FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. COSME RODRIGUEZ, *Defendant-Appellant.*	No. 21-15117 D.C. Nos. 2:17-cv-00718-KJM 2:11-cr-00097-KJM-1 OPINION

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted August 31, 2022
San Francisco, California

Filed September 23, 2022

Before: Sidney R. Thomas, Ronald M. Gould, and
Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea;
Partial Concurrence and Partial Dissent by
Judge S.R. Thomas

SUMMARY*

28 U.S.C. § 2255

On appeal from the district court's denial of Cosme Rodriguez's motion to vacate his conviction under 28 U.S.C. § 2255 in which Rodriguez raised three claims of ineffective assistance of counsel, the panel reversed the district court's judgment on the first claim, affirmed the district court's judgment on the second and third claims, and remanded for an evidentiary hearing on the first claim.

Rodriguez, a Mexican citizen and United States legal permanent resident, was arrested while attempting to sell five pounds of methamphetamine to a confidential informant. He was charged with possession of methamphetamine with intent to distribute and conspiracy to distribute methamphetamine—both offenses for which Rodriguez could be removed from the United States were he convicted. Rodriguez pleaded guilty to the conspiracy count. The Government then dismissed the possession with intent to distribute count. The district court denied on the merits Rodriguez's first and second claims in the § 2255 motion; it denied the third claim on the ground that Rodriguez, through his plea agreement, had waived his right to bring the claim in a post-conviction proceeding.

Rodriguez's first claim was that his attorney misinformed him of the likely immigration consequences of his plea—*i.e.*, that his attorney told him that avoiding removal from the United States was difficult but "do-able."

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel wrote that because the claim attacks whether Rodriguez had knowledge of the effect of his guilty plea, it was not waived by Rodriguez's collateral-attack waiver.

The panel held that the record does not conclusively establish that Rodriguez is entitled to no relief on his first claim, and that it was therefore an abuse of discretion to deny the first claim without an evidentiary hearing. The panel observed that because the record contains only Rodriguez's recollection as to what his attorney said, the record does not conclusively establish that Rodriguez is doomed on the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984)—objectively unreasonable performance. As for *Strickland*'s second prong, prejudice, the panel applied the factors set forth in *Lee v. United States*, 137 S. Ct. 1958 (2017), for determining, based on the evidence contemporaneous to the guilty plea, whether a defendant would have gone to trial in the hypothetical scenario where his attorney had provided competent advice. The panel wrote that the record evidence contradicting Rodriguez's argument is strong, as Rodriguez was told by the district court that removal was "a possible consequence" of his plea and the plea agreement informed Rodriguez that his plea would make removal "presumptively mandatory." But, the panel explained, possibilities and presumptions are not *conclusive*, and even the plea agreement stated that no one can predict to a certainty the effect of Rodriguez's conviction on his immigration status. The panel concluded that the district court therefore abused its discretion in denying an evidentiary hearing. The panel therefore remanded for the district court to determine through an evidentiary hearing (1) whether Rodriguez's attorney provided deficient performance by telling Rodriguez that prevention of removal was "do-able," and (2) whether, in the absence of this statement, Rodriguez would have proceeded to trail or received a better plea deal.

Rodriguez's second claim was that after he accepted his guilty plea, his attorney rendered ineffective assistance by dissuading Rodriguez from withdrawing the plea. The panel wrote that because the claim attacked the knowing and voluntary nature of Rodriguez's continued assent to the plea agreement, it was not waived by Rodriguez's collateral-attack waiver. Because the record does not contain any evidence showing that Rodriguez's attorney rendered deficient performance under *Strickland*, the panel affirmed the district court's dismissal of Rodriguez's second claim without an evidentiary hearing as conclusively disproved by the record.

Rodriguez's third claim asserted that his attorney failed adequately to investigate alternative pleas. Because that claim did not attack the knowledge or voluntary nature of the plea agreement and thus cannot be exempted from the provisions of the collateral-attack waiver, the panel affirmed the district court's dismissal of the third claim as waived.

Concurring in part and dissenting in part, Judge S.R. Thomas would affirm the judgment of the district court in its entirety. He wrote that the majority reverses the district court for not conducting an evidentiary hearing that Rodriguez never requested, the record clearly establishes that Rodriguez's guilty plea was knowing and voluntary, the district court correctly granted the government's motion to dismiss and properly denied the § 2255 motion, and the district court did not abuse its discretion in not holding an evidentiary hearing.

COUNSEL

Michael B. Bigelow (argued), Carmichael, California, for Defendant-Appellant.

Jason Hitt (argued), Assistant United States Attorney; Camil A. Skipper, Appellate Chief; Phillip A. Talbert, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee.

OPINION

BEA, Circuit Judge:

Cosme Rodriguez, a Mexican citizen and United States legal permanent resident, was arrested while attempting to sell five pounds of methamphetamine to a confidential informant. He was charged with possession of methamphetamine with intent to distribute and conspiracy to distribute methamphetamine—both offenses for which Rodriguez could be removed from the United States were he convicted. Rodriguez pleaded guilty to the conspiracy count. The Government then dismissed the possession with intent to distribute count.

Rodriguez later moved to vacate his conviction under 28 U.S.C. § 2255, raising three claims of ineffective assistance of counsel. The district court denied Rodriguez's first and second claims on their merits and denied Rodriguez's third claim on the ground that Rodriguez, through his plea agreement, had waived his right to bring the claim in a post-conviction proceeding.

For the reasons stated below, the record does not conclusively establish that Rodriguez is entitled to no relief

on his first claim. It was an abuse of discretion to deny the first claim without an evidentiary hearing. We therefore reverse the district court's judgment on the first claim and remand for the district court to determine through an evidentiary hearing (1) whether Rodriguez's attorney provided deficient performance by telling Rodriguez that prevention of removal was "do-able," and (2) whether, in the absence of this statement, Rodriguez would have proceeded to trial or received a better plea deal. We affirm the district court's judgment on the second and third claims.

I. BACKGROUND

In 2011, the United States Drug Enforcement Administration used a confidential source (hereafter "source") to infiltrate a drug trafficking ring in Northern California. The confidential source met with Rodriguez (and Rodriguez's co-defendant, Maria Hernandez) in person in late January 2011. At the meeting, Rodriguez and Hernandez agreed to sell methamphetamine to the source.

About two weeks later, and after some additional negotiations between the source and Hernandez, Rodriguez called and spoke with the source, and eventually drove with Hernandez to the source's house. Rodriguez showed the source a small bag of methamphetamine, and then showed the source several larger packages of methamphetamine in the trunk of the car that he and Hernandez were driving. The source alerted nearby police and Rodriguez and Hernandez were then arrested. The police found five one-pound packages of methamphetamine in the car.

After receiving his Miranda warnings, Rodriguez admitted that he was delivering methamphetamine to "that guy" (referring to the source) and that he was supposed to be paid for doing so.

A grand jury charged Rodriguez with (1) conspiracy to distribute and possess with intent to distribute methamphetamine and (2) possession with intent to distribute methamphetamine under 21 U.S.C. §§ 846, 841(a)(1). The conspiracy charge had a statutory mandatory minimum of 10 years and a maximum term of life. With representation by counsel, Rodriguez pleaded guilty to the conspiracy charge under the terms of a written plea agreement. Included in that plea agreement was a waiver of the right to appeal and collaterally attack his sentence, reading in relevant part:

> Regardless of the sentence he receives, the defendant also gives up any right he may have to bring a post-appeal attack on his conviction or his sentence. He specifically agrees not to file a motion under 28 U.S.C. § 2255 or § 2241 attacking his conviction or sentence.

The plea agreement also contained the following language under the caption "Impact of Plea on Defendant's Immigration Status":

> Defendant recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense to which the defendant is pleading guilty. (Indeed, by pleading guilty to Count 1, removal is presumptively mandatory.) Removal and other immigration consequences are the subject of a separate proceeding, however, and defendant

> understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. Defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequences is [sic.] his automatic removal from the United States.

At Rodriguez's plea hearing, he had a thorough colloquy with the district judge, in which Rodriguez said that he was pleading guilty voluntarily and knowingly, even after the judge stated that removal was "a possible consequence." The district court accepted Rodriguez's guilty plea, adjudicated him guilty, and sentenced him to twelve months and one day in prison followed by sixty months of supervised release. This was a significant, but permissible, departure from the statutory minimum of ten years imprisonment and was based on Rodriguez's good behavior on pretrial electronic monitoring, his strong role in his family and community, and his criminal history.

After his sentencing, Rodriguez filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. In his motion, Rodriguez makes three claims of ineffective assistance of counsel: Rodriguez claims that his attorney (1) incorrectly told Rodriguez that avoiding removal (from the United States to Mexico) was "difficult" but "do-able" when in fact removal was virtually certain, (2) "wrongly urged [Rodriguez] not to withdraw his guilty plea and withheld advice that would have counseled in favor of a motion to withdraw prior to sentencing," and (3) "provided ineffective assistance in failing to investigate, pursue or advise him about the possibility of [pleading guilty to] a non-

felony charge." The government moved to dismiss the motion, arguing that Rodriguez had waived any right collaterally to attack his sentence by signing a plea agreement that contained a collateral-attack waiver.[1] The government did not dispute Rodriguez's motion on its merits.

The district court found that Rodriguez's first and second claims challenged the validity of his plea agreement and thus were not waived through the plea agreement but found that Rodriguez had waived his third claim because that claim did not "implicate the validity of the plea agreement." The district court then rejected Rodriguez's two unwaived claims on the merits, but without an evidentiary hearing.

The district court granted a certificate of appealability as to the merits of Rodriguez's first claim and as to whether Rodriguez's third claim was waived.[2] Rodriguez timely appealed.

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[1] The government also moved to dismiss Rodriguez's § 2255 motion on the grounds that it was untimely. The district court rejected that argument and the government has not raised the issue on appeal.

[2] In a 28 U.S.C. § 2255 proceeding, an appeal may not be taken "[u]nless a circuit justice or judge issues a certificate of appealability" upon an applicant's "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253. When issuing or denying a certificate of appealability, "the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

II. STANDARD OF REVIEW

This court reviews de novo "the scope and validity" of waivers of the right to appeal or collaterally to attack a sentence. *Davies v. Benov*, 856 F.3d 1243, 1246 (9th Cir. 2017). "A district court's decision to deny an evidentiary hearing on a § 2255 motion is reviewed for abuse of discretion." *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–59 (9th Cir. 2000). In this context, the district court abuses its discretion "when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). A district court's decision to deny a motion under 28 U.S.C. § 2255 is reviewed de novo. *See United States v. Navarro*, 160 F.3d 1254, 1255 (9th Cir. 1998).

III. WAIVER

As a general rule, a defendant may waive his right to appeal and/or collaterally to attack his plea or sentence.[3] Such a waiver is enforced "if '(1) the language of the waiver encompasses [the defendant's] right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made.'" *Davies*, 856 F.3d at 1246 (quoting *United States v. Jeronimo*, 398 F.3d 1149, 1153 (9th Cir. 2005)).

A claim that challenges whether the waiver was knowing and voluntary is not waived. *Washington v. Lampert*, 422 F.3d 864, 871 (9th Cir. 2005). And because "waivers of appeal must stand or fall with the agreement of which they are a part," *United States v. Lo*, 839 F.3d 777, 784 (9th Cir.

[3] Waiver of the right to appeal a sentence is subject to the same analysis as waiver of the right collaterally to attack a sentence. *See Davies*, 856 F.3d at 1246. Thus, cases discussing either waiver are applicable here.

2016) (quoting *United States v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999)), we assess the knowing and voluntary nature of an appeal/collateral-attack waiver by assessing the knowing and voluntary nature of the plea agreement as a whole.

A plea agreement is made knowingly if the defendant understands the terms and, to a certain extent,[4] the consequences of the agreement. *See Lo*, 839 F.3d at 783–85. A plea agreement is made voluntarily if the defendant is not "induced by promises or threats" to enter the agreement. *Doe v. Woodford*, 508 F.3d 563, 570 (9th Cir. 2007) (quoting *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir. 1986)).

Rodriguez's first claim is that his attorney misinformed him of the likely immigration consequences of his plea. This claim attacks whether Rodriguez had knowledge of the effect of his guilty plea and is therefore not waived by Rodriguez's collateral-attack waiver. *See Lampert*, 422 F.3d at 868.

Rodriguez's second claim is that after he accepted his guilty plea, his attorney rendered ineffective assistance by dissuading Rodriguez from withdrawing the plea. This claim attacks both the knowledge and the voluntary nature of Rodriguez's plea. It attacks the knowledge requirement because it argues that Rodriguez was misinformed about the consequences of withdrawing the plea. It attacks the voluntary nature requirement because it argues that counsel coerced Rodriguez not to withdraw the plea. Because the claim attacks the knowing and voluntary nature of Rodriguez's continued assent to the plea agreement, it was

[4] We need not determine in this appeal to what extent a defendant must understand the consequences of his plea.

not waived by Rodriguez's collateral-attack waiver. *See Lampert*, 422 F.3d at 868.

While this second claim pertains to the withdrawal of a plea rather than the initial assent to a plea agreement, we find the distinction irrelevant. Both kinds of claims assert that the defendant is subject to the terms of his guilty plea only because of his attorney's ineffective assistance, not because of his own free will. Thus, a claim that an attorney misinformed or coerced the defendant to prevent a withdrawal of a guilty plea before sentencing suffices to attack the knowledge and/or voluntary nature of the plea and is exempted from the appeal/collateral attack waiver. *See United States v. Cockerham*, 237 F.3d 1179, 1186 (10th Cir. 2001) (holding that a claim for lack of assistance of counsel in withdrawing a plea "can reasonably be construed as an attack on the validity of the plea agreements as unknowing or unintelligent"); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) (holding that a lack of assistance of counsel at hearing to withdraw a plea "tainted" the waiver therein).

Rodriguez's third claim, however, is different. Rodriguez's third claim asserts that his attorney failed adequately to investigate alternative pleas. Namely, Rodriguez takes issue with his attorney's failure to identify a misdemeanor to which Rodriguez could plead guilty and which, unlike convictions for felonies, would not trigger removal. This claim does not assert that Rodriguez did not understand the terms and consequences of the plea agreement actually offered to him, nor does it assert that Rodriguez was induced by promises or threats to enter the agreement. The claim therefore does not attack the knowledge or voluntary nature of the agreement and cannot be exempted from the provisions of the collateral-attack

waiver. The district court was correct to dismiss this third claim as waived.

IV. DENIAL OF AN EVIDENTIARY HEARING

When a defendant files a motion under 28 U.S.C. § 2255, the district court "shall" grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *see also United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004). "A hearing must be granted unless the movant's allegations, when viewed against the record, do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984). In other words, "a hearing is mandatory whenever the record does not affirmatively manifest the factual or legal invalidity of the petitioner's claims." *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982).

"Evidentiary hearings are particularly appropriate when 'claims raise facts which occurred out of the courtroom and off the record.'" *Chacon-Palomares*, 208 F.3d at 1159 (quoting *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989)); *see Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989). The counterfactual inquiry of "what a defendant would have done" is also particularly appropriate for an evidentiary hearing. *See United States v. Werle*, 35 F.4th 1195, 1206 (9th Cir. 2022).

To obtain relief on a claim of ineffective assistance of counsel, Rodriguez must establish both: (1) that his attorney's performance fell "below an objective standard of reasonableness"; and (2) prejudice: "a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different". *United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984)). The attorney performance assessment is highly deferential: Rodriguez "must surmount the presumption that, 'under the circumstances, the challenged action might be considered sound trial strategy.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). In this case, where Rodriguez pleaded guilty and no trial occurred, Rodriguez is not required to show that he would have fared better at trial to prove prejudice. Rather, Rodriguez must demonstrate that absent his attorney's incompetence, Rodriguez would "rational[ly]" have "reject[ed] the plea bargain" and would "either have gone to trial or received a better plea bargain" instead. *United States v. Rodriguez-Vega*, 797 F.3d 781, 788 (9th Cir. 2015) (quoting *United States v. Howard*, 381 F.3d 873, 882 (9th Cir. 2004)).

A. Rodriguez's First Claim

In Rodriguez's first claim, he alleges that he pleaded guilty because of his attorney's "inadequate advice concerning the immigration related consequences" of the guilty plea. Rodriguez alleges that his attorney told him that avoiding removal from the United States was difficult but "do-able." Such statements, if made, might well fall below an objective standard of reasonableness because Rodriguez's guilty plea in fact made removal practically inevitable, and Rodriguez's attorney was therefore "required to advise [Rodriguez] that [his] conviction rendered [his] removal virtually certain, or words to that effect." *Rodriguez-Vega*, 797 F.3d at 786. To assess whether counsel's performance was deficient under the first prong of *Strickland*, we look only to the advice given and not the other ways that Rodriguez could have uncovered the truth.

Because the record contains only Rodriguez's recollection as to what his attorney said, the record does not conclusively establish that Rodriguez is doomed on the first *Strickland* prong.

As for the second *Strickland* prong, the court must assess whether the record conclusively establishes that Rodriguez would not have gone to trial or received a better plea deal absent the faulty advice. 28 U.S.C. § 2255; *Rodriguez-Vega*, 797 F.3d at 788. Rodriguez has not argued that he would have received a better plea deal, so the matter rests on whether Rodriguez would have gone to trial had he received better advice regarding the immigration consequences of his plea.

Rodriguez has submitted an affidavit stating that he would have gone to trial had he understood the immigration consequences of his plea. But to determine whether a defendant would have gone to trial in the hypothetical scenario where his attorney had provided competent advice, we are limited to evidence contemporaneous to the guilty plea. Looking at the contemporaneous evidence, we assess (1) how likely the defendant would be to prevail at trial; (2) the defendant's relative connections to the United States and to his country of citizenship; (3) the relative consequences of the defendant's guilty plea compared to a guilty verdict at trial; and most importantly, (4) any evidence of how important immigration consequences were to the defendant at the time he pleaded guilty. *See Lee v. United States*, 137 S. Ct. 1958, 1967–69 (2017).

First, how likely Rodriguez would be to prevail at trial: Where a defendant has no viable defense at trial, he might rationally go to trial under only "unusual circumstances." *Id.* at 1967. Here, based on the record, Rodriguez has little to no defense at trial. As the district court noted,

"[o]verwhelming evidence would likely have been presented at trial," including the five pounds methamphetamine recovered from the car Rodriguez was driving, the testimony of a confidential informant who spoke to Rodriguez on the phone, and Rodriguez's own, post-*Miranda*-advisement confession. In Rodriguez's motion and briefing, he nowhere alludes to a trial theory that could result in acquittal, and Rodriguez himself admitted that given his options and the evidence, he felt he had "no choice" but to plead guilty. So here, as in *Lee*, Rodriguez will be able to establish that he would have rationally gone to trial under only "unusual circumstances." *Id.* at 1967.

Second, Rodriguez's connections to the United States and to Mexico, the country to which he would be deported: Rodriguez has significant connections to the United States. Rodriguez has lived here since age 14 and his wife and three children (all United States citizens) live here. But Rodriguez also maintains ties with his country of citizenship: his mother and two siblings live in Mexico, and Rodriguez's wife and children are considering relocating to Mexico if Rodriguez is deported. Thus, this factor is inconclusive.

Third, the relative consequences for Rodriguez of going to trial and pleading guilty: Through his plea deal, Rodriguez received the following benefits relative to proceeding to trial: (1) the government dismissed the charged count of felony possession of methamphetamine with intent to distribute; (2) the government agreed to recommend that Rodriguez be sentenced at the low end of his guideline range; (3) the government agreed further to recommend the court reduce Rodriguez's sentence because he accepted responsibility for his role in his crime, so long as Rodriguez gave sufficient cooperation to the officer preparing his pre-sentence report; (4) the government agreed

to recommend a sentence reduction of up to thirty percent under § 5K1.1 of the Sentencing Guidelines so long as Rodriguez provided "substantial assistance to the government"; and (5) the government agreed that Rodriguez satisfied most of the criteria for a special "safety valve" sentence reduction that permitted Rodriguez to be sentenced below the 10-year statutory minimum sentence for his drug trafficking offense. These reductions combined such that Rodriguez reduced his guideline sentencing range from 255–93 months to 135–68 months. This case thus contrasts sharply with *Lee*, where "the consequences of taking a chance at trial were not markedly harsher than [the consequences of] pleading [guilty]." 137 S. Ct. at 1969. Here, Rodriguez's guilty plea cut his guideline sentence in half, and the "consequences of taking a chance at trial" *were* "markedly harsher than [the consequences of] pleading." *Id.* This factor strongly militates against Rodriguez.

And fourth, evidence of how important immigration consequences were to Rodriguez at the time he pleaded guilty: For comparison, in *Lee* both parties agreed that avoiding removal was "determinative" for Lee. *Id.* at 1967. In *United States v. Kwan*, the evidence established that the defendant would rationally have "moved to withdraw his guilty plea" because: (1) he "asked counsel about the immigration consequences of pleading guilty before agreeing to do so;" and (2) he "ha[d] also gone to great lengths to avoid deportation and separation from his wife and children." 407 F.3d 1005, 1017 (9th Cir. 2005). Similarly, in *Rodriguez-Vega*, the evidence established that the defendant would rationally have withdrawn her plea because she "made a concerted effort to avoid separation from her family . . . by rejecting an initial plea agreement containing a stipulated removal provision" and "ha[d]

numerous conversations with her counsel regarding the immigration consequences of her plea." 797 F.3d at 789.

Three pieces of evidence indicate that Rodriguez was considering immigration consequences when he weighed whether to accept his guilty plea: (1) the record suggests that Rodriguez spoke with his defense attorney at least twice about the immigration consequences of his plea: once before pleading and again after pleading; (2) at Rodriguez's plea hearing, he appeared surprised when the sentencing judge stated that his plea could cause him to be deported; and (3) Rodriguez hired an immigration attorney to consult with his defense attorney. While this contemporaneous evidence does not clearly demonstrate that Rodriguez's interest in immigration consequences rose to the level of the defendants in *Lee*, *Kwan*, and *Rodriguez-Vega*, it cannot be said that the record "conclusively" shows a lack of interest.

The record evidence contradicting Rodriguez's argument is certainly strong. Rodriguez was told by the district court that removal was "a possible consequence" of his plea and the plea agreement informed Rodriguez that his plea would make removal "presumptively mandatory." But possibilities and presumptions are not *conclusive*, and even the plea agreement stated that "no one . . . can predict to a certainty the effect of [Rodriguez's] conviction on his immigration status."

The district court should have held an evidentiary hearing unless the record "conclusively" disproved Rodriguez's claim. *Howard*, 381 F.3d at 877. When the court is faced with a fact-intensive analysis such as assessing whether a defendant would have gone to trial had he known the immigration consequences of his plea, and where the defendant presents some evidence not palpably false which suggests that he would have gone to trial, then it cannot be

said that the record is conclusive against the defendant, *see Werle*, 35 F.4th at 1206, nor can it be said that the defendant's claim is "so palpably incredible or patently frivolous as to warrant summary dismissal." *Schaflander*, 743 F.2d at 717. On these facts, it is "illogical"—and therefore an abuse of discretion—to deny an evidentiary hearing. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

B. Rodriguez's Second Claim

In Rodriguez's second claim, he argues that his attorney gave inadequate advice as to whether Rodriguez should withdraw his guilty plea. Rodriguez claims that his attorney "sought to discourage" him from withdrawing his plea by focusing on the downsides of that approach, including delay, change in the assigned judge, and other risks. On this claim, the record does conclusively establish that Rodriguez is entitled to no relief because the record does not contain any evidence showing that Rodriguez's attorney rendered deficient performance under *Strickland*.

Rodriguez alleges that his attorney dissuaded him from withdrawing his plea because of the possibility for delay and possibility of a reassignment of Rodriguez's case to another judge. These were reasonable justifications. First, every defendant has an interest in the speedy adjudication of his claims, lest a permanent air of accusation hang over him or, worse, a permanent pre-trial detention imprison him. The Constitution and laws of the United States have enshrined this interest in the Speedy Trial Clause of the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161. Second, the district judge assigned to Rodriguez's case had expressed considerable sympathy for Rodriguez at Rodriguez's change of plea hearing. Withdrawing the plea might have led to the case's reassignment to another,

possibly less sympathetic judge. Additionally, the advice not to withdraw the plea was good advice because, for the reasons explained above, the evidence against Rodriguez was extensive and Rodriguez faced the possibility of a far longer sentence were he to be convicted at trial.

An attorney cannot fall "below an objective standard of reasonableness" by giving good advice. *Quintero-Barraza*, 78 F.3d at 1348. There is no indication in the record that Rodriguez's counsel made any incorrect statements in advising Rodriguez not to withdraw his plea. Accordingly, the record provides no grounds for Rodriguez to attack the "strong presumption" that his counsel's conduct fell "within the wide range of reasonable professional assistance which, under the circumstances, might be considered sound trial strategy." *United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996). The record therefore conclusively disproves Rodriguez's second claim because his claim of deficient performance is "so palpably incredible or patently frivolous as to warrant summary dismissal." *Schaflander*, 743 F.2d at 717. The district court did not abuse its discretion in denying an evidentiary hearing on this claim, and the district court was correct summarily to dismiss this claim. We do not reach the issue of prejudice under *Strickland*.

V. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's dismissal of Rodriguez's first claim, we **AFFIRM** the district court's dismissal of Rodriguez's second claim without an evidentiary hearing as conclusively disproved by the record, and we **AFFIRM** the district court's dismissal of Rodriguez's third claim as waived. We **REMAND** to the district court for an evidentiary hearing on the first claim to determine (1) whether counsel indeed gave Rodriguez the advice Rodriguez claims counsel gave him, and if so,

(2) whether Rodriguez would have refused to plead guilty to the conspiracy count and demanded to go to trial had Rodriguez received accurate advice as to the effect of a felony conviction on the conspiracy count—that his removal would be a virtual certainty.

S.R. THOMAS, Circuit Judge, concurring in part and dissenting in part:

I would affirm the judgment of the district court in its entirety. The majority reverses the district court for not conducting an evidentiary hearing that the defendant never requested. The record of this case clearly establishes that the defendant's guilty plea was knowing and voluntary. The district court correctly granted the government's motion to dismiss and properly denied the § 2255 motion. The district court did not abuse its discretion in not holding an evidentiary hearing.

Rodriguez was part of a drug trafficking operation distributing large amounts of methamphetamine. The DEA infiltrated the group. A confidential informant arranged to buy twelve pounds of methamphetamine from Rodriguez and a co-conspirator for $16,500 a pound. The informant arranged to meet with Rodriguez so that Rodriguez could show him the drugs. Rodriguez and his co-conspirator were arrested at the site with five pounds of methamphetamine. Both Rodriguez and his co-conspirator confessed.

A grand jury charged Rodriguez with conspiracy to distribute and possess with intent to distribute methamphetamine and possession with intent to distribute methamphetamine. 21 U.S.C. §§ 846, 841(a)(1). Both counts carried a mandatory minimum ten year sentence.

Eventually, an extremely favorable plea agreement was negotiated. The government agreed to drop the possession count, which carried a ten year mandatory minimum sentence. As part of the plea agreement, the government agreed to recommend that the sentence be reduced, pursuant to U.S.S.G. § 5K1. Pursuant to the stipulation in the plea, the government moved for a sentence reduction pursuant to § 5K1. Pursuant to § 5K1, the court reduced the sentence to 81 months, and then also granted further a downward departure. After facing two mandatory minimum ten year sentences, Rodriguez was sentenced to a term of twelve months and one day.

After completing his sentence and being released from prison, Rodriguez filed this § 2255 motion, arguing that his guilty plea was not knowing and voluntary because his attorney had not adequately informed him of the immigration consequences of his plea. He claims he did not know that he was likely to be removed. As to this claim, the district court found that the record did not support that assertion and that "there is no reasonable probability that Mr. Rodriguez would have decided to withdraw his plea."

The Supreme Court has instructed that "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (emphasis in original). Rather, "[j]udges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

The contemporaneous record evidence in this case does not substantiate the defendant's post-hoc assertions, made a year after the judgment and after his release from prison. The plea agreement specifically provides otherwise. It provides, in relevant part:

> Under federal law, a broad range of crimes are removable offenses, including the offense to which the defendant is pleading guilty**. (Indeed, by pleading guilty to Count 1, removal is presumptively mandatory.)** Removal and other immigration consequences are the subject of a separate proceeding, however, and defendant understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. Defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequences is [sic] his automatic removal from the United States. (Emphasis supplied.)

At the plea colloquy, the district court asked Rodriguez whether he understood "that a plea of guilty can result in—affect citizenship status, resulting in a denial of naturalization, exclusion from this country or deportation." The defendant said that it was "the first time I have ever heard deportation." The court then granted a recess to allow Rodriguez to confer with his attorney. When court resumed, Rodriguez's attorney said:

> Your Honor, in the plea agreement they don't actually use the word "deportation." They talk in terms of automatic removal as a potential consequence. So, I think that may be why Mr. Rodriguez is indicating he hadn't heard the deportation part before, but he does understand that he is at risk of potentially

> being sent out of the country at the conclusion of his sentence.

The Court then engaged in the following colloquy with Rodriguez:

> Q. All right. Do you understand that, Mr. Rodriguez?
>
> A. Yes, I do.
>
> Q. Do you have any questions about my question? The way I asked my question?
>
> A. No.
>
> Q. So, you understand that those are possibilities, denial of naturalization, exclusion from this country?
> A. Yes.

At the first sentencing hearing, at which the defendant was present, the court inquired about the immigration consequences, asking "At this point is it understood, is Mr. Rodriguez—undoubtedly he will be deported?" The government deferred to defense counsel, who stated:

> I advised my client that without a change in the current state of the law there is a high likelihood he will be deported at the end of his federal sentence.

Near the end of the hearing, the court again raised the question of immigration consequences, queried both counsel as to whether the amount of sentence imposed would affect

immigration status, and questioned defense counsel whether he had exhausted all possibilities of reframing the plea agreement to reduce potential immigration consequences. Counsel suggested postponing sentencing to allow him to explore further possibilities, and the court agreed.

The government subsequently filed a response stating that the length of sentence imposed would not have any impact on immigration status, that "[n]early all federal drug convictions will also be aggravated felonies," and that the other forms of potential immigration relief "are so rarely granted as to be a negligible factor for consideration." Defense counsel filed a response indicating that he had received a report from an immigration attorney and needed additional time to consider options. The parties stipulated to continue the sentencing hearing.

At the second sentencing hearing, at which the defendant was present, defense counsel thanked the court for providing additional time to "do this immigration consult and for my client to consider his options in light of that advice." Counsel then reported that:

> Unfortunately, there's really not a lot that can be done in respect that other than a plea that would involve only a possession charge, and Mr. Hitt has refused to change the terms of the agreement to accommodate that.
>
> And so the immigration consequences are going to be what they will be as a result of the crimes convicted of.

In short, in contrast with other cases in which relief has been granted, the "contemporaneous evidence" in this case conclusively establishes that the immigration consequences

of the guilty plea were thoroughly investigated and communicated.

A guilty plea is knowing, intelligent, and voluntary if the defendant understands the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970). The defendant must understand how the plea "would likely apply in general in the circumstances—even though the defendant may not know the specific detailed consequences of invoking it." *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis omitted). Here, the contemporaneous record evidence demonstrates that Rodriguez was advised and understood the likely immigration consequences of his plea.

Thus, this case is not like *Lee*, where the attorney assured Lee that "there was nothing to worry about—the Government would not deport him if he pleaded guilty," *Lee*, 137 S. Ct. at 1962, and where the attorney "acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial," *id.* at 1963. Nor is it akin to *United States v. Rodriguez-Vega*, where the attorney advised that there was only a potential of immigration consequences. 797 F.3d 781, 785–86 (9th Cir. 2015). Here, the record evidence is to the contrary.

Rodriguez contends his counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) by misinforming him of the probable immigration consequences. To establish the requisite prejudice under *Strickland*, he must establish that, but for the attorney's alleged errors, he "would either have gone to trial or received a better plea bargain." *Rodriguez-Vega*, 797 F.3d at 788. The record establishes that he would not have received a better plea bargain, because the court granted a continuance of the sentencing hearing to allow such discussions, and

counsel reported at the second sentencing hearing that the government was unwilling to alter the plea agreement. And the district court noted that "No evidence suggests Mr. Rodriguez could have obtained a better plea bargain."

Therefore, Rodriguez must show by "a reasonable probability that, even in the absence of a more favorable plea agreement, []he would have gone to trial." *Id*. at 789. The district court found that there was no showing that "deportation was the determinative issue," as it was in *Lee*. Perhaps more importantly, Rodriguez was facing two mandatory ten year minimum charges to which he had no defense. He was caught red-handed. He confessed to the crimes. His co-conspirator confessed to the crimes. The change of plea hearing made it clear that he was pleading guilty because he saw no better option. Not only were convictions virtually certain on the two mandatory ten year minimum charges, but there was no guarantee that the government would file a post-trial § 5K1 sentence reduction motion—in fact, that would have been unlikely. The plea bargain was extraordinarily favorable, and the sentence imposed of one year and a day was extremely generous, particularly compared to the two mandatory ten year sentences he faced, with no apparent available defense.

As the Supreme Court has observed: "Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one." *Lee,* 137 S. Ct. at 1966. Given the circumstances and the record, the district court properly denied the § 2255 motion to vacate the plea and sentence. And the district court did so in a careful, thorough, and very persuasive opinion.

My friends in the majority reverse and remand because no evidentiary hearing was conducted. But there is no need

for an evidentiary hearing under § 2255 if the record conclusively shows that the petitioner is not entitled to relief, as it does here. More importantly, the petitioner did not request an evidentiary hearing. Rodriguez only filed an opposition to the motion to dismiss, a declaration, and a notice that he "intends to stand on his Section 2255 motion,"

In other words, the alleged error here was failure to order a hearing *sua sponte*, not denying an evidentiary hearing. However, under § 2255, "a federal prisoner does not have an automatic right to an evidentiary hearing." *Rodriguez v. United States*, 286 F.3d 972, 986 (7th Cir. 2002). Indeed, the statute itself states the motion may be determined without the petitioner present at a hearing. 28 U.S.C. § 2255 (c). And we do not consider the absence of an evidentiary hearing to be structural error. We have never held the failure to hold an evidentiary hearing *sua sponte* to be reversible error. Rather, we review the denial of a hearing under the deferential abuse of discretion standard. *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–59 (9th Cir. 2000).

One can readily understand why Rodriguez did not request a hearing. Given his trial attorney's statements on the record, an evidentiary hearing would likely have completely undermined his post-hoc assertions. Rather, for the purpose of its analysis, the district court generously assumed that the assertions of his affidavit were true, and then assessed *Strickland* prejudice based on the contemporaneous record evidence.

Given the lack of a request for an evidentiary hearing, the contemporaneous record evidence, and the court's personal observation of the defendant during the extensive change of plea and sentencing hearings, there was no plain

error or abuse of discretion, in not *sua sponte* holding an evidentiary hearing.

In sum, I agree completely with my colleagues as to affirming the district court as to claims two and three. However, I would affirm the judgment of the district court in its entirety. Therefore I concur in part, and respectfully dissent in part.