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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

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

Perez-Basurto failed to show Attorney Hackbarth provided ineffective assistance of counsel, because Attorney Hackbarth accurately advised Perez-Basurto of his deportation consequences. Additionally, Perez-Basurto failed to show, after being advised of the possibility of deportation, he was prejudiced by his decision to plead guilty.

A. Attorney Hackbarth accurately stated to Perez-Basurto his deportation consequences as required by *Pallida.*

Attorney Hackbarth, with numerous years of experience in criminal law and prior experience of representing defendants who were not legal immigrants, provided Perez-Basurto with accurate information as to the possibility of deportation. (R33:28). Perez-Basurto drastically minimizes the circuit courts findings as to the knowledge and advice Attorney Hackbarth provided. (Defendant-Respondent Brief, p. 10). Instead, consistent with both federal and state law, Attorney Hackbarth provided accurate information that since Perez-Basurto was here on a two year permit and was not a legal resident, he may be deported based on his pleas to the domestic violence offenses. (R33:28, 40); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *State v. Shata*, 2015 WI 74, ¶ 63, 364 Wis. 2d 63, 868 N.W.2d 93. Perez-Basurto's wishes for a "more accurate" certainty of deportation, is exactly what the court in *Shata* held was not necessary and, frankly, not attainable. *See* 364 Wis. 2d 63.

Shata did not hold that an attorney must inform an immigrant clients that a conviction for a deportable offense will absolutely result in deportation and "*did not require* an attorney to use any particular words, such as 'inevitable deportation,' or to even convey the idea of inevitable deportation." 364 Wis. 2d 63, ¶62 (emphasis added). Perez-Basurto seeks this type of certainty deportation advisement.

Instead, the court in *Shata* correctly interpreted *Padilla* to mean that counsel was required to advise the defendant that he was eligible for deportation. 364 Wis. 2d 63, ¶ 101. The court in *Shata* stated "[a]lthough a controlled substance conviction makes an alien 'deportable,' such a conviction will not necessarily result in deportation." 364 Wis. 2d 63, ¶ 59 (internal citation omitted) (footnote omitted). This is very similar to the domestic violence conviction Perez-Basurto pled guilty to in this matter. Similar to Padilla and Shata, Perez-Basurto's conviction clearly made him deportable under the immigration statute, but what was not clear is if Perez-Basurto would be deported. *Shata*, 364 Wis. 2d 63, ¶ 61 (citing

Commonwealth v. Escobar, 70 A.3d 838, 842 (Pa. Super. 2013)).

The *Padilla* Court did not hold that Attorney Hackbarth must read those immigration statutes in order to avoid performing deficiently. *Shata*, 364 Wis. 2d 63, ¶ 75. Rather, the *Padilla* Court focused on the advice that was given and concluded that the advice was deficient because it was *contrary* to the clear language of the relevant immigration statutes. *See Padilla*, 559 U.S. at 368–69 (emphasis added). Although Attorney Hackbarth did not specifically read the immigration statutes at the time of providing advice to Perez-Basurto, Attorney Hackbarth's 40 years of experience and knowledge regarding those statutes made Attorney Hackbarth well aware of the immigration consequences Perez-Basurto faced and explained.

Attorney Hackbarth is not required to advise Perez-Basurto that the Department of Homeland Security would initiate, prosecute a removal proceeding or enforce a removal order against Perez-Basurto. *Shata*, 364 Wis. 2d 63, ¶61; *See Padilla*, 559 U.S. 356. Rather, the *Padilla* Court's "overall emphasis was that the deportation statute in question makes most drug convicts subject to deportation in the sense that they certainly become deportable, not in the sense that plea counsel should know and state with certainty that the federal government will, in fact, initiate deportation proceedings." *Escobar*, 70 A.3d at 842; *Shata*, 364 Wis. 2d 63, ¶ 61.

Attorney Hackbarth provided accurate information to Perez-Basurto that he may be deportable. Attorney Hackbarth was not legally required to function as an immigration lawyer. *Padilla*, 559 U.S. 356, 369. Attorney Hackbarth was not legally required to predict what the administration's immigration policies for deportable immigrant may or may not be to avoid deportation either. *Shata*, 364 Wis. 2d 63, ¶ 59; *Padilla*, 559 U.S. 356, 369. This reasoning was discussed at length in *Shata* and the lack of certainty as to administrative branch policies have been more evident in the last few years. 364 Wis. 2d 63, ¶ 59.

Attorney Hackbarth is not required to provide certainty as to deportation, partially because defense counsel is not able

to predict what deportation policies will be enforced now or in the future. For example, in 2013, over 36,000 convicted immigrates awaiting deportation proceedings where released and not deported. Jessica M. Vaughan, *ICE Document Details 36000 Criminal Aliens Released in 2013*, Center for Immigration Studies, (2014), http://cis.org/sites/cis.org/files/vaughan-criminals-5-14_2.pdf. Recently, the court in *DeBartolo v. United States* noted that there are at least 10 million illegal immigrants in the United States, implying significant under enforcement of the immigration laws. 790 F.3d 775, 780 (7th Cir. 2015). Another example is seen recently with the changes following the presidential election. President Trump has signed numerous executive orders related to deportation of convicted immigrants, regardless of their temporary legal status or illegal status in the United States. *See* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017). These examples are the same change in circumstances discussed in *Shata*, which effects a defense attorney's ability to provide certainty of deportation even when the statutes clearly indicate it is mandatory. *Shata,* 364 Wis. 2d 63, ¶ 59.

Instead of requiring criminal defense attorneys to essentially serve as immigration lawyers, *Padilla* continued the longstanding practice of *Strickland* by requiring counsel to act "'reasonabl [y] under prevailing professional norms.' " 559 U.S. 356, 366, (quoting *Strickland,* 466 U.S. 668, 688 (1984)). The Court further explained that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the *risk of deportation.*" *Padilla,* 559 U.S. 356, 367 (emphasis added). As *Shata* found, the *Padilla* Court did not conclude that prevailing professional norms require attorneys to inform immigrant clients that convictions for deportable offenses will absolutely result in deportation. *See id; Shata,* 364 Wis. 2d 63, ¶¶ 62-64.

Attorney Hackbarth provided accurate information to Perez-Basurto that the domestic violence conviction may make him deportable. Further support that Attorney Hackbarth's accurate advice is not ineffective, is outlined by both *Padilla* and *Shata. Padilla*, 559 U.S. 356; *Shata,* 364 Wis. 2d 63. Both *Padilla* and *Shata* discuss Wis. Stat. § 971.08 which requires the circuit court to provide similar reasonably warnings: that an immigrant's conviction *may result* in deportation. *Padilla*, 559

U.S. 356, 367; *Shata,* 364 Wis. 2d 63, ¶65. As held in *Shata,* the *Padilla* Court found these statutes were "significant" to its conclusion that an attorney must "inform her noncitizen client that he faces a *risk* of deportation." *Padilla,* 559 U.S. 356, 373–74 & n. 15; *Shata,* 364 Wis. 2d 63, ¶¶ 65-66 (emphasis added). The circuit court found Perez-Basurto was advised of this "risk" by Attorney Hackbarth prior to his plea, while filling out the plea form, and discussed by the circuit court during the plea. (R33:49). Again, demonstrating Attorney Hackbarth was not ineffective and provided accurate information to Perez-Basurto several times.

Similar to Shata's position, Perez-Basurto's assertion that Attorney Hackbarth was required to tell Perez-Basurto that his conviction would result with some type of absolute deportation is unworkable and untenable. *Shata,* 364 Wis. 2d 63, ¶67. As the *Shata* court held, that advice would be incorrect, because Attorney Hackbarth could not know with certainty whether the federal government would deport Perez-Basurto upon conviction. *Id.* If this court were to ignore *Shata* and adopt Perez-Basurto's position, the unintended consequence may be that an immigrant defendant could be essentially precluded from ever pleading guilty or no contest to a crime. *Id.* As the *Shata* court explained, the State would be placed at a great disadvantage because any plea bargain offer to such a defendant could almost always be withdrawn. *Id.* at ¶ 68.

As explained in *Shata, Padilla* requires counsel's advice to be correct and, unlike in *Padilla,* the advice that Perez-Basurto received was actually correct. *Shata,* 364 Wis. 2d 63, ¶ 71. Perez-Basurto's arguments fail because the advice that he received—that he may be deported based on his status—was correct and accurate and Perez-Basurto entered a knowing, intelligent, and voluntary plea with that understanding.

B. Perez-Basurto's statement he would have proceeded to trial is insufficient to show prejudice.

Regardless of the circuit court failure to make any findings as to whether or not Perez-Basurto showed any prejudice, Perez-Basurto's statement he would have proceeded

to trial is insufficient to show prejudice and inconsistent with the record.

Perez-Basurto misstates the circuit courts findings, indicating the circuit court found Perez-Basurto was prejudiced by Attorney Hackbart's deficient performance. (Defendant-Respondent Brief, p. 12). Instead, as to prejudice, the circuit court found that it was not relevant, stating, "I don't think, personally, don't think it is relevant to this issue of [Perez-Basurto] ability to withdraw his plea." (R33:62).

Perez-Basurto asserts that if he was told he would be deported for his pleas he "would have fought this case. [He] would have definitely fought the case harder, [he] would have demanded a jury trial." (R33:10). Perez-Basurto's testimony at the postconviction hearing was inconsistent with the record, inconsistent with Attorney Hackbarth's testimony, inconsistent with Perez-Basuto postconviction counsel's agreement that Attorney Hackbarth advised Perez-Basurto of the potential immigration consequences, and inconsistent with the circuit court credibility determination that Perez-Basurto had a "fuzzy" memory. (R33:25, 39, 49). Regardless, Perez-Basurto argues that his assertion is sufficient for this court to find prejudice based on *DeBartolo v. United States.* 790 F.3d 775 (7th Cir. 2015). However, Perez-Basurto still had failed to meet his burden to show prejudice based on how factually different his assertion is to Debartolo.

DeBartolo is very factually different then Perez-Basurto's case. DeBartolo was 48 years old and immigrated to the United States with his family at the age of one, and never applied for U.S. citizenship. *DeBartolo*, 790 F.3d 775, 776. In 2011, DeBartolo was indicted in federal court for possessing with intent to distribute more than 100 marijuana plants and with manufacturing more than 100 such plants, in violation of 21 U.S.C. § 841(a)(1). *Id.* DeBartolo provided important information to law enforcement and in return to pleading guilty to the manufacturing offense, the government moved for a below-minimum sentence. *Id.* On the basis of the plea deal, the district judge sentenced DeBartolo to only 25 months in prison. *Id.*

During the proceedings there was no mention of deportation in the federal case. *Id.* But unbeknownst to

DeBartolo, and also it seems to his lawyer, the prosecutors, and the judge, DeBartolo's conviction of the drug offense made him deportable and, were he ordered removed, would prevent him from applying for cancellation of removal. *Id.* Following deportation to Italy, DeBartolo sought relief based on ineffective assistance of counsel. *Id.* The court held DeBartolo's counsel was ineffective for not providing any advice as to deportation and that DeBartolo was prejudiced. *Id.*

In determining DeBartolo was prejudice the court focused on the fact DeBartolo did not have the chance to weigh the benefits and consequences of proceeding to trial, no matter how strong the government's case was, because DeBartolo was never advised he would be facing deportation once convicted. *See Id. at* 778. Therefore, at the time he pled, he did not have that important information when deciding whether to seek a trial rather than pleading guilty. *See Id. at* 778. Additionally, the *DeBartolo* court further supported a defendant's choice to "roll the dice" during it's discussion of the likelihood of DeBartolo succeeding at jury trial, noting jury nullification as a likelihood. 790 F.3d 775, 779. Finally, in vacating the guilty plea, the court stated the *Padilla* line of cases to be considered is what DeBartolo would have done, at the time he had to decide whether to plead guilty, *had he known* of the grave risk of being deported, if he were convicted. *Id. at* 780 (emphasis added).

Perez-Basurto still fails to meet his burden as to prejudice under *DeBartolo.* Perez-Basurto circumstances are completely contrary to DeBartolo because, unlike DeBartolo, Perez-Basurto was advised by Attorney Hackbarth and the circuit court about his deportation consequences. Perez-Basurto was aware of the possibility of deportation. Perez-Basurto made the choice to not "roll the dice" having the knowledge of deportation, based on the overwhelming evidence the state was ready to present to the awaiting jury.

Besides Perez-Basurto's circumstances being distinctly different then DeBartolo, this court should apply the reasoning previously argued from *United States v. Chan Ho Shin* and reaffirmed in *Lee v. United States. United States v. Chan Ho Shin*, 891 F. Supp. 2d 849 (N.D. Ohio 2012); *Lee v. United*

States, 825 F.3d 311, 316 (6th Cir.), cert. granted, 137 S. Ct. 614, 196 L. Ed. 2d 490 (2016).

Lee specifically addresses the grave concerns of following the court's reasoning and holdings in *DeBartolo*, including how the decision is contrary to *Strickland. Lee*, 825 F.3d 311, 316; *Strickland*, 466 U.S. 668. As the court explained in *Lee*, there is no way to square such a conclusion with *Strickland*' s admonition that courts may not consider jury nullification or happenstance when deciding whether a petitioner has demonstrated prejudice. *Lee*, 825 F.3d 311, 316.

As the court discussed in *Lee*, "[w}e reach this conclusion for the straightforward reason that *Strickland* itself has taken the matter out of our hands: 'A defendant has no entitlement to the luck of a lawless decisionmaker.'" *Lee*, 825 F.3d 311, 315 (quoting 466 U.S. 668, 695). Therefore, like the *Lee* court did, this court should exclude from its analysis "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Id.* Such possibilities, "are irrelevant to the prejudice inquiry" under *Strickland*. *Id.*

Perez-Basurto's circumstances are again different than in *Lee*, because Perez-Basurto was advised as to the possibility of deportation. Perez-Basurto is similar to Lee, because all Perez-Basurto really would have if he "rolled the dice" is "the luck of the lawless decisionmaker" *Id.* at 316 (quoting *Strickland*, 466 U.S. 668, 695).

Adopting Perez-Basurto's arguments would ignore the difficult task of showing prejudice entirely, since it would provide those in Perez-Basurto's position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences. *Lee*, 825 F.3d 311, 316. This would go against the "strong presumption" against ineffective-assistance claims outlined in *Strickland*, and it is out of step with the rule that prejudice requires showing a "substantial, not just conceivable," chance of a different result. 466 U.S.668, 696; *Lee*, 825 F.3d 311, 316 (quoting *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

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 May, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,472.

_____ _____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

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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.

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