.

9 JUSTICE SOTOMAYOR: What's the windfall?
10 You're entitled to a constitutional trial. But putting
11 that aside, you're not entitled to a plea. You're not
12 entitled to a lesser sentence. You're entitled to go to
13 jail if you want to. Isn't that what we said in
14 Dominguez Benitez in a Rule 11 Strickland evaluation?

15 We said that a court should, quote, "Not
16 second guess a defendant's actual decision if it is
17 reasonably probable he would have gone to trial absent
18 the error, it is no matter that the choice may have been
19 foolish."

20 Now, that's Strickland under Rule 11, and
21 it's the same inquiry. Would he have pled guilty if he
22 had known this information? And we explicitly said your
23 decision can be foolish.

24 MR. FEIGIN: Well, Your Honor, while
25 Dominguez Benitez draws some analogies to Strickland,

1 it's a slightly different test.

2 JUSTICE SOTOMAYOR: It's not an analogy. It
3 talks about Strickland in the Rule 11 context.

4 MR. FEIGIN: I think the Court made clear in
5 Gonzalez-Lopez that the Sixth Amendment right to
6 effective assistance of counsel actually includes the
7 prejudice itself, which isn't true of the Rule 11 right
8 that was issued in Dominguez Benitez. Attorney errors
9 come in all sorts of shapes and sizes, and the kind of
10 error that amounts to ineffective assistance of counsel
11 is one that prejudiced the defense. So you have to --

12 JUSTICE SOTOMAYOR: So here we have a
13 defense attorney who says: I didn't know the law. I
14 told him he wouldn't be deported. And if I had known
15 the law, I would have told him to go to trial.

16 MR. FEIGIN: Well --

17 JUSTICE SOTOMAYOR: So this is both
18 prejudice in the advice and prejudice in the decision to
19 go -- move forward.

20 MR. FEIGIN: Well, I think you have to
21 also --

22 JUSTICE SOTOMAYOR: Or not move forward.

23 MR. FEIGIN: I think you have to also look
24 whether there was prejudice in the outcome. And I
25 actually think this is clear, if we -- if you'll bear

1 with me for a second, if you think about an example that
2 comes straight from Hill.

3 So let's take a defendant where there is
4 overwhelming evidence that he committed, say, a bank
5 robbery: Forensic evidence, video evidence, what have
6 you. And that defendant's complaint is that his
7 attorney didn't adequately investigate. And the
8 attorney did nothing to investigate. He just said, why
9 don't you plead guilty.

10 And it turns out, had the attorney
11 investigated, he would have come up with 20 character
12 witnesses, all of whom would have testified this is a
13 great guy and he just needed money because one of his
14 children was sick. And let's say the defendant, because
15 he has a sick child, would have done anything to avoid
16 prison time.

17 Under the analysis that goes from page 59 to
18 page 60 in Hill, that defendant, even if we subjectively
19 believed him that he would have selected trial, is not
20 entitled to Strickland relief if his only chance of
21 prevailing at trial was jury nullification or some off
22 chance of some external circumstance handicapping the
23 government's case.

24 JUSTICE BREYER: So step back a second. And
25 I agree with you. I can't find total clarity in -- in

1 these decisions. And it seemed to me that if we're
2 making the separation, as they made, between what you
3 look to, to show prejudice in a plea agreement and at a
4 trial, both Strickland errors, it must be that the
5 constitutional consideration of not really wanting a
6 person to feel he has to give up his right to a jury
7 trial, that influences the standard. And if it doesn't
8 influence the standard, I have a harder time deciding
9 the cases.

10 So, really, I think what we're deciding here
11 is to what extent it influences the standard.

12 MR. FEIGIN: Well, Your Honor --

13 JUSTICE BREYER: And -- and -- and you --
14 you see how I'm thinking that?

15 MR. FEIGIN: Well --

16 JUSTICE BREYER: Because there's a kind of
17 just look to the plea, just look to the plea. Don't
18 give a damn about what happens at trial. Well, we can't
19 get that extreme. So we say, well, we'll look just at
20 the plea. But if it's just overwhelming, then we're
21 going to say we're looking to the trial, too. Okay.

22 If I'm right as to what these cases mean,
23 then we are in a world where 95 percent of the people
24 and what happens to them depend upon pleas, not upon
25 trials. And doesn't that argue for "look to that plea"

1 part of the thing? Don't worry so much about whether
2 he'd been convicted at trial. In other words, we're
3 talking about very small degrees here. But that factor
4 seems to me to -- to push in the direction of, if you
5 really think he would have gone to trial, that should be
6 the end of it, even if he's pretty irrational.

7 MR. FEIGIN: Your Honor, I don't think
8 that's a good reason for under -- for unwinding reliable
9 admissions of guilt when we have a kind of outlier case
10 like this one where the lower courts were certain that
11 he would have been convicted at trial unless jury
12 nullification or some other happenstance occurred.

13 JUSTICE GINSBURG: What is the answer to the
14 lesser-included offense? Was that -- is that out of the
15 picture?

16 MR. FEIGIN: That is also out of the
17 picture, Your Honor.

18 So if I could just briefly recount the
19 evidence here. On a search of his residence, they found
20 88 Ecstasy pills, over \$32,000 in cash, and a loaded
21 rifle. Immediately after the search, he admitted to the
22 police, after being given Miranda warnings, that he --

23 JUSTICE GINSBURG: Yeah, I know what the --

24 MR. FEIGIN: Okay.

25 JUSTICE GINSBURG: -- what the facts are.

1 But isn't it sometimes a prosecutor might say, I have a
2 solid case, the evidence is overwhelming, but this is a
3 nice young man and the jury might be sympathetic, so
4 rather than risk nullification, if you call it that, why
5 not give the jury an opportunity to convict him on the
6 lesser, so at least there will be a conviction?

7 MR. FEIGIN: Well, Your Honor, there might
8 be cases where a prosecutor might say that, but the
9 question here is whether Petitioner has a constitutional
10 entitlement through the lens of ineffective assistance
11 of counsel to try to seek that kind of result. And
12 here, there is absolutely no evidence that the trial
13 prosecutor was --

14 JUSTICE SOTOMAYOR: Wait a minute.

15 MR. FEIGIN: -- inclined to --

16 JUSTICE SOTOMAYOR: He has a constitutional
17 right to effective counsel.

18 MR. FEIGIN: And I think that --

19 JUSTICE SOTOMAYOR: And if he has that
20 right, aren't we depriving him of that right and the
21 right to a trial, both of them guaranteed by the
22 Constitution -- as I keep saying, a plea is not -- to
23 have his attorney try everything that is legally
24 permissible to try? None of these attempts -- and your
25 adversary went on for pages of the variety of different

1 ways for him to have achieved a nondeportation plea as a
2 possibility. Doesn't he have a right to have someone
3 try that for him?

4 MR. FEIGIN: No, Your Honor, not where
5 there's no evidence that there's any -- there was any
6 possibility of a better plea. The government doesn't
7 have any general practice or policy of --

8 JUSTICE KAGAN: You don't mean that --

9 MR. FEIGIN: -- deals that --

10 JUSTICE KAGAN: -- Mr. Feigin. I think --

11 MR. FEIGIN: Huh?

12 JUSTICE KAGAN: You don't mean that. I
13 think -- because I think what you just said was that
14 there's no constitutional right to go to trial when
15 there's no evidence?

16 MR. FEIGIN: Oh, Your Honor, I was answering
17 the question about the plea. I'm -- if I could
18 answer --

19 JUSTICE KAGAN: Of course --

20 MR. FEIGIN: -- the question about the
21 trial.

22 JUSTICE KAGAN: -- there's a constitutional
23 right to go to trial, isn't there?

24 MR. FEIGIN: There is, Your Honor, but --

25 JUSTICE KAGAN: Even if there's -- even if

1 there's very weak evidence on your side.

2 MR. FEIGIN: There is, Your Honor, but I
3 think we protect that ex ante much more than --

4 JUSTICE KAGAN: Well --

5 MR. FEIGIN: -- post, and let me explain
6 why.

7 JUSTICE KAGAN: Well, let me just --

8 MR. FEIGIN: Okay.

9 JUSTICE KAGAN: -- finish the question.
10 I mean, you would agree that there's a
11 constitutional right to go to trial, regardless of what
12 the --

13 MR. FEIGIN: I think I'd have to, Justice
14 Kagan, yes.

15 JUSTICE KAGAN: -- regardless of what the
16 state of the evidence was; right?

17 MR. FEIGIN: That's absolutely correct.

18 JUSTICE KAGAN: Which is the question that
19 Justice Sotomayor asked you. And she said, and why
20 isn't this correct?

21 So then the question is, has there been
22 deficient performance? And a person's entitlement to go
23 to trial and entitlement to stare at all the various
24 probabilities and to make an informed choice, that
25 entitlement has been taken away by the supremely

1 deficient performance. And that should be the question.

2 MR. FEIGIN: So, Your Honor, I think there's
3 several reasons why we would -- we value the right to go
4 to trial ex ante and not necessarily in the Strickland
5 context, whereas I've suggested I think it's much more
6 outcome-focused.

7 The first is that the touchstone of
8 Strickland is fundamental fairness. And we don't -- I
9 think both Strickland and Hill exclude the possibility
10 of jury nullification or happenstance precisely because
11 we don't think anything unfair has happened to a
12 defendant because he's been denied the possibility --

13 JUSTICE KAGAN: Strickland is a very
14 different case in that -- in that way. Because what
15 Strickland says is once you're at a trial, you're right
16 is to a fair and accurate trial. And nullification has
17 nothing to do with a fair and accurate trial.

18 But this is before. This is when you're
19 trying to decide whether to exercise that right to go to
20 trial. And there, what you're entitled to is that a
21 lawyer be able to give you, in a nondeficient way, the
22 various circumstances, the various things that you would
23 consider to enable you to make that constitutional --
24 constitutionally protected decision in a reasonable way.

25 MR. FEIGIN: Well, Your Honor, we protect

1 the right to go to trial ex ante very closely and allow
2 a defendant to select that result, even when it's
3 foolish. But the difference when you're looking at it
4 ex post is that you're asking a judge to both evaluate
5 and endorse the idea that someone would seek these
6 extra-legal results, like jury nullification or simply
7 hoping that overwhelming evidence of guilt falls apart,
8 as a reason for unwinding a reliable admission of
9 guilt --

10 JUSTICE KAGAN: Well, all you're asking the
11 judge to do is to say that in certain circumstances, it
12 is not beyond the bounds of reasonableness to throw the
13 dice in order to get an outcome -- in order to get -- in
14 order not to be deported from a country where you've
15 lived your whole life.

16 MR. FEIGIN: Well, Your Honor, I don't think
17 the bounds of reasonableness rationality test is a
18 particularly workable standard. And I think in cases
19 like this, it's just going to lead these --

20 JUSTICE SOTOMAYOR: Mr. Feigin, you know,
21 we're talking about cases like this, the circuits are
22 split. The vast majority of them do the reasonable
23 probability test and don't seem to have the problems
24 you're talking about.

25 Do you know how many of these motions there

1 are?

2 MR. FEIGIN: I don't, Your Honor, but I
3 also --

4 JUSTICE SOTOMAYOR: There's not a whole --

5 MR. FEIGIN: I --

6 JUSTICE SOTOMAYOR: I -- I mean, there's not
7 a whole lot of them.

8 MR. FEIGIN: Your Honor, I --

9 JUSTICE SOTOMAYOR: There's a handful of
10 them. The vast majority, the motion for relief are
11 denied by the lower courts, not on the Sixth Circuit
12 rule, but on the totality of the circumstances. It --
13 it doesn't appear as if we're overwhelmed with these.

14 MR. FEIGIN: Well, Your Honor, I can't give
15 you a precise number, but if you search for cases in the
16 Federal and State courts in which, you know, Padilla is
17 cited more than five times, you get about 1500 results.
18 And I think that shows these claims are being brought
19 fairly frequently.

20 And under Petitioner's rule, I don't
21 think --

22 JUSTICE SOTOMAYOR: How many of them are
23 being granted?

24 MR. FEIGIN: Your Honor, I -- I couldn't
25 give you an answer to that, but I think under

1 Petitioner's rule, many more of them will -- will be
2 granted.

3 JUSTICE ALITO: Because defendant --

4 MR. FEIGIN: It means that any time -- I'm
5 sorry, Justice Alito.

6 JUSTICE ALITO: No, I -- finish your
7 sentence. I'm sorry.

8 MR. FEIGIN: It means that any time a
9 defendant can subjectively state that he would have gone
10 to trial and the trial judge finds it credible, which I
11 think you could under pretty much any set of
12 circumstances, the Chief Justice pointed out -- I'm
13 sorry, the sentence is getting a little run on, Justice
14 Alito.

15 JUSTICE ALITO: No, no, that's fine.

16 MR. FEIGIN: Then the -- then that defendant
17 will be entitled to relief and will have a new trial,
18 even though that defendant, when he actually faced the
19 choice as to whether he should enter the plea and was
20 balancing that against a trial, didn't have any
21 legitimate chance of prevailing at a trial.

22 JUSTICE ALITO: I -- I --

23 MR. FEIGIN: His chances were jury
24 nullification --

25 JUSTICE ALITO: I -- I understand the

1 argument that the test should be purely subjective.
2 What would this defendant have done? There's language
3 in Hill that supports that. The language that says is
4 it rational under the circumstances is contrary to that,
5 as I read it, because rationality is not a matter of --
6 is not a subjective thing. It's objective.

7 But let's say it is a purely subjective
8 question. Then I think it's a question of historical
9 fact. So you have to have a finding of fact by
10 somebody, presumably the judge, in the 2255, and that
11 would be reviewed for clear error. Would that --
12 wouldn't that follow?

13 MR. FEIGIN: Well, Your Honor, I think
14 you -- are you proposing a test where you just find the
15 fact --

16 JUSTICE ALITO: No, I'm not proposing that
17 test, but I'm -- I'm suggesting that that is the
18 consequence of our saying that the test is purely
19 subjective. We can't decide that this defendant would
20 have, as a matter of fact, gone to trial had he been
21 properly advised. That's a -- that's a factual
22 question, purely historic fact. It would have to go
23 back to a judge to make a finding of fact on that
24 question.

25 MR. FEIGIN: You mean in this case?

1 JUSTICE ALITO: In this case or in any case.

2 MR. FEIGIN: I think you could ask judges to
3 make those sorts of -- of factual findings. But I think
4 one problem that Justice Kennedy brought up earlier is
5 there's a problem there of hindsight bias, and in some
6 cases, I'm not suggesting that that's true in this case,
7 a defendant telling things that aren't true in order to
8 obtain collateral relief and having an objective
9 backstop where we make sure that we don't give
10 defendants a chance in postconviction review that they
11 didn't originally have.

12 JUSTICE SOTOMAYOR: Mr. Feigin --
13 Mr. Feigin, routinely papers come in from a Petitioner
14 who says, my lawyer didn't do X. Most commonly, the
15 lawyer comes in and says I did do X. And most commonly,
16 the district court says the lawyer told me I did X, and
17 at the plea -- plea colloquy I asked that question and
18 the defendant said yes, I understood that consequence,
19 and the court doesn't have a hearing.

20 A ruling in our case wouldn't change those
21 cases.

22 MR. FEIGIN: Well --

23 JUSTICE SOTOMAYOR: It wouldn't change the
24 cases where the defendant comes in and says I would have
25 pled guilty, but the lawyer comes in and says he

1 insisted he was innocent. I kept telling him the
2 evidence was overwhelming, that he should take the plea,
3 but he kept telling me I'm innocent. It doesn't require
4 a hearing for a judge to say that defendant would not
5 have pled guilty because he was claiming his innocence.
6 Those cases wouldn't change either.

7 Those are a good majority of the cases that
8 come before district and circuit courts.

9 MR. FEIGIN: So, Your Honor, what we're
10 talking about here is a set of cases where, as the lower
11 courts founds here, the only chance the defendant had at
12 trial was jury nullification or, frankly, some stroke of
13 luck that would collapse the government's case somehow.
14 And in that set of cases, it does not make sense to
15 grant a defendant windfall relief that gives him an
16 opportunity he could never have reasonably expected at
17 the outset.

18 I think the --

19 JUSTICE SOTOMAYOR: Well, I still go back
20 to -- to my earlier point, which is the difference
21 between nine years and five and ten years is very big.
22 For nine months and sure banishment? What's so
23 irrational about going to trial?

24 MR. FEIGIN: Well, Your Honor, as I
25 suggested earlier in my colloquy with the Chief Justice,

1 I think rationality here has its traditional legal
2 meaning, meaning looking at it through an objectively
3 reasonable len -- a lens of objective reasonableness.
4 And I think that makes great sense here because if that
5 were not the case, then I think Padilla's promise that
6 the ruling would not really be opening Pandora's box,
7 but would instead be cabined by the requirement --

8 JUSTICE SOTOMAYOR: So what do we do -- what
9 do we do with all those defendants who reject pleas with
10 full knowledge and say a rational person must have
11 wanted -- should have taken this case. And so you
12 should vacate because I didn't take my plea. Don't look
13 at all the facts and circumstances. Don't look at any
14 of the arguments because it's only a rationality test.

15 MR. FEIGIN: Your Honor, we're not saying
16 there's only a rationality test here. First of all,
17 the -- there's a threshold inquiry -- and this is where
18 the defendant in Hill failed -- there's a threshold
19 inquiry that this defendant has to say I would have done
20 something differently if my lawyer had given me better
21 advice, constitutionally competent advice. And then, if
22 that is what the -- then if we believe that the
23 defendant is credible in saying that, we then go on to
24 the objective portion of the inquiry, which is the --

25 JUSTICE KAGAN: But, Mr. Feigin, again

1 the -- just in your words, objective reasonableness, why
2 can't a judge find as to a defendant that it is
3 objectively reasonable to give up six or eight or nine
4 months for a shot at staying in this country rather than
5 being deported to a place that you don't know and where
6 you have no ties? I mean, you know, if somebody gave me
7 that choice, sign me up.

8 So I think of myself as an objectively
9 reasonable human being.

10 MR. FEIGIN: Well, Your Honor, I think what
11 objective reasonableness means here -- again, I come
12 back to the way the Court uses the term rational that's
13 used in Padilla and the way it uses it to describe, for
14 example, a rational jury, is the application of the law
15 to the facts and what outcome we would have reached
16 there. And I'm not sure --

17 JUSTICE KAGAN: It's an objectively
18 reasonable assessment, it's an -- it -- it would be an
19 objectively reasonable choice to exercise my right to a
20 jury trial in that context. And that's the question,
21 whether it's objectively reasonable to make a decision
22 different from the decision that I would have made in
23 this proceeding, which is the plea negotiation.

24 MR. FEIGIN: So, Your Honor, if you look at
25 the inquiry that way, I don't think it's acting as any

1 sort of meaningful check at all, because you could
2 always make the argument that, yeah, I would have risked
3 two more years, yes, I would have risked five more
4 years, and I don't know how a court can come in and say,
5 you know what, that's not objectively reasonable.

6 JUSTICE KAGAN: Well, the court can do it in
7 the way that the Court has done it since 1985 when we
8 said that this was the inquiry under Hill. This is what
9 courts have been doing since -- for the last 30 years.

10 MR. FEIGIN: Well, Your Honor, I think the
11 circuit conflict that we have here shows that that's not
12 what all courts have been doing. Another point --

13 JUSTICE KAGAN: It's what many courts have
14 been doing for three decades.

15 MR. FEIGIN: I'm not saying -- I'm not
16 saying that a court can't try to do that. I'm saying
17 that we -- it's very difficult to achieve reliable
18 results.

19 So Petitioner has an example on page 6 of
20 his reply brief of circumstances where a defendant
21 doesn't have very many ties to the United States and
22 just got here, and Petitioner asserts well, in that
23 case, he couldn't possibly have shown that he would have
24 selected a trial. But I don't think that's true. A
25 defendant could get up on the stand and say all my life,

1 as the Chief Justice suggested earlier, I've wanted to
2 come to the United States and I --

3 JUSTICE KENNEDY: This -- this is a
4 little -- little bit different question --

5 MR. FEIGIN: Yeah.

6 JUSTICE KENNEDY: -- but assume a petitioner
7 prevails and there can be no trial because the evidence
8 is stale or something. Can the INS still proceed to
9 deport this person? Does it need a conviction given --
10 given his admission at -- at the earlier plea?

11 MR. FEIGIN: Right now, there is a final
12 order of removal, but that final order of removal is
13 based on his conviction for aggravated felony.

14 JUSTICE KENNEDY: My question is, can you do
15 it without the -- without the conviction?

16 MR. FEIGIN: Without the conviction for an
17 aggravated felony, there would be no basis for the
18 removal. He would be a lawful --

19 JUSTICE KENNEDY: There has to be a
20 conviction --

21 MR. FEIGIN: It -- to -- to make sure I'm
22 giving you a complete answer, Justice Kennedy --

23 JUSTICE KENNEDY: Sure.

24 MR. FEIGIN: -- he would need to seek some
25 sort of immigration relief from the immigration courts

1 in order to -- in order to not be removed from the
2 United States.

3 CHIEF JUSTICE ROBERTS: Well, he would get
4 that, right, if the basis for the removal order was a
5 conviction that's been overturned?

6 MR. FEIGIN: He should be able -- he should
7 be able to seek reopening. If for some reason the case
8 is not reopened, he could seek judicial review of the
9 non-reopening. So he has various avenues in which to --

10 JUSTICE KENNEDY: Could the government still
11 make the -- the case that even though the conviction has
12 been set aside, it has adequate proof and it wants to
13 present proof of the violation in the -- in the
14 deportation hearings?

15 MR. FEIGIN: I don't believe it would do
16 that just because it has evidence that wouldn't be
17 sufficient to convict. I don't think that's necessarily
18 going to make him removable here.

19 So I think if -- if a defendant's conviction
20 were vacated, he -- he would not be removed.

21 JUSTICE KENNEDY: Do prosecutors ever advise
22 the court in open court that this is a deportable
23 offense?

24 MR. FEIGIN: I don't know whether they do
25 that. Under the new version of Federal Rule 11, the

1 court is required to --

2 JUSTICE KENNEDY: I know the court asked.

3 MR. FEIGIN: The court is required to ask
4 and -- and to advise.

5 JUSTICE KENNEDY: Does counsel -- does --
6 does the prosecution ever comment in response to that
7 question? It's a colloquy between the defendant and --
8 and -- and does the counsel ever --

9 MR. FEIGIN: I --

10 JUSTICE KENNEDY: -- prosecutor ever
11 interrupt or intervene?

12 MR. FEIGIN: I think it's unlikely that the
13 prosecutor would interrupt a colloquy between the court
14 and the defendant in a Rule 11 context.

15 JUSTICE KENNEDY: Right.

16 MR. FEIGIN: I think prosecutors, of course,
17 have their ethical duties, and if they see some mistake
18 is being made, I'm sure they would speak up. And the
19 court is always entitled to ask the prosecutor if they
20 have a view.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Two minutes, Mr. Bursch.

24 REBUTTAL ARGUMENT OF JOHN J. BURSCH

25 ON BEHALF OF THE PETITIONER

1 MR. BURSCH: Thank you, Mr. Chief Justice.

2 Two quick things.

3 First, I don't want to lose the point that
4 Justice Sotomayor raised, that this isn't just keep this
5 plea or go to trial. There's also the opportunity to
6 negotiate other plea alternatives. And we give a couple
7 of those in our reply brief, including one where there
8 was a defendant with two-and-a-half kilograms of meth
9 who was able to get a plea conviction with lessened
10 deportation consequences.

11 And my friend says there's no evidence that
12 could happen here. Well, that's because the government,
13 based on the Sixth Circuit categorical rule, has refused
14 to negotiate throughout the process.

15 If you look at what happened at that plea
16 colloquy again, even the government believed that
17 Mr. Lee was going to remain in the country. And the
18 fact that he was willing to serve seven years here
19 instead of just his one voluntarily rather than be
20 deported is strong evidence that there could have been
21 some other arrangement, a meeting in the middle.

22 Second thing about Cooper and Frye, my
23 friend mentioned that in that case, you did look at what
24 would likely happen at trial. Well, we don't disagree
25 with that approach. Under our approach, just like in

1 Strickland, you look at all the circumstances. And the
2 Sixth Circuit's mistake here, Justice Breyer, is that
3 they focused just on one circumstance, not the rest.

4 JUSTICE BREYER: This is what they say. It
5 says at the end there that it's alongside -- I mean, she
6 says: Alongside -- we adjoin the second to the -- that
7 a claimant's ties to the United States should be taken
8 into account in evaluating alongside the legal merits.

9 MR. BURSCH: She says that because that was
10 the test. But then what she says on page 4A of the
11 Appendix, in Pilla -- again, the -- the prior Sixth
12 Circuit precedent they're bound by: We held that no
13 rational defendant charged with a deportable offense and
14 facing overwhelming evidence of guilt would proceed to
15 trial rather than take a plea deal. That's the problem.

16 So that the final thing, I think Justice
17 Kagan nails this on the head when she says the test has
18 to be did deficient performance lead to a different
19 decision? That was the -- the standard you articulated
20 in Hill. It's been on the books for 32 years. Justice
21 Alito, I understand completely how district courts might
22 struggle with that in tough cases, but they've been
23 doing that successfully.

24 And to the extent that there's any doubt
25 about whether that should be the test, Justice Breyer,

1 you're exactly right. It's that consideration of the
2 right to jury trial that's being given up, the gold
3 standard in our judicial process.

4 So we ask that you reverse the Sixth Circuit
5 and hold that Mr. Lee can withdraw his plea.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Case is submitted.

9 (Whereupon, at 11:09 a.m., the case in the
10 above-entitled matter was submitted.)

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