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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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.

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