STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2012AP0055

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRES ROMERO-GEORGANA,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A § 974.06 POSTCONVICTION MOTION ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE KENDALL M. KELLEY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

EILEEN W. PRAY
Assistant Attorney General
State Bar #1009845

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2798
(608) 266-9594 (Fax)
prayew@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

ARGUMENT

ROMERO-GEORGANA'S POST-CONVICTION COUNSEL PROVIDED CONSTITUTIONALLY EFFECTIVE ASSISTANCE.

A. General legal principles concerning ineffective assistance of counsel.

To prove a claim of ineffective assistance of counsel, the defendant must show both that his attorney's performance was deficient and that the defendant was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). With respect to the "performance" prong of the test, counsel is presumed to have acted properly, so the defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91; *see also Pitsch*, 124 Wis. 2d at 636-37.

With regard to the "prejudice" component, the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687; *see also State v. Johnson*, 133 Wis. 2d 207, 222, 395 N.W.2d 176 (1986). A defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

In the context of alleging the ineffectiveness of postconviction counsel, a defendant does not have a constitutional right to have postconviction or appellate counsel raise every nonfrivolous issue he requests. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). Postconviction

counsel should not raise every nonfrivolous claim, but should select from among them in order to maximize the likelihood of success on review. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

Since the defendant must show both deficient performance and prejudice to succeed in establishing ineffective assistance, the courts need not address both components of the test if the defendant makes insufficient showing on either one. *See Strickland*, 466 U.S. at 697; *see also State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 245 (1990).

B. Postconviction counsel did not perform deficiently, because counsel is not required to raise every nonfrivolous issue defendant requests.

In the context of alleging the ineffectiveness of postconviction counsel, a defendant does not have a constitutional right to have postconviction or appellate counsel raise every nonfrivolous issue he requests. *Barnes*, 463 U.S. at 754. Postconviction counsel should not raise every nonfrivolous claim, but should select from among them in order to maximize the likelihood of success on review. *Robbins*, 528 U.S. at 288.

In Romero-Georgana's case, he was represented by Assistant State Public Defender Suzanne Hagopian on direct appeal (111:8). Attorney Hagopian had been defending criminal appeals for nineteen years in the Madison Appellate Office of the State Public Defender's Office (111:10). She chose to appeal on a sentencing issue after determining that the sentencing court had not considered the sentencing guidelines, which were applicable at the time. Attorney Hagopian determined that Romero-Georgana would likely have received a lower sentence "in a range of probation to eight years" if the sentencing court had properly applied the guidelines

(111:10). The court had imposed a sixteen-year sentence, which included twelve years of initial confinement followed by four years of extended supervision (22).

In fact, Attorney Hagopian was successful in winning the appeal; the court ordered a resentencing for Romero-Georgana (111:10). Specifically, this court held:

> Andres Romero-Georgana appeals a judgment convicting him of one count of first-degree sexual assault of a child and an order denying his motion for resentencing. Because we conclude that the trial court failed to consider the sentencing guidelines as required in *State v. Grady*, 2007 WI 81, ¶ 44, 302 Wis. 2d 80, 734 N.W.2d 364, we summarily reverse the judgment and order and remand the matter for resentencing. *See* WIS. STAT. RULE 809.21 (2005-06).

(44:1.)

Unfortunately for Romero-Georgana, upon resentencing, the court imposed a lengthier rather than a shorter sentence. Romero-Georgana was sentenced to a total of twenty-eight years, which included twenty years of initial confinement followed by eight years of extended supervision (62).

In light of this lengthier sentence, Romero-Georgana now believes that it would have been better to request a withdrawal of his no contest plea rather than seek a reduction in his sentence. However, ineffective assistance of counsel is determined deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland,* 466 U.S. at 689-91.

It was reasonable for Attorney Hagopian to believe that resentencing would result in a reduced sentence for Romero-Georgana. She had completed the guidelines, resolving potential disputes against Romero-Georgana, and had determined that use of guidelines would likely result in a significant reduction in his sentence (111:10).

Moreover, requesting a plea withdrawal carried a significant risk for Romero-Georgana. As part of the plea negotiations, the State had agreed "not to file any additional charges and to make no specific recommendation at sentencing" (107:4). The complaint charged Romero-Georgana with First Degree Sexual Assault of his seven-year-old step-daughter. The victim's statement indicated that Romero-Georgana had put his penis in her vagina. She further indicated that Romero-Georgana had shown her his penis on several occasions (1:1). If Romero-Georgana had requested a plea withdrawal, the State could have potentially charged him with additional sexual offenses. Moreover, in light of the serious nature of the sexual assault, the State could have argued for the maximum penalty of sixty years imprisonment upon conviction (1:1).

Thus, in light of the risks of a plea withdrawal and the likelihood of a reduced sentence using the guidelines, it was reasonable for Attorney Hagopian to choose the sentencing issue for appeal. The decision only became questionable in hindsight when the court upon resentencing increased Romero-Georgana's sentence. This is not a case in which postconviction counsel made serious mistakes in selecting the issues for appeal, which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91; *see also Pitsch*, 124 Wis. 2d at 636-37.

C. Romero-Georgana was not prejudiced by postconviction counsel's choice of issues.

In his § 974.06 motion, Romero-Georgana alleged that trial counsel was ineffective for failing to fully explain the deportation consequences of his no contest plea (92:8). The application of the *Strickland* prejudice

standard to a plea withdrawal case requires proof that, if defense counsel had not performed deficiently, the defendant would not have pleaded guilty, but would have gone to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("in order to satisfy [*Strickland's*] 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial") (footnote omitted); *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996) ("A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions."); *State v. Thornton*, 2002 WI App 294, ¶ 27, 259 Wis. 2d 157, 656 N.W.2d 45; *State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

The United States Supreme Court very recently reiterated this standard in two cases—*Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) and *Lafler v. Cooper*, 132 S. Ct. 1376, 1384-85 (2012).

> This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill.* In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S., at 59, 106 S. Ct. 366. *Hill* was correctly decided and applies in the context in which it arose.

Frye, 132 S. Ct. at 1409.

Romero-Georgana did allege that, if he had been properly advised concerning possible deportation, he would have entered a not guilty plea and would have chosen to go to trial (92:9). However, his allegation is conclusory. He does not explain why he would have given up the favorable plea deal and risked additional criminal charges to take his chances at trial. After all he

would have faced the same deportation consequences if convicted after trial.

In his motion to the circuit court, Romero Georgana also claimed that postconviction counsel was ineffective for failing to request a plea withdrawal based on inadequacies in the plea colloquy. Specifically, the court did not:

> 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."

Wis. Stat. § 971.08(1)(c) (2007-08).

However, Romero-Georgana has failed to show that he was prejudiced by postconviction counsel's choice of issues for appeal because he has failed to show that he would have been successful in withdrawing his no contest plea. It is true that the circuit court did not comply with Wis. Stat. § 971.08(1)(c). However, Romero-Georgana has not alleged sufficient facts to show that his no contest plea was "likely to result in the defendant's deportation." *See* Wis. Stat. § 971.08(2) (2007-08).

Before he entered his no contest plea, Romero-Georgana signed a plea questionnaire written both in English and in Spanish (16). That questionnaire explained both in English and in Spanish that:

> I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.

(16:1, 3.) At the plea hearing, the court referenced the plea questionnaire (107:2-3). In *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, the supreme court stated that the circuit court's duty to personally advise the defendant regarding deportation is not satisfied

by an on-the-record reference to the guilty plea questionnaire. Wis. Stat. § 971.08(1)(c); *Douangmala*, 253 Wis. 2d 173, ¶ 3 n.3, *citing State v. Issa*, 186 Wis. 2d 199, 202, 519 N.W.2d 741 (Ct. App. 1994) (*reversed on other grounds*).

In *Issa*, this court stated:

> Clearly and unambiguously, § 971.08(1)(c), Stats., requires a trial court to personally advise a defendant of the potential deportation consequences of a guilty plea. Unlike other portions of § 971.08(1), subsection (1)(c) requires the trial court to advise a defendant with specific language. Thus, it provides a less flexible structure than that found in (1)(a) allowing a trial court to "determine," and in (1)(b) allowing a trial court to "make such inquiry" that "satisfies." Therefore, we conclude that a defendant makes a prima facie showing where a trial court has failed to personally advise a defendant as specified in § 971.08(1)(c).

Issa, 186 Wis. 2d at 209.

Though *Douangmala* reversed *Issa*'s harmless-error interpretation of Wis. Stat. § 971.08, it left undisturbed *Issa*'s holding that a circuit court's reference to a plea questionnaire does not satisfy Wis. Stat. § 971.08(1)(c). The State does not contend that a defendant's knowledge of the deportation consequences of his or her plea irrespective of the plea colloquy absolves a court's failure to comply with Wis. Stat. § 971.08(1)(c). As noted, *Douangmala* precludes such an argument. *Douangmala*, 253 Wis. 2d 173, ¶ 42.

As our supreme court held this term:

> The statutory language is clear. As we recognized in *Douangmala*, 253 Wis. 2d 173, ¶¶ 23-25, where a defendant's motion establishes that a court failed to properly advise the defendant of the potential immigration consequences of his plea, the defendant may withdraw his plea and enter a new

> plea, without regard to whether he was otherwise aware of such consequences.

State v. Negrete, 2012 WI 92, ¶ 23, ___ Wis. 2d ___, ___N.W.2d ___.

When a circuit court does not perform the requirements of Wis. Stat. § 971.08(1)(c), the defendant may move for plea withdrawal under Wis. Stat. § 971.08(2). Under Wis. Stat. § 971.08(2), a circuit court must "vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea" when a defendant meets the following three conditions: (1) the defendant makes a motion; (2) the circuit court has failed to advise the defendant under § 971.08(1)(c) regarding the deportation consequences of a no-contest plea; and (3) the defendant shows that the plea is likely to result in his being deported. *Douangmala*, 253 Wis. 2d 173, ¶ 24.

With respect to the third condition for withdrawing a plea, the defendant must show a nexus between the plea and the federal government's likely deportation.

> The second allegation that a defendant must make when seeking to withdraw a guilty or no contest plea under Wis. Stat. § 971.08(2) is that the plea "is likely to result in the defendant's deportation, exclusion from admission to this country[,] or denial of naturalization." This requires that the defendant allege facts demonstrating a causal nexus between the entry of the guilty or no contest plea at issue and the federal government's likely institution of adverse immigration actions consistent with § 971.08(1)(c).

Negrete, 2012 WI 92, ¶ 26. To satisfy the pleading requirements, 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." *Id.* at ¶ 27. It is not sufficient to simply allege that the defendant "is now the subject of deportation proceedings." *Id.* at ¶ 36. The dissent interpreted the majority as instituting an "absolute

requirement into the statute, namely, that the defendant has already been notified that he or she will be deported." *Id.* at ¶ 74 (J. Abrahamson, dissenting).

Attached to his § 974.06 motion, Romero-Georgana attached an immigration detainer (92:10). The detainer indicated that an "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States" (92:10). The detainer did not indicate that removal proceedings had been initiated or that deportation had been ordered (92:10). It would appear that, under the supreme court's new standards established in *Negrete,* it is not sufficient to allege that an investigation has been initiated. Consequently, Romero-Georgana failed to show that his plea is likely to result in his being deported.

Thus, Romero-Georgana has failed to demonstrate that he was prejudiced by his postconviction counsel's choice of issues to appeal, because he has failed to show that he would have been successful in withdrawing his no contest plea.

D. The circuit court properly denied Romero-Georgana's ineffective assistance of counsel claim without holding an evidentiary hearing.

1. General legal principles concerning the right to an evidentiary hearing in the context of an ineffective assistance of counsel claim.

A properly pleaded claim of ineffective assistance of trial counsel triggers an evidentiary hearing at which counsel testifies regarding his challenged conduct. *See State v. Machner,* 92 Wis. 2d 797, 804, 285 N.W.2d 905

(Ct. App. 1979); *see also State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App.), *review dismissed*, 584 N.W.2d 125 (1998) (reaffirming *Machner* hearing as condition precedent for reviewing claim of ineffective assistance of trial counsel). However, a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. A circuit court's decision to summarily deny a motion must be measured against the standard set in *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), and reaffirmed in *Bentley*, 201 Wis. 2d at 310-11.

A hearing is required only if the motion alleges facts which, if proved true, would entitle the defendant to relief. *See Bentley*, 201 Wis. 2d at 310; *Nelson*, 54 Wis. 2d at 497; *see also Curtis*, 218 Wis. 2d at 555 n. 3. If the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may summarily deny the motion. *See Bentley*, 201 Wis. 2d at 309-10, citing *Nelson*, 54 Wis. 2d at 497-98. The facts supporting the claim of ineffective assistance must be alleged in the moving papers. The defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing. *See Bentley*, 201 Wis. 2d at 313.

Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law reviewed by an appellate court *de novo*. *See Bentley*, 201 Wis. 2d at 310. If the motion is deficient, the circuit court's decision to deny it without a hearing, for any of the reasons listed above, is reviewed under the deferential erroneous exercise of discretion standard. *See Bentley*, 201 Wis. 2d at 310-11.

2. Romero-Georgana's allegations concerning postconviction counsel were solely conclusory.

In his § 974.06 motion, Romero-Georgana simply alleged that postconviction counsel was ineffective for failing to raise the deportation issue on appeal. This conclusory assertion appears only in the heading. Romero-Georgana's factual allegations concern only the court's performance at the plea colloquy and ***trial*** counsel's actions in explaining the deportation consequences of the no contest plea. Romero-Georgana did not explain why it constituted deficient performance for postconviction counsel to choose the sentencing guidelines issue for appeal or how Romero-Georgana was prejudiced by postconviction counsel's choice of appellate issues (92:7-9).

In fact, Romero-Georgana did not even name which postconviction counsel's performance he was challenging. His motion indicated that Attorney Hagopian represented him in his initial appeal and that Attorney Dommershausen represented him in his appeal of the resentencing by filing a no merit report (92:5).[1]

The circuit court denied Romero-Georgana's claims of ineffective assistance of postconviction counsel without holding an evidentiary hearing because none of the factual allegations related to postconviction counsel; the relevant allegations were entirely conclusory.

[1]The State has assumed that Romero-Georgana's ineffective assistance of postconviction counsel claims relate to Attorney Hagopian with respect to her representation on the initial direct appeal. In his appeal of the resentencing, Romero-Georgana responded to Attorney Dommershausen's no-merit report. Although the response is not in the appellate record, this court indicated that Romero-Georgana had raised an issue regarding his initial no contest plea. However, the court determined that the appeal was limited to issues arising out of the resentencing and that Romero-Georgana had forfeited his right to challenge the entry of his plea by not raising the issue in his initial direct appeal (87:2, n.1).

> Here, Romero-Georgana does nothing more than make bare bones conclusory allegations based on his own opinions.
>
> . . . There are no specific facts that allow this Court to objectively determine if postconviction counsel was ineffective.
>
> First, Romero-Georgana alleges that postconviction counsel was ineffective because she did not argue that the circuit court failed to comply with statutory mandates when accepting a plea. Romero-Georgana focuses his analysis on what happened at the trial level rather than alleging why postconviction counsel was ineffective. He does not show that failing to raise the issue fell below an objective standard of reasonableness. Essentially, he fails to demonstrate the requisite "five w's and an h" that allow a court to analyze deficient performance.
>
> This same limitation occurs in his discussion concerning postconviction counsel failing to raise effective trial counsel. Although Romero-Georgana's allegations of the ineffectiveness of trial counsel are relevant to the analysis, he limits his argument to what happened on the trial level. For the Court to analyze postconviction ineffectiveness, it needs facts pertaining to why postconviction counsel was ineffective. Accordingly, this Court declines to allow Romero-Georgana a hearing on this issue. A hearing would only result in a fishing expedition; there is no indication of what he would attempt to prove in regards to ineffective postconviction counsel.

(94:2) (citations omitted.)

The State believes that the circuit court properly denied Romero-Georgana's claims of ineffective assistance of postconviction counsel without holding an evidentiary hearing. *Nelson* and *Bentley* teach that it is within a circuit court's discretion to deny a postconviction motion which relies solely on conclusory allegations. *See Bentley*, 201 Wis. 2d at 309-10, citing *Nelson*, 54 Wis. 2d at 497-98.

CONCLUSION

The State asks this court to affirm the circuit court's order denying Romero-Georgana's § 974.06 postconviction motion to withdraw his no contest plea.

Dated this 10th day of August, 2012.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

EILEEN W. PRAY
Assistant Attorney General
State Bar #1009845

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2798
(608) 266-9594 (Fax)
prayew@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,419 words.

_____
Eileen W. Pray
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of August, 2012.

_____
Eileen W. Pray
Assistant Attorney General