STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 2014AP678-CR
2014AP679-CR
2014AP680-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MELISA VALADEZ,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF
WALWORTH COUNTY,
THE HONORABLE DAVID M. REDDY, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

DAVID ZIEMER
State Bar #1001594
Attorney for Melisa Valadez

David Ziemer
6920 N. Ardara Ave.
Glendale, WI 53209
414.306.1324

Marc E. Christopher
State Bar #1050295
Christopher Law Office LLC
4369 S. Howell Ave #301
Milwaukee, WI 53207
414.751.0051

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REPLY

VALADEZ IS ENTITLED TO WITHDRAW HER GUILTY PLEAS, EVEN THOUGH SHE IS NOT CURRENTLY FACING IMMINENT REMOVAL, HAS NOT ACTIVELY REQUESTED NATURALIZATION, OR BEEN DENIED RE-ENTRY INTO THE UNITED STATES

The question ultimately facing this court is, what exactly did the Wisconsin Supreme Court hold in *State v. Negrete*, 2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749.

At a minimum, it holds, "Bare allegations of possible deportation are insufficient" to entitle a defendant to withdraw a guilty plea based on a sec. 971.08(1)(c) violation. *Id.*, 343 Wis.2d at 18. The circuit court and the State, however, read *Negrete* to establish assorted criteria which, if not met, doom such a motion.

Complicating the analysis is that, in many ways, *Negrete* was not the best vehicle for the Supreme Court to use to set forth what a defendant must show. In the first place, he failed to even show that he was not given the required warning under sec. 971.08(1)(c). In the second, he did nothing more to show likelihood of deportation than make bare allegations. In the third, he argued the case as if deportation was the only negative immigration consequence in the world, when in fact, the statute also contemplates denial of naturalization, and exclusion from admission, as well (federal law now calls deportation "removal," but state court opinions generally still use the term "deportation," so this brief will, as well, unless specifically citing to a federal statute).

Nevertheless, Valadez labored in her main brief thoughtfully to apply *Negrete* to her case, in which she indisputably did not receive the

required warning, and did indisputably did demonstrate genuine immigration consequences because of her conviction.

The State, in contrast, has done no more than pluck one passage from one paragraph of *Negrete,* and divorce it from the rest of the opinion.

However, relief in this case can be reconciled with the Supreme Court opinion in *Negrete*.

At its core, the State's entire argument is that the following passage from *Negrete* is dispositive of this case, notwithstanding significant factual differences:

> 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. *Negrete,* 343 Wis.2d at 25.

However, as Defendant noted in her main brief, this passage is immediately followed by this sentence:

> 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.*

In the case at bar, there is no speculation required. If Valadez seeks naturalization or renewal of her LPR status, the request will be denied and she will be deported. If she leaves the country and attempts to reenter through lawful channels, she will be excluded from admission and deported.

The State does not even attempt in its brief to reconcile the Court's final sentence -- which sets forth the rationale for requiring more than mere bare allegations of possible immigration consequences -- with its radical interpretation – that the passage establishes mandatory minimum requirements for obtaining relief.

In the passage at issue, the Supreme Court consistently uses suggestive and permissive, rather than mandatory, terminology.

The court says: "a defendant may set forth the crime of conviction…"; "a defendant may submit some written notification…"; "a defendant may narrate verbal communications…" At no point does the Court say that, in the absence of written notification or verbal communications from immigration authorities, she necessarily fails to meet her burden.

It is undisputed that Valadez has set forth that her crime of conviction makes her automatically deportable, without any possibility of cancellation of removal, automatically excludable from admission to the country, and automatically ineligible for naturalization.

Admittedly, she has not received written or verbal communications that adverse immigration consequences are likely. However, the court's suggestive, rather than mandatory, choice of language, means that this failure is not dispositive of her motion.

The State states on page 11 of its brief, "It was not the lack of specificity regarding how immigration enforcement actions proceed that led the supreme court to conclude that Negrete had not sufficiently alleged that he was likely to be subject to adverse immigration consequences. It was his failure to show that he was likely to be deported because of his plea/conviction."

But this is simply a misstatement of the opinion. On the contrary, the lack of specificity was a huge concern for the Supreme Court. Negrete's failure to show that he was even subject to adverse immigration consequences necessarily prevented him from showing that he faced likely immigration consequences. Furthermore, as noted earlier, deportation is not the only adverse immigration consequence contemplated by sec. 971.08. It is true that Valadez could live in hiding her whole life and never face deportation. But it is equally true that if she seeks naturalization, she will necessarily, not merely likely, be taken into custody and deported, without any ability to seek cancellation of removal.

The circuit court in this case gave Valadez the opportunity to obtain written notification from a federal agent concerning immigration consequences.

Counsel for Valadez wrote to an agent seeking confirmation that, indeed, if an alien in Valadez' position sought to renew a green card or apply for citizenship, the request would certainly

be denied, and she "could likely be subject to removal proceedings."

The State correctly points out in its brief, on page 9, that the federal agent, in his response, did not acknowledge that counsel's representations were true.

Nevertheless, the undisputed reality is that counsel's representations in the e-mail to the federal agent are true, as a matter of federal law. It is unreasonable to hold that, unless a defendant can get a federal agent to affirm in writing that a federal statute means what it says, then that defendant has failed to meet his burden. Yet, that is what the State is effectively advocating.

It is undisputed that, as a consequence of her guilty pleas, Valadez is subject to automatic deportation, cannot be naturalized, cannot reenter the country if she were to leave, and cannot renew her LPR Card.

Federal immigration law is clear and unequivocal that a person with Valadez' controlled substance convictions can never reenter the United States if she leaves. Immigration and Nationality Act sec. 212(a)(2)(A)(i)(II) holds that entry is prohibited if the person has been convicted of "any law or regulation of a State, the United States, or a foreign county relating to a controlled substance."

Valadez is also subject, at any time, to deportation (removal). INA sec. 237(a)(2)(B)(i) provides,

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign

> country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

No federal statute specifically makes a person in Valadez' position ineligible for renewal of an LPR card, or naturalization. But that is only because such a statute would be redundant. It is implicit that, if a person is subject to automatic deportation, without the possibility of cancellation, or even entry into the country, then they obviously cannot be eligible for naturalization as a citizen.

In the end, Valadez' case is distinguishable from *Negrete* for the same reason that the United States Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), carved out an exception to the general rule that an attorney's failure to inform his client of collateral consequences of a guilty plea don't support a claim of ineffective assistance of counsel. The particular conviction at issue in *Padilla*, and in the case at bar, make it "presumptively mandatory" that he would be deported. *Padilla*, 559 U.S. at 369.

The Supreme Court in *Padilla* noted, "Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* For this same reason, the Wisconsin Supreme Court in *Negrete* required defendants seeking to withdraw a guilty plea under sec. 971.08 to show likelihood of adverse consequences.

But despite the complexity of immigration law, the United States Supreme Court recognized that, in Padilla's case, the law wasn't complicated at all. Because the deportation consequence was "truly clear," the Court created an exception. *Id.*

Here, too, the consequences to Valadez are "truly clear." The court need not speculate as to the consequences. They are set forth in black and white in the federal statutes, and they brook no exceptions. Accordingly, just as the United States Supreme Court held in *Padilla* that it was deficient performance for his counsel not to advise Padilla of those consequences, this court can similarly, and easily, find that Valadez has demonstrated sufficient likelihood of adverse immigration consequences, as a result of her pleas.

Finally, the State failed in its brief to even address Valadez' argument regarding exhaustion of remedies. The Wisconsin Supreme Court in *Negrete* made clear that they did not know what would happen if Negrete were to come into contact with immigration authorities. In the case at bar, Valadez has made abundantly clear what would happen. This makes *Negrete* distinguishable.

It is undisputed that Valadez' convictions make her subject to automatic deportation, and ineligible for reentry to the country or naturalization. It is undisputed that, if she were placed in custody by immigration authorities, because she is subject to deportation, she would be guaranteed the right to withdraw her guilty pleas in these cases. It is unreasonable to require her to turn herself in and be placed in custody, just to obtain a court ruling that it is predetermined – she is entitled to withdraw her guilty pleas.

The question in this case is, what really is the gist of *Negrete*? For all intents and purposes, the State's contention is that, unless a defendant is in federal custody facing deportation, she can't be allowed to withdraw a guilty plea pursuant to a sec. 971.08 motion.

That is unreasonable. The real gist of *Negrete* was that the Supreme Court wouldn't let him withdraw his guilty plea, because they really didn't know what would happen to him if he were to face immigration authorities.

In the case at bar, we do. Valadez would be deported if she sought to renew her LPR card. Therefore, *Negrete* is distinguishable, and Valadez is entitled under sec. 971.08(2) to withdraw her pleas.

CONCLUSION

In this case, Valadez' convictions make her subject to deportation, and ineligible for admission or naturalization. Furthermore, the nature of her convictions make those consequences automatic, rather than speculative. Because immigration consequences to her are not merely likely, but certain, her case distinguishable from *Negrete*.

Accordingly, Valadez respectfully requests that the Court of Appeals reverse the holding of the circuit court, and order that she be entitled to withdraw her guilty pleas.

Dated this 2nd day of October, 2014

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David Ziemer
State Bar #1001594
Attorney for Appellant

David Ziemer
Attorney at Law
6920 N. Ardara Ave.
Glendale, WI 53209
(414)306-1324

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,978 words.

Dated this 2nd day of October, 2014

_____
David Ziemer

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. SEC. 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. sec. 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 the brief filed with the court and served on all opposing parties.

Dated this 2nd day of October, 2014

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David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 2nd day of October, 2014, I mailed 10 copies of the Brief of Defendant-Appellant Melisa Valadez to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688

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David Ziemer