COURT OF APPEALS OF WISCONSIN
DISTRICT NO. II

CASE NO. 2013AP000218 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JESSICA M. WEISSINGER,

Defendant-Appellant,

APPEAL FROM A JUDGMENT OF CONVICTION FROM THE
CIRCUIT COURT, OZAUKEE COUNTY,
THE HONORABLE SANDY A. WILLIAM PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT ERR WHEN IT ALLOWED TESTIMONY ABOUT A BLOOD DRAW ANALYZED BY THE WISCONSIN STATE LABORATORY OF HYGIENE TO BE ADMITTED INTO EVIDENCE AT TRIAL?

TRIAL COURT ANSWERED: NO

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant submits that the legal issues are clearly set forth in the Briefs, and the factual situation is properly reflected in the Statements of Fact and Briefs. Therefore, oral argument and publication are not necessary, but would be welcome if the Court so decides.

STATEMENT OF THE CASE

On May 24, 2010 a criminal complaint was filed charging the Defendant-Appellant, Jessica M. Weissinger, with Count 1: Use of a Vehicle w/controlled Substance in Blood - Great Bodily Harm, contrary to Sec. 940.25(1)(am), 939.50(3)(f) Wis. Stats., and Count 2: Operating with a Detectable Amount of Restricted Controlled Substance in Blood - 2nd Offense, contrary to Sec. 346.63(1)(am), 346.65(2)(am)2 Wis. Stats. (R:1)(A-app. 106).

On May 4, 2011 Weissinger filed a Motion for Scientific Testing of Blood Evidence and a Motion to Adjourn Trial and Dismiss with Affidavit. (R:23)(A-app. 109) (R:22,24) (A-app. 110,111). On June 20, 2011 the State's Brief on Defendant's Motion to Dismiss was filed. (R:27)(A-app. 118). The Defendant's Brief in Opposition to the State's Brief on Defendant's Motion to Dismiss was filed on July 5, 2011. (R:30)(A-app. 125). On July 11, 2011 and August 17, 2011 the Court denied Weissinger's Motions. (R:98 at 3)(R:96 at 29).

On November 14, 2011 Weissinger filed a Motion to Renew Motion to Dismiss and/or to Grant the Defendant the Right to File an Interlocutory Appeal. (R:45)(A-app. 129). The State responded in letter form to the Court on November

14, 2011. (R:40)(A-app. 132). A motion hearing was held on November 15, 2011 wherein the matter was reset for the parties to prepare arguments. (R:102). On November 23, 2011 Weissinger filed a Second Motion to Renew Motion to Dismiss. (R:46)(A-app. 133). At a hearing held on November 28, 2011 the Court denied Weissinger's motion to dismiss. The Court ruled that the blood test result was admissible and that Weissinger's counsel would have full range in cross examination of same. The Court also granted Weissinger's counsel the right to file an interlocutory appeal. (R:99 at 13-15).

Weissinger proceeded to a jury trial on April 23, 2012 in the Circuit Court of Ozaukee County before the Honorable Sandy A. Williams. (R:97,100). On April 24, 2012 Weissinger was found guilty on both counts as charged in the Information. (R:8)(R:97 at 166-167).

On June 11, 2012 Weissinger was sentenced to 5-years probation on Count 1, sentence withheld and 2-years DOT License Revoked; stayed pending appeal. On Count 2 Weissinger was sentenced to 2-years probation, sentence withheld and 12-months DOT License Revoked; concurrent with Count 1 and stayed pending appeal. (R:101 at 25) (R:80) (A-app. 137).

Weissinger filed a Notice of Intent to Pursue Post-Conviction Relief on June 18, 2011. (R:82). Weissinger now appeals from her judgment of conviction and sentence, the said Notice of Appeal having been filed on January 23, 2013 and Amended Notice of Appeal filed on March 14, 2013. (R:94) (R:106) (A-app. 140).

STATEMENT OF THE FACTS

On July 6, 2009, around 5:20-5:205pm, City of Mequon police officer Brent Smith was dispatched to the scene of a car and motorcycle accident at Highland Road and Highgate Road in Mequon, Wisconsin. Upon arrival Officer Smith observed a black Pontiac and a motorcycle in the roadway, and he saw the motorcycle operator, David Pipkorn, lying in the roadway covered with blankets. Officer Smith started first aid until the EMS arrived and he observed a gash on Pipkorn's forehead and Pipkorn was complaining of pain in his wrists and legs. Pipkorn was eventually taken from the scene by a Flight for Life helicopter. (R:97 at 10-13).

According to Pipkorn he was on his way home from work, traveling westbound on Highland Road, when he observed a car coming towards him from about a quarter mile away. Pipkorn said the car was swerving so he downshifted his

motorcycle to slow his speed and judge what the car was going to do. The car made a left turn right in front of Pipkorn and he tried to apply his brakes but he could not stop and he struck the car. Pipkorn said he hit the windshield and then woke up on the pavement. (R:97 at 85-88,92-93). Pipkorn subsequently learned that he broke both wrists, he broke his back, and he had a head laceration and a concussion. (R:97 at 89,91).

At the scene Officer Mark Riley approached Weissinger who was standing near her vehicle, introduced himself, and due to the nature of the crash asked her for a voluntary blood draw to which she voluntarily consented. While standing by Weissinger Officer Riley said he had no reason to believe she was under the influence of alcohol or a narcotic, but he told her the blood draw was to make sure there were not any drugs or alcohol in her system. (R:100 at 142-146,149-150,152)(R:97 at 49,53). Officer Riley did not explain to Weissinger that if she did not agree to the blood draw that he might have to obtain a warrant to do so. (R:100 at 151). Officer Riley did not search Weissinger's car for any drugs or alcohol and he did not know if any other officer conducted a search. (R:100 at 149).

Officer Smith spoke with Weissinger at the scene and she told him that while driving she dropped her cell phone. While at the stop sign at Granville Road and Highland Road Weissinger said she looked for it briefly but was unable to find it. She said she turned on to Highland Road and wanted to again stop her car to look for the phone and when she turned left on to Highgate Court to do that, she did not see the motorcycle approaching and was not aware of the motorcycle until it collided with the front of her vehicle. (R:97 at 23). When speaking to Weissinger Officer Smith did not observe anything to detect or any signs that she was under the influence of drugs or alcohol. (R:97 at 24, 46).

Officer Smith eventually conveyed Weissinger to Columbia St. Mary's Hospital for a blood draw. Weissinger was conveyed in a squad car but she was not placed under arrest and was not handcuffed. While in the squad car Officer Smith did not observe any signs of marijuana on Weissinger. (R:97 at 25,47,50). After the blood was drawn on July 6, 2009 at 18:45pm by medical technician Lisa Brandt, the blood was given back to Officer Smith wherein he labeled it, sealed it and placed it back in the legal

blood kit. Weissinger's blood kit was eventually mailed to the State Lab of Hygiene. (R:97 at 26, 24)(R:100 at 222).

Amy Miles, advanced chemist at the Wisconsin State Laboratory of Hygiene testified that Weissinger's blood specimen kit was received on July 10, 2009. (R:100 at 163,224,237). On July 13, 2009 the first test done was for alcohol or ethanol. On July 14, 2009 a report was generated indicating that no ethanol was detected in Weissinger's blood sample. The report also indicated that "Specimen(s) will be retained no longer than six months unless otherwise requested by agency or subject." (R:100 at 192-193,230,237-238,243)(A-app. 116).

According to Miles, the first drug testing screen occurred on August 7, 2009 wherein a positive result was received for oxycodone and THC. The secondary screen occurred on September 14, 2009 wherein the presence of fluoxetine and oxycodone were confirmed. The next test performed for the quantitation of fluoxetine occurred on October 9, 2009, and on January 28, 2010 the oxycodone was guantitated again and confirmed. (R:100 at 194,197-198,244-246,263). The final test was conducted on February 24, 2010 for the presence and amount of THC and the final results for Weissinger's blood specimen were submitted in a

report dated March 7, 2010 wherein there was no indication on the report that the blood specimen would be destroyed. (R:100 at 202,264,267,276) (A-app. 117). Miles testified that Weissinger's blood was then discarded or destroyed the end of April 2010. Miles said that the blood tested for the presence of THC was discarded within 60-days of the findings because it was outside of the Labs 6-month specimen standard retention time. (R:100 at 275).

At trial the parties stipulated to three facts: 1) On July 6, 2009, Lisa Brandt was an employee of Columbia St. Mary's Hospital in Mequon. Her responsibilities included taking legal blood draws. On July 6, 2009, at approximately 6:45pm, Lisa Brandt properly collected two vials of blood from Weissinger. 2) Weissinger was charged on May 24, 2010. 3) Weissinger filed a motion for blood testing pursuant to statute, but the blood had already been destroyed in April 2010. (R:97 at 119).

Having said the above it is appropriate to proceed to argument. Additional facts will be inserted and referenced as necessary in the argument portion of this brief.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ALLOWED TESTIMONY ABOUT A BLOOD DRAW ANALYZED BY THE WISCONSIN STATE LABORATORY OF HYGIENE TO BE ADMITTED INTO EVIDENCE AT TRIAL.

There is no question that the present state of the law in the State of Wisconsin allows reports about levels of alcohol or drug ingestion in a suspect's system to be admissible. Because of a recent Supreme Court case, Bullcoming v. New Mexico, 564 U.S. ___ (2011), 131 S.Ct. 2705, a State can no longer just introduce the forensic results of such testing but must present the analyst at court to testify to the report. Prior thereto the State need only introduce the official report of the test and its findings.

This case presents a much more serious question than even the Bullcoming case and that is simply, can an analyst testify to the findings of, in this case, a report from the Wisconsin State Laboratory when the blood that was tested was destroyed before a given defendant had the advantage as provided by Sec. 971.23 Wis. Stats., which clearly provided a defendant an opportunity to inspect and perform tests on any physical evidence the State has in its possession with the approval of the Court.

The answer to that under the present State of Wisconsin would be "yes." The problem in this case is the fact that the blood was destroyed prior to Weissinger being charged. A review of the chronological facts will highlight the issue raised in this appeal.

1) Weissinger was involved in an accident at around 5:00pm on July 6, 2009 when, while making a left turn onto an entry road, she was struck by a motorcycle and the driver, David Pipkorn, was gravely injured.

2) The Mequon Police Department responded and while not observing any evidence of impairment invited Weissinger to consensually give blood at the local hospital. The reason given was to make sure that even though there was no evidence of alcohol consumption or of drug injection, the officer suggested it would be helpful if a blood test was taken to rule out any such fact in case the injured man might pass. Weissinger voluntarily agreed to do so and went to the hospital in a Mequon Police Department vehicle where the blood was drawn, given to an officer of the Mequon Police Department and subsequently sent to the State Department of Hygiene.

3) The official report of the Wisconsin State Laboratory of Hygiene dated July 14, 2009 reflects the test

of 7/13/2009 on the blood draw of Weissinger taken on the date of the accident, 7/6/2009, showed as it relates to Ethanol, "NOT DETECTED." Said report was certified and indicated, "Specimen(s) will be retained no longer than six months unless otherwise requested by agency or subject." It also states that "A SEPARATE REPORT ON THE RESULTS OF THE REQUESTED DRUG TESTING WILL BE ISSUED WHEN ALL LABORATORY ANALYSES ARE COMPLETED." The analyst was one Tracy Fritsch. (A-app. 123).

4) Since no ethanol was detected there was no issue of Weissinger being under the influence of alcohol and no charges were forthcoming.

5) On 3/7/2010 a second report on testing was forwarded to the Mequon Police Department indicating that the test of the blood previously mentioned indicated there was a finding of "CARBOXY-THC, >125 ng/mL, Delta-9-THC metabolite." (A-app. 124). The report was dated 3/7/2010. This was eight months after the blood was drawn and eight months after the report about non-detection of Ethanol. This report did not contain the language about the preservation of the blood for six months as did the prior report relative to Ethanol.

6) The criminal complaint charging Weissinger with Use of a Vehicle w/Controlled Substance in Blood-Great Bodily Harm was filed on May 24, 2010. While the complaint alludes to the findings of the tests, no reports were furnished to Weissinger until after the waiver of the preliminary hearing on August 18, 2010.

7) The blood itself was destroyed the end of April 2010 according to a letter from Assistant District Attorney Jeffrey Sisley. (A-app. 132).

8) The blood investigation for THC was conducted by testing and reported on 3/7/2010. The blood was destroyed at the end of April 2010, some 50-days after testing. The charges against Weissinger were filed on May 24, 2010. The reports generated by the Department of Hygiene were not seen until after the preliminary hearing on August 18, 2010.

9) Even if Weissinger wanted to utilize her rights of testing as outlined in Sec. 971.23 Wis. Stats., there would have been no blood to test as it had been destroyed well before she learned of the findings outlined in the report generated by the Department of Hygiene on 3/7/2010.

This recitation of facts clearly pinpoints the issue raised on this appeal. While this argument was made to the

Trial Court, Judge Williams ruled the report was admissible and the tester was able to testify in spite of the fact that Weissinger lost her right to have the blood examined.

Prior to trial, in answer to a motion made by the defense to quash any testimony or any reports reference findings by the State Department of Hygiene, the State filed a brief in opposition to the motion and after argument the Court issued its oral decision. In effect the Court, while denying the motion, did allow the defense to cross examine the analyst and could in opposition to the State's argument allow the defense to make inquiry about the facts as stated above where in other cases of like nature such cross examination would be irrelevant. But because of the proffer made by the defense and the fact of the destruction of the blood evidence in this case the Court would allow it. (R:99 at 14).

During the pendency of this case, the Supreme Court of the United States was presented with a case of like nature. In Bullcoming v. New Mexico a question was presented as to whether or not the analyst who testified as to the results of blood testing had to appear in court to present the findings made on the blood testing or could any person from the Laboratory testify as to the report. Prior thereto,

any analyst was able to testify as to the results by reviewing the official report. This was also the law in Wisconsin. Bullcoming changed that. The Supreme Court ruled that the analyst who performed the test must be the person testifying to the results. We argued before the trial court if it be such that the Supreme Court ruled in Bullcoming that the analyst who did the test be present to testify, then how much more important it is that the object of the report, to wit: the blood, must be preserved to allow a given defendant the right to challenge the report by having the blood be tested by an analyst of their choice.

In opposition to Weissinger's position the State utilized the reasoning in State v. Nienke, 2006 WI App 244, 297 Wis.2d 585, 724 N.W.2d 704. It would appear on its face that Nienke would be definitive in resolution of this issue, but it is not. In the Nienke case there were two questions; prosecutorial delay in charging the defendant and suppression of blood test results. We are only discussing suppression of blood test results. In Nienke, in answer to the question of suppression the court in denying the claim states "Due process is afforded by the defendant's right to have an additional test at the time of

arrest." Citing State v. Ehlen, 119 Wis.2d 452-453, 351 N.W.2d 503 (1984). In Ehlen the court held suppression was not in order when the blood is no longer available for testing because there are appropriate safeguards to insure that due process is properly protected. The Court stated at p. 455-457, "Again, it must be emphasized, the blood test statutes and the implied consent law have their internal safeguards of due process - the right to demand and to receive an additional or alternate type of an alcohol test. The duties of law enforcement officers in respect to guaranteeing the statutory safeguards is set forth in State v. Walstad." State v. Walstad, 119 Wis.2d 483, 381 N.W.2d 469 (1984).

A pretrial hearing was held before the trial judge on August 17, 2011 concerning the issue presented here. (R:96). Before commencing with the testimony of Officer Brent Smith of the Mequon Police Department who accompanied Weissinger to the hospital for the blood draw, the court noted that the hearing was to determine "how the sample was taken because that wasn't put on the record, was it, by informing the accused. Was it by consent? . . . I have Officer Smith here and who is prepared to testify that he asked the defendant to voluntarily submit to a sample of

her blood, and she consented and the sample was drawn under those circumstances. So there was not an informing the accused form used." (R:96 at p.2). Officer Smith was then called as a witness and testified to the fact that there was not an "informing the accused" form used nor was Weissinger advised as to her options as to testing. (R:96 at 9-14).

> It is clear that there was no informing the accused of her options. Fact is the Court stated in addressing the motion: "The police should have told her. But it's likened to any police request under a consent issue. . . . and that's why I don't think there is a requirement that the law enforcement officer had to tell Miss Weissinger that, oh, and after we leave here you can get another test, but it's at no cost. There's nothing requiring them to do it because he's not acting under the informing the accused, and it's that sense of fairness and that's why I understand your argument because had he been operating under the informing the accused and had he told her that the blood test would be suppressed, but in this case, the law doesn't require him to, and that's what I'll find. And based on that then, I find that there are other due-process rights available for an effective defense through cross-examination of the analyst, and I'll deny the motion." (R:96 at p.29).

It would appear that in Wisconsin the law would indicate there are sufficient safeguards simply by telling the accused what is on a paper called "informing the accused." Those words would alert the accused to many options, not the least of which is his or her ability to

have a second test done on the blood taken. Then if the blood is destroyed the accused cannot argue their due process rights were violated because they were told of the opportunity that they could have a test done. However if the person is not arrested and goes voluntarily to the hospital and gives blood, the officer does not have to share those rights with the subject involved. Here the evidence is quite clear that there was no probable cause for the officer to believe that Weissinger was under the influence of drugs or alcohol. Absolutely nothing to raise any suspicion whatsoever either found on her or her car or any physical condition that would warrant suspicion. His belief was:

Q But in the informing the accused, you let the person know that they've got a right to have their blood tested by another source?

A Yes.

Q You didn't tell her that?

A No.

Q And thank you for your candor, because you said that you had no reason to believe that she was under the influence, either drugs or alcohol, correct?

A That's correct.

Q So no - - nothing of what she did that would in any way cause you to believe that there

was going to be a finding that she was under the influence, correct?

A No, I did not.

(R:96 at p.14-15).

That basically is why she was not informed under the standard 'informing the accused'.

We submit the reasoning as found in State v. Ehlen and State v. Nienke, takes into account that a person's 'due process' rights are protected because of the 'informing the accused' form which law enforcement uses when taking a person into custody and preparing to draw blood. Here there was no such happening. Also, even if one were to argue that the first report from the Laboratory finding no presence of ethanol had a statement that the blood would be retained for six months and then destroyed, this was not conveyed to Weissinger. She never saw this report. And had she, why would she have wanted the blood tested since it was totally exculpatory for her.

Now the second report showed the presence of THC, but there was no statement on that report that the blood was available for testing and would be retained for six months. The accident happened on July 6, 2009. The report was dated July 14, 2009. That contained the statement that the

blood would be retained for six months and that would make the time of destruction January 2010. The blood was destroyed in April 2010. The report concerning the presence of THC was dated March 7, 2010. That report was silent as to retention and destruction. Weissinger was charged in May 2010 and discovery turned over in August 2010. These facts are certainly different than in any case cited as it relates to the rationale of finding that 'due process' was present in this case. We submit that the destruction of the blood clearly violated Weissinger's due process rights as it relates to the singularly different factual situation in the case before this Court.

There is no question that a defendant in a criminal case has an unfettered right to have evidence tested as argued above. Here there is no evidence to be tested because it was destroyed. The Laboratory destroyed the blood without informing the accused that it would do so. Thus the accused had no way to test the blood. The authorities did not inform her of her rights; 'informing the accused.' She was not arrested for driving under the influence. She learned for the first time that her blood contained the presence of THC when she was arrested in May 2010. Obviously she could not have the blood retested

because it did not exist. State v. Ehlen that had a similar issue is distinguishable because in Ehlen the court notes: "Again, it must be emphasized, the blood test statutes and the implied consent law have their internal safeguards of due process - the right to demand and to receive an additional or alternate type of an alcohol test. The duties of law enforcement officers in respect to guaranteeing the statutory safeguards is set forth in State v. Walstad."

This case differs on the issue of 'due process' than the other cited cases and the rulings of the Supreme Court because Weissinger was not told of her right to demand or to receive an additional or alternative type of alcohol test. Nor was she able to have the blood tested after she was arrested. While it is conceded that the officer involved should have made sure Weissinger knew of her rights such as a person who was arrested, Weissinger should not suffer losing her due process right to testing because the officer did not tell her she had that right because he did not believe she was under the influence of anything and as such did not feel he needed to inform her of her rights as he would have had he arrested her and went for a blood draw. Let us assume that she was advised that she could

have had the blood tested. Since the Laboratory held it for six months the advisement that she could have had it tested was worthless because no such test could have been performed because the blood was destroyed one month before she was charged.

We also rely upon State v. Hahn, 132 Wis.2d 351, 392 N.W.2d 464 (Ct. App. 1986), as our reasoning for the dismissal of this case. In Hahn the defendant was charged with Homicide by Intoxicated User of a Motor Vehicle. His truck was impounded and the Sheriff told the person where the truck was brought to not destroy the vehicle and to keep it impounded. Unknown to anyone the truck was sent to a scrap yard where it was demolished. When the defense asked to examine the vehicle they learned it had been destroyed. They thereby lost their ability to examine it for exculpatory evidence as they were trying to attempt to find out whether or not it was true that the steering column was defective while trying to establish a legitimate defense that the accident would have happened if the driver had nothing to drink. The Court found that the defendant's right to due process was lost upon the destruction of the vehicle and dismissed the case.

The Court reasoned that in such a case the defense must posit how the examination of the evidence would produce exculpatory evidence. In the case at Bar we argue that since there was not one iota of evidence that Weissinger ingested any alcohol or drugs, clearly the test of the blood could produce exculpatory evidence. Had there been any corroborative evidence other than the test done by the Department that she had used drugs or alcohol prior to the accident or within the allotted period of time, then perhaps our argument may not have merit. But when experienced police officers all claim she showed no signs whatsoever of having used drugs or alcohol and further were surprised when the report show that she had, the reasoning in Hahn has merit for our argument that the failure to maintain the blood was a violation of her due process rights.

The court in Hahn, relying upon the reason in its decision in California v. Trombetta, 467 U.S.479,485 (1984), held in effect that the one chance the defendant had to defend himself was destroyed. There is only one real defense to Homicide by Intoxicated User and that is that the accident would have happened whether the defendant had anything to drink or not. In that case it had to do

with a defective steering column that caused the crash. Here we have a young woman with absolutely no sign that she was under the influence. To the contrary, law enforcement as stated previously, did not believe so and did not therefore advise her of her rights as they would have had she been arrested or there was probable cause for her arrest. They did not use the Notice to Inform or even suggest that she had certain rights contained in that form. The only defense Weissinger had was to test the blood to see if the analyst may have been mistaken. She was unable, just as Hahn, because that one defense was lost to her because of the destruction of the blood evidence. The form as stated above had language that the blood would be preserved for six months as it relates to alcohol. The form as stated above as it related to drugs did not contain any such notification. Had it, and had Weissinger been made aware of it, perhaps the argument may have a different tenor to it. But that fact was never made known to her about the retention of the blood and even if it had, it would have not meant anything as it had already been destroyed.

The issue presented heretofore is quite clear. The Court should have dismissed the case prior to trial because

of the destruction of the blood for testing. To argue further about the facts and law in this case would be a useless waste of time. The blood was destroyed in April 2010. Weissinger was charged in May 2010. She could not have had the blood tested. She was not advised of her rights to an alternative blood test because the officer did not believe she was under the influence of drugs or alcohol.

So looking at the facts objectively we conclude that there was no corroboration that Weissinger was intoxicated. There were absolutely no signs that she was under the influence of drugs or alcohol. No slurring of words, no signs of alcohol on her breath, no evidence whatsoever that she was under the influence of drugs or alcohol. Nothing found in her car would lead the officers to believe otherwise. Here, experienced police officers not only did not find evidence of drug use, the opposite was true. When asked to take a blood draw, she immediately consented. It was really done at the request of the officer just so he did a full and complete investigation; not believing for a moment any report would show drug or alcohol ingestion. When the report did come back with the presence of the THC, would not it be safe to conclude that perhaps a mistake was

made in the testing and warrant someone to ask for an attempt to retest the blood to make sure the analyst was accurate? The answer is 'of course.' That is exactly why sec 971.23 exists. To belabor the point would be a waste of time. If fingerprints were important in a prosecution for murder and the same led to the belief that the prints were those of a given suspect, would not it seem reasonable for a defense attorney to have an expert look at the report of the Government's analyst and determine whether or not the finding was meritorious? To then find that the weapon involved was destroyed and could not be tested, would not it be appropriate for a court to disallow testimony of the report claiming that a given suspect's prints were on the murder weapon? Clearly that testimony could not be allowed and to rule otherwise would be a violation of a given defendant's right to due process and a fair trial.

One could argue that there was other corroborative evidence such as the person's demeanor, their failure of 'road side' tests, their slurring of words or their imbalance that could lead a reasonable person to believe that the person was intoxicated. That coupled with a law enforcement officer's experience might be sufficient to take the matter to trial. With drugs the same argument can

be made. Here in this case there is not a scintilla of evidence of drug or alcohol use. The opposite is true. Weissinger's only hope would be to demonstrate that the testing was flawed. The only way to reach that would be to retest the blood. The courts have held that even if the blood was destroyed, there can be a conviction on the basis of a report done by an analyst and that such is 'gospel.' This is quite unfair. We know from experience that even the best analyst is not infallible and mistakes are rampant in laboratories all over the Country.

To take a position that the heart of this case, the blood evidence destroyed for no apparent reason, can be destroyed and an analyst's report can be used to convict does not seem fair. If any given defendant has a right under the law to inspect the 'blood' but cannot through no fault of their own, the State should be prohibited from proceeding and we respectfully request that the Court vacate this conviction.

CONCLUSION

For all reasons stated herein and the arguments set forth in support thereof, Defendant-Appellant Jessica M. Weissinger respectfully asks that this Honorable Court vacate the convictions, or in the alternative, order a new trial, resentencing, or whatever proceeding the Court deems appropriate.

Dated this 16th day of ~~April~~ May 2013.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using a monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 26 pages.

Dated: 5-16-13

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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: 5-16-13

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