"THE FEDERAL CORNER"

Jae Lee's Claim of Ineffective Assistance of Counsel – Revisited

Buck Files

On June 23, 2017, the Supreme Court held that the defendant, Jae Lee, had demonstrated a reasonable probability that he would not have pleaded guilty if he had known that it would lead to his mandatory deportation, and thus, his lawyer's erroneous advice as to the deportation consequences of his guilty plea prejudiced him and amounted to ineffective assistance of counsel. *Lee v. United States,* ___S.Ct.___, 2017 WL 2694701 (June 23, 2017) [Opinion by Chief Justice Roberts in which Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan joined. Justice Thomas filed a dissenting opinion in which Justice Alito joined, in part. Justice Gorsuch took no part in the consideration or decision of the case.]

In the January/February 2017 issue of the *VOICE*, I reported that the Supreme Court had granted certiorari in Mr. Lee's case. The United States Court of Appeals for the Sixth Circuit had denied Mr. Lee relief on his claim of ineffective assistance of counsel that he had raised in a habeas filing. The Court determined 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. The Court noted that the Courts of Appeal for the Sixth, Second, Fourth and Fifth Circuits had concluded that being denied the chance to throw a "hail mary" at trial does not by itself amount to prejudice. *Lee v. United States*, 825 F.3d 311, 314 (6th Cir. 2016).

Chief Justice Roberts' opinion reads, in part, as follows:

[An Overview of the Case]

> Petitioner Jae Lee was indicted on one count of possessing ecstasy with intent to distribute. Although he has lived in this country for most of his life, Lee is not a United States citizen, and he feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him there was nothing to worry about—the Government would not deport him if he pleaded guilty. So Lee, who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial.
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> Lee's attorney was wrong: The conviction meant that Lee was subject to mandatory deportation from this country. Lee seeks to vacate his conviction on the ground that, in accepting the plea, he received ineffective assistance of counsel in violation of the Sixth Amendment. Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.

[The Facts of the Case]

Jae Lee moved to the United States from South Korea in 1982. He was 13 at the time. His parents settled the family in New York City, where they opened a small coffee shop. After graduating from a business high school in Manhattan, Lee set out on his own to Memphis, Tennessee, where he started working at a restaurant. After three years, Lee decided to try his hand at running a business. With some assistance from his family, Lee opened the Mandarin Palace Chinese Restaurant in a Memphis suburb. The Mandarin was a success, and Lee eventually opened a second restaurant nearby. In the 35 years he has spent in the country, Lee has never returned to South Korea. He did not become a United States citizen, living instead as a lawful permanent resident.

At the same time he was running his lawful businesses, Lee also engaged in some illegitimate activity. In 2008, a confidential informant told federal officials that Lee had sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana over the course of eight years. The officials obtained a search warrant for Lee's house, where they found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle. Lee admitted that the drugs were his and that he had given ecstasy to his friends.

[The Charge Against Mr. Lee and His Appearance in the District Court]

A grand jury indicted Lee on one count of possessing ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Lee retained an attorney and entered into plea discussions with the Government. *The attorney advised Lee 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 informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty. Lee v. United States*, 825 F.3d 311, 313 (C.A.6 2016). Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison, though it deferred commencement of Lee's sentence for two months so that Lee could manage his restaurants over the holiday season. (emphasis added)

[Mr. Lee's § 2255 Motion]

Lee quickly learned, however, that a prison term was not the only consequence of his plea. Lee had pleaded guilty to what qualifies as an 'aggravated felony' under the Immigration and Nationality Act, and a noncitizen convicted of such an offense is subject to mandatory deportation. See 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); *Calcano–Martinez v. INS*, 533 U.S. 348, 350, n. 1, 121 S.Ct. 2268, 150 L.Ed.2d 392 (2001). Upon learning that he would be deported after serving his sentence, Lee filed a motion under 28 U.S.C. § 2255 to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

[The Evidentiary Hearing Before a Magistrate Judge]

At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that 'deportation was the determinative issue in Lee's decision whether to accept the plea.' Report and Recommendation in No. 2:10–cv–02698 (WD Tenn.), pp. 6–7 (Report and Recommendation). *In fact, Lee explained, his attorney became 'pretty upset because every time something comes up I always ask about immigration status,' and the lawyer 'always said why [are you] worrying about something that you don't need to worry about.'* App.170. *According to Lee, the lawyer assured him that if deportation was not in the plea agreement, 'the government cannot deport you.' Lee's attorney testified that he thought Lee's case was a 'bad case to try' because Lee's defense to the charge was weak. The attorney nonetheless acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial.* Based on the hearing testimony, a Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated because he had received ineffective assistance of counsel. (emphasis added)

[The District Court Denies Relief]

The District Court, however, denied relief. Applying our two-part test for ineffective assistance claims from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the District Court concluded that Lee's counsel had performed deficiently by giving improper advice about the deportation consequences of the plea. But, '[i]n light of the overwhelming evidence of Lee's guilt,' Lee 'would have almost certainly' been found guilty and received 'a significantly longer prison sentence, and subsequent deportation,' had he gone to trial.

* * *

[The Court of Appeals for the Sixth Circuit Denies Relief]

The Court of Appeals for the Sixth Circuit affirmed the denial of relief. On appeal, the Government conceded that the performance of Lee's attorney had been deficient.

* * *

Relying on Circuit 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,' the Court of Appeals concluded that Lee could not show prejudice. We granted certiorari. 580 U.S. ——, 137 S.Ct. 614, 196 L.Ed.2d 490 (2016).

* * *

[The Question Before the Supreme Court]

The Sixth Amendment guarantees a defendant the effective assistance of counsel at 'critical stages of a criminal proceeding,' including when he enters a guilty

plea. *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); *Hill*, 474 U.S., at 58, 106 S.Ct. 366.

* * *

The Government concedes that Lee's plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he pleaded guilty. Brief for United States 15. The question is whether Lee can show he was prejudiced by that erroneous advice.

* * *

… in 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.' *Flores–Ortega*, 528 U.S., at 483, 120 S.Ct. 1029. 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.' *Id.*, at 482–483, 120 S.Ct. 1029 (internal quotation marks omitted).

We instead consider whether the defendant was prejudiced by the 'denial of the entire judicial proceeding ... to which he had a right.' *Id.*, at 483, 120 S.Ct. 1029. As we held in *Hill v. Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' 474 U.S., at 59, 106 S.Ct. 366.

* * *

[The Government's Position]

The Government asks that we, like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial.

* * *

[The Court's Response]

A defendant without any viable defense will be highly likely to lose at trial.

* * *

But common 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. See *INS v. St. Cyr*, 533 U.S. 289, 322–323, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). 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.

* * *

[Mr. Lee Has Met His Burden of Proof]

In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. *There is no question that 'deportation was the determinative issue in Lee's decision whether to accept the plea deal.'* Report and Recommendation, at 6–7; see also Order, at 14 (noting Government did not dispute testimony to this effect). *Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences.* See Report and Recommendation, at 12 *(noting 'the undisputed fact that had Lee at all been aware that deportation was possible as a result of his guilty plea, he would ... not have pled guilty'),* adopted in relevant part in Order, at 15. (emphasis added)

Lee demonstrated as much at his plea colloquy: When the judge warned him that a conviction 'could result in your being deported,' and asked '[d]oes that at all affect your decision about whether you want to plead guilty or not,' Lee answered 'Yes, Your Honor.' App. 103. *When the judge inquired '[h]ow does it affect your decision,' Lee responded 'I don't understand,' and turned to his attorney for advice. Ibid. Only when Lee's counsel assured him that the judge's statement was a 'standard warning' was Lee willing to proceed to plead guilty. Id.,* at 210. (emphasis added)

There is no reason to doubt the paramount importance Lee placed on avoiding deportation. Deportation is always 'a particularly severe penalty,' *Padilla*, 559 U.S., at 365, 130 S.Ct. 1473 (internal quotation marks omitted), and we have 'recognized that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence,"' *id.*, at 368, 130 S.Ct. 1473 (quoting *St. Cyr*, 533 U.S., at 322, 121 S.Ct. 2271; alteration and some internal quotation marks omitted); see also *Padilla*, 559 U.S., at 364, 130 S.Ct. 1473 ('[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.' (footnote omitted)). *At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.* (emphasis added)

[The Government's Suggestion that a Defendant's Decision to Reject a Plea Bargain Must be Rational]

The Government argues, however, that under *Padilla v. Kentucky,* a defendant 'must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.' *Id.*, at 372, 130 S.Ct. 1473. The Government contends that Lee cannot make that showing because he was going to be deported either way; going to trial would only result in a longer sentence before that inevitable consequence. See Brief for United States 13, 21–23.

[The Court Cannot Say That it Would Be Irrational for a Defendant in Mr. Lee's Position to Reject a Plea Offer in Favor of Trial]

We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. 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 country and 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. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. See *id.,* at 6. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

[Mr. Lee's Claim is Backed by Substantial and Uncontroverted Evidence]

Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence. Accordingly we conclude Lee has demonstrated a 'reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' *Hill*, 474 U.S., at 59, 106 S.Ct. 366.

[Mr. Lee Wins]

The judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

[My Thoughts]

- Some 40 years ago, the State Bar of Texas had an advertising campaign with this tag line, "If you don't know the law, know a lawyer." For those of us who represent non-citizens in Texas and federal criminal cases, it is critical that we remember the heavy burden that *Padilla* places on us. We either advise these clients appropriately on immigration issues

or we invite a claim of ineffective assistance of counsel. For me, that means having an immigration lawyer on standby.

- In my January/February column on *Lee*, I foolishly predicted that the Supreme Court would follow the lead of the Sixth Circuit and deny relief to Mr. Lee. I went on to say, "When the Court decides in favor of Mr. Lee, just call me and remind me never to make predictions." You don't have to call. I acknowledge the error of my ways.