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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2015AP002041-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

Jose Alberto REYES FUERTE,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal From Denial of Motion To Withdraw Plea
Honorable Alan J. White
Columbia County Circuit Court
Case No. 12-CF-582

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STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant, Mr. Reyes, submits that briefing may be sufficient and oral argument may not be necessary to aid the Court in determining the issues raised on appeal, however Mr. Reyes welcomes oral argument if the Court believes it would be helpful.

The publication of the Court's opinion would help clarify the interpretation of Wis. Stat. §§ 971.08(1)(c) and (2). WIS. STAT. § 809.23(1)(a)1 and 2.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Is mere "substantial compliance" with Wisconsin Statute § 971.08(1)(c), enough to require dismissal of a motion to withdraw a guilty plea after the Court failed to deliver the full statutory warning?

If so, did the Court here substantially comply with the above statute, when it failed to mention naturalization, confused citizenship with residency, referred to Mr. Reyes' conviction rather than guilty plea, and prefaced its advisal with language suggesting that adverse consequences were unlikely?

In denying the motion to withdraw Mr. Reyes's plea, did the Court's "totality of the circumstances" test incorrectly focus on Mr. Reyes' "understanding" of the immigration consequences of his conviction instead of the more limited test of the adequacy of the Court's language?

STATEMENT OF THE CASE

This case arises from the Portage County Circuit Court's February 20, 2014 plea colloquy with Mr. Jose Alberto Reyes Fuerte, a Mexican immigrant. During that colloquy, the Court delivered an advisal which differed from that required by Wisconsin Statute § 971.08(1)(c). (28:5; App.130). Aside from minor linguistic differences, the Court's attempted advisal failed to mention naturalization, conflated citizenship with residency, referred to Mr. Reyes' conviction rather than guilty plea, and even prefaced its advisal with language suggesting that adverse consequences were unlikely. After that advisal Mr. Reyes pled guilty to a felony, and became ineligible for a defense against deportation.

Mr. Reyes filed a motion to withdraw his plea of guilty under Wisconsin Statute § 971.08(2) based on the Court's failure to fully provide the statutory advisal. (21; 1-5; App 121-125). The Circuit Court denied the motion, however, concluding that it had substantially complied with the statutory mandate. (23:2; App. 101-102). In so concluding, the Court did not merely compare the specific language of its advisal to the one contained in the statute, but applied a novel

"totality of the circumstances" analysis which seemed to focus on Mr. Reyes' legal knowledge and the adequacy of his representation. *Id*.

This Court should reject the Court's approach and reverse the Circuit Court's denial of Mr. Reyes' motion. The Court's advisal differed materially from the statutory one and therefore does not comply with § 971.08(1)(c).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The defendant, Mr. Reyes was born in Mexico and entered the U.S. in February of 2000. (21: 1; App. 121). He is not a US Citizen, but he has two US Citizen children: Harina, 6, and Alan, 4. *Id*.

On February 20, 2014, he pled guilty in Columbia County Circuit Court to a Class I Felony for Fleeing or Eluding an Officer as well as a misdemeanor for operating with a restricted controlled substance. (28:12; App. 137). The felony has been classified as a "Crime Involving Moral Turpitude" by the Court of Appeals for the Seventh Circuit. *See Cano-Oyarzabal v. Holder*, 774 F.3d 914 (7th Cir., 2014) (interpreting this statute in relation to 8 USC § 1182(a)(2)(A)). His conviction, therefore, left him ineligible

for cancellation of removal, a defense against deportation. *See* 8 USC § 1229b(b)(1)(C). But for Mr. Reyes' 2012 guilty plea, he would be eligible for a defense against deportation. (21:1; App 121).

During the plea colloquy, the trial court gave only a partial advisal of the potential immigration consequences of a guilty plea as compared to the full statement required by §971.08(1) (c). Specifically, the Court stated:

> Alright. And another thing I want to make sure of is that – has [defense counsel] made you aware of the fact that any conviction basically --- Usually we're looking at felonies, but any conviction to a person who is not a resident of the United States could lead, at some point in the future, to that person either being denied re-entry or that person being required to leave this country. And I am not saying that's going to happen at all. I'm just saying that convictions can lead to those results. Do you understand that?

(28:5; App.130).

On June 16, 2015, Mr. Reyes moved the Columbia County Circuit Court to withdraw his guilty plea solely on the basis of Wisconsin Statute section 971.08, and pointing to the deficiencies in the above advisal. (21:1-5; App 121-125). The State responded with a letter simply stating that it was opposed to the motion, and on September 2, 2015 the Court held a hearing on the merits of that motion. (22:1). At the hearing, the State argued against reopening, because the

Court's advisal was sufficient, citing *State v Mursal*.[1] 2013 WI App 12, 351 Wis. 2d 180, 839 N.W.2d 173. (29: 8-9; App. 111-112).

On September 10, 2015 the Court issued a written decision denying Mr. Reyes' motion. (23:1-2; App. 101-102). The Court reasoned that substantial compliance with the statute was sufficient, and that it substantially complied because the differences between its advisal and the stature were minor, and that in any event, the "totality of the circumstances" showed that Mr. Reyes understood "that his conviction could lead to deportation."

The present appeal followed.

[1] During its argument, the State also referred to several unrelated cases interpreting *Padilla v Kentucky*.

STANDARD OF REVIEW

This case is one of undisputed facts and statutory interpretation, and thus presents a question of law for the Court to review independently. *See State v. Negrete*, 2012 WI 92, ¶15 343 Wis.2d 1, 819 N.W.2d 749.

ARGUMENT

The Circuit Court erred in denying Mr. Reyes' motion to withdraw his plea for three reasons. First, substantial compliance is not enough to satisfy Wisconsin Statute section 971.08. Second, even if substantial compliance were the law, the defects here are too great. And third, a defective plea colloquy cannot be cured by the defendant's alleged "understanding."

I. The Circuit Court erred as a matter of law in ruling that Wisconsin Statute § 971.08(1)(c) requires merely "substantial compliance."

Strict compliance with Wisconsin Statute section 971.08(1)(c) is required. The statutory language and published case law interpreting it are clear. A Court must read the precise admonishment to a defendant. Wis. Stat. § 971.08(1)(c) reads:

> (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 are you charged may result in deportation, the exclusion from admission to the this country or the denial of naturalization, under federal law."

As to the meaning of this paragraph, the Wisconsin Supreme Court simply left no room for interpretation. It reasoned "the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be *followed by the letter*." *State v. Douangmala*, 253 Wis. 2d 173 ¶21 (2002) (Citing *State v. Garcia*, 2000 WI APP 81 ¶16) (emphasis added).

Thus, when Hawaii's Supreme Court interpreted Wisconsin's *Douangmala* decision, they concluded that it required "strict compliance" with the written admonishments. *State v. Sorino*, 117 P.3d 847, 855 (HI, 2005) (Acting C.J. Nakamura dissenting).[2] The language of the decision is that clear.

"Strict compliance" need not be taken to the point of absurdity, however. Very minor linguistic discrepancies in that advisal may not require withdrawal of a plea. *State v.*

[2] The majority's decision in *Sorino* left Hawaii as something of an outlier among the states. Ultimately the majority did not analyze the content of the terse advisal actually delivered but focused on the defendant's understanding. *See Sorino*, 117 P.3d at 850.

Mursal, cited in the decision below, is a perfect example of minor linguistic discrepancies which could still satisfy a strict compliance regime. *See, e.g. State v. Mursal,* 351 Wis. 2d 180, 839 N.W.2d 173, 2013 WI App 125 (Wis. App., 2013).

In that case, the court stated the following: "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." *Id*. at ¶ 4. Language differences here included: the contraction "you're" from "you are" and the omission "of America" after United States. The biggest difference was the Judge's use of the phrase "your plea" instead of the statute's "a plea of guilty or no contest for the offense with which you are charged." But this reference to the case at hand did not strip any meaning from the statute.

Therefore, the minor linguistic differences litigated in *Mursal* did not truly test the "strict compliance" rule with the Appellate Court. Given the oral nature of advisals, even a "strict compliance" regime may make allowances for the very minor linguistic discrepancies so long as they do not alter the meaning of in any way.

A common-sense approach like that appropriately balances the legislature's clear intent that specific language be provided directly to the defendant while acknowledging the reality of oral advisals.

II. Even if "substantial compliance" were sufficient to satisfiy the statute, the advisal here fails.

Even if Wisconsin broke with clear, established precedent and instead established a "substantial compliance" rule, the Court here did not substantially comply with requirements for several reasons. First, "substantial compliance" can be achieved only by discussing all three distinct consequences outlined in the statute: *deportation, exclusion of admission, and denial of naturalization*. Second, the Court's use of immigration terms of art "resident" instead of "citizen" led to a substantive misstatement of the law. And third, by using the word "conviction" rather than "plea," the advisal subtly directed attention away from the voluntary act of pleading.

As addressed above, there is no "substantial compliance" rule in Wisconsin. But when crafting a new rule, it makes sense to look to other states. And here Wisconsin's immigration admonishment law requirement is

hardly unique. Many others adopted statutes substantially similar to Wisconsin Statute Section 971.08, including its discussion of immigration consequences of a plea.[3] And indeed, many courts around the United States have addressed litigation around incomplete advisals. Some have ruled that a plea may be withdrawn and a conviction vacated only if the Circuit Court failed to substantially comply with the requirements.

Outside Wisconsin, many Courts use a "substantial compliance" rule to hold that minor errors in recitation do not require reopening, but vague admonitions regarding immigration are not enough. For example, the Rhode Island Supreme Court found that a Court's vague admonishment was insufficient to constitute "substantial compliance." *Machado v. Rhode Island*, 839 A.2d 509, 513 (R.I. 2003). In that case, the trial court had this dialogue with a defendant pleading guilty:

> THE COURT: You also understand that because of the fact that you are a resident alien here that this may have some effect upon what happens with the immigration service. Do you understand that?

[3] *See for example*: Cal. Penal Code § 1016.5(a) (California); Conn. Gen. Stats. § 54-1j(a) (Connecticut); Neb. Rev. Stat. § 29-1819.02 (Nebraska) R.I. Gen. Laws §12-12-22(b) (Rhode Island); Tex. Code Crim. Proc.Ann. Art. 26.13(c) (Texas).

Id. at 511. The Court concluded that this was insufficient because it was too vague, and did not address *all three possibilities* discussed in the statute. *Id*. Those three possibilities are deportation, exclusion of admission, or denial of naturalization. *See id*.

Like Rhode Island, the California Court of Appeals has interpreted its statute to require "the court to warn the defendant expressly of each of the three distinct possible immigration consequences of his conviction(s) prior to his plea." *People v. Gontiz*, 68 Cal.Rptr.2d 786, 58 Cal.App.4th 1309 (Cal. App. 3 Dist., 1997).

One notable exception inevitably comes from Texas, where the Court of Appeals found that the following advisal substantially complied with its statutes:

> Do you understand that a conviction in this case, if you're not a citizen or if you're not legally in this country, that it could mean that you would have to be sent back to your original country? That would not be done by this--do you understand that it could happen?

Garcia v. State, 877 S.W.2d 809 (Tex.App.-Corpus Christi, 1994). This advisal differed drastically from the statute, but short of a "complete failure to admonish" the Court would not reopen. *Id*. at 813.

On the “near-miss” end of the spectrum of advisals, Nebraska’s Court of Appeals found an advisal to be sufficient despite containing grammatical errors like those in *Mursal*. *See State v. Molina-Navarrete*, 739 N.W.2d 771 (Neb. App., 2007). In that Case, the Court of Appeals declined to permit the withdrawal stating:

> Specifically, the only differences between the district court's advisement and the exact statutory language were that the district court did not use the words "you are hereby advised," used the words "causing you to be removed" instead of "removal from," used the words "deported or denied naturalization" instead of "denial of naturalization," and failed to include "pursuant to" prior to "laws of the United States.

Id. at 776. This was close enough, the Court ruled.

With the exception of Texas, Courts in other states are clear on the extremes of the issue: vague admonishments do not constitute “substantial compliance,” but an advisal containing only linguistic differences does. But as addressed above, a common-sense interpretation of the strict compliance rule can already adequately dispose of minor linguistic differences.

A closer call comes out of the Connecticut Supreme Court in *State v. Malcolm*, 778 A.2d 134 (Conn., 2001). There the Court found substantial compliance when a trial Court stated to a defendant the following:

> The law says that I have to tell you that if you're not a citizen of the United States, conviction of this offense can result in your being deported, being denied admission to the United States or being denied readmission to the United States, have you discussed that with your lawyers too?

Id. at 140-141.

By ignoring naturalization, the Connecticut Court failed to address one of three listed consequences of conviction. This would, therefore, likely not satisfy Rhode Island's or California's clear, formal rule. *See Machado v. Rhode Island*, 839 A.2d 509, 513 (R.I. 2003). But that was the only substantive difference between the advisal the Judge delivered from the statutory one (the Connecticut statute contained the word "conviction" unlike Wisconsin's.) *See* Conn. Gen. Stats. § 54-1j.

Similarly, the Court of Appeals in the District of Columbia has held that a Judge substantially complied with the District's advisal rule when it mentioned of two out of the three potential immigration consequences. *Daramy v. United States*, 750 A.2d 552, 554 (D.C. 2000). Mentioning only one, however, was not substantial compliance. *Slytman v. United States*, 804 A.2d 1113, 1117 (DC, 2002).

Although the above cases provide some guidance as to crafting a "substantial compliance" rule, there were many

problems with the advisal in this case. The first was that the court did not mention the possibility of denial of naturalization. This omission alone would likely be enough warrant reopening under California and Rhode Island law. But it would not be enough automatically in Connecticut or the District of Columbia.

But there are two more significant errors in the case at hand. The more substantial of those was the Court's use of the word "resident" rather than "citizen." It is difficult to find any case law interpreting this issue, possibly because the concept of citizenship is so central to the advisal that the word is rarely omitted or misstated. Residence, under immigration laws may be conferred to many non-citizens.[4] To suggest that immigration risks would not apply to residents is manifestly false.

Second, the Court used the word "conviction" rather than "plea." In a strict legal sense, unlike the above, this word does not render the sentence untrue. Indeed, some states use the word conviction in their advisals. *See, e.g.*, Conn. Gen. Stats. § 54-1j. But the Wisconsin Statute requires

[4] Lawful Permanent Residence may be conferred under a number of federal statutes including 8 U.S.C. §§ 1255(a), (i) 1229b(b)(1), (2).

the Court to use the word "plea." Wisconsin Statute § 971.08. This word directs a defendant to think about the *voluntary act* of accepting responsibility instead of the legal conclusion that the word "conviction" carries. This is the entire purpose of the advisal.

Finally, if the Court adopts a substantial compliance regime for analyzing incomplete advisals under Wisconsin Statute § 971.08, it should, at a minimum, follow California and Rhode Island, and require a Court to list all three consequences: deportation, denial of naturalization, and denial of admission. Two out of three is not good enough. Furthermore, the three consequences are only part of the advisal. The Court must also explain what exactly triggers those consequences: 1) the defendant's guilty plea, and 2) his status as a non-citizen. In this case, the Court missed on both of those predicate statements. Therefore, the statute must fail even if substantial compliance becomes the law.

III. The Court erred in its "totality of the circumstances" analysis because it focused on Mr. Reyes' knowledge or understanding, which is irrelevant.

In its September 10, 2015 decision, the Circuit Court purported to determine whether it had substantially complied with the advisal statute by applying a "totality of the

circumstances" test to determine whether the defendant actually understood the immigration consequences of his conviction.

The Court's test missed the point. The Wisconsin Legislature clearly wanted the Court itself to personally address the issue with the pleading defendant, rather than rely on the defendant's discussions with his criminal defense attorney, who often have little understanding of the complex immigration laws. The Wisconsin Supreme Court acknowledged the importance of that discussion *Douangmala,* 253 Wis. 2d. 173,¶3. *See generally Padilla v. Commonwealth of Kentucky,* 559 U.S. 356 (2010) (addressing the lack of knowledge of immigration laws by criminal defense attorneys).

Advising a defendant of the deportation consequences pursuant to WIS. STAT. § 971.08(1)(c) when accepting a plea of guilty or no contest is not an unfair burden on a circuit court because "pleading guilty or no contest is a serious event." *State v. Burns,* 266 Wis. 2d 762, 764-65, 594 N.W.2d 799. When pleading guilty, defendants waive significant constitutional rights, accept convictions, and are often incarcerated. *Id.* Defendants who are not U.S. citizens are

often giving up even more by pleading guilty; their right to stay in the United States. The legislature has recognized the magnitude of this loss by mandating the disclosures and advisements in § 971.08(1)(c). While Circuit Courts in Wisconsin are busy, the clear directive of § 971.08(1)(c) is not a duty to be delegated to others.

Such a rule would essentially resuscitate the "harmless error" exception that the Supreme Court abrogated in *Douangmala*. *See Douangmala*, at ¶ 32-39 (discussing *State v. Garcia*, 2000 WI App 81, ¶1, 234 Wis. 2d 304, 610 N.W.2d 180). Before *Douangmala*, a defendant could only reopen his conviction if he proved that he did not understand of the consequences of his conviction when he pled. But the Court very clearly abandoned that exception. *Id*.

Thus, a retroactive exploration of the defendant's knowledge at the time of his plea hearing is completely irrelevant when determining the sufficiency of an advisal. The test must focus exclusively on the substance of the advisal itself.

The Circuit Court should have vacated the no contest pleas because the Circuit Court failed to comply, strictly or substantially, with the requirements of § 971.08(1)(c)

regarding the deportation consequences of his guilty plea; and Mr. Reyes was rendered ineligible for a defense against deportation. *See Douangmala*, 253 Wis. 2d. 173, ¶ 23; WIS. STAT. § 971.08(2).

CONCLUSION

For the aforementioned reasons, the Court should REVERSE the Circuit Court's denial of the motion to withdraw and permit the Mr. Reyes to withdraw his plea.

Respectfully submitted this day of December, 2014.

_____
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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and a maximum of sixty characters per line of body text. The length of this brief is 3,204 words.

Dated this day of December, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of WIS.STAT. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the Court and served on the opposing party.

_____

Ben M Crouse

CERTIFICATION OF APPENDIX

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 WIS. STAT. § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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. This case presents none of these concerns, though, so no names have been omitted or pseudonyms employed.

Dated this 18th day of December, 2015.

_____

Ben M Crouse

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2015AP002041-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

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APPELLANT'S SHORT APPENDIX

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