

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2012AP0055

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

L.C. No. 2006CF379

ANDRES ROMERO-GEORGANA,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A \$974.06
POSTCONVICTION MOTION ENTERED IN THE
BROWN COUNTY CIRCUIT COURT, THE
HONORABLE KENDELL M. KELLEY, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

SUBMITTED BY,

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ARGUMENT

- I. **POSTCONVICTION COUNSEL WAS INEFFECTIVE BECASUE COUNSEL DID NOT RAISE THE ISSUE THAT ROMERO-GEORGANA BE ALLOWED TO WITHDRAW HIS NO CONTEST PLEA.**

The state argues that because Romero-Georgana prevailed in winning his appeal that he now (in hindsight) believes it would have been better to withdraw his plea. This is not true. Romero-Georgana was never informed by counsel that he had a choice to withdraw his plea. In light of the facts, that this case was "she said/he said" with no physical evidence it is

reasonable to say that had Romero-Georgana known he could have withdrawn his no contest plea he would have done so.

Although postconviction counsel does not have to raise every nonfrivolous issue the defendant requests...the accused does have the ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty. see *Jones v. Barnes*, 463 U.S. 745, 753-754. Romero-Georgana was never given the choice to make this fundamental decision because counsel never informed him as was stated in Romero-Georgana's Brief-in-chief.

Romero-Georgana further argues counsel's ineffective assistance denied him a constitutional right because he personally bears the consequences of counsel's failure to consult him of his opportunity to withdraw his plea. see *Barnes*, at 758-759. "The defendant, and not the lawyer or the state, will bear the personal consequences of a conviction." "Absent exceptional circumstances, he is bound by the tactics used by counsel at trial and on appeal.

- A. Postconviction counsel was deficient, because failed to raise the issue that Romero-Georgana be allowed to withdraw his no contest plea and counsel failed to advise him of the deportation consequences of his no contest plea.**

Romero-Georgana claims postconviction counsel was ineffective for failing to request a plea withdrawal based on the courts failure to comply with Wis. Stat. §971.08(1)(c) when it failed to personally advise him: "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.", because the facts in the record support such a claim and warren relief. see State v. Balliette, 2011 WI 79, ¶55; see also State v. Douangmala 2002 WI 62.

The state concedes that the court did not comply with Wis. Stat. 971.08(1)(c). (State Brief at p. 7)

The state further fails to apply State v. Bangert, 131 Wis 2d 246, 389 N.W.2d 12 (1986). "Under Bangert, we establish an approach for plea withdrawals whereby a defendant may shift the burden of proof to the state when: (1) the defendant can point to a plea colloquy deficiency evident in the plea colloquy transcript, (Defendant-Appellant Brief-in-Chief; Ap. 107-109), and (2) the defendant alleges that he did not know or understand the information that should have been provided in the plea colloquy." Id. at 274-275; see State v. Hampton, 274 Wis 2d 379, ¶46. When a defendant is able to make such a showing, the burden shifts to the state to show by clear and convincing evidence that the defendant's plea was made knowingly, intelligently, and voluntarily. Bangert, 131 Wis 2d at 275.

Therefore the burden of proof is upon the state and the state fails to show that Romero-Georgana understood the plea and or it consequences. None the less, the state argues

Romero-Georgana does not show that the plea is likely to result in his being deported. The state is wrong in contending Romero-Georgana does not allege facts demonstrating a nexus between the entry of his no contest plea and the Federal Government's likely institution of adverse immigration actions. The state improperly applies the language set forth in *State v. Negrete*, 2012 WI 92, ¶27, ¶36. To satisfy the pleading a defendant "may submit some written notification that the defendant has received from a federal agent that imports adverse immigration consequences because of the plea that was entered," and it is not sufficient to simply allege that the defendant, "is now the subject of deportation proceedings.." Id. 36.

However, Romero-Georgana understands *Negrete* at 27 as follows: "In addition, such a motion, a defendant should allege that the Federal Government has conveyed its intent to impose on of the enumerated immigration consequences set out in Wis. Stat. 971.08(2). This required nexus between the crime to which a plea was made and adverse immigration consequences **can be demonstrated by alleging facts** that show that, because of the plea, the defendant has become subject to deportation proceedings...". Romero-Georgana's submission to the court of the INS Detainer (92:10) indicating that an investigation has been initiated to determine whether he is subject to removal from the United States is a fact alleging an adverse immigration consequence. Specifically, Romero-Georgana's subjection to deportation. This INS investigation will establish that Romero-Georgana by pleading no contest to 1st degree sexual

assault of a child will be deportable under Federal Law 8 USC §1227 (2006). Specifically, 8 USC §1227, Deportable Aliens, (2)(A) General Crimes, (i) Crimes of Moral Turpitude, (E) Crimes Against Children. The fact that the detainer was dated after Romeor-Georgana's plea of no contest provides the proper nexus of his plea to the adverse immigration consequences as he was not subject to any actions of the Federal Government prior to entering his plea. Second, postconviction counsel's failure to raise the issue that trial counsel failed to advise him of the deportation consequences of his no contest plea are not conclusory. Romero-Georgana had been living in the United States for several years, working multiple jobs to provide for his family in Mexico with the intentions of bringing them to the United States. Brief-in-Chief p. 23. Thus, had Romero-Georgana been properly advised of the deportation consequences he would have risked everything to preserve his ability to remain in the United States. His family's economic future depended on him earning money to sustain them. The courts have previously recognized "[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 US 289, 323, 121 S.Ct. 2271 (quoting 3 Criminal Defense Techniques §§60A.01; 60A.02[2] (1999)). Likewise we have recognized the "preserving the possibility of" discretionary relief from deportation under §212(c) of the 1952 INA 166 Stat. 187, repealed by congress in 1996, "would have been one of the principle benefits

sought by the defendants whether to accept a plea offer or instead to proceed to trial. " St. Cyr, 533 US at 323.

The state further argues that Romero-Georgana would not risk additional charges by going to trial. This statement is not supported by any facts in the record. The state does not present any physical evidence that the state told Romero-Georgana that if he did not plea to one count of 1st degree sexual assault that they would bring additional charges. To imply that the state intended to do so had Romero-Georgana not plead no contest is conclusory.

Romero-Georgana urges this court to apply Padilla v. Kentucky, 130 S.Ct. 1473, in which the United States Supreme Court discusses that not only misadvice to a client about immigration consequences but also remaining silent or giving no advice is deficient.

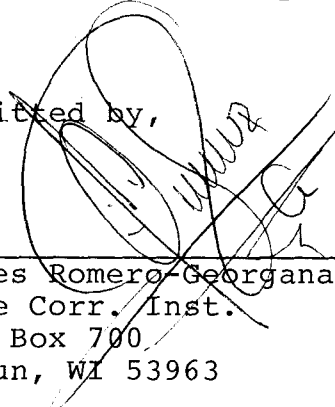
B. ROMERO-GEORGANA WAS PREJUDICED BY POSTCONVICTION COUNSEL'S DEFICIENT PERFORMANCE.

Romero-Georgana was prejudiced because he has shown the proper nexus between his plea and the deportation consequences and that he would have been successful in withdrawing his plea. He was also prejudiced because the deficient performance by counsel denied him a chance to preserve his right to a trial by a jury of his peers. Ultimately denying him his freedom, liberty, and ability to remain in the United States.

CONCLUSION

Romero-Georgana, respectfully requests that this court remand this case back to the trial court for a new trial, or in the alternative, remand back for an evidentiary hearing.

Submitted by,



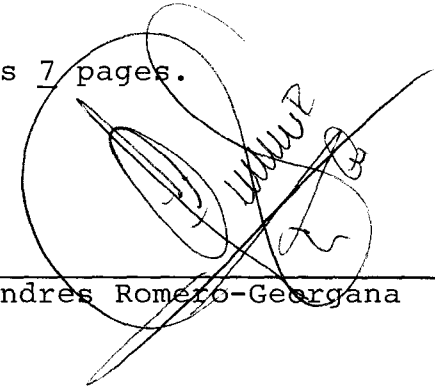
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FORM AND LENGTH CERTIFICATION

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

The length of this brief is 7 pages.

Dated October 15, 2012.



Andres Romero-Georgana