

No. 1-11-0673

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 517
	)	
JAKUB KSIAZEK,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Cunningham and Rochford concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The circuit court erred in dismissing the defendant's postconviction petition without an evidentiary hearing, where the defendant made a substantial showing that he had been denied effective assistance of counsel. The judgment of the circuit court is reversed, and the cause is remanded for further proceedings.
- ¶ 2 The defendant, Jakub Ksiazek, challenges the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, the defendant argues that the circuit court erred in dismissing his petition without an evidentiary

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hearing because he presented a substantial showing that he was deprived of his constitutional right to effective assistance of counsel, where his attorney provided him with erroneous information that caused him to enter an involuntary and unintelligent plea of guilt to possession of a controlled substance. For the reasons set forth below, we reverse the judgment of the circuit court and remand the cause for an evidentiary hearing on the defendant's postconviction petition.

¶ 3 The record reveals that, on September 2, 2009, the defendant, a native of Poland, was arrested for possession of 0.1 grams of cocaine. Though he was a permanent resident alien of the United States, the defendant was on "immigration bond" and facing removal proceedings at the time of his arrest.

¶ 4 At his arraignment, the defendant was represented by an immigration attorney and also by a criminal defense attorney. After the defendant was advised of the charge and had entered a plea of not guilty, his immigration attorney requested a plea conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). During the conference, the immigration attorney informed the court and the State that the defendant "strongly denie[d]" possession or knowledge of the cocaine. The immigration attorney further indicated that, if the matter proceeded to trial, he would argue that the officers did not have probable cause or consent to search the defendant's vehicle. In addition, the immigration attorney advised that the defendant "was on an immigration bond and he knew if he got in any further problems with the law he would possibly be deported back to Poland where none of his family live." The immigration attorney stated that the defendant rejected the State's plea offer of one year in prison because it was an "automatic ticket" and because the defendant felt he was not guilty of the offense charged. The immigration attorney made a counter offer of misdemeanor

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probation, which the State rejected. The defendant's immigration attorney then requested that the matter proceed to trial, and the case was passed because the State's witnesses were not present.

¶ 5 When the case was recalled, the immigration attorney requested a "short date" so that he could "present the plea [offer] to the immigration Judge." The court consented, and the parties agreed to continue the case to March 9, 2010, for filing of pretrial motions. Thereafter, the case was passed a second time. When the case was again recalled, the immigration attorney stated that the defendant would take a "blind plea," and the criminal defense counsel confirmed that decision. The court proceeded to inform the defendant of the charge and possible sentencing range and also admonished the defendant as follows:

THE COURT: Mr. Ksiazek, you are advised that if you are not a citizen of the United States that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Your attorney advised me that you decided to plead guilty on this case, is that right?

THE DEFENDANT: Yes.

THE COURT: Do you understand what I just explained to you about the immigration consequences of a plea of guilty to this charge?

THE DEFENDANT: Yes.

THE COURT: Knowing and understanding that, do you still wish to plead guilty?

THE DEFENDANT: Yes.

¶ 6 After hearing the State's recitation as to what evidence it would present if the case were tried, the court found a factual basis for the plea, and the defendant pled guilty. Finding that the defendant's plea was knowing and voluntary, the court sentenced him to 24 months' felony probation. Following his conviction, the immigration court revoked the defendant's permanent resident-alien status and entered an order for his deportation.

¶ 7 Within 30 days of the defendant's conviction and sentence, the immigration attorney prepared a motion to withdraw the guilty plea, asserting that it was involuntary because the defendant needed, but was not provided, a Polish interpreter. He attempted to file the motion by having it delivered through a third-party commercial carrier, but the motion was returned to him on March 3, 2010. The immigration attorney apparently did not make any further attempt to file the motion.

¶ 8 The defendant subsequently filed a postconviction petition, asserting that he was denied effective assistance of counsel because his immigration attorney erroneously informed him that his guilty plea would not adversely affect his immigration status since it was only a conviction for class-four possession. The defendant's petition alleged that, when his case was passed the second time, his immigration attorney spoke with him regarding the plea offer. The defendant's supporting affidavit further attested that his immigration attorney advised him to plead guilty because the attorney was in a hurry to dispose of the criminal case in order to proceed with the immigration case and because pleading guilty to the charge would have no impact on his immigration status, since he would only be sentenced to probation and would not be deported. According to the petition, the criminal defense counsel was present during this discussion and advised that the immigration

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attorney first check with the immigration judge regarding the plea's effect on the defendant's immigration status because the criminal defense counsel suspected that the immigration attorney's advice was wrong. In his affidavit, the defendant attested that, based on his immigration attorney's advice, he decided to plead guilty to possession of 0.1 grams of cocaine even though he was innocent of the offense.

¶ 9 The circuit court found that the defendant's petition was not frivolous and patently without merit and advanced it to the second stage. The State filed a motion to dismiss, arguing that, even if his counsel's performance was deficient, the defendant failed to make a substantial showing that he was prejudiced by that ineffective assistance because he had independent knowledge of the deportation consequences of his guilty plea and because the court's admonitions cured the erroneous information provided by his attorney. The trial court granted the State's motion, concluding that it had thoroughly and exhaustively admonished the defendant regarding the immigration consequences of his plea and that the admonitions were sufficiently related to the erroneous information such that it cured any prejudice. The court also determined that the defendant's contention that, absent the erroneous advice of his immigration attorney, he would have insisted on going to trial was a bare allegation that did not rise to the requisite level of reasonable probability. This appeal followed.

¶ 10 On appeal, the defendant argues that the second-stage dismissal of his postconviction petition was in error, where he made a substantial showing that he had been deprived of effective assistance of counsel. In support of this argument, the defendant contends that his guilty plea was involuntary and unintelligent because it resulted from his reliance on his immigration attorney's incorrect advice to so plead since the plea would not affect his immigration status.

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¶ 11 Under the Act, individuals convicted of criminal offenses may challenge those convictions on grounds of constitutional violations. 725 ILCS 5/122-1 *et seq.* (West 2010). The Act sets forth three stages of review. *Id.* First, the trial court may employ its discretion to dismiss postconviction petitions that are "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204 (2009). If the court does not dismiss the petition as frivolous or patently without merit, then the petition advances to the second stage. *Hodges*, 234 Ill. 2d at 10. At this stage, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2010)), and the State may file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2006)). The court must accept as true all well-pleaded facts that are "not positively rebutted by the original trial record." *People v. Coleman*, 183 Ill. 2d 366, 385, 701 N.E.2d 1063 (1998); *People v. Garcia*, 405 Ill. App. 3d 608, 615, 939 N.E.2d 972 (2010). "Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Coleman*, 183 Ill. 2d at 381. However, if the defendant makes the requisite substantial showing that his constitutional rights were violated, he is entitled to an evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442 (2001); *Coleman*, 183 Ill. 2d at 381.

¶ 12 The second and third stages are distinct in their requirements and should not mistakenly be treated the same. See *People v. Dodds*, 344 Ill. App. 3d 513, 520, 801 N.E.2d 63 (2003) (holding that the circuit court "should not collapse the second and third stages of postconviction proceedings"). At the second stage, "the dismissal of a post-conviction petition is warranted only when the petition's allegations of fact-liberally construed in favor of the petitioner and in light of the

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original trial record-fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *Coleman*, 182 Ill. 2d at 382. No credibility determinations will be made at the second stage. *People v. Childress*, 191 Ill. 2d 168, 174, 730 N.E.2d 32 (2000). The proper standard of review for a second stage dismissal of a postconviction petition is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999 (2008).

¶ 13 The right to effective assistance of counsel in a criminal proceeding is constitutionally guaranteed to defendants. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Where a defendant seeks relief from a plea agreement he entered into in reliance on his counsel's advice, which he now alleges was deficient, he must show that the advice given was not "within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The ineffectiveness of counsel during the plea process is evaluated under the two-part *Strickland* test. *Hill*, 474 U.S. at 58. Specifically, the court must "determine whether counsel's representation 'fell below an objective standard of reasonableness' \*\*\* [and then] whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Padilla v. Kentucky*, 559 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1473, 1482 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). It is not enough that trial counsel failed to meet the competence standard of his profession, the defendant must also show that he was prejudiced as a result. *Strickland*, 466 U.S. at 692-93.

¶ 14 Under the first part of the *Strickland* analysis, we are tasked with determining whether an attorney's representation fell within professional standards of competence. A determination of

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ineffectiveness of counsel must be viewed in terms of the reasonableness of the representation in light of the individual facts known to counsel at the time he engaged in the challenged conduct. *Id.* at 690. A proper claim of ineffective assistance of counsel must allege the specific acts or omissions which fell below the requisite professional standards. *Id.* "The court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

¶ 15 Changes in immigration law have made it more likely that a noncitizen convicted of certain criminal offenses will face the prospect of deportation. *Padilla*, 130 S. Ct. at 1480. "[D]eportation is an integral part—indeed, sometimes the most important part [footnote]—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* The possibility of facing this subsequent penalty following a criminal conviction, warrants a higher degree of concern and consideration for noncitizen criminal defendants. *Id.* It follows that effective assistance of counsel entails informing clients of the deportation risks involved in their criminal conviction. *Id.* at 1482. If the applicable law is clear on the deportation consequences of the offense charged, there is an affirmative duty for counsel to give "correct advice." *Id.* at 1483. Failure to fulfill this duty "clearly satisfies the first prong of the *Strickland* analysis." *Id.* at 1484 (quoting *Hill*, 474 U.S. at 62 (White, J., concurring)).

¶ 16 The defendant here was charged with possession of cocaine, a controlled substance that falls squarely within the scope of the federal statute governing aliens who are subject to deportation. That statute provides as follows:

"Any alien who at any time after admission has been convicted of a violation of (or

a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C.A. § 1277 (a)(2)(B)(I) (West 2009); see also 21 U.S.C.A. § 812, Schedule II(a)(4) (West 2009).

¶ 17 The statute does not indicate that either the degree of sentence, *i.e.*, probation instead of prison time, or the class of felony, *i.e.*, a class-four felony, would remove the defendant-alien from the scope of its reach. See 8 U.S.C.A. § 1277 (a)(2)(B)(I) (West 2009). Rather, a straightforward reading of the language of the statute makes clear that a conviction of 0.1 grams of cocaine rendered the defendant "deportable." *Id.* Therefore, both the immigration attorney and the criminal defense counsel had an affirmative duty to give the defendant correct advice regarding the deportation consequences of his guilty plea. That is, the defendant's attorneys were required to inform him that, if he pled guilty to possession of 0.1 grams of cocaine, he would face deportation. Accepting the truth of the defendant's allegations, as is required at second-stage postconviction proceedings, the immigration attorney's contrary statement was incorrect, and the State concedes this point. Thus, the defendant's claim of ineffective assistance of counsel falls squarely within the rule articulated in *Padilla*.

¶ 18 The State cites two cases in support of its argument that, where multiple attorneys provide a defendant with conflicting advice, their representation is nonetheless competent and complies with the Sixth Amendment's guarantees. However, the State's reliance on these cases is misplaced. *Spencer v. State*, 287 Ga. 434, 439 (2010), involved three attorneys who disagreed about whether

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a defendant should testify at his trial, and *United States v. Marshall*, 1992 CMR LEXIS 705, at \*2-5, dealt with conflicting advice of a military defense counsel and a civilian public defender as to whether a defendant should reject a non-judicial punishment. Both of these cases involved conflicting advice with regard to strategy, but neither case concerned a defense attorney giving altogether wrong information to his client.

¶ 19 We recognize that courts grant high deference to defense attorneys' decisions in their representation. *Strickland*, 466 U.S. at 689. However, we do not believe that such deference extends to situations where, as here, the information provided to the defendant was incorrect and the correct information could have been easily ascertained by proper investigation of a federal statute. Moreover, this is not a situation involving a decision based on conflicting strategic advice that a defendant, in hindsight, would like to do over because the strategy failed. Rather, the defendant's petition and affidavit allege that he was represented by two attorneys: one was unsure of the consequences of a guilty plea on his immigration status and did not offer any definitive information; the other incorrectly advised him that his guilty plea would not render him subject to deportation. In light of these circumstances, we find that the defendant has made a substantial showing that his counsels' representation was deficient under the performance prong of *Strickland*.

¶ 20 The State, noting that the defendant was represented by two attorneys, stresses that the defendant hired his criminal defense counsel to represent him on the narcotics charge, not his immigration attorney. This distinction is irrelevant when we consider the conduct of the defendant and both attorneys in this matter. An attorney-client relationship is formed when both parties have consented to it, the client has indicated that the attorney is authorized to act on his behalf, and the

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attorney has shown his acceptance of that authority. *People v. Clark*, 386 Ill. App. 3d 673, 678, 899 N.E.2d 342 (2008) (citing *Simon v. Wilson*, 291 Ill. App. 3d 495, 509, 684 N.E.2d 791 (1997)).

¶21 The record reflects that the immigration attorney filed a written appearance for the defendant and appeared on his behalf at the arraignment. In open court, and in the presence of the defendant, the immigration attorney entered a plea of not guilty for the defendant, requested a plea conference with the court, argued for the defendant on the substance of his *criminal* case, and later agreed to a blind plea by the defendant. The immigration attorney's conduct, and the defendant's acquiescence in that conduct, sufficiently demonstrates that the defendant authorized his immigration attorney to act on his behalf and that the immigration attorney accepted. Accordingly, an evaluation of the effectiveness of the immigration attorney's representation is subject to the same standards of professional conduct as would be applied to the criminal defense counsel. Although the criminal defense counsel was present during most or all of these proceedings, he was often silent, and it was the immigration attorney who predominantly spoke on the defendant's behalf.

¶22 In urging us to affirm the dismissal of the defendant's petition, the State relies heavily on the fact that there is no indication that the defendant's criminal defense counsel gave him incorrect advice. However, the defendant's postconviction petition asserted that his criminal defense counsel merely expressed misgivings about the immigration attorney's advice and suggested that he speak with an immigration judge first. This assertion finds support in the record, which reflects that, after the case was passed the first time, the immigration attorney requested a "short date" so that he could "present the plea [offer] to the immigration Judge." The criminal defense counsel's expression of doubt as to the reliability of the immigration attorney's advice cannot be equated with providing

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correct information to a noncitizen, criminal defendant, as required by *Padilla*. Therefore, the defendant made a substantial showing that both his immigration attorney and his criminal defense counsel were ineffective in that they did not inform him that he would be subject to deportation if he pled guilty to the possession charge.

¶ 23 In determining the validity of a guilty plea, "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A plea based on reasonably competent advice is voluntary and not subject to challenge on the basis that counsel erred in his judgment. *People v. Palmer*, 162 Ill. 2d 465, 475, 643 N.E.2d 797 (1994). However, when a defendant has pled guilty in reliance on counsel's advice, which unreasonably misapprehends the law, his plea should be withdrawn. *Clark*, 386 Ill. App. 3d at 679 (citing *People v. Pugh*, 157 Ill. 2d 1, 13-14, 623 N.E.2d 255 (1993)). It is the responsibility of the defendant's attorney to inform him of the immigration consequences he faces following a conviction. *People v. Correa*, 108 Ill. 2d 541, 550, 485 N.E.2d 307 (1985). Thus, an intelligent choice rests, at least in part, on having correct information about the consequences of each available course of action. See generally *Padilla*, 130 S. Ct 1473; see also *Hill*, 474 U.S. at 56 (holding that "[t]he longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant' ") (quoting *Alford*, 400 U.S. at 31).

¶ 24 To satisfy the prejudice requirement of the *Strickland* analysis, in the context of a guilty plea challenged by a postconviction petition, the defendant must show a reasonable probability exists that,

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absent counsel's ineffectiveness, he would have rejected the plea agreement and insisted on proceeding to trial. *Lafler v. Cooper*, 566 U.S. \_\_\_, \_\_\_, 132 S. Ct. 1376, 1384-85 (2012); *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688, 694). In Illinois, a defendant's assertion, that he would not have pled guilty absent his counsel's inadequate advice, must be accompanied by either a claim of innocence or the articulation of a plausible defense in order to satisfy the prejudice requirement under *Strickland*. *People v. Rissley*, 206 Ill. 2d 403, 459-60, 795 N.E.2d 174 (2003) (citing *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd on other grounds*, 520 U.S. 751 (1997)).

¶ 25 The State correctly argues that, in assessing the prejudice from defense counsel's errors, we must view the totality of the circumstances surrounding the defendant's representation (see *Strickland*, 466 U.S. at 695), and it claims that the record defeats his claim of prejudice. Therefore, we must consider whether the trial court's admonishments cured the defense counsels' deficiency or the record otherwise refutes the defendant's claim that he suffered prejudice as a result of his attorneys' representation.

¶ 26 First, the record reveals that the trial court admonished the defendant only as to the *potential* deportation consequences of the conviction. The court informed the defendant that conviction of the offense for which he was charged "*may* have the consequences of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States." (Emphasis added.) The court then twice asked the defendant if he understood, and he replied in the affirmative.

¶ 27 In *People v. Ramirez*, 162 Ill. 2d 235, 245-46, 642 N.E.2d 1224 (1994), the Illinois Supreme

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Court determined that the defendant was not entitled to postconviction relief based on his allegations that he was denied effective assistance of counsel because he was promised a lighter sentence based on a supposed favor owed to his counsel by the trial judge. The court reached this decision after finding that the trial court thoroughly admonished the defendant by going beyond what Rule 402 (eff. July 1, 1997) required and giving specific examples of promises that could not be the basis of a decision to plead guilty. *Ramirez*, 162 Ill. 2d at 241-42. The defendant assured the court that he understood his sentence and that his plea was not based on any such promises. *Id.*

¶ 28 This case is distinguishable from *Ramirez* because the lower court's admonitions to the defendant did not directly contradict the immigration attorney's incorrect advice. See *People v. Hall*, 217 Ill. 2d 324, 340-41, 841 N.E.2d 913 (2005) (holding that court's admonitions did not overcome counsel's erroneous advice where the court informed defendant of the charge and that it involved "knowingly" confining a child, but defendant pled guilty after counsel advised him that his lack of knowledge was no defense). Specifically, the court admonished the defendant that based on the charge he may face deportation. This does not overcome the immigration attorney's incorrect advice that, based on the sentence and felony class, he would not be deported. Moreover, though the immigration attorney stated that the defendant "knew if he got in any further problems with the law he would possibly be deported back to Poland," the defendant's awareness that he faced the possibility of deportation is markedly different from being advised that he would be deported following his conviction. Considering this fact, it would not have been unreasonable for the defendant to rely on the advice of his immigration attorney that he would not be deported, since the immigration attorney was more intimately familiar with his immigration status and his pending

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immigration case. Therefore, the court's admonishments do not negate the defendant's allegations that he was prejudiced by the erroneous advice on which he relied.

¶ 29 Second, the record contains facts which, when construed liberally in favor of the defendant, lend substantial support to his position that, absent the immigration attorney's ineffectiveness, he would have proceeded to trial. Contrary to the characterization by the circuit court and the State, this is not a bare allegation. The immigration attorney stated that the defendant "strongly denie[d] that he had the cocaine or had any knowledge of it" and felt that he was not guilty. In addition, the immigration attorney began to argue that the arresting officers engaged in a search that was not supported by probable cause or the defendant's consent. These facts indicate that the defendant could have raised a plausible defense, particularly if he was successful on a pre-trial motion to quash his arrest or suppress evidence. See *Rissley*, 206 Ill. 2d at 459-60. Further, the record demonstrates that, prior to pleading guilty, the defendant asserted his innocence. The parties were set to go to trial, but the case was passed because the State's witnesses were not present. Shortly thereafter, the defendant withdrew his request for trial and agreed to enter a "blind" guilty plea. These facts indicate that there is a reasonable probability the defendant would have insisted on going to trial, in the absence of the immigration attorney's alleged statements as to the effect of his guilty plea.

¶ 30 The State argues unpersuasively, and without support, that the stipulated facts of the defendant's guilty plea should be accepted as true and that they overcome the defendant's allegation that he was innocent. Yet, the very purpose of the defendant's postconviction petition is to collaterally attack the judgment, based on his allegation that the plea was involuntary and unintelligent. If the defendant is successful, this would void the stipulation of facts that initially

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supported the plea of guilty. Accordingly, we reject the State's request to use the defendant's plea of guilty as evidence that he would not have asserted a viable defense or maintained his innocence at trial.

¶ 31 At this stage, the defendant is not required to show that the conviction resulted in his deportation, as the State implies. Rather, the prejudicial effect the defendant must advance at this stage, is that the outcome of the *trial court* proceeding would have been different, not that the outcome of the immigration proceeding would have been different. See *Hill*, 474 U.S. at 58-9 (concluding that, in the context of guilty pleas, the *Strickland* prejudice prong requires a showing that "\*\*\* but for counsel's errors, [the defendant] would not have pleaded guilty, and would have insisted on going to trial").

¶ 32 Given the totality of the circumstances, we conclude that the defendant has raised a reasonable probability that, but for his immigration attorney's erroneous advice regarding the deportation consequences of his conviction, the outcome of the plea process would have been different and he would have insisted on going to trial. Consequently, we find that the defendant made a substantial showing that his constitutional right to effective assistance of counsel was violated and that he was prejudiced as a result. Accordingly, we reverse the judgment of the circuit court and remand for an evidentiary hearing on the defendant's postconviction petition.

¶ 33 Reversed and remanded.