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STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2015 AP 450-CR
(Fond du Lac County Case No. 13 CF 659)

STATE OF WISCONSIN,

Plaintiff-Appellant,

-vs-

ADAM M. BLACKMAN,

Defendant-Respondent-Petitioner.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

On Appeal from an Order to Suppress Entered in Fond du Lac County Circuit Court, The Honorable Gary Sharpe, Presiding

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The Trial Court Answered: **Yes.**

The officer's request for the suspicionless and warrantless blood test was based on Section 343.305(3)(ar)2. (R23 at 1.) Importantly, the circuit court held that there was no probable cause to arrest Mr. Blackman. (R23 at 4.) Thus, because under Section 343.305(3)(ar)2, Mr. Blackman could only have been threatened with a possible arrest—which would have been unlawful in this case—the court held it was unconstitutionally coercive to have threatened him with a driver's license revocation and other penalties if he refused the suspicionless and warrantless blood test. *See* (R23 at 4-5.)

The Court of Appeals Answered: **No.**

The Court of Appeals' decision, however, reads out the portion of Section 343.305(3)(ar)2 which states, "if a person refuses to take a test under this subdivision, he or she may be arrested under par. (a)" and ignores that there is no other possible penalty for such a refusal.[1]

Thus, the Court of Appeals' decision below rests on the incorrect belief that had Mr. Blackman refused, the officer was correct when he told Mr. Blackman that "his license would have been statutorily revoked." *State v. Blackman*, Slip op. at ¶12. (Decided August 3, 2016).

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1 Rather, upon a Section 343.305(3)(ar)2 refusal, the person may be arrested, and asked again to submit to a chemical test – this time under Section 343.305(3)(a). A refusal under Section 343.305(3)(a) will lead to a revocation and "other penalties." *See* Section 303.305(9)(a)("If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately prepare a notice of intent to revoke….").

STATEMENT OF THE ISSUES (cont.)

II. WHETHER THE CIRCUIT COURT PROPERLY SUPPRESSED MR. BLACKMAN'S BLOOD TEST AFTER MR. BLACKMAN WAS UNCONSTITUTIONALLY COERCED INTO TAKING THE BLOOD TEST, UNDER THE TOTALITY OF THE CIRCUMSTANCES, WHEN HE ACQUIESCED TO THE UNLAWFUL ASSERTION BY THE OFFICER THAT THEY TAKE BLOOD SAMPLES IN CASES LIKE HIS—IN ADDITION TO BEING MISTAKENLY TOLD THAT HE FACED A REVOCATION AND OTHER PENALTIES IF HE REFUSED THE TEST?

The Trial Court Answered: **N/A.**

The Court of Appeals Answered: **N/A.**

III. WHETHER SECTION 343.305(3)(AR)2 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT COERCES CONSENT TO OTHERWISE UNCONSTITUTIONAL SEARCHES WITHOUT DUE PROCESS OF LAW?

The Trial Court Answered: **N/A.**

The Court of Appeals Answered: **No** (citing *State v. Padley*, 2014 WI App 65.)

STATEMENT OF THE FACTS AND CASE

On June 22, 2013, at approximately 10:10 a.m. Deputy John Abler was dispatched to a car/bicycle accident.[2] (R23 at 1.) Deputy Abler spoke with witnesses, including the driver of the car, Adam Blackman, the Defendant-Respondent-Petitioner. (R23 at 1.); (R36 at 5.) Deputy Abler indicated that he learned during his investigation that the car was making a left turn when "the bicycle collided with the right front area of the car." (R36 at 6.)

Further, Deputy Abler believed that Mr. Blackman may have failed to yield while making his left turn. (R36 at 6.) As a result of the accident, the bicyclist did sustain great bodily harm. (R36 at 15.); (R23 at 1.)

Deputy Abler later testified that it is "standard operating procedure for the department, when drivers are involved in accidents of a serious nature, to obtain a blood sample." (R36

2 The transcript from the motion hearing indicates that Deputy Abler testified that he was dispatched on June 27, 2013. (R36 at 4.) All other documents, however, use the June 22 date, as will this brief.

at 6-7.) Accordingly, Deputy Abler transported Mr. Blackman to a hospital. (R36 at 15-16.)

Prior to the transport, Deputy Abler spoke to Mr. Blackman about going to the hospital. *Id*. Deputy Abler, however, could not remember the specifics of the conversation, but he was "sure" that he told Mr. Blackman his department's "normal procedure… [to] take blood samples." (R36 at 15-16.)

Importantly, Mr. Blackman was not under arrest for any wrongdoing at the time of his transport and he had not been issued any citations. (R36 at 11.)

Deputy Abler spoke with Mr. Blackman over an extended period of time and never noticed an odor of an intoxicant. (R36 at 9-11.) In fact, Deputy Abler made no observations that Mr. Blackman might be impaired in any way. (R36 at 10.) Specifically, Deputy Abler testified as follows:

> Q: You noticed no odor of intoxicants coming from him?
>
> A: That's correct.
>
> Q: You noticed no slurred speech?

A: That is correct.

Q: You noticed no bloodshot eyes?

A: That is correct.

Q: You noticed no glassy eyes?

A: Correct.

Q: You noticed no glassy eyes?

A: Correct.

Q: Okay. You noticed no signs with his balance or coordination?

A: I did not notice anything.

Q: You did not notice any mental impairment on his part, meaning it didn't seem like he was intoxicated or impaired in any way. Would you agree?

A: I agree.

Q: Okay. And, in fact, during your entire contact with Mr. Blackman, you never observed anything that you would have attributed to even the consumption of alcohol. Would you agree?

A: I agree.

Q: …. You never - - I think we asked this already. You never observed an odor coming from him; is that right?

A: I did not detect an odor.

(R36 at 9-11.)

Once at the hospital, Mr. Blackman was read the Informing the Accused Form. (R36 at 7.) The circuit court found that the deputy's request for blood was based on Section 343.305(3)(ar)2, which states in part:

> If a person is the operator of a vehicle that is involved in an accident that causes the death or great bodily harm to any person and the law enforcement officer has any 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 breath, blood or urine…. **If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).**

Wisconsin Statute § 343.305(3)(ar)2(emphasis added); *see also* (R23 at 1.).

Rather than informing Mr. Blackman that he "may be arrested" for refusing the requested blood test, Deputy Abler read the Informing the Accused form that told Mr. Blackman, in part:

> If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties.

See (R36 at 7,12-13.)(Exhibit No. 1.); Wisconsin Statute § 343.305(4).

Mr. Blackman then agreed to the blood test. (R36 at 8.) The blood test result allegedly indicated a prohibited alcohol concentration. (R1 at 2.)

Mr. Blackman was later charged with Reckless Driving Causing Great Bodily Harm, Injury by Intoxicated Use of a Vehicle, Injury by use of a Motor Vehicle with a Prohibited Alcohol Concentration, Operating a Motor Vehicle While Intoxicated (Causing Injury – First Offense) and Operating a Motor Vehicle with a Prohibited Alcohol Concentration (Causing Injury – First Offense). (R13.)

Subsequently, Mr. Blackman filed two motions—only the Motion to Suppress the blood test result is relevant to this appeal. (R19.) Mr. Blackman's arguments for suppression fell into two main categories. First, that Mr. Blackman's consent to the blood test was unconstitutionally coerced. (R19 at 2-8.) Second, that Section 343.305(3)(ar) of the Implied Consent Law is unconstitutional, both on its face and as applied to Mr. Blackman. (R19 at 8-12.)

On October 17, 2014, a motion hearing was held. (R36.) The State's argument before the circuit court below was limited to telling the circuit court that the Court of Appeals has already ruled on the issue of whether the Informing the Accused form is "a coercive mechanism to obtain consent" and found it is a reasonable form of coercion, and that a person is required to make a difficult choice, but that it is a choice nonetheless. (R36 at 20-22.)(citing *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875 and *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545).

Lastly, the State argued that the officer was acting according to "standard operating procedure," so if the circuit court felt that the procedure was not constitutional, that the officer was acting in good faith based on his standard procedure and what the law has been. (R36 at 22-23.)

Mr. Blackman responded by distinguishing *Wintlend* and *Padley*. Most importantly, Mr. Blackman quoted the *Padley* decision where the court found a "disconnect" between

Section 343.305(3)(ar)2 and the statutes governing refusal hearings.[3] (R36 at 25-26.); *Padley*, Wis. 2d at ¶66 n.12.

Mr. Blackman argued that the "disconnect" was that "any person in Mr. Blackman's position is not subject to license revocation."[4] (R36 at 27.) Rather, Mr. Blackman argued, "only a driver who has been lawfully arrested for an OWI-related incident is facing a license revocation if they refuse." (R36 at 27.)

At that point, the circuit court interrupted Mr. Blackman and asked:

> THE COURT: The question of the century is **arrested for what?**

(R36 at 28.)(emphasis added).

Mr. Blackman agreed that statute is flawed, and continued by arguing that the State's reliance on prior case law was misplaced. Specifically, Mr. Blackman pointed out that

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3 The *Padley* court concluded that had Ms. Padley refused, she would have won her refusal hearing. *Padley*, 354 Wis. 2d at ¶66 n.12.

4 Mr. Blackman, to the contrary, was only facing possible arrest as stated in Section 343.305(3)(ar)2. (R36 at 27.)

in those prior cases where the Court of Appeals upheld the threat of a driver's license revocation—in an attempt to nudge the suspected drunk driver into consent—that the person was actually facing a driver's license revocation.[5] (R36 at 28.)

Again, if Mr. Blackman refused—he was only facing the possibility of being arrested. *See* (R36 at 27, 28-29.); Wisconsin Statute § 343.305(3)(ar)2. Importantly, there are no "refusal" penalties, outside of the possible arrest, for refusing a suspicionless and warrantless blood test pursuant to Section 343.305(3)(ar)2. *See* Section 343.305(9).

Thus, Mr. Blackman argued he was misinformed when the Informing the Accused form told him that if he refused testing, his license would be revoked and he would be subject to other penalties. *See* (R36 at 12, 28-30.) Accordingly, Mr. Blackman argued that he could not have given valid consent,

5 The *Padley* court, did not address this issue directly, in part, because Ms. Padley "failed to raise this argument in the circuit court." *Padley*, 2014 WI App at ¶66 n.12.

in part, because his decision was based on "a threatened penalty that did not apply to him." (R36 at 29.)

Moreover, Mr. Blackman argued that because his coerced consent was based on the disconnect between Sections 343.305(3)(ar)2, 343.305(4) and 343.305(9) – that Section 343.305(3)(ar)2 is unconstitutional on its face. (R36 at 30.) Lastly, Mr. Blackman argued that at the very least, Section 343.305(3)(ar)2 is unconstitutional as applied to him.

In summary, Mr. Blackman argued that under the totality of the circumstances, his consent was unconstitutionally coerced. Furthermore, the coercion was due to the way the implied consent law was written and applied to him. (R36 at 31-32.)

The circuit court then took the case under advisement. Further, the circuit court indicated that the Office of the Attorney General could provide additional input if they had intended to do so, but lacked notice of the actual hearing date. (R36 at 32-36.) Neither the Office of the District Attorney nor

the Office of the Attorney General provided the circuit court with further arguments.

On January 20, 2015, the circuit court filed its written decision granting Mr. Blackman's Motion to Suppress the blood test because his consent was coerced. (R23.) Specifically, the circuit court found that at the time Mr. Blackman was read the "Informing the Accused" form, the threatened revocation was "statutorily unenforceable."[6] (R23 at 4.) The circuit court did not reach the issue of the constitutionally of Section 343.305(3)(ar). (R23 at 5.)

The State then appealed the circuit court's decision granting Mr. Blackman's motion to suppress.[7] In a decision

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6 The circuit court held that if Blackman had refused the requested Section 343.305(3)(ar)2 test, he could have been arrested for impaired driving. (R23 at 3.)("If the operator refuses, the officer can only arrest under Section 343.305(3)(a) for impaired driving.")

7 Mr. Blackman objected to numerous arguments made by the State because they were being made for the first time on appeal. (Blackman's Response Brief in the Court of Appeals, p. 23)(citing *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)). "[T]he appellant [must] articulate each of its theories to the trial court to preserve its right to appeal." *Id*. at 828-29.)

dated August 3, 2016, the Court of Appeals reversed the circuit court.

The Court of Appeals below, however, mistakenly believed that a driver in Mr. Blackman's position would have their driver's license revoked for refusing a chemical test requested under Section 343.305(3)(ar)2. *See Blackman*, Slip op. at ¶¶1, 4, 16.

Moreover, the Court of Appeals' decision mistakenly stated that it was bound by a previous Court of Appeals' decision holding that Section 343.305(3)(ar)2 was constitutional—when that prior decision had not addressed the issues raised in Mr. Blackman's appeal. *See Blackman*, Slip op. at ¶10 (citing *Padley*). Specifically, the *Padley* court held that "Padley does not argue that any statement the deputy made to her via the 'Informing the Accused' form was an inaccurate statement…." *Padley*, 2014 WI at ¶66 ("We do not address this issue" because "Padley does not direct our attention to this apparent inconsistency in her briefing on appeal.") Again, as

Mr. Blackman argued to the circuit court, "I'm raising" the issue left undecided in *Padley*. (R36 at 30.)

The Court of Appeals' decision did not address Mr. Blackman's other arguments, e.g., whether under the totality of the circumstances Mr. Blackman's consent was coerced. (Blackman's Response Brief in the Court of Appeals, p. 24.)

The concurring opinion below acknowledged that Mr. Blackman had a "legitimate gripe" as Wisconsin's implied consent law is "incomplete and imprecise, no doubt." *Blackman*, Slip op. at ¶¶16,18. (concurring opinion)(holding that Mr. Blackman was not entitled "to a broad understanding of all his rights under the implied consent law").

Mr. Blackman then filed a petition with this Court to review the Court of Appeals' decision, which this Court granted on December 19, 2016.

STANDARD OF REVIEW

Voluntariness of consent is a question of constitutional fact. *State v. Artic*, 2010 WI 83, ¶23, 327 Wis. 2d 392, 786 N.W.2d 430. Appellate courts review questions of constitutional fact as mixed questions of fact and law and apply a two-step standard of review. *Id*. (citing *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634); *see also State v. Robinson*, 2009 WI App. 97, ¶9, 320 Wis. 2d 689, 770 N.W.2d 721(appellate courts review a motion to suppress under a two-step analysis). Appellate courts will uphold the circuit court's findings of historical fact unless those findings are clearly erroneous, but the application of constitutional principles to the facts found presents a question of law that appellate courts review *de novo*. *Post*, 2007 WI 60, ¶8.

Constitutionality of a statute presents a question of law that appellate courts review de novo. *State v. Padley*, 2014 WI App. 65, ¶16, 354 Wis. 2d 545, 849 N.W.2d 867. Appellate courts start with a presumption that a challenged

statute is constitutional, and a challenger must prove that the statute is unconstitutional beyond a reasonable doubt. *Id*. "Further, a facial challenge to the constitutionality of a statute cannot prevail unless the statute cannot be enforced under any circumstances." *Id*.

ARGUMENT

I. THE IMPLIED CONSENT LAW—AS IT RELATES TO DRIVERS WHO ARE NOT UNDER ARREST, AND ARE NOT SUSPECTED OF BEING IMPAIRED—UNCONSTITUTIONALLY COERCES SUCH DRIVERS INTO TAKING SUSPICIONLESS AND WARRANTLESS BLOOD TESTS BY MISINFORMING THEM.

Citizens have the right to be free from "unreasonable searches and seizures."[8] *State v. Richardson*, 156 Wis. 2d 128,

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8 The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 11 of the Wisconsin Constitution provides:

> The right of the people to be secure in their persons,

137, 456 N.W.2d 830 (1990)(citing the Fourth Amendment to the United States Constitution and Article I sec. 11 of the Wisconsin Constitution). "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[9] *Schmerber v. California*, 384 U.S. 757, 767 (1966).

A blood draw conducted at the direction of a police officer is a search subject to the Fourth Amendment requirement that all searches must be reasonable. *State v. Padley*, 2014 WI App 65, ¶23, 354 Wis. 2d 545, 849 N.W.2d 867. In fact, "such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of

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> houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the persons or things to be seized.

9 Generally, Wisconsin courts interpret Article I, Section 11 of the Wisconsin Constitution in accordance with the United States Supreme Court's interpretation of the Fourth Amendment. *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998).

privacy.'" *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

Warrantless searches are per se unreasonable, subject to a few "well-delineated" exceptions.[10] *Padley*, 2014 WI App at ¶8 (citation omitted). "When the purported legality of a warrantless search is based on the consent of the defendant, that consent must be freely and voluntarily given." *State v. Johnson*, 2007 WI 32, ¶16, 229 Wis. 2d 675, 729 N.W.2d 182 (citing *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998)).

The State bears "the burden of proving that consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Further, the State must satisfy that burden by clear and convincing evidence. *State v. Artic*, 2010 WI 83, ¶32, 327

10 In the present case, the only exception to the warrant requirement argued by the State before the circuit court, was that Mr. Blackman consented to the blood test. *See* (R36 at 20-22.)

Wis. 2d 392, 786 N.W.2d 430 (citing *Phillips*, 218 Wis. 2d at 197).

"Acquiescence to an unlawful assertion of police authority is not equivalent to consent." *Johnson*, 2007 WI at ¶16 (citing *Bumper*.) In other words, police cannot assert that they have a right to conduct a warrantless search, or indicate that they are going to search absent legal authority to do so. *Id*. As this Court has explained, "orderly submission to law enforcement officers who, in effect, incorrectly represent that they have the authority to search and seize property, is not knowing, intelligent and voluntary consent under the Fourth Amendment." *Padley*, 2014 WI App at ¶62 (quoting *State v. Giebel*, 2006 WI App 239, ¶18, 297 Wis. 2d 446, 724 N.W.2d 402.).

For example, in *Birchfield v. North Dakota,* the Supreme Court recently held that a suspected drunk driver's consent to a warrantless blood test must be reevaluated in the lower court because there was a "partial inaccuracy of the

officer's advisory" to the suspect. *Birchfield v. North Dakota*,[11] 579 U.S. __, 136 S. Ct. 2160, Slip op. at 38 (2016).

In *Birchfield*, Beylund, one of the defendants, consented to a warrantless blood test after police told him that refusing the test "in these circumstances is itself a crime." *Id*. at Slip op. 12. Beylund argued that his consent to take the warrantless blood test was coerced by the officer's warning that refusing to consent was a crime. *Id*. The lower courts had all upheld North Dakota's implied consent law reasoning that the advisory was not misleading—because it truthfully related the penalties for refusal. *Id*.

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11 The *Birchfield* court began its review by "considering whether the searches demanded in these cases were consistent with the Fourth Amendment." *Birchfield*, Slip op. at 13. The *Birchfield* Court then noted that the demanded warrantless searches were sought "categorically" and thus, not on a case-by-case basis, as required in of *Schmerber v. California*, and *Missouri v. McNeely*. *Birchfield*, Slip op. at 16, 37 (leaving the prosecution to provide the case-specific information needed to justify a search under the exigent circumstance exception). The *Birchfield* court next found that warrantless blood searches cannot be justified as a search-incident-to-arrest. *Id*. at 36. Lastly, *Birchfield* decided, as discussed above, that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense" – leaving the possibility of actual consent to justify the warrantless blood test. *Id*. at 37.

The *Birchfield* court, however, noted that "[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*. at 36. The *Birchfield* court then concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at 37.

Accordingly, the *Birchfield* court stated:

> The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests.[12] Because voluntariness of consent to a search must be "determined from the totality of all the circumstances, [] we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.

Id. at 38 (citations omitted).

Thus, *Birchfield* stands for the proposition that consent cannot be determined by the presence in an implied consent law alone. Rather, one must always consider the totality of

12 *Birchfield* held that warrantless breath tests can be required as a search incident to an arrest, and thus, refusing such a breath test can be punished criminally. *Id*. at 37-38.

the circumstances when determining whether consent was voluntarily given. *See Schneckloth v. Bustamonte*, 412 U.S. 212, 233, 93 S. Ct. 2041, 36 L.Ed.2d (1973).

In this case, the circuit court found that Mr. Blackman's consent was unconstitutionally coerced due to the wording and structure of the implied consent law alone and suppressed Mr. Blackman's suspicionless and warrantless blood test. *See* (R23 at 4-5.) The circuit court was correct.

A. The Implied Consent Law.

Generally, Wisconsin's implied consent law is used to obtain warrantless chemical tests for intoxication after a driver has been arrested for suspicion of impaired driving. *See generally* Section 343.305.

However, Wisconsin's implied consent law has evolved to encompass more and more driving situations, including, as the Court of Appeals stated below, to fact patterns which do not require law enforcement to suspect a driver of impairment

from alcohol or controlled substances.[13] (Blackman, Slip op. at ¶4.)(citing Section 343.305(3)(ar)2). In this case Mr. Blackman was asked to submit to a suspicionless and warrantless blood test under Section 343.305(3)(ar)2. (R23 at 1.)

Unfortunately, the Court of Appeals below, mistakenly believed that a driver in Mr. Blackman's position would have their driver's license revoked for refusing a chemical test requested under Section 343.305(3)(ar)2. *See* (*Blackman*, Slip op. at ¶¶1, 4, 16.) Specifically, the Court of Appeals stated:

> Wis. Stat. § **343.305(3)(ar)2, which provides for the taking of a blood,** breath, or urine sample from a driver involved in an accident that causes death or great bodily harm to a person when an officer has evidence that the driver violated a traffic law. . . **If a driver refuses to take a test, his or her license is statutorily revoked. Sec. 343.305(9)(a).**

Blackman, Slip op. at ¶4 (emphasis added).

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13 This Court is currently considering whether the portions of Wisconsin's implied consent law which authorizes warrantless blood draws from unconscious drivers violates the Fourth Amendment. *State v. Howes*, 2014AP1870-CR.

Rather, Section 343.305(3)(ar)2 states, in part:

> If a person is the operator of a vehicle that is involved in an accident that causes the death or great bodily harm[14] to any person and the law enforcement officer has any reason to believe that the person violated any state or local traffic law,[15] the officer may request the operator to provide one or more samples of his breath, blood or urine…. **If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).**

Wisconsin Statute § 343.305(3)(ar)2 (emphasis added).

Mr. Blackman, however, was not informed that if he refused to take the test, that the officer "may" arrest him. Rather, Mr. Blackman was read the Informing the Accused form which told him, in relevant part:

> **If you refuse** to take any test that this agency requests, **your operating privilege will be revoked and you will be subject to other penalties.**

Wisconsin Statute § 343.305(4)*; see also* (R36 at 7,12-13.).[16]

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14 Mr. Blackman does not dispute that the bicyclist sustained great bodily harm. (R23 at 1.); (R36 at 15.)

15 Deputy Abler testified that he believed that Mr. Blackman failed to yield while making a left turn. (R36 at 6.) Mr. Blackman does not dispute that the deputy "had reason to believe" that Mr. Blackman violated a traffic law. Likewise, the circuit court found that "the officer concluded that the defendant failed to yield the right of way to the bicyclist." (R23 at 1.)

16 Section 343.305(4) states as follows:

In other words, for people in Mr. Blackman's position, the Informing the Accused form does not accurately inform them of their precise legal situation.[17]

INFORMATION. At the time that a chemical test specimen is requested under sub. (3)(a), (am) or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

"You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operating of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

17 Thus, this case is distinguishable from cases cited by the State to the circuit court for the proposition that the implied consent law is not unreasonably coercive. *See e.g. State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745; *Padley*, 2014 WI App 65.

Again, the Court of Appeals claimed that a driver in Mr. Blackman's position would have their driver's license revoked for refusing a chemical test requested under Section 343.305(3)(ar)2. *See* (*Blackman*, Slip op. at ¶4)(citing Section 343.305(9)(a)).

To the contrary, a driver only has their license revoked under Section 343.305(9)(a) after they have refused a chemical test requested under Section 343.305(3)(a). Specifically, Section 343.305(9)(a) states in relevant part:

> If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately

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Wintlend and *Padley*, all say that the Informing the Accused form does "not involve any deceit or trickery, but instead accurately informed [the suspected drunk driver] of his **precise legal situation**." *Wintlend*, 2002 WI App at ¶3(emphasis added); *see also Padley*, 2014 WI App at ¶72. These cases and this quote are cited numerous times in the State's Initial Court of Appeals' brief. (State's Initial br. at 7, 8, 26.)(also citing *Village of Little Chute v. Walitalo*, 2002 WI App 211, 256 Wis. 2d 1032, 659 N.W.2d 891.)

Walitalo, *Wintlend* and *Padley* can be further distinguished as they do not address the problem with the "disconnect" between Section 343.305(3)(ar)2 and the statutes governing refusal hearings. Specifically, *Walitalo* and *Wintlend* were decided before Section 343.305(3)(ar)2 was created by 2009 Wis. Act 163, effective March 10, 2010. Lastly, the *Padley* court did not address the "disconnect," because Ms. Padley, in part, failed to raise the issue before the circuit court. *Padley*, 2014 WI App ¶66 n.12.

> prepare a notice of intent to revoke, by court order under sub. (10).

Thus, Mr. Blackman had correctly argued to the circuit court that "only a driver who has been lawfully arrested for a OWI-related incident is facing license revocation if they refuse." (R36 at 27.)

B. Penalties for Refusing a Requested Test.

Below are two columns pairing the implied consent statute provisions authorizing law enforcement to request a chemical test for intoxication with the statutory provision for a driver's license revocation and the holding of a refusing hearings on the alleged refusal, if any.

Request Authorized	Refusal Penalty
Section 343.305(3)(a):	Section 343.305(9)(a):
Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith, or… upon arrest subsequent to a refusal under par. (ar), a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified in sub. (2).	If a person **refuses to take a test under sub. (3)(a)**, the law enforcement officer shall immediately prepare a notice of intent to revoke, by court order under sub. (10)….

Request Authorized	Refusal Penalty
Section 343.305(3)(am):	Section 343.305(9)(am):
Prior to arrest, a law enforcement officer may request the person to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2) whenever a law enforcement officer detects any presence of alcohol, a controlled substance, a 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….**	If **a person driving** or operating or on duty time with respect to **a commercial motor vehicle refuses a test under sub. (3)(am),** the law enforcement officer shall immediately issue an out-of-service order to the person for the 24 hours after the refusal and notify the department in the manner prescribed by the department, and prepare a notice of intent to revoke, by court order under sub. (10)….
Section 343.305(3)(ar)2:[18]	None, other than possible arrest.
If a person is the operator of a vehicle that is involved in an accident that causes the death or great bodily harm to any person and the law enforcement officer has any 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 breath, blood or urine…. **If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).**	

18 There is also a Section 343.305(3)(ar)1 – for less serious accidents. Both Sections (ar)1 and (ar)2 carry the same arrest provision for refusing and have no Refusal Hearing statute.

Request Authorized	Refusal Penalty
Section 343.305(3)(b):	None
If 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)… one or more sample specified in par (a) or (am) may be administered to the person.	

(emphasis added).

C. Refusal Hearings.

As noted above, a person alleged to have refused a chemical test under Section 343.305(3)(a) or (am) is entitled to a "refusal hearing." *See generally Padley*, 2014 WI App at ¶66 n.12 (citing Section 343.305(9)(a)(5)a). Both the *Padley* court and the circuit court below, however, noted a "disconnect" between Section 343.305(3)(ar) and the refusal hearing statute, i.e., Section 343.305(9). *See Padley*, 2014 WI App at ¶66 n.12; (R23 at 4.)

Specifically, the *Padley* court mistakenly believed that there could be Section 343.305(3)(ar)2 refusal followed by a refusal hearing under Section 343.305(9). Again, someone refusing a chemical test requested under Section 343.305(3)(ar)2 could only be arrested. In other words, a person refusing a Section 343.305(3)(ar) test, would not be entitled to a refusal hearing under Section 343.305(9)(a)(5)a.

Rather, as the circuit court below held, if the driver refuses a chemical test requested under Section 343.305(3)(ar)2, "the officer can only arrest under Section 343.305(3)(a) for impaired driving. Thereafter, the officer can request the [driver] to submit to a blood test under section 343.305(3)(a). If the [driver] refuses at that point to take the test the officer may issue [a] Notice of Intent to Revoke." (R23 at 3.)

The *Padley* court, believing that there could be a Section 343.305(3)(ar)2 refusal hearing, suggested that the legislature

"inadvertently failed" to create a refusal hearing statute for such refusals.[19] *See Padley*, 2014 WI at ¶66 n.12.

To the contrary, the legislature clearly indicated that a driver may be arrested for refusing a chemical test requested under Section 343.305(3)(ar). If that driver is arrested, and refuses a second chemical test requested under Section 343.305(3)(a), that driver can request a refusal hearing provided in Section 343.305(9)(a)(5)a. *See generally State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (statutory interpretation begins with the language of the statute, if the meaning of the statue is plain, we ordinarily stop the inquiry).

Moreover, if the legislature made the mistake of the magnitude suggested by *Padley*, it begs the question why has the legislature chosen to not correct the statute? Thus, by not changing the statue, the legislature is rejecting the suggestion

19 The *Padley* court's decision lacked briefing on this issue. *Padley*, 2014 WI at ¶66 n.12. Moreover, both the State and Padley made "arguments that rest[ed] on inaccurate views of the law." *Id*. at ¶37.

that they made a mistake—as they are the only body in a position to implement any change to the statute. *See generally Reiter v. Dyken*, 95 Wis.2d 461, 474, 290 N.W.2d 510, 515 (1980).

Next, the circuit court's problem with the Refusal Hearing was that someone like Mr. Blackman would always win their refusal hearing because there would be no probable cause that he was operating while intoxicated, as is required to be found at a refusal hearing pursuant to Section 343.305(9)(a)(5)(a). *See* (R23 at 4.)("We know that for Mr. Blackman, there was no such probable cause and no likelihood a revocation would be upheld.")

Not coincidentally, the problem raised by the *Padley* court and the circuit court below is resolved if law enforcement officers only arrest drivers—after a refusal of a Section 343.305(3)(ar) chemical test—when they have adequate probable cause to arrest the driver for impaired driving.[20]

20 The State has previously argued to the Court of Appeals in its Response Brief in the *Padley* case that under Section 343.305(3)(ar)2 - a person cannot be

This interpretation of the statute avoids the unreasonable result suggested by the *Padley* court and the circuit court below – where a driver avoids any consequences for otherwise unlawfully refusing a chemical test requested under Section 343.305(3)(ar). *See Kalal*, 2004 WI at ¶¶45-46.

Importantly, requiring law enforcement to have adequate probable cause—after a driver refuses a Section 343.305(3)(ar)2 chemical test—will not stop the State from obtaining evidence of impaired driving in an appropriate case. For example, law enforcement can continue to investigate, and in the appropriate case, arrest the suspected drunk driver. Moreover, the State can always seek a warrant.

D. Applying the Implied Consent law.

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arrested for only refusing a chemical test. Specifically, the State argued:

> "[C]ontrary to the suggestion in Padley's brief, Brief for Defendant-Appellant at 14-15, there is nothing in either of these subsections which suggests that anyone can be arrested without actual constitutionally adequate probable cause to believe they have committed an offense involving impaired driving."

(State's Response Br. at 9-10, *State v. Padley*, Appellate Case No. 2013 AP 852-CR)(Def.-App. at 101-102.)

The circuit court below acknowledged Mr. Blackman's argument that he was misled by the Informing the Accused form which told him that he was facing a revocation instead of arrest, but noted that there was "potential" for revocation if Mr. Blackman had been arrested and continued refusing. (R23 at 3.) Eventually, the circuit court found this "potential" revocation was illusory because the refusal penalty found in Section 343.305(9)(a) – for a refusal requested under Section 343.305(3)(a) – would be reversed because there was no probable cause that he was under the influence. *Id*. at 4 (citing Section 343.305(9)(a)(5)(a)).

Thus, the circuit court correctly found that the threatened revocation in the Informing the Accused form was "statutorily unenforceable" from the time it was first read to Mr. Blackman. (R23 at 4.) Accordingly, the circuit court found that Mr. Blackman was coerced by the information found in the Informing the Accused form. Specifically, the circuit court held:

> The very nature of an enforceable consent is that the individual consenting not be threatened. The *Padley* court (supra) has held that it is no coercion to force a motorist to choose between taking the test and having their license revoked. However, if the statutory scheme does not support a revocation that is threatened, this Court finds that coercion has occurred. As a consequence, the Court will grant suppression of the blood test result because of this coercion.

(R23 at 4-5.)

Accordingly, the State failed to meet its burden to prove Mr. Blackman had freely and voluntarily consented to the suspicionless and warrantless blood test. *See Bumper*, 391 U.S. at 548. In fact, the State failed to produce or argue any facts to the circuit court that would support its voluntariness argument, i.e., that *Padley* already held that the implied consent statue was not unduly coercive.[21] (R36 at 18-22.)

To the contrary, as discussed above, *Padley* does not stand for the proposition that the implied consent law is not

21 In fact, the State argued, in part, that "*res ipsa loquitor*" justified the blood draw. Specifically, the State argued, "I would use this general term that we think of in civil law, you know, *res ipsa loquitor*, the thing speaks for itself. You are on scene. This is a crash. This is how we believed this occurred. There must have been a traffic violation. They go through and get the blood is standard operating procedure." (R36 at 19.)

coercive as it relates to suspicionless and warrantless blood tests requested under Section 343.305(3)(ar)2. Rather, this is a fact pattern that the *Padley* court explicitly choose to not decide. *Padley*, 2014 WI at ¶66 n.12.

Therefore, because the State failed to meet it burden that the implied consent law, in this case, allowed Mr. Blackman to make a free and voluntary choice – free from duress or coercion – the circuit court properly suppressed the blood test result. *See Phillips*, 218 Wis. 2d at 197.

III. UNDER THE TOTALITY OF THE CIRCUMSTANCES, MR. BLACKMAN'S CONSENT TO TAKE THE SUSPICIONLESS AND WARRANTLESS BLOOD TEST WAS COERCED.

Mr. Blackman believes the circuit court's decision below finding that the Informing the Accused form alone was unconstitutionally coercive is correct. The circuit court's decision is further solidified, however, when considering the totality of the circumstances Mr. Blackman was facing when he consented to the blood test.

Again, the Supreme Court's decision in *Birchfield* is a reminder that a voluntariness of consent determination should always consider the totality of the circumstances, even where implied consent laws are used. *See Birchfield*, Slip op. at 38; *Schneckloth*, 412 U.S. at 233.

Again, it is the State's burden to prove that Mr. Blackman's consent to the suspicionless and warrantless blood draw was freely and voluntarily given. *See Bumper*, 391 U.S. at 548. Further, the State must satisfy that burden with clear and convincing evidence. *Artic*, 2010 WI at ¶32.

Importantly, Mr. Blackman was told by Deputy Abler that "our normal procedure [] when there is a serious accident like this, that we do take blood samples."[22] (R36 at 16.) Deputy Abler noted that Mr. Blackman "did not disagree or refuse or give me any indication that he was going to refuse." (R36 at 16.)

22 Deputy Abler stated he was "sure" he told Mr. Blackman this, but could not remember the exact conversation. (R36 at 16.)

This is exactly the type of acquiescence to an unlawful assertion of police authority prohibited by case law. *See Johnson*, 2007 WI at ¶16. In *Johnson*, this Court found that the defendant did not "freely and voluntarily give his consent" to a search his car after a traffic stop. *Id*. at ¶19. Specifically, the police officers testified that they advised the defendant that "due to his movements that we were going to search the vehicle [and that] Mr. Johnson didn't have a problem with that." *Johnson*, 2007 WI at ¶18.

Likewise, in this case, Deputy Abler had no authority to "take blood" in this case. Rather, Deputy Abler only had the lawful authority to ask Mr. Blackman if he would consent to a suspicionless and warrantless blood test under Section 343.305(3)(ar)2. *See Padley*, 2014 WI App at ¶70 ("offering [a] choice, rather than requiring a blood draw, makes all the difference.")

Yet Deputy Abler indicated to Mr. Blackman that he had no choice because "our normal procedure is… [to] take

blood." (R36 at 16.) Moreover, the deputy said this to Mr. Blackman in order to transport him to the hospital in his squad car. *Id*. Mr. Blackman was then transported some unknown distance to a hospital. The State made no attempt to argue that this detention of Mr. Blackman was a voluntary one.

Furthermore, Wisconsin-licensed motorists are presumed to know the contents of the Wisconsin Department of Transportation *Motorists' Handbook*, which unequivocally states:

> ***Implied Consent***: If a police or traffic officer asks you to take a PAC [Prohibited Alcohol Concentration] test, you must comply. If you refuse, you will lose your driver license for at least one year.

See Wisconsin Department of Transportation, Motorists' Handbook 52 (Nov. 2012)(this is the handbook used at the time of the requested blood test in this case)(App. F).

Accordingly, in addition to the misinformation provided in the Informing the Accused form discussed above, when one considers the totality of the circumstances surrounding Mr.

Blackman's consent to take the test – it becomes more clear that his consent was unconstitutionally coerced.

In other words, Mr. Blackman was told by a deputy at the scene of a serious accident that it was their standard procedure to "take blood." (R36 at 16.) Further, the deputy's statement was consistent with Wisconsin's *Motorist Handbook* which states that a driver must consent to any requested blood test. Mr. Blackman was then detained, placed in a squad car and transported to a hospital. Once at the hospital, Mr. Blackman was incorrectly told that if he refused the blood test, his license would be revoked and that he would be subject to other penalties. *See* (R36 at 7, 12-13.) Thus, based on the information provided to Mr. Blackman by the deputy, it becomes clear that one of the other "penalties" would be a blood draw, regardless of his consent.

Therefore, Mr. Blackman was faced with more than the misleading Informing the Accused form, he was also told that his blood was going to be taken because of the serious accident.

Under these circumstances, one cannot say that Mr. Blackman's consent was "knowingly, intelligent and voluntary consent under the Fourth Amendment." *See Johnson*, 2014 WI at ¶62.

Moreover, the State did not attempt to meet its burden to prove that Mr. Blackman's consent was voluntary under the totality of the circumstances. Accordingly, this court should find that the State failed to meet its burden, and suppress the suspicionless and warrantless blood test.

III. WISCONSIN'S IMPLIED CONSENT LAW IS UNCONSTITUTIONAL ON ITS FACE AND AS-APPLIED TO MR. BLACKMAN.

While the circuit court below indicated that it was not reaching the issue of the constitutionality of Section 343.305(3)(ar)2, this Court should decide this issue based on the circuit court's decision. Specifically, the circuit court's decision below was that "the statutory scheme does not support a revocation that is threatened" and thus, found that the statute was unconstitutionally coercive. (R23 at 5.)

In other words, Section 343.305(3)(ar)2, is unconstitutional on its face. When someone in Mr. Blackman's position is asked to submit to a chemical test – under the current statutory scheme – they will be misinformed of the consequences of their decision, and thus, cannot provide a "knowingly, intelligent and voluntary consent." *Bumper*, 391 U.S. at 548.

It is a distinction without a difference to say that the statute is unconstitutionally coercive, so Mr. Blackman's consent was not voluntary, but not take the next step and say that the statute is unconstitutional. Admittedly, appellate courts are to decide an issue on the narrowest of grounds, but the statutory scheme is broken as noted in *Padley* and needs to be rebuilt. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989)(appellate courts generally decide cases on the narrowest possible ground).

Again, as discussed above, Mr. Blackman's position is that the threatened penalties provided to him in the "Informing

the Accused" form did not apply to him. *See* Section 343.305(4)(containing the required warnings).

Assuming *arguendo*, that the Court of Appeals was correct in its holding that "Blackman was correctly informed that if he withdrew his consent, his license would be statutorily revoked" – Wisconsin's implied consent law is too broad, and has exceeded the limits of what a motorist may be deemed to have consented by virtue of their decision to drive on public roads.[23] *See generally Birchfield*, 579 U.S. ___, Slip op. at 36-37.(holding that implied consent laws have constitutional limits and cannot threaten criminal penalties).

As the Court of Appeals' decision acknowledged below, law enforcement had not observed any signs of impairment and lacked probable cause to believe that Mr.

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23 Importantly, the State has previously argued that the implied consent law contained drafting errors. These errors implicate procedural due process because they will cause different and varying standards for adjudication of Wisconsin's implied consent law. *See generally State ex rel. Hennekens v. River Falls Police Fire Comm'n*, 124 Wis. 2d 413, 420, 369 N.W.2d 670 (1985). A law violates due process when those who must enforce and apply the law end up creating or applying their own standards. *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

Blackman had alcohol or any other intoxicant in his system. *Blackman*, Slip op. at ¶9. In other words, the State lacked any particularized suspicion that Mr. Blackman's blood contained any evidence of a crime. Admittedly, the State has interests in keeping the roadways safe. *Mackey v. Montrym*, 443 U.S. 1, 17 (1979). The State cannot, however, treat all citizens involved in accidents involving injuries – as if they are drunk drivers by default – just because a traffic law might have been violated.

The Wisconsin Department of Transportation reports that in 2014, the most current year available, Wisconsin drivers had 28,801 "injury crashes" with 2,694 alcohol-related injuries. (http://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx last visited on February 6, 2016.) Thus, a vast majority of injury-accidents in this state do not involve impaired driving.[24]

24 This is not to say that drunk driving is not a serious problem. "Alcohol consumption is a leading cause of traffic fatalities and injuries." *Birchfield*, Slip op. at 24 (citing NHTSA studies).

Importantly, Refusal convictions in Wisconsin are treated like drunk driving convictions. *See e.g*. Section 343.307(1)(f). Thus, while the State could pass laws revoking a driver's license for causing an injury accident – the State cannot pass a law saying you can keep your license if you agree to a chemical test, but if you refuse, you will branded as a drunk driver. *But see Padley*, 2014 WI App at ¶¶68-69.

In other words, the potential for innocent drivers to get caught up in Wisconsin's "incomplete and imprecise" implied consent law, especially in situations where the State "would have difficulty defending" the imposed revocation – is too great to pass constitutional scrutiny. *See Blackman,* Slip op. at ¶¶16,18 (concurring opinion); *see also Birchfield*, Slip op. at 36-37.

As discussed above, the *Birchfield* court noted that "[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*. at 36.

Similarly, Wisconsin's implied consent law should not penalize a motorist for asserting their constitutional right to be free from unreasonable searches and seizures when they are not under arrest and there is no reason to suspect them of impaired driving. *See* (R19 at 8,10.)

Significantly, Mr. Blackman disagrees with the Court of Appeals' assessment that *Birchfield* "addressed the propriety of implied consent laws where criminal penalties are imposed for refusing… and therefore *Birchfield* does not impact our decision."[25] *Blackman,* Slip op. at ¶10 n.5.

To the contrary, the *Birchfield* court found that a criminal refusal conviction could not stand where the motorist was "threatened with an unlawful search." *Id*. at 37.

Like *Birchfield*, the suspicionless and warrantless blood test sought by law enforcement in this case was not lawfully obtainable under exigent circumstances, or as a search incident

25 The *Birchfield* case was decided after briefing was completed by the parties in the Court of Appeals.

to arrest. *See generally Birchfield*, Slip op. at 16, 36. In fact, the only exception to the warrant requirement argued by the State before the circuit court was that Mr. Blackman consented to the warrantless blood test. *See* (R36 at 20-22.) Therefore, if Mr. Blackman's consent was unconstitutionally obtained – the circuit court correctly suppressed it.

Importantly, finding Section 343.305(3)(ar)2 unconstitutional will not stop the State from obtaining evidence of impaired driving. Law enforcement can always request the motorist take a blood test outside the implied consent law or continue to investigate, and in the appropriate case, arrest the suspected drunk driver and proceed under Section 343.305(3)(a) of Wisconsin's implied consent law. Moreover, the State can always seek a warrant.

CONCLUSION

For the reasons set forth above, Mr. Blackman respectfully requests this Court reverse the Court of Appeals'

decision, and remand this matter to the circuit court for further proceedings consistent with this Court's decision.

Dated this _____ day of February, 2017.

Respectfully submitted,

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STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Appellant**,**

-vs-

ADAM M. BLACKMAN,

Defendant-Respondent-Petitioner.

APPENDIX

Table of Contents

STATE OF WISCONSIN
IN SUPREME COURT

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 7,877 words.

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.12.

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 6th day of February, 2017.

Respectfully submitted:
By:_____
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