SUPREME COURT OF WISCONSIN

Appeal Nos. 2014AP678-CR
2014AP679-CR
2014AP680-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.
MELISA VALADEZ,
Defendant-Appellant.

On Certification from the Wisconsin Court of Appeals, District II, After Appeal from the Circuit Court of Walworth County, the Honorable David M. Reddy Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT MELISA VALADEZ

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ISSUES PRESENTED

I. How definite or imminent must deportation, denial of naturalization, or denial of admission, be, in order for it to be "likely," such that a defendant may withdraw a guilty or no contest plea on the basis that he or she was not informed of the immigration consequences at the plea colloquy?

The Circuit Court held that the defendant had not become subject to deportation proceedings, and therefore, could not withdraw her pleas.

The Court of Appeals certified the issue to the Supreme Court.

II. If, in order to withdraw the plea, the defendant must show that deportation proceedings are underway, how does this standard fit in with the time limits for a motion to withdraw the plea?

The Circuit Court did not address the issue.

The Court of Appeals certified the issue to the Supreme Court.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a review of an order of the Hon. David M. Reddy, Circuit Court Judge, Walworth County, presiding, which was entered on February 28, 2014, and which denied Defendant Melisa Valadez' motions to withdraw her guilty pleas to controlled substance charges entered in three separate cases nearly ten years earlier.

It is undisputed that the circuit court which accepted defendant's guilty pleas failed to provide the required immigration warning under Wis. Stats. Sec. 971.08. It is also undisputed that, as a consequence of the convictions, she is presumptively deportable, cannot legally be naturalized (technically not an automatic bar to naturalization but very likely), cannot renew her Legal Permanent Resident Card, nor can she be legally allowed to reenter the country should she leave and attempt to return.

However, to date, she has suffered no concrete adverse action such as deportation, exclusion from admission or denial of naturalization. The State argued, and the circuit court agreed, that, under the Wisconsin Supreme Court's opinion in *State v. Negrete*,

2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749, Valadez' claim for plea withdrawal is not ripe for adjudication, and must be denied.

On March 19, 2014, Valadez filed a timely notice of appeal, and the parties briefed the case.

On January 21, 2015, the Court of Appeals certified the above issues to the Supreme Court. On March 16, 2015, the Supreme Court accepted certification of the appeals.

B. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Statement of Facts

The facts were not disputed at the circuit court level, and are set forth in Valadez' brief in support of her motion to withdraw her pleas as follows (all citations are to the Index of Circuit Court Record for Appeal No. 2014AP680-CR):

Defendant Melissa Valadez is a Legal Permanent Resident of the United States. She must renew her LPR status every ten years. (R.14; pps. 1, 4).

In 2004, Valadez was charged with and pleaded guilty to Possession of Cocaine and Possession of THC in Case No. 04CM245 and Possession of Drug Paraphernalia in Case No. 04CM257. In 2005, Ms. Valadez was charged with and pleaded guilty to Possession of THC as a Repeater in Case No. 05CF83. (R.14; p.1).

The Court, in all cases, conducted a plea colloquy with Valadez, but did not include the immigration warning required by sec. 971.08(1)(c). (R.14; pps. 1; 5-39).

Valadez' deportation is presumptively mandatory as a consequence of the convictions, pursuant to Immigration and Naturalization Act § 237(a)(2)(A)(v), which states that "Any alien at any time after admission has been convicted of a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana." (R.14; p. 1).

Valadez also cannot travel outside the country as she will not be admitted back into the United States with these convictions. INA §212(a)(2)(A)(i)(II) states that one cannot enter (or re-enter) the United States if he or she has been convicted of, makes a valid admission of having violated, or has conspired to violate "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." (R.14; p.1).

If Valadez were to apply for Naturalization as a citizen, she would have her biometrics taken, and likely be subject to Immigration Court Removal Proceedings given that her criminal

background would be available to Immigration and Customs Enforcement. (R.14; p.2).

Since her convictions in these cases, Valadez has successfully completed her sentence, she had three U.S. citizen children, and has had no further contacts with police. (R.17; p.1).

Procedural History

Valadez, now the mother of three United States citizen children, is in an Immigration "no-mans" land. She is unable to renew her LPR Card, seek naturalization, or leave and reenter the country. Any action she would take would require her biometrics to be taken and alerting ICE as to her convictions. Further raising the stakes for Valadez is that if and when ICE institutes proceedings—Valadez would be subject to mandatory immigration detention under INA 236(c)—for which there is no discretion or opportunity for bond. Therefore, she would be detained in Immigration and Customs Enforcement Custody, away from her children, while her case plays out in the Federal Immigration Courts. Living under the constant prospect of being separated from her young children, Valadez filed a motion to withdraw her guilty pleas in these cases, pursuant to *State v. Douangmala*, 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1. (R-13; R-14).

The State conceded that Valadez met the first prong of *Douangmala* – that she did not receive the required warning. However, the State contended that Valdez failed to show that she is now subject to actual immigration proceedings, and therefore, she failed to meet her burden under the *Negrete* opinion. (R.15; p.2).

The parties engaged in further briefing and oral arguments on the issue at two hearings.

Ultimately, the circuit court held that, because Valadez was not facing any imminent immigration proceedings, she failed to meet the second requirement, and denied the motions. (R.24; pps. 11-12).

Valadez appealed, and the case is not before the Supreme Court upon its acceptance of certification of the appeal by the Court of Appeals.

STANDARD OF REVIEW

Review is de novo. Whether a defendant is entitled to withdraw her guilty plea pursuant to Wis. Stat. sec. 971.08(2) is a question of statutory interpretation that the court reviews

independently of the circuit court." *State v. Negrete*, 2012 WI 92, 343 Wis. 2d 1, 13, 819 N.W.2d 749, 755.

ARGUMENT

I. VALADEZ IS ENTITLED TO WITHDRAW HER GUILTY PLEAS, EVEN THOUGH DEPORTATION IS NOT AUTOMATIC OR IMMINENT BECAUSE THE OPINION IN *NEGRETE* DOES NOT REQUIRE SUCH A SHOWING, AND EVEN IF IT DID, VALADEZ' INABILITY TO LEAVE AND REENTER THE COUNTRY IS A SUFFICIENT BASIS FOR PLEA WITHDRAWAL.

On its face, Wis. Stats. Sec. 971.08(2) clearly and unambiguously requires that Valadez be allowed to withdraw her guilty pleas.

Subsection (1)(c) provides that, before a circuit court can accept a guilty plea, it must 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 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 County or a denial of naturalization under federal law."

It is undisputed that this warning was not given. Subsection (2), in turn, 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."

Unlike many of who seek to vacate their plea under §971.08, by claiming to be "deportable," Valadez can lay claim to being denied on all three of those immigration consequences §971.08 proposes to warns defendants. Therefore, it is important to examine the Federal immigration laws as they pertain not only to deportability, but also admission and denial of naturalization.

Granted, because of these convictions, Valadez is presumptively deportable. However, because she is a Legal Permanent Resident, and has been for more than 5 years she would be able to obtain citizenship, but for these convictions. Further, and perhaps most unequivocal, is that if she were to leave the United States, she absolutely could not and would not be readmitted.

Deportability and Admissibility

The Immigration and Nationality Act sets forth those qualifications for when a person is "Admissible" to the United

States. INA §212. It also has a separate section for when an individual is "Removable" from the United States. INA §237. Those who have never been formally admitted to the United States, though they are present, are governed by rules of admissibility.

Those who have been formally admitted, and remain in the United States are subject to the laws of removability. However, once an individual leaves the United States and attempts to reenter, that person is governed by the laws of admissibility—regardless of whether they are Legal Permanent Residents, or non-immigrant visa holders.

Admissibility. Federal immigration law is clear and unequivocal that a person with Valadez' controlled substance convictions can never reenter the United States if she leaves. Immigration and Nationality Act sec. 212(a)(2)(A)(i)(II) holds that entry is prohibited if the person has been convicted of "any law or regulation of a State, the United States, or a foreign county relating to a controlled substance."

Thus, if Valadez were ever to visit family in Mexico, or visit any other country, not only is it "likely" that she would be denied reentry, it is an absolute certainty.

Removability. Valadez is also subject, at any time, to deportation.

INA sec. 237(a)(2)(B)(i) provides,

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

This is the same statute that was at issue in the U.S. Supreme Court opinion in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010). Furthermore, pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(II), in 1996, Congress eliminated discretionary relief from deportation for controlled substance convictions such as Padilla's and Valadez'. As with Padilla, Valadez' removal is not just likely, but "removal is practically inevitable." *Padilla*, 559 U.S. at 363.

This Court recently held that an alien in Defendant's position is not "automatically deportable," but that her deportation is "presumptively mandatory." *State v. Shata,* 2015 WI 74, -- Wis.2d --, -- N.W.2d -- (July 9, 2015).

To date, however, Valadez has been fortunate in that removal proceedings have never actually been instituted against her. Nor has she left the country. Nor has she applied for naturalization or

renewal of her LPR card. Nevertheless, her current position is untenable.

As Valadez argued in the circuit court,

> "Valadez is in a very precarious situation. She has three young children and is subject to arrest by ICE at any time. She also cannot leave the United States and she will not be allowed to be readmitted. She cannot apply for citizenship or renew her Green Card, for she will risk being subject to mandatory detention after she has complied with the mandatory background checks. She was not warned by the Court of the immigration consequences of her plea and she can demonstrate that she is 'likely' to be removed, denied admission as well as denied citizenship. She cannot leave the country, because she will not be readmitted. She will eventually have to try to renew her LPR status, undergo a criminal background check, and be subject to removal proceedings. And she cannot apply for Citizenship, because she will again be subject to a criminal background check and be determined removable and place[d] in removal proceedings."

Despite the clear and unambiguous language of sec. 971.08(2), the issue is complicated by subsequent court decisions. A brief review of the history of how criminal law and immigration intersect is necessary to understand the issue.

Historically, all immigration consequences of criminal convictions were considered collateral, and thus, wholly irrelevant to the entry of a guilty or no contest plea.

Nevertheless, the Wisconsin legislature sought to alleviate the harshness of persons entering guilty pleas unaware of the immigration consequences, by enacting Wis. Stats. Sec. 971.08(1)(c) and (2).

In 2002, this Court gave teeth to the statute, by holding that the statute unambiguously does not require the defendant to show prejudice; that is, he need not show that, had he received the warning, he would not have entered his plea. *State v. Douangmala*, 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1.

In 2010, the United States Supreme Court changed the landscape by holding in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), that a defense attorney's performance could be defective for failure to advise his client of immigration consequences. Padilla was, like Valadez, charged with a controlled substance offense that made his deportation presumptive. Even a cursory review of the immigration statutes would have revealed this to his counsel. Nevertheless, his counsel told him he was not likely to be deported.

Inasmuch as *Padilla* involved an ineffective assistance of counsel claim, and not the Wisconsin statute at issue, it is not directly relevant. But it is indirectly so, as this Court has twice held

that sec. 971.08(1)(c) and (2) are a codification of *Padilla*. *State v. Shata*, par. 66; *State v. Negrete,* 343 Wis.2d 1, par. 34 n. 12.

Negrete was decided in 2012. Negrete sought to withdraw his guilty plea to one count of second-degree sexual assault of a person under the age of 16 years. He alleged that he did not receive the warning required by sec. 971.08(1)(c). However, this Court found that he failed to make the requisite showing that he did not receive the warning. *Negrete*, at par. 35.

Although this Court could have stopped there, nevertheless, the court went on to address whether Negrete was able to show that he was likely to be deported. The court found that he failed to meet this burden.

This Court held as follows:

> To comply with the *Bentley*-type pleading standard in the context of Wis. Stat. § 971.08(2), a defendant may set forth the crime of conviction, the applicable federal statutes establishing his potential deportability, and those facts admitted in his plea that bring his crime within the federal statutes. In so doing, 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; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered *A defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for*

the requisite nexus. *Id.* (emphasis added). *Negrete*, at par. 37.

Finally, on July 9 of this year, this Court issued its opinions in *Shata*, and in *State v. Ortiz-Mondragon*, 2015 WI 73. In *Ortiz-Mondragon*, this Court held that the defendant, who pleaded no contest to a felony battery, failed to show that his attorney rendered defective performance under *Padilla*, even though his attorney did not tell him that his deportation was automatic. In *Shata*, this Court made the same holding, although Shata had pleaded guilty to a felony controlled substance offense, just as in *Padilla*.

Shata is the more relevant case to the case at bar. In *Shata*, this Court agreed that he was presumptively deportable, as is Valadez; in *Ortiz-Mondragon*, the defendant failed to make that showing.

ON THE ISSUE OF DEPORTABILITY

Boiled down to the essence, the question in this case is whether Valadez is entitled to withdraw her pleas, notwithstanding paragraph 37 in *Negrete*, and this Court's rejection of Shata's argument that his felony drug conviction made him "automatically deportable." The answer is yes.

Negrete is distinguishable for several reasons.

The facts in *Negrete* were radically different from those in the case at bar. First, no transcript of the plea hearing in Negrete's case was available. *Id.*, 343 Wis.2d at 7. He alleged only that he "did not recall" whether he received the warning. *Id.,* at 6.

Thus, the court held that Negrete failed to meet the first requirement -- proving that he was not given the necessary warning. *Id.*, 343 Wis.2d at 24.

More importantly, Negrete supplied nothing to show that he was actually subject to any immigration consequences, but only mere speculation about the nexus. The court wrote, "Bare allegations of possible deportation are insufficient." *Id.*, 343 Wis.2d at 18.

In contrast, Valadez has provided much more. Her convictions may not make her deportation "automatic," as this Court held in *Shata.* Nevertheless, she is "presumptively deportable." "Presumptively deportable" is obviously greater than "likely," the term used in the statute. As a matter of common usage, if a person can show that she is "presumptively deportable,"

then she has, by definition, shown that she is "likely" to be deported.

In rejecting Valadez' motion, the circuit court relied on paragraph 37 of *Negrete*, but ignored the final sentence.

> A defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for the requisite nexus. *Negrete,* at par. 37.

In contrast, in the case at bar, there is no speculation required. If Valadez seeks naturalization or renewal of her LPR status, it will be denied and she will be deported. If she leaves the country and attempts to reenter through lawful channels, she will be excluded from admission.

Also, in paragraph 37, this Court consistently used suggestive and permissive, rather than mandatory, terminology.

This Court says: "a defendant may set forth the crime of conviction…"; "a defendant may submit some written notification…"; "a defendant may narrate verbal communications…" At no point did this Court say that, in the absence of written notification or verbal communications from immigration authorities, she necessarily fails to meet her burden.

It is undisputed that Valadez has set forth that her crime of conviction makes her presumptively deportable, without the possibility of cancellation, and is automatically ineligible for admission to the country.

Admittedly, she has not received written or verbal communications that deportation proceedings have been commenced. However, the court's suggestive, rather than mandatory, choice of language, means that this is not dispositive of her motion.

The final sentence of paragraph 37 makes clear that the earlier statements in the paragraph do not apply to the case at bar, in which there is no speculation required about the nexus between Valadez' convictions and her being subject to deportation, or denial of entry.

Furthermore, the defendant in *Negrete* argued the case, as if sec. 971.08 referred only to deportation, and not other immigration consequences such as denial of reentry.

This Court wrote, in paragraph 36 of the opinion, immediately prior to the language on which the State and circuit court place all their reliance, as follows:

> "The second pleading requirement for motions under Wis. Stat. sec. 971.08(2) is that a defendant must allege that the plea at issue 'is likely to result' in one of the enumerated immigration consequences. To this end, Negrete's motion states the offense for which he entered the plea ('second degree sexual assault of a child') and alleges that 'Negrete is now the subject of deportation proceedings.' …" *Id.*, at par. 36.

Valadez, in contrast, has no so limited herself. Deportation is not the only enumerated consequence that entitles a defendant to plea withdrawal. Exclusion from admission to the country is another.

This Court in *Shata* made abundantly clear that the defendant's deportation as a consequence of his drug conviction was not "automatic," but only "presumptive." This Court correctly noted that the government must take many positive actions before deportation can occur. *Shata*, at pars. 59-60.

Exclusion of admission, however, is automatic. Were Valadez to leave the country, there is, quite simply, no possible way that she could legally reenter.

INA §212(a)(2)(A)(i)(II) states that one cannot enter (or re-enter) the United States if he or she has been convicted of, makes a valid admission of having violated, or has conspired to violate "any

law or regulation of a State, the United States, or a foreign country relating to a controlled substance."

Among the crimes that make a person categorically inadmissible to the country are "Persons who have been convicted, *or who admit* having committed, or who admit committing acts that constitute the essential elements of a violation of or conspiracy to violate any law or regulation of a state, the U.S., or a foreign country relating to a controlled substance as defined in 21 U.S.C. 802, 8 U.S.C. 1182(a)(2)(A)(i)(II).(emphasis in original)." Kurzban's Immigration Law Sourcebook, Chapter 3, section III.C.2.a., p. 108 (Fourteenth Edition, 2014).

In contrast to deportation, denial of admission is not merely presumptive; it is automatic. No positive steps are required on the part of the government to effect exclusion from admission. No action or inaction on the part of the Attorney General can result in admission. There is no discretion; there is no right to due process; there is no reviewability. The difference between deportation and exclusion from admission is akin to the difference between positive and negative rights.

Denial of naturalization presents a somewhat different picture. Paradoxically, although Valadez' deportation is

presumptive, and reentry to the country should she leave is categorically impossible, there is no specific statutory bar prohibiting naturalization.

Nevertheless, as a practical matter, naturalization is also impossible. A Guide for Immigration Advocates, 17th Edition, Volume 2, 17-20 (Immigration Legal Resource Center, 2010), contains the following warning:

> "**WARNING:** ***Beware of applying for naturalization for clients who fall within the grounds of deportability, even if they can show good moral character.*** *In the course of investigating the naturalization application the CIS might discover those things*. Needless to say, if this happens, your client's application could be denied, and the CIS or ICE could place her in removal proceedings where a judge might take away her green card and remove her….(emphases in original)."

In short, given Valadez' convictions, applying for naturalization would be futile; it would not only result in denial, but would almost certainly result in "removal proceedings," even if deportation itself is not automatic.

This Court's concern in *Negrete* was that the defendant failed to show any nexus between his guilty plea and the immigration consequences. In contrast, Valadez has eliminated any speculation regarding the nexus. Valadez' deportation is presumptive; if she

leaves the country, denial of admission is automatic; and seeking naturalization is the equivalent of self-deportation. Accordingly, *Negrete* is distinguishable.

Shata is also distinguishable. As this court correctly noted in *Shata*, by enacting sec. 971.08(1)(c) & (2), the legislature codified the protections contemplated in *Padilla*. *Shata*, at par. 66. In fact, it does much more. A defendant seeking plea withdrawal under the statute need not show defective performance by his attorney or prejudice. Under the plain language of the statute, even if a defendant knew his plea made him presumptively deportable, he can still withdraw his plea if any of the three enumerated immigration consequences is likely.

Furthermore, *Shata* discusses only deportation. There is no discussion of denial of admission.

Finally, Valadez and Shata stood in very different positions when they sought to withdraw their respective pleas. Valadez has completed serving her sentences; she is seeking only to avoid the immigration consequences of her pleas.

In contrast, Shata sought to withdraw his plea as a consequence of receiving a higher sentence than agreed to in the plea agreement. His motion, if it had been granted by the circuit

court, would have relieved him of both the immigration consequences of his plea, and his criminal consequences, as well.

Padilla, and its progeny, such as *Shata*, because they involve ineffective assistance claims, relieve a defendant of the direct criminal consequences of his plea. Section 971.08, in contrast, is intended to relieve defendants of the collateral immigration consequences.

Accordingly, Valadez is entitled to withdraw her pleas, pursuant to sec. 971.08(1)(c) and (2), notwithstanding paragraph 37 in *Negrete*, or this Court's discussion of *Padilla* in *Shata*.

In conclusion, as discussed, the practical effect is Valadez in the ultimate "no man's land" for which there are no real options—her LPR Card has expired, she cannot leave the country and she cannot apply for naturalization. If Court does not allow Valadez to withdraw her plea she is left with the following options as the single mother of three young children. First, she can do nothing and live every day knowing that an ICE official could be at your door when you wake up or leave the house—and every contact with law enforcement, even if for one's own protection, could lead to ICE detention and ultimate removal. Never obtain a driver's license, or any other benefit for which proof of LPR status is required. All

while knowing that ICE's initiation of removal proceedings will mean that you will be ICE detention for the entire duration of your proceedings. Second, apply to renew your Legal Permanent Resident Card, of which you know the Department of Homeland Security will conduct biometrics and criminal background check and discover the "presumptively mandatory" offenses. This action will certainly result in the initial of removal proceedings and your mandatory detention throughout the process. Third, submit an application for Naturalization, for which you will again have biometrics taken and for which DHS will be alerted to the deportable offenses—whereby again you will be detained throughout the Immigration Court proceeding and without the prospect of relief. Finally, leave the country, without any prospect of returning to the United States to live and raise your three children for the rest of their lives.

Further, if Valadez's motion is denied by this Court, there is the practical effect of how Ms. Valadez is to file her plea withdrawal while in ICE custody.

Or, in there is the practical consequence of those who leave the country and seek admission from a point of entry—there is no practical means of requesting a plea withdrawal while outside the

United States with the idea of successful re-entry. Potentially, one may argue that one could hire an attorney to assert she has been denied entry into the United States. However, upon plea withdrawal, the prosecutor may simply choose to continue the prosecution of the case, knowing full well that the alien will not be allowed re-entry into the United States—because of the pending charges. Such was the case in *State v. Mendez*, 2014 WI App 57, 354 Wis.2d 88, 847 N.W.2d 895. Mendez sought to withdraw his plea based on *Padilla*; while the case was pending before the Court of Appeals, Mendez was removed/deported from the United States by the Department of Homeland Security. Ultimately, upon the Court of Appeals remanding the case to the Circuit Court, and upon the Circuit Court granting Mendez's plea withdrawal, the District Attorney's office continued with the prosecution. Ultimately, Mendez was not able to re-enter the United States because of a pending drug delivery charge and open bench warrant.

Though Mendez won his appeal, his victory is hollow. He has been deemed inadmissible and unable to return to the United States and defend himself on those charges.

II. VALADEZ IS ENTITLED TO WITHDRAW HER PLEAS, NOTWITHSTANDING THE TIME LIMITS IN WIS. STATS. SECS. 809.30 AND 974.06.

In the circuit court, and in the court of appeals, the parties solely focused on whether or not the motion for plea withdrawal was ripe. In its certification to this Court, the court of appeals certified the question of whether the motion was untimely.

At issue is dicta from this Court's opinion in a procedurally complex case, *State v. Romero-Georgana*, 2014 WI 83, 360 Wis.2d 522, 849 N.W.2d 668.

Romero-Georgana pleaded no contest to first-degree sexual assault of a child in 2006, but did not receive the sec. 971.08(1)(c) warning. *Id.*, at pars. 8 and 9. He was sentenced to 12 years of initial confinement, and four years of extended supervision. *Id.*, at par. 11. Several weeks later, he received notice that INS was investigating whether he was subject to deportation. *Id.*, at par. 14.

Nevertheless, with a new attorney, he did not seek to withdraw his plea under sec. 971.08(1)(c). Instead, on appeal, he successfully obtained a new sentencing. *Id.*, at par. 18. On remand, with a third attorney, a different circuit court judge imposed a longer sentence: 20 years of initial confinement, and 8 years of extended supervision. *Id.*, at par. 20.

With a fourth attorney, Romero-Georgana filed a second postconviction motion claiming that his first postconviction attorney was ineffective for not advising him that substitution of judge on remand could result in the longer sentence. He did not claim postconviction counsel was ineffective for not raising the sec. 971.08(1)(c) issue. *Id.*, at par. 21.

The motion was denied; counsel filed a no-merit brief, which the court of appeals accepted, and this Court denied review. *Id.*, at par. 24.

Finally, in 2011, Romero-Georgana filed a third postconviction motion, this time alleging ineffective assistance on the part of his initial trial attorney and his first postconviction attorney. He alleged trial counsel was ineffective for failing to advise him of the deportation risk, and postconviction counsel was ineffective for not raising the sec. 971.08(1)(c) issue. *Id.*, at par. 25. The circuit court denied the motion, and the court of appeals held that the bar against successive postconviction motions barred the motion. *Id*, at pars. 27 and 28.

> This Court made several holdings in this case, but as is relevant to the case at bar, it held that the motion must be denied, because Romero-Georgano failed to allege that his second postconviction attorney was

> ineffective. This Court explained, "When a defendant has two attorneys that share the classification of 'postconviction counsel,' a general reference to 'postconviction counsel' is not enough. Romero-Georgana's third postconviction motion was bound to fail if it did not allege and explain why his second postconviction motion did not make the claim he now seeks to make." *Id.*, at par. 53.

This Court could have stopped there. "Having concluded that Romero-Georgana is barred from raising his current claims, we need not go any further. However, we will discuss briefly the insufficiency of Romero-Georgana's sec. 974.06 motion to provide guidance for future movants." *Id.*, at par. 54.

Among the issues this Court addressed, it addressed a contention by the dissent that the Court should have simply construed the sec. 974.06 motion as a sec. 971.08(1)(c) motion. In doing so, it issued the footnote that caused the court of appeals to certify this issue.

> Justice Bradley asked at oral argument, "Why does 971.08(2) have to be a 974.06 motion at all?" Romero–Georgana's counsel responded:
> I believe that it could have been raised as a straight 971.08(2) motion. As this court knows we were appointed … after the petition for review was filed and the case had been decided up to that point under 974.06 and we believe that our client is entitled to relief on that basis, and so that's how we've construed the motion and argued it.
> Chief Justice Abrahamson continued Justice Bradley's line of questioning and suggested that Romero–

Georgana could have pursued an argument based on Wis. Stat. § 971.08. The Chief Justice then asked, "But you didn't take that position?" Romero–Georgana's counsel responded, "It's true your honor. We did not." Thus, despite being prodded at oral argument, Romero–Georgana was clear: he is not asking this court to construe his Wis. Stat. § 974.06 motion as a Wis. Stat. § 971.08(2) motion. Indeed, such a request would appear improper under the facts of this case and in light of the history of § 971.08(2). In the 1981–82 version of the Wisconsin Statutes, § 971.08(2) contained a time limit that stated, "The court shall not permit the withdrawal of a plea of guilty or no contest later than 120 days after conviction." Wis. Stat. § 971.08(2) (1981–82). The 120–day time limit was repealed in 1983 Wis. Act 219. A judicial council note explained:

> Section 971.08(2), stats., providing a 120–day time limit for withdrawing a guilty plea or a plea of no contest after conviction, is repealed as unnecessary. Withdrawal of a guilty plea or plea of no contest may be sought by postconviction motion under s. 809.30(1)(f), stats., or under s. 974.06, stats.

Judicial Council Note, 1983 Wis. Act 219, § 43. The Judicial Council Note suggests that, in general, the proper method for raising § 971.08 plea withdrawal claims after conviction is through a motion under Wis. Stat. § (Rule) 809.30, Wis. Stat. § 974.02, or Wis. Stat. § 974.06.

In the present case, the notice that INS had started an investigation to determine whether Romero–Georgana was subject to deportation was dated March 20, 2007—four months before Attorney Hagopian filed the first postconviction motion. In addition, the petitioner's brief demonstrates that Romero–Georgana's Final Administrative Removal Order from the Department of Homeland Security was dated October 22, 2007, and he appears to have received it on November 5, 2007—almost a year and a half before he filed his second postconviction motion. When a defendant has notice that he is likely to be deported and subsequently brings postconviction claims unrelated to Wis. Stat. §

> 971.08(2), we think it would be unwise to allow him to bring his claim as a § 971.08(2) motion at a later time, although he may be able to bring his claim as a Wis. Stat. § 974.06 motion if he has a sufficient reason for the delay. Removing all time constraints on a Wis. Stat. § 971.08(2) motion would frustrate judicial efficiency by encouraging defendants to delay bringing those motions. In the absence of a time limit, if a defendant were indifferent to deportation or wanted to be deported, the defendant would have incentive to keep a § 971.08(2) motion in his back pocket while pursuing relief on other grounds. However, that issue is not before us. In this case, we need only address Romero–Georgana's motion under Wis. Stat. § 974.06 because that is the motion he brought. *Id.*, at par. 76, fn. 14.

There are two reasons why this footnote does not bar the motion in the case at bar. The first is that it can be distinguished on the facts. Romero-Georgana knew, four months before his first postconviction motion was even filed that ICE was investigating him for possible deportation. That alone is sufficient to distinguish the two cases.

More importantly, the dicta in footnote 14 is simply not compatible with either the plain text of the statute or any of the other cases this Court has issued that discuss sec. 971.08(2).

The Court of Appeals was spot-on in its certification, when it asked,

> "How would such a time limit fit in with the possible need to await actual deportation proceedings before moving to withdraw the plea? ... Is a Wis. Stat. sec. 971.08(2) motion doomed as premature when there are no deportation proceedings underway at the time of conviction, doomed as an ineffective assistance of postconviction counsel claim when there was no ripe claim to pursue, yet doomed as too late when a procedural time limit has passed prior to immigration proceedings being initiated. This may be a Catch-22 for the defendant who was not warned about immigration consequences in the first place."

Respectfully, this Court's dicta in footnote 14 cannot be reconciled with the statute or other well-considered precedent.. It not only belies the plain language of sec. 971.08(2), but would effectively defeat the entire purpose of the statute. Indeed, the express language of the statute only requires that the warning not be given, and that the defendant "later" shows that the plea is likely to have immigration consequences, then the defendant is entitled to withdraw his plea. This Court has already ruled in *State v. Douangmala*, 2002 I 62, par. 25, 253 Wis.2d 173, 183, 646 N.W.2d 1, 6 (2002), that the statutory language is plain. Since the statute does not contain any time limitation, there is none.

In fact, the State has previously conceded this very issue long ago. See *State v. Lagundoye*, 2003 WI App 63, par. 3, fn. 2, 260 Wis. 2d 805, 809, 659 N.W.2d 501, 503 (after trial court denied a

motion brought Wis. Stat. sec. 971.0S(2) as being untimely under Wis. Stat. sec. 974.06, the Court of Appeals did not entertain the issue "[g]iven the States's concession that Lagundoye's request should 'probably' be considered timely'').

If the Wisconsin legislature wanted a particular time limitation for a defendant to exercise his rights under Wis. Stat. sec. 971.08(2), then it could have easily written that requirement in the law. Instead, a defendant must only "later" show that the plea has caused adverse immigration consequences.

CONCLUSION

In this case, Valadez' convictions make her subject to presumptive deportation, permanently ineligible for admission, and makes a request for naturalization the equivalent of self-deportation. None of these consequences are speculative. Thus, her case is distinguishable from *Negrete.* Finally, the dicta in footnote 14 of *Romero-Georgana* is contrary to the plain language of the statute, inconsistent with well-reasoned precedent, and mutually exclusive with the ripeness requirement in *Negrete*.

Accordingly, Valadez respectfully requests that the Court reverse the holding of the circuit court, and order that she be entitled to withdraw her guilty pleas.

Dated this 5th day of August, 2015

_____

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,230 words.

Dated this 5th day of August, 2014

_____

David Ziemer

CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. SEC. 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. sec. 809.19(12).

I further certify that:

This electronic brief 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 the brief filed with the court and served on all opposing parties.

Dated this 5th day of August, 2014

_____

David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 5th day of August, 2015, I mailed 22 copies of the Brief of Defendant-Appellant Melisa Valadez to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688

_____

David Ziemer

APPELLANT'S BRIEF APPENDIX CERTIFICATION

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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 5th day of August, 2015

_____

David Ziemer

STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP678, 2014AP679 and 2014AP680

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELISA VALADEZ,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT II, FOLLOWING APPEAL FROM AN ORDER DENYING A POSTCONVICTION MOTION FOR PLEA WITHDRAWAL, ENTERED IN WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did the circuit court properly deny Valadez's motions for plea withdrawal because she had not established that her pleas were "likely" to result in her deportation, exclusion from admission to the country, or denial of naturalization under federal law?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting certification of this case from the court of appeals, this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT VALADEZ WAS NOT ENTITLED TO WITHDRAW HER PLEAS.

A circuit court's decision to grant or deny a motion to withdraw a guilty plea will stand on appeal unless it represents an erroneous exercise of the court's discretion. *State v. Thomas*, 2000 WI 13, ¶ 13, 232 Wis. 2d 714, 605 N.W.2d 836. The circuit court's exercise of discretion will be affirmed if the record demonstrates that the court correctly applied legal standards to the facts and came to a reasoned conclusion. *State v. Nawrocke*, 193 Wis. 2d 373, 381, 534 N.W.2d 624 (Ct. App. 1995).

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in "manifest injustice." *Thomas*, 232 Wis. 2d 714, ¶ 16; *see also State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish "manifest injustice," a criminal defendant must show a "serious flaw in the fundamental integrity of the plea." *Nawrocke*, 193 Wis. 2d at 379.

---

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

On a challenge to the plea colloquy itself, the defendant bears the initial burden to make a prima facie showing that the circuit court accepted the plea without satisfying its duties under Wis. Stat. § 971.08 or other mandatory procedures. *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *see also State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14. Generally, when a defendant demonstrates a prima facie violation and alleges that she did not know or understand critical information that the court should have provided at the time of the plea, "the burden will then shift 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 at the time of the plea's acceptance." *Bangert*, 131 Wis. 2d at 274.

Given the applicable statutory language and related case law, the analysis is different when the claimed deficiency in the plea colloquy relates to the circuit court's failure to address the immigration consequences of a defendant's plea.

Wis. Stat. § 971.08(1)(c) provides:

> (1) Before the court accepts a plea of guilty or 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 with which you are charged 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). In addition, however, subsection (2) states:

> 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.

Wis. Stat. § 971.08(2). This provision alters the standard plea withdrawal procedure and analysis under *Bangert* and eliminates the State's ability to assume the burden of proof and show that the defendant was otherwise aware of the immigration consequences of her plea. This court has made clear that if a defendant's motion for plea withdrawal demonstrates that the circuit court did not give the proper immigration warning and that the resulting plea is likely to result in the defendant's deportation, exclusion from admission to the country, or denial of naturalization, the defendant may withdraw her plea and enter a new one, irrespective of whether she was otherwise aware of such consequences. *State v. Douangmala*, 2002 WI 62, ¶¶ 22-25, 42, 253 Wis. 2d 173, 646 N.W.2d 1.

In this case, it is undisputed that the circuit court did not provide Valadez with the immigration warning pursuant to Wis. Stat. § 971.08(1)(c) at the time of her pleas. The plea transcripts show that it failed to do so (2014AP678:27; 2014AP679:25; 2014AP680:22).[2] The issue here is whether Valadez, who is not currently subject to any immigration proceedings, sufficiently established that her pleas are "*likely* to result in [her] deportation, exclusion from admission to this country or denial of naturalization[.]" Wis. Stat. § 971.08(2); *State v. Negrete*, 2012 WI 92, ¶¶ 26-27, 343 Wis. 2d 1, 819 N.W.2d 749. The circuit court correctly determined that she did not.

---

[2] In the absence of the transcripts, the plea withdrawal analysis would fall under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), not *Bangert*. *State v. Negrete*, 2012 WI 92, ¶¶ 29-33, 343 Wis. 2d 1, 819 N.W.2d 749.

Virtually all of the materials that Valadez submitted to the circuit court discuss a variety of statutes and related procedures that the federal government generally follows when and if it pursues enforcement action against a non-citizen (*see* 2014AP680:14; 16; 17). Her reliance on those materials is misplaced. What would happen to Valadez if she were subject to an immigration enforcement action, says nothing about whether she is likely to be subject to such an action.

In *Negrete*, this court explained:

> The second allegation that a defendant must make when seeking to withdraw a guilty or no contest plea under Wis. Stat. § 971.08(2) is that the plea "is likely to result in the defendant's deportation, exclusion from admission to this country[,] or denial of naturalization." This requires that the defendant allege facts demonstrating a causal nexus between the entry of the guilty or no contest plea at issue and the federal government's likely institution of adverse immigration actions consistent with § 971.08(1)(c). **Bare allegations of possible deportation are insufficient**.
>
> . . . Accordingly, to satisfy Wis. Stat. § 971.08(2)'s "likelihood" of immigration consequences requirement, a defendant may allege that: (1) the defendant pleaded guilty or no contest to a crime for which immigration consequences are provided under federal law; and (2) because of his plea, the federal government has manifested its intent to institute one of the immigration consequences listed in § 971.08(2), as to the defendant. **As alternatives, 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; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered.**

Negrete, 343 Wis. 2d 1, ¶¶ 26-27 (emphasis added) (footnote omitted).

The court added that in a motion for plea withdrawal pursuant to Wis. Stat. § 971.08(2):

> [A] defendant should allege that the federal government has conveyed its intent to impose one 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 his plea, the defendant has become subject to deportation proceedings, has been excluded from admission to the country, or has been denied naturalization.

Negrete, 343 Wis. 2d 1, ¶ 27 n.8.

Despite the opportunity to do so, Valadez failed to satisfy this requirement. At a December 20, 2013 hearing on Valadez's motion to withdraw her pleas, the State cited *Negrete* and pointed out that:

> There's been nothing provided to this point showing that the federal government has in any way manifested its intent [to take action against Valadez]. There are attachments [to her motion] showing other cases where this has occurred, but not this case, not this defendant.
>
> As -- the court goes on to indicate that as alternatives, the defendant can, may submit some written notification that they have received from a federal agent, they may narrate verbal communications that they have had with a federal agent showing consequences, such as those that she was to be apprised of.
>
> . . . .
>
> . . . *Negrete* doesn't necessarily require a guarantee, but it does require some evidence that the federal government is going forward. Something. Anything. It goes so far as to say that a defendant can narrate verbal communications with a federal agent.

> Unfortunately, Attorney Christopher has provided none of that along with his motion. He is, in fact, making bare allegations of possible deportation. I am in no way saying that it's not possible that this defendant could be deported or face one of the other consequences she was to be warned of. But that's exactly what *Negrete* says; that is not enough.

(2014AP680:23:3-5). Following the prosecutor's comments, the circuit court addressed Valadez's attorney:

> I have had a case like this before. Mr. Necci argued it. And what we ended up doing was giving the defense counsel an opportunity to speak with a federal agent, and come back and indicate the context of that discussion. I know his concern was that by having the discussion it would, therefore, create an investigation and actually lead to the results which he was trying to avoid. But he indicated that he was going to give that an opportunity or give it a shot, I suppose.
>
> So we are talking about the level of likelihood or the standard for likelihood, and as it relates specifically to [Valadez].
>
> So can you tell me, has your client received any communication or notification from the federal government?
>
> MR. CHRISTOPHER: Um, no. No she hasn't, Your Honor.

(2014AP680:23:5). With the court's permission, Valadez's attorney then agreed to contact an immigration agent about her situation and submit additional information by affidavit or testimony (2014AP680:23:10, 14).

On February 19, 2014, Valadez's counsel, Marc Christopher, filed supplementary materials with the court (2014AP680:17).[3] Once again, most of the documents address certain processes of immigration enforcement actions, but

[3] The supplemental filing, applicable to all three cases subject to this appeal, only appears in the record for 2014AP680.

not the likelihood that Valadez would be subject to any of those processes because of her convictions. Attorney Christopher's only effort to show that Valadez is likely to face adverse immigration consequences is by way of an email exchange between himself and Special Agent Ian House from the Department of Homeland Security (2014AP680:17:3-8). Those emails fall far short of the mark.

In one email, Attorney Christopher sent what he labeled as a confirmation of a telephone conversation he had with Special Agent House:

> Agent House,
>
> Thank you for taking the time to speak with me yesterday regarding my immigration enforcement questions. I am sending this email as a confirmation of our conversation.
>
> As you recall, my questions centered around the "likelihood" of immigration consequences of certain drug crimes in circuit court. Specifically an LPR [Legal Permanent Resident] who has been convicted of criminal 1. Felony possession of marijuana 2. Misdemeanor possession of marijuana and 3. Possession of Cocaine. Keeping in mind that each case is different, and we were speaking in generalities, you indicated that under current federal law, these crimes are removable crimes. If that alien is not placed in jail, they may not come under your attention. However, when that alien would apply to renew a green card or apply for citizenship, they would be required to have their fingerprints taken and their criminal record obtained. The immigration official would review any of their convictions for removability grounds. Again, understanding that each case is different, under these general facts, it would be likely that they would be denied renewal of LPR status and denied citizenship. Also, just to clarify, under federal law possession of cocaine and repeated possession of marijuana would be basis for removal, and could likely be subject to removal proceedings.
>
> The second issue we spoke about is that if an alien, with the same convictions listed above, would leave the country and attempt to return. Upon re-entry a

> returning alien is governed by the law of "admissibility" which requires that an alien cannot [be] admitted with certain criminal offenses. Upon re-entry a returning alien would be asked by a Customs and Border Patrol agent if they have ever been arrested for any reason. The alien would be required to tell the truth (or face removal on basis of untruthfulness). If the person indicated that they did, their criminal background would be investigated. If they had inadmissible convictions, such as possession of marijuana, or possession of cocaine, they would likely be detained at the border and remain in custody until they would assert some form of relief (if they had any).
>
> If anything is incorrect, or misstated, please let me know.
>
> Again, thank you for your help. And, of course, if you ever[] need anything from me, please feel free to call any time.

(2014AP680:17:5). None of Attorney Christopher's representations can be attributed to Agent House, particularly given his response:

> Hi Marc,
>
> As I stated before, any administration action in immigration court proceedings would follow any criminal sentence imposed by any level criminal or circuit court in the country. A judge's decision at sentencing should not be affected by whether or not the sentence handed down would raise or lower the level of a conviction to a remov[able] offense. A judge, as you mentioned, may be required to advise the defendant that the crime may make them removable from the US if they have not obtained US citizenship, but this should not bind the judge to set a specific sentence, whether harsh or lenient, based on the possibility of the lawful permanent resident being removed from the US.
>
> One thing I should mention is that if someone who is in removal proceedings leaves the country prior to the completion of the proceedings, they may be removed by the immigration judge in absentia. Also, if they are attempting to enter the country as a lawful permanent

> resident who is in removal proceedings, they may be denied entry into the US.
>
> Please let me know if you have any further questions.

(2014AP680:17:4). In his reply, Special Agent House did not acknowledge any part of Attorney Christopher's email. More important, he did not indicate in any way that Valadez is likely to face any immigration enforcement action because of her convictions. Even Valadez's attorneys appear to agree on this point.

When they were filed with the circuit court, the emails were attached to a sworn affidavit from Attorney Christopher (2014AP680:17:3-8). In his affidavit, Attorney Christopher did no more than attest to the validity and accuracy of the email exchange itself; he did not offer any additional information regarding his communication with Special Agent House, and he did not state that House advised him that Valadez was likely to face adverse immigration consequences based on her convictions (2014AP680:17:3). In addition, Attorney Christopher did not even mention his communications with Special Agent House at the final hearing on Valadez's motion for plea withdrawal (2014AP680:24:8-11).

On appeal, Valadez's attorney also does not claim that any of the information from Special Agent House establishes that Valadez is likely to suffer adverse immigration consequences based on her criminal record. Instead, he argues that Valadez should not be subject to *Negrete's* "likelihood" prong because, unlike the defendant in that case, Valadez has provided more detailed information about how the immigration process may proceed once the federal government has taken action against a non-citizen defendant. In doing so, counsel misreads *Negrete*.

It was not the lack of specificity regarding how immigration enforcement actions proceed that led this court

to conclude that Negrete had not sufficiently alleged that he was likely to be subject to adverse immigration consequences. It was his failure to show that he was likely to be deported because of his plea/conviction:

> The second pleading requirement for motions under Wis. Stat. § 971.08(2) is that a defendant must allege that the plea at issue "is likely to result" in one of the enumerated immigration consequences. To this end, Negrete's motion states the offense for which he entered a plea ("second degree sexual assault of a child") and alleges that "Negrete is now the subject of deportation proceedings." These bare allegations are insufficient to demonstrate that Negrete's "plea is likely to result in [his] deportation."
>
> To comply with the *Bentley*-type pleading standard in the context of Wis. Stat. § 971.08(2), a defendant may set forth the crime of conviction, the applicable federal statutes establishing his potential deportability, and those facts admitted in his plea that bring his crime within the federal statutes. In so doing, 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; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered. A defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for the requisite nexus.

Negrete, 343 Wis. 2d 1, ¶¶ 36-37 (citation omitted). The court then found that Negrete had "not satisfied the **two necessary requirements of Wis. Stat. § 971.08(2).**" *Id.* ¶ 38 (emphasis added).

Unlike Negrete, Valadez has satisfied the first requirement of Wis. Stat. § 971.08(2) by establishing that she "pleaded guilty or no contest to [crimes] for which immigration consequences are provided under federal law[.]" *Negrete*, 343 Wis. 2d 1, ¶ 27. Like Negrete, however, she has

not satisfied the second requirement by showing that she is likely to suffer adverse immigration consequences because of her pleas/convictions. *Id*. Contrary to Valadez's argument, the detail she supplied as to the first requirement does not obviate her obligation to fulfill the second. Based on her submissions, the circuit court properly concluded that Valadez failed to meet her burden under Wis. Stat. § 971.08(2) and *Negrete* (2014AP680:19; 24:11-12). This court should affirm that decision.

II. THERE IS NO RISK THAT DEFENDANTS MIGHT BE UNABLE TO SEEK RELIEF FOR VIOLATION OF WIS. STAT. § 971.08(2).

In its certification to this court, the court of appeals questioned whether a non-citizen defendant who did not receive a proper warning under Wis. Stat. § 971.08(2) might be barred from seeking plea withdrawal based on this court's decision in *State v. Romero-Georgana*, 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668. Specifically, the court of appeals referenced the following passage from that decision:

> In the present case, the notice that INS had started an investigation to determine whether Romero–Georgana was subject to deportation was dated March 20, 2007—four months before Attorney Hagopian filed the first postconviction motion. In addition, the petitioner's brief demonstrates that Romero–Georgana's Final Administrative Removal Order from the Department of Homeland Security was dated October 22, 2007, and he appears to have received it on November 5, 2007—almost a year and a half before he filed his second postconviction motion. When a defendant has notice that he [or she] is likely to be deported and subsequently brings postconviction claims unrelated to Wis. Stat. § 971.08(2), we think it would be unwise to allow him [or her] to bring his [or her] claim as a § 971.08(2) motion at a later time, although he [or she] may be able to bring his [or her] claim as a Wis. Stat. § 974.06 motion if he [or she] has a sufficient reason for the delay. Removing all time constraints on a Wis. Stat. § 971.08(2) motion would frustrate judicial efficiency by encouraging defendants to delay bringing those motions. In the absence of a time

> limit, if a defendant were indifferent to deportation or wanted to be deported, the defendant would have incentive to keep a § 971.08(2) motion in his [or her] back pocket while pursuing relief on other grounds. However, that issue is not before us. In this case, we need only address Romero-Georgana's motion under Wis. Stat. § 974.06 because that is the motion he brought.

Romero-Georgana, 360 Wis. 2d 522, ¶ 67 n.14.

Acknowledging that this court did not impose a time limit on § 971.08(2) motions for plea withdrawal, the court of appeals felt that the *Romero-Georgana* majority had strongly suggested that there should be one for all defendants with such claims. The above dicta, however, seems to be far more limited.

Romero-Georgana received notice of an immigration action against him four months before he filed the first of three successive postconviction motions. Nonetheless, he failed to bring his claim for plea withdrawal based on the circuit court's violation of Wis. Stat. § 971.08(2) until he filed his *third* postconviction motion, in which he raised the issue exclusively as a claim under Wis. Stat. § 974.06. The above discussion seems to represent the court's concern about a defendant who, with knowledge of a ripe claim based on violation of Wis. Stat. § 971.08(2), chooses to reserve that claim and instead pursue unrelated postconviction issues first. That situation not only seems unlikely, it certainly does not exist in this case.

Like many similar defendants, Valadez did not pursue additional postconviction relief beyond the motions underlying this consolidated appeal. Even if she had, however, her Wis. Stat. § 971.08(2) claims should not be barred later because they are not yet viable. As discussed above, Valadez was not able to present information sufficient to show that her pleas are, in fact, "*likely* to result in [her] deportation, exclusion from admission to this country or denial of naturalization[.]" Wis. Stat. § 971.08(2); *Negrete*, 343 Wis. 2d 1, ¶¶ 26-27. Absent the necessary proof, her

claim for relief is premature. So, if such proof only becomes available in the future, Valadez (and defendants like her) should be able to pursue Wis. Stat. § 971.08(2) claims at that time.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's decision denying Melisa Valadez's motions for plea withdrawal.

Dated this 25th day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,816 words.

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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 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 filed with the court and served on all opposing parties.

Dated this 25th day of August, 2015.

_____
Nancy A. Noet
Assistant Attorney General

SUPREME COURT OF WISCONSIN

Appeal Nos. 2014AP678-CR
2014AP679-CR
2014AP680-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MELISA VALADEZ,
Defendant-Appellant.

On Certification from the Wisconsin Court of Appeals, District II, After Appeal from the Circuit Court of Walworth County, the Honorable David M. Reddy Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT MELISA VALADEZ

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I. VALADEZ, A LEGAL PERMANENT RESIDENT, IS ENTITLED TO WITHDRAW HER GUILTY PLEAS BECAUSE WHEN SHE APPLIES FOR ADMISSION SHE WILL BE ABSOLUTELY INADISSIBLE TO REENTER THE UNITED STATES REGARDLESS OF WHETHER THE FEDERAL GOVERNMENT INITIATES REMOVAL PROCEEDINGS.

The State's brief absolutely ignores that 971.08(2), is not limited to deportation actions, but that it applies also to exclusion from admission and denial of naturalization. The act of initiating deportation procedurally is a much different legal and procedural than an individual applying for admission or naturalization. And, the standard the State seeks to adopt would make for 971.08(2) plea withdrawals, would make an actual plea withdrawal virtually impossible.

Thus, the State's argument ignores the basic laws and procedures governing immigration laws, at least as they pertain to admission. And, by doing so, seeks to implement an unworkable "one size fits" all standard for vacating judgments for all three immigration consequences enumerated in sec. 971.08(2).

In Valadez's case, in the context of admission, the glaring certainty is that not only does Valadez' plea make it "likely" that she would be excluded from admission to this country, it

guarantees it. Unlike, deportation, where the Immigration and Customs Enforcement seeks out those who are deportable, admission instead requires an individual to affirmatively apply to Customs and Border Patrol for the benefit as they enter into the United States.

What federal immigration law provides was fully set forth in the main brief; the State has made no attempt to refute that analysis; therefore, it need not be iterated in reply. However, the following additional discussion of the law is helpful to understanding the difference between deportation and exclusion of admission.

Prior to enactment of the IIRIRA in 1996, lawful permanent residents leaving and reentering the country were not deemed to be making a new "admission" to the United States. This was known as the *Fleuti* doctrine, after the case of *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

Under current law, however, Valadez could not leave the country and reenter under any circumstances. Current law provides:

> **(C)** An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--
> **(i)** has abandoned or relinquished that status,
> **(ii)** has been absent from the United States for a continuous period in excess of 180 days,
> **(iii)** has engaged in illegal activity after having departed the United States,
> **(iv)** has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
> ***(v)*** *has committed an offense identified in section 1182(a)(2)*[1] *of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or*
> **(vi)** is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer. 8 U.S.C. 1101(a)(13)(C) (emphasis added).

The controlled substance convictions that Valadez specifically fall within subsec. (v). The Immigration and Nationality Act provides no waivers to this law; there are no procedures in law to

[1] 8 USCA § 1182(a)(2)(A)(II) Criminal and Related Grounds, states "a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance is inadmissible."

seek admission with these convictions, and there is no "prosecutorial discretion" afforded to returning individuals who have committed such crimes. To be most simplistic, there is simply no possible way to be admitted to the country given her guilty pleas in these cases, period. This distinguishes this case from *Negrete*, in which the defendant did nothing more than allege he was subject to deportation.

Thus, Valadez has established, beyond any question, "a causal nexus between the entry of the guilty [pleas] at issue" and "adverse immigration actions consistent with sec. 971.08(1)(c)."

To hold that she cannot withdraw her pleas, solely because the federal government has not instituted exclusion of admission, when that is not something the federal government is even capable of doing, would be the equivalent of excising "exclusion of admission" as one of the enumerated consequences, and limiting sec. 971.08(1)(c) to deportation only.

The standard set forth by the State, whereby some manifestation of removability must be underway is absolutely unworkable for someone who is an Legal Permanent Resident and wishes to reenter the United States, or if someone wished to apply for naturalization. If the State's position were adopted by this

Court, the only way a defendant could seek relief under the admissibility portion of the statute would be to leave the country, attempt to reenter, and then seek to withdraw their plea, either from immigration custody or from another country. In such a scenario, however, it would not, at that point, be "likely" that the person would be denied admission. The person would have already been denied admission. If this were really what the legislature had intended, it would have specifically limited relief to persons already denied admission. It did not do so; it afforded relief to those "likely" to be denied admission. Accordingly, this portion of the statute must be construed to provide relief to persons who, like Valadez, because of their conviction, are certain not to be readmitted were they ever to leave. Any other construction would make relief illusory, and thus, unreasonable.

The State sets forth paragraphs 26 and 27 from *State v. Negrete*, 2012 WI 92, 343 Wis.2d 1, 819 N.W.2d 749, and later, paragraphs 36 and 37. Both passages purport to set forth the legal standard for meeting the second requirement under sec. 971.08(2). However, the two sets of paragraphs are not identical—and not workable for someone in Valadez's place.

Paragraphs 26 and 27 are problematic, in that they set forth a standard which can only be applied, where the defendant, like Negrete, only contends that he is likely to be deported. This Court spoke in paragraph 26 of the "the federal government's likely institution of adverse immigration actions." The problem with this choice of words is that, outside of the deportation context, the federal government does not, and cannot, institute exclusion from admission or denial of naturalization. Both of these consequences require, instead, that the alien initiate action, either by seeking naturalization, or by leaving the country and then seeking to reenter. Read literally, the penultimate sentence in paragraph 26 forecloses a defendant from ever being able to withdraw his guilty plea under two of the three enumerated immigration consequences. The federal government will never be "likely" to institute exclusion of admission or denial of naturalization. Both circumstances depend on the alien initiating action; and once done, will be *fait accompli*, not "likely."

The second sentence of paragraph 27 suffers from the same problem. It states that a defendant may show likelihood of immigration consequences if "the federal government has manifested its intent to institute one of the immigration

consequences listed in sec. 971.08(2).” To iterate, the federal government does not, and cannot, “institute” exclusion from admission. To be excluded, an alien must *affirmatively* present themselves for admission. And, in the case of Valadez, they will be denied.

Paragraphs 36 and 37, although similarly worded to paragraphs 26 and 27, do have the virtue of setting forth a standard that Valadez and other aliens can plausibly satisfy if the logic is extended to naturalization and admission.

Paragraph 37 provides:

> To comply with the *Bentley*-type pleading standard in the context of Wis. Stat. § 971.08(2), a defendant may set forth the crime of conviction, the applicable federal statutes establishing his potential deportability, and those facts admitted in his plea that bring his crime within the federal statutes. In so doing, 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; or, a defendant may narrate verbal communications that the defendant has had with a federal agent advising that adverse immigration consequences were likely and that such consequences were tied to the crime for which the plea was entered *A defendant's motion should not require the circuit court or a reviewing court to speculate about the factual basis for the requisite nexus. Id.* (emphasis added). *Negrete*, at par. 37.

In the case at bar, Valadez set forth the crimes of conviction, and the applicable federal statutes establishing both deportability, and exclusion from admission to the country. In contrast to Negrete, who put forth "bare allegations" that he is subject to deportation, Valadez set forth the applicable federal statutes that make legal readmission to the country an absolute impossibility, and deportation a certainty, if proceedings were ever instituted.

This Court continued, in paragraph 37, to set forth means with which a defendant "may" show that he is likely to face immigration consequences. Nothing in this passage, however, sets forth a mandatory requirement that a defendant must show.

Indeed, if it had, such a requirement would be unreasonable. The statute gives a defendant the right to withdraw her guilty plea if she can show that she is likely to face one of three enumerated immigration consequences. The statute does not require, nor could it reasonably be interpreted to require, that a defendant find a "friendly" federal agent willing to help her withdraw her plea.

The State, in its brief, sets forth the entirety of communications between defense counsel Marc Christopher and Special Agent Ian House. The passage is a red herring. The exchange itself shows how unreasonable it would be to read the

language in paragraph 37 as providing a requirement, rather than a suggestion.

First, the confirmation sent by Attorney Christopher to Agent House is indisputably correct in its legal analysis. At no point in this case has the State ever contended otherwise.

Second, Agent House did not provide a responsive reply. Instead, the email discusses the duties of the sentencing judge in state court. It also discusses situations not applicable to Valadez – someone leaving the country while in removal proceedings. If Valadez were in removal proceedings, it is undisputed that she would be absolutely entitled to withdraw her pleas. Agent House's reply was simply unresponsive to Attorney Christopher's request.

Third, it would be an absurd interpretation of the statute to say that, merely because a defendant cannot find a federal immigration agent willing to help her withdraw her plea, therefore, she cannot. It is not the job of a federal ICE agent to give advisory opinions to aliens seeking to remain in the country.

Finally, imposing such a requirement would ignore the division of labor among departments concerned with immigration. ICE agents, such as Agent House, deal strictly with deportation. Exclusion from admission, in contrast, is wholly within the

province of the United States Customs and Border Protection. Denial of naturalization lies with the United States Citizenship and Immigration Services (CIS).

It does not, and cannot, matter, whether Agent House confirmed that the law, as set forth in Attorney Christopher's email, is correct. The law as set forth in the email is correct; it states exactly what federal immigration law provides.

II. VALADEZ IS ENTITLED TO WITHDRAW HER PLEAS, NOTWITHSTANDING THE TIME LIMITS IN WIS. STATS. SECS. 809.30 AND 974.06.

It appears that the Wisconsin Court of Appeals, the State, and Valadez, are all in agreement that the dicta in *State v. Romero-Georgana,* 2014 WI 83, 360 Wis.2d 522, 849 N.W.2d 668, quoted by the Court of Appeals in its certification, is incompatible with both the statute, and with *Negrete*, however this Court may apply *Negrete* to the case at bar. For the reasons put forth in Valdez' main brief, it is appropriate for the Court to either withdraw the footnote at issue, or limit it to the very complicated facts in that case.

CONCLUSION

In conclusion, Valadez is in an immigration "no-mans land." Since her 2004 and 2005 convictions, she has not had any criminal contacts, she has settled down and became the mother of 3 young United States citizen children. Only when she went to visit an immigration attorney to renew her LPR card, did you realize the severe consequences of her convictions.

Legally, she is still a Legal Permanent Resident, but she cannot renew her LPR card to demonstrate her status to her employer or to obtain a driver's license. More anguishing for her is living in constant fear that at any time a Federal Immigration and Customs Enforcement Agent may knock on her door and institute removal proceedings against her. Also, knowing that, if they do, because of her convictions, she will be relegated to mandatory detention during any removal proceeding—away from her young family. See 8 USC §1236(c). Also, she knows that she cannot leave the United States, because she will forever denied admission back into the United States. 8 USC

It is undisputed that Valadez did not receive the immigration warning as required in sec. 971.08(1)(c). And, given that her convictions came pre-*Padilla*, the US Supreme Court

case requiring attorneys to warn of the immigration consequences of their plea, she was not even so much as informed of the dire immigration consequences of her plea.

For Valadez, her options are few. She can continue to live like she has, in constant fear of being arrested, placed in removal proceedings, during which time she will be in ICE custody. She can apply to renew her Legal Permanent Resident Card, of which would require her to undergo Federal biometrics background check and be placed in removal proceedings. She can leave the United States with her three young United States citizen children, knowing that she will never be allowed to return. Or, she can seek to withdraw her plea—as she has done here.

Sec. 971.08(2) states that if a defendant shows that it is "likely" to result in "deportation, exclusion from admission to this country or denial of naturalization, the court. . .shall vacate any applicable judgment…" Here Valadez, has directly and unequivocally demonstrated how these convictions are not just likely to result in her denial of admission, but how it is an absolutely certainty. She has outlined for the Court exactly how this will happen, what specific and direct federal laws apply to her, how the laws will be enforced on her, and by what agencies.

It is true that there is a chance, albeit small, that ICE will never initiate removal proceedings against her. However, when she affirmatively applies for admission, there is no such chance she will be admitted.

The State did not refute any of Valadez's argument with regard to her being denied admission, because it cannot do so. Instead, asks this Court to ignore the admissibility laws and procedures and put in place an unpractical and unworkable procedure that will virtually eliminate "admission" as a basis to withdraw a plea under sec. 971.08(2).

Accordingly, Valadez respectfully requests that the Court reverse the holding of the circuit court, and order that she be entitled to withdraw her guilty pleas.

Dated this 8th day of September, 2015

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David Ziemer

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Dated this 8th day of September, 2015

_____
David Ziemer

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. 809.80(4) that, on the 8th day of September, 2015, I mailed 22 copies of the Reply Brief of Defendant-Appellant Melisa Valadez to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688

_____

David Ziemer