No. 17-1356

In The

Supreme Court of the United States

UMESH KAUSHAL,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

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

REPLY BRIEF

HAROLD SAMUEL ANSELL III
Counsel of Record
156 E. Market Street, Suite 900
Indianapolis, Indiana 46204
(317) 381-0371
(317) 614-7676 (fax)
sam@attorneyansell.com

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. This Court has Jurisdiction to Review the Denial of Kaushal's Motion

Where a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

The trial court denied Kaushal's petition to withdraw his guilty plea prior to sentencing for failure to establish prejudice under the Sixth Amendment standard articulated in *Strickland v. Washington*. "In order to prevail on a post-conviction claim that the Sixth Amendment right to effective assistance of counsel was violated, Defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)." (Pet. App. 25-26) "Based on all of the factors discussed *supra*, Defendant has failed to meet his burden of proving the required prejudice." (Pet. App. 30)

On appeal, Kaushal argued that the statute specifying ineffective assistance of counsel as a "manifest injustice" does not require a finding of prejudice to require the court to permit a defendant to withdraw his guilty plea prior to sentencing. (Pet. Reply App. 1-2)

However, Kaushal went on to argue that, if required to prove prejudice, he met that standard by proving that he would not have pled guilty had he been correctly advised of the immigration consequences. In support, Kaushal cited *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001) and specifically quoted the language adopted from *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "A petitioner may be entitled to relief if there is an objectively credible factual and legal basis from which it may be concluded that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* (Pet. Reply App. 2)

The Indiana Court of Appeals also purported to apply the Sixth Amendment standard articulated in *Strickland v. Washington*. "Prejudice exists when a defendant shows 'there is a reasonable probability [i.e., probability sufficient to undermine confidence in the outcome] that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Brightman v. State*, 748 N.E.2d 41, 46 (Ind. 2001) (quoting *Strickland*, 466 U.S. at 694). (Pet. App. 12)

Furthermore, every Indiana case cited by the Court of Appeals also purported to apply Sixth Amendment analysis to the question of ineffective assistance of counsel. (*See Burris v. State*, 558 N.E.2d 1067, 1072 (Ind. 1990); *Segura v. State*, 749 N.E.2d at 500-501; *Black v. State*, 54 N.E.3d 414, 427 (Ind. Ct. App. 2016); *Carillo v. State*, 971 N.E.2d 1258, 1260-1261 (Ind. Ct.

App. 2013); *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013); *Barajas v. State*, 987 N.E.2d 176, 180 (Ind. Ct. App. 2013)).

Kaushal also argued in both his petition for rehearing to the Indiana Court of Appeals and his petition for transfer to the Indiana Supreme Court that the court erred in its Sixth Amendment prejudice analysis by failing to consider this Court's recent decision in *Lee v. United States*, 137 S. Ct 1958 (2017). (Pet. Reply App. 3-10, 12-18)

II. The Facts are Simple and Undisputed

The eleven facts listed below are undisputed. No additional facts exist to support the holding below.

1. Kaushal is an Indian citizen and a lawful permanent resident of the United States. (Pet. App. 2; Br. in Opp. 1)

2. Kaushal pled guilty to a felony punishable by up to 12 years in prison in exchange for a suspended sentence of four years with three years on probation and home detention followed by one year of non-reporting probation. (Pet. App. 3; Br. in Opp. 2)

3. The evidence of Kaushal's guilt is not overwhelming and the likelihood of a conviction at trial is not certain. (Pet. App. 3; Br. in Opp. 10-11)

4. Kaushal owns and operates several convenience stores in Indianapolis and wanted to avoid any incarceration whatsoever so he could still run his businesses and care for his mother. (Pet. App. 2, 16; Br. in Opp. 2, 5)

5. Kaushal's trial counsel admitted under oath that he was unaware of the actual immigration consequences of Kaushal's guilty plea and did not discuss with him those consequences. (Pet. App. 37-38, 44-45)

6. The written plea agreement contained an advisement that the conviction could affect his immigration status, specifically stating that "deportation, denial of re-entry, prohibition of citizenship, or loss of future immigration benefit(s) could occur." (Pet. App. 3-4)

7. Trial counsel reviewed with Kaushal the written advisements contained in the plea agreement and advised him that his green card would not be renewed. (Pet. App. 5, 17; Br. in Opp. 1, 4, 5, 11)

8. Prior to accepting Kaushal's guilty plea, the trial court conducted a colloquy with Kaushal during which he admitted under oath that he had reviewed and understood the written advisements contained

in the plea agreement. (Pet. App. 9, 11, 17; Br. in Opp. 2-3, 5, 11)

9. Kaushal testified at a hearing on his motion to withdraw his guilty plea that he understood he would face a "hard road" with respect to his immigration status but he had not known the actual immigration consequences when he pled guilty. (Pet. App. 5, 41-43; Br. in Opp. 11)

10. After pleading guilty and prior to sentencing, Kaushal learned that the actual immigration consequences of his guilty plea included immediate detention pending certain deportation and permanent inadmissibility. (Pet. App. 34-45)

11. Upon learning that the negotiated-for benefits of his plea agreement were illusory, Kaushal requested to withdraw his guilty plea and go to trial. *Id.*

These undisputed facts raise two obvious questions. First, if Kaushal wanted to avoid any incarceration whatsoever in order to continue running his businesses and caring for his mother, why would he plead guilty knowing the immigration consequences to be immediate detention and certain deportation?

Second, does not the demand for a trial upon learning the immigration consequences conclusively prove that he would have gone to trial had he known those consequences three weeks earlier when he pled guilty? Does that not speak for itself? Is this not an instance of *res ipsa loquitor*?

There is no need to reweigh evidence. The undisputed facts lead to only one reasonable inference. Had Kaushal known his guilty plea would result in immediate detention pending certain deportation rather than three years of home detention, he would have opted for trial. Contrary interpretations are too absurd to credit. If he knew all along that there could be no probation or home detention why did he negotiate for an illusory result? If he wasn't concerned about immigration consequences why is he now willing to face a trial and up to twelve years in prison in order to avoid those consequences?

III. The Designation of Indiana Appellate Decisions as Unpublished Strengthens Kaushal's Argument for Intervention by this Court

Respondent argues that the decision below doesn't merit this Court's attention because it is "unpublished" and therefore has no precedential effect under Indiana law. (Br. in Opp. 12). Respondent also argues that the other decisions cited in Kaushal's petition "fail to evince a pattern of disregard for binding precedent," and in support notes that "[a]ll but two of those decisions are unpublished[.]" (Br. in Opp. 13). The unpublished designation applied to these decisions actually further justifies intervention by this Court as appropriate and necessary to protect the rule of law.

The Indiana Rules of Appellate Procedure only permit decisions by the Court of Appeals to be "published [and] citable" if the court finds that the case

"establishes, modifies, or clarifies a rule of law[,] criticizes existing law[,] or involves a legal or factual issue of unique interest or substantial public importance." Ind. R. App. P. 65(a). The rule also states that unpublished decisions "shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case." Ind. R. App. P. 65(d).

Fundamental to jurisprudence is the repeated application of a rule to an ever growing range of fact patterns. The separation of appellate decisions from that process removes their accountability to the coherency and consistency of case law. It therefore removes an historical protection against arbitrary or irrational decisions. Ordinarily a decision that disregards logic or binding precedent will not fit comfortably into a body of case law. It will stick out like a sore thumb and be an ongoing source of confusion and target for criticism. Pursuant to Indiana Rule of Appellate Procedure 65 such decisions are routinely disappeared from view and memory. They are also typically disregarded for review by the Indiana Supreme Court precisely because they are unpublished and therefore of lesser importance. The rule therefore facilitates and forgives arbitrary and irrational decisions.

In its decision affirming Kaushal's conviction, the Indiana Court of Appeals blatantly disregarded binding precedent establishing Sixth Amendment analysis for determining whether a defendant was prejudiced by incorrect advice as to the penal consequences of a guilty plea. The correct question is whether the

properly advised defendant would have gone to trial. "As we held in *Hill v. Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill v. Lockhart*, 474 U.S. at 59). Instead, the court found that because Kaushal knew of possible immigration consequences and because he would receive a suspended sentence in exchange for his plea, he was not prejudiced.

The court's analysis appears arbitrary other than fitting the two facts upon which it rests. It also conspicuously omits the one question the court should ask, what would Kaushal have done had he known the truth? If the decision was not arbitrary but rather an attempt to follow precedent, the court must have concluded that, because Kaushal was willing to accept a risk of deportation, he would have also been willing to accept immediate detention and certain deportation when he pled guilty. This begs the question, why would he then not accept such consequences three weeks later when he learned the truth and asked for a trial instead?

The undisputed facts and inescapable logic clearly prove that Kaushal would have chosen a trial had he known the immigration consequences when he pled guilty. The decision to deny Kaushal a trial disregarded logic and binding precedent and, as with many

other cases not specifically designated for publication, it was swept under the rug of Indiana Appellate Rule 65.

This not a one-time event. This case represents an ongoing pattern of disregard for logic and precedent to reach arbitrary conclusions in decisions that in many instances are removed from further scrutiny by designating them as unpublished.

CONCLUSION

The Court should grant the Petition and vacate the judgment below per curiam.

Respectfully submitted,

HAROLD SAMUEL ANSELL III
Counsel of Record
156 E. Market Street, Suite 900
Indianapolis, Indiana 46204
(317) 381-0371
(317) 614-7676 (fax)
sam@attorneyansell.com