No. 16-1445

In The

Supreme Court of the United States

ASHRAM SEEPERSAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY BRIEF

RION LATIMORE ESQ.
LATIMORE ESQ. LLC
2751 Hennepin Ave. South
Ste. 10
Minneapolis, MN 55408
(612) 605-3203
latimore@gmail.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

The government in their brief in opposition requests that this Court not take action on the instant case as the court of appeals: "Its decision is consistent with the framework for assessing prejudice that this Court approved in *Lee v. United States*, 137 S. Ct. 1958 (2017), and it implicates no ongoing circuit conflict." (Resp. brief in opposition 7-8). The Petitioner disagrees, this reply brief for the Petitioner follows.

ARGUMENT

I. *Lee v. United States*

The Court issued its decision in *Lee v. United States*, 137 S. Ct. 1958 (2017), after the Petitioner had already filed his writ with this Court. 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. This Court directed that a lower court 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. In *Lee*, the Court also found that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies," and that "[j]udges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 137 S. Ct. at 1967.

The government in their brief in opposition argues that "The court of appeals correctly determined that petitioner's plea agreement and the plea colloquy provided a "strong record basis for discrediting [petitioner's] claim that he would not have pled guilty if he were properly advised as to the immigration consequences of his plea." " (Resp. brief in opposition 9). The Government further argues that: "The approach of the court of appeals in petitioner's case is consistent with *Lee* . . . he would not be entitled to relief because the court of appeals in his case rejected petitioner's ineffective assistance claim based on a case-specific analysis that did not rely at all on the strength of the evidence against petitioner." (Resp. brief in opposition 11).

As in *Lee*, the often discussed issue of Mr. Seepersad's current immigration status, the effect his sentence would have on that status, and even possible relief available to Mr. Seepersad in immigration court, all of which was discussed on the record during the plea hearing by counsel and the Court, shows that avoiding deportation was "the determinative factor," for Mr. Seepersad and the court of appeals failed to take these and other factors into consideration when "asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decision making." *Id*. at 8. 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. Mr. Seepersad similarly did not have an adequate understanding of the immigration consequences at the time before, during, or after his plea. The misadvice by criminal counsel as to the length of sentence being the determinative factor in immigration consequences affected Mr. Seepersad's understanding of his plea and likewise prejudiced him.

In the instant case Mr. Seepersad had an elderly mother who he cared for and numerous siblings present in the U.S. He has been steadily employed by UPS for over a decade and has significant monetary and property interests in the U.S. including his retirement and a home. Mr. Seepersad argued before the District Court that he had received affirmative misadvice from his criminal counsel before, during, and after his plea hearing and that if he had received correct advice he would have insisted on an alternate plea agreement or would have gone to trial. Specifically, he argued that his counsel gave him the affirmative misadvice before the plea hearing that he would be safe from immigration consequences if he received a sentence of under a year and the affirmative misadvice during the plea hearing itself that he would have affirmative defenses to deportation available to him before the immigration court in spite of the plea agreement due to his immigration status. App. 11. Former counsel discussed during the plea hearing Mr. Seepersad obtaining immigration waivers, eligibility of immigration relief, as well as after the plea Mr. Seepersad still receiving lawful permanent resident status. Counsel states on the record that Mr. Seepersad's position may be "more fortuitous" for immigration purposes due to the timing of his conviction. (D. Ct. Doc. # 126-3, Plea Transcript Pg. 18-19, C.A. 50-51) (D. Ct. Doc. # 126-3, Plea Hearing Transcript Pg. 1-28, C.A. 33-60). All of this information and advice was incorrect but it goes to show that the immigration consequences were of special and determinative importance to Mr. Seepersad. These incorrect representations during the plea hearing by counsel influenced the Petitioner to plead guilty.

As in the instant case, where counsel affirmatively misadvised Mr. Seepersad as to the immigration consequences of his plea, he was thereafter prejudiced during the pre-plea phase of his case from seeking to go to trial or seeking a plea agreement without immigration consequences. He instead took counsel's advice, that he would not suffer immigration consequences if his sentence was under a year, he was thereafter sentenced to under a year (3 years probation only) but was still ordered removed by an immigration judge as an aggravated felon. Although the possibility of receiving a sentence under a year may not have been guaranteed, it was certainly possible as it occurred in reality. "The probability that he will come out ahead by taking that course 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). Mr. Seepersad had no expectation of a shorter sentence just like Lee had no expectation of winning at trial, but Mr. Seepersad should not have been prohibited from showing prejudice because of that, all factors considered.

Mr. Seepersad continues to assert that he suffered prejudice due to his counsel's 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. Seepersad would always have been prejudiced by this pre-plea 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 or possible length of sentence should not bar him from showing prejudice as the Second Circuit found.

The Second Circuit limiting its prejudice inquiry to the judge's very general Rule 11 admonishment and to the possible sentence length Mr. Seepersad might, but in fact did not receive, and in considering no other factors made a similar mistake to the Sixth Circuit's evaluation in *Lee* where they found a chance of success at trial to be the ultimate and exclusive determinative factor. The Supreme Court found in *Lee* that type of prejudice evaluation to be unacceptable.

II. Rule 11 Admonishment, Circuit Split

The government in their brief in opposition also heavily relies on the Petitioner's plea colloquy and specifically the judge's admonishment as to possible immigration consequences to oppose prejudice as did the Second Circuit in denying his appeal. "Moreover, as the court of appeals explained, the district court's warnings during petitioner's plea colloquy also undercut petitioner's prejudice claim." (Resp. brief in opposition 11). Several courts have noted that a judge's warnings at a plea colloquy *may* undermine a claim that the defendant was prejudiced by his attorney's misadvice. See, e.g., *United States v. Newman*, 805 F.3d 1143, 1147 (D.C. Cir. 2015); *United States v. Kayode*, 777 F.3d 719, 728-729 (5th Cir. 2014); *United States v. Akinsade*, 686 F.3d 248, 253 (4th Cir. 2012); *Boyd v. Yukins*, 99 Fed. Appx. 699, 705 (6th Cir. 2004). In *Lee* however the Court found that "The present case involves a claim of ineffectiveness of counsel extending to advice specifically undermining the judge's warnings themselves, which the defendant contemporaneously stated on the record he did not understand. There has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of Lee's counsel." *Lee v. United States*, 137 S. Ct. 1958 (2017) at 11 n.4.

Unlike judicial warnings about the length of a possible criminal sentence, immigration warnings generally lack the specificity to counteract an attorney's misadvice. See *Akinsade*, 686 F.3d at 253 (distinguishing between specificity of criminal punishment in Fed. R. Crim. P. 11 warnings and generality of immigration warnings); *United States v. Rodriguez-Vega*, 797 F.3d 781, 790 (9th Cir. 2015) (same); *United States v. Swaby*, 855 F.3d 233, 240-41 (4th Cir. 2017) (same). There does seem to be a circuit split regarding this issue however, the Third Circuit appears to have reached a different conclusion in holding that a defendant could not show prejudice who acknowledged in a Rule 11 colloquy that he would have pled guilty even if removal were automatic. *United States v. Fazio*, 95 F.3d 421, 428 (3d Cir. 2015). The Supreme Court in *Lee* affirmatively decided to not make a ruling on the issue, which is present in the instant case and it is therefore ripe for a decision. (Petitioner's writ at 14-17).

CONCLUSION

Mr. Seepersad was never given the opportunity to reject his plea agreement due to the affirmative misadvice of counsel. When viewing the record as a whole and considering all important factors, such as family and property ties to the United States, the small possible increase in sentence if going to trial, minor nature of the crime, lack of prior criminal record, how central and often discussed on the record the issue of immigration status was during the plea hearing, and his representations that he would have sought an alternate plea or presented a defense at trial, it is reasonable to conclude under the framework employed by *Lee* that an objectively rational person would have gone to trial or sought an alternate plea if given the correct advice as to immigration consequences prior to the plea hearing. The Second Circuit in deciding his case before *Lee* and in line with the Fourth, Fifth, and Sixth Circuits' frameworks denied his appeal based upon only possible length of sentence and the Judge's Rule 11 admonishments. They therefore did not fully consider the *Lee* requirements and gave other factors significant weight, which they should not have.

We respectfully ask that this Court grant, vacate, and remand the Petitioner's case to the Second Circuit Court of Appeals for reconsideration in light of this Court's decision in *Lee*. The Second Circuit's framework for evaluating cases such as the instant one was more similar to that of the Fourth, Fifth, and Sixth Circuits pre *Lee* and the government has argued as to such previously. "The court of appeals also observed (Pet. App. 4a) that its decision in this case accords with decisions of the Second and Fourth Circuits. Petitioner errs in contending otherwise" (Pet. 14-15). (Brief for the United States in Opposition at 12, *Lee v. United States*, 137 S. Ct. 1958 (2017)) "And we therefore join the Second, Fourth, and Fifth Circuits. . . ." *Lee v. United States*, 825 F.3d 311 (6th Cir. 2016).

In the alternative we respectfully ask this Court to accept this case on the issue of whether general Rule 11 admonishments cure affirmative misadvice as to immigration consequences of a criminal plea, an issue which there is a Circuit split and has not been previously decided by this Court.

Respectfully submitted,

RION LATIMORE ESQ.
LATIMORE ESQ. LLC
2751 Hennepin Ave. South
Ste. 10
Minneapolis, MN 55408
(612) 605-3203
latimore@gmail.com

Counsel for Petitioner