STATE OF WISCONSIN

IN THE SUPREME COURT

No. 2013AP002433-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2013AP002433CR

STEPHEN A. LEMERE

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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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 a basis for an ineffective assistance of counsel claim.

The State's reliance on *State v. Brown*, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543 rings hollow on a number of levels. (State's br. at 4-5) First of all, *Brown* predates the United States Supreme Court decisions in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (2013). Secondly, the mere possibility of lifetime commitment as

a sexually violent person under Chapter 980 is so severe that calling the consequence direct or collateral should not make a wit of difference. Competent counsel must warn defendants of such a severe consequence in order for a plea to be considered voluntary and informed. Third, Brown was permitted to withdraw his plea because the attorney in *Brown* misadvised the defendant that his plea would not subject him to either sex offender registration or Chapter 980 commitment. Is it really any less an injury to a defendant's right to effective assistance of counsel when the defendant receives no warning of severe consequences as opposed to erroneous advice as to a consequence of the defendant's plea? Failing to warn a defendant of the possibility that facing lifetime commitment is as grave an instance of ineffective assistance of counsel as mistaken advice that the offense to which he pleads does not carry the possibility of life time commitment as a sexually violent person. Defendant in one instance has a mistaken understanding. And in the other, no knowledge at all.

In light of the United States Supreme Court decisions in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) and *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103 (2013), the decision in *State v. Myers* 199 Wis.2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996) is no longer good law and its reasoning and holding should be discarded. The decision in *Myer*s predates the decision in *Padilla* and *Chaidez* by many years. The United States Supreme Court now seems to be saying that it will decide whether failure to advise or erroneous advise as to a collateral consequence amounts to ineffective assistance of counsel on a case-by-case basis. *Chaidez,* 133 S.Ct. At 1108 n.5. The United States Supreme Court has yet to say that prior to entry of a guilty plea by a defendant a failure by counsel to warn a defendant of the severe consequence of lifetime commitment as a sexually violent person is not a Sixth Amendment violation. The State's brief tries to limit the reach of the United States Supreme Court

decisions *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) and *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103 (2013). But until the Court actually addresses a fact pattern such as LeMere's case, the State's argument must fail.(State's br. at 4-8) The law is in a state of flux. It is that simple. And the reasoning of the Illinois Supreme Court in *People v. Hughes*, 983 N. E. 439, 455 (Illinois 2012) is compelling. It is the decision which is more in accord with the direction the law is moving. The State dismisses the decision in Huges as an outlier. (State's br. at 17). Often outliers are the voice in the wilderness that lead others to the truth. In any event, *Hughes* must not be ignored.

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

> The distinction between omissions and affirmative misrepresentations on which these lower court cases depended cannot be reconciled with *Strickland*. In *Padilla* itself, we rejected the Solicitor General's suggestion that *Strickland* should apply to advice about the immigration consequences of a plea only in cases where defense counsel makes an affirmative misstatement. *Padilla*, 559 U.S., at ___ (slip op., at 12). We did so because we found that *Strickland* was incompatible with the distinction between an obligation to give advice and a prohibition on affirmative misstatements. 559 U.S., at ___ (slip op., at 12-13) (citing *Strickland*, 466 U.S., at 690). *Strickland* made clear that its standard of attorney performance applied to both "acts" and "omissions," and that a rule limiting the performance inquiry to one or the other was too narrow. 466 U.S., at 690. Thus, the distinction between misrepresentations and omissions, on which the majority relies in classifying lower court precedent, implies a categorical rule that is inconsistent with *Strickland*'s requirement of a case-by-case assessment of an attorney's performance. *Id.*, at 688-689; see, *e.g.*, *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000). In short, that some courts have differentiated between misleading by silence and affirmative

> misrepresentation hardly establishes the rationality of the distinction. Notably, the Court offers no reasoned basis for believing that such a distinction can be extracted from *Strickland*.

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

Justice Sotomayor, in her dissent in *Chaidez*, also takes the majority to task in its interpretation of a law review article regarding collateral consequences. "The majority cites a law review article for the proposition that the categorical consequences rule is 'one of 'the most widely recognized rules of American law.'' *Ante*, at 8 (quoting Chin & Holmes*, Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 Cornell L. Rev. 697, 706 (2002)). But the article was, in fact, quite critical of the rule. The authors explained that '[t]he real work of the conviction is performed by the collateral consequences,' and that the direct/collateral distinction in the context of ineffective-assistance claims was 'surprising because it seems inconsistent with the framework that the Supreme Court...laid out' in *Strickland*. Chin & Holmes, at 700-701." *Chaidez,* 133 S.Ct. at 1120.

The State would have this Court believe that LeMere is being an alarmist when he uses the phrase possible lifetime commitment. The State argues something like this. See the statistics about the Chapter 980 process. There is nothing to worry about. Lemere, stop using that phrase "lifetime"! But yet nothing in this argument convinces one that the possibility of lifetime commitment is not a real danger to a defendant who pleads to a sex offense such as LeMere did. Although the phrase lifetime commitment is viewed by the State as a manifestation of "faulty logic", the Wisconsin Court of Appeals recognizes that a defendant faces the possibility of **lifetime** commitment when he pleads to a Chapter 980 eligible offense. "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.**" *State v. Nelson*, 2005 WI App 113, ¶15 282 Wis. 2d 502, 701 N.W.2d 32 (Emphasis added).

The State believes that "[d]escribing ch. 980 commitment as lifetime or even presumably lifetime is false." Citing the Supreme Court decision in *Kansas v. Hendricks,* 521 U.S. 346, 364 (1997), nevertheless the State recognizes that the reality of "potentially indefinite" commitment under Chapter 980, "whether it's institutionalized or through supervised release". The State goes on to concede that "regardless of how long a person is committed, it is a serious, if not severe, consequence." The State's whimsical belief that ability to institutionalize a human being under Chapter 980, although "potentially indefinite", is not simply another away of saying Chapter 980 carries with it the possibility of lifetime commitment rings "false". (State's br. at 13-16)

The State's exposition on the many procedural niceties in Chapter 980 is interesting, but fails to calm LeMere's nerves. The State has failed to answer how many individuals since the enactment of Chapter 980 have lived out the balance of their days on this earth involuntarily institutionalized under a Chapter 980 commitment after having completed their sentence. If it is only a small percentage of defendants, LeMere takes no comfort in that. The percentage of defendants who suffer a lifetime commitment does not eviscerate his right to be informed under the Sixth Amendment prior to making the decision to plead guilty.

Every defendant should be entitled to be warned by counsel before he enters a plea of guilty to a triggering offense under Chapter 980 along the following lines. "You should know that there is a possibility of lifetime

commitment under Chapter 980 after you have completed your sentence on this offense." No matter how few or how many have been committed for life, a defendant has a Sixth Amendment right to be warned by counsel that a commitment under Chapter 980 could be lifelong.

As one scholar observed, "Adhering to a formalistic distinction between 'direct' and 'collateral' consequences creates a fiction that defendants knowingly and voluntarily plead guilty when they do not learn about those consequences, such as involuntary commitment, that may matter more to them than the direct criminal punishment. It also creates the fiction that defense counsel is competent despite failing to warn about such a critical consequence of the plea. The issue here is not whether convicted sex offenders should or should not be involuntarily committed, but rather whether they should be informed about the possibility of involuntary commitment." Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators*", 93 Minn. L. Rev. 670, at 677(2008)

II. LeMere is entitled to an evidentiary hearing on his motion.

The State argues that "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." (State's br. at 26). For the following reasons, the State is wrong. An evidentiary hearing is necessary.

The Eau Claire County Circuit Court, in denying LeMere's request for an evidentiary hearing, erroneously exercised its discretion. And this is so for a very simple reason. LeMere made a compelling case in his affidavit,

motion, and original memorandum for an evidentiary hearing on the question of whether he was denied his right to effective assistance of counsel because of his attorney's failure to advise him prior to his entry of a guilty plea to a charge of 1st Degree Sexual Assault of a Child that he faced a consequence of lifetime commitment as a Sexually Violent Person under Ch. 980. LeMere made clear that he would not have entered a plea of guilty to the charge of 1st Degree Sexual Assault of a Child if his attorney had advised him that he could face, as a consequence, lifetime commitment as a Sexually Violent Person under Ch. 980. The circuit court here found that counsel is not required to advise a defendant of this grave and serious consequence when he enters a plea of guilty to a charge of 1st Degree Sexual Assault of a Child because potential lifetime commitment under Chapter 980 is a collateral consequence. The Court of Appeals agreed. (47:2-3; App. 5: 2-3; App 6:1-4)

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

The circuit court's first error of law is not applying the teaching of *State v. Burton*, 2013 WI 61, ¶64, __ Wis. 2d __, 832 N.W.2d 611 to the facts before it in LeMere's case. The circuit court erroneously exercised its discretion in denying LeMere's motion to withdraw his plea since LeMere's affidavit and motion and memorandum were clearly sufficient to make the case for an evidentiary hearing. The second error of law is the circuit court's

reliance on *State v. Myers*, 199 Wis.2d 391, 394, 544 N. W.2d 609 (Ct. App. 1996). (47:2-3) This case is no longer sound precedent in the era following the United States Supreme Court decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

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

The State's argument that LeMere is not entitled to withdraw his plea is focused wrongly on the circuit court's dialogue with LeMere. (State's br. at 24-27). The State assumes that the short dialogue about commitment between the circuit court and LeMere at the change of plea hearing means that LeMere understood that he could be committed for life as a sexually violent person under Chapter 980. The circuit court failed to mention any possibility that the commitment of which the court spoke could be a lifetime commitment. And LeMere had no idea what the circuit court was talking about. Trial counsel had never warned him of any of this. (40:1-2; 41:1-15; 47 :1-6; App. 2; App 3; App. 4).

The State's approach disregards the defendant's fundamental right, and need, to know what he is truly getting himself into by waiving his Constitutional rights to

trial and to remain silent. As the Supreme Court recognizes, " a guilty plea is a grave and solemn act to be accepted only with care and discernment...." *Brady v. United States*, 397 U.S. 742, 748 (1970). When a defendant pleads guilty, he consents to a judgment of conviction without trial that will remain with him for the rest of his life. *See Boykin v. Alabama,* 395 U.S. 238, 242 (1969). This consent "not only must be voluntary but must be [a] knowing, intelligent, act[] done with sufficient awareness of the relevant circumstances and likely consequences." See *Brady*, 397 U.S. at 748. *See* Roberts at 623.

The judge and defense counsel have very different roles with respect to a person pleading guilty in a criminal case. A judge is not charged with the underlying counseling of the defendant before the plea. A judge must only ensure, on the record, that a plea is entered voluntarily and with the requisite knowledge. "A judge's role is much more limited, both in terms of time spent with a defendant and the extremely limited scope of permissible inquiry." *See* Roberts at 697.

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. It is important to note that LeMere is not asked by the Court if his trial counsel has advised him about the possibility of lifetime commitment. The obligation for providing that information fell upon his counsel, not the circuit court. And trial counsel, LeMere contends, did not warn him about Chapter 980 commitments at all. And the circuit court ended its questioning of LeMere with a laundry list, "Now, do you understand what I just said to you about probation, election, firearms, limitations on your ability to work, sex offender registry, and the sexually violent offender issue?" To which, LeMere answered, "Yes, ma'am." Can we say

on this record that he had any clear understanding that he faced potential involuntary lifetime commitment as a sexually violent person? Absolutely not. It may seem obvious. But when someone is asked a laundry list of a question which calls for only a yes or no answer, it is unclear to what part of the laundry list the defendant is responding with a yes or no. (40:1-2; 41:1-15 62:12; App. 2; App 3; App. 4 App. 5:12).

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 at all. By the time LeMere was at the plea hearing, the violation of his Sixth Amendment rights had already occurred. The time to provide the information about the possibility of lifetime commitment falls on counsel because he is the one that ultimately helps the defendant decide whether he will plead guilty at all.

This case is about the failure to provide advice about the potential for involuntary lifetime commitment under Chapter 980 and the Sixth Amendment obligation to do so. Such advice is crucial to a defendant's informed and voluntary decision to plead guilty. Only counsel bears this unique responsibility. The circuit court does not. By the time a defendant is in court and entering his plea of guilty, it is too late as LeMere's case sadly illustrates.

CONCLUSION

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

Dated at Milwaukee, Wisconsin, this 26th day of May, 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 produced using the following font:

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Dated at Milwaukee, Wisconsin, this 26th of May, 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 26th day of May, 2015.

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