

16-8501
No. _____

ORIGINAL

Supreme Court, U.S.
FILED

OCT 10 2018

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Mohammed Bah — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mohammed Bah 63814-019
(Your Name)

FCI Allenwood Medium, P. O. Box 2000
(Address)

White deer, Pennsylvania 17887
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does an analysis of prejudice in the context of ineffective assistance of counsel involving the guilty plea of an immigrant result in a unreasonable application of Lee v. United States, 137 S.Ct. 1958 (2017) where no consideration is given as to how an attorney's misadvice concerning the deportation consequences affected the decision to plead guilty?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was July 19, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment: 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 defence.

STATEMENT OF CASE

A grand jury in the District of Georgia returned a multi-count indictment charging Petitioner with, inter alia, conspiracy to possess with intent to distribute marijuana and at least 28 grams of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B) (Count One), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Three).

Petitioner ultimately entered a plea of guilty to both Counts One and Three. The district court imposed an aggregated sentence of 120 months imprisonment. The conviction and sentence were affirmed on direct appeal.

Thereafter, Petitioner filed a timely motion collaterally attacking the convictions for Counts One and Three pursuant to 28 U.S.C. § 2255. The § 2255 alleged that counsel's representation was constitutionally ineffective during the plea proceedings based on his affirmative misadvice with respect to the immigration consequences associated with the plea of guilty. Specifically, Petitioner asserted via sworn affidavit that he was provided incorrect legal advice by counsel related to the immigration consequences. Petitioner also submitted a sworn affidavit from his wife detailing her conversation with counsel and the assurances provided by counsel that Petitioner would be released to Georgia if she could persuade him to accept the plea offer.

The district court ultimately denied the ineffective assistance of counsel claim on the ground that Petitioner had not established that he was prejudiced by counsel's deficient performance based on his statements during the plea colloquy that he understood the immigration consequences associated with the

government's plea offer.

The appellate court determined that no certificate of appealability was warranted.

REASONS FOR GRANTING THE PETITION

The Court should grant the writ in this instance to determine whether a lower court's assessment of prejudice in the context of a guilty plea involving an immigrant's deportability results in a misapplication of Lee v. United States, 137 S.Ct. 1958 (2017) where the analysis of the contemporaneous evidence of the petitioner's preference does not include any evaluation of how the decision to plead guilty may have been influenced by the petitioner's desire to remain in the United States. Currently, the Eleventh Circuit implicitly endorses an approach for determining prejudice post-Lee whereby affirmative misadvice by an attorney with respect to a guilty plea's impact on a petitioner's deportability can be cured by an explanation during the plea colloquy in relation to the immigration consequences of the plea without considering how the incorrect deportation advice influenced the decision to accept a plea offer that would allow a petitioner to remain in the United States. This approach cannot be countenanced with Lee's Sixth Amendment holding.

Sixth Amendment Right to Counsel

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right to counsel encompasses the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). A petitioner claiming ineffective assistance of counsel must establish that (1) his trial counsel's performance fell below objective standards for reasonably effective representation and (2) that this deficiency

prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 688-94 (1984).

A petitioner's Sixth Amendment right to effective assistance also extends to the plea-bargaining process. Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012) (citing Missouri v. Frye, 132 S.Ct. 1399, 1407-08 (2012)). "[T]he two-part Strickland test applies to challenges to guilty pleas based on ineffective assistance of counsel." Lafler, 132 S.Ct. 1384 (citations and quotations marks omitted).

In the context of a guilty plea, the prejudice prong of Strickland requires a petitioner to show that his attorney's constitutionally ineffective performance "affected the outcome of the plea process. In other words ... there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Frye, 132 S.Ct. @ 1410 (noting that Strickland's inquiry, as applied to advice with respect to plea bargains, turns on whether the result of the proceeding would have been different).

Deficient Performance

Petitioner asserts that counsel's representation was deficient under the rationale of Padilla v. Kentucky, 559 U.S. 356 (2010). There, this Court held that the Sixth Amendment "requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." Chaidez v. United States, 568 U.S. 342, 344 (2013) (citing Padilla). "When the law is not succinct and straightforward ..., a criminal defense attorney need do no more than advise a noncitizen that pending criminal charges may carry a risk of adverse immigration consequences." Padilla, 559 U.S. @ 369 (footnote omitted). "But when the deportation consequence is truly clear, ... the duty

to give correct advice is equally clear." Id. The latter situation arises when "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence. ..." Id. @ 368. In that situation, deportation is "presumptively mandatory." Id. @ 369. Counsel's advice in Padilla was plainly incorrect, and this Court determined that counsel was deficient. Id. @ 359, 368-69.

In the present case, Petitioner's charges of conspiracy to possess with intent to distribute marijuana and possession of a firearm in furtherance of a drug trafficking crime are aggravated felonies under 8 U.S.C. § 1101(a)(43)(B). A noncitizen convicted of an aggravated felony is subject to mandatory deportation. See 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1228(c) (stating that "[a]ny alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."). Because the relevant immigration statutes clearly define a presumptively mandatory deportation consequence for Petitioner, counsel had a duty to advise him accordingly, pursuant to Padilla.

The record of the § 2255 proceedings established that counsel affirmatively misadvised Petitioner about the immigration consequences of the plea. Specifically, the affidavit submitted by Petitioner's wife shows that she was informed by counsel that she should persuade Petitioner to accept the government's plea offer to counts One and Three so that he could do whatever time he was sentenced and rejoin her and their children in Atlanta. Counsel also expressed this same sentiment to Petitioner when explaining the benefits of accepting the government's plea offer.

Counsel's advice that the plea would allow Petitioner to be reunited with his wife and children in Atlanta would have been sufficient only if the

relevant immigration statutes were not "succinct and straightforward." Padilla, 559 U.S. @ 369. Counsel was required to provide the additional advice that counts One and Three were both aggravated felonies that would result in mandatory deportation. Because counsel did not provide that additional advice, his performance was constitutionally deficient.^{1/}

Prejudice

Below, Petitioner argued in light of Lee he had established a reasonable probability that but for counsel's affirmative misadvice in relation to the deportation consequences of the plea that he would not have pleaded and would have instead insisted on going to trial. The appellate court acquiesced with the finding of the district court that no prejudice existed because any affirmatively incorrect legal advice that had been provided by counsel was cured when the district court explained the immigration consequences of the plea agreement to Petitioner during the plea colloquy. This conclusion contrasts the logic of Lee.

In Lee, this Court explained that "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id. 137 S.Ct. @ 1967. The focus of the inquiry is "a defendant's decisionmaking, which may not turn

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1. Neither the district nor appellate court addressed the deficient performance prong of Strickland. Instead, both courts concluded that because Petitioner could not establish prejudice, he was not entitled to relief. See Strickland, 466 U.S. @ 697 (noting that a reviewing court need not consider both prongs if the court finds that the defendant has failed to prove either).

solely on the likelihood of conviction after trial." Id. @ 1966. "The decision whether to plead guilty... involves assessing the respective consequences of a conviction after trial and by plea.... When those consequences are, from a 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." Id. @ 1966-67 (citation omitted). "[T]he possibility of even a highly improbable result may be pertinent to the extent it would have affected [a defendant's] decisionmaking." Id. @ 1967. "Deportation is always a particularly severe penalty, ... and we have recognized that preserving the client's right to remain in the United States may be more important to the client than any potential [prison] sentence. ..." Id. @ 1968

This Court determined that there was "substantial and uncontroverted evidence" of prejudice in Lee for the following reasons: (1) "avoiding deportation was the determinative factor" and of "paramount importance" to Jae Lee, a lawful permanent resident who had pleaded guilty and "had no real defense to the charge"; (2) Lee had "strong connections to the United States"; (3) to Lee, "deportation after some time in prison was not meaningfully different from deportation after somewhat less time"; (4) "both Lee and his attorney testified at the evidentiary hearing [in the district court] that Lee would have gone to trial if he had known about the deportation consequences"; and (5) Lee "demonstrated as much at his plea colloquy" by stating that deportation affected his decision to plead guilty, but he did not understand how. Id. @ 1962, 1967-69. This Court concluded:

But for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the determinative

issue for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that 'almost' could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time.... Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Id. @ 1968-69.

Here, the record below also established that there existed "substantial and uncontroverted evidence" of prejudice. Id. @ 1969. As detailed in Petitioner's affidavit (and his Presentence Investigation Report), he has virtually no connections in Sierre Leone; rather, all of his family—including his wife and children are in the United States. His affidavit also noted that he was a child soldier in Sierre Leone who faced 'certain' persecution if were to return. The contemporaneous evidence showed that the disparity between the penalty that Petitioner could have received had he went to trial (approximately 12½ to 14 years) and that which he received per the plea agreement (10 years) was not so substantial that he would not have risked an additional few years in prison for the opportunity to remain in the United States if he were successful at trial. Indeed, as stated during the § 2255 proceedings, the government's evidence of his guilt of the firearm and conspiracy offenses (and the other counts in the indictment) was not so overwhelming that the outcome of the trial was a foregone conclusion. Thus, because the issue of immigration was the "determinative factor" throughout the plea bargaining stages, Lee, 137 S.Ct. @ 1562, the Eleventh Circuit unreasonably applied Lee in concluding that the statements related to the deportation effect of the offenses at the plea colloquy was adequate to overcome any misunderstanding that Petitioner may have had about his immigration status based on counsel's

affirmative misadvice.^{2/}

In the aftermath of Lee, district courts have reasoned that statements made during a plea colloquy explaining the deportation consequences of a plea agreement are not alone sufficient to remedy an attorney's affirmative misadvice to a defendant regarding the immigration effects of a plea to a given offense where the question of deportation central theme of the plea discussions. See e.g., United States v. Arce-Flores, 2017 U.S. Dist. LEXIS 170829 (D.Wash.2017); Tzen v. United States, 2017 U.S. Dist. LEXUS 155301 (S.D. Illin.2017). In Arce-Flores, the defendant entered a plea of guilty to illegal reentry by an alien. The defendant agreed to accept the plea because she intended to challenge her removal from the United States and her attorney had informed her that as long as she pled to a charge that prescribed a maximum penalty of less than 365 days she would be eligible to contest her removal. During the plea colloquy, the judge informed the defendant that the plea may have adverse immigration consequences. Specifically, the judge discussed a paragraph of the plea agreement which stated that 'a broad range of crimes are grounds for removal, including the offense to which [the defendant] was pleading guilty' and that the 'defendant nevertheless affirms that she wants to plead guilty regardless of any immigration consequences that her plea may entail, even if the consequence is her mandatory removal from the United States.' The judge ultimately sentenced the defendant to time served. An immigration court later denied the defendant's bond request

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2. It is also important to note that the record of the plea colloquy showed Petitioner had to confer with counsel on several occasions throughout this proceeding in an effort to get a better understanding of the overall consequences of accepting the plea agreement. However, the district nor appellate courts made no mention of these occurrences in discussing the prejudice prong.

because she had served more than 180 days in prison for the federal charge. The immigration court noted that the defendant was ineligible for an order cancelling her removal because she had served more than 180 days in prison between December 2015 and December 2016.

The defendant subsequently filed a writ of error coram nobis alleging that counsel's representation was constitutionally ineffective based on his failure to understand the immigration consequences of the imposition of the 6-month sentence in the case and assurance to her that there would be no adverse immigration consequences from a conviction and a 6-month sentence. The district court ultimately concluded that in light of Lee, notwithstanding the defendant's comments during the plea colloquy with respect to the deportation language of the plea agreement, the defendant had established that her counsel's immigration advice was deficient and that but for this deficient advice she would not have accepted the plea offer and would have instead proceeded to trial.

Similarly, in Tzen the court also determined that the defendant was entitled to relief post-Lee. There, the defendant entered a plea of guilty to conspiracy to commit wire fraud and was sentenced to 12 months. So concerned was the defendant about the immigration effects of the plea agreement that she hired an additional counsel to explain the immigration consequences. Both her of her attorneys led the defendant to believe that she would be able to avoid deportation if she was not deemed to be a threat to national security and that the judge and prosecutor could make a recommendation in the judgment that the defendant not be deported to England because she was not a security threat. During the plea colloquy, citing language from the plea agreement, the judge informed the defendant that there was 'real' possibility that she would be deported based on the conviction.

In light of Lee, the defendant filed a § 2255 motion alleging that her plea was involuntary. Based on the relevant facts, the district court agreed that Lee entitled the defendant to relief and allowed her to withdraw the plea of guilty.

These cases illustrate that Lee necessitated the district court and the appellate court to consider the contemporaneous evidence on the record that tended to suggest that Petitioner would not have accepted the government's plea offer had been properly advised. Because no such consideration occurred, the judgment of the district court and the Eleventh Circuit resulted in an unreasonable application of Lee.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bah. mohammed.

Date: October 10, 2018