



**U.S. Department of Justice**

Office of the Solicitor General

*Washington, D.C. 20530*

June 18, 2019

Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
Washington, D.C. 20543

Re: Ward v. United States, No. 18-7439

Dear Mr. Harris:

The government writes to correct an error in its response to the petition for a writ of certiorari in this case.

Petitioner, proceeding pro se, filed a petition challenging the denial of a certificate of appealability (COA) regarding his claim of ineffective assistance of counsel. The government recommended that the petition be granted, the judgment vacated, and the case remanded for further consideration of whether petitioner was entitled to a COA in light of Lee v. United States, 137 S. Ct. 1958 (2017). The government reasoned that further consideration was warranted because both lower courts had “analyzed whether petitioner had established prejudice without the benefit of this Court’s decision in Lee.” That statement was mistaken. While the district court’s decision predated Lee, the court of appeals denied a COA after Lee was decided. The government regrets that error.

In the government’s view, the petition should nevertheless be granted, the decision denying a certificate of appealability vacated, and the case remanded for further proceedings. As the government stated in response to the petition, jurists of reason would find it debatable whether petitioner was entitled to an evidentiary hearing on deficient performance in light of defense counsel’s representations to the government and affidavits by petitioner and his sister. Further, jurists of reason would find debatable whether petitioner was entitled to an evidentiary hearing on prejudice in light of Lee, which made clear (after the district court’s decision) that the prejudice inquiry focuses on the defendant’s decision-making and may take account of contemporaneous evidence that a particular defendant would have rejected a particular plea deal absent deficient advice. If this Court remands the case to the court of appeals, the government intends to consent to a further remand to the district court for an evidentiary hearing on the performance and prejudice prongs of the ineffective-assistance inquiry.

If the Court concludes, however, that it would be inappropriate to grant the petition, vacate the judgment, and remand the case for further proceedings in light of the position expressed in this letter, then the government would advocate that the petition be denied. Although the government believes that further proceedings in the lower courts are appropriate, this case does not present a question of broad legal importance that warrants this Court’s review on the merits, particularly since the only salient issue is the further development of the record.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

Noel J. Francisco  
Solicitor General

cc: See Attached Service List

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