STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1437-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

HATEM M. SHATA,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITIES

STATE OF WISCONSIN

I N S U P R E M E C O U R T

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ISSUES PRESENTED

1. Did trial counsel, who advised Shata that he faced a "strong chance" of being deported based on his plea to a felony drug charge, perform deficiently under *Padilla v. Kentucky*, 559 U.S. 356 (2010), in which the United States Supreme Court held that "counsel must inform her client whether his plea carries a *risk* of deportation." *Padilla*, 559 U.S. at 374 (emphasis added)?

The circuit court answered: "No."

The majority at the court of appeals answered: "Yes." The dissent answered: "No."

2. Did Shata establish prejudice under *Padilla* and *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895, by demonstrating that it would have been rational for him to reject the plea agreement and proceed to trial if he had been properly advised of the immigration consequences of his plea?

The circuit court answered: "No."

The majority at the court of appeals answered: "Yes." The dissent answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE

By criminal complaint dated April 18, 2012, the Milwaukee County District Attorney's Office charged Hatem Shata with two counts of possession with intent to deliver marijuana, as party to a crime (2). On October 5, 2012, Shata appeared in court and pleaded guilty to one of those counts (9; 13; 26:11). At that time, Shata's attorney informed the court that Shata was concerned about the immigration consequences of a plea, and the court passed the case to allow them to discuss it (26:4-6). Back on the record, Shata's counsel explained:

> MR. TORAN: I did inform him of the potential that he's – Are you a United States citizen?
>
> THE DEFENDANT: No.
>
> MR. TORAN: He's not a United States citizen, that there's a potential he could be deported.
>
> THE COURT: All right. And, Mr. Shata, is that your understanding as well?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you want to enter a plea today?
>
> THE DEFENDANT: Yes, sir.

(26:7-8). In connection with Shata's plea, the court reiterated:

> THE COURT: I'll also advise you that if you're not a citizen of the United States that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.[1] And you understand that?
>
> THE DEFENDANT: Yes.

(26:9). Shata pleaded guilty to one count of possession with intent to deliver marijuana as party to a crime (13; 26:11, 16-17).

[1] *See* Wis. Stat. § 971.08(1)(c), and (2).

On March 15, 2013, Shata filed a postconviction motion to withdraw his plea (15). Shata claimed that his trial attorney's performance was deficient because he failed to inform Shata "that federal law required he be deported following his conviction" (15:3) (emphasis added). On May 31, 2013, the circuit court held a hearing on Shata's motion (28; Pet-Ap. 121-45).

At the hearing, Shata's trial counsel, James Toran, testified that he knew Shata was concerned about the possibility of deportation (28:5; Pet-Ap. 125). Attorney Toran explained that he knew Shata's conviction would subject him to deportation, but that he did not know it was mandatory:

> 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 it 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.

(28:5-6; Pet-Ap. 125-26). Regarding his advice to Shata and Shata's decision to plead guilty, Attorney Toran testified that:

> A: I advised him prior to the plea that he may be deported, that there's a strong chance that he could be deported, that the State was recommending probation, and the fact remains the matter was set for trial, the State, which would be, I believe, Megan Williamson, which would be you, the prosecutor, that you had the co[-]defendant who was present to testify that my client had given her drugs, I think that was about five pounds of marijuana, somewhere in that range, from a restaurant, and she took the drugs to drive away to get 'em out of the place of business and that she was going to testify to that fact and that in fact if he was very cooperative and he had really more or less had admitted that this – that the drugs weren't his, they were holding them for someone else and he was just trying to get [them] out of his place of business and that he did, in fact, give them to his employee, who was, I believe, a waitress.
>
> And furthermore, I had made efforts for community service to work with law enforcement to – to mitigate his circumstances to get him out of the with intent conviction in efforts to avoid any – any concerns about being deported. But the State was unwilling to work with Mr. Shata. They didn't like him. The law enforcement didn't like his demeanor, and they just didn't want to work with him because I believe he had gone to an officer's home and stopped by where the officer was in the yard or something because he's a real nervous type of guy, and the officer got very offended by that and told the – one of the undercover officers from HIDTA about the fact that he had come to his home, and they just refused to work with him.

So I was – the matter was set for trial, we proceeded to trial. 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.

Q: And you're aware that the defendant did give a confession in this case?

A: Absolutely. Absolutely.

Q: And that was part of what you discussed with him?

A: Yes.

Q: In going over a plea with him?

A: Right.

Q: And you did indicate that you did advise him that there was a strong chance that he would be deported?

A: Yes. I advised him a strong chance he would be deported, that the recommendation from the State was probation, but actually, you know, in the plea colloquy, I mean, it's evident and Judge Dugan, very thorough, and he indicated that he didn't have to follow the State's recommendation, he's free to do whatever he chooses to do.

So, I mean, we were aware of all of those concerns, but he had no prior record, and he had been here for 20 years, and he's a businessman and had family, strong family ties, and his family lived in New Jersey, and I don't know, it's a situation whereas if he had gone to trial, the recommendation probably would've gone up. I've never seen anyone go to trial when they have no defense and come out

> with probation, taking three or four days of the court's time when there's really no issue of fact.
>
> So it – I mean, it was just a tough position to be in given the circumstances.

(28:8-11; Pet-Ap. 128-31).

Shata testified at the hearing as well, and he confirmed his concern about being deported (28:12; Pet-Ap. 132). Shata also discussed the advice he received from his attorney:

> Q: Did he tell you that by entering a guilty plea to this particular charge that you would be deported automatically?
>
> A: He didn't say for sure.
>
> Q: If you had known that you would be subjected to mandatory deportation, would you have entered a guilty plea?
>
> A: No.

(28:13; Pet-Ap. 133). Shata claimed that Attorney Toran not only failed to tell him that there was a "strong chance" that he would be deported, but that he assured Shata that he would not be deported if he received probation following his conviction (28:15-16; Pet-Ap. 135-36).

Regarding his immigration status, Shata stated that he had received a letter from Immigration and Naturalization Service ("INS") on July 12th, and that he had to "go in front of judge, and then the judge will decide" (28:14; Pet-Ap. 134). That letter, however, does not appear in the record, and there was no additional testimony about the nature of those proceedings. Attached to Shata's postconviction motion is "Page 1 of 3" of an "Immigration Detainer – Notice of Action" that appears to have been

signed on November 23, 2012 (15:28). That portion of the document is unauthenticated, but a checked box on the form indicates that the Department of Homeland Security had "[i]nitiated an investigation to determine whether this person is subject to removal from the United States" (15:28). The form also has a separate box which reads that the Department of Homeland Security has "[i]nitiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____" (15:28). That box, however, is unchecked and does not include a date of service (15:28). The record does not include any additional information about Shata's possible deportation.

After brief argument from both sides at the close of evidence, the circuit court issued its oral ruling. The court found "the testimony of Mr. Toran to be credible under the circumstances, that he did advise Mr. Shata, unlike *Padilla*, that there was a strong likelihood that he would be deported" (28:21; Pet-Ap. 141). The court also rejected Shata's testimony "that Mr. Toran told Mr. Shata that he would be getting probation and would go back to New Jersey and nothing would happen" (28:22; Pet-Ap. 142). Specifically, the court found that:

> [The record] clearly reflects that Mr. Toran had been talking to Mr. Shata about his deportation. It reflects that there was a hope that the matter could be expunged to allow him to remain in the country and that again Mr. Toran told him that there was a strong likelihood that he would be deported, not that it was mandatory, and even the language in *Padilla* is not that it's mandatory that you'll be deported, but that it's presumptively mandatory, and the difference between the strong likelihood and presumptive deportation, I don't think that there's necessarily a significant difference.

(28:22; Pet-Ap. 142). The circuit court went on to state:

> I don't find Mr. Shata's testimony to be credible today that he would've gone to trial under any circumstance had he known that removal, deportation was a presumptive mandatory. It appears at least no one has presented factually that the law is that he will, in fact, automatically be deported.

(28:23-24; Pet-Ap. 143-44). Based on that oral ruling, the circuit court issued a written order denying Shata's motion on July 15, 2013 (19). Shata appealed.

The court of appeals' decision.

A majority of the court of appeals disagreed with the circuit court's decision and reversed, holding that Shata's attorney, who advised Shata that he faced a "strong likelihood" of deportation, had performed deficiently under *Padilla's* mandate that "counsel must inform her client whether his plea carries a *risk* of deportation." *Padilla*, 559 U.S. at 374 (emphasis added); *State v. Hatem M. Shata*, No. 2013AP1437-CR, slip op. ¶¶ 20, 28 (Wis. Ct. App. July 15, 2014) (Pet-Ap. 109, 111-12). Because Shata's conviction made his deportation "presumptively mandatory" under federal law, the court concluded that "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.'" *Id.* ¶ 28 (Pet-Ap. 111-12). Without specifying how trial counsel could have satisfied his obligation under *Padilla*, the majority concluded that counsel failed to provide Shata with "complete and accurate information" about the immigration consequences of his plea. *Id*.

The majority also found that Shata had been prejudiced, as required by *Padilla* and *Mendez*, because the circuit court's finding to the contrary "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[,]" and "[t]here 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." *Shata*, slip op. ¶ 33 (Pet-Ap. 114). Instead of remanding the case for the circuit court to address those issues, however, the majority decided that Shata was entitled to withdraw his plea. *Id*. ¶ 34 (Pet-Ap. 114).

Judge Brennan disagreed with the majority on both points (deficient performance and prejudice) and dissented. First, she determined that "trial counsel's advice that there was a 'strong chance' of deportation was accurate and compliant with the holding in *Padilla*." *Shata*, slip op. ¶ 35 (Pet-Ap. 115) (quoted source omitted). As to counsel's performance, Judge Brennan noted that *Padilla* simply required defense counsel to advise Shata "'whether his plea carries a risk of deportation,' *see* [*Padilla*], 559 U.S. at 374," and that Shata's attorney "went one better and advised Shata not only that there was a 'risk' of deportation, but that there was a *strong* one." *Id*. ¶ 38 (Pet-Ap. 116).

Judge Brennan also determined that Shata had not established prejudice because, unlike the defendant in *Mendez*, Shata knew that he faced a "strong chance" of deportation, he had confessed to the crime at issue, he faced substantially more exposure, and he had expressed only a desire to remain in the United States (instead of a fear of returning to his home country). *Shata*, slip op. ¶¶ 43-48 (Pet-Ap. 118-19). As a result, Judge Brennan found that "[b]ecause 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." *Id*. ¶ 49 (Pet-Ap. 120).

The State petitioned for review with this court.

ARGUMENT

SHATA WAS NOT ENTITLED TO WITHDRAW HIS PLEA.

A. Legal Standards For Plea Withdrawal Based On Ineffective Assistance Of Counsel.

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in a "manifest injustice." *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836; *see also State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). "[T]he manifest injustice test is met if the defendant was denied the effective assistance of counsel." *Id.* at 311 (quotation marks and citation omitted).

Consistent with the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a defendant seeking to withdraw his plea(s) based on a claim of ineffective assistance of counsel must establish that his attorney's performance was deficient and that he suffered prejudice as a result. *See State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. In this context, the defendant may demonstrate a manifest injustice by proving that his counsel's conduct was objectively unreasonable and that, but for counsel's error(s), he would not have entered a plea. *See Bentley*, 201 Wis. 2d at 311-12. The circuit court correctly found that Shata did not satisfy his burden of proof on either prong.

B. There Was No Deficient Performance Because Attorney Toran Properly Advised Shata Of The Deportation Consequences Of His Plea.

In *Padilla*, the Supreme Court held that counsel was required to inform the defendant that his conviction for distributing drugs would render him deportable because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Padilla*, 559 U.S. at 368 (citing 8 U.S.C. § 1227(a)(2)(B)(i)).[2] And, as the court noted:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency. 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.

Padilla, 359 U.S. at 368-69. The court also explained, however, that:

---

[2] 8 U.S.C. § 1227(a)(2)(B)(i) provides that "[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 . . ., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

> Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at 369 (footnote omitted).

Like Padilla, Shata's drug conviction for possession with intent to deliver marijuana rendered him "deportable" pursuant to 8 U.S.C. § 1227(a)(2)(B)(i). Unlike the attorney in *Padilla*, Attorney Toran did not give Shata false assurances that he would *not* be deported. The question is whether his advice that Shata had a "strong chance" (28:8, 10; Pet-Ap. 128, 130),[3] of being deported was sufficiently accurate. In her dissent, Judge Brennan explained why it was:

> 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

[3] When it ruled on Shata's motion, the circuit court stated that Attorney Toran advised Shata that there was a "strong likelihood" that he would be deported (28:22; Pet-Ap. 142).

> 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.
>
> 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* [*Padilla*,] 559 U.S. at 359. In fact, he went one step worse: he told Padilla that there was *no risk* of deportation. *Id.* [emphasis in original]. 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.

Shata, slip op. ¶¶ 38-39 (Pet-Ap. 116-17). Courts in other jurisdictions have reached similar conclusions.

In *Commonwealth v. Escobar*, 70 A.3d 838 (Pa. Super. Ct. 2013), the Superior Court of Pennsylvania held that defense counsel gave proper advice to his client about the immigration consequences of his plea by telling him that it was "likely and possible" that he would face deportation proceedings:

> We do not agree that giving "correct" advice [pursuant to *Padilla*] necessarily means counsel, when advising Escobar about his deportation risk, needed to tell Escobar he definitely would be deported. It is true that 8 U.S.C. § 1227(a)(2)(B)(i) does lead to the conclusion that Escobar's [possession with intent to deliver] conviction

> certainly made him *deportable*. However, whether the U.S. Attorney General and/or other personnel would necessarily take all the steps needed to institute and carry out Escobar's actual deportation was not an absolute certainty when he pled. Given that Escobar did know that deportation was possible, given that counsel advised him there was a substantial risk of deportation, and given that counsel told Escobar it was likely there would be deportation proceedings instituted against him, we find counsel's advice was, in fact, correct.
>
> ****
>
> In reaching our result, we are mindful that the *Padilla* court specifically considered 8 U.S.C. § 1227(a)(2)(B), the same immigration/deportation statute at issue in the present case. When it did so, the court concluded that the statute clearly made Padilla "*eligible* for deportation" and that "his deportation was *presumptively* mandatory." These remarks by the court were consonant with the terms of the statute indicating most drug convictions render a defendant deportable. We do not read the statute or the court's words as announcing a guarantee that actual deportation proceedings are a certainty such that counsel must advise a defendant to that effect.

Escobar, 70 A.3d at 841-42 (emphasis in original) (citation omitted); *see also Neufville v. State*, 13 A.3d 607, 614 (R.I. 2011) ("Counsel is not required to inform their clients that they *will* be deported, but rather that a defendant's 'plea would make [the defendant] eligible for deportation.'" (quoting *Padilla*, [559 U.S. at 368]) (emphasis in original).

In *Chacon v. Missouri*, 409 S.W.3d 529 (Mo. Ct. App. 2013), the Missouri Court of Appeals also rejected the argument that *Padilla* requires criminal defense attorneys to advise clients that deportation is "mandatory." Chacon pleaded guilty to two felonies which made him "deportable" under federal law. *Chacon*, 409 S.W.3d at 534 ("The law is

clear that, after pleading guilty to cocaine possession and forgery, Chacon was deportable, meaning that deportation was 'virtually inevitable.'" (citing *Padilla*, 559 U.S. at 359)).

Before he entered his pleas, Chacon's attorney advised him that "'if he pled guilty to the charges, he would *very likely be deported* and wouldn't be able to come back.'" *Chacon*, 409 S.W.2d at 532 (emphasis in original). On appeal, Chacon argued that his counsel had been ineffective because "anything short of advice that he was subject to 'mandatory deportation' or 'automatic deportation,' is deficient performance under *Padilla*." *Id*. at 534. The court rejected Chacon's claim that such specific language was required:

> Chacon's convictions made his deportation presumptively mandatory, and the motion court could properly find that advice that he "would very likely be deported and wouldn't be able to come back," did not fall below what is required of a reasonably competent attorney under the circumstances. ***Padilla*** **does not require that counsel use specific words to communicate to a defendant the consequences of entering a guilty plea. Rather, it requires that counsel *correctly* advise his client of the *risk* of deportation so that the plea is knowing and voluntary.** In this case, while we recognize some distinction between the statements that removal was "very likely" versus "mandatory," the motion court did not clearly err in finding that counsel adequately advised Chacon of the risk of deportation so as to allow Chacon to make a knowing and voluntary decision to plead guilty.

Chacon, 409 S.W.2d at 537 (emphasis added).[4] The same analysis applies in this case.

Here, the circuit court found that Attorney Toran advised Shata that there was a "strong likelihood" that he would be deported based on his conviction. (28:20-24; Pet-Ap. 142-46). The court also determined, like the court in *Chacon*, that there was no meaningful difference between saying that deportation was a "strong likelihood" versus "presumptively mandatory" (28:20-24; Pet-Ap. 142-46).

As the court pointed out, the record demonstrated that Attorney Toran raised his client's concern about deportation during multiple court appearances, (28:21-22; Pet-Ap. 143-44), and Attorney Toran testified that he tried to have the charge against Shata amended to avoid the possibility of deportation by having Shata cooperate with law enforcement, but the State refused to work with him (28:9; Pet-Ap. 131). Aware that a drug-dealing conviction would subject Shata to deportation, Attorney Toran also consulted with several federal prosecutors, none of whom indicated that Shata's deportation was a certainty (28:5-7; Pet-Ap. 127-29).

What is most important is that Attorney Toran's advice to Shata was accurate. Shata's conviction made him "deportable." 8 U.S.C. § 1227(a)(2)(B)(i). That alone, however, did not make his deportation an absolute certainty. *Escobar*, 70 A.3d at 841-42. When he told Shata that he faced a "strong chance" of being deported based on his

[4] In *Mendez*, our court of appeals rejected and distinguished *Chacon*, noting that "while Chacon's lawyer at least told Chacon that deportation was 'very likely,' Mendez's lawyer gave only the same unclear warning that appears in the generic plea questionnaire, that the plea 'could result in deportation.'" *State v. Mendez*, 2014 WI App 57, ¶ 14, 354 Wis. 2d 88, 847 N.W.2d 895. Although the circumstances in *Mendez* arguably are distinguishable from *Chacon*, the courts of appeals erred in describing Chacon as "bad law." *Id.*

conviction, Attorney Toran was right. No additional investigation or research would have changed that. The circuit court correctly determined that Attorney Toran's performance was not constitutionally deficient.

C. The Record In This Case Does Not Support A Finding That Shata Was Prejudiced.

Even if a defense attorney performs deficiently in advising a criminal defendant about the deportation consequences of a plea, the inquiry is far from over because the defendant bears the heavy burden of proving that the error prejudiced him:

> Surmounting *Strickland*'s high bar is never an easy task. *See, e.g.*, 466 U.S. at 689, 104 S. Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential"); *id.* at 693, 104 S. Ct. 2052 (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial"). Moreover, **to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.** *See Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).

Padilla, 559 U.S. at 371-72 (emphasis added); *see also Mendez*, 354 Wis. 2d 88, ¶ 12 (quoting *Padilla*, 559 U.S. at 372). In other words, a defendant must establish a reasonable probability that he would not have pleaded guilty and would have gone to trial but for his attorney's allegedly deficient performance. *See Bentley*, 201 Wis. 2d at 311-12; *see also Hill v. Lockhart,* 474 U.S. 52, 59 (1985) (requires reasonable probability defendant would not have pleaded guilty and would have insisted on going to trial); *People v. Bao Lin Xue,* 30 A.D.3d 166, 815 N.Y.S.2d 566 (N.Y. App. Div. 2006) (no reasonable probability that defendant would

have insisted on going to trial but for counsel's alleged mistake in affirmatively misrepresenting the immigration consequences of the plea).

In a recent decision, the Fifth Circuit Court of Appeals explained how to determine prejudice in cases like this one:

> In assessing prejudice, we consider the totality of the circumstances, including [the defendant's] evidence to support his assertion, his likelihood of success at trial, the risks [the defendant] would have faced at trial, [the defendant's] representations about his desire to retract his plea, his connections to the United States, and the district court's admonishments.

United States v. Kayode, No. 12-20513, 2014 WL 7334912 at *5 (5th Cir. Dec. 23, 2014) (footnote omitted). Balancing all of those factors, the Fifth Circuit held that Kayode had not proven prejudice. *Id*. *8.

The Kayode court agreed that certain factors, including Kayode's familial ties to the United States and his previous efforts to withdraw his pleas, weighed in favor of finding prejudice. *Kayode*, 2014 WL 7334912, at *6, *7. The court concluded, however, that several other factors outweighed a finding of prejudice. Chief among those factors were Kayode's inability to show that he was likely to succeed at trial given the overwhelming evidence against him, and his "apparent defense" that he was only a minor participant in the crimes at issue, the additional exposure he faced in choosing a trial instead of a plea bargain, and the district court's admonishment to Kayode that he faced deportation consequences as a result of his plea. *Id*. at *5-8. Shata's case is highly similar.

Like Kayode, Shata has been in the United States for many years and has a family here (28:13; Pet-Ap. 133). Nonetheless, Shata had no likelihood of success at trial. Not only was Shata's co-actor available and prepared to testify

against him at trial, Shata had made a confession to law enforcement (28:8-10; Pet-Ap. 128-30). Attorney Toran testified:

> 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.

(28:9; Pet-Ap. 129). In addition, Attorney Toran explained that Shata faced a far greater chance of receiving a prison sentence if he took the case to trial:

> [I]f [Shata] had gone to trial, the [State's] recommendation [for probation] probably would've gone up. I've never seen anyone go to trial when they have no defense and come out with probation, taking three or four days of the court's time when there's really no issue of fact.

(28:10-11; Pet-Ap. 130-31). So, without a viable defense, Attorney Toran was able to negotiate a plea agreement that called for a probationary recommendation from the State on a charge for which Shata most likely would not have received probation had he been convicted at trial. Then, prior to his plea, the circuit court admonished Shata and confirmed his understanding that he could face deportation as a result of his plea (26:7-9). Under the circumstances, the circuit court correctly concluded that Shata had not shown that it would have been a more rational decision to go to trial, where he was facing a likely conviction, significantly more incarceration time, and the same risk of deportation that he faced based on his plea.

Citing *Mendez*, the majority in this case found "that the circuit court here did not apply the test mandated by *Padilla*." *Shata*, slip op. ¶ 31 (Pet-Ap. 113). The majority observed that:

> 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 the 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.

Shata, slip op. ¶ 33 (Pet-Ap. 114). Despite that conclusion, the court of appeals did not, like the *Mendez* court, remand the case to permit the circuit court to perform the required analysis. Instead, the majority simply held that "Shata was prejudiced[,]" and that "because of the inaccurate and prejudicial advice Shata received from counsel, he is entitled to withdraw his guilty plea." *Id*. ¶¶ 29, 34 (Pet-Ap. 112, 114). The majority erred in finding that Shata had demonstrated prejudice.

Given its conclusion that the circuit court failed to consider pertinent information, the majority should have remanded the case to the circuit court for additional analysis and related findings. *Mendez*, 354 Wis. 2d 88, ¶¶ 12, 17.[5] This is particularly important in light of the incomplete information that Shata submitted regarding the basis for his immigration detainer (15:28). The single, unauthenticated page of Shata's apparent immigration detainer indicates

[5] The circuit court noted that the record in this case is insufficient to determine whether, in fact, Shata will be deported (28:24; Pet-Ap. 144).

only that the Department of Homeland Security was investigating to determine whether Shata was subject to removal from the country (15:28). The document is also missing two of three pages (15:28).

If those pages or related evidence demonstrate that Shata is in the United States illegally or otherwise subject to deportation, he cannot establish prejudice under *Strickland* and *Padilla*. *See Garcia v. State,* 425 S.W.3d 248, 261 n.8 (Tenn. 2013) ("[C]ourts have consistently held that an illegal alien who pleads guilty cannot establish prejudice, even if defense counsel failed to provide advice about the deportation consequences of the plea as Padilla requires, because a guilty plea does not increase the risk of deportation for such a person."); *see also* César Cuauhtémoc, García Hernández, *Padilla v. Kentucky's Inapplicability to Undocumented and Non-Immigrant Visitors*, 39 Rutgers L. Rec. 47, 52 (2012) (observing that even if courts applied *Padilla* to undocumented persons, courts likely would deny claims of ineffective assistance of counsel on the grounds that any incompetent advice regarding the deportation consequences of a criminal conviction would be harmless because the individual would be deported regardless of the conviction).

Based on the record in this case, this court should reverse the court of appeals' decision and determine that Attorney Toran's performance was not deficient under *Padilla*, and that Shata failed to demonstrate prejudice resulting from Attorney Toran's advice regarding the deportation consequences associated with his pleas. In the alternative, the court should reverse and remand the case to the circuit court for an additional evidentiary hearing and related determination.

CONCLUSION

For all of the above reasons, the State of Wisconsin asks this court to reverse the court of appeals' decision in this case and affirm the circuit court's decision to deny Shata's motion to withdraw his plea.

Dated this 27th day of January, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,696 words.

Dated this 27th day of January, 2015.

_____
Nancy A. Noet
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of January, 2015.

_____
Nancy A. Noet
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of January, 2015.

_____

Nancy A. Noet
Assistant Attorney General

STATE OF WISCONSIN
SUPREME COURT

No. 2013AP1437-CR
(Milwaukee County Case No. 2012CF1757)

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

HATEM M. SHATA,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Review of a Decision of the Court of Appeals, District I, Reversing the Judgment of Conviction and Order Denying Post-Conviction Relief in the Milwaukee County Circuit Court, the Hon. Timothy G. Dugan, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

ISSUES PRESENTED FOR REVIEW

Hatem Shata, an Egyptian foreign national, faced automatic deportation upon conviction of the drug charge he faced. Yet, his trial attorney never reviewed the relevant federal statute that revealed those consequences in succinct, clear and explicit terms. Instead, counsel informed Shata that there was a possibility or strong chance of deportation and encouraged him to plead guilty.

This appeal asks only one question:

1. Was trial counsel ineffective when he failed to consult readily available federal statutes that would succinctly, clearly, and explicitly inform him that his client would be subject to an automatic deportation order upon his conviction?

The court of appeals concluded that counsel was ineffective because deportation was Shata's primary concern and counsel "had a duty to obtain and provide Shata with accurate information about the deportation consequences of his plea." Decision at ¶28, Pet-Ap. 111-112. Taking into account all of Shata's circumstances, the court found that Shata was prejudiced. *Id.* at ¶¶31-33, Pet-Ap. 113-114.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review demonstrates the need for publication. Oral argument will take place April 21, 2015.

STATE OF WISCONSIN
SUPREME COURT

No. 2013AP1437-CR
(Milwaukee County Case No. 2012CF1757)

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

HATEM M. SHATA,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

SUPPLEMENTAL STATEMENT OF THE CASE

The state charged Shata with one count of possession with intent to deliver marijuana, as party to a crime. R2. Throughout this appeal, the state has repeatedly said that it charged Shata with two counts. *See* State's Brief at 2, State's Petition for Review at 3, State's Court of Appeals Brief at 2. At every turn, Shata has corrected the state. *See* Response to Petition for Review at 1, Court of Appeals Reply Brief at 1. The second count related not to Shata, but to co-defendant Amanda Nowak. *Id.*

From the start, Shata was concerned about the immigration consequences of any conviction. At the final pre-

trial turned plea hearing, Shata's attorney, James Toran, requested an adjournment. R26:2. The court wondered why, if the matter was likely to be resolved, Toran needed a new trial date instead of a plea hearing date. R26:3. Counsel explained: "[t]he issue with my client he doesn't want to be deported, he—there's some consequences on a plea, so that's what I'm trying to deal with." R26:4.

The court repeated its position that it wasn't inclined to adjourn the trial and suggested another final pre-trial hearing for the next week to give the parties a chance to come to an agreement. The prosecutor, however, was unavailable the next week, prompting the court to respond. *Id.* "I guess today's the date. So if you want to talk about further resolution we can do it this afternoon if it's going to resolve; if it's not, then we can do the final pretrial and we'll proceed to trial on the 15th." R26:5.

The prosecutor had a lengthy sentencing hearing that afternoon, but Toran said, "[t]hat's fine. Let's see what we can do in the next 15 minutes." R26:6. When the case was re-called, Toran informed the court that Shata wanted to plead guilty. *Id.*

After the state summarized the negotiations, Toran told the court that Shata was "not a United States citizen, that there's a potential he could be deported." R26:7. The court gave Shata the standard warning, advising him that his plea "may result in deportation, the exclusion from admission to

this country, or the denial of naturalization under federal law." R26:9.

At sentencing, the state recommended two years of probation with 12 months of condition time and stayed two years initial confinement and two years extended supervision. R27:2. The prosecutor based her recommendation on Shata's lack of any prior criminal record and his remorse. R28:8-9. She acknowledged that while Shata made bad decisions, he wasn't a bad person. R27:8. Plus, he "has other consequences." *Id.* "It's my understanding that he is potentially facing deportation." R27:8-9.

Toran explained that he tried to get the same deferred prosecution agreement for Shata that the state gave to his co-defendant, but the state was not amenable to it. R27:12. Shata was "very, very concerned about being deported out of this country." *Id*. Toran asked the court to impose and stay a prison sentence, place him on probation, and allow his probation to be transferred to New Jersey, where his family resides. He also asked that any condition time be stayed. R27:13. Toran said that Shata wished "at the conclusion of probation that his record could be expunged so he could remain in this country." R27:14.

The court imposed one year of initial confinement and four years of extended supervision, and allowed the extended supervision to be transferred to New Jersey. R27:23. The court denied the request for expungement, noting it "was not an option." R27:14-15.

SUMMARY OF THE ARGUMENT

This Court should affirm the court of appeals' decision reversing the judgment of conviction and the order denying Shata post-conviction relief. In determining whether an attorney denied a defendant his Sixth Amendment rights to the effective assistance of counsel in this context, the reviewing courts apply the well-known test identified in ***Strickland v. Washington***, 466 U.S. 668 (1984).

In a case like Shata's, determining deficient performance requires two steps. The first is to determine whether the immigration consequences were clear. In this case, that question is easily answered: the same statutes at issue in Shata's case were at issue in ***Padilla v. Kentucky***, 559 U.S. 356 (2010). Next, the court looks to the quality of the advice counsel gave. Toran told Shata that there was the "potential" for deportation or, as he testified at the post-conviction motion hearing, that there was a "strong chance" of it. While he did not affirmatively misadvise Shata, this was incorrect advice. Deportation was automatic and "no one—not the judge, the INS, nor even the United States Attorney General—has any discretion to stop the deportation." ***United States v. Couto***, 311 F.3d 179, 190 (2nd Cir. 2002). Thus, the court of appeals was correct when it found deficient performance based on Toran's "obvious failure to even read the applicable federal statutes." Decision at ¶28, Pet-Ap. 112.

Next, the reviewing court examines prejudice. In this context, the inquiry is whether a decision to reject the plea

bargain would have been rational. ***Padilla***, 559 U.S. at 364.

"As a matter of federal law, deportation is an intergral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." ***Padilla***, 559 U.S. at 364. In analyzing this, the reviewing court must examine more than just the strength of the state's case. Here, Shata demonstrated that immigration proceedings had been initiated, which is all that was necessary given the inevitable result. He also demonstrated that he would not have accepted the plea deal (which did not reduce the penalties he faced) if he had been correctly advised of the immigration consequences. Thus, as the court of appeals correctly concluded, "Shata was prejudiced by [Toran's] inaccurate information and advice." Decision at ¶34, Pet-Ap. 114. Accordingly, this Court should affirm the court of appeals' decision.

ARGUMENT

I. Shata is Entitled to Withdraw his Plea Based on the Ineffective Assistance of Counsel

Shata's decision to enter his plea was based on misinformation. Rather than tell Shata that his conviction would absolutely result in deportation, counsel told him at the plea hearing that there was the "potential" for deportation or, as he described it at the post-conviction motion hearing, that

there was a "strong chance"[1] of deportation. R26:7; R28:8, 10, Pet-Ap. 128, 130.

The court of appeals correctly found that such advice fell short of what was constitutionally required. "Defense counsel's reported casual inquiry of unidentified federal prosecutors does not excuse his obvious failure to even read the applicable federal statutes." Decision at ¶28, Pet-Ap. 112. Such "inaccurate information and advice," the court of appeals concluded, prejudiced Shata, entitling him to withdraw his plea. Decision at ¶34, Pet-Ap. 114.

A. Standard for Plea Withdrawal

The validity of a guilty plea turns on whether or not it was entered knowingly, voluntarily, and intelligently. ***State v. Bangert***, 131 Wis.2d 246, 257 (1986) *citing* ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction." ***Boykin***, 395 U.S. at 242.

In order to withdraw a plea post-sentencing, a defendant must prove, by clear and convincing evidence, that refusal to allow withdraw of the plea would result in a "manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16. The manifest injustice test is met if the defendant was denied the effective assistance of counsel. ***State v. Rock***, 92 Wis.2d 554, 558-59 (1979).

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[1] Toran testified that he told Shata there was a "strong chance" of his deportation. R28:8, 10, Pet-Ap. 128, 130. It was the circuit court, however, that transformed Toran's testimony into a "strong likelihood" during its ruling denying Shata's post-conviction motion. R28:22, Pet-Ap. 142. *See also* State's Brief at 13, fn. 3.

An "accused who has not received reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by that plea because a plea of guilty is valid only if made intelligently and voluntarily." ***United States v. George***, 869 F.2d 333, 335-36 (7th Cir. 1989).

In deciding whether a plea was involuntary or unknowing due to ineffective assistance of counsel, this Court uses the test established in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Hill v. Lockhart***, 474 U.S. 52. 58 (1985); ***Padilla v. Kentucky***, 559 U.S. 356, 366-67 (2010). The ***Strickland*** test is well-settled: a defendant must show that counsel performed deficiently and that the deficiency prejudiced him. ***Strickland***, 466 U.S. at 687. To satisfy the prejudice prong, the defendant must allege facts to "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill,*** 474 U.S. at 59.

B. Counsel's "Obvious Failure to Even Read the Applicable Federal Statutes" and Advise Shata According Amounted to Deficient Performance

In this context, determining deficient performance under ***Strickland*** is two parts. First, counsel must first determine whether the applicable immigration law is clear. ***Padilla***, 559 U.S. at 368. If so, then counsel must give equally clear, accurate advice to the client non-citizen about the impact of a conviction on his immigration status. ***Id.*** at 369.

1. The Immigration Consequences are Clear

Here, as in ***Padilla***, "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for [Shata's] conviction." ***Padilla***, 559 U.S. at 368. And, as the court of appeals recognized, the same deportation statutes that led to the result in ***Padilla*** remain in effect today. Decision at ¶21, Pet-Ap. 109.

Under 8 U.S.C. §1227, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. §1227(a)(2)(A)(iii). An aggravated felony includes "illicit trafficking in a controlled substance." 8 U.S.C. §1101(a)(43)(B). But if that weren't clear enough, §1227(a)(2)(B)(i) specifically explains that "[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…, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." *See also* Decision at ¶¶22-23, Pet-Ap. 109-110.

Like Padilla's attorney, Toran "could have easily determined that [Shata's] plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." ***Padilla***, 559 U.S. at 368.

The state acknowledges this similarity between Padilla and Shata, conceding that the immigration consequences were clear. *See* State's Brief at 12-13.

2. Counsel's Advice was Not Accurate

Having established that the immigration consequences are clear, the analysis turns to the quality of counsel's advice. ***Padilla***, 559 U.S. at 369. This is where the state and Shata diverge.

a. "Strong Chance" was not Good Enough

According to the state and the dissent, Toran's self-serving post-conviction hearing testimony that he advised Shata that there was a "strong chance" of his deportation is good enough to convey "the essence of 'presumptively mandatory' and 'subject to automatic deportation.'" Decision at ¶38 (Brennan, J. dissenting), Pet-Ap. 116.

"Strong chance" is not, as the dissent claims, the same as 'presumptively mandatory' or 'subject to automatic deportation.' *See* Decision at ¶38 (Brennan, J. dissenting), Pet-Ap. 116. And we know that because if Toran had advised Shata that his plea would make him 'subject to automatic deportation' then he would have been effective. The fact that he did not is the very problem. *See* Decision at ¶20, Pet-Ap. 109 *quoting* ***Padilla***, 559 U.S. at 360 ("constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to

automatic deportation.") (emphasis in original court of appeals decision, but added to ***Padilla***).

There is a difference between a "strong chance" and an "absolute certainty." And there is no question here that Shata's deportation upon conviction was an absolute certainty. *See* ***United States v. Couto***, 311 F.3d 179, 190 (2nd Cir. 2002).

There is no difference between Padilla's attorney, who affirmatively gave her client bad advice, and Shata's attorney, who told him there was a "strong chance" he would be deported when it was actually inevitable. *Id.* at 13; R28:8, 10, Pet-Ap. 128, 130.

The state and dissent want ***Padilla*** to only apply if the attorney gave the defendant "affirmative misadvice," ***Padilla***, at 369. States' Brief at 13-17, Decision at ¶¶38-39 (Brennan, J. dissenting), Pet-Ap. 116-117. ***Padilla*** specifically rejected this exact argument. To do otherwise would "invite two absurd results," giving counsel an incentive to remain silent "even when answers are readily available" and would "deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." ***Id.*** at 370, 371.

b. Controlling Precedent Rejects Generic Advice as Sufficient

Padilla specifically rejected the kind of generic advice that Toran gave. It's not enough, ***Padilla*** says, to advise a "noncitizen client that pending criminal charges *may* carry a

risk of adverse immigration consequences." ***Padilla***, 559 U.S. at 369 (emphasis added). Despite this, the state argues that this Court should ignore controlling precedent in favor of out-of-jurisdiction cases that have found, contrary to ***Padilla,*** that generalized advice about the potential of deportation is enough. *See* State's Brief at 14-17. In doing so, the state devotes more than a page of its brief to ***Chacon v. Missouri***, 409 S.W.3d 529 (Mo. Ct. App. 2013), a case that Wisconsin has explicitly rejected. State's Brief at 15-16. *See* ***State v. Mendez***, 2014 WI App 57; Decision at ¶31, Pet-Ap. 113. Bluntly, the ***Mendez*** Court said: "We reject ***Chacon***. Its holding is contrary to ***Padilla***'s plain statement that 'when the deportation consequences is truly clear…the duty to give correct advice is equally clear.'" ***Mendez*** at ¶14 *quoting* ***Padilla***, 559 U.S. at 369.

In ***Mendez***, the court assumed counsel's lack of meaningful advice amounted to deficient performance. *See* ***id.*** at ¶¶9-11. At the time of his plea to the charge of maintaining a drug trafficking place, Mendez's attorney "failed to inform him that conviction of this charge would subject him to automatic deportation from the United States with no applicable exception and no possibility of discretionary waiver." ***Id.*** at ¶1. Mendez's attorney "did not advise Mendez that he would be deported if he pled guilty," but rather "he 'basically' reiterated the general warning on the plea questionnaire, that 'a conviction may make [the defendant] inadmissible or deportable.'" ***Id.*** at ¶4.

Toran did the same to Shata: he failed to inform him that conviction would guarantee his removal from this country. And while Toran's statements were somewhat stronger than the basic warning in the plea questionnaire, they did not go far enough because they left open the possibility that Shata could avoid deportation, and that possibility did not exist.

Several jurisdictions agree with ***Mendez***. The Ninth Circuit has emphasized that in light of ***Padilla***, a "criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." ***United States v. Bonilla***, 637 F.3d 980, 984 (9th Cir. 2011) (emphasis added). The message from the Ninth Circuit is clear, phrases like "potential," "possible," "likelihood," even "strong likelihood," are not sufficient where, as here, the immigration consequence is truly clear. ***Id***.

Texas rejected the warning from a defense attorney to his client that there was a possibility or likelihood of deportation upon conviction, finding such advice was insufficient because "[b]oth the terms of 'likelihood' and 'possibility' leave open the hope that deportation might not occur." ***Salazar v. Texas***, 361 S.W.3d 99, 103 (Tex. Ct. App. 2011). The court found the same true of the word 'chance.' Such "admonishments were inaccurate and did not convey to the defendant the certainty that the guilty plea would lead to his deportation." ***Id.***

This reasoning is directly contrary to the reasoning of the dissent, which concluded that counsel not only complied with ***Padilla***, but "went one better and advised Shata not only that there was a 'risk' of deportation, but that there was a *strong* one." Decision (Brennan, J. dissenting) at ¶38, Pet-Ap. 116 (original emphasis). Like the terms ***Salazar*** rejected, "strong chance" leaves open the possibility that deportation can be avoided, when in fact, it cannot.

Like Texas, Washington also rejected the kind of equivocal advice at issue in this case. Counsel there acknowledged some immigration consequences, but told his client that a guilty plea to second-degree rape would not result in his immediate deportation and he would have enough time to hire immigration counsel to ameliorate any potential consequences. ***Washington v. Sandoval***, 249 P.3d 1015, 1017 (2011) (en banc). The advice incorrectly left the defendant with the impression that deportation was a remote possibility, and thus it amounted to deficient performance.

3. Counsel's Duty Under *Padilla*

The state complains that the court of appeals didn't specify "how trial counsel could have satisfied his obligation under ***Padilla***." State's Brief at 9. But that's incorrect. The court of appeals specifically said: "[c]ounsel had a duty to obtain and provide Shata with accurate information about the deportation consequences of his plea." Decision at ¶28, Pet-Ap. 111. The court of appeals noted the following:

> 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.

Id., Pet-Ap. 112. Even more specifically, the court of appeals said: "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 statue, 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.'" ***Id***. So while the court of appeals didn't explicitly say, "defense counsel, you have an obligation to read the applicable federal statute," the message couldn't be clearer: Defense counsel, you have an obligation to read the applicable federal statute and advise the client accordingly. In cases like Shata's that involve a non-citizen and a drug trafficking offense, the advice is easy: upon conviction, you, client, shall be deported. *See* 8 U.S.C. §1227(a)(2)(B)(i).

The state finds solace in Toran's claim that he spoke to several unnamed federal prosecutors at an unspecified time. State's Brief at 17, R28:5-7, Pet-Ap. 127-29. But if Toran didn't want to take the time to at least Google "immigration consequences drug convictions," which would have instantly informed him that Shata's conviction would result in deportation, then rather than calling prosecutors, he should

have called immigration attorneys.[2] They, unlike the unnamed federal prosecutors he queried, could have immediately provided him with the accurate information he was lacking.

Just as in ***Padilla***, "[t]his is not a hard case in which to find deficiency[.]" ***Padilla***, 559 U.S. at 368. The court of appeals decision on this point should be affirmed.

C. Toran's Deficient Performance Prejudiced Shata

Shata was prejudiced because his conviction made deportation inevitable. The state wishes to look no further than what it views as the strength of its case against Shata. *See* State's Brief at 21-22. But, as the court of appeals pointed out, that is not the test for examining prejudice. Decision at ¶31, Pet-Ap. 113. And despite the state's argument, the record in this case is sufficient for determining prejudice given the clarity of the immigration consequences for Shata's conviction. Accordingly, this Court should affirm the court of appeals' decision. However, if the Court finds the record is not sufficient then, as the state suggested, Shata is entitled to an additional evidentiary hearing. *See* State's Brief at 22.

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[2] Googling it is the very least Toran could have done. Defense counsel is expected to research the law crucial to a client's case, be it immigration consequences or otherwise. *See* ***Hinton v. Alabama***, __ U.S.__, 134 S.Ct. 1081, 1089 (2014) ("ignorance of a point of law that is fundamental to the case combined with [a] failure to perform basic research on that point is a quintessential example of unreasonable performance under ***Strickland***."); ***Rompilla v. Beard***, 545 U.S. 374, 387 (2005) (finding that counsel's failure to look at a legal file that he should have known would be relevant to sentence was deficient).

1. The Prejudice Analysis Requires the Court to Look at More than Just the Strength of the State's Case

The ***Mendez*** decision, decided in line with ***Padilla,*** describes the test for determining prejudice. It is "whether 'a decision to reject the plea bargain would have been rational under the circumstances.'" ***Mendez***, 2014 WI App 57, ¶12, *quoting* ***Padilla***, 559 U.S. at 372. The reviewing court must examine *more* than the strength of the state's case, a fact that ***Mendez*** Court emphasized. "Under ***Padilla***, we repeat, '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*** at ¶16 *quoting* ***United States v. Orocio***, 645 F.3d 630, 643 (3d Cir. 2011), *abrogated in part on other grounds by* ***Chaidez v. United States***, 133 S.Ct. 1103 (2013).

Mendez joined other courts that "have concluded that despite the benefit of a great reduction in the length of the potential prison sentence, a rational noncitizen defendant might have rejected a plea bargain and risked trial for the chance at avoiding deportation." ***Mendez*** at ¶16 *recognizing* ***Sandoval*** 249 P.3d at ¶¶21-22 (decision not to plea was rational despite reduction from possible life imprisonment to a maximum one year imprisonment); ***Orocio***, 645 F.3d at 645 (decision not to plea rational despite facing a mandatory 10-year imprisonment); ***Denisyuk v. Maryland***, 30 A.3d 914, 929

(Md. 2011) ("We are not alone in understanding that many noncitizens might reasonably choose the possibility of avoiding deportation combined with the risk of a greater sentence over assured deportation combined with a lesser sentence.")

The state would have this Court ignore Wisconsin precedent and the test clearly articulated in ***Padilla*** in favor of an out-of-jurisdiction case from the Fifth Circuit, ***United States v. Kayode***, 2014 U.S. App. LEXIS 24338 (5th Cir. 2014), involving a *pro se* defendant. *See* State's Brief at 19-20.

Shata agrees that the totality of the circumstances must be considered in determining prejudice. Decision at ¶32, Pet-Ap. 113; ***Mendez*** at ¶12. But Shata does not agree that the factors the ***Kayode*** Court laid out constitute the correct test or even that the factors it identified would be applicable in this case. *See* State's Brief at 19 (holding the ***Kayode*** analysis out as an explanation of "how to determine prejudice in cases like this one[.]") ***Kayode*** and this case bear little in common.

Kayode involved a reduction of 44 fraud counts to 3. ***Kayode*** at *2-3. It also involved a written plea agreement that included his admission that he was "ineligible to be admitted to citizenship because he was unable to establish good moral character," ***id.*** at *3, as well as a pre-sentence report informing him that as a result of his conviction, he was "deportable and should be stripped of his naturalization." ***Id.*** at *4. By comparison, Shata's case involved a plea to the crime as charged, no written plea agreement, and no pre-sentence

report. Certainly, there was never any explanation (written or otherwise) that Shata's conviction would instantly make him deportable.

The ***Kayode*** decision rests heavily on the court's consideration of the strong evidence against the defendant, in part, because Kayode did not argue, as Shata did, that it's "possible to show prejudice even absent a showing that a trial would have likely resulted in a different outcome." ***Id.*** at *12, fn.3; R15:3, 4.

As described earlier, the strength of the state's case at trial is just one factor and does not automatically prevent a rational defendant from showing he would have rejected a plea and gone to trial. *See* ***United States v. Akinsade***, 686 F.3d 248, 255-56 (4th Cir. 2012) ("counsel's affirmative misadvice on collateral consequences to a guilty plea was prejudicial where the prosecution's evidence 'proved to be more than enough' for a guilty verdict but was 'hardly invincible on its face.'") ***Gonzalez v. United States***, 722 F.3d 118, 132 (2nd. Cir. 2013) (rejecting the district court's prejudice analysis, which was "based solely on the strength of the government's case and the likelihood of a longer sentence upon conviction.")

The United States Supreme Court has long acknowledged that deportation is a severe penalty. ***Fong Yue Ting v. United States***, 149 U.S. 698 (1893). Similarly, preserving the client's right to remain in the country "'may be more important to the client than any potential jail sentence.'" ***INS v. St. Cyr***, 533 U.S. 289, 322 (2001) (citation omitted). The

severity of the consequence of deportation, which the United States Supreme Court has called "the equivalent of banishment or exile," ***Delgadillo v. Carmichael***, 322 U.S. 388, 390-391 (1947), "only underscores how critical it is for counsel to inform [his or] her noncitizen client that he faces a risk of deportation." ***Padilla***, 559 U.S. at 373-74.

2. Shata Need not Show that he is in the Middle of Removal Proceedings to Demonstrate Prejudice

A defendant need not prove that a court has entered a deportation order pursuant to 8 U.S.C. §1227 in order to demonstrate prejudice. This Court should hold that in clear cases, like Shata's, the reviewing court may presume that deportation is inevitable and the only question should be whether, in light of that, the decision to reject the plea bargain would have been rational.

The deadlines imposed by WIS. STAT. (RULE) 809.30 are not compatible with requiring a defendant to show more than the initiation of immigration proceedings. And, given the clear results mandated by 8 U.S.C. §1227, that is all a defendant *should* have to show. To require otherwise, for example, to require that a defendant show that a judge has ordered him deported, would result in multiple motions to extend the deadline, perhaps for years. It also could result in the loss of the constitutional right to a direct appeal if, for example, the court of appeals refused to extend the deadline. In that situation, a defendant would be unable to proceed on his motion, would lose his right to appeal and to counsel on

appeal, and would only be able to challenge his conviction years later after he was ordered deported. This also begs the question of how he would do so after having been ordered deported.

Here, Shata demonstrated that immigration proceedings had been initiated. R15:28. The state complains that he provided only an unauthenticated document demonstrating a detainer and investigation. *See* State's Brief at 8. But Shata testified that a hearing had been scheduled, that it was for "deportation," and that he had "to go in front of a judge, and then the judge will decide." R28:14, Pet-Ap. 134. Of course, a review of the relevant statutes reveals that the judge could make only one decision in Shata's case: order him removed from the country. "An alien convicted of an aggravated felony is automatically subject to removal and no one—not the judge, the INS, nor even the United States Attorney General—has any discretion to stop the deportation." ***Couto***, 311 F.3d at 190.

3. It Would Have Been Rational for Shata to Reject the Plea Bargain

Shata testified that he would have gone to trial if he had known his conviction would subject him to an automatic deportation order. He explained that he'd been in the country for more than 22 years, has children he didn't want to be away from, and that he thought he would get probation, allowing him to work and be with his kids. R28:13-14, Pet-Ap. 133-134. On cross, he said that the only thing he was worried about

was "just being deported and being away from my kids." R28:15-16, Pet-Ap. 135-136.

With the exception of the state's acknowledgement that Shata had been in the country a long time and had a family, the state's analysis of prejudice is based on its view of the strength of its case. *See* Brief at 19-20. In doing so, it takes Toran's word for it that he "had nothing to work with" and Shata had "no viable defense." R28:9, Pet-Ap. 129, State's Brief at 20. But Shata's statements at the sentencing hearing suggest otherwise.

At sentencing, Shata apologized for his role in the offense, but said that he "was not involved with selling directly." R27:15. Rather, he "allowed some people to sell from my place" of business. *Id.* Police surveillance showed Shata putting a box in his co-defendant's car. After she was pulled over, officers found marijuana in that box. The defendant explained that he knew that the people who sold from his store, had sold drugs to someone who had been arrested. R27:20. He wanted the drug dealer's things out of his store. "I could've told the guy, come and tell him, take your stuff. It's not mine. And God knows it's not mine. If it was mine, I would've admitted, said yes, it was mine." *Id.*

Whether this is "no viable defense," as Toran put it or a defense is in the eye of the beholder. This was on display this past week in Milwaukee when a jury acquitted a former police officer charged with misconduct in public office and abuse of a prisoner despite a videotape of him beating a suspect

chained to a wall. *See* BRUCE VIELMETTI, *Jury acquits fired Milwaukee cop in suspect's beating*, MILWAUKEE JOURNAL SENTINEL (Feb. 13, 2015) (available at http://bit.ly/17HpSJv). This is exactly why the reviewing court must consider something more than merely the strength of the state's case because what is strong to the state may be an acquittal to the jury. But if nothing else, Shata's statements suggest that the case was 'hardly invincible on its face.'" ***Gonzalez*** 722 F.3d at 132 (citation omitted).

For many, fear of prison pales in comparison to their fear of returning to their home country. Shata, for example, left Egypt over two decades ago and deportation would mean being away from his children. But that may be the least of Shata's problems given the current political climate in Egypt.

Since Egypt's current ruler, Abdel Fattah Sisi, has taken power, more than 41,000 people have been imprisoned, 29,000 of whom were members of the opposition party. *See* HUMAN RIGHTS WATCH, *Egypt: Human Rights in Sharp Decline* (Jan. 29, 2015) (accessible at http://bit.ly/17HqpLz).

The Word Report's chapter on Egypt paints a terrifying picture. Last spring, a single judge sentenced 1,200 people to death for allegedly being involved in two attacks on police that resulted in the death of a single officer. HUMAN RIGHTS WATCH, *World Report 2015: Egypt* (available at http://bit.ly/1MqPNVn). The judge didn't allow the defendants to mount a defense or have access to counsel. *Id.*

Sisi has expanded military court jurisdiction for civilians, permitting him to decimate his political opposition. *Id.*

On this record, Shata has met his burden to demonstrate prejudice. It's easy to see why Shata would be much less fearful of a 10-year maximum sentence than a return to a country he has not visited in over two decades and which is rapidly changing for the worse.

In that same vein, the court need only look to the same immigration statutes Toran was required to consult to conclude that an order deporting Shata was an inevitable conclusion. Thus, Toran's incorrect advice that there was the "potential" or even "strong chance" of deportation prejudiced Shata by leaving open the possibility that he could avoid an order from an immigration judge removing him from the country, when in fact, he cannot. Shata has demonstrated that he rationally would have rejected the plea had Toran correctly informed him of the inevitable deportation consequences upon entry of his plea. Accordingly, the court of appeals decision should be affirmed.

4. In the Alternative, Shata is Entitled to an Evidentiary Hearing

If this Court finds that Shata has not demonstrated prejudice on this record, then it should remand the case for an evidentiary hearing.

In a single paragraph on the last full page of its brief, the state suggests that at such a hearing, if immigration documents show that Shata was in the country "illegally or

otherwise subject to deportation," then he would not be able to show prejudice and that ***Padilla*** and ***Mendez*** does not apply to him. *See* State's Brief at 22. Shata disagrees. This is an unsettled area of the law and it is not the question before this Court.

There is at least some authority that suggests the ***Padilla*** does apply. 8 U.S.C. §1229b(b)(1) permits the cancellation of removal for a person who is not a legal permanent resident if that person has been in the country for the last 10 years, has been a person of good moral character, has not been convicted of an aggravated felony or crime of moral turpitude, and demonstrates that removal would result in exception and extremely unusual hardship to his or her spouse, parent, or child, who is a U.S. citizen or lawfully admitted. So a defendant's eligibility for cancellation of removal may have been discretionary before a plea, but was certainly not discretionary after. *See* ***People v. Burgos***, 950 N.Y.S.2d 428, 441-42 (N.Y. Sup. Ct. 2012) (undocumented noncitizen's guilty plea unquestionably deprived him of any avenue by which he could avoid deportation, including cancellation of removal); ***Padilla***, 559 U.S. at 368 (stressing the importance of "'preserving the possibility of' discretionary relief from deportation" *quoting* ***INS v. St. Cyr***, 533 U.S. 289, 323 (2001)).

Burgos involved a controlled substance offense and his conviction eliminated his eligibility for any remedies allowing him to remain in the country, rendering him "subject to

deportation without recourse." ***Burgos***, 950 N.Y.S.2d at 442. Thus, "the clarity of the law at the time of [the] defendant's plea triggered plea counsel's higher duty under ***Padilla*** to give correct advice[.]" ***Id.*** at 441.

CONCLUSION

Shata demonstrated the denial of his Sixth Amendment right to the effective assistance of counsel. Toran performed definiciently by not reading the relevant federal statutes that made clear that deportation was inevitable upon conviction. His advice prejudiced Shata because he demonstrated that it would have been a rational decision for him to reject the plea offer, which did not involve any reduction of the maximum penalty, in favor of trial given the immigration consequences. Accordingly, this Court should affirm the court of appeals decision reversing Shata's conviction and order denying his post-conviction motion. In the alternative, if this Court finds that this record does not adequately demonstrate prejudice, it should remand for an evidentiary hearing on that prong.

Dated at Milwaukee, Wisconsin, February 19, 2015.

Respectfully submitted,

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 5,687 words.

Amelia L. Bizzaro

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

Amelia L. Bizzaro

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 16th of February, 2105, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Hatem Shata to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin, 53701-1688.

_____

Amelia L. Bizzaro

STATE OF WISCONSIN
SUPREME COURT

Case No. 2013AP1437-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner

v.

HATEM SHATA,
Defendant-Appellant

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN, PRESIDING

BRIEF OF AMICUS CURIAE UNIVERSITY OF WISCONSIN LAW SCHOOL IMMIGRANT JUSTICE CLINIC IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

OTHER AUTHORITIES

ARGUMENT

IV. Defense Counsel Must Provide Meaningful Advice to Noncitizen Clients Regarding the Immigration Consequences of a Proposed Plea and Must Seek to Mitigate those Consequences in Plea Negotiations.

A. The Duty to Advise

The U.S. Supreme Court has long held that defense counsel has a "critical obligation" to advise her client of "the advantages and disadvantages of a plea agreement." *Libretti v. U.S.*, 516 U.S. 29, 50–51 (1995). That the Sixth Amendment guarantee of effective assistance of counsel extends to the plea bargaining context has been clear since *Hill v. Lockhart* was decided in 1985. *Hill v. Lockhart*, 474 U.S. 52 (1985) (holding that the two-part *Strickland* test applied to ineffective assistance of counsel claims in the plea bargaining context). Currently, more than 95% of state and federal cases are resolved by plea. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). As the Court in *Frye* observed, our criminal justice system has become "a system of pleas, not a system of trials." *Id*. (citing *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012)). This new reality is reflected in the recent line of Supreme Court decisions that have built upon *Hill* and further elucidated the

contours of defense counsel's duties in the plea bargaining context. *See, e.g., Frye*, 132 S. Ct. 1399; *Lafler*, 132 S. Ct. 1376; *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Premo v. Moore*, 562 U.S. 115 (2011); *Hinton v. Alabama*, 134 S.Ct. 1081 (2014).

In *Padilla*, the Supreme Court took immigration consequences, which were previously almost universally regarded as collateral and beyond the ambit of counsel's duty to advise, and made them part and parcel of the criminal case, and thus of counsel's duty to provide effective representation. *Padilla*, 559 U.S. at 366. Because the consequence of deportation is so severe and has become so intertwined with the criminal justice process, deportation has become an "integral part—indeed, sometimes the most important part—of the penalty that may be imposed" on noncitizen defendants. *Id.* at 364. "The importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Id.* at 356.

Viewed in the context of the Court's other plea bargaining rulings, it is clear that *Padilla* requires more than a cursory warning that a plea carries some level of risk of deportation. Just as counsel must advise his client of the

specific sentencing range of a given conviction, counsel must advise his client with specificity regarding the immigration consequences of conviction. Counsel cannot simply advise a client that pleading guilty will result in a "risk" of prison. Counsel must advise her client of the specific sentencing range, and the likely sentence within that range. Advice must be specific, informed, and accurate. Advisal duties exist to ensure that clients are meaningfully informed about their rights. If informed consideration is the goal, a simple perfunctory notice cannot suffice.[1] The Oxford Dictionaries define "advice" as "guidance or recommendations concerning prudent future action, typically given by someone regarded as knowledgeable or authoritative."[2]

Wisconsin law supports this reading of *Padilla*. In *State v. Bowens*, the Court of Appeals found that *Frye* and *Lafler* did not create new law in Wisconsin, as attorneys in Wisconsin "have long had an obligation to properly communicate information to their clients under Wisconsin's rules of

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[1] *See*, Lindsay Nash, *Considering the Scope of Advisal Duties Under Padilla*, 33 Cardozo L. Rev. 549 (2011).

[2] *Advice*, Oxford Dictionaries, www.oxforddictionaries.com/us/definition/american_english/advice (last visited Mar. 17, 2015).

professional conduct." *State v. Bowens*, 2014 WI App. 38, ¶14, 353 Wis.2d 303, 2014 WL 406650. Thus the defendant in that case was not allowed to withdraw his plea in reliance on these new cases. *Id*. This duty to communicate, coupled with the centrality of immigration consequences, means that advice given regarding immigration consequences must be just as thorough as the advice given regarding the criminal charge itself. A noncitizen defendant is entitled to the advice of competent counsel before entering a plea and giving up her Constitutional right to a fair trial. *Lafler*, 132 S. Ct. 1376.

B. Duty of Zealous Advocacy

Not only must defense counsel accurately advise his client regarding the immigration consequences of criminal charges, counsel must actively seek to mitigate those consequences. The "*negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, at 373, 1486 (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) and *McMann v. Richardson*, 397 U.S. 759, 771 (1970)) (emphasis added). To effectively represent a noncitizen in that plea bargain process,

defense counsel must bring consideration of the immigration consequences into the negotiation. As *Padilla* observed, by creatively bargaining with the prosecutor counsel may be able to craft a plea that reduces or eliminates the likelihood of deportation. *Padilla*, 559 U.S. at 373.

Informed consideration of immigration consequences during the plea bargaining process will benefit both the State and the noncitizen defendant. *Id*. The parties will be able to reach agreements that better satisfy the interests of both parties and thus are less likely to result in later postconviction challenges. *See*, *id*. And when challenges are brought they will be less likely to result in overturned convictions and the re-litigation of old cases. In addition, noncitizens who are fully cognizant of the immigration consequences they face will generally end up spending less time overall in Wisconsin's jails. Understanding immigration consequences facilitates not only the criminal case process, but the immigration case process as well. Noncitizens in removal proceedings are held in one of two Wisconsin jails under contract with ICE, often for the duration of their immigration court proceedings. Studies have shown that noncitizens who have received "know-your-rights" education and understand the process move more

quickly through the system and so will also move more quickly out of Wisconsin jails. *Accessing Justice: The Availability And Adequacy Of Counsel In Immigration Proceedings*, New York Immigrant Representation Study 19 (Dec. 2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf .

V. Whether Immigration Consequences are "Clear" Should be Determined by Their Predictability.

Rather than defining the limits of *Padilla* by the relative ease or difficulty of the research required to determine the immigration consequences of a plea, the proper scope should be a function of the law's predictability and determinacy. If a plea can be reasonably predicted to lead to a particular immigration outcome, then counsel must so advise his client even if it requires extra work. Clarity may not equate to simplicity. The Supreme Court's Sixth Amendment jurisprudence has never suggested that the need for legal research or the complexity of the legal question should relieve defense counsel of her duty to provide effective representation. *See*, *e.g.*, *Hinton*, 134 S.Ct. 1081, 1089 (2014) (citing *Williams v. Taylor*, 529 U.S. 362 (2000) ("an attorney's ignorance of a

point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*"). A math problem may have a clear answer but yet be difficult to solve, requiring multiple levels of analysis. Similarly, determining immigration consequences may involve a complex process but result in a clear answer. Immigration law may be difficult, but it is not immune to comprehension. There is a plethora of readily accessible resources from which courts and counsel may draw in making sense of the immigration consequences of crimes.[3] Indeed the State in both the present case and in *Ortiz-Mondragon* proved quite capable of finding and making sense of the law; certainly defense counsel is no less competent.[4]

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[3] *See, e.g., Immigration Consequences of Criminal Convictions: Padilla v. Kentucky*, Office of Immigration Litigation, Department of Justice (2010); Immigrant Legal Resource Center, *Criminal and Immigration Law: Defending Immigrants' Rights*, ilrc.org/crimes (offering consulting services for defense counsel nationwide); Mary Kramer, *Immigration Consequences of Criminal Activity*, AILA (2012); Dan Kesselbrenner, Lory D. Rosenberg, Maria Baldini-Potermin, *Immigration Law and Crimes* (2014); *Overview of Immigration Consequences of State Court Criminal Convictions*, Center for Public Policy Studies, Immigration and the State Courts Initiative, State Justice Initiative (2012); Immigrant Defense Project, www.immigrantdefense.org (provides free consultations to indigent defenders).

[4] *See*, Brief and Appendix of Plaintiff-Respondent-Petitioner in *State v. Shata*; Brief of Plaintiff-Respondent in *State v. Ortiz-Mondragon*.

A basic understanding of immigration law reveals that there are specific steps to follow in analyzing the immigration consequences of a given conviction. The case law defining those steps is found in the Board of Immigration Appeals' precedent decisions and in Seventh Circuit cases. [5] In most instances, the "categorical approach" governs the determination of whether a particular offense falls within a ground of removal. *See*, *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (2013). This approach is rooted in over a century of federal and agency case law and practice and should be familiar to any defense attorney. *Id*. The Supreme Court and the Board of Immigration Appeals have progressively clarified the contours of the categorical approach, so that the methodology is now quite clear. *See e.g.*, *id.*; *Descamps v. U.S.*, 133 S.Ct. 2276 (2013); *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 354 (BIA 2014). In the context of crimes involving moral turpitude, which the State calls "murky," the Seventh Circuit has upheld the BIA's decision in *Matter of Silva-Trevino*,

[5] The State points to differing standards in different circuits as evidence of the law's difficulty, but this has no relevance in determining the consequences of a conviction in the Seventh Circuit.

which lays out in detail a specific three-step inquiry to determine whether a given offense involves moral turpitude. *Mata-Guerrero v. Holder*, 627 F.3d 256, 260 (7th Cir. 2010); *see Matter of Silva-Trevino*, 24 I&N Dec. 687 (2008).

The term "removal" was introduced to the Immigration and Nationality Act (INA) in 1996 and encompasses both grounds of inadmissibility (formerly exclusion) and grounds of deportability. 8 U.S.C. §§ 1182, 1227. Which grounds apply depends on the individual's immigration status. A noncitizen who entered the U.S. unlawfully or who is seeking admission to the U.S. or applying for some kind of a benefit under the immigration law is subject to the grounds of inadmissibility. A noncitizen who has been lawfully admitted to the U.S. in any status, even if that status has now expired, is subject to the grounds of deportability. Knowing which set of grounds applies is crucial, as they are not identical. For example, a firearms conviction is a ground of deportability but not of inadmissibility. *Compare* 8 U.S.C. § 1227(a)(2)(C) *with* 8 U.S.C. § 1187(a)(2).

In the present case, the record never tells us how Mr. Shata came to the United States. Trial counsel missed the very first step in being able to assess the immigration consequences

of Mr. Shata's conviction. Thus we cannot be certain which set of rules to use in analyzing his case. If Mr. Shata entered the U.S. lawfully, with a visa, he is subject to removal based on the grounds of deportability. On the other hand, if he entered unlawfully, he is subject to removal based on the grounds of inadmissibility.

What we do know is that Mr. Shata's conviction for possession with intent to deliver marijuana is an aggravated felony as "illicit trafficking in a controlled substance." 8 U.S.C. §1101(a)(43)(B). The term "aggravated felony" is defined in the INA at 8 U.S.C. § 1101(a)(43), which specifically lists those crimes deemed to constitute aggravated felonies for immigration purposes. Aggravated felonies are infamous for carrying the harshest immigration consequences. An aggravated felony conviction renders any noncitizen removable, regardless of her immigration status. An aggravated felony such as Mr. Shata's also bars the noncitizen from eligibility for any discretionary relief from removal under the INA.

A noncitizen in removal proceedings may be eligible to seek relief from removal before the immigration court. The most common forms of discretionary relief include:

cancellation of removal for permanent residents under 8 U.S.C. § 1229b(a), cancellation for nonpermanent residents under 8 U.S.C. § 1229b(b); cancellation under the Violence Against Women Act, under 8 U.S.C. § 1229b(b)(2); and asylum under 8 U.S.C. § 1158. Winning relief under any of these provisions provides a path to lawful permanent residence.

There are two nondiscretionary forms of relief: withholding of removal under 8 U.S.C. § 1231 and protection under the Convention Against Torture under 8 C.F.R. § 208.16. If an eligible individual establishes that it is more likely than not that she will be persecuted or tortured if deported, the immigration judge must grant relief. An individual convicted of an aggravated felony will generally only be eligible for relief under the Torture Convention. If an application is successful, the immigration judge will enter an order of removal, but will then withhold the order, similar to a withheld or imposed and stayed sentence. These forms of relief do not result in any permanent status and bar eligibility to seek future lawful status. If at some point in the future it becomes safe to deport the person, due to changed country conditions for example, the person will be deported.

In Mr. Shata's case, we know that when he appears before an immigration judge (if he hasn't already), the judge will have no choice but to order Mr. Shata removed based on his conviction for an aggravated felony. The only thing that could then prevent Mr. Shata's actual physical removal is if he were able to prove that he would be persecuted or tortured in his home country. Thus contrary to the State's argument and the Court of Appeals' dissent, the fact that Mr. Shata will see a judge does not indicate that the judge has discretion to allow him to stay; Mr. Shata is barred from any discretionary relief. Nor does the sentence imposed in Mr. Shata's case have any bearing on whether he will be subject to removal: a drug trafficking conviction is an aggravated felony regardless of the length of sentence.

VI. The Proper Standard for Determining Prejudice in the Context of Plea Bargaining is Whether the Defendant can Show that the Outcome of the Plea Process Would have been Different

Strickland's prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Lafler*, 132 S.Ct. at 1384 (2012); *see also*, *Hill*, 474 U.S. at 5 ("The … 'prejudice' requirement … focuses on whether counsel's constitutionally ineffective

performance affected the outcome of the plea process."). It is not necessary that a defendant demonstrate that he would have rejected the plea and gone to trial, though that is certainly one form of showing prejudice. Instead, the question is whether a different outcome might have been obtained. Thus Mr. Shata can establish prejudice if he can show that a competent attorney could have negotiated a plea that avoided or mitigated the immigration consequences. For example, given Mr. Shata's lack of criminal record, his family ties, and the severe hardship that he and his family would endure if he were deported, it is probable that competent counsel could have negotiated a plea to simple possession of marijuana in lieu of the trafficking offense. This conviction would have enabled Mr. Shata to seek legal status based on his wife's citizenship and would not have barred him from seeking cancellation of removal.

A defendant's guilt does not negate his ability to demonstrate prejudice as a result of his attorney's deficient performance during plea bargaining. *Lafler*, 132 S. Ct. at 1388. In *Padilla* the Court recognized that in the context of ineffective assistance of counsel claims under *Padilla*, the court should evaluate whether a decision to reject the plea bargain would have been rational under the circumstances. *See*

Padilla, 559 U.S. at 374 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486). The Wisconsin Court of Appeals also adopted this "rational under the circumstances" test. *See State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895. If the ability to remain in the U.S. was more important to Mr. Shata than the potential sentence he faced, and had he been competently advised, it would have been rational for him to reject the plea offer in hopes of obtaining a more favorable offer, even if doing so increased the risk he might have to go to trial and face a longer sentence. The desire to avoid removal at all costs can dramatically affect a rational noncitizen defendant's decision to accept or reject a particular plea offer.

The State argues that if Mr. Shata is in the U.S. unlawfully and is thus removable independently of his conviction, then he cannot show prejudice. However, as discussed above, a noncitizen without status and in removal proceedings may seek discretionary relief from removal if eligible. Eligibility for such relief in turn depends on the noncitizen's convictions. In Mr. Shata's case, but for his conviction he could seek lawful status based on his marriage to a U.S. citizen or by applying for cancellation of removal. In *Ortiz-Mondragon*, but for his felony battery conviction, Mr.

Ortiz-Mondragon could have applied for cancellation of removal. 8 U.S.C. § 229b(b). Clearly a noncitizen without legal status can suffer prejudice if by virtue of inadequate counsel she is convicted of a crime disqualifying her from eligibility to seek cancellation of removal.

CONCLUSION

Based on the above, amicus urges this Court to adopt a rule requiring that defense counsel meaningfully advise his client of the immigration consequences of a plea in a way that promotes informed decision-making. Counsel's duty to effectively represent a client in plea bargaining proceedings means that in the case of a noncitizen, counsel must bring the issue of deportation into the negotiations. Finally, this Court should clarify the standard for showing prejudice as a result of ineffective assistance of counsel.

Dated this 17th day of March, 2015.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2766 words.

_____

Stacy Taeuber

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____

Stacy Taeuber

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DEPARTMENT OF JUSTICE

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March 2, 2015

Diane M. Fremgen, Clerk,
Wisconsin Supreme Court
110 East Main Street, Suite 215
Post Office Box 1688
Madison, WI 53701-1688

Re: ***State of Wisconsin v. Hatem M. Shata***
Case No. 2013AP1437-CR

Dear Ms. Fremgen:

Please be advised that I have received the Respondent's Brief in the above entitled matter. Since I believe that I have set forth my arguments in this case in the Appellant's Brief that was filed in this matter, I do not plan to file a Reply Brief.

Sincerely,

Nancy A. Noet
Assistant Attorney General

NAN:mhb
Enclosures

c: Amelia L. Bizzaro
Counsel for Defendant-Appellant

Karen A. Loebel
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