SUPREME COURT OF WISCONSIN

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

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.
MELISA VALADEZ,
Defendant-Appellant.

On Certification from the Wisconsin Court of Appeals, District II, After Appeal from the Circuit Court of Walworth County, the Honorable David M. Reddy Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT MELISA VALADEZ

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
1574A W. National Ave.
Milwaukee, WI 53204
414.751.0051

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ISSUES PRESENTED

I. How definite or imminent must deportation, denial of naturalization, or denial of admission, be, in order for it to be "likely," such that a defendant may withdraw a guilty or no contest plea on the basis that he or she was not informed of the immigration consequences at the plea colloquy?

The Circuit Court held that the defendant had not become subject to deportation proceedings, and therefore, could not withdraw her pleas.

The Court of Appeals certified the issue to the Supreme Court.

II. If, in order to withdraw the plea, the defendant must show that deportation proceedings are underway, how does this standard fit in with the time limits for a motion to withdraw the plea?

The Circuit Court did not address the issue.

The Court of Appeals certified the issue to the Supreme Court.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a review of an order of the Hon. David M. Reddy, Circuit Court Judge, Walworth County, presiding, which was entered on February 28, 2014, and which denied Defendant Melisa Valadez' motions to withdraw her guilty pleas to controlled substance charges entered in three separate cases nearly ten years earlier.

It is undisputed that the circuit court which accepted defendant's guilty pleas failed to provide the required immigration warning under Wis. Stats. Sec. 971.08. It is also undisputed that, as a consequence of the convictions, she is presumptively deportable, cannot legally be naturalized (technically not an automatic bar to naturalization but very likely), cannot renew her Legal Permanent Resident Card, nor can she be legally allowed to reenter the country should she leave and attempt to return.

However, to date, she has suffered no concrete adverse action such as deportation, exclusion from admission or denial of naturalization. The State argued, and the circuit court agreed, that, under the Wisconsin Supreme Court's opinion in *State v. Negrete*,

2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749, Valadez' claim for plea withdrawal is not ripe for adjudication, and must be denied.

On March 19, 2014, Valadez filed a timely notice of appeal, and the parties briefed the case.

On January 21, 2015, the Court of Appeals certified the above issues to the Supreme Court. On March 16, 2015, the Supreme Court accepted certification of the appeals.

B. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Statement of Facts

The facts were not disputed at the circuit court level, and are set forth in Valadez' brief in support of her motion to withdraw her pleas as follows (all citations are to the Index of Circuit Court Record for Appeal No. 2014AP680-CR):

Defendant Melissa Valadez is a Legal Permanent Resident of the United States. She must renew her LPR status every ten years. (R.14; pps. 1, 4).

In 2004, Valadez was charged with and pleaded guilty to Possession of Cocaine and Possession of THC in Case No. 04CM245 and Possession of Drug Paraphernalia in Case No. 04CM257. In 2005, Ms. Valadez was charged with and pleaded guilty to Possession of THC as a Repeater in Case No. 05CF83. (R.14; p.1).

The Court, in all cases, conducted a plea colloquy with Valadez, but did not include the immigration warning required by sec. 971.08(1)(c). (R.14; pps. 1; 5-39).

Valadez' deportation is presumptively mandatory as a consequence of the convictions, pursuant to Immigration and Naturalization Act § 237(a)(2)(A)(v), which states that "Any alien at any time after admission has been convicted of a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana." (R.14; p. 1).

Valadez also cannot travel outside the country as she will not be admitted back into the United States with these convictions. INA §212(a)(2)(A)(i)(II) states that one cannot enter (or re-enter) the United States if he or she has been convicted of, makes a valid admission of having violated, or has conspired to violate "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." (R.14; p.1).

If Valadez were to apply for Naturalization as a citizen, she would have her biometrics taken, and likely be subject to Immigration Court Removal Proceedings given that her criminal

background would be available to Immigration and Customs Enforcement. (R.14; p.2).

Since her convictions in these cases, Valadez has successfully completed her sentence, she had three U.S. citizen children, and has had no further contacts with police. (R.17; p.1).

Procedural History

Valadez, now the mother of three United States citizen children, is in an Immigration "no-mans" land. She is unable to renew her LPR Card, seek naturalization, or leave and reenter the country. Any action she would take would require her biometrics to be taken and alerting ICE as to her convictions. Further raising the stakes for Valadez is that if and when ICE institutes proceedings—Valadez would be subject to mandatory immigration detention under INA 236(c)—for which there is no discretion or opportunity for bond. Therefore, she would be detained in Immigration and Customs Enforcement Custody, away from her children, while her case plays out in the Federal Immigration Courts. Living under the constant prospect of being separated from her young children, Valadez filed a motion to withdraw her guilty pleas in these cases, pursuant to *State v. Douangmala*, 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1. (R-13; R-14).

The State conceded that Valadez met the first prong of *Douangmala* – that she did not receive the required warning. However, the State contended that Valdez failed to show that she is now subject to actual immigration proceedings, and therefore, she failed to meet her burden under the *Negrete* opinion. (R.15; p.2).

The parties engaged in further briefing and oral arguments on the issue at two hearings.

Ultimately, the circuit court held that, because Valadez was not facing any imminent immigration proceedings, she failed to meet the second requirement, and denied the motions. (R.24; pps. 11-12).

Valadez appealed, and the case is not before the Supreme Court upon its acceptance of certification of the appeal by the Court of Appeals.

STANDARD OF REVIEW

Review is de novo. Whether a defendant is entitled to withdraw her guilty plea pursuant to Wis. Stat. sec. 971.08(2) is a question of statutory interpretation that the court reviews

independently of the circuit court." *State v. Negrete*, 2012 WI 92, 343 Wis. 2d 1, 13, 819 N.W.2d 749, 755.

ARGUMENT

I. VALADEZ IS ENTITLED TO WITHDRAW HER GUILTY PLEAS, EVEN THOUGH DEPORTATION IS NOT AUTOMATIC OR IMMINENT BECAUSE THE OPINION IN *NEGRETE* DOES NOT REQUIRE SUCH A SHOWING, AND EVEN IF IT DID, VALADEZ' INABILITY TO LEAVE AND REENTER THE COUNTRY IS A SUFFICIENT BASIS FOR PLEA WITHDRAWAL.

On its face, Wis. Stats. Sec. 971.08(2) clearly and unambiguously requires that Valadez be allowed to withdraw her guilty pleas.

Subsection (1)(c) provides that, before a circuit court can accept a guilty plea, it must 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 and a finding of guilty by the Court of the offense(s) with which you are charged in the Criminal Complaint or Information, may result in deportation, exclusion from admission to this County or a denial of naturalization under federal law."

It is undisputed that this warning was not given. Subsection (2), in turn, provides,

> "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, exclusion from admission to this country or denial of naturalization, 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."

Unlike many of who seek to vacate their plea under §971.08, by claiming to be "deportable," Valadez can lay claim to being denied on all three of those immigration consequences §971.08 proposes to warns defendants. Therefore, it is important to examine the Federal immigration laws as they pertain not only to deportability, but also admission and denial of naturalization.

Granted, because of these convictions, Valadez is presumptively deportable. However, because she is a Legal Permanent Resident, and has been for more than 5 years she would be able to obtain citizenship, but for these convictions. Further, and perhaps most unequivocal, is that if she were to leave the United States, she absolutely could not and would not be readmitted.

Deportability and Admissibility

The Immigration and Nationality Act sets forth those qualifications for when a person is "Admissible" to the United

States. INA §212. It also has a separate section for when an individual is "Removable" from the United States. INA §237. Those who have never been formally admitted to the United States, though they are present, are governed by rules of admissibility.

Those who have been formally admitted, and remain in the United States are subject to the laws of removability. However, once an individual leaves the United States and attempts to reenter, that person is governed by the laws of admissibility—regardless of whether they are Legal Permanent Residents, or non-immigrant visa holders.

Admissibility. 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."

Thus, if Valadez were ever to visit family in Mexico, or visit any other country, not only is it "likely" that she would be denied reentry, it is an absolute certainty.

Removability. Valadez is also subject, at any time, to deportation.

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.

This is the same statute that was at issue in the U.S. Supreme Court opinion in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010). Furthermore, pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(II), in 1996, Congress eliminated discretionary relief from deportation for controlled substance convictions such as Padilla's and Valadez'. As with Padilla, Valadez' removal is not just likely, but "removal is practically inevitable." *Padilla*, 559 U.S. at 363.

This Court recently held that an alien in Defendant's position is not "automatically deportable," but that her deportation is "presumptively mandatory." *State v. Shata,* 2015 WI 74, -- Wis.2d --, -- N.W.2d -- (July 9, 2015).

To date, however, Valadez has been fortunate in that removal proceedings have never actually been instituted against her. Nor has she left the country. Nor has she applied for naturalization or

renewal of her LPR card. Nevertheless, her current position is untenable.

As Valadez argued in the circuit court,

> "Valadez is in a very precarious situation. She has three young children and is subject to arrest by ICE at any time. She also cannot leave the United States and she will not be allowed to be readmitted. She cannot apply for citizenship or renew her Green Card, for she will risk being subject to mandatory detention after she has complied with the mandatory background checks. She was not warned by the Court of the immigration consequences of her plea and she can demonstrate that she is 'likely' to be removed, denied admission as well as denied citizenship. She cannot leave the country, because she will not be readmitted. She will eventually have to try to renew her LPR status, undergo a criminal background check, and be subject to removal proceedings. And she cannot apply for Citizenship, because she will again be subject to a criminal background check and be determined removable and place[d] in removal proceedings."

Despite the clear and unambiguous language of sec. 971.08(2), the issue is complicated by subsequent court decisions. A brief review of the history of how criminal law and immigration intersect is necessary to understand the issue.

Historically, all immigration consequences of criminal convictions were considered collateral, and thus, wholly irrelevant to the entry of a guilty or no contest plea.

Nevertheless, the Wisconsin legislature sought to alleviate the harshness of persons entering guilty pleas unaware of the immigration consequences, by enacting Wis. Stats. Sec. 971.08(1)(c) and (2).

In 2002, this Court gave teeth to the statute, by holding that the statute unambiguously does not require the defendant to show prejudice; that is, he need not show that, had he received the warning, he would not have entered his plea. *State v. Douangmala*, 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1.

In 2010, the United States Supreme Court changed the landscape by holding in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), that a defense attorney's performance could be defective for failure to advise his client of immigration consequences. Padilla was, like Valadez, charged with a controlled substance offense that made his deportation presumptive. Even a cursory review of the immigration statutes would have revealed this to his counsel. Nevertheless, his counsel told him he was not likely to be deported.

Inasmuch as *Padilla* involved an ineffective assistance of counsel claim, and not the Wisconsin statute at issue, it is not directly relevant. But it is indirectly so, as this Court has twice held

that sec. 971.08(1)(c) and (2) are a codification of *Padilla*. *State v. Shata*, par. 66; *State v. Negrete,* 343 Wis.2d 1, par. 34 n. 12.

Negrete was decided in 2012. Negrete sought to withdraw his guilty plea to one count of second-degree sexual assault of a person under the age of 16 years. He alleged that he did not receive the warning required by sec. 971.08(1)(c). However, this Court found that he failed to make the requisite showing that he did not receive the warning. *Negrete*, at par. 35.

Although this Court could have stopped there, nevertheless, the court went on to address whether Negrete was able to show that he was likely to be deported. The court found that he failed to meet this burden.

This Court held as follows:

> 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. *Id.* (emphasis added). *Negrete*, at par. 37.

Finally, on July 9 of this year, this Court issued its opinions in *Shata*, and in *State v. Ortiz-Mondragon*, 2015 WI 73. In *Ortiz-Mondragon*, this Court held that the defendant, who pleaded no contest to a felony battery, failed to show that his attorney rendered defective performance under *Padilla*, even though his attorney did not tell him that his deportation was automatic. In *Shata*, this Court made the same holding, although Shata had pleaded guilty to a felony controlled substance offense, just as in *Padilla*.

Shata is the more relevant case to the case at bar. In *Shata*, this Court agreed that he was presumptively deportable, as is Valadez; in *Ortiz-Mondragon*, the defendant failed to make that showing.

ON THE ISSUE OF DEPORTABILITY

Boiled down to the essence, the question in this case is whether Valadez is entitled to withdraw her pleas, notwithstanding paragraph 37 in *Negrete*, and this Court's rejection of Shata's argument that his felony drug conviction made him "automatically deportable." The answer is yes.

Negrete is distinguishable for several reasons.

The facts in *Negrete* were radically different from those in the case at bar. First, no transcript of the plea hearing in Negrete's case was available. *Id.*, 343 Wis.2d at 7. He alleged only that he "did not recall" whether he received the warning. *Id.,* at 6.

Thus, the court held that Negrete failed to meet the first requirement -- proving that he was not given the necessary warning. *Id.*, 343 Wis.2d at 24.

More importantly, Negrete supplied nothing to show that he was actually subject to any immigration consequences, but only mere speculation about the nexus. The court wrote, "Bare allegations of possible deportation are insufficient." *Id.*, 343 Wis.2d at 18.

In contrast, Valadez has provided much more. Her convictions may not make her deportation "automatic," as this Court held in *Shata.* Nevertheless, she is "presumptively deportable." "Presumptively deportable" is obviously greater than "likely," the term used in the statute. As a matter of common usage, if a person can show that she is "presumptively deportable,"

then she has, by definition, shown that she is "likely" to be deported.

In rejecting Valadez' motion, the circuit court relied on paragraph 37 of *Negrete*, but ignored the final 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. *Negrete,* at par. 37.

In contrast, in the case at bar, there is no speculation required. If Valadez seeks naturalization or renewal of her LPR status, it 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.

Also, in paragraph 37, this Court consistently used suggestive and permissive, rather than mandatory, terminology.

This 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 did this 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 presumptively deportable, without the possibility of cancellation, and is automatically ineligible for admission to the country.

Admittedly, she has not received written or verbal communications that deportation proceedings have been commenced. However, the court's suggestive, rather than mandatory, choice of language, means that this is not dispositive of her motion.

The final sentence of paragraph 37 makes clear that the earlier statements in the paragraph do not apply to the case at bar, in which there is no speculation required about the nexus between Valadez' convictions and her being subject to deportation, or denial of entry.

Furthermore, the defendant in *Negrete* argued the case, as if sec. 971.08 referred only to deportation, and not other immigration consequences such as denial of reentry.

This Court wrote, in paragraph 36 of the opinion, immediately prior to the language on which the State and circuit court place all their reliance, as follows:

> "The second pleading requirement for motions under Wis. Stat. sec. 971.08(2) is that a defendant must allege that the plea at issue 'is likely to result' in one of the enumerated immigration consequences. To this end, Negrete's motion states the offense for which he entered the plea ('second degree sexual assault of a child') and alleges that 'Negrete is now the subject of deportation proceedings.' …" *Id.*, at par. 36.

Valadez, in contrast, has no so limited herself. Deportation is not the only enumerated consequence that entitles a defendant to plea withdrawal. Exclusion from admission to the country is another.

This Court in *Shata* made abundantly clear that the defendant's deportation as a consequence of his drug conviction was not "automatic," but only "presumptive." This Court correctly noted that the government must take many positive actions before deportation can occur. *Shata*, at pars. 59-60.

Exclusion of admission, however, is automatic. Were Valadez to leave the country, there is, quite simply, no possible way that she could legally reenter.

INA §212(a)(2)(A)(i)(II) states that one cannot enter (or re-enter) the United States if he or she has been convicted of, makes a valid admission of having violated, or has conspired to violate "any

law or regulation of a State, the United States, or a foreign country relating to a controlled substance."

Among the crimes that make a person categorically inadmissible to the country are "Persons who have been convicted, *or who admit* having committed, or who admit committing acts that constitute the essential elements of a violation of or conspiracy to violate any law or regulation of a state, the U.S., or a foreign country relating to a controlled substance as defined in 21 U.S.C. 802, 8 U.S.C. 1182(a)(2)(A)(i)(II).(emphasis in original)." Kurzban's Immigration Law Sourcebook, Chapter 3, section III.C.2.a., p. 108 (Fourteenth Edition, 2014).

In contrast to deportation, denial of admission is not merely presumptive; it is automatic. No positive steps are required on the part of the government to effect exclusion from admission. No action or inaction on the part of the Attorney General can result in admission. There is no discretion; there is no right to due process; there is no reviewability. The difference between deportation and exclusion from admission is akin to the difference between positive and negative rights.

Denial of naturalization presents a somewhat different picture. Paradoxically, although Valadez' deportation is

presumptive, and reentry to the country should she leave is categorically impossible, there is no specific statutory bar prohibiting naturalization.

Nevertheless, as a practical matter, naturalization is also impossible. A Guide for Immigration Advocates, 17th Edition, Volume 2, 17-20 (Immigration Legal Resource Center, 2010), contains the following warning:

> "**WARNING:** ***Beware of applying for naturalization for clients who fall within the grounds of deportability, even if they can show good moral character.*** *In the course of investigating the naturalization application the CIS might discover those things*. Needless to say, if this happens, your client's application could be denied, and the CIS or ICE could place her in removal proceedings where a judge might take away her green card and remove her….(emphases in original)."

In short, given Valadez' convictions, applying for naturalization would be futile; it would not only result in denial, but would almost certainly result in "removal proceedings," even if deportation itself is not automatic.

This Court's concern in *Negrete* was that the defendant failed to show any nexus between his guilty plea and the immigration consequences. In contrast, Valadez has eliminated any speculation regarding the nexus. Valadez' deportation is presumptive; if she

leaves the country, denial of admission is automatic; and seeking naturalization is the equivalent of self-deportation. Accordingly, *Negrete* is distinguishable.

Shata is also distinguishable. As this court correctly noted in *Shata*, by enacting sec. 971.08(1)(c) & (2), the legislature codified the protections contemplated in *Padilla*. *Shata*, at par. 66. In fact, it does much more. A defendant seeking plea withdrawal under the statute need not show defective performance by his attorney or prejudice. Under the plain language of the statute, even if a defendant knew his plea made him presumptively deportable, he can still withdraw his plea if any of the three enumerated immigration consequences is likely.

Furthermore, *Shata* discusses only deportation. There is no discussion of denial of admission.

Finally, Valadez and Shata stood in very different positions when they sought to withdraw their respective pleas. Valadez has completed serving her sentences; she is seeking only to avoid the immigration consequences of her pleas.

In contrast, Shata sought to withdraw his plea as a consequence of receiving a higher sentence than agreed to in the plea agreement. His motion, if it had been granted by the circuit

court, would have relieved him of both the immigration consequences of his plea, and his criminal consequences, as well.

Padilla, and its progeny, such as *Shata*, because they involve ineffective assistance claims, relieve a defendant of the direct criminal consequences of his plea. Section 971.08, in contrast, is intended to relieve defendants of the collateral immigration consequences.

Accordingly, Valadez is entitled to withdraw her pleas, pursuant to sec. 971.08(1)(c) and (2), notwithstanding paragraph 37 in *Negrete*, or this Court's discussion of *Padilla* in *Shata*.

In conclusion, as discussed, the practical effect is Valadez in the ultimate "no man's land" for which there are no real options—her LPR Card has expired, she cannot leave the country and she cannot apply for naturalization. If Court does not allow Valadez to withdraw her plea she is left with the following options as the single mother of three young children. First, she can do nothing and live every day knowing that an ICE official could be at your door when you wake up or leave the house—and every contact with law enforcement, even if for one's own protection, could lead to ICE detention and ultimate removal. Never obtain a driver's license, or any other benefit for which proof of LPR status is required. All

while knowing that ICE's initiation of removal proceedings will mean that you will be ICE detention for the entire duration of your proceedings. Second, apply to renew your Legal Permanent Resident Card, of which you know the Department of Homeland Security will conduct biometrics and criminal background check and discover the "presumptively mandatory" offenses. This action will certainly result in the initial of removal proceedings and your mandatory detention throughout the process. Third, submit an application for Naturalization, for which you will again have biometrics taken and for which DHS will be alerted to the deportable offenses—whereby again you will be detained throughout the Immigration Court proceeding and without the prospect of relief. Finally, leave the country, without any prospect of returning to the United States to live and raise your three children for the rest of their lives.

Further, if Valadez's motion is denied by this Court, there is the practical effect of how Ms. Valadez is to file her plea withdrawal while in ICE custody.

Or, in there is the practical consequence of those who leave the country and seek admission from a point of entry—there is no practical means of requesting a plea withdrawal while outside the

United States with the idea of successful re-entry. Potentially, one may argue that one could hire an attorney to assert she has been denied entry into the United States. However, upon plea withdrawal, the prosecutor may simply choose to continue the prosecution of the case, knowing full well that the alien will not be allowed re-entry into the United States—because of the pending charges. Such was the case in *State v. Mendez*, 2014 WI App 57, 354 Wis.2d 88, 847 N.W.2d 895. Mendez sought to withdraw his plea based on *Padilla*; while the case was pending before the Court of Appeals, Mendez was removed/deported from the United States by the Department of Homeland Security. Ultimately, upon the Court of Appeals remanding the case to the Circuit Court, and upon the Circuit Court granting Mendez's plea withdrawal, the District Attorney's office continued with the prosecution. Ultimately, Mendez was not able to re-enter the United States because of a pending drug delivery charge and open bench warrant.

Though Mendez won his appeal, his victory is hollow. He has been deemed inadmissible and unable to return to the United States and defend himself on those charges.

II. VALADEZ IS ENTITLED TO WITHDRAW HER PLEAS, NOTWITHSTANDING THE TIME LIMITS IN WIS. STATS. SECS. 809.30 AND 974.06.

In the circuit court, and in the court of appeals, the parties solely focused on whether or not the motion for plea withdrawal was ripe. In its certification to this Court, the court of appeals certified the question of whether the motion was untimely.

At issue is dicta from this Court's opinion in a procedurally complex case, *State v. Romero-Georgana*, 2014 WI 83, 360 Wis.2d 522, 849 N.W.2d 668.

Romero-Georgana pleaded no contest to first-degree sexual assault of a child in 2006, but did not receive the sec. 971.08(1)(c) warning. *Id.*, at pars. 8 and 9. He was sentenced to 12 years of initial confinement, and four years of extended supervision. *Id.*, at par. 11. Several weeks later, he received notice that INS was investigating whether he was subject to deportation. *Id.*, at par. 14.

Nevertheless, with a new attorney, he did not seek to withdraw his plea under sec. 971.08(1)(c). Instead, on appeal, he successfully obtained a new sentencing. *Id.*, at par. 18. On remand, with a third attorney, a different circuit court judge imposed a longer sentence: 20 years of initial confinement, and 8 years of extended supervision. *Id.*, at par. 20.

With a fourth attorney, Romero-Georgana filed a second postconviction motion claiming that his first postconviction attorney was ineffective for not advising him that substitution of judge on remand could result in the longer sentence. He did not claim postconviction counsel was ineffective for not raising the sec. 971.08(1)(c) issue. *Id.*, at par. 21.

The motion was denied; counsel filed a no-merit brief, which the court of appeals accepted, and this Court denied review. *Id.*, at par. 24.

Finally, in 2011, Romero-Georgana filed a third postconviction motion, this time alleging ineffective assistance on the part of his initial trial attorney and his first postconviction attorney. He alleged trial counsel was ineffective for failing to advise him of the deportation risk, and postconviction counsel was ineffective for not raising the sec. 971.08(1)(c) issue. *Id.*, at par. 25. The circuit court denied the motion, and the court of appeals held that the bar against successive postconviction motions barred the motion. *Id*, at pars. 27 and 28.

> This Court made several holdings in this case, but as is relevant to the case at bar, it held that the motion must be denied, because Romero-Georgano failed to allege that his second postconviction attorney was

> ineffective. This Court explained, "When a defendant has two attorneys that share the classification of 'postconviction counsel,' a general reference to 'postconviction counsel' is not enough. Romero-Georgana's third postconviction motion was bound to fail if it did not allege and explain why his second postconviction motion did not make the claim he now seeks to make." *Id.*, at par. 53.

This Court could have stopped there. "Having concluded that Romero-Georgana is barred from raising his current claims, we need not go any further. However, we will discuss briefly the insufficiency of Romero-Georgana's sec. 974.06 motion to provide guidance for future movants." *Id.*, at par. 54.

Among the issues this Court addressed, it addressed a contention by the dissent that the Court should have simply construed the sec. 974.06 motion as a sec. 971.08(1)(c) motion. In doing so, it issued the footnote that caused the court of appeals to certify this issue.

> Justice Bradley asked at oral argument, "Why does 971.08(2) have to be a 974.06 motion at all?" Romero–Georgana's counsel responded:
> I believe that it could have been raised as a straight 971.08(2) motion. As this court knows we were appointed … after the petition for review was filed and the case had been decided up to that point under 974.06 and we believe that our client is entitled to relief on that basis, and so that's how we've construed the motion and argued it.
> Chief Justice Abrahamson continued Justice Bradley's line of questioning and suggested that Romero–

Georgana could have pursued an argument based on Wis. Stat. § 971.08. The Chief Justice then asked, "But you didn't take that position?" Romero–Georgana's counsel responded, "It's true your honor. We did not." Thus, despite being prodded at oral argument, Romero–Georgana was clear: he is not asking this court to construe his Wis. Stat. § 974.06 motion as a Wis. Stat. § 971.08(2) motion. Indeed, such a request would appear improper under the facts of this case and in light of the history of § 971.08(2). In the 1981–82 version of the Wisconsin Statutes, § 971.08(2) contained a time limit that stated, "The court shall not permit the withdrawal of a plea of guilty or no contest later than 120 days after conviction." Wis. Stat. § 971.08(2) (1981–82). The 120–day time limit was repealed in 1983 Wis. Act 219. A judicial council note explained:

> Section 971.08(2), stats., providing a 120–day time limit for withdrawing a guilty plea or a plea of no contest after conviction, is repealed as unnecessary. Withdrawal of a guilty plea or plea of no contest may be sought by postconviction motion under s. 809.30(1)(f), stats., or under s. 974.06, stats.

Judicial Council Note, 1983 Wis. Act 219, § 43. The Judicial Council Note suggests that, in general, the proper method for raising § 971.08 plea withdrawal claims after conviction is through a motion under Wis. Stat. § (Rule) 809.30, Wis. Stat. § 974.02, or Wis. Stat. § 974.06.

In the present case, the notice that INS had started an investigation to determine whether Romero–Georgana was subject to deportation was dated March 20, 2007—four months before Attorney Hagopian filed the first postconviction motion. In addition, the petitioner's brief demonstrates that Romero–Georgana's Final Administrative Removal Order from the Department of Homeland Security was dated October 22, 2007, and he appears to have received it on November 5, 2007—almost a year and a half before he filed his second postconviction motion. When a defendant has notice that he is likely to be deported and subsequently brings postconviction claims unrelated to Wis. Stat. §

> 971.08(2), we think it would be unwise to allow him to bring his claim as a § 971.08(2) motion at a later time, although he may be able to bring his claim as a Wis. Stat. § 974.06 motion if he has a sufficient reason for the delay. Removing all time constraints on a Wis. Stat. § 971.08(2) motion would frustrate judicial efficiency by encouraging defendants to delay bringing those motions. In the absence of a time limit, if a defendant were indifferent to deportation or wanted to be deported, the defendant would have incentive to keep a § 971.08(2) motion in his back pocket while pursuing relief on other grounds. However, that issue is not before us. In this case, we need only address Romero–Georgana's motion under Wis. Stat. § 974.06 because that is the motion he brought. *Id.*, at par. 76, fn. 14.

There are two reasons why this footnote does not bar the motion in the case at bar. The first is that it can be distinguished on the facts. Romero-Georgana knew, four months before his first postconviction motion was even filed that ICE was investigating him for possible deportation. That alone is sufficient to distinguish the two cases.

More importantly, the dicta in footnote 14 is simply not compatible with either the plain text of the statute or any of the other cases this Court has issued that discuss sec. 971.08(2).

The Court of Appeals was spot-on in its certification, when it asked,

> "How would such a time limit fit in with the possible need to await actual deportation proceedings before moving to withdraw the plea? ... Is a Wis. Stat. sec. 971.08(2) motion doomed as premature when there are no deportation proceedings underway at the time of conviction, doomed as an ineffective assistance of postconviction counsel claim when there was no ripe claim to pursue, yet doomed as too late when a procedural time limit has passed prior to immigration proceedings being initiated. This may be a Catch-22 for the defendant who was not warned about immigration consequences in the first place."

Respectfully, this Court's dicta in footnote 14 cannot be reconciled with the statute or other well-considered precedent.. It not only belies the plain language of sec. 971.08(2), but would effectively defeat the entire purpose of the statute. Indeed, the express language of the statute only requires that the warning not be given, and that the defendant "later" shows that the plea is likely to have immigration consequences, then the defendant is entitled to withdraw his plea. This Court has already ruled in *State v. Douangmala*, 2002 I 62, par. 25, 253 Wis.2d 173, 183, 646 N.W.2d 1, 6 (2002), that the statutory language is plain. Since the statute does not contain any time limitation, there is none.

In fact, the State has previously conceded this very issue long ago. See *State v. Lagundoye*, 2003 WI App 63, par. 3, fn. 2, 260 Wis. 2d 805, 809, 659 N.W.2d 501, 503 (after trial court denied a

motion brought Wis. Stat. sec. 971.0S(2) as being untimely under Wis. Stat. sec. 974.06, the Court of Appeals did not entertain the issue "[g]iven the States's concession that Lagundoye's request should 'probably' be considered timely'').

If the Wisconsin legislature wanted a particular time limitation for a defendant to exercise his rights under Wis. Stat. sec. 971.08(2), then it could have easily written that requirement in the law. Instead, a defendant must only "later" show that the plea has caused adverse immigration consequences.

CONCLUSION

In this case, Valadez' convictions make her subject to presumptive deportation, permanently ineligible for admission, and makes a request for naturalization the equivalent of self-deportation. None of these consequences are speculative. Thus, her case is distinguishable from *Negrete.* Finally, the dicta in footnote 14 of *Romero-Georgana* is contrary to the plain language of the statute, inconsistent with well-reasoned precedent, and mutually exclusive with the ripeness requirement in *Negrete*.

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

Dated this 5th day of August, 2015

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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

Marc E. Christopher
State Bar #1050295
Christopher Law Office LLC
1574A W. National Ave.
Milwaukee, WI 53204
414.751.0051

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 6,230 words.

Dated this 5th day of August, 2014

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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 5th day of August, 2014

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David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 5th day of August, 2015, I mailed 22 copies of the Brief of Defendant-Appellant Melisa Valadez to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688

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David Ziemer

APPELLANT'S BRIEF APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of August, 2015

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David Ziemer