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State of Wisconsin
Supreme Court
Appeal No. 2010AP001702

State of Wisconsin,

Plaintiff-Respondent,

v.

Abraham Negrete,

Defendant-Appellant-Petitioner.

Review of an opinion of the Wisconsin Court of Appeals, District 2

Defendant-Appellant's-Petitioner's Brief and Appendix

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Statement of the Issues

I. Where a motion to withdraw a guilty plea pursuant to Sec. 971.08(2), Stats. (failure of the court to give the immigration warning) is brought eighteen years after the plea was entered, and the transcript of the plea hearing is unavailable, is the inability to prove that the immigration warning was given on the record, as required by the statute, harmless error as a matter of law simply because the court file contains a plea questionnaire indicating that defense counsel explained the immigration consequences to the defendant?

Answered by the court of appeals: Yes

Answered by the trial court: Yes

Statement of the Case

On May 28, 1992, the petitioner, Abraham Negrete (hereinafter "Negrete"), pleaded guilty to second degree sexual assault of a child. Negrete served his sentence.

On March 10, 2010, Negrete filed a motion to withdraw his guilty plea. (R:27; Appendix A). In the motion, Negrete alleged by affidavit that at the time his guilty plea was entered, he did not recall his attorney or the court explaining to him the immigration consequences of his guilty plea; and, more importantly, that he did not know of the immigration consequences of the plea. Finally, he alleged that he was now

the subject of immigration proceedings. (R:25) Additionally, Negrete alleged that he had attempted to obtain the transcript of the plea hearing, but that the court reporter was deceased. *Ibid.*

On May 5, 2010, without conducting a hearing, the trial court denied Negrete's motion. (R:29; Appendix B). The trial court wrote that, at the time Negrete's plea was entered, the immigration warning was "not mandatory". Furthermore, the trial court noted, the plea questionnaire signed by Negrete indicated that defense counsel had explained the immigration consequences to Negrete and that Negrete understood. *Id.* Therefore, any failure to give the statutory warning on the record was harmless error.

Negrete timely filed a notice of appeal to the Wisconsin Court of Appeals.

The Court of Appeals, by summary disposition (App. C), affirmed the order of the trial court. In a nutshell, the Court of Appeals reasoned that since Negrete averred in his affidavit filed in support of the motion that he could “not recall” his lawyer or the court explaining the immigration warning to him, and since there was in the court file a guilty plea questionnaire which indicated that defense counsel had explained the immigration warning to Negrete, Negrete could not raise a factual issue about whether any failure of the trial court to give

the statutory warning on the record was harmless.[1]

Argument

I. The lower courts erred in holding that there was no factual issue as to whether Negrete understood the immigration consequences of his guilty plea.

Due to the absence of the transcript of the plea hearing, it is difficult, if not impossible, to prove that Negrete was given the immigration warning on the record as required by the statute. Here, though, the lower courts held that the existence of the plea questionnaire, which contained an immigration warning and was signed by Negrete, demonstrated that there is no issue of fact as to whether the error was harmless. The reasoning of the lower courts overlooks two very important points: (1) Negrete alleged in the affidavit filed in support of the motion that, at the time he entered his plea, he did not, in fact, understand the immigration implications of his plea (and this is totally contrary to what is in the plea questionnaire); and, (2) If the existence of a plea questionnaire will, in every case, establish harmless error where the warning is not given on the record, then the requirement of the statute that the judge give the warning on the record is rendered entirely meaningless.

Sec. 971.08(2), Stats., which was created in 1985,

[1] As will be set forth below, under the law that was applicable to Negrete, the failure to give the statutory immigration warning was harmless if the defendant actually understood the immigration consequences of his guilty plea.

provides:

> 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 judgment 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.

At the time Negrete's guilty plea was entered, if it were established that the court failed to give the defendant the statutory warning, the question then became whether the the error was harmless. That is, if it were shown that the defendant had independent *knowledge* of the immigration consequences the court would not permit the defendant to withdraw his plea. *See, e.g., State v. Garcia*, 2000 WI App 81, PP1, 11-13, 234 Wis. 2d 304, 610 N.W.2d 180; *State v. Lopez*, 196 Wis. 2d 725, 731-32, 539 N.W.2d 700 (Ct. App. 1995); *State v. Issa*, 186 Wis. 2d 199, 209-210, 519 N.W.2d 741 (Ct. App. 1994).

Here, in affirming the denial of Negrete's motion to withdraw his plea, the Court of Appeals assumed for the sake of discussion that Negrete was not given the statutory warning on the record; however, the court ultimately concluded that there was no issue of fact about whether the error was harmless. The Court of Appeals noted that there was, in the circuit court file, a plea questionnaire that contained the immigration warning, and that Negrete had initialed it.

Moreover, Negrete's affidavit filed in support of his motion to withdraw his guilty plea merely indicated that he "did not recall" his attorney or the court giving him the immigration warning. Consequently, according to the Court of Appeals, there was no factual issue for an evidentiary hearing. The plea questionnaire indicated that Negrete was *explained* the immigration warning by his attorney, and that he understood it. According to the Court of Appeals, Negrete's affidavit merely averred that he "did not recall" either his lawyer or the court explaining to him the immigration consequences. Thus, the Court of Appeals implicitly concludes, Negrete was in no position to deny that his lawyer explained the immigration consequences to him (as alleged on the plea questionnaire), and, by his signature on the plea questionnaire, he admitted to understanding each item. As such, even if the circuit court failed to give the statutory warning on the record, the error was harmless.

The Court of Appeals, though, has overlooked several key points.

Firstly, Negrete's affidavit-- in addition to alleging that he could not "recall" his lawyer or the court explaining the immigration consequences to him-- further alleged that, "At the time I entered my guilty plea in this matter, *I did not understand that the plea could result in deportation, exclusion of entry into the United States, or denial of my application for citizenship*" (R:) And, further, the affidavit alleged that, "Had I known of this

consequence, I would not have entered the guilty plea." Thus, Negrete did aver in his affidavit that the court's failure to give the statutory warning on the record during the plea colloquy was not harmless; that is, Negrete alleged that he did not, in fact, understand the immigration consequences.

Secondly, if a signed plea questionnaire which contains the immigration warning is sufficient, in and of itself, to establish harmless error (i.e. that the defendant was aware of the immigration consequences), then the requirement of 971.08(2), Stats., that the court place the warning on the record during the plea colloquy is rendered wholly meaningless. As long as there is a signed plea questionnaire, the court would never have to give the warning on the record. If the defendant later filed a motion to withdraw his plea for this reason, the existence of the plea questionnaire would permit the court-- as the trial court did here-- to deny the motion, without a hearing, on harmless error grounds. In other words, the reasoning of the Court of Appeals in this case permits the plea questionnaire to be substituted for the on-record warning by the court; and, in the process, it renders Sec. 971.08(2), Stats., utterly meaningless.

A. Negrete's affidavit plainly raises an issue of fact as to whether he understood the immigration consequences at the time of his guilty plea (i.e. whether the failure to give the statutory warning was harmless).

The harmless error rule on which the Court of Appeals

relied was first stated in *State v. Chavez,* 175 Wis. 2d 366, 371 (Wis. Ct. App. 1993), overruled by *State v. Douangmala,* 2002 WI 62, P31 (Wis. 2002), where the Court of Appeals held that, "Consistent with this legislative history, we conclude that the legislature did not intend a windfall to a *defendant who was aware of the deportation consequences of his plea*." Thus, under the now overruled harmless error rule, the failure to give the statutory warning on the record was harmless only if the defendant was actually *aware* of the immigration consequences.

Here, Negrete affirmatively alleged in his affidavit that at the time he entered his guilty plea he *did not*, in fact, understand the immigration consequences; and, further, if he had understood the consequences, he would not have entered the guilty plea. The guilty plea questionnaire, relied upon by the court of appeals, may be sufficient to establish that Negrete's lawyer *explained* the immigration consequences to him, but it is woefully inadequate to establish that Negrete *understood* the immigration consequences; and this is what is required in order for the error to be harmless. Thus, there plainly is a factual issue raised by the pleadings concerning Negrete's awareness of the immigration consequences.

B. The mere existence of a plea questionnaire which contains the immigration warning ought not be a substitute for the on-the-record warning required by the statute.

The reasoning of the Court of Appeals in this case seems to suggest that the existence of a signed plea questionnaire which contains the immigration warning is *ipso facto* proof that the failure to give the immigration warning on the record is harmless error.

As mentioned, Negrete averred in his motion to withdraw his plea that he "did not understand that the plea could result in deportation, exclusion of entry into the United States, or denial of my application for citizenship." (R:25)

Based solely on the plea questionnaire, though, the Court of Appeals held that there was no issue of fact for a hearing as to whether Negrete understood the immigration consequences of this plea.

Such an interpretation of the harmless error rule renders the requirement of the statute that the court place the immigration warning on the record entirely meaningless. "A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect." *Donaldson v. State*, 93 Wis. 2d 306, 315 (Wis. 1980) Under the holding of the Court of Appeals, if there is a plea questionnaire in the file, signed by the defendant,

which acknowledges that he understands the immigration consequences, then the circuit court judge may completely ignore the requirements of Sec. 971.08(2), Stats. because no matter how affirmatively the defendant later alleges that, in fact, he *did not* understand the immigration consequences, the very existence of the plea questionnaire will serve to deny the defendant a hearing into the motion. It is almost as if the plea questionnaire serves as a replacement for the judge's warning on the record; however, this is not what the statute requires.

Conclusion

For these reasons, it is respectfully requested that the Supreme Court reverse the holding of the Court of Appeals affirming the trial court's denial of Negrete's motion to withdraw his guilty plea; and remand the matter to the trial court for an evidentiary hearing into whether Negrete had independent knowledge of the immigration consequences.

Dated at Milwaukee, Wisconsin, this _____ day of November, 2011.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1985 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

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

Dated this _____ day of _____, 2011:

_____

Jeffrey W. Jensen

State of Wisconsin
Supreme Court
Appeal No. 2010AP001702

State of Wisconsin,

Plaintiff-Respondent,

v.

Abraham Negrete,

Defendant-Appellant-Petitioner.

Defendant-Appellant's-Petitioner's Appendix

A. Negrete's affidavit filed in support of the motion

B. Memorandum decision of the trial court

C. Opinion of the Court of Appeals

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of

fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of November, 2011.

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Jeffrey W. Jensen

State of Wisconsin
Supreme Court
Appeal No. 2010AP001702

State of Wisconsin,

Plaintiff-Respondent,

v.

Abraham Negrete,

Defendant-Appellant-Petitioner.

Defendant-Appellant's-Petitioner's Appendix

A. Memorandum decision of the trial court

B. Opinion of the Court of Appeals

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Dated this 23rd day of November, 2011.

Jeffrey W. Jensen

STATE OF WISCONSIN | CIRCUIT COURT | WASHINGTON COUNTY

STATE OF WISCONSIN,
Plaintiff,
vs.
ABRAHAM C. NEGRETE
Defendant,

DECISION

Case No. 92-CF-41

This matter is before the Court on the Defendant's motion to withdraw a guilty plea. The Defendant alleges that during the course of the plea colloquy on April 29, 1992, the Honorable Leo F. Schlaefer failed to advise the Defendant on the record of the immigration consequences of his guilty plea. Specifically, the Defendant alleges in his affidavit in support of the motion that he does not "recall" the Court or his lawyer ever telling him of the consequence of the plea.

The Defendant, in his motion, cites *State v. Douangmala,* 253 Wis. 2d 173 (2002) for the proposition that the deportation warning is mandatory and if not given the Court must permit the Defendant to withdraw his guilty plea.

However, in *State v. Lagundoye,* 268 Wis. 2d 77 (2004), the Supreme Court clarified that the new rule of criminal procedure announced in *Douangmala* can be retroactively applied only to cases that were not yet final when *Douangmala* was decided. This Court finds that the above entitled action was final in all aspects at the time the *Douangmala* decision was entered on June 19, 2002. As such, the deportation warning at the time of the Defendant's plea colloquy in 1992 was not mandatory.

There is no transcript of the April 29, 1992 plea hearing. Furthermore, both the court reporter and the Defendant's lawyer at the time of the plea are deceased. However, the Defendant did execute a "request to enter plea and waiver of rights" on April 29, 1992 prior to the plea hearing. In that document, the Defendant's then attorney acknowledged that he

discussed and explained the contents of the questionnaire to the Defendant and that the Defendant acknowledged an understanding of each item in the questionnaire. The questionnaire did contain the deportation warning. *See Pg. 3, paragraph 20.* That paragraph was specifically initialed by the Defendant. The instructions on the request to enter plea and waiver of rights indicate that "if a blank appears in the margin initial it to indicate that you understand the statement." The Court concludes therefore that the Defendant was advised and understood the ramifications of entering his plea if he were not a citizen of the United States of America.

Since the giving of the deportation warning by the Judge on the record was not mandatory at the time of the plea colloquy in this case, the appropriate analysis of the issue raised by the Defendant is the "harmless error" analysis. This Court finds that given the information presented to Judge Schlaefer by way of the plea questionnaire, if Judge Schlaefer failed to provide the warning orally on the record to the Defendant, such failure was harmless.

The Defendant's motion to withdraw plea is therefore denied.

Dated at West Bend, Wisconsin this 5th day of May, 2010.

BY THE COURT:

Honorable Andrew T. Gonring
Circuit Court Judge, Br. 4

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Copies of the foregoing Decision were mailed to the following on the 6th day of May, 2010:

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June 8, 2011

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You are hereby notified that the Court has entered the following opinion and order:

2010AP1702 State of Wisconsin v. Abraham C. Negrete (L.C. #1992CF41)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Abraham C. Negrete appeals from an order denying his postconviction motion to withdraw his plea—filed eighteen years after entering his plea—on grounds that he had not understood that a guilty plea could result in deportation. Upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2009-10).[1] We affirm the order.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

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In 1992, Negrete, a native of Mexico, pled guilty to second-degree sexual assault. In 2010, he filed a postconviction motion alleging that he did not understand and does not recall his lawyer or the judge informing him of a guilty plea's deportation consequences, that he was facing deportation proceedings and that his sole remedy, therefore, was plea withdrawal. *See* WIS. STAT. § 971.08(2). He represented that no plea hearing transcript was available because the court reporter had died. The State's letter brief responded that Negrete indicated his understanding by initialing and signing the Request to Enter Plea and Waiver of Rights form.

The trial court decided the matter without a hearing. It found that there was no transcript and that both the court reporter and Negrete's attorney from the plea hearing were deceased. It also found that Negrete was informed of the potential for deportation because Negrete's lawyer acknowledged by his signature that he discussed with and explained to Negrete the contents of the Plea/Waiver form; and that, per directions to enter one's initials "to indicate that you understand the statement," Negrete initialed the box next to the paragraph on the form warning that a noncitizen's guilty plea could result in deportation. The court concluded that any failure to orally warn Negrete on the record was harmless error and denied the motion without a hearing.

As a threshold matter on appeal, the State urges that Negrete's claim is barred by laches, a defense that operates "as a bar upon the right to maintain an action by those who unduly slumber upon their rights." *See **Flejter v. Estate of Flejter***, 2001 WI App 26, ¶41, 240 Wis. 2d 401, 623 N.W.2d 552 (citation omitted). The State argues that an eighteen-year delay is unreasonable, that it logically did not anticipate an appeal because Negrete indicated early on he did not intend to seek postconviction relief and that it was prejudiced by the loss of witnesses and no transcript. *See **Coleman v. McCaughtry***, 2006 WI 49, ¶¶28-29, 290 Wis. 2d 352, 714 N.W.2d 900. Negrete responds that he did not unduly delay because he did not know his claim

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existed until deportation proceedings began. While the State makes a sound argument, we nonetheless address the merits of Negrete's appellate issue.

As part of ensuring that a defendant's plea is knowingly and voluntarily entered, a court must warn a defendant during the plea colloquy that, for noncitizens, a plea of guilty has possible deportation consequences under federal law. *See* WIS. STAT. § 971.08(1)(c). Whether a plea was knowingly and voluntarily entered is a legal issue, which we review de novo. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283-84, 389 N.W.2d 12 (1986). We accept the trial court's finding of evidentiary or historical facts on this point, however, unless they are clearly erroneous. ***Id.*** at 283-84

Negrete asserts that whether the court advised him of possible deportation presents an issue of fact meriting an evidentiary hearing. We accept for the purpose of discussion Negrete's claims that the court did not properly advise him, that no transcript can be had and that deportation is "likely." *See* WIS. STAT. § 971.08(2). The court's alleged failure is harmless error, however, if, when he entered his plea, Negrete was aware that deportation could result. *See* ***State v. Lagundoye***, 2004 WI 4, ¶44, 268 Wis. 2d 77, 674 N.W.2d 526.[2] We conclude that he was.

Negrete averred in the affidavit supporting his motion to withdraw his plea that he "do[es] not recall" the court or his lawyer advising him of the deportation consequences. There

[2] "Harmless error" no longer is the rule in these cases. *See* ***State v. Douangmala***, 2002 WI 62, ¶¶42, 46, 253 Wis. 2d 173, 646 N.W.2d 1. The new rule, however, is not retroactive to cases like Negrete's that were final before ***Douangmala*** was decided or to collateral appeals. *See* ***State v. Lagundoye***, 2004 WI 4, ¶¶31, 42, 268 Wis. 2d 77, 674 N.W.2d 526.

is no transcript and no chance of obtaining one. The court reporter and Negrete's lawyer are deceased. The judge is retired. Negrete is the only one who possibly could testify, and he already has sworn that he "do[es] not recall."

It is proper, then, to look to the entire record to assess Negrete's awareness when he entered his plea of the deportation consequences. *See* ***Bangert***, 131 Wis. 2d at 275. Negrete initialed the box next to the clearly stated deportation warning on the Plea/Waiver form and affixed his signature below a line reading: "I have read the entire document and I understand its contents." Negrete's lawyer signed the Plea/Waiver form acknowledging that he "discussed and explained the contents" of it to Negrete and that Negrete "acknowledged his understanding of each item" on the form. There is nothing for an evidentiary hearing to resolve. Negrete's "do[es] not recall" testimony does not, in any way, constitute a different historical basis and there is, as a result, no disputed fact.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

A. John Voelker
Acting Clerk of Court of Appeals

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP1702

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ABRAHAM NEGRETE,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF AN UNPUBLISHED OPINION OF THE WISCONSIN COURT OF APPEALS DISTRICT II AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE LEO F. SCHLAEFER AND THE HONORABLE ANDREW T. GONRING RESPECTIVELY PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ON PETITION FOR REVIEW OF AN UNPUBLISHED OPINION OF THE WISCONSIN COURT OF APPEALS DISTRICT II AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE LEO F. SCHLAEFER AND THE HONORABLE ANDREW T. GONRING RESPECTIVELY PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

STATEMENT OF ISSUE

Because Negrete pled guilty in 1992, this case is governed by the now-defunct law of *State v. Chavez*, 175 Wis. 2d 366, 498 N.W.2d 887 (Ct. App. 1993), which held that a court's failure to orally advise a defendant of the immigration consequences of entering a guilty plea was harmless error if the defendant was independently aware of those consequences when he entered the plea. *Id*. at 368 (overruled by *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1); *State v. Lagundoye*, 2004 WI 4, ¶ 44, 268 Wis. 2d 77, 674 N.W.2d 526 (holding *Douangmala* does not apply retroactively). The issue is

therefore whether the circuit court is required to hold an evidentiary hearing on a plea withdrawal motion relating to a pre-*Douangmala* plea where: (1) the defendant supports his motion only with the conclusory allegation that he would not have pled guilty if he known the immigration consequences of entering a plea; (2) the defendant cannot remember if he received an oral deportation warning at the plea hearing 18 years prior; (3) the hearing transcript is unavailable; and (4) the available evidence contradicts the defendant's conclusory allegation and indicates that he discussed the immigration consequences of pleading guilty with his attorney and that he understood that issue before entering his plea.

The court of appeals affirmed the circuit court's ruling that Negrete was not entitled to an evidentiary hearing because, even if the plea-taking court failed to give Negrete a deportation warning on the record, that error was harmless in light of record evidence indicating Negrete was aware of and understood the immigration consequences of his plea.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough for this court to grant a petition for review, the State requests oral argument and publication of the court's opinion.

STATEMENT OF FACTS

Negrete pleads guilty to sexual assault. Negrete was charged in February 1992 with sexually assaulting a 15-year-old girl (1). He pled guilty to second-degree sexual assault at a hearing held April 29, 1992, before Judge Schlaefer (10). The day of the plea hearing, Negrete and his attorney submitted to the court a "Request to Enter Plea and Waiver of Rights" form (8; R-Ap. at 101 (the "plea/waiver form")).

The plea/waiver form contains many statements relating to a guilty plea and a space by each statement for

a defendant to initial "to indicate that you understand the statement" (*Id.*). Among those statements was the following:

> 20. If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest and a finding of guilty by the Court of the offense(s) with which you are charged in the Criminal Complaint or Information, may result in deportation, exclusion from admission to this country or a denial of naturalization under federal law.

(8:3; R-Ap. at 103). Negrete initialed next to that statement to indicate, in accordance the form's instructions, that he understood it (*Id.*). Negrete also signed and dated the plea/waiver form just below the statement: "I have read this entire document and I understand its contents" (8:4; R-Ap. at 104).

Negrete's lawyer signed the plea/waiver form the same day to show that he "discussed and explained the contents of the questionnaire to the defendant, [and] that the defendant acknowledged his understanding of each item in this questionnaire . . ." (*Id.*).

The circuit court accepted Negrete's plea (10) and sentenced him to 18 months' probation (18). Negrete completed his sentence on April 25, 1994 (23:2).

Negrete moves to withdraw his plea 18 years later. On March 10, 2010, Negrete moved to withdraw his 1992 plea (27). Negrete, a native of Mexico (9), alleged in an affidavit that he was the subject of deportation proceedings (25:1). He further alleged—contrary to his initialing and signature of the plea/waiver form in 1992—that he did not understand the immigration consequences of entering a guilty plea when he did so and that he "do[es] not recall" whether the court or his lawyer told him he could be deported as a result of his plea (*Id.*). According to Negrete, his attorney could not obtain a

transcript of the plea hearing because the court reporter was deceased (*Id.*).[1]

The circuit court denies the motion without a hearing. The circuit court denied Negrete's withdrawal motion without a hearing (29; P-Ap. A). It found that both the court reporter and Negrete's lawyer at the time had died and there was no plea hearing transcript available (29:1; P-Ap. A-1). However, the court concluded that based on the contents of the plea/waiver form Negrete "was advised and understood the ramifications of entering his plea if he were not a citizen of the United States of America" (29:2; P-Ap. A-2). Thus, the court found "that given the information presented to Judge Schlaefer by way of the plea questionnaire, if Judge Schlaefer failed to provide the warning orally on the record to the Defendant, such failure was harmless" (*Id.*).

The court of appeals affirms, finding a hearing unnecessary. The court of appeals affirmed that ruling, and explained why it was appropriate to deny Negrete's motion without a hearing:

> Negrete averred in the affidavit supporting his motion to withdraw his plea that he "do[es] not recall" the court or his lawyer advising him of the deportation consequences. There is no transcript and no chance of obtaining one. The court reporter and Negrete's lawyer are deceased. The judge is retired. Negrete is the only one who possibly could testify, and he has already sworn that he "do[es] not recall."
>
> It is proper, then, to look to the entire record to assess Negrete's awareness when he entered his plea of the deportation consequences. Negrete initialed the box next to the clearly stated deportation warning on the Plea/Waiver form and affixed his signature below a line reading: "I have read the entire document and I understand its

[1] Negrete indicated in May 1992 that he did not intend to seek postconviction relief (15), so there would have been no need for the reporter to create a transcript in anticipation of appellate proceedings.

> contents." Negrete's lawyer signed the Plea/Waiver form acknowledging that he "discussed and explained the contents" of it to Negrete and that Negrete "acknowledged his understanding of each item" on the form. There is nothing for an evidentiary hearing to resolve. Negrete's "do[es] not recall" testimony does not, in any way, constitute a different historical basis and there is, as a result, no disputed fact.

State v. Negrete, No. 2010AP1702, slip op. at 3-4 (Wis. Ct. App. June 8, 2011) (P-Ap. B-3-4).

This court granted Negrete's petition for review.

SUMMARY OF ARGUMENT

Negrete has not alleged any error in the circuit court's plea colloquy; he merely cannot remember if an error occurred or not. That is not enough to prove a prima facie case under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Negrete was therefore not entitled to an evidentiary hearing on his withdrawal motion under the *Bangert* line of case law.

Nor should Negrete have received a hearing under the *Nelson/Bentley* analysis. *See Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). By offering only self-serving conclusions in support of his withdrawal motion—rather than objective facts which would have allowed the circuit court to meaningfully assess his claim—Negrete was not automatically entitled to an evidentiary hearing under the first prong of *Nelson/Bentley*. The conclusory nature of Negrete's allegations, and the contradictory record evidence, allowed the circuit court to properly use its discretion to deny Negrete's motion without a hearing under the test's second prong.

Under the circumstances of this case, a hearing would add no new relevant evidence. Requiring one would simply waste judicial resources.

ARGUMENT

I. NEGRETE IS NOT ENTITLED TO A HEARING UNDER *BANGERT*.

Negrete seeks an evidentiary hearing on his plea withdrawal motion. *See* Negrete Brief at 12. But he fails to specify under which line of cases, *Bangert* or *Nelson/Bentley*, his request is made. Analyzed through the *Bangert* lens, the circuit court properly denied Negrete's motion without a hearing.

A. A *Bangert* motion only warrants an evidentiary hearing if it "alleg[es] that the circuit court failed to fulfill its plea colloquy duties."

"*Bangert* and its progeny govern the circuit court at plea colloquies." *State v. Howell*, 2007 WI 75, ¶ 26, 301 Wis. 2d 350, 734 N.W.2d 48. Under that line of cases, to ensure a defendant's plea is constitutionally sound, the circuit court must address the defendant personally and fulfill several duties set forth in Wis. Stat. § 971.08. *Id*. "The purpose of these duties is to inform the defendant of the nature of the charges, to ascertain the defendant's understanding of the charge, and to ensure that the defendant is aware of the constitutional rights being waived." *Id*. As part of that colloquy, the circuit court must advise the defendant that a plea of guilty or no contest "may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law." Wis. Stat. § 971.08(1)(c); *Howell*, 301 Wis. 2d 350, ¶ 26 n.12.

In a motion for plea withdrawal, "[a] defendant may invoke *Bangert only by alleging that the circuit court failed to fulfill its plea colloquy duties*." *Howell*, 301 Wis. 2d 350, ¶ 27 (emphasis added).

> A *Bangert* motion warrants an evidentiary hearing if (1) the motion makes a prima facie showing that the plea was accepted without the trial court's conformance with Wis. Stat. § 971.08 or other mandatory procedures, and if (2) the motion alleges that in fact the defendant did not know or understand the information that should have been provided at the plea colloquy.

Id. (footnotes, quotation marks, and brackets omitted).

To meet the first *Bangert* element and make a prima facie showing the plea colloquy was inadequate, a defendant "must point to a specific defect in the plea hearing which constitutes an error by the court." *State v. Hampton*, 2004 WI 107, ¶ 57, 274 Wis. 2d 379, 683 N.W.2d 14. That is, "[t]he defendant must make specific allegations such as 'at no point during the plea colloquy did the court explain that it was not bound by the plea bargain and was free to disregard the prosecutor's sentencing recommendation.'" *Id*.

"Whether a party has met its burden of establishing a prima facie case is a question of law that [this court] decide[s] de novo." *State v. Baker*, 169 Wis. 2d 49, 78, 485 N.W.2d 237 (1992).

B. Negrete has not established a prima facie *Bangert* case—he alleged only that he cannot remember if the colloquy was adequate.

Negrete has not satisfied the first *Bangert* element. He did not allege the circuit court failed to fulfill its plea colloquy duties; instead, he "do[es] not recall" if the court did so or not (25:1). The unavailability of the plea hearing transcript does not let Negrete off the hook of proving a prima facie case. *See Baker*, 169 Wis. 2d at 77-78. In *Baker*, the plea hearing transcript had been lost and the related reporter's notes destroyed. *Id*. at 76. Yet this court still required the defendant to make, by affidavit or otherwise, a prima facie showing of a colloquy deficiency.

Id. at 77. And the defendant met that burden by filing an affidavit alleging he "was unrepresented by counsel, and *did not at any time affirmatively waive his right to counsel*." *Id*. at 76-78 (emphasis added).

Unlike *Baker*, Negrete has not alleged the circuit court erred; he just claims he cannot remember. A lapse of memory on the part of a defendant should not translate into an assumption of circuit court error. If that were the case, the *Bangert* burden for obtaining a hearing would be rendered null, satisfied with a simple "I don't remember." Negrete offers no reason that is, or should be, the standard and thus fails to carry his burden under *Bangert* to obtain an evidentiary hearing. *See Howell*, 301 Wis. 2d 350, ¶ 27.

II. THE DENIAL OF NEGRETE'S MOTION WITHOUT A HEARING WAS ALSO PROPER UNDER *NELSON/BENTLEY*.

Under the *Nelson/Bentley* analysis, the outcome remains the same. Negrete has neither pled sufficient facts to require an evidentiary hearing nor shown the circuit court's failure to grant him one was an erroneous exercise of discretion. Moreover, a hearing in this case would waste time and resources with naught to gain.

A. A two-part standard of review applies to the *Nelson/Bentley* analysis.

A defendant's motion is treated as a *Nelson/Bentley* motion "insofar as the motion alleges that the defendant's failure to understand certain information resulted from problems extrinsic to the plea colloquy." *State v. Hoppe*, 2009 WI 41, ¶ 59, 317 Wis. 2d 161, 765 N.W.2d 794. Because Negrete alleges he cannot remember if his counsel informed him of the immigration consequences of entering a plea (25:1), the *Nelson/Bentley* analysis becomes relevant. Whether Negrete should have been granted an evidentiary hearing under that line of cases is an issue reviewed under the two-part test described in

Nelson, 54 Wis. 2d at 497-98. *See Bentley*, 201 Wis. 2d at 309-10.

The first element of the *Nelson*/*Bentley* test looks at "whether a motion alleges facts which, if true, would entitle a defendant to relief . . . ." *Bentley*, 201 Wis. 2d at 310. If the motion meets that standard, the circuit court must hold an evidentiary hearing. *Id*. This court reviews that issue de novo. *Id*.

Should the motion fail the first *Nelson*/*Bentley* prong, the second prong is applied: the circuit court has discretion to deny a withdrawal motion without a hearing if (1) the defendant fails to allege sufficient facts in his motion to raise a question of fact, (2) the withdrawal motion presents only conclusory allegations, or (3) the record conclusively demonstrates that the defendant is not entitled to relief. *Id*. at 309-10 (quoting *Nelson*, 54 Wis. 2d at 497-98). "When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard." *Bentley*, 201 Wis. 2d at 311.

Here, by providing in his affidavit only bare-bones allegations unsupported by detailed facts, Negrete failed the first part of the *Nelson*/*Bentley* test. And because there is evidence—the plea/waiver form—demonstrating Negrete is not entitled to relief, the circuit court did not err in using its discretion to deny Negrete's motion without a hearing.

B. Negrete's conclusory allegation that he would have pled differently was not sufficient to satisfy the first *Nelson/Bentley* prong.

Applying the first prong of *Nelson/Bentley*, this court must consider "whether [Negrete's] motion alleged sufficient facts which would entitle him to withdraw his guilty plea." *Bentley*, 201 Wis. 2d at 311. "A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." *Id.* (quoting *State v. Rock*, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979)).

With regard to the required specificity of a plea withdrawal motion, "[t]his court has long held that the facts supporting plea withdrawal must be alleged in the petition and the defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing." *Bentley*, 201 Wis. 2d at 313. "*A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions.*" *Id.* (emphasis added). That is, "a specific explanation of *why* the defendant alleges he would have gone to trial is required." *Id.* at 314 (quoting *Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir. 1989) (brackets omitted)). "[I]f a defendant need only make a mere conclusory allegation of prejudice to obtain a hearing, the fundamental interest in the finality of guilty pleas would be frustrated." *Bentley*, 201 Wis. 2d at 317.

Without facts to support a defendant's allegation that he pled guilty only because of some alleged error, the allegation "amounts to merely a self-serving conclusion." *Id.* at 316. "A bare-bones allegation that a defendant would have pled differently is no more than a conclusory allegation and, under *Nelson*, not sufficient to require the trial court to direct that an evidentiary hearing be conducted." *Id.* (quoting *State v. Smith*, 60 Wis. 2d 373,

380, 210 N.W.2d 678 (1973) (internal quotation marks omitted)).

This court applied the *Nelson* analysis in *Bentley*. There, the defendant alleged he would not have pled guilty had his counsel not mistakenly told him the wrong parole eligibility date. *Bentley*, 201 Wis. 2d at 316-17. But the defendant "never explain[ed] how or why the difference . . . would have affected his decision to plead guilty." *Id.* And he "allege[d] no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether to plead guilty." *Id.* at 317. Because the defendant failed to provide facts allowing the court to "meaningfully assess" his withdrawal claim, "the circuit court was not required to hold a hearing on his motion under the first prong of *Nelson*." *Id.* at 318.

Negrete has likewise failed to allege facts that would allow this court to meaningfully assess his claim. In the affidavit supporting Negrete's motion, he states he "do[es] not recall" if his lawyer or the court told him about the immigration consequences of pleading guilty, and that "[h]ad I known of this consequence, I would not have entered the guilty plea" (25:1). Yet Negrete provides nothing to support that assertion (*see* 25; 26; 27).

That conclusory allegation fails to satisfy the first prong of the *Nelson/Bentley* test. Negrete never offered any objective factual assertions showing *why* he would not have pled guilty and instead gone to trial due to the immigration issue. Nor did he allege any special circumstances that might support the conclusion that he placed particular emphasis on that issue.

Indeed, the available facts point the other way. Negrete got what one might call a sweetheart of a deal—18 months of probation for second-degree sexual assault (18). And his case was not one involving a consensual encounter between two lovelorn teenagers, where a jury may have been sympathetic. Rather, a 36-year-old Negrete

forced himself on a sleeping 15-year-old girl, putting his finger and then his penis in her vagina while she cried for him to stop (5:3, 12). Given these facts, Negrete had a strong incentive to take a plea and probation rather than face the potential 10 years' imprisonment that could have resulted from a conviction at trial (*see* 6 (describing possible penalties)).

The likelihood that Negrete would have stared down 10 years in prison because of potential future immigration consequences seems slim. And his bare-bones affidavit offers no "objective factual assertions" to make his claim more plausible. *Bentley*, 201 Wis. 2d at 313. Instead, he completely omits the requisite "specific explanation of *why* [he] alleges he would have gone to trial" absent the alleged immigration colloquy error. *Id*. Without those facts, the circuit court was left with "no more than a conclusory allegation[,]" which is not enough to trigger an evidentiary hearing under *Nelson*/*Bentley*'s first prong. *Id*. at 316.

C. The circuit court did not erroneously exercise its discretion in denying Negrete's factually-unsupported motion without a hearing.

This court's de novo review stops there, at Negrete's failure to allege facts in his motion which, if true, would entitle him to relief. *Id*. at 310. Under the second *Nelson*/*Bentley* prong, the circuit court could properly deny Negrete's motion without a hearing if Negrete failed to allege sufficient facts to raise a question of fact, presented only conclusory allegations, or the record conclusively demonstrated Negrete was not entitled to relief. *Id*. That decision is reviewed deferentially—for erroneous exercise of discretion. *Id*. at 311.

"A circuit court properly exercises its discretion when it has examined the relevant facts, applied the

proper legal standards, and engaged in a rational decision-making process." *Id.* at 318. This court's "inquiry focuses on whether the circuit court made a reasoned determination . . . not whether this court would have taken the same action as an original matter." *Schultz v. Darlington Mut. Ins. Co.*, 181 Wis. 2d 646, 656-57, 511 N.W.2d 879 (1994).

The circuit court here properly exercised its discretion to deny Negrete's motion without a hearing. Consider:

- The circuit court examined the relevant facts, including the plea/waiver form, Negrete's allegations, and whether there were any other available sources of information (29:1-2; P-Ap. A-1-2).

- The circuit court applied the proper standard, holding that, under *Lagundoye*, the harmless error test applied to Negrete's plea, which was taken pre-*Douangmala* (*Id.*).

- The circuit court engaged in a rational decision-making process, finding that based on Negrete's initialing and signing of the plea/waiver form indicating he understood the immigration consequences of his plea, and his attorney's signature of the same form, "the Defendant was advised and understood the ramifications of entering his plea if he were not a citizen of the United States of America" (29:2; P-Ap. A-2). And "given the information presented to Judge Schlaefer by way of the plea questionnaire, if Judge Schlaefer failed to provide the warning orally on the record to the Defendant, such failure was harmless" (*Id.*).

While the circuit court did not explicitly cite the *Nelson/Bentley* factors, it is clear Negrete failed on all

three elements of the second prong. *First*, he did not allege sufficient facts to raise a question of fact. As the court of appeals noted, Negrete's motion raised "no disputed fact." *Negrete*, No. 2010AP1702, slip op. at 4 (P-Ap. B-4). The only evidence available—the plea/waiver form—indicated Negrete had been aware of the deportation consequences of a plea, a fact he did not dispute by claiming to "not recall" whether he had been orally warned about that issue by counsel or at the plea hearing. *Id*. *Second*, as described *supra* at Section I.B., Negrete presented only conclusory allegations—claiming without support, and contrary to existing evidence, that he would have pled differently (25:1). *Third*, the record evidence in the form of the plea/waiver form initialed and signed by Negrete and his counsel conclusively demonstrated Negrete was aware of the immigration consequences of pleading guilty. There existed no evidence to the contrary, merely that Negrete could "not recall" an oral warning and his self-serving statement made 18 years later that contradicted the plea/waiver form. An evidentiary hearing would have added nothing; all other sources of information were unavailable. *See Negrete*, No. 2010AP1702, slip op. at 3-4 (P-Ap. B-3-4).

Negrete points to nothing in the record—aside from the self-serving statement in his affidavit—that shows the circuit court's decision-making was irrational or faulty. *See* Negrete Brief at 8-10. As such, he failed to satisfy *Nelson/Bentley*'s second prong, and the circuit court properly denied his motion without a hearing. *See Bentley*, 201 Wis. 2d at 309-10 (quoting *Nelson*, 54 Wis. 2d at 497-98).

D. The use of a plea/waiver form in place of an oral colloquy can only occur in pre-*Douangmala* cases and is not improper.

Negrete contends that using a plea/waiver form as evidence of harmless error under *Chavez* undermines Wis. Stat. § 971.08's requirement that a deportation warning be given on the record. Negrete Brief at 11-12. But Negrete submits no case law supporting that position, and it is unsupportable.

1. This issue is only relevant to a limited set of cases.

According to Negrete, "[a]s long as there is a signed plea questionnaire, the court would never have to give the [deportation] warning on the record." *Id*. at 9. That is incorrect. A plea/waiver form could only suffice to show harmless error in cases where the harmless error analysis is applied—that is to pleas entered before *Douangmala* issued in 2002. *See Lagundoye*, 268 Wis. 2d 77, ¶ 44. In more recent cases, failure to give the oral warning is automatic grounds for withdrawal if the other criteria are met. *Douangmala*, 253 Wis. 2d 173, ¶ 42. Thus, the alleged evil Negrete complains of would be only be relevant to pleas entered after 1985, when the statute was amended to add the deportation warning requirement,[2] and before 2002, when *Douangmala* eliminated the harmless error test. Relying on a plea/waiver form in place of an oral warning is thus not the overarching problem Negrete makes it out to be but is instead limited to a subset of older cases.

[2] *See* 1985 Wis. Act 252.

2. Finding harmless error based on a plea/waiver form does not undermine Wis. Stat. § 971.08.

Moreover, Negrete's contention that using the plea/waiver form to find harmless error undermines Wis. Stat. § 971.08 is illogical. In his view, finding harmless error based on the plea/waiver form would "render[] the requirement of the statute that the court place the immigration warning on the record entirely meaningless." Negrete Brief at 11. But so too would finding harmless error based on *any other evidence* aside from an oral colloquy. A defendant could have written a 10-page essay on her understanding of the immigration consequences of pleading guilty, but to Negrete, considering this extraneous evidence would render Wis. Stat. § 971.08's oral warning requirement "surplusage[.]" Negrete Brief at 11. In Negrete's Catch-22 view, the court could only find harmless error if the defendant had received an on-the-record deportation warning, which would negate the need for harmless error analysis altogether.

That is not how the harmless error test works. Instead, the court looks for other evidence in the record that shows "the defendant was aware of the potential for deportation when he entered his plea." *Lagundoye*, 268 Wis. 2d 77, ¶ 42 (citing *Chavez*, 175 Wis. 2d at 368). This court in *Lagundoye* found that a defendant had independent awareness of the potential for deportation because he had been orally warned in a prior plea hearing on a different crime. *Lagundoye*, 268 Wis. 2d 77, ¶ 43. To Negrete, substituting an earlier warning for a current one would undermine Wis. Stat. § 971.08. As demonstrated by *Lagundoye*, that position is incorrect.

There is little difference between finding independent awareness based on a prior colloquy or a plea/waiver form. Both constitute record evidence that a defendant was made aware he could be deported if he pled

guilty. With Negrete's conclusory statement made 18 years late as the only evidence contradicting the plea/waiver form, the circuit court did not erroneously exercise its discretion in denying his withdrawal motion without a hearing.

E. Requiring a hearing would waste judicial resources.

Negrete fights for a hearing but offers no insight as to what that proceeding would offer that is not already on the record. The only witness who could testify about the plea colloquy and related contacts is Negrete himself, and he does not remember if he was given the deportation warning or not (25:1). His lawyer at the time is deceased (29:1). Almost certainly the judge's and assistant district attorney's memories of an 18-year-old plea hearing have faded.[3] We would thus be left after a hearing with the same thing we have now—Negrete's plea/waiver form signed the day he pled guilty versus his self-serving affidavit filed nearly two decades later.

The circuit court avoided such a needless exercise. And given that Negrete's conclusory allegations fail both prongs of the *Nelson*/*Bentley* test, this court should not order a hearing.

[3] It is for precisely that reason that, in cases involving long delays, hard evidence like the plea/waiver form appears to be even *more* reliable. A contemporaneously-signed document likely captures the facts better than testimony given decades later (and, in Negrete's case, given after an incentive arises to claim lack of knowledge).

CONCLUSION

Negrete's faulty memory should not suffice to satisfy the *Bangert* burden of proving a prima facie case that a colloquy error occurred. Negrete was therefore not entitled to an evidentiary hearing on that ground.

The conclusory allegations in Negrete's affidavit and motion were also insufficient trigger a hearing under the first *Nelson/Bentley* prong. Because Negrete failed to satisfy the second *Nelson/Bentley* prong by offering no objective factual support for his claim, and because the available evidence contradicted him, the circuit court did not erroneously exercise its discretion in denying Negrete's motion without a hearing on that ground either. The State therefore respectfully requests that this court affirm Negrete's judgment of conviction and the order denying his motion for plea withdrawal and deny his request for an evidentiary hearing.

Dated at Madison, Wisconsin: December 14, 2011.

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CERTIFICATION

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 200 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 length of the brief is 4422 words.

_____
THOMAS E. DIETRICH

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief, excluding the appendix, is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief, excluding the appendix, filed with the court and served on all opposing parties.

Dated: December 14, 2011.

_____
THOMAS E. DIETRICH
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP1702

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ABRAHAM NEGRETE,

Defendant-Appellant-Petitioner.

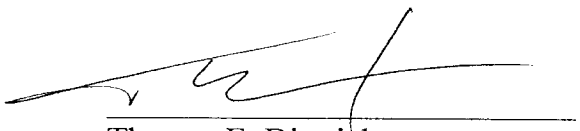
APPENDIX OF PLAINTIFF-RESPONDENT

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 that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of December, 2011.



Thomas E. Dietrich
Assistant Attorney General

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STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY
CRIMINAL/TRAFFIC DIVISION
BRANCH ____

STATE OF WISCONSIN,
Plaintiff

vs.

Abraham Negrete,
Defendant

REQUEST TO ENTER PLEA AND WAIVER OF RIGHTS

Case No. 92-CF-41

I, Abraham Negrete the above name defendant, wish to enter a plea of guilty/~~no contest~~ in this/~~these~~ criminal matter(s) before the Court.

I DECLARE THAT:

If a blank appears in the margin, initial it to indicate that you understand the statement.

1. I am 37 years of age.

2. I have completed the 6th grade in school and ____ years in college.

3. I can read, write, and understand the English language, and the charge(s) herein.

4. I currently reside at:
1718 West Washington
West Bend, WI 53095

5. My home phone number is: 334-7975

6. I am employed at Level Valley Dairy where I have worked since 8 years OR I'm not presently employed. My last job was at ____

AN 7. I have never been committed to a mental institution as mentally ill or incompetent, nor have I recently received treatment for any mental or emotional problems.

AN 8. I am not using drugs or alcohol to such an extent that the use thereof interferes with my understanding of these court proceedings.

AN 9. I am now in complete possession of all my faculties.

AN 10. I am represented by an attorney. I have

discussed all the facts and circumstances known to me about this charge (s) pending against me. I have no questions about what has happened in this case so far.

AN

11. I am aware of the possible maximum penalties that may be imposed by the Court upon my conviction of this charge(~~s~~), which in this case ~~is~~/are 10 years prison and a $10,000 fine

AN

12. I have entered into (no) (a) plea agreement. My understanding of the plea agreement is: State to recommend a sentence investigation after to argue penalties

AN

13. I understand that the Judge is not bound to follow any plea bargain or any recommendation agreed upon by the attorneys; I understand that the Judge is free to sentence me to the maximum possible penalties in this case.

AN

14. I understand that by pleading guilty, I am admitting that I committed all the elements of the offense(s) of Sexual intercourse with a woman not legally able to consent to same

AN

15. I understand that by pleading guilty (no contest) I will be giving up the following Constitutional Rights:

a) I will be giving up my right to remain silent, to maintain a plea of not guilty and have this (these) matter(s) tried before a jury or to the Court without a jury.

b) I will be giving up my right to cross examine or to ask questions of the State's witnesses by cross-examination.

c) I will be giving up my right to call witnesses, or to subpoena them to court and require them to testify on my behalf.

d) I will be giving up my right to make the State prove me guilty by evidence beyond a reasonable doubt to a jury's

unanimous satisfaction. That is, that any verdict reached by a jury must be agreed to by each member of the jury.

AN

16. I wish to give up these Constitutional Rights and enter a plea of guilty (no contest):

a) Other than any plea agreement(s) no one has made any threats against me to persuade or coerce me into giving up these Constitutional Rights and enter my plea.

b) Other than any possible plea bargain, no one has made any promises to persuade me to give up my rights of trial and I enter my plea(s) freely and voluntarily.

AN

17. I understand that I will most likely be found guilty on a plea of "no contest".

AN

18. I acknowledge that a factual basis for my plea of guilty is established by Information and Complaint

AN

19. I understand that if I am placed on probation and if I at any later time violate a condition of probation, my probation may be revoked and I may be required to serve the jail or prison sentence entered herein by the Judge.

AN

20. If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest and a finding of guilty by the Court of the offense(s) with which you are charged in the Criminal Complaint or Information, may result in deportation, exclusion from admission to this Country or a denial of naturalization under federal law.

AN

21. I understand that any motion to modify sentence, including the amount of the fine, must be filed within 90 days from the date of sentencing.

AN

22. If I am to be convicted of a felony, I understand that I may not possess a firearm from now on. Further, I have reviewed with my attorney the requirements and penalties

under Sec. 941.29 of the Wisconsin Statutes.

AW

23. I have discussed this case and all matters mentioned in this questionnaire with my attorney, Gary McGregor and I am satisfied with the representation I have received from my attorney and that this plea is in my best interests.

I have read this entire document and I understand its contents.

Dated this 29th day of April, 1993.

Defendant's signature

ATTORNEY'S ACKNOWLEDGEMENT

I, Gary McGregor, state that I am the attorney for the above-named defendant, that I discussed and explained the contents of the questionnaire to the defendant, that the defendant acknowledged his understanding of each item in this questionnaire, including any post-conviction relief procedures, and that I know the above signature to be the defendant's. I am aware that I have a continuing duty to represent this defendant in any post-conviction relief proceedings until I am retained as appellate counsel or another attorney is retained or appointed as appellate counsel, or until the time for appeal has expired without appeal being taken.

Dated this 29th day of April, 1993.

Attorney

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State of Wisconsin
Supreme Court
Appeal No. 2010AP001702

State of Wisconsin,

Plaintiff-Respondent,

v.

Abraham Negrete,

Defendant-Appellant-Petitioner.

Review of an opinion of the Wisconsin Court of Appeals, District 2

Defendant-Appellant's-Petitioner's Reply Brief

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Argument

I. The State, in its brief, repeatedly and deliberately mischaracterizes the allegations of Negrete's motion to withdraw his plea in order to suggest that Negrete has not sufficiently alleged that the plea colloquy was deficient.

The State, for the first time during this appeal[1], is suddenly very anxious to persuade the Supreme Court that the allegations of Negrete's motion are facially insufficient to allege that the plea colloquy was defective (i.e. that the immigration warning was not given).[2] Both of the lower courts, though, found that Negrete's allegations in that regard were sufficient. Instead, the lower courts found that there was no issue of fact as to harmless error due to the existence of the plea questionnaire. Now, for the first time, the State deliberately mischaracterizes Negrete's allegations so as to suggest that he cannot remember *whether or not* the judge gave him the immigration warning.

In his motion to withdraw his guilty plea, Negrete alleged on page one that, "2. During the course of the plea colloquy the court did not inform Negrete, on the record, of the immigration

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[1] Before the Court of Appeals, the State's lead-off argument was that Negrete was guilty of laches; and, secondly, the State argued that because of the plea questionnaire, even if the trial court failed to give the immigration warning, it was harmless error. Now, for the first time on this appeal, the State is suddenly of the opinion that Negrete's motion is facially insufficient to allege that the plea colloquy was defective.

[2] That is, the State argues that Negrete has failed to raise an issue of fact as to whether the plea colloquy was defective in the first place.

consequences of his guilty plea." (R:25) This allegation of fact was supported by an attached affidavit-- signed under oath by Negrete-- that, "3. I do not recall the court, or my lawyer, ever telling me of this consequence of the plea." (R:25)[3] Finally, Negrete alleged that if he had known of the immigration consequences, he would not have pleaded guilty.

Taken as a whole, the meaning of these allegations is not really subject to dispute. Negrete does not recall his lawyer or the court *ever* having explained to him the immigration consequences; and, if they had, he would not have pleaded guilty. Based on these factual premises, Negrete concludes that during the course of the plea colloquy *the court did not inform him of the immigration consequences of the plea.*[4]

Nonetheless, in its brief, the State repeatedly mischaracterizes the allegations of Negrete's motion. The State writes that, "Negrete has not satisfied the first *Bangert* element. He did not allege the circuit court failed to fulfill its plea colloquy duties; instead, he 'do[es] not recall' *if the court did so or not* (25:1)." (emphasis provided; State's brief p. 7)

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[3] Indisputably, Negrete did *not* allege that he cannot recall "if" the judge gave him the warning. Rather, he alleged that he cannot recall the judge "ever" giving him the warning. The meaning of Negrete's affidavit is very different than what the State claims it to be

[4] The trial judge understood it this way. In his memorandum decision the trial judge wrote, "The Defendant alleges that during the course of the plea colloquy on April 29, 1992, the Honorable Leo F. Schlaefer failed to advise the Defendant on the record of the immigration consequences of his guilty plea." (R:29) Similarly, the Court of Appeals found that, "We accept for the purpose of discussion Negrete's claims that the court did not properly advise him, that no transcript was be had and that deportation is likely." (Court of Appeals opinion p. 3). Thus, the State's interpretation of Negrete's affidavit that has Negrete not recalling "if" the judge gave him the warning "or not" is a new invention of fact before the Supreme Court.

In Negrete's motion and affidavit, there was no "if". There was no "did so or not." The ambiguous language provided by the State suggests that Negrete leaves open the possibility that the judge did, in fact, give him the immigration warning, but that he simply does not remember it. As mentioned above, this is not at all the meaning of the allegations in Negrete's motion. This is a patent misrepresentation of the facts of this case.

The misrepresentation is made so repeatedly that one cannot avoid the inference that it must have been deliberate. For example, several pages later, the State writes, "Unlike Baker, Negrete has not alleged the circuit court erred; he just claims he cannot remember. A lapse of memory on the part of a defendant should not translate into an assumption of circuit court error." (State's brief p. 8).

Plainly-- and contrary to the State's assertion-- Negrete alleged that he was not given the immigration warning during the plea colloquy. Both of the lower courts found the allegations in this regard to be sufficient, but decided the issue on the harmless error rule, not on whether the allegations of Negrete's motion were facially sufficient.

II. Under the former law, the burden is on the State to establish harmless error and, here, there is plainly an issue of fact as to whether Negrete understood the immigration consequences.

There is probably a very good reason for the State's new

theory before the Supreme Court; and its enthusiasm in attempting to persuade the Court that Negrete's motion failed to allege sufficient facts to establish that the plea colloquy was defective in the first place. It is because if the plea colloquy was, in fact, defective, then the burden to establish harmless error shifts to the State.

Under the former law:

> A defendant who seeks to withdraw a guilty plea on the basis that the trial court allegedly failed to follow the mandated procedures for accepting a guilty plea must make a prima facie showing that the trial court failed to follow the necessary procedures. *State v. Bangert*, 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986). Additionally, the defendant must allege that he or she "did not know or understand the information which should have been provided at the plea hearing." Id. Where the defendant makes the required prima facie showing, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered despite the inadequacy of the record from the hearing at which the plea was accepted. Id.

State v. Issa, 186 Wis. 2d 199, 204-205 (Wis. Ct. App. 1994), overruled by, *State v. Douangmala,* 2002 WI 62, P31 (Wis. 2002).

Perhaps in recognition of the difficulty in proving that the error here was harmless, the State's lead-off argument before the Court of Appeals was that Negrete was guilty of laches in bringing the motion. Despite the fact that the Court of Appeals called the laches argument a "sound argument", laches has

been utterly abandoned by the State before the Supreme Court.[5]

This is almost certainly because, in the situation presented by this appeal, laches is not, in fact, a very sound argument. A motion under Sec. 971.08(2), Stats. is not ripe unless and until the defendant becomes the subject of immigration proceedings based on the conviction. Thus, in this case, Negrete brought the motion as soon as he possibly could.

If there is difficulty for the State in proving, eighteen years later, that the error was harmless, it is the fault of the federal government. It is not Negrete's fault.

Dated at Milwaukee, Wisconsin, this _____ day of December, 2011.

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[5] The decision of the Court of Appeals was based on harmless error, and the State does not address that claim in its brief, either.

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 983 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

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

Dated this _____ day of _____, 2011:

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
IN SUPREME COURT

No. 2010AP1702-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ABRAHAM NEGRETE,

Defendant-Appellant-Petitioner.

NON-PARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Washington County Circuit Court, the Hons. Leo F. Schlafer and Andrew T. Gonring, Presiding

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No. 2010AP1702-CR

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NON-PARTY BRIEF OF THE WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

ARGUMENT

The issue presented for this Court's review is:

> Where, many years after a criminal conviction, a person becomes the subject of immigration proceedings based on that conviction, does the fact that the transcript of the plea hearing is no longer available mean that a motion, pursuant to Wis. Stats. § 971.08(2) (failure of court to advise, on the record, a defendant of an immigration warning) cannot be granted?

Wisconsin Supreme Court, Table of Pending Cases (November 11, 2011) at 13.

In the court of appeals, the state argued that the doctrine of laches barred Negrete's motion to withdraw his plea, filed 18 years after he entered it. While finding that the state had made "a sound argument," A-App. C at 3, the court of appeals opted to address Negrete's claim on the merits.

Although the state has abandoned its laches argument here, the Wisconsin Association of Criminal Defense Attorneys (WACDL) addresses it to remove any doubt that the doctrine of laches does not apply to the type of motion to withdraw a plea at issue in this case.

The Doctrine of Laches Can Never Apply to Motions to Withdraw a Plea Pursuant to WIS. STAT. §971.08(2)

WIS. STAT. §971.08(1)(c) requires the court to personally advise the defendant that his guilty or no contest plea could have immigration consequences. But if the court fails to so advise the defendant, the legislature has crafted a remedy that allows the defendant to withdraw his plea if he can show "that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial or naturalization…" WIS. STAT. §971.08(2). The doctrine of laches, an equitable remedy, can never apply to a legal remedy such as this.

There are two types of remedies: legal and equitable. This has a historical basis because at common law there were two types of courts: courts of law and courts of equity. The development of the American legal system, however, eliminated the two distinct courts and created a system based on a single court of general jurisdiction that has the power to provide both legal and equitable relief. *See* ***Tull v. United States***, 481 U.S. 412, 417-418 (1987).

The test for determining whether a remedy is legal or equitable is two-part. First, the Court compares "the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." ***Id.***

Equitable relief is only available if there is no available legal remedies. *See* ***State ex rel. Mayberry v. Macht***, 2003 WI 79, ¶2, 262 Wis2d 720, 65 N.W.2d 155 (habeas is an equitable remedy that only applies when no other remedy at law is adequate to provide relief). For example, if money damages will make a party whole in a contract dispute, then that legal remedy controls. However, where money damages are inadequate, then the equitable remedy of specific performance may apply.

Where there is no legal remedy and a party seeks equitable relief, the party defending against the imposition of the equitable remedy may seek to prevent the remedy by naming an equitable defense. Among those defenses is the doctrine of laches. ***Sawyer v. Midelfort***, 227 Wis.2d 124, 158, ¶74, 595 N.W.2d 423 (1999).

Laches prevents the plaintiff or appellant from pursuing their claim if three circumstances are met: (1) the defendant unreasonably delayed bringing the claim; (2) the state lacked knowledge the claim would be brought; and (3) the state suffered prejudice as a result of the delay. ***Coleman v. McCaughtry***, 2006 WI 49, ¶¶28-29, 290 Wis.2d 352, 714 N.W.2d 900. The burden on each prong is on the party asserting the laches defense. ***Midelfort***, 227 Wis2d at 158.

Thus, the courts have held that the state may rely on the defense of laches in habeas claims, a procedure seeking equitable relief, but may not rely on it, for example, against a defendant's post-conviction motion filed pursuant to WIS. STAT. §974.06, a procedure seeking legal relief. ***State v. Evans***, 2004 WI 84, ¶35, 273 Wis.2d 192, 682 N.W.2d 784 ("unlike §974.06 motions, a habeas petition under Knight is subject to the doctrine of laches because a petition for habeas corpus seeks an equitable remedy"), *citing* ***Smalley v. Morgan***, 211 Wis.2d 795, 800, 565 N.W.2d 805 (Ct. App. 1997) (the doctrine

of laches applies to habeas petitions because habeas petitions seek an equitable remedy).

WIS. STAT. §971.08(2) builds into it the remedy that a person is entitled to if the court fails to provide the immigration warnings it is required to provide. Thus, there is a legal remedy — vacation of "any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea." WIS. STAT. §971.08(2). Laches is inapplicable, for no other reason, than the fact that the statute provides a legal remedy. Because there is no equitable relief available to the defendant, the state cannot assert an equitable defense.

But that is not the only reason laches can never apply to motions filed pursuant to WIS. STAT. §971.08. In every guilty plea hearing, an attorney for the state is present. Thus, the state would have the same knowledge as the defendant as to whether the Court complied with the requirements of WIS. STAT. §971.08(1)(c). Where the court failed to comply with that section, the state accordingly would be on notice that a defendant will likely be filing a motion should the defendant later face deportation as a result of the plea. This means that, in these cases, the state could never satisfy the second part of the test for laches — that it lacked knowledge the claim would be brought. By its very presence at the plea hearing, the state is on notice from the moment the court fails to give the required warnings laid out in WIS. STAT. §971.08(1)(c) that the defendant likely will file a motion to withdraw it if he or she later should face deportation due to the plea.

The language of WIS. STAT. §971.08(2), permitting the defendant to file a motion to withdraw his plea upon the facing deportation, provides notice to the state in the same way that this Court held that WIS. STAT. §802.05(3)(b) provided notice to a petitioner that his case could be

dismissed *sua sponte* for failure to state a claim. *See* ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, 263 Wis.2d 83, 664 N.W.2d 596.

In ***McCaughtry***, petitioner Leslie Schatz filed a petition for writ of certiorari for review of three disciplinary decisions he received at Waupun Correctional Institution. ***Id.*** at ¶3. The circuit court *sua sponte* dismissed his petition for failure to state a claim pursuant to WIS. STAT. §802.05(3)(b). ***Id.*** at ¶4. The statute did not require the court to give the petitioner notice or an opportunity to respond prior to dismissing the petition based on a failure to state a claim. ***Id.*** at ¶17. The language of the statute, the Court held, "expressly puts prisoners on notice that a circuit court will examine the initial pleading and may, without further briefing or hearing on the matter, dismiss the complaint if the court determines that the initial pleading fails to state a claim." ***Id.*** at 31.

Similarly, the specific language of WIS. STAT. §971.08(2) warns that if the court fails to properly advise the defendant and the conviction may later result in deportation, the defendant may file a motion to vacate the plea. Such constructive notice defeats the requirements of a laches defense.

CONCLUSION

The equitable defense of laches can never apply to motions filed pursuant to WIS. STAT. §971.08 because laches is A defense only to an equitable remedy. Section 971.08, however, provides a legal remedy. In any event, even if the defense of laches did apply, the state could never meet it because the very language of WIS. STAT. §971.08(2) puts the state on notice that a defendant may seek relief in situations in which the court does not provide the required immigration notice and the defendant is facing deportation.

For these reasons, WACDL respectfully asks that this Court reject any suggestion that laches may provide a defense to the legal remedy provided by WIS. STAT. §971.08(2).

Dated at Milwaukee, Wisconsin, January 5, 2012.

Respectfully submitted,

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of the brief is 1,507 words.

Amelia L. Bizzaro

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

Amelia L. Bizzaro

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 5th day of January 2012, I caused 22 copies of the Non-Party Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin, 53701-1688.

Amelia L. Bizzaro