

No. _____

In The
Supreme Court of the United States

UMESH KAUSHAL,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals Of Indiana**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a resident alien pleads guilty to a crime, while ignorant of the immigration consequences, then discovers those consequences and demands a trial before sentencing, while the state remains prepared to try the case, does his demand for a then-deliverable jury trial establish a reasonable probability that he would have opted for trial had he known the consequences when he pled guilty?
2. Does the opinion on remand so significantly disregard facts and logic that it denies the Petitioner his right to due process of law in violation of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	5
I. When a resident alien pleads guilty to a crime, while ignorant of the immigration consequences, then discovers those consequences and demands a trial before sentencing, while the state remains prepared to try the case, his demand for a then-deliverable jury trial establishes a reasonable probability that he would have opted for trial had he known the consequences when he pled guilty	5
a. Undisputed Facts.....	5
b. Inescapable Inferences	6
II. The opinion on remand so significantly disregards facts and logic that it denies Kaushal due process of law in violation of the Fourteenth Amendment to the United States Constitution.....	7
CONCLUSION.....	8

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
Opinion on Remand, Court of Appeals of Indiana (October 5, 2018)	App. 1
Denial of Rehearing on Remand, Court of Appeals of Indiana (December 6, 2018)	App. 13
Opinion, Supreme Court of the United States (June 28, 2018)	App. 14
Memorandum Decision, Court of Appeals of Indiana (July 18, 2017)	App. 15
Denial of Rehearing, Court of Appeals of Indiana (September 26, 2017)	App. 34
Order on Defendant’s Motion to Correct Error, Marion County Superior Court Criminal Division (December 15, 2016)	App. 35
Order Denying Verified Motion to Withdraw Guilty Plea, Marion County Superior Court Criminal Division (November 7, 2016)	App. 38
Order, Indiana Supreme Court (December 19, 2017)	App. 46
Order, Indiana Supreme Court (February 28, 2019)	App. 48
Verified Motion to Withdraw Guilty Plea, Marion County Superior Court (July 21, 2016)	App. 50
Transcript of Motion to Withdraw Guilty Plea, Marion County Superior Court Criminal Division (August 5, 2016)	App. 56

TABLE OF CONTENTS – Continued

	Page
Transcript of Hearing on Motion to Withdraw Guilty Plea, Marion County Superior Court Criminal Division (September 9, 2016).....	App. 59

TABLE OF AUTHORITIES

	Page
CASES	
Evitts v. Lucey, 469 U.S. 387 (1985)	7
Griffin v. Illinois, 351 U.S. 12 (1956)	7
Jae Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958 (2017).....	4, 5
Kaushal v. Indiana, 201 L. Ed. 2d 1094 (2018).....	1
Kaushal v. State, 112 N.E.3d 1138 (Ind. Ct. App. 2018).....	1
Kaushal v. State, 2017 Ind. App. Unpub. LEXIS 915	1
Kaushal v. State, 2019 Ind. LEXIS 112 (Ind. 2019)	1
Kaushal v. State, 2017 Ind. LEXIS 948	1
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. VI.....	2
U.S. Const. amend. XIV	2, 7
STATUTES	
28 U.S.C. §1257(a).....	2

OPINIONS BELOW

The opinion on remand of the Indiana Court of Appeals is published at Kaushal v. State, 112 N.E.3d 1138 (Ind. Ct. App. 2018). App. 1. The order of the Indiana Court of Appeals denying rehearing on remand is unpublished. App. 13. The order of the Indiana Supreme Court denying review on remand is unpublished and found at Kaushal v. State, 2019 Ind. LEXIS 112 (Ind. 2019). App. 48.

The order of the United States Supreme Court granting certiorari, vacating the judgment, and remanding to the Court of Appeals of Indiana for further consideration is published at Kaushal v. Indiana, 201 L. Ed. 2d 1094 (2018). App. 14. The opinion of the Indiana Court of Appeals is unpublished and available at Kaushal v. State, 2017 Ind. App. Unpub. LEXIS 915. App. 15. The order of the Court of Appeals of Indiana denying rehearing is unpublished. App. 34. The order of the Marion County Superior Court denying Kaushal's motion to correct error is unpublished. App. 35. The order of the Marion County Superior Court denying defendant's motion to withdraw his guilty plea is unpublished. App. 38. The order of the Indiana Supreme Court denying transfer is unpublished and found at Kaushal v. State, 2017 Ind. LEXIS 948. App. 46.

JURISDICTION

The judgment of the Indiana Court of Appeals on remand was entered on December 6, 2018. The order of the Indiana Supreme Court denying transfer on remand was entered on February 28, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and have the assistance of counsel for his defense. U.S. Const. amend. VI.

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Umesh Kaushal (“Kaushal”) is a citizen of India and a lawful permanent resident of the United States. He owns and runs three convenience stores and cares for his U.S. resident mother. On August 11, 2015, the State charged Kaushal with a single count of child molestation. The charge was based solely on the word of Kaushal’s then 13-year-old step-daughter who accused him of a single instance of groping her breast while she

slept. There were no other witnesses to the alleged conduct. Kaushal denies the allegation.

Kaushal hired attorney Rahul Patel (“Patel”) who charged a \$20,000 flat fee, regardless of whether he defended Kaushal to a jury or shepherded him through a guilty plea. On May 4, 2016, on the eve of their sixth trial setting, Patel filed with the court a signed plea agreement and requested a plea hearing. The next morning Kaushal appeared in court and refused to plead guilty. The trial court reset the jury trial to June 30th and scheduled another plea hearing on June 7th. Kaushal again refused to plead guilty on June 7th. Patel later admitted that, prior to June of 2016, he never even considered preparing for trial. App. 61.

On June 28, 2016, the parties appeared in court and confirmed the jury trial on June 30th. On June 29th, Patel filed another signed plea agreement. The trial court set a plea hearing the next morning at which time Kaushal pled guilty in exchange for a sentence of four years suspended to probation. The trial court accepted the guilty plea, entered judgment of conviction, and scheduled sentencing for August 5th. The trial court did not discuss immigration consequences with Kaushal before accepting his guilty plea.

Shortly after pleading guilty, Kaushal consulted with another attorney who informed him that his conviction would render him forever inadmissible to the United States, immediately deportable, subject to mandatory detention pending deportation, and ineligible for relief from deportation.

On July 21, 2016, Kaushal moved to withdraw his guilty plea and proceed to trial to avoid the immigration consequences. App. 50. The motion included a notarized affidavit by Patel admitting that he never informed Kaushal of the actual immigration consequences of pleading guilty because he did not know them himself. App. 53.

The trial court denied the motion, finding that Patel's failure to inform Kaushal of the immigration consequences did not prejudice him. App. 38. Despite the fact that the only relief requested was to stand trial, the court concluded that Kaushal did not "present facts to support a reasonable probability that the [properly advised] hypothetical reasonable defendant would have elected to go to trial." App. 44. The trial court denied Kaushal's motion to correct error. App. 35.

On July 18, 2017, the Indiana Court of Appeals affirmed the trial court. App. 15. On September 26, 2017, the Indiana Court of Appeals denied the petition for rehearing. App. 34. On December 19, 2017, the Indiana Supreme Court denied the petition for transfer. App. 46.

On June 28, 2018, the United States Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Jae Lee v. United States*, 137 S. Ct. 1958 (2017). App. 14.

On October 5, 2018, the Indiana Court of Appeals on remand affirmed the denial of Kaushal's petition to withdraw his guilty plea. App. 1. On December 6, 2018, the Indiana Court of Appeals denied the petition for

rehearing. App. 13. On February 28, 2019, the Indiana Supreme Court denied the petition for transfer. App. 48.

REASONS FOR GRANTING THE WRIT

- I. When a resident alien pleads guilty to a crime, while ignorant of the immigration consequences, then discovers those consequences and demands a trial before sentencing, while the state remains prepared to try the case, his demand for a then-deliverable jury trial establishes a reasonable probability that he would have opted for trial had he known the consequences when he pled guilty.**

The United States Supreme Court clarified in *Jae Lee v. United States*, that the necessary inquiry to determine if a defendant was prejudiced by counsel's failure to inform him of the immigration consequences of a guilty plea is whether that defendant, correctly informed, would have refused to plead guilty and gone to trial instead. *Jae Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958 (2017).

a. Undisputed Facts.

Kaushal pled guilty on June 30, 2016, in exchange for a suspended sentence. After pleading guilty and before sentencing, Kaushal learned the immigration consequences of his conviction. On July 21, 2016, Kaushal

moved to withdraw his guilty plea and proceed to trial in order to avoid those consequences. App. 50-55.

b. Inescapable Inferences.

Kaushal's decision on July 21st to withdraw his guilty plea to avoid the immigration consequences tends to prove that he would have made the same decision on June 30th had he known the immigration consequences. The only fact known to distinguish Kaushal's state of mind on July 21st from his state of mind on June 30th is knowledge of the immigration consequences. Since there is no other variable, it is extremely likely that Kaushal would make the same decision given the same information. Ignorant of the immigration consequences, Kaushal preferred to plead guilty in exchange for a suspended sentence. Aware of the immigration consequences, Kaushal preferred to risk a trial to avoid those consequences. Therefore, if Kaushal had known the immigration consequences on June 30th, he would have rejected the plea offer and stood trial to avoid those consequences. There is no logical reason to conclude otherwise.

II. The opinion on remand so significantly disregards facts and logic that it denies Kaushal due process of law in violation of the Fourteenth Amendment to the United States Constitution.

“[T]he Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal ‘adequate and effective.’” *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)). By ignoring the relevant facts and disregarding logic, the opinion on remand denies Kaushal meaningful appellate review and due process of law.

The opinion on remand ignores the fact that Kaushal demanded a trial when he learned the immigration consequences of his guilty plea. It silently assumes that Kaushal’s decision on July 21st to stand trial has no relevance to whether he would have decided to stand trial on June 30th. The opinion instead points to evidence that Kaushal was averse to incarceration and announces that “[t]he contemporaneous evidence in the record reflects that avoiding imprisonment, not deportation, was the determinative issue for Kaushal in resolving his criminal case and ultimately deciding to enter a guilty plea.” App. 10.

Kaushal certainly wants to avoid incarceration. Attorney Patel testified that avoiding any jail time was Kaushal’s number one issue and Kaushal testified that he pled guilty because he was afraid of going to prison. App. 11, 57. Aversion to imprisonment does not prove

indifference to deportation. On the contrary, Kaushal wants to avoid deportation for most of the same reasons he wants to avoid prison. In fact, the opinion on remand mentions that Kaushal “made it clear to his attorney that his priority was to avoid any amount of incarceration so he could continue to run his businesses and care for his mother.” App. 2. The opinion ignores the obvious fact that Kaushal would need to avoid both prison and deportation to continue running his businesses and caring for his mother. Kaushal’s only chance to avoid both prison and deportation is to prevail at trial.

CONCLUSION

Kaushal moved to withdraw his guilty plea when he learned the immigration consequences of his conviction. This evidenced his sincere choice to stand trial. He had not yet been sentenced and only three weeks had passed since the last trial date. Kaushal had no reason to doubt the state remained prepared for trial and no reason to expect any resolution other than a trial. Given his choice on July 21st to stand trial to avoid the immigration consequences, there can be little doubt that Kaushal would have chosen to stand trial to avoid those consequences on June 30th had he known them. The opinion on remand disregards logic and relevant facts to conclude otherwise.

For the forgoing reasons the petition for writ of certiorari should be granted, the judgment below vacated, and Kaushal's right to trial restored.

Respectfully submitted,
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