STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2014AP1870-CR

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**STATE OF WISCONSIN,**

Plaintiff-Appellant,

vs.

**DAVID W. HOWES**,

Defendant-Respondent.

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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

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# BRIEF OF DEFENDANT-RESPONDENT

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## ISSUE PRESENTED FOR REVIEW

Whether the Circuit Court erred in concluding that Wis. Stat. §§ 343.305(3)(ar) and (b) are unconstitutional insofar as they create an irrebuttable presumption that an incapacitated person has consented to a blood draw and therein permit a law enforcement officer to order a blood draw without a warrant where no exigent circumstances or other identifiable exception to the warrant requirement exists.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The defendant-respondent requests the opportunity to present oral argument if the Court finds that the parties' positions require further elucidation and/or to clear up any specific questions that the Court may have that were unanticipated or unaddressed by the parties in their briefs. The defendant-respondent joins the State's position on publication, and believes it will be warranted and necessary to clarify the workings and application of the implied consent law in the context presented here.

## STATEMENT OF THE FACTS

On July 7, 2013, Deputy Robert Schiro of the Dane County Sheriff's Department responded to the scene of a motorcycle crash had occurred on Highway 14 in the Town of Middleton. (R.37:6). The dispatch call came at 9:20 p.m. and indicated that it appeared that the motorcycle operator had

collided with a deer, throwing him from his motorcycle. (R.37:6-7). Dispatch reported that the operator of the motorcycle was unconscious at the scene. (R.37:6-7).

When Deputy Schiro arrived on the scene, he observed that Middleton EMS were present. (R.37:7). He observed the body of a deer, which was deceased, lying in the westbound lanes of Highway 14. (R.37:7-8). Approximately 40-50 feet west of the deer he noticed the EMS attending to Mr. Howes, the motorcycle operator, surrounded by bystanders. (R.37:8). Per Deputy Schiro's recollection, Howes' motorcycle was approximately 40 feet further west of where he had come to rest. (R.37:9). There were no eyewitnesses to the crash. (R.37:10). The deputy claimed, however, that an unidentified bystander stated that they could smell an odor of intoxicants coming from Mr. Howes. (R.37:10-11). Deputy Schiro did not get close enough to Howes to discern as much for himself. (R.37:10).

At the UW Hospital emergency room, Deputy Schiro spoke with the two EMS workers who had transported Howes to the hospital. (R.37:15-16). One EMT indicated he could smell an odor of intoxicants during the transport to the hospital which appeared to be coming from Mr. Howes. (R.37:16-17). The other EMT stated that he could not smell any odor of intoxicants coming from Mr. Howes. (R.37:17).

Deputy Schiro then entered the emergency room in an attempt to make contact with Mr. Howes, who was being attended to by numerous UW Hospital medical staff. (R.37:17-18). Mr. Howes was heavily sedated and unconscious. (R.37:18). Deputy Schiro claims that he spoke to a nurse who stated that there was an odor of intoxicants apparent in the room where Howes was located. (R.37:18). The deputy never independently confirmed that any suspicious odor was

emanating from Mr. Howes, though he moved within 2-3 feet of where Mr. Howes was lying. (R.37:19, 25).

Eventually, Deputy Schiro spoke with Mr. Howes' attending physician about the extent of Howes' injuries, noting that Mr. Howes had a breathing tube in his mouth by this time and was surrounded by a substantial amount of medical equipment. (R.37:34-5).

Shortly thereafter, Deputy Schiro decided to arrest Mr. Howes for OWI. At 10:15 p.m., the deputy informed Mr. Howes that he was under arrest. (R.37;19, 31). Mr. Howes was still unconscious and accordingly, could not hear or react to anything the deputy said. (R.37:19). Deputy Schiro claims that he read the "Informing the Accused" form to the unconscious Mr. Howes who, unsurprisingly, did not respond. (R.37:20). Deputy Schiro then asked whether Howes "would submit to an evidentiary chemical test of his blood." (R.37:20). Again, an unconscious Mr. Howes failed to respond. (R.37:20). Deputy Schiro supervised a hospital phlebotomist perform a blood draw at 11: 17 p.m. (R.37:20-2, 31). There is no dispute as to the fact that Mr. Howes was unconscious for the entirety of these described events.

Ultimately, Howes was formally charged with OWI and PAC. (R.3; 8). He moved to suppress the blood test results on the grounds that there was no probable cause and that the blood draw violated the Fourth Amendment by way of *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). (R.17). Mr. Howes supplemented his motion by asserting that the pertinent Wisconsin statute (§ 343.305(3)(b)) authorizing police officers to take blood from unconscious individuals in the absence of a warrant or a showing of exigent circumstances was unconstitutional pursuant to *McNeely* because it precluded a

"case-by-case" analysis based on the "totality of the circumstances. (R.26).[1]

After hearing testimony at a suppression hearing, the Circuit Court concluded that Mr. Howes' arrest was supported by probable cause. (R.37:57-64). The Court also found, however, that §§ 343.305(3)(ar) and (b), which authorize law enforcement officers to draw blood from unconscious or otherwise incapacitated persons without actual consent, a warrant, or a showing of exigent circumstances, are unconstitutional. (R.37:65-9).[2] Accordingly, and because there

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[1] Wis. Stat. § 343.305(3)(b) provides:

> 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), (2m) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or detects any presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated s. 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person.

[2] Wis. Stat. § 343.305(3)(ar) provides:

> 1. If a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm, as defined in s. 939.22 (38), to any person, and a law enforcement officer detects any presence of alcohol, a controlled substance, a controlled substance analog or other drug, or a combination thereof, the law enforcement officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose

were no facts presented indicating exigent circumstances that would otherwise obviate the warrant requirement, the Circuit Court granted Mr. Howes' motion to suppress pursuant to its reading of *McNeely* and *State v. Padley*, 2014 WI App 65, 354 Wis.2d 545, 849 N.W.2d 867. (R.37:65-9).

The State filed a motion for reconsideration with the Circuit Court, attempting to factually distinguish *Padley* and arguing that *McNeely* makes no implications regarding implied consent. (R.29). The Circuit Court denied the motion. (R.31). The State now appeals, asserting that the Circuit Court's conclusions were erroneous, and that "implied consent" constitutes an absolute forfeiture of Fourth Amendment

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specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. 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. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

2. If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law, the officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. 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. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

protections for unconscious or incapacitated persons, and that the relevant provisions of §§ § 343.305(3)(ar) and (b) provide law enforcement the unassailable authority to draw blood from unconscious or incapacitated persons so long as they can prove mere operation of a motor vehicle and the "[detection] of any presence of alcohol— no other prerequisite, i.e. a warrant, actual contemporaneous consent, or a showing of exigent circumstances, is required.

## ARGUMENT

### I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT WIS STAT. §§ 343.305(3)(ar) and (b) ARE UNCONSTITUTIONAL PER THE DICTATES OF *PADLEY* AND *MCNEELY*. THEREFORE, THE BLOOD TEST RESULTS SHOULD BE SUPPRESSED IN THIS CASE.

#### A. Introduction and Standard of Review applicable to a Circuit Court's finding that a statute is unconstitutional.

An appellate court should uphold a circuit court's findings of historical fact unless those finding are clearly erroneous. *Padley*, 2014 WI App 65, ¶ 15, 354 Wis.2d at559-60. The application of constitutional principles to those facts, however, presents a question of law subject to de novo review. *Id.*

Ultimately, this case turns on whether Wis. Stat. §§343.305(3)(ar) and (b) are constitutional.[3] The constitutionality of a statutory scheme is a question of law subject to de novo review on appeal. *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis.2d 335, 360, 797 N.W.2d 451, 464. A statute enjoys a presumption of constitutionality that can only be overcome by a showing or proof that the statute is unconstitutional beyond a reasonable doubt. *State v. Smith*, 2010 WI 16, ¶ 8, 323 Wis.2d 377, 387, 780 N.W.2d 90, 95. A reviewing court may find that only a portion of a particular statute or scheme is unconstitutional, therein permitting the remaining valid portions of that statute to continue in effect. *In Interest of Hezzie R.*, 219 Wis.2d 848, 863, 580 N.W.2d 660, 664 (1998).

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[3] As far as he understands the distinction, Mr. Howes challenged the constitutionality of the "unconscious driver" provision on its face and the Circuit Court agreed that the law cannot be enforced under any circumstances. *Padley*, 2014 WI App 65, ¶ 35, 354 Wis.2d at 569. The factual background is necessary to provide context for how the controversy arose, but Mr. Howes believes his challenge is "as-applied" only insofar as his Fourth Amendment rights were personally violated by the State's conduct under the general auspices of the provisions in question when the blood draw was performed. In other words, he does not believe that any variation in circumstances (except for the crucial one–incapacitation, which brings him within the purview of the provision in the first place) would materially affect the analysis. The provisions in question are tantamount to a per se rule/exception to the warrant requirement and should therefore be void "from... beginning to the end." *Id.*

In terms of summary factual findings immediately relevant to this appeal, the Court found that the law enforcement officer ordered the blood draw of an incapacitated Mr. Howes without a warrant, and that the facts did not lend themselves to any arguable exception to the Fourth Amendment's warrant requirement other than the erroneous one advanced by the State that was premised upon implied consent. (R.31:2, 6). It discussed the nuance of "implied consent" in explicating *Padley*, and reviewed the permissions granted by §§343.305(3)(ar) and (b) against the backdrop of *McNeely* and its contemporary vivification of the precepts originally expounded in *Schmerber v. California*, 384 U.S. 757, 88 S.Ct. 1826 (1966). In doing so, the Circuit Court explicitly acknowledged the presumption of constitutionality and the heavy burden necessary to overcome it before affirmatively finding that the "unconscious driver" implied consent provisions did not pass constitutional muster, as Mr. Howes alleged. (R.37:64-9; R.31).

Somewhat predictably then, Mr. Howes does not have much novel commentary to add to the erudite analysis conducted by the Circuit Court in its written decision on the matter of the State's motion for reconsideration, which would be difficult to improve upon in terms of either clarity or thoughtfulness. (R.31). To put it plainly, Mr. Howes believes the Circuit Court got it right— that *McNeely* stands for the proposition that per se exceptions to the Fourth Amendment's warrant requirement are prohibited, that the "unconscious driver" provisions of Wisconsin's implied consent laws operate as such a categorical exception, and that, therefore, the provisions under controversy here are unconstitutional.

### B. Under Wisconsin law, "implied consent" does not mean the police enjoy *carte blanche* to physically force a blood draw.

Forced blood draws conducted by law enforcement constitute "searches" under the Fourth Amendment and are therefore required to be reasonable. *Padley*, 2014 WI App 65, ¶ 23, 354 Wis.2d at 562. In the absence of an established exception, warrantless searches are per se unreasonable and are therefore unlawful. *Id.* This is true even when the search is conducted following a lawful arrest. *McNeely*, 133 S.Ct. at 1558, 185 L.Ed. 696. In the context of a blood draw, the exceptions to the warrant requirement are more or less limited to (a) consent, or (b) a showing of exigent circumstances. There is no claim that exigent circumstances for purposes of exception to the warrant requirement presented in Mr. Howes' case. Thus, the State premises its argument on its (erroneous) construction of "consent".

The State incorrectly interprets the notion of "implied consent" as an invasive literal permission and/or absolute forfeiture of individual security and privacy rights, rather than an implicit agreement to be subject to codified penalties for non-compliance.[4] It persists in doing so despite the Court of

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[4] Wis. Stat. § 343.305(2) reads:

IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, 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

Appeals' discussion in *Padley*, where the Court explicitly clarified the definition of implied consent in finding that Wis. Stat. § 343.305(3)(ar)2. (analogue/companion to the statutes at issue here) did not actually authorize police to conduct a search, and that "'implied consent' alone [cannot] 'serve as a valid exception to the warrant requirement." 2014 WI App 65, ¶ 37, 354 Wis.2d at 569. The *Padley* Court explained the limited scope of consequential permissions authorized under "implied consent", stating:

> [i]t is incorrect to say that a driver who consents to a blood draw after receiving the advisement contained in the "Informing the Accused" form has given "implied consent." If a driver consents under that circumstance, that consent is actual consent, not implied consent. If the driver refuses to consent, he or she thereby withdraws "implied consent" and accepts the consequences of that choice. See, e.g., *McNeely*, 133 S.Ct. at 1566 (Implied consent laws "impose significant consequences when a motorist withdraws consent."); *State v. Neitzel*, 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980) ( "The entire tenor of the implied consent law [WIS. STAT. § 343.305 (1975) ] is ... that consent has already been given [at the time a person

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his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and 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. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3) (a), (am), or (ar), and may designate which of the tests shall be administered first.

> obtains a license] and cannot be withdrawn without the imposition of the legislatively imposed sanction of mandatory suspension."); see also *State v. Krajewski*, 2002 WI 97, ¶ 25, 255 Wis.2d 98, 648 N.W.2d 385 (explaining that a driver can "withdraw[ ] consent" by "refus[ing] to provide a requested sample for testing")...
>
> 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...
>
> [i]n this context, § 343.305(3)(ar)2. does not authorize searches, instead it 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.

*Id.* at ¶¶ 38-40.

Though *Padley* did not involve an incapacitated driver, the Court there– in a footnote to the above-excerpted passage—acknowledged the potential implications that its analysis of implied consent might present in such a context. *Id.* at ¶ 39

fn.10.[5] In essence, the Court presciently observed that, as written, the fact that "implied consent" is transmogrified into actual consent by the "unconscious driver" provisions of the implied consent laws may provide an exception to its general holding that the informed consent statute provision it was reviewing was constitutional (insofar as it applied to conscious persons with the capacity to consent or refuse). Ultimately, *Padley* affirmed the constitutionality of Wis. Stat. § 343.305(3)(ar)2. only to the extent that it allows law enforcement officers to compel a suspected offender to submit to a blood test by presenting them with the choice of compliance

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[5] In its entirety, footnote 10 to paragraph 39 reads:

> We acknowledge that there may be tension between the case law we summarize here and language in the implied consent law as amended by 2009 Wisconsin Act 163, which establishes that, at least in the context of incapacitated drivers, "implied consent" is a sufficient basis on which to proceed with a warrantless search. See WIS. STAT. § 343.305(3)(ar)2. 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. However, we need not address this tension further because, in the instant case, Padley has not called any court's attention to the incapacitated driver scenario and there is no question that Padley was treated by the deputy as a conscious driver who could give actual consent. Having acknowledged this tension, we will not reference the incapacitated driver aspect of § 343.305(3)(ar)2. in this opinion each time that it could represent an exception to our analysis.

or sanctions. It did not imply that a forced blood draw falls into the definition of implied consent law sanctions, nor did it validate any notion that implied consent may serve as a valid exception to the warrant requirement in the absence of express, contemporaneous consent to draw blood.[6]

The State insists that *Padley* was wrong, and therein, that the Circuit Court's conclusion in Mr. Howes' case carved out some sort of improper, *de facto* exemption from the implied consent law for unconscious persons. Again, this conclusion not only relies upon an erroneous view of what "implied consent" conceptually connotes, but collapses upon its own internal contradiction.[7] The only true "exemption" that the Circuit

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6 The State cites a litany of cases in section I.C of its brief to suggest that "implied consent" is the equivalent of actual consent, most of which were considered by the Court in *Padley*, and none of which are necessarily inconsistent with the holding there per the State's own recapitulation of each of the cases' respective decisions. Moreover, Mr. Howes would note that the holdings cited by the State are not consistent as a body of law themselves, as admitted by the State at pages 16 and 17 of its brief. The disagreement as to whether implied consent is given when licensed or upon mere operation highlights the absurdity in the contention that implied consent and actual consent to a Fourth Amendment search are categorically interchangeable. If we cannot agree when implied consent attaches under the statute, how can we conclusively say if or when it ever supplants the consent necessary to permit a constitutionally sound warrantless search to proceed?

7 This same type of contradiction is also evident in the State's insistence that the language in §§ 343.305(3)(ar) and (b) "cannot reasonably be read as referring to a different consent than that which applies in the rest of the

Court's holding delivers is the same "exemption" claimed by conscious drivers who refuse to submit to an evidentiary test— i.e. the non-administration of the sought test in the absence of a warrant or exigent circumstances.[8] Just like their conscious counterparts, unconscious drivers would not be exempt from the test altogether; the proverbial 'ball' is still firmly within in the State's 'court'. It is simply incumbent upon the State— in the

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implied consent law," while simultaneously doing just that by necessary implication. (State's Brief p. 29). If confirmatory consent from a conscious person is a prerequisite to constitutionality of a blood draw– meaning that "implied consent" alone in that context is not enough— how can it suffice where a person is unconscious? It's paradoxical to argue that the same "implied consent" is sufficient to pass constitutional muster in one context but not another immediately after asserting that the only reasonable interpretation of the law would require that the same standard be met no matter the circumstance.

8 Mr. Howes would concede that an unconscious person would be, as a practical matter, "exempt" from refusal sanctions for non-compliance with a request for testing made pursuant to implied consent laws. However, he submits that the State's lamentation at its immediate inability to sanction an unconscious person for non-affirmative conduct is hardly a reason to presume that such a personal invasion is authorized. Nothing in the Circuit Court's holding (or *Padley*) intimates that the State would be deprived wholesale of an opportunity to administer the chemical test. Rather, the Circuit Court's holding by way of *McNeely* and *Padley* just ensures that the same constitutional safeguards are afforded irrespective of an individual's consciousness or lack thereof. If a conscious person has the constitutionally afforded right to require the State to procure a warrant or prove application of a valid exception to the warrant requirement, that same right ought to be afforded to an unconscious person. Presuming the opposite would seem manifestly unjust.

absence of confirmatory, contemporaneous consent— to come up with either a warrant or a showing of exigent circumstances before the test is administered.

Finally, any notion that the State's position on consent has a basis in good-standing legal precedent is a fiction rendered obvious by the fact of law enforcement agencies' changes in policy and procedure in the wake of *McNeely*. If implied consent could suffice as actual consent (given at the time of licensure per the State's reasoning) then there would be no need for a law enforcement officer to ever apply for a warrant in order to initiate a blood draw. To extend the logic even further and as far as pre-*McNeely*— reading the "Informing the Accused" form would seemingly be rendered superfluous— after all, consent for the search has already been given, like the State says. (State's Brief p.17, 25). The obvious obverse implication of the State's acknowledgment that "implied consent" can be revoked is that implied consent is neither absolute nor an adequate substitute for the actual consent necessary to initiate a blood draw in the absence of a warrant and where no other exceptions to the warrant requirement apply.

### C. Wis. Stat. §§ 343.305(3)(ar) and (b) create a per se rule permitting a warrantless search in the absence of any valid exception to the warrant rule, i.e. actual consent or exigent circumstances, in violation of *McNeely* and therein, the Fourth Amendment.

With all due respect, the bulk of the State's brief consistently reiterates a few minor variations on the same basic

theme that— despite the explicit, contradictory commentary in the very recent *Padley* decision—"implied consent" authorizes warrantless blood draws in unconscious persons. Accordingly, as far as Mr. Howes understands, the State believes that no further inquiry is really required. The State does not meaningfully address the holding in *McNeely*, or appear to acknowledge its significance with respect to the Circuit Court's holding in this case. Given the tenor and content of the Circuit Court's written decision denying the State's motion for reconsideration, Mr. Howes submits that the State has largely missed the forest for the trees. While *McNeely* may not have directly addressed analogues of the express provisions on trial here, its underlying logic and reasoning seem resoundingly clear: per se exceptions to the warrant requirement are not permissible, nor in consonance with the "totality of the circumstances" approach espoused in *Schmerber* as the proper rubric by which to determine the "reasonableness" of a search. 133 S.Ct. 1559-60. Mr. Howes submits that the Circuit Court was hardly inscrutable in its progression of logic on this point (with its emphasis on "irrebuttable presumptions") and so Howes admits a certain bemusement at the State's characterizations of the Circuit Court's holding that suggest anything to the contrary.

To wit, in its written decision denying the State's motion for reconsideration, the Court stated:

> I would like to clarify the significance of the *McNeely* case in my reasoning. In *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the Court reaffirmed that a blood draw is a search under the Fourth Amendment. A warrant is required unless there is a recognized exception. That is true even when the search is conducted following a lawful arrest. *Id.* At 1558.

> The natural metabolization of alcohol in the bloodstream is not a per se exigency so as to justify an exception to the warrant requirement. Whether the dissipation of alcohol presents an exigency must be determined on a case-by-case basis considering the totality of the circumstances. *Id.* at 1563
>
> Before *McNeely*, some courts, including our supreme court, were of the view that, provided there was probable cause, the dissipation of alcohol categorically constituted an exigent circumstance, rendering a warrant unnecessary. *See, State v. Bohling*, 173 Wis.2d 529 (1993). *Bohling* is no longer good law, *see*, *State v. Reese*, 353 Wis.2d 266, ¶ 18 (2014).
>
> So, the blood draw in our case needs to fit within a recognized exception to the warrant requirement in order to pass constitutional muster. The exception advanced by the state here is consent, invoking the provisions of the implied consent law referred to above. Our statutes, however, cannot authorize something that the Fourth Amendment prohibits.

(R.31, p.3). The Fourth Amendment prohibits categorical exceptions to the warrant requirement dictating that warrantless searches are per se unreasonable, which is what § 343.305(3)(ar) and (b) effectively create. As written, the "unconscious driver" provisions constitute the functional equivalent of the categorical rule that dissipation of alcohol comprises an exigent circumstance— a maxim quashed by *McNeely*.

To be more specific, the Supreme Court in *McNeely* held that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case...it does not do so categorically." 133 S.Ct. 1563. Pointedly, it concluded that

"[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."*Id.* By way of that proclamation, Mr. Howes submits that *McNeely* stands for the proposition that per se exceptions to the warrant requirement are prohibited under the Fourth Amendment. Each case must be examined in totality. If the *McNeely* court considered implied consent a valid per se exception to the warrant requirement, there would have been no need to draft the opinion in the first place— the Court could have just relied on Missouri's analogous "implied consent" involved in that case. *Id.* at 1557.

In any event, Mr. Howes understands the Circuit Court's ultimate holding to be that the Wisconsin statutes under scrutiny in this case, §§ 343.305(3)(ar) and (b), create an "irrebuttable presumption" that "cannot be reconciled with the Fourth Amendment's warrant requirement" as affirmed and clarified by the logic and analysis in *McNeely*. (R.31:1). The State, while not directly engaging that proposition, cites *State v. Piddington*, 2000 WI App 44, 233 Wis.2d 257, 607 N.W.2d 303, *State v. Disch*, 129 Wis.2d 225, 385 N.W.2d (1986), and *State v. Wintlend*, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 745, along with some related progeny, to generally support their objection to any assertion that a blood draw based on implied consent alone runs afoul of the Fourth Amendment. While these cases can all be distinguished factually– *Piddington* and *Disch* concerned whether notice requirements under the implied consent scheme were met rather than the general constitutionality of warrantless blood draws, and *Wintlend* largely constitutes a study of the reasonableness of the coercive nature of the implied consent statute not entirely different from some of the discussion seen in *Padley*— they

collectively signify a more telling problem: they all are firmly anchored in the pre-*McNeely* canon.

Prior to McNeely, as the Circuit Court observed, some courts, including the Wisconsin Supreme Court, "were of the view that, provided there was probable cause, the dissipation of alcohol categorically constituted an exigent circumstance, rendering a warrant unnecessary." (R.31:3). By the time *Piddington* was written, that notion was apparently considered so self-evident that the only tie-in necessary to tether an analysis to a footing in established precedent was something along the lines of "[t]he Supreme Court in *Schmerber v. California*...held that a state-compelled blood test following a person's arrest for OMVWI does not violate the Fourth, Fifth or Fourteenth Amendments to the U.S. Constitution," before freely proceeding with further discussion.

Ignoring the extent to which this decades-old presumption permeated and crystallized in much of the attendant case law is part and parcel of the State's foremost conceit in its position, as this "constitutionally permissible" presumption—originating with *Schmerber* in 1966— predates the very "unconscious driver" presumptions at issue here that the State considers so sacrosanct at least in part, ironically, due to their age. (State's Brief p. 32). The implied consent laws themselves were drafted with the *Schmerber* presumption firmly ensconced as a matter of legal dogma, and therefore, much of the case law that previously touched upon these presumptions is predicated upon antiquated notions of "exigency" and underdeveloped, if not wholly misconstrued, extensions of *Schmerber* and the concept of categorical exception. The implied consent laws themselves are (almost certainly) directly premised upon the purported exigency created by alcohol

dissipation — apparent in the fact that the statutes create the presumption of consent where a law enforcement officer "detects any presence" of alcohol or another controlled substance— which is precisely the fallacious conception of exigence that was expressly repudiated by *McNeely*. If the dissipation of alcohol in a conscious person does not present a per se exigency for purposes of an exception to the warrant requirement, how can the mere detection of "any presence" of alcohol in an unconscious person be construed to present one?

The undeniable truth of the matter is that the jurisprudential landscape, at least insofar as concerns the close question of the constitutionality of categorical exceptions to the warrant requirements, has now changed with *McNeely* and its embracement of modern realities in law enforcement[9] that coincides with its rejection of some of problematic developments from *Schmerber*.[10] A basic foundational premise upon which much of the pertinent case law relied, however obliquely, has been significantly altered— or perhaps, to state it more accurately— it has been restored to its original form, with years of nebulous outgrowth suddenly elided.

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9 Mr. Howes would note that the Circuit Court included some instructive empirical remarks to this end at page 7 of its written decision denying the State's motion for reconsideration. (R.31:7).

10 See also *State v. Reese*, 2014 WI App 27, ¶¶ 16-19, 353 Wis.2d 266, 844 N.W.2d 396, and *State v. Foster*, 2014 WI 131, ¶¶ 31-40, 856 N.W.2d 847, for an overview of the *McNeely* effect with respect to Wisconsin law thus far.

As the Circuit Court observed, our statutes cannot authorize something that the Fourth Amendment prohibits. The Fourth Amendment, per *McNeely*, prohibits per se or categorical exception to the warrant requirement— including any purported based upon "implied consent," which does not suffice in terms of actual, constitutional consent per *Padley*. Thus, the "unconscious driver" presumptions at issue here are invalid under the Fourth Amendment. A state could not pass legislation permitting police to freely search a home *sans* search warrant so long as no one is home to answer the door in order to object to it. The only valid basis for allowing otherwise would be a showing that "exigent circumstances" exist— a showing that cannot be made by any per se or categorical rule, but only upon an analysis of the totality of the circumstances. Because Wis. Stat. §§ 343.305(3)(ar) and (b) preclude such an analysis from taking place in the situations to which they purportedly apply, the Circuit Court correctly concluded that these statutes are constitutionally invalid.

## CONCLUSION

For the foregoing reasons— because "implied consent" is not constitutional, actual consent, and because the "unconscious driver" provisions under scrutiny therein create an irrebuttable presumption and/or a categorical rule of exception to the warrant requirement that is irreconcilable with the Fourth Amendment— Mr. Howes respectfully asks this Court to affirm the judgment of the Circuit Court.

Dated this 29th day of January, 2015.

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,869 words.

Dated this 29th day of January, 2015.

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CERTIFICATION OF COMPLIANCE WITH
§ 809.19(12), WIS. STATS.

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

I further certify that the 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 29th day of January, 2015.

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