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STATE OF WISCONSIN

IN THE SUPREME COURT

APPEAL NO. 2013AP002433-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN A. LEMERE,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF
APPEALS, DISTRICT III/IV, AFFIRMING AN
ORDER AND DECISION ENTERED IN THE
CIRCUIT COURT FOR EAU CLAIRE COUNTY,
HONORABLE KRISTINA M. BOURGET, PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF ISSUES

1. MAY STEPHEN A. LEMERE WITHDRAW HIS GUILTY PLEA BY CLAIMING THAT HIS TRIAL LAWYER WAS INEFFECTIVE, FOR FAILING TO ADVISE HIM THAT, AS A CONSEQUENCE OF HIS PLEA, HE COULD BE SUBJECT TO LIFETIME COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980?

The circuit court and the court of appeals answered no.

2. IS 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 circuit court and the court of appeals answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Consistent with this Court's practice, oral argument and publication are warranted.

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; App. 5:1-13).

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).

On October 16, 2014, the Wisconsin Court of Appeals issued an a summary order in *State v. LeMere*, Case No. 2013AP2433-CR, affirming the Judgment of Conviction and the Circuit Court's Order denying LeMere's motion to withdraw his guilty plea. (App 6:1-4). LeMere continues to serve his sentence in a Wisconsin State Prison. (23:1-2).

On November 17, 2014, LeMere filed a Petition for Review. This Court granted the Petition for Review.

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 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 pled guilty to the offense because "enough of what I remember correlates with what she said (happened)" (1:1-4; 26;62:5; App. 5:1-13)

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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On November 17, 2014, LeMere filed a petition for review. This Court granted the petition for review

Further facts will be discussed where necessary below.

ARGUMENT

I. STEPHEN A. LEMERE MAY WITHDRAW HIS GUILTY PLEA BY CLAIMING THAT HIS TRIAL LAWYER WAS INEFFECTIVE, FOR FAILING TO ADVISE HIM THAT, AS A CONSEQUENCE OF HIS PLEA, HE COULD BE SUBJECT TO LIFETIME COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980.

A. The decision in *Padilla v. Kentucky* means that LeMere's case is not controlled by the Wisconsin Court of Appeals decision in *State v. Myers*.

In *Padilla v. Kentucky*, 559 U.S. 356, 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 *Padilla*, the defendant, a resident alien, pleaded guilty to transporting a large amount of marijuana in his tractor trailer. *Padilla*, 130 S. Ct. At 1477-1478. The defendant alleged his attorney provided ineffective counsel when he did not advise the defendant that the conviction made him eligible for deportation, and had told him not to worry about deportation. *Id.* The Kentucky Supreme Court affirmed the defendant's conviction, holding that the sixth amendment did not apply because deportation was a civil, and therefore, collateral consequence. *Id.* At 1477-1478. The United States Supreme Court reasoned that even though deportation is a civil consequence of a guilty plea, it could not be "categorically removed" from defense counsel's duties, given deportation increased enmeshment with the criminal process. *Id.* At 1481-1482 . Having found deficient performance because Padilla's counsel had failed to provide accurate legal advice as to whether his drug conviction made him subject to automatic deportation under *Strickland v. Washington*, 466 U.S. 468 (1984), the United States Supreme Court reversed the judgement of the Supreme Court of Kentucky and remanded the defendant's case to determine whether the defendant could demonstrate prejudice under the *Strickland* test. *Id.* At 1478, 1482-1484, 1487.

In *Padilla*, the Court refused to draw a clear line between direct and collateral consequences within the Sixth Amendment context. *Id.* At 1481. Before *Padilla*, counsel was not ineffective if he failed to provide advice, or even incorrect advice, regarding collateral consequences in every context. *Padilla*, 559 U.S. at 376, 130 S. Ct. At 1487 (Alito, J., concurring) (citing Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Corn. L. Rev. 697, 699 (2002) (noting that more than thirty states and eleven federal circuits did not mandate advice about

collateral consequences)). After *Padilla*, the collateral consequences rule cannot always control the analysis under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

The Court of Appeals in LeMere's case held that his case was governed by *State v. Myers*, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996), which held that a potential Chapter 980 commitment is a collateral consequence of a guilty plea. The Court of Appeals in *Myers*, 199 Wis.2d at 394-95, emphasized:

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 ch. 980 procedures, due process, and an independent trial, including the right to offer evidence to refute the State's charges.

LeMere argues that *Myers* is no longer good law in light of *Padilla*, the logic of which could be extended to Chapter 980 consequences. In addition to saying it was bound by *Myers*, the court of appeals cited *Chaidez v. United States*, 133 S. Ct. 1103, 1110-12 (2013), for the proposition that *Padilla* didn't invalidate the distinction between direct and collateral consequences, and that deportation was unique, intimately related to the criminal process, and nearly automatic in flowing from a conviction for specified crimes. "Unlike deportation, a Wis. Stat. Ch. 980 commitment is not a nearly automatic result of conviction. The potential for a future Chapter 908

commitment will not occur unless the State initiates a separate proceeding and meets its burden of proving specific facts beyond the fact of conviction.” (Slip op. At 3: App. 6; 3). LeMere respectfully disagrees with the court of appeals, and argues that lifetime civil commitment under Chapter 980 is an integral part of a conviction for a felony sexual assault that such a consequence is so enmeshed with a conviction for a “sexually violent offense” as defined in § 980.01(6)(a), Wis. Stats., and so severe a consequence that a defendant should be put on notice before entering his guilty plea that there is even a possibility of lifetime commitment under Chapter 980. For instance, the Illinois Supreme Court relied upon *Padilla* when it held the risk of involuntary civil commitment for particular offenses was certain and severe enough to rise to the level warranting a Sixth Amendment duty to advise. *People v. Hughes*, 983 N.E. 439, 455 (Ill. 2012). Why should Wisconsin defendants be entitled to less notice of consequences by their counsel? The severity of involuntary lifetime commitment in and of itself warrants the same Sixth Amendment duty to advise.

Myers also predates the Supreme Court decision in *Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399 (2012). This is important because *Frye* gives vitality to the importance of notice and how its absence can support a successful habeas claim under the Sixth Amendment. In this sense, it follows the requirement of notice which is at the heart of the decision in *Padilla*. Both cases suggest that effectiveness of counsel and the legitimacy of pleas hinge on how informed a defendant is, by counsel, when making a decision about whether to plead guilty. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1120 (2011) (“With *Padilla*, the Court has now begun to interpret due process and the Sixth Amendment right to counsel to impose meaningful safeguards on the plea process.”). Both decisions constitutionalized notice by

counsel to the accused prior to entry of guilty pleas. See *Id.* At 1118 (noting how *Padilla* “marks a watershed in the Court’s approach to regulating plea bargains”). In *Padilla*, notice is essentially tied to collateral consequences, albeit with respect to immigration. In *Frye*, notice is linked to the plea bargaining process itself. See generally *Frye*, 132 S. Ct. 1399.

Prior to sentencing under a different standard than manifest injustice, 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). It is interesting to note that *Nelson* and *Brown* predate *Padilla* and *Frye*.

Relying upon the *Myers* decision, The Court of Appeals holding in LeMere’s case was constrained to pre-

Padilla jurisprudence rather than post-*Padilla* jurisprudence. Some consequences, sex offender registration and lifetime commitment under Chapter 980 as a sexually violent person, hitherto labeled as collateral are so integrally related, or so automatic, or so enmeshed in the underlying offense and conviction, or so severe that a defendant should be given complete and accurate advice about them before pleading guilty. Some courts have extended *Padilla* to cover for example, parole eligibility, (at least in some circumstances), *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012), and sex offender registration, e.g., *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010), *People v. Fonville*, 804 N.W.2d 878 (Mich. Ct. App. 2011). A United States Court of Appeals extended *Padilla* to erroneous advice to a defendant that he would *not* be subject to civil commitment under Florida's version of Chapter 980. *Bauder v. Florida Dep't of Corrections*, 619 F.3d 1272 (11th Cir. 2010). Again, the world is changing when it relates to notice of consequences which an attorney is required to provide to his client.

The traditional definition of “direct” consequences includes terms of imprisonment, fines and community supervision that are part of the court's judgement at sentencing. “Collateral” consequences of a plea may include sex offender registration and lifetime civil commitment. Put another way, direct consequences are penal sanctions stemming directly from the guilty plea. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 Minn. L. Rev. 670, 689-93 (2008). As defined by courts and commentators, collateral consequences are ramifications which are indirect, inexplicit, or implicit and a result of the “fact of conviction rather than from the sentence of the court”. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly*

Incarcerated Individuals, 86 B.U. L. Rev. 623, 634 (2006) (describing the nature of collateral consequences). According to some scholars, the distinction between direct and collateral consequences is mythical, especially when one considers that a significant number of collateral consequences are automatically imposed. Roberts, 93 Minn. L. Rev. 670, 689-93 (2008); *see also* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1130 (2011) (“The neat walls between criminal and civil, between direct and collateral consequences, have steadily eroded in recent years.”)

B. *Padilla v. Kentucky* and *Missouri v. Frye* reinforce the Sixth Amendment obligation of counsel to provide notice to an accused before he enters a plea of guilty.

LeMere contends that the *Padilla* decision must also be read in conjunction with *Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399 (2012). *Frye*, like *Padilla*, is an ineffective assistance of counsel case. In light of the overwhelming prevalence of guilty pleas, *Frye* recognizes the need for adequate representation in the plea bargaining context. *Padilla* acknowledges that some collateral consequences, like deportation, are significant enough to require counsel provide accurate advice as to consequences of a guilty plea in order to be effective. Both decisions make concrete the evolving right to counsel jurisprudence that acknowledges the importance of notice within the criminal system, albeit through lawyers for the accused. In *Frye*, the Court held that the right to effective assistance of counsel extends to the plea-bargaining process and that counsel is mandated to convey offers to a defendant. *Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399 (2012) (holding that the right applies to “all” ‘critical’ stages of the criminal proceedings,” which includes plea bargaining). Charged with driving a revoked license for the fourth time. Frye never received two plea

offers conveyed to his counsel. *Frye*, 132, S. Ct. At 1404. He ultimately submitted entered a guilty plea that resulted in three years of incarceration. *Id.* Upon learning that his counsel had received an offer that would have resulted in only ninety days of incarceration, he filed a petition for post-conviction relief, claiming ineffective assistance of counsel. *Id.* *Frye* definitively answered in the affirmative the question as to whether counsel might be deficient for not conveying the terms of a plea offer to a defendant, especially if those terms are favorable. The plea-bargaining realities of the criminal system make an informed plea, with the aid of counsel, essential. Justice Kennedy, author of the Court’s opinion in *Frye*, emphasized that “in today’s criminal justice system, therefore the negotiations of a plea bargain, rather than *the* unfolding of a trial, is almost always the critical point for a defendant”. *Frye*, 132 S. Ct. At 1407 (emphasis added). Kennedy also noted that “criminal defendants require effective counsel during plea negotiations. ‘Anything less . . . might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him’” *Id.* At 1407-1408 (citations omitted). *Padilla* and *Frye* marked the first time that the Court began to regulate the plea bargaining as the main aspect of the criminal justice process instead of the right to a jury trial.

C. The Severe and Enmeshed and Integral Consequences of LeMere’s Uninformed and Involuntary Guilty Plea.

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).

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).

The Court in *Padilla* also noted that deportation is so “enmeshed” and “intimately related to the criminal process” that trying to classify it as direct or collateral proves “difficult. *Padilla*, 130 S. Ct. At 1481-82. Just like deportation, lifetime civil commitments under Chapter 980 are so intimately related to, and enmeshed with, the criminal process that the direct/collateral distinction is inapposite. Indeed, lifetime civil commitment under Chapter 980 is even more enmeshed with the criminal process than deportation and it is impossible - not just “difficult” - to divorce the possibility of lifetime civil commitment under Chapter 980 from the underlying conviction.

In many respects, lifetime civil commitment is a harsher result than deportation. When non-citizens are deported, they must return to their home country, but once there, they face no continued punishment - they are free to live their lives however they choose, so long as they do not reenter the United States. Persons committed under Chapter 980 are restrained and deprived of their liberty and institutionalized for their lifetime after they have completed a lengthy prison sentence. It is hard to imagine a more severe consequence enmeshed with the criminal conviction and criminal process. The fact that there is a possibility that a petition will not be filed and that after a jury trial a defendant will not be committed does not lessen the degree of severity of this consequence. Thus, a defendant should be informed by his attorney of the possibility of lifetime commitment under Chapter 980.

It is the profoundly severe nature of the consequence of lifetime commitment under Chapter 980 which requires

counsel to provide notice to the accused that it is a distinct possibility upon entering a plea of guilty to a sexually violent offense. Otherwise it cannot be said that a defendant has been provided effective assistance of counsel. One State Court went so far as to mandate that trial courts inform defendants of the consequence of lifetime commitment during the plea colloquy given the severity of the consequence. *See 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”).

D. 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 did not specifically address the possibility of **lifetime** commitment as a sexually violent person under Chapter 980. (62:12; App. 5:12). 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 prejudiced 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.

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

A. LeMere is 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. The circuit court did raise the topic of commitment. However, the circuit 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).

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).

In 2013, 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).

CONCLUSION

For all these reasons, this Court should reverse the circuit court and the court of appeals and remand this case for an evidentiary hearing.

Dated at Milwaukee, Wisconsin, this 21st day of April,
2015.

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 and appendix produced with a proportional serif font. The length of the brief's is 6764 words.

Dated at Milwaukee, Wisconsin, this 21st day of April, 2015.

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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 21st day of April, 2015.

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CERTIFICATION OF APPENDIX

I hereby certify that filed as a separate document is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

- (1) a table of contents;
- (2) the findings or opinions of the circuit court;
- (3) a copy of any unpublished opinion cited under s. 809.23(3) (a) or (b);
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. 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 21st day of April, 2015.

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