STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2025 3:12 PM
v	No. 368481 Oakland Circuit Court
MAHER SABRI HANNA, Defendant-Appellant.	LC No. 1998-161693-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 368482 Oakland Circuit Court
MAHER SABRI HANNA, Defendant-Appellant.	LC No. 1999-167112-FH

Before: LETICA, P.J., and MURRAY and PATEL, JJ.

PER CURIAM.

In these consolidated appeals, defendant, Maher Sabri Hanna, appeals by delayed leave granted two orders denying relief from judgment of his plea-based convictions relating to marijuana in cases from 1998 and 1999. He alleges his attorneys were ineffective because they misadvised him regarding potential immigration consequences. The Court granted the applications and consolidated them.[1] We affirm.

[1] *People v Hanna*, unpublished order of the Court of Appeals, entered March 29, 2024 (Docket No. 368481) (RICK, P.J., and MALDONADO, J., and REDFORD, J., dissenting) and *People v Hanna*,

I. FACTUAL BACKGROUND

Defendant is an Iraqi national who moved to this country with his parents in 1983, when he was five years old. He did not become a citizen, but lived in the United States as a lawful permanent resident. In 1998 and 1999, he committed crimes to which he pleaded guilty, and which subjected him to deportation. He received a deportation notice to appear in 1999, but he was not removed, and he remained in the United States with his wife and daughter, who are both United States citizens. In 2017, Immigration and Customs Enforcement (ICE) agents arrested Iraqi citizens, including defendant, with orders of removal. Defendant deferred his removal, but it was reissued in 2019. In 2023, he sought relief from the judgments in the 1998 and 1999 cases on the basis of his trial counsels' assistance, contending they misadvised him about potential deportation consequences related to his convictions.

A. 1998 AND 1999 CASES

In 1998, defendant was charged with delivery or manufacture of marijuana, MCL 333.7401(2)(d)(*iii*), and possession of marijuana, MCL 333.7403(2)(d), after police found 14 packets of marijuana, weighing approximately 50 to 55 grams, rolled in a t-shirt underneath the hood of defendant's car. Attorney William Wilson represented defendant, who pleaded guilty to the possession charge, and the delivery charge was dismissed. Defendant was placed on probation for six months and his sentencing was deferred under MCL 333.7411. In May 1999, the court issued a notice of probation violation, and in December 1999, defendant pleaded guilty to violating his probation and received a 365-day jail sentence with credit for 55 days served. Defendant did not seek leave to appeal. Shortly thereafter, defendant received a notice to appear to defend his immigration status, but he was not deported at that time.

In May 1999, while he was still on probation for the 1998 offense, defendant was charged with delivery or manufacture of 5 to 45 kilograms of marijuana, MCL 333.7401(2)(d)(*ii*). Defendant admitted to delivering 15 pounds of marijuana to an undercover agent in exchange for over $19,000. At the plea hearing, defense counsel Mark Kriger noted that he had explained to defendant that, because he was not a citizen, he would be subject to automatic deportation if he received a sentence of one year or more. Kriger believed, if given a sentence of less than one year, defendant would not be subject to automatic deportation. The parties reached a *Cobbs*[2] agreement to an 11-month sentence of incarceration with no probation.

At the 1999 sentencing hearing, the parties disputed the scoring of offense variable (OV) 13, with defense counsel arguing that the variable should have been scored for a guidelines range of 0 to 11 months, rather than 0 to 17 months. Even if the guidelines were 0 to 17 months, counsel asked the court not to exceed 12 months for defendant's sentence because a higher sentence would subject defendant to automatic deportation. The prosecutor responded that the misdemeanor in

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unpublished order of the Court of Appeals, entered March 29, 2024 (Docket No. 368482) (RICK, P.J., and MALDONADO, J., and REDFORD, J., dissenting).

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

the 1998 case, for which defendant was then on probation, initially had been charged as a felony, but was reduced to help defendant avoid deportation.

The court decided to score OV 13 at 10 points, so the guidelines were increased to 0 to 17 months. The court acknowledged the parties' sentencing agreement was for 11 months, and asked if defendant wished to withdraw his plea. After discussing withdrawal with defendant off the record, Kriger indicated defendant did not wish to withdraw his plea. The court sentenced defendant to 15 to 84 months' imprisonment.

Defendant did not seek leave to appeal either guilty plea, although appellate counsel was appointed for him in October 1999, and he had received a notice to appear to defend his immigration status in December 1999.

B. MOTIONS FOR RELIEF FROM JUDGMENT

On March 22, 2023, defendant moved for relief from judgment in each case, raising similar arguments. He did not specifically assert good cause and actual prejudice under MCR 6.508; however, he argued his guilty pleas were involuntary and unknowing because he was deprived of the effective assistance of counsel under the Sixth and Fourteenth Amendments.[3] He asserted his trial attorneys advised him to plead guilty without adequately explaining the ramifications of pleading guilty to the crimes. Defendant maintained he would not have pleaded guilty had it not been for trial counsels' ineffective assistance—although he did not submit affidavits to that effect—and said he was prejudiced by taking his counsels' advice. Relying on *People v Walker (On Remand)*, 328 Mich App 429; 938 NW2d 31 (2019), defendant argued *Lafler v Cooper*, 566 US 156; 132 S Ct 1376; 182 L Ed 2d 398 (2012), applied retroactively because he had not understood what it meant to plead guilty given his trial counsels' deficient performance. He requested that the court vacate his convictions. He did not provide an affidavit or other documentation in support of his motion in the 1998 case; in the 1999 case, he provided the 1999 notice to appear.

C. ORDERS IN 1998 CASE

In the order denying relief in the 1998 case,[4] the court observed that defendant failed to argue good cause. Defendant did not appeal his conviction, did not argue he had ineffective appellate counsel, and did not argue he had been prevented from filing an appeal and raising the issue on appeal. The court rejected defendant's citation to *Walker*, 328 Mich App 429, because *Walker* involved counsel's failure to convey a plea to the defendant. The court noted other relevant cases cited by defendant predated his conviction and could have been raised on appeal. The court concluded defendant did not establish good cause and, on that basis alone, he was not entitled to relief.

[3] US Const, Am VI, and US Const Am XIV.

[4] The order erroneously identifies defendant as "Mountaser" Hanna, but it is undisputed that it applies to defendant Maher Hanna.

The court continued that, even if defendant had established good cause, he failed to demonstrate actual prejudice. Defendant did not meet his burden under MCR 6.508, and did not provide any support such as affidavits, documents, or citations to the record. In the absence of authority and analysis, the court deemed the issue abandoned. The court added that the claim was especially insufficient where defendant's plea resulted in a misdemeanor with a maximum possible sentence of one year of imprisonment or a $2,000 fine or both, although he was charged with felony delivery or manufacture of marijuana with a maximum sentence of four years' imprisonment or a $20,000 fine or both. The court opined that the record did not support finding that defendant was not properly advised. Further, defendant failed to establish his plea was unknowing and involuntary or that an irregularity offensive to the judicial process existed.

Defendant moved for reconsideration, noting that the prosecution did not oppose relief. Defendant referenced a stipulation to set aside conviction, to which the prosecutor agreed and which provided in pertinent part:

> IT IS HEREBY STIPULATED by and between the parties that defendant's conviction be set aside due to the conduct of defendant's attorney, which fell below an objective standard of reasonableness, resulting in substantive and procedural defects in the underlying proceedings, as Defendant's guilty plea was involuntary and unknowing, in violation of the Sixth and Fourteenth Amendments. The parties respectfully request that this Honorable Court enter the attached order.

The proposed order provided, in relevant part:

> IT IS THEREFORE ORDERED that the previous order of dismissal be amended to reveal a dismissal due to the conduct of defendant's attorney, which fell below an objective standard of reasonableness, resulting in substantive and procedural defects in the underlying proceedings, in violation of the Sixth Amendment [sic] and Fourteenth Amendments.

Defendant continued to maintain trial counsel did not advise him of the collateral consequences of his plea and thus was ineffective. Defendant argued he would be entitled to expungement under MCL 780.621g(4) because he possessed under 2.5 ounces of marijuana in 1999, and currently would not even be charged under MCL 333.27955.

The court denied reconsideration, ruling that defendant did not expressly allege an error, but simply restated his prior arguments and unsupported allegations. Regarding defendant's argument that the court erred in rejecting the stipulation, the court indicated defendant offered no legal authority it had erred in rejecting a stipulation to which defendant did not demonstrate he was entitled. The court declined to fashion a legal argument on defendant's behalf. The court also rejected defendant's expungement argument, noting defendant could pursue the procedures specific to that form of relief. Defendant had not produced authority holding that a defendant entitled to expungement did not have to meet the burden under MCR 6.508.

Defendant applied for leave to appeal. In conjunction with his motion to remand in this Court, defendant included an affidavit in which he stated that trial counsel Wilson gave him improper advice regarding the immigration consequences of his offenses. According to defendant,

Wilson incorrectly believed that a sentence of probation would avoid deportation, and did not investigate the immigration consequences of defendant's guilty plea and conviction. Defendant asserted that he would have proceeded to trial regardless of the outcome had he known that his conviction itself automatically would result in possible deportation.[5]

D. ORDERS IN THE 1999 CASE

In its order denying relief in the 1999 case,[6] the court similarly ruled defendant had not shown good cause or actual prejudice. The court also reasoned that the record reflected defendant was aware of the potential consequences of a guilty plea:

> Further, the record reflects that trial counsel vigorously fought for a sentence of no more than 11 months in county jail due to the potential for automatic deportation if Defendant was sentenced to one year or more imprisonment. The record supports that trial counsel's advice and advocacy was well within the range of competency. The record also reflects that Defendant chose not to withdraw his plea after the Court ruled that OV-13 should be scored to reflect that Defendant was a member of an organized criminal group, thus increasing the applicable sentencing guidelines range from zero to 11 months to zero to 17 months. Thus, the record supports that Defendant was fully aware of the potential consequences of pleading guilty, and Defendant has not provided the Court with any support for his claims that his plea was unknowing and involuntary. General principles of law and conclusory statements are insufficient. Accordingly, Defendant failed to establish that his plea was unknowing and involuntary or that there was some other irregularity offensive to the judicial process in order to establish actual prejudice.

The court then concluded that defendant had not shown he was entitled to relief from judgment:

> The record supports that Defendant made a knowing and voluntary plea based on advice that would fall within the range of competence. It is apparent from the record that Defendant chose to plead guilty knowing that a sentence within the guidelines could trigger potential automatic deportation. The record also reflects that trial counsel made every effort to keep Defendant's sentence below the one-year imprisonment that would trigger automatic deportation. Defendant has not provided the Court with any factual support for his claims of ineffective assistance of counsel. Defendant failed to establish both good cause for failure to raise the issue on appeal and actual prejudice. Accordingly, Defendant failed to meet the burden set forth in MCR 6.508(D)(3) in order to be entitled to relief from judgment. Therefore, this Court may not grant Defendant's Motion for Relief from Judgment. Defendant is not entitled to his requested relief.

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[5] The affidavit was not submitted to the lower court with defendant's motion for judgment relief.

[6] The order erroneously identifies defendant as "Mountaser" Hanna, but it is undisputed that it applies to defendant Maher Hanna.

Defendant moved for reconsideration, stating that the prosecution did not oppose his initial motion for reconsideration. In fact, the prosecution concurred in the relief sought; defendant provided a stipulation and proposed order similar to those in the 1998 case. Defendant said he established good cause because he did not realize the collateral consequences of his conviction until he was threatened with removal to Iraq in 2017. He also established actual prejudice because the error affected his understanding of the consequences of his guilty plea. He cited *Lee v United States*, 582 US 357; 137 S Ct 1958, 1965; 198 L Ed 2d 476 (2017), in support. Defense counsel should have known that accepting the plea agreement would lead to immediate detention and deportation. Defendant maintained he was not relying on the reasoning of *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010), involving defense counsel's obligation to advise a defendant when a guilty plea will subject the defendant to automatic deportation.[7] When he took the plea, defendant had lived in the United States for years and he had never returned to Iraq after he left when he was a child. Counsel's omissions regarding deportation denied defendant guidance in this critical decision.

The court acknowledged that the prosecution had not opposed defendant's reconsideration motion. Nevertheless, it recognized that stipulations regarding legal conclusions or questions of law are invalid. And, it determined that a stipulation to grant a motion for relief from judgment was invalid because the decision involved legal conclusions, such as if defendant demonstrated good cause or if he was entitled to relief because his trial counsel was ineffective. The court further ruled that defendant had not shown palpable error.

Defendant appealed. In November 2023, defendant provided an affidavit similar to the one in the 1998 case with his motion to remand. He said his trial counsel, Mark Kriger, did not inform him that his plea would automatically result in his deportation. According to defendant, Kriger gave him improper advice regarding immigration because Kriger believed an 11-month jail sentence would avoid defendant's deportation and Kriger did not advise him that the conviction itself would subject him to deportation. Defendant added: "When I was sentenced to prison, I was told that I would never be deported to Iraq by the Immigration and Customs Enforcement agent." Had he known his conviction automatically would subject him to deportation, he would have gone to trial, no matter the outcome.[8]

In March 2024, this Court granted defendant's applications and consolidated the appeals.

II. LEGAL ANALYSIS

A. STANDARDS OF REVIEW

This Court applies the abuse of discretion review to a trial court's decision regarding a motion for relief from judgment. *People v Spears*, 346 Mich App 494, 502; 13 NW3d 20 (2023). An abuse of discretion occurs when the court's decision falls outside "the range of reasonable and

[7] Defendant recognized that *Padilla* is not retroactive. See *Chaidez v United States*, 568 US 342; 133 S Ct 1103; 185 L Ed 2d 149 (2013).

[8] The affidavit was not submitted to the lower court with defendant's motion for judgment relief.

principled outcomes." *People v Segura*, 348 Mich App 123, 132; 17 NW3d 129 (2023) (quotation marks and citation omitted). The clear error standard applies to findings of fact supporting the decision on a motion for judgment relief. *Spears*, 346 Mich App at 502. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Byars*, 346 Mich App 554, 563; 13 NW3d 328 (2023) (quotation marks and citation omitted). The Court reviews de novo the interpretation of court rules and statutes. *People v Antaramian*, 346 Mich App 710, 718; 13 NW3d 380 (2023).

B. STIPULATIONS

Defendant argues that the trial courts should have granted his motions for relief from judgment because the prosecution conceded he was entitled to relief. Whether a defendant is entitled to relief from judgment involves conclusions of law and fact. MCR 6.508(E). Although parties may stipulate regarding factual matters, they may not bind the court with stipulations regarding questions of law. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). The lower courts therefore were not bound by the parties' stipulations, and we need not further consider them.[9]

C. RELIEF FROM JUDGMENT

Defendant contends his attorneys were ineffective. Because defendant raises this argument in the context of the denial of judgment relief, he has the burden of establishing entitlement to relief. MCR 6.508(D). The record reflects that defendant has not met his burden.

A defendant may not allege grounds for relief, other than jurisdictional defects, that the defendant could have brought in an earlier appeal, unless the defendant demonstrates that "good cause" existed for failure to raise the issue and that the defendant has suffered "actual prejudice" from the irregularities. MCR 6.508(D)(3). Defendant could have, but did not, raise errors in a previous appeal; defendant thus must show good cause.

In the court below, defendant did not specifically address the good cause requirement and did not explain why he did not raise his ineffective assistance of counsel argument in an earlier appeal. On appeal, defendant argues he did not become aware that he would be actually deported until 2017, when ICE agents detained Iraqi nationals convicted of crimes. The record is contrary to defendant's assertion because defendant was aware in 1999 that his crimes had immigration consequences, even though he apparently believed the United States government would not enforce those consequences. Defendant's Presentence Investigation Report reflects that he told his probation officer in September 1999 that he could be deported if he received a sentence exceeding 11 months in jail. At his October 1999 sentencing, the trial court asked whether defendant wished to withdraw his plea in light of the fact that his sentence would exceed 11 months in jail, and, after a discussion off the record, defense counsel indicated defendant did not wish to withdraw his plea. Although the trial court did not expressly reference deportation, the record

[9] On appeal, we note that the prosecution recognizes the parties' stipulation while also recognizing that the courts' ultimate decisions arguably fell within the range of principled outcomes.

reflects that Kriger, specifically intending to avoid deportation, challenged the OV 13 scoring to circumvent a guidelines range and sentence over 12 months. Consequently, defendant has not shown good cause.[10]

Even assuming for the sake of argument defendant has shown good cause, defendant also must show actual prejudice. In the context of a guilty plea, actual prejudice means "the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand." MCR 6.508(D)(3)(b)(ii). Defendant contends that his plea was involuntary given the ineffective assistance from his trial counsel.

In the plea-bargaining process, a defendant is entitled to the effective assistance of counsel. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Michigan has adopted the standard under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), for ineffective assistance, and a defendant must show " 'that counsel's representation fell below an objective standard of reasonableness,' " and " 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014), quoting *Lafler*, 566 US at 163.

"When ineffective assistance of counsel is claimed in the context of a guilty plea, the relevant inquiry is whether the defendant tendered the plea voluntarily and understandingly." *People v White*, 307 Mich App 425, 431; 862 NW2d 1 (2014). A defendant who pleaded guilty and argues ineffective assistance "is essentially arguing that counsel failed to provide sufficient information regarding the consequences, elements, or possible defenses of the plea." *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011) (quotation marks and citation omitted).

To establish the prejudice prong, a " 'defendant must show the outcome of the plea process would have been different with competent advice.' " *Douglas*, 496 Mich at 592 quoting *Lafler*, 566 US at 163. Specifically, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v Lockhart*, 474 US 52, 59; 106 S Ct 366; 88 L Ed 2d 203 (1985).

Defendant must show that counsel erred, and that he would have rejected the pleas and gone to trial. For the latter, defendant relies on his affidavits, where he states that, had he known his convictions would result in deportation, he would have gone to trial regardless of the outcome. Notably, even assuming his affidavits would be considered a sufficient offer of proof, defendant did not submit them with either of his motions for relief from judgment; he submitted them only with his motion to remand filed in November 2023 in this Court.[11]

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[10] We are unpersuaded by defendant's argument it would not be reasonable to presume that defendant actually believed he would be automatically deported. A defendant's failure to *actually believe* in potential deportation as a consequence does not excuse him from the burden of demonstrating good cause, particularly where he was aware he could be deported.

[11] In the lower courts, defendant did not provide an affidavit from counsel, notes from their files, his own affidavit, or an affidavit from an immigration law expert. In the absence of support, the

Even accepting defendant's affidavits, we next consider whether counsel erred in the advice to defendant that he would not be subject to deportation unless his sentence exceeded 11 months. Assuming without deciding that the advice given to defendant was, in fact, incorrect, the question becomes whether counsel was ineffective for giving that advice.[12] "[T]he validity of a guilty plea is to be determined under the law on the day the plea is taken." *People v Osaghae (On Reconsideration)*, 460 Mich 529, 533; 596 NW2d 911 (1999).

In 1999, immigration consequences of a defendant's plea were collateral matters. See *People v Davidovich*, 463 Mich 446, 453; 618 NW2d 579 (2000), abrogation recognized by *Chaidez v United States*, 568 US 342; 133 S Ct 1103; 185 L Ed 2d 149 (2013). In *Davidovich*, our Supreme Court ruled that "immigration consequences of a plea are collateral matters that do not bear on whether the defendant's plea was knowing and voluntary." *Id*. The Court concluded that, by analogy, a counsel's failure to give advice on immigration matters did not make the representation constitutionally ineffective. *Id*. Also, in *Osaghae*, which involved counsel's advice regarding immigration consequences, our Supreme Court held that the trial court erred in part by setting aside the defendant's guilty plea because no state law required counsel to advise a defendant of the consequences of a plea under federal immigration law. *Osaghae*, 460 Mich at 533. See also, *People v Gomez*, 295 Mich App 411, 418; 820 NW2d 217 (2012) (observing that, pre-*Padilla*, Michigan caselaw held that counsel's failure to advise regarding immigration consequences did not make the representation constitutionally ineffective). Thus, in 1999, Wilson and Kriger were not obliged to advise defendant on immigration, a collateral matter.

Eleven years after defendant's pleas, the United States Supreme Court ruled in *Padilla*, a failure to advise case, that the right to the effective assistance of counsel includes counsel's obligation to inform a defendant of the immigration consequences of a guilty plea. Specifically, counsel must inform an immigrant client "whether his plea carries a risk of deportation." *Padilla*, 559 US at 374. Defendant is not entitled to relief under *Padilla* because this Court has ruled that *Padilla* applies only prospectively under both federal law and Michigan law. *Gomez*, 295 Mich App 412, 419. See also, *Chaidez*, 568 US at 358 (ruling that *Padilla* announced a new rule and therefore was not retroactive).

Two years after *Padilla*, the United States Supreme Court issued *Lafler*, a misadvice case. The *Lafler* Court ruled that a defendant who rejects a plea offer as a result of counsel's ineffective

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lower courts had no grounds for defendant's assertion that he would have gone to trial rather than plead guilty. We conclude defendant abandoned this point. See *People v Henry*, 315 Mich App 130, 148-149; 889 NW2d 1 (2016) (ruling that an appellant must do more than give cursory analysis to an issue or else the Court could deem it abandoned). Similarly, we deem abandoned defendant's one-sentence argument on appeal that defense counsel failed to explain to him the nature of the charges or possible defenses.

[12] In the absence of a *Ginther* hearing, our "review is limited to mistakes that are apparent from the record." *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019).

advice, and later is convicted at trial, may be entitled to relief under *Strickland*.[13] *Lafler*, 566 US at 162. When establishing prejudice in the context of a plea, "a defendant must show the outcome of the plea process would have been different with competent advice." *Id*. at 163.

Again, under *Hill*, 474 US at 59, when a defendant claims counsel's deficient performance caused him to accept a plea rather than go to trial, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Similarly, see *Douglas*, 496 Mich at 608 (VIVIANO, J., concurring in part) (commenting that "a reviewing court should aim, as closely as possible, to restore the parties to the same position they were in before the plea-bargaining process was corrupted by defense counsel's ineffective assistance").

In this case, defendant contends he would have gone to trial. But defendant did not support that claim below with an affidavit and the record does not reflect he otherwise insisted on going to trial; therefore, we conclude defendant has not met his burden.

Defendant also relies on *Lee*, 582 US 357, where, as here, the defendant accepted a plea after misadvice regarding immigration consequences. In *Lee*, the defendant was a lawful permanent resident of the United States who moved from South Korea when he was 13 years old. Many years later, he was indicted on one count of possessing ecstasy with intent to distribute. The defendant informed his attorney of his noncitizen status and asked whether he would face deportation from the criminal proceedings. The attorney incorrectly told the defendant he would not be deported as a result of pleading guilty. That advice was incorrect because possession with the intent to distribute ecstasy was an aggravated felony. The defendant accepted the plea and received a sentence of 18 months in prison. *Id*. at 361-362.

Under federal statute, a noncitizen convicted of an "aggravated felony," which included illicit trafficking of a controlled substance, was subject to mandatory deportation. 8 USC 1101(a)(43)(B); 8 USC 1227(a)(2)(A)(iii). The defendant moved to vacate his conviction and sentence, arguing his attorney provided constitutionally ineffective assistance. At the evidentiary hearing, the defendant and his trial counsel testified that "deportation was the determinative issue in Lee's decision whether to accept the plea." *Id*. at 362. Counsel acknowledged, had he realized the immigration consequences, he would have advised the defendant to go to trial. *Id*. The prosecution conceded that trial counsel provided inadequate representation. *Id*. at 364.

In its analysis, the *Lee* Court indicated that whether to plead guilty required more than consideration of the likelihood of trial success, but also involved weighing consequences of a conviction, both after trial and by plea. *Id*. at 367. In analyzing claims of ineffective assistance of counsel in the plea process, the *Lee* Court ruled that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's

[13] Although *Lafler* was decided in 2012, years after defendant's plea, this Court has ruled that *Lafler* is retroactive because it did not create a new rule and applied established federal law. *Walker*, 328 Mich App at 449.

deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id*. at 369.

The *Lee* Court decided the defendant adequately demonstrated he would have rejected the plea had he known that it would result in mandatory deportation. The defendant asked his attorney whether the risk of deportation existed, and the testimony showed the defendant would have gone to trial had he known about the deportation consequences. Further, at the plea colloquy, the judge warned a conviction could result in deportation and asked if that affected his decision, the defendant answered it did. When the judge inquired how that affected his decision, the defendant responded that he did not understand, and conferred with his attorney. Only after his counsel explained that the judge's statement was a "standard warning," did the defendant plead guilty. *Id*.

The *Lee* Court decided the defendant had demonstrated a reasonable probability that he would have gone to trial:

> We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. . . . Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so. [*Id*. at 371.]

Defendant argues that, under *Lee*, to establish prejudice, a noncitizen must show he would have rolled the dice and taken his chances at trial. Here, the record suggests defendant rolled the dice and took his chances with the pleas, hoping the federal authorities would not deport him. Unfortunately for defendant, federal deportation policies have changed.

This Court has considered *Lee* just once in the context of deportation. In *People v Brito-Custodio*, unpublished per curiam opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 354542),[14] the defendant, originally from Mexico, lived in Michigan for more than 15 years and was charged with felony home invasion. In plea negotiations, his trial counsel consulted with an immigration attorney, who failed to warn the defendant that deportation turned on whether the potential sentence for a conviction was greater than one year, or whether the crime involved moral turpitude. The defendant accepted a plea to misdemeanor larceny, believing he would avoid immigration consequences, and was sentenced to one day in jail and 12 months of probation. However, his conviction required deportation because it was a crime of moral turpitude, and ICE officers immediately took him into custody and eventually deported him. The defendant moved to withdraw his plea, referencing an affidavit from an expert in immigration law, but

[14] Unpublished opinions are not binding, but may be considered persuasive. *People v Brcic*, 342 Mich App 271, 279 n 2; 994 NW2d 812 (2022).

providing only his own affidavit. The trial court denied the motion because: (1) the defendant had not provided a record, including the plea hearing transcript; (2) the court had told defendant his immigration status might be affected; (3) counsel's consultation with the immigration attorney was competent, even though the immigration attorney gave incorrect advice; and (4) defendant had not attached affidavits to his motion. *Id*., unpub op at 1-3.

The *Brito-Custodio* defendant appealed, and this Court decided that it was not possible from the record to determine whether the defendant received ineffective assistance of counsel and if he was prejudiced by that performance. This Court vacated the denial of the motion to withdraw the plea and remanded for further proceedings for testimony from trial counsel and the immigration attorney, if available. The *Brito-Custodio* Court explained that alternately, the trial court could reconsider its denial of the motion to withdraw the plea, thereby rendering moot the ineffective assistance of counsel issue. This Court added that the parties could stipulate to the withdrawal of the plea and agree to a substitute plea agreement without immigration consequences. If the trial court accepted the alternative plea, it would render moot the ineffective assistance of counsel issue. *Id*., unpub op at 5-6.

Unlike this case, *Brito-Custodio* was not decided in the context of the framework of MCR 6.500. Further, the record here reflects defense counsel informed defendant that he could be deported if he was sentenced to more than 11 months in jail. Thus, in contrast to *Brito-Custodio*, counsel here informed defendant his convictions could have immigration consequences. Admittedly, the record does not reflect that Wilson and Kriger addressed every possible immigration consequence. Regardless, the contemporaneous evidence of the October 1999 sentencing hearing shows defendant was aware of potential immigration consequences. Kriger argued defendant could be deported if the guidelines exceeded 11 months. Once the guidelines range changed to 0 to 17 months, and after consulting with Kriger, defendant again chose to plead guilty. Defendant does not contend that his counsel did not advise him of immigration consequences, he instead asserts that the advice was wrong. However, Kriger's advice was correct in that defendant could face deportation if sentenced over 11 months, which occurred in the 1999 case. Even aware of the possibility of deportation, defendant accepted the plea in the 1999 case.

Defendant's argument is not so much that counsel misadvised him, but that defendant had no reason to believe he *actually* would be deported years later. That argument, however, does not pertain to his counsels' performance; it relates to defendant's subjective belief that federal authorities would never deport him, despite the existence of the 1999 deportation notice. Defendant's subjective belief does not support a claim of ineffective assistance.

Affirmed.

/s/ Anica Letica
/s/ Christopher M. Murray
/s/ Sima G. Patel