



2018

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### Recommended Citation

Segal, Zachary (2018) "Lee v. United States: The Unusual Circumstances Test for Strickland Relief," *Touro Law Review*. Vol. 34 : No. 3 , Article 7.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol34/iss3/7>

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**LEE V. UNITED STATES: THE UNUSUAL CIRCUMSTANCES  
TEST FOR STRICKLAND RELIEF**

*Zachary Segal\**

**I. INTRODUCTION**

On March 31, 2010, the United States Supreme Court decided *Padilla v. Kentucky*.<sup>1</sup> Jose Padilla, born in Honduras, had been living in the United States for over four decades as “a lawful permanent resident.”<sup>2</sup> Years later, however, he was charged with transporting marijuana.<sup>3</sup> Padilla asked his attorney whether a conviction would affect his immigration status, and Padilla’s attorney responded that Padilla had nothing to worry about.<sup>4</sup> Relying on his attorney’s advice, Padilla pled guilty to the crime only to find that his conviction mandated automatic deportation.<sup>5</sup> Padilla then, in subsequent post-conviction proceedings, challenged the legality of his guilty plea—resulting in a denial by the Kentucky Supreme Court followed by an appeal to the nation’s highest court.<sup>6</sup> The issue before the Supreme Court was whether a non-citizen’s Sixth Amendment right to effective

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<sup>1</sup> 559 U.S. 356 (2010).

<sup>2</sup> *Id.* at 359.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Padilla*, 559 U.S. at 364.

assistance of counsel was violated when an attorney fails to advise the non-citizen that a criminal conviction could result in deportation.<sup>7</sup>

Courts use the ineffective assistance of counsel analysis prescribed in the landmark 1984 case, *Strickland v. Washington*.<sup>8</sup> To find ineffective assistance of counsel, a court must determine (1) whether “counsel’s representation fell below an objective standard of reasonableness”<sup>9</sup>; and (2) whether the deficient performance prejudiced the defense.<sup>10</sup> In the context of plea agreements, the Court, in *Hill v. Lockhart*,<sup>11</sup> held that showing prejudice requires “a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”<sup>12</sup> Accordingly, the Court in *Padilla* was presented with two specific questions: (1) whether an attorney’s failure to advise his non-citizen client of deportation fell below an objective standard of reasonableness; and (2) if so, whether his non-citizen client was prejudiced as a result of the attorney’s deficient performance because, but for counsel’s error, he would have gone to trial.<sup>13</sup>

The Court answered the first question in the affirmative by holding that an attorney’s performance is objectively unreasonable when—regardless of how clear the immigration laws are—he fails to inform a non-citizen client that deportation will, or might, follow from a conviction.<sup>14</sup> The second question, or the prejudice prong, however,

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<sup>7</sup> *Id.* at 360 (“We granted certiorari to decide whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this county.” (internal citations omitted)).

<sup>8</sup> 466 U.S. 668 (1984).

<sup>9</sup> *Id.* at 688.

First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. . . . When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness. . . . The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

*Id.* at 687-88, 694.

<sup>10</sup> *Id.* at 688.

<sup>11</sup> 474 U.S. 52 (1985).

<sup>12</sup> *Id.* at 59.

<sup>13</sup> *Padilla*, 559 U.S. at 360, 372.

<sup>14</sup> *Id.* at 373-74 (“It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.” (internal citation omitted)).

was more complex considering a petitioner needed to show, but for counsel's errors, a reasonable petitioner in his situation would have gone to trial even though deportation was inevitable.<sup>15</sup> In its analysis of the prejudice prong, the Court explained the *appropriate* question was whether a deportable non-citizen's decision to reject the plea and to pursue trial would be rational.<sup>16</sup> Instead of answering this question in this case, however, the Court remanded that question to Kentucky's highest court as a matter of first impression.<sup>17</sup>

In the wake of *Padilla*, courts were split over whether it would be rational for a defendant, facing deportation, to reject a favorable plea agreement in order to “throw ‘a Hail Mary’”<sup>18</sup> at trial.<sup>19</sup> Specifically, under what, if any, circumstances could prejudice be proven when guilt automatically results in deportation?<sup>20</sup> Another uncertainty facing the lower courts was whether *Padilla* was retroactive.<sup>21</sup> In *Chaidez v. United States*,<sup>22</sup> a case decided three years after *Padilla*, the Court held *Padilla* was not retroactive pursuant to

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<sup>15</sup> Daniel A. Horwitz, *Actually, Padilla Does Apply to Undocumented Defendants*, 19 HARV. LATINO L. REV. 1, 3 (2016) (“Specifically, these authorities have reasoned that because ‘a guilty plea does not increase the risk of deportation’ for undocumented defendants, ‘in a situation where a defendant seeks to withdraw a plea based on Padilla, and alleges lack of knowledge of the risk of deportation, prejudice cannot be established[.]’” (alteration in original) (internal citations omitted)).

<sup>16</sup> *Padilla*, 559 U.S. at 372.

<sup>17</sup> *Id.* at 374 (“Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.”).

<sup>18</sup> *Lee v. United States*, 825 F.3d 311, 313 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 614 (2016), *rev'd and remanded*, 137 S. Ct. 1958 (2017). Although the Sixth Circuit does not explicitly define “Hail Mary,” the context allows the inference that it refers to whether a petitioner can try his luck, despite overwhelming odds, that he will obtain a different outcome at trial. *See id.*

<sup>19</sup> *Id.*

As a factual matter, we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were.

But would such a decision be “rational”? Several courts, including this circuit, have said “no”: being denied the chance to throw “a Hail Mary” at trial does not by itself amount to prejudice.

*Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See infra* Part IV.A.

<sup>22</sup> 568 U.S. 342 (2013).

*Teague v. Lane*;<sup>23</sup> nevertheless, confusion remained as to whether this meant misadvice claims were also denied retroactive effect.<sup>24</sup>

In June 2017, *Lee v. United States*<sup>25</sup> answered both questions left behind by *Padilla* when it held, “[W]e cannot agree that it would be irrational for a defendant in Lee’s position to reject the plea offer in favor of trial.”<sup>26</sup> First, *Lee* expressly held it could be rational for a non-citizen defendant to reject a plea in lieu of trial when his attorney erroneously advises him about whether deportation will result from a conviction.<sup>27</sup> However, *Lee* limited this showing to Jae Lee’s (“Lee”) unusual circumstances.<sup>28</sup> Second, although *Chaidez* held *Padilla* is not retroactive,<sup>29</sup> *Chaidez* focused on the “new rule” established by *Padilla* (i.e., counsel must inform a defendant of potential immigration consequences of a guilty plea).<sup>30</sup> Therefore, by accepting petitioner Lee’s writ of certiorari, *Lee* confirmed that *Padilla* is retroactive regarding erroneous immigration advice because Lee was convicted one year before the Supreme Court decided *Padilla*.<sup>31</sup>

*Lee* has wide-ranging effects on non-citizen defendants because it implicates both prongs of *Strickland*. First, by granting

<sup>23</sup> 489 U.S. 288 (1989).

<sup>24</sup> See *infra* Part IV.A.4.

<sup>25</sup> 137 S. Ct. 1958 (2017).

<sup>26</sup> *Id.* at 1968.

<sup>27</sup> *Id.* at 1968-69.

<sup>28</sup> *Id.* at 1967.

<sup>29</sup> *Chaidez*, 568 U.S. at 357.

<sup>30</sup> *Id.* at 346.

*Padilla*’s new rule plainly governs failure-to-advise claims . . . leaving three possibilities for *Padilla*’s impact on misadvice claims. First, the new rule may encompass such claims, meaning that Castro may avail himself of the misadvice holding under *Teague* only if there was First Circuit precedent prior to 2003 that would have dictated the same outcome as *Padilla* would in this case. See *Chaidez*, 133 S. Ct. at 1110-12. Second, the misadvice portion of *Padilla*’s holding may reflect established law, and thus not be part of the new rule—in which case Castro may rely on that holding (at least assuming there was no contrary First Circuit precedent as of 2003). Third, as explained below, neither of these alternatives may be clearly discernible from *Padilla* and *Chaidez*, requiring us to examine our own and other courts’ cases to determine the state of the law as of 2003.

*United States v. Castro-Taveras*, 841 F.3d 34, 41 n.7 (1st Cir. 2016) (emphasis in original); See also *United States v. Chan*, 792 F.3d 1151 (9th Cir. 2015); *Kovacs v. United States*, 744 F.3d 44 (2d Cir. 2014).

<sup>31</sup> *Ex Parte Osvaldo*, 534 S.W.3d 607, 621 (Tex. App. 2017) (“Had the Supreme Court viewed Lee’s misadvice claim as being barred by the non-retroactivity of *Padilla*’s rule, it could have denied the writ.”).

Lee's writ, the Court held misadvising a client of deportation is objectively unreasonable under *Strickland* and, thus, retroactive under *Padilla*. Second, rejecting a plea based on attorney misadvice could be considered a rational decision to satisfy *Strickland's* prejudice prong. The Court held it would not be irrational to reject a plea and pursue trial, but it limited its holding to Lee's unusual circumstances.

This Note argues that while *Lee* confirmed that *Padilla* is retroactive regarding misadvice claims, the Court construed its rule so narrowly that post-conviction relief for non-citizen defendants—convicted before or after *Padilla*—will be limited to a very specific class of individuals who satisfy what this Note coins as the “unusual circumstance test.” Therefore, a petitioner seeking relief under *Lee* must show the following: (1) counsel erroneously misadvised the petitioner regarding deportation; (2) deportation was the determinative issue in pleading guilty; (3) the record unambiguously supports this contention; (4) the petitioner has strong ties to the United States compared to the home country; and (5) the difference between pleading guilty and the maximum sentence at trial are not grossly disproportionate or an alternative disposition could be obtained at trial.

This Note will be separated into eight parts. Part II traces the procedural history of Lee's journey to the Supreme Court. Part III briefly explores the precedential history of ineffective counsel concluding with *Padilla*. Part IV explains the circuit-court splits and the contrasting approaches to *Padilla's* unanswered questions. Part V returns to *Lee* in order to show why the case resolves *Padilla's* unanswered questions concerning retroactivity and what is rational. Part VI will look at how cases apply *Lee* followed by Part VII which will synthesize *Lee's* holding with subsequent courts applying *Lee* to show how a non-citizen petitioner can obtain relief under *Lee*. Part VIII will conclude by predicting why *Lee's* holding will result in an influx of unsuccessful ineffective counsel claims or *Lee* claims.

## II. JAE LEE'S JOURNEY TO THE UNITED STATES SUPREME COURT

In 1982, thirteen-year old Lee and his family left South Korea for a new life in the United States.<sup>32</sup> For thirty-five years, Lee, a

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<sup>32</sup> *Lee*, 137 S. Ct. at 1962.

permanent resident, never returned to his native South Korea.<sup>33</sup> Like countless other new immigrants, Lee's family settled in New York City.<sup>34</sup> Lee seemed to be on the road towards living the American dream—after graduating business school, Lee moved to Memphis to work in a restaurant.<sup>35</sup> A few years later, with the help of his parents, Lee opened his first Chinese restaurant and opened a second shortly thereafter.<sup>36</sup>

Despite Lee's success in the restaurant industry, he was, for reasons unknown, also a small-time drug dealer.<sup>37</sup> A confidential government informant revealed to authorities that Lee, over eight years, "sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana."<sup>38</sup> Following a raid on Lee's home, authorized by a search warrant, authorities discovered "88 ecstasy pills, three Valium tablets, \$32,432 in cash, and a loaded rifle."<sup>39</sup> Lee took full responsibility for the drugs and weapon discovered.<sup>40</sup>

### A. Plea Bargain

Lee was indicted by a federal grand jury "on one count of possessing ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1)."<sup>41</sup> Having no experience in the court system, Lee relied on his retained attorney who explained that Lee should plead guilty because trial was "very risky,"<sup>42</sup> and a guilty plea likely would result in a "lighter sentence."<sup>43</sup> Specifically, as a first time offender, Lee was eligible for the safety valve exception<sup>44</sup> to the otherwise ten year

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<sup>33</sup> *Id.* at 1963.

<sup>34</sup> *Id.* at 1962.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1963.

<sup>37</sup> *Lee*, 137 S. Ct. at 1963.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Lee*, 137 S. Ct. at 1963.

<sup>43</sup> *Id.*

<sup>44</sup> *See* 18 U.S.C. § 3553(f) (2012), which provided:

Limitation on applicability of statutory minimums in certain cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United

mandatory minimum for the charged offense.<sup>45</sup> Although Lee trusted his attorney's advice, he repeatedly asked his attorney if his non-citizen status would result in deportation following the criminal proceedings to which the attorney replied, "[H]e would not be deported as a result of pleading guilty."<sup>46</sup>

During the plea hearing, the presiding judge warned Lee that a conviction could result in Lee's deportation, followed by asking Lee if deportation affects his decision.<sup>47</sup> Lee replied in the positive prompting the judge to question why deportation would affect his decision.<sup>48</sup> Stunned, Lee asked his attorney what the judge was talking about and the attorney replied the judge's question was a "standard

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States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

<sup>45</sup> *United States v. Lee*, No. 10-02698-JTF-dkv, 2013 WL 8116841, at \*2, \*12 (W.D. Tenn. Aug. 6, 2013), *report and recommendation adopted in part, rejected in part*, 2014 WL 1260388 (W.D. Tenn. Mar. 20, 2014), *aff'd*, 825 F.3d 311 (6th Cir. 2016), *rev'd and remanded*, 137 S. Ct. 1958 (2017), *vacated* 869 F.3d 400 (6th Cir. 2017).

<sup>46</sup> *Lee*, 137 S. Ct. at 1963. "In fact, Lee explained, his attorney became 'pretty upset because every time something comes up I always ask about immigration status,' and the lawyer 'always said why [are you] worrying about something that you don't need to worry about.'" *Id.* (alteration in original) (citation omitted).

<sup>47</sup> *Id.* at 1968 ("When the judge warned him that a conviction 'could result in your being deported,' and asked '[d]oes that at all affect your decision about whether you want to plead guilty or not,' Lee answered 'Yes, Your Honor.'" (alteration in original)).

<sup>48</sup> *Id.*



warning.”<sup>49</sup> Convinced pleading guilty would not result in inevitable deportation, Lee entered a guilty plea, and the court sentenced him to imprisonment for one year and one day.<sup>50</sup>

Shortly after receiving an otherwise very lenient sentence, for a crime carrying a ten year mandatory minimum,<sup>51</sup> Lee learned he pled guilty to an aggravated felony under the Immigration Nationality Act, which, according to 8 U.S.C. § 1227(a)(2)(A)(iii),<sup>52</sup> required mandatory deportation because of his non-citizen status.<sup>53</sup> Lee, however, was eligible for the safety valve exception, which could have spared Lee the mandatory minimum because he was a first-time offender as well as reducing the sentence from a three to five year period of incarceration versus a likely mandatory minimum without the safety valve.<sup>54</sup> Lee immediately sought post-conviction relief and filed a motion pursuant to 28 U.S.C. § 2255,<sup>55</sup> seeking his conviction and sentence be vacated because of defense counsel’s “constitutionally ineffective assistance.”<sup>56</sup>

## B. Procedural History

The Magistrate recommended Lee’s conviction be set aside because it was based on a violation of his Sixth Amendment right to effective counsel.<sup>57</sup> The Magistrate explained that the Court in *Chaidez* confirmed that *Padilla* was not retroactive regarding failure to advise claims, which, thus, had no bearing on Lee because Lee was

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<sup>49</sup> *Id.*

<sup>50</sup> *Lee*, 137 S. Ct. at 1963.

<sup>51</sup> *See* 21 U.S.C. § 841(b)(1)(A) (2012).

<sup>52</sup> “Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is . . . convicted of an aggravated felony at any time after admission . . .” 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

<sup>53</sup> *Id.*

<sup>54</sup> *See* 18 U.S.C. § 3553(f), *supra* note 44.

<sup>55</sup> *See* 28 U.S.C. § 2255 (2012), which provided:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

<sup>56</sup> *Lee*, 137 S. Ct. at 1963.

<sup>57</sup> *Lee*, 2013 WL 8116841, at \*1.

relying on a separate, pre-existing rule (i.e., affirmative misadvice).<sup>58</sup> Moreover, considering the two-year difference between what Lee would have received under a plea and trial—because of safety valve eligibility—pursuing trial would have been rational.<sup>59</sup> As such, the Magistrate found Lee met both prongs of the *Strickland* test because of the following: (1) affirmative misadvice to a client regarding deportation is objectively unreasonable;<sup>60</sup> and (2) Lee was prejudiced by this misadvice—evidenced by Lee’s otherwise likely decision to try his luck at trial.<sup>61</sup>

The District Court declined to adopt the Magistrate’s recommendation and denied Lee’s motion, stating Lee did not meet the prejudice prong of *Strickland*.<sup>62</sup> The Sixth Circuit affirmed, agreeing with the District Court’s finding that Lee could not show prejudice under *Strickland*.<sup>63</sup> The Sixth Circuit, however, provided more insight into its decision to deny Lee relief.<sup>64</sup> The Sixth Circuit remarked, following *Padilla*, that other circuits were split regarding whether it would be “rational” to proceed to trial, despite overwhelming odds, with the hope of avoiding deportation.<sup>65</sup>

On one side of the split was the Second, Fourth, and Fifth Circuits, which declined to find prejudice when the petitioner could not show any benefit from relief aside from a re-trial.<sup>66</sup> These courts opined, pursuant to *Hill*, it would be objectively irrational to pursue trial when deportation was inevitable and there was no legal gain.<sup>67</sup>

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<sup>58</sup> *Id.* at \*8.

The “new rule” identified by the Court in *Chaidez* as having been announced in *Padilla* is one that speaks to the attorney’s obligation to act (specifically, to advise). . . . Thus, to the extent Lee’s claim relies on a “separate rule” for affirmative misadvice in place at the time of his conviction, the fact that *Padilla* is not retroactive is inconsequential to Lee’s case.

*Id.*

<sup>59</sup> *Id.* at \*12.

<sup>60</sup> *Id.* at \*11.

<sup>61</sup> *Lee*, 2013 WL 8116841, at \*12.

<sup>62</sup> *Lee*, 137 S. Ct. at 1964 (“But, ‘[i]n light of the overwhelming evidence of Lee’s guilt,’ Lee ‘would have almost certainly’ been found guilty and received ‘a significantly longer prison sentence, and subsequent deportation,’ had he gone to trial.” (alteration in original) (citation omitted)).

<sup>63</sup> *Id.*; see also *Lee*, 825 F.3d at 313.

<sup>64</sup> *Id.* at 313.

<sup>65</sup> *Id.* at 313-14.

<sup>66</sup> *Id.* at 313.

<sup>67</sup> See *infra* Part IV.B.1.

The Third, Ninth, and Eleventh Circuits, by contrast, found prejudice based solely on the misadvice itself.<sup>68</sup> Of particular relevance, all of these courts agreed individuals in Lee's position could show the erroneous advice satisfied the first prong of *Strickland*, but disagreed on how prejudice could be shown.<sup>69</sup> Ultimately, the Sixth Circuit sided with the Second, Fourth, and Fifth Circuits "in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice."<sup>70</sup>

While the Sixth Circuit denied Lee's motion, it explained its duty "is neither to prosecute nor to pardon; it is simply to say, 'what the law is.'"<sup>71</sup> The Sixth Circuit understood the existing law to mean a bare bones misadvice claim, without some legal gain, was insufficient to raise a successful ineffective assistance of counsel claim.<sup>72</sup> The Supreme Court granted certiorari to determine "whether [Lee] can show he was prejudiced as a result"<sup>73</sup> of the unanimously agreed objectively unreasonable representation that he received during the plea phase.<sup>74</sup>

### C. The United States Supreme Court Decision

The Court focused its attention on the prejudice prong of *Strickland*.<sup>75</sup> The Court discussed the history behind the prejudice

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<sup>68</sup> *Id.* at 314.

<sup>69</sup> Compare *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (not rational), *Haddad v. United States*, 486 F. App'x 517, 521–22 (6th Cir. 2012) (same), *Kovacs v. United States*, 744 F.3d 44, 52–53 (2d Cir. 2014) (same), *United States v. Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012) (same), and *United States v. Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014) (same), with *United States v. Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 568 U.S. 342 (2013), *DeBartolo v. United States*, 790 F.3d 775, 777–80 (7th Cir. 2015), *United States v. Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015), and *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

<sup>70</sup> *Lee*, 825 F.3d at 316 (emphasis in original).

<sup>71</sup> *Id.* at 317 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>72</sup> *Lee*, 137 S. Ct. at 1964 ("Relying on Circuit precedent holding that 'no 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 sentence,' the Court of Appeals concluded that Lee could not show prejudice." (citation omitted)).

<sup>73</sup> *Id.* at 1962.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1964 ("The first requirement is not at issue in today's case: The Government concedes that Lee's plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he pleaded guilty. The question is whether Lee can show he was prejudiced by that erroneous advice." (citations omitted)).

prong for ineffective plea-stage counsel claims, concluding *Hill* requires that courts determine whether the petitioner would have gone to trial but for his attorney's error.<sup>76</sup> The majority focused on whether Lee would have gone to trial but for counsel's misadvice.<sup>77</sup> The majority took this approach because it interpreted *Hill* to mean that determinative issues behind pleading and going to trial, although usually resting on the shortest sentence, can also involve risk of deportation.<sup>78</sup>

Deportation can be considered more severe than a few years in prison, which would justify rejecting an otherwise favorable plea agreement.<sup>79</sup> In fact, as the Court noted, "preserving a client's right to remain in the United States may be more important to the client than any potential jail sentence."<sup>80</sup> Therefore, by repeatedly asking his attorney if a guilty plea would result in his deportation, Lee proved that the determinative issue for him in pleading guilty was whether he would be deported.<sup>81</sup> Lee's prejudice, thus, was the inability to make an informed decision as to whether pleading guilty would affect his status in the United States—the only home he knew.<sup>82</sup> By focusing on Lee's determinative issue, the Court's decision was not confined to whether the outcome would be different, but rather whether Lee had a chance to act on the determinative issue.<sup>83</sup>

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<sup>76</sup> *Id.* at 1965 ("As we held in *Hill v. Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" (quoting *Hill*, 474 U.S. at 59)).

<sup>77</sup> *Lee*, 137 S. Ct. at 1965.

<sup>78</sup> *Id.* at 1966.

<sup>79</sup> *Id.* at 1968; see *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 322-23 (2001); see also *Padilla*, 559 U.S. at 364 (stating "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes" (footnote omitted)); Jennifer H. Berman, *Padilla v. Kentucky: Overcoming Teague's "Watershed" Exception to Non-Retroactivity*, 15 U. PA. J. CONST. L. 667, 700 (2014) ("If armed with the knowledge that a conviction is almost certain to land a defendant in immigration court, a defendant may very well choose to risk going to trial rather than accept a plea deal offering a reduced sentence.").

<sup>80</sup> *Lee*, 137 S. Ct. at 1968 (quoting *St. Cyr*, 533 U.S. at 322).

<sup>81</sup> *Id.*; see *United States v. Pola*, 703 F. App'x 414 (6th Cir. 2017) (rejecting the petitioner's pro se argument that deportation was a determinative issue because the record did not support the contention and the petitioner knew deportation was a possibility because ICE agents were in courtroom).

<sup>82</sup> *Lee*, 137 S. Ct. at 1968.

<sup>83</sup> *Id.* at 1967.

However, the Court narrowed its rule to Lee's "unusual circumstances."<sup>84</sup> In doing so, the Court essentially encouraged lower courts to consider the outcome when ruling on ineffective assistance of counsel claims presented by non-citizen defendants.<sup>85</sup> Lee was able to satisfy this requirement because his eligibility for the safety valve reduced the ten-year mandatory minimum at trial to two to three years; gambling two to three years, instead of accepting a one-year plea, would be rational.<sup>86</sup>

Another one of Lee's unusual circumstances was the record supported his claim that deportation was the determinative issue in his decision to plead guilty.<sup>87</sup> The Court cautioned against "post hoc assertions" by claimants that, but for their attorney's misadvice, they would have pleaded guilty because deportation was the determinative issue.<sup>88</sup> To further this end, the Court required the petitioners to point to the record in order to prove deportation was in fact the determinative issue when they entered the guilty plea.<sup>89</sup>

The Court concluded, "Lee has demonstrated a 'reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"<sup>90</sup> The consideration of the trial outcome, however, is not irrelevant in conducting the analysis because Lee had a mere two years to lose by going to trial.<sup>91</sup> Thus, a decision to pursue trial to avoid deportation, despite inevitable deportation, would be rational for a petitioner in Lee's position.<sup>92</sup>

The dissenting Justices, however, rejected the majority's holding because it "announce[d] a novel standard for prejudice at the plea stage."<sup>93</sup> The standard was deemed novel because Lee could not show, but for his counsel's misadvice, the outcome would be

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<sup>84</sup> *Id.*

<sup>85</sup> See *infra* Part V.

<sup>86</sup> *Lee*, 137 S. Ct. at 1967 ("But where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking.").

<sup>87</sup> *Id.* at 1969.

<sup>88</sup> *Id.* at 1967; See also *Pola*, 703 F. App'x at 421.

<sup>89</sup> See *infra* note 288 and accompanying text.

<sup>90</sup> *Lee*, 137 S. Ct. at 1969 (citing *Hill*, 474 U.S. at 59) (alteration in original).

<sup>91</sup> *Id.* at 1967; see *supra* note 86.

<sup>92</sup> *Lee*, 137 S. Ct. at 1969.

<sup>93</sup> *Id.* at 1969 (Thomas & Alito, JJ., dissenting).

different.<sup>94</sup> The dissenting Justices concluded the Court erroneously found Lee showed prejudice because, even with competent advice, Lee likely would have lost at trial and been deported.<sup>95</sup> Therefore, the novel standard, according to the dissent, provides that a petitioner can overturn a conviction if he, by pointing to the record, can show he subjectively would have rejected the plea and gone to trial, but for counsel's misadvice regarding the consequences of the guilty plea.<sup>96</sup>

According to the dissenting Justices, this novel standard is dangerous because it re-defined the prejudice prong of *Strickland*.<sup>97</sup> The dissent maintained the prejudice prong was re-defined because *Strickland* sought to narrow its holding to preclude reversal based on a "Hail Mary."<sup>98</sup> *Strickland*, thus, wanted to avoid petitioners coming forth with ineffective counsel claims based on a subjective belief and hope that an irrational jury would decide the case in his or her favor.<sup>99</sup>

While the dissent focused the bulk of its criticism on the majority's holding regarding the diminution of the prejudice prong, the Justices also predicted an influx of ineffective counsel claims resulting

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<sup>94</sup> *Id.* at 1970 (Thomas & Alito, JJ., dissenting) ("In other words, the defendant's ability to show that he would have gone to trial is necessary, but not sufficient, to establish prejudice.").

<sup>95</sup> *Id.* at 1974 (Thomas & Alito, JJ., dissenting); *Compare Strickland*, 466 U.S. at 691 ("An error by counsel . . . does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."), *with Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993) ("Sheer outcome determination, however, was not sufficient to make out a claim under the Sixth Amendment."), and *Glover v. United States*, 531 U.S. 198, 204 (2001) ("Although the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, under a determinate system of constrained discretion[,] . . . it cannot serve as a bar to a showing of prejudice.").

<sup>96</sup> *Lee*, 137 S. Ct. at 1970 (Thomas & Alito, JJ., dissenting).

<sup>97</sup> *Id.* at 1973 (Thomas & Alito, JJ., dissenting.) ("In my view, we should take the Court's precedents at their word and conclude that '[a]n error by counsel . . . does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" (alteration in original) (quoting *Strickland*, 466 U.S. at 691)).

<sup>98</sup> *Lee*, 137 S. Ct. at 1974 (Thomas & Alito, JJ., dissenting.); *see also Strickland*, 466 U.S. at 695 ("A defendant has no entitlement to the luck of a lawless decisionmaker . . .").

<sup>99</sup> *Lee*, 137 S. Ct. at 1974 (Thomas & Alito, JJ., dissenting.)

In the face of overwhelming evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner's shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. . . . Finding that petitioner has established prejudice in these circumstances turns *Strickland* on its head.

*Id.* (Thomas & Alito, JJ., dissenting.)

from matters a defendant placed “paramount importance”<sup>100</sup> on during plea negotiations.<sup>101</sup> Particularly, the majority’s decision impacts the entire plea process because they lack the finality previously accorded to them.<sup>102</sup> By concluding Lee’s attorney violated his Sixth Amendment rights, the holding is not limited to immigration cases, and so “a defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial” to obtain relief.<sup>103</sup>

### III. INEFFECTIVE COUNSEL 101

The Assistance of Counsel Clause in the Sixth Amendment guarantees, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”<sup>104</sup> Assistance, however, does not merely mean having any counsel present, but rather effective assistance is required per the Sixth Amendment.<sup>105</sup> Therefore, in order to raise an ineffective assistance of counsel claim, *Strickland* held the petitioner must show (1) his counsel’s performance was deficient; and (2) “the deficient performance prejudiced the defense.”<sup>106</sup>

Under *Strickland*, the reviewing court must find that the petitioner satisfies both prongs before obtaining any relief.<sup>107</sup> The first prong evaluates whether counsel’s representation “fell below an

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<sup>100</sup> *Id.* (Thomas & Alito, JJ., dissenting).

<sup>101</sup> *Id.* (Thomas & Alito, JJ., dissenting) (“Under its rule, so long as a defendant alleges that his counsel omitted or misadvised him on a piece of information during the plea process that he considered of ‘paramount importance,’ he could allege a plausible claim of ineffective assistance of counsel.” (internal citation omitted)).

<sup>102</sup> *Id.* at 1975 (Thomas & Alito, JJ., dissenting).

<sup>103</sup> *Lee*, 137 S. Ct. at 1974 (Thomas & Alito, JJ., dissenting); *see, e.g., Young v. Spinner*, 873 F.3d 282, 283-84 (5th Cir. 2017) (rejecting petitioner’s argument that his attorney’s failure to inform him of a potential sentence for failing to register as a sex offender influenced his decisions to enter into a plea bargain and not go to trial); *Thompson v. United States*, 872 F.3d 560, 562-63 (8th Cir. 2017) (rejecting petitioner’s ineffective counsel claim that he would have gone to trial but for counsel’s assertion that petitioner would have received twelve years in prison when he actually received life); *United States v. Vaughn*, 704 F. App’x 207 (3d Cir. 2017) (reversing the district court’s holding that an evidentiary hearing was not necessary to determine whether counsel’s advice was deficient and if so, whether petitioner, convicted of money laundering, was prejudiced).

<sup>104</sup> U.S. CONST. amend. VI.

<sup>105</sup> *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

<sup>106</sup> *Strickland*, 466 U.S. at 687.

<sup>107</sup> *Id.* (“Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.”).

objective standard of reasonableness.”<sup>108</sup> This prong reflects what the legal community expects of practicing attorneys.<sup>109</sup> Thus, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”<sup>110</sup>

The second prong—prejudice—generally requires the lower courts to ask whether “the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.”<sup>111</sup> However, prejudice is not assumed once counsel’s performance has been deemed deficient because the outcome could have otherwise been the same.<sup>112</sup> Although *Strickland* dealt with a capital case where the ineffective counsel claim was raised due to defense counsel’s failure to compile mitigation letters for his capital sentencing hearing,<sup>113</sup> the standard has also been applied to ineffective plea stage counsel.<sup>114</sup> While the first prong of *Strickland* has generally remained constant, analyzing the prejudice prong varies for claims arising outside the death penalty setting.<sup>115</sup>

One year after *Strickland*, in *Hill v. Lockhart*, the Court prescribed the approach for ineffective assistance of counsel claims in the context of plea agreements.<sup>116</sup> Under the second prong, courts consider whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>117</sup> In these situations, the fundamental issue becomes whether the defendant was prejudiced by not having the

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<sup>108</sup> *Id.* at 688.

<sup>109</sup> *See id.* at 687-88.

<sup>110</sup> *Id.* at 688; *see also Padilla*, 559 U.S. at 367 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”).

<sup>111</sup> *Strickland*, 466 U.S. at 696.

<sup>112</sup> *Id.* at 693; *see Fretwell*, 506 U.S. 364, 369-70 (1993) (stating “[t]hus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error may grant the defendant a windfall to which the law does not entitle him”).

<sup>113</sup> *Strickland*, 466 U.S. at 697.

<sup>114</sup> *Hill*, 474 U.S. at 58 (“We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.”); *see also Lafler v. Cooper*, 566 U.S. 156, 169 (2012) (“The fact that [a defendant] is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.”).

<sup>115</sup> *Lee*, 137 S. Ct. at 1965 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)).

<sup>116</sup> *See supra* note 114.

<sup>117</sup> *Strickland*, 466 U.S. at 694.



ability to exercise his right to a trial.<sup>118</sup> However, the factors a defendant considers when deciding whether to go to trial vary such that one defendant may base his decision between entering a guilty plea or trial on length of sentence while another may base the same decision on deportation.<sup>119</sup> When the latter is the determinative issue, the focus shifts from whether the outcome would be different to whether counsel's deficient performance prejudiced the defendant by disabling him from exercising his right to pursue a jury trial.<sup>120</sup> Therefore, the mere fact that a defendant did not have the opportunity to make an informed decision supersedes whether the decision would have still resulted in a finding of guilt.<sup>121</sup>

Deportation presents a different context because the defendant may consider deportation a greater penalty than prison.<sup>122</sup> The Court, in *Padilla*, added a new layer to *Strickland* when it held that counsel's failure to advise his client of the immigration consequences of a guilty plea satisfied the first prong.<sup>123</sup> However, the question of whether the defendant was prejudiced by his counsel's failure to advise was remanded to the State.<sup>124</sup> Nonetheless, the Court provided factors to consider.<sup>125</sup> Notably, one of these factors was whether rejecting the

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<sup>118</sup> *Flores-Ortega*, 528 U.S. at 483 (“The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice.”). Conversely, a defendant who, due to erroneous advice of counsel, rejects a plea and loses at trial, is not precluded from obtaining a chance to plead because “criminal justice today is for the most part a system of pleas, not a system of trials.” *Lafler*, 556 U.S. at 170.

<sup>119</sup> *Lee*, 137 S. Ct. at 1966-67.

<sup>120</sup> *Id.* at 1965.

When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial “would have been different” than the result of the plea bargain. That is because, while we ordinarily “apply a strong presumption of reliability to judicial proceedings,” “we cannot accord” any such presumption “to judicial proceedings that never took place.”

*Id.* (quoting *Flores-Ortega*, 528 U.S. at 482-83).

<sup>121</sup> *Id.* at 1966 (“And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction at trial.”).

<sup>122</sup> *Id.* (citing *St. Cyr*, 533 U.S. at 322-23).

<sup>123</sup> *Padilla*, 559 U.S. at 369.

<sup>124</sup> *Id.* (“Whether *Padilla* is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.”).

<sup>125</sup> *Id.* at 372.

plea in favor of trial would be “rational under the circumstances.”<sup>126</sup> The aftermath of *Padilla* was wrought with confusion as to whether *Padilla* was retroactive and whether it could be rational to reject a plea agreement in lieu of trial.

#### IV. THE SPLITS

##### A. Padilla Is Retroactive

Following *Padilla*, a number of state and federal courts were unsure as to whether *Padilla* was retroactive.<sup>127</sup> Particularly, courts questioned whether *Padilla* announced a “new rule,” which according to *Teague v. Lane*,<sup>128</sup> would preclude retroactivity. Prior to the Court’s decision in *Chaidez*, however, two interpretations of whether *Padilla* was retroactive split the circuit courts.<sup>129</sup>

##### 1. Between *Padilla* and *Chaidez*

According to the Third Circuit, *Padilla* was decided according to the guidelines set out in *Strickland* and *Hill* such that attorneys always had a duty to provide clients with accurate information at the plea stage.<sup>130</sup> Moreover, *Padilla* noted, “For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the [removal] consequences of a client’s plea.”<sup>131</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Chaidez*, 568 U.S. at 347 n.2; compare *Chaidez v. United States*, 655 F.3d 684, 693 (7th Cir. 2011) (not retroactive), *aff’d*, 568 U.S. 342 (2013), *United States v. Amer*, 681 F.3d 211 (5th Cir. 2012) (same), *United States v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011) (same), *and State v. Gaitan*, 37 A.3d 1089 (N.J. 2012) (same), *with Orocio*, 645 F.3d at 630 (retroactive), *and Commonwealth v. Clarke*, 949 N.E.2d 892 (Mass. 2011) (same).

<sup>128</sup> 489 U.S. 288, 301 (1989). A rule is a “new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Id.* (emphasis in original).

<sup>129</sup> *Chaidez*, 568 U.S. at 347.

<sup>130</sup> *Orocio*, 645 F.3d at 639, *abrogated by Chaidez*, 568 U.S. at 342 (2013).

*Strickland* and *Hill* required counsel to advise criminal defendants at the plea stage in accordance with precedent and prevailing professional norms to ensure that the defendant makes an informed, knowing, and voluntary decision whether to plead guilty. *Padilla* is set within the confines of *Strickland* and *Hill*, as it concerns what advice an attorney must give to a criminal defendant at the plea stage.

*Id.*

<sup>131</sup> *Id.* (quoting *Padilla*, 559 U.S. at 372).

Therefore, according to the Third Circuit, *Padilla* did not announce a new rule and the petitioner was entitled to a review of his claim under *Padilla*.<sup>132</sup>

Conversely, the Seventh Circuit found *Padilla* did announce a new rule because it was the first time the Supreme Court held the Sixth Amendment required counsel to inform his client “about matters not directly related to their client’s criminal prosecution.”<sup>133</sup>

The Seventh Circuit petitioner’s conviction became final conviction prior to *Padilla*.<sup>134</sup> The Seventh Circuit reasoned that because the conviction became final before *Padilla*, she was barred from obtaining relief under *Padilla*—even though her attorney failed to inform her that the deportation would stem from a guilty plea.<sup>135</sup> The Supreme Court, one year after *Padilla* was decided, granted a writ of certiorari from the Seventh Circuit in *Chaidez* to determine whether *Padilla* announced a new rule.<sup>136</sup>

## 2. *Chaidez v. United States*

According to the Court in *Chaidez*, *Padilla* announced a new rule, which precluded retroactivity.<sup>137</sup> Contrary to the Third Circuit, the *Chaidez* court noted that informing a client of the collateral consequences stemming from a guilty plea “is never a violation of the Sixth Amendment.”<sup>138</sup> In making this determination, *Chaidez* pointed to the fact that all ten federal appellate courts and thirty state appellate courts agreed the Sixth Amendment did not extend to informing a client of collateral consequences of a guilty plea.<sup>139</sup> This lack of precedent, therefore, barred any retroactive application of *Padilla* because its *Strickland* analysis of a failure to advise claim in the context of a collateral consequence broke new ground, thus, creating a

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<sup>132</sup> *Id.*

<sup>133</sup> *Chaidez*, 655 F.3d at 693 (“Before *Padilla*, the Court had never held that the Sixth Amendment requires a criminal defense attorney to provide advice about matters not directly related to their client’s criminal prosecution.”).

<sup>134</sup> *Chaidez*, 568 U.S. at 345.

<sup>135</sup> *Id.* at 346.

<sup>136</sup> *Id.* at 347.

<sup>137</sup> *Id.* at 357 (“This Court announced a new rule in *Padilla*. Under *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.”).

<sup>138</sup> *Id.* at 350.

<sup>139</sup> *Chaidez*, 568 U.S. at 350 (“All 10 federal appellate courts to consider the question decided, in the words of one, that “counsel’s failure to inform a defendant of the collateral consequences of a guilty plea is never” a violation of the Sixth Amendment.”).

new rule.<sup>140</sup> Accordingly, a petitioner could not obtain relief under *Padilla* because, although her attorney may have failed to advise her that she would be deported, her conviction became final before *Padilla*.<sup>141</sup>

*Chaidez*, however, acknowledged relief had previously been granted under *Strickland* when counsel misadvised clients about deportation.<sup>142</sup> Despite this admission, both state and federal courts have denied relief to petitioners asserting misadvice claims on the grounds that *Padilla*'s rule applied to all advice claims involving collateral consequences.<sup>143</sup>

In *Chavarria v. United States*,<sup>144</sup> for example, the Seventh Circuit held the Sixth Amendment did not cover failure to advise or misadvise prior to *Padilla*.<sup>145</sup> In *Chavarria*, the petitioner, a permanent resident from Mexico, repeatedly asked his attorney whether deportation would follow from a conviction.<sup>146</sup> Each time the attorney

<sup>140</sup> *Id.* at 354.

<sup>141</sup> *Id.* at 347.

<sup>142</sup> *Id.* at 356.

True enough, three federal circuits (and a handful of state courts) held before *Padilla* that misstatements about deportation could support an ineffective assistance claim. But those decisions reasoned only that a lawyer may not affirmatively misrepresent his expertise or *otherwise actively mislead his client on any important matter, however related to a criminal prosecution.*

*Id.* (emphasis added).

<sup>143</sup> *Chavarria v. United States*, 739 F.3d 360, 362-63 (7th Cir. 2014).

A lawyer's advice about matters not involving the "direct" consequences of a criminal conviction—collateral matters—is, in fact, irrelevant under the Sixth Amendment; such advice is categorically excluded from analysis as professionally incompetent, as measured by *Strickland*. . . . Thus, regardless of how egregious the failure of counsel was if it dealt with immigration consequences, pre-*Padilla*, both the Sixth Amendment and the *Strickland* test were irrelevant.

The *Chaidez* majority jointly referred to both misadvice and non-advice throughout its opinion. There is no question that the majority understood that *Padilla* announced a new rule for all advice, or lack thereof, with respect to the consequences of a criminal conviction for immigration status.

*Id.*; see also *United States v. Florian*, No. 86 CR 850, 2016 WL 4611422, at \*10 (N.D. Ill. 2016) (relying on *Chaidez* and *Chavarria*, the court explained that the petitioner could not obtain relief on a misadvice claim because petitioner's conviction became final prior to *Padilla*); *Barajas v. United States*, 151 F. Supp. 3d 952, 959 (N.D. Iowa 2016) (same); *State v. Merheb*, 858 N.W.2d 226, 228 (Neb. 2015) (same).

<sup>144</sup> 739 F.3d 360 (7th Cir. 2014).

<sup>145</sup> *Id.* at 364.

<sup>146</sup> *Id.* at 361.

responded, “[T]he Bureau of Immigration and Customs Enforcement . . . were not interested in deporting him.”<sup>147</sup> The attorney also told petitioner to ignore the warnings from the judge regarding deportation.<sup>148</sup> Nonetheless, the court in *Chavarria* held that petitioners, whose convictions became final prior to *Padilla*, were precluded from any retroactive relief for a misadvice claim.<sup>149</sup>

### 3. *Pre-Padilla*

In 1970, the D.C. Circuit Court raised the possibility of a successful ineffective assistance of counsel claim based on erroneous advice concerning the likelihood of deportation.<sup>150</sup> Fifteen years later, the Eleventh Circuit reversed the lower court’s denial of petitioner’s post-conviction motion and remanded the case for an evidentiary hearing regarding whether the petitioner’s counsel misadvised him regarding the prospect of deportation.<sup>151</sup> According to the Eleventh Circuit, petitioner changed his plea from not guilty to guilty following the government’s decision to drop a count, and his attorney told him he was not deportable.<sup>152</sup> Once he was released, he discovered he was subject to deportation and challenged his conviction.<sup>153</sup>

The Eleventh Circuit made clear it would not “hold that an affirmative misrepresentation by an attorney in response to a specific inquiry by the accused which results in a plea of guilty necessarily constitutes ineffective assistance of counsel.”<sup>154</sup> However, the court then explained a *Strickland* analysis requires courts to consider all the circumstances.<sup>155</sup> Accordingly, the case was remanded to establish whether petitioner’s allegations that his attorney misrepresented the prospect of deportation, which influenced his ability to enter a well-

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<sup>147</sup> *Id.* (citation omitted).

<sup>148</sup> *Id.* at 361.

<sup>149</sup> *Chavarria*, 739 F.3d at 361.

<sup>150</sup> *United States v. Briscoe*, 432 F.2d 1351, 1353 (D.C. Cir. 1970) (“Under appropriate circumstances the fact that a defendant has been misled as to [the] consequences of deportability may render his guilty plea subject to attack.”).

<sup>151</sup> *Downs-Morgan v. United States*, 765 F.2d 1534, 1536-37 (11th Cir. 1985).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1540.

<sup>155</sup> *Id.* at 1541.

informed guilty plea.<sup>156</sup> Consistent with *Lee*, the Eleventh Circuit recognized—as early as 1985—attorney misadvice on a determinative issue warrants a second look and thus remanded to determine whether deportation was the determinative issue for the defendant in entering his guilty plea.<sup>157</sup>

Subsequent cases, such as *United States v. Couto*,<sup>158</sup> held that “affirmative misrepresentation[s] by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.”<sup>159</sup> The Second Circuit relied on prior case law, which held counsel “has the obligation of advising [a non-citizen client] of his particular position as a consequence of his plea.”<sup>160</sup> In *Couto*, the petitioner, a Brazilian citizen, was convicted of bribery and conspiracy to commit bribery of an Immigration and Naturalization Service (“INS”) official.<sup>161</sup> Petitioner’s attorney told her if she did not accept the government’s plea agreement, she likely would face incarceration, but would not by pleading guilty.<sup>162</sup> Of particular relevance, despite receiving notice of possible deportation from INS, petitioner’s attorney then erroneously informed her that deportation was avoidable through various means including a recommendation letter from the judge.<sup>163</sup>

At the evidentiary hearing conducted by the district court on post-conviction review, petitioner explained she would not have pleaded guilty had she known she would be subject to automatic deportation.<sup>164</sup> This misrepresentation, combined with evidence of a

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<sup>156</sup> *Downs-Morgan*, 765 F.2d at 1541 (“As a result, we conclude that under these unique circumstances Downs-Morgan is at least entitled to an evidentiary hearing to determine if he was afforded reasonably effective assistance from his counsel in deciding to plead guilty.”).

<sup>157</sup> See *infra* Part IV.B.2.

<sup>158</sup> 311 F.3d 179 (2d Cir. 2002), *abrogated by Padilla*, 559 U.S. at 356.

<sup>159</sup> *Id.* at 188.

<sup>160</sup> *Id.* at 187 (quoting *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974)); see *United States v. Kwan*, 407 F.3d 1005, 1015 (9th Cir. 2005) (“Counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel’s performance is objectively unreasonable under contemporary standards for attorney competence.”), *opinion amended on reh’g*, No. 03-50315, 2005 WL 1692492 (9th Cir. 2005), *abrogated by Padilla*, 559 U.S. at 356; see also *St. Cyr*, 533 U.S. at 323 n.50 (“Even if the defendant were not initially aware of [possible waiver of deportation under the Immigration and Nationality Act’s prior] § 212(c), *competent defense counsel*, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.” (emphasis added) (citation omitted)).

<sup>161</sup> *Couto*, 311 F.3d at 182.

<sup>162</sup> *Id.* at 183.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 184.

“reasonable probability,”<sup>165</sup> that, but for counsel’s error, she would not have pled guilty and gone to trial, satisfied both prongs of *Strickland*, which invalidated the earlier guilty plea.<sup>166</sup>

Courts prior to *Padilla* have clearly recognized that non-citizen defendants could successfully raise an ineffective assistance of counsel claim when their attorneys affirmatively misrepresent the likelihood of deportation following a guilty plea, and the petitioner relied on this advice because deportation was a determinative issue.<sup>167</sup> Thus, *Padilla*’s new rule is confined to failure to advise claims, and not misadvice claims, because courts prior to *Padilla* have recognized misadvice claims in the Sixth Amendment context.<sup>168</sup> Proof lies in the fact that three circuit courts held, after *Padilla* and *Chaidez*, that *Padilla*’s holding is retroactive with regard to misadvice claims.<sup>169</sup> In doing so, these courts decided, in reliance on their own precedent and the retroactivity application elicited by *Teague*, that claims based on erroneous advice concerning deportation at the plea stage are grounds for reversal under *Strickland*.<sup>170</sup>

#### 4. *Post-Padilla & Chaidez*

The Second Circuit, in *Kovacs v. United States*,<sup>171</sup> explained prior courts acknowledged that misadvice claims fell within the gambit of ineffective counsel contexts dating back to the 1970s.<sup>172</sup> Although

<sup>165</sup> *Id.* at 188.

<sup>166</sup> *Couto*, 311 F.3d at 191.

<sup>167</sup> *Kovacs*, 744 F.3d at 53 (holding a defendant can satisfy *Strickland* by showing that immigration consequences were the determinative issue in entering a guilty plea and his attorney erroneously told him pleading guilty to the charged offense would not impact his immigration status); see *Chan*, 792 F.3d at 1154 (same); *United States v. Castro-Taveras*, 841 F.3d 34 (1st Cir. 2016) (same).

<sup>168</sup> *Chan*, 792 F.3d at 1152 (“Because we conclude that *Kwan* both survives *Padilla v. Kentucky*, and did not establish a new rule of criminal procedure under *Teague v. Lane*, we thus hold that *Kwan* applies retroactively to *Chan*’s case.” (citations omitted)).

<sup>169</sup> See *supra infra* Part IV.A.4.

<sup>170</sup> See *infra* Part IV.A.4.

<sup>171</sup> 744 F.3d 44 (2d Cir. 2014).

<sup>172</sup> *Id.* at 50.

We have little trouble concluding that, by the time *Kovacs*’ conviction became final, the *Couto* rule was indicated, and was awaiting an instance in which it would be pronounced. Courts had concluded similar misadvice was objectively unreasonable as far back as the 1970s; our decisions reflected this trend long before *Kovacs* conviction.

*Id.* (footnote omitted) (citation omitted).

the defendant's conviction in *Kovacs* became final prior to the Second Circuit's decision in *Couto*, he was still entitled to relief because "*Couto* did nothing more than apply the 'age-old principle that a lawyer may not affirmatively mislead a client.'" <sup>173</sup> Therefore, the Second Circuit held that the petitioner satisfied his burden of showing prejudice because he could have litigated a statute of limitations defense or negotiated a plea favorable to his immigration status at trial. <sup>174</sup> The petitioner, like Lee, was able to prove deportation was the determinative issue by pointing to the record of the plea hearing, which allowed the court to reverse the conviction in reliance on its own precedent. <sup>175</sup>

In *United States v. Castro-Taveras*, <sup>176</sup> the First Circuit elaborated on the holding in *Kovacs* regarding the "age-old principle that a lawyer may not affirmatively mislead a client" by undergoing a lengthy analysis of retroactivity. <sup>177</sup> The petitioner's post-conviction petition alleged the 2003 conviction was invalid because it was obtained in violation of the Sixth Amendment due to his attorney's misrepresentation of deportation consequences, which motivated his guilty plea. <sup>178</sup> Prior to the retroactivity analysis, however, the court remarked that neither *Padilla* nor *Chaidez* expressly addressed whether misadvice claims are subject to a *Strickland* analysis. <sup>179</sup> Further, the court explained that it needed to dissect the question

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<sup>173</sup> *Id.* at 51 (quoting *Chaidez*, 568 U.S. at 367) (Sotomayor, J., dissenting).

<sup>174</sup> *Id.* at 53.

<sup>175</sup> *Kovacs*, 744 F.3d at 48.

*Kovacs*' immigration concerns were aired during the plea hearing. At the outset, [counsel] sought to seal the minutes of the guilty plea so immigration officials could not see them. The district court warned *Kovacs* that immigration consequences were not in its control and that it would give no such assurance. [Counsel], however, responded that he "researched it and we feel comfortable that this is not a deportable offense." At the conclusion of the proceeding, [counsel] again stated that "misprision of felony is not deportable."

*Id.* (internal citations omitted).

<sup>176</sup> 841 F.3d 34 (1st Cir. 2016). In *Castro-Taveras*, petitioner, a lawful permanent resident, plead guilty to what he discovered was an aggravated felony carrying mandatory deportation following his attorney's conclusion that a probationary sentence would not result in deportation. *Id.* at 36. Six years after his three-year probationary sentence ended, petitioner applied for naturalization, but was denied because his probationary sentence did in fact carry with it mandatory deportation. *Id.* at 37-38.

<sup>177</sup> *See id.* at 40-52.

<sup>178</sup> *Id.* at 38.

<sup>179</sup> *Castro-Taveras*, 841 F.3d at 43.



regarding retroactivity in *Teague*, the seminal retroactivity case.<sup>180</sup> The court explained, if the circuit addressing the claim anticipated that the Supreme Court created a “new rule,” a petitioner could get relief even though the conviction was obtained prior to announcing this new rule.<sup>181</sup> Conversely, if the circuit court did not have the new rule of law announced by the Court, but the state of the law reflected an understanding that the Supreme Court affirmed a new rule, the petitioner could nevertheless obtain relief.<sup>182</sup>

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<sup>180</sup> *Id.* at 46.

Having concluded that *Padilla* and *Chaidez* left undecided the question of whether *Padilla*'s new rule excludes (or includes) misrepresentation claims, we must undertake our own analysis as to whether *Padilla*'s holding on misadvice would have constituted a new rule based on the state of the law in the lower courts as of 2003. Indeed, the relevant question, in the language of *Teague*, is whether the lower courts in 2003 would have considered application of *Strickland* to a misadvice claim regarding deportation consequences “a garden-variety application of the test in *Strickland*,” *Chaidez*, 133 S. Ct. at 1107, such that it was “apparent to all reasonable jurists,” *Lambrich*, 520 U.S. at 528, 117 S. Ct. 1517, that *Strickland* applied to Castro's claim.

*Id.*

<sup>181</sup> *Id.* at 41.

Even when a Supreme Court holding constitutes a new rule, however, a defendant may still be able to take advantage of the legal principle it articulates in a collateral proceeding. That would be so if the applicable circuit law, at the time the defendant's conviction became final, was consistent with the Supreme Court's subsequently pronounced rule—i.e., if circuit precedent anticipated the path the Supreme Court would take, even though that law “would [not] have been ‘apparent to all reasonable jurists.’”

*Id.* (quoting *Chaidez*, 133 S. Ct. at 47 (quoting *Lambrich*, 520 U.S. at 527–28)); see *Kovacs*, 744 F.3d at 50–51 (identifying the circuit precedents that preceded *Padilla*); see also *id.* at 46 (“If *Padilla*'s holding on misadvice constituted a new rule in 2003 based on the state of the law in the lower courts, then Castro's Sixth Amendment claim would be barred under *Teague*, unless he can show that the First Circuit was an exception—i.e., we had a case prior to 2003 that would have dictated the same outcome as *Padilla* would in this case.” (citation omitted)).

<sup>182</sup> See *Castro-Taveras*, 841 F.3d at 48.

That is to say, while no case of our own can support the proposition that “all reasonable jurists,” *Lambrich*, 520 U.S. at 528, 117 S. Ct. 1517, would have agreed that an affirmative misrepresentation on deportation consequences is subject to *Strickland*, pre-2003 law in other lower courts—combined with our own—could lead us to conclude that *Padilla*'s misadvice holding was, to borrow the words of our sister circuit, simply “awaiting an instance in which it would be pronounced,” *Kovacs*, 744 F.3d at 50.

*Id.*

The First Circuit previously permitted ineffective counsel claims based on collateral consequence claims derived from erroneous attorney advice.<sup>183</sup> However, that alone was not enough according to the court.<sup>184</sup> In other words, similar holdings in the circuit, which do not directly address the new rule, are not sufficient for a defendant to obtain retroactive relief.<sup>185</sup> In these situations, where the circuit does not explicitly address the new rule, the state of the law must either permit misadvice claims for immigration consequences nationwide or the various holdings “appl[y] a general standard to the kind of factual circumstance it was meant to address.”<sup>186</sup>

The court pointed to a number of district court and state court cases<sup>187</sup> prior to *Padilla*, which held both misadvice claims relating to deportation consequences, and collateral consequences in general, are triable ineffective assistance of counsel issues pursuant to the Sixth Amendment.<sup>188</sup> Therefore, the *Castro-Taveras* court concluded,

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<sup>183</sup> *Id.* at 47-48 (citing *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973); *Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983); *Wellman v. Maine*, 962 F.2d 70 (1st Cir. 1992)).

<sup>184</sup> *Id.* at 48. “[T]he fact that a court says that its decision is within the ‘logical compass’ of an earlier decision, or indeed that it is ‘controlled’ by a prior decision, is not conclusive for purposes of deciding whether the current decision is a ‘new rule’ under *Teague*.” *Id.* (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)).

<sup>185</sup> *Castro-Taveras*, 841 F.3d at 48.

<sup>186</sup> *Id.* at 50 (quoting *Chaidez*, 568 U.S. at 347); *see also* *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring) (“Where the beginning point is a rule of general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.”).

<sup>187</sup> *See infra* note 188.

<sup>188</sup> *Kovacs*, 744 F.3d at 49-51; *see Couto*, 311 F.3d at 188; *Downs-Morgan*, 765 F.2d at 1540-41; *United States v. Khalaf*, 116 F.Supp. 2d 210, 214 (D. Mass. 1999) (explaining that an attorney’s affirmative misrepresentation in response to a specific question about deportation consequences “may, under certain circumstances, constitute ineffective assistance of counsel” (citations omitted)); *United States v. Mora-Gomez*, 875 F. Supp. 1208, 1213 (E.D. Va. 1995) (same); *Beavers v. Saffle*, 216 F.3d 918, 925 (10th Cir. 2000) (“[A]ttorney advice which misrepresents the date of parole eligibility by several years can be objectively unreasonable.”); *Meyers v. Gillis*, 142 F.3d 664, 666 (3d Cir. 1998) (recognizing that “a defendant may be entitled to habeas relief if counsel provides parole eligibility information that proves to be grossly erroneous”); *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) (“[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel.”); *Hill*, 894 F.2d at 1010 (en banc) (“[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland*.”); *Czere v. Butler*, 833 F.2d 59, 63 n.6 (5th Cir. 1987) (“Even if the Sixth Amendment does not impose on counsel an affirmative obligation to inform clients of the parole consequences of their pleas, . . . other courts have recognized a distinction between failure to inform and giving misinformation.”); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (“[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that

although the petitioner was convicted in 2003, he can still bring the claim because he was not barred by lack of retroactivity.<sup>189</sup>

Clearly, *Chavarria* and other courts erred in holding that *Chaidez* barred misadvice claims where the convictions were final prior to *Padilla*.<sup>190</sup> With that in mind, the following section will turn to the second split in order to determine why *Padilla*'s retroactivity is relevant. While *Lee* confirms *Padilla* is retroactive regarding misadvice claims (thus, subjecting such claims to a *Strickland* analysis), the remaining question to be answered is whether, or to what extent, *Lee*'s second holding—it could be rational to gamble losing at trial to avoid deportation—is retroactive.

### B. It Is Rational To Reject a Favorable Plea In Order To Try and Avoid Deportation at Trial

The obvious holding in *Lee* is that under *Lee*'s “unusual circumstances,” it would not be irrational to reject the favorable plea in lieu of going to trial to avoid deportation.<sup>191</sup> Considering *Padilla* is retroactive regarding misadvice claims, the looming question is whether, and to what extent, *Lee* has any retroactive effect. It could be readily assumed *Lee* restricted its holding to circumstances where the

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misinformation, he is deprived of his constitutional right to counsel.”). *See also* state cases affirming misadvice claims concerning collateral consequences are subject to *Strickland*, which include the following: *Roberti v. State*, 782 So. 2d 919, 920 (Fla. Cist. Ct. App. 2d 2001); *Goodall v. United States*, 759 A.2d 1077, 1082 (D.C. 2000); *State v. Vieira*, 760 A.2d 840, 843–44 (N.J. Super. Ct. Law Div. 2000); *People v. Ping Cheung*, 718 N.Y.S.2d 578 (Sup. Ct. 2000); *State v. Goforth*, 503 S.E.2d 676 (N.C. Ct. App. 1998); *People v. Garcia*, 815 P.2d 937, 942 (Colo. 1991) (en banc); *Hinson v. State*, 377 S.E.2d 338, 339 (S.C. 1989); *In re Peters*, 750 P.2d 643 (Wash. Ct. App. 1988); *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983).

<sup>189</sup> *Kovacs*, 744 F.3d at 52-53.

<sup>190</sup> *Chan*, 792 F.3d at 1157-58.

[W]e acknowledge that our conclusion puts us at odds with the Seventh Circuit's ruling in *Chavarria* . . . .

Ultimately, we read the language in *Chaidez* differently than the Seventh Circuit did in *Chavarria*, and we agree with the Second Circuit's analysis in *Kovacs*. We thus conclude that *Kwan* did not announce a new rule of criminal procedure under *Teague* and that the rule in *Kwan*—affirmative misrepresentations by defense counsel regarding immigration consequences is deficient under *Strickland*—can support *Chan*'s IAC claim.

*Id.* (internal citations omitted)

<sup>191</sup> *Lee*, 137 S. Ct. at 1967 (“In the unusual circumstances of this case, we conclude that *Lee* has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation.”).

difference in sentence between pleading guilty and trial was a few years.<sup>192</sup> For example, it is unlikely the Court would determine that rejecting a plea agreement for two years to pursue a trial, where the defendant faces fifty years, is in fact rational when deportation is inevitable.<sup>193</sup> Alternatively, maybe *Lee* adopted a strict interpretation of *Hill*, which focuses on the defendant's decision to take the plea rather than the outcome.<sup>194</sup>

Although the two approaches seem to come into conflict, the Court explained, when “the error is one that is not alleged to be pertinent to a trial outcome, but is instead alleged to have affected a defendant's understanding of the consequences of his guilty plea,” predicting the outcome of trial is not necessary.<sup>195</sup> In fact, during oral arguments, Justice Kagan seemed unpersuaded by the Government's argument that Lee's inevitable deportation disabled him from showing prejudice by pointing to the *Hill* inquiry.<sup>196</sup> The *Lee* Court likely chose to apply a strict application of *Hill*, but restricted it to situations where the decision to reject a plea in favor of trial would be rational so to

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<sup>192</sup> *Id.* at 1966-67.

The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years.

*Id.*

<sup>193</sup> *Id.* at 1966.

A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea.

*Id.*

<sup>194</sup> *Lee*, 137 S. Ct. at 1966.

The Government asks that we, like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. . . . And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

*Id.* (emphasis added).

<sup>195</sup> *Id.* at 1967 n.3.

<sup>196</sup> Transcript of Oral Argument at 34, *Lee v. United States*, 137 S. Ct. 1958 (2017) (No. 16-327).

avoid the types of claims the dissent anticipated.<sup>197</sup> Therefore, to ascertain whether, and to what extent, non-citizen petitioners can obtain retroactive relief under *Lee*, courts must evaluate the rationality of decisions regarding a defendant's rejection of a plea in lieu of trial.

Wrestling with whether it is rational to throw a "Hail Mary" at trial in lieu of a favorable plea after *Padilla*, the circuit courts fall into two categories. Courts in the first category hold that no defendant can show prejudice when deportation is inevitable and the chances of obtaining any form of relief at trial is impossible; courts in the second category hold the opposite.<sup>198</sup>

### 1. *It Could Be Rational If Relief Can Be Obtained At Trial*

The Fourth Circuit, in *United States v. Akinsade*,<sup>199</sup> held the petitioner's decision to reject the plea would be rational because he could have contested the restitution amount.<sup>200</sup> In *Akinsade*, the petitioner was a lawful permanent resident from Nigeria who lived in the United States since he was seven years old.<sup>201</sup> Twelve years after his arrival in the United States, he was charged with embezzlement.<sup>202</sup> During plea negotiations, petitioner twice asked his attorney if a conviction would result in deportation.<sup>203</sup> Both times, the attorney replied in the negative because "he could only be deported if he had two felony convictions."<sup>204</sup> Relying on his attorney's advice, the petitioner pleaded guilty—receiving a one-month sentence—only to find out the charged offense warranted mandatory deportation.<sup>205</sup>

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<sup>197</sup> *Lee*, 137 S. Ct. at 1974 (Thomas & Alito, JJ., dissenting.) ("Under its rule, so long as a defendant alleges that his counsel omitted or misadvised him on a piece of information during the plea process that he considered of "paramount importance," ante, at 1968, he could allege a plausible claim of ineffective assistance of counsel.").

<sup>198</sup> See *infra* Part IV.B.1-2.

<sup>199</sup> 686 F.3d 248 (4th Cir. 2012).

<sup>200</sup> *Id.* at 256. Ultimately, while the record supported the petitioner's ineffective counsel claim, he succeeded on his prejudice claim because he showed that he could have contested the restitution at trial, but for the attorney's erroneous advice. *Id.*

<sup>201</sup> *Id.* at 250.

<sup>202</sup> *Id.*

<sup>203</sup> *Akinsade*, 686 F.3d at 250.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

During the plea hearing, the judge informed the petitioner he “could” be deported if he was not a citizen.<sup>206</sup>

On these facts, the reviewing district court denied the petitioner’s claim. The Fourth Circuit rejected this argument because the district court’s admonishment was not concise enough because the petitioner was not told deportation was mandatory.<sup>207</sup> Therefore, considering the court agreed that the petitioner could have contested the restitution amount at trial, the attorney’s erroneous advice prejudiced him because going to trial would have been rational.<sup>208</sup>

Like the Fourth Circuit, the Second Circuit, in *Kovacs*, explained prejudice is cognizable if the petitioner could show that he could have obtained an alternative disposition preventing deportation after trial.<sup>209</sup> In *Kovacs*, because the petitioner could have obtained a plea avoiding deportation—which the government likely would have accepted—he demonstrated prejudice.<sup>210</sup> Specifically, the court explained that the petitioner had a statute of limitations defense that could have culminated in alternative plea.<sup>211</sup> Similarly, in *United*

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<sup>206</sup> *Id.* at 254 (“Instead, the district court warned that Akinsade’s plea *could* lead to deportation.” (emphasis in original)).

<sup>207</sup> *Id.* at 254, 265 n.6. In other cases in which the district court’s admonishment was found to have corrected counsel’s ineffective assistance regarding deportation, the courts inquired into whether the defendant understood the *specific* warning pertaining to deportation. *See, e.g., United States v. Hernandez–Monreal*, 404 F. App’x 714, 715; *Gonzalez v. United States*, Nos. 10 Civ. 5463(AKH), 08 Cr. 146(AKH), 2010 WL 3465603, at \*1 (S.D.N.Y. Sept. 3, 2010) (explaining that the district court twice advised the defendant that he faced potential deportation and specifically asked the defendant, given that risk, whether he still wanted to plead guilty); *United States v. Cruz–Veloz*, Crim. No. 07–1023, 2010 WL 2925048, at \*3 (D.N.J. Jul. 20, 2010) (finding the petitioner was not prejudiced by counsel’s failure to advise of deportation consequences because the district court admonished him that he would subject himself to deportation and further asked whether he understood the deportation consequence and still wanted to plead guilty). Here, the district court did not elicit a direct response to the deportation admonishment, but instead asked if Akinsade understood a list of generalized warnings of which deportation was a part. *Akinsade*, 686 F.3d at 254.

<sup>208</sup> *Id.* at 256.

<sup>209</sup> *Kovacs*, 744 F.3d at 52.

We conclude that a defense lawyer’s incorrect advice about the immigration consequences of a plea is prejudicial if it is shown that, but for counsel’s unprofessional errors, there was a reasonable probability that the petitioner could have negotiated a plea that did not impact immigration status or that he would have litigated an available defense.

*Id.*

<sup>210</sup> *Id.*; *see, e.g., Rodriguez v. United States*, 730 F. App’x 39, 44 (2d Cir. 2018) (Petitioner, convicted before *Padilla*, was granted *coram nobis* relief for her ineffective assistance of counsel claim because counsel’s performance precluded from raising a possible defense and the record unambiguously supported this contention.)

<sup>211</sup> *Id.* at 52–53.

*States v. Chan*,<sup>212</sup> the district court held that the petitioner could not obtain relief because she could not show an alternative disposition at trial was possible.<sup>213</sup> Prior to *Lee*, a bare showing of prejudice (i.e., without a contestable issue or chance of conviction for a non-deportable offense) deriving from the misadvice would not have been enough in the Fourth or Second Circuits.

## 2. *It Could Be Rational Regardless Of Relief*

On the other end of the spectrum, in *Hernandez v. United States*,<sup>214</sup> the Eleventh Circuit held the defendant, a Cuban citizen legally living in the United States, was entitled to an evidentiary hearing to determine whether the attorney's erroneous advice regarding deportation, supported by the record, prejudiced him.<sup>215</sup> Although the Eleventh Circuit noted it need not hold an evidentiary hearing "if the allegations are 'patently frivolous' . . . or 'affirmatively contradicted by the record,'"<sup>216</sup> the court still held that an evidentiary hearing was required to determine if the petitioner was prejudiced

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To prevail on that ground, a petitioner must therefore demonstrate a reasonable probability that the prosecution would have accepted, and the court would have approved, a deal that had no adverse effect on the petitioner's immigration status. . . .

. . .

Kovacs has sustained the very considerable burden of establishing prejudice under the principles reviewed above. It is apparent from the transcript of the Rule 11 hearing that Kovacs' single-minded focus in the plea negotiations was the risk of immigration consequences.

*Id.*

<sup>212</sup> No. CR 93-00583-RGK, 2015 WL 11438556, at \*1 (C.D. Cal. Nov. 23, 2015).

<sup>213</sup> *Id.* at \*2.

<sup>214</sup> 778 F.3d 1230 (11th Cir. 2015).

<sup>215</sup> *Id.* at 1233-34.

Hernandez alleged that his counsel advised him that there was a "substantial likel[i]hood that he would not be deported." But "deportation [i]s presumptively mandatory" for convictions related to trafficking in a controlled substance." *see* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of . . . any law . . . relating to a controlled substance . . . is deportable."). The record corroborates Hernandez's allegation because his counsel stated on the record that she "informed him that based on . . . [her] past experience . . . Cuban Defendants . . . generally . . . are not deported back to Cuba."

*Id.* (alteration in original) (internal citations omitted).

<sup>216</sup> *Id.* at 1232 (quoting *Winthrop–Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (quoting *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989)).

because the facts supported an ineffective assistance of counsel claim.<sup>217</sup>

Contrary to *Kovacs* and *Akinsade*, the Eleventh Circuit opinion lacks any indicia that the petitioner in *Hernandez* was unable to offer a strategic reason for pursuing trial, but instead relied exclusively on his ties to the United States and the attorney's misadvice regarding deportation.<sup>218</sup> The Eleventh Circuit held the petitioner's choice to risk more time in prison—he received 120 months—to remain in the United States could be rational.<sup>219</sup> Synthesizing a rule for the pre-*Lee* cases is complicated because, while the circuit courts agreed erroneous advice regarding deportation satisfied the first *Strickland* prong, they disagreed on what needed to be shown to satisfy prejudice.<sup>220</sup> Specifically, they disagreed as to whether an alternative disposition could be reached at trial.<sup>221</sup>

*Lee* clarifies this ambiguity because, unlike the defendant in *Kovacs* and *Akinsade*, *Lee*, like the petitioner in *Hernandez* had no real strategic reason to pursue trial except to avoid deportation.<sup>222</sup> *Lee* had strong ties to the United States, ample evidence of his allegation in the record, and a few years to lose by pursuing trial.<sup>223</sup> Thus, although *Lee* did not expressly address retroactivity, it seems the Court was cognizant of the split concerning what is rational and narrowed its rule to limit its application to cases where vacating the sentence would not appear to give the petitioner deference to, in the words of *Strickland*, the “luck of a lawless decisionmaker.”<sup>224</sup> In the Second, Fourth, and Ninth Circuits, therefore, the existing state of law would permit retroactive *Lee*-relief so long as the petitioner could obtain an alternative disposition while in the Eleventh Circuit, *Lee* will impose a higher bar.

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<sup>217</sup> *Id.* at 1234.

<sup>218</sup> *Id.* at 1233-34.

<sup>219</sup> *Id.* at 1232.

<sup>220</sup> *Akinsade*, 686 F.3d at 250.

<sup>221</sup> *Id.*

<sup>222</sup> *Lee*, 137 S. Ct. at 1969.

<sup>223</sup> *See supra* Part II.C.

<sup>224</sup> *See supra* Part II.C.



## V. APPLYING LEE

The number of cases citing *Lee* increases almost every day. As of February 2018, a majority of the federal Circuit Courts of Appeals cases citing *Lee* do not involve the immigration question.<sup>225</sup> Rather, only two of the ten federal Circuit Court of Appeals cases involved a non-citizen petitioner seeking relief for attorney failures to properly advise them as to immigration consequences of entering a guilty plea.<sup>226</sup> This section will consider how the federal courts interpret *Lee*.<sup>227</sup>

### A. Federal District Courts Applying *Lee* in Immigration Contexts

The district courts, for the most part, have strictly applied *Lee*, but some petitioners have successfully overturned their convictions through *Lee*.<sup>228</sup> The means by which the court granted relief, however,

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<sup>225</sup> Cases not involving immigration are not discussed in this Note, but suffice to say petitioners have relied on *Lee*'s principle that erroneous advice by counsel prior to entering a plea is a ground for voiding the plea because pursuing a trial would be rational. *Compare Pola*, 703 F. App'x at 414 (deportation), *Dodd v. United States*, 709 F. App'x 593 (11th Cir. 2017) (same), *with Young v. Spinner*, 873 F.3d 282, 283 (5th Cir. 2017) (mistaken belief regarding prospective sentence); *Fox v. United States*, No. 17-5352, 2017 WL 4404676, at \*1 (6th Cir. July 27, 2017) (same); *Thompson v. United States*, 872 F.3d 560, 563 (8th Cir. 2017) (same); *Spriggs v. United States*, No. 15-10659, 2017 WL 3411796, at \*1 (11th Cir. Aug. 9, 2017) (attorney failed to pursue motion to suppress); *Vaughn*, 2017 WL 3484974, at \*1 (attorney failed to communicate plea offer and object to guideline enhancement); *United States v. Buchanan*, 698 F. App'x 149, 150 (4th Cir. 2017) (holding that the district court erred in failing to allow withdrawal of plea); *Schneider v. United States*, 864 F.3d 518, 519 (7th Cir. 2017) (“[T]rial lawyer was ineffective for advising him that he met the statutory elements of the offense of sexual abuse of a minor and for not explaining that his prior conduct could be considered during sentencing.”), *cert. denied*, 138 S. Ct. 437 (2017); *and Stillwell v. United States*, 709 F. App'x 585 (11th Cir. 2017) (“[C]ounsel rendered ineffective assistance by advising [petitioner] that the conduct related to two dismissed counts would not be considered relevant conduct for sentencing and that his appeal waiver would not prevent him from appealing the district court’s guidelines calculations.”).

<sup>226</sup> *See infra* Part V.B.

<sup>227</sup> State court decisions are omitted because a state denial of post-conviction relief can be appealed to federal district court, which will analyze the claim under established federal law. *See* 28 U.S.C. § 2254 (d)(1) (2016) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .”).

<sup>228</sup> *See, e.g., United States v. Tzen*, No. 16-0734-DRH, 2017 WL 4233077, at \*1 (S.D. Ill. Sept. 22, 2017); *United States v. Hernandez*, 282 F. Supp. 3d 144 (S.D.N.Y. 2018); *United*

have varied.<sup>229</sup> For instance, in *Hernandez*, the petitioner only proffered a self-serving affidavit in support of her ineffective assistance claim.<sup>230</sup> Even though the affidavit was the sole evidence, the district court inferred its validity from an immigration court's finding that her attorney's performance was ineffective.<sup>231</sup>

Conversely, in *United States v. Garcia*,<sup>232</sup> the district court held that the petitioner's declaration alone was insufficient to support a claim that his attorney misadvised him regarding whether a guilty plea would result in automatic deportation.<sup>233</sup> The court stated, because Garcia's conviction became final prior to *Padilla*, "[H]e must show that counsel affirmatively misrepresented immigration consequences to him."<sup>234</sup>

### I. *Tzen v. United States*

In *Tzen v. United States*,<sup>235</sup> the petitioner, a British citizen living in the United States, had her conviction overturned because her attorney failed to advise her of the deportation consequences of pleading guilty.<sup>236</sup> Although petitioner also raised a claim that her attorney misadvised her, the Southern District of Illinois emphasized that its holding was based on the failure to advise claim.<sup>237</sup> Despite this admonition, however, the court focused on petitioner's ability to show, through her actions and the record, that deportation was the determinative issue in her decision to plead guilty.<sup>238</sup>

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States v. Arce-Flores, No. CR15-0386JLR, 2017 WL 4586326, at \*1 (W.D. Wash. Oct. 16, 2017).

<sup>229</sup> See *infra* Part V.A.1-2.

<sup>230</sup> *Hernandez*, 282 F. Supp. 3d at 150.

<sup>231</sup> *Id.* at 151, 154.

<sup>232</sup> No. CR 99-0699-RSWL-3, 2017 WL 3669542, \*1 (C.D. Cal. Aug. 24, 2017).

<sup>233</sup> *Id.* at \*4 ("Permitting such a declaration to carry the day for an ineffective-assistance-of-counsel analysis would allow virtually any defendant to retroactively claim that his attorney told him he would not be deported.")

<sup>234</sup> *Id.* at \*3 (citing *Chan*, 792 F.3d at 1154).

<sup>235</sup> No. 16-0734-DRH, 2017 WL 4233077, at \*1 (S.D. Ill. Sept. 22, 2017).

<sup>236</sup> *Id.* at \*4.

<sup>237</sup> *Id.* at \*1 ("[T]he Court focuses its discussion entirely to Tzen's argument that counsel was ineffective in that he failed to inform her that if she pled guilty to the charges in the Indictment that she would be automatically deported.")

<sup>238</sup> *Id.* at \*4 ("It is clear to the Court that had Tzen received both clear and correct advice regarding her immigration status and clear and correct advice regarding the application of the aforementioned pattern instruction insofar as her the suspicion or indifference of her wrongdoing, she would not have pleaded guilty.")

The petitioner hired an immigration attorney who told her she could avoid deportation by showing she was not a national security threat.<sup>239</sup> Moreover, her trial lawyer e-mailed the Assistant United States Attorney (“AUSA”) saying, “Tzen is desperate not to be deported.”<sup>240</sup> The court also emphasized her plea agreement only states she “may” be deported and during the plea hearing she was told there “was a real possibility of being deported.”<sup>241</sup> Lastly, her attorney failed to challenge a jury instruction, which foreclosed a valid defense.<sup>242</sup> The combination of the “confusing, conflicting, and wrong” advice given by her attorneys and the courts’ failure to clarify the confusion was enough for petitioner to successfully argue that her Sixth Amendment rights were violated.<sup>243</sup>

## 2. *United States v. Arce-Flores*

In *United States v. Arce-Flores*,<sup>244</sup> the petitioner challenged her 2016 time-served conviction arguing her attorney misadvised her as to the implications of a guilty plea on her chances of avoiding removal.<sup>245</sup> She rejected an otherwise favorable plea to ensure that she had a chance at contesting her removal for being in the country illegally.<sup>246</sup> According to the record, her attorney explained, “as long as Ms. Arce-Flores pleaded guilty to a crime for which the maximum sentence was less than 365 days, she would be eligible to contest her removal.”<sup>247</sup> On that presumption, the petitioner instructed her attorney to make a counter-offer where she would plead guilty to a lesser offense, which carried a maximum sentence of six months.<sup>248</sup> The Government agreed and petitioner received a sentence of time served.<sup>249</sup> She was then

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<sup>239</sup> *Id.* at \*3 (“[Immigration attorney] stated: If not, the next best thing would be to have the Judge and the prosecutor put on the record, and judgment and sentence, that they do not feel Gemma is a threat to national security, border security, or public safety and they do not recommend that she be deported back to England.” (internal quotations omitted)).

<sup>240</sup> *Tzen*, 2017 WL 4233077, at \*3.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at \*4.

<sup>243</sup> *Id.* at \*3.

<sup>244</sup> No. CR15-0386JLR, 2017 WL 4586326, at \*1 (W.D. Wash. Oct. 16, 2017).

<sup>245</sup> *Id.* at \*3.

<sup>246</sup> *Id.* at \*2.

<sup>247</sup> *Id.* at \*1.

<sup>248</sup> *Id.*

<sup>249</sup> *Arce-Flores*, 2017 WL 4586326, at \*2.

remanded to ICE custody for removal proceedings because “she had served at least 180 days for a criminal offense.”<sup>250</sup>

In light of her attorney’s error, the petitioner asked the district court to re-sentence her to 179 days to potentially avoid removal by showing she was of good moral character.<sup>251</sup> The petitioner also pursued a writ of *coram nobis* (withdrawal of a guilty plea).<sup>252</sup> The district court denied the petitioner’s request stating “the most lenient sentence it could impose . . . was six (6) months.”<sup>253</sup> However, the Ninth Circuit reversed and remanded the issue to the district court to consider the *coram nobis* writ.<sup>254</sup>

Prior to the remand, the district court explained, relying on *Lee*, that in the immigration context, *Strickland*’s first prong is satisfied when counsel fails to advise, or misadvises, the petitioner of immigration consequences stemming from a guilty plea.<sup>255</sup> According to the court, the petitioner satisfied her burden.<sup>256</sup> Regarding *Strickland*’s prejudice prong, however, the petitioner must show rejecting the plea would be rational under the circumstances.<sup>257</sup> Specifically, for non-citizens illegally in the United States, the court explained the petitioner can satisfy its burden by (1) citing cases indicating the government allowed a similarly charged defendant to plead to a non-removable offense, (2) showing the plea was motivated

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<sup>250</sup> *Id.* at \*2.

<sup>251</sup> *Id.* at \*3.

<sup>252</sup> *Id.* at \*4.

<sup>253</sup> *Id.* at \*3.

<sup>254</sup> *United States v. Arce-Flores*, No. CR15-0386JLR, 2018 WL 401524, at \*1 (W.D. Wash. Jan. 12, 2018) (“The court ordered the supplemental briefing after the Ninth Circuit Court of Appeals remanded Ms. Arce-Flores’s appeal ‘for the limited purpose of enabling the [ ] court to consider [her] motion for a writ of error *coram nobis*.’” (alteration in original) (internal citations omitted)).

<sup>255</sup> *Id.* at \*8.

<sup>256</sup> *Arce-Flores*, 2017 WL 4586326, at \*9.

During plea negotiations, Mr. Engelhard affirmatively advised Ms. Arce-Flores that as long as she pleaded guilty to an offense with a maximum sentence below 365 days, she would still be able to contest her removal from the United States. . . . Thus, Mr. Engelhard misadvised Ms. Arce-Flores about the immigration consequences, despite clear law on this issue. This misadvice also undermined the plea agreement and plea colloquy’s general warnings about the possibility of deportation, given that Ms. Arce-Flores believed the crime to which she was pleading guilty would nevertheless allow her to contest removal.

*Id.*

<sup>257</sup> *Id.* at \*10.

by a desire to avoid deportation, and (3) “in the absence of a more favorable plea agreement, he or she would have gone to trial.”<sup>258</sup>

Following the remand, the court explained, unlike other cases involving a non-citizen petitioner illegally in the United States, the instant petitioner was trying to cancel her removal by satisfying the “good moral character” requirement prescribed in 8 U.S.C. § 1229b(b)(1).<sup>259</sup> In light of the remand, the court affirmed its initial finding that the petitioner satisfied *Strickland*.<sup>260</sup> Although the court did not reiterate the factors it concluded were necessary for a non-citizen illegally in the United States to satisfy *Strickland*, the application reflected the prescribed analysis, and the petitioner’s sentence was not only vacated but also reduced from 180 to 179 days.<sup>261</sup>

With the exception of *Garcia*, district courts seem to construe an attorney’s inconclusive opinion regarding deportation and affirmative misrepresentation as one and the same.<sup>262</sup> Relying on *Padilla*, these courts explained, “But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”<sup>263</sup> In other words, failing to give accurate advice has been interpreted as a complete failure to give any advice.<sup>264</sup>

Once the first prong is met, the district courts turn to *Lee* to determine whether the petitioner was prejudiced by the erroneous or

<sup>258</sup> *Id.* (“A petitioner can demonstrate this prejudice by (1) identifying cases that indicate the government’s willingness to permit defendants charged with the same or substantially similar crime to plead guilty to a nonremovable offense, (2) showing that he or she purposefully agreed to the charge to avoid adverse immigration consequences, or (3) in the absence of a more favorable plea agreement, he or she would have gone to trial.” (citing *Vega*, 797 F.3d at 789)).

<sup>259</sup> *Id.*; see 8 U.S.C. § 1229b(b)(1) (2016) (“The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien . . . has been a person of good moral character during such period.”).

<sup>260</sup> *Arce-Flores*, 2018 WL 401524, at \*3 (“Counsel’s failure to mention the importance of a one-day sentence reduction depriv[ed Ms. Arce-Flores] of an opportunity to have a sentencing court exercise its discretion in her favor, which would have allowed Ms. Arce-Flores to apply for the good moral character waiver. In short, counsel’s deficient performance prejudiced Ms. Arce-Flores.” (alteration in original) (internal quotations omitted)).

<sup>261</sup> *Id.* at \*3, \*5 (“Where ‘a nominally shorter sentence’ would enable a petitioner to avoid deportation, there is a reasonable probability that the court would have imposed the shorter sentence.” (quoting *Kwan*, 407 F.3d at 1017)).

<sup>262</sup> *Tzen*, 2017 WL 4233077 at \*4.

<sup>263</sup> *Padilla*, 559 U.S. at 369.

<sup>264</sup> See *United States v. Hernandez*, 283 F. Supp. 3d 144, 147, 150 (S.D.N.Y. 2018).

inconclusive advice.<sup>265</sup> Although the means by which petitioners raise this claim vary between writs of *coram nobis* and § 2255 motions, the district courts have been consistent in granting relief under *Strickland* so long as the claim is supported by a sufficient finding that the determinative issue in pleading guilty is avoiding deportation.<sup>266</sup> As such, no acute test has been prescribed by the district courts.<sup>267</sup>

## B. Federal Circuit Courts of Appeals Applying *Lee* in Immigration Contexts

Unlike the district courts, petitioners have not obtained relief in the federal circuit courts of appeals.<sup>268</sup> However, the circuit courts have seemingly prescribed a test to determine whether a petitioner can obtain relief under *Lee*.<sup>269</sup> While they have established concise rules; the Sixth and Eleventh Circuits have carved out exceptions to prevent relief.<sup>270</sup>

### 1. *United States v. Pola*

In *United States v. Pola*,<sup>271</sup> the petitioner, a Canadian citizen legally living in the United States with his American wife and two American children, had a lengthy post-conviction history.<sup>272</sup> The petitioner was convicted in 2010, one month before *Padilla*, for “knowingly and intentionally possessing oxycodone with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C).”<sup>273</sup> One year after the conviction, petitioner filed a § 2255 motion alleging ineffective counsel on grounds unrelated to the immigration consequences resulting from an error made by his attorney.<sup>274</sup> Six

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<sup>265</sup> See *supra* note 231.

<sup>266</sup> *Garcia*, 2017 WL 3669542 at \*4 (“[A]llegedly, Defendant inquired whether he would be deported and [his attorney] told Defendant he would not be deported. By contrast, [his attorney] states in his declaration that generally, he would note all significant discussions with his client, but there is no apparent notation of this conversation.” (internal citations omitted)).

<sup>267</sup> See *supra* note 229 and accompanying text.

<sup>268</sup> See *Tzen*, 2017 WL 4233077 at \*1; *Hernandez*, 282 F. Supp. 3d at 144; *Arce-Flores*, 2017 WL 4586326, at \*1.

<sup>269</sup> See *infra* Part VI.

<sup>270</sup> See *infra* Part VI.

<sup>271</sup> *Pola*, 703 F. App’x at 414.

<sup>272</sup> *Id.* at 415.

<sup>273</sup> *Id.* at 416.

<sup>274</sup> *Id.*

years later, however, petitioner moved to have his conviction reversed arguing that his attorney both failed to advise and misadvised him of deportation consequences.<sup>275</sup>

In interpreting *Lee*, the Sixth Circuit concluded relief was granted to him, Lee, because (1) counsel erroneously misadvised Lee regarding deportation, (2) deportation was the determinative issue in pleading guilty, and (3) the record supported the allegation with testimony by both Lee and his attorney.<sup>276</sup> Even if the petitioner in *Pola*, could show that his attorney misadvised him, the Sixth Circuit maintained he could not show prejudice because the AUSA “indirectly” confirmed petitioner’s deportability during the plea, petitioner did not object, and petitioner’s passport had been surrendered to ICE prior to entering the guilty plea.<sup>277</sup> ICE agents, moreover, were in the court at sentencing.<sup>278</sup> Therefore, the Sixth Circuit explained, petitioner had enough notice from the AUSA and presence of ICE agents to overcome any prejudice from his attorney’s erroneous advice.<sup>279</sup>

Petitioner’s counsel raised no concerns of deportation during either the plea or sentencing hearings.<sup>280</sup> The Sixth Circuit ultimately held that the petitioner could not carry his burden because “the record [was] devoid of evidence supporting [petitioner’s] claim that he was denied effective assistance of counsel based on inadequate advisement of immigration consequences.”<sup>281</sup> The Sixth Circuit, therefore, was

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<sup>275</sup> *Id.* at 418, 420. (“He has not shown how more *accurate* advice by [his attorney] about the likelihood of his release from the courtroom after sentencing (which did not in fact have any impact on his immigration status) would have altered his decision to waive his rights to trial and enter an *Alford* plea.” (emphasis added)).

<sup>276</sup> *Pola*, 703 F. App’x at 421 (“The Lee Court went on to grant relief for three reasons: it was undisputed that Lee’s counsel had erroneously advised him that he would not be deported; deportation was clearly the determinative issue in Lee’s decision to plead guilty; and both Lee and his attorney testified that Lee would have gone to trial if he had known about the deportation consequences.”).

<sup>277</sup> *Id.* at 418-19.

<sup>278</sup> *Id.* at 420-21.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 419 (“The issue was also apparent, albeit not well developed, at *Pola*’s sentencing hearing. Yet, *again*, *Pola* did not object to the prospect of deportation at sentencing *either*.” (emphasis added)).

<sup>281</sup> *Pola*, 703 F. App’x at 421 (“In sum, the record is devoid of evidence supporting *Pola*’s claim that he was denied effective assistance of counsel based on inadequate advisement of immigration consequences.”).

unwilling to, as it explained, grant relief based on *post hoc* assertions.<sup>282</sup>

## 2. *Dodd v. United States*

In *Dodd v. United States*,<sup>283</sup> petitioner, a British citizen legally living in the United States, sought relief arguing her counsel failed to inform, and misinformed her, as to possible deportation.<sup>284</sup> The crux of petitioner's argument is that she would have rejected the, now deemed, unfavorable plea and gone to trial if she knew, with certainty, the immigration consequences of doing so.<sup>285</sup>

The Eleventh Circuit, like the Sixth Circuit, turned to *Lee* noting Lee obtained relief because "deportation was the determinative issue, Lee had strong connections to the United States and no other country, and the consequences for proceeding to trial were not markedly harsher than pleading."<sup>286</sup> According to the Eleventh Circuit, the petitioner in *Dodd* could not meet the criteria in *Lee*.<sup>287</sup> Specifically, the record proved the determinative issue for pleading guilty was the following: fear of "facing her daughter at trial," evidence presented at her son's trial, counsel informing her she could be deported, lack of objections or questions posed during the plea or sentencing hearing regarding deportation, and the petitioner "repeatedly [lying] during the proceedings."<sup>288</sup> Moreover, as the Eleventh Circuit explained, petitioner inquired about transferring and serving her sentence in England, which "weigh[ed] against a finding that she was willing to risk a larger sentence to secure the possibility of remaining in the United States."<sup>289</sup>

Based on *Pola* and *Dodd*, it seems the two circuit courts to interpret *Lee* in the deportation context understand the *Lee* majority

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<sup>282</sup> *Id.* at 424 ("Again, these are precisely they kinds of unsupported '*post hoc assertions*' and mere 'expressed preferences' we are adjured to ignore in favor of 'contemporaneous evidence.'" *Lee*, at 1967. In the end, *Pola* has failed to make his case based on evidence.").

<sup>283</sup> *Dodd*, 709 Fed. Appx. at 593.

<sup>284</sup> *Id.* at 594.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 595.

<sup>287</sup> *Id.* In other words, Lee's claim was not some *post hoc* assertion, but rather was "backed by substantial and uncontroverted evidence" that he would have rejected the plea in favor of trial if he knew deportation was inevitable. *Dodd*, 709 Fed. Appx. at 595.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 596.



intended that *Lee* be strictly applied.<sup>290</sup> What is interesting, however, is how these two courts apply factors such as continuously lying on the record and other factors that show petitioner was aware of the issue of deportation to justify denying the ineffective assistance of counsel claims.<sup>291</sup> Put simply, circuit courts, like the Supreme Court, likely will grant relief only if the circumstances are truly as unusual as *Lee*'s and will ensure the record fully supports the purported circumstances.<sup>292</sup>

## VI. THE UNUSUAL CIRCUMSTANCE TEST

The Court in *Lee* predicated its holding, according to the dissent, on a limited interpretation of *Hill*.<sup>293</sup> Its narrow rule, however, tightens the application because *Hill*'s holding permitted relief by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>294</sup> *Lee*'s unusual circumstances requirement is a variation of *Hill* because it likely denies relief if the petitioner wants to void an otherwise favorable plea to pursue an almost certain, far lengthier, conviction at trial.<sup>295</sup> *Lee*'s holding, moreover, sets the bar for what is rational under *Padilla*.<sup>296</sup> *Lee* does so in holding that although there

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<sup>290</sup> See *supra* note 274.

<sup>291</sup> See *Pola*, 703 Fed. Appx. at 418-20 (explaining that the AUSA indirectly informed a petitioner of deportation to show that the petitioner knew about deportation because of (1) the presence of ICE agents in a courtroom to show petitioner knew about deportation, (2) the seizure of a petitioner's passport to show petitioner knew about deportation, and (3) the lack of objections during plea or sentencing hearings to show that the petitioner was not concerned with deportation). See also *Dodd*, 709 Fed. Appx. at 595-96 (discussing that inquiries into prison transfers to show deportation was not the determinative issue in pleading guilty).

<sup>292</sup> *Id.*

<sup>293</sup> *Lee*, 137 S. Ct. at 1972 ("In reaching this conclusion, the Court relies almost exclusively on the single line from *Hill* that 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." (internal quotations omitted)).

<sup>294</sup> *Id.* at 1964 (quoting *Hill*, 474 U.S. at 59).

<sup>295</sup> *Lee*, 137 S. Ct. at 1966-67 ("For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. . . . But where we are instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking.").

<sup>296</sup> *Id.* at 1968-69.

We cannot agree that it would be irrational for a defendant in *Lee*'s position to reject the plea offer in favor of trial. But for his attorney's incompetence, *Lee* would have known that accepting the plea agreement

could be a reasonable probability the petitioner would have not pled guilty and gone to trial, the decision to do so must also be satisfactorily rational.<sup>297</sup> As far as the circuit courts are concerned, in relation to those petitioning the courts, Lee's decision would be rational only under Lee's unusual circumstances.<sup>298</sup> Therefore, contrary to the dissent's conclusion that *Lee* simplified *Strickland*'s prejudice inquiry, the majority's holding actually made it harder to obtain relief because the petitioner must satisfy the unusual circumstances requirement.<sup>299</sup>

In *Pola*, the Sixth Circuit set out the *Lee* test, but in doing so, it omitted the unusual circumstances requirement.<sup>300</sup> Therefore, the proper test for relief under *Lee*, regardless of whether the conviction became final prior to *Padilla*, requires the petitioner show (1) counsel erroneously misadvised petitioner regarding deportation, (2) deportation was the determinative issue in pleading guilty, (3) the record unambiguously supports the contention that deportation was the determinative factor, (4) the petitioner has strong ties to the United States compared to the home country, and (5) the petitioner's unusual circumstances result in the difference between pleading guilty and the maximum sentence at trial not being grossly disproportionate or an alternative disposition could be obtained at trial. However, *Pola* and *Dodd* illustrate how courts can carve out exceptions, which supply an inference that the claim is merely the *post hoc* assertion *Lee* sought to avoid.<sup>301</sup> Reviewing examples of courts carving out exceptions to each element will illustrate this.

First, a number of courts before and after *Lee* held a curative strike could overcome prejudice resulting from an attorney's misadvice so long as the strike is affirmative rather than

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would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

*Id.* (emphasis in original) (internal citations omitted). See also *Pola*, 703 Fed. Appx. at 423.

<sup>297</sup> *Lee*, 137 S. Ct. at 1964 (quoting *Hill*, 474 U.S. at 59).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Pola*, 703 F. App'x at 424.

<sup>301</sup> *Id.*

hypothetical.<sup>302</sup> In fact, *Lee* itself mentions this in a footnote.<sup>303</sup> Moreover, in *Pola*, the court explained the presence of ICE agents in the courtroom and seizure of petitioner's passport put him on notice that he was subject to deportation.<sup>304</sup>

Second and third, in *Dodd*, the petitioner's prior statements that she pleaded guilty fearing her daughter would testify against her at trial disproved the contention that deportation was the determinative issue.<sup>305</sup> Fourth, again in *Dodd*, the petitioner alleged she had strong ties to the United States, but the court inferred from petitioner's raising the issue of a possible prisoner transfer to her country of origin that her ties there were stronger.<sup>306</sup> Thus, a reviewing court could consider other factors in determining whether the petitioner satisfies the unusual circumstance test, which further complicates matters for petitioners.<sup>307</sup>

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<sup>302</sup> *Lee*, 137 S. Ct. at 1975 n. 4.

Several courts have noted that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice. *See, e.g.*, *United States v. Newman*, 805 F.3d 1143, 1147 (D.C. Cir. 2015); *Kayode*, 777 F.3d at 728–729; *Akinsade*, 686 F.3d at 253; *Boyd v. Yukins*, 99 F. App'x 699, 705 (6th Cir. 2004). The present case involves a claim of ineffectiveness of counsel extending to advice specifically undermining the judge's warnings themselves, which the defendant contemporaneously stated on the record he did not understand. There has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of Lee's counsel.

*Id.*

<sup>303</sup> *Id.*; *Tzen*, 2017 WL 4233077, at \*3.

<sup>304</sup> *Pola*, 703 Fed. App'x at 420-21.

<sup>305</sup> *See supra* note 289 and accompanying text.

<sup>306</sup> *See supra* note 296.

The primary objective of the international prisoner transfer program is to facilitate the rehabilitation of the prisoner so that he may be a productive member of society in his home country upon release from incarceration. The prisoner transfer program is premised on the universal understanding that a prisoner has the best chance of being successfully rehabilitated and reintegrated into a society where a support system exists to assist the prisoner's adjustment to life after incarceration.

*Guidelines for the Evaluation of Transfer Requests Submitted by Foreign Nationals*, U.S. DEP'T JUST., <https://www.justice.gov/criminal-oeo/guidelines-evaluation-transfer-requests-submitted-foreign-nationals> (last updated Aug. 17, 2016) (emphasis added).

<sup>307</sup> *See supra* note 298.

**VII. CONCLUSION**

At first glance, *Lee v. United States* seemed to hold that a petitioner's decision to reject a favorable plea to pursue his constitutional right to trial is rational even when deportation remains inevitable.<sup>308</sup> This assumption, however, is false. In denying Lee relief, the Sixth Circuit remarked, although it sympathized with Lee's plight, its job "is neither to prosecute nor to pardon; it is simply to say 'what the law is.'"<sup>309</sup> *Lee* clarified what the law is albeit limiting its rule to Lee's unusual circumstances. In conclusion, although the Court in *Lee* confirmed that misadvice claims are retroactive under *Padilla*, a limited class of petitioners will be able to prove all five elements required to satisfy *Strickland*'s prejudice prong.

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<sup>308</sup> Zachary Segal & Cory Morris, *Jae Lee v. United States: Immigration Consequences Trump Prejudice Prong of Ineffective Assistance of Counsel Analysis Under Strickland*, SUFFOLK LAW (Sept. 2017), at 18, 23, <https://www.scba.org/eva/displayFile.php?id=3227>.

<sup>309</sup> See *supra* note 71.