STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 18 AP 637

JORDAN B. MICKLEVITZ,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

APPEALED FROM MILWAUKEE COUNTY
CIRCUIT COURT
CASE NO. 15 CF 2777
THE HONORABLE
CAROLINA STARK AND FREDERICK ROSA,
PRESIDING

KAY & KAY LAW FIRM
BY: NOLAN A. JENSEN
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STATEMENT OF ISSUES

I. Did the circuit court erroneously deny the motion to suppress evidence gain from a protective sweep, when officers had no articulrable facts to support a reasonable inference that another person was inside Micklevitz's apartment.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

II. Did the circuit court abuse its discretion in not reopening the suppression hearing testimony, when irrefutable evidence was uncovered that officers entered and remained inside the premises for more than 4 hours prior to the execution of a search warrant.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

III. Was Atty. Kohn ineffective when he failed to review discovery which contained evidence that officers' "quick and limited" protective sweep actually lasted for more than 4 hours.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

IV. Was Atty. Kohn ineffective for failing to investigate and argue that officers had entered the curtilage of Micklevitz's apartment when officers bypassed the

locked outer door.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

IV. Was Atty. Kohn ineffective for failing to investigate and argue that officers conducted an illegal seizure the second Officer Chapman placed his foot inside Micklevitz's apartment door.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant, Jordan Micklevitz, would be willing to participate in oral arguments if this Court believes it would be beneficial.

STATEMENT ON PUBLICATION

Defendant-Appellant, Jordan Micklevitz, does request publication as the issues related to the right to bear arms and the protection from search and seizure have historically been unpublished in Wisconsin. Moreover, this Court can further interpret and clarify the law related to the curtilege of multi-family homes, and what should be done when officers conduct a "quick and limited" protective sweep, which lasts for more than four hours.

STATEMENT ON THE CASE

This appeal arises from the trial court's Decision and Order Denying Motion for Postconviction Relief dated March 27, 2018, [R.86], issued by the Honorable Frederick C. Rosa and from the judgment of conviction entered by the Honorable Carolina Stark on February 17, 2017. [R.53]. For purposes of this appeal, Defendant-Appellant, Jordan Micklevitz, will hereinafter be referred to as "Micklevitz" and the State of Wisconsin will hereinafter be referred to as "State."

STATEMENT OF FACTS

On August 20, 2015, Milwaukee Police Squad #4227 was dispatched to 9099 N. 75th St. #206 to check for Micklevitz, who had a want for an allegation of misdemeanor battery. [R.93 at 8]. "A want is a law enforcement created investigative alert to other officers that the department wants to investigate the individual." [R.9 at 1]. A misdemeanor want is not an arrest warrant. That is to say, Officers may not enter the residence, restrain, detain, and/or arrest an individual based upon the 'want.'

To reach apartment #206 officers had to enter the locked common hallway of the apartment building. [R.75 at Exhibit E]. It is

unknown how officers circumvented the locked outer door to the common hallway. In the common hallway officers proceeded to Micklevitz's apartment door. Officers knocked on Micklevitz's door, identified themselves as maintenance, while covering the peephole. [R.93 at 10]. Ostensibly, they said maintenance, because if a person does not answer the door when maintenance is present, maintenance will enter upon their own authority.

A short time later an individual opened the door approximately six inches. The officers asked the individual if he was Jordan Micklevitz, to which Micklevitz replied "Yeah, Hold on." [R.93 at 10]. At this time Officer Chapman placed his foot inside Micklevitz's apartment. [R.93 at 10]. With Officer Chapman's foot inside Micklevitz's apartment, Micklevitz began closing the door. Officers stated, "police, stop pushing on the door." Officers indicated that they the could smell the odor of fresh marijuana emanating from the residence[1]. A struggle ensued over the officers attempting to gain access to Micklevitz's apartment. Eventually officers sprayed Micklevitz with a 6 second burst of O.C. spray. [R.93 at 20]. Micklevitz let go of the door and stubbled to the ground, where he was detained by police. [R.93 at 20-1]. Within 10 seconds of opening

[1]Four days later, after a conference with the Milwaukee District Attorney's office, Officer Zaworski issued Supplemental report No. 2, which indicated a faint smell of marijuana in the hallway. [Exhibit I]. This contradicts the affidavit to the search warrant which indicates marijuana was smelled only upon the opening of Micklevitz's door. [Exhibit C].

the door Micklevitz was detained, and within an additional 5 seconds Micklevitz was in the hallway. [R.93 at 24]. On Micklevitz, officers located a loaded Glock 380[2].

Micklevitz was escorted into the common hallway. Officers explained that once detained, they were unable to see anyone else in the apartment. [R.93 at 23].

Officer Zaworski decided to reenter the apartment because Micklevitz's armed resistive behavior caused him to believe others may be in the apartment. [R.93 at 27]. During this search officers saw magazines, and spent shell casings. However, in Officer Zaworski's supplemental report, after a charging conference with the Assistant District Attorney, Officer Zaworski claimed to have seen the shell casings when Micklevitz was first detained. This was during the 15 seconds officers were in the entry way of Micklevitz's apartment–Struggling to breath and see due to the affects of the O.C. spray. [R.93 at 24-25]. During this "quick" protective sweep which ensued, officers claim to have seen several pieces of contraband in plain view. [R.93 at 27].

According to the CAD report Micklevitz was taken into custody at 7:02 p.m. [R.75 at Exhibit F]. Metadata from photographs taken on scene show Micklevitz handcuffed and outside

[2] Micklevitz was inside his own home and in possession of a valid Wisconsin Concealed Carry License #178513.Micklevitz was also a member of the local gun range and an avid supporter of the Second Amendment.

the building at 7:32 p.m. A picture is taken of the outside of Micklevitz's apartment door at 7:35 p.m. Photographs are taken **inside** of Micklevitz's apartment at the following times:

Time	Number of Photographs	Brief Description
7:35pm	2	
7:36pm	1	An Officer is manipulating a Glock firearm.
7:38pm	2	A Scale is seen on table.
7:39pm	4	One photo shows a second officer's foot.
7:51pm	4	
7:52pm	5	Second officer pictured walking into apartment. Another photo shows an officer in Micklevitz's bedroom.
7:53pm	3	
7:54pm	7	Photos with Micklevitz's closet doors open. Additional photos taken with Micklevitz's gun safe open.
8:09pm	1	The scale from 7:38pm has been moved on the table

[R.74 at Exhibit A].

At 9:08pm Officers advise that they will be a while on scene because they are working on a search warrant. [R.75 at Exhibit F].

At 10:25pm the search warrant affidavit was approved by ADA Marissa Santiago. [R.75 at Exhibit C]. In said warrant, Officer Zaworski admits that Officer Jung field tested and weighed the

tetrahydrocannabinols located inside the apartment and it came back with a weight of 41.3 grams. [R.75 at Exhibit C]. This field test is presumably during the brief protective sweep of the apartment.[3]

At 11:15pm, four additional photos are taken inside the apartment. [R.74].

At 11:44 pm, Judge T. Christopher Dee finally signs the search warrant allowing officers to search apartment #206. [R.75 at Exhibit C].

At the motion hearing, Officer Zaworksi claimed to have entered Micklevitz's apartment only three times before the issuing of the search warrant. [R.93 at 50-52]. (1) to arrest Micklevitz, (2) to search for confederates, (3) to get water for officers to deal with the effects of the O.C. spray. [R.93 at 50-52].

The aforementioned photos show that officers entered and remained inside apartment 206 for 4 hours and 9 minutes prior to the search warrant being signed. Moreover, officers were inside the apartment for two (2) hours and fifty (50) minutes prior to applying for a search warrant. [R:74 at Exhibit A].

Inside the apartment officers located marijuana and other controlled substances. Being an avid supporter of the Second

[3] Additionally, Officer Zaworski cites to an "above-mentioned informant," however, no informant was ever mentioned. It is unclear if this was a typographical error, or if an informant was actually used by police. [Exhibit C at ¶9].

Amendment, Micklevitz's apartment also contained 21 firearms in a gun safe, thousands of rounds of ammunition, and other various hunting outfits and accessories. All of these items were confiscated from Micklevitz.

Attorney Steven Kohn filed a motion to determine the legality of the search on October 29, 2015. [R.7]. Attorney Kohn has admitted he does not recall the specifics of the case. According to Micklevitz, Attorney Kohn only discussed challenging the protective sweep, and no other searches of Micklevitz's apartment were discussed. [R.75 at Exhibit E]. Attorney Kohn only discussed three entry's of Micklevitz's apartment: (1) to arrest Micklevitz, (2) to conduct the protective sweep, and (3) to get water for the officers' eyes. The Court held, after the first motion hearing, that the basis for the search warrant was for the officer's three searches. [R.94 at 8].

The Court reasoned that the officers had a reasonable suspicion for the protective sweep citing: (1) the odor of fresh marijuana, (2) the defendant's resistive behavior (3) viewing a spent bullet casing and other ammunition, [R.74 at photograph 8, taken at 7:35pm] (4) finding a loaded handgun on the defendant. [R.94 at 9-10].

When Micklevitz learned of additional flaws in the officers' search, he retained Atty. James Goldmann. [R.101]. Atty. Goldmann

then filed a Motion to Suppress Fruits of Search of Premises on June 24, 2016. [R.32]. This was a motion to reconsider the circuit courts suppression decision. This motion was not the boilerplate motion previously filed by Atty. Kohn, but clearly addressed the specifics of Mr. Micklevitz's case. [R.32]. Atty. Goldmann challenged: (1) officers entering into the locked outer doors of the apartment building; (2) officers failure to follow the knock and announce rule; (3) illegal arrest of the defendant when he opened the door; (4) the forced entry into Micklevitz apartment; (5) the assault of Micklevitz as officers entered the apartment; (6) the illegal protective sweep. [R.32 at 2]. Further, Atty. Goldmann challenged the issuance of the warrant. [R.102 at 7].

The Court addressed Micklevitz's motion to reconsider on July 6, 2016[4]. The Court specifically addressed the first entry to arrest Mickelvitz as being waived. [R.102 at 4]. However, the Court took the decision a step further and held that all of Mickelvitz's arguments had been waived due to counsel not bringing them up at the prior hearing. The court ignored Atty. Goldmann's proof that officers' testified falsely or incorrectly at the first suppression hearing. [R.32 at 8].

[4] The parties and Court proceed believing that Attorney Cheryl Ward conducted the first motion. However, Atty. Steven Kohn conducted the first motion hearing on January 14, 2016.

With the adverse motion decision, Micklevitz plead guilty to counts 1 and 2. [R.112]. This decision was made even though a witness was willing to testify that the marijuana located at the apartment was hers. [See R.106].

For both counts Micklevitz received a concurrent sentence of 3 years of initial incarceration and 2 years of extended supervision. [R.113]. With these felony convictions, Micklevitz was precluded from exercising his Second Amendment rights. [R.75 at Exhibit D]. A notice of intent to pursue postconviction relief was filed on March 7, 2017. The court of appeals granted extensions for filing of the postconviction motion on September 19, 2017 and November 27, 2017. [R.70, 72].

A postconviction motion was filed with the circuit court on December 29, 2017. [R.73-75]. The circuit court requested additional briefing on the issues on January 2, 2018. A State's response was filed on February 28, 2018 and the Micklevitz's reply was filed on March 22, 2018. [R.81, 84]. The circuit court issued its Decision and Order on March 27, 2018. [R.86]. The notice of appeal was timely filed on April 2, 2018. [R.87]. This appeal now follows.

ARGUMENT

I. THE CIRCUIT COURT INCORRECTLY HELD THAT OFFICERS HAD THE REQUIRED ARTICULABLE FACTS TO SUPPORT A PROTECTIVE SWEEP.

The United States Supreme Court established the law related to protective sweeps in ***Maryland v. Buie***, 494 U.S. 325 (1990). There it was held that an officer could conduct a protective sweep "if the searching officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to officers or to others." ***Id***. at 327 (internal quotation and citation omitted).

The Wisconsin Supreme Court has repeatedly recognized the United States Supreme Court rule regarding protective sweeps.

> Once inside an area a law enforcement officer may perform a warrantless "protective sweep," that is, "a **quick and limited** search of the premises, incident to an arrest and conducted to protect the safety of police officers or others. Under ***Buie*** a law enforcement officer is justified in performing a warrantless protective sweep when the officer possesses " a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the areas swept harbored an individual posing a danger to the officer or others."

State v. Sanders, 2008 WI 85 ¶32 (emphasis added).

In Micklevitz's case, officers did not have the required articulable facts to support the belief that Micklevitz's apartment harbored and individual posing a danger to the officers.

The Court listed four reasons which it held justified the protective sweep. Those were the following: (1) the odor of fresh marijuana, (2) the defendant's resistive behavior, (3) viewing of a spent bullet casing and other ammunition, (4) recovering a loaded handgun on Mickevlitz. [R.94 at 9-10]. None of these reasons made it reasonable for officers to believe another individual was inside Micklevitz's apartment.

First, the odor of fresh marijuana has no relation to a protective sweep. Nothing about the odor of fresh marijuana creates a "rational inference" that officers needed to sweep the apartment to protect the officers. Holding so would completely vacate the warrant requirement in drug cases.

The circuit court then claimed that the odor of fresh marijuana meant that officers needed to search the apartment to ensure evidence was not destroyed. [R.94 at 9]. This reason, again, has no relation to the protection of officers, which was the main reason behind the holding in ***Buie***. Moreover, the circuit court's attempt to make this

an exigent circumstances based upon the odor of marijuana is incorrect.

The odor of marijuana was described by officers as being "fresh" marijuana – not burnt. [R.93 at 31]. Two cases show why the smell of fresh marijuana does not create the exigent circumstances required for a warrantless entry. *See Generally* ***State v. Hughes***, 2000 WI 24, 233 Wis.2d 280, 607 N.W.2d 621 and ***State v. Phillips***, 15AP927 (Cited persuasively attached at 6).

In ***Phillips***, the court of appeals distinguished the case from the case of ***Hughes***. ***Id.*** at ¶¶29-30. Because the marijuana was fresh and not burnt, and because there was no articulable facts showing that other individuals were in the apartment, there was not enough facts to conclude evidence may be destroyed. ***Id.*** at ¶¶29-30.

Moreover, as ***Hughes*** makes clear, the odor of a burning drug alone does not created an exception to the warrant requirement. ***State v. Hughes***, 2000 WI 24, ¶¶27-28, 233 Wis.2d 280, 607 N.W.2d 621. Here, officers did not smell burnt marijuana, they smelled fresh marijuana. [R.93 at 31]. This means there was no fear that evidence was actively being destroyed or consumed. Additionally, officers did not have any articulable facts that anyone else was in the apartment.

Second, a defendant's armed resistive behavior does not create a reasonable suspicion to justify a protective sweep. Holding

so would create a blanket rule allowing officers to search whenever an individual resists. Arguably, even in ***Buie***. the defendant was resisting officers by attempting to hide in the basement of the building. ***Buie***. at 328. Nothing about Micklevitz's resistive behavior, made it more likely that other individuals posing a danger to police were inside Micklevitz's apartment.

Additionally, Micklevitz answering the door while armed is understandable. Micklevitz's apartment building has a lock on the outer door. [R.75 at Exhibit E]. No one had sought to enter his apartment building through the intercom system. Instead, someone was covering the peephole, knocking on his door, and shouting maintenance. [R.93 at 10]. Being an avid supporter of the Second Amendment it was logical that Micklevitz would answer the door armed. It is even more predictable that Micklevitz may, when surprised by officers in the locked common area of the apartment, want to return the firearm to its safe, prior to meeting with officers.

To the circuit courts third and fourth reasons for the protective sweep, Micklevitz being armed, in his own home, and having ammunition, in his own home, does not create a reasonable suspicion that other individuals are within the home. Holding the opposite would act to limit a persons Fourth Amendment Rights when exercising his or her Second Amendment Rights.

The State used a similar argument in the case of ***State v. Schwartz***, 356 Wis. 2d 327, 855 N.W.2d 492 (unpublished, cited persuasively attached at 7). There it was claimed that an empty gun magazine and a rifle round on the table near the defendant "made it possible that someone else in the residence was armed and might ambush police." ***Id.*** at ¶8. The court of appeals in ***Schwartz*** affirmed the suppression of drug evidence.

The Court of Appeals came to a similar decision in ***State v. Kruse***. 175 Wis. 2d 89, 499 N.W.2d 185 (1993). There, Kruse was arrested inside his apartment for a felony burglary warrant and for making threats with a .357 magnum. ***Id.*** at 92. Officers knew of the warrant, the threat, and that another individual lived with Kruse in the apartment. ***Id.*** at 97. Officers knowing that another individual lived in the apartment, and may have access to a .357 magnum, did not create the reasonable suspicion required to perform a protective sweep. ***Id.*** at 98. The court held that the evidence used in a later warrant was fruit of the initial illegal search. ***Id.***

Nothing about Micklevitz exercising his Second Amendment Rights makes it more likely that confederates were lurking in his home. In fact, many individuals exercise their Second Amendment Rights to protect against individuals lurking in their homes.

Moreover, Micklevitz had the required license to be in possession of the concealed firearm at the time of his arrest. [R.75].

The articulable facts with "rational inferences from those facts" did not make it reasonable for officers to believe Micklevitz's apartment harbored an individual posing a danger to the officer or others." ***State v. Sanders***, 2008 WI 85 ¶32, 311 Wis. 2d 257, 752 N.W.2d 713.

Without addressing the officers clear violation of the "quick and limited" portion of the Protective Sweep Doctrine, the circuit court's decision on the original motion was incorrect. This Court should remand with an order to reverse the suppression decision.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN NOT REOPENING TESTIMONY TO ADDRESS THE NEW EVIDENCE AND ISSUES THAT WERE NOT BROUGHT TO THE COURTS ATTENTION IN THE ORIGINAL MOTION.

The circuit court was shown by Attorney Goldmann seven reasons why the original decision not to suppress the evidence was wrong. [R:32]. Moreover, Atty. Goldmann's motion addressed evidence that officers had lied about their number of entrances and the length of entrances into Micklevitz's apartment. [R.32 at pg 9].

Taken a step further, Micklevitz in the postconviction motion was able to show clearly, and without any reasonable doubt, that officers entered and remained inside Micklevitz's apartment for hours prior to the circuit court granting a search warrant. [R.74]. This was in clear violation of ***Buie***'s requirement that a protective sweep be "quick and limited." ***Maryland v. Buie***, 494 U.S. 325, 327 (1990).

A court may, on its own motion or on the motion of the parties, "reopen [a case] for further testimony in order to make a more complete record in the interests of equity and justice." ***See State v. Hanson***, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978). The circuit court has the power to reopen in its sound discretion. ***State v. Vodnik***, 35 Wis. 2d 741, 746, 151 N.W.2d 721 (1967).

In the "interests of equity and justice" the Court should have allowed further testimony addressing the numerous errors surrounding the search of Micklevitz's apartment for two reasons. First, photographic evidence proves that officers violated ***Maryland v. Buie***. Second, Atty. Kohn was ineffective in his representation of Micklevitz at the first hearing.

A. Photographs Taken By Officers Four Hours Prior to the Search Warrant.

Officer Zaworksi claimed to have entered Micklevitz's apartment only three times before the issuing of the search warrant. [R.93 at 50-52]. (1) To arrest Micklevitz, (2) to search for confederates, (3) to get water for officers to deal with the effects of the O.C. spray. [R.93 at 50-52].

Photos taken by officers on scene show that officers were in Micklevitz's apartment from the time of arrest at 7:02 pm until 11:15 pm. A warrant was not issued until 11:44 pm. [R:75 at Exhibit C]. This warrant references the viewing and testing of marijuana within Micklevitz's apartment. Additionally, the CAD report references that officers were working on a search warrant at 9:08 pm. [R.75at Exhibit F]. At this time, officers had already taken 29 pictures of Micklevitz's entire apartment.

> Once inside an area a law enforcement officer may perform a warrantless "protective sweep," that is, "a **quick and limited** search of the premises, incident to an arrest and conducted to protect the safety of police officers or others. Under ***Buie*** a law enforcement officer is justified in performing a warrantless protective sweep when the officer possesses " a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the areas swept harbored an individual posing a danger to the officer or others."

State v. Sanders, 2008 WI 85 ¶32 (emphasis added).

A more than four hour protective sweep, involving photographs, and testing of evidence,[5] is not quick and limited sweep. A protective sweep "may last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest **and depart the premises**." ***Id***. at 33 (emphasis added). Micklevitz was photographed arrested outside the building at 7:32 pm. Presumably, officers had already left the premises, before deciding to return and take photographs and test evidence.

The photographs with the metadata attached can paint a clearer picture than any brief. [R:74].

The State in its postconviction response dedicated one paragraph to this epiphany. [R:81 at 17]. The State's defense to the evidence that officers lied in their testimony was as follows: "The record is void of any indication that the camera . . . was properly set/calibrated with the correct time . . ." [R:81 at 17].

The CAD report taken with the date and time of the photographs dispels any doubt that the camera was not set to the

[5]"After taking Micklevitz into custody, Affiant did a protective sweep for lurking confederates of the apartment and observed four sandwich bags containing a green, leafy plan like substance suspected to be marijuana and thirteen corner cut bags containing a green, leafy plant-like substance suspected to be marijuana on a stool in the living room of the apartment. Affiant later transported the suspected marijuana to District 4 where it was turned over to Police officer Travis Jung hereinafter refereed to as PO Jung. PO Jung . . . Field test[ed] and found that it tested positive for tetrahydrocannabinols . . ." Affidavit approved on August 20, 2015 at **10:25pm**. [R. 75 Exhibit C].

correct time. [R.75 at Exhibit F]. Moreover, simply viewing the sunlight setting outside of the apartment window can create a valid assumption that these photographs were not being taken at 11:44 pm, when the warrant was granted.

The information that officers testimony was at best incorrect, or at worst, a lie, should have been enough evidence that required the court to reopen testimony "in the interests of equity and justice." ***See State v. Hanson***, 85 Wis. 2d at 237. It was an abuse of discretion for the circuit court to not reopen testimony when it was clear the court's decision was based on incorrect information.

B. Atty. Kohn Was Ineffective for Failing to Properly Review Discovery and Failing to Address the Multiple Other Fourth Amendment Violations.

Atty. Kohn was deficient for numerous reasons related to the suppression hearing which occurred on January 14, 2016. [R.93]. First, Atty. Kohn failed to review the discovery, which the previous section shows had crucial information related to the number and length of the protective sweep conducted by officers.

Counsel's failures amount to ineffective assistance of counsel. ***See Strickland v. Washington***, 466 U.S. 668, 687 (1984). To meet this standard the defendant must prove both that counsel's performance was deficient and that the deficient performance was

prejudicial. Counsel's performance is deficient when it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). The attorney's performance is measured against the objective standard of what a reasonably prudent attorney would do in similar circumstances.

The "who, what, when, where, why, and how" was sufficiently addressed in the postconviction motion. [R:73 at 7]. ***See Generally State v. Allen***, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d.. The circuit court did not address whether Atty. Kohn's errors were deficient performance. [R.86 at 5]. Instead the circuit court only addressed prejudice prong of ***Strickland.*** [R.86 at 5].

It appears it was the circuit court's decision that there was not a reasonable probability that the errors would have resulted in the proceedings being different. [R.86 at 5] citing ***State v. Erickson***, 227 Wis.2d 758, 769 (1990). Then the circuit court went on to briefly describe why the court "would have determined" that individual searches and acts by officers would have been reasonable. [R.86 at 5].

Notably, the circuit court ignored without reference the proof that officers were inside the apartment taking pictures and testing evidence long before the warrant was granted. Evidence that clearly contradicts the testimony taken on January 14, 2016.

The circuit court would have come to a different conclusion regarding the suppression of evidence if the court had been aware of the evidence overlooked by Atty. Kohn. This means that Micklevitz was prejudiced by Atty. Kohn's actions.

Atty. Kohn's errors were threefold. First, he failed to review the discovery, which conclusively showed that officers were inside the apartment long before the search warrant was granted. Second, Atty. Kohn failed to investigate or argue that officers entered the curtilage of Micklevitz's apartment when the officers bypassed the locked outer door. Finally, Atty. Kohn failed to argue that officers violated the Fourth Amendment the moment Officer Zaworski placed his foot inside Micklevitz's apartment.

i. Review of Discovery

To Atty. Kohn's investigation failures, the previous section outlines how officers entered and remained in Micklevitz's apartment for more than four hours and nine minutes.

> Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge.

Moore v. United States, 432 F.2d 730, 735 (3rd Cir. 1970).

Atty. Kohn's investigative oversight fell outside of the "objective standard of reasonableness," for attorneys. ***State v. Behnke***, 203 Wis. 2d 43, 62, 553 N.W.2d 265 (Ct. App. 1996).

Atty. Kohn's failure prejudiced Micklevitz by preventing the defense from impeaching the credibility of officers' claims that they entered the apartment three times. [R.93 at 50-52]. Officers remaining in the apartment shows that this was not the quick and limited protective sweep that officers claimed. But instead, this was a full search of the premises, without a warrant, and without a justifiable reason. The credibility of officers was crucial in determining how credible it was that officers had arctiularble facts that another person was inside the apartment.

ii. Investigating Officers Entry into the Curtilage of Micklevitz's Apartment

Next, Atty. Kohn was deficient for failing to determine that Micklevitz's apartment building had a locked outer door that was bypassed by officers. [R.75 at Exhibit E]. Atty. Kohn could have discovered this information by either going to the scene or speaking with his client. This investigation would have lead to a crucial argument–that officers were in the curtilege of Micklevitz's

apartment long before Officer Chapman placed his foot inside the Micklevitz's apartment door.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. ***State v. Dumstrey***,2016 WI 3, ¶22, 366 Wis. 2d 64, 873 N.W.2d 502 (internal citations omitted). "Indeed, 'it is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ***Id.*** "Given the heightened fourth Amendment protection, where the police effectuate a warrantless arrest inside of a home, the State must prove that the warrantless entry was justified by exigent circumstances." ***Id.***

"The protection provided by the Fourth Amendment to a home also extends to the curtilage of a residence. ***Id.*** at ¶23. This protection extends not only to areas in which the Court has historically considered part of the home because it is "associated with the sanctity of a [person's] home and the privacies of life," but also to places where the person "has a legitimate expectation of privacy." **Id.**

The Wisconsin Supreme Court in passing stated that the common storage area in an apartment building's basement was 'clearly within the curtilage' of the home. ***See Generally Id.*** However, in ***Dumstrey***, the Court Declined to rely upon a "passing

remark... to support the proportion that common area beneath an apartment building constitutes curtilage of the home." ***Id.*** Rather, the Wisconsin Supreme Court relies upon the ***Dunn*** factors to determine on a case by case basis "whether the area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection. ***Id.*** at 32, citing ***United States v. Dunn***, 480 U.S. 294, 301, 1007 S.Ct. 1134, 94 L.Ed.2d 326 (1987). The factors to consider in ***Dunn*** are the following: "(1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within the enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by." **Id.**

In this case, in review of the concurring opinion in ***Dumstrey*** that relies upon and discusses the concept of "open to the public" and "enclosures" and reviewing the dissenting opinion, the hallway outside of Micklevitz's apartment is within the curtilage of his home. Officers were not granted access to this hallway by legal means. Neither did officers receive consent of Micklevitz to enter into the building. Therefore, officers were unlawfully in the curtilage of Micklevitz's home when they first allegedly smelled fresh marijuana.

By simply speaking with Micklevitz, Atty. Kohn could have discovered that officers bypassed the locked outer door and entered the curtilage of Micklevitz's apartment. This error prejudiced Micklevitz's by preventing the court from addressing this argument at the suppression hearing.

iii. Officer Chapman Placing His Foot Inside Micklevitz's Apartment Prior to Any Exigency.

Atty. Kohn was defective for failing to challenge Officer Chapman's entry into Micklevitz's apartment prior to any exigent circumstances. Failure to challenge this entry prejudiced Micklevitz because all evidence collected after should have been suppressed.

Officer Chapman placed his foot inside Micklevitz's apartment immediately after Micklevitz acknowledged his identity. [R.93 at 10]. At this moment, the officer violated the Fourth Amendment. [R75 at Exhibit G] ***See State v. Johnson***, 177 Wis. 2d 224, 227, 501 N.W.2d 876 (Ct. App. 1993); ***see also State v. Larson***, 2003 WI App 150 ¶10, 266 Wis. 2d 236, 668 N.W.2d 338. Officers did not have an arrest warrant, they had only a misdemeanor want. [R.9 at 1]. "A want is a law enforcement created investigative alert to other officers that the department wants to investigate the individual." [R.9 at 1].

> This court's decision in ***Johnson*** clearly teaches that even if the officer's incursion only extends from the tips of his toes to the balls of his feet, this incursion is the fixed "first footing" against which the United States Supreme Court and the Wisconsin Supreme Court have previously warned. Applying this reasoning to the instant case, it is without question that Zuhlke's step into the threshold, preventing Larson from closing the door, was an entry for Fourth Amendment purposes.

Id. at ¶11 (internal citation omitted).

Once Micklevitz opened the door, Officer Chapman placed his foot inside the residence. [R.93 at 10]. Officers did not have a warrant to enter Micklevitz's apartment. In addition to officers unlawfully being in the curtilage of Micklevitz's apartment, all evidence gained after Officer Chapman placed his foot inside Micklevitz's apartment, should have been suppressed.

The only reason this argument did not make it to the circuit court's attention was the failure of Atty. Kohn. This error again had a reasonable likelihood of suppressing the evidence within Micklevitz's apartment.

Addressing the prejudice to Micklevitz's case, this court should aggregate the effects of all of Atty. Kohn's errors. ***State v. Thiel***, 2003 WI 11, ¶ 60, 264 Wis. 2d 571, 665 N.W.2d 305. This Court should remand the case for a ***Machner*** hearing to address the errors of Atty. Kohn.

CONCLUSION

This Court should reverse the circuit court's decision denying the suppression of evidence, because the decision did not follow the precedent set by the court of appeals.

In the alternative, this Court should order this case remanded, the judgement of conviction vacated, and the suppression hearing reopened, due to the circuit courts abuse of discretion on not reopening testimony regarding the suppression hearing.

Finally, in the alternative, this Court should remand the case for a ***Machner*** hearing to gather evidence regarding the deficient performance of Atty. Kohn.

Dated this 7th day of June, 2018.

Respectfully submitted:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font.

The length of this brief is 5,502 words.

Signed:

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 7th day of JUNE, 2018.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.12(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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I hereby certify this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, **on JUNE 7, 2018,** I further certify that th brief and appendix was correctly addressed and postage was pre-paid.

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