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

# REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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Page

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

**Cases**

Page

**Statutes**

## I. *Douangmala* was wrong.

By itself, 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. That provision, however, does not exist in isolation; it is part of statutory scheme that includes Wis. Stat. §§ 971.26 and 805.18, which generally excuse harmless errors. Properly read in conjunction with those statutes, Wis. Stat. § 971.08(2) could be read to mean that a 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) is ambiguous.[1]

The *Douangmala* Court dismissed this ambiguity and the related legislative history indicating that the legislature enacted Wis. Stat. § 971.08 to address the unfairness involved when a noncitizen defendant *unwittingly* pleads guilty or nolo contendere to a charge without being informed of the immigration consequences of the plea. *State v. Douangmala*, 2002 WI 62, ¶¶ 27–31, 253 Wis. 2d 173, 646 N.W.2d 1. Focusing instead on the language of Wis. Stat. § 971.08 alone, the Court incorrectly exempted plea withdrawal claims based on a court's failure to give the statutory immigration warning from the harmless error analysis that applies to virtually every other request for plea withdrawal.

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[1] *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) (statutory ambiguity may be created by the interaction of separate statutes); *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).

As a result, *Douangmala* allows noncitizen defendants to withdraw their pleas automatically based on violations of Wis. Stat. § 971.08(1)(c), even when they were fully aware of the possible immigration consequences when they entered the pleas. This rule of law is an unwarranted windfall not just because it runs contrary to other statutes and applicable legislative history, but because it affords noncitizen defendants with claims under Wis. Stat. § 971.08(2) the ability to void valid pleas based on only harmless errors in the administration of the statutory immigration warning.

In any other circumstance, such an error or technical defect does not provide grounds to invalidate a criminal proceeding or judgment of conviction if it did not result in any prejudice to the defendant. *See* Wis. Stat. §§ 805.18 and 971.26. The same is true for a plea withdrawal claim based on other deficiencies in the plea colloquy or a defendant's legal representation. *See State v. Bangert,* 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *State v. Bentley*, 201 Wis. 2d 303, 311–12, 548 N.W.2d 50 (1996).

Despite the severity of immigration consequences like deportation, there is no sound reason to insulate plea withdrawal claims based on a court's failure to give the statutory immigration warning from the harmless error analysis that governs other plea withdrawal claims. And, as the legislative history of the statute indicates, it does not appear that the legislature intended that result when it enacted Wis. Stat. § 971.08(2).

Criminal defendants in Wisconsin are not allowed to withdraw their pleas based on harmless errors alone. Nor should they be. The integrity of valid pleas and related criminal convictions is an essential part of our criminal justice system, and that is true irrespective of the potential

immigration consequences associated with certain pleas/convictions.

## II. *Padilla* warrants overturning *Douangmala*.

Before the Supreme Court's decision in *Padilla*,[2] the statutory immigration warning under Wis. Stat. § 971.08(1)(c) was the only advisement that defendants were entitled to receive regarding the immigration consequences of their pleas; legal advice about those possible consequences was considered unnecessary. Under *Padilla*, defense attorneys now have an affirmative obligation to give their clients accurate advice about the potential immigration consequences associated with their pleas in criminal cases, and this Court has acknowledged that obligation.[3]

Reyes Fuerte improperly downplays the significance of this extraordinary change in the law because, in his opinion, the new rule of law does not require enough of criminal defense attorneys in terms of their knowledge of immigration law and the related depth of the legal advice they are required to provide to their clients about the potential consequences of certain pleas. Comparing the required legal advice from counsel to the statutory warning from the circuit court, Reyes Fuerte complains that "[i]t is less information from a less authoritative source" because attorneys who are not well-versed in immigration law will attempt to shield themselves from malpractice by limiting their advice to "a vague statement that approximates the statutory warnings in Wis. Stat. § 971.08." (Reyes Fuerte Br. 15–16.)

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[2] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

[3] *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.

Reyes Fuerte's argument is not just an unsupported jab at criminal defense attorneys. It misses the point of both the statutory warning and the legal advice that defendants receive about the potential immigration consequences of their pleas. Neither is intended to provide a defendant with a comprehensive analysis of things like his immigration status, the likelihood or projected outcome of an immigration action, or available defenses and other forms of relief from immigration action.

That said, the advice that defendants receive from their attorneys is substantially different from the information they receive in circuit court immediately prior to entering their pleas. Before pleading guilty or no contest, defendants meet with their attorneys and often discuss the parameters and ramifications of their pleas at length. A defendant's discussions with counsel necessarily include a number of issues that the circuit court also must address during the plea colloquy. Despite the overlap, defense counsel's role is more extensive.

For example, the circuit court must establish that the defendant understands the nature of the crime at issue. To accomplish this, the court may list the elements of the crime and then ask whether the defendant understands those elements. With a simple "yes" from the defendant and her attorney, the court's inquiry is complete. More often than not, however, that kind of quick exchange with the court is possible because defense counsel thoroughly reviewed and explained the elements to her client.

The same is true regarding the potential immigration consequences of a defendant's plea. The statutory warning informs a defendant that his plea "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). And the circuit court discharges its obligation simply by reading the warning aloud during the plea colloquy. In contrast, defense counsel must provide her clients with accurate advice about the immigration consequences of their pleas. As *Padilla* notes, the complexity of federal immigration law may appropriately limit the substantive scope of such advice. 559 U.S. at 369. Contrary to Reyes Fuerte's argument, this does not render *Padilla* and its progeny meaningless.

Pursuant to *Padilla*, noncitizen defendants are entitled to affirmative legal advice to protect them from entering pleas without knowing about immigration issues that might follow. And counsel's duty to advise comes with 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.

Despite this significant change in the law, *Douangmala* still allows noncitizen defendants to withdraw their pleas based on violations of Wis. Stat. § 971.08(1)(c), even though the pleas were knowing, voluntary, and intelligent. Reyes Fuerte argues that this rule of law is preferable because it is "simpler." (Reyes Fuerte Br. 18.) Even if it is "simpler" to administer, the rule is fundamentally unfair and wrong. Now that defendants are entitled to legal advice from their attorneys about the immigration consequences of their pleas, they should not be allowed to withdraw otherwise valid pleas just because they did not receive a technically accurate statutory immigration warning.

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).

## CONCLUSION

For all of the reasons stated above and its brief-in-chief, 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: March 27, 2017.

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## CERTIFICATION

I hereby certify that this reply 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 1524 words.

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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 27th day of March, 2017.

_____
NANCY A. NOET
Assistant Attorney General