STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. **Case No. 2013AP002433 CR**

STEPHEN A. LEMERE,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION, HONORABLE LISA STARK, PRESIDING, EAU CLAIRE COUNTY CIRCUIT COURT, AND ORDER AND DECISION DENYING A § 809.30, STATS., MOTION TO WITHDRAW GUILTY PLEA, ENTERED IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY, HONORABLE KRISTINA M. BOURGET, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Edward John Hunt
Attorney for Defendant-Appellant
State Bar No. 1005649

HUNT LAW GROUP, S.C.
829 NORTH MARSHALL STREET
MILWAUKEE, WI 53202-3910 (414) 225-0111
FAX: (414) 225-9492

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

CONSTITUTIONAL PROVISIONS CITED

CASES CITED

OTHER AUTHORITIES

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2013AP002433 CR

STEPHEN A. LEMERE,

Defendant-Appellant.

BRIEF IN CHIEF AND APPENDIX OF DEFENDANT-APPELLANT

STATEMENT OF ISSUES

1. WAS STEPHEN A. LEMERE ENTITLED TO AN EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW HIS GUILTY PLEA ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL?

The trial court answered no.

2. WAS STEPHEN A. LEMERE DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE 6TH AMENDMENT AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7 OF THE WISCONSIN CONSTITUTION?

The trial court answered no.

STATEMENT OF THE CASE

By criminal complaint filed on May 18, 2011, the State charged the defendant, Stephen A. LeMere, in Count One with 1st Degree Child Sexual Assault - Contact With a Child Under Age 13, a child, CRC, under the age of 13, named as victim, contrary to §948.02(1)(e), §939.50(3)(b) Wis. Stats., a Class B Felony, in Count Two with Second Degree Reckless Endangerment, a child, CRC, under the age of 13, named as victim, contrary to §941.30(2), § 939.50(3)(g) Wis. Stats., a Class C Felony and in Count Three with Strangulation and Suffocation, a child, CRC, under the age of 13, named as victim, contrary to §940.235(1), § 939.50(3)(h) Wis. Stats., a Class H Felony in Eau Claire County Circuit Court. (1:1-4). An initial appearance was held on May 18, 2011. (53:1-5). A preliminary hearing was held on May 24, 2011. Probable cause was found and LeMere was bound over. (54:1-13). On May 25, 2011, an Information was filed charging LeMere with the same three offenses described in the criminal complaint. (2:1). An arraignment was held on June 7, 2011. LeMere entered pleas of not guilty to all three charges in the Information. (55:1-10).

LeMere entered into negotiations with the State whereby LeMere would plead guilty to Count 1, 1st Degree Child Sexual Assault - Contact With a Child Under Age 13, a child, CRC, under the age of 13, named as victim,

contrary to §948.02(1)(e), §939.50(3)(b) Wis. Stats., a Class B Felony, in the instant case, 11CF333, and the State would agree to dismiss and read in the remaining charges in the instant case as well as all charges in another Eau Claire County Circuit case, 11CF721, which LeMere was charged with Battery by Prisoner and Aggravated Battery. (16:1-2; 62:1-4). LeMere submitted a completed guilty plea questionnaire and waiver of rights to the Circuit Court. (16:1-2). The Honorable Lisa Stark, Eau Claire County Circuit Court, presiding, engaged in a guilty plea colloquy with Mr. LeMere before accepting his plea of guilty to Count 1, 1st Degree Child Sexual Assault - Contact With a Child Under Age 13, a child, CRC, under the age of 13, named as victim, contrary to §948.02(1)(e), §939.50(3)(b) Wis. Stats., a Class B Felony, in the instant case. (62:1-18).

On August 3, 2012, the Honorable Lisa Stark, Eau Claire County Circuit Court, imposed a sentence of 45 years in the Wisconsin State Prison on the charge of 1st Degree Child Sexual Assault - Sexual Contact with Person under Age of 13, contrary to Wis. Stats., § 948.02(1)(e). Judge Stark ordered that LeMere serve the first 30 years in initial confinement and the remaining 15 years to be served on extended supervision. The Judge also ordered that the read in charges of 2nd Degree Recklessly Endangering Safety, contrary to Wis. Stats., § 941.30(2) and Strangulation and Suffocation, contrary to Wis. Stats., § 940.235(1) be dismissed. The Circuit Court also dismissed all of the charges in Eau Claire County Circuit Court case 11CF721. (17:1; 18:1; 56:1-38). The Judgment of Conviction was entered August 3, 2012. (23:1-2; App. 1).

On August 22, 2013, a Motion to Withdraw his Guilty Plea and Vacate Judgment of Conviction and Memorandum of Authority was filed by LeMere. LeMere's Affidavit in Support of the Motion to Withdraw his Guilty Plea was also filed on the same day (40:1-2; 41:1-15; App. 2; App 3). Eau Claire County Circuit Court,

Honorable Kristina M. Bourget, presiding, established a briefing schedule by letter to the parties dated August 27, 2013. (42:1). On September 20, 2013, the State filed a Response to the Defendant's Motion to Withdraw his Guilty Plea. (43:1-5). On September 30, 2013, LeMere filed a Reply Brief and a Renewed Request for an Evidentiary Hearing. (44:1-10). The State filed another letter brief with case law attached in Response to the Defendant's Reply Brief and Renewed Request to an Evidentiary Hearing dated October 2, 2013. (45:1-3; 46:1-48). On October 10, 2013, the Circuit Court entered a written Order and Decision denying the defendant's Motion for Postconviction Relief. (47:1-6; App. 4). On October 28, 2013, the defendant filed a timely Notice of Appeal. (48:1-2).

LeMere continues to serve his sentence in a Wisconsin State Prison. (23:1-2). This appeal follows.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

LeMere does not take a position on oral argument. However, he does believe that publication of an opinion on this case would be helpful to the development of law on issues related to the failure of trial counsel to advise a defendant of the consequence of potential lifetime commitment as a sexually violent person under Chapter 980, Wis. Stats., prior to entry of a guilty plea for a felony sexual assault. Such a failure on the part of trial counsel clearly demonstrates that a guilty plea in this context is not a voluntary one.

STATEMENT OF FACTS

Although both the criminal complaint and information in this case erroneously indicate the offense date in the instant case as May 17, 2011, in fact, as noted by Attorney Weber at the initial appearance in this case, the actual offense date is May 14, 2011. (53:3). The reference to May 17, 2011 in the complaint and Information is obviously a typographical error, since even the testimony adduced at the preliminary hearing confirm that the offense date is May 14, 2011. (54:1-13). Interestingly enough, at the plea hearing of March 26, 2012, neither the defense counsel nor LeMere nor the prosecution nor the Circuit Court correct the error as to the date of the offense. (62:9). The PSI filed with the Court clearly spells out that the offense date is May 14, 2011. (26:1). It is quite clear that both the victim and LeMere both understand that the offense date occurred on May 14, 2011 rather than May 17, 2011. (26:1; 54:1-10). At the change of plea hearing, LeMere admits that the facts set forth in the complaint and adduced at the preliminary hearing are correct. (62:5). His trial counsel also admits that the facts in the complaint and the information adduced at the preliminary hearing provide an adequate basis for the charge and plea. (62:6).

On May 13, 2011, CRC, a child under the age of 13, visited her brother Jonathan's home on Summit Street in the City and County of Eau Claire. She awoke the following morning of May 14, 2011 at approximately 5:30 a.m. Shortly thereafter, CRC claims LeMere confronted her in the kitchen of her brother's home. He grabbed her around the neck with his arm. While holding a knife to her throat, LeMere said, "If you tell anyone, I will kill you." At some point, LeMere pushed her up against the refrigerator, and CRC said that LeMere had one hand around her neck and held knife against her neck with his other hand. LeMere fondled her vaginal area and inserted his finger into her vagina. (1:1-4; 26).

LeMere informed the author of the PSI that he was intoxicated and did not remember much. He and another male, Dylan, drank most of two 30-packs of beer at a gathering held at CRC's brother Jonathan's home. Also present were Jonathan's wife, Ashley, as well as Jessica and Dylan. Dylan is Ashley's brother. LeMere remembered playing drinking games all night. His recollection of the evening and early morning hours was "fuzzy." (26).

He went to sleep sometime after 3:00 a.m. on May 14, 2011. At some point, he woke up, LeMere recalled holding CRC with his arm against her chest up against the refrigerator. He also recalled she called her mother. He went to the bathroom while she was in the kitchen. He said that was the extent of what he remembered until he woke up as he was being hit. LeMere took a narcotic painkiller that was not prescribed to him during the evening that he drank. He explained that he pled guilty to the offense because "enough of what I remember correlates with what she said (happened)." Finally, he told the PSI author it must have happened because she says so. (26).

On August 3, 2012, the Honorable Lisa Stark, Eau Claire County Circuit Court, imposed a sentence of 45 years in the Wisconsin State Prison on the charge of 1st Degree Child Sexual Assault - Sexual Contact with Person under Age of 13, contrary to Wis. Stats., § 948.02(1)(e). Judge Stark ordered that LeMere serve the first 30 years in initial confinement and the remaining 15 years to be served on extended supervision. The Judge also ordered that the read in charges of 2nd Degree Recklessly Endangering Safety, contrary to Wis. Stats., § 941.30(2) and Strangulation and Suffocation, contrary to Wis. Stats., § 940.235(1) be dismissed. The Circuit Court also dismissed all of the charges in Eau Claire County Circuit Court case

11CF721. (17:1; 18:1; 56:1-38). The Judgment of Conviction was entered August 3, 2012. (23:1-2; App. 1).

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LeMere continues to serve his sentence in a Wisconsin State Prison. (23:1-2). This appeal follows.

Further facts will be discussed where necessary below.

ARGUMENT

I. STEPHEN A. LEMERE WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS MOTION TO WITHDRAW HIS GUILTY PLEA ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. The Consequences of LeMere's Uninformed and Involuntary Guilty Plea.

Under §§980.01(6)(a) and 980.02 (2)(a) , 980.06, Wis. Stats, a person convicted of a "sexually violent offense" is subject to commitment with the Department of Health Services following completion of their prison term or period of supervision with the Department of Corrections. A conviction for 1st Degree Sexual Assault - Contact With a Child Under Age 13, contrary to §948.02(1)(e), is defined as a "sexually violent offense". *See* §980.01(6)(a), Wis. Stats. Since commitment under Chapter 980 is indefinite, it is therefore potentially a life sentence. LeMere was not advised by trial counsel of any of this prior to his guilty plea (40:1-2). If he had known that he was subject to potential lifetime commitment under Chapter 980, he would not have entered a guilty plea. LeMere would have insisted on going to trial. (40:1-2). The potential consequence of involuntary commitment is no doubt uniquely severe. The Supreme Court has acknowledged that the practical effect of a sexually violent person commitment "may be to impose confinement for life." *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring).

LeMere made clear in his original motion seeking withdrawal of his guilty plea and supporting affidavit that he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel causing him to enter a guilty plea to a charge of 1st Degree Sexual Assault of a Child - Contact with a Child under the Age 13, contrary to §§948.02(1)(e), 939.50(3)(b), Wis. Stats. His counsel never informed him prior to his guilty plea that he would be subject to lifetime commitment as a sexually violent person under Chapter 980. If LeMere had known this prior to entry of his guilty plea, he would not have pled guilty. He would have insisted on going to trial. Both LeMere and his counsel, George Miller, would have been called to testify as witnesses at an evidentiary hearing on the motion. (41:1-15; 40:1-2; 44:1-10). Eau Claire County Circuit Court, Honorable Kristina M. Bourget, proposed in a August 27, 2013 letter that, "[t]he State has until September 20, 2013 to file a response brief and Defendant has until September 30, 2013 to file a reply brief. Unless I receive a request for oral argument from either party by October 4, 2013 the motion will be decided on the briefs." (42:1). The Court was not going to schedule an evidentiary hearing. Again LeMere insisted on an evidentiary hearing in his reply brief. (44:1-10) On October 10, 2013, the Circuit Court entered a written Order and Decision denying LeMere's request for an evidentiary hearing and his Motion to Withdraw his Guilty Plea. (47:1-6).

B. Case Law Supports LeMere's Entitlement to an Evidentiary Hearing.

The motion and affidavit seeking withdrawal of a guilty plea and requesting an evidentiary hearing, which LeMere filed with the Circuit Court on August 22, 2013, is called a Nelson/Bentley motion. See *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); *State v. Bentley*, 201 Wis. 2d 303, 548 N.W. 2d 50 (1996).

The sufficiency of a *Nelson/Bentley* motion is examined carefully because the defendant has the burden of proof in a *Nelson/Bentley* hearing. A *Nelson/Bentley* hearing is an evidentiary hearing in which a defendant is permitted to prove a claim that his attorney was constitutionally ineffective, producing a manifest injustice.

The evidentiary hearing determining counsel's effectiveness is also referred to as a Machner hearing. *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Last year, the Wisconsin Supreme Court addressed the question of what must a defendant allege in a *Nelson/Bentley* motion seeking withdrawal of a guilty plea on the grounds of ineffective assistance of counsel to warrant an evidentiary hearing. In finding that the defendant failed to raise sufficient facts to justify a *Machner* hearing, the Wisconsin Supreme Court said, "But it is not enough for the post conviction motion to allege that the record does not show that Burton was told about his options. To obtain an evidentiary hearing based on ineffective assistance of counsel, **Burton was required to assert that his counsel in fact failed to tell him this information.** He was also required to assert that this failure

to inform him of his prerogatives was so serious an error that it fell below the standard of reasonable performance by reasonable counsel, such that counsel was not functioning as counsel, as guaranteed by the Sixth Amendment. *Strickland, 466 U.S. at 687.* Burton's motion failed to make this elementary allegation of deficient performance. Burton's motion is conclusory and lacks sufficient material facts to establish a failure to inform. The motion presents a hypothesis, not an offer of proof." See *State v. Burton,* 2013 WI 61, ¶64, __ Wis. 2d __, 832 N.W.2d 611. (Emphasis added).

In contrast to Burton, LeMere's affidavit and motion presented more than a hypothesis. Following the standards in Burton, his affidavit, motion, and memorandum make a compelling offer of proof warranting an evidentiary hearing. First, LeMere's affidavit and motion specifically states that his trial counsel failed to inform him at all about lifetime commitment as a sexually violent person under Chapter 980 prior to entry of the plea. Second, his affidavit and motion and memorandum specify that this failure to inform LeMere of the consequences of his plea was so serious that it fell below the standard of reasonable performance by reasonable counsel such that counsel was not functioning as counsel, as guaranteed by the Sixth Amendment.

Additionally, LeMere's affidavit states, " . . . Attorney Miller at no time told me that a conviction for the crime of 1st Degree Child Sexual Assault - Sexual Contact with Person under Age of 13 could make me subject to lifetime commitment as a sexually violent person under Chapter 980. If I had been aware of the Chapter 980 consequence by counsel, I would not have entered a plea of guilty on March 26, 2012. I would have insisted on taking this case to trial. In the time between my guilty plea and my

sentencing hearing, Attorney Miller never discussed with me that I could be subject to lifetime commitment as a sexually violent person under Chapter 980. If I had been made aware of this consequence of my guilty plea in the period between my plea of guilty and my sentencing hearing, I would have insisted that Attorney Miller file a motion to withdraw my guilty plea." (App. 3: 1-2)

Unlike the hapless defendant in *Burton*, LeMere set forth a sufficient offer of proof. LeMere's affidavit, motion and memorandum not only more than satisfied the sufficiency standards for a Nelson/Bentley motion, but his affidavit, motion and memorandum also entitle him to an Machner evidentiary hearing. LeMere did exactly what the Supreme Court of Wisconsin in Burton directed defendants to do in order to earn an evidentiary hearing on a motion to withdraw a guilty plea because of ineffective assistance of counsel. (41:1-15; 40:1-2).

After learning that the Circuit Court would be content to decide this matter without an evidentiary hearing, LeMere made all of the above arguments to the Circuit Court in an effort to convince the Circuit Court to grant him an evidentiary hearing. (42:1; 44:1-10).

The Circuit Court summarily rejected LeMere's request for an evidentiary hearing, and ruled, "Thus, a hearing is not required . . . Mr. LeMere asserts that he was denied effective assistance of counsel because his attorney failed to advise him of the potential for lifetime commitment under Ch. 980. Mr. LeMere further asserts that had he been so advised, he would not have pled guilty and instead would have proceeded to trial. . . . For purposes of Mr. LeMere's motion, the court assumes both of these assertions to be true. Defense counsel's failure to advise a

defendant of the collateral consequences of a conviction is not a sufficient basis for an ineffective assistance of counsel claim. *State v. Madison*, 120 Wis.2d 528, 532-33, 401 N. W.2d 856 (Ct.App. 1987). The potential for a future commitment under Ch. 980 is a collateral consequence of Mr. LeMere's conviction. *State v. Myers*, 199 Wis.2d 391, 394, 544 N. W.2d 609 (Ct.App. 1996). As such, Mr. LeMere's attorney was not obligated to inform Mr. LeMere of the potential for future commitment under Ch. 980." (47:2-3; App. 4:2-3).

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, the reviewing Court must determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that appellate courts review de novo. *Bentley*, 201 Wis. 2d at 309-10. If the motion raises such facts, the circuit court must hold an evidentiary hearing. Id. at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. The appellate courts require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." Nelson, 54 Wis. 2d at 498. See *Bentley*, 201 Wis. 2d at 318-19 (quoting the same). A circuit court's discretionary decisions are reviewed under the deferential erroneous exercise of discretion standard. *In re the Commitment of Franklin*, 2004 WI 38, ¶ 6, 270 Wis. 2d 271, 677 N.W.2d 276;

Bentley, 201 Wis. 2d at 311. *See State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433.

C. The Circuit Court Erroneously Exercised Its Discretion in Denying An Evidentiary Hearing.

The Eau Claire County Circuit Court, in denying LeMere's request for an evidentiary hearing, erroneously exercised its discretion. And this is so for a very simple reason. LeMere made a compelling case in his affidavit, motion, and original memorandum for an evidentiary hearing on the question of whether he was denied his right to effective assistance of counsel because of his attorney's failure to advise him prior to his entry of a guilty plea to a charge of 1st Degree Sexual Assault of a Child that he faced a consequence of lifetime commitment as a Sexually Violent Person under Ch. 980. LeMere made clear that he would not have entered a plea of guilty to the charge of 1st Degree Sexual Assault of a Child if his attorney had advised him that he could face, as a consequence, lifetime commitment as a Sexually Violent Person under Ch. 980. The Circuit Court here was simply content to make a finding that counsel is not required to advise a defendant of this grave and serious consequence when he enters a plea of guilty to a charge of 1st Degree Sexual Assault of a Child because potential lifetime commitment under Chapter 980 is a collateral consequence. (47:2-3)

Questions regarding the admissibility of evidence are within the circuit court's discretion. *Grube v. Daun*, 213 Wis. 2d 533, 541-42, 570 N.W.2d 851 (1997) (citing *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983)). "Where this court is asked to review such rulings, we look not to see if we agree with the circuit court's determination, but rather whether `the trial court exercised its discretion in accordance with accepted legal standards and in

accordance with the facts of record.'" Id. at 542 (quoting *Pharr*, 115 Wis. 2d at 342). A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision. *In re Marriage of Krebs v. Krebs*, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989). Therefore, a discretionary decision by a circuit court will be affirmed as long as the court did not erroneously exercise its discretion. *State v. Davis*, 2001 WI 136, ¶ 28, 248 Wis. 2d 986, 637 N.W.2d 62.

In order to properly exercise its discretion, a circuit court must "apply the correct standard of law to the facts at hand." *State v. Margaret H.*, 2000 WI 42, ¶ 32, 234 Wis. 2d 606, 610 N.W.2d 475 (citations omitted). A discretionary decision should be reversed if the circuit court's exercise of discretion "is based on an error of law." *Marten Transp. v. Hartford Specialty*, 194 Wis. 2d 1, 13, 533 N.W.2d 452 (1995). *See National Auto Truckstops, Inc. v. DOT*, 2003 WI 95, ¶12, 263 Wis. 2d 649, 665 N.W.2d 198.

The Circuit Court's first error of law is not applying the teaching of *State v. Burton*, 2013 WI 61, ¶64, __ Wis. 2d __, 832 N.W.2d 611 to the facts before it in LeMere's case. The Circuit Court erroneously exercised its discretion since LeMere's affidavit and motion and memorandum were clearly sufficient to make the case for an evidentiary hearing. The second error of law is the Circuit Court's reliance on cases such as *State v. Madison*, 120 Wis.2d 528, 532-33, 401 N. W.2d 856 (Ct.App. 1987) and *State v. Myers*, 199 Wis.2d 391, 394, 544 N. W.2d 609 (Ct.App. 1996) which stand for the proposition that counsel is under no obligation to advise clients of collateral consequences even consequences which result in potential consequence. (47:2-3) These cases are no longer sound precedent in the

era following the United States Supreme Court decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). The logic of *Padilla v. Kentucky* is not limited to deportation consequences. Padilla's holding extends to other severe consequences of conviction that are imposed by operation of law rather than the sentencing court.

The Circuit Court could not assume that Attorney Miller informed LeMere that he was subject to lifetime commitment under Chapter 980. LeMere's affidavit clearly makes the case that he was not informed at all. LeMere is confident this question will be settled in LeMere's favor at an evidentiary hearing where Attorney Miller admits he never told LeMere anything about lifetime commitment under Chapter 980 either prior to the plea of guilty or subsequent to the plea of guilty. Any assumption to the contrary is not supported by LeMere's affidavit or the record before the Circuit Court. Given the type of showing in his motion, memorandum, and affidavit, an evidentiary hearing, where Attorney George Miller and Stephen LeMere testify, is necessary for a complete record.

The State's argument below that LeMere is not entitled to withdraw his plea is based upon four faulty premises. First, the State assumes that Attorney Miller did inform LeMere of the consequence of lifetime commitment under Chapter 980. Second, the State's brief assumes that the short dialogue about commitment between the Circuit Court and LeMere at the change of plea hearing means that LeMere understood that he could be committed for life as a sexually violent person under Chapter 980. Third, since neither LeMere nor Attorney Miller spoke up about their lack of understanding that LeMere would be subject to lifetime commitment as a sexually violent person under Chapter 980 at the plea hearing, or in the period subsequent to the plea hearing, then it is to be assumed that Miller had

informed LeMere about lifetime commitment as a sexually violent person under Chapter 980 and understood the consequences. Finally, the Wisconsin cases relied upon by the State to support its position no longer have much relevance. All of those Wisconsin cases predate the decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). (43:1-5; 44:1-10).

II. STEPHEN A. LEMERE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE 6TH AMENDMENT AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7 OF THE WISCONSIN CONSTITUTION.

A. LeMere was Entitled to Withdraw His Plea of Guilty Because He was Denied His Right to Effective Assistance of Counsel.

LeMere moved to withdraw his pleas of guilty because his constitutional right to effective assistance of counsel, guaranteed by the 6th Amendment and 14th Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, was denied. He respectfully submits that there was no legitimate tactical basis for the following conduct and omissions of his trial counsel, and that such conduct and omissions were unreasonable under prevailing professional norms. LeMere was prejudiced by Attorney George Miller's failure to advise him that he could face lifetime commitment as a sexually violent person under Chapter 980 of the Wisconsin Statutes prior to entry of his guilty plea to a "sexually violent offense", contrary to §948.02(1)(e), §939.50(3)(b), and §980.01(6)(a), Wis. Stats. LeMere's

plea of guilty was not entered knowingly, voluntarily, and intelligently. LeMere would not have entered his plea of guilty to the offense of 1st Degree Sexual Assault of a Child - Contact with a Child under the Age 13 if his attorney had made him aware prior the plea hearing that he was subject to lifetime commitment under Chapter 980 as a sexually violent person. LeMere would have instead insisted on going to trial. He acknowledged that the Court did raise the topic of commitment, but he did not know what the court was talking about. The Court never informed him that there was a possibility of **lifetime** commitment. Therefore his plea was not knowing, voluntary, and intelligent. (41:1-15; 40:1-2).

After conviction and sentencing, a defendant seeking to withdraw a plea must demonstrate by clear and convincing evidence that withdrawal is required to correct a manifest injustice. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea that was "not entered knowingly, voluntarily, and intelligently violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right." *State v. Cross*, 2010 WI 70, ¶14, 326 Wis. 2d 492, 786 N.W.2d 64. "Following sentencing, a defendant who seeks to withdraw a guilty or nolo contendere plea carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice'." *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331(Ct. App. 1993) (citation omitted). Ineffective assistance of counsel can constitute a "manifest injustice." Id. at 213-14.

Where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. The two-part

standard adopted in *Strickland v. Washington*, 466 U.S. 668 (1984) for evaluating claims of ineffective assistance of counsel - requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different - applies to guilty plea challenges based on ineffective assistance of counsel. In order to satisfy the second, or " prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985).

Defendants are permitted to withdraw their pleas of guilty if they are unaware that they would be subject to civil commitment for life under chapter 980 prior to entering a plea to a sexual assault offense. In *State v. Nelson*, 2005 WI App 113, ¶15 282 Wis. 2d 502, 701 N.W.2d 32, the Wisconsin Court of Appeals agreed with

the trial court that the defendant should be allowed to withdraw his plea prior to sentencing and conviction because he was "unaware of the consequences of his pleas - that he could be subject to a Chapter 980 commitment as a sexually violent person. Just like the lack of knowledge as to sex offender registration requirement is a fair and just reason to withdraw one's plea, so too is the lack of knowledge that one is now eligible for a Chapter 980 commitment a fair and just reason. In fact, eligibility for a Chapter 980 commitment has the potential for far greater consequences than registering as a sex offender. Sex offender registration merely centralizes information already in the public domain. A Chapter 980 commitment, however, could be lifelong."; *See also State v. Brown*, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543

(permitting plea withdrawal where plea was entered under mistaken belief that the charge he agreed to plead to did not trigger sex offender registration or Wis. Stat. Ch. 980 confinement).

B. The Effect of the United States Supreme Court Decision in *Padilla v. Kentucky*.

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the United States Supreme Court found that it was ineffective for trial counsel to incorrectly advise non-citizen clients prior to entry of guilty pleas of the deportation consequences of their plea. In LeMere's case, it is irrelevant to the analysis whether Chapter 980 commitment is considered a collateral consequence or a direct consequence. In *Padilla*, the Supreme Court noted that it had never before applied the collateral consequence rule and did not apply it in *Padilla*, 130 S.Ct. at 1481-82. However, the Court avoided technically addressing the question of whether the rule is ever appropriate in the Sixth Amendment context. Id. At 1481-82. After *Padilla*, it is at least clear that the collateral consequences rule cannot always govern the analysis under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

The U.S. Supreme Court ruled in *Padilla* that an attorney's incorrect advice regarding the deportation consequences of a guilty plea might violate the client's Sixth Amendment right to effective assistance of counsel. *Padilla* constitutes an expansion of the Sixth Amendment right into the realm of advice on the collateral consequences

Prior to the decision in *Padilla*, appellate courts have held that failure of counsel to inform a client that a guilty

plea in a criminal case might make the client eligible for lifetime commitment as a sexually violent person amounts to ineffective assistance of counsel. One court went so far as to mandate that trial courts inform defendants of the consequence of lifetime commitment during the plea colloquy. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators*", 93 MINN. L. REV. 670, note 29 at 720-721 (2008), discussing *State v. Bellamy*, 835, A.2d 1231, 1238 (N.J. 2003) (holding that "when the consequence of a plea may be so severe that a defendant may be confined for the remainder of his or her life [under New Jersey's Sexually Violent Predator Act], fundamental fairness demands that the trial court inform defendant of that possible consequence"').

Since *Padilla* was decided, appellate courts have extended its logic to other serious collateral consequences. Those cases extended *Padilla* to sex offender registration, community supervision, parole eligibility, misadvice on the plea's effect on civil liability, and loss of pension rights. *See United States v. Rose*, No. ACM 36508, 2010 WL 4068976 (A.F. Ct. Crim. App. June 11, 2010) (extending *Padilla* to sex offender registration); *Frost v. State*, No. CR-09-1037, 2011 WL 2094777 (Ala. Crim. App. May 27, 2011) (extending *Padilla* to parole eligibility); *Wilson v. State*, 224 P.3d 535 (Alaska Ct. App. 2010) (extending *Padilla* to the effect of a plea on a civil case, at least where there is affirmative misadvice); *Taylor v. State*, 698 S.E.2d 684 (Ga. Ct. App. 2010) (extending *Padilla* to sex offender registration); *Jacobi v. Commonwealth*, No. 2009-CA-001572-MR, 2011 WL 1706528 (Ky. Ct. App. May 6, 2011) (extending *Padilla* to parole eligibility); *Pridham v. Commonwealth*, No. 2008-CA-002190-MR, 2010 WL 4668961 (Ky. Ct. App. Nov. 19, 2010) (same); *People v.*

Fonville, No. 294554, 2011 WL 222127 (Mich. Ct. App. Jan. 25, 2011) (extending *Padilla* to sex offender registration); *Commonwealth v. Abraham*, 996, A.2d 1090 (Pa. Super. Ct. 2010) (extending *Padilla* to loss of pension rights); *Calvert v. State*, 342 S.W.3d 477 (Tenn. 2011) (extending *Padilla* to community supervision requirement).

Since *Padilla* was decided, a United States Court of Appeals has applied its reasoning to find ineffective assistance of counsel when a defendant is misadvised concerning civil commitment as a sexually violent person. In *Bauder v. Dep't of Corrections, State of Fla.* 619 F.3d 1272 (11th Cir. 2010), the 11th Circuit Court of Appeals affirmed a grant of habeas relief to a petitioner whom it found to have received ineffective assistance of counsel. Based upon the United States Supreme Court decision in *Padilla v. Kentucky*, the *Bauder* court held that trial counsel's misadvice to the petitioner concerning the likelihood of a "civil commitment" sentence as a "sexually violent predator" under Florida law constituted ineffective assistance of counsel. It concluded that even though a "civil commitment" sentence might be considered an "adverse collateral consequence" of a conviction, the petitioner's attorney was still required under *Padilla* to advise the client that the charges at issue might trigger the collateral consequence, particularly in situations when the law is unclear.

In *Padilla*, the adverse collateral consequence at issue was, of course, the prospect of deportation. The *Bauder* decision doesn't really establish new law on the long lasting impact of the *Padilla* decision. Even before *Padilla*, the law is well established that an attorney's affirmative misadvice concerning an "adverse collateral

consequence" constitutes ineffective assistance of counsel. See, e.g., *Strader v. Garrison*, 611 F. 2d 61 (4th Cir. 1979).

C. The Burden to Fully Advise as to Consequences of a Guilty Plea is on Counsel, not the Court.

The Circuit Court's short dialogue during the change of plea hearing about commitment made absolutely no reference to any possibility of "lifetime" commitment as a sexually violent person under Chapter 980. (62:12; App. 5:12). But LeMere was never told he could be committed for his lifetime after he completed his lengthy prison sentence. And so, the short dialogue between the Circuit Court and LeMere at the change of plea hearing does not make LeMere's plea knowing, intelligent, and voluntary. LeMere was not informed by the Circuit Court about lifetime commitment as a sexually violent person. Nevertheless, the obligation for providing that information fell upon his counsel, not the Circuit Court.

The consequence of involuntary lifetime commitment as a sexually violent person may be more devastating and severe than the criminal penalty imposed by the sentencing court. Because of its severity, the possibility of lifetime commitment under Chapter 980 may be considerably significant to a defendant's analysis in determining whether to plead guilty. The American Bar Association Standards for Criminal Justice 14-3.2(f)(3d ed. 1999) state, "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." The ABA Standards emphasize that

"counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* at 127. The Standards also make clear:

> Knowing the likely consequences of certain types of offense conduct will also be important. Defense counsel should routinely be aware of the collateral consequences that obtain in their jurisdiction with respect to certain categories of conduct. The most obvious such categories are controlled substance crimes and sex offenses because convictions for such offense conduct are, under existing statutory schemes, the most likely to carry with them serious and wide-ranging collateral consequences. *Id.*

The Sixth Amendment guarantees a defendant the right to effective assistance of counsel at all critical stages of the criminal proceedings, which include the entry of a guilty plea. *Missouri v. Frye*, 566 U.S. __, __, __, 132 S. Ct. 1399, 1405, 1407-08 (2012). Prior to entry of a guilty plea where the consequence is serious, a reasonable attorney would advise his client because of the nature of the offense his client would be evaluated for possible life-long commitment. Defense counsel has a minimal duty to advise a defendant who pleads guilty to a triggering offense subject to the provision of Chapter 980 that he will be evaluated for and may risk involuntary commitment after completing his prison term. Unlike the complexity of immigration law, the task is not difficult or involved. Chapter 980 is straightforward in this regard and is limited to a defined group of enumerated sexually violent offense §§980.01(6)(a) and 980.02 (2)(a) , 980.06, Wis. Stats.

LeMere has made a compelling case that his trial counsel did not perform this minimally required task. LeMere has also made a case that he was prejudice by the deficient performance of his counsel. (40:1-2; 41:1-15). LeMere is entitled to withdraw his guilty plea, because his guilty plea was not knowing, voluntary, and intelligent.

CONCLUSION

In light of the arguments advanced above, Stephen A. LeMere respectfully asks that this Court to reverse the Order denying his motion to withdraw his guilty plea, remand this case for an evidentiary hearing on his motion and reverse the judgement of conviction.

Dated at Milwaukee, Wisconsin, this 11th day of February, 2014.

Respectfully submitted,

STEPHEN A. LEMERE, Defendant-Appellant

HUNT LAW GROUP S.C.

/s/Edward John Hunt
Edward John Hunt
Attorney at Law
State Bar No. 1005649

Mailing Address:
HUNT LAW GROUP S.C.
829 North Marshall Street
Milwaukee, Wisconsin 53202-3910
(414) 225-0111; Fax: (414) 225-9492

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c) for a brief produced using the following font:

Times New Roman: 14 characters per inch; 2 inch margin on the left and right; 1 inch margins on the top and bottom. The brief's word count is 6740 words.

Dated at Milwaukee, Wisconsin, this 11thth day of February, 2014.

/s/Edward John Hunt

Edward John Hunt
Attorney at Law
State Bar No. 1005649

Mailing Address:
HUNT LAW GROUP S.C.
829 North Marshall Street
Milwaukee, Wisconsin 53202-3910
(414) 225-0111; Fax: (414) 225-9492

CERTIFICATE OF COMPLIANCE WITH 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 s. 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 at Milwaukee, Wisconsin, this 11thth day of February, 2014.

/s/Edward John Hunt
Edward John Hunt
Attorney at Law
State Bar No. 1005649

CERTIFICATION OF APPENDIX

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 s. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinions of the trial court;

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 at Milwaukee, Wisconsin, this 11thth day of February, 2014.

/s/Edward John Hunt

Edward John Hunt
Attorney at Law
State Bar No. 1005649

Mailing Address:
HUNT LAW GROUP, S.C.
829 North Marshall Street
Milwaukee, Wisconsin 53202-3910
(414) 225-0111; Fax: (414) 225-9492