STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2015AP001581

COUNTY OF MILWAUKEE,

Plaintiff-Respondent,

vs.

ALPESH SHAH,

Defendant-Appellant

ON APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS ENTERED ON JANUARY 29, 2015 AND A JUDGMENT OF CONVICTION ENTERED ON JULY 1, 2015, IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

I. Was a warrantless, non-consensual, blood draw lawful under *State v. Bohling,* where a driver was under arrest for an OWI-related offense, and the arresting officer had reason to believe the driver had been using both alcohol and marijuana?

Trial Court Implicitly Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The County requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. See Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On December 2, 2012 at about 8:30 am, Milwaukee County Sheriff's Deputy Christopher Leranth was working patrol in a marked squad car on the freeway. (R16:9-10) There was another marked squad car in the median, or the left distress lane, with its red lights on. (R16:10) Leranth was in lane 3, driving at about 60 miles per hour, when a sedan—later found to be driven by Alpesh Shah—passed him and the parked squad at a high rate of speed. Shah did not slow down or pull over for the squad with its lights on; instead, he sped up as he passed Leranth. (R16:10) Deputy Leranth saw Shah straddle two lanes for a period of time, and drive at approximately 84 miles per hour in a 50 mile per hour zone. (R16:10-11; R17:9)

Deputy Leranth conducted a traffic stop of the car Shah was driving. When the deputy made contact, Shah only rolled the car window down three to four inches. (R16:12). Deputy Lernath immediately smelled the strong odor of what he believed to be burned marijuana coming from the car. (R16:11) Shah's eyes were red, glassy and bloodshot. (R16:13-14) From his observation, Deputy Lernath believed Shah "possibly could have been smoking marijuana." (R16:14)

Deputy Leranth had Shah step from the car and have a seat in the squad car; he then searched the car Shah was driving (R16:15-16) In that search, the deputy recovered a glass pipe, partially filled with what he believed to be marijuana, and a glass jar that contained what appeared to be fresh marijuana in the center console. (R16:16; R17:12). Deputy Leranth did not note that the pipe was warm as if someone had just been using it. (R16:24) Deputy Leranth also found white powder in the

glove box and an orange substance packaged in tin foil, in a box. (R16:17) He thought the white powder was cocaine, and he had no idea what the orange substance was. (R16:24-25) The smell of marijuana coming from the car was "overwhelming;" but Leranth did not detect that odor on Shah, once Shah stepped from the car. (R16:29-30)

Deputy James Jarvis responded to assist Deputy Leranth, because Jarvis was trained in the administration of field sobriety tests. (R16:17-18; R17:13) Deputy Jarvis spoke with Shah. Shah said that he had four to five drinks at approximately 1:00 a.m., and that he currently had an empty stomach. (R16:38) He admitted smoking marijuana a couple of days before (R17:24), but denied smoking that morning (R17:36) and denied the marijuana found in the car was his. (R17:14, 36)

Deputy Jarvis attempted to administer field sobriety tests. Shah completed the Horizontal Gaze Nystagmus test, declined two other field tests for medical reasons, but did recite part of the alphabet, as requested. (R16: 39-42; R17:34-35). At the conclusion of the field sobriety tests, Deputy Jarvis placed Shah into custody for operating while "under the influence of drugs." (R17:35). Specifically, based on Shah's erratic driving, the fact that he passed two marked squad cars at high rate of speed, his speed generally, the lane deviation, the strong odor of marijuana, and Shah's bloodshot eyes, Deputy Leranth believed Shah "was possibly under the influence of marijuana while operating the motor vehicle." (R16:19-20).

Because Deputy Leranth believed Shah was under the influence of marijuana, he transported Shah to Froedtert Hospital for a blood draw under the Implied Consent law (R16:42; R17:14). Shah refused to submit to the blood test (R17:14-15), so the deputy had medical personnel perform a non-consensual, warrantless blood draw, which occurred at about 10:30 a.m. (*Id*.; R16:21-22).

The results of that blood draw showed that that Shah had 2.5 ng/mL of Delta-9-THC in his blood (R9), and he was later issued a citation for Operating a Motor vehicle with a Restricted Controlled Substance in his blood, contrary to §

346.63(1)(am), Stats. (R2) Shah made his initial appearance on that citation on July 16, 2013.[1] (R1)

Shah filed a motion to suppress the blood test results, arguing (1) under McNeely, exigent circumstances did not exist, per se; (2) while the dissipation of alcohol from the blood might lead to an exigent circumstance, there was no similar concern regarding the metabolization of THC; and (3) ample time existed for the deputy to procure a warrant for Shah's blood. (R3)

A hearing was held on that motion on January 29, 2015. At that hearing, Deputy Leranth testified that, although he was aware of no circumstances that would have prevented him from getting a warrant, he did not do so because, "we didn't need to at the time," as there was no warrant requirement at the time of Shah's arrest. (R16:28, 21) When asked why he requested a warrantless blood draw, Deputy Leranth replied, "I believed he was under the influence of marijuana." (R17:14). He also said,

> A: Because I felt he was under the influence or had marijuana in his system while he was driving.
> Q: Okay. There's no evidence of marijuana in his system over time?
> A: It dissipates. You're still going to find it. But it dissipates, the level dissipates.

(R16:21)

After hearing the testimony, Judge Siefert denied Shah's motions. (R16:64)

Judge Siefert presided over Shah's court trial on June 30 and July 1, 2015. (R17, R18) After hearing from the witnesses and the arguments of counsel, Judge Siefert found Shah guilty of Operating a Motor Vehicle with a Restricted Controlled Substance in his blood. (R18:2, 9)

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[1] Shah was also cited for possession of drug paraphernalia; possession of marijuana; operating with .PAC greater than .08, first offense; exceeding speed zones, thirty to thirty-four, on a highway area; failure to slow vehicle when passing a stopped emergency vehicle; and refusal to take test for intoxication after arrest. (R16; R17) None of those matters are relevant to this appeal.

This appeal follows.

Additional relevant facts will be set forth, below.

STANDARD OF REVIEW

A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶ 9, 314 Wis. 2d 661, 762 N.W.2d 385. The reviewing court will uphold the trial court's findings of fact unless they are clearly erroneous. *Id*.; Wis. Stat. § 805.17(2) (made applicable to criminal proceedings by Wis. Stat. § 972.11(1)). Where the trial court does not make specific findings, it is necessary for this court to independently review the record. *Turner v. State,* 76 Wis. 2d 1, 18-19, 250 N.W.2d 706 (1977).

The trial court's application of constitutional principles is reviewed de novo *Casarez*, 314 Wis. 2d 661, ¶ 9.

Whether the good faith exception to the Fourth amendment exclusionary rule precludes suppression of evidence in a particular case is a question of constitutional fact. *State v. Oberst,* 2014 WI App 58, ¶ 4, 354 Wis. 2d 278, 847 N.W.2d 892. A reviewing court must accept the trial court's factual findings unless they are clearly erroneous. *Oberst,* 354 Wis. 2d 278, ¶ 4, 847 N.W.2d 892. The application of the good-faith exception is a question of law that a reviewing court reviews *de novo. Id*.

ARGUMENT

I. BECAUSE THE NON-CONSENSUAL, WARRANTLESS SEIZURE OF SHAH'S BLOOD COMPLIED WITH WISCONSIN LAW THEN IN EFFECT, GOOD FAITH PRECLUDES APPLICATION OF THE EXCLUSIONARY RULE

a. Warrantless seizures of a person's blood were governed by *State v. Bohling* at the time of this incident.

As our Supreme Court recently noted,

> The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution prohibit "unreasonable searches and seizures." Warrantless searches are per se unreasonable unless they fall within a well-recognized exception to the warrant requirement.

State v. Parisi, 2016 WI 10, ¶ 28, 367 Wis. 2d 1**,** 875 N.W.2d 619. (Internal quotations and citations omitted).

One of the well-recognized exceptions to the warrant requirement is the doctrine of exigent circumstances. *Payton v. New York*, 445 U.S. 573, 575, 583-88 (1980); *State v. Hughes*, 2000 WI 24, ¶17, 233 Wis. 2d 280, 289-290, 607 N.W.2d 621; *State v. Smith,* 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). That exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. *Parisi*, 367 Wis. 2d 1**,** ¶ 29, 875 N.W.2d 619, citing *Missouri v. McNeely,* 569 U.S. ___, 133 S. Ct. 1552, 1558 (2013).

Until the United States Supreme Court's decision in *McNeely* was announced in 2013, "forced blood draws"—that is blood taken without consent and without a warrant—were governed by *State v. Bohling*, 173 Wis. 2d 529, 537-38, 494 N.W.2d 399 (1993). *State v. Reese*, 2014 WI App 27, ¶17, 353 Wis. 2d 266, 844 N.W.2d 396.

b. The *Bohling* test applied in instances where an officer reasonably believes drug intoxication is present.

In *Bohling*, the Court found that "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency," per se, to justify a warrantless blood draw. *Bohling*, 173 Wis. 2d at 533, 494 N.W.2d 399. The Court therefore held that officers were permitted to obtain blood without a warrant and without consent when (1) the blood was taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime; (2) a clear indication existed that the blood draw will produce evidence of intoxication; (3) the method used to take the blood sample was reasonable and is performed in a reasonable manner; and (4) he arrestee presented no reasonable objection to the blood

draw. *Bohling*, 173 Wis. 2d at 533–34, 494 N.W.2d 399. Thus under *Bohling*, a blood sample could be obtained without the showing of any additional exigencies.

Bohling specifically noted the dissipation of alcohol from a person's system as an exigent circumstance. It is the County's position that the dissipation or metabolization of a controlled substance creates the same exigency, per se. As a consequence, *Bohling* applies in cases of operating while under the influence of a controlled substance, such that no additional exigency is required.

Like alcohol, a controlled substance will be eliminated from a person's blood in time. While the elimination period may differ from that of alcohol, and while some drugs may be in a person's system long enough for a warrant to be obtained, there is no way for an officer to know whether that time exists when making an arrest for operating while under the influence of a controlled substance.

First, until the blood is drawn, the officer cannot be certain what drugs have been consumed: street drugs are not produced under the controls attendant to the alcohol industry. A person may intend to consume one drug, but may find it was a different one, or laced with a different one. A person may intentionally have taken more than one drug; or, a person may not be truthful about what drug he has taken: he may admit to having taken one, but may actually have taken a different drug, or a combination of drugs.

Second, an officer cannot be certain when the drug was consumed, and cannot be expected to know metabolization data for every controlled substance.

Shah seems to argue that metabolization or dissipation is irrelevant in drugged driving cases, that no exigency exists because the restricted controlled substance law requires only the presence–not any particular amount–of the restricted controlled substance. (*Id*., p. 11, 14). The argument follows that an immediate blood draw is not necessary: it doesn't matter if the level of the drug dissipated, because the level is irrelevant. This position is in error, for several reasons.

While the mere presence of a restricted controlled substance may be sufficient to prove guilt in a charge of operating a motor vehicle while having a restricted controlled substance in the blood under Wis. Stat. § 346.63(1)(am), the level could be relevant to a companion charge of operating a motor vehicle under the influence of a controlled substance, under 346.63(1)(a). Moreover, not all controlled substances are restricted controlled substances.[2] Amphetamine and ketamine, among many others, are Schedule II and Schedule III drugs, and thus not restricted controlled substances. Wis. Stat. §§ 961.16(5)(a), 961.18(4)(ak). Operation of a motor vehicle following consumption of such drugs could not be prosecuted under Wis. Stat. § 346.63(1)(am), and the mere presence of a such a drug in a person's blood would not support a conviction under Wis. Stat. § 346.63(1)(a). And, as a matter of common sense, even restricted controlled substances will metabolize to a point where they are no longer detectable.

The County's position that *Bohling* is applicable in drugged driving cases is supported by the Court of Appeals' decision in *State v. Malinowski*, No. 2010AP1084-CR, unpublished slip op. (WI App Nov. 10, 2010)[3] (Appendix 101). In *Malinowski*, an officer (Officer Long) stopped Malinowski because of unusual driving. On contact with Long, Malinowski appeared lethargic and confused, had difficulty producing his drivers' license, and seemed confused. From her continued contact, the field sobriety tests and PBT result (which did not register the use of alcohol), Long formed the opinion that Malinowski was under the influence of drugs. She arrested him and transported him to a hospital for a blood test. When

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[2] The term "restricted controlled substance," is defined in Wis. Stat. § 340.01 **(50m):**

"Restricted controlled substance" means any of the following:

(a) A controlled substance included in schedule I under ch. 961other than a tetrahydrocannabinol.

(am) The heroin metabolite 6−monoacetylmorphine.

(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).

(c) Cocaine or any of its metabolites.

(d) Methamphetamine.

(e) Delta−9−tetrahydrocannabinol.

[3] An unpublished, but authored, opinion issued on or after July 1, 2009 may be cited for persuasive value. Wis. Stat. (Rule) 809.23(3)(b)

Malinowski refused to consent to a blood test, the officer ordered his blood be drawn anyway. He was later charged with operating a motor vehicle while under the influence of a controlled substance (OWI), second offense.

Pre-trial, Malinowski moved to suppress the blood test results. He argued the warrantless blood draw violated the Fourth Amendment and that the officer should have obtained a warrant before drawing his blood. He conceded that—had he been suspected of being under the influence of alcohol—*Bohling* would have permitted a warrantless blood draw. However, like Shah, he argued that *Bohling* did not permit a warrantless blood draw in a controlled substances case: he contended that, while alcohol in the blood begins to diminish shortly after drinking stops, the same is not true of drugs. He argued that exigent circumstances are therefore not present are not present in a case where drugs, rather than alcohol, form the basis for an OWI arrest. In contrast, the State contended that exigent circumstances permitted the warrantless blood draw because drugs dissipate, or are metabolized, over time. The circuit court denied Malinowski's suppression motion, finding that exigent circumstances justified taking his blood without a warrant, and Malinowski appealed.

The court of appeals concluded, as a matter of first impression, that exigent circumstances permit a warrantless blood draw from a person arrested for operating while under the influence of a controlled substance.

The *Malinowski* court "agreed with the majority of jurisdictions that it is not necessary to distinguish between alcohol and drugs for purposes of the exigent circumstances exception." *Id*. at ¶¶13-14. It cited with approval the California Court of Appeals decision in *People v. Ritchie*, 181 Cal. Rptr. 773 (Cal. Ct. App. 1982), a drugged driving case where exigent circumstances were present because "drugs in the blood stream, like alcohol, dissipate." *Id.* at 775. The *Malinowski* court agreed with *Ritchie* that 'distinguishing between alcohol and drugs in the context of determining exigent circumstances is a "needless refinement." The *Malinowski* court wrote,

> ¶ 16 We agree with the *Ritchie* court's analysis. Like alcohol, the amount of drugs present in the blood stream begins to dissipate following consumption. Thus, the mere passage of time operates to destroy evidence of the defendant's intoxication. For this reason, exigent circumstances justified the warrantless draw of Malinowski's blood.

State v. Malinowski, No. 2010AP1084-CR, unpublished slip op. ¶ 16 (WI App Nov. 10, 2010).

The court also rejected Malinowski's contention that Long's ignorance of the dissipation rate defeated an exigence circumstances claim:

> ¶ 17 Malinowski argues that even if drugs dissipate from the blood over time, and even if some drugs dissipate rapidly, there were no exigent circumstances in this case because Long had no way of knowing how quickly the particular drugs in Malinowski's blood would dissipate. However, we again agree with the Ritchie court that there is "no basis for a requirement that law enforcement officials ascertain the nature of the drug ingested in order to determine just how fast it will dissipate." Id. "Although some drugs may be detectable for long enough that police can obtain a warrant, police officers cannot know with certainty which drugs are affecting [a] suspect[]" until a blood test is performed. *Steimel*, 921 A.2d at 385. Because police cannot know which drugs an arrestee has taken without first testing the arrestee's blood, accepting Malinowski's argument would mean that police could almost never obtain a blood draw of a suspected drug-influenced driver without first obtaining a warrant.
>
> ¶ 18 Here, Long suspected Malinowski was under the influence of a controlled substance, but she did not know which controlled substance he had taken. Consequently, she could not ascertain how quickly that substance would dissipate from Malinowski's blood stream without first obtaining a blood sample. Contrary to Malinowski's contention, Long's ignorance of which drugs Malinowski had taken actually contributed to the exigency that justified ordering a warrantless blood draw.

State v. Malinowski, No. 2010AP1084-CR, unpublished slip op. ¶ 17 (WI App Nov. 10, 2010) (internal footnote omitted).

Here, Leranth believed that Shah had very recently been smoking marijuana. (R17:25) But he also recovered two additional substances: he thought one was cocaine; he had no idea what the other was, but he gave it to another deputy to be field tested for the presence of drugs. (R16:24-26) As in *Malinowski*, Leranth could not be certain what Shah had taken. And, as in Malinowski, Leranth could not know for certain when Shah had consumed whatever he had consumed. He believed the ingestion to be recent, but the pipe was not warm to the touch, (R16:24; R17:25), and although the car smelled like marijuana, Shah, personally did not. (R16:29-30)[4]

In arguing that no exigency existed, Shah repeatedly asserts that he was not arrested or charged with operating under the influence of THC, but only for operating while having a restricted controlled substance in his system. (Brief of Defendant-Appellant, p. 7, 9-10). While Shah was tried for Operating with a Restricted Controlled Substance in his blood, the record suggests that he was arrested for Operating a Motor Vehicle While Under the Influence of a Controlled Substance.

Neither deputy was asked for the statutory section that underlay Shah's arrest, both paraphrased the charge as an "operating under the influence" charge. Deputy Leranth testified, "We felt he was possibly under the influence of marijuana while operating the motor vehicle." (R16:19). Asked specifically about the charge for which Shah was arrested, Deputy Leranth testified,

> Q: Okay. But you had arrested Alpesh Shah for operating a motor vehicle while under the influence of THC, correct?
> A: Correct.

(R16:28)

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[4] On appeal, Shah cites to "the alleged smoky interior" of the vehicle as support that Shah's use was recent. (Brief of Defendant-Appellant, p. 7). The testimony, however, suggests that it was the odor of the THC which was smoky (as opposed to fresh), not the interior of the car.

> Q: Okay. Could you make any identification of whether there was fresh marijuana or the smell of burnt marijuana in this case?
> A: It was definitely the smell of burnt marijuana. It was smokey. (sic)

(R16:13)

Deputy Jarvis testified that Shah was arrested for impaired driving, or driving under the influence. He said that, following the field sobriety tests,

> Mr. Shah was handcuffed and detained and put in the rear of Deputy Leranth's car for pending a blood draw for determining to see for impaired driving while under the influence of marijuana.

(R16:42-43)

Asked again, Jarvis reiterated that Shah was arrested for impaired driving:

> Q: So based on what you said was the drinking earlier, the lack of ability to follow orders, the driving, the fact that you guys found the marijuana pipe with marijuana in it, suspected marijuana, and the driving that you placed him under arrest for that impaired driving?
> A: That's correct.

(R16:43-44)

While Shah is correct that the level of a restricted controlled substance is generally irrelevant to a restricted controlled substance charge, the level could be relevant to a charge of operating while under the influence of a controlled substance, where the County would need to prove impairment due to the controlled substance. That the County did not ultimately proceed on that charge is irrelevant: the question is whether, at the time of seizure, there was the risk of loss of evidence, such that an exigency existed.

Under circumstances similar to these, the *Malinowski* court held that the warrantless blood draw was lawful under *Bohling*. This court should hold the same.

c. Shah's admission to drinking alcohol independently justified a warrantless blood draw under *Bohling.*

Even if *Bohling* does not permit warrantless, non-consensual blood draws where drugs alone are implicated, it would justify the blood draw here. Shah told Deputy Jarvis that that he had four to five drinks, ending at approximately

1:00 a.m. (R16:38). That admission, combined with Shah's apparent inability to see or perceive two squad cars—one of which had its lights on—the impaired driving and his red, glassy and bloodshot eyes (R16:13-14), would warrant a reasonable officer to believe that Shah was under the influence of alcohol, or alcohol and a controlled substance.

The record demonstrates that Deputy Leranth and Deputy Jarvis did suspect both marijuana and alcohol-related impairment. On the form used to submit the blood sample to the Hygiene Laboratory for testing, received in evidence at trial as Exhibit 5, Deputy Leranth requested that the laboratory conduct both an alcohol and full drug panel, rather than just THC or alcohol and THC. (R9:5; Appendix 109) And, testifying about the decision to arrest Shah, Deputy Jarvis explained,

> The decision was based on representations that he had indicated that he had drank up until 1:00 that morning with four to five drinks, his inability to follow orders, the inability to ascertain through the standardized field sobriety tests that he possibly could be not following orders, and the strong odor of marijuana, as well as the contents found in the vehicle, in conjunction with the report from Deputy Leranth that he personally observed him pass the fully-marked squad car at a high rate of speed in lane one, northbound on Interstate 43.

(R16: 43-44)

That Shah reported last consuming those drinks some seven-and-a-half hours before the stop made the need to draw blood without delay even more urgent.

d. The Deputy's Good Faith Reliance on *Bohling* precludes the application of the exclusionary rule in this case.

Bohling, of course, was abrogated by *McNeely*. *See*, *Parisi*, 367 Wis. 2d at 15, ¶ 23, 875 N.W.2d at 623; *State v. Kennedy,* 2014 WI 132, ¶5, 359 Wis. 2d 454, 461, 856 N.W.2d 834. However, the blood draw in the instant case occurred some four months before *McNeely* was decided. It is the County's position that *Bohling* was controlling case law at the

time of the instant seizure and that if the blood was drawn in good faith reliance on, and in compliance with, *Bohling,* the exclusionary rule should not apply.

Numerous Wisconsin cases have recognized that the good faith exception precludes the application of the exclusionary rule 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. *State v. Dearborn,* 2010 WI 84, 327 Wis.2d 252, 786 N.W.2d 97 [involving the search of a vehicle incident to arrest, prior to the Supreme Court's decision in *Arizona v. Gant,* 556 U.S. 332, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009)]*; State v. Loranger*, 2002 WI App 5, 250 Wis. 2d 198, 640 N.W.2d 555 [involving the warrantless use of a thermos-imaging device prior to the Supreme Court's decision in *Kyllo v. United States,* 533 U.S. 27, 121 S. Ct. 2038, 150 L.Ed.2d 94 (2001)]; *State v. Oberst, supra* [involving the warrantless installation of a GPS tracking device on a vehicle prior to the Supreme Court's decision in *United States v. Jones,* 565 U.S. –––, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012)]. More specifically, several case have held that the good faith exception precludes application of the exclusionary rule when officers, pre-McNeely, acted in reliance on and in accordance with *Bohling. Kennedy, supra; Reese, supra*.

In *Reese*, the defendant was arrested for an OWI offense on June 18, 2009. He was transported to a hospital where blood was drawn without a warrant and without separate exigent circumstances. *Reese*, 353 Wis. 2d 266, ¶¶ 4, 14, 844 N.W.2d 396. Reese argued that the only evidence of exigent circumstances in his case was the natural dissipation of alcohol from his blood. Relying on *McNeely,* Reese argued that that evidence, standing alone, was insufficient to support a finding of exigent circumstances and that warrantless blood draw was therefore inadmissible. The State conceded that it had not established exigent circumstances independent of the dissipation of alcohol from Reese's blood, but contended that the good faith exception articulated in *State v. Dearborn,* rendered the blood test result admissible. *Reese*, 353 Wis. 2d 266, ¶ 19, 8

The court of appeals agreed with the State and refused to suppress the blood test. The court wrote,

> ¶ 22 As was the case in *Dearborn,* the police officer here was following the "clear and settled precedent" when he obtained a blood draw of Reese without a warrant. The deterrent effect on officer misconduct, which our supreme court characterized as "the most important factor" in determining whether to apply the good faith exception, would, as in *Dearborn,* be nonexistent in this case because the officer did not and could not have known at the time that he was violating the Fourth Amendment. *See id.*, ¶ 49. At the time of the blood draw the officer was following clear, well-settled precedent established by the Wisconsin Supreme Court, which the court has stated "is exactly what officers *should* do." *Id.,* ¶ 44. Accordingly, because the officer reasonably relied on clear and settled Wisconsin Supreme Court precedent in obtaining the warrantless blood draw and because exclusion in this case would have no deterrent effect, we conclude that the blood draw evidence should not be suppressed.

Reese, 353 Wis. 2d 266, ¶ 22, 844 N.W.2d 396.

As in *Reese*, Deputy Leranth relied on *Bohling* when he obtained Shah's blood without a warrant. As in *Reese*, the good faith exception should bar application of the exclusionary rule here.

CONCLUSION

For the reasons herein, the County requests that this court affirm the trial court's denial of Shah's motion to suppress the results of the non-consensual, warrantless blood draw.

Dated this _____ day of July, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4,648.

Date

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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 s. 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.

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