STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

Appellate Case No.: 2014AP001983-CR
Circuit Case No.: 2010CF1780
Milwaukee County

ERIKA LISETTE GUTIERREZ,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF POST-CONVICTION MOTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY WAGNER PRESIDING

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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Issue Presented

The only issue this supplemental brief deals with is the first issue in Gutierrez's first brief-in-chief; namely, should Gutierrez be entitled to withdraw her plea because the court failed to fully advise her of the deportation statute and because she will likely be deported as a result of this offense? This supplemental brief is necessary due to the Wisconsin Supreme Court's decision regarding the immigration statute in *State of Wisconsin* v. *Melisa Valadez*, 2016 WI 4, which was decided on January 28, 2016.

Argument

I. Gutierrez is entitled to withdraw her plea because the court failed to fully advise her of the

deportation statute and because she will likely be deported, refused admission to the country, or denied naturalization as a result of this offense.

a. General principles of law.

Wis. Stat. § 971.08(1)(c) states,

> Before the court accepts a plea of guilty or no contest, it shall…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).

To withdraw a plea under Wis. Stat. § 971.08(2), a defendant's motion must allege two facts: (1) that the circuit court failed to advise the defendant of the deportation consequences as required by Wis. Stat. § 971.08(1)(c), and (2) that the defendant's plea is likely to result in the defendant's deportation, exclusion from admission to this country, or denial of naturalization. *State v. Negrete*, 2012 WI App 92, ¶23, 343 Wis.2d 1, 819 N.W.2d 749.

State v. Valadez does not give any further guidance on the first requirement because in the *Valadez* case, the court neglected to give the immigration warning at all, which is, of course, different than Gutierrez's case. Where *Valadez* is helpful, however, is shedding light on the second requirement.

In *Valadez,* the defendant, who was not a citizen of the United States, was "convicted more than 10 years ago for violations of laws relating to controlled substances. She does not allege she is the subject of a deportation proceeding. According to the record, the federal government has not taken any steps to deport her and has not manifested any intent to

deport her." *State v.* Valadez, 2016 WI 4, ¶31. Valadez argued that she was "likely" to be excluded from admission to the United States due to her conviction. *Id*. at ¶32. Short of Valadez "taking the affirmative step of leaving the United States and actually being excluded from admission, Ms. Valadez had no way aside from the immigration and naturalization statutes to demonstrate that she is "likely" to be excluded from admission." *Id*. at ¶18. Based on her convictions for controlled substances, which the federal statutes listed as grounds for exclusion from admission, the government would "likely" exclude her from admission to the United States should she leave. *Id*. at ¶44.

The court found that the

> Wisconsin legislature afforded relief to a defendant 'likely' to be excluded from admission. Wisconsin Stat. § 978.02 does not require a defendant to show that he or she actually has been excluded from admission or that the federal government has manifested its intent to exclude the defendant from admission other than through the federal law providing for exclusion for admission.

Id. at ¶49.

b. General principles of law as applied to Gutierrez's case.

Gutierrez meets the first requirement, which is that the court failed to advise her as required by Wis. Stat. § 971.08(1)(c), and Gutierrez will rely on the arguments in her brief-in-chief regarding the first requirement. *Valadez* gives no further guidance because the facts in that case were different in that the court never gave any warning.

With regard to the second requirement, Gutierrez is much like *Valadez*; if she were to leave the United States and seek to return, she would be excluded from admission as a

result of her conviction. As originally discussed, Gutierrez's crime appears to be one involving a crime of moral turpitude because it was a crime in which bodily harm was caused or threatened by an intentional act. 8 U.S.C. 1182 (a)(2)(A)(i)(I). Further, she was convicted of two or more offenses of any type and received an aggregate prison sentence of 5 years or more. 8 U.S.C. 1182 (a)(2)(B).

Much like the defendant in *Valadez*, Gutierrez is likely to be excluded from admission to this country due to the nature of her convictions. Her crime is not directly labeled by the government as one involving a crime of moral turpitude; however, she was convicted of two or more offenses and received an aggregate prison sentence of 5 years or more, so even if the government does not believe her convictions are one of moral turpitude, they would fall under that requirement.

Based on Gutierrez's convictions, it is likely that she will be deported, excluded from admission to the country, and denied naturalization after she is finished serving her sentence. As *Valadez* illustrates, Gutierrez does not have to demonstrate that the government has already taken any steps to exclude her. Thus, based on the reasoning as set forth in Gutierrez's brief-in-chief and in this supplemental brief, Gutierrez has fulfilled the two requirements regarding the immigration warnings to withdraw her plea.

Conclusion

For the reasons set forth above, Gutierrez respectfully requests that the Court of Appeals reverse the order of the circuit court and remand to the circuit court.

Dated this 7th day of March, 2016.

Respectfully submitted,

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 929 words.

Respectfully submitted,

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I certify that the text of the electronic appeal is identical to the text of the paper copy of the appeal.

Respectfully submitted

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I certify that this brief or appendix was deposited in the U.S. mail for delivery to the Clerk of the Court of Appeals by first class mail, or other class of mail that is at least expeditious, on March 7, 2016. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

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