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OF WISCONSIN

No. 14AP1870-CR

IN THE SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN, PLAINTIFF-APPELLANT,

v.

DAVID W. HOWES, DEFENDANT-RESPONDENT.

On Appeal from the Dane County Circuit Court,
The Honorable John W. Markson, Presiding,
Case No. 2013CF1692

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT, DAVID W. HOWES

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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 joins the State's position on oral argument and publication, believing it warranted and necessary to clarify the workings and application of the implied consent law in the context presented here.

STATEMENT OF THE FACTS AND CASE

Howes does not dispute the State's description of this case's procedural history. Howes also does not dispute the State's general recitation of Wisconsin's statutory scheme of implied consent except to the extent that it asserts that the unconscious-driver "presumption" of consent to a blood draw is rebuttable and otherwise constitutionally sound. Howes contends that the unconscious driver provisions of Wis. Stat. § 343.305 create an irrebuttable presumption of consent and are accordingly unconstitutional insofar as they authorize a warrantless blood draw in the absence of actual voluntary consent sufficient to satisfy the Fourth Amendment or pursuant to any other established exception to the warrant requirement. He further asserts that Wisconsin's implied consent provisions, as applied to unconscious drivers, operate in fact as a categorical exception to the warrant requirement, thereby violating the Fourth Amendment per the reasoning of the Supreme Court in *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

Finally, Howes does not dispute the general facts of the case as described by the Court of Appeals in its certification: police were dispatched to the scene of an accident involving Howes (on his motorcycle) and a deer. App. 2.[1] Howes was found seriously injured and unconscious. App. 2. He was transported to a hospital by ambulance. App. 2, 48. Howes reportedly smelled of alcohol. App. 2. Subsequently, while at the hospital, a law enforcement officer read him the informing the accused form before subsequently directing medical personnel to draw a blood sample without first obtaining a warrant, relying on the authority afforded under Wis. Stat. § 343.305 and by Howes' "implied consent." App. 3, 54. Testing revealed a blood alcohol content of 0.11. App. 3.

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[1] For the purpose of the Court's convenience, all of Howes' citations to an Appendix refer to the pagination of the State's Appendix. The Supplemental Appendix that Howes submits in conjunction with his brief will only contain copies of unpublished opinions that he cites, per court rule.

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.

Ultimately, this case turns on whether Wis. Stat. §§343.305(3)(ar) and (b) are constitutional.[2] The constitutionality of a statutory scheme is a question

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[2] 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. *State v. Padley*, 2014 WI App 65, ¶ 35, 354 Wis.2d at 569. Some 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 State, at footnote 9 of its brief, refutes this notion and asserts that the statute could apply in a situation where no search is ultimately permitted— where an unconscious driver is discovered under circumstances that indicate that he had previously withdrawn his "revocable" implied consent. Presumably, the State is referring to the possibility mentioned earlier in its brief that an unconscious driver *could* revoke his consent by carrying a notarized letter in his front pocket objecting to a search. Howes submits that this notion, while imaginative, is unreasonable under the Fourth Amendment to the point of absurdity and highlights the unworkability of the State's theoretical consent scheme. In effect, this would mean that an unconscious driver

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).

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 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. App. 26-27, 100-102. It discussed the nuance of "implied consent" in explicating *State v. Padley*, 2014 WI App 65, 354 Wis.2d 545, 849 N.W.2d 592, 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). App. 28-31, 99-102. 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

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> would only have the ability to revoke his or her implied consent as a matter of anticipation, and that revocation would hang in indefinite suspension (without inducing penalty) until circumstances arose that would allow it to take effect (presumably triggering a penalty). This onerous impracticality hardly constitutes a meaningful, practicable ability to limit or revoke consent. Such ability is a necessary element of consent that is valid under the Fourth Amendment. See *State v. Villarreal*, 475 S.W.3d 784, 799 (Tex. Crim. App. 2014), reh'g granted (Feb. 25, 2015), cert. denied, No. 15-1063, 2016 WL 707952 (U.S. June 28, 2016) (citing *Florida v. Jimeno*, 500 U.S. 248, 252, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). As a matter of both practicality and constitutional principle then, Howes submits that, for an unconscious driver, consent is effectively irrevocable and thereby invalid under the Fourth Amendment.

did not pass constitutional muster, as Howes alleged. App. 27, 98-103.

The District IV Court of Appeals certified the case for this Court, stating that the central issue presented is "whether provisions in Wisconsin's implied consent law authorizing a warrantless blood draw from an *unconscious* suspect violate the Fourth Amendment to the United States Constitution." App. 1. It homed in on the issue of whether implied consent, deemed to have occurred before a defendant is ever a suspect, is voluntary consent for purposes of the consent exception of the Fourth Amendment's warrant requirement. App. 1. The Court noted that the parties agreed that this statutory justification for warrantless blood draws is a categorical exception to the warrant requirement, but differed as to whether such exception satisfies the Fourth Amendment. App. 2. After touching on *McNeely* and some of the "muddled" case law concerning consent, the Court ultimately concluded that "[t]he question seems to boil down to whether courts should apply the normal case-by-case totality-of-the-circumstances test, as Howes argues, or instead conclude that the scheme is, in effect, a permissible per se exception, as the State argues. App. 23.

To put it plainly, Howes believes that the Circuit Court got it right with its original determination— that (1) *Padley* provides a clear elucidation of the constitutional implications of implied consent, and therein, that the *Padley* distinction between "implied" consent and "actual" consent renders the use of implied consent to authorize warrantless blood draws from unconscious persons violative of the Fourth Amendment. Furthermore, and expanding on the Circuit Court's logic, he believes (2) that *McNeely* stands for the general proposition that per se exceptions to the Fourth Amendment's warrant requirement are prohibited, and accordingly, because the "unconscious driver" provisions of Wisconsin's implied consent laws effectively operate as such a categorical exception, the provisions under controversy here are unconstitutional. That being the case, Howes submits (3) that the Circuit Court's judgment should be affirmed, and that no good faith exception to the exclusionary rule applies.

B. Wisconsin's implied consent provisions authorizing a suspicion-based warrantless blood draw of an unconscious driver are unconstitutional under the Fourth Amendment.

1. *Padley* correctly delineates the bounds of implied consent with respect to the Fourth Amendment.

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.[3] 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 allowing warrantless blood draws in the absence of circumstances indicating an intent to revoke that permission rather than merely an implicit agreement to be subject to codified penalties for non-compliance.[4]

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[3] Howes submits that the Supreme Court, in *Birchfield v. North Dakota*, No. 14-1468, 2016 WL 3434398, at *5 (U.S. June 23, 2016), conclusively determined that a blood draw may not be administered under the "search incident to arrest" exception to the Fourth Amendment warrant requirement.

[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,

It persists in doing so despite the Court of 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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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, 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.

The penalties for failure to comply with these provisions are outlined at length in §§ 343.305(9)-(10m).

> 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

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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

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 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]

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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.

6 The State cites numerous cases indicating that implied consent statutory schemes are generally valid, but none that acutely consider the question of whether implied consent is tantamount to actual consent permitting a warrantless blood draw under circumstances similar to those presented here. In addition to some Wisconsin case law touching upon the general mechanics of the implied consent statutes' refusal procedures, the State mentions *State v. Scales*, 64 Wis.2d 494, 219 N.W.2d 286 (1974), which briefly discusses the presumptive consent of unconscious drivers, but

The State largely ignores existence of *Padley* despite the Circuit Court's reliance upon it and the certifying Court of Appeals' intimation that *Padley* more closely controls the issue at stake here than broad statements about the validity of implied consent laws and penalization for non-compliance in general. App. 13-23.[7] In doing so, the State seems to miss the proverbial boat entirely: implied consent laws and penalties imposed for noncompliance with those laws are generally permissible, but implied consent alone cannot constitute de facto permission to conduct a warrantless blood draw. The effective permissions of "implied consent" cannot be construed as broadly as the State would make them out to be.

Despite its implicit repudiation of *Padley*, the State neither addresses the opinion directly nor cites to any case law that explicitly support its expansive view of "implied consent." The cases that are emphasized either simply state general approval for the notion of implied consent schemes or only actually touch on the issue of whether implied consent provides authorization for a constitutionally valid search in an oblique sense. State's Br., 19-22. This particularly evident in the State's discussion of *State v. Piddington*, 2001 WI 24, 241 Wis.2d 754, 623 N.W.2d 528 and *State v. Neitzel*, 95 Wis.2d 191, 289 N.W.2d 828 (1980). In *Piddington*, the issue was

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settled the case on other grounds (moreover, the State also concedes that *Scales* and *State v. Neitzel*, 95 Wis.2d 191, 289 N.W.2d 828 (1980), another cases it relies heavily upon, incorrectly interpret when implied consent actually occurs). Similarly, *Breithaupt v. Abram*, 352 U.S. 432 (1957) was resolved under the due process clause, did not discuss irrebuttable presumptions, and took a favorable view of blood tests that is somewhat inconsistent with the Court's recent decision in *Birchfield v. N. Dakota*. *South Dakota v. Neville*, 459 U.S. 553 (1983) merely concerned whether the fact of a refusal to comply with implied consent laws might be used against a defendant in court.

[7] Howes submits that the Court of Appeals, in its certification, accurately elucidated the tension between *Padley* and *State v. Wintlend*, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 745, the cases *Wintlend* relied upon, and its progeny. He submits that *Padley* controls here, as it includes the most direct and lucid discussion of the consent issue under evaluation here.

whether an officer complied with a statutorily imposed duty to provide implied consent warnings. As the Court of Appeals observed, the issue as to whether the defendant's consent to the blood draw that took place was voluntary for Fourth Amendment purposes was never addressed App. 21. Because the defendant in *Piddington* was deaf, and the Court endorsed the officer's reading of the implied consent warnings in spite of that fact, the State apparently takes case to mean that implied consent alone can justify a warrantless blood test irrespective of a voluntariness analysis. This is an erroneously overbroad reading that fails to mention that the deaf defendant was able to communicate through an interpreter and notes passed back and forth with the arresting officer. 2001 WI 24, ¶ 29-32. The defendant himself did not go so far to suggest that his eventual actual consent to a blood draw was involuntary, and so the State's attempt to draw an inference that a voluntariness analysis has no place where implied consent is involved seems confused at best.[8]

The suggestions made by the State using the *Neitzel* decision are similarly awkward and overstated. *Neitzel* merely concerned the propriety of refusal penalties and the issue of whether a right to counsel attaches before a suspect decides to take or refuse a chemical test for intoxication. In its certification, the Court of Appeals pointed out all of *Neitzel*'s shortcomings with respect to the applicable analysis here, explicitly observing that the *Neitzel* Court did not focus on consent. App. 19-21. Rather, within its discussion of the right to counsel issue, the *Neitzel* Court generally observed that

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[8] As the Court of Appeals alluded, Howes' endorsement of *Padley* necessitates his objection to the unconscious driver provisions on the basic grounds that the statute eschews the proper "totality-of-the-circumstances" voluntariness analysis under *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1972). App. 9. Seeing that analysis through to fruition results in the determination that passive, implied consent via statute does not constitute actual consent for purposes of the Fourth Amendment, as decided in *Padley*. Obviously, Howes also submits that the unconscious driver provisions fall short of meeting any totality-of-the-circumstances considerations pursuant to *McNeely*.

> [i]t 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.

95 Wis.2d at 201. That statement is immediately followed by a discussion of the penalties that a driver would face if he were to recant that consent. *Id.* There is nothing absolutist mentioned regarding the effect of implied consent in terms of warrantless blood draws or that implied consent premised (erroneously) on licensure dispensed with the issue of voluntariness. The Court did not overtly propose that implied consent alone satisfies the Fourth Amendment when it comes to blood draws. Thus, when the certifying Court of Appeals observed that *"Neitzel* uses broad language that *could* be read as the State now reads it...as holding that it is statutory implied consent, given before a person becomes a suspect, that supplies voluntary consent to a blood draw, not some later consent a person might give directly to police," it was hardly delivering an endorsement of that view, which the State seems to suggest (emphasis in original). App. 19. Moreover, as noted herein at footnote 5, the State itself concedes that the *Neitzel* Court's approximation as to when implied consent attaches was incorrect, so it seems paradoxical to rely on commentary not immediately concerning the issue before it in order to justify an overruling of *Padley*.

Ultimately, the State frames its case around the notion of absolute, continuous consent to submit to chemical testing that can only be interrupted or nullified by express revocation at the time that such testing is requested. The State insists that *Padley*'s distinction between implied and actual consent is invalid, and that this case turns on the matter of whether a singular instance of implied consent per se authorizes a constitutionally sound, warrantless blood test of an unconscious driver. Again, the State's conclusion that the statute does not violate the Fourth Amendment rests upon an erroneous view of what "implied consent" conceptually connotes, which is merely an agreement to abide by the penalties for actual noncompliance with the statutory directives. Beyond that *Padley* rationale, this assertion is supported by the fact that reading the "Informing the Accused" form is statutorily required at all. The act

of actually reading the form at the time that a search is requested would be entirely superfluous under the State's view— after all, consent for the search has already been given and no extended process would be needed beyond a simple request of a 'yes' or a 'no.' The fact that the informing the accused is part of drunk-driving protocol suggests that serious rights are implicated and generally supports the notion that implied consent, in and of itself, should not be the sole prerequisite to warrantless blood test, unconscious or not. The obverse implication of the State's acknowledgment that "implied consent" can be revoked at that time at all is that the original 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.

Howes would note that a holding consistent with this proposition would not "exempt" unconscious drivers from penalization for driving while intoxicated. The only true "exemption" that the Circuit Court's holding here 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.[9] 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 absence of confirmatory,

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[9]

> 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 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.

contemporaneous consent— to come up with either a warrant or a valid exception to the requirement for one (here, a showing of exigent circumstances) before the test is administered.

a. Even if *Padley* did not settle the issue, suspicion-based warrantless blood draws of unconscious drivers are unreasonable.

The State devotes the second section of its brief to the argument that warrantless blood draws in the presented context are presumptively reasonable. Much of the State's argument is again premised on the notion that drivers imply their consent to searches by driving on Wisconsin's highways. The State asserts therein that consent to a search may be implied by conduct. Howes would note that, coincidentally, the conduct of a defendant can also imply a refusal, or revocation of that consent. *State v. Reitter*, 227 Wis.2d 213, 235, 595 N.W.2d 646 (1999). Utter non-responsiveness to a request to submit to a chemical test— presumably identical to the response given by an unconscious driver subjected to a reading of the "informing the accused"— could result in a refusal, requiring the necessity of a warrant (in the absent of exigent circumstances) if a chemical test is to be legally administered. That peculiarity notwithstanding, Howes submits that the United States Supreme Court's ruling in *Birchfield v. North Dakota* assails and undermines the State's position here.

In *Birchfield*, the Court took up the issue as to whether the "search incident to arrest" categorical exception to the Fourth Amendment's warrant requirement permitted blood tests in cases of arrests for drunk driving. After assessing both the privacy interests at stake and the governmental interest in preserving the safety of the public on our nation's highways (taking into account many of the same considerations offered by the State in this case), the Court concluded that the Fourth Amendment does not categorically permit warrantless blood tests incident to drunk-driving arrests. 2016 WL 3434398, at *25. Distinguishing blood tests from breath tests, the Court stated that "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." *Id.* Referring to *McNeely*, the Court went on to explain that "[n]othing prevents

the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Id*. More importantly, for purposes of the issue in this case, the Court specifically noted that

> [i]t is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Id.

Finally, and though it noted that the constitutionality of implied consent schemes were not generally under review, the Court took up the opportunity to address an alternatively submitted argument that warrantless blood tests "are justified based on the driver's legally implied consent to submit to them." *Id.* at *26. The Court essentially drew a line in the sand, stating "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* Citing "reasonableness" as the underlying touchstone to all Fourth Amendment analysis, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.*

While refusals are not criminal offenses in Wisconsin, Howes submits that the tenor and logic of the *Birchfield* holding still sanction the notion that warrantless blood draws justified by only implied consent (as a categorical exception) are unreasonable under the Fourth Amendment.[10] If the Supreme

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[10] While Howes submits that *Padley* and *McNeely* ultimately control here, he also believes that *Birchfield's* discussion of the reasonableness and constitutional implications of a blood draw should inform this Court's analysis. To the extent that *Birchfield* enunciates new rules, Howes submits that the retroactivity rule should apply. See *State v. Dearborn*, 2010 WI 84, ¶ 31, 327 Wis.2d 252, 786 N.W. 2d 97. As also noted in

Court refuses to categorically permit such a personal invasion premised on the well-established "search incident to arrest" exception to the warrant requirement, a blood draw based on the nebulous notion of statutorily imputed implied consent should certainly not pass muster. As the *Birchfield* Court observed, an identifiable exigency may permit a warrantless blood draw under certain circumstances, but otherwise, law enforcement is free to pursue a warrant. As the Circuit Court noted, there was no such exigency in Howes' case. See App. 27, 101.

2. In the wake of *McNeely*, categorical nontraditional exceptions to the Fourth Amendment's warrant requirement are prohibited, and as the "unconscious driver" provisions of Wisconsin's implied consent statutes operate as a categorical exception to the Fourth Amendment's warrant requirement, such provisions are therefore unconstitutional.[11]

This Court has itself acknowledged that *McNeely* abrogated previous Wisconsin precedent that dictated that the natural dissipation of alcohol in a defendant's bloodstream was per se an "exigent circumstance" justifying a warrantless blood draw, holding that "the Fourth Amendment does not allow such per se rules in the context of warrantless investigatory blood draws." *State v. Kennedy*, 2014 WI 132, ¶ 29, 359 Wis.2d 454, 856 N.W.2d 834.

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this brief, however, Howes believes that the exclusionary rule should still apply given that *McNeely* was settled well before Howes' accident and arrest.

[11] As observed by the Court of Appeals, there is "a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an [individualized] assessment." *McNeely*, 133 S.Ct. 1552, 1559 n.3. App. 10, n.4. The Court also noted that the State does not argue that implied consent falls into this category of exceptions. App. 10, n.4.

Despite that being the case, the State somewhat perversely asserts that *McNeely* actually supports its position in this case. State's Br., 18, 22. Howes submits that the State's confidence is decidedly misplaced, and that *McNeely* actually stands for the broader proposition that *all* (nontraditional) per se or categorical exceptions to the Fourth Amendment's warrant requirement are— in the context of drunk-driving arrests— unconstitutional. Moreover, Howes, as the Court of Appeals has observed, submits that the unconscious driver provisions of Wisconsin's implied consent law under scrutiny are quintessentially the functional equivalent of the sort of categorical rule explicitly rejected by the Supreme Court in *McNeely*, and are therefore unconstitutional.

Treatment of *McNeely* and its progeny in other jurisdictions that have explored the constitutionality of similar implied consent provisions supports this contention. In *State v. Dawes*, the Kansas Court of Appeals explicitly found that "[u]nder *McNeely*, implied consent that was not revoked because the suspect was unconscious cannot do away with the warrant requirement for a blood draw; the State needs to establish a warrant exception." No. 111310, 2015 WL 5036690, at *5 (Kan. Ct. App. Aug. 21, 2015)(unpublished). The *Dawes* Court based its reasoning on the United States Supreme Court's treatment of another case, *Aviles v. Texas*, 134 S. Ct. 902, 187 L. Ed. 2d 767 (2014). In *Aviles*, the Texas Court of Appeals had upheld a warrantless blood draw based on a statute "that did not take into account the totality of the circumstances but only covered certain facts." *Id.* at *4. The Supreme Court granted review of the case and remanded it for consideration in light of *McNeely*, "indicating that *McNeely's* holding was not limited to the exigent-circumstances exception to the warrant requirement and that the United states Supreme Court was disapproving of all categorical exceptions to the Fourth Amendment." *Id.* Taking that disapproval into account, the *Dawes* Court found that the unconscious driver provisions of the Kansas implied consent statutory scheme "improperly created a per se consent exception to the warrant requirement in violation of the Fourth Amendment." *Id.* at *5.

Discussing the same treatment of *Aviles*, the Texas Court of Appeals, in *Weems v. State*, concluded (in concert with other Texas appellate courts) that

> the implied consent and mandatory blood draw statutes are not exceptions to the Fourth Amendment's warrant requirement. The State urges that we balance the public and private interests that are implicated in serious DWI cases and find that Texas's mandatory blood draw statute, section 724.012(b), is a reasonable substitute for the Fourth Amendment's warrant requirement. *McNeely*, however, clearly proscribed what it labeled categorical or per se rules for warrantless blood testing, emphasizing over and over again that the reasonableness of a search must be judged based on the totality of the circumstances presented in each case. See *McNeely*, 133 S.Ct. at 1560–63. Texas's implied consent and mandatory blood draw statutes clearly create such categories or per se rules that the Supreme Court proscribed in *McNeely*. See TEX. TRANSP. CODE ANN. §§ 724.011(a), 724.012(b). These statutes do not take into account the totality of the circumstances present in each case, but only consider certain facts. See *id.* Thus, we hold that the implied consent and mandatory blood draw statutory scheme found in the Transportation Code are not exceptions to the warrant requirement under the Fourth Amendment. To be authorized, the State's warrantless blood draw of Weems must be based on a well-recognized exception to the Fourth Amendment.

434 S.W.3d 655, 665 (Tex. App. 2014), petition for discretionary review granted (Aug. 20, 2014), aff'd, No. PD-0635-14, 2016 WL 2997333 (Tex. Crim. App. May 25, 2016). Ultimately, after remand, the *Aviles* Court acknowledged the holding in *Weems* and co-opted its reasoning:

> [i]n this case, as in *Weems*, the State urges us to adopt a balancing test—balancing the public interests (public safety on roads and DWI enforcement) and the defendant's "minimal" privacy interests—in DWI cases wherein the defendant has been convicted of two or more prior DWIs. This is the same approach we specifically rejected in *Weems*. See 434 S.W.3d at 665–66. The State also suggests that statutes such as the implied consent and mandatory blood draw statutes are permissible exceptions to the warrant requirement because they are searches

> pursuant to reasonable statutes or regulations. We hold this flies in the face of *McNeely's* repeated mandate that courts must consider the totality of the circumstances of each case. 133 S.Ct. at 1560–63. Thus, we reject the State's suggested balancing and regulatory approach.

Aviles v. State, 443 S.W.3d 291, 294 (Tex. App. 2014), petition for discretionary review refused (Jan. 27, 2016).

In *People v. Arredondo*, the Sixth District Court of Appeal in California arrived at a similar conclusion when confronted with the issue of whether implied consent provides a valid exception to the warrant requirement. 245 Cal. App. 4th 186, 203, 199 Cal. Rptr. 3d 563, 577, as modified on denial of reh'g (Mar. 24, 2016), review granted and opinion superseded, 371 P.3d 240 (Cal. 2016). It found that "[n]othing in *McNeely* suggests that statutory implied consent is by itself a sufficient basis to forego a warrant." *Id.* Subverting the State's argument in this case that *McNeely* promotes the administration of warrantless blood draws based on implied consent, the *Arredondo* Court explained that

> the *McNeely* court addressed an argument that to require a case-by-case demonstration of exigent circumstances would "undermine the governmental interest in preventing and prosecuting drunk-driving offenses." (*McNeely*, supra, —— U.S. ——, 133 S.Ct. at p. 1566.) The court cited the states' implied consent laws as an example of the "broad range of legal tools" states have "to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." (Ibid.) Those laws, explained the court, "require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." (Ibid.) The laws also "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." (Ibid.) The court did not suggest that a statute explicitly imputing

> consent to drivers—as California's does—would sustain a warrantless blood draw of its own force. Nor did the court address the effect of such laws on the Fourth Amendment rights of a driver who is unconscious or otherwise incapable of either consenting or refusing to consent.[12]

Id. Ultimately, the *Arredondo* Court concluded that

> if imputed consent is to be held sufficient to sustain a warrantless search, the holding will have to come from a court other than this one. We fear the Fourth Amendment could be left in tatters by a rule empowering the state to predicate a search on conduct that does not in fact constitute a manifestation of consent but is merely "deemed" to do so by legislative fiat.

Id. at 205.

Cases from many other States have come to similar conclusions in exploring the constitutionality of their own implied consent statutes authorizing warrantless blood draws. See *Byars v. State*, 336 P.3d 939 (Nev. Slip Op. 2014) (An irrevocable consent from implied consent statute does not make the search reasonable under the Fourth Amendment); *State v. Wells*, 2014 WL 4977356 (Tenn. Crim. App. 2014)(unpublished) (Privilege of driving does not alone create a consent for forcible blood draw. The State needs a warrant or an exception to the warrant requirement for it to be reasonable); *State v. Fierro*, 853 N.W.2d 235 (S.D. 2014) (Implied consent standing alone is not an exception to the warrant requirement); *State v. Butler*, 302 P.3d 609 (Ariz. 2013) (Fourth Amendment requires arrestee's consent to be voluntary, independent of the implied consent, to justify a warrantless blood draw); *Williams v. State*, 167 So.3d 483, 490, 491 (Dist. Ct. App. Fla. 2015) (statutory implied consent to breath alcohol test pursuant to implied consent law was not equivalent to the Fourth Amendment consent for purposes of

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[12] Howes would note that the Circuit Court here also observed that "[i]n no way did the *McNeeley* (sic) Court sanctioned the idea that a police officer can order a blood draw from a driver incapable of actually giving consent." App. 32

consent exception to the search warrant requirement. Allowing implied consent statutes to constitute a per se categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold that voluntariness must be determined based on the totality of the circumstances); *People v. Schaufele,* 325 P.3d 1060, 1068 (Col. 2015) ("[*McNeely* holds] that the Fourth Amendment requires officers in drunk-driving investigations to obtain a warrant before drawing a blood sample when they can do so without significantly undermining the efficacy of the search.")[13]

The State refers to cases from other jurisdictions ostensibly arriving at opposite conclusions to support its position, but Howes submits that these cases were all either erroneously decided, premised on pre-*McNeely* canon, or inapposite on the facts and precise issues under review. The State puts the most emphasis on a case from Idaho, *Bobeck v. Idaho Transp. Dept.*, 2015 WL 5602964 (Idaho Ct. App. 9/24/2015), which upheld an unconscious driver provision of an implied consent law because the driver did not object to or resist a blood draw at the time the blood was drawn. As Howes previously submitted to the Court of Appeals, *Bobeck* was decided in error. Prior to *Bobeck*, the Idaho Supreme Court ruled in *Idaho v. Wulff*, 157 Idaho 416 (2014), that the application of an implied consent statute as a per se exception to the warrant requirement as to blood draws violates the Fourth Amendment. More specifically, the Court held that

> [i]rrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent. Voluntariness has always been analyzed under the totality of the circumstances approach: 'Whether a consent to a search was in fact voluntary' . . . is a question of fact to be

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[13] Howes would also note that although the question of the constitutionality of a statute authorizing a warrantless blood draw of an unconscious driver without their express consent was not immediately before it, the Minnesota Court of Appeals recently observed that "the constitutional application of [the unconscious driver] provision requires an exigency to preserve evidence," referencing both State precedent and *McNeely* in doing so. *State v. Schlingmann*, No. A15-1080, 2016 WL 3461854, at *5 (Minn. Ct. App. June 27, 2016) (unpublished).

determined from the totality of all the circumstances.

Id. at 422. The Court went on to elaborate by specifically referencing *McNeely* and stating that "[a] holding that the consent implied by statute is irrevocable would be utterly inconsistent with the language in *McNeely* denouncing categorical rules that allow warrantless forced blood draws." *Id.* The Court unequivocally indicated that it "read McNeely as prohibiting all per se exceptions to the warrant requirement. This conclusion is consistent with other states that have considered the issue." *Id.* at 423.

As far as the other cases cited by the state are concerned— *Goodman v. Virginia*, 558 S.E.2d 555(Va. Ct. App. 2002) was decided pre-*McNeely*, as was *Minnesota Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416 (Minn. 1979). The Court in *Martini v. Virginia*, No. 0392-15-4, 2016 WL 878017 (Va. Ct. App. Mar. 8, 2016)(unpublished) relied on the aforementioned *Goodman* (erroneously, Howes submits, in light of *McNeely*) in finding that a forced blood draw pursuant to Virginia's implied consent statute did not violate the Fourth Amendment, but also noted that the constitutionality of that statute was not at issue in the appeal. *Id.* at *4, n.2. In *Idaho v. Eversole*, No. 43277, 2016 WL 1296185 (Idaho, April 4, 2016), the Court expressed some reservations about reading *McNeely* too narrowly in the context of implied consent statutes, but the case ultimately turned "on the scope of the withdrawal of implied consent to a particular form of alcohol testing," and suppression was granted due to the fact that the defendant's refusal negated application of any theoretical consent exception to the warrant requirement *Id*. at *4-5. Moreover, it did not overrule the aforementioned *Wulff*. *Burnell v. Indiana*, 44 N.E.3d 771 (Ind. 2015) did not discuss *McNeely* and only concerned a definition of refusal— "anything short of an unqualified, unequivocal assent to a properly offered chemical test"— that is not incommensurate with Howes contentions regarding actual consent per *Padley*. In *Tiller v. Arkansas*, 439 S.W.3d 705 (Ark. Ct. App. 2014), the constitutionality of an implied consent statute was not challenged, and the case otherwise concerned simply whether the refusal to submit to field-sobriety tests could be used at trial— again, *McNeely* was not discussed. *McNeely* was also never mentioned in *Massachusetts v. Thompson*, 32 N.E.3d 1273 (Mass. Ct. App. 2015), which only considered the implications of a defective "informing the accused" a la *Piddington*. Finally,

while the Court in *Flonnory v. Delaware* did indicate that express or implied consent may waive Fourth Amendment rights, it remanded in spite of an implied consent statute with the logic that *McNeely* still instructed that the validity of a warrantless blood test can only be determined on a case by case basis taking into account the totality of the circumstances. 109 A.3d 1060, 1066 (Del. 2015).[14]

In light of the all of the foregoing jurisprudence, Howes submits that he is not alone in his reasoning in this case— on balance, the majority of Courts that have taken up the present issue or an comparable analogue endorse his position based on a reasonable reading of *McNeely* and the Supreme Court's subsequent treatment of cases that seemingly fall within *McNeely's* purview, (i.e. *Aviles*).

3. The Circuit Court's judgment should be affirmed and no good faith exception applies to the law enforcement activity in this case.

In a footnote, the State summarily asserts that even if this Court were to find the unconscious driver provisions of the implied consent law unconstitutional, the exclusionary rule ought not to apply "since the officer relied in good faith on the law's validity." The State cites *Kennedy*, 2014 WI 132, in support of this contention.

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[14] The State also cites *Nebraska v. Modlin*, 867 N.W.2d 609, 617 (Neb. 2015) in support of the proposition that *McNeely* did not directly address whether a blood draw could be justified under the consent exception to the Fourth Amendment. State's Br., 39 n.11. The State fails to mention that the *Modlin* Court *did* endorse *Padley's* reasoning and the notion that the post-*McNeely* canon cases seems to indicate that compliance with statutory implied consent requirements does not, per se, equate to actual voluntary consent. *Id.* at 618-19. Ultimately the *Modlin* court concluded that "a court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes and that the determination of whether consent was voluntarily given requires a court to consider the totality of the circumstances." *Id.* at 619.

Howes submits that this argument is underdeveloped and therefore should not be considered by this Court. See *Petit v. Iwen*, 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (citing *State v. S.H.*, 159 Wis.2d 730, 738, 465 N.W.2d 238 (Ct. App. 1990)). Further, he submits that neither *Kennedy* nor the "good faith" exception to the exclusionary rule are applicable here because *McNeely* overruled previously applicable precedent approximately three months prior to Howes' accident. Law enforcement was on notice regarding that development and the sanctity of the warrant requirement. The failure to follow the proper, prudent course and acquire a warrant should not be countenanced by this Court. As the Circuit Court discerningly observed,

> [a]ll the police officer had to do to comply with the Fourth Amendment was to get a warrant. The defendant was not about to go anywhere but to the operating room. The duty judge was a phone call away. Following *McNeeley* (sic), we routinely handle blood draw search warrants by telephone. I respectfully suggest that procedure is more consonant with the Fourth Amendment than reading a form to an unconscious man and then ordering his blood to be taken.

App. 32.

CONCLUSION

Howes does not dispute the State's prerogative in attempting to curb the scourge of drunk-driving, nor the necessity of statutes designed to both punish and deter it— rather, he simply insists that these laws cannot and should not impinge on an individual's Fourth Amendment right to be free from unreasonable searches and seizures. In its current iteration as applied to unconscious drivers, Wisconsin's implied consent law constitutes a categorical, per se exception to the warrant requirement, which is constitutionally impermissible under the dictates of *McNeely*. Moreover, Howes submits that a warrantless blood test in the present context is simply unreasonable from a basic Fourth Amendment evaluative standpoint. He believes that the Supreme Court's recent holding in *Birchfield* supports the contention that warrantless blood draws, even where purportedly sanctioned

by implied consent schemes, are deemed invasive to the extent that they are generally impermissible unless the totality of the circumstances and the unavailability of less intrusive means of gathering BAC evidence justify their administration. Essentially, he asserts that if the "search incident to arrest" exception to the warrant requirement does not generally permit a blood draw under the basic rubric of "reasonableness," it follows that no exception should be preserved for consent premised upon mere suspicion-based, statutory imputation, as pursuant to *State v. Padley*, statutory, implied consent does not comprise affirmative, voluntary consent for Fourth Amendment purposes in the context of a blood draw. The State's suggestion otherwise depends on fictive, unworkable legal constructs that cannot be rationally applied in the post-*McNeely* legal landscape.

For the foregoing reasons— because "implied consent" is not constitutional, actual consent, and because the "unconscious driver" provisions under scrutiny 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 30th day of June, 2016.

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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 8,561 words.

Dated this 30th day of June, 2016.

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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 30th day of June, 2016.

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