STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2012 AP 000307CR

v.

NELY B. ROBLES,

Fond du Lac County Case
No. 10 CF 160

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED AND ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT BRANCH II, THE HONORABLE PETER GRIMM PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

PETIT & DOMMERSHAUSEN, S.C.
By: Brian P. Dimmer
State Bar No. 1073944
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

Attorneys for the
Defendant-Appellant

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ARGUMENT

I. THE COURT SHOULD NOT FOLLOW THE STATE'S ARGUMENT THAT WISCONSIN'S COURTS HAVE INTENTIONALLY OMITTED THE DUTY TO ADVISE DEFENDANTS WHETHER THEY ARE PLEADING TO A FELONY VERSUS A MISDEMEANOR AT THE PLEA HEARING.

Although the State seems to agree that no state or federal court has directly addressed the issue of whether the felony versus misdemeanor designation is a component of the "nature of the offense," the State argues that these courts have intentionally omitted

this designation. The State's argument is without merit.

First, the State contends that because the Special Materials Section 32, hereafter SM-32, does not expressly advise courts to advise defendants of the misdemeanor versus felony designation, that doing so is "not constitutionally, statutorily, or otherwise required or even recognized as good practice." See State's Response Brief, page 10. The court should note, however, that SM-32 expressly directs trial courts to assure that the defendant has a copy of the complaint or the information and read the charging document (unless waived). See SM-32 at 2. Either procedure would ensure that the defendant, at the plea hearing, was aware of the charge she was pleading to, including the felony versus misdemeanor designation.

Second, the State erroneously contends that United States Supreme Court precedent, Smith v. O'Grady, 312 U.S. 329 (1941), and Henderson v. Morgan, 426 U.S. 637 (1976), confirm that the felony versus misdemeanor designation is not part of the nature of the offense. See State's Response Brief, at 11. These cases provide

no language by which the State can support this position.

On one hand, Smith, a worst-case example of unknowing and unintelligently entered pleas, contains no language limiting the "nature of the charge" to the elements of the offense or the factual and legal bases. In fact, one of the Court's concerns in Smith was that Smith never received a copy of the charges against him or was advised of the charges against him. 312 U.S. at 332-33. Again, if the court had ensured that Robles was entering a plea with a copy of the criminal complaint or criminal information before her, or alternatively read the complaining or charging documents to her at the hearing, then the court would have satisfied the duty to inform her that Count 1 was, in fact, a felony.

On the other hand, in Henderson, the Court addressed the need for courts to ensure that the defendant has knowledge of the charge, including the requisite intent, before entering a guilty plea. 426 U.S. at 645-46. However, the Court bluntly limited Henderson to its facts:

> There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second-degree murder that notice of that element is required.

Id. at 647, n. 18. This court should therefore disregard both Smith and Henderson as guidance in deciding this case, for Wisconsin's plea colloquy requirements rise well above the bare minimum established by the Supreme Court back in 1976.

Finally, the State looks to the Federal Rule of Criminal Procedure Rule 11, as discussed in McCarthy v. U.S., to support its limited interpretation of "nature of the offense." See State's Response Brief, page 12. Similar to Wisconsin case law and Wis. Stat. § 971.08, the Rule 11 requires courts to ensure that the defendant understands the "nature of the offense," but does not specifically identify what that means. See FRCP 11(b)(1)(G). However, McCarthy, which discusses Rule 11, does not limit the "nature of the offense" requirement in Rule 11 to not include the felony versus misdemeanor designation. 394 U.S. 459 (1969).

Together, Robles understands the parties' competing arguments as follows. On one hand, Robles would argue that the felony versus misdemeanor designation is fundamentally connected to the nature of the offense, supported by Wisconsin precedent addressing other criminal procedure issues, and not expressly excluded by federal case law or the Federal Rules of Criminal Procedure. On the other hand, the State responds that the felony versus misdemeanor designation is not part of the nature of the offense unless the courts say it is. As no courts have addressed the issue, the State argues, the designation must not be tied to the nature of the offense. This court should rely upon the Wisconsin cases cited in Robles' brief in chief, which shows that when Wisconsin courts have tackled the felony versus misdemeanor designation in other contexts, they do so using a "nature of the offense" frame of mind. See Robles' Brief, pages 15-17.

II. THE COURT SHOULD NOT FOLLOW THE STATE'S ARGUMENT THAT INFORMING DEFENDANTS OF THE FELONY VERSUS MISDEMEANOR DISTINCTION IS HOLLOW OR A CONFLICT WITH THE DISTINCTION BETWEEN COLLATERAL VERSUS DIRECT CONSEQUENCES.

This court should resist the State's argument that advising defendants of the felony versus misdemeanor designation would amount to an empty exercise, hollow words, or a conflict with the duty to only advise defendants of direct consequences. See State's Response Brief, at 13. First, the State argues that the penalty distinction between felonies and misdemeanors is addressed by the court's discussion of the maximum penalties. Unfortunately, as noted in State v. Harms, the specific penalty exposure does not convert a misdemeanor into a felony or change the nature of the offense. 36 Wis. 2d 282. Therefore, statutory penalty enhancers, which could increase a misdemeanor's maximum penalty to beyond one year of jail, make the express distinction between felonies and misdemeanors independently and uniquely relevant at the plea hearing.

Second, the State argues that because the felony versus misdemeanor designation carries with it several collateral consequences, that the designation itself is also collateral. Id. Robles would agree, for sake of argument, that the felony designation is more akin to a

direct consequence: it has a definite, immediate, and largely automatic effect on the range of defendant's punishment. See State v. Bollig, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199. Nonetheless, Robles maintains that the felony versus misdemeanor designation is less about consequences and more about the fundamental, nature of the charge itself.

Finally, this court should easily shrug off the State's concerns about implementing a requirement to advise defendants about the felony versus misdemeanor designation. Again, SM-32 provides a simple method of providing this advice—ensuring that the defendant has a copy of the charging documents before her, or reading the charging document to the defendant. Furthermore, Robles has never argued that trial courts should review "every such possible ramification of felony convictions." See State's Response Brief, at 14. Rather, Robles contends that the felony versus misdemeanor designation, in and of itself, is a vital part of understanding any plead-to charge.

III. THE COURT SHOULD NOT FOLLOW THE STATE'S ARGUMENT THAT THE RECORD PROVIDES A SUFFICIENT BASIS TO DECIDE AND DENY ROBLES' BANGERT CHALLENGE WITHOUT AN EVIDENTIARY HEARING.

The State contends that, even if the trial court had a duty to advise Robles of the felony versus misdemeanor designation, and that Robles' motion provides a *prima facie* Bangert claim, no further evidentiary hearing is necessary based on the record as supplemented by the Bentley evidentiary hearing(s). This argument should fail for several reasons.

First, Robles' examination of witnesses and presentation of evidence at the Bentley hearing focused on the issue of whether trial counsel rendered ineffective assistance of counsel by failing to properly advise Robles that she was pleading to a felony as opposed to a misdemeanor. By contrast, the Bangert claim is whether, under the totality of circumstances, Robles knew or should have known that she had plead to a felony as opposed to a misdemeanor. Robles contends that the trial court's and parties' mutual understanding that the hearing was solely to address the Bentley claim distinguishes this case from State v. Hoppe, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794. If granted a remand and evidentiary hearing, Robles could provide testimony about her subjective

understanding of the plea negotiations and would call her probation agent, Jennifer Hlinak, to testify as to her surprise when informed about the felony nature of the conviction during their first meeting. Due to the different scope of the Bentley hearing, Robles did not call this witness. (R. 26:19-20; A. – 138-39).

Second, even if this court opts to resolve Robles' Bangert claim based on the now-existing record, testimony and evidence provides a reasonable basis for holding that she did not know or otherwise understand that she had pled to a felony. Should this court deem Robles' testimony to lack credibility or be self-serving, trial counsel's testimony and the plea hearing transcript support Robles' position that (a) negotiations seemed ongoing through two adjourned plea and sentencing hearings to the eventual December 2, 2010, hearing; (b) that Robles and trial counsel spent perhaps as little as three minutes quickly reviewing the plea questionnaire, and (c) the plea colloquy itself did not serve to inform her of the ultimate felony designation. (R. 54: 4-64; A. – 186-246).

Based upon the totality of the circumstances, the court should find that the State cannot meet their burden to show that Robles knew that she was pleading to a felony. Accordingly, even if trial counsel was not ineffective in advising Robles as to the felony designation of the plead-to offense, Robles should be entitled to relief and allowed to withdraw her plea.

CONCLUSION

For all of the foregoing reasons as set forth in this Reply Brief and in Robles' Brief, Robles believes she should be granted an evidentiary hearing to specifically address her Bangert claim.

Dated this _____ day of August, 2012.

PETIT & DOMMERSHAUSEN, S.C.
By: Brian P. Dimmer
Attorneys for the Defendant-Appellant
State Bar No. 1073944
1650 Midway Road
Menasha, WI 54952
Phone: (920) 739-9900
Fax: (920) 739-9909

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c)

for a brief and appendix produced with mono spaced font. This brief has eleven (11) pages.

Dated this _____ day of August, 2012.

Brian P. Dimmer

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. § 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 _____ day of August, 2012.

Brian P. Dimmer