VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 27th *day of* February, 2014.

Commonwealth of Virginia, Appellant,

against Record No. 130772
Circuit Court No. 11-7538

Marlon Borja Barrera, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Prince William County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the judgment of the Circuit Court of Prince William County ("circuit court").

This appeal arises out of a habeas corpus proceeding in the circuit court. Marlon Borja Barrera ("Barrera") filed a petition for a writ of habeas corpus in which he challenged three prior convictions for embezzlement, possession of marijuana, and possession of drug paraphernalia. Barrera alleged that he had been denied the effective assistance of counsel, that his guilty pleas to these three charges were not knowing and voluntary, and that he was being detained by federal immigration officials and facing removal from the United States as a result of these convictions.

The circuit court denied Barrera's habeas petition with respect to the convictions for embezzlement and possession of marijuana but granted Barrera's petition with respect to the

conviction for possession of drug paraphernalia. The Commonwealth appealed that judgment to this Court, and we granted the appeal.

The Commonwealth's first assignment of error in this Court challenges the circuit's court's finding that it had jurisdiction to consider Barrera's challenge to his convictions for embezzlement and possession of marijuana. The Commonwealth argues that because Barrera had fully served his sentence and had no suspended time remaining on these two convictions, the circuit court lacked jurisdiction to consider those two convictions.

Courts are not constituted to render advisory opinions, to decide moot questions, or to answer inquiries which are merely speculative. Commonwealth v. Harley, 256 Va. 216, 219-20, 504 S.E.2d 852, 854 (1998)(internal citations omitted). It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and where no relief can be afforded. EC v. Virginia Department of Juvenile Justice, 283 Va. 522, 530, 722 S.E.2d 827, 831 (2012). The Commonwealth was successful in the circuit court in having the petition denied as to these two convictions. The Commonwealth is not aggrieved by the circuit court's judgment. Accordingly, the Commonwealth lacks standing and we will not consider assignment of error 1.

Assignments of error 2 and 3 both relate to the conviction for possession of drug paraphernalia. When Barrera filed his petition for a writ of habeas corpus, he was not in state custody as a result of this conviction, but he did have suspended time remaining on the sentence for this conviction. Code § 8.01-654(B)(3) permits a petitioner to allege detention without lawful authority even

though the sentence imposed for such conviction is suspended. However, Code §§ 8.01-657 and 658 require that the writ be directed and served on "the person" having custody of the petitioner. In situations where the petitioner only has suspended time, no state or local actor has "custody" of the petitioner, and it may not be clear to whom the writ should be served and directed.

In this case, Barrera named the Commonwealth of Virginia as the respondent and served the Attorney General's office. The circuit court directed the writ to the general district court and ordered that Barrera's plea of guilty to the paraphernalia charge and his conviction be vacated and the original charge of possession of marijuana be reinstated. In this appeal, which is brought by the Commonwealth, the Commonwealth has not alleged that it was improperly named or that service was improper. Accordingly, we will resolve assignments of error 2 and 3 on the merits.

As mentioned above, Barrera was initially charged with possession of marijuana, but upon the advice of his counsel, he pled guilty to possession of drug paraphernalia. He was sentenced to 30 days in jail with 28 days suspended. No period of suspension was fixed by the trial court, so pursuant to Code § 19.2-306, the sentence was suspended for twelve months. In his petition for a writ of habeas corpus, Barrera alleged he was denied the effective assistance of counsel with respect to this conviction because counsel failed to inform him of immigration consequences of his plea, and a conviction for possession of drug paraphernalia has more severe immigration consequences than a conviction for possession of marijuana.

At the evidentiary hearing, Barrera presented the testimony of an immigration lawyer, who testified that for immigration purposes, it would have been better for Barrera to be convicted of possession of marijuana instead of possession of drug paraphernalia. Barrera testified that his counsel informed him the paraphernalia conviction would be better because he would get to keep his driver's license. When Barrera asked if there would be any immigration consequences, counsel stated that he did not know if there would be any. Counsel also testified at the hearing and admitted that he advised Barrera to plead guilty to possession of drug paraphernalia instead of the original charge of possession of marijuana so that Barrera could keep his driver's license.

The circuit court granted Barrera's petition as to this conviction, holding that counsel's performance was deficient as the immigration consequences of this conviction were much more severe than for possession of marijuana, and this fact was readily ascertainable by counsel. The circuit court further held that Barrera was prejudiced by this deficient performance, as he would not have accepted the plea agreement and would have insisted on going to trial if he had been properly advised.

In order to establish ineffective assistance of counsel, a defendant must show both deficient performance by counsel and prejudice. Knowles v. Mirzayance, 556 U.S. 111, 122 (2009); Strickland v. Washington; 466 U.S. 668, 687 (1984). On appeal, the Commonwealth has not challenged the circuit court's determination that counsel's performance was deficient. Therefore, the issue on appeal is limited to whether Barrera was prejudiced by counsel's deficient performance.

In Padilla v. Kentucky, 559 U.S. 356 (2010), the Supreme Court of the United States held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel," and that Strickland v. Washington applied to Padilla's claim. Id. at 366. Padilla had been given erroneous advice from his counsel regarding immigration consequences of a guilty plea and conviction for the offense of transporting marijuana. This crime was a "removable offense" under 8 U.S.C. § 1227(a)(2)(B)(i). However, his counsel had told him that he did not have to worry about immigration status as a consequence of his plea and conviction because he had been in the United States for quite some time and deportation was merely a collateral consequence of his conviction. Id. at 368-69). Counsel's advice was erroneous. Id. at 369. Padilla sought habeas relief, and upon review the Court stated, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Id. at 372.

Earlier, in Hill v. Lockhart, 474 U.S. 53, 59 (1985), the Court was presented with a habeas case wherein the petitioner had been given erroneous advice regarding parole eligibility. The case did not present questions of immigration consequences. In Hill, the Court noted that Hill did not allege in his habeas petition that had counsel correctly informed him about parole eligibility, he would have pleaded not guilty and insisted on going to trial. Id. at 60. The Court held that Hill had therefore failed to allege the kind of prejudice necessary to satisfy the second half of the Strickland v. Washington test. Id.

The distinctions between Hill, Padilla, and this case are significant. Unlike Hill and Padilla, Barrera's plea bargain on the issue before us today was directed to an entirely different offense than originally charged. Barrera was originally charged with possession of marijuana. The plea bargain offered to him was for possession of drug paraphernalia.

Citing Hill, the Commonwealth asserts that "in order to satisfy the 'prejudice' requirement, [Barrera] 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." 474 U.S. at 59. The Commonwealth concedes that Barrera alleges that he would not have pled guilty, but the Commonwealth maintains that Barrera did not allege that he would have insisted upon going to trial. But in the context of this case, Barrera could not have insisted upon going to trial for possession of drug paraphernalia because he was not charged with that offense. In both Padilla and Hill, the decision to go to trial was on the offense charged and not a proposed substitution of a different offense.

In Barrera's case, it is sufficient for him allege that he would not have pled guilty to possession of drug paraphernalia which would have left only two options remaining - a plea of guilty to possession of marijuana or a trial for possession of marijuana. Whether he pled guilty or was found guilty of the possession of marijuana offense is of no significance to Barrera's claim in this case, because no matter the outcome of the possession of marijuana charge, the immigration consequences would have been significantly different and better for him than that provided by a conviction for

possession of drug paraphernalia. Barrera established that a conviction for possession of drug paraphernalia rendered him removable, whereas a conviction for possession of marijuana did not have the same consequence. The only benefit that Barrera obtained from pleading guilty to possession of drug paraphernalia, as opposed to pleading guilty to or going to trial on the original charge of possession of marijuana, was that he was allowed to keep his driver's license.

Consistent with the United States Supreme Court's holding in Padilla, in order to obtain habeas relief in the immigration context, "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." 559 U.S. at 372. The trial court in this case held that it would have been a rational decision for Barrera to reject the plea bargain and we cannot say that the trial court erred.

Accordingly, we affirm the judgment of the circuit court granting Barrera's petition for a writ of habeas corpus as to his conviction for possession of drug paraphernalia.

This order shall be certified to the said circuit court.

JUSTICE McCLANAHAN, dissenting.

I disagree that it was unnecessary for Barrera to prove he would have pleaded not guilty and insisted on going to trial. This is a fundamental element of any claim of ineffective assistance in connection with a guilty plea, the proof of which is essential to demonstrating prejudice and obtaining habeas relief. Premo v.

Moore, 131 S. Ct. 733, 745, 178 L.Ed.2d 649, 665 (2011); Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because Barrera did not prove, or even claim, that he would have pleaded not guilty and insisted on going to trial on the original charge of possession of marijuana, the circuit court erred in concluding otherwise.[1]

When a criminal defendant challenges a guilty plea on the grounds that ineffective assistance of counsel rendered the plea involuntary, the defendant is required to prove 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, 474 U.S. at 59 (applying the "prejudice" requirement set forth in Strickland v. Washington, 466 U.S. 668, 694 (1984) in the context of a guilty plea). This test specifically applies to claims of ineffective assistance regarding deportation consequences of guilty pleas. Padilla, 559 U.S at 369 (holding that Strickland applies to claim that failure to advise defendant of possible deportation consequences constituted ineffective assistance of counsel and remanding for determination of whether defendant can satisfy Strickland's requirement of prejudice); United States v. Akinsade, 686 F.3d 248, 253 (4th Cir. 2012) (where defendant claims he relied upon counsel's advice regarding risk of deportation in pleading guilty, he "must demonstrate that but for his counsel's

[1] Although the Commonwealth assigned error to the circuit court's determination that there was a reasonable probability that Barrera would have gone to trial on the original charge of possession of marijuana, the majority does not address the correctness of this determination by the circuit court, but rather holds that Barrera was not required to prove that there was a reasonable probability he would have gone to trial.

error, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial").

Because the defendant's right to trial is forfeited upon a plea of guilty, it is the deprivation of this right that entitles the defendant to relief from a guilty plea upon a claim of ineffective assistance of counsel. Explaining the rationale underlying the prejudice requirement for claims of ineffective assistance in the context of guilty pleas, the United States Supreme Court in Roe v. Flores-Ortega, 528 U.S. 470 (2000) compared the defendant's right to appeal with the defendant's right to trial addressed in Hill. As the Court stated, "[l]ike the decision whether to appeal, the decision whether to plead guilty (i.e., waive trial) rested with the defendant and, like this case, counsel's advice in Hill might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." Id. at 485. Accordingly, reasoned the Court, "[w]e held that 'to satisfy the "prejudice" requirement [of Strickland], 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.'" Id. (quoting Hill, 474 U.S. at 59). Therefore, "[i]f the defendant cannot demonstrate that, but for counsel's deficient performance, he would have [gone to trial], counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." Flores-Ortega, 528 U.S. at 484.[2]

[2] The Supreme Court of the United States has also explained that "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." Hill, 474 U.S. at 58.

Contrary to the majority's suggestion, the United States Supreme Court in Padilla did not enunciate a new test for demonstrating prejudice under Strickland or indicate that the test set forth in Hill was inapplicable. In fact, the Court expressly stated that "[w]hether Strickland applies to Padilla's claim follows from Hill," which applies to challenges of guilty pleas based on ineffective assistance of counsel. Padilla, 559 U.S. at 371 n.12 (emphasis added). Addressing the Solicitor General's concerns regarding the importance of protecting the finality of guilty pleas, the Court responded that [s]urmounting Strickland's high bar is never an easy task." Id. at 371. And noting the petitioner in Hill was unable to sufficiently allege prejudice since he did not claim he would have pleaded not guilty and insisted on going to trial, the Court stated that "[t]his disposition further underscores the fact that it is often quite

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> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

United States v. Timmreck, 441 U.S. 780, 784 (1979) (internal quotation marks and citation omitted).

difficult for petitioners who have acknowledged their guilt to satisfy Strickland's prejudice prong." Id. at 371 n.12.[3]

Applying the test required by Hill and Padilla, it is abundantly clear that Barrera did not satisfy his burden of proving that he would have pleaded not guilty and insisted on going to trial. Throughout the proceedings, Barrera has consistently maintained that he would have sought an alternative to pleading guilty to possession of paraphernalia if he had been properly advised of the possibility of removal. In Barrera's petition, he did not allege that he would have gone to trial but instead alleged that he would have "made different decisions in this matter." At the evidentiary hearing, Barrera did not testify that he would have insisted upon going to trial on the original charge of possession of marijuana and his counsel rebuffed any contention that Barrera would have gone to trial. Although Barrera testified he would not have pled guilty if he knew the possession of paraphernalia conviction would have led to his removal, when asked why his

[3] Citing Flores-Ortega, the Court pointed out that a petitioner would also have to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372. In doing so, the Court was not creating a new standard but reaffirming the previously-established requirement that a petitioner's claim would have to be judged rational. This assurance left the Court with "no reason to doubt that lower courts - now quite experienced with applying Strickland, can effectively and efficiently use its framework to separate specious claims from those with substantial merit." Id. In fact, any contention that the Court created a new standard is belied by the fact that the Court did not reach the issue of whether Padilla could demonstrate prejudice but remanded the case to the state court to "consider [the matter] in the first instance." Id. at 369.

decision would now be different, he explained that "[k]nowing the consequences, I probably would stay away from [marijuana]." According to Barrera, because his companions were born here, he "never really knew what could happen to me" and "would have stayed away from things like that if I knew."[4]

Barrera's counsel confirmed that it was not Barrera's position that Barrera would have gone to trial, but instead that he "may have made different decisions that would have kept him eligible for cancellation of removal." This claim is patently insufficient to establish prejudice. See Premo v. Moore, 131 S. Ct. at 745 (the possibility that defendant would have obtained a better plea agreement but for counsel's errors does not establish prejudice under Strickland and Hill); Fields v. Att'y Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992) (where defendant claimed he would not have gone to trial but would have pled to a different plea bargain, he could not make the required showing of prejudice).

The majority has failed to provide any authority or legal justification for relieving Barrera of his burden to prove that he would have pleaded not guilty and insisted on going to trial on the original charge of possession of marijuana. Although the majority suggests that Barrera is relieved of this burden because he pleaded guilty to a crime that was different from the one for which he was

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[4] Elaborating on Barrera's position in closing argument, his counsel stated that if Barrera "had known that [he] would have to go back over [he] would have never smoked marijuana to begin with," and suggested that if trial counsel had known the immigration consequences of possession of marijuana and possession of drug paraphernalia when he was representing Barrera on an earlier charge, "I don't think Mr. Borja Barrera would have gotten those other convictions."

originally charged, this distinction is immaterial. As the United States Supreme Court has explained, "[i]f the defendant cannot demonstrate that, but for counsel's deficient performance, he would have [gone to trial], counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." Flores-Ortega, 528 U.S. at 484. Furthermore, to the extent the majority is suggesting that in pleading guilty to reduced charge of possession of paraphernalia, Barrera gave up the right to be convicted of possession of marijuana, there is no such right under the law.[5]

Additionally, even if Barrera would have preferred a conviction for marijuana possession and was arguably unconcerned about the likely outcome of a trial on that charge, that fact does

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[5] Barrera does not claim he was deprived of the right to enter into a plea agreement on the original charge of possession of marijuana, but even if he made such a claim, he would not be entitled to relief. When a defendant claims that ineffective assistance of counsel led to the rejection of a plea offer, "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler v. Cooper, 132 S.Ct. 1376, 1385, 182 L.Ed.2d 398, 407 (2012). Moreover, Barrera could not obtain relief under Virginia's habeas corpus statute without proving his sentence for conviction or possession of marijuana would have been less severe than the sentence he received for the conviction of the reduced charge of possession of paraphernalia. See Code 8.01-654(A) (petitioner must show he is detained without lawful authority).

not eliminate Barrera's burden to prove he would have pleaded not guilty and insisted on going to trial on the charge of marijuana possession.[6] It is the deprivation of the right to trial that establishes prejudice in the context of challenges to guilty pleas based on ineffective assistance, not the likelihood of a particular outcome. Flores-Ortega, 528 U.S. at 484. In its singular focus on the immigration consequences of Barrera's decision to plead guilty to possession of paraphernalia, the majority has lost sight of the right at issue when a defendant pleads guilty - the right to trial. Because Barrera did not prove his counsel's errors caused him to give up this right, he cannot establish prejudice.

In sum, because Barrera failed to present any evidence that he would have pleaded not guilty and insisted on going to trial, and affirmatively argued that he was making no such claim, I would hold he failed to establish prejudice. Accordingly, I would reverse the judgment of the circuit court granting the petition for a writ of habeas corpus.[7]

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[6] The majority also states that if Barrera had not pled guilty to possession of paraphernalia, he would only have been left with the option of pleading guilty to the charge of possession of marijuana or going to trial on that charge. If the majority's point is that we can assume Barrera would have either pled guilty or gone to trial on the charge of possession of marijuana such that proving he would have gone to trial is unnecessary, no such assumption can be made. Barrera's claim is not premised on the contention that he would have either pled guilty or gone to trial on possession of marijuana, but only on his contention that he had options other than pleading guilty to possession of paraphernalia.

[7] The Commonwealth also assigned error to the circuit court's refusal to consider the strength of the Commonwealth's case against Barrera. See, e.g., Akinsade, 686 F.3d at 255 (in considering the prejudice prong of Strickland, "[t]he potential strength of the

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state's case must inform our analysis, inasmuch as a reasonable defendant would surely take it into account") (internal quotation marks and citation omitted). I need not reach this issue since Barrera did not prove, in the first instance, that he would have gone to trial.