No. 08-651

In the Supreme Court of the United States

JOSE PADILLA, PETITIONER

v.

COMMONWEALTH OF KENTUCKY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether defense counsel, in order to provide the effective assistance guaranteed by the Sixth Amendment, has a duty to investigate and advise a non-citizen defendant whether the offense to which the defendant is pleading guilty will result in removal.

2. Whether petitioner's counsel provided ineffective assistance of counsel by affirmatively misadvising petitioner concerning the likelihood of removal upon the entry of his guilty plea.

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INTEREST OF THE UNITED STATES

This case presents questions concerning the scope of the Sixth Amendment right to effective assistance of counsel in connection with a guilty plea—specifically, the duties of counsel when an alien defendant enters a guilty plea that may have consequences for her immigration status. Because the majority of federal criminal prosecutions are resolved by a plea of guilty, the resolution of the questions presented will have substantial implications for direct and collateral review of federal convictions.

STATEMENT

1. Petitioner, an alien, is a national of Honduras who has lived in the United States for about 40 years. Pet.

App. 19, 41-42. In 2001, law enforcement officers at a Kentucky weigh station stopped petitioner for failing to have a weight and distance number on his truck. Findings of Fact, Conclusions of Law and Order 1 (Hardin Cir. Ct. May 28, 2002) (Findings). Petitioner consented to a search of the truck, which disclosed approximately 1000 pounds of marijuana. *Id.* at 2; Pet. 2; Pet. App. 41. Petitioner was subsequently indicted by a grand jury in Hardin County, Kentucky, on charges of trafficking in more than five pounds of marijuana, possessing marijuana, possessing drug paraphernalia, and operating a truck without a weight and distance tax number. *Id.* at 20, 30. Petitioner initially pleaded not guilty, and he was released on bond. J.A. 8-9.

After his arrest, on September 20, 2001, the Immigration and Naturalization Service (INS) lodged an immigration detainer against petitioner, stating that "[i]nvestigation has been initiated to determine whether [petitioner] is subject to removal from the United States." J.A. 44-46. Petitioner's bond was revoked as a result. J.A. 43.[1]

Petitioner was provided defense counsel, who conducted discovery, J.A. 9, and moved to suppress the evidence of the marijuana and petitioner's admission to the arresting officers that he had been paid to transport the

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[1] In 1999, the INS had issued a Notice to Appear requiring petitioner to respond to allegations that he was removable because he had been convicted of an aggravated felony in 1997—namely, a California offense of receiving stolen property, see 8 U.S.C. 1101(a)(43)(G). File No. A14 575 460, Notice to Appear (Dec. 13, 1999). We are informed by the Department of Homeland Security that petitioner was not served with the order until 2004 and that he is currently seeking discretionary relief from the order under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994). See 8 C.F.R. 1212.3(h)(2).

marijuana. J.A. 12; see Findings 1. The trial court denied the motion, finding that petitioner had validly consented to the search of his truck. J.A. 14.

Shortly thereafter, petitioner pleaded guilty to the three drug-related charges, and the remaining charge was dismissed. Pet. App. 20. The charge of trafficking in more than five pounds of marijuana, the most serious charge, was a Class C felony, punishable by a term of imprisonment of five to ten years. Ky. Rev. Stat. Ann. §§ 218A.1421(4)(a), 532.060(2)(c). Pursuant to the plea agreement, the Commonwealth agreed to recommend a sentence of five years of imprisonment followed by five years of probation. J.A. 54. On October 4, 2002, the trial court imposed the agreed sentence. J.A. 61-68.

2. In August 2004, petitioner filed a pro se collateral attack on his conviction in the Hardin County Circuit Court, claiming that his counsel had provided ineffective assistance, in violation of the Sixth Amendment, by failing to properly investigate and advise him of the potential immigration consequences of his guilty plea. J.A. 71-74. Petitioner alleged that his counsel had inaccurately advised him that he "did not have to worry about [his] immigration status since he had been in the country so long," J.A. 72, and that he would not have pleaded guilty had he been correctly advised about the removal consequences of his plea. J.A. 73.

The Hardin County Circuit Court denied the motion without an evidentiary hearing, observing that "[a] valid guilty plea does not require that a defendant be informed of every consequence" of conviction. Pet. App. 43. The court further reasoned that petitioner was aware of the possibility of removal and had discussed it with counsel, *ibid.*, and that petitioner could not claim ineffective assistance based on "a statement of opinion

[by counsel] on whether the Immigration and Naturalization Service would choose to deport [him] given his length of time in the United States." *Id.* at 44.

3. On appeal, the Kentucky Court of Appeals vacated and remanded for an evidentiary hearing. Pet. App. 29-40. The court observed that *Commonweath* v. *Fuartado*, 170 S.W.3d 384 (Ky. 2005), had "held that the validity of a defendant's guilty plea is not compromised by trial counsel's failure to render advice relating to the collateral consequences of the plea." Pet. App. 34. But the court distinguished *Fuartado* on the ground that petitioner claimed that his counsel had affirmatively provided erroneous information concerning the risk of removal. *Ibid.* Misadvice, the court concluded, could constitute ineffective assistance. *Id.* at 34-36.

Judge Henry dissented, reasoning that "the consideration of collateral consequences is outside the scope of representation required under the Sixth Amendment," Pet. App. 37, and that petitioner would be unable to demonstrate prejudice from counsel's misdavice, *id.* at 39.

4. The Commonwealth sought review in the Supreme Court of Kentucky, which reversed the court of appeals and reinstated the judgment of the trial court denying petitioner's motion for collateral relief. Pet. App. 19-24. Relying on *Fuartado*, the court concluded that "[a]s collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [petitioner] of such collateral issue or his act of advising [petitioner] incorrectly provides no basis for relief." *Id.* at 23. The court thus rejected petitioner's argument that misadvice about removal consequences is distinguishable from failure to advise. "In neither instance is the matter re-

quired to be addressed by counsel," the court stated, "and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland* v. *Washington* [466 U.S. 668 (1984)]." *Ibid.*

Justices Cunningham and Schroder dissented. Pet. App. 25-27. The dissenting Justices agreed with the court that a defense lawyer has "no affirmative duty to inform his or her client" about potential immigration consequences of a plea, *id.* at 25, but believed that "[c]ounsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all." *Id.* at 26. The dissenting Justices concluded that counsel's action in affirmatively providing mis-information could provide a basis for a claim of ineffective assistance if that misadvice influenced the decision to plead. *Ibid*.

SUMMARY OF ARGUMENT

An attorney's Sixth Amendment duty to render effective assistance does not require her to provide advice about the possible immigration consequences of a guilty plea. An attorney who provides such advice, however, has a duty to avoid doing so incompetently. In this case, the Supreme Court of Kentucky erred in holding that misadvice about immigration consequences can never support an ineffectiveness claim. But such a claim requires both deficient performance *and* prejudice. Because petitioner cannot establish that a rational defendant in his shoes would have gone to trial if properly advised, the judgment should be affirmed.

I. The Sixth Amendment requires counsel, in assisting a defendant to decide whether to plead guilty, to advise the defendant about relevant strategic consider-

ations within the criminal case. See *Brady* v. *United States*, 397 U.S. 742, 748 n.6 (1970). Counsel is not obligated, however, to advise a defendant about potential consequences of a conviction, including removal, that are beyond the scope of the criminal prosecution. That limitation arises from the purpose of the guarantee of effective assistance of counsel, which is to safeguard the reliability of the "adversarial testing process" by ensuring that the defendant has a fair opportunity to answer the criminal charges against her. *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). That purpose demarcates the scope and content of counsel's duties as advocating for, and advising on, the defendant's interests within the criminal case—that is, the defendant's interests, as against her prosecutorial adversary, in minimizing the jeopardy that she faces in the criminal proceeding. Counsel therefore does not perform deficiently in failing to advise her client about potential consequences of conviction, including immigration consequences, that are beyond the scope of the criminal case.

II. If counsel undertakes to advise the defendant about immigration or other consequences that are beyond the scope of the criminal proceeding, however, counsel has a duty to ensure that her advice is reasonably competent. That duty arises from counsel's responsibility to respect that the decision whether to plead guilty, or instead to go to trial, belongs to the defendant personally. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004). In assisting the defendant with that choice, counsel must ensure that she does not actively interfere with or undermine the defendant's independent ability to decide. When counsel offers professionally incompetent advice about a consequence of conviction that she reasonably should know may be relevant to the defendant's deci-

sion, counsel risks inducing the defendant to rely on that misadvice in deciding whether to plead. Such misadvice—regardless whether it concerns a matter within or beyond the scope of the criminal proceeding—may thereby impermissibly skew the defendant's decision-making process. Accordingly, legal advice that counsel provides to a defendant about consequences outside the scope of the criminal proceeding is subject to *Strickland*'s requirement of reasonable competence, and deficient performance in providing that advice can support an ineffective-assistance claim.

III. Although the Supreme Court of Kentucky erred in holding that misadvice about immigration consequences can never constitute deficient performance, this Court should nonetheless affirm the judgment below, on the ground that petitioner cannot establish that he suffered prejudice as a result of counsel's errors. *Hill* v. *Lockhart*, 474 U.S. 52, 58-59 (1985). To demonstrate prejudice in connection with a guilty plea, the defendant must show a reasonable probability that a rational defendant in her position would not have pleaded had she received competent advice. *Ibid.*; see *Roe* v. *Flores-Ortega*, 528 U.S. 470, 484-486 (2000). That inquiry is important for claims based on misadvice about removal and similar consequences, because it distinguishes defendants who merely regret their pleas in hindsight, when faced with later adverse consequences, from defendants whose attorneys' deficient advice skewed their plea decision at the time. Here, the record of petitioner's criminal proceeding establishes that a rational defendant would have pleaded guilty even after receiving correct information about potential removal consequences. Because petitioner cannot establish prejudice, the judgment should be affirmed.

ARGUMENT

A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MAY BE BASED ON INCOMPETENT ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF A PLEA, BUT THE DEFENDANT MUST ALSO ESTABLISH PREJUDICE

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused" has the right to "the [a]ssistance of [c]ounsel for his defence." U.S. Const. Amend. VI. That right comprehends the *effective* assistance of counsel. *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984). Because the constitutional right to counsel is designed to protect the defendant in the criminal proceedings, the Sixth Amendment does not require counsel to provide advice on immigration and other consequences of conviction that are beyond the scope of the criminal proceeding. But if counsel chooses to provide such advice, she has a duty to ensure that her advice is within the "range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). The vast majority of the lower courts considering claims of ineffective assistance in the plea context have drawn precisely that distinction—between defense counsel who remain silent and defense counsel who give affirmative misadvice.[2] Here, the court below erred in categorically holding that misadvice on removal can never form the basis of an ineffective-assistance

[2] Compare, *e.g.*, *United States* v. *Fry*, 322 F.3d 1198 (9th Cir. 2003) (no duty to advise on removal); *Broomes* v. *Ashcroft*, 358 F.3d 1251 (10th Cir.), cert. denied, 543 U.S. 1034 (2004); *United States* v. *Santelises*, 509 F.2d 703, 704 (2d Cir. 1975); *Commonwealth* v. *Fuartado*, 170 S.W.3d 384 (Ky. 2005), with *United States* v. *Kwan*, 407 F.3d 1005 (9th Cir. 2005) (erroneous advice can be deficient performance); *United States* v. *Couto*, 311 F.3d 179, 188 (2d Cir. 2002); *People* v. *Correa*, 485 N.E.2d 307 (Ill. 1985).

claim. But the inability of petitioner here to show prejudice precludes his establishment of a constitutional violation.

I. COUNSEL'S SIXTH AMENDMENT OBLIGATION AT THE PLEA STAGE DOES NOT EXTEND TO PROVIDING ADVICE BEYOND THE SCOPE OF THE CRIMINAL CASE

A. The Right To Effective Assistance Of Counsel Pertains To The Defense Of The Criminal Case

The guarantee of effective assistance of counsel applies in all "criminal prosecutions." U.S. Const. Amend. VI. It extends to all critical stages of the adversarial criminal process, see *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2591 (2008), and comprehends counsel's advice in deciding whether to plead guilty or go to trial. See, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52, 56-57 (1985); *Tollett* v. *Henderson*, 411 U.S. 258, 266-268 (1973).

The scope of counsel's duty to advise the defendant concerning the plea decision—in other words, the "meaning" of the effective-assistance guarantee in the plea context—is a function of "the purpose of the effective assistance guarantee of the Sixth Amendment." *Strickland*, 466 U.S. at 689; *id.* at 686. That purpose is to promote the "proper functioning of the adversarial process," which, in turn, ensures that criminal prosecutions reach just and reliable results. *Ibid.* In the "criminal prosecution[]" to which the Sixth Amendment applies, the defendant faces a "tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). The assistance of counsel is necessary "to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government." *McNeil* v. *Wisconsin*, 501 U.S. 171,

177-178 (1991) (brackets in original) (quoting *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984)). The right attaches when the government has committed itself to prosecute, such that "the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery*, 128 S. Ct. at 2583 (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972)). The right to effective assistance of counsel therefore serves to "minimize the imbalance in the adversary system" in order to safeguard the defendant's ability to confront the prosecution and to test its charges and evidence. *United States* v. *Ash*, 413 U.S. 300, 309-311 (1973).

Because "counsel's function * * * is to make the adversarial testing process work in the particular case," *Strickland,* 466 U.S. at 690, counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case: matters that have nothing to do with the defendant's guilt or innocence of the charges and that are not part of the punishment that the prosecution seeks to impose for the offense. As the Court noted in *Strickland*, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation * * * [but] is simply to ensure that criminal defendants receive a fair trial." *Id.* at 689. Counsel's errors therefore violate the right to effective assistance only if they are so severe as to "undermine[] the proper functioning of the adversarial process," thereby casting doubt on the reliability of its outcome. *Id.* at 686. Cf. *Ash*, 413 U.S. at 319 ("Sixth Amendment's counsel guarantee" is fulfilled so long as counsel protects against "inequality in the adversarial process itself."); *Commonwealth* v. *Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005).

B. The Scope Of Counsel's Duties Within The Criminal Case Extends To Guilt And Sentencing

In counseling a defendant whether to plead guilty, the attorney's duty to advise the defendant extends to the facts and law necessary to enable the defendant to evaluate the plea's strategic implications for the defendant's interests within the criminal case—in other words, the defendant's interests, as against her prosecutorial adversary, in minimizing the jeopardy that she faces in the criminal proceeding.

As this Court's decisions make clear, counsel's duty encompasses advising the defendant on relevant guilt-innocence and sentencing issues so that the defendant has a meaningful understanding of a guilty plea's strategic implications for the defendant's interests within the criminal case. Counsel must advise on whether, given the strength of the prosecution and defense cases, the defendant has any realistic opportunity to avoid conviction on some or all charges by going to trial, and so whether pleading guilty would not represent an advantageous resolution of the proceedings. See *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995); *Brady* v. *United States*, 397 U.S. 742, 748 n.6 (1970); *Hill*, 474 U.S. at 59; *Tollett*, 411 U.S. at 268. Counsel must also explain the penalties that the defendant faces in the criminal proceeding—the punishment that the prosecution can seek to impose for the offense, and the plea's likely effect on the nature and scope of the punishment. See *id.* at 268; *Hill*, 474 U.S. at 56. And counsel must ensure that the defendant understands the rights within the criminal process that she would surrender by pleading—the constitutional trial rights that she would waive, as well as the ability to hold the prosecution to its bur-

den of proof. *Libretti*, 516 U.S. at 50-51; *Brady*, 397 U.S. at 748 n.6.

All of these affirmative obligations promote the defendant's capacity to evaluate intelligently how to resolve her jeopardy in the criminal proceeding, in light of the defense options available and the potential punishments. As petitioner notes (Pet. Br. 29), counsel's duty to advise the defendant extends beyond the basic topics that the court must explain in a guilty plea colloquy to ensure that the defendant's plea is knowing, intelligent, and voluntary. Counsel, unlike the court, must not only ensure that the defendant understands the charges and her trial rights, but also the strategic considerations surrounding a guilty plea. See *Brady*, 397 U.S. at 748 n.6. For example, defense counsel has a duty to evaluate and advise the defendant about possible affirmative defenses, see *Hill*, 474 U.S. at 59, while the trial court does not. See *United States* v. *Broce*, 488 U.S. 563, 574 (1989) (a guilty plea extinguishes defenses without the need for an express waiver even though "[a] failure by counsel to provide advice may form the basis of a claim of ineffective assistance"); *Mitchell* v. *Scully*, 746 F.2d 951, 956-957 (2d Cir. 1984) (noting that a defendant who pleads guilty must be advised of the nature of the offense, but "[a]n affirmative defense stands differently"), cert. denied, 470 U.S. 1056 (1985). The difference between the duties of the court and the duties of counsel has particular resonance in the plea-negotiation context: counsel has a duty "to inform a defendant of the advantages and disadvantages of a plea agreement," *Libretti*, 516 U.S. at 50, but "[t]he court must not participate" at all in discussions concerning a plea agreement. Fed. R. Crim. P. 11(c)(1).

While counsel's duties are not limited to the inquiries that a court must undertake in ensuring that a guilty plea is knowing, intelligent, and voluntary, the Court has never suggested, and the Sixth Amendment does not mandate, that counsel must advise the defendant about matters that are *not* part of the criminal jeopardy that the defendant faces and therefore are beyond the scope of the criminal proceeding. A myriad of consequences may arise from a conviction that are not a component of the defendant's punishment for the offense and will not be imposed by the presiding court—in other words, consequences that are usually termed "collateral." See *United States* v. *Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000). For example, defendants may face loss of a professional license or federal benefits, may be required to register as a sex offender, may be exposed to civil liability, or may lose the right to vote, possess firearms or hold public office. Because these consequences are not part of the criminal jeopardy faced by the defendant in the adversarial process, the Sixth Amendment does not require counsel to advise about them.[3]

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[3] Contrary to petitioner's argument (Pet. Br. 22-25), *Hill* does not hold that counsel has a wide-ranging duty to advise the defendant about all consequences, even those outside of the criminal adversarial proceeding. *Hill* concerned a claim that the defendant had been misadvised concerning parole eligibility, a matter that a panel of the court of appeals had deemed "collateral." 474 U.S. at 55. The Court in *Hill* found "it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland* v. *Washington* requirement of 'prejudice.'" *Id.* at 60. *Hill* thus did not examine the scope of counsel's duties —the performance aspect of *Strickland*. *Hill* also does not support petitioner's claim that the failure to give advice about collateral con-

As petitioner argues (Br. 36-43), certain professional standards of conduct state that counsel should "determine and advise the defendant * * * as to the possible collateral consequences that might ensue from entry of the contemplated plea." ABA, *Standards for Criminal Justice: Pleas of Guilty* § 14-3.2(f) (3d ed. 1999); see *INS* v. *St. Cyr*, 533 U.S. 289, 322-323 & nn.48 & 50 (2001) (noting ABA and criminal-practitioner admonitions to advise about removal consequences). But those best-practices formulations do not define the meaning of the Sixth Amendment. Professional standards are "guides to determining what is reasonable, but they are only guides." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000) (quoting *Strickland*, 466 U.S. at 688). While thoroughly counseling a criminal defendant about relevant collateral consequences, including deportation, would certainly be desirable, the Sixth Amendment does not provide a right to a lawyer who will investigate and advise about all possible material issues that are outside of the criminal prosecution itself. Rather, the purpose of the constitutional guarantee is to provide a lawyer to respond to the prosecution's *criminal* case.

C. The Possibility Of Removal Based On A Conviction Is Not Part Of A Defendant's Criminal Jeopardy

Removal from the country is normally beyond the scope of the defendant's jeopardy in the criminal adversarial process, and counsel therefore generally has no affirmative duty to provide advice on that topic. Although removal may be a significant adverse consequence for many alien defendants, and certain convic-

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sequences may violate counsel's performance duties, because *Hill* concerned *erroneous* advice by counsel, which can support a *Strickland* claim. See Pt. II, *infra*.

tions render aliens ineligible for many forms of relief, see 8 U.S.C. 1158(b)(2)(B)(i), 1182(h), 1227(a)(2)(A)(iii), 1228(b), 1229b(a)(3), 1229b(b)(1)(C); removal is not a part of the punishment for any criminal offense. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *United States* v. *Amador-Leal*, 276 F.3d 511, 515-516 (9th Cir.), cert. denied, 535 U.S. 1070 (2002). Rather, it is an independent civil proceeding, *Lopez-Mendoza*, 468 U.S. at 1038, that may or may not subsequently be instituted, based on the standards set forth in the immigration statutes. And it is usually instituted by the Department of Homeland Security, which is an authority independent of the presiding court (and is an independent sovereign, in the case of state convictions).[4]

Although removal is generally not part of the criminal proceeding, the prospect of removal may fall within counsel's duty to give advice when it becomes part and parcel of a plea agreement. For instance, in federal prosecutions, the government may raise the subject of removal in the context of plea negotiations, by offering to agree to a reduced sentence if the defendant agrees not to contest removal. See, *e.g.*, *United States* v. *Pereira*, 465 F.3d 515, 523 n.7 (2d Cir. 2006). And by statute, a defendant may stipulate to a judicial order of removal "as a condition of the plea agreement or as a

[4] Under 8 U.S.C. 1228(c)(1), a federal district court may enter an order of "judicial removal" at the time of sentencing in a criminal case, upon the request of the United States Attorney, with the concurrence of immigration officials, and in the discretion of the court. But even the concomitant entry of a judicial order of removal does not, by itself, render the prospect of removal part of the Sixth Amendment jeopardy the defendant faces in the prosecution. As noted, removal is not a punishment for the crime, but is a prospective remedy concerning the alien's "right to remain in th[e] country in the future." *Lopez-Mendoza*, 468 U.S. at 1038.

condition of probation or supervised release, or both." 8 U.S.C. 1228(c)(5). In these circumstances, counsel's duty to negotiate a plea and sentence on behalf of her client would include both performing the reasonable research necessary to understand the value to her client of the government's proposal, and then advising the client on the matter.[5] See *United States* v. *Barnes*, 83 F.3d 934, 939-940 (7th Cir.), cert. denied, 519 U.S. 857 (1996). But that obligation arises only when removal consequences are incorporated into the plea agreement or the criminal judgment, because only then is advising a client about removal a part of advocating for her interests within the criminal proceeding.

Even assuming that criminal counsel must provide immigration advice to alien defendants in other situations—when removal is not itself part of the criminal proceeding—a defendant in these cases would rarely be able to establish prejudice, which is a requirement for this kind of Sixth Amendment claim. To meet the prejudice standard, the defendant must show that, as an ob-

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[5] In addition, defendants may argue in certain cases that they should be given a reduced sentence either to enable them to avoid removal, see Pet. Br. 46, or because removal itself is a severe consequence. A defendant could thus argue that counsel performed deficiently by failing to seek sentencing leniency on such bases. Such claims, however, would not challenge the validity of the plea. And these *Strickland* claims would not prevail if counsel made a reasonable professional judgment that immigration consequences would likely hold little sway at sentencing, or if the defendant could not establish prejudice—both of which inadequacies are likely in view of the limited weight of removal in the sentencing calculus. See, *e.g.*, *United States* v. *Rivera*, 527 F.3d 891, 912 (9th Cir.) (district court's refusal to take removal into account was reasonable), cert. denied, 129 S. Ct. 654 (2008); *Velasquez* v. *United States*, No. 07-cv-4419, 2008 WL 397874 (E.D.N.Y. Feb. 14, 2008); *United States* v. *Cabrera*, No. 07-077-ML, 2009 WL 1530703, at *2 (D.R.I. May 28, 2009).

jectively reasonable matter, she would not have pleaded guilty but for counsel's deficient failure to advise. *Hill*, 474 U.S. at 59. As a rule, alien defendants are "acutely aware" that because they are aliens, removal is a possible consequence of conviction. *St. Cyr*, 533 U.S. at 322. An alien defendant who pleads guilty without having received any advice about immigration consequences—either because she did not ask about immigration consequences or because she did ask but received no answers—typically knows that she faces some uncertain risk of removal or other immigration consequences. Her decision to proceed in these circumstances indicates that resolving the criminal case mattered more to her than measuring or minimizing the chance of removal. Such a defendant will therefore be unable to credibly allege that she would not have pleaded guilty but for counsel's failure to advise her about potential immigration consequences, and thus will almost certainly be unable to establish prejudice. See *Parry* v. *Rosemeyer*, 64 F.3d 110, 118-119 (3d Cir. 1995) (concluding that, where the subject of parole revocation "never came up," other factors, including potential sentencing consequences, drove the defendant's plea decision), cert. denied, 516 U.S. 1058 (1996); see Pt. III, *infra*.

D. Practical Considerations Support Limiting Counsel's Duties To The Criminal Prosecution

Imposing an affirmative, independent duty on defense counsel to advise about matters outside the scope of the criminal case would also create significant practical concerns.

First, the obligation to investigate and advise the defendant on any consequence that may be of importance to her, Pet. Br. 16-17, 32-33, would impose a significant burden on defense counsel. See *United States* v.

Yearwood, 863 F.2d 6, 8 (4th Cir. 1988). Counsel would have to determine which of the myriad adverse consequences that can flow from a conviction are important to the defendant, and then perform the necessary research to give reasonable advice with respect to each. Although petitioner suggests that this Court could extend counsel's duty of affirmative advice to removal but not to other consequences because removal "is different in kind from other collateral consequences," Pet. Br. 54; see *id.* at 50-54, that is not so. Removal may be a significant consequence for many defendants, but so are other collateral consequences, such as sex offender registration, civil commitment, and professional disbarment.[6]

In addition, defense attorneys would be forced to investigate and answer complex legal questions in which they have little or no expertise or experience. See, *e.g.*, *United States* v. *Morse*, 36 F.3d 1070, 1072 (11th Cir. 1994) (loss of federal benefits); *Kratt* v. *Garvey*, 342 F.3d 475, 485 (6th Cir. 2003) (revocation of pilot license). It is no answer to suggest, as petitioner does (Pet. Br. 39), that counsel can associate with or consult knowledgeable attorneys, because such resources may not be readily available or free of charge. The logic of petitioner's argument is that, if appointed criminal counsel felt herself insufficiently versed in immigration law (or

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[6] See, *e.g.*, *Steele* v. *Murphy*, 365 F.3d 14, 17 (1st Cir.) (defendant was unaware of committal for life as sexually dangerous person), cert. denied, 543 U.S. 893 (2004); *United States* v. *Bethurum*, 343 F.3d 712, 715 (5th Cir. 2003) (defendant alleged that "as an employee of his family's gun dealership, he would not have pleaded guilty to the offense had he known that the conviction would affect his ability to possess firearms"), cert. denied, 540 U.S. 1162 (2004); *United States* v. *Cariola*, 323 F.2d 180, 181-182 (3d Cir. 1963) (defendant alleged that loss of right to vote was particularly severe for him because of his position as a union leader).

other relevant collateral matters), a judge would be required to appoint additional qualified counsel to provide the advice desired—or risk the defendant's later collateral challenge to any ensuing conviction.

Advising defendants on immigration law in particular can involve complex legal and factual questions— ranging from the characterization of an offense for immigration purposes, to naturalization questions, to research into an alien defendant's past immigration status—that are unfamiliar to many criminal defense attorneys. See *Zhang* v. *United States*, 506 F.3d 162, 169 (2d Cir. 2007). The duty that petitioner proposes would thus require counsel to go beyond "the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771.

Second, imposing a duty on counsel to advise about any and all adverse effects of conviction would undermine the finality of plea-based convictions and could strain judicial and prosecutorial resources. Many defendants would likely not challenge their pleas until years later, when the collateral consequences of the conviction first become evident. See, *e.g.*, *Santos-Sanchez* v. *United States*, 548 F.3d 327, 329 (5th Cir. 2008), petition for cert. pending, No. 08-9888 (filed Apr. 15, 2009); *People* v. *Gutierrez*, No. B209591, 2009 WL 2025638 (Cal. App. July 14, 2009). The sheer multiplicity of adverse consequences that could form the basis of plea challenges—and defendants' incentive to attack otherwise valid pleas by raising these consequences—could lead to an influx of challenges to long-final pleas. These claims could be hard for the government to refute, because the existing record might not be sufficient to avoid the need for an evidentiary hearing and because memories of the trial participants would fade over time. And if pleas were set

aside only because the passage of time rendered the government unable to muster its proof, significant costs would result—either the dismissal of charges to which the defendant once admitted her guilt, or the expense and burden of a new trial. Those costs should not be imposed based on expansion of counsel's duty to advise on a criminal defendant's collateral, non-criminal interests.

II. COUNSEL'S DUTY TO RESPECT THE DEFENDANT'S PERSONAL DECISION WHETHER TO PLEAD GUILTY ENTAILS THE DUTY TO AVOID INCOMPETENT ADVICE ABOUT CONSEQUENCES OF A CONVICTION

Although defense counsel has no affirmative duty to advise the defendant on removal and other consequences that are beyond the scope of the criminal proceeding, counsel must ensure that if she does provide advice on such consequences, it falls "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771.

A. Counsel Must Respect That The Decision Whether To Plead Guilty Belongs To The Defendant Personally

The decision whether to plead guilty is personal to the defendant, who alone has the "ultimate authority" to decide to enter a guilty plea. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Brady*, 397 U.S. at 748 (decision must be an "expression of [the defendant's] own choice"). Because a guilty plea is both a conviction and a waiver of several constitutional trial rights, the decision to plead is "of signal significance" in the criminal proceeding and requires the "utmost solicitude." *Nixon*, 543 U.S. at 187 (quoting *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)).

Defense counsel's obligation is to assist the defendant in her decision-making process. To that end, defense counsel ordinarily should offer a recommendation on the plea. *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion). But counsel must always ensure that the defendant understands the decision to plead guilty as hers alone to make, and that the decision made is in fact the defendant's personal choice, free of undue pressure from the court or prosecution. *Nixon*, 543 U.S. at 187; see ABA, *Standards for Criminal Justice: Prosecution Function & Defense Function* § 4-5.1 cmt. (3d ed. 1993) (*ABA Standards*); cf. *Flores-Ortega*, 528 U.S. at 478 (counsel has duty to assist defendant in deciding whether to appeal, including by "making a reasonable effort to discover the defendant's wishes"); *Nichols* v. *Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992) (en banc) (counsel must ensure that defendant understands that whether to testify is the defendant's personal decision, and that defendant's right to decide "is protected").[7]

A corollary to that duty, necessitated by the "utmost solicitude" due the defendant's decision, *Nixon*, 543 U.S. at 187, is that counsel must not inappropriately interfere with the defendant's decision-making process. Thus, counsel may not "override his client's desire * * * to plead not guilty." *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966); see *Nixon*, 543 U.S. at 187. Counsel also may perform deficiently if she improperly burdens the defendant's decision, for instance by threatening to withdraw or taking other actions that might unduly influence the

[7] The right to appeal and the right to testify are particularly apt analogies, because those rights, like the decision to plead guilty, are among the few that the defendant, rather than counsel, must make personally. See *Jones*, 463 U.S. at 751.

decision-making process. See *Wellnitz* v. *Page*, 420 F.2d 935, 936 (10th Cir. 1970) (coercive pressure and "unfair[]" "assurance[s] of leniency" constitute improper interference); *Nichols*, 953 F.2d at 1553 (threat to withdraw is improper interference with right to decide whether to testify); *ABA Standards* § 4-5.2 cmt. ("[I]t is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence").

B. Incompetent Advice May Undermine The Defendant's Decision-making

Like threats of withdrawal and other forms of undue influence, counsel's incompetent advice may improperly interfere with the defendant's decision-making process. A defendant is entitled to, and likely will, rely on any advice provided by her counsel, if counsel represents that she is able to give the defendant an authoritative and informed view of the law and facts. See *McMann*, 397 U.S. at 770. This is true not only of advice regarding the criminal proceeding itself, but also of advice on subjects outside its scope, such as collateral legal consequences that the defendant would wish to avoid if possible. Thus, when counsel provides the defendant with purportedly authoritative but professionally incompetent and erroneous advice on a collateral consequence of conviction, and counsel reasonably should know the defendant will consider that advice in deciding whether to plead guilty, counsel improperly undermines the defendant's decision-making process, in violation of a constitutional duty. Counsel, in short, has a responsibility to provide professionally reasonable advice, if she provides any advice, even on topics as to which she need not provide advice at all. Cf. *Libretti*, 516 U.S. at 50-51 (district

court has no obligation to hold a colloquy on a defendant's waiver of a jury trial to decide forfeiture, but "a district judge must not mislead a defendant regarding the procedures to be followed in determining whether the forfeiture" will be imposed).

Counsel's erroneous advice can skew a defendant's decision-making process because such advice leaves the defendant in a markedly worse position than if she had received no advice at all. See Pet. App. 26a. When counsel provides no advice about collateral consequences, counsel leaves the defendant in a position to determine whether she wants such advice or information before making a decision in the criminal case. If that defendant pleads guilty without seeking such advice, she has made her own plea decision with the knowledge that she faces uncertainty about collateral consequences. Counsel has therefore assisted the defendant to the extent required by the Sixth Amendment and has not taken any action that affirmatively interferes with the defendant's decision-making process.

In contrast, when counsel gives her client seemingly authoritative but materially incorrect advice on a collateral consequence, counsel may actively induce the defendant to rely on the misadvice in deciding whether to plead. That misadvice injects a new factor into the defendant's decision and simultaneously misleads her about it.[8] By causing the defendant to believe, wrongly, that she has a definitive and correct understanding of an

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[8] Because counsel distorts the plea decision process only when she induces the client to rely on the misadvice, statements that reflect uncertainty about removal consequences should not be considered misadvice. See, *e.g.*, *Santos-Sanchez*, 548 F.3d at 332-333 (no misadvice when counsel stated that conviction "may" result in removal); cf. *Zhang*, *supra* (same as to statements by court).

issue that is important to her decision, counsel affirmatively and improperly skews the defendant's evaluation of all of the other considerations surrounding the plea. Counsel thus undermines the integrity of the defendant's decision-making process, in violation of counsel's duty to safeguard the defendant's ability to make her own decision about a plea.

C. Recognizing A Duty To Avoid Incompetent Advice Even When Counsel Has No Duty To Speak Is Consistent With Related Legal Principles

The conclusion that counsel need not affirmatively advise defendants about collateral consequences, but must provide reasonably competent advice if she chooses to provide any at all, has analogues in the standards of conduct governing lawyers generally. When an attorney gives legal advice, inviting her audience to rely on it, the attorney owes a duty of care, regardless of whether she was obligated to give the advice in the first place. See 1 Restatement (Third) of the Law Governing Lawyers § 51(2) & cmt. e (2000); *id.* § 14 cmt. e; *Goodman* v. *Kennedy*, 556 P.2d 737, 743 & n.4 (Cal. 1976). That duty is similar to a physician's duty to "first, do no harm": Although doctors do not invariably have a duty to provide medical care, AMA, *Principles of Medical Ethics* para. VI (2001), any care that they decide to provide is held to professional standards of patient care, see generally *Fruiterman* v. *Granata*, 668 S.E.2d 127, 136-137 (Va. 2008); Karen H. Rothenberg, *Who Cares?: The Evolution of the Legal Duty to Provide Emergency Care*, 26 Hous. L. Rev. 21, 25, 35-40 (1989).

Counsel's duty to provide reasonably competent advice if she chooses to speak, even though she could decline to give advice in the matter, also has analogues in other areas of law. Tort law, for instance, generally

does not impose an affirmative duty to take action, but when a person voluntarily does so, thereby inducing reliance, she is held to a duty of reasonable care. See, *e.g.*, *First Nat'l Bank* v. *Small Bus. Admin.*, 429 F.2d 280, 288 (5th Cir. 1970); 3 Restatement (Second) of Torts §§ 551, 552 (1965). And while a State has no constitutional obligation to provide medical care and other services to its citizens, when the State institutionalizes a person, her resulting dependence gives rise to a duty to provide necessary services and to exercise reasonable care in doing so. See *Youngberg* v. *Romeo*, 457 U.S. 307, 317-319 (1982). When a lawyer causes her client to rely on her advice, a similar duty of reasonable competence arises.

D. Misadvice On Immigration Consequences May Constitute Deficient Performance

In light of these principles, misadvice on immigration consequences can rise to the level of deficient performance under *Strickland*. Not all wrong advice, however, would do so. A defendant would have to establish that counsel's advice was not only erroneous, but sufficiently unreasonable that it falls below the standard of competence set forth in *Hill*, 474 U.S. at 56-57, and *Strickland*, 466 U.S. at 687. That analysis should take into account that immigration-law questions may be complex and that the standard of competence refers to "attorneys in *criminal* cases." *McMann*, 397 U.S. at 771 (emphasis added). But the Supreme Court of Kentucky erred in holding that misadvice about "collateral consequences," including immigration, can never constitute deficient performance. Pet. App. 23a.

III. ALTHOUGH PETITIONER HAS ALLEGED THAT HE RECEIVED MISADVICE, PETITIONER CANNOT ESTABLISH THAT HE SUFFERED PREJUDICE

Although the Supreme Court of Kentucky erred in holding that incompetent advice on immigration consequences can never constitute deficient performance, this Court may affirm the judgment below on the ground that petitioner cannot establish *Strickland*'s second requirement—that counsel's errors prejudiced him. 466 U.S. at 687; *Hill*, 474 U.S. at 59 (affirming judgment based on insufficiency of allegations of prejudice, when court of appeals had found no deficient performance). To demonstrate prejudice, petitioner must establish a reasonable probability that had he been competently advised, he would not have pleaded guilty, but instead would have insisted on going to trial. *Id.* at 59-60. The Supreme Court of Kentucky did not decide whether petitioner would be able to demonstrate prejudice, and this Court normally does not consider questions not passed on below. See *Wilson* v. *Arkansas*, 514 U.S. 927, 937 (1995). But, as in *Hill*, and in light of the importance of the prejudice inquiry to the analysis of misadvice claims, a decision applying the prejudice standard to petitioner's case would provide valuable guidance to the lower courts.

A. Defendants Who Challenge Guilty Pleas Based On Alleged Immigration Misadvice Must Establish That, With Correct Advice, They Would Have Gone To Trial

To demonstrate prejudice, a defendant must show that "counsel's constitutionally ineffective performance affected the outcome of the plea process," such that a competently counseled defendant "would not have pleaded guilty and would have insisted on going to trial."

Hill, 474 U.S. at 59; see *ibid.* (inquiry turns on whether competent performance "would have led counsel to change his recommendation as to the plea"). The prejudice inquiry is founded on the principle that only attorney errors that affect the outcome of the adversarial process should be grounds for relief, *Strickland*, 466 U.S. at 691—and on the recognition that the government's substantial interest in the finality of guilty pleas would be undermined if it were too easy for defendants seeking a better outcome to challenge a plea after the fact, *Hill*, 474 U.S. at 58.

These concerns are significant in challenges to a plea based on alleged misadvice about removal. When faced with removal, defendants will have every incentive to challenge their former pleas, regardless of whether a correct understanding of removal consequences would have altered their decisions at the time. These defendants can easily allege, after the fact, that they would not have pleaded guilty had they been given competent advice. If every such credited allegation established prejudice, the prejudice inquiry would fail to filter out cases in which counsel's deficiency did not actually affect the outcome of the proceeding. Cf. *Strickland*, 466 U.S. at 697 (ineffective assistance claim can be resolved by finding lack of prejudice without reaching adequacy of performance).

Courts considering claims like petitioner's should therefore apply the prejudice prong rigorously, by closely examining the record of the criminal proceeding to determine whether, in light of the prosecution's evidence and the available defense options, a reasonable defendant would have pleaded guilty notwithstanding the possibility of removal. See *Hill*, 474 U.S. at 59.

B. A Showing Of Prejudice Turns On An Objective Test

The prejudice inquiry is an objective one, asking whether, if given competent advice about the chances of prevailing at trial, "a rational defendant [would have] insist[ed] on going to trial." *Flores-Ortega*, 528 U.S. at 486; *Meyer* v. *Branker*, 506 F.3d 358, 369 (4th Cir. 2007) (*Hill*'s prejudice prong is "an objective inquiry."), cert. denied, 128 S. Ct. 2975 (2008); *United States* v. *Curry*, 494 F.3d 1124, 1131 (D.C. Cir. 2007); *Richardson* v. *United States*, 379 F.3d 485, 488-489 (7th Cir. 2004).

As a result, a defendant's subjective allegation that she would have chosen to go to trial, without more, is insufficient to establish prejudice. See *Hill*, 474 U.S. at 59; see, *e.g.*, *United States* v. *Arteca*, 411 F.3d 315, 321-322 (2d Cir. 2005) (citing "weight of authority" among other courts); cf. *Flores-Ortega*, 528 U.S. at 486 (fact that defendant "demonstrated to counsel his interest in an appeal," without more, is "insufficient to establish that, had the defendant received reasonable advice from counsel," she would have appealed). Rather, a defendant must support her assertion by showing that, in view of all of the considerations in play at the time of the plea—the chances of prevailing at trial, given the strength of the prosecution's case and the availability of any defenses, and the relative advantages and disadvantages of a trial and a plea—going to trial would have been a rational choice.[9] See *Hill*, 474 U.S. at 59 (preju-

[9] Although a defendant may exercise her prerogative to go to trial for irrational reasons, the prejudice inquiry need not take into account such idiosyncracies. Cf. *Strickland*, 466 U.S. at 695 ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed."). Crediting pure-

dice analysis entails a "prediction whether the evidence likely would have changed the outcome of a trial"); *Flores-Ortega*, 528 U.S. at 486.

Whether going to trial would have been a rational choice in the circumstances can often be discerned from the record of the criminal proceedings. If the record establishes that a trial would have offered only negligible benefits and significant costs, such that going to trial would have been irrational, the defendant will be unable to establish prejudice, and an evidentiary hearing is unnecessary. See, *e.g.*, *In re Sealed Case*, 488 F.3d 1011, 1019 (D.C. Cir. 2007); *United States* v. *Nino*, 878 F.2d 101, 105 (3d Cir. 1989) (hearing was unnecessary where record showed that "even had petitioner been advised of the deportation consequences of his guilty plea, he would have pled guilty anyway"); *Meyer*, 506 F.3d at 369-370.

C. Petitioner Cannot Establish Prejudice

The record of petitioner's criminal proceeding conclusively demonstrates that petitioner was not prejudiced by counsel's alleged misadvice. As competent counsel would have advised, petitioner faced removal if he was convicted, whether that conviction was the result of a trial or a plea. See *In re Resendiz*, 19 P.3d 1171, 1187 (Cal. 2001). Petitioner's only chance to avoid removal was therefore an acquittal, but the evidence of guilt was overwhelming, and at the same time, going to

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ly subjective desires to "roll the dice" with the jury, despite overwhelming evidence of guilt, would not serve the purposes underlying the right to effective assistance of counsel. Cf. *Hill*, 474 U.S. at 60 (predictions about what advice a competent attorney would give about the outcome of a trial "should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'") (quoting *Strickland*, 466 U.S. at 695).

trial would have exposed petitioner to a longer sentence. Because competent counsel would have advised petitioner that trial entailed significant risk and conferred no realistic advantage, petitioner cannot establish a reasonable probability that he would have insisted on going to trial. See, *e.g.*, *id.* at 1187-1188; *Gumangan* v. *United States*, 254 F.3d 701, 706 (8th Cir. 2001); *Nino*, 878 F.2d at 105.

Petitioner had no realistic chance of being acquitted at trial. The evidence would have shown that petitioner was lawfully stopped at a weigh station, and arrested after law enforcement officers found marijuana and drug paraphernalia in the cab of his truck. Petitioner consented in writing to a search of the truck's trailer, where officers found approximately 1000 pounds of marijuana. *Commonwealth* v. *Padilla*, No. 01-CR-00517 R. at 30; Findings 1-3. Petitioner then told officers that he had been paid to ship the marijuana. *Id.* at 3. Although petitioner moved to suppress the evidence of the drugs and his statements, the court denied the motion in full after a hearing at which one of the arresting officers testified. *Id.* at 1. The evidence at trial therefore would have overwhelmingly established that petitioner was caught transporting, for payment, a massive quantity of marijuana in his own truck.

In addition, had petitioner gone to trial, he would have faced a significant risk of receiving a longer term of incarceration than he received in his plea agreement. The offense of trafficking in five pounds or more of marijuana exposed petitioner to five to ten years of imprisonment. See Ky. Rev. Stat. Ann. §§ 218A.1421(4)(a), 532.060(2). The plea agreement recommended an advantageous sentence of a five-year term of incarceration and a five-year term of probation. J.A. 58-59, 63, 69.

Given that petitioner's conduct involved 1000 pounds of marijuana (that is, 995 pounds above the statutory threshold), after trial he faced a substantial possibility of receiving the maximum sentence of ten years' imprisonment.[10] See Order Denying Mot. for Shock Probation (finding probation inappropriate because the "case involved trafficking in almost 1,000 pounds of marijuana"). Both the longer term of incarceration and the decision to put the Commonwealth to its proof rather than accepting responsibility could have adversely affected petitioner's chances of receiving parole.

Faced with the strength of the prosecution's case and the risk of a longer sentence if he went to trial, petitioner pleaded guilty, allegedly after counsel advised him that he "did not have to worry about immigration status since he had been in the country so long." J.A. 72. Assuming that he received such advice, it was incorrect.[11] The Court may also assume that the advice fell outside the range of reasonableness. *Strickland*, 466 U.S. at 687-690. Nevertheless, petitioner can establish prejudice from that erroneous advice only if a rational defendant, advised by competent counsel that removal would likely result from a conviction following trial *or* a

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[10] Petitioner suggests that, if he were found guilty following a trial, he would have been sentenced by the jury, rather than the judge, resulting in a lesser sentence. The assumption of jury leniency, however, is not well-founded. See Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 898 (2004) (discussing practitioners' and judges' views that Kentucky jury sentencing resulted in higher sentences, particularly for drug offenses).

[11] At the time of petitioner's plea, federal law treated his trafficking conviction as an aggravated felony, 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii) and (B)(i) (2002), which rendered him removable and eliminated most grounds for relief from removal. See *Lopez* v. *Gonzalez*, 549 U.S. 47, 50-51 (2006).

plea, would have insisted on going to trial in these circumstances—despite the virtual impossibility of an acquittal and the substantial risk of a longer term of imprisonment. Given that a trial would have provided no real chance of avoiding removal to offset the sentencing benefits associated with a plea, petitioner cannot demonstrate that competent counsel would have advised going to trial. Nor can he demonstrate that going to trial would have been a rational decision. See *Hill*, 474 U.S. at 59; *Parry*, 64 F.3d at 118.

Because the existing record decisively rebuts petitioner's claim of prejudice, the Court need not remand to the Kentucky courts for a determination of prejudice. See, *e.g.*, *Bethel* v. *United States*, 458 F.3d 711, 718-720 (7th Cir. 2006), cert. denied, 549 U.S. 1151 (2007); *Gumangan*, 254 F.3d at 706; *People* v. *Mrugalla*, 868 N.E.2d 303 (Ill. Ct. App. 2007); cf. *Schriro* v. *Landrigan*, 550 U.S. 465, 474 & n.2, 475-477 (2007) (hearing would be "futile" because the trial record refuted defendant's contention that he would have chosen to permit counsel to present mitigating evidence had counsel adequately investigated such evidence). Petitioner will be unable to establish that his plea should be overturned for ineffective assistance of counsel.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be affirmed.

Respectfully submitted.

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