III. CONCLUSION

Although we find that Ellis' argument regarding evidence admitted pursuant to rule 404(2) has merit, we find that the error was harmless; the physical evidence, and statements Ellis was reported to have made before the physical evidence connected him to the crime, established his guilt beyond any reasonable dispute. The district court, however, correctly overruled Ellis' objections to alleged "jailhouse informer" testimony and DNA evidence. And we find no merit to Ellis' constitutional challenges to Nebraska's capital sentencing scheme or his claims that the evidence is insufficient to support the findings of the jury and the sentencing panel. Finally, we find, on our de novo review, that the death penalty is warranted and proportional in this case. Therefore, Ellis' conviction and sentence are affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MAURO YOS-CHIGUIL, APPELLANT.
798 N.W.2d 832

Filed May 27, 2011. No. S-10-671.

1. **Jurisdiction: Appeal and Error.** An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
3. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred presents a question of law.
4. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision. The court reviews factual findings for clear error.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order.

7. **Postconviction: Appeal and Error.** In a postconviction motion, an appellate court will not consider as an assignment of error a claim that was not presented to the district court.
8. **Postconviction: Statutes.** Neb. Rev. Stat. § 29-1819.02 (Reissue 2008) is not a general postconviction relief statute.
9. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
10. **Postconviction: Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
11. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
12. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a court denies relief without an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief.
13. **Postconviction: Effectiveness of Counsel: Proof.** To establish a right to postconviction relief on a claim of ineffective assistance of counsel, the petitioner has the burden to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.
14. **Effectiveness of Counsel: Proof.** To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
15. ____: ____. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
16. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, 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.
17. ____: ____: ____. To establish an ineffective assistance of counsel claim, the viability of the defense is relevant as to how it would have reasonably affected the defendant's decision whether to plead guilty or go to trial.
18. **Postconviction: Effectiveness of Counsel: Proof.** A postconviction petitioner does not need to show that a defense of which counsel failed to advise him would have succeeded at trial. Instead, he must show only a reasonable probability that he would have insisted on going to trial.
19. **Effectiveness of Counsel: Pleas: Proof.** In a claim for ineffective assistance of counsel, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. Self-serving declarations that he would have gone to trial will not be enough; he must present objective evidence showing a reasonable probability that he would have insisted on going to trial.

20. **Effectiveness of Counsel: Proof.** As with all applications of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the question whether a given defendant has made the requisite showing will turn on the facts of a particular case.
21. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether to appoint counsel to represent the defendant.
22. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.
23. **Postconviction: Justiciable Issues: Right to Counsel.** When the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded.

Mauro Yos-Chiguil, pro se.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In 2008, Mauro Yos-Chiguil pleaded nolo contendere to attempted second degree murder and second degree assault. The Court of Appeals dismissed his direct appeal as untimely. He then unsuccessfully sought relief under Nebraska's immigration advisement statute.[1] He now petitions for postconviction relief. The district court denied his petition without an evidentiary hearing, and he appealed. We conclude that we lack jurisdiction over some, but not all, of Yos-Chiguil's claims. We remand the claim over which we have jurisdiction for an evidentiary hearing.

BACKGROUND

The State initially charged Yos-Chiguil in December 2007 with one count of attempted second degree murder, a Class II

[1] See Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).

felony[2]; one count of second degree assault, a Class IIIA felony[3]; and two counts of use of a deadly weapon to commit a felony, a Class III felony.[4] As part of a plea bargain, Yos-Chiguil pleaded nolo contendere to amended charges of one count of attempted second degree murder and one count of second degree assault. On May 9, 2008, the court sentenced him to prison for 18 to 28 years on the attempted murder conviction and 2 to 5 years on the assault conviction. The court gave Yos-Chiguil credit for 153 days served and ordered that the sentences be served concurrently. Yos-Chiguil did not file his notice of appeal until June 17, which rendered it untimely under Neb. Rev. Stat. § 25-1912 (Reissue 2008). On July 15, 2008, in case No. A-08-697, the Court of Appeals summarily dismissed his appeal.

Later in 2008, Yos-Chiguil sought to withdraw his nolo contendere pleas under § 29-1819.02, which allows defendants facing immigration consequences to withdraw their pleas if the court failed to warn them of such consequences.[5] The district court denied him relief. On appeal in *State v. Yos-Chiguil*,[6] we upheld the district court's order. We concluded that although the trial court did not warn Yos-Chiguil of the effect his conviction would have on efforts to gain naturalization, he had not shown that his conviction had had any effect on such efforts.

Yos-Chiguil next moved for postconviction relief, which is the current appeal. His first claim is somewhat difficult to pin down. It seemingly alleges both a due process violation and an ineffective assistance of counsel claim. Yos-Chiguil seems to argue that due process requires strict compliance with § 29-1819.02 and that his attorney was ineffective for failing to press this claim. Yos-Chiguil's next claim is clearer; he argues that his attorney was ineffective for not explaining that

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[2] Neb. Rev. Stat. §§ 28-201 and 28-304 (Reissue 2008).

[3] Neb. Rev. Stat. § 28-309 (Reissue 2008).

[4] Neb. Rev. Stat. § 28-1205 (Reissue 2008).

[5] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[6] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

the defense of intoxication could possibly negate the intent element required for second degree murder. As his final claim, Yos-Chiguil argues that his attorney was ineffective in failing to timely perfect his direct appeal. Yos-Chiguil explains that he made his desire to appeal known to his attorney but that it was frustrated because the attorney wrote all correspondence to Yos-Chiguil in English, a language that Yos-Chiguil does not understand. Yos-Chiguil argues that this language barrier complicated the perfecting of the appeal and ultimately caused it to be untimely. As relief, Yos-Chiguil sought an evidentiary hearing, discovery, and ultimately a vacation of the convictions and sentences.

On January 22, 2010, the district court ruled on several of Yos-Chiguil's claims. The district court denied the first claim regarding strict compliance with § 29-1819.02. The court seems to have considered our previous ruling in *Yos-Chiguil* dispositive as to that issue. The court also denied the claim that trial counsel was ineffective in failing to perfect an appeal. The court said that it was aware of no precedent requiring that counsel provide translated documents to his client. The court also noted that Yos-Chiguil apparently had access to translation services in prison because he has been able to file lengthy legal documents. Finally, the court found that defense counsel should have discussed an intoxication defense with the defendant. It gave the State 30 days to brief why the failure to discuss the intoxication defense should not be considered ineffective assistance of counsel. Yos-Chiguil moved for reconsideration of this order, but on February 11 the court denied this motion.

On June 21, 2010, the court entered an order overruling the remaining postconviction claim, which asserted that defense counsel was ineffective for not advising the defendant of an intoxication defense. The court denied this claim because it concluded that the argument could have been presented at an earlier proceeding but was not, and was thus procedurally barred. The court apparently thought that the argument could have been presented with Yos-Chiguil's § 29-1819.02 motion.

On July 7, 2010, Yos-Chiguil filed his notice of appeal in the district court, perfecting his appeal to this court.

ASSIGNMENTS OF ERROR

Yos-Chiguil assigns that the district court erred as follows:

(1) in finding that Yos-Chiguil's postconviction motion is procedurally barred;

(2) in denying Yos-Chiguil's motion for an evidentiary hearing and postconviction relief on his claim that counsel was ineffective in failing to (a) perfect an appeal, (b) argue that due process required strict compliance with § 29-1819.02, and (c) advise Yos-Chiguil of the possibility of an intoxication defense;

(3) in committing plain error by not requiring strict compliance with the terms of § 29-1819.02 when Yos-Chiguil entered his nolo contendere pleas; and

(4) in denying Yos-Chiguil's motion for appointment of counsel to assist him with presenting the meritorious claims raised in his postconviction motion.

STANDARD OF REVIEW

[1-3] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.[7] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[8] Whether a claim raised in a postconviction proceeding is procedurally barred also presents a question of law.[9]

[4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[10] Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.[11] We review factual findings for clear error.[12]

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[7] See *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010).

[8] See *id.*

[9] See *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

[10] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[11] See *id.*

[12] See *Haas, supra* note 9.

ANALYSIS

JURISDICTION

[5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[13] The State argues that we lack jurisdiction over Yos-Chiguil's claims that the trial court dismissed in its January 22, 2010, decision because Yos-Chiguil did not file his notice of appeal within 30 days of the date of the judgment.[14] The State asserts that even if the 30 days did not begin running until February 11 because of Yos-Chiguil's motion to reconsider, the notice of appeal filed on July 7 would have still been untimely.

[6] We agree that we lack jurisdiction over several of Yos-Chiguil's claims. We have previously stated that within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order.[15] In other words, an order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim.[16] Under § 25-1912, a notice of appeal must be filed within 30 days. Yos-Chiguil did not file his appeal until July 7, 2010, which, even if the clock did not begin running until February 11, is well outside the 30 days that Yos-Chiguil had to file his appeal.

So we do not have jurisdiction to hear any claims that were disposed of in the court's January 22, 2010, order. These include the claims that trial counsel was ineffective in not arguing that due process requires trial courts to follow the exact language of § 29-1819.02 and that trial counsel was ineffective in perfecting the appeal. Excising these claims from the errors assigned by Yos-Chiguil, we are left with the following assigned errors to consider: whether the trial court's failure to strictly comply with § 29-1819.02 constitutes plain error,

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[13] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

[14] See § 25-1912.

[15] See, *Poindexter, supra* note 13; *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[16] *Poindexter, supra* note 13.

whether the postconviction court erred in determining that Yos-Chiguil's ineffective assistance claim regarding the intoxication defense was barred, and if it was not, whether the claim was meritorious and whether the court should have appointed counsel for Yos-Chiguil.

Strict Compliance With § 29-1819.02

[7] Yos-Chiguil argues that it was error for the trial court that took his plea to not strictly comply with § 29-1819.02. As mentioned, Yos-Chiguil's first claim for relief in his petition is somewhat muddled, so it is not entirely clear that Yos-Chiguil presented this argument to the district court. We have previously said that, in a postconviction motion, we will not consider as an assignment of error a claim that was not presented to the district court.[17]

But giving Yos-Chiguil the benefit of the doubt and reading his complaint to include this claim for relief would not help his cause. Assuming that we read Yos-Chiguil's motion to encompass this claim, the court dismissed this claim in the January 22, 2010, order. The court made clear that the only claim not dismissed in the January 22 order is the ineffective assistance of counsel claim regarding the intoxication defense. Because Yos-Chiguil did not timely appeal from that final order, we lack jurisdiction to consider his strict compliance claim.

Ineffective Counsel for Failure to Advise on an Intoxication Defense

Yos-Chiguil claimed that his trial counsel was ineffective because he did not advise him on the possibility of an intoxication defense. Although this is Yos-Chiguil's first postconviction proceeding, the district court found that this argument was procedurally barred because Yos-Chiguil had previously moved to withdraw his pleas under § 29-1819.02. The court ruled that Yos-Chiguil could have raised his ineffective assistance of counsel argument then. The State concedes that the district court erred. The State correctly explains that § 29-1819.02 is a statutory remedy for the trial court's failure

[17] See *Haas, supra* note 9.

to give an immigration advisement and cannot be used to assert other errors.

[8] Section 29-1819.02 is not a general postconviction relief statute. The Nebraska Postconviction Act[18] provides relief if there was a "denial or infringement" of constitutional rights. But the failure of a trial court to warn a defendant of immigration consequences does not implicate a constitutional right.[19] So a defendant seeking to withdraw his plea because the court failed to advise him of immigration consequences cannot find relief under the act.

However, recognizing the unfairness present when a defendant pleads to a crime without knowing the immigration consequences of such a plea, the Legislature enacted § 29-1819.02. This statute requires that courts apprise defendants of the potential immigration consequences of their pleas and allows some defendants to withdraw their pleas if a court has failed to do so. While the Constitution does not require such a practice, the Legislature, in its judgment, determined that fairness did.

[9] Section 29-1819.02, however, speaks only to immigration consequences. Nothing in its text indicates that the Legislature intended it to serve as a vehicle for asserting all errors in the plea process. And we will not read into a statute a meaning that is not there.[20] We conclude that the district court erred in holding that Yos-Chiguil's claim of ineffective assistance of counsel was procedurally barred because he could have raised it in his § 29-1819.02 motion.

The State, nevertheless, argues that we should still affirm the decision of the district court, but for a different reason. The State argues that Yos-Chiguil's pleadings are insufficient to grant him relief.

[10,11] Normally, a voluntary guilty plea waives all defenses to a criminal charge.[21] However, in a postconviction proceeding

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[18] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008).

[19] See *Smith v. State*, 287 Ga. 391, 697 S.E.2d 177 (2010).

[20] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal., ante* p. 93, 798 N.W.2d 823 (2011).

[21] See *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[22]

[12] At this stage in the proceedings, the question is not whether Yos-Chiguil is entitled to relief. Rather, it is simply whether his pleadings are sufficient to grant him an evidentiary hearing. When a court denies relief without an evidentiary hearing, we must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief.[23]

[13-16] To establish a right to postconviction relief on a claim of ineffective assistance of counsel, the petitioner has the burden to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.[24] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[25] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[26] Within the plea context, "in order to satisfy the 'prejudice' requirement, 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."[27]

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[22] See *id.*

[23] See *id.*

[24] See *McGhee, supra* note 10. See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[25] *State v. Cook*, 257 Neb. 693, 601 N.W.2d 501 (1999).

[26] See *McGhee, supra* note 10.

[27] *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). See, also, *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005); *State v. Stevenson*, 9 Neb. App. 316, 611 N.W.2d 126 (2000); *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

The State, while acknowledging that this is the standard we have long applied to guilty pleas, insists that we have misinterpreted U.S. Supreme Court precedent regarding the prejudice requirement. The State argues that a showing that the defendant would have insisted on trial is not enough; the defendant must also prove that the defense would have likely succeeded at trial. In support of its argument, the State cites *Hill v. Lockhart*,[28] which contains two paragraphs that have resulted in a split of authority.[29] They read:

> We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*[30] and *McMann v. Richardson*.[31] The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, 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.
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> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead

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[28] *Hill, supra* note 27.

[29] See *Grosvenor v. State*, 874 So. 2d 1176 (Fla. 2004).

[30] *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

[31] *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

> guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, *e. g.*, *Evans* v. *Meyer*, 742 F. 2d 371, 375 (CA7 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington*,[32] these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker."[33]

The State seizes on language in the second paragraph and argues that Yos-Chiguil must show that his defense will ultimately be successful at trial. The State argues that to merely claim that he would have insisted on a trial is not enough.

[17] We, however, do not read *Hill* as the State does. Under our reading, a defendant must only allege facts showing a reasonable probability that he would have insisted on going to trial had counsel informed him of the defense. The viability of the defense is relevant as to how it would have reasonably affected the defendant's decision whether to plead guilty or go to trial. But it is not the sole factor to consider.

Two aspects of the above-quoted language lead us to this reading of *Hill*. Most important, the Court unequivocally stated that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but

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[32] *Strickland, supra* note 24.

[33] *Hill, supra* note 27, 474 U.S. at 58-60, quoting *Strickland, supra* note 24.

for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[34] This seems clear.

It is true that the Court also stated, "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial."[35] But we would emphasize the word *largely*. This qualifying language indicates to us that there are other factors at play. Other relevant factors could include the benefit of an offered plea bargain or the potential penalties the defendant faces. We do not believe that the ultimate merits of the defense are the only consideration. But they are relevant to whether the defendant would, in the light of all the circumstances known to him at the time, roll the dice on that defense and insist on going to trial.

In *Grosvenor v. State*,[36] the Florida Supreme Court confronted the exact argument we find before us. The court concluded that the defendant did not have to allege that the defense would have ultimately succeeded at trial to show prejudice. The court also noted that this approach was the majority rule.[37]

The Florida court explained that the viability of any defense went to the credibility of the defendant's assertion that he or she would have insisted on going to trial. In other words, if counsel failed to advise the defendant of a defense that was likely unmeritorious, it is doubtful that the defendant was prejudiced because he would probably have taken the benefit of a favorable plea bargain and refused to bet on a long shot.

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[34] *Id.*, 474 U.S. at 59.

[35] *Id.*

[36] *Grosvenor, supra* note 29.

[37] *Id.* See, also, e.g., *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006); *Miller v. Champion*, 262 F.3d 1066 (10th Cir. 2001); *Armstead v. Scott*, 37 F.3d 202 (5th Cir. 1994); *Ex Parte Imoudu*, 284 S.W.3d 866 (Tex. Crim. App. 2009); *McKeeth v. State*, 140 Idaho 847, 103 P.3d 460 (2004); *Copas v. Commissioner of Correction*, 234 Conn. 139, 662 A.2d 718 (1995).

The U.S. Supreme Court's recent decision in *Premo v. Moore*[38] also bolsters our analysis. In *Premo*, the Court reversed the Ninth Circuit's grant of habeas corpus to an inmate who alleged that his counsel had provided ineffective assistance in advising him to plead to the charge without first attempting to suppress a confession. The Court repeated that to show prejudice under *Hill*, 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.'"[39] The Court found that the state postconviction court's conclusion that the defendant would have accepted the plea bargain even if the confession had been suppressed was not unreasonable. The Court noted that the defendant's early plea cut short the State's investigation, during which it could have found even more incriminating evidence; that the State already had two other admissible confessions; that the defendant could face the death penalty or life without parole; and that the defendant received the statutory minimum sentence under the plea bargain. The Supreme Court's analysis confirms our prior decisions holding that the inquiry is whether the defendant would have pleaded guilty or insisted on trial based on the circumstances known to him at the time.

[18-20] In sum, a postconviction petitioner does not need to show that a defense of which counsel failed to advise him would have succeeded at trial. Instead, he must show only a reasonable probability that he would have insisted on going to trial. But the likelihood of the defense's success is not irrelevant; rather, it is relevant to the consideration of whether "a rational defendant [would have] insist[ed] on going to trial."[40] It should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's

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[38] *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

[39] *Id.*, 562 U.S. at 129, quoting *Hill, supra* note 27.

[40] *Roe v. Flores-Ortega*, 528 U.S. 470, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), citing *Hill, supra* note 27.

case. Self-serving declarations that he would have gone to trial will not be enough; he must present objective evidence showing a reasonable probability that he would have insisted on going to trial.[41] "As with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the facts of a particular case."[42]

We thus stay true to our prior holdings that to allege ineffective assistance of counsel regarding the entry of a guilty plea, a petitioner must allege only facts that show deficient performance on the part of counsel and facts that show the defendant would have insisted on going to trial but for the deficient performance.

Having reviewed the pleadings, we conclude that Yos-Chiguil's pleadings state a claim for postconviction relief. And because the meager record in front of us does not affirmatively show that he is not entitled to relief, Yos-Chiguil must receive an evidentiary hearing.

Appointment of Counsel

[21-23] Finally, we consider whether Yos-Chiguil is entitled to appointed counsel on remand. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether to appoint counsel to represent the defendant.[43] Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[44] But when the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.[45]

As mentioned, we have determined that Yos-Chiguil's pleadings are adequate to state a claim for ineffective assistance of

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[41] *Berkey v. U.S.*, 318 F.3d 768 (7th Cir. 2003).

[42] *Flores-Ortega, supra* note 40, 528 U.S. at 485.

[43] *Silvers, supra* note 15.

[44] *Id.*

[45] *Id.*

counsel. Thus, on remand, he is entitled to have the assistance of appointed counsel.

CONCLUSION

We conclude that we are unable to reach any of Yos-Chiguil's claims with the exception of his claim that counsel was ineffective for not discussing an intoxication defense. We believe that that claim alleges sufficient facts to warrant an evidentiary hearing. Finally, Yos-Chiguil is entitled to the assistance of counsel during his hearing.

REVERSED AND REMANDED.

WRIGHT, J., not participating.

HEAVICAN, C.J., concurring.

I concur with the majority's decision and reasoning. I write separately to highlight one important caveat: A defendant seeking postconviction relief after pleading guilty might receive an evidentiary hearing by alleging in pleadings that he or she would have insisted on going to trial but for his or her counsel's ineffective assistance. But this is merely the first hurdle. As the U.S. Supreme Court recently stated in *Premo v. Moore*[1]:

> There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those . . . where a plea was entered even before the prosecution decided upon all of the charges. A trial provides the full written record and factual background that serve to limit and clarify some of the choices counsel made. Still, hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed. . . .
>
> Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial or . . . even before the prosecution decided on the charges. The added uncertainty that results when there is no extended, formal record and no actual history

[1] *Premo v. Moore*, *562* U.S. 115, 132, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

> to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place.

In addition to making sufficient allegations to warrant an evidentiary hearing, defendants such as Yos-Chiguil must also bear "the substantial burden" to show that counsel was ineffective.