STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP0007-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

KALLIE M. GAJEWSKI,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

INTRODUCTION

Police officers seized Kallie M. Gajewski on her home's porch and arrested her. (R. 53:13–14, 26.) Later, while Gajewski was in a squad car, she voluntarily consented to a blood draw. (R. 53:27–28.) Gajewski moved to suppress the blood test results, asserting that her arrest was unlawful because police arrested her in her home's curtilage. (R. 15.) After the circuit court denied her motion (R. 55:2–8; 56), Gajewski pled no contest to operating a motor vehicle while under the influence of an intoxicant (OWI) as a fourth offense within five years-a felony (R. 59:11).

The court of appeals affirmed Gajewski's conviction in an unpublished opinion. *State v. Kallie M. Gajewski*, 2022 WL 3035958, 2020AP0007-CR (August 2, 2022) (unpublished) (Pet. App. 3–26.) The court concluded that the arrest in the curtilage of Gajewski's home without a warrant or an exception to the warrant requirement was unlawful. *Id.* ¶ 33. But the court recognized that under *New York v. Harris*, 495 U.S. 14 (1990), and *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775, the blood test results need not be suppressed because there was probable cause to arrest Gajewski before police seized her in her home's curtilage, and she later voluntarily consented to the blood test outside of her home and its curtilage. *Gajewski*, 2020AP0007-CR, ¶ 46.

Gajewski asks this Court to grant review on a single issue: "Do the rules in *Harris* and *Felix* permitting the admission of evidence obtained outside of a home after an illegal in-home arrest extend to evidence obtained from a blood draw?" (Pet. 3.) She seems to read *Harris* and *Felix* as providing that evidence that is obtained *unlawfully* outside of the home need not be suppressed after police unlawfully arrested the person in her home or its curtilage. (Pet. 4, 6, 16.) She asserts that in an OWI case, *Harris* and *Felix* mean that if police unlawfully arrest a person in her home, they can then

draw her blood without a warrant, consent, or another warrant exception, and the blood test results will be admissible evidence. (Pet. 19.)

However, Gajewski's view of *Harris* and *Felix* is wrong. *Harris* and *Felix* do not provide an end-run around the Fourth Amendment or function as an exception to the warrant requirement. *Harris* and *Felix* do not authorize the admission of evidence obtained *unlawfully* outside of a home or its curtilage. They apply only when evidence is obtained *lawfully* outside the home. If police unlawfully arrest a person in her home or its curtilage, evidence obtained inside the home or its curtilage must be suppressed. But under *Harris* and *Felix*, so long as there was probable cause to arrest, evidence *lawfully* obtained outside the house is not suppressed. Gajewski points to nothing in either *Harris* or *Felix* even suggesting that those cases apply to make unlawfully obtained evidence admissible. And she points to no case applying the rule of those cases to unlawfully obtained evidence. Simply put, if evidence is obtained unlawfully—for instance, a warrantless nonconsensual blood draw not justified by another exception to the warrant requirement—*Harris* and *Felix* do not make it admissible.

Had Gajewski's blood been drawn *unlawfully* outside of her home or its curtilage in violation of the Fourth Amendment, *Harris* and *Felix* would not have made the unlawfully obtained evidence admissible, because the police also violated the Fourth Amendment by unlawfully arresting her in her home. *Harris* and *Felix* apply because Gajewski's blood was *lawfully* obtained when she voluntarily consented to a blood draw outside of her home and her curtilage. As the court of appeals recognized, *Harris* and *Felix* plainly apply to this lawfully obtained evidence, and Gajewski's blood test results were properly not suppressed. *Gajewski*, 2020AP0007-CR, ¶ 46. Because this case does not actually present the Court with a real and significant question of law, and because

the case merely calls for the application of well-settled principles to the factual situation, review is unnecessary and unwarranted. Wis. Stat. § 809.62(1r)(a); (c)1.

THIS CASE DOES NOT SATISFY THE CRITERIA FOR REVIEW.

A. Gajewski's petition does not set forth a real and significant issue of constitutional law that requires resolution by this Court.

Gajewski asserts that review is warranted because this case "presents the Court with a real and significant question of federal and state constitutional law." (Pet. 4.) She argues that the question 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." (Pet. 5.) Gajewski claims that "If *Felix* extends to blood draws," so long as there is probable cause to arrest for OWI, police "can unlawfully arrest [a person] 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." (Pet. 6.) She argues that "*Felix* could become a means of circumventing the warrant requirement for OWI blood draws." (Pet. 6.)

However, *Harris* and *Felix* apply only to evidence obtained *lawfully* outside the home and its curtilage, not to evidence that is obtained *unlawfully*. In *Harris*, police went into the suspect's home without a warrant, and while in his home, the suspect confessed to killing someone. *Harris*, 495 U.S. at 15–16. Police arrested the suspect and took him to the police station. *Id.* at 16. After police read the suspect the *Miranda* warnings, he "signed a written inculpatory statement." *Id.* Then, after the suspect said he wanted a lawyer, police interviewed him and he gave another incriminating statement. *Id.*

The circuit court suppressed the suspect's confession in his home and the incriminating statement he made after he said he wanted a lawyer. *Id.* Those statements were *unlawfully* obtained, and the State did not challenge their suppression. *Id.* The issue in *Harris* was whether the "signed written inculpatory statement"—which was *lawfully* obtained because it was given after the suspect had been read the *Miranda* warnings and before he said he wanted a lawyer—must be suppressed because police had earlier unlawfully entered the suspect's home. *Id.*

The Supreme Court concluded that the lawfully obtained statement should not be suppressed. *Id.* at 17. The court "decline[d] to apply the exclusionary rule" because the rule "protect[s] the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime." *Id.* The Court reasoned that "Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Id.* The Court explicitly rejected the notion that evidence *unlawfully* obtained outside the house would be admissible under its rule: "We do not hold, as the dissent suggests, that a statement taken by the police while a suspect is in custody is always admissible as long as the suspect is in legal custody." *Id.* at 20. The Court said, "Statements taken during legal custody would of course be inadmissible, for example, if they were the product of coercion, if *Miranda* warnings were not

given, or if there was a violation of the rule of *Edwards v. Arizona*, [451 U.S. 477] (1981)."[1] *Id.*

In *Felix*, the Wisconsin Supreme Court "adopt[ed] the *Harris* exception to the exclusionary rule." *Felix*, 339 Wis. 2d 670, ¶ 38. The court "interpret[ed] *Harris* to apply to statements and evidence that police obtain from the defendant outside of the home." *Id.* ¶ 48.[2] And just as the United States Supreme Court did in *Harris*, the Wisconsin State Supreme Court made it clear that *Harris* and *Felix* apply only to evidence obtained *lawfully* outside the home and its curtilage. The evidence at issue in *Felix* was the suspect's "signed statement at the police station, after he was given and waived his *Miranda* rights," his buccal swab obtained while he was in lawful police custody, and his clothes that police seized when he was being booked into jail. *Felix*, 339 Wis. 2d 679, ¶ 45. The court concluded that under *Harris*, none of this evidence, which was lawfully obtained by the police outside the home, should have been excluded. *Id.* ¶ 48–50.

---

[1] In *Edwards*, the Court held that when an accused invokes his right to counsel, use of his confession against him at his trial violates his rights under the Fifth and Fourteenth Amendments. *Edwards v. Arizona*, 451 U.S. 477, 480–81 (1981).

[2] Contrary to Gajewski's assertion, the Wisconsin Supreme Court did not "extend" the *Harris* rule "under the Wisconsin Constitution." (Pet. 5.) The Wisconsin Supreme Court noted that that it is, of course, "bound to follow the United States Supreme Court's interpretation of the Fourth Amendment that sets the minimum protections afforded by the federal constitution." *State v. Felix*, 2012 WI 36, ¶ 36, 339 Wis. 2d 670, 811 N.W.2d 775. And the Wisconsin Supreme Court explicitly found "no reason in this case to depart from our customary practice of interpreting Article I, Section 11 in accord with the Fourth Amendment." *Id.* ¶ 38.

The same is plainly true here. The court of appeals concluded that police unlawfully arrested Gajewski in the curtilage of her home. *Gajewski*, 2020AP0007-CR, ¶ 38. But it recognized that the officers had probable cause to arrest her and that once she was outside her home and its curtilage, she *voluntarily consented* to a blood draw. *Id.* Therefore, under a straightforward application of *Harris* and *Felix*, this evidence—like any other evidence lawfully obtained outside the home when there was probable cause to arrest—should not be excluded.[3] *Id.* There simply is no question of federal or state constitutional law to resolve.

B. There is no need for a different rule for blood tests in OWI cases because *Harris* and *Felix* apply only to lawful blood draws.

Gajewski asserts that review is warranted because no published opinion in Wisconsin has applied *Harris* and *Felix* in the context of a blood draw. (Pet. 5–6.) She argues that this Court should grant review and determine that *Harris* and *Felix* do not apply to blood draws. (Pet. 6 –7.) She asserts that "If this Court extends *Felix* to blood draws," police may "violate the constitutional sanctity of a person's home," "warrantlessly arrest the person without any exigency" and "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." (Pet. 19.) She argues that if *Felix* and *Harris* apply, the voluntariness of a person's consent to a blood draw no longer matters, and "an unlawful in-home arrest is a free

---

[3] The State does not concede that the court of appeals was correct in concluding that the arrest was unlawful. But since the court of appeals was plainly correct in concluding that under *Harris* and *Felix* the blood test results were admissible, it makes no difference.

pass for a warrantless blood draw with admissible test results, so long as the police had probable cause to arrest." (Pet. 18.)

Again, Gajewski's argument is premised on her misconception of the *Harris* rule. *Harris* and *Felix* do not function as an exception to the warrant requirement. They do not provide that the results of a test of unlawfully obtained blood draws are admissible. *Harris* and *Felix* apply only to lawfully obtained evidence.

Gajewski asserts that *Harris* and *Felix* should be *extended* to blood draws. (Pet. 27.) But she is really asserting that this Court should *exclude* blood draws from the *Harris* rule. *Harris* and *Felix* apply to evidence. They plainly apply to the results of blood tests. As this Court has concluded, *Harris* applies "to statements and evidence that police obtain from the defendant outside of the home." *Felix*, 339 Wis. 2d 670, ¶ 48. Therefore, if police have probable cause to arrest before they enter the house, and the blood draw is justified by a search warrant or an exception to the warrant requirement, the blood test results should not be suppressed.

Gajewski argues that blood test results should be treated differently than other evidence because blood draws are particularly intrusive. (Pet. 17–19.) She argues that "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." (Pet. 18.)

However, the intrusive nature of a blood draw is already accounted for by the requirement that a blood draw must be justified by a warrant, consent, or another warrant exception. If a blood draw is not constitutionally justified, the blood test results are simply not admissible. And again, the *Harris* rule does not even arguably apply to "nonconsensual blood draws" that are not justified by another exception to the warrant requirement, typically exigent circumstances. If the

blood draw is not justified by a warrant or an exception to the warrant requirement, nothing in *Harris* or *Felix* authorizes admission of the test results.

But if a blood draw is constitutionally justified—by a search warrant, consent, or another warrant exception—there is no reason that the *Harris* rule would not apply. After all, in *Harris*, the Supreme Court concluded that a suspect's statement incriminating him in a homicide should not be suppressed. *Harris*, 495 U.S. at 14–15. Similarly, in *Felix*, this Court concluded that a suspect's statement incriminating him in a homicide should not be suppressed. *Felix*, 339 Wis. 2d 670, ¶ 4. There is no reason that the *Harris* rule would apply to a murder confession but would somehow not apply to a blood draw justified by a search warrant, the suspect's consent, or another warrant exception.

As the court of appeals recognized, Gajewski voluntarily consented to a blood draw. *Gajewski*, 2020AP0007–CR, ¶ 38. Gajewski acknowledges that the court was correct. (Pet. 9.) If she had not consented, and the State had obtained her blood without a warrant or another exception to the warrant requirement, her blood test results would be suppressed. The *Harris* rule would simply not apply.

But since Gajewski's blood was drawn lawfully—with her voluntary consent—outside of her home and its curtilage, the *Harris* rule applies, and the blood test results were properly not suppressed.

Gajewski's petition is premised on her misconception that application of *Harris* and *Felix* to warrantless blood draws would mean that results of tests of *unlawfully* obtained blood samples are admissible. But *Harris* and *Felix* apply only to lawfully obtained blood samples—like Gajewski's consensual blood draw. There is no real and significant question of law, and as the court of appeals recognized, this case was resolved by application of well-settled principles to

the factual situation. Review by this Court is unnecessary and unwarranted.

CONCLUSION

This Court should deny Gajewski's petition for review.

Dated: October 12, 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2502 words.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH

WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 12th day of October 2022.

MICHAEL C. SANDERS
Assistant Attorney General