STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP2041-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSE ALBERTO REYES FUERTE,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION FOR PLEA WITHDRAWAL, ENTERED IN COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE ALAN J. WHITE, 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 FACTS AND STATEMENT OF THE CASE

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 offers the following summary and will present additional facts, if necessary, in the argument portion of its brief.

On February 20, 2014, Reyes Fuerte pleaded guilty to fleeing/eluding an officer and second-offense operating a motor vehicle under the influence of restricted controlled substance (17; 18; 28). Before Reyes Fuerte entered his pleas, the circuit court gave him the following warning:

> All right. And another thing I want to make sure of is that – has he 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'm 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).

On June 16, 2015, Reyes Fuerte filed a motion to withdraw his pleas, claiming that the circuit court's warning did not satisfy Wis. Stat. § 971.08(1)(c), which provides that before accepting a plea of guilty or no contest, a court shall inform the defendant that:

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

> "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). Already in removal (deportation) proceedings, Reyes Fuerte alleged that his conviction "left him ineligible to defend against deportation" because it constituted a "crime involving moral turpitude" that "left him ineligible for cancellation of removal" (21:4-5). Reyes Fuerte did not claim that his attorney failed to advise him about the possible immigration consequences of his pleas or that he was unaware of those consequences when he entered the pleas (21; 29).

The circuit court issued a written decision denying Reyes Fuerte's motion:

> The court did ask the defendant if he'd reviewed the plea questionnaire and waiver of rights and if he understood it. His responses were yes. He also indicated he read the Spanish portion of the form and his attorney Mr. Vargas indicated he was fully bilingual, "so I went over it with him as well." The plea questionnaire specifically states, "I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law." This was read to him at least twice prior to the entry of the plea. The court also reiterated to the defendant that he had certain constitutional rights regardless of whether you're a citizen or not. Transcript of plea page 7 (lines 23-25 and page 8 (lines 1-2). The court therefore believes the distinction between "resident" and "citizen" and its leading to a defective colloquy is unfounded.
>
> The court finds many of the complaints of the defendant to fall into the category of complaints similar to those in Mursal. (i.e. citizen v. resident; conviction v. guilty plea). The other claimed defects were dealt with in the plea questionnaire which the court went over with the defendant accepting his assurances that he not only read it but understood it. Also, he stated he had read the Spanish

> language portion of the plea questionnaire and he had the form explained to him not only by the interpreter but by his bi-lingual attorney. The court finds under all the circumstances presented here that the defendants understanding that his conviction could lead to deportation was clear and that the court substantially complied with 971.08 under the totality of circumstances and therefore denies the defendant's motion to withdraw his plea.

(23:2).

Reyes Fuerte appeals.

ARGUMENT

I. THE "HARMLESS ERROR" RATIONALE FOR THE CIRCUIT COURT'S DECISION WAS CORRECT BECAUSE THE WISCONSIN SUPREME COURT'S DECISION IN *STATE V. DOUANGMALA*, WHICH ELIMINATED THE HARMLESS ERROR RULE IN CASES LIKE THIS, SHOULD BE OVERRULED IN LIGHT OF THE UNITED STATES SUPREME COURT'S DECISION IN *PADILLA V. KENTUCKY*.[2]

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

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[2] 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.

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 applicable crimes.[3] "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.

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[3] 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).

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 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.

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

Wisconsin 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,[4] 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 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).

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

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

C. Historically, Plea 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.[5]

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 (emphasis in original). 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.

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

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[5] 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).

omission. *Issa*, 186 Wis. 2d at 204-05, 209-11.[6] 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 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

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[6] 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.

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

and that he is likely to face adverse immigration 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 that 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).[7]

Douangmala altered the standard plea withdrawal procedure[8] for claims based on the circuit court's failure to

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[7] The supreme court also noted, but failed to address, the impact of Wis. Stat. § 805.18, which instructs courts to disregard error that do not affect the substantial rights of an adverse 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.

[8] 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

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 *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

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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.

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*, 359 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.[9] 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. 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.

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[9] *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.").

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*.[10]

[10] The Wisconsin Circuit Court Access database indicates that following remittitur on March 4, 2016, the circuit court set Valadez's cases for status conference on May 12, 2016. Given the supreme court's apparent 2-2-2 split (Justice Rebecca Bradley did not participate in the case), it is unclear how the case will proceed.

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).[11] 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 adverse immigration consequences until years later when, for example, Homeland Security finally initiates deportation proceedings against him.[12]

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[11] 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).

[12] *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").

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

II. HARMLESS ERROR RULE OR NOT, THE RECORD IN THIS CASE DOES NOT SUPPORT REYES FUERTE'S CLAIM.

A. The Best Indication From The Record Is That Reyes Fuerte Is Seeking To Withdraw His Pleas Even Though He Knew About The Possible Immigration Consequences When He 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 his 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 he 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 his pleas with full knowledge of the potential immigration consequences. The record in this case strongly indicates that Reyes Fuerte is just such a defendant.

Reyes Fuerte did not seek plea withdrawal based on ineffective assistance of counsel. In other words, his attorney(s) did not fail to provide him with accurate advice about the immigration consequences of his pleas. If that were not true, surely he would have offered ineffective assistance of counsel as an alternate basis to withdraw his pleas. The fact that he didn't probably makes sense given that Reyes Fuerte was in removal proceedings for a full year before he pled guilty to the charges in this case. During that time, one certainly would expect that Reyes Fuerte received proper legal advice about both his removal proceedings and his pleas in the criminal case. The record does not disclose precisely what advice Reyes Fuerte received before pleading guilty, but his failure to pursue

an ineffective assistance of counsel claim is a strong indication that he is seeking to withdraw his pleas even though he knew the related immigration consequences when he entered them.

If the harmless error rule were reinstated, this case may require an evidentiary hearing for a full assessment of Reyes Fuerte's claim under Wis. Stat. § 971.08. If the evidence demonstrates that he was aware of the immigration consequences of his pleas, his claim properly would fail.

B. Reyes Fuerte Is Not Entitled To Relief, And His Requested "Strict Compliance Rule" Improperly Seeks A Revision Of This Court's Decision In *Mursal* That Would Lead To Unfair Results.

In *State v. Mursal*, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173, this court established the standard for evaluating a circuit court's delivery of the statutory immigration warning according to Wis. Stat. § 971.08(1)(c). In *Mursal*, the court held that a court's warning is sufficient when it "substantively" complies with the suggested language of the statute. *Id.* ¶¶ 16-20. In other words, a court's delivery of the warning is acceptable as long as it does "not alter the meaning of the warning in any way[.]" *Id.* ¶ 20.

Reyes Fuerte argues that this court should somehow alter its decision in *Mursal* and issue a new legal rule requiring what he calls "strict compliance" with Wis. Stat. § 971.08(1)(c). Acknowledging that *Mursal* "is a perfect example of minor linguistic discrepancies which could still satisfy a strict compliance regime[,]" (Reyes Fuerte Br. 9), Reyes Fuerte seems to suggest courts need to do more and that they should be required to follow the statutory warning "to the letter" (Reyes Fuerte Br. 9). This court flatly rejected a similar proposition in *Mursal*, with good reason:

> [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.

Mursal, 351 Wis. 2d 180, ¶¶ 19-20. Short of adopting the verbatim approach that this court dismissed in *Mursal*, it is unclear exactly what Reyes Fuerte's "substantial compliance" standard would be. This court should decline Reyes Fuerte's invitation to depart from its decision in *Mursal*. *See Cook*, 208 Wis. 2d at 189 (only the supreme court can overrule, modify or withdraw language from a previous supreme court case).

Here, the circuit court's warning substantively complied with Wis. Stat. § 971.08(1)(c) by advising Reyes Fuerte that "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" (28:5). The only substantive omission from the warning was the possibility that Reyes Fuerte might be denied naturalization – something that is not at issue in this case.

That omission appears to be the crux of Reyes Fuerte's "substantial compliance" pitch even though his ability to seek naturalization is not at issue. So in keeping with his desire to be

permitted to withdraw his pleas despite any knowledge he had of the related immigration consequences, it seems that Reyes Fuerte also would like to be able to withdraw his pleas simply because the circuit court failed to warn him about an issue that does not pertain to him.

Obviously, reinstatement of the harmless error rule would address this possibility. Other courts have simply denied motions for plea withdrawal under similar circumstances. The Massachusetts Appeals Court held that a defendant was not entitled to plea withdrawal based on the trial court's inadvertent failure to include the denial of naturalization in its statutory immigration warning because naturalization was not at issue:

> [T]he defendant is not entitled to relief based upon the judge's failure to warn him that he may be denied naturalization because he has not argued, let alone demonstrated, such a consequence[.]

Commonwealth v. Cartagena, 883 N.E.2d 986, 989 (Mass. App. Ct. 2008).

The Supreme Court of Nebraska reached the same conclusion on similar facts:

> We agree with the reasoning of the Massachusetts courts and hold that failure to give all or part of the [statutory warning] regarding the immigration consequences of a guilty or nolo contendere plea is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn …. The defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given.

State v. Yos-Chiguil, 772 N.W.2d 574, 598 (Neb. 2009).

This case demands the same result. Wisconsin Stat. § 971.08(2) requires a defendant to show that he is "likely" to face a certain immigration consequence to be entitled to relief

based on an omission in the circuit court's delivery of the statutory warning. How and why should a defendant be able to satisfy this standard when he does not claim that the omitted consequence is a true possibility for him?

Reyes Fuerte claims that his pleas prevent him from "defending" against removal (deportation) proceedings that began well before he pled guilty in this case. His request for plea withdrawal is not based in any way on the possible denial of naturalization. He should not be permitted to withdraw his pleas just because the circuit court failed to advise him about an immigration consequence that he is not genuinely facing based on his pleas in this case. For that reason alone, this court should affirm the circuit court's decision denying Reyes Fuerte's motion for plea withdrawal.

C. Without Application Of The Harmless Error Rule, The Record Is Still Inadequate To Support Reyes Fuerte's Claim That His Pleas Are Likely To Result In Deportation, Exclusion From Admission To The Country, Or Denial Of Naturalization.

Wisconsin Stat. § 971.08(1)(c) provides the mandatory immigration warning that a circuit court must give before accepting a criminal plea. In addition, however, subsection (2) states that a defendant who did not receive a proper warning is entitled to withdraw his plea if he "shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization[.]" Wis. Stat. § 971.08(2).

In *State v. Negrete*, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749 our supreme 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).[13]

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

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[13] *Valadez* did not change this requirement for defendants who, like Reyes Fuerte, are seeking plea withdrawal because of the deportation consequences of their pleas. *Valadez*, 366 Wis. 2d 332, ¶ 64 (J. Ziegler, concurring in part, dissenting in part) ("this case should not be read as modifying our prior case law on deportation, including *State v. Shata*, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93, *State v. Ortiz-Mondragon*, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717, and *State v. Negrete*, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749").

> [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.

According to Reyes Fuerte's motion for plea withdrawal, the federal government initiated removal proceedings against him in January 2013, more than a year before he entered his pleas in this case (21:4). Neither his motion papers nor the remaining record says *anything* about the basis for those proceedings. And Reyes Fuerte is not claiming that his pleas are the reason the government is deporting him; he argues that his conviction prevents him from qualifying for cancellation of removal because of the amount of time he's been in the United States and the fact that he has two children who are United States Citizens (21:4), (Reyes Fuerte Br. 4-5).

Beyond a general and conclusory cite to the federal statute "listing the elements" for cancellation of removal, however, Reyes Fuerte has not provided any proof in support of his allegations (21:4), (Reyes Fuerte Br. 4-5). Specifically, he has not adequately alleged that his guilty pleas are "likely" to result in deportation, exclusion from admission to the country, or denial of naturalization. *See* Wis. Stat. § 971.08(2). Reyes Fuerte is not entitled to relief based on the record in this case. *Negrete*, 343 Wis. 2d 1, ¶¶ 26-27.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's decision to deny Jose Reyes Fuerte's motion for plea withdrawal. Given the State's argument in favor of overturning our supreme court's decision in *Douangmala*, however, the State also believes that certification to the supreme court is warranted.

Dated this 14th day of April, 2016.

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 7,610 words.

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Nancy A. Noet
Assistant Attorney General

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 14th day of April, 2016.

_____
Nancy A. Noet
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