STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP001737-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. LUEDTKE,

Defendant-Appellant.

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On Notice of Appeal from the Judgment of Conviction
and Order Denying Postconviction Motion,
Entered in the Circuit Court, Winnebago County,
the Honorable Karen L. Seifert, Presiding

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUES PRESENTED

1. Does Wis. Stat. § 346.63(1)(am), which prohibits the operation of a vehicle with a detectable amount of a restricted controlled substance in the blood, or the instructions submitted to the jury on this charge, violate due process by failing to include a scienter element requiring the jury to find the defendant knowingly ingested the detected restricted controlled substance?

The trial court denied Luedtke's postconviction which alternatively challenged the constitutionality of Wis. Stat. § 346.63(1)(am), or the absence of a scienter element in the jury instructions. Rejecting these substantive claims on the merits, the court concluded it was unnecessary to address Luedtke's alternative argument that trial counsel was ineffective for failing to challenge the instructions or statute.

2. Did the post-charging destruction of Luedtke's blood sample prior to Luedtke receiving actual notice of the operating with a restricted controlled substance charge violate due process?

The trial court, citing the absence of a bad faith effort to withhold evidence, denied Luedtke's pretrial motion to suppress challenging the destruction of his blood sample before he received notice of the test results and could seek independent testing. The court also denied Luedtke's postconviction motion, similarly concluding the routine destruction of the blood sample did not violate due process. The court therefore concluded it was unnecessary to address Luedtke's alternative ineffective counsel claim.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication may be warranted. This appeal raises novel questions addressing whether a person who has unwittingly ingested a restricted controlled substance may be criminally punished for operating a vehicle with a detectable amount of a restricted controlled substance in his blood? Does Wis. Stat. § 346.63(1)(am), create a strict liability offense, or does the statute necessarily include a scienter element requiring that the defendant at least have knowledge that he ingested or used a restricted controlled substance? While the issues presented in this appeal may be sufficiently addressed by the parties' briefs, oral argument may be helpful to clarify distinctions between the present circumstances and prior decisions addressing related issues. Regardless of whether oral argument is ordered, the Court's decision should be published.

A related procedural question in this appeal is whether the Wisconsin Supreme Court's ruling in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, wherein the Court concluded the due process clause of the Wisconsin Constitution provides greater protection than the federal constitution, impacts the scope of the state's responsibility to preserve a motorist's blood sample when the state subsequently elects to file a charge under Wis. Stat. § 346.63(1)(am)? The concern here is that a person who has unwittingly ingested a restricted controlled substance but is not otherwise impaired will have no reason to know his operation of a vehicle is unlawful. Consequently, when this person's blood is drawn following a traffic arrest, he will have no reason to request independent testing of the blood sample until he later receives notice that there was, in fact, a restricted substance detected therein. Consequently, when, as

in this case, a restricted controlled substance charge is belatedly filed but the defendant's blood sample is destroyed before he receives actual notice of the restricted substance charge, the defendant's opportunity to prepare a defense is substantially undermined. When a defendant is charged under Wis. Stat. § 346.63(1)(am), following the type of "fishing expedition" inquiry inherent in screening blood for drugs, shouldn't the state be required to preserve the defendant's blood sample for possible independent testing at least until the defendant receives actual notice of the charges?

## STATEMENT OF THE CASE

On April 17, 2012, Michael R. Luedtke was found guilty of operating a vehicle with a detectable amount of a restricted controlled substance, cocaine or a metabolite of cocaine, in his blood contrary to Wis. Stat. § 346.63(1)(am). (56; 102:230). The jury returned a not guilty verdict on the companion charge of operating under the influence. (102:229-230). The Honorable Karen L. Seifert withheld sentence and imposed a four year consecutive term of probation with jail time. (69; 103:19).

On the afternoon of April 27, 2009, Luedtke was arrested following a traffic accident in Oshkosh. (2:2). Nearly eight months later, on December 18, 2009, a criminal complaint was filed charging him with one count of operating under the influence of an intoxicated and one count of operating with a detectable amount of a restricted controlled substance in his blood. (2).

Luedtke first appeared in court on May 24, 2010. (85). He was bound over for trial following a preliminary hearing conducted over four dates. (86; 87; 88; 89:4). The information renewed the two charges in the complaint. (13; 89:4).

On December 28, 2010, the defense filed a "motion to suppress" challenging the State Hygiene Lab's destruction of Luedtke's blood sample before he received notice of the charges. (23). Following a hearing on January 12, 2011, the court denied Luedtke's motion to suppress the drug test results. (94:17-20).

On May 31, 2013, Luedtke filed a postconviction motion requesting either dismissal of the restricted substance charge or a new trial. (78). His motion alleged several alternative grounds for relief. First, Luedtke alleged the restricted substance offense set forth in Wis. Stat. § 346.63(1)(am), and/or the accompanying jury instructions defining this offense, violated due process insofar as they authorized a finding of guilt without a scienter element requiring that the defendant at least knew he had ingested a restricted substance. Second, the motion alleged the state's destruction of Luedtke's blood sample prior to providing him with notice of the restricted substance charge violated due process. Third, Luedtke alleged that even if the destruction of the blood sample did not require dismissal, jurors should at least have been instructed as in ***Arizona v. Youngblood***, 488 U.S. 51 (1988), that they could infer the destroyed evidence would have been favorable to the defense. Alternatively, the motion alleged that if Luedtke's right to review was waived by the absence of a contemporaneous objection, Luedtke was either denied effective counsel or should be afforded a new trial in the interests of justice. (78).

Following the filing of briefs and arguments from counsel, the trial court issued an oral ruling denying Luedtke's postconviction claims on the merits. (79; 80; 105:17-20). Adopting the state's position that Luedtke's postconviction claims were legally unfounded, the court concluded it was unnecessary to conduct the requested

***Machner***[1] hearing to address Luedtke's alternative ineffective counsel arguments. (79; 80; 105:3-4, 6-7). This case is before the Court of Appeals, District II, pursuant to a notice of appeal from the judgment of conviction and from the order denying the postconviction motion. (69; 81; 82).

## STATEMENT OF THE FACTS

Michael R. Luedtke was convicted of operating a vehicle with a detectable amount of a restricted controlled substance, cocaine or a metabolite of cocaine, in his blood. Shortly after 2:00 p.m. on April 27, 2009, a Ford Escort driven by Luedtke rear ended a Saturn. (102:58-60). Luedtke, who was doing work for the woman who owned the Escort, described the accident as follows:

> [T]he phone rang as I was going over the little bridge, the new bridge they built, and I looked down and grabbed it thinking it might be that lady calling me and when I looked back up, the lady in front of me had stopped and was turning to take a left or do whatever, she chose to take a left.
>
> And I went to hit the brakes on the car and I noticed that they were very spongy. I had not driven the car for any length of time anywheres anyway but a parking lot so I didn't know. And I went to swerve out into the opposite lane, traffic coming towards me, a pickup truck, I thought, nope, I don't want to hit nobody head-on especially a pickup truck and I swerved back in and still was applying the brakes and they were just too spongy to stop. When I hit, that was that. That's what happened.

(102:164-165, 166-168).

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[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

According to the Officer Joseph Framke, Luedtke, "stepped forward and identified himself as the operator of the Escort." Luedtke told the officer:

> "[H]e reached over to the passenger side to pick up a phone and that when he looked back up the road, the vehicle in front of him had stopped and that there was no way for him to stop.

(102:61-62, 181).

Even though he was wearing a seat belt, Luedtke indicated he slammed into the steering wheel and his head slammed the visor area. (102:166). He exited the Escort to check on the other driver, but someone was already there with a cell phone. When this person asked if he was all right, Luedtke recalled: "I was holding my chest and I knew I wasn't really all right but I didn't have insurance and I didn't want to say get me an ambulance." (102:166). Luedtke returned to the Escort to turn it off. (102:166, 168).

Luedtke recalled that when he spoke with Officer Framke he "was very panicked" and "hurt." He found it "really hard to concentrate." (102:170). He declined medical attention because he "didn't want to be hauled to the hospital in an ambulance cause that's a $500 trip." (102:171). Luedtke explained he had trouble making a clear decision at the time because he was hurt, was worried about the other driver, was concerned the Escort was destroyed, and knew tools he needed were in the Escort's trunk and was not sure how he would get them back. (102:170, 178-179).

During their initial contact Officer Framke did not notice anything significant about Luedtke's speech or ability to walk. (102:61, 73, 74). He allowed Luedtke to retrieve items from the Escort. (102:62, 73). Framke became

suspicious when he received information from a nearby resident who reported seeing Luedtke remove an item from the Escort and put it in the sewer on Seventh Avenue. (102:63-64, 65, 73-74). Officers subsequently found syringes and a spoon in a nearby sewer. (102:65, 85).

Luedtke testified that when he returned to the Escort he observed syringes on the floorboard pushed out of a bag. He "thought this is definitely not good." Luedtke explained:

> I was panicked. I just thought this is illegal. I didn't know they were in there. I thought they were illegal. I didn't know that they weren't, something that wasn't.

(102:168-169). Luedtke emphasized that he did not know these needles were in the car. (102:181, 182). Using his work t-shirt, Luedtke wrapped his "hands around them, picked them up, disposed of them into the sewer drain." (102:169). He tried to conceal the needles because he "just thought the needles were illegal to have period. I just thought they were illegal." (102:177-178, 182). He "panicked" noting he "didn't want no trouble." (102:178-179, 183, 188). He didn't look for any more needles in the car, adding: "I knew I didn't do anything." (102:169, 178).

Officer Framke secured Luedtke's permission to search his person and "did not find any contraband." (102:65). Luedtke also agreed to a search of the Escort. (Id.). The vehicle search revealed items Framke believed could qualify as drug paraphernalia. The officer found a syringe "underneath the passenger side on the passenger side front floorboard," two syringes "underneath the driver's side on the driver's side floorboard area," a brown-colored prescription bottle with no label with some powder residue, and "on the driver side door in the door pocket a metal spoon." (102:65-66, 74).

Framke reported that Luedtke acknowledged taking several prescription medications including morphine for his back. (102:64). According to Framke, Luedtke indicated he injected his morphine medication but declined to say anything further. (102:66, 173). He also said he occasionally used pot. (102:65).

Luedtke testified that in 1984 he broke his back in an accident, at which time three vertebrae in his neck were crushed. (102:163). He now took methadone and diazepam in pill form. The methadone was for pain. He only took the diazepam at night because it made him feel lethargic. (102:185). Thomas Neuser from the state hygiene lab confirmed that methadone is a pain reliever and diazepam is a sedative drug. (102:137).

Luedtke testified that on the day of the accident he had only taken his prescribed antidepressant. (102:163-164, 172). He took other medication the previous day. (102:172). He took diazepam at 10:00 p.m. the previous night before going to bed. (102:164). He last took methadone more than sixteen hours before the accident. (102:164, 173). Luedtke indicated he did not take any medications by injection, reaffirming he was unaware the syringes were in the Escort. (102:187).

Officer Framke indicated Luedtke's ability to perform field sobriety tests was "not to a degree where I felt that he was safe to operate a vehicle." (102:66). Framke could not recall whether he asked Luedtke if he had difficulty walking, standing or had any other problems that would interfere with his ability to perform these tests. (102:76, 81). Framke noted Luedtke had said he had hit the steering wheel and his chest hurt, but after being checked out by fire department personnel he declined treatment. (102: 76-77, 79).

Luedtke testified he "can't really stand on one foot" because his knees and back are "messed up." (102:171). With regard to the heel to toe test, Luedtke told the officer "I don't walk that way and I never have. It's a genetic thing." When he turns his legs like that "it hurts my knees even worse." (102:171-172, 174-175, 185-186). Luedtke indicated he tried to do the tests the best he could, believing he "was going to be vindicated, that there was going to be no problems whatsoever." (102:175). His "chest was throbbing" at the time, and he suspected he had broken his sternum when he hit the steering wheel." (Id).

Based on Luedtke's performance on the field sobriety tests and the presence of the drug paraphernalia, Framke concluded there was cause to believe Luedtke was impaired and under the influence of some substance. (102:69, 71-72, 81). Luedtke agreed to a blood test believing he had "done nothing wrong." (102:172, 173-174). He was absolutely certain he did not use cocaine on the day of the accident or at any time near that day. (102:177).

Luedtke testified that at the time of his arrest he did not think there was anything in his blood. He believed he would pay a ticket for inattentive driving and the matter would be over. He assumed the blood test "came back good." He was first notified of the charges in this case nearly eleven months later on March 22, 2010. (102:179). He saw the lab report for the first time at his initial appearance on May 25, 2010. (102:179, 183). In response to the report indicating there was cocaine in his blood, Luedtke asked his attorney to have the blood sample tested again because "I don't ever do cocaine." (102:179-180, 183-184). He subsequently learned the sample could not be retested because it had been destroyed back on February 4, 2010. (102:180-181).

Blood was drawn from Luedtke at 3:28 p.m. (102:87, 90). At that time he was assessed by Detective Brett Robertson, who is trained in drug recognition. (102:93, 96, 177). Robertson did not detect any odor of alcohol and did not believe Luedtke was under the influence of alcohol or other depressant. (102:96-97, 99-100). Luedtke was coherent and able to follow directions. (102:103). According to Robertson, Luedtke's feet pointed out on the heel to toe test, he swayed, raised his harms and put his foot down on the one leg stand, and he was unable to touch the tip of his nose with his finger tip. (102:105-106, 107, 109). Robertson didn't ask Luedtke whether he had any medical conditions that would give him problems with these tests. (102:125). On Luedtke's right hand near the thumb Robertson observed fresh puncture marks consistent with a needle injection. (102:110).

Robertson believed Luedtke "was under the influence of a central nervous system narcotic analgesic" such as morphine or painkillers. (102:114, 118). The cocaine and cocaine metabolite reportedly detected in Luedtke's blood sample were stimulants that would tend to counteract the narcotic medications. (102:116-118, 119-120). Luedtke's medications were within the therapeutic range. (102:123). The hygiene lab chemist, Thomas Neuser, later noted Luedtke's detected methadone level of 24 nanograms was "quite small," noting the detection limit is about 20 nanograms. (102:138-139).

Neuser testified that testing of Luedtke's blood sample revealed the presence of cocaine at less than 20 nanograms per milliliter, and the cocaine metabolite benzoylecgonine at 330 nanograms per milliliter. (102:132, 133, 136, 151). Cocaine and the metabolite benzoylecgonine are restricted controlled substances. (102:134). The detection limit for

cocaine is 10 nanograms, below which it is reported as not detected. The quantification limit is 20 nanograms, so results below 20 nanograms are reported as less than 20. (102:151).

According to Neuser, the hygiene lab saves blood samples a minimum of six months after the date of receipt. (102:145). The lab does not notify the submitting party before discarding a sample, but trusts the agency will contact them if they want it saved longer. (102:146).

Additional facts will be set forth as necessary in the argument sections below.

## ARGUMENT

I. Luedtke was Denied Due Process when the Charge of Operating with a Detectable Amount of a Restricted Controlled Substance in His Blood was Submitted to the Jury Without a Scienter Element Requiring a Finding Luedtke Knowingly Ingested the Substance.

A. Introduction.

Luedtke was convicted of operating a vehicle with a detectable amount of a restricted controlled substance in his blood, contrary to Wis. Stat. § 346.63(1)(am). Testing of the blood sample seized following Luedtke's arrest reportedly revealed the presence of cocaine at less than 20 nanograms per milliliter, and the cocaine metabolite benzoylecgonine at 330 nanograms per milliliter. (102:132, 133, 134, 136). A nanogram is one billionth of a gram (1/1,000,000,000). The hygiene lab's detection limit for cocaine is 10 nanograms per milliliter, while the quantification limit is 20 nanograms. (102:151). Luedtke testified he asked his attorney to have the blood sample tested again insisting "I don't ever do cocaine." (102:179-180, 183-184).

At the close of the trial the jury was instructed that the charge of operating a motor vehicle while having a detectable amount of a restricted controlled substance in the blood had two elements. First, that "the defendant operated a motor vehicle on a highway." Second, that "the defendant had a detectable amount of restricted controlled substance in his or her blood at the time the defendant operated a motor vehicle." The jury was further instructed that "Cocaine and benzoylecgonine are restricted controlled substances." (102:194-195). The parties did not request and the court did not instruct the jury that in order to find Luedtke guilty it must also find he knowingly ingested the restricted substance.

For the reasons outlined below, Luedtke submits that permitting a finding of guilt on the restricted substance charge without first requiring a finding that defendant knowingly ingested the restricted substance violates due process. First, consistent with the decision in ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), the restricted substance offense set forth in Wis. Stat. § 346.63(1)(am), must be construed to include a scienter requirement. A driver who unwittingly ingests a restricted substance but is not otherwise impaired should not be exposed to such severe criminal penalties.

Second, if Wis. Stat. § 346.63(1)(am), does not include a scienter requirement, the resulting strict liability offense violates due process. Luedtke's due process challenge, which is predicated upon the absence of a scienter requirement, is distinguishable from the constitutional challenges previously considered in ***State v. Smet***, 2005 WI App 263, 288 Wis. 2d 525, 709 N.W.2d 474, and ***State v. Gardner***, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720.

Third, if Luedtke's due process challenge to the statute or the jury instructions was waived because of the absence of a contemporaneous objection by trial counsel, Luedtke was denied his right to the effective counsel. Alternatively, a new trial should be ordered in the interests of justice because the jury never considered the essential scienter element.

B. Construing Wis. Stat. § 346.63(1)(am).

Resolution of the due process claim presented in this appeal requires a construction of Wis. Stat. § 346.63(1)(am). The applicable version of this provision, along with the companion operating under the influence prohibitions, read:

> **346.63 Operating under influence of intoxicant or other drug.** (1) No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or
>
> (am) The person has a detectable amount of a restricted controlled substance in his or her blood.
>
> (b) The person has a prohibited alcohol concentration.

The interpretation and application of a statute presents a question of law subject to independent review. ***State v. Ziegler***, 2012 WI 73, ¶37, 342 Wis. 2d 256, 277, 816 N.W.2d 238; ***State v. West***, 2011 WI 83, ¶21, 336 Wis. 2d 578, 590, 800 N.W.2d 929. The primary source of construction of any statute, of course, is the plain language of the statute itself.

***Ziegler***, 342 Wis. 2d at 279, ¶42. However, in construing and applying Wis. Stat. § 346.63(1)(am), several additional principles of statutory construction must be considered.

First, statutes must be construed "reasonably, to avoid absurd or unreasonable results." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 663, 681 N.W.2d 110; ***State v. Dinkins***, 2012 WI 24, ¶49, 339 Wis. 2d 78, 96-97, 810 N.W.2d 787. For the reasons discussed below, construing Wis. Stat. § 346.63(1)(am) to authorize the punishment of a motorist who is neither impaired nor aware he has ingested a restricted substance produces unreasonable results.

Second, courts must "interpret statutes to be constitutional if possible." ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, ¶¶49-50, 293 Wis. 2d 530, 559-560, 716 N.W.2d 845 (Due process precluded an interpretation of the TPR statute that permitted a finding the parent failed to meet the conditions for return of a child based solely on the parent's incarceration). ***See also***, ***State v. Stenklyft***, 2005 WI 71, ¶8, 281 Wis. 2d 484, 495, 697 N.W.2d 769 (Courts attempt to avoid a statutory interpretation that creates constitutional infirmities); ***State v. Post***, 197 Wis. 2d 279, 328-329, 541 N.W.2d 115 (1995) (To avoid constitutional concerns Wis. Stat. § 980.09(2), was construed to include the right to a jury trial even though this right was not mentioned in the statute); ***State v. Petrone,*** 161 Wis. 2d 530, 550-552, 468 N.W.2d 676 (1991)(The sexual exploitation of a child provision set forth in Wis. Stat. § 940.203(2), was construed to include a scienter element even though there is no scienter requirement in the statute); ***State v. Vonesh***, 135 Wis. 2d 477, 487-488, 400 N.W.2d 508 (Ct. App. 1986) (When faced with a choice of possible interpretations of a statute, a court "must select the

construction that results in constitutionality rather than invalidity."). Permitting criminal punishment of an unimpaired motorist who is unaware he has ingested a restricted substance implicates due process concerns.

Third, insofar as there is any ambiguity as to whether Wis. Stat. § 346.63(1)(am), includes a scienter requirement, application of the "rule of lenity," requires this penal statute to be construed in favor of the accused. ***Donaldson v. State***, 93 Wis. 2d 306, 315-316, 286 N.W.2d 817 (1980); ***State v. Morris***, 108 Wis. 2d 282, 289, 322 N.W.2d 264 (1982); ***State v. Church***, 223 Wis. 2d 641, 653, 589 N.W.2d 638 (Ct. App. 1999). Applying the "rule of lenity," § 346.63(1)(am), should be read to reflect the general preference for a scienter requirement rather than imposing strict liability.

Obviously, the plain language of Wis. Stat. § 346.63(1)(am), does not specifically include a scienter element. Nevertheless, the Wisconsin Supreme Court has long recognized that "the element of scienter is the rule rather than the exception in our criminal jurisprudence." ***State v. Alfonsi***, 33 Wis. 2d 469, 476, 147 N.W.2d 550 (1960); ***State v. Collova***, 79 Wis. 2d 473, 480, 255 N.W.2d 581 (1977); ***State v. Weidner***, 2000 WI 52, ¶11, 235 Wis. 2d 306, 314, 611 N.W.2d 684 ("scienter constitutes the rule in our criminal jurisprudence and is generally presumed even absent express statutory reference").

Consistent with this general rule, the Supreme Court has, notwithstanding the absence of a scienter requirement in the plain language of the statute, construed criminal provisions to include a scienter element in order to avoid absurd or potentially unconstitutional results. Thus, in ***State v. Alfonsi***, ***supra***., the bribery statute was construed to include an intent requirement not contained in the statute. In

***State v. Collova***, 79 Wis. 2d at 486-487, the Court, emphasizing the potentially harsh consequences of a misdemeanor conviction, (a minimum ten day jail sentence), construed the operating after revocation provision to include a scienter element requiring that the defendant at least have cause to believe his license might be revoked or suspended. In ***State v. Petrone***, 161 Wis. 2d at 550-552, the Court, citing the state's argument that either the legislature intended a scienter requirement or the court will supply this element to save the statute's constitutionality, concluded the crime of sexual exploitation of a child included a knowledge element not mentioned in the statute.

As in ***Alfonsi***, ***Collova,*** and ***Petrone***, the restricted substance charge set forth in Wis. Stat. § 346.63(1)(am), must similarly be construed to include a knowledge requirement. Indeed, construing this provision to require a knowledge element is compelled by the decision in ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), wherein the court held that Griffin's conviction for possessing cocaine could not be sustained based solely on chemical testing that detected cocaine and cocaine metabolite in his urine. The ***Griffin*** court observed that the great majority of courts that had considered the question had "held that the presence of a controlled substance in one's urine or blood, without more, is insufficient evidence on which to base a conviction for possession." ***Id,*** at 380. As several of the cases cited in footnote two in ***Griffin*** specifically observe, the knowing possession of a controlled substance such as cocaine cannot be inferred beyond a reasonable doubt based simply on the results of a blood or urine test because these substances are capable of being unknowingly or unwittingly ingested. *See*, ***State v. Flinchpaugh***, 232 Kan. 831, 659 P.2d 208(Kan. 1983)("The drug might have been injected involuntarily, or introduced by artifice, into the defendant's system."); ***State v.***

***Lewis***, 394 N.W.2d 212, 215 (Minn. 1986)("The State has offered no evidence in this case to prove Lewis' 'conscious possession of the substance' other than mere presence in his system; it has not offered proof to show where, how, when, or under what circumstances the controlled substance was introduced into Lewis' body. The morphine could have been introduced by trick or guile, or injected involuntarily."); ***State v. Lowe***, 86 Ohio App. 749, 631 N.E.2d 1244, 1248 (Ohio App. 4 Dist. 1993)(Recognizing that while in most instances it is unlikely that a person ingests a controlled substance by accident, by mistake, or by involuntary means, the fact a person's urine contains cocaine metabolites does not provide sufficient proof the person knowingly ingested the substance).

Likewise, Wis. Stat. § 346.63(1)(am), should not be narrowly construed as a strict liability offense because of the potential risk a motorist might unknowingly ingest a restricted substance such as cocaine through a food item, beverage, or through some other unwitting contact with the substance. Indeed, an increasing body of research reveals citizens may unknowingly encounter cocaine in their daily environment. It has long been reported that traces of cocaine can be found on much of the nation's currency. ***See***, ***New York Daily News***, "New study finds that 90% of U.S. currency has cocaine residue on it," (8/17/09), http://www.nydailynews.com/2.1353/new-study-finds-90-u-s-currency-cocaine-residue-article-1.401382 (Reporting that an average of 85% of the U.S. greenbacks tested had traces of the drug with the percentage rising to 95% in Washington D.C.); ***National Geographic News***, "Cocaine on Money: Drug found on 90% of U.S. bills," (8/16/09), http://news.nationalgeographic.com/news/2009/08/090816-cocaine-money.html. There are now studies indicating that cocaine may also be found in other parts of our environment.

***See***, ***Minneapolis StarTribune***, "Minnesota lakes contaminated with all kinds of chemicals," (5/14/13), www.startribune.com/politics/statelocal/207214931.html (Reporting that cocaine was found in 32% of the 50 Minnesota lakes studied); Sara Castiglioni, Ettore Zuccato, and Roberto Fanelli, ***Illicit Drugs in the Environment***: ***Occurrence, Analysis, and Fate Using Mass Spectrometry,*** Chapter 8, p. 151 (John Wiley & Sons, Inc. 2011)(Reporting that cocaine and its metabolite benzoylecgonine have been found in surface waters in the United Kingdom).

Based on the two elements submitted to Luedtke's jury, the charge of operating with a detectable amount of a restricted controlled substance was truly a strict liability offense. Indeed, the prosecutor told jurors during closing arguments: "Cocaine is in his system and as a result of that alone you can find him guilty of operating with a restricted controlled substance." (102:210). The prosecutor further argued that Luedtke was guilty no matter how little cocaine was detected in his system, so that "[i]t doesn't matter how many zeros are in front of that result" he is guilty "despite the level" "if it's in there." (102:211). Contrary to the concerns underlying the holding in ***Griffin***, the instructions authorized a finding of guilt even if Luedtke was, as he claimed, completely unaware he had ingested any cocaine. To avoid this absurd result, § 346.63(1)(am), must be construed to include a scienter element.

In most cases it will not be difficult for the prosecution to prove the defendant knowingly ingested the detected substance. In many cases, the requisite knowledge can be inferred from the defendant's contemporaneous possession of the restricted substance. In other cases, defendant use of the restricted substance can be confirmed by another witness. In some cases the defendant will have acknowledged using the

drug. Yet, even absent such an admission, the defendant's severe impairment and/or the high level of the restricted substance detected in his blood can support the inference that defendant must have knowingly ingested the substance. In any case, whether the defendant knowingly ingested the restricted substance is ultimately a question of fact for the jury. When, as in this case, the reported level of the detected substance is so small, the inference of knowing ingestion is certainly subject to dispute.

C. Construing Wis. Stat. § 346.63(1)(am), as a strict liability offense violates due process.

In the absence of actual impairment, a person who has unwittingly ingested a small amount of a restricted controlled substance will not, indeed cannot, reasonably know he has a detectable amount of the restricted substance in his blood. If Wis. Stat. § 346.63(1)(am), is construed to authorize the punishment of anyone who operates a vehicle with a detectable amount of a restricted substance in the blood without any accompanying requirement of knowing ingestion of the substance, the statute is arbitrary and oppressive and deprives the accused of due process.

"Substantive due process rights are rooted in the Fourteenth Amendment of the United States Constitution, and Article I, Sections 1 and 8 of the Wisconsin Constitution." ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, ¶39, 293 Wis. 2d 530, 554, 716 N.W.2d 845. *See also*, ***State v. Wood***, 2010 WI 17, ¶ 17, 323 Wis. 2d 321, 338-339, 780 N.W.2d 63. "The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair." ***Jodie W.,*** at 554, ¶39; ***Wood***, at 339, ¶17.

The constitutionality of a statute is ultimately a question of law subject to independent appellate review. ***Jodie W.,*** at 545, ¶22; ***Wood***, at 337, ¶15. Statutes are presumed to be constitutional and the party challenging the statute has the burden of establishing it is unconstitutional beyond a reasonable doubt. ***Wood***, at 338, ¶15.

Constitutional challenges to the type of restricted substance provision set forth in § 346.63(1)(am), were previously rejected in ***State v. Smet***, 2005 WI App 263, 288 Wis. 2d 525, 709 N.W.2d 474, and ***State Gardner***, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720. Significantly, however, neither case addressed the threshold concern that before criminal punishment may be imposed the defendant must at least know that he has ingested a restricted controlled substance. Indeed, the decision in ***Gardner*** implicitly assumes the statute addresses the knowing use of controlled substances. Rejecting Gardner's claim that the prosecution must establish a causative link between the presence of the restricted substance and the resulting impairment, accident and injury, the court concluded:

> With the enactment of this statute, the legislature is sending a clear message: do not do illegal drugs and drive, because if you do and the operation of your motor vehicle causes injury, you can be held criminally responsible

***Gardner***, 292 Wis. 2d at 695, ¶21.

In ***Smet***, the court rejected a similar claim that the restricted substances provision violated due process, equal protection and fundamental fairness in that the statute did not require an affirmative finding of actual impairment. Smet argued that absent such a showing there was not a sufficient relationship between the statute and the proper exercise of the

legislative police power. The court of appeals disagreed, concluding "the legislature reasonably and rationally could have determined that, as a class, those who drive with unprescribed illegal chemicals in their blood represent a threat to public safety." ***Smet***, 288 Wis. 2d at 536, 537, ¶¶16, 20. Furthermore, since "no reliable measure of illicit drug impairment exists, the more prudent course" for public safety purposes was for the legislature to ban any measure of the substance in the driver's system. ***Id.***, at ¶17.

Luedtke is not challenging the rulings in ***Smet*** and ***Gardner***. Luedtke merely contends that § 346.63(1)(am), must be construed to include a threshold scienter requirement. For the sake of clarity, it should be noted there are several other related matters that are not in dispute in this appeal.

First, if a person operating a vehicle is actually impaired, the state is not required to prove the driver knew he was impaired or that the driver understood why he was impaired. Persons who elect to operate a motor vehicle have a responsibility not to drive impaired.

Second, consistent with the rulings in ***Gardner*** and ***Smet***, if a driver knowingly ingests a restricted controlled substance the state is not required to prove the driver was aware of the continued presence or level of the substance in his system when driving. The legislature has determined that motorists should not operate a vehicle with a restricted controlled substance in their system. Unlike the claims in ***Smet*** and ***Gardner***, however, a driver should not be punished for what he does not, and could not, know.

Third, Luedtke is not suggesting that due process precludes the legislature from creating strict liability offenses. However, whether a particular strict liability offense is permissible necessarily depends on the nature of the punished

conduct and whether the defendant can reasonably be expected to have knowledge of the facts that render said conduct unlawful. Strict liability offenses are particularly appropriate when employed to perform a regulatory function to safeguard the public from conduct the actor can reasonably be expected to know—indeed has an affirmative responsibility or duty to know—is unlawful. ***See***, ***State v. Collova***, 79 Wis. 2d 473, 482-484, 255 N.W.2d 581 (1977)(Citing the use of strict liability "regulatory criminal statutes" designed to address the needs of the "complex industrial state"). On the other hand, due process concerns are implicated when, as here, the defendant faces punishment based on facts he could not have known; the unwitting ingestion and subsequent presence of a mere detectable amount of a restricted substance in his blood.

The traditional charge of operating under the influence is appropriately a strict liability offense because a person who elects to operate a vehicle can reasonably be expected to recognize whether his ability to drive is impaired. This case presents a much different situation. A person who unknowingly ingests a small amount of a restricted substance (an amount insufficient to impair the ability to drive as said impairment permits prosecution under a separate provision regardless of whether the ingestion was unwitting) cannot know this substance is in his blood system. In such a case imposing liability without requiring proof of defendant's knowledge of the presence of the substance is fundamentally unfair. In circumstances such as this a scienter element is constitutionally required. *See*, ***State v. Petrone***, ***supra,*** 161 Wis. 2d 53 at 552 ("scienter is a constitutionally required element of the offense charged.").

Unlike the prohibited blood alcohol concentration offenses authorized under Wis. Stat. § 346.63(1)(b), the

restricted substance provision does not set a threshold concentration level required for liability. Blood alcohol concentration offenses are governed by a tiered standard whereby motorists are responsible for monitoring their alcohol consumption so they do not exceed the applicable designated level of alcohol in their blood. Under this scheme, most citizens are prohibited from driving with a blood alcohol level of .08 grams or more of alcohol in 100 milliliters of blood. This standard basically supplements the concomitant provision prohibiting the operation of a vehicle while under the influence. After all, the legislature has determined that a blood alcohol level of .08 or greater constitutes prima facie evidence of being under the influence of an intoxicant. Wis. Stat. § 885.235(1g)(c); ***Wis. JI-Criminal***, 2663, p. 2 (2006).

For those persons who have already demonstrated a risk to the public by accumulating prior OWI convictions, the legislature has imposed greater personal responsibility to more closely monitor their alcohol consumption. Thus, motorists with three or more prior convictions are required to restrict their consumption of alcohol so they do not operate a vehicle with a blood alcohol level of .02 grams or more. Wis. Stat. § 340.01(46m)(c). Unlike the person who consumes alcohol, a driver who is otherwise unimpaired cannot know he has unwittingly ingested a detectable amount of a restricted substance.

The jury in this case was not instructed that before it could return a finding of guilt, it was required to find that Luedtke knowingly ingested a restricted controlled substance. If this Court concludes Wis. Stat. § 346.63(1)(am), cannot be construed to include a scienter element, the judgment should be vacated and the charge dismissed because the resulting strict liability offense violates due process.

If § 346.63(1)(am), does include a scienter element, the instructions submitted in this case omitting a scienter element violated Luedtke's right to a jury trial, as well as his related due process right to have the government prove all of the elements of the charge beyond a reasonable doubt.

D. Trial counsel's failure to object to the absence of a scienter element or challenge the constitutionality of Wis. Stat. § 346.63(1)(am), deprived Luedtke of effective counsel.

Trial counsel did not object to the instructions submitted on the restricted controlled substance charge notwithstanding the absence of a scienter element. Nor did counsel raise a constitutional challenge to Wis. Stat. § 346.63(1)(am), alleging this strict liability provision violates due process. In his postconviction motion Luedtke alternatively alleged that trial counsel's failure to challenge either the jury instructions or statute deprived him of his right to effective counsel. Particularly inasmuch as Luedtke insisted that he did not use cocaine, it is difficult to imagine any strategic justification for trial counsel not challenging a statute and jury instructions that relieved the prosecution of having to prove Luedtke knowingly ingested the restricted substance.

Rejecting Luedtke's due process claims on the merits, the trial court below agreed with the state's contention that it was therefore unnecessary to conduct a ***Machner*** hearing to address trial counsel's reasons for not pursuing these claims. (105:6-7). For the reasons outlined above, Luedtke disagrees with the lower court's assessment of his substantive claims.

The right to effective counsel is guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 7 of the

Wisconsin Constitution. ***State v. Felton***, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 587, 665 N.W.2d 305; ***State v. Carter***, 2010 WI 40, ¶20, 324 Wis. 2d 640, 657-658, 782 N.W.2d 695. In assessing whether counsel's actions satisfy this standard, Wisconsin applies the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). In order to establish that he was denied effective representation, defendant must demonstrate both that counsel's performance was deficient and that counsel's errors or omissions were prejudicial. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985); ***Thiel***, 264 Wis. 2d at 587, ¶18; ***Carter***, 324 Wis. 2d at 658, ¶21.

On review, a trial court's findings as to what happened are entitled to deference. ***Pitsch,*** at 634; ***Thiel***, at 588, 589, ¶¶21, 24; ***Carter***, 324 Wis. 2d at 657, ¶19. The ultimate determinations whether counsel's performance was deficient and whether counsel's deficient performance was prejudicial are questions of law subject to independent review. ***Pitsch,*** at 634; ***Thiel***, at 588, 589, ¶¶21, 23-24; ***Carter***, at 657, ¶19.

1. Counsel's failure to contest the absence of a scienter element constituted deficient performance.

***Strickland*** teaches that review of a trial attorney's performance should be highly deferential and should avoid second-guessing of counsel's strategic choices. ***Strickland***, 466 U.S. at 689; ***Thiel***, at 588, ¶19; ***Carter***, at 659, ¶22. Such deference is unwarranted however when, rather than being a strategic choice, trial counsel's failure to act is the product of oversight. As the Court recognized in ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983), trial strategy "implies deliberateness, caution and circumspection. It is

substantially the equivalent of the exercise of discretion; and accordingly, it must be based upon a knowledge of all facts and law that may be available."

The trial court denied Luedtke's postconviction motion without hearing trial counsel's testimony addressing why he did not challenge the statute or instructions. Again, it is difficult to imagine any strategic justification for these omissions. If this Court determines the instructions were deficient or the statute violates due process, but concludes these defects were waived by the absence of a contemporaneous objection, the case should be remanded for a ***Machner*** hearing to afford trial counsel an opportunity to explain these omissions.

2. Trial counsel's omission was prejudicial.

To satisfy the prejudice prong of ***Strickland,*** the defendant must show there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. ***See***, ***State v. Johnson***, 133 Wis. 2d 207, 217, 222-223, 395 N.W.2d 176 (1986). This is not, however, an "outcome determinative standard." ***Strickland***, at 694. The question is whether counsel's errors deprived defendant of "a trial whose result is reliable." ***Strickland***, at 687; ***Johnson***, 133 Wis. 2d at 222; ***Thiel***, 264 Wis. 2d at 588, ¶20.

As a result of counsel's omission, the jury was permitted to return a guilty verdict regardless of whether Luedtke even knew he had ingested cocaine. Luedtke denied using cocaine. Testing of his blood sample detected only a small amount of cocaine. Luedtke was entitled to have a jury decide whether he knowingly used this substance.

E. Alternatively, a new trial should be ordered in the interests of justice.

Pursuant to Wis. Stat. § 752.35, this court has the authority to order a new trial in the interests of justice. Exercise of this authority is warranted "whenever the real controversy has not been fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985); ***State v. Williams***, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 845, 723 N.W.2d 719. As in ***State v. Harp***, 161 Wis. 2d 773, 469 N.W.2d 210 (Ct. App. 1991), this may occur when, as here, a faulty jury instruction precluded full consideration of the case. *See also*, ***State v. Thomas***, 161 Wis. 2d 616, 625-626, 468 N.W.2d 729 (Ct. App. 1991)(citations omitted)(noting discretionary reversals have been ordered "in a variety of circumstances," including "when an unobjected-to but erroneous jury instruction had a significant adverse impact on the case, . . . and when incomplete jury instructions precluded the parties from arguing a crucial issue."). In this case, the absence of a proper jury instruction containing the requisite scienter element prevented the real controversy from being fully tried.

To order a new trial because the real controversy was not fully tried a reviewing court "need not determine that a new trial would likely result in a different outcome." ***Williams***, 296 Wis. 2d at 858, ¶36. ***See also***, ***State v. Watkins***, 2002 WI 101, ¶¶97, 98, 255 Wis. 2d 265, 309, 310, 647 N.W.2d 244 (Ordering a new trial even though "it is far from clear whether a new trial will result in a different verdict, or in precisely the same verdict previously rendered.").

## II. The State Hygiene Lab's Post-charging Destruction of Luedtke's Blood Sample Prior to Luedtke Receiving Notice of the Restricted Substance Charge Violated Due Process.

### A. Introduction.

Prior to trial the defense filed a "motion to suppress" challenging the State Hygiene Laboratory's destruction of the blood sample seized from Luedtke thereby making it unavailable for independent defense testing. (23). The sample was seized shortly after Luedtke's arrest on April 27, 2009. (94:5; 102:90). The hygiene lab tested the sample for alcohol on May 1, 2009, producing a negative result. (94:6). Over six months later, on November 18th, the sample was tested for the presence of drugs. (94:5). A small amount of cocaine and cocaine metabolite were detected. These test results were forwarded to the prosecutor on December 2, 2009. (94:10).

On December 18, 2009, a criminal complaint was filed charging Luedtke with operating with a detectable amount of a restricted controlled substance in his blood. (2). At that time a summons and complaint were mailed to Luedtke at the address listed on the original traffic citations. (1; 94:5). By that time, however, nearly eight months after his arrest, Luedtke was in custody on another charge in Outagamie County and was subsequently transferred to the state prison system. (94:4, 10, 13). Consequently, Luedtke did not appear for the originally scheduled initial appearance on January 11, 2010. (4; 84; 94:5, 13). The initial appearance was adjourned until May 24, 2010. (85; 94:11). Prior to that time Luedtke had not received notice of the drug test results. (94:4-5, 9, 10, 16; 102:179, 183).

In the meantime, on February 4, 2010, the hygiene lab discarded Luedtke's blood sample. (25; 94:2-3, 6). Thomas Neuser testified the lab generally discards samples six months after they are received unless the submitting agency requests the lab to preserve the sample longer. (102:145-146). There is no indication the lab was requested to further preserve Luedtke's blood sample.

The trial court denied the motion to suppress, noting there was no evidence the destruction of Luedtke's blood sample was the product of a purposeful effort to withhold evidence. (94:19-20). The court noted that while it was unfortunate the sample was destroyed, the defense could use available raw data to challenge the test results. (94:17-20).

Luedtke submits he was denied due process when, subsequent to the filing of formal charges, the state, without providing notice to the defense, failed to preserve his blood sample for possible independent defense testing. The significance of this destroyed evidence is magnified if Wis. Stat. § 346.63(1)(am), is deemed a strict liability provision, such that the test results essentially compel a finding of guilt.

In accordance with the Wisconsin Supreme Court's decision in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, Luedtke submits the state's post-charging responsibility to preserve potentially exculpatory evidence under the Wisconsin Constitution is broader than the test set forth in ***Arizona v. Youngblood***, 488 U.S. 51 (1988). Once the criminal complaint was filed it was readily apparent the blood test result was central to the state's prosecution of Luedtke on the restricted substance charge. At that point, the state had a responsibility to safeguard the potentially

exculpatory blood sample in order to afford the opportunity for independent defense testing.

Furthermore, Luedtke submits that due to the unique nature of a restricted substance charge, the prior rulings in ***State v. Disch***, 119 Wis. 2d 461, 351 N.W.2d 492 (1984), and ***State v. Ehlen***, 119 Wis. 2d 451, 351 N.W.2d 503 (1983), addressing the state's duty to preserve samples for testing in the typical OWI case should not be extended to restricted substance cases. Consistent with the principle of necessity addressed in ***Dubose***, the state's duty to preserve a blood sample that supplies the foundation for a restricted substance charge must extend until the defendant receives actual notice of this charge. Once the defense receives actual notice and has an opportunity to act thereon, the responsibility for preserving the blood sample may then shift to the defense. Luedtke was not afforded this opportunity.

B. The due process standard governing the state's failure to preserve potentially exculpatory evidence and the due Process ruling in ***Dubose***.

In ***Arizona v. Youngblood***, 488 U.S. 51 (1988), a divided Supreme Court addressed the due process standard to be applied when government officials fail to preserve physical evidence for testing. Youngblood was arrested and charged with sexually assaulting a ten year old boy. The sole issue in the case was whether Youngblood was correctly identified as the person responsible for this offense. Unfortunately, officials did not refrigerate clothing worn by the victim. As a result, ABO testing of seminal stains that might have exonerated Youngblood could not be conducted. Concluding Youngblood had not been denied due process, the majority deemed the failure to refrigerate the clothing was at worst a product of negligence rather than "bad faith on the

part of the police." ***Id.,*** at 58. The Court drew a distinction between the government's failure to disclose "material exculpatory evidence" and those situations where the State failed "to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." ***Id***., at 57. ***Youngblood*** concluded:

> We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

***Youngblood***, at 58.[2] At issue here is the meaning of "bad faith" for due process purposes when, after charges have been filed, the state fails to take available steps to prevent the destruction of potentially exculpatory physical evidence without first providing notice to the defense.

In ***State v. Greenwold***, 181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App. 1994), the court applied the ***Youngblood*** test in a case arising from a vehicle accident wherein the defendant disputed he was the driver. Efforts to reconstruct the accident were compromised by the failure of investigating officers to record the scene and to store the vehicle in a location that would have helped preserve blood stains for future testing. In denying Greenwold's challenge to the loss of this evidence, the court emphasized there was no claim the lost evidence was "apparently exculpatory" in that investigating officers knew the blood stains would have exonerated Greenwold. Rather, the blood samples were only "potentially useful," and

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[2] Years later, DNA testing confirmed Youngblood had been wrongly convicted. Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 ***Washington University Law Review***, p. 243-244, 276-277 (2008).

therefore, to establish a due process violation Greenwold was required to show the officers acted in bad faith. The court noted the "presence or absence of bad faith" "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." ***Greenwold***, at 885-886. The court concluded:

> Because the exculpatory value of the blood samples was not apparent, the blood samples were only "potentially useful" evidence. Therefore, Greenwold must demonstrate bad faith on the part of the officers to establish a due process violation.

***Greenwold***, at 885-886. The governing due process test was more recently summarized as follows:

> "A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory."

***State v. Huggett***, 2010 WI App 69, ¶11, 324 Wis. 2d 786, 793, 783 N.W.2d 675, *quoting* ***State v. Greenwold***, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994).

By its very nature the exculpatory value of a blood sample will rarely be apparent upon visual examination, but rather, its evidentiary value can only be ascertained through further testing. When, as here, a blood sample is destroyed, the defendant is foreclosed from determining whether the destroyed evidence was exculpatory. Correspondingly, as critics of a mechanistic application of ***Youngblood*** point out, when this type of physical evidence is destroyed the defendant is also effectively precluded from ever satisfying the second prong of the due process test by demonstrating officials acted in bad faith. Norman C. Bay, "*Old Blood, Bad*

*Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*," 86 **Washington University Law Review**, p. 279, 291 (2008)("The one constant, however, has been that bad faith is almost impossible to prove."); Cynthia Jones, "*The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*," 77 **Fordham Law Review** 2893, No. 6, p. 2903 (2009)("The ***Youngblood*** bad faith requirement has posed a virtually insurmountable burden on defendants seeking to demonstrate that the government's destruction of evidence violated due process.").

Given the irreparable damage that results from the destruction of a potentially exculpatory blood sample, when, as here, the state has already initiated formal charges, the state should not permit (at least in the absence of some compelling necessity) the destruction of said blood sample without first giving actual notice to the defense and/or securing approval from the trial court.[3] Particularly in this unique situation, where the defendant may be unaware he even had the restricted substance in his system, the state had a duty to preserve Luedtke's blood sample until he received actual notice of the restricted substance charge and had an opportunity to seek independent testing. Absent such notice, an uncharged individual in Luedtke's position would have no reason to anticipate the need to seek an independent test.

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[3] This was not a situation where the failure to provide Luedtke with actual notice of the blood test results was attributable to his own flight or a knowing failure to respond to court notices. Arguably, a defendant may forfeit the right to require the State to preserve a blood sample if he flees the jurisdiction. For instance, in ***Illinois v. Fisher***, 540 U.S. 544, 545 (2004), the accused, after being charged and released on bond, was a fugitive for over ten years.

It has long been recognized that the balance of interests between the government and accused shifts when a case transitions from the investigation stage to the filing of charges. In order to safeguard the integrity of the fact-finding process, once formal charges are filed some forms of prosecutorial conduct are no longer permitted. ***See***, ***United States v. Wade***, 388 U.S. 218 (1967)(prohibiting post-indictment lineups in the absence of counsel); ***Massiah v. United States***, 377 U.S. 201 (1964)(prohibiting government efforts to elicit post-indictment statements from the accused once the sixth amendment right to counsel has attached). In declining to extend the ***Wade-Gilbert*** counsel requirement to identification procedures conducted prior to the initiation of formal charges, the Supreme Court pointed to this line between pre and post-charging investigatory procedures.

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

***Kirby v. Illinois***, 406 U.S. 682, 689-690 (1972).

The Wisconsin Supreme Court addressed this due process balance between the interests of the state and the accused in ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. In ***Dubose***, the Court, seeking to reduce the risk of misidentification resulting from suggestive show-up

procedures, concluded the Wisconsin Constitution prohibited the use of show-ups once the defendant is under arrest. As the Court observed, under such circumstances swift police action is no longer necessary and the potential risk of misidentification resulting from a show-up is unjustified. Therefore, under such circumstances officials must safeguard the integrity of the fact-finding process by employing a line-up, photo-array, or some other less suggestive identification procedure. The Court concluded the due process clause of the Wisconsin Constitution, Article I, Section 8, provided greater protection than is required under the Fourteenth Amendment of the United States Constitution. ***Dubose***, 285 Wis. 2d at 172-174.

Application of the principle of "necessity" recognized in ***Dubose*** is similarly warranted in this case. After the filing of formal charges Luedtke's blood sample was destroyed without notice to the defense. Consistent with the necessity principle in ***Dubose***, the post-charging failure to preserve Luedtke's blood sample until he received notice of the drug test results or the restricted substance charge constituted "bad faith." Unlike the circumstances in ***Youngblood*** and ***Greenwold***, the state affirmatively destroyed, not simply neglected to adequately preserve, potentially exculpatory evidence.[4]

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4 The state cannot escape responsibility for the destruction of the blood sample because it was destroyed by the hygiene lab, not the prosecutor's office. In addressing the state's duty to disclose exculpatory information, courts recognize that prosecutors and other law enforcement entities are part of the same government team so that a prosecutor's duty to disclose extends to information possessed by other law enforcement agencies. See, ***Strickler v. Greene***, 527 U.S. 263, 280-281 (1999); ***State v. DeLao***, 202 WI 49, ¶¶21, 24 252 Wis. 2d 289, 301-303, 643

Not surprisingly, a number of states have declined to adopt the ***Youngblood*** "bad faith" analysis on state constitutional due process grounds. *See,* Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 **Washington University Law Review**, p. 246-247, n. 17, 275, 278-279, 287-288 (2008)(Listing ten states that have rejected the ***Youngblood*** bad faith analysis on state constitutional grounds); Cynthia Jones, "*The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*," 77 **Fordham Law Review** 2893, no. 6, p. 2903-2904, n. 56 (2009) (Listing nine states that have rejected the ***Youngblood*** bad faith analysis on state constitutional grounds); ***Illinois v. Fisher***, 540 U.S. 544, 549, n.* (Stevens, J., concurring). Once formal charges have been filed and the adversarial positions of the state and defense have solidified, the ***Youngblood*** test is inadequate to safeguard a defendant's opportunity to secure access to potentially exculpatory evidence.

C. A restricted substance charge presents unique concerns distinguishable from the typical OWI prosecution.

Luedtke recognizes that our Supreme Court has previously rejected due process challenges to the state's failure to preserve blood samples for independent defense testing. ***State v. Disch***, 119 Wis. 2d 461, 351 N.W.2d 492 (1984); ***State v. Ehlen***, 119 Wis. 2d 451, 351 N.W.2d 503 (1983). ***Disch*** and ***Ehlen***, however, were decided long before the Supreme Court's subsequent decision in ***Dubose***,

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N.W.2d 480; ***Wold v. State***, 57 Wis. 2d 344, 349, 204 N.W.2d 482 (1973).

clarifying that the Wisconsin Constitution provides greater due process protection than the federal constitution.

More importantly, unlike the present case, both ***Disch*** and ***Ehlen*** arose from the more typical situation where the defendant was charged with an operating offense involving the consumption of alcohol. In both cases the defendant had reason to know the seized sample would be tested for alcohol. In both cases the defendant also knew, or had reason to know, that a second test could be requested if the defendant believed no alcohol would be detected or believed his/her alcohol consumption was within a lawful range.

Unlike the tests at issue in ***Disch*** and ***Ehlen***, which focused on the presence of alcohol, a general screening test for the presence of a restricted controlled substance is really in the nature of a fishing expedition. Any substance ultimately detected may not have been specifically suspected by the testing entity and may have been unknowingly ingested by the driver. A driver who, at the time of arrest, has either not ingested or has unwittingly ingested a restricted substance, will have no reason to request a second test to refute the subsequent detection of a substance he has no notice might be at issue. In ***Disch*** and ***Ehlen***, on the other hand, the Court implicitly assumed the defendants were aware of the specific focus of the testing on alcohol use.

In this case, unlike ***Disch*** and ***Ehlen***, Luedtke had no reason to seek an independent blood test to refute the presence of cocaine in his system until he was subsequently informed the presence of cocaine was an issue. Luedtke testified he did not use cocaine. He asked his lawyer to seek a second blood test because he believed the reported test results could not be correct. (102:179-181, 183-184). Unfortunately,

by that time, the blood sample was already destroyed and a second test was no longer possible.

D. If the destruction of Luedtke's blood sample does not require dismissal or suppression, the case should be remanded for a new trial wherein a lost evidence instruction is submitted.

The remedy to be applied when the state impermissibly destroys potentially exculpatory evidence is unclear. In ***State v. Huggett***, 2010 WI App 69, ¶¶25-28, 324 Wis. 2d 786, 793, 783 N.W.2d 675, the court, citing ***State v. Hahn***, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986), suggests that at least in the absence of bad faith the trial court has discretion to select the appropriate sanction including dismissal. In ***Huggett,*** the state proposed an instructional remedy to mitigate the impact of the lost evidence. ***Id.***, at 800, ¶26. The court ultimately upheld the trial court's order of dismissing the homicide charge with prejudice. ***Id***., at 801-802, ¶¶27-28.

In this case, trial counsel's motion sought suppression of the drug test results. Consistent with ***Huggett*** and ***Hahn***, perhaps this case should be remanded for a determination of the appropriate remedy for the post-charging destruction of Luedtke's blood sample. As the state argued in ***Huggett,*** in some circumstances the remedy of dismissal with prejudice may be unduly harsh. Consistent with the state's proposal in ***Huggett***, Luedtke alternatively proposes that this case be remanded for a new trial wherein Luedtke would be entitled to an instruction similar to that submitted in ***Arizona v. Youngblood***, 488 U.S. 51 (1988), advising jurors they could infer the destroyed evidence would have been favorable to the defense.

In ***Youngblood***, the government's failure to refrigerate the sexual assault victim's clothing prevented application of identification testing procedures available at that time. At trial, however, Youngblood was at least able to mitigate the prejudice resulting from the loss of this potentially exculpatory evidence by securing an instruction authorizing jurors to draw an adverse inference from the fact this evidence had been lost. The jury was told:

> If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest

***Arizona v. Youngblood***, 488 U.S. at 54, 59-60.

E. Alternatively, Luedtke was denied effective counsel or a new trial should be ordered in the interests of justice.

If Luedtke forfeited the right to pursue the due process claim presented herein or to challenge the absence of a ***Youngblood*** lost evidence instruction, because trial counsel did not raise these claims with sufficient particularity, Luedtke was denied his right to effective counsel. The defense obviously believed the destruction of Luedtke's blood sample was important. The defense brought a motion to suppress based on the state's failure to preserve this evidence. Under the circumstances, it is difficult to imagine the failure to invoke ***Dubose*** or pursue other available legal grounds to secure dismissal, suppression, or a ***Youngblood*** instruction was the product of a deliberate trial strategy.

Rejecting Luedtke's postconviction challenge to the destruction of the blood sample on the merits, the trial court concluded it was unnecessary to conduct a ***Machner*** hearing

to hear trial counsel's testimony on these issues. If this Court agrees the post-charging destruction of the blood sample violated due process but trial counsel failed to adequately preserve the issue for review, the case should be remanded for a ***Machner*** hearing. Alternatively, a new trial should be ordered in the interests of justice because the admission of the drug test results without the mitigating balance of a ***Youngblood*** instruction prevented the real controversy from being fully tried.

## CONCLUSION

For the reasons set forth above Luedtke respectfully requests that the judgment and order entered below be reversed and the case remanded for a new trial and a determination of the appropriate remedy for the destruction of evidence, or for a ***Machner*** hearing.

Dated this 6th day of November, 2013.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,388 words.

## 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 6th day of November, 2013.

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# CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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