SIXTH DIVISION
June 30, 2016

No. 1-14-0612

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 22380
	)	No. 11 CR 14446
EYAD AMAD,	)	
	)	Honorable
Defendant-Appellant.	)	Dennis J. Porter,
	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hoffman concurred in judgment. Justice Delort specially concurred.

ORDER

¶ 1 *Held*: We reversed the second-stage dismissal of defendant's amended postconviction petition and remanded for a third-stage evidentiary hearing where defendant made a substantial showing of ineffective assistance of counsel.

¶ 2 Defendant, Eyad Amad, appeals the second-stage dismissal of his amended postconviction petition, alleging that he made a substantial showing of ineffective assistance of counsel pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010), where his defense attorneys failed to advise him of the deportation consequences of his guilty pleas to robbery and retail theft. We reverse and remand for a third-stage evidentiary hearing.

¶ 3 In case number 09 CR 22380, the State charged defendant with armed robbery for stealing approximately $938 on November 22, 2009, from a liquor store where he previously

worked while brandishing a knife. On March 8, 2011, defendant pleaded guilty, pursuant to a plea agreement, to a reduced charge of robbery in exchange for 24 months' probation. As part of his probation, defendant was to report to his probation officer and he was not to commit any other crimes.

¶ 4 The factual basis of the plea, to which defendant stipulated, indicated that the victim would testify that at about 2:30 p.m. on November 22, 2009, defendant, a former employee of a liquor store located at 3215 West Division Street, walked into the store and demanded money from the victim. Defendant and the victim struggled with each other, and defendant took approximately $980 from the victim.

¶ 5 Subsequent to the entry of the guilty plea, the State filed a number of petitions for violation of defendant's probation. The first petition, filed on August 12, 2011, alleged: (1) defendant was arrested for reckless driving and disorderly conduct on July 6, 2011; (2) defendant failed to report to his probation officer for evaluation on July 11, 2011; and (3) defendant was arrested for disorderly conduct on July 28, 2011.

¶ 6 On August 26, 2011, the State filed a supplemental petition alleging that defendant violated his probation by committing retail theft. Defendant was subsequently charged with retail theft in case number 11 CR 14446.

¶ 7 On September 7, 2011, the State filed another petition for violation of probation alleging: (1) defendant failed to report to his probation officer on August 5, 2011; (2) while meeting with his probation officer on August 11, 2011, defendant refused to sign a release of information or submit to an interview with him; (3) on August 18, 2011, defendant was over an hour late for an appointment with his probation officer and, once he arrived, he smelled of alcohol and refused to

submit to a Breathalyzer test or a urine drop; and (4) defendant was arrested on August 20, 2011, for reckless conduct and theft.

¶ 8 On November 1, 2011, the State filed yet another petition for violation of probation alleging that defendant had committed aggravated battery to a correctional officer on October 6, 2011.

¶ 9 On February 10, 2012, the trial court conducted a hearing on the various petitions for violation of probation. The trial court found that the State had proven certain of the violations of probation by a preponderance of the evidence, including the retail theft. Probation was revoked.

¶ 10 Defendant was subsequently resentenced on his original robbery conviction (09 CR 22380) to five years' imprisonment. Defendant pleaded guilty to retail theft in case number 11 CR 14446 and was sentenced to a concurrent two-year term of imprisonment.

¶ 11 The factual basis for the guilty plea to retail theft, to which defendant stipulated, indicated that a loss prevention agent for a Target store located at 1154 South Clark Street would testify he observed defendant enter the store at about 9 a.m. on August 24, 2011. Defendant removed items from shelves, put them in his shopping bag, walked past the last available register without paying, and was detained. The value of the merchandise was approximately $400. The incident was captured on video surveillance.

¶ 12 Defendant appealed his robbery conviction and the State Appellate Defender (SAD) was appointed to represent him. The SAD filed a motion for leave to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing that an appeal in the case would be without arguable merit. The appellate court found there were no issues of arguable merit, granted the motion to withdraw, and affirmed the judgment of the circuit court. See *People v. Amad*, 2013 IL App (1st) 121305-U.

¶ 13 While defendant's appeal was pending, he filed an amended *pro se* petition for postconviction relief on May 3, 2013, in which he stated that the Department of Homeland Security had initiated deportation proceedings against him based on his convictions for robbery and retail theft. Defendant alleged that the attorney who represented him for his robbery plea and the attorney who represented him during his subsequent retail theft plea were ineffective because they never informed him of the potential deportation consequences of pleading guilty.

¶ 14 On December 12, 2013, postconviction counsel filed a supplement to defendant's *pro se* postconviction petition, again alleging that both of defendant's attorneys were ineffective for failing to respectively inform him of the potential deportation consequences of pleading guilty to robbery and retail theft. In pertinent part, the supplement alleged: defendant came to this country from Jordan with his entire family when he was five years old and has resided here for over 25 years; both of his parents and his seven siblings are naturalized U.S. citizens; at the time of his arrest, he was in the process of becoming a U.S. citizen; if deported, he fears his life could be in danger due to his religious beliefs; he would have chosen to go to trial had his attorneys informed him that his guilty pleas would render him deportable; he had a defense in the robbery case where the evidence would show the victim owed him the monies allegedly stolen and where he was not found in possession of the robbery proceeds; and he had a defense in the retail theft case, where the evidence would show that he "did not pass the last point of sale prior to being detained by the store security" and that the reasonable value of the items taken was less than $300 and would only support a misdemeanor charge.

¶ 15 Defendant attached his affidavit, dated October 25, 2013, in which he attested: during his plea to robbery in case number 09 CR 22380, his trial counsel never asked him about his immigration status nor informed him that he could be deported if he pleaded guilty; while on

probation for the robbery, he was charged in case number 11 CR 14446, with retail theft; his counsel in the retail theft case (who was different than his counsel in the robbery case) never informed him of the deportation consequences to pleading guilty to retail theft; had he known that he could be deported, he never would have pleaded guilty to either the robbery or retail theft charges, as he came to the United States as a young child, his family and friends are here, and this is the "only country" he knows.

¶ 16 The petition advanced to the second stage of proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2.1 (West 2010)), and the State filed a motion to dismiss. The circuit court granted the motion to dismiss on February 11, 2014. Defendant appeals.[1]

¶ 17 Initially, the State argues we should dismiss defendant's appeal because he did not file a motion to withdraw either of his guilty pleas within 30 days as required by Illinois Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016)). The State's argument is not well-taken, as Rule 604(d) does not apply to postconviction proceedings. *People v. Flowers*, 208 Ill. 2d 291, 302 (2003).

¶ 18 The State argues that *res judicata* bars defendant from raising his postconviction claim of ineffective assistance of counsel, as he failed to raise it on direct appeal. Issues that were raised and decided on direct appeal are barred by *res judicata*. *People v. English*, 2013 IL 112890, ¶ 22. The issue of counsels' ineffective assistance was not actually decided on direct appeal, and therefore *res judicata* does not apply here.

¶ 19 The State also argues that defendant forfeited his postconviction claim of ineffective assistance of counsel by failing to raise it on direct appeal. Generally, issues that could have been raised on direct appeal, but were not, are forfeited. *Id*. However, defendant's claim of

[1] Defendant has been deported to Jordan, where he currently resides.

ineffective assistance could not have been raised on direct appeal because his conversations with counsel regarding his pleading guilty were not of record, and, thus, could only be raised in a collateral proceeding. *People v. Richardson*, 401 Ill. App. 3d 45, 48 (2010).

¶ 20 We proceed to address the merits of defendant's appeal from the second-stage dismissal of his postconviction petition.

¶ 21 In non-capital cases, the Act provides a three-stage process for the adjudication of postconviction petitions and permits defendant to mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998); *People v. Molina*, 379 Ill. App. 3d 91, 93 (2008). In the instant case, the circuit court dismissed defendant's petition at the second stage of the proceedings. "At the second stage of postconviction proceedings, the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation." *People v. Graham*, 2012 IL App (1st) 102351, ¶ 31. When the State seeks dismissal of a postconviction petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency. *People v. Miller*, 203 Ill. 2d 433, 437 (2002). We review *de novo* the second-stage dismissal of a postconviction petition. *Id*. A petition that is not dismissed advances to a third-stage, evidentiary hearing. 725 ILCS 5/122-6 (West 2012).

¶ 22 A challenge to a guilty plea alleging ineffective assistance is judged according to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). To obtain relief under *Strickland*, defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance prejudiced him. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010).

¶ 23 Generally, to establish prejudice in a case involving an ineffective assistance challenge to a guilty plea, defendant must show a reasonable probability that but for defense counsel's error, he would not have pleaded guilty but instead would have insisted on going to trial. *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). In *Hall*, our supreme court held that "[a] bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *Hall*, 217 Ill. 2d at 335. Instead, "defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id*. 335-36. The question of whether defense counsel's deficient representation caused defendant to plead guilty "depends in large part on predicting whether the defendant likely would have been successful at trial." *Id*. at 336 (citing *People v. Pugh*, 157 Ill. 2d 1, 15 (1993), and *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Neither *Rissley*, *Hall*, *Pugh*, nor *Hill* involved a non-citizen of the United States who pleaded guilty without being informed of the deportation consequences of his guilty plea.

¶ 24 Subsequent to our supreme court's decision in *Hall*, the United States Supreme Court (Court) issued its decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Padilla*, the defendant there was a lawful permanent resident of the United States who faced deportation after pleading guilty to the transportation of a large amount of marijuana in Kentucky. *Id*. at 359. In his postconviction proceeding, defendant claimed his counsel not only failed to advise him of the deportation consequences of his plea, but also told him that his plea would not affect his immigration status. *Id*. The Court held that defense counsel must inform his client whether the client's plea carries a risk of deportation and that the failure to do so constitutes deficient performance under the first prong in *Strickland*. *Id*. at 374. The Court remanded for further proceedings, expressly stating that "[w]hether Padilla is entitled to relief on his claim will depend

on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance." *Id*. at 369. However, elsewhere in the opinion, the Court stated, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id*. at 372.

¶ 25 The Illinois Supreme Court discussed *Padilla* in *People v. Hughes*, 2012 IL 112817. In *Hughes*, the defendant there pleaded guilty to one count of aggravated criminal sexual abuse and later moved to withdraw his plea in pertinent part because his counsel failed to advise him of the possibility the State would file a petition to commit him as a sexually violent person. *Id*. ¶ 1. The trial court denied the motion. *Id*.

¶ 26 On appeal, defendant argued that *Padilla* compelled that his motion to withdraw his guilty plea be granted. *Id*. ¶ 43. The Illinois Supreme Court (court) noted *Padilla*'s holding that the sixth amendment right to effective assistance of counsel required defense counsel to inform his non-citizen client whether his plea carries a risk of deportation. *Id*. The court then determined that, given the similarly significant liberty interest at stake for a sexually violent offender at risk for commitment, defense counsel "has a minimal duty to advise a defendant who pleads guilty to a triggering offense subject to the provision of the Sexually Violent Persons Commitment Act that he will be evaluated for and may risk involuntary commitment after completing his prison term." *Id*. ¶ 60. The court noted that defendant must prove he was prejudiced by his counsel's failure to so advise him, and that under *Hall*, he would have to show actual innocence or a plausible defense indicating he would have been successful at trial.

Id. ¶ 64. However, the court also noted *Padilla*'s statement that a petitioner must only show that his decision to reject the plea bargain was rational under the circumstances, and the court stated

that "there may be circumstances where a defendant could prove that the deficient performance affected the outcome of the plea process" in ways other than showing that he was actually innocent or had a plausible defense. *Id*. ¶ 65. The supreme court held that in the case before it, defendant's "mere assertion" that he would not have pleaded guilty had he known of the possibility of civil commitment, was not sufficient to allege the requisite prejudice and accordingly the trial court did not err in denying defendant's motion to withdraw his guilty plea. *Id*. ¶ 66.

¶ 27 In the present case, defendant argues that *Padilla*'s statement that a defendant must convince the court that his decision to reject a plea bargain would have been "rational under the circumstances" constituted an announcement of a new prejudice standard to be applied in cases involving a counsel's alleged ineffectiveness in failing to advise a defendant of the deportation consequences of his guilty plea. Defendant argues that, under the new prejudice standard articulated in *Padilla*, he was not required to show that he likely would have succeeded at trial, but only that his decision to go to trial would have been rational regardless of the outcome. Defendant argues that neither his attorney for his robbery plea nor his attorney for his retail theft plea informed him of the deportation consequences thereof, [2] and that he has made a substantial showing that had his attorneys informed him that his guilty pleas could lead to deportation, his decision to forego the plea deals and go to trial would have been rational due to his personal and family ties to the United States as well as his fear that his life could be endangered if deported to the Middle East. Accordingly, defendant contends he has made a substantial showing of

[2] The State does not dispute that both the attorney in the robbery case and the attorney in the retail theft case failed to inform defendant that his guilty pleas thereto could lead to his deportation and, thus, defendant sufficiently showed his attorneys' conduct was deficient under the first *Strickland* prong.

ineffective assistance of counsel and that we should reverse and remand for a third-stage evidentiary hearing.

¶ 28 The State counters that *Padilla* did not enunciate a new prejudice standard to be applied in cases involving a counsel's alleged ineffectiveness in failing to advise a defendant of the deportation consequences of his guilty plea. The State argues we should follow *Hall* and its progeny which hold that a defendant alleging ineffectiveness of counsel with respect to his guilty plea must assert a claim of actual innocence or articulate a plausible defense, thereby showing he was likely to succeed at trial had he foregone his guilty plea.

¶ 29 Since *Padilla*, the various districts of this court have considered the question of what must be shown to establish prejudice under the second prong of *Strickland* when a *Padilla* violation has occurred. One line of cases holds that a defendant must show actual innocence or a plausible defense at trial. The other, more recent line of cases holds that a defendant need not show actual innocence or a plausible defense as long as the decision to go to trial would have been rational. We discuss each line of cases in turn.

¶ 30 Cases Requiring a Showing of Actual Innocence or a Plausible Trial Defense

¶ 31 In *People v. Gutierrez*, 2011 IL App (1st) 093499, the defendant there, a Mexican native, pleaded guilty to first degree murder. *Id.* ¶ 4. Defendant subsequently filed an application for leave to file a successive postconviction petition, arguing that his counsel was ineffective for failing to inform him that his guilty plea would subject him to deportation. *Id.* ¶ 7. Defendant argued that had he been so informed, he would have opted to go to trial because the evidence against him was not overwhelming. *Id.* The trial court denied leave to file. *Id.* ¶ 8. On appeal, the First District determined that *Padilla* had not addressed the issue of what must be shown to establish prejudice under the second prong of *Strickland* when counsel fails to inform defendant

of the immigration consequences of his guilty plea (*id.* ¶ 43). The First District applied the *Pugh/Hall* standard requiring a defendant to show he likely would have succeeded at trial (*id.* ¶ 44) and concluded that defendant could not show prejudice because the evidence against him was overwhelming. *Id.* ¶ 45.

¶ 32 In *People v. Pena-Romero*, 2012 IL App (4th) 110780, the defendant there, a non-citizen of the United States, pleaded guilty to attempted first degree murder. *Id.* ¶ 4. Defendant subsequently filed an amended motion to withdraw the guilty plea and vacate or reduce the sentence, arguing in pertinent part that his guilty-plea counsel was ineffective for failing to inform him he could be deported as a consequence of his plea. *Id.* ¶ 7. The trial court denied the amended motion. *Id.* ¶ 8.

¶ 33 On appeal, defendant argued that, under *Padilla*, his counsel's failure to advise him of the deportation consequences of his guilty plea rendered counsel ineffective. *Id.* ¶ 12. Citing *Hall*, the Fourth District held that, to establish prejudice, defendant's claim must be accompanied by a claim of innocence or the articulation of a plausible defense such that he likely would have been successful at trial. *Id.* ¶ 16. The Fourth District held that defendant did not make a claim of innocence or articulate a plausible defense, and therefore his claim of ineffective assistance failed. *Id.* ¶ 17.

¶ 34 The Fourth District further held that, even if it excused defendant's failure to claim innocence or raise a plausible defense as required by *Hall*, the result would be the same:

> "[D]efendant does not explain how his alleged ignorance of the deportation consequences factored into his decision to plead guilty. Or, stated differently, he does not explain why, had he known of that consequence, he would have pleaded not guilty and insisted on going to trial. While *Padilla* did not resolve the prejudice prong, it stated

> what was required for a defendant to show prejudice: 'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.' [Citation.] It is hard to imagine how rejection of the plea offer in this case would have been rational. Going to trial would not have spared defendant of the effect of deportation if he were convicted, which was likely, and would also have subjected him to the possibility of a greater term of imprisonment. The evidence against defendant is overwhelming. Essentially, the prejudice defendant alleges is dissatisfaction about the effects of deportation, which would not have changed if he had gone to trial and been convicted." *Id.* ¶ 18.

¶ 35 Cases Requiring that the Decision Go to Trial Would Have Been Rational

¶ 36 In *People v. Guzman*, 2014 IL App (3d) 090464, aff'd on other grounds, 2015 IL 118749, the defendant there, a non-citizen of the United States, pleaded guilty to aggravated possession of stolen firearms. *Id.* ¶ 1. On appeal, he argued in pertinent part that the trial court erred by denying his motion to withdraw his guilty plea because trial counsel committed ineffective assistance under *Padilla* by failing to inform him of the potential deportation consequences of his conviction. *Id.* Defendant contended he was prejudiced thereby because had he known of the deportation consequences he would not have pleaded guilty, as he had a plausible defense and he has family living in the United States. *Id.* ¶ 34.

¶ 37 The Third District held that defendant's claims were sufficient to establish prejudice under *Padilla*, as "a trial would provide defendant the opportunity to contest the State's evidence" and, "[m]oreover, defendant's family ties and bonds to the United States provide a rational basis to reject a plea deal. [Citations.] As a result, defendant might have been willing to risk a lengthier prison sentence in exchange for even a slight chance of prevailing at trial and

thereby avoiding deportation. Counsel's deficient performance deprived defendant of a chance to avoid deportation if he had prevailed at trial. Thus, defendant was prejudiced by his attorney's failure to advise him of the risk of deportation." *Id.* ¶ 35.[3]

¶ 38 In *People v. Deltoro*, 2015 IL App (3d) 130381, the defendant there, a native of Mexico who had resided in the United States for 35 years and whose friends and family resided in the United States (*id.* ¶ 26), pleaded guilty to two counts of unlawful possession of a controlled substance with intent to deliver. *Id.* ¶ 3. He subsequently filed a postconviction petition alleging in pertinent part that his trial counsel committed ineffective assistance by failing to advise him he could lose his status as a legal permanent resident and be deported from the United States as a consequence of his guilty plea. *Id.* ¶¶ 4, 5. The circuit court summarily dismissed defendant's petition. *Id.* ¶ 8.

¶ 39 On appeal, defendant cited *Padilla* and argued he was prejudiced by his counsel's failure to inform him of the deportation consequences of his guilty plea because, if he had been so informed, he rationally would have rejected the plea offer as all his friends and family live in the United States and as he was not guilty of the charged offenses. *Id.* ¶ 21.

¶ 40 The Third District noted its earlier holding in *Guzman* that a defendant's claim that he had a plausible defense and that he had family living in the United States was sufficient to show the requisite prejudice under *Padilla*. *Id.* ¶ 23. The Third District then stated:

> "While the apparent existence of a plausible trial defense, as in *Guzman*, may make a defendant's showing of prejudice stronger, it is not *required* in order to show prejudice in cases involving counsel's failure to advise a defendant as to the immigration

[3] The trial court in the present case determined that since all three justices wrote separate opinions in *Guzman*, there was no majority opinion. Careful review reveals that a majority of the justices in *Guzman* agreed on the *Padilla* analysis.

> consequences of his guilty plea. Such a requirement makes sense in other contexts. For example, if a defendant claims that his counsel provided ineffective assistance by failing to discover exculpatory evidence or by failing to inform the defendant of a possible affirmative defense before inducing him to plead guilty, the prejudice to the defendant (if any), will depend on whether the presentation of the undiscovered evidence or the assertion of the affirmative defense at issue could have resulted in an acquittal at trial. [Citation.] However, that is not the case when counsel fails to advise a defendant of the risks of deportation, because the defendant may suffer prejudice in that instance regardless of the strength of his case at trial. As noted, to show prejudice in such cases, the defendant is only required to show that a decision to reject the plea bargain would have been 'rational under the circumstances.' [Citation.] A defendant facing potential deportation may show that his decision to reject a plea offer and go to trial would have been 'rational' without showing that he would likely have succeeded at trial." (Emphasis in the original.) *Id*. ¶ 24.

¶ 41 In *People v. Lopez*, 2015 IL App (1st) 142260, the defendant there, a non-citizen of the United States, pleaded guilty to possession of a controlled substance (*id*. ¶ 1) and ultimately filed a postconviction petition seeking to withdraw his plea in pertinent part because his attorney committed ineffective assistance by failing to inform him he could be deported as a consequence of pleading guilty. *Id*. ¶ 7. The trial court dismissed the petition. *Id*. ¶ 1.

¶ 42 On appeal, the First District noted our supreme court's statement in *Hughes*, that there may be circumstances where defendant could show that counsel's deficient performance during the plea process prejudiced him even where he was not actually innocent or did not have a plausible defense (*id*. ¶ 33); it also cited with approval the Third District opinion in *Deltoro* that

the existence of a plausible defense is not required to show prejudice in cases where counsel fails to inform defendant of the deportation consequences of his guilty plea, as long as the decision to forego the guilty plea and go to trial would have been rational had he been so informed. *Id*. ¶ 37. The First District concluded that "when plea counsel fails to advise a defendant of the succinct, clear, and explicit immigration consequences of a guilty plea, an allegation of a plausible defense or actual innocence is not indispensible to a finding of prejudice." *Id*. ¶ 32. The First District further stated:

> "We hold that, given the facts alleged in the petition and supporting materials, taken as true, had he been properly advised of the consequences, defendant's decision to reject the plea bargain would have been rational under the circumstances. We note those circumstances include the nature of the offense and defendant's lack of criminal history as revealed at the plea hearing. In defendant's affidavit attached to his response to the State's motion to dismiss, defendant averred counsel '*never* advised me that [pleading guilty] would cause me to be immediately deported from the United States of America and separated from my family. If they would have explained to me that by pleading guilty I would have been exiled from this country forever, I *never* would have pleaded guilty or rather would have [asked] for a modification to avoid getting automatically deported.' (Emphases in original.) On appeal, defendant argues in his appellate brief he 'came to the United States as a toddler and his entire immediate family is in this country. Had he known the plea would ensure his deportation *** and cause him to be separated from his family-he would have rejected the plea bargain. And this decision would have been completely rational considering [his] family ties in the United States-and his incentive to avoid deportation.' " *Id*. ¶ 38.

¶ 43 The First District acknowledged the prior decisions in *Pena-Romero* and *Gutierrez*, which held that defendant satisfies the prejudice prong only by making a claim of actual innocence or articulating a plausible defense. However, the First District determined to follow *Deltoro* instead, finding it was the better-reasoned case. *Id.* ¶ 39. The First District also distinguished *Gutierrez* on its facts, noting that: "[u]nlike the defendant in *Gutierrez*, the claimed prejudice to defendant is not based on the strength of the evidence. Rather, defendant here claims he was prejudiced because he would rather have faced trial or entered a different plea rather than be deported, and, under the circumstances, that decision would have been perfectly reasonable." *Id.* ¶ 41.

¶ 44 In the present case, defendant asks us to follow *Guzman*, as well as *Deltoro* and *Lopez* (both of which were issued subsequent to the circuit court's dismissal order) and hold that he was not required to show that he likely would have succeeded at trial, but rather that he needed only to show that his decision to reject the plea agreements and proceed to trial on armed robbery and retail theft would have been rational. The State responds that we should follow *Gutierrez* and *Pena-Romero* and affirm the second-stage dismissal due to defendant's failure to show he likely would have succeeded at trial on the armed robbery and retail theft charges.

¶ 45 We follow the more recent line of cases, *Guzman*, *Deltoro*, and *Lopez*, cited by defendant. We agree with the reasoning therein that a long-time resident of this country with family ties here may be prejudiced by his counsel's failure to inform him of the deportation consequences of his guilty plea, even if he likely would have been convicted at trial and given a longer prison sentence than that received as a result of the guilty plea. Such a person may rationally decide to reject a plea agreement and go to trial even where the evidence is against

him, as long as there is even the *slightest* chance he may prevail at trial and avoid being deported away from his family, friends, and country.

¶ 46 In the present case, defendant alleged in the supplement to his amended postconviction petition that had his attorneys informed him of the deportation consequences of his guilty pleas to robbery and to retail theft, he would have chosen to go to trial because "preserving the right to remain in the country is more important than any jail sentence he could receive." In support, defendant alleged that he and his entire family came to this country from Jordan over 25 years ago, when he was five, that both of his parents and his seven siblings are naturalized U.S. citizens, and that he was in the process of becoming a U.S. citizen, having applied for citizenship in 2007.

¶ 47 In his affidavit, defendant similarly attested that had he been made aware of the deportation consequences of pleading guilty to robbery and retail theft, he would have chosen to go to trial because he came to the United States as a small child, this is the only country he knows, and his family and friends are here.[4]

¶ 48 Taking all these allegations as true, as we must because the State filed a motion to dismiss instead of filing an answer (*Miller*, 203 Ill. 2d at 437), we find that defendant has made a substantial showing he would have acted rationally by rejecting the plea agreements in his robbery and retail theft cases and deciding to go to trial, given his long-standing family ties here. Therefore, defendant has made a substantial showing of the requisite prejudice necessary for an ineffective assistance claim predicated on counsels' failure to inform him of the deportation

[4] Defendant also asserted in his supplement that "[i]f deported, he fears that his life could be in danger due to his religious beliefs" and, as such, that "deportation is a much greater consequence than jail time." Defendant failed to attest to this in his affidavit, and the assertion is not supported in the record, and therefore we do not consider it when determining whether a third-stage evidentiary hearing is required. See *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

consequences of pleading guilty, and we reverse the second-stage dismissal and remand for a third-stage evidentiary hearing.

¶ 49 The circuit court shall serve as the fact finder at the evidentiary hearing, and will determine witness credibility, decide the weight to be given the testimony and evidence, resolve any evidentiary conflicts, and determine whether the evidence introduced demonstrates that defendant is, in fact, entitled to relief. *People v. Domagala*, 2013 IL 113688, ¶ 34.

¶ 50 The State argues that *People v. Delvillar*, 235 Ill. 2d 507 (2006), compels us to affirm the dismissal order. *Delvillar* involved the trial court's failure to admonish defendant about the immigration consequences of his guilty plea pursuant to section 113-8 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-8 (2006)), and did not involve counsel's rendering of ineffective assistance under the sixth amendment by failing to inform him of those consequences. Accordingly, *Delvillar* is inapposite.

¶ 51 For the foregoing reasons, we reverse the second-stage dismissal of defendant's amended postconviction petition and remand for a third-stage evidentiary hearing.

¶ 52 Reversed and remanded.

¶ 53 JUSTICE DELORT, specially concurring:

¶ 54 Two years ago, I authored an order reaching a different conclusion in a case involving similar facts. See *People v. Shimon*, 2014 IL App (1st) 122772-U. In *Shimon*, this court affirmed the dismissal of a post-conviction petition brought by an Australian citizen who was also a legal permanent resident of the United States. He pled guilty to a charge of possession of cannabis with intent to deliver and sought to overturn the resulting conviction, alleging that his attorney failed to inform him that his plea of guilty might lead to deportation. This court held

that he failed to make a substantial showing of ineffective assistance of counsel, largely because his post-conviction petition contained only the barest allegations regarding a potential defense.

¶ 55 Since this court issued *Shimon*, the law has developed in a direction markedly favorable to defendants. Many courts have now adopted the "game theory" or "rational roll of the dice" analysis espoused in this panel's order, which makes it easier for criminal defendants to pursue postconviction remedies when they alleged they were unaware they could be deported for the crime for which they pled guilty. See *People v. Guzman*, 2014 IL App (3d) 090464; *People v. Deltoro*, 2015 IL App (3d) 130381; *People v. Lopez*, 2015 IL App (1st) 142260. See also *DeBartolo v. United States*, 790 F.3d 775, 780 (7th Cir. 2015) (applying the same analysis in a habeas corpus context).

¶ 56 In affirming the *Guzman* court's judgment, our supreme court specifically noted that "noncitizen defendants who do not receive [possible deportation] advice from criminal defense counsel may be entitled to relief based on counsel's ineffective assistance if they can make the requisite showing of prejudice." *People v. Guzman*, 2015 IL 118749, ¶ 33.

¶ 57 These more recent authorities have persuaded me to reach a different conclusion than I did in *Shimon*. Accordingly, I concur in the court’s order in full.