Via Electronic Mail & Standard Mail
Defense Attorney

Re: ***State v. Defendant***
Case No. XX-CF-XXXX

Dear Defense Attorney:

I have been retained by Defendant to advise you on the pending charges in the above-captioned matter.

Although OWI offenses in Wisconsin are not crimes involving moral turpitude, a substantial sentence could result in far reaching immigration consequences. Specifically, actual confinement of 180 days or more will statutorily bar Defendant from seeking cancellation of removal if placed into removal proceedings.

Defendant will be entering pleas to one count of OWI (2^{nd}) and one count of misdemeanor OWI causing injury. That resolution will avoid any serious immigration consequences **unless** Defendant serves a jail term of 180 days or more.

IMMIGRATION HISTORY

Defendant was born on XXXXX in Mexico. He first entered the U.S. in 1996 when he was 15 years old. He briefly returned to Mexico for two months in 1998. Other than that brief return to Mexico, Defendant has lived in the U.S. continuously since 1996.

Defendant is married to a U.S. citizen. He also has a U.S. citizen son from a prior relationship. Defendant has primary physical custody. The boy's mother has visitation rights on the weekends, but I am told that she rarely visits her son. Defendant is therefore the sole caregiver to his son.

Defendant presently lacks immigration status. However, if he is placed into removal proceedings before the Chicago Immigration Court, he may seek a form of relief called cancellation of removal.

In order to be cancellation eligible, an applicant must: (1) be residing in the U.S. continuously for ten years; (2) has been a person of good moral character during that period; (3) has not been convicted of an inadmissible or deportable offense; and (4) establishes that his removal will result in "exceptional and extremely unusual hardship" to the applicant's U.S. citizen (or permanent resident) spouse, child, or parent. 8 U.S.C. §1229b(b) (**Ex. A**).

ANALYSIS

Standing alone, simple OWI under Wisconsin law is not an inadmissible or deportable offense because it is not considered a crime involving moral turpitude ("CIMT") under immigration law. This general rule also applies to OWI causing injury.

However, if Defendant is placed into removal proceedings, incarceration of 180 days or more would render him ineligible for cancellation of removal because it would statutorily preclude him from establishing good moral character.

A. OWI Offenses Are Generally Not Inadmissible Or Deportable Offenses

In order for Defendant to apply for cancellation of removal if placed into immigration court, he must show that he has not been convicted of an inadmissible or deportable offense. A felony CIMT conviction, as well as multiple misdemeanor CIMTs, would bar Defendant from seeking cancellation of removal. *See* 8 U.S.C. §1182(a)(2)(A)(i)(I); 8 U.S.C. §1229b(b) (**Ex. A**).

The Board of Immigration Appeals, which is the highest agency interpreting immigration law, held in *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1194 (BIA 1999) (**Ex. B**) that "simple DUI offense does not inherently involve moral turpitude" because it "is ordinarily a regulatory offense that involves no culpable mental state requirement, such as intent or knowledge."

Neither simple OWI nor OWI causing injury under Wis. Stat. §346 require a *mens rea* for a conviction. They are regulatory offenses that do not require the defendant to have knowingly operated a vehicle while intoxicated or to have intentionally, knowingly, or recklessly caused an injury.

Without some level of scienter, these offenses are not CIMTs under immigration law. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687, 689, n. 1 (A.G. 2008) (A CIMT "must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.").

Finally, it does not matter that Defendant has been charged with a second OWI offense. The Board addressed this issue, finding that multiple OWI offenses do not constitute CIMTS because "nonturpitudinous conduct is not rendered turpitudinous through multiple convictions for the same offense." *Matter of Torres-Varela*, 23 I&N Dec. 78, 86 (BIA 2001) (**Ex. C**).

Standing alone, the charges will not trigger Defendant's inadmissibility or deportability under immigration law.

B. Cancellation of Removal

Although OWI offenses under Wis. Stat. §346 are not inadmissible or deportable offenses under immigration law, a jail term of 180 days or more would render Defendant ineligible for cancellation of removal.

In order to be *prima facie* eligible for cancellation of removal, an applicant cannot lack good moral character as defined under 8 U.S.C. §1101(f). (**Ex. A**). A noncitizen confined to a jail or prison for 180 days or more due to a conviction lacks good moral character as a matter of law. 8 U.S.C. §1101(f)(7).

If Defendant is convicted of OWI causing injury, then he must avoid an actual jail term of 180 days or more in order to preserve his eligibility for cancellation of removal in deportation proceedings.

A statutory bar to applying for cancellation of removal will have dramatic consequences on Defendant's U.S. citizen wife and child. A jail term of 180 days or more will strip the immigration judge of any discretion in his case, even if his removal to Mexico will result in exceptional hardship to his U.S. citizen family members.

Although Defendant has primary physical custody of his son, the boy's mother has parental rights. For that reason, Defendant's son could not accompany his father to Mexico unless the child's mother agrees to it. There is a genuine danger that Defendant's deportation to Mexico could result in permanent separation from his U.S. citizen son.

A 2010 study from the Urban Institute found that parent-child separation resulting from deportation poses serious risks to children's immediate safety, economic security, well-being, and longer-term development. (*See* excerpts of report, attached hereto as **Ex. D**). The study also found housing instability and food hardship resulting from deportation.

Importantly, the study also reported widespread changes in the children's behavior after removal, finding that "[y]ounger children experienced greater difficulties eating and sleeping, excessive crying, and clinging to parents, while aggressive and withdrawn behavior was more common among the older children."

Even if Defendant's son could live with him in Mexico, his son would suffer considerably. A recent article from the New York Times reported that U.S. citizen children living in Mexico due to a parent's deportation often find themselves without access to basic services in Mexico, such as education or health care. (**Ex. E**).

Defendant's removal to Mexico would also cause serious hardship to his U.S. citizen wife. She would either have to accept a lengthy physical separation from Defendant, or try to live in Mexico with her husband. Presently, Mexico is experiencing a severe wave of crime and violence from the Mexican drug cartels. (*See* U.S. State Department Travel Warning to Mexico, attached hereto as **Ex. F**). Due to Defendant immigration history, it is possible he could be barred from returning to the U.S. for at least ten years. His wife would have to either live with in Mexico or remain in the U.S. without him.

Finally, it should be emphasized that a sentence of less than 180 days may not necessarily result in approval of cancellation of removal. An immigration judge could deny the application in the exercise of discretion. When applying for cancellation, Defendant will be required to explain the circumstances of his convictions. Since he will bear the burden of establishing his cancellation

claim, he cannot remain silent on his conviction record. He will need to explain to the satisfaction of the immigration judge why these offenses occurred, and why he deserves approval of cancellation of removal.

In other words, a sentence of less than 180 days will not necessarily insulate Defendant from deportation. However, a sentence of less than 180 days will at least provide him with an opportunity to apply for cancellation of removal. It will then be up to the immigration judge as to whether Defendant merits a favorable exercise of discretion.

CONCLUSION

You have explained to me that Defendant will be entering pleas to OWI (2^{nd}) and misdemeanor OWI causing injury. This will preserve Defendant's eligibility for cancellation of removal as long as he does not serve a jail term of 180 days or more.

If Defendant is sentenced to confinement of 180 days or more, then he will be statutorily ineligible for cancellation of removal. Losing his eligibility to cancellation of removal will mean an immigration judge could not take into account the effect his deportation would have on his U.S. citizen wife and son.

If you have any questions regarding my analysis, please do not hesitate to contact me.

Sincerely,

Davorin J. Odrcic

Encl.