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.

REPLY BRIEF OF DEFENDANT-APPELLANT MELISA VALADEZ

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I. VALADEZ, A LEGAL PERMANENT RESIDENT, IS ENTITLED TO WITHDRAW HER GUILTY PLEAS BECAUSE WHEN SHE APPLIES FOR ADMISSION SHE WILL BE ABSOLUTELY INADISSIBLE TO REENTER THE UNITED STATES REGARDLESS OF WHETHER THE FEDERAL GOVERNMENT INITIATES REMOVAL PROCEEDINGS.

The State's brief absolutely ignores that 971.08(2), is not limited to deportation actions, but that it applies also to exclusion from admission and denial of naturalization. The act of initiating deportation procedurally is a much different legal and procedural than an individual applying for admission or naturalization. And, the standard the State seeks to adopt would make for 971.08(2) plea withdrawals, would make an actual plea withdrawal virtually impossible.

Thus, the State's argument ignores the basic laws and procedures governing immigration laws, at least as they pertain to admission. And, by doing so, seeks to implement an unworkable "one size fits" all standard for vacating judgments for all three immigration consequences enumerated in sec. 971.08(2).

In Valadez's case, in the context of admission, the glaring certainty is that not only does Valadez' plea make it "likely" that she would be excluded from admission to this country, it

guarantees it. Unlike, deportation, where the Immigration and Customs Enforcement seeks out those who are deportable, admission instead requires an individual to affirmatively apply to Customs and Border Patrol for the benefit as they enter into the United States.

What federal immigration law provides was fully set forth in the main brief; the State has made no attempt to refute that analysis; therefore, it need not be iterated in reply. However, the following additional discussion of the law is helpful to understanding the difference between deportation and exclusion of admission.

Prior to enactment of the IIRIRA in 1996, lawful permanent residents leaving and reentering the country were not deemed to be making a new "admission" to the United States. This was known as the *Fleuti* doctrine, after the case of *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

Under current law, however, Valadez could not leave the country and reenter under any circumstances. Current law provides:

> **(C)** An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--
> **(i)** has abandoned or relinquished that status,
> **(ii)** has been absent from the United States for a continuous period in excess of 180 days,
> **(iii)** has engaged in illegal activity after having departed the United States,
> **(iv)** has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
> ***(v)*** *has committed an offense identified in section 1182(a)(2)*[1] *of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or*
> **(vi)** is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer. 8 U.S.C. 1101(a)(13)(C) (emphasis added).

The controlled substance convictions that Valadez specifically fall within subsec. (v). The Immigration and Nationality Act provides no waivers to this law; there are no procedures in law to

[1] 8 USCA § 1182(a)(2)(A)(II) Criminal and Related Grounds, states "a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance is inadmissible."

seek admission with these convictions, and there is no "prosecutorial discretion" afforded to returning individuals who have committed such crimes. To be most simplistic, there is simply no possible way to be admitted to the country given her guilty pleas in these cases, period. This distinguishes this case from *Negrete*, in which the defendant did nothing more than allege he was subject to deportation.

Thus, Valadez has established, beyond any question, "a causal nexus between the entry of the guilty [pleas] at issue" and "adverse immigration actions consistent with sec. 971.08(1)(c)."

To hold that she cannot withdraw her pleas, solely because the federal government has not instituted exclusion of admission, when that is not something the federal government is even capable of doing, would be the equivalent of excising "exclusion of admission" as one of the enumerated consequences, and limiting sec. 971.08(1)(c) to deportation only.

The standard set forth by the State, whereby some manifestation of removability must be underway is absolutely unworkable for someone who is an Legal Permanent Resident and wishes to reenter the United States, or if someone wished to apply for naturalization. If the State's position were adopted by this

Court, the only way a defendant could seek relief under the admissibility portion of the statute would be to leave the country, attempt to reenter, and then seek to withdraw their plea, either from immigration custody or from another country. In such a scenario, however, it would not, at that point, be "likely" that the person would be denied admission. The person would have already been denied admission. If this were really what the legislature had intended, it would have specifically limited relief to persons already denied admission. It did not do so; it afforded relief to those "likely" to be denied admission. Accordingly, this portion of the statute must be construed to provide relief to persons who, like Valadez, because of their conviction, are certain not to be readmitted were they ever to leave. Any other construction would make relief illusory, and thus, unreasonable.

The State sets forth paragraphs 26 and 27 from *State v. Negrete*, 2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749, and later, paragraphs 36 and 37. Both passages purport to set forth the legal standard for meeting the second requirement under sec. 971.08(2). However, the two sets of paragraphs are not identical—and not workable for someone in Valadez's place.

Paragraphs 26 and 27 are problematic, in that they set forth a standard which can only be applied, where the defendant, like Negrete, only contends that he is likely to be deported. This Court spoke in paragraph 26 of the "the federal government's likely institution of adverse immigration actions." The problem with this choice of words is that, outside of the deportation context, the federal government does not, and cannot, institute exclusion from admission or denial of naturalization. Both of these consequences require, instead, that the alien initiate action, either by seeking naturalization, or by leaving the country and then seeking to reenter. Read literally, the penultimate sentence in paragraph 26 forecloses a defendant from ever being able to withdraw his guilty plea under two of the three enumerated immigration consequences. The federal government will never be "likely" to institute exclusion of admission or denial of naturalization. Both circumstances depend on the alien initiating action; and once done, will be *fait accompli*, not "likely."

The second sentence of paragraph 27 suffers from the same problem. It states that a defendant may show likelihood of immigration consequences if "the federal government has manifested its intent to institute one of the immigration

consequences listed in sec. 971.08(2).” To iterate, the federal government does not, and cannot, “institute” exclusion from admission. To be excluded, an alien must *affirmatively* present themselves for admission. And, in the case of Valadez, they will be denied.

Paragraphs 36 and 37, although similarly worded to paragraphs 26 and 27, do have the virtue of setting forth a standard that Valadez and other aliens can plausibly satisfy if the logic is extended to naturalization and admission.

Paragraph 37 provides:

> 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.

In the case at bar, Valadez set forth the crimes of conviction, and the applicable federal statutes establishing both deportability, and exclusion from admission to the country. In contrast to Negrete, who put forth "bare allegations" that he is subject to deportation, Valadez set forth the applicable federal statutes that make legal readmission to the country an absolute impossibility, and deportation a certainty, if proceedings were ever instituted.

This Court continued, in paragraph 37, to set forth means with which a defendant "may" show that he is likely to face immigration consequences. Nothing in this passage, however, sets forth a mandatory requirement that a defendant must show.

Indeed, if it had, such a requirement would be unreasonable. The statute gives a defendant the right to withdraw her guilty plea if she can show that she is likely to face one of three enumerated immigration consequences. The statute does not require, nor could it reasonably be interpreted to require, that a defendant find a "friendly" federal agent willing to help her withdraw her plea.

The State, in its brief, sets forth the entirety of communications between defense counsel Marc Christopher and Special Agent Ian House. The passage is a red herring. The exchange itself shows how unreasonable it would be to read the

language in paragraph 37 as providing a requirement, rather than a suggestion.

First, the confirmation sent by Attorney Christopher to Agent House is indisputably correct in its legal analysis. At no point in this case has the State ever contended otherwise.

Second, Agent House did not provide a responsive reply. Instead, the email discusses the duties of the sentencing judge in state court. It also discusses situations not applicable to Valadez – someone leaving the country while in removal proceedings. If Valadez were in removal proceedings, it is undisputed that she would be absolutely entitled to withdraw her pleas. Agent House's reply was simply unresponsive to Attorney Christopher's request.

Third, it would be an absurd interpretation of the statute to say that, merely because a defendant cannot find a federal immigration agent willing to help her withdraw her plea, therefore, she cannot. It is not the job of a federal ICE agent to give advisory opinions to aliens seeking to remain in the country.

Finally, imposing such a requirement would ignore the division of labor among departments concerned with immigration. ICE agents, such as Agent House, deal strictly with deportation. Exclusion from admission, in contrast, is wholly within the

province of the United States Customs and Border Protection. Denial of naturalization lies with the United States Citizenship and Immigration Services (CIS).

It does not, and cannot, matter, whether Agent House confirmed that the law, as set forth in Attorney Christopher's email, is correct. The law as set forth in the email is correct; it states exactly what federal immigration law provides.

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

It appears that the Wisconsin Court of Appeals, the State, and Valadez, are all in agreement that the dicta in *State v. Romero-Georgana,* 2014 WI 83, 360 Wis.2d 522, 849 N.W.2d 668, quoted by the Court of Appeals in its certification, is incompatible with both the statute, and with *Negrete*, however this Court may apply *Negrete* to the case at bar. For the reasons put forth in Valdez' main brief, it is appropriate for the Court to either withdraw the footnote at issue, or limit it to the very complicated facts in that case.

CONCLUSION

In conclusion, Valadez is in an immigration "no-mans land." Since her 2004 and 2005 convictions, she has not had any criminal contacts, she has settled down and became the mother of 3 young United States citizen children. Only when she went to visit an immigration attorney to renew her LPR card, did you realize the severe consequences of her convictions.

Legally, she is still a Legal Permanent Resident, but she cannot renew her LPR card to demonstrate her status to her employer or to obtain a driver's license. More anguishing for her is living in constant fear that at any time a Federal Immigration and Customs Enforcement Agent may knock on her door and institute removal proceedings against her. Also, knowing that, if they do, because of her convictions, she will be relegated to mandatory detention during any removal proceeding—away from her young family. See 8 USC §1236(c). Also, she knows that she cannot leave the United States, because she will forever denied admission back into the United States. 8 USC

It is undisputed that Valadez did not receive the immigration warning as required in sec. 971.08(1)(c). And, given that her convictions came pre-*Padilla*, the US Supreme Court

case requiring attorneys to warn of the immigration consequences of their plea, she was not even so much as informed of the dire immigration consequences of her plea.

For Valadez, her options are few. She can continue to live like she has, in constant fear of being arrested, placed in removal proceedings, during which time she will be in ICE custody. She can apply to renew her Legal Permanent Resident Card, of which would require her to undergo Federal biometrics background check and be placed in removal proceedings. She can leave the United States with her three young United States citizen children, knowing that she will never be allowed to return. Or, she can seek to withdraw her plea—as she has done here.

Sec. 971.08(2) states that if a defendant shows that it is "likely" to result in "deportation, exclusion from admission to this country or denial of naturalization, the court. . .shall vacate any applicable judgment…" Here Valadez, has directly and unequivocally demonstrated how these convictions are not just likely to result in her denial of admission, but how it is an absolutely certainty. She has outlined for the Court exactly how this will happen, what specific and direct federal laws apply to her, how the laws will be enforced on her, and by what agencies.

It is true that there is a chance, albeit small, that ICE will never initiate removal proceedings against her. However, when she affirmatively applies for admission, there is no such chance she will be admitted.

The State did not refute any of Valadez's argument with regard to her being denied admission, because it cannot do so. Instead, asks this Court to ignore the admissibility laws and procedures and put in place an unpractical and unworkable procedure that will virtually eliminate "admission" as a basis to withdraw a plea under sec. 971.08(2).

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 8th day of September, 2015

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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 2,563 words.

Dated this 8th day of September, 2015

_____
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 8th day of September, 2015

_____
David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 8th day of September, 2015, I mailed 22 copies of the Reply 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