STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP218-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSICA M. WEISSINGER,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING THE JUDGMENT ENTERED BY THE OZAUKEE CIRCUIT COURT, THE HONORABLE SANDY A. WILLIAMS PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Wisconsin precedent produced a settled body of law that decided that the routine destruction of a driver's blood sample does not deprive a defendant of due process. But Jessica M. Weissinger asks this Court to interpret the Wisconsin Constitution as providing a greater due process protection to overturn her convictions after she seriously injured a motorcyclist when she drove with a detectable amount of a restricted controlled substance in her blood. Should this Court overrule precedent?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication.

STATEMENT OF THE CASE

This Court granted Defendant-Appellant-Petitioner Jessica M. Weissinger's petition for review as to the following issue:

> In light of State v. Dubose, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, should this court interpret the Wisconsin Constitution to provide greater due process protection than the federal constitution, such that Weissinger was denied due process under the Wisconsin Constitution when her blood sample was destroyed before she was charged

> with offenses based on a detectable amount of a controlled substance in her blood?

(Wis. S.Ct. Order (Oct. 15, 2014)). This Court did not grant review on any other issue (*Id.*).

This case began as an investigation into a vehicular collision that resulted in serious injuries to a motorcyclist. The collision occurred on July 6, 2009, between 5:00 to 5:30 p.m. on a warm sunny day on a dry highway (R. 100:86). The motorcyclist was driving home from work in the westbound lane when he observed Weissinger's vehicle swerve in the eastbound lane (R. 100:85-87,91). The swerve concerned the motorcyclist enough to downshift and slow down (R. 100:87). Weissinger then drove her vehicle directly in front of the motorcyclist—completely into the westbound lane—as she turned left at an intersection (R. 100:87,93,98). The motorcyclist applied his brakes, but a collision still ensued and the impact threw him to the pavement (R. 100:87-88). The motorcyclist suffered serious injuries including a broken back, two broken wrists, a laceration to the head, and a concussion (R. 100:89-91).

Law enforcement and emergency personnel arrived to provide care to the motorists and investigate the collision. The motorcyclist had limited contact with law enforcement because paramedics administered drugs for his injuries (R. 100:93). Soon after, an emergency helicopter transported the motorcyclist from the scene to a hospital for medical treatment (R. 100:90). Meanwhile, Officer Mark Riley, one of the officers involved in the investigation, had face-to-face contact with Weissinger for about one minute (R. 100:141,157). He described her as being "emotional, crying" with "bloodshot" eyes (R. 100:157). But Officer Riley acknowledged that the bloodshot eyes were not dispositive of impairment, as they were consistent with Weissinger's emotional state (R. 100:157).

During the law enforcement investigation, Weissinger consented to a blood draw. Officer Riley asked for her consent and she agreed (R. 100:142). Officer Brent Smith confirmed that Weissinger consented to the blood draw (R. 96:4-5). He explained that Weissinger did not exhibit typical signs of intoxication, such as the odor of alcohol on

her breath, slurred speech, and glassy eyes (R. 96:7). But Officer Smith was concerned that the severity of injuries to the motorcyclist might result in his death, which would turn the incident into a fatality investigation (R. 96:7). Officer Smith thought a blood sample would provide a stronger foundation for such an investigation (R. 96:4-5).

Officer Smith recognized that he could not provide Weissinger with the statutory warning—commonly referred to as informing the accused—before the blood draw because she had not been arrested for an impaired driving offense (R. 96:8-9).[1] So he relied on Weissinger's consent for the draw (R. 96:8-9). Officer Smith confirmed that he would have permitted Weissinger to pursue an alternate test at the time of the draw had she asked for one, but he did not

[1]The statute requires an officer to provide specific information after arresting a person for an impaired driving offense. Wis. Stat. § 343.305(4) (2007-08). In 2010, the Wisconsin Legislature amended the statute so that informing the accused now includes situations when the operator of the vehicle "was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person." 2009 Wisconsin Act 163, sec. 3 (amending Wis. Stat. § 343.305(4)). This new language covers the situation here. But Officer Smith had to rely on Weissinger's consent because her blood draw occurred before the amendment (R. 96:10-11).

provide her with specific information about alternate tests (R. 96:14-15).

The parties stipulated that a lab technician, Lisa Brandt, properly drew Weissinger's blood at approximately 6:45 p.m. on July 6, 2009 (R. 100:4). And the parties stipulated that Technician Brandt properly returned the sample to the investigating police officer (R. 100:4).

After a blood draw, the Wisconsin State Laboratory of Hygiene analyzes the blood sample. The laboratory is accredited by the American Board of Forensic Toxicologists (R. 100:176). It is a public health laboratory at the University of Wisconsin (R. 100:215-16). The laboratory is neither a law enforcement agency nor a laboratory acting under the direction of a law enforcement agency (R. 100:215-16).

Weissinger's blood sample went through several stages of analysis at the laboratory following its arrival on July 10, 2009 (R. 100:189). First, on July 13, 2009, a laboratory analyst examined the blood for the presence of alcohol in an ethanol test (R. 100:243). Second, on August 7, 2009, an

analyst performed a drug screen using the Enzyme Multiplied Ammonia Acetate Technique (R. 100:173-74, 243-44). On September 14, 2009, the sample proceeded to a more comprehensive drug panel screen in a Gas Chromatograph with Nitrogen Phosphorous Detector (R. 100:174,246). Thereafter, a Gas Chromatograph with Mass Selective Detector ("GCMSD") analysis provided a very precise calculation of each drug within Weissinger's blood (R. 100:175,178-79). On October 9, 2009, the GCMSD analysis revealed that her blood contained fluoxetine at a concentration near the therapeutic range (R. 100:199-200,246-47). On January 28, 2010, the GCMSD analysis revealed the concentration of oxycodone in the blood within the therapeutic range (R. 100:197-98,263). On February 24, 2010, the GCMSD analysis revealed that Weissinger's blood contained Delta-9-Tetrahydrocannabinol ("Delta-9-THC") at a concentration of 5.9 nanograms per milliliter (R. 100:195,264).

The laboratory created two reports memorializing its findings. On July 14, 2009, the laboratory generated a report

to reflect the absence of alcohol in Weissinger's blood sample (R. 100:246). On March 7, 2010, the laboratory generated a report to identify the drug results (R. 100:241-42). The laboratory mailed a copy of each report to Weissinger (R. 100:220-30).

Advanced Chemist Amy Miles performed the analysis on Weissinger's blood for Delta-9-THC. She worked at the laboratory for more than a decade before she tested Weissinger's blood sample (R. 100:164). Miles obtained a bachelor of science degree in biology from Edgewood College prior to starting work at the laboratory (R. 100:164). And she excelled in her profession, serving on many professional boards and panels, including the International Association of Chiefs of Police, the National Safety Council, and the Society of Forensic Toxicologists (R. 100:167). Miles serves on the faculty at Indiana University for an annual course on the effects of drugs on the human body (R. 100:166). She is also among the guest faculty appointed by the Illinois Supreme Court for judicial education conferences (R. 100:166). Miles has published an article in the peer-reviewed scientific

Journal of Analytic Toxicology and presented at many conferences in the United States and Canada (R. 100:166,168). By the time Miles analyzed Weissinger's blood sample, she already had tested more than one thousand samples for drugs (R. 100:169).

On May 24, 2010, the State issued a two count complaint against Weissinger (R. 1). First, she was charged with causing great bodily harm to the motorcyclist by the operation of her vehicle while she had a detectable amount of a restricted controlled substance in her blood. *See* Wis. Stat. § 940.25(1)(am). Second, she was charged with having a detectable amount of a restricted controlled substance in her blood. *See* Wis. Stat. § 346.63(1)(am). Delta-9-THC is a restricted controlled substance (R. 100:195).

On May 3, 2011, Weissinger made her first request to retest the blood sample (R. 96:22). Soon after, she filed a formal motion to retest the sample (R. 23). The parties contacted the laboratory in May 2011 and a representative from the laboratory informed them that the blood sample no

longer existed (R. 96:22). Weissinger then filed a motion to dismiss the case based upon the destruction of the blood sample (R. 24).

The circuit court denied Weissinger's motion to dismiss (R. 96:27-29). It grounded its decision on controlling case law (R. 96:27; R. 99:12). Weissinger through her attorney, Gerald P. Boyle, had argued that she did not "care what the Supreme Court said in these other cases, they weren't considering cases as tough as this one" (R. 99:11). The court rejected her argument because "our Supreme Court has given us the direction" (R. 99:12). The court gave Weissinger wide latitude to present a vigorous defense based on the destruction of the blood sample (R. 96:27-29). The court found that Weissinger's due process rights were protected (R. 99:13).

The circuit court also denied the State's motion in limine seeking to restrict the subject matter of Weissinger's cross-examination (R. 99:12-15). In denying the State's motion, the court gave Weissinger the "full and free reign [sic] of cross-examination" into the laboratory's destruction

of the blood (R. 99:13). The court required the analyst who tested the blood to testify to enable Weissinger to exercise her right of cross-examination (R. 96:28). The court gave Weissinger additional time to hire an expert witness for her defense (R. 96:31-32; R. 99:8).

Weissinger took full advantage of the free rein that the court permitted when cross-examining the analyst. On cross-examination, Advanced Chemist Miles acknowledged that testing is not infallible and is subject to human error (R. 100:270-71). Miles further conceded that she had no direct knowledge or proof that Weissinger received the two reports that the laboratory mailed to her (R. 100:220-29).

Weissinger focused a considerable amount of her cross-examination on the laboratory's destruction of her blood sample. Advanced Chemist Miles testified that the laboratory destroys samples after six months of receipt or after all testing is complete (R. 100:238,275-76). She explained that testing on Weissinger's sample concluded with the generation of the drug report in March 2010; therefore, destruction occurred at the end of

April 2010 (R. 100:275). Miles did not know the specific reason for the six-month retention rule (R. 100:277-78). But she explained that, because the laboratory receives more than 20,000 blood samples annually, the sheer volume requires destruction of dated samples (R. 100:173,181,184,277).

In Weissinger's cross-examination, she attacked the State's case beyond simply the laboratory's destruction of the blood. On cross-examination, Officer Smith acknowledged that Weissinger did not exhibit any overt signs of drug use or impairment when he had contact with her the day of the collision (R. 97:45-46). Similarly, Officer Riley confirmed that he did not have any reason to believe that she was under the influence of alcohol or marijuana at the time of the blood draw (R. 100:145,149). Weissinger used the cross-examination of Officer Riley to emphasize her emotional state, thereby providing the jury with an explanation of her bloodshot eyes (R. 100:160-61).

Weissinger's vigorous cross-examination did not always cast her in a favorable light. Weissinger's questioning of

Advanced Chemist Miles on the details of her metabolic levels revealed that she was probably a regular user of marijuana (R. 100:260-61). The cross-examination also revealed that her Delta-9-THC level was consistent with recent marijuana consumption—certainly within 24 hours and likely within the last several hours (R. 100:256-57, 261-62). Delta-9-THC has a very short half-life where a person's body eliminates about half of it every hour (R. 100:196).

Weissinger presented her defense primarily through the full and free rein of cross-examination the court permitted. Weissinger made a strategic decision not to call an expert witness (R. 97:98-99). And she called no other witnesses (R. 97:82-83). Weissinger introduced a statement, read by her attorney, regarding the destruction of the blood sample:

> Wisconsin statutes, in other words, the law of Wisconsin, section 971.31 (5) states the Court may order the production of any item of physical evidence which is intended to be introduced at the trial for specific and scientific analysis under such terms and conditions as the Court prescribed. Such a motion was made by the defense for that scientific testing. It was determined that the blood was not capable of being analyzed because it had been destroyed prior to the time that Miss Weissinger was charged with commission of this crime, and sometime in the

> month of April 2010, a month prior to the charging of Miss Weissinger.

(R. 97:83). The court allowed the jury to hear the statement (R. 97:83).

The circuit court provided a specific jury instruction regarding the destruction of the blood sample in the form of a stipulated fact (R. 97:119 (Wis. J.I.-Criminal 162)). The court also concluded that, out of fairness to Weissinger, he would neither include nor let the State argue that she waited to request retesting until May 2011 (R. 97:101-02). Weissinger did not object to the jury instructions as presented by the court (R. 97:162).

The jury returned guilty verdicts (R. 97:166-67). The jury found Weissinger guilty of causing great bodily harm to the motorcyclist by her operation of a vehicle while she had a detectable amount of a restricted controlled substance in her blood (R. 97:166). And the jury found her guilty of having a detectable amount of a restricted controlled substance in her blood (R. 97:166-67). The circuit court imposed a judgment of conviction (R. 80). And Weissinger appealed.

The court of appeals affirmed the judgment of the circuit court. *State v. Weissinger*, 2014 WI App 73, ¶ 1, 355 Wis. 2d 546, 851 N.W.2d 780. The court found that "Weissinger has not shown that the destroyed test was apparently exculpatory or that the test was destroyed in bad faith." *Id.* ¶ 19. Therefore, the circuit court's denial of Weissinger's motion to dismiss and its admission of the blood test results did not violate her due process rights. *Id.* ¶¶ 1, 4.

This Court granted Wiessinger's petition for review. And now considers, in the context of evidence preservation, whether the Wisconsin Constitution provides greater due process protection than the United States Constitution.

ARGUMENT

This Court should adhere to precedent. So this Court should not interpret the Wisconsin Constitution as providing a greater due process protection than the United States Constitution in the context of evidence preservation and destruction. And this Court should find that Weissinger was not denied due process when her blood sample was destroyed before she was charged.

This Court's standard of review in this case presents a mixed question of fact and law. First, this Court defers to the circuit court's findings of fact unless they are clearly erroneous. *State v. Felix*, 2012 WI 36, ¶ 22, 339 Wis. 2d 670, 811 N.W.2d 775. Second, this Court reviews de novo the application of the constitutional due process principles to those facts. *Id.* But de novo review "in no way authorizes wholesale disregard of the principle of stare decisis." *Coulee Catholic Sch. v. Labor and Industry Review Comm'n*, 2009 WI 88, ¶ 110 n.8, 320 Wis. 2d 275, 768 N.W.2d 868 (Crooks, J., dissenting). So, although de novo review means this Court starts over in the analysis of the application of the law to this case, it does not disregard precedent unless it has a compelling justification to do so. *Id.*

I. The Wisconsin Constitution does not provide greater due process protection in the context of evidence preservation and destruction.

A well-settled body of law on the due process implications of evidence preservation and destruction is correctly decided. The case law held that due process does not require preservation of blood samples

per se. *State v. Disch*, 119 Wis. 2d 461, 480-81, 351 N.W.2d 492 (1984); *State v. Ehlen*, 119 Wis. 2d 451, 453, 455-57, 351 N.W.2d 503 (1984); *see also State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984). And the precedent created a reasonable requirement that a defendant challenging the destruction of evidence must show bad faith. *State v. Pankow*, 144 Wis. 2d 23, 42-43, 422 N.W.2d 913 (Ct. App. 1988); *accord State v. Greenwold*, 181 Wis. 2d 881, 885-86, 512 N.W.2d 237 (Ct. App. 1994) ("*Greenwold I*"). This precedent interprets the Wisconsin Constitution as affording the same due process protections for evidence preservation and destruction recognized under the United States Constitution. *State v. Greenwold*, 189 Wis. 2d 59, 71, 525 N.W.2d 294 (Ct. App. 1994) ("*Greenwold II*"). There is no prudent and pragmatic justification to overrule this precedent.

A. The doctrine of stare decisis compels this Court to generally adhere to precedent.

Normally, respect for prior decisions compels this Court to follow precedent. The doctrine of stare decisis is a

"bedrock principle in our system of justice." *State v. Reed*, 2005 WI 53, ¶ 53, 280 Wis. 2d 68, 695 N.W.2d 315 (Abrahamson, C.J., concurring). It is "one of the pillars that support the institutional integrity of the court." *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Ins. Corp.*, 2006 WI 91, ¶ 188, 293 Wis. 2d 38, 717 N.W.2d 216 (Roggensack, J., concurring in part and dissenting in part). So this Court abides by precedent absent a compelling reason to overrule it because stare decisis is a "cornerstone of the judicial process." *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78, ¶ 71, 244 Wis. 2d 613, 628 N.W.2d 376 (Crooks, J., concurring).

While this Court's power to repudiate prior decisions is unquestioned, such a power is not often exercised. *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60, ¶ 96, 665 N.W.2d 257. "Fidelity to precedent ensures that existing law will not be abandoned lightly." *Id.* ¶ 94 (quoting *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266). Stare decisis promotes

predictable and consistent results. *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 82, 318 Wis. 2d 553, 769 N.W.2d 481 (Bradley, J., concurring in part and dissenting in part). The alternative of "frequent and careless departure from prior case precedent undermines confidence in the reliability of court decisions." *Johnson Controls*, 264 Wis. 2d 60, ¶ 95. Failure to abide by precedent raises a serious concern as to whether the law is founded upon legal principles or the proclivities of individual jurists. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 292 n.6, 295 Wis. 2d 1, 719 N.W.2d 408 (Roggensack, J., concurring in part and dissenting in part).

Wisconsin legal precedent consists of published opinions of this Court and the court of appeals. *See State v. Ziegler*, 2012 WI 73, ¶ 114, 342 Wis. 2d 256, 816 N.W.2d 238 (Abrahamson, J., concurring in part and dissenting in part); *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 195, 307 Wis. 2d 1, 745 N.W.2d 1 (Prosser, J., dissenting). A published decision by the court of appeals has statewide

precedential effect. *In re Samuel J.H.*, 2013 WI 68, ¶ 5 n.2, 349 Wis. 2d 202, 833 N.W.2d 109 (citing Wis. Stat. § 752.41(2)). Thus, this Court abides by published court of appeals precedent absent a compelling reason to overrule it. *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405; *State v. Douangmala*, 2002 WI 62, ¶ 42, 253 Wis. 2d 173, 646 N.W.2d 1; *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997).

This Court engages in two levels of analysis for dealing with a challenge to precedent. First, this Court determines whether the precedent is incorrect as a matter of law. *Johnson Controls*, 264 Wis. 2d 60, ¶ 28 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in part and dissenting in part)). Then this Court determines whether a precedent should be overruled by weighing "'a series of prudential and pragmatic considerations.'" *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78, ¶ 30, 244 Wis. 2d 613, 628 N.W.2d 376 (Sykes, J.) (quoting *Casey*, 505 U.S. at 854).

Even when this Court determines conclusively that precedent is incorrect as a matter of law, it still must decide whether the error requires overruling it. *Johnson Controls,* 264 Wis. 2d 60, ¶ 28. It is not sufficient for this Court merely to disagree with precedent and reach a contrary conclusion. *Id*. ¶ 93. Thus, prior to rejecting an established rule of law, this Court weighs the precedent against five prudential and pragmatic factors:

> (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is "unsound in principle;" or (5) the prior decision is "unworkable in practice."

Bartholomew, 293 Wis. 2d 38, ¶ 33 (quoting *Johnson Controls*, 264 Wis. 2d 60, ¶¶ 98-99).

This Court does not abandon precedent lightly. *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 30, 284 Wis. 2d 573, 701 N.W.2d 440. On the contrary, this Court affords due respect to longstanding precedent. *State v. Taylor*, 2013 WI 34, ¶ 42 n.12, 347 Wis. 2d 30, 829 N.W.2d 482. So this Court may adhere to precedent even

when one or more of the five *Bartholomew* factors exist, particularly when it was correctly decided or produced a settled body of law. 293 Wis. 2d 38, ¶¶ 33-34.

The doctrine of stare decisis imposes a severe burden on the party who seeks to overrule precedent. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). Although the burden may lighten when the precedent rests on a constitutional ground, the party's request to disrupt years of precedent still requires compelling justification. *See id.* at 272 n.18; *see also Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶¶ 41-46, 281 Wis. 2d 300, 697 N.W.2d 417.

B. Weissinger has not met her burden of providing a compelling justification to overrule precedent.

1. The case law was correctly decided and produced a settled body of law.

Wisconsin precedent has produced a settled body of law that the routine destruction of a driver's blood sample does not deprive a defendant of due process per se. *Walstad*, 119 Wis. 2d at 528, *Disch*, 119 Wis. 2d at 480-81; *Ehlen*, 119 Wis. 2d at 453. This case law nevertheless insures that a

defendant will have an opportunity to raise a due process challenge when evidence—such as a blood sample—no longer exists when the defendant proves the destruction occurred in bad faith under a test derived from federal precedent. *Pankow*, 144 Wis. 2d at 42-43 (citing *California v. Trombetta*, 467 U.S. 479 (1984)); *accord Greenwold I*, 181 Wis. 2d at 885-86 (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988)); *see Greenwold II*, 189 Wis. 2d at 71 (affording the same due process protection under the Wisconsin and United States Constitutions).

In a triad of opinions issued in 1984, this Court decided that "[t]he importance of the production of the original breath ampoule or a portion of the blood sample as the *sine qua non* of due process is a myth that should not be perpetuated." *Ehlen*, 119 Wis. 2d at 453; *accord Disch*, 119 Wis. 2d 461; *Walstad*, 119 Wis. 2d 483. The Court explained that it was an error "to conclude due process will be violated if a blood test is not suppressed merely because a portion of the sample—even if it were retestable—could not be produced for further tests." *Ehlen*, 119 Wis. 2d at 457. So

whether blood is retestable is irrelevant because the failure to preserve and to allow a retest is not a denial of due process per se. *Disch*, 119 Wis. 2d at 481. And the Court was "convinced that the claim that due process could only be preserved for defendants by such retests was illusory." *Id*. at 480.

The same month this Court issued these opinions, the United States Supreme Court similarly concluded that due process does not require preservation of a breath sample in order to introduce breathalyzer results at trial. *Trombetta*, 67 U.S. at 491. In *Trombetta*, the Court recognized that retesting of the samples was feasible. *Id*. at 482 n.3. So the Court accepted the premise that preserving the samples could conceivably lead to exculpatory evidence. *Id*. at 489-90. Nevertheless, the Court found no due process violation because the destruction occurred in good faith and in accord with normal evidence retention practice. *Id*. at 488.

In *Youngblood*, the Court "stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence

attributable to the Government." 488 U.S. at 57. After *Youngblood*, a three-part test for analyzing due process challenges to lost or destroyed evidence emerged in the federal courts:

> This requires the defendant to demonstrate: "(1) bad faith on the part of the government; (2) that the exculpatory value of the evidence was apparent before the evidence was destroyed; and (3) that the evidence was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

United States v. Stewart, 388 F.3d 1079, 1085 (7th Cir. 2004) (quoting *United States v. Aldaco*, 201 F.3d 979, 982-83 (7th Cir. 2000)).

Published Wisconsin appellate court opinions adhered to the *Trombetta* and *Youngblood* precedent. In *Pankow*, the court of appeals identified the same three-part test that later emerged in the federal opinions:

> The court looked at three factors in determining that the state was not obligated to preserve the physical evidence: First, the state had destroyed the breath sample in good faith compliance with its normal practices. Second, the evidence did not possess exculpatory value that was apparent before the evidence was destroyed. Third, the evidence was

> such that the defendant would be able to obtain comparable evidence by other available means.

144 Wis. 2d at 42-43 (citations omitted); *see also Greenwold I*, 181 Wis. 2d at 885-86 (requiring a defendant to show bad faith when the exculpatory value of a blood sample was not apparent prior to its destruction).

As shown, Wisconsin has a settled body of law that the routine destruction of a driver's blood sample, without more, does not deprive a defendant of due process. This Court's opinions in *Ehlen*, *Disch*, and *Walstad* resolved this issue. Significantly, the Court considered and prepared its triad of opinions independent to the Supreme Court's *Trombetta* opinion. *Walstad*, 119 Wis. 2d at 528 n.18. And both the Supreme Court and this Court expressly rejected the notion that due process requires the preservation of samples. *Trombetta*, 67 U.S. at 491; *Disch*, 119 Wis. 2d at 480-81; *Ehlen*, 119 Wis. 2d at 453. The independently decided case of *Trombetta* confirms that this Court correctly decided its opinions in 1984. In a sense, the Wisconsin cases were immediately validated by *Trombetta*.

After *Trombetta*, the court of appeals articulated a three-part test for analyzing the due process question. *Pankow*, 144 Wis. 2d at 42-43. The *Pankow* test was later embraced by federal precedent. *Compare id.*, *with Stewart*, 388 F.3d at 1085. So, again, the independently decided federal precedent validates Wisconsin precedent and confirms that *Pankow* is not incorrect as a matter of law.

Meanwhile, the Wisconsin courts reliance on *Trombetta* and *Youngblood* coincided with the "well established" principle that, at least in the preservation and destruction of evidence context, "the due process clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution." *Greenwold II*, 189 Wis. 2d at 71. So in *Greenwold II*, the court of appeals expressly rejected "the argument that the due process clause of the Wisconsin Constitution affords greater protection." *Id.* *Greenwold II* underscored the importance of relying on such precedent by holding that the Due Process Clause of the Wisconsin Constitution does not afford greater protection

than the United States Constitution in the context of evidence preservation. *Id.* at 71.

Weissinger does not argue that *Ehlen*, *Disch*, *Walstad*, *Pankow*, and *Greenwold II* are incorrect as a matter of law (Def.-Appellant Br. 5-21 (Nov. 14, 2014)). Indeed, she makes no effort whatsoever to challenge or attack their correctness. Ironically, she cites to *Ehlen* in a favorable manner (*Id*. at 13). In her view, *Ehlen* is important to this case not because it was wrongly decided, but because she believes it is not satisfied in this case. She makes only a cursory reference to *Walstad* through a quotation to *Ehlen* (*Id*. at 14-15). Weissinger never cites to *Disch*, *Pankow*, and *Greenwold II* at all (*see id*. at 5-21).[2]

Instead, Weissinger relies upon *State v. Hahn* to "offer[] some assistance." *Id.* at 18 (citing 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986)). But she neglects to explain that any precedential value of *Hahn* is severely limited by

[2]Weissinger improperly cites to the unpublished court of appeals opinion of *State v. Nienke*, 2006 WI App 244, 297 Wis. 2d 585, 724 N.W.2d 704 (Table) (Def.-Appellant Br. 10-13). *See* Wis. Stat. § 809.23(3). The State does not respond to her reliance on *Nienke* because such a citation is improper. *See id*.

its abrogation through later refinement in *Youngblood*. The court of appeals expressly recognized *Hahn*'s limitations post-*Youngblood*. *See Greenwold I*, 181 Wis. 2d at 882-83. Even assuming *Hahn* has some precedential value, it is clearly distinguishable. *Hahn* involved destruction of a vehicle, which had apparent and material exculpable value at the time of its destruction. 132 Wis. 2d at 360. In contrast, the blood sample at issue in Weissinger's case is only potentially useful evidence. *See Trombetta*, 467 U.S. at 489 (describing the retesting of samples as unlikely to produce exculpatory evidence). So *Hahn* is not controlling precedent here because Wessinger's blood sample is only potentially useful—not materially exculpable.[3]

[3]This Court should not decide whether a distinction exists between "potentially useful" and "material exculpability" evidence such that the bad faith requirement exists for the former and may not for the latter because that is not the issue in this case. *See Illinois v. Fisher*, 540 U.S. 544, 549 (2004); *see also State v. Huggett*, 2010 WI App 69, ¶ 11, 324 Wis. 2d 786, 783 N.W.2d 675 (the State called into question such a distinction). A settled body of law requires bad faith when the exculpatory value of the evidence was not apparent before the potentially useful evidence was destroyed. *See Greenwold II*, 189 Wis. 2d at 67; *Greenwold I*, 181 Wis. 2d at 885-86; *Pankow*, 144 Wis. 2d at 42-43.

Under the first level of stare decisis analysis, this Court should find that Weissinger did not meet her burden for overruling precedent. *Ehlen*, *Disch*, and *Walstad* correctly decided that the routine destruction of an impaired driver's blood sample does not per se deprive a defendant of due process. *Pankow* provides a defendant with the opportunity to raise a due process challenge when evidence—such as a blood sample—no longer exists, and articulates what the defendant must prove in order to prevail. *Greenwold II* held that the Wisconsin Constitution affords no greater due process protection with respect to the preservation of evidence. This Court should hold that these precedents were correctly decided.

2. There is not a prudent and pragmatic compelling justification to overrule the case law.

Wisconsin's correctly decided precedent produced a settled body of law that outweighs any prudential and pragmatic claim against it. So this Court should not overrule the precedent under any of the five *Bartholomew* factors in

the second level of stare decisis analysis. *See* 293 Wis. 2d 38, ¶ 33 (identifying the five factors).

Weissinger does not directly address any of the *Bartholomew* factors. Indeed, she does not address factors two through five even implicitly. According to this Court's grant of review in this case, the focus of this argument is on only the first of the five *Bartholomew* factors: Whether changes or developments in the law in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, have undermined the rationale behind the *Ehlen*, *Disch*, *Walstad*, *Pankow*, and *Greenwold II* decisions. *See Bartholomew*, 293 Wis. 2d 38, ¶ 33.

In *Dubose*, this Court held that Wis. Const. art. I, § 8[4] contained a broader right than contained within the Fifth

[4]Wisconsin Const. art. I, § 8, cl. 1 states: "No person may be held to answer for a criminal offense without due process of law . . . ."

Amendment[5] and Fourteenth Amendment[6] of the United States Constitution. 285 Wis. 2d 143, ¶ 41 (Fourteenth Amendment); *id*. ¶ 64 (Wilcox, J., dissenting) (Fifth Amendment); *see also State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 (concluding that under the Wisconsin Constitution the fruit of the poisonous tree doctrine applies to evidence obtained from a *Miranda* violation).

In *Dubose*, the court reached its decision in the specific context of an identification procedure known as a showup. "'A 'showup' is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes.'" 285 Wis. 2d 143, ¶ 1 n.1 (quoting *State v. Wolverton*, 193 Wis. 2d 234, 263 n.21, 533 N.W.2d 167 (1995)).

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[5]United States Const. amend. V states: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[6]United States Const. XIV, § 1 states: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

The *Dubose* court held that identification of the defendant by "a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary." *Id.* ¶ 45. This Court explained that "[a] lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification." *Id.* ¶ 33.

The holding in *Dubose* required this Court to overrule precedent by withdrawing language from *Wolverton* and related opinions. *Id.* ¶ 33 n.9. This Court found that new information since *Wolverton* demonstrated that unreliable eyewitness identification contributed to wrongful convictions. *Id.* ¶¶ 29-30. Based upon such newly ascertained facts, this Court stated that the *Wolverton* approach had flaws making it unsound. *Id.* ¶ 31. So this Court found a compelling justification to overrule precedent. *Id.* ¶ 33 n.9. The Court's analysis in *Dubose* is consistent with *Bartholomew* framework.

The decision in *Dubose* faced strong opposition in three dissenting opinions. Justice Wilcox observed that the decision abandoned a long line of well-established precedent that had "'repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation.'" *Id.* ¶ 56 (quoting *State v. Hezzie R.*, 219 Wis. 2d 848, 891, 580 N.W.2d 660 (1998)). Justice Prosser found that "[n]othing in the facts of this case justifies the precipitous departure from state and federal precedent the majority undertakes." *Id.* ¶ 68 (Prosser, J., dissenting). And Justice Roggensack stated that the majority opinion erred by placing too much reliance on the purported newly ascertained facts when it concluded that the prior precedent was unsound in principle. *Id.* ¶ 89 (Roggensack, J., dissenting).

After *Dubose*, this Court and the court of appeals have observed that the decision did not create a precedential sea change with respect to recognizing a broader due process right under the Wisconsin Constitution than the United States Constitution. In *State v. Drew*, the court of appeals

held that *Dubose* did not alter precedent with respect to lineups and photo arrays, explaining that *Dubose* recognized those identification procedures as preferable to a showup. 2007 WI App 213, ¶¶ 2, 17, 305 Wis. 2d 641, 740 N.W.2d 404. In *State v. Hibl*, this Court ruled that *Dubose* did not directly control spontaneous or accidental identifications lacking police involvement. 2006 WI 52, ¶ 56, 290 Wis. 2d 595, 714 N.W.2d 194. And, in *State v. Ziegler*, this Court found *Dubose* inapplicable—distinguishing a showup from an identification made in court through the showing of a single mug shot photograph. 342 Wis. 2d 256, ¶¶ 81-82. Thus, even within the specific context of eyewitness identification, post-*Dubose* precedent confirms the limited reach of its actual holding. *Drew*, 305 Wis. 2d 641, ¶ 19.

Dubose is not a change or development in the law sufficient to undermine the rationale behind *Ehlen*, *Disch*, *Walstad*, *Pankow*, *Greenwold II*, and their progeny. Arguably, *Dubose* may undermine *Greenwold II*'s general observation about the similarity between the Due Process

Clauses in the Wisconsin Constitution and the United States Constitution. *Dubose*, 285 Wis. 2d 143, ¶ 56 (Wilcox, J., dissenting) (citing *Greenwold II*). Nevertheless, post-*Dubose* precedent has clearly limited its holding to only one identification procedure—the showup. *See Drew*, 305 Wis. 2d 641. So *Dubose* did not overtly overrule *Greenwold II*'s ruling that the constitutions provide the same due process protections in the context of evidence preservation and destruction. And *Dubose* made no change to *Ehlen*, *Disch*, *Walstad*, and *Pankow*.

Weissinger has not shown that *Dubose* changed or developed the law so as to compel this Court to overrule precedent. In fact, Weissinger's reliance on *Dubose* undermines her quest. In *Dubose*, this Court overruled *Wolverton* and related opinions after finding that two of the five factors listed in *Bartholomew* supported such a drastic result. 285 Wis. 2d 143, ¶ 33 n.9. Specifically, this Court noted that the second and fourth factors supported overruling precedent because "new information"

demonstrated that the precedent was "unsound." *Id.* ¶¶ 29-31 (citation omitted). Weissinger makes no such showing with regard to the routine destruction of a driver's blood sample. And she does not refute that the preservation of a sample is "much more likely to provide inculpatory than exculpatory evidence . . . [i]n all but a tiny fraction of cases . . . ." *Trombetta*, 467 U.S. at 489. *Dubose* overruled *Wolverton* after finding that misidentification was "the single greatest source of wrongful convictions." *Dubose,* 285 Wis. 2d 143, ¶ 30. This declaration contrasts sharply with Weissinger's desire to overrule precedent when "the chances are extremely low that preserved samples would have been exculpatory." *Trombetta*, 467 U.S. at 489. *Dubose* has been and should continue to be limited to a single due process problem identified with showups.

Under the second level of stare decisis analysis, this Court should find that Weissinger has not met her burden to overrule precedent. Weissinger does not allege that any of the *Bartholomew* factors justify overruling precedent (Def.-Appellant Br. 5-21). This Court should hold that there

is not a prudential and pragmatic justification that compels this Court to overrule *Ehlen*, *Disch*, *Walstad*, *Pankow*, *Greenwold II,* and their progeny.

C. This Court should adhere to precedent and should not interpret a greater due process protection under the Wisconsin Constitution.

Interpreting greater due process protection for evidence preservation and destruction under the Wisconsin Constitution would uproot thirty years of precedent, seriously threatening this Court's fidelity to stare decisis.

There are three settled branches of Wisconsin precedent regarding the routine destruction of a driver's blood sample. First, in 1984, this Court decided in *Disch* and *Ehlen* that production of the original blood sample as a due process requirement is an illusory myth. *Disch*, 119 Wis. 2d at 480 ("illusory"); *Ehlen*, 119 Wis. 2d at 453 ("myth"); *accord Walstad*, 119 Wis. 2d 483. Second, *Pankow* produced a workable due process test that requires, among other things, a showing of bad faith. 144 Wis. 2d at 42-43; *accord Greenwold I*, 181 Wis. 2d at 885-86 (requiring bad faith when the exculpatory value of the blood sample was not

apparent prior to its destruction). Third, *Greenwold II* has rejected affording greater due process under the Wisconsin Constitution than the United States Constitution in the evidence preservation and destruction context. 189 Wis. 2d at 71.

To grant greater due process to Weissinger under the Wisconsin Constitution, this Court must overrule all three branches of precedent. First, this Court would have to overrule *Greenwold II*, which found no greater due process protection in the context of evidence preservation and destruction. *Id*. Next, this Court would have to reach a result contrary to its holdings in its triad of 1984 opinions finding no due process requirement for the preservation of the original sample. *Disch*, 119 Wis. 2d at 480; *Ehlen*, 119 Wis. 2d at 453; *see also Walstad*, 119 Wis. 2d 483. The effect of all this would be to eliminate and effectively overrule a constitutional test that is both easy to apply and protective of a defendant's due process rights. *See Pankow*, 144 Wis. 2d at 42-43; *accord Greenwold I*, 181 Wis. 2d at 885-86.

This Court should not overrule these precedents—it should not interpret the Wisconsin Constitution as providing greater due process protection than the United States Constitution in the context of evidence preservation and destruction. *Ehlen*, *Disch*, *Walstad*, *Pankow*, and *Greenwold II* were correctly decided and produced a settled body of law. There is no prudent and pragmatic justification to overrule this precedent and their progeny. *Dubose* does not provide such a justification; to the contrary, it produced a limited holding to address a specific and severe problem with showup identifications. This Court should find that the Wisconsin Constitution does not provide a greater due process protection than its federal counterpart in the context of evidence preservation and destruction.

II. Weissinger was not denied due process when her blood sample was destroyed before she was charged with offenses based on a detectable amount of a controlled substance in her blood.

The United States and Wisconsin Constitutions protect substantive and procedural due process

rights. *In re Commitment of Laxton*, 2002 WI 82, ¶ 10 n.8, 254 Wis. 2d 185, 647 N.W.2d 784; *accord State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶¶ 54-68, 353 Wis. 2d 307, 845 N.W.2d 373 (discussing the difference between substantive and procedural due process). Substantive due process protects a person from government conduct that "shocks the conscience." *Laxton*, 254 Wis. 2d 185, ¶ 10 n.8 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). Procedural due process protects a person from being deprived of constitutionally protected interests in an unfair manner. *Id.*; *see also District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 107 (2009) (Souter, J., dissenting).

The routine destruction of blood samples presents a procedural due process concern. *See Dubose*, 285 Wis. 2d 143, ¶ 81 (Roggensack, J., dissenting). In *Ehlen* and *Disch*, the court framed the due process issue as one of fairness. 119 Wis. 2d at 477; 119 Wis. 2d at 456-57. The court in *Trombetta* included in the fairness guarantee "a meaningful opportunity to present a complete

defense." 467 U.S. at 485; *accord State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 44 n.3, 370 N.W.2d 271 (Ct. App. 1985). And Weissinger frames her argument consistent with these authorities presenting the issue as one of "fairness" (Def.-Appellant Br. 15-21).[7] So the issue before this Court is whether the circuit court provided Weissinger with the fair process due. *See State v. Hazen*, 198 Wis. 2d 554, 559, 543 N.W.2d 503 (Ct. App. 1995); *see also Disch*, 119 Wis. 2d at 469 ("A defendant is entitled to a fair trial but not a perfect one.").

[7]Weissinger does not allege that the routine destruction of blood samples presents a substantive due process issue (Def.-Appellant Br. 5-21). Having waived such an argument, Weissinger cannot raise this issue for the first time in a reply brief or at oral argument. *See State v. Green*, 2002 WI 68, ¶ 20 n.2, 253 Wis. 2d 356, 646 N.W.2d 298 (an argument raised for the first time in a reply brief is deemed waived). *City of Milwaukee v. Christopher*, 45 Wis. 2d 188, 190, 172 N.W.2d 695 (1969) (an argument raised for the first time at oral argument is deemed waived). Even if Weissinger had raised a substantive due process concern, the result would not change because "[w]hether framed as a 'substantive liberty interest . . . protected through a procedural due process right' to have evidence made available for testing, or as a substantive due process right to be free of arbitrary government action, . . . the result is the same . . . ." *Osborne*, 557 U.S. at 93 (citation and footnote omitted); *see also id.* at n.6 (describing the difference between substantive and procedural due process in this context as "faint").

Due process analysis involves a balance between the individual rights of the defendant and the demands of society and law enforcement for justice. *State v. Post*, 197 Wis. 2d 279, 317, 541 N.W.2d 115 (1995); *accord State v. Forbush*, 2011 WI 25, ¶ 149, 332 Wis. 2d 620, 796 N.W.2d 741 (Crooks, J., dissenting). In the context of evidence preservation and destruction "the defendant's interests in having access to significant evidence [must be] weighed against the unreasonableness of requiring the police to retain and preserve all evidence that might have significance." *Greenwold II*, 189 Wis. 2d at 68. Consequently, due process requires the preservation of neither all potentially exculpable evidence, nor all essential evidence determinative to the outcome of a case. *See Illinois v. Fisher*, 540 U.S. 544, 548 (2004).

When potentially exculpable evidence is destroyed, "courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *Trombetta*, 467 U.S. at 486. At one extreme, courts could bar further prosecution or exclude the

prosecution's most probative evidence. *Id.* at 487. At the other extreme, courts could disregard a defendant's individual interest in favor of the demands of society for public safety. Neither extreme strikes the balance due process requires. *See Youngblood*, 488 U.S. at 58; *Ehlen*, 119 Wis. 2d at 456 ("the retention of a breath ampoule or of a blood sample was of miniscule importance in the assurance of a fair trial when weighed in the balance against the traditional rights of defendants in criminal or quasi-criminal proceedings"); *State v. Rogers*, 70 Wis. 2d 160, 166, 233 N.W.2d 480 (1975) (not every delay detrimental to a defendant's case should abort a prosecution). Courts have found balance in permitting prosecutions to continue with missing evidence when defendants have an adequate means to present their defense. *See, e.g., Trombetta*, 467 U.S. at 490; *Ehlen*, 119 Wis. 2d at 476-78; *Disch*, 119 Wis. 2d at 456-57.

This Court recognized that "a whole panoply of due process safeguards . . . protect[s] a defendant's right to a fair trial, whether or not at a particular time a sample of blood is

retestable." *Disch*, 119 Wis. 2d at 470. This panoply includes "[t]he right to cross-examine witnesses and experts for the state, the right to impeach by use of the separate blood or breath analysis results, and the right to attack the credibility of the state's witnesses." *Ehlen*, 119 Wis. 2d at 452. The statutory and constitutional rights to discovery secure these other rights. *Walstad*, 119 Wis. 2d at 524; *Ehlen*, 119 Wis. 2d at 452 (identifying the results of the blood test as discoverable—not the blood sample itself).

Weissinger had a battalion of due process safeguards for her defense. She received discovery on July 6, 2010 (R. 96:22). The circuit court ensured Weissinger had a "full and free reign [sic] of cross-examination" (R. 99:13). Weissinger took full advantage—vigorously attacking the State's case through cross-examination (R. 97:45-46; R. 100:103-09,145,149,160-61,220-29,238, 270-71,275-78). Although she was not specifically informed that she could have a second test at the time of blood draw, Officer Smith confirmed that he would have permitted an alternate test at the time had Weissinger requested

one (R. 96:14-15). The circuit court also provided Weissinger with additional time to hire an expert witness (R. 96:31-32; R. 99:8). Weissinger made a strategic decision not to call an expert witness at the trial (R. 97:98-99).

Weissinger could have moved to exclude the evidence about the blood result under the rules of evidence. *See* Wis. Stat. § 904.03. When the *Hibl* court declined to expand *Dubose*, it highlighted the circuit courts' limited gate-keeping function to exclude relevant evidence when its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury. 290 Wis. 2d 595, ¶ 31 (citing Wis. Stat. § 904.03). In most cases, a circuit court should admit the evidence, allowing the jury to assess its weight and credibility. *Id.*; *Disch*, 119 Wis. 2d at 476. But a defendant may prevail when he or she makes a sufficient showing. *See* Wis. Stat. § 904.03. Weissinger made no such claim before the circuit court in this case. Instead, she raises a general claim in her brief that laboratories are fallible with no citation to the record that the laboratory or analyst erred in her

case (Def.-Appellant Br. 20-21). Such a vague attack untethered to the facts of the case would not warrant exclusion under the statute. *See Hibl*, 290 Wis. 2d 595, ¶ 31.

Weissinger had within her arsenal the option to pursue an affirmative defense. The viability of an affirmative defense necessarily depends upon the facts of a case. But nothing prevented Weissinger from pursuing such a defense in the circuit court. *See State v. Kircher*, 189 Wis. 2d 392, 401-04, 525 N.W.2d 788 (Ct. App. 1994) (finding no due process violation when a defendant contended the destruction of evidence undermined his affirmative defense). She could have negated the most serious charge by arguing that the motorcyclist would have suffered great bodily harm even if she did not have 5.9 nanograms per milliliter of Delta-9-THC in her blood. *See* Wis. Stat. § 940.25(2)(a). Weissinger elicited facts supportive of this defense during cross-examination by having Officer Smith and Officer Riley confirm that she did not exhibit overt signs of impairment (R. 97:45-46; R. 100:145,149). But Weissinger ultimately chose not to pursue the affirmative defense (R. 97:88-89

(waiving the defense contained within Wis. J.I.-Criminal 1262)).

To ensure that Weissinger received a fair trial, the circuit court added a jury instruction at her request regarding her inability to retest the blood (R. 97:119). So the jury heard that she made a motion for testing and was denied such an opportunity because the blood sample had been destroyed before she was charged with the offense (R. 97:83). This instruction further ensured Weissinger received a fair trial. *See State v. Ledbetter*, 881 A.2d 290, 311-319 (Conn. 2005) (preferring a jury instruction over the approach taken by the *Dubose* court).

The circuit court properly concluded that excluding the blood test result or dismissing the case outright was too extreme a remedy. *See Disch*, 119 Wis. 2d at 478. Weissinger did not allege that the police engaged in bad faith. To the contrary, she said that the "[p]olice didn't screw up here, the police did exactly what you'd expect them to do." (R. 97:137-38,140). The court fashioned a remedy to protect Weissinger's due process rights by allowing her to present

a thorough defense which included a complete cross-examination into the laboratory's destruction of the blood (R. 99:13). The court provided this remedy even without a bad faith showing.

Having struck a proper balance, the circuit court did not resolve whether Weissinger's blood sample could have been retested had it not been destroyed. The blood draw occurred on July 6, 2009 (R. 100:4). The laboratory completed its last test of the blood on February 24, 2010 (R. 100:195,264). On May 24, 2010, the State filed the complaint (R. 1). Weissinger received discovery on July 6, 2010 (R. 96:22). But Weissinger waited to seek a retest of the blood until May 3, 2011 (R. 96:22). Assuming the laboratory had not destroyed Weissinger's blood, the prosecutor questioned the viability of retesting a 22 month old blood sample (R. 96:23).[8] The circuit court did not need to resolve the retestability of the

[8]*See, e.g., Clarke's Analytical Forensic Toxicology* 351 (Adam Negrusz & Gail Cooper eds., 2d ed. 2013) (stating that THC concentrations remain stable in refrigerated blood for approximately six months before THC concentrations decrease due to oxidative losses).

blood because "[d]ue process does not rest on so narrow a basis." *Disch*, 119 Wis. 2d at 463.

This Court should find that Weissinger was not denied due process when her blood sample was destroyed before she was charged in May 2010. This Court explained 30 years ago that "[d]ue process—the *sine qua non* of a fair trial—may be assured and, by our constitution and statutes, is assured quite apart from any questions about the materiality of the blood test sample or of a breathalyzer ampoule." *Ehlen*, 119 Wis. 2d at 456. And "[i]t is error to so minimize these great tools of the common law as to conclude due process will be violated if a blood test is not suppressed merely because a portion of the sample—even if it were retestable—could not be produced for further tests." *Id*. at 457.

III. Weissinger violated this Court's order granting her petition for review when she interjected an issue beyond the scope of the order.

This Court should not consider the argument Weissinger made in violation of its order granting review. This Court granted Weissinger's petition for review limited to whether the Wisconsin Constitution provides a greater due process

protection than the United States Constitution in light of *Dubose* (Wis. S.Ct. Order). Weissinger acknowledges in her brief that she understands the limited issue before this Court (Def.-Appellant Br. 5). But she then rehashes a different issue that she raised in the court of appeals involving *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) (Def.-Appellant Br. 6-15). Aside from citations to *Ehlen* and an indirect citation to *Walstad*, Weissinger's 10-page detour violates this Court's order. And it is irrelevant to the issue before this Court. This Court should not consider an issue beyond the scope of its order. Or this Court to issue a new order for supplemental briefing.

* * * * *

Wisconsin precedent produced a settled body of law that correctly decided that the routine destruction of a driver's blood sample does not deprive a defendant of due process. *Dubose* is not a change or development in the law sufficient to undermine the rationale behind *Ehlen*, *Disch*, *Walstad*, *Pankow*, *Greenwold II*, and their progeny. And the circuit court protected Weissinger's due process rights when her

blood sample was destroyed before she was charged. So this Court should not overrule precedent.

CONCLUSION

This Court should affirm.

Dated this 4th day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,118 words.

Dated this 4th day of December, 2014.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated this 4th day of December, 2014.

_____

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