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STATE OF WISCONSIN
SUPREME COURT

Case No. 2015AP002041-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner

Jose Alberto REYES FUERTE,

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT

Review of a decision by the Court of Appeals District IV on Appeal Reversing the Denial of a Motion To Withdraw Plea
Honorable Alan J. White, Columbia County Circuit Court

Ben M Crouse
Wisconsin Bar No. 1073936

Sesini Law Group, S.C.
Counsel for Jose A. Reyes Fuerte
234 West Florida Street, Ste 203
Milwaukee, Wisconsin 53204
(414) 224-8080
ben@sesinilaw.com

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STATEMENT OF ORAL ARGUMENT AND PUBLICATION

By granting the State's Petition for Review, this Court has indicated that this case is appropriate for oral argument and publication, both of which are welcomed by Mr. Reyes.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Was this Court wrong to rely on the plain meaning of Wis. Stat. § 971.08(2) in *State v. Douangmala* 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d, and if so, does anything justify departing from precedent to reverse it today?

STATEMENT OF THE CASE

Jose Alberto Reyes Fuerte immigrated to the United States from Mexico shortly after he turned 18. (21.) He settled in Wisconsin where he had two children. But in November of 2012, he was arrested and charged with, among other offenses, fleeing or eluding an officer—a class I felony. Shortly after that arrest, Immigration and Customs Enforcement initiated deportation[1] proceedings against him.

Meanwhile on February 20, 2014, as deportation proceedings dragged on, Mr. Reyes pled guilty to the felony charge. At his plea hearing, the Court spoke off the cuff about immigration, rather than reciting the statutorily mandated sentence about immigration consequences of his plea. (23:2, Pet. App.162.)

And those immigration consequences were stark. Eluding an officer is a crime involving moral turpitude. *Cano-Oyarzabal v. Holder*, 774 F.3d 914, 916−17 (7th Cir. 2014). Therefore, his conviction left Mr. Reyes ineligible for "cancellation of removal" an important defense against his deportation from the United States which would permit a

[1] Since 1996, Federal Law has referred to the process as "removal," but to avoid confusion the term deportation will be used as it is in Wis. Stat. § 971.08.

judge to take into account his years in the United States and his young children's hardship if he were deported. *See* 8 USC § 1229b(b)(1). Once that reality became clear, he moved to withdraw his guilty plea. He argued that the Court's language meaningfully differed from that language required by law.

The Court denied Mr. Reyes' motion, concluding that its comments came close enough.[2] (Pet. App. at 135.) Mr. Reyes appealed, again pointing to significant discrepancies between the statute and the Court's words. In response, the State went even further than the Court below, arguing that *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d. 173, 646 N.W. 2d 1 should be overruled. It argued that the Circuit Court must examine Mr. Reyes' knowledge and understanding of immigration laws before permitting withdrawal of his plea under Wis. Stat 971.08(2).

The Court of Appeals reversed in a published decision. *State v. Reyes Fuerte*, 2016 WI App 78, 372 Wis. 2d 106, 887 N.W.2d 121. It concluded that the Circuit Court's admonition differed from the one required by law "in two significant ways." *Id.* at ¶17. It did not address the State's argument for reversing *Douangmala*. This appeal followed.

[2] A partial copy of the decision is contained in (Pet. App. 135.)

ARGUMENT

On April 15, 1986, the Wisconsin Legislature passed a law requiring judges to "personally" address a defendant who wishes to plead guilty, and deliver a specific fifty-word sentence regarding the immigration consequences of such a plea. 1985 Wisconsin Act 252 (codified at Wis. Stat. § 971.08(1)(c)). To enforce that requirement, the legislature created a unique plea withdrawal mechanism, available to defendants who later faced immigration consequences after the Court had not followed the law. Wis. Stat. § 971.08(2).

In 2002 this Court unanimously held that this plea withdrawal mechanism did not invite an inquiry into the defendant's knowledge or state of mind. *State v. Douangmala,* 253 Wis. 2d., ¶42.. The Court concluded that the "harmless error rule," codified in section 971.26 does not control motions under section 971.08(2) because its language is clear. A contrary interpretation is "objectively wrong." *Id*.

Today, thirty years after Act 252's passage, and nearly fifteen since the *Douangmala* decision, the legislature has not changed that law. And this Court should decline the State's invitation to do so judicially.

I. This Court was right when it decided *Douangmala*.

The Court in *Douangmala* had it right when it concluded that grafting the "harmless error rule" from section 971.26 onto section 971.08(2) was "objectively wrong." 2002 WI 62 at ¶42. The plain language does not support such a reading. Thus, the appeal to legislative history is misplaced.

But even the legislative history itself is supports the plain language reading. The documents cited by the State show that the legislature deliberately required a statement by a Judge to a Defendant, rather than merely relying on defense counsel to discuss immigration consequences, as the State's proposed rule would do.

Finally, there is no merit the State's argument that the harmless error rule is necessary to avoid a later windfall for a non-citizen who pleads guilty with full knowledge of his resulting deportation. First, not being deported is hardly a windfall. But more importantly, the vacatur remedy outlined in (2) is an enforcement mechanism for the simple advisal requirement in (1)(c). The legislature could very plausibly have intended a vigorous enforcement mechanism that results in occasional "windfalls."

A. The plain language is clear: grafting the "harmless error" rule onto 971.08(2) would render the phrase "and a defendant later shows that the plea is likely to result in deportation…" superfluous.

Statutory interpretation, of course, must begin with the language of the statute itself. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. Here, the "[c]ontext is important to meaning." *Id*. at ¶ 46.

Section 971.08(2) lists two only facts that a defendant must show before a court "shall" vacate the judgment and withdraw a guilty plea: 1) that the "court fail[ed] to advise . . . as required under sub (1) (c)" and 2) "that the plea is likely to result in the defendant's deportation, exclusion of admission to this country or denial of admission to the United States."

Clearly absent from that text is a requirement that the defendant show that he did not understand that his plea would result in adverse immigration consequences. The State argues that an ambiguity arises when 971.08 is read together with another section, Wis. Stat. 971.26, known as the harmless error rule—a general statute which explicitly applies to any "indictment, information, warrant" or to a "trial, judgment, or other proceeding."

However, the State's suggested reading of Wis. Stat. § 971.26 would render most of § 971.08(2) superfluous. In fact, it would entirely obviate one of only two stated factual showings. Logically, a Judge's failure to advise would always be a "harmless error" if the defendant could not later show that the plea was likely to result in his deportation, exclusion, or denial of naturalization.

In its brief, the State has suggested that the harmless error statute adds a "prejudice" element like the one in ineffective assistance of counsel claims. *See* (Pet Br. at 17-18 (quoting *State v Chavez*, 175 Wis.2d 366, 371 498 N.W.2d 887 (Ct. App. 1993)). But a prejudice element is already contained in the statute: a defendant must show that his plea is likely to result in adverse immigration consequences. The one in the statute is just a more limited factual inquiry—one which does not attempt to retroactively divine the comprehension of a non-citizen defendant.

The State's interpretation is doubly problematic because it substitutes the language of a general statute (section 971.26) for the language in a specific one (section 971.08(2)). And this Court has cautioned against such an approach. *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").

Finally, it is also worth noting that section 971.26 was already the law in April of 1986 when the legislature passed 1985 Wisconsin Act 252. *See* Wis. Stat. § 971.26 (1985-86); *State v. Leach*, 124 Wis.2d 648, 370 N.W.2d 240 (Wis., 1985) (discussing its application in another context). It is unclear why the legislature would waste its ink requiring a showing that a defendant faced adverse consequences as a resulting from his guilty plea if the harmless error rule already required that.

Ultimately, the State's reading is unreasonable because it does not give meaning to all the words of the statute. So the Court was right in *Douangmala* that the statute is unambiguous: it clearly describes a factual inquiry independent of the harmless error rule, avoiding the tricky inquiry into a non-citizen defendant's knowledge at the time of his plea hearing. The plain, unambiguous language leaves no need to imagine legislative intent, but even if it did, the State's arguments are unpersuasive.

B. The legislature intended to require a specific conversation between the Court and a Defendant instead of relying defense counsel for discussion of immigration consequences.

The evidence of the legislative history behind 1985 Wisconsin Act 252 is scant. A modest criminal-procedural bill, Senate Bill 541 provoked so little controversy it makes one nostalgic for the 1980s. The only clear evidence in the existing record is that the Legislature wanted to mandate a conversation between a Judge and defendant about immigration consequences.

Reading the harmless error rule into 971.08(2) as the State asks would have the opposite effect. The State argues that now that criminal defense attorneys must mention the possibility of deportation, the Courts no longer have to.

The analysis provided by the Legislative Reference Bureau and attached to the bill itself described the existing obligation of a judge to "ascertain" whether the plea was voluntarily entered and with an "understanding" of the charges. (Pet. App. at 138.) That sentence contrasts the following sentence stating that a judge is required to merely "advise a defendant" of the immigration consequences of a plea. It does not state that a Judge is required to ascertain the

understanding of a defendant as to those consequences. This is further evidence that the legislative focus was not on the knowledge and understanding of a defendant, but merely upon a judge's language in court.

The State's seizes on one word ("unwittingly") photocopied from a publication known as *Interpreter Releases* and attached to a drafting request by then-Senator John Norquist to the Legislative Reference Bureau. (Pet. Br. 17); (Pet.-App. at 142). It offers this word up as proof of the legislature's intent to protect only those non-citizens who were unaware that criminal cases had immigration consequences. *Id.*

But this Court in *Douangmala* was rightly dismissive of this document. *See* 253 Wis. 8d 173, ¶¶ 28-30. That word is not even good evidence of Senator Norquist's intent. But it is even less clear that his fellow Senators or members of the Assembly would have seen this article from an obscure immigration-related weekly.

C. Section 971.08(2) is a robust, legislatively-imposed enforcement mechanism that should not be weakened by the harmless error rule.

The Legislature passed a simple advisal statute to ensure that the Court, a neutral, authoritative figure

personally address the possibility of a defendant's deportation before accepting his or her guilty plea. And it wisely created an enforcement mechanism to ensure that such an advisal be delivered. Today, motions under section 971.08(2) provide occasional, if at times painful, reminders to Circuit Court judges of the importance of the Legislature's instructions.

Judicially inserting the harmless error rule into the legislature's withdrawal mechanism would render it nearly toothless. In practice, the district attorney would call defense counsel, who would only have to admit not committing malpractice to satisfy the harmless error test. This would effectively pass all responsibility for advising a client of adverse immigration consequences to defense counsel.

The State, citing *Chavez*, suggests that a defendant who knowingly pleads guilty would receive a windfall if his conviction were vacated because of a Judge's error. (See Pet. Br. at 11 (citing *Chavez*, 175 Wis.2d at 371).) But even this argument falls flat. By not being deported as a result of his conviction a non-citizen is merely restored to the same position of a US Citizen defendant, who never faces such risks when appearing in Wisconsin Courts. That is hardly a windfall.

II. There is no reason to revisit *Douangmala* now.

Stare decisis does not permit this Court to revisit the legal conclusion it reached in *Douangmala*, because there is no reason to depart from its precedent. The legislature certainly could have revisited its brief statute in the fifteen years following this Court's opinion, but it has not. And the State's policy arguments come to nothing in the end.

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, Inc. v. Employers Ins. Of Wausau*, 2003 WI 108, ¶ 98, 234 Wis.2d 1, 665 Wis.2d.

Further, *stare decisis* takes on even greater significance when, as here, the Court's interpretation of a statute stands for many years. *See Progressive Northern Insurance Co. v. Romanshek*, 2005 WI 67, 281 Wis.2d 300, 697 N.W. 2d 417. That is because "a construction given to a statute by the court become a part therof, unless the legislature amends the statute to effect a change." *Id.* at ¶52. (citing *City of Sun Prairie v. PSC*, 37 Wis.2d 96, 154 N.W.2d 360 (1967); and *State v. Eichman*, 155 Wis.2d 552, 566

(1990). Put another way, the inaction of the legislature in the nearly fifteen years since *Douangmala* should be seen as its "acquiescence." *See Eichman*, 155 Wis.2d at 566; *Bauman v. Gilbertson*, 7 Wis.2d 467, 469-70, 96 N.W.2d 854 (1959) (eleven years of legislative inaction deemed acquiescence).

To justify departing from *stare decisis* and overrule *Douangmala*, the State has not suggested that the rule is unworkable, for reinsertion of the harmless error analysis would only complicate matters. Instead, it has argued that expanded constitutional protections in *Padilla v. Kentucky*, 559 U.S. 356 (2010), undermine the legislature's rationale for requiring an in Court admonishment—and presumably the *Doaungmala* Court's rationale interpreting that statute.

But *Padilla* has nothing to do with Wis. Stat. 971.08. *Padilla* is a constitutional decision about the relationship between attorney and client. And there are two major flaws with the State's argument vigorous attempts to conflate the two. First, there is no evidence that *Padilla* has led to a better informed criminal defendant. And second, motions under in *Douangmala* are quite clearly simpler to adjudicate, because they do not involve determining a defendant's understanding.

A. A brief admonishment by counsel may satisfy *Padilla*, and particularly this Court's interpretation of it, but such an admonishment neither meaningful nor new.

This Court's interpretation of the US Supreme Court's decision in *Padilla v. Kentucky* does not lead to better informed criminal defendants in most cases. In fact, today it has almost no practical impact on a defendant in Wisconsin unless he or she is affirmatively misled by counsel.

The decision to either plead guilty or go to trial involves a complex weighing of costs and benefits. *See DeBartolo v. United States*, 790 F.3d 775, 777–80 (7th Cir. 2015) (J. Posner) (discussing that analysis). And accurate measurement of both requires experienced legal advice. For non-citizens the cost of a conviction are often much higher than for non-citizens because their livelihood and family unity can be lost by subsequent immigration actions. The US Supreme Court acknowledged the difficulty of this decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010).

When it comes to this difficult decision, this Court has held that Defense counsel's role is extremely limited. *State v. Shata*, 2015 WI 74, ¶¶ 63, 364 Wis.2d 63, 868 N.W.2d 93. "The *Padilla* Court did not require that criminal defense

lawyers function as immigration lawyers or be able to predict what the executive branch's immigration policies might be now or in the future." *Id*.

In fact, that 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). Vague advice like that is not "far better than the statutory warning" as the State suggests. (Pet. Br. at 8). It is less information from a less authoritative source.

But even when immigration laws are clear, and a conviction automatically forecloses a defendant's future eligibility for relief against deportation, that vague statement may still be enough. *See Shata*, 364 Wis.2d 63 ¶¶ 71 (reasoning that stating possibilities is all an attorney can truthfully do, for future enforcement actions are inherently uncertain).

Thus, accepting *Shata* and *Ortiz-Mondragon* as law there is no reason whatsoever for criminal defense counsel to go any further than the minimal advice described therein.

Attorneys who are not experienced in the complicated immigration laws should limit their advice to a vague statement that approximates the statutory warnings in Wis. Stat § 971.08. *See Shata*, 364 Wis.2d 63 ¶¶ 63, 66 (comparing the statute to counsel's advice); *Padilla*, 559 U.S. 356, 385 (2010) (J. Alito concurring). Incorrect advice would be malpractice. Short, vague advice is the safest course.

This case is a perfect example of exactly how complex immigration consequences can be, and thus how little a practical effect *Padilla* affects the present case. When Mr. Reyes pled guilty in February of 2014, a strong case could be made that the offense was not a Crime Involving Moral Turpitude (commonly referred to as a CIMT). *See Mei v. Ashcroft*, 393 F.3d. 737 (7th Cir. 2004) (holding that an aggravated fleeing offense in Illinois is not a CIMT). But later in 2014, the Court of Appeals for the Seventh Circuit published a decision concluding that the Wisconsin statute at issue *was* a CIMT. *Cano-Oyarzabal v. Holder*, 774 F.3d 914, (7th Cir. 2014) (distinguishing *Mei*).

To satisfy the Sixth Amendment, as interpreted by *Ortiz-Mondragon* and *Shata,* counsel would have been required to tell Mr. Reyes that his plea may carry a risk of

adverse immigration consequences. That brief admonishment would not help him make a better informed decision about trying his case.

But even more importantly for present purposes, the brief admonishment anticipated by *Shata* and *Ortiz-Mondragon* is not even new. It was common practice for years before *Douangmala* for defendants to fill out plea questionnaires with defense counsel 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, 743 (1994) (describing a plea questionnaire with an immigration advisal on it). Thus, a brief acknowledgement of possible immigration consequences by counsel before a plea hearing was already common before *Douangmala*.

In sum, *Padilla* did not alter the legal landscape. And so it cannot serve as the basis for departing from *stare decisis*.

B. The current rule is workable, in fact, more so than the State's alternative

An alternative justification for departing from stare decisis and overturning *Doangmala* would be if that rule were unworkable. *See Johnson Controls*, 234 Wis.2d 1, at ¶ 98. But as a practical matter, *Douangmala* eliminated a tricky

factual inquiry into what a defendant understood when he pled guilty to an offense. Applying the harmless error rule requires Courts to determine what information was conveyed to a defendant, in what language, and at what time. It also invites speculation into whether any advice given would have impacted the defendant's decision to plead guilty.

Far from "unworkable," the rule is simpler in practice. The minor questions as to the sufficiency of a statutory advisal had been settled by the Court of Appeals. *See State v. Mursal*, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173; *State v. Reyes Fuerte*, 2016 WI App 78, 372 Wis. 2d 106, 887 N.W.2d 121.

CONCLUSION

For the aforementioned reasons, the Court should Affirm the Court of Appeals Decision and remand to the Circuit Court for an evidentiary hearing on whether Mr. Reyes is likely to be deported as a result of his plea.

Respectfully submitted this 8th day of March, 2017.

_____

Ben M Crouse
Counsel for Jose A Reyes Fuerte
Wisconsin Bar No. 1073936
234 W. Florida Street, Ste 203
Milwaukee, Wisconsin 53204

CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and a maximum of sixty characters per line of body text. The length of this brief is 3212 words.

Dated this 8th day of March, 2017

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Ben M Crouse

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

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Ben M Crouse

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the March 8, 2016, I caused 22 copies of the Brief Defendant-Appellant to be mailed, properly addressed and

postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin, 53701-1688.

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Ben M Crouse