

18-8378

SUPREME COURT OF THE UNITED STATES

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

OCT 26 2018

OFFICE OF THE CLERK

GARRON BRIGGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED

Garron T. Briggs pleaded guilty to one count of conspiracy to distribute five kilograms or more of cocaine, and one count of distribution of 28 grams or more of cocaine base. Mr. Briggs filed a motion to vacate his conviction pursuant to 28 U.S.C. § 2255, arguing that his guilty plea was the product of ineffective assistance of counsel, and that, but for counsel's inaccurate advice, he would not have pleaded guilty and would have insisted on proceeding to trial. The district court recognized that Mr. Briggs' "exhibits indeed indicate that defense counsel erred in his statements" to Mr. Briggs, but then applied an erroneous application of the law in denying the claim by raising Mr. Briggs' burden to showing "that the outcome of his trial would have resulted in an acquittal." The district court's order squarely conflicts with Supreme Court precedent set forth in *Jae Lee v. United States*, 198 L. Ed. 2d 476 (2017), which specifically directed that "courts do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain." Id. at 484. Instead, "courts ask whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." Id. at 485. Therefore, a "defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 485.

The question presented by this petition is whether the district court's ruling, which implies that when a petitioner successfully proves that his counsel was ineffective, that petitioner must then show that the outcome of his trial would have resulted in an acquittal, conflicts with *Jae Lee v. United States*?

PARTIES TO THE PROCEEDINGS

Those individuals who appeared in the criminal proceedings brought in the United States District Court for the Western District of Missouri by the United States of America are:

Brian K. Johnson,

Alvin Dixon,

Lonnie Acklin,

Joshua Hudspeth,

Garron T. Briggs,

Tiara Johnson,

Ira Yates,

Donzell Jones,

Keith E. Jones, II,

Nicholas Belgrave,

Ian Nelson,

Julie Borgman,

Husam "Sam" Elmasri,

Jeffreye Hines,

Marlon

Minton,

Wade Cozart.

The following parties are before the Court: Garron Briggs, Petitioner, and the United States of America, Respondent.

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SUPREME COURT OF THE UNITED STATES

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GARRON BRIGGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Garron Briggs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Court of Appeals for the Eighth Circuit's opinion (Pet. App. 1a) reported at 18-1087 (8th Cir. 2018). The Court of Appeals for the Eighth Circuit's opinion (Pet. App. 2a) reported at 17-00238-CV-W-BCW-P (W.D. Mo. 2017).

JURISDICTION

The Court of Appeals entered its judgment on August 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides: “ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

INTRODUCTION

This petition asks this Court to examine whether the order below is in conflict with Supreme Court precedent set forth in *Jae Lee v. United States*, 198 L. Ed. 2d. 476 (2017). This petition, therefore, can be easily resolved with a simple GVR.

Garron T. Briggs filed a motion to vacate his conviction pursuant to 28 U.S.C. § 2255, arguing that his counsel provided ineffective assistance when counsel advised Mr. Briggs that the Government would be able to present evidence from an unrelated state charge in his federal trial, and that Mr. Briggs could avoid an enhancement to his federal sentence for that same state charge by simply pleading guilty in federal court. Counsel's advice was inaccurate because any evidence from the unrelated state charge would have

been surely inadmissible under Rule 404(b) of the Federal Rules of Criminal Procedure. Counsel's advice was further inaccurate because Mr. Briggs received the exact enhancement to his federal sentence that counsel told him he would avoid by pleading guilty.

Prior to entering his plea of guilty, Mr. Briggs also expressed to both his counsel and the trial court that he was not guilty of the 5 kilograms threshold charged in the indictment that required a statutory sentencing range of 10 years to life imprisonment. Counsel never informed Mr. Briggs of his right to have a jury determine whether the Government's evidence supported the quantity charged in the indictment, or only supported a lesser included offense. Rather, both the district court and counsel advised Mr. Briggs that he could argue the quantity supporting the statutory sentencing range at his sentencing hearing. Although the quantity was in dispute, counsel allowed Mr. Briggs to plead guilty as charged for conspiring to distribute 5 kilograms or more, which required a statutory sentencing range of 10 years to life. In his § 2255 motion, Mr. Briggs presented evidence that his counsel also understood the Government's evidence to only amount to 3.5-5 kilograms, less than the statutory 5 kilograms threshold that Mr. Briggs pleaded guilty to.

The district court recognized that Mr. Briggs' "exhibits indeed indicate that defense counsel erred in his statements to [Mr. Briggs] regarding defense counsel's research", and that "counsel was mistaken in his belief that [Mr. Briggs] would be at a level 28 due to the quantity of drugs[.]" Although the district court recognized that counsel's advice was inaccurate, the district court nevertheless denied the claim because, in its opinion, Mr. Briggs "has not shown that the outcome of his trial would have resulted in an acquittal." Mr. Briggs applied to the Eighth Circuit for a certificate of appealability, which was summarily denied without explanation.

The district court's order squarely conflicts with Supreme Court precedent set forth in *Jae Lee v. United States*, 198 L. Ed. 2d 476 (2017), which held that "when a defendant

alleges that his counsel's deficient performance led him to accept a guilty plea rather than go to trial, courts do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain." Id. at 484. Instead, "courts consider whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." Id. at 485. Therefore, "the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." This Court should therefore grant certiorari, vacate the order below, and remand this case for reconsideration in light of Jae Lee.

This petition asks the Court to consider, as it did in Jae Lee, that once Mr. Briggs successfully proved that his counsel's inaccurate advice led him to accept a plea rather than go to trial, he can then satisfy the prejudice prong by proving that, but for counsel's errors, he would not have pleaded guilty and would have insisted on proceeding to trial.

STATEMENT OF THE CASE

On September 26, 2012, Garron T. Briggs was charged with one count of conspiracy to distribute five kilograms or more of cocaine and/or 280 grams or more of cocaine base, and one count of distribution of 28 grams or more of cocaine base. Prior to pleading guilty, Mr. Briggs remained free on pretrial release for nearly two years. During discussions with his court appointed attorney, John R. Osgood ("counsel"), Mr. Briggs told counsel that he was not guilty of the five kilograms quantity threshold charged in the indictment. Mr. Briggs informed counsel that he was willing to accept his responsibility for the distribution count, and would accept a guilty plea for the Class B felony which carried a penalty of no less than five years imprisonment, and not more than forty years imprisonment. Mr. Briggs asserted to counsel that he was not guilty of the five kilograms threshold charged in the indictment, and informed counsel that he wished to proceed to trial on the conspiracy charge if the Government was unwilling to offer a guilty plea solely for the distribution count. Counsel initially promised Mr. Briggs that he would secure a plea offer under those exact terms.

After the initial discussions took place between Mr. Briggs and counsel, a final trial date was scheduled for June 12, 2014. Within the week before trial was set to commence, new discussions between Mr. Briggs and counsel began to take place. Counsel informed Mr. Briggs that the Government was, in fact, unwilling to offer any plea agreement, and advised that Mr. Briggs would have to plead guilty as charged without a plea agreement or proceed to trial. Counsel advised Mr. Briggs to plead guilty to distributing five kilograms or more of cocaine, although counsel believed the Government's evidence against Mr. Briggs was, in fact, less than five kilograms. (See Appendix "App."3a, Exhibit "Ex." B).

During the same time frame of the aforementioned events, Mr. Briggs was also out on bond for a murder charge that was pending in state court (Jackson County, Missouri).

Counsel advised that if Mr. Briggs were to proceed to trial on the federal drug conspiracy charge, the Government would present evidence to the jury of the pending state murder charges in his federal trial, although the cases had no relevance to one another. Counsel did not inform Mr. Briggs that such evidence would actually be inadmissible pursuant to Rule 404(b) of the Federal Rules of Criminal Procedure, and counsel did not advise Mr. Briggs that he could first file a motion in limine seeking to exclude such evidence from being presented in his federal trial. Mr. Briggs' co-defendant to the state charge, Victor Vickers, was also charged in a federal drug conspiracy and faced the same situation. However, Mr. Vickers proceeded to trial on his federal charge, but first filed a motion to exclude any evidence or mention of the pending state charges. The district court excluded any evidence of the pending state charges after holding that any such evidence would be inadmissible pursuant to Rule 404(b). See United States v. Taylor, No. 12-CR-00291-GAF-19, (W.D. Mo. 2012), Docs. 371, 454. Mr. Briggs was never informed that he had the right to file the same motion as his co-defendant to exclude the evidence from his trial. Instead, counsel inaccurately advised Mr. Briggs that evidence of the state charges would absolutely be presented in his federal trial. Out of fear that he would not receive a fair federal trial if the Government was allowed to present the irrelevant, but inflammatory, evidence from the pending state charges, and with the understanding that his statutory sentencing range could be argued at his sentencing hearing, Mr. Briggs entered a plea of guilty just two business days before trial was scheduled to commence. At the change of plea hearing, Mr. Briggs expressed his disagreement with the five kilograms quantity that was charged in the indictment, and required a mandatory minimum sentence of ten years, and a maximum of life imprisonment. In response to Mr. Briggs' disagreement with the drug quantity charged in the indictment, the district court further fueled Mr. Briggs' misunderstanding of his admissions during the plea process. The district court explained:

[W]hen you object to [the drug quantity], the government's burden for showing that this certain amount, they may say 5 kilos, and you say, no, it was, you know, 30 grams. And so the Court will take in evidence and then I make a determination based upon a preponderance of the evidence [at sentencing].

(Plea Tr. 10-12). The district court's explanation led Mr. Briggs to believe that he could argue, at sentencing, that his statutory sentencing range could be as low as 0-20 years imprisonment (i.e., the statutory sentencing range for 30 grams of cocaine). Despite the district court's explanation, Mr. Briggs pleaded guilty to a statutory sentencing range of 10 years to life imprisonment.

After Mr. Briggs entered his plea of guilty, a PSR was prepared by the U.S. Probation Office. The PSR determined that Mr. Briggs' attributable drug quantity was less than 5 kilograms, but applied an enhancement pursuant to U.S.S.G. § 2A1.1 for the unrelated state murder allegations, which required a base offense level of 43, and an advisory guideline range of life imprisonment. As previously mentioned, this was the exact enhancement that counsel advised Mr. Briggs he would avoid by pleading guilty and not going to trial.

After reading the PSR and realizing that counsel had given him inaccurate advice, Mr. Briggs filed a motion to withdraw his plea due to ineffective assistance of counsel. On the day of the scheduled sentencing hearing, the district court denied Mr. Briggs' motion and proceeded with sentencing. The district court applied the § 2A1.1 enhancement for the pending state murder charges and determined the base offense level to be 43, and further determined that the advisory sentencing guideline range was life imprisonment. However, based on its overall assessment of the evidence, the district court determined that a life sentence would be too harsh, and therefore imposed a sentence of 300 months imprisonment. Mr. Briggs then appealed to the Eighth Circuit Court of Appeals.

On appeal, Mr. Briggs argued that he should have been allowed to withdraw his plea due to the ineffective assistance that he received from his plea counsel, and that the application of the § 2A1.1 enhancement was applied in violation of his constitutional rights under the Sixth Amendment. *United States v. Briggs*, 820 F.3d 917 (8th Cir. 2016). The Eighth Circuit affirmed Mr. Briggs' conviction and sentence after holding that his ineffective assistance of counsel claim was not fully developed and should be raised in a collateral proceeding, and that the enhancement did not violate his Sixth Amendment right to a jury trial for the state charges. In contrast, Victor Vickers, who was Mr. Briggs' co-defendant in the state case, and who also received the exact § 2A1.1 enhancement to his federal sentence, argued on appeal that the enhancement was applied in violation of the United States Sentencing Guidelines because the state allegations were in no way connected to the federal drug conspiracy that formed the offense of conviction. The Eighth Circuit agreed with Mr. Vickers and vacated his sentence and remanded for resentencing. *United States v. Taylor*, 813 F.3d 1139, 1150 (8th Cir. 2016).

Mr. Briggs then filed a motion to vacate his conviction pursuant to 28 U.S.C. § 2255, arguing (1) his guilty plea was involuntary because counsel provided ineffective assistance by inaccurately informing him that evidence of unrelated state charges would be presented as evidence in his federal drug conspiracy trial, and for failing to file a motion in limine to exclude said evidence, (2) counsel was ineffective for allowing him to plead guilty to a statutory sentencing range of 10 years to life when both Mr. Briggs and counsel agreed that the Government's evidence only supported a quantity finding of less than 5 kilograms of cocaine, (3) counsel was ineffective for failing to raise the exact argument raised by Mr. Vickers, which was that the § 2A1.1 enhancement was applied in violation of the U.S.

Sentencing Guidelines because the state allegations were in no way relevant to the federal drug conspiracy offense of conviction.

In support of his § 2255 motion, Mr. Briggs attached, as exhibits, emails that he received from counsel that contained proof of counsel's inaccurate advice. (See App. 3a, Exs. A, B, C). The emails revealed that counsel understood the evidence against Mr. Briggs to be less than 5 kilograms of cocaine, that counsel consistently told Mr. Briggs that the § 2A1.1 enhancement was inapplicable, and that counsel admitted he had previously given Mr. Briggs inaccurate advice.

In analyzing Mr. Briggs' claims, the district court recognized that "[Mr. Briggs'] exhibits indeed indicate that defense counsel erred in his statements to [Mr. Briggs] regarding defense counsel's research that the state murder charges could not be used at sentencing." (App. 2a, pg. 9). The district court also recognized that "[p]lea counsel was mistaken in his belief that [Mr. Briggs] would be a level 28 due to the quantity of drugs". To clarify, Level 28 was the offense level for 3.5-5 kilograms of cocaine. *Id.*

In relation to Mr. Briggs' claim that his counsel was ineffective for inaccurately informing him that evidence of the state charges could be presented at his federal trial, the district held that "even assuming the [state] evidence would have been excluded at [Mr. Briggs'] trial, [Mr. Briggs] has not shown that the outcome of his trial would have resulted in an acquittal." *Id.* Based on this erroneous application of law, the district court denied Mr. Briggs' § 2255 motion without the benefit of an evidentiary hearing, and declined to issue a certificate of appealability.

Mr. Briggs filed an application to the Eighth Circuit Court of Appeals seeking a certificate of appealability. The Eighth Circuit summarily denied Mr. Briggs' application

without explanation. Mr. Briggs now seeks a writ of certiorari from the United States Supreme Court, because the order below squarely conflicts with Supreme Court precedent set forth in *Jae Lee v. United States*, 198 L. Ed. 2d 476 (2017).

REASONS FOR GRANTING THE PETITION

The United States Constitution guarantees that any criminal defendant shall have the right to effective assistance of counsel. Mr. Briggs was clearly deprived of that right. In his case, the ineffective assistance of Mr. Briggs' counsel led to him receiving an extremely lengthy sentence of 300 months imprisonment. In analyzing his § 2255 motion, the district court recognized that emails exchanged between Mr. Briggs and his counsel "indeed indicate that that defense counsel erred in his statements to [Mr. Briggs]." However, rather than granting relief, the district court erroneously raised Mr. Briggs burden of satisfying the prejudice prong of his ineffective assistance of counsel claim by requiring him to prove that "the outcome of his trial would have resulted in an acquittal." The district court's ruling therefore squarely conflicts with Supreme Court precedent set forth in *Jae Lee v. United States*, 198 L. Ed. 2d 476 (2017) which expressly held that when a defendant alleges that his counsel's erroneous advice led him to accept a plea rather than go to trial, courts cannot ask whether, had the defendant gone to trial, the result of that trial would have resulted in an acquittal. Id. at 484. Instead, "courts consider whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." Id. at 485. Therefore, "the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. Mr. Briggs told his attorney he did not want to plead guilty to the conspiracy

charge, asserted his disagreement with the quantity charged in the indictment at his change of plea hearing, and filed a motion to withdraw his guilty plea immediately upon learning that counsel gave him inaccurate advice prior to the entry of his guilty plea. Mr. Briggs, therefore, clearly satisfies the requirement set forth in *Jae Lee* that he prove that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." This Court should therefore grant Mr. Briggs' petition, vacate the order below, and remand for reconsideration in light of *Jae Lee*.

I. THE COURT SHOULD GRANT CERTIORARI TO ORDER THE COURTS BELOW TO ABIDE BY PRECEDENT ESTABLISHED BY THIS COURT IN *JAE LEE v. UNITED STATES*

The Sixth Amendment to the United States Constitution "guarantees a defendant the right to effective assistance of counsel at 'critical stages of the proceeding,' including when he enters a guilty plea." *Jae Lee v. United States*, 198 L. Ed. 2d 476, 484 (2017)(quoting *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)). In *Jae Lee*, this Court held:

When a defendant alleges that his counsel's deficient performance led him to accept a guilty plea rather than go to trial, courts do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain. *Id.* at 484. That is because, while courts ordinarily apply a strong presumption of reliability to judicial proceedings, they cannot accord any such presumption to proceedings that never took place. *Id.* [C]ourts consider whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right. *Id.* at 485. When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.*

The order below directly conflicts with the Court's decision in *Jae Lee* because it requires the petitioner, who successfully shows that his counsels' performance was deficient, to then

show that had he went to trial rather than plead guilty, "the outcome of his trial would have resulted in an acquittal." (App 2a, pg. 9). The order below raises a defendant's burden beyond that which is permitted by Jae Lee. Further review of Mr. Briggs' ineffective assistance of counsel claims, under the correct standard set forth in Jae Lee, reveals that Mr. Briggs should have been entitled to relief.

A. The Performance of Mr. Briggs' Counsel Was Deficient

"[T]he two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)(citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The performance prong of Strickland requires a defendant to show " 'that counsel's representation fell below an objective standard of reasonableness.' " 474 U.S. at 57, (quoting Strickland, 466 U.S. at 688).

Mr. Briggs filed a motion to vacate his conviction pursuant to 28 U.S.C. § 2255, arguing that his guilty plea was involuntary because his counsel provided ineffective assistance by: (1) inaccurately informing Mr. Briggs that evidence of unrelated state charges would be presented as evidence in his federal drug conspiracy trial, and for failing to file a motion in limine to exclude the prejudicial evidence pursuant to Rule 404(b) of the Federal Rules of Criminal Procedure; (2) allowing Mr. Briggs to plead guilty to a statutory sentencing range of 10 years to life imprisonment, which provides punishment for drug offenses involving 5 or more kilograms, although both counsel and Mr. Briggs agreed that the Government's evidence was less than 5 kilograms of cocaine; (3) failing to raise the proper argument to challenge the applicability of a sentencing enhancement pursuant to U.S.S.G. § 2A1.1.

As for his first claim, Mr. Briggs claimed that his counsel was ineffective for inaccurately informing him that if he were to proceed to trial in his federal drug conspiracy case, the Government would present evidence of an unrelated state murder charge that was simultaneously pending in the state court of Jackson County, Missouri. Counsel never informed Mr. Briggs of his right to file a motion in limine seeking to exclude the introduction of any such prejudicial evidence pursuant to Rule 404(b) of the Federal Rules of Criminal Procedure. In any event, counsel's advice was inaccurate because any evidence of the unrelated state charges would have been excluded pursuant to Rule 404(b) because the prejudicial effect of murder allegations would far outweigh its probative value in a drug conspiracy trial. See *United States v. Fawbush*, 634 F.3d 420 (8th Cir. 2011).

To support his claim that counsel's advice was inaccurate, Mr. Briggs pointed the district court to the federal case of Victor Vickers, his co-defendant in the pending state case. Mr. Vickers also faced a federal drug conspiracy charge while the murder case was simultaneously pending in state court. Prior to his federal trial, Mr. Vickers filed a motion to exclude any evidence or mention of the state allegations in his federal trial. See *United States v. Taylor*, 12-CR-00291-GAF-19, (W.D. Mo. 2012), Doc. 371. The district court granted Mr. Vickers' motion in limine, and excluded the use of any evidence or reference to the state charges, holding that its prejudicial effect would far outweigh its probative value. *Id.*, Doc. 454. Mr. Briggs' counsel's performance was deficient because reasonable counsel would seek to exclude the introduction of prejudicial evidence and ensure that it is not presented at trial.

Mr. Briggs also claimed that his counsel was ineffective for inaccurately telling Mr. Briggs that he could avoid having his sentence enhanced pursuant to U.S.S.G. § 2A1.1 by

pleading guilty. Prior to the entry of his guilty plea, Mr. Briggs and counsel discussed the possibility of the Government seeking to enhance Mr. Briggs' sentence pursuant to § 2A1.1 by claiming that the state murder allegations were relevant conduct to the conspiracy charge. Counsel told Mr. Briggs that because he was not charged with murder in federal court, the Government could not prove the existence of the facts beyond a reasonable doubt, and therefore his sentence could not be enhanced pursuant to §2A1.1. (See App. 3a, Ex. #C) However, as counsel had concluded that the Government would introduce evidence of the murder allegations if Mr. Briggs went to trial, counsel told Mr. Briggs he could avoid the enhancement by pleading guilty and foregoing his right to trial.

This Court has held that counsel's failure to properly advise a defendant of the consequences of his guilty plea amounts to ineffective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L. Ed. 2d 284(2010). Mr. Briggs can prove his ineffective assistance of counsel claim by proving that the error was "one that affected [Mr. Briggs'] understanding of the consequences of pleading guilty." *Jae Lee*, 198 L. Ed. 2d at 485.

Here, just as in *Jae Lee*, counsel's inaccurate advice caused Mr. Briggs to misunderstand the consequences of pleading guilty. Mr. Briggs was led to believe that he would avoid the § 2A1.1 enhancement, and thereby avoid the accompanying life sentence, by pleading guilty. However, Mr. Briggs' sentence was enhanced using the exact enhancement that counsel told him he would avoid by pleading guilty. Counsel's performance was clearly deficient, and this deficiency was recognized by the district court. The district court noted that the emails between Mr. Briggs and his counsel "indeed indicate that defense counsel erred in his statements to [Mr. Briggs] regarding defense counsel's research that the

state murder charges could not be used at sentencing." (App. 2a, pg. 9). This claim therefore satisfies the deficient performance prong of Mr. Briggs' ineffective assistance of counsel claim.

Next, Mr. Briggs claimed that his counsel was ineffective for allowing him to plead guilty to a sentencing range of 10 years to life imprisonment, which provides punishment for drug offenses involving 5 kilograms or more, although counsel agreed with Mr. Briggs that the Government's evidence against him was less than 5 kilograms.

Mr. Briggs was charged in federal court with conspiring to distribute 5 kilograms or more of cocaine, and one separate count for distribution of 28 grams or more of cocaine base. After being indicted, Mr. Briggs remained free on pretrial release for nearly two years. During this time frame, Mr. Briggs and counsel discussed the evidence and the options for resolving the case. Mr. Briggs told counsel that he was willing to plead guilty to the distribution count, but he contested the conspiracy count as a whole, but specifically contested the quantity charged in the conspiracy count. Emails from counsel show that counsel also believed that the evidence against Mr. Briggs was less than 5 kilograms. (App. 3a, Ex. B).

During the time Mr. Briggs was free on pretrial release, counsel promised Mr. Briggs that he would secure a plea for just the distribution count, and dismissal of the conspiracy count. In the eleventh hour, just one week before trial was set to commence, counsel surprisingly informed Mr. Briggs that the Government was not, in fact, willing to offer any plea agreement at all. With just one week to prepare for trial, counsel informed Mr. Briggs that he would have to plead guilty as charged, or he would have to begin preparing for trial. Mr. Briggs again voiced his disagreement with the quantity charged in the indictment, and

informed counsel that he wished to proceed to trial. Counsel told Mr. Briggs that he could plead guilty as charged, and object to the quantity at sentencing.

Counsel's advice was inaccurate because Mr. Briggs' challenge to the drug quantity was in regards to the statutory quantity threshold that was charged in the indictment. Therefore, to plead guilty as charged, Mr. Briggs would be pleading guilty to, and therefore admitting involvement with, at least 5 kilograms or more, and a statutory sentencing range of 10 years to life imprisonment. Counsel's performance was further deficient because by pleading guilty, the district court was allowed to make any quantity finding by an extremely low standard of a preponderance of the evidence. Counsel never informed Mr. Briggs of his right to have a jury determine the appropriate statutory quantity beyond a reasonable doubt. Counsel never informed Mr. Briggs that he could submit a lesser included offense instruction to the jury.

This Court has held that any fact that increases the statutory minimum sentence must be found by a jury. *Allyene v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). "Drug quantity is an element of the offense when it increases the statutory maximum sentence." *United States v. Carnahan*, 684 F.3d 732, 737 (8th Cir. 2012).

During his change of plea hearing, Mr. Briggs voiced his disagreement with the statutory drug quantity to the district court. The district court further fueled Mr. Briggs' understanding of the rights he was losing by telling Mr. Briggs that he could object to the quantity at sentencing, and argue that it was lower than the 5 kilograms or more that he was pleading guilty to. At the change of plea hearing, the district court's explanation to Mr. Briggs was:

[W]hen you object to it, the government's burden for showing that this certain amount, they may say, 5 kilos, and you say, no, it was,

you know, 30 grams. And so the Court will take in evidence and then I make a determination based upon a preponderance of the evidence. (Plea Tr. 10-12).

Due to counsel's advice, and the district court's explanation of Mr. Briggs' rights at sentencing, Mr. Briggs did not understand that he was forfeiting the right to have a jury determine, in the first instance, whether he was even guilty of the overall conspiracy. But Mr. Briggs also did not understand that he was forfeiting his right to have a jury determine his statutory quantity, and, therefore, his statutory sentencing range. The district court's explanation, that Mr. Briggs could argue that the appropriate attributable quantity was as low as "30 grams", which is a quantity much lower than 5 kilograms, caused Mr. Briggs to misunderstand the consequences of pleading guilty, and further caused him to unintelligently and unknowingly waive his right to have a jury make the appropriate quantity finding beyond a reasonable doubt.

Any one of the aforementioned claims of ineffective assistance of counsel would satisfy the deficient performance prong of *Jae Lee* and *Strickland*. The Court must next determine whether Mr. Briggs can satisfy the prejudice prong as explained in *Jae Lee*.

B. Mr. Briggs Clearly Satisfies the Prejudice Prong as Set Forth in *Jae Lee v. United States*

In *Jae Lee*, this Court held that "[w]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to plead guilty, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 198 L. Ed. 2d at 485.

In the instant case, the district court ignored the holding in *Jae Lee*, and raised Mr. Briggs' burden for proving prejudice by requiring him to show "that the outcome of his trial

would have resulted in an acquittal." (App. 2a, pg. 9). The district court's holding squarely conflicts with this Court's holding in *Jae Lee*. Had the district court conducted the proper analysis, it would be clear that Mr. Briggs is entitled to relief.

To begin, Mr. Briggs voiced his disagreement with the conspiracy count and the quantity charged in the indictment from the very beginning. Mr. Briggs told his counsel that he would plead guilty to the distribution count, but not the conspiracy count. Mr. Briggs further told his counsel that he wished to proceed to trial if the Government was unwilling to extend a plea solely for the distribution count.

Counsel initially promised Mr. Briggs that he would secure a plea under those exact terms. However, it was not until one week before trial was set to begin that counsel told Mr. Briggs that the Government was unwilling to extend any plea offer at all. At that point, Mr. Briggs told counsel that he wished to proceed to trial. Counsel discouraged Mr. Briggs from proceeding to trial by inaccurately advising him that the Government would present evidence of the pending state murder allegations if he proceeded to trial.

At the change of plea hearing, Mr. Briggs voiced his disagreement with the drug quantity charged in the indictment to the district court. After Mr. Briggs was misled into pleading guilty by the district court and his counsel, the PSR was returned and supported Mr. Briggs' contention that the Government's evidence against him was less than the quantity charged in the indictment, and therefore less than the quantity and statutory sentencing range he pleaded guilty to. The initial PSR listed a quantity that was less than 5 kilograms. After reviewing the PSR and realizing that his guilty plea was the product of ineffective assistance of counsel, Mr. Briggs filed a motion to withdraw his plea, and sought an opportunity to proceed to trial. Although the PSR pointed out that the Government's

evidence against him involved less than 5 kilograms, it nevertheless applied a statutory sentencing range of 10 years to life in prison because it was required by Mr. Briggs' unknowing and unintelligent guilty plea.

This Court has held that any fact that increases the statutory minimum sentence must be found by a jury. *Allyene v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). "Drug quantity is an element of the offense when it increases the statutory maximum sentence." *United States v. Carnahan*, 684 F.3d 732, 737 (8th Cir. 2012). Counsel never informed Mr. Briggs that he had the right to have a jury determine the element of drug quantity at trial. *Jae Lee* instructs courts to "consider whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." 198 L. Ed. 2d at 485. Mr. Briggs' initial wish was to only plead guilty to the distribution charge or go to trial. Counsel's deficient performance deprived Mr. Briggs of a jury trial, which was "a judicial proceeding to which he had a right." Id. Mr. Briggs was further prejudiced by his right to a jury trial because he believed he was not guilty of the conspiracy as charged in the indictment, a claim that was supported by the PSR, but the district court was able to make a finding of an increased quantity by using the extremely low standard of a preponderance of the evidence rather than having a jury determine that quantity threshold beyond a reasonable doubt.

Mr. Briggs was further prejudiced by the denial of a trial because, if the jury had acquitted him of the conspiracy count, the district court would not have been able to apply the § 2A1.1 enhancement to Mr. Briggs' sentence. Mr. Briggs first argues that the § 2A1.1 enhancement was erroneously applied in the first instance, and that had his attorney raised the proper argument, his sentence would have been vacated just as his codefendant's

sentence was vacated in *United States v. Taylor*, 813 F.3d 1139, 1150-51 (8th Cir. 2016).

However, under the current circumstances, the district court held that the enhancement applied because the state murder allegedly occurred to recover drug money and cocaine, and therefore, according to the district court, any alleged involvement in the murder would have been in furtherance of the drug conspiracy. But the Government could not make such an argument if Mr. Briggs had only been convicted of the distribution count. The U.S. Sentencing Guidelines Manual provides that "the application of a cross-reference shall be determined on the basis of all acts...that occurred during the commission of the Offense of Conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a). If Mr. Briggs had been acquitted of the conspiracy count, and only convicted of the distribution count, which is the defense he wished to present to a jury, the Government would be unable to argue that a murder occurred during commission of the isolated drug transaction, in preparation for that drug transaction, or in the course of attempting to avoid detection of responsibility for that drug transaction. See *United States v. Sellers*, 512 Fed. Appx. 319, 331 (4th Cir. 2012); see also *United States v. Allen*, 488 F.3d 1244, 1256 (10th Cir. 2007)(holding that "The Wal-Mart incident and Mr. Allen's discussions with Ms. A did not occur in preparation for the methamphetamine sale, during the execution of the sale, or in the course of avoiding responsibility for the sale. See U.S.S.G. 1B1.3(a)(1).")

It is important to note that counsel specifically told Mr. Briggs that the only way to avoid the § 2A1.1 enhancement was by pleading guilty. That information was clearly false as Mr. Briggs' sentence was eventually enhanced with the exact same enhancement that counsel told Mr. Briggs he could avoid by pleading guilty. The district court recognized that

the emails between Mr. Briggs and his counsel "indeed indicate that defense counsel erred in his statements to [Mr. Briggs] regarding defense counsel's research that the state murder charges could not be used at sentencing." (App. 2a, pg. 8). However, rather than proceed to the proper inquiry of whether Mr. Briggs could demonstrate that, but for counsel's errors, he would not have pleaded guilty and would have insisted on proceeding to trial, the district court instead held, erroneously, that "even assuming the [state] evidence would have been excluded in [Mr. Briggs'] trial, [Mr. Briggs] has not shown that the outcome of his trial would have resulted in an acquittal." Id.

Mr. Briggs successfully proved that his counsel's inaccurate advice amounted to ineffective assistance of counsel. Mr. Briggs also demonstrated a reasonable probability that he would have proceeded to trial absent counsel's errors. Mr. Briggs contested the conspiracy count to his attorney, contested the drug quantity charged in the indictment during his change of plea hearing, pointed out that the PSR supported his contention that the Government's evidence was less than 5 kilograms, and he filed a motion to withdraw his guilty plea immediately upon learning that his plea was induced by inaccurate advice from his counsel. *Jae Lee* should entitle Mr. Briggs to relief.

CONCLUSION

Mr. Briggs clearly proved that his counsel's performance was deficient. If the district court had followed the directive of *Jae Lee v. United States*, 198 L. Ed. 2d 476 (2017), Mr. Briggs would have been entitled to relief. This Court should therefore grant certiorari, vacate the order below, and remand the case for reconsideration in light of *Jae Lee*.

Respectfully submitted,



s/Garron T. Briggs

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