STATE OF WISCONSIN
SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

HATEM M. SHATA,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

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

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

This appeal asks only one question:

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

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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

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SUPPLEMENTAL STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

ARGUMENT

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

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

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

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

A. Standard for Plea Withdrawal

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

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

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

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

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

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

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

1. The Immigration Consequences are Clear

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

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

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

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

2. Counsel's Advice was Not Accurate

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

a. "Strong Chance" was not Good Enough

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

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

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

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

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

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

b. Controlling Precedent Rejects Generic Advice as Sufficient

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

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

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

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

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

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

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

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

3. Counsel's Duty Under *Padilla*

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

> A reading of the federal statutes, as explained above, establishes that not only is the Attorney General directed to conduct deportation proceedings against a noncitizen convicted of the offense to which Shata pled, but the Attorney General is instructed to expedite those proceedings to insure the person is deported promptly upon completing his incarceration sentence.

Id., Pet-Ap. 112. Even more specifically, the court of appeals said: "Defense counsel's reported casual inquiry of unidentified federal prosecutors does not excuse his obvious failure to even read the applicable federal statutes. Under the applicable federal statue, the deportation consequences for conviction of Shata's offense, like the consequences of Padilla's, were in fact dramatically more serious than 'a strong likelihood.'" ***Id***. So while the court of appeals didn't explicitly say, "defense counsel, you have an obligation to read the applicable federal statute," the message couldn't be clearer: Defense counsel, you have an obligation to read the applicable federal statute and advise the client accordingly. In cases like Shata's that involve a non-citizen and a drug trafficking offense, the advice is easy: upon conviction, you, client, shall be deported. *See* 8 U.S.C. §1227(a)(2)(B)(i).

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

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

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

C. Toran's Deficient Performance Prejudiced Shata

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

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

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

The ***Mendez*** decision, decided in line with ***Padilla,*** describes the test for determining prejudice. It is "whether 'a decision to reject the plea bargain would have been rational under the circumstances.'" ***Mendez***, 2014 WI App 57, ¶12, *quoting* ***Padilla***, 559 U.S. at 372. The reviewing court must examine *more* than the strength of the state's case, a fact that ***Mendez*** Court emphasized. "Under ***Padilla***, we repeat, 'a rational decision not to plead guilty does not focus solely on whether [a defendant] would have been found guilty at trial—***Padilla*** reiterated that an alien defendant might rationally be more concerned with removal than with a term of imprisonment.'" ***Mendez*** at ¶16 *quoting* ***United States v. Orocio***, 645 F.3d 630, 643 (3d Cir. 2011), *abrogated in part on other grounds by* ***Chaidez v. United States***, 133 S.Ct. 1103 (2013).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated at Milwaukee, Wisconsin, February 19, 2015.

Respectfully submitted,

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FORM & LENGTH CERTIFICATION

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

Amelia L. Bizzaro

ELECTRONIC FILING CERTIFICATION

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

Amelia L. Bizzaro

CERTIFICATE OF MAILING

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

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