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CLERK OF WISCONSIN
SUPREME COURT

**State of Wisconsin
Supreme Court
Appeal No. 2024AP001875-CR**

State of Wisconsin,

Plaintiff-Respondent-Respondent,

v.

Nicolas J. Bergner,

Defendant-Appellant-Petitioner.

**Petition for Review of a Decision of the Wisconsin Court of
Appeals, District I, Dated June 3, 2025**

Petitioner's Petition

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Petition

Now comes the above-named petitioner, Nicolas Bergner, by his attorney, Jeffrey W. Jensen, Sr., and pursuant to § 809.62, Stats, hereby petitions the Wisconsin Supreme Court to review this matter.

As grounds, the undersigned alleges and shows to the court that this appeal presents an opportunity for the Supreme Court to clarify and harmonize the law on a substantial question of state and federal constitutional law. Specifically, the question whether restricting juror information during the jury selection process, without making proper findings, is structural error.

Introduction

Nicolas Bergner was charged with a third offense operating under the influence of alcohol, and with a third offense operating with a prohibited alcohol concentration. He entered not guilty pleas to both counts and, eventually, the matter was called for trial. Prior to the start of jury selection, the judge ordered that a numbers-only selection process be used. The court made no findings to support the order, but defense counsel did not object. A numbers-only selection procedure was used. The jury found Bergner not guilty of operating under the influence, but guilty of operating with a prohibited alcohol

concentration. Bergner filed a postconviction motion alleging that his trial counsel was ineffective for failing to object to the numbers-only selection process. The circuit court denied the motion without conducting an evidentiary hearing. According to the circuit court, Bergner failed to allege sufficient facts to demonstrate that, but for counsel's error, there is a substantial likelihood that he would have been acquitted. Bergner appealed.

On appeal, the court of appeals assumed that trial counsel's performance was deficient for failing to object to the numbers-only jury selection procedure. However, according to the court, "In examining Bergner's motion under an ineffective assistance of counsel framework, Bergner has failed to satisfy the prejudice prong of the Strickland test." [Ct. Appeals opinion p. 8] In other words, Bergner was unable to allege sufficient facts to demonstrate that, but for counsel's error, there is a substantial likelihood that he would have been acquitted.

Statement of the Issue

Where the circuit court fails to make the findings required by *State v. Tucker*, is it structural error for the court to restrict juror information during the voir dire process? Put another way, where trial counsel's performance is deficient for failing to object to a numbers-only jury selection procedure, must the

defendant demonstrate that but for counsel's error, there is a substantial likelihood that he would have been acquitted.

Answered by the circuit court: The court did not specifically address the concept of structural error. The circuit court found that Bergner failed to allege sufficient facts to demonstrate that, but for counsel's error in failing to object to the numbers-only procedure, there is a substantial likelihood he would have been acquitted..

Answered by the court of appeals: Again, the court of appeals did not directly discuss the concept of structural error. Rather, the court held that Bergner failed to allege sufficient facts to demonstrate prejudice.

The issue was presented to the court of appeals as follows:

I. Did the circuit court err in denying Bergner's postconviction motion alleging ineffective assistance of counsel without conducting a hearing?

Statement of the Case

I. Procedural History

On September 16, 2019, the petitioner, Nicolas Bergner (hereinafter "Bergner"), was charged in count one with a third offense operating under the influence of alcohol; and, in count two, with a third offense operating with a prohibited

blood-alcohol concentration [R:1] He made his initial appearance on October 18, 2019, and entered a not guilty pleas to the charges. [R:73-4]

The case languished in the Milwaukee County Circuit Court for nearly four years.¹ Finally, on July 17, 2023, Bergner filed a motion to dismiss the case on the grounds of a constitutional speedy trial violation. [R:30] The motion was filed on a day that the case was set for trial. The state moved to adjourn the trial, and the court held an immediate hearing on the motion. The court denied the motion saying, “Okay. I mean, I just think, you know, pandemic, both sides have requested multiple adjournments at this point, and so I don't think that it's sufficient here to grant the Defense motion to dismiss. I'll deny that and I will grant the State's motion to adjourn the trial. We'll put it back on (the) trial calendar.” [R:64-6] The case was set for trial on October 9, 2023.

Once again, the state filed a motion to adjourn the October trial date because one of the state's witnesses, Officer Krakau, was unavailable “for a wedding.” [R:32] This prompted Bergner to file a second motion to dismiss on constitutional speedy trial grounds on August 25, 2023. [R:33]

The court addressed the motion at a final pretrial held on September 9, 2023. The court denied the state's motion to adjourn. [R:61-9] The court held Bergner's motion to dismiss

¹ To be fair, some of the delay was due to the fact that the courts were unable to try cases during the COVID-19 pandemic.

in abeyance. [R:61-9]

When the case was called for trial on October 9, 2023, the state was still without Officer Krakau; but, nevertheless, the prosecutor indicated that the state was ready to proceed. [R:62-9] Consequently, the defense indicated that they were not ready to proceed. According to defense counsel, she was aware that Officer Krakau would not be appearing at trial, and, therefore, counsel assumed that either the case would be dismissed, or the court would grant the state another adjournment. Thus, defense counsel did not make arrangements for the defendant's out-of-state expert witness to be present. [R:62-7 *et seq.*] The state objected to an adjournment, and indicated that he would proceed without Officer Krakau. [R:61-10]

The court initially denied the defense motion to adjourn. [R:62-11] Later, after in-chambers discussions, and efforts to arrange for the defense expert to testify remotely by Zoom, the court decided to grant one final adjournment of the trial. [R:62-14,15] The case was set for trial on January 16, 2024.

The matter proceeded to jury trial beginning on January 16, 2024. Prior to the start of jury selection, the court made the following order: "And then I should say, when I ask you all questions, if your answer to my question is yes, just raise your hand and keep your hand in the air and I'll call on you and ask you for your juror number. Okay? *You don't need to use your*

--your -- your first or last name or any of your names here in court today. You can just go by your juror number to give you a little -- a little bit of privacy. Okay?" [emphasis provided; R:88-23, 24] The court made no findings that a numbers-only selection process was appropriate. Defense counsel did not object to using a numbers-only procedure during jury selection, and he did not prompt the court to make proper findings..

During the jury selection process, then, the panel members were consistently addressed by their juror numbers, and not by their names.

In announcing the jury that was selected, the judge said, "I'm going to read people's names . . ." but then he read only the juror numbers. [R:88-108]

After a little more than a day's worth of testimony, the case was submitted to the jury. The following day, the jury returned a verdict finding Bergner not guilty of operating under the influence of alcohol, but guilty of operating with a prohibited alcohol concentration. [R:49]

The court proceeded directly to sentencing. The court sentenced Bergner to 48 days in jail with work-release. [R:91-21; R:51]

Bergner timely filed a notice of intent to pursue post-conviction relief. [R:53] On August 26, 2024, Bergner filed a postconviction motion seeking to vacate his conviction and to order a new trial because defense counsel was ineffective for

failing to object to the court's order for a numbers-only jury selection process. [R:92].

Only three days later, and without conducting an evidentiary hearing, the circuit court entered a written order denying Bergner's postconviction motion. [R:94] According to the circuit court, "[B]ecause counsel did not object to the procedure, the defendant's claim must be analyzed under the standard of ineffective assistance of counsel." [R:94-1] The court wrote, "[T]he court is not persuaded that counsel was deficient for failing to object to a 'numbers jury' under the circumstances of this case. *Referring to jurors by their juror numbers during voir dire is a relatively common practice, often adopted without objection, for the convenience of the parties, to avoid mispronouncing names, and for juror comfort.*" [emphasis provided; R:94-3]

Concerning the prejudice prong, the circuit court reasoned, "The defendant's claim of prejudice is nothing more than speculation. Again, *the defendant has provided no support for a finding that the jury would interpret the court procedure as implying dangerousness on his part given the context of the trial.*" [emphasis provided; R:94-3]

Bergner timely filed a notice of appeal. On June 3, 2025, the Wisconsin Supreme Court issued an opinion affirming the circuit court's order denying Bergner's postconviction motion. According to the court of appeals, assuming without deciding

that trial counsel's performance was deficient for failing to object to the numbers-only jury selection procedure, Bergner's postconviction motion failed to allege sufficient facts to demonstrate that trial counsel's error was prejudicial. Thus, the court of appeals affirmed the circuit court's order.

II. Factual Background

Officer Alan German of the Franklin Police Department testified that on August 22, 2019 he was on routine patrol. [R:88-119, 120] German conducted a routine registration check on a vehicle that had passed him. [R:88-121] The registration of the vehicle was expired, so he conducted a traffic stop. Bergner was the driver of the vehicle. *Id.* According to German, once he had contact with Bergner, he noticed that Bergner's eyes were bloodshot, and German could smell the odor of an alcoholic beverage. [R:88-122] Bergner said he had one beer, but then later said it was two beers. [R:88-128, 129] German conducted the field sobriety tests on Bergner; and, according to the officer, Bergner failed the horizontal gaze nystagmus test, the walk-and-turn test, and the alphabet test. [R:88-139 to 142]. German arrested Bergner for operating under the influence of alcohol.

Back at the station, Bergner submitted to an Intoximeter test. The test was administered by Officer Krakau. [R:63-36] The result was .08 grams of alcohol per 210 liters. [R:88-153;

R:63-38]

Bergner called Ronald Henson as an expert witness. According to Henson, the field tests administered were not conclusive as to whether Bergner's ability to drive was impaired. [R:63-53] Further, according to Henson, given the margin of error for the Intoximeter machine, Bergner's actual blood-alcohol concentration was between .075 and .085. *Id.*

Bergner did not testify.

Discussion

- I. **The Supreme Court should review this matter for the purpose of clarifying that restricting juror information during *voir dire*, without making the findings required by *Tucker*, is structural error.**

In *State v. Tucker*, 2003 WI 12, P19, 259 Wis. 2d 484, 498, 657 N.W.2d 374, 381, 2003 Wisc. LEXIS 12, *15-16, this court held that:

As illustrated by these federal and state court decisions, the restriction of juror information raises serious concerns regarding a defendant's rights to an impartial jury and a presumption of innocence. Accordingly, we uphold the two-prong test enunciated in *Britt* and conclude that if a court withholds any juror information, it must both: (1) find that a jury needs protection; and (2) take reasonable precautions to avoid prejudicing the defendant. We now examine whether the circuit court in this case satisfied this two-prong test.

In *Tucker*, the trial judge made an off-the-record order that during *voir dire* the jury panel members should be addressed only by their juror numbers. Defense counsel did not object to using the procedure without proper findings.

The majority opinion found that the circuit court erred in ordering the restriction of juror information without making the proper findings. *Tucker*, 2003 WI 12, P26, 259 Wis. 2d at 501, 657 N.W.2d at 382. Nevertheless, the court continued, “The circuit court in this case failed to satisfy this two-prong test; however, the error was harmless in light of the *overwhelming evidence of Tucker's guilt*.” *Tucker*, 2003 WI 12, P27, 259 Wis. 2d at 502, 657 N.W.2d at 383. In the majority opinion, there was no discussion of structural error.

However, in concurring opinions, both Justice Abrahamson and Justice Bradley asserted that the restriction of jury information affects the defendant’s right to an impartial jury, which is a fundamental constitutional right; and, therefore, it is structural error. In the words of Justice Abrahamson’s concurrence, “[T]he alleged error is an alleged structural defect because it is in the framework of the trial, the composition of the jury, not in a single event during trial. A defendant has a constitutional right to a presumption of innocence and an impartial jury. The presumption of innocence and an impartial jury are cornerstones of our criminal justice system and guaranteed by the due process clause of the United States

Constitution. *Tucker*, 2003 WI 12, P42, 259 Wis. 2d 484 at 507-508, 657 N.W.2d at 386. Similarly, in the words of Justice Bradley, “The majority departs from well-established precedent which recognizes that certain constitutional deprivations are structural and therefore defy harmless error analysis.” *Tucker*, 2003 WI 12, P60, 259 Wis. 2d at 513, 657 N.W.2d at 388.

It should be pointed out here that although the concurring opinions asserted that the restriction of juror information can be structural error; neither Justice Abrahamson or Justice Bradley found that structural error had occurred.²

Bergner’s appeal presents the perfect opportunity for the Supreme Court to clarify and harmonize the law concerning the numbers-only jury selection process. That is, where defense counsel is alleged to be ineffective for failing to object to the numbers-only procedure, what prejudice must be shown? Is the error structural error? Must the defendant demonstrate that, but for counsel’s error, there is a substantial likelihood that he would have been acquitted? Is sufficient to allege merely that if counsel had objected, the could not have reasonably made the findings required by *Tucker*?

To begin with, unlike in *Tucker*, where the evidence of Tucker’s guilt was overwhelming, the evidence against Bergner

² Both concurring opinions found that Tucker did not have an anonymous jury. The juror information was available to the lawyers and the parties. Justice Sykes also filed a concurring opinion; but, according Justice Sykes, a numbers-only jury “is not the equivalent of an anonymous jury” *Tucker*, 2003 WI 12, P86, 259 Wis. 2d at 521, 657 N.W.2d at 392

was exceedingly thin. Although he was convicted of the BAC count, he was acquitted of the operating under the influence charge. The “overwhelming evidence” against Tucker was central to the court’s holding that the numbers-only procedure was harmless. Here, the evidence was not overwhelming.

Thus, Bergner’s case puts in sharp focus the difficulty of demonstrating that the court’s unobjected-to error was prejudicial. Short of interviewing each of the jurors, how could Bergner ever demonstrate that the numbers-only procedure left him with a biased jury? This is what prompted Bergner to rhetorically ask in his court of appeals brief, somewhat out of frustration, “What kind of factual ‘support’ [concerning prejudice] does the circuit court expect Bergner to provide? Does the circuit court mean to suggest that Bergner was required to ‘support’ his claim by filing affidavits signed by each of the jurors[?]” [Ct. App. opinion p. 7] What should have been added to this argument is the matter of what questions should be asked of the jurors? Should counsel ask, “Did you vote to convict Bergner just because, based on the fact that the judge referred to the jury panel by numbers, you thought Bergner was a dangerous person?” Or, “If you had known that the use of a numbers-only jury was merely a matter of convenience, would you have found Bergner not guilty?” Interviewing the jurors certainly would not have helped Bergner prove prejudice. No

juror is likely to admit that he or she voted guilty just because they thought Bergner was a dangerous person.

The bottom line is that, under the present status of the law, where a defendant claims that his attorney was ineffective for failing to object to a numbers-only jury selection process, that defendant must demonstrate that, but for counsel's failure to object, there is a substantial likelihood that he would have been acquitted. There is not likely to be a defendant who could ever make that showing.

One of the things that makes the denial of a fundamental constitutional right structural error is the inability of the defendant to demonstrate actual prejudice. For example, the United States Supreme Court has explained:

The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affect[] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." [internal citation omitted], the denial of the right of self-representation, [internal citation omitted], the denial of the right to public trial, [internal citation omitted], and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction.

United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149, 126 S. Ct. 2557, 2564, 165 L. Ed. 2d 409, 419-420, 2006 U.S. LEXIS 5165, *16-17, 74 U.S.L.W. 4453, 33 A.L.R. Fed. 2d 661, 19 Fla. L. Weekly Fed. S 368

If the Supreme Court does not believe that a numbers-only jury selection procedure is structural error; then,

at the bare minimum, the court should clarify that, in the context of the ineffective assistance of counsel rubric, where it is alleged that defense counsel was ineffective for failing to object to a numbers-only selection process, “prejudice” is demonstrated if, after being called upon to do so in a postconviction motion, the circuit court could not reasonably make the findings required by *Tucker*? In other words, if defense counsel had objected to the numbers-only procedure, and the court could have made the appropriate findings, then counsel’s failure to object is truly not prejudicial.

On the other hand, if the court is not able to reasonably make the findings necessary to support a numbers-only process, then the defendant has been denied a fair jury just because of counsel’s failure to object. If this is not the measure of prejudice; and, rather, Bergner must show that but for counsel’s error the *result of the trial* would have been different, then no defendant could ever demonstrate that trial counsel’s failure to object to a numbers-only jury selection process was prejudicial.

Conclusion

For these reasons, it is respectfully requested that the Wisconsin Supreme Court review this matter.

Dated at Milwaukee, Wisconsin, this 2nd day of July,
2025.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 3317 words.

Dated at Milwaukee, Wisconsin, this 2nd day of July, 2025..

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