WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

HATEM M. SHATA,

Case No. 2013AP1437 CR

Defendant-Appellant.

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

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully Submitted,

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SUPPLEMENTAL STATEMENT OF FACTS

The State's Brief incorrectly states that Mr. Shata was charged with two counts of possession with intent to deliver marijuana as a party to a crime. (State's Brief at 2). He was charged with one count; count two applied to co-defendant Amanda Nowak. (2).

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

The State acknowledges that if a defendant is denied the effective assistance of counsel, he has met his burden of "proving by clear and convincing evidence that plea withdrawal is necessary to avoid a manifest injustice." (State's Brief at 11 (citing *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996)). In order to establish ineffective assistance, the defendant must show that his attorney's performance was deficient and that he suffered prejudice as a result. *State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232.

A. SHATA ESTABLISHED THAT HIS ATTORNEY PERFORMED DEFICIENTLY

Under *Padilla v. United States*, 130 S. Ct. 1473 (2010), constitutionally competent defense attorneys must accurately inform their clients of the immigration

consequences of their plea. *Id.* at 1483 ("[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."). This case involves the same removal statute as in *Padilla* and both cases involved marijuana trafficking. However, the deportation consequences for Mr. Shata are even clearer than they were in *Padilla*. Unlike Mr. Padilla, Mr. Shata is not a lawful permanent resident and the attorney general's authority to cancel his removal under 8 U.S.C. § 1229b does not apply. *See also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013) ("The Immigration and Nationality Act (INA), 66 Stat. 163, 8 U.S.C. § 1101 *et seq.,* provides that a noncitizen who has been convicted of an 'aggravated felony' may be deported from this country. The INA also prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case. Among the crimes that are classified as aggravated felonies, and thus lead to these harsh consequences, are illicit drug trafficking offenses.").

Whether he is subject to deportation for possessing more than 30 grams of marijuana for personal use or as an alien who has committed an aggravated felony makes no difference; Mr. Shata is subject to mandatory deportation under either provision.

Attorney Toran stated on the record at the plea hearing that he informed Mr. Shata "that there's a potential he could be deported." (26:7–8). Interestingly, he made that statement immediately after asking Mr. Shata if he was a United States citizen. He testified at the May 31, 2013 hearing on Mr. Shata's post-conviction motion that he knew prior to the plea hearing that Mr. Shata was not a U.S. citizen. (28:4–5). Also at that hearing Attorney Toran testified that he "didn't research the immigration consequences in terms of whether or not it was mandatory," and did not inform Mr. Shata that deportation would be mandatory. (28:5-6). He later testified that he "advised [Mr. Shata] prior to the plea that he may be deported, that there's a strong chance that he could be deported . . . ." (28:8). He also testified that he spoke with federal prosecutors and they told him that Mr. Shata "could" or "may" be deported. (28:6). Apparently neither Mr. Toran nor the federal prosecutors actually read the removal statute, which the *Padilla* Court found to be "truly clear," nor were they familiar with *Padilla* itself, which had been decided only two years earlier and created an important new obligation for criminal defense attorneys. This is difficult to believe. Finally, Attorney Toran could have consulted an immigration attorney for advice rather than

federal prosecutors, or referred Mr. Shata to someone who specializes in immigration law. He did not.

The State relies on *Chacon v. Missouri*, 409 S.W.3d 529 (Mo. Ct. App. 2013) to assert that a defense attorney does not need to use specific words to describe the deportation consequences of a plea but merely needs to "correctly advise his client of the risk of deportation so that the plea is knowing and voluntary." 409 S.W.3d at 537. Attorney Toran did not correctly advise Mr. Shata of the risk of deportation. He merely stated that there was "a potential" or "a strong chance" when deportation is actually mandatory. Mr. Shata was misled into believing there was a chance he would not be deported when there was not. Even if deportation were only presumptively mandatory, that is still quite different from "a strong chance." Further, there are differences between Mr. Shata's case and *Chacon*. Immigration officials issued a detainer for Mr. Chacon before he entered his plea. *Id.* at 531. He was therefore well aware that deportation proceedings had begun based on the charges he was facing prior to pleading guilty. Chacon's attorney also recommended he seek advice from an immigration attorney. *Id.*

The simple truth is that Attorney Toran did not give Mr. Shata correct advice about the immigration consequences of his plea. He did not check the removal statute, which is "succinct, clear, and explicit in defining the removal consequence" for Mr. Shata's conviction. *Padilla*, 130 S. Ct. at 1483. He did not contact an immigration attorney or advise Mr. Shata to seek advice from such a specialist. He claims to have discussed the case with some federal prosecutors, but there is no indication that they had any experience in immigration cases whatsoever. Attorney Toran's performance in his representation of Mr. Shata was deficient.

B. SHATA ESTABLISHED THAT HE WAS PREJUDICED BY THE DEFICIENT PERFORMANCE

In order to establish prejudice, Mr. Shata must show a reasonable probability that he would not have pleaded guilty and would have gone to trial but for his attorney's deficient performance. *See Bentley*, 201 Wis. 2d at 311–12. He needs to establish that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S. Ct. at 1485. Contrary to the State's assertion, he does not need to show that it would have been a ***more*** rational decision to go to trial than to take the

plea, nor does he have to establish that he had a viable defense or a likelihood of success at trial:

> Nonetheless, neither the fact that the defendant had previously been convicted of a removable offense, nor the seemingly strong evidence against him with respect to the instant offense, nor the favorable plea bargain he received, necessarily requires a finding that the defendant was not prejudiced by his counsel's failure to advise him of the removal consequences of his plea. The determination of whether to plead guilty is a calculus, which takes into account all of the relevant circumstances. The People's evidence against a defendant, potential sentences, and the effect of any prior convictions are but factors in this calculus. For a citizen defendant, the strength of the People's evidence and the potential sentence in the event of conviction likely bear the greatest weight in a decision of whether to accept a plea offer. However, removal from the United States is a unique consequence of a criminal conviction (*see Padilla v Kentucky, 559 US at —, 130 S Ct at 1482*). "[T]he equivalent of banishment or exile" (*Delgadillo v. Carmichael,* 332 US 388, 391 [1947]), it is "a particularly severe penalty" (*Padilla v Kentucky,* 559 US at —, 130 S Ct at 1481 [internal quotation marks omitted]). Especially for "the alien who has acquired his residence here," the "stakes are ... high and momentous" (*Delgadillo v. Carmichael,* 332 US at 391). As such, the United States Supreme Court has recognized that "`[p]reserving [a noncitizen defendant's] right to remain in the United States may be more important to [him or her] than any potential jail sentence'" (*Padilla v. Kentucky,* 559 US at —, 130 S Ct at 1483 [some internal quotation marks omitted], quoting *INS v. St. Cyr,* 533 US at 322 [recognizing the acute significance alien defendants place on immigration consequences when deciding whether to enter into plea agreements]).
>
> In light of the primary importance that aliens may place upon avoiding exile from this country,

an evaluation of whether an individual in the defendant's position could rationally reject a plea offer and proceed to trial must take into account the particular circumstances informing the defendant's desire to remain in the United States. Those particular circumstances must then be weighed along with other relevant factors, such as the strength of the People's evidence, the potential sentence, and the effect of prior convictions. If, for example, an alien has significant ties to his or her country of origin, or has only resided in the United States for a relatively brief period of time, or has no family here, a decision to proceed to trial in lieu of a favorable plea agreement may be irrational in the face of overwhelming evidence of guilt and a potentially lengthy prison sentence. The circumstances of the present case, however, stand in stark contrast to those just posited.

Here, the defendant has alleged that he was born in Italy, left his country of origin when he was three years old, and has never returned. The defendant is now 50 years old, is a lawful permanent resident of the United States, and has resided in this country for over three decades. The defendant has been employed only in the United States. His entire family, including his wife, an American citizen to whom he has been married for more than 20 years, his three sons, also American citizens, his parents, and his siblings all reside in the United States. Based upon these alleged circumstances, the defendant averred that he never would have pleaded guilty had he known that removal from the United States was a mandatory consequence of that plea.

We conclude that the defendant's averments sufficiently alleged that a decision to reject the plea offer, and take a chance, however slim, of being acquitted after trial, would have been rational. The rationality standard set by the United States Supreme Court in *Padilla* does not allow the courts to substitute their judgment for that of the defendant. In applying that standard, we do not determine whether a decision to reject

> a plea of guilty was the best choice, but only whether it is a rational one.

People v. Picca, 97 A.D.3d 170, 183–85, 947 N.Y.S.2d 120 (N.Y. App. Div. 2012) (footnote and some internal citations omitted).

Mr. Shata was born in Egypt and has been living in the United States for over twenty years without returning to his native country. He was a hardworking restaurant owner. His wife and two children, who are American citizens, all reside in the United States. (Sent'g at 10; 28:13). If he is deported he very likely will never see them again. Additionally, Egypt had been in a state of chaos and remained unstable at the time he entered his plea. For him, the consequences of deportation far outweighed the potential for a harsher sentence if he went to trial and was convicted. Had he known that deportation was mandatory for this offense he would have rejected the plea offer and taken a chance, however slim, of being acquitted at trial. (15; 28:13). Under the circumstances, that would have been a rational decision for him to make. He has shown a reasonable probability that he would have gone to trial if Attorney Toran had correctly advised him that deportation was mandatory for his offense.

CONCLUSION

Attorney Toran failed to inform Mr. Shata that his plea would subject him to mandatory deportation. He failed to examine the removal statutes, failed to seek advice from an immigration attorney (or refer Mr. Shata to one), and failed to be aware of *Padilla v. Kentucky*, a landmark case establishing new and vitally important duties for criminal defense attorneys. The immigration consequences of Mr. Shata's plea were "truly clear," and Attorney Toran had an equally clear duty to provide accurate advice about those consequences. His failure to do so constitutes deficient performance.

Prejudice is established by showing a reasonable probability that it would have been rational for Mr. Shata to reject the plea offer and go to trial, from his point of view under the circumstances as they existed at the time, had he been correctly informed of the immigration consequences of his plea. Mr. Shata has been living here for over twenty years without returning to his native country. His wife and two children are U.S. citizens and if he is deported he runs the very real risk of never seeing them again. Egypt was and continues to be a dangerously unstable area. Had he been told that pleading guilty would subject him to mandatory deportation, it is

eminently reasonable to believe that he would have rejected the plea and gone to trial despite the fact that his chances of being acquitted were slim. He literally had nothing to lose and it would have been rational for him to go to trial even if the odds were a million-to-one against. At least then he would have had a miniscule chance of avoiding deportation. If he cannot withdraw his plea he has no chance whatsoever. A competent attorney would have given accurate advice about such a serious matter and allowed him to enter a knowing, intelligent, and voluntary plea. He was deprived of that right and the Court should reverse the decision of the trial court and allow him to withdraw his plea.

CERTIFICATION

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

Dated this ___ day of January, 2014.

Respectfully submitted,

_____

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