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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP432-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

AHMED A.M. AL BAWI,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING A PETITION FOR REVIEW

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INTRODUCTION

Ahmed Al Bawi seeks reversal of the court of appeals' opinion in *State v. Ahmed A.M. Al Bawi*, 2021AP432-CR, 2023 WL 241129 (Wis. Ct. App. Jan. 18, 2023) (unpublished). (Pet-App. 3–22.) Al Bawi, an Iraqi citizen, pleaded no-contest to third-degree sexual assault. On appeal, Al Bawi argued that he should be able to withdraw his plea because counsel provided ineffective assistance when he failed to (1) provide Al Bawi with a “probabilistic assessment” of the risk that he would “actually encounter immigration consequences”; and (2) research or consult with an immigration attorney about the likelihood of deportation. (Pet-App. 4.) The court of appeals rejected Al Bawi's arguments, concluding that there was no deficiency. (Pet-App. 19, 21.) First, counsel “correctly advised Al Bawi that he ‘would be subject to deportation’ as a result of his no-contest plea and that he ‘would have to deal with [the possibility of deportation] in immigration court.’” (Pet-App. 19.) Second, counsel “provided correct advice by warning Al Bawi that he ‘would be subject to deportation,’” and so counsel did not perform deficiently by failing to research or consult with an immigration attorney. (Pet-App. 21.) Relying on *State v. Shata*, 2015 WI 74, ¶ 67, 364 Wis. 2d 63, 868 N.W.2d 93, the court reiterated that “[c]orrect advice is not deficient.” (Pet-App. 4.) Because the court of appeals applied the correct controlling caselaw to the facts of the case, this Court should deny Al Bawi's petition.

RESPONSE TO PETITION

The State opposes Al Bawi's petition for the additional following grounds:

1. At the plea hearing, the circuit 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.) And, at the *Machner* hearing, trial counsel (whom the circuit court found to be credible) testified that he “consistently told [Al Bawi] that he would be subject to deportation if he entered a plea.” (R. 55:13.)

2. The issue in this case has already been decided in *Shata*, 364 Wis. 2d 63. There, this Court held that when an attorney must advise a client about the risk of adverse immigration consequences from a conviction, the attorney must provide correct legal advice. *Id.* ¶ 58; *see also Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Here, as the court of appeals found, counsel “provided Al Bawi with sufficiently correct legal advice regarding the deportation consequences of his plea, such that counsel met the constitutional requirements under *Padilla* and *Shata*.” (Pet-App. 15–16.)

3. As recognized in *Shata*, *Padilla* does not require that counsel use specific words to communicate to a defendant the consequences of entering a guilty plea. Rather, *Padilla* 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 (emphasis added).

4. The court of appeals in this case correctly determined that “[c]ounsel was not required to use any particular words, such as ‘very likely’ or ‘strong chance,’ to quantify the risk when advising Al Bawi on the deportation consequences of his plea.” (Pet-App. 4.) Here, trial counsel correctly and repeatedly told Al Bawi that he could be deported upon conviction. (R. 55:13.)

5. *Shata* did not leave any “gray area.” (Pet. 8.) *Shata* was specific in providing that counsel’s duty is to “*correctly* advise his client of the *risk* of deportation so that the plea is knowing and voluntary.” 364 Wis. 2d 63, ¶ 62. As

the court of appeals concluded in this case, counsel performed that duty. (Pet-App. 4, 21.)

6. While Al Bawi seeks review to “set the parameters for sufficient advice” (Pet. 11), parameters were already set in *Shata*. And as this Court confirmed as recently as 2018, in *Villegas. State v. Villegas*, 2018 WI App 9, ¶ 29, 380 Wis. 2d 246, 908 N.W.2d 198 (emphasis added) (the defendant in *Shata* “was advised that his plea carried a risk of deportation, *and that was enough.*”).

7. This Court also does not need to review the issue of counsel’s alleged “objectively unreasonable failure to conduct” research. (Pet. 11.) As the court of appeals determined, “counsel did not perform deficiently by not researching the relevant immigration law” because counsel “correctly warned Al Bawi that he ‘would be subject to deportation’ as a result of his no-contest plea.” (Pet-App. 21.)

8. Next, although the court of appeals decided Al Bawi’s claim solely on *Strickland’s* deficiency prong, the circuit court correctly concluded that Al Bawi also failed to prove prejudice “because the outcome of this case was unlikely to be different if [trial counsel] had given Al Bawi more detailed immigration advice.” (Pet-App. 9.) This conclusion is correct. The record shows that whenever defense counsel did discuss his concerns with Al Bawi about deportation, Al Bawi would just “brush[] it off.”¹ (R. 55:8.) It “did not appear to be a concern of [Al Bawi’s].” (R. 55:9.) When asked if Al Bawi ever expressed any concerns that maybe he should *not* enter a plea because he might be deported, his defense attorney replied, “No. He was - - he was - - appeared to be fully - - he took

¹ Again, the circuit court found defense counsel credible and Al Bawi to be incredible. (R. 40:7.) “A circuit court’s credibility finding is, in most cases, conclusive on appeal.” *State v. Bucki*, 2020 WI App 43, ¶ 97, 393 Wis. 2d 434, 947 N.W.2d 152. And here, Al Bawi did not challenge the court’s credibility findings.

responsibility. He did not wish that this go to a jury.” (R. 55:17–18.) And as the circuit court found, Al Bawi did “not dispute that testimony.” (R. 40:8.)

9. Also, Al Bawi cannot prove prejudice because as the circuit court found, “[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.) So, regardless of his deficiency claim, Al Bawi also loses because he failed 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 v. United States*, 137 S. Ct. 1958, 1969 (2017) (citation omitted).

10. In the end, Al Bawi’s petition is an assault on *Shata*, as opposed to the court of appeals’ decision in *his* case. (Pet-App. 6–13.) His argument for review is that *Shata* incorrectly applied *Padilla*, and that he loses under *Shata*. (Pet. 7.) But *Shata* controls. And neither *Shata* nor *Padilla* require counsel to use specific words to communicate to a defendant the consequences of entering a guilty or no-contest plea.

CONCLUSION

This Court should deny and dismiss Al Bawi's petition for review.

Dated this 1st day of March 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,159 words.

Dated this 1st day of March 2023.



SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 1st day of March 2023.



SARA LYNN SHAEFFER
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