No. _____

In The
Supreme Court of the United States

CARLOS NOE GALLEGOS,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals for the Thirteenth Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Carlos Noe Gallegos faces the loss of his naturalized citizenship due to his counsel's faulty advice regarding the consequences of his guilty plea in the underlying criminal proceeding. The Texas Court of Appeals for the Thirteenth Judicial District affirmed the state trial court's denial of habeas corpus relief, holding that assuming *Padilla v. Kentucky* applies, because Gallegos trusted his counsel's advice and did not thereafter repeatedly question him about the immigration consequences of his plea, he failed to show sufficient prejudice.

The questions presented are:

1. Should the Court resolve the circuit split regarding whether *Padilla* applies to denaturalization consequences flowing from a guilty plea?

2. Did the trial court and Thirteenth Court of Appeals apply an erroneous prejudice standard by requiring proof that the "consequences of taking a chance at trial were not markedly harsher than pleading guilty," and should Gallegos be faulted for not repeatedly questioning his counsel's erroneous advice?

PARTIES TO THE PROCEEDING

The parties are as named on the front cover.

RELATED PROCEEDINGS

Court of Criminal Appeals of Texas at Austin, No. PD-0238-23, *Ex Parte Carlos Noe Gallegos,* (petition for discretionary review refused Aug. 23, 2023) (App. C).

Texas Court of Appeals for the Thirteenth Judicial District at Corpus Christi-Edinburg, No. 13-20-00320-CR, *Ex Parte Carlos Noe Gallegos* (opinion and judgment entered Nov. 29, 2022; mandate issued Sept. 22, 2023) (App. A).

275th Judicial District Court of Hidalgo County, Texas, No. CR-4248-16-E(1), *Ex Parte Carlos Noe Gallegos* (denial of writ of habeas corpus Mar. 24, 2020) (App. B).

275th Judicial District Court of Hidalgo County, Texas, No. CR-4248-16-E, *State of Texas v. Carlos Noe Gallegos* (judgment of deferred adjudication & community supervision entered Apr. 19, 2017) (App. D).

TABLE OF CONTENTS

Page

Questions Presented i
Parties to the Proceeding iii
Related Proceedings iii
Table of Contents v
Table of Authorities vii
Opinions and Orders Below 1
Statement of Jurisdiction 2
Constitutional and Statutory Provisions Involved 2
Introduction 3
Statement of the Case 6
Reasons for Granting the Writ 23
1. 24
2. 31
Conclusion 36
Certificate of Compliance 36

Appendix

Opinion of the Texas Court of Appeals for the Thirteenth Judicial District at Corpus Christi-Edinburg (Nov. 29, 2022) ..... Appendix A

Findings of Fact, Conclusions of Law, and Order Denying Habeas Relief by the 275th Judicial District Court of Hidalgo County, Texas (Mar. 24, 2020) ..... Appendix B

Order of the Court of Criminal Appeals of Texas at Austin denying petition for discretionary review (Aug. 23, 2023).....Appendix C

Judgment of Deferred Adjudication & Community Supervision by the 275th Judicial District Court of Hidalgo County, Texas (Apr. 19, 2017) .....Appendix D

Order Denying Reconsideration En Banc by the Texas Court of Appeals for the Thirteenth Judicial District at Corpus Christi-Edinburg (Mar. 29, 2023).....Appendix E

Statutes.....Appendix F

Record excerpts.....Appendix G

TABLE OF AUTHORITIES

Cases **Page**

Ex Parte Maldonado,
688 S.W.2d 114 (Tex. Crim. App. 1985).....21

Ex parte Tanklevskaya,
361 S.W.3d 86 (Tex. App.—Houston [1st Dist.] 2011),
petition for discretionary review granted, judgm't vacated on other grounds,
393 S.W.3d 787 (Tex. Crim. App. 2013).....29

Farhane v. United States,
77 F.4th 123 (2d Cir. 2023).....26

Fedorenko v. United States,
449 U.S. 490 (1981) 4

Padilla v. Kentucky,
559 U.S. 356 (2010) ..... passim

Rodriguez v. United States,
730 Fed. Appx. 39 (2d Cir. 2018) (summary order)
.....25

Sears v. Upton,
561 U.S. 945 (2010).....2

Strickland v. Washington,
466 U.S. 668 (1984) 18

United States v. Kayode,
777 F.3d 719 (5th Cir. 2014).....25

Statutes

8 U.S.C. § 1227 .....3, 11

TEX. CODE CRIM. PROC. art. 11.072 3

TEX. CODE CRIM. PROC. art. 26.13 .....3, 9

Other Authorities

Amber Qureshi,
The Denaturalization Consequences of Guilty Pleas, 130 Yale L.J. Forum 166 (2020) 25

U.S. Const. Amend. VI.....3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carlos Noe Gallegos respectfully submits this petition for a writ of *certiorari* to review the judgment of the Texas Court of Appeals for the Thirteenth Judicial District at Corpus Christi-Edinburg.

OPINIONS AND ORDERS BELOW

The Texas Court of Appeals for the Thirteenth Judicial District's panel opinion affirming the district court's judgment (App. A) is unreported but available at 2022 WL 17260517. The opinion of the 275th District Court denying habeas relief (App. B) is unreported. The Court of Criminal Appeals of Texas's order refusing discretionary review (App. C) is unreported. The 275th District Court's Judgment of Deferred Adjudication & Community Supervision (App. D) is unreported.

STATEMENT OF JURISDICTION

The Court of Criminal Appeals of Texas refused Petitioner's timely-filed petition for discretionary review on August 23, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(1). *See Sears v. Upton,* 561 U.S. 945, 946 n.1 (2010) (citing *Padilla v. Kentucky,* 559 U.S. 356 (2010) (reviewing state postconviction decision raising Sixth Amendment question).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

> informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

8 U.S.C. § 1227 is voluminous, and the text is set out in Appendix F.

Texas Code of Criminal Procedure article 11.072 is voluminous, and the text is set out in appendix F.

Texas Code of Criminal Procedure article 26.13 is voluminous, and the text is set out in appendix F.

INTRODUCTION

"[T]he right to acquire American citizenship is a precious one," and "once citizenship has been acquired, its loss can have severe and unsettling consequences." *Fedorenko v. United States*, 449 U.S.

490, 505 (1981). The lower courts were asked to address trial counsel's ineffective assistance under the *Padilla v. Kentucky* standard because counsel failed to advise Petitioner Gallegos of the consequences of his plea bargain—the loss of his recently-obtained, naturalized citizenship. Instead of informing, Gallegos he was subject to immigration consequences, counsel erroneously assured Gallegos that there would be no consequences because Gallegos was a United States citizen. Apps. A-3, G

The State half-heartedly argued below that *Padilla* did not apply, but courts around the country are in conflict on the issue. After the trial court rejected Gallegos's ineffective assistance claim and impliedly found that his counsel was not ineffective, a panel of the Texas Court of Appeals for the Thirteenth Judicial District assumed *Padilla* applied, but erroneously found insufficient evidence to establish

the prejudice element. *See generally* App. A. It gave credit to ineffective counsel's testimony that Gallegos's "'determinative issue' in deciding to plead guilty was 'that he did not want to go to prison and that he wanted [counsel] to try anything and everything to get him probation.'" App. A-23.

But that is *only* because Gallegos relied on counsel's erroneous advice regarding denaturalization and assurances that there would be no immigration consequences—consequences that Gallegos inquired about at the very first meeting with his counsel. Given that Gallegos was *never* told he could lose his citizenship, but was affirmatively told his citizenship would not be affected, and that the standard immigration warnings in Texas do not contemplate the loss of naturalized citizenship, this Court should grant the writ. The Court should clarify that *Padilla* applies and that even criminal

defendants who rely on their counsel's erroneous advice can be entitled to habeas relief. *Lee* should not be read to punish criminal defendants solely because they rely on counsel's advice instead of repeatedly inquiring about immigration consequences.

STATEMENT OF THE CASE

After his arrest on March 10, 2016 on allegations of sexual assault of a child, Gallegos met with attorney Richard Gonzalez, who represented him in the ensuing criminal proceedings. (Clerk's Record at pg. 99) (hereinafter "CR[page]"); App. G-35. Gallegos—a native Spanish speaker—took his sister along to translate. (CR99); App. G-35. During the meeting, Gallegos informed Gonzalez that he became a naturalized citizen in 2010. (CR99); App. G-35.

Gonzalez informed Gallegos that he "didn't know much about immigration law, but, that, because

[Gallegos] was a citizen, that [his] status as a citizen shouldn't be affected by the criminal proceedings." (CR99); App. G-35. Gonzalez did not recommend that Gallegos speak to an immigration attorney and represented that he could handle the criminal case. (CR99); App. G-35. Gallegos agreed to retain Gonzalez because he believed that his "status as a U.S. citizen would not be adversely affected." (CR99); App. G-35. Gonzalez never told Gallegos that "by pleading guilty, he could face removal by U.S. Immigration and Customs Enforcement." (CR100); App. G-36.

In November 2016, Gallegos was indicted for two counts of aggravated sexual assault of a child, alleged to have occurred "on or about the 1st day of March A.D., 2007." App. G-1. In April 2017, the State offered a plea bargain of six years' deferred adjudication community supervision and a fine.

(CR99); App. G-35. According to Gallegos, Gonzalez counseled him that "this was a great deal because [Gallegos] would not have to serve any prison time." (CR99); App. G-35. Again, "[Gonzalez] did not tell [Gallegos] that [he] risked losing [his] citizenship and being removed from the US." (CR99); App. G-35. Gallegos accepted the plea bargain based on Gonzalez's advice. (CR99); App. G-35.

Gallegos and Gonzalez appeared for the plea hearing on April 19, 2017. (CR38–39); App. G-17 to G-18. During the hearing, the trial court inquired whether Gallegos was a U.S. citizen, to which Gallegos responded affirmatively. (CR45); App. G-24. Gallegos pleaded guilty to one count of aggravated sexual assault of a child, and the State dismissed the second count of the indictment. (CR46, 51); App. G-25, G-30.

The State presented its plea admonishments, waiver of rights, stipulation of evidence, felony offense report, agreed punishment recommendation, and Michael Morton Disclosure Statement. (CR46–47); App. G-25 to G-26. Gonzalez did not object. (CR47); App. G-26. The trial court accepted the plea bargain, deferred adjudication of guilt for count one, placed Gallegos on six years' community supervision with standard conditions, and imposed a $1,000.00 fine. (CR20–24, 51); App. D.

The plea paperwork did not provide any warnings regarding the possible denaturalization and loss of citizenship consequences of the guilty plea. Rather, the only admonishments provided—which are standard in Texas and mandated by statute—applied to non-citizens. (CR 14, 21, 56); Apps. D, G-3, G-34; TEX. CODE CRIM. PROC. art. 26.13(a)(4) (requiring warning that "if the defendant is not a

citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law").

After the guilty plea, the United States brought denaturalization proceedings against Gallegos in 2018. (CR28); App. G-7. On November 14, 2018, Gallegos filed an application for a writ of habeas corpus under Texas Code of Criminal Procedure article 11.072. (CR25); App. G-4. Gallegos alleged that Gonzalez rendered ineffective assistance under the Sixth Amendment and that he was prejudiced under the standards announced in *Padilla v. Kentucky*. (CR25–36); App. G-4 to G-15.

Specifically, Gallegos asserted that Gonzalez knew he became a naturalized citizen in 2010 and

that the aggravated sexual assault allegedly occurred in March 2007. (CR26); App. G-5. Gallegos claimed that Gonzalez "knew or should have known that eligibility for naturalization requires a showing of good moral character, and that having committed such an offense just three years earlier probably would have made Mr. Gallegos ineligible for citizenship in 2010. Deferred adjudication constitutes a conviction for immigration purposes, and necessarily left Mr. Gallegos vulnerable to having his naturalization revoked." (CR26); App. G-5. Gallegos alleged that "if naturalization were revoked, he would revert to the status of a lawful permanent resident, and would be deportable under 8 U.S.C. § 1227(a)(2)(A)(i)(1)." (CR26); App. G-5.

Gallegos attached his affidavit, testifying to the conversations he had with Gonzalez recited above.

(CR99-100); App. G-35 to G-36. Regarding prejudice from the bad advice, Gallegos stated by affidavit that:

> Had I not been mis-advised by Attorney Gonzalez of the nearly automatic immigration consequences of my plea, I would not have accepted the plea and I would have gone to trial, instead. For several important reasons, I would not have voluntarily agreed to a plea which could result in my return to Mexico.
>
> First and foremost, I have lived in the United States since 2003 as a lawful permanent resident and as a naturalized citizen since 2010. My family all live here. I would have fought the 2016 charge had I known I would be separated from my family.
>
> I would never have willingly accepted a plea that could result in my removal to my home county. I am married with one child, both of whom depend on me for assistance. I would not have voluntarily separated myself from my Wife and child. Nor would I have subjected my family to living in Mexico, in order for my family to remain together.
>
> Lastly, had I known the immigration consequences of my guilty plea, I would not have accepted it, because I

> would never willingly accept being sent to Mexico, which is on the verge of civil war between feuding cartels and where corrupt law enforcement are closely allied to the various cartels. There, I would face possible kidnaping, extortion, and execution by members of the MX cartels and by those law enforcement officials tied to the Mexican cartels.

(CR100); App. G-36. The record includes evidence that not only did Gallegos have his wife and biological daughter here in the United States, but also his brother and sister. (CR69, 99; RR27); App. G-35, G-54.

On December 11, 2019, the trial court held a hearing on the application. (*See generally* Reporter's Record ("RR[page]" herein); App. G-46. The trial court took notice of the court's file, which included Gonzalez's affidavit. (RR33; CR108–13); App. G40 to G-42, G-56. In the affidavit, Gonzalez vaguely claimed

he provided immigration advice, but limited to the non-citizen admonishments in the plea paperwork:

> I advised Mr. Gallegos of his rights, the consequences of pleading guilty and all plea documents pertaining to his case. Included in those documents were his right to a jury trial, his right to confront State's witnesses and the applicable range of punishment. I read and explained to Mr. Gallegos the section in the plea paperwork regarding US Citizenship which states, **as a non-US citizen,** a plea of guilty would result in deportation, exclusion from the country[,] or denial of naturalization under Federal law.

(CR111); App. G-40 (emphasis added).

The remainder of Gonzalez's affidavit discussed the interactions between Gonzalez and Gallegos, negotiation of the plea, and what Gonzalez believed were the objectives of the representation:

> While representing Mr. Gallegos, I spent considerable time discussing the case, the State's evidence, which included a statement of accused,

and all possible defenses that could be raised. We reviewed discovery, including but not limited to, reports and affidavits. We discussed all the evidence that was presented against him. I informed Mr. Gallegos of both the likelihood of success and the risks of proceeding with trial. We discussed the strengths and weaknesses of the State's case. I advised Mr. Gallegos that putting this case in front of a jury was a very risky move based on the facts of the case. However, I told him that there was a possibility that he could be acquitted of all charges, but also a possibility he would be found guilty. I explained to him that if found guilty he ran the risk of being sent to prison. Additionally, we spent time discussing, the District Attorney's plea offer, which ultimately was negotiated in Mr. Gallegos'[s] favor.

Mr. Gallegos made it very clear that he did not want to go to prison and that he wanted me to try anything and everything to get him probation. I spoke with the Assistant DA in the case and we had lengthy conversations about the plea deal. The original recommendation was a TDC prison sentence. After much negotiation and with input from the victim's

family, a deferred probation sentence was offered. I attempted to try and find a way to get the case dismissed because of the immigration situation, but based on the facts and the willingness of the victim to proceed, those attempts were unsuccessful.

After considerable discussion of the evidence and the plea offer, Mr. Gallegos stated to me he did not want a jury trial and wanted to proceed forward with the deferred probation plea agreement. During his plea of guilty, the Court admonished the Defendant of the range of punishment, that any recommendation of the State is not binding on the Court, that the existence of a plea bargain limits the right of an appeal, and all immigration admonishments. Those included that a plea of guilty by a non-US citizen may result in deportation, exclusion from this country or denial of naturalization under Federal law. The Court found the defendant competent to stand trial and was not coerced, threatened[,] or persuaded in any way to plead guilty. Mr. Gallegos stated that he understood the admonishments of the Court and was aware of the consequences of

> his plea, and the Court received the plea freely and voluntarily.
>
> When asked by the Court if he had anything to say as to why the sentence should not be pronounced, Mr. Gallegos answered "no", [and] the Court proceeded to pronounce sentence upon Defendant."

(CR111-12); App. G-40 to G-41.

Gonzalez did not testify at the hearing, but Gallegos testified through an interpreter. (RR14); App. G-48. Gallegos reiterated the statements in his affidavit supporting habeas relief in his testimony at the hearing. (RR16-17); App. G-49 to G-50. He added that he believed Gonzalez was "almost securing that it was not going to affect my documents." (RR17); App. G-50. Gallegos reiterated that he would not have accepted the plea had Gonzalez told him it was going to affect his immigration status. (RR18); App. G-51.

On March 24, 2020, the trial court rendered its "Findings of Fact, Conclusions of Law, and Order

Denying Habeas Relief." (CR122–26); App. B. The court's findings of fact include a recitation of the procedural history of the case, but no discrete factual findings regarding Gallegos's connections to the United States. (CR122–23); App. B.

In its conclusions of law, the district court recited the basic standard for ineffective assistance of counsel claims under *Strickland v. Washington,* 466 U.S. 668, 687 (1984). (CR123–24); App. B. The court did not, however, refer to or cite *Padilla v. Kentucky*, or recite the standard for determining the deficiency of counsel's representation because of flawed immigration advice under that case and its progeny. (CR123–26); App. B. Rather, the court's conclusions of law focused on the prejudice analysis:

> 4. If a habeas applicant can show based on the totality of the circumstances that plea counsel's error was one that affected his

> understanding of pleading guilty, and if he can show by substantial and uncontroverted evidence (1) that deportation was the determinative issue for him in plea discussions; (2) that he had strong connections to the United States and no other country; and (3) that the consequences of taking a chance at trial were not markedly harsher than pleading guilty, then it might not be irrational to reject a guilty plea. Lee v. United States, 137 S. Ct. 1958, 1967 (2017).

(CR124); App. B. Purporting to apply this standard, the court issued the following conclusions:

> 5. The Court heard evidence that, prior to applying for U.S. citizenship in 2010, Applicant had committed the offense to which he had pled in this cause. The Court also heard evidence that Applicant omitted from said citizenship application that he committed the offense to which he had pled in this cause. The Court also heard evidence that naturalization requires a showing of good moral character.
>
> 6. Mr. Gonzales's credible affidavit testimony makes clear

that: Applicant was informed of the strengths and weaknesses of the State's case; Applicant was advised of the success and the risks of proceeding to trial; Applicant was advised that having a jury trial was a very risky move given the facts of the case; Applicant was much more concerned of avoiding prison time, rather than going to trial; **Applicant was given immigration warnings prior to his plea of guilt by Mr. Gonzales and the Court**; and Mr. Gonzales attempted to find a way to have the case dismissed due to the immigration situation, but was ultimately unsuccessful.

7. The Court finds that Applicant has failed to show, by substantial and uncontroverted evidence, the factors enunciated in Lee. *See* Lee v. United States, 137 S. Ct. 1958, I967 (2017).

8. The Court finds that Applicant's claims regarding ineffective assistance of counsel unmeritorious.

. . . .

10. Applicant has failed to allege and prove facts which, if true, entitle him to relief. *Ex Parte*

> *Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

(CR124–26); App. B (emphasis added).

On appeal, Gallegos argued that (1) the trial court failed to properly apply *Padilla* to its implied determination that counsel's conduct was not deficient, and (2) the trial court misstated and then misapplied the prejudice standard required by *Lee v. United States*. *See* App. A. With regard to the prejudice analysis, the trial court required evidence that "the consequences of taking a chance at trial were not markedly harsher than pleading guilty," which is directly inconsistent with this Court's refusal in *Lee* to require proof that the defendant would have been better off going to trial. (CR124-26); Apps. A, B.

A Panel of the Texas Thirteenth Court of Appeals assumed, without deciding, that *Padilla v. Kentucky* applied to the denaturalization context.

App. A-20 to A-21. It then held that because of its prejudice analysis, it need not decide whether counsel's performance was deficient. *Id.* The Panel's opinion appears to initially recognize that the trial court applied the wrong prejudice standard. *Id.* at A-21 to A-22. Yet the Panel then reevaluated the record itself, and itself applied the wrong standard. *Id.* at A-22 to A-25. This is problematic for three reasons.

First, the Panel relied on facts that were not found by the trial court in its findings of fact and conclusions of law and were not contemporaneous with the plea. *Id.* Second, the Panel ignored other material evidence in the record that Gallegos was focused on immigration consequences and familial ties. *Id.*

Finally, and most importantly, the Panel faulted Gallegos for relying on his attorney's

erroneous advice, effectively creating a requirement that defendants must repeatedly questioned their attorney's advice to prove prejudice under *Lee*. *Id.*

The Thirteenth Court of Appeals denied Gallegos's timely motion for reconsideration en banc. App. E. The Texas Court of Criminal Appeals then refused Gallegos's petition for discretionary review. App. C. This petition follows.

REASONS FOR GRANTING THE WRIT

Petitioner is facing the loss of his most precious right—the right to citizenship—because of his attorney's ineffective assistance of counsel. This Court has never considered the effect of *Padilla v. Kentucky,* 559 U.S. 356, 369 (2010), in the context of a naturalized citizen losing his or her citizenship as a result of faulty legal advice to accept a plea bargain. There is a circuit split on whether *Padilla* applies to

denaturalization consequences of a guilty plea. Moreover, this case involves the important question of whether a criminal defendant must express distrust in his counsel's advice, and repeatedly question that advice, in order to show prejudice. This Court should grant the writ to address these important issues.

1. A circuit split exists over whether *Padilla* applies to denaturalization consequences, and this Court should resolve the conflict.

The Thirteenth Court of Appeals assumed, without deciding, that *Padilla v. Kentucky* applied to the denaturalization context. App. A-20 to A-21. It then held that because of its prejudice analysis, it need not decide whether counsel's performance was deficient. *Id.* This Court should, however, grant the writ and find that the trial court failed to apply the proper legal standard to its implied determination

that counsel's representation was sufficient and clarify *Padilla's* application in this context.

Although this Court has not applied *Padilla* to denaturalization consequences, lower circuit courts have applied *Padilla* in the denaturalization context. *See United States v. Kayode*, 777 F.3d 719, 723 (5th Cir. 2014); *see also Rodriguez v. United States*, 730 Fed. Appx. 39, 42 (2d Cir. 2018) (summary order); Amber Qureshi, *The Denaturalization Consequences of Guilty Pleas*, 130 Yale L.J. Forum 166, 178–84 (2020) ("The Court's reasoning and holding in *Padilla* logically applies to denaturalization even though the Court did not explicitly acknowledge it in its opinion."). In contrast, and contrary to its prior summary order, the Second Circuit recently held that "[a]s a collateral consequence, denaturalization is 'categorically removed from the scope of the Sixth Amendment[,]'" and *Padilla* does not require a

warning. *Farhane v. United States*, 77 F.4th 123, 132 (2d Cir. 2023).

Neither the trial court nor the The Thirteenth Court of Appeals addressed whether the denaturalization consequences of Gallegos's guilty plea were clear, and thus, did not evaluate Gonzalez's conduct in light of the proper, applicable duty under *Padilla. See Padilla,* 559 U.S. at 369 (holding that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."); (CR122–26); Apps. A, B. And the trial court did not even mention *Padilla* in its conclusions of law, did not recite or apply its legal standard for deficient performance, and apparently did not conduct any such analysis. (CR122–26); App. B. Moreover, the trial court did not issue any specific findings or conclusions of law regarding Gonzalez's deficient representation. (CR122–26); App. B.

Rather, the trial court issued generic conclusions of law regarding Gallegos's failure to meet the standard for ineffective assistance of counsel and failure to prove entitlement to relief. (CR122–26); App. B. The only finding that relates to Gonzalez's performance is conclusion of law number 6—more properly considered a fact finding—which states: "Applicant was given immigration warnings prior to his plea of guilt by Mr. Gonzales and the Court; and Mr. Gonzales attempted to find a way to have the case dismissed due to the immigration situation, but was ultimately unsuccessful." (CR125); App. B. Applying *Padilla* properly, it is clear that these generic conclusions are not supported by the record, which shows the only warnings provided were directed toward noncitizens. (CR 14, 21, 56); Apps. D, G-3, G-34. These warnings did not apply to Gallegos as a

naturalized citizen. (CR 14, 21, 56); Apps. D, G-3, G-34.

The only evidence in the record that could potentially support the trial court's broad findings is Gonzalez's affidavit. (CR111–12); App. G-40 to G-41.. But the affidavit refers to the plea admonishments, which did not provide affirmative, correct advice regarding denaturalization proceedings and the potential loss of Gallegos's citizenship. (CR111-12); App. G-40 to G-41. Instead, these admonishments *again* only referred to noncitizens. (CR 14, 21, 56); Apps. D, G-3, G-34.

During the plea hearing, the trial court gave no immigration admonishments, given that Gallegos stated that he was a United States citizen, and despite the judgment's recitation that the trial court had admonished him of potential immigration

consequences to non-citizens. (CR38-52); App. G-17 to G-31. Even if the routine admonishments had been given, they would not have applied to Gallegos, who was a naturalized citizen. (CR 14, 21, 45, 56); Apps. D, G-3, G-24, G-34. These "admonishments" did nothing to cure Gonzalez's failure to properly advise Gallegos of the denaturalization risk. *See Ex parte Tanklevskaya*, 361 S.W.3d 86, 99 (Tex. App.—Houston [1st Dist.] 2011), *petition for discretionary review granted, judgm't vacated on other grounds,* 393 S.W.3d 787 (Tex. Crim. App. 2013) (holding trial court's "statutory admonishment prior to accepting applicant's guilty plea does not cure the prejudice arising from plea counsel's failure to inform applicant that, upon pleading guilty, she would be presumptively inadmissible.").

Indeed, the only evidence in the record regarding the specific immigration advice provided is

Gallegos's own testimony that he was never informed of this potential consequence, and like in *Padilla*, was affirmatively told he would suffer no immigration consequences. (CR99–100; RR16–17, 21–22, 28); App. G-35 to G-36, G-49 to G-50, G-52 to G-53, G-55.

Thus, the trial court's finding of fact that Gallegos was "given immigration warnings prior to his plea of guilt by Mr. Gonzales and the Court," is not supported by the record. Moreover, because *Padilla* required that Gonzalez specifically and accurately advise Gallegos that he would be denaturalized if he pleaded guilty, the trial court applied the wrong legal standard when it entered a conclusion of law that Gallegos did not meet his burden to prove ineffective assistance. (CR122–26); App. B; *Padilla,* 559 U.S. at 369.

The Court should take this opportunity to clarify the law, hold that *Padilla* applies in this context, instruct the trial court to address whether the denaturalization consequences of Gallegos's guilty plea were clear, and instruct the trial court to evaluate Gonzalez's conduct in light of the proper, applicable duty under *Padilla.*

2. This Court should clarify that the prejudice requirement does not require a defendant to distrust and repeatedly question counsel's erroneous advice, and hold that the lower courts applied the wrong standard.

The Thirteenth Court purported to decide the case under the prejudice analysis set forth in *Lee v. United States*. App. A-22 to A-25. Gallegos expressly argued that the trial court applied an incorrect standard by requiring proof that "the consequences of taking a chance at trial were not markedly harsher than pleading guilty[.]" Apps. A-1, B. The Thirteenth

Court initially appeared to agree, stating that "[a]s *Lee* instructs us, in a case with immigration consequences like this, we do not look at the strength of the State's case when determining prejudice. The defendant does not have to show that he 'would have been better off going to trial.'" App. A-21.

But instead of remanding, the Thirteenth Court relied on facts not found by the trial court or even argued by the State to reach a decision that Gallegos did not bring forth sufficient proof of prejudice, and imposed a requirement that Gallegos repeatedly question his counsel's advice in order to prove prejudice. *Id.* at A-22 to A-25.

Specifically, the Thirteenth Court held:

> Gallegos did not establish a contemporaneous record of strong family connection or responsibility to substantiate his claim of prejudice, either. Although Gallegos's affidavit after his plea

> set forth that he was "married with one child, both of whom depend[ed] on [him] for assistance," the investigation reports noted that Gallegos's wife, stepdaughter L.G., and biological daughter were all seeking shelter and resources from a local church and/or women's shelter in order to move away from Gallegos.

Id. at A-24.

Notably, however, the records on which the Thirteenth Court relied were not contemporaneous with the plea bargain; these investigation reports were from more than a year before the plea. (*See* CR65–76, 85); *Lee*, 582 U.S. at 369. Those reports indicate that despite purportedly receiving the stepdaughter's outcry years earlier, Gallegos's wife had remained with him and given him a second chance before coming forward later. (CR65–76, 85). Indeed, Gallegos's affidavit is the only evidence regarding his familial status that is contemporaneous

with the plea bargain, and it specifically states that all of his family lives in the U.S. (CR100); App. G-99 to G-100, and that includes his brother and sister. (CR69, 99; RR27). This Court can't know what weight the trial court gave to any of this evidence, if any, because the investigative reports were never argued in the trial court. Nor should the Thirteenth Court have surmised how the trial court would have ruled had it applied the correct prejudice standard.

Moreover, the Thirteenth Court's decision creates a problematic new standard for showing prejudice by faulting Gallegos for not repeatedly questioning his attorney's faulty advice. App. A-22 to A-25. The Thirteenth Court gave credit to ineffective counsel's testimony that Gallegos's "'determinative issue' in deciding to plead guilty was 'that he did not want to go to prison and that he wanted [counsel] to try anything and everything to get him probation.'"

App. A-23. It is true that Gallegos did not repeatedly question counsel about immigration consequences and instead focused on avoiding jail time, but "this is not surprising given counsel's alleged early and continued assurances that there were no immigration consequences to worry about in [his] case." *Rodriguez*, 730 Fed. Appx. at 43. The Thirteenth Court's holding means a defendant who trusts his counsel will not be entitled to habeas relief, while a distrusting defendant who questions his counsel ad nauseum will be entitled to relief.

That is not what this Court required in *Lee*. This Court should grant a writ of *certiorari* to clarify that defendants who trust their counsel, and receive and rely on affirmative but erroneous advice, are just as entitled to relief as defendants who question that advice.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted, and the Court should vacate the lower court's judgment and remand.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.2(b), I certify that the petition for a writ of certiorari contains 36 pages, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2023
/s/ Jaime M. Diez