No. _____

In The

Supreme Court of the United States

NILESH KUMAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant who has pleaded guilty based on deficient advice from his attorney must show "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). In the context of a noncitizen defendant with legal resident status and extended familial and property ties to the United States, the question that is of particular importance is whether the defendant failing to prove that a superior alternate plea agreement was available or not is fatal to showing prejudice. The Ninth Circuit in the instant case decided this important federal question in a way that conflicts with relevant decisions of this Court.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Mr. Nilesh Kumar. The Respondent is the United States of America.

RELATED CASES

United States of America v. Nilesh Kumar, U.S. District Court for the Central District of California, 09-cr-132, April 12, 2010

United States of America v. Nilesh Kumar, Ninth Circuit, 10-50227, June 24, 2013

United States of America v. Nilesh Kumar, U.S. District Court for the Central District of California, 14-cv-181, July 2, 2014

United States of America v. Nilesh Kumar, Ninth Circuit, 14-56546, May 7, 2015

United States of America v. Nilesh Kumar, U.S. District Court for the Central District of California, 18-cv-421, May 24, 2018

United States of America v. Nilesh Kumar, Ninth Circuit, 18-55972, July 16, 2018

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App. 1, is not reported. The opinion of the United States District Court for the Southern District of California is not reported. App. 6.

JURISDICTION

The judgment of the court of appeals denying the direct appeal of the writ of error coram nobis was issued on July 16, 2019. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

INTRODUCTION

Nilesh Kumar is a citizen and national of the United Kingdom. App. 1. Mr. Kumar was arrested on June 12, 2009, based upon a three count Federal indictment. App. 6. Count 1, conspiracy to use and possess unauthorized access devices under 18 U.S.C.

§ 1029(b)(2); Count 2, use of unauthorized access devices under 18 U.S.C. § 1029(a)(2); and Count 3, unlawfully possessing 15 or more access devices under 18 U.S.C. § 1029(a)(3). App. 7.

He was represented by retained counsel John Early, before, during and after his plea and through sentencing. Mr. Kumar pled guilty to Count 1 of the indictment on January 8, 2010. App. 1. He was sentenced on April 12, 2010, to 24 months imprisonment, two years supervised release, and restitution in the amount of $145,151.50. App. 2, 7. Mr. Kumar has completed his term of imprisonment and has completed his supervised release. He had appealed his conviction to the Ninth Circuit, which on June 24, 2013, affirmed the decision of the District Court. App. 7.

Mr. Kumar filed a motion to vacate his conviction with the Federal District Court for the Southern District of California under 28 U.S.C. § 2255 based upon ineffective assistance of counsel on February 12, 2014. App. 8. On July 2, 2014, the District Court denied Mr. Kumar's 2255 motion finding that the plea agreement which he signed as well as the Court's own admonishments as to possible immigration consequences during the plea colloquy prohibited Mr. Kumar from proving prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Kumar requested a certificate of appealability from the Ninth Circuit, which was denied on May 7, 2015. App. 8.

Most recently Mr. Kumar filed a writ of error coram nobis with the Federal District Court for the

Central District of California on March 15, 2018, arguing that the legal framework for determining prejudice to be applied in cases such as his was set forth by the Supreme Court in *Lee v. United States*, 137 S. Ct. 1958 (2017), and the law to be applied within the Ninth Circuit as to court issued Rule 11 admonishments curing or prohibiting showing prejudice was set forth after the decision to deny Mr. Kumar's 2255 motion was issued by the District Court. *United States v. Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015) App. 6.

After briefing by both sides the District Court Judge denied the writ of error coram nobis on a single basis; finding a lack of prejudice. Specifically, he found:

> Petitioner's evidence is much weaker than that presented in either *Rodriguez-Vega* or *Lee* and falls short of establishing prejudice. His attorney's statements at the sentencing hearing do little to advance Petitioner's position. At the hearing, his attorney stated, "If [Petitioner] is sentenced to more than 12 months he gets a prison sentence plus he gets deported," a result which he argued would not be in the best interests of Petitioner or the community and would frustrate his ability to pay restitution. (Sentencing Transcript 4:22–23, Case No. 8:09-cr-00132, ECF No. 262.) These statements hardly suggest that avoiding deportation was Petitioner's priority. In fact, Petitioner also spoke at the sentencing hearing and did not express any concerns about deportation. (*Id.* at 9:13–10:15.) Nor did

> he indicate any particular concerns about deportation at his plea colloquy, even when the Court advised him that he could be deported as a result of pleading guilty. Unlike in *Rodriguez-Vega* and *Lee*, Petitioner presents no evidence that he repeatedly asked his attorney about the risks of deportation during the course of his representation. In addition, Petitioner's plea reduced his prison time much more significantly than the plea agreements in *Rodriguez-Vega* and *Lee.* Petitioner's plea carried a maximum sentence of five years in prison and three years of supervised release, while he faced a maximum penalty of twenty-five years in prison had he gone to trial. (*See* Plea Agreement 4, Case No 8:09-cr-00132, ECF No. 94.) This evidence overshadows Petitioner's strong ties to the United States and refutes his assertion that he would have taken the case to trial absent his attorney's alleged misadvice. App. 14–15.

Mr. Kumar timely appealed the District Court denial to the Ninth Circuit on July 17, 2018. App. 1–5. The Ninth Circuit issued a memorandum order on July 16, 2019, affirming the decision of the District Court. App. 5. The Ninth Circuit found that he could not establish prejudice. Specifically, they found that "Kumar therefore has not established that he would have gone to trial rather than pleaded guilty, if properly advised." App. 4. The Ninth Circuit further found that "Kumar has not established he would have received a better plea bargain, and he therefore has not met his burden to show that, but for any asserted errors of counsel, his

proceedings would have ended in a different result." App. 4. This petition for writ of certiorari follows; no further action has been taken in this case.

The Ninth Circuit in the instant case decided this important federal question regarding *Strickland* prejudice in a way that conflicts with relevant decisions of this Court. *Lee v. United States*, 137 S. Ct. 1958 (2017), *Vartelas v. Holder*, 132 S. Ct. 1479 (2012).

STATEMENT OF THE CASE

Ineffective assistance of counsel for a deportable offense

Ineffective-assistance claims are evaluated using a two-part test: (1) whether the attorney performance was deficient; and (2) if so, whether the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To show prejudice a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A defendant who pled guilty because of ineffective assistance "must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (emphasis added).

Before a defendant enters a guilty plea, "counsel's function as assistant to the defendant [gives rise to] the overarching duty to advocate the defendant's cause

and the more particular duties to consult with the defendant on important decisions" after "mak[ing] reasonable investigations." *Strickland v. Washington*, 466 U.S. at 688, 691 (1984). Counsel is required " . . . to advise the client of 'the advantages and disadvantages of a plea agreement,'" *Padilla*, 559 U.S. at 370 (quoting *Libretti v. United States*, 516 U.S. 29, 50–51 (1995)).

INDICTMENT, LEGAL REPRESENTATION, PROCEEDINGS BELOW

Mr. Kumar pled guilty to Count 1 of his criminal indictment on January 8, 2010; conspiracy to use and possess unauthorized access devices under 18 U.S.C. § 1029(b)(2). App. 7. He was sentenced on April 12, 2010, to 24 months imprisonment, two years supervised release, and restitution in the amount of $145,151.50. App. 7. Mr. Kumar has completed his term of imprisonment and has completed his supervised release.

Mr. Kumar entered the U.S. when he was 9. App. 6. His father, mother, and sister live in California with him. App. 14. His friends are all in the U.S. App. 14. He has attended school from elementary through college here in the U.S. App. 14. He has no relatives outside the U.S., either in the U.K. or India. App. 14. He works in his parent's business and has aided them significantly. App. 14. (Exhibit 1 CDCA Coram Nobis: Petitioner's affidavit at 7–10) Mr. Kumar has significant life and family ties to the U.S. and certainly will suffer significantly if he cannot live or visit here.

Mr. Kumar filed a writ of error coram nobis with the Federal District Court on March 15, 2018, based upon ineffective assistance of counsel previously raised in his 2255 motion before the Federal District Court for the Central District of California, based upon his criminal counsel's failure to discuss the immigration consequences of his plea before, during, and after the plea hearing and counsel's affirmative misadvice as to the immigration consequences before, during, and after sentencing. App. 8. Counsel was aware of the immigrant status of Mr. Kumar before, during and after the plea was entered into and before, during, and after sentencing. This ineffective assistance resulted in Mr. Kumar entering into his plea in an unknowing, involuntary, and unintelligent manner. After briefing by both sides the District Court Judge denied the writ of error coram nobis on a single basis; finding a lack of prejudice under *Rodriguez-Vega* or *Lee.* App. 16.

Mr. Kumar timely appealed the denial to the Ninth Circuit on July, 17 2018. App. 1. The Ninth Circuit issued a memorandum order on July 16, 2019, affirming the decision of the District Court. App. 1. The Ninth Circuit found that he could not establish prejudice under *Rodriguez-Vega* or *Lee.* Specifically they found that the immigration consequences were not "determinative" in Mr. Kumar deciding to go to trial or take a plea agreement. App. 4. They further found that there was no reason to believe that Kumar could have gotten a better immigration neutral plea deal which would have brought a different result to the proceedings. App. 4.

Mr. Kumar continues to assert that he suffered prejudice due to his counsel's failure to inform and later affirmative misstatements of the immigration consequences of his plea. With counsel's focus on the length of sentence as the determinative factor as to immigration consequences (which had absolutely no bearing on whether the plead to crime was an aggravated felony or not for immigration purposes), Mr. Kumar would always have been prejudiced by this lack of pre-plea and incorrect pre-sentencing advice, and deprived of his ability to make an informed and rational decision to plead to a different charge or go to trial. The possibility of his ultimate inability to win at trial, possible length of sentence, or difficulty in obtaining an alternate plea agreement should not bar him from showing prejudice as the Ninth Circuit ruled.

It is not disputed that Mr. Kumar's conviction makes him an aggravated felon for immigration purposes and that the results of his plea agreement were easily discernable. App. 7.

REASONS FOR GRANTING THE PETITION

The Court should grant the instant Petition and reverse because it would not have been irrational for Mr. Kumar to reject the plea agreement or seek a different plea agreement or go to trial had he been properly advised of the deportation consequences.

The District Court Judge and Ninth Circuit Court of Appeals issued orders denying Mr. Kumar's writ of error coram nobis based upon a single ground: lack of prejudice. These decisions directly impact an important federal question regarding *Strickland* prejudice and conflict with relevant decisions of this Court. Mr. Kumar respectfully disagrees with the lower Court's findings as outlined below.

Ineffective-assistance claims are evaluated using a two-part test: (1) whether the attorney performance was deficient; and (2) if so, whether the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To show prejudice a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A defendant who pled guilty because of ineffective assistance "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)

Before a defendant enters a guilty plea, "counsel's function as assistant to the defendant [gives rise to]

the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions" after "mak[ing] reasonable investigations." *Strickland v. Washington*, 466 U.S. at 688, 691 (1984). Counsel is required " . . . to advise the client of 'the advantages and disadvantages of a plea agreement,' " *Padilla*, 559 U.S. at 370 (quoting *Libretti v. United States*, 516 U.S. 29, 50–51 (1995)).

The Supreme Court issued its decision regarding prejudice through ineffective assistance of counsel related to immigration consequences of criminal proceedings in *Lee v. United States*, 137 S. Ct. 1958 (2017), on June 23, 2017. The Court in the *Lee* case rejected the Sixth Circuit's per se rule that a defendant who pleads guilty where there is strong evidence of guilt could never show that he was prejudiced by his attorney's incompetent immigration advice. Instead, the Court found that assessing prejudice is a context-specific determination that may turn on evidence of a noncitizen's strong connections to the United States and a desire to remain in the country. The Supreme Court directed that lower courts should engage in a "case-by-case examination" of whether, "but for counsel's errors," a particular defendant "would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1965, 1966. *See also United States v. Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013); *DeBartolo v. United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th

Cir. 2015); *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

Counsel in the instant case was ineffective when he failed to provide Mr. Kumar the important information about mandatory deportation as a consequence of entering into his plea agreement and failed to consult with him prior to entering into the plea agreement. This ineffective assistance resulted in Mr. Kumar entering into his plea in an unknowing, involuntary, and unintelligent manner. Likewise the error in *Lee* was one that was not claimed to be pertinent to a trial outcome, but is instead claimed to have "affected a defendant's **understanding** of the consequences of his guilty plea." *Id*. at 8 n.3. "The probability that he will come out ahead by taking that course (going to trial) may be small, but it is not trivial. He is entitled to roll the dice." *DeBartolo v. United States*, 790 F.3d 775 (7th Cir. 2015)

A reasonable attorney adhering to the required professional norms after *Padilla*, as in the instant case, would have affirmatively informed a defendant of the 100% chance of mandatory deportation if a guilty plea was entered into for the charged crime and related loss amount, regardless of sentence length, or any other factors, and not made erroneous statements in the sentencing memorandum and at the sentencing hearing, misstating immigration law, as which occurred in this case.

The Ninth Circuit has previously held that there are multiple ways a petitioner may demonstrate

prejudice in immigration misadvice cases, including showing a reasonable probability that a petitioner settled on a criminal charge in a purposeful attempt to avoid an adverse effect on his immigration status. *See Kovacs v. United States*, 744 F.3d 44, 53 (2d Cir. 2014) (finding petitioner's "single-minded focus in the plea negotiations [on] the risk of immigration consequences" and evidence that he "settled on [the felony charge] for the sole reason that [counsel] believed it would not impair [petitioner's] immigration status . . . show[ed] a reasonable probability that he could have negotiated a plea with no effect on his immigration status."). *United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015)

The Ninth Circuit held in *Rodriguez-Vega* that: "It is often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than to plead guilty to an offense rendering her removal virtually certain." *See Padilla*, 559 U.S. at 368 ("[P]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (alteration omitted))). "We have found prejudice where a non-citizen demonstrates clearly that she placed a 'particular emphasis' on the immigration consequence of a plea in deciding whether or not to accept it." *United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015). *See DeBartolo v. United States*, 790 F.3d 775 (7th Cir. 2015), *United States v. Kwan*, 407 F.3d 1005, 1017–18 (9th Cir. 2005), *abrogated on other grounds by*

Padilla, 559 U.S. 356. *See also United States v. Akinsade*, 686 F.3d 248, 255 (4th Cir. 2012) ("We have . . . found prejudice where the defendant, whose counsel misinformed him of deportation consequences, had significant familial ties to the United States and thus would reasonably risk going to trial instead of pleading guilty and facing certain deportation.").

The Ninth Circuit further found in *Rodriguez-Vega* that a "young lawful permanent resident may rationally risk a far greater sentence for an opportunity to avoid lifetime separation from her family and the country in which they reside." *See also DeBartolo v. United States*, 790 F.3d 775 (7th Cir. 2015), *United States v. Orocio*, 645 F.3d 630, 645 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013) ("Mr. Orocio was only 27 years old at the time he entered the plea agreement, and he rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of a single decade in prison.").

Ultimately, the Ninth Circuit found that when "Taken together, these facts demonstrate that Rodriguez-Vega placed a particular emphasis on preserving her ability to remain in the United States, and that had she known that her removal was virtually certain she would have acted rationally in rejecting the second plea agreement and going to trial." *United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015). *See DeBartolo v. United States*, 790 F.3d 775 (7th Cir. 2015).

Under the framework set forth by the Supreme Court in *Lee v. United States*, 137 S. Ct. 1958 (2017) and the Circuit in which this case was heard in *Rodriguez-Vega*, Mr. Kumar in the instant case was clearly prejudiced, as he is deportable with no defense to deportation and upon deportation will be barred for life from return, with no waiver available to him, from visiting his family in the U.S. He entered the U.S. when he was 9. His father, mother, and sister live in California with him. His friends are all in the U.S. He has attended school from elementary through college here in the U.S. He has no relatives outside the U.S., either in the U.K. or India. He works in his parent's business running the day to day operations and has aided them significantly. Mr. Kumar has substantial life and family ties to the U.S. and certainly will suffer considerably if he cannot live or visit here.

Mr. Kumar in the instant case, like the one in *Lee* and *Rodriguez-Vega* would have gone to trial or sought an alternate plea had he been properly informed of the certain immigration consequences of his crime *prior* to his plea. He affirmatively states such in his affidavit. It is clear from the record that he has strong family, work, and life ties to the U.S. "If I had known what the immigration consequences were prior to signing the plea agreement, I would have sought an alternate plea or taken my case to trial. I would have at all costs attempted to secure my status as legal immigrant and stay with my family in the United States." (Affidavit of Mr. Kumar filed with writ of error coram nobis)

It is also clear from his former counsel's statements at the sentencing hearing, in his sentencing memorandum, and in his interrogatories response to the previously filed 2255 motion, that counsel was aware of the significant possibility of immigration consequences and that such consequences were of great importance to Mr. Kumar, factors the Supreme Court found in *Lee* to require strong consideration in determining whether a petitioner was prejudiced in cases such as this.

The immigration issues present with the plea agreement were never fully explained to Mr. Kumar before the plea and after they were explained incorrectly to him. That in effect is the failure of counsel to properly inform him of the intersection of his criminal issues and immigration consequences, and when counsel did inform him the information was incorrect and too late. "Moreover, even had counsel accurately stated that Rodriguez-Vega's removal was virtually certain, we would still find his statement inadequate to purge prejudice because it came too late." (at the sentencing hearing) *United States v. Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015)

The immigration consequences and preserving his status in the U.S. was of the utmost importance to Mr. Kumar. When someone's whole life is in the United States and has been for an extensive period of time it is not unreasonable to think that they might risk taking a longer sentence, seek an alternate plea, or go to trial, to avoid immigration consequences. The option of going to trial, seeking an alternate plea, or the

necessity of going to trial to protect his immigration status was never presented by former counsel to Mr. Kumar as an option however. He furthermore could not properly weigh the value of a different plea or of going to trial because of a lack of knowledge of specific immigration consequences provided by defense counsel prior to entering into the guilty plea.

But for defense counsel's ineffective assistance, Mr. Kumar in the instant case could have tried to receive a plea that would have been structured to avoid adverse immigration consequences or gone to trial. ("Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."); *Vartelas v. Holder*, 132 S. Ct. 1479, 1492 n. 10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, alien[ ] [defendants] might endeavor to negotiate a plea to a nonexcludable offense"); *see also Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1110–11 (9th Cir. 2011).

Defense counsel did not advise Mr. Kumar as to the immigration consequences of his guilty plea, and later misadvised him before and at the sentencing hearing. Taking all the aforementioned factors into account it is reasonable to expect that in the totality of the circumstances test as is now required by the Supreme Court's ruling in *Lee* and as in the Ninth

Circuit's decision in *Rodriguez-Vega*, Mr. Kumar suffered prejudice as he would have gone to trial or sought an alternate plea had he known the certainty of deportation that was caused by taking his plea. Mr. Kumar's inability to prove that an alternate plea was available many years ago should not bar him from showing prejudice. Unfortunately, he was completely unaware of the seriousness of the immigration consequences until long after the sentence and conviction itself.

Mr. Kumar suffered significant prejudice due to counsel's failure to discuss the specific immigration consequences with him prior to pleading guilty, the failure of defense counsel to seek an alternate plea agreement or inform him that his current plea would result in mandatory deportation, information which Mr. Kumar could have used to seek an alternate plea or go to trial.

The question that is of particular importance before this Court is whether Mr. Kumar in failing to prove that a superior alternate plea agreement was available or not should be prohibited from showing prejudice. The Ninth Circuit in the instant case decided this important federal question regarding *Strickland* prejudice in a way that conflicts with relevant decisions of this Court, as outline above. *Lee v. United States*, 137 S. Ct. 1958 (2017), *Vartelas v. Holder*, 132 S. Ct. 1479 (2012) Mr. Kumar would always have been prejudiced by this lack of pre-plea and incorrect pre-sentencing advice, and deprived of his ability to make an informed and rational decision to demand a plea agreement with a different immigration safe charge or

go to trial, when he had no information about the immigration consequences of his plea before entering into it, even though such information was required to be given to him by counsel at the time of his proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: October 11, 2019

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