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 REPLY BRIEF

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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. The record does support Gutierrez's claim for plea withdrawal.

Regardless of whether Gutierrez's claim falls under "moral turpitude," she has shown that she qualifies under 8 U.S.C. 1182 (a)(2)(B). U.S.C. 1182(a)(2)(B) states that

"Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible."

On July 26, 2010, Gutierrez entered a guilty plea to counts two, three, five and six on July 26, 2010. (R87:2). On April 20, 2011, Gutierrez was sentenced to three years of initial confinement and two years of extended supervision on all counts. All of the counts were run consecutive to one another. (R100). Thus, Gutierrez was sentenced on four counts for an aggregate of 12 years initial confinement, well over the minimum of 5 years.

b. Gutierrez is entitled to withdraw her plea even though she knew the possible immigration consequences when she entered them.

State v. Douangmala permits a defendant who does receive accurate legal advice to withdraw his or her plea if the court failed to read the statutory warning. *State v. Douangmala*, 2002 WI 62, 253 WIs3d 173, 646 N.W.2d 1. The State now argues that *Douangmala "*should now be overturned to reinstate application of the harmless error rule in cases where the circuit courts fail to provide the statutory immigration warning, Wis. Stat. Sec. 971.08" due to *Padilla v. Kentucky.* (State's Response, p. 13).

When *Douangmala* was decided, trial attorneys were already required to go through plea questionnaires with clients, including the section about deportation if defendants are not citizens. *Douangmala* took this into account when it was decided.

The Supreme Court held in *Padilla* that "[w]hen the law is not succinct and straightforward…, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *State v. Ortiz-Mondragon,* 2015 WI App 192, ¶ 2, 364 Wis.2d 1, 866 N.W.2d 717 citing *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). However, "when the deportation consequence is truly clear,…the duty to give correct advice is equally clear." *Id.* This language is what trial attorneys are already expected to do while going over the plea questionnaire with clients. The language in the plea questionnaire was already in place when *Douangmala* was decided. Thus, *Padilla* does not add any safeguards for a non-citizen defendant that the defendant did not already have.

As *Negrete* points out, "by enacting Wis. Stat. Sec. 971.08(1)(c) and (2), Wisconsin codified the protections contemplated in *Padilla,* but placed the duty to warn on the circuit court, rather than solely on the attorney." The immigration warning is a "court-oriented, statutorily protected right." *State v. Negrete*, 2012 WI 92, fn. 12, 343 WIs.3d 1, 819 N.W.2d 749.

Wis. Stat. Sec. 971.08(1)(c), however, is more specific than *Padilla* and states that the correct warning must be read to every defendant. The Supreme Court's decision in *Padilla* changes nothing. Immigration is a tricky subject that many criminal defense attorneys do not know a lot about, and it is the court's duty to make sure that a defendant is fully aware of immigration consequences. If the defendant does not receive that information, he or she is entitled to withdraw his or her plea, plain and simple, regardless of what an attorney may have advised.

In Ms. Gutierrez's case, the court failed to advise her as required by statute and she can show that the plea is likely to result in her deportation, exclusion from admission to this

country or denial of naturalization, so the court *shall* vacate the judgment against Ms. Gutierrez and permit her to withdraw her plea, regardless of what her trial attorney told her.

II. Gutierrez is entitled to withdraw her plea due to a collateral consequence.

Gutierrez relies on her original brief with regards to this issue.

III. Gutierrez is entitled to withdraw her guilty plea due to ineffective assistance of counsel.

Gutierrez relies on her original brief with regards to this issue.

IV. Gutierrez is entitled to a new trial in the interest of justice.

Gutierrez relies on her original brief with regards to this issue.

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 28th day of July, 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 796 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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Sara Roemaat
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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 July 28, 2016. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

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