

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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UMESH KAUSHAL,

*Petitioner,*

v.

STATE OF INDIANA,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The Court Of Appeals Of Indiana**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Where a resident alien defendant pleads guilty after incorrect advice by counsel as to clear immigration consequences and discovers the error prior to sentencing, must that defendant prove he would have opted for trial had he been correctly advised when the sole remedy he seeks is to proceed to trial?
2. Where a defendant learns the immigration consequences three weeks after his guilty plea and promptly demands to go to trial, does that not adequately prove he would have opted for trial had he known the immigration consequences before he pled guilty?
3. Does the instant case represent a pattern of Indiana cases in which alien defendants who plead guilty while ignorant of the immigration consequences are unfairly denied their Sixth Amendment rights to effective assistance of counsel and trial by jury?

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The opinion of the Court of Appeals of Indiana is an unpublished opinion pursuant to Indiana Appellate Rule 65(D). It is available at *Kaushal v. State*, 2017 Ind. App. Unpub. LEXIS 915. App. 1. The order of the Court of Appeals of Indiana denying a Petition for Rehearing is unpublished. App. 20. The order of the Marion County Superior Court 3, Indiana denying Defendant's Motion to Correct Error is unpublished. App. 21. The opinion of the Marion County Superior Court 3, Indiana, denying the Motion to Withdraw Guilty Plea is unpublished. App. 24. The order of the Indiana Supreme Court denying review is without published opinion. App. 32.



## JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on July 18, 2017. The order of the Indiana Supreme Court denying review was entered on December 19, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).



## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant parts: "In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury . . . and have the assistance of counsel for his defense.”

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### STATEMENT OF THE CASE

Umesh Kaushal (“Kaushal”) is a citizen of India and a lawful permanent resident of the United States. He owns and runs three convenience stores and takes care of his mother who is also a resident of the United States. On August 11, 2015, the State charged Kaushal with one count of child molesting as a level 4 felony. The charge was based solely on the word of Kaushal’s then 13 year old step-daughter who accused Kaushal of a single instance of groping her breast while she slept. There were no other witnesses to the alleged conduct. Kaushal denies the allegation.

Kaushal hired attorney Rahul Patel (“Patel”) who charged him a flat fee of \$20,000 regardless of whether he pled guilty or went to trial. On May 4, 2016, on the eve of the sixth trial setting, Patel filed a signed plea agreement and request for guilty plea hearing. The court vacated the trial and set a change of plea hearing for May 5th, at which Kaushal refused to plead guilty. The Court reset the trial for June 30th, and set a second guilty plea hearing for June 7th, at which time Kaushal again refused to plead guilty. Patel admitted that he never seriously considered preparing the case for trial before his client refused to plead guilty the second time. App. 45.

On June 29, 2016, again on the eve of trial, Patel filed a new signed plea agreement pursuant to which Kaushal pled guilty on June 30th. The Court accepted the guilty plea, entered a judgment of conviction, and set the matter for sentencing. The new plea agreement stipulated a sentence of four years of suspended time and three years of probation on home detention followed by one year of non-reporting probation. The trial court did not discuss immigration consequences with Kaushal before accepting his guilty plea.

After pleading guilty Kaushal consulted with another attorney who informed him that his conviction would render him forever inadmissible to the United States, immediately deportable, subject to mandatory detention pending deportation, and ineligible for relief from deportation.

On July 21, 2016, Kaushal, by new counsel, filed a verified motion to withdraw his guilty plea on the basis of ineffective assistance of counsel for failure to advise of the immigration consequences of his guilty plea. Attached to the motion was a notarized affidavit by Patel admitting that he had not informed himself or his client of the immigration consequences of the conviction and that he was completely ignorant on the subject “when advising [his client] in his decision to plead guilty.” After learning the actual immigration consequences, Kaushal decided he preferred to take his chances at trial. In his petition he admitted that he pled guilty despite being innocent because he was fearful of incarceration.

On November 7, 2016, the trial court denied Kaushal's motion to withdraw his guilty plea and reset the case for sentencing. Kaushal filed a motion to correct error which the trial court also denied. Kaushal appealed.

On July 18, 2017, the Indiana Court of Appeals affirmed the trial court's denial. On September 26, 2017, the Indiana Court of Appeals denied Kaushal's petition for rehearing. On December 19, 2017, the Indiana Supreme Court denied Kaushal's petition for transfer.



### **REASONS FOR GRANTING THE WRIT**

- I. The instant case is just one of a series of decisions that disregard logic and binding precedent to deny defendants their Sixth Amendment rights to effective assistance of counsel and trial by jury. Therefore, intervention by this Court is necessary to guarantee the full scope of Sixth Amendment protections to individuals accused of crimes in Indiana.**
  - a. The decision to deny Kaushal's petition to withdraw his guilty plea and proceed to trial has no basis in logic or precedent.**

Indiana statute requires a trial court to permit a defendant to withdraw his guilty plea prior to sentencing "whenever the defendant proves that the withdrawal of the plea is necessary to correct a manifest

injustice.” Indiana Code § 35-35-1-4(b). “[W]ithdrawal of the plea is necessary to correct a manifest injustice whenever . . . the convicted person was denied the effective assistance of counsel.” Indiana Code § 35-35-1-4(c). That statute further clarifies that, “[t]he motion to vacate the judgment and withdraw the plea need not allege, and it need not be proved, that the convicted person is innocent of the crime charged or that he has a valid defense.” *Id.*

An attorney’s performance is ineffective if it falls below an objective standard of reasonableness under prevailing professional norms. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). “The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Id.* at 367. “When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.” *Id.* at 369.

The deportation and mandatory detention consequences of a criminal conviction for child molestation are clear. Federal statute mandates that Immigration and Customs Enforcement (“ICE”) “take into custody any alien who is inadmissible by reason of having committed any offense covered in 8 U.S.C. § 1182(a)(2),” which states in relevant part that, “any alien convicted of a crime involving moral turpitude is inadmissible.” 8 U.S.C. § 1226(c)(1)(A), 8 U.S.C. § 1182(a)(2)(A)(i).

Child molestation is universally considered to be a crime involving moral turpitude.

The statute also mandates that ICE “take into custody any alien who is deportable by reason of having committed any offense covered in 8 U.S.C. § 1227(a)(2)(A)(iii),” which states in relevant part that, “any alien who is convicted of an aggravated felony at any time after admission is deportable.” 8 U.S.C. § 1226(c)(1)(B), 8 U.S.C. § 1227(a)(2)(A)(iii). The term “aggravated felony” is defined by statute to include sexual abuse of a minor. 8 U.S.C. § 1101(a)(43).

It is also clear that an alien taken into custody pursuant to 8 U.S.C. § 1226(c)(1) may only be released if the Attorney General decides that, “release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.” 8 U.S.C. § 1226(c)(2).

Here the Indiana Court of Appeals did not decide whether counsel’s failure to advise of the clear immigration consequences of Kaushal’s guilty plea was ineffective. It rather determined that, even if his counsel was ineffective, Kaushal had not proven prejudice resulting from his counsel’s deficient performance.

In its analysis the court initially cites Indiana Supreme Court precedent to describe the standard for establishing prejudice on a Sixth Amendment ineffective assistance of counsel claim: “[A] petitioner must establish, by objective facts, circumstances that support the conclusion that counsel’s errors in advice to penal consequences were material to the decision to plead.” “[S]pecific facts, in addition to petitioner’s conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea.” *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001).

The Court then seems to adopt a different standard by citing its decision in *Gulzar v. State*, 971 N.E.2d 1258 (Ind. Ct. App. 2012), *trans. denied*. In *Gulzar*, the Indiana Court of Appeals held that, despite being incorrectly advised of the deportation consequence of his guilty plea, and despite the special circumstance that appellant immigrated from Pakistan to the United States with his entire nuclear family when he was a child, the “evidence of his guilt” supported a finding that, “at the end of the day, the inevitable result is conviction and the same sentence.” *Id.* at 1262.

As in *Gulzar*, the Indiana Court of Appeals found that Kaushal had established special circumstances which, “favor a finding” that he was prejudiced. Specifically, the court stated:

[H]is motion contends that he pled “guilty in order to avoid prison without having knowledge

that his ability to legally reside in the United States would end. [He] owns several businesses and considers the United States to be his home. Although he has pled guilty, Kaushal maintains his innocence and wishes to proceed to trial.” In addition, evidence elicited during the hearing on Kaushal’s motion . . . indicate that he takes care of his mother.

The appellate court also criticized the factual basis set forth to support Kaushal’s guilty plea as a mere “recitation of the elements of the crime rather than an admission of specific facts to prove those elements.” “Thus, unlike in *Gulzar*, we can hardly say that there is overwhelming evidence of his guilt such that the ultimate result would have likely been the same regardless of whether Kaushal pled guilty or proceeded to trial.”

Despite these circumstances, and despite the fact that Kaushal’s only demand was to go to trial, the court found that Kaushal had not established that he was prejudiced by his guilty plea. Instead, the court found that Kaushal “undoubtedly received a substantial benefit by pleading guilty, as he received an entirely suspended sentence for an offense that carries a possible term of incarceration of two to twelve years.” This finding of “substantial benefit” necessarily assumes that Kaushal would have been convicted at trial. The court also noted that Kaushal’s counsel had informed him that his Green Card would not be renewed, and that Kaushal reviewed and affirmed understanding of the

contents of the plea agreement which included a paragraph indicating a risk of deportation.

The appellate court further stated that, “the trial court confirmed that Kaushal had read, understood, and signed the provision of the plea agreement discussing the possibility of deportation.” This statement by the appellate court is misleading because, although the trial court confirmed that Kaushal had read and understood the entire plea agreement, it never mentioned the specific provision of the plea agreement regarding immigration consequences. Nevertheless, on that basis, the appellate court cited with approval its decision in *Barajas v. State*, where it held that, “even if trial counsel had performed below prevailing professional norms by failing to explain the potential immigration consequences of pleading guilty, the defendant was not prejudiced because the trial court explained that his guilty plea could possibly result in deportation.” *Barajas v. State*, 987 N.E.2d 176, 181 (Ind. Ct. App. 2013).

The appellate court ultimately found that, despite Kaushal’s “mistaken belief that he would have the time and ability to appeal any immigration consequences with immigration officials,” he was “aware he would face hurdles with respect to his immigration status.” The appellate court reasoned that because he was willing to accept those risks and because “it is clear that [he] was advised of the possibility that he would be deported if he pled guilty but chose to do so regardless[,]” he “failed to establish that he was prejudiced by his attorney’s performance.”

The court's analysis omits the required question to determine prejudice. Would Kaushal have chosen a trial had he known the immigration consequence of his guilty plea? Failure to address that question requires the court to ignore binding precedent. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To find that Kaushal would have pled guilty had he known the true immigration consequences before his guilty plea, despite demanding a trial when he learned those consequences only three weeks later, simply defies logic.

**b. The appealed decision is one of a series of decisions that disregard logic and precedent.**

Since 2011, the majority of Indiana appellate decisions on the issue of failure to correctly advise a noncitizen defendant of the immigration consequences of a guilty plea were decided on findings of fact that defy reason and legal analyses that disregard binding precedent.

**i. *Martinez v. State***

In 2007, Mexican national Jose Martinez was charged with forgery as a class C felony for his use of identifying information of another person in order to obtain employment. His attorney did not advise him regarding the immigration consequences of pleading guilty to felony forgery.<sup>1</sup> Subsequently, immigration

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<sup>1</sup> Although this court had not yet decided *Padilla v. Kentucky*, the Indiana Court of Appeals had previously held that, “the

proceedings were initiated against Martinez and he learned that his forgery conviction precluded him from contesting his deportation. *Martinez v. State*, 2011 Ind. App. Unpub. LEXIS 1584.<sup>2</sup>

Martinez argued that his attorney was ineffective for failing to inform him that his forgery conviction would lead to automatic deportation. The Court of Appeals reduced Martinez' argument from failure to advise of *automatic* deportation to failure to advise of the *possibility* of deportation. It found that he had not proved that he was prejudiced by that failure because the trial court told him that deportation was a possibility. "[Counsel's] defective act of failing to inform Martinez that a conviction *could* result in deportation was remedied when the trial court informed him of that fact." *Martinez*, at 9-10.

In *Martinez*, the court conflates knowledge of the risk of deportation with knowledge of the actual deportation consequence. Upon his conviction, deportation became a legal certainty and therefore inevitable. Knowledge that there is a risk of deportation differs greatly from knowledge that deportation is a certainty. The correct question is whether, knowing

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consequence of deportation, whether labeled collateral or not, is of sufficient seriousness that it constitutes ineffective assistance for an attorney to fail to advise a noncitizen defendant of the deportation consequences of a guilty plea." *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994).

<sup>2</sup> The abbreviation "Unpub." in the case citation indicates that the opinion is "unpublished" pursuant to Indiana Appellate Rule 65 and therefore is not regarded as precedent.

that deportation would be a certainty rather than a mere possibility, would the defendant have still pled guilty? *Hill v. Lockhart*, 474 U.S. at 59.

**ii. *Carvajal v. State***

Mauricio Carvajal and his domestic partner completed an application to their local township for assistance in paying their utility bill. During an interview with the township trustee's office, Carvajal admitted that he was not a legal citizen and the social security number he put on his application was not his own. The State charged him with forgery as a class C felony. *Carvajal v. State*, 2011 Ind. App. Unpub. LEXIS 355 at 1-2.

Carvajal pled guilty pursuant to an open plea agreement that limited his executed time to no more than two years of prison. The trial court advised Carvajal of the possibility of deportation before accepting his guilty plea. *Id.* at 3. Carvajal's trial counsel advised him to plead guilty based on his belief that Carvajal would receive probation. The Court of Appeals noted that "this was likely bad advice, as pleading guilty to forgery carries with it automatic deportation[.]" *Id.* at 13.

Prior to sentencing, Carvajal filed a verified motion to withdraw his guilty plea. *Id.* at 3. Carvajal argued that he was unaware that his guilty plea would lead to automatic deportation. *Id.* at 7, 10. The Court of Appeals found that Carvajal was not prejudiced by his lack of knowledge that a forgery conviction would

lead to automatic deportation because he “was indeed aware that deportation was possible.” *Id.* at 13-14.

As in *Martinez*, the court in *Carvajal* fails to distinguish between knowledge of the risk of deportation and knowledge that deportation would become a certainty. Such analysis defies reason and ignores binding precedent.

### **iii. *Naveed Gulzar v. State***

In 2000, Naveed Gulzar immigrated from Pakistan to the United States at the age of fourteen with his parents and siblings, all with the intent of becoming naturalized United States citizens. *Gulzar v. State*, 971 N.E.2d 1258, 1259 (Ind. Ct. App. 2012). In 2006, the State charged Gulzar with theft for using a stolen credit card. *Id.* Gulzar pled guilty to one count of theft as a class D felony. His plea agreement included an advisement that he may be deported as a result of his guilty plea. *Id.*

In 2011, Gulzar petitioned for post-conviction relief alleging ineffective assistance of counsel for failure to advise him that a theft conviction would make him automatically deportable. *Id.* At hearing his trial counsel admitted that he failed to inform Gulzar that his guilty plea to felony theft would make him automatically deportable. *Id.* at 1260.

The Court of Appeals found its perception of the strength of the evidence, untested by trial, to be dispositive. “We see no reason to require revisiting a

guilty plea if, at the end of the day, the inevitable result is the same.” *Id.* (quoting *Segura v. State*, 749 N.E.2d at 507.) “While Galzar may have shown special circumstances related to his family, in light of the evidence establishing his guilt, he has failed to demonstrate prejudice as a result of trial counsel’s failure to advise him that his guilty plea would result in automatic deportation.” *Id.*

The Court’s analysis seems to be that, whether he went to trial or not, a conviction was certain, therefore he was not prejudiced. That analysis disregards binding precedent establishing that the correct inquiry regarding deficient advice as to penal consequences prior to a guilty plea is whether the properly informed defendant would have still pled guilty. *Hill v. Lockhart*, 474 U.S. at 59.

#### **iv. *Carreno v. State***

Jose Carreno was found to be in possession of hydrocodone that he claimed was prescribed to his wife but which he had been taking for tooth pain. *Carreno v. State*, 2016 Ind. App. Unpub. LEXIS 424 at 6. Carreno pled guilty to possession of a controlled substance as a class D felony and received a sentence of 180 days with 178 days suspended to probation. The conviction rendered him automatically deportable. *Id.* at 2, n. 2.

Carreno petitioned for post conviction relief on the basis that, had he known the offense could result in deportation, he would not have pled guilty. His wife

testified that they had married in the United States and had a child together. *Id.* at 5.

The Court of Appeals found that Carreno was not prejudiced by his choice to plead guilty despite his ignorance of the deportation consequence. “Given the strength of the State’s case and the benefits to Carreno accruing from his decision to plead guilty, we conclude that Carreno has failed to show that there is an objectively reasonable probability that he would have insisted on going to trial had his counsel advised him of possible deportation.” *Id.* at 7.

This finding fails to consider the enormity of what it means for a person, let alone a family with a child and scarce resources, to be forcibly removed from their home and sent to a country they left behind precisely because survival was so difficult. The likely punishment to a first-time offender in possession of a few of his wife’s hydrocodone pills for his toothache is probation, even after a trial. The real penalty here, and the primary concern to a rational defendant in Carreno’s position, is deportation. The conclusion that Carreno would likely plead guilty to avoid a slightly stiffer criminal penalty while knowing the immigration consequence to be certain and inevitable deportation defies reason.

#### **v. *Bobadilla v. State***

Angelo Bobadilla was born in Mexico in 1986 and brought to the United States as a child. As such he obtained a work permit under the Deferred Action for

Childhood Arrivals (“DACA”) program. *Bobadilla v. State*, 2018 Ind. App. LEXIS 19. On March 1, 2016, Bobadilla pled guilty to theft as a class A misdemeanor and possession of marijuana as a class B misdemeanor. *Id.* The State dismissed two additional misdemeanor counts pursuant to the plea agreement. His trial counsel failed to advise him even of the possibility of deportation. The conviction for theft rendered him deportable and ineligible for relief due to the offense being a crime involving moral turpitude. On May 3, 2017, Bobadilla was taken into custody by ICE.

The Court of Appeals opinion does not specify how young Bobadilla was when he came to the United States but to qualify for DACA an alien must prove that he or she arrived in the United States prior to their sixteenth birthday. The opinion does note that his counsel never asked about his citizenship status because he spoke fluent English and was familiar with American customs. *Id.* at 3.

The Court of Appeals found that Bobadilla failed to show he was prejudiced. The first reason it gave was that Bobadilla never asserted that he would have proceeded to trial had he known the potential immigration consequence. *Id.* at 6. This ignores the nature of his petition which does not request an acquittal, but rather a chance to face the charges anew. Bobadilla filed his post conviction petition only eight months after pleading guilty. There is no reason to conclude that the State was no longer able to prosecute the case after such a short time. The Court also found Bobadilla’s statement that he “would have taken a different

approach to that” as too vague to credit as meaning he would not have pled guilty. *Id.* at 7. This again, defies reason.

The primary justification given by the court of appeals to deny relief to Bobadilla was that he failed to prove that he would not have pled guilty had he known the deportation consequence. “Rather, the evidence shows that his decision to plead guilty was more likely heavily influenced by the State’s agreement to drop two additional misdemeanor charges and its agreement to an entirely suspended sentence to probation.” *Id.* at 10-11.

This conclusion fails to recognize the enormity of impact that deportation has on the life of a person who grew up in the United States and whose family continues to reside in the United States. The notion that Bobadilla would choose deportation to avoid a stiffer penalty as a first time offender on a misdemeanor charge is absurd. The notion that Bobadilla would choose deportation to avoid being convicted on additional misdemeanor charges whose sentences would almost certainly run concurrent to his other charges is beyond absurd.

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## CONCLUSION

The cases decided in Indiana on the issue of prejudice resulting from the failure of trial counsel to correctly advise defendants of the immigration consequences of their guilty pleas demonstrate a troubling

pattern of disregard for logic and binding precedent. Umesh Kaushal is one of a series of defendants unfairly denied their Sixth Amendment rights to effective assistance of counsel and trial by jury.

For the forgoing reasons the petition for writ of certiorari should be granted, the judgment below vacated, and Kaushal's right to a jury trial restored.

Respectfully submitted,

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