STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1737-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 AND ORDER ENTERED BY THE WINNEBAGO CIRCUIT COURT, THE HONORABLE KAREN L. SEIFERT PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

The Wisconsin Legislature created a statute that prohibits operating a vehicle while a driver has a restricted controlled substance in his blood. And Wisconsin precedent produced a settled body of law that decided that the routine destruction of a driver's blood sample does not deprive a

defendant of due process. But Michael R. Luedtke asks this Court to find the statute unconstitutional and he asks it to interpret the Wisconsin Constitution as providing greater due process protection to overturn his conviction for driving with cocaine and its metabolite in his blood when he caused a vehicular collision. Should this Court find the statute unconstitutional? And should this Court overrule precedent?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication.

STATEMENT OF THE CASE

This Court granted Michael R. Luedtke's petition for review on the two issues he presented in his petition. (Wis. S.Ct. Order (Oct. 15, 2014)). In Luedtke's petition, he framed one issue as a question whether the operating a motor vehicle with the restricted controlled substances statute requires an element of scienter (Pet. for Review). He framed the second issue as a question whether the Wisconsin Constitution provides greater due process

protection than the United States Constitution in the context of evidence preservation and destruction (*id.*).

This case began as an investigation into a vehicular collision that resulted in injury (R. 102:59). The collision occurred at approximately 2:07 p.m. on April 27, 2009 (R. 102:58-59,90). Luedtke caused the collision by rear-ending a vehicle in front of him, causing extensive damage to the other vehicle (R. 102:59). Luedtke admitted to causing the collision, alleging that he was distracted when he reached for his cellular phone (R. 102:61-62;165).

Law enforcement arrived to investigate. An eyewitness told an officer that he observed Luedtke, shortly after the collision, exit his vehicle with a blue item—what appeared to be a bag—which he stuffed down a sewer (R. 102:63-64). Detective Christopher Guiliani recovered a blue shirt in the sewer drain that contained six syringes and a metal spoon (R. 102:85). Officer Joseph Framke then spoke with Luedtke who explained that he took several prescription medications and occasionally used marijuana (R. 102:64-65). Luedtke consented to a search of his vehicle (R. 102:65).

Within the driver's area, Officer Framke found three syringes, an unlabeled prescription bottle that had powder residue, and a metal spoon (R. 102:65-66). Detective Brett Robertson observed signs of drug use in the form of fresh puncture marks in a one-inch area over a vein on Luedtke's right arm (R. 102:109-10). Luedtke admitted to injecting morphine, but did not want to say anything else (R. 102:66).

Luedtke performed a series of field sobriety tests. First, Officer Framke administered standard tests and concluded that Luedtke was impaired (R. 102:66-71). Second, Detective Robertson administered a 12-step drug recognition panel (R. 102:94). Based on the field panel, Detective Robertson believed that Luedtke was impaired (R. 102:118).

The parties agreed that a valid blood draw was taken at 3:28 p.m. on April 27, 2009 (R. 102:7,90). As part of the process, Detective Guiliani provided Luedtke with a notice (R. 102:87), regarding his opportunity to request an alternate test free of charge and his ability to have a test conducted by a qualified person of his choice.

Wis. Stat. § 343.305(4) (2007-08). Luedtke did not chose to take an alternate test (R. 105:18).

After the blood draw, Advanced Chemist Thomas Neuser at the Wisconsin State Laboratory of Hygiene analyzed the sample. The laboratory is accredited by the American Board of Forensic Toxicologist (R. 102:129). Neuser is a 29-year veteran at the laboratory with a bachelor of science degree in medical technology from the University of Wisconsin (R. 102:127-28). Luedtke's blood sample arrived at the laboratory on April 30, 2009 (R. 102:130). It underwent several levels of analysis before examination under a Gas Chromatography with Mass Selective Detection (R. 102:134-35,146). The analysis on the sample revealed the presence of many substances, including venlafaxine, methadone, and diazepam (R. 102:133-34). Luedtke's blood also contained cocaine and its metabolite benzoylecgonine (R. 102:133). It had a concentration of benzoylecgonine at 330 nanograms per milliter (R. 102:133). And Luedtke's blood contained cocaine at a rate between 10 to 20 nanograms per milliter (R. 102:133,151).

The laboratory created two reports memorializing its findings. In May 2009, the laboratory generated its first report to show that Luedtke's blood sample tested negative for the presence of alcohol (R. 94:6). This report provided notice that the laboratory only saves a blood sample for six months (R. 102:145-46). In November 2009, the laboratory generated a second report to identify the drugs found within Luedtke's blood sample (R. 94:5, 102:133). The laboratory mailed a copy of each report to Luedtke (R. 94:5-8). Luedtke alleged that he never received the reports (R. 94:4-5).

On December 18, 2009, the State issued a two-count complaint against Luedtke (R. 2). First, he was charged with operating a motor vehicle while under the influence of a controlled substance. *See* Wis. Stat. § 346.63(1)(a). Second, he was charged with having a detectable amount of a restricted controlled substance in his blood. *See* Wis. Stat. § 346.63(1)(am). Cocaine and its metabolite benzoylecgonine are restricted controlled substances. Wis. Stat. § 340.01(50m)(c).

On May 24, 2010, Luedtke appeared at an initial appearance (R. 85). He had failed to appear at his originally scheduled initial appearance on January 11, 2010, because he was in custody in another county's jail (R. 84; R. 94:4).

Luedtke's attorney later learned that the laboratory had destroyed his client's blood sample on February 4, 2010 (R. 94:3). The laboratory maintains a blood sample for at least six months, but may retain a sample longer for additional testing (R. 94:6). The laboratory discarded Luedtke's sample consistent with its standard retention procedure (R. 94:6).

On December 28, 2010, Luedtke filed a suppression motion based upon the destruction of the blood sample (R. 23). The circuit court found no bad faith (R. 94:19). The court found that suppression of the test or dismissal of the case were "too extreme," finding that "the remedy for the lack of a sample to retest is that you tell the jury we didn't get a chance, they destroyed the sample" (R. 94:19). The court denied Luedtke's motion (R. 94:20).

The case proceeded to trial where Luedtke vigorously cross-examined the analyst. He had Advanced Chemist Neuser admit that testing is not infallible and is subject to human error (R. 102:140-41). Luedtke had Neuser concede that cocaine is an unstable molecule where the value reported does not precisely match the target value (R. 102:144). But such a discrepancy is not a false positive (R. 102:144). So Luedtke focused his attack on the laboratory's retention policy. Neuser acknowledged that the laboratory routinely destroys samples after six months (R. 102:145-46).

Luedtke used cross-examination to attack the State's case beyond simply the laboratory's destruction of the blood. Luedtke had Officer Framke acknowledge that he did not exhibit any signs of impairment when the officer first had contact with him (R. 102:73).

Luedtke presented his defense primarily through vigorous cross-examination. But he also testified in his own defense (R. 102:162-90). Luedtke explained that he took the antidepressant venlafaxine as well as methadone and

diazepam (R. 102:163-64). But he denied taking cocaine (R. 102:177). Luedtke told the jury that he wanted to have the blood retested, but could not because it was destroyed before he saw the result (R. 102:179-81).

Luedtke admitted to hiding syringes in the sewer, but denied hiding the spoon that was found with the syringes (R. 102:168-69). He claimed having no knowledge of the syringes being in the vehicle until after the collision because the vehicle did not belong to him (R. 102:165-69). He said that he only hid the syringes because he thought that possession of them was illegal (R. 102:177). Luedtke denied having ever used any of the syringes recovered by the police officers (R. 102:187). He admitted to having marks on his right arm, but denied that they were injection marks (R. 102:188-89). Luedtke said that the marks "were probably just from work or something, you know" (R. 102:189).

Luedtke claimed that he performed poorly on the field sobriety and drug panel tests for a variety of reasons, including that his "knees are messed up," he cannot walk a specific way because of a "genetic thing," he "didn't

understand" some of the instructions, and he was injured by the collision (R. 102:171-76).

Luedtke rested his defense after his testimony (R. 102:190). He did not call an expert witness, despite previously considering such an option (R. 94:18; R. 101:2; R. 102:190).

Luedtke neither objected to the jury instructions, nor asked to put anything on the record following the court's instructions to the jury (R. 102:153-54,225). Instead, Luedtke used his closing argument to attack the laboratory's destruction of the blood (R. 102:217-19). He also argued to the jury that impairment did not cause the collision; instead, he was distracted by his phone (R. 102:214).

The jury acquitted Luedtke on the first count and convicted him on the second count. The jury found Luedtke not guilty of operating under the influence of the controlled substances diazepam and methadone (R. 102:191-93,229-30). The jury found Luedtke guilty for operating with the restricted controlled substances of cocaine and its metabolite

benzoylecgonine (R. 102:194-95,230). The court entered judgment of conviction (R. 69; R. 77).

Luedtke filed a postconviction motion (R. 78). He renewed his previous motion regarding the destruction of the blood sample and added a challenge to the constitutionality of the statute (R. 78; R. 80). The court found no due process violations and denied Luedtke's motion (R. 81; R. 105:18-20). Luedkte then filed a notice of appeal (R. 82).

The court of appeals affirmed the judgment of the circuit court. *State v. Luedkte*, 2014 WI App 79, ¶ 1, 355 Wis. 2d 436, 851 N.W.2d 837. The court found that Luedtke failed to establish beyond a reasonable doubt that the statute was unconstitutional. *Id.* ¶ 19. The court also explained that Luedtke did "not argue that the blood sample was destroyed in bad faith" and he made "no showing that the evidence was apparently exculpatory at the time of its destruction." *Id.* ¶¶ 22, 24.

This Court granted Luedtke's petition for review. So this Court now considers the constitutionality of the operating with the restricted controlled substance statute. And this

court considers in the context of evidence preservation and destruction whether the Wisconsin Constitution provides greater due process protection than the United States Constitution.

ARGUMENT

I. This Court should affirm because Luedtke's substantive due process rights were not violated.

In 2003, the Wisconsin Legislature prohibited operating a motor vehicle while a "person has a detectable amount of a restricted controlled substance in his or her blood." 2003 Wisconsin Act 97, sec. 2 (creating Wis. Stat. § 346.63(1)(am)). The new offense—abbreviated as OCS—is separate, but interrelated to operating while intoxicated ("OWI") and prohibited alcohol concentration ("PAC"). *State v. Carter*, 2010 WI 132, ¶ 71 n.2, 330 Wis. 2d 1, 794 N.W.2d 213 (Bradley, J., dissenting) (citing the Wisconsin Judicial Benchbook).

This Court reviews the constitutionality of the OCS statute de novo. *In Interest of Angel Lace M.*, 184 Wis. 2d 492, 515, 516 N.W.2d 678 (1994). So whether

this statue "constitutes a violation of due process presents a question of law, which this court decides independently of the circuit court but benefiting from its analysis." *State v. Neumann*, 2013 WI 58, ¶ 32, 348 Wis. 2d 455, 832 N.W.2d 560.

A. Operating with a restricted controlled substance is a strict liability offense.

OCS is a strict liability offense. *State v. Schutte*, 2006 WI App 135, ¶ 50, 295 Wis. 2d 256, 720 N.W.2d 469 (characterizing OCS as a "strict liability" offense by the defendant). The jury instruction confirms that it has only two elements: (1) the defendant drove or operated a motor vehicle on a highway; and (2) the defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant drove or operated a vehicle. Wis. J.I.-Criminal 2664B (2011); *see also State v. Olson*, 175 Wis. 2d 628, 642 n.10, 498 N.W.2d 661 (1993) (instructions are persuasive authority). The offense has no element of scienter; that is to say, it contains no knowledge or intent element requiring a culpable state of mind.

Strict liability crimes exist within the statutes. *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.*

Several factors assist a court in deciding whether a statute imposes strict liability, including: (1) statutory language, (2) legislative history, (3) related statutes, (4) enforcement practicality, (5) public protection, and (6) punishment severity. *Id.* ¶¶ 21-30. The application of these factors to the OCS statute show that the Legislature created a strict liability offense.

First, the plain language of the OCS statute omits any requirement that the person knows that he has or intends to have a restricted controlled substance in his blood. The statute states:

> No person may drive or operate a motor vehicle while:
>
> . . . .

> (am) The person has a detectable amount of a restricted controlled substance in his or her blood.

Wis. Stat. § 346.63(1)(am). The plain language of the statute does not require knowledge or intent.

Second, the legislative history shows the Legislature intended to create a strict liability crime. When the statute was enacted, the Legislative Council prepared a memorandum stating that the Legislature intended to remove the requirement that the State must prove the person was "under the influence" of the controlled substance; instead, "evidence of a detectable amount [of the substance in the person's blood] is sufficient" under the new subsection. Don Dyke, Wis. 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)[1] [hereinafter Wis. Leg. Council Memo]. There is no indication elsewhere in the legislative

[1]https://docs.legis.wisconsin.gov/2003/related (follow "LC Act Memos" hyperlink; then follow "AB458: LC Act Memo" hyperlink).

history that the Legislature intended to require proof of knowledge or intent.

Third, related statutes do not require a showing of the defendant's state of mind. The companion offense of PAC requires no proof of knowledge or intent. Wis. Stat. § 346.63(1)(b); Wis. J.I.-Criminal 266 (2006). And driving with any alcohol concentration before a person attains 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.

Fourth, considerations of enforcement practicality led to the adoption of the OCS statute. The Legislature created the offense because "[i]t is often difficult to prove that a person who has used a restricted substance was 'under the influence' of that substance." Wis. Leg. Council Memo 1. The Legislature intended to make it easier to prove operation with a restricted controlled substance by eliminating the need for proof of impairment. Requiring proof of knowledge

or intent is contrary to this express Legislative purpose for practical enforcement.

Fifth, a person operating a motor vehicle with a controlled substance in his or her blood—sometimes referred to as "drugged driving"—is a serious threat to public safety. The Institute for Behavior and Health estimates that 20 percent of motor vehicle 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*. 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*.[2] Against this stark reality, the

[2]http://www.cdc.gov/Motorvehiclesafety (follow "Impaired Driving" hyperlink; then follow "Get the Facts" hyperlink.

Legislature created a strict liability standard to facilitate prosecution of "drugged driving."

And sixth, the penalty supports the strict liability conclusion. The penalty for the first offense of OCS is the same forfeiture penalty as first offense OWI. Wis. Stat. § 346.65(2). Subsequent violations only carry jail or imprisonment if a defendant has previous convictions. Wis. Stat. § 346.65(2)(am)2.-7. These relatively light penalties support the conclusion that this is a strict liability offense. *See Jadowski*, 272 Wis. 2d 418, ¶ 18.

This Court should find that OCS is a strict liability statute. The six *Jadowski* factors clearly demonstrate that OCS does not require proof of knowledge or intent. The Legislature intended to and did create a strict liability offense.

B. Luedtke has not met his burden to overcome the presumption in favor of constitutionality.

Wisconsin statutes have a presumption of constitutionality. *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328. So this Court "'indulges

every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, we must resolve that doubt in favor of constitutionality.'" *Id*. (citation omitted).

The party asking this Court to find a statute unconstitutional has the burden to prove the statute's unconstitutionality beyond a reasonable doubt. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. Luedtke argues that the OCS is unconstitutional without a scienter element. Thus, he has the "heavy burden" to overcome the presumption of constitutionality and to show the statute violates substantive due process. *State v. Gardner*, 2006 WI App 92, ¶ 6, 292 Wis. 2d 682, 715 N.W.2d 720.

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); *accord State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶¶ 57-61, 353 Wis. 2d 307, 845 N.W.2d 373. Among the laws that may violate a person's substantive due

process rights are strict liability crimes. LaFave, Substantive due process, 1 Subst. Crim. L. § 3.3.

Faced with a substantive due process challenge, 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. A higher level of scrutiny applies if a protected class or fundamental right is implicated. *In re Gwenevere T.*, 2011 WI 30, ¶ 52, 333 Wis. 2d 273, 797 N.W.2d 854 (fundamental right); *In re Reitz*, 53 Wis. 2d 87, 93 n.3, 191 N.W.2d 913 (1971) (protected class). That is not the case here. So this Court examines the OCS statute under rational basis analysis. *Miller By and Through Sommer v. Kretz*, 191 Wis. 2d 573, 579, 531 N.W.2d 93 (Ct. App. 1995).

The OCS statute is constitutional on its face. In *Smet*, the court held that the statute's prohibition against driving "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" even without proof of intoxication. 288 Wis. 2d 525, ¶ 20.

Similarly, here, the statute's imposition of liability without proof of scienter is reasonably and rationally related to the legislative goal of protecting the public from the danger posed by drugged drivers. *See id.*, ¶ 11. The chance that an actually innocent person may come within the statute's reach is small. *See* LaFave, Substantive Due Process, 1 Subst. Crim. L. § 3.3.

Drugged driving creates a serious threat to public safety. The Legislature created the OCS offense 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." Wis. Leg. Council Memo 1. The clear legislative intent was to make it easier to convict someone who operated a vehicle with a controlled substance in their system. The statute achieved this goal by eliminating the requirements of both intoxication and scienter.

Wisconsin is not alone in creating this type of strict liability statute. More than a dozen states have such laws. Charles R. Cordova, Jr., *DWI and Drugs: A Look at Per Se Laws for Marijuana*, 7 Nev. L.J. 570, 571 (Spring 2007);

accord National Conference of State Legislatures, *Drugged Driving Per Se Laws* (2014).[3]

Luedtke has not proved beyond a reasonable doubt that the statute is unconstitutional. He argues that scienter is a necessary element because a person may unknowingly ingest cocaine through contact with money or lake water (Def.-Appellant Br. 17-18). But he provides no factual basis to show that such incidental contact or ingestion leads to any detectable level of cocaine within a person's blood. The circuit court found the Luedtke's due process challenge based upon a lack of scienter as "just way out there on the boarders of ludicrous." (R. 105:18). Such speculation and conjecture is not proof beyond a reasonable doubt.

Moreover, Luedtke lacks standing to challenge that the statute is unconstitutional as applied to others. *See State v. Stevenson*, 2000 WI 71, ¶ 44, 236 Wis. 2d 86, 613 N.W.2d 90. The circuit court made a finding of fact that—despite Luedtke's protestation of innocence—he knowingly ingested

[3]http://www.ncsl.org/documents/transportation/persechart.pdf.

cocaine, which the court found through corroboration with paraphernalia evidence in the vehicle and his consciousness of guilt in concealing paraphernalia in the sewer (R. 105:18). Such a factual finding is not clearly erroneous. *See State v. Dearborn*, 2010 WI 84, ¶ 13, 327 Wis. 2d 252, 786 N.W.2d 97. So Luedtke cannot use hypothetical examples to argue that enforcement of the statute leads to absurd or unreasonable results. *Stevenson*, 236 Wis. 2d 86, ¶ 44.

This Court should find that Luedtke has not met his burden to prove the OCS statute's unconstitutionality beyond a reasonable doubt. *See Wood*, 323 Wis. 2d 321, ¶ 15. Luedtke has not proved the statute unconstitutional on its face. And the statute is not unconstitutional as applied to him. So this Court should find that the OCS statute is constitutional without a scienter element.

C. This Court should not insert a scienter element into the operating with a restricted controlled substance statute.

This Court should not add scienter to the OCS statute because it "would defy the legislative intent and usurp the

role of the legislature." *State v. Weidner*, 2000 WI 52, ¶ 39, 235 Wis. 2d 306, 611 N.W.2d 684. The Legislature chose neither to include knowledge or intent as an element nor as an affirmative defense. *See id.*

The rule of lenity does not apply to the OCS statute because both the language and logic of the statute reflects the Legislature's intent to create a strict liability offense. *See State v. Rabe*, 96 Wis. 2d 48, 71 n.13, 291 N.W.2d 809 (1980). Luedtke asks this Court to apply lenity, but he acknowledges that the rule exists for ambiguous statutes (Def.-Appellant Br. 15). So the rule of lenity is not applicable to the OCS statute. *See Rabe*, 96 Wis. 2d at 71 n.13.

The court of appeals case of *State v. Griffin* is equally irrelevant to the OCS statute. 220 Wis. 2d 371, 584 N.W.2d 127 (Ct. App. 1998). In *Griffin*, the State charged the defendant with possession of cocaine. *Id.* at 379. The crime required the State to prove that the defendant possessed cocaine. *Id.* at 381. "Possession" means that "the defendant knowingly had actual physical control of a substance." Wis. J.I.-Criminal 3060 (2014). The court of

appeals held that "the mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs are within the person's control." *Griffin*, 220 Wis. 2d at 381. But the OCS statute does not have a possession element. Instead, the statute requires the State to prove that Luedtke had a detectable amount of a restricted controlled substance in his blood at the time the defendant drove a vehicle. Wis. J.I.-Criminal 2664B. Luedtke's reliance on *Griffin* is misguided.

Luedtke correctly observes that this Court "'interpret[s] statutes to be constitutional if possible'" (Def.-Appellant Br. 14 (quoting *In re Termination of Parental Rights to Max G.W.*, 2006 WI 93, ¶ 50, 293 Wis. 2d 530, 716 N.W.2d 845)). But he is incorrect that "'scienter is a constitutionally required element of the offense charged'" (*id*. at 22 (quoting *State v. Petrone*, 161 Wis. 2d 530, 552, 468 N.W.2d 676 (1991))). Luedtke neglects to explain in his citation to *Petrone* that it involved an unrelated statute for sexual exploitation of a child in which the parties agreed on the

scienter element. 161 Wis. 2d at 550-52, *overruled in part by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

This Court should not insert a scienter element into the OCS statute. This Court should find that Luedtke's substantive due process rights were not violated by his prosecution under the OCS statute.

II. This Court should affirm because Luedtke's procedural due process rights were not violated.

This Court reviews the destruction of Luedtke's blood sample as a mixed question of fact and law. First, this Court defers to the circuit court's findings of fact unless they are clearly erroneous. *State v. Felix*, 2012 WI 36, ¶ 22, 339 Wis. 2d 670, 811 N.W.2d 775. Second, this Court reviews de novo the application of constitutional due process principles to those facts. *Id.* But de novo review "in no way authorizes wholesale disregard of the principle of stare decisis." *Coulee Catholic Sch. v. Labor and Industry Review Comm'n*, 2009 WI 88, ¶ 110 n.8, 320 Wis. 2d 275, 768 N.W.2d 868 (Crooks, J., dissenting). So, although de

novo review means this Court starts over in the analysis of the application of the law to this case, it does not disregard precedent unless it has a compelling justification to do so. *Id*.

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

A well-settled body of law on the due process implications of evidence preservation and destruction is correctly decided. The case law held that due process does not require preservation of blood samples per se. *State v. Disch*, 119 Wis. 2d 461, 480-81, 351 N.W.2d 492 (1984); *State v. Ehlen*, 119 Wis. 2d 451, 453, 455-57, 351 N.W.2d 503 (1984); *see also State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984). And the precedent created a reasonable requirement that a defendant challenging the destruction of evidence must show bad faith. *State v. Pankow*, 144 Wis. 2d 23, 42-43, 422 N.W.2d 913 (Ct. App. 1988); *accord State v. Greenwold*, 181 Wis. 2d 881, 885-86, 512 N.W.2d 237 (Ct. App. 1994) ("*Greenwold I*"). This precedent interprets the Wisconsin Constitution as

affording the same due process protections for evidence preservation and destruction recognized under the United States Constitution. *State v. Greenwold*, 189 Wis. 2d 59, 71, 525 N.W.2d 294 (Ct. App. 1994) ("*Greenwold II*"). There is no prudent and pragmatic justification to overrule this precedent.

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

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

Cnty. Bd. of Adjustment, 2001 WI 78, ¶ 71, 244 Wis. 2d 613, 628 N.W.2d 376 (Crooks, J., concurring).

While this Court's power to repudiate prior decisions is unquestioned, such a power is not often exercised. *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 96, 264 Wis. 2d 60, 665 N.W.2d 257. "Fidelity to precedent ensures that existing law will not be abandoned lightly." *Id.* ¶ 94 (quoting *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266). Failure to abide by precedent raises a serious concern as to whether the law is founded upon legal principles or the proclivities of individual jurists. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 292 n.6, 295 Wis. 2d 1, 719 N.W.2d 408 (Roggensack, J., concurring in part and dissenting in part).

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

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

This Court engages in two levels of analysis for dealing with a challenge to precedent. First, this Court determines whether the precedent is incorrect as a matter of law. *Johnson Controls*, 264 Wis. 2d 60, ¶ 28 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in part and dissenting in part)). Then this Court determines whether a precedent should be overruled by weighing "'a series of

prudential and pragmatic considerations.'" *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78, ¶ 30, 244 Wis. 2d 613, 628 N.W.2d 376 (Sykes, J.) (quoting *Casey*, 505 U.S. at 854).

Even when this Court determines conclusively that precedent is incorrect as a matter of law, it still must decide whether the error requires overruling it. *Johnson Controls,* 264 Wis. 2d 60, ¶ 28. So prior to rejecting an established rule of law, this Court weighs the precedent against five prudential and pragmatic factors:

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

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

This Court does not abandon precedent lightly. *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 30, 284 Wis. 2d 573, 701 N.W.2d 440. On the contrary, this Court affords due respect to longstanding precedent.

State v. Taylor, 2013 WI 34, ¶ 42 n.12, 347 Wis. 2d 30, 829 N.W.2d 482. So this Court may adhere to precedent even when one or more of the five *Bartholomew* factors exist, particularly when it was correctly decided or produced a settled body of law. 293 Wis. 2d 38, ¶¶ 33-34.

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

2. Luedtke has not met his burden of providing a compelling justification to overrule precedent.

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

Wisconsin precedent has produced a settled body of law that the routine destruction of a driver's blood sample does

not deprive a defendant of due process per se. *Walstad*, 119 Wis. 2d at 528, *Disch*, 119 Wis. 2d at 480-81; *Ehlen*, 119 Wis. 2d at 453. This case law nevertheless insures that a defendant will have an opportunity to raise a due process challenge when evidence—such as a blood sample—no longer exists when the defendant proves the destruction occurred in bad faith under a test derived from federal precedent. *Pankow*, 144 Wis. 2d at 42-43 (citing *California v. Trombetta*, 467 U.S. 479 (1984)); *accord Greenwold I*, 181 Wis. 2d at 885-86 (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988)); *see Greenwold II*, 189 Wis. 2d at 71 (affording the same due process protection under the Wisconsin and United States Constitutions).

In a triad of opinions issued in 1984, this Court decided that "[t]he importance of the production of the original breath ampoule or a portion of the blood sample as the *sine qua non* of due process is a myth that should not be perpetuated." *Ehlen*, 119 Wis. 2d at 453; *accord Disch*, 119 Wis. 2d 461; *Walstad*, 119 Wis. 2d 483. The Court explained that it was an error "to conclude due process will

be violated if a blood test is not suppressed merely because a portion of the sample—even if it were retestable—could not be produced for further tests." *Ehlen*, 119 Wis. 2d at 457. So whether blood is retestable is irrelevant because the failure to preserve and to allow a retest is not a denial of due process per se. *Disch*, 119 Wis. 2d at 481. And the Court was "convinced that the claim that due process could only be preserved for defendants by such retests was illusory." *Id*. at 480.

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

In *Youngblood*, the Court "stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government." 488 U.S. at 57. After *Youngblood*, a three-part test for analyzing due process challenges to lost or destroyed evidence emerged in the federal courts:

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

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

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

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

> exculpatory value that was apparent before the evidence was destroyed. Third, the evidence was such that the defendant would be able to obtain comparable evidence by other available means.

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

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

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

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

than the United States Constitution in the context of evidence preservation and destruction. 189 Wis. 2d at 71.

Luedtke does not argue that *Ehlen*, *Disch*, *Walstad*, *Pankow*, and *Greenwold II* are incorrect as a matter of law (Def.-Appellant Br. 29-39). Luedtke does argue that reliance on *Greenwold II* is "misplaced" (*id.* at 30). But such a veiled challenge is not a compelling justification to overrule it. Luedtke does not cite to *Walstad* and *Pankow*. And rather than argue the merits of *Ehlen* and *Disch*, he attempts to distinguish them from the post-charge destruction of his blood for an OCS offense (Def.-Appellant Br. 29-39).

Luedtke's distinction of an OCS charge from OWI and PAC charges is untethered to the facts of his case and contrary to informing the accused law. Luedtke's arrest involved no suspicion of alcohol—only suspicion of drugs. And Luedtke received notice that the "law enforcement agency now wants to test one or more samples of [his] breath, blood or urine to determine the concentration of *alcohol* or *drugs* in [his] system." Wis. Stat. § 343.305(4). So

Luedtke knew the nature of the investigation when he declined to pursue an alternate test on April 27, 2009.

Luedtke's pre- and post-charge distinction lacks a precedential foundation. He suggests that statutory discovery entitles a defendant with the post-charge right of blood sample preservation (Def.-Appellant Br. 31, 35 n.9 (citing Wis. Stat. § 971.23)). But Luedtke neglects to explain that this Court already concluded the test results—not the blood samples themselves—falls within the discovery statute. *Ehlen*, 119 Wis. 2d at 452 (citing Wis. Stat. § 971.23). While ignoring Wisconsin precedent, Luedtke cites to federal case law. Luedtke asks this Court to graft a post-charge right of counsel under the Sixth Amendment into due process rights under the Fifth and Fourteenth Amendments (Def.-Appellant Br. 36 (citing *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972)). Luedtke ultimately recognizes the oddity of a pre- and post-charge distinction by acknowledging a "defendant is no less prejudiced when his blood sample is destroyed prior to charging" (Def.-Appellant Br. 31 n.6).

Luedtke also directs this Court to *State v. Hahn* and *State v. Huggert* (*id.* at 39-40). But he neglects to explain that any precedential value of *Hahn* is severely limited by its abrogation through later refinement in *Youngblood*. The court of appeals expressly recognized *Hahn*'s limitations post-*Youngblood*. *See Greenwold I*, 181 Wis. 2d at 882-83. Even assuming *Hahn* has some precedential value, it is clearly distinguishable. *Hahn* involved destruction of a vehicle having apparent and material exculpable value at the time of its destruction. *State v. Hahn*, 132 Wis. 2d 351, 360, 392 N.W.2d 464 (Ct. App. 1986)). And *Huggert* also involved the destruction of materially exculpable evidence in the form of text messages and voicemail recordings. *State v. Huggert*, 2010 WI App 69, 324 Wis. 2d 786, 783 N.W.2d 675. In contrast, the blood sample at issue in Luedke's case is only potentially useful evidence. *See Trombetta*, 467 U.S. at 489 (describing the retesting of samples as unlikely to produce exculpatory evidence). So *Hahn* and *Huggert* are not

controlling precedent here because Luedtke's blood sample is only potentially useful—not materially exculpable.[4]

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

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

evidence. This Court should hold that these precedents were correctly decided.

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

Wisconsin's correctly decided precedent produced a settled body of law that outweighs any prudential and pragmatic claim against it. So this Court should not overrule the precedent under any of the five *Bartholomew* factors in the second level of stare decisis analysis. *See* 293 Wis. 2d 38, ¶ 33 (identifying the five factors).

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

Pankow, and *Greenwold II* decisions. *See Bartholomew*, 293 Wis. 2d 38, ¶ 33.

In *Dubose*, this Court held that Wis. Const. art. I, § 8[5] contained a broader right than contained within the Fifth Amendment[6] and Fourteenth Amendment[7] of the United States Constitution. 285 Wis. 2d 143, ¶ 41 (Fourteenth Amendment); *id.* ¶ 64 (Wilcox, J., dissenting) (Fifth Amendment); *see also State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 (concluding that under the Wisconsin Constitution the fruit of the poisonous tree doctrine applies to evidence obtained from a *Miranda* violation).

In *Dubose*, the court reached its decision in the specific context of an identification procedure known as a showup.

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

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

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

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

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

The holding in *Dubose* required this Court to overrule precedent by withdrawing language from *Wolverton* and related opinions. *Id.* ¶ 33 n. 9. This Court found that new information since *Wolverton* demonstrated that unreliable eyewitness identification contributed to wrongful convictions. *Id.* ¶¶ 29-30. Based upon such newly ascertained facts, this Court stated that the *Wolverton*

approach had flaws making it unsound. *Id.* ¶ 31. So this Court found a compelling justification to overrule precedent. *Id.* ¶ 33 n.9. The Court's analysis in *Dubose* is consistent with *Bartholomew* framework.

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

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

Dubose is not a change or development in the law sufficient to undermine the rationale behind *Ehlen*, *Disch*, *Walstad*, *Pankow*, *Greenwold II*, and their progeny. Arguably, *Dubose* may undermine *Greenwold II*'s general observation about the similarity between the Due Process Clauses in the Wisconsin Constitution and the United States Constitution. *Dubose*, 285 Wis. 2d 143, ¶ 56 (Wilcox, J., dissenting) (citing *Greenwold II*). Nevertheless, post-*Dubose* precedent has clearly limited its holding to only one identification procedure—the showup. *See Drew*, 305 Wis. 2d 641. So *Dubose* did not overtly overrule *Greenwold II*'s ruling that the constitutions provide the same due process protections in the context of evidence preservation and destruction. And *Dubose* made no change to *Ehlen*, *Disch*, *Walstad*, and *Pankow*.

Luedtke has not shown that *Dubose* changed or developed the law so as to compel this Court to overrule precedent. In fact, Luedtke's reliance on *Dubose* undermines his quest. In *Dubose*, this Court overruled *Wolverton* and related opinions after finding that two of the five factors listed in

Bartholomew supported such a drastic result. 285 Wis. 2d 143, ¶ 33 n.9. Specifically, this Court noted that the second and fourth factors supported overruling precedent because "new information" demonstrated that the precedent was "unsound." *Id.* ¶¶ 29-31 (citation omitted). Luedtke makes no such showing with regard to the routine destruction of a driver's blood sample. And he does not refute that the preservation of a sample is "much more likely to provide inculpatory than exculpatory evidence . . . [i]n all but a tiny fraction of cases . . . ." *Trombetta*, 467 U.S. at 489. *Dubose* overruled *Wolverton* after finding that misidentification was "the single greatest source of wrongful convictions." *Dubose*, 285 Wis. 2d 143, ¶ 30. This declaration contrasts sharply with Luedtke's desire to overrule precedent when "the chances are extremely low that preserved samples would have been exculpatory." *Trombetta*, 467 U.S. at 489. *Dubose* has been and should continue to be limited to a single due process problem identified with showups.

Under the second level of stare decisis analysis, this Court should find that Luedtke has not met his burden to overrule precedent. Luedtke does not allege that any of the *Bartholomew* factors justify overruling precedent. (Def.-Appellant Br. at 29-39). This Court should hold that there is not a prudential and pragmatic justification that compels this Court to overrule *Ehlen*, *Disch*, *Walstad*, *Pankow*, *Greenwold II,* and their progeny.

3. This Court should not interpret a greater due process protection under the Wisconsin Constitution.

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

There are three settled branches of Wisconsin precedent regarding the routine destruction of a driver's blood sample. First, in 1984, this Court decided in *Disch* and *Ehlen* that production of the original blood sample as a due process requirement is an illusory myth. *Disch*, 119 Wis. 2d at 480 ("illusory"); *Ehlen*, 119 Wis. 2d at 453 ("myth"); *accord*

Walstad, 119 Wis. 2d 483. Second, *Pankow* produced a workable due process test that requires, among other things, a showing of bad faith. 144 Wis. 2d at 42-43; *accord Greenwold I*, 181 Wis. 2d at 885-86 (requiring bad faith when the exculpatory value of the blood sample was not apparent prior to its destruction). Third, *Greenwold II* has rejected affording greater due process under the Wisconsin Constitution than the United States Constitution in the evidence preservation and destruction context. 189 Wis. 2d at 71.

To grant greater due process to Luedtke under the Wisconsin Constitution, this Court must overrule all three branches of precedent. First, this Court would have to overrule *Greenwold II*, which found no greater due process protection in the context of evidence preservation and destruction. *Id*. Next, this Court would have to reach a result contrary to its holdings in its triad of 1984 opinions finding no due process requirement for the preservation of the original sample. *Disch*, 119 Wis. 2d at 480; *Ehlen*, 119 Wis. 2d at 453; *see also Walstad*, 119 Wis. 2d 483. The

effect of all this would be to eliminate and effectively overrule a constitutional test that is both easy to apply and protective of a defendant's due process rights. *See Pankow*, 144 Wis. 2d at 42-43; *accord Greenwold I*, 181 Wis. 2d at 885-86.

This Court should not join Luedtke in his pursuit to uproot this case law. Luedtke attempts to distinguish precedent by seeking only a special due process post-charge right for an OCS offense that exists for neither OWI and PAC offenses nor pre-charge evidence destruction (Def.-Appellant Br. 29-39). But Luedtke's attempt to distinguish case law—as an end run around stare decisis—undermines this Court's fidelity to precedent in the same manner as directly overruling the cases. *See Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 85, 318 Wis. 2d 553, 769 N.W.2d 481 (Bradley, J., concurring in part and dissenting in part). So this Court should decline Luedtke's end run invitation.

This Court should not overrule these precedents—it should not interpret the Wisconsin Constitution as providing

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

B. Luedtke was not denied due process when his blood sample was destroyed.

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

"a meaningful opportunity to present a complete defense." 467 U.S. at 485; *accord State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 44 n.3, 370 N.W.2d 271 (Ct. App. 1985). And Luedtke frames his argument consistent with these authorities as a "'fair trial'" issue (Def.-Appellant Br. 41 (citations omitted)).[8] So the issue before this Court is whether the circuit court provided Luedtke with the fair process due. *See State v. Hazen*, 198 Wis. 2d 554, 559, 543 N.W.2d 503 (Ct. App. 1995);

[8]Luedtke does not allege that the routine destruction of blood samples presents a substantive due process issue (Def.-Appellant Br. 5-21). Having waived such an argument, Luedtke cannot raise this issue for the first time in a reply brief or at oral argument. *See State v. Green*, 2002 WI 68, ¶ 20 n.2, 253 Wis. 2d 356, 646 N.W.2d 298 (an argument raised for the first time in a reply brief is deemed waived). *City of Milwaukee v. Christopher*, 45 Wis. 2d 188, 190, 172 N.W.2d 695 (1969) (an argument raised for the first time at oral argument is deemed waived). Even if Luedtke had raised a substantive due process concern, the result would not change because "[w]hether framed as a 'substantive liberty interest . . . protected through a procedural due process right' to have evidence made available for testing, or as a substantive due process right to be free of arbitrary government action, . . . the result is the same . . . ." *District Attorney's Office for Third Judicial Dist.Osborne*, 557 U.S. 52, 93 (2009) (citation and footnote omitted); *see also id.* at n.6 (describing the difference between substantive and procedural due process in this context as "faint").

see also Disch, 119 Wis. 2d at 469 ("A defendant is entitled to a fair trial but not a perfect one.").

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

When potentially exculpable evidence is destroyed, "courts face the treacherous task of divining the import of materials whose contents are unknown and, very often,

disputed." *Trombetta*, 467 U.S. at 486. At one extreme, courts could bar further prosecution or exclude the prosecution's most probative evidence. *Id.* at 487. At the other extreme, courts could disregard a defendant's individual interest in favor of the demands of society for public safety. Neither extreme strikes the balance due process requires. *See Youngblood*, 488 U.S. at 58; *Ehlen*, 119 Wis. 2d at 456 ("the retention of a breath ampoule or of a blood sample was of miniscule importance in the assurance of a fair trial when weighed in the balance against the traditional rights of defendants in criminal or quasi-criminal proceedings"); *State v. Rogers*, 70 Wis. 2d 160, 166, 233 N.W.2d 480 (1975) (not every delay detrimental to a defendant's case should abort a prosecution). Courts have found balance in permitting prosecutions to continue with missing evidence when defendants have an adequate means to present their defense. *See, e.g., Trombetta*, 467 U.S. at 490; *Ehlen*, 119 Wis. 2d at 476-78; *Disch*, 119 Wis. 2d at 456-57.

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

Luedtke had a battalion of due process safeguards. The circuit court found that, at the time of the blood draw on April 27, 2009, "Luedtke was provided with documentation that he could have a second test done or he could have someone else test the blood, but he did not choose to do that" (R. 105:18). The court also found that Luedtke had several layers of protection to ensure a fair trial. First, he had the right to cross-examine witnesses (R. 94:18). Second, he had

the right to call his own expert witness (R. 94:18). Third, the court gave Luedtke the opportunity to tell the jury that the sample was destroyed and he did not have the opportunity to retest it (R. 94:18-19). And the court found that Luedtke preserved nearly all of the steps available for retesting the blood:

> A sample was analyzed and an expert can look over all of the methodology used and can actually reperform the evaluation that was done from the sample that was taken and you would have the opportunity to get the raw data that the crime lab used to make their opinion.
>
> And an expert can look at all the methodology the same way that you would in preparing for a trial anyway by looking at what the crime lab did, by questioning all the various steps taken. you still have the opportunity to do that, you just don't have the opportunity to actually perform a chemical test on it. But you can—you can do all the other steps and you can do all the things that you would at trial. So those things— You could have an expert go over everything the same way you would if the sample still existed other than that one step.

(R. 94:17-18).[9] Luedtke received discovery (R. 91:2). And the court gave him time to pursue additional documents from

[9]At the motion hearing, the circuit court stated that the "crime lab" tested Luedtke's blood (R. 94:17-18). But the State Laboratory of Hygiene actually was the laboratory that tested and ultimately destroyed the sample (R. 102:127-52).

the laboratory through a public records request (R. 101:2). The court also granted Luedtke multiple adjournments as he prepared his defense (R. 94:20-21; R. 101:2).

Luedtke had within his arsenal the option to exclude the evidence about the blood result under the rules of evidence. *See* Wis. Stat. § 904.03. When the *Hibl* court declined to expand *Dubose*, it highlighted the circuit courts' limited gate-keeping function to exclude relevant evidence when its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury. 290 Wis. 2d 595, ¶ 31 (citing Wis. Stat. § 904.03). In most cases, a circuit court should admit the evidence, allowing the jury to assess its weight and credibility. *Id.*; *Disch*, 119 Wis. 2d at 476. But a defendant may prevail when he or she makes a sufficient showing. *See* Wis. Stat. § 904.03.

The circuit court concluded that Luedtke sought "too extreme" a remedy (R. 94:19). The court held that "the remedy for the lack of a sample to retest is that you tell the

jury we didn't get a chance, they destroyed the sample" (R. 94:19).

Having struck a proper balance, the circuit court did not resolve whether Luedtke's blood sample could have been retested had it not been destroyed. The blood draw occurred on April 27, 2009 (R. 102:7,90). The State did not learn of Luedtke's desire to retest the blood until over a year later.[10] The circuit court did not need to resolve the retestability of

[10]Luedtke testified at the jury trial that he saw the laboratory report for the first time at the initial appearance in May 24, 2010 (R. 102:179). He said that he "immediately asked the attorney to have the blood tested again . . . because there is cocaine" (R. 102:179). Luedtke said that three months later his attorney told him that "the blood was thrown out on February 4" (R. 102:180). But it was Luedtke's second attorney, appointed in November 12, 2010, who said he received an e-mail from the laboratory confirming that the blood sample "was discarded on February 4, 2010" (R. 94:3). On December 28, 2010, Luedtke's second attorney filed the motion to suppress based upon destruction of the evidence (R. 23). So the State first learned of Luedtke's desire to retest the blood sometime between May 24 and December 28, 2010.

the blood because "[d]ue process does not rest on so narrow a basis." *Disch*, 119 Wis. 2d at 463.[11]

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

[11] *See Clarke's Analytical Forensic Toxicology* 352 (Adam Negrusz & Gail Cooper eds., 2d ed. 2013) (describing cocaine as "certainly notorious in terms of stability" with spontaneous conversion of cocaine to benzoylecgonine and further transformation of benzoylecgonine to other metabolites).

III. Luedtke is not entitled to a new trial.

This Court should find that Luedtke's is not entitled to a new trial. His trial counsel was not deficient and, thus, was not ineffective. And the real controversy was fully tried.

Luedtke's ineffective assistance of counsel claim fails because he raises issues in this appeal that are not settle areas of law. *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Luedtke argues that his trial counsel was ineffective for not raising these issues in the circuit court (Def.-Appellant Br. 24-26,39-40). But any such failure by trial counsel does not constitute deficient performance because the issues are novel. *State v. Maloney*, 2005 WI 74, ¶¶ 28-30, 281 Wis. 2d 595, 698 N.W.2d 583. So Luedtke fails to establish ineffective assistance of counsel because counsel was not deficient. *State v. Pitsch*, 124 Wis. 2d 628, 369 N.W.2d 711 (1985) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

Luedtke is not entitled to a new trial because the statute—as a strict liability offense—does not require proof of knowledge or intent. Had the court provided such an

instruction, it would have been in error. Even assuming that a scienter element was required, the absence of instructing the jury on the element in this case was harmless. *See State v. Harvey*, 2002 WI 93, ¶¶ 46-47, 254 Wis. 2d 442, 647 N.W.2d 189. The circuit court found that Luedtke knowing ingested cocaine based upon his consciousness of guilt and the paraphernalia (R. 105:18). So the evidence shows beyond a reasonable doubt that Luedtke's cocaine use was knowing and intentional.

Luedtke is not entitled to a new trial for the absence of an jury instruction about the destroyed blood sample. He argues that the interest of justice requires such an instruction (Def.-Appellant Br. 40). But the circuit court already considered the absence of this instruction (R. 105:19). The court found no due process violation because the vigorous cross-examination the court permitted accomplished the same objective (*id.*). And such an instructive was unnecessary because the court allowed Luedtke to tell the jury about the evidence destruction and

his inability to retest it (R. 94:19). So the real controversy was fully tried.

* * * * *

The Legislature created the OCS statute as a strict liability offense and Wisconsin precedent produced a settled body of law on evidence preservation and destruction. The OCS statute does not violate substantive due process. And the precedent correctly decided that the routine destruction of a driver's blood sample does not violate procedural due process. The circuit court and court of appeals properly found that Luedtke received due process. This Court should find the OCS statute constitutional. And this Court should not overrule precedent.

CONCLUSION

This Court should affirm.

Dated this _____ day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,999 words.

Dated this _____ day of December, 2014.

_____
WINN S. COLLINS
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 _____ day of December, 2014.

_____
WINN S. COLLINS
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