No. 17-1356

IN THE
Supreme Court of the United States

UMESH KAUSHAL,
Petitioner,
v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Indiana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Indiana Court of Appeals contravened Supreme Court precedent in affirming the denial of Petitioner's motion to withdraw his guilty plea.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE STATUTES [CONT'D]

RULES

INTRODUCTION

The State of Indiana charged Umesh Kaushal, an Indian citizen and a lawful permanent resident of the United States, with child molesting after Kaushal's thirteen-year-old stepdaughter told police that he had fondled her. Following extended plea negotiations—and after Kaushal's defense counsel informed him the conviction would guarantee his green card would not be renewed—Kaushal agreed to plead guilty. In exchange, Kaushal avoided serving any time in prison. A few weeks after the trial court accepted his plea, Kaushal moved to withdraw it, arguing that he was not sufficiently advised of the immigration consequences of his conviction. The Indiana trial court denied Kaushal's motion, the Indiana Court of Appeals affirmed, and the Indiana Supreme Court denied transfer. Kaushal now asks the Court to exercise its certiorari jurisdiction to reverse the denial of his motion, arguing that the Indiana Court of Appeals failed to apply binding Supreme Court precedent.

There is neither jurisdiction nor justification for the Court to hear this case. The denial of Kaushal's motion is entirely a matter of Indiana law, which the Court is without jurisdiction to review. Moreover, the decision below is heavily fact-bound, and it—as well as the other decisions cited in Kaushal's petition—is fully consistent with the Court's precedents.

STATEMENT OF THE CASE

In August 2015 the State charged Kaushal with one count of child molesting, accusing him of fondling

his thirteen-year-old stepdaughter's breast. Pet. App. 2. The child molesting charge was a Level 4 felony, *see* Ind. Code § 35-42-4-3(b), punishable by up to twelve years in prison, *see* Ind. Code § 35-50-2-5.5. Kaushal retained private counsel, and he told his attorney that his priority was to avoid prison time. Pet. App. 2. In addition to the general unpleasantness of incarceration, Kaushal was particularly eager to avoid time in confinement so that he could continue to care for his mother and could continue to run his convenience stores. *Id.*

Kaushal's attorney proceeded to negotiate a plea agreement with the State, and on May 4, 2016 Kaushal entered an agreement under which he would plead guilty to the child molesting charge in exchange for a one-year cap on executed time. Pet. App. 3. But upon realizing the deal could still result in prison time, Kaushal withdrew from the plea agreement. *Id.*

Several weeks later, the State and Kaushal's attorney negotiated a new deal that would ensure Kaushal would avoid incarceration entirely: Kaushal would plead guilty to the child molesting charge and would receive a four-year suspended sentence consisting of three years of home detention and one year of non-reporting probation. *Id.* Kaushal agreed to this deal, and his plea hearing took place on June 30, 2016. *Id.*

At the plea hearing, Kaushal told the trial court—under oath—that he read and understood the entire plea agreement, Hrg. Tr. 5:02–25; that he understood that his guilty plea waived several constitutional

rights, *id.* at 9:15–10:11; and that he admitted to fondling his thirteen-year-old stepdaughter, *id.* at 12:19–13:09. In addition to restating the warnings discussed orally by the trial court, the written plea agreement advised Kaushal that his conviction could result in deportation. Pet. App. 3–4. Kaushal signed his initials next to each of these written warnings—including the warning regarding immigration consequences—to affirm that he understood them. *Id.* Satisfied that the guilty plea was knowing, intelligent, and voluntary, the trial court accepted the plea agreement and entered a judgment of conviction of one count of child molesting. *Id.*

Three weeks after the trial court accepted the guilty plea, Kaushal moved to withdraw it. *Id.* at 4. The motion claimed that Kaushal's conviction rendered him automatically deportable, that he was unaware of this consequence when he pled guilty, and—notwithstanding his guilty plea and admission under oath—that he was innocent of the child molesting charge. Verified Mot. To Withdraw Plea Of Guilty (Jul. 21, 2016). The motion included an affidavit from Kaushal's original defense counsel claiming that counsel "did not specifically discuss [immigration] consequences with the defendant when advising him in his decision to plead guilty." *Id.*

At the hearing on his motion to withdraw his plea, Kaushal claimed that he pled guilty because he was afraid of prison, Hrg. Tr. 28:06–13, and he testified that he learned of the automatic deportation consequences of his conviction by speaking with an immigration attorney the day after the trial court accepted

his plea, *id.* 30:8–20. Kaushal also said that he understood, at the time he pled guilty, that there would be "a hard road after that [guilty plea]," but that he "didn't know that [it would] be that hard" or that he would be "deported that quick[ly]." *Id.* 29:13–19.

Kaushal's claims of ignorance, however, were undermined by the testimony of his original defense counsel. At a second hearing on Kaushal's motion, Kaushal's original defense counsel testified that he walked Kaushal through every paragraph of both the first and second plea agreements—agreements which were identical other than the recommended sentence. *Id.* 56:24–58:11, 61:04–62:04, 66:25–67:03. Each time he did so, he discussed with Kaushal the paragraph concerning possible immigration consequences, and each time Kaushal did not have any questions about the agreement. *Id.* In addition, he specifically told Kaushal that if he pled guilty his green card would not be renewed. *Id.* 65:19–66:02.

The provision of Indiana law under which Kaushal moved to withdraw his plea requires the trial court to "allow the defendant to withdraw his plea of guilty . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice." Ind. Code section 35-35-1-4(b). "Manifest injustice" includes the denial of "effective assistance of counsel." *Id.* § 35-35-1-4(c)(1). The State argued that even if Kaushal's attorney deficiently advised Kaushal regarding the immigration consequences of his guilty plea, Kaushal had failed to establish that he thereby had been prejudiced. The trial court agreed with the State and denied Kaushal's motion. Pet. App. 6.

After unsuccessfully moving to correct error before the trial court, Kaushal appealed to the Indiana Court of Appeals. In assessing Kaushal's argument, that court relied principally on the Indiana Supreme Court's decision in *Segura v. State*, which held that "'the failure to advise of the consequence of deportation can, under some circumstances, constitute deficient performance.'" Pet. App. 13–14 (quoting *Segura v. State*, 749 N.E.2d 496, 500 (Ind. 2001)). The Court of Appeals quoted the standard articulated in *Segura* "for establishing prejudice in cases concerning counsel's errors in advice as to penal consequences": A defendant must do more than merely allege that he would not have pleaded, but must adduce additional "'specific facts'" to "'establish an objective reasonable probability that competent representation would have caused the petitioner not to enter a plea.'" *Id.* 15 (quoting *Segura*, 749 N.E.2d at 507).

In applying this standard, the Indiana Court of Appeals acknowledged "that certain factors do favor a finding that Kaushal was prejudiced." *Id.* 17. It noted that Kaushal's mother and his convenience stores tie him to the United States, and it found that the facts in the record do not suggest "that there is *overwhelming* evidence of his guilt such that the ultimate result would have likely been the same regardless of whether Kaushal pled guilty or proceeded to trial." *Id.* 17–18. On the other hand, it observed that Kaushal was told his green card would not be renewed, was advised that his conviction raised a risk of deportation, swore that he read and understood the warnings in the plea agreement, and testified that he knew his

conviction would make it difficult to stay in the country. *Id.* 18–19. Moreover, Kaushal's guilty plea conferred a substantial benefit—no prison time for an offense with a twelve-year maximum. *Id.* 18.

In light of Kaushal's evident knowledge of the immigration consequences of a conviction and the obvious benefit he obtained by pleading guilty, the Indiana Court of Appeals found that "Kaushal was advised of the possibility that he would be deported if he pled guilty but chose to do so regardless." *Id.* 19. It held that Kaushal "failed to establish that he was prejudiced by his attorney's performance" and that he therefore failed to prove "that the withdrawal of his guilty plea was necessary to correct a manifest injustice." *Id.*

The Indiana Court of Appeals thus affirmed the trial court. Kaushal petitioned for rehearing, which was denied. *Id.* 20. He then filed a petition for transfer to the Indiana Supreme Court, which was also denied. *Id.* 32. He now petitions the Court for a writ of certiorari. This petition too should be denied.

REASONS TO DENY THE PETITION

I. The Court Does Not Have Jurisdiction to Review the Denial of Kaushal's Motion

The Court does not review cases that involve only questions of state law. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will

not review judgments of state courts that rest on adequate and independent state grounds."). This case involves a direct appeal, which means "the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Though he invokes the Sixth Amendment and uses the phrase "ineffective assistance of counsel," Kaushal's petition fundamentally raises only one issue: whether *Indiana* law required the state trial court to grant his presentence motion to withdraw his guilty plea. The only relief Kaushal sought below is withdrawal of his guilty plea under Indiana Code section 35-35-1-4(b). This provision requires a court to grant a motion to withdraw a guilty plea if it is necessary to correct a manifest injustice, a term that includes the denial of "effective assistance of counsel." Ind. Code § 35-35-1-4(c).

Notably, Kaushal did not argue below that a denial of his motion would constitute a violation of his Sixth Amendment right to counsel. *See* Verified Mot. To Withdraw Plea Of Guilty (Jul. 21, 2016); Mot. To Correct Error (Dec. 5, 2016); Appellant Br. (Mar. 10, 2017). Indeed, Kaushal's brief before the Indiana Court of Appeals expressly argued that because he was *not* raising a Sixth Amendment ineffective-assistance-of-counsel claim, Indiana law did not require

him to show prejudice. *See* Appellant Br. 20–21. Because Kaushal has not raised a federal-law claim, there is no federal-law question on which to rest the Court's jurisdiction. If Kaushal wishes to raise a Sixth Amendment ineffective-assistance-of-counsel claim on post-conviction review, he can attempt to do so, and the Court would have jurisdiction to review the disposition of that claim. As his case currently stands, however, Kaushal's state-law motion presents no federal question.

Nor does Kaushal's motion implicitly incorporate a question of federal law. The Indiana Court of Appeals grounded its decision denying Kaushal's state-law claim on Indiana law, relying primarily on the Indiana Supreme Court's decision in *Segura v. State*, 749 N.E.2d 496 (Ind. 2001), which set the standard Indiana courts use to determine whether a defendant has "establish[ed] prejudice" from "counsel's errors in advice as to penal consequences." Pet. App. 15. While *Segura* may have drawn on Supreme Court precedents that address Sixth Amendment ineffective-assistance claims—such as *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Williams v. Taylor*, 529 U.S. 362 (2000)—that fact standing alone does not bring Kaushal's case within the Court's jurisdiction. In *Michigan v. Long*, the Court held that it determines whether a state-court decision rests on an adequate and independent state ground by looking to "the face of the opinion." 463 U.S. 1032, 1041 (1983). The Court does not look behind the opinion to see whether the state-court decisions it cites—or the state-court decisions *those* decisions cite—rely on Supreme Court case law. Such an

inquiry would have no stopping point and would defeat the very purpose of *Long*: "obviat[ing] in most instances the need to examine state law in order to decide the nature of the state court decision." 463 U.S. at 1041.

The only claim in Kaushal's petition is his objection to the denial of his motion to withdraw his guilty plea under Indiana law. The decision affirming that denial relied on state-court decisions that explain when courts are required to grant such motions. Kaushal's petition therefore fails to present a question of federal law, and without a federal-law question to review, the Court has no jurisdiction to hear Kaushal's case.

II. Even If the Court Has Jurisdiction, There Is No Justification to Hear This Case

Even if the Court does have jurisdiction to hear Kaushal's case, there is no need for it do so. The analysis of the Indiana Court of Appeals is entirely consistent with the Court's precedents. And in any case, the decision below does not merit the Court's attention: It is an unpublished decision that applies the appropriate legal standard to a heavily fact-bound issue.

1. First, there is no conflict between the decision below and the standards the Court has articulated, for the purpose of a Sixth Amendment claim of ineffective assistance of counsel, to determine whether a criminal defendant has established prejudice from incorrect advice regarding the immigration consequences of a guilty plea. In *Padilla v. Kentucky*, 559

U.S. 356, 366 (2010), the Court held that incorrect "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." And in *Lee v. United States*—a decision strikingly absent from Kaushal's petition—the Court explained what must be shown to establish prejudice from such advice. 137 S. Ct. 1958, 1964–69 (2017).

In *Lee*, the government had advocated for "a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial." *Id.* at 1966. The Court rejected any categorical rule, holding that courts should consider all of the relevant circumstances and "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* The "contemporaneous evidence" courts are to consider includes "the respective consequences of a conviction after trial and by plea" and the importance the defendant placed on avoiding deportation—as evidenced by the defendant's statements before he pled guilty, the defense counsel's testimony, the content of the plea colloquy, and the existence of "strong connections to the United States." *Id.* at 1966–68. And while the Court held that the likelihood of conviction is not *dispositive*, this too is relevant evidence. *See id.* at 1966 ("Where 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.")

These categories of evidence are precisely what the Indiana Court of Appeals considered below. Unlike the lower court in *Lee*, the Indiana Court of Appeals did *not* rule against Kaushal on the ground that the

evidence against him was overwhelming; on the contrary, it noted that the likelihood of a conviction at trial was less than certain. *Id.* 18. And the Indiana Court of Appeals acknowledged Kaushal's ties to the United States. *Id.* 17–18. But that court also found that the contemporaneous evidence—the written warning of the risk of deportation in the plea agreement, Kaushal's sworn statement that he read and understood that agreement, the fact that Kaushal had been told his green card would not be renewed, and Kaushal's own testimony that he knew that a guilty plea would pave a "hard road" to avoid deportation—undermined Kaushal's after-the-fact declarations that he sought to avoid deportation at all costs. *Id.* 18–19. In addition, it found that Kaushal "received a substantial benefit by pleading guilty, as he received an entirely suspended sentence for an offense that carries a possible term of incarceration of two to twelve years." *Id.* 18.

The Indiana Court of Appeals' conclusion that, in light of this evidence, Kaushal "failed to establish that he was prejudiced by his attorney's performance" accords with the standards articulated in *Lee*. Pet. App. 19. That the outcomes of the two cases are different is unsurprising, for the evidence in this case contrasts strikingly with the "unusual circumstances" in *Lee*. 137 S. Ct. at 1967. In *Lee* there was considerable contemporaneous evidence of the "paramount importance Lee placed on avoiding deportation," and "the consequences of taking a chance at trial were not markedly harsher than pleading"—the difference between a trial and a guilty plea was merely a "year or

two more of prison time." *Id.* at 1968–69. Here, however, the contemporaneous evidence indicated that Kaushal did *not* place avoiding deportation above all other considerations, and the difference between Kaushal's guilty plea and a conviction at trial could have been as much as twelve years' incarceration. Pet. App. 18–19.

Indeed, rather than the Indiana Court of Appeals, it is Kaushal that has failed to abide by *Lee*. He asked the court below to find prejudice simply because he "demand[ed] a trial when he learned those [immigration] consequences only three weeks" after his guilty plea. Pet. App. 10. But that is precisely what *Lee* says courts should *not* do. *See Lee*, 474 U.S. 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.").

There is no merit to Kaushal's claim that the Indiana Court of Appeals "ignore[d] binding precedent." Pet. 10.

2. Second, in addition to the absence of any conflict between the Court's precedents and the decision of the Indiana Court of Appeals, this case has none of the attributes that normally merit the exercise of the Court's certiorari jurisdiction. Even if the Indiana Court of Appeals made an error of federal law, its decision cannot possibly raise an "important question." U.S. Sup. Ct. R. 10. The decision is unpublished and therefore has no precedential effect under Indiana law. *See* Ind. R. App. P. 65(D) ("Unless later desig-

nated for publication in the official reporter, a memorandum decision shall not be regarded as precedent."). And the other decisions cited in Kaushal's petition fail to evince a pattern of "disregard [for] binding precedent." Pet. 10. All but two of those decisions are unpublished, and all but one of them were issued prior to the Court's decision in *Lee*. *See id.* 10–17. *Bobadilla v. State*, 93 N.E.3d 783 (Ind. Ct. App. 2018), was decided shortly after *Lee*, and it is the exception that proves the rule: *Bobadilla*, which involved a post-conviction claim of ineffective assistance of counsel, applies the standard in *Lee* and explicitly finds that prejudice was absent because "unlike Lee, Bobadilla has failed to show that deportation was a determinative issue in his decision to plead guilty." *Id.* at 788.

Moreover, the gravamen of Kaushal's petition is that the Indiana Court should have weighed the evidence before it differently, principally by placing greater weight on his *post hoc* statements regarding the importance he places on avoiding deportation. Kaushal argues, in other words, that the court misapplied the federal ineffective-assistance standard to the facts at issue in his case. Even if Kaushal has actually raised a federal claim—and again he has not—this objection is plainly unsuited to the Court's certiorari jurisdiction. *See* U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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