

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-5466

**TITLE** EDWARD G. WELSH, Petitioner v. WISCONSIN

**PLACE** Washington, D. C.

**DATE** October 5, 1983

**PAGES** 1 thru 42



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440 FIRST STREET, N.W.  
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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 EDWARD G. WELSH, :

4                   Petitioner :

5                   v. :     No. 82-5466

6 WISCONSIN :

7 - - - - -x

8                   Washington, D.C.

9                   Wednesday, October 5, 1983

10                  The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 2:03 p.m.

13 APPEARANCES:

14 GORDON B. BALDWIN, ESQ., Madison, Wisconsin; on behalf  
15 of the Petitioner.

16 STEPHEN W. KLEINMAIER, ESQ., Assistant Attorney General  
17 of Wisconsin, Madison, Wisconsin; on behalf of the  
18 Respondent.

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1

P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: Mr. Baldwin, I think  
3 you may proceed when you are ready.

4

ORAL ARGUMENT OF GORDON B. BALDWIN, ESQ.,

5

ON BEHALF OF THE PETITIONER

6

MR. BALDWIN: Mr. Chief Justice, and may it  
7 please the Court:

8

This is an exigent circumstances case. On  
9 that proposition I think there is agreement between the  
10 State and the Defendant.

11

The issue in this case is whether an exigent  
12 circumstances doctrine will justify the arrest of the  
13 Defendant in his home. The Wisconsin Supreme Court  
14 calling Fourth Amendment standards upheld the right of  
15 police without a warrant and without establishing  
16 consent to enter a home at night to arrest the  
17 householder for a traffic offense that was not committed  
18 in the officer's presence.

19

QUESTION: You said at night. About what time  
20 was it?

21

MR. BALDWIN: The officer reportedly heard the  
22 call at 8:49 p.m. There was some dispute as to how long  
23 it took the officer to get to the house. I think it is  
24 generally agreed it is about 9:00. That was about a  
25 week before we would have gone on to daylight savings



1 time so it was dark.

2           The Wisconsin Supreme Court justified the  
3 traffic arrest applying its traffic arrest statute, and  
4 it held that exigent circumstances justified the  
5 arrest. It did so for three reasons: first, that the  
6 arrest was justified by a hot pursuit doctrine;  
7 secondly, that the Defendant who as I said was arrested  
8 in his home in his bedroom constituted a possible threat  
9 to public safety; and third, that the arrest was  
10 necessary in order to secure evidence of possible  
11 intoxication.

12           Now on the facts we do not know exactly what  
13 the arresting officer knew. The arresting officer  
14 relied on an eye witness who saw a car driven  
15 erratically, crossed in front of oncoming traffic and  
16 stopped or got stuck in an open field or cemetery.

17           QUESTION: When you said at the outset that  
18 this was truly an exigent circumstances case, did you  
19 mean that the exigent circumstance is the need of the  
20 officers to apprehend this gentleman while he might  
21 still be subject to a breathalyzer test or observation?

22           MR. BALDWIN: The officers justified, Mr.  
23 Chief Justice, the entry into the home as required by  
24 the need to obtain a blood-alcohol test, Officer Daley  
25 said, within two hours of the event to be proved.

1                   QUESTION: In other words to preserve  
2 evidence.

3                   MR. BALDWIN: This was to preserve -- As  
4 Officer Daley said, yes, to preserve evidence of  
5 intoxication he felt he had to enter the home under  
6 those circumstances. The officer had been called by a  
7 passing motorist and spoke to the eye witness.

8                   We do not know exactly what the eye witness  
9 said, but there is a discrepancy between what the eye  
10 witness testified on the stand where he said he thought  
11 that the errant driver was either drunk or sick and what  
12 the officer said he said. The officer said he received  
13 the opinion that the errant driver was definitely  
14 intoxicated. There was a difference.

15                  My point is that we would know what the  
16 arresting officer knew or thought if we had a warrant  
17 applied for during the course of that next hour or so.  
18 The officer did trace the automobile to the Defendant's  
19 home which was about half a mile away, went quickly to  
20 the home, knocked on the door. That is clear.

21                  What happened at the door is in dispute  
22 because the sixteen-year-old step-daughter who answered  
23 the knock was not available to testify when this hearing  
24 occurred about two years later. The officer went  
25 upstairs to the bedroom where he encountered Edward

1 Welsh --

2 QUESTION: Did the Circuit Court make any  
3 finding as to whether it had been consent?

4 MR. BALDWIN: The Circuit Court explicitly said  
5 we do not examine the question of consent. Its  
6 rationale was that the witnesses who are relevant to the  
7 question of consent were not then available.

8 The Circuit Court held, Judge Frankel held  
9 that the exigent circumstances doctrine including the  
10 hot pursuit doctrine justified this pursuit and entry  
11 into the home.

12 QUESTION: The Supreme Court of Wisconsin  
13 likewise did not pass on the issue of consent?

14 MR. BALDWIN: The Supreme Court of Wisconsin  
15 likewise said that the exigent circumstances doctrine  
16 justified excusing the warrant and consent requirement.  
17 The Court of Appeals of Wisconsin, however, had reversed  
18 the trial court because there was no finding of  
19 consent. In turn, the Wisconsin Supreme Court by a vote  
20 of four votes to two found that consent was not  
21 necessary to be shown in this case.

22 QUESTION: Did the officer know the man?

23 MR. BALDWIN: The officer testified that he  
24 had remembered the name from an incident that happened  
25 he said a week or two before -- Actually it probably

1 was somewhat earlier than that -- in which he said he  
2 had arrested Mr. Welsh in an alcohol-related  
3 disturbance.

4 That is all we have in the record, but it had  
5 nothing to do with traffic. It did not say anything  
6 about traffic. It said it was an alcohol-related  
7 disturbance. That is what we have in the record.

8 QUESTION: He did not know that he drove the  
9 car?

10 MR. BALDWIN: He obviously was highly  
11 suspicious, of course, sure.

12 QUESTION: I beg your pardon?

13 MR. BALDWIN: He was highly suspicious that  
14 the car had been driven by the owner, and the owner, of  
15 course, is the Defendant in this case. He did not know.

16 QUESTION: You mean that every car on the  
17 street is driven by the owner?

18 MR. BALDWIN: Oh, no. Oh, no.

19 QUESTION: What --

20 MR. BALDWIN: The officer was suspicious.  
21 There is no question about it. If, for example, Mr.  
22 Justice Marshall, if the officer had encountered my  
23 client on the door steps of the home, we do not deny  
24 that there would have been a right to stop, investigate,  
25 question and if the officer found evidence of



1 intoxication to make an arrest. We do not deny that.

2 That is a possibility.

3 But we do contest the right of the officers --

4 QUESTION: The law must be different in your  
5 state. I thought the crime, a misdemeanor was committed  
6 not in the presence of a police officer. You had to  
7 swear out a warrant. Is that the law in Wisconsin?

8 MR. BALDWIN: That is unquestionably the  
9 common law, Mr. Justice Marshall.

10 QUESTION: My question is what is the law in  
11 Wisconsin?

12 MR. BALDWIN: I regret --

13 QUESTION: Does the policeman on a story that  
14 somebody tells him have a right to go and lock up a  
15 man? Is that the law in Wisconsin?

16 MR. BALDWIN: The Wisconsin law apparently  
17 from the Wisconsin Supreme Court's opinion does not  
18 require that there be an in-presence offense in order to  
19 arrest for a misdemeanor. The law was changed in 1971.  
20 The legislative history is obscure, but prior to 1971 --

21 QUESTION: Does the law say he could break the  
22 door down?

23 MR. BALDWIN: Absolutely not, sir. There is  
24 nothing in the law saying you enter.

25 It is our contention that the exigent

1 circumstances doctrine should not apply for a  
2 misdemeanor or minor offense.

3 QUESTION: Mr. Baldwin, would you say that is  
4 true if the officer had personally observed your client  
5 behind the wheel and doing erratic driving and had  
6 observed all of the circumstances and had had to chase  
7 him to the house in an effort to apprehend him? Could  
8 the officer have followed him inside to make the arrest  
9 in your view?

10 MR. BALDWIN: The answer I give to that,  
11 Justice O'Connor is no as long as it is a minor  
12 offense. If an offense had occurred, for example  
13 failure to stay at the scene of an accident, far more  
14 serious and could even be a felony in the State of  
15 Wisconsin, then the case for a hot pursuit and entry  
16 would be permissible.

17 It is our belief that the bright line, if you  
18 will, is at the door of the house for a minor offense.

19 QUESTION: Do you think it should make a  
20 difference from state to state as to how the state  
21 chooses to classify an offense? In one state drunk  
22 driving might be made a felony and in another a  
23 misdemeanor. Does it make any real differences for  
24 purposes of the Fourth Amendment?

25 MR. BALDWIN: Yes, Justice O'Connor, I believe

1 it does for two reasons, and I think they are  
2 illustrated by the law of Wisconsin. The first point is  
3 that reasonableness under Fourth Amendment standards  
4 requires a balancing of the actual governmental interest  
5 asserted to justify invasion. What is the actual  
6 governmental interest? That is determined by the  
7 legislature.

8           The legislature may view some offenses more  
9 seriously than other states balanced against the  
10 seriousness of the intrusion. Here it is an intrusion  
11 into a highly protected place where expectations of  
12 privacy are greatest.

13           The second reason may be as in Wisconsin the  
14 state wishes to define reasonableness or define whether  
15 or not it has jurisdiction where an arrest has occurred  
16 under questionable circumstances.

17           QUESTION: Well, it makes it very difficult,  
18 does it not, for an officer in a jurisdiction where it  
19 would be a misdemeanor if there had been no prior  
20 conviction but it would be a felony if there had and the  
21 officer does not know that and he does not know whether  
22 he has to stop at the door or not? That strikes me as  
23 kind of a difficult line to be drawn.

24           MR. BALDWIN: It is a difficult line, but it  
25 is a difficult line because the legislature of Wisconsin

1 has drafted its driving while intoxicated statutes in  
2 that particular way.

3 QUESTION: Mr. Baldwin, I think the offense in  
4 Schmerber v. California was also a misdemeanor and yet  
5 the court there said that exigent circumstances existed  
6 for taking the sum from him by blood.

7 MR. BALDWIN: Justice Rehnquist, you are  
8 absolutely correct. The charge in Schmerber was for a  
9 misdemeanor, but as I read Schmerber and I think it is  
10 in a footnote the underlying act could have been charged  
11 as a felony at the time by the arresting officer.

12 The second point is -- Excuse me.

13 QUESTION: So could it here.

14 MR. BALDWIN: So could it here?

15 QUESTION: Yes, if he had known that he had a  
16 prior arrest.

17 MR. BALDWIN: If he had known there had been a  
18 prior arrest, then I would have to rely on the exigent  
19 circumstances doctrine and I could not make this  
20 assertion that the exigent circumstances doctrine should  
21 not apply to an arrest for a minor offense.

22 QUESTION: Mr. Baldwin, could I ask you what  
23 were you complaining about when you appealed? The  
24 reason your client had been hurt is that his driver's  
25 license had been revoked.



1 MR. BALDWIN: That is correct, sir.

2 QUESTION: That is what you were really

3 complaining about.

4 MR. BALDWIN: That is the --

5 QUESTION: Is that not -- So that the end

6 result that you wanted to attain in the state courts was

7 that the driver's license would be restored.

8 MR. BALDWIN: That is correct, sir.

9 QUESTION: Is the revocation procedure not a

10 civil proceeding?

11 MR. BALDWIN: It is most certainly a civil

12 proceeding.

13 QUESTION: Well, have we ever applied the

14 exclusionary rule to a civil proceeding?

15 MR. BALDWIN: This Court does not have to

16 apply the exclusionary rule, Mr. Justice White.

17 QUESTION: You want to say that the Fourth

18 Amendment barred the use of this evidence?

19 MR. BALDWIN: The Fourth Amendment, Justice

20 White --

21 QUESTION: You want to say that this refusal

22 and taking him down to the station was a fruit of an

23 illegal entry and that is what your argument is. That

24 is a Fourth Amendment argument to save your driver's

25 license in a civil proceeding. I do not know of any

1 cases where we --

2 MR. BALDWIN: If I might correct, I think,  
3 Justice White, the problem is created by the law of  
4 Wisconsin. The breathalyzer test cannot be administered  
5 under civil law of Wisconsin unless there has been a  
6 citation for the offense and an arrest.

7 QUESTION: I agree with you.

8 MR. BALDWIN: There must be an arrest.

9 QUESTION: I agree with you, but nevertheless  
10 it is a civil proceeding.

11 MR. BALDWIN: The State of Wisconsin viewed  
12 this as a criminal-type proceeding. The hearing judge  
13 who found that the refusal --

14 QUESTION: I know but that cannot control the  
15 application of the Fourth Amendment. I do not know why  
16 we have to decide this Fourth Amendment case if after we  
17 decided it the evidence would be admissible anyway  
18 because it is a civil proceeding.

19 MR. BALDWIN: The State of Wisconsin applied  
20 Fourth Amendment standards, Mr. Justice White --

21 QUESTION: I know they did, but the result is  
22 right.

23 MR. BALDWIN: Well, there is a link proceeding  
24 here. It is perfectly clear there is a link  
25 proceeding. There is the charge of driving while

1 intoxicated.

2 QUESTION: You are not challenging -- Were you  
3 convicted for it?

4 MR. BALDWIN: Subsequently. It is not in the  
5 record, of course.

6 QUESTION: Yes, but you are not challenging  
7 the criminal proceeding.

8 MR. BALDWIN: Not at this point.

9 QUESTION: Whatever evidence was seized or not  
10 has not tainted or otherwise affected the criminal  
11 proceeding.

12 MR. BALDWIN: The Fourth Amendment, Mr.  
13 Justice White, --

14 QUESTION: You are solely objecting to the  
15 cancelling your driver's license.

16 MR. BALDWIN: Well, this Court has recognized  
17 that that is a serious interest. The Fourth Amendment  
18 protects people, their places and effects from  
19 unreasonable searches and seizures. It is not  
20 restricted simply to the protection of individuals in  
21 the criminal process.

22 QUESTION: I agree with you, but we are  
23 talking about the exclusionary rule.

24 MR. BALDWIN: Mr. Justice White, the  
25 exclusionary rule is not invoked here for two reasons,

1 first, because Wisconsin law does not permit the  
2 breathalyzer or the blood-alcohol test to commit  
3 evidence unless there has been an arrest. That is  
4 Wisconsin rule.

5           It is not an exclusionary rule required by the  
6 Fourth. It is an exclusionary rule required by the law  
7 of Wisconsin.

8           QUESTION: But you are up here on Fourth  
9 Amendment grounds.

10           QUESTION: The Wisconsin Supreme Court has  
11 ruled against you on every conceivable state ground you  
12 could have so you must be here on a federal ground. I,  
13 too, like Justice White had thought you were making a  
14 claim under the exclusionary rule of the Fourth  
15 Amendment.

16           MR. BALDWIN: It seems to me, Justice  
17 Rehnquist, that the issue here is the reasonableness of  
18 an arrest which is not a question of necessarily the  
19 introduction of the evidence. It is the reasonableness  
20 of an arrest.

21           QUESTION: You are not interested in that in  
22 the abstract are you? You are interested in suppressing  
23 the evidence that arose out of the arrest.

24           MR. BALDWIN: The suppression rule was simply  
25 a product of the law of Wisconsin. I am interested in



1 the holding that this was a forbidden arrest under the  
2 Fourth Amendment.

3 QUESTION: But that is an abstract proposition  
4 under the ruling of the Wisconsin Supreme Court because  
5 you say that the Wisconsin Supreme Court may have  
6 misinterpreted the Fourth Amendment law of arrest  
7 apparently but nonetheless ruled against you. If you  
8 are not entitled as a matter of Fourth Amendment law to  
9 have the exclusionary rule brought over to a civil  
10 proceeding perhaps the Wisconsin Supreme Court opinion  
11 may have contained an abstractly wrong proposition of  
12 the federal Constitution but the result was right.

13 MR. BALDWIN: Well, the Wisconsin Supreme  
14 Court has construed an arrest as lawful under Fourth  
15 Amendment and Fourteenth Amendment standards. It is  
16 what the Wisconsin Supreme Court has said about the  
17 arrest criteria is why we are here.

18 QUESTION: But you have to be here because of  
19 something that is done about the criteria not because of  
20 what it said about it.

21 MR. BALDWIN: Well, the consequence, of  
22 course, of the lawful arrest was the loss of driving  
23 privileges and, of course, incidentally the introduction  
24 into evidence of the officer's testimony of what he saw  
25 in the bedroom in the criminal case which, of course,

1 was force. The exclusionary rule which is a product  
2 remedial device of the Fourth Amendment is not before  
3 this Court.

4           What is before this Court is the lawfulness of  
5 an arrest of the Defendant in his bedroom without  
6 consent and without warrant for a traffic offense not  
7 committed in the officer's presence. If the exigent  
8 circumstances doctrine applies it is our belief that the  
9 facts do not justify its application here.

10           There is no risk of escape. Edward Welsh was  
11 where he had every right to be in bed. He had every  
12 right -- The public interest is served perhaps by  
13 people who are sick or intoxicated going home to bed.

14           Secondly, there were no fire arms present nor  
15 any suggestion that any harm was going to occur to  
16 anyone. There was no cry for help.

17           The case would be quite different if Officer  
18 Daley at the threshold had heard the noise of breaking  
19 crockery and a cry for help.

20           QUESTION: Since you are speculating there,  
21 counsel, do you exclude the possibility that if not  
22 apprehended he might go out and drive his car  
23 immediately?

24           MR. BALDWIN: Well, his car was half a mile  
25 away, of course.

1 QUESTION: He might decide that after getting  
2 a couple of aspirins and some coffee to go out and get  
3 the car and bring it home where it would be safe.

4 MR. BALDWIN: If he was sober, of course, that  
5 would be perfectly permissible. The officers --

6 QUESTION: He might not be, but he might think  
7 he was. That happens.

8 MR. BALDWIN: There are several alternatives  
9 that would have been less stringent than simply entering  
10 the house without establishing consent, one of which of  
11 course is to keep your eye on the car, iron boots or  
12 what have you. The second possibility is one of the  
13 officer's could have gone for a warrant or called for a  
14 warrant.

15 There is no specific provision for a  
16 telephonic warrant in Wisconsin, but I read nothing in  
17 Wisconsin law that forbids the use of this innovative  
18 technique. The trial judge suggested there were three  
19 policemen in the home. Two could have watched the  
20 house. One could have called for a warrant or went in  
21 pursuit of a warrant.

22 The only evidence that could be destroyed was  
23 that which was in the -- excuse the expression -- the  
24 lawful possession of the Defendant. This is not  
25 contraband.

1           If he was intoxicated that evidence was not  
2 going to disappear instantly. It takes a period of  
3 time.

4           The Wisconsin Supreme Court has allowed  
5 evidence of the blood-alcohol test to be introduced  
6 three and a half hours after an accident.

7           QUESTION: I am not sure how you have  
8 distinguished Schmerber.

9           MR. BALDWIN: Well, excuse me. Schmerber for  
10 two points, first, the underlying offense could have  
11 been far more serious in Schmerber. Secondly, Schmerber  
12 was arrested at the hospital and the blood test was  
13 taken two hours after the event to be proven. It seems  
14 to me the exigencies in Schmerber were far more serious  
15 than the exigencies in the Welsh case.

16          QUESTION: Why should it make any difference  
17 that the offense in fact might have been prosecuted as a  
18 higher level offense than it was? Is the critical thing  
19 not how the state in fact prosecuted it?

20          MR. BALDWIN: I think what the arresting  
21 officer knew, I submit, is important in establishing  
22 grounds for the arrest. The penalty that the state  
23 assesses for a breach is relevant for two reasons.

24          First, the penalty helps us establish how the  
25 legislature has viewed the seriousness of the underlying



1 offense, the more serious the offense the more severe  
2 the penalty. Secondly, the common law which this Court  
3 has said on a number of occasions is instructive in  
4 determining what is reasonable under Fourth Amendment  
5 standards. At common law as Justice Marshall has  
6 pointed out, arrests for misdemeanors require that they  
7 be in the presence of the officer.

8 I am not suggesting that that is the absolute  
9 rule that this Court should apply here --

10 QUESTION: Schmerber is certainly against you  
11 on that point. It was a misdemeanor prosecution and --

12 MR. BALDWIN: He was arrested where the police  
13 had a right to be at the hospital two hours after the  
14 event under conditions where he might have received  
15 medical treatment or have been out of the custody of the  
16 police for a long period of time. There was a real  
17 exigency is Schmerber.

18 In South Dakota v. Neville this Court  
19 indicated --

20 QUESTION: I did not think you thought that  
21 exigencies made any difference in misdemeanor cases.

22 MR. BALDWIN: If the underlying arrest --

23 QUESTION: Real ones make a difference?

24 MR. BALDWIN: That is my fallback position,  
25 Justice White. If it is a minor offense at the outset,

1 I believe that the exigent circumstances doctrine does  
2 not apply to enter a home.

3 Schmerber did not apply any right to enter the  
4 home. Schmerber was a blood test at the hospital two  
5 hours after the event to be proven under circumstances  
6 where there was no possibility of delay if the man was  
7 going to receive medical treatment and was going to be  
8 incommunicado and unavailable.

9 There would have been a greater intrusion had  
10 the police waited being treated in a hospital. This is  
11 a case of the entry into the home.

12 As far as the police officer knew it was a  
13 first offense. Even if the police had known it was a  
14 second offense it still is punishable by the balance of  
15 authority established in the State as a minor offense.

16 If reasonableness, and this Court has said  
17 many times in Terry, for example, in Camara, is a  
18 product of a balance of the consideration of the  
19 governmental interest asserted on the one hand and the  
20 severity of the invasion on the other, we submit that  
21 the governmental interest established by the Wisconsin  
22 legislature suggests that this is not the case for a  
23 significant dilution of the protection of one of the  
24 specific places and interests explicitly provided in the  
25 Fourth Amendment.

1           Lower courts have given us a number of  
2 different tests on exigent circumstances. I urge this  
3 Court to look carefully at the California formulation  
4 which emphasizes urgency, which emphasizes the need for  
5 speed and emphasizes the need to protect immediately  
6 life and limb.

7           This, we submit, is not the kind of situation  
8 that fits the California definition of *People v. Ramey*.  
9 The District of Columbia definition has been criticized  
10 by the academics as perhaps complicated, but the  
11 District of Columbia formulation which relies on seven  
12 factors I submit has some value because it is a response  
13 to the human problem.

14           How do we define its broad generalization?  
15 Let's look at the specific facts. Let's try to  
16 categorize the seven-factor formula of *Dorman* which we  
17 cite on page 43 of our brief has utility and while it is  
18 not a guide to the policeman what is a guide to the  
19 policeman is you do not enter a house at night for a  
20 minor offense without consent or without a warrant  
21 particularly if you have not seen the offender  
22 yourself.

23           I would like to reserve a few moments for  
24 rebuttal.

25           CHIEF JUSTICE BURGER: Mr. Kleinmaier.

1 ORAL ARGUMENT OF STEPHEN W. KLEINMAIER, ESQ.,

2 ON BEHALF OF THE RESPONDENT

3 MR. KLEINMAIER: Mr. Chief Justice, and may it  
4 please the Court:

5 As indicated by the Petitioner the State in  
6 this case relies on the exigent circumstances doctrine  
7 which established the reasonableness of a warrantless  
8 entry under that doctrine the warrantless entry to  
9 arrest or to search that he made if the police possessed  
10 probable cause and exigent circumstances.

11 In this case the primary exigent circumstances  
12 relied upon by the state is the need to obtain evidence  
13 before it is lost. The police were after Mr. Welsh to  
14 arrest him for drunk driving and as the Court has  
15 indicated in Schmerber in a case for drunk driving or  
16 intoxication offense the evidence will dissipate  
17 gradually in the blood and over a period of time will  
18 disappear.

19 Therefore, there was a need to immediately  
20 enter the home in order to obtain the evidence as soon  
21 as possible. A delay that may have been occasioned by  
22 obtaining a warrant during a delay even if not all  
23 evidence of intoxication would have been lost there  
24 would have been a period of some dissipation of the  
25 alcohol. It is just unknown how much would have been



1 lost.

2           It is also important because there is no way  
3 until the police have contacted the suspect for them to  
4 know when he stopped drinking so he may have already  
5 stopped several hours before, still be intoxicated and  
6 by the time they get a warrant no longer be  
7 intoxicated.

8           QUESTION: Mr. Kleinmaier, may I ask you a  
9 question? I am just wondering if the case might  
10 possibly be moot. Your adversary indicated the man has  
11 actually been convicted of the misdemeanor offense. I  
12 gather that is a matter of public record if it is the  
13 fact.

14           MR. KLEINMAIER: That is what I understand.

15           QUESTION: If that were true was his license  
16 automatically revoked as a result of that conviction?

17           MR. KLEINMAIER: I do not know what happened  
18 or what the judgment was. The case as I understand it  
19 is on appeal and that case is pending in the Wisconsin  
20 Supreme Court waiting the outcome of this because he is  
21 also challenging the arrest in that case.

22           QUESTION: I see.

23           MR. KLEINMAIER: I assume that any penalty  
24 imposed in that case would have been stayed pending the  
25 appeal, but that I do not know.

1           QUESTION: I take it then he was convicted in  
2 the criminal case without the state using the evidence  
3 of the refusal to take the test.

4           MR. KLEINMAIER: I do not know what evidence  
5 was used.

6           QUESTION: Because I wondered in reading this  
7 record really how badly you needed this evidence. There  
8 is pretty strong evidence that he was intoxicated. Does  
9 your exigency depend, I take it, on the fact that you  
10 really needed the evidence in order to prove your case?

11          MR. KLEINMAIER: Well, I think evidence of a  
12 breathalyzer or a blood test would have been a much  
13 better and much stronger case obviously than the  
14 evidence from Mr. Jablonic who observed him only for a  
15 couple minutes.

16          QUESTION: That is not the only evidence you  
17 have. He saw him drive, too.

18          MR. KLEINMAIER: Yes.

19          QUESTION: He smelled his breath.

20          MR. KLEINMAIER: Well --

21          QUESTION: It is a matter of -- Go ahead.

22          MR. KLEINMAIER: As the first argument pointed  
23 out there is some discrepancy as to what Mr. Jablonic  
24 saw. He said one thing. The police officer said that  
25 he recalled something else.

1 QUESTION: He did not testify did he?

2 MR. KLEINMAIER: At this hearing -- Well --

3 QUESTION: Presumably he was available as a  
4 witness at the main trial.

5 MR. KLEINMAIER: Yes, he did testify. What  
6 happened was in the drunk driving case itself there was  
7 a suppression hearing challenging the arrest.

8 Mr. Jablonic testified. Officer Daley  
9 testified. Mrs. Welsh testified.

10 Then in the separate proceeding challenging  
11 the reasonableness of the refusal there was a question  
12 raised as to the arrest.

13 QUESTION: Well, that is this proceeding.

14 MR. KLEINMAIER: That is this proceeding now.  
15 All the parties and the court relied on the transcript  
16 and the findings from the drunk driving case to rule on  
17 the legality of the arrest for purposes of the  
18 reasonableness hearing.

19 QUESTION: Do I correctly understand that if  
20 the arrest was unlawful whether for state reasons or  
21 federal reasons that as a matter of state law the  
22 refusal to take the test could not have been put into  
23 evidence if the arrest was unlawful?

24 MR. KLEINMAIER: In this proceeding where it  
25 is to revoke his license the police officer is not

1 entitled to order him or request a breathalyzer unless  
2 he has first legally arrested him. So I think there is  
3 a matter of state law.

4           The Wisconsin courts have taken a position  
5 that the legality of the arrest depends not only on  
6 satisfying Wisconsin arrest statutes but on satisfying  
7 Fourth Amendment requirements.

8           QUESTION: So you agree that the Wisconsin  
9 Supreme Court was required to decide the federal  
10 constitutional question in order to dispose of the  
11 case?

12           MR. KLEINMAIER: I would like to be able to  
13 take the other position --

14           QUESTION: But it would not be sound.

15           MR. KLEINMAIER: I do not believe so. I think  
16 the other one is that they incorporated the Fourth  
17 Amendment as one of their criteria in determining the  
18 legality of the arrest.

19           MR. KLEINMAIER: On the exigent circumstances  
20 I think another reason that --

21           QUESTION: Before you go into the exigent  
22 circumstances is the inception of the concept of the  
23 exigent circumstances affected by the observations of  
24 the seriousness of his driving condition? For example,  
25 the witness Jablonic I think his name was said he had

1 undertaken to interfere with this fellow's driving  
2 apparently because he was afraid he was going to kill  
3 somebody.

4 MR. KLEINMAIER: Yes.

5 QUESTION: What impact does that have on the  
6 whole picture of exigent circumstances?

7 MR. KLEINMAIER: I think that would indicate  
8 that at least Mr. Jablonic was concerned that this  
9 person was quite intoxicated and that if he had returned  
10 to his car, stayed in his car and tried to drive it some  
11 more and gone back on the highway that in his condition  
12 there may have been an accident especially since Mr.  
13 Jablonic said he had seen the Petitioner go down the  
14 wrong lane, the left lane, and coming head on towards  
15 another car and at that point was able to veer off the  
16 left before an accident. But I am sure he was afraid  
17 that if he continued to drive he may not be so lucky the  
18 next time which would indicate that they wanted to cr at  
19 least Mr. Jablonic was concerned that something be done  
20 about his condition as soon as possible.

21 At this point I cannot recall that Mr.  
22 Jablonic expressed that same fear to the police officer  
23 at the time, however.

24 QUESTION: The statement in your record is  
25 because I realized they would probably kill somebody



1 and I immediately did thus and so.

2 MR. KLEINMAIER: That was Mr. Jablonic's  
3 testimony, yes. I believe that is why he stopped his  
4 car to block the path of Mr. Welsh if he had tried to  
5 get his car out of this lot.

6 But primarily --

7 QUESTION: Is that evidence available for a  
8 license cancellation proceeding?

9 MR. KLEINMAIER: Well, Mr. Welsh's -- Yes, in  
10 that his license could be suspended either through the  
11 reasonableness hearing for refusing the breathalyzer or  
12 as a result of his conviction for drunk driving.

13 QUESTION: Just so I am clear on it I take it  
14 here the license was suspended because of the refusal of  
15 Mr. Welsh to take the breathalyzer or the blood  
16 alcohol.

17 MR. KLEINMAIER: In this proceeding here, yes.

18 QUESTION: He asserted that his refusal was  
19 reasonable because the arrest was unlawful.

20 MR. KLEINMAIER: Yes, because --

21 QUESTION: Under Wisconsin law if the arrest  
22 is unlawful is that treated as a reason for refusing to  
23 take the test?

24 MR. KLEINMAIER: Well, the trial judges  
25 accepted that and the officer is not entitled to even

1 request him to take a breathalyzer until he has arrested  
2 him in a valid arrest so that is a requirement before  
3 even asking for the breathalyzer.

4           QUESTION: When the officer was at the door  
5 does the record show that he was aware of Mr. Jablonic's  
6 statement in detail that he was afraid the driver was  
7 going to kill soembody or was he just responding to the  
8 telephone warning that the lady had given?

9           MR. KLEINMAIER: No, Mr. Jablonic had stopped  
10 his car to block Mr. Welsh from moving his. Another  
11 motcrist stopped and Mr. Jablonic asked that motcrist to  
12 call the police.

13           Presumably that person called the police  
14 because the police did receive a call. A policeman  
15 responded to the call and went to talk first to Mr.  
16 Jablonic who then related some information to the police  
17 officer.

18           The police officer at that point also checked  
19 the license plate on the car to obtain some  
20 identification of the driver and at that point went to  
21 the address listed to that person. So before he had  
22 gotten to he house he had talked to Mr. Jablonic.

23           This Court in another drunk driving case in a  
24 context of different issue has again recognized the need  
25 for obtaining evidence of intoxication as soon as

1 possible. In the Mackey v. Montrym case the Court said  
2 then in order for the State to protect people from drunk  
3 drivers the State has to have the authority to obtain a  
4 breathalyzer test for evidence of intoxication at the  
5 earliest possible moment.

6           Again, that is simply what this officer said  
7 he was trying to do. That is why he went to the house  
8 and did not try to get a warrant.

9           I think the exigent circumstances prong of  
10 this to get into a house has been satisfied with a need  
11 to obtain this evidence. The other prong is probable  
12 cause which in this case the Petitioner says is not a  
13 problem.

14           So under those two tests it would appear that  
15 the police were justified in going in the house.  
16 However, as I understand Petitioner's objection now is  
17 that we cannot apply this exigent circumstances test  
18 because drunk driving was not a felony and was not a  
19 serious enough offense.

20           Our first response to that on this major-minor  
21 distinction is that drunk driving is a very serious  
22 offense. This Court has in its own cases indicated the  
23 number of people that are killed on the highway each  
24 year due to drunk drivers.

25           Just looking at it that way I think drunk

1 driving is a serious offense justifying action by the  
2 police.

3 QUESTION: Is a first offense a crime?

4 MR. KLEINMAIER: In Wisconsin no. I think  
5 that might be the only state where it is not.

6 QUESTION: Does it suggest that your  
7 legislature may have created this problem?

8 MR. KLEINMAIER: Well, yes. They created this  
9 question. I think there is also -- They have pointed  
10 out that they are still concerned about it enough that  
11 they authorized an arrest without a warrant.

12 I think the Petitioner's theory draws a big  
13 distinction between a felony and a misdemeanor and  
14 apparently in this case had the Wisconsin legislature  
15 really classified drunk driving as a felony we would not  
16 be here. In other words, he is leaving it up to a  
17 legislative decision and if the State can act to justify  
18 this arrest simply by classifying this as a felony I  
19 think the State can also express its interest in this  
20 offense through its arrest laws because if we are only  
21 talking about reclassifying as a felony to justify the  
22 arrest I think the State can classify as a misdemeanor a  
23 forfeiture and in another chapter of the statutes  
24 authorize an arrest for misdemeanor or forfeiture on the  
25 basis of probable cause which Wisconsin has done.

1           It has passed statutes changing the arrest law  
2 from a common law. Under the statutes the statute in  
3 the felony code -- pardon me, the criminal code is that  
4 police officers may arrest for any crime if they have  
5 reasonable grounds to believe that the crime has been or  
6 is being committed.

7           QUESTION: The only trouble with your argument  
8 is that your court does not agree with you. Is that not  
9 right?

10          MR. KLEINMAIER: I do not understand how they  
11 do not agree.

12          QUESTION: Well, I mean your court did not  
13 agree with what you just said in this case.

14          MR. KLEINMAIER: Well, in this case they said  
15 that the officers had probable cause to believe that the  
16 offense had been committed, and on the basis of that  
17 probable cause they were authorized to make the arrest.  
18 In addition to the statute in the criminal code dealing  
19 with misdemeanors and felonies classifying together  
20 there is also the statute in the motor vehicle code --

21          QUESTION: I could not get it out of that  
22 opinion. I got it out of the dissent.

23          MR. KLEINMAIER: Well, the issue presented to  
24 the Wisconsin Supreme Court was whether there were  
25 exigent circumstances and whether there was probable



1 cause, and they found probable cause and exigent  
2 circumstances and with those two they made the arrest in  
3 the context of this case. In the criminal code  
4 misdemeanors and felonies are treated together because  
5 they both fall within the definition of a crime.

6           The legislature has indicated that its  
7 interest is that the police have the same arrest  
8 authorities for a misdemeanor or for a felony. In the  
9 motor vehicle code the statute provides that a law  
10 enforcement officer may make an arrest for a traffic  
11 regulation by a violation of traffic regulation if he  
12 has reasonable grounds to believe that a violation has  
13 occurred or is being committed.

14           It is parallel language so I think the  
15 legislature has indicated that it wants the arrest  
16 authority for its officers to be the same whether the  
17 case involves a forfeiture or misdemeanor or a felony.  
18 I think it has expressed its concern that way as opposed  
19 to classifying this as a felony.

20           I think just because it gives a drunk driver a  
21 break by not calling it a felony does not necessarily  
22 mean that it is not interested enough that it wants to  
23 obtain convictions for this.

24           QUESTION: It is not just giving them a break  
25 by not calling it a felony. It also does not have the

1 penalties associated with it that it would if it were a  
2 felony. He cannot go to jail for as long and so forth.

3 MR. KLEINMAIER: That is correct. But he is  
4 still getting a break by not having it classified that  
5 way and it is still a decision.

6 QUESTION: But is it not true that the penalty  
7 that the state legislature seeks to impose is one of the  
8 ways we determine how important the state interest in  
9 the matter is?

10 MR. KLEINMAIER: That is correct. It is one  
11 of the ways. I think another way is looking at how --

12 QUESTION: The procedure for arrest.

13 MR. KLEINMAIER: Or enforcement of the laws.  
14 Here I think they have indicated through their arrest  
15 law which they have made the same for traffic  
16 regulations as for crimes that they also want those  
17 regulations enforced just as strictly as crimes whether  
18 the crime be a misdemeanor or a felony.

19 QUESTION: There are not other categories of  
20 misdemeanors that are so treated in Wisconsin for arrest  
21 purposes?

22 MR. KLEINMAIER: No, all crimes in Wisconsin  
23 whether it be misdemeanors or arrests or felonies are  
24 subject to arrest on probable cause. There is no  
25 misdemeanor that has to be committed in the officer's

1 presence to be subject to arrest just all misdemeanors  
2 are --

3 QUESTION: In your mind is there a right of an  
4 officer to follow any misdemeanor offender into a home  
5 to make an arrest regardless of the nature of the  
6 misdemeanor?

7 MR. KLEINMAIER: Well, he would have to have  
8 exigent circumstances to go with the probable cause. I  
9 think you cannot simply because he has probable cause to  
10 believe a misdemeanor has occurred just as if a felony --

11 QUESTION: Well, he had probable cause to  
12 believe someone has committed a misdemeanor offense and  
13 that the person is getting away and going into his home  
14 to avoid arrest. Is that enough?

15 MR. KLEINMAIER: I think he has to under the  
16 normal exigent circumstances it would require more than  
17 just think he is going into his house to avoid the  
18 arrest at that point. If he --

19 QUESTION: Does our Santana case not answer  
20 that in the affirmative?

21 MR. KLEINMAIER: Yes, if the officer saw the  
22 offense being committed and merely followed a hot  
23 pursuit theory. If a third party reports to the officer  
24 that a misdemeanor occurred two days before and just  
25 because the person is in the house the officer I do not

1 think can walk in. If he believed that the person was  
2 going to get an airplane within the next 15 minutes and  
3 fly to Alaska or to somewhere else then he has the other  
4 exigent circumstance of fearing the suspect is going to  
5 flee.

6 QUESTION: Or if it were shooting birds out of  
7 season and he thought that they were going to be eaten  
8 in the next hour and a half they could go in and --

9 MR. KLEINMAIER: I think under that  
10 qualification it is a reasonable probability that it is  
11 going to occur. He cannot just think of the possibility  
12 as a reasonable probability.

13 QUESTION: General, in Wisconsin is a police  
14 officer entitled to shoot a misdemeanor who is trying to  
15 run?

16 MR. KLEINMAIER: I just do not know the answer  
17 to that question. I do not know if there is any  
18 statutory question --

19 QUESTION: You said it was all the same.

20 MR. KLEINMAIER: Well, as far as arrest  
21 authorities. The other --

22 QUESTION: Oh, this is limited to arrest.

23 MR. KLEINMAIER: To arrest in the context of  
24 probable cause.

25 I think this Court as far as in what type of

1 offenses an officer may enter a home to make an arrest  
2 for exigent circumstances has already indicated that the  
3 entry can be made in the case of something less than a  
4 felony. I think in this case it also has to be  
5 recognized this case is not simply just a question of  
6 arrest.

7           The case involves obviously a question of  
8 search. They needed to obtain evidence. They were not  
9 going to arrest the evidence.

10           They searched coupled with arrest. In the  
11 Camara case which we have heard a lot about this  
12 afternoon and have heard many times it involved a  
13 misdemeanor. A violation of the building code in that  
14 case was a misdemeanor.

15           The court held that the building inspector  
16 normally needed a warrant to enter the home to check for  
17 the building code violation. However, the court said  
18 that the entry could be made without a warrant if there  
19 was probable cause and an emergency existed.

20           I think in the emergency language in that case  
21 they are referring to the same thing as exigent  
22 circumstances. Some of the cases cited in Camara for  
23 the emergency have also been cited in other cases under  
24 the heading of exigent circumstances.

25           The Camara case indicates that under the



1 Fourth Amendment the police can enter a residence to  
2 search for evidence of a misdemeanor if they possess  
3 probable cause and exigent circumstances. It is the  
4 same type of case as here.

5 QUESTION: What if you had a building code  
6 violation and the police had the same degree of reliable  
7 evidence they had here but they were afraid the man was  
8 about to fix it, could they break into the house to  
9 arrest him before he fixed it because that would void  
10 the evidence?

11 MR. KLEINMAIER: Again, under the cases on  
12 exigent circumstances it is more than just speculation  
13 or fear by the police. They are going to have to have I  
14 think a reasonable lead --

15 QUESTION: Say they had fairly reliable  
16 evidence that that was about to happen as they did  
17 here. We want to be sure to get a conviction.

18 MR. KLEINMAIER: Building code violations I  
19 think are somewhat different in that usually you enforce  
20 the building code violation to cure the violation. If  
21 the threat of violation is going to cause the person to  
22 cure the violation maybe it has already served its  
23 purpose.

24 QUESTION: Well, of course, one might argue  
25 that keeping this man in bed might have been the best

1 way to avoid the danger you are talking about.

2 MR. KLEINMAIER: However, when the police  
3 entered they did not know he was in bed.

4 QUESTION: Well, anyway I gather that your  
5 position is that exigent circumstances satisfied  
6 sufficiently where there was possibility of  
7 disappearance of the alcohol.

8 MR. KLEINMAIER: That is correct.

9 QUESTION: You do not think you have to rely  
10 on anything more than that do you?

11 MR. KLEINMAIER: Basically no. I think that  
12 exigent circumstances doctrine applies; however, the  
13 legislature happened to classify the offense on this  
14 case.

15 I think that pretty well sums up the case  
16 also.

17 Thank you.

18 CHIEF JUSTICE BURGER: Do you have anything  
19 further, Mr. Baldwin.

20 ORAL ARGUMENT OF GORDON B. BALDWIN, ESQ.,

21 ON BEHALF OF THE PETITIONER -- REBUTTAL

22 MR. BALDWIN: I would like to answer Justice  
23 Steven's question insofar as I have been informed by the  
24 principle counsel for Mr. Welsh. He was convicted at a  
25 jury trial in early 1982 at which his refusal to take

1 the blood test was in evidence which is permitted now  
2 under South Dakota v. Neville.

3           Secondly, Officer Daley testified as to what  
4 he saw in the bedroom and Mr. Jablonic testified. Mr.  
5 Jabonlic incidentally did not smell the errant driver's  
6 breath. For one reason or another he did not smell it,  
7 but the jury did convict.

8           One of the jurymen was the wife of one of my  
9 law students, and this is one of the sources of my  
10 information. Secondly, this Court has considered the  
11 problem of carnage on the highways in a number of  
12 instances, but I want to call your attention to and  
13 remind you of Craig v. Boren, an interesting case  
14 because of the way Justice Brennan dealt with the  
15 problem of statistics which Oklahoma had shown that  
16 there was a very high probability or a higher  
17 probability of drunken driving offenses committed by  
18 young men than by young women but that despite the  
19 statistical features which were really quite  
20 overwhelming it did not justify a deprivation of the  
21 Fourteenth Amendment claim to equal protection.

22           Similarly this Court in South Dakota v.  
23 Neville in a footnote indicated that perhaps the blood  
24 alcchol test would not have been appropriately taken or  
25 would not have been appropriately mentioned in the case

1 if it had been forced upon the Defendant. My point is  
2 that this Court has recognized that in the battle  
3 against drunk drivers there still are Fourteenth  
4 Amendment protections.

5 Similarly in *Mincey v. Arizona* this Court has  
6 declined to find a murder scene exception. My final  
7 slogan and I think this is a helpful one is that  
8 exigency is not the same as expediency.

9 Thank you, Mr. Chief Justice.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.

11 The case is submitted.

12 (Whereupon, at 2:49 p.m., the case in the  
13 above-entitled matter was submitted.)

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# CERTIFICATION

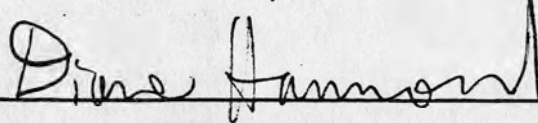
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EDWARD G. WELSH, Petitioner v. WISCONSIN # 82-5466

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