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Case No. 2013AP2435-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FERNANDO ORTIZ-MONDRAGON,

Defendant-Appellant-Petitioner.

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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.

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AMICUS BRIEF

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## I. ISSUES PRESENTED

- A. Is Mr. Ortiz-Mondragon's conviction for substantial battery contrary to Wis. Stat. 940.01(1) categorically a "crime involving moral turpitude".
- B. If so, is counsel required to explain the immigration consequences of his criminal conviction.

## II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Wisconsin Supreme Court's decision will have an immense impact on Wisconsin's immigrant community; both on those with lawful status and those without lawful status. The Pew Hispanic Trust estimates Wisconsin's immigrant community without status to be 100,000. This 100,000 includes potential applicants for immigrant visas as (1) abandoned and abused children, (2) as immigrant victims of domestic violence (3) as immigrant victims of crime, (4) and as victims of trafficking. It also includes every immigrant applying for lawful permanent residency, and for United States citizenship. Therefore, both oral argument and publication are warranted.

## III. STATEMENT OF THE CASE

Fernando Ortiz-Mondragon is an undocumented immigrant who pled guilty to substantial battery contrary to Wis. Stat. 940.01(1), criminal damage to property contrary to Wis. Stat. 943.01(1) and disorderly conduct, contrary to Wis. Stat. 947.01(1). He pled guilty to each crime as an act of domestic violence per Wis. Stat. 968.075(1)(a). The trial court ordered four months of conditional jail time and three years of probation.

#### IV. STATEMENT OF THE FACTS

Mr. Ortiz-Mondragon is a citizen and national of Mexico who has lived in the United States since 1997. He has four United States citizen children and no prior criminal convictions. Mr. Ortiz-Mondragon pled guilty to three criminal charges: substantial battery contrary to Wis. Stat. 940.01(1), criminal damage to property contrary to Wis. Stat. 943.01(1) and disorderly conduct, contrary to Wis. Stat. 947.01(1). Mr. Ortiz-Mondragon signed a standard plea questionnaire that contained the boilerplate language as to a plea having potential immigration consequences to anyone who is a non-citizen.

Ortiz-Mondragon sought post conviction relief in which he alleged ineffective assistance of counsel. Criminal convictions of the crimes to which he pled guilty are “crimes involving moral turpitude” (CIMTs) and that these CIMT convictions did two things. First, it made him ineligible for cancellation of removal and adjustment of status before an immigration court. Second, it made him inadmissible to the United States. Essentially, the plea and resulting criminal conviction preclude Mr. Ortiz-Mondragon from any form of immigration relief before an immigration court. Mr. Ortiz-Mondragon alleged that counsel failed to advise him of the adverse immigration consequences of his criminal convictions. He argued that under *Padilla v. Kentucky*, 559 U.S. 356 (2010) a competent attorney would have been able to discover the adverse immigration consequences of these criminal convictions as being CIMTs and advised him of the corresponding adverse immigration consequences. He also argued that this failure to advise caused prejudice to him. Had Mr. Ortiz-Mondragon known of that the plea agreement and resulting criminal conviction would result in certain deportation and

permanent inadmissibility he would have gone forward with a trial. In other words, had he known that he would be permanently separated from his three United States citizen children he would have gone to trial rather than accept the plea agreement.

The trial court denied Mr. Ortiz-Mondragon post conviction relief stating that trial counsel is not required to provide unequivocal advice regarding the adverse immigration consequences because the adverse immigration consequences are not “succinct and straightforward.” Although the trial court agreed that these convictions are CIMTs, it did not agree that these convictions carried the same clear adverse immigration consequences envisioned in *Padilla*. Furthermore, the trial court stated that Mr. Ortiz-Mondragon received the requisite immigration warnings in the during the plea colloquy, that he read and understood the plea questionnaire and that his attorney had signed the questionnaire as well.

Mr. Ortiz-Mondragon filed a timely appeal to the Court of Appeals who affirmed the trial court in a published opinion. Mr. Ortiz-Mondragon requested certiorari to the Wisconsin Supreme Court who granted review.

#### IV. ARGUMENT

Mr. Ortiz-Mondragon’s conviction cannot be fully considered without some understanding of the interplay between the state criminal conviction and its impact upon Mr. Ortiz-Mondragon’s current immigration status or potential immigration status. Were Mr. Ortiz-Mondragon a native born citizen, a conviction for a CIMT would not have the potential to separate him permanently from his family. However, as an non citizen, the CIMT conviction does have the potential to separate him permanently from his family.

## A. CIMTs WITHIN

### THE IMMIGRATION LAW CONTEXT

The CIMT analysis is important to undocumented immigrants such as Mr. Ortiz-Mondragon because a CIMT conviction precludes Cancellation of Removal for Non Lawful Permanent Residents as a form of relief before an immigration court. (8 §USC 1229(b)(1)(B), INA §240A(b)(1)(B) ) However, a CIMT conviction can also precludes those lawfully within the United States from certain immigration benefits.

A criminal conviction for a “crime involving moral turpitude” (CIMT) can affect a non United States citizen in various ways. First, it can affect a non United States citizen’s eligibility to become a lawful permanent resident of the United States. Second, it can make a lawful permanent resident of the United States ineligible for United States citizenship. Finally, it can make a lawful permanent resident of the United States deportable from the United States.

## 1. ELIGIBILITY FOR LAWFUL PERMANENT RESIDENCE

Generally, anyone who wants to live permanently in the United States must apply for lawful permanent residency. A lawful permanent resident, (LPR) is someone who can live indefinitely in the United States, work without separate employment authorization and travel from and return to the United States. The process of becoming a lawful permanent resident requires two steps. First the intending immigrant must petition for and be granted an immigrant visa. Second, the intending immigrant must use the immigrant visa to apply for lawful permanent residency. If successful, the intending



immigrant is admitted as an LPR. These two steps each have different forms, different fees, different statutory requirements and different processing times.

There are many ways to obtain an immigrant visa. Immigrant visas are available through certain United States citizen or lawful permanent resident family members (8 USC §§1153 and 1154, INA §§203 and 204) ; to certain immigrant victims of domestic violence pursuant to the Violence Against Women Act (8 U.S.C. §1154, INA §204(a)(1)(A)(i)(II)(bb) ) to certain immigrant victims of crime who cooperate with law enforcement as “U” Non Immigrant Status (8 §USC 1101(a)(15), INA §101(a)(15) ); to abused and abandoned children who cannot be reunited with one or both parents as Special Immigrant Juvenile Status (8 USC §1101(a)(27)(J), INA §101(a)(27)(J) ); as asylees who fear persecution in their countries of origin (8 USC 1159, INA §208), as refugees who fear persecution in their countries of origin (8 USC §1158, INA §207) and before the immigration court through Cancellation of Removal and Adjustment of Status (8 USC §1229(b)(1)(B), INA §240A(b)(1)(B) )

It is important to remember that the immigrant visa is only the first step of this two-part process. The grant of an immigrant visa does not of necessity result in the grant of lawful permanent residency. Once the intending immigrant has an immigrant visa, the intending immigrant must still apply for and be granted lawful permanent residency. The last step of becoming a lawful permanent resident is being admitted to the United States as a lawful permanent resident.

There are many reasons why the United States will not admit an intending immigrant as a lawful permanent resident. These reasons are found in the Immigration and Nationality Act (INA) at §212 and in the United States Code at §1182. One reason

that the United States will not admit someone as a lawful permanent resident is a criminal conviction for a CIMT. There is something called the “petty offense exception” which does not apply to Mr. Ortiz-Mondragon. (8 USC §1182(a)(2)(A)(ii)(I) and (II), INA §212 §(a)(2)(A)(ii)(I) and (II) )

Mr. Ortiz-Mondragon has three United States citizen children who could petition for their father upon reaching 21 years of age. However, those children could apply only for the immigrant visa. Mr. Ortiz-Mondragon must then apply for lawful permanent residency. The CIMT conviction, however, makes him inadmissible to the United States.

Most important for Mr. Ortiz-Mondragon, Cancellation of Removal and Adjustment of Status is precluded to any intending immigrant with a conviction for a CIMT. There are no waivers. The “petty offense exception” also applies to Cancellation of Removal and Adjustment of Status. However, Mr. Ortiz-Mondragon would not qualify for the petty offense exception. (8 USC §1182(a)(2)(A)(ii)(I) and (II), INA 212 §(a)(2)(A)(ii)(I) and (II) )

## 2. ELIGIBILITY FOR UNITED STATES CITIZENSHIP

Lawful Permanent Residents who wish to become United States citizens apply for citizenship through a process called naturalization. (8 USC §1427(a)(3), INA §316(a) ). The process of naturalization requires something called “good moral character” which cannot be found in anyone who has a conviction for a CIMT. (8 USC §1101(f)(3), INA §101(f)(3) )

## 3. DEPORTATION FROM THE UNITED STATES

The United States orders certain people removed from the United States. People who are ordered to be removed can be undocumented immigrants, lawful permanent residents and, on occasion, United States citizens. A lawful permanent resident who has one criminal conviction for a CIMT for which a sentence of one year may be imposed within his first five years as a lawful permanent resident is deportable. (8 USC §1227(a)(2)(A)(i), INA §237(a)(2)(A)(i) ) A lawful permanent resident who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable. (8 USC §1227(a)(2)(A)(ii), INA §237(a)(2)(A)(ii) )

B. PADILLA V KENTUCKY REQUIRES CRIMINAL  
DEFENSE COUNSEL TO ADVISE CLIENTS AS TO  
THE IMMIGRATION CONSEQUENCES OF A  
CRIMINAL CONVICTION IF THOSE  
CONSEQUENCES ARE CLEAR.

Under the schematic established in *Padilla*, a criminal defense attorney has an affirmative duty to give correct advice when the deportation consequence is truly clear. *Padilla* at 559 U.S. at 569 The question becomes whether or not the deportation consequence is truly clear. The court of appeals held that it was not because immigration was too complex. The Court of Appeals stated:

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.”

1. Wis.Stat. 940.01(1) IS CLEARLY A CIMT.

It does not require nuanced research to determine that Wis.Stat. 940.01(1) is a CIMT. Every attorney with an active Wisconsin law license also has free access to Fast Case. A simple search on Fast Case brings up cases which discuss simple battery, domestic battery and causing harm as an element of the offense. (See for example *Garcia-Meza v. Mukasey* 516 F.3d 535) It is true that an inexperienced criminal defense attorney may not know or understand CIMTs as part of his or her general working knowledge. However, there is a world of difference between an inexperienced criminal attorney’s general working knowledge and what he or she is required to know to provide competent representation.

This is very similar to Wisconsin’s Rules of Professional Conduct for Attorneys as to Competence. Chapter 20, Rule 1.1 states “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. “ The ABA comment at note 5 states, “[i]t also includes adequate preparation. The required attention and preparation are determined in part by what is at stake...” For Mr. Ortiz-Mondragon the ability to stay in the United States with his four United States citizen children was at stake.

Immigration case law does not use the succinct, clear and explicit language that *Padilla* uses. Rather it speaks in terms of three differing approaches. The first is the categorical approach in which the adjudicator or judge must “...determine whether there

is a ‘realistic probability, not a theoretical possibility,’ that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude.” *Sanchez v. Holder*, 757 F.3d 712 (7<sup>th</sup> Cir) at 717 If this categorical approach cannot determine if the criminal conduct is a CIMT, then the adjudicator or judge moves to a second step called the modified categorical approach. *Sanchez* at 712. The second is the modified categorical approach in which the alien's “record of conviction—including the charging document, the judgment of conviction, jury instructions, a signed guilty plea, or a plea transcript—to determine which part of the statute the alien's conviction falls under (in the case of a divisible statute), or whether the alien's conduct otherwise “evidences a crime that in fact involved moral turpitude.” *Sanchez* at 717. Finally, if the question cannot be answered using either the categorical or the modified categorical approach, the consider evidence beyond the record of conviction “if doing so is necessary and appropriate to ensure proper application of the [INA]'s moral turpitude provisions.” *Sanchez* at 718.

However, for Mr. Ortiz-Mondragon, there is no need to go beyond the categorical approach because there is no realistic probability that someone could devise a fact pattern in which a violation of Wis. Stat. 940.01(1) is not a crime involving moral turpitude.

Padilla may require initial additional continuing legal educational credits for the criminal defense bar. It may require learning some aspects of the intersection between criminal and immigration law. However, once those basic skills are acquired, they need merely be maintained. It is not as though *Padilla* requires the criminal defense bar to understand all immigration law. In many ways, *Padilla*, is merely a restatement of SCR 20: 1.1 as to competence.

V. CONCLUSION:

Mr. Ortiz-Mondragon conviction for Substantial Battery contrary to Wis. Stat. 940.01(1) as a crime of domestic violence contrary to Wis. Stat. 968.075(1)(a) is categorically a CIMT and, therefore, his criminal defense attorney did not meet his obligations under *Padilla* or the Wisconsin Rules of Professional Conduct for Attorneys.

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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 2452 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.

Dated this 12<sup>th</sup> day of March 2015

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Amicus Brief

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### **CERTIFICATION OF MAILING**

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of appeals by first-class mail, or other class of mail that is at least as expeditious, on March 12, 2015. I further certify that the petition for review or appendix was correctly addressed and postage was pre-paid.

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