No. 16-327

In The Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……ii

INTEREST OF THE *AMICUS CURIAE*……1

SUMMARY OF THE ARGUMENT……2

ARGUMENT……2

I. The Sixth Circuit's rule gives insufficient deference to the goal of maintaining the adversarial process during plea bargaining….2

II. The significant circuit split on this issue will have wide-ranging practical ramifications until it is resolved……7

CONCLUSION……10

TABLE OF AUTHORITIES

Constitutional provision

U.S. Const. amend. VI.....3, 4, 5, 9

Cases

Hill v. Lockhart,
474 U.S. 52 (1985).....2

Lafler v. Cooper,
132 S. Ct. 1376 (2012).....3, 4, 6

Missouri v. Frye,
132 S. Ct. 1399 (2012).....4-5

Padilla v. Kentucky,
559 U.S. 356 (2010).....4

Strickland v. Washington,
466 U.S. 668 (1984).....2, 3, 6, 7, 9

United States v. Cronic,
466 U.S. 648 (1984).....5

Statutes

8 U.S.C. § 1101(a)(43)(B).....7

8 U.S.C. § 1101(a)(48)(A).....8

8 U.S.C. § 1182(a)(9)(A).....8

8 U.S.C. § 1182(h).....7

8 U.S.C. § 1228……..…7

18 U.S.C. § 924(c)……..7

21 U.S.C. § 802……..…..7

21 U.S.C. § 841(a)(1)……..8

Other authorities

Immigration Consequences of Criminal Convictions: Padilla v. Kentucky (Office of Immigration Litigation, Department of Justice, Civil Division 2010)……..……7

United States Sentencing Commission, *Statistical Information Packet – Fiscal Year 2015*……8

The Center on the Administration of Criminal Law ("the Center) respectfully submits this amicus curiae brief in support of Petitioner in this case.[1]

INTEREST OF THE *AMICUS CURIAE*

The Center, based at New York University School of Law,[2] is dedicated to defining and promoting good government practices in the criminal-justice system through academic research, litigation, and formulating public policy. One of the Center's guiding principles in selecting cases to litigate is identifying those that raise substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities. The Center also defends criminal-justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities.

The Center's appearance as amicus curiae in this case is prompted by its belief that it is important

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[1] Counsel for all parties received timely notice of intent to file this amicus curiae brief and consented to its filing; their consent letters are being filed with this brief. No counsel to any party authored this brief in whole or in part, and no person or entity other than Amicus, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to represent the views of New York University School of Law, or of New York University, if any.

to have uniformity among the circuits on this point: whether an alien defendant who pleads guilty to an offense that will result in mandatory, permanent deportation, in the face of strong evidence of guilt, is barred from establishing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and thus, ineffective assistance of counsel.

SUMMARY OF THE ARGUMENT

The rule applied by the Sixth Circuit and three others gives insufficient weight to the importance of safeguarding the adversarial process throughout the plea-bargaining stage of proceedings. It also widens a stark circuit split that will have broad practical ramifications if not addressed by this Court.

ARGUMENT

I. The Sixth Circuit's rule gives insufficient deference to the goal of maintaining the adversarial process during plea bargaining.

To show prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984) and establish ineffective assistance of counsel in connection with a guilty plea, a petitioner 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 applying that standard, the Sixth Circuit held that Mr. Lee faced "overwhelming evidence" of guilt, had no "*bona fide* defense, not even a weak one," and could not show that an attempt by competent counsel to negotiate a plea to a non-

deportable offense "would have changed the ultimate outcome of his case." Pet. App. 10a, 8a. The court thus held that Mr. Lee had not shown that even if he had effective counsel, rejecting the plea would have had a reasonable probability of producing a different result, and therefore would have been rational under the circumstances. Pet. App. 4a.

However, that ruling fails to give adequate weight to this Court's admonition that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the *adversarial process* that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686 (emphasis added). The probability that counsel's deficient performance affected the proceeding's result undeniably is an important consideration in the prejudice analysis. But a breakdown in the adversarial process leading to that result can make the result unreliable and unjust, even if there is a significant amount of incriminating evidence that makes going to trial unlikely to be successful.

The importance of the adversarial process is demonstrated by *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), where defendant rejected a favorable plea agreement after heeding the uninformed advice of counsel. *Id.* at 1384. At trial, he was convicted and sentenced to a significantly more severe term of imprisonment than the one proposed in the rejected plea agreement. *Id.* Opposing habeas relief, Michigan argued that the defendant could not show prejudice since "the purpose of the Sixth Amendment is to ensure the reliability of a conviction following a trial,"

and that, because the evidence had been weighed by a jury and determined to indicate his guilt beyond a reasonable doubt, the reliability of his conviction could not be doubted. *Id.* at 1388. This Court summarized that argument as an assertion that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining," *Id.*, and rejected it. As this Court explained, "[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." 132 S. Ct. at 1388. In other words, no matter how much evidence prosecutors marshal against a defendant, he still may be prejudiced by ineffective assistance of counsel at the plea-bargaining stage, by giving up valuable rights and benefits he otherwise would have retained but for counsel's deficient performance.

Plea bargaining is a critical stage at which the Sixth Amendment's guarantee of effective assistance of counsel is implicated. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). "Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), quoting *Lafler*, at 132 S. Ct. at 1388. As this Court has explained, "horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.*

(emphasis in original; internal brackets and citations omitted). "In order that these benefits can be realized…criminal defendants require effective counsel during negotiations. Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* at 1407-08 (internal punctuation and citations omitted).

Maintenance of plea bargaining's adversarial component is essential to preserving the Sixth Amendment's promise of guaranteed effective assistance at critical stages. Indeed, "the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. … But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (internal citations omitted). As the Court has observed, "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *Id.* at 657 (citation omitted).

In having an ineffective advocate during the plea-bargaining stage of his litigation, Mr. Lee was essentially sacrificed to the government's gladiators. In exchange for his plea, he surrendered "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. This is exemplified by the Sixth Circuit's very holding: while the court describes the evidence against Mr. Lee as

"overwhelming," none of it was subjected to the crucible of an adversary proceeding, which might have entailed any number of defensive and/or evidentiary strategies that might have weakened the prosecution's case.[3] Instead, Mr. Lee, by accepting the erroneous advice of his ineffective counsel, gave up his right to test the state's case in any of those ways. He also thus gave up the very means by which he might have undermined the "overwhelming evidence" against him – the same evidence cited in support of the notion that counsel's deficient performance did not prejudice his case.

Lafler teaches the importance of protecting the process. There, defendant demonstrated prejudice by showing that "as a result of not accepting the plea and being convicted at trial, [defendant] received a minimum sentence three and a half times greater than he would have received under the plea." *Lafler*, 132 S. Ct. at 1391. As a result of not accepting this plea, defendant lost a valuable benefit and suffered prejudice – prejudice not remedied by the reliability of the subsequent trial and evidence that convicted him. *Id.* at 1388 ("the question is not the fairness or reliability of the trial but the fairness and regularity of the *processes* that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." (emphasis added)). Here, too, the rule foreclosing a showing of *Strickland* prejudice by one

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[3] Notably, despite judicial pronouncements of the "overwhelming" case against Mr. Lee, his (deficient) trial counsel characterized a potential personal-use defense to the trafficking charge as "difficult….[though] not impossible." Pet. App. 45a.

who pleads guilty in the face of "overwhelming" evidence, undermines the adversarial process by accepting that characterization of evidence that never will be tested.

II. The significant circuit split on this issue will have wide-ranging practical ramifications until it is resolved.

As the ruling below notes, the Sixth Circuit sides with three other circuits in holding that an alien criminal defendant facing "overwhelming" evidence of guilt would not rationally choose to go to trial – even where a guilty plea guarantees his removal from the only country he has ever known – and thus, cannot establish *Strickland* prejudice. Pet. App. 4a (citations omitted). That ruling further entrenches a circuit split this Court should address.

Illicit trafficking in a "controlled substance," including a "drug trafficking crime" as defined in 18 U.S.C. § 924(c), is an aggravated felony. 8 U.S.C. § 1101(a)(43)(B); 21 U.S.C. § 802. Generally, an alien convicted of an aggravated felony is statutorily ineligible for most forms of discretionary relief from removal, including cancellation of removal and asylum, and may be subject to expedited removal procedures. *Immigration Consequences of Criminal Convictions:* Padilla v. Kentucky (Office of Immigration Litigation, Department of Justice, Civil Division 2010), pg. 20, *citing* 8 U.S.C. § 1182(h), 8 U.S.C. § 1228. Further, an aggravated felon deportee is permanently barred from readmission to the United States unless the Attorney General has consented to the alien reapplying for admission. *Id.*,

citing 8 U.S.C. § 1182(a)(9)(A). For purposes of removal, a conviction includes pleas of guilty or nolo contendere, as well as admission of sufficient facts to warrant a finding of guilt, along with judicial imposition of punishment. 8 U.S.C. § 1101(a)(48)(A).

The circuit split the petition identifies exposes numerous alien defendants to potentially disparate outcomes, based purely on the happenstance of the circuit where he or she pleads guilty. For example, in 2015 a total of 19,479 guilty pleas were entered for drug-trafficking offenses in Federal district courts, including violations of 21 U.S.C. § 841(a)(1), the offense to which Mr. Lee plead guilty. United States Sentencing Commission, *Statistical Information Packet – Fiscal Year 2015*, collected by circuit at http://www.ussc.gov/research/data-reports/geography/federal-sentencing-statistics-2015 (accessed Oct. 11, 2016) (Table 3 – Guilty Pleas and Trials in Each Primary Offense Category). Of those, a combined 8,920 guilty pleas were entered in the courts of the Second, Fourth, Fifth, and Sixth circuits, which follow the rule the petition challenges. *Id.* Conversely, a combined 6,915 guilty pleas to drug-trafficking offenses were entered in the Third, Seventh, Ninth, and Eleventh circuits, which follow the contrary rule. *Id.* Undoubtedly, some aliens were among each group, and received ineffective assistance from their counsel in the process of accepting that plea. Those who chose to plea rather than stand trial in the face of "overwhelming" evidence of guilt might still be able to establish *Strickland* prejudice in the Third, Seventh, Ninth, and Eleventh circuits, but will be barred from doing so in the Sixth Circuit and the three others that agree with it. For this latter group,

their plea means automatic and permanent removal from the United States, despite ineffective assistance of counsel, and regardless of longstanding ties to this Nation such as those of Mr. Lee.

The Sixth Circuit both acknowledged the "growing circuit split" and stated that it does not intend to "change camps" on the issue. Pet. App. 4a-5a. If not reviewed, its decision will result in an enduring circuit split and inconsistent application of *Strickland*. Aliens who enter guilty pleas to deportable offenses based on erroneous advice from counsel will obtain relief, or be barred from it, based solely on the happenstance of the circuit in which that plea was entered. This Court's Sixth Amendment jurisprudence should not operate in such a patchwork and haphazard fashion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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