STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT 3

Case No. 2022AP181-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

THOMAS W. BATTERMAN,
Defendant-Appellant.

On Appeal from the Circuit Court for Marathon County, Branch II
The Honorable Michael H. Bloom, presiding
(Marathon County Case No.: 18CM752)

RESPONSE BRIEF OF PETITIONER-RESPONDENT

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STATEMENT OF ISSUE PRESENTED

WHETHER DEFENSE HAS AN UNFETTERED CONSTITUTIONAL RIGHT TO INTRODUCE EVIDENCE, WHICH DOES NOT GO TO AN ELEMENT OF THE OFFENSE IN AN ATTEMPT TO ATTACK SCIENTIFIC EVIDENCE THE STATE PRESENTS THROUGH AN EXPERT.

> TRIAL COURT RESPONSE: No. The trial court ruled for a charge of Operating a Motor Vehicle with a Prohibited Alcohol Concentration pursuant to Wis. Stat. § 346.63(1)(b) "the field sobriety test, if not offered by the State in and of themselves, I'm not going to allow those to come in." (R[1]. 103 at 102:3 to 102:5.) The court's entire analysis and ruling was based on the elements of the remaining offense that was being presented to the jury and the relevancy of the field sobriety tests to what would be presented to the jury. (R. 103 at 98:18 to 104:2.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent State is not requesting oral argument or publication. Publication is not appropriate in this case, as it is a one-judge appeal pursuant to Wis. Stat. § 752.31(2)(d) and Wis. Stat. § 752.31(3). Oral arguments are not requested, because the briefs will fully address the disputed issues.

STANDARD OF REVIEW

Whether the trial court properly exercised discretion presents a question of law. Seep v. State Personnel Comm'n, 140 Wis. 2d 32, 38, 409 N.W.2d 142 (Ct.App.1987).

> [T]he court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of

[1] References to the Record are referencing the Index for Appeal in Appeal No. 2022AP000181-CR, unless noted otherwise.

> evidence or set them forth in an opinion or memorandum of decision filed by the court....Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Wisconsin Statutes §805.17(2). The trial court's discretionary decision should not be overturned unless the court improperly exercised its discretion. Jerry M. v. Dennis L.M., 198 Wis. 2d 10, 21, 542 N.W.2d 162 (Ct. App. 1995). In order to determine whether a claimant is entitled to a new trial, the higher court must determine if a new trial is warranted in the interest of justice or due to plain error. State v. Mayo, 2007 WI 78, ¶28, 301 Wis. 2d 642, 734 N.W.2d 115 (internal citations omitted). There are two avenues under which a new trial could be granted in the interest of justice. First if "the real controversy has not been fully tried," Second, if the court finds "there has been a miscarriage of justice and there is a "substantial probability of a different result on retrial." Id. at ¶30 (internal citations omitted). Whether the higher court chooses to grant a new trial on "the existence of plain error will turn on the facts of the particular case." Id. at ¶29. "If the higher court finds that a plain error was made, the burden then shifts to the State to prove that the plain error is harmless beyond a reasonable doubt." Id.

STATEMENT OF THE CASE

On May 1, 2018, a criminal complaint was filed against the defendant, Mr. Thomas W. Batterman, with the sole count of Operating a Motor Vehicle While Under the Influence of an Intoxicant [hereinafter "OWI"], 2nd Offense,

contrary to Wisconsin Statute §346.63(1)(b). Mr. Batterman retained Attorney Richard Lawson to represent him on the matter. On May 7, 2018, defense through counsel filed a notice of motion and motion to dismiss due to the Court's lack of personal jurisdiction over the defendant and suppress all evidence obtained due to a lack of probable cause for a crimes. On June 1, 2018, there was a stipulation for substitution of Attorney filed, Attorney Melowski for Attorney Lawson. The Court granted an order for Substitution of Attorney on June 4, 2018. On June 20, 2018, Judge Gregory J. Strasser recused himself from this matter. On June 25, 2018, Judge Ann Knox-Bauer was assigned the file. The Defendant exercised his right for Substitution of Judge on June 27, 2018. On July 2, 2018, Judge Jay R. Tlusty was assigned. An Application for specific judicial assignment was filed on July 9, 2018. On July 12, 2018, Judge Kevin Klein as assigned. On July 23, 2018, an application for specific judicial assignment was filed, and on September 25, 2018, the responsible court official was changed to Judge Michael H. Bloom. On November 12, 2018, the defendant filed a number of motions through counsel which were as follows: Defendant's Notice of Motion and Motion to Suppress Based upon Fourth Amendment Violation: Unlawful Police Entry onto Private Property; Notice of Motion and Motion to Suppress Based upon Lack of Probable Cause to Arrest; and Notice of Motion and Motion to exclude Horizontal Gaze Nystagmus [hereinafter "HGN"] test evidence. On January 24, 2019, a motion hearing was held, Rothschild Police Officer Jace Klemm

testified at the hearing, and the parties stipulated for the squad video to be admitted into evidence. Both the State and Defense requested additional time to brief the issues prior to the court issuing a ruling, and a briefing schedule was established. The court issued an oral ruling on April 5, 2019, granting the motion to suppress the HGN results and denying defendant's motions related to probable cause and seizure. A pretrial conference was held on May 14, 2019, defense counsel acknowledged receipt of an offer from the State and requested additional time to discuss with defendant. On May 30, 2019, a telephone scheduling conference was conducted and jury dates were set. On May 30, 2019, the State filed a motion to amend the complaint. On October 7, 2019 the Defendant filed a Notice of Motion and Motion to Suppress Blood Test, which was subsequently withdrawn or not pursued. An Amended Complaint was filed on October 30, 2019, adding an additional count for Operating a Motor Vehicle with a Prohibited Alcohol Concentration [hereinafter PAC], 2nd Offense, contrary to Wisconsin Statute § 346.63(1)(b). A final pre-trial was conducted on November 4, 2019, the trial was subsequently rescheduled. A final pre-trial was conducted on September 23, 2021, and both parties indicated the case remained in a trial posture at that time. On October 8, 2021, the State filed the following: State's Notice of Intent to Introduce Expert Testimony; State's Notice Regarding Defendant's Statements; and State's Notice of Motion and Motion in Limine. On October 14, 2021, the State filed a petition for dismissal of Count #1, OWI 2nd Offense

without Prejudice. The State filed Proposed Jury Instructions on October 8, 2021. On October 19, 2021, the court granted the Order to Dismiss Count #1, OWI 2nd with prejudice. The Case proceeded to Jury Trial on October 19, 2021, and the defendant was found guilty of the sole count of Operating a Motor Vehicle with a PAC, 2nd Offense. On December 29, 2021, a Sentencing Hearing was conducted and the defendant was sentenced according to the guideline recommendations. On January 3, 2022, the Defendant filed a Notice of Intent to Pursue Post Conviction relief. On January 4, 2022, the Court stayed the sentence pending the outcome of the appeal.

STATEMENT OF FACTS

On April 10, 2018, at approximately 10:14 pm, Officer Jace Klemm observed a vehicle traveling southbound on Alderson Street in the Village of Rothschild, at a rate of speed faster than the posted limit of 35 MPH. (R103 at 129:5-25 and 130:1-3). Upon Officer Klemm activated his radar unit he discovered the vehicle was traveling at 46 MPH. (R103 at 130:16-23 and 131:12-14). Officer Klemm subsequently conducted a traffic stop on the vehicle. (R103 at 132:10-12).

Once the vehicle stopped, Officer Klemm approached the vehicle and was able to identify the driver of the vehicle as the defendant, Thomas Batterman (R103 at 132:13-21). Officer Klemm asked Mr. Batterman if he had any alcohol to drink, and he confirmed he had, that he was from Daley's Restaurant in downtown Wausau. (R103 at 133:10 to 134:1). Mr. Batterman

was then taken to Aspirus Hospital for a blood sample to be drawn. (R103 at 134:2 to 135:15). Once the blood sample was drawn, appropriately sealed and packaged in the blood kit it was turned over to Officer Klemm, appropriately processed as evidence, and subsequently sent to the Wisconsin State Lab of Hygiene for testing. (R103 at 135:11 to 136:8). Officer Klemm completed the Alcohol and Drug Influence Report with Mr. Batterman, and Mr. Batterman had reported he had three drinks. (R103 at 138:3-25). Mr. Batterman indicated he had been drinking beer and wine from 6pm to 10pm. (R103 at 139:1-5). Mr. Battermans' blood specimen was later analyzed and returned a blood alcohol content of 0.124 grams over 100 milliliters. (R103 at 181:21-24). At trial a jury found Mr. Batterman guilty of PAC. (R103 at 250:14-19). Mr. Batterman then filed this appeal.

ARGUMENT

I. The Defendant does not have an unfettered right to introduce irrelevant evidence at trial as part of his defense.

The court of appeals is not to overturn the circuit courts factual findings unless they are clearly erroneous. K.N.K. v. Buhler, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987).

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of...error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Wis. Stat. § 805.18(2). "An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial." Martindale v. Ripp, 246 Wis. 2d 67, 87 (2001). "A motion for a new trial is addressed to the sound discretion of the trial court. The action of the trial court thereon will not be disturbed on appeal in the absence of an abuse of such discretion." West v. Day, 193 Wis. 187, 193, 212 N.W. 648, 650 (1927). "Our court has stated that '[t]he rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial.' The confrontation clause 'grants defendant's the right to admit favorable testimony.'" State v. St. George, 252 Wis. 2d 499, 512-513 (2002). "Despite these constitutional guarantees, a defendant's right to present evidence is not absolute. 'Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect.'" Id. at 513.

The defendant has cited a number of cases to support his assertion that his constitutional right to present a defense was violated, each of the cases he cites are not on point with this particular case and his argument. In State v. St. George, the defendant incorrectly summarized the court's ruling, when it came to the rape shield evidence of the victim child having been previously assaulted, the Court held that evidence did not come in and baring the admission of the evidence was not a violation of the defendant's right to present a defense. Id. at 518.

The Court did ultimately find that the exclusion of testimony of the defense expert witness about recantation and interview techniques used for children denied the defendant his constitutional right to present a case. Id. at 529. In our present case, the defendant was pursing to have evidence that did not have a tendency to make the existence of any fact that is of consequence to the action more probable, so the court correctly denied its admissibility. To make this case analogous to our present situation and to have inhibited the defendant's ability to present a defense, the court would have had to exclude an expert witness the defendant wanted to have testify about his theory that the absence of clues on SFSTs invalidates the blood specimens validity—this did not occur in the present case.

The defendant also cited Chambers v. Mississippi, which is a homicide case where the court ruled the defendant would not allow the third party hearsay testimony of a different person confessing to the crime and prohibited the Defendant from cross-examination of the third person. Chambers v. Mississippi, 410 U.S. 284, 307 (1973). "[T]he right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Id. at 294. "In the exercise of this right [to present a defense], the accused, as

is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Id. at 302.

The last case defense cites in support of his right to present a defense is Rock v. Arkansas. Rock v. Arkansas, 483 U.S. 44 (1987). This is a case about a defendant's right to testify, which Mr. Batterman elected not to do in our present case so it's irrelevant to his position. The issue in controversy in this homicide case, is the defendant had her memory refreshed through the use of hypnosis, and the State moved to exclude the defendant from testifying to any hypnotically refreshed memories pursuant to a rule in Arkansas. The Court's holding was "[c]riminal defendants have a right to testify in their own behalf under the Due Process clause of the Fourteenth Amendment" and "[a]lthough the right to present relevant testimony is not without limitation, restrictions placed on a defendant's constitutional right to testify by a State's evidentiary rules may not be arbitrary or disproportionate to the purposes they are designed to serve"—again this is not an issue in our current case. Id. at 44. Even though this case is not relevant to our current case as Mr. Batterman did not exercise his right to testify, but if he did, according to the Court's holding there would still be limitations

that could be placed on Mr. Batterman's relevant testimony he would be presenting.

a. Defense already obtained an order excluding part of the SFSTs, so introducing partial fields would have further confused the issues and frustrated the interests of justice.

Defense argued at trial part of their concern in excluding the Field Sobriety Testing (hereinafter SFSTs) was confusion of the jury and leaving them to speculate since they would not be given the full picture. Yet, defense already had one of the grounds inappropriately excluded to ensure the jury does not hear the full picture. The defense argued in its brief that "the State cannot have its cake and eat it too", and referenced that the State will sometimes argue the SFSTs and the number of clues observed prove the validity of the blood test; however, the State did not argue that here. The court's pretrial ruling explicitly indicated that if the State opened the door to the SFSTs then defense would be able to question on them. In the present case though, defense does not want to question on all the fields, just those that were not excluded during a pretrial motion which are most favorable to the defendant.

A recent unpublished District III Wisconsin Court of Appeals case, State v. Kothbauer, the Court, in this unpublished opinion, reviewed whether trial counsel was ineffective for failing to suppress evidence related to the SFSTs which did not comply with the National Highway Traffic Safety Administration's DWI Detection and Standardized Field Sobriety Testing Manual (hereinafter "NHTSA

Manual") as well as not presenting other evidence at trial. Unpublished Case, WI App No. 2020AP1406-CR. The Defendant argued that "[t]he NHTSA Manual requires strict compliance with the instructions to avoid the tests' "validity" being compromised." *See* National Highway Traffic Safety Admin., U.S. Dept. of Transp., DWI Detection and Standardized Field Sobriety Testing, Instructor Guide, Session VIII, 13 (2015). However, Wisconsin has not adopted a "strict compliance with the NHTSA Manuals a prerequisite for SFSTs to be used for determining probable cause for an OWI-related offense." Id., City of West Bend v. Wilkens, 2005 WI App 36, ¶¶12-16, 22, 278 Wis.2d 643, 693 N.W.2d 324. In State v. Wilkens, the defendant for suppression of his poorly administered SFSTs claiming they were unreliable. Id. at ¶¶12-13. In Wilkens, the court held SFSTs "are merely observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication, the perception of which is necessarily subjective….the procedures the officer employed go to the weight of the evidence, not its admissibility." Id. ¶1. In the present case, the State was faced with making a tactical strategic decision on how to present its case to the jury after the court inappropriately excluded the HGN test results which demonstrated the most clues of impairment. This tactical strategic decision resulted in the State dismissing the OWI 2nd offense, to eliminate the element of intoxication of the case and proceed on the remaining count of PAC 2nd which does not have the influence of an intoxicant requirement. WIS JI-CRIMINAL 2663 and 2660. In the present case, the defendant "cannot have his cake and eat it

too", to argue for the suppression of one of the SFSTs, which had the most clues of impairment, rather than attacking the Officer's credibility and means of conducting the test, and then later attempt to have the two most favorable tests admitted to attack the credibility of the scientific analysis done to his blood frustrates the means of justice—especially since the SFSTs speak to a person's level of intoxication, not blood alcohol content.

The defendant argues an example of an officer arresting an individual for operating while intoxicated and during a search incident to arrest a half-empty bottle of vodka is found in the vehicle. Defense argues that "is there any reasonable universe in which a trial court would exclude evidence of the open bottle of vodka simply because no witness ever saw the defendant actually consuming the same? It is highly doubtful." Brief of Appellant, pg. 12 ¶ 2. In order for this analogy to work, the defendant would need to be arrested for a PAC offense instead of an OWI and for argument sake, a pretrial ruling would need to have occurred limiting the evidence that the State is able to present, perhaps just that a bottle of vodka was found but there would not be a means to comment on the bottle being open or the amount of alcohol still in the bottle—this would make the analogy more accurate and on point with the present case. The State, with the burden of proof and right to litigate its case as it sees fit, could very well decide rather than have partial evidence admitted which in a pretrial ruling has been trimmed down to lose its true effect, would rather not introduce any evidence of the vodka bottle and ask for the court to limit the defense

introduction of the same as it would nor create a true story of the facts at play in the case and could only lead to misleading the jury and confusing the issues. In this more accurate analogy to our present case, it's clear why the State would do such a thing in the interests of justice.

As the court stated in its ruling, "[i]t is a different question scientifically as to whether the absence of clues correlates in the same way with a person having X percent probability of being below a prohibited alcohol concentration. You know, 'absence of proof is not proof of absence' would be the colloquialism that could get thrown out. And I'm not aware, at least explicitly Mr. Melowski has not pointed it out as to, you know, an empirical or other evidentiary basis to argue that, like the underlying rationale that law enforcement officers are trained with regarding the presence of clues, whether the absence of clues means the opposite. I'm not aware of that. And as we discussed off the record the fact that the existence of the prohibited alcohol concentration charge is there for those occasions potentially where there may not be impairment." (R 103 at 100:17 to 101:7).

b. All evidence, regardless of a defendant's defense, is still evaluated pursuant to the rules of evidence.

"It is readily apparent that a defendant suffers no constitutional deprivation when he is limited to subpoenaing witnesses who can offer relevant and material evidence on his behalf. The proposition is so apparent on its face that it is difficult to find legal citation to support it." State v. Groppi, 41 Wis. 2d

312, 323, 164 N.W.2d 266 (1969). To "determine whether the defendant's right to present the proffered evidence are nonetheless outweighed by the State's compelling interest to exclude the evidence." State v. Dodson, 219 Wis.2d 65, 73 (Wis. 1998). Evidence must have a "tendency to make existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Evidence of SFSTs go to whether or not a defendant is intoxicated, which is not an element for a PAC violation. In this particular case, admitting the SFSTs evidence was not relevant. "So I - - I cannot find that - - that the absence of clues correlates with a non-prohibited alcohol concentration in the same way that the presence of clues indicates to officers a certain percentage likelihood that there is a prohibited alcohol concentration. So the field sobriety tests, if not offered by the State in and of themselves, I'm not going to allow those to come in." (R. 103 at 101:23 to 102:5).

c. Defendant's attempts at jury nullification should not be tolerated.

The appellate court is to uphold the trial court's discretionary decision if the record demonstrates that the court examined the relevant facts, applied a proper standard of law and employed a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* In re B.W.S., 131 Wis. 2d 301, 315, 388 N.W.2d 615 (1986). What defense is really attempting in the present case is to engage in jury nullification. The practice of "jury nullification" is not accepted in the State of Wisconsin. State v. Bjerkaas, 163 Wis. 2d 949, 472

N.W.2d 615 (Ct. App. 1991). The jury instructions on an OWI provide the definition for "under the influence"

> [u]nder the influence of an intoxicant" means that the defendant's ability to operating a vehicle was impaired because of consumption of an alcoholic beverage. Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judge and steady hand necessary to handle and control a motor vehicle.

WIS JI-CRIMINAL 2663. Due to this element, the Defendant's driving behavior and ability to perform SFSTs are a vital part of an OWI trial. However, this is not the same for a PAC trial. The necessary elements the State must prove are: 1) "The defendant drove/operated a motor vehicle on a highway"; and 2) "The defendant had a prohibited alcohol concentration at the time the defendant drove/operated a motor vehicle." WIS JI-CRIMINAL 2660. "Impairment is not directly before the jury given the elements of the charge that's still pending, and to the extent that it's not presented by the State, my belief is that in absence of some scientific basis or some evidence - - and, you know, I don't know to what extent trying to get at that through the analyst could produce answers that would make it fair, and, you know, Mr. Melowski should have some leeway to get into that, I would think - - but that's - - goes more to the validity of the test result than, you know, what happened at the time of the scene of the stop and the arrest and what not." (R. 103 at 102:20 to 103:6). The State has the ability to present its case as it sees fit. This is why in the court's determination on the admissibility of the evidence the court based its ruling on "to the extent that it's not presented by the State." Id. A defendant, if he so chooses, is able to present a defense that is in line with the other rules of evidence. Again, the State has the right to prove its case as it sees fit, if the State chooses during its case in chief to eliminate any evidence of the SFSTs for whatever reason,

and intoxication and the defendant's performance on the SFSTs are not an element to be proven at trial, the State can do so and then object to the defendant's ability to present this evidence as it could lead to misleading the jury and confusion of the issues. The court also noted in his ruling, "[n]ormally a blood alcohol concentration result is challenged with a curve defense and whatnot. That's based on numbers of drinks and specific time frames and so it is an empirical process that the analyst can respond to. That's not the case with using evidence to undermine the jurors' faith in something." (R. 103 at 103:7-12). The PAC Jury Instruction even provides that if there is no "blood-alcohol curve" argument and the blood was taken within the three hour window of the defendant driving that the jury "may find from that fact alone that the defendant had a prohibited alcohol concentration at the time of the alleged driving." WIS JI-CRIMINAL 2660.

The defendant is attempting to muddy the waters and intertwine the factors a jury must decide for a PAC offense with that of an OWI offense. He's trying to argue that the jury should have been able to disregard what the law says with respect to a strict liability finding as to the amount of someone's blood alcohol content being over the legal limit, and only convict on a PAC charge if the defendant is also exhibiting signs of impairment to support that he was under the influence which is beyond what the law requires. The defendant provides argues in his brief of why someone who exhibits minimal clues during SFSTs when their blood alcohol content comes back significantly over the legal limit would indicate the blood test and analysis is not reliable or trustworthy, but the defendant provides no prove to support this assertion. To the contrary pursuant to Wisconsin Statute § 885.235(1g)(c), "[t]he fact that the analysis shows that

the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she…had an alcohol concentration of 0.08 or more." Wis. Stat. § 885.235(1g)(c). The defendant asserts that SFSTs "evidence is wholly relevant to whether an ethanol test result is accurate and the court may not exclude the same without violating Mr. Batterman's constitutional right to present a defense"; nevertheless, absent some conclusory statements and arguments in his brief, the defendant has provided no proof that this evidence is relevant to this count with how the State decided to present its case in this circumstance. Brief of Appellant, pg. 11 ¶1. While the totality of the record in this case demonstrates that the trial court's discretionary decision should be upheld.

CONCLUSION

Due to the aforementioned reasons, the State respectfully requests this Court uphold the lower court's decision as to the admissibility of evidence pursuant to Wis. Stat. § 904.01, as the defendant does not have an unfettered right to present a defense irrespective of the rules of evidence. Based on the lack of a clear error occurring, the defendant's request for a new trial should be denied.

Dated this 20th day of June, 2022.

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a brief producted with a proportional serif font. The length of this brief is 4,665 words.

Dated: June 20, 2022

Marathon County District Attorney's Office

By: _____
Lacey L. Coonen
Assistant District Attorney

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

Dated: June 20, 2022

Marathon County District Attorney's Office

By: _____
Lacey L. Coonen
Assistant District Attorney