STATE OF WISCONSIN

SUPREME COURT

Case No. 2014AP1267-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDY J. PARISI,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT II,
AFFIRMING A JUDGMENT OF THE
CIRCUIT COURT FOR WINNEBAGO COUNTY,
DANIEL J. BISSETT, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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S U P R E M E C O U R T

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ORAL ARGUMENT AND PUBLICATION

This case has already been set for oral argument. The court ordinarily publishes its opinions in cases that have been orally argued.

ARGUMENT

I. The exclusionary rule should not be applied to suppress the results of a test of Parisi's blood where the police could have relied in good faith on settled precedent and made at worst a reasonable mistake of law in interpreting that precedent to believe they did not need exigent circumstances to take Parisi's blood without a warrant to search for evidence of drugs.[1]

This case comes at the confluence of two principles relating to the application of the exclusionary rule, a judicially created remedy designed to deter the deliberate, reckless or grossly negligent disregard of Fourth Amendment rights by the police. *See generally Davis v. United States*, 131 S. Ct. 2419, 2427 (2011).

First, the exclusionary rule does not apply to require the suppression of erroneously seized evidence when the police seized it in objectively reasonable reliance on clear and settled Wisconsin precedent that was later abrogated by the United States Supreme Court. *State v. Kennedy*, 2014 WI 132, ¶ 37, 359 Wis. 2d 454, 856 N.W.2d 834; *State v. Dearborn*, 2010 WI 84, ¶ 51, 327 Wis. 2d 252, 786 N.W.2d 97. *Accord Davis*, 131 S. Ct. at 2423-24.

Second, the exclusionary rule does not apply so as to require the suppression of erroneously seized evidence when the police seized it in objectively reasonable reliance on a

[1] For the purpose of this argument it does not matter whether or not there actually were exigent circumstances. Indeed, for the purpose of this argument it can be assumed that there were no exigent circumstances that would have excused the police from getting a warrant before seizing Parisi's blood. However, the second argument in this brief will show that exigent circumstances were present.

mistake of law. *See Heien v. North Carolina*, 135 S. Ct. 530, 536, 539 (2014); *State v. Houghton*, 2015 WI 79, ¶¶ 44-46, ___Wis. 2d ___, ___N.W.2d ___ , 2015 WL 4208659.

The police seized blood from the defendant-appellant-petitioner, Andy J. Parisi, on October 16, 2012 (30:5).

When the police seized Parisi's blood, *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), had not yet been decided by the United States Supreme Court. When the police seized Parisi's blood, *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), decided almost twenty years earlier by the Wisconsin Supreme Court, was still the law in this state.

Bohling interpreted *Schmerber v. California*, 384 U.S. 757 (1966). *Bohling*, 173 Wis. 2d at 539-40.

In *Schmerber*, the Supreme Court held that the rapid dissipation of alcohol in the blood presented an exigent circumstance that allowed the police to seize a suspect's blood without a warrant. *Schmerber*, 384 U.S. at 770-71.

In *Bohling*, this court interpreted *Schmerber* to hold that an exigency based solely on the fact that alcohol dissipated rapidly in the blood was enough to draw blood without a warrant. *Bohling*, 173 Wis. 2d at 533, 539-40, 547-48. So in *Bohling*, the court recognized a per se rule that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication. *Bohling*, 173 Wis. 2d at 539, 547-48.

In *McNeely*, the Supreme Court recognized that lower courts had interpreted *Schmerber* differently. *McNeely*, 133 S. Ct. at 1558 & n.2. However, the Court said that the correct interpretation of *Schmerber* was that it did not create a per se rule. *McNeely*, 133 S. Ct. at 1559-60, 1563. The Supreme Court

ruled that the natural dissipation of alcohol in the bloodstream does not constitute an exigency sufficient to justify the seizure of blood without a warrant in every case, and that the reasonableness of a warrantless seizure must be determined case by case based on the totality of the circumstances. *McNeely*, 133 S. Ct. at 1563, 1568.

Thus, in the hindsight of *McNeely*, *Bohling* was wrongly decided because it interpreted *Schmerber* differently than the Supreme Court eventually interpreted *Schmerber*. So *McNeely* abrogated *Bohling*. *Kennedy*, 359 Wis. 2d 454, ¶ 29; *State v. Reese*, 2014 WI App 27, ¶¶ 17-18, 353 Wis. 2d 266, 844 N.W.2d 396.

The usual rule is that newly declared constitutional rules, including Fourth Amendment rules, must be applied retroactively to all pending cases that are not yet final at the time the decision was rendered. *Kennedy*, 359 Wis. 2d 454, ¶ 33; *Dearborn*, 327 Wis. 2d 252, ¶ 31. So *McNeely* must be applied to this case which is still on direct appeal. Assuming for the sake of this argument that Parisi's blood might have been seized without a warrant in the absence of exigent circumstances, that seizure would have been unlawful under *McNeely*.

But the fact that a constitutional rule applies retroactively to render a previous seizure unlawful does not necessarily mean that the exclusionary rule should also be applied to suppress the evidence that, in retrospect, has been unlawfully seized. *Davis*, 131 S. Ct. at 2430-31; *State v. Oberst*, 2014 WI App 58, ¶ 9, 354 Wis. 2d 278, 847 N.W.2d 892. *See Dearborn*, 327 Wis. 2d 252, ¶¶ 32-33.

In *Kennedy*, this court refused to apply the exclusionary rule to suppress evidence that was unlawfully seized without a warrant or exigent circumstances under *McNeely*, but was seized in objective good faith reliance on this court's then controlling precedent in *Bohling* which did not require specific

exigent circumstances to justify a seizure. *Kennedy*, 359 Wis. 2d 454, ¶ 39. *Accord Reese*, 353 Wis. 2d 266, ¶ 22.

Kennedy would be controlling law in this case but for the fact that *Bohling* was expressly based on the seizure of blood to test for the presence of alcohol while Parisi's blood was seized to test for the presence of drugs (30:16-18).

Noting that alcohol dissipates rapidly in the blood after a defendant stops drinking, *Bohling*, 173 Wis. 2d at 538-45, that case specifically held 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.

Bohling, 173 Wis. 2d at 547-48.

So the fact that the police could have reasonably considered the precedent in *Bohling* to be valid controlling law when they seized Parisi's blood is not dispositive of the ultimate question whether the results of the test of Parisi's blood should be suppressed.

The second step of the inquiry in this case is to determine whether the exclusionary rule should be applied involves an assessment of whether the police officers who seized Parisi's blood could have reasonably believed that the controlling precedent in *Bohling* also applied to the seizure of blood to test for the presence of drugs, even if that belief might have possibly been mistaken.

As the Supreme Court reiterated in *Heien*, the ultimate test of the Fourth Amendment is reasonableness. *Heien*, 135 S. Ct. at 536. But "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Heien*, 135 S. Ct. at 536. *Accord Houghton*, 2015 WL 4208659, ¶ 44.

The Court has recognized that searches and seizures based on mistakes of fact can still be reasonable. *Heien*, 135 S. Ct. at 536. But reasonable people make mistakes of law too. *Heien*, 135 S. Ct. at 536.

> The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or [Supreme Court] precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Heien, 135 S. Ct. at 536. *Accord Houghton*, 2015 WL 4208659, ¶ 45.

In *Heien* and in *Houghton*, the police were mistaken about whether statutory law allowed them to seize a person. *Heien*, 135 S. Ct. at 534-35 (mistake that statute permitted seizure of person driving with only one working brake light); *Houghton*, 2015 WL 4208659, ¶¶ 56-64 (mistake that statute permitted seizure of person driving with air freshener hanging from rearview mirror). But there is no reason why constitutional principles regarding mistake of law should not apply where the police were arguably mistaken about whether case law allowed them to seize evidence.

Court decisions as much as statutes are "law." Black's Law Dictionary 259, 1015 (10th ed. 2014). Indeed, in *Heien*, the Court characterized *Davis*, where police relied on a subsequently overruled judicial decision, as a case where it "looked to the reasonableness of an officer's legal error." *Heien*, 135 S. Ct. at 539.

Moreover, because the Fourth Amendment protects persons, houses, papers and effects against unreasonable searches and seizures, it applies equally to seizures of persons and evidence. *See State v. Kiper*, 193 Wis. 2d 69, 81-83, 86, 532 N.W.2d 698 (1995); *State v. Douglas*, 123 Wis. 2d 13, 17, 25, 365 N.W.2d 580 (1985).

Although both *Heien* and *Houghton* found that there was no constitutional violation because of a reasonable mistake of law, *Heien*, 135 S. Ct. at 534, 539-40; *Houghton*, 2015 WL 4208659, ¶¶ 5-6, 71, in cases like this one where there arguably is a constitutional violation, a court can look to the reasonableness of an officer's legal error in considering whether to apply the exclusionary rule as an appropriate remedy for the violation. *Heien*, 135 S. Ct. at 539.

Finally, the fact that the legal mistakes in *Heien* and *Houghton* related to the requirement of reasonable suspicion, *Heien*, 135 S. Ct. at 534, 540; *Houghton*, 2015 WL 4208659, ¶¶ 5, 52, does not significantly differentiate those cases from this one.

Reasonable suspicion is necessary to justify a warrantless seizure of a person in a traffic stop. *Houghton*, 2015 WL 4208659, ¶ 30. Reasonable suspicion is also necessary to justify a warrantless seizure of blood. *State v. Thorstad*, 2000 WI App 199, ¶¶ 6, 13, 238 Wis. 2d 666, 618 N.W.2d 240. But exigent circumstances are necessary too. *McNeely*, 133 S. Ct. at 1563, 1568.

It makes no difference that the police were mistaken about the first of these requirements in *Heien* and *Houghton*, while they were arguably mistaken about the second of these requirements in this case. The critical fact is that in both situations the police may have made a mistake about the law that erroneously led them to believe a seizure was constitutionally permissible under the circumstances when actually it was not.

In *Houghton*, this court said that the "issue in this case is whether a seizure predicated on an objectively reasonable mistake of law violates constitutional protections against unreasonable searches and seizures." *Houghton*, 2015 WL 4208659, ¶ 31. That statement of the issue covers both the situation in *Heien* and *Houghton* and the situation in this case. It covers both mistakes of statutory law relating to reasonable suspicion to seize a person and mistakes of decisional law relating to exigent circumstances to seize evidence.

A mistake of law is a mistake of law. There is no principled basis for making fine distinctions among different kinds of mistakes in different kinds of law regarding different kinds of seizures. If the law imposes certain requirements to justify a seizure, and the police make a reasonable mistake about what that law requires, the exclusionary rule should not be applied to suppress the evidence that has been reasonably although mistakenly seized.

In determining whether the police could have reasonably believed that *Bohling* applied to seizures of blood to search for drugs as well as alcohol, the court does not examine the subjective understanding of the particular officer who made the seizure. *Heien*, 135 S. Ct. at 539. The question is whether that belief, whether correct or mistaken, was objectively reasonable instead of just a sloppy study of the law. *Heien*, 135 S. Ct. at 539-40; *Houghton*, 2015 WL 4208659, ¶ 52.

If an objectively reasonable police officer would have made a diligent study of the law on October 16, 2012, the officer would have discovered a decision of the Wisconsin Court of Appeals which, while not binding precedent, persuasively held that *Bohling* applied to seizures of blood to search for drugs.

In *State v. Malinowski*, 2011 WI App 1, 2010 WL 4840092 (Nov. 30, 2010) (authored unpublished decision), the court expressly confronted the question of whether *Bohling* applies to searches of blood for drugs as well as to searches for alcohol. *Malinowski*, 2010 WL 4840092, ¶¶ 1-2, 10-11.

Noting that a "majority of jurisdictions that have addressed this issue make no distinction between the dissipation of alcohol and drugs from the blood stream," the court "agree[d] with the majority of jurisdictions that it is not necessary to distinguish between alcohol and drugs for purposes of the exigent circumstances exception." *Malinowski*, 2010 WL 4840092, ¶¶ 13-14.

The court of appeals was especially convinced by *People v. Ritchie*, 181 Cal. Rptr. 773 (Cal. Ct. App. 1982), which held that distinguishing between alcohol and drugs in the context of determining exigent circumstances is a "'needless refinement'" because, while the rate of dissipation may be different, both alcohol and drugs dissipate and diminish over time. *Malinowski*, 2010 WL 4840092, ¶¶ 14-15. The court said there was no basis for any requirement that the police ascertain the nature of the drug allegedly ingested in order to determine just how fast it will dissipate. *Malinowski*, 2010 WL 4840092, ¶ 17.

Had the police contemporaneously consulted the leading treatise on the law of search and seizure they would have found the same thing.

Professor LaFave similarly notes that a clear majority of jurisdictions that had addressed the issue made no distinction between the metabolization of alcohol and controlled drugs for the purpose of determining whether there were exigent circumstances. 3 Wayne R. LaFave, Search and Seizure § 5.3(c) at 226-28 & n.132 (5th ed. 2012).

There is nothing in the opinion in *Bohling* that would cause anyone to question these authorities.

Although *Bohling* was aimed at alcohol, it said nothing to exclude drugs. *See Berg v. State*, 63 Wis. 2d 228, 238, 216 N.W.2d 521 (1974) (common error in analyzing opinions to assume that because X is included, Z is necessarily excluded). Although it may be true that some drugs do not dissipate as quickly as alcohol, *Bohling* did not set a timer on how rapidly a substance must dissipate to create exigent circumstances.

Indeed, *Bohling* cited a federal case which indicated that the exigent circumstances described in *Schmerber* would exist when the police searched for either drugs or alcohol because "'[a]lcohol and other drugs are eliminated from the blood stream at a constant rate.'" *Bohling*, 173 Wis. 2d at 543 (citing *United States v. Reid*, 929 F.2d 990, 993 (4th Cir. 1991)).

Based on the authorities available at the time Parisi's blood was taken, the police could have made an objectively reasonable determination that *Bohling* applied to the seizure of blood for the purpose of testing it for drugs, and therefore that they did not need any special exigent circumstances to excuse them from getting a warrant.

Interpreting *Bohling* to apply to drugs may have been right or it may have been wrong. But it does not matter whether that interpretation was correct. What matters is that it was objectively reasonable.

So even assuming for the sake of this argument that Parisi's blood might have been seized in the absence of exigent circumstances, because the police who seized Parisi's blood to search for evidence of drugs could have relied in good faith on the contemporaneous controlling precedent in *Bohling* and made at worst a reasonable mistake of law in interpreting *Bohling* to believe they did not need exigent circumstances to search for drugs, the exclusionary rule should not be applied to suppress the results of the test of Parisi's blood.

II. There were exigent circumstances that excused the police from obtaining a warrant to seize Parisi's blood.

Even if the good faith and mistake of law exceptions to the exclusionary rule would not apply in this case so that the police could not reasonably believe they did not need exigent circumstances to seize Parisi's blood, that seizure would still be lawful because there were exigent circumstances that excused the police from obtaining a warrant.

The test for assessing the exigencies of a situation is objective, turning on the reasonableness of a belief that evidence might be lost if the police did not act promptly under the circumstances. *State v. Leutenegger*, 2004 WI App 127, ¶ 11, 275 Wis. 2d 512, 685 N.W.2d 536; *State v. Richter*, 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 612 N.W.2d 29. The subjective beliefs of the police are not relevant. *See State v. Larsen*, 2007 WI App 147, ¶ 19, 302 Wis. 2d 718, 736 N.W.2d 211; *State v. Peardot*, 119 Wis. 2d 400, 405, 351 N.W.2d 172 (Ct. App. 1984).

Here, the police had no way of knowing when Parisi might have ingested heroin or any other drugs. No one saw him take any drugs. No one saw him start to feel the effects of any drugs.

Parisi was found overdosing sometime after midnight (30:7), so he must have ingested the drugs before then.

The police were dispatched at 12:38 a.m. (30:5). They arrived about five to ten minutes later (30:10).

The evidence established that in 2012 it usually took the Oshkosh police about two hours to get a warrant (30:20-21). Although that now seems like a long time to Parisi, Brief for Defendant-Appellant-Petitioner at 25, a brief in the supreme court is not the time or place to question the credibility of uncontradicted evidence presented at a hearing in the circuit court. *State v. Hughes*, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621; *State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989); *Johnson v. Merta*, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980).

So even if the police had tried to obtain a warrant as soon as they arrived on the scene, it would probably have been more than three hours after Parisi ingested the heroin before they could have executed a warrant to seize his blood to obtain evidence of his ingestion of that drug. By that time the best evidence of heroin use would have been gone.

Heroin is diacetylmorphine, a semi-synthetic morphine derivative. Elisabeth J. Rook et al., *Pharmacokinetics and Pharmacokinetic Variability of Heroin and its Metabolites: Review of the Literature*, Current Clinical Pharmacology 109, 109-10 (Vol. 1, No. 1, 2006) (attached as Exhibit 1 to State's Response to Defendant's Motion to Suppress (7)).

Morphine is a natural alkaloid harvested from poppies. Rook at 110. In the synthesis of heroin, morphine molecules are acetylated in an excess of acetic anhydride at higher temperatures. Rook at 110. The molecular structure of heroin shows that it derives its scientific name from the fact that the

base morphine acquires two acetyl molecules during the synthesis. *See* Rook at 110, fig. 1.

In human plasma, heroin is rapidly hydrolyzed into 6-monoacetylmorphine, i.e., morphine with only one acetyl molecule instead of two, and finally into ordinary morphine with no remaining acetyl molecules attached. Rook at 110.

Heroin completely devolves into 6-monoacetylmorphine within ten to forty minutes and becomes undetectable as heroin after that time. Rook at 111. 6-Monoacetylmorphine is still detectable in plasma for only one to three hours after ingestion of heroin. Rook at 111.

The final byproduct of the breakdown of heroin, non-acetyl morphine, has a half-life of 100 to 280 minutes in blood, Rook at 112, which means that half the morphine that was initially in the blood can still be detected from about one and two-thirds to four and two-thirds hours after formation. One quarter of the morphine can still be detected from about three to nine hours later.

So the police can still obtain some evidence of heroin ingestion more than three hours after the heroin was ingested. The problem is that the evidence that can be obtained more than three hours after ingestion of heroin is not the best evidence that the defendant ingested heroin.

6-Monoacetylmorphine is specific evidence that the defendant ingested heroin because it is acetylated morphine, which is what heroin is. The difference between 6-monoacetylmorphine and heroin, i.e., diacetylmorphine, is that heroin has two acetyl molecules (di) rather than just one acetyl molecule (mono). In breaking down, heroin loses one of its acetyl molecules very quickly, and the second acetyl molecule a bit less quickly.

Morphine is some evidence that the defendant ingested heroin because it is the base component of heroin. If there is morphine in the defendant's blood, it is possible that the morphine previously had an acetyl component, making it heroin, that has since broken down and dissipated.

But in the absence of any present acetyl molecules, morphine is not specific evidence of heroin ingestion. Morphine in the blood means the defendant could have ingested heroin, but could also have ingested morphine.

Although both heroin and morphine are Schedule I controlled substances, Wis. Stat. § 961.14(3)(k), (p-s), (v-w) (2013-14), this ambiguity is significant in a prosecution for possessing a controlled substance because the presence of drugs in the blood by itself is not sufficient evidence to support a conviction. *State v. Patterson*, 2009 WI App 161, ¶ 25, 321 Wis. 2d 752, 776 N.W.2d 602, *aff'd*, 2010 WI 130, 329 Wis. 2d 599, 790 N.W.2d 909; *State v. Griffin*, 220 Wis. 2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). The presence of drugs in the blood is circumstantial evidence of possession that can support other evidence showing that the defendant has control over the substance. *Patterson*, 321 Wis. 2d 752, ¶ 25; *Griffin*, 220 Wis. 2d at 381.

In this case, the other evidence indicated that Parisi had control over heroin. A bindle of heroin was found in a room to which Parisi had access in the house where he overdosed (30:8-9, 13). There was no evidence that linked Parisi to morphine.

So the probative value of the evidence found in Parisi's blood depended on the extent to which it tended to circumstantially prove that he possessed the heroin found in the house. *See generally State v. Payano*, 2009 WI 86, ¶ 81, 320 Wis. 2d 348, 768 N.W.2d 832 (probative value is the degree to which evidence tends to make a fact more probable or less

probable); 29 Am. Jur. 2d, *Evidence* § 333 at 351-52 (2008) (same).

The presence in Parisi's blood of 6-monoacetylmorphine, which could only come from heroin, would be compelling circumstantial evidence that Parisi possessed the heroin in the house where he overdosed. If Parisi had a form of heroin in his blood at the time and place he had access to a quantity of heroin, he likely ingested a portion of that heroin. And if he ingested a portion of that heroin, it can reasonably be inferred that he possessed and had control over that heroin.

The presence of morphine in Parisi's blood would be some circumstantial evidence that he possessed the heroin. But this evidence would be less probative because it would not show with certainty that Parisi ingested heroin.

In *McNeely*, the Supreme Court stated that exigent circumstances exist when, regardless of the exact elimination rate, "a significant delay in testing will negatively affect the probative value of the results" of a test of the defendant's blood. *McNeely*, 133 S. Ct. at 1560-61. No warrant is needed when waiting to obtain one would "significantly undermin[e] the efficacy of the search." *McNeely*, 133 S. Ct. at 1561.

Although the ultimate holding of *Bohling* was abrogated by *McNeely*, a part of the reasoning in *Bohling* is completely consistent with these statements in *McNeely*.

In *Bohling*, this court stated that exigent circumstances can be presented when the probative value of blood test evidence is diminished by delayed testing. *Bohling*, 173 Wis. 2d at 546.

Coincidentally, the court recognized a cutoff point of three hours when the probative value of blood test evidence

plunges because after that time additional evidence is needed to establish the state's case. *Bohling*, 173 Wis. 2d at 546.

In this case, waiting three hours or more to obtain and execute a warrant would have significantly undermined the efficacy of the search of Parisi's blood and negatively affected the probative value of the results of a test of that blood because such a belated search would have found only morphine rather than heroin in the blood.

Under these circumstances, the police could take a sample of Parisi's blood without obtaining a warrant so that they could obtain evidence with significantly greater probative value than they could have recovered if they waited for a warrant.

Parisi argues that while 6-acetylmorphine is detectable in plasma for only one to three hours after heroin use, it is detectable in urine for longer, on average five hours but up to thirty-four and one-half hours. Brief for Defendant-Appellant-Petitioner at 22-23. But the authority on which Parisi relies does not support such an absolute assertion.

The cited article states that although one study found that 6-acetylmorphine was detectable in urine for an average of five hours but up to thirty-four and one-half hours, "[a]fter administration of 3, 6, and 12 mg heroin intravenously, 6-acetylmorphine is detectable in urine during respectively 2.3, 2.6, and 4.5 hours." Alain G. Verstraete, *Detection Times of Drugs of Abuse in Blood, Urine, and Oral Fluid*, Ther Drug Monit 200, 203 (Vol. 26, No. 2, April 2004). It is morphine that may be detectable in urine for over thirty-four hours. Verstraete at 203.

Thus, even if urine is tested, it is vital to get the test sample within a couple hours after the ingestion of heroin to obtain the most probative evidence of heroin use.

Besides, Parisi refused to provide a sample of his bodily fluids for testing (30:21). Even a blood sample could not be taken involuntarily for more than an hour after that because Parisi was medically unstable (30:17, 23-24). There is no evidence in the record that a urine sample could have been taken involuntarily at all, much less in time to provide the most probative evidence of heroin ingestion.

Parisi misstates the state's position when he contends that the state conceded in its response to the petition for review that there were no exigent circumstances in this case. Brief for Defendant-Appellant-Petitioner at 23-24.

The state did not refer to the blood draw in this case as one in fact done without exigent circumstances. Brief for Defendant-Appellant-Petitioner at 23. What the state said was,

> If the police could reasonably rely on the holding in *Bohling* to take a blood sample without a warrant or exigent circumstances to test it for alcohol, why could the police not reasonably rely on the holding in *Bohling* to take a blood sample without a warrant or exigent circumstances to test it for drugs when the only difference is what the blood was tested for?

Response to Petition for Review at 4-5.

What the state was arguing was that under *Bohling*, the police did not need exigent circumstances, not that they did not have exigent circumstances.

And when the state argued that

> the good faith question 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 or any other exception to the warrant requirement such as consent, the blood was drawn before April 17, 2013, when *McNeely* was decided, and the case involving a two year old blood draw is still not final,

Response to Petition for Review at 6, it was simply listing the conditions that had to be met before a good faith issue could be justiciable in any case. It was not arguing that all those conditions were necessarily met in this case.

Relying on the Rook article, the state argued in the circuit court that exigent circumstances excused the police from obtaining a warrant to seize Parisi's blood (7). In the court of appeals the state argued in the alternative that there were exigent circumstances that excused the police from obtaining a warrant. Brief for Plaintiff-Respondent in Wis. Ct. App. at 6-10. After that, it would have been absurd for the state to casually concede in a response to a petition for review that opposed granting review that there were no exigent circumstances.

Contrary to Parisi's assertion that the state is advocating a per se rule in all heroin cases, Brief for Defendant-Appellant-Petitioner at 24, the state is simply arguing that under the circumstances established by the factual record in this case where the police did not know when Parisi ingested drugs and it would have taken them two hours after they found him to get a warrant, there were exigent circumstances that allowed them to take Parisi's blood without waiting to get a warrant.

Even if no exception to the exclusionary rule applied in this case, an exception to the warrant requirement would apply because there were exigent circumstances that excused the police from obtaining a warrant to seize Parisi's blood.

CONCLUSION

It is therefore respectfully submitted that for either or both of these reasons the decision of the court of appeals affirming a judgment convicting Parisi of a second offense of possessing narcotic drugs should be affirmed.

Dated: July 30, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,959 words.

Dated this 30th day of July, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 30th day of July, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General