STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP659-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

AMANDA L LONGLEY,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 11, THE HONORABLE ELLEN K. BERZ, PRESIDING
CIRCUIT COURT CASE 2015CM1673

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE

As the Plaintiff-Respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] The State will supplement the statement of the facts and case as appropriate in its argument.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

INTRODUCTION AND LEGAL FRAMEWORK

The only issue on appeal is whether the trial court properly denied Longley's motion to withdraw her plea. Wis. Stat. § 971.08(1)(a) requires that a judge taking a plea must "determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." However, a plea is not knowing, voluntarily, and intelligently made if the defendant does not know what sentence could be imposed, and then a manifest injustice is the result. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 636-37, 579 N.W.2d 698, 708-09 (1998). "[A] defendant seeking to withdraw a guilty or no contest plea after sentencing must prove manifest injustice by clear and convincing evidence." *State v. Negrete*, 2012 WI 92, ¶ 29, 343 Wis. 2d 1, 819 N.W.2d 749.

Courts are only required to make sure that defendants understand the potential punishment and the direct consequences of a plea, but there is no requirement that a defendant must be informed of the collateral consequences of a plea. *Warren*, 219 Wis. 2d at 636-37. Direct consequences are defined as having a "definite, immediate, and largely automatic effect on the *range of a defendant's punishment*." *State v. LeMere*, 2016 WI 41, ¶ 31, 368 Wis. 2d

624, 879 N.W.2d 580. (emphasis added). Whereas collateral consequences "are indirect and do not flow from the conviction" and may be contingent on a future proceeding or rest with a different tribunal. *Id.*; *see also Warren*, 219 Wis. 2d at 636. Not informing a defendant of a collateral consequence does not result in manifest injustice, except in the limited scope of immigration consequences. *See generally Padilla v. Kentucky*, 559 U.S. 356 (2010); *see also State v. LeMere*, 2016 WI 41, ¶ 31; *see also State v. Madison*, 120 Wis. 2d 150, 159-161, 353 N.W.2d 835 (Ct. App. 1984).

The standard of review for whether a person was denied effective assistance of counsel is a mixed question of law and fact. The findings of fact made by a trial court will be affirmed unless clearly erroneous. *State v. Hunt,* 2014 WI 102, 122, 360 Wis. 2d 576, 851 N.W.2d 434.; *see also* Wis. Stat. § 805.17(2). "Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo." *State v. Thiel,* 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF LONGLEY'S MOTION TO WITHDRAW HER PLEA BECAUSE COUNSEL'S ALLEGED FAILURE TO WARN LONGLEY THAT PLEADING GUILTY TO A CRIME OF DOMESTIC VIOLENCE MAY RESULT IN THE LOSS OF THE ABILITY TO POSSESS A FIREARM UNDER FEDERAL LAW IS NOT A BASIS FOR AN INEFFECTIVE ASSISTANCE CLAIM.

A. Courts Are Required to Inform Defendants About Potential Punishment and Direct Consequences of a Plea.

Wis. Stat. § 971.08(1)(a) requires that a judge taking a plea must "determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." However, a plea is not knowing, voluntarily, and intelligently made if the defendant does not know what sentence could be imposed, and then a manifest injustice is the result. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 636-37, 579 N.W.2d 698, 708-09 (1998). "[A] defendant seeking to withdraw a guilty or no contest plea after sentencing must prove manifest injustice by clear and convincing evidence." *State v. Negrete*, 2012 WI 92, ¶ 29, 343 Wis. 2d 1, 819 N.W.2d 749.

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consequences of a plea, but there is no requirement that a defendant must be informed of the collateral consequences of a plea. *Warren*, 219 Wis. 2d at 636-37. Direct consequences are defined as having a "definite, immediate, and largely automatic effect on the *range of a defendant's punishment*." *LeMere*, 2016 WI 41, ¶ 31. (emphasis added). Whereas collateral consequences "are indirect and do not flow from the conviction" and may be contingent on a future proceeding or rest with a different tribunal. *Id.*; *see also Warren*, 219 Wis. 2d at 636. Not informing a defendant of a collateral consequence does not result in manifest injustice, except in the limited scope of immigration consequences. *See generally Padilla v. Kentucky*, 559 U.S. 356 (2010)*; see also LeMere*, 2016 WI 41, ¶ 31; *see also State v. Madison*, 120 Wis. 2d 150, 159-161, 353 N.W.2d 835 (Ct. App. 1984).

1. In *State v. Kosina*, the Court of Appeals confirms that losing the right to possess a firearm due to a domestic violence conviction is a not a direct consequence of a plea.

In *State v. Kosina*, 226 Wis. 2d 482, 489, 595 N.W.2d 464, 468 (Ct App. 1999), the Wisconsin Court of Appeals held that losing the right to possess a firearm under the federal firearm prohibition under 18 U.S.C. § 922(g)(9) was

a collateral consequence to a plea to a misdemeanor crime of domestic violence, and therefore cannot form the basis of a claim of manifest injustice requiring plea withdrawal. *Kosina*, 226 Wis. 2d at 489. The Appellate Court held "that restriction is not a direct consequence of his plea because a direct consequence must have a direct, immediate, and automatic *effect on the range of Koshina's punishment* for disorderly conduct." *Id*. (emphasis original). The phrase in italics is key to this analysis.

The defendant's conviction in *Kosina* was for disorderly conduct under Wis. Stat. § 947.01(1), and although it was for an incident between Kosina and his wife, no factual finding of the domestic relationship was made by the trial court. *Id.* at 487. The Appellate Court explained that without a determination by the trial court that the offense involved domestic violence, the defendant could still contest the federal statute's applicability to his conviction and thus the firearm prohibition was not automatic. *Id.*

Additionally, the Appellate Court further concluded in *Kosina* that even if the trial court made a finding that the disorderly conduct conviction involved domestic violence, the federal firearms prohibition would *nonetheless be*

considered a collateral consequence of the defendant's plea. *Id.* at 488 (emphasis added). Therefore, regardless of whether the circuit court makes a finding that a misdemeanor conviction involved domestic abuse, a defendant's loss of the right to possess a firearm under federal law is a collateral consequence of a conviction. It follows that *Kosina* cannot be distinguished from the facts of the present case simply because the trial court did not make a specific finding that Kosina's offense involved domestic abuse, but the trial court in the present case did make a finding and imposed the domestic abuse surcharge.

In summary, *Kosina* holds that regardless of whether the trial court makes a finding that a misdemeanor conviction involved domestic abuse, losing the right to possess firearms under the federal firearm prohibition is a collateral consequence of a conviction, not a direct consequence.

Because the firearms prohibition arises under the authority of federal law and is imposed by a federal tribunal, the effect of the federal statute is not a decision in which the trial court participates. *Kosina*, 226 Wis. 2d at 488-89. "Therefore, the firearm prohibition is a separate, peripheral consequence and does not have an

immediate or automatic effect on the *range of punishment imposed under state law by the trial court* accepting the plea." *Id.* at 489. (citations omitted) (emphasis added). A collateral consequence cannot form the basis of a claim of manifest injustice requiring plea withdrawal, and therefore there is no due process right to be informed of the collateral consequences of entering a plea. *Id.* (citations omitted).

2. Wisconsin's domestic abuse surcharge is not an element or punishment.

For a trial court to make a finding that a conviction involved an act of domestic abuse, the court first determines if the conviction falls under one of the enumerated offenses listed in Wis. Stat. § 973.055(1)(a)1. If it is – and Disorderly Conduct under Wis. Stat. § 947.01(1) is - then the second determination is whether the facts support a domestic relationship as defined in Wis. Stat. § 973.055(1)(a)2. If the court determines that the defendant's conduct "involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child," the court is required to impose the $100 domestic abuse surcharge. Wis. Stat. § 973.055(1).

In the present case, the defendant was convicted of Disorderly Conduct under Wis. Stat. § 947.01(1), which does not contain an element of "domestic abuse." R. 14. Even if the criminal complaint lists Wis. Stat. §§ 973.055(1) and/or 968.075(1)(a) as a part of the charging language, that does not change the elements of the actual offense (Disorderly Conduct) or in any way create criminal liability for the defendant. R. 1.

The domestic abuse surcharge was created by the Wisconsin Legislature in 1979 to fund grants for domestic abuse organizations. 1979 Wisconsin Act 111. At the current amount of $100, the relatively small size of the fee indicates that it is not intended to have a significant deterrent or retributive value. It is significant that the domestic abuse surcharge and other related surcharges found in Chapter 973 are not included with the penalty or fine provisions in Chapter 939. This also speaks to the legislature's intent behind the law, which is to have the domestic abuse surcharge be just that – a surcharge – making it very clear that the surcharge is not a penalty or a fine, but rather a civil non-punitive label, and therefore not punishment. *See State v. Scruggs*, 2017 WI 15, ¶¶ 38, 49, 373 Wis. 2d 312, 891 N.W.2d 786. That is an

important distinction under Wis. Stat. § 971.08(1)(a), which requires that a defendant has to be made aware of the "potential punishment" before entering a guilty plea, in order for the plea to be knowing, voluntary, and intelligent. *See State v. Bollig*, 2000 WI 6, ¶ 16, 232 Wis. 2d 561. Because a surcharge is not punishment, a defendant is not required to be advised of the imposition of that surcharge (or its potential effects) prior to entering a plea.

3. When manifest injustice results from ineffective assistance of counsel at the plea stage, the usual remedy is to vacate the plea and sentence.

The State contends that the defendant has not met her burden to prove ineffective assistance of counsel. However, if a defendant seeks withdrawal of a plea, the defendant would follow the process as outlined by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted by Wisconsin courts.

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in "manifest injustice." *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish "manifest injustice," a criminal defendant must show a "serious flaw in the

fundamental integrity of the plea." *State v. Nawrocke,* 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995) (citation omitted). "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." *Bentley*, 201 Wis.2d at 311.

To prove ineffective assistance of counsel, a defendant must satisfy a two-prong test by demonstrating both that counsel's performance was deficient and that the deficiency resulted in prejudice. *Strickland*, 466 U.S. at 687. A pretrial error affecting a guilty plea vacates the plea and sentence and the defendant is entitled to a new trial. *State v. Lentowski*, 212 Wis. 2d 849, 857-58, 569 N.W.2d 758 (Ct. App. 1997). The usual remedy is to restore the defendant to the stage in proceedings before the acts of ineffectiveness by counsel. *Id.* If a defendant alleges that the ineffective acts occurred during the plea, then it would follow that the plea and sentence would be vacated, and the parties would either negotiate a new plea agreement or proceed to trial. *See Lentowski*, 212 Wis. 2d at 857.

B. Loss Of The Ability To Possess A Firearm Under Federal Law Due To A Domestic Violence Conviction Is A Collateral Consequence Of A Plea And, As A Result, Counsel's Alleged Failure To Warn Of That Consequence Is Not Deficient Performance.

1. Determining ineffective assistance of counsel is a two-prong test.

The United States and Wisconsin Constitutions guarantee the right to effective assistance of counsel is guaranteed for all criminal defendants. U.S. Const. Amends. VI and XIV; Wis. Const. art. I, § 7. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To find an attorney ineffective, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. The Sixth Amendment just refers to "counsel," and does not specify a certain degree of effectiveness. *Id.* at 687-88. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. *Strickland* set forth a two-prong test that a defendant must follow to prove that her attorney was ineffective. *Id.* at 687. First, a defendant must prove that counsel performed deficiently. *Id.*; *see e.g., State v. LeMere*, 2016 WI 41, ¶ 25, 368 Wis. 2d 624, 879 N.W.2d 580. Second, the defendant has to show that she suffered prejudice as a result of the deficient

performance. S*trickland,* 466 U.S. at 687*.* This Court done not have to address both prongs of the test if the defendant fails to make a sufficient showing on one prong. *See Strickland*, 466 U.S. at 697.

2. Applying the *Strickland* Test to the Present Case.

The first prong of the ineffective assistance test is whether counsel performed deficiently. "Deficient performance means that counsel 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.'" *State v. Foy*, 206 Wis. 2d 629, 640, 557 N.W.2d 494, 498 (Ct. App. 1996) (citing *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990)). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Counsel should be afforded a strong presumption that his or her conduct falls within the wide range of reasonable professional assistance and avoid the "distorting effects of hindsight." *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695; *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305. Counsel must be adequate; it does not mean the best attorney nor the best defense. *State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993), *aff'd and remanded*, 190 Wis. 2d 677, 526 N.W.2d

144 (1995). “Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.” *Williquette*, 180 Wis. 2d at 605. When assessing the attorney’s performance, the court should “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* at 604.

The second prong of the *Strickland* test requires that the defendant must show prejudice by demonstrating that there is a reasonable probability that counsel’s errors “had an adverse effect on the defense.” *State v. Jenkins*, 2014 WI 59, ¶ 37, 355 Wis. 2d 180, 848 N.W.2d 786. Within the context of ineffective assistance of counsel, the test for determining prejudice is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* ¶ 37. “Reasonable probability” is a probability sufficient to undermine confidence in the outcome. *State v. Burton*, 2013 WI 61, ¶ 49, 349 Wis. 2d 1, 832 N.W.2d 611; *see also State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305. Defense counsel’s errors must be so serious as to deprive the defendant of a fair trial and one with a reliable result. *Jenkins,* 2014 WI 59, ¶ 37. The

focus is on the reliability of proceedings, not on the outcome of the trial. *Thiel*, 2003 WI 111, ¶ 20.

At an evidentiary hearing held on November 4, 2016, both of the defendant's attorneys testified that they did not recall whether or not they counseled the defendant regarding the possibility that she would lose her right to bear arms upon being convicted of an offense that involved domestic abuse. R. 32 at 15:9-12, 18:8-10. However, both attorneys testified that it is their normal practice in domestic abuse cases to inform their clients that they may lose their right to possess a firearm. R. 32 at 15:13-17, 20:20-23.

Attorney Breun testified that usually the firearms prohibition issue comes up early in the case, but that it is her normal practice to make sure she goes over that when reviewing the plea questionnaire with her client. R. 32 at 15:14-17. However, Attorney Khandhar covered the plea hearing for Attorney Breun.

During her testimony, Attorney Khandhar explained that when stepping in to cover a plea and sentencing hearing for a colleague, she would not normally have a conversation about the federal firearms prohibition for convictions involving domestic abuse because that is a conversation

that she usually has much earlier in a case. R. 32 at 22:12-18. Attorney Khandhar also explained that she does not use the plea questionnaire form to discuss the firearm prohibition with her clients, but instead uses the criminal complaint. Additionally, Attorney Khandhar testified that she used to work for the State Public Defender's Office in Spooner, where the hunting tradition is very strong and thus losing the right to bear arms was a very relevant conversation. R. 32 at 21:12-19.

The defendant testified that the right to bear arms is significant to her because her family has a tradition of hunting together. R. 32 at 25:25-26:11. During her testimony, the defendant explained that had she known she would have lost her right to possess a gun, she would have taken the case to trial instead of entering a plea. R. 32 at 26:12-17. The defendant testified that she asked her attorneys questions, but did not specifically recall asking about possessing firearms, including when she saw the bullet point on the plea questionnaire about felony convictions and the right to possess firearms. R. 32 at 28:5-15. Finally, the defendant testified that she had assumed that only people convicted of felonies lose their right to possess a gun. R. 32 at 30:17-19.

None of the general practices described by either attorney could be described as "not functioning" as the right to counsel guaranteed by the Sixth Amendment. To the contrary, it seems that *both* attorneys have a similar practice when counseling clients about domestic abuse convictions and the firearms prohibition. Neither the attorneys nor the defendant could recall specifically discussing the federal firearms prohibition. However, it is more likely that one of the two attorneys, both who have no doubt counseled many clients about entering guilty pleas, followed their general practice and discussed the firearms prohibition with the defendant at some point prior to the plea hearing. Even if the court assumes that the defendant was not told about the firearms prohibition prior to her plea, that still does not rise to the level of "not functioning" as described in *Strickland*.

Therefore, since neither Attorney Breun nor Attorney Khandhar's performances were deficient, the court does not need to explore the second prong of the ineffective assistance of counsel test under *Strickland*.

II. THE COURT OF APPEALS SHOULD DECLINE TO EXTEND *PADILLA* AND *LEMERE* TO PLEA WITHDRAWALS INVOLVING LOSS OF THE RIGHT TO POSSESS A FIREARM DUE TO A DOMESTIC VIOLENCE CONVICTION.

A. *Padilla* And Its Narrow Focus On The "Unique" Consequence Of Deportation Does Not Extend To Firearm Prohibitions Under Federal Law.

The first prong of the ineffective assistance of counsel test within the context of immigration consequences was discussed in *Padilla v. Kentucky*, 559 U.S. 356 (2010). In that case, the Supreme Court held that counsel was required to inform the defendant that his conviction for distributing drugs would render him deportable because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Id.* at 368. The Court noted that Padilla's attorney could have easily determined the offense was a deportable one simply by reading the statute, but instead Padilla's attorney provided false assurance that the conviction would not result in removal.

However, *Padilla* did not change or eliminate the distinction between direct and collateral consequences. "Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." *Padilla*, 559 U.S. at 365.

The *Kosina* analysis is still valid in light of *Padilla* and the interplay with *District of Columbia v. Heller*, which clarified that the right to possess a firearm is a

constitutional right held by an individual. *Heller*, 554 U.S. 570, 592 (2008). Because the firearms prohibition arises out of federal law that is collateral to state court proceedings, and the defendant's punishment for Disorderly Conduct arises out of state law, the firearm prohibition is separate from the state criminal conviction and the range of punishment. *Kosina*, 226 Wis. 2d at 488-89.

B. Under The *Lemere* Analysis, The Firearm Prohibition Is Not Equivalent To Deportation Within The Context Of Plea Withdrawal.

The defendant argues that the collateral consequences analysis outlined in *State v. LeMere*, 2016 WI 41, ¶¶ 49-66, 368 Wis. 2d 624, 879 N.W.2d 580, should be utilized in the present case because both *LeMere* and *Padilla* modified the *Kosina* decision. The State disagrees.

In *LeMere*, the Court discussed whether the Sixth Amendment requires defendants to be advised about the possibility of Chapter 980 commitment. *LeMere*, 2016 WI 41, ¶ 49. The Court reviewed the same factors that the U.S. Supreme Court set forth in their decision in *Padilla*, a case that essentially set deportation apart from other collateral consequences. *LeMere*, 2016 WI 41, ¶ 49. Even in the case of a civil commitment under Chapter 980, which is ultimately a deprivation of a person's liberty, the

Wisconsin Supreme Court determined that a Chapter 980 commitment is a collateral consequence for the following reasons: it is not as severe as deportation, it is not a penalty but rather for treatment purposes, it is not an automatic result of the underlying conviction, it is rehabilitative, and is not enmeshed in the criminal process. *LeMere*, 2016 WI 41, ¶¶ 49-66. Ultimately the Court in *LeMere* decided that "*Padilla* specifically brought advice about the unique consequence of deportation within the Sixth Amendment's guarantee of effective assistance of counsel. We decline to create a similar exception for Chapter 980 civil commitment." *LeMere*, 2016 WI 41, ¶ 69.

In light of the holding in *LeMere*, the State contends that if the Wisconsin Supreme Court will not apply *Padilla* to Wisconsin law by granting an exception to the definition of collateral consequences for advising defendants about the possibility of a Chapter 980 commitment – which involves a deprivation of liberty – how can Wisconsin courts make an exception for the intersection of the federal firearm prohibition and crimes of domestic abuse – which only involves the loss of the right to possess a firearm? Furthermore, the Wisconsin Supreme Court declined to grant an exception to the definition of collateral

consequences for civil commitment under Chapter 980, which is a Wisconsin state law and clearly within the constitutional charge of our state's highest court to interpret. Therefore, whether or not a person who is convicted of a misdemeanor crime involving domestic abuse will lose their right to possess a firearm under federal law is a determination that is made by a federal tribunal, and is thus further removed from interpretation by our state courts.

In the alternative, should this Court decide that applying the *LeMere* analysis to the facts of the present case is appropriate, the State contends that the outcome is still the same.

The factors in the *LeMere* analysis are: 1) the uniqueness of the consequence; 2) the severity of the consequence; 3) the penal nature of the consequence; 4) whether the consequence is the automatic result of conviction; 5) whether the consequence is enmeshed in the criminal process; and 6) whether a special vulnerability or class status warrants particularized consideration. *LeMere*, 2016 WI 41, ¶¶ 46-48.

The Defendant very briefly discusses each of the six factors in her brief, but provides no case law or even

public policy arguments to support her assertions. First, the Defendant asserts that because the firearm prohibition is life-long, it is therefore unique. *See* Def. Br. 9-10. However, based on the structure of 18 U.S.C. § 922(g), the firearm prohibition applies not only to those convicted of domestic violence, but also to 1) those convicted of a crime punishable by imprisonment for more than one year; 2) a fugitive from justice; 3) an unlawful user of or addicted to any controlled substance; 4) someone who has been adjudicated as a mental defective or been committed to any mental institution; 5) undocumented persons or anyone in the country on a nonimmigrant visa; 6) those dishonorably discharged from the armed forces; 7) anyone who has renounced their citizenship; and 8) anyone subject to a restraining order. 18 U.S.C. § 922(g)(1)-(9). Therefore, simply based on the large number of categories of people who are federally banned from possessing a firearm, there is nothing unique about this consequence to this Defendant.

Second, the loss of the right to possess a firearm is in no way comparable to deportation. If the possibility of a Chapter 980 commitment is only a collateral consequence and not as severe as deportation, then certainly the severity of the firearm prohibition does not rise to the

level of deportation, even in light of the Defendant's "cultural and familial pastime" of hunting.

The firearm prohibition is not penal in nature. The Ch. 980 commitment is rehabilitative and therefore not penal. *See LeMere*, 2016 WI 41, ¶ 56. When Congress enacted the firearm prohibition, the intent of the legislation was to protect victims of domestic abuse by reducing the risk of future violence involving guns, not to penalize domestic abusers. *See Koll v. Dep't of Justice*, 2009 WI App 74, ¶ 16, 317 Wis. 2d 753, 769 N.W.2d 69; *see also U.S. v. Hartsock*, 347 F.3d 1, 4-5 (1st Cir. 2003). Just like the Ch. 980 commitment serves the greater purpose of rehabilitating sex offenders and protecting the public, the firearm prohibition serves the greater purpose of protecting victims of domestic violence.

The fourth factor addresses whether the firearm prohibition is automatic upon conviction, and the answer is yes. Once the circuit court makes a finding that a conviction involves domestic violence, the firearm ban is automatic. *See Kosina*, 226 Wis. 2d at 487. However, just because the ban is automatic does not mean that it morphs into a direct consequence of a conviction, requiring *Padilla* to apply. *See Kosina*, 226 Wis. 2d at 488-89.

Additionally, there is nothing to indicate that the all the factors must be considered under the *LeMere* analysis, and there is nothing to indicate that any of the factors hold greater weight than the others. *See LeMere*, 2016 WI 41, ¶ 48.

Whether the firearm prohibition is "enmeshed in the criminal process" is the fifth factor under the *LeMere* analysis, which determined that commitment under Ch. 980 was not enmeshed in the criminal process because it is a separate process in which the State has to prove the person's "dangerousness" on top of the underlying conviction. *LeMere*, 2016 WI 41, ¶ 66. Additionally, the Court determined in LeMere that the Ch. 980 program is rehabilitative in nature and is unlikely to affect the majority of people convicted of sexual offenses. *Id.* The firearm prohibition is similar in that the purpose is not punitive, but rather for the purpose of public safety.

The Defendant argues that "gun owners are a class defined by their cultural connection to traditions such as hunting," thus fulfilling the sixth factor in the *LeMere* analysis. Def. Br. 11. Additionally, the Defendant contends that because "only immigrants that are charged with crimes are affected by *Padilla*, only gun owners charged with

crimes would benefit from having adequate advice prior to entering pleas." Def. Br. 11. Again, the Defendant is trying to assert that the consequences gun owners and undocumented persons convicted of a crime face are similarly severe, therefore warranting special protections for gun owners. However, the Defendant provides no support for this argument.

The firearm prohibition does not rise to the same level as deportation even when applying the *LeMere* factors. Therefore, the firearm prohibition continues to be a collateral consequence of conviction.

C. Wisconsin Courts Continue to Follow *Kosina.*

Although *Kosina* was decided in 1999, it is still good law for a number of reasons. First, Wisconsin courts continue to rely on *Kosina* when addressing whether or not a defendant may withdraw a plea due to not being advised of the federal firearm prohibition for misdemeanor convictions involving domestic abuse. In an unpublished 2010 case, the Wisconsin Court of Appeals confirmed in *State v. Neis*[2] that *Kosina* still applies and the impact of the federal firearms prohibition for persons convicted of misdemeanor offenses involving domestic abuse is a collateral consequence of a

[2] Per Wis. Stat. §809.23(3)(b), an unpublished decision issued on or after July 1, 2009, may be cited for its persuasive value.

conviction and therefore cannot form the basis for a plea withdrawal. *State v. Neis*, No. 2009AP1287, unpublished slip op. (Ct. App. Jul. 15, 2010), ¶ 11. This unpublished decision is certainly persuasive given the facts are similar to the present case, and *Neis* demonstrates that Wisconsin courts continue to rely on the holdings in *Kosina*.

The defendant in *Neis* makes essentially the same argument as in the present case: the rights under the Second Amendment to the U.S. Constitution are significant enough to render the plea involuntary because the defendant did not have knowledge that the federal firearm prohibition would apply upon conviction of a misdemeanor crime involving domestic abuse. *Neis*, No. 2009AP1287, ¶ 7. The appellate court concluded that they are "bound by *Kosina's* holding that a circuit court need not inform a defendant of the federal firearm ban before accepting a guilty plea" and upheld the circuit court's decision to deny the defendant's motion without a hearing. *Id.* ¶¶ 5, 7.

The second reason that demonstrates *Kosina* is still good law involves the timing of court decision. *Neis* was decided about four months after *Padilla v. Kentucky*, 559 U.S. 356 (2010), so if Wisconsin's appellate court believed

that *Padilla* could apply in this situation, it seems logical that the Court of Appeals would have addressed *Padilla* in this unpublished decision, but it did not.

Third, while upholding *Kosina*, the appellate court in *Neis* indicates that it understands the significance of the constitutional right to bear arms, but notes that this issue "must be addressed by the legislature or supreme court; we cannot read new requirements into Wis. Stat. § 971.08 that are not there based on our assessment of the importance of those rights." *Neis*, No. 2009AP1287, ¶ 13. The court further opines:

> The distinction between direct and collateral consequences as determinative of the constitutional validity of a plea seems to be problematic… [The right to possess a firearm] is a significant enough right for United Sates and Wisconsin citizens that we have included it in both constitutions. It is difficult to conclude that this right is nonetheless so insignificant that it is only a "collateral" consequence of pleading guilty to a disorderly conduct charge. *But that is all it is.* (emphasis added). *See State v. Kosina,* 226 Wis. 2d 482, 489, 595 N.W.2d 464 (Ct. App. 1999).

State v. Neis, No. 2009AP1287, unpublished slip op. (Ct. App. Jul. 15, 2010), ¶ 15, n.4.

Finally, *State v. Kosina* continues to be listed in the annotations for the current[3] Wis. Stat. § 971.08, which is

[3] This citation is to the 2015-16 statutes and the online version indicates they are updated as of Nov. 30, 2017.

another indication that Wisconsin courts continue to follow the holdings in that case.

As noted by the Wisconsin Court of Appeals in *Neis*, there is nothing Wisconsin courts can do unless the Wisconsin Legislature adds a requirement to Wis. Stat. § 971.08, or the U.S. Supreme Court decides to weigh in. *See State v. Neis*, No. 2009AP1287, unpublished slip op. (Ct. App. Jul. 15, 2010), ¶ 13.

III. *STATE V. BROWN* IS DISTINQUISHABLE FROM THE PRESENT CASE AND THEREFORE DOES NOT HELP THE DEFENDANT'S ARGUMENT

In her brief, Longley argues that even if the Court of Appeals determines that the consequences of the Defendant's plea are collateral, there could still be alternative grounds for plea withdrawal under *State v. Brown*, 2004 WI App. 179, 276 Wis. 2d 559, 687 N.W.2d 543. Def. Br. 7. That case involved a defendant pleading guilty to six counts, including child enticement, causing a child to view sexual activity, exposing genitals to a child and intimidating a victim. *Brown*, 2004 WI App 179, ¶ 2. The plea deal was supposed to be structured in a way that the defendant would not have to register as a sex offender or be subject to Ch. 980 proceedings. *Id*. The intention behind the structure of

the plea deal was placed on the record. *Id.* After he was sentenced, Brown learned that the offenses did require him to register as a sex offender and one of the charges was a sexual predator offense, which then prompted him to move to withdraw his plea. *Id.* ¶ 3.

The primary and significant difference between *Brown* and the present case is that in the present case, there were no affirmations put on the record by either the prosecutor or defense counsel that the defendant's plea to a crime of domestic violence would somehow have immunity from the federal firearms prohibition. R. 33. Therefore, there are no "affirmative, incorrect statements on the record" to form an alternative basis for plea withdrawal, and the Court should decline to entertain this alternative theory.

CONCLUSION

For the above reasons, the State of Wisconsin asks this court to affirm the circuit court's denial of Amanda Longley's motion to withdraw her plea and affirm the conviction.

Dated this 30th day of November, 2017.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 29 pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of November, 2017.

_____

Stephanie R. Hilton
Assistant District Attorney
Dane County, Wisconsin

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 this 30th day of November, 2017.

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