STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP2433-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN A. LEMERE,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A DECISION AND ORDER ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE KRISTINA M. BOURGET, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Counsel is not ineffective for failing to warn a defendant of collateral consequences of pleading guilty, including the risk of future ch. 980 commitment. But counsel's failure to warn noncitizen defendants of deportation—a "unique," "automatic," and severe consequence of

certain convictions—can be deficient performance.[1] Should this court extend that reasoning to establish a similar constitutional duty for counsel to warn of possible ch. 980 commitment, imposition of which depends upon factors other than the conviction?

Both the circuit court and the court of appeals concluded that the Supreme Court's reasoning in *Padilla v. Kentucky*, 559 U.S. 356 (2010), did not extend beyond deportation consequences (47:3-4; 63:3-4; A-Ap. 4:3-4, 6:3-4).[2] This court should affirm.

2. If so, when a defendant seeks post-sentencing plea withdrawal based on a claim of ineffective assistance, he is not entitled to a hearing if the record conclusively demonstrates that he is not entitled to relief. Here, Stephen LeMere alleged that counsel failed to warn that LeMere's plea to sexual assault carried a risk of future ch. 980 commitment. Can LeMere show prejudice where the court warned LeMere of that risk and LeMere expressed that he understood it?

This court need not address this question if it affirms on the first issue. That said, the court at LeMere's plea hearing warned LeMere of the risk of ch. 980 commitment, LeMere expressed his understanding of that risk, and the record contained no inference that LeMere misunderstood the court's warning (47:4-5; A-Ap. 4:4-5). Because the record established that LeMere cannot demonstrate prejudice, this court may affirm the circuit court's denial of LeMere's motion without a hearing; alternatively, this court may remand to the circuit court for further proceedings.

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[1] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

[2] The court of appeals' decision is unnumbered in the record, but appears after record number 62. According, the State cites it as record number 63.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case that this court deems important enough to grant review, oral argument and publication are warranted.

INTRODUCTION AND LEGAL FRAMEWORK

In this case, LeMere filed a post-sentencing motion seeking plea withdrawal based on his claim that his counsel was ineffective for failing to warn him of the risk of civil commitment under Wis. Stat. ch. 980, a collateral consequence of LeMere's plea to first-degree sexual assault of a child under thirteen (41; A-Ap. 2). The circuit court denied the motion without a hearing—and the court of appeals affirmed—on grounds that under established Wisconsin law, counsel cannot be deemed ineffective for failing to warn a defendant of collateral consequences of a plea (47; 63; A-Ap. 4, 6).

In order to withdraw a plea after sentencing, a defendant must show a manifest injustice justifying such relief. *State v. Taylor*, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482 (citation omitted). Ineffective assistance of counsel can satisfy the manifest injustice test. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

A defendant asserting a claim of ineffective assistance of trial counsel must demonstrate: (1) deficient performance, and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether a person was deprived of the effective assistance of counsel presents a mixed question in which this court upholds the circuit court's factual findings unless they are clearly erroneous, but determines de novo whether counsel's performance was deficient and prejudicial. *State v. Hunt*, 2014 WI 102, ¶22, 360 Wis. 2d 576, 851 N.W.2d 434.

ARGUMENT

I. Counsel's failure to warn a defendant pleading guilty to certain sex offenses that those convictions carry a risk of ch. 980 commitment is not a basis for an ineffective assistance claim.

A. Possible civil commitment is a collateral consequence of a plea and, as a result, counsel's alleged failure to warn of that consequence is not deficient performance.

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, it does not automatically flow from a conviction, and it may depend on other factors including the subsequent conduct of the defendant. *Id.*, ¶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).

The court's failure to inform a defendant of a collateral consequence does not establish a manifest injustice warranting 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. *Id.*, ¶7 n.3.

The potential for a future sexually violent person commitment under ch. 980 is a collateral consequence of a guilty plea. *State v. Myers*, 199 Wis. 2d 391, 394-95, 544 N.W.2d 609 (Ct. App. 1996). In *Myers*, the court of appeals observed that even though a defendant may plead to a predicate offense for

ch. 980 commitment, future commitment did not "automatically flow" from that conviction. Rather, whether commitment occurs depends on other factors, including whether the defendant satisfies the criteria for commitment at the time of his release from prison, whether the state initiates proceedings, and whether the evidence—presented at a full trial with due process protections—supports 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. . . . In sum, Myers needed no knowledge of the potential for a future chapter 980 commitment in order to make his plea knowing and voluntary.

Id. at 394-95.

Accordingly, *Myers* controls LeMere's case: LeMere alleges that counsel failed to warn him that his plea to first-degree sexual assault of a child carried the risk of ch. 980 commitment. But under *Myers*, counsel had no constitutional duty to warn LeMere of the collateral consequences of his plea, including the risk of ch. 980 commitment.

Hence, the circuit court and court of appeals here correctly denied LeMere's motion because, as a matter of law, LeMere cannot establish a manifest injustice even if counsel did not warn him of the risk of ch. 980 commitment.

B. *Padilla* and its narrow focus on the "unique" consequence of deportation does not extend to ch. 980 sexually violent person commitments.

1. The Court in *Padilla* did not eliminate the distinction between direct and collateral consequences of a plea.

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 ch. 980 commitment. 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 ch. 980 commitment, thereby overruling *Myers* (LeMere's br. at 7-10).

The United States Supreme Court's decision in *Padilla* is narrowly limited to deportation. Padilla pleaded guilty to a drug offense, and the resulting conviction made him subject to automatic deportation (also described as "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 advising him that "he 'did not have to worry about immigration status since he had been in the country so long.'" *Id*. at 359.

The United States Supreme Court explained that changes in immigration law have made deportation nearly automatic and practically inevitable for noncitizens convicted of a broad class of offenses. *Id.* 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 plead guilty to specified crimes." *Id.* at 364 (footnote omitted).

And deportation, "'the equivalent of banishment or exile,'" is uniquely severe. *Padilla*, 559 U.S. at 373 (citation omitted). Based on the unique severity of deportation and the nearly automatic, practically inevitable result of permanent removal for noncitizens convicted of a broad class of offenses, changes in immigration law and its application made deportation nearly indistinguishable from the penalty for the offense. Given that, 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 sum, the *Padilla* Court took the unique consequence of deportation out of the direct-collateral Sixth Amendment analysis and announced a new rule specific to that consequence. It did no more than that. To wit, the Court did not hold that trial counsel's failure to advise a defendant of collateral consequences of a guilty plea constitutes deficient performance. Moreover, contrary to LeMere's suggestion that

the *Padilla* Court "refused to draw a clear line between direct and collateral consequences within the Sixth Amendment context" (LeMere's br. at 8), the Court did not hold or even suggest that the traditional distinction between direct and collateral consequences is invalid.

Indeed, the Court solidified that point in *Chaidez v. United States*, 133 S. Ct. 1103 (2013). In *Chaidez*, 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. *Id.* at 1109. Civil commitment has been designated a collateral consequence. *Id*. at 1108 n.5.

The Court explained that *Padilla* declared a new, non-retroactive 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 traditionally labeled a collateral consequence of a guilty plea. *Id.* at 1110. The Court's holding in *Padilla* was limited to deportation because deportation is "unique," it is a "particularly severe penalty," it is "intimately related to the criminal process" and, importantly, it is a "nearly automatic result" of conviction of designated offenses. *Id.* (internal quotation marks omitted) (citation omitted).

Significantly, the *Chaidez* Court explained that it did not "eschew the direct-collateral divide across the board" in *Padilla*, but rather held that the distinction did not insulate from Sixth Amendment scrutiny defense counsel's failure to advise or to correctly advise a defendant on deportation, given its unique nature, severity, and automatic nexus to the conviction. *Id.* at 1112.

Thus, *Padilla*, as further illuminated by *Chaidez*, is properly read as endorsing the nearly universally accepted views that the Sixth Amendment does not require defense counsel to inform the defendant of a conviction's collateral consequences, and that 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 duty to advise a noncitizen defendant of the deportation risks resulting from a guilty plea.

2. Ch. 980 commitment is neither automatic, nor presumably "lifetime."

LeMere argues that ch. 980 commitment is like deportation—and that the logic of *Padilla* should extend to such a consequence—asserting that it is automatic because convictions for certain offenses satisfy one criterion for commitment and that it is "severe" because it presumably lasts a "lifetime" (LeMere's br. at 15-17).

The fatal flaw in LeMere's argument is that he separately earmarks initial eligibility for ch. 980 commitment based on certain convictions as "automatic," and then describes the imposed commitment, if it occurs, as "severe." But to call a consequence of a conviction "automatic" solely because initial eligibility flows from the conviction simply restates the definition of a consequence. Indeed, in *Padilla*, the Court was not so concerned about whether a conviction automatically made a noncitizen eligible for deportation, but rather that removal itself—that is, the actual imposition of the consequence—was nearly automatically occurring, was based entirely on the conviction itself, and was severe.

In contrast, a ch. 980 commitment is not "virtually automatic." Rather, it is rare and far from automatic for persons convicted with qualifying offenses. Further, for those who are committed, the duration of that commitment depends on

numerous factors and decisions, not just the conviction itself. In all, it is a textbook collateral consequence of a plea, and nothing in *Padilla* compels a different conclusion.

a. Unlike deportation for noncitizens whose crime makes them "deportable," very few persons who are "subject to" ch. 980 commitment based on a sex offense are referred for commitment, let alone actually committed.

Although it is arguable just how "automatic" deportation or removal of noncitizens convicted of particular crimes is, that consequence is significantly more automatic and "enmeshed" with the criminal process than ch. 980 commitment is. As the *Padilla* Court noted, amendments to federal immigration law eliminating courts' and the Attorney General's discretionary authority to grant relief from deportation has meant that

> if a noncitizen has committed a removable offense after the 1996 effective dates of these amendments, *his removal is practically inevitable* but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of a particular class of offenses.

559 U.S. at 363-64 (emphasis added). The Court went on to note that based on the conviction at issue—a drug trafficking offense—a defendant in Padilla's position did not have even that limited discretionary relief available. *Id.* at 364.

In contrast, ch. 980 commitment is far from automatic. The Department of Corrections, though its End of Confinement Review Board (ECRB) initially screens defendants who have qualifying convictions shortly before their release dates. Of those that still potentially qualify for commitment, the ECRB determines whether they should undergo a special purpose evaluation by psychologists to help determine whether they

satisfy the ch. 980 criteria. That criteria include not just the predicate offense, but two other elements: (1) the defendant must have a mental disorder and (2) that mental disorder makes the defendant dangerous because it makes him more likely to commit acts of sexual violence. Wis. Stat. §§ 980.01(7); 980.02(2)(b), (c). After the special purpose evaluations eliminate additional offenders from consideration, the ECRB then refers those remaining offenders to the Department of Justice (DOJ) for it to potentially file a petition for commitment.

As the data suggest, that initial screening process by the ECRB eliminates most sex offenders from consideration for ch. 980 commitment very early in the process. In *In re Commitment of Budd*, 2007 WI App 245, ¶4, 306 Wis. 2d 167, 742 N.W.2d 887, a psychologist, Dr. Cynthia Marsh, testified that as of 2006, the preliminary screening process typically eliminated nearly 96 percent of those sex offenders who were initially eligible for ch. 980 commitment:

> [T]he chairman of the ECRB screens all sex offenders that are scheduled for release from Wisconsin state prisons every year, and refers about twenty-five percent to the ECRB. The ECRB decides that about fifty percent of those cases require a special purpose evaluation, and those are sent to Marsh and her colleagues. Marsh testified that she and the other special evaluators recommend about a third of the cases to the Department of Justice for ch. 980 proceedings. The assistant attorney general then elicited a reiteration from Marsh that the original screening eliminates seventy-five percent of sex offenders for potential evaluation, the ECRB reduces the remaining group by another fifty percent, and that finally an even smaller group are referred on for ch. 980 proceedings.

Id. In all, that testimony indicated that as of 2006, only approximately 4.5 percent of offenders with qualifying sex

offenses were even referred to the DOJ to potentially initiate commitment proceedings.[3] *Id.*, ¶16.

And even when the ECRB refers offenders to the DOJ, commitment under ch. 980 is far from assured. Numerous additional hurdles must be cleared: the DOJ must decide whether to file a ch. 980 petition; if so, the petition must survive a probable cause hearing, Wis. Stat. § 980.04(2); if so, Department of Health Services staff evaluates the person subject to the petition to help determine whether the subject meets the criteria for a sexually violent person (SVP), Wis. Stat. § 980.04(3); and if so, the state must then prove beyond a reasonable doubt, at a full court or jury trial at which the subject is afforded full due process protections and other rights, that the subject is an SVP, Wis. Stat. §§ 980.03, 980.05.

In all, very few of the sex offenders who are "subject" to ch. 980 commitment based on their underlying convictions are actually committed. And to be clear, the State is not asserting that commitment itself is an insignificant result because it affects only a small percentage of sex offenders. Rather, this point makes ch. 980 commitment readily distinguishable from the *Padilla* Court's understanding of deportation. The multilayer screening and review process described above, which eliminates the possibility of commitment for all but a

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[3] Data on the Department of Health Services web site from as recently as 2013 generally support those statistical breakdowns from *Budd* and suggest that the ECRB refers an even lower percentage—only 3.3 percent of the sex offenders nearing release—to the DOJ for possible commitment proceedings. *See* Deborah McCulloch, Sand Ridge Chapter 980 Overview at 19, available at https://www.dhs.wisconsin.gov/sandridge/inforpapers-980.htm by clicking on the "Chapter 980 Overview" link (last visited May 5, 2015) (stating that of 19,689 DOC inmates are screened; 3,802 of those go to the ECRB; 1,983 of those are referred for a special purpose evaluation; and 657 of those are referred to the DOJ for a decision on whether to file a petition).

very small percentage of offenders, cannot compare to "virtually automatic" noncitizen removal, which ensnares a large group of offenders based solely on their convictions and noncitizen status without any discretionary processes to make removal less certain.

Thus, in *Padilla*, removal was both "virtually automatic" in nature and wide-ranging in scope, simply by virtue of the underlying convictions. *See Padilla*, 559 U.S. at 366 (noting that deportation is a penalty that is "most difficult to divorce" from the conviction because, "importantly, recent changes in our immigration law have made removal *nearly an automatic result for a broad class of noncitizen offenders*") (emphasis added and internal quotation marks omitted).

b. Ch. 980 commitment is not presumably "lifetime," nor is it as severe as deportation.

LeMere sets forth the proposition that "[s]ince commitment under Chapter 980 is indefinite, it is therefore potentially a life sentence" (LeMere's br. at 15). He then persists in using the adjective "lifetime" throughout his brief in describing civil commitment, as if simply repeating the word will make his faulty logic true.[4]

[4] LeMere takes that proposition even further, falsely stating that "[p]ersons committed under Chapter 980 are restrained and deprived of their liberty and institutionalized for their lifetime after they have completed a lengthy prison sentence" (LeMere's br. at 16). But commitment under ch. 980 does not presumably mean restraint or institutionalization, given the availability and use of supervised release for committed persons. Moreover, the fact that there is no mandatory release date does not mean that committed persons are "institutionalized for their lifetime." LeMere overlooks the mandated annual reexaminations and other provisions built into the statute to enable discharge from the commitment or supervised release and to ensure that only persons satisfying the criteria remain committed.

Describing ch. 980 commitment as lifetime or even presumably lifetime is false. Rather, the program is designed to ensure that those who are committed and participate in programming will regularly be reexamined and have meaningful opportunities for discharge from the commitment or supervised release.

As the Supreme Court noted in holding that a similar SVP commitment statute was constitutional, it rejected the argument that such commitment was punitive because its duration was potentially indefinite. *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997). It first observed that the duration of commitment was tied to the statutory purpose, i.e., for the time that the committed person's mental condition causing him to be a sexually violent person no longer causes him to be so. *Id.*

The Court also observed that requirements that the state annually re-establish that the committed person continues to satisfy the criteria for commitment likewise demonstrated an intent that SVP commitments last no longer than the statutory purpose demanded:

> Furthermore, commitment under the Act is only *potentially* indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. § 59–29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. *Ibid.* This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.

Id.

So too, under ch. 980, every twelve months in a person's commitment DHS must appoint an examiner to reexamine the person's mental condition to determine whether the person has

made sufficient progress for the court to order supervised release or discharge. Wis. Stat. § 980.07(1). During this reexamination, the committed person may also seek to retain or have appointed his own examiner. *Id.* Moreover, outside this annual reexamination, the court that committed the person may order a reexamination of the person at any point during his commitment period. Wis. Stat. § 980.07(3).

Following the completion of the annual reexamination, the department provides the person with an opportunity to petition for discharge or supervised release. Wis. Stat. § 980.07(6)(b). If the petition establishes that a discharge hearing is warranted, the court must discharge the person unless the state carries its burden of establishing by clear and convincing evidence that the person is still an SVP. *See* Wis. Stat. § 980.09(2), (3), (4); *State v. Post*, 197 Wis. 2d 279, 329, 541 N.W.2d 115 (1995). And even if a court declines to discharge the person, the court may still grant supervised release. Wis. Stat. § 980.09(4).

Further, a committed person need not even wait for the annual reexamination to seek discharge or supervised release: He can petition for discharge at any time, Wis. Stat. § 980.09, and may petition for supervised release every twelve months, Wis. Stat. § 980.08(1).

In all, the ch. 980 statutory scheme is designed with intent that commitment is *not* presumably life-long, but rather that it lasts no longer than its purpose requires.

That said, ch. 980 commitment, whether it's institutionalized or through supervised release, can be "*potentially* indefinite." *See Hendricks*, 521 U.S. at 364. And regardless of how long a person is committed, it is a serious, if not severe, consequence.

But even so, ch. 980 commitment—a treatment program that commits the small percentage of sex offenders who have a

mental disorder that makes them likely to be sexually violent, that has built-in annual reviews to ensure that commitment lasts no longer than necessary, and that is designed to terminate when the state can no longer establish by clear and convincing evidence that the committed person is still an SVP—is not akin to the largely mandatory, unchallengeable removal of a noncitizen based solely on a conviction for a broad swath of crimes. It's not even close.

3. Nearly every other jurisdiction considering the issue has declined to extend *Padilla*'s logic to counsel's failure to warn of possible SVP commitment.

Although this case presents the first opportunity for this court to address whether *Padilla*'s logic extends to create a duty for counsel to warn of the risk of ch. 980 commitment before a defendant enters a plea, nearly every other court to consider this question has answered in the negative.[5] For example, the

[5] *See, e.g.*, *United States v. Francis*, No. 5:04-CR-74-KSF, 2011 WL 1303275, at *1-2 (E.D. Ky. Apr. 1, 2011) (accepting magistrate judge's recommendation that *Padilla* reasoning does not extend to failure to warn of possible future SVP commitment); *Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *10 (E.D. Mo. July 1, 2010) (distinguishing SVP commitment as an individualized assessment compared to the automatic result of deportation stemming from a conviction); *Brown v. Goodwin*, No. 09-211 (RMB), 2010 WL 1930574, at *13 (D. N.J. May 11, 2010) (same); *State v. Carter*, No. 12-1938, 2013 WL 4769414, at *2–4 (Iowa Ct. App. Sept. 5, 2013) (holding that SVP commitment is "not a definite, immediate, or automatic result of conviction"); *State v. Schaefer*, No. 109,915, 2014 WL 4080152, at *4–7 (Kan. Ct. App. Aug. 15, 2014) (declining to extend *Padilla* beyond deportation consequences); *Nicolaison v. State*, No. A12-0187, 2012 WL 5381852, at *3 (Minn. Ct. App. Nov. 5, 2012) (same); *Hamm v. State*, 744 S.E.2d 503, 504-05 & n.3 (S.C. 2013) (same); *Thomas v. State*, 365 S.W.3d 537, 542–45 (Tex. App. 2012) (declining to extend *Padilla* beyond immigration warnings and distinguishing SVP commitment based on the lengthy evaluation process required for commitment to actually occur).

Texas Court of Appeals set forth reasoning consistent with and echoed in the other cases declining to extend *Padilla* to warnings of potential civil commitment. *Thomas v. State*, 365 S.W.3d 537, 544 (Tex. App. 2012).

In *Thomas*, the Texas Court of Appeals held that trial counsel's failure to inform the defendant that his guilty plea would subject him to civil commitment as a sexually violent predator in the future was not deficient performance. *Id.* In so holding, the court observed that the Supreme Court in *Padilla* did not extend counsel's duty to warn "beyond the immediate context of deportation." *Id.* at 543. It further concluded that the reasoning in *Padilla* did not logically extend to warnings about the risk of future SVP commitment. It explained that the "concern in the SVP commitment process is the person's lack of volitional capacity" and, because of that, even though the predicate conviction is a necessary basis for commitment, that alone is not sufficient. *Id.*

The sole outlier of this line of consistent cases is *People v. Hughes*, 983 N.E.2d 439, 457 (Ill. 2012), in which the Illinois Supreme Court held that "defense counsel has a minimal duty to advise a defendant who pleads guilty to a triggering offense subject to the provision of the [SVP commitment statute] that he will be evaluated for and may risk involuntary commitment after completing his prison term." *See* LeMere's br. at 10. Even though that court noted that "the possibility of involuntary commitment . . . is not immediate, automatic, or mandatory in the same way that deportation would be," it concluded that because the conviction alone subjects all qualifying offenders to screening for possible commitment at the end of their term and that *if imposed*, involuntary commitment could be a more severe penalty that the criminal penalty imposed by the court. H*ughes*, 938 N.E.2d at 454-55.

Hughes was wrongly decided and unpersuasive. As explained above, the *Padilla* Court distinguished the consequence of removal as "unique" from other consequences of a plea because *the removal itself* was automatic, more or less certain, and severe. In contrast, the *Hughes* court reasoned that *initial consideration* for SVP commitment was automatic and *the commitment itself*, if imposed, could be severe—and did not consider the many steps and conditions that would need occur in between that initial screening and the actual commitment.

Based on that (and LeMere's) reasoning, *Padilla* would extend to virtually any collateral consequence of a plea. Whether it is direct or collateral, a consequence is something that a conviction or plea makes ultimately possible. *See Merriam-Webster's Collegiate Dictionary* at 246 (10th ed. 1997) (defining "consequence" as "something produced by a cause or necessarily following from a set of conditions"). Thus, the *Hughes* court answered the wrong question when it reasoned that *the initial screening* for SVP commitment is automatic, certain, and caused by the conviction. Of course the initial screening is all of those things: eligibility for SVP commitment is a consequence of a guilty plea to qualifying sex offenses. Again, the real question was whether *the actual imposition* of SVP commitment was all of those things. As explained above, the imposition of SVP commitment requires conditions, proceedings, and multiple discretionary exercises in addition to the qualifying conviction. It is a purely collateral consequence of a plea and not analogous to the "unique" consequence of deportation in *Padilla*.

LeMere's reliance on other case law is misplaced. First, *Missouri v. Frye*, 132 S. Ct. 1399 (2012), is irrelevant to the analysis (LeMere's br. at 10-11, 13-14). In that case, the Supreme Court concluded that counsel's failure to communicate a plea offer to a client was ineffective assistance. It had nothing to do with a failure by counsel to warn a client of collateral

consequences of a plea, and nothing about *Frye* compels this court to overrule *Myers*.

Moreover, *Nelson* and *Brown* support neither an overrule of the *Myers* holding that possible SVP commitment is a collateral consequence nor an extension of *Padilla*'s logic to possible SVP commitment (LeMere's br. at 11). In *State v. Nelson*, 2005 WI App 113, ¶15, 282 Wis. 2d 502, 701 N.W.2d 32, the court of appeals held that the defendant's lack of knowledge that he could be subject to ch. 980 commitment as a consequence of his guilty plea and resulting conviction justified presentencing plea withdrawal. But the *Nelson* court applied the presentencing "fair and just" standard, which is simply "some adequate reason for [a] change of heart . . . other than the desire [for] a trial." *Id.*, ¶11 (citation and internal quotation marks omitted). With such an adequate reason demonstrated, the burden then shifts to the state to show "substantial prejudice." *Id.* (citation omitted). While withdrawal is not automatic under that standard, courts are to be liberal in considering and granting requests for pre-sentencing plea withdrawal. *Id.* (citation omitted).

Nelson is of no moment for LeMere, who is seeking post-sentencing plea withdrawal, to which he has the burden of presenting clear and convincing evidence that a manifest injustice justifies withdrawal. The policy in Wisconsin that presentencing plea withdrawal should be easier for a defendant than post-sentencing withdrawal—even when the reasons for withdrawal are the same—is well-established:

> The clear and convincing standard for plea withdrawal after sentencing, which is higher than the "fair and just" standard before sentencing, "reflects the State's interest in the finality of convictions, and reflects the fact that the presumption of innocence no longer exists." The higher burden "is a deterrent to defendants testing the waters for possible punishments."

Taylor, 347 Wis. 2d 30, ¶48 (citation omitted).

Similarly, *Brown* offers LeMere no support for his position. In *Brown*, the court of appeals permitted post-sentencing plea withdrawal where trial counsel affirmatively misadvised Brown that his conviction would not subject him to a ch. 980 commitment. *Brown*, 276 Wis. 2d 559, ¶8. Brown's plea deal was specifically crafted to avoid a future ch. 980 commitment, but all of those involved failed to realize that one of the crimes to which Brown pled would subject him to a ch. 980 commitment. Therefore, under those circumstances, Brown's misunderstanding caused by counsel's incorrect assurances of the consequences of Brown's plea called into question the knowing, intelligent, and voluntary nature of his plea. *Id.*, ¶¶13-14. Those circumstances made for a manifest injustice for which plea withdrawal was appropriate.

But in so holding, the court of appeals was careful to limit its holding to affirmative misadvice—not a failure to advise—of a collateral consequence, which was a recognized exception to the collateral consequence rule:

> Brown seeks to withdraw his pleas not because he lacked information of the pleas' consequences, but rather because he was mis[]informed of those consequences by both his attorney and the prosecutor, with acquiescence by the judge. Wisconsin courts have permitted defendants to withdraw pleas that were based on a misunderstanding of the consequences, even when those consequences were collateral. *See, e.g., State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983); *State v. Woods*, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992).

Id., ¶8. Here, in sharp contrast, LeMere has never claimed that trial counsel erroneously advised him that his conviction would not subject him to a ch. 980 commitment.[6]

The fact that some other courts may have extended *Padilla* to the failure to warn of other collateral consequences, such as sex offender registration or parole eligibility, is irrelevant to whether that reasoning should extend to the risk of SVP commitment (LeMere's br. at 12). And even though some jurisdictions may have concluded that a trial court has a duty to inform pleading defendants of the consequence of potential SVP commitment, those jurisdictions are outliers and do not compel expansion of *Padilla* in the ch. 980 context.[7]

Finally, LeMere argues that counsel's failure to warn of potential SVP commitment was contrary to the ABA standards

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[6] 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 SVP commitment (LeMere's br. at 12).

[7] *See* LeMere's br. at 17 (invoking *State v. Bellamy*, 835 A.2d 1231, 1238 (N.J. 2003) (holding that although potential SVP commitment was a collateral consequence, "fundamental fairness" required that the trial court inform a defendant of the risk). The State has identified only one other jurisdiction that requires the court to provide a defendant with such warnings. *See* Mass. R. Crim. P. 12(c)(3)(B) (May 11, 2015). That said, most other jurisdictions have rejected that approach, even post-*Padilla*. *See, e.g., United States v. Youngs*, 687 F.3d 56, 60–62 (2d Cir. 2012) (holding that no due process violation occurred where trial court failed to warn defendant of risk of SVP commitment and reasoning that *Padilla* does "not apply to such a remote and uncertain consequence as civil commitment"); *Anderson v. State*, No. 14-0092, 2015 WL 405982 at *1 & n.1 (Iowa Ct. App. Jan. 28, 2015) (court and counsel had no duty to warn of possible SVP commitment); *Fujimoto v. State*, 407 S.W.3d 656, 663-64 (Mo. Ct. App. 2013) (declining to adopt reasoning in *Bellamy*); *People v. Harnett*, 72 A.D.3d 232, 234 & n.2 (N.Y. App. Div. 2010) (holding that court had no duty to inform defendant of potential SVP commitment and collecting supporting cases).

advocating that defense counsel "should" discuss relevant collateral consequences to a plea with a client (LeMere's br. at 18). Although such bar standards can be helpful to a court evaluating whether counsel performed reasonably, "they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89; *see also Padilla*, 559 U.S. at 377 (Alito, J., concurring) ("Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. . . . And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.") (citation omitted).

Indeed, the ABA recognizes that its recommendation that counsel advise a client of collateral consequences is aspirational and, importantly, beyond what is required by case law:

> Given the ever-increasing host of collateral consequences that may flow from a plea of guilty or nolo contendere, it may be very difficult for defense counsel to fully brief every client on every likely effect of a plea in all circumstances. Courts do not require such an expansive debriefing in order to validate a guilty plea. This Standard, however, strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction.

ABA Standards for Criminal Justice, Commentary to Standard 14-3.2(f) (Collateral consequences) (3rd ed. 1999) (footnote omitted). In other words, the ABA standards may at most set forth "best practices" for attorneys. But failure to conform to best practices is not constitutionally deficient performance. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The question is whether an attorney's representation amounted to

incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.").

And more to the point, LeMere fails to explain exactly how much detail counsel, in any given situation, must provide defendants pleading to predicate offenses for possible future ch. 980 commitment. Is it adequate and accurate for counsel to warn that the conviction carries the risk of ch. 980 commitment without explaining the process and that the likelihood of it occurring is statistically low? Must counsel, as LeMere seems to suggest, tell the defendant that commitment is "lifetime," even though that is inaccurate? Must counsel investigate whether the defendant may have a mental disorder that could satisfy the criteria for commitment? *See, e.g.*, *Thomas*, 365 S.W.3d at 544 (noting that competent counsel could be reasonably concerned that advising a client that he is subject to civil commitment would not accurately describe the process).

Given that even a minimal warning can be arguably misleading, this court should decline to create a difficult-to-satisfy constitutional duty to warn. Doing will provide defendants a fertile but unjustified basis upon which to premise allegations of manifest injustice to disturb the finality of their knowing, intelligent, and voluntary pleas. The Court's reasoning in *Padilla* does not demand such an expansion.

In sum, counsel cannot be held to be ineffective for failing to warn of a collateral consequence of a plea, including the risk of ch. 980 commitment. *Myers*, 199 Wis. 2d at 394-95. Nothing in *Padilla* compels or encourages a different result. Accordingly, the circuit court and court of appeals properly denied LeMere's motion for post-sentencing plea withdrawal. This court should affirm.

II. LeMere is not entitled to an evidentiary hearing on his motion.

If this court agrees with the circuit court and court of appeals that LeMere cannot assert a claim of ineffective assistance of counsel for failure to warn of the collateral consequence of possible ch. 980 commitment, it need not address this second question presented. If, however, it disagrees, the question remains whether LeMere's motion entitled him to a hearing. For the reasons stated below, LeMere is not entitled to a hearing, and the circuit court did not erroneously exercise its discretion in declining to grant him one.

A circuit court must conduct a hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *Bentley*, 201 Wis. 2d at 309-10; *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Thus, "the motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *Bentley*, 201 Wis. 2d at 314) (brackets in *Allen*).

If the motion does not raise facts sufficient to entitle the defendant 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 circuit court should "form its independent judgment after a review of the record and pleadings and . . . support its decision by written opinion." *Nelson*, 54 Wis. 2d at 498; *see Bentley*, 201 Wis. 2d at 318-19.

In denying LeMere's petition without a hearing, the circuit court first held that because counsel's failure to advise of a collateral consequence cannot be deficient performance,

LeMere could not, as a matter of law, satisfy the first prong of *Strickland* (47:4; A-Ap. 4:4). Although the court stated that it was not addressing the prejudice prong of *Strickland* (47:4 n.2; A-Ap. 4:4 n.2), it nevertheless (1) found that the circuit court at the plea hearing had expressly warned LeMere of the risk of possible ch. 980 commitment and (2) concluded that LeMere understood that warning (47:4-6; A-Ap. 4:4-6).[8]

It first found that the court accepting LeMere's plea expressly warned LeMere of the possibility of ch. 980 commitment:

> THE COURT: In addition, although not necessarily likely, I do have to tell you that if you are incarcerated and the State thought it appropriate, they could petition for what's called a Chapter 980, or habitual—or that's not what it's called. It's a—I'm sorry. I'm blanking on the name of the statute. As a sexually violent person, which could require further incarceration on a civil basis past criminal. I don't know that will happen. I don't think that it likely will, but I don't know that. I just want to be sure you understand that that's a potential.

(47:4; A-Ap. 4:4 (quoting 62:12; A-Ap. 5:12)). The plea hearing court then asked LeMere in four different ways if he understood that consequence and others discussed; LeMere unequivocally responded that he did (47:4-5; A-Ap. 4:4-5 (quoting 62:12; A-Ap. 5:12)).

Given that, the postconviction court rejected LeMere's assertion in his motion that his "robotic, monosyllabic" answers did not evince a real understanding, explaining that his yes-

[8] What's more, LeMere did not allege in his motion that the circuit court violated due process by failing to advise or misadvising him of the risk of ch. 980 commitment. Rather, his sole claim was ineffective assistance based on failure to advise. Hence, the circuit court's discussion of the plea colloquy was not a separate resolution of a due process claim raised by LeMere.

and-no answers did not infer lack of understanding. The court found that the plea hearing court made firsthand observations and findings that LeMere appeared to be solemn, appeared to understand "the seriousness of the matter," that he was answering questions appropriately, and that he understood "what he's doing" (47:5; A-Ap. 4:5 (quoting 62:8; A-Ap. 5:8)). In all, the postconviction court concluded: "The trial court's observation of Mr. Le[M]ere's demeanor at the plea hearing, together with the appropriateness of his responses, prevent any inference that Mr. Le[M]ere did not understand the plea hearing process" (47:5; A-Ap. 4:5).

The circuit court's findings and conclusions as to LeMere's understanding of the risk of ch. 980 commitment was in effect a determination that the record conclusively demonstrated that LeMere is not entitled to relief. The record demonstrated that LeMere was aware of the risk based on the colloquy from the court. In other words, had the circuit court expressly considered the prejudice prong, its analysis would have followed its findings and conclusions as to LeMere's understanding of the risk of ch. 980 commitment. Hence, because the circuit court effectively—and correctly—concluded that the record demonstrated that LeMere could not establish prejudice based on any deficiency by counsel, it soundly exercised its discretion in denying LeMere's motion without a hearing.

LeMere's complaints that the court should have specifically warned him that potential ch. 980 commitment was lifetime go nowhere. As explained above, civil commitments under ch. 980 are not presumably lifetime; hence, telling a defendant that they are would be misleading.

Thus, if this court concludes that, as a matter of law, counsel may be ineffective for failing to warn a defendant pleading to a predicate offense that he risks future ch. 980 commitment, it should proceed in one of several ways. For the reasons set forth

above, it may nevertheless affirm the circuit court's denial of LeMere's motion without a hearing as a proper discretionary exercise. If it is unclear whether the circuit court's decision represents an exercise of discretion, this court should remand to the circuit court for it to exercise that discretion. *See King v. King*, 224 Wis. 2d 235, 255, 590 N.W.2d 480 (1999). Finally, and alternatively, if this court concludes that LeMere adequately pleaded his motion, it should remand for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the State respectfully asks this court to affirm the decisions of the court of appeals and circuit court denying LeMere's postconviction motion for plea withdrawal without a hearing.

Dated this 11th day of May, 2015.

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 7271 words.

_____
Sarah L. Burgundy
Assistant Attorney General

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

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Dated this 11th day of May, 2015.

_____
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