STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP1437-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HATEM M. SHATA,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court correctly determine that Shata was not entitled to plea withdrawal based on his claim that he received ineffective assistance of counsel regarding the immigration consequences of his plea?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument in this case. Nonetheless, the State believes that publication of this court's decision is warranted. The issues presented

here are not only questions of first impression, they will recur frequently in many similar cases. Resolution is necessary to establish the correct protocol for those cases.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State offers the following summary and will present additional facts, if necessary, in the argument portion of its brief.

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, he 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.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

(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.[2] 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).

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).

At the hearing, Shata's trial counsel, James Toran, testified that he knew Shata was concerned about the possibility of deportation (28:5). 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?

[2] *See* Wis. Stat. § 971.08(2).

> 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). 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, every 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 a 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).

Shata testified at the hearing as well, and he confirmed his concern about being deported (28:12). 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). 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).

Regarding his immigration status, Shata stated that he had received a letter from INS on July 12th, and that he had to "go in front of judge, and then the judge will decide" (28:14). 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: All right. The court in Padilla, it's P-A-D-I-L-L-A, v. Kentucky at 559 U.S. 356 holds that counsel engaged in – the question is whether or not counsel engaged in deficient performance by failing to advise the defendant that his plea of guilty made him subject to automatic deportation, and then secondly, whether or not there was ineffective assistance of counsel.
>
> And the fact of the matter is as to the first prong, we have the exact same statute that the court in Padilla dealt with, and basically as the Supreme Court decision states, and explains that – well, it's interesting that they say that it was presumptively mandatory, and his advice was the – the lawyer's advice was incorrect. Which doesn't mean apparently that there's going to be a mandatory deportation.
>
> And the question then becomes, and I find 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.
>
> Part of that comes from the transcript submitted with the defense's motion, page four, lines eight through 14. Mr. Toran notes that the issue my client, he doesn't want to be deported, there's some circumstances on a plea, so that's what I'm trying to deal with. So, Your Honor, I don't – all I can do is

ask for a brief adjournment, take it off the trial calendar, and I can set it for another date.

Court at that point declined to adjourn the matter. It had been set for trial. It was intended to go forward.

On page 14 of the sentencing transcript from November 16th, lines 17 to 22, Mr. Toran notes he wishes at the conclusion of probation that his record could be expunged so he could remain in this country. I indicated to him I don't know if that's possible, and I will address the Court, and he has no credit for the time served. Court went on to say and explain that there is no chance of expungement under those circumstances.

That 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.

Moreover, I don't find that Mr. Toran told Mr. Shata that he would be getting probation and would go back to New Jersey and nothing would happen. Clearly this court in its plea colloquy advised Mr. Shata that the Court did not follow that for the reasons at the time of sentencing.

The statement of Mr. Toran certainly is obligated to and did tell Mr. Shata that there was a risk of proceeding to trial, there was no defense, that he was facing a maximum sentence of 10 years, that the State was recommending probation with 12 months at the House of Corrections.

He explained to Mr. Shata that the co[-]defendant, Amanda Nowak, was present, intended to proceed to trial – or to testify against him in trial, and as he explained, that he didn't believe and told Mr. Shata that had he decided to proceed to go to

> trial, it's not likely that the Court would have granted him – placed him on probation.
>
> Now, ultimately the Court didn't follow that recommendation, and as I recall, we passed the case, they had further discussions, and ultimately Mr. Shata decided to proceed.
>
> The discussion in Padilla is that the Court did not decide whether or not there was prejudice as a result, and it's a question that the Padilla court did not reach. 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.
>
> There appears to be some discretion, and the risk that he ran had this matter gone to trial and more adverse facts came out, that the Court wasn't necessarily aware of at the time of sentencing, the sentence could've been much longer and a more significant period of incarceration or imprisonment which may ultimately reflect upon a presumptive mandatory removal.
>
> To that extent he opted and chose that with a possible recommendation of probation that he could look more positive in light of the immigration authorities, and so for both of those reasons the Court's going to deny the motion to vacate the conviction and the plea and to withdraw the plea.

(28:20-24). Based on that hearing and oral ruling, the circuit court issued a written order denying Shata's motion on July 15, 2013 (19). This appeal followed.

ARGUMENT

SHATA IS NOT ENTITLED TO WITHDRAW HIS PLEA.

A. Legal Standards for Plea Withdrawal.

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in "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). To establish "manifest injustice," a criminal defendant must show a "serious flaw in the fundamental integrity of the plea." *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995) (citation omitted).

A circuit court's decision to grant or deny a motion to withdraw a guilty plea will stand on appeal unless it represents an erroneous exercise of the court's discretion. *Thomas*, 232 Wis. 2d 714, ¶ 13. The circuit court's exercise of discretion will be affirmed if the record demonstrates that legal standards were correctly applied to the facts and a reasoned conclusion was reached. *Nawrocke*, 193 Wis. 2d at 381. A defendant may meet his burden of establishing a manifest injustice by demonstrating, among other things, that his plea was involuntary or that he received ineffective assistance of counsel. *See State v. Daley*, 2006 WI App 81, ¶ 20 n.3, 292 Wis. 2d 517, 716 N.W.2d 146 (citation omitted).

On a challenge to the plea colloquy itself, the defendant bears the initial burden to make a *prima facie* showing that the circuit court accepted the plea without

satisfying its duties under Wis. Stat. § 971.08[3] or other mandatory procedures. *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *see also State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14. If the defendant demonstrates a *prima facie* violation and alleges that he did not know or understand critical information that the court should have provided at the time of the plea, "the burden will then shift to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." *Bangert*, 131 Wis. 2d at 274.

If, however, the defendant argues that he is entitled to withdraw his plea because of something outside of the plea colloquy, like ineffective assistance of counsel, plea withdrawal follows the *Nelson/Bentley* line of cases.[4] *State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350, 734 N.W.2d 48. As to these claims, the burden does not shift to the State. *State v. Brown*, 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906. Instead, the defendant bears the burden of proving by clear and convincing evidence that plea withdrawal is necessary to avoid a manifest injustice. *Bentley*, 201 Wis. 2d at 311. "[T]he manifest injustice test is met if the defendant was denied the effective assistance of counsel." *Id.* (quotation marks and citation omitted).

In this case, Shata seeks to withdraw his plea pursuant to the *Nelson/Bentley* lines of cases only.

---

[3]This provision specifically requires a court, before it accepts a plea, to "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. § 971.08(1)(a).

[4]The full citations for these cases are *Nelson v. State*, 54 Wis. 2d 489, 194 N.W.2d 629 (1972) and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

B. The Circuit Court Correctly Determined That Shata Was Not Entitled To Withdraw His Plea Because He Had Not Established Either Deficient Performance Or Prejudice.

When a defendant seeks to withdraw his plea based on a claim of ineffective assistance of counsel, he 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.

The Immigration and Nationality Act ("INA") provides that noncitizens are "deportable" based on a number of criminal offenses, including:

(1) a crime of moral turpitude committed within a certain time after admission to the country and subject to a sentence of one year or more, 8 U.S.C. § 1227(a)(2)(A)(i) (any alien who is convicted of such a crime "is deportable");

(2) multiple crimes of moral turpitude, 8 U.S.C. § 1227(a)(2)(A)(ii) (any alien who is convicted of such crimes "is deportable");

(3) an aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii) ("[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable");

(4) high speed flight, 8 U.S.C. § 1227(a)(2)(A)(iv) (alien convicted of high speed flight from immigration checkpoint "is deportable");

(5) failure to register as a sex offender, 8 U.S.C. § 1227(a)(2)(A)(v) (applicable conviction renders alien "deportable");

(6) most crimes involving controlled substances, 8 U.S.C. § 1227(a)(2)(B)(i) ("[a]ny alien . . . convicted of [such a violation] . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable");

(7) drug abuse or addiction, 8 U.S.C. § 1227(a)(2)(B)(ii) ("[a]ny alien who is, or at any time after admission has been, a drug abuser or addict is deportable");

(8) certain firearm offenses, 8 U.S.C. § 1227(a)(2)(C) (applicable convictions render alien "deportable");

(9) miscellaneous crimes regarding conspiracy or attempt to commit offenses related to sabotage, treason, and similar acts, 8 U.S.C. § 1227(a)(2)(D) (applicable convictions render alien "deportable"); and,

(10) crimes of domestic violence, 8 U.S.C. § 1227(a)(2)(E) (applicable convictions render alien "deportable");

8 U.S.C. § 1227(a)(2)(A)-(E) (2005 and Supp. 2013). Shata's conviction for possession with intent to deliver marijuana, therefore, appears to render him "deportable" under one or more of these provisions. 8 U.S.C. § 1227(a)(2)(B)(i); *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) (a controlled substance crime may constitute an aggravated felony if it involves "illicit trafficking in a controlled substance," 8 U.S.C. § 1101(a)(43)(B)) and *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 130 S. Ct. 2577, 2582 (2010) (a state drug conviction may be an "aggravated felony" for immigration purposes if it is punishable as a felony under federal law).

As a result, Shata argues that pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010), his attorney's performance was constitutionally deficient because he did not advise Shata that his deportation was "mandatory." In a very recent decision, *Chacon v. Missouri*, 409 S.W.3d 529 (Mo. Ct. App. 2013), the Missouri Court of Appeals rejected the identical claim. This court should do the same.

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)). Prior to 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.'" *Id*. 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 Missouri Court of Appeals first addressed the holding in *Padilla*:

> When applying the *Strickland* standard to the new rule announced in *Padilla*, the Court held that an objective standard of reasonableness requires counsel to "advise [his or] her client regarding the *risk* of deportation." The Court also recognized that '[i]mmigration law can be complex," that it is its own legal specialty, and that some attorneys practicing criminal law "may not be well versed in it." The Court went on to note that, due to this complexity in the law, "[t]here will … undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." "When 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 [Padilla's] case, the duty to give correct advice is equally clear."

Chacon, 409 S.W.2d at 536 (internal citations omitted).

Noting that Chacon's convictions made his deportation "presumptively mandatory" according to a reading of the applicable federal statutes, the court rejected Chacon's claim that "under *Padilla*, his attorney was required to specifically inform him that he was subject to "'mandatory deportation.'" *Chacon*, 409 S.W.2d at 536. As the court explained:

> 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). The same analysis applies in this case.

Here, as the circuit court found, Attorney Toran advised Shata that there was a "strong likelihood" that he would be deported based on his conviction. (28:20-24)[5]. The court also determined, as did the court in *Chacon*, that there was no meaningful difference between saying that

[5] Attorney Toran also based his advice, in part, on discussion he had with several federal prosecutors (28:6).

deportation was a "strong likelihood" versus "presumptively mandatory" (28:20-24). The circuit court correctly decided, therefore, that Attorney Toran's performance was not constitutionally deficient under *Strickland*. The circuit court also ruled, at least implicitly, that Shata had not shown any prejudice associated with Attorney Toran's advice (28:20-24).

As the United States Supreme Court pointed out in *Padilla*:

> 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). 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).

As the circuit court found, Shata cannot meet this burden. His bald allegation that he would not have entered a plea had he been told that his deportation was

"mandatory" is not enough, especially since the record so clearly contradicts the assertion.

On similar facts, the United States District Court for the Northern District of Ohio rejected just this kind of conclusory allegation and found that the defendant had not demonstrated prejudice with respect to his ineffective assistance of counsel claim:

> Even if Shin could show his counsel's performance was deficient and fell below an objective standard of reasonableness, he cannot establish that such deficiency caused him actual prejudice. Shin argues he would not have pled guilty "[h]ad [he] known or been told that [his] guilty plea in this case would lead to [his] automatic removal from the United States" (Doc. 28 at 20). According to Shin, such a blanket assertion is a "sufficient showing" under *Hill* (Doc. 28 at 20). *Hill,* however, says the complete opposite: "[a] petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice.' " 474 U.S. at 60, 106 S.Ct. 366. Indeed, the Sixth Circuit has clarified that a petitioner cannot satisfy the prejudice element by merely telling the court that he would have gone to trial if he had received different advice. *See Pilla,* 668 F.3d at 372–73; *see also Haddad v. United States,* 2012 WL 2478355, *3–4 (6th Cir.2012). Rather, the test is objective, and Shin must convince this Court "that a decision to reject the plea bargain would have been rational under the circumstances." *Pilla,* 668 F.3d at 373; *see also Hill,* 474 U.S. at 59, 106 S.Ct. 366. Shin's brief is completely silent in this regard.
>
> Notwithstanding Shin's silence, this Court is convinced that accepting the plea was certainly a rational choice in this case. A conviction following a trial would have resulted, at a minimum, in a sentencing guidelines offense level of 14, which carries a sentencing range of 15 to 21 months imprisonment. Shin's acceptance of responsibility led to a lower guidelines range and, due in large part to his cooperation, Shin was ultimately sentenced to a term of probation. Shin offers no argument that he had a realistic chance of being acquitted at trial, and

> there is no evidence in the record that Shin had a rational defense to the charges.
>
> Moreover, had Shin been convicted after a trial, he would not have eliminated, or even reduced, his chances of removal. The only consequence of his counsel's "erroneous" advice—assuming Shin's assertion that he would have gone to trial had he received more accurate advice—is that he received a more lenient sentence. In short, nothing leads to the conclusion that a rational defendant in Shin's position would have proceeded to trial. Shin fails to show his lawyer's advice created a "reasonable probability" of prejudice, and thus he cannot show that the advice " 'probably ... altered the outcome of the challenged proceeding,' as is required for a writ of *coram nobis.*" *Pilla*, 668 F.3d at 373 (quoting *Johnson*, 237 F.3d at 755).

United States v. Chan Ho Shin, 891 F. Supp. 2d 849, 857-58 (N.D. Ohio 2012). For essentially the same reasons, Shata's claim of prejudice under *Strickland* must fail.

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). As 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). Attorney Toran also explained that:

> [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). 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. As the circuit court noted, Shata's sentence could have been significantly greater had he gone to trial, which also could have had an adverse impact on his immigration status (28:24)[6].

Under the circumstances, Shata cannot show 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 deportation consequences that he now faces.

[6] As the circuit court pointed out in its oral ruling, the record in this case is insufficient to determine whether, in fact, Shata will be deported (28:24). The single, unauthenticated page of Shata's apparent immigration detainer indicates only that the Department of Homeland Security is investigating to determine whether Shata is subject to removal from the country (15:28). In addition, that one page does not indicate whether there may be other grounds for Shata's removal. If that is the case, Shata's claim of prejudice likely would fail for that reason as well because he would be subject to removal for reasons independent of his conviction in this case. For this reason, it is troubling that Shata chose not to include the remainder of his immigration detainer.

CONCLUSION

For the above reasons, the State of Wisconsin asks this court to affirm the circuit court's denial of Hatem M. Shata's motion to withdraw his plea.

Dated this 23rd day of December, 2013.

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 5,290 words.

Dated this 23rd day of December, 2013.

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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 23rd day of December, 2013.

_____
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