STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP2041-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOSE ALBERTO REYES FUERTE,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER DENYING A POSTCONVICTION MOTION FOR PLEA WITHDRAWAL, ENTERED IN COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE ALAN J. WHITE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Wisconsin Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
noetna@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page(s)

Statutes

ISSUE PRESENTED FOR REVIEW

Now that criminal defense attorneys are obligated to advise their clients about the immigration consequences of their pleas, *Padilla v. Kentucky*, 559 U.S. 356 (2010), should the Wisconsin Supreme Court overturn its decision in *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, and reinstate the harmless error rule to prohibit a defendant who was aware of the potential immigration consequences of his plea from being able to withdraw the plea because the circuit court failed to give a statutory immigration warning that complied with Wis. Stat. § 971.08(1)(c)?

Neither the circuit court nor the court of appeals addressed the issue.

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE

On February 20, 2014, Jose Alberto 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, Pet-App. 124.)

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:

> 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).[1] Already in removal (deportation) proceedings,[2] Reyes Fuerte alleged that his conviction "left

---

[1] Subsection (2) states the remedy for a court's failure to provide the required warning:

> 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).

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. It observed that the required information was in the plea questionnaire, which Reyes Fuerte confirmed he'd reviewed and understood:

> 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.

(23:2, Pet-App. 135.) The court then found that any defects in the colloquy were inconsequential and that the

---

[2] Federal statutes most often refer to deportation as "removal." The terms are used interchangeably in this brief.

record demonstrated that Reyes Fuerte understood the immigration consequences of his plea:

> The court finds many of the complaints of the defendant to fall into the category of complaints similar to those in Mursal. (ie 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, Pet-App. 135.)

On September 8, 2016, the court of appeals reversed the circuit court's decision based on its conclusion that "the circuit court deviated in significant ways from [the] statutorily specified language" of Wis. Stat. § 971.08(1)(c). *State v. Reyes Fuerte*, No. 2015AP2041-CR, 2016 WL 4690058, ¶ 2 (Wis. Ct. App. Sept. 8, 2016) (unpublished). (Pet-App. 103.) The court of appeals also decided that "[i]n the absence of supreme court guidance and briefing by the parties, we conclude that Reyes Fuerte's allegations are sufficient for purposes of [establishing that his plea is likely to result in his deportation,]" as required by Wis. Stat. § 971.08(2). *Reyes Fuerte*, 2016 WL 4690058, ¶¶ 38–39. (Pet-App. 116.)

The court of appeals rejected the circuit court's harmless error analysis because of this Court's decision in *State v. Douangmala*:

> Our supreme court explained in *Douangmala* that harmless error principles do not apply to Wis. Stat. § 971.08(2). It follows that the failure to provide a proper advisement under the statute cannot be deemed harmless based on a showing that the defendant was actually aware of the immigration consequences information that is contained in the required advisement.

Reyes Fuerte, 2016 WL 4690058, ¶ 8 (internal citations omitted). (Pet-App. 104.)

Noting that the State's brief included "theories for why *Douangmala*'s rejection of harmless error in this situation should be overruled[,]" the court of appeals declined to address the merits of the State's argument. *Reyes Fuerte*, 2016 WL 4690058, ¶ 8 n.3. (Pet-App. 104.) Instead, the court observed that "[w]hether there is any merit to the State's challenge is for the supreme court to decide." *Reyes Fuerte*, 2016 WL 4690058, ¶ 8 n.3.

The State petitioned for review in this Court.

STANDARD OF REVIEW

Only this Court can overrule, modify or withdraw language from one of its previous decisions. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

ARGUMENT

The Wisconsin Supreme Court's decision in *State v. Douangmala*, which eliminated the harmless error rule in cases like this, should be overturned in light of the United States Supreme Court's decision in *Padilla v. Kentucky*.

A. Summary of argument.

Before the United States Supreme Court decided *Padilla v. Kentucky*, 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.

The warning became especially important in 1996 when changes in federal immigration law made removal from the United States virtually automatic for noncitizens who committed certain crimes.[3] "While once there was only a

[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.

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, this Court decided *State v. Douangmala*. *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. *Douangmala*, 253 Wis. 2d 173, ¶ 42.

While this 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 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. United*

"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).

States, 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. Defendants who do not receive proper legal advice can withdraw their pleas based on the ineffective assistance of counsel.

The problem is that *Douangmala* still 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).

All of these provisions remain unchanged today. *See* Wis. Stat. § 971.08(1)(a)-(c) & (2) (2015-16).

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

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

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, the court of appeals 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

---

[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).

was prejudiced by the omission. *Issa*, 186 Wis. 2d at 204–05, 209–11.[6] The court explained:

> [A]lthough 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), the court of appeals 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. The *Lopez* 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).

---

[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.

Five years later, the court of appeals 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. *Douangmala* overturned long-standing precedent and ignored important principles of statutory construction to exempt plea withdrawal claims based on a court's failure to give the statutory warning from the harmless error analysis that applies to virtually every other request for plea withdrawal.

Two years after *Garcia*, this Court decided *Douangmala* and overruled *Chavez, Issa, Lopez,* and *Garcia*,

holding that harmless error analysis *never* applies when a court fails to give the immigration warning before accepting a defendant's plea. *Douangmala*, 253 Wis. 2d 173, ¶ 42. Focusing on the language of Wis. Stat. § 971.08(1)(c) and 971.08(2), this Court concluded that those provisions mandate plea withdrawal whenever a defendant shows that the circuit court did not give a proper immigration warning and 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 *Douangmala* 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 noncitizen defendants who *unwittingly* entered pleas without being informed of the related immigration consequences. *Douangmala*, 253 Wis. 2d 173, ¶¶ 27–31. Despite that clear legislative intent, the Court 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 *Douangmala* Court found that "the *Chavez* harmless-error interpretation of Wis. Stat. § 971.08(2) is objectively wrong under the language of the statute." *Douangmala*, 253 Wis. 2d 173, ¶ 42. The opinion did not include any discussion or analysis of the interaction and inconsistency between Wis. Stat. § 971.08 and Wis. Stat. § 971.26 (the harmless error statute). The 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. The oversight is significant.

Generally, statutory interpretation starts with the language of the statute, and if the meaning of the statute is plain, the inquiry ordinarily ends. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663–64, 681 N.W.2d 110. At the same time, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46 (citations omitted).

"A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Kalal*, 271 Wis. 2d 633, ¶ 47 (citations omitted). And statutory ambiguity may be created by the interaction of separate statutes. *All Star Rent A Car, Inc. v. Wis. Dept. of Transp.*, 2006 WI 85, ¶ 25, 292 Wis. 2d 615, 716 N.W.2d 506 (citations omitted). As the court of appeals correctly noted in *Chavez*, the conflict between the statutes listed above renders the directive in Wis. Stat. § 971.08(2) ambiguous.

Section 971.08(2) provides that when a court fails to give a proper immigration warning to a defendant who demonstrates that his plea is likely to result in certain adverse immigration consequences, the court "shall" permit that defendant to withdraw his plea.

Nonetheless, sec. 971.26 states that: "[n]o 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." In addition, Wis. Stat. § 805.18 provides that a court "shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Wis. Stat. § 805.18(1). The statute goes on to state:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding . . . for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Wis. Stat. § 805.18(2).[7]

Alone, Wis. Stat. § 971.08(2) could be read to mean that a defendant who does not receive a proper statutory immigration warning may withdraw his plea even if he was fully aware of the possible immigration consequences when he entered the plea. Read with Wis. Stat. §§ 971.26 and 805.18, however, it may be read to mean that the defendant's conviction will not be vacated if the court's failure to deliver a sufficient warning did not prejudice the defendant. As a result, the directive in Wis. Stat. § 971.08(2)

---

[7] Although Wis. Stat. § 805.18 applies to civil procedure, it also applies to criminal proceedings pursuant to Wis. Stat. § 972.11(1). *State v. Rocha-Mayo*, 2014 WI 57, ¶ 31, 355 Wis. 2d 85, 848 N.W.2d 832; Wis. Stat. § 972.11(1) ("Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction.").

is ambiguous. *Watton v. Hegerty*, 2008 WI 74, ¶ 15, 311 Wis. 2d 52, 751 N.W.2d 369 (citation omitted) (statute is ambiguous if it is capable of being reasonably understood in two or more ways).

To resolve the ambiguity, it is appropriate to consider extrinsic sources. *Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 18, 369 Wis. 2d 387, 882 N.W.2d 371 (citation omitted). In this case, it is helpful to examine the legislative history of the act that created Wis. Stat. § 971.08, 1985 Wis. Act 252. The history noted that several other states had enacted similar statutes and that "[s]uch enactments go a long way to alleviate the hardship and unfairness involved when an alien *unwittingly* pleads guilty or nolo contendere to a charge without being informed of the immigration consequences of such a plea." 1985 Wis. Act 252. (Pet-App. 142.) (emphasis added). The notes also observed that some other state courts had begun to allow defendants vacate their pleas based on claims that their attorneys had been ineffective in failing to advise them about the potential immigration consequences of their pleas. 1985 Wis. Act 252. (Pet-App. 142.)

Based on the legislative history of Wis. Stat. § 971.08, the *Chavez* court correctly concluded that

> the 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 (emphasis added).

Dismissing the ambiguity created by the interaction among the above-discussed statutes as well as the related legislative history, *Douangmala* drastically altered the

standard plea withdrawal procedure for claims based on a 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 result may well have stemmed from policy concerns over the fact that at the time, the statutory immigration warning was the only advice that noncitizen defendants were entitled to receive about the immigration consequences of their pleas. However reasonable those concerns may have been, the United States Supreme Court's decision in *Padilla* changed the legal landscape dramatically, and the same policy concerns no longer apply.

E. Now that defense attorneys have a constitutional obligation to advise their clients about the immigration consequences of their pleas, a circuit court's failure to give a proper statutory warning should not allow automatic plea withdrawal.

For many years, the immigration consequences of a criminal plea were considered "collateral" consequences that defense attorneys were not required to address with their clients. *See Chaidez,* 133 S. Ct. at 1109. This left noncitizen 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).

The Supreme Court's decision in *Padilla* 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 ("This Court announced a new rule in *Padilla*."). Two cases from this Court have recognized that obligation. *State v. Shata*, 2015 WI 74, ¶ 35, 364 Wis. 2d 63, 868 N.W.2d 93; *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 33, 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.

Following *Padilla*, noncitizen defendants are entitled to affirmative legal advice to protect them from entering pleas without knowing about immigration issues that might follow. 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, *Douangmala* allows noncitizen 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 noncitizen defendants with claims under Wis. Stat. § 971.08(2) *automatically* are entitled to withdraw their pleas even if the pleas were knowing, voluntary and intelligent.

This unfair result exists nowhere else in the law regarding plea withdrawal. Although it may have made practical sense before defendants had the benefit of *Padilla*, it doesn't any longer.

F. Continued adherence to *Douangmala* will allow noncitizen defendants to automatically withdraw their pleas based on violations of Wis. Stat. § 971.08(1)(c), even when they were fully aware of the immigration consequences of the pleas.

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, 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). A defendant may show a manifest injustice by demonstrating that his plea was not knowingly, voluntarily, and intelligently entered. *State v. Taylor,* 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482. A defendant may also establish that a manifest injustice has occurred by proving that he did not personally enter or ratify his plea, or that his attorney was ineffective. *Taylor*, 347 Wis. 2d 30, ¶ 49.

When a defendant challenges his plea colloquy, he must show that the circuit court accepted the plea without satisfying its duties under Wis. Stat. § 971.08 or other mandatory procedures. *Bangert*, 131 Wis. 2d at 274; *see also State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14. If the 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. 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 *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 exempts noncitizen defendants seeking plea withdrawal under Wis. Stat. § 971.08(2) from having to prove that "manifest injustice" warrants relief and allows the withdrawal of pleas that are knowing, voluntary and intelligent. 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.

Overruling *Douangmala* and reinstating the harmless error rule is necessary to guard against this problem, particularly since the overriding goal of *Douangmala* — to protect noncitizen defendants from *unknowingly* entering pleas without being informed of the related immigration consequences — has been better accomplished by the U.S. Supreme Court's decision in *Padilla*.

This Court should overturn *Douangmala* and reinstate the harmless error rule for plea withdrawal claims based on violations of Wis. Stat. § 971.08(1)(c).

G. Departing from stare decisis is warranted.

Finally, this Court adheres to the doctrine of stare decisis out of "abiding respect for the rule of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. That said, "special justification" may warrant departure from stare decisis, and "the power of the court to repudiate its prior rulings is unquestioned, though not often exercised." *Id.* ¶ 96 (internal quotation marks and quoted source omitted). As this Court has noted:

> Stare decisis is neither a straightjacket nor an immutable rule. We do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision.

Johnson Controls, 264 Wis. 2d 60, ¶ 100 (citation omitted).

Reasons for departing from stare decisis include: "(1) changes or developments in the law that undermine the rationale behind a decision; (2) the need to make a decision correspond to newly ascertained facts; (3) a showing that a decision has become detrimental to coherence and consistency in the law; (4) a showing that a decision is unsound in principle; and (5) a showing that a decision is unworkable in practice." *State v. Young,* 2006 WI 98*,* ¶ 51 n.16, 294 Wis. 2d 1, 717 N.W.2d 729.

The Supreme Court's holding in *Padilla* was a massive shift in the law. Before the decision, legal advice about the immigration consequences of a defendant's plea was considered unnecessary. *Padilla* made such advice a

constitutional requirement under the Sixth Amendment. As the above discussion demonstrates, this significant change in the law has undermined the rationale of *Douangmala* and shown that *Douangmala* is both unsound in principle and unworkable in practice. This case presents precisely the kind of "special justification" that warrants departure from the doctrine of stare decisis.

H. The circuit court's alleged errors in giving the statutory immigration warning in this case appear to be harmless.

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 did not 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 would require an evidentiary hearing for a full assessment of Reyes Fuerte's claim under Wis. Stat. § 971.08.[8] Should the evidence show that he was aware of the immigration consequences of his pleas, his claim properly would fail.

[8] The court of appeals' decision already calls for an evidentiary hearing in the circuit court to afford Reyes Fuerte the opportunity to prove up his allegation that his plea in this case is, in fact, likely to result in adverse immigration consequences. *State v. Reyes Fuerte*, No. 2015AP2041-CR, 2016 WL 4690058, ¶ 42 (Wis. Ct. App. Sept. 8, 2016) (unpublished). (Pet-App. 101-117.)

CONCLUSION

For all of the above reasons, the State of Wisconsin asks this Court to: (1) reverse the court of appeals' decision, (2) overturn *Douangmala*, and (3) reinstate the harmless error rule for plea withdrawal claims based on violations of Wis. Stat. § 971.08(1)(c). Should the Court reinstate the harmless error rule, the Court should remand the case to the circuit court for an evidentiary hearing to permit the State to prove that Reyes Fuerte's plea was knowing, intelligent and voluntary despite any violation of Wis. Stat. § 971.08(1)(c). In the alternative, the case would return to the circuit court for further proceedings consistent with the court of appeals' decision.

Dated: February 17, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)

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 6,327 words.

_____
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: February 17, 2017.

_____
NANCY A. NOET
Assistant Attorney General

Index to Appendix
State of Wisconsin v. Jose Alberto Reyes Fuerte
Case No. 2015AP2041-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: February 17, 2017

_____

NANCY A. NOET
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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. § (Rule) 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 all opposing parties.

Dated: February 17, 2017.

_____

NANCY A. NOET
Assistant Attorney General