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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP2435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FERNANDO ORTIZ-MONDRAGON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction Entered
in the Circuit Court for Brown County,
the Honorable Donald R. Zuidmulder, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Does ***Padilla v. Kentucky*** and the Sixth Amendment require criminal defense attorneys to conduct research, outside of the immigration statute, to determine whether a particular crime falls into a broader category of crimes for which the immigration consequences are clear in order to properly advise their client about the immigration consequences that will result from a plea?

In the Court of Appeals Mr. Ortiz-Mondragon argued that the immigration consequences of his plea were straightforward and that trial counsel was constitutionally deficient for failing to provide him with specific advice as the United States Supreme Court's decision in ***Padilla v. Kentucky*** required.

The Wisconsin Court of Appeals affirmed the circuit court's order denying the postconviction motion and concluded that the consequences cannot be clear if an attorney must research federal court and "unfamiliar" Board of Immigration Appeals decisions to identify elements that constitute a category of crimes, such as crimes involving moral turpitude (CIMT), and then analyze whether the elements of the crime at issue meet that definition. ***State v. Ortiz-Mondragon***, 2014 WI App 114, ¶ 12, __ Wis.2d__, 856 N.W.2d 339. (App. 101-109).

2. Can a signed plea questionnaire form, on its own, affirmatively demonstrate that defense counsel adequately advised his client of the immigration consequences of the plea?

The Wisconsin Court of Appeals did not directly address whether a plea questionnaire on its own is sufficient

to show that an attorney adequately counseled his client about potential immigration consequences of his plea. However, it affirmed the written decision of the circuit court, which held that because the consequences were unclear, counsel was only required to give a general warning; therefore a ***Machner*** hearing was unnecessary because the record affirmatively showed that counsel fulfilled his obligation. ***Ortiz-Mondragon***, 2014 WI App 114, ¶13, (App. 109); (36:6-7; App. 115-116).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In light of this Court's decision to grant Mr. Ortiz-Mondragon's petition for review, both oral argument and publication are warranted.

STATEMENT OF THE CASE

Defendant-Appellant-Petitioner, Fernando Ortiz-Mondragon petitioned for review of a published decision of the Court of Appeals, which affirmed the decision of the circuit court, denying, without a hearing, his postconviction motion for plea withdrawal based on the ineffective assistance of counsel.

Pursuant to a plea agreement, Mr. Ortiz-Mondragon pled guilty to substantial battery, contrary to Wis. Stat. § 940.01(1), criminal damage to property, contrary to Wis. Stat. 943.01(1), (1:1), and disorderly conduct, contrary to Wis. Stat. § 947.01(1:1), all as acts of domestic violence under Wis. Stat. § 968.075(1)(a). (45:3-4). The circuit court followed a joint recommendation and placed Mr. Ortiz-Mondragon on probation for a period of three years, with four months of conditional jail time. (45:12-13).

Mr. Ortiz-Mondragon timely filed a notice of intent to pursue postconviction relief, and subsequently filed a postconviction motion alleging ineffective assistance of counsel for failure to advise him of the immigration consequences of his conviction. (35:19; App. 117-123).

The circuit court denied the motion in a written order, without a hearing, and Mr. Ortiz-Mondragon appealed. (36:1-7; App. 110-116; 37). In a published opinion, the Court of Appeals affirmed the judgment and order. ***Ortiz-Mondragon***, 2014 WI App 114, (App. 101-109).

Mr. Ortiz-Mondragon filed a petition for review in this Court on November 6, 2014, and on December 18, 2014 this Court granted review.

STATEMENT OF THE FACTS

Mr. Ortiz-Mondragon came to the United States from Mexico in 1997. (35: 1; App. 117) He moved to Wisconsin in 2002 to work in the agricultural industry. (35: 1; App. 117). He has four children that are citizens of the Untied States, all of whom reside in Wisconsin. (35:1; App. 117). Prior to the charges in the present case, Mr. Ortiz-Mondragon had no prior criminal history. (35:1; App. 117).

On September 14, 2012, the state filed a criminal complaint charging Mr. Ortiz-Mondragon with the following: (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). (1:2).

Pursuant to a plea agreement, Mr. Ortiz-Mondragon pled guilty to counts one, four and five. (45: 3-4). The state and defense jointly recommended that the circuit court impose three years of probation with four months of conditional jail time. (45:3-4, 8). Mr. Ortiz-Mondragon, along with his attorney, signed a plea questionnaire and waiver of rights form. (20:3). The form contained the same standard immigration warning that judges are required to give during a plea colloquy under Wis. Stat. § 971.08(1). (20:3).

At sentencing, the victim spoke to the court, expressing concern that Mr. Ortiz-Mondragon may be deported. (45:9-10). The circuit court asked defense counsel whether there was an immigration hold, to which counsel replied, "I think there is, but the information I get is secondhand." (45:11). The circuit court explained that a hold would was a federal issue separate from the court's sentence. (45:14). The circuit court followed the joint probation 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. 117-123). The motion asserted that Mr. Ortiz-Mondragon's 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. 118). The same crime also rendered him permanently inadmissible to the United States. (35:3; App. 19). Mr. Ortiz-Mondragon asserted that trial counsel failed to advise him about adverse

immigration consequences, and specifically that his plea precluded him from gaining lawful status and rendered him permanently inadmissible. (35:5; App. 121).

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 of his conviction, including removal and permanent exclusion from the United States. (35:5;App. 121). 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 immigration consequences of his conviction. (35:5; App. 121).

Finally, Mr. Ortiz-Mondragon argued that defense counsel's deficient performance prejudiced him because if he had known that his plea would result in mandatory deportation and permanent separation from his family, he would have either attempted to negotiate a different plea agreement, or would have gone to trial in order to preserve any possibility of either remaining in the United States or being able to return in the future. (35:6; App. 122).

The circuit court denied the postconviction motion in a written order without a hearing. (36:6-7; App. 115-116). It 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. 113-114). The circuit court said that unlike the controlled substance conviction in

Padilla, a CIMT is a broad classification of crimes. (36:6; App. 115).

The circuit court assumed that Mr. Ortiz-Mondragon's conviction for substantial battery was 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. 115). It concluded, therefore, that defense counsel was not required to do more than provide Mr. Ortiz-Mondragon with "equivocal" advice that any conviction could carry adverse immigration consequences. (36:6; App. 115). The circuit court noted that it provided Mr. Ortiz-Mondragon with the statutory immigration warnings during the plea colloquy, and that Mr. Ortiz-Mondragon represented that he read and understood the plea questionnaire form, which contained the identical warning the court gave. (36:2; App. 118). The court also pointed out that defense counsel signed the form as well, affirming that he discussed the document with Mr. Oritz-Mondragon. (36:2; App. 118). The circuit court concluded that the record affirmatively demonstrated that defense counsel fulfilled this obligation to provide Mr. Ortiz-Mondragon with an "equivocal" warning about the potential immigration consequences. (36:6-7; App. 115-116).

Mr. Ortiz-Mondragon filed a timely notice of appeal. (37). As indicated above, the Court of Appeals, in a published decision, affirmed the circuit court's decision and denied relief. This court granted review.

ARGUMENT

I. Counsel's Duty to Provide His Client with Specific Advice Regarding the Immigration Consequences of His Conviction Under ***Padilla*** and the Sixth Amendment Remains the Same Whether the Crime(s) Triggering the Consequences Is Enumerated in the Immigration Statute, or Whether it Belongs to a Broader Category of Crimes.

A. Summary of the argument and standard of review.

Mr. Ortiz-Mondragon, a non-citizen, made the United States his home for approximately fifteen years prior to the inception of this case. (35:1; App. 117). During that time he worked and had a family. (35:1; App. 117). The length of time Mr. Ortiz-Mondragon spent in the United States, as well as his family connections, made preserving any ability to remain in or return to the United States following his conviction extremely important to him. Prior to entering the plea, Mr. Ortiz-Mondragon was eligible to apply for status as a lawful permanent resident (LPR) through non-LPR cancellation of removal. The moment he pled guilty in this case he lost his only defense to removal. Moreover, due solely to his plea, he became permanently inadmissible to the United States.

Like all criminal defendants, under the Sixth Amendment of the United States Constitution and Article I, §7 of the Wisconsin Constitution, Mr. Ortiz-Mondragon had a right to the effective assistance of counsel. ***State v. Thiel***, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. Because of his status as a non-citizen, as well as his desire to mitigate adverse immigration consequences, his right to the effective assistance of counsel included the right to receive

advice about how his plea would affect his ability to remain and/or return to the United States. *See* ***Padilla v. Kentucky***, 559 U.S. 356 (2010).

In ***Padilla v. Kentucky***, the United States Supreme Court announced that advice regarding immigration consequences of a criminal conviction was within the scope of the Sixth Amendment's right to the effective assistance of counsel. In reaching this conclusion, the Court recognized that the classes of offenses susceptible to adverse immigration consequences had significantly increased, thereby 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. It reasoned that because changes in immigration law had "raised the stakes of a noncitizen's criminal conviction[,] [t]he importance of accurate legal advice has never been more important." ***Id***. at 364. The ***Padilla*** Court held that the nature of the advice - specific or general - was dependent on the clarity of the immigration consequences. ***Id***. at 369.

Here, the consequences for Mr. Ortiz-Mondragon's conviction were straightforward, therefore requiring defense counsel to provide clear advice about the immigration consequences under ***Padilla***. 559 U.S. 356, 369. The Immigration and Naturalization Act (INA) explicitly outlines the consequences for convictions of CIMTs. Substantial battery as an act of domestic abuse in Wisconsin is a CIMT that triggered certain deportation by rendering Mr. Ortiz-Mondragon ineligible for cancellation or removal and also made him permanently inadmissible.

Although Crimes Involving Moral Turpitude is a broad classification of crimes, not all crimes belonging to that class have "unclear or uncertain" consequences so as to limit

counsel's role to providing more general advice to his non-citizen client. Some crimes, such as substantial battery, domestic abuse, are universally treated as CIMT and will trigger the clear consequences the immigration statute prescribes for committing a CIMT. Therefore, in this case, defense counsel should have advised Mr. Ortiz-Mondragon that a conviction for substantial battery, domestic abuse, would render him ineligible for cancellation of removal and permanent exclusion.

Determining whether a crime is a CIMT requires more than a review of the immigration statute. Under the Sixth Amendment, counsel is required to investigate and research the law in order to provide his client with advice about whether or not a particular plea is the best option. In this instance, research would have revealed the serious and permanent nature of the immigration consequences for the substantial battery offense, given Mr. Ortiz-Mondragon's particular situation. Moreover, ample resources are available to assist attorneys in determining whether the immigration consequences are clear.

Here, because the circuit court denied the motion without a hearing, there is no record as to what, if any, advice trial counsel provided Mr. Oritz-Mondragon regarding the immigration consequences of his conviction for substantial battery, domestic abuse. The record contains only the plea questionnaire and statutory notification from the court. The generic plea questionnaire warning does not provide sufficient evidence that trial counsel met his obligation to research in order determine the immigration consequences and recommend a plea that was in Mr. Ortiz-Mondragon's best interest. Moreover, the court's statutory plea colloquy notification is insufficient to cure the deficiency in trial

counsel's advice regarding the particular immigration consequences of a conviction for his client.

An ineffective-assistance-of-counsel claim ordinarily presents a mixed question of fact and law. ***Thiel***, 264 Wis. 2d 571, ¶ 21. This Court upholds a circuit court's factual findings unless they are clearly erroneous. ***Id***. Whether an attorney's performance was constitutionally deficient is a question of law that this Court reviews *de novo*. ***Id***.

B. Determining the clarity of the immigration consequences of a conviction should not be limited to a perfunctory review of crimes enumerated in the Immigration and Naturalization Act.

1. ***Padilla v. Kentucky*** requires affirmative advice about immigration consequences.

Immigration law and criminal law intersect, and their consequences are intertwined. Over time, changes in immigration laws have increasingly expanded the classes of deportable offenses, while at the same time imposing increased limitations on the discretion of judges to provide relief from the harsh consequences of removal. ***Padilla***, 559 U.S. 356, 360. Therefore, removal is now "virtually inevitable for a vast number of noncitizens convicted of crimes." ***Id***. Long- recognized as a penalty, deportation and/or exclusion may at times be the most significant consequence that results from a criminal conviction for a non-citizen defendant. ***Id***. at 364.

Because of the particularly severe immigration penalties non-citizens may face, counsel's performance is not only constitutionally deficient in instances where counsel

affirmatively misadvised a client, but also where counsel failed to provide any advice at all. ***Id***. at 369.

Padilla distinguishes the nature of the advice - specific or general - based on whether the consequences of a conviction are "clear," and "succinct and straightforward," or whether they are "unclear" or "uncertain." ***Id***. When the consequence is clear, counsel must provide advice that is "equally clear." ***Id***. However, when the consequence is "unclear," counsel's role "is more limited." ***Id***. In an "unclear" situation, a defense attorney must still advise his client regarding immigration consequences, but the advice may be reduced to a more general warning that a conviction may result in adverse immigration consequences. ***Id***. Silence regarding immigration consequences is, however, per se deficient for purposes of an ineffective assistance of counsel claim, because a failure to provide any advice is "fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." ***Id***. at 370-371.

2. The Court of Appeals misinterpreted the clear vs. unclear distinction.

The scope of counsel's duty to provide specific advice hinges on the clarity of the immigration consequences that will result from a conviction. ***Padilla***, 559 U.S. 356, 369. In ***Padilla***, the defendant pled guilty to trafficking marijuana, which was a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i). ***Id***. at 368. There, the immigration consequences were "succinct, clear, and explicit" and could be easily gleaned from a reading of the statute. ***Padilla***, 559 U.S. 356, 369. Accordingly, Mr. Padilla's counsel had a duty to inform him that a plea to the marijuana trafficking charge would result in mandatory deportation. ***Id***. The ***Padilla*** Court

acknowledged that there will be situations where the consequences of a particular plea agreement will be "unclear" or "uncertain," and in those situations, the duty to provide advice is more limited. ***Id***.

Here, the Court of Appeals interpreted the distinction between clear and unclear consequences, and therefore the scope of advice required according to whether the crime at issue was enumerated in the immigration statute, ***Ortiz-Mondragon***, 2014 WI App 114 ¶¶ 12-13, (App.109). It concluded that if an attorney must research federal law and Board of Immigration Appeals decisions to determine whether the crime the crime will fall into a broader category of crimes, then the consequences can not be clear. Padilla, 2014 WI App 114, ¶ 12. ***Id***.

Importantly, however, the Court in ***Padilla*** did not limit its analysis of the clarity of the consequences to crimes that are specifically defined in the immigration statute. Such a limitation undermines the importance that the Court placed on a non-citizen defendant's right to the effective assistance of counsel at perhaps the most critical phase of their case – the plea negotiation. This stage of a criminal proceeding is crucial for a non-citizen defendant to be informed about whether a particular plea will result in virtually certain removal. ***Padilla***, 559 U.S. 356, 373-374. ***Padilla*** did not expand the Sixth Amendment, rather, it clarified that because the drastic measure of removal is virtually inevitable for the majority of non-citizens convicted of crimes, it is penalty necessarily linked to a conviction. ***Id***. at 363-364. Therefore, advice about that penalty is necessary to ensure a defendant's decision to accept a plea is informed. ***Id***. at 363- 364.

Indeed, "'[m]ost crimes affecting immigration status are not specifically mentioned by the [Immigration and

Nationality Act (INA)], but instead fall under a broad category of crimes, such as crimes involving moral turpitude or aggravated felonies."' ***Id***. at 378 (Justice Alito, concurrence, quoting M. Garcia &L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (September 20, 2006)(summary)(emphasis in original). An interpretation that permits a general warning to be sufficient advice about adverse immigration consequences for crimes simply because the crime at issue is not enumerated in the immigration statute is inconsistent with ***Padilla***, the professional practice guides the Supreme Court cited, and the factors that attorneys need to consider when conducting an analysis of immigration consequences. *The American Bar Association's Annual Litigation Conference 2013:* ***How Much to Advise: What are the Requirements of Padilla v. Kentucky***.[1] Furthermore, it will prevent the vast majority of defendants, like Mr. Ortiz-Mondragon, from receiving specific advice about the immigration consequences of a conviction, even when the crime at issue clearly falls within a broader category for which the consequences are succinct, straightforward, and permanent.

Moreover, an approach such as this one , contravenes a defendant's right to the effective assistance of counsel and an attorney's obligations under the Sixth Amendment to ensure that his client understands the advantages and disadvantages about the plea in order to make an informed decision. Permitting this interpretation is "akin to saying that a criminal defender can determine the outcome of a case by simply looking at the initial charging document." *The American Bar Association's Annual Litigation Conference 2013:* ***How***

[1]http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/18_world_after_padilla_v_kentucky.authcheckdam.pdf (last visited January 15, 2015).

Much to Advise: What are the Requirements of Padilla v. Kentucky. Therefore, in this case, the Court of Appeals' interpretation would leave a majority of non-citizen defendant's in the dark about the certainty of deportation, even when the information is readily available.

3. The Sixth Amendment demands that defense counsel reasonably investigate and research in order to properly advise clients of the immigration consequences of a conviction.

This Court employs the standards that the United States Supreme Court set forth to measure whether an attorney's representation fell below the constitutional minimum. ***State v. Trawitzki***, 2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801; ***Thiel***, 264 Wis.2d 571, ¶ 18. The standard by which to measure an attorney's representation is "reasonableness under prevailing professional norms." ***Strickland v. Washington***, 466 U.S. 668. 688 (1984); ***Thiel***, 264 Wis. 2d 571, ¶ 19. Therefore, whether or not trial counsel's performance was constitutionally deficient is "necessarily linked to the practice and expectations of the legal community." ***Padilla***, 559 U.S. 356, 357. *citing* ***Strickland***, 466 U.S. 668, 688.

Strickland and its progeny consistently require defense attorneys to investigate and research points of law crucial to a client's case. *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); ***State v. Carter***, 2010 WI 40, ¶23, 324 Wis. 2d 640, 782 N.W.2d 695. (Counsel has a duty to either reasonably investigate law and facts or reasonably decide strategically that any further investigation is unnecessary).

Moreover, professional standards make clear that investigation and analysis of a client's immigration status and the criminal statute at issue is required in order to determine the particular immigration consequences. ***Padilla***, 559 U.S. 356, 367; *see*, e.g., Nat'l Legal Aid and Defender Ass'n, ***Performance for Criminal Representation*** § 6.2 (1995) (counsel must be aware of the advantages and disadvantages of the plea under the specific circumstances of the case)[2]; Amer. Bar Ass'n., ***ABA Standards for Criminal Justice, Pleas of Guilty*** **Standard** 14-3.2, (3d ed. 1999) ("counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client").[3] Wisconsin State Public Defender trainings echo these professional standards. [4]

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[2] The National Legal Aid Defender Association Guidelines: www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

[3] The ABA criminal justice standards are available at www.americanbar.org/content/dam/aba/publications/criminal_justice_sta standards/pleas_guilty.authcheckdam.pdf.

[4] 2012 Wisconsin State Public Defender Conference steps to provide effective assistance necessitate investigation available at: http://wispd.org/attachments/article/249/Advising%20Non-Citizen%20Clients%20-%20Defense%20Counsel%E2%80%99s%20Obligations.pdf

Following ***Padilla's*** announcement that affirmative advice regarding the immigration consequences that stem from a criminal conviction is within the ambit of the Sixth Amendment, national legal organizations have produced publications that detail the duties of counsel and provide guidance to defense attorneys on how to adequately advise non-citizen clients about immigration consequences that result from a conviction. For example, the American Bar Association advocates that attorneys must ascertain a non-citizen's criminal history, investigate the specific consequences of the plea, and find out whether preserving immigration benefits is important to the client.[5] The National Immigrant Defense Project has published a guide and practice advisory for defense attorneys that outline an attorney's duties to investigate immigration consequences.[6] Another guide notes that when a defense attorney cannot determine the consequences, he or she should consult an immigration attorney. *See* Kara Hartzler, Florence Immigrant and Refugee Rights Project, ***Surviving Padilla, A Defender's Guide to Advising Noncitizens on the Immigration Consequences of Criminal Convictions***, 17 (2011).

Moreover, various practice guides are available to assist Wisconsin defense attorneys in assessing the immigration consequences of their clients' pleas in order to meet their Sixth Amendment obligations. For example, the

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5 The American Bar Association's Annual Litigation Conference: How Much to Advise: What are the Requirements of ***Padilla v. Kentucky*** 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 January 15, 2015).

6 Duty of Criminal Defense Counsel Representing an Immigrant Defendant After ***Padilla v. Kentucky***, April 6, 2010. Available at: www.ImmigrantDefenseProject.org

National Immigrant Justice Center has a free, online guide to defending non-citizen clients. The guide assists attorneys in identifying whether a particular crime in their jurisdiction falls into a broader category. *See* Maria Theresa Baldini-Potermin, ***Defending Non-Citizens in Illinois, Indiana, and Wisconsin***. (2009).[7] In Chapter 3, the guide provides that "[w]here the elements of a domestic battery offense *do not* require either actual infliction of serious harm or specific intent and physical injury to a victim, the offense is not categorically a crime involving moral turpitude." ***Id***. 3-12. (emphasis added). The guide also notes that the "willful infliction of corporal injury on a spouse, cohabitant, or parent of the offender's child" in violation of the California Penal code has been classified as a CIMT. ***Id***. Applying the guide's information to this case would have informed defense counsel that substantial battery, domestic violence – whose elements include an intentional act causing 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) - would meet the criteria to be classified as a CIMT, thereby triggering certain immigration consequences.

Additionally, the Wisconsin State Public Defender provides trainings and a staff resource for an individualized analysis of immigration consequences to staff and private bar attorneys. The Wisconsin State Bar Association provides *Fast Case*, an online legal research tool, free of charge. A *Fast Case* search for "battery" and "domestic violence" and "crimes involving moral turpitude" yielded many cases. [8]

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[7] Also available at: https://www.immigrantjustice.org/defendersmanual. (last visited January 14, 2015.)

[8] The link to the described search can be found at: http://www.wisbar.org/formembers/legalresearch/pages/fastcase.aspx?q=

Finally, the Immigrant Defense Project's ***Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky***, provides a checklist which indicates that crimes involving moral turpitude include "crimes in which *bodily harm* is caused or threatened by an intentional act." (emphasis in original). (App. 124).

Applying the principles of the Sixth Amendment and reasonableness under prevailing professional norms to this case establishes that counsel had a duty to investigate and research the immigration consequences for the plea agreement he proposed, and that Mr. Ortiz-Mondragon ultimately accepted. Even when a more general warning is warranted, counsel must reasonably investigate the potential immigration consequences in light of the particular facts of the case because counsel cannot determine the clarity of a consequence without some investigation and research. ***Strickland***, 466 U.S. at 668, 690-691; ***Thiel***, ¶ 40 (defense counsel cannot make a strategic decision to forgo interviewing a witness if he has not read reports relating to that witness.). Here, there is nothing in the record that indicates trial counsel engaged in any investigation or esearch regarding the immigration consequences.

C. Failure to provide specific advice regarding immigration consequences to Mr. Ortiz-Mondragon constituted deficient performance.

Counsel's failure to inform a defendant of the adverse immigration consequences when legal research would show that the crimes at issue involved moral turpitude for immigration purposes falls below an objective standard of

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battery%20and%20domestic%20violence%20and%20crimes%20involving%20moral%20turpitude&juris=All

reasonableness. ***Commonwealth v. Balthazar***, 86 Mass.App.Ct. 438, 442-443, 16 N.E.3d 1143 (2014). In that case the defendant pled guilty to one count of malicious destruction of property under $250 and one count of larceny under $250. ***Id***. at 439. There, while the defense attorney urged his client to seek the advice of an immigration attorney, the client failed to do so, and the attorney negotiated a plea to misdemeanors, indicating that he was unsure of whether the misdemeanors would pose any immigration problems. ***Id***. at 441-442. The court concluded that although the immigration statute did not enumerate specific crimes of moral turpitude, research would have revealed that the offenses were CIMTs, and that failure to conduct that research and advise accordingly was deficient performance. ***Id***. at 442-443.

Other jurisdictions are in accord *See* e.g. ***Ortega-Araiza v. Wyoming***, 2014 WY 99, ¶ 19, 331 P.3d 1189. (Deportation consequences for domestic violence strangulation were clear because the consequences for an aggravated felony were clear.)[9]; ***People v. Kazadi***, 284 P.3d 70, 73-74 (Colo. App. 2011). (Attorneys have a duty to research relevant immigration law and that duty stems from a fundamental principle that attorneys understand the legal principles that may impact their client's decision.); ***State New Mexico v. Favela***, 2013 NMCA 102, ¶ 17, 311 P.3d 1213, 1218. (explaining that prior to ***Padilla***, New Mexico required defense attorneys to determine the immigration status of their client and provide specific advice without clear vs. unclear distinction in ***Padilla***.); ***Montes-Flores v. U.S.***, 2013 WL 428024,(unpublished, S.D.Ind.L.R., 2013) (App. 124-129). (explaining that the defendant had a duty to look beyond the

[9] The issue on appeal was in regards to the prejudice analysis, but the Supreme Court of Wyoming characterized the consequences as clear.

statute at the case law and that doing as such showed that the crime at issue was consistently categorized as CIMT, thereby rendering clear consequences requiring equally clear advice.)

In this case, the record contains no evidence that defense counsel investigated Mr. Ortiz-Mondragon's immigration status or relevant law. Similar to ***Balthazar***, legal research would have revealed that substantial battery as an act of domestic violence qualified as a CIMT and as such, would subject Mr. Ortiz-Mondragon to harsh and permanent immigration consequences. And, unlike in ***Balthazar***, here, there is no evidence that trial counsel considered immigration consequences when negotiating the plea or that he even suggested to Mr. Ortiz-Mondragon that he consult an immigration attorney.

Mr. Ortiz-Mondragon alleged that his attorney failed to advise him about the nature of the immigration consequences that would result from his plea. Because the circuit court denied a ***Machner*** hearing, there is no affirmative showing in the record that trial counsel engaged in any of the investigation or research both the Sixth Amendment and professional standards require. Furthermore, his counsel's lack of knowledge as to Mr. Ortiz-Mondragon's immigration status at the time of sentencing suggests that he had not engaged in any investigation as to Mr. Ortiz-Mondragon's status or how the plea would affect him. (45:11).

Just as research in ***Balthazar*** would have shown that although the crimes were misdemeanors, they would be classified as CIMTs, here, investigation and research would have revealed the same result. If counsel had investigated Mr. Ortiz-Mondragon's immigration status, he would have known that he was a non-LPR who, prior to his plea, was

eligible to apply for LPR status because 8 U.S.C. § 1229b(b)(1) permits the Attorney General to:

> [C]ancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

An immigration consequences analysis would have considered whether the crimes in the plea negotiation would have affected his ability to apply for lawful status. Part (C), references various offenses that would make a non-citizen defendant ineligible for discretionary relief in the form of cancellation of removal or adjustment of status. 8 U.S.C. § 1227(a)(2)(A)(i), specifies crimes of moral turpitude. It states:

> Any alien who --
>
> (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission,

and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

Moreover, convictions for CIMTs also carry clear consequences as to future admissibility. 8 U.S.C. § 1182(a)(2)(A)(i)(I) states:

> (i) In general except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

Clause (ii) provides an exception, that section (i)(I):

> shall not apply to an alien who committed only one crime if—
>
> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6

> months (regardless of the extent to which the sentence was ultimately executed)

The next step in the analysis would be to determine whether any of the crimes at issue would be classified into the broader CIMT category for which the consequences are clear and permanent.

In addition to the practice guides and resources listed above, research would have revealed the elements that courts consider when determining whether a crime is a CIMT. Research would also have shown that courts routinely consider convictions for crimes such as substantial battery, domestic abuse, where there is the intentional infliction of actual harm against a domestic partner to be a CIMT. *See e.g.* ***In re: Solon***, 24 I&N Dec. 239, 242 (BIA 2007) ("[A] finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense." A crime will be considered morally turpitudinous if there is intentional conduct that results in harm.); ***Michel v. INS***, 206 F.3d 253, 263 (2d Cir. 2000) (Crimes committed intentionally or knowingly have historically been found to involve moral turpitude.); ***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."); ***Grageda v. INS***, 12 F.3d 919, 922 (9th Cir.1993) (the willful infliction of injury to one's spouse is a CIMT); ***Galeana-Mendoza v. Gonzales***, 465, F.3d 1054, 1061 (9th Cir. 2006). (a misdemeanor battery, domestic violence in California was not categorically a CIMT because the California interpreted the statute to include acts of offensive or harmful touching and a violation thereof did not require actual injury.); ***Knapik v. Ashcroft***, 384 F.3d 84 (3rd Cir. 2005) (conviction for attempted reckless endangerment

was not a CIMT because while attempt signals an intent, recklessness does not); ***Morales v. Gonzales***, 435 F.3d (8th Cir. 2006) (an alien's intent is critical to the finding of moral turpitude and "threatening behavior" without a mental state requirement is insufficient to be a CIMT); ***Garcia-Meza v. Mukasey***, 516 F.3d 535, 537 (7th Cir. 2008). (explaining that the BIA considers crimes against people in a protected class such as domestic partners, peace officers or children where the statute of conviction requires actual infliction of bodily harm to be CIMT's).

Failure to investigate and research the immigration consequences falls below an objectively reasonable standard and should constitute deficient performance because it is "quintessentially the duty of counsel to provide her client with available advice about an issue like deportation[.]" ***Padilla***, 559 U.S. at 370. Failure to provide specific advice is equivalent to remaining silent, when, like in this case, the consequences of the plea are readily available and the client faces permanent exclusion and separation from his family. Silence in this case was "fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" Id. quoting ***Libretti v. United States***, 516 U.S. 29, 50-51 (1995).

D. Trial counsel's deficient performance prejudiced Mr. Ortiz-Mondragon.

Because a review of the immigration code and controlling case law clearly shows that one of the crimes charged in this case would have certain, adverse, and permanent immigration consequences, Mr. Ortiz-Mondragon's trial counsel was obligated to explain those consequences to him in order to ensure that Mr. Ortiz-Mondragon could make an informed decision whether or not

to accept the plea agreement. ***Id***. at 369. However, counsel did not discuss immigration consequences with him prior to entry of his plea, nor did counsel provide him with the specific advice that pleading to substantial battery as an act of domestic violence would result in certain deportation by rendering him ineligible for cancellation of removal and also make him permanently inadmissible. (35:5; App. 121.)

Counsel's deficient performance prejudiced Mr. Ortiz-Mondragon because he had every reason to try and preserve a chance to remain in the United States where he had lived, worked and raised a family since 1997. Had Mr. Ortiz-Mondragon been aware of the severity and permanent nature of the immigration consequences, he would not have pled guilty to that crime. (35:6; App.122). Instead, as alleged in his postconviction motion, Mr. Ortiz-Mondragon would have tried, through his attorney, to negotiate a plea that would not have resulted in mandatory removal and permanent exclusion and separation from his family. (36:6; App.122). If he had been unable to negotiate an immigration-safe disposition, Mr. Ortiz-Mondragon would have insisted on going to trial in order to preserve any possibility of avoiding the adverse and permanent immigration consequences. (35:6; App.122).

II. The Record Does Not Affirmatively Demonstrate that Trial Counsel Adequately Advised Mr. Ortiz-Mondragon About the Adverse Immigration Consequences of His Guilty Plea.

For a non-citizen defendant such as Mr. Ortiz-Mondragon, avoiding adverse immigration consequences may be more important than the length of incarceration he faces. ***Padilla***, 559 U.S. at 368. Here, the circuit found that the record affirmatively demonstrated that Mr. Ortiz-Mondragon received advice about the immigration consequences of his

plea in the form of the general warnings contained in the plea questionnaire form as well as the circuit court's statutory warnings. (36:2; App. 118). The circuit court observed that Mr. Ortiz-Mondragon told the court that he read and understood the plea questionnaire. (36:2; App. 118). The questionnaire states, "I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law." (20). Similarly, the circuit court noted that it had personally addressed Mr. Ortiz-Mondragon as required under Wis. Stat. § 971.08(1)(c), telling him:

> If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

The circuit court concluded that Mr. Ortiz-Mondragon was only entitled to an equivocal warning that there may be adverse immigration consequences and that the record affirmatively showed that defense counsel fulfilled his duties under ***Padilla*** to provide him with that advice. (36:2,6; App. 118, 122). Although the Court of Appeals did not specifically address the guilty plea questionnaire as an affirmative showing that counsel provided advice regarding immigration consequences, it affirmed the circuit court's decision. ***Ortiz-Mondragon***, 2014 WI App 114. (App. 101-109).

However, a plea questionnaire form for this purpose is insufficient because the form is not meant as a substitute for the advice of counsel; rather, it is meant to facilitate the court's duty under to provide the statutory warnings under Wis. Stat. § 971.08 and to ensure a defendant's plea is constitutionally valid. *See* ***State v. Bangert***, 131 Wis. 2d 246,

389 N.W.2d 246. Moreover, it is a long standing principle that a plea questionnaire, by itself, cannot take the place of a trial court's colloquy to ensure the plea is being made knowingly, intelligently and voluntarily. *See* ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987). Likewise, the form should not substitute for meaningful counsel about how a conviction is likely to impact one's immigration status.

Here, the circuit court pointed to its statutory warning under Wis. Stat. § 971.08(1)(c) as further showing Mr. Ortiz-Mondragon was provided equivocal advice. The statutory court warning which is the same general warning contained in the plea questionnaire form, is unclear and generic. ***State v. Mendez***, 2014 WI App 57, ¶14, 354 Wis. 2d 88, 847 N.W.2d 895.[1] The court's warning should not be a substitute for the reasoned advice of counsel because the roles of each in the criminal justice system are distinct. The boilerplate language of the warning provides no insight into whether the consequences are clear, whether the conviction will trigger mandatory deportation, or as in this case, the likelihood of a particular crime being categorized as a CIMT. Moreover, the general court warning does not take into consideration the particular immigration status of the defendant.

A "may" warning, on its own, is inadequate because it conveys to a defendant that there is a chance, perhaps even a good one, that he will not be deported.***Favela***, 311 P.3d 1213, ¶ 17. "With such an important consideration at stake, boilerplate language contained in a plea agreement cannot substitute for the reasoned and thoughtful discourse between defense counsel and client." ***Ortega-Araiza***, 2014 WY 99, ¶ 22. Accordingly, the generic warning simply shows that an attorney relayed that generic information. It does not establish

that counsel fulfilled his obligation to investigate and research the relevant law necessary to meaningfully counsel his client as to how, or the likelihood, that the warning contained in the form applies to his particular case.

In this case, the fact that the signed form exists in the court record provided 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). The generic warning does not affirmatively demonstrate that counsel and Mr. Ortiz-Mondragon had a discussion about why or how the plea may impact him and the likelihood of adverse immigration consequences being triggered. All the form shows is that counsel relayed information. An attorney's role goes beyond reading boilerplate language. ***Id***.

The Court of Appeals rejected qualified advice such as "may" or "strong likelihood" in cases involving offenses similar to those in ***Padilla***. *See* ***State v. Mendez***, 2014 WI App 57, 354 Wis. 2d 88, 847 N.W.2d 895; ***State v. Shata***[10], 2014 WI 90, 356 Wis. 2d 326, 855 N.W.2d 491. (unpublished opinion). (App. 131-138). In ***Shata***, the Court of Appeals expected trial counsel to read the federal statute and apply it to the crime at issue because doing so would have revealed to the client that deportation was certain. ***Id***. ¶ 28. (App. 135).

Yet, in the case at hand, the court of appeals held that trial counsel need not go beyond the immigration statute, even when doing so will enable the attorney to determine that

[10] This Court granted review on December 18, 2014.

the plea his is proposing will result in certain deportation and permanent exclusion. ***Ortiz-Mondragon***, 2014 WI 114, ¶ 12. (App. 109). Rather, it concluded that in cases such as this one, a generic warning is sufficient advice and it accepted the circuit court's conclusion that the plea questionnaire affirmatively shows a non-citizen defendant receive adequate warning. ***Id***. (App. 109).

These two decisions create different standards for the effective assistance of counsel for non-citizen defendants facing certain removal and exclusion based not on the clarity of the immigration law, but solely whether a particular crime is enumerated in the immigration statute. On one end of the spectrum, non-citizen defendants contemplating a plea to a crime found in the INA statute are entitled to receive specific advice about how a particular plea, under their particular circumstances, will affect their immigration status. However, on the other end of the spectrum, non-citizen defendants contemplating a plea to a crime not enumerated in the immigration statute are entitled to nothing more than the boilerplate language contained in the plea form and used by the court. These defendants cannot be assured of any thoughtful discussion or analysis about whether or not the immigration consequences of their plea are actually clear and how a plea may affect their immigration status given their own personal circumstances.

The fundamental role of defense counsel is to be aware of the advantages and disadvantages of a plea negotiation with respect to the interests and circumstances of a particular client. *See e.g.*, Nat'l Legal Aid and Defender Ass'n, ***Performance for Criminal Representation*** § 6.2 (1995). Allowing for a general warning, even when the immigration consequences are unclear undermines the long established role of defense counsel.

CONCLUSION

For the reasons stated above, Mr. Ortiz-Mondragon requests that the court reverse the decision of the court of appeals and find that as a matter of law his counsel's performance was deficient and remand to the circuit court for a ***Machner*** hearing. Alternatively, he requests that this Court find that there are insufficient facts to determine deficient performance and remand for a ***Machner*** hearing.

Dated this 20th day of January, 2015.

Respectfully submitted,

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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 7, 617 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 20th day of January, 2015.

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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) a copy of any unpublished opinion cited under § 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 20th day of January, 2015.

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