STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP2433-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN A. LEMERE,

Defendant-Appellant.

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

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

CASES

Page

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues raised can be resolved by application of controlling law to the particular case.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING LEMERE'S POST-SENTENCING GUILTY PLEA WITHDRAWAL MOTION WITHOUT AN EVIDENTIARY HEARING.

The trial court properly denied LeMere's post-sentencing guilty plea withdrawal motion without an evidentiary hearing. The trial court assumed for the sake of argument that it was true that LeMere's trial attorney failed to advise him of the potential for lifetime commitment under Wis. Stat. ch. 980 and that if LeMere had been so advised, he would not have pled guilty and would have proceeded to trial (47:3). The trial court held that as a matter of law, LeMere was not entitled to relief because trial counsel's failure to advise him of the collateral consequence of a potential Chapter 980 commitment does not constitute a valid basis for a claim of ineffective assistance of counsel. If this court determines that the trial court was correct that LeMere was not entitled to relief as a matter of law, a remand is not necessary and this court should affirm the judgment of conviction and order denying postconviction relief. If this court determines that the trial court was incorrect on the law, then this court should grant LeMere's request for remand for an evidentiary hearing at which LeMere will have the opportunity to present his own testimony and the testimony of his trial counsel to try to prove the truth of his factual allegations.

The trial court correctly held that as a matter of law, LeMere is not entitled to relief because it is not deficient performance for a trial attorney to fail to advise a defendant of the collateral consequence of a potential Chapter 980 sexually violent person commitment.

A defendant who seeks to withdraw a guilty plea after sentencing must establish a manifest injustice. A manifest injustice exists if the defendant's plea was not knowing, voluntary and intelligent. A criminal defendant

must be informed of the direct consequences of his plea in order for his plea to be knowing, voluntary and intelligent; direct consequences are those that have a direct, immediate and largely automatic effect on the range of a defendant's punishment. *State v. Brown*, 2004 WI App 179, ¶¶ 4, 7, 276 Wis. 2d 559, 687 N.W.2d 543. A collateral consequence, in contrast, is indirect, does not automatically flow from conviction and may depend on other factors including the subsequent conduct of the defendant. *Brown*, 276 Wis. 2d 559, ¶ 7. A collateral consequence does not have a definite, immediate or largely automatic effect on the range of punishment. *State v. James*, 176 Wis. 2d 230, 238, 500 N.W.2d 345 (Ct. App. 1993). A defendant's failure to be informed of a collateral consequence does not establish a manifest injustice that warrants plea withdrawal. *Brown*, 276 Wis. 2d 559, ¶ 7. Likewise, trial counsel's failure to advise a defendant of a collateral consequence is not a sufficient basis for a claim of ineffective assistance of counsel. *Brown*, 276 Wis. 2d 559, ¶ 7 n.3.

In *State v. Myers*, 199 Wis. 2d 391, 394-95, 544 N.W.2d 609 (Ct. App. 1996), this court held that the potential for a future sexually violent person commitment under Chapter 980 is a collateral consequence of a guilty plea. *Myers* controls LeMere's case.

In *State v. Nelson*, 2005 WI App 113, ¶ 15, 282 Wis. 2d 502, 701 N.W.2d 32, this court held that the defendant's lack of knowledge that he could be subject to a Chapter 980 commitment as a consequence of his guilty plea and resulting conviction provided a fair and just reason to allow him to withdraw his plea prior to sentencing. *Nelson* is of no moment in the instant case, because LeMere filed his motion to withdraw guilty plea after sentencing. The manifest injustice standard, rather than the far more easily met fair and just reason standard, applies to a post-sentencing plea withdrawal motion. To the extent LeMere seeks to rely on *Nelson*, such reliance is misplaced.

Similarly, to the extent LeMere seeks to rely on *Brown*, such reliance is misplaced. In *Brown*, this court did not hold that trial counsel's failure to advise Brown that a conviction resulting from his guilty plea would subject him to a Chapter 980 commitment. Rather, trial counsel specifically misadvised Brown that his conviction would not subject him to a Chapter 980 commitment. It was this erroneous advice, not the absence of advice, that justified Brown's post-sentencing plea withdrawal. *Brown*, 276 Wis. 2d 559, ¶ 8. Indeed, as the court explained, Brown's plea deal was specifically crafted to avoid a future Chapter 980 commitment, but all of those involved failed to realize that one of the crimes to which Brown pled would subject him to a Chapter 980 commitment. This court explained:

> Here, Brown's misunderstanding of the consequences of his pleas undermines the knowing and voluntary nature of his pleas. Brown's plea agreement was purposefully crafted to only include pleas to charges that would not require him to register as a sex offender or be subject to post-incarceration commitment under Wis. Stat. ch. 980. Brown entered his pleas believing he would not be subject to those collateral consequences. Brown's belief was not the product of "his own inaccurate interpretation," but was based on affirmative, incorrect statements on the record by Brown's counsel and the prosecutor. The court did not correct the statements.
>
> Under these circumstances, we conclude that Brown's pleas, as a matter of law, were not knowingly and voluntarily entered and he must, therefore, be permitted to withdraw his pleas. On remand, the case shall resume with a new arraignment on all the original charges in the information.

Brown, 276 Wis. 2d 559, ¶¶ 13-14.

Here, in sharp contrast, LeMere has never claimed that trial counsel erroneously advised him that his

conviction would not subject him to a Chapter 980 commitment.[1]

LeMere acknowledges that *Myers* precludes relief in his case. However, he asks this court to overrule *Myers* by extending the decision of the United States Supreme Court on deportation in *Padilla v. Kentucky*, 559 U.S. 356 (2010), to cover the collateral consequence of a potential future Chapter 980 commitment. The court of appeals does not have the power to overrule, modify or withdraw language from a previously published decision of the court of appeals. *Cook v. Cook*, 208 Wis. 2d 166, 185-90, 560 N.W.2d 246 (1997).

Where there is a direct conflict between a controlling state court decision and a subsequent, controlling United States Supreme Court decision on a matter of federal law, the court of appeals may certify the case to the Wisconsin Supreme Court, but if it opts not to certify the case, or the state supreme court declines to grant certification, the court of appeals must apply the subsequent, controlling United States Supreme Court decision. *See State v. Jennings*, 2002 WI 44, ¶ 3, 252 Wis. 2d 228, 647 N.W.2d 142.

Wisely, LeMere does not claim that *Padilla* is directly controlling, nor would such a claim be valid. Rather, he argues that this court should extend the logic of *Padilla* to cover the collateral consequence of a potential Chapter 980 commitment, thereby overruling *Myers*. Under *Cook*, this court does not have authority to do what LeMere requests.

The United States Supreme Court's decision in *Padilla* is narrowly limited to deportation. Padilla's trial counsel failed to tell him that conviction of the drug

[1] Accordingly, LeMere also misplaces reliance on *Bauder v. Dep't of Correction*, 619 F.3d 1272 (11th Cir. 2010), which involved an attorney's misadvice to the defendant concerning his eligibility for a sexually violent predator commitment.

offense to which he was pleading guilty made him subject to automatic deportation (removal) from the United States. *Padilla*, 559 U.S. at 359-60. Not only that, trial counsel affirmatively misinformed Padilla about the deportation consequences of his plea by erroneously advising him that "he 'did not have to worry about immigration status since he had been in the country so long.'" *Padilla*, 559 U.S. at 359.

The United States Supreme Court explained that changes in the immigration law have made deportation nearly automatic and practically inevitable for noncitizens convicted of a broad class of offenses. *Padilla*, 559 U.S. at 365-66. The Court held that "as a matter of federal law, deportation is an integral part - indeed, sometimes the most important part - of the penalty that may be imposed on noncitizen defendants who have plead guilty to specified crimes." *Padilla*, 559 U.S. at 364 (footnote omitted). Moreover, deportation, "'the equivalent of banishment or exile'" is uniquely severe. *Padilla*, 559 U.S. at 373 (citation omitted). Based on the unique severity of the consequence of deportation and the nearly automatic, practically inevitable result of deportation for noncitizens convicted of a broad class of offenses, which makes deportation nearly indistinguishable from the penalty for the offense, the Court held that:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.
>
> . . . When the law is not succinct and straightforward . . . a criminal defense attorney need

> do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla, 559 U.S. at 368-69 (footnote omitted).

In *Padilla*, the Court did not hold that trial counsel's failure to advise a defendant of collateral consequences of a guilty plea constitutes deficient performance. The Court did not hold that the traditional distinction between direct and collateral consequences is invalid. In *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103 (2013), the Court held that *Padilla* is not retroactive because it declared a new rule. The Court explained that the State and lower federal courts have almost unanimously held that the Sixth Amendment does not require defense attorneys to inform their clients about the collateral consequences of a guilty plea, and failure of a defense attorney to inform a client about a collateral consequence is never a violation of the right to effective assistance of counsel. *Chaidez*, 133 S. Ct. at 1109. Civil commitment has been designated a collateral consequence. *Chaidez*, 133 S. Ct. at 1108 n.5.

The Court explained that *Padilla* declared a new rule because it held that defense counsel's failure to advise a defendant about a guilty plea's deportation risk could constitute ineffective assistance, even though deportation had been labeled a collateral consequence of a guilty plea. *Chaidez*, 133 S. Ct. at 1110. The Court's holding was limited to deportation because deportation is "unique," it is a "particularly severe penalty," it is "intimately related to the criminal process" and, significantly, it is a "nearly automatic result" of conviction of designated offenses. *Chaidez*, 133 S. Ct. at 1110 (internal quotation marks omitted) (citation omitted).

Significantly, the Court explained that in *Padilla*, it did not "eschew the direct-collateral divide across the

board," but, rather, held that the distinction did not insulate from Sixth Amendment scrutiny of defense counsel's failure to advise or to correctly advise a defendant on deportation because of the unique nature of the severity of the deportation penalty and the "automatic" way it flows from a conviction. *Chaidez*, 133 S. Ct. at 1112.

Thus, *Padilla*, as further illuminated by *Chaidez*, is properly read as endorsing the nearly universally accepted view that the Sixth Amendment does not require defense counsel to inform the defendant of a conviction's collateral consequences and defense counsel's failure to inform a defendant of a collateral consequence does not violate the right to effective assistance of counsel. The narrow exception to this rule is defense counsel's failure to advise a defendant of the deportation risk of a guilty plea.

Accordingly, even if this court had the authority to do so, it should not extend the logic of *Padilla* to a future, potential Chapter 980 sexually violent person commitment, as LeMere requests. Deportation is materially distinguishable from a potential Chapter 980 commitment. Unlike deportation, a Chapter 980 commitment is not the "'equivalent of banishment or exile.'" *Padilla*, 559 U.S. at 373 (citation omitted). Most significantly, a Chapter 980 commitment is not a "nearly . . . automatic" or "practically inevitable" result of conviction of a qualifying offense. *Padilla*, 559 U.S. at 366, 364. Rather, as this court explained in *Myers*:

> A future ch. 980, Stats., commitment will not automatically flow from Myers' conviction for first-degree sexual assault of a child. Although such a commitment will require a prior predicate offense, Myers' offense, by itself, will not trigger a commitment. Rather, a commitment will depend on Myers' condition at the time of the ch. 980 proceeding and the evidence that the State will then present on his condition. If the State were to initiate such commitment proceedings, Myers will have the full benefit of the ch. 980 procedures, due process,

> and an independent trial, including the right to offer evidence to refute the State's charges. Other courts have held that such potential future commitments will depend on future trials and evidence, not on prior guilty pleas, and therefore constitute collateral consequences of those guilty pleas, not immediate, direct consequences. *See Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366-67 (4th Cir. 1973). We agree with the *Cuthrell* court's analysis. In sum, Myers needed no knowledge of the potential for a future chapter 980 commitment in order to make his plea knowing and voluntary.

Myers, 199 Wis. 2d at 394-95.

For all of these reasons, this court must reject LeMere's request that it extend *Padilla* outside its narrow bounds of nearly automatic deportation, to the potential for a future, possible Chapter 980 commitment, which is far from automatic, and which will never occur unless the State initiates a separate proceeding and meets its burden of proving specific facts well above and beyond the fact of conviction.

LeMere relies on cases from other jurisdictions, none of which directly support his position. None of the cases he cites extended the logic of *Padilla* to a future potential sexually violent person commitment. Case law from other jurisdictions may be helpful or persuasive, but it is not precedent in Wisconsin, and a Wisconsin court need not consider or apply it. *State v. Muckerheide*, 2007 WI 5, ¶ 38, 298 Wis. 2d 553, 725 N.W.2d 930. None of the cases proffered by LeMere provide a persuasive, reasoned discussion of *Padilla* that would provide any basis for extending *Padilla* to a Chapter 980 commitment.

For example, in *Frost v. State*, 76 So. 3d 862 (Ala. Crim. App. 2011), the court adhered to the principle that counsel's failure to advise a defendant of the collateral consequences of a guilty plea is not ineffective assistance of counsel. Failure to advise a defendant of a direct consequence (one that represents a definite, immediate and largely automatic effect on the range of punishment),

may constitute ineffective assistance of counsel. *Frost*, 76 So. 3d at 868. The court concluded that by statute, Frost's conviction of certain sex offenses made him ineligible for parole. That consequence was direct, mandatory and automatic and thus it was a direct, not a collateral, consequence of his guilty plea. *Frost*, 76 So. 3d at 868. Instead of informing Frost that his guilty plea would subject him to mandatory, automatic life imprisonment without the possibility of parole, his attorney misinformed him by telling him that whether he got paroled would be up to the Department of Corrections. *Frost*, 76 So. 3d at 868. *Frost* is not remotely comparable to a trial counsel's simple failure to advise the defendant that his guilty plea subjects him to a potential, possible future Chapter 980 commitment.[2]

Similarly, *United States v. Rose*, No. ACM-36508 (A.F. Ct. Crim. App. June 11, 2010) (R-Ap. 101-13),[3] did not involve the simple failure to advise a defendant about the collateral consequence of sex offender registration. Rather, the court stated, "In the present case, we have more than just silence in the face of repeated questions by the client concerning the admittedly important collateral consequence of sex offender registration; counsel provided the false assurance that the consequence would not happen" (R-Ap. 102). *Rose* cannot be fairly characterized as extending the logic of *Padilla* to sex offender registration. *Rose* does not provide persuasive authority for extending *Padilla* to a potential, future, possible sexually violent person commitment.

Similarly, *Wilson v. State*, 244 P.3d 535 (Alaska Ct. App. 2010), which discussed *Padilla*, did not involve a simple failure to advise a defendant about a collateral

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[2] *McCary v. State*, 93 So. 3d. 1002 (Ala. Crim. App. 2011), simply applied *Frost* as a matter of state law.

[3] *Rose* is unpublished. LeMere has not included it in his appendix as required by Wis. Stat. § 809.19(2)(a). The State includes it in the appendix to its brief.

consequence. Wilson did not simply allege that his attorney failed to advise him about the consequences that his plea might have in a later civil case. Rather, Wilson alleged that both he and his attorney were aware that the victim of his offense would file a civil case, the civil case was of critical importance to Wilson, Wilson specifically asked his attorney for legal advice on the possible consequences of his plea in the civil case, and his attorney wrongly assured him that his plea would not prejudice him in the subsequent civil case. Based on the misinformation provided by counsel, the court held the defendant made out a prima facie case for deficient performance. *Wilson* does not provide persuasive authority for extending *Padilla* to a potential, future, possible sexually violent person commitment.

The court in *People v. Fonville*, 804 N.W.2d 878, 895 (Mich. Ct. App. 2011), did extend the logic of *Padilla* to the "automatic result" of sex offender registration. The court, however, went on to make it clear that its holding was limited to "the unique and mandatory nature of the specific consequence of the sex-offender-registration," and that its holding did not extend to all collateral consequences. *Fonville*, 804 N.W.2d at 895. Earlier in listing examples of collateral consequences, the court included "institution of separate civil proceedings against the defendant for commitment to a mental-health facility." *Fonville*, 804 N.W.2d at 891.

In *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010), the court analogized to *Padilla* and held that trial counsel's failure to advise the defendant that his plea would subject him to sex offender registration was deficient performance because sex offender registration is an automatic result of conviction, it is mandatory, it has severe consequences, and its application is easily discernible from the statutes. Unlike sex offender registration in these cases, a potential, future, possible Chapter 980 sexually violent person commitment is not an automatic, mandatory consequence of a conviction of a qualifying offense. *Fonville* and *Taylor* do not provide

persuasive authority for extending *Padilla* to a potential, future, possible sexually violent person commitment.

In *Commonwealth v. Pridham*, 394 S.W.3d 867, 871 (Ky. 2012), the defendant alleged that his trial counsel assured him he would be eligible for parole upon having served 20% of his thirty-year sentence, or six years, whereas, in fact, under the violent offender statute that applied in his case, the defendant would be ineligible for parole for twenty years, at which point he would be seventy- seven years old. Analogizing to *Padilla*, the court held that trial counsel's misadvice about when Pridham would be eligible for parole constituted deficient performance. The court explained that like deportation, the extended period of parole ineligibility for parole for violent offenders is a punitive measure designed to enhance punishment; the extended ineligibility is a certain, automatic and direct consequence of the conviction, and is therefore legally inseparable from the sentence. *Pridham*, 394 S.W.3d at 878. *Pridham* does not provide persuasive authority for extending *Padilla* to a potential, future, possible sexually violent person commitment.

In *Calvert v. State*, 342 S.W.3d 477, 490 (Tenn. 2011), the court relied on prior state case law, and analogized to *Padilla*, in holding that trial counsel's failure to advise defendant that his plea subjected him to mandatory lifetime community supervision constituted deficient performance because such supervision is an additional part of the sentence, it is clearly and explicitly provided for in the statutes, it imposes significant consequences and it is a mandatory and automatic result of conviction. *Calvert* does not provide persuasive authority for extending *Padilla* to a potential, future, possible sexually violent person commitment.

LeMere also relies on *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010), as extending *Padilla* to loss of pension rights. However, in *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012) the supreme court

reversed the lower court. The supreme court held that *Padilla* is limited to deportation, and a defendant's lack of knowledge of other collateral consequences does not undermine the validity of a guilty plea and therefore trial counsel is not constitutionally ineffective for failing to advise a defendant of the collateral consequences of a guilty plea. *Abraham*, 62 A.3d at 350. The court held that pension forfeiture is a collateral consequence of a guilty plea, and therefore trial counsel's failure to advise defendant of that consequence cannot be deemed ineffective assistance of counsel. *Abraham*, 62 A.3d at 353. *Abraham* does not provide persuasive authority for extending *Padilla* to a potential, future, possible sexually violent person commitment.[4]

In contrast to the cases cited by LeMere, the Texas appellate court refused to extend *Padilla* beyond deportation, and held that trial counsel's failure to inform defendant that his guilty plea would subject him to civil commitment as a sexually violent predator in the future was not deficient performance. *Thomas v. State*, 365 S.W.3d 537, 544 (Tex. App. 2012).

For all of these reasons, this court must adhere to *Myers*, which is controlling precedent. This court does not have authority to overrule *Myers*. Even if this court had such authority, LeMere has failed to provide any persuasive grounds for this court to extend *Padilla* beyond its narrow holding on deportation. Unlike deportation, a Chapter 980 commitment is not comparable to banishment or exile. Significantly, it is not a nearly automatic, practically inevitable result of conviction of a qualifying offense. Rather, a potential, future, possible Chapter 980 commitment is the near opposite of automatic. It will never occur unless the State initiates a separate proceeding and meets its burden of proving specific facts regarding

[4] LeMere also cites to *Jacobi v. Commonwealth*, No. 2009-CA-001572-MR, 2011 WL 1706528 (Ky. Ct. App. May 6, 2011) as extending *Padilla* to parole eligibility. Counsel for the State did not find an opinion at that cite.

the defendant's present mental condition and future dangerousness, well above and beyond the fact of conviction. A sexually violent person commitment is a prime example of a collateral consequence. Trial counsel's failure to advise a defendant of this collateral consequence does not constitute ineffective assistance of counsel, and LeMere's claim is without merit.

CONCLUSION

Based on the record and the legal theories and authorities presented, the State asks this court to affirm the judgment of conviction and order denying postconviction relief entered below. Alternatively, if this court holds the trial court erred in concluding LeMere was not entitled to relief as a matter of law, this court should grant LeMere's request for a remand for an evidentiary hearing to give him the opportunity to prove his factual allegations by clear and convincing evidence.

Dated this 27th day of March, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this 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 3,968 words.

Dated this 27th day of March, 2014.

_____
SALLY L. WELLMAN
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, 2014.

_____
SALLY L. WELLMAN
Assistant Attorney General