NO. 16-327

IN THE

Supreme Court of the United States

JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

REPLY BRIEF FOR PETITIONER

PATRICK MCNALLY
WEATHERLY, MCNALLY & DIXON, P.L.C.
424 Church Street, Suite 2260
Nashville, TN 37219

MATTHEW T. NELSON
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for Petitioner

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The government concedes that "courts have not articulated a uniform approach to prejudice analysis in cases where a defendant's counsel has provided deficient advice about the immigration consequences of a plea." Br. in Opp'n 11. Yet the government maintains that Petitioner Jae Lee's "claim of a circuit conflict reads the court of appeals' decision more rigidly than the opinion's language indicates." *Ibid.* Not so. The Sixth Circuit expressly recognized there is a deep, mature, and "growing circuit split" over the answer to the question presented. App. 5a. And had Mr. Lee's plea taken place in one of the numerous circuits on the other side of the split, that geography would have been dispositive.

Regardless of which side of the circuit split has the better of the argument, the issue presented is important and the conflict should be resolved without delay. First, the split exposes defendants to "potentially disparate outcomes, based purely on the happenstance of the circuit where he or she pleads guilty." Center on the Admin. of Criminal Law Amicus Curiae Br. 8. Second, state courts "are the most common forum for ineffective assistance of counsel claims," and "state high courts are *also* split on the issue of when the deportation consequences of a guilty plea establish prejudice." AAJC & Other Immigrants' Rights Groups Amici Curiae Br. 4–5 (emphasis added). Finally, the Sixth Circuit's reasoning deprives Mr. Lee and similarly situated defendants of their ability to invoke their constitutional right to trial based solely on the ineffective assistance of their counsel. Nat'l Ass'n of Criminal Defense Lawyers Amicus Curiae Br. 2.

The petition should be granted.

I. The Court's review is warranted to resolve an acknowledged circuit split.

The government acknowledges that "the court of appeals *did* view its approach to prejudice in this case to be different from the approaches of four other circuits." Br. in Opp'n 13 (emphasis added). That concession alone demonstrates why the Court should grant the petition. Nonetheless, the government insists, it is "far from clear" that a different circuit would have found prejudice in the specific circumstances of Mr. Lee's case. *Id.* at 13–15. It is difficult to understand why that would be so. For example, the Seventh Circuit articulated four independent reasons why it would be rational for a defendant to reject a plea to a shorter sentence if the plea would cause mandatory deportation: (1) to try to negotiate a non-deportable plea, (2) to take the high risk of a longer sentence on the chance that a not-guilty verdict would allow the defendant to remain in the United States, (3) to accept a longer sentence in the United States over a short sentence and swift deportation, or (4) to hope for a change in law or government priorities. *DeBartolo* v. *United States*, 790 F.3d 775, 779–80 (7th Cir. 2015). Each reason applies equally to Mr. Lee.

The same is true in *United States* v. *Orocio*, 645 F.3d 630 (3d Cir. 2011). There, faced with overwhelming evidence of guilt, the Third Circuit still believed Orocio "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of a single decade in prison." *Id.* at 645. That fact was enough for Orocio to show prejudice, and it would for Mr. Lee as well.

So too the decisions of the Ninth and Eleventh Circuits. In *United States* v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015), the court concluded that Rodriguez-Vega could show prejudice even if "removal was virtually certain" if she went to trial, *id.* at 790, because she could have negotiated for a non-deportable plea offense or could have reasonably chosen to risk a longer prison term rather than plead guilty to a deportable offense. And in *Hernandez* v. *United States*, 778 F.3d 1230 (11th Cir. 2015), the defendant likewise "could have rationally chosen to risk longer incarceration *for the chance* to avoid deportation, despite sufficient evidence of guilt to result in a grand jury indictment. *Id.* at 1234 (emphasis added). Applying the same reasoning in these decisions to the specific circumstances of Mr. Lee's case would likely result in a finding of prejudice.

Finally, the government says that the Sixth Circuit's ruling follows the Second and Fourth Circuit decisions in *Kovacs* v. *United States*, 744 F.3d 44 (2d Cir. 2014), and *United States* v. *Akinsade*, 686 F.3d 248 (4th Cir. 2012). Br. in Opp'n 13. This assertion is incorrect, as Mr. Lee explained in the petition. Pet. 14–15. More important, the assertion is irrelevant to the merits of the petition. Whether the circuits are evenly divided 4-4 or instead are split 6-2 in favor of Mr. Lee, this Court should grant the petition and resolve the well-developed circuit conflict.

II. The government's prejudice test is inapplicable to the circumstances here.

Given the Sixth Circuit's acknowledgment of the growing circuit split, App. 5a, the government spends the bulk of its opposition brief arguing that review is not warranted because the Sixth Circuit's holding is correct. Br. in Opp'n 6–11. That is not a reason to deny the petition. Cf. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012) (resolving circuit split by affirming the decision below). The argument is also wrong.

1. The government first contends that resolution of the prejudice inquiry "will depend largely on whether the [defendant] would have succeeded at trial," Br. in Opp'n 7 (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59–60 (1985)), and says it is difficult for petitioners who have acknowledged their guilt to satisfy this prejudice requirement, Br. in Opp'n 8 (citing *Padilla* v. *Kentucky*, 559 U.S. 356, 371 n.12 (2010)). But the government is attempting to apply a prejudice test this Court created for ineffective assistance on the merits, not ineffective assistance regarding advice on collateral consequences.

In *Hill*, this Court noted that the *Strickland* prejudice inquiry closely resembles "the inquiry engaged in by courts reviewing ineffective assistance challenges obtained through a trial." 474 U.S. at 59. In such circumstances, if counsel fails to investigate or discover potentially exculpatory evidence, or fails to advise regarding an affirmative defense, the question is whether the evidence or defense would have changed the outcome at trial. *Ibid.*

But where prejudice flows from the collateral consequences of a plea, a court instead asks whether, had counsel "correctly informed" the defendant at the plea stage, the defendant "would have pleaded guilty and insisted on going to trial." *Hill*, 474 U.S. at 60. The petitioner in *Hill* could not show prejudice because he did not allege that parole eligibility was a factor he considered in deciding whether to plead guilty. *Ibid.* But the exact opposite is true here. As the Magistrate found in her Report and Recommendation, the "testimonies of Lee and Fitzgerald were consistent that deportation *was the determinative issue* in Lee's decision whether to accept the plea deal." App. 56a (emphasis added).

To be sure, this Court in *Padilla* observed that it is difficult for petitioners who have acknowledged guilt to show that they would have succeeded at trial but for their counsel's ineffective assistance. 559 U.S. at 371 n.12. But that discussion referenced the same portion of the *Hill* opinion discussed above and related to ineffective assistance on the merits. *Id.* (citing *Hill*, 474 U.S. at 59–60). It is irrelevant here.

2. The government says that the evidence against Mr. Lee was overwhelming, and that the concept of jury nullification is immaterial to an objective analysis of whether a defendant would have been better off to invoke his right to trial. Br. in Opp'n 8–9 (citations omitted). The government also says there is nothing in the record to suggest the prosecutor might have agreed to a plea to a non-deportable offense. *Id.* at 8. Neither of these arguments should be a barrier to granting the petition.

On the first point, the government is wrong to assume that Mr. Lee's only hope is jury nullification. When a defendant invokes his right to trial, his counsel sometimes discovers new legal issues to be advanced, or new flaws in the prosecution's evidence. Nat'l Ass'n of Criminal Defense Lawyers Amicus Curiae Br. 4. Moreover, juries are unpredictable, especially when taking seriously their instruction to render a guilty verdict only when the prosecution proves guilt beyond a reasonable doubt, the highest burden of proof the law can impose. *Id.* at 5. The not-guilty verdicts of O.J. Simpson, George Zimmerman, and the Los Angeles police officers in the Rodney King case are all examples of a jury putting the government to its proofs. *Id.* at 6–7. That is why defendants should always have the ability to invoke their constitutional right and "choose trial for any reason or for no reason" at all. *Id.* at 5.

On the second point, it is nonsensical to fault Mr. Lee for having nothing in the record suggesting that he had an opportunity to plead to a non-deportable offense. Br. in Opp'n 8, 9, 10. Mr. Lee's counsel never sought another deal because counsel erroneously believed the plea he had already negotiated would not result in deportation. App. 56a, 57a. For the same reason, the Seventh Circuit in *DeBartolo* did not demand that the defendant prove there was a better plea he could have pursued but instead recognized that the defendant "could have *tried* to negotiate a different plea deal for an offense that does not make deportation mandatory." 790 F.3d at 779 (emphasis added). As the Magistrate found here, "it would have been [objectively] rational for [Mr. Lee] to choose to go to trial, *whatever* the likelihood of success *and even though* he might face one to five years greater a sentence than if he had pled guilty,

because under the circumstances, deportation was, objectively, at least as undesirable as *any* prison sentence." App. 76a (emphasis added).

3. Turning to policy, the government argues that granting Mr. Lee relief would effectively amount to a *per se* rule of prejudice whenever a defendant asserts that he would not have taken a plea deal had he been properly advised of the immigration consequences of a conviction. Br. in Opp'n 9. That is incorrect. Under Mr. Lee's approach, lower courts will still conduct an "objective" inquiry into a defendant's rational options. And that inquiry will necessarily turn on a wide variety of facts, including how long the defendant has lived in the United States, his connection to his birth country, his ability to speak his birth country's native language, his proximity to family and friends in the United States, and the like. There would be no *per se* rule.

4. Finally, the government notes in passing that Mr. Lee received "tangible benefits" from pleading guilty in the form of a "greatly reduced sentence." Br. in Opp'n 4 (quoting App. 45a, 46a). What the government does not mention is that despite being sentenced on September 28, 2009, to an incarceration period of 12 months and a day, App. 57a, Mr. Lee has now served more than *seven years* in custody, waiting to see whether he will be released to his home in the United States or deported to a country in which he has not stepped foot for nearly 35 years. In other words, while Mr. Lee has seen none of the purported benefits of his plea, he will experience all the downside of his counsel's ineffective assistance if this Court denies the petition.

III. The government does not deny the importance of the question presented nor meaningfully contest that this case is an appropriate vehicle to resolve it.

Having already conceded there is a deep and mature circuit split, the government does not deny the importance of the question presented. Pet. 23–24. And, aside from making the erroneous argument that Mr. Lee could not prevail under the prejudice standard articulated by other circuits, the government does not contest this case is an ideal vehicle to resolve that question. Pet. 24.

Additional reasons counsel for this Court's immediate review, as explained by the amici brief for Asian Americans Advancing Justice (AAJC) and 14 other immigrants' rights groups:

- "[T]he instances of noncitizen defendants receiving deficient advice of counsel—even after making clear that their primary goal is avoiding deportation—is all too common." AAJC Br. 2.
- "[T]he [circuit] conflict is widespread and affects noncitizen defendants and their families throughout the nation." *Id.* at 3.
- The conflict "ignores the experience of thousands of defendants and families who have faced this dilemma, and who have made it clear that their predominant goal is taking every step possible, including the constitutionally protected step of insisting on a trial, to avoid deportation." *Ibid.*

- The circuits applying the wrong prejudice standard inflict harms not only on non-citizen defendants but "on American citizens, like Mr. Lee's elderly parents." *Id.* at 4.
- And state high courts, like the federal circuits, "are also split on the issue of when the deportation consequences of a guilty plea establish prejudice." *Id.* at 4–6.

This Court's grant of the petition will eliminate the "patchwork and haphazard" Sixth Amendment jurisprudence in the lower federal courts and state high courts regarding the question presented. Center on the Admin. of Criminal Law Amicus Curiae Br. 9; AAJC Br. 4–6. It will directly impact the over 4.3 million noncitizens who live in the Fifth and Sixth Circuits alone. AAJC Br. 7. And it will address the humanitarian harms of deportation. *Id.* 8–14. As the Sixth Circuit noted, it is unclear "why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense." App. 10a. It is even less clear when the exile is the result of unconstitutionally ineffective counsel.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley
Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

PATRICK MCNALLY
WEATHERLY, MCNALLY &
DIXON, P.L.C.
424 Church Street, Suite 2260
Nashville, TN 37219

MATTHEW T. NELSON
WARNER NORCROSS &
JUDD LLP
900 Fifth Third Center
111 Lyon Street N.W.
Grand Rapids, MI 49503

Counsel for Petitioner

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