RECEIVED
11-14-2014
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP001737-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. LUEDTKE,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals,
District II, Affirming the Judgment of Conviction
and Order Denying Postconviction Motion,
Entered in the Circuit Court, Winnebago County,
the Honorable Karen L. Seifert, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

DONALD T. LANG
Assistant State Public Defender
State Bar No. 01003242

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1638
langd@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. As construed by the courts below, does the absence of a *scienter* element in Wis. Stat. § 346.63(1)(am), which prohibits operation of a vehicle with a detectable amount of a restricted controlled substance in the blood, violate due process by authorizing the conviction of an otherwise unimpaired motorist who unknowingly ingests a restricted substance?

The trial court denied Luedtke's postconviction motion challenging the constitutionality of Wis. Stat. § 346.63(1)(am), and/or the absence of a *scienter* element in the instructions defining this offense. Rejecting Luedtke's substantive arguments, the court found it unnecessary to address his alternative ineffective counsel claim.

The Court of Appeals affirmed, concluding the absence of a *scienter* element did not violate due process. The court did not address whether this omission can be reconciled with ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), which held that a blood or urine test alone is insufficient to prove possession of cocaine because cocaine can be unwittingly ingested.

2. Consistent with ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, did the State's *post-charging* destruction of Luedtke's blood sample prior to Luedtke receiving actual notice of the restricted substance charge violate due process under the Wisconsin Constitution?

Concluding there was no bad faith, the trial court denied Luedtke's pretrial and postconviction motions challenging the destruction of his blood sample. The court

found it was unnecessary to address Luedtke's companion ineffective counsel claim.

The Court of Appeals affirmed, concluding it was bound by prior rulings adopting ***Arizona v. Youngblood***, 488 U.S. 51 (1988). The court did not mention Luedtke's state constitutional claim based on ***Dubose***.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are requested.

STATEMENT OF THE CASE

On the afternoon of April 27, 2009, Michael Luedtke was involved in a traffic accident in Oshkosh, wherein the Ford Escort he was driving rear ended a vehicle that stopped to make a left turn. (2:2). Nearly eight months later, on December 18, 2009, a complaint was filed charging Luedtke with felony counts of operating under the influence of an intoxicant contrary to Wis. Stat. § 346.63(1)(a), and operating with a detectable amount of a restricted controlled substance in his blood contrary to Wis. Stat. § 346.63(1)(am). (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). On January 12, 2011, Judge Karen L. Seifert declined to suppress the drug test results. (94:17-20).

On April 17, 2012, a jury found Luedtke guilty of operating with a detectable amount of a restricted controlled substance, cocaine or a metabolite of cocaine, in his blood. The jury found Luedtke not guilty of operating under the influence. (102:229-230). The court later imposed consecutive probation and jail time. (103:19).

On May 31, 2013, Luedtke filed a postconviction motion requesting dismissal or a new trial. (78). First, Luedtke alleged the restricted substance charge and/or the jury instructions defining this offense violated due process by imposing liability without regard to whether Luedtke knew he had ingested a restricted substance. Second, Luedtke alleged the State's post-charging destruction of his blood sample before he received notice of the restricted substance charge violated due process. Luedtke further argued that even if the destruction of his blood sample did not require dismissal, jurors should 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. Luedtke alternatively alleged that if these claims were waived Luedtke was either denied effective counsel or should be granted a new trial in the interests of justice. (Id).

Following briefs and argument, the trial court denied Luedtke's motion. (79; 80; 105:17-20). Rejecting Luedtke's substantive claims, the court concluded a ***Machner***[1] hearing was unnecessary to address the alternative ineffective counsel arguments. (79; 80; 105:3-4, 6-7). The Court of Appeals affirmed.

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

STATEMENT OF THE FACTS

Michael Luedtke was convicted of operating 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, the Ford Escort Luedtke was driving rear ended another vehicle. (102:58-60). The fifty-five year old Luedtke, who was doing work for the owner of the Escort, explained he looked down to pick up his ringing cell phone and when he looked back up the vehicle in front of him had stopped and was turning left. (102:164-168, 181, 190). Luedtke explained:

> 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).

Officer Joseph Framke testified Luedtke "identified himself as the operator of the Escort," and reported:

> "[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, 84, 181).

Luedtke testified his body slammed into the steering wheel and his head struck the visor. (102:166). He exited the

Escort to check on the other driver, but someone was already there. 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 indicated that when he spoke with Officer Framke he "was very panicked" and found it "hard to concentrate." (102:170). He declined medical attention because he didn't want to pay $500 for an ambulance. (102:171). He had trouble making clear decisions because he was hurt, was worried about the other driver, was concerned the Escort was destroyed, and knew his tools were in the Escort's trunk and was unsure how he would get them back. (102:170, 178-179).

During their initial contact Framke did not notice anything significant about Luedtke's speech or ability to walk. (102:61, 73, 74). Framke allowed Luedtke to retrieve items from the damaged Escort. (102:62, 73). Framke became suspicious when a nearby resident reported seeing Luedtke remove something from the Escort and put it in the sewer. (102:63-64, 65, 73-74). Officers 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. Luedtke explained: "I was panicked. I just thought this is illegal. I didn't know they were in there. I thought they were illegal." (102:168-169). He was unaware 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 concealed the needles because he "thought they were illegal" to possessand "didn't want no trouble." (102:177-179, 182-183, 188). He

did not look for more needles in the car, adding: "I knew I didn't do anything." (102:169, 178).

With Luedtke's permission, Framke searched Luedtke's person and found no "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; a syringe "underneath the passenger side on the passenger side front floorboard," two syringes and a prescription bottle with no label with some powder residue "underneath the driver's side on the driver's side floorboard area," and a metal spoon in the door pocket on the driver's side. (102:65-66, 74).

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

Luedtke testified he broke his back in a 1984 semi accident wherein three vertebrae in his neck were crushed. (102:163). He took methadone and diazepam in pill form. The methadone was for pain. He only took diazepam at night because it made him feel lethargic. (102:185).

Luedtke testified that on the day of the accident he had only taken a prescribed antidepressant. (102:163-164, 172). He took other medications the previous day including diazepam at 10:00 p.m. before going to bed. (102:164, 172). He last took methadone more than sixteen hours before the accident. (102:164, 173). Luedtke denied taking any medications by injection reaffirming he was unaware the syringes were in the Escort. (102:187).

Framke felt Luedtke inadequately performed field sobriety tests. (102:66-69). Framke could not recall whether he asked Luedtke if he had any physical problems that would interfere with his ability to perform these tests. (102:76, 81). Framke recalled Luedtke saying he hit the steering wheel and his chest hurt, but after being checked out by fire department personnel Luedtke 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 tried to tell the officer "I don't walk that way and I never have." Turning the legs like that "hurts my knees even worse." (102:171-172, 174-175, 185-186). Notwithstanding the "throbbing" in his chest, Luedtke performed the tests the best he could, believing he "was going to be vindicated." (102:175).

Based on Luedtke's performance on the field sobriety tests and the presence of drug paraphernalia, Framke concluded there was cause to believe Luedtke was 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, 183-184).

At the time of his arrest Luedtke did not think there was anything in his blood. He expected to pay a ticket for inattentive driving and the matter would be over. (102:79). His blood was drawn at 3:28 p.m. (102:87, 90). Luedtke was then assessed by Brett Robertson, an officer trained in drug recognition. (102:93, 96, 177). Detecting no odor of alcohol and observing no sign of HGN, Robertson did not believe Luedtke was under the influence of alcohol or some other

depressant. (102:96-97, 99-100). Luedtke was cooperative, coherent and able to follow directions. (102:97, 103).

With regard to the physical tests, Robertson reported Luedtke swayed while performing a balancing test yet accurately estimated the passage of thirty seconds. (102:101-103). Luedtke's feet pointed out on the heel to toe test, he swayed, raised his arms and put his foot down on the one leg stand, and was unable to touch the tip of his nose with his finger tip. (102:105-106, 107, 109, 125). Robertson didn't inquire whether Luedtke had any medical condition that might impede his performance of these tests. (102:125). On Luedtke's right hand near the thumb Robertson observed what appeared to be scabbed over puncture marks that were consistent with a needle injection. (102:110). Luedtke testified he was probably skinned up from work. (102:189).

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 were stimulants that would tend to counteract the narcotic medications. (102:116-118, 119-120). Luedtke's medications were within the therapeutic or normal range. (102:123). Chemist Thomas Neuser later noted Luedtke's methadone level of 24 nanograms was "quite small" as the detection limit is about 20 nanograms. (102:138-139).[2]

According to Neuser, 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. (102:133, 136, 151). Cocaine and the metabolite benzoylecgonine are restricted controlled substances. (102:134). The detection limit for cocaine is

[2] A nanogram is one billionth of a gram (1/1,000,000,000).

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).

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 expects the submitting agency will contact them if they want it saved longer. (102:145-146).

Luedtke assumed his blood test "came back good." He was first notified of the restricted substance charge nearly eleven months later on March 22, 2010. (102:179). He first saw the lab report at his initial appearance on May 25th. (102:179, 183). Luedtke asked his attorney to have the sample tested again because "I don't ever do cocaine." (102:179-180, 183-184). He later learned the sample could not be retested because it had been destroyed on February 4, 2010. (102:180-181).

ARGUMENT

This appeal presents related substantive and procedural problems. First, as a substantive matter, can an otherwise unimpaired motorist be punished for operating a vehicle with a detectable amount of a restricted controlled substance in his blood even when the substance was unknowingly ingested? In accordance with the ruling in ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), and the longstanding recognition that a *scienter* requirement is the rule rather than the exception in criminal prosecutions, Luedtke submits Wis. Stat. § 346.63(1)(am), must be construed to include a knowledge element. Indeed, due process forbids imposing criminal punishment based on facts the defendant did not, and could not know.

Second, as a procedural matter, since a prosecution for operating with a restricted substance in the blood substantially rests on the results of a blood test, does the Wisconsin Constitution restrict the State's *post-charging* authority to unilaterally destroy a suspect's blood sample without first giving notice to the accused or securing consent from a court? In accordance with ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, Luedtke submits that absent court approval, the State has a *post-charging* responsibility to refrain from destroying a driver's blood sample until after the driver receives actual notice of the restricted substance charge.

Traffic accidents occur every day. In most instances, accidents are the result of some momentary lapse in the driver's concentration. This case illustrates the dilemma such a driver may encounter when, months later, criminal charges are filed after a screening test detects a restricted substance in the driver's blood sample. How can a driver who insists he never ingested a detected substance demonstrate his innocence? If the blood sample has been destroyed, retesting is impossible. At the time of the accident, a driver who is unaware of having ingested a restricted substance will have no reason to request an independent blood test to establish the nonexistence of an unexpected substance. Furthermore, since months may pass before drug screening is even conducted, it will be impossible for the driver to meaningfully reconstruct his activities in the hours or days preceding the accident to try to determine when he could have unwittingly come into contact with the detected substance.

I. The Offense of Operating with a Detectable Amount of a Restricted Controlled Substance in the Blood Must Be Construed to Include a *Scienter* Element Requiring that the Driver Knowingly Ingested a Restricted Substance.

A. Introduction.

Luedtke was convicted of driving with a detectable amount of a restricted substance in his blood. Belated testing of the blood sample reportedly seized from Luedtke indicated 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). Luedtke, however, insisted "I don't ever do cocaine." (102:179-180, 183-184).

The jury was instructed that the restricted substance charge has two elements. First, "the defendant operated a motor vehicle on a highway." Second, "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 jury was never told that before it could return a guilty verdict it must find Luedtke *knowingly* ingested the restricted substance. Consequently, the jury was authorized to return a finding of guilt even if, as Luedtke claimed, he did not knowingly ingest cocaine. The prosecutor told jurors: "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 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).

Luedtke submits Wis. Stat. § 346.63(1)(am), must be construed to include a *scienter* element requiring that the driver knowingly ingested a restricted controlled substance. To authorize the prosecution of an otherwise unimpaired motorist who unknowingly ingests a restricted substance is problematic on several levels. First, it conflicts with the principle that *scienter* is the rule rather than the exception in our criminal jurisprudence and will be presumed even in the absence of an express statutory reference. Second, it conflicts with the recognition in ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998), that a blood or urine test, standing alone, is insufficient to prove possession of cocaine because cocaine can be unwittingly ingested. Third, imposing strict liability in this fashion conflicts with the due process principle that it is unfair to impose punishment based on facts the defendant is unable to know.

Luedtke's *scienter* claim is distinguishable from the arguments raised 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, which focused on the absence of an impairment requirement. Luedtke is not seeking to overturn ***Smet*** and ***Gardner***. Luedtke merely contends that § 346.63(1)(am), must be construed to include a threshold *scienter* element. In thid regard, it is worth clarifying what is **not** in dispute in this appeal.

First, Luedtke agrees that if a driver is actually impaired, the State is not required to prove either that the driver knew he was impaired or understood why he was

impaired. Individuals who elect to drive have a responsibility not to drive impaired.

Second, consistent with ***Gardner*** and ***Smet***, if a driver *knowingly* ingests a restricted substance, the State is not required to prove the driver was aware of the continued presence or level of the substance in his system. The legislature has determined that individuals should not drive after ingesting a restricted substance. Unlike the claims in ***Smet*** and ***Gardner***, however, a driver should not be punished based on facts he does not, and could not, know.

B. General rules applicable to the construction and application of Wis. Stat. § 346.63(1)(am).

The applicable version of Wis. Stat. § 346.63(1)(am), 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 is the plain language of the statute itself. ***Ziegler***, 342 Wis. 2d at 279, ¶42. However, in construing Wis. Stat. § 346.63(1)(am), some 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. Authorizing punishment of a driver who is neither impaired nor aware he has even ingested a restricted substance is an unreasonable result.

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 conditions 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 (Statutory interpretations that create constitutional infirmities should be avoided); ***State v. Post***, 197 Wis. 2d 279, 328-329, 541 N.W.2d 115 (1995) (Wis. Stat. § 980.09(2), construed to include a jury trial right not mentioned in the statute); ***State v. Petrone***, 161 Wis. 2d 530, 550-552, 468 N.W.2d 676 (1991) (The sexual exploitation statute construed to include a *scienter* element not mentioned in the statute). Authorizing the punishment of an otherwise unimpaired driver who

unknowingly 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 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). In this case the statute should be construed consistent with the general preference for a *scienter* requirement rather than imposing strict liability.

C. A *scienter* requirement is generally presumed even when not expressly included in the statute.

The statutory language of Wis. Stat. § 346.63(1)(am), does not include a *scienter* element. This omission does not, however, compel the conclusion that the statute may be applied without any *scienter* requirement. ***State v. Polashek***, 2002 WI 74, ¶28, 253 Wis. 2d 527, 543, 646 N.W.2d 330 ("[T]he mere fact that there is no mention of a mental state in the statute does not inevitably lead to that conclusion"). This point was made clear in ***Staples v. United States***, 511 U.S. 600 (1994), where a statute prohibiting possession of an unregistered machine-gun was construed to include a *scienter* element requiring that the defendant knew the weapon he possessed had the characteristics that brought it within the definition of a machine gun. The Court recognized the absence of a *mens rea* element in the statute was not dispositive, because "'[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" ***Id.*** at 605, *quoting*

United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978).

This Court has similarly recognized "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"). Consequently, on several occasions this Court has, notwithstanding the absence of a *scienter* requirement in the plain language of the particular statute, construed statutory offenses 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 defendant at least have cause to believe his license was 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. Consistent with ***Staples***, ***Alfonsi***, ***Collova,*** and ***Petrone***, Wis. Stat. § 346.63(1)(am), must be construed to include a knowledge element.

Citing ***State v. Jadowski***, 2004 WI 68, ¶44, 272 Wis. 2d 418, 680 N.W.2d 810, the court below notes that strict liability statutes are not unknown. ***Jadowski,*** however, also recognizes that dispensing with a *scienter* requirement may implicate due process concerns.

> It is a fundamental principle of law that an actor 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. An intent requirement was the general rule at common law. The absence of a mens rea requirement in a criminal statute is a significant departure from longstanding principles of criminal law.

Jadowski, at 438-439, ¶¶42-43 (footnotes omitted). ***Jadowski*** implicitly recognizes that strict liability is appropriate only if the accused has the opportunity to recognize his conduct is prohibited.

> In general, when strict liability is imposed, the actor is deemed to have sufficient notice concerning the risk of penal sanction inherent in the prescribed activity that it is not unjust to impose criminal liability without the necessity of proving moral culpability.

Id. at 439, ¶44.[3]

Plainly, due process does not forbid all strict liability offenses. 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 to know—is unlawful. ***See***, ***State v. Collova***, 79 Wis. 2d at 482-484

[3] In ***Jadowski***, this Court recognized that adults are well aware of the prohibition against engaging in sexual relations with underage individuals and are plainly on notice of their responsibility to steer clear of such conduct.

(Citing "regulatory criminal statutes" designed to address the needs of the "complex industrial state"); ***Staples v. United States***, 511 U.S. at 606-616 (Explaining that "public welfare offenses" "that regulate potentially harmful or injurious items" constitute "limited circumstances" in which dispensing with a *mens rea* element is tolerated, provided defendant has notice he is dealing with a dangerous item). Ultimately, whether a strict liability offense is permissible depends on whether the defendant can reasonably be expected to have knowledge of the facts that render his conduct unlawful.[4]

The typical OWI charge is appropriately a strict liability offense because individuals who elect to drive can reasonably be expected to monitor whether they are impaired. This case presents a much different issue. A driver who unknowingly ingests a small amount of a restricted substance cannot know he has engaged in prohibited conduct. The due process implications of imposing punishment based on facts a defendant does not and could not know are further addressed in Section F. below.

D. A knowledge requirement comports with the holding in ***Griffin***.

Construing Wis. Stat. § 346.63(1)(am), to include a knowledge element is also in accord with the reasoning of ***State v. Griffin***, 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998). ***Griffin*** held that a conviction for possessing cocaine could not be sustained based solely on chemical testing that detected cocaine and cocaine metabolite in defendant's urine.

[4] For instance, in ***Staples***, the Court observed that unlike a hand grenade, the suspect nature and potential dangerousness of which is reasonably apparent, a person would not necessarily know a semiautomatic AR-15 rifle would be subject to registration requirements.

Griffin noted that the great majority of courts that had considered the issue 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. Indeed, as several cases cited in ***Griffin*** specifically observe, the knowing possession of a controlled substance cannot be inferred beyond a reasonable doubt based solely on the results of a blood or urine test because these substances are capable of being unknowingly or unwittingly ingested. ***Id.***, at 380-381, n.2.[5]

Likewise, it is unreasonable to impose strict liability against a driver who may have unknowingly ingested a restricted substance hidden in some food or beverage, or unwittingly encountered in some other fashion. An increasing body of research reveals citizens may, in fact, 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-

[5] *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.3d 749, 631 N.E.2d 1244, 1248 (Ohio App. 4 Dist. 1993) (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).

article-1.401382 (Reporting 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. More recent studies indicate that cocaine may also be found in other parts of the environment. ***See***, Minneapolis StarTribune, "***Minnesota lakes contaminated with all kinds of chemicals***," (5/14/13), www.startribune.com/politics/statelocal/207214931.html (Reporting 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).

In most cases it will not be difficult to prove a driver knowingly ingested a detected substance. Often, the requisite knowledge can be inferred from defendant's contemporaneous possession of the substance. In some cases, knowing use of the restricted substance can be confirmed by another witness. In other instances, the defendant will have acknowledged using the drug. Even absent an admission, evidence of the driver's severe impairment and/or the high level of the substance in his blood will circumstantially demonstrate the substance must have been knowingly ingested. Ultimately, whether the defendant knowingly ingested the restricted substance should be a question of fact for the jury. The issue here is not whether the evidence, viewed in the light most favorable to the State, might have been legally sufficient to support a finding of knowing

ingestion, but whether Luedtke was entitled to have jurors consider his claim that he did not ingest cocaine.

The court below asserts that Luedtke "does not directly argue that he accidentally ingested cocaine." (Court of Appeals, p. 10, ¶19). This contention is both factually and substantively flawed. First, Luedtke specifically testified he did not use cocaine. (102:177, 179-180, 183-184). In other words, any cocaine detected in his system was necessarily unknowingly ingested. Second, the court's remarks appear to shift the burden of proof to the defense, imposing a burden a defendant could never meet. If a substance is unknowingly ingested, defendant will rarely be able to establish when and how this occurred, particularly when, as here, a year has passed before defendant receives notice of the charge.

E. The six ***Jadowski*** factors do not support the imposition of strict liability.

Citing ***Jadowski***, the court of appeals notes there are several factors that may be considered in ascertaining whether strict liability may be imposed, including "(1) the language of the statute, (2) legislative history, (3) related statutes, (4) law enforcement practicality, (5) protection of the public from harm, and (6) severity of the punishment." (Court of Appeals, p. 5, ¶8). Contrary to the court's conclusion, however, an examination of these factors does not support the imposition of strict liability against a driver who unknowingly ingested a restricted substance.

The language of the statute. Given the presumption favoring a *scienter* requirement, the mere absence of an express *scienter* requirement in the statute does not establish an intent to impose strict liability.

Legislative history. Contrary to the characterization of the court below, the Legislative Council memo does not demonstrate legislative intent to create a strict liability offense that extends to the unknowing ingestion of a trace amount of a restricted substance. (Court of Appeals, p. 6, ¶10). The memo merely confirms the legislature's intent to eliminate the need to prove a driver was "under the influence" of a restricted substance. Again, Luedtke is not contesting the absence of an impairment requirement. Luedtke agrees a person who *knowingly* ingests drugs and drives can be prosecuted under § 346.63(1)(am), regardless of whether he was impaired. In the absence of impairment, however, a driver must at least know he ingested a restricted substance. The State's interest in deterring drugged drivers is not advanced if the accused is not even aware he ingested a restricted drug.

Related statutes. The fact that a few other driving statutes also lack an express knowledge element provides no guidance in assessing whether § 346.63(1)(am), may be applied without a *scienter* element. (Court of Appeals, p. 6-7, ¶11). First, the propriety of omitting a *scienter* element from these other provisions is also unresolved. Second, "prohibited alcohol concentration" offenses are fundamentally different in that they generally require a minimum quantitative level of consumption that is unlikely to be unknowingly achieved. Rather than setting a threshold concentration level for liability, the restricted substance provision prohibits driving with just "a detectable amount" of the substance in the blood. Third, the underage drinking and driving statute, § 346.63(2m), and the commercial vehicle statute, § 346.63(7)(a), are easily distinguished in that neither provision carries a potential sanction of imprisonment. Rather, violation of these provisions merely permits a

suspension of driving privileges or a civil forfeiture. *See*, Wis. Stats. § 346.65(2q) & (2u).

The blood alcohol concentration provisions place responsibility on prospective drivers to monitor their alcohol consumption so they do not exceed the applicable level. The standard .08 alcohol level basically supplements the concomitant provision prohibiting operating under the influence. The legislature has determined a level of .08 or greater constitutes *prima facie* evidence of being under the influence. *See*, Wis. Stat. § 885.235(1g)(c); ***Wis. JI-Criminal***, 2663, p. 2 (2006). Individuals who have accumulated three or more OWI convictions have a greater responsibility to monitor their alcohol consumption so they do not drive with a blood alcohol level of .02 grams or more. Wis. Stat. § 340.01(46m)(c). A person is unlikely to exceed either of these quantitative thresholds through the unknowing ingestion of alcohol.

Law enforcement practicality. Again, the court of appeals' reliance on the Legislative Council Memo is misplaced; obscuring the distinction between an "under the influence" requirement and the *scienter* element of knowing ingestion.

Protection of the public from harm. While elimination of the "under the influence" requirement may facilitate the deterrence of drugged driving, this interest is not advanced by punishing an otherwise unimpaired motorist who is not even aware he ingested a restricted drug. If such a driver is actually impaired, he can be independently prosecuted for operating under the influence.

Severity of the punishment. Disregarding the fact Luedtke was convicted of a Class G felony, the court below notes that a first offense restricted substance charge is a civil

forfeiture. (Court of Appeals, p. 8, ¶14). The reality is, of course, that depending on the extent of the driver's prior record, a restricted substance conviction can lead to a substantial prison term. Regardless of what his prior record may be, a driver who unknowingly ingests a restricted substance should not be punished for conduct for which he is unaware.

Based on the instructions submitted to Luedtke's jury, the restricted substance charge was truly a strict liability offense. The prosecutor told jurors: "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 instructions authorized a finding of guilt even if Luedtke was, as he claimed, completely unaware he had ingested cocaine. To avoid this absurd result, § 346.63(1)(am), must be construed to include a knowledge element.

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

In the absence of actual impairment, a driver who has unwittingly ingested a small amount of a restricted controlled substance will not, indeed cannot, reasonably know he is engaging in prohibited conduct. If Wis. Stat. § 346.63(1)(am), is construed to authorize the punishment of anyone who drives with a detectable amount of a restricted substance in the blood without regard to whether this substance was unknowingly ingested, 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.

Due process limits the authority to impose punishment when the defendant could not know his conduct is prohibited. Thus, in ***Lambert v. California***, 355 U.S. 225, 229 (1957), an ordinance requiring felons to register was invalidated because it was improbable Lambert was aware of the obligation to register. In ***State v. Dinkins***, 2012 WI 24, ¶5, 63, 339 Wis. 2d 78, 82, 101, 810 N.W. 2d 787, this Court similarly concluded a homeless inmate could not be punished under the sex offender registration law when he was incapable of providing information as to where he would be living following his release.

As noted earlier, constitutional challenges to the restricted substance provision were previously rejected 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. Neither case, however, addressed the threshold concern that before criminal punishment may be imposed the defendant must at least know he ingested a restricted substance. Indeed, ***Gardner*** implicitly assumes the statute addresses the knowing use of illegal drugs

and driving. Rejecting Gardner's claim that the prosecution must prove 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 substance 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.

Again, Luedtke is not challenging the rulings in ***Smet*** and ***Gardner***. He merely contends the statute should not be construed to permit the punishment of a driver based on what he does not, and could not, know. The absence of a minimal *scienter* requirement violated due process. Correspondingly, the failure to submit a knowledge element to the jury violated Luedtke's right to a jury trial as well as the related due

process requirement that the State prove all of the elements of the charge beyond a reasonable doubt.

G. Alternatively, counsel's failure to challenge the statute or jury instructions deprived Luedtke of effective counsel.

Trial counsel's failure to challenge either the absence of a *scienter* element in the jury instructions or the constitutionality of Wis. Stat. § 346.63(1)(am), deprived Luedtke of effective counsel. Given Luedtke's insistence that he did not use cocaine, there can be no strategic justification for failing to challenge either the jury instructions or a statute that foreclosed consideration of whether Luedtke knowingly ingested the substance. Rejecting Luedtke's claims on the merits, the trial court found it unnecessary to address trial counsel's reasons for not pursuing these claims. (105:6-7).

To establish a denial of effective representation a defendant must demonstrate both that counsel's performance was deficient and counsel's omissions were prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 587, 665 N.W.2d 305; ***State v. Carter***, 2010 WI 40, ¶¶20-21, 324 Wis. 2d 640, 657-658, 782 N.W.2d 695. On review, a trial court's findings as to what happened are entitled to deference, while the ultimate determinations whether counsel's performance was deficient and prejudicial are questions of law subject to independent review. ***Thiel***, at 588, 589, ¶¶21, 23-24; ***Carter***, at 657, ¶19.

Strickland v. Washington, 466 U.S. 668, 689 (1984) teaches that review of counsel's performance must be deferential and should avoid second-guessing of strategic choices. ***Thiel***, at 588, ¶19; ***Carter***, at 659, ¶22. Such deference is unwarranted however when, rather than being strategic, counsel's omissions were simply an oversight. As

this Court explained 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." If this Court concludes Luedtke's challenges to the instructions or the statute were waived by the absence of a contemporaneous objection, the case should be remanded for a ***Machner*** hearing.

To satisfy the prejudice prong of ***Strickland***, there must be 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). As a result of counsel's omission, the jury was authorized to return a guilty verdict even if it believed Luedtke's testimony effectively claiming he did not knowingly ingest cocaine. The jury should have addressed this factual issue.

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

This Court has the authority to order a new trial in the interests of justice pursuant to Wis. Stat. § 751.06 when "the real controversy has not been fully tried." ***State v. Wyss***, 124 Wis. 2d 681, 741, 370 N.W.2d 745 (1985). This may occur when, as here, a deficient jury instruction precluded full consideration of the case. ***State v. Perkins***, 2001 WI 46, ¶12, 243 Wis. 141, 149, 626 N.W.2d 762 (A new trial may be ordered "when the instruction obfuscates the real issue or arguably causes the real controversy not to be fully tried."); ***State v. Thomas***, 161 Wis. 2d 616, 625-626, 468 N.W.2d 729 (Ct. App. 1991) (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."). Due to the incomplete instructions Luedtke's jury never addressed the requisite *scienter* element.

II. In Addition to Undercutting Discovery Rules, the State's Post-charging Destruction of Luedtke's Blood Sample Without First Providing Notice to Luedtke or Securing Approval From a Court Violated Luedtke's Right to Due Process Under the Wisconsin Constitution.

A. Introduction.

Luedtke moved to suppress the State Hygiene Laboratory's drug test results because the destruction of his blood sample foreclosed any opportunity for independent defense testing. (23). The blood sample was taken on April 27, 2009. (94:5; 102:90). The sample was tested for alcohol on May 1, 2009. (94:6). Over six months later, on November 18th, the sample was tested for drugs. (94:5). Traces of cocaine and cocaine metabolite were detected. The test results were forwarded to the prosecutor on December 2nd. (94:10).

The complaint charging Luedtke with operating with a restricted substance in his blood was filed on December 18, 2009. (2). A summons and complaint were mailed to Luedtke at the address listed on the traffic citations. (1; 94:5). By that time, however, Luedtke was in custody on an Outagamie County charge. (94:4, 10, 13). Consequently, Luedtke was unable to appear for the initial appearance originally scheduled for January 11, 2010. (4; 84; 94:5, 13). The case was adjourned until May 24, 2010. (85; 94:11).

Prior to that date Luedtke did not receive notice of the drug test results. (94:4-5, 9, 10, 16; 102:179, 183).

Meanwhile, on February 4, 2010, the State Hygiene Lab discarded Luedtke's blood sample. (25; 94:2-3, 6). The lab generally discards samples six months after they are received unless the submitting agency requests that the sample be preserved longer. (102:145-146). There was apparently no such request in this case.

The trial court denied Luedtke's suppression motion as there was no evidence destruction of his blood sample reflected a purposeful effort to withhold evidence. (94:19-20). The court noted Luedtke could dispute the tests at trial. (94:17-20).

Citing ***Arizona v. Youngblood***, 488 U.S. 51 (1988), and ***State v. Greenwold***, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994), the Court of Appeals affirmed. The court's reliance on ***Greenwold***, however, is misplaced, because ***Greenwold*** rests on the faulty premise that "the due process clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution." ***Greenwold***, 189 Wis. 2d at 71. In ***State v. Dubose***, 2005 WI 126, ¶¶40-41, 285 Wis. 2d 143, 173, 699 N.W.2d 582, this Court repudiated the notion that it is "required to interpret the Due Process Clause . . . of the Wisconsin Constitution in lock-step with the Federal Constitution." While the language of the two provisions "is somewhat similar," this Court may interpret the Wisconsin Constitution "to provide greater protection than its federal counterpart." ***Id.***

In accordance with ***Dubose***, Luedtke submits the State's *post-charging* responsibility not to destroy potentially exculpatory evidence under the Wisconsin Constitution is

broader than the ***Youngblood*** bad faith test. To safeguard the reliability of the fact-finding process, once formal charges are filed the State should be prohibited from destroying potentially exculpatory physical evidence without first providing notice to the defense and/or securing independent approval from a neutral magistrate. Indeed, such a requirement is necessary to meaningfully implement the discovery rights outlined in Wis. Stat. §§ 971.23(1)(g) & (5). Once Luedtke was charged it was evident his blood sample was central to the prosecution.[6]

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), relieving the state of the duty to preserve samples in the typical OWI prosecution should not be extended the unique circumstances of a restricted substance charge. Consistent with the principle of necessity addressed in ***Dubose***, the State's *post-charging* 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 such notice is received and the defendant has an opportunity to act thereon, the responsibility for preserving the blood sample may then shift to the defense. Luedtke was denied this opportunity.

[6] A defendant is no less prejudiced when his blood sample is destroyed prior to charging. The point here is that once charges are filed the State is on notice of the sample's materiality. When a drug test is negative there will be no restricted substance charge, and thus, no need to preserve the sample.

B. The State's post-charging responsibility not to destroy potentially exculpatory evidence in light of ***Dubose***.

Arizona v. Youngblood, 488 U.S. 51 (1988), addressed the due process standard to be applied when officials fail to preserve physical evidence for testing. Youngblood was charged with sexually assaulting a child. The sole issue at trial was the assailant's identity. Unfortunately, officials did not refrigerate the victim's clothing thereby precluding testing of seminal stains that might have exonerated Youngblood. 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 distinguished the government's failure to disclose "material exculpatory evidence" from those situations where it fails "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.

> 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.[7]

The ***Youngblood*** analysis was adopted in ***State v. Greenwold***, 181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App.

[7] 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).

1994), a case involving a vehicle accident wherein Greenwold disputed being the driver. Efforts to reconstruct the accident were compromised because the vehicle was not stored in a manner that preserved blood stains. The court denied Greenwold's challenge to the loss of this evidence, emphasizing there was no claim the lost evidence was "apparently exculpatory" in that officers knew the stains would have exonerated Greenwold. Rather, the stains were only "potentially useful," and therefore, to establish a due process violation Greenwold was required to show officers acted in bad faith. Furthermore, 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 resulting 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).

At issue here is the meaning of "bad faith" for due process purposes when, *after* charges have been filed, the State unilaterally destroys potentially exculpatory physical evidence without first providing notice to the defense or securing approval from a court. By its very nature the exculpatory value of a blood sample will rarely be apparent upon visual examination, but can only be ascertained through further testing. When, as here, a blood sample is destroyed, defendant is foreclosed from independently determining whether the sample was exculpatory. Correspondingly, as

critics of ***Youngblood*** point out, when this type of physical evidence is destroyed defendant is effectively precluded from 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.").

Not surprisingly, a number of states have declined to adopt the ***Youngblood*** "bad faith" analysis on state constitutional due process grounds. ***Old Blood, Bad Blood, and Youngblood, supra,*** pp. 246-247, n. 17, 275, 278-279, 287-288 (2008) (Listing ten states that have rejected ***Youngblood*** on state constitutional grounds); ***The Right Remedy for the Wrongly Convicted, supra,*** pp. 2903-2904, n. 56 (2009) (Listing nine states); ***Illinois v. Fisher***, 540 U.S. 544, 549, n.* (Stevens, J., concurring). Once charges are filed and the adversarial positions of the state and defense have solidified, the ***Youngblood*** test is inadequate to safeguard defendant's opportunity to access potentially exculpatory physical evidence.

Given the irreparable damage that results from the destruction of a blood sample, when, as here, the State has already initiated formal charges, it should not be permitted (at least absent some compelling necessity) to unilaterally destroy said sample without first giving actual notice to defendant and/or securing approval from a neutral

magistrate.[8] Particularly in this unique situation, where defendant may be completely unaware of the possible presence of a restricted substance in his system, the State should be required to preserve the blood sample until the defendant has an actual opportunity to seek independent testing. Absent such notice, an individual in Luedtke's position will have no reason to foresee the need for an independent drug test.

Permitting the post-charging destruction of defendant's blood sample without prior notice or judicial approval undermines discovery provisions designed to afford access to physical evidence, Wis. Stats. §§ 971.23(1)(g) & (5).[9] The

---

[8]Unlike ***Illinois v. Fisher***, 540 U.S. 544, 545 (2004), where the accused, after being charged and released on bond, was a fugitive for over ten years, Luedtke's inability to independently test the sample was not attributable to his own flight. Arguably, a defendant could forfeit the right to challenge the destruction of evidence by fleeing the jurisdiction.

[9] The discovery provisions set forth in Wis. Stats. §§ 971.23(1)(g) & (5), read:

> **(1) What a district attorney must disclose to a defendant.** Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> . . .
>
> (g) Any physical evidence that the district attorney intends to offer in evidence at the trial.
>
> . . .

authority to seek independent testing is hollow if the State can discard said evidence before this opportunity can be invoked.

The balance of interests between the government and accused shifts once a case transitions from an investigation to the filing of charges. To safeguard the integrity of the fact-finding process, once 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 efforts to elicit post-indictment statements from the accused once the 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 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.

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

> **(5) Scientific testing.** On motion of a party subject to s. 971.31(5), the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes.

The due process balance between the government and accused was addressed in ***Dubose***. Seeking to reduce the risk of misidentification resulting from the suggestive show-up procedure, this Court 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, once there is probable cause to arrest, officials must safeguard the integrity of the fact-finding process by employing a line-up, photo-array, or some other less suggestive procedure.

The principle of "necessity" recognized in ***Dubose*** is similarly implicated here. The State's *post-charging* destruction of Luedtke's blood sample before he received actual notice of the restricted substance charge constituted "bad faith." Unlike ***Youngblood*** and ***Greenwold***, the State affirmatively destroyed, not simply neglected to adequately preserve Luedtke's blood.[10]

Restricting the State's *post-charging* authority to unilaterally destroy potentially exculpatory evidence would similarly safeguard the fact-finding process. The independent

---

[10] The State cannot escape responsibility for the destruction of Luedtke's 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 N.W.2d 480; ***Wold v. State***, 57 Wis. 2d 344, 349, 204 N.W.2d 482 (1973).

scrutiny of a neutral magistrate would reduce the risk of exculpatory evidence being irretrievably lost due to the type of "confirmation bias" or "tunnel vision" that often contributes to wrongful convictions. Keith A. Findley and Michael S. Scott, ***The Multiple Dimensions of Tunnel Vision in Criminal Cases,*** 2006 Wis. L. Rev. 291, 292-295 (2006) (The susceptibility of investigators to focus on a suspect and select and filter evidence to "build a case" while ignoring evidence that points away from guilt). The State should not be the final arbiter of whether relevant physical evidence is preserved for independent examination. *See*, ***Johnson v. United States***, 333 U.S. 10, 13-14 (1948)(Explaining the warrant requirement assures that inferences are drawn by a neutral and detached magistrate rather than a partisan investigator).

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

Luedtke recognizes that in ***Disch*** and ***Ehlen*** this Court rejected due process challenges to the State's failure to preserve blood samples for independent testing. ***Disch*** and ***Ehlen*** were, however, decided long before ***Dubose***'s recognition that the due process clause of the Wisconsin Constitution provides greater protection than the federal constitution. ***Dubose***, 285 Wis. 2d at 173.

More importantly, unlike this case, both ***Disch*** and ***Ehlen*** involve the more typical OWI prosecution arising from the consumption of alcohol. In ***Disch*** and ***Ehlen*** the defendant had reason to know the seized sample would be tested for alcohol. In both cases defendant also knew, or had reason to know, that a second test could be requested if

defendant believed no alcohol would be detected or believed his/her alcohol consumption was within a lawful range.

Unlike the typical testing to measure the level of alcohol, a general screening test for traces of any restricted controlled substance is more in the nature of a fishing expedition. Any substance ultimately detected may not have been suspected by investigators 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 is unaware 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.

Luedtke had no reason to seek an independent drug test until he received notice of the charge advising him the presence of cocaine was an issue. Luedtke testified he did not use cocaine. He asked his lawyer to seek an independent blood test because he believed the test result could not be correct. (102:179-181, 183-184). By that time, however, the destruction of his blood sample precluded another test.

D. The destruction of evidence necessitates either dismissal, suppression or at least a new trial with a lost evidence instruction.

The remedy to be applied when the State impermissibly destroys potentially exculpatory evidence remains 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), suggested that at least in the absence of bad faith a trial court has discretion to select the appropriate sanction, including dismissal. The State proposed an instructional

remedy to mitigate the impact of the lost evidence. ***Id.***, at 800, ¶26. ***Huggett*** upheld the dismissal. ***Id***., at 801-802, ¶¶27-28.

Consistent with ***Huggett*** and ***Hahn***, perhaps this case should be remanded for a determination of the appropriate remedy for the destruction of Luedtke's blood sample. In ***Huggett***, the State suggested dismissal may be unduly harsh in some cases. Reflecting this view, courts have ordered a new trial wherein the defendant would be entitled to an instruction advising jurors they could infer the destroyed evidence would have been favorable to the defense. In ***Youngblood***, the jury received the following instruction:

> 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. *See*, ***Collins v. Commonwealth***, 951 S.W.2d 569, 573 (Ky. 1997) (noting "another factor of critical importance" was the missing evidence instruction).

In ***Cost v. State***, 10 A.3d 184 (Md. 2010), defendant's conviction was reversed because the court declined to give a similar missing evidence instruction. Even though the Maryland Constitution did not afford greater protection than ***Youngblood***, and the failure to preserve evidence was not attributable to bad faith, the court concluded Cost was entitled to a missing evidence instruction. Recognizing there is a greater willingness to depart from a rigid bad faith requirement when the remedy is a missing evidence instruction rather than dismissal, the court observed:

> In these cases we see an emerging consensus that a universal bad faith standard does not go far enough to adequately protect the rights of a person charged with a

> crime. The courts have seen the bad faith requirement as a potentially bottomless pit for a defendant's interest in a fair trial, and stepped back from the brink.

Cost, 10 A.3d at 194, 195. Thus, "[t]he emerging consensus among the states which have considered the issue" is "that to insure a fair trial, the missing evidence jury instruction in a criminal case should not be limited to the ***Youngblood*** bad faith standard." ***Id***., at 195. *See also*, ***People v. Handy***, 20 N.Y.3d 663, 988 N.E.2d 879, 882 (Ct. App. 2013) ("An adverse inference charge mitigates the harm done to defendant by the loss of evidence, without terminating the prosecution.").

In ***State v. Glissendorf***, 235 Ariz. 147, 329 P.3d 1049, 1052-1053 (2014), a child molesting conviction was similarly reversed due to the denial of an adverse-inference instruction. The court reaffirmed that even absent bad faith a defendant is entitled to this instruction when the state fails to preserve evidence that was "potentially helpful" or "could have had a tendency to exonerate." Furthermore, the threshold to secure a lost evidence instruction is appropriately lower than the bad faith standard because a jury instruction is a less severe remedy than dismissal or suppression. ***Id.,*** at 1053.

Luedtke's jury did not receive a lost evidence instruction. "Arguments by counsel cannot substitute for an instruction by the court. Arguments by counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law." ***State v. Perkins***, 2001 WI 46, ¶41, 243 Wis. 2d 141, 164, 626 N.W.2d 762. *See*, ***Carter v. Kentucky***, 450 U.S. 288, 304 (1981). ***Cost*** recognized that while counsel could address the missing evidence in argument, an instruction has "more force and effect" because it "carries with it the imprimatur of a judge learned in the law." ***Cost***, 10 A.3d at 196-197.

E. Alternatively, Luedtke was denied effective counsel or a new trial is warranted in the interests of justice.

If Luedtke's right to review was forfeited because trial counsel did not raise these claims with sufficient particularity, Luedtke was denied effective counsel. In filing a suppression motion counsel recognized the destruction of Luedtke's blood sample was important. There could have been no strategic reason not to invoke ***Dubose*** or request a ***Youngblood*** instruction. Rejecting Luedtke's arguments on the merits, the trial court found it unnecessary to examine counsel's strategy. Thus, the case should either be dismissed, remanded for a ***Machner*** hearing, or a new trial should be ordered in the interests of justice because the absence of a lost evidence instruction prevented the real controversy from being fully tried.

CONCLUSION

Luedtke respectfully requests that the judgment and order be reversed and the case remanded for a new trial, a determination of the appropriate remedy for the destruction of evidence, and/or a ***Machner*** hearing.

Dated this 14th day of November, 2014.

Respectfully submitted,

DONALD T. LANG
Assistant State Public Defender
State Bar No. 01003242

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1638
langd@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 10,965 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 14th day of November, 2014.

Signed:

DONALD T. LANG
Assistant State Public Defender
State Bar No. 01003242

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1638
langd@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

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.

Dated this 14th day of November, 2014.

Signed:

DONALD T. LANG
Assistant State Public Defender
State Bar No. 01003242

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1638
langd@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner