No. 16-327

IN THE

Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a 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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October 14, 2016

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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.

NACDL supports the petition 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 what choices criminal defendants might make had they been properly advised by their counsel with respect to deportation risks. Judicial reasoning about whether a defendant would have chosen to take his

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioner and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with Clerk.

case to trial improperly usurps the defendant's fundamental right to a jury of his peers.

SUMMARY OF ARGUMENT

The importance of the question presented in this case is highlighted by three additional arguments. 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. 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, our collective experience of "can't win" cases amply demonstrates that such cases can indeed be won based upon much more than "whimsy," "caprice," or "nullification." Finally, the Sixth Circuit's reasoning rests on a shop-worn claim that the result is necessary because otherwise defense counsel may act in bad faith. The Court should not countenance any such assumption that members of the bar and officers of the court would act contrary to their ethical duties.

ARGUMENT

1. 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. It presumes that the dispositive factor for defendants in plea negotiations is the period of incarceration. Of course, other factors may have equal or greater weight, including the risk of deportation for a defendant who has spent his entire life in the United States. 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] Here the Sixth Circuit offered that there was "overwhelming evidence of Lee's guilt." Petition for Writ of Certiorari at 10, *Lee* v. *United States*, No. 16-327 (S. Ct. Sept. 6, 2016). 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. 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. 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

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

the substance of immigration law or the priorities of enforcement officials.

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. Dispositive motions may uncover constitutional or statutory issues previously considered to be foreclosed[3] and motions *in limine* may find new evidentiary flaws with incriminating evidence.[4]

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. See *Jones* v. *Barnes,* 463 U.S. 745, 762 n.6 (1983) (Brennan and Marshall, JJ. dissenting) ("Furthermore, the 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

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

[4] *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").

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

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. Likewise, defendants may invoke their right to counsel or the privilege against self-incrimination for any reason or no reason. For that matter, 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 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.

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 Petition for Writ of Certiorari at 11, *Lee* v. *United States*, No. 16-327. Instead, it 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] 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).

2. Funny things happen on the way to, and at, the forum.[6] The annals of criminal law are replete with unexpected developments and shocking results in the courtroom. In the case of O.J. Simpson,[7] 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.

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[5] *See Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) ("[T]he plea-bargaining process is often in flux, with no clear standards or timelines . . .").

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

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

Zimmerman.[8] George Zimmerman, a neighborhood watch leader, shot and killed Trayvon Martin, an unarmed black teenager. See generally Adam Serwer, *Why George Zimmerman was acquitted*, MSNBC (July 14, 2013), http://www.msnbc.com/msnbc/why-george-zimmerman-was-acquitted. The acquittal engendered astonishment. Defense counsel was able to point out inconsistencies in the testimony of the prosecution's star witness, Rachel Jeantel. See 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.*

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 – and so is the government. That uncertainty alone may make an election to place one's fate in the

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

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).

3. 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." Petition Appendix at 9a, *Lee* v. *United States*, No. 16-327. Such reasoning, all too often expressed in judicial opinions,[9] 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. See ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-1.2(b) (Am. Bar. Ass'n. 1993).

Defense counsel must advise, communicate, and explain to the accused all developments and proposals in plea discussions. See *id.* at 4-6.2(a)-(b). 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,

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[9] *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 with whom Fuentes, J. joins 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).

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. NACDL urges this Court to grant review and 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 the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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