No. 16-1445

In the Supreme Court of the United States

ASHRAM SEEPERSAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner failed to show ineffective assistance of counsel because he had not demonstrated a reasonable probability that he would have declined his plea deal in the absence of erroneous advice from his attorney.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is available at 674 Fed. Appx. 69. The decision of the district court (Pet. App. 7-17) is not published in the Federal Supplement but is available at 2015 WL 13215054.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2017. A petition for rehearing was denied on March 3, 2017 (Pet. App. 18-19). The petition for a writ of certiorari was filed on June 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to use stolen and fraudulently obtained credit cards, in violation of 15 U.S.C.

1644(a). C.A. App. 24; Pet. App. 7-8. He was sentenced to three years of probation and ordered to pay $73,564.12 in restitution. Pet. App. 8. After completing his sentence and paying his restitution, petitioner filed a petition for a writ of coram nobis. *Ibid.* The district court denied the petition, *id.* at 7-17, and the court of appeals affirmed, *id.* at 1-6.

1. While employed at a Radio Shack store in Jamaica, New York, petitioner entered into a fraud scheme with co-workers involving the use of stolen credit cards to purchase merchandise at the store. Gov't C.A. Br. 3. When Radio Shack investigators confronted petitioner, he admitted that he had knowingly processed fraudulent transactions using stolen credit cards. *Ibid.* He also admitted that he had taken merchandise acquired through the scheme for his own use. *Ibid.*

A grand jury in the Eastern District of New York charged petitioner with credit card fraud and conspiracy to commit credit card fraud. Pet. App. 7; C.A. App. 16-17. Petitioner entered into a plea agreement in which he agreed to plead guilty to the conspiracy charge. Pet. App. 8. The plea agreement calculated the range of imprisonment under the Sentencing Guidelines as 12 to 18 months. D. Ct. Doc. 126-2, at 2 (July 23, 2015). As part of the plea agreement, petitioner agreed not to appeal any sentence of imprisonment of 18 months or less. *Id.* at 3.

The district court conducted a change-of-plea hearing before accepting petitioner's plea. During the plea colloquy, petitioner told the court that he had reviewed the plea agreement, discussed it with his attorney, and that he understood its provisions, including its appeal waiver for a sentence of imprisonment of 18 months or less. C.A. App. 46-48. The court advised petitioner that

his conviction "will provide the basis for the Immigration and Naturalization Service to deport you." *Id.* at 51. It added that "all the Immigration and Naturalization Service has to do is take [your] guilty plea, you know, that conviction, based on your admission, and they can use that to deport you. And there is probably a real high likelihood that's exactly what they will do. They are very strict." *Ibid.* Petitioner stated that he understood. *Id.* at 52.

The district court also discussed the sentence that petitioner would face. The court observed that the plea agreement calculated the range of imprisonment recommended under the Sentencing Guidelines to be 12 to 18 months. C.A. App. 52-53. The court stated that it had not yet determined whether those calculations were correct. *Ibid.* But it stated that under the then-mandatory Sentencing Guidelines, the court would generally "be required to sentence [petitioner] somewhere within [the Guidelines] range." *Id.* at 53. The court stated that exceptions were available "only * * * in very, very unusual cases." *Ibid.* Petitioner stated that he understood. *Id.* at 53-54. After petitioner stated his desire to proceed with the plea, petitioner admitted his guilt to the charge in the plea agreement, and the court accepted his plea. *Id.* at 55-60.

The district court subsequently sentenced petitioner to three years of probation and ordered petitioner to pay $73,564.12 in restitution. Pet. App. 8.

2. After petitioner completed his sentence, immigration authorities started removal proceedings on the ground that petitioner had been convicted of an aggravated felony. Pet. App 8 (explaining that petitioner's conviction "constitutes an aggravated felony because it 'involves fraud or deceit in which the loss to the victim

or victims exceeds $10,000'" and that petitioner's conviction rendered him removable) (quoting 8 U.S.C. 1101(a)(43)(M)(i)).

Petitioner then filed a petition for a writ of coram nobis, alleging ineffective assistance of counsel and seeking to vacate his conviction. Petitioner asserted in an affidavit that his attorney had told him before he pleaded guilty that he "would not be deported if [he] received less than one year in jail." C.A. App. 31. He also stated that "[h]ad [he] known that [his] immigration status would be impacted by a guilty plea regardless of serving less than one year in jail," he would not have pleaded guilty or would have "attempted to plead to an offense that did not constitute an aggravated felony." *Id.* at 32. In addition, he asserted that if he had gone to trial, he might "not have been convicted because [he] could have shown that [he] was unaware of the activity perpetrated by the other conspirators." *Ibid.* Petitioner did not offer evidence to corroborate his claims. See *id.* at 31-32.

The district court denied the petition. Pet. App. 7-17. The court explained that petitioner was entitled to a writ of coram nobis only if he could establish ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 10. As a result, the court explained, petitioner was required to (1) demonstrate that his counsel's performance fell below "an objective standard of reasonableness" and (2) prove prejudice from the deficient performance. *Ibid.* (citation omitted).

The district court stated that petitioner had alleged conduct that would constitute deficient performance when he asserted that his attorney had incorrectly told him "that he would not be deported if he was sentenced to serve less than one year in jail." Pet. App. 11 (citation

omitted). The court noted that "[o]nly [petitioner's] affidavit support[ed]" the claim that his counsel made such a statement and that it would be "both surprising and inconsistent with [counsel's] other statements during [petitioner's] change of plea hearing" if counsel had done so, but the court "assume[d] without deciding that his attorney in fact made this representation." *Id.* at 11 n.2.

The district court concluded, however, that petitioner had not demonstrated prejudice from the alleged erroneous advice because he had not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 13 (quoting *Strickland*, 466 U.S. at 694). The district court first noted that petitioner "d[id] not argue that he could have negotiated a better plea deal" if not for the alleged deficient performance. *Ibid.*

The district court then determined that petitioner had not shown that he "would have insisted on going to trial but for his attorney's errors." Pet. App. 13. The court found it implausible that advice regarding the immigration consequences associated with a sentence of less than one year had influenced petitioner's decision to plead guilty. First, the court observed, petitioner "had no grounds to believe he would necessarily receive such a sentence." *Id.* at 14. The court explained that "the Guidelines estimated sentence for [petitioner's] pleaded-to crime was not under one year" and that the district court had advised petitioner that a below-Guidelines sentence was the "kind of thing [that] only happens in very, very unusual cases." *Ibid.* (citations omitted). Second, the court observed, petitioner "waived his right to appeal any sentence under eighteen months, not under the twelve months he allegedly thought would subject

him to removal." *Ibid.* Third, the court observed, petitioner had acknowledged under oath that he had received no promise regarding what his sentence would be. *Ibid.* Since petitioner "entered his plea with no legitimate expectation that he would get a sentence under a year," the court concluded, "the alleged statement of counsel" regarding the immigration consequences of such a sentence "could not have caused him to enter a plea." *Id.* at 14-15. The court therefore found "not credible" petitioner's assertion that he would have gone to trial were it not for the incorrect advice he allegedly received. *Id.* at 15.

The district court also found that petitioner had not put forward other evidence to support a finding of prejudice. It observed that petitioner "might have strengthened his argument that he would have gone to trial by showing that he 'would have litigated an available defense,'" but that petitioner had failed to show he would have litigated any defense. Pet. App. 15 (citation omitted). The court added that "[t]he mere possibility of acquittal does not demonstrate that [petitioner] would have gone to trial but for his attorney's errors." *Ibid.* And it observed that the circumstances of petitioner's case would have made it irrational for him to proceed to trial because petitioner would have faced greater sentencing exposure if convicted following trial and because petitioner had admitted guilt and had not put forward any evidence that suggested his guilt would not have been established at trial. *Id.* at 15-16.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-6. The court of appeals assumed, like the district court, that petitioner's counsel had performed deficiently by incorrectly advising petitioner that he would not be removed if he received a sentence

of imprisonment of less than 12 months. *Id.* at 4-5. But the court of appeals then agreed with the district court that petitioner could not demonstrate prejudice. *Id.* at 5. The court explained that "[t]he record makes clear that [petitioner] had no reasonable expectation that he would, in fact, be sentenced to less than a year." *Ibid.* The court emphasized that the Sentencing Guidelines called for a sentence of 12 to 18 months' of imprisonment and that the district court had informed petitioner that a below-Guidelines sentence "only happens in very, very unusual cases." *Ibid.*[1] In addition, the court emphasized, the district court had warned petitioner that his guilty plea would provide a basis for deportation, and petitioner had stated that he understood. *Ibid.* Given those circumstances, the court concluded, "the district court had a strong * * * basis for discrediting [petitioner's] claim that he would not have pled guilty if he were properly advised as to the immigration consequences of his plea." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-19) that this Court should grant a writ of certiorari to consider whether it is always irrational for a defendant facing strong evidence of guilt to decline a plea bargain and instead go to trial or seek an alternative plea deal. The court of appeals correctly rejected petitioner's ineffective assistance claim without relying on any such rule of irrationality, relying instead on case-specific evidence that petitioner would

[1] The court of appeals also stated that the plea agreement had "miscalculated" the Sentencing Guidelines range as 15 to 21 months of imprisonment, Pet. App. 5, but the final version of the plea agreement did not contain that error, see D. Ct. Doc. 126-2, at 2.

not have declined his plea deal in the absence of the erroneous advice he alleged. Its decision is consistent with the framework for assessing prejudice that this Court approved in *Lee* v. *United States*, 137 S. Ct. 1958 (2017), and it implicates no ongoing circuit conflict. Further review is unwarranted.

1. The court of appeals correctly determined that petitioner was not entitled to a writ of coram nobis based on ineffective assistance of counsel because petitioner did not meet his burden of establishing prejudice from alleged erroneous advice. In order to establish ineffective assistance, a defendant in petitioner's position generally must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty" under the plea agreement he accepted. *Lee*, 137 S. Ct. at 1965 (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)).

As the court of appeals recognized, petitioner has not met that burden. In support of his ineffectiveness claim, petitioner submitted an affidavit asserting that he would not have accepted his plea offer absent his counsel's alleged erroneous advice regarding the immigration consequences of a sentence of less than one year of imprisonment. C.A. App. 31-32. This Court has made clear, however, that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies," and that "[j]udges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 137 S. Ct. at 1967.

Here, as the court of appeals explained, the contemporaneous evidence surrounding petitioner's plea refutes petitioner's *post hoc* assertion that he would not have accepted his plea offer had he believed the immigration consequences associated with a sentence of less

than one year would be different. As the court observed, petitioner's suggestion that he pleaded guilty because of erroneous advice on that issue is implausible because the record undercuts any suggestion that petitioner expected to receive a sentence of less than a year. Pet. App. 5. Petitioner accepted a plea agreement that calculated the range of imprisonment under the then-mandatory Sentencing Guidelines to be 12 to 18 months. C.A. App. 52. He agreed to waive any right to appeal a sentence within that range. *Id.* at 47-48. And the district court expressly warned petitioner that "once [the court] determine[d] the guideline range," it would be "required to select a sentence within [that] range," except in "very, very unusual cases." *Id.* at 53.

Moreover, as the court of appeals explained, the district court's warnings during petitioner's plea colloquy also undercut petitioner's prejudice claim. Pet. App. 5. The district court expressly advised petitioner during his change-of-plea hearing that his "his guilty plea 'will provide the basis for the Immigration and Naturalization Service to deport you.'" *Ibid.* Petitioner responded that he understood. *Ibid.* The court of appeals correctly determined that petitioner's plea agreement and the plea colloquy provided a "strong record basis for discrediting [petitioner's] claim that he would not have pled guilty if he were properly advised as to the immigration consequences of his plea." *Ibid.*

2. There is no reason to grant, vacate, and remand petitioner's case for reconsideration in light of this Court's decision in *Lee*, *supra*. While petitioner frames his case as presenting the question on which this Court had granted certiorari in *Lee* several months before his petition was filed, the question considered and decided in

Lee would not affect the resolution of petitioner's case. See Pet. i; cf. Pet. at i, *Lee*, *supra* (No. 16-327).

In *Lee*, this Court considered the circumstances under which a defendant who claimed that he had received erroneous advice concerning the immigration consequences of a guilty plea could establish prejudice from that advice. The Court rejected the approach of the Sixth Circuit, which had adopted "a *per se* rule that a defendant with no viable defense [at trial] cannot show prejudice from the denial of his right to trial." *Lee,* 137 S. Ct. at 1966. This Court directed that a court should instead engage in a "case-by-case examination" of whether, "but for counsel's errors," a particular defendant "would not have pleaded guilty and would have insisted on going to trial." *Id.* at 1965, 1966 (citations omitted). The Court explained that for purposes of that examination, it generally "makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea." *Id.* at 1966. The Court also stated that "*post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies" would not be sufficient to disturb a plea, and that courts "should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* at 1967. "In the unusual circumstances" of *Lee* itself, *ibid.*, the Court concluded that the petitioner had demonstrated prejudice because he had put forward "substantial and uncontroverted evidence" that he would not have accepted his plea offer had it not been for certain erroneous advice he received regarding immigration consequences, *id.* at 1969.

The approach of the court of appeals in petitioner's case is consistent with *Lee*. Contrary to petitioner's suggestion (see Pet. i), the court did not hold that petitioner could not establish prejudice based on a "*per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial," *Lee*, 137 S. Ct. at 1966. The court instead found that petitioner had not demonstrated prejudice because the record surrounding petitioner's plea indicated that petitioner did not in fact enter his guilty plea as a result of purported erroneous advice regarding the immigration consequences associated with a sentence of less than one year. Pet. App. 4-5. That case-specific analysis is what *Lee* requires. 137 S. Ct. at 1967 ("Judges should * * * look to contemporaneous evidence to substantiate a defendant's expressed preferences."); see *id.* at 1968-1969.

Petitioner suggests that he is entitled to relief because precedent in the court below, *Kovacs* v. *United States*, 744 F.3d 44, 52-53 (2d Cir. 2014), had "lean[ed] toward" holding that it is "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." Pet. 9. Petitioner is mistaken in two respects. First, even if petitioner correctly construed *Kovacs*, he would not be entitled to relief because the court of appeals in his case rejected petitioner's ineffective assistance claim based on a case-specific analysis that did not rely at all on the strength of the evidence against petitioner. Second, in any event, petitioner misunderstands *Kovacs*. *Kovacs* held that a defendant was entitled to post-conviction relief because he would have negotiated a more favorable plea deal or "litigated a meritorious statute of limitations defense" had he understood the immigration consequences of the plea deal he

accepted. 744 F.3d at 53. In reaching that conclusion, the court stressed that prejudice inquiries require "a context-specific application of *Strickland* directed at a particular instance of unreasonable attorney performance." *Id.* at 52. In addressing whether a defendant could show prejudice "under the standards set forth in *Hill*," the court quoted this Court's statement that "'the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.'" *Id.* at 53 (quoting *Hill*, 474 U.S. at 59). That statement did not establish a rule that defendants without viable trial defenses can never establish prejudice—a rule that would have contradicted circuit precedent. See *Gonzalez* v. *United States*, 722 F.3d 118, 133 (2d Cir. 2013) ("[T]he strength of the government's evidence * * * [is] not always determinative on the issue of whether, in the absence of substandard advice from counsel, a particular defendant would have decided to plead guilty or go to trial."). Rather, it reflects that, as this Court explained in *Lee,* a defendant without "a realistic defense" will rarely be able to establish prejudice because "[w]here a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one." 137 S. Ct. at 1966.[2]

3. The rejection of petitioner's ineffectiveness claim does not implicate any ongoing circuit conflict. None of the cases that petitioner cites (Pet. 10-11, 13, 16) involved circumstances parallel to those on which the court of appeals relied—such as the plea colloquy that

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[2] Indeed, the petition for a writ of certiorari in *Lee* described the Sixth Circuit's bar on ineffective assistance claims by defendants who lacked viable trial defenses as conflicting with the approach of the Second Circuit. See Pet. at 14-15, *Lee*, *supra* (No. 16-327).

warned petitioner of immigration consequences or the plea agreement indicating that the erroneous advice of which petitioner complained would have been of limited relevance. And each decision invoked case-specific considerations of its own. See *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 788-790 (9th Cir. 2015) (relying on pleas negotiated by similarly-situated defendants and evidence that the defendant rejected an earlier plea offer based on immigration concerns); *DeBartolo* v. *United States*, 790 F.3d 775, 778-780 (7th Cir. 2015) (relying on nature of the charge and evaluation of possible sentencing consequences); *Hernandez* v. *United States*, 778 F.3d 1230, 1232, 1234 (11th Cir. 2015) (relying on defendant's family circumstances); *United States* v. *Orocio*, 645 F.3d 630, 645 (3d Cir. 2011) (relying on defendant's age and status as a legal permanent resident), abrogated on other grounds by *Chaidez* v. *United States*, 568 U.S. 342 (2013).[3] Insofar as any of those decisions suggest that a defendant's assertion that he would have gone to trial absent erroneous advice by itself establishes prejudice, that aspect of those decisions does not survive this Court's decision in *Lee*. See 137 S. Ct. at 1967 ("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies.").

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[3] Petitioner also cites (Pet. 13) *United States* v. *Newman*, 805 F.3d 1143 (D.C. Cir. 2015), but the court of appeals in that case merely remanded for the district court to consider whether a defendant who had received incorrect legal advice on the immigration consequences of his plea could establish prejudice. *Id.* at 1147-1148.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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