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STATE OF WISCONSIN  
SUPREME COURT

Appeal No. 2021AP432-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

-vs.-

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

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ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON MARCH 2, 2020, AND  
THE ORDER DENYING GUILTY PLEA WITHDRAWAL FILED ON FEBRUARY 23, 2021, IN  
THE OUTAGAMIE COUNTY CIRCUIT COURT,  
THE HONORABLE CARRIE SCHNEIDER, PRESIDING  
OUTAGAMIE COUNTY CASE No. 2088-CF-669

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PETITION FOR REVIEW

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### **STATEMENT OF THE ISSUE**

#### **Background**

Petitioner Ahmed Al Bawi is a noncitizen. In 2019 and on the advice of counsel, he plead guilty to a crime that will result in his automatic deportation from the country. In postconviction proceedings, Al Bawi contested the effectiveness of his trial counsel on the ground that he'd not been rightly informed that his plea would result in his automatic deportation. Instead, he claimed, his attorney's advice was unclear on that score. Although the possibility of deportation was raised by counsel, that was all Al Bawi was told: that his plea may result in removal. Al Bawi protested that advice as insufficient under controlling United States Supreme Court precedent.

The circuit court and the court of appeals alike rejected that claim. Both courts relied on this Court's decision in *State v. Shata*, 2015 WI 74, 364 Wis.2d 63, 868 N.W.2d 93, to hold that the advice Al Bawi was given was sufficient to render constitutionally effective assistance.

Issue presented

Whether Al Bawi's counsel performed ineffectively under controlling Supreme Court precedent when counseling him to take a plea that will clearly result in his automatic deportation without informing him of anything other than that deportation was a possible consequence of his plea?

As mentioned, the circuit court and court of appeals answered no. This Court should answer yes.

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**STATEMENT OF CRITERIA FOR REVIEW**

This Court's review is appropriate. As more fully explained below, this petition meets the following criteria for review by this Court:

1. The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority. Wis. Stat. § 809.62(1r)(b).
2. The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court, specifically *Padilla v. Kentucky*, 559 U.S. 356 (2010) . Wis. Stat. § 809.62(1r)(d).
3. The case presents real and significant questions of federal or state constitutional law. *Id.*.
4. Resolution will require this Court to clarify a question of federal law that will have a real and significant impact on the representation of noncitizen criminal defendants throughout the State. Wis. Stat. § 809.62(1r)(a), (c) .

Review is therefore appropriate.

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### **STATEMENT OF THE CASE**

This petition for review is made following a decision by the Court of Appeals, District III, affirming the circuit court's denial of noncitizen Ahmed Al Bawi's motion for postconviction relief. *State v. Al Bawi*, No. 2021AP432-CR, ¶2 (Wis. Ct. App. Jan. 18, 2023); (P-Ap 3). The Court of Appeals held that Outagamie County Judge Carrie Schneider correctly concluded that, while the immigration consequences of Ahmed Al Bawi's criminal conviction were clear, Al Bawi received constitutionally sufficient advice of these consequences from his previous criminal defense attorney when that attorney said that Al Bawi "would" or "could be subject to deportation." *Id.* ¶¶2, 22, 27; (P-Ap 4, 12, 15-16.)

Following the receipt of this advice, Al Bawi plead guilty and was sentenced to prison. (R. 52:22.) After his conviction and during his period of confinement, Al Bawi received a "detainer" notice from Immigration and Customs Enforcement (ICE), stating that ICE intended to affect his removal from the United States following the completion of his period of confinement. (R:29:17). Al Bawi filed a motion for postconviction relief, which was denied following an evidentiary hearing before the circuit court. As noted above, the Court of Appeals upheld the circuit court's ruling on Al Bawi's motion for postconviction relief. *See generally Al Bawi*, No. 2021AP432-CR (P-Ap 3-23). He now asks this Court to review the court of appeals' decision so that it can resolve the issues around *Padilla* and *Shata*.

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## ARGUMENT

**I. Review is appropriate so that this Court may determine whether *State v. Shata* correctly interprets the Supreme Court’s decision *Padilla v. Kentucky*.**

The Sixth Amendment requires counsel to advise noncitizen clients about potential immigration consequences of a conviction. *See Padilla*, 559 U.S. at 366. 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 noncitizen 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 rejecting Al Bawi’s appeal, the court of appeals rested its decision on this Court’s interpretation of *Padilla*. *See Al Bawi*, 2021AP432, ¶2 (citing *State v. Shata*, 2015 WI 74, ¶67); (P-Ap at 4.). Specifically, the court of appeals cited *Shata* for the proposition that “an attorney does not perform deficiently by correctly advising a criminal defendant there is a risk of deportation” as a result of his or her guilty or no-contest plea. *Id.* (“Correct advice is not deficient.”).

*Shata* held that defense counsel is never required “to use any particular words” when explaining the immigration consequences of a plea. 2015 WI 74, ¶62. In so doing, this Court interpreted *Padilla* as “suggest[ing] that an attorney would give reasonably competent advice by providing a warning similar to the one that WIS. STAT. § 971.08 requires a circuit court to give: that an alien’s conviction may result in deportation.” *Id.* at ¶65. According to this Court, Section 971.08 “codified the protections of *Padilla*,” meaning that defense counsel is therefore not required to express certainty that a guilty plea would result in deportation. *Id.* at ¶66.

Insofar as *Shata* held that defense counsel may simply repeat the language of Section 971.08 or its equivalent to provide competent advice to noncitizen

defendants facing clear deportation consequences, this holding appears to be in direct contravention of the Supreme Court's holding in *Padilla*. Namely, *Padilla* determined that the actual scope of advice necessary is dependent upon the clarity of the immigration consequence. *Padilla*, 559 U.S. at 369. If immigration consequences are "unclear or uncertain," counsel must only advise a noncitizen client that a conviction "may" carry immigration consequences. *Id.* In such circumstances, giving Section 971.08 advice seems sufficient. However, where "the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.*

In making this holding, the Supreme Court did not directly specify what language constitutes "correct" advice to a clear consequence. However, the Court did specify what falls short: when defense counsel chooses to "do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* This type of open-ended, blanket advice to a noncitizen client is exactly what is codified under Section 971.08. Therefore, to the extent that *Shata* holds that defense counsel's repetition of Wisconsin's statutory warning to every noncitizen defendant regardless of the immigration consequence satisfies *Padilla*, its holding appears to be in direct contravention to Supreme Court precedent. For that reason, this Court should grant review to determine whether *Shata* correctly interpreted *Padilla*, and thus whether the advice that Al Bawi received amounts to ineffective assistance.

**II. Review is appropriate so that this Court can address questions that remain unanswered by *Shata*, including what specific level of advice defense counsel is required to give and how defense counsel's performance in arriving at that advice factors into the deficiency analysis.**

As detailed in the preceding section, Al Bawi takes the position that *Shata*'s reasoning did not rightly keep separate instances in which the immigration

consequences of a plea are clear and those in which they are unclear. As a result, says Al Bawi, *Shata* conflated *Padilla*'s differentiation of the advice due on differing immigration consequences into a single rule that makes the advice for unclear consequences sufficient across the board. But even if this Court disagrees with that position and believes that *Shata* rightly parsed *Padilla*, reviewing Al Bawi's case will still meaningfully advance the case law concerning what defense counsel must do to be constitutionally effective when advising a noncitizen about the clear immigration consequences of their plea.

Wisconsin case law has interpreted *Padilla* in various contexts which establish fact-specific examples of what is or is not correct advice to clear consequences. *See, e.g., Shata*, 2015 WI 74, ¶¶19-22; *State v. Mendez*, 2014 WI App 57, ¶¶4-5, 354 Wis.2d 88, 847 N.W.2d 895; *see also Salazar v. State*, 361 S.W.3d 99, 101 (Tex. App. 2011) (distinguished in *Shata*, 2015 WI 74, ¶72).

But those cases have yet to establish a workable rule by which the bench and bar alike can discern, qualitatively, the sufficiency of the advice given and the related effectiveness of counsel's performance. Instead, they serve merely as bookends to what is or is not sufficient advice, leaving considerable gray area in between.

For example, in *Shata*, this Court contrasted the advice given by that defense attorney ("strong chance of deportation") from advice given in other cases including *Salazar* ("a possibility" of deportation) and *Mendez* ("a conviction may make [the defendant] inadmissible or deportable"). *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 74, ¶62. And, *Shata* pointed out, 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. So, according to *Shata*, advising a noncitizen that there's a "strong chance" they'll be deported is correct and satisfies *Padilla*. *Id.*

*Shata*'s interpretation of *State v. Mendez* provides a further guidepost for what constitutes correct advice. In *Mendez*, trial counsel declined to give any warnings beyond telling the immigrant client that "a conviction may make [the defendant] inadmissible or deportable." *Mendez*, 2014 WI App 57, ¶4. The court of appeals 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. *Id.* at ¶13.

But *Shata* reined in *Mendez*'s holding, making clear that an advisal of 100% certainty of deportation is not required. 2015 WI 74, ¶78 ("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"). Despite limiting that part of *Mendez*, *Shata* determined that "the remainder of *Mendez* retains precedential value." *Id.* In so doing, *Shata* interpreted *Padilla* as not requiring an ironclad warning that a criminal conviction will 100% result in a deportation, but nonetheless left open the possibility that there must be some degree of probabilistic warning as to the likelihood of deportation beyond a simple warning that a conviction "may" make a noncitizen deportable. But where that line gets drawn is presently unclear.

Interestingly, *Shata* 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*, this 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.* ¶22. *Shata*'s inclusion of that analysis causes some confusion as to what matters in the deficiency analysis: is the advice all that matters or does a reviewing court also assess the manner by which defense counsel arrived at that advice? In other words, does defense counsel's failure to investigate or research immigration consequences factor into the deficiency analysis? Can a defense attorney who gets right the advice still be deficient if that advice was dumb luck and not the result of objectively reasonable lawyering? Or is a reviewing court only to look at what the attorney told the noncitizen defendant?

In Al Bawi's case, trial counsel testified that he conducted no research and consulted with no attorney with specialized immigration knowledge; in addition, he testified to using at least three 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"). In his appeal, Al Bawi argued that this language does not constitute correct advice, because none of these phrases provide any real assessment of the risk of deportation from this conviction, rather placing it somewhere between 0% and 100%. As Al Bawi argued, that sort of advice is no different than simply telling him that his conviction "may make" him deportable, which *Shata* itself indicates is deficient advice.

In the history of published Wisconsin cases, there are examples of what does not constitute deficient legal advice: in *Shata*, a warning of a "strong chance" of deportation was found sufficient; in *Shata*'s interpretation of *Mendez*, a failure to "advise an alien client that a conviction for a deportable offense will necessarily result in deportation" was found to be an unnecessarily high standard. However,

this line of cases does not define qualitatively what level of advice is actually required and what benchmarks may be used by defense counsel and noncitizen clients alike to ensure that defense counsel's advice satisfied the standard in *Padilla*.

This Court's review of Al Bawi's case will allow it to clarify what defense counsel must do to effectively advise a noncitizen about the immigration consequences of their plea. Rather than being another bookend, this Court can set the parameters for sufficient advice. It can determine: what advice satisfies a defense attorney's "truly clear" duty to provide correct legal advice. Surely this Court can resolve what sort of probabilistic warning is required under *Padilla* when immigration consequences are clear. And, this Court can address how defense counsel's objectively unreasonable failure to conduct research, read relevant statutes, and conference with immigration practitioners factors into the sufficiency of his or her immigration advice.

Al Bawi's case thus presents this Court with a good opportunity to address questions left unanswered by *Shata*. He urges this Court to grant review.

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### **CONCLUSION**

For the aforementioned reasons, Al Bawi respectfully requests that this Court grant his petition for review based on the facts and argument set forth above.

Dated this 16<sup>th</sup> day of February, 2023.

Respectfully submitted by,

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Kevin Layde

Attorney for the Defendant-Appellant-Petitioner

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**CERTIFICATION**

I certify that this petition conforms to the rules contained in Section 809.19(8)(b) and (c) for a petition 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 petition is 2,359 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 16<sup>th</sup> day of February, 2023.

Respectfully submitted by,

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Kevin Layde

Attorney for the Defendant-Appellant-Petitioner

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**CERTIFICATION OF APPENDIX CONTENT**

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, 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 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.

Dated this 16<sup>th</sup> day of February, 2023.

Respectfully submitted by,

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