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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 And Order Denying Postconviction Relief Entered in the Circuit Court for Brown Court, the Honorable Donald R. Zuidmulder, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. ***Padilla*** and the Sixth Amendment Require Defense Counsel to Determine Whether Substantial Battery-Domestic Abuse Is A Crime Involving Moral Turpitude, Thereby Triggering Adverse Consequences the Immigration Statute Defines Clearly.

A. An attorney performing reasonably under the prevailing weight of professional norms would conclude that substantial battery under Wis. Stat. § 940.19(2), domestic abuse, is a CIMT.

1. The clarity of immigration consequences is not determined by the level of difficulty in determining whether a crime will be classified as a CIMT.

The state does not refute that trial counsel had a duty to research and investigate the immigration consequences of the plea negotiation, and to advise Mr. Ortiz-Mondragon accordingly to ensure that his decision to plead was an informed one. The state also agrees that the ***Strickland*** standard applies in the context of this case. (State's Br. at 6). ***Padilla*** holds that ***Strickland*** requires defense counsel to provide affirmative advice regarding immigration consequences to their non-citizen clients, and that when the consequences are clear or succinct and straightforward, defense counsel must provide equally clear advice. ***Padilla v. Kentucky***, 559 U.S. 356, 366, 369 (2010).

However, it argues that counsel was not required to give specific advice regarding the immigration consequences in this case because the "complexity of deciphering whether a given offense is a crime involving moral turpitude[]" rendered the conclusion about the consequences "unclear", and not "succinct or straightforward." (State's Br. at 14). However, ***Padilla*** held that the *clarity* of the consequence, not

the ease by which the consequences can be deciphered, determines the scope of counsel's advice. 559 U.S. 356, 369. (emphasis added). Moreover, ***Strickland*** and its progeny have never measured whether or not counsel performed deficiently based upon the level of difficulty of the research or investigation involved.

While the immigration statute does not define "crime involving moral turpitude," it is a constitutional categorization of crimes, and courts routinely determine whether a particular offense qualifies as a CIMT. ***Jordan v. DeGeorge***, 341 U.S. 223, 232 (1951). For example, the 7th Circuit recently affirmed the BIA's decision that fleeing and eluding a police officer, contrary to Wis. Stat. § 346.04(3), is categorically a CIMT. ***Cano-Oyarzabal v. Holder***, 774 F.3d 914, 919. (7th Cir. 2014). The court considered whether the elements of the offense included morally wrong conduct with some degree of intent, and concluded that the element of knowledge made it categorically a CIMT. ***Id***. at 916-918. It also took into account previous decisions involving similar offenses. ***Id***. at 918. Because the statutory language and previous cases supported the finding of a CIMT, no further inquiry was required. ***Id***. at 917.

The issue here is whether it is clear that a substantial battery under Wis. Stat. § 940.19(2) as an act of domestic violence qualifies as a CIMT; thereby triggering straightforward consequences outlined in the immigration statute. Attorneys undertaking the research and analysis for which they are trained will be able to determine whether an offense qualifies as a CIMT. In ***Matter of Silva-Trevino***, 24 I. & N. Dec. 687, 690 (A.G. 2008) the attorney general established a three-step, hierarchical approach to determining whether an offense is a CIMT. Prior to the opinion, all of the federal circuits consistently applied the long-established first

two steps.[1] Only the 7th and 8th circuits currently permit use of the third step.[2]

The first step, the "categorical approach", requires courts to look first at the statutory language and determine whether there is a "realistic probability, not theoretical possibility," that the criminal statute at issue could be applied to conduct that does not involve moral turpitude. ***Silva-Trevino***, 24 I.&N. Dec. at 688. (internal quotations omitted). The second step, the "modified categorical approach," allows courts to consider the record of conviction if, after the first step, it is unclear whether the crime of conviction is a CIMT. ***Id***. at 690. The record of conviction includes charging documents, the judgment of conviction, jury instructions, and a plea form or transcript. ***Id***. The third step allows courts to use evidence beyond the formal record of conviction when under the first two steps the analysis is inconclusive. ***Id***. However, that approach is "applied only where the record of conviction does not itself resolve the issue. . . ."***Marin-Rodriguez***, 710 F.3d at 738 (7th Cir. 2013).

Here, an attorney would use this framework for analyzing substantial battery, domestic abuse. Under the first step, defense counsel would consider whether an act against a domestic partner, done with intent to cause bodily harm, that actually causes substantial bodily harm under Wis. Stats. §§ 940.19(2) and 968.075(1)(a), encompasses morally wrong conduct with a "scienter". To guide the analysis, an attorney would consider how courts have ruled on similar offenses.

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[1] ***Jean-Louis v. Attorney General of U.S.***, 582 F.3d 462, (3rd Cir.); ***Prudencio v. Holder***, 669 F.3d 472, 482 (4th Cir. 2012); ***Marmalejo-Campos v. Holder***, 558 F.3d 903 (9th Cir. 2009); ***Fajardo v. U.S. Atty. Gen.***, 659 F.3d 1303 (11th Cir. 2011); ***Silva-Trevino v. Holder***, 742 F.3d 197 (5th Cir. 2014).

[2] ***Marin-Rodriguez v. Holder***, 710 F.3d 734, 737 (7th Cir. 2013); ***Bobadilla v. Holder***, 679 F.3d 1052 (8th Cir).

Courts have consistently held that when a simple battery involves some aggravating factor like the infliction of injury on a person deserving of special protection, such as domestic partners, children, or peace officers, it will be considered a CIMT. ***Matter of Ahortalejo-Guzman***, 25 I&N Dec. 465, 466-467 (BIA), citing ***Garcia v. Att'y Gen. of the U.S.***, 329 F.3d 1217, 1222 (11th Cir. 2003) (the inherent nature of the statute – aggravated child abuse – rendered its violation a crime involving moral turpitude); ***Pichardo v. INS***, 104 F.3d 756, 760 (5th Cir. 1997) (Pennsylvania aggravated assault was CIMT because all four categories of commission involved bodily injury and a minimum mens rea of recklessness); ***Grageda v. U.S. INS***, 12 F.3d 919, 921-22 (9th Cir. 1993) (California statute for spousal abuse included willfulness as an element, thus CIMT)(superceded by statue in ***Plane v. Holder***, 652 F.3d 991 (9th Cir. 2011) on other procedural grounds); ***Matter of Sanudo***, 23 I&N 968, 971-972 (BIA 2006) (no admissible record indicating more than nonviolent touching resulting in injury was not CIMT.); ***Matter of Tran***, 21 I&N Dec. 291, 294 (BIA 1996) (willful infliction of corporal injury on a spouse resulting in a traumatic condition is a CIMT.) ; ***Matter of Danesh***, 19 I&N Dec. 669, 673 (BIA 1988) (aggravated assault resulted in bodily harm against a peace officer resulting in bodily harm was CIMT.); ***Matter of Medina***, 15 I&N Dec. 611, 612 (BIA 1976).(all three mental states in Illinois aggravated assault supported CIMT finding).

Even if the attorney was unsure how a court would rule using the categorical approach, he would know that under step two, a court considers the record of conviction. Here, the criminal complaint states the elements of the offense and the probable cause section alleges that Mr. Ortiz-Mondragon committed acts of violence against his live-in girlfriend/mother of his children, with the intention to cause her harm, and that and she received an injury to her head resulting in five staples. (1:1, 3-4). The plea transcript shows that he admitted to the facts in the complaint. (45: 4, 7). This

record of conviction makes it clear that an evaluating court would find that the offense is a CIMT.

Thus, the analysis in this case straightforward; substantial battery under Wis. Stat. § 940.19(2), domestic abuse, contains the essential elements to support a finding that it is a CIMT. Likewise, the terms and elements of the statute, the record of conviction and case law support that finding. The clear nature of the consequences here required counsel to provide equally clear advice, without regard to the difficulty. ***Padilla***, 559 U.S. 356.

2. Courts consistently use the same analysis in determining whether an offense is a CIMT.

The state agrees that domestic assaults involve moral turpitude if an essential element of the crime is the intent to cause physical harm to a spouse, child, or domestic partner. (State's Br. at 13). Nevertheless, it contends that different outcomes for similar crimes and the differences in analytical framework among the federal circuits, make analyzing whether substantial battery under Wis. Stat. § 940.19(2), domestic abuse, too difficult and murky. (State's Br. at 10-13). However, as described in the previous section, the case law is clear regarding the test that courts employ in determining whether an offense is a CIMT; thus providing defense counsel with an analytical framework to determine whether his client's conviction will be a CIMT.

The state argues that the discrepancies in decisions about whether a domestic abuse battery charge is a CIMT renders whether the Wisconsin statute in this case is a CIMT unclear. (State's Br. at 13). It relies on ***In re Sejas***, 24 I&N Dec. 236, 238 (B.I.A. 2007), in which the BIA held that the Virginia statute for domestic assault and battery was not a CIMT. However, the state's argument fails because that decision turned on the fact that the Virginia statute did "not require the actual infliction of physical injury and may [have]

include[d] any touching, however slight[,]" while Wisconsin's substantial battery requires actual substantial bodily harm. ***Id***. Additionally, 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***. Accordingly, ***Sejas*** demonstrates that courts apply the tests consistently and predictably. Thus, contrary to the state's assertion, the decision in ***Sejas*** does not muddy the waters in this case, but further confirms that substantial battery, which *does* have an element requiring actual injury, is a CIMT.

Although the state complains that there is "significant disagreement" amongst the circuits and that this will lead to different results, as previously noted, all of the circuits employ the first two steps in the CIMT analysis. (State's Br. at 12). The fact that the 7th Circuit permits courts to look at evidence beyond the formal record of conviction is inconsequential here because doing so is unnecessary. *See* ***Marin-Rodriguez***, 710 F.3d at 738 (7th Cir. 2013). While similar offenses may yield different results, the consistent way in which courts determine that an offense is a CIMT – looking first at the statutory language and then, if necessary, the record of conviction – make it clear that Wisconsin's substantial battery statute is a CIMT.

B. It would have been rational for Mr. Ortiz-Mondragon to reject the plea, therefore, counsel's deficient performance prejudiced him.

Neither the circuit court nor the court of appeals reached a determination regarding prejudice. Mr. Ortiz-Mondragon agrees that if this court finds that as a matter of law, trial counsel's performance was deficient, then the case should be remanded for an evidentiary hearing on the prejudice prong of the ineffective assistance of counsel claim.

As asserted in his postconviction motion, had Mr. Ortiz-Mondragon been aware that his plea disqualified from

cancellation of removal and rendered him inadmissible, he would not have pled. (35:6). Instead, he 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). 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).

In light of the severity of the consequences here – being permanently separated from his children - it is rational that, regardless of his chance at being acquitted at trial, Mr. Ortiz-Mondragon would have insisted on going to trial in order to try to avoid the immigration consequences of his conviction. See ***Padilla***, 559 U.S. 356, 372 (2010); ***State v. Mendez***, 2014 WI App 57 ¶ 17, 354 Wis. 2d 88, 98, 847 N.W.2d 895 ("[T]he proper analysis here, too: not merely whether [the defendant] would have won his trial but whether in his circumstances . . . .he might rationally have decided to reject the plea and risked . . . . prison so as to preserve a chance at avoid deportation").

The state, for the first time in its response, discusses the test for evaluating prejudice and suggests a case from the Fifth Circuit, ***United States v. Kayode***, 2014 U.S. App. WL 7334912 (5th Cir. 2014) as the case to look to when evaluating prejudice. (State's Br. at 16). In ***Kayode***, the court assessed prejudice under the totality of the circumstances, including, the defendant's "likelihood of success at trial, the risks [he] would have faced at trial, [his] representations about his desire to retract his plea, his connections to the United States, and the district court's admonishments." ***Id***. at *5. However, the court of appeals explicitly rejected a determination of prejudice that focuses on the strength of the state's case and whether a defendant is likely to be found guilty at trial. ***Mendez***, 354 Wis. 2d, ¶ 16. (citing ***Padilla*** that a rational decision does not focus on being found guilty at trial). Thus,

in Wisconsin, the likelihood of success at trial is not a factor in assess prejudice for ***Padilla*** purposes.

In addition, the state also asserts, for the first time, that if Mr. Ortiz-Mondragon was undocumented, he cannot show prejudice. (State's Br. at 17). While this question is not one before this court, assuming that he was undocumented, Mr. Ortiz-Mondragon still had a right to the effective assistance of counsel, and counsel's deficient performance prejudiced him because it rendered him ineligible for cancellation of removal, and inadmissible.

While unlawful presence in the United States renders one inadmissible under 8 U.S.C. § 1182(a)(D)(6)(A)(i), and by virtue of inadmissibility, that person is then deportable under 8 U.S.C. § 1227 (a)(1)(B), there are forms of relief and immigration benefits available. For example, 8 U.S.C. § 1229b(b)(1) permits the attorney general to cancel the removal of a non legal permanent resident if that person has been in the country for the past ten years, can show a good moral character, is not convicted of an aggravated felony or a CIMT, and can demonstrate that removal would result in extreme hardship to a spouse, parent, or child that is a U.S. citizen or lawful resident. Moreover, there are various family petitions, visas, and, as the immigration landscape continues to change, executive actions that allow for a period of authorization for those who are undocumented and meet eligibility criteria.[3]

Preserving the possibility of discretionary relief from deportation is crucial. ***Padilla***, 559 U.S. 356, 368. Although the relief cited above is discretionary and dependant on individual circumstances, criminal convictions will often foreclose an opportunity to gain lawful status for an undocumented individual. Here, once Mr. Ortiz-Mondragon

[3] Executive actions DACA, DAPA, family petitions and visas found at www.uscis.gov

pled guilty, he was no longer eligible for cancellation of removal. Thus, even if Mr. Ortiz-Mondragon was undocumented, he suffered prejudice by the deficient performance of his counsel in failing to advice him of the adverse immigration consequences.

II. The Record Is Insufficient to Demonstrate that Trial Counsel Adequately Advised Mr. Ortiz-Mondragon About the Adverse Immigration Consequences of His Guilty Plea

The state asserts that the victim's statement, "we were trying to keep him here in the states, but if he ends up with a felony charge, that's not going to happen[]" and trial counsel's lack of understanding as to whether his client was subject to an immigration hold corroborate that Mr. Ortiz-Mondragon's counsel adequately informed him about the immigration consequences. (State's Br. at 14 fn6).

However, neither of these statements establishes that trial counsel provided sufficient advice to Mr. Ortiz-Mondragon about the immigration consequences of his plea. The victim's statement fails to establish that defense counsel advised Mr. Ortiz-Mondragon about the immigration consequences. Moreover, the attorney's uncertainty about whether there was an immigration hold is no more illuminating. In fact, the attorney's uncertainty about the hold arguably demonstrates that he lacked the basic information about his client's status necessary to make an analysis and provide advice.

Nothing in the record establishes that counsel fulfilled his obligation to investigate and research the relevant law necessary to meaningfully counsel his client about the immigration consequences of his plea. Moreover, the ***Padilla*** court contemplated that there would be an informed consideration of adverse immigration consequences during the plea bargaining process; something that begins from the outset of a case. 559 U.S. 356, 373. Here, the plea form was

signed on November 27, 2012, the same day that Mr. Ortiz-Mondragon entered his plea. (20:4). Boilerplate language provided on the day of entering a plea is insufficient advice under ***Padilla***.

Even if this Court determines that counsel was not required to definitively advise Mr. Ortiz-Mondragon that substantial battery as domestic abuse was a CIMT, and that pleading to it would make him ineligible for cancellation of removal and inadmissible, Mr. Ortiz-Mondragon was entitled to know more than what is on a generic plea form. "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 v. Wyoming***, 2014 WY 99, ¶ 22, 331 P.3d 1189. Research would have enabled counsel to minimally advise Mr. Ortiz-Mondragon that many courts consider similar offenses a CIMT, and that if he pleads to a CIMT carrying a potential penalty of more than a year imprisonment, he would lose eligibility for cancellation of removal, and be inadmissible. The record is insufficient because boilerplate language in the plea form is insufficient to demonstrate that defense counsel adequately advised Mr. Ortiz-Mondragon.

CONCLUSION

For all of the reasons argued here, and in the brief-in-chief, Mr. Ortiz-Mondragon respectfully requests that this court hold that the immigration consequences for substantial battery were clear and that trial counsel's performance was deficient for failure to provide specific advice. This court should then remand for a hearing regarding the prejudice prong of the ***Strickland*** analysis. Alternatively, this court should hold that the record here is insufficient to find that counsel provided adequate advice regarding immigration consequences and remand for a ***Machner*** hearing.

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 3000 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.

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Dated this 23rd day of February, 2015.

Signed:

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