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IN THE
INDIANA COURT OF APPEALS

Case No. 49A04-1612-CR-2862

UMESH KAUSHAL)Appeal from the Marion
 Appellant,)Superior Court
)Criminal Division 3
v.)Case No. 49-G03-1508-F4-028287
STATE OF INDIANA,)The Honorable Sheila A. Carlisle,
 Appellee.)Judge
)The Honorable Stanley E. Kroh,
)Magistrate Judge

BRIEF OF APPELLANT

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* * *

[22] The correct interpretation of § 35-35-1-4, at least as applied to a pre-sentence motion pursuant to subsection (b), would allow withdrawal of a guilty plea any time a defendant was denied effective assistance of counsel, regardless of whether she is able to prove prejudice. The risk of prejudice that is unknown to the

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defendant or difficult to prove is too great to allow guilty pleas made without effective counsel to stand where the only remedy sought is to proceed to trial with competent counsel and where the state was not prejudiced by reliance on the guilty plea.

If proved prejudice is required to prove manifest injustice despite the language of the statute, a more reasonable interpretation regarding pre-sentence withdrawal of a guilty plea would be to require proof that, absent the ineffective assistance of counsel, the defendant would not have pled guilty. This is consistent with *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001). (“A petitioner [23] 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.’” (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

The prejudice Kaushal has proven is that he would not have waived his trial rights had he not been grossly misinformed and misled by ineffective counsel as to the severe immigration consequences of his guilty plea. That he only asks for reinstatement of his right to a trial proves that he would have gone to trial but for his mistaken beliefs resulting from his counsel’s errors.

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**IN THE
INDIANA COURT OF APPEALS
APPELLATE CASE NO. 49A04-1612-CR-02862**

UMESH KAUSHAL,) Marion Superior Court
 Appellant,) Criminal Division 3
 v.) Cause No. 49G03-1508-F4-028287
STATE OF INDIANA,)
 Appellee.) The Honorable Shelia [sic] A.
) Carlisle, Judge
) The Honorable Stanley E. Kroh,
) Magistrate

APPELLANT'S PETITION FOR REHEARING

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[4] STATEMENT OF THE ISSUE

The Supreme Court’s recent opinion *Lee v. United States*, __ U.S. __, 137 S. Ct. 1958 (2017), fined-tuned the prejudice prong of ineffective assistance of counsel cases alleging deficient advisements of immigration consequences. In light of that opinion, this Court should revisit its decision in Mr. Kaushal’s case and reverse the trial court’s order denying his request to withdraw his guilty plea.

ARGUMENT

This Court’s decision affirming the trial court’s denial of Mr. Kaushal’s motion to withdraw his guilty

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plea examines the prejudice prong of his ineffective assistance of counsel argument under a test that was fine-tuned by the United States Supreme Court two weeks before this Court handed down its decision in this matter. Appellant respectfully requests this Court revisit its decision in light of that authority.

In *Lee*, Petitioner Jae Lee pled guilty to [sic] one federal count of possessing ecstasy with intent to distribute after he admitted to police that the drugs seized from his residence were his and that he had given ecstasy to his friends. *Id.* at 1962-63. In consultation with his criminal defense attorney, Lee opted to enter into the guilty plea. *Id.* at 1963. Lee's attorney advised him "that going to trial was 'very risky' and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial." *Id.* (citation omitted). The District Court sentenced Lee to one year and one day in prison. *Id.*

But Lee's legal troubles were complicated by the fact that, although he had lived in the United States since he was thirteen years old, he did not become a [5] United States citizen. *Id.* at 1962-63. Instead, he resided in this country for thirty-five years as a lawful permanent resident. *Id.* at 1963. During that time, Lee graduated from a "business high school" in New York City, moved to Memphis, and opened and operated two successful restaurants there. *Id.* Because Lee plead [sic] guilty to an "'aggravated felony' under the Immigration and Nationality Act," he was subject to mandatory deportation." *Id.* (citation omitted). After learning he would be deported when he was released from

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prison, Lee, like Mr. Kaushal, moved to vacate his conviction and argued his attorney provided ineffective assistance of counsel. *Id.* at 1963-64. The District Court denied Lee's motion. *Id.* at 1964.

On appeal to the Sixth Circuit, "the Government conceded that the performance of Lee's attorney had been deficient." *Id.* Nonetheless, the Sixth Circuit concluded that Lee could not show prejudice and affirmed the District Court. In doing so, the Sixth Circuit "relied on precedent holding that 'no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence.'" *Id.* (citation omitted).

The Supreme Court reversed the District Court's order and concluded Lee demonstrated he suffered prejudice as a result of his attorney's deficient representation. *Id.* at 1967. *Lee* recognized that, where avoiding deportation is a defendant's paramount concern when deciding whether to plea guilty or go to trial, it is not irrational for that defendant to reject a plea offer in favor of a trial, even when his chances of success at trial are slim. *Id.* at 1967-68. The Court stated:

[6] But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this county [sic] and to no other, as did Lee,

and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that “almost” could make all the difference.

Id. at 1968-69.

Mr. Kaushal’s case is similar to *Lee*, and application of the Supreme Court’s prejudice analysis and rationale in that case should lead to a reversal here. With respect to Mr. Kaushal’s ineffective assistance of counsel claim, this Court’s conclusion rests largely on the fact 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.” *Kaushal v. State*, No. 49A04-1612-CR-2862 (Ind. Ct. App. July 18, 2017), slip op. p. 17.

That statement from this Court’s decision echoes an argument the *Lee* Court rejected: “that to prove prejudice] a defendant must also show that he would have been better off going to trial.” *Lee*, ___ U.S. at ___, 137 S. Ct. at 1965. Lee explained:

That is true when the defendant’s decision about going to trial turns on his prospects of success and those are affected by the attorney’s error – for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession.

Not all errors, however, are of that sort. Here Lee knew, correctly, that his prospects of

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acquittal at trial were [7] grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in *Hill [v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985)]. Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial.

* * * * *

[C]ommon sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was *the* determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation – even if it

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shaved off prison time – in favor of throwing a “Hail Mary” at trial.

Lee, ___ U.S. at ___, 137 S. Ct. at 1965-67 (citations omitted).

Pursuant to *Lee*, whether Mr. Kaushal received a substantial benefit by pleading guilty is not the key question. Instead, the question Mr. Kaushal asks this Court to address on rehearing is whether he would have elected to forfeit his right [8] to a trial if trial counsel had effectively advised him regarding the immigration consequences of his guilty plea. *Id.* at 1965.¹

During plea negotiations, Mr. Kaushal sought to avoid an executed sentence because, if he was incarcerated, he would not be able to operate his three businesses or care for his mother. Tr. Vol. II p. 23. From that testimony, one can reasonably infer that, like Lee, Mr. Kaushal’s primary concern was removal from the United States because, like imprisonment, removal from the United States would render him unable to

¹ [I]n this case counsel’s deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. When a defendant alleges his counsel’s deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial would have been different than the result of the plea bargain. That is because, while we ordinarily apply a strong presumption of reliability to judicial proceedings, we cannot accord any such presumption to judicial proceedings that never took place.

(citations omitted) (quotations omitted).

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fulfill his business and family responsibilities. In its decision, this Court recognized those responsibilities as “‘special circumstances’ that could support a finding that Kaushal was prejudiced by his attorney’s failure to adequately advise him of the penal consequences of his plea.” *Kaushal*, No. 49A04-1612-CR-2862, slip op. at 16 (citation omitted). In light of those special [9] circumstances and the Supreme Court’s analysis in *Lee*, Mr. Kaushal respectfully requests this Court revisit his ineffective assistance of counsel argument.²

CONCLUSION

For the foregoing reasons, Mr. Kaushal respectfully asks this Court to revisit its July 8, 2017, decision in this matter and reverse the trial court’s order denying his motion to withdraw his guilty plea.

Respectfully Submitted,

/s/ H. Samuel Ansell

H. Samuel Ansell, #24163-49

² This Court did not reach a conclusion with regard to the [sic] whether trial counsel’s performance was deficient, the first prong of an ineffective assistance of counsel argument. See *Kaushal*, No. 49A04-1612-CR-2862, slip op. at 15. Instead, this Court’s treatment of Mr. Kaushal’s ineffective assistance of counsel argument focuses on prejudice. However, this Court noted that, in its Order Denying Verified Motion to Withdraw Guilty Plea, the trial court found that the State “conceded that Kaushal’s attorney ineffectively advised Kaushal on the immigration consequences of pleading guilty . . .” *Id.* at 5-6; Supp. App. V. II, p. 42. Should this Court address the deficient performance question on its merits, Mr. Kaushal urges it to conclude the State conceded that issue.

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/s/ Anna Onaitis Holden
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[10] **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petition for Rehearing has been served upon Deputy Attorney General Christina D. Pace and H. Samuel Ansell via **E-Service using IEFS**, this 17th day of August, 2017.

/s/ Anna Onaitis Holden
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**IN THE
INDIANA SUPREME COURT**

Cause Number _____

**Court of Appeals Cause
Number 49A04-1612-CR-02862**

UMESH KAUSHAL) Marion Superior Court
Appellant) Criminal Division 3
v.) Case No. 49G03-1508-F4-028287
STATE OF INDIANA,) The Honorable Shelia [sic] A.
Appellee) Carlisle, Judge
) The Honorable Stanley E. Kroh,
) Magistrate

PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

Whether the Court of Appeals' decision affirming the trial court's denial of Mr. Kaushal's motion to withdraw his guilty plea conflicts with *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958 (2017), which revised the prejudice prong of *Strickland* arguments that allege counsel failed to effectively advise a defendant with regard to the immigration consequences of a guilty plea?

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[4] BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

Umesh Kaushal is citizen of India who holds a "green card," which allows him to live and work in the United States. Tr. pp. 28-31, 34. On August 11, 2015, the State charged Mr. Kaushal with child molesting, a Level 4 Felony. Supp. App. p. 2. On June 30, 2016, Mr. Kaushal pleaded guilty to the offense and agreed to serve a fully-suspended four-year sentence. *Id.* at 13-15; Tr. pp. 12-13. Mr. Kaushal's trial attorney did not

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adequately advise him of the immigration consequences of his guilty plea, specifically, that he would be removed from the United States if he was convicted of the charges. On July 21, 2016, Mr. Kaushal filed a motion to withdraw his guilty plea prior to sentencing pursuant to Indiana Code 35-35-1-4(b). The relief sought by Mr. Kaushal is simply to proceed to trial. App. pp. 15-19. The trial court denied that motion on November 7, 2017. Supp. App. pp. 41-46.

On December 2, 2016, Mr. Kaushal filed a motion to correct error and alleged his trial attorney was ineffective for failing to advise him of the immigration consequences of his guilty plea. App. pp. 20-30. During the hearing on that motion, Mr. Kaushal testified that he sought to avoid an executed sentence because, if he was incarcerated, he would not be able to operate his three businesses or care for his mother. Tr. Vol. II p. 23. The same, of course, would be true if he were removed from the United States. The trial court denied the motion to correct error on December 15, 2016. *Id.* at 52-53.

Mr. Kaushal appealed the trial court's denial of his motion to correct error. On July 18, 2017, the Court of Appeals affirmed the trial court's order in a [5] memorandum decision finding that Kaushal had not established that he had been prejudiced by his attorney's performance and therefore had not proven that withdrawal of his guilty plea was necessary to correct a manifest injustice. *See Kaushal v. State*, No. 49A04-1612-CR-2862 (Ind. Ct. App. July 18, 2017). On June 23, 2017, just two weeks before the Court of Appeals handed down its decision in this case, the United

States Supreme Court decided *Lee v. United States*, __ U.S. __, 137 S. Ct. 1958 (2017). Relying on *Lee*, Mr. Kaushal filed a Petition for Rehearing and asked the Court of Appeals to reconsider his ineffective assistance of counsel argument in light of *Lee*. The Court of Appeals denied his petition on September 26, 2017. Mr. Kaushal now asks this Court to grant transfer in this matter.

ARGUMENT

Lee v. United States, __ U.S. __, 137 S. Ct. 1958 (2017), revised the prejudice analysis in *Strickland* claims that allege, as Mr. Kaushal does, trial counsel's advisement (or lack thereof) with regard to the immigration consequences of a guilty plea was deficient. This case is factually similar to *Lee* and provides this Court an early opportunity to instruct Indiana attorneys with regard to advising their non-citizen clients whose guilty pleas may have dire immigration consequences.

Lee pleaded guilty to a drug-related offense after his attorney advised him "that going to trial was 'very risky' and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial." *Lee*, 137 S. Ct. at 1963 [6] (citation omitted). Lee's attorney did not, apparently, advise him his offense would lead to mandatory removal proceedings. The District Court sentenced Lee to one year and one day in prison. *Id.* After learning he would be deported after he was released from prison, Lee, like Mr. Kaushal,

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moved to withdraw his guilty plea and argued his attorney provided ineffective assistance of counsel. *Id.* at 1963-64. The government conceded that Lee's trial counsel provided ineffective assistance. *Id.* at 1964.

The United States Supreme Court concluded Lee suffered prejudice as a result of his attorney's deficient representation. *Id.* at 1967. The Court recognized that, if avoiding deportation is a defendant's primary consideration when deciding whether to plea guilty or go to trial, it is not irrational for that defendant to reject a plea offer in favor of a trial, even when his chances of success at trial are slim. *Id.* at 1967-68. The Court stated:

But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this county [sic] and to no other, as did Lee, and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference.

Id. at 1968-69.

In reaching its decision, the Supreme Court rejected the idea "that [to prove prejudice] a defendant must also show that he would have been better off going to trial." *Id.* at 1965. That is precisely the rationale

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upon which the Court of Appeals' [7] decision rests in this case. The Court of Appeals stated, "Kaushal undoubtedly receive [sic] 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." *Kaushal v. State*, No. 49A04-1612-CR-2862 (Ind. Ct. App. July 18, 2017), slip op. p. 17. The Court of Appeals' decision contravenes *Lee*.

Mr. Kaushal respectfully urges this Court to grant transfer in this matter because he seeks relief pursuant to *Lee*. Granting transfer would give this Court the early opportunity to educate Indiana attorneys and trial courts regarding the United States Supreme Court's refined analysis in cases like this one, and it would do so at a time when there is a great deal of public attention focused on immigration issues. To date, neither the Indiana appellate courts nor the Seventh Circuit Court of Appeals has substantively addressed *Lee*. Providing early guidance to practitioners would help ensure non-citizen defendants' Sixth Amendment right to counsel is protected.

CONCLUSION

For the foregoing reasons, and for the reasons detailed in his Appellant's Brief and Petition for Rehearing, Mr. Kaushal respectfully asks this Court to grant

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transfer in this matter and reverse the trial court's order denying his motion to withdraw his guilty plea.

Respectfully Submitted,

/s/ H. Samuel Ansell
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Attorney for Appellant

[8] **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petition to Transfer has been served upon Deputy Attorney General Christina D. Pace via **E-Service using IEFS**, this 26 October, 2017.

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