STATE OF WISCONSIN

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

DISTRICT III

Case No. 2021AP432-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AHMED A.M. AL BAWI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POSTCONVICTION RELIEF,
ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT,
THE HONORABLE CARRIE A. SCHNEIDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Ahmed A.M. Al Bawi, a non-citizen, pleaded no contest to third-degree sexual assault. The court sentenced Al Bawi to probation for five years with conditions to include 12 months of jail. About five months after sentencing, Immigrations and Customs Enforcement (ICE) sent a notice to the county jail indicating that probable cause exists that Al Bawi "lacks immigration status or notwithstanding such status is removable under U.S. immigration law."

Al Bawi moved to withdraw his plea based on ineffective assistance of counsel. He argued that his counsel was deficient when he told Al Bawi that he could "potentially" be deported, as opposed to "automatically being subject to deportation." Al Bawi also argued that such deficiency prejudiced him because had he properly been advised of the deportation consequences, he would have negotiated for a better plea or proceeded to trial. After a *Machner* hearing, where the court found defense counsel's testimony credible, the court denied Al Bawi's motion.

Did Al Bawi show by clear and convincing evidence that a manifest injustice would result if plea withdrawal was not granted?

The circuit court held, No.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the issue in this case has already been decided in *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93, the State requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE

Facts alleged in the complaint

On September 27, 2017, Al Bawi went to AJL's[1] residence to drink alcohol and use illegal drugs. (R. 2:1.) At one point, AJL and Ahmed began kissing, but when Ahmed attempted to place his hands down her pants, AJL told him to stop because they were just friends. (R. 2:2.) AJL subsequently went to her bedroom and fell asleep. (R. 2:2.) Al Bawi told police that after AJL went to bed, he went into her bedroom and noticed that she was "butt ass naked" and "took it as a signal." (R. 2:2.) Al Bawi stated that he did "what any other guy would have done" and began to "play with her" vagina. (R. 2:2.)

AJL awoke to find Al Bawi in her bed with his finger or fingers inside her vagina. (R. 2:2.) Al Bawi had also taken AJL's hand and placed it on his penis. (R. 2:2.) AJL immediately ordered Al Bawi to leave. (R. 2:2.) After he left, Al Bawi sent several text messages to AJL, including one that said, "I was not in the state of mind," and "[AJL] I love you and I'm sorry I made you uncomfortable I have no idea." (R. 2:2.)

The State charged Al Bawi with third-degree sexual assault, contrary to Wis. Stat. § 940.225(3). (R. 2:1.)

Preliminary and plea proceedings

Al Bawi appeared at his initial appearance along with his attorney, Matthew Goldin. (R. 47:1.) After testimony from Officer Blaine Vander Wielen at the preliminary hearing, the court bound the matter over for trial. (R. 47:13.)

Al Bawi eventually pleaded no contest. (R. 16.) The plea provided that Al Bawi understood that "if I am not a citizen of the United States, my plea could result in deportation, the

[1] The State uses initials.

exclusion of admission to this country, or the denial of naturalization under federal law." (R. 16:2.) And, at the plea hearing, the court advised Al Bawi that his plea could result in deportation:

> The Court: Okay. I have to also advise that if you're not a citizen of the United States, your plea could result in deportation, exclusion of admission to the country, or denial of naturalization. Are you aware of that?
>
> [Al Bawi]: Yes, Your Honor.

(R. 53:6.)

The court then confirmed with Attorney Goldin that before the hearing Goldin discussed with Al Bawi his constitutional rights being waived. (R. 53:9–10.) Attorney Goldwin also informed the court that he and Al Bawi went over the plea form (which includes the deportation warning) once in his office and once on the day of the plea hearing. (R. 53:9.)

The court found Al Bawi guilty, ordered a PSI, and scheduled sentencing. (R. 53:9–10.) At sentencing, the court addressed Al Bawi: "If they say no, it ends. It stops. And I don't know that you get that or understand that." (R. 54:21.) The court continued, "when she's sleeping and not awake or if she had drank so much that she passed out, then hands off. You can't touch her." (R. 54:22.) While Al Bawi then informed the Court, "I understand," the Court replied, "I don't know if you do." (R. 54:22.)

The court withheld sentence and placed Al Bawi on probation for five years with conditions to include 12 months of jail with Huber release privileges. (R. 54:25–26.)

About five months after sentencing, the Outagamie County Jail received an "Immigration Detainer – Notice of Action," indicating that "probable cause exists" that Al Bawi "lacks immigration status or notwithstanding such status is

removable under U.S. immigration law."[2] (R. 28:17.) The notice directed the jail to call ICE "as early as practicable" and to "maintain custody" of Al Bawi. (R. 28:17.)

Postconviction proceedings

Al Bawi moved to withdraw his plea. (R. 28.) He averred that after sentencing, he learned that his conviction for third-degree sexual assault categorized him as an aggravated felon under federal immigration law, which "essentially end[s] any hope of avoiding deportation." (R. 28:4.) Al Bawi argued that Attorney Goldin was deficient when he told Al Bawi only that he could "potentially" be deported, because "the clear immigration consequence" was "automatically being subject to deportation." (R. 28:9.) And, had Al Bawi known that "this deportation would be essentially automatic," he "would have attempted to negotiate a plea agreement that avoided the aggravated felony conviction" or "insisted on going to trial." (R. 28:10–12.)

Al Bawi attached an affidavit from Attorney Goldin to his postconviction motion. (R. 28:15.) In his affidavit, Goldin averred the following:

- "I told [Al Bawi] on a number of occasions during representation that a guilty plea could potentially make him subject to a deportation";
- "Each time we had this conversation, Mr. Al Bawi responded that he had served with the United States army, and this fact would protect him from deportation"; and
- "To the best of my recollection, I did not perform research on the immigration consequences of this specific criminal conviction, nor did I tell

[2] The notice did *not* provide that Al Bawi would be "removed from the United States" (Al Bawi's Br. 13); it only provided that probable cause exists to begin removal proceedings. (R. 28:17.)

> Mr. Al Bawi that a conviction under this section would make it extremely likely that he would be deported from the United States."

(R. 28:15.)

The State opposed Al Bawi's motion. (R. 33.) It argued that *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93, which analyzed *Padilla v. Kentucky*, 559 U.S. 356 (2010), was "binding authority and directly on point." (R. 33:4.) And, under *Shata,* the question is "not whether or not Mr. Al Bawi knew all of the immigration consequences of entering his plea. The question is whether Attorney Goldin provided either inaccurate information or failed to advise him that a conviction could result in deportation." (R. 33:4 (citing *Shata,* 364 Wis. 2d 63, ¶ 64).) Because it is undisputed that Attorney Goldin advised Al Bawi that he could be deported, and because Attorney Goldwin did not provide any inaccurate information to Al Bawi, the State argued that Al Bawi could not show deficient performance. (R. 33:5.) The State also argued that Al Bawi failed to show prejudice because his motion failed to show that absent the alleged deficient performance, Al Bawi would have chosen to go to trial. (R. 33:6.)

Machner hearing

The court held a *Machner* hearing where both Attorney Goldin and Al Bawi testified. (R. 55.)

Goldin testified every time he discussed Al Bawi's immigration status, Al Bawi informed Goldin that "his immigration status was secure; that he had worked for the military." (R. 55:5.) Regardless of Al Bawi's opinion regarding the security of his immigration status, however, Goldin testified that he "did not defer to it. I always consistently told him that he would be subject to deportation if he entered a plea." (R. 55:13.)

He also testified that he did not recall researching any immigration statutes or the potential immigration consequences of Al Bawi's plea. (R. 55:6, 13.) Goldin testified, however, that at least three or four times he told Al Bawi that "a plea and a conviction could result in his deportation. That was conveyed to him multiple times." (R. 55:6 (*see also* R. 55:8 ("I told him that a conviction could result in his deportation"; "I told him multiple times again that he would be subject to deportation"; and "I would tell him multiple times that this was a serious charge and he would be subject to deportation. . . .").)) Whenever he would tell Al Bawi this, however, Al Bawi would just "brush" it off. (R. 55:8) While Goldin testified it was a concern of his (Goldin's), it "did not appear to be a concern of [Al Bawi's]." (R. 55:9.)

Goldin also testified that because "[t]his was a serious felony-level charge" and he was aware that it was Al Bawi's second felony, Goldin knew that this conviction might be treated differently than a misdemeanor. (R. 55:15.)

When asked about whether he tried to negotiate for a different plea than one that would subject Al Bawi to deportation, Goldin answered:

> [T]here was a lot of give-and-take in this case. There was a lot of negotiating with the prosecutor. I did everything I could to reduce the penalties and the charges. I know I tried to get it down to a misdemeanor, but the State wasn't -- unfortunately, I was not able to do that for Ahmed as I tried.
>
> We were left with what the final offer was, and I think the State was asking for a prison recommendation, as I'm sure the Court recalls, and I think the Court deviated on that to his benefit.

(R. 55:17.) Finally, when asked if Al Bawi ever expressed any concerns that maybe he shouldn't enter a plea because he might be deported, Goldin replied, "No. He was -- he was -- appeared to be fully – he took responsibility. He did not wish that this go to a jury." (R. 55:17–18.)

Al Bawi testified that he talked to Attorney Goldin about the effect of his immigration status two times, once in his office and once before the plea hearing. (R. 55:21.) According to Al Bawi, he asked Goldin, "do you think I'd get deported, even though I worked for the U.S. military?" Goldin replied, "I'm not an immigration lawyer, but I highly doubt it." (R. 55:21.) According to Al Bawi, he (Al Bawi) was not concerned about being deported. (R. 55:22.) And, during Attorney Goldin's representation, "I don't remember if he said anything about deportation." (R. 55:23.) Al Bawi did, however, remember the court warning him about deportation, and he also remembered viewing the deportation warnings in the plea with Attorney Goldin. (R. 55:23.) But, according to Al Bawi, Goldin "didn't tell me anything about them." (R. 55:24.)

Al Bawi testified that if Goldin would have told him "that there was a strong possibility that you would be deported," he would not have entered the plea. (R. 55:24.) Rather, he would have gone to trial or negotiated another plea deal. (R. 55:25–26.) When asked why he would take the risk and go to trial, he replied, "I would take jail time over deportation." (R. 55:26.)

The postconviction court's decision and credibility findings

The court denied Al Bawi's postconviction motion. (R. 40.) It found Attorney Goldin's testimony at the *Machner* hearing "to be the most credible record of the advice he actually provided [to] Al Bawi." (R. 40:7.) Conversely, it found Al Bawi not credible: "The Court does not find Al Bawi's testimony that he was afraid of being deported as a result of entering his plea and that Attorney Goldin did not emphasize the risk of deportation that Al Bawi faced to be credible." (R. 40:7.)

In addition to credibility findings, the court found that Goldin's advice to Al Bawi that he "would be subject to deportation" was "adequate because it accurately reflected

the risk of deportation that Al Bawi faced." (R. 40:7.) The court continued, "Although Attorney Goldin did not offer an opinion on the likelihood of Al Bawi actually being deported, he did advise Al Bawi that deportation was a risk that arose with pleading to the sexual assault charge, and Al Bawi would have to deal with that in immigration court." (R. 40:7.) Therefore, "Al Bawi entered his plea knowing that it was accompanied by the risk of deportation." (R. 40:7.)

The court recognized that while Al Bawi faults Goldin for not researching immigration law which, according to Al Bawi, would have yielded information that Al Bawi was likely to be deported, this "assumes that counsel is deficient unless counsel opines on how likely it is that deportation will actually result in a given case, but no court has held criminal defense counsel to such a standard." (R. 40:7.) Rather, citing *Padilla*, the court noted that "[t]he only time defense attorneys have been found deficient is where their advice on immigration consequences was actually wrong." (R. 40:8.) And here, the court determined, Attorney Goldin's advice was not inaccurate, nor was there an obligation to conduct more research. (R. 40:8.) He therefore did not provide deficient performance. (R. 40:8.)

Regarding prejudice, the court agreed with the State that Al Bawi was not prejudiced "because the outcome of this case was unlikely to be different if Attorney Goldin had given Al Bawi more detailed immigration advice." (R. 40:8.) It noted that Goldin testified that Al Bawi took responsibility for his actions and did not want the case to go to a jury. (R. 40:8.) It also noted that Al Bawi "does not dispute that testimony or claim to have had a defense that was likely to succeed at trial." (R. 40:8.) While the court recognized that Al Bawi testified that he would have been willing to risk a longer sentence after being convicted by a jury if he had known that he faced deportation upon conviction, the court found that "[f]acing the risk of deportation after a jury conviction and a

possibly longer sentence is not a different outcome than facing the risk of deportation upon conviction after entering a plea." (R. 40:8.) Consequently, even if Al Bawi had met his burden and shown that Goldin provided deficient performance, "he has not shown that he was prejudiced." (R. 40:8.)

This appeal follows.

STANDARD OF REVIEW

The issue of whether Al Bawi proved that his plea amounts to a manifest injustice warranting plea withdrawal is left to the sound discretion of the trial court, reviewable for an erroneous exercise thereof. *State v. Lopez,* 2014 WI 11, ¶ 60, 353 Wis. 2d 1, 843 N.W.2d 390.

ARGUMENT

The circuit court properly determined that Al Bawi failed to show by clear and convincing evidence that a manifest injustice would result if plea withdrawal were not permitted.

The only issue on appeal is whether Al Bawi can prove that a manifest injustice will occur if he is not allowed to withdraw his plea. Specifically, did counsel render ineffective assistance of counsel in advising Al Bawi about the deportation consequences of his plea, and, if so, then Al Bawi is entitled to plea withdrawal. Whether or not the federal government will ultimately decide to make the discretionary decision to proceed with Al Bawi's deportation is not before this Court.[3]

[3] As indicated in fn. 2, *supra*, the immigration detainer is not a final order; it is a finding that sufficient "probable cause" exists to begin the removal proceedings. (R. 28:17.)

A. A defendant seeking plea withdrawal after sentencing has a high burden.

A defendant who seeks to withdraw a plea after sentencing has the burden of showing by clear and convincing evidence that a manifest injustice would result if the withdrawal were not permitted. *State v. Savage*, 2020 WI 93, ¶ 24, 395 Wis. 2d 1, 951 N.W.2d 838. "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." *State v. Sulla*, 2016 WI 46, ¶ 24, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). "This means a defendant who pleads guilty must understand both the constitutional rights being relinquished as well as the nature of the crimes to which he or she is pleading." *State v. Hoppe*, 2008 WI App 89, ¶ 10, 312 Wis. 2d 765, 754 N.W.2d 203.

When a defendant asserts his plea was involuntary due to some factor extrinsic to the plea colloquy, such as ineffective assistance of counsel, the *Nelson/Bentley*[4] test applies. *Sulla*, 369 Wis. 2d 225, ¶ 25. To obtain relief under *Nelson/Bentley*, a defendant must show that his attorney's representation was ineffective. *State v. Bentley,* 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) ("[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel."). To establish ineffective assistance of counsel, a defendant must show that the attorney acted deficiently and that he was prejudiced by the attorney's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must prove both components to establish an ineffective assistance of counsel claim. *State v. Jones*, 181 Wis. 2d 194, 199, 510 N.W.2d 784 (Ct. App. 1993).

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[4] *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

Deficient performance occurs when an attorney's errors are so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 688. There is a highly deferential presumption that counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The issue of whether [Al Bawi's] trial counsel performed deficiently hinges on whether he gave [Al Bawi] correct advice regarding the possibility of being deported." *Shata*, 364 Wis. 2d 63, ¶ 36.

In determining prejudice, a "defendant must show that there is 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. "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." *Johnson*, 153 Wis. 2d at 128.

Should this Court determine that Al Bawi failed to prove deficient performance, it does not need to address prejudice. *Shata*, 364 Wis. 2d 63, ¶ 36.

Finally, this Court "will not exclude the circuit court's articulated assessment of credibility and demeanor, unless they are clearly erroneous." *State v. Bucki*, 2020 WI App 43, ¶ 82, 393 Wis. 2d 434, 947 N.W.2d 152 (citation omitted). Indeed, "[a] circuit court's credibility finding is, in most cases, conclusive on appeal." *Id*. ¶ 97.

B. Counsel must inform his or her client whether a plea carries a *risk* of deportation.

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court explained the scope of an attorney's duty to give advice regarding deportation. The defendant in *Padilla* was advised, incorrectly, that he "did not have to worry about immigration status since he had been in the country so long." 559 U.S. at 359. In reality, the plea made his deportation

"virtually mandatory." *Id.* The Supreme Court, accepting the defendant's allegations as true, concluded that this false advice constituted deficient performance. *Id.* at 368–69. The Court explained that "[w]hen 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." *Id.* at 369. "But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* Ultimately, the Supreme Court held "that counsel must inform her client whether his plea carries a *risk* of deportation."[5] *Id.* at 374 (emphasis added).

Five years later, in *Shata*, 364 Wis. 2d 63, the Wisconsin Supreme Court also addressed the scope of an attorney's duty to give accurate deportation advice. In *Shata*, both the defendant and the State agreed that Shata's conviction of possession with intent to deliver marijuana "clearly made him deportable." *Id.* ¶ 57. Shata argued that his trial counsel was deficient because he was required, under *Padilla,* "to tell him that 'his conviction would *absolutely* result in deportation.'" *Id.* ¶ 53 (emphasis added). According to Shata, his attorney told him only that there was "a strong chance" he would be deported. *Id.*

But the Wisconsin Supreme Court disagreed that his attorney's advice constituted deficient performance:

> [W]e conclude that *Padilla* did not require Shata's attorney to tell him that his conviction would absolutely result in deportation. Shata's argument is

[5] The Supreme Court did not address the prejudice prong of *Strickland*, as "it was not passed on below." *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

> inconsistent with [Wis. Stat.] § 971.08.[6] In fact, unlike Padilla's attorney whose advice was absolutely incorrect, Shata's attorney gave him advice that there was a "strong chance" of deportation, which was absolutely correct. Correct advice is not deficient.

Id. ¶ 67 (footnote added).

The *Shata* court also explained that requiring Shata's trial counsel to render advice that Shata *absolutely* would be deported upon pleading guilty "would be incorrect because a defense attorney does not control and cannot know with certainty whether the federal government will deport an alien upon conviction." *Id.* ¶ 71. Rather, "deportation is not an absolutely certain consequence of a conviction for a deportable offense." *Id.* ¶ 60. Therefore, according to our supreme court, the *Padilla* Court simply held that counsel must advise his or her client that his or her plea carries a risk of deportation, but *Padilla* "did *not* hold that an attorney must inform an alien client that a conviction for a deportable offense will absolutely result in deportation," and it "did not require an attorney to use any particular words, such as 'inevitable deportation,' or to even convey the idea of inevitable deportation." *Id.* ¶ 62. Our Supreme Court concluded that under the circumstances

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[6] This statue places "the duty to warn on the circuit court, rather than solely the attorney":

> Before the court accepts a plea of guilty or no contest, it shall . . . [a]ddress the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged *may result* in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

State v. Shata, 2015 WI 74, ¶ 66, 364 Wis. 2d 63, 868 N.W.2d 93 (citing Wis. Stat. § 971.08(1)(c) (2005–06)).

of the case in *Shata*, the defendant's counsel did not perform deficiently in advising the defendant about the risk of deportation because that advice was actually correct. *Id.* ¶¶ 71, 76.

Finally, *Shata* warned against holding criminal defense attorneys to the same standard of subject-matter expertise as immigration attorneys:

> The *Padilla* Court did not require that criminal defense lawyers function as immigration lawyers or be able to predict what the executive branch's immigration policies might be now or in the future. . . . [*Padilla*] noted that "[i]mmigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it." Accordingly, "the Court appears to acknowledge [that] thorough understanding of the intricacies of immigration law is not 'within the range of competence demanded of attorneys in criminal cases.'" "[R]easonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar," such as immigration law.

Shata, 364 Wis. 2d 63, ¶ 63 (citations omitted). Therefore, *Shata* rejected the defendant's claim that his attorney performed deficiently "by not reading the relevant immigration statutes." *Id.* ¶ 75. As this Court recognized in *State v. Villegas*, 2018 WI App 9, ¶ 29, 380 Wis. 2d 246, 908 N.W.2d 198, the defendant in *Shata* "was advised that his plea carried a risk of deportation, and that was enough."[7] *Id.*

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[7] Like the *Padilla* Court, because the *Shata* Court determined that defense counsel did not perform deficiently, it did not address prejudice. *Shata*, 364 Wis. 2d 63, ¶ 56.

In *Villegas*, which involved a DACA[8]-eligible defendant, this Court similarly held that counsel was not ineffective for failing to warn the defendant he would be ineligible for the deferred action program. *Villegas*, 380 Wis. 2d 246, ¶ 34 ("[Defense counsel] simply had no constitutional duty to give specific, direct advice on how pleading guilty would affect [the defendant's] possibilities for readmission beyond the accurate, generalized warnings that were given."). Rather, defense counsel's warning to the defendant that pleading guilty could result in deportation and subsequent inadmissibility was both correct and constitutionally adequate. *Id*. ¶¶ 35, 40.

C. Defense counsel provided no incorrect or inaccurate advice. Conversely, he gave correct advice to Al Bawi's about the risk of deportation, and as provided in *Shata*, "correct advice is not deficient."

Al Bawi argues that trial counsel's conduct "falls short under the standards established under *Padilla* and *Shata*" because he never told Al Bawi that there was "a strong chance" he would be deported[9] for his conviction. (Al Bawi's Br. 24.) Rather, Al Bawi argues, "[a]ll that trial counsel told Al Bawi was that 'he would be subject to deportation.'" (Al

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[8] Deferred Action for Childhood Arrivals.

[9] The Immigration and Nationality Act ("INA") provides that noncitizens, such as Al Bawi, are "deportable" based on a number of criminal offenses, one of which includes "an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii) (providing, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable"). At the time of Al Bawi's plea, aggravated felonies were defined under 8 U.S.C. § 1101(a)(43)(A) as, *inter alia,* "murder, rape, or sexual abuse of a minor." Here, the circuit court found (R. 40:7) that Al Bawi's conviction—third-degree sexual assault—constitutes an aggravated felony under this definition.

Bawi's Br. 23, 24.) According to Al Bawi, "[t]herein lies the deficiency." (Al Bawi's Br. 23.) Al Bawi is incorrect.

While the record indicates that Attorney Goldin did not advise Al Bawi that he had a "strong" chance of being deported, caselaw does not require that. *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. *Padilla*, 559 U.S. at 374. And while *Shata* recognized that the defense counsel in that case warned the defendant that his plea carried a "strong chance" that he would be deported, 364 Wis. 2d 63, ¶ 22, the *Shata* court did not require that specific, "strong chance" warning in all cases. Rather, *Shata* recognized that *Padilla* "did not require an attorney to use any particular words, such as 'inevitable deportation,' or to even convey the idea of inevitable deportation." *Id.* ¶ 62. *Padilla* only "requires that counsel *correctly* advise his client of the *risk* of deportation so that the plea is knowing and voluntary." *Id.* ¶ 62 (quoting *Chacon v. State*, 409 S.W.3d 529, 537 (Mo. Ct. App. 2013)). So just because Attorney Goldin did not use the particular words "strong chance," does not render his performance deficient.

Further, Goldin testified that, as required under *Padilla* and *Shata*, he advised Al Bawi about the risk of deportation:

- "I always consistently told him that he would be subject to deportation if he entered a plea." (R. 55:13.)
- At least three or four times he told Al Bawi that "a plea and a conviction could result in his deportation. That was conveyed to him multiple times." (R. 55:6.)
- "I told him that a conviction could result in his deportation." (R. 55:8.)

- "I told him multiple times again that he would be subject to deportation." (R. 55:8.)
- "I would tell him multiple times that this was a serious charge and he would be subject to deportation." (R. 55:8.)

The court found Goldin's testimony at the *Machner* hearing to be credible. (R. 40:7.) That credibility finding has not been challenged on appeal as clearly erroneous. (Al Bawi's Br. 16–34.) Nor does Al Bawi argue that the court's other credibility finding, finding Al Bawi not credible, to be clearly erroneous: "The Court does not find Al Bawi's testimony that he was afraid of being deported as a result of entering his plea and that Attorney Goldin did not emphasize the risk of deportation that Al Bawi faced to be credible." (R. 40:7.) The circuit court's credibility findings are therefore dispositive on this issue. *See Bucki*, 393 Wis. 2d 434, ¶ 82.

Al Bawi also argues that trial counsel's "failure to perform legal research or to contact other attorneys more experienced" rendered him "unable to offer meaningful advice." (Al Bawi's Br. 24.) While it is true that Attorney Goldwin certainly could have researched the detailed immigration consequences, he was under no constitutional obligation to do so. Indeed, whether Al Bawi's defense counsel did no research on immigration law and contacted no other attorneys on immigration law is not the benchmark for deficient performance. Rather, the issue here hinges on whether Attorney Goldin provided correct advice to Al Bawi about the risk of deportation. *Padilla,* 559 U.S. at 374; *Shata*, 364 Wis. 2d 63, ¶ 36. He did.

While Al Bawi also argues that he "clearly did not have any idea that his plea carried significant immigration consequences" (Al Bawi's Br. 24), the circuit court found this testimony to be incredible. (R. 40:7.) Also, the plea court told him so:

> The Court: Okay. I have to also advise that if you're not a citizen of the United States, your plea could result in deportation, exclusion of admission to the country, or denial of naturalization. Are you aware of that?
>
> [Al Bawi]: Yes, Your Honor.

(R. 53:6.) And, as the Supreme Court recognized in *Shata*, Wis. Stat. § 971.08(1)(c) places "the duty to warn on the circuit court, rather than solely on the attorney." 364 Wis. 2d 63, ¶ 66 (citing Wis. Stat. § 971.08(1)(c) (2005–06)). While Al Bawi claims he did not believe that the court's express warning to Al Bawi *applied* to Al Bawi (Al Bawi's Br. 24), that is an unsupported claim belied by the record.

Al Bawi also argues that Goldin was deficient when he "failed to disabuse Al Bawi of the erroneous belief that, despite his plea, he would not be deported because he had served in the U.S. military." (Al Bawi's Br. 25.) But the record indicates that Goldin tried to disabuse Al Bawi of that belief, several times, but was unsuccessful. (R. 55:12–13.) "I always consistently told him that he would be subject to deportation if he entered a plea." (*Id.*) The court found this testimony credible. (R. 40:7.)

Al Bawi argues that when he told Goldin that his military service would protect him from deportation, Goldin "just took Al Bawi's word for it." (Al Bawi's Br. 25–26.) But Goldin credibly testified otherwise. (R. 55:13.) While Goldin was aware of Al Bawi's opinion about the security of his immigration status, Goldin testified that he "did not defer to it. I always consistently told him that he would be subject to deportation if he entered a plea." (R. 55:13.)

In this case, Attorney Goldin accurately and repeatedly told Al Bawi that he could be deported upon conviction. He did not advise Al Bawi that working for the United States Army was an absolute defense to deportation. He did not tell Al Bawi that asylum status was a bar to deportation

regardless of convictions. Attorney Goldin had no duty to serve as Mr. Al Bawi's immigration attorney; his duty was to correctly advise Al Bawi that a conviction could result in deportation, which he did repeatedly. Further, Attorney Goldin did not provide Al Bawi any inaccurate or incorrect advice. Based on the transcripts, record, and the court's credibility findings, Al Bawi has not met the burden of showing deficient performance. This Court should affirm the postconviction court's decision denying relief.

D. Even if defense counsel provided deficient performance, Al Bawi fails to show that he was prejudiced.

Finally, even if this Court concludes that Al Bawi proved deficient performance, he cannot show any resulting prejudice. In *Padilla*, the United States Supreme Court pointed out that proving prejudice is a high bar, especially in these cases:

> 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.

559 U.S. at 371–72 (emphasis added). *See also Lee v. United States*, 137 S. Ct. 1958 (2017) (providing that to prove prejudice, a defendant must "convince the court that a decision to reject the plea bargain would have been rational under the circumstances"). Ultimately, however, a defendant still must demonstrate a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1969 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Al Bawi argues that he was prejudiced because he "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." (Al Bawi's Br. 32.) But this argument completely ignores the circuit court's credibility finding, which found Al Bawi's testimony to be incredible, and which Al Bawi does not challenge on appeal as clearly erroneous. (R. 40:7; Al Bawi's Br. 16–34.) This credibility finding is dispositive. *See Bucki*, 393 Wis. 2d 434, ¶ 82.

While Al Bawi also argues that "[i]f he had known the immigration consequences, [he] would have taken his case to trial, regardless of how slim his chance of winning might have been," this was not Attorney Goldin's testimony. (Al Bawi's Br. 32.) Goldin, whose testimony the court found credible (R. 40:7), testified that Al Bawi did not want to go to trial (R. 55:18). When asked if Al Bawi ever expressed any concerns that maybe he shouldn't enter a plea because he might be deported, Goldin replied, "No. He was -- he was -- appeared to be fully – he took responsibility. He did not wish that this go to a jury." (R. 55:17–18.) And as the postconviction court found, Al Bawi "does not dispute that testimony." (R. 40:8.) Further, while Al Bawi testified at the *Machner* hearing that he would take the risk and go to trial because he "would take the jail time over deportation" (R. 55:26), that is a false choice. If he went to trial, he may have subjected himself to both "jail time" *and* deportation.

Additionally, whenever Goldin would tell Al Bawi about his concerns about deportation, Al Bawi would just "brush" it off. (R. 55:8.) It "did not appear to be a concern of [Al Bawi's]." (R. 55:9.) Again, these credibility findings are not challenged on appeal. They are dispositive. *See Bucki*, 393 Wis. 2d 434, ¶ 82. Al Bawi therefore fails to demonstrate a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1969 (citation omitted).

Al Bawi also argues that, like the defendant in *Lee*, he "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." (Al Bawi's Br. 31–32.) And "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." (Al Bawi's Br. 32.) Consequently, a choice to "roll the dice" at trial is a rational choice. (*Id*.) Perhaps, but again, Goldin testified that "rolling the dice" at trial was not an option for Al Bawi. Rather, Al Bawi "took responsibility. He did not wish that this go to a jury." (R. 55:18.) Again, the court's credibility findings have not been challenged on appeal.

Finally, Al Bawi also argues that he "did not get a substantial benefit out of his plea that he would have lost by going to trial." (Al Bawi's Br. 32.) He notes that the State did not amend the charge to a lesser offense, that the State "said nothing on the record to suggest that its sentencing recommendation would have been any different had the matter gone to trial," and that it was not likely that the court would impose a more significant sentence had Al Bawi gone to trial. (*Id*.) But had Al Bawi gone to trial and forced the victim to provide extremely damaging testimony, it's unfathomable that the State would not have requested a harsher sentence, especially considering that this was not Al Bawi's first felony conviction. But more importantly, had Al Bawi been convicted after a trial, he would not have eliminated, or even reduced, his chances of being deportable. As the postconviction court opined, "[f]acing the risk of deportation after a jury conviction and a possibly longer sentence is not a different outcome than facing the risk of deportation upon conviction after entering a plea." (R. 40:8.) Nothing leads to the conclusion that a rational defendant in Al Bawi's position would have proceeded to trial.

In sum, unlike the defendant in *Lee*, Al Bawi's claim that he would not have accepted a plea had he known it would lead to deportation is not "backed by substantial and uncontroverted evidence." *Lee*, 137 S. Ct. at 1969. Goldin's testimony alone defeats Al Bawi's claim. Al Bawi fails to demonstrate a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (citation omitted).

CONCLUSION

Al Bawi is not entitled to withdraw his plea because he has failed to show that counsel rendered deficient performance and that he was prejudiced as a result. Attorney Goldin provided no incorrect legal advice about the risk of deportation. Rather, he correctly informed Al Bawi multiple times that pleading guilty could result in deportation. This warning was a correct statement of the law and constitutionally adequate. This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 20th day of August 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,328 words.

Dated this 20th day of August 2021.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of August 2021.

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