

FIFTH DIVISION  
May 24, 2013

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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      |
| Plaintiff-Appellee,                 | ) | Cook County.          |
|                                     | ) |                       |
| v.                                  | ) | No. 10 CR 10878       |
|                                     | ) |                       |
| JOAN LOPEZ,                         | ) | Honorable             |
|                                     | ) | Maura Slattery-Boyle, |
| Defendant-Appellant.                | ) | Judge Presiding.      |

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**ORDER**

JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice McBride and Justice Taylor concurred in the judgment.

¶ 1 *HELD:* Allegations in defendant's post-conviction petition that the trial court gave noncompliant Rule 402 admonishments did not rise to the level of a constitutional deprivation of due process where the trial court admonished defendant of the direct consequences of his plea; defendant's petition stated the gist of a constitutional claim that trial counsel was ineffective where he alleged counsel misled him about the immigration consequences of his plea.

¶ 2 This appeal arises from an order of the circuit court summarily denying defendant Joan

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Lopez's post-conviction petition. For the following reasons, we reverse and remand for further proceedings under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010).

### ¶ 3 BACKGROUND

¶ 4 On May 16, 2010, at approximately 9:00 p.m., police were called to 2841 West 25th Street in Chicago. When police arrived, defendant was observed standing in the alley, smoking a hand-rolled cigarette that smelled of cannabis. Defendant was arrested and searched. The search yielded a bag filled with suspected cannabis from his waistband, which was subsequently found to contain 196 grams of cannabis. Defendant was subsequently charged with misdemeanor possession of the cannabis cigarette and felony possession of 196 grams of cannabis.

¶ 5 Defendant is not a United States citizen. He subsequently entered into a negotiated plea agreement to possession of more than 10, but less than 30 grams of cannabis on August 4, 2010. According to the report of proceedings, at the time of defendant's plea hearing, the State sought leave of court to amend the amount of drugs from 196 grams of cannabis to between 10 and 30 grams of cannabis, which motion was granted:

"MR. REYNA [Assistant State's Attorney]: State seeks leave for an amendment not to the class, but the amount.

THE COURT: Any objection?

MR. BENESH [Defense Counsel]: No objection. Waive re-swearing re-execution.

THE COURT: Leave to amend is allowed. Sir, you have the right

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to plead not guilty and the right to require the State to prove you guilty beyond a reasonable doubt. \* \* \* "

However, the common law record reveals that the information was also amended at some point to allege possession with intent to manufacture or deliver rather than simple possession.

¶ 6 The trial court admonished defendant during the plea hearing about the charges he was pleading guilty to as follows:

"THE COURT: You're here charged [sic] with the offense of possession of controlled substance. It is as charged, correct Mr. Reyna?

MS. INNES [Assistant States Attorney]: It is, your Honor.

THE COURT: Possession of a controlled substance allegedly occurring May 16th 2010. Is that your understanding, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: It's a Class 4 felony with a minimum sentence that I can impose being anywhere from 1 year in the Illinois Department of corrections to 3 years, Illinois Department of corrections. Sir, do you understand that?

THE DEFENDANT: Yes, ma'am."

¶ 7 After learning that defendant was not a citizen of the United States, the trial court then inquired of defendant whether he understood that the felony conviction could affect his future status in this country and the following colloquy ensued:

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"THE COURT: Okay. Do you understand, sir, that this felony conviction, while it is right now may affect your future status in this country? Sir, do you understand that?

THE DEFENDANT: Yes, your Honor.

MR. BENESH [Defense Counsel]: Your Honor, for the record, we did discuss that on the 15th of July.

THE COURT: Is that correct? You had this discussion with Mr. Benesh about how this may affect your status in this country?

THE DEFENDANT: Yes.

THE COURT: Do you still wish to persist with your plea of guilty, knowing this may affect your status in this country?

THE DEFENDANT: Yes, your Honor."

Defendant was then sentenced to a 410 probation (720 ILCS 570/410 (West 2010)) term of twenty-four months.

¶ 8 Defendant did not file a direct appeal. However, on March 16, 2011, through counsel, he filed a motion to withdraw his guilty plea pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2010)), section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), Illinois Supreme Court Rules 402(a) (Ill. S. Ct. R. 402(a) (eff. July 1, 1997)) and 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)), and *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010). The motion was later amended and alleged that: 1) defendant thought he was pleading guilty to simple possession of a controlled substance, but the certified statement of

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conviction indicated that he was convicted of possession with intent to manufacture or deliver; 2) defendant was not informed of the immigration consequences of his guilty plea and he was unaware that he was pleading guilty to possession with intent to manufacture or deliver; 3) if he had known of the true nature of the charge and the harsh immigration consequences, he would not have pleaded guilty; 4) he was not fully advised of the nature of the charge under Rule 402(a); 5) his trial counsel was ineffective when she failed to advise him of the consequences of his plea; and 6) he was prejudiced when he was not advised of the true nature of the charge and when he pled guilty to possession with intent to manufacture or deliver.

¶ 9 Attached to defendant's motion was his affidavit, in which he averred that:

"The second plea offer was for a more serious charge (Manufacture and Delivery of Cannabis) but the female Public Defender *mised* me to believe I would get a less stringent form of Probation by pleading guilty to this charge, and the conviction would **not** be added to my criminal record, and that this conviction would **not** have adverse immigration consequences.

The female Public defender enticed me to plead guilty to the second plea offer by giving me false information." (Emphasis in original).

¶ 10 A hearing on defendant's motion was held on April 20, 2011, at which time the trial court stated that it had no jurisdiction to hear the motion because defendant had not filed the motion to withdraw his plea within 30 days. The trial court then stated that upon its review of the record, it

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was made clear to defendant that a felony conviction would impact his status in this country. The trial court also stated that the conviction was not for manufacture and delivery and that "if the Illinois INS or Immigration Central Emergency or ICE interprets the Illinois statute one way or another, that's their determination based upon the reading of the facts or charging document."

The trial court further noted that both charges were Class 4 felonies with the same sentencing guidelines and the same possible sentence. When defense counsel inquired as to whether the conviction order could be amended to show that defendant was convicted of possession of a controlled substance, the trial court refused, saying: "I'm not going to modify a plea. The pleas is indicated on - - this is what is indicated in the transcript. I'm not going to deal with immigration and how they interpret our law. " The trial court then denied defendant's motion.

¶ 11 Defendant filed a motion to reconsider on May 3, 2011, and a hearing was held on May 24, 2011. At that time, defense counsel presented the trial court with authority from the Post-Conviction Act that the trial court has jurisdiction even without a direct appeal. The trial court responded "okay." Defense counsel then argued that defendant was not fully apprised of the true nature of the charge when he was advised that the charge was possession of a controlled substance but he was convicted of possession with intent to deliver or manufacture cannabis, which is clearly distinct from simple possession. The trial court denied defendant's motion to reconsider and this timely appeal followed.

#### ¶ 12 ANALYSIS

¶ 13 On appeal, defendant contends that: 1) the trial court erred in holding that a direct appeal was a necessary jurisdictional prerequisite to filing a post-conviction petition; 2) his trial counsel

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was ineffective for misadvising him of the immigration consequences of the guilty plea; 3) the trial court failed to admonish defendant sufficiently as to the nature of the charge as required by Rule 402(c) (Ill. S. Ct. R. 402(c) (eff. July 1, 1997)); and 4) his guilty plea was taken in violation of due process because he was never advised of the true charge.

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* West 2010)) provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois State Constitution or both. *People v. Tate*, 2012 IL 112214, ¶ 8; *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A post-conviction action is not an appeal from the judgment of the conviction but is a collateral attack on the trial court proceedings. *Tate*, 2012 IL 112214, ¶ 8. Thus, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited. *Tate*, 2012 IL 112214, ¶ 8.

¶ 15 There are three levels or stages of review under the Act. *People v. Mack*, 336 Ill. App. 3d 39, 42 (2002), (citing *People v. Coleman*, 183 Ill. 2d 366, 379-82 (1998)). At the first stage, the trial court must independently review the petition, taking the allegations as true, and determine "whether the petition is frivolous or patently without merit." *Tate*, 2012 IL 112214, ¶ 9, (quoting 725 ILCS 5/122-2.1(a)(2) (West 2010)). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Tate*, 2012 IL 112214, ¶ 9. This first stage in the proceedings allows the trial court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *Tate*, 2012 IL 112214, ¶ 9, (quoting *People v. Rivera*, 198 Ill. 2d 364,

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373 (2001)). At this initial stage of the proceeding, there is no involvement by the State. *Tate*, 2012 IL 112214, ¶ 9. The trial court cannot engage in any fact finding or any review of matters beyond the allegations of the petition. *Mack*, 336 Ill. App. 3d at 42.

¶ 16 If the trial court does not dismiss the petition at the first stage, the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2010)), and where the State, as respondent, enters the proceedings (725 ILCS 5/122-5 (West 2010)). At this second stage, the trial court must determine whether the petition and any accompanying documentation make " "a substantial showing of a constitutional violation." " *Tate*, 2012 IL 112214, ¶ 10, (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001), (citing *Coleman*, 183 Ill. 2d at 381)). If no such showing is made, the petition is dismissed. *Tate*, 2012 IL 112214, ¶ 10. If, however, a substantial showing of a constitutional violation is set forth, the petition advances to the third stage, where the trial court conducts an evidentiary hearing. *Tate*, 2012 IL 112214, ¶ 10; 725 ILCS 5/122-6 (West 2010). The summary dismissal of a post-conviction petition is reviewed *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

#### ¶ 17 Jurisdiction

¶ 18 As previously stated, defendant filed a motion to withdraw his guilty plea pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2010)), section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), Illinois Supreme Court Rules 402(a) (Ill. S. Ct. R. 402(a) (eff. July 1, 1997)) and 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)), and *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010). The trial court denied defendant's petition on all bases.

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¶ 19 At the first hearing on defendant's petition, the trial court purportedly dismissed the petition because it did not have jurisdiction because defendant had not filed a direct appeal. Under Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)), a defendant may not appeal unless defendant files a motion to withdraw the plea and vacate the judgment within 30 days of entry of the plea. Thus, Rule 604(d) standing alone does not provide an independent basis for review of defendant's petition more than 30 days after entry of the plea. See *People v. Taylor*, 57 Ill. App. 3d 29, 31 (1978) (the trial court lacked jurisdiction to consider defendant's motion to vacate the guilty pleas because defendant did not file a timely motion to vacate the pleas). Therefore, the trial court correctly determined that it could not entertain defendant's untimely claim under Rule 604(d).

¶ 20 Defendant also sought review of his petition under section 2-1401. 735 ILCS 5/2-1401 (West 2010). Under section 2-1401, a defendant must file a petition no later than two years after the entry of the order of judgment, set forth a meritorious defense or claim, have due diligence in presenting that defense or claim to the circuit court, and have due diligence in filing the petition. *People v. Glowaki*, 404 Ill. App. 3d 169, 171 (2010). The trial court did not make a specific finding as to section 2-1401, but found it had no jurisdiction. Although defendant's petition was filed less than one year following his conviction, we find that he did not allege due diligence in filing the petition, so he was not entitled to relief under section 2-1401. *People v. Bramlett*, 347 Ill. App. 3d 468, 473 (2004). Therefore, the trial court did not have jurisdiction to consider defendant's petition under either Rule 604(d) or section 2-1401.

¶ 21 Finally, the trial court denied defendant's petition under the Post-Conviction Hearing Act

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(725 ILCS 5/122-1 *et seq.* (West 2010)), finding that it had no jurisdiction because defendant did not file a direct appeal. However, a defendant who pleads guilty is not required to perfect a direct appeal in order to pursue post-conviction relief. *People v. Stein*, 255 Ill. App. 3d 847, 848 (1993). Therefore, the trial court erred when it declined to consider defendant's claim under the Act, and we will review defendant's claims under the standards of the Act.

¶ 22 With those principles in mind, we now turn to the merits of defendant's petition.

¶ 23 Propriety of the Dismissal

¶ 24 Defendant essentially asserts that his post-conviction petition stated the gist of a meritorious claim that he was improperly admonished as required by Rule 402, which in turn, means that his plea agreement violated due process, and further that his trial counsel was ineffective for misadvising him regarding the immigration consequences of his plea.

¶ 25 Trial court's failure to comply with Rule 402

¶ 26 Defendant first contends that the trial court's failure to properly admonish him in accordance with Rule 402 when accepting his guilty plea violates due process.

¶ 27 Supreme Court Rule 402 states in pertinent part:

"The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by addressing the defendant personally in open court, informing him or her of and determining that he or she understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law

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\* \* \*;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him." Ill. S. Ct. R. 402 (a) (eff. July 1, 1997).

¶ 28 The United States Constitution requires that a guilty plea be knowing, voluntary and intelligent. *People v. Shuman*, 226 Ill. App. 3d 1065, 1067 (1992), (citing *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969)). The constitutional requirement is satisfied when the trial court substantially complies with Rule 402 (*People v. Wilson*, 295 Ill. App. 3d 228, 235 (1998)); Rule 402 is considered to be the embodiment of constitutional standards for procedures at plea proceedings. *Shuman*, 226 Ill. App. 3d at 1067. Admonishments are sufficient if they amount to substantial compliance with the rule. *People v. Fish*, 316 Ill. App. 3d 795, 799 (2000).

¶ 29 Consequently, the failure to strictly comply with Rule 402 does not automatically raise an issue of constitutional dimensions, although noncompliance may be relevant in determining whether a defendant knowingly and voluntarily pled guilty. *Shuman*, 226 Ill. App. 3d at 1067. Principles of due process apply to the procedure of accepting a plea. *People v. Whitfield*, 217 Ill. 2d 177, 185-86 (2005).

¶ 30 With regard to inadequate admonishments, the failure to properly admonish a defendant,

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standing alone, does not automatically establish grounds for reversing the judgment or vacating the plea. *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009). Rather, a reviewing court focuses on whether the guilty plea was affirmatively shown to have been made voluntarily. *Delvillar*, 235 Ill. 2d at 520. With respect to voluntariness, our supreme court has established that the pertinent knowledge to be provided by the court prior to accepting a guilty plea includes only the direct consequences of the defendant's plea. *Delvillar*, 235 Ill. 2d at 520, (citing *People v. Manning*, 227 Ill. 2d 403, 415 (2008)). Direct consequences of a plea are those consequences affecting the defendant's sentence and other punishment that the circuit court may impose. *Delvillar*, 235 Ill. 2d at 520, (citing *People v. Williams*, 188 Ill. 2d 365, 372 (1999)).

¶ 31 Collateral consequences, on the other hand, are effects upon the defendant that the circuit court has no authority to impose. *Delvillar*, 235 Ill. 2d at 520. A collateral consequence is one that results from an action that may or may not be taken by an agency that the trial court does not control. *Delvillar*, 235 Ill. 2d at 520, (citing *Williams*, 188 Ill. 2d at 372). Immigration consequences are considered collateral consequences. *Delvillar*, 235 Ill. 2d at 521. Due process does not require that the defendant be informed of the collateral consequences of a plea. *Delvillar*, 235 Ill. 2d at 520-21, (citing *Williams*, 188 Ill. 2d at 371). As such, the failure to admonish a defendant of potential immigration consequences does not affect the voluntariness of the plea. *Delvillar*, 235 Ill. 2d at 521.

¶ 32 In this case, defendant raised the issue of the trial court's admonishments more than 30 days after the plea. The report of proceedings indicates that the trial court advised defendant that he was being charged with the offense of possession of a controlled substance, to which the State

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responded affirmatively, prior to defendant's plea of guilty. The trial court then informed defendant of the penal consequences of the plea.

¶ 33 In this case, we do not find that defendant was denied due process by the incomplete admonishments because the penal consequences for possession of between 10 and 30 grams of cannabis and possession with intent to manufacture and deliver 10 to 30 grams of cannabis were the same. Thus, defendant was not prejudiced in that regard. It is established through case law that the collateral consequences, such as immigration consequences, of a plea do not affect the voluntariness of a plea. See *Delvillar*, 235 Ill. 2d at 521. Because this is a post-conviction petition, we are confined to the review of constitutional issues. *People v. Williams*, 392 Ill. App. 3d 359, 365 (2009). Therefore, notwithstanding the irregularities in the record regarding the amendment of the information, we find that defendant was not prejudiced and the trial court's error does not rise to the level of a constitutional deprivation of due process because the trial court substantially complied with Rule 402.

¶ 34 Ineffective Assistance of Trial Counsel

¶ 35 Defendant further contends that his trial counsel was ineffective for failing to properly advise him of the immigration consequences of his plea, and cites to *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010) in support of his contention. We agree.

¶ 36 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. Advice regarding deportation falls under *Strickland*. *Padilla*, 559 U.S. \_\_\_, 130 S. Ct. at 1482. Where a defendant seeks relief from a plea agreement he entered into in reliance on his counsel's advice,

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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, 106 S. Ct. 366, 369 (1985), (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)). The ineffectiveness of counsel during the plea process is evaluated under the two-part *Strickland* test. *Hill*, 474 U.S. at 57, 106 S. Ct. at 370. 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*, 559 U.S. at \_\_\_, 130 S. Ct. at 1482, (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Defendant must also show that he was prejudiced as a result. *Strickland*, 466 U.S. at 693; 104 S. Ct. at 2067.

¶ 37 Changes in immigration law have made deportation an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1480. The distinction between collateral and direct consequences does not apply when defining the scope of constitutionally reasonable professional assistance required under *Strickland*. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1481. Effective assistance of counsel entails informing clients of the deportation risks involved in their criminal conviction. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1482-83.

¶ 38 The Deportation of Aliens statute, 8 U.S.C.S. §1227(a)(B)(i), provides as follows:

"(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has

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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 102 of the Controlled Substances Act (21 U.S.C. 802)), 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.S. §1227(a)(B)(i).

Based on the deportation statute, it is clear that if a defendant is found guilty of the charge of possession with intent to deliver 10-30 grams of cannabis, it is deportable.

¶ 39 In this case, there is no question that defendant had a conversation with his attorneys about the consequences of his guilty plea on his immigration status. Indeed, defendant states on record that such a conversation took place. However, the fact that the attorney discussed the consequences does not resolve the issue of counsel's effectiveness. Counsel is not only required to discuss the issue of immigration with the defendant, but also to give accurate information. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1483. Defendant here alleges that he was misled by his attorney. Defendant avers in his affidavit that his counsel did not tell him that the offense to which he pled guilty was deportable. In fact, defendant averred that counsel advised him that pleading guilty to the manufacture and delivery of cannabis charge would not result in adverse immigration consequences.

¶ 40 Where the defendant is pleading guilty to a possession charge which under section 1227 is clearly deportable (regardless of whether it is a possession only charge or possession with

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intent to manufacture or deliver), counsel must tell his client that deportation is inevitable as a result of the plea. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1486.

¶ 41 Here, as in *Padilla*, we find that the terms of the relevant immigration statute are succinct, clear and explicit in defining the removal consequences for defendant's conviction. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1483; 8 U.S.C.S. §1227(a)(2)(B)(i). The deportation statute clearly states that any conviction for any amount of cannabis for manufacture or delivery was deportable, as opposed to possession of an amount less than 30 grams. 8 U.S.C.S. §1227(a)(B)(i).

Accepting his allegations as true, we find that defendant has sufficiently alleged a constitutional deficiency to satisfy *Strickland*. See *Padilla*, 559 U.S. \_\_\_, 130 S. Ct. at 1483-84. Therefore, defendant has stated the gist of a claim required to survive dismissal of his petition at the first stage of proceedings under the Act, and a first stage dismissal was improper.

#### ¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we reverse the trial court's denial of defendant's post-conviction petition and remand for further proceedings.

¶ 44 Reversed and remanded.