STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2013AP002435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FERNANDO ORTIZ-MONDRAGON,

Defendant-Appellant.

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

---

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
velasquezm@opd.wi.gov
Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Code

Wisconsin Statutes

ARGUMENT

I. The Immigration Consequences of Mr. Ortiz-Mondragon's Plea Were Succinct and Straightforward and Therefore Trial Counsel Was Obligated to Explain Those Consequences to Him.

A. Summary

The parties agree on the legal principles governing a plea withdrawal, ***Machner*** hearings, and ineffective assistance of counsel. Generally, a circuit court should hold a hearing when a defendant alleges that his trial counsel was ineffective. ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Here, the circuit court concluded the following when it declined to hold a ***Machner*** hearing and denied Mr. Ortiz-Mondragon's postconviction motion:

> [e]ven if, ultimately, Ortiz's crime *is* one of moral turpitude, as the term is used in 8 U.S.C. S 1227(a)(2)(A)(i), that statute, which does not provide or point one to a definition for the term, can hardly be said to be "succinct and straightforward." Because the law is not succinct and straightforward, Ortiz's counsel "need do more than advise [Ortiz] that pending criminal charges may carry a risk of adverse immigration consequences. Padilla at 369. Ortiz does not assert that trial counsel did not so advise him, and the record affirmatively establishes that trial counsel did so advise him.

The circuit court's decision relieved trial counsel from any obligation to look beyond the statute when advising non-citizen clients about immigration consequences. Moreover, the circuit court's decision relied on the signed generic plea questionnaire to find that trial counsel fulfilled his obligation to counsel a non-citizen client about adverse immigration

consequences. The generic plea questionnaire is inadequate to show, on its own, that counsel provided advice regarding immigration consequences.

Counsel has an obligation to look into adverse immigration consequences and advise his client accordingly. *See* ***Padilla v. Kentucky***, 559 U.S. 356 (2010). In some instances the consequences of a particular crime will not be straightforward. However, in this case, the consequences of Mr. Ortiz-Mondragon's plea to substantial battery as an act of domestic violence were clear and straightforward. Therefore requiring counsel to provide equally clear advice. ***Id***. at 369

A. The law is succinct and straightforward that substantial battery as an act of domestic violence in Wisconsin is a crime involving moral turpitude.

1. Research would have revealed to defense counsel that Mr. Ortiz-Mondragon's offense was clearly a crime involving moral turpitude.

Where the immigration consequences of a 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. A defendant, like Mr. Ortiz-Mondragon, facing almost certain deportation "is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." ***United States v. Bonilla***, 637 F.3d 980, 984 (9th Cir. 2011) (citing ***Padilla***, 559 U.S. at 368-69).

The state points out that when consequences are not clear, counsel's duty is limited. (State's Br. at 9). It seems to argue that crimes involving moral turpitude, a broad category of crimes, make the consequences less clear, and therefore counsel's duty will be limited. (State's Br. at 10-11) To

support its position the state relies on Justice Alito's (State's Br. at 10-11). However, the opinion does not state that the consequences of crimes involving moral turpitude can never be succinct and straightforward, rather, it points out that in many situations, where the immigration statute does not delineate a crime, the consequence of that crime may be difficult to ascertain. ***Padilla v. Kentucky***, 359 U.S. 356, 377-81 (2010) (Alito, J., concurring).

The absence of a crime within the immigration statute does not mean that the adverse immigration consequences of a conviction for that crime can never be clear or straightforward. While in some instances it may be difficult to determine whether a defendant has committed a crime involving moral turpitude, there are times when the crime at issue is clearly a crime involving moral turpitude. Because a crime involving moral turpitude will trigger serious, adverse immigration consequences, when it is clear a crime fits that category, counsel will have the duty to so advise his client. *See* ***Padilla*** 359 U.S. 356.

For example, in ***Montes-Flores v. U.S.***, the court found defense counsel deficient because he failed to provide clear advice to his client that her plea would subject her to deportation. 2013 WL 428024, at *4-5 (unpublished, S.D.Ind.L.R., 2013) (App. 103-104). The defendant in that case pled guilty to a making a materially false statement ***Id***. at *1 (App. 101). Trial counsel told his client that he did not know the consequences and then failed to make an inquiry to determine whether the plea would result in adverse consequences. ***Id***. at *5. (App. 104). The court found that counsel failed to meet his duty to provide clear advice under ***Padilla***. ***Id***. (App. 104).

The court reasoned that counsel had a duty to provide clear advice because just as it was clear in ***Padilla*** that the controlled substance violation would result in deportation, so was the consequence of removal for crimes involving moral turpitude. ***Id***. at *4. (App. 103-104). While the definition for a

crime involving moral turpitude is not in the statute, the court reasoned that the consequence was clear because the Seventh Circuit had consistently held that the violation for making a materially false statement, was a crime involving moral turpitude. ***Montes-Flores*** at *4 (App. 103-104). Therefore, the defendant's attorney had a duty to look beyond the statute and at the case law. ***Id***. at *5 (App. 104). Had counsel done some additional research, he would have been able to discern that the violation was clearly a crime of moral turpitude, and in turn, he would have had the duty to give equally clear advice regarding the consequences for such crimes. ***Id***. at *4-5 (App. 103-104).

Just as the consequences were easily attainable in ***Montes-Flores***, the consequences of Mr. Ortiz-Mondragon's conviction were also easily attainable. The immigration statute itself is clear as to the consequences for crimes involving moral turpitude. 8 U.S.C. §1227(a) provides that any alien "***shall***, upon order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens…"(emphasis added). Moreover, 8 U.S.C. § 1182 (a) provides that "aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States." Among the enumerated paragraphs of classes of aliens ineligible to be admitted to the United States are those with convictions for crimes involving moral turpitude. 8 U.S.C. § 1182(a)(2)(A)(i)(I). The statutory language describing the consequences is succinct and straightforward. In this case, a reading of the statute would have informed defense counsel that a crime classified as a crime involving moral turpitude will trigger consequences of deportation and future inadmissibility.

Although crimes involving moral turpitude trigger clear adverse consequences, the state argues that the class of crimes is too "murky" and that it is inherently difficult to discern whether a crime will be defined as a crime involving

moral turpitude. (State's Br. at 10-11). Following this logic, defense counsel would never be required to look beyond the text of the statute to determine if a crime falls into a particular class of crimes triggering adverse immigration consequences. This means that most non-citizen defendants would not get specific advice, even when their crime(s) is clearly one within the category because, as Justice Alito noted, "Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)…] ***Padilla***, 559 U.S. 377-378.

Permitting counsel to fulfill his Sixth Amendment duty by reaching no further than the statute to advise about consequences as severe as deportation and inadmissibility is contrary to counsel's duty to provide effective assistance. ***Strickland*** has never let defense attorneys off the hook – in any context – from performing the essential 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***")

Here, as the state correctly points out, research would have revealed that the Board of Immigration Appeals (BIA) and courts have held that convictions for domestic assaults are crimes involving moral turpitude where there is an intent to cause harm. (State's Br. at 14). Moreover, courts have consistently held that crimes in which the *intentional act* leads to *actual injury*, and an *aggravating factor such as a domestic relationship* exists, are crimes involving moral turpitude. *See e.g.* ***In Matter of Tran***, 21 I&N Dec. 291, 294 (BIA 1996) (willful infliction of corporal injury on "a person with whom one has . . . a familial relationship is an act of depravity which is contrary to accepted moral standards."); ***Garcia-Meza v. Mukasey***, 516 F.3d 535, 537 (7th Cir. 2008)(aggravated battery to a police officer was not a crime

involving moral turpitude because the Illinois statute did not require the officer to sustain bodily injury; ***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 Crime involving moral turpitude 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 crime involving moral turpitude).

The state cites one case in which the BIA held that a Virginia conviction for domestic battery was not a crime involving moral turpitude. (State's Br. at 14). However, the BIA determined that the Virginia domestic battery statute was not a crime involving moral turpitude because did "not require the actual infliction of physical injury and may [have] include[d] any touching, however slight." ***In re Sejas***, 24 I&N Dec. 236, 238 (B.I.A. 2007). Moreover, the record of conviction in that case did not offer any facts to determine whether the defendant was convicted for portions of the statute that would be crimes involving moral turpitude. ***Id***. Therefore, the decision in ***In re Sejas*** was not inconsistent with the aforementioned decisions, which held that crimes involving an intentional act, actual injury, and an aggravating factor such as a domestic relationship are crimes of moral turpitude.

2. Different approaches to classify a crime as one involving moral turpitude do not produce different results when applied to substantial battery, as act of domestic violence in Wisconsin.

The state also argues that a split between the federal circuits in methodology in how the courts determine whether the offense at issue is a crime involving moral turpitude illustrates how "murky" the area of law is. (State's Br. at 11). However, this split does not affect how clear it is that

substantial battery as an act of domestic violence in Wisconsin is a crime involving moral turpitude.

All circuits start with determining whether the crime at issue is categorically a crime involving moral turpitude. ***Matter of Silva-Trevino***, 24 I. & N. Dec. 687, 689-90 (A.G. 2008). The next step would be to examine the record of conviction, such as the complaint, judgment of conviction, jury instructions, plea questionnaire and plea transcript. ***Id***. at 690. The Seventh Circuit, which encompasses Wisconsin, unlike most circuits, allows judges to look at evidence beyond the record of conviction only when the record is not clear and additional evidence is necessary to determine whether the crime is a crime involving moral turpitude. *See* ***Marin-Rodriguez v. Holder***, 710 F.3d 734, 738 (7th Cir. 2013).

Here, a judge would not need to reach the third-step because the crime at issue embodies an intentional act to cause harm, actual substantial harm and a domestic relationship. *See* Wis. Stat. §§§ 940.19(2), 939.22(38) and 968.075(1)(a). The above cited case law is clear that such crimes constitute crimes involving moral turpitude. Moreover, the record of conviction is clear. The criminal complaint states the elements of the offense and the probable cause section alleges that the victim received an injury to her head resulting in five staples and that Mr. Ortiz-Mondragon was her live-in boyfriend. (1:1, 3-4). The plea transcript shows that he did plead guilty and that he admitted to the facts alleged in the complaint. (45: 4, 7).

So, while similar offenses from other states may yield different results because the elements and terms of the statutes differ, the terms and elements of the statute at issue in this case clearly make it a crime involving moral turpitude. Moreover, the different approaches employed by the circuits do not alter the outcome.

3. Mr. Ortiz-Mondragon was unaware of the specific consequences and his attorney failed to give him that advice.

The state cites additional facts to support its position that Mr. Ortiz-Mondragon was aware that the charges against him may carry a risk of adverse immigration consequences. (State's Br. at 15-16, fn. 6). First, it argues that because the court provided the statutory warnings required under Wis. Stat. § 971.08(1)(c), Mr. Ortiz-Mondragon was aware that he faced the possibility of deportation. The court's warning is not a substitute for advice that he should have received directly from counsel. As the Supreme Court stated, 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." ***Padilla***, 559 U.S. 356, at 370.

The state also argues that the alleged victim's statement, "we were trying to keep them here in the states, but if he ends up with a felony charge, that's not going to happen[]"and defense counsel's response that he believed there was an immigration hold, but the information was secondhand corroborate that Mr. Ortiz-Mondragon understood that the charges carried a risk of adverse immigration consequences. (State's Br. at 15-15, fn 6).

However, these statements do not shed any light onto what Mr. Ortiz-Mondragon knew or believed about the immigration consequences of his plea. The alleged victim's statement is her own and there is not evidence that Mr. Ortiz-Mondragon shared her belief. The attorney's uncertainty about the whether there was an immigration hold is no more illuminating than the alleged victim's statements as to what Mr. Ortiz-Mondragon knew about the immigration consequences. In fact, the attorney's uncertainty about the hold arguably demonstrates that he lacked the basic information about his client's status that would have been necessary to make an analysis and provide advice. Because

there was not a ***Machner*** hearing, there is no evidence that these statements are attributable to Mr. Ortiz-Mondragon's understandings of the immigrations consequences of his plea.

Finally, as already noted, in many cases, whether a particular crime, under a particular set of facts, is a crime involving moral turpitude will be far from certain. However, in this case, basic research would have lead to a straightforward conclusion that a conviction for substantial battery, under Wis. Stat. § 940.19(2), charged as domestic abuse. Therefore, Mr. Ortiz-Mondragon was entitled to know the consequences were virtually certain, and not just merely possible. ***Bonilla***, 637 F.3d 984 (9th Cir. 2011) (citing ***Padilla***, 559 U.S. at 368-69).

II. 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.

Mr. Ortiz-Mondragon also argues that even when the law regarding adverse immigration consequences is not clear, a defense attorney still has an obligation to provide meaningful counsel and advice, even if the outcome was not clear. (Ortiz-Mondragon's BIC, at 12-14). The plea questionnaire form is not adequate to show that the attorney actually counseled the client regarding adverse immigration consequences. *Id*.

The state failed to respond to this argument. By failing to respond, the state concedes that a plea questionnaire is insufficient to show trial counsel fulfilled his obligation to provide his non-citizen client with meaningful counsel and advice about adverse immigration consequences. *See* ***State v. Baldwin***, 2010 WI App 162, ¶42, 330 Wis. 2d 500, 794 N.W.2d 769. (citing ***Charolais BreedingRances, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979))(arguments that are not refuted are deemed conceded).

CONCLUSION

For the reasons set forth in this brief, and his brief-in-chief, Mr. Ortiz-Mondragon respectfully requests that this court remand for a ***Machner*** hearing.

Dated this 26th day of June, 2014.

Respectfully submitted,

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

Office of the State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202
(414) 227-4300
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 2716 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 26th day of June, 2014.

Signed:

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

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) @227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

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; 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 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 26th day of June, 2014.

Signed:

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

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
E-mail: 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