STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2016AP002136-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

IRVIN PEREZ-BASURTO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER VACATING THE JUDGMENT OF CONVICTION, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY KREMERS, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

John Chisholm
District Attorney
Milwaukee County

Katherine M. Halopka-Ivery
Assistant District Attorney
State Bar No. 1075311
Attorneys for Plaintiff-Appellant

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

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C O U R T OF A P P E A L S

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ISSUE PRESENTED

Did Perez-Basurto establish ineffective assistance of counsel regarding the immigration consequences which justified plea withdrawal?

Answer: The trial court found Perez-Basurto was entitled to withdraw his plea.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case can be resolved by applying well-established legal principles to the facts of the case and will not meet the criteria for publication. See Wis. Stat (Rule) 809.23(1)(b).

STATEMENT OF THE CASE

On December 19, 2015, Perez-Basurto, the father of J.B.'s child, came to her residence, located at 1340 South 59th Street, #3, in the City of West Allis, County of Milwaukee, State of Wisconsin. Perez-Basurto began banging on J.B's door demanding to be let in. (R1:2; App.102). J.B. called the police because she did not want Perez-Basurto at her residence. (R1:2; App.102). The police arrived and informed Perez-Basurto to leave and that he was not welcome at J.B.'s residence. (R1:2; App.102). About 10 minutes after the police left, Perez-Basurto began yelling at J.B. to let him inside again. (R1:2; App.102). J.B. stated that about two minutes after that, Perez-Basurto started to knock on her second story kitchen window yelling at her. (R1:2; App.102). J.B. stated that she grabbed the child they shared and ran to the bathroom and locked herself and the child inside and called 911. (R1:2; App.102).

J.B. stated that she heard a loud crashing noise from inside the kitchen and then Perez-Basurto began to kick at the bathroom door demanding she open the door. (R1:2; App.102). J.B. stated she was standing with her back against the door holding the two year old child, telling Perez-Basurto no. (R1:2; App.102). J.B. stated she feared Perez-Basurto was going to seriously hurt her. (R1:3; App.103). J.B. stated Perez-Basurto was able to kick the bathroom door open causing her fall forward and her son to hit his head on a heat register. (R1:3; App.103). J.B. stated she ran out of the room and Perez-Basurto grabbed her and pulled her back to him by her hair causing pain without her consent telling her to call off the cops and ripped the cell phone out of her hands. (R1:3; App.103). J.B. ran to the corner of the kitchen and Perez-Basurto dead

bolted the door so the police could not get in. (R1:3; App.103). This caused damage to the bathroom door. J.B. stated that soon after the police kicked the door in. (R1:3; App.103). J.B. did not consent to any of Perez-Basurto's actions. (R1:3; App.103).

On December 20, 2016, Perez-Basurto was charged with Criminal Damage to Property (less than $2,500 Damage), Domestic Abuse Assessment, contrary to Wis. Stat §§943.01(1) 973.055(1), Criminal Trespass, Domestic Abuse Assessment, contrary to Wis. Stat. §§943.14, 973.055(1), Misdemeanor Battery, Domestic Abuse Assessment, contrary to Wis. Stat. §§940.19(1), 973.055(1), and Felony Intimidation of a Victim, Domestic Abuse Assessment, contrary to Wis. Stat. §§940.45(1), 973.055(1). (R1:1; App.101). The State filed an Information charging the same offenses on January 4, 2016. (R7:1). A final pretrial was scheduled for February 3, 2016 and a jury trial was scheduled for February 10, 2016. (R29:5).

On the final pretrial date, February 3, 2016, defense keep the matter on for jury trial to see if J.B. would appear for the jury trial. (R33:32, App.153). On jury trial date, February 10, 2016, J.B. was present and the State was ready to proceed. (R33:32, App.153). An offer was provided to Perez-Basurto to amend the Felony Intimidation of a Victim to a misdemeanor offense and Perez-Basurto plead to the already charged three misdemeanor offenses. (R33:25, App.), (R12:1, App.104).

Attorney Thomas Hackbarth represented Perez-Basurto and spent over a half hour discussing the offer and plea. (R33:25, App.146). Attorney Hackbarth, with the previous knowledge that Perez-Basurto was not a citizen of the United States, went over the plea questionnaire a couple of times. (R33:25, App.146). Attorney Hackbarth discussed the unlikelihood of winning at trial because of J.B. being present and cooperative. (R33:25, App.146). Attorney Hackbarth also discussed with Perez-Basurto that he could be deported because he was not a citizen. (R33:25, App.146), (R33:28, App.149). Attorney Hackbarth also read the plea/questionnaire/waiver of rights to Perez-Basurto and circled and underlined "I understand that if I am not a citizen of the United States, my pleas could result in deportation, the exculpation of admission to this country, or the denial of naturalization under federal law." (R12:2, App.105). The court also informed Perez-

Basurto that if he was not a citizen of this country that his plea could result in his deportation, exclusion from admission to the country or denial of naturalization under federal law. (R30:5).

On February 29, 2016 Perez-Basurto was sentenced. Attorney Hackbarth discussed during sentencing how Perez-Basurto was born in Mexico and how the criminal convictions would be a problem for Perez-Basurto. (R31:11). Attorney Hackbarth further discussed how the felony conviction would be a huge problem, so the misdemeanor convictions were a preferred resolution. (R31:11). The court sentenced Perez-Basurto to six months in jail as to the criminal damage to property and twenty-four months of probation as to the remaining counts. (R31:21).

Perez-Basurto filed a notice of intent to seek post-conviction relief and filed a Notice of Motion and Motion to withdraw guilty plea on June 29, 2016. (R21; App.107). The circuit court scheduled a motion hearing, which was held on September 21, 2016. (R:33; App.122-187).

Perez-Basurto's post-conviction motion alleged ineffective assistance of counsel based on a violation of *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L. Ed. 2d 284 (2010). (R:21; App.107-120). At issue was the same deportation federal statute that was at issue in *Padilla*, that being 8 U.S.C. § 1227. (R:21; App.107-120). Perez-Basurto also addressed the federal statute 8 U.S.C. §1229 regarding cancellation of removal for certain non-permanent residents. (R:21; App.107-120). Perez-Basurto's offense involved domestic violence criminal offenses. Perez-Basurto alleged that Attorney Hackbarth's performance was deficient because Attorney Hackbarth "never advise him [Perez-Basurto] of the potential immigration consequences of his plea." (R:21:3; App.109). Perez-Basurto further alleged that had Attorney Hackbarth "informed him as to the immigration consequences of his plea, he would have not entered a guilty plea." (R21:5; App.111). Perez-Basurto further signed a sworn affidavit stating "I can state without hesitation that he did not advise me of any immigration consequences of my plea. He [Attorney Hackbarth] never once bought up the subject at all." (R21:13; App.119).

At the motion hearing on September 21, 2016, Attorney Hackbarth testified that he knew and discussed with Perez-Basurto at the preliminary hearing that Perez-Basurto was not a United States citizen and was in United States on a two year permit. (R33:22; App.143). Attorney Hackbarth stated the case was scheduled for jury trial and on the jury trial date the victim was present and an offer was made to resolve the case without a felony conviction. (R33:25; App.146). Attorney Hackbarth testified he reviewed the plea with Perez-Basurto for over thirty minutes. (R33:25; App.146). Attorney Hackbarth discussed with Perez-Basurto the lack of possibility of winning at trial, because the victim was present and she was convincing. (R33:25; App.146). Additionally, they discussed how the offer would prevent Perez-Basurto from having a felony conviction. (R33:25; App.146).

Attorney Hackbarth testified about his experience in discussing deportation with clients who are not citizens and that it is an important discussion he has with his clients. (R33:28; App.149). Attorney Hackbarth testified he discussed with Perez-Basurto that he was not a citizen and could be deported. (R33:28; App.149), (R33:40; App.161). Attorney Hackbarth further stated he read and the plea questionnaire/waiver of rights to Perez-Basurto, specifically the area related to not being a citizen of the United States. (R33:28; App.149).

Attorney Hackbarth further testified that he does not practice in immigration law and he did not do research as to Perez-Basurto specific status. (R33:30; App.151). Attorney Hackbarth further testified, that from his almost 40 years of experience working as an attorney, he is aware that a non-citizen pleading guilty to a felony or misdemeanor offense could have major problems with immigration. (R33:36; App.157). Attorney Hackbarth further explained, through his experience, crimes of moral turpitude have a great effect on individuals who are not Untied State citizens, either felony or misdemeanor offenses. (R33:38; App.159). During the motion hearing, Perez-Basurto's counsel agreed that Attorney Hackbarth advised Perez-Basurto of the potential of immigration consequences. (R33:39; App.160).

Perez-Basurto testified during the hearing and stated he told Attorney Hackbarth that if he was convicted of a felony that would affect his DACA status. (R33:8; App.129). Perez-Basurto further testified that Attorney Hackbarth did not discuss anything about Perez-Basurto's immigration status at the time of the plea. (R33:8; App.129). Perez-Basurto also stated he personally believed a misdemeanor conviction would not affect his status and allow him to stay in the United States. (R33:9; App.130).

The circuit court found that Perez-Basurto has a "fuzzy memory" stating it might be because he is afraid to admit any discussion about deportation. (R33:49; App.170). The circuit court further found that Attorney Hackbarth clearly discussed deportation at the time of the plea with Perez-Basurto. (R33:49; App.170). However, the court stated that Attorney Hackbart was short on understanding the application of the immigration law to Perez-Basurto's specific status as a DACA person. (R33:50; App.171). The circuit court further found *Shata* court got it wrong and Perez-Basurto's case is different because it is a domestic violence case, not a drug offense like in *Shata.* (R33:52; App.173). The circuit court stated Attorney Hackbarth failed to take affirmative steps to accurately advise Perez-Basurto of the likelihood or certainty or probability, depending on the circumstance of someone being deported. (R33:57; App.178). The circuit court further found *Shata* did not apply, because Perez-Basurto's case involved domestic violence, not drugs. (R33:61; App.182).

Additionally, the circuit court found it was not relevant to address if Perez-Basurto suffered prejudice as a result due of Attorney Hackbarth's effectiveness. (R33:62; App.183).

STANDARD OF REVIEW

The question of whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. The circuit court's finding of fact will not be reversed unless they are clearly erroneous. *State v. Smith*, 207 Wis. 2d 258, 266, 558 N.W.2d 339 (1997) (internal citations omitted). Whether trial counsel violated Perez-Basurto's right to effective assistance of

counsel is a question of law that this court decides without deference to the trial court. *Id.* at 266-67.

ARGUMENT

I. Perez-Basurto Is Not Entitled to Withdraw His Plea.

A. Legal standards for plea withdrawal.

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in "manifest injustice." *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836; *see also State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (Wis. 1996). To establish "manifest injustice," a criminal defendant must show a "serious flaw in the fundamental integrity of the plea." *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995) (citation omitted).

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

If the defendant argues that he is entitled to withdraw his plea because of something outside of the plea colloquy, like ineffective assistance of counsel, plea withdrawal follows the *Nelson/Bentley* line of cases. *State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350, 734 N.W.2d 48; *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629. As to these claims, the burden does not shift to the State. *State v. Brown*, 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906. Instead, the defendant bears the burden of proving by clear and convincing evidence that plea withdrawal is necessary to avoid a manifest injustice. *Bentley*,

201 Wis. 2d at 311. "[T]he manifest injustice test is met if the defendant was denied the effective assistance of counsel." *Id.* (quotation marks and citation omitted).

In this case, Perez-Basurto sought to withdraw his plea pursuant to the *Nelson/Bentley* lines of cases only. *Nelson*, 54 Wis. 2d 489.

B. There was no deficient performance because Attorney Hackbarth properly advised Perez-Basurto of the risk of deportation consequences of his plea.

When a defendant seeks to withdraw his plea based on a claim of ineffective assistance of counsel, he must establish that his attorney's performance was deficient and that he suffered prejudice as a result. *See State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. In this context, the defendant may demonstrate a manifest injustice by proving that his counsel's conduct was objectively unreasonable and that, but for counsel's error(s), he would not have entered a plea. *See Bentley*, 201 Wis. 2d at 311-12. It is the State's position that the circuit court here incorrectly found that Perez-Basurto did satisfy his burden of proof as to the first prong. Further, the court failed to make any findings as the second prong, though requested by the State.

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

> (1) a crime of moral turpitude committed within a certain time after admission to the country and subject to a sentence of one year or more, 8 U.S.C. § 1227(a)(2)(A)(i) (any alien who is convicted of such a crime "is deportable");
> (2) multiple crimes of moral turpitude, 8 U.S.C. § 1227(a)(2)(A)(ii) (any alien who is convicted of such crimes "is deportable");
> (3) an aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii) ("[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable");

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

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

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

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

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

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

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

8 U.S.C. § 1227(a)(2)(A)-(E) (2005 and Supp. 2013).

Perez-Basurto's conviction for criminal damage to property, domestic abuse, criminal trespass to dwelling, domestic abuse, battery, domestic abuse, and intimidate victim, domestic abuse, therefore, appears to render him "deportable" under one at least one of these provisions. 8 U.S.C. § 1227(a)(2)(E)(i); *see also* 8 U.S.C. § 1227(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(ii).

As a result, Perez-Basurto argues that pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010), his attorney's performance was constitutionally deficient because counsel did not advise Perez-Basurto that a domestic violence related convictions to Battery and/or Intimidation of a Witness would result in deportation (R:21:1, App.). In a recent decision, *Chacon v. Missouri*, 409 S.W.3d 529 (Mo. Ct. App. 2013), the Missouri Court of Appeals rejected a similar claim. Further, Wisconsin Supreme Court has recently address the *Padilla*

issue, adopting a similar holding as *Chacon*. *State v. Shata*, 2015WI 74, 364 Wis. 2d 63, 868 N.W.2d 93.

In *Chacon*, the defendant pleaded guilty to two felonies which made him "deportable" under federal law. *Chacon*, 409 S.W.3d at 534 ("The law is clear that, after pleading guilty to cocaine possession and forgery, Chacon was deportable, meaning that deportation was 'virtually inevitable."' (citing *Padilla*, 559 U.S. at 359)). Prior to his pleas, Chacon's attorney advised him that "'if he pled guilty to the charges, he would *very likely be deported* and wouldn't be able to come back."' *Id.* at 532 (emphasis in original). On appeal, Chacon argued that his counsel had been ineffective because "anything short of advice that he was subject to 'mandatory deportation' or 'automatic deportation,' is deficient performance under *Padilla*." *Id.* at 534.

The Missouri Court of Appeals first addressed the holding in *Padilla*:

> When applying the *Strickland* standard to the new rule announced in *Padilla*, the Court held that an objective standard of reasonableness requires counsel to "advise [his or] her client regarding the *risk* of deportation." The Court also recognized that '[i]mmigration law can be complex," that it is its own legal specialty, and that some attorneys practicing criminal law "may not be well versed in it." The Court went on to note that, due to this complexity in the law, "[t]here will ... undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." "When the law is not succinct and straightforward ..., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." "But, when the *14 deportation consequence is truly clear, as it was in [Padilla's] case, the duty to give correct advice is equally clear."

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

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

> Chacon's convictions made his deportation presumptively mandatory, and the motion court could properly find that advice that he "would very likely be deported and wouldn't be able to come back," did not fall below what is required of a reasonably competent attorney under the circumstances. *Id.* ***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.**

Id (emphasis added). In this case, while the court 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. *Id.*.

In *State v. Shata*, the Wisconsin Supreme Court has recently addressed the *Padilla* decision and applied similar reasoning as *Chacon.* 364 Wis. 2d 63. The Court in *Shata* stated the issue of whether trial counsel performed definitely hinges on whether counsel gave the defendant correct advice regarding the possibility of being deported. *Id.* at 84.

Shata was convicted of possession with intent to deliver marijuana which made him "deportable" under federal law. *Id.* at 72. Prior to his plea, Shata's attorney advised him of the potential of being deportable because he was not a citizen of the United States. *Id.* This was also discussed on the record, during the plea hearing. *Id.* At a post-conviction hearing, Shata's trial attorney further testified he advised Shata there was a strong chance he could be deported. *Id.* at 77. Shata appealed the circuit court's denial of his post-conviction motion, arguing that trial counsel was ineffective, because counsel failed to inform Shata that federal law required he be deported following his conviction. *Id*. at 68.

The *Shata* Court closely examined Immigration Law background, *Padilla*, and several similar cases including *Chacon, Escobar, Mendez* in reach its decision. *Id.* at 85, *Padilla*, 559 U.S. 356, *Chacon*, 409 S.W.2d 529, *Comm. v.*

Escobar, 70A.3d 838 (Pa.Super.Ct. 2013), *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895.

The *Shata* Court held that *Padilla* did not require an attorney to inform non-citizen clients that a conviction for a deportable offense will absolutely result in deportation. *Id.* at 89. Additionally, *Padilla* did not require criminal defense attorneys to function as immigration lawyers or to be able to predict what actions the executive branch might take in relation to deportation. *Id.* at 99. The court found counsel must provide correct advice unlike what counsel did in *Padilla*. *Id.* at 104. Additionally, the *Shata* Court specifically noted, *Padilla* suggests that an attorney would give reasonably competent advice by providing a warning similar to Wis. Stat. §971.08, which requires judges to advise non-citizen defendant's that a conviction *may result* in deportation. *Id.* at 100 (emphasis added).

The *Shata* Court found trial counsel was effective, noting that correct advice is not deficient. *Id.* at 102. The *Shata* Court withdrew any language from the *Mendez* decision in which the Court of Appeals rejected *Chacon,* and that suggested *Padilla* required an attorney advise non-citizen clients that a conviction for a deportable offense would necessarily result in deportation. *Id.* at 107. The *Shata* Court noted that the bottom line is that an attorney's advice must be adequate to allow a defendant to knowingly, intelligently, and voluntarily decide whether to enter a guilty plea. *Id.* at 107 citing s*ee Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir.1984) (citations omitted). The *Shata* Court found counsel advised Shata of the risk of deportation in order to allow Shata to make a knowing and voluntary decision to plead guilty. *Id. at 107 citing see Chacon,* 409 S.W.3d at 537.

The same analysis in *Chacon* and *Shata* applies in this case: Whether Perez-Basurto's trial counsel gave him correct advice regarding the possibility of being deported. See *Chacon,* 409 S.W.3d 529; *Shata,* 364 Wis. 2d 63. The trial court found Attorney Hackbarth discussed deportation at the time of the plea with Perez-Basurto, regardless of Perez-Basurto's testimony. (R33:49, App.). Additionally, the plea form, which is underlined and circled, supports the circuit court's finding that Attorney Hackbarth and Perez-Basurto discussed

deportation, exclusion of admission to the country and denial of naturalization, in regards to Perez-Basurto's non-citizen status and his convictions. (R12: 2, App.). Perez-Basurto's postc-conviction counsel conceded that Attorney Hackbarth advised Perez-Basurto of the potential of immigration consequences. (R33:39; App.). Based on the circuit court's findings, Attorney Hackbarth *correctly* advised Perez-Basurto of the *risk* of deportation before Perez-Busurto entered his plea as required under *Padilla* and found legally effective in *Shata*. *Padilla*, 559 U.S. 356; *Shata,* 364 Wis. 2d 63

It is the State's position, however, the circuit court incorrectly ignored *Chacon and Shata's* holdings. The circuit court – in spite of finding, first, that Attorney Hackbarth had advised Perez-Baurto that he may be deported; second, that Attorney Hackbarth had reviewed with Perez-Basurto the plea forms which also set forth possible deportation consequences; and third, that the court had advised Perez-Basurto of possible deportation – nonetheless found that Attorney Hackbarth had failed to meet his responsibilities. (R23:1). The circuit court determined Attorney Hackbarth failed to appropriately advise Perez-Basurto that he would be *automatically deportable* and to review the special consequences under deportation immigration law that are attributable to a conviction for domestic abuse battery. (R33:60-61, App.181-182) (emphasis added).

The circuit court's decision was in direct contradiction to *Chacon* and *Shata. See Chacon*, 409 S.W.3d 529; *Shata*, 364 Wis. 2d 63. As the *Shata* Court stated, *Padilla* does not require an attorney to advise non-citizen clients that a conviction for a deportable offense will necessarily result in deportation. *Shata,* 364 Wis.2d at 107. Additionally, counsel is not deficient by not reading the relevant immigration statutes, but instead counsel's advice must be correct. *Id.* at 106. Attorney Hackbarth discussed his almost forty years of experience in the law practice, as well as his experience representing non-citizens clients. (R33:36, App.). Attorney Hackbarth testified about his knowledge of deportable offenses, both misdemeanor and felony. (R33:8, App.). Attorney Hackbarth provided correct advise to Perez-Basurto, that Perez-Basurto, based on the four misdemeanor convictions, may be

deported, as required under *Padilla* and explained in *Shata. Shata*, 364 Wis. 2d 63.

In also reaching its decision, the circuit court stated "domestic violence is in a whole special category in immigration law with respect to the issue of *Padilla."* (R33:52, App.173). The circuit court appears to be attempting to carve out a different standard for domestic violence offense, when it comes to *Padilla*. However, the circuit court failed to provide any meaningful difference application of the law between non-citizens facing drug convictions and non-citizens facing domestic abuse convictions. *Shata* makes no distinction between criminal offenses; instead, the *Shata* court requires counsel to provide correct advise as to the risk in order for the non-citizen client to knowingly, intelligently, and voluntarily decide whether to enter a guilty plea regardless of the criminal offense. *Shata* at 107.

Perez-Basurto's case is similar to *Shata*. In applying the same reasoning as the Court described in *Shata,* Attorney Hackbarth's advice was adequate in advising Perez-Basurto of his risk of deportation in relation to his four misdemeanor convictions; therefore, Attorney Hackbarth was not ineffective under *Padilla* .

C. The record in this case does not support a finding that Perez-Basurto was prejudiced.

The circuit court failed to make any findings as to whether or not Perez-Basurto showed any prejudice associated with Attorney Hackbarth's advice, though testimony to support a finding was discussed. (R33; App.122-187). As to this prejudiced prong, the circuit court indicated, "I don't think, personally, don't think it is relevant to this issue of [Perez-Basurto] ability to withdraw his plea." (R33:62; App.183). However, as outlined previously, when a defendant seeks to withdraw his plea based on a claim of ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient *and* that he suffered prejudice as a result. *See Wesley*, 321 Wis. 2d 151.

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

> Surmounting *Strickland*'s high bar is never an easy task. See, *e.g.*, 466 U.S., at 689, 104 S.Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential"); *id.*, at 693, 104 S.Ct. 2052 (observing that "[a]ttorney errors ... are as likely to be utterly harmless in a particular case as they are to be prejudicial"). Moreover, **to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances**. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Padilla, 559 U.S. at 371-72 (emphasis added).

In other words, a defendant must establish a reasonable probability that he would not have pleaded guilty and would have gone to trial but for his attorney's allegedly deficient performance. *See Bentley*, 201 Wis. 2d at 311-12; *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (requires reasonable probability defendant would not have pleaded guilty and would have insisted on going to trial); *People v. Bao Lin Xue*, 30 A.D.3d 166, 815 N.Y.S.2d 566 (N.Y. App. Div. 2006) (no reasonable probability that defendant would have insisted on going to trial but for counsel's alleged mistake in affirmatively misrepresenting the immigration consequences of the plea).

Perez-Basurto cannot meet this burden. Perez-Basurto alleges that he "would never have agreed to plead guilty" had he been told "the harsh immigration consequences of the conviction" is not enough, especially since the record so clearly contradicts the assertion. (R21:13; App.119). As defense counsel discussed during the motion hearing, the whole point of putting the case on for trial was to see if the victim would appear, in hopes she would not and the matter would be dismissed. (R33:32; App.153). Attorney Hackbarth explained that, on the day of trial, the victim was present and convincing. (R33:25; App.146). Based on Attorney Hackbarth's assessment, he advised Perez-Basurto that he did not believe they would win if the matter proceeded to trial. (R33:25; App.146). An offer to resolve the matter with misdemeanors instead of a felony conviction was extended and accepted. (R12:1; App.104). Attorney Hackbarth stated one of the main

reasons the defendant accepted the plea offer on the jury trial date was because the victim was present and ready to proceed. (R33:25-26; App.146-147).

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

> Even if Shin could show his counsel's performance was deficient and fell below an objective standard of reasonableness, he cannot establish that such deficiency caused him actual prejudice. Shin argues he would not have pled guilty "[h]ad [he] known or been told that [his] guilty plea in this case would lead to [his] automatic removal from the United States" (Doc. 28 at 20). According to Shin, such a blanket assertion is a "sufficient showing" under *Hill* (Doc. 28 at 20). *Hill*, however, says the complete opposite: "[a] petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice."' 474 U.S. at 60, 106 S.Ct. 366. Indeed, the Sixth Circuit has clarified that a petitioner cannot satisfy the prejudice element by merely telling the court that he would have gone to trial if he had received different advice. *See Pilla*, 668 F.3d at 372-73; *see also Haddad v. United States*, 2012 WL 2478355, *3-4 (6th Cir.2012). Rather, the test is objective, and Shin must convince this Court "that a decision to reject the plea bargain would have been rational under the circumstances." *Pilla*, 668 F.3d at 373; *see also Hill*, 474 U.S. at 59, 106 S.Ct. 366. Shin's brief is completely silent in this regard.
>
> Notwithstanding Shin's silence, this Court is convinced that accepting the plea was certainly a rational choice in this case. A conviction following a trial would have resulted, at a minimum, in a sentencing guidelines offense level of 14, which carries a sentencing range of 15 to 21 months imprisonment. Shin's acceptance of responsibility led to a lower guidelines range and, due in large part to his cooperation, Shin was ultimately sentenced to a term of probation. Shin offers no argument that he had a realistic chance of being acquitted at trial, and *17 there is no evidence in the record that Shin had a rational defense to the charges.
>
> Moreover, had Shin been convicted after a trial, he would not have eliminated, or even reduced, his chances of

> removal. The only consequence of his counsel's "erroneous" advice - assuming Shin's assertion that he would have gone to trial had he received more accurate advice - is that he received a more lenient sentence. In short, nothing leads to the conclusion that a rational defendant in Shin's position would have proceeded to trial. Shin fails to show his lawyer's advice created a "reasonable probability" of prejudice, and thus he cannot show that the advice "'probably ... altered the outcome of the challenged proceeding,' as is required for a writ of *coram nobis*."

United States v. Chan Ho Shin, 891 F. Supp. 2d 849, 857-58 (N.D. Ohio 2012).

For essentially the same reasons, Perez-Basurto's claim of prejudice under *Strickland* must fail. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2055 (1984). Not only was Perez-Basurto's victim present and prepared to testify against him at trial, officers arrived on scene and personally witnessed some of Perez-Basurto's criminal conduct. (R:33;25; App.146), (R1:3, App.103). Though the state was ready to proceed and pursue felony charges against Perez-Basurto, Attorney Hackbarth was able to negotiate a plea agreement that called for a probationary recommendation from the State and no felony conviction. (R12; App.104-106). Perez-Basurto's sentence could have been significantly greater had he gone to trial, which could have been a prison sentence and also could have had an adverse impact on his immigration status. (R1:1; App.101).

In spite of the lack of specific findings by the circuit court, it is clear that based on the record, Perez-Basurto cannot show that it would have been a more rational decision to go to trial, where he was facing a felony conviction, significantly more incarceration time, and the same deportation consequences that he now faces.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court reverse the circuit court's decision granting Mr. Perez-Basurto's post-conviction motion to withdraw his guilty plea.

Dated this _____ day of February, 2017.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

_____
Katherine M. Halopka-Ivery
Assistant District Attorney
State Bar No. 1075311

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 word count of this brief is 5,441.

_____ _____
Date Katherine M. Halopka-Ivery
Assistant District Attorney
State Bar No. 1075311

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_____ _____

Date

Katherine M. Halopka-Ivery
Assistant District Attorney
State Bar No. 1075311

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.