STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2014 AP 962 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RANDALL L. SHEPARD,

Defendant-Appellant

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
JANUARY 29, 2014 IN THE CIRCUIT COURT
FOR MARQUETTE COUNTY,
THE HON. BERNARD BULT PRESIDING.

Respectfully submitted,

RANDALL L. SHEPARD,
Defendant-Appellant

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STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a denial of a suppression motion challenging a warrantless blood draw. R. 23.

Mr. Shepard, the defendant-appellant herein, was originally charged with fifth offense operating a motor vehicle under the influence of an intoxicant and operating with a prohibited alcohol concentration. R. 1. After a successful collateral attack motion, he was then charged with only a misdemeanor fourth offense operating a motor vehicle under the influence of an intoxicant, as well as fourth offense operating with a prohibited alcohol concentration. R. 15.

The only issue raised in this appeal is the denial of Mr. Shepard's Motion to Suppress -- Blood Test Result. R. 23; R. 32.

The parties stipulated to the officer's police report as a factual basis in lieu of taking evidence for the suppression motion. R. 41. The police report indicated that the officer placed Shepard under arrest for operating a motor vehicle under the influence of an intoxicant. He was read the Informing the Accused form. Shepard wanted to contact his wife, who was his power of attorney. The officer informed Shepard that was not an option. Shepard stated he was refusing the evidentiary chemical test of his blood. According

to the officer's report, the officer informed Shepard of the Wisconsin Implied Consent Law and told Shepard they would be going to the hospital for a blood draw. Shepard reiterated that he said "no." Blood was then taken at the hospital. R. 23; R. 24; R. 26; R. 30.

After extensive briefing by both parties and oral argument, the trial court found there was good faith for the blood draw in spite of the *Missouri v. McNeely,* 569 U.S. ___, 133 S.Ct. 1552 (2013) based upon *State v. Bohling,* 173 Wis. 2d 529, 454 N.W.2d 395 (1993), and *State v. Dearborn*, 2010 is. 84, 327 Wis. 2d 252, 786 N.W.2d 97 (2010). The State conceded in its brief that exigent cicumstances were not present in this case; thus, its entire argument was premised upon good faith. R. 30. The Court stated:

> All right. The Court does note, first of all, that this is a circumstance where our current law is somewhat in flux, with the McNeely decision that has put considerable restrictions in terms of how this type of activity, the blood draw and the related warrant requirements, are applied. The Court also notes that by the stipulation to have based this on the officer's report, that gives the Court a very limited record upon which to reflect. But nonetheless, the record is there.
>
> I turn, I think – you know, the arguments that both counsel have made are interesting, persuasive. But in the State v. Dearborn decision, which is at **2010 WIS 84**, at paragraph four the Court specifically indicated that, "we hold the good faith exception precludes application of the exclusionary rule where officers" – and this is where I think it's important – "conduct a search in objectively

> reasonable reliance upon clear and settled Wisconsin precedent that may later be deemed unconstitutional by the United States Supreme Court."
>
> Looking at the limited record that I have before me, the officer's report, I do find that the officer did conduct his search in an objectively reasonable reliance upon the precedent.
>
> I do agree with Mr. Hendee's statement that, given the current state of the law with the McNeely decision and the other recent decisions, there would probably be a different result if we were proceeding under that point. But under the holding of the Dearborn case that I just cited, I do think that the preclusion – that the rule is precluded by that reasonable reliance upon the earlier settled Wisconsin precedent. Based on that, I am going to deny the motion and we will schedule this matter for further proceedings. R. 32, pp. 9-10.

Shepard entered a plea of no contest to operating a motor vehicle while under the influence of an intoxicant as a fourth offense. His sentence was withheld, and he was placed on probation with jail as a condition, along with other conditions of probation. R. 33.

Shepard filed a notice of intent to file post-conviction relief. R. 38; R. 39. Penalties were stayed pending appeal. Shepard then filed a notice of appeal to this Court. R. 43.

ARGUMENT

I. THE WARRANTLESS BLOOD DRAW WAS UNREASONABLE, AND GOOD FAITH DOES NOT APPLY TO THIS CASE.

A. Standard of Review

Whether a warrantless blood draw falls within the exigent circumstances exception to the warrant requirement is a question of law subject to a *de novo* review by this Court. *State v. Faust*, 274 Wis. 2d 183, 682 N.W.2d 371 (2004) (citing *State v. Krajewski*, 255 Wis. 2d 98, 648 N.W.2d 385 (2002)); *State v. Bohling*, 173 Wis. 2d 529, 533 (1993), *abrogated by Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013). The trial court's findings of fact are to be upheld unless they are clearly erroneous. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990).

The application of constitutional principles to a case is a question of constitutional fact. *State v. Pallone*, 2000 WI 77, ¶ 26, 236 Wis. 2d 162, 613 N.W.2d 586; *State v. Dearborn*, 2010 Wis. 84, 102, 327 Wis. 2d 252, 786 N.W.2d 97 (2010). A finding of constitutional fact consists of the circuit court's factual findings which are subject to the "clearly erroneous standard," and the

application of these historical facts to constitutional principles are reviewed *de novo*. *Id.*, ¶¶ 18-19; *State v. Popke*, 317 Wis. 2d 118, 126, 765 N.W.2d 569, 573 (2009).

B. The State has conceded this blood draw was not based upon exigent circumstances, and Wisconsin law does not currently permit a warrantless blood draw in a drunk driving case without exigent circumstances.

"The United States Supreme Court has consistently held that warrantless searches are *per se* unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions." *State v. Murdock*, 155 Wis. 2d 217, 227, 455 N.W.2d 618 (1990). Searches performed incident to lawful arrests are one such exception. See: *Id*. at 228-29. However, "[t]he integrity of an individual's person is a cherished value of our society." *United States v. Schmerber*, 384 U.S. 757, 772 (1966). And because of the great interests in human dignity and privacy that are at stake, searches that intrude beyond the surface of the body require more than mere probable cause to arrest in order to pass constitutional muster. See: *Id*. at 770.

An exception to the warrant requirement is the existence of exigent circumstances, such as when the time needed to obtain a warrant would risk the destruction of evidence. *United States v.*

Cisneros-Gutierrez, 598 F.3d 997, 1004 (8th Cir. 2010). The Court will objectively inquire "whether a reasonable, experienced police officer would believe evidence was in danger of removal or destruction." Id. "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." *United States v. Schmerber*, 384 U.S. 757, 772 (1966). The burden of proof is on the State to demonstrate that an exigent circumstance existed, and that burden is both heavy and difficult to rebut. *See Cisneros-Gutierrez*, 598 F.3d at 1004; *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). The State has conceded there were no exigent circumstances present in Shepard's case. In its brief, the State noted "To be very clear, the State is not arguing or implying that there were any exigent circumstances in the case before the Court." R. 30, p. 2.

The U.S. Supreme Court has previously acknowledged that a blood draw for evidentiary purposes is a Fourth Amendment search that necessitates a warrant, unless the particular facts of the case provide some acknowledged exception to the warrant requirement. *Schmerber*, 384 U.S. at 770. In *Schmerber*, a police officer arrived at the scene of a car accident shortly after it occurred. The officer smelled alcohol on the defendant's breath and noted the defendant's

bloodshot, watery, and glassy eyes. Less than two hours later, the same officer saw the defendant at the hospital and noted similar evidence of drunkenness. The officer arrested the defendant and, over the defendant's objections, directed a blood sample to be drawn from the defendant by a physician at the hospital. The defendant moved for suppression of the chemical analysis as the product of an unlawful search and seizure. The Court clearly stated that a warrant is required where intrusions into the human body are concerned, but in consideration of the specific facts of the case, it upheld the warrantless blood search. *Id*. at 770, 772. The specific facts upon which the Court relied were that, due to the fact that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops," "[t]he officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, **under the circumstances**, threatened the destruction of evidence." *Id*. at 770 (internal quotation mark omitted; emphasis added). The Court further noted that "the test chosen to measure petitioner's blood-alcohol level was a reasonable one," and that "the test was performed in a reasonable manner." *Id*. at 771 (emphasis added). Thus, *Schmerber* rested on the special facts of the case.

Wisconsin caselaw has previously permitted warrantless blood draws, but the United States Supreme Court under *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013), has now clarified that the Fourth Amendment prohibits warrantless blood draws based upon a *per se* rule that the mere dissipation of alcohol constitutes an emergency situation permitting police to dispense with the warrant requirement.

In *State v. Bohling*, the issue was:

> [W]hether the fact that the percentage of alcohol in a person's blood stream rapidly diminishes after drinking stops alone constitutes a sufficient exigency . . ., to justify a warrantless blood draw under the following circumstances: (1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is a clear indication that the blood draw will produce evidence of intoxication
> .

173 Wis. 2d 529, 533 (1993), *abrogated by Missouri v. McNeely*, 569 U.S. ___,133 S.Ct. 1552 (2013). Under those circumstances, held the *Bohling* Court, "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw." *Id*. (emphasis added). The Court, however, noted the possibility that *Schmerber* could be read to mean that the rapid dissipation of alcohol in the blood, coupled with the other facts of the case, created an exigency justifying a warrantless blood draw,

and concluded instead that our Court would deem *Schmerber* to mean that the rapid dissipation of alcohol in the bloodstream alone creates such an exigency. *Bohling*, 173 Wis. 2d at 539.

It is important to note that Wisconsin's reading of *Schmerber* has been disfavored in other courts. See for example: *State v. Rodriguez*, 156 P.3d 771, 570 Utah Adv. Rep. 55, 2007 UT 15 (Utah Jan 30, 2007) (No. 20040566), rehearing denied (Mar 28, 2007), *State v. Johnson*, 744 N.W.2d 340 (Iowa Feb 08, 2008) (No. 06-0880). Other courts have read *Schmerber* to stand for the proposition that the dissipation of alcohol in the blood is but one of a myriad of factors the officer in that case reasonably believed constituted an exigency significant enough to forgo the warrant requirement.

In *State v. Faust*, 274 Wis.2d 183, 682 N.W.2d 371 (2004), the Court stated "We reiterate that the reasonableness of a warrantless nonconsensual test [for blood alcohol content] . . . will depend upon the totality of the circumstances of each individual case." *Faust* at 383, n.16. The Court stated that "[t]here may well be circumstances where the police have obtained sufficient evidence of the defendant's level of intoxication that a further test would be unreasonable under the circumstances presented." Thus, *Faust*

reaffirmed that it is not only the elimination of alcohol that is to be considered in determining whether there is an exigency sufficient to dispense with the warrant requirement; each case should be decided on its own facts. Every search must be reasonable.

Bohling has since been abrogated by *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013). In *McNeely*, the Court considered the case of *Schmerber, supra*, where a blood draw from a suspect arrested for driving under the influence was taken on an emergency basis. The Court noted that the *Schmerber* Court reiterated the importance of warrants:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.

Id. at 770, cited by *McNeely* at p. 1557.

In *Schmerber*, the totality of circumstances, including the length of delay due to the transport to the hospital and the defendant's medical treatment, along with the dissipation of alcohol, led the Court to hold the officer in that case "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances threatened 'the destruction of evidence.'" *Schmerber* at 770, (quoting *Preston v. United States*, 376 U.S. 364 (1964)). Notably,

the Court stated, there was "no time to seek out a magistrate and secure a warrant" because of the length of time it took to bring the suspect to the hospital and investigate the accident. *Id.* at 770–71, as quoted by *McNeely*, *supra* at 1560. Thus, the natural metabolism of alcohol is but one consideration in determining whether there is an exigency which justifies an exception to the warrant requirement when a subject is lawfully arrested for driving under the influence of an intoxicant.

The Wisconsin Court of Appeals also recently noted the applicability of *McNeely*, *supra*, to Wisconsin law in *State v. Reese*, 353 Wis. 2d 266, 844 N.W.2d 396 (Ct. App. 2014).[1] In *Reese*, the Court of Appeals, District IV, noted that previous Wisconsin caselaw under *Bohling*, *supra*, and its progeny is no longer good law. It, however, upheld the lower court's denial of the suppression motion under a good faith analysis. Good faith will be discussed later in this brief, as good faith was the State's basis for requesting the test result not be suppressed; and the trial court decision was based solely upon a good faith analysis.

[1] According to CCAP, a petition for review was filed on March 21, 2014.

C. Good faith does not apply here, as the officer's reason for doing the warrantless blood draw was invalid under Wisconsin law at the time.

In order for the good faith exception to the warrant requirement to apply, the State must establish that police were relying upon settled precedent. See: *Davis v. United States*, 131 S.Ct 2419 (2011); *State v. Dearborn*, 2010 Wis. 84, 327 Wis. 2d 252, 786 N.W.2d 97 (2010).

In the case at bar, the officer did not allege he was following *Bohling*, *supra*. He merely said he was doing a forced blood draw due to the Implied Consent Law. The Implied Consent Law, however, does not say that blood can be taken from an individual who refuses an evidential test. Wis. Stat. § 343.305(9)(a) states:

> If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege.

Thus, the Implied Consent Law contemplates that when an arrestee refuses, the officer's duty at that time is to commence the refusal proceeding. The law does not say he should then draw blood over objection.

The Implied Consent Law, the alleged basis for the officer's forcing of blood, does not permit a warrantless blood draw. Nowhere in that statute is blood permitted to be taken or forced after

an arrestee refuses such a draw. In fact, the Implied Consent Law permits refusals; albeit, there are certain ramifications for refusal, such as drivers license revocation. Under these specific facts, good faith does not apply.

Here, the officer was acting upon a misunderstanding of the law—that the Implied Consent Law required blood draws. That is simply not true—police in Wisconsin are permitted to request breath, blood or urine. The defendant also presented a reasonable objection to the forced draw—he did not want to give blood and had a right to refuse and asked to speak with his wife and power of attorney. Those objections were simply ignored. Even if *Bohling* remained good law, a reasonable objection mandates blood not be taken from an arrestee. Additionally, caselaw establishes that when arrestees make reasonable requests-like getting an attorney to help them make a decision as to whether to submit, the police should attempt to inform the arrestee that he is not entitled to an attorney at that juncture. That was not even done here. See: *State v. Baratka*, 258 Wis. 2d 342, 654 N.W.2d 875 (Ct. App. 2002); *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 646 (1999).

Bohling required the following four factors be present for such a draw to be permissible:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.

Id. at 534. Thus, the draw is only permitted if there is no reasonable objection. There was a reasonable objection here; thus, good faith reliance on *Bohling* does not apply. The officer did not claim he was relying on *Bohling, supra*, and this blood draw would have not been supported under *Bohling*.

D. Application of the good faith doctrine must be determined on a case by case basis, as the Fourth Amendment does not tolerate blanket exceptions to its requirements.

Even if this officer had said he was following *Bohling* and not simply proceeding under the Implied Consent Law, good faith would not apply.[2] Insofar as *Bohling* purported to create a *per se* exigent circumstances exception to the warrant requirement in cases of alcohol-intoxicated driving, good-faith application of its rule required strictly limiting *Bohling* to its facts, because the United

[2] Shepard recognizes this Court's decision to the contrary in *Reese, supra*, as well as unpublished cases citing *Reese*. Shepard also notes that the issue of good faith is likely to be addressed when the Wisconsin Supreme Court issues its decisions in the cases of *State v. Foster*, 11 AP 1673-CR, *State v. Kennedy*, 12 AP 523-CR, and *State v. Tullberg*, 12 AP 1593, which were all argued in that Court on September 9, 2014. Shepard raises this section of his brief in order to preserve his rights pending the decisions in the Wisconsin Supreme Court.

States Supreme Court had otherwise clearly stated that the Fourth Amendment will not allow blanket exceptions to its protections, and that when an exception is claimed, the validity of that claimed exception must be evaluated on a case-by-case basis by a detached and neutral magistrate. This limitation on good-faith application of *Bohling* was also required by *Dearborn, supra.*

In *McNeely*, the United States Supreme Court held "the natural metabolization of alcohol in the bloodstream" does not create "a per se exigency that justifies an exception to the warrant requirement for nonconsensual blood testing in all drunk-driving cases." Rather, "exigency in this context must be determined case by case based on the totality of the circumstances." 569 U.S. ___, 133 S.Ct. 1552 (2013). That is, Wisconsin's *Bohling* is bad law. The Fourth Amendment will not tolerate a predetermined rule that the rapid dissipation of alcohol from the bloodstream is, *per se*, an exigent circumstance eliminating the warrant requirement in alcohol-intoxicated driving cases. The question then arises what effect this Fourth Amendment ruling has on application of the exclusionary rule in cases such as Shepard's which occurred prior to *McNeely*.

U.S. Supreme Court decisions construing the Fourth Amendment apply retroactively "'to all convictions that were not yet

final at the time the decision was rendered.'" *Dearborn*, *supra* at ¶ 31 (quoting *United States v. Johnson*, 457 U.S. 537, 562 (1982)). Current Wisconsin law is that when retroactive application of a new Fourth Amendment ruling would result in application of the exclusionary rule, application of the exclusionary rule itself (not of the new Fourth Amendment ruling) is sometimes excepted on the grounds that law enforcement acted in objectively reasonable, good-faith reliance "on clear and settled law that was only subsequently changed." *Dearborn*, *supra* at ¶ 34. The good faith exception to the exclusionary rule, however, is in tension with the rule of retroactivity. *Id*.

In *Dearborn, supra* the Wisconsin Supreme Court had to determine "whether the good faith exception to the exclusionary rule should apply when clear and settled precedent, reasonably relied upon by law enforcement, is subsequently overruled." *Dearborn, supra* at ¶ 16. There, law enforcement searched the defendant's vehicle after he had been secured in the back of a squad car. The search was authorized under then-precedential Wisconsin case law, namely, *State v. Fry*, 131 Wis. 2d 153, 388 N.W.2d 565 (1986) (overruled by *State v. Dearborn*) which, purporting to follow *New York v. Belton*, 453 U.S. 454 (1981), created a *per se* exception to

the warrant requirement for automobile searches incident to the arrest of a recent occupant: "A police officer may **assume** under Belton that the interior of an automobile is within the reach of a defendant when the defendant is still at the scene of an arrest, but the defendant is not physically in the vehicle." *Fry*, *supra* at 174 (emphasis added).

While Dearborn's case was on appeal, the U.S. Supreme Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), which rendered *Fry* unconstitutional. In *Dearborn*, the Wisconsin Supreme Court, therefore, overruled *Fry* and considered the retroactive application of *Gant* to Dearborn's case. It held that because *Fry* was clear and settled law in Wisconsin at the time of the search of Dearborn's vehicle, law enforcement reasonably relied upon it, and the fruits of the search would not be suppressed (even though the search was unconstitutional), because in such a case suppression would not serve the purpose of the exclusionary rule, which is to deter unlawful police misconduct.

The good faith exception to the exclusionary rule only applies when the State meets its burden of establishing that the officer's behavior was done in accordance with binding and settled precedent, and that precedent is later overturned. Additionally, as noted above,

even Wisconsin's cases differed as to whether the mere elimination of alcohol should constitute a sufficient exigency without consideration as to other factors. *Bohling* seems to be the only case where a court permitted a *per se* exigency in blood draws without consideration as to any other facts.

The *Dearborn* decision itself says the following:

> [U]nder our holding today, the exclusionary rule is inappropriate only when the officer reasonably relies on clear and settled precedent. Our holding does not affect the vast majority of cases where neither this court nor the United States Supreme Court have spoken with specificity in a particular fact situation. The only litigants who will be disincentivized [from challenging searches] are the relatively small number of defendants who choose to challenge searches that have already clearly and unequivocally been held lawful. The vast majority of cases, particularly in the fact-intensive Fourth Amendment context, will not fall into this category.

Dearborn, 2010 WI 84 at ¶ 46 (emphasis added).

In *Dearborn*, the Supreme Court "adopt[ed] the reasoning in *Gant* as the proper reading of Article 1, Section 11 of the Wisconsin Constitution." The "reasoning in *Gant*" which the Supreme Court adopted, was that the "broad reading of *Belton*"—namely, that a blanket exception to the warrant requirement existed on the grounds of an assumed *per se* exigency in cases of automobile searches incident to arrest—untethered the rule from its circumstantial, factual

justifications. By adopting the reasoning in *Gant*, the Supreme Court accepted that the factual circumstances of each case provide the only justification for an exception to the warrant requirement. *Dearborn*, therefore, completely undermined the rationale of *Bohling*, because *Bohling* relied upon exactly the sort of assumed *per se* exigency untethered from the factual circumstances of the case that the "reasoning in *Gant*" found so repugnant to the Fourth Amendment.

Dearborn, thus, directly called into question the rationale of *Bohling*, making any good-faith reliance on *Bohling* impossible. It established that any case with such a *per se* rule ran afoul of the Fourth Amendment, and police action based upon such a case would not be excused by good faith. As noted above, Fry attempted to create a "bright-line" rule of uniform application in cases of automobile searches incident to arrest that would avoid the alternative, case-by-case factual analysis of the constitutionality of such a search:

> The only other alternative to the Belton rule would be to permit searches on a case-by-case basis when the police believe that a suspect may escape from their control and regain access to an automobile. This alternative is unworkable, however, because such momentary escapes are not predictable. The rule would effectively prevent automobile searches, or at least **eliminate any uniform rule of search**. Given that we determine constitutional facts on an independent basis to assure the uniform application of constitutional rights, such an ad

> hoc test for determining whether a defendant had access to the interior of an automobile is undesirable.

Fry, 131 Wis. 2d at 175 (emphasis added). And just that sort of "case-by-case" analysis, the elimination of any "uniform rule of search", and the requirement of an "ad hoc test" of the facts is precisely what the U.S. Supreme Court held in *Arizona v. Gant* was required by the Fourth Amendment. In *Dearborn*, the Wisconsin Supreme Court "adopt[ed] the reasoning in *Gant* as the proper reading of Article 1, Section 11 of the Wisconsin Constitution." *Dearborn*, *supra* at ¶ 27.

Thus, *Dearborn* itself adopted as law a decision of the U.S. Supreme Court that clearly rejected a *per se* exception to the warrant requirement on the grounds that the *per se* exception untethered the exception from its circumstantial justification (see: *Gant*, 556 U.S. at 343). By adopting *Gant*, *Dearborn* undermined the entire rationale for any *per se* exigent circumstances rule, including that crafted in *Bohling*. After *Dearborn*, *Bohling* was no longer "clear" or "settled"

law in Wisconsin. Police should, therefore, not have been relying upon it at that juncture.[3]

Perhaps recognizing the difficulty any officer would have in interpreting various cases, the Seventh Circuit Court of Appeals has distinguished between "good faith" reliance on a search warrant and "good faith" reliance on police understanding and application of court decisions:

> We decline to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law—as distinguished from the subsequently invalidated statute at issue in *Krull*—absent magistrate approval by way of a search warrant. Such expansion of the good-faith exception would have undesirable, unintended consequences, principal among them being an implicit invitation to officers in the field to engage in the tasks—better left to the judiciary and members of the bar more generally—of legal research and analysis. *United States v. Real Property Located at 15324 County Highway E.*, 332 F.3d 1070, 1076 (7th Cir.2003).

Explaining the importance of the distinction between judicial and police evaluation of facts at greater length in the context of a

[3] It should be noted that the Wisconsin Supreme Court has also previously held that good faith is not applicable if a warrant is issued without authority. See: *State v. Hess*, 327 Wis.2d 524, 551, 785 N.W.2d 568 (2010). The Supreme Court has never addressed whether the good-faith exception can save evidence seized pursuant to a warrant that the judge had no authority to issue. Applying the traditional principles of the exclusionary rule and the good-faith exception, we decline to extend the good-faith exception to the facts of this case.

probable cause determination, the Western District of Michigan reasoned:

> The difficulties facing courts making probable cause determinations and interpreting case law, however, are small in comparison to those facing police officers. Officers are particularly poorly situated to determine whether the facts of a particular case establish probable cause to search because they lack "the detached scrutiny of a neutral magistrate." Indeed, the "judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime" is considerably less reliable than that of a neutral court. The expansions of the good-faith doctrine have shown that courts do not wish to entrust to the executive branch law enforcement the unilateral power to make probable cause determinations based on their own reading of case law. *United States v. Peoples*, 668 F.Supp.2d 1042, 1049 (W.D.Mich.2009).

Given that states and federal circuits differ as to when, if ever, good faith should apply, courts need to carefully limit the application of that doctrine. Here, there was no proof the officer was following clear and settled precedent. There was no evidence he was relying upon *Bohling*. However, even if he had relied upon *Bohling*, good faith should not apply, as *Bohling*, when read in conjunction with other decisions, would not mandate a warrantless forced draw in this case.

Whether good faith can apply turns on whether the officer acted reasonably and in good-faith reliance on *Bohling*; *Faust* and other caselaw when he drew Shepard's blood. *Bohling* did not stand

alone and could not be applied in a vacuum. In order to find good-faith reliance on the *per se* rule created in *Bohling*, the police must have attempted to interpret and apply it in conformity with relevant United States Supreme Court (SCOTUS) precedential case law holding that the very existence of exigent circumstances depends upon the particular circumstances of a given case. What constitutes "exigent circumstances" in one case may not be sufficient to create an exigency in another case. As noted above, in *Schmerber*, SCOTUS upheld a warrantless blood draw under the exigent circumstances exception on the grounds that the officer might reasonably have believed that the delay that would be created by obtaining a warrant threatened the destruction of the evidence, but it did so "only on the facts of the … record." 384 U.S. at 772. Those facts were these: the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops; there was an accident in Schmerber's case, and additional time was required to transport the defendant to the hospital and to investigate the scene of the accident. There was no time to get a warrant. *Id*. at 770-71.

But SCOTUS made clear in *Welsh v. Wisconsin*, 466 U.S. 740 (1984) that, even in the case of a drunk-driving related offense, the "need to preserve evidence of the [accused]'s blood-alcohol level"

does not, of itself, create an exigency obviating the need for a warrant; other factors must be considered in determining the existence of an exigency, including the gravity of the offense. *Welsh*, *supra* at 753. In *Welsh*, SCOTUS vacated a judgment of the Supreme Court of Wisconsin in a case in which law enforcement, having probable cause to believe that the defendant had committed a drunk-driving-related offense, entered the defendant's home without a warrant to effectuate his arrest. As in *Schmerber*, there was an accident—car ran off the road into a field—and law enforcement had reason to believe the defendant was intoxicated by alcohol. Unlike *Schmerber*, Welsh did not require medical treatment for injuries sustained in the accident, and Welsh's blood was not drawn. Instead, Welsh refused to submit to a breath test and moved to dismiss the complaint on the grounds that law enforcement unlawfully entered his home without a warrant to arrest him for drunk driving.

Under *Welsh*, a claim of exigent circumstances requires a factual calculation in the totality of circumstances, one step in which is the identification of the gravity of the underlying offense:

> We therefore . . . hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed,

> see Payton, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

466 U.S. at 753 (citing *Payton v. New York*, 445 U.S. 573 (1980)). Although the instant case involves a misdemeanor criminal offense, it is important to note that *Bohling*, to the extent it contradicts with *Welsh v. Wisconsin*, was not valid law, as *Welsh* is a United States Supreme Court case mandating that it is only after a review of the totality of factors that a decision can be rendered as to whether there is a sufficient exigency to justify dispensing with the warrant requirement.

To conclude from *Schmerber* and *Welsh* that the rapid dissipation of alcohol in the blood is an exigency sufficient to obviate the need for a warrant, when police wish to draw a person's blood on probable cause to arrest for an OWI, but not when they wish to enter a person's home on probable cause to arrest for the same offense is disingenuous. Searches that intrude beyond the surface of the body require more than probable cause to arrest in order to pass constitutional muster. *See Schmerber*, 384 U.S. at 770. *Schmerber* and *Welsh* require that all the facts of the situation be taken into consideration before law enforcement may command a

warrantless blood draw on the grounds of exigency. While the potential loss of blood-alcohol evidence caused by a delay in obtaining a warrant may justify a warrantless blood draw under some circumstances, courts and law enforcement must assess the facts of each case individually. Thus, to the extent *Bohling* read *Schmerber* as it did, *Bohling* was simply bad law. Moreover, *Bohling* failed to take into account other cases mandating a totality of circumstances approach to exigency.

Another case which addresses a blanket exception to the warrant requirement is *Richards v. Wisconsin*, 520 U.S. 385, 390 (1997). In *Richards v. Wisconsin*, police officers obtained a warrant to search the defendant's hotel room for drugs. The police requested a "no-knock" warrant, but the magistrate deleted the "no-knock" provisions, thereby requiring announcement. When executing the warrant, the police failed to announce their presence before forcibly entering the hotel room. The Wisconsin Supreme Court had previously re-affirmed its earlier holding that exigent circumstances justifying a no-knock entry are always present in felony drug cases. See: *State v. Richards*, 201 Wis. 2d 845, 549 N.W.2d 218 (1996). The United States Supreme Court in *Richards v. Wisconsin*, 520 U.S. 385, 390 (1997) then affirmed the Wisconsin Supreme Court's

judgment that the no-knock entry was reasonable on the special facts of the case but struck down Wisconsin's categorical, blanket exception to the announcement requirement, saying the unique facts of each case must be individually considered before an exception is admitted:

> Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

Richards, supra at 394.

The Fourth Amendment (and Art. 1, sec. 11, Wis. Const.) will not tolerate blanket exceptions to its requirements. The facts of each case must be individually evaluated before any "good faith" exception to the warrant requirement may be claimed. It should be noted that the officer in this case did not say he was acting in good faith based upon any Wisconsin cases. If it is presumed this officer was relying on *Bohling*, good faith should not apply when *Bohling* permitted a blanket exception to the warrant requirement, and other cases clearly held such blanket exceptions will not be tolerated.

E. No case has permitted the good faith doctrine to excuse an unreasonable warrantless bodily intrusion.

The Fourth Amendment and Wis. Const., Art. I, sec. 11 provide as much protection to the integrity of a person's skin as to the integrity of his/her residence. *See Schmerber*, 384 U.S. at 770; *Bohling*, 173 Wis. 2d at 549, n.3 (J. Abrahamson, dissenting).

As noted above, the good faith cases have thus far not dealt with a warrantless intrusion into one's body. The *Reese*, *supra*, decision of this Court is the first. The search of a trunk of a car is a far cry from the search into one's veins to withdraw blood. The distinction was recently highlighted by the United States Supreme Court's decision in *Maryland v. King*, 133 S.Ct. 1958, 1969 (2013), where a law permitting DNA swabs upon an arrest based upon probable cause was considered a minor enough intrusion as to not require a warrant.

> A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no 'surgical intrusions beneath the skin.' *Winston*, 470 U.S., at 760, 105 S.Ct. 1611. The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search. . .

Whether the police conduct was reasonable is the central question in determining whether the exclusionary rule should apply. Clearly, an intrusion into the skin without warrant, in contravention of United States Supreme Court caselaw, is not reasonable. Moreover, *McNeely* was not new law at all—it merely explained *Schmerber*. Thus, the good faith analysis would not apply because that doctrine is only applicable when a higher court completely changes a long line of cases, such as in *Gant*. It was clear that *Gant* was a complete reversal of prior caselaw relating to car searches incident to arrests. *Gant* was not simply an explanation of how previous cases were to be read, as was *McNeely*. No case has held that police may act in good faith upon a court decision which misreads clear United States Supreme Court law. Thus, good faith should not be used to justify following a case which was based upon misunderstanding of federal law. As the United States Supreme Court noted in *McNeely*, *Schmerber* has always stood for the proposition that the elimination of alcohol is just one possible factor that may contribute to a finding of exigency—it never meant that in and of itself could be used as a basis for a warrantless blood draw.

No case has ever permitted an unreasonable bodily intrusion by police to be excused by the good faith doctrine. Good faith was

never meant to excuse such police action, and to expand the doctrine now would eviscerate the protections of the Fourth Amendment beyond what was ever contemplated in federal or state jurisprudence.

CONCLUSION

For the reasons stated in this Brief, Shepard respectfully requests this Court reverse the conviction and the trial court's denial of the suppression motion, with instructions to remand to the trial court with an Order suppressing the results of the warrantless blood draw.

Dated at Madison, Wisconsin, September 17, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7795 words.

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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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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