

No. 18-7439

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IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY M. WARD, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES

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Petitioner, proceeding pro se, contends (Pet. 10-19) that the court of appeals erred in denying his request for a certificate of appealability (COA) to challenge the denial of his motion for post-conviction relief under 28 U.S.C. 2255. The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration of whether petitioner has met the requirements for a COA in light of the approach to prejudice in Lee v. United States, 137 S. Ct. 1958 (2017).

Petitioner asserts (Pet. 10-12) that his trial counsel was ineffective for erroneously advising him that he would be able to

appeal the denial of a pretrial suppression motion after pleading guilty unconditionally. The district court denied relief, taking the view that petitioner had shown neither deficient performance nor prejudice as required under Strickland v. Washington, 466 U.S. 668 (1984). 2017 WL 497676. The court concluded that petitioner failed to establish deficient performance because he did not submit a supporting affidavit from his trial counsel attesting to the misadvice. Id. at \*3. The court further concluded that even if counsel's performance was deficient, petitioner had not established prejudice under the approach in United States v. Kayode, 777 F.3d 719, 725 (5th Cir. 2014), which predated this Court's decision on prejudice in Lee. Applying Kayode, the district court concluded that petitioner had not demonstrated prejudice in light of "the amount of evidence against [petitioner] and the benefit he received from his guilty plea." 2017 WL 4976576, at \*3 (emphasis omitted).

The district court denied a COA. D. Ct. Doc. 93 (Feb. 6, 2017). The court of appeals also denied a COA, in a decision issued the month before this Court's decision in Lee. Pet. App. 1-2. The court of appeals stated that petitioner had not 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," as required for a COA. Id. at 1-2 (citation omitted).

The court of appeals did not expressly specify whether it was denying a COA because jurists of reason would not find debatable the performance prong of the ineffective assistance inquiry, the prejudice prong, or both. Pet. App. 1-2. On this record, however, jurists of reason would find it debatable whether petitioner was entitled to an evidentiary hearing on deficient performance. While the district court denied relief on the ground that petitioner did not submit an affidavit from trial counsel, the government had informed the court that petitioner's trial attorney had advised the government that "he believed that he secured a conditional plea" and believed "that the AUSA and the Court were aware that [petitioner] [had] preserved his appellate right." Gov't Resp. to 2255 Mot. at 10 n.6. Jurists of reason would find it debatable whether petitioner was entitled to an evidentiary hearing on whether trial counsel performed deficiently in light of trial counsel's statements to the government, in combination with petitioner's affidavit and an additional affidavit from petitioner's sister.

Both the district court and the court of appeals analyzed whether petitioner had established prejudice without the benefit of this Court's decision in Lee. That decision provided additional guidance on prejudice in the context of misadvice concerning guilty

pleas, making clear that a court's inquiry "focuses on a defendant's decisionmaking," and may properly take account of both the objective rationality of accepting a plea and contemporaneous evidence demonstrating that the defendant, rationally or not, would have rejected a plea absent deficient advice. 137 S. Ct. at 1966. Because the court of appeals did not have the benefit of that decision when deciding whether to issue a COA, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of Lee.\*

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General

MAY 2019

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\* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.