

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

APPEAL NO. 2012AP55

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

L.C. No. 2006CF379

ANDRES ROMERO-GEORGANA,

Defendant-Appellant.

ON APPEAL FROM A JUDGEMENT OF CONVICTION AND SENTENCE
ENTERED JANUARY 23, 2007, IN BROWN COUNTY CIRCUIT COURT,
THE HONORABLE J.D. MCKAY PRESIDING, AND THE JUDGEMENT OF
CONVICTION AND SENTENCE ENTERED ON OCTOBER 28, 2008, IN BROWN
COUNTY CIRCUIT COURT, THE HONORABLE KENDALL KELLEY, PRESIDING,
AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF PURSUANT TO
WIS. STAT. 974.06, FILED DECEMBER 22, 2011, THE
HONORABLE KENDALL KELLEY, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

SUBMITTED BY,

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S T A T E O F W I S C O N S I N
C O U R T O F A P P E A L S

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HONORABLE KENDALL KELLEY, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COMES NOW, Defendant-Appellant Andres Romero-Georgana,
proceeding pro-se, hereby submits this brief and appendix
in the above captioned matter pursuant to Wis. Stat. (Rule)
809.30, and hereby present to the court the following:

ISSUES PRESENTED FOR REVIEW

- I. Did the Circuit Court err denying Romero-Georgana's Motion for Postconviction Relief Pursuant to Wis. Stat. 974.06, based on ineffective assistance of postconviction counsel and trial counsel in violation of his 6th and 14th amendments of the United States Constitution and Article 1, sections 1 and 7 of the Wisconsin Constitution.
- II. Did the Circuit Court err denying Romero-Georgana's claim that postconviction counsel was ineffective for failing to raise the issue that the Circuit Court failed to comply with the statutory mandate when it did not address Romero-Georgana personally to advise him in the words set forth in Wis. Stat. 971.08(1)(c) of the deportation consequences of his No-Contest plea in violation of his 6th and 14th amendments of the United States Constitution and Article 1, sections 1 and 7 of the Wisconsin Constitution.
- III. Did the Circuit Court err denying Romero-Georgana's claim that postconviction counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for failing to fully explain the deportation consequences of his No-Contest plea in violation of his 6th and 14th amendments of the United States Constitution and Article 1, sections 1 and 7 of the Wisconsin Constitution.

STATEMENT OF ORAL ARGUMENT

Appellant, Andres Romero-Georgana, does not believe that oral argument is necessary in this case as the briefs filed should explicate the issues and relevant case law. Publication is not requested.

STATEMENT OF CASE

On April 7, 2006, the State filed a Criminal Complaint charging Andres Romero-Georgana (hereafter Romero-Georgana) with one count of first degree sexual assault of a child in violation of Wis. Stat. §948.02(1), alleging the offense occurred in March of 2006. (R.1:3)

On May 26, 2006, Romero-Georgana waived a Preliminary Hearing and an information was filed. (R.12:2)

On November 17, 2006, Romero-Georgana, entered a No-Contest plea and a Presentence Investigation was ordered. (R.19:1)

On January 19, 2007, Romero-Georgana was sentenced by the Honorable J.D. McKay. (R.108:21)

On January 23, 2007, Judgement of Conviction was filed sentencing Romero-Georgana to 12 years initial incarceration and 4 years extended supervision. (R.22:2;Ap. 101-102)

On January 24, 2007, Romero-Georgana, by Attorney Suzanne Hagopian, filed a Notice of Intent to Pursue Postconviction Relief. (R.24:1)

On July 20, 2007, Romero-Gerogana, filed a Postconviction Motion for Resentencing or Sentence Modification with attachments. (R.31:6)

On August 23, 2007, a Postconviction Hearing (R.119:11) was held, the Honorable J.D. McKay, presiding, ordered denying Romero-Georgana his Postconviction Motion. (R.35:1)

On August 29, 2007, Romero-Georgana filed a Notice of Appeal. (R.36:2)

On April 23, 2008, the Court of Appeals order was filed reversed and vacating the sentence and remanded it for resentencing. (R.44:2)

On May 28, 2008, Romero-Georgana, was appointed Attorney William Fitzgerald, by the Appellate Division of the State Public Defender Office. (R.45:1)

On May 30, 2008, Attorney William Fitzgerald, filed an Application Requesting Substitution of Judge. (R.46:1)

On June 6, 2008, the case was assigned to the Honorable Kendall Kelley, Brown County Circuit Court. (R.50:1)

On October 1, 2008, Romero-Georgana, was resentenced by the Honorable Kendall Kelley. (R.110:33)

On October 2, 2008, a Judgement of Conviction was entered sentencing Romero-Georgana to 20 years initial confinement and 8 years extended supervision. (R.62:1;Ap. 103)

On October 28, 2008, an Amended Judgement of Conviction was entered. (R.65:1;Ap. 104)

On October 2, 2008, Romero-Georgana, filed a Notice of Intent to Pursue Postconviction Relief. (R.63:1)

On March 24, 2009, Romero-Georgana, by Attorney Tajara Dommershausen, filed a Postconviction Motion requesting a resentencing in this matter as he was deprived effective assistance of counsel. (R.68:4)

On June 5, 2009, a Postconviction Hearing was held, the Honorable Kendall Kelley, presiding. (R.111:56)

On July 7, 2009, the Honorable Kendall Kelley, denied Romero-Georgana's Postconviction Motion. (R.75:1)

On July 21, 2009, Romero-Georgana, filed a Notice of Appeal (R.76:1) and Statement on Transcripts. (R.77:1)

On March 2, 2010, A No-Merit report was filed by Attorney Tajara Dommershausen. (R.86:12)

On May 25, 2010, Romero-Georgana, filed a No-Merit Response Brief.

On September 9, 2010, The Court of Appeals, District III, affirmed Romero-Georgana's conviction. (R.87:2)

On December 8, 2010, Romero-Georgana's Petition for Review was denied. (R.88:1)

On September 2, 2011, Romero-Georgana, filed a Motion for Postconviction Relief Pursuant to Wis. Stat. §974.06. (R.92:12)

On December 22, 2011, the Honorable Kendall Kelley, denied Romero-Georgana's Motion for Postconviction Relief Pursuant to Wis. Stat. §974.06, without holding a hearing. (R.94:3)

On January 9, 2012, Romero-Georgana filed a Notice of Appeal. (R.95:12)

Romero-Georgana now appeals this decision.

STATEMENT OF FACTS

Romero-Georgana was born and raised by his parents in Chiapas, Mexico as part of a large, lower middle-class family. He has no family members in the United States. (R.99:5-6) Romero-Georgana, in his twenties, came to the United States in order to work and help support his family in Mexico. (Id. at 7, 10) While often working several jobs, Romero-Georgana sent money back home to support his two children in Mexico. Romero-Georgana also stated he earned enough money to be self supported. (Id. at 7, 10)

In early 2005, Romero-Georgana began dating a woman he had met at work. (R.1:2) Occasionally, he would spend the night at his girlfriend's apartment. (Id.) In March of 2006, the girlfriend's seven-year-old daughter reported that Romero-Georgana had put his private part in her private part. (Id.) On the night of the reported incident, he had returned to his girlfriend's apartment in the early morning hours under the influence of alcohol and cocaine. Romero-Georgana stated that after arriving at the apartment he and his girlfriend had sex. He went on to say that the alleged victim must have crawled into bed with them afterward while they had fallen asleep. His girlfriend got up and went to work at 4:00 a.m. Romero-Georgana said that he doesn't remember anything after that. He stated, "I don't know if I touched her or not, I've never touched her before." (R.99:4)

The alleged victim's mother, turned over a pair of the alleged victim's pants to Investigator Schartner for possible DNA testing. (Id. at 2) However, he never received the results.

On April 7, 2006, the State filed a Criminal Complaint charging Romero-Georgana with one count of first degree sexual assault of a child. (R.1:3) Romero-Georgana entered a No-Contest Plea on November 17, 2006 and a Presentence Investigation was ordered.

On January 19, 2007, Romero-Georgana, was sentenced by the Honorable J.D. McKay to 12 years initial confinement and 4 years extended supervision. (R.22:2;Ap. 101-102) This sentence was then appealed and based on State v. Grady, 2009 WI 47, ¶13, 317 Wis.2d 344, 766 N.W.2d 729, and the fact that the court did not consider the sentencing guidelines, the Court of Appeals, on April 23, 2008, reversed and vacated the sentence and remanded for resentencing. (R.44:2) Romero-Georgana was subsequently appointed Attorney William Fitzgerald, by the State Public Defender Office. On May 30, 2008, Attorney William Fitzgerald filed an application requesting substitution of Judge. (R.46:1) The case was assigned to the Honorable Kendall Kelley on June 6, 2008. (R.50:1) On October 1, 2008, Romero-Georgana was resentenced by the Honorable Kendall Kelley to 20 years initial confinement and 8 years extended supervision. (R.62:1;Ap. 103)

On June 5, 2009, a Postconviction Hearing was held before the Honorable Kendall Kelley. During this Postconviction Hearing, Romero-Georgana's first Appellate Attorney Suzanne Hagopian testified that a couple of weeks after the decision was issued that she talked with Romero-Georgana about the

fact that he had been granted a resentencing. That he had a right to substitution of the Judge. "And that ultimately, the decision on that question should be made between he and successor counsel." (R.75:11-12) Hagopian later testified that she sent Romero-Georgana a letter that she specifically drafted for this case explaining the relief was granted, his right to substitution and that ultimately he should discuss this with successor counsel. Hagopian went on to state that in this letter she did not inform Romero-Georgana that he could receive more time if sentenced by a different Judge. (R.75:14)

Finally, Hagopian testified that there is a difference between mentioning that a client could receive more time if he substituted the Judge and emphasizing the possibility of receiving more time. Hagopian testified that, "And when I learned the sentence that, um, my client received at resentencing, I was very, very, very surprised. And it -- was that I don't think I had prepared him for the eventuality. (R.75:18)

Attorney William Fitzgerald testified that Romero-Georgana sent him a letter On May 27, 2008 indicating that he wanted the Judge to be substituted. (R.75:23) On May 30, 2008, Fitzgerald filed a substitution of Judge and on June 6, 2008, the Honorable Kendall Kelley was assigned. (R.50:1)

However, Fitzgerald also testified that although he filed the request for substitution on May 30, 2008, he did not personally discuss the right of the substitution with Romero-Georgana. (R.75:20) Fitzgerald further testified that he received an e-mail communication from Hagopian on

May 22, 2008, where she stated, quote, I know Andres would like a different Judge. And I think it probably is a good idea to substitute. However, I have no clue to which Judge the case might go. So, Ideally, I think this decision should be made by his next attorney in consultation with Andres.

(R.75:22) Fitzgerald testified that on May 22, 2008 he mailed a letter to Romero-Georgana at Dodge Correctional Institution, stating that if Romero-Georgana wanted to substitute on the presiding Judge, Judge McKay, a request for substitution must be filed within 20 days of the date of remittitur. (R.75:22) Fitzgerald testified that the letter from Romero-Georgana dated May 27, 2008 was received by his office on May 29, 2008 subsequently causing him to file on May 30, 2008 for the substitution so he would not miss the time line of 20 days from the date the remittitur was filed. (R.75:24) Fitzgerald testified that he does not remember having a conversation with Romero-Georgana prior to filing for the substitution and that when he did have a conversation with Romero-Georgana that he did not have a translator and the topic of the conversation was to talk to Romero-Georgana about the sentencing and any witness or facts that he wanted to be brought up at sentencing. (R.75:23-25)

The Wisconsin Court of Appeals Remittitur was filed on May 30, 2008. (R.48:2) The same day that Fitzgerald filed for substitution of Judge.

On July 7, 2009 the Honorable Kendall Kelley denied Romero-Georgana's Postconviction Motion stating counsel was not ineffective. (R.75:56)

On July 21, 2009, Romero-Georgana, filed a Notice of Appeal. (R.76:1)

On March 2, 2010, a No-Merit Report was filed by Attorney Tajara Dommershausen. (R.86:12)

On May 25, 2010, Romero-Georgana, file a No-Merit Response Brief.

On September 9, 2010, the Court of Appeals, District III, affirmed Romero-Georgana's conviction. (R.87:2)

On December 8, 2010, Romero-Georgana's Petition for Review was denied. (R.88:1)

On September 2, 2011, Romero-Georgana, filed a Motion for Postconviction Relief Pursuant to Wis. Sta. §974.06. (R.92:12)

Romero-Georgana's Postconviction Motion claims:

(1) Postconviction counsel was ineffective for failing to raise the issue that the Circuit Court failed to comply with the statutory mandate when it did not address Romero-Georgana personally to advise him in the words set forth in Wis. Stat. 971.08(1)(c) of the deportation consequences of his No-Contest Plea in violation of his 6th and 14th Amendments to the United States Constitution and Article 1, Sections 1 and 7 of the Wisconsin Constitution. (2) Postconviction counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for failing to fully explain thhe deportation consequences of his No-Contest Plea in violation of his 6th and 14th Amendments to the United States Constitution and Article 1, Section 1 and 7 of the Wisconsin Constituion.

On December 22, 2011, Romero-Georgana's Postconviction Motion Pursuant to Wis. Stat. §974.06 was denied by the Honorable

Kendall Kelley. (R.94:3;Ap. 104-106)

On January 9, 2012, Romero-Georgana filed a Notice of Appeal (R.95:2) and a Statement on Transcript. (R.96:1)

Romero-Georgana now appeals this decision.

ARGUMENT

- I. THE CIRCUIT COURT ERRED IN DENYING ROMERO-GEORGANA'S MOTION FOR POSTCONVICTION RELIEF PURSUANT TO WIS. STAT. 974.06 BASED ON INEFFECTIVE ASSISTANCE OF POSTCONVICTION AND TRIAL COUNSEL IN VIOLATION OF HIS 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 1 AND 7 OF THE WISCONSIN CONSTITUTION.

Whether a Wis. Stat. 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective assistance of postconviction counsel claim is a question of law that appellate courts review de novo. State v. Balliette, 2011 WI 79, ¶18.

Balliette explained:

If the motion raises sufficient facts that, if true, show the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court.

Whether counsel was ineffective is a mixed question of fact and law. The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law.

Id., ¶¶18-19(citations omitted).

As in Balliette, Romero-Georgana's Motion for Postconviction Relief Pursuant to Wis. Stat. 974.06 will require this court

to apply several different tests. see Balliette, 2011 WI 79, ¶20.

"To evaluate the sufficiency of the allegations in [the defendant's] motion, we must consider his ineffective assistance of counsel claims in relation to the established pleading requirements for a §974.06 motion." The test for ineffective assistance of counsel, as articulated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), provides "that a convicted defendant must show two elements to establish that his counsel's assistance was constitutionally ineffective: First, that counsel's performance was deficient; second, that the deficient performance resulted in prejudice to the defense." Balliette , 2011 WI 79, ¶21. "[T]here is a presumption that counsel is effective unless shown otherwise by the defendant" and the presumption applies to trial counsel, postconviction counsel and appellate counsel. *Id.*, ¶¶27-28.

"When a defendant attempts to circumvent the procedural bars outlined in Escalona-Naranjo and Balliette by asserting that postconviction counsel was ineffective for not raising additional challenges to the effectiveness of his trial counsel, the court must determine whether the postconviction motion was sufficient to entitle the defendant to an evidentiary hearing. Balliette, explained what a sufficient motion must contain:

As a general rule, a motion must "[s]tate with particularity the grounds for the motion and the order or relief sought." Wis. Stat. §971.30. When the relief sought is a new trial based upon the alleged ineffective assistance of post-conviction counsel, this statute appears to require some particularity of how

the defendant intends to show that post-conviction counsel's performance was objectively deficient and how that performance resulted in prejudice to the defense.

Balliette, 2011 WI 79, ¶40 (bracketing in original). A court must apply "the five 'w's' and on 'h' test, 'that is, who, what, where, when, why, and how." Id., ¶59 (citation and emphasis omitted). "A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe...will necessarily include sufficient facts for reviewing courts to meaningfully assess a defendant's claim." Id. (citations and emphasis omitted; ellipsed in original). State v. Eppinger, 2011 WI APP 143, ¶10-11, 337 Wis.2d 557, 806 N.W.2d 269.

Romero-Georgana asserts he has met this standard. First, WHO: Postconviction counsel and the circuit court WHAT: Postconviction counsel failed to raise that the circuit court erred by failing to comply with Wis. Stat. 971.08(1)(c). Where: Circuit Court for Brown County When: Upon submitting Romero-Georgana's postconviction motion after sentencing. Why & How: Because the record conclusively shows that during the plea colloquy that the court failed to comply with the statutory mandate when it did not personally address Romero-Georgana personally to advise him in the words set forth in Wis. Stat. 974.08(1)(c) of the deportation consequences of his no-contest plea. The remedy for which is an evidentiary hearing where the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly, intelligently, and voluntary despite the identified inadequacy of the

plea colloquy. Therefore, postconviction counsel's failure to raise and obvious issue that has relief is ineffective assistance of counsel.

Second,

WHO: Trial counsel and Postconviction counsel.

WHAT & WHERE: For trial counsel leading up to and informing Romero-Georgana prior to accepting a plea deal; for postconviction counsel upon filing Romero-Georgana's postconviction motion for relief.

WHY & HOW: Because Romero-Georgana states that his trial counsel never advised him of the consequences of his no-contest pleas in regards to deportation and in fact that his contact with his trial counsel was through poorly qualified interpreters that only explained to him to complete forms and return them to his attorney. He also claims his trial attorney never told him of the consequences and the only advise she gave was not to talk to others about the case. The facts if true entitle him an evidentiary hearing to determine whether his attorney did or did not advise him. If she did not then her performance is deficient and an evidentiary hearing is necessary to determine if he was prejudiced. Postconviction counsel is deficient for not raising trial counsel ineffective if Romero-Georgana prevails in showing trial counsel ineffective. Thus, denying Romero-Georgana from making an informed, intelligent, and knowing plea.

II. POSTCONVICTION COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE THAT THE CIRCUIT COURT FAILED TO COMPLY WITH THE STATUTORY MANDATE WHEN IT DID NOT ADDRESS ROMERO-GEORGANA PERSONALLY TO ADVISE HIM IN THE WORDS SET FORTH IN WIS. STAT. 971.08(1)(c) OF THE DEPORTATION CONSEQUENCES OF HIS NO-CONTEST PLEA IN VIOLATION OF HIS 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 1 AND 7 OF THE WISCONSIN CONSTITUTION.

Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel. Strickland, 466 U.S. at 686. the Supreme Court explained that a convicted defendant must show two elements to establish that his counsel's assistance was constitutionally ineffective: First, that counsel's performance was deficient; second, that the deficient performance resulted in prejudice to the defense. *Id.*, at 687.

Whether counsel was ineffective is a mixed question of fact and law. State ex. rel Flores v. State, 183 Wis.2d 587, 609, 516 N.W.2d 362(1994). The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. State v. McDowell, 2004 WI 70, ¶31, 272 Wis.2d 488, 681 N.W.2d 500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. Flores, 183 Wis.2d at 609.

This presumption is not limited to trial counsel. It applies to postconviction counsel as well. Smith v. Robbins, 528 U.S. 259, 285-86, 120 S.Ct. 746, 145 L.Ed.2d 756(2000) (applying the Strickland analysis to a claim of ineffective assistance of counsel on direct appeal) United States v. Cook, 45 F.3d. 388, 392(10th Cir. 1995); see Lisa Griffin,

The Right to Effective Assistance of Appellate Counsel, 97 W. Va. L. Rev. 1 (1994). Consequently, a motion for a new trial under §974.06 based on ineffective assistance of postconviction counsel must lay out the traditional elements of deficient performance and prejudice to the defense.

After the time for appeal or postconviction remedy in Wis. Stat. 974.02 has expired, a prisoner in custody under sentence of a court may bring a motion to vacate, set aside, or correct a sentence, utilizing the procedure set out in Wis. Stat. 974.06. Section 974.06(1) allows such a motion where the prisoner is claiming that (1) his sentence was imposed in violation of the constitution; (2) the court imposing the sentence was without jurisdiction; or (3) the sentence was in excess of the maximum or otherwise subject to collateral attack. State v. aaron allen, 2010 WI 89, ¶22, 328 Wis.2d 1, 786 N.W.2d 124 (Aaron Allen). A claim that trial counsel provided ineffective assistance is a claim that the defendant's sentence was imposed in violation of the constitution.

In Rothering, the court of appeals opined that "in some circumstances...ineffective postconviction counsel" may constitute "sufficient reason as to why an issue which could have been raised on direct appeal was not." Rothering, 205 Wis.2d at 682. This observation was noted in State v. Love, 2005 WI 116, ¶31 n.11, 284 Wis.2d 111, 700 N.W.2d 62, and in Aaron Allen, 328 Wis.2d 1, 31. However, the Aaron Allen court indicated that the trial court would be required to engage in fact-finding to rule on the sufficiency of the reason. Id.

In a Bangert-type case, the defendant points to a specific deficiency in the plea colloquy and asserts that he lacked the requisite understanding to make a knowing, intelligent, and voluntary plea. Because the evidence to support the defendant's motion is contained in the court transcript, the State bears the burden of proof in any Bangert hearing. State v. Balliette, 2011 WI 79, ¶55, 336 Wis.2d 358, 805 N.W.2d 334.

Romero-Georgana is a native of Mexico and is not a citizen of the United States of America. Romero-Georgana contends that the trial court failed to advise him that if he plea no-contest he may be deported.

Romero-Georgana pled no-contest to one count of first degree sexual assault of a child. Romero-Georgana did through the use of a Plea Questionnaire/Waiver of Rights Form (R.16:3) verify that he did understand the question regarding deportation.

Romero-Georgana contends that at the time he completed the Plea Questionnaire/Waiver of Rights Form that he did not fully understand what he was doing due to his limited English skills, poor quality of interpreters being used by his attorney and his attorney not advising him during this process.

Romero-Georgana further contends that his acknowledging th Plea Questionnaire/Waiver of Rights Form does not satisfy the requirements of Wis. Stat. §971.08(1)(c). see State v. Issa, 186 Wis.2d 199, 202, 519 N.W.2d 741 (Ct.App. 1994), "the court of appeals concluded that if the circuit court does not personally advise the defendant regarding deportation, the mere reference to the guilty plea questionnaire does

not satisfy Wis. Stat. §971.09(1)(c)." see also State v. Ruby, 2010 WI App 33, ¶10, quoting State v. Hoppe, 2009 WI 41, ¶¶30-33, 317 Wis.2d 161, 765 N.W.2d 794, the Supreme Court made clear that the "use of a plea questionnaire to fulfill a court's mandatory duties when accepting pleas...is merely a supplement to and not a substitute for an in-person colloquy." "The holding in Hoppe clearly applies to all of the court's duties at the plea colloquy and clearly admonishes that "[t]he plea colloquy cannot...be reduced to determining whether the defendant has read and filled out the Form."

The court prior to accepting Romero-Georgana's plea asked the following questions during the plea colloquy:

THE COURT: The court's been presented with a plea questionnaire and waiver of rights form. Mr. Romero-Georgana, the plea questionnaire indicates that you're prepared to enter a plea of no contest to first degree sexual assault of a child under 13 years of age. Is your plea one of no contest to that charge?

DEFENDANT: Yeah, I'm going to plead no--no contest.

THE COURT: All right. And are you offering that plea voluntarily, sir?

DEFENDANT: Yes.

THE COURT: There's an attachment to the plea questionnaire which outlines in a criminal jury instruction the elements of this offense. Did you go over those with Ms. Laplant?

DEFENDANT: Yes.

THE COURT: Do you also understand the potential penalties that you face, this being a potential imprisonment of up to 60 years? Do you understand that?

DEFENDANT: Yes.

THE COURT: As you went through this form, and as you went through the Spanish form which is also attached, and before you signed it, did you recognize you were waiving, or giving up, basic constitutional rights?

Defendant: Yes.

The Court: No one's threatened you to get you to do this, have they?

Defendant: No.

The Court: And the only promise anyone's made would appear to be that the State agrees not to file any additional charges and to make no specific recommendation at sentencing, but to just argue the facts. Is that your understanding?

Defendant: Yes.

The Court: And do you understand that although this court doesn't control what the state is willing to do or not to do, if there would be any kind of recommendation either by the state or your attorney or jointly, that those recommendations would not be binding on the court. Do you understand that?

Defendant: Yes.

(R. 107:2-4; Ap. 107-109)

Wisconsin State Statute §971.08(1)(c) states that:

(1) Before the court accepts a plea of no contest, it **SHALL** do all of the following:

...

(c) 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 which you are charged may result in deportation, the exclusion or denial of naturalization, under federal law."

The Supreme Court of Wisconsin agreed with the Court Appeals, "that Wis. Stat. 971.08(1)(c) is a clear directive to the Circuit Courts and that it 'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to

the letter.'" State v. Douangmala, 2002 WI 62, 253 Wis.2d 173, 646 N.W2d 1.

Therefore, the court failed to comply with Wis. Stat. 971.08(1)(c) by not addressing Romero-Georgana personally to advise him in the words set forth in the statute.

In evaluating a claim such as Romero-Georgana's the Wisconsin Supreme Court turned to Wis. Stat. 971.08(2) which requires a circuit court to:

"vacate any applicable judgement against the defendant and permit the defendant to withdraw the plea and enter another plea" when a defendant meets the following 3 conditions: (1) the defendant makes a motion, (2) the circuit court has failed to advise the defendant under 971.08(1)(c) regarding deportation consequences of a no contest plea; and (3) the defendant shows that the plea is likely to result in his deportation. State v. Douangmala, 2002 WI 62, ¶23.

Wisconsin State Statute 971.08(2) provides as follows:

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 judgement against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other grounds.

Romero-Georgana contends that he has met all three conditions set forth. First, Romero-Georgana is making the appropriate motion in his 974.06 motion. Second, the circuit court did fail in it's obligation to personally advise Romero-Georgana under Wis. Stat. 971.08(1)(c) regarding the deportation consequences of a no contest pleas. Thus, Romero-Georgana

plea was not voluntarily, intelligently, and knowingly made.

see State v. Bangert, 131 Wis.2d 246, 270, 389 N.W.2d 12.

"A person must know and understand what constitutional rights are waived by the plea in order for the plea to be voluntarily, intelligently made." "The defendant need to specifically waive each right but the record or other evidence must show that he entered his plea voluntarily and knowingly with the understanding of the rights he was waiving." (citations omitted) Third, that Romero-Georgana has shown by the nature of the Immigration Detainer-Notice of Action Form File #A097-838-176, dated March 20, 2007, (R.92, Ex.1; Ap. 110) pursuant to Wis. Stat. 971.08(2), "that the plea is likely to result in the defendant's deportation." Thus, the circuit court must permit Romero-Georgana to withdraw his plea.

Therefore postconviction counsel was ineffective for failing to raise the issue of the courts failure to comply with Wis. Stat. 971.08(1)(c) because the facts in the record support such a claim and would warrant relief and Romero-Georgana claims postconviction counsel failed to consult with him concerning withdrawing his plea. see Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty..." The ABA Model Rules of Professional Conduct provide: "A lawyer shall abide by a client's decision's concerning the representation...and shall consult with the client as to the means by which they are to be pursued..." Barnes, 463 U.S. at 753.

Romero-Georgana further argues that counsel's ineffective assistance denied him his constitutional right because he personally bears the consequences of counsel's failure to consult/advise him of the opportunity to withdraw his no-contest pleas due to the circuit court's violation of Wis. Stat. 971.08(1)(c). "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." "Absent exceptional circumstances, he is bound by the tactics used by his counsel at trial and on appeal." Barnes, 463 U.S. at 758-759.

Romero-Georgana was prejudiced by counsel's ineffective assistance because by entering a plea of no-contest to the charges he will subsequently be deported and will never be allowed admission into the United States of America. It is obvious from the statement of facts that Romero-Georgana came to this country in order to find employment to provide a better life for his family in Mexico and to one day bring his family to live in the United States of America and partake of all the advantages this great country has to offer. Because the case was close had Romero-Georgana fully understood the consequences of his no-contest plea he would have went to trial in order to preserve this precious right to be allowed admission to the United States of America.

III. POSTCONVICTION COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO FULLY EXPLAIN THE DEPORTATION CONSEQUENCES OF HIS NO-CONTEST PLEA IN VIOLATION OF HIS 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 1 AND 7 OF THE WISCONSIN CONSTITUTION.

A. STANDARD OF REVIEW.

"A claim of ineffective assistance of postconviction counsel for not challenging the effectiveness of trial counsel may overcome the procedural bar of Escalona-Naranjo, Rothering, 205 Wis.2d at 682. When a defendant claims ineffective assistance of postconviction counsel on the basis of failure to assert trial counsel's ineffectiveness, however, the defendant must first establish that trial counsel provided ineffective assistance." State v. Ziebart, 2003 WI APP 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369.

Under Strickland, we must first determine whether counsel's representation "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonable under prevailing professional norms." Id., at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like...are

guides to determining what is reasonable..."Ibid.; Bobby v. Van Hook, 130 S.Ct., 175 L.Ed.2d 255, 259 (2009)(per curiam); Florida v. Nixon, 543 U.S. 175, 191, 125 S.Ct. 551, 160 L.Ed. 2d 565, and n. 6 (2004); Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471(2003); Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389(2000). Although they are "only guides," Strickland, 466 U.S., at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674, and not "inexorable commands," Bobby, 130 S.Ct. 13, 17, 175 L.Ed.2d 255, 259, these standards may be valuable measures of the prevailing norms of effective representation, especially as the standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that "counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2(1995); G. Herman, Plea Bargaining §3.03, pp. 20-21(1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713-718(2002); A. Cambell, Law of Sentencing §13:23,pp. 555, 560(3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8(2000)(providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p.197 (3d ed.1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed.1999). "[A]uthorities of every stripe--including the American

Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications--universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients..." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae 12-14 (footnotes omitted) (citing inter alia, National Legal Aid and Defender Assn., Guidelines, Supra, §§6.2-6.4(1997); S. Bratton & Kelley, Practice Points; Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan/Feb. 2007); N. Tooby, Criminal Defense of Immigrants §1.3 (3d ed. 2003); 2 Criminal Practice Manual §§45:3, 45:15 (2009).

We have to previously recognize that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." INS v. St. Cyr, 533 U.S. 289, 323, 121 S.Ct. 2271, 150 L.Ed.2d 347 (quoting 3 Criminal Defense Techniques §§60A.02[2] (1999)). Cited from Padilla v. Kentucky, 130 S.Ct. 1473, 176 L.Ed.2d 284, 294-295

"Whether trial counsel's performance was deficient and, if so, whether it was prejudicial are legal issues also subject to our de novo review. State v. Pitsch, 124 Wis.2d 628, 634, 369 N.W.2d 711 (1985).

B. POSTCONVICTION COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO FULLY EXPLAIN THE DEPORTATION CONSEQUENCES OF ROMERO-GEORGANA'S NO CONTEST PLEA.

Romero-Georgana entered a plea of No-contest on November 17, 2006. Romero-Georgana was represented by Attorney Carrie

Laplant.

Romero-Gerogana contends that at no time did Attorney Laplant discuss with him the deportation consequences of entering a plea of no contest. Romero-Georgana contends that although he initialed the Plea/Questionnaire/Waiver of Rights Form that he understood the question regarding deportation that in reality he did not fully understand the consequences. Especially that not only would he be deported but that he would also be denied any future entry into the United States of America.

Romero-Georgana contends that during this time Attorney Laplant used a very poorly qualified interpreter that only explained to Romero-Gerogana to complete the Questionnaire and then return it to Attorney Laplant. At no time did Attorney Laplant with or without the aide of the interpreter attempt to discuss with Romero-Gerogana the contents of the Plea Questionnaire or the consequences of his no contest plea.

Romero-Gerogana contends that his contact with Attorney Laplant was limited to her bringing forms that required his signature and that the only advise she gave him was not to talk about the case with anyone other than herself.

Romero-Georgana contends that had he been advised, as is required by effective counsel, then he would not have entered a plea of no contest and instead would have entered a plea of not guilty and went to trial.

The Circuit Court acknowledges Romero-Georagana's allegations of the ineffectiveness of trial counsel as relevant to the analysis of his argument but for the court to analyze

postconviction counsel's ineffectiveness, it needs facts pertaining to why postconviction counsel was ineffective. (R.94:2;Ap. 105)

Romero-Georgana contends his case is similar to Padilla v. Kentucky, 130 S.Ct. 1473, 176 L.Ed.2d 284, in which, the Petitioner faced deportation after pleading guilty to drug distribution charges in Kentucky. At Padilla's postconviction proceedings he claimed that his counsel not only failed to advise him of his status concerning deportation prior to pleading guilty, but also told him not to worry about his immigration status. Padilla relied on this erroneous advice making his deportation virtually mandatory. Padilla then alleged that he would not have entered his guilty plea, and would have insisted on going to trial had he not received incorrect advice from his attorney.

The United States Supreme Court then discusses that not only misadvice to a client about immigration consequences but also remaining silent or giving no advice is deficient. Padilla, 130 S.Ct. at ¶296.

Finally the United States Supreme Court holds, "It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the "mercies of counsel." McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the

concomitant impact of deportation on families living lawfully in this country demand no less." Padilla, 130 S.Ct. at 299.

Therefore, Romero-Georgana has satisfied the first prong of Strickland that his trial counsel's performance was defiecient because she failed to advise him of his deportation consequences of his no-contest pleas leading to his inevitable deportation.

As to the second prong Romero-Georgana was prejudiced. Romero-Georgana would not have entered a plea of guilty had he known he would be deported and that any reentry into the United States of America would also not be available to him after his conviction. Romero-Georgana entered this country for a chance at a better life and to support his wife and kids in Mexico. Therefore, had Romero-Georgana received effective assistance from his counsel he would have gone to trial. The case against him was not very strong. There was a reasonable probability had he gone to trial a jury would have acquitted him. Had Romero-Georgana's counsel advised him of the deportation consequences then and only then could Romero-Georgana have made a voluntarily, intelligently, and knowingly decision regarding his plea.

Romero-Georgana asserts that because he has shown trial counsel to be ineffective then postconviction counsel must be ineffective for failing to discuss and raise an issue that has merit and would entitle him with relief.

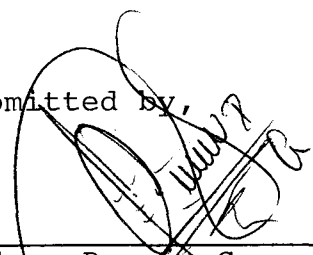
Thus, Romero-Gerogana urges the court to grant him a new trial or in the alternative remand for an evidentiary hearing so Romero-Georgana can ascertain why trial counsel failed to advise him of the consequences of his no-contest

plea.

CONCLUSION

Therefore, for the above reasons, Romero-Georgana respectfully requests that this court find that the trial court erred when it denied his 974.06 Motion for Postconviction Relief regarding ineffective assistance of counsel and trial court error; and remand this case back to the trial court for a new trial, or in the alternative, remand back for an evidentiary hearing.

Submitted by,



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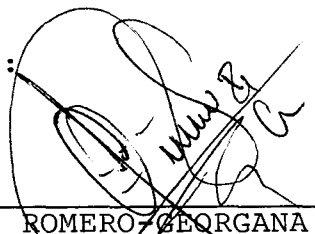
CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a monospaced Courier font.

The length of this brief is 30 pages.

Dated this 4 day of may, 2012.

Signed:



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