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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP001267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDY J. PARISI,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals,
District II, Affirming a Judgment of Conviction
Entered in the Circuit Court for Winnebago County,
the Honorable Daniel J. Bissett, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Police responded to a call that Mr. Parisi was possibly not breathing at an apartment. After he was taken to the hospital, Mr. Parisi's blood was drawn without a warrant and without his consent to test for evidence of heroin use. Could the police officer in this case have reasonably relied on ***State v. Bohling*** in conducting the warrantless blood draw even though ***Bohling*** was about testing for a specific alcohol concentration level in a drunk driving context and this is a non-driving case that involves testing for heroin in any detectable amount?

   The circuit court did not consider this question.

The court of appeals ruled that the police officer could have reasonably relied on ***Bohling*** in concluding that the dissipation of drugs in Mr. Parisi's bloodstream, alone, constituted an exigent circumstance justifying the warrantless blood draw.

2. Were there exigent circumstances justifying the warrantless blood draw?

   The circuit court answered yes.

Because it ruled against Mr. Parisi on the issue of the good faith exception, the court of appeals did not reach the question of exigency.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

STATEMENT OF THE CASE

The state filed a complaint charging Andy J. Parisi with possession of narcotic drugs, in violation of Wis. Stat. § 961.41(3g)(am). (1). An information charging the same was filed on May 2, 2013. (3). Mr. Parisi filed a motion asking the court to suppress the results of his warrantless blood draw, which indicated he had morphine, a metabolite of heroin, in his system. (6). After holding a hearing, the court denied the suppression motion. (30:41; App. 114). On September 13, 2013, Mr. Parisi entered a no contest plea to possession of narcotic drugs. (32:2). On November 25, 2013, the court, the Honorable Daniel J. Bissett presiding, withheld sentence, imposed 24 months of probation, and ordered that Mr. Parisi serve 90 days of condition time, which the court stayed pending appeal. (33:15). Mr. Parisi filed a timely notice of appeal on May 23, 2014. (26).

The court of appeals affirmed the circuit court's decision, holding that the good faith exception to the exclusionary rule applied in this case because on the day Mr. Parisi's blood was drawn, ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *abrogated by* ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), was the law of the state and the officer could have reasonably relied on that case in concluding that the dissipation of drugs, alone, constituted an exigent circumstance justifying the warrantless blood draw. ***State of Wisconsin v. Andy J. Parisi***,

No. 2014AP1267-CR, unpublished slip op. (WI App January 21, 2015) (Slip op. at ¶¶9-12; App. 103-04).

On June 12, 2015, this Court granted Mr. Parisi's petition for review.

STATEMENT OF FACTS

At 12:38 a.m. on October 16, 2012, Oshkosh police were dispatched to an apartment to attend to a person who was possibly not breathing. (1:1-2; 30:5). Police arrived five to ten minutes after the dispatch. (30: 10). A woman who lived in the apartment directed them in. (30:6). Fire department paramedics and four roommates who lived in the apartment were already there. *Id.* Police observed Mr. Parisi, who was a visitor there, laying motionless on the floor with "puke" on the sofa and floor near him. (30:6-7, 9). A total of five or six police officers were present working on the call. (30:21).

Officer Benjamin Fenhouse observed paramedics administer Narcan, which Fenhouse knew was used to revive persons overdosing on heroin. (30:15). Fenhouse had personally witnessed Narcan administered "between five and ten times" in other cases. *Id.*

Officer Fenhouse was at the apartment "probably like 20 minutes to a half hour" when Mr. Parisi was transported by ambulance to Aurora Medical Center in Oshkosh. (30:16-17). Fenhouse followed the ambulance to the hospital for the purpose of obtaining a blood sample. (30:16). Specifically, Fenhouse went to "investigate a heroin overdose and obtain I guess an evidentiary test of his blood." (30:16). He stated he planned to get the blood sample to "analyze it for evidence of a crime." (30:18).

Fenhouse asked Mr. Parisi for consent to draw blood. (30:21). When Mr. Parisi declined, Fenhouse directed medical staff to take the sample anyway. (30:21, 23). The phlebotomist first attempted to take blood at 1:55 a.m., but because Mr. Parisi was medically unstable, did not actually obtain a sample until 3:10 a.m. (30:17, 23-24).

Fenhouse testified that he has been involved in "about 12" other investigations where search warrants were obtained. (30:19). Fenhouse stated in those cases when consent was denied, an officer had to "go back and type out a search warrant" and then "make contact with a judge." *Id.* Fenhouse indicated that it takes "approximately two hours from the start of that process until it's actually signed by a judge." (30:21, 24).[1]

Neither Fenhouse nor any of the other officers applied for a search warrant. (30:22, 24).

The blood sample, when tested, indicated the presence of morphine (which can appear in blood as a metabolite of heroin) in Mr. Parisi's blood. (1:2).

While Mr. Parisi was being transported to and treated at the Aurora Medical Center, Officer Kaosinu Moua interviewed witnesses at the apartment. (1:2). The witnesses reported that Mr. Parisi did not live there and had come over to watch a football game around 9:00 or 9:30 p.m. that evening. (1:2; 30:7). At some point during the course of the night, he left to go to a nearby gas station to get something to eat and drink. (1:2; 30:10). He returned to the residence after the occupants had gone to bed. (1:2; 30:7). One of the

[1] He also said the whole process can take between three and five hours but clarified it only takes two hours to get a warrant signed and the additional time is to carry out searches. (30:20, 24).

residents woke up and discovered Mr. Parisi in the living room having breathing difficulty. (1:2; 30:7-8).

Although Mr. Parisi did not live at the apartment and was found in the living room, Officer Moua searched the other rooms of the apartment and found a marijuana pipe and a substance that was later confirmed to be heroin in one of the bedrooms. (1:2; 30:8-9).

Suppression Motion and Hearing

Mr. Parisi filed a motion to suppress the results of the warrantless blood draw. At the suppression hearing, Officers Fenhouse and Kaosinu Moua testified to the above-outlined facts. Relying on an article written "to review the pharmacokinetics of heroin and its metabolites and the influence of the route of administration, drug-interactions and the presence of liver and kidney impairment on the pharmacokinetics," the state argued that both heroin and 6-monoacetylmorphine,[2] the first metabolite of heroin, dissipate quickly from blood. (7:2; 30:27-28; App. 126-35).

The state acknowledged that morphine, a metabolite of heroin, stays in the blood longer but did not provide information on its rate of dissipation. (7:2). The state argued that the presence of morphine, while relevant to a charge of heroin possession, does not provide conclusive evidence of heroin use and thus officers need to be permitted to draw blood quickly without a warrant in order to get evidence of the presence of heroin or 6-monoacetylmorphine in the blood. (7:2; 30:28-29). The state argued for a per se rule that

[2] 6-monoacetylmorphine is also commonly referred to as 6-acetylmorphine and is referred to that way in some of the articles in the attached appendix.

warrantless blood draws be permitted in any case involving heroin. (30:30).

Mr. Parisi argued there was no exigency because six officers were working on the case and one of them easily could have started the warrant application process right away. (30:35-36). Further, the officer at the hospital did nothing during the time it took to get Mr. Parisi stabilized, when he could have used that time to try to obtain a warrant. (30:34). Mr. Parisi also noted that a forced blood draw implicates an individual's expectation of privacy, there was no evidence the officer thought heroin would dissipate quickly when he made his decision to pursue a warrantless blood draw, and the state could prove possession with any amount of morphine detected in Mr. Parisi's blood. (30:31-33).

The circuit court denied the suppression motion. The court declined to adopt the state's proposed per se rule that warrantless blood draws are acceptable in all heroin cases because of the rate of dissipation. (30:40; App. 113). However, citing ***McNeely***, 133 S. Ct. 1552, and its totality of the circumstances test, the court stated that the warrantless blood draw was justified in Mr. Parisi's case because of:

> …the unknown time of intake of the substance, the delay that took place in trying to determine what the defendant may or may not have taken, and what his medical condition was, the delays that were involved in regards to the treatment of him at the hospital setting, the time that it would have taken for obtaining the warrant, the dissipation of the heroin within the human body, and the speed in which it does that.

(30:41; App. 114).

Mr. Parisi thereafter entered a no contest plea, was sentenced, and appealed. (32:2; 33:15; 26).

Mr. Parisi argued in the court of appeals that information gleaned from the warrantless blood draw should have been suppressed because there was no exigency, there was ample time to secure a warrant, and the nature of the search was unreasonable. The state argued that the search was valid based upon good faith reliance on ***Bohling***, 173 Wis. 2d 529 (since abrogated by ***McNeely***), which the state characterized as "controlling precedent." The state argued ***Bohling*** established a per se rule allowing police to seize blood without a warrant to obtain evidence that rapidly dissipates with time. The state also argued that the rate of dissipation of heroin's first metabolite, 6-acetylmorphine, constituted an exigent circumstance which excused the police from obtaining a warrant.

The court of appeals affirmed. In the court's view, ***Bohling*** was good law in Wisconsin on the date police obtained the warrantless blood draw and ***Bohling*** "held that the dissipation of alcohol in a person's bloodstream, alone, constituted an exigent circumstance justifying a warrantless blood draw." (Slip op. ¶9; App. 103). Citing a footnote in Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.3(c) at 226-228 & n.132 (5th ed. 2012), which referenced a New Hampshire case, the court reasoned "[g]iven this precedent, police could have reasonably concluded that the dissipation of controlled drugs in Parisi's blood stream, alone, constituted an exigent circumstance justifying a warrantless blood draw." *Id.* ¶10. (App. 103). The court held that "regardless of whether the warrantless blood draw of Parisi may or may not have been retroactively unlawful under new United States Supreme Court precedent [***McNeely***], the good faith exception

precludes application of the exclusionary rule to exclude the evidence obtained." *Id*. ¶12. (App. 104).

ARGUMENT

I. The Police Officer Could Not Have Reasonably Relied on ***Bohling*** Because Case Law Permitting a Warrantless Blood Draw to Test for a Specific Alcohol Concentration Level in a Drunk Driving Context is Not "Clear and Settled" Precedent Justifying a Test for Heroin in Any Detectable Amount in a Non-Driving Possession Case.

A. Introduction, summary of the argument and standard of review.

Police responded to a 911 call regarding Mr. Parisi and found him on the floor of an apartment he was visiting. After being revived, Mr. Parisi refused to consent to having his blood drawn but Officer Fenhouse ordered that a blood sample be taken anyway. At no time did any of the five or six officers involved in the case take any action to obtain a warrant.

The court of appeals ruled the warrantless blood draw was justified by reasonable reliance on ***Bohling***. ***Bohling*** created a per se rule that allowed for warrantless blood draws in all cases of suspected drunk driving. 173 Wis. 2d at 533. ***Bohling*** did not discuss testing for drugs or testing for any substance in a non-driving context. In ***McNeely***, the Supreme Court struck down ***Bohling***'s per se rule stating that the dissipation of alcohol is not per se exigency and courts must consider the totality of the circumstances to decide if there are exigent circumstances to justify warrantless blood draws.

133 S. Ct. at 1563, 1568. Mr. Parisi's blood was drawn before ***Bohling***'s per se rule was overturned by ***McNeely***.

Thus, the question in this case is whether Officer Fenhouse could have reasonably relied on ***Bohling*** to draw Mr. Parisi's blood without a warrant even though ***Bohling*** was about alcohol concentration levels and driving and Mr. Parisi's case is about heroin in any detectable amount and did not involve a vehicle.

State v. Dearborn states that the good faith exception to the exclusionary rule applies "where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." 2010 WI 84, ¶ 4, 327 Wis. 2d 252, 786 N.W.2d 97. This case does not pass the ***Dearborn*** test. The police officer in this case could not have reasonably relied on ***Bohling*** because ***Bohling*** was a drunk driving case about testing blood for a specific alcohol concentration level and this is a non-driving case about testing blood for any detectable amount of heroin. ***Bohling*** did not provide "clear and settled" precedent for Mr. Parisi's entirely different factual situation. Further, applying the good faith exception here would allow police officers to rely on precedent of factually dissimilar cases to conduct warrantless searches, creating a slippery slope and unduly expanding the scope of the good faith exception. Additionally, application of the exclusionary rule is appropriate in order to deter police misconduct.

In reviewing a circuit court's denial of a motion to suppress, this Court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Sveum***, 2010 WI 92, ¶16, 328 Wis. 2d 369, 787 N.W.2d 317. However, the question of whether police conduct violates the

constitutional guarantee against unreasonable searches is a question of constitutional fact this Court reviews independently. ***Id.***

B. Summary of ***Schmerber***, ***Bohling*** and ***McNeely*** and the ***Dearborn*** test for the good faith exception.

Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches. The Fourth Amendment provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…" U.S. Const. Amend. IV. A warrantless search is per se unreasonable unless it falls within a recognized exception to the warrant requirement. ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983).

One recognized exception is the exigent circumstances exception which applies when there is a threat that evidence will be destroyed if time is taken to obtain a warrant. ***State v. Faust***, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371. The test is an objective one inquiring into whether the officer might have reasonably believed an emergency threatened the destruction of evidence. ***Id***., ¶12.

The courts in ***Schmerber v. California***, 384 U.S. 757 (1966) and ***State v. Bohling***, 173 Wis. 2d at 533-34, found exigent circumstances existed. Additionally, exigent circumstances were discussed in ***Missouri v. McNeely***, 133 S. Ct. 1552. In contrast to Mr. Parisi's case, all three cases were about warrantless blood draws to test for alcohol concentration levels when drunk driving was suspected.

In ***Schmerber***, the Supreme Court upheld a warrantless blood draw from a person under arrest for drunk driving because the percentage of alcohol in blood begins to diminish shortly after drinking stops, leaving inadequate time to seek a warrant. 384 U.S. at 770-71.

Following ***Schmerber***, jurisdictions were split on whether the decision meant that in all drunk driving cases the dissipation of alcohol in blood was by itself an exigent circumstance justifying an exception to the warrant requirement. In ***Bohling***, this Court held that the rapid dissipation of alcohol from blood, alone, amounted to a per se exigent circumstance justifying warrantless blood draws in all drunk driving cases. 173 Wis. 2d at 533.

In ***McNeely***, another drunk driving case, the Supreme Court ruled that the dissipation of alcohol in one's blood is not a per se exigent circumstance justifying a warrantless blood draw and that whether a warrantless blood draw is reasonable must be determined on a case-by-case basis by examining the totality of the circumstances. 133 S. Ct. at 1563, 1568. ***McNeely*** thus abrogated ***Bohling***. *See* ***State v. Reese***, 2014 WI App 27, ¶¶17-18, 353 Wis. 2d 266, 844 N.W.2d 396.

McNeely was decided after Mr. Parisi's blood was drawn but before his case was before the circuit court.[3] Ordinarily, newly declared constitutional rules are applied retroactively to all pending cases that are not yet final at the time the decision was rendered. ***Dearborn***, 327 Wis. 2d 252, ¶31 citing ***U.S. v. Johnson***, 457 U.S. 537, 562 (1982). However, this rule of retroactivity does not always mean that the exclusionary rule is applied. As discussed in ***Dearborn***,

[3] Mr. Parisi's blood was drawn on October 16, 2012. ***McNeely*** was decided on April 17, 2013. Mr. Parisi was arraigned on June 6, 2013.

the "good faith exception" to the exclusionary rule "precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance on clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." 327 Wis. 2d 252, ¶51.

In ***Reese***, 353 Wis. 2d 266, ¶22, the court of appeals ruled that the good faith exception precluded the application of the exclusionary rule where the police officer conducted the warrantless blood draw in a drunk driving case, in violation of the law established in ***McNeely*** but done in reliance on ***Bohling***'s per se rule.

C. The good faith exception does not apply because ***Bohling*** is not "clear and settled" precedent justifying a test for heroin in any detectable amount in this non-driving possession case.

It would not be reasonable for a police officer to rely on ***Bohling***, a case involving alcohol concentration levels and drunk driving, in a case like this one, where there was no vehicle, no alcohol, and where the concentration level was irrelevant.

Dearborn discusses the good faith exception and sets out its limits. In ***Dearborn***, this Court stated "under 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." ***Dearborn***, 327 Wis. 2d 252, ¶46. Thus, the language of ***Dearborn*** limits the application of the good faith exception to only those situations where the officer was acting in reliance on a case with the same type of facts.

Accordingly, the good faith exception should not apply in this case because ***Bohling*** and Mr. Parisi's case have entirely different facts – ***Bohling*** was about testing a suspected drunk driver for a specific level of alcohol concentration and this case is about finding evidence of heroin in any detectable amount and did not involve driving.

Bohling specifically referred to alcohol, percentage of alcohol in blood, and drunk driving over and over again. The court began by saying:

> The issue in the case is whether the fact that the **percentage of alcohol** in a person's blood stream rapidly diminishes after drinking stops alone constitutes a sufficient exigency under the Fourth Amendment to the United States Constitution and Article 1 Section 11 of the Wisconsin Constitution, 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 intoxication."

173 Wis. 2d at 533 (emphasis added).

The court went on to establish its rule with specific reference to drunk driving:

> A warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (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 533-34 (emphasis added).

On page 548, the court repeated the rule with its focus on dissipation of alcohol and drunk-driving, stating:

> We hold that the **dissipation of alcohol** from a person's bloodstream 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.

Id. at 548 (emphasis added).

The court also stated it was relying on ***Schmerber*** and quoted ***Schmerber***'s statement about how fast alcohol diminishes after drinking stops. ***Id***. at 539. ***Bohling*** also discussed the importance of alcohol concentration and how the state's case can be prejudiced if the amount of alcohol in blood drops below the criminal threshold. ***Id***. at 546.

Finally, the ***Bohling*** court explained that allowing warrantless blood draws in drunk driving cases was appropriate because of Wisconsin's significant interest in enforcing its drunk driving laws. The court stated that this government interest justified the intrusion on individual privacy. ***Id***. at 545. In total, ***Bohling*** mentioned alcohol thirty-four times and drunk driving or drivers nineteen times. Mr. Parisi's case does not involve alcohol and it does not involve driving. Mr. Parisi was found in an apartment and a drug overdose was suspected. Alcohol consumption was never suspected. He never drove a car. Further, any trace

amount of evidence of heroin use, rather than a specific concentration, was all that was needed to support his conviction. How then can ***Bohling***, a case about drunk driving and obtaining a blood sample before blood alcohol concentration dropped to a legal level be "clear and settled" precedent for this case? It cannot. It would not be reasonable for a police officer to read ***Bohling*** and assume its holding applied to a non-driving drug case like Mr. Parisi's.

The court of appeals did not address the fact that ***Bohling*** was about drunk driving whereas Mr. Parisi's case has nothing to do with driving. The court also did not find it significant that (1) ***Bohling*** was about getting a blood sample before the alcohol concentration level dropped and that this case is about testing for drugs in any detectable amount, and (2) that drugs and alcohol metabolize at different rates. To support its holding that warrantless blood draws for alcohol and drugs should be treated the same, the court cited a footnote from Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.3(c) at 226-228 & n.132 (5th ed. 2012), which referenced ***State v. Steimel***, 155 N.H. 141 (N.H. 2007), a New Hampshire case that held that exigent circumstances supported a warrantless blood draw in an operating while intoxicated case where drug use was suspected. ***Wisconsin v. Andy J. Parisi***, No. 2014AP1267-CR, unpublished slip op. (WI App January 21, 2015) (Slip op. at ¶10: App. 103). ***Steimel*** stated that the majority of jurisdictions that have examined the issue have made no distinction between the metabolization of alcohol and drugs. 155 N.H. at 148. ***Steimel*** cited only a few cases, and no Wisconsin case, to support its position. Further, all the cases ***Steimel*** cited were decided before ***McNeely*** struck down the rule that dissipation rates amount to per se exigent circumstances.

The reasoning applied by ***Steimel*** and the court of appeals is problematic for multiple reasons. First, while alcohol dissipates rapidly, evidence of drug use, whether in the form of the drug itself or its metabolites, is detectable in a person's blood or urine for many hours. For example, as discussed in more detail on pages 22-23, morphine, a metabolite of heroin, has a half life of 100-280 minutes and thus remains detectable for many hours after heroin use. As such, there are no exigent circumstances justifying an exception from the warrant requirement. *See* ***State v. Jones***, 111 Nev. 774, 776 (Nev. 1995) (no exigent circumstances present because, unlike alcohol, cocaine traces remain in blood for 6 to 14 hours, providing plenty of time to secure a warrant); ***U.S. v. Pond***, 36 M.J. 1050 (A.F.C.M.R. 1993) (no exigency for nonconsensual urine test because, unlike alcohol, presence of methamphetamine can be detected in urine for 24 to 48 hours after consumption).

Second, in drunk driving cases the concentration level of alcohol is key because the difference between committing a crime and driving legally is dependent on whether the driver had a blood alcohol level of .07 or .08. *See* ***McNeely***, 133 S. Ct. at 1561, 1571 (Roberts, J., concurring) (in drunk driving cases, delaying testing can negatively affect the probative value of the blood results and may make the difference between guilt and innocence). This coupled with the fact that alcohol dissipates rather rapidly, creates a situation where officers often need to act fast. The same is not true of illegal drugs. Any detectable amount of drugs found in the person's body is sufficient evidence of illegal activity. The fact that any detectable amount is sufficient, along with the fact that evidence of drug use remains in the body for long periods of time, means officers have hours, or even days, to act before losing evidence of a crime.

It would not be "objectively reasonable" for an officer to rely on ***Bohling*** in this case because it is common sense what the differences are between drugs and alcohol and between drunk driving and non-driving cases. Any officer or even a layperson knows that what is important in drunk driving cases is the alcohol concentration level and because that level can change rapidly, officers need to act quickly. They also know that drugs do not work the same way. It is common sense that because controlled substances are illegal, a finding of any detectable amount, rather than a certain concentration, is sufficient. Further, it is common sense that drugs dissipate at slower rates than alcohol. Anyone who has been subject to, or knows anyone who has been subject to, urinalysis for drug use knows that drugs like marijuana are detectable in urine for days after use. Police officers are even more likely to know this than laypeople because they work in a field where drug testing is common.

But even if an officer was unsure how fast drugs and their metabolites dissipate, the burden is on the state to justify an intrusive warrantless blood draw. ***Welsh v. Wisconsin***, 466 U.S. 740, 750 (1984) (police have the heavy burden to prove that an urgent need justifies a warrantless search). Thus, if an officer is not sure how long it takes drugs to dissipate, he cannot draw the blood. He must err on the side of protecting constitutional rights, not on the side of acting fast.

It is telling that the officer in this case did not say that he relied on ***Bohling*** in drawing Mr. Parisi's blood. The district attorney also did not argue reasonable reliance on ***Bohling***.[4] Nor did the circuit court mention ***Bohling***. If it

[4] The state first argued reasonable reliance on ***Bohling*** in its appellate brief.

were in fact reasonable for an officer to rely on ***Bohling*** in this factually dissimilar case, why didn't the police officer or the district attorney or judge, both trained in the practice of law and familiar with ***Bohling***, find ***Bohling*** applicable? ***Bohling*** was not discussed at the circuit court level because it is factually distinct from Mr. Parisi's case and thus could not be reasonably relied on in drawing Mr. Parisi's blood.

D. Finding that the officer could have reasonably relied on ***Bohling*** would greatly expand the good faith exception to the exclusionary rule.

A finding that reliance on ***Bohling*** was appropriate in this case will greatly expand the good faith exception contrary to the limiting language of ***Dearborn***. It will open the door for police officers to extrapolate holdings from cases with entirely different facts to justify warrantless searches. This will make police, untrained in legal research, the judges of what precedent is on point in a given situation. Legal research is complex and police officers are not trained or equipped to reasonably extrapolate legal principles from fact-specific scenarios and decide whether to apply those to cases with different facts. Additionally, "the hurried 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 decision maker. ***State v. Leon***, 468 U.S. 897, 914 (1984) (quotation omitted).

This dangerous expansion of the good faith exception would be far-reaching and would affect cases beyond just those involving ***Bohling***. It would give police officers the first crack at interpreting the Fourth Amendment and determining what the law permits in a new situation and would create an incentive for officers to interpret all Fourth Amendment decisions as broadly as possible in favor of

warrantless searches. Such an expansion would be contrary to the very purpose of the warrant requirement – to ensure that inferences to support searches are drawn by neutral and detached magistrates rather than by officers. ***Schmerber***, 384 U.S. at 770 quoting ***Johnson v. U.S.***, 333 U.S. 10, 13-14 (1948). To expand the good faith exception this way would minimize "the importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt [which] is indisputable and great." ***Id***.

E. The exclusionary rule should be applied to deter police misconduct.

The Supreme Court has concluded that the exclusionary rule should apply when excluding evidence would deter future grossly negligent, reckless or intentional police misconduct. ***Herring v. U.S.***, 555 U.S. 135, 144 (2009). When officers act in objective good faith on the relevant law as it existed at the time, or on a warrant, there is no police misconduct to deter. But when an officer acts outside the scope of a statute or Fourth Amendment precedent, there is misconduct to deter. There is police misconduct to deter in this case. Officer Fenhouse did not act in accordance with a statute that existed at the time. Nor did he act in reliance on a warrant or a factually similar case from the United States Supreme Court or from this Court. Instead he drew Mr. Parisi's blood without a warrant, without consent and without any legal authority to do so. Officer Fenhouse did not testify that he relied on ***Bohling*** or any other precedent in drawing Mr. Parisi's blood. Rather, it seemed he drew the blood without a warrant because he simply did not want to bother with getting one. However, even if he had said he relied on ***Bohling***, there would still be misconduct to deter because this Court should discourage officers from

extrapolating holdings from factually distinct cases to justify Fourth Amendment violations.

At the hospital, Officer Fenhouse was also put on notice that the blood draw would have to be delayed until Mr. Parisi's medical condition could be stabilized. At that point, he should have attempted to get a warrant. This Court should discourage law enforcement officers from taking no action when they have time to pursue a warrant.

Because it was not reasonable to rely on ***Bohling*** in drawing Mr. Parisi's blood without a warrant, this Court must determine whether, based on the totality of the circumstances, exigent circumstances existed.

II. There Were No Exigent Circumstances Justifying the Warrantless Blood Draw Because Evidence of Heroin Use Remains Detectable in the Human Body for Many Hours, Police Had Time to Get a Warrant But Failed to Obtain One and Mr. Parisi's Fourth Amendment Protections Were Not "Relaxed" as They Are in Drunk Driving Cases.

Mr. Parisi's blood draw was not justified by the exigent circumstances exception to the warrant requirement. The state failed to meet its burden to prove there was a threat of destruction of evidence. Nor could it meet this burden because metabolites of heroin remain in an individual's system for many hours, or even days. Further, the officers in this case had time to obtain a warrant, or at least start the process to do so, but failed to take any action to pursue one. Additionally, the warrantless blood draw was inappropriate because Mr. Parisi's Fourth Amendment protections were not "relaxed" as they are in drunk driving cases because his actions posed no risk to anyone but himself.

A. There were no exigent circumstances justifying the warrantless blood draw because evidence of heroin use remains detectable for many hours.

Citizens have a right to be free from "unreasonable searches and seizures." ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990) (citation omitted). Warrantless searches are deemed per se unreasonable unless they fall into one of "a few specifically established and well-delineated exceptions." ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385. The exceptions to the warrant requirement are "jealously and carefully drawn" because "search warrants are an essential safeguard against government overreaching" ***Jones v. U.S.***, 357 U.S. 493, 499 (1958); ***State v. Ward***, 2000 WI 3, ¶93, 231 Wis. 2d 723, 604 N.W.2d 517 (Prosser, J., dissenting).

The state has the burden of proving that an exception to the warrant requirement exists. ***State v. Payano-Roman***, 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W.2d 548. The exigent circumstances exception applies when there is a threat that evidence will be destroyed if time is taken to obtain a warrant. ***State v. Faust***, 2004 WI 99, ¶11. The test is objective and the exception only applies when a police officer under the circumstances would have reasonably believed that the delay in procuring a warrant would risk destruction of evidence. ***Id***., ¶12. The exigent circumstances exception is a narrow exception and the state's burden to prove that exigent circumstances exist is heavy. ***Welsh***, 466 U.S. at 750. There was no threat of evidence destruction in this case because evidence of heroin use remains in a person's body for many hours, or even days. Thus, the officers in this case would have had ample time to obtain a warrant.

Evidence of a person's heroin use can be found not just in blood, but also in other bodily fluids and substances such as hair and urine. Alain G. Verstraete, *Detection Times of Drugs of Abuse in Blood, Urine, and Oral Fluid*, Ther Drug Monit, 26, 200 (April 2004) (App. 115). *See also* Michael L. Smith et al., *Urinary Excretion Profiles for Total Morphine, Free Morphine, and 6-Acetylmorphine Following Smoked and Intravenous Heroin*, Journal of Analytical Toxicology, 25, 504, 507-11 (October 2001) (App. 139-43) (analyzing how long morphine, as a evidence of heroin use, remains in urine). As with other drugs, evidence of heroin use is detectable for many hours, or even days, after use.[5] Heroin converts to its first metabolite, 6-acetylmorphine within a few minutes. Elisabeth J. Rook et al., *Pharmacokinetis and Pharmacokinetic Variability of Heroin and its Metabolites: Review of the Literature*, Current Clinical Pharmacology, 1, 109, 111 (2006) (App. 128).[6] 6-acetylmorphine then converts to morphine. (Rook at 112; App. 129). 6-acetylmorphine is detectable in plasma for 1-3 hours after heroin use. (Rook at 111; App. 128). 6-acetylmorphine is

[5] Verstraete's article discusses the dissipation rates associated with a number of illegal drugs. It states, "in blood or plasma, most drugs of abuse can be detected at the low nanogram per milliliter level for 1 or 2 days. In urine the detection time of a single dose is 1.5 to 4 days." (Verstraete at 200; App. 115).

[6] The court of appeals stated in a footnote that Mr. Parisi did not argue that the circuit court's finding that heroin dissipates quickly (30:40; App. 113) was clearly erroneous. ***State of Wisconsin v. Andy J. Parisi***, No. 2014AP1267-CR, unpublished slip op. (WI App January 21, 2015) (Slip op. at ¶10, n.1: App. 103-04). Because heroin converts to metabolites in a matter of minutes, the circuit court's factual finding was not clearly erroneous. However, morphine, a metabolite of heroin, provides proof of heroin use and is detectable for many hours or days after heroin use.

detectable in urine for longer – on average five hours but up to 34.5 hours (Verstraete at 203; App. 118).

Morphine can be found in blood much longer than 6-acetylmorphine. According to the article relied on by the state (Rook), morphine has a half life of 100-280 minutes meaning half of the original morphine present in the body after heroin use would be detectable at 100-280 minutes (1.66-4.66 hours), and then one fourth of the original amount of morphine would be detectable at 200-560 minutes (3.33-9.33 hours), and so on. (Rook at 112; App. 129). Morphine can also be found in urine for 4.95 to 11.3 days. (Verstraete at 203; App. 118).

The state has the burden of proving that an exception to the warrant requirement exists. ***State v. Payano-Roman***, 290 Wis. 2d 380, ¶30. The state failed to meet its burden to prove exigent circumstances justified a warrantless blood draw at the circuit level where it acknowledged that morphine stays in the body after heroin and 6-acetymorphine have fully dissipated but did not say for how long, despite that being the key fact for proving exigency. (7:2).

The state also failed to prove exigent circumstances existed at the appellate level. The state said that morphine has a half life of 100-280 minutes thereby admitting evidence of heroin use is detectable for many hours after heroin use. (State's Br. at 7-8). The state also conceded there were no exigent circumstances in its response to Mr. Parisi's petition for review referring to the blood draw as one done "without a warrant or exigent circumstances" (State's Resp. to Pet. for Rev. at 4-5), and stating that the good faith exception question in this case "could arise in only a very narrow class of cases, i.e., those where the blood was drawn solely for the purpose of testing for drugs, the blood was drawn without a

warrant and **without exigent circumstances**…" *Id*. at 6 (emphasis added).

Morphine remains detectable for many hours after heroin use and police only need the presence of morphine, not heroin or 6-acetylmorphine, to prove there was illegal conduct. Morphine in the blood can indicate a person used heroin or morphine, both of which are Schedule 1 narcotics. Because the presence of drugs in blood is not sufficient by itself to support a conviction of possessing a controlled substance, any blood test result would be coupled with other corroborating evidence from the case in order to convict. ***State v. Griffin***, 220 Wis. 2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). That other evidence in a case will inform which of these two Schedule 1 narcotics, heroin or morphine, the individual unlawfully consumed.

Not only is finding morphine, rather than heroin or 6-acetylmorphine, in blood sufficient, heroin dissipates so quickly there would be no chance to get it before an individual is transported to a hospital for the blood draw. To rule that exigent circumstances exist because heroin and 6-acetylmorphine dissipate quickly ignores the fact that morphine remains after those two substances are gone. Given the rapid dissipation rates provided by the state, if this Court rules there are exigent circumstances because heroin and 6-acetylmorphine dissipate quickly, it will be adopting a per se rule that in all cases of suspected heroin use, a warrantless blood draw is justified. This is exactly the kind of per se rule that was struck down in ***McNeely*** in the context of drunk driving cases and that was rejected by the circuit court in this case. (30:40; App. 113).

Officer Fenhouse testified that it takes approximately two hours to apply for a warrant and get it signed by a judge

in Winnebago County. (30:24). That seems like a long time given that Wisconsin's search warrant statute allows a judge to issue a warrant based on oral testimony "communicated to the judge by telephone, radio or other means of electronic communication." Wis. Stat. § 968.12(3)(a). *See also* ***McNeely***, 133 S. Ct. at 1561-62, 1572-73 (Roberts, J., concurring) (discussing advancements which allow for more expeditious processing of warrant applications using telephones and other electronic means). Exceedingly long delays in obtaining warrants cannot justify Fourth Amendment violations, because under that reasoning, "the slower the jurisdiction is to issue search warrants, the more 'exigent' circumstances arise, and the fewer warrants are needed." ***Jones***, 111 Nev. at 776.

However, even if it did take two hours to obtain a warrant, the officer in this case still could have waited for a warrant because morphine remains in the system for many hours after heroin use. Mr. Parisi's blood was drawn almost two and a half hours after police first encountered Mr. Parisi due to medical complications. The fact that morphine was still found in Mr. Parisi's blood almost two and a half hours after police encountered him proves that the officer could have taken time to get a warrant and still would have obtained the evidence of drug use he sought. (1:2; 30:5, 10, 23). Because evidence of heroin use would have remained long after the time it would take to secure a warrant, the exigency exception to the warrant requirement should not apply. *See* ***Jones***, 111 Nev. at 776 (holding no exigent circumstances because cocaine traces remained in blood for at least 6 hours and maybe as many as 14); ***State v. Palmer***, 803 P.2d 1249, 1253 (Utah Ct. App. 1990) (holding no exigent circumstances existed for x-ray test because ring individual was suspected of swallowing would have passed safely through the suspect's system without the x-ray); ***People v. Bracamonte***,

15 Cal. 3d 394, 397, 403-04 (Cal. 1975) (holding no exigent circumstances existed that required induced regurgitation of drug balloons because balloons would have passed through the body naturally without the procedure). *See also* ***McNeely***, 133 S. Ct. at 1561 (noting that there will more likely be exigent circumstances in cases where evidence can be easily destroyed than in cases where the evidence is in the body and dissipates over time at predictable rates).

The test for determining exigency is whether a police officer would reasonably believe taking the time to get a warrant would risk destruction of evidence. ***Faust***, 274 Wis. 2d 183, ¶12. In this case, Officer Fenhouse did not testify that he feared evidence of heroin use would be destroyed. He did not testify that he had any knowledge or assumptions about how fast evidence of heroin dissipates. The state also failed to establish that a reasonable police officer would believe that heroin dissipates as quickly as or more quickly than alcohol thereby requiring a warrantless blood draw. Indeed, such an assumption on the part of an officer would not be reasonable because, unlike in drunk driving cases where law enforcement and laypeople alike know that a specific minimum blood alcohol level is required, an indication of any amount, however trace, of an illegal drug in one's blood can be used to prove illegal activity.

B. There were no exigent circumstances because the officers had the opportunity to pursue a warrant but failed to take any action to obtain one.

The Fourth Amendment mandates that police officers obtain a warrant when one can be obtained without significantly undermining the efficacy of the search. ***McNeely***, 133 S. Ct. at 1555 citing ***McDonald v.***

U.S., 335 U.S. 451, 456 (1948). *See also* ***McNeely***, 133 S. Ct. 1552, 1572 (Roberts, J., concurring) ("for exigent circumstances to justify a warrantless search, there must be no time to secure a warrant.") As discussed above, the efficacy of the search would not have been affected by waiting to draw Mr. Parisi's blood until after obtaining a warrant because metabolites of heroin remain in blood for many hours. There were also no exigent circumstances because the officers could have taken action to obtain a warrant and simply did not. Five to six officers responded to the 911 call regarding Mr. Parisi. (30:21). One of those officers could have started the process for obtaining a warrant shortly after arrival at the scene. Officer Fenhouse testified he followed Mr. Parisi to the hospital to get evidence of heroin use, meaning he decided before he left the apartment that he would be conducting a warrantless blood draw. (30:16). He testified that he had obtained warrants in approximately twelve other cases but gave no reason for not pursuing one in this case. (30:19).

Additionally, Officer Fenhouse was alerted at the hospital that the medical staff was unable to carry out his requested warrantless blood draw due to Mr. Parisi's unstable medical condition. At that point, Officer Fenhouse was on notice that he would be waiting for some time for the blood to be taken. He therefore could have started the process for obtaining a warrant but instead sat in the hospital and took no action. This is an approach ***McNeely*** does not authorize and it flies in the face of the principle that a warrantless blood draw should only be done as a last resort.

C. Mr. Parisi's warrantless blood draw was inappropriate because Mr. Parisi's Fourth Amendment protections were not "relaxed" as they are in drunk driving cases.

The courts in both ***Bohling*** and ***McNeely*** considered that the crime of drunk driving created a public safety risk and balanced the state's interest in protecting the public from that risk against the defendant's privacy rights in deciding whether warrantless blood draws were justified. This case is fundamentally different from drunk driving cases because the state's interests in combating drunk driving and protecting citizens are not applicable as Mr. Parisi never operated a vehicle or put anyone other than himself at risk.

The Supreme Court discussed the government interest in combating drunk driving in ***McNeely***. 133 S. Ct. at 1565. Similarly, this Court discussed the important governmental interests that are at play in drunk driving cases in ***Bohling***. In ***Bohling***, this Court held that the state's significant interest in enforcing drunk driving laws to avoid the loss of life, limb and property outweighed the intrusion on individual privacy created by a warrantless blood draw. 173 Wis. 2d at 545. The court cited ***Skinner v. Labor Railway Executives' Ass'n***, 489 U.S. 602 (1989), stating that in the context of a warrantless blood draw, the Fourth Amendment warrant requirement is "relaxed when the activity at issue constitutes a serious risk to public safety. Because of this public safety risk, persons engaging in such activities have a reduced expectation of privacy." 173 Wis. 2d at 540.

Bohling went on to say that the Wisconsin Legislature recognized that public safety concerns reduce a driver's expectation of privacy in passing Wisconsin's implied consent law. That law states that a person who drives is

deemed to have given consent to the taking of his blood. *See* Wis. Stat. § 343.305(2). Thus, a driver suspected of drunk driving can be forced to give a blood sample. The same is not true for a person who has not driven and who is suspected only of being under the influence of a controlled substance. Heroin use is dangerous but if the user does not get behind the wheel, the threat it poses is to the person who uses it, not to the public at large. Mr. Parisi was not driving and was not engaging in an activity that put public safety at risk. Thus, the warrant requirement should not be "relaxed" in his case as it is in drunk driving cases.

In ***McNeely***, the Supreme Court noted the compelling interest states have in combating drunk driving but said that interest alone is not enough to justify a warrantless blood draw and that there must be some additional showing of exigent circumstances beyond just the fact that alcohol dissipates quickly. 133 S. Ct. at 1565-66. The Supreme Court has thus held that alcohol dissipation rates plus public safety considerations together do not justify warrantless blood draws. If that is the case, certainly drug dissipation rates (which are slower than alcohol dissipation rates), alone, with no public safety consideration, are insufficient to justify warrantless blood draws.

CONCLUSION

For the reasons stated above, Andy J. Parisi requests that the court reverse the decision of the court of appeals.

Dated this 13th day of July, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,941words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 13th day of July, 2015.

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CERTIFICATION AS TO APPENDIX

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

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

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

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