No.

IN THE SUPREME COURT OF THE UNITED STATES

ARQUIMEDES MENDOZA

Petitioner,

v.

MATHEW CATE

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, it is enough for a defendant claiming ineffective assistance of counsel in the plea context to back his claim with substantial contemporaneous evidence demonstrating an express preference and that he would have rejected the plea offer and gone to trial but for his lawyers deficient performance, or must he also show that an objective "reasonable person" or "reasonable defendant" under similar circumstances would regard the decision to go to trial to be either rational under *Padilla v. Kentucky*, 559 U.S 372 (2010), or reasonable not withstanding strong evidence of guilt in the underlying offense.

LIST OF PARTIES

Petitioner, Arquimedes Mendoza, is represented by Michael B. Bigelow, Esq., of Carmichael, California.

Respondent, Matthew Cate, is represented by the Office of the Attorney General, State of California.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

CALIFORNIA STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner, Arquimedes Mendoza, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished memorandum of the court of appeals is at Appendix A, App. 1. The order of the court of appeals denying rehearing En Banc is at Appendix B, App. 4. The order of the district court denying Mr. Mendoza's habeas petition is at Appendix C, App. 6. The district court's order clarifying his Certificate of Appealability is at Appendix D, App. 8. The district court's order rejecting the Magistrate's Findings and Recommendations is at Appendix D, App. 9. The State Court Order Directing an Informal Response from Respondent is at Appendix E, App 16. The State Court Order denying

Mr. Mendoza's state habeas petition is at Appendix F, App. 20. The transcript of Mr. Mendoza's change of plea is at Appendix G, App. 24. The Magistrate's Findings and Recommendations (rejected) are at Appendix I, App. 33.

JURISDICTION

This petition for certiorari is filed within the 90-day period allowed by Supreme Court Rule 13.1 and Rule 29 and is timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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.

STATEMENT

A. Introduction

Under *Strickland v. Washington,* 466 U.S. 668, 693 (1984*)* habeas petitioners claiming attorney error are required to show a reasonable probability that the result of the proceeding would be different. *Strickland,* 466 U.S. at 694. In the context of a guilty plea, under *Hill v. Lockhart* 474 U.S. 52, 59, (1985), prejudice may be shown if there is a reasonable probability the defendant would not have pled guilty and would have insisted on going to trial. 474 U.S. 52, 59. *Padilla v. Kentucky*, 559 U.S 372 (2010), added a new dimension, suggesting that a defendant must also convince the court that under *Hill* rejection of the plea bargain *would have been rational.* The *Padilla*

Court did not suggest, nor did it decide whether a *rational* decision should be judged objectively or subjectively. It is noteworthy that neither *Strickland* nor *Hill* mention the word *rational* as part of its prejudice analysis.

Because attorney ineffectiveness, and prejudice arising from it, comes in different flavors, in *Lee v United States,* 137 S. Ct. 1958 (2017), this Court articulated a different way to demonstrate prejudice in the plea context, one suited to attorney error claimed to have "affected a defendant's understanding of the consequences of the plea." 137 S. Ct. at 1967 fn. 1. In *Lee,* this Court looked to the particular defendant's *decision-making,* his express preferences and whether they were backed by substantial contemporaneous evidence. If so, the *Lee* Court required no additional showing that the decision was *rational* in order to satisfy *Strickland's* prejudice prong, Nor did *Lee* express a view whether the defendant's decision should be judge objectively or subjectively.

B. The Charges and the Plea

Arquimedes Mendoza was charged with a violation of California Penal Code, section 261(1)(3) a *Strike Offense* under California's Three Strike law. He had previously suffered one *strike* and told his attorney, repeatedly, that he did not want another and would not plead to a strike offense. On the day of trial, the district attorney made a new offer. Mr. Mendoza asked, and was told by his attorney, repeatedly, that the offense was not a *strike*. During the plea colloquy the prosecutor, the judge and trial counsel all confirmed that the

offense was not a *strike*, App. 24-32, because, according to trial counsel, "it does make a difference."[1] APP. 25. When he eventually learned that the offense was *strike* Mr. Mendoza moved to vacate his conviction and sentence under 28 U.S.C. § 2254, claiming ineffective assistance of counsel and that but for his attorney's poor advice he would have rejected the plea offer and gone to trial. Although the government did not concede trial counsel's deficient performance, judges before whom this matter has appeared, including the Ninth Circuit panel, agree it was deficient, satisfying the first part of *Strickland's* two-part test. 466 U.S. 668, 687. The question before each court has been whether Mr. Mendoza could demonstrate prejudice.

C. Proceedings Below

1. The state court, after a hearing to which only Respondent was invited, denied relief, finding that although, "[p]etitioner was particularly anxious to avoid a strike conviction . . . "had he proceeded to trial and been convicted, he would have had a strike against him in any event," and so could

[1] It made a difference because as every California resident, and certainly every state court criminal defendant knows a defendant incurring three strike goes to prison for the rest of his life, or at a minimum 25 years. At the time of Mr. Mendoza's offense in 1999, it was even worse. Prior to the enactment of Proposition 36 in 2012, the penalties were draconian. As set forth in the Voter Information Guide, Gen. Elec. (Nov. 6, 2012) "[p]eople convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences." For that very reason a 21 year-old defendant rejected a strike offer with a three year sentence, even though a robbery conviction would mean much greater prison time. *See,* Tina M. Olson: The Consequences of Plea Bargaining "First Strike" Offenders Under California's "Three Strikes" Law, 36 CAL. W.L. REV. 545, 558. (2000). Thus, avoiding even a first strike, regardless of the cost, is neither unreasonable nor irrational.

not show prejudice.[2]

2. In federal court the Magistrate first determined that the state court's findings of fact were not entitled to deference because it's hearing was procedurally defective and because the state court failed to address many key pieces of evidence. *Taylor v. Maddox*, 366 F.3d 992, 1000, 1001 (9th Cir. 2004); *Hurles v. Ryan*, 706 f.3d 1021, 1038 (9th Cir. 2013.). App. 47. Her conclusion was correct. "A state-court decision will certainly be contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." See, *Williams v. Taylor,* 529 U.S. 362 at 405-06. Moreover. the state court's determination was also contrary to *Hill* because it relied solely on Mr. Mendoza's likelihood of success at trial. Accordingly, the Magistrate found that the state court's "no prejudice" conclusion because Mr. Mendoza was not likely to prevail at trial, was contrary to Supreme Court precedent and an unreasonable determination of the facts, as well as an incorrect application of law under 28 U.S.C. § 2254(d). App.47. Turning then to Mr. Mendoza's claim that had he been properly advised he would have rejected the plea offer and gone to trial, the Magistrate first found trial counsel's performance to be deficient. Then, following *Lee* to

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[2] The state court cited only to *In re Resendiz* (2001) 25 C.4th 230, an IAC immigration case holding that the defendant could not show prejudice because he most likely would have been convicted at trial and therefore could not satisfy *Strickland v. Washington.*

the letter, the Magistrate rejected respondent's argument that Mr. Mendoza would not have plead guilty because of the strength of the underlying case against him because, it "is not the proper question in an ineffective assistance of counsel claim such as this." Instead, she found that although Mr. Mendoza's chances at trial may have been minimal at best, "it is not unreasonable to conclude that petitioner would have preferred those chances to a certain strike in the course of the plea deal." App. 63-64. Pointing to the fact that the guilty plea came after Mr. Mendoza had already been detained for 239 days, after numerous court appearances and on the eve of trial, as "suggest[ing] petitioner's willingness to proceed to a trial throughout the course of his detention on the charges" was substantial contemporaneous evidence supporting his position. App. 63-64. She found even more compelling trial counsel's on the record statement that "the plea offer was being accepted as to that particular subsection *because it does make a difference."* The Magistrate then found that, "the exchange reveals that the difference was attributed to the strike consequences of the plea. She noted as well that when the court referred to the subsection as a "serious felony or violent felony," both of which are strikes, "trial counsel immediately interjected with, "[n]o, that was not agreed upon. That is why we found this section." She also found to be significant that the trial judge had affirmed "this implicit focus on the strike nature of the offense ("why we found this section"), when he asked, "This is not a strike, then?" to which the prosecutor responded, "I don't believe so, Judge."

All of this, the Magistrate concluded, is substantial corroborative evidence of petitioner's willingness to plead solely because he believed that the offense was not a strike. App. 62-64**.** The Plea Colloquy in part**:**

HICKEY: He is prepared this morning to resolve his case. I have been in discussion with Mr. Brooks.

We have come up with a section that is fine as to his conduct; sex with a woman who is passed out. So, we'll enter a plea to 261(a)(3) for a period of three years.

COURT: That a correct statement of the negotiation Mr. Brooks?

BROOKS: Yes, Your Honor, it is.

* * *

COURT: I guess it is charged in count 1, is it not?

HICKEY: We want to make sure the subsection is correct, because it does make a difference.

COURT: 261(1)(3)?

BROOKS: Correct.

* * *

COURT: Because it is a serious felony or violent felony conviction, you will be required to complete 85 percent of the term.

HICKEY: No, that was not agreed upon. That is why we found this section.

COURT: This is not a strike, then?

BROOKS: I don't believe so, Judge.

COURT: All right.

* * *

They were wrong of course. California Penal Code section 261(3)(1) is a strike.

Based on the foregoing, the Magistrate concluded that under these particular circumstances, Mr. Mendoza had credibly and adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to a strike conviction. Accordingly, she recommended his habeas petition be granted. App. 65.

3. The district court rejected the Magistrate's findings and recommendation for want of an evidentiary hearing.[3] App 15. At bottom, the basis for the district court's rejection was because it "would require this Court to accept that Petitioner's trial counsel, the prosecutor, and the state court judge all misunderstood whether Petitioner's conviction qualified as a strike offense." App. 13. Clearly, however, the plea colloquy shows that all three were wrong. App. 29. Moreover, every other judge reviewing this case has agreed that all three were wrong.

> COURT: Because it is a serious felony or violent felony conviction, you will be required to complete 85 percent of the term.
>
> HICKEY: No, that was not agreed upon. That is why we found this section.
>
> COURT: This is not a strike, then?
>
> BROOKS: I don't believe so, Judge.

[3] An evidentiary hearing had been scheduled, but trial counsel, who would have been the only witness, had died. The Magistrate found an evidentiary hearing unnecessary. App. 35-34. *See* Rules. Governing § 2254 Cases U.S. Dist. Cts. 8(a), Advisory Committee Notes (1976 Adoption). *See also, Young v. Gipson*, 163 F. Supp. 3d 647, 749-50 (N.D. Cal. 2015).

COURT: All right.

4. On appeal the Ninth Circuit, electing to decide Mr. Martinez appeal on its merits, affirmed. App. 2-4 fn.1. The panel agreed, tacitly, that Mr. Mendoza had established deficient performance, App. 3. The panel also recognized that the attorney error claim regarded the *consequences* of the plea agreement and that Mr. Mendoza had expressed his *concern* about pleading to another strike offense. App. 3. Beyond that spare acknowledgment, the panel failed address key pieces of evidence the Magistrate considered when she found that Mr. Martinez had backed his claim that he would have rejected the plea offer and gone to trial instead, with substantial contemporaneous evidence. Simply put, the Ninth Circuit failed to conduct any semblance of the analysis required of it by this Court in *Lee*. Instead, the panel zeroed in on its own certainty that Mendoza's case was indefensible and that he lacked a viable defense. App. 2-3. And, contrary to the panel's conclusion otherwise, App. 4, in light of this Court's decision in *Lee* the state court's decision denying Mr. Mendoza' prejudice claim on the grounds that his underlying case was indefensible, App. 21-23 (quoting *In re Resendiz* (2001) 25 C.4th 230), was an objectively unreasonable finding of fact.

Finally, even though the Ninth Circuit's panel did not cite *Padilla* it is clear from its citation to *United States v. Rodriguez*, 49 F.4th 1205, 1213-14, (9th Cir. 2023) App. 3, that from this panel's perspective Mr. Martinez was

required "to establish that he would have rationally gone to trial" and that he could not because he had "no viable defense at trial." *Id.,* at 1214.

The court of appeals denied Mr. Mendoza's claim without bothering to consider anything other than the strength of the underlying case, "is not the proper question in an ineffective assistance of counsel claim such as this." 137 S.Ct. at 1967 fn.3. The panel failed to consider Mt. Mendoza's *special circumstances* – that he had suffered one strike and that it was his *preference* not to incur another. Nor did the panel consider the fact that Mr. Mendoza had already been detained for 239 days, after numerous court appearances. Nor did the panel consider that it was only on the eve of trial that he changed his plea and then only because he had been convinced by trial counsel, the district attorney and the judge that the offense to which he was pleading was not a strike. All of the forgoing is substantial contemporaneous evidence supporting Mr. Martinez' position but not considered by the panel. Nor did the panel consider trial counsel's on the record statement that "the plea offer was being accepted as to that particular subsection "*because it does make a difference"* the importance of which is manifest because when the judge got it wrong trial counsel immediately interjected with, "[n]o, that was not agreed upon. That is why we found this section." Nor did the panel consider that the trial judge had affirmed the parties focus on the strike nature of the offense ("why we found this section"), when he asked, "This is not a strike, then?" to which the prosecutor responded, "I don't believe so, Judge."

Even though the Magistrate found this all to be substantial corroborative evidence that Mr. Martinez would have rejected the plea offer and instead gone to trial had he not been misadvised that the offense to which he was pleading guilty was a strike offense, and the Ninth Circuit did not trouble to consider it or analyze it. Instead, the appellate court chose a familiar path and asked, in effect, whether the defendant's decision to reject the plea offer and instead have gone to trial would have been objectively rational in the absence of a viable defense. The panel agreed it would not have been, bypassing this Court's decision in *Lee* altogether and judging it by a standard the *Lee* Court did not intend.

Certiorari is warranted in this case. It cannot be that ineffective assistance of counsel claims which follow *Lee* may be granted relief in some courts, while the same claim might be denied in other courts because the defendant is unable to also convince the court that some hypothetical reasonable person, or reasonable defendant would find the decision to go to trial to be irrational.

The rampant confusion and misunderstanding of *Lee's* holdings evidence the need for a more clearly articulated test that captures the full nuance of defendant decision-making in the plea bargain context.

REASONS FOR GRANTING THE PETITION

A. This Petition Readily Satisfies this Court's Criteria for Certiorari.

This case presents the same issue on which this Court previously granted certiorari in *Lee v. United States* 137 S.Ct. 1958, albeit wrapped a bit differently. In *Lee,* the Question Presented was whether it was always irrational for a defendant to reject a plea offer not withstanding strong evidence of guilt. 137 S.Ct. 1958. Here the question is whether a defendant satisfying *Lee's* criteria must also convince the court that some objective "reasonable person" or "reasonable defendant" under similar circumstances would regard the decision to go to trial to be either rational under *Padilla v. Kentucky*, 559 U.S 372 (2010), or reasonable notwithstanding strong evidence of guilt in the underlying offense. Confusion is rampant. Some courts argue the standard is objective under *Padilla,* others that it is some kind of a hybrid. Most consider that evidence of the decision's rationality must be shown in addition to satisfying *Lee's* requirements. Others, like the Ninth Circuit in this case, ignore *Lee* and jump to the question of whether the decision is rational by some reasonable person standard. *See,* pages 13-15 *infra*; *see also,* fn4.

This petition should be granted because it is the perfect vehicle to address the standard by which *Lee's* decision making should be judged.

In the plea context the heart of *Lee's* prejudice inquiry centered on the individual defendant's *decision-making* process, to be evaluated on a case-by-case basis looking to contemporaneous evidence to substantiate the

defendant's claim and express preferences. The *Lee* Court instructed lower courts to do the same and admonished them not to include in their analysis their own prediction of the likely outcome of a trial that had not taken place. 137 S. Ct. at 1967, 1968 fn.3. To obtain relief, the *Lee* Court required no additional showing. Nor did it judge the defendant's decision making by a reasonable person or by a reasonable defendant under similar circumstances standard. While the Ninth Circuit's decision here does not directly reject the defendant's decision to go to trial in the absence of a viable defense, and so avoids the government's problem in *Lee.* Instead, the Ninth Circuit asks a slightly different question. It asks if, under *Padilla,* "would it have been objectively *rational* for the defendant to have rejected the plea offer and instead go to trial in the absence of a viable defense?" Under *Lee,* that question is answered by establishing what the particular defendant would actually do, or actually did do. When the question is asked by the Ninth Circuit, and others, what the defendant would or would not do, or did or did not do doesn't matter. All that matters from the Ninth Circuit's perspective, is what a *reasonable person* would have done in that same situation. Moreover, when the question is asked as the Ninth Circuit has asked it, courts are freed from *Lee's* admonition that they should not consider trial outcome in their prejudice analysis. 137 S.Ct. 1967 fn. 3. More problematic, courts are also able to avoid *Lee's decision-making* analysis altogether, as did the Ninth Circuit in this case. By asking whether the decision was objectively rational

and then considering the likelihood of success at trial, *Lee* is, from the Ninth Circuit and other court's perspective not implicated. In another Ninth Circuit case, *United States v. Figueras*, 2022 U.S. App. LEXIS 3666 **3-4 (CA 9th 2022) the appellate court did as it did in Mr. Mendoza's case, ignored *Lee* and required the defendant's decision to have been rational under *Padilla,* considering "the strength of the government's case."

Like the Ninth Circuit, the Sixth Circuit has declared in similar cases that the test is objective, not subjective and that a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *United States v. Varatha-Rajan, 2018 U.S. App. LEXIS 16924 *2 (*CA6 2018*). See also, Hill v. Christiansen*, 2021 U.S. App. LEXIS 31420 *4 (CA 6th Cir). In the Fourth Circuit: a defendant need only demonstrate that, from the perspective of a reasonable person in his position, rejecting the plea agreement would have been rational. *United States v. Murillo*, 927 F.3d 808, 817 (4th Cir. 2019). The Tenth Circuit is a hybrid and puts it this way: "the requirement that a defendant convince the court that a decision to change his plea would have been rational as setting an " objective *floor*, somewhere below [the] more demanding requirement that the defendant show a *reasonable probability* that he would have gone to trial absent counsel's errors." *United States v. Dominguez*, 998 F.3d 1094, 1112 (10th Circ. 2021). *See also Clayton v. Crow*, 2022 U.S. App. LEXIS 29168 *29 (CA10 2022)(defendant must prove decision rational and that he would have changed

his mind). District courts are no different. Even after *Lee,* in fact, often citing *Lee* they continue to apply *Padilla's* "rational under the circumstance" standard objectively and as a separate and distinct finding from *Lee's* intended focus on the individual defendant's decision making supported by substantial contemporaneous evidence. What's more, under *Padilla*, whether a defendant's decision is rational or not is most often determined by reference to the probable outcome of a hypothetical trial with no viable defense, all in contravention of this Court's holding and intent in *Lee. Cf. Clement v. Hooks*, 2021 U.S. Dist. LEXIS 118747 *14 (MD NC June 25, 2021) holding that *Strickland* prejudice under *Padilla* not only requires a reasonable probability . . . that the defendant would have rejected the plea bargain but, "*[f]urthermore*, 'to obtain relief, . . . [the] decision . . . [must] have been rational which [is] an 'objective inquiry' focusing on 'the likely outcome of a trial had the defendant not pleaded guilty'" (Cite omitted, emphasis added.") *Id.* at 14. *See also Hanger v. Clarke*, 2023 U.S. Dist. LEXIS 33045 (WD VA February 28, 2023) (unpublished)(under *Padilla*, the decision [must be] rational "judged by an objective standard, meaning that the petitioner must convince the court that a decision to reject the plea bargain would have been reasonable *and* rational under the circumstances. *See also,* 2020 *Lozano v. United States*, 802 F. App'x 651, 654, 655 (2d Cir. 2020)(explaining that *Lee* requires a subjective standard); 2022 *Miraldacruz v. United States*, 2022 U.S. Dist. LEXIS 209549 *8 (ND T No. 3, 2022)(Courts may consider risk of going to trial); *Superville v.*

United States, 284 F. Supp. 3d 364 (NY ED Feb. 27, 2018); *McKathan v. United States*, 969 F.3d 1213 (11th Cir. 2020)(In immigration case court denies appeal in part because of disparity between plea offer and likely sentence after trial.) Some courts do manage to follow *Lee* without resorting to *Padilla* ,but they are few. [4] *See, Delarosa v. Myrick,* 2021 U.S. App.Lex. 24803 (CA 9th Cir 2021). But *see*, Judge Watford's Dissent. *Id.,* at *7;

Six years after *Lee* federal appellate courts and lower district courts continue to apply either an objective or subjective reasonable person or reasonable defendant test to the basic question of whether a defendant who claims he would have rejected a plea offer and gone to trial but for his lawyer's bad advice. That was not the *Lee* Court's holding, nor was it the *Lee* Court's intent.

[4] Other courts in cases similar to *Lee* or analogous to it apply an objective test or sometime a subjective test or both to a defendant's rejection of plea offer, and his rationality in doing so. District court cases are all over the place, most requiring the decision to reject the plea to be *Padilla* rational under an objective standard. See, *United States v. Murray* 2022 U.S. Dist. LEXIS 150510 (PMDC August 22, 2022) (even if attorney provided wrong advise, defendant's decision to reject the plea offer must also be rational); In *Nutt v. Payne*, 2021 U.S. Dist. LEXIS 115795 *11 (AED May 18, 2021) the defendant must substantiate his preference and "further" his decision must be rational); *Hanger v. Clarke*, 2023 U.S. Dist. LEXIS 33045 (WD VA February 28, 2023) (unpublished); *Peterson v. United States*, 2020 U.S. Dist. LEXIS 118499 *9 (VA DC June 12, 2020); *United States v. Jimenez*, 2019 U.S. Dist. LEXIS 86314 *15 (NYWD May 21, 2019); *Klaiber v. United States*, 471 F. Supp. 3d 696, 707 DC M 2021); *United States v. McRae*, 2022 U.S. Dist. LEXIS 189371 *11 (KDC October 17, 2022); *Pantoliano v. United States*, 2020 U.S. Dist. LEXIS 78170 (NYED 2020); *Marshall v. United States*, 368 F. Supp. 3d 674, 680 (NYSD 2019); *Royster v. Daye*, 2020 U.S. Dist. LEXIS 180345 *11 (NCED 2020); *Smith v. Dist. Atty. of Chester Cnty*., 2023 U.S. Dist. LEXIS 3414 *28 (PEDC January 9, 2023); 2022).

Lee clarified *Strickland's* prejudice requirements in plea bargaining cases and articulated a different way to establish prejudice, one suited to attorney error claimed to have "affected a defendant's understanding of the consequences of the plea." *Id.,* at 1967 fn1. *Lee* focused on the intent of the individual defendant *decision-maker* a fact which is evident from its instruction to the lower courts that rather than asking whether the *fact-finder* judge would have made a different decision, ask what the *decision-making* defendant actually did under his particular circumstances. In addition, the *Lee* Court provided lower courts with guidelines on how they should go about their obligations and instructed them to center their *Strickland* prejudice inquiry on the defendant's *decision-making*. Taking a page from *Hill v. Lockhart,* 474 U.S. 52, 60, (1985), judges, said the *Lee* Court, should also determine if the defendant *decision-maker* "placed particular emphasis [on a specific] issue in deciding whether or not to plead guilty'" and to, "look to contemporaneous evidence to substantiate the defendant's express preferences" in their prejudice analysis. 137 S.Ct. at 1958, 1967. Finally, *Lee* also admonished judges not to consider probable trial outcome in their prejudice analysis. 137 S. Ct. 1958, 1967 fn. 3.

Lee did not come from whole cloth. Chief Justice Roberts' decision demonstrated an acute awareness of, and manifest intent to adopt and apply the somewhat esoteric theories of *rational choice* and *rational-decision making* as a different way to establish *Strickland* prejudice in consequence focused

cases.[5] To understand *Lee*, it is helpful to understand Rational Choice Theory.

Rational *choice theory* informs *Lee* and explains why *Lee's* holdings, instructions and admonitions to lower courts do not ask what a *reasonable person* or a reasonable *defendant* would do under the same circumstance. It explains why *Lee* focuses on the determination of what *this* particular defendant did and why he, from *his* perspective and under *his* circumstances, did what he did. And rational choice theory explains why *Lee's* findings are not based on *Padilla's* standard of objective rationality, and why under *Lee* once a defendant *decision maker* substantiates his claim that he would have rejected the plea offer and gone to trial but for his lawyer's bad advice, nothing more is required of him to satisfy *Strickland's* "reasonable probability that the result of the proceedings would have been different" prejudice prong. In short, *Lee's* analysis, instruction and admonitions to lower courts all reflect a whole-sale adoption of the *Rational Choice* paradigm.

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[5] The discussion which follows is an effort to distill and summarize a complex topic about which volumes have been written. Links to some of the more helpful articles offering a more complete understanding of *rational choice* are attached. *See,* Rational Decision Making. Nitta, Keith. "decision making". *Encyclopedia Britannica*, 19 Apr. 2023, https://www.britannica.com/topic/decision-making
See, Introduction to Rational Choice Theory in Social Work. Online MSW Programs. https://www.onlinemswprograms.com/social-work/theories/rational-choice-theory/
See also, Stanford Encyclopedia of Philosophy – *Decision Theory*: https://plato.stanford.edu/entries/decision-theory/
Stanford Encyclopedia of *Philosophy – Normative Theories of Rational Choice – Expected Utility*: https://plato.stanford.edu/entries/rationality-normative-utility

In sum the wide version of rational choice theory assumes that all kinds of motives must be considered when a behavior is explained; that beliefs and attitudes matter and that individuals do what they think is best for them. In *rational choice* theory the decision-maker strives to achieve benefits that are optimal in nature *to the decision-maker*, even though the choice may not always give the best possible returns and even though a different decision maker under the same circumstance might not agree. In other words, a *defendant decision-maker* who chooses a course of action that is most in line with his own preferences comports with the theory of *rational choice*.

It cannot be an accident that the *Lee* Court focused on the defendant's decision making from the defendant's perspective, placing itself in Lee's shoes and asking what the particular defendant would decide, and why. As systematically thorough as this Court's discussion is, had it intended to judge the defendant *decision-maker's conduct* objectively, by what some hypothetical reasonable person or reasonable defendant would have done, one may be confident the *Lee* Court would have said so. No, *Lee's* analysis reflects a full-throated endorsement, and application, of a *decision-making* process fully within the paradigmatic, interrelated models of *Rational Behavior*, *Rational Decision Making* and *Rational Choice*.

And here it is essential to appreciate that *rational* as used in the *rational choice* models is quite different from Justice Steven's colloquial use of the word *rational* in *Padilla* and those cases which follow it so slavishly. In

the context of those cases, requiring a defendant to convince the court that his decision is *rational* is simply asking him to explain why his decision is sensible, intelligent, reasonable, or logical as *rational* is often defined. [6] Perhaps Justice Stevens intended more, but the fact is that in the decisions citing *Padilla* it is fair to say that "rational under the circumstances" test has morphed into a full blown reasonableness standard, if it ever was anything more. *See, e.g.,* pgs. 14-15 fn. 4, and cases cited.

Rational choice models, however, uses a much narrower definition of rational and rationality. The informal definition of rationality in the context of theories involving rational choice and rational decision making revolves around the ability to convince others.[7] Where the choices are somewhat equal and the decision maker can convince others that he is right in making them, the decision is said to be *objectively rational*. Where, however, the decision maker cannot be convinced that he is wrong but is prepared to stand by his decision in any event, the decision is *subjectively rational*. *See Faro, Jean-Philippe Lefort, See,* fn.7 at *2.*

Without diving too deeply into the literature and theory, suffice it to say that *rational behavior* in the decision-making process focuses on making choices that result in the optimal level of benefit for an individual decision maker. The assumption of rational behavior implies that people would rather

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[6]Merriam Webster Thesaurus: https://www.merriam-webster.com/thesaurus/rational

[7] *José Heleno Faro, Jean-Philippe Lefort, Dynamic Objective and Subjective Rationality,* Theoretical Economic Theory No. 1 (2019)

take actions that benefit them versus actions that harm them. Although it strives to achieve benefits that are optimal in nature *to the decision-maker* it is recognized that rational behavior may also facilitate decision-making that may not always give the best possible returns. Nor is it necessary that it do so.

Rational Choice theory in conjunction with Rational *Decision-Making* theory have at their center the assumption that decision makers choose a course of action that is most in line with their own personal preferences. It does *not* require that a decision makers preference be in his best interest and in fact, a decision maker's act may be against a broadly construed self-interest. Decision theory is concerned with the reasoning underlying a decision maker's choices. As a part of the rational decision-making process, a decision maker reviews alternatives, considers consequences from each alternative, and acts in a manner he or she believes has optimal consequences for himself or herself. It does not require the decision-maker be able to convince others his decision was sensible, reasonable, or intelligent.

In sum then, *Rational Choice* posits that human beings are rational, self-interested creatures who make decisions based on a reasoned weighing of potential costs and benefits. A decision-maker who chooses a course of action that is most in line with his preferences comports with the theory of rational behavior. Rational behavior need not involve receiving the greatest possible benefit because the satisfaction received could be purely emotional or non-monetary.

In *Lee,* informed by Rational Choice theory's focus on the individual's decision making, the Court asks only: 1) what are the defendant's choices; 2) what are his preferences and 3) what is his reasoning behind his choice; and 4) what did he decide. In applying *Hill, Lee* also instructs judges to consider a defendant's special circumstances for whom avoidance may be the determinative factor in his decision-making process and to look to contemporaneous evidence which supports the defendant's preferences. The *Lee* Court neither asks about nor requires the defendant's preference and/or choice and decision to be objectively the most optimal, only that the *decision-making* defendant believe it to be optimal from his perspective under his circumstances. The *Lee* Court does not ask if the decision is rational from a reasonable person's perspective or from the fact finder's perspective.

Unsurprisingly these are the very same factors one finds predominate and inform *rational choice theory* to wit, a decision maker who chooses a course of action in line with his preferences even though it may be against a broadly construed self-interest. *Lee's* analysis focuses on the individual defendant as the decision maker, his reasoning underlying his choices in light of alternatives, and consequences from each alternative, and whether the defendant decision-maker acts in a manner he or she believes has optimal consequences for him. Informed by the *rational choice* models, evaluating the factors and the reasons alleged to have influenced the defendant's decision, the *Lee* Court was able to conclude, without more, that the defendant would

have rejected the plea offer and gone to trial, even though some other decision maker might not have made the same choice. 137 S.Ct. at 1969.

It just may not be gainsaid that the *Lee* Court's discussion and conclusion were decidedly informed by and carefully tracked the *rational choice* and *rational decision* paradigms. Because they were, it is reasonable to look to the rational choice models to better understand *Lee,* its explanations and holdings. By doing so it becomes clear that any court requiring a defendant in the context of a plea case to convince the court that his decision is *rational* under *Padilla* does not conform to rational choice theory and is not what *Lee* had intended. Likewise, *Padilla's* mandate that the *decision maker* "convince others" compels the finding that the *decision-maker's* decision be judged by an objective standard, which is also not part of the rational choice paradigm or a part of the *Lee* Court's intent. To the *Lee* Court it simply did not matter that Lee was or was not able to convince others, particularly judges, that his decision was rational or reasonable. In other words, from this Court's perspective consonant with rational choice theory, Lee's decision to reject the plea offer was neither *Padilla* rational nor irrational and neither subjectively nor objectively reasonable.

To the extent some lower courts are persuaded that the *Lee* Court itself also looked to the *rationality* of the defendant's decision, a closer reading and an understanding of rational choice theory reveals the exact opposite to be true. When *Lee* rejected the government's contention that it would not have

been "irrational" for a defendant in Lee's circumstances to reject the plea offer, an additional objective showing required of the defendant under *Padilla*, the *Lee* Court did two things. First, it instead instructed lower court judges to focus on the defendant's *decision-making* and provided guidelines on how they should go about their analysis. Next it stated that it [could] not agree that would be irrational [for Lee] to reject the plea offer . . . not everyone in *Lee's* position would . . . . But we cannot say it would be irrational to do so[,]" Here the *Lee* Court took a page directly from the rational choice model. In rational choice theory the choice is not required to be optimal. The decision-maker is not required to convince others the choice is optimal. The *Lee* Court's rejection of the government's proposal and its holding that it cannot decide what is irrational, make it about as clear as it can be that the decision is the defendant's, from his perspective, given his circumstances and what some *reasonable person* or some reasonable defendant would do does not matter. This Court's final pronouncement on the subject clearly reemphasized the point that it is the defendant's decision, right or wrong, reasonable or unreasonable, intelligent or not to make, and is not to be judged objectively or subjectively by some disinterested fact-finder. After all, if the standard were anything else, if the *Lee* Court "cannot say it would be irrational," who can.

B. The Question Presented is of National Importance and Requires Prompt Resolution, and This Case is an Ideal Vehicle for Resolving that Question

The numerous conflicting decisions establish the issue to be a recurring one with much unnecessary litigation. The Court should grant the petition and resolve that conflict now.

First, despite this Court's decision in *Lee*, a shocking number of courts apply an incorrect standard the context of ineffective assistance of counsel in plea cases, one neither consonant with *Lee,* nor intended by this Court in *Lee.*. As a result, circuits have been forced to address the question presented and mostly get it wrong.

Second, the split is profound and well developed and it is highly unlikely that subsequent circuit decisions or *en banc* proceedings will resolve the conflict or provide useful additional analysis. The Ninth Circuit panel in this very case, for example, had the opportunity to follow another panel's decision in *Delarosa v. Myrick,* or advocate for *en banc* review of its decision. Instead, it rejected the latter and tacitly adopted the view of *Delarosa's* dissenter. What's more, the panel adopted the incorrect analysis of another panel's decision in *United States v. Rodriguez*, 49 F.4th 1205, 1213-14.

Third, further delay in resolving the conflict harms the government, defendants, and the justice system. As additional cases similar to *Lee* continue to forsake *Lee* and are incorrectly decided in reliance on *Padilla's* rationality requirement, greater government expense will be incurred, defendants will

continue to be denied their Sixth Amendment right to effective assistance of counsel and the justice system will be perceived as arbitrary, capricious and at the whim of a judicial luck of the draw.

Finally, this Court's intervention now is required to vindicate the Sixth Amendment's guaranty of effective assistance of counsel. This Court's review is justified if there is even a possibility lower courts are permitting unconstitutionally obtained pleas to remain uncorrected. And certainly, that is the case here. In the present case, the Ninth Circuit simply ignored *Lee* and because in its view the defendant had no viable defense was able to do an end run around *Lee's* precedent. Clearly there is a the need for a more clearly articulated test that captures the full nuance of defendant decision-making in the plea bargain context.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted

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