No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To establish prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant who has pleaded guilty based on deficient advice from his attorney must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). In the context of a noncitizen defendant with legal resident status and extended familial and property ties to the United States, the question that has deeply divided the circuits is whether it is always irrational for a defendant to reject a plea offer notwithstanding evidence of guilt when the plea would result in mandatory and permanent deportation.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Mr. Ashram Seepersad. The Respondent is the United States of America.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The order denying rehearing and rehearing en banc by the United States Court of Appeals for the Second Circuit, App. 18, is not reported. The opinion of the United States Court of Appeals for the Second Circuit, App. 1, is not reported. The opinion of the United States District Court for the Eastern District of New York, App. 7, is not reported.

JURISDICTION

The judgment of the court of appeals denying panel rehearing or in the alternative rehearing en banc was issued on March 3, 2017. App. 18 This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

INTRODUCTION

On December 21, 2001, Mr. Seepersad was indicted for credit card fraud and conspiracy to commit credit card fraud in violation of 15 U.S.C. § 1644(a). App. 7 Mr. Seepersad plead guilty to the conspiracy charge via plea agreement on February 28, 2002, and was sentenced to three years of probation and restitution of $73,564.12 on May 16, 2002. App. 8 Mr. Seepersad has served his full probation and completed his restitution successfully. App. 8 He has no other criminal record.

It is undisputed that Mr. Seepersad's conviction for credit card fraud constitutes an aggravated felony for immigration purposes because it involved fraud or deceit and a loss greater than $10,000, under 8 U.S.C. § 1101(a)(43)(M)(i) and that he is therefore deportable from the United States. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). On March 18, 2015, Mr. Seepersad was placed into removal proceeding by Immigration and Customs Enforcement. App. 8 He has since been ordered removed by the immigration court, the Board of Immigration Appeals has dismissed his appeal, and he currently has an immigration Petition for Review pending before the Second Circuit.

On September 29, 2015, the Honorable Chief Judge Carol Bagley Amon issued a memorandum and order denying Mr. Seepersad's petition for writ of error coram nobis relief. App. 7 Mr. Seepersad sought to overturn his conviction for conspiracy to commit credit card fraud in violation of 15 U.S.C. § 1644(a) via writ arguing

that former criminal counsel was ineffective when he misrepresented the immigration consequences of pleading guilty to that offense and that those misrepresentations prejudiced him. App. 7

The District Court did not dispute that Mr. Seepersad's counsel had made an affirmative misrepresentation as to the immigration consequences of his plea if he told Mr. Seepersad that he would not face immigration consequences if he received a sentence of a year or less, and therefore satisfied the first prong of the *Strickland* test. App. 11 The District Court however found that Mr. Seepersad could not show prejudice, as he was not guaranteed to receive a sentence under a year (although in reality he did) as his attorney had advised him would shield him from immigration consequences. App. 14

Mr. Seepersad timely appealed the denial to the Second Circuit which heard oral argument on the case on December 13, 2016, and issued a summary order on January 6, 2017, denying Mr. Seepersad's appeal. App. 2 The Second Circuit likewise agreed with the District Court judge, finding that Mr. Seepersad could not demonstrate the requisite prejudice due to his possible sentence to be received including time over a year and the fact that the District Court judge admonished him that he might face deportation due to the plea. App. 5

A petition for rehearing and rehearing en banc was filed with the Second Circuit on January 20, 2017,

which was denied on March 3, 2017. App. 1 This petition for writ of certiorari follows, no other action has been taken in this case.

There is currently a Circuit split as to the possibility of showing prejudice due to affirmative misstatements of criminal counsel as to the immigration consequences of a criminal plea. The Second (where this case arises), Fourth, Fifth and Sixth Circuits have held that a defendant in Mr. Seepersad's position is not entitled to relief. *See Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012); *Kovacs* v. *United States*, 744 F.3d 44, 52-53 (2d Cir. 2014); *United States* v. *Akinsade*, 686 F.3d 248, 255-56 (4th Cir. 2012); *United States* v. *Kayode*, 777 F.3d 719, 724-29 (5th Cir. 2014).

Circuit Courts of Appeals for the Third, Seventh, Ninth and Eleventh Circuits have all reached the opposite conclusion. *See United States* v. *Orocio*, 645 F.3d 630, 643-46 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013); *DeBartolo* v. *United States*, 790 F.3d 775, 777-80 (7th Cir. 2015); *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 789-90 (9th Cir. 2015); *Hernandez* v. *United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

Certiorari is therefore warranted to resolve this mature circuit conflict.

STATEMENT OF THE CASE

A. Ineffective assistance of counsel for a deportable offense

Ineffective assistance claims are evaluated using a two-part test: (1) whether the attorney performance was deficient; and (2) if so, whether the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To show prejudice a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). A defendant who pled guilty because of ineffective assistance "must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*." *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010) (emphasis added).

Before a defendant enters a guilty plea, "counsel's function as assistant to the defendant [gives rise to] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions" after "mak[ing] reasonable investigations." *Strickland* v. *Washington*, 466 U.S. at 688, 691 (1984). Counsel is required " . . . to advise the client of 'the advantages and disadvantages of a plea agreement,'" *Padilla*, 559 U.S. at 370 (quoting *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995)).

B. Indictment, legal representation, proceedings below

On December 21, 2001, Mr. Seepersad was indicted for credit card fraud and conspiracy to commit credit card fraud in violation of 15 U.S.C. § 1644(a). App. 7 Mr. Seepersad pled guilty to the conspiracy charge via plea agreement on February 28, 2002, and was sentenced to three years of probation and restitution of $73,564.12 on May 16, 2002. App. 8 The basis for the charge was Mr. Seepersad worked as a non-managerial employee of Radio Shack and participated in a scheme which was in progress before he became an employee to allow individuals to use fraudulent credit cards to purchase store merchandise. He was a lawful permanent resident at the time of his plea. App. 11 Mr. Seepersad has served his full probation and completed his restitution successfully. App. 8 He has had no run-ins with the law since. Mr. Seepersad has an elderly mother who he cares for and numerous siblings present in the United States. He has been steadily employed by UPS for over a decade and has significant monetary and property interests in the United States.

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 that he would have affirmative defenses to deportation available to him before the immigration court in spite of the plea agreement. App. 11 The District Court found that the affirmative misadvice that a sentence of under one year would keep Mr. Seepersad safe, if made, constituted affirmative misadvice and would satisfy the first prong under *Strickland*. App. 11 The District Court then found that the second alleged ground regarding defenses to deportation was not a misstatement of law but a misstatement of fact which did not satisfy the first prong under *Strickland*. App. 12

The District Court then turned to the prejudice prong of *Strickland*. The Court found that Mr. Seepersad could not have relied on receiving a sentence of under a year due to his plea and therefore could not show prejudice absent this reliance. App. 14 The District Court also found that it was unlikely that any defenses were available to Mr. Seepersad, in spite of him proposing a "lack of knowledge about the fraudulent scheme" defense in his affidavit to the District Court and therefore he could not show he would have gone to trial but for his attorney's errors. App. 15 The Court determined that: "Seepersad has therefore not given the Court any pause as to his guilt . . . " App. 16

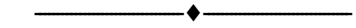
Mr. Seepersad timely appealed to the United States Court of Appeals for the Second Circuit. After briefing and oral argument the panel found in their January 6, 2017, summary order that:

> . . . Seepersad cannot demonstrate the requisite prejudice. The record makes clear that Seepersad had no reasonable expectation that he would, in fact, be sentenced to less than a year. The sentencing guidelines for his pled-to crime provided for 12 to 18 months' imprisonment (miscalculated as 15 to 21 months in the plea agreement), and Seepersad waived his right to appeal any sentence under 21 months. During the plea colloquy, the district court warned Seepersad that a below-Guidelines sentence "only happens in very, very unusual cases," where "there was some extraordinary unusual mitigating factor." Also during the plea colloquy the district court told Seepersad his guilty plea "will provide the basis for the Immigration and Naturalization Service to deport you. You've got to understand that." Seepersad twice indicated that he understood. App. 5

His Petition for rehearing and in the alternative rehearing en banc was denied without opinion by the Second Circuit on March 3, 2017. App. 18

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 crime pled to 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.



REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A DEEP AND MATURE CIRCUIT CONFLICT.

Is it always irrational for a defendant facing evidence of guilt on a deportable offense to exercise his right to go to trial or to seek an alternative plea? Currently the Second, Fourth, Fifth and Sixth Circuits lean towards "yes" and the Third, Seventh, Ninth and Eleventh lean toward "no." *See Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012); *Haddad* v. *United States*, 486 F. App'x 517, 521-22 (6th Cir. 2012); *Kovacs* v. *United States*, 744 F.3d 44, 52-53 (2d Cir. 2014); *United States* v. *Akinsade*, 686 F.3d 248, 255-56 (4th Cir. 2012); *United States* v. *Kayode*, 777 F.3d 719, 724-29 (5th Cir. 2014); *see also United States* v. *Orocio*, 645 F.3d 630, 643-46 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013); *DeBartolo* v. *United States*, 790 F.3d 775, 777-80 (7th Cir. 2015); *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 789-90 (9th Cir. 2015); *Hernandez* v. *United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

The Second, Fourth, Fifth and Sixth Circuits have held that strong evidence of guilt precludes a defendant from establishing *Strickland* prejudice in the

context of a defendant's plea to a deportable offense based on ineffective assistance. The Sixth Circuit held Pilla could not prove prejudice because she "faced overwhelming evidence of her guilt." *Pilla*, 668 F.3d 373. The Fifth Circuit held that Kayode could not establish *Strickland* prejudice because "there was 'overwhelming evidence against Kayode.'" *Kayode*, 777 F.3d at 725-26. These Circuits have determined that if the defendant would have been found guilty of the charge plead to no matter what then the result of the proceedings would have been the same ultimately whether incorrect advice was given by counsel regarding immigration consequences of the plea or not, and therefore prejudice cannot be shown.

The Third, Seventh, Ninth and Eleventh Circuits take a more holistic approach to determining whether it would have been reasonable for a non-citizen defendant to reject a plea agreement offer and require counsel to negotiate an alternative plea or insist on going to trial. For instance, the Seventh Circuit's decision in *DeBartolo*, 790 F.3d 775 noted that "[j]udges and prosecutors should hesitate to speculate on what a defendant would have done in changed circum-stances." *DeBartolo*, 790 F.3d at 778. They went on to further find that: "We don't condone jury nullification," but "a criminal defendant cannot be denied the right to a trial, and forced to plead guilty, because he has no sturdy legal leg to stand on but thinks he has a chance that the jury will acquit him even if it thinks he's guilty." *DeBartolo*, 790 F.3d at 779. The Seventh Circuit

also recognized that DeBartolo "could have tried to negotiate a different plea deal for an offense that does not make deportation mandatory." *DeBartolo*, 790 F.3d at 779. DeBartolo "might even have preferred a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation, because the lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners." *DeBartolo*, 790 F.3d at 780. Last the Seventh Circuit found that DeBartolo might have taken his chances at trial with hopes that he would slip under the radar of ICE after his sentence was completed. *DeBartolo*, 790 F.3d at 780.

The Ninth Circuit in *Rodriguez-Vega*, 797 F.3d 781, found that prejudice could have been demonstrated on two bases. First, *Rodriguez-Vega* could have negotiated a plea bargain that would not result in her removal. *Rodriguez-Vega*, 797 F.3d at 788-89. Second, it "is often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than to plead guilty to an offense rendering her removal virtually certain." *Rodriguez-Vega*, 797 F.3d at 789. This was so even if Rodriguez-Vega had known "removal was virtually certain" if she went to trial. *Rodriguez-Vega*, 797 F.3d at 790.

There is a clear divide in the two approaches taken by the various Circuits, one approach looks at the likelihood of success at trial and if there is none or little, finds that a defendant can never show prejudice

as required under *Strickland*. The other approach, which is much more broad, looks at the totality of the circumstances surrounding the defendant's personal situation and information available to them before pleading guilty and determines if that defendant may have rejected their plea to seek out another plea or go to trial despite the strength of the evidence against them involved.

II. THE COURT SHOULD GRANT THE INSTANT PETITION AND REVERSE BECAUSE IT WOULD NOT HAVE BEEN IRRATIONAL FOR MR. SEEPERSAD TO REJECT THE PLEA AGREEMENT OR SEEK A DIFFERENT PLEA AGREEMENT OR GO TO TRIAL HAD HE BEEN PROPERLY ADVISED OF THE DEPORTATION CONSEQUENCES.

The possibility of success at trial, the possibility of a longer sentence, and the Rule 11 admonishment from the District Court Judge should not have barred Mr. Seepersad from showing prejudice as the Second Circuit found, as they used the incorrect standard currently employed by the Second, Fourth, Fifth and Sixth Circuits to determine prejudice in such cases. It would not have been irrational for Mr. Seepersad to seek an alternate plea or go to trial under the totality of the circumstances.

Correct advice from counsel regarding the immigration and deportation consequences of plea agreement and conviction is essential to provide constitutionally adequate representation during pre-plea proceedings because, "'[p]reserving the client's right to remain in

the United States may be more important to the client than any potential jail sentence.'" *Padilla*, 559 U.S. at 368 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 322 (2001)). 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); *see also United States* v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015); *United States* v. *Orocio*, 645 F.3d 630 (3d Cir. 2011) (defendant may risk taking a much longer sentence for small chance to remain in the United States). The U.S.C.A. for the District of Columbia heard a factually similar case and found that the petitioner was not prohibited from showing prejudice when counsel advised him that a sentence of a year or less would protect from immigration consequences, when in fact length of sentence was inconsequential to the immigration consequences of the plea, and such a sentence was actually given by the Court. *United States* v. *Newman*, 805 F.3d 1143 (D.C. Cir. 2015).

The Supreme Court has repeatedly emphasized the importance of providing effective representation and competent advice regarding the immigration consequences of a conviction *before* entry of the defendant's guilty plea; therefore, the prejudice caused by a violation of that duty should not be found as it was by the Second Circuit in this case to not matter due to the possibility of a larger sentence or to be cured by a judge's general statement during the plea colloquy that the plea agreement "will provide the basis for the Immigration and Naturalization Service to deport you."; after the plea bargaining process is already complete and immediately prior to the court's acceptance of the guilty plea. App. 5 *See*, *e.g.*, *United States* v. *Cronic*, 466 U.S. 648, 656 (1984) ("[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'") (quoting *Anders* v. *California*, 386 U.S. 738, 743 (1967)); *Padilla*, 559 U.S. at 370-71; *see also Chaidez* v. *United States*, 133 S. Ct. 1103, 1105 (2013) "[T]his Court held [in *Padilla*] that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." The only thing counsel in the instant case advocated for was a plea that would not protect Mr. Seepersad from immigration consequences but instead one which sealed his fate as an aggravated felon.

The Supreme Court in *Lafler* and *Frye* makes it clear that a full and fair trial or an otherwise voluntary guilty plea cannot "inoculate[ ] [counsel's] errors in the

pretrial process" from collateral attack under *Strickland*, *see Missouri* v. *Frye*, 132 S. Ct. 1399 at 1407 (2012), neither should a district court judge's mere general admonition at a plea colloquy that deportation is "possible" function to bar a defendant from demonstrating that he was prejudiced by counsel's deficiencies during the pre-guilty-plea stage of proceedings. *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012). Although Mr. Seepersad plead guilty to a crime with a possible sentence above what his counsel told him was the threshold for immigration consequences Mr. Seepersad received a sentence less than that threshold and counsel's errors should not be found to have not prejudiced him insofar as he lost his opportunity to go to trial or seek an alternate plea that guaranteed immigration safety without the proper guidance and advice by counsel at the pre-plea stage of the proceedings. In *Frye*, the Supreme Court expressly rejected the State's arguments that a guilty plea that was entered after the trial court fulfilled its obligation to ensure the voluntariness of that plea "supersedes errors by defense counsel." *Frye*, 132 S. Ct. at 1406. The Supreme Court in *Lafler* also rejected the State's argument that *Strickland* prejudice cannot arise from defective representation *during plea bargaining* if the defendant is later convicted after a fair trial. *Lafler*, 132 S. Ct. at 1385. The Supreme Court stated that "[t]he fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance **or that he suffered no prejudice from his attorney's deficient performance during plea bargaining**." *Lafler*, 132 S. Ct. at 1388 (emphasis added).

The Supreme Court in both *Lafler* and *Frye* therefore made it clear that if the defendant establishes ineffective assistance of counsel during the plea negotiation stage of proceedings, a subsequent, otherwise-voluntary guilty plea or even a full and fair trial does not necessarily "wipe[] clean any deficient performance by defense counsel during plea bargaining." *Id*.

Mr. Seepersad was prejudiced at the pre-plea stage and although he later plead to a crime in which the sentence might have put him in danger of immigration consequences based upon his attorney's advice, that fact should not prohibit Mr. Seepersad from showing ineffective assistance of counsel and prejudice pre-plea hearing due to counsel's errors by not informing Mr. Seepersad that sentence length was inconsequential and that he instead would have to seek an alternate plea without immigration consequences or to go to trial. *See DeBartolo* v. *United States*, 790 F.3d 775 (7th Cir. 2015). "He could have tried to negotiate a different plea deal for an offense that does not make deportation mandatory."

Circuit Courts have given judicial admonishments about immigration consequences far less weight than was given by the Second Circuit in the instant case. In *United States* v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015), the court of appeals held that a brief, equivocal statement that the defendant "potentially * * * could be deported or removed, perhaps" did not "purge prejudice" and that "The government's performance in including provisions in the plea agreement, and the court's performance at the plea colloquy, are simply *irrelevant*

to the question whether counsel's performance fell below an objective standard of reasonableness." *Id*. at 785, 790. In *United States* v. *Urias-Marrufo*, 744 F.3d 361 (5th Cir. 2014), the Fifth Circuit stated that it is "counsel's duty, not the court's, to warn of certain immigration consequences, and counsel's failure cannot be saved by a plea colloquy." *Urias-Marrufo*, 744 F.3d at 369. Accordingly, the courts of appeals to address the issue have uniformly held that a district court's plea-colloquy warnings are irrelevant to the prejudice inquiry, do not cure prejudice, and are given little to no weight when general in nature such as the instant case.

By the time the plea hearing occurred in this case the plea bargaining process was over, and with it was counsel's opportunity and ability to advocate and negotiate a proper plea which would avoid immigration consequences as was clearly from the record a very important and a central issue to Mr. Seepersad at the time. Mr. Seepersad did not have an adequate understanding of the immigration consequences at the time before, during, or after his plea. If the negotiation process that preceded the plea hearing was based upon affirmative misinformation provided Mr. Seepersad by counsel and Mr. Seepersad's consideration of the immigration consequences of the plea focused on the incorrect factors, Mr. Seepersad was prejudiced in that respect, limited in his ability to seek an alternate plea agreement or decide to go to trial, and the ultimate sentence which he may have received or guilt for the crime he plead guilty to is inconsequential in removing

or curing that pre-plea prejudice. His ultimate guilt or his ability to prove such at trial should not have prohibited him from showing prejudice as the Second Circuit held.

Mr. Seepersad was never given the opportunity to reject his plea agreement due to the affirmative misadvice of counsel, however 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 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 the Third, Seventh, Ninth and Eleventh Circuits 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. *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1492 n. 10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, alien[] [defendants] might endeavor to negotiate a plea to a non excludable offense.") "In order that the[] benefits [of plea bargaining] can be realized, however, criminal defendants require effective counsel *during plea negotiations*. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407-08 (2012) (emphasis added). As the *Padilla* court recognized, "[c]ounsel who

possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." *Padilla*, 559 U.S. at 373.

The petition should be granted, and this Court should adopt the analyses of the Third, Seventh, Ninth and Eleventh Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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15-3771-cr
United States v. Seepersad

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 6th day of January, two thousand seventeen.

Present: ROSEMARY S. POOLER,
PETER W. HALL,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 15-3771-cr

ASHRAM SEEPERSAD,

Defendant-Appellant.[1]

Appearing for Appellant: Rion Latimore, Minneapolis, MN.

Appearing for Appellee: J. Matthew Haggans, Assistant United States Attorney (Emily Berger, Assistant United States Attorney, *on the brief*), *for* Robert L. Capers, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from the United States District Court for the Eastern District of New York (Amon, *C.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of said District Court be and it hereby is **AFFIRMED**.

Ashram Seepersad appeals from the September 29, 2015 memorandum and order of the United States District Court for the Eastern District of New York (Amon, *C.J.*) denying his petition for a writ of coram

[1] The Clerk of the Court is directed to amend the caption as above.

nobis. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

"Coram nobis is not a substitute for appeal, and relief under the writ is strictly limited to those cases in which errors . . . of the most fundamental character have rendered the proceeding itself irregular and invalid." *Foont v. United States*, 93 F.3d 76, 78 (2d Cir. 1996) (internal quotation marks and citation omitted). "The proceedings leading to the petitioner's conviction are presumed to be correct, and the burden rests on the accused to show otherwise." *Id.* at 78-79 (internal quotation marks and citation omitted). "A petitioner seeking such relief must demonstrate that 1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." *Id.* at 79 (internal quotation marks, brackets and citations omitted). "On appeal, we review *de novo* the question of whether a district judge applied the proper legal standard, but review the judge's ultimate decision to deny the writ for abuse of discretion." *United States v. Mandanici*, 205 F.3d 519, 524 (2d Cir. 2000) (citation omitted).

"[I]neffective assistance of counsel is one ground for granting a writ of *coram nobis.*" *Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014) (citation omitted). "A claim of ineffective assistance entails a showing that: 1) the defense counsel's performance was objectively unreasonable; and 2) the deficient performance

prejudiced the defense." *Id.* (citation omitted). "[A]n affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is . . . objectively unreasonable." *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002). "To establish prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Kovacs*, 744 F.3d at 51 (internal quotation marks and citation omitted); *see also Chhabra v. United States*, 720 F.3d 395, 408 (2d Cir. 2013). Where, as here, counsel's alleged errors relate to immigration issues, the petitioner also must "clearly demonstrate that he placed particular emphasis on immigration consequences in deciding whether or not to plead guilty." *Id.* at 52 (internal quotation marks, citation, and brackets omitted).

Seepersad argues that his original lawyer misrepresented the immigration consequences of his guilty plea by advising him that he "would not be deported if [he] received less than one year in jail," and that he signed the plea agreement based on that advice. App'x at 31 ¶ 4. Seepersad also avers that if he had known his "immigration status would be impacted by a guilty plea regardless of serving less than one year in jail, [he] would not have entered such a plea or attempted to plead to an offense that did not constitute an aggravated felony." App'x at 32 ¶ 7.

Even assuming arguendo that Seepersad's counsel wrongly advised him that he would not be deported if

he was sentenced to less than a year, Seepersad cannot demonstrate the requisite prejudice. The record makes clear that Seepersad had no reasonable expectation that he would, in fact, be sentenced to less than a year. The sentencing guidelines for his pled-to crime provided for 12 to 18 months' imprisonment (miscalculated as 15 to 21 months in the plea agreement), and Seepersad waived his right to appeal any sentence under 21 months. During the plea colloquy, the district court warned Seepersad that a below-Guidelines sentence "only happens in very, very unusual cases," where "there was some extraordinary unusual mitigating factor." Also during the plea colloquy the district court told Seepersad his guilty plea "will provide the basis for the Immigration and Naturalization Service to deport you. You've got to understand that." Seepersad twice indicated that he understood.

Given this, the district court had a strong record basis for discrediting Seepersad's claim that he would not have pled guilty if he were properly advised as to the immigration consequences of his plea. As the district court properly found, at the time he entered his plea, Seepersad did not have a legitimate expectation that he would be sentenced to less than a year, and he nonetheless pleaded guilty. The fact that he was eventually sentenced to three years' probation does not alter the analysis.

We have considered the remainder of Seepersad's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ASHRAM SEEPERSAD,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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NOT FOR PUBLICATION

MEMORANDUM & ORDER

01-CR-1444 (CBA)

(Filed Sep. 29, 2015)

AMON, Chief United States District Judge:

Ashram Seepersad petitions for a writ of error *coram nobis* pursuant to the All Writs Act, 28 U.S.C. § 1651, (D.E. # 121, 122), and moves for an expedited hearing on his petition, (D.E. # 123). His petition arises from a prior conviction for conspiracy to commit credit card fraud in violation of 15 U.S.C. § 1644(a). (*See* D.E. # 89.) Seepersad now seeks the writ on the ground that his lawyer rendered ineffective assistance of counsel by misrepresenting the immigration consequences of pleading guilty to that offense. For the following reasons, the Court denies the petition for a writ of error *coram nobis* and the motion for an expedited hearing.

BACKGROUND

On December 21, 2001, Seepersad was indicted for credit card fraud and conspiracy to commit credit card fraud in violation of 15 U.S.C. § 1644(a). (D.E. # 26.)

Seepersad pleaded guilty to the conspiracy charge pursuant to a plea agreement on February 28, 2002, and was sentenced by this Court to three years of probation and restitution of $73,564.12 on May 16, 2002. (D.E. # 89.) Seepersad has served his probation and completed his restitution. (*See* D.E. # 126, Mem. of Law in Opp'n to Pet. for Writ of Error *Coram Nobis* ("Gov't Mem.") at 4.)

Seepersad's conviction constitutes an aggravated felony because it "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *See* 8 U.S.C. § 1101(a)(43)(M)(i). "Any alien who is convicted of an aggravated felony at any time after admission is deportable," 8 U.S.C. § 1227(a)(2)(A)(iii), and "[a]ny alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States," 8 U.S.C. § 1228(c).

On March 18, 2015, removal proceedings were initiated against Seepersad. (*See* D.E. # 123.) On June 30, 2015, Seepersad filed this petition seeking a writ of error *coram nobis,* alleging that his counsel misrepresented the immigration consequences of pleading guilty and he was therefore denied effective assistance of counsel. (*See* D.E. # 121.) On July 21, 2015, Seepersad appeared before the United States Immigration Court, and on September 4, 2015, an immigration judge issued a decision ordering Seepersad to be removed from the United States. (*See* D.E. # 127.) Seepersad has thirty calendar days from that date to appeal the decision to the Board of Immigration Appeals. *Id*. He is currently held at the Hudson County

Correctional Facility in Kearney, New Jersey, pending his removal. (D.E. # 121.)

DISCUSSION

A writ of error *coram nobis* is available only to petitioners who are no longer in custody and therefore cannot avail themselves of direct review or collateral relief by writ of habeas corpus. *See Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014). A writ of error *coram nobis* is "essentially a remedy of last resort," *Fleming v. United States*, 146 F.3d 88, 89 (2d Cir. 1998), that will issue "only where extraordinary circumstances are present," *Nicks v. United States*, 955 F.2d 161, 167 (2d Cir. 1992).

To obtain *coram nobis* relief, a petitioner must show that (1) "there are circumstances compelling such action to achieve justice"; (2) "sound reasons exist for failure to seek appropriate earlier relief"; and (3) "the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." *Fleming*, 146 F.3d at 90 (quoting *Foont v. United States*, 93 F.3d 76, 79 (2d Cir. 1996)). "In reviewing a petition for the writ, this Court presumes that the proceedings were correct, and the burden of showing otherwise rests on the petitioner." *Foreman v. United States*, 247 F. App'x 246, 248 (2d Cir. 2007). *Coram nobis* relief is "strictly limited to those cases in which errors of the most fundamental character have rendered the proceeding itself irregular and invalid."

Foont, 93 F.3d at 78 (internal quotation marks and ellipsis omitted).

Applying this standard here, the Court concludes that Seepersad is not entitled to *coram nobis* relief. Even assuming that his petition is timely, and admitting that he continues to suffer the legal consequence of being presumptively deportable, Seepersad's petition fails on the merits because it does not demonstrate the extraordinary circumstances necessary to justify the writ.

To show such circumstances, Seepersad must prove that a fundamental error occurred during the criminal proceeding underlying his conviction. *United States v. Morgan*, 346 U.S. 502, 512 (1954). Seepersad claims that the fundamental error was a denial of his Sixth Amendment right to effective assistance of counsel, which is one ground for granting a writ of *coram nobis*. *See Kovacs*, 744 F.3d at 49. To establish ineffective assistance of counsel, Seepersad must (1) demonstrate that his counsel's performance fell below "an objective standard of reasonableness" and (2) "affirmatively prove prejudice." *Strickland v. Washington*, 466 U.S. 668, 688, 693 (1984). In the Second Circuit, "an affirmative misrepresentation as to the deportation consequences of a guilty plea is . . . objectively unreasonable." *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002).[1]

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[1] Because Seepersad alleges misadvice, not an omission, his petition is governed by *Couto*, not *Padilla v. Kentucky*, 559 U.S.

Seepersad identifies two ways that he believes his counsel's performance was objectively unreasonable. First, he argues that his counsel misrepresented the immigration ramifications of his guilty plea. He alleges that he "was advised by counsel, during a private conference approximately one week before the change of plea hearing, that he would not be deported if he was sentenced to serve less than one year in jail."[2] (D.E. # 121.) Because Seepersad pleaded to an aggravated felony, which makes him presumptively deportable, this advice constitutes an affirmative misrepresentation, satisfying the first prong of the *Strickland* test.

Second, Seepersad argues that his attorney misadvised him about his legal permanent resident (LPR) status during the change of plea hearing. Seepersad's petition states that "[a]t the change of plea hearing the attorney advised that he could still receive LPR status after pleading guilty – even though he already had

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356 (2010), which established that counsel must inform the defendant of immigration consequences where a conviction will result in deportation. *See Kovacs*, 744 F.3d at 50 (applying *Couto* to a petition based on an attorney's misrepresentation). Although *Couto* was decided after judgment was entered on Seepersad's petition, *Couto* applies retroactively, unlike *Padilla*. *Compare Chaidez v. United States*, 133 S. Ct. 1103 (2013) (*Padilla* does not apply retroactively), *with Kovacs*, 744 F.3d at 50-51 (*Couto* does).

[2] Only Seepersad's affidavit supports this claim. (*See* D.E. # 125.1.) For his counsel to make such a clear prediction would be both surprising and inconsistent with his other statements during Seepersad's change of plea hearing, (*See* Gov't Mem. Ex. 3, Tr. of Plea Hr'g (Feb. 28, 2002) ("Plea Hr'g") at 18-19). Nevertheless, the Court will assume without deciding that his attorney in fact made this representation.

LPR status – and could even be in a more fortuitous position than had he already obtained LPR status." (*Id*.)

But Seepersad misstates his lawyer's comments made during the change of plea hearing. His lawyer stated that Seepersad "may actually receive his resident status *after the events in the case and after his arrest*, which means he was not a resident *at the time of this occurrence*." (Plea Hr'g at 18 (emphasis added).) The attorney did not think that Seepersad "could still receive LPR status after pleading guilty," but that he had not achieved LPR status before the crime. It is implausible that the lawyer thought Seepersad was not a resident at the change of plea hearing: immediately before the lawyer's comments, the Court had asked Seepersad if he had a green card, and Seepersad answered yes. (*See id*.) Even thinking Seepersad a nonresident, however, would not have been a "blatant misstatement of the law" as Seepersad claims, but merely a misstatement of fact. (D.E. # 121.) Such a mistake would not constitute an "affirmative misrepresentation of the deportation consequences of a guilty plea" rendering his attorney's performance objectively unreasonable. *Kovacs*, 744 F.3d at 50 (citing *Couto*, 311 F.3d at 188); *cf., e.g.*, *United States v. Dyess*, 478 F.3d 224 (4th Cir. 2007) (counsel's failure to discover facts that could affect sentencing was not unreasonable); *Perez v. Rosario*, 449 F.3d 954 (9th Cir. 2006) (counsel's mistake about defendant's number of strikes under California's three-strikes law was not unreasonable).

And Seepersad's attorney does not in fact make this mistake.

Therefore, while the first alleged misrepresentation – that receiving a sentence under one year did not make Seepersad deportable – was objectively unreasonable if it occurred, the second was not a misrepresentation of the plea's deportation consequences at all. Seepersad thus satisfies *Strickland*'s performance prong only as to his first alleged misrepresentation.

To demonstrate ineffective assistance of counsel, however, Seepersad must still show that he was prejudiced by this misrepresentation. To establish prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A petitioner can show prejudice by demonstrating that but for incorrect advice, the petitioner would have been able to secure a better plea bargain, *see Missouri v. Frye*, 132 S. Ct. 1399 (2012), or would have insisted on trial, *see Hill v. Lockhart*, 474 U.S. 52 (1985). *See Dorfmann v. United States*, 597 F. App'x 6, 8 (2d Cir. 2015); *see also Kovacs*, 744 F.3d at 51.

Seepersad does not argue that he could have negotiated a better plea deal and fails to show that he would have insisted on going to trial but for his attorney's errors. The first alleged misrepresentation by his

lawyer – that Seepersad could not be deported if sentenced to under one year – could not have persuaded him to plead guilty because he had no grounds to believe that he would necessarily receive such a sentence. First, the Guidelines estimated sentence for Seepersad's pleaded-to crime was not under one year; it was twelve to eighteen months. (Gov't Mem. Ex. 2 ("Plea Agreement") at 2.). The Court reiterated this fact during the plea colloquy and told Seepersad that any sentence below this range would require "some extraordinary unusual mitigating factor" and "[t]hat kind of thing only happens in very, very unusual cases."[3] (Plea Hr'g at 20-21.) Second, Seepersad waived his right to appeal any sentence under eighteen months, not under the twelve months he allegedly thought would subject him to removal. (Plea Agreement at 3.) The Court explained this waiver to him in detail. (Plea Hr'g at 16.) Third, Seepersad acknowledged that no one had promised him what his sentence would be. Both the Plea Agreement and the Court reminded him of this fact. (*See* Plea Agreement at 3, Plea Hr'g at 20-21.) And Seepersad swore under oath that he understood all of this. (*See* Plea Agreement at 5, Plea Hr'g at 20.) Seepersad entered his plea with no legitimate expectation that he would get a sentence under a year. Thus the alleged statement of counsel

[3] The Court's emphasis is all the more pointed because Seepersad is being sentenced in 2002, before *United States v. Booker*, 543 U.S. 220 (2005), made the Guidelines discretionary rather than mandatory.

could not have caused him to enter a plea. His statement to the contrary is not credible.

The second alleged misrepresentation – the supposed error about his resident status – was no misrepresentation at all, nor would it have been objectively unreasonable. But even such an error would not have prejudiced Seepersad. Seepersad surely knew his own immigration status – he had just told the Court that he had his green card. (Plea Hr'g at 18.) It is implausible that he would have decided to go to trial based on information about his status that he knew to be false.

Although Seepersad might have strengthened his argument that he would have gone to trial by showing that he "would have litigated an available defense," *Kovacs*, 744 F.2d at 52, he has failed to do so. Seepersad asserts only that "it is possible that he could prove he lacked knowledge about the fraudulent scheme." (D.E. # 121.) "No factual defenses appear to have been available to [him], and he points to none." *Dorfmann*, 597 F. App'x at 8. The mere possibility of acquittal does not demonstrate that Seepersad would have gone to trial but for his attorney's errors.

Indeed, a decision to risk trial would have been irrational given the strength of the case against him. Seepersad confessed to his role in the conspiracy in a sworn statement. (*See* Gov't Mem., Ex. 1.) Each of his codefendants also pleaded guilty. (*See* Gov't Mem. at 10.) If tried and convicted, Seepersad was subject to a maximum penalty of ten years for both the fraud and

the conspiracy charges. *See* 15 U.S.C. § 1644. Additionally, he would have lost any potential reduction in the Guidelines sentence based on his acceptance of responsibility. (*See* Gov't Mem. at 10.) Seepersad has therefore not given the Court any pause as to his guilt – which he admitted – or whether his guilt would have been established at trial. *Cf. Silent v. United States*, No. 11-CV-5359, 2012 WL 4328386, at *6 (E.D.N.Y. Sept. 19, 2012).

Therefore Seepersad has not proven prejudice. His ineffective-assistance-of-counsel claim accordingly fails, and, because he has not shown compelling circumstances, his petition for writ of error *coram nobis* is denied.

With his petition, Seepersad moved for an expedited hearing in response to his upcoming immigration proceedings and likely removal. (D.E. # 123.) No evidentiary hearing is necessary, however, because Seepersad's allegations fail to establish the merits of his petition even if they are accepted as true.

CONCLUSION

For the above reasons, the petition for a writ of error *coram nobis* is denied and Seepersad's motion for an expedited hearing is denied as moot. The Clerk of Court is directed to close the file.

SO ORDERED.

Dated: Brooklyn, New York
September 28, 2015

s/Carol Bagley Amon

Carol Bagley Amon
Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of March, two thousand seventeen.

United States of America,

Appellee,

v.

Ashram Seepersad,

Defendant-Appellant.

ORDER
Docket No: 15-3771

Appellant, Ashram Seepersad, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe