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STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2012AP000055

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRES ROMERO-GEORGANA,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER OF THE CIRCUIT COURT OF BROWN COUNTY, THE HONORABLE KENDALL M. KELLEY, PRESIDING.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER OF THE CIRCUIT COURT OF BROWN COUNTY, THE HONORABLE KENDALL M. KELLEY, PRESIDING.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ISSUES PRESENTED

1. Is Romero-Georgana entitled to an evidentiary hearing based on his WIS. STAT. § 974.06 motion alleging ineffective assistance of postconviction counsel for failing to raise a strong argument for plea withdrawal?

   The circuit court ruled that Romero-Georgana was not entitled to an evidentiary hearing because he failed to allege sufficient facts relating to postconviction counsel's

performance. The court of appeals affirmed the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Consistent with this Court's practice, oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a *pro se* WIS. STAT. § 974.06 motion alleging ineffective assistance of postconviction counsel. The claim is that postconviction counsel failed to advise Romero-Georgana about the possibility of plea withdrawal on the basis of the circuit court's failure to give the required immigration warnings at the plea hearing.[1] *See* WIS. STAT. § 971.08(1)(c) & (2). As Romero-Georgana's motion was denied without a hearing, the primary issue before this Court is whether he was entitled to a hearing on his motion.

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[1] In his *pro se* motion, briefs to the court of appeals, and petition for review, Romero-Georgana also alleged that his "[p]ostconviction counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for failing to fully explain the deportation consequences of his no contest plea." (App E:8.) This brief does not address that issue because Romero-Georgana now concedes that this is not a claim in which he can prevail under ***Chaidez v. United States***, 133 S. Ct. 1103 (2013).

In ***State v. Santos***, 136 Wis. 2d 528, 531, 401 N.W.2d 856 (Ct. App. 1987), the court of appeals held that "[d]eportation is a collateral consequence of a plea" and that "defendants need not be informed of the collateral consequences of a guilty plea." Since then, the US Supreme Court held in ***Padilla v. Kentucky***, 559 U.S. 356, 374 (2010), that it is ineffective assistance of counsel to fail to inform a client of the deportation consequences of a plea. However, in ***Chaidez***, the US Supreme Court held that the ***Padilla*** holding cannot be applied retroactively. ***Chaidez***, 133 S. Ct. at 1113. So, when Romero-Georgana was convicted in 2007, ***Santos*** was still controlling law. Because of that, his claim that his trial counsel was ineffective for failing to fully inform him of the deportation consequences of his plea cannot be successful.

Underlying the procedural complexities of Romero-Georgana's motion is a relatively simple story. It is undisputed that Romero-Georgana was not warned of the immigration consequences of his plea at his plea hearing. He is now subject to removal from this country because of his plea. He has been asking for plea withdrawal since his first *pro se* filing, a response to his attorney's no merit report, in June 2010. Most recently, he filed a WIS. STAT. § 974.06 motion alleging that he is entitled to plea withdrawal under WIS. STAT. § 971.08(2), which he has pursued *pro se* all the way to this Court. He has yet to have a hearing or a decision on the merits of his § 971.08(2) claim.

Procedural History

Andres Romero-Georgana, a citizen of Mexico, pled no contest to first-degree sexual assault of a child on November 17, 2006. (107:2-3.) At his plea hearing, the judge failed to explain the possible deportation consequences of his plea as required by WIS. STAT. § 971.08(1)(c). (107.) At his first sentencing hearing on January 19, 2007, he was sentenced to twelve years initial confinement followed by four years extended supervision. (108:17.)

Attorney Suzanne Hagopian represented Romero-Georgana after sentencing. She filed a postconviction motion on his behalf in July 2007 alleging that he was entitled to a new sentencing hearing because the circuit court had failed to consider the appropriate sentencing guidelines as outlined in ***State v. Grady***, 2007 WI 81, ¶¶28-30, 302 Wis. 2d 80, 734 N.W.2d 364. (31:4.) The circuit court denied that motion but its decision was later reversed by the court of appeals and the case was remanded for resentencing. (35; 44:1-2.) There is no evidence that Attorney Hagopian identified or advised Romero-Georgana about the possibility of plea withdrawal.

On remand for resentencing, Attorney William Fitzgerald represented Romero-Georgana and filed a motion to substitute the original sentencing judge. (87:2, hereinafter App B.) Romero-Georgana was resentenced by a second judge on October 1, 2008, to twenty years initial confinement followed by eight years extended supervision. (110:1, 26.)

Attorney Tajara S. Dommershausen represented Romero-Georgana after his resentencing hearing. (68:1.) She filed a postconviction motion on his behalf alleging that Attorney Hagopian was ineffective for failing to advise Romero-Georgana that under ***State v. Church***, the original sentencing judge would have had to justify a longer sentence after Romero-Georgana's successful appeal and therefore may have been less likely to impose a longer sentence. *See* ***State v. Church***¸ 2003 WI 74, ¶¶31, 51-52, 262 Wis. 2d 678, 665 N.W.2d 141. (68:2-3.) That motion was denied and the denial was affirmed after Attorney Dommershausen filed a no-merit report with the court of appeals. (App B:1-2.)

In his response to Attorney Dommershausen's no-merit report, Romero-Georgana raised for the first time "an issue regarding his no contest plea."[2] (App B:2 n.1.) The court of appeals did not address that issue on the merits, noting in its decision affirming his conviction that "this appeal [was] limited to issues arising out of the resentencing." (App B:2 n.1.)

Romero-Georgana's Third Postconviction Motion

[2] Romero-Georgana's response to Attorney Dommershausen's no-merit report is not part of the record so the only information about his argument is what the court of appeals included in its decision.

On September 2, 2011, Romero-Georgana filed a fill-in-the-blank *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. (92, hereinafter App E.) Attached to the form motion was a narrative description of his claims and argument, his supporting affidavit, and an immigration detainer/notice of action. (App E:7, 10, 11.) In the attached explanation of his claims he alleged that "[p]ostconviction counsel was ineffective for failing to raise the issue that the circuit court failed to comply with the statutory mandate when it did not address Romero-Georgana personally to advise him in the words set forth in WIS. STAT. [§] 971.08(1)(c)." (App E:7.)

In support of his claim that the WIS. STAT. § 971.08(1)(c) requirements were not met, Romero-Georgana stated that "[a]t no time did the court during the plea colloquy…advise Romero-Georgana of the deportation consequences of his entering a plea of no contest" and cited to the plea hearing transcript. (App E:8.) In addition, he submitted a notice of action from the Immigration and Naturalization Service (INS) stating that "[i]nvestigation has been initiated to determine whether [Romero-Georgana] is subject to removal from the United States." (App E:10.) He also stated that he was submitting the notice of action "[t]o verify that Romero-Georgana is indeed facing deportation back to his native land of Mexico." (App E:8.) A final administrative removal order was already in the circuit court record when Romero-Georgana filed his motion. (61, hereinafter App F.)

The postconviction court denied Romero-Georgana's motion without a hearing. Its written decision asserts that Romero-Georgana failed to allege sufficient facts to entitle him to a hearing because the motion was focused "on what happened at the trial level rather than alleging why postconviction counsel was ineffective." (94:2, App C.) Romero-Georgana appealed *pro se* from the postconviction

court's decision. (Romero-Georgana's Court of Appeals Brief:1.)

In a per curiam decision, the court of appeals affirmed Romero-Georgana's conviction, but for different reasons than the circuit court. *See* ***State v. Romero-Georgana***, No. 12-55, unpublished slip op., ¶1 (Ct. App. March 19, 2013); (App D). The court of appeals based its decision on ***Smith v. Robbins***¸ 528 U.S. 259, 288 (2000), which held that when appellate counsel is alleged to be ineffective for failing to pursue certain issues on appeal, defendants will usually have to show that the ignored issues were stronger than those actually presented. ***Romero-Georgana***, unpublished slip op., ¶6. The court noted that Romero-Georgana did "not explain why he would have given up a favorable plea agreement and risked additional charges to take his chances at trial had he been properly advised about the possibility of deportation. He would have faced the same deportation consequences if convicted after trial and it appeared the State had a strong case against him." ***Id.***

Although Romero-Georgana was not given a hearing to present Attorney Hagopian's testimony, the court of appeals stated that Attorney Hagopian "reasonably calculated that resentencing would likely produce a lesser sentence or the same sentence. On the other hand, had she succeeded in vacating the plea, the State would have been free to bring additional charges and could have recommended the maximum on the existing charge." ***Id.***, ¶7. The court concluded Romero-Georgana's "motion does not allege sufficient facts which, if true, would entitle him to relief." ***Id.***, ¶7.

STANDARD OF REVIEW

The standard of review for cases involving the sufficiency of WIS. STAT. § 974.06 motions alleging ineffective assistance of postconviction counsel was laid out in ***State v. Balliette***, 2011 WI 79, ¶¶18-19, 336 Wis. 2d 358, 805 N.W.2d 334. The motion's sufficiency is a question of law, which this Court reviews de novo. ***Id.***, ¶18.

If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, then the circuit court is required to hold an evidentiary hearing. ***Id.*** On the other hand, if the motion does not raise sufficient facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court. ***Id.*** (citations omitted).

Romero-Georgana's objective in filing his motion is plea withdrawal under WIS. STAT. § 971.08(2). Therefore, he must allege that he is entitled to relief on that basis. *See* ***Balliette***, 336 Wis. 2d 358, ¶61. This requires the interpretation of the language of § 971.08(2) to determine what he must plead in his motion to satisfy the statutory elements. ***State v. Negrete***, 2012 WI 92, ¶15, 343 Wis. 2d 1, 819 N.W.2d 749. Statutory interpretation presents a question of law that is reviewed de novo. ***Id.***

In addition, since this § 974.06 motion came after two prior postconviction motions under WIS. STAT. §§ 809.30 and 974.02, Romero-Georgana must allege a "sufficient reason" why the claims were not raised in his previous motions. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); *see also* § 974.06(4). In some cases, ineffective assistance of postconviction counsel may constitute a "sufficient reason as to why an issue which could have been

raised on direct appeal was not." ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 905 (Ct. App. 1996).

Romero-Georgana's motion alleges that his postconviction counsel was ineffective for failing to argue that he was entitled to plea withdrawal under WIS. STAT. § 971.08(2), in violation of his constitutional right to effective assistance of counsel. *See* U.S. CONST. AMEND. VI and XIV. Whether counsel was ineffective involves a mixed question of fact and law. ***Balliette***, 336 Wis. 2d 358, ¶19. The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law, which this Court reviews de novo. ***Id.***

ARGUMENT

I. Romero-Georgana's motion alleges facts that, if true, show that he is entitled to relief on his claim for plea withdrawal under WIS. STAT. § 971.08(2).

WIS. STAT. § 971.08 reads, in relevant part:

> (**1**) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> ….
>
> > **(c)** Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."
>
> ….

> **(2)** If a court fails to advise a defendant as required by sub. (1) (c) and a defendant later shows that the plea is likely to result in the defendant's deportation…the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea.

Plea withdrawal under WIS. STAT. § 971.08(2) is a relatively straightforward, statutory remedy. To qualify, Romero-Georgana must allege "(1) that the circuit court 'fail[ed] to advise [the] defendant [of the deportation consequences of the defendant's plea] as required by [§ 971.08(1)(c)]'; and (2) that the defendant's 'plea is likely to result in the defendant's deportation, exclusion from admission to this country[,] or denial of naturalization.'" ***State v. Negrete***, 343 Wis. 2d 1, ¶23 (citing Wis. Stat. § 971.08(2); further citations omitted).

Since Romero-Georgana entered his plea in 2006, this Court's holding in ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, is applicable to his case. ***Douangmala*** held that the statutory language of WIS. STAT. § 971.08(2) precludes a harmless error analysis of § 971.08(2) claims. *See* ***Douangmala***, 253 Wis. 2d 173, ¶42. As such, it does not matter whether Romero-Georgana knew or understood the possible deportation consequences his plea. *See* ***id.***, ¶¶40-42.

A. The plea hearing transcript conclusively shows that the circuit court failed to advise Romero-Georgana as required by WIS. STAT. § 971.08(1)(c).

It is undisputed that the circuit court failed to advise Romero-Georgana as required by WIS. STAT. § 971.08(1)(c). Romero-Georgana's motion alleged that "[a]t no time did the court during the plea colloquy…advise Romero-Georgana of the deportation consequences of his entering a plea of no

contest" and cited to the plea hearing transcript, which is part of the record. (App E:8; 107.) The transcript, when read in its entirety, conclusively supports Romero-Georgana's allegation. (107.)

B. Romero-Georgana adequately alleged that he is likely to be deported as a result of his plea.

To show that he is likely to be deported based on his plea, Romero-Georgana stated that he is a citizen of Mexico, that he pled no contest to first degree sexual assault of a child, and that he is facing deportation. (App E:7-8.) He also attached an immigration detainer stating that an investigation of his immigration status had been initiated. (App E:10.) In addition, there was a copy of his final administrative removal order in the circuit court's file when Romero-Georgana filed his motion. (App F.) That order explained that his removal was based on his conviction and listed the applicable immigration statutes. (App F.)

The State argued in the court of appeals that Romero-Georgana's motion failed to show the nexus between his offense and his deportation proceedings. (State's Court of Appeals Brief at 9-10.) That argument was based on the following paragraph of this Court's decision in ***Negrete***:

> *To comply with the **Bentley**-type pleading standard* in the context of WIS. STAT. § 971.08(2), a defendant may set forth the crime of conviction, the applicable federal statutes establishing his potential deportability, and those facts admitted in his plea that bring his crime within the federal statutes. In so doing, a defendant may submit some written notification that the defendant has received from a federal agent that imports adverse immigration consequences because of the plea that was entered; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the

> plea was entered. A defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for the requisite nexus.

Negrete, 343 Wis. 2d 1, ¶37 (emphasis added). Even if the above standards are applicable, Romero-Georgana has met them.

i. The *Negrete* standards do not apply to Romero-Georgana's underlying claim for plea withdrawal.

Negrete was decided nearly a year after Romero-Georgana filed his motion in the circuit court. In addition, it involved a WIS. STAT. § 971.08(2) plea withdrawal claim where there was no transcript of the plea hearing and ***Douangmala*** was not applicable. ***Negrete***, 343 Wis. 2d 1, ¶¶7-9. Before deciding the sufficiency of Negrete's motion, the ***Negrete*** court addressed the applicable pleading standard in such cases. Then, when discusssing what a defendant might show to prove the likelihood of deportation, the ***Negrete*** court limited its analysis to cases under the "***Bentley***-type pleading standard." ***Id.***, ¶37.

This Court's underlying reasons for applying the ***Bentley***-type standard to ***Negrete***'s WIS. STAT. § 971.08(2) claim do not apply to this case. Cases involving a defect in the plea colloquy are typically analyzed under ***Bangert***.[3] *See* ***Negrete***, 343 Wis. 2d 1, ¶¶29-30. The defendant must show that the plea colloquy was deficient and allege that he or she did not understand or know the information that should have been provided in the colloquy. ***Id.*** Then, the burden shifts to the State to prove by clear and convincing evidence that the

[3] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

defendant's plea was made knowingly, intelligently, and voluntarily. ***Id.***

On the other hand, the ***Bentley***[4] standard generally applies to cases alleging a defect in the plea that is outside the plea colloquy. ***Id.***, ¶20. Under the ***Bentley*** standard, a defendant must allege facts that, if true, entitle the defendant to relief. ***Id.***, ¶33.

Although Negrete alleged a defect in the plea colloquy, because there was no transcript from the hearing, this Court decided to apply the ***Bentley*** standards to Negrete's motion. ***Id.***, ¶¶29-33. The ***Negrete*** court reasoned that "the rationale underlying ***Bangert***'s burden shifting rule does not support extending that rule to situations where a violation is not evident from the transcript." ***Id.***, ¶31; *see also* **State v. Hampton**, 2004 WI 107, ¶¶50-65, 274 Wis. 2d 379, 683 N.W.2d 14 (explaining that the difference in pleading standards and proof for ***Bangert***-type versus ***Bentley***-type violations is appropriate in part because ***Bangert***-type violations are generally apparent from the record and ***Bentley***-type violations are not).

Since there is a transcript of the plea hearing in this case, based on the ***Negrete*** court's reasoning, the ***Bangert*** burden-shifting standard of review should apply to Romero-Georgana's WIS. STAT. § 971.08(2) claim. *See* ***id.,*** ¶¶29-30.

However, the general ***Bangert*** framework does not make sense for analyzing cases that fall under ***Douangmala***, as this case does, because defendants' actual knowledge of the deportation consequences of a plea is not part of the analysis. *See* ***Douangmala***, 253 Wis. 2d 173, ¶41-42. So long as defendants show that the circuit court neglected to give the required warnings and that they are likely to be deported as a

[4] ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

result of the plea, they are entitled to relief. ***Id.***, ¶46. In other words, there is no need for defendants to allege that they did not understand the immigration consequences of the plea, and once the burden shifts to the State, proof that the defendant understood the immigration consequences of the plea is irrelevant. Thus, this case does not fall neatly into either the ***Bentley*** or the ***Bangert*** standard for analyzing plea withdrawal claims, and the framework underlying the ***Negrete*** analysis is not applicable to this case.

In ***State v. Bedolla***, 2006 WI App 154, ¶¶2, 6, 295 Wis. 2d 410, 720 N.W.2d 158, the court of appeals analyzed a case like this one. There was no dispute as to the deficiency in the plea colloquy, ***Douangmala*** was applicable, and the issue was whether the defendant had adequately shown that he was likely to be deported. The ***Bedolla*** court addressed the issue as the application of undisputed facts to law. ***Bedolla***, 295 Wis. 2d 410, ¶3. Bedolla was granted a hearing on his motion, so the court of appeals was deciding whether he was entitled to relief, not just whether he was entitled to a hearing. ***Id.***

The undisputed facts of ***Bedolla*** are remarkably similar to this case. The primary evidence submitted by Bedolla was a detainer from INS stating that an investigation had "been initiated to determine whether this person is subject to removal from the United States." ***Id.***, ¶¶3, 10.

Bedolla's case was weaker than Romero-Georgana's because the detainer in that case had been filed two months *before* Bedolla entered his plea. *See* ***id.***, ¶3. The State argued in ***Bedolla*** that since the detainer was filed before the defendant had entered his plea, there was no evidence that his plea in that case was likely to result in deportation. ***Id.***, ¶7. Rather, what was likely was that his prior conviction was going to result in his deportation. ***Id.***

Nonetheless, the court of appeals ruled in Bedolla's favor. The court of appeals reasoned that the State's argument was akin to a harmless error analysis and therefore inconsistent with this Court's holding in ***Douangmala***. ***Bedolla***, 295 Wis. 2d 410, ¶9. It continued: "What is relevant is that Bedolla, a non-citizen, has entered a no contest plea to a deportable offense, the required statutory warnings were not given, and the federal government has filed a detainer against him for his possible deportation." ***Id.***, ¶10. It relied on the language used in WIS. STAT. § 971.08(2)—"likely" rather than "shall"—to conclude as follows:

> Even though the earlier conviction sparked the investigation and immigration detainer, this additional sexual assault conviction obviously will now be included as part of the Immigration and Naturalization Service's information when determining whether to deport him. *Because the sexual assault offense will be considered as a basis, in full or part, for his possible deportation, Bedolla has shown his plea to this offense is likely to result in his deportation.*

Id., ¶11 (emphasis added).

Based on ***Bedolla***, Romero-Georgana has shown in his postconviction motion that he is entitled to relief under WIS. STAT. § 971.08(2). His plea hearing transcript conclusively shows that the § 971.08(1)(c) warnings were not given, he pled to a deportable offense, and he attached to his motion an immigration detainer dated shortly after his conviction. That detainer states that an investigation has been initiated. ***Bedolla*** precedes Romero-Georgana's postconviction motion, and is thus the standard by which the sufficiency of that motion should be judged today. Indeed, ***Bedolla*** continues to be good law regarding motions where there is a plea hearing transcript and ***Douangmala*** is applicable.

ii. Even if this Court decides to apply the *Negrete* standards, Romero-Georgana has adequately alleged that he is likely to be deported as a result of his plea.

In ***Negrete***, the defendant's motion stated only that he had entered a plea to second degree sexual assault of a child and was now subject to deportation proceedings. ***Negrete***, 343 Wis. 2d 1, ¶36. In holding that those "bare allegations" were insufficient under the ***Bentley***-type pleading standard, this Court noted that "[a] defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for the requisite nexus." ***Id.***, ¶¶36-37.

Romero-Georgana did more than the defendant in ***Negrete*** to show the required nexus between his plea and deportation. In addition to stating his crime and plea and stating that he would be deported, he attached an immigration detainer stating than an investigation had been initiated to determine whether he was subject to removal. (App E:7, 10.) While the detainer did not explicitly state that the investigation was because of Romero's plea, it was dated March 20, 2007, approximately two months after Romero's sentencing hearing and four months after his plea. (App E:10; 107:1; 108:1.) The date itself strongly suggests that his conviction was the impetus for the investigation.

It is true that Romero-Georgana's motion did not cite to the federal statutes that show he is subject to deportation and/or explain how the facts of his case fit within those statutes as suggested by the ***Negrete*** court.[5] In making those suggestions,

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[5] Romero-Georgana did cite to appropriate statutes in his court of appeals Reply Brief, his first court filing after the ***Negrete*** decision was released. Specifically, he stated that "Romero-Georgana by pleading no contest to 1st degree sexual assault of a child will be deportable under

however, the ***Negrete*** court used the word "may," which shows that the list was not meant to be an exhaustive one. *See **id.***, ¶37. That list should not now be interpreted as rigid requirements.

When determining whether Romero-Georgana has met the nexus requirements laid out in ***Negrete***, this Court should also consider the context in which he filed his motion. Romero-Georgana filed this motion in the circuit court, the same court where he was sentenced the second time. That court had direct knowledge of the nexus between his conviction and his removal order. Romero-Georgana's eventual deportation had been discussed at that second sentencing hearing. His attorney even brought a final removal order to the hearing and made it part of the record. (110:31-32.)

Thus, Romero-Georgana's final administrative removal order was already in the circuit court record when he filed his motion. (App F.) And that order specifies that his conviction is the basis for his removal.

Romero-Georgana did not need to repeat the same information a second time in his motion. Given Romero-Georgana's history in the court where he was submitting his motion, it was reasonable for him to assume that the court knew that he was likely to be deported based on his plea when he chose the amount of detail to include in his *pro se* motion. This is particularly true since his motion was filed before this Court's decision in ***Negrete*** was released.

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federal law 8 USC § 1227 (2006). Specifically, 8 USC § 1227, Deportable Aliens, (2)(A) General Crimes, (i) Crimes of Moral Turpitude, (E) Crimes Against Children." (Romero-Georgana's Court of Appeals Reply Brief at 5.) His removal order specifies 8 U.S.C. § 1101(a)(43)(A) (defining aggravated felonies) and 8 U.S.C. § 1227(a)(2)(A(iii) (explaining that he is deportable based on his aggravated felony conviction) as the basis for his removal. (App F.)

iii. Even if this Court believes that Romero-Georgana has not met the requirements put forward in *Negrete*, it should allow Romero-Georgana to re-plead that portion of his motion.

This Court has held in the past that complaints by *pro se* prisoners should be construed "liberally to do substantial justice." ***Amek bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983). This policy is based in part on the recognition that "the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are unlettered and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting…grievances to a court." ***Id.*** (citing ***State ex rel. Terry v. Traeger***, 60 Wis. 2d 490, 497, 211 N.W.2d 4 (1973)).

In addition to being *pro se*, Romero-Georgana filed his motion nearly one year before the ***Negrete*** decision was released. And since ***Bedolla*** was unquestionably good law when Romero-Georgana filed his motion, it was reasonable for him to rely on it when writing his motion, particularly given its factual similarities to his case. Under these circumstances, it would be particularly unfair to apply the standards from ***Negrete*** retroactively.

Not surprisingly, no one has alleged that Romero-Georgana is not in fact likely to be removed from this country due to his plea. Rather the State's only argument, raised for the first time in the court of appeals, is that he may have failed to properly allege it. To the extent that this Court believes his allegations are insufficient, he should be given the opportunity to re-plead rather than have his claim thrown out on that basis. Romero-Georgana's underlying WIS. STAT. § 971.08(2) claim

is unquestionably valid; it is in the interests of justice and efficiency to allow him a decision on the merits of that claim.

II. Romero-Georgana's motion alleges facts that, if true, show that he is entitled to a hearing on his ineffective assistance of postconviction counsel claim.

To prove that his postconviction counsel was ineffective, Romero must show that she performed deficiently and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***Balliette***, 336 Wis. 2d 358, ¶28 (applying the ***Strickland*** standards to postconviction counsel as well as trial counsel). There is a presumption that postconviction counsel's performance was effective. ***Balliette***, 336 Wis. 2d 358, ¶27.

Based on the standards outlined in ***Balliette***, in order for his motion to be sufficient, Romero needed to do more than merely state what his postconviction counsel did or failed to do that constituted ineffective assistance. He needed to address the *who*, *what*, *where*, *when*, *why* and *how* of postconviction counsel's ineffective assistance. *See* ***id.***, ¶59.

A. Romero-Georgana's motion adequately alleged that his postconviction counsel performed deficiently by failing to raise the issue of plea withdrawal under WIS. STAT. § 971.08(2).

Romero-Georgana answered the *who* and *what* of his postconviction counsel's deficient performance by stating in his motion that "[p]ostconviction counsel [*who*] was ineffective for failing to raise the issue that the circuit court failed to comply with the statutory mandate when it did not address Romero-Georgana personally to advise him in the words set forth in WIS. STAT. [§] 971.08(1)(c) [*what*]." (App E:7.) The *where* and the *when* are also established in Romero-Georgana's motion—his motion indicates that Attorney

Hagopian was his counsel for his "[i]nitial appeal" in Brown County. (App E:1, 5.) Thus, she was ineffective for failing to raise the plea withdrawal claim in the postconviction motion she filed on Romero-Georgana's behalf.

The questions *why* and *how* require close examination of the motion. The answers begin with the above statement—Attorney Hagopian was ineffective for failing to raise the issue of the circuit court's failure to give the immigration warnings. (App E:7.) But the ***Balliette*** court explained that to fully answer the *why* and the *how*, defendants must show *why* counsel's failure to raise certain issues was deficient performance and *how* they intend to prove it. ***Balliette***, 336 Wis. 2d 358, ¶¶65, 68.

Romero-Georgana acknowledges that he did not use the magic words "postconviction counsel's performance was deficient because…" or "I intend to prove this by…." In addition, his motion does not directly allege that Attorney Hagopian failed to advise him of the potential plea withdrawal issue; only that she failed to "raise" it. Nonetheless, his motion is sufficient to entitle him to a ***Machner***[6] hearing.

His motion alleges that he had poor communication with his trial counsel through interpreters, and that he did not understand the possible deportation consequences of his plea. (App E:8-9.) He further alleges that if he had understood, he would not have pled. (App E:9.) In addition to that, the motion itself seeks to withdraw his plea. Therefore, the inference presented by his motion as a whole is that if Attorney Hagopian had explained Romero-Georgana's ability to withdraw his plea under WIS. STAT. § 971.08(2) in the months immediately following his conviction, he would have chosen to pursue it.

[6] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

This case is different from ***Balliette*** because the issue postconviction counsel failed to raise would have resulted in an entirely different remedy than the one she did raise. In ***Balliette***, postconviction counsel was choosing between various arguments for the same remedy.

The ***Balliette*** court noted the context in which Balliette was making his claim of ineffective assistance of postconviction counsel; he was challenging the actions of a postconviction attorney who had made allegations of ineffective assistance of trial counsel on his behalf. ***Balliette***, 336 Wis. 2d 358, ¶67. Balliette was claiming that his postconviction counsel was ineffective for failing to raise several more instances of ineffective assistance of trial counsel. ***Id.***, ¶63. Under those circumstances, the ***Balliette*** court understandably focused on Balliette's failure to explain *why* his counsel's choice of issues could not be considered sound strategy.

Under the typical ***Strickland*** analysis, an attorney can defeat a claim of deficient performance by showing that he or she made a reasonable strategic choice based on professional judgment. ***Strickland***, 466 U.S. at 681. In ***Balliette***, it was reasonable to infer that the attorney's choice of issues was strategic. It is well-accepted that one of the roles of postconviction or appellate counsel is to pick and choose strategically between issues so as to highlight the client's strongest opportunities at success. *See*, *e.g.*, ***State v. Starks***, 2013 WI 69, ¶60, 349 Wis. 2d 274, 833 N.W.2d 146; ***Robbins***, 528 U.S. at 288. No such inference of strategy can be made in Romero-Georgana's case.

i. Because the choice of objectives lies with the client, Romero-Georgana overcame the presumption that Attorney Hagopian strategically chose to argue for resentencing over plea withdrawal by alleging that he wished to pursue a valid argument for plea withdrawal.

Similar to this Court's reasoning in ***Balliette***, the court of appeals in this case relied on Romero-Georgana's failure "to address the strategic reason for Hagopian's choice of issues." ***Romero-Georgana***, unpublished slip op., ¶7. However, that observation, while accurate, ignores the fact that Attorney Hagopian did not merely choose between issues; her choice was between potential remedies. The issue she chose to pursue resulted in resentencing but the issue Romero-Georgana wishes she had pursued would have resulted in plea withdrawal.

It is a core principle of effective legal representation that clients determine the goals of representation. *See, e.g.,* ***State v. Debra A.E.***, 188 Wis. 2d 111, 125, 523 N.W.2d 727 (1994) ("The client must decide whether to file an appeal and what objectives to pursue, although counsel may decide what issues to raise once an appeal is filed."); ***State v. Divanovic,*** 200 Wis. 2d 210, 224-25, 546 N.W.2d 501 (Ct. App. 1996) (explaining that the attorney-client relationship is one of agent to principal). This principle is further expressed in the Supreme Court Rules of Professional Responsibility, which require that lawyers "abide by a client's decisions concerning the objectives of representation." SCR 20:1.2(a).

In addition to allowing the client to determine the appropriate ends to representation, lawyers must also consult with the client about the means used to achieve that objective. ABA Model Rules of Professional Conduct Rule 1.2(a),

1.4(a)(2) (A lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished.") Even if a client broadly construes the goal of representation (e.g., a shorter sentence), the attorney must still consult with the client about the strategic decisions he or she intends to make. *See* ***id.*** So, even if Romero-Georgana was vague in his description of his goals of representation, Attorney Hagopian was obligated to consult him before "choosing" to pursue plea withdrawal over resentencing.

In this case, the difference between the remedy pursued by Attorney Hagopian—resentencing—and the one ignored or overlooked by her—plea withdrawal—is vast. When a defendant is permitted to withdraw his or her guilty or no contest plea, the conviction ceases to exist and all of the defendant's constitutional rights are reinstated. This includes the right to a jury trial, the right to testify, and the right to make the State prove the defendant's guilt beyond a reasonable doubt. *See* ***State v. Bangert***, 131 Wis. 2d 246, 271-72 n.5, 389 N.W.2d 12 (1986) (citing Wis. JI-Criminal SM-32 (1985), Part V). Furthermore, the previous plea cannot be used against the defendant in subsequent criminal proceedings. WIS. STAT. § 971.08(3).

When the defendant is not a citizen of the United States and may be deported as a result of the criminal conviction, the defendant also may avoid deportation by withdrawing a guilty or no contest plea. Defendants may attempt to plea bargain with the prosecutor to plead to a different charge that would not result in deportation, or may go to trial and seek an acquittal. Defendants in some cases may even be able to use their eventual deportation as part of the bargaining process. As a counter balance, a plea withdrawal provides the State with an opportunity to bring additional charges or change the conditions of a plea bargain to be less favorable.

In contrast, a new sentencing hearing is a more limited remedy; the sentencing judge may impose a sentence for a term of years, or fines, or both. WIS. STAT. § 939.50. The defendant retains the benefit of his original plea bargain, but the sentencing judge is not required to follow the recommendations of the parties. *See*, *e.g.,* ***State v. Williams***, 2000 WI 78, ¶2, 236 Wis. 2d 293, 613 N.W.2d 132.

Although the risks associated with a plea withdrawal are higher than a new sentencing hearing, the benefits can be greater as well. It is the defendant's, not counsel's, prerogative to weigh the potential risks and benefits of such a decision. Trial counsel cannot force a defendant to accept a plea bargain or waive the defendant's right to a jury trial. ***State v. Harper***, 57 Wis. 2d 543, 550, 205 N.W.2d 1 (1973). If trial counsel cannot make these determinations, then postconviction counsel cannot make the choice between plea withdrawal and a new sentencing hearing through a postconviction motion.

So, even presuming that Attorney Hagopian made a strategic decision to raise resentencing in favor of plea withdrawal based on a reasonable analysis of Romero-Georgana's chance at success on each one, that decision was not hers to make. *See* SCR 20:1.2(a). In fact, the purpose behind ensuring that a defendant knows about the deportation consequences of a plea is that it may alter the defendant's cost-benefit analysis in important ways. *See* ***Padilla v. Kentucky***, 559 U.S. 356, 374 (2010). Just as it is not trial counsel's decision whether the deportation consequences of a plea are important enough to choose not to plead, neither is it postconviction counsel's sole decision whether or not to pursue a plea withdrawal on that basis.

Put another way, the choice between remedies is not a strategic one. Thus, Romero-Georgana did not need to explain *why* his counsel's failure to raise a viable argument for plea

withdrawal was deficient in the same amount of detail as the defendant in ***Balliette***. The court of appeals erred when it listed Romero-Georgana's failure "to address the strategic reason for Hagopian's choice of issues." ***Romero-Georgana***, unpublished slip op., ¶7. All he needed to do was show that his attorney failed to pursue a strong argument for a remedy he wished to pursue. He did that by alleging that he had a WIS. STAT. § 971.08(2) claim, that he would not have pled if he had understood the possible deportation consequences of his plea, and that his postconviction attorney did not pursue the § 971.08(2) claim on his behalf.

ii. There can be no meaningful analysis of whether one issue is "clearly stronger" than another when two issues result in entirely different remedies.

The ***Balliette*** court next explained why it believed Balliette had not shown *how* he intended to establish deficient performance. The Court noted that he did "not assert that the issues that [postconviction counsel] failed to raise are obvious or very strong, and that the failure to raise them cannot be explained or justified." ***Balliette***, 336 Wis. 2d 358, ¶69. This reasoning very closely tracks this Court's even more recent decision in ***Starks***, 349 Wis. 2d 274, ¶60, which held that defendants alleging ineffective assistance of appellate counsel due to counsel's failure to raise certain issues must demonstrate that that the issues counsel failed to raise are "clearly stronger" than those raised.[7] In adopting the "clearly stronger" test, the

[7] In ***State v. Starks***, 2013 WI 69, ¶60, 349 Wis. 2d 274, 833 N.W.2d 146, this Court specifically adopted the "clearly stronger" test for claims of ineffective assistance of *appellate* counsel. Romero-Georgana's claim is one of ineffective assistance of *postconviction* counsel, so an argument can be made that this case is distinguishable from ***Starks*** on that basis. However, since ***Starks*** applied the test in a case where counsel was alleged to be ineffective for failing to raise an issue in a postconviction motion, it is difficult to imagine that the same reasoning would not apply in this case. Romero-Georgana is also alleging his counsel was ineffective

Starks court emphasized the need to "respect the professional judgment of postconviction attorneys in separating the wheat from the chaff." ***Id.*** In other words, the "clearly stronger" test is based on deference to counsel's strategic choices. This reasoning does not apply to Romero-Georgana's case.

The court of appeals ruled that "Romero-Georgana does not establish that raising the deportation issue would have been stronger than the issue actually presented." ***Romero-Georgana***, unpublished slip op., ¶6. There are two problems with this. The first is that both of Romero-Georgana's potential issues were equally strong in that they were both likely to result in relief. Romero-Georgana's first postconviction motion actually resulted in resentencing; there is little doubt that a motion for WIS. STAT. § 971.08(2) plea withdrawal would have been equally successful.

The second problem is that the court of appeals was comparing apples to oranges. A potential issue that would result in plea withdrawal cannot be meaningfully compared in strength to a potential issue that would result in resentencing.

Courts acknowledge that postconviction and appellate counsel are not required to bring every non-frivolous issue imaginable, as weaker arguments may overwhelm or obscure stronger arguments. *See* ***Jones v. Barnes***, 463 U.S. 745, 753 (1983). However, when two competing issues are strong, and the remedies available for each issue differ significantly, the attorney is no longer in the best position to choose which issue to pursue. *See* SCR 20:1.2(a) (attorneys must abide by clients' objectives of representation).

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for failing to raise an issue in a postconviction motion; the only difference between this case and ***Starks*** is that in this case, the counsel Romero-Georgana alleges to be ineffective filed a postconviction motion before filing an appellate brief and thus functioned as postconviction counsel before functioning as appellate counsel. *See* ***id.***, ¶4.

The case this Court relied on when adopting the "clearly stronger" test leaves room for a distinction between an attorney's choice of issues versus a client's choice of objective. ***Robbins*** does not stand for the proposition that in every case the issues not raised in a postconviction motion or appellate brief must be clearly stronger than those counsel did raise. In fact, when discussing the need to show that the unraised issue was stronger than the one(s) raised, the ***Robbins*** court cited ***Gray v. Greer***, which states, "*Generally*, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." ***Robbins***, 528 U.S. at 288 (quoting ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986); emphasis added). In other words, although the clearly stronger test can be a useful guideline for evaluating issues not raised by attorneys after sentencing, it is not appropriate to apply it in every situation.

The "clearly stronger" test fails in this case. To the extent that Romero-Georgana's postconviction attorney was making a strategic choice between issues, she was not "separating the wheat from the chaff." ***Starks***, 349 Wis. 2d 274, ¶60. Instead, as previously explained, she was making a choice between two different possible objectives of representation. That choice belonged to Romero-Georgana, not his attorney.

iii. Without a *Machner* hearing, there is simply not enough evidence to evaluate the strength of Romero-Georgana's claim that Attorney Hagopian's performance was deficient.

The theme of this Court's reasoning in ***Ballliette*** is that courts should not have to speculate as to the reasons for evidentiary hearings when defendants ask for them; instead,

defendants must adequately lay out just what they intend to prove. *See* ***Balliette***, 336 Wis.2d 358, ¶68. Romero-Georgana made his side of the story clear in his motion. He alleged that the possible deportation consequences of his plea at his plea hearing were not read to him at his plea hearing. Though not required, he also alleged that due to poor communication with his trial attorney, he was not aware of the possibility of deportation. He alleged that had he known about the potential deportation consequences of his plea, he would not have pled.

These allegations, read together, make it clear *why* Romero-Georgana believes Attorney Hagopian performed deficiently and *how* he intends to prove it. Her performance was deficient because she failed to pursue a viable means to achieve his objective of plea withdrawal. And he wishes to prove it at a ***Machner*** hearing, which is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). In this case, a ***Machner*** hearing is also the only way for a court to meaningfully evaluate Romero-Georgana's claims and determine whether Attorney Hagopian failed to spot the issue, failed to communicate it to her client, or has some other explanation—strategic or not—for not raising it in her postconviction motion.

Without Attorney Hagopian's testimony, courts can only speculate as to what her strategy might have been. Nonetheless, the court of appeals confidently asserted that Attorney Hagopian "reasonably calculated that resentencing would likely produce a lesser sentence or the same sentence. On the other hand, had she succeeded in vacating the plea, the State would have been free to bring additional charges and could have recommended the maximum on the existing charge, sixty years' imprisonment." ***Romero-Georgana***, unpublished slip op., ¶7. While testimony from Romero-Georgana's first ***Machner*** hearing suggests that Attorney Hagopian did believe

that resentencing would likely produce a lesser sentence or the same sentence, (111:15, 18), there is no evidence as to what she thought about a plea withdrawal claim or if she ever thought about this claim at all. Everything in Romero-Georgana's motion would suggest that she did not, or that at the very least, she did not discuss it with him.

B. Romero-Georgana's postconviction counsel's deficient performance prejudiced him because he is entitled to plea withdrawal under WIS. STAT. § 971.08(2) and his postconviction counsel's failure to raise that issue has so far deprived him of that remedy.

In order to show prejudice, Romero-Georgana must show "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." ***Strickland***, 466 U.S. at 694. The ***Balliette*** court noted that a defendant alleging ineffective assistance of postconviction counsel for failure to raise an issue may prove prejudice by showing that he is entitled to relief on the underlying claim. *See* ***Balliette***, 336 Wis.2d 358, ¶70.

Because Romero-Georgana has alleged facts that, if true, show he was entitled to plea withdrawal under WIS. STAT. § 971.08(2), *see Section I*, *infra*, he has met this burden. His postconviction motion makes clear that (1) the deportation consequences of his plea were important enough to him that he would not have pled if he known about them, (2) his postconviction counsel did not raise the issue of plea withdrawal on his behalf despite having grounds to do so, and (3) if postconviction counsel had argued that he was entitled to plea withdrawal under § 971.08(2), he would have been allowed to withdraw his plea. He is entitled to a ***Machner*** hearing on his claim.

CONCLUSION

For the above reasons, Romero-Georgana is entitled to a ***Machner*** hearing on his ineffective assistance of postconviction counsel claim.

Respectfully submitted this ____ day of ___, 2014.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7,818 words.

____
Sara Kelton Brelie

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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Sara Kelton Brelie

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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Sara Kelton Brelie

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