

No. \_\_\_\_\_

---

---

In The  
**Supreme Court of the United States**

—◆—  
ROBERTO CARLOS VALDEZ-AVALOS,

*Petitioner,*

vs.

STATE OF ILLINOIS,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari To The  
Appellate Court Of Illinois, Third District**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
KENNETH JAMES HOGAN

*Counsel of Record*

KENNETH JAMES HOGAN, P.C.  
311 East Main Street, Suite 415  
Galesburg, Illinois 61401  
Telephone: (309) 226-4200  
Facsimile: (309) 414-7076  
E-mail: kjhpc@bbwave.net

*Counsel for Petitioner*

**QUESTION PRESENTED**

Did the trial court's general admonition, given during a guilty-plea colloquy, concerning possible adverse immigration consequences of a guilty plea cure the prejudice to petitioner (a noncitizen, permanent legal resident of the United States) resulting from his guilty-plea counsel's specific, repeated, and incorrect reassurances that the government would not deport petitioner, if he pled guilty to the felony drug offense of unlawful delivery of a controlled substance, so long as petitioner complied with the conditions of the agreed-upon term of probation?

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

The parties to the proceeding in the Appellate Court of Illinois, whose judgment is sought to be reviewed, are:

- Roberto Carlos Valdez-Avalos, defendant, appellant below, and petitioner here.
- State of Illinois, plaintiff, appellee below, and respondent here.

No corporations are involved in this proceeding.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT.....	ii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PRO- VISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	4
Guilty-Plea Proceedings.....	4
Post-Conviction Proceedings.....	5
The Trial Court’s Decision.....	8
The Appellate Court’s Decision.....	11
The Illinois Supreme Court’s Order Denying Review.....	13
REASONS FOR GRANTING THE WRIT.....	13
CONCLUSION.....	19
 APPENDIX	
Order, Appellate Court of Illinois, Third Dis- trict, filed February 5, 2013.....	App. 1
Opinion and Order, Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois, filed February 7, 2012.....	App 12
Order denying petition for leave to appeal, Supreme Court of Illinois, filed May 29, 2013.....	App. 18

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Chaidez v. United States</i> , 568 U.S. ____ (2013).....	16
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963).....	15
<i>Hill v. Lockhart</i> , 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).....	16
<i>McMann v. Richardson</i> , 397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970).....	15
<i>Padilla v. Kentucky</i> , 559 U.S. ____, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).....	9, 15, 16
<i>People v. Correa</i> , 108 Ill. 2d 541, 485 N.E.2d 307 (1985).....	16
<i>People v. Hall</i> , 217 Ill. 2d 324, 841 N.E.2d 913 (2005).....	13, 17
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	<i>passim</i>
<i>United States v. Akinsade</i> , 686 F.3d 248 (4th Cir. 2012).....	17

## CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VI.....	2, 14, 15
U.S. Const., amend. XIV, § 1, cl. 2 .....	2, 15

## STATUTES

8 U.S.C. § 1227(a)(2)(B)(i) (2008).....	2, 3, 14
725 ILCS 5/113-8 (West 2006).....	<i>passim</i>
725 ILCS 5/122-1 through 122-8 (West 2010) .....	5

**OPINIONS BELOW**

The unpublished order of the Appellate Court of Illinois, Third District (the “Illinois Appellate Court” or “Appellate Court”), filed February 5, 2013, the subject of this petition, is reported at 2013 IL App (3d) 120192-U. (Appendix [“App.”] 1-11.) The order of the Supreme Court of Illinois filed May 29, 2013, denying discretionary review is not published in the official reports. (App. 18.)

The order of the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois (the “trial court”), filed February 7, 2012, is not published in the official reports. (App. 12-17.)

**JURISDICTION**

The Illinois Appellate Court filed its order on February 5, 2013. (App. 1-11.) The Supreme Court of Illinois filed its order denying discretionary review on May 29, 2013. (App. 18.) This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Appellate Court’s February 5, 2013 decision.



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

The Fourteenth Amendment to the Constitution of the United States, Section 1, Clause 2:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1, cl. 2.

Section 1227(a)(2)(B)(i) of the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq.* (2008)):

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

\* \* \*

(2) Criminal offenses

\* \* \*

(B) Controlled substances

(i) Conviction

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. § 1227(a)(2)(B)(i) (2008).

Section 113-8 of the Code of Criminal Procedure of 1963 (Illinois) (725 ILCS 5/1-1 *et seq.* (West 2006)):

§ 113-8. Advisement concerning status as an alien. Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere, to a misdemeanor or felony offense, the



court shall give the following advisement to the defendant in open court:

“If you are not a citizen of the United States, you are hereby advised 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.”

725 ILCS 5/113-8 (West 2006).



## **STATEMENT OF THE CASE**

### **Guilty-Plea Proceedings**

An Iroquois County grand jury charged petitioner, Roberto Carlos Valdez-Avalos, with two felony drug offenses; unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver. (App. 2-3.) On June 18, 2007, the State’s prosecution of petitioner proceeded to a hearing regarding a fully-negotiated plea agreement by the terms of which petitioner would plead guilty to unlawful delivery of a controlled substance in exchange for a recommended sentence of 48 months’ probation. (App. 12.) Petitioner was represented by attorney Martha Danhausen. (App. 3, 14.) A Spanish-language interpreter was present to translate the proceedings for petitioner. (App. 3.) During the guilty-plea hearing, the trial court admonished petitioner concerning possible immigration

consequences of a guilty plea with the aid of the interpreter in the following manner:

[I]f he is not a natural citizen of the United States, . . . pleading guilty to this crime could cause him to be deported or could keep him from becoming a citizen of this country. Does he understand that?

The interpreter replied, “yes.” (App. 3.) The court then accepted petitioner’s guilty plea and sentenced him to 48-months’ probation. (*Id.*)

### **Post-Conviction Proceedings**

In 2011, petitioner filed a petition under Illinois’ Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2010)) seeking to vacate his 2007 guilty plea. (App. 2, 12-14.) In the petition, petitioner alleged that his guilty-plea counsel had misadvised him that his guilty plea would not impact his immigration status or subject him to deportation. (App. 3.) Petitioner averred that he would not have pled guilty if he had known that his plea would expose him to deportation. (*Id.*)

The allegations of the petition proceeded to an evidentiary hearing. (App. 4, 12.) Petitioner testified that he was born in Mexico and had come to the United States in approximately 1991. (App. 4.) He subsequently married a U.S. citizen and has two children. (*Id.*) He has a sixth-grade education and speaks little English. (App. 15.) He has worked as a cook at various restaurants over the years. (App. 4.)

He complied with all the terms of his probation in the present case. (*Id.*) Other than his conviction in the case at bar, petitioner has had no involvement with the criminal justice system. (*Id.*)

Petitioner testified that he hired attorney Martha Danhausen to defend him. (App. 4.) He met with her on several occasions prior to the guilty plea. (*Id.*) Petitioner was concerned about his immigration status. (*Id.*) Attorney Danhausen told him that his guilty plea to unlawful delivery of a controlled substance would not impact his immigration status. (*Id.*) Danhausen advised him that, if he pled guilty, complied with probation, and did not get into any more trouble, he would not be deported. (App. 4, 14.)

Petitioner testified that he relied upon Danhausen's advice and would not have entered the guilty plea if he had known that it would subject him to deportation. (App. 4.) Petitioner heard the trial court's admonition concerning possible immigration consequences of a guilty plea. (*Id.*) But petitioner did not believe the admonition conflicted with Danhausen's advice. (*Id.*) Danhausen died shortly after the guilty plea. (*Id.*)

In late 2010, petitioner received notification from the United States Department of Homeland Security (the "Department") that it intended to remove him from the United States. (App. 5.) Prior to receiving the notification from the Department, petitioner was unaware that he could be deported based on the 2007 guilty plea. (*Id.*)

After offering his own testimony, petitioner called Investigator Clint Perzee of the Iroquois County Sheriff's Office to testify. (App. 16.) Perzee testified that petitioner was arrested for delivery of a controlled substance as the result of a "controlled buy" which employed the services of a confidential informant who made a drug purchase from petitioner at his residence. (*Id.*) Officers strip searched the informant prior to the operation to ensure that he did not have any illegal drugs on his person. (*Id.*) The informant was wearing an audio and video recording device. (*Id.*) Officers could not observe the informant once he entered petitioner's residence and did not make contact with him until he later emerged from the residence. (*Id.*) When the informant did emerge from petitioner's home, officers kept him under surveillance until he was in police custody. (*Id.*) Once in custody, a second search of the informant revealed the presence of more than one gram of a substance containing cocaine. (*Id.*)

The trial court watched a recording of the video and audio taken from the surveillance equipment worn by the informant. (App. 16.) The trial court made the following observations regarding the recording:

Most of the video is unclear, apparently due to poor lighting. At one point, someone puts what appears to a controlled substance on a table. Towards the end of it, another man is seen apparently snorting cocaine. This man is similar in appearance to [petitioner]. (*Id.*)

## The Trial Court's Decision

On February 7, 2012, the trial court filed a written opinion denying post-conviction relief (App. 12.), containing the following pertinent findings:

3. As to [petitioner's] claim of ineffective plea counsel, the *Strickland* test applies. [Petitioner] must show that counsel's representation was deficient, and that he was prejudiced thereby.

4. [Petitioner] testified that his plea counsel, Attorney Danhausen, basically told him he would not be deported if he pled guilty. This makes sense – he was legally in America, had a family here, and was concerned about his immigration status – why would he plead guilty knowing it would cause his deportation?

The State complains that [petitioner's] recollection is poor, and that he hasn't more fully documented his claims of what Attorney Danhausen specifically told him. Attorney Danhausen is long dead. She was a sole practitioner. It is unknown whether her files still exist. It must also be noted that [petitioner] has a sixth grade education, and speaks little English.

Both sides agree that the deportation consequences of a felony drug conviction were clear in 2007. Deportation was almost certain after a conviction.

This Court finds that [petitioner] has met the first prong of *Strickland*; Attorney Danhausen's representation at the plea fell below the standard, as set out in *Padilla*.

5. However, there is another issue in this case which was not present in *Padilla*. In this case, the Court gave the admonition required by 725 ILCS 5/113-8. [Petitioner] was told that his plea could result in deportation. [Petitioner] admitted being told this.

Even if Attorney Danhausen's advice was wrong (*sic*), is [petitioner] entitled to relief for relying on it, when the Court told him something different? At the very least, doesn't the admonition create an obligation on [petitioner] to speak up if he's being told something different by his lawyer? If [petitioner] can pursue post-conviction relief despite the court's 113-8 admonition, then what is the purpose of giving it?

While the case could perhaps be decided on this ground alone, in the interest of a complete adjudication of the matter, the court will proceed with the rest of the *Strickland* analysis.

6. [Petitioner] must still satisfy the second prong of *Strickland*. In this context, he must show a reasonable probability that[,] if he had gone to trial[,] he would have prevailed. If [petitioner] would likely have been found guilty at trial, then he is not prejudiced by his mis-advised guilty plea, since in either event he winds up facing deportation.

The only evidence on this issue came from Officer Perzee, the lead investigator in this case. He testified that the charge here was the result of a “controlled buy” using an undercover informant. He testified that the informant was strip searched beforehand and kept in constant surveillance until he entered [petitioner’s] home. When he exited the home he was again watched until he was in police custody, where a second search revealed a controlled substance. The substance was tested; it was over 1 gram of cocaine.

While in the house, the informant wore a hidden camera, pursuant to Court order. This Court has watched the video taken with the camera. Most of the video is unclear, apparently due to poor lighting. At one point, someone puts what appears to a controlled substance on a table. Towards the end of it, another man is seen apparently snorting cocaine. This man is similar in appearance to [petitioner].

[Petitioner] testified, but never mentioned the incident. He gave no evidence from which it could be inferred that he had a defense to the charge. He did not repudiate his guilty plea or proclaim his innocence.

It is not enough for [petitioner] to speculate about what might happen if he had a trial. [Petitioner] has the burden on this issue[] and he has not met the burden on this record.

[Petitioner] must satisfy both prongs of *Strickland* to obtain relief. Since [petitioner] has failed to show prejudice, his claim must fail.

For the reasons stated herein, the Court finds that [petitioner's] Petition for Post-Conviction Relief should be denied. (App. 14-16.)

### **The Appellate Court's Decision**

After hearing oral argument, on February 5, 2013, the Appellate Court filed its order affirming the trial court's judgment. (App. 1-11.) In its order, the Appellate court addressed petitioner's claim of ineffective assistance of counsel. (App. 8-10.) Noting that the State had conceded that guilty-plea counsel's performance was constitutionally deficient, the Appellate Court discussed the prejudice to petitioner in the following manner:

To show prejudice under *Strickland* [*v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984)], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have entered the plea. *People v. Hughes*, 2012 IL 112817 (2012). The question is whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *People v. Royark*, 215 Ill. App. 3d 255 (1991). A bare allegation that the petitioner would have insisted on trial, though, is not enough to establish prejudice under



*Strickland. People v. Rissley*, 206 Ill. 2d 403 (2003). While the petitioner need not show that he would have been acquitted at trial, he must articulate a plausible defense that likely would have been successful at trial. *People v. Hughes*, 2012 IL 112817, ¶ 60.

The State argues that the petitioner suffered no prejudice because he did not establish that he would have pled guilty if counsel had told him that he risked deportation by pleading guilty. The State acknowledges that the trial court applied the wrong standard in determining prejudice. In this case, the petitioner did claim that he would have insisted on a trial if he had been informed of the deportation consequences of his plea. Since the testimony at the evidentiary hearing established that there were problems with the videotaped transaction that the petitioner could have challenged at trial, we find that the petitioner arguably showed that as a plausible defense.

However, it is not necessary to the outcome of this case to determine whether the petitioner's defense likely would have been successful at trial. We agree with the State that the trial court's admonition in accordance with section 113-8 of the Code of Criminal Procedure [of 1963] (725 ILCS 5/113-8 (West 2008)) overcame any prejudice caused by [guilty-plea counsel's] erroneous advice. The petitioner acknowledges that the trial court substantially complied with section 113-8 of the Code of Criminal Procedure by

admonishing him that his guilty plea subjected him to deportation consequences. Although a trial court's admonitions are not sufficient in every case to overcome erroneous advice from counsel, the trial court's admonitions in this case were sufficiently related to counsel's erroneous advice to overcome the prejudice create by that advice. *See People v. Hall*, 217 Ill. 2d 324 (2005). Since he cannot show prejudice, the petitioner cannot prevail on his claim of ineffective assistance of counsel. (App. 9-10.)

### **The Illinois Supreme Court's Order Denying Review**

On May 29, 2013, the Supreme Court of Illinois, without comment, denied discretionary review of the Appellate Court's judgment. (App. 18.)



### **REASONS FOR GRANTING THE WRIT**

**The trial court's general admonition that petitioner's guilty plea might have adverse immigration consequences did not cure the specific, repeated, and incorrect reassurances of his guilty-plea counsel that the government would not deport petitioner if he pled guilty and complied with the conditions of the agreed-upon term of probation.**

Petitioner, a permanent legal resident of the United States, pled guilty to a felony drug charge.

Prior to the plea, his counsel told him that the government would not deport him if he pled guilty and complied with the conditions of the agreed-upon term of probation. As a result of his guilty plea, petitioner now faces deportation from the United States, his home for more than two decades. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2008) (“[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance . . . is deportable”). After an evidentiary hearing, the trial court denied petitioner’s request, under Illinois’ Post-Conviction Hearing Act, to vacate his conviction, withdraw his guilty plea, and reinstate his not-guilty plea. The trial court reasoned that petitioner could not show that he was prejudiced by his guilty-plea counsel’s advice because the court had admonished petitioner that pleading guilty “could cause him to be deported or could keep him from becoming a citizen of this country.” (App. 3, 15.) The Appellate Court affirmed based on this same rationale. (App. 10.) Contrary to the judgments of the lower courts, the trial court’s general admonition concerning possible adverse immigration consequences to petitioner’s guilty plea did not cure the prejudice resulting from his guilty-plea counsel’s specific, repeated, and incorrect reassurances to petitioner that the government would not deport him so long as he pled guilty and complied with the conditions of probation.

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the

accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const., amend. VI. The Sixth Amendment right to counsel includes the accused’s right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970). This right is a fundamental right and, accordingly, applicable to the States through the Due Process Clause of the 14th Amendment (U.S. Const., amend. XIV, §1, cl. 2). See *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963).

To prevail on a claim of ineffective assistance of counsel, the accused must show that his counsel’s assistance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In particular, the accused must demonstrate that his counsel’s assistance was objectively unreasonable under prevailing professional norms, and that there is a reasonable probability that, but for counsel’s unprofessional conduct, the result of the proceeding would have been different. *Id.*

The State conceded in the Appellate Court – and both the trial court and the Appellate Court held – that the performance of petitioner’s guilty-plea counsel was constitutionally deficient when she misinformed petitioner that the government would not deport him if he pled guilty so long as he complied with the conditions of the agreed-upon term of probation. (App. 9-10.) It should be noted that the finding of deficient performance did not depend on an application of this Court’s decision in *Padilla v. Kentucky*, 559 U.S. \_\_\_,

130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), which held that, to render competent counsel, a criminal defense attorney must inform his or her client whether the client's guilty plea carries a risk of deportation. *Padilla*, 559 U.S. \_\_\_, 130 S. Ct. at 1486, 176 L. Ed. 2d 284. Nearly a quarter century before *Padilla*, the Supreme Court of Illinois – in *People v. Correa*, 108 Ill. 2d 541, 485 N.E.2d 307 (1985) – held that guilty-plea counsel's provision of misinformation concerning the deportation consequences of a guilty plea rendered the plea involuntary and constituted ineffective assistance of counsel where counsel's misrepresentations were a primary factor in defendant's decision to plead guilty. *Correa*, 108 Ill. 2d at 550-53, 485 N.E.2d 307. Accordingly, this Court's recent decision in *Chaidez v. United States*, 568 U.S. \_\_\_ (2013), holding that *Padilla* does not apply retroactively, is irrelevant to the case *sub judice*.

In the context of a guilty plea, an accused claiming ineffective assistance of counsel must establish, in addition to counsel's deficient performance, a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have instead gone to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Stated another way, the question of *Strickland* prejudice in a guilty-plea context is "whether counsel's constitutionally ineffective performance affected the outcome of the plea process" (*Hill*, 474 U.S. at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203).

Contrary to the lower courts' decisions in this matter, petitioner's ineffective-assistance-of-counsel claim is not defeated by the trial court's substantial compliance with section 113-8 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-8 (West 2006)). Although a trial court's admonitions cannot be disregarded as a mere formality (*People v. Hall*, 217 Ill. 2d 324, 841 N.E.2d 913, 921-23 (2005)), where an admonition does not specifically negate the affirmative misrepresentations of defense counsel, the admonition is insufficient to overcome the prejudice of counsel's erroneous advice. See *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) (holding that court's admonition that defendant's plea of guilty might lead to deportation was insufficient to overcome the prejudice resulting from guilty-plea counsel's erroneous advice that the offense to which defendant pled guilty was not a "categorically deportable" offense).

During the guilty-plea colloquy, petitioner acknowledged his understanding that "[i]f he is not a natural citizen of the United States, . . . pleading guilty to this crime could cause him to be deported or could keep him from becoming a citizen of this country." (App. 3.) The trial court's general admonition that pleading guilty might cause petitioner to be deported or prevent him from becoming a citizen does not contradict guilty-plea counsel's specific and repeated reassurances to petitioner that he would not be deported if he pled guilty and complied with the conditions of probation. Petitioner could have rationally understood the trial court's warning that his

guilty plea might result in his deportation as entirely consistent with his counsel's advice that he would not be deported if he pled guilty and complied with the conditions of probation (App. 4.); *i.e.*, petitioner could have interpreted the court's admonition as a warning that, if he did not comply with the conditions of probation, he might then be deported. Moreover, it is unreasonable to require a lay person, especially one with a sixth-grade education and a limited facility in the English language (App. 15.), to interrupt a judge and question his attorney's specific advice in response to a general admonition concerning possible consequences of a guilty plea. Clearly, the trial court's paraphrase of the admonition set out in section 113-8 did not overcome the prejudice to petitioner occasioned by his counsel's specific and inaccurate advice concerning the immigration consequences of his guilty plea. Thus, petitioner established *Strickland* prejudice. Accordingly, petitioner met his burden to show that he received ineffective assistance of counsel during the guilty-plea proceedings. Petitioner is, therefore, entitled to *vacatur* of his conviction, withdrawal of his guilty plea, and a remand for trial on the original charges of the grand jury's indictment.



**CONCLUSION**

For all of the foregoing reasons, this Court should grant petitioner's petition for writ of certiorari.

Respectfully submitted,

KENNETH JAMES HOGAN

*Counsel of Record*

KENNETH JAMES HOGAN, P.C.  
311 East Main Street, Suite 415  
Galesburg, Illinois 61401  
Telephone: (309) 226-4200  
Facsimile: (309) 414-7076  
E-mail: kjhpc@bbwave.net

*Counsel for Petitioner*



**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (3d) 120192-U  
Order filed February 5, 2013

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A.D., 2013

THE PEOPLE OF THE	)	Appeal from the Circuit
STATE OF ILLINOIS,	)	Court of the 21st
Plaintiff-Appellee,	)	Judicial Circuit,
	)	Iroquois County, Illinois
v.	)	
ROBERTO CARLOS	)	Appeal No. 3-12-0192
VALDEZ-AVALOS.,	)	Circuit No. 06-CF-61
Defendant-Appellant.	)	Honorable
	)	Gordon L. Lustfeldt,
	)	Judge, Presiding.

---

JUSTICE O'BRIEN delivered the judgment of the court.  
Presiding Justice Wright and Justice Schmidt concurred in the judgment.

---

**ORDER**

*Held:* The denial of a Post-Conviction Hearing Act petition was upheld on appeal because, although the petitioner's defense counsel rendered erroneous advice regarding deportation consequences to a permanent legal resident upon his guilty plea to a felony drug offense, the trial court's specific admonitions regarding the potential for deportation was sufficient to overcome the prejudice caused by counsel's advice.

The petitioner, Roberto Carlos Valdez-Avalos, pled guilty to the crime of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2008)) and was sentenced to 48 months' probation. While the petitioner was serving his probation, he was notified by the United States Department of Homeland Security that it was seeking to remove him under the provisions of the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq.* (2008)). The petitioner sought relief in the trial court under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2008)), but the petition was denied after an evidentiary hearing. The petitioner appealed.

**FACTS**

The petitioner, a permanent legal resident of the United States, was charged with two felony drug offenses, unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2008)) and unlawful

possession of a controlled substance with intent to deliver (720 ILCS 570/402(c)(2) (West 2008)). The petitioner was represented by an attorney, Martha Danhausen and he pled guilty to unlawful delivery of a controlled substance, a class 1 felony, in exchange for a recommended sentence of 48 months' probation. At the plea hearing, through a Spanish language interpreter, the trial court asked:

“If he is not a natural citizen of the United States, . . . pleading guilty to this crime could cause him to be deported or could keep him from becoming a citizen of this county. Does he understand that?”

The defendant, through the interpreter, responded “yes.” The trial court accepted the petitioner's guilty plea and sentenced him to 48 months' probation.

On May 27, 2011, the petitioner filed a “Motion to Vacate Conviction,” seeking to vacate his conviction and withdraw his guilty plea. The State filed a motion to dismiss the motion, arguing that it was untimely. In response, on July 5, 2011, the petitioner filed an amended motion to vacate, explicitly pleading under the Post-Conviction Hearing Act. In the motion, the petitioner argued that he would not have pled guilty if his attorney had advised him that his guilty plea would impact his immigration status or subject him to deportation. He alleged that he was not culpably negligent for the untimely filing of his request for relief. The State again moved to dismiss, arguing that the motion was untimely and that the

petitioner lacked standing because he had been discharged from probation on June 18, 2011.

The trial court denied the motion to dismiss, and it held an evidentiary hearing on the postconviction petition. The petitioner testified that he was born in Mexico and that he came to the United States in approximately 1991. He married a U.S. citizen, and he had two children. He testified that he worked as a cook in various restaurants, and he complied with all the terms of his probation in this case. This case was his only involvement with the criminal justice system. The petitioner testified that he hired Danhausen to represent him in the criminal matter, and he met with her on a number of occasions. The petitioner testified that he told Danhausen that he was concerned about his immigration status. According to the petitioner, he and Danhausen discussed the guilty plea, and Danhausen advised him that a plea would not impact his immigration status. She advised him that if he pled guilty, complied with probation, and did not get into any more trouble, he would not be deported.

The petitioner testified that he relied on that advice and would not have entered a plea if he knew it subjected him to deportation. He heard the trial court's admonition that a guilty plea could cause him to be deported, but he did not question it because he did not think it conflicted with Danhausen's advice. Danhausen died soon after the plea, so she could not testify and it was unknown whether any of her files still existed.

The petitioner testified that late in 2010, he received a notice from United States Department of Homeland Security advising him of removal proceedings under the Immigration and Nationality Act. Prior to receiving the notice, the petitioner did not know of any problem with his immigration status. After receiving the notice, the petitioner spoke with two immigration attorneys, and the motion to vacate was filed on their advice.

The trial court ruled that the petition was timely, finding that the July 5, 2011, filing under the Post-Conviction Hearing Act was a continuation of the motion to vacate filed on May 27, 2011. As of May 27, the petitioner was still on probation. Also, the trial court found that the petitioner was free from culpable negligence in filing his petition after the three-year limit, primarily because the government did not make their decision to begin deportation proceedings against the petitioner until after the three-year period.

The trial court applied the test from *Strickland v. Washington*, 466 U.S. 668 (1984), to the petitioner's claim of ineffective assistance of counsel, and found that Danhausen's representation was deficient. The trial court noted, however, that the petitioner was given the admonition required by section 113-8 of the Code of Criminal Procedure (725 ILCS 5/113-8 (West 2010)) at the plea hearing, and the petitioner acknowledged that he was so admonished. The trial court questioned whether the admonition alone was sufficient to overcome the counsel's deficient advice,

but did not make a ruling on that basis. It denied the petition on the basis that the petitioner failed to show prejudice because he failed to show a reasonable probability that, if he had gone to trial, he would have prevailed. The petitioner appealed.

### ANALYSIS

The Post-Conviction Hearing Act (the Act) provides a remedy to a criminal defendant whose constitutional rights were substantially violated in his original trial or sentencing hearing 725 ILCS 5/122-1 et seq. (West 2008); *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). The Act provides a three-stage process, and, at the first stage, the trial court determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Bocclair*, 202 Ill. 2d 89 (2002). At the second stage, the trial court must determine whether the petition makes a substantial showing of a constitutional violation. *People v. Hodges*, 234 Ill. 2d 1 (2009). If the petition survives dismissal at the second stage, it proceeds to the third stage, where the trial court conducts an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 2008).

When there are fact-finding and credibility determinations to be made, we review the denial of a postconviction petition following a third-stage evidentiary hearing to determine whether it was manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458 (2006). When no such determinations are necessary, and the

issues are purely questions of law, we apply a *de novo* standard. *Id.*

The petitioner sought to vacate his conviction on the basis of ineffective assistance of counsel, and his claim proceeded to a third-stage evidentiary hearing. As an initial matter, the State argues that the petitioner lacked standing to file a postconviction petition because, when the petitioner filed his “Amended Motion to Vacate Conviction Pursuant to the Post Conviction Hearing Act,” he was no longer on probation. The trial court found that the petition was timely because it was a continuation of the petitioner’s “Motion to Vacate Conviction,” which the State acknowledges was filed while the petitioner was still on probation. However, the State argues that, since the petitioner’s original motion did not reference the Post-Conviction Hearing Act, it should not be considered a continuation.

In the petitioner’s motion to vacate, the petitioner sought to vacate his conviction and withdraw his guilty plea on the basis of ineffective assistance of counsel in the plea proceedings. The petitioner’s amended motion alleged the same facts and the same deprivation of constitutional rights, but expressly invoked the Act. It is clear that a trial court can recharacterize a *pro se* filing as a request for relief under the Act, if the filing alleges a deprivation of constitutional rights cognizable under the Act. *People v. Shellstrom*, 216 Ill. 2d 45 (2005). This is allowed because a *pro se* petitioner’s lack of knowledge might cause him to select the wrong method for collaterally

attacking his conviction. *Id.* Although the petitioner was represented by counsel, we find that the petitioner's amended motion was a continuation of the original filing.

The State also argues that the petition was untimely because it was not filed within three years of the petitioner's conviction. Section 122-1 of the Act provides that, if the defendant does not file a direct appeal, the postconviction petition must be filed no later than three years from the date of conviction, unless the petitioner alleges facts that show that the delay was not due to his culpable negligence. 725 ILCS 5/122-1(a-5)(c) (West 2008). The State argues that the petitioner failed to allege facts in his original motion that showed a lack of culpable negligence.

At the evidentiary hearing, the petitioner testified that he first learned of the immigration proceedings in late 2010, he sought advice from more than one attorney, and the motion was filed in May 2011. The trial court found that the petitioner was free from culpable negligence because United States Department of Homeland Security waited more than three years to start deportation proceedings. Upon receiving notice, the petitioner acted quickly in conferring with attorneys, and the trial court's conclusion that the additional six month delay in filing the motion to vacate did not rise to the level of culpable negligence was not manifestly erroneous.

Thus, we reach the issue of whether trial counsel rendered ineffective assistance when she advised the



petitioner that he would not be deported if he pled guilty. To prevail on a claim of ineffective assistance, a petitioner must show that his counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). The State does not challenge the trial court's determination that the petitioner satisfied the first prong, that Danhausen's performance was deficient. In fact, where deportation is a clear consequence, a defense attorney is required to advise her client of the risk of adverse immigration consequences. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

To show prejudice under *Strickland*, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have entered the plea. *People v. Hughes*, 2012 IL 112817 (2012). The question is whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *People v. Royark*, 215 Ill. App. 3d 255 (1991). A bare allegation that the petitioner would have insisted on trial, though, is not enough to establish prejudice under *Strickland*. *People v. Rissley*, 206 Ill. 2d 403 (2003). While the petitioner need not show that he would have been acquitted at trial, he must articulate a plausible defense that likely would have been successful at trial. *People v. Hughes*, 2012 IL 112817, ¶ 60.

The State argues that the petitioner suffered no prejudice because he did not establish that he would not have pled guilty if counsel had told him that he risked deportation by pleading guilty. The State

acknowledges that the trial court applied the wrong standard in determining prejudice. In this case, the petitioner did claim that he would have insisted on a trial if he had been informed of the deportation consequences of his plea. Since the testimony at the evidentiary hearing established that there were problems with the videotaped transaction that the petitioner could have challenged at trial, we find that the petitioner arguably showed that as a plausible defense.

However, it is not necessary to the outcome of this case to determine whether the petitioner's defense likely would have been successful at trial. We agree with the State that the trial court's admonition in accordance with section 113-8 of the Code of Criminal Procedure (725 ILCS 5/113-8 (West 2008)) overcame any prejudice caused by Danhausen's erroneous advice. The petitioner acknowledges that the trial court substantially complied with section 113-8 of the Code of Criminal Procedure by admonishing him that his guilty plea subjected him to deportation consequences. Although a trial court's admonitions are not sufficient in every case to overcome erroneous advice from counsel, the trial court's admonitions in this case were sufficiently related to counsel's erroneous advice to overcome the prejudice created by that advice. See *People v. Hall*, 217 Ill. 2d 324 (2005). Since he cannot show prejudice, the petitioner cannot prevail on his claim of ineffective assistance of counsel.

CONCLUSION

The judgment of the circuit court of Iroquois County is affirmed.

Affirmed.

---

**STATE OF ILLINOIS  
IN THE CIRCUIT COURT OF THE  
21ST JUDICIAL CIRCUIT  
COUNTY OF IROQUOIS**

PEOPLE OF THE STATE OF ILLINOIS  
Plaintiff

vs. Case No. 06-CF-61

ROBERTO CARLOS VALDEZ-AVALOS,  
Defendant

**OPINION AND ORDER**

(Filed Feb. 7, 2012)

This case comes on for decision after a third-stage evidentiary hearing on the Defendant's Petition for Post-Conviction Relief. The Court heard evidence and arguments, and took the matter under advisement.

Having considered the record, the evidence, arguments, and applicable law, the Court finds as follows:

1. The Defendant pled guilty herein on June 18, 2007. He pled guilty to a Class 1 felony drug offense. He was represented by counsel, and an interpreter was also present. The Defendant was placed on four years' probation. The attorney who represented him at the plea (and prior thereto), died on December 27, 2007.

On May 27, 2011 Defendant's new counsel filed a document entitled "Motion to Vacate Conviction". This document noted the Defendant's impending deportation because of his earlier felony plea. It raised the issue of ineffective assistance of plea counsel, citing *Padilla v. Kentucky* 130 S. Ct. 1473 (2010), and requested the Defendant be allowed to vacate his guilty plea. This filing did not invoke the Post-Conviction Act.

The State filed a motion to dismiss, which was set for hearing on July 14, 2011. On July 5, 2011 Defendant filed a motion for relief under the Post-Conviction Act, raising the same issue set out in the Motion to Vacate.

This Court declined to dismiss the Post-Conviction motion on first stage review. The case moved to the second stage. The State filed a motion to dismiss alleging the petition was untimely. The State's motion was heard and denied on September 30, 2011. The State filed an Answer, and the case proceeded to a third state hearing. Evidentiary hearings were held on November 21, 2011 and on January 27, 2012.

2. The State has a continuing objection to this Court's consideration of the petition, on timely grounds. Their objection has two parts: (1) that the request was not filed while the Defendant was still on probation; and (2) the request was not filed within 3 years as required by the Act, and the Defendant has

not shown that he was free of culpable negligence in the delay.

This Court has construed the July 5, 2011 filing under the Act to be a continuation of the motion filed on May 27, 2011. It raised the same issue, cited the same seminal case, and requested the same relief. As to the three year limit, this Court finds that the Defendant was free of culpable negligence. Apparently, there is no statute of limitations on the government's decision to deport someone. If the INS can wait more than three years to deport someone, it seems unfair to cut off the Defendant's right after three years.

3. As to the Defendant's claim of ineffective plea counsel, the *Strickland* test applies. The Defendant must show that counsel's representation was deficient, and that he was prejudiced thereby.

4. The Defendant testified that his plea counsel, Attorney Danhausen, basically told him he would not be deported if he pled guilty. This makes sense – he was legally in America, had a family here, and was concerned about his immigration status – why would he plead guilty knowing it would cause his deportation?

The State complains that his recollection is poor, and that he hasn't more fully documented his claims of what Attorney Danhausen specifically told him. Attorney Danhausen is long dead. She was a sole practitioner. It is unknown whether her files still exist.

It must also be noted that the Defendant has a sixth grade education, and speaks little English.

Both sides agree that the deportation Consequences of a felony conviction were clear in 2007. Deportation was almost certain after a conviction.

This Court finds that the Defendant has met the first prong of *Strickland*; Attorney Danhausen's representation at the plea fell below the standard, as set out in *Padilla*.

5. However, there is another issue in this case, which was not present in *Padilla*. In this case, the Court gave the admonition required by 725 ILCS 5/113-8. The Defendant was told that his plea could result in deportation. The Defendant admitted being told this.

Even if Attorney Danhausen's advice was wrong, is the Defendant entitled to relief for relying on it, when the Court told him something different? At the very least, doesn't the admonition create an obligation on the Defendant to speak up if he's been told something different by his lawyer? If the Defendant can pursue post-conviction relief despite the court's 113-8 admonition, then what is the purpose of giving it?

While the case could perhaps be decided on this ground alone, in the interest of a complete adjudication of the matter, the court will proceed with the rest of the *Strickland* analysis.

6. The Defendant must still satisfy the second prong of *Strickland*. In this context he must show a reasonable probability that if he had gone to trial he would have prevailed. If the Defendant would likely have been found guilty at trial, then he is not prejudiced by his mis-advised guilty plea, since in either event he winds up facing deportation.

The only evidence on this issue came from Officer Perzee, the lead investigator in this case. He testified that the charge here was the result of a “controlled buy” using an undercover informant. He testified that the informant was strip searched beforehand and kept in constant surveillance until he entered the Defendant’s home. When he exited the home he was again watched until he was in police custody, where a second search revealed a controlled substance. The substance was tested; was over 1 gram of cocaine.

While in the house, the informant wore a hidden camera, pursuant to Court order This Court has watched the video taken with the camera Most of the video is unclear, apparently due to poor lighting. At one point, someone puts what appears to be a controlled substance on a table. Towards the end of it, another man is seen apparently snorting cocaine. This man is similar in appearance to the Defendant.

The Defendant testified, but never mentioned the incident. He gave no evidence from which it could be inferred that he had a defense to the charge. He did not repudiate his guilty plea or proclaim his innocence.



It is not enough for the Defendant to speculate about what might happen if he had a trial. The Defendant has the burden on this issue, and he has not met the burden on this record.

The Defendant must satisfy both prongs of *Strickland* to obtain relief. Since the Defendant has failed to show prejudice, his claim must fail.

For the reasons stated herein, the Court finds that the Defendant's Petition for Post-Conviction Relief should be denied.

IT IS THEREFORE ORDERED that the Defendant's Petition for Post-Conviction Relief is denied.

Enter: February 7, 2012

/s/ Gordon L. Lustfeldt  
Judge Gordon L. Lustfeldt

---

App. 18

[SEAL]

SUPREME COURT OF ILLINOIS  
SUPREME COURT BUILDING  
200 East Capitol Avenue  
SPRINGFIELD, ILLINOIS 62701-1721

May 29, 2013

Mr. Kenneth James Hogan  
Kenneth James Hogan, P.C.  
P.O. Box 121  
Galesburg, IL 61402-0121

No. 115747 – People State of Illinois, respondent, v.  
Roberto Carlos Valdez-Avalos, petition-  
er. Leave to appeal, Appellate Court,  
Third District.

The Supreme Court today DENIED the petition for  
leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate  
Court on July 3, 2013.

---