STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP002435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FERNANDO ORTIZ-MONDRAGON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Motion,
Both Entered in Brown County Circuit Court,
the Honorable Donald R. Zuidmulder Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

U.S. Code

Wisconsin Statutes

OTHER AUTHORITIES CITED

ISSUES PRESENTED

Did the circuit court err in rejecting, without a hearing, Mr. Ortiz-Mondragon's postconviction claim that his trial counsel was constitutionally ineffective for failing to provide advice about the adverse immigration consequences that would result from his plea?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case raises an interpretation of ***Padilla v. Kentucky***, which Wisconsin courts have not yet addressed. Therefore, the court may wish to issue a published decision to develop this area of law. Mr. Ortiz-Mondragon believes the briefs will adequately address the issues raised, but welcomes oral argument if the court believes it will help clarify the issues.

STATEMENT OF THE CASE AND FACTS

The state filed a criminal complaint charging Mr. Ortiz-Mondragon with four counts:

1) substantial battery, contrary to Wis. Stat. § 940.19(2), (1:1);

2) false imprisonment, contrary to Wis. Stat. § 940.30, (1:1);

3) felony intimidation to a victim, contrary to Wis. Stat. § 940.45(1), (1:2);

4) criminal damage to property, contrary to Wis. Stat. § 943.01(1), (1:2); and

5) disorderly conduct, contrary to Wis. Stat. § 947.01(1), (1:2).

All of the counts included the domestic abuse enhancer. *See* Wis. Stat. § 968.075(1)(a).

Pursuant to a plea agreement, Mr. Ortiz-Mondragon pleaded guilty to counts one, four and five and there was a joint recommendation for three years of probation with four months of conditional jail time. (45:3-4, 8). The court followed the recommendation. (45:12-13).

Mr. Ortiz-Mondragon filed a timely notice of intent to seek postconviction relief and a timely postconviction motion alleging ineffective assistance of counsel. (19; 35; App. 108-114).

In his motion Mr. Ortiz-Mondragon asserted that his conviction for substantial battery as an act of domestic abuse made him ineligible to apply for cancellation of removal from the United States because the crime is considered a "crime involving moral turpitude" (CIMT) and is not eligible for any exception. (35:2; App. 109). The same crime also rendered him permanently inadmissible to the United States. (35:3; App. 110). Mr. Ortiz-Mondragon's motion alleged that his trial counsel had failed to advise him of either of these consequences. (35:3; App. 110).

Mr. Ortiz-Mondragon's motion argued that under ***Padilla v. Kentucky***, 559 U.S. 356 (2010), trial counsel had a duty to provide advice about the adverse immigration consequences, including removal and permanent exclusion. (35:5; App. 112). He further argued that the consequences of

his conviction were clear and that trial counsel acting within professional norms would have been able to discover that a substantial battery as an act of domestic abuse as defined in Wisconsin was a CIMT and therefore should have been able to provide him with specific advice about the consequences. (35:5; App. 112).

Finally, Mr. Ortiz-Mondragon argued that defense counsel's deficient performance prejudiced him because if he had known the immigration consequences of his plea he would have either attempted to negotiate a different plea agreement or would have gone to trial in order to preserve any possibility of remaining in the United States or being able to return in the future. (35:6; App. 113).

The circuit court denied the postconviction motion without a hearing. (36:6-7; App. 106-107). It stated that the issue before it was whether the circumstances required defense counsel to provide "*unequivocal*" advice about the consequences of his plea to substantial battery as an act of domestic violence. (36:4; App. 104). It found that Mr. Ortiz-Mondragon had received "*equivocal*" advice both from the court warning pursuant to Wis. Stat. § 971.08 and the Plea Questionnaire and Waiver of Rights form. (36:4; App. 104).

The circuit court determined that "Ortiz's trial counsel was *not* required to provide Ortiz with unequivocal advice regarding the immigration-related consequences of his plea because the law elucidating the consequences is not succinct and straightforward." (36:4-5; App. 104-105). The circuit court said that unlike the controlled substance conviction in ***Padilla v. Kentucky***, a CIMT is a broad classification of crimes. (36:6; App. 106).

The circuit court assumed that Mr. Ortiz-Mondragon's conviction for substantial battery is a CIMT but found that because the immigration statute does not "provide or point one to a definition for the term, [it] can hardly be said to be 'succinct and straightforward.'" (36:6; App. 106). It concluded therefore, that defense counsel was not required to do more than provide Mr. Ortiz-Mondragon equivocal advice that any conviction could carry adverse immigration consequences. (36:6; App. 106). The court determined that the signed Plea Questionnaire was sufficient to show that defense counsel had fulfilled this obligation. (36:6-7; App. 106-107).

Because there was no hearing, the extent, if any, of defense counsel's consideration of and consultation regarding this matter with Mr. Ortiz-Mondragon is unknown.

Mr. Ortiz-Mondragon filed a timely notice of appeal. (37).

ARGUMENT

I. Introduction and Standard of Review.

Both the federal and state constitutions guarantee criminal defendants the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). When claiming he or she was denied this right, the defendant bears the burden of proving that counsel's performance was deficient and it prejudiced the defense. ***Id.*** at 687; ***State v. Thiel***, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305.

Generally, a circuit court should hold a hearing when a defendant alleges that his trial counsel provided ineffective assistance. ***State v. Machner***, 92 Wis. 2d 797,

285 N.W.2d 905 (Ct. App. 1979). The circuit court has the discretion to deny a postconviction motion without a hearing only if the motion "fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111. In assessing whether there are sufficient allegations to raise a question of fact, the court must assume the allegations are true. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

An ineffective-assistance-of-counsel claim ordinarily presents a mixed question of fact and law. ***Thiel***, 264 Wis. 2d 571, ¶21. Where, as here, the circuit court has refused the defendant a ***Machner*** hearing, this court independently reviews whether the postconviction motion was sufficient to warrant a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

The precise question that this court must review is whether a defense attorney has a duty to provide his client with any information or counsel about the immigration consequences of his plea beyond providing him with the standard plea form, which contains the generic immigration warning from Wis. Stat. § 971.08(1)(c).

Mr. Ortiz-Mondragon first argues that the adverse immigration consequences of his plea were straightforward and therefore his trial counsel had a duty to provide him with specific, unequivocal advice about those consequences. He next argues that even where the immigration consequences of a plea are not straightforward, a defense attorney has a duty to provide a noncitizen client with available information and advice that is tailored to the client's situation. In some cases, this duty may reasonably be discharged by explaining to the

client the limitations of available information and/or advising him to consult with a more specialized attorney, but it cannot be discharged solely by providing the standard plea form. Because the record here does not contain evidence that Mr. Ortiz-Mondragon's trial counsel provided him with any information or advice about immigration – or even that he highlighted the plea form's immigration warning – this case should be remanded for a ***Machner*** hearing.

II. The Circuit Court Erred in Finding That the Immigration Consequences of Mr. Ortiz-Mondragon's Plea Were Not Succinct and Straightforward and Therefore Trial Counsel Was Not Obligated to Explain Those Consequences to Him.

A. A criminal defense attorney performs deficiently if he fails to advise a noncitizen client of potential adverse immigration consequences.

The Supreme Court recently clarified that "[i]t is quintessentially the duty of counsel to provide her 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 (internal quotation marks omitted). Failure to provide advice would be "fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." ***Id***. at 370.

In its discussion of immigration consequences, the Supreme Court noted that the classes of offenses susceptible to adverse immigration consequences has significantly increased, making the "drastic measure" of deportation or removal "virtually inevitable for a vast number of noncitizens convicted of crimes." ***Padilla***, 559 U.S. at 360. The Court

recognized that changes in immigration law have "raised the stakes of a noncitizen's criminal conviction," and that the "importance of accurate legal advice has never been more important." ***Id***. at 364.

The Court found that where the immigration consequences of conviction are "clear," or "succinct and straightforward," counsel's obligation to give specific advice regarding those consequences is "equally clear." ***Padilla***, 559 U.S. at 369. The Supreme Court recognized that at times the consequences will be "unclear or uncertain" and that in those situations counsel's role "is more limited." ***Id***. In an unclear situation, a defense attorney still must advise his client, but the advice may be reduced to a more general and equivocal explanation that pending criminal charges may carry a risk of adverse immigration consequences. ***Id.***

B. It is clear and certain that a conviction for the state crime of substantial battery, charged as an act of domestic violence, has significant adverse immigration consequences.

Any noncitizen convicted of a crime that can be categorized as a CIMT is ineligible for cancellation of removal and is permanently excluded from future admission into the United States unless the case fits the narrow exception outlined in the statute. 8 U.S.C. § 1229b.(b)(1)(C) (provides cancellation of removal if eligibility criteria are met); 8 U.S.C. § 1182(a)(2)(A)(i)(I) (provides that a conviction for a CIMT makes the person inadmissible); and 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (provides for an exception to inadmissibility if the maximum penalty is less than one year).

Although the concept of a CIMT is not clear on its face, the notion that a CIMT is a basis for adverse immigration consequences originated well over a century ago

and the concept is regularly addressed in the federal courts. *See* ***Cabral v. I.N.S.***, 15 F.3d 193, 195 (1st Cir. 1994) (noting that the term "moral turpitude" first appeared in federal immigration laws in 1891). Whether a crime is considered a CIMT depends in part on whether it is an intentional crime and whether it causes actual injury. Most relevant to this case, the federal courts are in accord that a crime involving an intentional act and actual injury in a domestic situation is a CIMT. *See e.g.* ***Garcia-Meza v. Mukasey***, 516 F.3d 535, 537 (7th Cir. 2008); ***Grageda v. I.N.S.***, 12 F.3d 919, 922 (9th Cir. 1993); *see also* ***Galeana-Mendoza v. Gonzales***, 465 F.3d 1054, 1061 (9th Cir. 2006) (stating that a misdemeanor domestic battery was not a CIMT because the statute lacked an injury element); ***Reyes-Morales v. Gonzales***, 435 F.3d 937, 944-45 (8th Cir. 2006) (noting that mere "threatening behavior" without a mental state requirement was not a CIMT). If the offense as charged and the record demonstrate that the conviction is for an intentional act that actually caused injury in a domestic situation, the courts need look no further into the case. *See* ***Prudencio v. Holder***, 669 F.3d 472, 482 (4th Cir. 2012) (citing ***Taylor v. United States***, 495 U.S. 575 (1990)); s*ee also* ***Marin-Rodriguez v. Holder***, 710 F.3d 734, 737-738 (7th Cir. 2013). (There is no need to look beyond the elements of the crime and the record of conviction if they are clear).

There is only one exception to the rule that a person convicted of a CIMT is ineligible for cancelation of removal and barred from admission into the United States, which is applicable to a case in which the CIMT does not carry a maximum penalty exceeding one year and the actual sentence given is less than six months. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

Substantial battery charged as an act of domestic violence is always a CIMT because it is an intentional crime that requires actual injury against a person with whom the defendant has a domestic relationship. *See* Wis. Stat. §§ 940.19(2), 939.22(38) and 968.075(1)(a); *see also* ***Garcia-Meza***, 516 F.3d at 537; ***Grageda***, 12 F.3d at 922. Furthermore, because it carries a maximum term of imprisonment exceeding one year, it could never be eligible for the CIMT exception. *See* § 940.19(2).

This matter is clear and certain – or, to put it in other words, succinct and straightforward – upon a reading of the federal immigration code and the leading cases interpreting it and/or upon a reading of any reputable practice guide. *See* Maria Theresa Baldini-Potermin, ***Defending Non-Citizens in Illinois, Indiana, and Wisconsin*** at 3-12-14 (2009)[1] (noting that the intentional infliction of injury on one's spouse is a CIMT, as is aggravated battery); LexisNexis, ***Immigration Law Pocket Field Guide*** at 116 (2010) (noting that a higher-degree battery is a CIMT). *See also* ***Padilla***, 559 U.S. at 368 (noting that the Court expected attorneys who were not knowledgeable about some aspect of immigration law to consult "practice guides").

In the present case, the circuit court apparently thought that an immigration matter – including this one – is not succinct and straightforward as contemplated by ***Padilla*** unless it is clear from the face of the immigration code, without the need to consult case law or any other reference tool. However, ***Strickland*** has never let defense attorneys off the hook – in any context – from performing the essential

[1] Also available at: https://www.immigrantjustice.org/defendersmanual.

research for which they are trained in law school. *See* ***Hinton v. Alabama***, __ U.S. __, 134 S. Ct. 1081, 1089 (2014) ("[I]gnorance of a point of law that is fundamental to the case combined with [a] failure to perform basic research on that point is a quintessential example of unreasonable performance under ***Strickland***"); ***Rompilla v. Beard***, 545 U.S. 374, 387 (2005) (finding that counsel's failure to look at a legal file that he should have known would be relevant to sentencing was deficient); ***State v. Domke***, 2011 WI 95, ¶¶38-46, 337 Wis. 2d 268, 805 N.W.2d 364 (finding that counsel had performed deficiently by failing to look at case law interpreting a statutory hearsay rule).

While a defense attorney is not expected to know every nuance of immigration law, he is expected to conduct some research into the immigration law that may apply to a noncitizen client. And while the concept of a CIMT as applied to many circumstances is complicated or unknown, that does not relieve a defense attorney of determining whether the application of that concept to a particular client is simple and straightforward and, if so, to provide straightforward advice. ***Padilla***'s reference to law that was "unclear or uncertain" did not encompass any law that was not apparent solely by skimming the immigration code. Indeed, as the circuit court interpreted counsel's duty in this case, there would be little value to having counsel at all. Pro se defendants are generally capable of reading a rule spelled out in the statutes, but it is quintessentially the job of an attorney to read that rule in light of relevant case law.

Again, in many cases, whether a particular crime, under a particular set of facts, is a CIMT will be far from certain. However, here, basic research tools available to all attorneys reveal that a conviction for substantial battery,

under Wis. Stat. § 940.19(2), charged as domestic abuse, is clearly and certainly a CIMT.

C. Mr. Ortiz-Mondragon's motion alleged that trial counsel did not advise him of these immigration consequences and this prejudiced him, entitling him to a ***Machner*** hearing.

Because a review of the immigration code and leading case law clearly shows that one of the crimes charged in this case would have certain, adverse immigration consequences, Mr. Ortiz-Mondragon's trial counsel was obligated to explain those consequences to him. *See* ***Padilla***, 559 U.S. at 369. However, as Mr. Ortiz-Mondragon explained in his postconviction motion, counsel did not discuss immigration consequences with him prior to entry of the plea. (35:5; App. 112.)

Further, as alleged in the motion, Mr. Ortiz-Mondragon was prejudiced by counsel's deficient performance because, if he had known that a plea to substantial battery would render him ineligible for cancelation of removal and bar him from returning to the United States, he would not have pleaded guilty to that crime. (35:6; App. 113). He would have, if need be, taken the case to trial to preserve any possibility of avoiding the adverse and permanent immigration consequences. (35:6; App. 113). As alleged in the motion, his priority is to remain and/or return to the United States to be with his children. (35:6; App. 113).

As such, the facts as alleged amounted to a prima facie case that Mr. Ortiz-Mondragon was entitled to relief and necessitated a hearing. Because the circuit court denied the motion without a hearing, it erred.

III. Even When the Immigration Law at issue is not succinct and straightforward, because it is unsettled or unclear, a Defense Attorney Must Provide Meaningful Counsel Beyond the Plea Questionnaire.

The circuit court concluded that the record demonstrated that trial counsel was not deficient because the record contained a standard, signed plea questionnaire and waiver of rights form. (36:6; App. 106). However, this interpretation relieves defense counsel of *any* obligation to counsel his client about immigration consequences.

The ultimate question involving an unsettled immigration issue is whether trial counsel's examination of immigration consequences and consultation regarding uncertain consequences is "reasonable" under "prevailing professional norms." *See* ***Strickland***, 466 U.S. at 688. Since ***Padilla***, organizations that train and inform criminal defense attorneys have produced practice guides describing the standard of practice on this issue. For example, the American Bar Association instructs defense counsel to ascertain a noncitizen client's immigration status and criminal history, investigate specific consequences the proposed plea would have on the individual, and find out whether preserving immigration benefits is important to the defendant.[2] Another guide notes that when a defense attorney cannot determine the consequences, he or she should consult an immigration attorney. Kara Hartzler, Florence Immigrant and Refugee

[2] ***The American Bar Association's Annual Litigation Conference: World After Padilla v. Kentucky- Criminal Attorney's Duty to Advise Clients of Immigration Consequences of Their Convictions*** (available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/18_world_after_padilla_v_kentucky.authcheckdam.pdf) (last visited Feb. 26, 2014).

Rights Project, ***Surviving Padilla, A Defender's Guide to Advising Noncitizens on the Immigration Consequences of Criminal Convictions***, 17 (2011). Furthermore, at a ***Machner*** hearing, a defendant would have the ability to ask other professionals to testify regarding practice in an area of law with which most state court judges are unfamiliar.

The ***Padilla*** court recognized that not all consequences are clear, and in those situations, defense counsel need only advise that there *may* be adverse immigration consequences. ***Padilla***, 559 U.S. at 369. However, ***Padilla*** did not relieve defense attorneys of looking into the immigration consequences of a noncitizen client's conviction (when the client cares about immigration status) to determine whether it is clear, just as they must look into countless other legal questions that arise in their criminal cases. Furthermore, Padilla did not relieve defense attorneys of providing the noncitizen client with information about the uncertainty of any consequences. In addition, where consequences are uncertain, a defense attorney may choose to consult with an immigration attorney or invite the client to do so before making a decision on the plea. Here, because there has been no hearing, this court must assume that the allegations in the record are true and that Mr. Ortiz-Mondragon's trial counsel provided him with *no* counsel about immigration consequences of his plea. ***Allen***, 274 Wis. 2d 568, ¶12.

A plea questionnaire and waiver of rights form is generic and used in all plea hearings, regardless of the defendant's citizenship status. It provides no information as to whether a defense attorney told his client that his particular case is more or less likely to have any effect on his particular immigration status, whether he told his client that the immigration consequences were clear or unclear, or whether he told his client about any resources that might help resolve

questions important to the client. (20). In this case, the fact that the signed form exists in the court record provides no insight into whether trial counsel read the immigration portion of the form out loud to Mr. Ortiz-Mondragon at all, whether he did so verbatim or added or subtracted information from it, or whether Mr. Ortiz-Mondragon understood how the immigration warning might be pertinent to his case and conviction. (20).

Just as a plea questionnaire, by itself, cannot take the place of a trial court's colloquy about a plea, neither can it take the place of meaningful counsel between a criminal defense attorney and his client. *See* ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794. And just as a defense attorney must give his client actual counsel regarding the other matters covered in the plea form – from the elements of the offense to the relevance of the sex offender registry – the attorney must also give his client real counsel regarding immigration consequences of the plea. Mere recitation of the plea form would fall far below prevailing professional norms and would be "fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." ***Padilla***, 559 U.S. at 370.

Because there has not been a ***Machner*** hearing in this case, the record contains no evidence that Mr. Ortiz-Mondragon's attorney provided real counsel. Defense counsel told the circuit court at the time of the plea that he provided Mr. Ortiz-Mondragon with the plea questionnaire and "information to use in counseling," but he did not mention the immigration warning in particular. (45:2). Mr. Ortiz-Mondragon has alleged that trial counsel did not provide him with information about adverse immigration consequences of his plea. (35:3; App. 110). Therefore, even if

this court were to find that the immigration consequences of Mr. Ortiz-Mondragon's plea were unclear or uncertain, the plea questionnaire cannot, and does not, resolve his postconviction claim. Without a hearing, there is no evidence that trial counsel performed reasonably under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 688.

CONCLUSION

Mr. Ortiz-Mondragon asks this court to reverse the order denying the postconviction motion and remand this case to the circuit court for a ***Machner*** hearing.

Dated this 12th day of March, 2014.

Respectfully submitted,

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 3,637 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 12th day of March, 2014.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 if 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 12th day of March, 2014.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant