STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP1870-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID W. HOWES,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, AND AN ORDER DENYING A MOTION FOR RECONSIDERATION, BOTH ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JOHN W. MARKSON, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Under Wisconsin's implied consent law, any person who operates a motor vehicle has effectively given consent to tests of his or her breath, blood or urine upon request from a law enforcement officer. The law presumes that a

person who is unconscious has not withdrawn consent. Did the circuit court correctly conclude that testing can be authorized only by "actual" consent given at the time of a request by an officer, and that the provisions in the law that presume an unconscious person has not withdrawn consent to testing, and therefore has consented, are unconstitutional?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin (State), does not request oral argument, because the briefs should adequately address the issues in this case. The State believes that publication will likely be warranted because this case is an opportunity for the court to clarify the workings of the implied consent law, and to explain how the law operates in regard to drivers who are unconscious or otherwise unable to withdraw the consent to testing that they have already given.

STATEMENT OF THE CASE

The State appeals an order granting a motion to suppress the test results of blood that was drawn from the defendant-respondent David W. Howes after he was arrested for operating a motor vehicle while under the influence of an intoxicant (OWI), and with a prohibited alcohol concentration (PAC) (32; A-Ap. 200). The State also appeals an order denying its motion for reconsideration (31; A-Ap. 192-99).

Howes was charged with OWI and PAC (3; 8; A-Ap. 101-03, 108-09). The State alleged that he had three prior convictions (3:3; A-Ap. 103), so if convicted in this case, he would be sentenced for a fourth offense (3; 8; A-Ap. 101-03, 108-09).

Before trial, Howes moved to suppress the results of the test of his blood (15; 17; A-Ap. 110-14), on the grounds that there was no probable cause to arrest him (17:3-4; A-Ap. 112-13), and that the officer failed to obtain his consent for the blood draw (17:4-5; A-Ap. 113-14). He also filed a supplement to his motion to suppress, seeking a declaration that part of Wisconsin's implied consent statute, Wis. Stat. § 343.305(3)(b),[1] is unconstitutional (26; A-Ap. 115-17).

The circuit court, the Honorable John W. Markson, held a hearing on the motions (37; A-Ap. 118-88). The court concluded that the officer had probable cause to arrest Howes (37:57-64; A-Ap. 174-81). However, it also concluded that Wis. Stat. § 343.305(3)(ar) and (b) are unconstitutional. The court therefore granted Howes' motion to suppress the blood test results (37:64-68; A-Ap. 181-85).

The State moved for reconsideration (29; A-Ap. 189-91), and the court denied the motion in a written decision and order (31; A-Ap.192-99). The court then issued a written order granting Howes' motion to suppress evidence (32; A-Ap. 200). The State now appeals.

STATEMENT OF THE FACTS

Because this case is on appeal before trial, most of the background facts are taken from the testimony of Deputy Robert Schiro at the hearing on Howes' motion to suppress evidence, and the circuit court's findings at that hearing.

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

Deputy Schiro was dispatched to the scene of an accident involving a motorcycle and a deer (37:6; A-Ap. 123). He testified that when he arrived, he observed a dead deer in the road and a man on the shoulder of the highway (37:7-8; A-Ap. 124-25). He said that EMS personnel were attending to the man, who appeared to be unconscious (37:7, 10; A-Ap. 124, 127). He said that several citizen bystanders were in the area, and that one citizen told him that the man smelled of intoxicants (37:10-11; A-Ap. 127-28).

Deputy Schiro identified the man as Howes by the driver's license he found in the man's wallet (37:13; A-Ap. 130). An ambulance took Howes to the hospital, and Deputy Schiro went to the hospital separately in his squad car (37:14; A-Ap. 131). Deputy Schiro testified that while en route to the hospital, he learned that Howes had three prior convictions, and he understood that a conviction for OWI or PAC would be a felony, and that Howes could not legally operate a motor vehicle with an alcohol concentration exceeding 0.02. (37:15; A-Ap.132).[2]

Deputy Schiro testified that when he arrived at the hospital, he asked two EMTs who were in the ambulance with Howes if they smelled alcohol on him (37:15-16; A-Ap. 132-33). He said that one EMT told him there was a "high odor" of intoxication coming from Howes (37:16; A-Ap. 133), while the other EMT, who was not near

[2] The parties stipulated that Deputy Schiro's report did not indicate that he ran Howes' identification prior to arresting him (37:27-28; A-Ap. 144-45). But the circuit court found as fact that Deputy Schiro knew that Howes was subject to the 0.02 standard before arresting him (37:62-63; A-Ap. 179-80).

Howes' upper body, said he did not smell anything (37:17; A-Ap. 134).

Deputy Schiro went into the emergency room and observed that Howes was unconscious (37:18; A-Ap. 135). He testified that he spoke to a nurse who said that there was a strong odor of intoxicants coming from the room that Howes was in (37:17-18; A-Ap. 134-35).

Deputy Schiro arrested Howes for OWI (37:19; A-Ap. 136). He testified that he based the decision to arrest Howes "on statements from three different individuals saying they could smell the odor of intox, the crash, and also the defendant being PAC restricted" (37:19-20; A-Ap. 136-37). Deputy Schiro testified that he did not remember whether he smelled alcohol on Howes, and he acknowledged that his report did not indicate that he smelled alcohol (37:25; A-Ap. 142).

Deputy Schiro read the informing the accused form to Howes, and Howes, who was unconscious, did not respond (37:20; A-Ap. 137). Deputy Schiro then set up a blood draw with a phlebotomist, and observed the blood draw (37:20-21; A-Ap. 137-38).

Howes was charged with OWI and PAC (3; 8; A-Ap. 101-03, 108-09). He moved to suppress the results of the test of his blood (15; 17; A-Ap. 110-14), on the grounds that there was no probable cause to arrest him (17:3-4; A-Ap. 112-13), and that the officer failed to obtain his consent for the blood draw (17:4-5; A-Ap. 113-14). He also filed a supplement to his motion to suppress, seeking a declaration that part of Wisconsin's implied consent statute, Wis. Stat.

§ 343.305(3)(b), is unconstitutional (26; A-Ap. 115-17).

After hearing Deputy Schiro's testimony at the suppression hearing, the circuit court concluded that the arrest was supported by probable cause (37:57-64; A-Ap. 174-81). The court based its conclusion on the time of the accident, 9:30 p.m. (37:59; A-Ap. 176), that three people, including an EMT and a nurse, told Deputy Schiro that they smelled alcohol on Howes (37:60-62; A-Ap. 177-79), and Deputy Schiro's knowledge that Howes was subject to the 0.02 standard (37:62-63; A-Ap. 179-80).

However, the circuit court concluded that § 343.305(3)(ar) and (b), the parts of the implied consent law that provide that a person who is unconscious or otherwise incapable of withdrawing consent are presumed not to have withdrawn consent, are unconstitutional (37:65-67; A-Ap. 182-84). The court concluded, based on this court's opinion in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, that "actual" consent, rather than "implied" consent is required to authorize a blood draw, and that the challenged portions of the statute that presume an unconscious person has not withdrawn consent and therefore has consented to a blood draw, are unconstitutional (37:65-67; A-Ap. 182-84).

The circuit court also noted that under *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552 (2013), exigent circumstances are determined on a case-by-case basis, and it concluded that in this case no exigent circumstance justified a warrantless blood draw (37:67-68; A-Ap.184-85). The court therefore granted Howes' motion to suppress evidence (37:69; A-Ap. 186).

The State moved for reconsideration (29; A-Ap. 189-91), and the circuit court denied the motion in a written decision (31; A-Ap. 192-99). The court explained that it relied on *Padley*'s determination that the implied consent statute "does not authorize searches," but instead "'authorizes police to require drivers to choose between giving actual consent to a blood draw, or withdrawing "implied consent" and suffering implied-consent-law sanctions'" (31:4 (citing *Padley*, 354 Wis. 2d 545, ¶ 40); A-Ap. 194). The circuit court concluded that the parts of the implied consent law that presume that a person who is unconscious or otherwise not capable of withdrawing consent has not withdrawn consent, and that authorize law enforcement to take a sample of the person's blood, breath or urine, are unconstitutional (31:1, 5-6; A-Ap. 192, 196-97). The circuit court then issued a written order granting Howes' motion to suppress the blood test results (32; A-Ap. 200).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE "UNCONSCIOUS DRIVER" PROVISIONS IN THE IMPLIED CONSENT LAW ARE UNCONSTITUTIONAL, AND IN GRANTING HOWES' MOTION TO SUPPRESS EVIDENCE.

A. Applicable legal principles and standard of review.

"'Whether evidence should be suppressed is a question of constitutional fact.'" *State v. Johnson*,

2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.* (citing *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987)). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The court's application of constitutional principles to those historical facts is reviewed de novo. *Id.*

Resolution of the issue in this case requires statutory interpretation. In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

This case also concerns the constitutionality of a statute.

> The constitutionality of a statutory scheme is a question of law that [an appellate court] review[s] de novo. Every legislative enactment is presumed constitutional. As such, [an appellate court] will "'indulge[ ] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [an appellate

> court] must resolve that doubt in favor of constitutionality.'" Accordingly, the party challenging a statute's constitutionality faces a heavy burden. The challenger must demonstrate that the statute is unconstitutional beyond a reasonable doubt. In this case, [the defendant] faces the heavy burden of demonstrating that a punishment approved by the Wisconsin legislature, and thus presumably valid, is cruel and unusual in violation of the Eighth Amendment of the United States Constitution and Article I, Section 6 of the Wisconsin Constitution.

State v. Ninham, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451 (citations omitted), *cert. denied*, 133 S. Ct. 59 (2012). "It is not sufficient for a party to demonstrate 'that the statute's constitutionality is doubtful or that the statute is probably unconstitutional.' Instead, the presumption can be overcome only if the party establishes 'that the statute is unconstitutional beyond a reasonable doubt.'" *Wisconsin Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22 (citations omitted). "This presumption and burden apply to as-applied constitutional challenges to statutes as well as to facial challenges." *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227. A facial challenge to the constitutionality of a statute cannot prevail unless "the law cannot be enforced 'under any circumstances.'" *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 (quoted source omitted).

B. Introduction.

The circuit court concluded that § 343.305(3)(ar) and (b) are unconstitutional (31:7-8; A-Ap. 198-99). The two provisions are part of Wisconsin's implied consent law, Wis. Stat.

§ 343.305, "Tests for intoxication; administrative suspension and court-ordered revocation." The implied consent law generally provides that:

> **(2)** IMPLIED CONSENT. Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs . . . when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Wis. Stat. § 343.305(2).

The provisions in § 343.305(3)(ar) and (b) concern operators of motor vehicles who are involved in accidents in which a person is seriously injured or killed. They state that if a law enforcement officer either detects the presence of alcohol or drugs, § 343.305(3)(ar)1., or has reason to believe the person has violated a traffic law, § 343.305(3)(ar)2., the officer may request that the operator give one or more samples of his or her blood, breath, or urine. Subparagraphs 1. and 2. both provide that "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person." Wis. Stat. § 343.305(3)(ar)1. and 2.

Paragraph (b) similarly provides that in the implied consent law generally, "A person who is unconscious or otherwise not capable of

withdrawing consent is presumed not to have withdrawn consent," and if a law enforcement officer has probable cause to believe that the person has committed an OWI-related offense, or detects any presence of alcohol or illegal drugs on the person, "one or more samples specified in par. (a) or (am) may be administered to the person." Wis. Stat. § 343.305(3)(b).

The circuit court concluded that § 343.305(3)(ar) and (b) are unconstitutional because they presume that a person who is incapable of withdrawing consent has given consent authorizing testing. It explained that

> The statutes in question conclusively presume that an incapacitated person has consented to a blood draw, and therefore permit an officer to order a blood draw without a warrant. Statutory implied consent is not constitutional actual consent. The statutes' irrebuttable presumption cannot be reconciled with the Fourth Amendment's warrant requirement.

(31:1; A-Ap. 192.)

The circuit court relied on *Padley*, in which this court concluded that the consent a person is deemed to have given when the person operates a motor vehicle on a highway in Wisconsin, under § 343.305(2), generally is insufficient to authorize the taking of a sample for testing. *Padley*, 354 Wis. 2d 545, ¶¶ 26, 40. Instead, only "actual consent" given when a law enforcement officer requests a sample of a person's blood, breath or urine for testing, is sufficient. *Id.* ¶ 27. However, this court noted a "tension" between its interpretation of the implied consent law and the

language in § 343.305(3)(ar)2,[3] and recognized that "at least in the context of an incapacitated driver and in the limited context of § 343.305(3)(ar)2., implied consent is deemed the functional equivalent of actual consent." *Id.* ¶ 39 n.10.

The circuit court in this case concluded that the statutory "provisions of our informed consent law that create an irrebuttable presumption that an incapacitated driver is deemed not to have withdrawn his consent - - and therefore consented - - to a blood draw, cannot be squared with the Fourth Amendment" (31:7-8; A-Ap. 198-99).

If *Padley* correctly interpreted the implied consent law as authorizing testing only when a person gives "actual" consent at the time a law enforcement officer requests or requires a sample, the circuit court's conclusion in this case is likely correct. However, the State respectfully maintains that *Padley* did not correctly interpret the implied consent law.

As the State will explain, under the plain language of the implied consent law, and as the law has been interpreted by the Wisconsin Supreme Court and by this court, a person who operates a motor vehicle on a Wisconsin highway has given consent to a test of his or her blood, breath or urine. Wis. Stat. § 343.305(2). When a law enforcement officer requests a sample of blood, breath or urine under § 343.305(3)(a) or (am), or requires a sample under § 343.305(3)(ar) or (b), the officer does not ask for consent, because the person has already given consent. The officer requests or requires that the person submit to a

[3] This "tension" also applies to Wis. Stat. § 343.305(3)(ar)1. and (b), both of which use the same language as Wis. Stat. § 343.305(3)(ar)2.

test. If the person submits, one or more samples may be taken and one or more tests may be administered. If the person refuses, thereby withdrawing consent, he or she faces revocation of his or her operating privilege.

A person has no right to refuse testing. The choice is either to submit, and follow through on the consent the person has already given, or withdraw that consent and face revocation.

In the provisions of the implied consent law at issue here, the legislature has recognized that whether a person is conscious or unconscious, capable or incapable of withdrawing consent, the person has given consent to testing by operating a motor vehicle on a highway in Wisconsin. But unlike conscious drivers, who are capable of choosing to withdraw that consent, unconscious drivers, or those who are otherwise incapable of withdrawing their consent, are not capable of choosing to withdraw their consent.

The legislature did not exempt unconscious drivers from the implied consent law because they cannot give consent when a law enforcement officer requests or requires a test. It instead stated that the law applies to all drivers unless they withdraw consent, and it made clear that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection." Wis. Stat. § 343.305(3)(ar) and (b). These provisions are not unconstitutional because a person who is subject to testing under these provisions has already given consent to testing. The circuit court erred in finding these provisions unconstitutional and in therefore granting Howes' motion to suppress evidence.

C. Under Wisconsin's implied consent law, any person who operates a motor vehicle on a highway in Wisconsin is deemed to have given consent to the taking of one or more samples of his or her blood, breath or urine for testing, when requested or required by a law enforcement officer.

The implied consent law states that "Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine," when requested or required by a law enforcement officer. Wis. Stat. § 343.305(2). The Wisconsin Supreme Court has consistently interpreted the implied consent law as providing that a person gives consent to testing by obtaining a driver's license or operating a motor vehicle on a highway in Wisconsin.

In *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974), the supreme court recognized that the purpose of the implied consent law is "to impose a condition on the right to obtain a license to drive on a Wisconsin highway. The condition requires that a licensed driver, by applying for an[d] receiving a license, consents to submit to chemical tests for intoxication under statutorily determined circumstances." *Id.* at 494.

In *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980), the supreme court explained that the consent necessary to authorize chemical testing is not given at the time a law enforcement officer requests or requires a test, because the driver

> has, by his application for a license, waived whatever right he may otherwise have had to refuse to submit to chemical testing. It is assumed that, at the time a driver made application for his license, he was fully cognizant of his rights and was deemed to know that, in the event he was later arrested for drunken driving, he had consented, by his operator's application, to chemical testing under the circumstances envisaged by the statute.

Id. at 201. The supreme court added that "The entire tenor of the implied consent law is . . . that consent has already been given and cannot be withdrawn without the imposition of the legislatively imposed sanction of mandatory suspension. *Id.* at 203.

In *State v. Brooks*, 113 Wis. 2d 347, 335 N.W.2d 354 (1983), the supreme court recognized that authority for testing is not dependent on a person giving consent when a law enforcement officer requests a test, stating "The implied consent law can only serve its purpose if there are penalties for unlawfully revoking consent." *Id.* at 355-56.

In *State v. Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986), the supreme court recognized that the language that was then in subsection (1) stating "'*Any person who drives* or operates a motor vehicle upon the public highways of this state . . . shall be deemed to have given consent to one or more tests . . . ,'" "declares legislative policy, namely, that those who drive consent to chemical testing." *Id.* at 27-28.

In *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), the supreme court again recognized that consent to testing under the

implied consent law is given when a person operates a motor vehicle on a highway in Wisconsin, not when law enforcement asks for submission to a test. The court stated that under the implied consent law, "The refusal procedures are triggered when an arrested driver refuses to honor his or her previously given consent implied by law to submit to chemical tests for intoxication. The consent is implied as a condition of the privilege of operating a motor vehicle upon state highways." *Id.* at 47-48 (citing *Neitzel*, 95 Wis. 2d at 201) (footnote omitted).

In *State v. Krajewski*, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, the supreme court stated that "In Wisconsin, a driver impliedly consents to take the test requested by a law enforcement officer. When the driver refuses to take that test, the driver has withdrawn his or her consent—officers must yield to that decision or proceed in a manner outside the statute." *Id.* ¶ 36 n.15.

In *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, the supreme court stated that "Under the Implied Consent Law, the defendant was deemed to have consented to the test requested by Deputy Sutherland when the defendant decided to drive upon a Wisconsin highway." *Id.* ¶ 40 n.36 (citing Wis. Stat. § 343.305(2)).

In some cases, the supreme court has concluded that a person impliedly gives consent to testing by obtaining a driver's license. *See e.g.*, *Scales*, 64 Wis. 2d 485; *Neitzel*, 95 Wis. 2d 191. In other cases, the supreme court has concluded that a person impliedly gives consent to testing by operating a motor vehicle on a highway in

Wisconsin. *See e.g.*, *Nordness*, 128 Wis. 2d 15; *Krajewski*, 255 Wis. 2d 98; *Smith*, 308 Wis. 2d 65. The State maintains that the cases stating that a person gives consent by operating on a highway in Wisconsin are correct, as that is precisely what the law states, in Wis. Stat. § 343.305(2). The legislature could not reasonably have intended that a person gives implied consent by obtaining a Wisconsin driver's license, as this would seemingly exempt any person who does not have a Wisconsin driver's license from the implied consent law.

But whether stating that a person gives consent to testing by obtaining a driver's license, or by operating a motor vehicle on a highway in Wisconsin, the supreme court in each of these cases has made clear that under the implied consent law, any person has already given consent authorizing the taking of one or more samples before a law enforcement officer requests or requires a sample.

D. Additional consent when a law enforcement officer requests or requires testing is not required to authorize the taking of one or more samples.

When a law enforcement officer requests or requires testing, the person is required to either submit, or refuse and withdraw consent. No additional consent is required to authorize the taking of one or more samples for testing. While an officer generally is required to read the informing the accused information in § 343.305(4) to the person when requesting a sample, the Wisconsin Supreme Court has determined that it is not required that the person understand the information given by the officer. If the person is

unconscious, the officer is not even require to read the informing the accused information to the person. Because all persons have given consent to testing by driving in Wisconsin, they need not give additional "actual" consent to authorize the taking of a sample for testing.

In *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, the supreme court determined that because a person gives consent under the implied consent law authorizing testing, it is not required that the person even understand the informing the accused warnings that a law enforcement officer reads to the person when requesting a sample.

In *Piddington*, a law enforcement officer stopped a driver who was severely deaf. *Id.* ¶ 2. The officer attempted to communicate with the driver through notes, gestures, and some speaking. *Id.* ¶ 3. After the driver was arrested, a police officer who was not a certified ASL interpreter but who knew some sign language, gave the driver the informing the accused information orally and by sign. *Id.* ¶ 5-6. The officer also read the informing the accused form to the driver, who said he could not read the officer's lips. *Id.* ¶ 6. The driver "indicated that he would submit to a blood test." *Id.*

The driver moved to suppress the blood test results, arguing that he needed an ASL interpreter to fully understand the informing the accused form. *Id.* ¶ 8. The circuit court concluded that the officers made a reasonable effort to communicate the warnings to the driver, but the court granted the motion to suppress the blood test results because the State failed to show that the driver understood the warnings. *Id.* ¶ 10.

The court of appeals reversed, concluding that an officer need only read the form to the person to comply with the implied consent law. *Id.* ¶ 11 (citing *State v. Piddington*, 2000 WI App 44, ¶ 12, 233 Wis. 2d 257, 607 N.W.2d 303).

The supreme court affirmed, concluding that compliance with the implied consent law is dependent on the officer's actions, not on whether the driver understands the information in the informing the accused form. The court stated:

> We agree with the court of appeals that "since the statute requires the information to be provided only to persons who are probably intoxicated, it is unlikely that the legislature intended a persons' understanding or comprehension of the information to be determinative of compliance with the statute."

Id. ¶ 25 n.14 (citing *Piddington*, 233 Wis.2d 257, ¶ 15).

The supreme court added that "Whether Piddington subjectively understood the warnings is irrelevant," *id.* ¶ 32 n.19, and "Whether the accused driver has actually comprehended the warnings is not part of the inquiry, rather the focus rests upon the conduct of the officer." *Id.* ¶ 55.

The supreme court's determination in *Piddington* that a person need not understand the implied consent warnings an officer gives him or her in order to validly consent to a blood draw, could not be correct if the only consent that can authorize a blood draw is "actual" consent given in response to a request from an officer. A person who cannot understand the information that the officer is required to give him or her cannot

reasonably be held to have given knowing, intelligent, and voluntary constant at that time.

The supreme court's holding in *Piddington* recognized the well-established interpretation of the implied consent law—that consent is given at the time the person operates a motor vehicle on a Wisconsin highway. A driver's consent is not dependent on his or her understanding the informing the accused warnings because the driver already gave knowing and voluntary consent by operating a motor vehicle on a highway in Wisconsin.

In *State v. Disch*, 129 Wis. 2d 225, 385 N.W.2d 140 (1986), the supreme court addressed the "unconscious driver" provision in the 1979-80 version of the implied consent law, and concluded that under that provision, additional consent at the time a law enforcement officer requests a sample is explicitly not required. The implied consent law stated in part that:

> (c) A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1) or a local ordinance in conformity therewith, the person may be arrested therefor and a test may be administered to the person.

Wis. Stat. § 343.305(2)(c) (1979-80); *Disch*, 129 Wis. 2d at 231. The court concluded that the provision

> obviates the necessity of an officer's request for a test or a blood sample. This subsection comes into play only when the person is

> unconscious or otherwise not capable of withdrawing consent. If a person is unconscious or otherwise not capable of withdrawing consent, it would be useless for the officer to request the person to take a test or to give a sample. It would be just as useless for the officer to inform an unconscious person or one who is otherwise not capable of withdrawing consent that he or she is deemed to have consented to tests

Id. at 233.

The supreme court concluded that "when the requirements of sec. 343.305(2)(c) are met, an officer may administer a test without complying with sec. 343.305(3)(a)," by informing the accused about the implied consent law. *Id.* at 234.

The supreme court's conclusion that a law enforcement officer can validly administer a test without even informing the accused about the implied consent law, or asking for consent, recognizes that the authority to administer a test is based on the consent a person impliedly gives when the person operates a motor vehicle on a Wisconsin highway, and does not require additional consent when an officer requests a test.

In *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, this court addressed a defendant's argument that the consent that authorizes a test of a person's blood, breath or urine under the implied consent law is the consent given when a law enforcement officer reads the informing the accused warnings to the person, and that this consent is coercive and invalid. *Id.* ¶¶ 2, 8. This court rejected this argument, explaining that consent to testing is given at the time a person obtains a driver's license or operates a motor vehicle on a highway in Wisconsin, and that

additional consent is not required when a law enforcement officer requests that the person submit to testing. The court stated:

> We begin our analysis with the truism that no one forces anyone in this state to get a driver's license. Individuals have the freedom to choose whether and when to drive on our highways. However, in return for seeking the privilege of driving on our highways, the would-be motorist must obtain a valid driver's license. As a condition of obtaining a driver's license, the would-be motorist must be willing to accept the burdens associated with this choice. . . . pertinent to this case, our supreme court has declared that when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests.

Id. ¶ 12.

This court noted that in *Neitzel*, the supreme court wrote that:

> By reason of the implied consent law, a driver, when he applies for and receives an operator's license, submits to the legislatively imposed condition on his license that, upon being arrested and issued a citation for driving under the influence of an intoxicant, contrary to sec. 346.63(1), Stats., he consents to submit to the prescribed chemical tests. He applies for and takes his license subject to the condition that a failure to submit to the chemical tests will result in the sixty-day revocation of his license unless the refusal was reasonable.

Wintlend, 258 Wis. 2d 875, ¶ 12 (quoting *Neitzel*, 95 Wis. 2d at 193).

This court recognized the supreme court's interpretation of the implied consent law, stating:

> Thus, our supreme court has decided that the time of consent is when a license is obtained. As such, it stands to reason that any would-be motorist applying for a motor vehicle license is not coerced, at that point in time, into making the decision to get a license conditioned on the promise that if arrested for drunk driving, the motorist agrees to take a test or lose the license. The choice is there. If the would-be motorist decides to dissent, he or she does not have to get a license to exercise the constitutional right to travel. The person can take a bus, ride a bike, or walk. Thus, there is no psychological pressure brought to bear at the time that a motorist applies for and obtains a driver's license in exchange for accepting the burdens imposed by the State.

Id. ¶13 (citation omitted).

This court noted that the defendant in *Wintlend* "does not acknowledge the language contained in N*eitzel*," but "Rather, he argues that the time when consent to take the test occurs and the time when the coercion rears its head is when a law enforcement officer reads the Informing the Accused form to the accused motorist." *Id.* ¶ 14.

This court rejected the defendant's argument, stating that "As we already noted, the argument that consent comes at some time different from the time a person applies for and obtains the license is directly contrary to the specific language found in *Neitzel*." *Id.*

This court then explained why, even if the supreme court had not made clear that consent to testing is not given at the time the officer requests

a sample, the defendant's argument to the contrary would still be wrong. The court stated:

> For the sake of argument, let us suppose that *Neitzel* did not contain the language we have cited. Let us indulge Wintlend in his argument. He cites WIS. STAT. § 343.305(2), which says, in pertinent part: "Any person who . . . drives or operates a motor vehicle upon the public highways . . . is deemed to have given consent." Wintlend argues that the legislature has thus decreed that consent is obtained when the person has actually driven on the highway, not at some time beforehand. He apparently further argues that the statute is addressing the motorist in "real-time," after arrest when being read the Informing the Accused form, not before. And while he has not made the argument, one could assert that the language in *Neitzel* weakens when it is observed that out-of-state drivers would not fit nicely into the *Neitzel* court's analysis.
>
> We could quibble with Wintlend's statutory construction analysis. We could say that what is wrong with Wintlend's reasoning is that the legislature did not put that language in the present tense as if to say that the person "gives consent" each time he or she decides to drive. Rather, the legislature said that the person "is deemed to have given consent." WIS. STAT. § 343.305(2). That wording implies that the consent antecedes the operation of the vehicle. Our construction would be consistent with the language contained in *Neitzel*. Or we could read the statute to say that the statute says nothing about consent being obtained at the time the form is read; at the most, it says that any time a person drives a motor vehicle on our highways, at that time, consent is obtained. Either construction would doom Wintlend's argument.

Id. ¶¶ 15-16.

As the supreme court has recognized in numerous cases, any person who obtains a Wisconsin driver's license or operates a motor vehicle on a highway in Wisconsin has given consent to testing when a law enforcement officer requests or requires that he or she submit to testing. As the supreme court has recognized in numerous case, and as this court recognized in *Wintlend*, additional consent at the time the officer requests or requires a sample is not required to authorize the taking of a sample for testing. Under this well-established interpretation of the implied consent law, Wis. Stat. § 343.305(3)(ar) and (b), which authorize the taking of a blood sample from an unconscious person, are not unconstitutional. After all, the person has already consented to testing, and additional consent is not required.

The circuit court in this case did not cite or rely on any of these cases. It instead relied on *Padley*, a case in which this court interpreted the implied consent law very differently.

In *Padley*, this court examined the implied consent law, and explained that the law creates two types of consent: first, the "implied consent" a person gives when operating a motor vehicle in Wisconsin; and second, "actual consent" given when a law enforcement officer requests a sample. This court explained that:

> "Implied consent" is not an intuitive or plainly descriptive term with respect to how the implied consent law works. We suspect that it is a source of confusion. On occasion in the past we have seen the term "implied consent" used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent.

However, actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.

There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized. This penalty scenario for "refusals" created by the implied consent law sets the scene for the second consent issue.

The State's power to penalize a refusal via the implied consent law, under circumstances specified by the legislature, gives law enforcement the right to force a driver to make what is for many drivers a difficult choice. The officer offers the following choices: (1) give consent to the blood draw, or (2) refuse the request for a blood draw and suffer the penalty specified in the implied consent law. When this choice is offered under statutorily specified circumstances that pass constitutional muster, choosing the first option is voluntary consent. The fact that the driver is forced to make a difficult choice does not render the consent involuntary. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow." ***McGautha v. California***, 402 U.S. 183, 213 (1971) (quoting ***McMann v. Richardson***, 397 U.S. 759, 769

> (1970)), *vacated on other grounds by* ***Crampton v. Ohio***, 408 U.S. 941 (1972).
>
> With the general understanding that a proper implied consent law authorizes law enforcement to present drivers with a difficult, but permissible, choice between consent or penalties for violating the implied consent law, we resume more specific discussion.

Padley, 354 Wis. 2d 545, ¶ 25-28.

After identifying these two types of consent, this court went on to distinguish between implied consent and actual consent, and concluded that law enforcement can order the taking of a sample only upon actual consent. The court explained that:

> What is important for current purposes is that, at least in cases of the type we now address, the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent. Withdrawing consent by choosing the "no" option is an unlawful action, in that it is penalized by "refusal violation" sanctions, even though it is a choice the driver can make.

Id. ¶ 39.

The State respectfully maintains that this court's explanation of the implied consent law in *Padley* was incorrect. This court's conclusion that the consent a person impliedly gives when he or she operates a motor vehicle on a Wisconsin highway does not authorize testing, and that only "actual" consent given when a law enforcement officer requests or requires a sample can authorize testing, is seemingly the interpretation of the implied consent law that this court rejected in *Wintlend*, 258 Wis. 2d 875, ¶ 12. It is also contrary to the interpretation of the implied consent law in the supreme court decisions discussed above, in which the supreme court has found implied consent sufficient to authorize testing. *See Scales*, 64 Wis. 2d at 494; *Neitzel*, 95 Wis. 2d at 201, 203; *Nordness*, 128 Wis. 2d at 27-28; *Zielke*, 137 Wis. 2d at 47-48; *Krajewski*, 255 Wis. 2d 98, ¶ 36 n.15; *Smith*, 308 Wis. 2d 65, ¶ 40 n.36; *Piddington*, 233 Wis. 2d 257, *Disch*, 129 Wis. 2d at 233.

In *Padley* this court recognized a "tension" between its interpretation of the implied consent law generally, and the language in § 343.305(3)(ar)2., that "establishes that, at least in the context of incapacitated drivers, 'implied consent' is a sufficient basis on which to proceed with a warrantless search." *Padley*, 354 Wis. 2d 545, ¶ 39 n.10. This court noted that

> Under § 343.305(3)(ar)2., a driver involved in an accident resulting in a death or great bodily harm who police believe committed a traffic law violation, and who is "unconscious or otherwise not capable of withdrawing consent[,] is presumed not to have withdrawn consent" and a blood draw "may be administered" to the driver. Thus, at least in the context of an incapacitated driver and in the limited context of § 343.305(3)(ar)2.,

> implied consent is deemed the functional equivalent of actual consent.

Id.

The circuit court concluded that this "tension" means that the "unconscious driver" provisions in the implied consent law are unconstitutional (31:1, 5-6; A-Ap. 192, 196-97).

The State respectfully maintains that this "tension" indicates that this court's interpretation of the implied consent law was incorrect.

The language in § 343.305(3)(ar)2., and in § 343.305(3)(ar)1. and (b), cannot reasonably be read as referring to a different consent than that which applies in the rest of the implied consent law. Consent under the implied consent law is established in § 343.305(2), which states that:

> Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his blood, breath or urine . . . when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so by a law enforcement officer under sub. (3) (ar) or (b).

Padley recognized that the consent under § 343.305(2) is deemed to be the "functional equivalent" of "actual" consent when the person is unconscious or otherwise incapable of withdrawing consent. *Padley*, 354 Wis. 2d 545, ¶ 39 n.10. But it concluded that the same consent under § 343.305(2) is not the equivalent of actual consent when the person is conscious. *Padley*, 354 Wis. 2d 545, ¶¶ 38-39.

The State maintains that the consent a person gives under § 343.305(2) by operating a motor vehicle in Wisconsin cannot reasonably have two different meanings depending on whether the person is conscious or unconscious when a sample is requested. The only reasonable interpretation of the implied consent law is that the consent a person gives by operating a motor vehicle in Wisconsin authorizes testing when it is requested or required by a law enforcement officer, whether the person is conscious or unconscious at the time the officer seeks the sample. This is what the supreme court has determined in numerous cases, and this court determined in *Wintlend*.

The State is aware that the court of appeals cannot "overrule, modify or withdraw" language from another decision of the court of appeals. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). However, when language in a decision of the court of appeals "is inconsistent with controlling supreme court precedent," the court of appeals is "not obligated to apply it" and "must, instead, 'reiterate the law under previous supreme court . . . precedent.'" *State v. Matke*, 2005 WI App 4, ¶ 15, 278 Wis. 2d 403, 692 N.W.2d 265 (citing *State v. Noll*, 2002 WI App 273, 258 Wis. 2d 573, ¶ 16 n.4, 653 N.W.2d 895).

When a court of appeals' opinion conflicts with a prior court of appeals' opinion, the first opinion controls. *See State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452 (citing *State v. Bolden*, 2003 WI App 155, ¶¶ 9-11, 265 Wis. 2d 853, 667 N.W.2d 364 ("if two court of appeals decisions conflict, the first governs").

The State therefore respectfully requests that this court decline to follow *Padley*, and

reiterate that, as the supreme court and this court have recognized, the consent any person who operates a motor vehicle on a highway in Wisconsin is sufficient to authorize law enforcement to take a sample of the person's blood, breath or urine for testing. When a law enforcement officer requests a sample for testing, the person has the choice of submitting to testing, and affirming the consent he or she has already given, or withdrawing that consent and refusing, and thereby facing revocation of his or her operating privilege. No additional consent is required to authorize testing.

E. The presumption in Wis. Stat. § 343.305(3)(ar) and (b), that a person who is unconscious or otherwise not capable of withdrawing consent has not withdrawn consent, does not make the statute unconstitutional.

The circuit court concluded that § 343.305(3)(ar) and (b) are unconstitutional based on this court's interpretation of the implied consent law in *Padley*. The circuit court explained that

> The statutes in question conclusively presume that an incapacitated person has consented to a blood draw, and therefore permit an officer to order a blood draw without a warrant. Statutory implied consent is not constitutional actual consent. The statutes' irrebuttable presumption cannot be reconciled with the Fourth Amendment's warrant requirement.

(31:1; A-Ap. 192.)

The circuit court gave no reason other than *Padley* for concluding that § 343.305(3)(ar) and (b) are unconstitutional.

However, as explained above, under the Wisconsin Supreme Court's interpretation of the implied consent law, statutory implied consent is sufficient to authorize testing of a sample of a person's blood, breath or urine, whether the person is conscious or unconscious. Therefore, the "irrebuttable presumption" that a person who is unconscious or otherwise incapable of withdrawing consent has not withdrawn consent, is not unconstitutional.

The presumption that a person who is unconscious or otherwise not capable of withdrawing consent has not withdrawn consent, has been part of Wisconsin's implied consent law since at least 1969. The 1969 version of the statute provided that "Any person who operates a motor vehicle upon the public highways of this state . . . shall be deemed to have given consent to a chemical test of his breath, blood or urine, . . . if arrested and issued a citation for driving or operating under the influence of a motor vehicle while under the influence of an intoxicant." Wis. Stat. § 343.305(1) (1969). The statute further provided that "A person who is unconscious or otherwise incapacitated is presumed not to have withdrawn his consent under this subsection." Wis. Stat. § 343.305(1) (1969).

Wisconsin courts have addressed the unconscious driver provision in a number of opinions. *See e.g.*, *Scales*, 64 Wis. 2d at 494; *Disch*, 129 Wis. 2d at 233-35; *State v. Lange*, 2009 WI 49, ¶ 17 n.5, 317 Wis. 2d 383, 766 N.W.2d 551; *State v. Hagaman*, 133 Wis. 2d 381, 383-84, 395

N.W.2d 617 (Ct. App. 1986). But no appellate court has found that anything in Wisconsin law makes this provision unconstitutional.

In its decisions granting Howes' motion to suppress evidence and denying the State's motion for reconsideration, the circuit court addressed the United States Supreme Court's decision in *McNeely*, 133 S. Ct. 1552. The circuit court explained in its decision denying reconsideration that it relied on *McNeely* solely for the proposition that a warrantless blood draw is constitutional only if it was validly based on an exception to the warrant requirement (31:3; A-Ap. 194). The court recognized that one of those exceptions is consent (31:3; A-Ap. 194).

The circuit court did not conclude that Wis. Stat. § 343.305(3)(ar) and (b) are unconstitutional under *McNeely*. The State maintains that *McNeely* does not render any part of Wisconsin's implied consent law unconstitutional. Instead, the Supreme Court recognized in *McNeely* that implied consent laws are "legal tools" to enforce drunk-driving laws, and that "Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *McNeely*, 133 S. Ct. at 1566.

The Supreme Court recognized that implied consent laws "impose significant consequences when a motorist withdraws consent." This is exactly what Wisconsin's implied consent law does. Under the implied consent law, any person who operates a motor vehicle on a highway in

Wisconsin has given consent to testing. That consent is valid unless the person withdraws it. The provisions of the law at issue here, that simply presume that a person who cannot withdraw consent has not withdrawn consent and refused testing, are not unconstitutional.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court reverse the circuit court's order granting the motion to suppress evidence and finding part of Wisconsin's implied consent law unconstitutional.

Dated this 30th day of December, 2014

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,430 words.

Dated this 30th day of December, 2014.

_____

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 30th day of December, 2014.

_____
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