STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP2162-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARCOS ROSAS VILLEGAS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. REDDY, PRESIDING.

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE

The State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. The relevant facts and procedural history will be discussed below in the argument section.

INTRODUCTION

Defendant-appellant Marcos Rosas Villegas challenges both his waiver into adult court and his guilty plea to one count of armed robbery. He also claims that his trial counsel rendered ineffective assistance in connection with both proceedings. Because Rosas' claim of ineffective assistance applies to both his waiver and his plea, the State will set forth the standard applicable to such claims in this section, deferring discussion of the additional standards to the relevant sections of this brief.

A defendant asserting a claim of ineffective assistance of trial counsel must demonstrate: (1) deficient performance, and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether a person was deprived of the effective assistance of counsel presents a mixed question in which this court upholds

the circuit court's factual findings unless they are clearly erroneous, but determines de novo whether counsel's performance was deficient and prejudicial. *State v. Hunt*, 2014 WI 102, ¶ 22, 360 Wis. 2d 576, 851 N.W.2d 434.

ARGUMENT

I. Trial Counsel Did Not Render Ineffective Assistance In Connection With His Waiver Into Adult Court.

A. The lack of investigation of Rosas' psychological status or intellectual functioning was neither deficient nor prejudicial.

Rosas first challenges his waiver into adult court, on the ground that his attorney rendered ineffective assistance by failing to investigate when "red flags indicated likely mental health, psychological, and/or developmental issues which could weigh against waiver." (Rosas' Br. 10.) But those "red flags" were too few and faint to require Rosas' counsel to commission a probing inquiry into Rosas' psychological state, in hopes it would persuade the court not to waive juvenile jurisdiction.

At the waiver hearing, a juvenile intake worker with Walworth County Human Services, Erin Bradley, testified that her department was "not able to find any information related to diagnosis of mental illness." (65:33, 35.) Dr. Glassman confirmed in his post-conviction psychological report that Rosas "has no history of self-harm or mental health diagnoses."

(42:3.) Hence there was no indication of any serious mental health concerns (and none expressed by Rosas) that would have led Rosas' counsel to secure a full-blown psychological assessment of his client.

Rosas nonetheless asserts that there was a record of his "learning and behavioral issues, having had an IEP . . ."[1] (Rosas' Br. 10.) Yet Rosas cites the court only to his own postconviction motion, which in turn refers to an item not in the record—namely, the Waiver Investigation Report. The court should ignore this reference because it is the appellant's obligation to ensure that all relevant items are in the record. *State v. Marks*, 2010 WI App 172, ¶ 20, 330 Wis. 2d 693, 794 N.W.2d 547; *see also State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("An appellate court's review is confined to those parts of the record made available to it."). But even accepting Rosas' assertion as accurate, the mere existence of an IEP hardly warranted the commission of a psychological evaluation.

Nor does the fact that a sixteen-year-old smokes marijuana in itself carry any significant weight in a court's decision whether to waive a juvenile into adult court. (Rosas'

[1] The State assumes that Villegas intends "IEP" to refer to an Individualized Education Plan. *See In re Brandon L.Y.*, 2008 WI App 73, ¶ 3, 312 Wis. 2d 406, 753 N.W.2d 529.

Br. 10.) Rosas cites no authority suggesting that a defense attorney performs deficiently by not engaging a psychologist to evaluate every teenaged client who uses marijuana. In short, Rosas' counsel was not deficient for not undertaking a psychological evaluation, given the absence of indicia of any significant issues.

An even more basic flaw in Rosas' argument is the fact that presenting the findings the psychologist made during post-conviction proceedings would not have affected the circuit court's decision to waive juvenile court jurisdiction. Hence even if counsel's performance were deficient, there was no prejudice.

The governing statute directs the circuit court to waive a juvenile into adult court when the court determines that retaining juvenile jurisdiction "is contrary to the best interests of the juvenile *or* of the public to hear the case." Wis. Stat. § 938.18(6) (emphasis added).

During the waiver hearing the State explicitly argued that "the extreme seriousness of an offense can justify waiver, a waiver order, even if all other factors suggest retention in the juvenile system." (65:72.) Even where retaining juvenile jurisdiction is in the best interest of the juvenile, the seriousness of the offense alone can warrant waiver into adult court, as was

the case in *In Interest of B.B.*, 166 Wis. 2d 202, 479 N.W.2d 205 (Ct. App. 1991), which the prosecutor cited to the circuit court. (65:72.)

The circuit court agreed, having this to say about the seriousness of the offense:

> The type and seriousness of the offense, holy cow. He just – welcome to the big leagues on his first time with a serious offense. . . This is very, very, very serious conduct. This isn't a burglary. This isn't breaking in a garage and stealing bottles of booze and their change and their video games. This is going in with children in a house as part of an organized – and maybe 'organized' is strong – concerted effort of four young men. They apparently – and correct me if I'm wrong – kind of set somebody up on the inside to make it look as though he's there as a victim as well.
>
> This is sophisticated crime that the juvenile system just isn't equipped to handle. . . So the offense is serious. It's a crime against person. . . .
>
> . . . To carry weapons in, to mask oneself, to wear gloves, implies danger and sophistication and a desire not to take responsibility.
>
> . . . I don't know what would get through to him. And I have nothing now that indicates that anything would get through to him.
>
> . . . I do find that there is clear and convincing evidence that is contrary to his best interests because his best interests is not to be just pushed through quickly and back. . . .
>
> . . . And clearly, contrary to the best interests of the public to hear this case in juvenile court. The public includes the victims; the public includes those at large. And as I said in the

> vernacular, holy cow, welcome to the big leagues. This was serious, beyond-the-pale serious.

(65:87-90.)

Asserting that there is a reasonable probability that the circuit court would not have waived juvenile jurisdiction had the court been aware of the psychologist's subsequent findings strains credulity. To bolster his claim, Rosas exaggerates Dr. Glassman's observations. For example, according to Rosas, Dr. Glassman opined that he has depression and anxiety that "were significant factors in Marcos' behavioral and adjustment problems, including the offense conduct." (Rosas' Br. 11.) In fact, Dr. Glassman stopped well short of blaming Rosas' criminal behavior on his depression and anxiety, stating that those "mood disorders have also likely impacted his ability to attain and maintain pro-social behavior." (42:3.)

Equally oversimplified and unsupported is Rosas' assertion that his marijuana use "caused Marcos' behavioral problems." (Rosas' Br. 11.) What Dr. Glassman said in his report was that the marijuana use "likely was a significant factor in having repeated problems at home and school, which resulted in numerous police contacts." (42:3.) Conspicuously absent is the opinion that marijuana use alone "caused" him to commit crimes.

As for Rosas' intellectual functioning, Dr. Glassman stated that this fell "likely within the Low Average range," and

that Rosas has "slightly more difficulty with language-based tasks." (42:2.) Rosas spins this into the worse-sounding description of "low" academic functioning, including "difficulty with language-based tasks." (Rosas' Br. 11.)

But even overlooking the embellishments of Dr. Glassman's findings, the question—for purposes of Rosas' ineffective assistance claim—is whether there is a reasonable probability that had the circuit court seen this report at the time of the waiver hearing it would have altered the outcome. Rosas simply speculates that this would have done so, but offers nothing beyond mere speculation. The circuit court made it quite clear that the best interests of the public compelled waiver—regardless of the specific juvenile-related factors.

Accordingly, Rosas has failed to establish either deficient performance or prejudice, and his claim of ineffective assistance of counsel fails.

B. Not discovering Rosas' immigration status was not ineffective assistance.

Rosas next asserts that his trial counsel rendered ineffective assistance by not investigating Rosas' immigration status and the potential effects of a conviction, thereby precluding him from advising Rosas "about the automatic, irreversible and permanent immigration consequences

(inadmissibility and DACA ineligibility) of waiver into, and felony conviction in criminal court." (Rosas' Br. 13.)

One would think from Rosas' argument that he consented to waiver. On the contrary, his counsel vigorously contested waiver, and could hardly have tried any harder to keep his client in juvenile court. (65.) Although this argument might have some legs had Rosas consented to waiver on the advice of his counsel, he did not.[2]

Rosas also argues that not knowing about the immigration consequences of waiver into adult court prevented trial counsel from informing the court of those consequences. (Rosas' Br. 14-15.) He identifies those consequences as "inadmissibility and DACA ineligibility," which he asserts are "automatic, irreversible and permanent" with a conviction. (Rosas' Br. 13.) This, he argues, should have factored into the circuit court's determination whether to waive Rosas into adult court. (*Id.* at 15-17.)

Rosas tries but fails to show that potential immigration consequences are relevant under the factors listed in Wis. Stat. § 938.18(5). He suggests that "two of the 5 statutory factors courts must consider in waiver determinations implicated

[2] Rosas also asserts that his waiver was invalid because the court did not advise him about the specific immigration consequences of waiver. (Rosas' Br. 14.) Because this claim attacks the court's decision—rather than the effectiveness of Rosas' counsel—the State will address it the next section.

[Rosas'] eligibility for lawful U.S. residence under DACA," namely "the juvenile's pattern of living . . . and apparent potential for responding to future treatment . . . and the prior record of the juvenile." (Rosas' Br. 15.) But Rosas does not explain the basis for this claim; nor is it apparent to the State.

Further, it is a stretch to argue that the prospect of possible adverse immigration consequences would have persuaded the circuit court not to waive Rosas into adult court. The consequence of deportation paled in comparison to the lengthy prison term Rosas faced—sixty-four-and-a-half years for the offenses charged in the criminal complaint. (2.) Thus Rosas has not shown a reasonable probability that the circuit court would have retained jurisdiction in juvenile court—despite the serious nature of Rosas' criminal behavior and the threat to the public—had it known that deportation was a risk.

II. The Circuit Court Properly Exercised Its Discretion In Waiving Rosas Into Adult Court, Even Though Rosas' Guilty Plea Precludes Him From Challenging It.

Rosas next challenges the circuit court's decision to waive him into adult court.[3] (Rosas' Br. 17-25.) But by pleading

[3] Rosas includes this argument in his first argument section, relating to his claim of ineffective assistance in connection with the waiver hearing. (Rosas' Br. 17-18.) Because it logically relates to his second claim—the correctness of the circuit court's waiver decision—the State will address it together with his challenge to the circuit court's decision.

guilty, Rosas forfeited his ability to challenge this decision. And even if he could assert this claim, it fails on the merits.

A. By pleading guilty, Rosas waived his right to challenge his waiver into adult court.

Rosas acknowledges that "[v]alidly pleading to an adult charge waives a juvenile's right to challenge the waiver of [the] juvenile court's jurisdiction," citing *State v. Kraemer*, 156 Wis. 2d 761, 766, 457 N.W.2d 562 (Ct. App. 1990). (Rosas' Br. 17, n.13.) Rosas observes that the circuit court applied *Kraemer* in concluding that the forfeiture rule applied to Rosas, and in his argument heading states that this decision was erroneous. (Rosas' Br. 17.)

What Rosas does not do is articulate any argument as to why the circuit court erred. Instead, he states that "[t]he postconviction court's relatively unclear and unspecific rulings, cited supra, prevent undersigned counsel from specifically addressing the court's positions, findings, reasonings, and rulings, and require undersigned counsel to infer or guess at the court's reasonings." (Rosas' Br. 18.)

This assertion is puzzling, since as Rosas recognizes the circuit court explicitly held that the forfeiture rule articulated in *Kraemer* bars Rosas' challenge to his waiver into adult court. (62:17-18.) No guesswork is required.

In light of Rosas' failure to develop an argument as to why *Kraemer* does not apply, this court need not consider this claim. *Pettit*, 171 Wis. 2d at 646.

B. The circuit court properly exercised its discretion in waiving Rosas into adult court.

Rosas attempts to litigate his forfeited claim despite the plain rule established in *Kraemer*. He argues that the waiver was invalid because the circuit court failed to exercise its discretion and because there were "no valid reasons" for the waiver. (Rosas' Br. 18-25.) Even if not forfeited, this claim is meritless.

The governing statute sets forth the relevant factors and directs the juvenile court to waive jurisdiction if "there is clear and convincing evidence that it is contrary to the best interests of the juvenile or of the public to hear the case." Wis. Stat. § 938.18(5) and (6). Whether to waive a juvenile into adult court "is committed to the sound discretion of the juvenile court." *In re Tyler T.*, 2012 WI 52, ¶ 24, 341 Wis. 2d 1, 814 N.W.2d 192 (citation omitted). Thus the circuit court's decision is reversible

> only if the court erroneously exercised its discretion . . . A juvenile court erroneously exercises its discretion if it fails to carefully delineate the relevant facts or reasons motivating its decision or if it renders a decision not reasonably supported by the facts of record. . . In reviewing the juvenile court's

> discretionary decision to waive jurisdiction, we look for reasons to sustain the court's decision.

Id. (citations omitted).

The State presented two witnesses at the waiver hearing, and the defense elicited testimony from Rosas' father. (65:5-68.) Judge Phillip Koss then rendered an oral ruling spanning ten transcript pages. (65:82-91.) As discussed above, Judge Koss methodically addressed the statutory factors and explained his evaluation of each one applied to Rosas. (*Id.* at 82-89.) Judge Koss carefully explained his reasoning, and gave consideration to all of the arguments Rosas raised for retaining juvenile jurisdiction. While Rosas no doubt disagrees with the court's ultimate conclusion to waive him into adult court, no reasonable view of the decision supports Rosas' claim that Judge Koss failed to exercise his discretion in the matter.

The hearing record also plainly negates Rosas' assertion that "[n]o valid reasons exist for sustaining the juvenile court's waiver determination." (Rosas' Br. 23.) Rosas himself concedes this, by relying upon facts "discovered only post-waiver, due to counsel's ineffectiveness)." (*Id.*) But the waiver decision must be evaluated based upon the record before the circuit court—absent a determination that Rosas' counsel rendered ineffective assistance of counsel. As shown earlier, he did not.

Finally, Rosas asserts that "[j]uvenile clients in waiver proceedings must be advised about the consequences of waiver." (Rosas' Br. 14.) The case Rosas cites, however, *In Interest of T.R.B.*, 109 Wis. 2d 179, 325 N.W.2d 329 (1982) does not support this claim. (Rosas' Br. 14.) Unlike here, in that case the juvenile did not contest waiver. 109 Wis. 2d at 182. Moreover, even where the juvenile does not contest waiver, the supreme court held that that, "as a matter of state or federal constitutional law," there was no requirement that "the decision not to contest waiver must be made personally by the juvenile on the record." *Id.* at 199. Rosas' argument thus distorts the holding of *T.R.B.* He offers no authority supporting his attempt to treat the waiver hearing as a guilty plea hearing, for purposes of informing the defendant of the consequences of a plea.

In sum, Rosas forfeited his ability to challenge the waiver decision through his guilty plea. Even if he had not, his attacks on the circuit court's waiver decision lack merit.

III. Rosas' trial counsel was not ineffective in connection with his guilty plea.

Rosas next turns his sights on his guilty plea, which he seeks to withdraw based upon alleged ineffective assistance of counsel. Rosas asserts that his counsel was ineffective in two ways: 1) by failing to advise Rosas that by pleading guilty he

would forfeit his right to challenge his waiver into adult court, and 2) by failing to advise Rosas about certain immigration consequences of his plea. Neither claim has merit.

As shown below, Rosas' counsel did not perform deficiently by failing to inform Rosas of these consequences of pleading guilty. Further, there was no prejudice because Rosas has failed to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

A. Counsel was not ineffective for not informing Rosas that a guilty plea would preclude him from challenging his waiver into adult court.

Rosas contends that his trial counsel failed to advise him that by pleading guilty he would forfeit his right to appeal his waiver into adult court, and that had he known this consequence he would not have pled guilty. (Rosas' Br. 25-27.)

The premise of this claim, of course, contradicts Rosas' argument that his guilty plea does not preclude him from challenging the waiver. (Rosas' Br. 17-18.) Nonetheless, Rosas' argument fails.

Rosas states that both he and Attorney Kennedy testified that Attorney Kennedy "had not advised [Rosas] about this result of the plea." (Rosas' Br. 26.) It is true that Attorney

Kennedy testified that he was unaware of the specific forfeiture rule recognized in *Kraemer*. (61:16.) But even if this were deficient performance, Rosas has not established any prejudice.

At the hearing on Rosas' postconviction motion, Attorney Kennedy testified as follows:

> Q From what you're saying, I understand that you did not advise Marcos before the plea that the plea would waive his right to appeal the waiver?
>
> A I didn't advise him of that; however, I did advise him that a plea would waive virtually all rights he had.

(61:16.)

Under Rosas' theory, it is not sufficient for a defense attorney to warn the client that a plea would "waive virtually all rights" the client had; instead, counsel must go above and beyond the core set of rights set forth in the plea questionnaire. Rosas cites no authority for this proposition. Nor does Rosas assert that his counsel gave him incorrect information, for example by telling him that he would still be able to challenge the waiver decision on appeal.

Absent from Rosas' claim is the assertion that had he known his guilty plea would bar him from challenging his waiver, he would not have pled guilty. Rosas contends only that he strongly wanted to stay in juvenile court, and "would have rational reasons to go to trial, despite low chances of

success, if [he] had known of the clear, automatic, tragic immigration consequences of pleading." (Rosas' Br. 26.)

Rosas thus conflates his two ineffective assistance claims, and does not assert what his claim requires to be viable, namely that he would not have pled guilty had he known he could no longer challenge the waiver decision. *Lockhart*, 474 U.S. at 59.

In fact, the record shows the contrary. Attorney Kennedy testified as follows:

> Q [W]as there ever a point when you represented the defendant that he told you that he was entering his plea with the hope that he could appeal the waiver decision?
>
> A No, he never said anything like that.
>
> Q Did you ever tell him: Hey, if you plead guilty, you'll be able to challenge this in the future; don't worry about it?
>
> A No, I didn't do that.

(61:21-22.)

For his part, Rosas testified at the postconviction hearing as follows:

> Q And when pleading, you also thought that maybe at some point somehow you could return to children's court by appealing?
>
> A Yes.

(61:38.)

This falls well short of asserting that Rosas would not have pled guilty had he known he was forfeiting his right to challenge his waiver into adult court. Rosas' failure to assert prejudice from trial counsel's alleged deficiency is fatal to his claim of ineffective assistance, and the circuit court correctly rejected this claim.

B. Trial counsel was not ineffective for not advising Rosas that his conviction would render him automatically inadmissible and that he would lose DACA eligibility.

Rosas' second ineffective assistance claim is that his trial counsel failed to inform him that his conviction "made him automatically, irreversibly, permanently inadmissible and ineligible for DACA." (Rosas' Br. 27-31.) Rosas' claim is based upon a misunderstanding of these immigration consequences.

Rosas' insistence that these two immigration consequences are automatic and irreversible appears to be an effort to circumvent the principle that a defense attorney does not render deficient performance by failing to warn a client that pleading guilty will necessarily result in adverse immigration consequences, when applicable immigration law is not absolute. The Wisconsin Supreme Court has applied this principle in two recent cases. *State v. Ortiz-Mondragon*, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717; *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93.

In *Ortiz-Mondragon*, the court held that defense counsel was not ineffective for informing his client that deportation was a possible—but not certain—consequence of his no-contest plea, because the applicable immigration law was "not 'succinct, clear and explicit' in providing" for deportation. 364 Wis. 2d 1, ¶ 3, 5. Similarly, in *Shata*, the court concluded that defense counsel had correctly advised his client that deportation "carried a 'strong chance' of deportation" because "deportation was not an absolute certainty. Executive action, including the United States Department of Homeland Security's exercise of prosecutorial discretion, can block the deportation of deportable aliens." 364 Wis. 2d 63, ¶ 5.

Ortiz-Mondragon and *Shata* applied the holding of the United States Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010). In that case the Court found that the defense attorney performed deficiently by failing to advise the defendant that by pleading guilty he risked deportation, since "the terms of the relevant immigration statute [subjecting him to deportation] are succinct, clear, and explicit." 559 U.S. at 368.

That is not the case here.

1. Rosas' claim that he will be automatically and irreversibly inadmissible is incorrect.

The first immigration consequence of which Rosas claims his counsel was obligated to inform him was that he would

"become automatically and categorically inadmissible once convicted of a qualifying crime." (Rosas' Br. 30.) The applicable immigration statutes provide otherwise.

Setting aside whether federal immigration laws allow no exceptions to inadmissibility for a person convicted of armed robbery, Rosas ignores a critical exception to inadmissibility contained in the statute, which applies where:

> [T]he crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States.

8 U.S.C. § 1182(2)(A)(ii)(I).

Rosas meets these criteria. Because he committed his crime when he was under 18, it appears that he will be eligible to seek readmission to the United States after a five-year waiting period. Hence inadmissibility is not, as Rosas claims, "clear, automatic, irreversible, and permanent." (Rosas' Br. 30.)

Further, Rosas was duly warned that his conviction could result in serious immigration consequences. Just as did the defendant in *Ortiz-Mondragon*, Rosas acknowledged signing the plea questionnaire, which included the following standard warning: "I understand that if I am not a citizen of the United States, my plea could result in deportation, *the exclusion of admission to this country*, or the denial of naturalization under

federal law." (11:2; 52:9 (emphasis added).) *Ortiz-Mondragon*, 364 Wis. 2d 1, ¶¶ 12, 14.

And the circuit court here, as did its counterpart in *Ortiz-Mondragon*, also complied with Wis. Stat. § 971.08(1)(c), which requires the court accepting a plea to:

> 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."

The circuit court did so, nearly verbatim, and Rosas agreed that he understood that "ICE [Immigration and Customs Enforcement] may look into this case." (52:12.)

Although Rosas' claim here centers on inadmissibility, rather than deportation, this situation is on all fours with that in *Ortiz-Mondragon*. The warnings Rosas received explicitly covered not only deportation but "the exclusion of admission to this country," neither of which was a certainty requiring counsel to inform Rosas that such consequences were automatic. The supreme court in *Ortiz-Mondragon* concluded that these "equivocal" warnings (that deportation was a possibility, as opposed to a certainty) were sufficient because the immigration consequence was not automatic. 364 Wis. 2d 1, ¶¶ 61-63. This holding applies equally here.

2. Rosas' claim that his counsel was required to warn him that he would be ineligible for DACA is meritless.

The second immigration consequence Rosas asserts as a basis for finding ineffective assistance is his automatic ineligibility for the Deferred Action for Childhood Arrivals program (DACA). According to Rosas, DACA would have potentially provided possible "legalization of [Rosas'] status, and "makes available legal residency in the US to 'childhood arrivals.'" (Rosas' Br. 6, 13.)

DACA does no such thing. DACA is simply a discretionary enforcement policy the Department of Homeland Security adopted in 2012, which provides a temporary (currently two-year) reprieve from removal proceedings for qualifying young non-citizens.[4] Memorandum of Secretary Janet Napolitano, U.S. Department of Homeland Security, June 15, 2012, available at https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. (R-App. 101-03.) Contrary to Rosas' characterization, the policy "confers no substantive right, immigration status or pathway to citizenship." (R-App. 103.)

[4] Rosas erroneously characterizes DACA as "a federal statute," but provides no citation or even description of it in his brief. (Rosas' Br. 2.)

Unquestionably, DACA is not available to persons with a felony conviction. (R-App. 101.) But even if Rosas were eligible, at best DACA only delays removal proceedings. It hardly qualifies as a sufficiently momentous collateral consequence to engender a duty by trial counsel to warn the client about it.

A recent decision by the Wisconsin Supreme Court illustrates the point. In *State v. LeMere*, 2016 WI 41, ¶ 55, __ Wis. 2d __, __ N.W.2d __, the court held that defense counsel is not required to warn defendants about the potential consequence of Chapter 980 commitment for sexually violent offenses. *Id.* ¶ 69. The court emphasized that although Chapter 980 commitment was a severe consequence, given its likely temporary state—if it occurred at all—it "is not as uncompromisingly severe a consequence as deportation." *Id.* ¶ 55. Here the consequence of a conviction, namely ineligibility for deferred removal proceedings, is in an altogether different (and milder) league of severity as deportation. Rosas' counsel was not obligated to warn him of this collateral immigration consequence of pleading guilty.

In sum, Rosas' trial counsel did not render ineffective assistance by failing to advise Rosas' that a conviction would render him ineligible for deferred action under DACA, or would definitely result in his permanent exclusion from the United States.

IV. Rosas' Plea Was Knowing, Intelligent And Voluntary.

Rosas next argues that he should be allowed to withdraw his plea because it was not knowing, intelligent and voluntary. (Rosas' Br. 33-45.) Rosas essentially relies upon the previous arguments, namely that he was unaware of the immigration consequences of pleading guilty, as well as the forfeiture of his right to appeal the waiver decision.

When a defendant seeks to withdraw his plea because it was not knowingly, intelligently, and voluntarily entered, the motion to withdraw the plea may rest on two different lines of cases. The first is a claim alleging that the plea colloquy was deficient under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See State v. Howell*, 2007 WI 75, ¶ 7, 301 Wis. 2d 350, 734 N.W.2d 48. To prevail on a *Bangert* claim, Rosas must first establish that his plea was accepted without the trial court's conformance with Wis. Stat. § 971.08(1)(a) or other mandatory procedures. *Bangert*, 131 Wis. 2d at 274. Once a defendant makes a prima facie showing of a defective colloquy, the burden shifts to the State to establish by clear and convincing evidence that the defendant pled knowingly and voluntarily. *Id.* at 275.

The second type of claim is based on circumstances extrinsic to the plea colloquy, and is governed by the principles

in *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See Howell*, 301 Wis. 2d 350, ¶ 74. In a *Nelson/Bentley* claim, the defendant's challenge to his plea is based not on an alleged inadequacy of the plea colloquy, but on "some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion," that renders the plea infirm. *Id.* ¶ 74. Unlike with *Bangert* claims, the defendant carries the burden of proof on non-*Bangert* claims. *State v. Brown*, 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906.

It appears that Rosas asserts both types of claims here. Rosas invokes *Bangert* by arguing that the plea colloquy was defective for two reasons: 1) because the court did not adequately determine Rosas' ability to comprehend the proceedings; and 2) because the court did not warn Rosas of the immigration and waiver consequences of his plea, discussed above. (Rosas' Br. 42.)

With respect to the immigration and waiver consequences, as shown above the circuit court was not required to make any of the disclosures Rosas relies upon.

As for his alleged lack of understanding at the time of his plea, the record amply demonstrates that Rosas' plea was knowing, intelligent and voluntary. At the sentencing hearing,

the prosecutor raised a concern when Rosas appeared for the first time with a Spanish interpreter, specifically stating, "I don't want an appeal later on where he said, 'Well, I didn't understand what was going on.'" (60:31.) This led the court to suggest re-taking his plea in Spanish. (60:30-31.) Rosas' counsel demurred, and after consulting with Rosas, stated that "[h]e's telling me he's understanding English better than Spanish" and that "he understood it better in English, your honor." (60:33-34.)

The court then engaged in a colloquy with Rosas "to make sure that his plea was done knowingly, voluntarily, and intelligently." (60:36.) The following exchange then occurred:

> THE COURT: Did you have any problem understanding those questions that were asked of you [at the plea hearing]?
>
> THE DEFENDANT: No.
>
> . . . .
>
> THE COURT: Did you have any problem understanding [the court's questions about the plea questionnaire]?
>
> THE DEFENDANT: No.
>
> THE COURT: Attached to this also are the jury instructions for the charge that you pled to. Do you remember the judge asking you questions about that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you understand all those questions?

THE DEFENDANT: Um, yes, I did. After my attorney read to me all the . . . like the report, he brought up [at] his office, . . . he read to me, and then he read it again on the court; so, yes, I did understand it.

. . . .

THE COURT: Going back to that date in May of 2013, was there anything about that proceeding that you had a problem understanding?

THE DEFENDANT: Um, no, just, um, the fact that there's a piece of paper attached on this report that – that I never saw.

. . . .

THE COURT: . . . And that's a letter dated January 21st, 2013, from Assistant District Attorney Haley Rea?

THE DEFENDANT: Yes.

THE COURT: And that sets forth what the offer was?

THE DEFENDANT: Yes.

. . . .

THE COURT: And did you know you were going to plead to arm[ed] robbery before you went to court and talked to the judge?

THE DEFENDANT: Yes.

THE COURT: Did you think there was an agreement on what was going to be recommended by the state?

THE DEFENDANT: No.

> THE COURT: I think those are the essential terms of the agreement; that is, he knew what he pled to and that there was no agreement. So I'm satisfied with proceeding.

(60:38-43.)

This exchange undercuts Rosas' contention that he did not understand what he was being told or what was occurring at his plea hearing. Even accepting Rosas' complaint that the court at his plea hearing did not adequately explore his understanding or capacity to make decisions (Rosas' Br. 42), Rosas was able to make a full record on his postconviction motion, and the circuit court reasonably rejected his claim. And the record amply supports the circuit court's rejection of Rosas' claim that he did not understand his plea, or its consequences.

Rosas also asserts that reasons outside the plea colloquy rendered his plea not knowing, voluntary or intelligent, namely ineffective assistance of counsel and Rosas' lack of understanding of the consequences of his plea. (Rosas' Br. 38-41.) The State has already thoroughly addressed Rosas' ineffective assistance claims, and showed why they lack merit. And Rosas' claims that he was unable to understand the plea colloquy are refuted by the record made at sentencing. (60:38-43.) He has failed to carry his burden of demonstrating that due to factors extrinsic to the plea colloquy his plea was not knowing, intelligent or voluntary.

CONCLUSION

For the reasons stated above, this court should affirm the judgment of conviction and the circuit court's order denying Rosas' postconviction motion.

Dated this 8th of June, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,749 words.

_____
JOHN S. GREENE
Assistant Attorney General

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JOHN S. GREENE
Assistant Attorney General

SUPPLEMENTAL APPENDIX

Index to Supplemental Appendix

Item Page

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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Assistant Attorney General

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