

No. 18-5665

IN THE
SUPREME COURT OF THE UNITED STATES

ORESTES CABRERA, -- PETITIONER

vs.

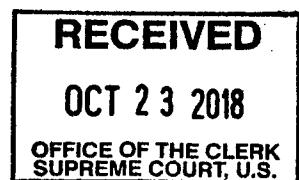
UNITED STATES OF AMERICA, -- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE ELEVENTH U.S. CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING

ORESTES CABRERA
07021-017 H02-301U
MCRAE CORRECTIONAL FACILITY
P. O. DRAWER 55030
MCRAE HELENA, GA 31055



PETITION FOR REHEARING

COMES NOW, ORESTES CABRERA, Petitioner, pro se, and, pursuant to S. Ct. R. 44.2, hereby files this PETITION FOR REHEARING. In support thereof, Petitioner respectfully submits the following:

1. Petitioner's Petition for Writ of Certiorari was denied on October 1, 2018.

2. This Petition for Rehearing involves a Padilla v. Kentucky claim.

Petitioner respectfully submits that he would not have accepted a plea had he known that it would lead to deportation. Petitioner's claim is backed by substantial and uncontroverted evidence. Accordingly, Petitioner submits that he has demonstrated a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

3. In Padilla v. Kentucky, seven members of the Court, Justices Stevens, Kennedy, Ginsburg, Breyer, Sotomayor, Roberts and Alito all agreed that:

"We have long recognized that deportation is a particularly severe "penalty," Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed.2d 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century... And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context ... Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult." Padilla v. Kentucky, 130 S.Ct. 1481 (2010).

4. Petitioner has advanced a claim that his counsel was constitutionally ineffective for failing to inform Petitioner that by pleading guilty, he would automatically be subject to deportation. Petitioner's claim was framed as follows:

WHETHER PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHERE BOTH OF THE LOWER COURTS ERRED IN MISCONSTRUING, THEN DENYING PETITIONER'S PETITION PURSUANT TO THE ALL WRITS ACT?

PETITIONER'S ISSUE IS "CERTWORTHY"
DUE TO THIS COURT'S RECENT DECISION IN LEE V. UNITED STATES

5. This court, in Lee v. United States, 198 L.Ed. 2d 476 (2017) held that: "... [c]ommon sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and plea. See INS v. St. Cyr, 533 U.S. 289, 322-323, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look Attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation –

even if it shaved off prison time – in favor of throwing a “Hail Mary” at trial ... In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. There is no question that “deportation was the determinative issue in Lee’s decision whether to accept the plea deal.” Lee, at 137 S.Ct. 1966-67.

Finally,

“... Lee’s claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontested evidence. Accordingly we conclude Lee has demonstrated a “reasonable probability that, but for [his] counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill, 474 U.S., at 59, 106 S.Ct. 366,” Lee, at 137 S.Ct. 1969.

THIS COURT’S GRANT, VACATE AND REMAND (“GVR”) PROTOCOL

6. “[The Grant, Vacate and remand (“GVR”) practice has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court’s insight before we rule on the merits, and alleviates the “[p]otential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues ... Where intervening developments or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it

appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR order is ultimately appropriate depends further on the equities of the case: if it appears that the intervening development, such as a confession of error in some, but not all, aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate. This approach is similar in its flexibility to this Court's longstanding approach to applications for stay and other summary remedies granted without determining the merits of the case under the All Writs Act. 28 U.S.C. § 1651...Used in accordance with this approach, the GVR order can improve fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." Lawrence on behalf of Lawrence v. Chater, 116 S.Ct. 604, 516 U.S. 163 (1996).

7. In light of this Court's foregoing "GVR" protocol, Petitioner respectfully submits that this Court should issue a GVR order to the Eleventh U.S. Circuit Court of Appeals, in light of this Court's recent decision in Lee, *supra*.

8. This Court's recent opinion in Lee assures Petitioner that there is a "reasonable probability that four members of the Supreme Court will issue a favorable decision in his Petition for Rehearing." At a minimum, this court should GRANT VACATE AND REMAND - "GVR" - his Petition to the Eleventh U.S. Circuit Court of Appeals in light of Lee, *supra*.

PETITIONER HAS DEMONSTRATED "EXTRAORDINARY CIRCUMSTANCES"
WARRANTING THE GRANT OF THIS PETITION FOR REHEARING

9. Petitioner respectfully submits that this court's recent decision in Lee demonstrates "extraordinary circumstances" that warrant the grant of his Petition for Rehearing.

10. Petitioner respectfully submits that the unique facts and circumstances of this case strongly warrant that this court grant his Petition for Rehearing.

11. In light of all of the foregoing, it is respectfully requested that this Court grant Petitioner's Petition for Rehearing and order any other relief that it deems proper, necessary and just.

Respectfully submitted,



Orestes Cabrera
07021-017 H02-301U
McRae Correctional Facility
P. O. Drawer 55030
McRae Helena, GA 31055

Date: October 15, 2018

CERTIFICATE OF SERVICE

I, ORESTES CABRERA, HEREBY CERTIFY, that a true and correct copy of the foregoing was placed in the McRae Correctional Facility Legal Mail-box, with proper, first-class postage affixed, addressed to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC, 20530-0001, on this 15th day of October, 2018.

Respectfully Submitted,



Orestes Cabrera
07021-017 H02-301U
McRae Correctional Facility
P. O. Drawer 55030
McRae Helena, GA 31055

CERTIFICATE OF A PERSON UNREPRESENTED BY COUNSEL

I, ORESTES CABRERA, HEREBY CERTIFY that the foregoing Petition for Rehearing is limited to the intervening circumstances as related above which is of a substantial and controlling effect and is presented in good faith and not for delay.

Respectfully Submitted,



Orestes Cabrera
07021-017 H02-301U
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Nation

Lawyers must point out deals' deportation risks

Supreme Court's 7-2 decision cites right to effective counsel

By Joan Biskupic
USA TODAY

WASHINGTON — Attorneys must tell their immigrant clients if pleading guilty to a crime carries a risk of deportation, the Supreme Court ruled Wednesday in a decision bolstering the constitutional guarantee of effective assistance from a lawyer.

"It is our responsibility under the Constitution to ensure that no criminal defendant — whether a citizen or not — is left to the mercies of incompetent counsel," Justice John Paul Stevens wrote for the majority. "Our long-standing Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the ... impact of deportation on families ... demand no less."

Seven of the nine justices agreed that the constitutional rights of a Kentucky drug defendant had been violated because his lawyer gave bad information about the possibility of deportation. Two members of the majority disagreed with Stevens' broad reading of the Sixth Amendment guarantee of effective counsel.

Justices Antonin Scalia and Clarence Thomas fully dissented.

The case of *Padilla v. Kentucky* had been closely watched by immigrants' rights advocates concerned about how federal laws over the years has greatly expanded the types of crimes that warrant deportation.

Michelle Fei, co-director of the New York-based Immigrant Defense Project, said immigrants "often plead guilty unaware that the result would be permanent exile from their families and communities." She praised the court for recognizing that "deportation is an extreme penalty."

The U.S. Justice Department, which had argued that lawyers do not have to



2008 photo by Jason Miller, AP

Alito: Agreed lawyers should not mislead immigrants about deportation.

provide advice on the deportation consequences of a guilty plea, had no comment.

The Supreme Court case centered on Jose Padilla, a native of Honduras, who has been a lawful permanent resident for 40 years. Stevens noted that Padilla served in the U.S. military during the Vietnam War.

In 2002, Padilla pleaded guilty to transporting marijuana.

After agreeing to a plea deal, Padilla discovered that it exposed him to deportation proceedings. He claimed his lawyer told him that he "did not have to worry about immigration status since he had been in the country so long." He says he would not have pleaded guilty if he had not received the flawed advice.

The Kentucky Supreme Court ruled that the Sixth Amendment guarantee of effective counsel does not protect a defendant from bad advice about deportation. Like some other state and federal courts, the Kentucky top court minimized deportation as merely a "collateral" consequence of the guilty plea.

The Supreme Court's decision Wednesday treats deportation as a far more serious consequence. Stevens re-

ferred to the "steady expansion of deportable offenses" and said, "The importance of accurate legal advice for noncitizens accused of crimes has never been more important."

The justices returned Padilla's case to lower courts for proceedings on whether his lawyer's bad advice sufficiently hurt his case to require a new hearing.

Joining Stevens were Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor.

Chief Justice John Roberts and Justice Samuel Alito agreed that a lawyer should not mislead an immigrant about deportation but disagreed with Stevens on how far the lawyer must go to explain potentially complex immigration law.

In dissent, Scalia, joined by Thomas, said the majority too expansively interpreted the protections against ineffective counsel. "The Constitution ... is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed."