STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2435-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FERNANDO ORTIZ-MONDRAGON,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER DENYING A POSTCONVICTION MOTION FOR PLEA WITHDRAWAL, ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE DONALD R. ZUIDMULDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITIES

Page

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant-petitioner, Fernando Ortiz-Mondragon, appeals a published opinion of the court of appeals, *State v. Ortiz-Mondragon*, 2014 WI App 114, 358 Wis. 2d 423, 856 N.W.2d 339.[1] The court of appeals affirmed the Brown County Circuit Court's decision denying Ortiz-Mondragon's postconviction motion for plea withdrawal based on his claim that trial counsel performed deficiently under *Padilla v. Kentucky*, 559 U.S. 356 (2010), by failing to unequivocally inform him that his plea would result in his deportation or inadmissibility to the United States. *Ortiz-Mondragon*, 358 Wis. 2d 423, ¶¶ 1, 12-13.

The circuit court's decision.

On October 9, 2013, the circuit court issued a written decision and order denying Ortiz-Mondragon's motion to withdraw his plea (36). The court acknowledged that, pursuant to *Padilla*, attorneys must inform their clients whether their pleas carry a risk of deportation (36:3-4). The court also noted, however, that "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences" (quoting *Padilla*, 559 U.S. at 369) (36:4). Applying *Padilla*, the circuit court rejected Ortiz-Mondragon's claim:

> Ortiz now asks the Court to allow him to withdraw his plea because his "trial counsel failed to advise him of adverse immigration consequences of his plea, specifically that the convictions mandated removal and resulted in his permanent exclusion from the country once removed." (Postconviction

[1] The court of appeals opinion is appended to the petitioner's brief (Pet-Ap. 101-09).

Motion, ¶ 15.) Despite this claim, Ortiz acknowledges that he was given *equivocal* immigration warnings by both the Court, as required by Wisconsin Statutes section 971.08, and the Plea Questionnaire/Waiver of Rights form. (See Postconviction Motion, ¶ 2.) Therefore, the Court views the issue before it as, essentially, whether the circumstances were such that trial counsel was required to provide Ortiz with *unequivocal* advice regarding the immigration-related consequences of his plea to the charge of substantial battery. In other words, is the law regarding the immigration consequences of Ortiz's conviction "succinct and straightforward." See Padilla at 369.

The Court determines 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. Ortiz's conviction, and thus the advice trial counsel was required to provide, is distinguishable from that in Padilla.

. . . .

Unlike the clarity that exists with a crime involving a controlled substance conviction [like the one at issue in *Padilla*], a "crime involving moral turpitude" is a broad, rather than specific, classification of crimes. Notably, Ortiz does not provide any citation to statutory or case law to explain *why* Ortiz's conviction for substantial battery is a crime of moral turpitude. Instead, he simply asserts that it is. The Court searched for a definition for "crime of moral turpitude" within the federal immigration statutes and was unable to find one. Black's Law Dictionary does not have a definition for "crime of moral turpitude" but defines "moral turpitude" as "[c]onduct that is contrary to justice, honesty, or morality". Black's Law Dictionary, 1030 (8th ed., 2004). This definition is extremely broad.

> Even if, ultimately, Ortiz's crime *is* one of moral turpitude, as the term is used in 8 U.S.C. § 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 no 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.
>
> Under the circumstances, Ortiz has not stated sufficient facts which entitle him to a hearing on his postconviction motion. The facts, as alleged, demonstrate that Ortiz's counsel did not perform deficiently by providing Ortiz with equivocal, rather than unequivocal, advice regarding the immigration-related consequences of his plea. Therefore, Ortiz's motion to withdraw his plea must be dismissed.

(36:4-7) (footnote omitted)(emphasis in original).

The court of appeals' decision.

The court of appeals affirmed the circuit court's ruling and held that "counsel performed adequately by informing Ortiz-Mondragon that his plea carried the possibility of these consequences [deportation and inadmissibility to the United States]." *Ortiz-Mondragon*, 358 Wis. 2d 423, ¶ 1. Noting the difficulty of determining whether an offense might be considered a "crime of moral turpitude" by the Board of Immigration Appeals or the federal courts, the court of appeals rejected Ortiz-Mondragon's argument that the consequences of his plea were sufficiently clear to require more specific advice from his attorney:

> If an attorney must search federal court and unfamiliar administrative board decisions from

> around the country to identify a category of elements that together constitute crimes of moral turpitude, and then determine whether a charged crime fits that category, then the law is not "succinct, clear, and explicit." *See Padilla*, 559 U.S. at 368.
>
> Ortiz-Mondragon asserts he pled guilty to a crime of moral turpitude. In contrast with the circumstances in Padilla, this category is a "broad classification of crimes" that escapes precise definition. *See. id*. He has not identified clear authority indicating any of the crimes to which he pled were crimes of moral turpitude. Rather, this appears to be one of the "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *See id*. at 369. Accordingly, Ortiz-Mondragon's attorney did not perform deficiently by failing to unequivocally inform him that his plea would result in deportation and permanent inadmissibility.

Id. ¶¶ 12-13.

Ortiz-Mondragon petitioned for review with this court.

ARGUMENT

ORTIZ-MONDRAGON IS NOT ENTITLED TO WITHDRAW HIS PLEA.

A. Legal Standards For Plea Withdrawal Based On Ineffective Assistance Of Counsel.

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in "manifest injustice." *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836; *see also State v. Bentley*, 201 Wis. 2d

303, 311, 548 N.W.2d 50 (1996). "[T]he manifest injustice test is met if the defendant was denied the effective assistance of counsel." *Id.* at 311 (quotation marks and citation omitted).

Consistent with the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a defendant seeking to withdraw his plea(s) based on a claim of ineffective assistance of counsel must establish that his attorney's performance was deficient and that he suffered prejudice as a result. *See State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. In this context, the defendant may demonstrate a manifest injustice by proving that his counsel's conduct was objectively unreasonable and that, but for counsel's error(s), he would not have entered a plea. *See Bentley*, 201 Wis. 2d at 311-12. The circuit court and the court of appeals correctly found that Ortiz-Mondragon's trial counsel did not perform deficiently.

B. Ortiz-Mondragon Was Not Entitled To Additional And Unequivocal Advice About The Immigration Consequences Of His Plea Because The Determination Of Whether Any Of His Offenses Would Be Deemed A Crime Against Moral Turpitude In The Context Of Immigration Proceedings Was Not "Succinct And Straightforward," *Padilla*, 359 U.S. at 369.

In *Padilla*, the Supreme Court held that counsel was required to inform the defendant that his conviction for distributing drugs would render him deportable because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Padilla*, 559 U.S. at 368 (citing 8

U.S.C. § 1227(a)(2)(B)(i)).[2] As the Court noted, Padilla's case presented a succinct and straightforward legal scenario, and his attorney not only advised him incorrectly that he would not face deportation, the attorney could have avoided doing so by simply reading the relevant federal statute:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, **which addresses not some broad classification of crimes** but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency. The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Padilla, 359 U.S. at 368-69 (emphasis added).

The Court went on to explain, however, that in cases where the law is not succinct and straightforward, an attorney need only provide a general warning that criminal charges may present a risk of adverse immigration consequences:

> Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be

[2] 8 U.S.C. § 1227(a)(2)(B)(i) provides that "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . ., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

> numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. **When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences**. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla, 559 U.S. at 369 (emphasis added)(footnote omitted). Among the unclear scenarios Justice Alito addressed in his concurring opinion were crimes against moral turpitude:

> [P]roviding advice on whether a conviction for a particular offense will make an alien removable is often quite complex. "Most 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* . . . ." M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is . . . a "crime involving moral turpitude [(CIMT)]" is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer's Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) . . . ABA Guidebook § 4.65, at 130 ("Because nothing is ever simple with immigration law, the terms 'conviction,' 'moral turpitude,' and 'single scheme of criminal misconduct' are terms of art"); *id.*, § 4.67, at 130 ("[T]he term 'moral turpitude' evades precise definition").
>
> . . . .

> Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 ("Writing bad checks *may or may not* be a CIMT" (emphasis added)); *ibid.* ("[R]eckless assault coupled with an element of injury, but not serious injury, is *probably* not a CIMT" (emphasis added)); *id.*, at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his license had been suspended or revoked); *id.*, at 136 ("If there is no element of actual injury, the endangerment offense *may* not be a CIMT" (emphasis added)); *ibid.* ("Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT" (emphasis added)).
>
> . . . .
>
> In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "nothing is ever simple with immigration law" – including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook § 4.65, at 130; Immigration Law and Crimes § 2:1.

Padilla, 559 U.S. at 377-81 (Alito, J., concurring). Justice Alito's comments accurately reflect the difficulty inherent in determining the immigration consequences of certain convictions, particularly those that may or may not be crimes involving moral turpitude.

The Immigration and Nationality Act does not define what constitutes a crime involving moral turpitude. Despite the vagueness of the phrase, the Supreme Court has held that it is not unconstitutional. *Jordan v. De George*, 341 U.S. 223, 240 (1951). In his dissent, however, Justice Jackson observed that:

> What is striking about the opinions in these "moral turpitude" cases is the wearisome repetition of cliché[s] [] attempting to define "moral turpitude," usually a quotation from Bouvier. But the guiding line seems to have no relation to the result reached. The chief impression from the cases is the caprice of the judgments. How many aliens have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law.

Jordan, 341 U.S. at 239 (Jackson, J., dissenting) (footnote omitted). In keeping with that sentiment, courts often have criticized the murkiness of how crimes involving moral turpitude are defined. *See, e.g., Partyka v. Att'y Gen. of U.S.*, 417 F.3d 408, 409 (3d Cir. 2005) (referencing the "amorphous morass of moral turpitude law"); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) ("'[M]oral turpitude' is perhaps the quintessential example of an ambiguous phrase."); *id.* at 921 (Berzon, J., dissenting) (referring to precedent on the definition of crimes involving moral turpitude as "a mess of conflicting authority"); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008) (describing the phrase "crime involving moral turpitude" as "notoriously baffling").

One example of just how murky this area of the law is illustrated by the split in the federal circuits concerning the proper methodology for immigration judges and courts to use in assessing whether convictions are crimes involving moral turpitude. The split stems largely from the United States Attorney General's opinion in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008). In that opinion, the Attorney General attempted to clarify earlier decisions concerning crimes involving moral turpitude:

> [T]his opinion rearticulates the Department's definition of the term [CIMT] in a manner that responds specifically to the judicial criticism. . . . [T]his opinion makes clear that, to qualify as a crime

> involving moral turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.

Id. at 709 n.1.

In addition, the Attorney General analyzed the Immigration and Nationalization Act and concluded that immigration judges may consult evidence outside the record of conviction to determine whether an alien has been convicted of a crime involving moral turpitude.[3] It appears that the Attorney General chose to permit immigration judges to consult information outside the record of conviction because "[t]he relevant provisions contemplate a finding that the particular alien did or did not commit a crime involving moral turpitude before immigration penalties are or are not applied." *Id.* at 699. The Attorney General also concluded that immigration judges should not be confined to the record of conviction when deciding whether an alien has been convicted of a crime involving moral turpitude because "moral turpitude" is not "an element of an offense." *Id.* at 699-700.

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[3] The Attorney General established a three-step process for this assessment. First, the immigration judge must determine if 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). If it is not, the immigration judge moves to the second step to decide whether the conviction is a crime involving moral turpitude under the modified categorical approach, which permits the immigration judge to consider the "record of conviction[,]" including "documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea and the plea transcript." *Id.* at 690. Finally, if the offense is not a crime involving moral turpitude under the modified categorical approach, the immigration judge goes on to the third step and considers evidence outside of the record of conviction. *Id.*

The federal circuits disagree on the *Silva-Trevino* opinion. Some circuits, including the Seventh and Eighth Circuits, are in accord with *Silva-Trevino* and allow immigration judges to consider evidence outside the record of conviction to determine whether an alien's conviction is a crime involving moral turpitude.[4] The Third, Fourth, Fifth, Ninth, and Eleventh Circuits, however, have explicitly rejected the *Silva-Trevino* three-step analysis.[5] The Supreme Court may well resolve this split, but it has not done so yet. *Silva-Trevino* remains as precedent, but with such significant disagreement across the circuits, the law is far from settled. Naturally, different methodologies can and do yield different results in cases that are otherwise similar.

In addition, the assessment of what constitutes a crime involving moral turpitude is further complicated under any methodology because of the wide variety of criminal statutes and related offenses that may qualify. The elements and terms of individual state statutes for something as simple as battery often vary significantly. As a result, decisions regarding whether and when a given offense amounts to a crime involving moral turpitude vary as well.

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[4] *Ali v. Mukasey*, 521 F.3d 737, 741 (7th Cir. 2008) (regarding "crimes involving moral turpitude," there are two questions a court must answer: first, "the fact of the prior conviction," for which the immigration judge cannot go outside the record of conviction, and second, "the appropriate classification of that conviction, which may require additional information."); *Bobadilla v. Holder*, 679 F.3d 1052, 1055 (8th Cir. 2012) ("[b]ecause 'moral turpitude' is not an element of any criminal offense," the [immigration judge] can look beyond the fact of conviction to the circumstances of the crime to determine whether moral turpitude was involved).

[5] *See Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), *republished* at 746 F.3d 907 (9th Cir. 2013); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303 (11th Cir. 2011).

To determine whether a crime is one of moral turpitude, adjudicators examine the elements of the applicable statute. *See Matter of Torres-Varela*, 23 I. & N. Dec. 78, 84-85 (B.I.A. 2001). At the same time, neither the seriousness of the offense nor the severity of the sentence imposed is conclusive as to whether a crime involves moral turpitude. *Matter of Serna*, 20 I. & N. Dec. 579, 581 (B.I.A. 1992). For example, a simple assault and battery offense generally is not a crime of moral turpitude, but an aggravating factor can alter that determination. *See, e.g., Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 326-27 (4th Cir. 2001); *Matter of Fualaau*, 21 I. & N. Dec. 475 (B.I.A. 1996); *Matter of Danesh*, 19 I. & N. Dec. 669 (B.I.A. 1988). The analysis is far from precise, and decisions from both the Board and the courts reflect that.

For instance, the Board and the courts have held that a conviction for domestic assault involves moral turpitude if an essential element of the crime is intent to cause physical harm to a spouse, child, or domestic partner. *In re Tran*, 21 I. & N. Dec. 291 (B.I.A. 1996); *Gradega v. U.S. I.N.S.*, 12 F.3d 919 (9th Cir. 1993), *superseded by statute as stated in Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011). The Board also held, however, that a Virginia conviction for domestic assault and battery is not necessarily a crime of moral turpitude despite the fact that the statute requires an intent to cause injury. *In re Sejas*, 24 I. & N. Dec. 236 (B.I.A. 2007).

In another context, the Fifth Circuit held that a Texas conviction for failing to provide assistance after a car accident that resulted in injury or death was a crime involving moral turpitude. *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 290 (5th Cir. 2007). The Ninth Circuit then distinguished that decision and found that a conviction for leaving the scene after an accident did not necessarily involve moral turpitude when the minimum violation included refusal to provide identification information. *Cerezo v. Mukasey*, 512 F.3d 1163, 1168-69 (9th Cir. 2008).

The above discussion does not capture nearly all of the nuances and discrepancies that exist in this area of the law, but it does illustrate the complexity of deciphering whether a given offense is a crime involving moral turpitude. The cases and sources cited in Ortiz-Mondragon's brief further illustrate the point. While Ortiz-Mondragon's conviction may well qualify as a crime of moral turpitude, that conclusion is not "clear and certain" or "succinct and straightforward[,]" *Padilla*, 559 U.S. at 369. The circuit court correctly found that:

> Even if, ultimately, Ortiz's crime *is* one of moral turpitude, as the term is used in 8 U.S.C. § 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 no 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.[6]

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[6] As the circuit court noted, Ortiz-Mondragon conceded in his motion for plea withdrawal that he had received the statutory immigration warning, Wis. Stat. § 971.08(1)(c), from both the circuit court and his trial counsel prior to entering his pleas (35:2; 36:2). The transcript from his plea and sentencing hearing is also illuminating. When the victim addressed the court, she specifically stated that she and Ortiz-Mondragon "were trying to keep [the family] here in the states, but if he ends up with a felony charge, that's not going to happen" (45:10). Then, when the circuit court asked whether Ortiz-Mondragon was on an immigration hold, his attorney stated: "I think there is, but the information I get is secondhand" (45:11). Those statements corroborate Ortiz-Mondragon's understanding that the charges against him "may carry a risk of adverse immigration consequences." *Padilla*, 559 U.S. at 369 (footnote omitted). Should this court disagree and conclude that additional information is necessary to support the circuit court's finding, however, the case should be remanded to the circuit court for an evidentiary hearing.

(36:6) (footnote added)(emphasis in original). This court should affirm the court of appeals' decision and find that Ortiz-Mondragon's trial attorney was required to do no more than advise him that his plea "may carry a risk of adverse immigration consequences." *Padilla*, 559 U.S. at 369. The court should also uphold the circuit court's finding that Ortiz-Mondragon did, in fact, receive such a warning. Should the court feel that additional evidence is necessary to support that finding, it should remand the case for an evidentiary hearing.

C. Even If This Court Concludes That Ortiz-Mondragon's Trial Attorney Performed Deficiently, The Court Should Remand The Case To The Circuit Court To Determine Whether Ortiz-Mondragon Suffered Prejudice As A Result.

Even if a defense attorney performs deficiently in advising a criminal defendant about the deportation consequences of a plea, the inquiry is far from over because the defendant bears the heavy burden of proving that the error prejudiced him:

> Surmounting *Strickland*'s high bar is never an easy task. *See, e.g.*, 466 U.S. at 689, 104 S. Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential"); *id.* at 693, 104 S. Ct. 2052 (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial"). Moreover, **to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.** *See Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).

Padilla, 559 U.S. at 371-72 (emphasis added); *see also State v. Mendez*, 2014 WI App 57, ¶ 12, 354 Wis. 2d 88, 847 N.W.2d 895 (quoting *Padilla*, 559 U.S. at 372). In other

words, a defendant must establish a reasonable probability that he would not have pleaded guilty and would have gone to trial but for his attorney's allegedly deficient performance. *See Bentley*, 201 Wis. 2d at 311-12; *see also Hill v. Lockhart,* 474 U.S. 52, 59 (1985) (requires reasonable probability defendant would not have pleaded guilty and would have insisted on going to trial); *People v. Bao Lin Xue,* 30 A.D.3d 166, 815 N.Y.S.2d 566 (N.Y. App. Div. 2006) (no reasonable probability that defendant would have insisted on going to trial but for counsel's alleged mistake in affirmatively misrepresenting the immigration consequences of the plea).

In a recent decision, the Fifth Circuit Court of Appeals explained how to determine prejudice in cases like this one:

> In assessing prejudice, we consider the totality of the circumstances, including [the defendant's] evidence to support his assertion, his likelihood of success at trial, the risks [the defendant] would have faced at trial, [the defendant's] representations about his desire to retract his plea, his connections to the United States, and the district court's admonishments.

United States v. Kayode, No. 12-20513, 2014 WL 7334912 at *5 (5th Cir. Dec. 23, 2014) (footnote omitted). Balancing all of those factors, the Fifth Circuit held that Kayode had not proven prejudice. *Id*. *8. Because both the circuit court and the court of appeals found that Ortiz-Mondragon's trial counsel did not perform deficiently, neither addressed whether Ortiz-Mondragon suffered prejudice based on his attorney's advice. The record is incomplete on that point.

The record also does not include any specific documentation regarding Ortiz-Mondragon's removal proceedings. At his initial appearance, however, the prosecutor indicated that " the defendant is not here legally. I believe there is going to be an immigration hold on him very shortly" (42:3). If Ortiz-Mondragon was in the United

States illegally or otherwise subject to immigration action, he would not be able to establish prejudice under *Strickland* and *Padilla*. *See Garcia v. State,* 425 S.W.3d 248, 261 n.8 (Tenn. 2013) ("[C]ourts have consistently held that an illegal alien who pleads guilty cannot establish prejudice, even if defense counsel failed to provide advice about the deportation consequences of the plea as *Padilla* requires, because a guilty plea does not increase the risk of deportation for such a person."); *see also* César Cuauhtémoc García Hernández*, Padilla v. Kentucky's Inapplicability to Undocumented and Non-Immigrant Visitors*, 39 Rutgers L. Rec. 47, 52 (2012) (observing that even if courts applied *Padilla* to undocumented persons, courts likely would deny claims of ineffective assistance of counsel on the grounds that any incompetent advice regarding the deportation consequences of a criminal conviction would be harmless because the individual would be deported regardless of the conviction). So, should this court find that Ortiz-Mondragon's attorney performed deficiently under *Padilla*, the court should remand the case to the circuit court for a hearing and related determination on prejudice.

CONCLUSION

For the above reasons, the State of Wisconsin asks this court to affirm the court of appeals' and the circuit court's decisions denying Fernando Ortiz-Mondragon's motion to withdraw his plea.

Dated this 9th day of February, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,626 words.

Dated this 9th day of February, 2015.

_____
Nancy A. Noet
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

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

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

Dated this 9th day of February, 2015.

_____
Nancy A. Noet
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