

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

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

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

18 I think the --

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

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

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

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

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

25 JUSTICE KAGAN: But, Mr. Feigin, again

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. FEIGIN: Yeah.

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

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

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

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

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

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

23 JUSTICE KENNEDY: Sure.

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

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

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

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

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

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

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

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

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

1 court is required to --

2 JUSTICE KENNEDY: I know the court asked.

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

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

9 MR. FEIGIN: I --

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

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

15 JUSTICE KENNEDY: Right.

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

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Two minutes, Mr. Bursch.

24 REBUTTAL ARGUMENT OF JOHN J. BURSCH

25 ON BEHALF OF THE PETITIONER

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

2 Two quick things.

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

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

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

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

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

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

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

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

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

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

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

6 Thank you.

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

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

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