STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP000007-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KALLIE M. GAJEWSKI,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

The police unlawfully climbed onto the porch of Ms. Gajewski's home, pulled her out of her doorway, and arrested her for OWI. Later, the police transported Ms. Gajewski to a local hospital where, without a warrant but with Ms. Gajewski's consent, they inserted a needle into her arm and took her blood.

Despite Ms. Gajewski's unlawful arrest, the court of appeals refused to suppress the results of her warrantless blood draw. It held that *State v. Felix*, 2012 WI 36, ¶51, 399 Wis. 2d 670, 811 N.W.2d 775—which relied on *New York v. Harris*, 495 U.S. 14 (1990)—does not require the suppression of physical evidence obtained outside of the home after an unlawful in-home arrest so long as it was supported by probable cause.

> Do the rules in *Harris*[1] and *Felix*[2] permitting the admission of evidence obtained outside of a home after an illegal in-home arrest extend to evidence obtained from a blood draw?

The circuit court did not address *Harris* or *Felix*. The court of appeals answered yes.

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[1] *New York v. Harris*, 495 U.S. 14 (1990)

[2] *State v. Felix*, 2012 WI 36, 399 Wis. 2d 670, 811 N.W.2d 775.

CRITERIA FOR REVIEW

This case presents the Court with a real and significant question of federal and state constitutional law. *See* Wis. Stat. § 809.62(1r)(a). It also presents a novel question, the resolution of which will have statewide impact. *See* Wis. Stat. § 809.62(1r)(c)2.

As a means of enforcing Fourth Amendment rights, the exclusionary rule requires the suppression of evidence obtained as a result of unlawful searches and seizures. *United States v. Calandra*, 414 U.S. 338, 347 (1974). The rule's core purpose is to deter future police misconduct.

The long-standing attenuation doctrine puts limits on the exclusionary rule. *Brown v. Illinois*, 422 U.S. 590, 598-599 (1975). This doctrine recognizes that, at some point after an unlawful search or seizure, the collection of evidence becomes so attenuated from past police misconduct that the exclusionary rule no longer serves its deterrent purpose. *Id*. Thus, such attenuated evidence need not be suppressed. *Id*.

The United States Supreme Court complicated this exclusionary-attenuation regime in *Harris*, which added another rule regarding the admissibility of unlawfully obtained evidence. *Harris* held that a person's Mirandized statements made *outside of the home* need not be suppressed after the police unlawfully arrested that person *inside the home*, so long as the police had probable cause to arrest. *Harris*, 495 U.S. at 21. Importantly, *Harris* ruled only that the Mirandized statements Mr. Harris made were

admissible—it made no mention as to whether physical evidence would still be suppressed under the same circumstances. *Id*. Thus, *Harris* did not nullify the attenuation doctrine altogether; its new rule applied only to a limited type of evidence. *Id*.

In *Felix*, this Court considered whether to adopt the *Harris* rule (or continue applying the traditional attenuation analysis) for evidence obtained after an unlawful arrest inside of a home for which police had probable cause. *Felix*, 399 Wis. 2d 670, ¶1. The Court followed *Harris*. But it went further, too: it extended the *Harris* rule to *physical* evidence collected after such an arrest—namely, a DNA swab and the clothes off Mr. Felix's back. *Id*., ¶¶ 38, 50. Thus, under the Wisconsin Constitution, an unlawful arrest inside a home is not a poisonous tree from which fruits need to be suppressed—so long as those fruits were collected outside of the home and the police had probable cause to arrest.

Here, the question this Court should answer is whether Wisconsin's interpretation of the *Harris* rule in *Felix* should extend even further: to physical evidence collected from a warrantless blood draw after a person has been unlawfully arrested inside of her home. This is a novel issue because neither this Court nor any published[3] court of appeals decisions have

[3] The two unpublished court of appeals decisions that address *Felix* and the suppression of a blood draw are: *State v. Schiewe*, No. 2012AP2767-CR, unpublished op., (Wis. Ct. App. Oct. 24, 2013) and *State v. McGinnis*, No. 2018AP1388-CR, unpublished op., (Wis. Ct. App. Oct. 8, 2019).

decided this issue. A decision by this Court will have statewide impact because police investigate and arrest individuals for OWI across the state, but not all of those investigations involve a traffic stop. *See e.g. State v. Weber*, 2016 WI 96, ¶ 2, 372 Wis. 2d 202, 887 N.W.2d 554. If *Felix* extends to blood draws, then it may change the way police investigate and arrest suspects of OWIs. If police have probable cause to arrest for OWI, they can unlawfully arrest her inside her home, take her to a local hospital, draw her blood, and use the blood test results—without a warrant or the suspect's consent. *Felix* could become a means of circumventing the warrant requirement for OWI blood draws.

Blood draws are unique, and worthy of specific consideration in this context, for four reasons. First, the "physical intrusion beneath [a person's] skin and into his veins to obtain a sample of his blood for use as evidence" is such an invasion of a person's "bodily integrity" that it implicates "an individual's most personal and deep-rooted expectations of privacy." *Missouri v. McNeely*, 569 U.S. 141, 148, (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760, (1985)). Second, due to implied consent laws, refusing a warrantless blood draw results in significant consequences such as license suspension or revocation. *Id.* at 161. Third, Wisconsin's implied consent laws require that the person subject to a warrantless blood draw be in lawful custody. *State v. Bohling*, 173 Wis. 2d 529, 533-34, (1993) (abrogated on other grounds by *McNeely*, 569 U.S. 141). Fourth, a blood draw will not ordinarily occur inside a person's home;

if *Felix* does extend to blood draws, blood test results will always be admissible regardless of the lawfulness of the preceding in-home arrest.

In sum, the particularities of OWI blood draws complicate the Fourth Amendment analysis. This Court should thus carefully assess whether *Felix* applies to blood draw evidence, or whether the traditional exclusionary-attenuation regime governs.

STATEMENT OF FACTS

After midnight on August 28, 2016, dispatch informed Officer Marcus Goetsch of the Athens Police Department that an eyewitness saw a woman in a blue Saturn stopped on Corlad Road and believed the woman to be intoxicated. (51:4-5; App. 32-33)

Upon responding to this location, Goetsch found no car stopped in the road. (51:5; App. 33). So, he continued to drive around the area searching for the car. (51:5; App. 33). He made several stops throughout the area, including one to speak with a woman driving a blue Saturn whom Goetsch believed was not the person he was looking for. (51:6-9; App. 34-37). Eventually, based on information a pedestrian provided, Goetsch pulled into Ms. Gajewski's driveway—twice. (51:7-9; App. 35-37). Only on his second entry did Goetsch see a blue Saturn parked in the backyard. Shortly after, Goetsch called for backup from the Marathon County Sheriff's Department, and Deputy Brandon Stroik responded. (51:7; App. 35).

Ms. Gajewski lived in a single-wide trailer home with two doors, one facing the road and one facing the backyard, both with porches attached. (51:9, 10, 16-17, 23; App. 37-38, 44-45). Both officers approached Ms. Gajewski's home: Stroik knocked on her back door while Goetsch waited at her front door. Eventually Ms. Gajewski opened her back door and stepped out onto her porch. (51:24; App. 52).

Stroik began to inquire into Ms. Gajewski's evening. (51:11; App. 39). During the ensuing conversation, both officers observed signs of intoxication. (51:53:13, 25; App. 41, 53). However, Ms. Gajewski consistently denied driving that evening, and after only a few minutes, she decided to end the questioning and go inside. (51:25; App. 53). Stroik ordered Ms. Gajewski to stop, climbed onto her porch, and grabbed her. (51:13, 25-26, 31; App. 41, 53-54, 59). He told her to stop resisting or she would be tased. (51: 25-26, 31; App. 53-54, 59). Goetsch also stepped onto the porch, grabbing Ms. Gajewski by the arm she was using to hold onto her door. (51:13; App. 41). Stroik handcuffed Ms. Gajewski, led her out of the doorway, off her porch, down through her yard, and to his squad car. (51:14, 16; App. 42-44). Ms. Gajewski was under arrest. (54:4; App. 91).

At the suppression hearing, Goetsch stated that while Stroik questioned her, he recognized Ms. Gajewski from earlier in the evening; he believed she was the woman driving a blue Saturn whom he'd pulled over earlier that night. (51:12; App. 40). Goetsch thus believed Ms. Gajewski's denials to be

false. (51:12; App. 40). By contrast, Stroik stated that he was unaware that Goetsch had recognized Ms. Gajewski at the time Stroik arrested her. (51:12; App. 40). Goetsch informed Stroik of this detail after Ms. Gajewski's arrest when Stroik was arranging a show up with the eyewitness. (51:28, 31; App. 56, 59).

After Stroik learned that Goetsch recognized Ms. Gajewski, he called off the show up and sought to administer field sobriety tests. (51:27; App. 55). Ms. Gajewski refused, so Stroik handcuffed her again and told her she was under arrest for operating while intoxicated. (51: 27; App. 55). Stroik then drove Ms. Gajewski to the hospital for a blood draw. (51:27, 28; App. 55-56). On the way, he pulled over to issue Ms. Gajewski an OWI citation and to read her the informing-the-accused form. She consented to the blood draw, and testing revealed a blood alcohol content of 0.268 (4:3; 51:28; App. 56).

STATEMENT OF THE CASE

Circuit Court Proceedings

The state charged Ms. Gajewski with operating while intoxicated — fourth offense in five years. (37:1) Ms. Gajewski filed two motions to suppress evidence. First, she moved the circuit court to suppress any statements made before she had received *Miranda*[4] warnings. (14:1). Second, she moved to suppress the

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

fruits of her illegal arrest, including the result of her blood draw. (15:1).

The circuit court held a suppression hearing. (51:1; App. 29). Goetsch and Stroik testified about Ms. Gajewski's arrest. (51: 1-32; App. 29-60). The parties also stipulated to the introduction of Stroik's squad video, although the video wasn't played at the hearing. (51:33-35; App. 61-63). After the officers' testimony, the court agreed to watch the video and requested supplemental briefing. (51:35; App. 63).

A few months later, the circuit court issued an oral ruling on the *Miranda* issue. (52:1; App. 67). It held that Ms. Gajewski was in custody when Stroik prevented her from entering her home and was not given her *Miranda* warnings at that time. (52:4; App. 70). Thus, it suppressed statements Ms. Gajewski made during her custodial interrogation. (52:4; App. 70). The court then requested another round of supplemental briefing on whether Ms. Gajewski's arrest was unlawful—specifically, how the "hot pursuit" doctrine applied. (52:5-9; App. 70-75).

After briefing, the circuit court held a second oral ruling. (53:1; App. 77). It concluded that the porch where Ms. Gajewski was arrested was the curtilage of her home. (53:8; App. 84). Next, it held that Ms. Gajewski was obstructing the officers because she'd lied about her whereabouts that evening. (53:7; App. 83). And finally, it held that the officers were pursuing Ms. Gajewski onto her porch for obstruction and were thus in hot pursuit when they entered the

curtilage of her home without a warrant and arrested her. (53:8; App. 84). The court also concluded that the exigent circumstance that justified the entry was the dissipation of alcohol in her bloodstream. (53:9; App. 85).

Ms. Gajewski filed a motion to reconsider. (26:1). The circuit court then held its final hearing. (54:1; App. 88). This time it held that law enforcement had probable cause to arrest for obstruction and that law enforcement did not need a warrant to arrest her on her porch. (54:5-10; App. 92-97). Exigency was thus irrelevant.

After the court denied suppression, Ms. Gajewski entered a plea of no contest to operating while intoxicated—fourth offense. (59:12). The court withheld sentence and placed Ms. Gajewski on three years of probation. (59:14).

Court of Appeals Proceedings

Ms. Gajewski appealed the circuit court's denial of her motion to suppress the evidence obtained as a result of her unlawful arrest. In her brief-in-chief, Ms. Gajewski argued that the police did not have probable cause plus an exigent circumstance to arrest her in the curtilage of her home, and therefore, her arrest was unlawful. (App. Br. 10). Specifically, Ms. Gajewski argued that hot pursuit was not a stand-alone exigency that could justify her warrantless in-home arrest. (App. Br. 10-11).

The state moved to stay briefing pending the resolution of *Lange v. California*, 141 S. Ct. 2011, 2016 (2021). The court of appeals agreed to stay briefing because the issue in *Lange* would directly answer the question Ms. Gajewski posed in her brief-in-chief. (App. Br. 14-28) In June of 2021, the United States Supreme Court answered the question in favor of Ms. Gajewski. It agreed that when police have probable cause of a misdemeanor, flight (or hot pursuit) does not categorically justify a warrantless entry into a home. *Lange*, 141 S. Ct. at 2024.

Dropping the hot pursuit issue, the state then argued in its response brief that Ms. Gajewski's arrest was lawful because she was not in the curtilage of her home when she was standing on the porch of her home. (Resp. Br. 11).

After the submission of the original briefs, the court of appeals issued an order requesting supplemental briefing. The court had the parties address (1) whether the police had probable cause given the collective knowledge doctrine, and (2) whether, assuming the police had probable cause, the *Felix* rule applied to whether suppression is appropriate in this case.

Ms. Gajewski's supplemental briefing argued that (1) the police did not have probable cause and that the collective knowledge doctrine did not apply under these circumstances, and (2) *Felix* was wrongly decided because it extended beyond the *Harris* rule, but *Felix* does appear to permit the admission of

physical evidence obtained outside of the home after an unlawful arrest inside the home. (App. Supp. Br. 5-18). The state then argued that (1) the police had probable cause because the collective knowledge doctrine applied, and (2) suppression is not appropriate under *Felix*. (Resp. Supp. Br. 6-15).

The court of appeals affirmed. *State v. Kallie M. Gajewski*, 2020AP7-CR, ¶2 (August 2, 2022); (App. 2-25). First, it held that Ms. Gajewski's arrest was unlawful because the police entered the curtilage of her home without a warrant or exception to the warrant requirement. *Id*., ¶1. (App. 3). Second, citing *Felix*, it held that the police had probable cause to arrest Ms. Gajewski and thus, the evidence derived from her blood draw was not subject to the exclusionary rule. *Id*., ¶2. (App. 4).

This petition for review follows.

ARGUMENT

Review is warranted to determine whether *Harris* and *Felix* permit the admission of blood-draw evidence obtained outside of a home after an illegal in-home arrest.

A. The exclusionary rule and the attenuation doctrine control the admissibility of evidence derived from police misconduct.

The exclusionary rule generally bars the government from introducing evidence obtained in

violation of the Fourth Amendment to the United States Constitution. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). Excluding unlawfully obtained evidence effectuates the rights protected by the Fourth Amendment and deters future unlawful police conduct. *Calandra*, 414 U.S. at 347. It applies to all evidence that derived from the unlawful conduct. *Id*.

However, the application of the exclusionary rule is limited to circumstances where its objectives are "most efficaciously served." *Id*. In some circumstances, the exclusionary rule "imposes greater costs on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes." *Brown*, 422 U.S. at 598-599.

This is where the attenuation doctrine comes into play. When evidence is "so attenuated as to dissipate the taint" of the unlawful police conduct, then the evidence need not be excluded. *Id*. To determine whether the evidence obtained as a result of unlawful police conduct is sufficiently attenuated from said unlawfulness, courts weigh three factors: (1) the temporal proximity between the illegal activity and the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the police misconduct. *Id*. at 603-04.

For example, in *Brown*, the Supreme Court found that Mr. Brown's Mirandized statements made at the police station two-hours after his unlawful arrest were (1) close in time, (2) not preceded by a

significant intervening event, and (3) the result of an unlawful arrest made solely to investigate and question Mr. Brown. *Id*. at 605. Importantly, the court found that *Miranda* warnings alone are not an intervening event and do not categorically attenuate a statement from an unlawful arrest.

As early as 1976, Wisconsin adopted the *Brown* attenuation doctrine. *See Muetze v. State*, 73 Wis. 2d 117, 132 (1976).

B. The *Harris* and *Felix* rules deviate from the attenuation doctrine and only apply under limited circumstances.

Decades later, in *Harris*, the Supreme Court did not suppress Mr. Harris' Mirandized confessions made at the police station shortly after he was unlawfully arrested inside his home for first-degree intentional homicide. *Harris*, 495 U.S. at 16. It held that Mirandized statements made outside of the home after an unlawful arrest inside of the home need not be suppressed if the police have probable cause to arrest. *Id*. at 21.

Despite *Brown* and the attenuation doctrine, *Harris* determined that a person is no longer in "unlawful custody" once she has been pulled outside of her home after an unlawful arrest inside her home (again, so long as the police have probable cause to arrest her). *Id*. at 18. Although *Harris* avoided *Brown*'s three-factor test, it did not nullify *Brown* or the attenuation doctrine. Instead, the *Harris* rule appears to sit adjacent to *Brown* and applies only to limited

types of evidence: Mirandized statements made outside of the home after an unlawful arrest inside the home based on probable cause. *Id*. at 21.

Then, in *Felix*, this Court had to decide whether to adopt the *Harris* rule or continue applying the traditional *Brown* test to evidence obtained after an unlawful arrest inside of a home. *Felix*, 399 Wis. 2d 670, ¶1.

The police had probable cause to arrest Mr. Felix for first-degree intentional homicide but went inside his home—without a warrant or exception to the warrant requirement—and unlawfully arrested him. *Id*., ¶¶ 7-11. After his arrest, Mr. Felix was taken to the police station where he was Mirandized, made statements, and agreed to submit to a DNA swab. *Id*., ¶ 12. He was then booked into jail, where the police seized his clothes. *Id*., ¶ 13.

Ultimately this Court decided to adopt the *Harris* rule to admit Mr. Felix's Mirandized statements. *Id*., ¶¶ 38, 50. But, it also extended the rule to physical evidence collected after Mr. Felix's arrest—namely, a DNA swab and the clothes off his back. *Id*.

It follows that, under Wisconsin law, courts need not suppress Mirandized statements, or some types of physical evidence, seized after an unlawful in-home arrest. So long as the evidence was seized outside of the home and the police had probable cause to arrest, the evidence may be admitted.

C. Review is warranted so this Court can decide whether blood-test results, a special kind of physical evidence, are subject to the *Harris* and *Felix* rules.

Whether the *Felix* rule extends to the results of a blood draw after an unlawful home arrest turns on both federal and state constitutional jurisprudence regarding protections against unreasonable searches and seizures, suppression of evidence derived from constitutional violations, and the unique legal treatment of blood draws. This Court is wary of announcing categorical rules in Fourth Amendment cases, it is particularly wary of doing so in the context of nonconsensual warrantless blood draws, and thus it should be wary of doing so here.

There are four important ways blood draws are a distinct type of physical evidence deserving of special Fourth Amendment attention.

First, the United States Supreme Court declined to extend a well-established exception to the warrant requirement, dissipation of evidence as an exigency, to warrantless blood draws. It held that the "physical intrusion beneath [a person's] skin and into his veins to obtain a sample of his blood for use as evidence" is such an invasion of a person's "bodily integrity" that it implicates "an individual's most personal and deep-rooted expectations of privacy." *McNeely*, 569 U.S. at 148 (quoting *Lee*, 470 U.S. at 760). Thus, the contents of our blood are on the extreme end of privacy expectations.

Second, due to implied consent laws, refusing a warrantless blood draw results in significant consequences such a license suspension or revocation, or used as evidence of guilt in court. *Id*. at 161; *see also* Wis. Stat. § 343.305(10)(em). If a person refuses to consent to a different warrantless search or seizure, such as a DNA swab, the police would have to get a warrant, but there would be no administrative or criminal consequence for the refusal.

Third, Wisconsin's implied consent laws require that the person subject to a warrantless blood draw be in lawful custody. *State v. Bohling*, 173 Wis. 2d 529, 533-34, (1993) (abrogated by *McNeely*, 569 U.S. 141 on other grounds). And, consent to a warrantless blood draw requires a special voluntariness analysis even if the person is in lawful custody. *State v. Blackman*, 2017 WI 77, ¶¶ 56-59, 377 Wis. 2d 339, 898 N.W.2d 774. What would become of these layers of protections if *Felix* governs?

Fourth, a blood draw will never (or almost never) occur inside a person's home. If the police are investigating an OWI and want to draw a person's blood as part of the investigation, they must take that person to a clinic or hospital where a medical professional can properly insert the needle and collect the blood. That means an unlawful in-home arrest is a free pass for a warrantless blood draw with admissible test results, so long as the police had probable cause to arrest.

If this Court extends *Felix* to blood draws, it may change the way police investigate and arrest suspects of OWIs. It may lead police to violate the constitutional sanctity[5] of a person's home, may lead them to warrantlessly arrest the person without any exigency, and may lead them to pull the person outside of her home to collect various forms of evidence—including by taking her to a clinic and forcing her to have her veins pierced and her blood drawn—all while knowing the state can use any of this evidence in a criminal prosecution.

Despite the deviation *Harris* and *Felix* took from the traditional attenuation analysis, neither case should be interpreted to permit the admission of evidence from blood draws conducted after unlawful in-home arrests. Blood draws invoke the most deep-rooted expectations of privacy and should continue to receive careful attention under the law. To protect long-standing Fourth Amendment jurisprudence and deter police circumvention of the critical warrant requirement, this Court should grant review and hold that *Felix* does not extend to blood-draw evidence.

[5] *Payton v. New York*, 445 U.S. 573 (1980).

CONCLUSION

For the reasons stated above, Kallie M. Gajewski respectfully requests that this Court grant review of the court of appeals' decision denying the suppression of the results of her warrantless blood draw.

Dated this 1st day of September, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,697 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 1st day of September, 2022.

Signed:

MEGAN ELIZABETH LYNEIS
Assistant State Public Defender