STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP450-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ADAM M. BLACKMAN,

Defendant-Respondent-Petitioner.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE GARY SHARPE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Under Wisconsin's implied consent law, all persons who operate a motor vehicle on a Wisconsin highway are deemed to have consented when a law enforcement officer requests a sample of blood, breath, or urine for testing. When an officer requested a blood sample Blackman agreed, and did not withdraw his implied consent. Was Blackman's consent sufficient to authorize the taking of a blood sample for testing?

The circuit court and court of appeals both implicitly concluded that the consent Blackman impliedly gave by operating a motor vehicle on a Wisconsin highway was insufficient to authorize a blood draw. Both courts therefore analyzed Blackman's submission to the officer's request for a blood sample as a question of whether it constituted "actual" rather than implied consent.

2. When a person refuses a request for a blood sample under Wis. Stat. § 343.305(3)(ar), a law enforcement officer may arrest the person under § 343.305(3)(a). The officer then may again request a sample, and if the person refuses, the officer prepares a notice of intent to revoke the person's operating privilege. Was Blackman coerced into agreeing to provide a blood sample when an officer told him that if he refused a request for a sample under § 343.305(3)(ar), his operating privilege would be revoked?

The circuit court and court of appeals both concluded that Blackman was properly informed that if he refused, his operating privilege would be revoked.

3. Wisconsin Stat. § 343.305(3)(ar)2. authorizes a law enforcement officer to request a sample from a person involved in an accident resulting in death or great bodily harm if the officer has probable cause to believe the person violated a traffic law. A law enforcement officer knew that Blackman was involved in an

accident that resulted in great bodily harm, and had probable cause to believe Blackman violated a traffic law. Did the officer unconstitutionally coerce Blackman into agreeing to provide a sample by first telling Blackman that the department takes a blood sample when there is a serious crash?

The circuit court and court of appeals both concluded that the officer did not coerce Blackman into agreeing to provide a sample.

4. A person who refuses a request for a sample under § 343.305(3)(ar), and then under § 343.305(3)(a), is subject to revocation of his or her operating privilege. But a person who then timely requests a refusal hearing under § 343.305(9) could prevail and have the revocation rescinded. Does the fact that a person could prevail at a refusal hearing render § 343.305(3)(ar) unconstitutional?

The circuit court did not address this issue. The court of appeals concluded that § 343.305(3)(ar) is constitutional.

5. The good faith exception to the exclusionary rule applies when an officer acts in good faith reliance on a statute, even if the statute is later found to be unconstitutional. The officer in this case relied on §§ 343.305(3)(ar) and (4) in requesting a sample and explaining the implied consent law to Blackman. If this Court were to find the statute unconstitutional, would the good faith exception apply?

The circuit court did not address this issue. The court of appeals ordered briefing on the applicability of the good faith exception, but then did not address the issue in its decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE

The State has charged Adam M. Blackman with reckless driving causing great bodily harm, injury by intoxicated use of a vehicle, injury by use of a vehicle with a prohibited alcohol concentration, operating a motor vehicle while under the influence of an intoxicant (OWI), and operating a motor vehicle with a prohibited alcohol concentration (PAC). (13.) Blackman moved to suppress the results of a test of his blood conducted under Wisconsin's implied consent law. (19.) The circuit court, the Honorable Gary Sharpe, presiding, granted the motion, concluding that Blackman's consent to a blood draw was coerced. (23:5.) The State appealed, and the court of appeals reversed in a published decision. *State v. Blackman*, 2016 WI App 69, 371 Wis. 2d 635, 886 N.W.2d 94. This Court then granted Blackman's petition for review.

SUPPLEMENTAL STATEMENT OF FACTS

A car that Blackman was driving and a bicycle that S.R.K. was riding collided, and the bicyclist suffered extremely serious injuries. (1:1–2.) Fond Du Lac County Sheriff's Deputy John Abler arrived to the scene and a witness told him that the bicycle hit Blackman's car, and the rider was thrown over the car. (35:7.) The bicyclist's injuries included "a mandibular fracture, fractures to both forearms, rib fracture, sinus fracture, a C6 vertebrae fracture, liver laceration," as well as a "lung contusion, [and] a subdural hemorrhaging brain bleed." (35:24.)

Deputy Abler testified at the suppression hearing that he believed that Blackman violated a traffic law by turning left without yielding to oncoming traffic. (36:5–6.) Deputy Abler also testified that he did not initially have reason to believe that Blackman was under the influence of intoxicants. (36:6.)

Deputy Abler read the Informing the Accused form to Blackman and requested that Blackman submit to a blood draw under the implied consent law. (36:7–8.) Blackman submitted (36:7–9), and a test of his blood revealed an alcohol concentration of .10 (35:8).[1]

The State charged Blackman with reckless driving causing great bodily harm, injury by intoxicated use of a vehicle, injury by use of a vehicle with a prohibited alcohol concentration, and OWI and PAC, both as first offenses. (13.) He moved to suppress the results of the test of his blood on three grounds. (19.) Blackman argued that he was coerced into providing a blood sample because Deputy Abler improperly invoked the implied consent law. (19:2–4.) Blackman also argued that Deputy Abler misinformed him that he faced revocation of his operating privilege if he refused chemical testing § 343.305(3)(ar), but he really faced only arrest under § 343.305(3)(a), not revocation. (19:4–8.) Blackman also argued that if the implied consent law applied to him, and if his consent was valid, § 343.305(3)(ar) is unconstitutional, both facially and as applied to him. (19:8–13.)

After a hearing (36), the circuit court rejected the first two arguments Blackman made in his motion. The court

[1] Deputy Abler testified that the blood test result was .10. (35:8.) The criminal complaint indicates that the result was .104. (1:2.)

concluded that § 343.305(3)(ar)(2) is "part of and governed by the implied consent law." (23:2.) The court agreed that an officer is not authorized to issue a notice of intent to revoke when a person refuses to submit to a request for a sample under § 343.305(3)(ar), but it noted that the officer can arrest the person and then request a sample under § 343.305(3)(a), and if the person refuses, the officer can issue a notice of intent to revoke. (23:3.) The court concluded that the officer did not mislead Blackman "because the potential for revocation was ultimately available through section (3)(a) if the refusal continued." (23:3.) The court did not address Blackman's argument that § 343.305(3)(ar) is unconstitutional.

The circuit court granted Blackman's motion to suppress on a different ground, concluding that Blackman's consent to a blood draw was coerced because he was told that if he refused, his operating privilege would be revoked. (23:4–5.) The court concluded that a revocation for a refusal under § 343.305(3)(ar) would be "statutorily unenforceable" because the issues at a refusal hearing would include whether the officer had probable cause to arrest for an OWI-related offense, and whether the person was arrested for an OWI-related offense. (23:4–5.)

The State appealed, and the court of appeals reversed in a published decision. The court of appeals concluded that Blackman gave implied consent to a test by driving on a Wisconsin highway, and then gave actual consent when the officer requested a sample. *Blackman*, 371 Wis. 2d 635, ¶¶ 10–11. The court also concluded that Blackman was

properly informed that if he withdrew his consent and refused to submit to a blood draw, his operating privilege would have been revoked. *Id.* ¶ 12. This Court granted Blackman's petition for review.

SUMMARY OF ARGUMENT

The circuit court granted Blackman's motion to suppress the results of a test of his blood because it concluded that Blackman's consent to the blood draw was coerced. The court reasoned that Blackman was told that if he refused to provide a sample his operating privilege would be revoked, but due to a "disconnect" in various parts of the implied consent law, the revocation would have been statutorily unenforceable. The court of appeals reversed, concluding that Blackman's consent was not coerced. The court reasoned that Blackman was properly informed that if he refused a request for a blood sample his operating privilege would be revoked, and he chose to give actual consent to a blood draw.

The State maintains that the court of appeals decision was correct, but not because Blackman gave actual consent to a blood draw. Blackman, like every person who drives on a Wisconsin highway, is deemed to consent to a law enforcement officer's request for a sample for testing. Wisconsin Stat. § 343.305(3)(ar)2. provides that an officer may request a sample from a driver who is involved in an accident resulting in death or great bodily harm if the officer has reason to believe the driver violated a traffic law. It is undisputed that both conditions were satisfied in this case. Under the plain language of the implied consent law, by driving on a Wisconsin highway, Blackman consented to the blood draw. It is also undisputed that Blackman did not withdraw his consent. The issues in this case don't concern whether Blackman consented to the blood draw. They

concern whether Blackman was properly informed of the consequences of refusing the officer's request for a sample, and withdrawing the consent he had already given.

The officer in this case read the Informing the Accused form to Blackman, and told him that if he refused to provide a sample, his operating privilege would be revoked. As the court of appeals concluded, this information was correct. If Blackman had refused, the officer would have arrested him and requested a sample under Wis. Stat. § 343.305(3)(a). If Blackman had refused again, his operating privilege would have been revoked. Like any driver who refuses, Blackman would have had a statutory right to a refusal hearing, and he may have prevailed at the hearing and had the revocation rescinded. But an officer is not required to inform a person of the procedure at a refusal hearing until the officer issues the notice of intent to revoke—after the person refuses. Here, the officer gave Blackman correct information, and Blackman chose not to commit an unlawful act by refusing and withdrawing his implied consent. Blackman instead chose to affirm his implied consent and submit to a test.

Blackman voluntarily consented to a blood draw by driving on a Wisconsin highway. His decision to affirm his implied consent and submit to a blood draw was not coerced because he was properly informed of his choice and of the consequences of refusing. For the same reason, Wis. Stat. § 343.305(3)(ar) is constitutional on its face and as applied to Blackman.

I. Blackman was not coerced into consenting to a blood draw when the officer requested a sample, because he had already consented by operating a motor vehicle on a Wisconsin highway, and did not withdraw that consent.

A. All persons who operate a motor vehicle on a highway in Wisconsin impliedly consent to submit to a proper request for a sample for testing.

Wisconsin's implied consent provides that any person who operates a motor vehicle on a Wisconsin highway consents to submit a sample when a law enforcement officer properly requests a sample under the implied consent law. Wis. Stat. § 343.305(2).[2] This Court explained the general workings of the implied consent law in *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675:

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[2] Wisconsin Stat. § 343.305(2) provides, in relevant part, as follows:

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

> Wisconsin Statute § 343.305, known as the implied consent law, provides that any person who drives on the public highways of this state is deemed to have consented to chemical testing upon request by a law enforcement officer. Upon arrest of a person for violation of an OWI-related statute, a law enforcement officer may request the person to provide a blood, breath, or urine sample for chemical testing. Wis. Stat. § 343.305(3)(a). At the time of the request for a sample, the officer must read to the person certain information set forth in § 343.305(4), referred to as the Informing the Accused form.
>
> If the person submits to chemical testing and the test reveals the presence of a detectable amount of a restricted controlled substance or a prohibited alcohol concentration, the person is subjected to an administrative suspension of his operating privileges. Wis. Stat. § 343.305(7)(a). . . .
>
> If, on the other hand, the person refuses to submit to chemical testing, he is informed of the State's intent to immediately revoke his operating privileges. Wis. Stat. § 343.305(9)(a).

Id. ¶¶ 22–24.

The provision of the implied consent at issue in this case, § 343.305(3)(ar)2., applies when a person operates a motor vehicle that is involved in an accident resulting in death or great bodily harm, and a law enforcement officer has reason to believe the person violated a traffic law.[3] The

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[3] Wisconsin Stat. § 343.305(3)(ar)2. provides, in relevant part, as follows:

> 2. If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law, the

officer reads the Informing the Accused form to the person and requests a sample. If the person submits to the request, the officer administers the taking of a sample. If the person refuses, the officer may arrest the person under § 343.305(3)(a), and then request a sample under § 343.305(3)(a). If the person refuses again, the officer prepares a notice of intent to revoke. A person has no constitutional or statutory right to refuse a request for a sample. The choice is to submit and affirm the consent the person has already given, or refuse and withdraw that consent, and face penalties.

This Court has long recognized that under the implied consent law, a person gives consent to chemical testing by his or her conduct, either by obtaining a driver's license, or by driving on a Wisconsin highway. In *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974), this Court concluded that the implied consent law "requires that a licensed driver, by applying for an[d] receiving a license, consent[s] to submit to chemical tests for intoxication under statutorily determined circumstances."

In *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980), this Court explained that by applying for a driver's license, a person has "waived whatever right he may otherwise have had to refuse to submit to chemical testing." This Court added, "It is assumed that, at the time a driver made application for his license, he was fully cognizant of his rights and was deemed to know that, in the event he was

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> officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2). . . . If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

later arrested for drunken driving, he had consented, by his operator's application, to chemical testing under the circumstances envisaged by the statute." *Id.*

In *State v. Nordness*, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986), this Court noted that the implied consent law "declares legislative policy, namely, that those who drive consent to chemical testing."

In *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), this Court recognized that "consent is implied as a condition of the privilege of operating a motor vehicle upon state highways." *Id.* at 48 (citing *Neitzel*, 95 Wis. 2d at 201). "By implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." *Id.* (citing *State v. Crandall*, 133 Wis. 2d 251, 255–57, 394 N.W.2d 905 (1986)). "The implied consent law attempts to overcome the possibility of refusal by the threat of an adverse consequence: license revocation." *Id.* (citing *Neitzel*, 95 Wis. 2d at 203–05). "The refusal procedures are triggered when an arrested driver refuses to honor his or her previously given consent implied by law to submit to chemical tests for intoxication." *Id.* at 47–48.

In *Washburn County v. Smith*, 2008 WI 23, ¶ 40 n.36, 308 Wis. 2d 65, 746 N.W.2d 243, this Court recognized a defendant was deemed to have consented to a requested test "when the defendant decided to drive upon a Wisconsin highway."

In these and many more cases, this Court has recognized that drivers in Wisconsin give consent to a request for a sample for chemical testing by their conduct, either by applying for or receiving a driver's license, or by driving on a Wisconsin highway, long before a law enforcement officer requests a sample. When an officer

requests a sample the issue is not whether the person will consent, but whether the person will submit, and affirm the consent he or she has already given, or refuse, and withdraw that consent. "Put simply, consent to testing had already been given" by driving on a Wisconsin highway, "and it remained valid until withdrawn." *State v. Howes*, 2017 WI 18, ¶ 75, __ Wis. 2d __, __ N.W.2d __ (Gableman, J., concurring).

B. *State v. Padley* did not overrule this Court's cases and establish that actual consent, rather than implied consent, is required to authorize the taking of a blood sample under the implied consent law.

In the current case, the court of appeals recognized that Blackman gave consent to a blood draw by operating a motor vehicle on a Wisconsin highway, stating: "The fundamental fact is that under the implied consent law, Blackman, by driving on the highway, impliedly consented to submitting a sample of his blood under the facts presented." *Blackman,* 371 Wis. 2d 635, ¶ 11. But the court of appeals concluded that Blackman's implied consent did not authorize the taking of a sample of his blood, breath, or urine. Instead, a sample may be taken only if a person gives "actual consent" when the officer requests a sample. *Id.* ¶¶ 10–11.

The court of appeals based its conclusion that only "actual consent" can authorize a blood draw in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. In *Padley*, the court of appeals concluded that Wis. Stat. § 343.305(3)(ar)2, the same part of the implied consent law at issue in this case, is constitutional. *Id.* ¶¶ 48, 54, 60.

The court of appeals in *Padley* also addressed the operation of the implied consent law, to clarify "confusion" with "how the implied consent law works." *Id.* ¶ 25. The court distinguished between the "implied consent" a person gives by operating a motor vehicle in Wisconsin, and "actual consent" a person gives when a law enforcement officer requests a sample. *Id.* ¶ 26. The court rejected the proposition that "'implied consent' alone can 'serve as a valid exception to the warrant requirement.'" *Id.* ¶ 37. It stated that only "actual consent" when an officer requests a sample, not "implied consent," authorizes the taking of a sample under the implied consent law. *Id.* ¶ 40. The court explained that:

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

Id. ¶ 39.

The court of appeals' explanation of the implied consent law in *Padley* is generally consistent with this Court's interpretation of the law, particularly if the term "actual consent" is viewed as meaning "submission."

But *Padley* is incorrect in stating that only "actual" consent at the time the officer requests a sample can authorize the taking of a sample for testing. That

interpretation has "no basis in law." *Howes*, 2017 WI 18, ¶ 75 n.10 (Gableman, J., concurring). It would contradict the plain language of the implied consent statute, which provides that "Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine . . . when requested to do so by a law enforcement officer." Wis. Stat. § 343.305(2). It would also contradict myriad cases in which this Court and the court of appeals have recognized that by operating a motor vehicle on a Wisconsin highway, a person consents to an officer's request for a sample when arrested for a drunk-driving related offense.

In *State v. Bohling*, 173 Wis. 2d 529, 541, 494 N.W.2d 399 (1993) (footnote omitted) (abrogated on other grounds by *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)), this Court recognized that the Legislature "has concluded that all drivers lawfully arrested for drunk driving have impliedly consented to blood sampling, sec. 343.305(2), Stats., and that warrantless blood samples may be taken from unconscious drivers based solely on probable cause."

In *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, this Court determined that an officer complied with the implied consent law when he read the Informing the Accused warnings to a driver who was severely deaf. *Id.* ¶ 2. This Court concluded that whether the driver "subjectively understood the warnings is irrelevant," *id.* ¶ 32 n.19, and "not part of the inquiry." *Id.* ¶ 55.

In *State v. Disch*, 129 Wis. 2d 225, 385 N.W.2d 140 (1986), this Court determined that if a driver is unconscious or otherwise incapable of withdrawing consent, an officer need not even read the Informing the Accused form to the

person. The officer can simply order that a sample be taken for testing. *Id.* at 234.

In *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608 (Ct. App. 1980), the court of appeals recognized that consent "is not optional, but is an implied condition precedent to the operation of a motor vehicle on Wisconsin public highways." The court added, "This statutory scheme does not contemplate a choice, but rather establishes that a defendant will suffer the consequences of revocation should he refuse to submit to the test after having given his implied consent to do so. The defendant's consent is not at issue." *Id.* at 624.

In *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, the court of appeals concluded that consent to testing is given at the time a person obtains a driver's license or operates a motor vehicle on a highway in Wisconsin, and that additional consent is not required when a law enforcement officer requests that the person submit to testing. *Id.* ¶ 12.

A requirement of "actual" voluntary consent when an officer requests a sample would mean that these and many other Wisconsin cases are wrong. Such an interpretation of the implied consent law would also be "inconsistent with the Supreme Court's analysis of a state implied consent law under the principle that 'consent to a search need not be express but may be fairly inferred from context.'" *Howes*, 2017 WI 18, ¶ 75 n.10 (Gableman, J., concurring) (citing *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016)).

A requirement of "actual" voluntary consent when an officer requests a sample would also mean that the implied consent law somehow has effect only if a person who likely is intoxicated voluntarily consents to give a sample when

facing the threat of revocation of his or her operating privilege.

The court of appeals in *Padley* could not have intended to interpret the implied consent law in a manner inconsistent with the language of the statute, and with this Court's interpretation of the law. To the extent that *Padley* can be read in such a fashion it is incorrect and not controlling.

C. *Missouri v. McNeely* does not affect Wisconsin's implied consent law, and *Birchfield v. North Dakota* affirms the constitutionality of the law.

Neither *Missouri v. McNeely*, nor *Birchfield v. North Dakota*, cast doubt on how Wisconsin's implied consent law works, or on the law's validity. *McNeely* concerned the exigent circumstance exception to the warrant requirement, not the consent exception. And the Supreme Court "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185 (citing *McNeely*, 133 S. Ct. at 1565–66; *South Dakota v. Neville*, 459 U.S. 533, 559 (1983)).

In *Birchfield*, the Supreme Court considered the constitutionality of laws that "make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired." *Id.* at 2166. The Court concluded that states may not impose criminal penalties for refusal to submit to a warrantless blood draw, *id.* at 2186, but that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." *Id.* at 2184. The Court concluded that states may impose criminal or civil penalties for refusal to submit to a breath test. *Id.* at 2185–86. The

Court also said that "nothing we say here should be read to cast doubt on" implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. *Id.*

Birchfield reinforces the constitutionality of Wisconsin's implied consent law, which imposes only civil penalties for a person's refusal to submit to a test of his or her blood, breath, or urine. "Far from disapproving the concept of consent by conduct within the context of a driver's implied consent, the Court expressly endorsed the general validity of state implied consent laws that infer motorists' consent to testing from the conduct of driving." *Howes*, 2017 WI 18, ¶ 74 (Gableman, J., concurring).

D. Blackman consented to a blood draw and did not withdraw his consent.

As this Court has long recognized, under Wisconsin's implied consent law, all persons who operate a motor vehicle on a Wisconsin highway are deemed to have given consent to one or more tests of his or her breath, blood or urine, when an officer requests a sample. That consent, unless withdrawn, authorizes the taking of one or more samples. It is undisputed that Blackman consented to a blood draw by driving on a Wisconsin highway, and that he did not withdraw his consent. The issues in this case do not concern whether Blackman consented, but only whether he was properly informed of the statutory opportunity to withdraw his consent, and the consequences of doing so.

II. Blackman was not coerced into agreeing to submit to the officer's request for a blood sample for testing.

A. Blackman was correctly informed that if he refused the officer's request for a sample under Wis. Stat. § 343.305(3)(ar) his operating privilege would be revoked.

As explained above, Blackman consented to a blood draw by operating a motor vehicle on a Wisconsin highway. When an officer requested a sample, Blackman was correctly advised of the mechanisms of the statute and the consequences for refusal.

Deputy Abler requested a blood sample from Blackman under Wis. Stat. § 343.305(3)(ar)2., which provides that if a person is the operator of a vehicle that is involved in an accident that causes death or great bodily harm to any person, and an officer has reason to believe the person violated a state or local traffic law, the officer may request a sample of a person's blood, breath, or urine. Deputy Abler testified that he believed Blackman had violated a traffic law by turning left without yielding to oncoming traffic. (36:6.) It is undisputed that the bicyclist suffered great bodily harm. (35:24.)[4]

Deputy Abler read the Informing the Accused form to Blackman, as required by § 343.305(4), and told Blackman that if he refused to provide a sample, his operating privilege

[4] At the suppression hearing, the parties stipulated that the bicyclist suffered great bodily harm. (36:15.)

would be revoked.[5] Deputy Abler requested a blood sample (36:7–8), and Blackman agreed to provide a sample (36:8).

Blackman asserts that the information Deputy Abler gave him was incorrect for two reasons. First, he argues that the statute provides only that the officer "may" arrest a person who refuses. Second, he argues that arrest is the only

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[5] Wisconsin Stat. § 343.305(4) provides, in relevant part, as follows:

> (4) 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 operator 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."

penalty for refusal under § 343.305(3)(ar). (Blackman's Br. 23–29.)

Deputy Abler did not misinform Blackman by not telling him that he "may" be arrested. After all, whether Blackman would be arrested was entirely up to Deputy Abler. Had Deputy Abler told Blackman that he "may" be arrested if he refused, Blackman perhaps would not have understood that Deputy Abler was going to arrest him if he refused.

Deputy Abler also did not misinform Blackman by telling him that his operating privilege would be revoked if he refused. While an officer cannot issue a notice of intent to revoke after a refusal under § 343.305(3)(ar), an officer is authorized to arrest the person under § 343.305(3)(a), and then request a sample under § 343.305(3)(a). If the person refuses that request, the officer is required to issue a notice of intent to revoke the person's operating privilege. Wis. Stat. § 343.305(9)(a). Deputy Abler did not inform Blackman about each step of the process, but he properly informed him of the end result—if Blackman refused, his operating privilege would be revoked.

B. Wisconsin Stat. § 343.305(9)(a)5 limits the issues at a refusal hearing, but does require that each issue be litigated in every refusal hearing.

The circuit court concluded that Blackman's consent to a blood draw was coerced because he was threatened with revocation if he refused, but a revocation would be statutorily unenforceable. (23:4–5.) The court of appeals agreed that a revocation after a refusal under § 343.305(3)(ar) would be statutorily unenforceable, and would have been rescinded at a refusal hearing, but it concluded

that Blackman was not coerced into agreeing to a blood draw. *Blackman*, 371 Wis. 2d 635, ¶¶ 11–12. Blackman asserts that the circuit court was correct, and that he was coerced into agreeing to a blood draw because he was threatened with a revocation for refusal that could not be enforced. (Blackman's Br. 32, 34.)

The issues that may be raised at a refusal hearing are set forth in Wis. Stat. § 343.305(9), which provides that the issues are limited to:

> **a.** Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol . . . and whether the person was lawfully placed under arrest for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25.
>
> **b.** Whether the officer complied with sub. (4).
>
> **c.** Whether the person refused to permit the test.

Wis. Stat. § 343.305(9)(a)5.

Blackman, like the circuit court and court of appeals, contends that a revocation after a refusal under § 343.305(3)(ar) and then under § 343.305(3)(a) is unenforceable because the State will be unable to satisfy the first issue, that the officer had probable cause to believe the person operated a motor vehicle while under the influence, and arrested the person for operating while under the influence. Like the circuit court and court of appeals, Blackman relies on *Padley*, in which the court of appeals recognized "an apparent disconnect between the terms of Wis. Stat. § 343.305(3)(ar)2. and the statutes governing refusal hearings." *Padley*, 354 Wis. 2d 545, ¶ 66 n.12. Like in this case, in *Padley* a driver was involved in an accident and a law enforcement officer believed she had violated a traffic law. The officer requested a sample under § 343.305(3)(ar)2.

Id. ¶¶ 9–10. The officer read the Informing the Accused form to Padley, who agreed to provide a blood sample. *Id.* ¶¶ 10–11.

In *Padley*, this court noted that:

> If Padley had refused to give her consent and timely sought a refusal hearing, the issues she could have raised at the hearing are limited and include: (1) "[w]hether the officer had probable cause to believe the [driver] was driving or operating a motor vehicle while under the influence of alcohol, [or] a controlled substance . . . ."; and (2) whether the driver was "lawfully placed under arrest" for an OWI-related violation. Sec. 343.305(9)(a)5.a.

Id. ¶ 66 n. 12.

In the current case, the circuit court concluded that as a result of this "apparent disconnect," Blackman's consent to a blood draw was coerced. The court stated that "[t]he issue becomes whether Mr. Blackman was [misled] or coerced by the 'Informing the Accused' language under a scenario where any revocation described therein would be reversed." (23:4.) The court concluded that the language at issue was misleading and coercive:

> Clearly a motorist like Mr. Blackman would have had his revocation reversed had he refused a test and been revoked because there was no probable cause to believe impairment existed under Section 343.305(9)(a)5(a) at the time of driving. If his revocation was statutorily unenforceable at the time he was read the Informing the Accused and threatened with just such a revocation, how could he not be improperly coerced into consenting to a test.

(23:4.)

The court of appeals agreed that a person who refuses under § 343.305(3)(ar)2 "should win a refusal hearing under the current statute." *Blackman*, 371 Wis. 2d 635, ¶ 5.

But Blackman's consent was not coerced because he consented when he operated a motor vehicle on a Wisconsin highway. And a revocation for a refusal under § 343.305(3)(ar), and then under § 343.305(3)(a), is not unenforceable, because § 343.305(9)(a)5 can reasonably be interpreted as limiting the issues that may be raised at a refusal hearing, but not requiring that each issue be addressed at every refusal hearing.

The statute says that the issues at a refusal hearing "are limited to" those listed in § 343.305(9)(a)5.a.–c. The word "limited" means "[c]onfined or restricted within certain limits." American Heritage Dictionary of the English Language (5th ed. 2015). "Limited" is also defined as "Restricted; bounded; prescribed. Confined within positive bounds; restricted in duration, extent, or scope." Black's Law Dictionary (6th ed. 1990).

The statute does not say that all of the listed issues will be presented at every refusal hearing. By use of the word "limited," the statute simply precludes other issues from being raised at a refusal hearing.

Under this interpretation, a person who was arrested for an OWI-related offense and refused under § 343.305(3)(a) can challenge whether the officer had probable cause to arrest for an OWI-related offense, whether the person was lawfully placed under arrest for an OWI-related offense, whether the officer gave the person the Informing the Accused information, and whether the person refused.

But a person who refused under § 343.305(3)(ar) and then refused after arrest under § 343.305(3)(a), but was not arrested for an OWI-related offense can challenge only whether the officer read the Informing the Accused form to him or her, and whether he or she refused. This

interpretation of § 343.305(9)(a) comports with the Legislature's intent in creating § 343.305(3)(ar).

In 2005, the Legislature enacted 2005 Wis. Act 413, which created Wis. Stat. § 343.305(3)(ar), authorizing law enforcement officers to request a sample from persons involved in accidents that cause death or great bodily harm when the officer detects the presence of alcohol or controlled substances. In the same act, the Legislature amended § 343.305(9)(a)1., adding the language "or had requested the person to take a test under sub. (3)(ar)." 2005 Wis. Act 413. The Legislature also amended § 343.305(8)(b)2.e, which concerns the issues at an administrative hearing for a person who gives a sample which reveals a prohibited alcohol concentration, or the presence of a restricted controlled substance. Under the old provision, "whether probable cause existed for the arrest" was an issue at a hearing on the administrative suspension. When the Legislature added § 343.305(3)(ar), authorizing the taking of samples without probable cause to arrest for an OWI-related offense, it amended § 343.305(8)(b)2.e. to remove probable cause as an issue at an administrative hearing. 2005 Wis. Act 413. The new law restates the issue as, "[i]f a test was requested under sub. (3)(a), whether probable cause existed for the arrest."

The legislative history indicates that the change to § 343.305(8)(b)2.e. resulted from Assembly Amendment AA 1 to SB 611, the Senate Bill that became 2005 Wis. Act 413. (R-App. 101.) The drafting instructions for AA 1 were to "exempt probable cause for these violations." 2005 Drafting Request for Assembly Amendment AA 1 to SB 611, April 21, 2006. (R-App. 102.)

A Legislative Council Amendment Memo confirms that the Legislature intended to remove probable cause as an

issue at refusal hearings for persons who refuse under § 343.305(3)(ar). The memo noted that under current law, "[t]he issues at the hearing are limited, and one of the issues is whether the officer had probable cause to arrest the person." The memo then explained AA 1, as follows:

> **Assembly Amendment 1** provides that whether the officer had probable cause to arrest the person is not an issue at a hearing to contest a revocation based upon a refusal to take a test as provided under the bill because the person is not required to be arrested before the test may be requested.

Wisconsin Legislative Council Amendment Memo for AA 1 to 2005 SB 611, April 27, 2006. The amendment was offered and adopted by the Assembly Committee on Criminal Justice and Homeland Security, and became part of the bill that became 2005 Wis. Act 413. Wisconsin Legislative Council Amendment Memo for AA 1 to 2005 SB 611, April 27, 2006.

Wisconsin Stat. § 343.305(3)(ar)2. was created by 2009 Wis. Act 163. That act authorized chemical testing when there is an accident causing death or great bodily harm, and a law enforcement officer believes a person has violated a traffic law. The act also amended § 343.305(4), which provides the information an officer reads to a person when requesting a sample, to include "or you are the operator of a vehicle that was involved in an accident that caused the death of, or great bodily harm to, or substantial bodily harm to a person." 2009 Wis. Act 163 did not amend the scope of issues that can be raised at a refusal hearing.

The State is unable to find anything in the legislative history of 2005 Wis. Act 413 or 2009 Wis. Act 163 indicating that the legislature intended to allow a person from whom a sample is requested under § 343.305(3)(ar) to challenge the basis for the request at a refusal hearing. Instead, the

legislative history suggests that the Legislature simply intended that probable cause to arrest for an OWI-related offense not be an issue at a hearing for a refusal under § 343.305(3)(ar). The issues would be only those listed in § 343.305(9)(a)5.b., and c.: "[w]hether the officer complied with sub. (4)," and "[w]hether the person refused to permit the test."

This interpretation is supported by the language of the statute, and fulfills the Legislature's intent in creating § 343.305(3)(ar). Under this interpretation, such a revocation is enforceable.

C. A revocation of a person's operating privilege after the person refuses under § 343.305(3)(ar) and then under § 343.305(3)(a) will be sustained unless the person timely requests a refusal hearing.

Even under the circuit court and court of appeals' interpretation of § 343.305(9)(a), a revocation for refusing under § 343.305(3)(ar) and then under § 343.305(3)(a) can be enforced. The circuit court and court of appeals focused on what occurs if the person requests a refusal hearing within ten days. But they did not address the threshold requirement that the person request a hearing within ten days.

As the court of appeals observed in *Padley*, 354 Wis. 2d 545, ¶ 31, "[r]evocation of the license is automatic, in the sense that revocation may be overturned only if the driver prevails before a court at a refusal hearing requested by the driver within ten days of receipt of the notice of intent to revoke his or her license." If the person does not timely request a hearing, the revocation is enforced. As this Court

has recognized: "Wisconsin Stat. §§ 343.305(9)(a)4. and (10)(a) impose a mandatory requirement that the refusal hearing must be requested within ten days of service of the Notice of Intent." *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 39, 348 Wis. 2d 282, 832 N.W.2d 121.

A revocation after a person refuses under § 343.305(3)(ar), and then after being arrested, refuses again under § 343.305(3)(a), works in the same manner. Wis. Stat. § 343.305(9)(a)4. The person's operating privilege will be revoked unless he or she requests a hearing within ten days.

D. A revocation of a person's operating privilege after the person refuses under § 343.305(3)(ar) and then under § 343.305(3)(a) may be sustained even if the person timely requests a refusal hearing.

As explained above, even under the circuit court and court of appeals' interpretation of § 343.305(9)(a), a revocation for refusal under § 343.305(3)(ar), and then under § 343.305(3)(a), is not unenforceable, but automatic unless the person timely requests a refusal hearing. Under a number of scenarios a revocation would not be unenforceable even if the person were to timely request a refusal hearing.

In finding a revocation for refusal under § 343.305(3)(ar) unenforceable, the circuit court relied on the *Padley* court's description of the "apparent disconnect between the terms of Wis. Stat. § 343.305(3)(ar)2. and the statutes governing refusal hearings." In *Padley*, the court of appeals concluded that "a court at Padley's hypothetical refusal hearing could not have concluded" that the officer had probable cause to arrest Padley for an OWI-related

offense, and that Padley was lawfully placed under arrest for an OWI-related offense. *Padley*, 354 Wis. 2d 545, ¶ 66 n.12.

The circuit court seemed to conclude that due to the "apparent disconnect," a revocation for a refusal under § 343.305(3)(ar), an arrest, and a refusal under § 343.305(3)(a), would never be enforceable because at a refusal hearing the person would always be able to show that the officer did not have probable cause to arrest for an OWI-related offense, and did not lawfully place the person under arrest for an OWI-related offense. (23:3–5.)

However, in a case involving an accident, a law enforcement officer could have reason to believe the driver has violated a traffic law, and also have probable cause to believe that the person committed an OWI-related offense. The officer may proceed under either § 343.305(3)(a) or § 343.305(3)(ar). The officer could request a sample under § 343.305(3)(ar), and after a refusal, arrest the person for OWI or PAC or some other OWI-related offense, and then request a sample under § 343.305(3)(a). A revocation after another refusal would likely be sustained after a refusal hearing.

Even in a case in which an officer does not initially have probable cause to arrest for an OWI-related offense under § 343.305(3)(a), and therefore proceeds under § 343.305(3)(ar), nothing in the implied law precludes the officer from considering the person's refusal under § 343.305(3)(ar) in deciding whether to arrest the person for an OWI-related offense under § 343.305(3)(a). Refusal to submit to a test is powerful evidence that a person is under the influence of an intoxicant, or has a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood. A refusal carries sanctions. A person from whom a sample is requested is told that if he or she refuses, sanctions include revocation and

the use of the refusal in court proceedings. In addition, an improper refusal counts as a prior conviction to enhance the sentence for subsequent offenses. After considering the refusal, an officer may well have probable cause to arrest the person for an OWI-related offense.

After a person refuses a request under § 343.305(3)(ar), the officer might learn that the person has three or more prior offenses, and is subject to the 0.02 standard. In such a case, a serious accident, a violation of a traffic law, and a refusal under § 343.305(3)(ar)2., might be sufficient to give the officer probable cause to arrest for an OWI-related offense.

Even if a refusal under § 343.305(3)(ar) along with the officer's other observations might not be sufficient for probable cause to arrest for an OWI-related offense, the officer might have probable cause to administer a preliminary breath test (PBT), or field sobriety tests. The purpose of field sobriety tests and the PBT is to determine whether there is probable cause to arrest for an OWI-related offense. "The legislature entitled Wis. Stat. § 343.303 'Preliminary breath screening test,' and the text of the statute also describes the test as a 'preliminary breath screening test.'" *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 313, 603 N.W.2d 541 (1999). To request a PBT, an officer needs probable cause that is "greater than the reasonable suspicion necessary to justify an investigative stop," but "less than the level of proof required to establish probable cause for arrest." *State v. Goss*, 2011 WI 104, ¶ 25, 338 Wis. 2d 72, 806 N.W.2d 918 (quoting *Renz*, 231 Wis. at 317). The results of a PBT and field tests may give the officer probable cause to arrest for an OWI-related offense. Alternatively, refusal to perform field tests can be considered in determining whether there is probable cause to arrest. *State v. Schmidt*, 2012 WI App 137, ¶ 8, 345 Wis. 2d 326, 825

N.W.2d 521 (citing *State v. Babbitt*, 188 Wis. 2d 349, 362–63, 525 N.W.2d 102 (Ct. App. 1994)).

In any of these situations, an officer could have probable cause to arrest for an OWI-related offense after a refusal under § 343.305(3)(ar). A revocation would therefore be statutorily enforceable even if the person timely requests a refusal hearing.[6]

III. Blackman's consent to the officer's request for a sample was not coerced under the totality of the circumstances.

Blackman asserts that under the totality of the circumstances, his consent to a blood draw was coerced. (Blackman's Br. 36–41.) He points out, correctly, that voluntariness of consent must be determined on the totality of the circumstances. *Birchfield*, 136 S. Ct. at 2186 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

Blackman argues that the totality of the circumstances include that the officer who requested a blood sample from him first told him that "our normal procedure [ ] when there is a serious accident like this [is] that we do take blood samples." (36:16; Blackman's Br. 37.) Blackman argues that the officer had no authority to "take blood," and that his consent to a blood draw was therefore acquiescence to unlawful authority rather than voluntary consent.

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[6] In the current case, it is unclear whether Deputy Abler would have had probable cause to arrest Blackman for an OWI-related offense, or probable cause sufficient to request a PBT or field sobriety tests, if Blackman had refused. It makes no difference, because Blackman voluntarily consented to a blood draw by operating a motor vehicle on a Wisconsin highway, and he affirmed his consent when Deputy Abler requested a sample of his blood and informed him of the consequences of a refusal.

Blackman is wrong for a number of reasons. First, Blackman consented to a blood draw by operating a motor vehicle on a Wisconsin highway. Second, the officer had lawful authority to request a blood sample, and if Blackman refused the request, he was subject to revocation of his operating privilege. Third, by saying that department policy is to take blood when there is a serious accident, the officer merely clarified that the policy is to request or require a blood sample, rather than a breath or urine sample. He did not say that the policy is to take a blood sample even if the person refuses the officer's request for the sample. Fourth, the officer did not tell Blackman that the department's policy is to take a blood sample and then order a blood draw. The officer read the Informing the Accused form to Blackman, giving Blackman the choice of (1) affirming the consent he gave by operating a motor vehicle on a Wisconsin highway, by submitting to a request for a blood sample; or (2) exercising his statutory opportunity to withdraw that consent, by refusing to provide a sample. Blackman chose to affirm his consent, and submit.

Blackman argues that he, like all Wisconsin-licensed motorists, is presumed to know the contents of the Wisconsin Department of Transportation Motorists' Handbook, and that the handbook incorrectly states that a driver must consent to a request for a blood sample. (Blackman's Br. 39–40.) But the handbook does not say a driver must consent. It correctly states that if an officer properly requests a sample, "you must comply." It adds that, "If you refuse, you will lose your driver license for at least one year." This information is correct. It is well established that a driver in Wisconsin has no right to refuse an officer's request for a sample. *State v. Reitter*, 227 Wis. 2d 213, 239, 595 N.W.2d 646 (1999). A person has a statutory opportunity to refuse a request, and to withdraw the consent that he or she gave by operating a motor vehicle on a Wisconsin

highway. But the person has no constitutional or statutory right to refuse a proper request. As the handbook accurately states, a driver must comply or face a penalty, namely the loss of his or her operating privilege.

Blackman also argues that when the officer read him the Informing the Accused form, the officer "incorrectly" told him that "if he refused the blood test, his license would be revoked and that he would be subject to other penalties." He argues that it is "clear that one of the other 'penalties' would be a blood draw, regardless of his consent." (Blackman's Br. 40.)

Blackman is incorrect. He had already consented to a blood draw, and the officer explicitly told him that he had an opportunity to withdraw that consent and refuse to submit to a blood draw. The officer said nothing even hinting that if Blackman refused his blood would be drawn anyway. Blackman consented to a blood draw by operating a motor vehicle on a Wisconsin highway, and he has pointed to nothing that renders that consent involuntary.

IV. Wisconsin's implied consent law is not unconstitutional on its face or as applied to Blackman.

Blackman argues that Wisconsin's implied consent law is unconstitutional because the statutory scheme does not support a revocation that is threatened when a person refuses under § 343.305(3)(ar). (Blackman's Br. 42.) As explained above, the statutory scheme can be enforceable. But even if a person who refused a request for a sample under § 343.305(3)(ar) and then under § 343.305(3)(a) might have a revocation rescinded after a refusal hearing, § 343.305(3)(ar) is not unconstitutional.

Blackman argues that "the threatened penalties provided to him in the 'Informing the Accused' form did not apply to him," and that § 343.305(3)(ar)2. is therefore unconstitutional on its face and as applied to him. (Blackman's Br. 42–43.) He relies on *Birchfield*, arguing that the Supreme Court in *Birchfield* found that a North Dakota statute that did not accurately set forth the consequences for refusal was unconstitutional, and that the Court concluded 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." (Blackman's Br. 45.)

Blackman's reliance on *Birchfield* is misplaced. The "consequences" that *Birchfield* referred to are criminal penalties for refusing a request for a blood sample. Nothing in *Birchfield* suggests that a person cannot properly be deemed to have consented to a blood draw by driving on a public road, on pain of a civil penalty, even if the penalty might not be imposed.

In *Birchfield*, the Supreme Court concluded that one of the petitioners (Beylund) was misinformed by a North Dakota statute that criminalized refusal to submit to a blood draw. *Birchfield*, 136 S. Ct. at 2186. The Court held that a state may impose a criminal penalty for refusal to submit to a breath test, or a civil penalty for refusal to submit to either a breath test or a blood test. But a state may not lawfully impose a criminal penalty for refusal to submit to a blood test. *Id.* at 2184. 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.* at 2186. The North Dakota statute in question did precisely what the Court held it could not do—compel a blood test on pain of committing a criminal offense. *Id.* The Court therefore remanded the case for an evaluation of the voluntariness of Beylund's consent. *Id.*

The "problem" with Wisconsin's implied consent law that Blackman identifies in this case is entirely different than the one at issue in *Birchfield*. The North Dakota statute informed drivers that they face a criminal penalty for refusal to submit to a blood draw, but a state may not impose a criminal penalty for refusal to submit to a blood draw. *Id.* The Court remanded for determination of whether the consent the driver impliedly gave by operating a motor vehicle was voluntary when it was given on pain of an unlawful criminal penalty.

Under Wisconsin's implied consent law, drivers impliedly consent to a test of their blood, breath, or urine on pain of a lawful civil penalty. Nothing in *Birchfield* suggests that a Wisconsin driver's implied consent is involuntary. Instead, *Birchfield* affirmed that laws like Wisconsin's—which impose only civil penalties for refusal—are constitutional. And nothing in *Birchfield* invalidates an implied consent law that correctly tells a driver that refusal will be punished with a civil penalty.

Blackman also argues that the provisions of Wisconsin's implied consent law at issue are unconstitutional because they authorize a test of a driver's blood, breath, or urine without "any particularized suspicion that Mr. Blackman's blood contained any evidence of a crime." (Blackman's Br. 44.) He asserts that "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." (Blackman's Br. 43.)

Blackman again bases his argument on *Birchfield*. But as the court of appeals recognized in this case, the Supreme Court in Birchfield "addressed the propriety of implied consent laws where criminal penalties are imposed

for refusing . . . and therefore *Birchfield* does not impact our decision." *Blackman*, 371 Wis. 2d 635, ¶ 10 n.5.

Blackman argues that in *Birchfield*, the Court invalidated a law that resulted in a motorist being "threatened with an unlawful search." (Blackman's Br. 46.) But that result turned on the invalidity of the threatened penalty. The Court in *Birchfield* did not say, or even suggest, that a state cannot deem a person to have consented to a test of blood, breath, or urine, when an officer requests a sample after the person is involved in a crash, where a refusal does not carry a criminal penalty.

Blackman has not shown that Wisconsin's implied consent law is unconstitutional on its face, or as applied to him.

V. Even if Blackman had been misinformed about whether his operating privilege would be revoked if he withdrew his consent, suppression of the blood test results would not be required.

Blackman consented to a request for a blood sample by operating a motor vehicle on a Wisconsin highway, and he submitted to a request for a blood sample after he was correctly informed that refusal would result in revocation of his operating privilege. But even if Blackman was somehow misinformed about the consequences of refusing, the officer who misinformed him was acting in good faith reliance on Wis. Stat. § 343.305(4), which requires an officer requesting a sample under § 343.305(3)(ar) to inform a person that a refusal will result in revocation of the person's operating privilege. Suppression of the blood test results would therefore be unnecessary and inappropriate.

A. The good faith exception to the exclusionary rule applies when an officer acts in good faith reliance on a statute.

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citations omitted). However, "[t]he exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995)).

The exclusionary rule should not apply when officers act in good faith. *Id.* ¶ 36 (citing *Herring*, 555 U.S. at 142; *United States v. Leon*, 468 U.S. 897 (1984)). This Court has concluded that, "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Dearborn*, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 144).

In *Krull*, the Supreme Court held that the good faith exception applies when an officer acts in good faith reliance on a statute that is later determined to be unconstitutional. *Krull*, 480 U.S. at 349–50. This Court later extended the rule from *Krull*, and concluded that the good faith exception applies in cases in which the officers act in "objectively reasonable reliance on settled law subsequently overruled." *Dearborn*, 327 Wis. 2d 252, ¶¶ 37, 44 (citing *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517).

In *Dearborn*, this Court affirmed that the good faith exception applies in Wisconsin when officers reasonably rely on clear and settled precedent. This Court found a statute unconstitutional, but it concluded that suppression was inappropriate, because "[a]pplication of the exclusionary rule would have absolutely no deterrent effect on officer misconduct, while at the same time coming with the cost of allowing evidence of wrongdoing to be excluded." *Id.* ¶ 44.

In *Davis v. United States*, 564 U.S. 229 (2011), the U.S. Supreme Court reached a similar result. It concluded that "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.' [*Leon*, 468 U.S.] at 919. Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis,* 564 U.S. at 241.

B. The officer relied on Wis. Stat. §§ 343.305(3)(ar) and (4) when he read the Informing the Accused form to Blackman and requested a blood sample.

Deputy Abler requested that Blackman consent to a blood draw under the implied consent law. (36:7-8.) He read the Informing the Accused form to Blackman, and Blackman agreed to a blood draw. (36:7-9.) It does not appear that Blackman disputes that Deputy Abler was required to read the form to Blackman when he requested a sample under § 343.305(3)(ar), that he correctly read the form, or that the form states that if a person refuses a request for sample of his or her blood, breath, or urine, the person's operating privilege will be revoked. The dispute is only whether Blackman was misinformed when the officer told him that if he refused, his operating privilege would be revoked.

The circuit court concluded that the statute misinformed Blackman, because "[c]learly a motorist like Mr. Blackman would have had his revocation reversed had he refused a test and been revoked because there was no probable cause to believe impairment existed under Section 343.305(9)(a)(5)(a) at the time of driving." (23:4.)

The State maintains that the Informing the Accused information in Wis. Stat. § 343.305(4), which is reflected in the Informing the Accused form, is correct, and that Blackman was properly informed that a refusal would result in revocation. But even if Blackman was misinformed, it was not because the officer failed to read the form to him, or misread it, or because of any other error by the officer. Any error was a legislative error in creating § 343.305(9)(a)5.a., which sets forth the issues that can be raised at a refusal hearing if a person refuses a request for chemical testing and then timely requests a hearing.

The officer read the Informing the Accused form to Blackman, and correctly informed him of the consequence the Legislature mandates for improper refusal—revocation of his operating privilege. This is precisely what the officer was required to do. As the circuit court recognized, "reading the Informing the Accused is mandated by Section 343.305(4) and had the officer not read that Informing the Accused, we would be here considering the defense argument that the officer failed to comply with the statute." (23:3.)

The statute that the officer relied upon, Wis. Stat. § 343.305(4), is not clearly unconstitutional or invalid. At most, as the court of appeals suggested in *Padley*, another portion of the implied consent law—§ 343.305(9)(a)5.a., concerning the issues at a refusal hearing—demonstrates a "disconnect" in the statute. But the *Padley* court did not find

any part of the implied consent law unconstitutional. Instead, it rejected the defendant's argument that § 343.305(3)(ar)2. is unconstitutional. *Padley*, 354 Wis. 2d 545, ¶ 3.

Even if the court had found part of the implied consent law unconstitutional in *Padley*, the officer's reliance on the statute in this case would have been entirely reasonable. After all, the officer read the Informing the Accused form to Blackman on June 22, 2013, and the court of appeals issued the *Padley* decision on May 22, 2014.

Any possible misinformation that the officer gave Blackman by reading the Informing the Accused form to him was due to an error by the Legislature, not an error by the officer. As the Supreme Court has concluded, a legislative error should not result in suppression of evidence: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Krull*, 480 U.S. at 350 (citing *Leon*, 468 U.S. at 921). As the Court explained,

> [T]he greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes. Invalidating a statute informs the legislature of its constitutional error, affects the admissibility of all evidence obtained subsequent to the constitutional ruling, and often results in the legislature's enacting a modified and constitutional version of the statute . . . .

Id. at 352.

When the Legislature amended the implied consent law with 2009 Wisconsin Act 163, it authorized chemical testing when there is an accident causing death or great bodily harm, and a law enforcement officer believes a person has violated a traffic law. Applying the exclusionary rule in

this case—to suppress the results of a test under 2009 Wisconsin Act 163—obviously would be contrary to the purpose of the legislation. And even if suppressing evidence in this case could have some possible deterrent effect on the Legislature, "that possible benefit must be weighed against the 'substantial social costs exacted by the exclusionary rule.'" *Krull*, 480 U.S. at 352–53 (quoting *Leon*, 468 U.S. at 907).

The societal costs of applying the exclusionary rule in this case would be extremely high. It would result in suppression of evidence showing that a person who violated a traffic law and was involved in an accident that caused extremely serious injuries to another person had a prohibited alcohol concentration.

This cost clearly outweighs any benefit in the deterrent effect of suppressing evidence. As the circuit court recognized, the officer was required to read the Informing the Accused form to Blackman. (23:3.) There was no misconduct by the officer. The only possible deterrence would be of the Legislature, not the officer. But this Court can point out any flaws in the statutory scheme, and the Legislature can amend the statute, without the drastic measure of suppressing evidence, which is a "last resort." *Dearborn*, 327 Wis. 2d 252, ¶ 35 (citing *Herring*, 555 U.S. at 140). In this case, there is no misconduct to deter, and suppression would be inappropriate.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the court of appeals' decision which reversed the order granting Blackman's motion to suppress evidence from a test of his blood.

Dated this 13th day of March, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,717 words.

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MICHAEL C. SANDERS
Assistant Attorney General

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

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 13th day of March, 2017.

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MICHAEL C. SANDERS
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Adam M. Blackman
Case No. 2015AP450-CR

Description of document	Page(s)
2005 Drafting Request for Assembly Amendment AA 1 to SB 611, dated April 21, 2006	101
Wisconsin Legislative Council Amendment Memo for AA 1 to 2005 SB 611, dated April 27, 2006	102

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, 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.

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