15AP0213

STATE OF WISCONSIN
COURT OFAPPEALS
DISTRICT IV

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

APPEAL NO. 2015-AP-213

v.

CASE NO. 2011-TR-3678
(LA CROSSE COUNTY)

JOSEPH WILLIAM NETZER,
DEFENDANT-APPELLANT.

BRIEF OF DEFENDANT-APPELLANT JOSEPH WILLIAM NETZER IN THE APPEAL FROM THE DECISION OF HONORABLE JUDGE TODD W. BJERKE LA CROSSE COUNTY CIRCUIT COURT, BRANCH 3

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STATEMENT OF THE ISSUES

I. DID THE DEFENDANT-APPELLANT IN THIS CASE, JOSEPH WILLIAM NETZER (JWN), RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

The Defendant-Appellant herein, Joseph William Netzer (JWN) did not receive effective assistance of counsel in this case. The mishandling of JWN's initial appearance by Attorney Nathan Schnick resulted in a plea being entered nin absentia that was not knowingly or voluntarily made by JWN. Also because of the mishandling of the plea and other inaction on the part of Attorney Schnick, JWN's right to a jury trial under Section 345.43(1), Wis. Stats. Was impaired. And, lack of preparation by counsel in order to secure a defense for JWN that would reasonably meet prevailing professional norms prejudicially undermine JWN's case.

II. WAS JOSEPH WILLIAM NETZER (JWN) DENIED THE RIGHT TO A JURY TRIAL?

But for the inaction and ineffective assistance of Atttorney Schnick, JWN would have made a proper jury demand and would have been entitled to a trial by jury.

III. SHOULD THE BLOOD TESTS USED IN THIS CASE BE ALLOWED INTO EVIDENCE?

Issues with the blood tests include whether or not there was probable cause or if it was otherwise appropriate to conduct blood tests in the first place in this case. Once the tests were to be taken, there were issues with contamination and chain of custody. Finally, the State never laid a proper foundation for any blood test results in this case to be properly admitted into evidence.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

At this time, the Defendant-Appellant, Joseph William Netzer (JWN), is not requesting oral argument in this case. Also, there is not being made a request for publication, however, it is believed that a decision in this case could offer clarification of some or all of the legal issues addressed in this case and, therefore, publication could have instructional benefits.

STATEMENT OF THE CASE

On August 22, 2011, Joseph William Netzer, the Defendant-Appellant herein (hereinafter referred to as JWN or the Defendant), a minor with a probationary driver's license, was stopped by University of Wisconsin - La Crosse Police (hereinafter referred to as UWL-PD) for suspicion of JWN driving a motor vehicle in a restricted area of street. At the traffic stop, Officer Paul Iverson of UWL-PD concluded that in his opinion JWN was operating a vehicle while impaired. Ultimately, Officer Iverson issued JWN a single citation, **Citation Number 996308-5,(R. p.3, App. P.1)**, for operating under influence in violation of **Section 346.63(1)(am), Wis. Stats.**, but no citation was issued for traveling on a restricted roadway.

JWN was handcuffed at the scene and taken to a hospital for a blood test. JWN was not asked to give consent for the blood test until after he arrived at the hospital. In essence, JWN refused to take a blood test least four times before the test was actually taken. Furthermore, as will be discussed later in this Brief, there were problems and issues with both the manner in which the blood test was taken, the test analysis procedures, and the proffer of the blood test results as

evidence at trial.

Upon being issued said Citation, JWN sought legal counsel to help him through the legal process and thus hired Attorney Nathan Schnick. JWN and his parents, Jeff and Teresa Netzer, asked and expected Attorney Schick to vigorously pursue all of JWN's rights, however, Attorney Schnick did not take any steps to preserve a right to a jury trial until June 2012 and never filed any objections to the blood testing or motions to suppress or other motions. In essence, Attorney Schnick told JWN and his parents that nothing could be done until after the blood test results came back.

For the first court appearance that was scheduled for October 6, 2011 **(R. p. 50, App. P. 2-9)** , Attorney Schnick told JWN and his parents that JWN did not need to appear; however, JWN's father, Jeff Netzer, was leery of that advice because the Citation on its face said that appearance was required. And, since Jeff Netzer also wanted to be fully informed, he attended the full October 6, 2011 hearing from start to finish. At the October 6,2011 court proceeding, which was the initial appearance in this case, Jeff Netzer witnessed that the name of his son, JWN, was

not called in any form. Thus, somehow a not guilty plea was entered on JWN's behalf at that hearing without his presence, knowledge, or consent and without the statutory procedures required at an initial appearance according to **Section 345.34 (1), Wis. Stats.**, including the right to receive notice of the option for a jury trial and the right to a continuance before entering a plea.

Subsequently, it was only after blood test results came back in February 2012 and after adjourned pre-trial hearings (scheduled for October 21, 2011, December 16, 2011, and June 8, 2012) that Attorney Schnick finally asked for a jury trial in June 2012 - approximately ten months after the alleged incident of August 22, 2011 and nine months after being retained as counsel for JWN in September 2011.

An adjourned initial appearance was held before the Honorable Judge Todd W. Bjerke on July 11, 2012. Unlike the October 6, 2011 original initial appearance where neither Attorney Schnick nor the Defendant, JWN, were in court, both were present at this hearing. At this hearing JWN did finally enter a plea at this time which was not guilty. But again, just as at the original initial appearance, Attorney Schnick failed to specifically request a jury trial at this

hearing.

On July 18, 2012, Judge Bjerke ruled that JWN would not be afforded a jury trial via his **Memorandum Decision and Order R. p. 9, App. P. 10-15).**

Before this case was tried, Attorney Schnick withdrew in January 2013. JWN briefly represented himself pro se during this time and by motion petitioned Judge Bjerke to in essence reconsider allowing a jury trial (R.) on February 28, 2013 but was denied by Judge Bjerke on March 1, 2013 **(R. p. 20, App. P. 16-22).**

Subsequently, JWN retained Attorney Christopher Dyer as trial attorney. Attorney Dyer raised issues in briefs and at trial about the blood tests.

Trial to the Court started on December 27, 2013 and was adjourned to January 17, 2014 at which time the State had called all the witnesses it had specified and it appeared to have rested its case. However, Judge Bjerke took briefs from both sides to determine if the blood test evidence produced at trial was admissible or not. On April 15, 2014, Judge Bjerke issued a **Decision and Order on Admissibility of chemical test results (R. p. 35, App. P. 23-28)** ruling in essence that the State had not laid a proper foundation for the blood test results and as such

the results could not be submitted as evidence. Specifically, in said **Decision** Judge Bjerke stated: "In addition to not knowing who performed the testing or who created the lab reports, as Netzer points out, NMS is a for-profit laboratory contracting with the State Laboratory of Hygiene. While the Court has no reason to doubt the integrity of NMS, in addition to uncertainties regarding how NMS arrived at its results, the Court cannot ignore the fact that NMS has an incentive to return a positive result to the State." Following up that Decision, at a June 11, 2014 status hearing, Attorney Dyer argued for JWN that the State had rested its case on January 17, 2014 **(R. p. 58, App. P. 29-48 at p. 38 [p. 10 on transcript face] at lines 14-15)** and even the State asked to dismiss the matter **(R. p. 58 at p. 15 on line 22 et seq., App. P. 29-48 at p. 43).**

Thereafter the trial concluded on August 6, 2014 when Judge Bjerke allowed testimony from a representative of the blood testing lab in Pennsylvannia, NMS, even though the representative had not performed or oversaw the tests, but was merely interpreting the results, and even though the lab did not meet Wisconsin statutory requirements under **Section 343.305(6)(a).**

Ultimately, on October 29, 2014 Judge Bjerke found JWN guilty of operating a motor vehicle under the influence of a restricted controlled substance in violation of Section **346.63 (1) (am), Wis. Stats** per his written **Findings of Facts, Conclusions of Law, and Decision (R, p. 48, App. P. 49-67)** Now, JWN is respectfully appealing this conviction and the process that has led to this point.

STATEMENT OF FACTS

On August 22, 2011 at approximately 12:12 AM JWN was driving east-bound on Badger Street in the City of La Crosse, La Crosse County, Wisconsin, when he realized the street changed from a through street to a restricted access street and so JWN immediately performed a U-turn to leave the restricted part of Badger Street and return to that portion of the street that allowed through traffic. The restricted part of Badger Street that JWN had temporarily accessed was essentially a service road on University of Wisconsin - La Crosse campus that fed from the public roadway portion of Badger Street. If one looked at a map of the City of La Crosse it would appear that JWN was actually on a through street at all times and at the sight there is no narrowing of the street and no change in the road

surface that would lead someone to actually view the street as a service road. Since it was late August at the time of this incident, students had begun to return to the college campus dormitories that border the portion of Badger Street where this incident occurred. So, in fact, at the time of this incident there were several moving vans, large vehicles and equipment parked on Badger Street and these items obstructed the view of the "Do Not Enter" signs posted alongside Badger Street. This area is further confusing because, as was testified to by Officer Paul Iverson of UWL-PD, the arresting officer in this case, in his testimony at JWN's trial on December 27, 2013 **(12/27/13 Transcripts, R. p. 56, App. P. 68-129)** that a variety of vehicles do use the restricted portion of Badger Street including regular vehicles or regular-looking vehicles from time to time when Officer Iverson answered the following questions **(12/27/13 Transcripts at R.p 58, p. 21-22,** App. P. 88-89):

> (Attorney Dyer) Q: So this is a road that nobody at all can drive on?
>
> (Officer Iverson) A: Only people allowed to drive on Badger Street are state vehicles, emergency vehicles and MTU buses.

(Attorney Dyer) Q: And there are never any civilian vehicles allowed at all?

(Officer Iverson) A: Move-in day and that's, that should be it.

Once Officer Iverson stopped JWN, Officer Iverson testified at various places during his testimony at trial **(12/27/13 Transcripts, R. p. 58, App. P. 68-129)** that his basis for believing that JWN was impaired include (1) JWN's movement in the car, (2) JWN not looking directly at Officer Iverson when Officer Iverson spoke to him (before JWN was told to exit his vehicle), (3) JWN mumbling responses, and (4) JWN exhibiting "nervousness". However, the police squad car dash-cam clearly shows little or no movement on the part of JWN. The dash-cam also shows that at no point during the stop while Officer Iverson was addressing JWN while JWN was still in his vehicle did Officer Iverson stand in front of JWN so that JWN could look at him directly, but rather Officer Iverson used a common police tactic of speaking to a motorist from behind or alongside a motorist instead of in front of the motorist, making it challenging and uncomfortable for any motorist to face such a speaker in such a position and, if JWN had done so, it would have required more of the movement that Officer Iverson seems to be concerned with or

uses to support the rest of his story. And, when two people are speaking to each other but one is behind the other and elevated above the other, it is not surprising that the seated person's words might come across as mumbled. Officer Iverson used this subjective and easily 'embellishable' criteria to claim that JWN was acting nervous, yet it is normal for anyone to be nervous when stopped by a police officer -in fact, it may be more abnormal and suspicious if someone is not nervous. Furthermore, it is very convenient that audio recording, which Officer Iverson had the capabilities for at the time of this stop, was not performed, not preserved, or was destroyed and this deprived JWN of possible exculpatory or impeachment evidence that Officer Iverson and the UWL-PD would have been obligated to provide to JWN.

Officer Iverson used this basis to further investigate impairment of JWN despite the fact that before doing so he did not state in his report (R) or in his testimony (R) that he noticed while JWN was still in his vehicle any erratic behavior on JWN's part or incoherence, etc. Officer Iverson further testified that "Normally I would ask for a DRE", but in this case Officer Iverson neglected his normal procedures of calling the City of La Crosse police

Department for assistance from a trained Drug Recognition Expert who would have been specially trained in the detection of impairment as officer Iverson testified he would normally do **(Transcript 12/27/13, R. p. 56 at p. 32-33, App. P. 68-129 at p. 99-100)**.

It states in Officer Iverson's report that he arrested [JWN] for operating a motor vehicle while impaired, I then placed him in handcuffs…" **(Incident Report #1, NOT IN TRIAL COURT RECORD, App. p. 130-135 at p. 133)**. Thereafter, Officer Iverson completed a citation (Citation No. 996308-5 **(R. p. 3, App. p. 1)** and then drove JWN to a local hospital for a blood test without any notation of reading JWN his rights up to that point and without asking JWN if he would consent to a blood test until after they were already at the hospital. At the hospital, Officer Iverson stated, per his report **(Ibid.)**, that he "explained to him [JWN] that Joseph did not have the right to legal counsel at this time." Despite the fact that Officer Iverson , per the above timelines as outlined in Officer Iverson's very own report, already acknowledges that JWN is under arrest, handcuffed, and transported somewhere against his will. Also, at the hospital Officer Iverson acknowledges that he read the "informed The Accused" form to JWN five times

before JWN finally signed the form - essentially then JWN refused to sign the form after the first four readings.

It should be noted that the memory of these events by Officer Iverson is inaccurate and so the testimony Officer Iverson offered based thereon is unreliable. For instance, in addition to his statements about JWN's movements that were clearly incorrect given dash-cam video, Officer Iverson testified at trial that he saw JWN driving on East Avenue and turning from there onto Badger Street but JWN was never on East Avenue leading up to this stop and this fact is supported by both Officer Iverson's own contemporaneous report and the report of Officer Miller who was riding with Officer Iverson at the time as well as the video from the dash-cam.

While the police stop and fruits thereof are in question in this Brief, the bloods test also comes into question. First, as already stated, JWN essentially refused to take the blood test on four separate occasions after Officer Iverson had read the Informing The Accused" form before agreeing to the form after Officer Iverson read it a fifth time. Second, qualifications of the blood test taker, Kelly Schallert of Gundersen Lutheran Hospital, were never fleshed out at trial. And, when Ms. Schallert performed the

blood test there are questions about contamination which include Officer Iverson touching JWN on the arm in the area where the test occurred that may have caused a transference and the swabs used by Ms. Schallert could have also caused a false reading. Furthermore, it took Ms. Schallert several tries to draw blood. Third, the chain of custody comes into question because, among other reasons, it took nearly one week according to the Wisconsin State Laboratory of Hygiene per its records **(R. NOT IN RECORD, App. p. 136-138)** for that lab to receive the blood kit presumably of JWN's blood sample on August 29, 2011 when it was collected On August 22, 2011 and mailed on that same date by Officer Iverson according to the testimony of Officer Iverson. Fourth, a lab in Pennsylvannia, NMS, performed analysis of the blood and as such did not comply with the requirements for a valid test result under Wisconsin law in accordance with **Section 343.305 (6) (a), Wis. Stats.** Fifth, the Pennsylvannia lab, NMS, did not perform the safeguard testing that would be required of a Wisconsin lab as there was no dual testing of the blood by that lab in this case. Sixth, Judge Bjerke agreed that the testimony of Laura Liddicoat from the Wisconsin State Laboratory of Hygiene in this case was hearsay and not

admissible and the State rested their case after that testimony, but Judge Bjerke 'unrested' the State's case and allowed Chan Hosokawa of NMS Lab in Pennsylvannia to later testify at an adjourned session of the trial in this case.

After the issues with the police stop and blood testing, JWN resolved to fight the charge against him so he retained legal counsel in the form of Attorney Nathan Schnick in September 2011 in advance of the October 6, 2011 court appearance stated on the citation issued to him. Even before that initial appearance, JWN asked Attorney Schnick to fight the charge aggressively, file motions necessary to dispute the probable cause for the stop and the arrest and the blood test, challenge the arrest and the blood test, and ensure a jury trial in case the matter did go to a trial. At the initial appearance on October 6, 2011, **(R. p. 50, App. p. 2-9)** Attorney Schnick did not appear because apparently he had
contacted the court clerk in advance to notify the Court that he had a signed authorization from JWN to represent JWN; it is unclear from the record if Attorney Schnick felt that there would be no plea on this date or if he believed that any plea would perhaps simply be a sort of 'placeholder' until an adjourned initial appearance at a

later time after blood test results came back that would be the 'official' plea. In any case, Attorney Schnick led JWN to believe that JWN did not need to appear at this hearing and that no plea would be entered on this date. However, Jeff Netzer, JWN's father and legal guardian, did attend the October 6, 2011 court hearing from start to finish and did not witness JWN's name being called at all during that hearing. Instead, at that initial appearance and outside of the hearing of the gallery, the court transcripts appear to show that essentially prior to calling JWN's name to the gallery the clerk informed the Honorable Judge Elliott Levine, who was substituting for Judge Bjerke at this proceeding, outside the hearing of the gallery that Attorney Schnick had spoken to the clerk prior to court, and so, in essence, Judge Levine in conference with the court clerk entered a not guilty plea on October 6, 2011 without that being known by JWN and perhaps not even being known at the time by Attorney Schnick.

Thereafter, Attorney Schnick did request some discovery - although not until he had already been retained for about one month and about six weeks after the incident in question and he never followed up on demanding missing audio recordings from the police stop, he did not file any

motions - contrary to his discussions with JWN, and Attorney Schnick did not keep his promise of keeping JWN and his parents informed about the status of the case - the most egregious specific example of this being that Attorney Scnick did not inform JWN or his parents that there was in effect a plea entered in JWN's case and that Attorney Schnick did not request a jury and the clock was ticking for demanding and paying for a jury. Instead, Attorney Schnick continued to inform JWN that there was nothing more that could be done on JWN's case until the blood test results came back. When the blood test results did finally come back in February 2012, a status conference that was set previously for June 2012 was allowed by Attorney Scnick to stand and it was because of that that it was not until June 2012 that JWN learned that a plea was entered in October and time had lapsed to preserve JWN's right to a jury. Prior to June 2012, Attorney Schnick had led JWN to believe that after the June 2012 status conference there would be an adjourned initial appearance and at that time JWN would enter a plea. Of course, JWN was never insistent on waiting for a plea to make a jury demand as from the outset of Attorney Schnick's representation of JWN in September 2012 - before the original initial appearance -

JWN had emphasized to Attorney Schnick that he wanted a jury trial. So, when JWN learned of the lapse in the jury demand he implored Attorney Schnick to resolve this matter and Attorney Schnick attempted to do so by making a motion to extend the time limits to allow for a jury demand to be made in this case. However, while Judge Bjerke acknowledged in his written **Memorandum Decision and Order** that he has the power to grant such an extension and allow a jury demand by citing **Teff v. Unity Health Plans Ins. Corp.**, 265 Wis. 2d 703, at 724, 666 N.W. 2d 38 (2003) wherein it states "A trial court has broad discretion in deciding how to respond to untimely motions to amend scheduling orders because that broad discretion is essential to the court's ability to manage its calendar.", essentially Judge Bjerke said that failure to make a timely jury demand was not excusable neglect on the part of Attorney Schnick and whereas Judge Bjerke has allowed the state to stretch a trial from December 27, 2013 to adjourned trial dates on January 17, 2014 and August 6, 2014 largely because the State did not have its case ready for prime time, yet Judge Bjerke would not allow a jury demand that would have protected the interests of the accused without interfering with the Court's calendar. At the June 11, 2014 status

hearing, Judge Bjerke talks a lot about fairness, but at that hearing Judge Bjerke decided to continue the prosecution of this case when in that very hearing the State wanted to dismiss the case **(R. p. 58 at p. 15 on line 22, et. seq., App. p. 29-48)** and at the phase of the court trial that had proceeded it on January 17, 2014 the State had already rested its case once yet Judge Bjerke set up his calendar so that the State could add a key witness at a third phase of the court trial which did not occur until August 2014, so for Judge Bjerke to do all of that but not allow an accused a jury trial raises a question about fairness.

Ultimately, Judge Bjerke decided this case in favor of the State and against JWN by finding JWN guilty of operating motor vehicle on August 22, 2011 under the influence of a restricted controlled substance in violation of Section 346.63 (1) (am), Wis. Stats.as memorialized in Judge Bjerke's **Findings of Fact, Conclusions of Law and Decision** dated October 29, 2014 **(R. p. 48, App. p. 68-129).**

ARGUMENT

I.

DEFENDANT-APPELLANT IN THIS CASE, JOSEPH WILLIAM NETZER (JWN), RECEIVED INEFFECTIVE OR INADEQUATE ASSISTANCE OF COUNSEL.

1. **THE HANDLING BY JWN'S ATTORNEY OF JWN'S PLEA IN THIS CASE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.**

2. **THE FAILURE OF JWN'S ATTORNEY TO REQUEST A JURY IN A TIMELY MANNER WAS INEEFECTIVE ASSISTANCE OF COUNSEL.**

3. **THE PREPARATION OR LACK THEREOF BY EITHER OF JWN'S ATTORNEYS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Joseph William Netzer (JWN) received less than the objective standard of reasonable legal representation, considering prevailing norms, in particular from his first legal counsel, Attorney Nathan Schnick, contrary to the standard for effective legal representation as established in **Strickland v. Washington,** 466 U. S. 668,at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Claiming ineffective assistance of counsel, one must prove under the **Strickland, Ibid.**, the following:

a. Counsel's representation fell below the standard of reasonableness, and

b. The Defendant was prejudiced by counsel's deficient performance.

The test for the requisite prejudice to a defendant's case in order to find inadequate assistance of counsel is

simply a "but for" test where it can be shown that "but for the deficient performance of the attorney, the defendant had a reasonable probability of not entering the same plea or having a different outcome." See **State v. Ludwig,** 124 Wis. 2d 60, 369 N. W. 2d 725 (1985).

1. THE HANDLING BY JWN'S ATTORNEY OF JWN'S PLEA IN THIS CASE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

On October 6, 2011 at the initial appearance in this case, either Attorney Nathan Schick entered a plea on behalf of JWN without informing JWN that he was going to do so, or without understanding the significance of this plea, or caused a plea to be entered by not physically or by other means actually appearing at the initial appearance at court - leading the court to ultimately enter a plea in absentia - since there apparently was no request for a continuance communicated by Attorney Schnick to the court. **(**Please see **R, p. 50, App. p. 2-9).** In any event, before the initial appearance, Attorney Schnick informed JWN that he did not need to appear at this hearing and led JWN to believe that no plea would be entered on this date. And, after this hearing Attorney Schnick did not notify JWN of the entry of a plea. This failing, gets right to the heart of taking away from JWN his right to make a

knowing and voluntary plea as required by **State v. Bangert,** 131 Wis. 2d 246, at 257, 389 N. W. 2d 12, at 19 (1986).

In the instant case, the first hearing or appearance date schedule on this matter was set for 9:00 A.M. on October 6, 2011, according to the citation issued, Citation No. 996308-5. When JWN retained Attorney Schnick to represent him, Attorney Schnick informed JWN that he did not need to appear at that October 6, 2011 hearing. However, because the Citation on its face said that an appearance was required, JWN's father and legal guardian, Jeff Netzer, attended the October 6, 2011 hearing from start to finish. At that hearing, defendants were called one-by-one and if someone did not respond the court would restate that defendant's name to give them an opportunity to come forward, but JWN's name was never called out to the gallery at any time during that court proceeding and Jeff Netzer never saw Attorney Schick at that hearing either. It appears, according to the Transcripts for that hearing, that outside of the hearing of the gallery, when it came time for JWN's name to be called the clerk essentially in conference with the presiding judge, the Honorable Judge Elliott Levine - serving as a substitute that day for the Honorable Judge Todd Bjerke - instructed Judge Levine "Not

guilty plea by Schnick prior to court.", so Judge Levin entered that plea absent Attorney Schnick and absent the Defendant JWN. And, since Attorney Schnick essentially told JWN not to come to that hearing, then JWN did not hear the court's instruction about the right to a jury trial and the need to preserve that right by requesting a jury and paying the fees. However, at the hearing the court did omit another notice required by **Section 345.34 (1), Wis. Sats.**, which allows a defendant a continuance before a plea is required if so requested, to wit:

> SECTION 345,34 Arraignment; pleas.:
>
> (1) If the defendant appears in response to a citation, or is arrested and brought before a court with jurisdiction to try the case, the defendant shall be informed that he or she is entitled to a jury trial and then aske whether he or she wishes presently to plead, or whether he or she wishes a continuance. If the defendant wishes to plead, the defendant may plead guilty, not guilty or no contest.

It is unclear as to whether or not Attorney Schnick actually asked the court clerk to enter a not guilty plea at the October 6, 2011 hearing as there does not appear to be any written documentation from Attorney Schnick on his point one way or the other but it is clear that Attorney Schnick never told JWN about the plea within the time frame for demanding a jury and it is clear that in advance of

that hearing Attorney Schnick told JWN that there would be no plea on that date. It could be that Attorney Schnick simply believed that at an initial appearance in La Crosse County all that needed to be done was for him to make an appearance and he thought he had accomplished that with his conversation in advance of the hearing with the court clerk. This would seem to be supported by his **DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION TO DENY EXTENSION OF TIME LIMITS**, dated July 11, 2012, **(R. p. 7, App. p. 139-141)** wherein Attorney Schnick

does not state that he asked the court clerk to enter a plea and where he seems to explain the mistake by saying various courts have varying local rules. It could be that Attorney Schnick did in fact ask for entry of a not guilty plea in his conversation with the clerk leading up to the October 6, 2011 initial appearance but mistakenly viewed the plea as a 'place-holding' plea that could be replaced by a firm plea later at an adjourned initial appearance after blood test results were returned without prejudicing his client's rights.

Simply, since the way Attorney Schnick handled JWN's plea in this case affected his rights, including but not limited to a right to a jry, Attorney Schnick's actions or

inactions fell below the standard of a reasonable attorney complying within prevailing norms and prejudiced JWN's case, Attorney Schick did offer to JWN ineffective assistance of counsel in this case.

2. THE FAILURE OF JWN'S ATTORNEY TO REQUEST A JURY IN A TIMELY MANNER WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

In fact, it is unclear if Attorney Schnick himself appreciated the ramifications of a plea being entered on October 6, 2011 at the original initial appearance. When there is a situation such as this, the Wisconsin Supreme Court has shown that there is a remedy to protect defendants where a possible unintended jury waiver can be reversed given a court's non-compliance with the requirements of **Section 345.34(1) Ibid.** or to correct some other circumstances. See **City of Madison v. Donohoo,** 118 Wis. 2d 646, 348 N. W. 2d 70 (1984). And even in cases where Donohoo does not apply, the Wisconsin Supreme Court has empowered the courts to make corrections, provide practicality, and/or inject fairness into the legal process as the Court stated: "A trial court has broad discretion in deciding how to respond to untimely motions to amend scheduling orders because that broad discretion is essential to the court's ability to manage its calendar."

Teff v. UnityHealth Plus Ins. Corp., 265 Wis.2nd 703, at 724, 666 N.W. 2d 38 (2003). However, Attorney Schnick should have known the rules for making a timely jury demand as any reasonable practitioner putting himself in the public as a competent attorney should. And, even without consideration of the rules, since Attorney Schnick knew from the very beginning of his representation of JWN that JWN and his parents wanted to preserve the right to a jury trial, then there should have been no hesitancy on the part of Attorney Schnick to make that demand and pay fees even before any deadlines would have been broached. By not making the jury demand that JWN expected there is flexibility and strategy in this case which were affected and the Defendaant's, JWN's, confidence is affected, and those factors are a few of the many factors in JWN's case that are prejudiced by Attorney Schnick's inaction. Therefore, the facts in this case fit exactly as a case of ineffective assistance of counsel because *but for* the actions/omissions of Attorney Schnick JWN would have reasonably expected any attorney complying with prevailing professional norms to have presered JWN's right to a jury trial See **Strickland, Ibid**. In fact, when Attorney Schnick finally got around to trying to arrange a jury trial for

JWN by asking for an extension of the time limits for making a jury dmand, Judge Bjerke wrote in his **MEMORANDUM DECISION AND ORDER**, dated July 18, 2012 "despite the undiscovered issues for this trial, a delay in obtaining test results could be anticipated prior to the jury demand time limits passing. Thus, the Defendant's attorney should have taken steps to assure that his client's rights were preserved at the time the plea was entered. Additionally, though it remains unclear as to what discrepancy took plac while entering the plea, not knowing the local court rules or other associated legal requirements is not an argument for excusable neglect." **(R. p. 9, App. p. 10-15).**

JWN was prejudiced by the ineffective assistance of counsel provided by Attorney Schnick because once that right was gone due to Attorney Schnicks omission it was gone.

3. THE PREPARATION OR LACK THEREOF BY EITHER OF JWN'S ATTORNEYS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

JWN further received ineffective assistance of counsel because, while representing JWN, Attorney Schnick failed to do the things necessary to prepare JWN's defense as would have been done by a reasonable attorney performing up to

prevailing professional norms. The underlying incident that was the cause of all of these legal proceedings occurred on August 22, 2011. Attorney Schick was hired in September 2011 and at that time Attorney Schnick clearly stated to JWN that it would be important to get any physical evidence, including police video and audio, as soon as possible to avoid destruction, misplacement, etc. However, Attorney Schnick did not first request audio and video from UWL-PD until October 10, 2011. Eventually Attorney Schnick was able to get video but no audio from UWL-PD even though UWL-PD acknowledged that at one time there was or should have been audio of the incident. Thus possibly prejudicing JWN's case as there may have been exculpatory or impeachment evidence on such audio. In particular, as a for instance, at one point when Officer Iverson claims that JWN said he had been smoking marijuana whereas the audio may have only roven that JWN said he had been smoking - which could mean tobacco instead of marijuana.

There are also questions about whether Atttorney Schnick investigated this case thoroughly. For instance, JWN has seen nothing to indicate that Attorney Schnick thoroughly interviewed the passenger in JWN's car at the time of the traffic stop, Daniel R. Callahan.

Omissions similar to these have been found to be the basis in other cases for a claim of ineffective assistance of counsel, for instance, see **State v. Bentley,** 195 Wis. 2d 580, 536 N. W. 2d 202 (1995) and **State v. Harper,** 57 Wis. 2d 543, 205 N. W. 2d 1 (1973).

II.

JOSEPH WILLIAM NETZER (JWN) WAS DENIED A RIGHT TO A JURY TRIAL.

Section 345.43 (1) gives defendants the right to a jury trial. This right was first denied JWN by his attorney, Attorney Nathan Schnick, failing to preserve that right as discussed above. Thereafter, both Attorney Schnick and JWN subsequently pro se litigated this matter with Judge Bjerke denying JWN a jury trial because the rigid time limits had passed for a jury demand and Judge Bjerke was unwilling to use his discretion he has under **Teff, Ibid.** to allow for a jury trial even though precedent such as **Donohoo, Ibid.** would support allowing a defendant such as JWN, who did not have a continuance at his original initial appearance where even Judge Bjerke acknowledges there may have been some confusion or unusual circumstances, to enter a plea at an adjourned initial

appearance with a new clock running on a window within which to file a jury demand. There is no question that given the opportunity, JWN would have made such a jury demand. The bottom line regarding this issue is that it is grossly unfair that Judge Bjerke kept on extending the trial in this case from the first phase being December 27, 2013 to the second phase being January 17, 2014 to the third phase being held on August 6, 2014 - all so that the State could restart its case and perhaps fix some of its hearsay problems - while Judge Bjerke would not allow JWN, a minor, a second chance to simply demand a jury trial which he was deprived of initially not because of JWN's own actions, but rather because of the inaction of JWN's attorney.

III.

THE BLOOD TESTS USED IN THIS CASE SHOULD NOT BE ALLOWED INTO EVIDENCE.

Defendant-Appellant JWN challenges the validity of the blood tests used in this case from all directions. It is JWN's belief that there was insufficient probable cause for there to be any blood test in the first place. There are further issues with possible contamination because of the manner in which the blood testing was

performed; specifically, the area where the blood was drawn was touched by Officer Iverson before the drawing and the nurse drawing the blood had trouble doing so. The chain of custody is questioned as well, with one particular concern being the fact that the blood was drawn on August 22, 2011 in La Crosse, Wisconsin and was mailed out that same day according to testimony of arresting Officer Paul Iverson but did not arrive in Madison according to the records of the Wisconsin State Laboratory of Hygiene until August 29, 2011. But, the focus below evolves around the question of whether or not the blood tests in this case should be admissible at trial and allowed to be evidence in this case. This is largely due to the fact that the laboratory that performed the blood tests in this case, NMS, is a company out of Pennsylvannia that has none of the licenses or permits required by Wisconsin law.

1. THE BLOOD TESTS ARE NOT ADMISSIBLE BECAUSE THE STATE FAILED TO SUPPLY ADEQUATE FOUNDATION, AND THE TESTING WAS NOT PERFORMED IN ACCORDANCE WITH STATUTORY REQUIREMENTS.

The State failed to lay the necessary foundation for admission of the blood tests results. In fact, the State could never lay the necessary foundation for admission of the blood test results, because under these circumstances,

it cannot comply with the requirements necessary to produce a "valid" result.

Wis. Stat. 343.305(6)(a), "REQUIREMENT FOR TESTS", states as follows:

> Chemical analysis of blood or urine to be considered valid under this section shall have been performed substantially according to methods approved by the laboratory of hygiene and by an individual possessing a valid permit to perform the analyses issued by the department of health services. The department of health services shall approve laboratories for the purpose of performing chemical analyses of blood or urine for alcohol, controlled substances or controlled substance analogs and shall develop and administer a program for regular monitoring of the laboratories. A list of approved laboratories shall be provided to all law enforcement agencies in the state…

[T]he state is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person" WIS JI - CRIM. 235 see also Ibid at 2600, D. However, the State was unable to produce even the identity of the person who performed the testing, let alone his/her credentials, or any documents demonstrating the proper maintenance and operation of the equipment used.

It is clear that the test reults are "invalid". The testing, admittedly, was not performed by a person holding a "valid permit to perform the analyses issued by the department of health services" See Wis. Stat. Section

343.305(6)(a). Further, there is no evidence that NMS Labs was eve approved by the laboratory of hygiene or the the department of health services, as required. Moreover, simply testifying that the NMS Labs procedures were similar to those used by the Lab of Hygiene does not demonstrate that the tests were actually performed "substantially according to methods approved by the laboratory of hygiene." See Ibid.

Webster's Dictionary simply defines "invalid" as "not valid". Webster's New World Compact Desk Dictionary, 2nd Ed., 2002. It further defines "valid" as "1. Having legal force", or "2. Based on evidence or sound reasoning." Ibid.

The State bears the burden of demonstrating the proper operation of the device. However, aside from discussing the method of testing and the credentials of NMS Labs, it provided no testimony regarding the specific device used to test this sample.

It should be obvious that a test result that lacks a foundation as to render it "valid" is not competent and admissible evidence at trial. The State of Wisconsin has declared by statute that it is necessary to produce a valid test result. For reasons of expediency, the Lab of Hygiene sent the blood sample of JWN to a lab and analyst which did

not meet the criteria, and the test result should not be considered evidence.

2. **THE NMS LABS REPORT IS INADMISSIBLE BECAUSE IT WAS PREPARED IN ANTICIPATION OF LITIGATION AND IS NOT OTHERWISE SUPPORTED BY TESTIMONY FROM A "QUALIFIED WITNESS."**

The United States Supreme Court considered the question of whether the **Sixth Amendment** gives a defendant the right to confront the forensic analyst who tested the defendant's blood sample to determine the sample's blood-alcohol concentration (BAC). A majority of the Court held that it does.

The defendant was convicted of aggravated drunk driving in New Mexico. **Bullcoming v. New Mexico,** 131 S. Ct. 2705, at 2709 (2011). In the rocess of defendant's appeal, the U. S. Supreme Court decided **Melendez-Diaz v. Massachusetts,** 668 U. S. ___, 129 S. Ct. 2527 (2009), which held that a forensic laboratory report constituted testimony for purposes of the Confrontation Clause, requiring a live witness to testify to the truth of the report's statements. The Supreme Court granted certiorari in this case to consider the following question: "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing

testimonial certification - made for the purpose of roving a particular fact - through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. **Bullcoming,** 131 S. Ct. at 2709.

A majority of the Court held that [t]he accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." **Ibid.**

In the instant case, the Defendant-Appellant, JWN, did not have such an opportunity afforded him to cross examine the actual scientist who performed blood tests on what was purported to be JWN's blood sample. Moreover, the witness offered by the Stat at trial, Ms. Ayako Chan-Hosokawa, was a supervisor at the Pennsylvannia based laboratory that performed the blood tests in question, NMS Labs, but she did not perform or oversee the tests or sign the certification for these tests. So, the State's evidence in this case is not admissible in Court under the rulings of the U. S. Supreme Court.

The State made no effort to arrange an appearance of the analyst that performed the testing for this case, or

another person who had first-hand knowledge. Instead, it was able at the trial court to gain Judge Bjerke's acceptance as evidence of the unsigned test results of NMS Labs by the testimony of a supervisor at NMS Labs that did not perform any of the testing. Therefore, this test from this out of state lab should not be allowed ass evidence.

CONCLUSION

At a minimum, Joseph William Netzer prays that the Wisconsin Supreme Court will not penalize him for the shortcomings of his previous counsel, Attorney Nathan Schnick, and will grant him the opportunity for a new trial with a jury. The basis of this request is that Joseph William Netzer in good faith retained Attorney Schnick to represent him and to take this matter to a trial by jury if necessary. That option was taken away when a demand for a jury trial was not timely made by Attorney Schick.

As the Court reads this Brief and Appendix, it is further the hope that the Court can appreciate the issues that cloud the charge against in this case from a questionable traffic stop to invalid blood testing to improperly allowing the blood test results with a deficient foundation to be evidence herein, and, based on those factors dismiss this case in its entirety. Thank you.

CERTIFICATION

I, Joseph William Netzer certify that this Brief of the Defendant-Appellant conforms to the rules contained nin Section 809.19 (8)(b)and (c), Wis. Stats., for a Brief of Defendant-Appellant and Appendix produced with Courier New 12 point font. The length of this Brief is 35 pages and words total 7429

x Joseph William Netzer
Joseph William Netzer, Pro se

I, Joseph William Netzer, certify that filed with this Brief, either as a separate document or as part of this Brief, is an Appendix that complies with Section 809.19 (2)(a), Wis. Stats. And contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or eritten rulings or decisions showing the circuit court's reasoning regarding those issues.

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