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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 15AP1452-CR

GARY F. LEMBERGER,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
DANE COUNTY, BRANCH VII
THE HONORABLE WILLIAM E. HANRAHAN

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ISSUES PRESENTED

I. Does the State violate a defendant's due process rights by asking the jury to infer guilt from the defendant's refusal to consent to a warrantless search?

The trial court answered: No.

II. Is trial counsel ineffective for failing to object to the State's request for an inference of guilt from the defendant's refusal to consent to a warrantless search?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Lemberger requests an oral argument because, while this brief fully presents his arguments, the evolution and interplay of federal and state law on this matter is complex and convoluted. *See* Wis. Stat. § 809.22(1).

Mr. Lemberger requests publication of the Court's decision in this case because that decision will invariably resolve an apparent conflict between prior state and federal decisions. *See* Wis. Stat. § 809.23(1)(a)(3).

STATEMENT OF THE CASE

On April 5, 2014, a Madison police officer stopped Mr. Lemberger's vehicle while Mr. Lemberger drove westbound Highway 12/18 in Madison. (*See* R. 62 at 6.) While the officer had responded to 911 calls reporting "aggressive driving" on Mr. Lemberger's part; the officer that stopped Mr. Lemberger observed no substandard driving or illegal conduct. (*Id.* at 12.)

During the traffic stop, the officer requested Mr. Lemberger exit his vehicle in order to perform a series of field sobriety tests. (*Id.* at 8.) Despite the fact that his squad car had a camera designed to capture his interaction with drivers, the officer conducted the sobriety tests outside the camera's range. (*Id.* at 70, 185.) While one officer conducted the field sobriety tests, another officer conducted a search of Mr. Lemberger's vehicle without Mr. Lemberger's consent. The search yielded no evidence of criminal activity or empty alcohol containers. (*Id.* at 138, 163.) Still, on account of Mr. Lemberger's responses during the field sobriety test, officers placed Mr. Lemberger under arrest and transported him to the West District of the Madison Police Department. (*Id.* at 10.)

At the police station, officers escorted Mr. Lemberger into an intoximeter room to take a breath test. (*Id.* at 17.) The officers observed Mr. Lemberger understood the situation and spoke coherently. (*Id.* 123.) The officer operating the intoximeter stated the machine had been "calibrated," which Mr. Lemberger interpreted as tampering. (*Id.* at 158.) Mr. Lemberger then refused the breath test, knowing he could request his blood be drawn instead. *Id.* at 17. Yet, the officers chose not to draw Mr. Lemberger's blood. (*Id.* at 16; 184.)

At trial, the State consistently argued to the jury that Mr. Lemberger's refusal to take the breathalyzer test amounted to strong evidence of his intoxication. (*Id.* at 182.) The State began its opening statement by noting Mr. Lemberger had refused the breathalyzer test – and by calling that refusal "proof positive" that Mr. Lemberger had alcohol in his system while he was operating his vehicle. (*Id.* at 33–34.) During closing arguments, the State expressly told the jury that Mr. Lemberger's refusal to consent to the breathalyzer test was evidence of a "guilty conscience" and an attempt to hide incriminating evidence. (*Id.* at 181–82.)

The State ended its closing argument by calling Mr. Lemberger's refusal the "smoking gun" in its case. (*Id.* at 182.)

Before deliberating, the jury received Wisconsin Criminal Jury Instruction 2663, which provided the following:

> What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> ***
>
> Testimony has been received that the defendant refused to furnish a breath sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving to it the weight you decide it is entitled to receive.

Wis JI—Criminal—2663. Trial counsel did not object to the State's arguments or to this jury instruction.

Mr. Lemberger was convicted following trial. The Court then sentenced Mr. Lemberger to one year in county jail. Mr. Lemberger is currently on bail pending his appeal.

STANDARD OF REVIEW

The Court reviews a claim that prosecutorial comments on the defendant's exercise of constitutional rights violated due process *de novo*. *See, e.g.*, *State v. Adams*, 221 Wis. 2d 1, 6, 584 N.W.2d 695, 698 (1998); *State v. Phillips*, 218 Wis.2d 180, 194, 577 N.W.2d 794, 800–01 (1998).

The Court applies two separate standards of review for ineffective assistance of counsel claims. The Court upholds the lower court's findings of fact that underlie the ineffective assistance of counsel claim unless those findings are clearly erroneous. *State v. Fonte*, 2005 WI 77, ¶ 11, 281 Wis. 2d 654, 665, 698 N.W.2d 594, 600–01. However, the Court reviews a claim that trial counsel's conduct was deficient and prejudicial *de novo*. *Id.*

ARGUMENT

I. The State's Request that the Jury Make an Inference of Guilt from Mr. Lemberger's Refusal to Consent to a Warrantless Breathalyzer Search Entitle Mr. Lemberger to a New Trial.

A. The State cannot ask for an inference of guilt based on a defendant's refusal of a warrantless breathalyzer.

1. The State cannot use a defendant's exercise of constitutional rights as evidence of guilt.

Beginning in the 1960s, the United States Supreme Court has consistently held that the prosecution cannot use a defendant's exercise of constitutional rights as evidence of guilt. *Griffin v. California,* 380 U.S. 609, 614 (1965). In *Griffin*, the Court held that the State may not argue that a defendant's refusal to testify is evidence of the defendant's guilt. *Id.* at 613. As the Court explained:

> What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614.

The *Griffin* court drew a clear line between a jury's unsolicited inference of guilt, and the prosecution's direct request for an inference of guilt. *Id.* The *Griffin* court recognized that when a defendant asserts his or her constitutional right not to testify, the jury may naturally infer that the defendant chose not to testify because he or she has a guilty mind. *Id.* However, the Court also recognized that the State crosses a constitutional line when it implies to the jury that that silence is evidence of guilt. *Id.* The *Griffin* court wrote:

> [T]he Fifth Amendment, in its direct application to the Federal Government, and it its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Id. at 615.

The United States Supreme Court would reaffirm *Griffin*'s holding in *Doyle v. Ohio*. 425 U.S. 610 (1976). In *Doyle*, the defendants had remained silent after arrest, but later provided exculpatory testimony at trial. *Id*. at 612–14. During cross-examination, the State asked why they had not given the exculpatory explanation to police officers immediately after arrest. *Id*. at 614.

On appeal, the defendants noted the cross-examination implied their use of post-arrest silence was evidence of guilt, which they argued was a violation of their due process rights. The *Doyle* court agreed:

> [I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 618. The *Doyle* court went on to hold that the prosecution cannot raise the question of why defendants remained silent after arrest. *Id*. at 619.

2. Wisconsin case law allowing the State to comment on a defendant's refusal of a breathalyzer has been effectively overruled.

As late as 1986, Wisconsin courts maintained that the State *could* use a defendant's refusal to submit to a warrantless breathalyzer test as evidence of a "guilty mind." *State v. Albright*, 98 Wis.2d 663 (Ct. App. 1980); *State v. Bolstad*, 124 Wis.2d 576, 580, 370 N.W.2d 257 (1985); *State v. Crandall*, 133 Wis.2d 251, 257, 394 N.W.2d 905 (1986).

In 1980, the Wisconsin Court of Appeals first addressed the issue of whether evidence of refusing a breathalyzer test is admissible at trial. *Albright*, 98 Wis.2d at 666. In *Albright*, the Court held that a defendant's refusal to take a breathalyzer is admissible as evidence of "consciousness of guilt." *Id*. at 667–70. The *Albright* court wrote:

> Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'
>
> A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to take an alternative test.

Id. at 668–69 (internal citations omitted).

The *Albright* court based its decision on the fact that, at the time, a defendant had no constitutional right to refuse a breathalyzer. *Id.* at 699. The *Albright* court wrote:

> The only rationale for a rule prohibiting comment on a refusal would be that there is a right to refuse the test…. Wisconsin drivers have no constitutional right to refuse to take the breathalyzer.

Id. Indeed, at the time of the *Albright* decision, there was no state or federal case law that deemed a breathalyzer to be a Fourth Amendment search, therefore allowing defendants to refuse them absent a warrant. In the following years, when the Wisconsin Supreme Court cited *Albright*, it continued to reiterate the lack of a constitutional right to refuse a breathalyzer. *See, e.g.*, *Crandall*, 133 Wis. 2d at 257, 394 N.W.2d at 907 (1986); *see also Bolstad*, 124 Wis. 2d at 584, 370 N.W.2d at 261.

However, in 1989, the United States Supreme Court held that breathalyzer tests and blood-tests are searches under the Fourth Amendment. *Skinner v. Ry. Labor Exec. Ass'n,* 489 U.S. 602, 616–17 (1989). The *Skinner* court wrote:

> Subjecting a person to a breathalyzer test…implicates similar concerns about bodily integrity and, like the blood-alcohol test, should also be deemed a search.

Id. Multiple United States Circuit Courts of Appeals have held the same. *See, e.g.*, *United States v. Reid*, 929 F.2d 990 (4th Cir. 1991); *Burnett v. Mun. of Anchorage*, 806 F.2d 1147 (9th Cir. 1986).

Recently, both the United States Supreme Court and the Wisconsin Supreme Court have held that a defendant has the right to refuse warrantless searches in drunk driving cases – despite the existence of an implied consent statute. *See Missouri v. McNeely*, 133 S.Ct. 1552, 1557 (2013); *State v. Kennedy*, 2014 WI 132, ¶ 5, 359 Wis. 2d 454, 461, 856 N.W.2d 834, 838; *State v. Padley*, 2014 WI App 65, ¶¶ 23–31, 354 Wis.2d 545, 562–67, 849 N.W.2d 867, 875–77.

In *McNeely*, the United States Supreme Court held that a defendant has a constitutional right to refuse a warrantless alcohol search in a drunk driving case – despite the existence of an implied consent statute. *See* 133 S.Ct. at 1557. In *McNeely*, police officers had conducted an alcohol blood test despite the defendant's refusal. *Id.* The *McNeely* court reversed the resulting conviction. *Id.* at 1566. In doing so, the court rejected the argument that implied consent statutes or exigent circumstances create a *per se* exception the warrant requirement in alcohol searches for drunk-driving cases. *Id.* at 1561. The *McNeely* court wrote:

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

Id. Last year, the Wisconsin Supreme Court adopted *McNeely* into Wisconsin jurisprudence. *See Kennedy*, 2014 WI 132 at ¶ 5.

Similarly, the Wisconsin Court of Appeals has explained at length that implied consent laws do not diminish individuals' constitutional right to refuse a blood alcohol test. *Padley*, 2014 WI App 65 at ¶¶ 23–31. Noting common confusion, the *Padley* court explained that a driver's "implied consent" means consent to having a civil penalty imposed should the driver refuse an alcohol test. *Id.* at ¶ 24. The *Padley* court made clear that this "implied consent" does not affect, and is distinct from, a driver's consent to a warrantless search. *Id.* The *Padley* court explained:

> The existence of this 'implied consent' does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized.

Id. at ¶ 26. In short, the existence of an implied consent statute does not change the fact that an alcohol test, such as a breathalyzer, is a Fourth Amendment search – one that a defendant has the constitutional right to refuse absent a warrant.

3. Recent federal and state case law prohibits the State from seeking an inference of guilt from a defendant's refusal of a warrantless search.

Since *Skinner*, multiple Circuit Courts of Appeals have consistently held that the prosecution cannot use a defendant's refusal to consent to a warrantless Fourth Amendment search as evidence of a "guilty mind." *See, e.g.*, *United States v. Thame*, 846 F.2d 200, 206–07 (3d Cir. 1988); *United States v. Moreno*, 233 F.3d 937, 940–41 (7th Cir. 2000); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999). These courts have reasoned that, since the United States Supreme Court has held that the prosecution cannot use a defendant's exercise of constitutional rights as evidence of guilt, the prosecution cannot seek an inference of guilt from a defendant's refusal to consent to a warrantless search. *See Moreno*, 233 F.3d at 940–41. The Seventh Circuit Court of Appeals has written:

> In reliance on *Griffin* and *Doyle*, other courts have either held or suggested that the government may not cite a defendant's refusal to consent to a search of his home as evidence that he knew the search would produce incriminating evidence.

Id. (internal citations omitted).

Recently, the Wisconsin Court of Appeals adopted the same principle in *State v. Banks*. 2010 WI App 107, ¶ 24, 328 Wis. 2d 766, 782, 790 N.W.2d 526, 533. In *Banks*, the defendant had refused to consent to a DNA test, which officers sought to determine whether the defendant had

been in illegal possession of a firearm. *Id.* at ¶ 13. The DNA test, much like a blood-alcohol test, qualified as a Fourth Amendment search that required a warrant in order to be constitutional. *Id.* at ¶ 18. At trial, the State presented testimony on Bank's refusal to consent to the DNA test on two different occasions. *Id.* at ¶ 19. Then, during closing argument, the State encouraged the jury to draw an adverse inference from the defendant's refusal to consent to the test. *Id.* The State argued:

> [The defendant] declined to give a DNA sample to officers that day…And why would he not give a sample? I submit to you because his DNA might have been on the gun….

Id. On appeal, the defendant argued that this statement violated his right to due process and a fair trial. *Id.* at ¶ 24.

The Wisconsin Court of Appeals reversed Banks' conviction. *Id.* The Court held that the State violates a defendant's due process rights when it seeks an inference of guilt from a defendant's refusal to consent to a warrantless search. *Id.* The Court's opinion on this matter was unanimous. *See id.* at ¶ 49. While Chief Judge Brown dissented on the basis of whether a DNA test constitutes a Fourth Amendment search, he endorsed the holding that the State cannot use a refusal to consent to a search to demonstrate a "guilty conscience." *Id.*

B. The State's request for an inference of guilt from Mr. Lemberger's refusal to take breathalyzer entitled Mr. Lemberger to a new trial.

1. A defendant has the right to a new trial if the State uses improper evidence or arguments in a way that affects the outcome of the trial.

The United States Supreme Court has articulated a two-prong test to determine whether the State's comments upon closing argument warrant a new trial. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The first prong is whether the State's comments were improper. *Id.* at 180. The second prong is whether the improper comment prejudiced the defendant. *Id.* at 181. In evaluating prejudice, courts should consider six factors:

- Whether the State misstated the evidence;

- Whether the State's remarks implicated specific rights the defendant has;

- Whether the defense invited the State's remarks;

- Whether the trial court endorsed the State's remarks through instructions to the jury;

- Whether the weight of the evidence was overwhelmingly against the defendant; and

- Whether the defense had a chance to rebut the State's remarks.

Id. at 194. Meanwhile, the U.S. Court of Appeals for the Seventh Circuit and the Wisconsin Supreme Court have evaluated prejudice on a simpler inquiry: whether the State's improper comments *likely* affected the trial's outcome. *State v. Hurley*, 2015 WI 35, ¶ 96, 861 N.W.2d 174, 203; *United States v. Morgan*, 113 F.3d 85, 89 (7th Cir. 1997).

In seeking a new trial due to improper prosecutorial comments, the defendant must only make a *prima facie* case for a new trial. *Morgan*, 113 F.3d at 89 (7th Cir. 1997). Once the defendant has met his or her burden, the burden shifts to the State to prove, beyond a reasonable doubt, that the State's actions amounted to harmless error. *State v. Lettice*, 205 Wis. 2d 347, 352–53, 556 N.W.2d 376, 378 (Ct. App. 1996).

2. The State's arguments at trial were improper and likely affected the outcome of the trial.

In this case, the State's arguments at trial went directly against the holding in *Banks* and the federal cases that preceded it. In its closing argument, the State repeatedly and impermissibly asked the jury to draw an inference of a guilty mind from Mr. Lemberger's refusal to take a breathalyzer test.

The State opened its case by commenting on Mr. Lemberger's refusal of the breathalyzer test – and then asking the jury to infer a guilty mind from that refusal. (*See* R. 62 at 33–34.) At opening statements, the State went as far as to call Mr. Lemberger's refusal of the breathalyzer test direct evidence that Mr. Lemberger was hiding intoxication – a key element of the offense with which he was charged. *See id.* In its opening statement, the State declared:

> "Hell no." Those are the last words you'll hear the defendant utter before he refuses to take a breath test.
>
> ***
>
> Over the course of the testimony, it's my hope, ladies and gentlemen, you'll understand why he's refusing this test, and that's because he's got a guilty conscience, and that will be proof positive that he knew he had been drinking.

Id.

The State closed its case in the same way. During closing argument, the State repeatedly told the jury that the reason Mr. Lemberger refused the breathalyzer test was to hide intoxication. (*Id.* at 181–82.) Indeed, the State went as far as expressly stating that the reason Mr. Lemberger refused the breathalyzer was to hide a "guilty conscience" and to hide incriminating evidence – precisely the kind of inference the case law prohibits the State from drawing from a search refusal. *Id.*; *see Banks*, 328 Wis. 2d at 794. The State argued:

> [W]e see that defendant has a change of heart when he's in front of the intoximeter …. Now he's got an opportunity to show that he's not intoxicated.… [A]nd he doesn't want to do it because he's got a guilty conscience. He doesn't want to see the number. He doesn't want you to see the number.
>
> ***
>
> [W]hen asked … to submit to a breath sample, ask yourself why is this defendant refusing? Why is he refusing? … It's because he had something to hide: the result. He knew he was over the legal limit.

(*Id.* at 181–82, 187.)

The State's closing argument leaves no doubt that the State used Mr. Lemberger's refusal of the breathalyzer test as the key, most important piece of evidence in its case. During closing, the State specifically called Mr. Lemberger's refusal "the smoking gun" of its case:

> Defendant had a chance to fully, fairly explain how much he had by blowing into that machine. He was right there. This is nothing more than a *smoking gun of a guilty conscience*…. It's nothing more than *proof positive that he knew he had alcohol in his system*, and I ask you when you go back there to deliberate, to render a just verdict for this case, a verdict of guilty for operating while under the influence of an intoxicant.

(*Id.* at 182 (emphasis added).) The State also made expressly clear that it wanted the jury to consider Mr. Lemberger's refusal as more important than any of the other evidence it presented and argued at trial:

> [N]obody on this panel … can, while sitting through this evidence, deny the erratic driving that the witnesses testified to, the strong odor of alcohol defendant had, his bloodshot eyes, his slurred speech, his belligerent attitude that drunks often exhibit, the clues of impairment through the field sobriety tests, and *undoubtedly the most important of them all, his guilty conscience and this refusal to provide that test result to us all*.

(*Id.* at 187 (emphasis added).) Throughout its opening statement and its closing argument, the State never mentioned the fact that Mr. Lemberger had the constitutional right to refuse the breathalyzer test. *See generally id.*

The State's comments on opening statement and closing argument warrant a new trial. Under the two-prong test the United States Supreme Court set forth in *Darden*, the State's comments were both improper and likely to affect the outcome of the trial. *Darden*, 477 U.S. at 180–81.

The State's comments on opening statement and closing argument ran directly against state law as set forth in *Banks*, and against the long-standing federal law that precedes it. *Banks*, 328 Wis. 2d at 782–83; *see*

also Moreno, 233 F.3d at 940–41. *Banks* is directly applicable and analogous: both *Banks* and this case involve the defendant refusing a warrantless search, the State introducing evidence and argument on that refusal, and the State expressly and repeatedly seeking an inference that the defendant was hiding a "guilty conscience" and incriminating evidence through that refusal. *See id.* And the holding in *Banks*, as the holding in so many other federal cases, is clear: to seek that inference is to violate a defendant's constitutional rights. *Id.*

The State may argue that Wisconsin Criminal Jury Instruction 2663 made its comments at trial permissible. *See* Wis JI—Criminal—2663 ("Instruction 2663"). That argument would fail for two reasons. First, Instruction 2663 refers only to *evidence* of a refusal, not to the State's comments on a refusal. *See id.* On the question of refusals, Instruction 2663 states as follows:

> *Testimony* has been received that the defendant refused to furnish a breath sample for chemical analysis. You should consider this evidence along with all the other *evidence* in the case, giving to it the weight you decide it is entitled to receive.

Id. (emphasis added). By its plain language, Instruction 2663 addresses the admissibility of evidence of a refusal – not of arguments on what inferences the jury should draw on a refusal. *See id.* The former may be reconcilable with *Banks* and its federal predecessors; the latter is not. *See Banks*, 328 Wis. 2d at 782–83; *see also Moreno*, 233 F.3d at 940–41.

Second, assuming for the sake of argument that Instruction 2663 does allow the State to seek adverse inferences from refusals, Instruction 2663 has been superseded by *Banks*. Instruction 2663 was last revised in 2006; *Banks* was decided in 2010. If Instruction 2663 were deemed to allow the State to use a defendant's exercise of his or her constitutional rights to refuse a warrantless search to argue a guilty conscience, it would run afoul not only of *Banks*, but of the jurisprudence of virtually every federal circuit. *See, e.g.*, *Moreno*, 233 F.3d at 940–41; *Dozal*, 173 F.3d at 794; *Thame*, 846 F.2d at 206–07.

Given the State's comments, there is at a minimum a *prima facie* case that the State's comments *likely* led the jury to reach a guilty verdict – thus warranting a new trial. *See Hurley*, 2015 WI 35, ¶ 96, *Morgan*, 113 F.3d at 89 (7th Cir. 1997). Mr. Lemberger's refusal was the very first thing that the State brought to the jury's attention during the State's opening statement. (*See* R. 62 at 33.) During closing argument, the State commented on Mr. Lemberger's refusal on four separate occasions. On two of those occasions, the State argued for an inference that Mr. Lemberger was hiding either a "guilty conscience" or incriminating evidence; on the other occasions, the State argued that Mr. Lemberger's refusal was the "smoking gun" of the case and "proof positive" of the intoxication element of the offense. The State's express and persistent reliance on Mr. Lemberger's refusal as the "smoking gun" makes the State's improper comments on that refusal impossible to divorce from the outcome of the trial.

The several factors the United States Supreme Court articulated in *Darden* support Mr. Lemberger's *prima facie* case for a new trial. *See Darden*, 477 U.S. at 194. Concededly, the State did not misstate the evidence on refusal: Mr. Lemberger did indeed refuse the breathalyzer test. *See id.* But every other factor articulated in *Darden* is present in this case.

The State's remarks clearly implicated Mr. Lemberger's constitutional rights, as made clear in *Banks* and similar federal cases. The defense clearly did not invite the State's remarks on refusal, as the defense did not introduce evidence or argument on Mr. Lemberger's refusal. The instructions to the jury, in combination with the State's comments, effectively served to endorse the State's arguments on refusal: the instructions allowed the jury to consider the refusal, and the State's comments capitalized on that opportunity. And while the State could have argued that other evidence of alleged intoxication were sufficiently strong to warrant conviction regardless of the refusal, it chose not to: the State repeatedly insisted that the "smoking gun" was Mr. Lemberger's refusal to take the breathalyzer.

The defense did fail to effectively rebut the State's comments on Mr. Lemberger's refusal. The defense also failed to object to those comments

at any stage. But that failure should not defeat Mr. Lemberger's right to a new trial because it constituted ineffective assistance of counsel.

II. Mr. Lemberger Received Ineffective Assistance of Counsel.

A. A defendant has the right to counsel who can identify points of law that are fundamental to the case.

A criminal defendant has the constitutional right to assistance of counsel that is effective. *Strickland v. Washington,* 466 U.S. 668 (1984). To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Banks* at 778-79 (citing *Strickland* at 466 U.S. at 687). To make a *prima facie* case for ineffective assistance of counsel, a defendant must make two preliminary showings. First, the defendant must first show that defense counsel made an error that caused representation to fall below an objective standard of reasonableness. *Strickland* at 687-88. Errors that cause representation to fall below an objective standard of reasonableness include a failure to note a point of law that is fundamental to the nature of the case. *Hinton v. Alabama,* 134 S. Ct. 1081, 1088 (2014).

Second, the defendant must show that the error in question was prejudicial. *Strickland,* 466 U.S. at 691-92. To show prejudice, a defendant does not need to show the outcome would have been different. It is sufficient for a defendant to show that the error produced a process that did not benefit from its adversarial nature and did not produce a reliable result. *State v. Smith,* 207 Wis. 2d 258, 275, 558 N.W.2d 379, 386 (1997).

In this case, prior counsel's failure to object to the State's use of Mr. Lemberger's refusal to consent to a breath test as inference of guilt creates a *prima facie* case for ineffective assistance of counsel.

B. Trial counsel's failure to object to the State's comments on Mr. Lemberger's refusal to consent to a warrantless search rendered trial counsel ineffective.

1. Failure to object made trial counsel's representation fall below an objective standard of reasonableness.

The failure of Mr. Lemberger's prior counsel to object to the State's use of Mr. Lemberger's refusal of a warrantless search caused prior legal counsel's representation fall below an objective standard of reasonableness. This error resulted from prior counsel failing to spot a key issue of the law.

In *Banks*, the Wisconsin Court of Appeals held that trial counsel's failure to object to the State's comments on the defendant's refusal of a warrantless search consisted of ineffective assistance of counsel. *See Banks*, 328 Wis. 2d at 782. As the Court noted in *Banks*, a defendants has the constitutional right to refuse a warrantless search. Consequently, when the State uses that refusal against the defendant, defense counsel must object. *See id.* Failure to do so is always ineffective assistance of counsel.

Unfortunately, that is exactly what happened in this case. In Mr. Lemberger's case, the State violated *Banks*' holding throughout the trial. The State repeatedly mentioned Mr. Lemberger's failure to consent to a breath test. The State's even referred to this refusal at the "smoking gun" that should convince the jury to find Mr. Lemberger guilty of an OWI. The number of times the State mentioned the refusal alone was sufficient to alert trial counsel to the imperativeness of the issue.

2. Failure to object prejudiced Mr. Lemberger.

The failure of Mr. Lemberger's prior counsel to object to the state's comments on Mr. Lemberger's lack of consent for a breath test during closing arguments at trial was prejudicial. The error prejudiced the process insofar as it rendered the adversarial process before the Court meaningless. Prior counsel's error also prejudiced the trial's outcome, as Mr. Lemberger did not benefit from the adversarial process. Additionally, this adversarial process did not produce a reliable result.

At trial, Mr. Lemberger was convicted of a fourth OWI. Throughout trial, the State emphasized Mr. Lemberger's refusal to submit to a breath test to bolster its theory that Mr. Lemberger feared this test would prove that he was intoxicated. It is impossible to know whether the jury's verdict was tainted by the State's arguments. However, there is a reasonable probability that, but for counsel's deficient performance, the result at trial would have been different. *See Strickland,* 466 U.S. at 694.

Based on the standards promulgated by *Strickland* and *Banks*, Mr. Lemberger received ineffective assistance of counsel and should be entitled to a new trial.

CONCLUSION

For the foregoing reasons, Mr. Lemberger respectfully requests that the Court vacate his conviction and remand this case for a new trial.

Dated this 29th day of October, 2015.

Respectfully submitted,

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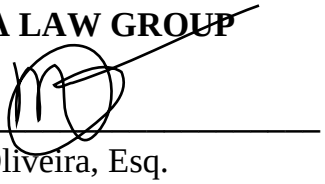
CERTIFICATION

Pursuant to section 809.19, Wisconsin Statutes, I hereby certify that this brief satisfies form and length requirements for a brief prepared using a proportional serif font. The length of this brief is 6,131 words.

Dated this 29th day of October, 2015.

Respectfully submitted,

OLIVEIRA LAW GROUP



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CERTIFICATION OF SERVICE

I hereby certify that on this 29th day of October, 2015, pursuant to section 809.80, Wisconsin Statutes, I caused ten copies of this brief to be served upon the Wisconsin Court of Appeals, and three copies of this brief to be served upon opposing counsel, via Federal Express.

Dated this 29th day of October, 2015.

Respectfully submitted,

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