STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2017-CF-1104

JOSE FLORES,

Defendant.

DECISION AND ORDER

On April 23, 2019, pursuant to Wis. Stat. § 971.08, and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), *Padillia v. Kentucky*, 559 U.S. 356 (2010), and *Strickland v. Washington*, 466 U.S. 668 (1984), Defendant Jose Flores filed a Motion to Withdraw Guilty Plea asserting that his guilty plea should be withdrawn upon any of the following three grounds: (1) that the trial court inadequately determined his general comprehension and capacity to understand the issues during the plea colloquy despite signs the Defendant Flores had trouble comprehending English; (2) that the trial court failed to establish that Flores understood the nature of the crime to which he plead; and (3) that Flores' trial counsel rendered ineffective assistance of counsel by failing to explain the element of child enticement, mental harm, and/or by failing to correctly advise Flores that he would be deported if convicted. The State disputes all three grounds and urges a denial of the Motion.

The State, by letter dated July 18, 2019, argued that, due to the claim of ineffective assistance of counsel, the attorney-client privilege was effectively waived pursuant to Wis. Stat. § 905.03(4)(c) and *State v. Flores*, 170 Wis. 2d 272, 488 N.W.2d 116 (Ct. App. 1992). The Court agreed and so ordered the same.

There were several hearings, including a hearing where a Judicial Subpoena served on this Court was quashed by another trial court, as well as three evidentiary hearings with a total of five witnesses, all at which the State appeared by Deputy District Attorney Michael D. Thurston and the Defendant appeared in person (albeit

in custody), and by attorney Anthony D. Cotton. Due to COVID-19,[1] the third evidentiary hearing was delayed, finally taking place on May 28, 2020. At the conclusion of that hearing, additional briefs were filed.

Defendant Flores filed an additional Brief in Support of the Motion to Withdraw Guilty Plea on June 5, 2020, emphasizing the argument that the neither the trial court nor trial counsel fully explained the elements of the offense of child enticement causing mental harm. The State filed a Response Motion to the Defense's Motion to Withdraw Guilty Plea on June 12, 2020, addressing those same points.

The Court took the Motion under advisement in anticipation of this written Decision, due on or before July 31, 2010.[2]

This Court concludes that the personal plea colloquy conducted with Defendant Flores was appropriate and that the Court took adequate steps to measure Flores' general comprehension of English and his ability to understand the issues covered during the colloquy. The Court further finds that the guilty plea of Defendant Flores was made knowingly, intelligently, and voluntarily under the totality of the circumstances. There was no lack of comprehension. There was no necessity to have an interpreter present. There was no violation of Defendant Flores' fundamental due process rights during the plea colloquy.

The Court further concludes that Defendant Flores understood the elements of the amended charge of Child Enticement, Mental Harm, and that the Court complied with *Bangert* by appropriately summarizing the elements of the charge through a reading of the Amended Information, a summary of the elements listed on the plea questionnaire and soliciting the affirmative statement of trial counsel that Defendant Flores understood the elements of the charge to which he was pleading guilty. There was real and actual notice of the elements, including mental harm, and there was no flaw in the fundamental integrity of the plea.

Finally, the Court concludes that there was no ineffective assistance of counsel by Defendant Flores' trial counsel because she both adequately explained the elements of the amended charge, including mental harm, and she properly discussed the possibility of deportation with Defendant Flores several times during the course of her representation. Accordingly, the former trial counsel's performance was not

[1]This refers to the global pandemic of Coronavirus 2019 that has resulted in a multitude of Standing Orders implicating the availability of hearings and the status of courthouse hours.

[2]See footnote 14, *infra*.

deficient. Additionally, Defendant Flores has failed to demonstrate that any deficient performance was prejudicial to his case. Defendant Flores was not deprived of a fair and just plea and sentencing through any deficiency by trial counsel.

Therefore, Defendant Flores's Motion to Withdraw Guilty Plea is denied in its entirety.

BACKGROUND[3]

The Complaint in this case alleged that, between June 1, 2016, and September 1, 2016, in Muskego, Wisconsin, Defendant Flores (between 51 and 52 years old at the time) committed repeated acts of sexual assault against a minor child, his seven-year old, step-granddaughter.[4] The stories about the assaults in the step-grandfather's (Defendant Flores') yard and, way in the back, the "little red shed" with two couches, is disturbing to say the least.

There were allegations of numerous incidences of inappropriate kissing and touching by Flores—both over and under clothing of the child—while the grandmother and step-grandfather (Defendant Flores) watched the little girl twice a week during the summer of 2016. There were reported incidences of touching of the girl's breast, vagina, and forced touching by the girl of Defendant's penis. It was around Christmas, 2016, when the little girl saw an older brother kiss his girlfriend that she realized the "secret" conduct with her step-grandfather was inappropriate and she reported it to her parents. The step-granddaughter's parents reported these alleged assaults, on December 27, 2016, to the Muskego Police Department. A forensic interview of the little girl was conducted on January 3, 2017.

During the course of the evidentiary hearings, more information was learned about Defendant Flores. First, Elizabeth Gaytan, a regional literacy consultant for Wisconsin Literacy, Inc., discussed the results of her literacy and comprehension assessment[5] testing of Defendant Flores, who is a native Spanish speaker. Gaytan

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[3]The initial facts, in the first two paragraphs, were taken from the Complaint, while the remaining facts were derived from the testimony at the three evidentiary hearings.

[4]While the child is identified by initials in the Complaint and mentioned at other points in this case, the Court, pursuant to privacy concerns underlying the new Constitutional Amendment (known colloquially as "Marsy's Law") has elected to only identify the victim as Flores' step-granddaughter or just as the child.

[5]Gaytan utilized the TABE CLAS-E assessment and the GED Prueba de desarrollo educativo general.

found that Defendant Flores was at a 6th to 8th grade education level, and found he was at the low-intermediate level that means that he is not fluent in English. Gaytan defined "fluent" as being able to accurately communicate in any social setting. She further cautioned that even fluent, native English speakers may not be totally proficient in every social setting.

Also discovered through the hearings was the background underlying the relationship with and representation of Defendant Flores by attorney Cervera Garcia, a native English speaker who is also a fluent in Spanish. Defendant Flores retained Cervera Garcia for this case after hearing rumors that he was under investigation for sexual misconduct with a family member. At the time, attorney Cervera Garcia expressly told Defendant Flores that she had never tried a sexual assault case and had no experience with this Judge. Defendant Flores had first met attorney Cervera Garcia after looking her up in the phone book when he was considering applying for American citizenship upon his retirement; attorney Ryan Masse handled that matter.

Jane Flores, Defendant Flores' wife of 32 years also testified. The Court did not find her testimony to be credible in several parts, and most particularly when she said she and Flores had never asked Cervera Garcia about deportation issues because they were always going to trial. Cervera Garcia said they spoke about deportation at least five times. The Court, recognizing the seriousness of the offense and that deportation would clearly weigh heavy on any individual in Defendant Flores' position, finds Cervera Garcia to be the more credible. There surely were at least one to two conversations about deportation—including conversations about the immigration memorandum of attorney Ryan Masse.

During Jane Flores' testimony she further explained Defendant Flores' background. He was born in Mexico, only went to six years of school, after which he helped his dad at a ranch. He lived there until he was 30 when he came to America. Defendant Flores worked in restaurants and in the construction industry. He never attended school in the United States.

Defendant Flores' first wife spoke Spanish; his second and current wife, Jane, speaks English and understands only a little bit of Spanish.

Defendant Flores believes that he and Cervera Garcia met four times in the course of her representation, a figure that mirrors the dates in the billing invoices from Cervera Garcia. She believes they met additional times—times for which she did not bill Flores. Regardless, they both agreed that they met before the intake proceeding

and at least other times including a meeting to discuss the final plea offer—that morning and again right before court that day.

Cervera Garcia spoke only English with Defendant Flores. She testified that, at their initial meeting, she made a "mistake" and tried to revert to Spanish and Flores "corrected" her, insisting they speak in English; Cervera Garcia says they never again spoke in Spanish. She did, however, ask[6] Defendant Flores (as she asks all non-native English speakers) if he wanted an interpreter in his case, mentioning that it would be free. Defendant Flores said "no." Defendant Flores's wife, Jane, who was also present at that initial meeting, laughed off the suggestion that Cervera Garcia should speak Spanish with Flores saying "he speaks really good English." Defendant Flores admits that conversation took place.

Even during Cervera Garcia's interaction with Defendant Flores at the Muskego Police Department was conducted solely in English. The police officers indicated that they, too, spoke only English with the Defendant; at no time there did Defendant Flores ask for an interpreter.

Cervera Garcia went over the English-written Complaint with Defendant Flores in English. In other cases where she has concerns about English comprehension by her clients she has had Complaints translated and provided to the defendant. Cervera Garcia didn't have that concern here and she didn't have a translation prepared of the Complaint. Nor did she have the discovery translated from English to Spanish.

Cervera Garcia also spoke about her knowledge of Defendant Flores' past involvements with the justice system aside from his divorce. She learned, after the plea, that he had plead guilty to a municipal Operating While Intoxicated- First in October, 1998, and guilty to an Operating While Intoxicated-Second on November 4, 2015, in Waukesha County Case No. 2005-CT-1659.

At the start of her representation in this case, Cervera Garcia had her law associate, immigration attorney Ryan Masse, prepare an immigration memorandum for this case addressing possible immigration consequences. It is Cervera Garcia's practice to have these memoranda prepared in any case where immigration concerns could arise. The memorandum in this case indicated that there would be deportation consequences for someone convicted of repeated sexual assault of a child. This

[6]This inquiry was even memorialized in the notes kept by attorney Cervera Garcia, in August, 2017, at the start of her representation of Defendant Flores.

memorandum was provided by Cervera Garcia to Defendant Flores under cover of a letter dated November 14, 2017.

Masse, an immigration lawyer for approximately ten years also testified. He and Defendant Flores had earlier entered into a fee agreement relationship on or around December 27, 2016, to assist in preparing an application for U.S. citizenship; during the engagement, Masse became aware that an investigation had begun about possible sexual misconduct by Defendant Flores.

Masse shares office space with Cervera Garcia. He is a native English speaker, but is also able to conduct rudimentary Spanish conversation. Masse claims to be "far from fluent," however. At no point during his representation of Defendant Flores did Masse ever speak Spanish with him; everything was conducted in English. The immigration forms are in English. At no point did Masse ever have any concerns about Defendant Flores' ability to understand the somewhat complicated naturalization process and the related legal ramifications. At no point did Defendant Flores request an interpreter. Masse has utilized such assistance with other clients when he discerns confusion or believes it is appropriate.

Defendant Flores was charged with second-degree sexual assault of a child in this case after the naturalization application was filed. It was after that charge that Cervera Garcia asked Masse to perform a legal analysis of the immigration consequences of the charges as well as certain related charges that could potentially arise in the course of negotiations. Child Enticement, Mental Harm, was one of the potential amended charges that was addressed in the initial immigration memorandum prepared in October, 2017.

Later in October, 2018, Masse prepared an update looking at a possible alternate plea including two fourth-degree sexual assault charges in addition to the child enticement, mental harm charge. Masse elaborated upon the prior section on child enticement, mental harm, in that update. He concluded this new charge was a potentially removable offense but that deportation would not be mandatory and/or automatic.

Masse disagreed with the opinion of Piontek Valle (submitted by Defendant Flores as an attachment to his original Motion to Withdraw Guilty Plea) that child enticement, mental harm, is most probably an aggravated felony (in other words a basis for mandatory deportation). Masse's opinion throughout was that if "Flores wishes to avoid harsh, immigration consequences, he must either win acquittal or

plea to a lesser charge." It is apparent that Defendant Flores decided to plea to a lesser charge and roll the dice on the Court's sentence.

Cervera Garcia also even made a referral for an unrelated juvenile matter for Defendant Flores: that attorney did not speak Spanish. Neither Cervera Garcia nor Masse ever raised any concerns over Defendant Flores' possible inability to understand English in their communications.

In the course of her representation, Cervera Garcia and Defendant Flores discussed how Waukesha, in their view, was a conservative county with a somewhat less diverse composition, and how that would play out with a Waukesha jury for a child sexual assault case.

The defense retained expert Dr. Anthony Jurek to file a report to refute or challenge the child's recorded forensic interview. However, Dr. Jurek's report was not favorable to Defendant Flores. Cervera Garcia spoke with Defendant Flores about Dr. Jurek's report and how the child had maintained her allegations even in the face of extreme family pressure and even against someone she said she loved.

Defendant Flores and his wife assert he "always" proclaimed his total innocence. Cervera Garcia testified that Defendant Flores told her "initially" that he was innocent. There, however, were two times he waived from that position, in her view. Ultimately, he agreed, at her office (after watching the forensic interview) that he had caused the child mental harm; he said that she might have gotten the wrong impression or misinterpreted his conduct. He even admitted that "maybe I touched her" when they talked about touching the child on her breast. Cervera Garcia notes that he never admitted to touching her vagina or anything "real strong like that." She claims that it was this conversation "that was the first time that it kind of caused me to pause." Following this discussion, they began to seriously consider how to resolve the matter short of trial. The second indication that Cervera Garcia observed Defendant Flores to move from his "absolute innocence" stance was in their discussion during the middle of the plea colloquy when Flores admitted that "yeah, he could have caused her mental harm."

Cervera Garcia recalls that, as early as October 9, 2018, she began seriously discussing the reduced charge of child enticement, mental harm. A final offer was made by the State on the evening of October 24, 2018, right before the jury status the next date. Cervera Garcia had sought to obtain an amendment to all misdemeanors to no avail. She was familiar with the statute on Child Enticement, Mental Harm, as she had previously proposed that as an amendment to the State. She found the State's

offer, given the circumstances and possible mandatory deportation, to be a best case scenario under the State's terms of negotiation.

Defendant Flores believed that the State had given up the case and was offering the minimum charge of child enticement, mental harm. He testified that, even today, he doesn't know precisely what that means, agreeing only that it was a punishable offense and was still a felony, but not as serious as the original charge. At one of those final plea offer meetings, Defendant Flores claims that Cervera Garcia told him possible options, none of which included prison. He did agree that they spoke about the conservative and non-diverse nature of Waukesha and its juries.

Cervera Garcia and Defendant Flores went over the plea questionnaire at her law office on the morning of October 25, 2018. The immigration memorandum was also updated and provided again to Defendant Flores the day before. That memorandum still indicated that the charge of causing mental harm (child enticement) would not result in an automatic deportation.

During the plea colloquy when Defendant Flores said "I don't do nothing. I don't mean to do nothing to that girl," Cervera Garcia was surprised because he had never come across to her as not understanding the case or the charge. But, she testified that when she looked over at him, she realized he was nervous. During the private attorney-client conversation they then held, Cervera Garcia said Defendant Flores indicated he was nervous. She further testified that, had this Court not[7] interrupted her, she would have finished her sentence and said "He does understand English but ***he is nervous.***"

Cervera Garcia said she accepted the offer of an interpreter for the sentencing just because it was made; not because she believed that an interpreter was necessary. She testified that Defendant Flores had not previously asked for an interpreter, and had even rejected an offer for an interpreter. As well, Cervera Garcia testified that she also knew Defendant Flores had never asked for an interpreter in the divorce case with his first wife. She simply said she never asked for an interpreter at the plea hearing because she never thought that he needed one.

After the sentencing, Defendant Flores spoke with Cervera Garcia about his appeal rights—in English. His concerns were two-fold: prison time and deportation.

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[7]Perhaps, as in oft-repeated the lyrics from "Hamilton," this Court should have talked less (and smiled more.)

When he testified, Defendant Flores addressed several of the earlier issues. Several times, Defendant Flores answered the English-asked questions in English before the interpreter had translated them into Spanish. Defendant Flores admitted he only spoke English with Masse when he was applying for citizenship in 2017. He also agreed that the application he filed out was in English and that he never asked for a Spanish version because the form was "so easy." When pressed about his English-only conversations with Cervera Garcia, Defendant Flores contended that they hardly spoke so it didn't matter.

Defendant Flores agreed that he watched the child's forensic interview recording and that Dr. Jurek's report was not helpful to his case. Regarding the Operating While Intoxicated-2d charge, Defendant Flores claimed it was presented easily to him and he just pled guilty.

Again, Defendant Flores jumped in, pre-translation by the interpreter, and agreed that he was happy the State was taking the most serious charge off the table. He admitted he was told about immigration consequences and that he had received a copy of the Masse immigration memorandum, at least once. Pre-translation, Defendant Flores testified that Jane was at every meeting with Cervera Garcia except when they watched the recording and that it was important she was there to explain things to him if he had questions.

PROCEDURAL HISTORY

On August 8, 2017, the State filed a Complaint against Defendant Flores asserting one count of Repeated Sexual Assault of a Child, a Class B Felony, carrying with it a maximum sentence of incarceration of sixty years. An initial appearance was held on August 28, 2017. Defendant Flores was represented by attorney Kristina M. Cervera Garcia. A preliminary hearing date was set. During the initial appearance there was no request for an interpreter, however, the only statement made by Defendant Flores was "good morning, ma'am" stated to the Court Commissioner after she wished him a good morning.

On September 7, 2017, Defendant Flores and attorney Cervera Garcia appeared again before a court commissioner and Flores waived his right to a preliminary hearing. At the start of the hearing, Defendant Flores was given a headset because he had some difficulty hearing the Court Commissioner. Again, no interpreter was requested and Defendant Flores participated in the colloquy with the Court Commissioner about the Preliminary Questionnaire and Waiver Form he had signed with no apparent difficulties. There was one indiscernible, partial answer (on the

digital recording) as to whether Flores could read English,[8] but he admitted that his attorney had gone through the form with him and that he had signed the document.

The first hearing before this Court was a status hearing on October 6, 2017. Again, both Defendant Flores and attorney Cervera Garcia were present. Ms. Cervera Garcia referenced a "memo" she was having another attorney assist her in preparing. Again, there was no request for an interpreter, but Defendant Flores was not asked to respond to any questions.

Subsequent status/further proceeding hearings were held on November 13, 2017, January 25, 2018, and March 26, 2018. Again, Defendant Flores and attorney Cervera Garcia appeared. Again, no interpreter was requested. At the January, 2018, hearing, Ms. Cervera Garcia explained that the memo she had mentioned was "on immigration." At the March, 2018, hearing, the matter was set for a three day jury trial to commence on July 31, 2018. No interpreters were requested for the trial.

On March 28, 2018, the State filed an intent to use the recorded forensic interview of the child.

Next, on July 9, 2018, Defendant Flores filed a Motion to Adjourn the upcoming July 31, 2018, jury trial, because an essential witness[9] (a forensic psychologist) had not been available to the defense and the Defendant sought additional time to file anticipated motions or defenses after consultation with that expert. The Court granted the Motion to Adjourn. Defendant Flores was ordered to provide notice of his anticipated expert(s) and dates were set for various pre-trial motions, including a possible defense motion to exclude the recorded child's forensic interview and a possible State *Daubert* motion. The trial was now set to commence on October 30, 2018. Again, no interpreters were requested for either at the July jury status or during the pending jury trial.

The Court heard motions on October 12, 2018. Defendant Flores withdrew his expert witness, thus negating several motions. The motions *in limine* not addressed on that date were to be resolved at the jury status date. No interpreters were requested and, as with the other hearings without an interpreter, there was no indication that Defendant Flores could not understand the proceedings.

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[8]The answer was noted as "(Indiscernible) much."

[9]Dr. Anthony Jurek.

Things came to a head—with respect to the pending motion in this case—on October 25, 2018, during the jury status at which the parties reached a resolution in the matter, an Amended Information alleging Child Enticement[10] was filed, as was a Plea Questionnaire and Waiver of Rights form (in English only), and Defendant Flores entered a guilty plea to the new charge. In addition to the allegations of ineffective assistance of counsel, it is the plea colloquy that is of issue. Here are the relevant parts of that colloquy:

> THE COURT: All right. So, Mr. Flores, do you understand that agreement that you entered into?
>
> DEFENDANT FLORES: Yes.
>
> THE COURT: All right. You understand the Court is not bound by the recommendations of the district attorney or your counsel?
>
> DEFENDANT: Yes.
>
> THE COURT: All right. And you understand that by pleading guilty even to this amended charge, as to any charge, that that could potentially impact you in the future beyond whatever sentence is ultimately imposed in December?
>
> DEFENDANT: Yes.
>
> THE COURT: You have to say yes because we can't take down head nods in the record. Have you seen the amended information and the complaint in this case?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. And the amended information has one count. It's child enticement. It states between June 1, 2016 and September 1, 2016 in Muskego with intent to cause mental harm it asserts you did cause a child under the age of 18, and that is the individual with the initials [ ], to go into a room contrary to the statutes. This is a felony and upon conviction you could be fined no more than $100,000 or imprisoned not more than 25 years or both, correct?
>
> DEFENDANT: Yes.
>
> THE COURT: All right. Having heard the charges against you, child enticement, how are you pleading?
>
> DEFENDANT: It looks like guilty this says.

[10]Child Enticement is a Class D Felony, carrying with it a possible maximum term of incarceration of twenty-five years.

THE COURT: Excuse me?

DEFENDANT: I pled guilty in this stuff I guess.

THE COURT: You plead guilty?

DEFENDANT: Yes.

THE COURT: So to the charge of child enticement, you're pleading guilty?

DEFENDANT: I am not saying. I don't know do nothing to that, but I don't mean to do nothing to that girl.

MS. GARCIA: You don't have to make a statement.

THE COURT: Do you want to take a moment and speak with your client?

MS. GARCIA: Yes, just one moment.

(Discussion held off the record)

MS. GARCIA: I think he understands now.

THE COURT: All right.

MS. GARCIA: He does understand English but –

THE COURT: Not a problem. Do you want to have an interpreter here when we have the sentencing?

MS. GARCIA: I think it would be a good idea for the sentencing.

THE COURT: We will make a note for the sentencing, we will have an interpreter to make sure everything is clear.

My question is, Mr. Flores, that to the charge of child enticement you have to enter either a plea of guilty or no contest. You can't enter a plea of not guilty and go through with this plea agreement.

So my question is, are you entering a plea of guilty of no contest?

DEFENDANT: Guilty.

THE COURT: You're entering a plea of guilty? You have to say yes or no.

DEFENDANT: Yes.

THE COURT: Okay. All right. So this is an important decision. I want to make sure you understand what we are doing here today. You signed the document, this plea questionnaire and waiver of rights today, right, you signed the document?

DEFENDANT: Yes.

THE COURT: And you signed this and checked off the box indicating that you are pleading guilty today; correct?

DEFENDANT: Yes.

THE COURT: All right. And did you review this document with your attorney before you signed it?

DEFENDANT: Yes.

THE COURT: Did you understand everything in this form before you signed it?

DEFENDANT: Yes.

THE COURT: All right. Did you have enough time to review this form?

DEENDANT: Well, yeah. Yes.

THE COURT: Okay. And this says that you are 64 years old. You have six years of schooling. You do not have a high school diploma or the equivalent, correct?

DEFENDANT: Correct.

THE COURT: You understand the English language sufficiently to understand what we are doing here today; correct?

DEFENDANT; Yes.

...

THE COURT: All right. In this case the State would have to proved beyond a reasonable doubt that with the intent to cause mental harm you did cause mental harm to an individual who was under the age of 18, the initials [ ], and you caused her in this case to go into a room and there you caused her mental harm; correct?

DEFENDANT: Correct.

THE COURT: All right. Has anyone made any threats or in any way forced you to plead guilty to this charge?

DEFENDANT: No.

THE COURT: Has anyone made you promises to make you plead guilty to this charge?

DEFENDANT: No.

THE COURT: Okay. Do you understand that if you are not a citizen of the United States of America, and I say that to everyone, that a plea of guilty or not contest for the offense with which you are charged may result in deportation, the exclusion of admission into this country or the denial of naturalization under federal law?

DEFENDANT: I understand.

THE COURT: All right. Are you satisfied that you discussed with your lawyer the charges against you as amended and any defenses that you would have to those charges?

DEFENDANT: Yes.

THE COURT: Okay. Are you satisfied with your attorney?

DEFENDANT: Yes.

THE COURT: Good. Are you at all confused about anything you are doing here today?

DEENDANT: No.

THE COURT: All right.

DEFENDANT: Nice and clear?

THE COURT: What?

DEFENDANT: Nice and clear.

THE COURT: All right. Do you have any questions that you want to ask your lawyer before we proceed?

DEFENDANT: Okay.

THE COURT: Do you have any questions?

DEFENDANT: No.

THE COURT: You have to ask her questions now before I accept your plea. Do you have any questions you want to ask her before I accept your plea.? If you do, you can take a moment to talk to her.

DEFENDANT: I have no questions.

THE COURT: Okay. Do you have any questions for the Court?

DEFENDANT: No.

THE COURT: All right. Is your plea today being made freely and voluntarily and by that I mean is it being made of your own free will based on what you believe to be in your best interest?

DEFENDANT: Yes.

THE COURT: Okay. Is your plea today being made knowingly and intelligently and by that I mean do you understand what you are doing here today and the consequences that could result from your plea?

DEFENDANT: Yes.

THE COURT: Okay. Are you asking this Court to accept your plea of guilty to the amended change of child enticement ? Is that a yes?

DEFENDANT: Yes.

. . .

THE COURT: All right. Mr. Flores, are the factual allegations contained in the amended information and complaint substantially true and correct?

DEFENDANT: It's true.

THE COURT: All right. So it's true that between those two dates that we discussed which were June 1, 2016, and September 1, 2017 [sic] that you with intent to cause mental harm did cause such mental harm to a juvenile with the initials MJF.

That was a question. Is that true?

DEFENDANT: It is.

Plea Hearing Transcript, dated October 25, 2018, at 5-17.

At the sentencing hearing on December 21, 2018, the State mentioned that Defendant Flores, by pleading and not demanding a trial where the child would have to testify, had "accepted responsibility knowing there are going to be immigration consequences, incarceration consequences, and everything else." As part of the negotiated settlement, the State agreed that it would not make any prison recommendations—something a savvy defense attorney would seek.

The father of the child spoke, starting, aptly, with a quote about whirlwinds and storms that he equated to the total turmoil these offenses had caused their family. He continued with a heart-wrenching description of the mental anguish his daughter lives with daily and how both their lives have been indelibly shattered.

Attorney Cervera Garcia noted that there would be grave consequences for Defendant Flores who was a permanent resident of the United States, but whose application for U.S. citizenship had been denied. She also indicated that she had an immigration attorney look at the case and explained that, as a convicted felon, Defendant Flores may have consequences including a removal proceeding. Accordingly, attorney Cervera Garcia recommended probation so Defendant Flores would not face removal, and the loss of his social security and health insurance.

Defendant Flores passionately stated that he did "nothing wrong as of right now" and that he did "nothing to this woman."

The Court concluded probation was not appropriate. It considered the three *Gallion*[11] objectives of protecting the community, rehabilitating the Defendant, and the gravity of the offense as follows:

> The community needs to be protected from people who not only think this inappropriate action is appropriate but who actually take the next step and do it. This is not a case where someone is sitting at home looking at inappropriate pictures. This is someone who crossed over the line and decided that it was appropriate to take a nine year old girl, who doesn't know how to say no, who doesn't know how to resist, who blames herself for the action that happened, and who is scared to tell anyone because she thinks she did something wrong. That's wrong.
>
> As to rehabilitation of the defendant, I'm not really sure what type of rehabilitation is appropriate. I do note that it's not something that I'm going to address, other than to say that there are classes that can be provided, that will be provided to address these circumstances, and I strongly encourage that they will be done.
>
> With respect to gravity of the offense, I don't know what is a bigger betrayal of trust or what is a bigger betrayal of innocence. This Court strongly believes that there are certain classes of people that deserve greater protection from the courts and from the entire community. Those include children, elderly, and the people who cannot protect themselves.
>
> In this case we have a child who cannot protect herself, and that is grave. This is a circumstance where you have an individual who not only committed these acts, but as [the child's father] said, this is like dropping a stone in a pond. There will be permanent ripple effects.

[11] *State v. Gallion*, 2004 WI 42, ¶ 23, 270 Wis. 2d 535, 678 N.W.2d 197.

> This little girl will permanently look at every sexual partner, every relationship, and wonder. She will constantly look at what she did wrong. Will most likely have to face this as she ages and becomes an adult and question whether or not she is worthy, whether or not she should just throw things to the wind and be promiscuous. That is one alternative. She will also possibly face significant periods of suicidal ideation. She will wonder if this was something she did, and she doesn't deserve to be here. And that's upsetting too.
>
> So, therefore, taking into account all of this, the Court believes that this is an aggravated circumstance which requires incarceration in the Wisconsin prison system.
>
> I strongly believe that had this not come to light, that Mr. Flores was grooming this little girl for something much, much worse. This is something I don't want you to tell her, [child's father], but that's what her future was. Had she not come forward, we would be talking about something much more significant, if at all.
>
> So, the Court believes that appropriately in this circumstance that Mr. Flores is to be sentenced to six years of initial incarceration and ten years of extended supervision. He will be required to report on the sexual offender registry.

Sentencing Transcript, December 21, 2018, at 23-25.

As noted above, the Court imposed a sentence of sixteen years of imprisonment, with six years of initial confinement and ten years of extended supervision, and imposed a ten-year sex offender registration requirement among other conditions of extended supervision.

On December 28, 2018, Defendant Flores (through new[12] appellate counsel), filed a Notice of Intent to Pursue Post-Conviction Relief. And, on April 23, 2019, Defendant Flores filed the current Motion to Withdraw Guilty Plea. At the same time, trial attorney Cervera Garcia advised the Court that her representation of Defendant Flores had ceased.

The Court held a status hearing on May 2, 2019, at which time, the Court concluded a formal hearing had to be set. Due to the representations in the Motion (as well as the last request at the sentencing hearing), an interpreter was arranged.

Two days before the next status hearing, Defendant Flores' new counsel indicated he was going to subpoena this Court with respect to the plea colloquy as a fact witness. Briefing schedules were set by the Court at the review hearing on July 26, 2019.

A subpoena was served on this Court on August 8, 2019.

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[12]The same counsel who filed the pending Motion to Withdraw Guilty Plea in this matter.

On August 15, 2019, the State filed a Motion to Quash the Defense's Judicial Subpoena. Defendant Flores filed a Response in Opposition to the State's Motion to Quash Subpoena Ad Testificandum. At a review hearing on August 26, 2019, the Court addressed the Subpoena and Motion to Quash and took the matter under advisement.

On September 9, 2019, the Court concluded that another Judge should be assigned, on a limited basis, to address the State's Motion to Quash the Judicial Subpoena; the Court did not recuse itself from the case at that time pending a determination by the other Judge. The District Court Administrator assigned[13] retired Waukesha County Judge Kathryn W. Foster to hear the Motion to Quash. That hearing took place on September 26, 2019, at which time Judge Foster granted the State's Motion to Quash the Judicial Subpoena.

This Court then considered, again, the Motion to Withdraw Guilty Plea.

There were three evidentiary hearings on this Motion. The first was on January 10, 2020, at which a regional literacy consultant for Wisconsin Literacy, Inc., Elizabeth Gaytan, testified. Former trial attorney Cervera Garcia also began her testimony.

On January 31, 2020, immigration attorney Ryan Masse testified. He had been retained by attorney Cervera Garcia. Jane Flores, the Defendant's English-only speaking wife also testified. The hearing ended with the conclusion of the testimony of attorney Cervera Garcia. A final evidentiary hearing, at which Defendant Flores would testify, was set for March 27, 2020. That date was delayed considerably by the global pandemic of COVID-19.

The last evidentiary hearing was finally held on May 28, 2020, at which Defendant Flores was the sole witness. The Court did note that at least four or five times, Defendant Flores would answer the question asked in English *before* the interpreter even began translating the question. In fact, the State asked Defendant Flores if he could understand the State's questions in English; Defendant Flores said he could "a bit" and "to a certain point." Following the final evidentiary hearing, the parties asked, once more, to file additional briefs. That request was granted.

[13] *See* Third Judicial District Standing Order 18-SO-4 regarding assignment of matters including in circumstances to expedite litigation or "otherwise to assist in any branch of circuit court."

Defendant Flores filed a Brief in Support of his Motion to Withdraw Guilty Plea on June 5, 2020. The State filed a Response Brief on June 12, 2020, and Defendant Flores filed a Reply Brief on June 19, 2020.

As noted above, this Motion to Withdraw Guilty Plea was filed on April 23, 2019, and there have been several evidentiary hearings, submissions of exhibits and additional briefs filed since then. After the sentencing of Defendant Flores on December 21, 2018, he was remanded to and has remained in state prison, serving his six year period of initial incarceration. He seeks to have the plea withdrawn upon the various grounds noted above.

The time by which to issue this decision was extended[14] several times by the Court of Appeals: due to scheduling concerns, the need for evidentiary hearings and then the inability to have Defendant Flores transported to Waukesha for his evidentiary hearing due to COVID-19. The final date was set as July 31, 2020.

THE LAW

I. Plea agreements resolve most criminal cases.

"Plea agreements occur routinely as part of the work of prosecutors, defense attorneys, and courts." *State v. Conger*, 2010 WI 56, ¶15, 305 Wis. 2d 664, 797 N.W.2d 341. Circumstances leading up to, and including, plea agreements are issues of major import in our criminal justice system and are subject to intense scrutiny and review by the courts. In fact, guilty pleas are considered a "problem which looms large" in most criminal cases. *Argersinger v. Hamilton*, 407 U.S. 25, 34 (1971). "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). "Properly administered, it is to be encouraged." *Id.*

The United States Supreme Court has deemed the entry of a guilty plea to be a "critical stage" in criminal proceedings. *Missouri v. Frye*, 566 U.S. 134, 140 (2012). In fact, plea bargains are now "so central to the administration of the criminal justice

[14]The Court of Appeals granted Motions to Extend Time for Trial Court to Decide Defendant's Post-Conviction Motion seven times as follows: by Order dated June 11, 2019, the deadline was extended to September 13, 2019; by Order dated August 23, 2019, it was extended to November 15, 2019; by Order dated October 11, 2019, it was extended to December 20, 2019; by Order dated November 11, 2019, it was extended to January 31, 2020; by Order dated January 17, 2020, it was extended to March 2, 2020; by Order dated February 13, 2020, that was amended on February 21, 2020, it was extended to May 27, 2020; and by Order dated April 23, 2020, it was extended to July 31, 2020.

system," *id.*, at 143, that there is an argument to be made that they now *are* the criminal justice system, as the *Frye* Court explains:

> "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992). *See also* Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

Frye, 566 U.S. at 144.

Trials—once the centerpiece of the judicial system—are now the anomaly in state and federal courts. As the United States Supreme Court in *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), aptly states, the "reality" is "that criminal justice today is for the most part a system of pleas, not a system of trials."

"The art of negotiation [in the context of plea bargains and deals] is at least as nuanced as the art of trial advocacy, and it presents questions further removed from immediate judicial supervision." *Premo v. Moore*, 562 U.S. 115, 125 (2011). But, the process affords defendants certain rights and protections. "Because important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate 'safeguards to insure the defendant what is reasonable [in] the circumstances.'" *State v. Rivest*, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (1982) (quoting *Santobello*, 404 U.S. at 262).

It is well established that "[a] criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court. . . ." *North Carolina v. Alford*, 400 U.S. 25, 38, n.11 (1970). In fact, "[a] court may reject a plea in exercise of sound judicial discretion." *Santobello*, 404 U.S. at 262. ("Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead.")

"Nevertheless, a court cannot act arbitrarily in rejecting a plea." *United State v. Kelly*, 312 F.3d 328, 330 (7th Cir. 2002); *see also United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998). When a trial court does opt to exercise its discretion and

reject a plea agreement, it "must articulate on the record a 'sound reason' for the rejection." *Kelly*, 312 F.3d at 330 (citing to *Kraus*, 137 F.3d at 453).

The United States (and Wisconsin) "Constitution sets forth the standard that a guilty or no contest plea must be affirmatively shown to be knowing, voluntary, and intelligent." *Bangert*, 131 Wis. 2d at 260; *State v. Van Camp*, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997) ("A plea of no contest that is not voluntarily, knowingly, and intelligently entered violates fundamental due process.")[15]

II. Ineffective Assistance of Counsel.

"Ineffective assistance of trial counsel may be raised in a postconviction motion under Wis. Stat. § 974.02." *State v. Burton*, 2013 WI 61, ¶ 51, 349 Wis. 2d 1, 30, 832 N.W.2d 611.

A. The Rationale Behind Motions for Ineffective Assistance of Counsel.

Derived from the "Counsel Clause" of the Sixth Amendment,[16] it is well-settled that defendants—and in particular, criminal defendants—are constitutionally guaranteed the right to the assistance of competent counsel. *Strickland*, 466 U.S. at 685. This fundamental right is applicable in Wisconsin as well, through the Sixth Amendment (that is made applicable to the states by the Fourteenth Amendment) and through Article 1, Section 7 of the Wisconsin Constitution. *State v. Jenkins*, 2014 WI 59, ¶ 34, 355 Wis. 2d 180, 194, 848 N.W.2d 786. This is not just a right to counsel, but a right to the "effective" or "adequate" assistance of counsel. *State v. Schaefer*, 2008 WI 25, ¶ 83, n.19, 308 Wis. 2d 279, 321. n.19, 746 N.W.2d 457.

In fact, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275, 276 (1942)).

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[15] *See also Boykin v. Ala.*, 395 U.S. 238, 242-43 (1969) ("a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.")

[16] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]."

This basic right is subject to some qualifications. For instance, "[c]riminal defendants have a right to a competent lawyer, but not to Clarence Darrow." *United States v. Rezin*, 322 F.3d 443, 446-47 (7th Cir. 2003);[17] *State v. Marks*, 2010 WI App 172, ¶ 17, 330 Wis. 2d 693, 708, 794 N.W.2d 547. Other courts have long struggled with the concept of what truly is effective and, on the reverse side, ineffective assistance of counsel. Noting the prevalence[18] of ineffective assistance of counsel arguments, the Seventh Circuit admonishes courts to stay on the right path and recognize the balance of competing interests in all cases:

> To show that his lawyers were constitutionally deficient, [the defendant] must establish that they performed well below the norm of competence in the profession, and that this caused prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984). Assistance may be deficient, in the sense that counsel could have done better, without being constitutionally ineffective. Even the best lawyer slips up from time to time. With the benefit of hindsight, judges see how many a lawyer could have acted differently. On the spot, with limited time to explore options, counsel must do the best they can. Only "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" establish deficient performance. *Ibid.*

Burris v. Farley, 51 F.3d 655, 662 (7th Cir. 1995). In other words, there must be a showing of lack of competence and prejudice. But, what constitutes deficient or ineffective assistance of counsel? It's not just a question of experience, and it is important to note that "the fact that an attorney is ineffective in a particular case is not a judgment on the general competency of that lawyer." *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983). Rather, "[it] is merely a determination that a particular defendant was not appropriately protected in a particular case." *Id.*

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[17]The *Strickland* analysis, and federal cases interpreting that analysis, applies to ineffective assistance of counsel cases under the Wisconsin Constitution as our State Courts operate under the principles adopted by the United States Constitution in *Strickland*. *State v. Carter (Michael)*, 2010 WI 40, ¶ 20, n.10, 324 Wis. 2d 640, 658, n.10, 782 N.W.2d 695; *Schaefer*, 2008 WI 25, ¶ 87.

[18]The Seventh Circuit in *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir. 1995), notes:

> Claims of ineffective assistance have become routine. If we are to believe the briefs filed by appellate lawyers, the only reason defendants are convicted is the bumbling of their predecessors. But lawyers are not miracle workers. Most convictions follow ineluctably from the defendants' illegal deeds, and nothing the lawyers do or omit has striking effect. Defendants are entitled to competent counsel not so that they will win every case, but so that the prosecution's evidence and arguments may be put to a rigorous test—so that the legal system gives the innocent every opportunity to prevail. The prospect of this testing also discourages prosecutors from charging the innocent in the first place.

"The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984). Simply put, the question of ineffectiveness is case-specific. It is an inquiry into a particular defendant's rights in one specific case. The Court in *Felton*, quoting Judge Bazelon from a Law Review article, aptly described how courts should examine ineffective assistance claims:

> Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly: the question is not whether the defendant received the assistance of effective counsel but whether he received the effective assistance of counsel. In applying this standard, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise. Bazelon, *The Realities of Gideon and Argersinger*, 64 Georgetown Law J. 811, 822-23 (1976).

Finally, it is the State that bears the risk of a constitutionally deficient assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). This is because "the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not '[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance.'" *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

B. The Standards and the *Strickland* Analysis.

"The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [in this case, plea colloquy] cannot be relied on as having produced a just result." *Jenkins*, 2014 WI 59, ¶ 34. The two-prong test to be used by the Court was set forth in *Strickland* and adopted in Wisconsin in *State v. Mayo*, 2007 WI 78, ¶¶ 33, 60, 301 Wis. 2d 642, 661, 674, 734 N.W.2d 115. "First, the defendant must demonstrate that counsel's performance was deficient." *Id.*, at ¶ 33. "Second, the defendant must demonstrate that counsel's deficient performance was prejudicial to his or her defense." *Id.* In essence, "[a] defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Prescott*, 2012 WI App 136, ¶ 11, 345 Wis. 2d 313, 320, 825 N.W.2d 515 (quoting *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999)).

The defendant asserting an ineffective assistance of counsel claim bears the burden of proof as to both of the *Strickland* analysis prongs. *State v. Romero-Georgana*, 2014 WI 83, ¶39, 360 Wis. 2d 522, 543, 849 N.W.2d 668. To prevail on a claim for ineffective assistance of counsel, *both* prongs must be established. *State v. Hudson*, 2013 WI App 120, ¶ 11, 351 Wis. 2d 73, 89, 839 N.W.2d 147. A court "need not address both the performance and the prejudice elements, if the defendant cannot make a sufficient showing as to one or the other element." *Mayo*, 2007 WI 78, ¶ 61. *State v. Tomlinson*, 2001 WI App 212, ¶ 40, 247 Wis. 2d 682, 706, 635 N.W.2d 201. Thus, a failure to prove either prong requires that the Motion be denied.

1. **The First Prong: Deficient Performance.**

Deficient performance means that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting *Strickland*, 466 U.S. at 687); *State v. Trawitzki*, 2001 WI 77, ¶ 40, 244 Wis. 523, 628 N.W.2d 801. To prove such deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" considering all of the circumstances. *Romero-Georgana*, 2014 WI 83, ¶40 (quoting *Strickland*, 466 U.S. at 688).

"The test for deficiency of performance is objective." *State v. Dillard*, 2014 WI 123, ¶ 88, 358 Wis. 2d 543, 859 N.W.2d 44. The question to be asked is "[u]nder the totality of the circumstances, did trial counsel's performance fall 'outside the wide range of professionally competent assistance?'" *Id.* (quoting *Strickland*, 466 U.S. at 690). "So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis. 2d 665, 675, 799 N.W.2d 461.

But, there are a few caveats. First, courts are to "give great deference to counsel's performance, and, therefore, a defendant must overcome 'a strong presumption that counsel acted reasonably within professional norms.'" *State v. Trawitzki*, 2001 WI 77, ¶ 40 (quoting *Johnson*, 153 Wis. 2d at 127 and *Strickland*, 466 U.S. at 689). "Normally, judicial scrutiny of an attorney's performance will be highly deferential." *Dillard*, 2014 WI 123, ¶ 88. (quoting *State v. Smith*, 207 Wis. 2d 258, 274, 558 N.W.2d 379 (1997)). "Thus, 'the law affords counsel the benefit of the doubt.'" *Burton*, 2013 WI 61, ¶ 48 (quoting *State v. Balliette*, 2011 WI 79, ¶ 27, 336 Wis. 2d 358, 373, 805 N.W.2d 334). Second, "'effective' does not mean successful or without flaw." *U.S. v. Recendiz*, 557 F.3d 511, 531 (7th Cir. 2009). "A defendant does not show the element

of deficient performance 'simply by demonstrating that his counsel was imperfect or less than ideal.'" *Burton*, 2013 WI 61, ¶ 48 (quoting *Balliette*, 336 Wis. 2d at ¶ 22.). Nor, does "effective" equate to successful. "A court must be vigilant against the skewed perspective that may result from hindsight, and it may not second-guess counsel's performance solely because the defense proved unsuccessful." *Balliette*, 336 Wis. 2d at ¶ 25. "As *Strickland* reminds us, there is a 'wide range of professionally competent assistance,' *id.*, 466 U.S. at 690, and the bar is not very high, *see Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (lawyer need not be a Clarence Darrow to survive an ineffectiveness contention)." *State v. Westmoreland*, 2008 WI App 15, ¶ 21, 307 Wis. 2d 429, 440, 744 N.W.2d 919.

The reason for both of these caveats is that scrutinizing an attorney's performance is not an easy task. The United States Supreme Court in *Strickland* wisely notes:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana*, 350 U.S. 91, 101 (1955). (Citations omitted).

Strickland, 466 U.S. at 694-95.

"The prudent-lawyer standard requires that strategic or tactical decisions must be based upon rationality founded on the facts and the law." *Felton*, 110 Wis. 2d at 502. "If tactical or strategic decisions are made on such a basis, this court will not find that those decisions constitute ineffective assistance of counsel, even though by hindsight we are able to conclude that an inappropriate decision was made or that a more appropriate decision could have been made." *Id.* "Instead, [courts] 'will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment.'" *State v. Jacobs*, 2012 WI App 104, ¶ 28, 344 Wis. 2d 142, 163, 822 N.W.2d 885 (quoting *Felton*, 110 Wis. 2d at 503).

2. The Second Prong: Prejudice.

If, and only if, there has been a showing that a trial counsel's performance was defective, then the defendant must move to the second *Strickland* prong "and prove that this deficient performance prejudiced the defense." *Trawitzki*, 2001 WI 77, ¶ 40. There must be an actual, "adverse effect on the defense." *Strickland*, 466 U.S. at 693. "To prove prejudice, the defendant must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Romero-Georgana*, 2014 WI 83, ¶41 (quoting *Strickland*, 466 U.S. at 687).

"The prejudice standard set by the *Strickland* Court does not require the defendant to show that counsel's deficient conduct was outcome determinative of his case. Rather, the Court states that '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Johnson*, 153 Wis. 2d at 129 (quoting *Strickland*, 466 U.S. at 694). *Trawitzki*, 2001 WI 77, ¶ 40. Courts are to consider the "totality of the evidence before the trier of fact. *Johnson*, 153 Wis. 2d at 130.

In assessing how and what should be considered prejudice, again, the *Strickland* Court outlines the balancing principles best:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Strickland, 466 U.S. at 691-92. (Citation omitted).

> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings.

Id., 466 U.S. at 693.

As with the first *Strickland* prong, the defendant bears the burden of affirmatively proving that the counsel's defective performance prejudiced the defense. *Jenkins*, 2014 WI 59, ¶ 37; *Burton*, 2013 WI 61, ¶ 49.

DISCUSSION

Defendant Flores asserts that the Court made two errors in the course of the plea colloquy. First, that it failed to adequately determine his general comprehension and capacity to understand the issues and the failure to, *sua sponte*, provide an interpreter when one had never been sought. Second, it failed to establish that Defendant Flores understood the elements of the amended charge to which he plead guilty. As well, Defendant Flores contends that his former trial counsel provided ineffective assistance of counsel, also, on two grounds. First, that she failed to explain and define the elements of Child Enticement – Mental Harm. Second, that she failed to correctly advise Defendant Flores that he would be deported if convicted.

Defendant Flores also contends that the State has failed to address these critical issues in its briefings and that, therefore, pursuant to *Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590, these arguments were conceded for purposes of appeal. The Court disagrees. The State has argued, orally in all of the motion hearings against all of the arguments made by Defendant Flores. There was no initial response brief to the original Motion; instead there hearings. Next, the final post-hearing brief of Defendant Flores focused only on one of the three arguments and the State responded in kind in its Response Brief. There has been no waiver or acquiescence of any argument by the State. *See State v. Davidson*, 222 Wis. 2d 233, 253-54, 589 N.W.2d 38 (Ct. App. 1998), *rev'd on other grounds*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606.

Accordingly, each of Defendant Flores' arguments are addressed below.

I. The plea colloquy complied with the statutes and caselaw.

Defendant Flores throws all of his hopes upon five words mentioned by attorney Cervera Garcia after a private conversation with Defendant Flores during the plea colloquy: "He does understand English but . . ." Had this Court *not* interjected a comment about the possibility of an interpreter before Ms. Cervera Garcia had finished her sentence, this Motion likely would never have been filed. Cervera Garcia testified, under oath and after the attorney-client privilege had been waived due to the allegations of ineffective assistance of counsel, that she was *going to say* "but, he is nervous." Quite a far cry from "but, he doesn't understand what is going on today"

or "but, he cannot comprehend English without an interpreter" or even "but, this colloquy is beyond his understanding."

The Court agrees with Defendant Flores that "a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. U.S.*, 397 U.S. 742, 748 (1970). It is also correct that a plea "must be affirmatively shown to be knowing, intelligent, and voluntary." *State v. Howell*, 2007 WI 75, ¶ 23, 301 Wis. 2d 350, 734 N.W.2d 48. *See also Boykin*, 395 U.S. at 242; *Bangert*, 131 Wis. 2d at 257. Without those three basic prerequisites, "a defendant is entitled to withdraw the plea as a matter of right because such a plea violates fundamental due process." *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906.

Wisconsin's constitution, like the federal Constitution, requires that the trial court must conduct a personal colloquy with the defendant in order to memorialize what the defendant knew at the time of the plea itself. *Bangert*, 131 Wis. 2d at 256-57. The reason for this personal touch is to "assist the trial court in making the constitutionally required determination that a defendant's plea is voluntary." *Id.*, at 261. As well, albeit in the context of *Miranda* warnings, the Court in *State v. Santiago*, 198 Wis. 2d 82, 92-93, 542 N.W.2d 466 (Ct. App. 1995), instructs that circuit courts "must consider a defendant's language skills when determining if under the 'totality of the circumstances' the defendant knowingly and intelligently waived his or her rights."

Here, Defendant Flores asserts maintaining his plea, where he agreed to a reduction from a Class B Felony to a Class D Felony (with a corresponding reduction from 60 possible years of confinement to 25 years) as well as the agreement to amend to a charge where, pursuant to the immigration memorandum by attorney Masse, he went from a mandatory deportation to a possible deportation, was a "manifest injustice" because the Court opted to sentence him to a sentence in excess of what he and his trial attorney *hoped* would be imposed. This Monday-morning quarterbacking is not a basis upon which to assert there is now a manifest injustice in his plea.

Trial court judges in the Criminal Division take many, many pleas following many, many plea colloquies. Interestingly, lay people likely believe that these plea colloquies are taken lightly by the courts. This Court cannot speak for any other court, but it can only emphasize—strongly—that *it* takes each and every plea colloquy seriously. It took Defendant Flores' plea colloquy seriously and asked more questions than normal just precisely to make it absolutely, positively "nice and clear" to Flores.

In fact, at least four to five times in this criminal rotation, this Court has stopped a plea colloquy mid-stream and *refused* to proceed with the plea. In some cases, it was where the defendant was uncertain of the complaint or was otherwise hesitant and in others, it was where the facts were not established and agreed to by the defendant. And, in at least one case, it was where the defendant reported that he/she simply did not commit the acts in question. Thus, the fact that a plea colloquy began with Defendant Flores does not mean that the Court was headed, pell-mell, to the inexorable acceptance of that plea.

Just as interesting is that this Court actually clearly recalls both the plea and the sentencing of Defendant Flores in 2018. Defendant Flores' new counsel attempted to subpoena this Court to ascertain what precisely happened in the plea colloquy—that subpoena was quashed by another Court. The question would have focused upon the reason that the concept of an interpreter was mentioned. The transcript is clear that the Court asked repeatedly if Defendant Flores understood the proceedings and if he was indeed pleading guilty and if the allegations were true.

Defendant Flores repeatedly said[19] he did understand, he said he was pleading guilty and he said "it is true" when asked if the facts in the Complaint were substantially true and correct. He also said "I understand" when asked the immigration warnings.[20] Finally, when asked if he had any questions he wanted to ask his lawyer before the plea was accepted, he said "I have no questions." He also said "no" to whether he had any questions for the Court.

Recall as well that Defendant Flores had been in court in front of this same judge several times before and that no one—not his attorney, not his wife, and not Defendant Flores himself—ever asked for an interpreter. Defendant Flores never said he did not understand during the colloquy and never asked to have matters repeated. He never asked for an interpreter to be present at the trial, clearly just as critical, if not more critical, a portion of his case as the plea colloquy.

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[19]He answered "yes" three times to the inquiry of whether he was pleading guilty. He also said he was "guilty" and that "it is true" when questioned about the allegations in the Complaint.

[20]Hearing Transcript, at 11:

> THE COURT: Okay. Do you understand that if you are not a citizen of the United States of America, and I say that to everyone, that a plea of guilty or not contest for the offense with which you are charged may result in deportation, the exclusion of admission into this country or the denial of naturalization under federal law?
>
> DEFENDANT: I understand.

This Court asked the questions of Defendant Flores more times than in a standard plea colloquy to satisfy itself that the questions were understood by Defendant Flores. While the Court mentioned an interpreter when Defendant Flores' trial attorney said he "understood English but --" it is clear that neither Flores nor his trial attorney asked to stop the plea to obtain an interpreter for the first time in the case. And, as Cervera Garcia testified, the actual completion of that interrupted sentence was "he is nervous."

As the other Judge noted at the hearing on the Motion to Quash Subpoena, it was attorney Cervera Garcia who made the statement that "he does understand English but - -" and it was this Court that finished that sentence questioning whether Defendant Flores needed an interpreter (albeit "at the sentencing.") That was the opportunity for Defendant Flores to say he *wanted or needed* an interpreter then *and* at the sentencing. He was silent.

The other Judge continued and stated:

> In this case, there is nothing in the record that Judge Lazar saw the defendant hesitating, saw the defendant looking quizzical, things of that nature.
>
> . . .
>
> It is in the everyday activity of a judge, a relatively mundane decision, if you will, to appoint an interpreter. When in doubt, appoint one. And it's clearly what happened here. There would appear to be doubt in the mind of trial counsel. That appears to be the most relevant, most material witness, and I would think that anything that Judge Lazar could possibly add to that would be cumulative and start a slippery slope.

Hearing Transcript, September 26, 2019, at 26.

During the plea colloquy, there was no hesitation noted by this Court; that would have been placed in the record. The Court was cautious with Defendant Flores in order to ensure he understood the plea agreement. The Court did not identify any concerns after or during the colloquy.

This Court also recalls the sentencing. After making the statement that he "didn't mean to do nothing to that girl," at his plea hearing, Defendant Flores became more obstructionist at his sentencing. The little girl's father—whom the Court saw seated on one side of the courtroom gallery behind the State while several other family members and supporters of Defendant Flores (including Jane Flores) sat on the other side glaring at him—spoke eloquently about how mad the family was at them, how

much pressure was placed on his daughter to recant and how her life had been traumatized with significant mental harm.

It was Defendant Flores' cold assertion at sentencing proclaiming his total innocence (not the "she may have misinterpreted his actions" that "did cause her mental harm") that gave this Court pause. It was the Court's question why, why were there couches in that little shed at the back of Defendant Flores' yard that kept repeating in its mind that lead to the discussion of that very fact at sentencing.

Recall, also that the Court knew the background of this case (in actuality or just as judicial notice) and knew that an interpreter had never been sought, several documents prepared only in English were signed by the Defendant, and that the Defendant had only spoken in English in the courtroom. Moreover, a Court Commissioner had already questioned Defendant Flores with respect to his waiver of a preliminary hearing (on an English-only form)—and that the colloquy that was undertaken to ascertain that Defendant Flores understood his rights and understood English, was, in and of itself, conducted solely in English with no request for an interpreter by Flores. The plea questionnaire was not in English and Spanish, as sometimes happens, but was only in English.[21] That would have been an indication to the Court that there might have been a language comprehension issue. In addition, the boxes indicating that Defendant Flores understood English and understood the charge(s) to which he was pleading were both checked off.[22] At no point did Defendant Flores ever state that he did not understand *any* of the proceedings or ask for clarification in the plea or during any other hearing.

This Court also knew that attorney Cervera Garcia had mentioned—twice—an immigration law memorandum and that she had indicated she had discussed these issues with Defendant Flores.

In fact, the Court noted that even *after* an interpreter was brought in for the post-conviction motion hearings, when Defendant Flores testified at the last evidentiary hearing, ***he often answered the English questions in English before the interpreter could even finish translating the question.***

In response to the testimony by Cervera Garcia that Defendant Flores had brusquely brushed aside and rebuffed her attempts to speak in Spanish, Jane Flores

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[21]This is the same as the plea questionnaire in the OWI-2d case, in Waukesha Case No. 2005-CT-1659.

[22]Both these boxes were also checked on the OWI-2d plea questionnaire.

claims this was because that was to allow *her* to understand everything. This is facially appealing but inherently flawed. Defendant Flores met alone with Cervera Garcia to watch the recorded interview and discuss Dr. Jurek—key moments in his case, moments where the attorney wanted only her client present. If he truly needed Jane Flores (or someone) to explain matters, he would have asked for interpretation at that meeting or, more easily, that it be conducted in Spanish. That did not happen. Moreover, this asserted claim doesn't support the view that Defendant Flores truly didn't understand English because Jane Flores admits she only speaks a little Spanish and she would have had difficulties translating to Spanish for her husband.

Some of the other arguments by Defendant Flores were elaborated upon in testimony. None of which are persuasive to the Court. Gaytan explained how verbal cues can assist an observer. A key point raised by Gaytan was that head nodding and affirmative answers actually are signals of possible miscommunication. But, this is setting an inappropriately high, if not impossible, bar for the Court. How is a judge to know if "yes" or "yes, your Honor" really means "I have no idea what you are saying." A judge has to observe individuals in the courtroom, including defendants, and has to—based on experience, intellect, and common sense—determine if a person is hesitating or looks confused. Signs of nervousness are often seen at sentencing, especially in felony cases where substantial prison incarceration is at risk. It doesn't mean there is a lack of comprehension. Courtrooms can be scary places. Bad consequences can be imposed—but imposed proportionally to each individual offense. This was an egregious defense, even as amended by the parties.

Relying upon Defendant Flores' arguments of lack of comprehension as detailed by Gaytan would, in effect, eviscerate every plea colloquy. The Court observed Defendant Flores. It took steps to speak slowly and clearly and to make certain that Defendant Flores answered each question. When there were pauses, they were probed by the Court. The Court asked multiple times if Defendant Flores was pleading guilty. He said, over and over, that he was.

Next, Defendant Flores had Gaytan address "tag questions"—or questions ending with the word "correct?" or "right?" That leads a non-fluent speaker, in Ms. Gaytan's view, to just acquiescence. Again, this is placing every plea colloquy in jeopardy and setting bars impossible for any court to achieve. That cannot be the intent or practice of the Legislature and appellate courts.

Finally, Gaytan said that it would be "best practice" to have an interpreter with any and all non-native English speakers who are not necessarily fluent in English regardless of whether they request an interpreter. But, again, aside from being an

impossible definition and practice, that is not how courts operate. Anyone who asks for an interpreter is given one—at no cost. It is the individual—or their counsel—who has to ask for an interpreter, unless the Court has sincere doubts that the individual comprehends the proceeding. Here, attorney Cervera Garcia tried to speak to Defendant Flores in Spanish when he first consulted her at her law office and she was cut short and told to continue in English. She did so—then and throughout her entire representation of Defendant Flores. She was the hired advocate of Defendant Flores who had his best interests at heart as part of her duties. A court should be able to rely that an attorney who spends exponentially more time with a defendant will affirmatively speak up for that defendant and seek an interpreter where one is needed. There are no allegations that Cervera Garcia was heartless and, knowing that Defendant Flores needed an interpreter, deliberately kept quiet.

In the court proceedings in this case, Defendant Flores had multiple times (over seven times) to request an interpreter. He did not do so.[23] Until now. Now that the sentence was beyond what he'd planned and hoped for. Now, when Defendant Flores answered questions before they were translated by the interpreter. Now, Defendant Flores seeks an interpreter, it appears, as a means by which to evade a sentence duly imposed.

The Court agrees that pursuant to Wis. Stat. § 885.38(3)(a), if it had "determined that [Flores] ha[d] limited English proficiency and that an interpreter [was] necessary," it was to have advised Defendant Flores that he had the right to a qualified interpreter. The plea questionnaire, the colloquy with Defendant Flores, the knowledge that an interpreter had never been sought in this case, the fact that neither Cervera Garcia nor Flores had ever, ever asked for an interpreter, and the observed demeanor of Flores combined to lead the Court to conclude not that Flores had limited English proficiency. To the contrary, those factors lead to the opposite conclusion that Defendant Flores understood English and was pleading to a lesser charge to avoid the harsher consequences of the original charge.

The suggestion of an interpreter at the sentencing was to afford Defendant Flores more comfort at that next hearing; it was not an acknowledgement that Flores had significant difficulties that would place his understanding of the plea colloquy in severe question. The Court made that suggestion and then repeatedly asked clarifying questions of Defendant Flores and observed his responses. The Court would have entered observations of concern, language difficulties or other hesitations

[23]A review of the pleadings in the 2005-CF-1659 case also appears to indicate that no requests were made for an interpreter.

into the record if any were so observed. It did not do so. Because there weren't any to observe or record.

Accordingly, the Court concludes that it took appropriate measures to determine Defendant Flores' general comprehension of English during the plea colloquy. The Court thoroughly probed to ascertain Defendant Flores' capacity to understand the issues at the plea colloquy. Defendant Flores explained that it was all "nice and clear." It was nice and clear: Defendant Flores spoke and understood English in order to voluntarily, knowingly, and intelligently plead guilty to the amended charge.[24] This part of Defendant Flores' Motion is, thus, denied.

II. The plea colloquy demonstrates that Defendant Flores understood the elements of the amended charge of Child Enticement.

In his second argument, Defendant Flores focusses upon the lack of an element sheet attached to the plea questionnaire and asserts that his lack of English comprehension makes it clear that he did not understand the elements of the mental harm aspect of the amended charge of child enticement. The Court has already concluded that Defendant Flores had a sufficient comprehension of English, so that part of his argument is, again, rejected.

Defendant Flores also asserts that after his profession of innocence and a private consultation with his trial attorney, his "swift change of heart" is evidence that the plea was entered in "haste and confusion." *State v. Garcia*, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). This is refuted by the fact that Defendant Flores had plead guilty several times during the plea colloquy before that statement and, more to the point, the fact that Cervera Garcia testified that Flores was understandably nervous about a plea in front of an unknown Judge in a highly charged case with allegations of sexual assault of a step-granddaughter. If anything, the only change of heart was the statement that he didn't mean to do anything.

Defendant Flores points to one section in the hearing where the Court mentions the elements of child enticement, mental harm, but doesn't say that the Defendant caused the child to go into a room or private space. Defendant Flores neglects to note that there was another recitation of the elements of the amended charge, as follows:

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[24]A multitude of information learned subsequent to the plea colloquy and set forth in the Background Section, *supra*, further support this determination. Defendant Flores spoke only English to attorneys Cervera Garcia and Masse, filed out his naturalization application and all plea questionnaires in English only, and never asked for an interpreter in his divorce and OWI-2d case, to repeat but a few here.

> THE COURT: Okay. And the amended information has one count. It's child enticement. It states between June 1, 2016 and September 1, 2016 in Muskego with intent to cause mental harm it asserts you did cause a child under the age of 18, and that is the individual with the initials [ ], to go into a room contrary to the statutes. This is a felony and upon conviction you could be fined no more than $100,000 or imprisoned not more than 25 years or both, correct?
>
> DEFENDANT: Yes.

Plea Hearing, at 6.

The Court read the amended charge with all of the elements listed on the Amended Information during the colloquy even though its formal reading had been waived. In addition, the Court explained what the State would have to prove beyond a reasonable doubt:

> THE COURT: All right. In this case the State would have to proved beyond a reasonable doubt that with the intent to cause mental harm you did cause mental harm to an individual who was under the age of 18, the initials [ ], and you caused her in this case to go into a room and there you caused her mental harm; correct?
>
> DEFENDANT: Yes.

Id., at 10-11.

The Court was also aware that Cervera Garcia had prepared and discussed an immigration memorandum with Flores. Attorney Cervera Garcia, at the plea colloquy averred that Defendant Flores understood all of the elements of the offense to which he was pleading guilty. Following the plea colloquy, the testimony at the evidentiary hearings, more information came to light showing that Defendant Flores was aware of the elements of child enticement, mental harm.

Defendant Flores testified that he did see, discuss and sign the plea questionnaire—but that Cervera Garcia's handwriting was very blurry. He—and Cervera Garcia—agree that he was never shown the Jury Instruction for Mental Harm. Now, after the fact, Defendant Flores asserts that he would never have signed the questionnaire or plead guilty had he reviewed that Jury Instruction.[25] Coincidentally, Defendant Flores—without waiting for his interpreter—answered yes to the question of whether it was complicated to understand the charge of child

[25]The Court can only assume that he would have asked to review it in Spanish. Regardless, the assertion is disingenuous at this time. He was given notice of the element in the memorandum and via discussion with Cervera Garcia.

enticement because it was explained in English. And, upon cross-examination, Defendant Flores admitted he could understand questions in English "a bit—to a certain point."

The chain of negotiation emails between the State and Cervera Garcia also rebut the claims that she was not effective or was in over her head. They show she had a command of the case, knew precise details about the charges and the possible deportation consequences. She severely down-played the child's forensic interview in the email, clearly as a bluff because, as she has since revealed, Dr. Jurek had found the interview to be compelling and difficult to refute. Cervera Garcia mentions the child enticement statute in the emails and that she had it analyzed. She convinces the State to, not only agree to child enticement, mental harm, which does not carry a mandatory sex offender registry component that would have made deportation more likely, but also got the State to remain silent as to any recommendations about such requirements. Clearly the work of a skilled attorney.

The Court did take great care to ascertain Defendant Flores' understanding of the amended charges. Even though the reading of the Amended Information was waived, the Court, in essence, actually read the entire amended charge to Defendant Flores. *See* above. There was a meaningful dialogue between Defendant Flores and the Court. There weren't simple, perfunctory, affirmative responses; Defendant Flores said "yes" he was pleading guilty and that "it was true" that the allegations in the amended information and complaint substantially supported the amended charge.

The Court in *Bangert*, a key case on the topic, explains that there are several ways in which a trial court may ascertain a defendant's understanding of a charge in a plea colloquy:

> While we have not established inflexible guidelines which a trial court must follow in ascertaining a defendant's understanding of the nature of the charge, this court is of the opinion that the time has arrived to require a trial court to do more than merely record the defendant's affirmation of understanding pursuant to sec. 971.08(1)(a). As a function of our superintending and administrative authority over the circuit courts, we now make it mandatory upon the trial judge to determine a defendant's understanding of the nature of the charge at the plea hearing by following **any one or a combination of the following methods.** We characterize this obligation as a duty to first inform a defendant of the nature of the charge or, alternatively, to first ascertain that the defendant possesses accurate information about the nature of the charge. The court must then ascertain the defendant's understanding of the nature of the charge as expressly required by sec. 971.08(1)(a). Which of the following methods is selected depends on the circumstances of the particular case, including the level of education of the defendant and the complexity of the charge.

> **First**, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, *see*, Wis. J I -- Criminal SM-32, Part IV (1985), or from the applicable statute. *See, e.g., Cecchini*, 124 Wis. 2d at 213. **Second**, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing. **Third**, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing. For example, when a criminal complaint has been read to the defendant at a preliminary hearing, the trial judge may inquire whether the defendant understands the nature of the charge based on that reading. A trial judge may also specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge.
>
> We first note that **this list is not necessarily exhaustive of the methods which a trial judge may exercise in satisfying the antecedent step to its statutory obligation to personally determine the defendant's understanding.**

Bangert, 131 Wis. 2d at 267-68 (emphasis added).

As noted in *State v. Cain*, 2012 WI 68, ¶ 14, 342 Wis. 2d 1, 816 N.W.2d 177, there must be "manifest injustice" to warrant the withdrawal of a plea after sentencing:

> When a defendant moves to withdraw a plea after sentencing, the defendant "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" *Thomas*, 232 Wis. 2d 714, ¶ 16 (quoting *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993)); *see State v.* Bentley, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Here, the burden is on Cain to prove that plea withdrawal is warranted because "the state's interest in finality of convictions requires a high standard of proof to disturb that plea." *Thomas*, 232 Wis. 2d 714, ¶ 16 (quoting *Washington*, 176 Wis. 2d at 213) (internal quotation marks omitted); *State v. Black*, 2001 WI 31, ¶ 9, 2424 Wis. 2d 126, 624 N.W.2d 363. Therefore, in order to disturb the finality of an accepted plea, the defendant must show "'a serious flaw in the fundamental integrity of the plea.'" Id. (citing *State v. Nawrocke*, 193 Wis. 2d 373, 379, 524 N.W.2d 624 (Ct. App. 1995)); *State v. Denk*, 2008 WI 130, ¶ 71, 315 Wis. 2d 5, 758 N.W.2d 775.

The Court concludes that, based on the clear record, that the Court summarized the elements of the charge by reading the Amended Information, by asking attorney Cervera Garcia if Defendant Flores understood the elements of the offense to which he plead guilty, and personally asking—twice—if Defendant Flores understood what the State would have to prove beyond a reasonable doubt. Defendant Flores had real notice of the true nature of the amended charge to which he plead guilty. Attorney Cervera Garcia even said that when she spoke about the case with Defendant Flores after they watched the recorded interview and after Flores admitting to causing the child mental harm, she talked to Flores about the elements of the amended charge;

that is what, in her mind, caused Defendant Flores to admit to causing the mental harm to his seven year old step-granddaughter.

There was no manifest injustice. There was no flaw—serious or otherwise—in the fundamental integrity of the plea. There was no violation of Defendant Flores' rights. The evidentiary hearings clearly establish that the State met its burden, by clear and convincing evidence, that the plea was nonetheless knowingly, voluntarily, and intelligently made. *See Bangert*, 131 Wis. 2d at 275.

Therefore, this part of Defendant Flores' Motion to Withdraw Guilty Plea is denied.

Defendant Flores' trial attorney provided effective assistance of counsel.

A. The former trial counsel provided effective assistance.

Defendant Flores also contends that his trial counsel was ineffective because she provided inaccurate advice to Defendant Flores about his deportation consequences of pleading guilty to Child Enticement, Mental Harm, failed to explain the elements of mental harm, was inexperienced and failed to have a full law library in her office with copies of the Wisconsin Jury Instructions. After a careful consideration of these arguments, the Court concludes that none of these establish that Attorney Cervera Garcia provided ineffective assistance of counsel.

Defendant Flores contends that Cervera Garcia was, basically, in over her head. Cervera Garcia has practiced law for over 22 years, focusing primarily in criminal defense work with some experience in family law and less in immigration law. Over the years, Cervera Garcia has handled at least 18 felony cases and has conducted at least two to three jury trials (all misdemeanors). She has never before handled a felony child sexual assault case, but has had the opportunity, in a juvenile case, to cross-examine a child witness making a sexual assault allegation.

It is true that there is a lack of felony child sexual assault experience, but that doesn't mean that Cervera Garcia is not capable of handling such a matter—as the cases say, there is a right to effective counsel, not a right to Clarence Darrow. And, who's to say that Cervera Garcia wasn't/isn't a litigation rock star in the making.

A Court is not to consider merely whether the plea and sentence strategy was unsuccessful; it must rather look to whether particular acts or omissions by trial counsel were unreasonable. *Strickland*, 466 U.S. at 694. The Court declines to second-guess trial counsel's strategies and tactics; none of those singled out by Defendant

Flores in his Motion appear to be based upon caprice rather than upon judgment. *Jacobs*, 2012 WI App 104, ¶ 28. Thus, they are, and were, reasonable.

Cervera Garcia had Masse almost immediately prepare an immigration memorandum in which the possible alternate charge of child enticement, mental harm, was addressed. She discussed that memorandum with Masse and then with Defendant Flores, including a discussion of the element of mental harm. She mentioned the charge, the underlying statute and the possible immigration consequences in her email exchanges with the State. These are not signs of an inadequate counsel. Moreover, when questioned at the plea colloquy as to whether he understood the possible immigration consequences for this amended charge, Defendant Flores said "I understand."

Next, the issues raised about the scrawled handwriting on the plea questionnaire, unfortunately, is not uncommon in the experience of a criminal trial court judge's daily practice. Would that every attorney typed up the questionnaires and didn't write in the wrong statutes, the wrong pleas, forget to sign the documents or otherwise, just barely get the information to the Court. But, that is not the norm. Nor is typing a requirement. The same applies with respect to the attachment of an element sheet. It is helpful, but not a requirement. While Clarence Darrow or Atticus Finch from *To Kill a Mockingbird* would probably have plea questionnaires typed up with detailed and elaborate element sheets, the lack of such almost impossible and nigh unlikely documentation does not render a normal attorney's conduct practicing in the high-pressured criminal defense world into an ineffective attorney. Hindsight is not to be the watchword. It is an inappropriate distortion of the legal standards to require perfection in the law, especially in the fact-paced criminal defense world.

Cervera Garcia explained that—almost a year before the plea colloquy—she went over the Masse immigration memorandum and discussed the possible alternate charge of child enticement, mental harm, with Defendant Flores. She further explained that she went over the elements of that amended charge the morning of the plea colloquy in both her law office and in a private conference room at the courthouse. She averred to the Court that she had honored this aspect of her fiduciary position with respect to Defendant Flores. Scribbles or illegible writing on a plea questionnaire does not convert an otherwise competent attorney into an adequate, unprofessional practitioner. If that were the case, more than half of the bar would be disqualified (as well, many judges).

In a motion to withdraw a guilty plea, the test "is not whether the defendant is guilty, but whether he was fairly convicted." *State v. Reppin*, 35 Wis. 2d 377, 386, 151

N.W.2d 9 (1967). Additionally, "the test is whether the withdrawal of the plea is dictated by the demands of manifest injustice, not whether the defendant will be successful at trial." *Id.*, 35 Wis. 2d at 390. Defendant Flores places an emphasis on his and his wife's testimony that he consistently and adamantly proclaimed his innocence from the start to the finish of his representation by Cervera Garcia. But, attorney Cervera Garcia was more credible when she testified that there was a softening of his position and a begrudging admission that maybe he had caused the child mental harm, had brushed her in play, and that she had likely misinterpreted his actions. This change in view took place after they watched the recorded interview of the child and discussed the unfavorable Jurek report.

The Court does not believe nor find credible the statement of Jane Flores that Cervera Garcia never discussed the possibility of deportation and that there were clear advantages to accepting the plea and throwing Flores at the mercy of the Court. Had this Court gone along with Defendant Flores' expectations for a light sentence, we would not be here today. This Motion is an "after-the-fact" attempt to re-do a sentence that Defendant Flores and his wife, Jane, had hoped would never happen. The Court began its colloquy—as it does every time—with the caution that the Court is not bound by the recommendations of *either* side. Defendant Flores agreed that that was how the sentencing would take place. The only manifest injustice is that which happened to the little girl who "misunderstood" her step-grandfather's "playfully inappropriate" conduct in a secluded little shed in the back of his yard.

Finally, Defendant Flores contends that Cervera Garcia also provided ineffective assistance of counsel by failing to explain that the factual allegations in the Complaint could not and should not be used as a factual basis for the charge. This is not a basis upon which to find ineffective assistance. Even if it was an error, it was not prejudicial to Defendant Flores.

* * *

The Court is to be highly deferential to the decisions made by trial counsel. It is easy in hind-sight to say what could and should have been done in a given circumstance. That is not the proper legal standard. *Strickland*, 466 U.S. at 694-95. There was no irrational trial tactic or plea and sentencing strategy. There was no evidence of caprice or absence of any reasonable judgment. *Jacobs*, 2012 WI App 104, ¶ 28. There is a wide range of professional conduct and mere imperfection is not the standard. *Burton*, 2013 WI 61, ¶ 48.

Taking all of these points together, the Court concludes that Defendant Flores has failed to prove that there was a deficient performance by his trial counsel. The challenged actions can well be considered sound trial or plea/sentence strategy, and are thus not a basis upon which the first prong for ineffective assistance of counsel is met. *Michel*, 350 U.S. at 101.

Moreover, Defendant Flores has failed to establish that trial counsel's performance was so seriously deficient that she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Trial counsel's performance did not so undermine the proper functioning of the adversarial process such that there was not a just result at the plea colloquy. This determination, in and of itself, should stop the inquiry, but the Court (aware that the matter is under appeal and that this Decision may also be subject to appeal), will also address the question of prejudice.

B. No Prejudice has Been Proven.

The Court acknowledges that there need not be a multitude of errors by trial counsel and that a single, isolated error of counsel could violate a defendant's right to effective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). But, that single, isolated error of counsel must be "sufficiently egregious and prejudicial." *Id.* Or, in the alternative, the Court may aggregate errors and make a determination in which "prejudice should be assessed based on the cumulative effect of counsel's deficiencies." *Mayo*, 2007 WI 78, ¶ 61 (quoting *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 604, 665 N.W.2d 305). "Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding." *Thiel*, 2003 WI 111, ¶ 60; *State v. Hunt*, 2014 WI 102, ¶ 55, n.15, 360 Wis. 2d 576, 611, n.15, 851 N.W.2d 434.

Defendant Flores, relying upon *Padilla* and its progeny, contends he was prejudiced because he would not have plead guilty if his trial counsel had properly advised him about the deportation consequences of his plea. In essence, he asserts that "a rational decision not to plead guilty does not focus solely on whether [a defendant] would have been found guilty at trial—*Padilla* reiterated that an alien defendant might rationally be more concerned with removal than with a term of imprisonment." *State v. Mendez*, 2014 WI App 57, ¶ 16, 354 Wis. 2d 88, 847 N.W.2d 895, *abrogated on other grounds*, 2014 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93 (quoting *U.S. v. Orocio*, 645 F.2d 630, 643 (3d Cir. 2011)). But, this presupposes that there was ineffective assistance of counsel and an actual failure to so advise Defendant Flores.

The Court concludes to the contrary. Attorney Cervera Garcia almost immediately retained Masse to prepare a memorandum summarizing and analyzing the legal ramifications of deportation and other immigration consequences for the original charge as well as the possible alternative of child enticement, mental harm. That memorandum was provided to Defendant Flores a year before he plead and was explained to him by Cervera Garcia. It was sent to his home where he resides with his wife, Jane. If Defendant Flores truly couldn't understand English, Jane could have read it to him and explained it. Jane Flores claims that's what she did in this case.

Next, the Court finds Cervera Garcia more credible when she testified that she went over that memorandum and the deportation consequences when it was first mailed to Defendant Flores and when it was updated prior to the final plea offer. The Court also believes that Cervera Garcia explained the deportation consequences the morning of the plea colloquy—and that, while she may have sugar-coated what she thought the sentence would be—she clearly explained that his exposure was far greater if they went to trial with such a compelling child forensic interview. While this may not have been the tactic selected by all criminal defense attorneys (some of whom may lean toward giving worst case, doomsday scenarios playing the odds that they'll likely come to pass in only a few cases, making the attorney seem to be more talented when they don't come to pass), it is not an absolutely, inappropriate way to practice. Moreover, Defendant Flores indicated he "understood" the possible immigration consequences.

The Court does take into account Defendant Flores' legal status and that deportation would lay heavy on his and Jane's minds. That is precisely why the Court does not find Jane Flores credible when she claims that there were no discussions about deportation because they simply were going to trial. While it may be that Defendant Flores asserts he had nothing to lose by going to trial, that is not accurate. His original exposure was 60 years of imprisonment with 30 of those as initial incarceration. At his age, that could have been a life sentence.

Accordingly, the Court disagrees that Defendant Flores was prejudiced because there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 475 U.S. 52, 29 (1985). There was no prejudice in this case.

Accordingly, Defendant Flores has not met his burden of proof by showing that trial counsel's performance had an actual, adverse, or prejudicial effect on the defense. *Strickland*, 466 U.S. at 693. There is no reasonable probability that, but for

trial counsel's conduct, the results of the proceeding would have been different such that confidence in the outcome has been undermined. *Johnson*, 153 Wis. 2d at 130.

"There are two elements that underlie every claim of ineffective assistance of counsel: first, the person making the claim must demonstrate that his or her counsel's performance was deficient; and second, he or she must demonstrate that this deficient performance was prejudicial." *Mayo*, 2007 WI 78, ¶ 60. Neither of these were met in this case.

Moreover, in all respects, the Court concludes that there was no actual, adverse, or prejudicial effect upon the defense though trial counsel's conduct. Defendant Flores was not deprived of a fair plea and sentencing with a reliable result. Based upon the foregoing discussion, the Court concludes that neither prong of the *Strickland* test was proven. Accordingly, this part of the Post-Conviction Motion is, likewise, denied.

CONCLUSION

Based upon the foregoing discussion, the Court concludes that the personal plea colloquy conducted with Defendant Flores was appropriate, that the Court took adequate steps to measure Flores' general comprehension of English and his ability to understand the issues covered during the colloquy, and that the guilty plea of Defendant Flores was made knowingly, intelligently, and voluntarily under the totality of the circumstances. There was no lack of comprehension. There was no necessity to have an interpreter present. There was no violation of Defendant Flores' fundamental due process rights during the plea colloquy.

The Court further concludes that Defendant Flores understood the elements of the amended charge of Child Enticement, Mental Harm, and that the Court complied with *Bangert* by appropriately summarizing the elements of the charge, among other steps taken. There was real and actual notice of the elements, including mental harm, and there was no flaw in the fundamental integrity of the plea.

Finally, the Court concludes that there was no ineffective assistance of counsel by Defendant Flores' trial counsel because she both adequately explained the elements of the amended charge, including mental harm, and she properly discussed the possibility of deportation with Defendant Flores several times during the course of her representation. Therefore, the former trial counsel's performance was not deficient. Additionally, Defendant Flores has failed to demonstrate that any deficient performance was prejudicial to his case. Defendant Flores was not deprived of a fair and just plea and sentencing through any deficiency by trial counsel.

Accordingly, Defendant Jose Flores' Motion for Withdrawal of Guilty Plea is hereby DENIED in its entirety as set forth above.

Dated this 31st day of July, 2020.

BY THE COURT:

Maria S. Lazar
Circuit Court Judge, Branch 7

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.

c: Dep. Dist. Atty. Michael Thurston (by ecf)
Anthony D. Cotton (by ecf)
Kristina Cervera Garcia (by ecf)
Jose Flores (by regular mail)