STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1983-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIKA LISETTE GUTIERREZ,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY WAGNER, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Although this case involves the application of some well-established legal principles, the State ultimately is seeking to overturn a related decision of the Wisconsin Supreme Court. For that reason, oral argument and publication of any decision by this Court may be warranted.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

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

On April 9, 2010, Erika Lisette Gutierrez was charged with eight counts of child abuse for repeatedly placing her infant son, J.G., in respiratory distress by putting her hand over the baby's nose and mouth and sometimes pinching the baby's nose shut. (2.) At the time, Children's Hospital was treating J.G. for possible seizures, and the hospital was monitoring him by video and audio. (2:3.) The hospital's video recordings captured what Gutierrez did to J.G., and the criminal complaint detailed her actions with specific references to the recordings. (2:4-5.)[2]

Gutierrez underwent two mental health examinations to assess whether she met the criteria to support a plea of

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

[2] The fifth and last page of the criminal complaint appears to be missing from the record. (2.) Because page 4 lists so many of Gutierrez's actions, along with references to the related video recording, the omission does not appear to be material to this appeal. (2:4.)

not guilty by reason of mental disease or defect, Wis. Stat. § 971.16. (7; 15; 18.) The psychiatrists who examined Gutierrez, Dr. John Pankiewicz and Dr. Robert Rawski, reached different conclusions about her mental responsibility for her actions. (15:6, 9; 18:6-8, 19.) In his report, Dr. Pankiewicz relied very little on the videotape of Gutierrez repeatedly covering her son's mouth and causing him to fall into respiratory distress. (15:6, 9; 92:30-35; 94:20-21.) Dr. Rawski, however, relied very heavily on the recording. (18:6-8, 19; 93:24-27, 36, 94:3-11, 14-15, 19-21.)

Gutierrez pleaded guilty to four of the eight counts against her in the first phase of trial,[3] and then chose a court trial for the second phase to determine whether she was mentally responsible for her crimes. *See* Wis. Stat. § 971.165(1)(a).[4] (87:7; 88; 92.)

During Gutierrez's plea colloquy, the circuit court advised her:

> THE COURT: You also understand if you're not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization?
>
> INTERPRETER: Yes.

(87:4.)

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[3] The remaining four counts were dismissed and read in for sentencing purposes. (87:2; 34.)

[4] When a defendant enters a plea of not guilty by reason of mental disease or defect (sometimes called a plea of "not guilty by reason of insanity" or "NGI"), Wisconsin law provides that "there shall be a separation of the issues with a sequential order of proof in a continuous trial." Wis. Stat. § 971.165(1)(a). The guilt phase is determined first, and the mental responsibility phase is determined second. *Id.* The mental responsibility phase is triggered only if the defendant is found guilty during the first phase. Wis. Stat. § 971.165(1)(d).

There was no discussion of the hospital video or how the video might be used in the remaining phase of the trial, and when the court asked Gutierrez whether anyone had made any promises or threats to get her to plead guilty, she replied, "No." (87:6.)

After the court accepted Gutierrez's pleas, the prosecutor addressed the possible immigration consequences of the pleas:

> [PROSECUTOR]: The only other thing I would ask today. I know immigration has been a big concern for Ms. Gutierrez. And I believe there is case law that says not only should the court look for any possible consequences of a criminal conviction but defense counsel also has the obligation to discuss those consequences with the defendant.
>
> Since I know that there is a concern in this case, I would just ask that defense counsel make a record as to not necessarily the substance of their conversation but that she did have those conversations.
>
> [DEFENSE COUNSEL]: And I can do that. I did discuss with Ms. Gutierrez the possible consequences from immigration that could result from the plea.

(87:10.)

At a separate hearing, Gutierrez waived her right to a jury trial for the mental responsibility phase of the case. (88.) There was no discussion of the hospital videotape during the waiver colloquy, and when the circuit court asked Gutierrez whether anyone had made any promises or threats to get her to waive the jury, she replied, "No." (88:4.)

At the court trial to determine whether Gutierrez was mentally responsible for her crimes, both of the experts who examined Gutierrez testified. (92.) Dr. Pankiewicz testified in support of Gutierrez's special plea, and the prosecutor asked him a series of questions about the video recording of Gutierrez's crimes. (*See* 92:30-35.) Dr. Pankiewicz acknowledged that the recording captured Gutierrez doing a

number of things that indicated her actions were purposeful and designed to avoid detection, which implied both some knowledge on her part that she was doing something wrong and some ability for her to control her behavior. (92:30-35.)[5]

Dr. Rawski testified for the State. (93:18-38; 94:3-58.) Dr. Rawski noted that Gutierrez's case was unique because it was the only one of the 800 criminal responsibility evaluations he has done in which he was able to witness the criminal behavior on video. (93:24-25.) And the video was helpful to Dr. Rawski's analysis because it allowed him to see what actually happened instead of forcing him to rely on the subjective reports from Gutierrez or other witnesses. (93:25-26.)

Dr. Rawski explained that the recording showed "a pattern of six episodes" and that "there appears to be a clear pattern of opportunistic attempts at suffocating the baby while avoiding detection." (93:27.) Dr. Rawski went on to detail the events depicted in the videotape and how those events led him to conclude that "it shows us her behavior during a period of which she retrospectively attributes that behavior to increasingly incredulous motives."[6] (93:36; *see* 94:3-11, 14-15, 19-21, 37-39, 55-56.)

Dr. Rawski testified that the videotape was "a very important piece of information," and that Dr. Pankiewicz did not watch it before preparing his written report on Gutierrez's mental responsibility. (94:20.) Even though Dr. Rawski specifically mentioned the recording to him, Dr.

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[5] A defendant is not responsible for her criminal conduct "if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." Wis. Stat. § 971.15(1).

[6] Gutierrez initially denied any wrongdoing, but then began attributing her actions to various auditory hallucinations. (*See* 93:27-35; 94:3-6.)

Pankiewicz did not review it until after he wrote his report, and he did not address the recording in either his original or a subsequent report. (94:20-21.)

When the State sought to introduce the actual video, Gutierrez's attorney objected because she did not believe the State's proposed witness could properly authenticate it. (95:4-6.) Defense counsel acknowledged that the recording was relevant to how both of the psychiatrists who examined Gutierrez formed their conclusions about her mental state, but then argued that it would be unfairly prejudicial because it might cause "confusion of the issues" and vilify Gutierrez in the eyes of the court. (95:7-8.) The court disagreed and proceeded to watch the video following testimony and further argument to authenticate it. (95:9-25.)[7] Afterward, defense counsel recalled Dr. Pankiewicz to address the video and Dr. Rawski's related testimony. (95:30; 96:3-15.)

Ultimately, the circuit court found that although Gutierrez suffered from a mental disease or defect at the time she attempted to suffocate her son, it did not prevent her from appreciating the wrongfulness or her behavior or

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[7] The court also asked defense counsel about the timing of her motion in limine to exclude the witness's testimony and the video:

> Why was [the motion] just dropped off this afternoon before we started this, this afternoon? And if you are going to test the foundation of it, then why didn't you just tell the DA about it before today's date?
>
> [DEFENSE COUNSEL]: You know, as I was thinking about the case last night, these issues came up. And so it wasn't something that I wanted – was just delaying, in order that – to use that as a tactic.

(95:10.)

Defense counsel said absolutely nothing about advising Gutierrez that the video would never be shown to the court if she pleaded guilty in phase one, or the State's alleged promise not to introduce the video if Gutierrez waived the jury for phase two.

from conforming her conduct to the requirements of the law. (98:4.) The court eventually sentenced Gutierrez to a total of twelve years of initial confinement and eight years of extended supervision. (34.)

On May 12, 2014, Gutierrez filed a motion to withdraw her pleas. (66.)[8] Gutierrez argued that she should be permitted to withdraw her guilty pleas because: (1) the circuit court failed to provide her with a proper immigration warning pursuant to Wis. Stat. § 971.08(1)(c), (2) the court's viewing of the hospital video was a "collateral consequence" that rendered her pleas involuntary because she believed her pleas would prevent the court from seeing the video, (3) her attorney was ineffective because she mistakenly advised Gutierrez that the court would not see the video during the mental responsibility trial, and (4) she was entitled to a new trial in the interest of justice. (66.)

On August 11, 2014, the circuit court issued a written decision and order denying Gutierrez's motion. (74.) Gutierrez appeals.

ARGUMENT

I. Gutierrez is not entitled to withdraw her pleas.

A. The circuit court's immigration warning was sufficient under Wis. Stat. § 971.08(1)(c) and *Mursal*.

Wisconsin Stat. § 971.08(1)(c) requires circuit courts to warn criminal defendants of the possible immigration consequences associated with their pleas:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> . . . .

[8] Gutierrez previously filed a similar motion, but her attorney at that time withdrew from the case. (50; 52; 53; 55.)

> (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 of admission to this country or the denial of naturalization, under federal law."

Wis. Stat. § 971.08(1)(c).

Despite this statutory mandate, circuit courts are not required to recite the statutory warning verbatim:

> [I]mplementing the rule Mursal proposes would lead to plea reversals in cases where, as here, the warning wholly complied with the substance of the statute. "If a *verbatim* reading of the statute were required, the *even mistaking one word* in the statute, no matter how inconsequential … would create a defect which would require the court to withdraw the plea." (Emphasis added). We decline to fashion such a rule.
>
> In the case before us, the statute's purpose – to notify a non-citizen defendant of the immigration consequences of a criminal conviction – was undoubtedly effectuated, and the linguistic differences were so slight that they did not alter the meaning of the warning in any way; therefore, we conclude that the trial court did in fact properly warn Mursal of the consequences of his plea pursuant to Wis. Stat. § 971.08(1)(c). Because the trial court substantially complied with the mandate of § 971.08, Mursal is not entitled to withdraw his plea.

State v. Mursal, 2013 WI App 125, ¶¶ 19-20, 351 Wis. 2d 180, 839 N.W.2d 173. So, as long as the circuit court's warning complies with the substance of statute, inconsequential linguistic differences from the exact wording of the statute do not matter. *Id.* ¶ 20.

In *Mursal*, this Court found that the circuit court properly advised the defendant of the immigration consequences of his plea when it said this:

> You … need to know if you're not a citizen of the United States, your plea can result in deportation, exclusion from admission to this country or denial of naturalization under federal law. Do you understand all that, sir?

Mursal, 351 Wis. 2d 180, ¶ 4.

Here, the circuit court's immigration warning was almost the same:

> THE COURT: You also understand if you're not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization?

(87:4.)

The one difference was that the court in this case said "exclusion" instead of "exclusion from admission to this country." That difference, however, did not alter the meaning of the immigration warning. *Mursal*, 351 Wis. 2d 180, ¶ 20. The substance of the statutory language is that non-citizen defendants may be (1) sent out of the country, (2) kept out of the country, or (3) prevented from being a citizen. *See* Wis. Stat. § 971.08(1)(c). The circuit court's immigration warning to Gutierrez sufficiently communicated all three.

B. Even if the court's immigration warning failed to comply with Wis. Stat. § 971.08(1)(c) and *Mursal*, the record does not support Gutierrez's claim for plea withdrawal.

Even if a court fails to give a proper immigration warning, a defendant must show that her plea is *likely* to result in at least one of the listed immigration consequences

before she is entitled to withdraw her pleas. Wis. Stat. § 971.08(2).[9] Gutierrez has not made that showing.

In her motion for plea withdrawal, Gutierrez alleged that:

> [Her] crime appears to be one involving moral turpitude because it was a crime in which bodily harm was caused or threatened by an intentional act. Further, she was convicted of two or more offenses of any type and received an aggregate prison sentence of 5 years or more. Therefore, her crime could prevent her from being able to obtain lawful admission status in the U.S. and her plea is likely to result in deportation as soon as she is done serving her sentence.

(66:4-5.)

The allegations are not just conclusory, Gutierrez did not even cite to any applicable law or documentation indicating that the federal government intended or had initiated any adverse immigration against her. (66:4-5.) Instead, she simply cited a single page printout entitled "Immigration Consequences of Crimes Summary Checklist." (66:19.) The printout invites users to visit the Immigrant Defense Project website "[f]or more comprehensive legal resources," and it indicates that it was "[l]ast updated January 2013." (66:19.) Gutierrez's conclusory allegations

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[9] Wis. Stat. § 971.08(2) reads:

> 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.

regarding her possible deportation or inadmissibility are insufficient to establish that she is *likely* to face those consequences, as required by Wis. Stat. § 971.08(2).

Regarding possible deportation, Gutierrez was required to demonstrate that the federal government manifested its intent to initiate a deportation (removal) action against her. *State v. Negrete*, 2012 WI 92, ¶¶ 26-27, 343 Wis. 2d 1, 819 N.W.2d 749. She still has not done so. Her bare allegation that her deportation is likely is insufficient. *Id.*[10]

And her claim regarding admissibility does not fare any better following our supreme court's recent decision in *State v. Valadez*, 2016 WI 4, 366 Wis. 2d 332, 874 N.W.2d 514. In *Valadez*, the defendant was able to establish that her pleas made her likely to be excluded from admission to the country in part because her drug convictions were explicitly listed in the federal statutes as offenses that render defendants inadmissible. *See Valadez*, 366 Wis. 2d 332, ¶ 33 n.16 (lead opinion of J. Abrahamson and J. Ann Walsh Bradley). The same is not true of Gutierrez's convictions, which she asserts are "crimes involving turpitude."

As the supreme court explained in another recent immigration case, "the amorphous term 'crime involving moral turpitude' is not defined, [and] it is even more problematic to ascertain whether a particular crime would qualify as a crime involving moral turpitude." *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 41, 364 Wis. 2d 1, 866 N.W.2d 717 (citation omitted). The court also noted that "'[t]he

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[10] The Wisconsin Supreme Court's decision in *State v. Valadez*, 2016 WI 4, 366 Wis. 2d 332, 874 N.W.2d 514, did not change this rule of law regarding claims based on the possibility of deportation. *Valadez*, 366 Wis. 2d 332, ¶ 36 (lead opinion of J. Abrahamson and J. Ann Walsh Bradley) and ¶ 64 (J. Ziegler and J. Gableman, concurring in part and dissenting in part).

current state of the case law for crimes involving moral turpitude is presently in a state of flux. . . .'" *Id.* ¶ 43 (quoted source omitted). Gutierrez's crimes *may* constitute crimes involving moral turpitude, but her reference to a one-page summary checklist from 2013 does not support that conclusion.[11] The circuit court correctly denied her motion for plea withdrawal, and this Court should affirm that decision.

II. Should Gutierrez prevail under current law, she most likely will be permitted to withdraw her pleas even though she knew the possible immigration consequences when she entered them.

A. Introduction.

Before the United States Supreme Court decided *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010), almost all state courts and federal courts of appeals held that a defense attorney's failure to advise a client of the possible immigration consequences of a plea did not provide a basis for an ineffective assistance claim. So for many years, Wisconsin's statutory immigration warning, Wis. Stat. § 971.08(1)(c), was the only required immigration-related information that noncitizen defendants received before entering their pleas. And the warning became especially important in 1996 when one of the more dramatic changes in federal immigration law made removal from the United States virtually automatic for noncitizens who committed

[11] The same is true for Gutierrez's claim regarding the number of her convictions and the aggregate sentence she received. (*See* Gutierrez's Br. 15.) The claim *may* be accurate, but the argument and proof provided in Gutierrez's submissions are insufficient to establish that.

applicable crimes.[12] "While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time [] expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation." *Padilla*, 559 U.S. at 360.

On the heels of these sweeping changes in federal immigration law, our supreme court decided *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. *Douangmala* parted with long-standing precedent for plea withdrawal motions and held that a plea withdrawal motion based on a circuit court's failure to provide the statutory immigration warning was not subject to the harmless error rule. In other words, defendants who did not receive the statutory warning could withdraw their pleas even if they

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[12] When it passed the Immigration Act of 1917, "[f]or the first time in our [nation's] history, Congress made classes of noncitizens deportable based on conduct committed on American soil." *Padilla V. Kentucky*, 559 U.S. 356, 361 (2010) (citation omitted). The Act "authorized deportation as a consequence of certain convictions," but it also included a procedure, known as a judicial recommendation against deportation ("JRAD"), which allowed a sentencing court to make a recommendation that a noncitizen defendant not be deported. *Id.* A JRAD was binding on the executive branch and prevented deportation. *Id.* at 361-62. So "[e]ven as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis." *Id.* at 362.

"However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it [.]" *Padilla*, 559 U.S. at 363 (footnote omitted) (citation omitted). "In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation[.]" *Id.* (citation omitted). So if a noncitizen commits a removable offense after the 1996 effective date of these amendments, his removal from the country is "practically inevitable[.]" *Id.* at 363-64 (citing 8 U.S.C. § 1229b).

were fully aware of the possible immigration consequences when they entered the pleas. *Id.* ¶ 42. While this extreme result may have made sense given the legal landscape at that time, it doesn't any longer.

Padilla created a new rule of law that now requires defense attorneys to give their clients accurate advice about the immigration consequences associated with their pleas. *See Padilla*, 359 U.S. at 368-69; *see also Chaidez v. U.S.*, 133 S.Ct. 1103, 1113 (2013). The requirement of affirmative legal advice not only serves noncitizen defendants far better than the statutory warning, it provides a related remedy for plea withdrawal. So defendants who do not receive proper legal advice can withdraw their pleas based on the ineffective assistance of counsel.

The problem is that *Douangmala* permits a defendant who *does* receive accurate legal advice about the immigration consequences of his plea to withdraw the plea simply because the circuit court failed to read the statutory warning. In light of *Padilla*, *Douangmala* should be overturned to reinstate application of the harmless error rule in cases where circuit courts fail to provide the statutory immigration warning, Wis. Stat. § 971.08.[13]

[13] Only our supreme court can overrule, modify or withdraw language from a previous supreme court case. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 255-56 (1997). That said, this Court is not powerless if it determines that a decision of the court of appeals or the supreme court may be erroneous. *Id.* at 190. Among other options, this Court may choose to certify the appeal to our supreme court, perhaps with an explanation about why a prior case may have been wrongly decided. *Id.* Based on its argument in this case, the State believes that certification to the supreme court is warranted. Wis. Stat. § (Rule) 809.61.

B. The statute.

On April 24, 1986, Wis. Stat. § 971.08(1)(c) became effective, adding an immigration advisory provision to the general plea withdrawal provisions already in place. 1985 Wis. Act 252, §§ 3 and 4. The amended statute then read, in relevant part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
>
> (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,[14] the exclusion from admission to this country or the denial of naturalization, under federal law."

Wis. Stat. § 971.08(1)(a)-(c) (1985-86).

In addition, a new subsection (2) provided the following remedy for a court's failure to provide the immigration warning required by Wis. Stat. § 971.08(1)(c):

> 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

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[14] Federal statutes most often refer to deportation as "removal." The terms are used interchangeably in the *Valadez* decision and in this memorandum.

> 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) (1985-86).

All of these provisions remain unchanged today. *See* Wis. Stat. § 971.08(1)(a)-(c) & (2) (2013-14).

C. Historically, pleas withdrawal claims based on a court's failure to give the statutory warning were treated just like other claims for plea withdrawal and subject to the harmless error rule.

In 1993, the court of appeals first addressed the unique nature of a motion for plea withdrawal based on a court's failure to give the immigration warning, as opposed to other violations under Wis. Stat. § 971.08. *State v. Baeza*, 174 Wis. 2d 118, 496 N.W.2d 233 (Ct. App. 1993). In *Baeza*, the defendant sought to withdraw his guilty plea because the circuit court failed to give him the statutory immigration warning. *Baeza*, 174 Wis. 2d at 121. Citing *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986), Baeza argued that a prima facie showing of a violation of Wis. Stat. § 971.08(1)(c) shifted the burden to the State to prove that the plea was entered knowingly and voluntarily despite the violation. *Baeza*, 174 Wis. 2d at 123. The court of appeals rejected that argument because (1) Wis. Stat. § 971.08(1)(c) was not in effect when *Bangert* was decided and (2) Wis. Stat. § 971.08(2) provided a specific remedy for a court's failure to give the immigration warning prior to accepting a plea. *Id*. at 125.

Later that same year, however, the court held that a court's failure to provide a proper immigration warning under Wis. Stat. § 971.08(1)(c) was subject to the harmless error rule. *State v. Chavez*, 175 Wis. 2d 366, 371, 498 N.W.2d 887 (Ct. App. 1993). In *Chavez,* the defendant argued that he

was entitled to withdraw his plea even though he knew the potential immigration consequences of his plea at the time he entered it. *Chavez*, 175 Wis. 2d at 369. First noting that *Baeza* was limited to cases in which a defendant did *not* know the immigration consequences of his plea, *Chavez*, 175 Wis. 2d at 369-70 n.1, the court went on to address the interaction between Wis. Stat. § 971.08 and Wisconsin's harmless error statute, Wis. Stat. § 971.26, which generally provides that the validity of a criminal proceeding is not affected by a defect in form that does not prejudice the defendant.[15]

Because the statutes created an ambiguity when read together, the *Chavez* court relied on the history of Wis. Stat. § 971.08, which demonstrated that "the legislature sought to alleviate the hardship and unfairness involved when an alien *unwittingly* pleads guilty or no contest to a charge without being informed of the consequences of such a plea." *Chavez*, 175 Wis. 2d at 371.
Accordingly, the court found that:

> [t]he legislature did not intend a windfall to a defendant who was aware of the deportation consequences of his plea. As is true of a defendant who asserts ineffective counsel, prejudice is an essential component of the inquiry.

Chavez, 175 Wis. 2d at 371.

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[15] That statute reads:

> No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant.

Wis. Stat. § 971.26 (1993-94) & (2013-14).

The following year, this Court decided *State v. Issa*, 186 Wis. 2d 199, 519 N.W.2d 741 (Ct. App. 1994), and reaffirmed its holding that a defendant seeking plea withdrawal based on the circuit court's failure to provide the statutory immigration warning must allege both that he did not know or understand the omitted information and that he was prejudiced by the omission. *Issa*, 186 Wis. 2d at 204-05, 209-11.[16] The court explained:

> Although Issa has made a *prima facie* showing of the invalidity of his guilty pleas by virtue of noncompliance with § 971.08(1)(c), STATS., he is not, on that basis alone, automatically entitled to withdraw his guilty pleas. He is, however, entitled to an evidentiary hearing at which the State will have the burden "to show by clear and convincing evidence that [Issa's] plea[s] [were] nevertheless valid."

Issa, 186 Wis. 2d at 211 (alterations added in *Issa*) (citation omitted).

In *State v. Lopez*, 196 Wis. 2d 725, 728, 539 N.W.2d 700 (Ct. App. 1995), this Court addressed the scope of *Baeza* in the context of Lopez's claim that *Baeza* and Wis. Stat. § 971.08(2) prohibited the court from using any information outside of the plea hearing record to assess his claim for plea withdrawal. Lopez also argued that *Chavez* and *Issa* improperly contradicted *Baeza* on that point. *Id*. at 730. This Court disagreed and explained that *Chavez* and *Issa* were compatible with *Baeza* because *Baeza* addressed only the issue of burden shifting, not the permissibility of an

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[16] In doing so, the court once again emphasized that its decision in *Baeza* was strictly limited to cases in which the trial court did not advise the defendant of immigration consequences *and* the defendant did not know of those consequences. *Issa*, 186 Wis. 2d at 207 n.2.

evidentiary hearing on the issue of harmless error or prejudice. *Id.* at 731. Consistent with those cases, the *Lopez* court found that "if a defendant knows of the [deportation] potential even though not given the statutory colloquy, the error can be harmless." *Id.* at 732 (citation omitted).

Five years later, the court acknowledged the importance of the statutory immigration warning, but once again upheld the harmless error analysis, this time under circumstances that illustrate the inequity that can result if a defendant seeking plea withdrawal for the circuit court's failure to provide a proper immigration warning is not required to prove prejudice:

> First, the trial court, working through the interpreter, warned Garcia about the risk of deportation. Second, the court established that Garcia understood that if he was not a citizen he could be deported. Third, Garcia confirmed that he understood this warning. Fourth, the trial court repeatedly said during the plea hearing that no one could say for certain what the position of the INS would be regarding deportation. Fifth, the exchange between the court and Garcia's counsel at the sentencing hearing established that the risk of deportation was a prime consideration in the negotiation of the plea agreement. Garcia makes no claim that he was not consulted regarding the factors motivating the plea agreement. This record establishes that Garcia was not prejudiced by the trial court's failure to follow the express mandate of WIS. STAT. § 971.08(1)(c).

State v. Garcia, 2000 WI App 81, ¶ 14, 234 Wis. 2d 304, 610 N.W.2d 180.

D. Our supreme court decides *Douangmala* and holds that a court's failure to give the immigration warning properly can *never* be harmless error.

Two years after *Garcia*, the Wisconsin Supreme Court addressed the harmless error issue for the first time in *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. The court departed with long-standing precedent and overruled *Chavez, Issa, Lopez,* and *Garcia*, holding instead that harmless error analysis simply does not apply when a court fails to give the immigration warning before accepting a defendant's plea. *Id.* ¶ 42. Focusing on the language of Wis. Stat. § 971.08(1)(c) and 971.08(2), the supreme court concluded that those provisions mandate plea withdrawal whenever a defendant shows that the circuit court did not give a proper immigration warning and that he is likely to face adverse immigration warning consequences – even if the defendant was aware of those immigration consequences when he entered his plea. *Douangmala*, 253 Wis. 2d 173, ¶¶ 42, 46.

The supreme court dismissed the legislative history of Wis. Stat. § 971.08(1)(c) and (2), which indicated that the provisions were intended to alleviate the hardships of non-citizen defendants who *unwittingly* entered pleas without being informed of the related immigration consequences. *Douangmala*, 253 Wis. 2d 173, ¶¶ 27-31. Despite the legislative intent, the court simply concluded that the "legislature intended what the statute explicitly states[,]" and that "[n]othing in Wis. Stat. § 971.08 points to a different interpretation of the word 'shall' than an interpretation that the word signifies a mandatory act." *Id.* ¶ 31. The court held that "the Chavez harmless-error interpretation of Wis. Stat. § 971.08(2) is objectively wrong under the language of the statute." *Id.* ¶ 42. Notably absent from the opinion is any discussion or analysis of the

interaction and inconsistency between Wis. Stat. § 971.08 and Wis. Stat. § 971.26 (the harmless error statute).[17]

Douangmala altered the standard plea withdrawal procedure[18] for claims based on the circuit court's failure to provide a proper immigration warning, and eliminated the State's ability to assume the burden of proof and show that the failure was harmless because the defendant was already aware of the immigration consequences of his plea. This extraordinary result may well have stemmed from policy concerns over the fact that at the time, the statutory immigration warning was the only advice that non-citizen defendants were entitled to receive about the immigration consequences of their pleas. However reasonable those concerns may have been, the *Douangmala* Court ignored legislative history and a clear inconsistency with Wisconsin's harmless error statute to reach the desired result. More importantly, the United States Supreme Court's decision in

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[17] The supreme court also noted, but failed to address, the impact of Wis. Stat. § 805.18, which instructs courts to disregard errors that do not affect the substantial rights of an adverse party and provides that no judgment shall be reversed or set aside unless the error affects the substantial rights of the party seeking relief. *Douangmala*, 253 Wis. 2d 173, ¶ 32 n.12.

[18] 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.

Padilla v. Kentucky, 559 U.S. 356 (2010), has now changed the legal landscape dramatically, and the same policy concerns no longer apply.

E. Now that defense attorneys have a constitutional obligation to provide their clients with accurate advice about the immigration consequences of their pleas, a circuit court's failure to give the Statutory Immigration Warning should not allow automatic plea withdrawal for defendants.

For many years, the immigration consequences of a criminal plea and conviction were considered "collateral" consequences that defense attorneys were not required to address with their clients. *See Chaidez v. United States*, 133 S.Ct. 1103, 1109 (2013). This, of course, left non-citizen defendants in Wisconsin with only one mandatory piece of advice about the immigration consequences of their pleas: the statutory immigration warning provided in Wis. Stat. § 971.08(1)(c). That short paragraph, delivered just before the actual plea, may not have had much of an impact as a practical matter. But at least it was something.

The Supreme Court's decision in *Padilla v. Kentucky* ended this problem by creating a new rule of law that required defense attorneys to give their clients accurate advice about the immigration consequences associated with their pleas. *See Padilla*, 559 U.S. at 368-69; *see also Chaidez*, 133 S.Ct. at 1113 ("Court announced a new ruled in *Padilla*."). Two recent cases from the Wisconsin Supreme Court applied and reaffirmed that obligation. *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93, and *State v. Ortiz-Mondragon*, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717. And with counsel's duty to advise came a related remedy; a defendant who does not receive proper legal advice about the immigration consequences of his plea can seek to withdraw the plea through a claim of ineffective assistance of counsel. *See Padilla*, 559 U.S. at 371-72; *Shata*,

364 Wis. 2d 63, ¶¶ 37-47; *Ortiz-Mondragon*, 364 Wis. 2d 1, ¶¶ 33-34.

Post-*Padilla*, non-citizen defendants are finally entitled to affirmative legal advice, not just a quick statutory warning, to protect them from entering pleas without knowing about immigration issues that might follow. And if they don't receive proper advice from their attorneys, defendants may be able to withdraw their pleas based on ineffective assistance of counsel. Given the current state of the law, *Douangmala*'s exemption from the harmless error rule for a court's failure to give the statutory immigration warning no longer serves any laudable purpose.

Instead, it will allow non-citizen defendants to withdraw their pleas even though they received proper advice from their attorneys and were fully aware of the immigration consequences of their pleas. So non-citizen defendants with claims under Wis. Stat. § 971.08(2) *automatically* will be entitled to withdraw their pleas even if the pleas were knowing, voluntary and intelligent.

This unfair result does not exist anywhere else in the law regarding plea withdrawal, and although it may have made some practical sense before defendants had the benefit of *Padilla*, it doesn't any longer. The problem is particularly troublesome given the Wisconsin Supreme Court's recent decision in *State v. Valadez*, 2016 WI 4, ¶¶ 11, 58-62, 68-108, 366 Wis. 2d 332, 874 N.W.2d 514, which indicates that claims for plea withdrawal pursuant to Wis. Stat. § 971.08(2) may not be subject to any time limits.

F. In light of *Valadez*, the extreme remedy of *Douangmala* is especially dangerous.

Douangmala was a complete departure from well-established precedent, not just for plea withdrawal in the context of a circuit court's failure to provide the statutory immigration warning, but for plea withdrawal in general. Outside of the immigration warning context, defendants

have long been required to prove that the errors underlying their requests for plea withdrawal caused them harm.

Generally, 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." *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836; *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." *State v. Nawrocke*, 193 Wis. 2d 373, 381, 534 N.W.2d 624 (Ct. App. 1995).

When a defendant challenges the plea colloquy itself, he must show 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. When a defendant demonstrates a prima facie violation and alleges that he did not know or understand critical information that the court should have provided at the time of the plea, the State then has the opportunity to show by clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered, despite the violation. *Bangert*, 131 Wis. 2d at 274.[19] In other words, the defendant may not withdraw his plea if the error was harmless.

The same is true when a defendant's plea withdrawal motion rests on a claim of ineffective assistance of counsel.

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[19] *Bangert* eliminated language from *State v. Cecchini,* 124 Wis. 2d 200, 368 N.W.2d 830 (1985), that made a defect in the plea colloquy an automatic due process violation. *State v. Brown,* 2006 WI 100, ¶ 26, 293 Wis. 2d 594, 716 N.W.2d 906 ("[U]nder *Cecchini,* a deficient plea colloquy was per se a violation of due process and required withdrawal of the defendant's plea.").

Consistent with the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a defendant seeking to withdraw his plea(s) based on a claim of ineffective assistance of counsel must establish that his attorney's performance was deficient and that he suffered prejudice as a result. *See State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. In this context, the defendant may demonstrate a manifest injustice by proving that his counsel's conduct was objectively unreasonable and that, but for counsel's error(s), he would not have entered a plea. *See Bentley*, 201 Wis. 2d at 311-12. Again, the defendant may not withdraw his plea if the error was not prejudicial.

Douangmala not only exempts non-citizen defendants seeking plea withdrawal under Wis. Stat. § 971.08(2) from having to prove that "manifest injustice" warrants relief, the Wisconsin Supreme Court's decision in *Valadez* indicates that they may be able to bring these claims at *any* time – which makes an already extreme result even more problematic.

In *Valadez*, the record indisputably proved that the circuit court had not given the statutory immigration warning before Valadez entered her pleas. Four members of our supreme court then concluded that even though Valadez was not facing adverse immigration action, she had successfully established that she was "likely" to be excluded from admission to the United States, Wis. Stat. § 971.08(2), based on applicable federal law. *Valadez*, 366 Wis. 2d 332, ¶¶ 51, 57. Two justices would direct the circuit court to allow Valadez to withdraw her pleas. *Id.* ¶ 54 (lead opinion of J. Abrahamson and J. Ann Walsh Bradley). The two justices who concurred in the substantive result, however, dissented on the mandate and would remand the case for further proceedings on the issue of timeliness. *Id.* ¶¶ 65-66 (J. Ziegler and J. Gableman, concurring in part and dissenting in part). The two dissenters felt that there should be a time limit on these claims, but could not identify what that time limit would be. *Id.* ¶¶ 68-109 (J. Prosser and C.J.

Roggensack, dissenting). Those two would not remand for further proceedings. *Id.*[20]

That our supreme court is struggling to discern a time limit in these cases is not surprising given the language of Wis. Stat. § 971.08(2), which does not specify or incorporate a time frame for related plea withdrawal motions. The absence of an express time limit may be because the Legislature felt that motions for plea withdrawal automatically would be subject to deadlines that govern other motions for postconviction relief. *See Valadez*, 366 Wis. 2d 332, ¶ 92 (J. Prosser, dissenting).[21] On the other hand, it may have been purposeful. While a circuit court's failure to give the statutory warning is an error that is *immediately* apparent, a non-citizen defendant may not be "likely" to face

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[20] The Wisconsin Circuit Court Access database indicates that following remittitur on March 4, 2016, the circuit court vacated Valadez's pleas, and the cases remain pending for further proceedings.

[21] As Justice Prosser noted in his dissent:

> In *State v. Romero-Georgana*, 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668, the court discussed the fact that the 1981-82 version of Wis. Stat. § 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, § 43. 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 a plea of no contest may be sought by postconviction motion under s. 809.30(1)(f), stats., or under s. 974.06, stats.
> >
> > (Emphasis added).
>
> *Valadez*, 366 Wis. 2d 332, ¶ 92 (J. Prosser, dissenting).

adverse immigration consequences until years later when, for example, Homeland Security finally initiates deportation proceedings against him.[22]

When this issue is resolved, it may be that a non-citizen's right to plea withdrawal under Wis. Stat. § 971.08(2) is not subject to any time limit. Should that happen, *Douangmala* and Wis. Stat. § 971.08(2) will allow many non-citizen defendants who do not receive the statutory warning to withdraw their pleas completely unchecked by time or their actual knowledge of the potential immigration consequences of their pleas. As Justice Prosser observed in his dissent in *Valadez*: "Permitting non-citizens to withdraw their pleas to serious crimes whenever they want to and regardless of the circumstances simply because they did not receive the statutory warning is too incongruous and unreasonable to be accepted." *Valadez*, 366 Wis. 2d 332, ¶ 108 (J. Prosser, dissenting).

Overruling *Douangmala* and reinstating the harmless error rule is necessary to guard against this, particularly since the overriding goal of *Douangmala* – to protect non-citizen defendants from *unwittingly* entering pleas without being informed of the related immigration consequences – has been better accomplished by the United States Supreme Court's decision in *Padilla*. Now that defendants are entitled to legal advice about the immigration consequences of their pleas, they should not be allowed to withdraw otherwise

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[22] *See* Wis. Stat. § 971.08(2); *State v. Negrete*, 2012 WI 92, ¶¶ 26-27, 343 Wis. 2d 1, 819 N.W.2d 749 ("[T]o 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.").

valid pleas just because they did not receive the statutory immigration warning.

G. Gutierrez is seeking to withdraw her pleas even though she knew about the immigration consequences when she entered them.

If a court fails to give the statutory immigration warning required under Wis. Stat. § 971.08(1)(c) and the defendant shows that her plea is likely to result in any of the listed immigration consequences, the court must vacate the judgment(s) of conviction and allow the defendant to withdraw the plea(s) even if she was fully aware of those consequences. Wis. Stat. § 971.08(2); *Douangmala*, 253 Wis. 2d 173, ¶ 42. As discussed above, this result is improper for a noncitizen defendant who received appropriate legal advice and entered her pleas with full knowledge of the potential immigration consequences. The record in this case strongly indicates that Gutierrez is just such a defendant.

Gutierrez did not seek plea withdrawal based on ineffective assistance of counsel. In other words, her attorney(s) did not fail to provide her with accurate advice about the immigration consequences of her pleas. If that were not true, surely she would have offered ineffective assistance of counsel as an alternate basis to withdraw her pleas. The fact that she didn't makes sense given that Gutierrez was concerned about immigration issues throughout the pendency of her case, and her attorney specifically stated on the record that "I did discuss with Ms. Gutierrez the possible consequences from immigration that could result from the plea." (87:10.)

It does not make sense, however, to allow a defendant to withdraw truly knowing and voluntary pleas simply because of a technical error in the circuit court's administration of the statutory immigration warning.

Douangmala must be overruled to reinstate the harmless error rule.[23]

III. The subsequent admission of the videotape of Gutierrez smothering her son during the mental responsibility phase of her case was not a "collateral consequence" of her plea, and her attorney was not ineffective in that regard.

A. Admission of the tape was not a "collateral consequence."

Wisconsin Statute 971.08(1)(a) requires the circuit court to "determine that the plea is made voluntarily and with understanding of the nature of the charge and the potential punishment if convicted." A plea is not knowingly, voluntarily, and intelligently entered, and a manifest injustice results when a defendant does not know what sentence could actually be imposed. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 636-37, 579 N.W.2d 698 (1998).

An understanding of potential punishments or sentences includes knowledge of the direct consequences of the plea, but does not require that a defendant be advised of consequences collateral to the plea. *Id.* at 637. A defendant who was not informed of the direct consequences of his plea did not enter his plea knowingly, intelligently and voluntarily and is entitled to withdraw it to correct a manifest injustice. *State v. Madison*, 120 Wis. 2d 150, 159, 353 N.W.2d 835, 840 (Ct. App. 1984). There is no manifest injustice, however, when the defendant is not informed of a collateral consequence. *Id.*

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[23] Should that happen, this case may require an evidentiary hearing for a full assessment of Gutierrez's claim under Wis. Stat. § 971.08. If the evidence demonstrates that she was aware of the immigration consequences of her pleas, her claim properly would fail.

In support of her claim for plea withdrawal, Gutierrez cites cases where defendants were permitted to withdraw their pleas based on affirmative misadvise about collateral consequences that they received not just from their attorneys, but from prosecutors and the circuit courts. *See, e.g., State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) and *State v. Brown*, 2004 WI App 179, ¶ 13, 276 Wis. 2d 559, 687 N.W.2d 543. Gutierrez's reliance on these cases is misplaced.

First, as the circuit court noted, playing the videotape of her crimes during the mental responsibility phase of her trial was not dependent at all on her pleas during the guilt phase. (74:4.) In other words, it was not even a "consequence" of her pleas at all. More importantly, as discussed below, Gutierrez's "collateral consequences" argument appears to be little more than a poorly veiled attempt to circumvent a strategic decision that she made with her attorney in an effort to keep the circuit court from watching the videotape of her crimes.

B. Gutierrez's attorney tried to minimize the impact of the videotape as best as she could, but she was not ineffective.[24]

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Gutierrez's ineffective assistance of counsel claim fails under both prongs of *Strickland*.

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[24] The circuit court denied Gutierrez's motion for plea withdrawal without a hearing. Should this Court find that her ineffective assistance of counsel claim has merit, the case would have to be remanded for an evidentiary hearing.

"To prove deficient performance, a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" *State v. Nielson*, 2001 WI App 192, ¶ 12, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Gutierrez's attorney attempted to keep the videotape from the circuit court by having Gutierrez plead guilty in phase one and then arguing that it was irrelevant to the mental responsibility phase. (*See* 73:5.) Ultimately, the strategy failed because the circuit court elected to watch the recording over counsel's objection, but that doesn't mean the strategy was unreasonable. *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. In fact, the tactic was Gutierrez's best chance to keep the court from watching the video.[25] It just didn't work.

Even assuming that Gutierrez's attorney somehow erred with respect to the video, the circuit court correctly found that the alleged error did not prejudice Gutierrez in any way. The test for prejudice is whether counsel's errors deprived the defendant of a fair trial -- one in which the result is reliable. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). The focus is not on the outcome, but on the fundamental fairness of the proceeding whose result is subject to challenge. *Id.* at 642.

In this case, the evidence against Gutierrez was overwhelming. The hospital recorded her repeatedly smothering her son on video, and she confessed to the crimes. In addition, the expert testimony described the video and Gutierrez's actions at length. While Gutierrez and her

[25] Even if the court hadn't seen the video at trial, it easily could have at sentencing.

attorney made their best effort to keep the court from watching the videotape, the horrifying details of what she did inevitably would have come out at trial even if the court did not watch the video. Gutierrez most certainly would have been found guilty as charged even if she hadn't pleaded guilty. The only difference would be that she would stand convicted of eight counts of child abuse instead of the four that resulted from her plea agreement.

IV. Gutierrez is not entitled to a new trial in the interest of justice.

Finally, Gutierrez asks this Court to exercise its power of discretionary reversal pursuant to Wis. Stat. § 752.35, claiming that "there is a substantial probability that a new trial would produce a different result." (Gutierrez's Br. 22.) In support of her argument, she cites only once to the record and then makes a series of unsupported guesses about what might occur at a new trial. Rank speculation does not warrant the extraordinary relief Gutierrez requests.

This Court's discretionary reversal power is formidable, and the court exercises it only sparingly and with tremendous caution. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719. As discussed above, Gutierrez's claims for relief are without merit. And in the end, "[z]ero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's denial of Erika Lisette Gutierrez's motion for plea withdrawal.

Dated: July 7, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 8,977 words.

_____
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I hereby certify that:

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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: July 7, 2016.

_____
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