

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2023 Term

HUSSEIN KADHIM ABOOD KHALAF

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Submitted By:

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QUESTION PRESENTED

Deportation consequences for noncitizens charged with crimes pose hardships as serious as imprisonment that bear on the decision of whether to plead guilty or contest a charge at trial. Immigration consequences are not always obvious to attorneys who do not specialize in such law. This Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that if immigration law clearly states that conviction for a specific crime (*e.g.*, drug trafficking) renders a client deportable, the failure to inform a client of such peril constitutes ineffective assistance. If the risk of deportation is not clear, *Padilla* held that defense counsel need do no more than advise their client that pending criminal charges may carry a risk of adverse immigration consequences.

Petitioner sought to withdraw a guilty plea he entered to a lesser charge of blackmail relying on his appointed attorney's assertion that his own research led him to believe that charge would "not certainly" constitute a crime of moral turpitude rendering him deportable, while at the same time stating he should consult an immigration attorney although counsel knew petitioner lacked the funds to obtain such advice. The Eighth Circuit held that counsel satisfied *Padilla* by advising his indigent client to seek advice from an expert and dismissed Mr. Khalaf's claim that counsel's false assurance that his own research showed deportation would not definitely result established good cause to withdraw his plea of guilty.

Mr. Khalaf's case raises the following issue:

1. When deportation consequences posed by a criminal charge are not clear, do attorneys render ineffective assistance by telling an indigent client their own research shows no certainty of deportation from a plea bargain, but adding they should consult an immigration attorney?

Parties to the Proceedings

Petitioner Hussein Kadhim Abood Khalaf was represented in the lower court proceedings by his appointed counsel, Nanci H. McCarthy, Public Defender, and Assistant Federal Public Defender Mohammed G. Ahmed, 1010 Market, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Sayler Fleming and Assistant United States Attorney Colleen Lang, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri 63102.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings:

- United States v. Khalaf, 4:22-CR-00062-HEA-1 (E.D. Mo) (criminal proceeding), judgment entered May 10, 2023,
- United States v. Khalaf, 23-2159 (8th Cir.) (direct criminal appeal), appellate judgment entered February 26, 2024,
- United States v. Khalaf, 23-2159 (8th Cir.) (direct criminal appeal), order denying petition for rehearing *en banc* and panel rehearing entered April 27, 2024, and
- Khalaf v. United States, 243A37 (Supreme Court) (Application to extend time to file a petition for a writ of certiorari) order granting additional time through September 14, 2024, entered on July 15, 2024.

There are no other proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	2
PARTIES TO THE PROCEEDING	3
DIRECTLY RELATED PROCEEDINGS	4
TABLE OF AUTHORITIES	6
OPINION BELOW	8
JURISDICTION	8
STATUTORY PROVISIONS	9
STATEMENT OF THE CASE	12
The Eighth Circuit’s ruling	15
GROUND FOR GRANTING THE WRIT	16
I. The Court should grant certiorari to resolve the conflicting views of federal and state courts as to whether an attorney violates Padilla by advising a noncitizen client that deportation consequences may result from conviction yet simultaneously belittling such risks.	16
The clear showing that Petitioner would not have pled guilty but for Counsel’s remarks belittling deportation risks a perfect case to resolve the issue.	19
C. This case is an excellent vehicle for resolving the circuit conflict	20
CONCLUSION	21
Appendix	

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Brady v. United States</i> , 397 U.S. 742 (1970)	16
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	16
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983)	16
<i>Lehmann v United States ex rel. Carson</i> , 353 U.S. 685 (1957)	18
<i>Libretti v. United States</i> , 516 U.S. 29 (1995)	16
<i>Florida v. Nixon</i> , 543 U.S. 175 (2004)	16
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010)	<i>passim</i>

Court of Appeals Cases

<i>Kovacs v. United States</i> , 744 F.3d 44 (2d. Cir. 2014)	19
<i>Ortiz v. Barr</i> , 962 F.3d 1045 (8th Cir. 2020)	17
<i>United States v. Rodriguez-Vega</i> , 797 F.3d 781 (9th Cir. 2015)	19
<i>United States v. Swaby</i> , 855 F.3d 233 (4th Cir. 2017)	19
<i>Zlatan v. Holder</i> , 390 Fed. Appx 569 (7th Cir. 2010) (unpublished)	18

State Court Cases

<i>Budziszewski v. Comm'r of Correction</i> , 142 A.3d 243 (Conn. 2016)	19
<i>People v. Kucharski</i> , 987 N.E.2d 906 (Ill. App. Ct. 2013)	18
<i>State v. Sandoval</i> , 249 P.3d 1015 (Wash. 2011)	19

Federal Statutes

8 U.S.C. § 1227	14, 17, 18
18 U.S.C. § 873	12, 14, 17, 18
18 U.S.C. § 1362	9, 20

2018 U.S.C. § 2261	11, 17
28 U.S.C. § 1254(1).	8

THE OPINION BELOW

The Eighth Circuit's ruling in Mr. Khalaf's case is not published. It appears in the Appendix to this Petition at pages 1-3.

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on February 26, 2024. Appendix 1-3. Mr. Khalaf filed a timely motion for rehearing and rehearing *en banc*, which was denied April 17, 2024. Appendix 4. Justice Kavanaugh granted Mr. Khalaf's timely application for additional time in which to file his petition up through September 14, 2024. Appendix 5. This petition is timely filed by mailing on September 16, 2024, the first open court day following Saturday September 14, 2024. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS

8 U.S.C. § 1227. Deportable aliens

- (a) **Classes of deportable aliens.** Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

.....

(2) Criminal offenses.

- (i) Crimes of moral turpitude. Any alien who—
- (I) Is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and
- (II) is convicted of a crime for which a sentence of one year or longer may be imposed,
- is deportable.

18 U.S.C. § 873. Blackmail

Whoever, under a threat of informing, or as a consideration for not informing, against any violation of an law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both.

8 U.S.C. § 1362 (2023)

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

18 U.S.C. § 2261 Interstate Domestic violence

(a) **Offenses)**

- (2) Causing travel of victim. A person who causes a spouse, intimate partner, nor dating partner to travel in interstate or foreign commerce . . . by force, coercion, duress, or fraud, and who, in the course of, as a result or, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner or dating partner, shall be punished as provided in subsection (b).

.....

(b) Penalties. A person who violates this section or section 2261A shall be fined under this title, imprisoned—

(5) for not more than 5 years[.].

STATEMENT OF THE CASE

This case presents an important and recurrent problem of whether defense counsel renders ineffective assistance by informing a non-citizen considering whether to enter a plea bargain confessing guilt of a criminal charge that deportation consequences might apply while also belittling any such risk. The Eighth Circuit's ruling that an attorney who advises that deportation consequences may result while offering an opinion belittling such risk conflicts with rulings in other circuits and state courts that hold that such advice provides ineffective assistance under *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Mr. Khalaf came to the United States from Iraq on a student visa and earned a master's degree in civil engineering at Western Michigan University before starting Ph.D. studies at St. Louis University. As a teaching assistant he met another student, E.M., and they dated in 2020. E.M. became involved online with another man named Almazroui, who was angered to learn of her relationship with Mr. Khalaf, whom he knew. Almazroui sent E.M. messages threatening to forward sexual videos she sent him to St. Louis University if she did not have sex with him. From February 6-8, 2022, E.M. received texts from differing phone numbers demanding money and threatening to spread the videos. Charter Communications attributed the texts origin to an IP address it attributed to Mr. Khalaf. An FBI investigation found Mr. Khalaf and his vehicle at that address at times and a search turned up computer equipment with some of the communications E.M. received. In an FBI interview, Mr. Khalaf admitted participating in messages prompted by Almazroui from different numbers but denied sending any threatening harm.

The government indicted Mr. Khalaf for cyberstalking involving instruments of interstate commerce for conduct reasonably expected to cause emotional distress punishable by five years in prison, 18 U.S.C. §2261(b)(5). A public defender was initially appointed, but Attorney

Charles Lozano entered as defense counsel before the Government disclosed any forensic evidence relating to the social media posts. Mr. Lozano waived the filing of pretrial motions on June 1, 2022, without notifying Mr. Khalaf. Trial was set for July 5, 2022, but was continued several times at Mr. Lozano's request. Mr. Khalaf wrote the Court asking for a new attorney and Attorney Lozano moved to withdraw. At a hearing, Mr. Khalaf noted he had been incarcerated since January in Marion County, Missouri, during which time the University dismissed him after he failed to receive notices about a hearing on continuing his Ph.D. Mr. Khalaf believed Lozano was seeking dismissal of the felony charge for which he signed a waiver of his right to speedy trial. After Mr. Khalaf wrote the Court, Mr. Lozano conveyed another offer that Mr. Khalaf turned down, stating he had "lost everything" when Saint Louis University dismissed him. Leaving the jail, Mr. Lozano remarked "f__k you and enjoy staying in [] prison." In the hearing on Lozano's withdrawal, Mr. Khalaf told the judge that if Mr. Lozano's remaining would help solve the case, he would agree to it, and counsel remained.

The United States subsequently sought a new trial date as the original prosecutor had taken a job out of state. The new prosecutor stated she had not been led to believe Mr. Khalaf wanted a trial. Appendix 8. The Court agreed to continue the trial setting, citing the new prosecutor's need for time to review complex social media evidence involved. *Id.* at 11. The prosecutor noted it had offered to file a misdemeanor information charging blackmail, 18 U.S.C. § 873, with a recommendation for "time served". *Id.* Petitioner Khalaf related his response:

"I explained like the reason for my rejection because I believe I'm innocent like when it comes to those like two charges, and again, the felony or misdemeanor or everything, I'm here on a student visa and anything of those will affect my stay like legally here in the United States. I know I was expelled from school because they held like three or four hearings. They were calling my number and I was in jail, and they decided to expel me. So my last chance to prove my innocence and hopefully go to school – I will not be joining St. Louis University anymore. I asked them to don't expel me so I can move to study in another school. Those are my reasons."

“And again, it’s like I am not expert. This is my first time in jail, first time being in trouble, anything, but I’ve seen like people like when they come to American jail, they have like very bad record sometimes, like violating all like probation, parole, whatever, and let’s say protection orders sometimes. They come and they offer a misdemeanor, they leave after one week. I’m here like for nine months. Like October 24th I was here for nine months. So those are like my reasons to reject it because I need another chance to continue my dream to finish my school.”

Id. at 13. As the hearing ended, Mr. Khalaf indicated he had “one more question if possible.”

Attorney Lozano spoke off the record to him and then declared:

MR. LOZANO: “Your Honor, I’m not an immigration attorney, and as such, I have discussed with Mr. Khalaf that he should consult with an immigration attorney with regards to the impact of any conviction. I will say that my non-immigration attorney understanding from discussions and my own research is that neither the felony certainly nor a misdemeanor to the charges as presently charged would be a crime of moral turpitude that would result in his deportation; however, none of that is from the standpoint of an expertise. It’s simply my research. So I want to make sure he understands that he should consult.”

Id. at 15-16. Trial was reset for January 17, 2023, but a change of plea hearing took place December 1, 2022. The Government filed a reduced charge of misdemeanor blackmail. Mr. Khalaf stated he would change his plea to guilty according to the parties’ plea agreement, though he initially indicated he had not had enough time to talk with Attorney Lozano, but then stated he was “good to proceed” after Mr. Lozano spoke to him off the record. The prosecutor confirmed the joint recommendation of “time served” and the Government’s plan to dismiss the felony indictment upon the Court’s acceptance of the plea. The prosecutor stated “the parties understand – we have made certain understandings or agreements as to the possibility of detention. The defendant’s immigration status may be affected by the Guilty Plea Agreement.” The Government did not specify those understandings further, nor did the Court ask about them. *Id.* Instead, the Court asked Mr. Khalaf if anything the prosecutor had stated “just now” confused him and Mr.

Khalaf said no. *Id.* The Court accepted the plea and set sentencing for March 2, 2023. The Court granted Mr. Khalaf release to pursue his reinstatement at Saint Louis University.

Four days later, Mr. Khalaf wrote the Court asking to withdraw his plea pursuant to Fed. R. Crim. P. 11(d)(2)(B) and to dismiss Attorney Lozano. Mr. Lozano withdrew and the public defender was reappointed who supplemented the motion to withdraw the plea. The supplement cited *Padilla v. Kentucky*, which held that the right to effective assistance of counsel included accurate advice concerning the immigration consequences and risks of deportation. The pleadings averred that Attorney Lozano denied Mr. Khalaf effective counsel by holding out a false hope that the plea agreement he secured for a misdemeanor charge of blackmail would not “certainly” compel his deportation, a conclusion he based on his own legal research and conferring with unidentified others. The supplemental memorandum cited federal statutes plainly defining offenses deemed “crimes of moral turpitude” compelling deportation include those punished by up to a year in prison, see 8 U.S.C. §1227(a)(2)(A)(i)(I)-(II), a range that encompassed the penalty for misdemeanor blackmail under 18 U.S.C. § 873. It also noted that blackmail had been deemed a crime involving moral turpitude compelling deportation. Mr. Khalaf asserted that the false hope Attorney Lozano’s ill-founded advice invited constituted ineffective assistance of counsel, despite counsel’s added suggestion that he should consult an immigration attorney as counsel knew Mr. Khalaf had no funds by which to hire an immigration attorney. The District Court denied the motion to withdraw the plea and sentenced Mr. Khalaf to “time served.” After Mr. Khalaf was convicted the Attorney General secured his custody and commenced removal proceedings.

The Eighth Circuit's Ruling

On appeal, Mr. Khalaf challenged the denial of his motion to withdraw, citing *Padilla*. He argued that Attorney Lozano went beyond merely stating that “immigration consequences” might follow his conviction to convey a false assurance that neither the original felony charge nor the misdemeanor “certainly” would do so. He also cited counsel’s failure to investigate any of the digital evidence to ready for a trial in light of Mr. Khalaf’s claim of innocence.

The panel issued a decision affirming Mr. Khalaf’s conviction. It noted that ineffective assistance of counsel can warrant withdrawal of a plea but denied relief. Appendix 2. It cited the fact that Khalaf, “on his own, raised concerns about the potential consequence his criminal case could have on his immigration status before his counsel made any statement on the topic to the court.” *Id.* at 3. The panel noted that the plea agreement “disclosed that Khalaf’s conviction could impact his immigration status or result in deportation, and that the government made a similar, generalized statement at the change of plea hearing.” *Id.*

The Eighth Circuit denied Mr. Khalaf’s timely motion for rehearing *en banc* on April 17, 2024. Appendix 4. Mr. Khalaf’s application for additional time through September 14, 2024, to file his petition. Appendix 5.

GROUNDS FOR GRANTING THE WRIT

- I. **The Court should grant certiorari to resolve the conflicting views of federal and state courts as to whether an attorney violates *Padilla* by advising a noncitizen client that deportation consequences may result from conviction yet simultaneously belittling such risks.**

The Eighth Circuit's ruling that an attorney who tells a non-citizen client that a plea bargain to resolve a criminal charge may carry deportation consequences while adding that counsel's research did not show deportation would clearly result conflicts with the view of other Circuits and state courts that such false assurances constitute ineffective assistance of counsel.

A defendant's right to effective assistance of competent counsel guarantees a right to accurate advice about the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo. *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). A decision to enter into a plea bargain is a personal decision made alone by a defendant who has the "ultimate authority" to decide whether or not to enter into a plea bargain. *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Brady v. United States*, 397 U.S. 742, 748 (1970) (decision must be an "expression of [the defendant's] own choice"). Counsel has a constitutional obligation to provide accurate advice about the direct consequences of conviction, like the penalty range, sufficient to enable the defendant to make a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985).

Although deportation "is not, in a strict sense, a criminal sanction," it is a particularly severe 'penalty.'" *Padilla*, 559 U.S. at 366. "[A]dvice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." *Id.* *Padilla* was a lawful permanent resident of the United States for over 40 years and a United States Armed Services veteran of the Viet Nam War. *Id.* He pled guilty to transporting marijuana in a tractor-trailer

relying on his attorney’s assurance that he did not have to worry about immigration status since he had been in the country so long.” *Id.* In fact, the relevant immigration statute succinctly and explicitly indicated Padilla’s offense as a crime relating to a controlled substance other than personal use of 30 grams or less of marijuana. *Id.* at 359. Padilla alleged that his attorney not only failed to advise him of this consequence, “but also told him that he “did not have to worry about immigration status since he had been in the country so long.” *Id.* (internal citation omitted). “Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country.” *Id.* at 368.

Congress authorized the Attorney General to order removal of non-citizens within certain classes identified in 8 U.S.C. § 1227. It provides in part that

“[a]ny alien who. . . is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.”

Section 1227(a)(2)(A)(i)(I)-(II). Absent a statutory definition of “moral turpitude,” Courts look to the definition of the term by the Bureau of Immigration Affairs, which has been defined as an act that is *per se* morally reprehensible and intrinsically wrong or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. *Ortiz v. Barr*, 962 F.3d 1045, 1048 (8th Cir. 2020).

Mr. Khalaf made clear to his attorney and the District Court that his ability to remain in this country to get his Ph.D. comprised the goal guiding his response to the charge against him. Appx. 13. Both the original felony cyberstalking charge filed against Mr. Khalaf and the amended misdemeanor information his attorney pursued to urge a guilty plea to blackmail under 18 U.S.C. § 873 could fit the “moral turpitude” definition. Cyberstalking under 18 U.S.C. § 2261A(2)(B) includes conduct intended to harass or intimidate another using electronic

communications that cause or would be reasonably expected to cause substantial emotional distress to the targeted victim. The Seventh Circuit upheld a ruling that an Illinois law prohibiting harassment via electronic communications in 720 ILCS § 5/12-7.5(a) was a crime of moral turpitude in *Zlatan v. Holder*, 390 Fed. Appx 569, 571 (7th Cir. 2010) (unpublished). The Illinois law prohibited electronic communication directed at a specific subject that would cause reasonable persons to fear for their safety or suffer emotional distress *See also People v. Kucharski*, 987 N.E.2d 906, 915-916 (Ill. App. Ct. 2013) (evidence proved electronic harassment by showing defendant accessed a My Space page he helped the victim setup to post lewd comments soliciting oral sex and told victim she deserved it).

The misdemeanor blackmail offense to which Mr. Khalaf pled guilty proscribed a form of extortion defined as a demand for money or some other valuable thing under a threat of informing, or as a consideration for not informing another about something. 18 U.S.C. § 873. This Court has treated blackmail as equivalent to crimes involving moral turpitude in the immigration context. *See Lehmann v United States ex rel. Carson*, 353 U.S. 685, 689-90 (1957). That blackmail constitutes a misdemeanor poses no bar to finding it embodies moral turpitude because they include crimes punishable by one year in prison under Section 1227(a)(2)(a)(i)(II). These readily available authorities pointedly negated the impressionistic conclusion Mr. Khalaf's counsel offered that Mr. Khalaf faced no certain deportation risk. The Eighth Circuit, however, summarily affirmed the District Court's denial of his motion to withdraw his guilty plea relying on Attorney Lozano's "advice" that he should consult a deportation expert even though counsel knew his client lacked funds to consult an immigration attorney.

Other Circuits have found false assurances like Attorney Lozano's remarks in this case ineffective assistance under *Padilla*. The Fourth Circuit held that an attorney who advised a

noncitizen client that a plea agreement he secured “presented only a risk, but not a certainty, of deportation,” committed the same constitutional error as Padilla’s attorney, where a simple reading of the relevant immigration statute would have established his crime was a deportable aggravated felony. *United States v. Swaby*, 855 F.3d 233 (4th Cir. 2017). The Ninth Circuit has found *Padilla* violations in a defense attorney’s assertions that a misdemeanor charge would “still *probably* considered an aggravated felony [subject to deportation] for purposes of immigration law,” where the defendant’s conviction was expressly identified in the immigration statute as ground for removal. *United States v. Rodriguez-Vega*, 797 F.3d 781, 786 (9th Cir. 2015). *See also Kovacs v. United States*, 744 F.3d 44 (2d. Cir. 2014) (defense counsel’s erroneous advice that “misprision of a felony is not deportable” was both deficient and prejudicial, despite the district court’s warning that “immigration consequences were not in its control and that it would give no such assurance”).

State Courts have also found ineffective assistance when an attorney negates the impact of the *Padilla* warning that deportation may follow. *See State v. Sandoval*, 249 P.3d 1015, 1020 (Wash. 2011) (*Padilla* advice would be a “useless formality” if counsel suggests the client could disregard it); *Araiza v. State*, 481 P.3d 14, 18 (Haw. 2021) (“Even technically-accurate immigration advice can be deficient if the advice as a whole ‘understates the likelihood that [a defendant] would be removed.’”); *Budziszewski v. Comm’r of Correction*, 142 A.3d 243, 251 (Conn. 2016) (“If counsel gave the advice required under *Padilla*, but also expressed doubt about the likelihood of enforcement, the court must also look to the totality of the immigration advice given by counsel to determine whether counsel’s enforcement advice effectively negated the import of counsel’s advice required under *Padilla* about the meaning of federal law.”).

This Court alone can resolve the matter because all of these decisions purport to follow its *Padilla* holding.

The clear impact of Counsel's false assurance in misleading Petitioner from his quest to resume his American studies make this a perfect case to resolve the issue.

This case presents a perfect vehicle for this Court to address this recurrent issue. It presents a common scenario where an attorney's desire to expeditiously resolve a case by a plea bargain that appears extremely beneficial to a native citizen facing no danger of deportation can lead to the unwitting choice of a conviction that will produce the very deportation the accused seeks most to avoid. Defense counsel repeatedly pressed Petitioner to accept the plea deal he devised whereby the original cyberstalking felony charge would be reduced to the misdemeanor blackmailing charge. Petitioner persistently rejected counsel's efforts to close the case through a plea bargain, for the express purpose of fighting to revive his "dream" of completing his education in the United States. Appx. 13. This case also presents the common scenario wherein the incarcerated non-citizen lacks the funds to hire an immigration specialist to definitively confirm or reject his appointed defense attorney's impressionistic conclusion that deportation will not automatically follow. There is no right to appointed immigration counsel. 8 U.S.C. § 1362.

As defense counsel noted when he argued the motion to withdraw his plea of guilty,

Mr. Khalaf sought to revive his right to trial, even though he would be subjecting himself to much more penalties. And I have made that clear to him several times, but he feels strongly in that he didn't because of these errors make an actual, knowing, and intelligent plea.

The record here already shows prejudice in Mr. Khalaf's to pursue any minimal chance of acquittal rather than plead guilty to a lesser crime that would hasten his deportation. *See Lee v. United States*, 582 U.S. 357 (2017). This Court alone can resolve the issue.

CONCLUSION

WHEREFORE, Petitioner Khalaf requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,



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