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Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

ERNY A. TITUS,
(aka Erny Alexander Titus),
Defendant-Appellee.

OPINION

Cite as: 2020 Guam 16

Supreme Court Case No. CRA18-001
Superior Court Case No. CF0727-16

Appeal from the Superior Court of Guam
Argued and submitted on July 10, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.[1]

PER CURIAM:

[1] The People of Guam ("People") appeal from a decision and order of the Superior Court of Guam granting Defendant-Appellee Erny A. Titus's motion to vacate and withdraw his guilty plea under 8 GCA § 120.42. We reverse and remand for the trial court to conduct an evidentiary hearing regarding the defendant's claim of ineffective assistance of counsel.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Titus is a non-citizen and has resided on Guam since 1994. In December 2016, officers responded to an alleged theft at "You Are Game" in Dededo, Guam. The People charged Titus with Theft of Property (as a Second Degree Felony), in violation of 9 GCA § 43.20(a), and Titus was indicted by a grand jury. Titus pleaded guilty to Theft of Property (as a Third Degree Felony), in violation of 9 GCA § 43.20(b), an included offense of 9 GCA § 43.20(a). He was sentenced to three years of imprisonment with credit for time served, restitution paid to You Are Game, and three years of probation.

[3] Titus filed a Motion to Vacate Conviction and Withdraw his Guilty Plea based on ineffective assistance of counsel for his plea counsel's failure to adequately warn Titus of the immigration consequences of pleading guilty to Theft of Property (as a Third Degree Felony). Titus also filed an affidavit with his motion, indicating what advice his counsel gave him regarding his decision to plead guilty. The trial court granted Titus's motion, and a hearing was scheduled to set a new trial date. The People timely appealed.

[1] The signatures in this opinion reflect the titles of the justices when this matter was argued and submitted.

II. JURISDICTION

[4] This court may raise issues of jurisdiction *sua sponte*. *People v. Angoco*, 2006 Guam 18 ¶ 7. We ordered the parties to submit supplemental briefs regarding appellate jurisdiction, given *Guam v. Estrebor*, 848 F.2d 1014 (9th Cir. 1988), under 8 GCA § 130.20(a)(3), and/or the applicability of 8 GCA § 130.20(a)(1). *See* 8 GCA § 130.20 (2005).

[5] The People argue that jurisdiction is proper under 8 GCA § 130.20(a)(3) because the Decision and Order granting Titus's motion to withdraw his plea is an order after judgment affecting the substantial rights of the People. Titus argues that the Decision and Order is an interlocutory order, and therefore 8 GCA § 130.20(a)(3) does not provide a statutory right of appeal. For the reasons below, we hold that jurisdiction is proper under 8 GCA § 130.20(a)(3).

III. STANDARD OF REVIEW

[6] We review the trial court's decision to grant or deny a motion to withdraw a guilty plea for an abuse of discretion. *People v. Castro*, 2016 Guam 16 ¶ 18; *see People v. Tedtaotao*, No. CR 96-00013A, 1996 WL 875739, *3 (D. Guam Sept. 30, 1996) ("[T]he decision lies within the sound discretion of the trial court."). "A trial court abuses its discretion when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *People v. Katzuta*, 2016 Guam 25 ¶ 18 (quoting *People v. Gutierrez*, 2005 Guam 19 ¶ 13 (per curiam)). A reviewing court does not substitute its own judgment for that of the trial court's but reviews the decision by weighing the factors to determine if the court committed a clear error of judgment. *Id.*

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IV. ANALYSIS

A. Jurisdiction is Proper Because the Order Granting the Post-Conviction Motion to Withdraw Titus's Guilty Plea and Vacate His Conviction is Appealable Under 8 GCA § 130.20(a)(3)

[7] We ordered the parties to submit supplemental briefs regarding appellate jurisdiction, given *Guam v. Estrebor*, 848 F.2d 1014 (9th Cir. 1988), under 8 GCA § 130.20(a)(3), and/or the applicability of 8 GCA § 130.20(a)(1). In *Estrebor*, the Ninth Circuit characterized an order granting a post-conviction motion to withdraw a guilty plea as an interlocutory order because it was merely a step in the criminal process. *See* 848 F.2d at 1015. The People's concession, in *Estrebor*, that the Organic Act of Guam did not confer the right to appeal an interlocutory order granting a post-conviction motion to withdraw a guilty plea was wise. *See id.* The Ninth Circuit applied the same reasoning to interpret 8 GCA § 130.20(a)(3), declining to expand the government's limited right of appeal to interlocutory orders absent more specific statutory language of legislative intent. *Id.* at 1016. The Ninth Circuit's analysis of Guam's statute is non-binding authority. *See Underwood v. Guam Election Comm'n*, 2006 Guam 17 ¶ 33 (declaring pronouncements of predecessor entities like the District Court of Guam Appellate Division as non-binding authority).

[8] The People's right to appeal in criminal matters is set out in 8 GCA § 130.20. "[S]ection 130.20 is a jurisdictional statute which will be strictly construed." *People v. Natividad*, 2005 Guam 28 ¶ 12 (quoting *People v. Superior Court (Bruneman)*, 1998 Guam 24 ¶ 9). While precedent exists on 8 GCA § 130.20(a)(1), we interpret 8 GCA § 130.20(a)(3) in the first instance here. We first address whether the People have the right to appeal the trial court's order under 8 GCA § 130.20(a)(1) as "[a]n order granting a new trial." 8 GCA § 130.20(a)(1).

1. The People have no right of appeal under 8 GCA § 130.20(a)(1)

[9] We ordered supplemental briefing on prospective jurisdiction under 8 GCA § 130.20(a)(1) and/or 8 GCA § 130.20(a)(3). Here, the People do not argue for appellate jurisdiction based on an appeal of "[a]n order granting a new trial." 8 GCA § 130.20(a)(1).

[10] The People's decision not to brief appellate jurisdiction under 8 GCA § 130.20(a)(1) is wise, given *People v. Natividad*, 2005 Guam 28. In *Natividad*, the People attempted to argue that a grant of a motion of acquittal after a jury's guilty verdict was, in effect, a motion for a new trial and therefore appealable under 8 GCA § 130.20(a)(1) as an order granting a new trial. 2005 Guam 28 ¶ 6 n.2. We rejected the People's argument to look beyond the label of the motion, citing our holding in *People v. Lujan*, 1998 Guam 28, "that jurisdiction be narrowly defined, and that this court 'must respect' those 'statutory provisions contain[ing] specific limitations on the ability of a party to pursue appellate relief.'" *Id.* (alteration in original) (quoting *People v. Lujan*, 1998 Guam 28 ¶ 9). Because the trial court did not grant a new trial, the People could not appeal under 8 GCA § 130.20(a)(1). *Id.* ¶ 6. Section 130.20(a)(1) has been interpreted literally—that it strictly permits only an appeal of an order granting a new trial and nothing more.

[11] Here, the trial court granted Titus's motion under 8 GCA § 120.42, which permits a defendant to withdraw a guilty plea and the court to vacate a conviction to correct for manifest injustice. *See* 8 GCA 120.42 (2005). Like in *Natividad*, the trial court did not grant a new trial, and therefore the People may not appeal under 8 GCA § 130.20(a)(1).

2. The People have the right of appeal under 8 GCA § 130.20(a)(3)

[12] Section 130.20 derives from California Penal Code section 1238, and 8 GCA § 130.20(a)(3) and California Penal Code section 1238(a)(5) are virtually identical. *See People v. Pak*, 1998 Guam 27 ¶ 6 ("Section 130.20 takes the identical language from the California statute .

. . ."). *Compare* 8 GCA § 130.20(a)(3), *with* Cal. Penal Code § 1238(a)(5) (1999). We may look to California case law to interpret our statute when our statute is adopted from California's. *See Castro*, 2016 Guam 16 ¶ 21 n.3.

[13] In *Estrebor*, the Ninth Circuit applied federal law to interpret 8 GCA § 130.20(a)(3), did not discuss the nature of orders "affecting the substantial rights of the government," and failed to analyze California case law. Because we are interpreting 8 GCA § 130.20(a)(3) for the first time and our statute is adopted from a California statute, we look to California case law for guidance.

[14] California Penal Code section 1238(a)(5) allows the People to appeal "[a]n order made after judgment, affecting the substantial rights of the people." The case law divides the statute into two parts, analyzing whether the order is "after judgment" and "affecting substantial rights." Here, the People contend California defines an "order after judgment" as "an order which is rendered after the imposition of sentence." Appellant's Suppl. Br. at 9 (June 6, 2019) (quoting *People v. Ibanez*, 90 Cal. Rptr. 2d 536, 539-40 (Ct. App. 1999)). We agree. California courts look at the time when the order-appealed-from was issued; if the order issued after the sentence was imposed, then it is an "order after judgment" for the purposes of California Penal Code section 1238(a)(5). *See People v. La Fave*, 156 Cal. Rptr. 63, 65 (Ct. App. 1979) (collecting cases). Here, the trial court's order granting Titus's motion issued after the sentence was imposed and therefore is an order "after judgment" under 8 GCA § 130.20(a)(3).

[15] California courts define orders affecting the substantial rights of the people as those that "must in some way affect the judgment or its enforcement or hamper the further prosecution of the particular proceeding in which it is made." *People v. Leonard*, 119 Cal. Rptr. 2d 57, 59 (Ct. App. 2002) (quoting *People v. McGuire*, 18 Cal. Rptr. 2d 12, 20 (Ct. App. 1993)). Orders affecting the substantial rights of the people include orders that "directly altered the judgment or somehow

directly affected the defendant's status as it related to the judgment already imposed." *People v. Benavides*, 120 Cal. Rptr. 2d 755, 759 (Ct. App. 2002) (collecting cases). California Penal Code section 1238(a)(5), however, is inapplicable to orders that "relate[] to a matter collateral to the underlying criminal case." *In re Anthony*, 186 Cal. Rptr. 3d 343, 349 (Ct. App. 2015) (quoting *Leonard*, 119 Cal. Rptr. 2d at 59). In *People v. McGuire*, 18 Cal. Rptr. 2d 12 (Ct. App. 1993), an order granting the defendant bail pending appeal was an order affecting substantial rights of the People because an "order releasing a convicted felon into society affects enforcement of the judgment and implicates the People's substantial rights to security." 18 Cal. Rptr. 2d at 21. In *People v. Gilbert*, 154 P.2d 657 (Cal. 1944), the court held that an order substantially modifying the judgment was an order issued after judgment which affected the substantial rights of the People because it directly altered the original judgment. 154 P.2d at 668.

[16] Here, the trial court granted Titus's post-conviction motion to withdraw his guilty plea and vacated his conviction. The trial court's order "directly altered the judgment" and "directly affected [Titus's] status as it related to the judgment already imposed." *See Benavides*, 120 Cal. Rptr. 2d at 759. The order was not related to a matter collateral to the criminal case. *See In re Anthony*, 186 Cal. Rptr. 3d at 349. Moreover, the trial court vacated Titus's conviction over six months after judgment was entered—meaning the time period to appeal the judgment had run. *See* 8 GCA § 130.40 (2005); Guam R. App. P. 4(b). "'The People have a right to rely upon the finality of judgments and to know when a judgment has become final that there has been an end to that particular litigation.' . . . [T]he People ha[ve] an interest in maintaining its integrity." *Benavides*, 120 Cal. Rptr. 2d at 758.

[17] We are persuaded by the definition in *People v. Leonard*, 119 Cal. Rptr. 2d 57, 59 (Ct. App. 2002), of orders affecting the substantial rights of the People. We hold that orders "affecting

the substantial rights of the government" under 8 GCA § 130.20(a)(3) must in some way affect the judgment or its enforcement or hamper the further prosecution of the particular proceeding in which it is made. The trial court's order meets this standard. The order affected the judgment by significantly and materially altering it. Moreover, the order vacated Titus's conviction, thereby changing Titus's status as it related to the judgment. Thus, the trial court's order granting Titus's motion to withdraw his guilty plea and vacate his conviction was an order after judgment that affected the substantial rights of the People. The trial court's order granting Titus's motion is appealable under 8 GCA § 130.20(a)(3).

[18] We now turn to the merits of the People's appeal.

B. The Trial Court Abused its Discretion by Granting Titus's Motion to Withdraw the Guilty Plea and Vacate the Conviction Because Titus Did Not Establish Prejudice

[19] The People appeal the trial court's order granting Titus's motion to vacate his conviction and withdraw his guilty plea based on ineffective assistance of counsel. Appellant's Br. at 10-23 (Mar. 19, 2018). There is no automatic right to withdraw a guilty plea. *See Roberson v. United States*, 901 F.2d 1475, 1477 (8th Cir. 1990). The trial court may allow a defendant to withdraw a guilty plea after sentencing to correct "manifest injustice." 8 GCA § 120.42. It may permit a defendant to withdraw a guilty plea to correct manifest injustice if he or she was "denied the effective assistance of counsel." *United States v. Boyd*, 429 F. Supp. 1018, 1019 (D. Md. 1977), *aff'd*, 594 F.2d 859 (4th Cir. 1979) (citing ABA Standards Relating to Pleas of Guilty § 2.1(a)(ii)(1)). "[T]he burden is on the defendant to show manifest injustice." *United States v. Laura*, 500 F. Supp. 1347, 1355 (E.D. Pa. 1980)), *aff'd*, 667 F.2d 365 (3d Cir. 1981); *United States v. Diaz*, 770 F. Supp. 840, 843 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 1160 (2d Cir. 1992). The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have

the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also People v. Root*, 1999 Guam 25 ¶ 12. The Sixth Amendment is incorporated and made applicable to Guam through the Organic Act. 48 U.S.C.A. § 1421b(g), (u) (Westlaw through Pub. L. 116-155 (2020)); *see also People v. Aguirre*, 2004 Guam 21 ¶ 13. The right to counsel is necessarily "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). This right applies at all critical stages of the proceedings, including the plea-bargaining stage. *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017).

[20] To satisfy a claim of ineffective assistance of counsel, a defendant must satisfy a two-prong test by showing: (1) "that counsel's performance was deficient," and (2) that counsel's "deficient performance prejudiced" the defendant's case. *Strickland*, 466 U.S. at 687; *see also People v. Ueki*, 1999 Guam 4 ¶ 6. Our analysis focuses on whether the trial court abused its discretion in its application of this two-prong test.

1. The trial court did not abuse its discretion in its application of the deficiency prong

[21] The trial court's finding that Titus's plea counsel's advice was deficient was not an abuse of discretion because it was not based on an erroneous conclusion of law or a clear error in judgment. First, a defendant must establish that his plea counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *see Ueki*, 1999 Guam 4 ¶ 6. A defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *Root*, 1999 Guam 25 ¶ 13. Reasonableness is measured by prevailing professional norms. *Strickland*, 466 U.S. at 688; *People v. Quintanilla*, 1998 Guam 17 ¶ 9. A defendant "must identify the acts or omissions of counsel that are alleged

not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *see Root*, 1999 Guam 25 ¶ 13. A reviewing court must assess "counsel's challenged conduct on the facts of the particular case." *Quintanilla*, 1998 Guam 17 ¶ 9 (quoting *Strickland*, 466 U.S. at 690). A court must consider the "acts or omissions" in light of the circumstances to determine whether such conduct was within the range of reasonable professional conduct. *Id.* (quoting *Strickland*, 466 U.S. at 690). There is a presumption counsel exercised reasonable judgment. *Id.* (quoting *Strickland*, 466 U.S. at 690).

[22] In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court determined that "[t]he weight of prevailing professional norms supports the view that counsel must advise [their] client regarding the risk of deportation." 559 U.S. at 367. This duty applies where the immigration statute is "succinct, clear, and explicit in defining the removal consequence" of the criminal conviction. *Id.* at 368. If a criminal offense is explicitly defined as an immigration violation and counsel "could have easily determined [the consequence] . . . from reading the text of the [removal] statute," counsel must advise his client of the immigration consequences. *Id.* at 368-69 (noting immigration statute explicitly defined Padilla's drug conviction as deportable offense). However, where "the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may* carry a risk of adverse immigration consequences." *Id.* at 369 (emphasis added). There is a duty to render the correct advice if immigration consequences are clear. *Id.*

[23] The People attempt to distinguish the facts in *Padilla* by arguing that Padilla's counsel gave incorrect advice, whereas here Titus's counsel simply omitted to give such advice. *See* Appellant's Br. at 15; *Padilla*, 559 U.S. at 359 (referring to Padilla's counsel incorrectly advising that Padilla "did not have to worry about immigration status since he had been in the country so

long"). Although Padilla's counsel gave him incorrect advice, the United States Supreme Court rejected a holding limiting deficiency to incorrect advice. *See* 559 U.S. at 370 ("A holding limited to affirmative misadvice would invite . . . absurd results."). The Court declined to distinguish between an affirmative act of incorrect advice and an omission—a failure to render advice altogether. *See id.* Either situation may be a deficient performance. We decline to diverge from the holding in *Padilla*. *See id.* Deficiency is not limited to rendering incorrect advice, and thus, *Padilla* applies to an act of commission or omission. *See id.*

[24] The trial court held that Titus's plea counsel was deficient because Titus's theft offense is "succinctly and clearly an 'aggravated felony'" under the Immigration and Nationality Act. Record on Appeal ("RA"), tab 44 at 5 (Dec. & Order, Jan. 16, 2018). The court reasoned that the advice given was too vague and Titus was entitled to explicit advice where deportation is clear and presumptively mandatory. The People argue that Titus affirmatively responded to the trial court's immigration warning, meaning he understood the consequences, and that Titus's plea counsel did not have to give "specific" advice about immigration consequences. Appellant's Br. at 13-19. The trial court did not abuse its discretion in finding that Titus's plea counsel rendered deficient performance.

[25] We do not agree with the People that the court's immigration warning during Titus's plea colloquy informed him of the immigration consequences to the effect that counsel is relieved of such duty.[2] The trial court's immigration warning does not cure the deficiency of Titus's plea counsel. Although most courts have adopted the practice of giving a *generic warning* regarding immigration consequences during the plea colloquy, *see* Fed. R. Crim. P. 11(b)(1)(O), giving such

[2] The trial court analyzed whether Titus's plea was voluntarily made under 8 GCA §§ 60.50 and 60.60 (2005). We also acknowledge that the defendant was properly advised by the trial court, at the plea colloquy, pursuant to the prevailing standard immigration warnings. However, the issue of voluntariness is not before us today.

a warning is not relevant to the inquiry of counsel's performance under a claim of ineffective assistance of counsel. *See United States v. Rodriguez-Vega*, 797 F.3d 781, 787 (9th Cir. 2015) ("[T]he court's performance at the plea colloquy [is] simply irrelevant to the question of whether *counsel's* performance fell below an objective standard of reasonableness."); *see also United States v. Urias-Marrufo*, 744 F.3d 361, 369 (5th Cir. 2014) ("It is counsel's duty, *not the court's*, to warn of certain immigration consequences, and counsel's failure cannot be saved by a plea colloquy."); *United States v. Swaby*, 855 F.3d 233, 240-41 (4th Cir. 2017). Thus, the court's warning does not relieve counsel of the duty to advise his client that removal is a virtual certainty when the deportation consequences of a conviction are clear and presumptively mandatory. *See Rodriguez-Vega*, 797 F.3d at 786 (citing *Padilla*, 559 U.S. at 368-69).

[26] The People's contention that defense counsel need not offer "specific" advice regarding immigration consequences, Appellant's Br. at 14, misses the mark because counsel's duty under *Padilla* is to give correct advice when the immigration consequences are clear and presumptively mandatory. General or vague advice like pleading guilty "may" lead to deportation does not fulfill counsel's duty when the correct advice is that it "almost certainly will." *Encarnacion v. State*, 763 S.E.2d 463, 466 (Ga. 2014). The clarity of the advice depends on the clarity of the statute. *See Padilla*, 559 U.S. at 368-69 (stating counsel's incorrect advice was deficient because consequences of Padilla's plea were easily determined from reading removal statute and his deportation was presumptively mandatory). Counsel's duty applies where a reading of the "immigration statute or controlling case law expressly identifies the crime of conviction as a ground for removal." *Rodriguez-Vega*, 797 F.3d at 786; *see also Padilla*, 559 U.S. at 369; *Swaby*, 855 F.3d at 240 (stating that defendant's counsel need only read the immigration statutes to determine that the crime was an aggravated felony). If the criminal offense is "succinct, clear, and explicit[ly]"

defined as a deportable offense within the immigration statutes, counsel must give correct advice that is equally clear regarding removal consequences. *Padilla*, 559 U.S. at 368; *see also Rodriguez-Vega*, 797 F.3d at 786. When the deportation consequence of the plea is clear, counsel has the duty to give his or her client clear, correct advice. In such case, general or vague advice does not satisfy counsel's duty to exercise reasonable judgment.

[27] Here, the trial court applied the correct legal standard in evaluating whether Titus's plea counsel's performance fell below an objective standard of reasonable judgment. The trial court appropriately compared Titus's conviction—Theft of Property (as a Third Degree Felony), in violation of 9 GCA § 43.20(b)—to the Immigration and Nationality Act. *See Rodriguez-Vega*, 797 F.3d at 786. Titus's conviction carried a maximum sentence of three years in prison, for which he received credit for time served. The Immigration and Nationality Act defines the crime for which Titus was convicted as an aggravated felony. 8 U.S.C.A. § 1101(a)(43)(G) (Westlaw through Pub. L. 116-158) ("The term 'aggravated felony' means . . . a theft offense . . . for which the term of imprisonment [is] at least one year[.]"). The Immigration and Nationality Act provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable," 8 U.S.C.A. § 1227(a)(2)(A)(iii), and defines "deportable" to mean subject to mandatory, rather than discretionary, removal, 8 U.S.C.A. § 1227(a).

[28] Titus was entitled to clear and correct advice regarding the deportation consequences of his guilty plea because the crime for which he was convicted presumptively leads to deportation. There is evidence on the record that Titus's plea counsel told him "that there might be some problems in the future with immigration." RA, tab 44 at 2 (Dec. & Order). Because theft is explicitly defined as an immigration violation, the trial court determined that the advice given by Titus's plea counsel was too vague. *Id.* at 5-7 (revealing that "might" and "maybe" are not enough

to advise of immigration consequences, and citing to *Encarnacion*, 763 S.E.2d at 463). We agree. This advice fails the reasonable professional norms standard because it did not clearly inform Titus of his presumptively mandatory deportation. Therefore, the trial court applied the law correctly and did not abuse its discretion by finding Titus satisfied the deficiency prong.

2. The trial court abused its discretion by applying the wrong standard for prejudice and concluding that Titus's evidence established prejudice

[29] Although the trial court did not abuse its discretion in ruling that Titus's plea counsel's advice was deficient, Titus also must prove that he was prejudiced by his plea counsel's deficient performance. *See Strickland*, 466 U.S. at 687. To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If a trial occurred, a court must assess whether the outcome of the trial would have been different. *See id.* But where a defendant pleads guilty and does not proceed to trial, a court must assess whether the defendant was prejudiced by the "denial of the entire judicial proceeding" because a court cannot assess the reliability of a trial that did not occur. *Lee*, 137 S. Ct. at 1965 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). A defendant who seeks to vacate a guilty plea must establish "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 U.S. 52, 59 (1985); *see also United States v. Gurumoorthy*, Criminal No. 08-00043, Civil No. 11-00016, 2012 WL 71022, *4 (D. Guam Jan. 11, 2012). To determine whether a defendant was prejudiced by his counsel's deficient performance, and ultimately allow withdrawal of a guilty plea, a reviewing court must consider "the totality of the evidence." *Strickland*, 466 U.S. at 695. There is a strong interest in preserving the "finality of convictions obtained through guilty pleas." *Padilla*, 559 U.S. at 371.

[30] In *Lee v. United States*, 137 S. Ct. 1958 (2017), the Court established that to prove prejudice a defendant must show a " reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 137 S. Ct. at 1965 (quoting *Hill*, 474 U.S. at 59). Further, the Court established it is the defendant's burden to produce "contemporaneous evidence" to substantiate his expressed preference that he would not have pleaded guilty and would have proceeded to trial. *Id.* at 1967.

[31] The requisite contemporaneous evidence should focus on the defendant's "decisionmaking" of whether to take the government's plea offer and plead guilty. *Id.* at 1966-67. The contemporaneous evidence produced in *Lee* included a transcript of the plea colloquy, evidentiary hearing testimony of both the defendant and his plea counsel, and uncontroverted evidence that avoiding deportation was the determining factor in accepting the plea. *See id.* at 1968-69. Specifically, the plea colloquy transcript provided the court with evidence of Lee's hesitation in answering the court's questions regarding the immigration consequences of his guilty plea. *Id.* at 1968. According to the transcript:

> When the judge warned him that a conviction "could result in your being deported," and asked "[d]oes that at all affect your decision about whether you want to plead guilty or not," Lee answered "Yes, Your Honor." When the judge inquired "[h]ow does it affect your decision," Lee responded "I don't understand," and turned to his attorney for advice. Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty.

Id. (internal citations omitted). At the evidentiary hearing, Lee's plea counsel testified that Lee's case was a "bad case to try" and acknowledged that "if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial." *Id.* at 1963. Lee testified that his attorney told him not to worry about immigration consequences because the government could not deport him. *Id.* After a review of the record, the United States Supreme Court found that the

evidence presented by Lee at the evidentiary hearing established prejudice because the record substantiated his argument that he would not have pleaded guilty and would have proceeded to trial if properly advised by his plea counsel. *See id.* at 1967.

a. The trial court erred by applying the wrong test to analyze prejudice

[32] The trial court held that Titus was prejudiced by his plea counsel's advice. In considering prejudice, the trial court applied a standard iterated in *Padilla*—whether a "decision to reject the plea bargain would have been rational under the circumstances." RA, tab 44 at 6 (Dec. & Order). The trial court found it would have been rational for Titus to reject the plea based on his history of living on Guam and connection to the United States. However, this test is inapplicable because the *Padilla* Court did not reach the merits of prejudice and the *Lee* Court did not apply this test to the prejudice prong. *See Padilla*, 559 U.S. at 374; *Lee*, 137 S. Ct. at 1967-68. The test for prejudice is the standard and burden established in *Lee*. 137 S. Ct. at 1967-68.

[33] In *Lee*, the Court determined a defendant must establish prejudice by demonstrating a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 1965 (quoting *Hill*, 474 U.S. at 59). The prejudice analysis focused on the contemporaneous evidence that substantiated Lee's assertion that he would not have pleaded guilty and would have proceeded to trial if properly advised. *See id.* at 1967. Thus, the trial court's finding of prejudice is based on an erroneous interpretation of the law because it applied the wrong test to determine prejudice.

b. The trial court erred by concluding the statements in Titus's affidavit established prejudice

[34] The only evidence on the record to support prejudice is Titus's affidavit filed in support of the motion to vacate his conviction. Titus lived nearly his entire life on Guam. His family lives

on Guam, and his son lives in Hawaii. The trial court concluded Titus would have rationally rejected a plea deal if advised that a guilty plea resulted in mandatory deportation because he would be unable to visit his son and had strong connections to Guam.

[35] However, under *Lee*, the inquiry is not whether Titus can show a rational basis for rejecting a plea and proceeding to trial. *See* 137 S. Ct. at 1966. Rather, the inquiry focuses on Titus's "decisionmaking." *Id.* Furthermore, the Court in *Lee* expressly stated: "Courts 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 deficiencies." *Id.* at 1967 (first emphasis added). If the only evidence provided is a defendant's "post hoc assertions," absent contemporaneous evidence to substantiate those preferences, the defendant has not established prejudice. *See United States v. Crain*, 877 F.3d 637, 650 (5th Cir. 2017) (ruling that defendant had not met his burden of proving prejudice where only evidence presented was "self-serving post hoc assertions about how he would have pled"); *see also Thompson v. United States*, 872 F.3d 560, 567 (8th Cir. 2017); *United States v. Pola*, 703 F. App'x 414, 421 (6th Cir. 2017) (distinguishing post hoc assertions as a lack of contemporaneous evidence from *Lee* where plea counsel's testimony substantiated Lee's motion). Thus, a defendant must produce contemporaneous evidence of his decisionmaking to substantiate his claim that he would not have pleaded guilty and would have proceeded to trial had he been properly advised of the deportation consequences. *See Lee*, 137 S. Ct. at 1968-69. The court must consider evidence beyond the defendant's self-serving statements.

[36] The contemporaneous evidence in *Lee* included the plea transcript and live testimony demonstrating Lee's decisionmaking. *Id.* at 1967-68. Lee answered affirmatively when asked whether deportation affected his desire to plead guilty during his plea colloquy. *Id.* at 1968. Lee's plea counsel testified at the evidentiary hearing that Lee would have gone to trial had he known

that he would be deported. *See id.* at 1967-68. Other examples of contemporaneous evidence include conversations between defense counsel and the prosecution during plea negotiations or affidavits of those other than the defendant to support the defendant's own assertions. *See Tzen v. United States*, No. 16-0734-DRH, 2017 WL 4233077 at *3 (S.D. Ill. Sept. 22, 2017) (revealing evidence of email conversation between defendant's plea counsel and Assistant United States Attorney discussing defendant's deportation concerns before entering plea); *Commonwealth v. Sylvain*, 46 N.E.3d 551, 557-58 (Mass. 2016) (discussing affidavits revealing specific advice defendant's plea counsel rendered and defendant's expressed concerns of immigration when he entered his plea); *see also Ueki*, 1999 Guam 4 ¶¶ 13-14 (characterizing defendant's affidavit as probative of prejudice contrasted against testimony and declarations from multiple sources which established prejudice).

[37] Titus's evidence of his ties to Guam and family circumstances, in contrast, are probative and factor into the totality-of-evidence analysis, but without substantiating contemporaneous evidence does not meet the prejudice standard in *Lee*. There is no evidence on the record, in the form of declarations or otherwise, from sources other than Titus to substantiate his assertion that he would have rejected a plea and proceeded to trial. There is no evidence on the record from other sources of Titus's decisionmaking about accepting or rejecting a plea. The only evidence on the record is Titus's affidavit offering post-hoc assertions. Under *Lee*, this is not enough to establish prejudice. Therefore, the trial court abused its discretion by erroneously concluding Titus was prejudiced.

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3. An evidentiary hearing is appropriate when the record is insufficient to determine prejudice

[38] The record must be sufficiently complete for the trial court to evaluate a claim of ineffective assistance of counsel. *See Ueki*, 1999 Guam 4 ¶ 14; *see also Castro*, 2016 Guam 16 ¶¶ 14-15. Generally, trial courts are "encouraged and ordinarily required to hold evidentiary hearings" when a claim of ineffective assistance of counsel is raised. 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2153 (updated June 2020) (collecting cases); *see also United States v. Tolson*, 372 F. Supp. 2d 1, 8 (D.D.C. 2005) (quoting *United States v. Taylor*, 139 F.3d 924, 932 (D.C. Cir. 1998)), *aff'd*, 264 F. App'x 2 (D.C. Cir. 2008). However, a court may exercise its discretion and refuse to hold a hearing if the motion is not supported by specific facts or if the allegations are unreliable. *See United States v. Trevino*, 829 F.3d 668, 673 (8th Cir. 2016).

[39] Here, the court did not conduct an evidentiary hearing. The court held only a motion hearing to discuss the legal merits of Titus's ineffective assistance of counsel claim. Because the court did not conduct an evidentiary hearing, there is no testimonial evidence by Titus, his plea counsel, or other witnesses demonstrating Titus's decisionmaking regarding his plea. *Cf. Lee*, 137 S. Ct. at 1963; *Ueki*, 1999 Guam 4 ¶ 13 (discussing testimonial evidence by defense counsel, petitioner, and family members in *Alvernaz v. Ratelle*, 831 F. Supp. 790, 792 (S.D. Cal. 1993)). Titus's affidavit filed in support of his *ex parte* motion constitutes the only prejudice evidence. It follows that the record is insufficient to properly evaluate prejudice under *Lee*. We hold that an evidentiary hearing is necessary to reach a conclusion on prejudice.

[40] Because the trial court abused its discretion in finding prejudice by its erroneous interpretation of the law and where the record does not support a finding of prejudice, we need not address the People's argument the trial court erred in utilizing standards from Ohio and Kansas to

determine manifest injustice. *See* Appellant's Br. at 24-28. However, we recognize the People's concern with the court's manifest injustice analysis because the source of the Guam statute, 8 GCA § 120.42, is federal law. *See* 8 GCA § 120.42 ("Section 120.42 is identical to former [Federal Rule of Criminal Procedure] 32(d)."); *see also Castro*, 2016 Guam 16 ¶¶ 20-27.

V. CONCLUSION

[41] We **REVERSE** the trial court's decision and order granting Titus's motion to vacate conviction and withdraw his guilty plea and **REMAND** for the trial court to conduct an evidentiary hearing upon its consideration of the defendant's claim of ineffective assistance of counsel. We **STAY** the trial court's May 25, 2017 Judgment until after the court determines Titus's ineffective assistance of counsel claim on remand.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice