STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2013AP002433CR

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

LeMere submits this reply brief to respond to some of the crucial flaws in reasoning set forth in the State's Brief. LeMere does not abandon any of the arguments made in the Defendant-Appellant's Brief. He has chosen to respond to selected contentions of the State. LeMere does not concede that any of the State's arguments warrant denying him withdrawal of his plea.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING LEMERE'S POST-SENTENCING GUILTY PLEA WITHDRAWAL MOTION WITHOUT AN EVIDENTIARY HEARING

First of all, the State makes much of a meaningless distinction. In its analysis of *State v. Brown*, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, the State argues that since the defendant below in that case was misadvised as to the consequence of whether his conviction would subject him to a Chapter 980 commitment, that case lends no support to LeMere's claim for relief. State's Brief at 3-4. It is difficult to understand logically why trial counsel's erroneous advice to a defendant prior to a plea, as to a consequence of the defendant's plea, is somehow a graver sin than failing to advise a defendant at all of a consequence. If guilty pleas are to be knowing, voluntary, and intelligent, how can the absence of information provided by counsel enhance the argument that a plea is knowing, voluntary, and intelligent? It is well established that a plea that is "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. There is no relevant distinction between acts of commission and omission in the context of advice concerning the consequences of a guilty plea. *Padilla v. Kentucky*, 130 S. Ct 1473, 1485 (2010)

As to whether a defendant should be entitled to know prior to entry of a guilty plea to a charge of felony sexual assault that he is facing a Chapter 980 lifetime commitment as a sexually violent person as a consequence of the plea, the Court of Appeals' language in *State v. Nelson*, 2005 WI App 113, ¶15 282 Wis. 2d 502, 701 N.W.2d 32 as to the gravity of this consequence is worth repeating here: "Nelson was also unaware of the consequence 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 the 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.**" (Emphasis added).

The State's Brief also points out, "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." State's Brief at 5. The State indirectly seems to be inviting this Court to accept an invitation to certify this case to the Wisconsin Supreme Court. The defendant does not object to certification to the Supreme Court. But first adds a few more words on the topic of whether the decision in *State v. Myers* 199 Wis.2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996) precludes granting LeMere any relief. LeMere contends again that the law is trending towards granting him relief in light of the United States Supreme Court decisions in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) and *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103 (2013). The United States Supreme Court now seems to be saying in both of these decisions that it will decide whether failure to advise or erroneous advise as to a collateral consequence amounts to ineffective assistance of counsel on a case-by-case basis. *Chaidez,* 133 S.Ct. At 1108 n.5. The decision in *Myer*s predates the decision in *Padilla* and *Chaidez* by many years. It is time to take another look at *Myers* in light of *Padilla* and *Chaidez*.

The dissent in *Chaidez* by Justice Sotomayor is compelling reading - particularly on the topic of the distinction between omissions and affirmative misrepresentations:

> The distinction between omissions and affirmative misrepresentations on which these lower court cases depended cannot be reconciled with *Strickland*. In *Padilla* itself, we rejected the Solicitor General's suggestion that *Strickland* should apply to advice about the immigration consequences of a plea only in cases where defense counsel makes an affirmative misstatement. *Padilla*, 559 U.S., at ___ (slip op., at 12). We did so because we found that *Strickland* was incompatible with the distinction between an obligation to give advice and a prohibition on affirmative misstatements. 559 U.S., at ___ (slip op., at 12-13) (citing *Strickland*, 466 U.S., at 690). *Strickland* made clear that its standard of attorney performance applied to both "acts" and "omissions," and that a rule limiting the performance inquiry to one or the other was too narrow. 466 U.S., at 690. Thus, the distinction between misrepresentations and omissions, on which the majority relies in classifying lower court precedent, implies a categorical rule that is inconsistent with *Strickland*'s requirement of a case-by-case assessment of an attorney's performance. *Id.*, at 688-689; see, *e.g.*, *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000). In short, that some courts have differentiated between misleading by silence and affirmative misrepresentation hardly establishes the rationality of the distinction. Notably, the Court offers no reasoned basis for believing that such a distinction can be extracted from *Strickland*.

Chaidez, 133 S.Ct. at 1119-1120.

Justice Sotomayor, in her dissent in *Chaidez*, also takes the majority to task in its interpretation of a law review article regarding collateral consequences. "The majority cites a law review article for the proposition that the categorical consequences rule is 'one of 'the most widely recognized rules of American law.'' *Ante*, at 8 (quoting Chin & Holmes*, Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 Cornell L. Rev.

697, 706 (2002)). But the article was, in fact, quite critical of the rule. The authors explained that '[t]he real work of the conviction is performed by the collateral consequences,' and that the direct/collateral distinction in the context of ineffective-assistance claims was 'surprising because it seems inconsistent with the framework that the Supreme Court...laid out' in *Strickland*. Chin & Holmes, at 700-701." *Chaidez,* 133 S.Ct. at 1120.

The State devotes considerable attention to discussing the numerous appellate decisions from other jurisdictions cited in LeMere's brief which it believes lack any persuasive authority. State's Brief at 9-13. Obviously since these cases are not Wisconsin cases, they have no precedential value. These cases were cited by LeMere to illustrate some of the trends in the law since *Padilla* was decided. These cases only provide support for the argument that *Padilla* is indeed changing the landscape in terms of how courts treat not only erroneous advice but also the failure to advise of collateral consequences. As such, they are persuasive in this case.

LeMere acknowledges that in *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012) the Supreme Court of Pennsylvania reversed the lower court decision in *Commonwealth v. Abraham* in 996 A.2d 1090 (Pa. Super. Ct. 2010). Yet, as an illustration of how much the law is in a state of flux and the opinions of appellate judges are continuing to evolve in light of *Padilla*, Justice Todd of the Pennsylvania Supreme Court wrote a vigorous dissent in which he argued the direct versus collateral consequences analysis employed by the majority is inappropriate to resolve Abraham's claim of his attorney's ineffectiveness for failing to advise him that he would lose his monthly pension benefit upon entry of his guilty plea. *Abraham* 62 A.3d at 357-363. Justice Todd's dissent makes clear that simply calling a consequence collateral does not relieve trial counsel under the Sixth Amendment of his obligation

to fully inform a client of the consequences of his plea. To that end, Justice Todd agrees that the lower court in *Abraham* got it right in its interpretation extending *Padilla* to loss of pension rights. *Abraham* 62 A.3d at 357-363.

Undersigned counsel admits that he did not spot in his research that the lower court decision in *Abraham* had been reversed by the Supreme Court of Pennsylvania. He apologizes for this oversight. Nevertheless the contrast in opinions between the lower court opinion in *Abraham*, the majority opinion of the Pennsylvania Supreme Court in *Abraham*, and the vigorous dissenting opinion by Justice Todd in *Abraham* confirm that this is, to say the least, a controversial issue. In the wake of *Padilla*, a direct/collateral consequences analysis of a defendant's claim of counsel ineffectiveness should no longer be controlling. The *Strickland* analysis is the only touchstone in making a fair determination of counsel's ineffectiveness.

Trial counsel's failure to advise a defendant as to the possibility of lifetime civil commitment before the defendant enters a guilty or no contest plea to a felony sexual assault charge is ineffective assistance of counsel. It makes no sense for courts to excuse the failure to inform a defendant of such a grave consequence by calling the consequence collateral. Nor does it make sense to distinguish between failure to inform a defendant of a grave collateral consequence and erroneous advice by defense counsel as to a grave collateral consequence. In applying the *Padilla* rationale to this case, LeMere requests this Court hold that defense counsel must advise a defendant that a conviction would subject him to potential lifetime commitment under Chapter 980 upon a plea to a felony sex offense. The failure to inform a pleading defendant that his plea will subject him to a potential lifetime commitment under Chapter 980 affects whether the plea is knowingly made.

CONCLUSION

In light of the arguments advanced above and in his initial brief, Stephen A. LeMere respectfully asks that this Court 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 24th day of April, 2014.

Respectfully submitted,

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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 1846 words.

Dated at Milwaukee, Wisconsin, this 24th of April, 2014.

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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 24th day of April, 2014.

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