STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP2041-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOSE ALBERTO REYES FUERTE,

Defendant-Appellant.

PETITION FOR REVIEW

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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 just 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.

STATEMENT OF CRITERIA SUPPORTING REVIEW

As more fully explained below, this petition meets the following criteria for review by this Court:

1. A decision by this Court will help develop, clarify or harmonize the law concerning novel legal questions, the resolution of which will have statewide impact. Wis. Stat. § (Rule) 809.62(1r)(c)2.

2. Important questions presented are not factual in nature; they are questions of law of the type that are likely to recur unless resolved by this Court. Wis. Stat. § (Rule) 809.62(1r)(c)3.

3. The court of appeals' decision is in accord with opinions of this Court, but due to the passage of time or changing circumstances, such opinions are ripe for reexamination. Wis. Stat. § (Rule) 809.62(1r)(e).

STATEMENT OF THE CASE

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, 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 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."

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[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).

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

> 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. (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). *Id.* ¶¶ 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 of appeals observed that "[w]hether there is any merit to the State's challenge is for the supreme court to decide." *Id.*

The State petitions for review.

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*, 559 U.S. 356 (2010), 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. "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.

On the heels of these sweeping changes in federal immigration law, this 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 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. 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. 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. *Douangmala* overturned long-standing precedent 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.

Historically, plea withdrawal claims based on a court's failure to give the statutory immigration warning were treated just like other claims for plea withdrawal and subject to the harmless error rule. *See, e.g.*, *State v. Chavez*, 175 Wis. 2d 366, 371, 498 N.W.2d 887 (Ct. App. 1993); *State v. Issa*, 186 Wis. 2d 199, 211, 519 N.W.2d 741 (Ct. App. 1994); *State v. Lopez*, 196 Wis. 2d 725, 732, 539 N.W.2d 700 (Ct. App. 1995); *State v. Garcia*, 2000 WI App 81, ¶ 14, 234 Wis. 2d 304, 610 N.W.2d 180.

When this Court decided *Douangmala*, however, the Court overruled *Chavez, Issa, Lopez,* and *Garcia*, and held 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 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.

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 U.S. Supreme Court's decision in *Padilla* changed the legal landscape dramatically, and the same policy concerns no longer apply.

C. 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 U.S. 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, and although it may have made some practical sense before defendants had the benefit of *Padilla*, it doesn't any longer.

D. 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).

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. *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. 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 the U.S. 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. 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. Overruling *Douangmala* and reinstating the harmless error rule is necessary to guard against this, particularly since the overriding goal of *Douangmala* – to protect noncitizen defendants from *unwittingly* entering pleas without being informed of the related immigration consequences – has been better accomplished by the U.S. 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.

This Court should grant review and reverse the court of appeals' decision. More specifically, the court should overturn *Douangmala* and reinstate the harmless error rule for plea withdrawal claims based on violations of Wis. Stat. § 971.08(1)(c).

E. The circuit court's alleged errors in giving the statutory immigration warning 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 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.

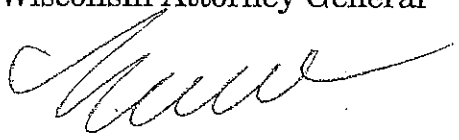
CONCLUSION

For all of the above reasons, the State of Wisconsin asks this Court to grant review in this case: (1) to reverse the court of appeals' decision, (2) to reexamine and overturn *Douangmala*, and (3) to reinstate the harmless 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: October 10, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General



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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 3,454 words.

Dated: October 10, 2016.

NANCY A. NOET
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b)and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated: October 10, 2016.

NANCY A. NOET
Assistant Attorney General