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FOR IMMEDIATE RELEASE

Wisconsin Supreme Court accepts three new cases

Madison, Wis. (Jan. 12, 2015) – The Wisconsin Supreme Court has voted to accept three new cases and has acted to deny review in a number of other cases. The case numbers, issues, and counties of origin of granted cases are listed below, as are hyperlinks to Court of Appeals' decisions where available. Visit the Supreme Court and Court of Appeals Access [website](#) for more information about the status of any particular case.

2013AP2435-CR

[State v. Ortiz-Mondragon](#)

This criminal case examines the scope of defense counsel's obligation to advise defendants of their likely risk of deportation. A decision by the Wisconsin Supreme Court could clarify what constitutes a clear consequence under Padilla v. Kentucky, 559 U.S. 356 (2010) and what the Sixth Amendment requires of defense attorneys who represent non-citizens and clients.

In Padilla, the U.S. Supreme Court held that constitutionally competent counsel would have advised the defendant that his conviction for drug distribution made him subject to automatic deportation.

Some background: Fernando Ortiz-Mondragon was an immigrant from Mexico who had been living and working in the United States since 1997. He has four children who are United States citizens and reside in Wisconsin. He had no prior criminal history.

Ortiz-Mondragon was originally charged with substantial battery, false imprisonment, felony intimidation of a victim, criminal damage to property, and disorderly conduct, all with a domestic abuse enhancer. The charges all arose out of a single episode.

He subsequently entered into a plea agreement whereby the state dismissed the false imprisonment and intimidation charges, and the defendant pled guilty to the remaining charges. The circuit court imposed a jointly recommended sentence of three years of probation with four months' conditional jail time.

The plea form that he signed said:

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.

After completing the jail time, Ortiz-Mondragon was taken into custody by immigration and customs enforcement and removal proceedings were commenced. In order to avoid having a deportation on his record, he agreed to a voluntary departure.

Ortiz-Mondragon filed a motion for plea withdrawal, arguing his attorney was ineffective in failing to inform him that his plea would result in mandatory deportation and permanent inadmissibility to the United States, as opposed to merely informing him that those consequences were a possibility. The motion argued that the conviction for substantial battery as an act of domestic abuse made the defendant ineligible to apply for cancellation of his removal from the United States because the crime is considered to involve moral turpitude and is not eligible for any exception.

Ortiz-Mondragon argued that defense counsel had a duty to inform him of the mandatory immigration consequences of the plea under Padilla. He also argued that counsel's deficient performance prejudiced him because if he had known about the mandatory immigration consequences of the plea, he would have either tried to negotiate a different plea agreement or would have insisted on going to trial.

The circuit court denied the motion without holding a proper hearing. The circuit court reasoned that because the law was not sufficient and straightforward as to what types of crimes involve "moral turpitude," defense counsel did not have to do anything more than advise the defendant that pending criminal charges may carry a risk of adverse immigration consequences. The circuit court said the record affirmatively established that trial counsel made this advisement. The defendant appealed, and the Court of Appeals affirmed.

The Court of Appeals agreed with the circuit court that defense counsel was not deficient in failing to unequivocally inform the defendant that his plea would result in deportation and permanent inadmissibility.

He argues a person facing potential banishment from his family and the life he has built over the course of many years would want to know more than what is contained in a general plea form because the warnings in the form do not communicate a thoughtful assessment of risks or how great the chance is that the crime to which the defendant is pleading will result in deportation or exclusion.

The state says that the immigration statute neither defines nor gives examples of crimes of "moral turpitude," and it is difficult to determine if a given crime will be treated as one of moral turpitude by either the Board of Immigration Appeals or the federal courts. Therefore, the state's argument was that the deportation consequences of this defendant's plea were not clear.

The central issue raised in this case, as in 2013AP2435-CR, [State v. Ortiz-Mondragon](#), is the scope of defense counsel's obligation to advise defendants of their likely risk of deportation in light of the U.S. Supreme Court's decision in [Padilla v. Kentucky](#), 559 U.S. 356 (2010). [Padilla](#) held that constitutionally competent counsel would have advised the defendant that his conviction for drug distribution made him subject to automatic deportation.

Some background: Hatem Shata, an Egyptian national, was charged with possession with intent to deliver marijuana as party to a crime. On Oct. 5, 2012, he appeared in court and Shata's attorney informed the court that Shata was concerned about the immigration consequences of a plea.

Shata's counsel explained that Shata was not a United States citizen and that there was a potential he could be deported. Shata acknowledged that, and he informed the circuit court that he wished to go forward with his plea. Shata pleaded guilty to one count of possession with intent to deliver marijuana as party to a crime. He was subsequently sentenced to one year of initial confinement and four years of extended supervision.

On March 15, 2013, Shata filed a post-conviction motion to withdraw his plea claiming that his trial attorney's performance was deficient because counsel failed to inform Shata "that federal law required he be deported following his conviction."

At the ensuing hearing, Shata's trial counsel, Atty. James Toran, testified that he knew Shata was concerned about the possibility of deportation and explained that he knew Shata's conviction would subject him to deportation, but that he did not know it was mandatory. Toran testified that he told Shata there was "a strong chance" that he would be deported. Toran also explained that he "had no viable defense," and that Shata chose to plead guilty because "we could not really prevail if we went to trial[.]" and Shata wanted to take advantage of the State's recommendation for probation. Shata testified that Toran "didn't say for sure" that he would be deported, and that he would not have pleaded guilty if he had known that his deportation was "mandatory."

The circuit court found "the testimony of Mr. Toran to be credible under the circumstances, that he did advise Mr. Shata, unlike [Padilla](#), that there was a strong likelihood that he would be deported". The court rejected Shata's testimony "that Mr. Toran told Mr. Shata that he would be getting probation and would go back to New Jersey and nothing would happen."

Shata appealed. A majority of the Court of Appeals reversed, holding that Shata's attorney, who advised Shata that he faced a "strong likelihood" of deportation, had performed deficiently under [Padilla's](#) mandate that "counsel must inform her client whether his plea carries a risk of deportation." [Padilla](#), 559 U.S. at 374.

The Court of Appeals remanded with directions to permit Shata to withdraw his guilty plea.

The state maintains that the Court of Appeals' majority misapplied Padilla in holding that Shata's attorney had to do more. Indeed, the state asserts that the "majority opinion in this case not only extends beyond the requirements of Padilla by imposing a new and far more stringent standard on defense attorneys in terms of how they must advise clients who face deportation due to their criminal convictions, it does so without a clear explanation of what they have to do to satisfy that standard."

The state is also aggrieved that, rather than remanding the case to permit the circuit court to perform the required analysis, the majority simply held that "Shata was prejudiced" and that "because of the inaccurate and prejudicial advice Shata received from counsel, he is entitled to withdraw his guilty plea." The State contends that "[a]t a minimum, the Court of Appeals should have remanded the case to the circuit court for additional analysis and related findings" citing a similar case in which this was done. See Mendez, 354 Wis. 2d 88, ¶¶12, 17.

A decision by the Supreme Court is expected to clarify the scope of defense counsel's obligation to advise defendants of their likely risk of deportation in light of the U.S. Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356 (2010).

2014AP1099-CR

[State v. Williams](#)

This certification involves the appeal of a murder conviction. A decision by the Supreme Court is expected to resolve a potential conflict in two prior court decisions relating to sufficiency of evidence challenges: State v. Wulff, 207 Wis. 2d 143, 557 N.W.2d 813 (1997), in which the evidence was measured against the instructions the jury actually received; and State v. Beamon, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681 in which the evidence was measured against the statutory requirements.

Some background: A jury found Maltese Williams guilty of two counts of felony murder. The verdict was based on Williams' involvement in the shooting deaths of two men during an attempt to take marijuana from the home of one of the victims, a drug dealer whose name was Parker. This appeal involves issues related to the death of the other victim, a man named Robinson, who was in Parker's home at the time.

The felony murder statute requires an underlying crime, and in this case, that crime was attempted armed robbery. See Wis Stat. § 940.03. Armed robbery requires the taking of "property from the person or presence of the owner." See Wis. Stat. § 943.32(1). The trial evidence was sufficient to support a finding that Williams and his accomplices attempted to take marijuana from Parker and, therefore, as pertinent here, was sufficient to support a finding that Williams attempted an armed robbery of Parker.

However, the Court of Appeals wrote that there does not appear to be sufficient evidence to support a finding of an attempted armed robbery of *Robinson*. This is significant because the jury was instructed that Williams could be found guilty of the felony murder of Robinson only if there was an attempted armed robbery of Robinson.

On the other hand, the Court of Appeals said it perceived no dispute that, under the applicable statutory scheme, all that was required to sustain a conviction on the felony murder count for Robinson's death was proof of an attempted armed robbery of Parker.

In Wulff, the Supreme Court reversed a conviction, and directed that the circuit court enter a judgment of acquittal, because the evidence was insufficient when measured against the jury instructions. Wulff, 207 Wis. 2d at 144, 149-54.

In Beamon the Supreme Court measured sufficiency of the evidence against the statutory requirements. Beamon, 347 Wis. 2d 559, ¶¶3, 40, 50. The crime there was "fleeing or attempting to elude a traffic officer."

The court in Beamon explained that one of the statutory requirements for this crime can be proven in three alternative ways. One statutory alternative requires proof that the defendant increased the speed of his vehicle to flee. The evidence in Beamon was sufficient to support at least one other alternative, but not sufficient to support the increasing-speed alternative.

The court in Beamon explained that the jury instructions "combined" alternatives in a way that made the increased-speed alternative a requirement. The court determined that the instructions were erroneous because they "added" a requirement to the statutory definition of the crime. The Beamon court concluded that, because the instructions added a requirement and "created a charge that does not exist," the sufficiency of the evidence should be measured against the statute instead of the instructions.

The Court of Appeals said it was uncertain whether Williams is more like Wulff or more like Beamon. Williams argues that Wulff requires that the evidence be measured against the jury instructions; the state argues that Beamon controls and requires that the evidence be measured against the statutory requirements.

Review denied: The Supreme Court denied review in the following cases. As the state's law-developing court, the Supreme Court exercises its discretion to select for review only those cases that fit certain [statutory criteria](#) (see Wis. Stat. § 809.62). Except where indicated, these cases came to the Court via petition for review by the party who lost in the lower court:

Brown

2012AP2597-CRNM State v. Freytes-Torres

2013AP1957-CR State v. Lange

Calumet

2013AP2654-CRNM State v. Loewe

Chippewa

2013AP2597 City of Bloomer v. Frank

Columbia

2013AP707-CR State v. Artis

2014AP2220-OA O'Grady v. Abrahamson
Chief Justice Shirley S. Abrahamson did not participate.

Dane

2011AP2264 Farm-to-Consumer Legal Defense Fund v. DATCP

2012AP626 Forbes SRE v. DOT

2012AP2821 Obrieht v. Schwarz

2013AP597 State v. Lynch

2014AP398-99 Dane Co. DHS v. Mable K.

2014AP445-CR State v. Obrieht

2014AP885-W Obrieht v. Foster
Justice Patience Drake Roggensack dissents.

2014AP2251 Kimbrough v. Watson

Dodge

2014AP1214 Bailey v. DOT

Dunn

2014AP2262-W Bengston v. Cir. Ct. for Dunn Co.

Eau Claire

2013AP2483 State v. Seeley

Green Lake

2013AP877-79-CR State v. Hertzberg

Jackson

2013AP2501 Giessel v. Woof

Kenosha

2013AP118-CR State v. Barnes

2014AP189-CR State v. Miller

La Crosse

2014AP151 Elder v. Wis. Dentistry & Exam. Bd.

Justices N. Patrick Crooks and David T. Prosser, Jr. did not participate.

Marinette

2013AP2625-CR State v. Olsen

Milwaukee

2011AP1960-CR State v. Scott

2011AP2835 State v. Dean

2013AP970 OneWest Bank v. Groysman

2013AP1443-CR State v. Williams

2013AP1633 State v. Lang

2013AP1814-CR State v. Banks

2013AP1842-CR State v. Gant

2013AP1889-CR State v. Chic

2013AP1944 Joseph Hirschberg Rev. Living Tr. v. City of Milw.

2013AP2016-CR State v. Hambright

2013AP2193-CR State v. Walker

2013AP2239-CR State v. Thomas

2013AP2252-CRNM State v. Thornhill

2013AP2384 State v. Curtis

2013AP2429 Hahn v. Harleysville
Justice David T. Prosser, Jr. dissents.

2013AP2515 State v. Henderson

2013AP2579-CR State v. Payne

2013AP2747-CR State v. Wilson

2014AP55-CR State v. Highshaw

2014AP170-71 State v. Rones

2014AP359 Milwaukee Co. v. Rebecca G.
Justices Ann Walsh Bradley and Patience Drake Roggensack dissent.

2014AP969-W Tatum v. Cir. Ct. for Milwaukee Co.

2014AP1426-27 State v. Jevon S.

Outagamie

2013AP2101-CR State v. Turner

Ozaukee

2014AP1011-FT Ozaukee Co. v. Laura B.

Rock

2013AP1207-08-CR State v. Pearson

2014AP2225-W Phiffer v. Cir. Ct. for Rock Co.

Sauk

2013AP2477 State v. Stanley

Shawano

2014AP208 Minniecheske v. Village of Tigerton

Sheboygan

2013AP1966-CR State v. Petrie

2013AP2187 State v. Moffett

Walworth

2014AP2093-W Stone v. Clements

Waukesha

2013AP2488-CRNM State v. Miller

2013AP2539-CR State v. Koeppen

2013AP2640-CR State v. Hodgkins

Winnebago

2013AP1967 State v. Hahn

2014AP977-FT Winnebago County v. William A.M.