STATE OF WISCONSIN
SUPREME COURT

Case No. 2013AP1437-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner

v.

HATEM 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 OF AMICUS CURIAE UNIVERSITY OF WISCONSIN LAW SCHOOL IMMIGRANT JUSTICE CLINIC IN SUPPORT OF DEFENDANT-APPELLANT

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ARGUMENT

IV. Defense Counsel Must Provide Meaningful Advice to Noncitizen Clients Regarding the Immigration Consequences of a Proposed Plea and Must Seek to Mitigate those Consequences in Plea Negotiations.

A. The Duty to Advise

The U.S. Supreme Court has long held that defense counsel has a "critical obligation" to advise her client of "the advantages and disadvantages of a plea agreement." *Libretti v. U.S.*, 516 U.S. 29, 50–51 (1995). That the Sixth Amendment guarantee of effective assistance of counsel extends to the plea bargaining context has been clear since *Hill v. Lockhart* was decided in 1985. *Hill v. Lockhart*, 474 U.S. 52 (1985) (holding that the two-part *Strickland* test applied to ineffective assistance of counsel claims in the plea bargaining context). Currently, more than 95% of state and federal cases are resolved by plea. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). As the Court in *Frye* observed, our criminal justice system has become "a system of pleas, not a system of trials." *Id*. (citing *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012)). This new reality is reflected in the recent line of Supreme Court decisions that have built upon *Hill* and further elucidated the

contours of defense counsel's duties in the plea bargaining context. *See, e.g., Frye*, 132 S. Ct. 1399; *Lafler*, 132 S. Ct. 1376; *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Premo v. Moore*, 562 U.S. 115 (2011); *Hinton v. Alabama*, 134 S.Ct. 1081 (2014).

In *Padilla*, the Supreme Court took immigration consequences, which were previously almost universally regarded as collateral and beyond the ambit of counsel's duty to advise, and made them part and parcel of the criminal case, and thus of counsel's duty to provide effective representation. *Padilla*, 559 U.S. at 366. Because the consequence of deportation is so severe and has become so intertwined with the criminal justice process, deportation has become an "integral part—indeed, sometimes the most important part—of the penalty that may be imposed" on noncitizen defendants. *Id.* at 364. "The importance of accurate legal advice for noncitizens accused of crimes has never been more important." *Id.* at 356.

Viewed in the context of the Court's other plea bargaining rulings, it is clear that *Padilla* requires more than a cursory warning that a plea carries some level of risk of deportation. Just as counsel must advise his client of the

specific sentencing range of a given conviction, counsel must advise his client with specificity regarding the immigration consequences of conviction. Counsel cannot simply advise a client that pleading guilty will result in a "risk" of prison. Counsel must advise her client of the specific sentencing range, and the likely sentence within that range. Advice must be specific, informed, and accurate. Advisal duties exist to ensure that clients are meaningfully informed about their rights. If informed consideration is the goal, a simple perfunctory notice cannot suffice.[1] The Oxford Dictionaries define "advice" as "guidance or recommendations concerning prudent future action, typically given by someone regarded as knowledgeable or authoritative."[2]

Wisconsin law supports this reading of *Padilla*. In *State v. Bowens*, the Court of Appeals found that *Frye* and *Lafler* did not create new law in Wisconsin, as attorneys in Wisconsin "have long had an obligation to properly communicate information to their clients under Wisconsin's rules of

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[1] *See*, Lindsay Nash, *Considering the Scope of Advisal Duties Under Padilla*, 33 Cardozo L. Rev. 549 (2011).

[2] *Advice*, Oxford Dictionaries, www.oxforddictionaries.com/us/definition/american_english/advice (last visited Mar. 17, 2015).

professional conduct." *State v. Bowens*, 2014 WI App. 38, ¶14, 353 Wis.2d 303, 2014 WL 406650. Thus the defendant in that case was not allowed to withdraw his plea in reliance on these new cases. *Id*. This duty to communicate, coupled with the centrality of immigration consequences, means that advice given regarding immigration consequences must be just as thorough as the advice given regarding the criminal charge itself. A noncitizen defendant is entitled to the advice of competent counsel before entering a plea and giving up her Constitutional right to a fair trial. *Lafler*, 132 S. Ct. 1376.

B. Duty of Zealous Advocacy

Not only must defense counsel accurately advise his client regarding the immigration consequences of criminal charges, counsel must actively seek to mitigate those consequences. The "*negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, at 373, 1486 (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) and *McMann v. Richardson*, 397 U.S. 759, 771 (1970)) (emphasis added). To effectively represent a noncitizen in that plea bargain process,

defense counsel must bring consideration of the immigration consequences into the negotiation. As *Padilla* observed, by creatively bargaining with the prosecutor counsel may be able to craft a plea that reduces or eliminates the likelihood of deportation. *Padilla*, 559 U.S. at 373.

Informed consideration of immigration consequences during the plea bargaining process will benefit both the State and the noncitizen defendant. *Id*. The parties will be able to reach agreements that better satisfy the interests of both parties and thus are less likely to result in later postconviction challenges. *See*, *id*. And when challenges are brought they will be less likely to result in overturned convictions and the re-litigation of old cases. In addition, noncitizens who are fully cognizant of the immigration consequences they face will generally end up spending less time overall in Wisconsin's jails. Understanding immigration consequences facilitates not only the criminal case process, but the immigration case process as well. Noncitizens in removal proceedings are held in one of two Wisconsin jails under contract with ICE, often for the duration of their immigration court proceedings. Studies have shown that noncitizens who have received "know-your-rights" education and understand the process move more

quickly through the system and so will also move more quickly out of Wisconsin jails. *Accessing Justice: The Availability And Adequacy Of Counsel In Immigration Proceedings*, New York Immigrant Representation Study 19 (Dec. 2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf .

V. Whether Immigration Consequences are "Clear" Should be Determined by Their Predictability.

Rather than defining the limits of *Padilla* by the relative ease or difficulty of the research required to determine the immigration consequences of a plea, the proper scope should be a function of the law's predictability and determinacy. If a plea can be reasonably predicted to lead to a particular immigration outcome, then counsel must so advise his client even if it requires extra work. Clarity may not equate to simplicity. The Supreme Court's Sixth Amendment jurisprudence has never suggested that the need for legal research or the complexity of the legal question should relieve defense counsel of her duty to provide effective representation. *See*, *e.g.*, *Hinton*, 134 S.Ct. 1081, 1089 (2014) (citing *Williams v. Taylor*, 529 U.S. 362 (2000) ("an attorney's ignorance of a

point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*"). A math problem may have a clear answer but yet be difficult to solve, requiring multiple levels of analysis. Similarly, determining immigration consequences may involve a complex process but result in a clear answer. Immigration law may be difficult, but it is not immune to comprehension. There is a plethora of readily accessible resources from which courts and counsel may draw in making sense of the immigration consequences of crimes.[3] Indeed the State in both the present case and in *Ortiz-Mondragon* proved quite capable of finding and making sense of the law; certainly defense counsel is no less competent.[4]

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[3] *See, e.g., Immigration Consequences of Criminal Convictions: Padilla v. Kentucky*, Office of Immigration Litigation, Department of Justice (2010); Immigrant Legal Resource Center, *Criminal and Immigration Law: Defending Immigrants' Rights*, ilrc.org/crimes (offering consulting services for defense counsel nationwide); Mary Kramer, *Immigration Consequences of Criminal Activity*, AILA (2012); Dan Kesselbrenner, Lory D. Rosenberg, Maria Baldini-Potermin, *Immigration Law and Crimes* (2014); *Overview of Immigration Consequences of State Court Criminal Convictions*, Center for Public Policy Studies, Immigration and the State Courts Initiative, State Justice Initiative (2012); Immigrant Defense Project, www.immigrantdefense.org (provides free consultations to indigent defenders).

[4] *See*, Brief and Appendix of Plaintiff-Respondent-Petitioner in *State v. Shata*; Brief of Plaintiff-Respondent in *State v. Ortiz-Mondragon*.

A basic understanding of immigration law reveals that there are specific steps to follow in analyzing the immigration consequences of a given conviction. The case law defining those steps is found in the Board of Immigration Appeals' precedent decisions and in Seventh Circuit cases. [5] In most instances, the "categorical approach" governs the determination of whether a particular offense falls within a ground of removal. *See*, *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (2013). This approach is rooted in over a century of federal and agency case law and practice and should be familiar to any defense attorney. *Id*. The Supreme Court and the Board of Immigration Appeals have progressively clarified the contours of the categorical approach, so that the methodology is now quite clear. *See e.g.*, *id.*; *Descamps v. U.S.*, 133 S.Ct. 2276 (2013); *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 354 (BIA 2014). In the context of crimes involving moral turpitude, which the State calls "murky," the Seventh Circuit has upheld the BIA's decision in *Matter of Silva-Trevino*,

[5] The State points to differing standards in different circuits as evidence of the law's difficulty, but this has no relevance in determining the consequences of a conviction in the Seventh Circuit.

which lays out in detail a specific three-step inquiry to determine whether a given offense involves moral turpitude. *Mata-Guerrero v. Holder*, 627 F.3d 256, 260 (7th Cir. 2010); *see Matter of Silva-Trevino*, 24 I&N Dec. 687 (2008).

The term "removal" was introduced to the Immigration and Nationality Act (INA) in 1996 and encompasses both grounds of inadmissibility (formerly exclusion) and grounds of deportability. 8 U.S.C. §§ 1182, 1227. Which grounds apply depends on the individual's immigration status. A noncitizen who entered the U.S. unlawfully or who is seeking admission to the U.S. or applying for some kind of a benefit under the immigration law is subject to the grounds of inadmissibility. A noncitizen who has been lawfully admitted to the U.S. in any status, even if that status has now expired, is subject to the grounds of deportability. Knowing which set of grounds applies is crucial, as they are not identical. For example, a firearms conviction is a ground of deportability but not of inadmissibility. *Compare* 8 U.S.C. § 1227(a)(2)(C) *with* 8 U.S.C. § 1187(a)(2).

In the present case, the record never tells us how Mr. Shata came to the United States. Trial counsel missed the very first step in being able to assess the immigration consequences

of Mr. Shata's conviction. Thus we cannot be certain which set of rules to use in analyzing his case. If Mr. Shata entered the U.S. lawfully, with a visa, he is subject to removal based on the grounds of deportability. On the other hand, if he entered unlawfully, he is subject to removal based on the grounds of inadmissibility.

What we do know is that Mr. Shata's conviction for possession with intent to deliver marijuana is an aggravated felony as "illicit trafficking in a controlled substance." 8 U.S.C. §1101(a)(43)(B). The term "aggravated felony" is defined in the INA at 8 U.S.C. § 1101(a)(43), which specifically lists those crimes deemed to constitute aggravated felonies for immigration purposes. Aggravated felonies are infamous for carrying the harshest immigration consequences. An aggravated felony conviction renders any noncitizen removable, regardless of her immigration status. An aggravated felony such as Mr. Shata's also bars the noncitizen from eligibility for any discretionary relief from removal under the INA.

A noncitizen in removal proceedings may be eligible to seek relief from removal before the immigration court. The most common forms of discretionary relief include:

cancellation of removal for permanent residents under 8 U.S.C. § 1229b(a), cancellation for nonpermanent residents under 8 U.S.C. § 1229b(b); cancellation under the Violence Against Women Act, under 8 U.S.C. § 1229b(b)(2); and asylum under 8 U.S.C. § 1158. Winning relief under any of these provisions provides a path to lawful permanent residence.

There are two nondiscretionary forms of relief: withholding of removal under 8 U.S.C. § 1231 and protection under the Convention Against Torture under 8 C.F.R. § 208.16. If an eligible individual establishes that it is more likely than not that she will be persecuted or tortured if deported, the immigration judge must grant relief. An individual convicted of an aggravated felony will generally only be eligible for relief under the Torture Convention. If an application is successful, the immigration judge will enter an order of removal, but will then withhold the order, similar to a withheld or imposed and stayed sentence. These forms of relief do not result in any permanent status and bar eligibility to seek future lawful status. If at some point in the future it becomes safe to deport the person, due to changed country conditions for example, the person will be deported.

In Mr. Shata's case, we know that when he appears before an immigration judge (if he hasn't already), the judge will have no choice but to order Mr. Shata removed based on his conviction for an aggravated felony. The only thing that could then prevent Mr. Shata's actual physical removal is if he were able to prove that he would be persecuted or tortured in his home country. Thus contrary to the State's argument and the Court of Appeals' dissent, the fact that Mr. Shata will see a judge does not indicate that the judge has discretion to allow him to stay; Mr. Shata is barred from any discretionary relief. Nor does the sentence imposed in Mr. Shata's case have any bearing on whether he will be subject to removal: a drug trafficking conviction is an aggravated felony regardless of the length of sentence.

VI. The Proper Standard for Determining Prejudice in the Context of Plea Bargaining is Whether the Defendant can Show that the Outcome of the Plea Process Would have been Different

Strickland's prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Lafler*, 132 S.Ct. at 1384 (2012); *see also*, *Hill*, 474 U.S. at 5 ("The … 'prejudice' requirement … focuses on whether counsel's constitutionally ineffective

performance affected the outcome of the plea process."). It is not necessary that a defendant demonstrate that he would have rejected the plea and gone to trial, though that is certainly one form of showing prejudice. Instead, the question is whether a different outcome might have been obtained. Thus Mr. Shata can establish prejudice if he can show that a competent attorney could have negotiated a plea that avoided or mitigated the immigration consequences. For example, given Mr. Shata's lack of criminal record, his family ties, and the severe hardship that he and his family would endure if he were deported, it is probable that competent counsel could have negotiated a plea to simple possession of marijuana in lieu of the trafficking offense. This conviction would have enabled Mr. Shata to seek legal status based on his wife's citizenship and would not have barred him from seeking cancellation of removal.

A defendant's guilt does not negate his ability to demonstrate prejudice as a result of his attorney's deficient performance during plea bargaining. *Lafler*, 132 S. Ct. at 1388. In *Padilla* the Court recognized that in the context of ineffective assistance of counsel claims under *Padilla*, the court should evaluate whether a decision to reject the plea bargain would have been rational under the circumstances. *See*

Padilla, 559 U.S. at 374 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486). The Wisconsin Court of Appeals also adopted this "rational under the circumstances" test. *See State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895. If the ability to remain in the U.S. was more important to Mr. Shata than the potential sentence he faced, and had he been competently advised, it would have been rational for him to reject the plea offer in hopes of obtaining a more favorable offer, even if doing so increased the risk he might have to go to trial and face a longer sentence. The desire to avoid removal at all costs can dramatically affect a rational noncitizen defendant's decision to accept or reject a particular plea offer.

The State argues that if Mr. Shata is in the U.S. unlawfully and is thus removable independently of his conviction, then he cannot show prejudice. However, as discussed above, a noncitizen without status and in removal proceedings may seek discretionary relief from removal if eligible. Eligibility for such relief in turn depends on the noncitizen's convictions. In Mr. Shata's case, but for his conviction he could seek lawful status based on his marriage to a U.S. citizen or by applying for cancellation of removal. In *Ortiz-Mondragon*, but for his felony battery conviction, Mr.

Ortiz-Mondragon could have applied for cancellation of removal. 8 U.S.C. § 229b(b). Clearly a noncitizen without legal status can suffer prejudice if by virtue of inadequate counsel she is convicted of a crime disqualifying her from eligibility to seek cancellation of removal.

CONCLUSION

Based on the above, amicus urges this Court to adopt a rule requiring that defense counsel meaningfully advise his client of the immigration consequences of a plea in a way that promotes informed decision-making. Counsel's duty to effectively represent a client in plea bargaining proceedings means that in the case of a noncitizen, counsel must bring the issue of deportation into the negotiations. Finally, this Court should clarify the standard for showing prejudice as a result of ineffective assistance of counsel.

Dated this 17th day of March, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2766 words.

_____

Stacy Taeuber

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 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.

_____

Stacy Taeuber