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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2020 AP 1406 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC TRYGVE KOTHBAUER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED
ON JULY 27, 2020, IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY, THE HONORABLE
STEVEN R. CRAY, PRESIDING

Respectfully Submitted,

ERIC TRYGVE KOTHBAUER,
Defendant-Appellant.

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Statement on Publication

Defendant-appellant does not request publication of the opinion in this appeal.

Statement on Oral Argument

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF CASE AND FACTS

On the night of March 23, 2016, at or about 2:07 a.m., Eric Trygve Kothbauer was stopped by Officer Michael Checkalski for failing to stop at a stop sign and conducting an illegal turn.[1] During the course of the investigation, Officer Checkalski expanded the scope of the stop into an investigation for operating while intoxicated (OWI) based upon him noting an odor of intoxicants, Mr. Kothbauer's admission to drinking, and Mr. Kothbauer's driving behavior.[2] After Mr. Kothbauer stepped out of the vehicle, Officer Checkalski asked Mr. Kothbauer if he could conduct a pat down search.[3] Mr. Kothbauer agreed.[4] However, Officer Checkalski did not conduct a pat down search, and instead put his hands directly into Mr. Kothbauer's pockets without first patting him down.[5]

Officer Checkalski then had Mr. Kothbauer perform Standardized Field Sobriety Tests (SFTS).[6] While administering the Walk and Turn test, Mr. Kothbauer informed Officer Checkalski that he had balance issues due to having been the victim of five roadside bombs during his service in Iraq.[7] Mr. Kothbauer asked for an alternative test.[8] Officer Checkalski told Mr. Kothbauer he could do an alternative test if he did not wish to do the Walk and Turn test.[9] Mr. Kothbauer

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[1] R.2 at 4.
[2] ***Id.***
[3] R.37.
[4] ***Id.***
[5] ***Id.***
[6] R.2 at 4.
[7] ***Id.*** at 5.
[8] ***Id.***; R.37.
[9] R.2 at 5.

stated he wished to do an alternative test.[10] Following Mr. Kothbauer's performance on the Horizontal Gaze Nystagmus (HGN) and One Leg Stand tests, Mr. Kothbauer was placed under arrest for OWI.[11] Mr. Kothbauer was asked to submit to an evidentiary chemical test of his blood, which he did.[12] On April 8, 2016, Officer Checkalski received a copy of the blood results from the Wisconsin State Laboratory of Hygiene.[13] The blood results came back at a 0.127 blood alcohol concentration.[14] Based upon these results, Officer Checkalski also issued Mr. Kothbauer a citation for operating with a prohibited alcohol concentration (PAC), as a second offense.[15] This entire incident, from the initial stop to Mr. Kothbauer's arrest, as has been described above, was captured on Officer Checkalski's L3 Dash Cam.[16] This footage does not provide a clear and up-close video of Mr. Kothbauer's eyes.[17]

Mr. Kothbauer was charged with one count of OWI, as a second offense, and one count of PAC, as a second offense, on April 19, 2016.[18] On September 13, 2016, Mr. Kothbauer was appointed trial counsel, who served as Mr. Kothbauer's attorney through trial.[19] On March 27, 2017, trial counsel filed a Motion to Suppress

[10] R.37.
[11] R.2 at 5.
[12] R.2 at 6.
[13] R.2 at 7.
[14] ***Id.***
[15] ***Id.***
[16] R.37.
[17] ***Id.***
[18] R.2.
[19] R.17.

Statements, claiming Officer Checkalski attempted to elicit incriminating statements from Mr. Kothbauer without first administering a ***Miranda*** warning.[20] A letter brief in support of that motion was filed on April 7, 2017.[21] A motion hearing was to be held on the issue of Mr. Kothbauer's statements on May 30, 2017.[22] At the motion hearing, the court asked the State if it was ready to proceed with the scheduled motion hearing, which the State responded it was not.[23] The court stated it could then either grant the motion, or issue a voluntary dismissal.[24] When the court asked trial counsel how it wished to proceed, trial counsel requested the court set the matter out for a motion hearing, as he wanted the issue before the court to be "fleshed out."[25] At the May 30, 2017 hearing, the court advised trial counsel that he could file a motion to dismiss if he wished to be heard on the suppression matter further.[26] Trial counsel filed a motion to dismiss on August 11, 2017.[27]

A motion hearing was held on the issue of the Motion to Suppress Statements and Motion to Dismiss on November 20, 2017, in which Officer Checkalski testified.[28] The court found that the statements made by Mr. Kothbauer and the questions asked by Officer Checkalski did not fall under the custodial interrogation

[20] R.23.
[21] R.24.
[22] R.26.
[23] R.96 at 2.
[24] ***Id.***
[25] ***Id.*** at 3.
[26] ***Id.*** at 5.
[27] R.28.
[28] R.94.

standard set forth in ***Miranda v. Arizona***, 384 U.S. 436.[29] As such, the court denied both the Motion to Suppress Statements and Motion to Dismiss.[30] Trial counsel filed a motion for reconsideration on March 7, 2018 regarding the Motion to Suppress Statements and Motion to Dismiss.[31] Trial Counsel argued Officer Checkalski went beyond the time necessary to complete the mission of the traffic stop when he asked Mr. Kothbauer unnecessary and argumentative questions.[32] These questions created an unnecessary delay in the Mr. Kothbauer's stop.[33] Trial counsel asserted "the unnecessary escalation of this stop results in not only a 5th Amendment violation, but a 4th Amendment violation as well pursuant to the Smith [***State v. Smith,*** 2018 WI ¶ 2, 376 Wis. 2d 86, 905 N.W. 2d 353] case."[34] At the time of his filing of the motion for reconsideration, trial counsel attached two disks which contained the L3 Dash Cam footage of Mr. Kothbauer's detention and arrest.[35] The court issued an Order Denying the Defendant's Motion to Reconsider on May 23, 2018.[36] The court stated it reviewed the L3 Dash Cam footage of the incident.[37] The court found when Mr. Kothbauer made incriminatory statements, he was not in custody for purposes of ***Miranda***.[38] No other motions to suppress were filed in Mr. Kothbauer's case.

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[29] ***Id.*** at 29.
[30] ***Id.*** at 31.
[31] R.35.
[32] R.35 at 2-3.
[33] ***Id.***
[34] ***Id.*** at 3.
[35] R.37
[36] R.38
[37] ***Id.***
[38] ***Id.*** at 2.

A jury trial was held on April 22, 2019.[39] At the trial, trial counsel asked the judge what was allowed for questioning of the witnesses with respect to Mr. Kothbauer's medical issues.[40] Trial counsel informed the court he was aware that head injuries could cause nystagmus and wanted to know the limitations of questioning.[41] The court informed trial counsel any statements made by Mr. Kothbauer to Officer Checkalski would be admissible, but any statements by any doctors would be hearsay, and Mr. Kothbauer's medical documentation would not be admissible due to there being a lack of foundation.[42] These medical records showed Mr. Kothbauer was diagnosed with a traumatic brain injury caused by an improvised explosive device (IED) explosion in November 2010.[43] His records further showed this incident had given him dizziness, headaches, affected his sleep as well as his balance, and he was found to have a slower than normal perception time along with difficulty activating the correct posture stabilizers to maintain an upright position against an incline or decline in the support surface.[44]

Trial counsel did not subpoena Mr. Kothbauer's physician or other qualifying medical professional, nor did he submit Mr. Kothbauer's medical records to the court or the State in advance. As such, trial counsel was not able to admit any

[39] R.98.
[40] ***Id.*** at 37.
[41] ***Id.***
[42] ***Id.*** at 38.
[43] R.79 at 48-50.
[44] ***Id.*** at 43-45.

medical documentation or testimony relating to Mr. Kothbauer's medical conditions.[45]

At the trial, Officer Checkalski testified.[46] On direct examination, Officer Checkalski stated he had received training in administering field sobriety tests.[47] Officer Checkalski testified he told Mr. Kothbauer he needed to speak with him outside the vehicle based upon Mr. Kothbauer's driving behavior, the fact he had admitted to consuming alcohol, and Officer Checkalski's observations of possible impairment (slow and delayed speech, slow reaction time).[48] Officer Checkalski put Mr. Kothbauer through SFST. On the HGN test, Officer Checkalski testified he noted four clues.[49] On the Walk and Turn test, Officer Checkalski stated he observed Mr. Kothbauer break the instructional stance before Mr. Kothbauer informed Officer Checkalski he had balance issues with his leg.[50] Officer Checkalski testified he did not observe any issues with Mr. Kothbauer that were noticeable with his walking or completing the Walk and Turn test.[51] Officer Checkalski testified that Mr. Kothbauer stated he did not want to complete the test and asked if there was an alternative test he could take, to which Officer Checkalski stated there was not.[52] Officer Checkalski also testified Mr. Kothbauer performed the One Leg Stand test,

[45] R.98 at 38**.**
[46] ***Id.*** at 43.
[47] ***Id.*** at 50.
[48] ***Id.*** at 53.
[49] ***Id.*** at 58.
[50] ***Id.*** at 61.
[51] ***Id.*** at 61-62.
[52] ***Id.*** at 62.

during which he noted multiple clues.[53] Officer Checkalski testified he had Mr. Kothbauer perform an alphabet test, which Mr. Kothbauer successfully completed.[54] After Mr. Kothbauer performed the tests, Officer Checkalski testified that he placed Mr. Kothbauer under arrest for OWI.[55]

On cross examination, trial counsel asked Officer Checkalski if he had performed a pat down search of Mr. Kothbauer.[56] Officer Checkalski testified he asked for Mr. Kothbauer's consent to perform a pat down search, and Mr. Kothbauer consented.[57] Officer Checkalski stated he then performed a pat down search.[58] Trial counsel questioned Officer Checkalski, stating that he did not perform a pat down search, but simply placed his hands directly into the pockets of Mr. Kothbauer.[59] Officer Checkalski stated in response "Based on my report, that is when I found the tins of chew."[60] Trial counsel then asked Officer Checkalski if he had reviewed the L3 Dash Cam footage of the arrest prior to his appearance at trial, to which Officer Checkalski stated he had not.[61] Officer Checkalski stated he asked Mr. Kothbauer to step out of the vehicle "to speak with him further regarding, yes, the tests or the

[53] ***Id.*** at 62-64.
[54] ***Id.*** at 64.
[55] ***Id.***
[56] ***Id.*** at 77.
[57] ***Id.*** at 78.
[58] ***Id.***
[59] ***Id.***
[60] ***Id.***
[61] ***Id.*** at 79.

observations with intent to, yeah, have Mr. Kothbauer perform tests, if he would consent to [the tests]."[62]

Officer Checkalski testified he had lost his original report from the night of March 23, 2016, and rewrote possibly two weeks or more after the arrest.[63] Trial counsel was aware that Officer Checkalski had lost his original report, as the report trial counsel had received in discovery was the rewritten report.[64] Officer Checkalski testified Mr. Kothbauer had informed him that he had been injured by five roadside explosives while in Iraq around six years earlier.[65] Officer Checkalski further testified he was aware nystagmus could be caused by something other than intoxication, such as certain health issues.[66] In his closing statement, trial counsel reminded the jury that even though Officer Checkalski was aware of Mr. Kothbauer's physical injuries, he still administered him balance based tests.[67]

Mr. Kothbauer also testified at trial. On direct examination, Mr. Kothbauer testified that while he consented to a pat down search, Officer Checkalski never conducted a pat down search.[68] Mr. Kothbauer testified Mr. Checkalski simply put his hands directly into Mr. Kothbauer's pockets, and that action made him "furious."[69] Mr. Kothbauer also testified that, when he was asked to perform the

[62] ***Id.***
[63] ***Id.*** at 81.
[64] ***Id.***
[65] ***Id.*** at 87.
[66] ***Id.*** at 81.
[67] ***Id.*** at 181.
[68] ***Id.*** at 145.
[69] ***Id.***

Walk and Turn test, he informed Officer Checkalski that he would have difficulty due to his injuries.[70]

In its closing, the State used the fact Mr. Kothbauer did not present any documentations about his injuries as evidence Mr. Kothbauer's performance on the SFST were due to intoxication by stating, "Now, he claims that there was leg injuries here, and we don't have any real proof of that other than him saying so."[71] At the conclusion of the trial, the jury returned a verdict of not guilty on the OWI charge and guilty on the PAC charge.[72] The court dismissed the OWI charge on its own motion.

Mr. Kothbauer proceeded to sentencing on May 13, 2019.[73] Mr. Kothbauer was sentenced to ten days in the Chippewa County Jail, a license revocation of twelve months, an interlock order for twelve months, and to pay fines totaling $1,464.00.[74] Trial counsel filed Mr. Kothbauer's Notice of Intent to Pursue Postconviction Relief on May 13, 2019.[75] Mr. Kothbauer filed a Motion for Postconviction Relief on April 2, 2020.[76] The State filed its Response to Defendant's Postconviction Motion on May 19, 2020.[77] Mr. Kothbauer filed his

[70] ***Id.*** at 147.
[71] ***Id.*** at 178.
[72] ***Id.*** at 195.
[73] R.99.
[74] R.63.
[75] R.61.
[76] R.79.
[77] R.81.

Reply Brief on May 22, 2020.[78] The court issued an Order Denying Mr. Kothbauer's Motion for Postconviction Relief without an evidentiary hearing on July 27, 2020.[79]

In his Motion for Postconviction Relief, Mr. Kothbauer alleged that trial counsel was ineffective and his performance was unfairly prejudicial to Mr. Kothbauer.[80] In his Motion for Postconviction Relief, Mr. Kothbauer explained trial counsel was ineffective for failing to file suppression motions on the issues of Officer Checkalski's unlawful search and seizure of Mr. Kothbauer, as well as on the field sobriety tests and the evidence derived from them.[81] Mr. Kothbauer also explained that trial counsel's strategy was ineffective, as trial counsel sought to suppress statements Mr. Kothbauer made based upon a ***Miranda*** violation when caselaw made it clear he was not in custody and ***Miranda*** did not apply.[82] Trial counsel was further ineffective for failing to utilize the L3 Dash Cam footage of Mr. Kothbauer's arrest, as such footage showed Officer Checkalski illegally searched and seized Mr. Kothbauer when he put his hands directly into Mr. Kothbuaer's pockets in lieu of performing the pat down search he was given permission to perform.[83] The footage also showed Officer Checkalski did not properly administer the SFST as required by National Highway Traffic Safety Administration (NHTSA) training.[84] Officer Checkalski did not ask Mr. Kothbauer if he had suffered any

[78] R.82.
[79] R.87; (App. A-11).
[80] R.79.
[81] ***Id.*** at 5, 10.
[82] ***Id.*** at 13.
[83] ***Id.*** at 15-16; R.37.
[84] ***Id.*** at 15; R.37.

injuries that would have affected his performance on the tests, and even after Officer Checkalski had been made aware Mr. Kothbauer had suffered injuries pertaining to his legs and had issues with balance, he still wished for him to perform the Walk and Turn test.[85] The footage further showed how Officer Checkalski informed Mr. Kothbauer that he could perform an alternate test instead of the Walk and Turn, and how Officer Checkalski never told Mr. Kothbauer he would penalize him if he did not perform the test.[86] Finally, Mr. Kothbauer argued in his Motion for Postconviction Relief that his trial counsel was ineffective for not obtaining a medical expert or presenting Mr. Kothbauer's medical records to bring forth evidence of Mr. Kothbauer's injuries at trial.[87]

The court pointed to six reasons as to why there was no need for there to be an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).[88] The court found that Mr. Kothbauer was not seized due to there being, in the court's eyes, no evidence that Mr. Kothbauer did not consent to the search of his person.[89] The court found trial counsel was not ineffective for failing to file a suppression motion on the results of the field sobriety tests due there being no case law cited stating an officer must strictly follow the National Highway Traffic Safety Administration manual in having a driver perform SFST.[90] The court

[85] ***Id.*** at 15-16; R.37.
[86] ***Id.*** at 15-16; R.37.
[87] ***Id.*** 16-17.
[88] R.87.
[89] ***Id.*** at 2.
[90] ***Id.*** at 2-3.

further stated Mr. Kothbauer declined to perform an alternative test when offered one by Officer Checkalski, and no evidence was presented to indicate Officer Checkalski did not consider all of these issues when making his arrest decision.[91] The court also saw no facts presented to it that supported a claim that trial counsel's strategy was ineffective in regards to the PAC charge, as Mr. Kothbauer was found not guilty of OWI.[92] The court also found trial counsel made no mistake in failing to present the L3 Dash Cam footage, saying such a choice was a "strategic decision and has rational basis."[93] The court also found trial counsel was not ineffective for failing to present expert testimony or Mr. Kothbauer's medical records, stating no evidence was presented to show what exactly an expert would testify to, along with what opinions they would have put forth that would be admissible at trial.[94] Further, the court claimed testimony about Mr. Kothbauer's disability would have gone to the OWI charge.[95] The court also claimed that the records contained information adverse to Mr. Kothbauer's position, with the court specifically quoting the following:

> He has full active range of motion in all four extremities. Strength is 5/5. No focal sensory deficits. Reflexes are 2+. Finger-to-nose and heel-to-shin are within normal limits. He is able to walk on toes and heels and perform single leg stance…MCT: Pt is able to react in timely manner to maintain balance amidst varying amplitude perturbations.[96]

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[91] ***Id.*** at 3.
[92] ***Id.***
[93] ***Id.***
[94] ***Id.*** at 4.
[95] ***Id.***
[96] ***Id.***

The court stated had the medical records attached to the Motion for Postconviction Relief been introduced, the prosecutor could have "made much of such information."[97] Lastly, the court found the records demonstrate Mr. Kothbauer is not entitled to relief even when the arguments are taken cumulatively.[98] Mr. Kothbauer now files this appeal.[99]

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE SUPPRESSION MOTIONS THAT WOULD HAVE CHANGED THE OUTCOME OF MR. KOTHBAUER'S CASE.

A. Standard of Review

A claim of ineffective assistance of counsel presents a mixed question of law and fact.[100] A Court's findings of fact are reviewed for clear error, but whether counsel's performance is constitutionally infirm is a question of law reviewed *de novo.*[101] Evidentiary issues are reviewed under the erroneous exercise of discretion standard.[102]

B. Governing Law

The Sixth Amendment guarantees the "fundamental and essential" right of the defendant in a criminal case to be represented by counsel.[103] "That a person who happens to be a lawyer is present at the trial alongside the accused, however, is not

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[97] ***Id.***
[98] ***Id.*** at 5.
[99] R.88.
[100] ***State v. Champlain***, 2008 WI App 5, 307 Wis. 2d 232, 744 N.W.2d 889.
[101] ***Id.***
[102] ***State v. Tabor***, 191 Wis. 2d 482, 488, 529 N.W.2d 915 (Ct. App. 1995).
[103] ***Gideon v. Wainwright***, 372 U.S. 335, 344 (1963).

enough to satisfy the constitutional command."[104] Thus, the right to counsel encompasses the right to the effective assistance of counsel.[105]

A claim of ineffective assistance of counsel is typically analyzed under the two-part ***Strickland*** test, which requires showing both that counsel performed deficiently and that his or her performance prejudiced the defense.[106] However, some circumstances "are so likely to prejudice the accused" that specific prejudice need not be litigated.[107] For example, prejudice may be presumed when the accused is denied counsel entirely, when counsel fails to subject the prosecution's case to meaningful adversarial testing, or on occasions when even a competent advocate could not be expected to provide effective assistance of counsel under the circumstances.[108]

To demonstrate deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering the totality of the circumstances.[109] "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer."[110] The defendant must also demonstrate that trial counsel's deficient performance was

[104] ***Strickland v. Washington***, 466 U.S. 668, 685 (1984).
[105] ***McMann v. Richardson***, 397 U.S. 759, 771 n.14 (1970).
[106] ***Strickland v. Washington***, 466 U.S. at 687.
[107] ***United States v. Cronic***, 466 U.S. 648, 658 (1984).
[108] ***Id.*** at 659-60.
[109] ***Id.***
[110] ***Id.***

prejudicial.[111] "The question on review is whether there is a reasonable probability" of a different result at trial but for counsel's deficient performance.[112] "Reasonable probability" is defined as "probability sufficient to undermine confidence in the outcome."[113]

A single unreasonable error is sufficient to a finding of ineffectiveness.[114] "[T]he right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial.[115]" Although the court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound plan.[116]" "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."[117]

The deficiency prong is met when counsel's oversight or inattention caused the error, instead of a reasoned defense plan.[118] Strategic decisions made after less

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[111] ***Id.***
[112] ***Id.***
[113] ***Id.***
[114] ***Kimmelman v. Morrison***, 477 U.S. at 383; see also: ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984).
[115] ***Murray v. Carrier***, 477 U.S. 478, 496 (1986).
[116] ***Strickland***, 466 U.S. at 690; ***Kimmelman***, 477 U.S. at 384, *citing* ***Strickland***, 466 U.S. at 688-89.
[117] ***Id.***, *citing* ***Strickland***, 466 U.S. at 689.
[118] *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Kimmelman v. Morrison***, 477 U.S. 365, 385 (1986); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis. 2d 343, 433 N.W.2d 572, 576 (1989).

than complete investigation of law and facts may still be adjudged reasonable.[119] But "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[120]" This Court must assess a given decision's reasonableness in light of "all the circumstances.[121]"

The defendant must also demonstrate that trial counsel's deficient performance was prejudicial.[122] The Wisconsin Supreme Court explicitly applies the "cumulative effect" approach to decide whether trial counsel's deficient performance prejudiced the defendant.[123] The second prong requires resulting prejudice. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case."[124] Rather, "[t]he question on review is whether there is a reasonable probability" of a different result but for counsel's deficient performance.[125] "Reasonable probability," under this standard is defined as "'probability sufficient to undermine confidence in the outcome.[126]'" In addressing this issue, the court normally must consider the totality of the circumstances.[127]

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[119] ***Strickland***, 466 U.S. at 690–91.
[120] ***Id.*** at 691.
[121] ***Id.***
[122] ***Id.*** at 687.
[123] ***State v. Thiel***, 264 Wis. 2d 571, 603–05, 665 N.W.2d 305 (2003) (citing, *inter alia*, ***Washington v. Smith***, 219 F.3d 620, 634–35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under ***Strickland***, rather than the individual errors."); ***Gonzales v. McKune***, 247 F.3d 1066, 1078 n.4 (10th Cir. 2001) ("***Strickland*** . . . makes it clear that all acts of inadequate performance may be cumulated in order to conduct the prejudice prong.")).
[124] ***Moffett***, 433 N.W.2d at 576, *quoting* ***Strickland***, 466 U.S. at 693.
[125] ***Moffett***, 433 N.W.2d at 577.
[126] ***Id.***, *quoting* ***Strickland***, 466 U.S. at 694.
[127] ***Strickland***, 466 U.S. at 695.

C. Trial Counsel was Ineffective for Failing to Seek to Suppress Evidence Derived from Mr. Kothbauer's Unlawful Seizure.

Mr. Kothbauer was illegally detained as well as illegally searched and seized by Officer Checkalski, and trial counsel was ineffective for failing to challenge these Fourth Amendment violations. Upon stepping out of his vehicle at Officer Checkalski's command to perform field sobriety tests, Officer Checkalski asked Mr. Kothbauer, "if [Officer Checkalski] had consent to pat down his front pockets for any weapons or contraband, which he gave permission to do so."[128] Such consent should only be elicited when an officer reasonably believes an individual to be armed and dangerous.[129] Officer Checkalski never testified Mr. Kothbauer was armed and dangerous, and his report makes no mention of such a belief either.[130] As such, the pat down performed by Officer Checkalski was unreasonable under the Fourth Amendment's protections against unlawful searches.

While Mr. Kothbauer did consent to a pat down search of his front pockets, Officer Checkalski exceeded the scope of the pat down search by not performing a pat down search at all.[131] After Mr. Kothbauer gave Officer Checkalski permission to perform the pat down search, Officer Checkalski put his hands straight into Mr. Kothbauer's pockets and began rummaging around, which can be seen clearly from Officer Checkalski's L3 Dash Cam footage from the night of the incident.[132] This

[128] R.2 at 6.
[129] ***Terry v. Ohio***, 392 U.S. 1, 27 (1968).
[130] R.79 at 5-6.
[131] R.37.
[132] ***Id.***

action has been specifically prohibited by the Wisconsin Supreme Court, which stated, "The Terry doctrine precludes reaching into a suspect's pockets during a frisk for weapons unless the officer feels an object that could be used as a weapon."[133]

By performing an illegal search, Officer Checkalski, in effect, seized Mr. Kothbauer without probable cause. The test of whether an individual is under arrest for Fourth Amendment purposes is an objective one.[134] An individual is under arrest in the constitutional sense when, "a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances."[135] Further, "the circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test."[136]

Mr. Kothbauer, after having been searched, would have reasonably believed he was under arrest, as Officer Checkalski did that which he could only do upon arrest. A search may be done only if law enforcement obtained a warrant or if there exists an exception to the warrant requirement.[137] One such exception is the search incident to arrest doctrine, which allows law enforcement officers to search an arrestee's person for any possible weapons that may threaten the officer's safety.[138] However, for this to be valid, the officer conducting the search must already have

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[133] ***State v. Swanson***, 164 Wis. 2d 437, 454, 475 N.W.2d 148 (1991).
[134] ***Id.*** at 447.
[135] ***Id.*** at 446-47.
[136] ***Id.*** at 447.
[137] ***Brigham City, Utah v. Stuart***, 547 U.S. 398, 403 (2006).
[138] ***Chimel v. California****,* 395 U.S. 752, 762-63 (1969), *abrogated on other grounds by* ***Davis v. United States***, 564 U.S. 229 (2011)).

probable cause to arrest the individual before conducting said search, and the individual must be lawfully arrested after the search is conducted.[139]

Officer Checkalski had no such probable cause to arrest Mr. Kothbauer, as the mere request for one to perform field sobriety tests is not enough for probable cause.[140] Since Mr. Kothbauer had not yet performed any field sobriety tests, nor had he admitted to any sort of illegal activity, Officer Checkalski lacked probable cause to arrest him and the authority to search him.[141] By Officer Checkalski placing his hands in Mr. Kothbauer's pockets and conducting a search of his person, Mr. Kothbauer believed, as any reasonable person would, that he was in custody and under arrest. Thus, Mr. Kothbauer was seized unlawfully.

The United States Supreme Court has made it clear when evidence is obtained in violation of the Fourth Amendment, "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions."[142]

> The exclusionary sanction applies to any "fruits" of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention.[143]

Thus, the proper remedy for such a violation in this case would have been to suppress any evidence obtained after this search and unlawful seizure. This would include the field sobriety tests and the arrest of Mr. Kothbauer.

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[139] ***State v. Sykes***, 2005 WI 48, 26, 279 Wis. 2d 742, 695 N.W.2d 277.
[140] ***State v. Swanson***, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991).
[141] ***State v. Lange***, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551.
[142] ***Wong Sun v. United States***, 371 U.S. 471, 484, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963).
[143] ***States v. Crews***, 445 U.S. 463, 470, 100 S. Ct. 1244, 1249, 63 L. Ed. 2d 537 (1980).

Had trial counsel filed the appropriate motion and effectively made this argument, there would have been no probable cause for the arrest, and the blood results would not have been admissible. Thus, Mr. Kothbauer would have been found not guilty of OWI and PAC, as no blood draw would have occurred had Mr. Kothbauer not been arrested for OWI. Further, the State would also have likely dismissed both charges upon a successful motion to suppress, as there would have been little evidence admissible at trial, so a trial would not even have been necessitated.

Even if trial counsel had filed the motion and it was not granted, the issue of the illegal search done by Officer Checkalski should have been given greater importance at trial. At trial, the jury acquitted Mr. Kothbauer of the OWI charge while finding him guilty of the PAC charge. If the issue had been given greater importance, it would have resulted in the jury being aware that the activity of searching someone's person, like Officer Checkalski did to Mr. Kothbauer, was not legal. This would have caused the jury to question other procedures done by Officer Checkalski during the investigation and arrest of Mr. Kothbauer, such as how he administered the field sobriety tests. If the jury believed Officer Checkalski did not follow the proper methods as it relates to police procedure and training, there also would have been a question as to whether Officer Checkalski followed proper procedure in reading Mr. Kothbauer the Informing the Accused Form and his handling of Mr. Kothbauer's blood sample, which was eventually given to the

Wisconsin State Hygiene Laboratory and led to the PAC charge.[144] In a close case like this, there would have been no conviction had these issues been brought forth before the jury.

The only time trial counsel brought forth the issue of the illegal search of Mr. Kothbauer's person conducted by Officer Checkalski was during the cross-examination of the officer, which was limited to the following interaction:

> Officer Checkalski: I asked Kothbauer if I had consent to pat down his front pockets for any weapons or contraband, which he gave me permission to do so. I was missing it here. That's when I advised multiple chew tins were found in his front pockets but no contraband was found.
>
> Trial Counsel: But, Officer, you didn't do a pat down. You just went right into his pockets. Is that true?
>
> Officer Checkalski: Based on my report, that is what I located was chew tins his pockets.
>
> Trial Counsel: You reviewed the drive cam in preparing for this?
>
> Officer Checkalski: Prior to today?
>
> Trial Counsel: Yeah.
>
> Officer Checkalski: I have not reviewed the dash cam at all.
>
> …
>
> Trial Counsel: Okay. Well, nevertheless, no weapons or contraband was found on Mr. Kothbauer?[145]

When presented with the opportunity to confront Officer Checkalski and question him more on how he reached directly into a detainee's pockets without consent or reasonable suspicion, trial counsel did not rise to the occasion. Trial counsel did not highlight a critical issue for the jury, which is Mr. Kothbauer had a

[144] R.2 at 4-7.
[145] R.98 at 78-79.

constitutional right violated when he was subjected to an unconstitutional search and seizure. This was unreasonable performance, there was no strategic value in not pursuing this issue more, and trial counsel's failure unduly prejudiced Mr. Kothbauer's case at trial. As such, trial counsel was ineffective for failing to file a motion to suppress based upon the unlawful search and seizure of Mr. Kothbauer, and for failing to highlight the issue for the jury.

D. Trial Counsel Failed to Seek to Suppress the Results of the Field Sobriety Tests Based upon Mr. Kothbauer's Physical Ailments and Officer Checkalski's Improper Administration of the Tests.

Trial counsel's failure to argue for the suppression of evidence derived from the administration of the field sobriety tests was also ineffective. In ***County of Jefferson v. Renz***, the Wisconsin Supreme Court held that police must possess "probable cause to believe" a person is under the influence of an intoxicant before requesting a preliminary breath test.[146] Probable cause must be assessed on a case-by-case basis, and a court determines if it existed based on an objective standard, considering all the information available to the officer at the time.[147] More specifically, probable cause refers to the amount of evidence within the officer's knowledge at the time that would lead a reasonable law enforcement officer to believe the driver was operating under the influence of an intoxicant.[148]

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[146] ***Cty. of Jefferson v. Renz***, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999).
[147] ***State v. Lange***, 2009 WI 49, ¶ 19, 317 Wis. 2d 383, 766 N.W.2d 551 (referring to probable cause to arrest).
[148] ***Id***.; ***State v. Secrist*****,** 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999) (considering probable cause to arrest).

Trial counsel should have raised this issue in a motion as well as at trial. At trial, Officer Checkalski testified he had received training, education, and was certified in SFST.[149] However, there was no mention by Officer Checkalski, nor were any questions posed by trial counsel, about what this training entailed. Trial counsel should have questioned Officer Checkalski on his training methods and experience to ensure his training and certification came from NHTSA, whose courses have been approved by the International Association of Chiefs of Police (IACP), who in turn establish national standards to ensure consistency in the content, delivery, and application of SFST.[150] If Officer Checkalski had not received the necessary training from NHTSA, then trial counsel could have used this information in a motion hearing to show the tests were improper as administered, and at trial caused the jury to question whether or not the methods Officer Checkalski used in his assessment of Mr. Kothbauer's impairment, and his blood alcohol level the tests were designed to show, were valid.[151]

NHTSA issues the DWI Detection and Standardized Field Sobriety Testing Manual, which contains the procedure to be used by law enforcement officers on how to administer and properly utilize the results observed from the SFST.[152] This manual is issued by NHTSA, a government agency, and as such is a government document which contains accurate facts that cannot reasonably be questioned.

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[149] R.98 at 50.
[150] DWI Detection and Standardized Field Sobriety Test Manual, Introduction, p. 1-2 (2015); (App. A-2, A-3).
[151] ***Id.***, Session 8, p. 13; (App. A-5).
[152] ***Id.***, (2015); (App. A-1).

Accordingly, this government-issued document is that of which this Court should take judicial notice pursuant to Wis. Stat. § 902.01(2)(b).[153]

Additionally, Officer Checkalski improperly administered the HGN test, making any of the clues he noted invalid. The DWI Detection and Standardized Field Sobriety Testing Manual states that prior to administering the HGN test, officers need to ask subjects questions about their eyes and general health conditions.[154] In addition to asking about medical conditions that will affect the test, NHTSA training requires officers to conduct a check for resting nystagmus before administering the HGN test.[155] If the officer notices any abnormal findings during the prechecks, he may choose not to continue with the HGN test.[156] Continuing on with the test after observing abnormalities does not conform with standard protocol and should be noted in the officer's report.[157] Abnormalities include resting nystagmus, which may be caused by brain damage and other neurological issues.[158] Officer Checkalski did not ask Mr. Kothbauer if he was suffering from any head injuries or medical issues as he should have, nor did Officer Checkalski note in his report he checked Mr. Kothbauer's eyes for resting nystagmus.[159] This precheck is

[153] Wis. Stat. § 902.01(2)(b).
[154] DWI Detection and Standardized Field Sobriety Test Manual, (2015); (App. A-1).
[155] ***Id.***, Session 8, p. 23-25 (App.6-8).
[156] ***Id.***
[157] ***Id.***
[158] ***Id.***
[159] R.98 at 87; R.2 at 3.

needed in order to ensure any nystagmus noted is caused by having a blood alcohol content above a .08, not an injury.[160]

At a suppression hearing, trial counsel could have questioned Officer Checkalski on the accuracy of his report, as it was rewritten two to three weeks after the night of the arrest and Officer Checkalski utilized the L3 Dash Cam and his memory when rewriting his report. A review of the L3 Dash Cam footage does not provide a clear and up-close video of Mr. Kothbauer's eyes, meaning that the clues Officer Checkalski noted in his report from the HGN test were entirely from relatively dated memory. Trial counsel could have questioned Officer Checkalski on his improper procedure and would have been able to show Officer Checkalski's report and recollection were unreliable. Such questioning would have led to suppression.

At trial, this line of questioning would have led to the jury to doubt the officer's procedure on administration. A jury hearing that Officer Checkalski had to re-write his report based on memory and the L3 Dash Cam footage, which does not show the subject's eyes, would put doubt into the jury's mind as to whether or not Officer Checkalski's testimony of this test was reliable. Additionally, Officer Checkalski himself stated nystagmus is known to be caused by certain medical issues.[161] Had trial counsel presented Mr. Kothbauer's medical records showing that

[160] DWI Detection and Standardized Field Sobriety Test Manual, Session 8, p. 13, 24-25 (2015); (App. A-5, A-7, A-8).
[161] R.98 at 81.

he suffered from a traumatic brain injury, the jury would have believed the clues noted were not due to Mr. Kothbauer's blood alcohol level, but due to his medical conditions, as Officer Checkalski performed no prechecks to prove otherwise.

At a suppression hearing, trial counsel could have attacked the validity of Mr. Kothbauer's performance on the Walk and Turn and One Leg Stand test based on his balance issues. Mr. Kothbauer asked Officer Checkalski if there was an alternative test to perform instead of the Walk and Turn test, as Mr. Kothbauer knew if he tried to perform that test (as well as the One Leg Stand test), he would not do well.[162] Despite being aware of Mr. Kothbauer's medical issues (issues that would show that failure on these tests has nothing to do with alcohol), Officer Checkalski wished for Mr. Kothbauer to continue with the Walk and Turn and administered him the One Leg Stand test.[163] Thus, after Mr. Kothbauer said he could not do balance tests due to his injuries, the officer proceeded with balance tests and based his arrest decision on poor performance. Officer Checkalski further failed to inform Mr. Kothbauer the results of the tests would not be used against him in the probable cause analysis if he physically could not do them. Officer Checkalski told Mr. Kothbauer, "if you want to take an alternative test, we can do so."[164] Therefore, none of the clues from the Walk and Turn test should have been used in Officer Checkalski's probable cause determination. Officer Checkalski based his arrest

[162] R.37.
[163] R.37.
[164] R.37; R.2 at 4.

decision on tests that could not properly determine impairment due to the medical condition of Kothbauer, whose results were irrelevant to impairment and his blood alcohol content in this case.

Trial counsel was aware of Mr. Kothbauer's physical limitations and the role they played in his performance on the field sobriety tests and, therefore, on Officer Checkalski's probable cause determination. Had a motion been filed to suppress all evidence derived from improperly administered field sobriety tests, the court would have granted the motion and found the arrest to be unsupported by probable cause. Thus, the blood test evidence would have been inadmissible, and there would be no PAC conviction.

Regardless of the court's ruling on a suppression motion, Mr. Kothbauer would have benefited from the jury hearing this line of questioning. Had the jury seen the inaccuracies that stemmed from the investigation, it would have seen that Mr. Kothbauer should not have been arrested for OWI. The jury would have also seen that Mr. Kothbauer should not have been charged with PAC, as the evidence relied upon to show his blood alcohol concentration was above a .08, such as the HGN, Walk and Turn, and One Leg Stand tests, was unreliable. Therefore, anything related to the arrest, including Mr. Kothbauer's blood alcohol level, should not have been considered.

II. Trial Counsel's Failure to Bring Forth Evidence of the L3 Dash Cam Footage of Mr. Kothbauer's Arrest during his Trial Unduly Prejudiced Mr. Kothbauer at Trial.

The night of Mr. Kothbauer's arrest, Officer Checkalski's L3 Dash Camera recorded the entire incident. The L3 Dash Cam footage showed Mr. Kothbauer's driving behavior, his interaction with Officer Checkalski, and his performance on the SFST.[165] The footage established that Officer Checkalski did not ask Mr. Kothbauer if he had any physical ailments or head injuries prior to Mr. Kothbauer's performance, which is required for the reasons listed above.[166] The footage also showed how Officer Checkalski informed Mr. Kothbauer he could perform an alternate test instead of the Walk and Turn, and how Officer Checkalski never told Mr. Kothbauer he would penalize him if he did not perform the test.[167] Officer Checkalski testified at trial he informed Mr. Kothbauer there was no alternative test for the Walk and Turn.[168] Such testimony conflicts with the video. This footage would have also shown Officer Checkalski illegally searched Mr. Kothbauer's person, as Mr. Kothbauer consented to a pat down search but Officer Checkalski did not perform a pat down and instead directly put his hands in Mr. Kothbauer's pockets.[169] The showing of all of the above-mentioned acts would have allowed the jury to see the improper procedure Officer Checkalski followed and would have led

[165] R.37.
[166] R.37; DWI Detection and Standardized Field Sobriety Test Manual, Session 8, p. 12-13, 24, 55, 65 (2015); (App. A-4, A-5, A-7, A-9, A-10).
[167] R.37.
[168] R.98 at 62.
[169] R.37.

the jury to doubt other procedures done by Officer Checkalski, such as the SFST. If the jury doubted correct police procedure, it would have likely acquitted on both charges and not just one as has been explained previously in this brief.

However, trial counsel never presented this footage at Mr. Kothbauer's trial, and it is unclear why the court claimed that the decision to not play the video was strategic.[170] This answer is insufficient and is speculation, as Mr. Kothbauer was not granted a hearing and thus was never given the chance to get an answer from trial counsel as to why he did not show the footage. Trial counsel never testified he did not play the footage for strategic reasons. That was simply something the trial court speculated upon.

III. Trial Counsel was Ineffective for Not Presenting Mr. Kothbauer's Medical Records, or Securing an Expert, in Order to Bring Forth Evidence of Mr. Kothbauer's Disabilities.

At Mr. Kothbauer's trial, trial counsel made multiple errors by not even attempting to bring forth evidence of Mr. Kothbauer's disabilities. Prior to the jury trial, trial counsel discussed with the court the scope of what statements would be allowed regarding Mr. Kothbauer's medical history. Trial counsel stated, "I need to know clearly what can come in and what can't. I know that under gaze nystagmus sometimes the disparity between the left and right eye can indicate brain damage."[171] The court stated any statements Mr. Kothbauer had told Officer Checkalski the night of his arrest were fair game; however, "statements about what

[170] R.87 at 3; (App. A-13).
[171] R.98 at 37.

doctors said, first, are not admissible because of hearsay; and second, because there hasn't been a foundation laid to indicate such a diagnosis."[172] After being told this, trial counsel stated, "I have the reports, but I don't have a doctor or any – anybody here to lay a foundation on that."[173]

Trial counsel could have avoided the foundational problem with Mr. Kothbauer's medical records had he followed Wis. Stat § 908.03(6m)(b). A custodian or other qualified witness are not needed to lay the foundation for patient healthcare records being offered as evidence at trial if the party offering the records presents a certified copy of medical records and gives the requisite notice for automatic admissibility 40 days before trial.[174] Trial counsel had months to gather Mr. Kothbauer's medical records and have them certified before the trial. However, trial counsel did not do so, thus acting ineffectively and prejudicing Mr. Kothbauer by not even having the foundation laid for the records.

Mr. Kothbauer was diagnosed with a traumatic brain injury prior to his arrest the night of March 23, 2016.[175] An expert, whether it be a general medical doctor or a specialist like a neurologist, could have laid the foundation for Mr. Kothbauer's medical records or his own evaluation to be admissible at trial. An expert would have testified Mr. Kothbauer's performance on the SFST was due to his disabilities, not his blood alcohol content being above a .08. This, combined with Officer

[172] ***Id.*** at 38.
[173] ***Id.***
[174] Wis. Stat. §§ 908.03(6m)(b)(1)-(2).
[175] R.79 at 48-50.

Checkalski's testimony that nystagmus may be caused by certain medical conditions, would have shown any nystagmus noted was due to the disabilities. The expert would have testified that, based upon the records of Mr. Kothbauer or any evaluation put forth by the expert, Mr. Kothbauer suffered from traumatic brain injury caused by an improvised explosive device (IED) explosion in November 2010.[176] This expert would have explained how the blast has given Mr. Kothbauer dizziness, headaches, and affected his sleep.[177] Further, Mr. Kothbauer's balance was also affected, as he was found to have a slower than normal perception time as well as difficulty activating the correct posture stabilizers to maintain an upright position against an incline or decline in the support surface.[178] These symptoms have gotten worse over time and specifically affect his balance and speech.

Furthermore, the opinion of the expert would have bolstered Mr. Kothbauer's claim that he suffered from balance issues and had said disabilities. The State used this lack of proof as evidence that Mr. Kothbauer's performance was due to intoxication by stating, "Now, he claims that there was leg injuries here, and we don't have any real proof of that other than him saying so."[179] If the jury had been able to hear expert testimony about Mr. Kothbauer's disabilities, such testimony would have influenced its deliberations, for it would have been able to see that Mr.

[176] R.79 at 48-50.
[177] ***Id.*** at 45.
[178] ***Id.*** at 43.
[179] R.98 at 178.

Kothbauer's performance on the fields was not due to alcohol in his blood stream but due to his disabilities.

Additionally, based upon trial counsel's statements regarding resting nystagmus and his statement in closing about Officer Checkalski being aware of Mr. Kothbauer's physical injuries, it can be inferred that the use of these medical records was part of his trial plan, as his question regarding the use of the medical records made it clear he hoped to be able to use them to put a question in the jury's mind on whether proper police protocol was used in this situation. That never happened because the court prohibited this necessary evidence.

The only testimony about any sort of injury or disability came from Mr. Kothbauer, who was only able to speak about the fact that he had been a victim of five IED explosives.[180] If an expert could be helpful and one is available to testify, counsel must at least consult with that expert.[181] Trial counsel's decision to not contact a medical doctor as an expert cannot be called a strategic one, especially when trial counsel wished to admit Mr. Kothbauer's medical records and asked questions of Officer Checkalski regarding Mr. Kothbauer's injuries and their effect on the field sobriety tests.

[180] R.98 at 147.
[181] *See* ***Ellison v. Acevedo***, 593 F.3d 625, 634 (7th Cir. 2010).

IV. The Circuit Court Erred in Denying Mr. Kothbauer an Evidentiary Hearing.

Once a defendant meets the initial burden of production, if sufficient facts are alleged that would merit relief, a Court grants an evidentiary hearing.[182] The caselaw states that where there are differences in fact, a defendant is entitled to an evidentiary hearing.[183] An evidentiary hearing may also develop the record and benefit the court, which does not have all of the facts before it, if it decides without a hearing requiring testimony.[184]

The Court of Appeals in ***State v. Saunders*** conceptualized the difference between adequate and inadequate allegations somewhat differently.[185] The ***Saunders*** case distinguishes between adequate, "factual-objective" allegations as opposed to inadequate, "opinion-subjective" allegations.[186] Defendant's allegations in the ***Saunders*** case were opinion-subjective because he merely alleged that "trial counsel failed to properly counsel defendant."[187] That allegation failed because he did not explain the circumstances of his attorney's deficient counseling such that his motion raised a question of fact requiring a hearing.[188] On the other hand, Mr.

[182] ***State v. Allen***, 274 Wis. 2d 568, 576, 682 N.W.2d 433 (2004); ***State v. Velez,*** 224 Wis. 2d 1, 18, 589 N.W.2d 9 (1999).
[183] ***State v. Allen***, 274 Wis. 2d 568, 576, 682 N.W.2d 433 (2004).
[184] ***Velez,*** 224 Wis. 2d at 17–18, citing ***State v. Garner***, 207 Wis. 2d 520, 534–35, 558 N.W.2d 916 (Ct. App. 1996).
[185] ***State v. Saunders,*** 196 Wis. 2d 45, 51–52, 538 N.W.2d 546 (Ct. App. 1995).
[186] ***Id.*** (citing Jeanne L. Schroeder, *Subject: Object*, 47 U. Miami. L. Rev. 1, 40 (1992)).
[187] ***Id.*** at 52.
[188] ***Id.***

Kothbauer alleged factual-objective circumstances with specificity. Therefore, this Court must schedule an evidentiary hearing.[189]

The court improperly denied Mr. Kothbauer's motion without an evidentiary hearing. The court found that Mr. Kothbauer was not unlawfully searched and seized, stating, "Mr. Kothbauer consented to the search and there is no evidence the search was other than consensual…The brief citation to Terry v. Ohio, 392 U.S. 1 (1968) is not on point as Terry dealt with a non-consensual search, not one performed with consent."[190] Mr. Kothbauer did not consent to a search of his person. Officer Checkalski asked Mr. Kothbauer if he could perform a pat down search, to which Mr. Kothbauer stated he could.[191] Officer Checkalski proceeded to put his hands directly into Mr. Kothbauer's pockets without having any reason.[192] "There is no Wisconsin case law which allows an officer to *bypass* the requirement for a frisk by asking consent to conduct a frisk."[193] Again, the United States Supreme Court specifically prohibited such type of conduct in ***Terry v. Ohio***.[194]

It does not follow that because Mr. Kothbauer gave consent for Officer Checkalski to perform a pat down search he consented to any and all searches that

[189] ***State v. Bentley,*** 201 Wis. 2d 303, 548 N.W.2d 50 (1996) at 309.
[190] R.87 at 2; (App. A-12).
[191] R.98 at 78.
[192] R.37.
[193] R.82 at 5.
[194] ***State v. McGill***, 2000 WI 38, ¶ 21, 234 Wis. 2d 560, 569, 609 N.W.2d 795, 801("Terry limits the protective frisk to situations in which the officer is 'justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.'" *quoting* ***Terry v. Ohio***, 392 U.S. at 24, 88 S.Ct. 1868).

followed.[195] Mr. Kothbauer testified at the trial that he agreed to a pat down search, but he was "furious" when Officer Checkalski put his hands into Mr. Kothbauer's pockets without patting him down first.[196] The court stated "No facts have been alleged to support a claim that Mr. Kothbauer was under arrest at the time of the search or immediately thereafter. No case law is cited to support a claim that a consensual search supports a finding that a person has been seized or arrested."[197] Again, Mr. Kothbauer consented to a pat down, not a search of his person.[198] Officer Checkalski exceeded the scope of said pat down by putting his hands directly into Mr. Kothbauer's pockets. The facts as alleged in Mr. Kothbauer's post-conviction motion are to be taken as true.[199] As such, the court erred in its decision to deny Mr. Kothbauer an evidentiary hearing.

The court also erred in deciding trial counsel was not ineffective for failing to file a motion to seek the suppression of the field sobriety tests. The court claims no law was cited in support that, "a traffic officer must strictly follow the manual in having a driver perform field tests."[200] This is incorrect. In Mr. Kothbauer's Reply Brief to State's Response to Defendant's Motion for Postconviction Relief, he cited to ***State v. Zivcic***, 229 Wis. 2d 119, 128, 598 N.W.2d 565, 570 (Ct. App. 1999), in which the Wisconsin Court of Appeals has held that the results of the Horizontal

[195] ***Bumper v. North Carolina,*** 391 U.S. 543 (1968).
[196] R.98 at 145.
[197] R.87 at 2; (App. A-12).
[198] R.98 at 145.
[199] ***State v. Allen***, 274 Wis. 2d 568, 576, 682 N.W.2d 433 (2004).
[200] R.87 at 2; (App. A-12).

Gaze Nystagmus (HGN) test may be admissible as evidence, "As long as the HGN test results are accompanied by the testimony of a law enforcement officer who is ***properly*** trained to administer and evaluate the test."[201] Assuming Officer Checkalski was NHTSA certified, his training was provided in the form of in-person instructors that teach from the DWI Detection and Standardized Field Sobriety Testing Manual. Thus, an officer that does not adhere to the manual in their administration of the HGN test is not using proper training methods, and the officer's observations must be discounted. Officer Checkalski did not check for resting nystagmus, and being that Mr. Kothbauer suffers from a severe head injury, any clues Officer Checkalski noted would not be related to Mr. Kothbauer's impairment or blood alcohol level. These facts, as alleged in Mr. Kothbauer's previous filings, are enough to support an evidentiary hearing.

The court incorrectly stated "the officer offered to perform an alternative test in addition to the standard tests he used. Mr. Kothbauer declined to perform an alternative test. No evidence has been produced to indicate the officer failed to consider these issues when making his decision to arrest Mr. Kothbauer"[202] Mr. Kothbauer testified at trial, "when [Officer Checkalski] was describing [the Walk and Turn Test], I kept asking him for, if there was an alternate that we could do, and he said we'll get to that eventually."[203] Later, Officer Checkalski had Mr. Kothbauer

[201] R.82 at 17.
[202] R.87 at 2-3; (App. A-12, A-13).
[203] R.98 at 147.

recite the alphabet, which he did correctly.[204] Thus, the court is incorrect in its claim that Officer Checkalski offered Mr. Kothbauer an alternative test and he refused. Officer Checkalski also testified, when asked by trial counsel about whether he could count Mr. Kothbauer's limited performance on the Walk and Turn test:

> Trial Counsel: And due to – due to there not being a walk-and-turn test, you cannot use the decision table for a combined scoring of the gaze nystagmus and walk-and-turn, correct?
>
> Officer Checkalski: He completed the first portion of the walk-and-turn test as the instructional. He didn't complete the walking phase of that test.
>
> Trial Counsel: Okay. But wouldn't it be true that unless he completed the whole test, you could not use the decision table for those two tests?
>
> Officer Checkalski: I can't see any more clues at that point.[205]

This testimony is evidence that Officer Checkalski still counted the clues he noted on Mr. Kothbauer's performance of the Walk and Turn test despite Mr. Kothbauer informing him of his balance issues. As such, evidence was submitted to the trial court which showed that Officer Checkalski did not consider Mr. Kothbauer's disabilities in his decision when administering the field sobriety tests.

The court further erred in holding trial counsel was not ineffective for failing to show the L3 Dash Cam footage. The court found both "parties could have had the jury view the recording. Both opted not to do so. The decision to not show the jury the camera footage was a strategic decision and has a rational basis."[206] The court gives no explanation as to how such a choice could be labeled "strategic" in nature. The court cannot speculate on strategic defenses trial counsel may have

[204] R.98 at 90.
[205] R.98 at 87-88.
[206] R.87 at 3; (App. A-13).

proffered at a ***Machner*** hearing, as no hearing was held due to the court's Order Denying the Motion for Postconviction Relief without an evidentiary hearing.[207] Without a ***Machner*** hearing, there was no way to know if trial counsel would claim the decision not to play the L3 Dash Cam footage was strategic or not. If the jury had seen this video, had an expert been attained to speak on Mr. Kothbauer's disabilities (or had medical records establishing those disabilities been admitted at trial), the jurors would have understood the reason for Mr. Kothbauer's performance on the SFST. Thus, the jury would have been more likely to acquit on both charges had the video been played.

Again, the court erred in finding that trial counsel was not ineffective for failing to retain an expert or bring forth medical documentation of Mr. Kothbauer's physical disabilities. First, the court stated that these medical records go toward the operating while intoxicated charge, and not the prohibited alcohol concentration charge.[208] Next, the court stated it had not been presented any information in the prior hearings to show what kind of expert was available and what such an expert would testify to.[209] The court also claimed, even though the attorney did not so testify, that it was a strategic decision on the part of trial counsel to not bring forth these medical records, as parts of medical records, the court believed, would show that Mr. Kothbauer did not have issues with his balance.[210]

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[207] ***Id.***; (App. A-11).
[208] ***Id.*** at 4; (App. A-14).
[209] ***Id.***
[210] ***Id.***

The documentation presented is not only relevant to the OWI charge. The medical documentation demonstrates Mr. Kothbauer's inability to proficiently pass the field sobriety tests for reasons explained above. Officer Checkalski testified that these tests were used to detect impairment.[211] The NHTSA DWI Detection Manual states these tests detect impairment based upon a certain number of clues reflecting a certain probability of an individual being at or above a .08 BAC.[212] These tests were used by Officer Checkalski to arrest Mr. Kothbauer and proceed to read him the Informing the Accused form and test a sample of Mr. Kothbauer's blood. It was these actions that led to Mr. Kothbauer being charged with PAC, and as such, being able to present evidence on how Mr. Kothbauer could not perform tests that were made to detect impairment and a blood alcohol content of .08 and higher goes to the PAC charge.

The court is also incorrect in its assertation that "no fact or other information has been submitted to show exactly what expert was available and what such an expert would testify to and precisely what opinions they would have that would be admissible."[213] In Mr. Kothbauer's Motion for Postconviction Relief, it was stated, "An expert could have testified that based upon Mr. Kothbauer's traumatic brain injury and the effects it has had on his balance, he was not a suitable candidate for the field sobriety tests."[214] In the Reply Brief to State's Response to Defendant's

[211] R.98 at 88.
[212] DWI Detection and Standardized Field Sobriety Test Manual, Session 8, p. 13 (2015); (App. A-5).
[213] R.87 at 4; (App. A-14).
[214] R.79 at 19.

Motion for Postconviction Relief, Mr. Kothbauer stated (in explaining why an expert would be helpful), trial counsel "could have used the expert to explain to the jury the true likelihood of improvement, and how the condition can worsen and what those effects would look like."[215] The conditions being referred to in the above-mentioned sentence are Mr. Kothbauer's injuries, as Mr. Kothbauer's medical records stem from 2013.[216] These records were submitted with Mr. Kothbauer's Motion for Postconviction Relief, and such records establish that Mr. Kothbauer would not be able to perform a balance test without the results being skewed, and that any clues noted in HGN would be irrelevant because of the injury to his head.[217] Thus, Mr. Kothbauer has explained what an expert would opine in Mr. Kothbauer's case.

Further, the court cited to certain documentation the court claimed would hurt the defense's position.[218] Specifically, the court found the following problematic:

> He has full active range of motion in all four extremities. Strength is 5/5. No focal sensory deficits. Reflexes are 2+. Finger-to-nose and heel-to-shin are within normal limits. He is able to walk on toes and heels and perform single leg stance…MCT: Pt is able to react in timely manner to maintain balance amidst varying amplitude perturbations.[219]

[215] R.82 at 20.
[216] R.79 at 42.
[217] ***Id.*** at 42-45.
[218] R.87 at 4; (App. A-14).
[219] ***Id.***

What the court did not address is all issues that would affect Mr. Kothbauer's performance, such as his dizziness and headaches.[220] An individual with dizziness would have issues being able to perform balance-related activities. An expert could have explained in detail how a traumatic brain injury would affect his balance, as well as the true likelihood of improvement, and how the condition can worsen and what those effects would look like. While the court may have believed the records would hurt Mr. Kothbauer's case, an expert's testimony would have been able to show that after five years since that original evaluation, Mr. Kothbauer's injury was at a worse stage than when it began.[221]

The court did not address that Mr. Kothbauer's medical documents showed he most likely suffered from a traumatic brain injury.[222] Specifically, an expert would have been able to explain how Mr. Kothbauer's traumatic brain injury would have resulted him in being a prime candidate to be screened out of the horizontal haze nystagmus (HGN) test due to the probability of any nystagmus present being due to injury, not intoxication or a .08 or higher blood alcohol content. When looking at all these factors in totality, trial counsel was ineffective for not bringing forth the medical documentation and an expert. This ineffectiveness unfairly prejudiced Mr. Kothbauer's case.

[220] R.79 at 42-46, 48-50.
[221] ***Id.*** at 17.
[222] R.79 at 41-46, 52-57.

Lastly, the court erred in finding that trial counsel's plan was not ineffective. While Mr. Kothbauer was acquitted of the OWI charge, it cannot be said that being acquitted of one charge and not another means counsel is automatically effective. It is important to note it is the cumulative effect of all of these issues, every action that trial counsel did, or failed to do, that prejudiced Mr. Kothbauer and denied him a fair trial.[223] Based upon the totality of the circumstances, trial counsel's performance was ineffective and prejudicial against Mr. Kothbauer.

Many of the court's findings were premature and based upon findings that would have required an evidentiary hearing. The court could not make the determinations it did without first hearing trial counsel's explanation for his actions. Again, "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer."[224] As such, an evidentiary hearing is necessary.

[223] *See* ***State v. Thiel***, 2003 WI 111, ¶ 4, 264 Wis. 2d 571, 581, 665 N.W.2d 305, 311; ***State v. Kemble***, 238 P.3d 251 (Kan. 2010).
[224] ***United States v. Cronic*****,** 466 U.S. 648, 659-60 (1984).

CONCLUSION

For the reasons stated above, Mr. Kothbauer respectfully requests that this Court reverse the circuit court's orders denying the Motion for Postconviction Relief without an evidentiary hearing and remand the matter for further proceedings.

Dated at Madison, Wisconsin, January 4, 2021.

Respectfully submitted,

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

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APPENDIX