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 RESPONSE TO PLAINTIFF-RESPONDENT'S BRIEF

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I. The State applies the wrong standard to analyze constitutionally sufficient advice.

The State argues that *Padilla* and *Shata* stand for the proposition that defense counsel is never deficient, in any case—regardless of the criminal charges, immigration consequences, or any other context—if he or she simply gives the generalized warning that a plea "carried a risk of deportation." *See* State's Brief, at 18. This is not the standard the United States Supreme Court established in *Padilla*. Rather, *Padilla* explicitly rejects this one size fits all approach, differentiating between counsel's duty when an immigration consequence is clear versus unclear. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Specifically, where an immigration consequence of a plea is unclear, counsel "need do no more" than provide the extremely generalized advisal proposed by the State in its response brief. *Id.* However, when the immigration consequence of a conviction is "truly clear," the Supreme Court mandates that providing generalized advice is not a sufficient warning because the "duty to give correct advice is equally clear." *Id.*

The trial judge in Al Bawi's case held that the immigration consequences of his third-degree sexual assault conviction were clear (R.41:7; A-Ap 11), and Al Bawi argued for the same conclusion in his opening brief. Al Bawi's Brief, at 19-21. By failing to contest the trial court's finding or Al Bawi's argument on this point, the State has conceded it here. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Therefore, given that the immigration consequence in Al Bawi's case is truly clear, the only remaining question related to deficiency is whether trial counsel provided equally clear advice.

A. Under the standard established by *Padilla* and *Shata*, trial counsel's advice to Al Bawi was deficient

i. The circuit court's credibility determination is not dispositive of this case

As a preliminary matter, throughout its brief, the State relies heavily on a credibility determination made by the trial court judge. While the trial court found that trial counsel's testimony regarding the advice given was the most credible version of events, that is certainly not dispositive in this case.

Contrary to the State's suggestion, the trial court did not find Al Bawi's testimony wholly incredible. Indeed, the only time the trial court wrote about credibility is when it was discerning as a matter of fact what advice trial counsel gave Al Bawi. (R. 41:6-7; A-Ap 11-12.) And even then, the circuit court made only two findings. First, that "the most credible record *of the advice* [trial counsel] actually provided Al Bawi" was counsel's "*Machner* hearing testimony." (R. 41:7; A-Ap. 11 (emphasis added).) And second, that Al Bawi's testified-to fear of deportation at the time of entering the guilty plea and the suggestion that trial counsel "did not emphasize the risk of deportation" were not credible. (*Id.*)

The State conflates this factual determination with a finding that trial counsel provided constitutionally sufficient advice. But the circuit court's factual findings do not, per se, establish the reasonableness of counsel's advice. Rather, "whether trial counsel rendered constitutionally ineffective advice presents a question of law." *State v. Bucki,* 2020 WI App 43, ¶ 82, 393 Wis. 2d 434, 947 N.W.2d 152. Therefore, the simple fact that the trial court made a credibility determination does not dispose of this

case; what is important is an evaluation of the advice that trial counsel gave under the standard set in *Shata* and *Padilla.*

ii. General advice is not enough to meet the standard.

In *Padilla*, the Supreme Court found that the immigration consequences of a drug conviction felony were truly clear, and that advice not to worry about a deportation was obviously not "truly clear." 559 U.S. at 368-69. However, the *Padilla* court specifically held that this finding was "not limited to affirmative misadvice,"considering that boiler plate, generalized advice is itself not "truly clear" to be constitutionally sufficient. *Id.* at 371-72.

Although no Wisconsin case has directly spelled out the threshhold of what constitutes "truly clear" advice, Wisconsin case law provides enough examples of constitutionally sufficient and insufficient advice consistent with the standard established by *Padilla* to establish that trial counsel's advice was insufficient.

For example, where the deportation consequence was clear in *State v. Shata,* counsel was found to have offered sufficient advice by informing his client that there was a "strong chance" he would be deported, along with performing other research and assessment. 2015 WI 73, ¶ 5, 75, 364 Wis.2d 63, 868 N.W.2d 93. On the other hand, in *State v. Mendez,* counsel was found to have offered deficient advice by only suggesting that the client "may" be subject to deportation, when in fact the immigration consequences were clear. 2014 WI App 57, ¶ 4, 14, 354 Wis.2d 88, 847 N.W.2d 895. Each of these cases reinforce the proposition that counsel has a duty to provide meaningful advice beyond general warnings regarding a risk of deportation in cases involving clear consequences. Put another way, "may" be deported is not meaningful advice, but "strong chance" of

deportation is. *See also State v. Villegas,* 2018 WI App 9, ¶ 31, 380 Wis.2d 246, 908 N.W.2d 198.

The State relies on another case, *State v. Villegas,* to suggest that trial counsel in Al Bawi's case had "no constitutional duty to give specific, direct advice…beyond the accurate, generalized warnings that were given." State's Brief, P. 19 (quoting *State v. Villegas,* 2018 WI App 9, ¶ 35, 40). However, this quote from *Villegas* is an out of context mischaracterization, implicating a false conclusion that is the exact opposite of the actual holding in that case.

Villegas did not hold that generalized advice is sufficient in any case; rather, the holding makes clear that "*Shata and Ortiz-Mondragon* stand for the proposition that *where the law is not 'succinct, clear, and explicit,'* counsel is not deficient by accurately warning a client of the 'risk of adverse immigration consequences.'" *Villegas,* ¶ 31 (quoting *State v. Ortiz-Mondragon,* 2015 WI 73, ¶ 69, 364 Wis.2d 1, 855 N.W.2d 717) (emphasis added). The court then went on to explain that the relevant immigration consequence implicated by the criminal conviction (loss of Deferred Action for Childhood Arrivals status, or DACA) is <u>not</u> clear, as it is "an exercise of prosecutorial discretion by the executive branch that can be changed at any time." *Villegas,* ¶ 36. "In view of these principles," general advice from counsel on the risk of deportation was sufficient in that case. *Id.* at ¶ 31.

Conversely, in Al Bawi's case, the trial judge already found that deportation consequences related to a plea to third-degree sexual assault were "succinct, clear, and explicit." Al Bawi explained that finding in his opening brief and detailed how his crime, as an "aggravated felony," clearly makes deportable. Al Bawi's Brief, at 19-20. The constant changes and uncertainty involving DACA that were integral to *Villegas*'s holding

are simply not applicable in Al Bawi's case. Whereas *Villegas* explicitly limits the sufficiency of generalized advice to cases in which the immigration consequences are not succinct, clear, and explicit, the holding in *Villegas* actually stands for the opposite point the State attempts to make.

The State further points to multiple instances where trial counsel advised Al Bawi that he "would be subject to deportation" and his conviction "could result in his deportation" to suggest that the advice was sufficient, stating that *Padilla* requires only that counsel advise his client of the risk of deportation. State's Brief, at 20 ("Further, Goldin testified that, as required under *Padilla* and *Shata* he advised Al Bawi about the risk of deportation.") In fact, what *Padilla* actually requires is for counsel to "*correctly* advise his client of the risk of deportation." 559 U.S. at 374 (emphasis added). Given that the deportation consequence in this case was truly clear, the sort of general advice offered by trial counsel did not "correctly advise" Al Bawi of his risk of deportation.

Al Bawi has at no point argued that trial counsel was required to inform him that deportation was absolutely certain, nor to use any specific language or take any particular action in advising him of potential consequences. Rather, the language used and additional research done by the attorney in *Shata* provide examples of what non-deficient trial counsel could have done in contrast to the advice actually given in this case.

Furthermore, the mere fact that Al Bawi signed the plea form including immigration warnings and was given the standard warning by the judge is not enough to make up for trial counsel's deficiencies. General warnings given by the court do not relieve counsel of their duty to provide their clients with meaningful advice regarding potential

deportation consequences. It is "quintessentially the duty of counsel to provide [his] client with available advice about an issue like deportation, and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis."' *Padilla,* 559 U.S. at 371 (quoting *Hill v. Lockhart,* 474 U.S. 52, 62 (1985) (White, J., concurring in judgment)). Trial counsel in this case failed to offer any meaningful advice and failed to disabuse Mr. Al Bawi of the erroneous belief that his military service would protect him from deportation. A standard warning recited by the judge does not cure this deficiency.

B. Avoiding affirmative misadvice is not enough to establish constitutionally sufficient advice

Finally, counsel cannot meet the standard to establish constitutionally sufficient advice by simply avoiding affirmative misadvice. *Padilla* explicitly states that limiting deficient advice only to affirmative misadvice is "absurd" as it encourages attorneys to stay silent on the matter of immigration consequences. 559 U.S. at 370. Encouraging counsel to remain silent on "matters of great importance" is "fundamentally at odds with the critical obligation of counsel to advise the client." *Id.*

Furthermore, the Wisconsin Supreme Court has found attorneys ineffective for offering advice which was not affirmatively incorrect. Trial counsel in *State v. Mendez* advised his client that "a conviction may make [the defendant] inadmissible or deportable." ¶ 4. The Wisconsin Supreme Court found this advice deficient, and even went so far as to suggest that a stronger warning that a defendant "would very likely be deported" was also not sufficiently clear under the circumstances. *Id.* at ¶ 13-14. While *Shata* reined in some aspects of *Mendez,* it specifically left intact this

portion of the holding, clearly establishing that affirmative misadvice is not the only deficient advice counsel can offer. *See Shata*, ¶ 78.

II. The State's brief misstates the standard for showing prejudice

Despite acknowledging that *Lee v. United States* establishes a standard of "rational under the circumstances" when evaluating prejudice, instead of focusing on the surrounding circumstances that may have affected Al Bawi's thought process, the State evaluates rationality by assessing Al Bawi's chances at trial and the likely outcome of his case had it proceeded to trial. State's Brief, at 24-25. In so doing, the State suggests that Al Bawi was not prejudiced because it is "unfathomable" that he would not have received a harsher sentence at trial simply based on the need for the victim to give testimony. State's Brief, at 25. That argument misses the mark. First, to suggest that the court could have sentenced Al Bawi more harshly for going to trial is contrary to the well-established law one cannot be punished for exercising their right to trial. *Cresci v. State* 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979) ("While the waiver of a constitutional right may be taken into account in mitigation, its invocation may not be used in aggravation of the sentence."). Second, *Lee* recognized that the likely outcome of trial is not dispositive of prejudice in cases like Al Bawi's involving the failure to give correct immigration advice. By not rightly applying the standard established in *Lee*, the State improperly assesses whether Al Bawi suffered prejudice.

A. *Lee v. United States* is controlling law on cases involving deficient advice

Where a defendant has been provided with deficient advice regarding a risk of deportation, the relevant inquiry to establish prejudice is whether the defendant's decision to reject the plea bargain was rational

under the circumstances. *Lee v. United States,* 137 S.Ct. 1958 (2017); *Padilla,* 559 U.S. at 371-72. In assessing rationality, the defendant's particular circumstances, rather than his prospects of success at trial are to be assessed. *See Lee,* 137 S.Ct. at 1965.

The State's evaluation of rationality based on Al Bawi's chances at trial seems to be based upon the Sixth Circuit conclusion that "no rational defendant" facing overwhelming evidence would go to trial rather than take a plea deal with a shorter prison sentence. *Lee v. United States,* 825 F.3d 311, 314 (6th Cir. 2016). However, the Supreme Court's decision in *Lee* specifically overrules this determination, instead establishing that the proper inquiry "does not ask whether had [the defendant] gone to trial, the result of the trial would have been different than the result of the plea bargain." *Lee,* 137 S.Ct. at 1965. As such, in order to demonstrate that his decision was rational under the circumstances, Mr. Al Bawi need not show that he would be better off going to trial. *Id.*

B. The circuit court made no explicit credibility finding related to prejudice

The State bases its argument related to prejudice entirely upon the testimony of trial counsel, relying on the credibility determination made by the trial court judge, stating it is dispositive. *See* State's Brief, at 24.

However, as explained above, the trial court's credibility determination was limited to the matter of trial counsel's advice. It does not mention prejudice or assess credibility in light of the related testimony. Therefore, it is incorrect to rely only on the testimony of trial counsel in assessing prejudice. Indeed, the trial court made no finding rejecting Al Bawi's testimony regarding the danger he faces in his home country. Again, the State pushes the trial court's deficiency-based credibility

determination too far. The trial court's stated credibility determination is simply not dispositve of whether Al Bawi was prejudiced by trial counsel's deficient advice.

C. Basing a prejudice finding on Al Bawi's perspective at the time of his plea alone necessarily ignores that his perspective then was informed by *erroneous* legal advice.

Finally, the State suggests that Al Bawi has not proved prejudice since he testified that he was not concerned about deportation at the time of his plea and trial counsel testified Al Bawi did not wish to go to trial. However, this argument assumes that Al Bawi was given sufficient advice and relied on that advice in assessing his risk of deportation.

Al Bawi's thought process at the time of the plea, under inaccurate advice, cannot possibly control what he would have done if given correct advice. This is precisely why counsel's advice is so important, as "but for his attorney's incompetence, [Al Bawi] would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly… That almost could make all the difference." *Lee,* 137 S.Ct. at 1968-69 (emphasis in original).

As such, the relevant question is not what Al Bawi's thought process was at the time of the plea, but rather—as established in *Lee*—whether taking his case to trial would have been rational had he been rightly advised of the immigration consequences that he faced. Given the circumstances discussed in Al Bawi's initial brief, including the threat to his life he faces upon return to Iraq, it would have been rational for Al Bawi to take his case to trial had he been properly informed.

CONCLUSION

Mr. Al Bawi should be allowed to withdraw his plea based on the above stated reasons and asks this Court to so hold.

Dated this 20th day of September, 2021.

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RULE 809.19(8g)(a) 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. The length of this brief is 2,614 words, as counted by the commercially available word processor Microsoft Word.

Dated this 20th day of September, 2021.

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