WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

HATEM M. SHATA,

Case No. 2013AP001437 CR

Defendant-Appellant.

AN APPEAL FROM THE DEFENDANT-APPELLANT'S CONVICTION AND THE DENIAL OF HIS MOTION FOR POST-CONVICTION RELIEF, ENTERED BY THE HONORABLE TIMOTHY G. DUGAN, MILWAUKEE COUNTY CIRCUIT COURT

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

Respectfully Submitted,

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I. WAS HATEM SHATA'S TRIAL ATTORNEY CONSTITUTIONALLY INEFFECTIVE?

TRIAL COURT ANSWERED: NO.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this appeal are based on established law, and, therefore, neither oral argument nor publication are requested by the Defendant-Appellant.

STATEMENT OF THE CASE

On February 16, 2012 Milwaukee and Waukesha police officers were preparing to execute a search warrant on the Sphynx Coffee restaurant located at 1751 N. Farwell Street in the City of Milwaukee. (App'x 102.) Milwaukee Police Detective Karl Zuberbier was conducting surveillance of the restaurant prior to executing the warrant. (*Id.*) He observed Mr. Shata exit the restaurant and inspect a bronze Oldsmobile parked on the street in front of the restaurant and then reenter the restaurant. (*Id.*) A short time later, Mr. Shata exited the restaurant with a young woman named Amanda Nowak. Mr. Shata placed a box in the trunk of

the Oldsmobile and he and Ms. Nowak went back inside the restaurant. (*Id.*)

Shortly thereafter, Ms. Nowak left the restaurant, got in the Oldsmobile, and parked it around the block before returning to the restaurant. (*Id.*) She later left the restaurant and drove away in the Oldsmobile, at which point she was pulled over by law enforcement. (*Id.*) Ms. Nowak consented to a search of her vehicle and officers located a box in the trunk containing 2,319 grams of suspected marijuana. (*Id.*)

Law enforcement officers then executed the search warrant on the Sphynx Coffee restaurant. Mr. Shata was the only person in the restaurant at the time. (*Id.*) In executing the warrant, officers discovered two small bags of suspected marijuana and one small bag of suspected cocaine on Mr. Shata's person. (*Id.*)

On April 18, 2012 Mr. Shata was charged with possession with intent to deliver a controlled substance (THC) (>1,000—2,500 grams) as a party to a crime in violation of Wis. Stat. §§ 961.41(1m)(h)3, 939.50(3)(g), and 939.05. (App'x 101.) The State filed an Information charging the same offense on May 5, 2012. (App'x 201-02.)

Mr. Shata entered a guilty plea on October 5, 2012. (*See* App'x 311.) At the plea hearing, Mr. Shata's attorney, James Toran, asked him if he was a United States citizen and Mr. Shata informed him that he is not. (App'x 307.) Mr. Toran then stated that he informed Mr. Shata that "there's a potential he could be deported." (*Id.*) The court later informed Mr. Shata that if he was not a U.S. citizen, "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." (*Id.* at 309 (emphasis added).) At no point did anyone tell him that deportation was mandatory for him.

Mr. Shata's sentencing hearing was held on November 16, 2012. The State recommended four years in prison comprised of two years of initial confinement and two years of extended supervision, imposed and stayed for two years' probation with twelve months at the House of Corrections as condition time. (App'x 402.) Attorney Toran recommended that the court impose and stay a prison sentence and place Mr. Shata on probation, and impose condition time but stay that as well. (*Id.* at 413.) The court sentenced Mr. Shata to five years imprisonment comprised of one year of initial

confinement and four years of extended supervision. (*Id.* at 423.)

Mr. Shata timely filed a notice of intent to seek post-conviction relief on November 28, 2012. Counsel received the last transcript on March 6, 2013 and filed a timely post-conviction motion seeking to withdraw Mr. Shata's plea on March 15, 2013. The circuit court scheduled a motion hearing for May 30, 2013. On May 20, 2013 counsel filed a motion with this Court seeking to extend the 60-day deadline for a circuit court to decide a post-conviction motion. Counsel's motion was granted, and the circuit court's deadline was extended to July 15, 2013.

Mr. Shata's post-conviction motion alleged ineffective assistance of counsel based on a violation of *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). At issue was the same federal statute that was at issue in *Padilla*, that being 8 U.S.C. § 1227, which describes "General Classes of Deportable Aliens," including those convicted of a controlled substance violation "other than a single offense involving possession for one's own use of 30 grams or less of marijuana." Mr. Shata's offense involved 2,319 grams of marijuana. He alleged that Attorney Toran's performance was deficient because Attorney Toran incorrectly advised that Mr. Shata did not need to

worry about immigration consequences because he would be receiving probation, and ICE only initiated deportation proceedings against aliens serving prison terms. (App'x 502.) He also alleged that Attorney Toran gave incorrect advice when he failed to inform Mr. Shata that his conviction would result in mandatory deportation. (*Id.*)

At the motion hearing on May 31, 2013 Attorney Toran testified that he knew prior to the plea hearing that Mr. Shata was not a U.S. citizen and that he was concerned about being deported. (App'x 604–05.) He further testified that he did not know that Mr. Shata's conviction would subject him to mandatory deportation, and that the word he used when describing the risk of deportation was "potential." (*Id.* at 605.) Attorney Toran further testified that he did not research the immigration consequences "in terms of whether it was mandatory" and that he did not inform Mr. Shata that deportation was mandatory for this offense. (*Id.* at 605–06.) On cross-examination, Attorney Toran testified that he advised Mr. Shata that there was "a strong chance" that he could be deported. (*Id.* at 608, 610.) Mr. Shata testified that Attorney Toran told him he might be deported, but did not say that there was a strong chance, (*id.* at 615), and told him that deportation would not be an issue if he received

probation, (*id.* at 615, 616). Further, Mr. Shata testified that he would have proceeded to trial rather than pleading guilty had he known that deportation was mandatory. (*Id.* at 617.)

The trial court found that *Padilla* referred to the removal statute at issue as being "presumptively mandatory," and that the attorney in that case gave incorrect advice. (*Id.* at 620.) The court also found that Attorney Toran informed Mr. Shata that there was a "strong likelihood" of deportation, and that "strong likelihood" was not significantly different from "presumptively mandatory," which was one way that the *Padilla* Court referred to the removal statute. (*Id.* at 622.) The court did not find Mr. Shata's testimony that he would have gone to trial under any circumstances in order to avoid deportation to be credible. (*Id.* at 623.) The court denied the motion and Mr. Shata appeals.

STANDARD OF REVIEW

> The question of whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. The circuit court's findings of fact will not be reversed unless they are clearly erroneous.

State v. Smith, 207 Wis. 2d 258, 266, 558 N.W.2d 339 (1997) (internal citations omitted). Whether trial counsel

violated Mr. Shata's right to effective assistance of counsel is a question of law that this Court decides without deference to the trial court. *Id.* at 266–67.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT GRANTING HATEM SHATA'S MOTION TO WITHDRAW HIS PLEA

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Ineffective assistance of counsel claims are reviewed under the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. Under *Padilla*, the Court declared that poor advice leading a defendant to plead guilty without understanding that his conviction would lead to deportation amounts to ineffective assistance. The Court stated that "[w]hen the law is not succinct and straightforward . . . a

criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may* carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.*" 130 S. Ct. at 1483 (footnote omitted) (emphases added). The Court clearly found that the deportation consequence at issue in that case, and at issue in this case, is "truly clear." *Id.*

"The importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Padilla*, 130 S. Ct. at 1480. Mr. Shata established ineffective assistance under *Padilla*. *Padilla* involved the exact same federal removal statute as this case. Both cases involved trafficking in marijuana by non-citizen defendants. Further, both involved a trial attorney who gave affirmatively incorrect advice as to the deportation consequences of entering a plea. In this case, the trial court found that

> Mr. Toran had been talking to Mr. Shata about his deportation. [The record] reflects that there was a hope that the matter could be expunged to allow [Mr. Shata] 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.

(App'x 622.) It undisputed that Mr. Shata was concerned about the possibility of being deported based on his conviction in this case. (*See* App'x at 412 ("H]e's very, very concerned about being deported out of this country."); *id.* at 413 ("[H]e's hopeful that he will be allowed to remain in this country and work and be a productive citizen and support his family.").)

A. ATTORNEY TORAN'S PERFORMANCE WAS DEFICIENT

The first question then is whether Attorney Toran provided affirmatively inaccurate advice regarding Mr. Shata's potential for deportation. The trial court found that *Padilla* held that deportation was *presumptively* mandatory for this offense rather than being absolutely mandatory. (App'x 622.) The trial court misinterpreted *Padilla*. *See Padilla*, 130 S. Ct. 1478 ("We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation."); *id.* at 1480 ("Under contemporary law, if a noncitizen has committed a removable

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

As the *Padilla* Court pointed out, it is virtually—and perhaps literally—impossible to avoid deportation for the types of offenses that Padilla and Shata were convicted of, particularly considering that Shata was not and is not a lawful permanent resident. Jose Padilla *was* a lawful permanent resident, which is why the Court referred to the deportation consequences in the case as "presumptively mandatory." *See Padilla*, 130 S. Ct. at 1477. The Attorney General's authority to cancel deportation of aliens is different for lawful permanent residents than it is for non-permanent residents. *See* 8 U.S.C. § 1229b. Mr. Shata's deportation is truly mandatory.

At the hearing on Mr. Shata's post-conviction motion, Attorney Toran admitted that he was concerned about Mr. Shata being deported, and "actually asked for an

adjournment to discuss this matter with him in terms of looking up the immigration statute. I didn't do that." (App'x 607.) Despite the fact that he had been representing Mr. Shata for six months and knew from their first meeting that Mr. Shata was not a U.S. citizen, (App'x 612), Attorney Toran failed to look up the removal statutes and familiarize himself with the deportation consequences his client was facing. Attorney Toran's failure to read the statutes constitutes deficient performance. In fact, the *Padilla* Court stated

> 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, 130 S. Ct. at 1483.

Furthermore, Mr. Shata alleges that Attorney Toran specifically told him that he would be getting probation, and that Immigration and Customs Enforcement only detained persons who were sentenced to prison. (App'x 504.) "It is

quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Hill* v. *Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring in judgment). From the record, it can be determined that Attorney Toran informed Mr. Shata that there was a potential that he could be deported, (App'x 307, 505), "that he *may* be deported, that there's *a strong chance that he could be deported*," (App'x 608), but not that his deportation was presumptively mandatory under the basic removal statute and conclusively mandatory under the provisions of 8 U.S.C. §§ 1101(a)(43)(B), 1228, & 1229b. The *Padilla* Court mentioned that deportation was "practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." *Padilla*, 130 S. Ct. at 1480. Based on Mr. Shata's status, the Attorney General's discretion to cancel removal does not apply to him. His removal from the country is truly mandatory, and Attorney Toran's failure to inform him of this critical fact constitutes deficient performance. *See Padilla*, 130 S. Ct. at 1478 ("We agree with Padilla that constitutionally competent counsel would

have advised him that his conviction for drug distribution made him subject to automatic deportation."); *id.* at 1483 ("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.").

B. MR. SHATA WAS PREJUDICED BY ATTORNEY TORAN'S DEFICIENT PERFORMANCE.

> In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Missouri v. Frye, No. 10-444, 132 S. Ct. 1399, 1409 (decided March 21, 2012).

"Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 323 (2001) (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). This is particularly true for Mr. Shata. He has been in the United States for 22 years. (App'x 613.) His wife and

children are United States citizens and live in New Jersey, where Mr. Shata also resided after losing his business in Milwaukee. If deported, Mr. Shata would be returned to his native Egypt, which has undergone two separate coups since 2011 and remains in a state of violent upheaval. Had he known that his conviction would subject him to mandatory deportation, he would have gone to trial even if it meant that he would receive a harsher sentence if convicted. (*See* App'x 613.) No charges were dismissed or read in as part of his plea, and the charge to which he pled was not reduced in any way. He gained no clear benefit whatsoever by foregoing trial.

Staying in the United States was more important to Mr. Shata than anything else and had Attorney Toran informed him that deportation was mandatory for him, he would have gone to trial even if there was only a miniscule chance of acquittal. He pled guilty not to receive a more lenient sentence, but because he believed doing so would give him a chance to stay in the United States. Here there is more than a "reasonable probability" that Mr. Shata would have insisted on going to trial in the absence of Attorney Toran's deficient performance, and that establishes prejudice. *See Frye*, 132 S. Ct. at 1409.

CONCLUSION

Because of Mr. Shata's immigration status, he was subject to mandatory deportation for the crime that he pled guilty to. Attorney Toran failed to familiarize himself with the federal immigration statutes governing Mr. Shata's deportation and affirmatively gave incorrect advice to Mr. Shata regarding the immigration consequences of his plea. This constitutes deficient performance.

Prejudice is established by showing a reasonable probability that Mr. Shata would have insisted on going to trial had he not been misled. His wife and children are U.S. citizens and live in New Jersey, where he also resided. Egypt, his country of origin, is literally a warzone. Had he known that pleading guilty would have banished him to a war-torn country that he had not been to in decades, away from his wife and children, with little or no hope of being reunited with them, he would have insisted on going to trial regardless of the odds against his acquittal. He gained no discernible benefit by foregoing trial and, all things considered, he would prefer to be in prison in America than free in Egypt. That being the case, it is not difficult to see that there is a reasonable probability that Mr. Shata would have insisted on going to

trial had he known that deportation was mandatory if he entered a guilty plea. Mr. Shata respectfully asks the Court to reverse the trial court's denial of his motion for post-conviction relief and allow him to withdraw his guilty plea and proceed to trial on the charge against him.

Dated this ___ day of September, 2013.

Respectfully submitted,

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c) Stats. for a Brief and Appendix produced with a monospaced font and consists of ___ pages.

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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.

I further certify that the electronic and paper copies of this brief are identical.

Dated this __ day of September, 2013.

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Brian M. Borkowicz

APPENDIX

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