No. 16-327

IN THE

Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the constitutional standards for effective criminal defense counsel. A core component of its mission is to foster the integrity of the criminal defense profession.

NACDL has particular interest in this case because the Sixth Circuit's position (and that of the Second, Fourth, and Fifth Circuits) reflects a fundamental misunderstanding of the role of appellate courts and would permit them to impermissibly speculate as to

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have submitted letters of consent to the filing of *amicus* briefs with the Clerk of the Court pursuant to Rule 37.3 (a).

what choices criminal defendants might make had they been properly advised by their counsel with respect to deportation risks—a position that undermines this Court's recognition that it is the defendant's unassailable right to decide whether to go to trial. Judicial reasoning about whether a defendant would have chosen to take his case to trial improperly usurps this right.

SUMMARY OF ARGUMENT

A criminal defendant alone holds the right to choose to go to trial. Not defense counsel, not the prosecutor, and not the court. This right is especially critical when the alternative to trial is deportation. The contours of this right are sharpened by three additional arguments urging the Court to reverse the Sixth Circuit and grant Mr. Lee's § 2255 petition.

First, the Sixth Circuit's reasoning constitutes improper appellate intrusion into an area in which appellate courts have no business; namely, a defendant's decision whether or not to invoke the right to trial. A defendant may choose to go to trial for any reason, or for no reason at all. Part I explains why the exercise of that right cannot be subject to a priori tests for rationality. Even if courts could impose such a test, the nature of our adversarial system makes rational assessment impossible.

Second, the decision to invoke his right to trial grants a noncitizen defendant the chance to avoid deportation, and that chance in itself makes declining a plea bargain rational. Part II discusses why declining one plea bargain may present opportunities for a defendant to negotiate a more favorable plea deal and avoid deportation. Part III illuminates how other opportunities to remain in the United States may also materialize during the trial: the unpredictable out-

comes of "can't win" cases amply demonstrate that such cases can indeed be won based upon much more than "whimsy," "caprice," or "nullification."

Third, the Sixth Circuit's reasoning rests on a disparaging and stale claim that the result is necessary because otherwise defense counsel may act in bad faith and purposely withhold information regarding deportation. Part IV cautions that such a presumption will erode the integrity of our criminal justice system, and will disrupt the longstanding notion that lawyers and judges act in good faith. The Court must not now countenance any such assumption that members of the bar and officers of the court would act contrary to their ethical duties.

ARGUMENT

I. COURTS ARE IMPROPERLY POSITIONED TO ASSESS WHETHER THE DECISION TO GO TO TRIAL IS RATIONAL.

An appellate court's speculation about whether a defendant would have accepted a plea deal in spite of unwarned deportation risks fallaciously begs the question at hand. While "harmless error" tests allow appellate courts to speculate about the fact a rational trier of fact may have found, most judges "have very limited experience with the high-risk decisions facing criminal defendants. Few have ever represented defendants and fewer still have ever sat in the position of a defendant."[2] And none have ever occupied the seat of a non-citizen defendant faced with a plea bargain.

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[2] César Cuauhtémoc García Hernández, *7 Cir: Migrant Defendants Entitled to Roll the Dice with a Jury*, crImmigration (July 16, 2015), http://crimmigration.com/2015/07/16/7-cir-migrant-defendants-entitled-to-roll-the-dice-with-a-jury/.

The Sixth Circuit's speculation 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" presumes that the dispositive factor for defendants in plea negotiations is the period of incarceration. Petition for a Writ of Certiorari at 4a, *Lee* v. *United States*, No. 16-327 (Sept. 6, 2016) (hereinafter "Cert. Pet."). Deportation, however, is "often [ ] the harshest consequence of a non-citizen criminal defendant's guilty plea" and so immigration consequences, rather than term of imprisonment, may dominate a defendant's calculus in determining whether or not to plead guilty. *State* v. *Paredez*, 136 N.M. 533, 539 (2004). This Court has also recognized the influence the potential for deportation has on a defendant's decision to accept a plea bargain: "deportation 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." *Padilla* v. *Kentucky*, 559 U.S. 356, 364 (2010). This view even predates *Padilla*: "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS* v. *St. Cyr.*, 533 U.S. 289, 322–23 (2001) (internal quotations and citations omitted).

Here the Sixth Circuit offered that there was "overwhelming evidence" of Lee's guilt. Cert. Pet. at 4a. But that would not make it "irrational" for a defendant to elect trial and risk a longer sentence in hopes of avoiding deportation. Indeed, it is inconsistent with any defendant's right to a fair trial for an appellate court to insist that a defendant would not have exercised that right.

The Seventh Circuit, by contrast, articulated at least four reasons why it would be rational for a criminal defendant like Mr. Lee to reject his plea deal. See *DeBartolo* v. *United States*, 790 F.3d 775, 779–80 (7th Cir. 2015). First, it is entirely rational for a defendant to reject a plea deal that would make him "deportable" in order to use the leverage of a trial to negotiate a different deal on a charge that would not make one "deportable." See *id.* at 776–79. In one case, a noncitizen defendant charged with a deportable misdemeanor offense of violating an order of protection plead guilty instead to felony witness dissuasion, a predicate strike under California's three-strikes law, with a 364-day sentence to preserve his eligibility for relief in removal proceedings.[3] Contrary to the Sixth Circuit's rational, the reasonableness of a defendant's decision cannot be measured solely by the strength of the evidence. See *People* v. *Lopez*, 41 N.E.3d 664, 677 (Ill. App. Ct. 2015) (holding that a decision would have been "perfectly reasonable" where the defendant claims prejudice because "he would have rather have faced trial or entered a different plea rather than be deported"). Second, it is rational to take a high risk on a longer prison term if the reward of a not guilty verdict is the ability to remain with his or her family and friends in the United States rather than forever being barred. See also *People* v. *Guzman*, 24 N.E.3d 831, 839 (Ill. App. Ct. 2014), *aff'd*, 43 N.E.3d 954 (Ill. 2015) ("defendant's family ties and bonds to the United States provide a rational basis to reject a plea deal.").

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[3] Heidi Altman, *Prosecuting Post*-Padilla: *State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101.1 Geo. L. J. 1, 29 (2012).

Third, even if a defendant accepts the inevitability of a guilty verdict, that defendant might rationally choose a longer prison sentence in the United States over a shorter one with swifter deportation. Fourth, a defendant who risks a longer prison term might pin his hopes, however slim, on an intervening change in the substance of immigration law or the priorities of enforcement officials.[4] See Brief for the Petitioner at 27, *Lee* v. *United States*, No. 16-327 (Feb. 1, 2017) (hereinafter "Pet'r Br.").

Nor is it proper for the Sixth Circuit to overlay "rationality" on the exercise of fundamental rights. Defendants may choose trial for any reason or for no reason. See *DeBartolo*, 790 F.3d at 779 ("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."). Likewise, defendants may invoke their right to counsel or the privilege against self-incrimination for any reason or no reason. Appellate courts are in no position to second-guess whether a defendant made a rational choice to talk to the police despite *Miranda* warnings. Certainly, then, it follows that they have no authority to invalidate waivers of such rights on the ground that no rational defendant in that predicament would have done the same.

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[4] *Commonwealth* v. *Marinho*, 981 N.E.2d 648, 662 n.21 (Mass. 2013) ("[n]ew avenues may open in the ever-changing field of immigration law that change the legal landscape for undocumented people."); Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 Cal. L. Rev. 541, 567 (2004) ("[a]s one public defender has noted, '[t]he law can change from morning to afternoon.'").

II. REJECTING A PLEA BARGAIN IS RATIONAL BECAUSE IT MIGHT LEAD TO MORE FAVORABLE OUTCOMES.

The Sixth Circuit's reasoning begs the question in yet another way: it presumes that a defendant's only hope would be jury nullification. But our criminal justice system is an adversarial one and not a civil-law investigation by learned tribunal. At its core is the presumption of innocence and the further process involves a host of tests that go far beyond prosecutorial claims of proof. Foregoing a guilty plea may well represent a strategic choice to change the calculus of a case – from early plea negotiations, through mid-trial plea negotiations even to post-verdict efforts.[5] Dispositive motions may uncover constitutional or statutory issues previously considered to be foreclosed[6] and motions *in limine* may find new evidentiary flaws with incriminating evidence.[7] Additionally, a defendant may rationally forego a guilty plea in the hopes of negotiating a more favorable plea. See Pet'r Br. at 20–21; *Commonwealth* v. *Lavrinenko*, 38 N.E.3d 278, 291–92 (Mass. 2015).

For example, all undocumented immigrants, regardless of immigration status, may avoid deporta-

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[5] *See Missouri* v. *Frye*, 566 U.S. 133, 143 (2012) ("the plea-bargaining process is often in flux, with no clear standards or timelines . . .").

[6] *See Yates* v. *United States*, 135 S. Ct. 1074 (2015) (disposal of undersized fish did not qualify as destruction of a tangible object); *Crawford* v. *Washington*, 541 U.S. 36 (2004) (key testimony excluded because it violated the Confrontation Clause).

[7] *See Williamson* v. *Reynolds*, 904 F. Supp. 1529, 1554 (E.D. Okla. 1995), *abrogated on other grounds by Nguyen* v. *Reynolds*, 131 F.3d 1340 (10th Cir. 1997) (government's criminalist "admitted that hair comparisons are not absolute identifications like fingerprints").

tion through prosecutorial discretion, defined as the agency's authority "to decide to what degree to enforce the law against a particular individual."[8] Some may be eligible to apply for relief from deportation under the Convention Against Torture, through seeking adjustment of status, or through qualifying for one of several specifically enumerated federal exemptions.[9] And even if a defendant is legally deportable, immigration authorities have to place him in removal proceedings before he is deported. The Department of Homeland Security acknowledges that its limited resources curtail its ability to "remove all persons illegally in the United States." Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. to Thomas S. Winkowski et al., at 2 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. If the Executive Branch, ultimately responsible for instituting deportation proceedings, does not conclude that all deportable individuals will ultimately be deported, then it is presumptuous for a court to opine, as the Sixth Circuit did, that a defendant would have been deported "no matter what."[10]

Rejecting the initial plea permits the defendant to participate in the plea bargain negotiation process that might result in a more favorable plea. For exam-

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[8] Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't to All Field Office Dirs. et al., at 2, (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf ("ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement."); *see also* Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 7 (2016).

[9] *Id.* at 7–8.

[10] Horwitz, *supra*, note 8, at 10.

ple, the defendant may plead guilty under a different section of the penal code to preserve his eligibility for cancellation of removal, or he may plead guilty to a harsher charge and sentence to avoid certain immigration penalties. Mr. Lee reasonably could have rejected the initial plea deal in the hopes of negotiating a more favorable outcome given his desire to avoid deportation. See Pet'r Br. at 30–33.

III. "FUNNY THINGS HAPPEN" AT TRIAL.[11]

The Sixth Circuit's myopic resort to "nullification" also ignores the human flaws in such a system, including a prosecutor's potential failure to investigate facts sufficiently or to present them properly. "[T]he relative skill of lawyers certainly makes a difference at the trial and pre-trial stages, when a lawyer's strategy and ability to persuade may do his client a great deal of good in almost every case, and when his failure to investigate facts or to present them properly may result in their being excluded altogether from the legal system's official conception of what the "case" actually involves." *Jones* v. *Barnes,* 463 U.S. 745, 762 n.6 (1983) (Brennan and Marshall, JJ., dissenting). Most fundamentally, it ignores the reality that jurors following their instructions might take the prosecution's burden quite seriously and find that the highest burden in the law had not been met. Cf. *United States* v. *Orocio,* 645 F.3d 630, 643–44 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States,* 133 S. Ct. 1103 (2013) (the "requirement that a defendant affirmatively show

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[11] *See, e.g.*, A Funny Thing Happened on the Way to the Forum (United Artists 1966) (the story of a Roman slave named Pseudolus and his many efforts to win his freedom by helping his master court the girl next door).

that he would [have] been acquitted in order to establish prejudice . . . is no longer good law.").

For all types of litigants, "there is no such thing as a sure winner . . . at trial" and "juries are inherently unpredictable." *Miller UK Ltd.* v. *Caterpillar, Inc.*, 17 F. Supp. 3d 711, 739–40 (N.D. Ill. 2014). Taking a case to trial may be more than just a "Hail Mary." See Pet'r Br. at 30. Instead, it is a key part of criminal procedure that has nothing to do with "whimsy" or "caprice," and everything to do with putting the government to its proof. *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984).

Funny things happen on the way to, and at, the forum.[12] The annals of criminal law are replete with unexpected developments and shocking results in the courtroom. A variety of factors influence a jury verdict, or a non-verdict. Trial practices affect trial outcomes. For example, juror note taking practices, the jury's ability to ask the witnesses questions, the jury's opportunity to discuss evidence before deliberation, jury instructions, juror sequestration, and the length of the deliberations may affect the outcome of a trial. Paula L. Hannaford-Agor, *When all eyes are watching: Trial characteristics and practices in notorious trials*, 91 Judicature 197, 200 (2008). Mr. Lee may reasonably weigh these factors, as well as those that affect a hung jury, against accepting his plea bargain. See Paula Hannaford-Agor et al., *Why Do Hung Juries Hang?* 251 Nat'l Inst. Justice J. 25, 26–27 (July 2004). Many factors influence a hung jury, separate from jury nullification—the quality of the evidence, the degree to which jurors believe that the law they are instructed to apply is fair, and the jury deliberation process. *Id.* For example, a survey in the

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[12] *See, e.g.*, *supra*, note 11.

early 2000s revealed "39 percent of potential white jurors and 50 percent of potential black jurors would be 'very willing' or 'mostly willing' to acquit, despite evidence of guilt, in a first-time, nonviolent drug possession case." *DeBartolo*, 790 F.3d at 779 (citing Lawrence D. Bobo and Victor Thompson, "Racialized Mass Incarceration: Poverty, Prejudice, and Punishment," in *Doing Race: 21 Essays for the 21st Century* 343 (Hazel R. Markus & Paula Moya eds., 2010) (Fig. 12.9)).

Data shows that juries are inherently unpredictable. So do jury trials, themselves. In the case of O.J. Simpson,[13] the former NFL star was acquitted of the murders of his ex-wife, Nicole Brown-Simpson, and her friend, Ron Goldman in what is known as the "Trial of the Century." Dave DeLuca, *On Oct. 3, 1995: O.J. is acquitted*, Buffalo News (Oct. 3, 2016), http://buffalonews.com/2016/10/03/oct-3-1995-o-j-aquitted/. Contrary to the "mountain of evidence," and certainly the opinion of much of the public and press, the jury was not convinced by the prosecution's case. Timothy Egan, *NOT GUILTY: THE JURY; One Juror Smiled; Then They Knew*, N.Y. Times (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/us/not-guilty-the-jury-one-juror-smiled-then-they-knew.html.

Pre-trial perceptions of the strength of the prosecution's case were also upended by the result in *State* v. *Zimmerman*.[14] George Zimmerman, a neighborhood watch leader, shot and killed Trayvon Martin, an unarmed black teenager. The acquittal engendered

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[13] *See People* v. *Simpson*, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995).

[14] *See generally* Information, *State* v. *Zimmerman*, No. 1712F04573, 2012 WL 1207410 (Fla. Cir. Ct. Apr. 11, 2012).

astonishment. Defense counsel was able to point out inconsistencies in the testimony of the prosecution's star witness, Rachel Jeantel. See Adam Serwer, *Why George Zimmerman was acquitted*, MSNBC (July 14, 2013), http://www.msnbc.com/msnbc/why-george-zimmerman-was-acquitted; see also Chelsea J. Carter and Holly Yan, *Why this verdict? Five things that led to Zimmerman's acquittal*, CNN (July 15, 2013), http://www.cnn.com/2013/07/14/us/zimmerman-why-this-verdict.

In *People* v. *Powell* four Los Angeles police officers were acquitted of excessive force charges in the beating of Rodney King at the conclusion of a high-speed car chase. The encounter was caught on tape by a bystander, George Holliday, and played for the world to see by the media. See generally Robert Reinhold, *AFTER THE RIOTS; Judge Sets Los Angeles for Retrial Of Officer in Rodney King Beating*, N.Y. Times (May 23, 1992), http://www.nytimes.com/1992/05/23/us/after-riots-judge-sets-los-angeles-for-retrial-officer-rodney-king-beating.html?pagewanted=all. Post-trial analysis pointed not to nullification, but to the change in jury composition brought about by a change in venue. See *id.*

A jury may sympathize with the defendants and acquit, as one recently did in *United States* v. *Bundy*.[15] The jury in that case acquitted the Bundy brothers and other defendants of conspiracy and firearm charges, despite (or perhaps because of) the defendants' widely publicized, forty-one day armed occupation of the Malheur national wildlife refuge in protest against the U.S. Bureau of Land Management. Sam Levin and Lauren Dake, *Bundy Brothers found not guilty of conspiracy in Oregon militia*

[15] No. 3:16-cr-00051-BR (D. Or. Oct. 27, 2016).

standoff, The Guardian (Oct. 27, 2016), https://www.theguardian.com/us-news/2016/oct/27/oregon-militia-standoff-bundy-brothers-not-guilty-trial.

Regardless of its sympathy for the defendant, a jury may be so averse to the prosecution that it finds a defendant innocent. The jury that declared Amy Carter, Abbie Hoffman, and thirteen other protestors who demonstrated against CIA recruiters at the University of Massachusetts innocent instead "found the CIA guilty of a larger crime than trespassing and disorderly conduct and decided [it] had a legitimate right to protest that." Carolyn Lumsden, *Amy Carter, Abbie Hoffman Acquitted*, Associated Press (Apr. 15, 1987), http://www.apnewsarchive.com/1987/Amy-Carter-Abbie-Hoffman-Acquitted/idbb87fa5908b15ecaf7bbecb46eea23b5 (quoting Amy Carter). The District Attorney in that case reflected, "If there is a message, it was that this jury was composed of middle America . . . Middle America doesn't want the CIA doing what they are doing." *Id.*

Mr. Lee could have reasonably taken his chances at trial in the hopes, however slight, of being tried before a jury sympathetic to his circumstances or hostile to the prosecution. This would have been a rational decision, especially considering another jury acquitted in an "iron-clad prosecution case" as a means to decry the enforcement of drug laws. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xix (2015). Judge Kozinski of the Ninth Circuit remembers being "a bit shocked and entirely puzzled" when the jury acquitted the defendant, who had been caught with 10,000 imported ecstasy pills. Apparently, the foreman in that case thought the government was wasting taxpayer money in prosecuting that defendant, and he convinced the

rest of the panel to join his crusade against the war on drugs. *Id.*

Even where "rational" results may be expected or hoped for, litigation is anything but foreseeable as these well known cases demonstrate. Defendants are fully aware of the uncertainty of the criminal justice process—so is the government, and so are courts. See *id.* at xx ("[t]he simple truth is that our confidence in juries rests largely on faith . . . because there is no systematic feedback mechanism to help us figure out what works and what doesn't."). That uncertainty alone may make an election to place one's fate in the hands of "twelve angry men" a rational one. In that fictional trial, Henry Fonda's character, Juror 8, explains in the jury room: "Nobody has to prove otherwise. The burden of proof is on the prosecution. The defendant doesn't even have to open his mouth. That's in the Constitution." Twelve Angry Men (United Artists 1957).

It is not irrational for a defendant, aware of the inherent mercurial nature of the trial process, to forego a plea bargain that will make him deportable, no matter how slight his chance of prevailing at trial. See *Guzman*, 24 N.E. at 839; John Caher, *Tag Team of Lawyers Drawn to Alien's Plight,* 231 N.Y.L.J. 1 (2005) (describing a case in which a Jamaican national was acquitted at trial after vacating his guilty plea to felony drug charges based on his attorney's incorrect advice that the plea would render him deportable). By holding otherwise, the Sixth Circuit foreclosed Mr. Lee's "personal choice to roll the dice" and go to trial, an affront to his constitutional rights and to the jury process. See *DeBartolo*, 790 F.3d at 778; *Handbook for Trial Jurors Serving in the United States District Courts*, at 1–2, https://www.tnwd.uscourts.gov/pdf/content/PetitHandbook.pdf ("[j]urors

perform a vital role in the American system of justice.").

IV. PRESUMING THAT DEFENSE COUNSEL WILL USE STRATEGY AS A GUISE FOR INCOMPETENCE OFFENDS THE ETHICAL STANDARDS DEFENSE ATTORNEYS ARE BOUND TO UPHOLD.

Finally, the instant case is important for another reason; namely the Sixth Circuit's presumption that appellate courts may speculate with regard to a defendant's exercise of trial rights because otherwise "competent defense counsel [may] decide in some cases that acting incompetently [and not informing defendants of deportation risks] is better[.]" Cert. Pet. at 9a (emphasis omitted). Such reasoning, all too often expressed in judicial opinions,[16] flies in the face of the reality that defense counsel, like prosecutors, are officers of the court and are bound by a code of ethics.[17] See *ABA Standards for Criminal Justice:*

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[16] *See, e.g.*, *United States* v. *Flores-Mejia*, 759 F.3d 253, 263 (3d Cir. 2014) (en banc) (Greenaway, Jr., Smith, Shwartz, and Sloviter, JJ., dissenting, and Fuentes, J., joining in part); *United States* v. *Pielago*, 135 F.3d 703, 709 (11th Cir. 1998); *Dean* v. *Sullivan*, 118 F.3d 1170, 1172 (7th Cir. 1997); *United States* v. *Reyes*, 102 F.3d 1361, 1365 (5th Cir. 1996); *Rodriguez Rodriguez* v. *Munoz Munoz*, 808 F.2d 138, 149 (1st Cir. 1986); *Runnels* v. *Hess*, 653 F.2d 1359, 1364 (10th Cir. 1981).

[17] For example, established law requires the prosecution to provide material exculpatory evidence. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) ("[w]e now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). Since *Brady*, the Court has expounded upon the obligation of a prosecutor to protect a defendant's right to a fair trial. *See, e.g.*, *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016); *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004) (explaining

Prosecution Function and Defense Function, Standard 4-1.2 (b) at 135 (Am. Bar Ass'n 1993, 3 eds.), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf (hereinafter "*ABA Standards for Criminal Justice*"). The Court has affirmed that "[t]he role of a prosecutor is to see that justice is done." *Connick* v. *Thompson*, 563 U.S. 51, 71 (2011); see also *Berger* v. *United States*, 295 U.S. 78, 88 (1935) ("[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

Supplementing the ABA Standards are the ABA Model Rules of Professional Conduct that all attorneys are bound to uphold. Model Rule of Professional Conduct 1.4 (b) requires lawyers to explain matters to the "extent reasonably necessary to permit the *client* to make informed decisions regarding the representation" (emphasis added) and Rule 2.1 instructs lawyers to "exercise independent professional judgment and render candid advice . . . [meaning] a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Rule 1.4(b)'s demand for client-centric representation reinforces what this Court recognized in *Padilla*—"incompetent advice distorts the defendant's decisionmaking process." See *Padilla*, 559 U.S. at 358.

Defense counsel must advise, communicate, and explain to the accused all developments and proposals in plea discussions. See *ABA Standards for*

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that the justice system is "a system constitutionally bound to accord defendants due process"); *Kyles* v. *Whitley*, 514 U.S. 419, 453-54 (1995); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

Criminal Justice, Standard 4-6.2 (a)-(b) at 221. These ethical standards prohibit defense counsel from knowingly, indeed strategically, not telling their clients that a criminal conviction could lead to their deportation. This Court has acknowledged as much, finding it "virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 n.7 (1986). In this case, however, the Sixth Circuit has relied upon precisely this "virtually inconceivable" and pernicious assumption.

The pursuit of fairness in our criminal justice system relies on the presumption that prosecutors, defense counsel, judges, and jurors will act in good faith. See *Banks*, 540 U.S. at 696 (quoting *Bracy* v. *Gramley*, 520 U.S. 899, 909 (1997)) ("[o]rdinarily, we presume that public officials have properly discharged their official duties"); *Schneiderman* v. *United States*, 320 U.S. 118, 164 (1943) (Douglas, J., concurring) (stating the assumption that the judge "acted in utmost good faith"). To presume otherwise, to even entertain the possibility that any of these actors would deliberately act in bad faith, cripples the adversarial process. Enough reasons exist to question the integrity of the criminal justice system without this Court's endorsement of a presumption of bad faith.[18] See *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.").

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[18] Kozinski, *supra*, p. 14, at iii-xiii.

NACDL urges this Court to declare unsound, once and for all, judicial reasoning that rests on general assumptions of bad faith among members of the defense bar.

CONCLUSION

For the foregoing reasons, and those set forth in Mr. Lee's petition, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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