Supreme Court of Wisconsin

Case No. 15-AP-1452CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GARY F. LEMBERGER,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING JUDGMENTS AND ORDERS OF THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE WILLIAM E. HANRAHAN PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

I. Should the U.S. Supreme Court's June 23, 2016 decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), which was decided after Lemberger petitioned this Court for review and after the State responded to the petition, be adopted in Wisconsin and apply in the present case?

Neither the trial court nor the court of appeals answered this question, because *Birchfield* had not yet been decided.[1]

II. Did the State violate Lemberger's constitutional right against self-incrimination and due process by repeatedly asking the jury during his trial for drunk driving to infer guilt based on his refusal to submit to a warrantless breathalyzer test?

The trial court answered no. The court of appeals answered no and concluded that Lemberger forfeited this argument.

III. Should *State v. Bolstad*, 124 Wis. 2d 576, 370 N.W.2d 257 (1985), *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986), *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), and their progeny be overruled in light of subsequent developments in search and seizure jurisprudence?

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[1] Because of the timing of the *Birchfield* decision, Lemberger acknowledges that this issue could not have been stated in his petition for review. *See* Wis. Stat. (Rule) 809.62(6). However, because this issue is relevant to the issues raised in the petition, it is discussed herein.

Neither the trial court nor the court of appeals expressly addressed this issue.

IV. Was Lemberger denied the effective assistance of counsel where trial counsel failed to object to the State's repeated comments to the jury seeking an inference of guilt based on Lemberger's refusal to consent to a warrantless breathalyzer?

The trial court and court of appeals answered no.

V. Did Lemberger adequately preserve his argument regarding the State's inappropriate comments to the jury by expressly arguing to the circuit court that "[t]he State violated Mr. Lemberger's constitutional rights at trial by seeking an inference of guilt on an element of the offense charged based on Mr. Lemberger's exercise of his constitutional right to refuse a warrantless search in the form of a breathalyzer test," (R.49), even though he did not discuss *Bolstad*, *Crandall*, or *Albright* until briefing in the court of appeals?

The trial court did not address this issue. The court of appeals held that Lemberger forfeited his arguments relating to the State's improper comments.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised by this appeal involve important questions the resolution of which will establish precedent of statewide significance. Publication and oral argument are therefore appropriate.

STATEMENT OF THE CASE AND FACTS

A. Background

This case arises from Gary Lemberger's arrest and subsequent conviction for operating a motor vehicle while intoxicated. On April 5, 2014, Officer Andrew Naylor responded to 911 reports from several individuals of an aggressive driver yelling and swerving on Highway 12/18 in Madison (R.62, App.[2] 148 at 66:13-23, App. 163 at 88:13-25). Officer Naylor was near the area at the time and identified the vehicle in question from the license plate number provided by one of the callers. (*Id.*, App. 163 at 88:23-89:2). Officer Naylor followed Lemberger's vehicle for approximately two minutes before initiating a traffic stop. (*Id.*, App. 149 at 67:13-15). The officer did not observe Lemberger drinking (*id*., App. 178 at 164:3-4), nor did he observe any unusual activity other than seeing the driver's hand outside the window of the vehicle. (*Id.*, App. 149 at 67:16-19). Officer Naylor did not observe Lemberger speeding or swerving, and Lemberger used his turn signals when changing lanes. (*Id.*, App. 164 at 89:5-10).

[2] For the convenience of the Court, references to the record in this case are denominated "R.". References to the appendix attached hereto are denominated "App.".

Based on the 911 calls, Officer Naylor activated his emergency lights and stopped Lemberger's vehicle. (*Id.*, App. 150 at 68:1-3). The officer claimed to smell alcohol during the traffic stop, and further claimed that Lemberger had bloodshot eyes, slurred speech, and was speaking slowly. (*Id.*, App. 151-52 at 69:23-70:1) However, Lemberger confirmed that he had *not* been drinking. (*Id.*, App. 152 at 70:8-10). Officer Naylor nevertheless requested that Lemberger perform a series of field sobriety tests, which Lemberger agreed to do. (*Id.*, App. 153 at 71:7-8). The officer's squad car was equipped with functioning video equipment to record his interaction with Lemberger (*id*., App. 152 at 70:16-18), and it was the "best practice" to record a driver's performance on field sobriety tests using this camera. (*Id*., App. 178 at 164:13-19).

Notwithstanding this "best practice," Officer Naylor conducted the field sobriety tests outside the range of the camera in a shaded area slightly under a bridge underpass on the Beltline Highway. (*Id.*, App. 137 at 14:7-24). The officer also declined to take Lemberger to an empty parking lot approximately 200 feet from their location in order to record the field sobriety tests. (*Id.*, App. 166 at 100:8-16).

While one officer conducted the tests, another officer searched Lemberger's vehicle without Lemberger's consent. The search yielded no evidence of alcohol containers or any criminal activity whatsoever. (*Id.*, App. 175 at 138:23, App. 177-78 at 163:25-164:2).

As a result of Lemberger's performance on the field sobriety tests, Officer Naylor arrested Lemberger, handcuffed him, and placed him in the rear seat of the officer's squad car. (*Id.*, App. 157 at 79:12-13). While Lemberger was seated in the squad car, Officer Naylor read him a form, titled "Informing The Accused" that explained various provisions of

Wisconsin's implied consent law. (*Id.*, App. 157-58 at 79:25-80:5). The officer asked Lemberger to submit to a chemical test, and Lemberger initially agreed. (*Id.*, App. 158 at 80:9-11).

Officer Naylor then transported Lemberger to a police station and led Lemberger to the intoximeter room where they were joined by Officer Ellis, the intoximeter operator (*Id.*, App. 158-59 at 80:12-81:6). Before attempting to test Lemberger's breath, Lemberger was placed under observation for approximately 20 minutes. (*Id.*, App. 159 at 81:15-16). During this period of observation, Lemberger was coherent and did not pass out, fall down, or stumble in any way. (*Id.*, App. 170 at 123:7-20).

After approximately 20 minutes of observation, Officer Naylor again read Lemberger the "Informing The Accused" form. (*Id.*, App. 161 at 83:9-11). This time, however, Lemberger withdrew his consent to a breathalyzer test. (*Id.*, App. 162 at 84:22-23). Although the officer could have attempted to obtain a search warrant to pursue blood testing, he did not. (*Id.*, App. 138 at 16:19-20, App. 165 at 93:6-24).

B. Trial Court Proceedings

The State charged Lemberger with operating while intoxicated (fourth offense) (R.1, R.2). These charges were tried during a one-day jury trial on November 15, 2014 in the Dane County Circuit Court.[3] At the civil refusal hearing that immediately preceded the trial,[4] the circuit court concluded that Lemberger's refusal was improper and that the State "may

[3] The Hon. Judge William E. Hanrahan presided over the trial.

[4] *See* Wis. Stat. § 343.305(9). Unless otherwise indicated, all references herein to the Wisconsin Statutes are to the 2013-14 Wisconsin Statutes.

comment upon that during the course of the trial." (R.62, App. 141 at 23:7-10).

1. The prosecutor repeatedly refers to Lemberger's withdrawal of consent.

At Lemberger's trial, the State repeatedly referred to Lemberger's refusal to consent to a warrantless breathalyzer test. The prosecutor's very first words to the jury during its opening statement were:

> "Hell no." Those are the last words you'll hear the defendant utter before he refuses to take a breath test.

(*Id.*, App. 142 at 33:5-7). Moments later, the prosecutor argued to the jury that Lemberger's withdrawal of consent was supposedly evidence of a "guilty conscience":

> 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*., App. 144 at 37:1-4) (emphases added).

During the trial, the State called three citizen witnesses who testified that they had observed Lemberger driving aggressively. (*Id*., App. 145 at 45:5-20, App. 146 at 53:1-12, App. 147 at 57:3-11). Although Lemberger appeared to be angry and driving aggressively, (*id*., App. 145 at 45:5-20), the witnesses did not report that they believed Lemberger to be intoxicated. (*Id.*, App. 171 at 134:6-135:1).

The State also called Officer Naylor and Officer Ellis to testify regarding their interactions with Lemberger, including the officers' observations that they supposedly smelled alcohol on Lemberger's breath (*id*., App. 151 at 69:23-24, App. 168 at 121:19-24), as well as Lemberger's performance on the field

sobriety tests. (*Id*., App. 154-56 at 76:7-78:20). Both officers testified to Lemberger's withdrawal of consent for a breath test. (*Id*., App. 162 at 84:22-23, App. 169 at 122:5-16).

Lemberger testified during the defense case and emphatically denied that he drove while intoxicated. (*Id*., App. 174 at 137:23-24). He explained that he was angry at the time of the incident because he had been "cut off" by another driver, which caused his dog (who was riding in the vehicle) to be hurt when Lemberger slammed on his brakes. (*Id*., App. 173 at 136:16-23).

During closing arguments, the prosecutor again repeatedly referred to Lemberger's withdrawal of consent:

> ….[O]nce [Lemberger] gets to the intoximeter room, we see that the defendant has a change of heart….*Now he's got an opportunity to show that he's not intoxicated*. He's being read the Informing the Accused one more time…and now is the part that his drinking and driving, his poor balance comes to haunt him, *and 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*.

(*Id*., App. 180-81 at 181:17-182:1) (emphases added). The State continued:

> 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*. The fact that defendant knowingly chose to accept a revocation of his driving privileges rather than provide a sample from an objective chemical test tells you something, ladies and gentlemen…It's nothing more than *proof positive that he knew he had alcohol in his system*…

(*Id*., App. 181 at 182:10-24) (emphases added). The State again reprised the same commentary during its rebuttal remarks, noting:

> And, when asked, while sitting in that room, 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*., App. 183 at 187:1-9). The prosecutor concluded by arguing:

> [N]obody on this panel…can…deny…undoubtedly the most important of them all, his guilty conscience and his refusal to provide that test result to us all.

(*Id*. at 187:16-23).

Trial counsel did not object to any of the prosecutor's comments.

2. The circuit court instructs the jury that it may consider Lemberger's withdrawal of consent, and the jury convicts.

The circuit court relied on language from Wisconsin's pattern jury instructions permitting the jury to consider evidence of Lemberger's refusal. (*Id*., App. 167 at 113:10-12, App. 179 at 170:8-12). *See* Wis JI—Criminal 2663, 2663B.[5]

After deliberating approximately one hour, the jury convicted Lemberger. (*Id*., App. 184-85 at 195:19-196:13. *See also* R.31). The circuit court sentenced Lemberger to 12

[5] For the convenience of the Court, Instruction 2663 and 2663B are included in the appendix at App. 129 and App. 132, respectively.

months in jail, plus a $600 fine and costs. (*Id*., App. 186 at 202:17-25).

3. Lemberger files a postconviction motion for a new trial.

Lemberger filed a postconviction motion seeking a new trial, arguing that "[t]he State violated Mr. Lemberger's constitutional rights at trial by seeking an inference of guilt on an element of the offense charged based on Mr. Lemberger's exercise of his constitutional right to refuse a warrantless search in the form of a breathalyzer test." (R.49, App. 115). Lemberger also contended that he was denied effective assistance of counsel based on trial counsel's failure to object to the prosecutor's comments. (*Id*.). In his brief in support of his postconviction motion, Lemberger developed his arguments, but did not discuss certain cases, including *Bolstad* or *Albright*. (R.51, App. 118-28).

The circuit court denied the motion without a hearing and reprimanded postconviction counsel for not addressing *Bolstad* or *Albright*. (R.53, App. 114).

C. Appellate Proceedings

In the court of appeals, Lemberger raised the same arguments he had argued in the postconviction motion. (Ct. App. Br. at 4, 9, 15-16). The court of appeals affirmed in an unpublished decision, concluding that the circuit court's observations about the postconviction motion were "accurate," and noting that postconviction counsel had not discussed *Bolstad* or *Albright* prior to briefing in the court of appeals (App. 107-08, ¶¶ 4-5).

Although the State did not raise the issue below, the court of appeals *sua sponte* held that Lemberger forfeited his

arguments by not discussing *Bolstad* or *Albright* in the circuit court. (App. 108, ¶ 6). The court of appeals concluded that Lemberger's appellate arguments "were never even hinted at" to the trial court and faulted Lemberger for not moving for reconsideration after denial of the postconviction motion. (App. 109-10, ¶ 9). In the court of appeal's view, reversal would "blindside the circuit court." (App. 109, ¶ 8).

The court of appeals also concluded that Lemberger's argument was "vague" and faulted postconviction counsel for not filing a reply brief. (App. 110, ¶ 11). Lemberger moved for reconsideration in the court of appeals, which was denied as untimely. (App. 112).

ARGUMENT

I. The U.S. Supreme Court's Ruling In *Birchfield v. North Dakota* Does Not Control This Case And Should Not Be Applied To Lemberger.

The Fourth Amendment and Article I, § 11 of the Wisconsin Constitution guarantee the right of individuals to be free of "unreasonable searches and seizures." U.S. Const. Amend. IV, Wis. Const. Art. I, § 11. The touchstone of this inquiry is "reasonableness." *State v. Faust*, 2004 WI 99, ¶ 32, 274 Wis. 2d 183, 682 N.W.2d 371, *cert. denied*, 543 U.S. 1089 (2005)

It is now settled that the administration of a breathalyzer test constitutes a "search" within the meaning of the Fourth Amendment and Wisconsin Constitution. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) ("[s]ubjecting a person to a breathalyzer test… should also be deemed a search."); *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) (same); *County of Milwaukee v. Proegler*, 95 Wis. 2d

614, 623, 291 N.W.2d 608 (Ct. App. 1980) ("the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions…").

A search is *per se* unreasonable unless it is supported by a warrant or falls within a well-defined exception. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013); *State v. Williams*, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834. Accordingly, a person has a constitutional right to refuse to consent to an unreasonable search. *State v. Banks*, 2010 WI App 107, ¶ 24, 328 Wis. 2d 766, 790 N.W.2d 526; *United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000) ("The Fourth Amendment entitled [the defendants] to withhold their consent to the search….").

A. *Birchfield* And Warrantless Breathalyzer Tests.

After Lemberger filed his petition for review with this Court and after the State responded, the U.S. Supreme Court decided *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). *Birchfield* held that under the Fourth Amendment, states may not criminalize the refusal to consent to a warrantless blood test, but could do so for refusal to consent to a warrantless breath test. *Birchfield*, 136 S. Ct. at 2186. The Supreme Court concluded that "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185. As such, the Court concluded that "a warrant is not needed in this situation." *Id.* at 2185.

Birchfield involved a Minnesota driver[6] arrested for drunk driving after police smelled alcohol on the driver's

[6] *Birchfield* consolidated three different cases—two from North Dakota and one from Minnesota. One defendant refused to allow his blood to be drawn following a drunk driving arrest. *Birchfield*, 136 S. Ct. at

breath, observed his eyes to be bloodshot and watery, and after the driver refused to perform field sobriety tests. *Id*. at 2171. The driver was taken into custody and transported to a police station. *Id*. After receiving a warning about the state's implied consent law, the driver refused to consent to a breath test. The driver was charged under a Minnesota law making refusal to consent to a breath test a crime. *Id*.

In affirming the conviction, the Supreme Court confirmed that "the administration of a breath test is a search." *Id*. at 2173. However, the Court concluded that a breath test—unlike a blood test—did not implicate "significant privacy concerns." *Id*. at 2178 (internal citation and punctuation omitted). And, the Court noted its previous cases that had approvingly referenced implied-consent laws that impose civil penalties on motorists who withdraw their consent. *Id.* at 2186.

The Court ultimately concluded that a warrantless breathalyzer search was permitted under the Fourth Amendment as incident to an arrest for drunk driving. *Id*. at 2184. As a result, the Court decided that the motorist who refused the breath test "had no right to refuse it." *Id.* at 2186.

The Court reached the opposite conclusion with respect to blood tests which it found to be "significantly more intrusive…" *Id*. Thus, the Court concluded that a blood test could *not* be justified as a search incident to a lawful arrest. Nor could a motorist be deemed to have consented under an implied consent statute to such a test "on pain of committing a criminal offense." *Id*.

2170. A second defendant refused to allow his breath to be tested. *Id*. at 2171. A third defendant consented to a blood test, but argued his consent was improperly coerced. *Id*. at 2172.

B. *Birchfield* Does Not Control This Case Because This Court Should Interpret Article I, Section 11 Of The Wisconsin Constitution To Provide Broader Protection Against Warrantless Breathalyzer Searches.

While this Court has typically interpreted Article I, Section 11 of the Wisconsin Constitution to be coextensive with the Fourth Amendment, "it is uncontested that a state's constitution may provide citizens with protections beyond those afforded by the United States constitution." *State v. Houghton*, 2015 WI 79, ¶ 49, 364 Wis. 2d 234, 868 N.W.2d 143. Indeed, "the fact that this court has followed the United States Supreme Court does not dictate that [it] always will." *State v. Eason*, 2001 WI 98, ¶ 60, 245 Wis. 2d 206, 629 N.W.2d 625.

Albeit rare, this Court has afforded greater protections under Article I, Section 11 of the Wisconsin Constitution. *Eason*, 2001 WI 98 at ¶ 63 (Wisconsin Constitution requires additional safeguards beyond Fourth Amendment to invoke good-faith reliance on defective no-knock search warrants); *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923) (applying exclusionary rule under Article I, § 11 of the Wisconsin constitution nearly four decades before required to do so by U.S. Supreme Court). Several compelling policy considerations justify broader protection for warrantless breathalyzer searches in Wisconsin.

1. *Birchfield* conflicts with the interests protected by Article I, Section 11 of the Wisconsin Constitution.

Birchfield should not be adopted in Wisconsin because it undermines the interests protected by Article I, § 11 of the Wisconsin constitution, including the long-standing

requirement that an officer obtain a search warrant prior to initiating a search. Indeed, long before the U.S. Supreme Court held that the Fourth Amendment and its exclusionary rule applied to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court independently recognized—based on the *Wisconsin* constitution—that the protections embodied in Article I, § 11 required suppression of evidence obtained in violation of those principles. *Hoyer*, 180 Wis. at 417 (noting the Wisconsin constitutional provision is "a pledge of faith" of all people to be secure in their "persons, houses, papers, and effects"). *See also State v. Baltes*, 183 Wis. 545, 198 N.W. 282 (1924) (applying requirements of warrants based on probable cause). The *Birchfield* decision conflicts with these Wisconsin constitutional principles in several important ways.

First, in drunk driving cases, while the State has an interest in facilitating "the identification of drunken drivers and their removal from the highways," *see Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 31, 348 Wis. 2d 282, 832 N.W.2d 121 (internal citation omitted), it is beyond dispute that once a driver has been arrested, he has been both identified and removed from the highways. As such, once a drunk driver is taken into custody, he "no longer poses an immediate threat to the public." *Birchfield*, 136 S. Ct. at 2191 (Sotomayor, J., dissenting). And, once in custody, there is "no serious claim that the time it takes to obtain a warrant would increase the danger that drunk driver poses to fellow citizens." *Id*.

Second, the uncontroverted evidence in the this case shows that after his arrest, Lemberger was transported to a police station where he was placed under observation for a full 20 minutes prior to being asked to submit to a breath test. (R.62, App. 157-58 at 79:12-80:17, App. 160 at 82:4-8). There was at least a 20 minute delay, *plus* the delay between arrest and transportation to the intoximeter room, during which time

law enforcement could have attempted obtained a warrant, but did not. And, even the arresting officer acknowledged that obtaining a warrant would have been possible, though he chose not to do so. (*Id.*, App. 165 at 93:10-24). Moreover, Wisconsin statutory law permits admission of evidence from a breath test conducted up to a full *three hours* after the time the defendant operated the vehicle. *See* Wis. Stat. § 885.235(1g). Thus, in Wisconsin, a typical evidentiary breath test is "conducted well after an arrest is effectuated." *Birchfield*, 136 S. Ct. at 2192 (Sotomayor, J., dissenting). During this time, there can be little doubt that law enforcement could have—and indeed should have—obtained a search warrant.

Third, this Court should decline to adopt *Birchfield's* distinction between breath tests and blood tests. Both are clearly "searches" subject to the requirements of the Wisconsin Constitution. *Skinner*, 489 U.S. at 616-17; *Proegler*, 95 Wis. 2d at 623. Administration of a breath test "generally requires the production of alveolar or 'deep lung' breath for chemical analysis." *Id*. While it may be true that a blood test requires a physical piercing of the body and may in some cases be more invasive than a breath test, for the purposes of Wisconsin law, a blanket exception permitting law enforcement open access to a person's deep lung breath in all drunk driving cases renders Article I, § 11 "an empty promise of protecting citizens from unreasonable searches." *Birchfield*, 136 S. Ct. at 2195 (Sotomayor, J., dissenting). In fact, there would be little need to recognize a breath test as a "search" if the contents of a person's lungs were categorically open to seizure by the police in all drunk driving cases.

Fourth, allowing different constitutional approaches to be taken with different types of chemical tests undermines this Court's recognition of the need "to prevent the confusion caused by differing standards." *State v. Fry*, 131 Wis. 2d 153,

173, 388 N.W.2d 565 (1986), *overruled on oth. grounds in State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, *cert. denied,* 564 U.S. 1039 (2011).

Finally, this Court has recognized that "advancements in technology…have greatly reduced the time and effort needed to secure a warrant before an investigatory blood draw is performed, resulting in more time for law enforcement officials to obtain a warrant." *State v. Kennedy*, 2014 WI 132, ¶ 30, 359 Wis. 2d 454, 856 N.W.2d 834, *citing with approval Missouri v. McNeely*, 133 S. Ct. 1552 (2013). As such, where the warrant process will not significantly increase the delay in testing because an officer can secure a warrant, there should be "no plausible justification for an exception to the warrant requirement." *McNeely*, 133 S. Ct. at 1561. Given the inevitable length of time between a possible OWI offense and testing, this Court should interpret Article I, § 11 of the Wisconsin Constitution to require that "where police officers can reasonably obtain a warrant…without significantly undermining the efficacy of the search," they must do so. *Id.*

2. The warrant exception for a search incident to lawful arrest in Wisconsin is not identical to the Fourth Amendment.

Birchfield relied on the search-incident-to-lawful-arrest exception of the Fourth Amendment. *Birchfield*, 136 S. Ct. at 2185. While Wisconsin has also recognized this exception, *see, e.g., Mantei v. State*, 210 Wis. 1, 245 N.W. 683 (1932), Wisconsin has also provided separate statutory codification of that exception since 1969. *See* Wis. Stat. § 968.11; *Fry*, 131 Wis. 2d at 161. The codification in Wisconsin of the requirements for a search incident to lawful arrest provides further support to interpreting Wisconsin's protections to be

greater than those articulated under the Fourth Amendment in *Birchfield*. Indeed, if the search-incident-to-lawful-arrest exception were necessarily in lockstep with the Fourth Amendment in all cases, Wis. Stat. § 968.11 would be entirely superfluous. *Cf. id*. at 188 (Bablitch, J., dissenting, urging broader safeguards for a search incident to lawful arrest under Wis. Stat. § 968.11 and Article I, § 11 of the Wisconsin Constitution).

C. *Birchfield* Should Not Be Applied Retroactively In This Case.

Even if the Court were to adopt *Birchfield* as a matter of Wisconsin constitutional law (which it should not), *Birchfield* should not apply in this case. The usual rule is that "newly declared constitutional rules must apply to all similar cases pending on direct review." *State v. Foster*, 2014 WI 131, ¶ 41, 360 Wis. 2d 12, 856 N.W.2d 847 (internal punctuation omitted), *citing Dearborn*, 2010 WI 84 at ¶ 31. This rule should not apply in this case for at least three reasons.

First, the rule—by its terms—applies only to "similar cases." *Foster*, 2014 WI 131 at ¶ 41. As discussed above, *Birchfield* involved a challenge to Minnesota and North Dakota statutes that imposed criminal penalties on a driver's refusal to consent to a blood or breath test. While the *Birchfield* court did note as a general matter that prior decisions had acknowledged that some implied consent laws impose civil penalties and evidentiary consequences, *see Birchfield*, 136 S. Ct. at 2185, *Birchfield* at its core involved a constitutional challenge to a conviction under a *criminal* statute, and did not rule on the precise issue in this case—namely, whether a prosecutor violates self-incrimination or due process principles by commenting on a person's refusal to consent to a breath test. And, it is beyond dispute that

"Wisconsin's implied consent law does not impose *criminal* penalties on drivers for failing to give actual consent," and therefore *Birchfield* does not apply. *State v. Blackman*, 2016 WI App 69, ¶ 10 n.5, 371 Wis. 2d 635, 886 N.W.2d 94, *petition for review filed*, Sep. 20, 2016 (emphasis in original) (distinguishing *Birchfield* because it addressed criminal, not civil penalties).

Second, the *Birchfield* rule should not apply in this case because (as shown below in more detail) at the time of Lemberger's trial, he had at very least a good faith belief that his withdrawal of consent from a breathalyzer test was immunized as a matter of state and federal constitutional law. Application of the *Birchfield* rule retroactively in this case would undermine Lemberger's interest in fair warning that his refusal would entitle the prosecutor to make pervasive arguments that his refusal was supposedly evidence of a guilty conscience. *See, e.g., United States v. Lanier*, 520 U.S. 259 (1997).[7]

Third, because Lemberger's arguments are based on the failure of his trial counsel to object to the prosecutor's statements during the trial, his claim must be reviewed within the framework of ineffective assistance of counsel. *See State v. Beauchamp*, 2011 WI 27, ¶ 14, 333 Wis. 2d 1, 796 N.W.2d 780, *cert. denied*, 565 U.S. 1078 (2011), *citing State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31. That framework necessarily focuses on counsel's deficient performance *at the time of trial*, and whether counsel's errors were reasonably likely "to undermine confidence in the outcome" of that trial. *Banks*, 2010 WI App 107 at ¶ 26. Thus, the proper focus is the propriety of the prosecutor's statements

[7] While *Lanier* involved the Supreme Court's rejection of retroactive application of a novel interpretation of a criminal *statute*, Lemberger's interests of fair warning in this case are analogous.

at the time of trial. And, as of that time, *Birchfield* had not yet been decided.

II. The Prosecutor Violated Lemberger's Right Of Self-Incrimination And Due Process By Repeatedly Urging The Jury To Draw A Negative Inference From His Refusal To Consent To A Breath Test.

A. Standard of Review

Appellate review of a prosecutor's improper comments to a jury involves "application of constitutional principles to undisputed facts which [is reviewed] de novo." *State v. Adams*, 221 Wis. 2d 1, 6, 584 N.W.2d 695 (Ct. App. 1998). *See also State v. Phillips*, 218 Wis. 2d 180, 194, 577 N.W.2d 794 (1998).

B. Lemberger Has A Wisconsin Constitutional Right To Decline To Consent To A Warrantless Breathalyzer Search Notwithstanding Wisconsin's Implied Consent Law.

As shown above, the administration of a breathalyzer test constitutes a "search" within the meaning of the federal and state constitutions. *Skinner*, 489 U.S. at 616-17 (1989); *King*, 133 S. Ct. at 1969; *Proegler*, 95 Wis. 2d at 623. To be valid, such a search must be supported either by a warrant or a warrant exception. *Foster*, 2014 WI 131 at ¶ 32. Any search not so supported is *per se* unreasonable, and a person has a constitutional right to decline to consent to it. *Banks*, 2010 WI App 107 at ¶ 24; *Moreno*, 233 F.3d at 941.

1. Wisconsin's implied consent law does not categorically authorize a warrantless breathalyzer test and offers Lemberger a choice of providing or withdrawing actual consent to that search.

One exception to the warrant requirement is consent. *Williams*, 2002 WI 94 at ¶ 19. Wisconsin has enacted a so-called "implied consent" statute. *See* Wis. Stat. § 343.305. That statute provides, in relevant part, that any person who

> drives or operates a motor vehicle upon the public highways of this state…is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol…

when requested or required to do so under certain statutory circumstances. Wis. Stat. § 343.305(2). If a motorist withdraws consent following a request by law enforcement, the motorist is subject to certain penalties if the withdrawal was improper, including revocation of driving privileges. Wis. Stat. § 343.305(7), (10).

This Court has held that the policy of the statute is "to facilitate the identification of drunken drivers and their removal from the highways." *Brefka*, 2013 WI 54 at ¶ 31. The statute is intended "to encourage drivers, upon a request by law enforcement, to submit to chemical testing….[which] allows for the efficient gathering of evidence that may be used to secure drunk-driving convictions." *State v. Bentdahl*, 2013 WI 106, ¶ 28, 351 Wis. 2d 739, 840 N.W.2d 704.

In *State v. Padley*, 2014 WI App 65, ¶ 33, 354 Wis. 2d 545, 849 N.W.2d 867, *rev. denied*, 2014 WI 122 and *Blackman*, 2016 WI App 69 at ¶ 10, the court of appeals

concluded that the implied consent statute offers drivers a *choice* between honoring their previous "implied" consent or withdrawing that consent. This Court should adopt the *Padley/Blackman* interpretation of Wisconsin's implied consent statute.

In *Padley*, the court of appeals clarified what it viewed as "confusion….regarding the implied consent law." *Padley*, 2014 WI App 65 at ¶ 37. The *Padley* court specifically held that the implied consent law does not categorically authorize law enforcement to conduct a blood test,[8] but merely "authorizes police to *require drivers to choose between consenting to a blood draw or, instead, refusing to give consent and being penalized for the refusal*." *Id*., at ¶ 33 (emphasis added).

The court of appeals in *Blackman* reached the same conclusion as in *Padley*, reiterating:

> [A] driver has two choices under the implied consent law. The first is to give actual consent to the blood draw which is in accord with the "implied consent" the driver gave as a condition to operating a motor vehicle upon the public highways of Wisconsin…The other choice is to withdraw implied consent (refuse) and suffer the penalty specified in the implied consent law.

Blackman, 2016 WI App 69 at ¶ 10.

Importantly, *Padley* flatly rejected the contention that "implied consent alone can serve as a valid exception to the warrant requirement." *Padley*, 2014 WI App 65 at ¶ 37 (internal punctuation omitted). To the contrary, [f]or all

[8] At issue in *Padley* was a blood test, not a breath test. However, for the reasons discussed above in Part I(B), breath tests and blood tests should be treated the same under Wisconsin law.

classes of drivers covered by the implied consent law…, any search conducted must be based on a warrant, *actual* consent, or another exception to the warrant requirement." *Id.* at ¶ 53 (emphasis added). As such,

> the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in terms of "implied consent," choosing the "yes" option affirms the driver's consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.

Id. at ¶ 39 (emphasis in original). *See also Blackman*, 2016 WI App 69 at ¶ 10 ("[a] driver who refuses to provide a sample has made a choice to withdraw his or her previously given consent.") (emphasis in original).

As pertinent here, when Lemberger withdrew his consent in the intoximeter room, he withdrew his *actual* consent to the breathalyzer search. Because law enforcement lacked a warrant or an applicable warrant exception under Article I, § 11 of the Wisconsin Constitution (as shown below), Lemberger's refusal was constitutionally privileged.

2. Article I, Section 11 of the Wisconsin Constitution does not categorically authorize a warrantless evidentiary breath search in all drunk driving cases.

In *McNeely*, the U.S. Supreme Court held that the natural dissipation of alcohol in the blood did not create a *per se* exception to the warrant requirement in all drunk driving

cases. This Court expressly adopted *McNeely* into Wisconsin law the following year. *Foster*, 2014 WI 131 at ¶ 42.

In *McNeely*, a driver arrested for drunk driving refused to consent to a breath or blood test, notwithstanding Missouri's implied consent law. *Id*. at 1557. The police nevertheless directed a hospital lab technician to take a blood sample over the driver's refusal. *Id*. Notwithstanding Missouri's implied consent law, the U.S. Supreme Court held that in drunk driving cases where law enforcement can reasonably obtain a warrant, "the Fourth Amendment mandates that they do so." *Id*. at 1561. In so holding, the Supreme Court rejected a *per se* exception to the warrant requirement in drunk-driving cases. *Id*. at 1560.

After *McNeely*, no categorical rule authorized warrantless blood or breath tests—even in an implied consent state. And, under *Padley* and *Blackman*, "implied" consent does not constitute *actual* consent to a search. Accordingly, Article I, § 11 of the Wisconsin Constitution entitled Lemberger to refuse to consent to the breath test in this case.

C. The State Violated Lemberger's Right Of Self-Incrimination And Due Process By Seeking A Negative Inference Based On His Assertion Of His Constitutional Right To Refuse Consent To A Warrantless Search.

The U.S. Supreme Court long ago established that a defendant's Fifth Amendment and Due Process rights are violated when a prosecutor requests a negative inference based on a defendant's exercise of a constitutional right. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment right to self-incrimination violated when prosecutor argued during closing argument that guilt should be inferred from defendant's failure to take the stand to explain or deny

charges); *Doyle v. Ohio*, 426 U.S. 610 (1976) (prosecutor violated Due Process by using post-arrest silence to impeach exculpatory story told by the defendant at trial).

In *Griffin*, the Supreme Court held that allowing the prosecutor to comment on a defendant's silence constituted "a penalty imposed by courts for exercising a constitutional privilege." *Griffin*, 380 U.S. at 614. Moreover, "[w]hat 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.* Stated differently, no special circumstances could justify

> use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts with exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.

Banks, 2010 WI App 107 at ¶ 24, *citing Grunewald v. United States*, 353 U.S. 391, 425-26 (1957) (Black, J., concurring.).

1. The prohibition against seeking an adverse inference from refusal to consent applies in the search and seizure context.

Although *Griffin* and *Doyle* arose in the context of an inference of guilt from a defendant's assertion of his *Fifth* Amendment rights, Wisconsin and federal courts have held that a prosecutor may not seek an adverse inference from a defendant's invocation of his *Fourth* Amendment right to be free from unreasonable searches and seizures. This right should be recognized and extended to a defendant's invocation

of his rights under Article I, § 11 of the Wisconsin Constitution. Indeed, there is "little, if any, valid distinction between the privilege against self-incrimination and the privilege against unreasonable searches and seizures which is relevant to the propriety of the prosecutor's argument." *United States v. Thame*, 846 F.2d 200, 206 (3d Cir.), *cert. denied*, 488 U.S. 928 (1988).

In *Banks*, the prosecutor had argued at trial that the jury should draw an adverse inference from the defendant's refusal to consent to a DNA test. The court of appeals held that "it is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search." *Banks*, 2010 WI App 107 at ¶ 24. The *Banks* court agreed with the defendant that "the State cannot imply that a defendant who refuses to voluntarily submit a DNA sample, absent a warrant, has done something incriminating." *Id*. at ¶ 20.

Similarly, the federal circuit courts that have addressed this issue have applied the *Griffin/Doyle* rule to prohibit prosecutors from commenting on a defendant's exercise of his right to decline to consent to a search. *See, e.g., Thame*, 846 F.2d at 207 (prosecutor's comment on defendant's refusal to consent to search of apartment was improper); *United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977) (relying on *Griffin* to hold that prosecutor's comment on refusal to consent to search constituted misconduct); *Moreno*, 233 F.3d at 941; (Fourth Amendment entitled defendants to withhold consent to search and commentary on invocation of that right may have been inconsistent with due process); *United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002) (assumes that it would be error "of constitutional magnitude" for trial court to permit a prosecutor to comment on defendant's refusal to consent to

warrantless search of desktop computer to support inference of guilt); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999) (asking jury to draw adverse inferences from refusal to consent to warrantless search may be impermissible if not admitted as fair response by defendant).

2. Wisconsin's implied consent law does not immunize a prosecutor's improper comments.

That the authorities discussed above applying the *Griffin/Doyle* rule arose outside the context of a drunk driving prosecution does not minimize the constitutional violation in this case. As shown above in Part II(B)(1), Wisconsin's implied consent law does not create its own categorical exception to the warrant requirement. *Padley*, 2014 WI App 65 at ¶ 37. Nor does "implied consent" constitute *actual* consent. *Id*. *See also Blackman*, 2016 WI App 69 at ¶ 10.

South Dakota v. Neville, 459 U.S. 553 (1983) is not to the contrary. In *Neville*, the defendant was stopped after he failed to stop at a stop sign. After police officers suspected the defendant was intoxicated, they asked the driver to submit to a blood test, which the driver refused to do. The U.S. Supreme Court upheld the admissibility of the defendant's refusal to take the test and rejected the claim that admission of the evidence violated the defendant's rights of due process and self-incrimination. The Court distinguished *Griffin*, and noted that "[u]nlike the defendant's situation in *Griffin*, a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *Neville* 459 U.S. at 560 n.10. *Neville* is distinguishable for at least three reasons.

First, the conclusion in *Neville*—decided before breath tests were found to constitute a "search" under *Skinner* and a full 30 years before *McNeely*—rested on an assumption that a

driver had no privilege of declining to consent to a blood (or breath) test based on South Dakota's implied consent law. *Id*. However, as shown above in Part II(B)(2), *McNeely*—now part of Wisconsin constitutional law—has since expressly rejected a *per se* rule that drunk driving cases arising out of implied consent states always present exigencies that authorize a warrantless blood or breath test. And, Wisconsin and federal cases have recognized that a defendant *does in fact* possess a constitutional right to refuse to consent to a warrantless search. *See, supra,* at Part I and II(B).

Second, the South Dakota implied consent statute at issue in *Neville* specifically directed the evidence of refusal was admissible into evidence at trial and that a person "may not claim privilege against self-incrimination with regard to admission of refusal to submit to chemical analysis." *Neville*, 459 U.S. at 556 n.4. By contrast, Wisconsin's implied consent statute contains no similar provision.[9]

Finally, *Neville* rejected the defendant's due process argument because the right to refuse the blood test was "simply a matter of grace bestowed by the South Dakota legislature." *Neville*, 459 U.S. at 565. As shown above in Part II(B), the right to refuse a warrantless search is not just a matter of legislative grace, but a constitutional right under Article I, § 11 of the Wisconsin Constitution.

[9] Wisconsin's statute does require that a warning be provided to the accused, including an indication that test results or evidence of refusal may be used at trial. *See* Wis. Stat. § 343.305(4).

D. The Prosecutor's Pervasive Comments To The Jury Undoubtedly Contributed To Lemberger's Conviction And Were Not Harmless Beyond A Reasonable Doubt.

The prosecutor pervasively and repeatedly argued to the jury that Lemberger's withdrawal of consent to submit to a breathalyzer search was evidence of a "guilty conscience," (R.62, App. 144 at 37:1-4, App. 180-81 at 181:17-182:1), a "smoking gun" of his supposed guilt, (*id*., App. 181 at 182:10-24), "proof positive" that he was purportedly intoxicated (*id*.), and that he supposedly "had something to hide" (*id*., App. 183 at 187:1-9). The prosecutor made these comments during opening arguments (*Id.*, App. 142 at 33:5-7, App. 144 at 37:1-4), closing arguments (*Id.*, App. 180-81 at 181:17-182:24), and even in rebuttal arguments (*Id.*, App. 183 at 187:1-23). Under these circumstances, the State cannot show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270 (internal citation omitted).

To the contrary, the pervasive and recurring nature of the prosecutor's comments shows that the error was "so frequent that it became the backbone of the State's argument." *Id*. at ¶ 47. Even though the officers claimed to smell intoxicants, and the jury heard evidence about Lemberger's performance on the field sobriety tests, the State did not pervasively focus on that evidence in the same manner that it focused on Lemberger's withdrawal of consent. As such, the State cannot reasonably assert that its continuous argument that the jury should infer guilt based on Lemberger's withdrawal of consent "did not contribute to the verdict obtained." *Martin*, 2012 WI 96 at ¶ 45.

III. The Decisions In *Bolstad*, *Crandall*, *Albright* And Their Progeny Should No Longer Be Controlling Because They Rest On A Premise That Is Untenable Under Wisconsin Law.

Nearly a full decade before the U.S. Supreme Court conclusively held that both blood tests and breath tests were "searches" subject to the rigors of the Fourth Amendment,[10] the court of appeals considered the effect of a driver's refusal to submit to a breath test under Wisconsin's implied consent laws. In *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), the defendant was arrested for operating a vehicle while intoxicated and was taken to a police station where he refused to take a breathalyzer test. *Albright*, 98 Wis. 2d at 666. During the defendant's trial, evidence of his refusal was admitted, and the prosecutor commented to the jury that the defendant refused the test.

In rejecting the defendant's claim that his refusal should not have been used as evidence of consciousness of guilt, the court of appeals explained its view that

> 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., 98 Wis. 2d at 669 (emphasis added).[11]

Several years later, this Court adopted the *Albright* rule in *State v. Bolstad*, 124 Wis. 2d 576, 370 N.W.2d 257 (1985). In *Bolstad*, this Court held that "refusal evidence is relevant,

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[10] *Skinner*, 489 U.S. at 616-17.

[11] In reaching this conclusion, the court of appeals relied on an older decision of this Court reaching the same conclusion. *See, e.g., City of Waukesha v. Godfrey*, 41 Wis. 2d 401, 409, 164 N.W.2d 314 (1969).

because it makes more probable the crucial fact of intoxication…," *id.* at 585, but also concluded that a defendant has the right to *rebut* such evidence. *Id*. at 585-86. The Court cited approvingly *Albright's* conclusion that it was reasonable to infer a "consciousness of guilt" from refusal to take a mandatory blood test. *Id*. at 585.

The following year, this Court revisited the issue in *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986) and rejected a claim that evidence of refusal to submit to a breath test could not be used as evidence at trial because she had not been previously warned of that consequence. In reaching its conclusion, the Court in *Crandall* reiterated *Albright's* conclusion that [i]n Wisconsin there is no constitutional or statutory right to refuse a breathalyzer test." *Id*. at 255.

These decisions should no longer be followed because they rest upon three premises that are no longer tenable under Article I, § 11 of the Wisconsin Constitution.

First, years after *Albright*, *Bolstad*, and *Crandall*, the U.S. Supreme Court resolved that breathalyzers are searches within the meaning of the Fourth Amendment, and subject to its "reasonableness" requirements. *Skinner*, 489 U.S. 616-17. Because a breath test did not conclusively constitute a "search" at the time of *Albright* and its progeny, it is unsurprising that those courts declined to accord a constitutional privilege to refuse to consent to that procedure.

Second, as shown above in Part II(B)(1), unlike at the time of *Albright*, state law now recognizes that the existence of an implied consent statute does not constitute *actual* consent to

a search. *Padley*, 2014 WI App 65 at ¶ 33.[12] To the contrary, Wisconsin's "implied consent" laws offer drivers a choice between acknowledging their previous consent and thereby providing *actual* consent, or withdrawing that consent and thereby removing *actual* consent. *Padley*, 2014 WI App 65 at ¶ 39; *Blackman*, 2016 WI App 69 at ¶ 10.

Third, under *McNeely* (which is now adopted into Wisconsin law under *Foster*), as shown above in Part II(B)(2), drunk driving cases do not present a *per se* exigency that justifies a warrantless search in all cases even under an implied consent statute. *McNeely*, 133 S. Ct. at 1560.

Thus, while *Albright*, *Bolstad*, and *Crandall* were premised on a holding that there is no right to refuse a breathalyzer test that may have been true at the time, subsequent developments in the law under the Fourth Amendment and the Wisconsin Constitution as described herein render that premise untenable. As such, these precedents should be overruled and no longer followed.

IV. The Court Of Appeals Erred In Affirming The Trial Court's Denial Of Lemberger's Claim Of Ineffective Assistance Of Counsel Without A Hearing.

A. Standard of Review

The U.S. Constitution and the Wisconsin Constitution guarantee criminal defendants the right to effective assistance

[12] While Lemberger contends that *Birchfield* does not control in this case and should not be applied for the reasons discussed herein, *Birchfield* held in the context of *blood tests*, that motorists "cannot be deemed to have consented" to a warrantless blood test even under an implied consent statute. *Birchfield*, 136 S. Ct. at 2186. Thus, there is no question that the central holdings of *Albright*, *Bolstad*, and *Crandall* have been abrogated at the very least in the context of blood tests.

of counsel. *State v. Shata*, 2015 WI 74, ¶ 32, 364 Wis. 2d 63, 868 N.W.2d 93, *citing Strickland v. Washington*, 466 U.S. 668, 686 (1984). *See also* U.S. Const. Amend VI, Wis. Const. Art. I § 7.

A defendant establishes that he was denied effective assistance of counsel by showing deficient performance of trial counsel as well as prejudice to the defense. *Shata*, 2015 WI 74 at ¶ 33. *Banks*, 2010 WI App 107 at ¶ 16. Deficient performance is performance that falls "below an objective standard of reasonableness considering all the circumstances." *State v. Jenkins*, 2014 WI 59, ¶ 36, 355 Wis. 2d 180, 848 N.W.2d 786. An attorney's "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014).

In order to show prejudice, it is sufficient for a defendant to show that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Jenkins*, 2014 WI 59 at ¶ 37. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

Whether a postconviction motion for ineffective assistance of counsel alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law this Court reviews *de novo*. *Id*. *See also State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). When sufficient facts are alleged, "the circuit court has no discretion and *must* hold" a *Machner* hearing. *Bentley*, 201 Wis. 2d at 310 (emphasis added). *See also State v. Allen,* 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

B. Trial Counsel's Failure To Object To The State's Comments Regarding Lemberger's Refusal To Consent To A Warrantless Search Constituted Deficient Performance.

As shown above, the court of appeals unequivocally held in *Banks* that "it is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search." *Banks*, 2010 WI App 107 at ¶ 24. *Banks* also held that "when the State introduced testimony regarding [the defendant's] refusal to voluntarily submit a DNA sample, [his] attorney should have challenged the evidence." *Id*., 2010 WI App 107 at ¶ 25. Because defense counsel in *Banks* failed to object, the court of appeals concluded that trial counsel's performance was constitutionally deficient. *Id*.

Here, as in *Banks*, Lemberger's trial counsel did not object to testimony concerning Lemberger's refusal or at any of the repeated instances the State asked the jury to infer guilt from that refusal. While it is true that Wisconsin's pattern jury instructions referenced *Albright* and *Bolstad* permitting prosecutorial comment on refusal evidence, (App. 129, 132) by the time of Lemberger's trial, subsequent caselaw not only called that rule into question,[13] but expressly found it to be ineffective assistance of counsel to fail to object to a prosecutor's comments about refusing to consent to a warrantless search. *Banks*, 2010 WI App 107 at ¶ 25.

Because *McNeely*, *Banks*, and *Padley* were decided before Lemberger's trial, defense counsel had a constitutional obligation to object to the State's comments. Trial counsel's

[13] Wisconsin pattern jury instruction was last revised in 2006. *Banks* was decided four years later.

failure to do so was constitutionally deficient performance. *Hinton*, 134 S. Ct. at 1089. *Banks*, 2010 WI App 107 at ¶ 25.

C. Trial Counsel's Failure To Object To The Prosecutor's Comments Prejudiced Lemberger's Defense.

The failure of Lemberger's trial counsel to object to the State's pervasive comments about Lemberger's test refusal also created at the very least a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Jenkins*, 2014 WI 59 at ¶ 37. *See also Banks*, 2010 WI App 107 at ¶ 28 (counsel's failure to object to prosecutor's comments concerning a defendant's refusal to consent to a DNA sample was prejudicial).

For all of the reasons Lemberger showed above in Part II(D), the pervasive comments to the jury about Lemberger's supposed "guilty conscience" make clear that it cannot be said "with any confidence that the jury's verdict was untainted by" these comments. *Banks*, 2010 WI App 107 at ¶ 28.

As such, Lemberger adequately pled that he was denied the effective assistance of counsel. As such, the court of appeals erred when it affirmed the trial court's denial of his postconviction motion without a hearing.

V. Lemberger Preserved His Arguments By Clearly Raising Them In The Circuit Court.

A. Standard Of Review

The forfeiture doctrine "is a rule of judicial administration." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177. It is "a fundamental principle of appellate review that issues must be preserved at the circuit court to be raised on appeal as a matter

of right." *Id*. This rule "gives the parties and the circuit court notice of the issue and a fair opportunity to address it; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id*. (internal citations omitted).

Notwithstanding, this Court long ago recognized that new *arguments* on issues that were previously raised in the circuit court are not forfeited. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 505, 311 N.W.2d 320 (1983) (additional argument on issue previously raised was not forfeited). While the forfeiture rule prevents "reversals based on *theories* which did not originate" in the circuit court, *see State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (emphasis added), the rule does not apply to "additional authority or legal analysis." *City of Oshkosh v. Winkler*, 206 Wis. 2d 538, 547, 557 N.W.2d 464 (Ct. App. 1996). Nor does a party's citation to additional caselaw on appeal constitute a forfeiture. *State v. Markwardt*, 2007 WI App 242, ¶ 33, 306 Wis. 2d 420, 742 N.W.2d 546 (party's citation to two additional cases in appellate court does not constitute a "advancement of a new theory on appeal").

Whether a party has forfeited an issue in the circuit court involves application of law to undisputed facts and is reviewed *de novo* without deference to the lower court. *Meyer v. Classified Ins. Corp.*, 179 Wis. 2d 386, 392, 507 N.W.2d 149 (Ct. App. 1993).

B. The Court Of Appeals Erred By Concluding That Lemberger Forfeited His Arguments In The Circuit Court.

The court of appeals erroneously held that Lemberger forfeited his appellate arguments, concluding that he "never even hinted at" them in the circuit court. (App. 109-10, ¶ 9). To the contrary, Lemberger specifically raised the arguments regarding the prosecutor's comments in the context of a claim of ineffective assistance of counsel—as he was required to do based on trial counsel's failure to object to those comments at trial. *Beauchamp*, 2011 WI 27 at ¶ 14. In his postconviction motion, Lemberger argued:

> (1) The State violated Mr. Lemberger's constitutional rights at trial by seeking an adverse inference of guilt on an element of the offense charged based on Mr. Lemberger's exercise of his constitutional right to refuse a warrantless search in the form of a breathalyzer test.
>
> (2) Mr. Lemberger received ineffective assistance of counsel, as evident from trial counsel's failure to object to the State's comments and arguments on Mr. Lemberger's refusal.

(R.49, App. 115).

Those two theories formed the basis of Lemberger's postconviction motion and appeal. Contrary to the court of appeals' ruling, he more than "hinted" at the arguments—he raised them squarely and succinctly. In so doing, Lemberger gave "the parties and the circuit court notice of the issue and a fair opportunity to address" these claims. *Schill*, 2010 WI 86 at ¶ 45 n.21. For this reason, there could be no real concern that a reversal based on these arguments would "sandbag" opposing counsel, *id*., or "blindside" the trial court because

those very theories had already "originated in" the circuit court. *Rogers*, 196 Wis. 2d at 827.

Notwithstanding, the court of appeals faulted Lemberger for not discussing *Albright*, *Bolstad*, and *Crandall* prior to briefing in the court of appeals. (App. 108 at ¶ 6, App. 110 at ¶ 11). Yet, it has long been the rule that merely raising additional caselaw on appeal does not implicate the forfeiture doctrine because citing additional cases does not constitute "advancement of a new theory on appeal." *Markwardt*, 2007 WI App 242 at ¶ 33. *See also Winkler*, 206 Wis. 2d at 547 (no forfeiture merely because party did not give as detailed a presentation to the circuit court as it did on appeal).

The court of appeals also faulted Lemberger for not filing a motion to reconsider in the circuit court (App. 109-10, ¶ 9), suggesting that such a motion "would have at least provided the court with an opportunity to consider" his arguments. (*Id.*) However, the court of appeals' requirement of a motion to reconsider ignores that "[i]f the [circuit] court had not been comfortable making a ruling because of the limited depth of [Lemberger's] analysis, it could have simply requested further briefing." *Markwardt*, 2007 WI App 242 at ¶ 33, *citing Winkler*, 206 Wis. 2d at 548.

Finally, the cases cited by the court of appeals are readily distinguishable and inapposite. The court below cited *Rogers*, *State v. Moran*, 2005 WI 115, 284 Wis. 2d 24, 700 N.W.2d 884, *State v. Kaczmarski*, 2009 WI App 117, 320 Wis. 2d 811, 772 N.W.2d 702, *Townsend v. Massey*, 2011 WI App 160, 338 Wis. 2d 114, 808 N.W.2d 115, and *State v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. None of these cases apply the forfeiture rule in a context where—as here—a party fails to distinguish adverse caselaw or cites to additional authority on appeal.

In *Ndina*, the appellant sought reversal based on a constitutional provision never raised before in the circuit court. *Ndina*, 2009 WI 21 at ¶ 26. In *Townsend*, *Moran*, and *Karczmarski*, the appellants similarly raised statutory claims not previously argued to the circuit court. *Townsend*, 2011 WI App 160 at ¶¶ 19-20; *Moran*, 2005 WI 115 at ¶ 29; *Karczmarski*, 2009 WI App 117 at ¶ 8. In *Rogers*, the appellant sought to argue an entirely new view of the facts. *Rogers*, 196 Wis. 2d at 827. In each of the cases on which the court of appeals relied, the appellants advanced wholly new theories never raised in the circuit court.

In stark contrast, Lemberger clearly raised his arguments in the circuit court in the context of a claim for ineffective assistance of counsel. He merely cited and discussed additional caselaw on appeal. Lemberger adequately preserved the issue, and the court of appeals' contrary argument is in error.[14]

[14] Even had Lemberger failed to preserve his arguments below (which he did not), the forfeiture rule does not prevent this Court from reaching the merits of this case. When an issue "involves a question of law, has been briefed by the opposing parties, and is of sufficient public interest to merit a decision, [the Supreme Court] has discretion to address the issue." *Moran*, 2005 WI 115 at ¶ 31. The issues in this appeal involve questions of law that will be fully briefed. Those issues implicate important questions of statewide merit, as reflected in this Court's decision to grant the petition for review. *See* Wis. Stat. (Rule) 809.62(1r). As such, this Court should consider these issues even if it were to conclude that the court of appeals properly applied the forfeiture rule.

CONCLUSION

For all of the foregoing reasons, Lemberger respectfully requests that this Court reverse the court of appeals and remand this matter to the trial court with instructions to hold a *Machner* hearing on Lemberger's claims of ineffective assistance of counsel.

Dated this 2nd day of December, 2016.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,905 words.

Dated this 2nd day of December, 2016.

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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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 2nd day of December, 2016.

Signed:

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