STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2021AP000432 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

AHMED A.M. AL BAWI,
Defendant-Appellant.

ON APPEAL FROM THE MARCH 4, 2020 JUDGMENT OF CONVICTION, AND THE FEBRUARY 22, 2021, ORDER DENYING POSTCONVICTION RELIEF, FILED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE CARRIE SCHNEIDER, PRESIDING. OUTAGAMIE COUNTY CASE NO. 2018CF669

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

Whether Al Bawi, a noncitizen who faces death if returned to his home country, should be allowed to withdraw his plea when his attorney (1) failed to offer him clear advice on the immigration consequences of his plea and (2) failed to correct his professed misunderstanding that he would not be deported because he had served the U.S. military in Iraq?

The circuit court denied Al Bawi's postconviction motion after a hearing at which his counsel testified. This Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Al Bawi does not believe oral argument will be necessary in this case, as the briefs should sufficiently present the issues on appeal and develop theories and legal authorities for this Court to reach a decision without the time and expenditure of oral argument. Wis. Stat. § (Rule) 809.22(2)(b).

Al Bawi does believe this case will meet the criteria for publication because it will likely be the first Wisconsin case to address prejudice in the context of *Padilla v. Kentucky* ineffectiveness post *Lee v. United States*. Wis. Stat. § (Rule) 809.23(1)(b).

STATEMENT OF THE CASE

Ahmed Al Bawi is an Iraqi citizen. (R.29:1). During the war on terror, he served as an Iraqi interpreter for the United States Army. (*Id.*) He came to this country almost a decade ago because terrorist groups in Iraq were trying to kill him for having helped the United States. (*Id.*:2.) Before coming here, Al Bawi was placed on a death list by enemies of the United States. (*Id.)* He survived multiple attempts on his life, including one in which an Iranian supported militia group shot him in his car. (*Id.*)

The militants were so persistent in their attempt to kill Al Bawi that, after he left Iraq, his brother had to fake his death just to take the heat off his family. (R.52:25; A-Ap 82.)

As a result of the danger that he faced in Iraq and because of his military service, the United States granted Al Bawi a special visa to immigrate for his own protection. (R.29:2.)

Al Bawi thus entered the United States as a lawful permanent resident in the summer of 2012. (*Id.*) He settled in the Fox Valley area of Wisconsin and enrolled in classes to study engineering. (*Id.*) However, he remained deeply traumatized by the danger he faced life in his home country, and as a result Al Bawi was diagnosed with Post Traumatic Stress Disorder. (*Id.*)

Despite these issues, Al Bawi gradually made a life for himself in Wisconsin, enrolling in college, securing stable employment, and getting married and purchasing a home in 2019. (*Id.*:2-3.)

But before his life had become so settled, Al Bawi got caught up in the criminal prosecution underlying this appeal. (*See* R.2:1.) In 2017, Al Bawi and a female friend were hanging out at her apartment. They consumed intoxicants together. (*Id.*) As the night went on, the two engaged in consensual foreplay. (*Id.*:1-2.) When Al Bawi attempted to progress from kissing to more intimate activity, his friend told him to stop—they were just friends after all. (*Id.*:2.) Al Bawi honored that request. (*Id.*)

Sometime later and while Al Bawi was still there, his friend went to her bedroom, disrobed, and climbed into bed. (*Id.*) She drifted off to sleep, but later awoke with Al Bawi in bed with her. (*Id.*) He was cuddling her and touching her body. (*Id.*) When Al Bawi put his hands down his friend's pants and touched her vagina, she objected and demanded that he leave. (*Id.*) He did. (*Id.*)

His friend subsequently called the police, and the State prosecuted Al Bawi with sexual assault. (*See id.*)

Al Bawi hired trial counsel to represent him in this case. (R. 29:3; 4:1) Early in the representation, Al Bawi made trial counsel aware of two salient facts: (1) he is not a United States citizen and (2) he obtained his permanent resident status as a result of his military service with the U.S. Army. (R. 29:15.)

I. Trial counsel offered various vague statements related to the immigration consequences of conviction.

During postconviction proceedings, trial counsel provided varying accounts of the advice that he gave Al Bawi concerning the immigration consequences of his no contest plea.

In an affidavit submitted along with Al Bawi's postconviction motion, trial counsel stated that he told Al Bawi that "a guilty plea could potentially make him subject to a deportation." (R.29:15.) He also stated that, "[t]o the best of [his] recollection, [he] did not perform research on the immigration consequences of this specific criminal conviction, nor did [he] tell Al Bawi that a conviction under [Wis. Stat. § 940.225(3)] would make it extremely likely that he would be deported from the United States." (*Id.*)

Then, at the hearing on Al Bawi's postconviction motion, trial counsel explained that he "told [Al Bawi] that a conviction could result in his deportation." (R.52:6; A-Ap 63.) But, trial counsel admittedly "did not" perform any follow-up research to discern whether Al Bawi's deportation risk was something more than that. (*Id.*) Instead, trial counsel merely "t[old] [Al Bawi] multiple times that this was a serious charge and he would be subject to deportation, not necessarily deported, but would be subject to that, and he would

have to deal with that in immigration court." (R.52:7-8; A-Ap 64-65.)

When asked to clarify what "subject to deportation" meant in his mind, trial counsel responded, "[Al Bawi] would have to answer to potentially being deported. I did not know if, in fact, he would be deported, but I told him he – he certainly would be subject to deportation and a detainer, and he understood that." (R.52:8-9; A-Ap 65-66.) Trial counsel "d[id]n't recall using the term, strong chance" to describe the likelihood that Al Bawi's conviction would result in his deportation. (R. 52:9; A-Ap 66.) Likewise, trial counsel did not "recall using the terms likely or very likely that [Al Bawi] would face deportation." (*Id.*) Instead, trial counsel explained, he merely "told [Al Bawi] he would be subject to deportation." (*Id.*) When the postconviction court asked trial counsel what specific advice he had given Al Bawi, he reiterated that he told Al Bawi he would be "subject to deportation." (R.52:15; A-Ap 72.) Trial counsel specifically stated that he "never weighed in on the likelihood that [Al Bawi] would be deported." (*Id.*)

Al Bawi remembered his interactions with trial counsel differently. While trial counsel testified to several possible different pieces of advice given over an unspecified number of conversations, Al Bawi testified that he and trial counsel had only two conversations related to immigration. (R.52:21; A-Ap 78.) The first occurred shortly before Al Bawi's plea hearing. (*Id.*)

[Atty. Layde]:	What do you recall from that conversation?
[Al Bawi]:	I asked him a question. I said, do you think I'd get deported, even though I worked for the U.S. military?
[Atty. Layde]:	And what was his response?

[Al Bawi]: He said something like, I'm not an immigration lawyer, but I highly doubt it.

[Atty. Layde]: Did he tell you during that conversation that there was a – it was likely you could get deported for pleading to this?

[Al Bawi]: No.

[Atty. Layde]: Did he say there was a strong chance that you might get deported?

[Al Bawi]: No.

[Atty. Layde]: How long do you think the conversation lasted with him?

[Al Bawi]: I would say less than five minutes.

[Atty. Layde]: Were you concerned about being deported at that point?

[Al Bawi]: No.

[Atty. Layde]: Why not?

[Al Bawi]: I mean, he said that's a good idea to take the plea. I mean, to take the plea deal, and he would have told me.

(R.52:22; A-Ap 79.) The second conversation that Al Bawi remembered occurred just before his sentencing hearing. (*Id.*)

[Atty. Layde]: Do you remember what was said during that conversation?

[Al Bawi]: I remember I was signing the paper, and he said that this is my – this can cause issues. He made a statement that – he said it can

> cause issues getting your citizenship down the road, but then he corrected himself. He said, but I wouldn't even worry about it because you worked for the army.
>
> [Atty. Layde]: Was the word deportation mentioned at that point?
>
> [Al Bawi]: Negative.

(R.52:22-23; A-Ap 79-80.) Al Bawi, therefore, remained unconcerned about deportation, even after hearing the standard warnings given by the judge. (R.52:24; A-Ap 81.)

> [Atty. Layde]: What did you think when you heard and saw those warnings?
>
> [Al Bawi]: My attorney didn't tell me anything about them. I mean, I – I thought it was – it wasn't meant to me or I wasn't – it wasn't directed to me, like what –
>
> [Atty. Layde]: If you – finish your answer.
>
> [Al Bawi]: I was just saying if I'm making sense. I mean, he didn't tell me anything like that.

(*Id.*) In fact, Al Bawi had no idea his conviction made him subject to automatic deportation until he was served with the ICE detainer on August 19, 2020. (*See* R.18:3.)

In its decision, the postconviction court noted the "multiple inconsistencies in the record" concerning the advice that trial counsel gave Al Bawi about the immigration consequences of his plea. (R.41:6; A-Ap 10.) However, the court ultimately found trial counsel's "*Machner* hearing testimony to be the most credible record of the advice he actually provided Al Bawi." (R.41:7; A-Ap 11.)

II. Trial counsel did not follow up on Al Bawi's assurances that his army service would protect him.

During his postconviction testimony, trial counsel explained that every time he brought up possible immigration consequences of his conviction, Al Bawi would simply respond that his status was secure due to his military service. (R.52:5; A-Ap 62.) Even though Al Bawi clearly believed this to be true, trial counsel never followed up on this assertion, and never performed any research as to its validity.

[Atty. Layde]:	Prior to [Al Bawi] entering the plea in this case, do you recall researching the potential immigration consequences of his plea?
[Trial counsel]:	I don't recall specifically researching it, no.
[Atty. Layde]:	So do you recall reading any statutes, immigration statutes, for example, that might pertain to this?
[Trial counsel]:	I don't recall doing that, no.
[Atty. Layde]:	Do you recall contacting any other attorneys for advice regarding possible immigration consequences?
[Trial counsel]:	No. I don't recall.
[Atty. Layde]:	Thank you. Do you recall ever raising any immigration concerns on the record when you were in open court?
[Trial counsel]:	Well, he was advised regarding the potential for being deported on the record.

…

[Atty. Layde]: Okay. And after he mentioned that, as you said he believed his status was secure due to service with the Army, did you perform any follow-up research as to the validity of that claim?

[Trial counsel]: I did not.

(R.52:6; A-Ap 63.) Al Bawi, in contrast, testified that he never assured trial counsel that he would not be deported due to his military service, but rather that he asked his attorney if he might still be deported despite his military service. (*See* R.52: 20-28; A-Ap 77-85.)

III. Al Bawi's no contest plea resulted in his designation as an aggravated felon under immigration laws.

Based on the advice he received from trial counsel, Al Bawi pleaded no contest to third-degree sexual assault. (R.52:22; A-Ap 79.) This plea made Al Bawi an "aggravated felon" according to federal immigration law. 8 U.S.C. § 1101(a)(43)(A). Al Bawi was later served with an immigration detainer from Immigration and Customs Enforcement (ICE), notifying him that upon his release from Outagamie County Jail, he would be taken into ICE custody and removed from the United States. (R.29:17.)

IV. Al Bawi pleaded no contest relying on the advice trial counsel gave him.

Postconviction, Al Bawi testified that he never would have taken the plea had he known that it would make him subject to automatic deportation:

[Atty. Layde]: You are. If your attorney told you that there was a strong possibility that you would be deported at the time you – after entering this

plea, would you have entered the plea?

[Al Bawi]: Negative.

[Atty. Layde]: Why not?

[Al Bawi]: Because getting deported is a death sentence to me.

[Atty. Layde]: What do you mean that getting deported is a death sentence for you?

[Al Bawi]: I'm on a hit list back in my country. That's why the reason I got brought over here. Back—

[Atty. Layde]: Who has—I'm sorry, go ahead.

[Al Bawi]: Back in the year from two thousand, probably, eight, I'd say the end of 2008 to 2012.

[Atty. Layde]: Who has a hit list?

[Al Bawi]: Well, later I found out it was insurgents.

[Atty. Layde]: It was an insurgent group?

[Al Bawi]: Insurgent that lives in Iraq, from like Iranian militia.

[Atty. Layde]: Were there ever any attempts on your life when you were in Iraq?

[Al Bawi]: Yes, sir.

[Atty. Layde]: Can you tell me what –tell us what happened?

[Al Bawi]: I mean, I got shot. My car got shot 16 times, 16 rounds in my car, and one of them hit my leg. I got pulled over by a fake police, and my brother had to help me out

and my brother had to fake my death so he could move on with his life afterward.

[Atty. Layde]: So your brother faked your death so that people in Iraq think that you're dead?

[Al Bawi]: Yeah, because they kept going back to my brother, because I was – after the Army pulled out of Iraq, I used my brother's house as a shelter because I used – before that I always go to the Army base and I was good.

[Atty. Layde]: So what do you think would happen if you were deported back to Iraq?

[Al Bawi]: I would get killed.

[Atty. Layde]: If you had known –

[Al Bawi]: My brother – probably my brother would get in trouble again. I mean --

[Atty. Layde]: If you had known that deportation was likely or possible, would you have gone to trial if you couldn't negotiate another plea deal?

[Al Bawi]: Yes.

[Atty. Layde]: Even if it would be a really hard case for you to win?

[Al Bawi]: Probably, yeah, I would go to trial.

[Atty. Layde]: Why would you take that risk? Even – you know, you might spend more time in jail. Why would you take that risk?

[Al Bawi]: I would take the jail time over deportation.

(R. 52:24-26; A-Ap 81-83.)

The same judge who presided over Al Bawi's plea and sentencing hearings decided his postconviction motion. The court concluded that trial counsel was not deficient because his advice regarding immigration consequences "accurately reflected the risk of deportation that Al Bawi faced." (R.41:7; A-Ap 11.) The court further concluded that trial counsel had "no obligation to conduct more research." (R.41:8; A-Ap 12.) The court also found that Al Bawi could not prove prejudice "because the outcome of [the] case was unlikely to be different if [trial counsel] had given Al Bawi more detailed immigration advice." (*Id.*) The court thus concluded that Al Bawi's plea did not result from his counsel's ineffectiveness and denied his plea withdrawal claim.

He appeals.

ARGUMENT

Al Bawi was never adequately advised of the immigration consequences of pleading guilty. As a result, he entered a plea that he otherwise would not have. As explained below, he asks this Court to reverse so he may withdraw his guilty plea.

I. Noncitizen criminal defendants have the right to effective representation in the plea process.

The right to effective assistance of counsel is constitutionally guaranteed. U.S. Const. Amend. VI, Wis. Const. Art. I, § 7, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984), *State v. Thiel*, 2003 WI 111, ¶11, 264 Wis. 2d 595, 665 N.W.2d 305. It "extends to the plea-bargaining process" and, "[d]uring plea negotiations[,] defendants are 'entitled to the effective assistance of competent counsel.'" *Lafler v. Cooper*, 566 U.S. 156, 162 (2012)

(quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Defendants whose attorneys perform ineffectively during the plea process are entitled to withdraw their plea. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

The rules governing ineffective assistance are well settled. *Williams v. Taylor*, 529 U.S. 362, 391 (2000). The test for ineffective assistance has two prongs, both of which the defendant must prove to be successful: deficient performance and resultant prejudice. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

To prove deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. An attorney is presumed competent, but a defendant can overcome that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). An attorney's decision, even if "strategic," must nonetheless be valid and have a basis in law and fact. *State v. Domke*, 2011 WI 95, ¶41, 337 Wis. 2d 268, 805 N.W.2d 364; *Thiel*, 2003 WI 111, ¶51. A prudent criminal defense lawyer must be skilled and versed in the nuances of criminal law, and any strategic or tactical decisions must be rational and based on the facts and the law. *State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161, 170 (1983).

Proof of prejudice requires proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This does not mean, however, that the defendant must show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693. Instead, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.*

In *Hill v. Lockhart*, the Supreme Court recognized that the tenets of *Strickland* apply equally "to ineffective-assistance claims arising out of the plea process." 474 U.S. 52, 57 (1985). Given the ubiquity of guilty pleas in our current criminal justice system, the Supreme Court has expressly stated that "defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri v. Frye*, 566 U.S. 134, 138 (2012). Deficient performance occurs whenever counsel's plea-bargaining representation falls below the range of competence demanded of attorneys in those circumstances. *Hill*, 474 U.S. at 56-57.

The prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome *of the plea process*," *Id.* at 59 (emphasis added), to such a degree that it rendered it unreliable, *Strickland*, 466 U.S. at 693-94. "[I]n order to satisfy the 'prejudice' requirement, the defendant must show 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.

On appeal, "the ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which [appellate court's] review[] independently." *Thiel*, 2003 WI 111, ¶23 (quotation, textual alteration, and authority omitted). The postconviction court's factual findings, however, are reviewed for clear error. *State v. Jenkins*, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786.

II. Trial counsel's performance was deficient for failing to give clear advice to Al Bawi of the clear

immigration consequences of pleading to third-degree sexual assault.

The Sixth Amendment requires counsel to advise non-citizen clients about potential immigration consequences of a conviction. *See Padilla v. Kentucky*, 559 U.S. 356 (2010). Under *Padilla*, the scope of advice necessary is dependent upon the clarity of the immigration consequence. *Id.* at 369. If immigration consequences are "unclear or uncertain," counsel must only advise a non-citizen client that a conviction "may" carry immigration consequences. *Id.* However, where "the deportation consequence is truly clear…the duty to give correct advice is equally clear." *Id.* In essence, this comprises a two-part test for determining the effectiveness of counsel's advice: first, were the immigration consequences actually clear? Second, if so, was the advice given equally clear?

A. The immigration consequences of a plea to third-degree sexual assault are clear.

As the postconviction court recognized in its decision below, the immigration consequences of pleading to third-degree sexual assault under Wis. Stat. § 940.225(3) are clear. (R.40:8; A-Ap 12.) Federal immigration laws make clear that a conviction under this statute is considered an "aggravated felony," the most serious type of crime for immigration purposes. 8 U.S.C. § 1228(a). Regardless of immigration status, being convicted of an aggravated felony makes a non-citizen deportable and leaves them with virtually no options for relief, resulting in nearly automatic deportation from the United States. 8 U.S.C. § 1228(c); 8 U.S.C. § 1227(a)(2)(a)(iii).

Determining whether third-degree sexual assault under Wisconsin law is an aggravated felony is uncomplicated. Unlike Crimes Involving Moral Turpitude (CIMTs), another classification of crimes carrying immigration consequences, aggravated felonies

are clearly defined in immigration law. There are no federal statutes that define what qualifies as a CIMT, nor is there clear case law which enumerates a list of qualifying crimes. *See State v. Ortiz-Mondragon,* 2015 WI 73 ¶ 37-51, 364 Wis. 2d 1, 866 N.W.2d 717. As a result of this lack of clarity in both case law and statute, the Wisconsin Supreme Court determined no specific advice on immigration consequences of CIMTs is required from counsel. *Id.* ¶ 45.

In contrast, aggravated felonies are clearly defined in federal statutes as "murder, rape, or sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A). Rape is as "an act of vaginal, anal, or oral intercourse, or digital or mechanical penetration, no matter how slight" with a non-consenting individual. *See e.g., Matter of Keeley,* 27 I &N Dec. 146 (BIA 2017), *see also* 18 USC § 920 – Art 120(g)(1). In comparing these federal definitions to Wis. Stat. § 940.225(3), which criminalizes "sexual intercourse with a person without the consent of that person," it becomes clear that third-degree sexual assault is an aggravated felony.

Basic case law research reveals the immigration consequences of a conviction for third-degree sexual assault. The Seventh Circuit has unequivocally held that a conviction under Wis. Stat. § 940.225(3) is an aggravated felony. *United States v. Panzo-Acahua,* 182 F.App'x 582 (7th Cir. 2006); *Hairic v. Holder,* No. 13-2256 (7th Cir. 2014). Each of these cases found a conviction under this statute to be sufficient basis for removal from the United States.

Furthermore, even simply Google searching "third degree sexual assault," "Wisconsin," and "deportation" produces a news article detailing the story of an immigrant who faced deportation for a conviction under the same statute. Frank Schultz, *Deportation an Issue in Janesville Sex Assault Case,* GAZETTE XTRA (Aug. 29, 2019). The attorney in that case stated that, if the defendant was

found guilty, "the sexual assault charges likely would have led to deportation." *Id.*

As such, the deportation consequences of a conviction for third-degree sexual assault are truly clear. The postconviction court in Al Bawi's case reached the same conclusion, stating: "Al Bawi's immigration status was clear. By entering a plea to a charge of sexual assault, Al Bawi was pleading to an aggravated felony and became 'presumptively deportable' upon conviction." (R.41:7; A-Ap 11.) This clarity, in turn, requires clarity in legal advice. *Padilla,* 559 U.S. at 369.

B. Trial counsel's failure to offer clear advice regarding the immigration consequences of Al Bawi's plea was deficient.

Based on his testimony at the postconviction hearing, trial counsel failed to offer clear advice to Al Bawi regarding the deportation consequences of a plea to third-degree sexual assault. Because the immigration consequences of the conviction are "truly clear," trial counsel's duty "to give correct advice is equally clear." *Id.*

While incorrect advice is obviously not "truly clear," the Supreme Court in *Padilla* also indicated that an attorney does not give "truly clear" advice simply by avoiding "affirmative misadvice;" in other words, an attorney cannot reach the *Padilla* standard by simply declining to give meaningful advice regarding immigration consequences. *Id.* at 369.

Wisconsin case law has interpreted *Padilla* in various contexts which establish specific examples of what constitutes clear advice. *State v. Shata* concluded that counsel's duty is to "correctly advise his client of the risk of deportation so that the plea is knowing and voluntary." 2015 WI 73, ¶62, 364 Wis.2d 63, 868 N.W.2d 93. *Shata* goes on to clarify that in cases with clear immigration consequences, informing the defendant that

their plea will result in a "strong chance" of deportation satisfies the requirement to give correct advice. *Id.* ¶ 5, 75.

The *Shata* court provides a further guidepost for what constitutes "truly clear" advice in its interpretation of *State v. Mendez*, a Wisconsin appellate court case. In *Mendez*, trial counsel declined to give any warnings beyond telling the immigrant client that "a conviction may make [the defendant] inadmissible or deportable." *State v. Mendez*, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895. The *Mendez* court determined that not only did this neutral language not constitute clear advice, but even a hypothetical stronger warning that a defendant "would very likely be deported and wouldn't be able to come back" was itself not sufficiently clear. *Mendez* at 899.

The *Shata* court reined in the holding in *Mendez*, ("We withdraw any language in *Mendez*…that suggests that *Padilla* requires an attorney to advise an alien client that a conviction for a deportable offense will necessarily result in deportation") but determined that "the remainder of *Mendez* retains precedential value." *Shata*, 2015 WI 73, ¶ 78. In so doing, the *Shata* court interpreted *Padilla* as not requiring an ironclad warning that a criminal conviction will 100% result in a deportation but did not disturb the *Mendez* court holding that there must be some probabilistic warning beyond that a conviction "may" make a noncitizen deportable.

Furthermore, the *Shata* court held that the precise words by which counsel provides immigration advice is not alone determinative of the reasonableness of counsel's performance. Instead, *Shata* also indicated that courts may take counsel's conduct into consideration when determining whether trial counsel performed effectively. In *Shata*, our supreme court noted that trial counsel had been effective because he consulted with multiple federal prosecutors, attempted to negotiate a

plea deal that carried no immigration consequences, and raised concerns about deportation multiple times on the record. *Id*.

In Al Bawi's case, trial counsel's conduct falls short under the standards established under *Padilla* and *Shata.* Trial counsel testified to using at least four different phrases when advising Al Bawi as to the immigration consequences of a conviction ("could potentially make him subject to a deportation"; "could result in his deportation"; "would be subject to deportation"; "could result in deportation."). And yet, none of these varying forms of advice render any probabilistic analysis of whether Al Bawi would actually encounter immigration consequences. Telling Al Bawi that a conviction "could potentially" make him subject to deportation, or "could result in deportation" is functionally the same as assessing the risk of deportation from this conviction at somewhere between 0% and 100%. But that sort of advice is no different than simply telling him his conviction "may make" him deportable, which *Shata* itself indicates is deficient advice. *Id.* at ¶ 72.

Indeed, trial counsel himself testified that he "*never weighed in on the likelihood* that [Al Bawi] would be deported." (R.52:15; A-Ap 72 (emphasis added).) Although at one point trial counsel told Al Bawi that "he would be subject to deportation," he never offered a probabilistic assessment of the level of risk this terminology actually suggested. For example, trial counsel admitted to telling Al Bawi that he would "*not necessarily* [be] deported, but would be subject to that" consequence. (R.52:8; A-Ap 66 (emphasis added.) When pressed to define "subject to a deportation," trial counsel responded "[h]e would have to answer to potentially being deported." (R.52:9; A-Ap 66.)

Therein lies the deficiency in trial counsel's advice: at no point did any of the proffered advice rise above "potentially", "possible" or "could be." Trial counsel, for

example, never told Al Bawi that there was a "strong chance" that he would be deported, nor did he "recall using the terms likely or very likely" when advising Al Bawi of his deportation risk. All that trial counsel told Al Bawi was that "he would be subject to deportation." Presumably, trial counsel hedged on his immigration advice because of his admitted unawareness of whether Al Bawi's conviction would result in his deportation: "I did not know if, in fact, he would be deported . . .." (*Id.*)

Trial counsel's lack of awareness regarding the immigration consequences of Al Bawi's plea likely stems from his failure to perform legal research or to contact other attorneys more experienced with this subject matter for advice. That counsel was unawares is further demonstrated by his failure to raise any immigration concerns on the record or in plea negotiations. The attorney in *Shata* did each of these things, and as a result was able to properly advise his client that a plea carried a "strong chance" of deportation. Trial counsel in Al Bawi's case, in contrast, did not do the research and was therefore unable to offer meaningful advice.

The deficiency of the offered advice is manifested in the fact that Al Bawi clearly did not have any idea that his plea carried significant immigration consequences. Al Bawi testified that when he heard the warnings given by the judge, he did not believe they applied to him, because trial counsel never gave him any warnings specific enough to cause him to be concerned. But, in addition to that testimony, Al Bawi's ignorance of the impending immigration consequences is further shown by his silence regarding deportation to Iraq when talking to the PSI writer and again at sentencing. (*See* R.18:3, R.54:16.) If Al Bawi—a person who faces death upon return to his home country—knew that he was going to be deported, then he most certainly would have mentioned that fact when the PSI writer asked him to opine on the proper disposition. (*See* R.18:3.) Likewise, he surely would have brought it up at sentencing as a

mitigating factor. *See State v. Gallion*, 2004 WI 42, ¶43, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing court must consider mitigating information), Wis. Stat. § 973.017(2)(b) (same). And yet, neither Al Bawi nor his attorney once mentioned his deportation at sentencing. (R.54:8-16.)

Given the severe consequences of his return to Iraq, if Al Bawi had known his deportation was essentially inevitable, he presumably would have indicated his concerns at either of these points. His lack of awareness regarding the consequences of his plea highlights the lack of clarity in the advice trial counsel offered to him.

The record is thus clear that trial counsel failed to advise Al Bawi on the deportation consequences of his plea in anything beyond the most general terms. Under controlling case law from the Supreme Court of Wisconsin as well as the Supreme Court of the United States, this does not rise to the level of "truly clear" advice to which Al Bawi was entitled. His attorney was thus deficient in his failure to give accurate advice.

But Al Bawi's trial counsel was deficient in yet another way. Not only did trial counsel fail to provide accurate immigration advice, but he allowed Al Bawi to operate with an affirmative misunderstanding of the applicable law. Namely, he failed to disabuse Al Bawi of the erroneous belief that, despite his plea, he would not be deported because he had served the U.S. military in Iraq.

C. The failure to correct Al Bawi's misunderstanding that his military service would save him from deportation was deficient performance.

Trial counsel testified at the postconviction hearing that whenever he raised the issue of deportation with Al Bawi, Al Bawi appeared confident that his military

service would protect him from that consequence. And yet, trial counsel admittedly never undertook to discern the accuracy of that opinion. He neither researched it nor discussed it with other attorneys. Instead, he just took Al Bawi's word for it.

Trial counsel thus failed to learn that Al Bawi was wrong; his military service *would not* exempt him from the otherwise clear deportation consequence that his conviction portended. Nonetheless, with that gaping hole in his understanding of the applicable law, trial counsel recommended that Al Bawi plead to an aggravated felony. In other words, trial counsel advised Al Bawi to plead guilty to a deportable offense while Al Bawi wrongly believed—and trial counsel advised him no differently—that his military service would save him from deportation.

Allowing Al Bawi to plead guilty to a deportable offense under the affirmative misunderstanding that he would not be deported was objectively unreasonable.

Importantly, trial counsel admittedly *knew* that Al Bawi believed he was protected from deportation by virtue of his military service. An objectively reasonable attorney knowing that his noncitizen client held strong views regarding his safety from deportation would not have just taken his client's word for it.

While there is generally no affirmative duty to conduct research regarding immigration consequences of conviction, the facts of Al Bawi's case are unique. *See Shata,* ¶ 75. No objectively reasonable attorney would surrender the professional obligation to provide correct legal advice to the purported knowledgeability of an average client. Undoubtedly, clients routinely misunderstand the law, even in areas that are reasonably straightforward. However, as the Supreme Court has recognized, immigration law is anything but that. *Padilla,* 559 U.S. at 369.

Trial attorneys have a duty to "act reasonably under prevailing professional norms." *Shata*, ¶64 (quoting *Padilla*, 559 U.S. at 366). Such professional norms make clear that, when a noncitizen defendant is involved, defense "counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions." ABA Crim. Justice Stds., *Defense Function*, § 4-5.5(b) (4th ed. 2017) (available at https://bit.ly/3bxRvry); *see also Strickland*, 466 U.S. at 688-89 (ABA standards "are guides to determining what is reasonable"). After discerning the immigration consequences, "counsel should advise the client of all such potential consequences and determine with the client the best course of action." ABA Crim. Justice Stds. § 4-5.5(b).

Whereas Al Bawi's trial attorney knew that deportation was a possibility and was aware that Al Bawi believed he was immune from that consequence, it behooved counsel to undertake *some* investigation to discern the validity of Al Bawi's opinion. Significantly, trial counsel admitted at the postconviction hearing that Al Bawi was not an expert in immigration law. (R. 52:12; A-Ap 69.) Objectively reasonable defense counsel would not cede to a noncitizen defendant's untested and unproven legal acumen the responsibility to ensure that the client rightly understands the applicable immigration law. Under the specific facts of this case, objectively reasonable defense counsel would have undertaken to learn whether Al Bawi was right in his belief that his military service would protect him from deportation. Instead, in the face of protestations that no negative immigration consequences would result, Al Bawi's trial counsel did not take a single step towards discerning the accuracy of that belief.

Allowing a client who is not an expert in immigration law to make their own assessment regarding deportation consequences and then do absolutely nothing to correct this erroneous assessment is akin to offering no advice at

all, clearly constituting deficient performance under *Padilla*. 559 U.S. at 384-85. *Padilla* plainly indicates that there is "no relevant difference between an act of commission and an act of omission" in the context of failing to provide correct advice. *Id.* at 370.

Courts must judge the reasonableness of counsel's conduct based on the facts of the particular case. *Strickland*, 466 U.S. at 690. Under the above-detailed facts, it was objectively unreasonable for Al Bawi's attorney not to disabuse him of the erroneous belief that he would be safe from deportation because he had served in the military.

III. Al Bawi could rationally choose a trial over a plea because he will be killed if he is deported; his attorney's deficient advice was thus prejudicial.

In *Padilla*, the Supreme Court articulated the prejudice test somewhat differently than it had in *Hill*: "[T]o obtain relief on [a claim of deficient immigration advice], a petitioner must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*." 559 U.S. at 372 (emphasis added). However, the Supreme Court did not apply the prejudice test in *Padilla* because the issue had not been reached by the lower courts. *Padilla*, 559 U.S. at 374. The Supreme Court did not address *Padilla*'s articulation of *Strickland* prejudice in immigration circumstances until *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958 (2017).

After *Padilla*, there was a split of authority about what proof was necessary for a criminal defendant to show prejudice upon receipt of incorrect advice regarding the immigration consequences of guilty plea. One theory was that the defendant could prove prejudice only upon proving that he or she could win at trial. *Lee v. United States*, 825 F.3d 311, 313 (6th Cir. 2016). The other theory was that a defendant did not need to prove likely success at trial; instead, it was enough to show that the defendant

could have rationally elected to roll the dice on a trial simply to avoid the permanent, life-altering consequence of deportation. *DeBartolo v. United States*, 790 F.3d 775, 778 (7th Cir. 2015). The Supreme Court took up the split in *Lee*. 137 S. Ct. at 1962.

Like Padilla, Lee had received incorrect immigration advice, resulting in his guilty plea to an automatically deportable offense. *Id.* at 1963. When Lee found out that he was to be deported, he sought to withdraw his plea. *Id.* Lee argued that he would not have pleaded guilty if he had been given the correct advice. *Id.* On review, the matter of counsel's deficiency was resolved by *Padilla*, and the government conceded it. The fight was exclusively about prejudice. *Id.* at 1964.

The government and lower courts reasoned that Lee could not prove prejudice because the evidence against him was overwhelming and he would not have succeeded at trial. *Id.* at 1966. Whereas Lee would certainly have lost at trial, reasoned the lower courts, he could not prove "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 1964 (quotation omitted). The Sixth Circuit explained that "'no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence.'" *Id.* (quoting 825 F.3d at 14.) The Supreme Court reversed. *Id.* at 1969.

The Court explained that the prejudice inquiry "do[es] not ask whether, had [the defendant] gone to trial, the result of that trial 'would have been different' than the result of the plea bargain." *Id.* at 1965. "Instead," explained the Court, the relevant question is "whether the defendant was prejudiced by the 'denial of the entire judicial proceeding . . . to which he had a right.'" *Id.* (quoting *Roe v. Flores–Ortega,* 528 U.S. 470, 483 (2000)). The Court rejected the proposition "that a defendant

must also show that he would have been better off going to trial." *Id.* That question is rightly applied "when the defendant's decision about going to trial turns on his *prospects of success* and *those are affected by the attorney's error*—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession." *Id.* (emphasis added). But, "[n]ot all errors . . . are of that sort," explained the Court. *Id.*

In *Lee*, the defendant "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error *had nothing to do with that*. The error was instead one that affected Lee's *understanding of the consequences* of pleading guilty." *Id.* (emphasis added). Reasoning that success at trial does not always decide prejudice, the Court explained that the test set forth in *Hill v. Lockhart* focuses on a defendant's decision making, which may not turn solely on the likelihood of conviction after trial. *Id.* at 1966-67. In truth, "[t]he decision whether to plead guilty also involves assessing the respective *consequences* of a conviction after trial and by plea. When those *consequences* are, from the defendant's perspective, *similarly dire*, even the smallest chance of success at trial may look attractive." *Id.* at 1966 (emphasis added) (cited authority omitted).

In Lee's case, the government had overwhelming evidence of his guilt. *See id.* at 1964. But its pretrial plea offer was not meaningfully different than the sentence he could have gotten after trial. *See id.* at 1969 And, Lee wanted to avoid deportation; he had strong connections to the United States. *Id.* at 1968. Accordingly, the Supreme Court held that Lee could prove prejudice because it would not have been "irrational for a defendant in [his] position to reject the plea offer in favor of trial." *Id.* As the Court explained, "[b]ut for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly." *Id.*

(emphasis in original). Given Lee's connections to the country, the likely similarity in sentence after a plea or a trial, and his sincere desire to avoid deportation, "that 'almost' could make all the difference." *Id.* at 1968-69. Thus, Lee could prove *Strickland* prejudice and was allowed to withdraw his plea. *Id.*

Lee's prejudice analysis controls in Al Bawi's case. It does not concern itself with Al Bawi's likely success at trial. *Id.* Instead, to prove prejudice, Al Bawi need only "'convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.* (quoting *Padilla*, 559 U.S. at 372.)

Consistent with *Lee*, the Seventh Circuit has before explained that a defendant's "personal choice to roll the dice is enough to satisfy the 'reasonable probability' standard" and prove *Strickland* prejudice in the plea withdrawal setting. *DeBartolo*, 790 F.3d at 778. In *DeBartolo*, the Seventh Circuit warned that "[j]udges and prosecutors should hesitate to speculate on what a defendant would have done in changed circumstances" when deciding *Strickland* prejudice. *Id.* Even though a defendant's chance of acquittal may be small, the defendant "is entitled to roll the dice" and hope for an acquittal at trial when the threat of an automatic, life-changing consequence looms. *Id.* at 780.

Al Bawi most certainly faces an automatic, life-changing consequence upon deportation. He vividly testified to the immense danger that he faces in Iraq if he ever returns to the country: he knows that he will be killed. Al Bawi detailed previous attempts on his life while in Iraq and persecution so severe that his family had to fake his death to be safe from reprisal.

In *Lee*, the Supreme Court called the defendant's choice to go to trial rational because he risked separation from the life that he had established in the United States. Al Bawi, like Lee, has a life in the United States. He has

been in the country for almost a decade. He has a wife here. He has a work history and is pursuing an education. But more significantly, Al Bawi's deportation will not only permanently divorce him from the life he knows here, it will also result in his death. Given that a return to Iraq amounts to a death sentence for Al Bawi, his choice to roll the dice on a trial is imminently more rational than the one the Supreme Court approved of in *Lee*.

What is more, as in *Lee*, Al Bawi did not get a substantial benefit out of his plea that he would have lost by going to trial. *See Lee,* 137 S. Ct. at 1963, 1968. The State did not amend the charge to some lesser offense as part of the plea negotiations. (*Compare* R.7 *with* R.22:1.) Instead, Al Bawi pleaded to the offense with which he was originally charged. (*Id.*) Additionally, the State said nothing on the record to suggest that its sentencing recommendation would have been any different had the matter gone to trial. (*See* R.51:2-8; A-Ap 28-34.) Relevantly, the sentencing court rejected the State's straight prison recommendation and instead placed Al Bawi on probation. (R.51:25; A-Ap 51.) Wisconsin law requires the sentencing court to consider probation as the first option and impose unless the facts dictate otherwise. *Gallion*, 2004 WI 42, ¶44. The facts in Al Bawi's case were not going to change at a trial, and thus it is not likely that the court would impose a more significant sentence simply because Al Bawi went to trial.

Al Bawi testified that he pleaded no contest based on trial counsel's advice and would not have done so had he known deportation was likely or even possible. If he had known the immigration consequences, Al Bawi would have taken his case to trial, regardless of how slim his chance of winning might have been. Al Bawi would have taken any amount of jail time over being deported. Based on this, there is no doubt that but for trial counsel's deficient advice, Al Bawi would not have pleaded no contest.

Al Bawi can thus show the same three things on which *Lee* relied to hold that the choice to go to trial would have been rational under the circumstances: connections to the country, the likely similarity in sentence after a plea or a trial, and a sincere desire to avoid deportation. *See Lee*, 137 S. Ct. at 1968-69. Al Bawi can thus prove prejudice derivative of his trial counsel's deficient advice and should be allowed to withdraw his plea.

CONCLUSION

Al Bawi hired an attorney to help him navigate the waters of his sexual assault prosecution. He told his lawyer that he was not a U.S. citizen and did not want to be deported. He also opined to his lawyer that he would be protected from deportation because he had served the U.S. military in Iraq.

And yet, Al Bawi's attorney never made clear to him in any probabilistic terms that pleading to sexual assault *would* result in his deportation. Instead, without doing any research, he offered vague hints that perhaps Al Bawi should be concerned about deportation. As for Al Bawi's belief that his military service would save him from removal, trial counsel accepted that misinformed legal opinion without questioning or researching its validity. Trial counsel thus never told Al Bawi that he was wrong and that his military service would provide him no protection.

The result: Al Bawi pleaded to an aggravated felony that will remove him from this country without knowing that his plea would have that effect. Al Bawi's removal will, in turn, very likely result in his death at the hands of militants in Iraq.

Because the advice that Al Bawi received was objectively unreasonable under the circumstances of this case, his attorney's performance was deficient. Because Al Bawi has connections to this country, would likely get

the same sentence after a trial, and likely will be killed if deported, he rationally could have opted for the slim chance of an acquittal at trial. He can thus prove both components of the test for ineffective assistance.

He should be allowed to withdraw his plea on that ground and asks this Court to so hold.

Dated this 1st day of June, 2021.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body

text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7,790 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 1st day of June, 2021.

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CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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