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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2023AP000543-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

NICHOLAS J. NERO  
Defendant-Appellant.

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On Appeal from the Final Orders Entered  
in the Circuit Court for Dunn County,  
The Honorable Christina Mayer and  
The Honorable James M. Peterson Presiding

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**BRIEF OF DEFENDANT-APPELLANT**

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### **ISSUES PRESENTED FOR REVIEW**

1. Should Nero's blood test results be suppressed as a violation of his Fifth Amendment rights?

The circuit court answered no. (202:6-7; App.34-35)

2. Did Trial Counsel perform deficiently because he failed to present evidence corroborating Nero's account of events?

The circuit court answered no. (202:10; App.38)

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is requested should the Court find it helpful for resolution of the issues in this matter.

Publication is requested under Wis. Stat. §809.23. because Mr. Nero's relief requires a factual interpretation of fruits derived from a fifth amendment violation which would clarify existing law. .

## STATEMENT OF THE CASE

### 1. *Mr. Nero gets stuck*

On the evening of October 13<sup>th</sup>, 2015, Mr. Nicholas Nero sought a safe place to sleep in Menomonie rather than making a late-night drive back to his home in Green Bay. (109:157; App. 74). After Mr. Nero dropped off his friend (Matt) and Matt's girlfriend at her relative's house in Menomonie, he planned to sleep. (109:147; App. 64). His plan: sleep in his car in the WalMart parking lot. But he got lost. (109:157; App. 74).

Mr. Nero ended up on the grounds of Monarch Paving Plant (hereinafter "Monarch Paving") driving around. Disoriented and tired, he struggled to navigate out of the dark plant grounds. Eventually, he prevailed; but another wrong turn got his car stuck in an oat field. (109:159-160; App. 76-77).

Nero testified at trial to this account of events. He left his car, walked to 628<sup>th</sup> road and called his friends. (109:160; App. 77). His friends picked him up. Although nervous about his car, Mr. Nero did not want to contact the police because he did not have a valid driver's license at the time. (109:148; App. 65). He thought he could come back and find his car later. So, he left with his friends. They went and smoked meth back at the house. Hours later, his friends dropped him back off near Monarch Paving, and he set out to find his car. But after about an hour of fruitless searching, Mr. Nero sought help. (109:152; App. 69).

Tired and cold, Nero eventually noticed a truck parked near a camper trailer at Monarch Paving; he knocked on the trailer door and a foreman (Mr. Guthman) from the plant answered. (109:152-153; App. 69-70). It was 3:30 am. (109:88; App. 55). Guthman works and lives at the plant. (109:64; App. 43). Guthman observed Mr. Nero shaking and disoriented. He helped him into the warm camper and,

unsure what to do from there, called the sheriff's department. (109:91-92; App. 58-59).

Earlier that evening (around 10:00 pm) Guthman observed a vehicle driving through the Monarch Paving grounds. The vehicle came in one gate, drove around the loop, proceeded over a concrete barrier, and exited out another gate. (109:65-66; App. 44-45). He observed one person in the vehicle; though he could not identify the driver as Mr. Nero. He did identify the vehicle as a Chevy Impala. (109:84; App. 51). Guthman chose not to notify anyone about the driver because he "[F]igured it was somebody lost or something or kids monkeying around and away they went." (109:66; App. 45). He returned to bed and slept until woken up by Mr. Nero at 3:30 am. (109:70; App. 47).

*2. Deputy Spenle arrests Mr. Nero for driving without a license and damage to property*

Deputy Michael Spenle met Mr. Nero at Guthman's trailer and joined the search effort to find Mr. Nero's stuck car. Deputy Spenle notes Mr. Nero initially seemed to be disoriented and confused. (109:99; App. 62). After he gathered the facts from the situation, Deputy Spenle drove Mr. Nero and Mr. Guthman around searching for Mr. Nero's car; but the three could not find it after over an hour of searching. (109:100; App. 63).

During this course of events, Deputy Spenle learned Mr. Nero's driving privileges were revoked. He also confirmed a large PVC pipe had been run over and damaged on Monarch Paving's grounds. (109:100; App. 63). In turn, Deputy Spenle arrested Mr. Nero for driving without a license and damage to property. (193:18; App. 145).

*3. Probation compels statement from Mr. Nero regarding the*

*incident*

After getting booked into the jail, Mr. Nero was met by a local probation agent, Ms. Brunk, who contacted him because Mr. Nero was on probation out of another county. She asked him for a statement regarding the incident involving his lost vehicle. Mr. Nero provided this statement:

“Since the last time I seen my agent I have been staying with friends in Hudson, WI. My friend was Justine. I knew her for a couple of years. I should be getting an apartment soon in Green Bay. I had nowhere to stay in Green Bay. Justine lives on Red Oak in Hudson.

I have not used methamphetamine since the last time I seen my agent which was 6 days ago. The last time I used Heroin was the last time I got out of jail on this case for probation.

I was in Menomonie and was looking for somewhere to rest. I was looking for Walmart and ended up driving into a cornfield. I pulled off to the side to just rest. I asked for help because I was walking through a big puddle. I was wet and cold. I knocked on a guy’s trailer for help. My car ended up stuck in the cornfield. The guy called the cops to help look for the car.

I have nothing else to say.” (146; App. 93-94).

*4. Probation follows up with Mr. Nero for a urinalysis test*

Ms. Brunk later told Mr. Nero his regular probation agent ordered and wanted him to take a urinalysis (UA) test. The results of the UA test returned positive for the presence of three controlled substances. (192:13; App.140).

*5. Mr. Nero asks the Court to suppress all tainted evidence*

Law enforcement then used the UA results as evidence to justify expanding the investigation into the driving incident from the previous night. (192:18-19; App.145-146). Most of the evidence would



later be suppressed as improperly tainted. (105:4-5; App.161-162).

To start, Sergeant Kurtzhals learned of Mr. Nero's positive UA test from "the girls at the front desk." (193:10; App.137). After talking with them, he determined probable cause existed to require a blood test from Mr. Nero. (192:19-20; App.146-147).

The blood test results confirmed the presence of methamphetamine in Mr. Nero's system. (165).

Kurtzhals also submitted the affidavit for a search warrant to search Mr. Nero's car; Deputy Vernon had found Nero's car earlier that morning. (192:13; App.140). Vernon wrote in his report that no illegal items were seen in plain view. (193:12; App. 139). Kurtzhals signed off on the report; however, in his affidavit Kurtzhals cited illegal items that were seen in plain view. (193:12; App. 139). This false statement, other incorrect statements, and the positive UA result formed the basis of the affidavit justifying the warrant. (142:2-3; App.168-169).

As a result of this additional evidence, Mr. Nero was charged with six counts:

Count 1: Possession of Cocaine

Count 2: Criminal Damage to Property

Count 3: Operate with Restricted Controlled Substance (3rd)

Count 4: OWI (3rd)

Count 5: Operating While Revoked

Count 6: Possess Drug Paraphernalia

Mr. Nero filed a motion to suppress all evidence tainted from the search, all non-Mirandized statements, the compelled probation statement and the compelled probation UA test. (20,38).

*6. Court suppresses all evidence except blood test result*

After two evidentiary hearings on Nero's suppression motion and briefing from both parties, the Court excluded all evidence and statements obtained except the blood test results. (105:3-6; App.160-163). In an oral ruling, the Court explained its decision:

**(i) Mr. Nero's statement to the probation officer—suppressed.**

The Court concluded the statements Mr. Nero made to probation agents were suppressed and could not be used in a criminal proceeding. (105:4; App.161).

**(ii) All evidence tied to unlawful search warrant—suppressed.**

Because the search warrant was based "in part on the statements Mr. Nero had made to his probation agent and some other information that had been obtained," the Court suppressed any evidence obtained because of that search warrant. (105:4-5; App.161-162).

**(iii) Statements obtained in jail without Miranda rights—suppressed.**

The Court concluded any statements that Nero made while he was incarcerated in the Dunn County Jail were suppressed because Sergeant Kurtzhals failed to provide Miranda warnings. (105:4; App.161).

**(iv) Blood test results—not suppressed.**

Regarding the blood tests results, the Court concluded the following facts could be considered by Sergeant Kurtzhals to justify the blood test:

- The urine sample of Mr. Nero that was taken by the probation agent,
- Sergeant Kurtzhals' review of what Deputy Spenle observed regarding Mr. Nero being disorientated when Spenle responded to the incident at Monarch Paving; and

- The operation of the vehicle in the Township of Red Cedar in the early morning on October 14, 205. (105:6; App.163).

7. *After court order suppressing evidence, the State amends the complaint from six counts to three counts.*

The State then amended the criminal complaint to three counts:

Count 1: Criminal Damage to Property (Repeater)

Count 2: Operate with Restricted Controlled Substance (3<sup>rd</sup> offense)

Count 3: Operating While Revoked (OAR). (58).

8. *At trial, Nero testifies to his account of events to the jury*

At trial, the State argued Mr. Nero drove through the Monarch Paving Plant around 10:00 pm—while on meth—and then exited the Plant onto the highway and into the oat field; thus, satisfying all the elements for OWI. It stressed to the jury Mr. Nero’s twelve convictions and the “erratic” nature of the driving. In sum, it argued Mr. Nero’s version of events was not believable and that Mr. Nero must have remained in his vehicle from some point around 10:00 pm until around 3:30 am when he knocked on Mr. Guthman’s trailer door.

In contrast, the defense presented Mr. Nero’s account of events: that he drove through Monarch Paving Plant around 10:00 pm, drove off the roadway into the oat field, abandoned his stuck vehicle, went and smoked meth with his friends, and returned later to Monarch Paving. He then knocked on Guthman’s trailer door because he could not find his vehicle. Mr. Nero testified to this account of events. The defense presented no other witnesses.

The jury found Nero guilty on all three counts. The parties

proceeded to sentencing and the Court imposed the following sentence: a 2-year bifurcated sentence on the criminal damage charge, a 60-day sentence on the operating with a controlled substance charge, and a 6-month sentence on the OAR charge. In each instance, Mr. Nero was given credit for time served. (109:201-203; App.89-91)

*9. Court of Appeals remands case for resentencing*

On appeal, the Court of Appeals determined the court failed to adequately explain the sentencing factors and remanded the case for resentencing. (182:3). On February 7, 2022, the circuit court resentedenced Nero. (177). He received the same sentence. (177). Thereafter, Nero filed another notice of intent to pursue post conviction relief. (175).

*10. Nero files motion requesting new trial*

Nero then filed a motion to reconsider the suppression of the blood test results and a request for a new trial. (196; App.3-28). Nero also claimed ineffective assistance of counsel due to his Trial Attorney's failure to call witnesses to corroborate Nero's testimony. (196; App. 3-28).

*11. Court denies Nero's new trial motion*

The circuit court denied Nero's motion without a hearing. (202:1; App.29).

The court first confirmed Nero's post-conviction motion was not barred because it was questionable whether he "actually has had a direct appeal on this case." The court found it would be unfair to bar his post-conviction motion based on the presumption under *Escalona-Naranjo*. The circuit court then addressed the merits of the post-conviction motion. (202:5; App.33).

Next, the court denied Nero's motion for reconsideration because it found the request for the UA was not fruit of his compelled probation statement. (202:6; App.34). The court starts by explaining that Nero's statement about drug use was a denial not an admission. In turn, the court concluded the UA test "was not derivative of his probation statement because he did not admit to using further drugs in his probation statement." (202:6; App.34).

Additionally, the court concluded the State met its burden under the *Kastigar* test. Specifically, the court found Sergeant Kurtzhals had probable cause to justify the blood test request without considering the positive UA test. The court based this probable cause on the following facts:

- Deputy Spenle observed that Mr. Nero was disorientated at Monarch Paving in the middle of the night.
- Mr. Nero did not know where his vehicle was located.
- He, Deputy Spenle and Foreman Guthman could not find the vehicle after searching for approximately 1 hour.
- In the morning, Deputy Vernon discovered that Nero drove in the parking lot of Monarch Paving, onto a grass yard, over a berm in between two retaining ponds, over a PVC pipe (breaking the pipe), and over a small retaining wall, knocking bricks out of place.
- Following the tracks, Mr. Nero then drove out onto 628th Avenue. He proceeded to turn into a bean field, drove into the beans for some distance until he went into a dip where his vehicle was stuck. (202:6-7; App.34-35).

*12. Court denies Mr. Nero's ineffective assistance of counsel claim*

The court also found that the failure to provide affidavits from Nero and his friends to support his claim of ineffective assistance of counsel, made his claim conclusory. (202:9; App.37). In addition, the court found that none of the alleged deficiencies prejudiced Mr. Nero.

The court refused to grant the requested *Machner* hearing and denied the motion. (202:10; App.38).

This appeal follows.

### STANDARD OF REVIEW

On appeal, this court determines if the circuit court properly exercised its discretion when it denied Nero's motion for reconsideration. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. A circuit court erroneously exercises its discretion if that exercise is based on an error of law, *State v. Davis*, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62, and this Court reviews questions of law de novo. *See State v. Kramer*, 2001 WI 132, ¶17, 248 Wis. 2d 1009, 637 N.W.2d 35. The issue of the correct legal standard presents a question of law. *Id.* Thus, this Court reviews de novo whether the court's denial of the reconsideration involved an error of law. Here, that asks whether the circuit court erred by not applying controlling precedent to the suppression issue involved.

The court's standard of review regarding the suppression issue involves a "two-step standard of review." First, the Court will uphold the trial court's factual findings unless they are clearly erroneous. Then, the Court reviews the application of constitutional principles to those facts de novo. *State v. Robinson*, 2009 WI App 97, ¶ 9, 320 Wis.2d 689, 770 N.W.2d 721.

Whether Nero received ineffective assistance of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). A trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The ultimate determination of whether counsel's performance was deficient and prejudicial are questions of law which this Court reviews independently. *Id.*

## ARGUMENT

### A. Authority for reconsidering the suppression issue

Mr. Nero asked the circuit court to reconsider its decision on his suppression motion and to now suppress the blood test results as well because the test results were derived from his compelled probation statement. As noted above, the circuit court refused to suppress the blood test results for two reasons: (1) that Nero's compelled statement did not serve as an "investigatory lead," and (2) because the State provided an independent source to justify the blood test results. For the following reasons, this Court may properly reverse the circuit court's conclusions as erroneous applications of the law.

#### 1. Authority governing Mr. Nero's motion to reconsider.

To prevail on his motion for reconsideration required Nero to either present newly discovered evidence or establish a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. A manifest error of law occurs when the circuit court disregards, misapplies, or fails to recognize controlling precedent. *Id.* ¶9. The circuit court concluded Nero failed to demonstrate a manifest error of law.

#### 2. Wisconsin authority that justifies excluding Mr. Nero's blood test results.

Overall, the Fifth Amendment's prohibition against compelled testimony forces the government to procure evidence by "its own independent labors." *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S. Ct. 1602, 1620, 16 L. Ed. 2d 694 (1966). Yet, under the rule of *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), the government can force a probationer's self-incriminating testimony. With probationers, the government can force such testimony because it needs self-incriminating testimony from probationers to enforce the probation system.

But the government can only compel this self-incriminating



testimony from probationers by promising not to use the compelled statements in future criminal proceedings “in any respect.” *Kastigar*, 406 U.S. at 453, 92 S. Ct. at 1661. See also *Braswell v. United States*, 487 U.S. 99, 108 S. Ct. 2284, 2295, 101 L. Ed. 2d 98 (1988) (“Obtaining testimony pursuant to a grant of statutory use immunity prevents use directly and derivatively.”).

In addition to prohibiting use of compelled testimony, Wisconsin law (hereinafter “*Evans* Rule”) has long held that the derivative evidence (fruits) of a probationer’s compelled testimony may not be used to incriminate the probationer in a subsequent criminal proceeding. *State v. Evans*, 77 Wis. 2d 225, 227-28, 252 N.W.2d 664 (1977). The *Evans* Court stressed how this rule both guarantees probationers their Fifth Amendment rights and “preserve[s] the integrity of the probation system.” *Id.* at 235.

The *Evans* Rule reconciled an inherent dilemma in compelling statements from probationers: probation agents need truthful information from probationers to enforce the probation system—but probationers will not provide truthful statements if those statements (and derived evidence) can incriminate them in subsequent criminal proceedings. The *Evans* Court concluded a probationer's answers to an agent's questions prompted by accusations of criminal activity are “compelled,” because a refusal to speak may be grounds for revocation. *Id.* at 235-36. In arriving at its holding, the *Evans* Court relied on earlier reasoning in *People v. Coleman*. *Id.* at 236.

In *Coleman*, the Court explained the rationale why derivative evidence (fruits) should be excluded when a probationer makes a compelled statement: put simply, such exclusion encourages probationers to make a statement rather than claim their Fifth Amendment privilege. *People v. Coleman*, 13 Cal.3d 867, 891,892, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975.) citing *Kastigar v. United States*, 406 U.S. 441, 453, 461 [32 L.Ed.2d 212, 221-222, 226]. Such protection against both direct and derivative use of a probationer's testimony provides protection “coextensive with the scope of the privilege against



self-incrimination," (*Id.* at p. 453 [32 L. Ed.2d at p. 222]),

Later Wisconsin cases further developed the *Evans* rule.

- 1987: In *State v. Thompson*, this Court held probationers need not exercise their Fifth Amendment right to remain silent in these instances; rather, it is self-executing. *State v. Thompson*, 142 Wis.2d 821, 825-26, 832, 419 N.W.2d 564 (Ct.App.1987), (citing *Minnesota v. Murphy*, 465 U.S. 420, 435, 104 S. Ct. 1136, 79 L.Ed.2d 409 (1984)).
- 2003: In *State v. Knapp*, the Supreme Court emphasized why the exclusionary rule doctrine applies to derivative evidence of Fifth Amendment violations. Specifically, because it deters police misconduct, and “acts to preserve judicial integrity.” *State v. Knapp*, 2005 WI 127, ¶2, ¶79, 285 Wis. 2d 86, 700 N.W.2d 899.
- 2012: In *State v. Spaeth* this Court expanded the *Evans* Rule and restricted law enforcement from using compelled testimony as an “investigatory lead.”

The *Spaeth* Court also incorporated the requirement from *Kastigar v. United States*, which forces the State to demonstrate disputed evidence is not tainted by the compelled statement. To do so, the State must show “an independent, legitimate source for the disputed evidence.” (emphasis in the original). *State v. Spaeth*, 2012 WI 95, 343 Wis. 2d 220, 819 N.W.2d 769, ¶37. citing *Kastigar*, 406 U.S. at 460, 92 S.Ct. 1653.

These above authorities apply here: because Mr. Nero made a compelled statement to probation, that statement was subject to derivative use immunity under the *Evans* Rule. 77 Wis. 2d 225, 227-28. Nero did not need to exercise the privilege because it was self-executing. 142 Wis.2d 821, 832. In turn, the State could not use his compelled statement—or derivative evidence—in any respect, including as an “investigatory lead.” 434 Wis.2d 220, ¶37. Lastly, to use any derivative evidence, the State must demonstrate it obtained

the disputed evidence (blood test results) from “an independent, legitimate source.” *Id.*

In addition, the public policy argument emphasized in *Coleman* applies to Nero’s UA test also; had Nero known that his UA test result could be used against him to justify probable cause for a blood test sample Nero would have been discouraged from complying with probation’s request. *People v. Coleman*, 13 Cal.3d 867, 891,892, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975.) If his UA test result could be used to justify a blood test, Nero would be incentivized to not comply with probation’s request for a urine sample.

In denying Nero’s postconviction motion, the court concluded his compelled statement was not used as an investigatory lead; it also found the State demonstrated an “independent legitimate source,” and thus met its burden. As described below, because the court disregarded and misapplied controlling precedent, these conclusions demonstrate a manifest error of law justifying reversal.

**B. Because the blood test results were fruits of the compelled statement and the State failed to meet its burden demonstrating an independent source, this Court may exclude the blood test results.**

Nero’s conviction depended entirely on the blood test results, but those results should be excluded as fruit of a Fifth Amendment violation. Importantly, the State presented no other direct evidence showing Nero’s intoxication.

- 1. The blood test results should be suppressed because they are derivative evidence of the compelled probation statement in violation of Mr. Nero’s Fifth Amendment rights.**

Because the blood test results flowed from Nero's compelled probation statement, it violated Nero's Fifth Amendment rights which prevented the State from using them at trial. The circuit court erred by not suppressing the results. The facts demonstrate Sergeant Kurtzhals relied on the UA test results to justify the blood test. And the UA test resulted from the compelled statement Mr. Nero provided to probation. Thus, the blood test flowed from the compelled probation statement because without the probation UA test result, no independent sources justified requiring Mr. Nero to submit to a blood test. As a result, the blood test is physical evidence derived from a compelled statement in violation of Mr. Nero's fifth amendment rights and should be excluded.

Based on the authorities set out above, Mr. Nero must prove the following points to exclude the blood test results as tainted fruit of the compelled statement:

- (1) His statement to probation was compelled;
- (2) The blood test result is derivative evidence of the compelled statement.

Once Nero proves the first two points, Nero must then demonstrate that the State lacks an independent source to justify procuring the blood test.

Mr. Nero can satisfy each of these requirements as explained below.

**(1) Mr. Nero's statement to probation was compelled.**

The circuit court agreed that Mr. Nero's statement to probation was compelled. This point is not at issue. (202:6; App.34).

In support, the circuit court properly excluded Mr. Nero's compelled statement made to probation in this case. (105:4; App. 161). Thus, Nero's probation statement was compelled.

**(2) The blood test results are physical evidence derived from Mr. Nero's statement made for probation.**

To prove the blood test results are fruit of the compelled

probation statement requires showing two things: (1) that the UA test was derived from the compelled statement, and (2) that the blood test request was derived from the UA test.

**(a) Nero's UA test was derived from the compelled probation statement because the statement served as an investigatory lead for the UA test.**

Mr. Nero's UA test request was derived from his compelled probation statement because the statement served as an investigatory lead. However, the circuit court found "Mr. Nero's UA was not derivative of his probation statement because [Nero] did not admit to using further drugs in his probation statement." (202:6; App.34). The circuit court claims he denied drug use and that *denial* prevented it from being an investigatory lead. Not so.

Because Nero admitted to recent drug use in his probation statement it raised the issue of substance use and served as an investigatory lead. Specifically, Nero said:

"I have not used methamphetamine since the last time I seen my agent which was 6 days ago. The last time I used heroin was the last time I got out of jail on this case for probation. (146:1; App. 93).

This statement effectively raised the issue of drug use. He admitted recent drug use—six days prior. Plus, he admitted to using two different drugs.

Before this admission of drug use, no recent drug use was connected to Nero for this incident. He denied drug use to Officer Spenle when first asked that morning at Monarch Paving. And Spenle appeared content with that answer as he administered no field sobriety tests or preliminary breath tests to Nero and included no indications of possible drug or alcohol use in the police reports.

Thus, before the probation statement there was no mention of considering drug use, but after the probation statement Nero must undergo drug testing. Suddenly probation's investigation turns to investigating drug use. Notably, Nero was on probation for

non-drug-related offenses (theft and forgery), and the record contains no indication that his probation conditions required drug testing. Thus, because no connection to drug use existed until Nero made his statement admitting to recent drug use, the UA test request may reasonably be considered derived from that compelled probation statement.

In the alternative, as noted above, this Court may validly exclude use of the UA test under public policy considerations. Admittedly, UA test results are not considered “statements” and are thus not suppressed per se as Fifth Amendment violations. See *Lucero v. Gunter*, 52 F.3d 874, 878 (10th Cir. 1995). However, the overarching rationale from *Coleman* reasonably still applies: probationers may likely refuse to submit to probation UA tests if the test results could be used to incriminate them for a separate crime. See *Coleman*, 13 Cal.3d 867,892, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975.).

In sum, excluding the UA test in this case upholds the policy underlying Wisconsin authorities; those authorities encourage probationers to make statements in order to effectively enforce the probation system. Allowing Nero’s UA test result to be used to justify the blood test result in this instance undermines the Fifth Amendment because, as it currently stands, it was in Nero’s best interest to refuse to submit to probation’s UA test. All he risked in refusing was revoked probation; but because he complied with the UA test, he received an additional conviction (the OWI). This Court’s reversal of the circuit court’s order can prevent such an incongruous outcome.

**(b) The blood test results were derived from the UA test results.**

Here, the blood test results were derived from the compelled statement because the UA test result provided the additional evidence needed to provide probable cause to justify the blood test request. The sequence of events demonstrates that the probable cause for the blood test request depended on Nero’s UA test result. These facts follow:

- 10:00 pm: Guthman observes Nero's vehicle driving through the Monarch Paving grounds (around 10:00 pm). (109:65-66; App. 44-45).
- 3:30 am: Nero knocks on Guthman's trailer door at Monarch Paving. (109:152-153; App. 69-70). (109:88; App. 55)
- 4:00 am: Guthman contacts law enforcement.(193:19; App. 146).
- 4:02 am: Deputy Spenle responds to Monarch Paving. (193:19; App.146).
- Spenle asks Nero if he has used drugs or alcohol. Nero denies. (193:19; App.146).
- 4:30-5:30 am: Nero, Guthman, and Deputy Spenle drive around together looking for Nero's vehicle. (193:19; App. 146)
- 5:30 am: Deputy Spenle arrests Nero and transports Nero to jail. (193:18; App. 145).
- 5:30 am: Spenle's shift ends; he goes home. (193:17; App.144).
- 9:30 am: Probation administers UA test to Nero. (30:2)
- 12:00 pm: Sergeant Kurtzhals gets involved in investigation. (192:12).
- Kurtzhals gets information about Nero's case from the "front desk girls."
  - The "front desk girls" had reviewed reports from Deputy Spenle and Deputy Vernon.
  - Kurtzhals does not read Spenle or Vernon's reports even though he signed off on Vernon's report of finding Nero's vehicle. (192:22; 193:12)
- 1:45 pm: Sergeant Kurtzhals visits Nero in the jail
- Kurtzhals does not provide *Miranda* warning to Nero<sup>1</sup>
  - Kurtzhals obtains two incriminating statements from Nero:

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<sup>1</sup> Kurtzhals testified he did not need to advise Nero of his *Miranda* rights at this point because he was not investigating the incident when he went to request the blood test. Kurtzhals testified in his "mind's eye" the information he received from the front desk girls gave him probable cause to justify the blood test prior to going to visit Nero in the jail. (192:19-20).

- Nero admits he has hypodermic needles in his vehicle, and he is not a diabetic. (192:19-21)
- Nero admits he used methamphetamine approximately 5 days prior. (192:19-21) <sup>2</sup>
- Kurtzhals reads Nero the Informing the Accused Form (193:8).
- Nero consents to blood draw request (193:8).

Notably, the only evidence conveyed to Kurtzhals about Nero's recent drug use was his positive probation UA test. Without the positive UA test result, Kurtzhals had no evidence confirming Mr. Nero's connection to recent drug use in order to justify the blood test.

This timeline of events demonstrates that prior to Mr. Nero's admission of drug use in his probation statement he was not under investigation for anything drug related; but after he makes his statement, which admits drug use, he must submit to a UA test. Then, after the UA test results get conveyed to Kurtzhals, Kurtzhals investigates Nero for a drug-related offense (OWI).

Thus, because the blood test request would not have existed without the UA test result, the UA test result served as an investigatory lead—leading to the blood test. Without the UA test result Sergeant Kurtzhals lacked the probable cause required to request a blood test.

The circuit court's first denial of Nero's suppression motion further demonstrates that the UA test result was needed to provide the requisite probable cause for the blood test request. In denying Nero's initial request to suppress the blood test results, the court stated Kurtzhals had probable cause based on three facts:

1. The positive UA test result,
2. His review of what Deputy Spence observed regarding Nero

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<sup>2</sup> Both statements obtained by Kurtzhals in violation of Nero's Miranda rights were suppressed by the court; Kurtzhals had included both statements in his affidavit to justify the search warrant for Nero's vehicle. (105:4; App.161)



being disorientated when Spenle responded to the incident at Monarch Paving; and

3. The operation of the vehicle in the Township of Red Cedar in the early morning on October 14, 2015. (105:6; App. 163).

Therefore, the circuit court acknowledged probable cause involved the consideration of the positive UA test result.

This connection demonstrates that the justification for the blood test result depended, at least in part, on the UA test result. As further explained below, the court's other two points standing alone do not provide the requisite probable cause. As such, the blood test is the fruit of the compelled probation statement because without the UA test result, Sergeant Kurtzhals lacked probable cause to justify the blood test.

**2. No independent source provides the necessary justification to conduct the blood test.**

The State cannot meet its burden in this case to demonstrate that it could have justified the blood test request without considering the UA test. Without the UA test, the State lacked the probable cause needed to justify the blood test request. As stated earlier, the State bears the burden of establishing an independent, legitimate source for the disputed evidence. *State v.. Spaeth* 434 Wis.2d 220, ¶137. citing *Kastigar*, 406 U.S. at 460, 92 S. Ct. 1653. And law enforcement must have probable cause to justify a blood test. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Here, as just reviewed, the circuit court's initial denial said Kurtzhals could consider three facts to justify the blood test:

1. The positive UA test sample of Mr. Nero that was taken by the probation agent,
2. Sergeant Kurtzhals' review of what Deputy Spenle observed about Mr. Nero being disorientated at Monarch Paving; and
3. The operation of the vehicle in the township where it was in the early morning on October 14, 2015.



But now, the circuit court changed its position. Now, the court found probable cause does not need to involve the consideration of the positive UA test result. In its recent denial, the circuit court says points 2 and 3 above—alone—provided probable cause to justify the blood draw: that Kurtzhals didn't need the positive UA test result to justify probable cause.

The record contradicts this newfound conclusion and, in turn, the State cannot meet its burden to demonstrate an independent source for the blood test results. In brief, there was no probable cause for an OWI investigation based on Spenle's observation of Nero as disorientated and the operation of the vehicle in that location. There was no probable cause for a blood test prior to the positive UA test results.

Deputy Spenle's actions provide the clearest demonstration that no probable cause existed to investigate the incident as an OWI crime—prior to the UA test results.

First, Spenle interacted significantly with Nero. He spent at least 90 minutes with Nero. This included over 60 minutes driving around with Nero looking for Nero's lost car. Spenle spoke with Nero. He asked about drug use that night. He observed Nero's denial. Yet, from all these interactions Spenle only noted that Nero appeared "disorientated." He never indicated Nero appeared intoxicated. And disorientated seems reasonable given the time of day (4:00 am) plus Nero's admission of feeling tired.

Next, Spenle gave no indication in his investigation that this driving incident involved operating with a controlled substance. He knew Nero had driven. He knew about the erratic driving around Monarch Paving. And he knew Nero had lost his car. He knew better than anyone what Nero's state was. Yet, knowing all these facts, Spenle decided not to conduct any field sobriety tests. (193:18; App. 145).

Finally, Spenle's report and arrest demonstrates no probable cause existed to investigate the incident as an OWI prior to the

positive UA test. Spenle arrested Nero for non-drug-related offenses: driving with a revoked license and criminal damage to property. And he included no indication of substance use in his report.

In addition, erratic driving around Monarch Paving alone is not reasonably suspect because Guthman testified anyone would have difficulty driving around the plant in the dark because of the barriers and complexity of navigating the property. (109:89).

Thus, Deputy Spenle knew the two factors the court now says justified the blood draw—but he lacked probable cause to arrest Nero for OWI. He inferentially lacked reasonable suspicion to even conduct field sobriety tests. See *State v. Dotson*, No. 2019AP1082, unpublished slip op. ¶¶1, 15 (WI App Nov. 24, 2020) (administering field sobriety tests requires reasonable suspicion a person operated while intoxicated). Notably, Deputy Spenle had the closest contact with Nero, and substance use was absent from his investigation, observations, and report.

In contrast, Sergeant Kurtzhals spent no time with Mr. Nero. And he knew only two additional facts unknown by Spenle:

- (1) Nero's vehicle had been found near the area Spenle, Nero, and Guthman searched that morning (193:12; App. 139); and
- (2) Nero's probation UA test results came back positive for three controlled substances. (192:13; Exhibit "3" ")

Kurtzhals' knowledge that Nero's vehicle was found changed nothing. Everyone knew the vehicle was out there. Nero admitted to it. Spenle, Nero and Guthman searched for it. They just could not find it in the dark. So, Kurtzhals' knowledge of the found vehicle did not position him any differently than Spenle.

But Kurtzhals' knowledge that Nero's UA tested positive for three confirmed substances changed everything. It suddenly tied drug use to the incident. Before he learned about the UA test results, Kurtzhals only knew what Spenle knew. And Spenle had not even conducted field sobriety tests. Thus, it was only after Kurtzhals

learned of the positive UA test that he had probable cause to justify the blood draw.

Therefore, without the positive UA test, Kurtzhals lacked probable cause to justify the blood draw and thus had no independent source to obtain the evidence.

Nero's case resembles the recent case *State v. Rodney J. Ofte*, when this Court applied the exclusionary rule in affirming suppression of all physical evidence tainted by a 5<sup>th</sup> Amendment violation in an OWI case. *State v. Rodney J. Ofte*, No. 2021AP1302-CR, unpublished slip op. (WI. App. April 21, 2022).

In *Ofte*, the defendant moved for suppression of evidence supporting the OWI (2<sup>nd</sup>) count because authorities obtained evidence after violating his Fifth Amendment rights (no Miranda warning). After stopping Ofte, authorities detained him in a locked squad car and obtained incriminating statements. No Miranda warnings were given. Then authorities obtained additional evidence: field sobriety test results and blood test results. *Id.* ¶¶12, 19. The Court of Appeals affirmed the circuit court's decision suppressing all evidence that was derived after the Fifth Amendment violation—this included Ofte's statements, the field sobriety test results, and his blood test results. *Id.*, ¶19.

Like in *Ofte*, in Nero's case, there was a Fifth Amendment violation (use of a compelled probation statement); and thus, as in *Ofte*, all evidence obtained from that point forward should be suppressed because the State cannot demonstrate it would have obtained the blood test results without the UA test.

In turn, Nero asks this Court to conclude the State failed to meet its burden like the case in *State v. Quigley*, 2016 WI App 53, ¶46, 370 Wis. 2d 702, 883 N.W.2d 139. In *Quigley*, this Court looked intently at the State's argument and asked: would the State really have obtained this evidence without considering the impermissible compelled statement? And this Court answered no. Likewise, in Nero's case the State would not have obtained the evidence (blood test

results) without considering the impermissible UA test.

In *Quigley*, the defendant confessed to sex offenses during an interrogation by a detective; and he later confessed to a second set of offenses when questioned by his probation officer. This Court found that the state failed to show that evidence obtained after the statement to the P.O. was “derived from a legitimate source wholly independent of” that statement, as required by *Kastigar v. United States*, 406 U.S. 441 (1972).

Quigley was on probation when investigated about his relationship with the victim, P.R.. In an initial interview Quigley admitted to various sexual offenses involving PR to the investigating detective. Then, after his arrest, Quigley was forced to give a statement to probation. In that statement, Quigley included information about a *second* series of assaults against P.R.. This second set of assaults occurred in February 2012. Quigley was told, consistent with *State v. Spaeth*, 2012 WI 95, 343 Wis. 2d 220, 819 N.W.2d 769, and *State v. Sabs*, 2013 WI 51, 347 Wis. 2d 641, 832 N.W.2d 80, that “none of this information could be used against him in criminal proceedings.” 2016 WI App 53, ¶14.

Regardless, as in Nero’s case, information tied to the probation statement got conveyed to investigators and was used against Quigley as an investigatory lead. Two days after Quigley made his probation statement, probation sent Quigley's statement to the prosecutor. The prosecutor then asked the detective to interview the victim, P.R., again. When the detective re-interviewed P.R., she told him about a *third* set of assaults by Quigley from 2011. Thereafter, the state charged Quigley with these 2011 assaults. *Id.* (¶¶16-19).

In *Quigley*, the State acknowledged that PR was reinterviewed because of Quigley’s probation statement but the state argued it had an independent source: specifically, that P.R. would have been re-interviewed at some unspecified later time. The circuit court was

unconvinced and found it did not know “whether it was true” that the detective would have done so. *Id.* ¶53.

More importantly, this Court concluded that even if the detective testified that he *had* interviewed P.R. independent of Quigley’s statement, it would not have been enough, because “conclusory denials of use or derivative use are insufficient to meet the government’s burden.” *Id.* ¶54, *citing United States v. Hampton*, 775 F.2d 1479, 1487 (11th Cir. 1985)). Such is the case here.

Here, likewise, the State must claim that Kurtzhals *had* requested the blood test independent of Nero’s positive UA test which is likewise a conclusory denial of use of Nero’s UA test result. And it denies the evidence. The evidence shows Kurtzhals waited until he learned of Nero’s UA test result before he requested the blood test. Kurtzhals could have requested a blood test from Nero based solely on Spenle’s observation of Nero being disorientated and the operation of the vehicle in that location at that time. Both those facts were known when Nero was booked in jail and no blood test was requested. He was arrested at 5:30 am and the blood test wasn’t requested until 1:45 pm that afternoon. No field tests were performed. No additional interviews were conducted. Nothing changed except the knowledge of Nero’s positive UA test, thus the State’s denial of using that UA test to justify the blood draw is a conclusory denial insufficient to meet the government’s burden. The same as was the case in *Quigley*.

Thus, as in *Quigley*, the State here cannot meet its burden to establish an independent source, and the Court may properly suppress the blood test because it is derivative evidence of a Fifth Amendment violation.

**C. Because Trial Counsel failed to present corroborating evidence to support the credibility of Mr. Nero’s version of events, Mr. Nero was denied the effective assistance of**

**counsel.**

Contrary to the circuit court's ruling, Nero provided sufficient grounds for the circuit court to grant a hearing on his claim of ineffective assistance of counsel. Here, Trial Counsel performed deficiently because he failed to substantiate Mr. Nero's version of events by presenting corroborating witnesses. That deficient performance weakened the defense's only strategy to convince the jury of Mr. Nero's account of events, thus prejudicing Mr. Nero.

Both the United States and Wisconsin Constitution guarantee the right to effective assistance of counsel for all criminal defendants. U.S. Const. Amends. VI and XIV; Wis. Const. art. I, § 7. Defendants must satisfy a two-prong test to prove ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). A defendant must first prove counsel performed deficiently. *Id.*; see e.g., *State v. LeMere*, 2016 WI 41, ¶ 25, 368 Wis. 2d 624, 879 N.W.2d 580. Next, the defendant must show the deficient performance caused them to suffer prejudice. *Strickland*, 466 U.S. at 687. See also *State v. Eckert*, 203 Wis. 2d 497, 506, 553 N.W.2d 539 (Ct. App. 1996).

First, Nero must point to Trial Counsel's specific action or inaction which fell "outside the wide range of professionally competent assistance," to satisfy the deficiency prong. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). All counsel benefit from a presumption that their conduct fell within a reasonable range. See *Strickland*, 466 U.S. at 689.

Next, to demonstrate prejudice, Mr. Nero "must show that there is a reasonable probability that, but for counsel's unprofessional errors (deficiency), the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See *Strickland*, 466 U.S. at 694.

The trial court refused to grant an evidentiary hearing on Nero's ineffective assistance of counsel claim. However, the circuit court must

hold an evidentiary hearing when a motion alleges facts on its face which would entitle the defendant to relief, *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

Here, because Mr. Nero alleges sufficient facts to raise questions of fact as to a showing of deficient performance and prejudice, an evidentiary hearing on this motion is proper. Also, because Mr. Nero alleges sufficient facts to raise questions of fact regarding excluding the blood test results, an evidentiary hearing on that issue may be held at the same time.

Therefore, Mr. Nero asks this Court to grant an evidentiary hearing on his motion.

Trial Counsel's deficient performance prejudiced Mr. Nero because it resulted in no testimony corroborating Mr. Nero's version of events. And the OWI count hinged entirely on the jury believing Mr. Nero's version. Because both the State's version and Mr. Nero's version of events required the jury to make reasonable circumstantial inferences, any additional testimony corroborating Nero's account could have tipped the scales. But without presenting any corroborating evidence, Mr. Nero's version of events remained limited by his credibility. Thus, failure to present this corroborating evidence denied Mr. Nero of the effective assistance of counsel.

Because Mr. Nero reasonably expected Trial Counsel to present evidence corroborating his testimony, Trial Counsel's failure to do so constitutes deficient performance. Trial Counsel failed to present two pieces of corroborating evidence: (1) testimony from Nero's friends corroborating his testimony, and (2) evidence that Nero's car still had gas in it.

Mr. Nero must point to Trial Counsel's specific action or inaction which fell "outside the wide range of professionally competent assistance," to satisfy the deficiency prong. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). To show an



attorney's deficient conduct, “the defendant must show that counsel's representation fell below an objective standard of reasonableness.” *Id.* at 687–88. The Sixth Amendment does not specify a certain degree of effectiveness. *Id.* at 687-88. Rather, an attorney’s performance is measured simply against: “reasonableness under prevailing professional norms.” *Id.* at 688. In this case, failing to present any of the corroborating evidence was unreasonable under prevailing professional norms.

In addition, Trial Counsel failed to introduce any additional evidence to corroborate Mr. Nero’s account of events. Most notably, Trial Counsel never emphasized that Mr. Nero’s car still had fuel in it when authorities found it. The officer drove it out of the field after it was unstuck. (192:9; App. 103). This fact supports Nero’s assertion that he left his vehicle on his own accord to call his friends—not out of cold-driven necessity as the State claimed. He still had heat and could have slept in his car. In contrast, the State’s version alleges he got cold in his car so he left and sought help. (109:177-178; App. 82-83). But if Nero still had gas to heat his car, why would he need to leave and seek help? Because Trial Counsel introduced no corroborating evidence, this reasonable doubt never made it to the jury’s consideration.

On its own, failure to add this fact for the jury’s consideration may not be deficient performance; but combined with the failure to present Mr. Nero’s friends corroborating his version of events, it demonstrates Trial Counsel presented no supporting evidence of Mr. Nero’s account of events. That omission left Mr. Nero’s fate dependent on his own limited credibility. And Nero’s story needed bolstering. Trial Counsel’s failure to bolster his credibility with available evidence thus constituted deficient performance.

The circuit court emphasized that the failure to attach an affidavit from Nero or affidavits from his friends made his postconviction claims conclusory. However, Nero’s claims do not require an affidavit. *See State v. Brown*, 2006 WI 100, ¶ 62, 293 Wis. 2d 594, 716 N.W.2d 906. And the circuit court primarily emphasized



that no affidavit from Nero was included. In turn, Nero's claims alone justified an evidentiary hearing, and additional corroborating testimony from his friends could be presented at that hearing.

Thus, Mr. Nero alleges sufficient facts to demonstrate deficient performance.

Because neither the State nor Mr. Nero presented evidence substantiating the precise sequence of events on the night of the incident, and because Mr. Nero's acquittal depended on the jury believing his version of events, failure to bolster his credibility prejudiced Mr. Nero. The amount of support needed to tip the credibility scales is unknown. Neither party had an eyewitness to events. Neither party had physical evidence confirming their accounts. The State produced no evidence to demonstrate Mr. Nero slept in his car, got cold, and then left to find help. All the evidence was circumstantial. Thus, the slightest amounts of corroborating evidence might have tipped the scales.

With that in mind, Mr. Nero asked Trial Counsel to have his friends testify on his behalf; and, at a minimum, the friends would have corroborated Nero's version of events. But left to his own efforts, Mr. Nero lacked the credibility, due to his prior convictions, to single-handedly convince the jury. He needed help. With that help, the jury could have gotten eyewitness accounts—the only eyewitness accounts it would have heard. And those eyewitness accounts, bolstering Mr. Nero's credibility and the credibility of his version of events, creates a reasonable probability of a different outcome. Thus, failure to produce or investigate this evidence prejudiced Mr. Nero.

Finally, had Trial Counsel presented evidence that Nero's car still had gas in it at the time Deputy Vernon located the vehicle, it would have placed doubt on the State's theory that Nero sought help because he got cold after sleeping in his car. Because the State lacked any corroborating evidence to its account of events, this evidence undermining the State's theory coupled with corroborating witness testimony could tip the scales in Nero's favor.

Thus, this Court may properly determine Mr. Nero can establish prejudice—a reasonable probability of a different outcome.

### CONCLUSION

For the reasons given above, the circuit court's order denying Mr. Nero's motion for reconsideration and a new trial should be reversed and the case should be remanded for further proceedings.

Respectfully Submitted,

Dated this 8<sup>th</sup> day of September 2023.

Electronically signed by Jonathan D. Gunderson

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**RULE 809.19(8)(d) CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) (bm) and (c) for a brief. The length of this brief is 8,488 words.

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