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JUL 10 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>ERNESTO CABANILLAS,<br><br>Petitioner. | 2 CA-CR 2012-0194-PR<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2010127379001DT

Honorable Jaime Holguin, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED

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William G. Montgomery, Maricopa County Attorney
By Catherine Leisch
Phoenix
Attorneys for Respondent

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By Michael J. Bresnehan
Tempe
Attorney for Petitioner

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B R A M M E R, Judge.

**¶1** Petitioner Ernesto Cabanillas seeks review of the trial court's order summarily dismissing his of-right petition for post-conviction relief filed pursuant to

Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

**¶2** Cabanillas pled guilty to possession of a narcotic drug for sale and the trial court suspended the imposition of sentence and placed Cabanillas on four years' probation. Cabanillas filed a notice and petition for post-conviction relief relying on *Padilla v. Kentucky*, __ U.S. ___, 130 S. Ct. 1473 (2010), and asserting his trial counsel had been ineffective in failing to advise him that by pleading guilty he was certain to be removed from the United States because he was not a citizen but instead a lawful permanent resident. He claimed that, had counsel properly advised him, he would not have pled guilty to possession of a narcotic drug for sale.

**¶3** Because Cabanillas's removal from the United States was imminent,[1] the parties stipulated that his deposition would be taken in lieu of his testimony in the event the trial court conducted an evidentiary hearing. At that deposition, and in his affidavit in support of his petition, Cabanillas confirmed that his counsel had been aware he "was a Mexican National here legally," and had advised him only that "the conviction contemplated in the plea agreement could, possibly, affect his immigration status." He also claimed his counsel had informed him that, if he qualified for a work furlough program, he would not be removed. Cabanillas acknowledged he was informed during his plea colloquy that there could be immigration consequences resulting from his

[1]Cabanillas states in his petition for review that he since has been removed.

conviction. His plea agreement contained a similar admonition. The trial court summarily dismissed Cabanillas's petition, concluding that, pursuant to Rule 32.6(c), Cabanillas had not presented a colorable claim.

**¶4** On review, Cabanillas repeats his claim of ineffective assistance of counsel based on *Padilla*, asserting he is entitled to an evidentiary hearing and the trial court therefore erred in summarily rejecting his claim. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced him. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this context, Cabanillas must demonstrate he would not have pled guilty absent counsel's deficient performance and must provide an "allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998).

**¶5** In *Padilla*, the defendant, a lawful permanent resident of the United States, faced certain removal from the United States after he pled "guilty to the transportation of a large amount of marijuana." ___ U.S. at ___, 130 S. Ct. at 1477. Padilla claimed "that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'" *Id.* at ___, 130 S. Ct at 1478, *quoting Kentucky v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008). The Supreme Court concluded that "constitutionally competent counsel would have advised [Padilla] that his conviction for

drug distribution made him subject to automatic deportation." *Id.* Cabanillas claims his case is "almost identical" to Padilla's and he has therefore presented a colorable claim of ineffective assistance of counsel.

**¶6** As we noted above, Cabanillas's deposition was taken in lieu of his testimony in the event the trial court conducted an evidentiary hearing. Thus, the state asserts the court "did not summarily dismiss" Cabanillas's petition and, "in effect," Cabanillas has had a hearing. The state does not argue, however, that provides a basis for us to deny relief and, in any event, the state's position is incorrect. Even if we agreed with the state that Cabanillas's deposition could substitute for a hearing held pursuant to Rule 32.8,[2] the court clearly dismissed Cabanillas's petition pursuant to Rule 32.6(c), which provides for the summary dismissal of a petition that does not present a colorable claim for relief, and not because the court made a credibility determination based on Cabanillas's deposition.[3] *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 ("A colorable claim is 'one that, if the allegations are true, might have changed the outcome.'"), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *see also State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008) (trial court presumed to know and follow law).

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[2]As Cabanillas notes, he could present additional evidence at an evidentiary hearing bolstering his claim that counsel had failed to advise him adequately and that he would not have entered the plea had he known the immigration consequences.

[3]Accordingly, we also reject the state's related suggestion that, due to purported inconsistencies between Cabanillas's affidavit and deposition testimony, the trial court could summarily reject his claim that he was not advised that his guilty plea would result in his removal.

**¶7** The state also argues Cabanillas's claim fails because he acknowledged he was aware his conviction could affect his immigration status. The state notes the Supreme Court in *Padilla* stated it "now hold[s] that counsel must inform her client whether his plea carries a risk of deportation," ___ U.S. at ___, 130 S. Ct. at 1486, and reasons that, because Cabanillas indisputably was aware his conviction created a "risk" of deportation, counsel's performance therefore was not deficient. Although the state accurately quotes *Padilla*, its argument fails to appreciate the scope of the Court's reasoning. The Court acknowledged "[i]mmigration law can be complex" and there "undoubtedly [will] be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* at ___, 130 S. Ct. at 1483. Thus, the Court concluded, in such circumstances, "[t]he duty of the private practitioner in such cases is more limited" and counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* But the Court went on to determine that, "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* Applying this reasoning and assuming the truth of Cabanillas's assertions, if it was "truly clear" that Cabanillas's guilty plea would result in his removal from the United States, his counsel's performance was deficient.

**¶8** We also reject the state's implicit suggestion that we should disregard the Court's reasoning as dicta. Even assuming the Court's discussion in *Padilla* is obiter

dictum rather than judicial dictum,[4] the state has presented no compelling reason for us to disregard it. *See Jordon v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974) ("[T]he [Supreme] Court's dicta is of persuasive precedential value."). Moreover, the state has identified no jurisdiction, and we have found none, rejecting that portion of *Padilla*. Indeed, those jurisdictions we have surveyed that have addressed similar circumstances have applied the Supreme Court's determination that counsel is obligated to inform his or her client when the immigration consequences of a guilty plea truly are clear. *See, e.g.*, *United States v. Chang Hong*, 671 F.3d 1147, 1153 (10th Cir. 2011); *Cun-Lara v. State*, 273 P.3d 1227, 1237-38 (Haw. Ct. App. 2012); *State v. Gaitan*, 37 A.3d 1089, 1108-09 (N.J. 2012); *Ex parte Rodriguez*, 350 S.W.3d 209, 211 (Tex. Ct. App. 2011); *Hernandez v. State*, 61 So. 3d 1144, 1148-49 (Fla. Dist. Ct. App. 2011); *Webb v. State*, 334 S.W.3d 126, 134-35 (Mo. 2011).

**¶9** Moreover, we observe that, in this case, Cabanillas alleges his counsel did more than give incomplete advice that he might face immigration consequences; he contends counsel incorrectly advised him that he could prevent his removal by being accepted in the work furlough program. Thus, even if we concluded counsel needed to do no more than advise Cabanillas that his plea could have immigration consequences,

[4]"'Judicial dictum' is a statement the court expressly declares to be a guide for future conduct and is therefore considered authoritative." *Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 211 Ariz. 146, n.9, 118 P.3d 1110, 1116 n.9 (App. 2005). "'Obiter dictum,' on the other hand, is '[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).'" *Id.*, *quoting Black's Law Dictionary* 490–91 (2d pocket ed. 2001) (alteration in *Phelps Dodge*).

taking Cabanillas's allegations as true, counsel had misled him affirmatively by incorrectly suggesting he could avoid those consequences. *See State v. Ysea*, 191 Ariz. 372, ¶ 16, 956 P.2d 499, 504 (1998) (incorrect legal advice deficient performance).

**¶10** Accordingly, we address whether it was "truly clear" Cabanillas would be removed from the United States upon pleading guilty. We find no basis in the record or law to conclude otherwise. Although the Supreme Court in *Padilla* did not define the term "truly clear," it found that Padilla's removal was certain given the nature of his offense. ___ U.S. at ___, 130 S. Ct. at 1483. Cabanillas's situation is not meaningfully distinguishable—he also was convicted of a drug trafficking felony and his removal, like Padilla's, was inevitable. *See* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who . . . after admission has been convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."); *see also* 8 U.S.C. § 1229b(a) (United States Attorney General may in certain circumstances cancel removal if alien "has not been convicted of any aggravated felony"); 8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance" aggravated felony for removal purposes); *Cun-Lara*, 273 P.3d at 1237-38 (concluding immigration consequences not "truly clear" if attorney general had discretion to cancel removal). As in *Padilla*, counsel readily could have determined that Cabanillas would face removal after pleading guilty "simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions

except for the most trivial of marijuana possession offenses." *Padilla*, ___ U.S. at ___, 130 S. Ct. at 1483.

**¶11** For the reasons stated, we grant review and relief. We remand the case to the trial court to conduct an evidentiary hearing on Cabanillas's claim of ineffective assistance of counsel.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge