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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.

REPLY BRIEF 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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To the State, Mr. Reyes Fuerte's arguments before this Court are an afterthought as it seeks a bigger prize from the Court above: reversal of *State v. Douangmala*. But precedent cannot be "abandoned merely because the composition of the court has changed." *See Johnson Controls v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257 (2003). Rather, "special justification" is required to overturn prior decisions." *Id*. at ¶ 96. And the State's ironic reliance on the US Supreme Court's *Padilla vs Kentucky* decision as such a justification is too clever by half.

But more importantly, the Supreme Court got *Douangmala* right. The State looks in vain for ambiguity in a brief, clear statute.

I. THE STATE CANNOT RE-LITIGATE *DOUANGMALA*.

Neither this Court nor the one above may simply revisit the merits of *Douangmala* on a whim. To overturn precedent, the rule of law demands "special justification," such as legal or factual developments which undermine the rationale for the law, or evidence that the law is "unworkable in practice." *Johnson Controls*, 234 Wis.2d 1, at ¶ 98.

In the precedent at issue, the Supreme Court in *State v. Douangmala* ruled that the harmless error rule does not apply to motions under Wisconsin Statute § 971.08. 2002 WI 62, ¶ 31, 253 Wis. 2d 173 646 N.W.2d 1. As a practical matter, this eliminated a tricky factual inquiry into what the defendant understood when he pled guilty to an offense. Far from "unworkable," the rule is *simpler* in practice than the prior, fact-intensive "harmless error rule."

The State's justification for returning to a more complicated rule is itself fittingly complicated. Essentially: Immigration consequences must now be accurately explained to defendants by defense attorneys pursuant to the US Supreme Court's *Padilla v. Kentucky* decision. *See* (State's Br. at 14.) Therefore, even if the Court's recitation of a "short paragraph . . . may not have had much of an impact" on a defendant before *Padilla*, it has even less impact on the educated, post-*Padilla* defendant. *Id*. (referring to Wis Stat. § 971.08(1)(c)). Plus, any defendant who truly did not understand the immigration consequences of his guilty plea, can blame counsel and withdraw his plea under *Padilla*.

Mr. Reyes replies in two ways. First, the redundancy of the 971.08 advisal is far from a new factual development.

And second, *Padilla* requires so little of a criminal defense attorney that a Judge's advisals are no less necessary today than they were in 2002, when *Douangmala* was decided.

A. The Court's advisal in § 971.08 was already redundant when *Douangmala* was decided.

The State argues that the rationale behind abrogating the harmless error rule is undermined by a defense counsel's new legal duty to mention the possibility of adverse immigration consequences of a guilty plea. But this conversation had been required for years before *Douangmala*. Defendants have had to fill out plea questionnaires which substantially track the language of the advisal in Wisconsin Statute § 971.08. *See State v. Issa*, 186 Wis. 2d 199 519 N.W.2d 741 (1994).

In *Issa*, the Wisconsin Supreme Court Court explained that a defendant's review of a plea questionnaire is very different than hearing an in-court admonishment—and does not satisfy that requirement. *Id*. at 209. And indeed, in *Douangmala* itself, the defendant had personally initialed next to a plea questionnaire stating the advisal nearly verbatim. The defendant's having heard this information before made it no less necessary. Some duties, according to

the Legislature and Supreme Court, must be fulfilled by Judge, and cannot be left to counsel.

In any event, the State is wrong to suggest that when *Douangmala* was decided, the Court's statutory advisal was the only time a defendant heard that adverse immigration consequences may attach to his guilty or no contest plea. The in-court advisal was then, as now, a redundancy.

B. *Padilla* often requires very little of criminal defense attorneys.

The Supreme Court's decision *Padilla* announced an important new rule. And the case can be an important protection against egregiously poor representation. But it is relevant only in clear-cut cases.

Under *Padilla*, when immigration laws are not "clear, succinct, and straightforward" a defense attorney need not say more to her client than: your offense "may carry a risk of adverse immigration consequences." *State v Ortiz Mondragon*, 2015 WI 73 ¶¶ 33, 59, 364 Wis 2d. 63, 866 N.W.2d 717 (citing *Padilla*, 559 U.S. at 369). This vague phrase is not "more than a quick statutory warning," as the State suggests. (State's Br. at 14). It is literally less.

Indeed, criminal defense attorneys who are not experienced in the complicated world of immigration laws have every reason to limit their advice to that vague statement. Incorrect advice would be malpractice.

A vague admonishment from defense counsel some time prior to a plea hearing is no more meaningful than reviewing a plea questionnaire as was required when *Douangmala* was decided.

In contrast, the advisal contained in Wisconsin Statute 971.08(1)(c) must be read to *every defendant*, regardless of the complexity of the immigration laws which may inhere to his or her guilty plea. This advisal addresses three important adverse consequences of a plea and it comes from a neutral, authoritative figure. The State may view the recitation of this "short paragraph" cynically, but the Legislature did not, and it added an important remedy when the Court failed to comply.

When defendants later face adverse immigration consequences as a result of their plea, section 971.08(2) created a robust right to withdraw the plea. That was quite clearly the intent of the strong statutory language.

Ultimately, the State justifies the reversal of *Douangmala,* on *Padilla,* reasoning that it changed the

landscape for non-citizens who plead guilty to crimes in Wisconsin. In practice, *Padilla* does next to nothing to educate defendants when immigration laws are complicated. And *Padilla*'s post-conviction remedy is necessarily also limited to clear-cut cases.

Not only is post-conviction litigation under *Padilla* often unavailable, but when it is, the litigation is inherently far more complicated. A moving party must prove the advice given, and explain how that advice compares to immigration laws. It may involve expert witnesses and contentious questions of credibility and professional ethics. It greatly burdens the moving party, not to mention criminal courts, which must schedule evidentiary hearings.

Therefore, *Padilla* provides right to limited advice, and an extremely complicated post-conviction remedy for *some* defendants. But it is certainly not enough of a protection to warrant reversing *Douangmala*.[1]

[1] Also, the State is either being disingenuous or employing deeply flawed logic when it infers in its Brief at 20-21, that Mr. Reyes' decision not to file a motion based on *Padilla* is because "he knew the related immigration consequences" when he entered his plea. And indeed, should *Douangmala* be reversed, a remand could determine what advice, if any, he received.

II. THE COURT WAS RIGHT IN *DOUANGMALA*.

Wisconsin Statute § 971.08 defines a simple remedy for a simple requirement. The law demands that the Court read specific advisals to a defendant before he pleads guilty or no contest. And when the Court fails to do so, the remedy is vacatur of the judgment. The Statute set only one condition: that the defendant show that she is likely to be deported as a result of her plea.

The State, however, urges the Court to add an additional element not contained specifically within section 971.08, but within a general statute: 971.26, sometimes known as the harmless error rule. Specifically, 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."

The argument continues: a defendant cannot logically be "prejudiced" if the Court failed to tell him what he already knew. Therefore, the defendant's understanding of

immigration laws at the time of his plea hearing is critical to vacatur under 971.08, despite the statute's silence.

But the State's preferred reading leaves a general statute (§ 971.26) controlling a specific one (§ 971.08). Such an approach to statutory interpretation defies logic. *See Am. Fed. of State, County, and Mun. Employees Local 1901 v. Brown Co.*, 432 N.W.2d 571, 574 146 Wis.2d 728 (Wis., 1988) ("where two conflicting statutes apply to the same subject, the more specific controls").

Thus the *Douangmala* Court was hardly "extreme" in declining to read the statute as the State urges. It was right. The statute describes a simple rule with a simple remedy.

CONCLUSION

The State has not provided a justification warranting *Douangmala*.

Respectfully submitted this 28th day of April, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1377 words.

Dated this 28th day of April, 2016

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Ben M Crouse

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Dated this 28th day of April, 2016

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