UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HATEM M. SHATA,

Petitioner,

v. **Case No. 16-CV-574**

DENISE SYMDON,

Respondent.

DECISION AND ORDER
GRANTING PETITION FOR WRIT OF HABEAS CORPUS

In 2012, Hatem M. Shata, a noncitizen of the United States, pled guilty in Wisconsin state court to an offense that made him subject to automatic deportation. Prior to entering that plea, Mr. Shata's lawyer advised him only that there was a strong chance he would be deported. Mr. Shata subsequently sought to withdraw his plea, arguing that his lawyer's advice was insufficient under the standard set forth in *Padilla v. Kentucky*.[1] Ultimately, the Wisconsin Supreme Court ruled that Mr. Shata was not entitled to withdraw his plea because his lawyer's advice about the deportation consequences of his plea was correct.

While serving the extended supervision portion of his sentence, in 2016, Mr. Shata filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that his custody is unconstitutional because his trial lawyer provided

[1] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

constitutionally ineffective assistance. Denise Symdon, the administrator of Wisconsin's Division of Community Corrections, maintains that Mr. Shata has not satisfied his burden of proving that his claim merits relief under the deferential standards set forth in § 2254. The Court disagrees. Because the state court's decision denying the ineffective assistance claim was objectively unreasonable, and because Mr. Shata's trial lawyer was ineffective under *Padilla*, Mr. Shata is entitled to relief under § 2254. The Court therefore will grant his federal habeas petition.

I. Background

Hatem M. Shata was born in Egypt, but he has been living in the United States since 1991. *See* Exhibit 8 to Answer to Petition for a Writ of Habeas Corpus ¶ 6, ECF No. 9-8; *see also State v. Shata*, 868 N.W.2d 93, 96–97 (Wis. 2015). In December 2011, Mr. Shata opened a coffee shop in Milwaukee, Wisconsin. About four months later, Mr. Shata was charged in Milwaukee County Circuit Court with selling a substantial amount of marijuana out of the shop. Answer, Ex. 8 ¶¶ 7–9. He was represented in that matter by James Toran. *Id.* ¶ 11; *see also* Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By a Person in State Custody 1, ECF No. 1.

A. Trial-court proceedings

At a final pretrial hearing on October 5, 2012, Mr. Toran asked the Circuit Court to adjourn the upcoming trial date because of scheduling conflicts and because it appeared that the matter would resolve short of trial. Exhibit 12 to Answer 2–3, ECF No. 9-12. Mr. Toran explained that he needed to "deal with" the

consequences of a plea, as Mr. Shata did not want to be deported. *Id.* at 3–4. The Circuit Court declined to adjourn the trial date but passed the case to allow Mr. Toran and Mr. Shata to confer. *Id.* at 2–6.

When the case was recalled several minutes later, Mr. Toran informed the court that the parties had reached a plea agreement. *Id.* at 6. Mr. Shata agreed to plead guilty to the charged offense and, in exchange, the State of Wisconsin agreed to recommend two years of initial confinement and two years of extended supervision, stayed for twenty-four months of probation. *Id.* at 6–7. The court then asked Mr. Toran if that was an accurate summary of the agreement, and the following exchange took place:

> MR. TORAN: . . . I did inform him of the potential that he's -- Are you a United States citizen?
>
> THE DEFENDANT: No.
>
> MR. TORAN: He's not a United States citizen, that there's a potential he could be deported.
>
> THE COURT: All right. And, Mr. Shata, is that your understanding as well?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you want to enter a plea today?
>
> THE DEFENDANT: Yes, sir.

Id. at 7–8.

The court then engaged in a plea colloquy with Mr. Shata. During the colloquy, the court advised Mr. Shata that, if he was not a United States citizen, a plea of guilty to the charged offense "may result in deportation, the exclusion from

admission to this country, or the denial of naturalization under federal law." *Id.* at 9. Mr. Shata subsequently pled guilty to one count of possession with intent to deliver between 1,000 and 2,500 grams of marijuana, as a party to the crime. *Id.* at 9–18. He was sentenced to one year of initial confinement and four years of extended supervision. *See* Exhibit 13 to Answer, ECF No. 9-13.

B. Post-conviction proceedings

Mr. Shata obtained new counsel for post-conviction proceedings. *See* Pet. 11. He filed a motion seeking to withdraw his plea, arguing that Mr. Toran was ineffective under *Padilla v. Kentucky* for failing to inform him "that he was subject to mandatory deportation because the offense involved more than 30 grams of marijuana." Exhibit 2 to Answer 81–85, ECF No. 9-2. Mr. Shata also alleged that Mr. Toran failed to inform him "that federal law required he be deported following his conviction." *Id.* at 83.

The post-conviction court held an evidentiary hearing at which Mr. Toran and Mr. Shata testified. Exhibit 14 to Answer, ECF No. 9-14. Mr. Toran testified that, prior to the plea hearing, he was aware that Mr. Shata was concerned about being deported. *Id.* at 5. Mr. Toran indicated that he advised Mr. Shata there was a "strong chance" he could be deported, but he never informed Mr. Shata that pleading guilty would subject him to mandatory deportation. *Id.* at 5, 8. Mr. Toran further indicated that he did not research the immigration consequences prior to the hearing. Rather, he contacted several federal prosecutors, and each told him that deportation was possible; no one used the term "mandatory." *Id.* at 5–6.

Mr. Shata testified that Mr. Toran did not inform him that he would automatically be deported if he pled guilty to the charged offense. *Id.* at 13. If he had been so informed, Mr. Shata claimed, he would not have pled guilty and instead would have gone to trial. Mr. Shata explained that he had been in the United States for over twenty years and that he did not want to be separated from his family. Mr. Shata also claimed that he pled guilty because Mr. Toran promised that he would receive probation and that a probation sentence would not result in deportation. *Id.* at 13–17.

The post-conviction court denied Mr. Shata's motion. *See id.* at 20–26. The court interpreted *Padilla* to require counsel to inform clients in Mr. Shata's position that deportation is "presumptively mandatory." *Id.* at 20. The court found that Mr. Toran had discharged this obligation by telling Mr. Shata that "there was a strong likelihood that he would be deported." *Id.* at 22. According to the court, the distinction between "strong likelihood" and "presumptively mandatory" was legally insignificant. *Id.* The court did not believe that Mr. Toran had promised probation. The court also determined that Mr. Shata had not demonstrated any prejudice resulting from his counsel's advice because it did not find credible Shata's testimony that he would have gone to trial had he known that deportation was presumptively mandatory. *Id.* at 23–24.

Mr. Shata appealed, arguing that "Attorney Toran provided affirmatively inaccurate advice regarding [his] potential for deportation." Answer, Ex. 2 at 12–16. The Wisconsin Court of Appeals agreed and reversed the post-conviction court's

denial of Mr. Shata's motion to withdraw his plea. *See* Exhibit 5 to Answer, ECF No. 9-5. The appellate court found that Mr. Toran "provided ineffective assistance by giving Shata inaccurate and incomplete information about the deportation consequences of his guilty plea" and that "Shata was prejudiced by that inaccurate information and advice." *Id.* at 14.

The Wisconsin Supreme Court granted the State's petition for review. In its brief, the State argued that Mr. Toran accurately advised Mr. Shata that he faced a "strong chance" of being deported. *See* Exhibit 6 to Answer 17–18, ECF No. 9-6. Mr. Shata argued that Mr. Toran's advice was incorrect—"'strong chance' was not good enough." Exhibit 7 to Answer 16, ECF No. 9-7. A majority of the Wisconsin Supreme Court agreed with the State and reversed the court of appeals; two justices dissented. *See* Answer, Ex. 8.

C. Habeas proceedings

On May 12, 2016, Mr. Shata filed a federal habeas petition alleging that he is in custody in violation of the United States Constitution because his trial lawyer provided ineffective assistance of counsel. *See* Attachment to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, ECF No. 1 at 13–16. The matter was reassigned to this Court after all parties consented to magistrate judge jurisdiction. *See* Order, ECF No. 8; *see also* Consent to Proceed Before a Magistrate Judge, ECF Nos. 2, 7 (citing 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73(b)). The Petition is fully briefed and ready for disposition. *See* Petitioner's Brief in Support of Petition for

Writ of Habeas Corpus, ECF No. 11; Respondent's Brief in Opposition to Petition for a Writ of Habeas Corpus, ECF No. 13; Petitioner's Reply Brief, ECF No. 14.

II. Standard of Review

Federal habeas corpus review is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Under AEDPA, a prisoner in custody pursuant to a state-court judgment of conviction is entitled to federal habeas relief only if he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). With respect to claims adjudicated on the merits in state court, a federal court can grant an application for a writ of habeas corpus "only if the state court's decision was contrary to clearly established Supreme Court precedent, involved an unreasonable application of such precedent, or was based on an unreasonable determination of the facts in light of the evidence presented in state court." *Promotor v. Pollard*, 628 F.3d 878, 888 (7th Cir. 2010) (citing 28 U.S.C. § 2254(d)); *see also White v. Woodall*, 572 U.S. 415, 419 (2014).

"A legal principle is 'clearly established' within the meaning of [§ 2254(d)(1)] only when it is embodied in a holding of [the Supreme Court of the United States]." *Thaler v. Haynes*, 559 U.S. 43, 47 (2010) (citing *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A state-court decision is "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of

materially indistinguishable facts." *Williams*, 529 U.S. at 412–13 (opinion of O'Connor, J.).

Similarly, a state-court decision results in an "unreasonable application" of clearly established federal law when that court either "identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407 (citing *Green v. French*, 143 F.3d 865, 869–70 (4th Cir. 1998)). A writ of habeas corpus may not issue under the "unreasonable application" clause "simply because the federal court concludes that the state court erred. Rather, the applicant must demonstrate that the state court applied the Supreme Court's precedent in an objectively unreasonable manner." *Kubsch v. Neal*, 838 F.3d 845, 859 (7th Cir. 2016) (citing *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2002)). Thus, the petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Kubsch*, 838 F.3d at 859 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

"[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). For purposes of federal habeas review, state-court factual determinations are entitled to "substantial deference."

Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015). To obtain relief under § 2254(d)(2), a petitioner must demonstrate that the state-court decision "rests upon fact-finding that ignores the clear and convincing weight of the evidence." *McManus v. Neal*, 779 F.3d 634, 649 (7th Cir. 2015) (quoting *Goudy v. Basinger*, 604 F.3d 394, 399 (7th Cir. 2010)); *see also* 28 U.S.C. § 2254(e)(1). "The decision must be 'so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable.'" *Alston v. Smith*, 840 F.3d 363, 370 (7th Cir. 2016) (quoting *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003)).

When applying the above standards, federal courts look to "the 'last reasoned state-court decision' to decide the merits of the case, even if the state's supreme court then denied discretionary review." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (quoting *Johnson v. Williams,* 568 U.S. 289, 297 n.1 (2013)).

III. Discussion

Mr. Shata maintains that "his trial counsel provided ineffective assistance when he failed to research relevant law and correspondingly advise Shata that he faced *automatic* deportation if found guilty of the crime with which he was charged." Pet., Attach. at 1.

Criminal defendants have a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on an ineffective assistance of counsel claim, a habeas petitioner must demonstrate (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense." *Id.* at 687. A petitioner satisfies the first prong

if he demonstrates that his "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. To satisfy the second prong, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[C]ourts need not address both prongs of *Strickland*" if the petitioner makes an inadequate showing as to one. *Atkins v. Zenk*, 667 F.3d 939, 946 (7th Cir. 2012) (citing *Strickland*, 466 U.S. at 697).

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. On habeas review, "[t]he question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). Thus, when a *Strickland* claim is evaluated under § 2254(d)(1), the standard of review is said to be "doubly deferential." *See Mirzayance*, 556 U.S. at 123 (citing *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) (per curiam)).

A. Deficient performance

Mr. Shata argues that the Wisconsin Supreme Court's decision denying his ineffective assistance of counsel claim is not consistent with *Padilla v. Kentucky* and is based on an unreasonable determination of the facts in light of the evidence presented at his post-conviction hearing. *See* Pet'r's Br. 10–23; Pet'r's Reply 3–5.

1. Whether the Wisconsin Supreme Court's decision was based on an unreasonable determination of the facts

According to Mr. Shata, the Wisconsin Supreme Court's decision was based on an unreasonable determination of the facts because the majority inaccurately characterized the advice he received from counsel. Pet'r's Br. 16–17. The Court respectfully disagrees. At times, the Wisconsin Supreme Court erroneously used the terms "strong possibility" or "strong likelihood" to describe the advice Mr. Shata had received from counsel. *See* Answer, Ex. 8 ¶¶ 24–26, 74. The state-court record shows that Mr. Shata's lawyer never used those words; rather, counsel informed Mr. Shata that there was a "potential" or "strong chance" he would be deported. *See* Answer, Ex. 12 at 7; Answer, Ex. 14 at 5, 8. "Possibility," "likelihood," "potential," and "chance" are all terms used to express a probability; they are not, in this Court's opinion, quantifiably different. As Ms. Symdon aptly noted, "A quibble over synonyms is not enough to show that the state court's decision violated § 2254(d)(2)." Resp't's Br. 25.

2. Whether the Wisconsin Supreme Court's decision is contrary to, or involved an unreasonable application of, clearly established federal law

Mr. Shata maintains that the Wisconsin Supreme Court's decision is contrary to *Padilla* because the court "'reache[d] a different result than the Supreme Court' reached on materially indistinguishable facts." Pet'r's Br. 17 (quoting *Hall v. Zenk*, 692 F.3d 793, 798 (7th Cir. 2012)); *see also* Pet'r's Reply 4–5. He further maintains

that the court unreasonably applied *Padilla* when the majority concluded that the advice he received was correct. *See* Pet'r's Br. 13–23; Pet'r's Reply 3–5.

a. *Padilla v. Kentucky*

José Padilla, a native of Honduras who had lived in the United States for more than forty years, faced deportation after pleading guilty to transporting a large amount of marijuana. *Padilla*, 559 U.S. at 359. Padilla subsequently moved to withdraw his plea, arguing that his lawyer provided ineffective assistance in two respects: (1) failing to advise Padilla of the deportation consequences prior to his entering the plea; and (2) telling Padilla "that he 'did not have to worry about immigration status since he had been in the country so long.'" *Id.* (quoting *Commonwealth v. Padilla*, 253 S.W.2d 482, 483 (Ky. 2008)). After the Supreme Court of Kentucky denied relief, Padilla filed a petition for writ of certiorari with the United States Supreme Court. *Padilla*, 559 U.S. at 359–60.

The Supreme Court granted certiorari "to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country." *Id.* at 360. After briefly explaining federal immigration law, the Court noted that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 364. Because such a consequence is closely connected to the criminal process, the Court concluded that *Strickland* applied to Padilla's claim. *Id.* at 366.

The Court ultimately held that Padilla's lawyer was constitutionally deficient under *Strickland*. Specifically, the Court held,

> [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. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at 369. The Court determined that "the terms of the relevant immigration statute [were] succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Id.* at 368 (citing 8 U.S.C. § 1227(a)(2)(B)(i)). According to those clear terms, Padilla's "deportation was presumptively mandatory." *Padilla*, 559 U.S. at 368–69. Thus, "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation." *Id.* at 360.

b. The Wisconsin Supreme Court's decision

The Wisconsin Supreme Court analyzed Mr. Shata's ineffective assistance claim under *Padilla*. The court interpreted *Padilla* as requiring criminal defense attorneys to correctly advise their clients about the possible immigration consequences of a conviction. *See* Answer, Ex. 8 ¶¶ 35–36. According to the court, Mr. Shata's trial lawyer "correctly told Shata that his conviction carried a 'strong chance' of deportation." *Id.* ¶ 58. The court explained that, while Mr. Shata's conviction made him deportable, "such a conviction will not necessarily result in deportation" because that decision is subject to the prosecutorial discretion of the

United States Department of Homeland Security. *Id.* ¶ 59. Thus, Mr. Shata's deportation "was not an absolute certainty." *Id.* ¶ 79.

The court also determined that Mr. Shata's lawyer did not perform deficiently by failing to read the relevant immigration statutes. *Id.* ¶ 75. According to the court, the Supreme Court in *Padilla* focused on the advice given, not whether counsel had actually read the statutes. The court further noted that Mr. Shata's lawyer had discussed the matter with several federal prosecutors, had attempted to negotiate a plea that carried no risk of deportation, and had informed the Circuit Court that Mr. Shata was concerned with being deported. *Padilla* did not, in the court's view, "state that not specifically reading the immigration statutes is the equivalent of giving misadvice." *Id.* Because the court found that Mr. Shata's lawyer was not deficient, it did not address the prejudice prong of *Strickland*. *Id.* at ¶ 79.

Two justices dissented from the majority's decision. The dissent believed that Mr. Shata's case should have the same result as Padilla's given that it "involves the same type of crime and the same immigration statute." *Id.* ¶ 81 (Bradley, J., dissenting). According to the dissent, the failure by Mr. Shata's lawyer to even look at the applicable immigration statute was "a quintessential example of deficient performance." *Id.* ¶ 87.

The dissent also thought that the majority misunderstood *Padilla*'s holding. *Id.* ¶ 99. The dissent explained that, "[b]ecause *Padilla* conclusively established that the immigration consequences of a controlled substances offense are clear, Shata should have been given more than general advice." *Id.* ¶ 102. In other words,

in the eyes of the dissent, the advice of Mr. Shata's attorney was not correct: advising Mr. Shata that he faced a "strong chance" of deportation did not "convey the same degree of certainty" as advising him that "deportation is presumptively mandatory." *Id.* ¶ 120. The dissent also concluded that the post-conviction court applied the wrong test when it analyzed whether Mr. Shata was prejudiced by his lawyer's bad advice. *See id.* ¶¶ 121–29. Consequently, the dissent would have remanded the matter to that court for further proceedings on the prejudice issue. *Id.* at ¶¶ 129, 132.

c. Analysis

Though both parties acknowledge that Mr. Shata's ineffective assistance claim is governed by *Padilla*, they disagree on defense counsel's obligations under *Padilla* and what legal principle *Padilla* "clearly established." *See* § 2254(d)(1). Ms. Symdon maintains that *Padilla* clearly established only that counsel must inform a noncitizen whether his plea carries a risk of deportation. *See* Resp't's Br. 14–20. Mr. Shata, on the other hand, believes that *Padilla* defines counsel's obligations with greater specificity. According to Mr. Shata, *Padilla* clearly established that counsel must inform a noncitizen pleading to a drug-trafficking offense that a conviction will make him subject to automatic deportation. *See* Pet'r's Br. 10–13; Pet'r's Reply 3–4. Ms. Symdon contends that the Court does not need to reach this issue because Mr. Shata has procedurally defaulted this argument because he failed to present it "through one complete round of state court review." Resp't's Br. 13 (citing *Byers v. Basinger*, 610 F.3d 980, 985 (7th Cir. 2010)).

i. Did Mr. Shata procedural default his argument?

According to Ms. Symdon, Mr. Shata argued in state court and his Petition that his trial lawyer was required to tell him that he would be deported, which is different from the argument made in his brief—that counsel should have told him that a conviction would subject him to automatic deportation. *See* Resp't's Br. 13–14. The Court agrees that these are distinct positions. However, the state-court record demonstrates that Mr. Shata did advance both positions, though not always with the same degree of fervor. *See* Answer, Ex. 2 at 15 (arguing that his attorney did not inform him "that his deportation was presumptively mandatory under the basic removal statute"), 82 (arguing that "[his] attorney did not inform him that he was subject to mandatory deportation"); Answer, Ex. 7 at 15–17 (arguing that "'[s]trong chance' is not . . . the same as 'presumptively mandatory' or 'subject to automatic deportation'").

Moreover, a habeas petitioner "may reformulate his claims as long as the substance of the argument remains the same." *Chambers v. McCaughtry*, 264 F.3d 732, 738 (7th Cir. 2001) (citing *Picard v. Connor*, 404 U.S. 270, 277–78 (1971)). The substance of Mr. Shata's argument has remained consistent: counsel failed to give him correct advice about the immigration consequences of his plea. He did not procedurally default this argument. The issue then is whether Mr. Shata's position accurately captures the Supreme Court's holding in *Padilla*.

ii. What legal principle did *Padilla* clearly establish?

The Supreme Court in *Padilla* clearly established that criminal defense attorneys must give noncitizens "correct advice" about the possible deportation consequences of a conviction. *See Padilla*, 559 U.S. at 369. The Court did not, as Ms. Symdon suggests, "ambiguously describe[] counsel's obligations," Resp't's Br. 17. Rather, the Court crafted a test that recognizes the nuances of immigration law. When the consequences of a guilty plea are "unclear or uncertain," counsel must simply advise their clients that the plea "may carry a risk of adverse immigration consequences." *Padilla*, 559 U.S. at 369. That general advice, however, is not sufficient when the immigration consequences under federal law are "truly clear." *Id.* In the latter situation, counsel must give clear and accurate advice about those consequences. *See id.* Consequently, Ms. Symdon's interpretation represents only the minimum duty placed on defense counsel and does not capture situations in which that minimum duty expands due to the truly clear consequences of a conviction.

Ms. Symdon cites several cases that ostensibly support her interpretation of *Padilla*. *See* Resp't's Br. 18–20. The first, *Chaidez v. United States*, does not restrict *Padilla*'s holding in the manner she suggests. In determining whether *Padilla* applied retroactively, the Supreme Court in *Chaidez* described *Padilla*'s holding in general terms. *See, e.g.*, *Chaidez v. United States*, 568 U.S. 342, 344 (2013) ("In *Padilla v. Kentucky* . . . , this Court held that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation

arising from a guilty plea."). Because the majority determined that *Padilla* established a new rule and, therefore, was not retroactive, the Court never analyzed whether Chaidez's counsel was deficient; it never had to apply *Padilla*.

But *Chaidez* came to the Supreme Court from the United States Court of Appeals for the Seventh Circuit, and the Seventh Circuit did discuss *Padilla*'s holding in greater specificity:

> The specific contours of the *Padilla* holding further indicate that it is a new rule. Under the rule set forth in *Padilla*, the scope of an attorney's duty to provide immigration-related advice varies depending on the degree of specialization required to provide such advice accurately. In particular, the Court held that "when the deportation consequence [of a guilty plea] is truly clear," counsel has a duty to "give correct advice." [*Padilla*,] 130 S. Ct. at 1483. But "[w]hen the law is not succinct and straightforward," such that "the deportation consequences of a particular plea are unclear or uncertain," "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.* That nuanced, new analysis cannot, in our view, be characterized as having been dictated by precedent.

Chaidez v. United States, 655 F.3d 684, 692 (7th Cir. 2011). The Seventh Circuit's decision in *Chaidez* suggests that *Padilla* clearly established that defense counsel have a heightened duty when the deportation consequences of a guilty plea are clear. So too did Justice Alito in his concurring opinion in *Padilla*. *See Padilla*, 559 U.S. at 377 (Alito, J., concurring) ("[T]he Court's opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel, in at least some cases, to specify what the removal *consequences* of a conviction would be."). The state-court cases cited by Ms. Symdon that appear to hold otherwise are not binding on this Court and are unpersuasive. Having clearly

defined the legal principle embodied in *Padilla*, the Court now must determine whether the Wisconsin Supreme Court's decision is consistent with that principle.

iii. Is the Wisconsin Supreme Court's decision contrary to *Padilla*?

The Wisconsin Supreme Court's decision is not contrary to clearly established federal law, as determined by the United States Supreme Court. The court correctly identified *Padilla* as the law governing Mr. Shata's ineffective assistance claim and accurately quoted *Padilla*'s holding. *See* Answer, Ex. 8 ¶¶ 5, 35–36, 43, 50, 55, 57, 79. Mr. Shata nevertheless argues that the court's decision is contrary to *Padilla* because it found that counsel's performance was not deficient despite having materially indistinguishable facts. Pet'r's Br. 17. This Court respectfully disagrees. Both Padilla and Mr. Shata became deportable after pleading guilty to distributing a large amount of marijuana. Prior to pleading guilty, Mr. Shata had been informed by his lawyer that he could potentially be deported. Padilla, on the other hand, was told that he would not be deported. The advice the two men received was materially distinguishable.

The Supreme Court did not, as Mr. Shata suggests, disavow any distinction between "affirmative misadvice" and "incorrect advice." Pet'r's Br. 17. Rather, the Court declined to limit its holding to affirmative misadvice from counsel. *See Padilla*, 559 U.S. at 369–74. Both Padilla and Mr. Shata received advice from counsel on the immigration consequences of their guilty pleas. The issue in both cases was whether that advice was correct.

iv. Did the Wisconsin Supreme Court unreasonably apply *Padilla*?

Here, like in *Padilla*, "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [Mr. Shata's] conviction." *Padilla*, 599 U.S. at 368. Because Mr. Shata was not a United States citizen, his drug-trafficking conviction made him "deportable." *See* § 1227(a)(2)(B)(i). Accordingly, to effectively discharge his responsibilities under the Sixth Amendment, Mr. Shata's counsel had to do more than simply inform Shata about the risks of deportation; he had to give "correct advice." Helpfully, the Supreme Court explained two years before Mr. Shata's plea what correct advice would look like in this situation: "constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to automatic deportation." *Padilla*, 599 U.S. at 360.

The Wisconsin Supreme Court held that Mr. Shata's counsel provided correct advice when he told Shata that there was a "strong chance" of deportation. *See* Answer, Ex. 8 ¶¶ 5, 58, 67, 71–72, 74–76, 79. That finding was objectively unreasonable. On at least seven occasions, the majority accurately recited the heightened duty placed on defense attorneys when advising noncitizen clients about clearly defined deportation consequences. *See* Answer, Ex. 8 ¶¶ 5, 35–36, 43, 50, 55, 57, 79 (quoting *Padilla*, 559 U.S. at 369). However, in analyzing the actual advice given by Mr. Shata's counsel, the majority appears to have disregarded the heightened duty required by *Padilla* in favor of general advice acceptable only when the consequences are unclear or uncertain. The Wisconsin Supreme Court therefore

unreasonably applied *Padilla* with respect to the advice provided by Mr. Shata's counsel.

v. Did Mr. Shata receive constitutionally deficient representation?

In this case, the advice given by counsel did not sufficiently convey the clear deportation consequences of Mr. Shata's guilty plea. "Advising a client that there is a 'strong chance' of deportation is not equivalent to advising that the client is 'subject to automatic deportation.' . . . It does not convey the same degree of certainty." Answer, Ex. 8 ¶¶ 118, 120 (Bradley, J., dissenting). A strong chance suggests that there was something Mr. Shata could have affirmatively done to avoid deportation when, in fact, that consequence was "practically inevitable." *See Padilla*, 559 U.S. at 363–64. The failure by Mr. Shata's counsel to provide accurate advice, despite the clear and inevitable consequences of conviction, constitutes deficient performance under *Padilla*.

This finding is reinforced by the fact that Mr. Shata's counsel admitted that he did not research the potential consequences even though he knew deportation was Shata's primary concern. *See* Answer, Ex. 14 at 4–8. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). The advice required under *Padilla* depends on the particular terms of the relevant immigration statute, and Mr. Shata's lawyer never looked at the statute. This was inarguably unreasonable under prevailing professional norms.

The Wisconsin Supreme Court concluded that *Padilla* did not require defense attorneys to read the relevant immigration statutes and suggested that other facts showed that Mr. Shata's lawyer understood the consequences of a guilty plea. *See* Answer, Ex. 8 ¶ 75. To be sure, *Padilla*'s command is that counsel provide accurate advice, and this command could be satisfied by way of blind luck rather than laborious research—the ends are the focus, not the means. But blind luck did not save the day here. As discussed above, Mr. Shata's counsel failed to provide accurate advice regarding the consequences of pleading guilty to the charged offense.

And it is possible that Mr. Shata's counsel did understand that a guilty plea would mean his client was deportable. That possibility, however, is belied by counsel's testimony at the post-conviction hearing, which demonstrated that he wrongly believed *Padilla* placed a duty on trial judges rather than defense counsel to advise defendants on deportation consequences. *See* Answer, Ex. 14 at 7–8. Regardless of what counsel knew, it is incontrovertible that counsel failed to apprise Mr. Shata that a guilty plea would render him automatically deportable. Accordingly, counsel's overall performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. 687–88.

B. Prejudice

The Wisconsin Supreme Court did not address the prejudice prong of the *Strickland* analysis. *See* Answer, Ex. 8 ¶ 79. Consequently, this Court's review is de

novo. *See Thomas v. Clements*, 789 F.3d 760, 767 (7th Cir. 2015); *see also* Pet'r's Br. 23; Resp't's Br. 26–27.

To show prejudice, a petitioner seeking relief based on constitutionally deficient advice from plea counsel "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000)). Mr. Shata testified at the post-conviction hearing that he would not have pled guilty if he had been properly advised about the deportation consequences of his plea. *See* Answer, Ex. 14 at 13. Mr. Shata explained that he had been in the United States for over twenty years and that he did not want to be separated from his family. Thus, he would have taken his chances at trial. *See id.*; *see also* Pet'r's Br. 23–25; Pet'r's Reply 5–8.

Ms. Symdon argues that it would have been irrational for Mr. Shata to reject the plea offer because "[t]he State's case against him was strong, he had no defense, and he obtained a great benefit by pleading guilty." Resp't's Br. 27. The Court respectfully disagrees. It is undisputed that Mr. Shata's primary concern was being deported and that a conviction—whether through a guilty plea or a jury verdict—would make him deportable. Thus, even though the chances at an acquittal may have been remote, Mr. Shata had little to lose at trial given his desire to remain in this country with his family. Moreover, Ms. Symdon erroneously claims that Mr. Shata's potential exposure was cut in half when the State agreed to dismiss one of

the charges against him, as Mr. Shata was never charged with more than one count. *See* Answer, Ex. 2 at 24–29; *see also* Answer, Ex. 12 at 6–7.[2]

Similarly, there is no evidence in the record to suggest that Mr. Shata would have received a significantly harsher punishment by going to trial. Mr. Shata did not receive an amendment or reduction of charges; he pled to the charged offense. The Circuit Court's sentence—one year of initial confinement and four years of extended supervision—was well below the maximum penalty of ten years, *see* Wis. Stat. § 939.50(3)(g), but was also greater than the State's recommendation. And given Mr. Shata's concern about being deported, it is reasonable to infer that he would have risked a lengthier term of imprisonment for the chance at avoiding deportation. Indeed, he may have preferred a longer prison stay in Wisconsin, close to his family, over swifter freedom and deportation.

The rationality of Mr. Shata's (hypothetical) decision is not undermined by the fact that he did plead guilty even though he was told there was a strong chance of being deported. As explained above, this advice conveyed to Mr. Shata that he had a chance, however slim, to take affirmative action to avoid deportation. In reality, his fate rested solely in the hands of the executive branch, and the only thing he could have done was pray for prosecutorial discretion, without the prospect of any further administrative process regarding his status, to save a deportable alien convicted of trafficking marijuana.

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[2] The second count of the Criminal Complaint and Information applied only to Amanda Nowak. *See* Answer, Ex. 2 at 24–26, 28–29. Ms. Nowak was employed by Mr. Shata at the coffee shop and was caught by law enforcement transporting several pounds of marijuana from the shop at Mr. Shata's direction.

In sum, had Mr. Shata correctly been informed that a guilty plea would have subjected him to automatic deportation, it would have been rational for him to reject the State's plea offer.

IV. Conclusion

The Wisconsin Supreme Court's decision denying Mr. Shata's ineffective assistance of counsel claim involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court in *Padilla v. Kentucky*. This Court does not draw this conclusion lightly, given the deep respect it holds for the Wisconsin Supreme Court and for the deference owed to state courts in administering state criminal law. But the symmetry of the factual postures of *Padilla* and Mr. Shata's case compels a symmetry of result.

Mr. Shata's trial lawyer performed deficiently when he inaccurately advised Shata that he faced a "strong chance" of being deported, and Mr. Shata was prejudiced by this bad advice. Accordingly, the Court will grant Mr. Shata's § 2254 habeas petition.

NOW, THEREFORE, IT IS HEREBY ORDERED that Hatem M. Shata's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 By a Person in State Custody, ECF No. 1, is **GRANTED**. This matter is remanded to Milwaukee County Circuit Court with instruction to vacate Mr. Shata's judgment of conviction.

IT IS FURTHER ORDERED that the Clerk of Court enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 12th day of December, 2018.

BY THE COURT:

s/ David E. Jones
DAVID E. JONES
United States Magistrate Judge