STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP1737-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. LUEDTKE,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF AND A JUDGMENT OF CONVICTION ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE KAREN L. SEIFERT, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent State of Wisconsin ("State") does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF FACTS

Defendant-Appellant Michael R. Luedtke's ("Luedtke") statement of facts is sufficient to frame the issues for review. The State will include any additional relevant facts in the argument section of this brief.

ARGUMENT

I. LUEDTKE FAILS TO MEET HIS BURDEN TO PROVE THAT WIS. STAT. § 346.63(1)(AM) VIOLATES DUE PROCESS.

A. Introduction.

Luedtke claims that Wis. Stat. § 346.63(1)(am) violates due process unless it is read to include a requirement that he knowingly ingested the controlled substance found in his blood. Luedtke's Brief at 12. Luedtke's due process claim is whether fundamental fairness requires the applicable statute to be read to require the person to knowingly ingest the controlled substance. The circuit court denied Luedtke's motion concluding that there was no due process violation (105:17-18). This court should affirm that conclusion. Luedtke fails to meet his burden.

B. Standard of Review.

Whether state action constitutes a violation of due process is a question of law that this court decides independently from the circuit court but benefitting from its analysis. *State v. Neumann*, 2013 WI 58, ¶ 32, 348 Wis. 2d 455, 832 N.W.2d 560. This court presumes that statutes are constitutional. *State v. Baron*, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34 (citing *State v. Zarnke*, 224 Wis. 2d 116, 124, 589 N.W.2d 370 (1999)). The person challenging a statute's constitutionality must show it is unconstitutional beyond a reasonable doubt. *Id.* This court sustains a constitutional challenge against a statute "if there is 'any reasonable basis' for the statute."

State v. Radke, 2003 WI 7, ¶ 12, 259 Wis. 2d 13, 657 N.W.2d 66. "That reasonable basis need not be expressly stated by the legislature; if the court can conceive of facts on which the legislation could reasonably be based, it must uphold the legislation as constitutional." *Id.*

C. The Legislature Intended to Create a Strict Liability Statute.

1. Legal Principles.

Strict liability crimes are known at law. *State v. Jadowski*, 2004 WI 68, ¶ 44, 272 Wis. 2d 418, 680 N.W.2d 810. "In general, when strict liability is imposed, the actor is deemed to have had sufficient notice concerning the risk of penal sanction inherent in the proscribed activity that it is not unjust to impose criminal liability without the necessity of proving moral culpability." *Id.*

A person "should not be convicted of a crime if he had no reason to believe that the act he committed was a crime or that it was wrongful." *Id.* ¶ 43. At common law, intent was required. *Id.* "The absence of a mens rea requirement in a criminal statute is a significant departure from longstanding principles of criminal law." *Id.* However, that does not mean this court should read a requirement of intent into all statutes. *Id.* ¶ 44.

When the legislature omits the words "knowingly," "fraudulently," "willfully," "with intent to" from a statute it may indicate that fault is not a necessary ingredient. Wayne R. LaFave, *Strict Liability*, 1 Subst. Crim. L. § 5.5 (2d ed. 2013). A number of factors help this court decide whether the legislature meant to impose liability without fault or whether it really meant to require fault but failed to do so clearly. *Jadowski*, 272 Wis. 2d 418, ¶¶ 21-30. The factors include: (1) the legislative history, (2) other related statutes, (3) the difficulty prosecutors would have proving the mental state for the type of crime, (4) the

seriousness of the harm to the public, and (5) the severity of the punishment. *Id.*

2. Wisconsin Stat. § 346.63(1)(am) is a Strict Liability Crime.

Luedtke challenges whether driving with a detectable amount of a restricted controlled substance is a strict liability crime. Luedtke's Brief at 15-19. Luedtke argues that this court should construe Wis. Stat. § 346.63(1)(am) to include an element of intent. Luedtke's Brief at 15-19. Based on the statute, the legislative history, related statutes, ease of prosecution, seriousness of the harm, and the severity of the punishment, this court should find that Wis. Stat. § 346.63(1)(am) does not include a requirement that the State prove the defendant knowingly ingested the controlled substance.

Luedtke looks to statutes criminalizing bribery, operating after revocation, and sexual exploitation of a child for support for his argument that Wis. Stat. § 346.63(1)(am) requires proof of intent. Luedtke's Brief at 15-16.[1] While in each case Luedtke cites the court read an intent element into the statute that was not in the plain language, those cases involve different crimes in different statutes and passed by different legislatures. When examining the statute outlawing driving with a controlled substance in ones blood, the opposite result is required. There is no specific intent required to convict someone of driving with a controlled substance in his blood.

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[1]Luedtke relies in part on *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991). Luedtke's Brief at 16. In *Petrone*, the court examined whether scienter was required to prove the defendant committed the crime of sexual exploitation of a child. 161 Wis. 2d at 550. The court accepted the parties' stipulation, and did not decide whether the legislature intended the statute to include the element of scienter or whether the court would read the element into the statute. *Id.* at 552. *Petrone* does not offer guidance on whether Wis. Stat. § 346.63(1)(am) requires knowledge of ingestion.

First, the plain language of the statute omits any requirement that the person know they have a restricted controlled substance in his or her blood. The statute states, "No person may drive or operate a motor vehicle while . . . [t]he person has a detectable amount of a restricted controlled substance in his or her blood." Wis. Stat. § 346.63(1)(am) (2007-08).[2] Wisconsin Stat. § 346.63(1)(am) is a strict liability crime.

Second, the legislative history shows the legislature intended to create a strict liability crime. The legislature created the provision in 2003 Wisconsin Act 97. The Legislative Council wrote a memo that stated the intent was to remove the requirement that someone was "under the influence" of the controlled substance and "evidence of a detectable amount is sufficient" under the new subsection. Don Dyke, *Wisconsin Legislative Council Act Memo: 2003 Wisconsin Act 97*, Operating Vehicle or Going Armed with a Detectable Amount of a Restricted Controlled Substance, Dec. 16, 2003[3] (R-Ap. 101-02). The legislature did not create a requirement that the person know they would have a restricted controlled substance in their blood.

This case is distinguishable from *State v. Alfonsi*, 33 Wis. 2d 469, 147 N.W.2d 550 (1967). In that case, the court examined whether Wis. Stat. § 946.10(2) (1965) required the State to prove that someone had an "evil or corrupt motive" to commit the crime of bribery. *Id.* at 476. The court based its decision on the language of the statute and its legislative background. *Id.* Both are different in this case.

Third, other statutory subsections in Wis. Stat. § 346.63 do not require the state to show the person knowingly ingested alcohol or a restricted controlled

[2]All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Found at http://docs.legis.wi.gov/document/lcactmemos/2003/reg/ab458.pdf (last accessed Dec. 20, 2013).

substance. Under Wis. Stat. § 346.63(1)(a), the state is required to prove that the defendant operated a vehicle and that the defendant was under the influence of an intoxicant or controlled substance.[4] *See* Wis. JI-Criminal 2663 (2006); Wis. JI-Criminal 2664 (2004). Under Wis. Stat. § 346.63(1)(b), the state is required to prove that the defendant operated a vehicle and that the defendant had a prohibited alcohol concentration at the time the defendant operated the vehicle. *See* Wis. JI-Criminal 2669 (2006).

Likewise, driving with any alcohol concentration before you attain the legal drinking age is punishable regardless of whether the person knowingly ingested alcohol. Wis. Stat. § 346.63(2m). Also, driving a commercial vehicle with any alcohol concentration is punishable regardless of whether the person knowingly ingested alcohol. Wis. Stat. § 346.63(7)(a)1.

Luedtke argues that 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." Luedtke's Brief at 22. However, the crimes of driving with a prohibited alcohol concentration, driving with any alcohol concentration underage, and driving a commercial vehicle with any alcohol concentration do not require intoxication. *See* Wis. Stat. § 346.63(1)(b), (2m), and (7)(a)1. Neither does Wis. Stat. § 346.63(1)(am). Luedtke's argument fails.

Luedtke distinguishes the crime of driving with a prohibited alcohol concentration as setting a threshold concentration required for liability unlike driving with a controlled substance in your blood. Luedtke's Brief at 23. However, Luedtke does not address Wis. Stat. § 346.63(2m) and (7)(a)1, each set the threshold at "any

[4]The United States Supreme Court found that drunken driving laws impose strict liability, meaning they criminalize conduct when the offender had no criminal intent. *See Begay v. United States*, 553 U.S. 137, 145 (2008).

alcohol concentration." Wisconsin Stat. § 346.63(1)(am) likewise does not set a threshold concentration required for liability.

Luedtke also claims that a person cannot unwittingly consume alcohol. Luedtke's Brief at 23. This court should reject this claim outright. A person could have a drink with a small amount of alcohol and not know that it contained alcohol. If that person had a requirement to drive with no alcohol concentration, they would be in the same position as a person who unknowingly consumed a controlled substance. Both situations are statutorily allowed under the scheme passed by the legislature.

The state does not have to prove knowing consumption of the intoxicant or controlled substance in any subsection of Wis. Stat. § 346.63. The legislature added (1)(am) in 2003 because "[i]t is often difficult to prove that a person who has used a restricted controlled substance was 'under the influence' of that substance. Dyke, *Wisconsin Legislative Council Act Memo: 2003 Wisconsin Act 97* at 1 (R-Ap. 101). The legislature intended to make it easier for the state to convict someone with controlled substances in their system by eliminating the requirement of intoxication. To require the state to prove an additional element, the knowing consumption of the drug, would be counter to the stated legislative intent.

Fourth, if the statute required the state to prove that a defendant knowingly ingested a restricted controlled substance, the statute would place a greater burden on the state. The legislative history shows that the legislature did not intend to make it harder for the state to meet its burden. This also weighs in favor of the legislature's intention not to include a requirement that the person intentionally consumed the controlled substance.

Fifth, the penalty weighs in favor of this court construing the statute as a strict liability statute. The penalty for the first offense of driving with a detectable

amount of a restricted controlled substance is the same as driving while intoxicated. Wis. Stat. § 346.65(2).

This case is unlike *State v. Collova*, 79 Wis. 2d 473, 255 N.W.2d 581 (1977). In *Collova*, the court inferred that a guilty mind was required because conviction of the charge lead to mandatory time in jail. *Id.* at 486. The court believed that the legislature would not have imposed such a severe penalty without some requirement of guilty knowledge as an element of the crime. *Id.* In this case, the penalty for the first offense is a civil forfeiture. Wis. Stat. § 346.65(2)(am)1. Only second and subsequent convictions involve potential jail time. Wis. Stat. §§ 346.65(2)(am)2. to 346.65(2)(am)7.

The facts of this case are also distinguishable from *State v. Griffin*, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998). In *Griffin*, this court concluded that presence of cocaine in a person's blood, without more, is insufficient to convict the person of possession of cocaine. 220 Wis. 2d at 380. The court found it was relevant to prior possession if other circumstantial evidence supported prior possession. *Id.* at 381. The penalties for possession are much higher than the penalties for drugged driving. A conviction for possession of cocaine is punishable with up to one year in jail for the first offense. Wis. Stat. § 961.41(3g)(c). A first offense of drugged driving is only a civil forfeiture. Wis. Stat. § 346.65(2)(am)1.

Finally, driving with a controlled substance in your blood causes serious risk to the public. Drugged driving is a serious threat to public safety. Less is known about drugged driving than about drunk driving, but studies show it is a very serious problem.

The Institute for Behavior and Health estimates that 20 percent of car crashes are caused by drugged driving. Tina Wescott Cafaro, *Slipping Through the Cracks: Why Can't We Stop Drugged Driving?*, 32 W. New Eng. L. Rev. 33, 35 (2010). "That translates into 8,600 deaths,

580,000 injuries, and $33 billion in property damage each year in the United States." *Id.* All "illicit drugs have the potential to impair the cognitive and behavioral skills that allow a person to engage in normal daily activities, such as driving and working." *Id.* The Center for Disease Control and Prevention estimates that drugs other than alcohol, specifically marijuana and cocaine, are involved in about 18 percent of motor vehicle driver deaths. Center for Disease Control and Prevention, *Impaired Driving: Get the Facts*, http://www.cdc.gov/Motorvehiclesafety/Impaired_Driving/impaired-drv_factsheet.html (last visited December 5, 2013).

The legislature's intention, to make it easier to obtain convictions for drivers with controlled substances in their blood, comports with the risk of drugged driving. The need to protect the public is great. This fact weighs in favor of interpreting Wis. Stat. § 346.63(1)(am) as an offense that does not require the state to prove that the defendant knowingly took the drugs found in his blood.

Luedtke argues that the "rule of lenity" should apply. Luedtke's Brief at 15. He wants this court to read the statute to place a higher burden on the state to prove the additional element that he knowingly ingested cocaine. Under the rule of lenity, this court will construe a criminal statute in favor of the accused "[w]hen there is doubt as to the meaning of a criminal statute." *State v. Quintana*, 2008 WI 33, ¶ 66, 308 Wis. 2d 615, 748 N.W.2d 447. In this case, there is no doubt to the meaning of Wis. Stat. § 346.63(1)(am). Therefore, the rule of lenity does not apply.

Based on all the above factors, the clear legislative intent was to allow the State to obtain convictions for drugged driving without having to prove intoxication. The legislature did not create Wis. Stat. § 346.63(1)(am) to include an additional element, not found elsewhere in the statute, to require the State to prove that the person knowingly took the drugs.

A defendant can raise the defense of accidental exposure at trial. However, there is no requirement that the State prove that Luedtke knew he took cocaine before he drove. The circuit court properly instructed the jury that there were two elements: that Luedtke drove and that he had a controlled substance in his blood at the time he drove.

D. Luedtke Fails to Meet His Burden to Prove His Due Process Rights Were Violated.

1. Legal Principles.

No person shall be deprived of "life, liberty, or property without due process of law." U.S. Const. amend. XIV; *see also* Wis. Const. art. I, § 1. The Due Process Clause contains "a substantive component that bars certain arbitrary, wrongful government actions." *Radke*, 259 Wis. 2d 13, ¶ 12. "Substantive due process forbids a government from exercising 'power without any reasonable justification in the service of a legitimate governmental objective.'" *Id.* (quoted source omitted).

Substantive due process is a constitutional limitation on the boundaries of police power. Wayne R. LaFave, *Substantive due process*, 1 Subst. Crim. L. § 3.3 (2d ed. 2013). Examples of situations that create potential for violations of substantive due process are: (1) a statute that threatens a freedom or right protected by the bill of rights, (2) legislation bearing no substantial relationship to injury to the public, (3) a statute covering harmless conduct, and (4) a statute creating strict liability crimes. *Id.*

This court examines "whether the statute is a reasonable and rational means to the legislative end." *State v. Smet*, 2005 WI App 263, ¶ 11, 288 Wis. 2d 525, 709 N.W.2d 474. The statute "that prohibits operation of a motor vehicle while having a detectable amount of a restricted controlled substance in one's blood bears a

reasonable and rational relationship to the purpose or objective of the statute." *Id.* ¶ 20.

2. Luedtke's Due Process Rights Were Not Violated.

Luedtke argues that the statute's failure to include a requirement that a defendant knowingly ingest the controlled substance violates his substantive due process rights. Luedtke's Brief at 19-24. The statute without that requirement is reasonably and rationally related to the legislative purpose of the statute. It does not violate due process. This court should affirm the circuit court's conclusion that the statute survives constitutional scrutiny.

As a threshold matter, Luedtke implies that he accidentally ingested cocaine and therefore, the statute is unconstitutional as applied to him. He cites to his own testimony that he does not ever do cocaine (102:183-84). He argues that a person might "unknowingly ingest a restricted substance." Luedtke's Brief at 17. He does not directly argue in his brief that he unwittingly took cocaine, but implies that he did. Luedtke fails to allege sufficient facts to support this implication.

Luedtke knowingly ingested cocaine. Luedtke tried to hide syringes and a spoon in a nearby sewer (102:63-65, 73-74). Officer Joseph Framke found three syringes in Luedtke's car, a brown-colored prescription bottle with no label with some powder residue and a metal spoon (102:65-66, 74). Luedtke's right hand had fresh puncture marks consistent with a needle injection (102:110).

This was not a case where Luedtke only had cocaine in his blood. He also possessed drug paraphernalia for injecting cocaine. He had marks consistent with needle injection. He had a bottle with powder residue. Luedtke intentionally took cocaine prior to operating his vehicle. The low amount in his blood is

likely due to the amount of time that had passed since he last injected cocaine, not due to accidental ingestion.

The sources Luedtke relies upon the proposition that cocaine is in our environment are likewise insufficient to prove that a due process violation occurs when the jury is not required to find that a defendant knowingly ingested a controlled substance. *See* Luedtke's Brief at 17-18. Luedtke says research reveals that "citizens may unknowingly encounter cocaine in their daily environment." Luedtke's Brief at 17. Luedtke fails to draw any connection to this unknowing exposure and cocaine ending up in the blood of a person. There is no reason to believe that unknowing exposure to cocaine results in cocaine being found in one's blood.

Luedtke cites to newspaper articles about money having cocaine on it. *Id.* at 17. Luedtke does not even claim let alone offer evidence to support the conclusion that cocaine can end up in your blood simply from handling money. This court should not draw the conclusion that it can.

Luedtke also cites articles that cocaine can be found in lakes in the United Kingdom and Minnesota. Luedtke's Brief at 18. This information is also irrelevant. Luedtke does not allege that cocaine in lake water can end up in a person's bloodstream. He does not allege he had contact with cocaine from lake water. He does not offer any scientific support for the conclusion he wants this court to draw. This court should reject this information as irrelevant and refuse to find that a person can accidentally ingest cocaine simply from cocaine being present in our physical environment.

The facts of this case do not show accidental ingestion. Luedtke intentionally took cocaine. There is no due process violation when the jury convicted Luedtke of operating with a detectable amount of a controlled substance under these facts. Luedtke's claim fails.

Even, if this court concludes that accidental ingestion can happen and if this court concludes that Luedtke accidentally ingested cocaine, it should refuse to find a due process violation. Wisconsin Stat. § 346.63(1)(am) is a reasonable and rational means to the legislative intent to protect the public from the danger of having drugged drivers on our highways. *See Smet*, 288 Wis. 2d 525, ¶ 11. The degree to which a person who is actually innocent is likely to come within the reach of the statute is small. *See* LaFave, *Substantive Due Process*, 1 Subst. Crim. L. § 3.3.

As discussed in section I.C. of this brief, drugged driving creates a serious threat to public safety. The legislature added (1)(am) in 2003 because "[i]t is often difficult to prove that a person who has used a restricted controlled substance was 'under the influence' of that substance." Dyke, *Wisconsin Legislative Council Act Memo: 2003 Wisconsin Act 97* at 1 (R-Ap. 101). The legislative intent by the amendment was to make it easier for the state to convict someone with controlled substances in their system by eliminating the requirement of intoxication. The legislature did not intend to create an additional element that the state is not required to prove when it attempts to convict someone of intoxicated driving.

Additionally, scientific evidence shows a relationship between unquantified presence of illicit drugs and impairment. Mark F. Lewis and Betty J. Buchan, *The Drugged Driver and the Need for a Per Se Law*, 72-AUG Fla. B.J. 32, 35 (Jul./Aug. 1998). The legislature employed reasonable and rational means to meet its intended purpose. The statute does not violate due process.

Luedtke attempts to distinguish *Smet*. In *Smet*, this court explicitly refused to address the situation where someone accidentally ingested a controlled substance for lack of standing. 288 Wis. 2d 525. However, the holding of that case applies to these facts because the same

reasoning applies. The legislature's action was reasonably and rationally related to its means.

In *Smet*, this court examined whether Wis. Stat. § 346.63(1)(am) violated substantive due process. 288 Wis. 2d 525, ¶ 3. This court examined specifically whether the statute violated due process by failing to require a fact finder to conclude that the driver was intoxicated. *Id.* ¶ 12. This court found that by placing the violation in Wis. Stat. § 346.63(1), the legislature made a determination that public safety is per se endangered when a person drives a motor vehicle while having a specified concentration of a controlled substance in the blood. *Id.* ¶ 13. This court found it reasonable to punish every person with a detectable amount of controlled substance in their blood regardless of whether that person was impaired at the time they drove. *Id.* ¶ 16.

This court held that the legislature reasonably and rationally could have concluded that "proscribed substances range widely in purity and potency and thus may be unpredictable in their duration and effect." *Smet*, 288 Wis. 2d 525, ¶ 17. The court also held that because no reliable measure of illicit drug impairment exists, the more prudent course was to ban any measure in the driver's system. *Id.* Finally, the legislature could have concluded that "absolute sobriety" is reasonably and rationally related to public safety. *Id.*

In *Smet*, this court was "satisfied that prohibiting operation of a motor vehicle while having a detectable amount of a restricted controlled substance in one's blood bears a reasonable and rational relationship to the purpose or objective of the statute, and that the statute is not fundamentally unfair." 288 Wis. 2d 525, ¶ 20. This court saw "no due process violation." *Id.* Nothing in the facts of Luedtke's case requires a different conclusion. This court should affirm its holding in *Smet* and conclude that Wis. Stat. § 346.63(1)(am) does not violate due process.

Not only has this crime survived a due process challenge in Wisconsin, but it has in other states as well.

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Schall v. Martin, 467 U.S. 253, 268 (1984) (internal quotation marks and quoted sources omitted).

Wisconsin is not alone in creating a per se law. In 2007, sixteen states had per se driving while under the influence of drugs laws. Charles R. Cordova, Jr., *DWI and Drugs: A Look at Per Se Laws for Marijuana*, 7 Nev. L.J. 570, 571 (Spring 2007). Wisconsin is not alone in concluding that its per se law does not violate due process.

In *Pennsylvania v. Etchison*, 916 A.2d 1169, ¶ 8 (Pa. Super. Ct. 2007), the Pennsylvania Superior Court examined a statute that criminalized driving with any amount of a controlled substance in one's blood. That court upheld a per se law and concluded it did not violate due process. *Id.* ¶ 10.

In *Shepler v. Indiana*, 758 N.E.2d 966, 970-71 (Ind. Ct. App. 2001), the Indiana Court of Appeals reached the same conclusion about a similar law. The court found a rational basis for the law because there is no accepted toxicological agreement as to the amount of marijuana or cocaine necessary to cause impairment. *Id.* at 970.

> The legislative decision to prohibit those with any level of controlled substances in their body from driving cannot be said to be without a rational basis. The legislature did not act arbitrarily in deciding that any person who operates a vehicle with any level of a controlled substance in their body is endangering others and should be subject to criminal charges.

Id.; *see also Florida v. Adkins*, 96 So. 3d 412, 422 (Fla. 2012) (finding a statute that did not require the state to prove that the defendant knew a substance was illicit to convict the person of selling, manufacturing, or delivery, or possession with intent to sell, manufacture, or deliver a controlled substance did not violate due process).

The legislature had a reasonable and rational basis for concluding that any amount of a controlled substance caused a driver to be impaired and therefore created criminal liability. This court should affirm its holding in *Smet* and conclude that Wis. Stat. § 346.63(1)(am) does not violate due process.

E. Luedtke's Attorney Did Not Provide Ineffective Assistance for Failing to Object on Constitutional Grounds.

1. Standard of review.

If the postconviction motion is deficient, the circuit court has the discretion to deny it without an evidentiary hearing because it fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is entitled to no relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief is a question this court reviews independent of the circuit court. *Id.* at 310; *see State v. Allen*, 2004 WI 106, ¶¶ 9, 12, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief, the circuit court decision to deny an evidentiary hearing will be subject to deferential appellate review. *Bentley*, 201 Wis. 2d at 310-11.

2. Legal principles.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." *Allen*, 274 Wis. 2d 568, ¶ 14 (citations omitted). The motion must allege facts that allow the reviewing court to meaningfully assess the defendant's claim. *Id.* ¶ 21. The facts must be material to the issue presented. *Id.* ¶ 22. In this case, Graham claimed his attorney provided ineffective assistance of counsel. A sufficient postconviction motion alleges the "five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Id*. ¶ 23.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. To demonstrate prejudice, the defendant must show that there is: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see Love*, 284 Wis. 2d 111, ¶ 30.

3. The circuit court properly denied Luedtke's motion without a hearing.

In his postconviction motion, Luedtke alleged that his attorney provided ineffective assistance for failing to object to the statute on due process grounds prior to trial (78:7-8). Luedtke's claim must fail. As discussed above, the statute does not require proof that Luedtke knowingly ingested the controlled substance and does not violate due process. Therefore, Luedtke's attorney could not have provided ineffective assistance for failing to object to it on those grounds. *See State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583 (counsel does not render deficient performance for failing to bring a motion that would have been denied.).

F. This Court Should Not Grant A New Trial In The Interest of Justice.

1. Legal principles.

This court has both inherent and statutory power to review waived errors. *See State v. Bannister*, 2007 WI 86, ¶ 40, 302 Wis. 2d 158, 734 N.W.2d 892 (citing *Vollmer v. Luety*, 156 Wis. 2d 1, 11-12, 456 N.W.2d 797 (1990)). This court is allowed discretionary reversal power:

> if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Wis. Stat. § 752.35.

This court may exercise its discretion when either the real controversy has not been tried or it is probable that there has been a miscarriage of justice. *Bannister*, 302 Wis. 2d 158, ¶ 40. In this case, Luedtke contends that the real controversy was not tried. Luedtke Brief at 31.

This court only exercises its power of discretionary reversal in exceptional cases. *Bannister*, 302 Wis. 2d 158, ¶ 42. The long-established general rule is that an appellate court does not review an error unless it has been properly preserved. *Id.* (citing *Cappon v. O'Day*, 165 Wis. 486, 490, 162 N.W. 655 (1917)). Some of the reasons for the general rule are that it gives attorneys an incentive to diligently try the case at trial because of the threat of waiver. *Id.* It also emphasizes the need for objections, which brings an issue to the court's attention and allows it to correct errors. *Id.* When courts correct an error at trial, it reduces the need for appeals. *Id.* The general rule also preserves for the court of appeals the role of corrector of errors actually made by circuit courts, rather than addressing issues not even raised in the circuit court. *Id.*

2. The real controversy has been tried.

Luedtke argues that alleged error regarding the scienter element kept the real controversy from being tried. Luedtke's Brief at 27. Luedtke's argument fails for the reasons articulated above. Whether Luedtke knowingly ingested the controlled substance was not an element of the crime. Therefore, no error occurred. This court should refuse to take the exceptional measure of granting a new trial in the interest of justice. Justice was not miscarried in this case. Luedtke should not receive a new trial.

II. THE CIRCUIT COURT PROPERLY DENIED LUEDTKE'S MOTION TO SUPPRESS EVIDENCE ABOUT THE RESULTS OF A TEST OF HIS BLOOD.

A. Introduction.

Luedtke moved to suppress the evidence of the test results from the sample of his blood (23:1). He asserts that because the blood sample was destroyed it could not be admitted because he could not conduct an independent drug test (23:1-2). The circuit court held a hearing on the motion (94), and denied the motion (26).

At the hearing, the State stipulated that the blood sample was destroyed, but asserted that it was not done in bad faith (94:3-4). It said the blood sample was destroyed based on the hygiene laboratory procedures (94:4). The circuit court found that Luedtke could have an expert look at the raw data from the sample and methodology (94:17-18). The court noted that Luedtke can tell the jury the sample was destroyed before he could test it (94:19). Therefore, the court denied the motion to suppress (94:20).

On appeal, Luedtke argues that his due process rights were violated when the potentially exculpatory evidence was destroyed, and the State was allowed to present the evidence at trial. Luedtke's Brief at 30-39. The circuit court properly denied Luedtke's motion. This court should affirm that decision.

Luedtke has not shown that the destruction of the blood sample violated due process because he has not shown that the blood sample was "apparently exculpatory," or that the State acted in bad faith. Luedtke's right to due process was not violated because he had the opportunity to have another blood sample taken and additional tests performed, and because the ruling fashioned by the circuit court afforded him the

opportunity to challenge the test results on cross-examination at trial and to tell the jury that the blood sample was destroyed.

B. Standard of Review.

Whether state action constitutes a violation of due process is a question of law that this court decides independently from the circuit court but benefitting from its analysis. *Neumann*, 348 Wis. 2d 455, ¶ 32.

C. Legal Principles.

In 1988, the United States Supreme Court held that the due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the state to preserve exculpatory evidence. *Arizona v. Youngblood*, 488 U.S. 51 (1988); *see also State v. Greenwold*, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994).

The court of appeals explained in *Greenwold* that:

> *Youngblood* "hold[s] 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." *Id.* 488 U.S. at 58, 109 S.Ct. at 337. *Youngblood* distinguished "potentially useful" evidence from "exculpatory" evidence. It observed that the due process clause makes the good or bad faith of the State irrelevant when the State fails to disclose material exculpatory evidence. *Id.* at 57-58, 109 S.Ct. at 337. "But we think the Due Process Clause requires a different result when we deal with the failure of the State 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, 109 S.Ct. at 337. Therefore, unless the evidence was apparently exculpatory, or unless the officers acted in bad faith, no due process violation resulted.

Greenwold, 181 Wis. 2d at 885.

In *Greenwold*, the defendant was involved in a one-car accident in which the other person in the vehicle died. *Id.* at 882. *Greenwold* was charged with OWI and homicide by intoxicated operation of a motor vehicle. *Id.* He asserted that he was a passenger, and the deceased person was the driver. *Id.* at 883-84. The vehicle had blood spots on the interior, but the state did not collect samples. *Id.* at 883. Five months later, blood samples were collected. *Id.* However the vehicle had been stored in a manner that could have had a detrimental effect on the samples, and other people had touched fabric from which the samples were drawn. *Id.* As a result, blood tests were inconsistent, and did not indicate a particular blood type. *Id.*

The defendant moved to dismiss. *Id.* The circuit court granted the motion, relying on *State v. Hahn*, 132 Wis. 2d 351, 392 N.W.2d 464 (Ct. App. 1986), concluding that the state failed to preserve potentially exculpatory evidence. *Id.* at 883-84. The state appealed, and this court reversed. *Id.* at 884. This court concluded that under *Youngblood*, the blood samples were not "apparently exculpatory" evidence, but rather "potentially useful" evidence. *Id.* at 885-86. The court noted that, like in *Youngblood* '"this evidence was simply an avenue of investigation that might have led in any number of directions.'" *Id.* at 885 (quoting *Youngblood*, 488 U.S. at 56 n.*). This court remanded to the circuit court to determine whether the defendant could establish bad faith on the part of police. *Id.* at 886.

On remand, the circuit court found bad faith. *State v. Greenwold*, 189 Wis. 2d 59, 63, 525 N.W.2d 294 (1994). The court of appeals reversed. *Id.* It noted that under *Youngblood:*

> 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.

Id. at 67-68 (citing *Youngblood*, 488 U.S. at 57-58). The court explained that "if the State fails to disclose or preserve materially exculpatory evidence, the defendant's due process rights are violated under the first prong of the test." *Id.* at 68 (citing *Youngblood*, 488 U.S. at 57). It further explained that:

> under *Youngblood* and the cases interpreting its standard, the second prong requiring bad faith can only be shown if: (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence.

Id. at 69 (citation omitted).

Failure to preserve material evidence can violate due process. *State v. Ehlen*, 119 Wis. 2d 451, 455, 351 N.W.2d 503 (1984). However, the evidence destroyed must be material evidence. *Id.* The other due process protections at trial protect a defendant when non-material evidence is destroyed. *State v. Disch*, 119 Wis. 2d 461, 463, 351 N.W.2d 492 (1984). The defendant has the right to confront and cross-examine all persons regarding the blood sample and to confront the person who conducted the blood test. *Id.*

In *Disch*, the court noted that because the defendant's blood was drawn pursuant to the implied consent law, she also had the right to another test at the state's expense, and "the suspect, at his or her own expense, may demand that the test be administered by any qualified person, which we construe as meaning any qualified person selected by the suspect." *Disch*, 119 Wis. 2d at 470.

The supreme court further noted that:

> In addition to having another test furnished upon request at state expense as a due process safeguard, the defendant may challenge the test results on the basis of the lack of the authentication

> of a test sample, *i.e.*, the chain of custody. If a test is not proved to be the test performed on the sample that came from the defendant's person, it can be suppressed. This is an unlikely turn of events, but the weight and credence to be given to the results can be tested by various components of due process: Was the test conducted in the manner directed by statute, *e.g.*, were the proper admonitions and options afforded; was the defendant under arrest; was a citation served upon him; was the procedure utilized in taking the test appropriate to accepted medical and scientific standards; was the test performed within the time period allowed by statute; was the person who performed the test a qualified person as required by the statutes; was the person who performed the test analysis qualified under the statute and did he or she have the necessary qualifications as an expert to testify with credibility. Other due process inquiries can explore such questions as: What is the experience of the operator who drew the blood and the analyst who reached a conclusion in respect to the BAC; what was the nature of the test or analysis itself; was the machine (usually a gas chromotograph testing device) properly tested and balanced before and during the analysis; and was it an approved type of testing device.

Id. at 471-72 (footnote omitted).

The supreme court concluded that "[i]n each case, the correctness of the result is ultimately dependent upon the training, skill, and attention to the analysis given by the operator. This is best revealed by the utilization of that great engine for the truth-cross-examination. Thus, can it best be determined whether due process is afforded." *Id.* at 472. The supreme court also concluded that even if there were an issue with due process, the blood test results would be admissible under Wis. Stat. §§ 343.305(7) (1979-80) and 885.235(1) (1979-80). *Id.*

In *Ehlen*, the defendant was charged with causing death by negligent operation of a motor vehicle while under the influence of an intoxicant. *Ehlen*, 119 Wis. 2d at 453. A blood sample was taken pursuant to the implied

consent law. *Id.* A test revealed a blood alcohol concentration of .233. *Id.* The sample was destroyed two to seven days after the test. *Id.* at 453-54. The defendant moved for discovery, or to suppress the blood test results. *Id.* at 454. The circuit court suppressed the test results, concluding that the blood sample was material evidence. *Id.* at 455. The court of appeals reversed, concluding that the blood sample was not material evidence. *Id.*

The supreme court affirmed, concluding that the blood test results were admissible, and that the destruction of the blood sample did not violate the defendant's right to due process. The court concluded that:

> All of these assertions of the state's witnesses may be again subject to scrutiny at trial. All the mechanisms of due process or fair trial, cross-examination, production and confrontation of witnesses, credibility, and the offer of counter-evidence can then come into play. It is error to so minimize these great tools of the common law as to conclude due process will be violated if a blood test is not suppressed merely because a portion of the sample-even if it were retestable-could not be produced for further tests.

Id. at 456-57. The court also noted that the defendant had additional due process, under the implied consent law, because she had "the right to demand and to receive an additional or alternate type of an alcohol test." *Id.* at 457.

The court explained that:

> due process is afforded, not only by the statutory right to have access to test reports prior to trial, but, more important, the statutes afford a defendant the right to an additional blood test at the time of arrest. Most important, however, the defendant is afforded the whole panoply of due-process protections at trial: The right to cross-examine witnesses and experts for the state, the right to impeach by use of

> the separate blood or breath analysis results, and the right to attack the credibility of the state's witnesses.

Id. at 452-53.

The supreme court added that "[t]he importance of the production of the original breath ampoule or a portion of the blood sample as the *sine qua non* of due process is a myth that should not be perpetuated." *Id.* at 453. The supreme court decision in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, that the court may interpret the State Constitution to afford greater protection than the United States Constitution did not overrule *Disch* or *Ehlen*. Both cases remain good law.

D. Luedtke's Due Process Rights Were Not Violated Because He Has Shown Neither Bad Faith by Police, Nor That the Blood Sample Was "Apparently Exculpatory."

Luedtke argues on appeal that the State violated his due process rights by its failure to preserve the blood sample. Luedtke's Brief at 29. He asserts that the State was required to preserve the blood sample until he had notice of the charges and an opportunity to retest the blood. *Id.*

Because Luedtke has not made and cannot make either a showing of bad faith or that the blood sample was "apparently exculpatory," he cannot show a due process violation. In fact, he does not make any attempt to explain why he believes his blood sample is "apparently exculpatory." Luedtke's due process rights were not violated.

Moreover, the blood test that showed a detectable amount of a controlled substance is, by statute, *prima facie* evidence that he had a detectable amount of a controlled substance in his blood. Wis. Stat. § 885.235(1k). There is no reason to believe that the test

was not performed correctly or that the result was not accurate. Defense counsel had an opportunity on cross-examination to cast doubt on the procedure and the results. At most, the blood sample was "potentially useful" rather than "apparently exculpatory" evidence.

Therefore, to show a due process violation because of the destruction of the evidence, Luedtke must show that the State acted in bad faith in failing to preserve the evidence. This requires him to show that "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." *Greenwold*, 189 Wis. 2d at 69 (citation omitted).

Luedtke fails to make such a showing. He has not even hinted that anyone associated with the State was aware that the blood sample, a test of which showed a detectable amount of a controlled substance, was potentially exculpatory. He has not even hinted that anyone associated with the State "acted with official animus or made a conscious effort to suppress exculpatory evidence." *See Greenwold*, 189 Wis. 2d at 69. Instead, the only evidence is that the hygiene lab disposed of the blood sample, under its policies, after it completed the test for controlled substances.

Luedtke claims that *Dubose* required a broader test than the test in *Youngblood*. Luedtke Brief at 29. *Dubose* does not help Luedtke. In *Dubose*, the supreme court noted that it retained the right to interpret the Wisconsin Constitution to provide greater protection than its federal counterpart. 285 Wis. 2d 143, ¶ 41. *Dubose* is a case about pretrial identification and not a case about failure to preserve evidence. The supreme court did not overrule *Greenwold* when it decided *Dubose*. In *Greenwold*, this court interpreted both due process clauses the same. 189 Wis. 2d at 71. It found that the Wisconsin Constitution does not afford greater protection. *Id.*

Dubose does not mandate a different interpretation of due process regarding destruction of evidence. The court indicated that the two due process provisions are not identical. *Dubose*, 285 Wis. 2d 143, ¶ 41. However, it did not mandate a stricter interpretation of the Wisconsin Constitution's due process provision. Instead, it simply noted it had the right to interpret the Wisconsin provision to provide greater protection and chose to do so in the area of pretrial identification. The decision did not mandate the interpretation of the Wisconsin Constitution to provide greater protection in all areas of due process.

Luedtke urges this court to abandon the "mechanistic application of *Youngblood*." Luedtke's Brief at 32. As support, he cites law review articles arguing that the bad faith test should be abandoned. This court should reject this argument. The *Greenwold*/*Youngblood* test remains. The evidence must be "apparently exculpatory" or the state must have acted in bad faith. *Greenwold*, 189 Wis. 2d at 67-68.

Luedtke also notes that a number of states have declined to adopt the *Youngblood* test on state constitutional grounds. Luedtke's Brief at 36. This court has gone a different route and explicitly adopted the *Youngblood* test. *See Greenwold*, 189 Wis. 2d at 69. This court must adhere to the principles in its *Greenwold* decision. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court has the power to overrule, modify or withdraw language from a published opinion of the court of appeals).

Luedtke has made no showing that by destroying the blood sample and failing to preserve it, the State violated his right to due process. He fails to prove it was "apparently exculpatory" or destroyed in bad faith. The circuit court order denying his motion to dismiss should therefore be affirmed.

E. Luedtke Failed to Show That the Blood Sample Was Material Evidence.

In addition, the "failure" to preserve the blood sample did not violate Luedtke's right to due process because he has not shown that the blood sample was material evidence at the time he sought to inspect it.

The supreme court addressed precisely this issue in *Disch*, 119 Wis. 2d 461, where the defendant was charged with homicide by intoxicated use a motor vehicle. *Id.* at 462. The defendant's blood was drawn pursuant to the implied consent law. *Id.* at 463, 470, 472. A blood test revealed that her blood alcohol concentration was .121. *Id.* at 464. The blood was then tested for controlled substances, and the test failed to reveal the presence of a controlled substance. *Id.* at 464-65.

Before trial, the remainder of the blood sample was turned over to the defense. *Id.* at 465. However, the quantity was insufficient for a test. *Id.* The defense moved to suppress the blood test on the ground that the state destroyed the blood sample depriving the defense of discovery. *Id.* The circuit court granted the motion to suppress evidence, concluding that the defendant's due process rights were violated. *Id.* at 465-66.

This court affirmed, concluding that the blood sample was material evidence, and that its destruction, which resulted in the defendant's inability to test it, violated the defendant's right to due process. *Id.* at 466-67.

The Wisconsin Supreme Court reversed. *Id.* at 462. The court first concluded that the defendant had not shown that the blood sample, which was six months old when the defendant sought to test it, was material evidence. *Id.* at 467-70. The court stated that:

> It cannot seriously be contended that the failure of the state to produce a six-month-old

> specimen of blood that was not in any way demonstrated to be material to the defendant's guilt or innocence deprived, or would deprive-since this is a pretrial suppression order-a defendant of a fair trial. Its production or nonproduction is irrelevant.

Id. at 470.

The supreme court noted that the defendant had not shown that the blood sample, which was material when it was initially drawn and tested, remained material or even testable six months later when the defendant sought it in discovery for testing purposes. *Id.* at 468.

In this case, Luedtke voluntarily gave the blood sample on April 27, 2009 (1:1-2). The report indicating the presence of cocaine and benzoylecgonine was dated November 18, 2009 (11). Luedtke moved to suppress the evidence on December 28, 2010 (23). Luedtke has not asserted, and has certainly not proved, that the blood sample would have been capable of retesting on December 28, 2010, 20 months after the blood was drawn. He therefore has not shown that the blood sample was material evidence. *See Disch*, 119 Wis. 2d at 468. Accordingly, the "failure" to preserve the blood sample did not violate Luedtke's right to due process.

F. Luedtke's Due Process Rights Were Not Violated Because He Had the Opportunity to Challenge the Test Results on Cross Examination at Trial and At Closing Argument.

The final reason that Luedtke has not shown a due process violation is that he had the opportunity to challenge the blood test on cross-examination at trial and at closing argument. These opportunities are sufficient to ensure due process even if the blood sample is later destroyed.

Wisconsin courts have made clear that when a blood sample is drawn under the implied consent law, and the sample is tested and then destroyed before the defendant can retest it, there is no due process violation. *Ehlen*, 119 Wis. 2d 451.

The State maintains that only real difference between the blood draws under the implied consent law in *Ehlen* and *Disch*, and the consensual blood draw in this case, is that in *Ehlen* and *Disch*, the defendants were informed of their right to an additional test at state expense. Luedtke, just like the defendants in *Ehlen* and *Disch*, had the opportunity to have additional tests by a qualified person of his choice, at his own expense.

In *Ehlen* and *Disch*, the supreme court concluded that the defendants were not denied due process when their blood samples were destroyed and were not available for retesting, because they had an opportunity for an additional test, and had the opportunity to challenge the test results on cross-examination.

In *Disch* and *Ehlen*, the defendants moved to suppress blood test results because the blood samples were destroyed before the defense could retest the samples. In *Disch*, the court explained in a footnote that its decision concerned blood tests for alcohol, rather than those for controlled substances. It stated:

> Because of the fact that the legislature has directed that the various blood test results are to be admissible and the blood samples *per se* will not be introduced as evidence at trial, it is clear that the production of blood samples for inspection for the purpose of testing for alcohol at the request of a defendant is not a due process requirement for admission. We have, however, no occasion in the present review to explore whether or not secs. 971.23(4) and (5), Stats., are inapplicable where there is a demand to produce for analysis other types of substances which will not be physically produced by the prosecution as evidence at trial, but in respect to which evidence of their nature or composition (*e.g.*, controlled substances),

> will be offered in evidence and there is no express statutory direction that the test results are admissible. We do not in this case intend to foreshadow or predict the holding of this court in the event such question were presented.

Disch, 119 Wis. 2d at 478 n.6.

The court's reasoning was that blood tests results for alcohol were admissible *per se*. Under the then-applicable version of Wis. Stat. § 885.235, "Chemical tests for intoxication," "evidence of the amount of alcohol in such person's blood at the time in question as shown by chemical analysis of a sample of his breath, blood or urine is admissible on the issue of whether he was under the influence of an intoxicant if such sample was taken within 2 hours after the event to be proved." Wis. Stat. § 885.235(1) (1979-80). The statute had no similar admissibility provision for controlled substances.

The current version of Wis. Stat. § 885.235 provides that chemical evidence of a detectable amount of a controlled substance in a person's blood is *prima facie* evidence. It provides that:

> In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

Wis. Stat. § 885.235(1k). The jury instructions committee has concluded that "the statement 'the court shall treat the analysis as prima facie evidence' strongly implies that the analysis is admissible." Wis. JI-Criminal 1266 (2011) at 6. The issue of admissibility in a given case concerns only whether the analysis is relevant to the issue of

whether the person had a detectable amount of controlled substance in his or her blood. *Id.*

In this case, there is no dispute that evidence of the blood test for controlled substances was relevant to proving whether Luedtke had a detectable amount of a controlled substance in his blood. The blood test results were admissible. The circuit court correctly denied his motion to suppress the results of the blood test, and correctly allowed the State to admit evidence.

As the supreme court stated in *Ehlen*, due process is not violated when a blood sample is destroyed before the defendant has an opportunity to retest it because "the defendant is afforded the whole panoply of due-process protections at trial: The right to cross-examine witness and expert for the state, the right to impeach by use of the separate blood or breath analysis results, and the right to attack the credibility of the state's witnesses." *Ehlen*, 119 Wis. 2d at 453.

Here, Luedtke's defense counsel cross-examined the witnesses and experts for the state, and challenged the tests and the results. Luedtke cross examined Thomas Neuser about the sample. Neuser told the jury that the samples are retained for six months (102:145). Neuser said he does not contact the submitting agency to ask if the sample can be discarded before discarding it (102:145). The submitting agency can ask that the sample be kept longer than the six month period (102:146).

Luedtke's defense counsel also argued at closing that the destruction of the blood test results were unreliable. He questioned the testimony that in 29 years the lab had never had a false positive test (102:218). He found that plainly impossible that an error would not have occurred at least once because only God is perfect (102:218). He noted that Luedtke never had a chance to test the blood because it was thrown out before he was charged (102:218). He felt that lack of second test was to

his detriment (102:219). Luedtke's attorney described the blood test as "just one opinion" (102:219).

Luedtke asserts that *Disch* and *Ehlen* do not apply to this case, because his blood test showed presence of a controlled substance and not alcohol. Luedtke's Brief at 36-37. The due process implications of testing for alcohol and controlled substances are the same. There is no reason to create different standards for alcohol and controlled substances.

Luedtke asserts that he is entitled to a new trial where the court would be required to give the lost evidence jury instruction. Luedtke's Brief at 38. In *State v. Huggett*, 2010 WI App 69, ¶ 26, 324 Wis. 2d 786, 783 N.W.2d 675, the state suggested that the court should have instructed the jury to accept the truthfulness and characterizations of the evidence the state failed to preserve. This court rejected that remedy concluding that the circuit court properly exercised its discretion. *Id.* ¶ 28.

Huggett does not offer guidance to the facts of this case. In *Huggett*, the state sought cell phone records and voice mail messages in response to the defendant's self defense claim. 324 Wis. 2d 786, ¶¶ 6-8. The state failed to preserve those messages and turn them over in discovery. *Id.* ¶ 9. In that case, the state conceded that the evidence was exculpatory or apparently exculpatory. *Id.* ¶ 14. This court applied the *Greenwold* test and concluded that the circuit court properly exercised its discretion in dismissing the case with prejudice. *Id.* ¶ 28. This court should refuse Luedtke's invitation to order a new trial. The blood was not apparently exculpatory.

In this case, Luedtke had even more protections that those found sufficient in *Ehlen*, because the circuit court allowed defense counsel to question the State's witness about the destruction of the blood sample and to argue to the jury about the unfairness of the destruction of the sample before trial and before he received notice of the charge. Luedtke failed to show the evidence was

"apparently exculpatory" or show bad faith. Luedtke failed to show the blood was material evidence. Luedtke had the opportunity to and did cross-examine Neuser about the missing sample. He argued at closing that the destruction of the sample caused him detriment. Under these circumstances, Luedtke has not shown that his due process rights were violated.

G. Luedtke's Attorney Did Not Provide Ineffective Assistance and a New Trial Is Not Required in the Interest of Justice.

In his postconviction motion, Luedtke alleged in the alternative that his attorney provided ineffective assistance for failing to object with sufficient particularity prior to trial (78:15). Luedtke's claims must fail. As discussed above, the failure to preserve his blood sample did not violate due process. Therefore, Luedtke's attorney could not have provided ineffective assistance for failing to object to it on those grounds. *See Maloney*, 281 Wis. 2d 595, ¶ 37 (counsel does not render deficient performance for failing to bring a motion that would have been denied).

Likewise, Luedtke argues that the presentation of the blood test results without a limiting instruction prevented the real controversy from being tried. Luedtke's Brief at 40. Luedtke's argument fails for the reasons articulated above. Luedtke failed to show the evidence was "apparently exculpatory" or the police acted in bad faith. Therefore, no due process violation occurred. This court should refuse to take the exceptional measure of granting a new trial in the interest of justice. Justice was not miscarried in this case. Luedtke should not receive a new trial.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm the circuit court's order denying postconviction relief and Luedtke's judgment of conviction.

Dated this 20th day of December, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,358 words.

Dated this 20th day of December, 2013.

_____
Christine A. Remington
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 20th day of December, 2013.

_____
Christine A. Remington
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