No. 19-645

In the Supreme Court of the United States

ARIZONA,

Petitioner,

v.

HECTOR SEBASTION NUNEZ-DIAZ,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

BRIEF IN OPPOSITION

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INTRODUCTION

The Supreme Court of Arizona concluded unanimously that this case is governed by *Lee* v. *United States*, 137 S. Ct. 1958 (2017).

According to *Lee*, when a criminal defendant accepts a plea because of deficient immigration advice, *Strickland* prejudice is determined by reference to the denial of the trial right, not the immigration consequences of the guilty plea. The question, therefore, is not whether the defendant "was going to be deported either way" (137 S. Ct. at 1968); it is, instead, whether "there was an adequate showing that the defendant, properly advised, would have opted to go to trial" (*id*. at 1965). That rule is dispositive here.

There is no disagreement among the lower courts over *Lee*'s application in circumstances like these. And there was no disagreement among the seven justices below over *Lee*'s application in this particular case: All agreed that respondent received deficient advice concerning the immigration consequences of his guilty plea. See Pet. App. 11a, 14a. And all agreed that if respondent had been correctly advised, there was a reasonable probability that he would have gone to trial in hopes of "avoid[ing] the permanent bar to admission to the United States." Pet. App. 18a. Straightforward application of *Lee* thus mandated affirmance of the trial court's grant of post-conviction relief.

In seeking further review, the State implies repeatedly that *Lee* was wrongly decided. As the State sees it, because "unauthorized aliens have no * * * right to continued presence in the U.S.," they cannot ever establish *Strickland* prejudice when the consequence of a conviction is deportation. Pet. 2. That is so, in the State's view, regardless of whether it would have been rational for the defendant to go to trial in

hopes of avoiding *other* immigration consequences like a permanent bar to reentry.

That position is plainly incompatible with *Lee*. Yet the State doesn't have the courage of its conviction to ask the Court to overrule *Lee*. The concurring justices below did; they took the position that *Lee* was "wrongly decided" and should be "reconsider[ed]." Pet. App. 14a. If the State wishes to see *Lee* overturned, it must say so expressly. Its assertion, instead, that the question of *Strickland* prejudice in circumstances like these was "left open" by *Lee* (Pet. App. 2a), and that the lower courts are divided after *Lee* (*ibid.*), is indefensible. The State cannot hide behind cert-stage catchphrases and decline to say what it really wants.

Because the decision below faithfully applies *Lee*, and because there are no post-*Lee* disagreements on the questions presented, the petition should be denied.

STATEMENT

A. Legal background

1. Deportable individuals include non-permanent residents who have been convicted of a violation of "any law or regulation * * * relating to a controlled substance." 8 U.S.C. § 1227(a)(2)(B)(i). One such offense is possession of drug paraphernalia under Arizona Revised Statutes 13-3415(A). Conviction under that law carries a presumptive sentence of one year in prison. Ariz. Rev. Stat. Ann. § 13-702(D).

A non-permanent resident ordered deported may request discretionary relief, including cancellation of deportation and adjustment of status upon a showing of, among other things, "unusual hardship to the alien's spouse, parent, or child." 8 U.S.C. § 1229b-(b)(1)(D). Such discretionary relief is unavailable to an alien who has been convicted of an offense defined in Section 1227(a)(2). See 8 U.S.C. § 1229b(b)(1)(C).

Once deported, individuals who were unlawfully present in the United States is barred from reentering the country for varying periods of time. Those who were present for less than one year prior to deportation are barred from reentry for three years. 8 U.S.C. § 1182(a)(9)(B)(i)(I). Those present longer than one year are subject to a ten-year reentry bar. 8 U.S.C. § 1182(a)(9)(B)(i)(II). An individual convicted of a "controlled substance" offense is permanently barred from reentry. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

2. The Sixth Amendment's guarantee of counsel entitles criminal defendants to the "the effective assistance of competent counsel." *Padilla* v. *Kentucky*, 559 U.S 356, 364 (2010) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984)). This right attaches at all "'critical stages of a criminal proceeding,' including when [the defendant] enters a guilty plea." *Lee* v. *United States*, 137 S. Ct. 1958, 1964 (2017) (quoting *Lafler* v. *Cooper*, 566 U.S. 156, 165 (2012)). In *Padilla*, this Court recognized that a criminal defense lawyer's failure to advise his client about the immigration consequences of a guilty plea is deficient performance. 558 U.S. at 368-69.

A defendant seeking post-conviction relief on the ground that he was denied effective assistance at a critical stage of the criminal proceedings must satisfy a two-pronged inquiry.

First, he must show that his "counsel's representation 'fell below an objective standard of reasonableness.'" *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 688).

Second, he must show that he was prejudiced. In the mine run of cases, the defendant "can demonstrate prejudice by showing 'a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Lee*, 137 S. Ct. at 1964. But "[w]hen a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, [the Court does] not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain." *Id*. at 1965. Rather, "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.'" *Ibid*. (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)).

B. Factual background

1. Respondent Hector Nunez-Diaz was stopped for driving 50 miles-per-hour in a 40 mile-per-hour speed zone. Pet. App. 52a. A search of his person and vehicle uncovered small amounts of methamphetamine and cocaine. *Id*. at 52a-53a. Respondent was charged with two violations of Arizona Revised Statutes Sections 13-3407 and 13-3408. *Id.* at 28a.

2. Respondent's family met with a defense attorney. Pet. App. 28a. The family stressed their concern that, because respondent was not lawfully present in the United States, they wanted foremost to avoid adverse immigration consequences. *Ibid*.

The lawyer explained the interaction between the criminal and immigration process and laid out a plan to minimize the risk of immigration consequences. Pet. App. 28a. When the family felt assured that they would be able to avoid adverse immigration consequences for respondent, they retained the firm. *Ibid.*

Respondent's case was later assigned to a different attorney in the firm, whom he met for the first time at

the preliminary hearing. Pet. App. 29a. The attorney reviewed the immigration consequences of a plea with respondent at this time. *Ibid.*

The lawyer told respondent that he could either request a suspended prosecution or plead to a lesser charge, but that the first option was not available because of his non-bondable status. Pet. App. 29a. Respondent testified that his lawyer informed him that "he was not going to have any consequences pleading guilty nor would he have any immigration consequences because her office had attorneys for that and it would not be a problem." *Id.* at 29a-30a.

Based on his lawyer's advice that he would not face adverse immigration consequences, respondent waived his right to a preliminary hearing and pled guilty to a single count of possession of drug paraphernalia in violation of Arizona Revised Statutes 13-3415(A). Pet. App. 4a, 30a. The plea agreement stipulated that the defendant would be placed on unsupervised probation. *Id*. at 22a. Although the judge warned respondent that there may be immigration consequences as a result of his conviction, respondent testified that he discounted the warning because his attorney had advised him that there would be none. *Id.* at 30a.

3. Respondent's lawyer's advice was incorrect. In fact, a conviction under Arizona Revised Statutes 13-3415(A) qualifies as an offense "relating to a controlled substance" within the meaning of Section 1227(a)(2)-(B)(i), subjecting respondent to immediate deportation and a permanent bar to reentry. Pet. App. 7a. Before he was released from state custody, respondent was transferred to federal custody and informed that he would be deported immediately. *Id*. at 4a. Respondent's family retained a new lawyer, who negotiated Mr. Nunez-Diaz's voluntary removal. *Ibid*.

C. Procedural background

1. Respondent filed a petition for post-conviction relief on the ground that he had received ineffective assistance of counsel. Pet. App. 21a.

The trial court held an evidentiary hearing. Pet. App. 27a-31a. Respondent testified that he would not have signed the plea agreement if he had been advised of the actual immigration consequences of the plea and that he was just subject to mandatory deportation. Pet. App. 30a. Respondent's sister testified that the family's primary goal in selecting an attorney was to avoid respondent's deportation. *Ibid*. Defense counsel also testified, conceding that she did not advise respondent that he would be subject to mandatory deportation if he accepted the state's plea offer of possession of drug paraphernalia. Pet. App. 21a-22a.

2. The trial court granted post-judgment relief. Pet. App. 27a-34a. It found first that "counsel's actions fell below an objective standard" of reasonableness because counsel had "misrepresented the immigration consequences to the defendant." Pet. App. 33a.

The court found next that, as a "direct result of [counsel's] failure" to competently advise respondent, respondent was prejudiced by forfeiting his chance at trial and thus his only chance at avoiding removal. Pet. App. 5a, 34a. Accordingly, the trial court ordered that respondent's guilty plea be vacated. *Id*. at 34a.

3. The Arizona Court of Appeals affirmed. Pet. App. 19a-26a. Recognizing that "[t]he [trial] court credited [respondent's] testimony, as well as that of his sister," the court of appeals found no abuse of discretion in the trial court's determination that respondent was "prejudice[d] when he entered a plea not understanding the immigration consequences of pleading guilty." *Id*. at 23a-24a.

4.a. The Arizona Supreme Court unanimously affirmed. Pet. App. 1a-18a.

The four-justice opinion for the court began by recounting the facts, recognizing that it was required to "defer to [the] trial court's findings of fact unless clearly erroneous." Pet. App. 3a.

Turning to the performance prong of the ineffective assistance inquiry, the court concluded that "counsel was obliged to give correct advice about the clear consequences of [the] plea" and failed to do so. Pet. App. 7a. And "[a]t oral argument * * * the State conceded that plea counsel's assistance fell below an objective standard of reasonableness." *Ibid*. The court thus held that the trial court did not clearly err when it found that trial counsel had failed to give complete and correct advice concerning the immigration consequences of respondent's plea.

Concerning the prejudice prong, the majority concluded succinctly that "*Lee* controls our resolution of this case." Pet. App. 8a. "The trial court found that had [respondent] been accurately advised, he would not have accepted his plea, opting instead to continue plea negotiations or proceed to trial." *Id*. at 8a-9a. "Although his chances of winning at trial, and thus avoiding automatic immigration consequences, were 'highly improbable,' it would not have been irrational for Nunez-Diaz to reject the plea." *Id*. at 9a. That is in part because the consequences of conviction for respondent were so great: He lost eligibility for cancellation of removal and adjustment of status and became "permanently barred from ever returning to this country." *Id*. at 10a.

The court rejected the State's argument that "*Lee* only applies to those who are lawfully present in this country." Pet. App. 9a. According to the Arizona Su-

preme Court, the State "misreads *Lee*," which "turned not on Lee's immigration status but on whether he was prejudiced by the denial of the entire judicial proceeding." *Ibid*. (quotation marks omitted). And "the cases the State relies on [for its contrary] argument were decided before *Lee*" and do not survive its reasoning. *Ibid*.

The court also rejected the State's contention that the denial of effective assistance was harmless. Pet. App. 10a. "There is a vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that subjects an unauthorized alien to automatic, mandatory, and irreversible removal." *Ibid*. (quoting *Diaz* v. *State*, 896 N.W.2d 723, 733 (Iowa 2017)). "[D]ue to his plea," the court explained, respondent "was permanently barred from ever returning to this country," which "can hardly be called harmless." *Id*. at 10a-11a.

b. Justice Bolick, joined by Justice Pelander, concurred fully. Pet. App. 11a-14a. He wrote separately to express his agreement with the dissenting opinion in *Lee* and his hope that this Court "will reconsider that decision." Pet. App. 14a.

c. Justice Lopez, joined by two of his colleagues, concurred in a third opinion. Pet. App. 14a-18. He took the position that an already-deportable defendant's preference to avoid deportation, without more, is insufficient to establish *Strickland* prejudice. That is so because it cannot be rational for a defendant "to go to trial to avoid deportation when he was deportable no matter the outcome of the case." *Id*. at 16a. Justice Lopez nevertheless agreed that a "permanent bar to admission into the United States" is sufficient to establish prejudice and that respondent established such prejudice in this case. *Id*. at 18a.

REASONS FOR DENYING THE PETITION

Following an evidentiary hearing involving the live testimony of three witnesses, the trial court found as a matter of fact that respondent had received bad immigration advice from his defense lawyer. It found further that, if respondent had been advised fully and accurately, there was a reasonable probability that he would have gone to trial rather than accepting the certainty of irreversible deportation. Under *Lee*, those findings are manifestly sufficient to justify post-conviction relief.

The Arizona Supreme Court did not find clear error in the trial court's findings of fact. It thus correctly affirmed the grant of post-conviction relief, recognizing that "*Lee* controls." Pet. App. 8a.

That decision does not warrant further review. It does not implicate any conflict among the lower courts, and it involves an infrequently litigated fact pattern. In arguing otherwise, the State seeks an implicit overturning of *Lee*—but without saying so or explaining why the dramatic step of overturning precedent would be warranted in this case (it would not be). Alternatively, the State seeks case-specific error-correction. Either way, certiorari should be denied.

A. This case is squarely governed by *Lee*

The Arizona Supreme Court was correct that "*Lee* controls" the outcome here. Pet. App. 8a.

1. According to *Lee*, "when a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, [the Court does] not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain." 137 S. Ct. at 1965. Rather, "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.'" *Ibid*. (quoting *Hill*, 474 U.S. at 59).

That is just what the Arizona Supreme Court held was proved in this case: "The trial court found that had [respondent] been accurately advised, he would not have accepted his plea, opting instead to continue plea negotiations or proceed to trial." Pet. App. 8a-9a. "Although his chances of winning at trial, and thus avoiding automatic immigration consequences, were 'highly improbable,' it would not have been irrational for [respondent] to reject the plea." *Id*. at 9a.

Here, just as in *Lee*, respondent's "claim that he would not have accepted a plea had he known it would lead to [irreversible] deportation is backed by substantial and uncontroverted evidence." 137 S. Ct. at 1969. The evidence here includes sworn testimony from respondent and his sister, whom the trial court "credited." Pet. App. 23a. As every one of the justices below agree, therefore, "*Lee* controls the result in this case." *Id*. at 18a (Lopez, J., concurring).

2. In resisting that conclusion, the State asserts repeatedly that *Strickland* prejudice requires the defendant to show that he has been "deprive[d] * * * of [a] substantive or procedural right to which the law entitles him." *E.g.*, Pet. 12-13 (emphasis omitted) (quoting *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993)). Quite right. And as *Lee* makes clear, the right to which respondent was entitled—but of which he was deprived by his lawyer's bad advice—is the right *to a trial*, not the right to remain in the United States. See *Lee*, 137 S. Ct. at 1965 (in cases like this one, the defendant must show he "was prejudiced by the denial

of the entire judicial proceeding to which he had a right") (quotation marks omitted, alterations incorporated). Understood in those terms, *Strickland*'s prejudice prong is satisfied here beyond dispute.

3. The State also insists that "*Strickland* requires [respondent] to prove a reasonable probability that the outcome would have been different," meaning that he would not have been irreversibly deported if he had not accepted the plea. Pet. 23. That ignores *Lee*, which said that a defendant like respondent "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.'" 137 S. Ct. at 1965. That is just what respondent proved, as all seven justices below concluded.

B. There is no post-*Lee* division of authority on the first question presented

The State asserts that "[t]he lower courts are deeply divided as to whether aliens with no right to remain in the United States can establish *Strickland* prejudice for deficient immigration-law advice." Pet. 12. That is wrong. In fact, each case that the State cites is distinguishable on its facts and predates *Lee*. This case would not have been decided differently in any other jurisdiction.

1. *United States* v. *Batamula*, 823 F.3d 237 (5th Cir. 2016) (en banc), is self-consciously limited to its facts. The court went out of its way to stress the "totality of the circumstances" analysis required for determining *Strickland* prejudice and to highlight the case-specific factors that undermined the defendant's bid for relief in that case. 823 F.3d at 240.

The Fifth Circuit placed significant weight, in particular, on the fact that the trial judge "admonished" the defendant that he "would *likely* be deported"

as a result of his conviction, which the court of appeals noted was a "stronger" admonishment than the usual warning that immigration consequences "*may*" result. 823 F.3d at 241 (emphasis added). In addition, the Fifth Circuit emphasized that the defendant in *Batamula* had "failed to allege even a rational explanation for his desire to proceed to trial" or "to adduce any other evidence relevant to the prejudice determination." *Ibid.*

Here, the opposites are true: There was no affirmative admonishment from the judge that respondent was "likely" to be deported. He was advised only that his conviction "may" and "could" result in deportation (Pet. App. 47a-48a), which respondent dismissed in light of his lawyer's advice (*id*. at 30a). And respondent produced ample, credited testimony to support his claim that he would have gone to trial if he had received accurate advice from his lawyer. *Batamula* is thus distinguishable on its facts.

The State disagrees, characterizing *Batamula* as establishing a "categorical rule" that an already-deportable defendant can never establish *Strickland* prejudice on the basis of bad immigration advice. Pet. 17. That is not a plausible reading of the opinion, and the State notably fails to cite a single case citing *Batamula* for that proposition and applying it in an outcome determinative way.

In fact, *Batamula* held only that, in light of the limited evidence presented in the case, the defendant failed to prove that he would have gone to trial if he had been advised differently by his lawyer. 823 F.3d at 242. On the facts of *this* case, by contrast, the Arizona Supreme Court held that respondent satisfied his burden. The difference in outcome is attributable to differences in facts, not legal rules.

In all events, *Batamula* predates *Lee*. Even if it established the categorical rule that the State says it does (it assuredly doesn't), the Fifth Circuit should be given an opportunity to revisit *Batamula* in light of *Lee*. Despite the supposed frequency with which the question presented arises, however, the State does not cite any post-*Lee* Fifth Circuit cases addressing circumstances like these. For our part, we have uncovered just two Fifth Circuit decisions that cite both *Batamula* and *Lee*. Neither involves the question presented. See *Sealed Appellee* v. *Sealed Appellant*, 900 F.3d 663 (5th Cir. 2018) (waiver of conflict of interest in a case concerning honest-services fraud); *United States* v. *Shepherd*, 880 F.3d 734 (5th Cir. 2018) (deficient performance in a sex offense case).

2. The Texas Court of Criminal Appeals' decision in *State* v. *Guerrero*, 400 S.W.3d 576 (Tex. Crim. App. 2013), is even further afield. That case involved a pre-*Padilla* plea agreement. Recall that in *Padilla*, this Court first recognized that a defense lawyer's failure "to warn [a defendant] about collateral deportation consequences" of a guilty plea is deficient performance. *Guerrero*, 400 S.W.3d at 588. The Court of Criminal Appeals held in *Guerrero* that *Padilla* does not apply retroactively, and that the defendant in that case therefore could not bring a *Strickland* claim on the basis of bad immigration advice. *Ibid*. The court did not reach the question of *Strickland* prejudice.

The court went on to hold that the defendant also need not have been accurately advised on immigration consequences "before his waiver of the right to counsel and his guilty plea could be recognized as intelligent and voluntary." *Guerrero*, 400 S.W.3d at 588. Because he was already deportable, the court reasoned, "[t]he prospect of removal" following a plea and conviction

"could not reasonably have affected his decision to waive counsel and plead guilty." *Ibid*.

That conclusion—made in support of an entirely different legal inquiry—is once again case-specific. Unlike in *Guerrero*, here there was significant credited testimony to support respondent's claim that he would have gone to trial if properly advised. And the Arizona Supreme Court found prejudice in this case on the basis of the permanent bar to reentry, which was not at issue in *Guerrero*. The State also (and again) fails to cite a single case that interprets *Guerrero* as establishing a categorical rule.

Like the Fifth Circuit's decision in *Batamula*, moreover, the Court of Criminal Appeals' decision in *Guerrero* predates *Lee*. Even if it could be read as establishing a categorical rule for *Strickland* prejudice—a highly dubious proposition given that the court never reached that issue—it should be afforded an opportunity to reconsider its precedents post-*Lee*.

3. *Garcia* v. *State*, 425 S.W.3d 248 (Tenn. 2013), does not help the State, either. The court there denied relief on the basis of *Stickland*'s performance prong, not the prejudice prong.

The testimony in *Garcia* established that the defendant's counsel had "unequivocally * * * told [him that] he would be deported upon pleading guilty." 425 S.W.3d at 259. As for the other consequences that the defendant might have faced, including a bar to reentry, "there was no clear answer to the petitioner's question about how his plea would affect his future ability to return legally to the United States." *Id*. at 260. The court thus held that the defendant's lawyer was required to give only "a general warning that the plea may have adverse future immigration consequences," which she did. *Ibid*. Accordingly, "the record over-

whelmingly support[ed]" the conclusion that the defendant had not received deficient advice. *Ibid*.

The court's subsequent dictum in a footnote that "courts have consistently held that an illegal alien who pleads guilty cannot establish [*Strickland*] prejudice" (425 S.W.3d at 261 n.8) does not suggest the outcome here would have been different in Tennessee. The court's point was only that "a guilty plea does not increase the risk of deportation" for a person already deportable. *Ibid*. That is not, in fact, true. See Daniel A. Horwitz, *Actually, Padilla Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1, 7-14 (2016). But it is also beside the point, because it says nothing about the other kinds of immigration consequences at issue in this case, or whether it would be rational for a defendant to take his case to trial in light of such consequences.

4. The remaining cases cited in the petition are unpublished and predate *Lee*. See *Gutierrez* v. *United States*, 560 F. App'x 924, 927 (11th Cir. 2014); *United States* v. *Sinclair*, 409 F. App'x 674, 675 (4th Cir. 2011); *People* v. *Gomez-Perez*, 2015 WL 1227721, at *2 (Mich. Ct. App. 2015).

Against this background, it simply is not credible to say that any other court, presented with the same facts proven on the same robust evidentiary record, would have decided this case any differently. The *Strickland* prejudice inquiry is highly fact specific, and any differences in outcomes are attributable to the varying facts, from case to case.

C. There is no post-*Lee* division of authority on the second question presented

1. The State asserts a second conflict among the lower courts "as to what quantum of evidence is necessary to establish such prejudice" under *Strickland* in

cases like this one. See Pet. 21. As the State sees it, the Arizona Supreme Court required "no evidence of a viable defense either to deportation or the underlying criminal charges." Pet. 22. In its view, the lower court improperly shifted the burden to the State "to prove the outcome 'necessarily' would have been the same." *Ibid*. Thus "the decision below likely establishes an irrebuttable presumption of prejudice." *Ibid*.

That is not a reasonable reading of the opinion below. By its plain terms (Pet. App. 7a-11a), the lower court's opinion properly placed the burden on respondent to show that "it would not have been irrational for [him] to reject the plea." Pet. App. 9a. All three state courts concluded that he met that burden with sworn "testimony from him, his sister, and his plea counsel." *Id*. at 21a. That testimony established that avoiding permanent removal from the country was respondent's highest concern, and if he had understood that his plea was certain to result in permanent banishment from the United States, he would have opted instead to go to trial. See *id*. at 5a, 8a-9a.

In light of that testimonial evidence, the court below affirmed, because "[i]t is not irrational for a defendant to go to trial when trial represents the only, albeit slim, chance that a defendant can avoid severe and certain immigration consequences." *Id*. at 8a.

The State disagrees with that conclusion, dismissing respondent's and his sister's stories as insincere "*post hoc* self-serving say-so." Pet. 26. But the state courts saw it differently and credited their testimony as truthful. See Pet. App. 23a ("The superior court credited Nunez-Diaz's testimony, as well as that of his sister."). It would not be an appropriate use of this Court's resources to grant review of a trial court's credibility determinations.

2. Recognizing that a straightforward request for error correction is not the stuff of certiorari review, the State attempts to spin its fact-based argument into a split of authority. It doesn't work.

Take first *Diaz* v. *State*, 896 N.W.2d 723 (Iowa 2017). There, the court affirmed that it would have been rational for the defendant to go to trial because "the evidence of guilt [was] not overwhelming." *Id*. at 733. The court "f[ound] it unnecessary to decide if overwhelming evidence of guilt forecloses a showing of prejudice." *Ibid*. The court's decision to *avoid* reaching that issue cannot be said to conflict with the Arizona court's decision in this case.

Commonwealth v. *Marinho*, 981 N.E.2d 648 (Mass. 2013), involved a defendant who went to trial, not one who pled guilty. Because the defendant was not deprived of a trial, the reasoning of *Hill* v. *Lockhart* was inapplicable. Instead, the defendant bore the burden of showing a probable difference in the outcome of the trial, which he attempted to meet on the questionable theory that "[i]mmigration consequences may * * * factor into litigation strategy." *Id*. at 659. Whatever the court in *Marinho* may have said about that very different theory of prejudice, it plainly has no bearing here.

The final authority that the State cites—*United States* v. *Arce-Flores*, 2017 WL 4586326 (W.D. Wash. 2017)—is a nonbinding district court decision.

Once again, there is no plausible basis for saying that this case would have been decided differently in any other jurisdiction.

D. The questions presented are not important

The State says that the questions presented are "highly recurrent." Pet. 31. That assertion is not borne out in the evidence. Although the State promises that "[t]he pool of alien convicts that could potentially avail

themselves of the decision [below] *could* * * * be vast" (Pet. 31 (emphasis added))—a rather tepid claim even on its own terms—it comes up short where it counts: It fails to identify a single post-*Lee* case that turns on either of the questions presented.

The absence of such citations is notable. If the questions presented truly did arise frequently, and if *Batamula*, *Guerrero*, and *Garcia* truly did establish a categorical rule as to the first question, the petition surely would have cited at least *one* case applying *one* of those decisions in an outcome determinative way. Tellingly, it did not.

The State also says that the "lack of uniformity" in the "immigration context further militates in favor of review." Pet. 34. As we have shown, however, there is no disagreement among the lower courts.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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