

On June 23, 2017, the United States Supreme Court decided *Lee v. United States*, 137 S.Ct. 1958 (2017). *Lee* involved a finding of ineffective assistance related to a noncitizen defendant's acceptance of a plea bargain where the conviction carried severe immigration consequences, and is of particular importance to defense counsel.

*Lee* was a long-term lawful permanent resident of the United States. *Lee*, 137 S.Ct. at 1963. He was charged with possessing ecstasy with intent to distribute, and pled guilty to that charge after being advised that he would not be deported as a result of his criminal conviction. *Id.* Upon discovering that his conviction was an aggravated felony that subjected him to removal from the United States with no possibility of relief, he moved to vacate his conviction alleging ineffective assistance of counsel. *Id.* Importantly, it was undisputed both that the evidence against *Lee* was overwhelming, and that the possibility of removal as a result of the conviction was “the determinative issue in *Lee*'s decision whether to accept the plea.” *Id.* at 1963, 1965.

The Supreme Court held that *Lee* successfully showed that it would not have been irrational to reject the plea offer in favor of trial, no matter how unlikely his acquittal. *Lee*, 137 S.Ct. at 1968. The Court noted that when the consequences of a plea and conviction at trial “are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive.” *Id.* at 1966. But for his counsel's inaccurate advice, *Lee* would have known that the government's plea offer would certainly have led to his removal, while going to trial would only “almost certainly” lead to removal. *Id.* at 1968.

*Lee* illustrates the important principle that possible resolutions to criminal cases, and the balance of risks associated with a plea agreement versus a trial, may need to be evaluated completely differently when the defendant is not a citizen of the United States. The usual assessment that a lesser sentence is a sufficient benefit to justify accepting a plea agreement may be inadequate when an additional consequence of the plea agreement is removal from the United States, permanent separation from family, or loss of life and livelihood. Immigration consequences may be, in effect, a kind of life sentence, and plea bargains that result in the imposition of that sentence may confer no meaningful benefit.

Where a plea offer, even if otherwise favorable, would lead to severe immigration consequences just as conviction at trial would, defense counsel should be particularly careful to ensure that the defendant is making an informed decision about whether to accept the offer. Counsel must also understand that immigration consequences alone may be sufficient basis to reject a plea offer. Whether a defendant chooses to proceed to trial based on the immigration consequences of a plea, or chooses to accept a plea offer despite the immigration consequences, counsel should document the nature of that decision in the file and on the record as appropriate.