STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2021AP002172

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. VIEZBICKE,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING DEFENDANT-APPELLANT'S POSTCONVICTION MOTION IN OZAUKEE COUNTY CIRCUIT COURT HONORABLE PAUL V. MALLOY PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the tactics deployed by police constitutes outrageous governmental conduct which violated Viezbicke's constitutional right to due process.

   The Trial Court answered: This issue was not addressed.

2. Whether the Trial Court errd in denying Viezbicke's spoliation claims by finding he failed to meet the burden of proof.

   The Trial Court answered: No.

3. Whether the Trial Court errd in denying Viezbicke's ineffective assistance of counsel claims by finding he failed to meet the burden of proof.

The Trial Court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested as it is necessary to clarify points made in the brief which cannot be fully understood in writing. An opportunity to make a physical presentation of the body camera footage would allow the Viezbicke to explain the inconsistencies in the other evidence more precisely to give the Court a better understanding of the issues. Publication is requested as this case presents a unique opportunity to for this Court to develop the common law in the area of spoliation of body camera footage.

STATEMENT OF THE CASE

On August 3, 2017 a Criminal Complaint was filed in Ozaukee County Circuit Court Branch 1 charging the Defendant-Appellant, Michael J. Viezbicke, with Count 1: Resisting an Officer contrary to Wis. Stat. § 946.41(1) and, Count 2: Disorderly Conduct contrary to Wis. Stat. § 947.01(1) both as a repeater invoking the provisions of Wis. Stat. § 939.62(1)(a). (R:1)

On December 21, 2017 Viezbicke pled guilty to the charges as stated in the Information. (R:13) On the same day, Viezbicke was sentenced before the Honorable Paul V. Malloy following a stayed and imposed sentence structure: with 38 days sentence credit, to 9 months confinement with 18 months of probation on Count 1, concurrent to 3 months confinement with 18 months of probation on Count 2. (R:14)

On January 15, 2019 Viezbicke filed a pro se *Motion for Postconviction Relief pursuant to Wis. Stat. § 974.06*. (R:19-21, 25) On April 19, 2019 Viezbicke filed an amended pro se postconviction motion. (R:30-33) In a letter dated April 23, 2019 the Court wrote, "I am not scheduling anything at this time as I do not know if you have a lawyer." (R:35) The Court held the motion in abeyance to allow Viezbicke to recruit counsel.

On May 28, 2021 Viezbicke filed a third-amended pro se *Notice of Motion and Motion to Withdraw Guilty Plea*. (R:42-47) A scheduling hearing was held on July 20, 2021. (R:69) A *Machner* hearing was set for September to allow time for legal research. (R:69, 11)

The *Machner* hearing was held on September 21, 2021. (R:71) The Trial Court denied a *Motion to Transport Prisoner* filed September 10, 2021 ruling there was not a significant reason to produce Viezbicke due to the quality of their audio/visual equipment and Coronavirus precautions. (R:61) (R:71, 2) Viezbicke amended the pleadings orally to include a claim of outrageous governmental conduct. (R:71, 4-7) The Court dismissed the postconviction motion at the hearing finding Viezbicke failed to meet the burden of proof. (R:71, 37)

On December 17, 2021 Viezbicke filed a *Notice of Appeal*. (R:63) On March 10, 2022 this Court ordered Viezbicke to obtain the entry of a written order from the Trial Court denying his postconviction motion. (R:76) On March 11, 2022 the Trial Court filed a written order denying the postconviction motion. (R:77) On April 11, 2022 this Court issued an order confirming appellate jurisdiction. Viezbicke now appeals from the order denying his postconviction motion.

STATEMENT OF THE FACTS

On August 2, 2017 at about 8:30 p.m., Officers Patrick J. Kosmosky and Eric E. Ramthun were dispatched to the area of 198 S. Dries St. in Saukville, Wisconsin. (R:1, 2) (R:46, 10) The Officers were responding to a report received by Ozaukee County Dispatch of an individual knocking over construction barrels and swearing. (R:1, 2) (R:46, 13) Officer Kosmosky and Officer Ramthun were employed by the Saukville Police Department as police officers, on duty, in uniform, and acting in their official capacity. (R:1, 2) (R:19, 1, 5)

Upon arrival, Officer Kosmosky spoke to the witness, M.B., who described the individual as someone who Officer Kosmosky was familiar with, Michael Viezbicke. (R:1, 2) (R:46, 15) The Officers found Viezbicke sitting on a chair in his enclosed front porch adjacent from M.B.'s residence. (R:1, 2) (R:46, 15) (Ex. 3, Body Camera Footage) Officer Kosmosky asked Viezbicke to come outside to talk. (R:46, 15, 18) (Ex. 3, Body Camera Footage) Viezbicke refused to exit the porch. (R:46, 15, 18) (Ex. 3, Body Camera Footage) Instead, Viezbicke opened a window to speak with them. (R:46, 15) (Ex. 3, Body Camera Footage)

Officer Kosmosky asked Viezbicke if he was the one kicking over construction barrels and swearing. (R:46, 15, 18) (Ex. 3, Body Camera Footage) Viezbicke denied

the accusations and told the Officers to get off his property. (R:46, 15, 18) (Ex. 3, Body Camera Footage) Officer Kosmosky then walked across the street to grab some forms and speak with M.B. (R:46, 15, 18) (Ex. 3, Body Camera Footage) Officer Ramthun stayed behind with Viezbicke. (R:46, 15, 18) Officer Kosmosky then delivered the witness statement to M.B. and filled out the municipal citation. (R:46, 15-16 & 18) (Ex. 3, Body Camera Footage)

When Officer Kosmosky returned he commented that it did not look like any progress had been made. (Ex. 3, Body Camera Footage) Officer Kosmosky then indicated to Viezbicke he was going to be cited for disorderly conduct. (R:46, 16, 18) (Ex. 3, Body Camera Footage) Officer Kosmosky stated he was leaving the ticket on Viezbicke's front door and warned if the police have to come back he would be placed under arrest. (R:46, 10, 16) (Ex. 3, Body Camera Footage) Officer Ramthun went across the street to speak with M.B. and Officer Kosmosky stayed behind with Viezbicke. (R:45, 3)

Officer Kosmosky turned his body camera off and approached the open window on his right to speak with Viezbicke. (R:45, 3) Officer Kosmosky ordered Viezbicke to come outside, get into the car across the street, and talk to the Officer. (R:45, 3) Viezbicke refused. (R:45, 3) Officer Kosmosky asked Viezbicke why he would not come outside and mocked that he was

scared. (R:45, 3) Officer Kosmosky taunted Viezbicke and asked if he was a chicken. (R:45, 3) This prompted Officer Kosmosky to place his hands under his armpits and cluck like a chicken in Viezbicke's front yard. (R:45, 3) Viezbicke still would not exit the front porch. (R:45, 3)

Officer Kosmosky threatened the police would not leave until Viezbicke came outside, got into the police car across the street, and talk to Officer Ramthun. (R:45, 3) Viezbicke agreed to come outside provided the police would leave. (R:45, 3) On the way, Viezbicke pointed in M.B.'s direction and stated I know who you are. (R:19, 17) (R:45, 3) Officer Kosmosky instructed Viezbicke to get into the police car, which was parked on the opposite side of the street in front of M.B.'s residence. (R:45, 3)

Viezbicke entered the south-facing Saukville Police sedan through the rear left passenger door. (R:45, 3) Officer Ramthun was sitting in the front passenger seat and Officer Kosmosky stood about fifteen feet in front of the vehicle. (R:45, 3) (R:46, 21) Officer Ramthun did not speak to Viezbicke inside the vehicle. (R:45, 3) Officer Ramthun handed Viezbicke his court date information. (R:45, 3) Viezbicke was free to go so he exited the vehicle through rear left door with the document in hand. (R:45, 3)

Viezbicke crumpled up the document en route to his residence and threw it on the ground in front of Officer Kosmosky. (R:45, 3) Viezbicke stated fuck you Kosmosky. (R:45, 3) At this point, Officer Kosmosky turned his body camera back on. (R:45, 3) (Ex. 3, Body Camera Footage) Officer Kosmosky began pursuing Viezbicke to his front door from the middle of the street. (R:45, 3) (R:46, 16, 19, 21) (Ex. 3, Body Camera Footage) Officer Kosmosky ordered Viezbicke to stop, come here, and stated you're going to jail. (R:45, 3) (R:46, 10, 16, 19) (Ex. 3, Body Camera Footage) Viezbicke shut the front door of his residence. (R:45, 3) (R:46, 10, 16, 19) (Ex. 3, Body Camera Footage)

Officer Kosmosky then breached the front door of the residence and pulled Viezbicke by the midsection causing him to lose his balance. (R:19, 1-2, 4) (R:45, 3) (R:46, 10, 16) (Ex. 3, Body Camera Footage) Officer Kosmosky ordered Viezbicke to put his hands behind his back. (R:1, 2) (R:45, 3) (R:46, 10, 16) (Ex. 3, Body Camera Footage) Before Viezbicke was given an opportunity to comply, Officer Kosmosky punched Viezbicke in the left eye causing him to fall backwards. (R:45, 3) (Ex. 3, Body Camera Footage) Viezbicke was now on his back with the nape of his neck positioned over an elevated stoop in a doorway. (R:45, 3) (Ex. 3, Body Camera Footage)

Officer Ramthun made entry into the residence. (R:45, 3) (R:46, 16, 19) (Ex. 3, Body Camera Footage) Officer Kosmosky instructed Officer Ramthun to use his Taser. (R:45, 3) (R:46, 16, 19) (Ex. 3, Body Camera Footage) Officer Ramthun fired his Taser in dart mode striking Viezbicke in the abdomen and belt, but it did not create a circuit. (R:19, 7) (R:45, 3-4) (R:46, 16, 19) (Ex. 3, Body Camera Footage) One probe was unable to penetrate the belt and the other probe short circuited burning Viezbicke's abdomen and shirt. (R:45, 4) (R;46, 19) Officer Kosmosky again ordered Viezbicke to put his hands behind his back. (R:45, 4) (R:46, 16) (Ex. 3, Body Camera Footage) Viezbicke was lying on his back and his hands remained on his head. (R:45, 4) (Ex. 3, Body Camera Footage) Viezbicke was not moving, struggling, or otherwise physically resisting the Officers. (R:45, 4) (Ex. 3, Body Camera Footage)

With the Taser in drive stun mode, Officer Ramthun administered the first cycle by pulling down Viezbicke's waistband and trusting the contact points into the flesh of his left hip. (R:19, 7-9) (R:45, 4) (R:46, 16, 19) (Ex. 3, Body Camera Footage) This rendered Viezbicke unable to move much less comply with the Officers' directives. (R:45, 4) Officer Kosmosky attempted to handcuff Viezbicke by grabbing his wrist, but he too had difficulty positioning himself in the confined space. (R:45, 4) (R:46, 19) (Ex. 3, Body Camera Footage) Once again, Officer Ramthun deployed

the Taser in a similar manner. (R:19, 7-9) (R:45, 4) (R:46, 16, 19) (Ex. 3, Body Camera Footage) After the second cycle was complete, Officer Kosmosky was able to relocate Viezbicke from the restricted space, roll him onto his stomach, and secure the arrest. (R:19, 8) (R:45, 4) (R:46, 16, 19) (Ex. 3, Body Camera Footage)

While escorting Viezbicke to the police car, Officer Kosmosky asked Officer Ramthun if he had his body camera activated. (Ex. 3, Body Camera Footage) Officer Ramthun stated he did have his camera on. (Ex. 3, Body Camera Footage) Once inside the police car, Officer Kosmosky stated he could have come in there after you ran from me a couple years ago when you were drunk and he could have kicked your damn door in and hauled you off, too. (R:45, 4, 21) (Ex. 9, Dash Camera Footage)

At the jail Viezbicke informed a sheriff's deputy he believed Officer Kosmosky had it out for him and used excessive force during the arrest. (R:45, 21) The sheriff's deputy asked Officer Kosmosky over the radio if he had it out for Viezbicke. (R:45, 21) (Ex. 9, Dash Camera Footage) Officer Kosmosky stated Viezbicke had to do the get-away type crap so we throw him down and then, or Tased him because he wouldn't put his hand behind his back – he just stood there. (R:45, 21) (Ex. 9, Dash Camera Footage) Five minutes later, Officer Kosmosky drafted a probable cause affidavit in support of the request for prosecution swearing to the material

fact that Viezbicke came charging towards him. (R:45, 21) (R:46, 10, 16)

On August 21, 2017 Attorney Heather Dvoran initially met with Viezbicke at the Ozaukee County Jail to discuss the case. (R:45, 4) (R:46, 1) (R:60, 1) At said meeting, Viezbicke instructed Ms. Dvoran to raise an entrapment defense. (R:45, 4) (R:71, 9, 17-18) Viezbicke was adamant on proceeding to trial and willing to take the stand in his own defense. (R:45, 4) Viezbicke explained to Ms. Dvoran he believed the police were targeting him for a previous incident. (R:46, 1) (R:71, 17) Viezbicke also explained he was disinclined to resist arrest as he remained in his enclosed front porch for about twenty minutes to prevent the situation from escalating, despite the unrelenting persistence by police. (R:45, 4) Viezbicke stated he would not have resisted arrest had it not been for Officer Kosmosky instigating the crime and coercion. (R:45, 4) Ms. Dvoran was opposed to raising the defense. (R:45, 4) (R:71, 9, 18) Ms. Dvoran stated Viezbicke was guilty anyways because he walked away from the Officers, and she cited the solid factual basis surrounding the disorderly conduct charge. (R:45, 4) (R:71, 18-19)

On August 31, 2017 Ms. Dvoran met with Viezbicke at the jail to watch the dash and body camera footage. (R:45, 4) (R:59, 1) (R:71, 10, 20-21) Ms. Dvoran stated she would not address Viezbicke's interest in

the entrapment defense any further because they were there to watch the videos. (R:45, 4) (R:71, 19) While watching the videos, Viezbicke pointed out Officer Kosmosky failed to secure evidence when he intentionally turned his body camera off just before he provoked the situation, but it fell on deaf ears. (R:45, 4) (R:71, 20)

After watching the incident unfold on camera, Ms. Dvoran stated this is excessive force and you need to sue them. (R:45, 5) (R:71, 9) Ms. Dvoran further stated I cannot help you with a lawsuit because that is not what I do. (R:45, 5) Ms. Dvoran then indicated she would be furnishing copies of the dash and body camera footage so Viezbicke could pursue a civil rights lawsuit. (R:45, 5) (R:71, 21-22) (see E.D. Wis. Case No. 18-CV-1272)

On December 21, 2017 Viezbicke appeared with counsel for the change of plea and sentencing hearing. (R:14, 1-3) Ms. Dvoran and Viezbicke spoke briefly in a conference room and Viezbicke signed the *Plea Questionnaire/Wavier of Rights* and *Notice of Right to Seek Postconviction Relief* form. (R:12, 1) (R:13, 1-3)

Argument

I. THE TACTICS DEPLOYED BY LAW ENFORCEMENT DURING THE COURSE OF VIEZBICKE'S ARREST CONSTITUTED OUTRAGEOUS GOVERNMENTAL CONDUCT

A. Legal Standards and Standard of Review

Outrageous governmental conduct, or governmental abuse of power, is a defense to criminal prosecution which originated in *U.S. v. Russell, 411 U.S. 423 (1973)*. The leading Wisconsin case in which the holdings of the *Russell* Court were first applied is *Steadman*, wherein, "a prosecution might violate due process if the enforcement tactics were fundamentally unfair or if they were 'shocking to the universal sense of justice.'" *State v. Steadman, 152 Wis. 2d 293, 301, 448 N.W.2d 267 (Ct. App. 1989) (quoting Russell, 411 U.S. at 432)*.

In *Hyndman*, "[t]he trial court's determination of constitutional fact, i.e., a determination of constitutional rights, is reviewed by this court without deference to the trial court." (citations omitted) *State v. Hyndman, 170 Wis. 2d 198, 207, 488 N.W.2d 111 (Ct. App. 1992)*. For a defense of outrageous governmental conduct to be successful a defendant "must assert that a specific constitutional right has been violated." (citations omitted) *Id. at 208*.

In addition, *Steadman* also says "[a] due process situation may arise where the government itself was so enmeshed in the criminal activity that the prosecution of the defendant was held to be repugnant to the

American criminal justice system." *Steadman, 152 Wis. 2d at 301 (see Russell 411 U.S. at 428)*. Further, "[a]lthough separate concepts, entrapment and government abuse of power find their genesis in due process." *Id.* Further still, "[t]he difference is that the entrapment inquiry focuses on the predisposition of the defendant whereas the question of governmental abuse of power focuses on whether the government 'instigated the crime.'" *Id. (see Russell 411 U.S. at 428-29)*.

Hence, "[i]n Wisconsin, it appears that: (1) the standard of review for the defense is de novo, (2) the defendant must assert that the State violated a specific constitutional right, and (3) the government's conduct must be so enmeshed in a criminal activity that prosecution of the defendant would be repugnant to the American criminal justice system." *State v. Gibas, 184 Wis. 2d 355, 360, 516 N.W.2d 785 (Ct. App. 1994)*.

B. Viezbicke Asserts His Constitutional Right to Due Process Was Violated

On the outset, Viezbicke has asserted at the *Machner* hearing his due process rights were violated as a result of outrageous governmental conduct. (R:71, 5) U.S. Const. amend. XIV § 1; Wis. Const. art. I, § 8(1). It is "fundamentally unfair" and "shocking to the universal sense of justice" for the police to exact retribution for a previous encounter with violence, by

destroying evidence, instigating the commission of a crime with fighting words, and coercively threatening to withhold an official action. *Steadman, 152 Wis. 2d at 301.* Accordingly, Viezbicke has satisfied the requirement of "assert[ing] that a specific constitutional right has been violated." *Hyndman, 170 Wis. 2d at 208*.

C. The Tactics Deployed By Police to Arrest Viezbicke and Secure His Conviction Are Repugnant to the American Criminal Justice System

The Officers did not merely furnish an opportunity for a crime to be committed; rather, they were "enmeshed in a criminal activity" themselves. *Steadman, 152 Wis. 2d at 301.* This case involves a common machination used by corrupt police officers. The scheme was Officer Kosmosky purposefully turned his body camera off to cover up the outrageous tactics he used to instigate the commission of a crime to exact revenge for prior encounters. This was done by fomenting violence with the use of fighting words and, more importantly, by way of criminal coercion. Thus, Viezbicke did not act under his own volition when he exited his residence.

The use of force exerted by the Officers thereafter was police brutality's poster child. Once at the jail, Officer Kosmosky then submitted a probable cause affidavit containing material facts which he did not believe to be true. The State should not be

allowed to enjoy the benefit of a conviction in this case. The law enforcement tactics police resorted to during Viezbicke's arrest are "repugnant to the American criminal justice system." *Id.*

In *Russell*, the Court stated "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Russell, 411 U.S. at 431-432.* That day has come with this case. The brutal, disingenuous, and coercive tactics deployed by police to arrest Viezbicke and secure his conviction are illegal under state and federal law. There is persuasive evidence in support of these contentions.

Before all else, Viezbicke contends Officer Kosmosky knowingly submitted a falsified probable cause affidavit contrary to Wis. Stat. § 946.32(1)(a). The dash camera recorded the conversation which took place over the police radio when a sheriff's deputy asked Officer Kosmosky if he had it out for Viezbicke. (Ex. 9, Dash Camera Footage, filename: 21h33m24s.dav, duration: 21:58:01 – 21:58:25) Therein, Officer Kosmosky states "[Viezbicke] has to do the get-away type crap so we throw him down and then, or Tased him because he wouldn't put his hands behind his back – he just stood there." The digital evidence tells us

Officer Kosmosky believed Viezbicke just stood there at this point in the arrest.

By contrast, this statement directly contradicts the probable cause affidavit in support of the request for prosecution submitted only minutes later. According to the probable cause affidavit, Officer Kosmosky then writes, "I immediately opened the door and told VIEZBICKE to put his hands behind his back which he did not do. VIEZBICKE came charging towards me and was assisted to the ground." (R:46, 10) Ostensibly, there is a tremendous difference between just standing there and charging a police officer in a prosecution for resisting arrest. The false swearing statute, Wis. Stat. § 946.32(1)(a), provides as follows:

> "Under oath or affirmation or upon signing a statement pursuant to s. 887.015 makes or subscribes a false statement which he or she does not believe is true, when such oath, affirmation, or statement is authorized or required by law or is required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action."

In *Devitt*, for a conviction under the felony false swearing statute, the allegedly false sworn statement must have been either required or authorized by law. *State v. Devitt, 82 Wis. 2d 262, 266, 262 N.W.2d 73 (1978)*. A person swearing falsely to material facts in an affidavit properly administered is guilty of false swearing. *24 Op.Atty.Gen 145 (1935)*. And as annotated

below Wis. Stat. § 970.01, *Koch* "requires that a judicial determination of probable cause be made within 48 hours of a warrantless arrest." *State v. Koch, 175 Wis. 2d 684, 689, 499 N.W.2d 152 (1993)*. In this instance, the probable cause affidavit contains a conscious submission of a false representation of material fact and it was required and authorized by law. Thus, Officer Kosmosky violated Wisconsin law when he committed false swearing.

In addition, Viezbicke contends Officer Kosmosky obstructed justice contrary to Wis. Stat. § 946.65(1) when he submitted the fabricated affidavit and altered body camera footage to the State. (R:25, 1) (R:46, 10) Below the obstructing justice statute, Wis. Stat. § 946.65(1) provides:

> "Whoever for a consideration knowingly gives false information to any officer of any court with intent to influence the officer in the performance of official functions is guilty of a Class I felony."

And under Wis. Stat. § 946.32(2), a district attorney is considered an "officer of the court." Officer Kosmosky obstructed justice by submitting the falsified affidavit and by evidence tampering.

Devoid of any statutory recitation, Viezbicke contends Officer Kosmosky committed battery contrary to Wis. Stat. § 940.19(1) when used excessive force by way of a punch to Viezbicke's left eye upon making entry into his residence. The question of "whether the force

used was excessive is determined by an evaluation of "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." (citations omitted) *State v. Krause, 168 Wis. 2d 578, 589, 484 N.W.2d 347 (1992) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989).* A police officer may be guilty of committing a battery under Wisconsin law by using unreasonable force in the apprehension of a suspect. e.g. *Driebel v. City of Milwaukee, 298 F.3d 622, 644 (7th Cir. 2002); State v. Mendoza, 80 Wis. 2d 122, 154, 258 N.W.2d 260 (1977); Wirsing v. Kreminski, 61 Wis. 2d 513, 521, 213 N.W.2d 37 (1973).*

To evidence this, the photograph taken by a lieutenant at the jail shortly after Viezbicke's arrival shows his left eye was swollen. (R:19, 20) And the fact that the photograph of Viezbicke in the jail cell was even taken at all suggests something was not quite right about his injuries. Also, the body camera footage illustrates there were no exigent circumstances in existence necessitating fists to start flying. The photographic evidence coupled with the body camera footage supports a conclusion that Officer Kosmosky battered Viezbicke with a punch to the face.

In the same token, Officer Ramthun's use of force with the Taser was objectively unreasonable insofar as his conduct fell into the category of substantial battery. Lethal force with a Taser was not the

appropriate reaction "from the perspective of a reasonable officer on the scene" considering all the circumstances in this case. (citations omitted) *Krause, 169 Wis. 2d at 589 (quoting Graham 490 U.S. at 396)*. Here, the circumstances which were in existence from the perspective of a reasonable officer did not call for the use of a Taser. The State will be hard-pressed to plausibly argue the use of force with the Taser was legal under the laws of this State in light of the evidence. (Ex. 3, Body Camera Footage, filename: PICT004_2017.08.03_02.25.42.avi, duration: 00:00 – 01:50 of 03:00) Wis. Stat. § 940.19(2) provides as follows:

> "Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony."

In *Mendoza*, "there are circumstances where a police officer's use of force is unlawful." *Mendoza, 80 Wis. 2d at 154*. And "[a]n officer may be guilty of assault and battery if he uses unnecessary and excessive force or acts wantonly and maliciously." *Id*. In this case, Officer Ramthun committed substantial battery contrary to Wisconsin law when he intentionally used excessive force with the Taser.

Overall, be it the suspicious mishandling of the body camera footage, the excessive use of force, or the cover up perpetuated with phony police reporting, it can be fairly said both Officer Kosmosky and Officer

Ramthun committed misconduct in public office. The misconduct in public office statute, Wis. Stat. § 946.12(2) provides:

> "In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity."

The Officers knew, or should have known, they exceeded their lawful authority by their actions which are forbidden under Wisconsin law.

Finally, Viezbicke alleges Officer Kosmosky committed criminal coercion contrary to code of federal regulation when he threatened the police would not leave until Viezbicke exited his enclosed front porch and came outside. Regrettably, this cannot be proven because the body camera footage was intentionally turned off to hide the illegal conduct. The code of federal regulation prohibiting criminal coercion, 25 C.F.R. § 11.406(a)(3) provides:

> "A person is guilty of criminal coercion if, with purpose to unlawfully restrict another's freedom of action to his or her detriment, he or she threatens to: ... (3) Take or withhold action as an official, or cause an official to take or withhold action."

Yet, this is precisely what Officer Kosmosky did. In essence, he unlawfully restricted Viezbicke's freedom to leave his residence by withholding an official action in an effort to embarrass him. Moreover, the

potential of societal ridicule from having a police presence outside of Viezbicke's home for an extended period of time weighed heavily on his decision to acquiesce to their request and leave the safety of his residence. It seemed to Viezbicke as though he was left with no choice but to comply due to Officer Kosmosky's desire to run a smear campaign.

The outrageous tactics used by Officer Kosmosky and Officer Ramthun to make an arrest and secure a conviction "offend common concepts of decency" and are "repugnant to the American criminal justice system." *quoting Steadman, 152 Wis. 2d at 301.* If a conviction remains intact in this case, it would invite police to conduct themselves without professionalism and further weaken the public's confidence that criminal cases will be handled lawfully by those who protect and serve.

II. THE TRIAL COURT ERRD IN DENYING VIEZBICKE'S CLAIMS OF SPOLIATION OF BODY CAMERA FOOTAGE

A. Legal Standards and Standard of Review

To determine whether a defendant's due process rights are violated by the destruction of evidence by police, Wisconsin courts have looked to the decisions in *California v. Trombetta, 467 U.S. 479 (1984)* and *Arizona v. Youngblood, 488 U.S. 51 (1988)* for guidance. "Under the due process clause of the fourteenth amendment, criminal defendants must be afforded 'a meaningful opportunity to present a complete defense.'" *State v. Heft, 178 Wis. 2d 823, 828, 505 N.W.2d 437,*

440 (Ct. App. 1993); State v. Hahn, 132 Wis. 2d 351, 355, 392 N.W.2d 464, 465-66 (Ct. App. 1986) (quoting Trombetta, 467 U.S. at 485).

As importantly, the State has a duty to preserve exculpatory evidence when it is evidence "that might be expected to play a significant role in the suspect's defense." *State v. Hahn, 132 Wis. 2d 351, 358, 392 N.W.2d 464 (Ct. App. 1986); State v. Oinas, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985) (quoting Trombetta, 467 U.S. at 488.*

Unlike the *Trombetta* Court, *Youngblood* created a bad faith analysis holding "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *State v. Greenwold, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (quoting Arizona v. Youngblood 488 U.S. 51, 58 (1988).* The *Youngblood* Court also differentiated between evidence that is apparently exculpatory and potentially exculpatory. *Id. (see Id. at 57-58).* *Youngblood* failed to set forth a rigid definition of bad faith, however, the cases interpreting its standard did explain bad faith is not attributable to negligence or inadvertence. *Id. at 68-69.*

Wisconsin courts applied the bad faith test in *Greenwold II*, wherein, "[t]he reviewing court has the duty to apply constitutional principles to the facts as

found in order to ensure that the scope of constitutional protections does not vary from case to case." *State v. Greenwold, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994).* The *Greenwold II* Court held "[a] defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." *Greenwold II, 189 Wis. 2d at 68.*

If a defendant is to prevail on grounds of the failure by police to preserve potentially exculpatory evidence then his burden to show bad faith is: "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." (emphasis retained) *Greenwold II, 189 Wis. 2d at 69.* It would be an "impossible task" if "defendants were required to show that the destroyed tape was exculpatory." *State v. Amundson, 69 Wis. 2d 554, 577, 230 N.W.2d 775 (1975).*

Whether action by the State constitutes a violation of due process is a question of law that is decided on appeal independent of the determination of the circuit court. *State v. Luedtke, 2015 WI 42, ¶37, 362 Wis. 2d 1, 863 N.W.2d 592.* A circuit court's findings of historical fact will be upheld unless those findings are clearly erroneous. *Id.* A circuit court's

findings of fact are clearly erroneous when those findings "are unsupported by the record." *Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530*. Whether facts satisfy a particular legal standard is a question of law. *Langlade Cnty. v. D.J.W., 2020 WI 41, ¶47, 391 Wis. 2d 231, 942 N.W.2d 277*.

B. The Officers Were Aware of the Potentially Exculpatory Value or Usefulness of the Body Camera Footage

It is a widely-recognized notion that evidence gathering is an integral function of a police officer's duty. Under the circumstances, Officer Kosmosky knew or should have known turning his body camera off violates the Saukville Police Department's policy and procedure pertaining to audio/video recording equipment. According to the policy, the use of body cameras "help[] [to] defend against civil litigation and allegations of officer misconduct." (R:46, 23) More importantly, the policy also states footage "shall be recorded using the MVAR or body camera systems" in "[a]ny situation or incident in which the officer has a professional contact with a member of the public." (R:46, 25)

A viewing of the body camera footage reveals an existential gap in the recordings captured by Officer Kosmosky's recording device. (Ex. 3, Body Camera

Footage) (compare filename: PICT0003_2017.08.03_02.24.20.avi to PICT0004_2017.08.03_02.25.42.avi) There is evidence of bad faith when evidence is destroyed in defiance of police procedure. *State v. Tarwid, 147 Wis. 2d 95, 105, 433 N.W.2d 255 (Ct. App. 1988)*.

The State will have us believe the footage would have been innocuous as, by and large, the court record reflects at this point Officer Kosmosky went across the street to speak with the witness. Even if this were true, it still would not explain why Officer Kosmosky turned his body camera off moments before he was about to have "a professional contact with a member of the public." (R:46, 25) Besides, Officer Kosmosky's body camera even recorded audio of him asking Officer Ramthun if he had his body camera activated towards the end of the arrest. (Ex. 3, Body Camera Footage, filename: PICT005_2017.08.03_02.29.18.avi, timestamp: 02:30, duration: 00:53 – 00:55)

In sum, what is clear in this case is Officer Kosmosky was not "acting in good faith and in accord with [the department's] normal practice" when he turned his body camera off. *Youngblood, 488 U.S. at 56 (citing Trombetta, 467 U.S. at 488)*. The Officers were aware of the potentially exculpatory value, or usefulness, of evidence they intentionally failed to preserve.

C. Viezbicke Has Met the Burden of Proof By Showing Bad Faith on the Part of Police

The Officers acted in bad faith with an official animus or ill will during the arrest. The Officers did not respond to the situation impartially or in a good faith effort to uphold the rule of law. Instead, Officer Kosmosky and Officer Ramthun worked in tandem to abuse their position of power for vengeful purposes. The evidence shows Viezbicke has met the burden of proof by showing bad faith on behalf of the Officers.

The State will argue Officer Kosmosky's failure to preserve the evidence is attributable to negligence or inadvertence. This argument is unpersuasive for many reasons. First, the dash camera footage suggests Officer Kosmosky acted in bad faith to intentionally fail to preserve the body camera footage. When Viezbicke questioned whether the force used during the arrest was necessary, the audio on the dash camera footage recorded Officer Kosmosky state "Yup, I could have came <sic> in there after you ran from me a couple years ago when you were drunk. I could have kicked your damn door in and hauled you off, too." (Ex. 9, Dash Camera Footage, filename: 21h33m24s.dav, duration 21:41:05 – 21:41:14) The dash camera footage evinces Officer Kosmosky had an *animus ulcicendi*, or an intention to take revenge, against Viezbicke in the wake of prior encounters.

Second, as stated in section I, C, *infra*, the Officers acted with an *animus felonicus* or an intention to commit a felony. Officer Kosmosky acted in bad faith when he submitted the falsified probable cause affidavit contrary to Wisconsin's false swearing statute, Wis. Stat. § 946.32. It is also indicative of bad faith when Officer Ramthun committed substantial battery contrary to Wis. Stat. § 940.19(2) while the body camera footage supports a conclusion that he used excessive force with a Taser during the apprehension of Viezbicke. (Ex. 3, Body Camera Footage, filename: PICT004_2017.08.03_02.25.42.avi, duration: 00:00 – 01:50 of 03:00)

Finally, Officer Kosmosky made a conscious effort to suppress exculpatory evidence. It is highly suspicious that Viezbicke's account of the incident so significantly differs from the Officers' version while the body camera was off. Officer Kosmosky knew if the body camera footage captured him inciting the situation with inflammatory language and coercive tactics the evidence would have been potentially exculpatory in a court of law.

There is no reason for us to believe the Officers are credible and acted in good faith to preserve evidence while their conduct was nothing short of reprehensible. Thus, Viezbicke's conviction is invalid as he has met the burden of proof by demonstrating bad faith of the Officers.

III. THE TRIAL COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS

The Trial Court's findings of fact relied on facts which are unsupported by the record and are favorable to the State's case. The Trial Court did not mention Viezbicke's facts as pled in the postconviction motion which went to the heart of the issues. This happened for the first time during a mix up with attorney-client correspondence which Viezbicke wished to refer Ms. Dvoran to, so as to help refresh her memory. (R:71, 14)

> The Court: What I want to know is Mr. Viezbicke says in his correspondence to me that he was in the car, the squad car with – there are two Ramthuns on the Saukville police Department. There is a sergeant and there is a patrolman, I think. And he was in the squad car. They gave him a ticket, and he got out and started yelling and carrying on out in the street. Does that sound familiar, or was it where he came out of the house that he lived in, took the ticket, tore up the ticket, and started swearing at the officers?
>
> The Witness: If I recall, it was much closer to the latter one.

The second time this happened was after direct examination of Ms. Dvoran was abruptly truncated by the Trial Court. (R:71, 23-24)

> The Court: So Mr. Viezbicke, your own pleadings say you were in the back of the squad car, that Officer Ramthun had let you out of the squad car after they gave you the ticket and the Court pamphlets, and you turned around and you ripped them – you crumpled up the paper en route back to your residence and threw it on the ground in front of Kosmosky and scolded Kosmosky, quote, "Fuck you, Kosmosky." At that point Kosmosky turned the body-worn camera back on.

> Kosmosky responded, walking in Viezbicke's direction from the middle of the street on his way, ordered Viezbicke to stop come here, as well as stating, "You are going to jail." Viezbicke shut the front door and said, goodbye. Then Kosmosky breached the front of the house and pulled Viezbicke in the middle section, causing him to lose his balance – in the mid-section. Did I read that correctly?
>
> Mr. Viezbicke: Yeah.

A fair and accurate reading of Viezbicke's pleadings would have included the excerpts before and after his facts pertaining to spoliation, entrapment, and outrageous governmental conduct. (R:45, 3) This Court is permitted to draw reasonable inferences from the allegations of a pleading. *State ex rel. Evanow v. Seraphim, 40 Wis. 2d 223, 228, 161 N.W.2d 369 (1968).* Therefore, this Court may find the Trial Court's findings of fact in this case are clearly erroneous as the findings "are unsupported by the record." *Royster-Clark, Inc., 290 Wis. 2d 264, ¶11.*

IV. THE TRIAL COURT ERRD IN DENYING VIEZBICKE'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. General Principles

A "*Nelson/Bentley* motion" is a motion for plea withdrawal on the basis of ineffective assistance of counsel. *State v. Burton, 2013 WI 61, ¶5, 349 Wis. 2d 1, 832 N.W.2d 611. see Nelson v. State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); State v. Bentley, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).* *Nelson/Bentley* is "invoke[d] ... when the defendant alleges some factor

extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." *State v. Howell, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48.* An adequate and accurate plea colloquy does not foreclose a *Bentley* challenge; the entire premise of a *Nelson/Bentley* plea withdrawal motion is that something not apparent from the plea colloquy may have rendered a guilty or no contest plea infirm. *Id. at ¶77.*

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that refusal to allow withdrawal of the plea would result in manifest injustice." (internal quotes omitted) *State v. Brown, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.* "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." *Id.* "Ineffective assistance of counsel is one type of manifest injustice." *State v. Shata, 2015 WI 74, ¶29, 364 Wis. 2d 63, 868 N.W.2d 93.*

A "defendant is entitled to withdraw his guilty plea if the circuit court's refusal to allow plea withdrawal would result in a manifest injustice." *State v. Hoppe, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794.* "A plea not entered knowingly, intelligently, and voluntarily violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right." *State v. Taylor, 2013 WI 34, ¶25, 347 Wis.*

2d 30, 829 N.W.2d 482. "When inaccurate legal information renders a guilty plea an uninformed one, it can also compromise the voluntariness of the plea." *State v. Woods, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992)*.

Notably, "it is well-settled that pro se complaints are to be liberally construed to determine if the complaint states any facts that can give rise to a cause of action". (citations omitted) *State v. Romero-Georgana, 2014 WI 83, ¶107, 360 Wis. 2d 522, 849 N.W.2d 668*. Accordingly, Viezbicke requests for the entirety of his claims contained in the plea withdrawal motion to be liberally construed as a Wis. Stat. § 974.06 postconviction motion where relief under *Nelson/Bentley* is not available.

B. Legal Standards and Standard of Review

The two-prong test for ineffective assistance of counsel set forth by the decision in *Strickland v. Washington, 466 U.S. 668 (1984)* requires a defendant to "show that counsel's performance was deficient and that deficient performance prejudiced him." *State v. Luedtke, 2015 WI 42, ¶63, 362 Wis. 2d 1, 863 N.W.2d 592 (citing Strickland, 466 U.S. at 687)*.

First, the deficiency prong of the *Strickland* test requires a defendant to "show that counsel's

representation fell below an objective standard of reasonableness considering all the circumstances." *State v. Dalton, 2018 WI 85, ¶34, 383 Wis. 2d 147, 914 N.W.2d 120 (citing Strickland, 466 U.S. at 688)*. Deficient performance is shown where counsel's representation was "outside the wide range of professionally competent assistance." *State v. McMahon, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (citing Strickland, 466 U.S. at 688)*.

The deficiency prong is met when counsel's performance was the result of an oversight rather than a reasoned defense strategy. (see *State v. Moffett, 147 Wis. 2d 343, 353, 433 N.W.2d 572 (1989)*; see also *Dixon v. Snyder, 266 F. 3d 693, 703 (7th Cir. 2001)*; see also *Wiggins v. Smith, 539 U.S. 510, 534 (2003)*).

Second, the prejudice prong of the *Strickland* test is satisfied when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different...." *State v. Hunt, 2014 WI 102, ¶40, 360 Wis. 2d 576, 851 N.W.2d 434 (quoting Strickland, 466 U.S. at 694)*. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Moffett, 147 Wis. 2d at 354 (quoting Strickland, 466 U.S. at 693*).

Instead, "[t]he question on review whether there is a reasonable probability that a jury viewing the

evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *Id. at 357*. "Reasonable probability," in the context of prejudice, is defined as "probability sufficient to undermine the outcome." *Id. (quoting Strickland, 466 U.S. at 694)*. If this test is satisfied then relief is required and no abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor, 529 U.S. 362 (2000)*.

However, "[w]hen a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice." *State v. Thiel, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305*.

C. Trial Counsel's Performance Was Deficient

i. Trial Counsel Performed Deficiently By Providing Improper Legal Advice Regarding the Availability of an Entrapment Defense

At the August 21, 2017 attorney visit, Viezbicke insisted the entrapment defense be attempted and Ms. Dvoran dissuaded him by giving defective advice. The defective advice was a "factor extrinsic to the plea colloquy" which prevented Viezbicke from knowingly, intelligently, and voluntarily entering the plea. *Howell, 296 Wis. 2d 380, ¶74*. If not for Ms. Dvoran's improper advice Viezbicke "would not have pleaded

guilty and would have insisted on taking the case to trial." *Bentley, 201 Wis. 2d at 312 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985))*. Ms. Dvoran performed deficiently by providing improper legal advice.

As previously stated fact, Ms. Dvoran advised Viezbicke he was guilty anyways because he ran from the officer and she would not raise an entrapment defense. Improper advice to a client regarding possible defenses can constitute ineffective assistance of counsel. *e.g. State v. Lentowski, 212 Wis. 2d 849, 854-55, 569 N.W.2d 758 (Ct. App. 1997)*. Here, the advice Viezbicke received runs contrary to basic legal principles of entrapment.

In *Strickland*, "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *quoting Strickland, 466 U.S. at 687 (internally quoting McMann v. Richardson, 397 US 759, 770-71 (1970))*. At the *Machner* hearing in this case, Ms. Dvoran testified as follows (R:71, 11-12):

> Mr. Viezbicke: So how much experience did you have as an attorney when you represented me?
>
> The Witness: I graduated law school in 2016. My entire 3L year I worked in a legal clinic helping with mental health claims. In the interim, before getting hired by the Public Defender, I also assisted an

> attorney out of Racine County with a pending homicide case. I don't remember exactly what time of year I was appointed to your case. But as I stated, I started practicing with the Public Defender's Office in May of 2017.

Ms. Dvoran was appointed to represent Viezbicke on August 8, 2017. (R:6) "A reasonably competent attorney" would have had considerably more than three months experience as a licensed practitioner of criminal law at the time. *Id.* Ms. Dvoran further testified (R:71, 18-19):

> Mr. Viezbicke: Right. So then is it true that you indicated to me that I was guilty anyways because I ran from the officer and therefore entrapment wasn't a viable defense? Is that fair to say?
>
> The Witness: I don't recall saying that. I might have. I just don't recall.

The advice Viezbicke received was not "within the range of competence demanded of attorneys in criminal cases." *Id.* The case law is in accord.

In *Shata*, "an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *State v. Shata, 2015 WI 74, ¶87, 364 Wis. 2d 63, 868 N.W.2d 93 (citing Hinton v. Alabama, 571 U.S. 263, 274 (2014)*. In this case, even the most cursory legal research shows the advice was not within the range of competence demanded of attorneys in criminal cases. The leading case on entrapment in Wisconsin is *Hochman*, wherein, "the invocation of

[entrapment] necessarily assumes the act charged was committed." *State v. Hochman, 2 Wis. 2d 410, 418, 86 N.W.2d 466 (1957)*. Similarly, in *Jensen*, "an entrapment defense may only be applied when all of the elements of the charged crime are established." *State v. Jensen, 198 Wis. 2d 765, 771, 543 N.W.2d 552 (Ct. App. 1995)*.

By definition, "[entrapment] is a defense available to a defendant who has been induced by law enforcement to commit an offense which the defendant was not otherwise disposed to commit." *State v. Pence, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989)*. In *Amundson*, "entrapment is involved where the police have instigated, induced, lured or incited the commission of a crime and where the tactics of the police offend concepts of decency." *State v. Amundson, 69 Wis. 2d 554, 565, 230 N.W.2d 775 (1975)*. Moreover, "entrapment encompasses inducements and other activities by the police which remove the element of volition from the conduct of the defendant." *Id*.

Thus, "if the evil intent and the criminal design originate in the mind of the government agent and, the accused is lured into the commission of the offense charged in order to prosecute him for it, when he would not have committed an offense of that character except for the urging of the agent, no conviction may be had." (internal quotes omitted) *State v. Saturnus, 127 Wis. 2d 460, 469, 381 N.W.2d 290 (1986)*. However,

"entrapment will only be established if the law enforcement officer used *excessive* incitement, urging, persuasion, or temptation, and prior to the inducement, the defendant was not already disposed to commit the crime." (emphasis retained) *State v. Hilleshiem, 172 Wis. 2d 1, 9, 492 N.W.2d 381 (1992)*.

The body camera footage demonstrates Viezbicke was lacking predisposition to partake in the more serious criminal behavior. For about twenty minutes, Viezbicke remained inside his front porch in an effort to prevent the situation from escalating. (Ex. 3, Body Camera Footage, filename: PICT0002_2017.08.03_02.03.02.avi timestamp: 02:03 – 02:14, duration 12:13 & filename: PICT0003.2017.08.03_02.24.20.avi timestamp: 02:24 – 02:24, duration: 00:35) Both attorney and client watched this footage together. The hesitancy depicted in the digital evidence shows Viezbicke lacked predisposition to resist arrest.

The police instigation of a crime in this case was "excessive" as it removed the element of volition from Viezbicke. *quoting Hilleshiem, 172 Wis. 2d at 9*. The purported inflammatory language and trickery used by Officer Kosmosky itself may not be enough to establish excessive inducement. Nevertheless the inducement was excessive since the factor of criminal coercion is involved. In the Seventh Circuit, "persistence ... in the absence of coercion ... does not establish

inducement." *U.S. v. Higham, 98 F.3d 285, 290 (7th Cir. 1996)*. According to Black's Law Dictionary (11th ed. 2019), criminal coercion is defined as "[c]oercion intended to restrict another's freedom of action by ... (4) taking or withholding an action or causing an official to take or withhold an official action."

Alas, if not for the alleged spoliation of evidence the body camera footage would have shown excessive inducement. Even so, inducement can be inferred based on the spoliation of this evidence.

> The intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable. This presumption or inference arises, however, only when the act was intentional and indicates fraud and a desire to suppress the truth. see Intentional Spoliation of Evidence, 18 Am. Jur. Proof of Facts 3d 515; Electronic Spoliation of Evidence, 3 A.L.R. 6th 13.

In sum, such as here, "an attorney's advice must be adequate to allow a defendant to knowingly, intelligently and voluntarily decide whether to enter a guilty plea." *quoting Shata, 364 Wis. 2d 63, ¶77.* Therefore, Ms. Dvoran's performance was deficient as she was not performing like "a reasonably competent attorney" and the advice was not "within the range of

competence demanded of attorneys in criminal cases." *quoting McMann v. Richardson, 397 US 759, 770-71 (citing Strickland, 466 U.S. at 687).*

ii. Trial Counsel Performed Deficiently By Overlooking the Probative Value of the Body Camera Footage

This concept is simple as it deals with Ms. Dvoran overlooking the inconsistencies of timestamps on the body camera footage in relation to the documentary evidence. This oversight is a "factor extrinsic to the plea colloquy" which prevented Viezbicke from knowingly, intelligently, and voluntarily entering the plea. *Howell, 296 Wis. 2d 380, ¶74.* Had it not been for Ms. Dvoran's laxity Viezbicke "would not have pleaded guilty and would have insisted on taking the case to trial." *Bentley, 201 Wis. 2d at 312 (citing Hill, 474 U.S. at 59).* Ms. Dvoran performed deficiently by overlooking the probative value of the digital evidence.

There are glaring inconsistencies between the timestamps on the body camera footage and police reports. Out of the five recordings on the body camera footage, two are important here. The second video in sequential order will be designated as Video A, and the third video in succession will be designated as Video B. (Ex. 3, Body Camera Footage) (compare "Video A" filename: PICT0003_2017.08.03_02.24.20.avi, timestamp:

02:24, duration: 00:35 to "Video B" filename: PICT0004_2017.08.03_02_25.42.avi, timestamp: 02:25 – 02:28, duration: 03:00) The timestamps in the lower right corner of the footage are an accurate reflection of the duration and sequence of events in real time formatted in hours and minutes.

Once queued up, for the entirety of Video A the timestamp reads 02:24. We know the 35 second duration of Video A occurs somewhere within a 60 second period. When Video B is started the time stamp reads 02:25 and then it changes to 02:26 after 17 seconds. This tells us a minimum of 43 seconds passed between recordings Video A and Video B, but it could have been as much as 1 minute 8 seconds because the length of Video A is 35 seconds. (R:46, 8) This timeline does not coincide with police reporting. For example, it is evident from snippets of the police reports (R:46, 9) and probable cause affidavit (R;46, 16) below, respectively, that, there was too much time between recordings for their account of the incident to be true.

> After leaving the citation at the front door (VIEZBICKE was still sitting in the front porch, but not opening the door), I walked across the street to collect [M.B.]'s written statement. I had not even reached [M.B.]'s house before VIEZBICKE came out of his residence and walked into the street with the disorderly conduct citation in his hand. VIEZBICKE crumpled up the citation and threw it in the street as he stated 'Fuck you Officer Kosmosky!' I walked towards VIEZBICKE who immediately started walking towards his residence."

> As Officer Ramthun and I walked away from his residence, MR. VIEZBICKE came out of his house and stood in the middle of the street with the municipal citation I had just issued him in hand. Mr. VIEZBICKE held up the citation and crumpled it with both hands and threw it in the middle of the street. MR. VIEZBICKE then made several derogatory statements including 'fuck you Officer Kosmosky' as well as telling us to 'fuck off'. I did begin walking towards MR. VIEZBICKE and told him that he would be going to jail. I did tell MR. VIEZBICKE several times to come towards me and he began walking towards his residence

The admissibility of the police reports is not objectionable as hearsay under the business records exemption because the police could testify to its contents if present in court. Wis. Stat. § 908.03(6); e.g. Mitchell v.State, 84 Wis. 2d 325, 267 N.W.2d 349 (1978); Wilder v. Classified Risk Ins. Co., 47 Wis. 2d 109, 177 N.W.2d 109, 112 (1970); Jacobson v. Bryan, 244 Wis. 2d 359, 366, 12 N.W.2d 789, 793 (1944).

It is obvious from these writings the timespan between recordings of the body camera does not align with police reporting. In particular, it almost leaps off the page when Officer Kosmosky writes "he had not even reached the witness's home before VIEZBICKE came out of his residence" and, "[VIEZBICKE] immediately started walking towards his residence." A better way to gage the timeline is with the body camera footage which shows Officer Kosmosky turned his body camera off as he supposedly turned to leave. (Ex. 3, Body Camera Footage, filename: PICT003_2017.08.03_02.29.18.avi, timestamp: 02:24, duration: 00:35) In view of this, it is illogical to reason the Officers permitted Viezbicke

anywhere from 43 seconds, all the way up to 1 minute and 8 seconds, to purportedly swear in the middle of the street in front of the witness.

Furthermore, the timeline and the Officers' account of the incident are also problematic as Officer Kosmosky invoked the "hot pursuit" doctrine to make entry into Viezbicke's residence. In *Weber*, "[t]he basic ingredient of the exigency of hot pursuit is immediate or continuous pursuit of [a suspect] from the scene of a crime." (internal quotes and citations omitted) *State v. Weber, 2016 WI 96, ¶66, 372 Wis. 2d 202, 887 N.W.2d 554 (2016)*. The body camera was turned back on while Officer Kosmosky was immediately pursuing Viezbicke to his residence. (Ex. 3, Body Camera Footage, filename: PICT004_2017.08.03_02.25.42.avi, timestamp: 02:26, duration: 00:00) Point being, the timestamps on the body camera footage do not coincide with the sequence of events documented by police as they stopped and started ticking on both ends with little to no delay.

The amount of time which elapsed between recordings with the body camera greatly exceeds how long it would have realistically taken to walk 20 feet to the middle of the street, tear up a ticket while swearing, and walk back in the front door. The positioning of the Officers and Viezbicke can be better understood with a birds-eye view of the scene from Google Earth. (R:46, 21) This evidence shows the

distance which both Viezbicke and Officer Kosmosky had to travel to and from the middle of the street would not account for that much time.

The timestamps on the body camera footage prove the Officers are lying about what happened and Ms. Dvoran was unconstitutionally remiss by failing to recognize this variance. Thus, Ms. Dvoran's performance was deficient as the "performance was the result of an oversight rather than a reasoned defense strategy." *Moffett, 147 Wis. 2d at 353*.

iii. Trial Counsel Performed Deficiently By Selecting the Irrational Trial Strategy of Not Raising an Entrapment Defense

The decision by Ms. Dvoran to forgo an entrapment trial strategy was capriciously decided on a whim and was not a rationalized choice premised in law and fact. The decision not to raise the defense was a "factor extrinsic to the plea colloquy" which prevented Viezbicke from knowingly, intelligently, and voluntarily entering the plea. *Howell, 296 Wis. 2d 380, ¶74*. Had it not been for Ms. Dvoran selecting the irrational trial strategy of abandoning an entrapment defense Viezbicke "would not have pleaded guilty and would have insisted on going to trial." *Bentley, 201 Wis. 2d at 312 (citing Hill, 474 U.S. at 59)*. Ms. Dvoran performed deficiently by selecting an irrational trial strategy.

In *Felton*, the Wisconsin Supreme Court said it will "second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based on caprice rather than upon judgment." *State v. Felton, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983)*. When a trial strategy is accessed "decisions must be based upon facts and law." *Id.*

In *Schuman*, "[o]nly slight evidence is required to create a factual issue and put the defense before a jury." *State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (1999)*. Moreover, "[t]he evidence may be weak, insufficient, or of doubtful credibility, but the defendant is entitled to the instruction unless the evidence is rebutted by the prosecution to the extent that no rational jury could entertain a reasonable doubt as to either element." *Id.* Here, there was more than "slight evidence" from which a jury could find Viezbicke was entrapped. As for predisposition, there are several instances within the body camera footage where Viezbicke exhibits a hesitancy to make himself more accessible to the police for it to even be possible to resist arrest in the first place. (Ex. 3, Body Camera Footage, filename: PICT0002_2017.08.03_02.03.02.avi, timestamp: 02:03 - 02:14, duration: 12:13; filename: PICT0003_2017.08.03_02.24.20.avi, timestamp: 02:24, duration: 00:35) "[E]vidence tending to negate

predisposition of the defendant to commit the crime is relevant to the defense of entrapment." *State v. Boutch, 60 Wis. 2d 443, 447, 210 N.W.2d 730 (1973)*. The body camera footage demonstrates Viezbicke was not predisposed to resist arrest.

As for inducement, the gap in the recordings with the body camera is "slight evidence" from which a jury could extrapolate Officer Kosmosky provoked Viezbicke into resisting arrest. Although Ms. Dvoran was unwilling to acknowledge she knew about the gap in the recordings at the *Machner* hearing (even though she testified to watching the footage), she did admit being privy to the disputed material facts pertaining to the inducement element of an entrapment defense. At the *Machner* hearing Ms. Dvoran testified (R:71, 18-19):

> Mr. Viezbicke: Yes. Yes, I know. So could you explain your reasoning why you didn't think entrapment was a viable defense to the charges?
>
> The Witness: Again, this is just based off of my memory, but my memory of the incident was really that the police gave you several opportunities to resolve this with a ticket, and were very clear that they were going to arrest you if you didn't just stop swearing at them and stop, you know, the conduct that you were engaged in. Did leave the ticket for you. You exited the house, ripped it up, and then they followed through with their statement that they would arrest you. So I did not feel that there was enough for an entrapment defense.
>
> Mr. Viezbicke: Okay. So then was my side of the story of what happened consistent with theirs? Does that make sense?
>
> The Witness: Yeah, it makes sense. I would say there are parts that were consistent.

> Mr. Viezbicke: I am sorry, you cut out. I couldn't hear you.
>
> The Witness: I am sorry, maybe I moved away from the microphone. I said I had stated there were parts that were consistent.

Again, Ms. Dvoran also testified that she "might have" said to Viezbicke he was guilty anyways because he ran from the Officer and therefore entrapment was not available. (R:71, 18-19) In all practicality, Ms. Dvoran had all the cogs at her disposal to raise entrapment.

In *Weatherall*, appellant sought relief from his conviction for three counts of sale of heroin on the ground his attorney was ineffective for selecting the irrational trial strategy of choosing not to raise an entrapment defense. *Weatherall v. State, 73 Wis. 2d 22, 242 N.W.2d 220 (1976)*. The Wisconsin Supreme Court believed "[t]he sole question before us is whether there was a basis in reason or any rational basis for the trial counsel recommending to his client that the defense of entrapment not be attempted." *Id. at 28*. Trial counsel reasoned not to use the defense because the defendant made three separate sales of heroin and there was "no evidence of the agent having to overcome refusals or reluctance." *Id. at 29*. Accordingly, the decision was affirmed.

By contrast, in this case Ms. Dvoran was lacking a basis in reason or any rational basis to recommend the

defense not be attempted. The hasty refusal to raise the defense was based on Ms. Dvoran's supposition that Viezbicke was guilty anyways because he ran from the Officers rather than fact and law. Ms. Dvoran also ignored Viezbicke's theory of the case even though it was corroborated by evidence of both inducement and a lack of predisposition.

The evasive and unconvincing testimony of Ms. Dvoran shows "the initial guess is one that demonstrates an irrational trial tactic" and "it is the exercise of professional authority based upon caprice rather than upon judgment." *Felton, 110 Wis. 2d at 503.* Therefore, Ms. Dvoran's performance was deficient for selecting the irrational trial strategy of rejecting an entrapment defense.

iv. Trial Counsel Performed Deficiently By Failing To Raise the Spoliation of Exculpatory Evidence

Ms. Dvoran failed to raise potential challenges (and inform Viezbicke of the same) to the charges based on spoliation of the body camera footage. The failure to inform Viezbicke a challenge to the charges could be made by requesting the adverse-inference instruction at trial or by motion to dismiss was a "factor extrinsic to the plea colloquy" which prevented him from knowingly, intelligently, and voluntarily entering the plea. *Howell, 296 Wis. 2d 380, ¶74.* Had it not been for Ms. Dvoran's failure to raise spoliation Viezbicke

"would not have pleaded guilty and would have insisted on going to trial." *Bentley, 201 Wis. 2d at 312 (citing Hill, 474 U.S. at 59)*. Ms. Dvoran performed deficiently by failing to raise spoliation of the digital evidence.

In *Greenwold II*, trial counsel "moved to dismiss the charges on the ground that the State failed to preserve relevant and exculpatory evidence and that this constituted a violation of his constitutional right to due process." *Greenwold II, 189 Wis. 2d at 65*. In view of this, *Steinhardt* says "[i]n determining whether counsel performed deficiently for failing to bring a motion, we may access the merits of that motion." *State v. Steinhardt, 2007 WI 62, ¶43, 375 Wis. 2d 712, 896 N.W.2d 700.* In this case, a motion to dismiss based on police misconduct would have been meritorious as the body camera footage is strangely missing from the incident in question and the other evidence better jibes with Viezbicke's account of the incident.

In *Milwaukee Constructors II*, "[d]ismissal as a sanction for spoliation is appropriate only when the party in control of the evidence acted egregiously in destroying that evidence. " *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist., 177 Wis. 2d 523, 533, 502, N.W.2d 881 (Ct. App. 1993)*. Egregious conduct "involves more than negligence; rather, it consists of a conscious attempt to affect the outcome

of the litigation, or a flagrant, knowing disregard for the judicial process." *American Family Mut. Ins. Co. v. Golke, 2009 WI 81, ¶40, 319 Wis. 2d 397, 768 N.W.2d 729.* Here, Officer Kosmosky's egregious conduct indicates a conscious attempt to affect the outcome of the litigation and a flagrant, knowing disregard for the judicial process. In light of Viezbicke's facts and the missing footage, Ms. Dvoran performed deficiently by failing to challenge the charges based on the spoliation of body camera footage.

D. Trial Counsel's Deficient Performance Prejudiced the Defense

Each and every instance of Ms. Dvoran's deficient performance prejudiced the defense. This is true whether we look to the misinformation pertaining to the entrapment defense, oversight of the probative value of the body camera footage, the irrational trial strategy of rejecting an entrapment defense, or the failure to raise the same.

To make a successful showing of prejudice "[t]he defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different." *State v. Smith, 207 Wis. 2d 258, 275, 558 N.W.2d 379 (1997).* A similar way to evaluate prejudice is with *Koller*, wherein, "[s]howing prejudice means showing that counsel's alleged errors actually had some

adverse effect on the defense." *State v. Koller, 2001 WI App 253, ¶9, 248 N.W.2d 259, 635 N.W.2d 838 (citing Strickland, 466 U.S. at 693).*

This Court cannot predict the future as it does not have the luxury of a crystal ball in its chambers. Even so, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have a reasonable doubt respecting guilt." *Moffett, 147 Wis. 2d at 357.* There is a "reasonable probability" in this case as it is fathomable a jury would have had a reasonable doubt respecting guilt in view of the missing body camera footage, disputes of material fact, and nefarious handling of the incident by police. *Id.*

Despite the Trial Court perfunctorily and summarily denying the entrapment claims, the evidence supports the giving of the entrapment jury instruction so Viezbicke was entitled to it as a matter of law. A trial court should give an instruction where the evidence reasonably requires it. *State v. Amundson, 69 Wis. 2d 554, 564, 230 N.W.2d 775 (1975).*

Each individual instance of deficient performance by Ms. Dvoran should not be compartmentalized and assessed in a vacuum. Instead, this Court may find the combination of Ms. Dvoran's unprofessional errors added up to prejudice. *State v. Thiel, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.*

CONCLUSION

This case exemplifies all of the hallmarks of underhanded police work and assembly-line justice. Viezbicke has met the burden of proof on his postconviction motion. Despite Ms. Dvoran's convenient bouts of amnesia on the stand, it is clear and convincing Viezbicke received ineffective assistance as his attorney encouraged him to file civil action for excessive force yet still adopted the government's version of the facts. For the reasons stated above, Viezbicke is entitled to relief from his conviction.

Based on the foregoing, as to Count 1 and Count 2, Viezbicke respectfully requests the entry of an order vacating the *Judgment of Conviction* and sentence should this Court find his constitutional right to effective assistance or due process was violated.

In the alternative, as to Count 1 and Count 2, Viezbicke respectfully requests the entry of an order reversing and remanding the case to the circuit court with directions for motions to dismiss.

In the alternative, as to Count 1 and Count 2, Viezbicke respectfully requests the entry of an order granting plea withdrawal reversing and remanding the case to the circuit court with directions for further proceedings.

Dated this 22nd day of June, 2022.

Respectfully submitted,

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X

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 12,982 words.

Dated this 22nd day of June, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 22nd day of June, 2022.

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