COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1437-CR **Cir. Ct. No. 2012CF1757**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HATEM M. SHATA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Hatem M. Shata appeals a judgment of conviction, following a guilty plea, of possession with intent to deliver between 1000 and 2500 grams of THC as a party to a crime. Shata also appeals the circuit court's

denial of his postconviction motion to withdraw his guilty plea. We reverse and remand.

BACKGROUND

¶2 At issue in this appeal is whether the circuit court erroneously denied Shata's postconviction motion seeking to withdraw his guilty plea on the basis of ineffective assistance of counsel. Specifically, whether Shata's counsel was ineffective when he failed to inform Shata, an Egyptian foreign national, that Shata's offense mandated deportation.

¶3 According to the criminal complaint, on February 16, 2012, Milwaukee and Waukesha police were conducting surveillance on the Sphynx Coffee restaurant, located at 1751 North Farwell Avenue, Milwaukee. Law enforcement officers from both departments received information that substantial amounts of marijuana were being stored at that location. Police observed an individual, later identified as Shata, along with a companion, later identified as Amanda Nowak, loading a large cardboard box into the trunk of a bronze Oldsmobile parked outside of the restaurant. A short time later, Nowak drove the vehicle; a traffic stop of that vehicle led to the discovery of a large amount of marijuana in the cardboard box.

¶4 Shata and Nowak were charged in the same complaint with possession with intent to deliver more than 1000 grams, but less than 2500 grams, of THC as parties to a crime.

¶5 Shata entered a guilty plea. At the plea hearing, Shata's defense counsel informed the court that Shata was not a United States citizen and "that there's a potential [Shata] could be deported." The court confirmed with Shata

that he understood the potential for being deported. After conducting a colloquy with Shata, the circuit court accepted Shata's guilty plea. Shata was subsequently sentenced to one year of initial confinement and four years of extended supervision.

¶6 Shata, through new counsel, filed a postconviction motion seeking to withdraw his guilty plea. Shata alleged that his defense counsel was ineffective for failing to inform Shata that his conviction would lead to automatic deportation. Specifically, the motion alleged that Shata's defense counsel violated the United States Supreme Court's decision in ***Padilla v. Kentucky***, 559 U.S. 356 (2010), which held that counsel is ineffective for failing to inform a defendant that an offense nearly identical to Shata's drug offense results in mandatory deportation.

¶7 The circuit court held a hearing on the motion. Shata's defense counsel testified at the hearing. The following exchange between Shata's postconviction counsel and Shata's defense counsel took place:

> Q: And you initially represented Mr. Shata in this case. He pled guilty to the charges, correct.
>
> A: Correct.
>
> Q: And did you know prior to the plea hearing that he was not a U.S. citizen?
>
> A: Yes.
>
> Q: And did you know that he was concerned about possibly being deported?
>
> A: Absolutely. We even placed it on the record and plea colloquy with the judge. I raised that issue.
>
> Q: Did you know that the events he was pleading guilty to would subject him to mandatory deportation?

> A: I knew it would subject him to deportation. I didn't know that it was mandatory. I knew it would subject him to deportation.
>
> Q: So–
>
> A: I didn't use the word "mandatory."
>
> Q: I believe the word used was "potential"?
>
> A: Yes.
>
> Q: Okay. Did you research the immigration consequences of pleading guilty on this charge at all?
>
> A: No, I didn't research the immigration consequences in terms of whether or not [deportation] was mandatory.
>
> Q: Okay. So you did not inform him that it would be mandatory?
>
> A: No, but I did contact a number of federal U.S. attorneys, because I do practice federal criminal law as well, and I asked a number of federal prosecutors about whether or not the impact of pleading to this charge would subject him to deportation, and they said it could, everyone used the word "it could." And I asked them if there was a specific amount of drugs or anything of that nature that would mandate a deportation, and they said, no, they didn't know of any specific amount, but everyone I questioned who did that type of law in the federal -- in the federal attorney's office, they just said may. No one said it was mandatory.

¶8 Defense counsel went on to state that he advised Shata of the "strong chance" that Shata could be deported, and that he encouraged Shata to plead guilty because counsel "had no viable defense" to the charges, should the case have proceeded to trial.

¶9 Shata also testified at the hearing, telling the circuit court that the possibility of deportation was his primary concern with his case, that defense counsel did not say "for sure" whether Shata would be deported, and that Shata

would have proceeded to trial if he knew that deportation was mandatory. Specifically, Shata stated that he would have gone to trial:

> [b]ecause I've been here for years, and I have a family and business, and, you know, it's just unfortunate, I lost my house, I lost a lot of money, and I was trying to, you know, restart again my life after, you know, 22 years of hard work, and I believed that I -- I was doing the right thing all along, and I never did anything wrong, so I was like, you know, I cannot be away from my kids, you know, that the only thing that I got left for me, my kids. That's it…. [Defense counsel] promised me to get probation, and … he said … you will work again, you live your life, so you don't have to worry about it, so I said okay, since it's going to be probation, no problem, you know. I can get another chance, you know.

(Some formatting altered.)

¶10 Shata also testified that he received a letter from Immigration and Naturalization Services, requiring him to appear for a deportation hearing. The letter is not in the record before us.

¶11 The circuit court denied Shata's motion to withdraw his guilty plea. The court found: (1) defense counsel informed Shata of the "strong likelihood" of deportation, which was sufficient under ***Padilla***; (2) because deportation was only "presumptive[ly] mandatory[,]" "there appears to be some discretion"; (3) Shata's testimony that he would have proceeded to trial had he known deportation was mandatory was not credible; and (4) Shata's sentence could have been significantly longer had he gone to trial, "which may ultimately reflect upon a presumptive mandatory removal."

¶12 On appeal, Shata contends that the circuit court erroneously exercised its discretion when it denied his motion to withdraw his guilty plea because defense counsel failed to advise Shata about the deportation mandate

associated with his offense. Based on ***Padilla***, and our recent decision in ***State v. Mendez***, 2014 WI App 57, ___Wis. 2d ___, ___ N.W.2d ___, we agree.

DISCUSSION

Standard of Review.

¶13 A defendant who moves to withdraw the plea after sentencing carries the heavy burden of establishing by clear and convincing evidence that the circuit court should permit plea withdrawal to correct a "manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The "manifest injustice" test requires a defendant to show a serious flaw in the fundamental integrity of the plea. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). Ineffective assistance of counsel is an example of a factual situation that establishes manifest injustice. ***State v. Krieger***, 163 Wis. 2d 241, 251 & n.6, 471 N.W.2d 599 (Ct. App. 1991). Plea withdrawal under the manifest injustice standard rests in the circuit court's discretion. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). A circuit court erroneously exercises its discretion, however, if it bases its decision on an error of law. ***State v. Woods***, 173 Wis. 2d 129, 137, 496 N.W.2d 144 (Ct. App. 1992).

¶14 In order to establish manifest injustice based on ineffective assistance of counsel, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Performance is deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See* ***Strickland***, 466 U.S. at

688; ***Pitsch***, 124 Wis. 2d at 637. We will affirm the circuit court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 324-25, 588 N.W.2d 8 (1999). However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

Applicable Deportation Law.

¶15 Relying on ***Padilla***, Shata contends that his trial counsel provided inaccurate advice regarding Shata's potential for deportation and that the circuit court denied his motion to withdraw his guilty plea based upon an error of law. We begin with an analysis of ***Padilla***, the controlling United States Supreme Court case.

¶16 Jose Padilla, a native of Honduras, pled guilty to the transportation of a large amount of marijuana in his tractor-trailer in Kentucky. ***Id.***, 559 U.S. at 359. Padilla had been a lawful permanent resident of the United States for over 40 years and served in the Armed Forces during the Vietnam War. ***Id.*** Padilla filed a postconviction motion to withdraw his guilty plea, arguing that his trial counsel did not inform him that mandatory deportation would result from pleading guilty to those drug charges. ***Id.*** The Supreme Court of Kentucky denied Padilla's motion without a hearing, concluding that Padilla's Sixth Amendment right to effective counsel did not extend to advice about deportation because deportation was simply a "'collateral' consequence" of Padilla's conviction. ***Id.*** at 359-60.

¶17 The United States Supreme Court accepted Padilla's case "to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty *would result in his removal from this country.*" ***Id.*** at 360 (emphasis added). The court concluded "that

constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to *automatic deportation*." ***Id.*** (emphasis added).

¶18 In explaining the rationale for its conclusion, the ***Padilla*** Court examined the history of United States deportation law, noting that for the nation's first 100 years, there was "'a period of unimpeded immigration.'" ***Id.*** (citation omitted). The Immigration Act of 1917, for the first time, "made classes of noncitizens deportable based on conduct committed on American soil." ***Padilla***, 559 U.S. at 361. However, both state and federal sentencing judges had the authority to recommend that the noncitizen not be deported. ***Id.*** The recommendation was binding. ***Id.*** at 361-62. As early as 1922, narcotics offenses became grounds for deportation, however, judicial recommendations could prevent deportation. ***Id.*** at 362-63.

¶19 In 1990, however, judicial recommendations against deportation were eliminated, and in 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation. ***Id.*** at 363. Under contemporary deportation law:

> if a noncitizen has committed a removable offense after … 1996 … his removal is *practically inevitable* but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. *See* 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. *See* § 1101(a)(43)(B); §1228.

Padilla, 559 U.S. at 363-64 (emphasis added; footnote omitted). Recognizing the impact of current deportation law on noncitizens convicted of crimes, the Court concluded that "[t]he importance of accurate legal advice for noncitizens accused

of crimes has never been more important[,]" ***id.*** at 364, and "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence," ***id.*** at 368 (brackets, quotation marks and citations omitted).

¶20 Taking the history of deportation law into consideration, the Supreme Court held that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to *automatic deportation*." ***Id.*** at 360 (emphasis added). The Court noted that the "consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was *presumptively mandatory*, and his counsel's advice was incorrect." ***Id.*** at 369 (emphasis added). The Court went on to conclude that "when the deportation consequence is truly clear, *as it was in this case*, the duty to give correct advice is equally clear." ***Id.*** (emphasis added).

¶21 The same deportation statutes the Court discussed in ***Padilla*** are in effect now. We summarize them briefly.

¶22 Classes of deportable aliens, which include aliens convicted of a large category of criminal offenses, are described in 8 U.S.C. § 1227(a)(2). As material in ***Padilla*** and here, under § 1227(a)(2)(A)(iii), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." "[A]ggravated felony" is defined as, among other things, "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), *including a drug trafficking crime* (as defined in section 924(c) of Title 18)." *See* 8 U.S.C. § 1101(a)(43)(B) (emphasis added).

¶23 In addition, 8 U.S.C. § 1227(a)(2)(B)(i) makes deportable "[a]ny alien who at any time after admission has been convicted of a violation of (or a

conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country *relating to a controlled substance* (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." (Emphasis added.)

¶24 The Attorney General is directed, by 8 U.S.C. § 1228(a)(3), to expedite the deportation process so that a noncitizen will be deported immediately upon completion of the sentence imposed, but the Attorney General is not required to remove the noncitizen before the person has completed the incarceration portion of his/her sentence.

¶25 The Attorney General has limited discretion to waive deportation in some cases. For example: 8 U.S.C. § 1229b(a)(3) authorizes the Attorney General to cancel removal if a person "has not been convicted of any aggravated felony"; 8 U.S.C. § 1227(a)(1)(E)(iii) allows the Attorney General, for humanitarian purposes, to waive deportation based on smuggling if the noncitizen aided illegal entry of a spouse, parent, son or daughter; § 1227(a)(1)(H) permits the Attorney General to waive deportation for certain misrepresentations or false statements if a spouse, parent, son or daughter is a United States citizen or permanent resident; § 1227(a)(2)(A)(vi) allows the Attorney General to waive deportation for conviction of certain general crimes (which are a different category than drug crimes) if the convicted person has been pardoned by the President or a Governor. We have found no provision, and the ***Padilla*** Court cited none, under which the Attorney General has the authority to waive any deportation based on conviction for drug offenses or an aggravated felony (which under the statutory definition described above includes drug offenses).

¶26 Wisconsin, as it must, follows the constitutional requirements explained in ***Padilla***. We recently applied the principles articulated in ***Padilla*** to our decision in ***Mendez***. In that case, Ivan Mendez pled guilty to maintaining a drug trafficking place. ***Id.***, ___ Wis. 2d ___, ¶1. Mendez sought to withdraw his guilty plea after sentencing, arguing that his defense counsel failed to advise him about the "clear deportation consequences" of a guilty plea to his offense. ***Id.*** At a hearing, Mendez's defense counsel testified that he was aware Mendez was not a United States citizen, but did not know that conviction of a serious drug crime "would render him automatically deportable." ***Id.***, ¶4. Counsel testified that he informed Mendez that a conviction "'may'" make Mendez deportable, but counsel believed that getting probation through a plea bargain rather than incarceration would allow Mendez to remain in the United States. ***Id.***

¶27 Relying on ***Padilla***, we concluded that Mendez's counsel performed deficiently by failing to give Mendez complete and accurate information about the deportation consequences of his guilty plea. ***Mendez***, ___ Wis. 2d ___, ¶¶16-17. We also noted that "the question in determining whether deficient counsel prejudiced a noncitizen defendant's plea is whether 'a decision to reject the plea bargain would have been rational under the circumstances.'" ***Id.***, ¶12 (quoting ***Padilla***, 559 U.S. at 372). With the principles articulated in ***Padilla*** and ***Mendez*** in mind, we now turn to the question of whether Shata's counsel rendered ineffective assistance.

I. Deficient Performance.

¶28 We conclude that Shata's counsel rendered deficient performance. Defense counsel was aware that deportation was Shata's primary concern. Counsel had a duty to obtain and provide Shata with accurate information about

the deportation consequences of his plea. A reading of the federal statutes, as explained above, establishes that not only is the Attorney General directed to conduct deportation proceedings against a noncitizen convicted of the offense to which Shata pled, but the Attorney General is instructed to expedite those proceedings to insure the person is deported promptly upon completing his incarceration sentence. There is no power given to the Attorney General to waive any of these requirements for Shata's offense, which constitute both an "aggravated felony" and a "drug offense" under federal law. Defense counsel's reported casual inquiry of unidentified federal prosecutors does not excuse his obvious failure to even read the applicable federal statutes. Under the applicable federal statute, the deportation consequences for conviction of Shata's offense, like the consequences of Padilla's, were in fact dramatically more serious than "a strong likelihood." Like Padilla's counsel, counsel's performance here was deficient when he failed to provide Shata with complete and accurate information about the deportation consequences of his plea.

II. Prejudice.

¶29 Shata is entitled to withdraw his guilty plea only if we conclude, based on the record before us, that the circuit court committed an error of law when it concluded that Shata was not prejudiced by his counsel's deficient performance. We conclude that Shata was prejudiced.

¶30 Arguing that we should adopt the analysis of the Missouri court in ***Chacon v. Missouri***, 409 S.W.3d 529 (Mo. Ct. App. 2013), the State contends that Shata was not prejudiced because he failed to show that he would have refused the plea bargain if he was aware of the mandatory deportation consequences of his conviction. Shata's counsel admitted to having no defense, Shata's co-defendant

was prepared to testify against him, and Shata's counsel's advise that there was " a strong likelihood" of deportation was sufficient.

¶31 We rejected ***Chacon*** in our ***Mendez*** decision because its holding is contrary to ***Padilla***. *See* ***Mendez***, __ Wis. 2d __, ¶14. As ***Padilla*** noted, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specific crimes." ***Id.***, 559 U.S. at 364 (footnote omitted). We conclude that the circuit court here did not apply the test mandated by ***Padilla***. Under ***Padilla***, a prejudice analysis turns on the question of whether "a decision to reject the plea bargain would have been rational *under the circumstances*." ***Id.*** at 372 (emphasis added). Here, the circuit court discounted the inevitability of Shata's deportation under federal law. We do not fault the court for not accurately understanding the impact of existing deportation law on Shata's circumstances because Shata's counsel never properly brought that law to the attention of the court as he should have done had he accurately understood the applicable statutes.

¶32 Therefore, a prejudice analysis must take all of Shata's circumstances into account when "measuring whether, properly informed of the automatic, irreversible, and permanent deportation consequences of his plea, [Shata] might rationally have rejected the plea bargain in favor of trial despite the risk" of confinement. *See* ***Mendez***, ___Wis. 2d ___, ¶12. As we noted in ***Mendez***, "'[A] rational decision not to plead guilty does not focus solely on whether [a defendant] would have been found guilty at trial—***Padilla*** reiterated that an alien defendant might rationally be more concerned with removal than with a term of imprisonment.'" ***Mendez***, __ Wis. 2d __, ¶16 (citation omitted; second set of brackets in ***Mendez***).

¶33 The circuit court found no prejudice. The court's explanation demonstrates that it did not believe, in view of counsel's concession that there was no factual defense, that a rational person would risk a longer sentence after a trial when a shorter sentence was likely to result from a plea bargain. There is no evidence the court considered the personal impact of unavoidable deportation (that not even an official pardon can avoid) on Shata, or that a person in Shata's circumstances who understood the realities of the deportation process could reasonably prefer delaying deportation by incarceration after trial rather than more expeditious removal from this country. As such, the court did not, as ***Padilla*** requires, consider all the circumstances, including the unique personal impact of eventual deportation.

¶34 Accordingly, we conclude that counsel provided ineffective assistance by giving Shata inaccurate and incomplete information about the deportation consequences of his guilty plea. We also conclude that Shata was prejudiced by that inaccurate information and advice. We conclude that because of the inaccurate and prejudicial advice Shata received from counsel, he is entitled to withdraw his guilty plea. We reverse and remand for further proceedings consistent with this opinion.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

¶35 BRENNAN, J. (*dissenting*). I respectfully dissent from the Majority on both the deficiency and prejudice prongs of the ineffective assistance analysis. In my view, Shata's trial counsel's advice that there was a "strong chance" of deportation was accurate and compliant with the holding in ***Padilla***. *See* ***id.***, 559 U.S. at 374 ("we now hold that counsel must inform her client whether his plea carries a risk of deportation"). Additionally, as to prejudice, given the strength of the State's case—including, Shata's full confession, his co-defendant's testimony against him, and the police surveillance of the crime—as well as the ten years of prison exposure Shata was facing, Shata has failed to show that he might rationally have decided to reject the plea, which contained a probation recommendation. *See* ***Mendez***, ___ Wis. 2d ___, ¶17 ("the proper analysis … [is whether] he might rationally have decided to reject the plea").

Trial counsel's advice was accurate and compliant with the holding in Padilla.

¶36 Trial counsel testified at the postconviction hearing that during the plea discussions he told Shata that he faced a "strong chance" of deportation. The circuit court found, at the conclusion of the postconviction hearing, that trial counsel testified credibly and that counsel advised Shata of the "strong likelihood" of deportation. Shata does not challenge the circuit court's findings.

¶37 The Majority concludes that trial counsel was deficient because in saying "strong likelihood" of deportation, trial counsel failed to give Shata "complete and accurate information about the deportation consequences of his plea." *See* Majority, ¶28. In the Majority's view, Shata, like Padilla, faced

"dramatically more serious [consequences] than 'a strong likelihood.'" *See* Majority, ¶28. In comparing Shata's deportation risks to Padilla's, the Majority adopts ***Padilla***'s conclusion that the federal statute makes Shata "subject to automatic deportation," *see* Majority, ¶20 (citing ***Padilla***, 559 U.S. at 360) (Majority's emphasis omitted), and that his deportation is "presumptively mandatory," *see* Majority, ¶20 (citing ***Padilla***, 559 U.S. at 369) (Majority's emphasis omitted). Because Shata's trial counsel failed to use those words, the Majority concludes that his advice was deficient. I respectfully disagree.

¶38 Trial counsel not only complied with ***Padilla***'s requirement that he inform Shata "whether his plea carries a risk of deportation," *see* ***id.***, 559 U.S. at 374, trial counsel went one better and advised Shata not only that there was a "risk" of deportation, but that there was a *strong* one. The common meaning and dictionary definition of "risk" is "the *possibility* of loss, injury, disadvantage …." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1961 (1966) (emphasis added). By saying that the risk or likelihood was "strong," trial counsel conveyed the essence of "presumptively mandatory" and "subject to automatic deportation." Both of those phrases convey a deportation prospect, a possibility, a risk—maybe even a strong or presumptive risk—but neither states that deportation is a certainty. And nothing in ***Padilla*** requires any particular words be used.

¶39 That becomes clearer in the context of ***Padilla***'s facts. Unlike, Shata's trial counsel, Padilla's trial counsel totally failed to advise him of the risk of deportation. *See* ***id.***, 559 U.S. at 359. In fact, he went one step worse: he told Padilla that there was *no risk* of deportation. ***Id.*** Padilla made his plea decision with inaccurate information about the deportation risk he faced. Accordingly, the United States Supreme Court concluded in ***Padilla*** that competent counsel must

accurately advise of the "risk of deportation." ***Id.*** at 374. Shata's trial counsel did that here.

¶40 Additionally, nothing in the record actually shows that deportation for Shata is in fact a certainty. The only evidence Shata submitted with his postconviction motion was a detainer form from the Department of Homeland Security to the Dodge County Jail, dated November 23, 2012, stating that Homeland had "[i]nitiated an investigation to determine whether this person is subject to removal from the United States" and requesting the jail to hold Shata for a period not to exceed forty-eight hours after his scheduled release from custody. Nothing in that form says that deportation is a certainty. On its face the form indicates that a conclusion had not yet been reached as to *whether* he was subject to removal.

¶41 Indeed, Shata himself testified at the postconviction hearing that the deportation decision was up to the judge. He said that he received a letter saying that he had some kind of a deportation hearing coming up in July 2013. Shata stated that at the deportation hearing "you … go in front of [a] judge, and then the judge will decide." The letter is not in the record. But even Shata's testimony about the letter allows for the possibility that the judge would decide against removal.

¶42 Shata's trial counsel, unlike Padilla's, did not fail to warn Shata of deportation consequences or falsely assume that there was no risk of deportation. The record here shows that Shata's trial counsel accurately and properly informed him that there was a "strong chance" of deportation upon conviction and accordingly was not deficient.

Shata fails to show prejudice.

¶43 Additionally, Shata fails to show that rejecting a plea with a probation recommendation from the State would have been a rational choice. We recently stated in ***Mendez***, another ineffective-assistance-of-counsel appeal based on failure to give deportation warnings, that the correct prejudice standard is whether "'a decision to reject the plea bargain would have been rational under the circumstances.'" ***Id.***, ___ Wis. 2d ___, ¶12 (citing ***Padilla***, 559 U.S. at 372). Applying that standard here, rejecting a plea with a probation recommendation from the State would not have been rational for Shata.

¶44 In ***Mendez***, like in ***Padilla***, the defendant received clearly incorrect deportation advice from his trial counsel. Mendez's trial counsel admitted that he did not advise Mendez that he would be deported if he pled guilty. ***Mendez***, ___ Wis. 2d ___, ¶4. We concluded in ***Mendez*** that Mendez was prejudiced by his trial counsel's failure to advise because he might have rationally decided to reject the plea and risk four and one-half years in prison due to his long ties to this country, the presence of his family here, and "his fear of return to Mexico." ***Id.***, ¶17. But there are significant factual differences between Shata's and Mendez's cases.

¶45 First, unlike Mendez's trial counsel, Shata's trial counsel gave him deportation advice. *See* ***id.***, ¶4. He advised Shata that there was a "strong chance" of deportation.

¶46 Second, the State's case against Shata was very strong. Shata confessed to the offense. Mendez apparently did not and denied his involvement. ***Id.***, ¶3. In addition to Shata's confession, police officers had Shata under surveillance and would testify that he sold drugs out of his restaurant the day

before they observed Shata and his seventeen-year-old employee and co-defendant remove the drugs from his restaurant and place them in Shata's car. Shata's accomplice was prepared to testify against him. As Shata's trial counsel testified at the postconviction hearing, he was left with no defense to work with: "I had no defense. I had no viable defense. There was -- I had nothing to work with, and so we went over that, and he chose to enter the plea because we could not really prevail if we went to trial."

¶47 Third, Shata faced substantially more exposure than Mendez did, making the probation recommendation more important to him. Shata was facing ten years of imprisonment, while Mendez only faced four and one-half years. Although Shata had no prior record, the amount of marijuana (five pounds) was large and he had involved his seventeen-year-old restaurant employee in the crime. As Shata's trial counsel explained at the postconviction hearing, probation was not a likely outcome without the State's negotiated sentencing recommendation. Trial counsel testified that he believed that if Shata were to reject the plea and go to trial, given the State's very strong case and without the State's probation recommendation, conviction and prison were the likely outcome. He testified, "I've never seen anyone go to trial when they have no defense and come out with probation."

¶48 Fourth, although Shata wanted to remain in the United States, and, like Mendez had been in the United States for a long time and had family here, there was nothing in this record to indicate Shata *feared* returning to Egypt as Mendez *feared* returning to Mexico. *See* ***id.***, ¶17. Shata only indicated a *desire* not to go back to Egypt.

¶49 Because of the likelihood of conviction and prison after a trial, Shata fails to show that it would have been a rational decision for him to reject a plea with a probation recommendation. Although he faced a "strong chance" of deportation upon conviction, deportation was not a certainty, especially if he was sentenced to probation as opposed to prison.

¶50 For the foregoing reasons, I would affirm the circuit court's decision and respectfully dissent.