STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

vs.

Appeal No.: 15 AP 656 CR

PATRICK K. KOZEL,

Defendant-Appellant

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR SAUK COUNTY, BRANCH III, THE HONORABLE GUY REYNOLDS PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Respectfully submitted,

PATRICK K. KOZEL,
Defendant-Appellant

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: TRACEY A. WOOD
State Bar No. 1020766

SARAH SCHMEISER
State Bar No. 1037381

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STATEMENT OF THE CASE AND FACTS

In addition to those facts noted in Petitioner's Brief, Mr. Kozel notes the following facts from the record in this matter.

Motion Hearing

On September 26, 2014, Mr. Kozel appeared for a motion hearing in the Sauk County Circuit Court, the Honorable Guy D. Reynolds presiding. (26:1). The parties addressed two issues at the hearing which had been raised via motion. (26:29–30). The first issue was whether the State proved that Matthew Goethel, an EMT-intermediate technician ("EMT") for the Baraboo District Ambulance Service ("BDAS"), acted "under the direction of a physician" for purposes of Wis. Stat. § 343.305(5)(b) when he stuck a needle into Mr. Kozel's arm and took his blood. (*Id.*) The second issue was whether the State proved that the EMT stuck a needle into Mr. Kozel's arm in a constitutionally reasonable manner. (*Id.*)

The EMT was the only witness. (26:2). He testified that he began working for BDAS in September of 2005. (26:3). He described his certifications. (26:4–5). He began performing blood draws in June of 2009, before Dr. Mendoza wrote his letter ostensibly authorizing that action. (26:7). He testified that he knew Dr. Mendoza. (*Id.*) Dr. Mendoza is the BDAS medical director. (*Id.*)

The EMT identified a letter that Dr. Mendoza wrote on August 21, 2009. (26:8). The lower court received the letter over Mr. Kozel's objection. (26:24). The letter reads, in pertinent part:

> To Whom It May Concern: . . . I have authorized a standing order for the EMT-Paramedics . . . authority [*sic*] to draw legal blood draws at the request of the law enforcement officers. The . . . EMT-Paramedics and EMT-Intermediate Technicians are acting under the direction of my physician license. They have all completed extensive training regarding the procedures and legalities of obtaining blood draws. If you have questions regarding this manner [*sic*], please do not hesitate to contact me. [1] (25:2).

Even on direct examination, the EMT admitted that he had never spoken with Dr. Mendoza about the letter. (26:8). The EMT acknowledged that if Dr. Mendoza were not available during a blood draw, he would simply consult a different physician at a nearby hospital. (26:9). However, Respondent offered no evidence that any physician – Dr. Mendoza nor anyone else – ever purported to authorize jail blood draws. The EMT admitted that his qualifications for establishing an IV line are not a blank check to perform any procedure on a person's vein. (26:10). He believed there were

[1] Nowhere in this letter, or in any other part of the record before this Court, does Dr. Mendoza authorize the practice of taking suspects' blood in the Sauk County Jail.

protocols and instructions from Dr. Mendoza but would have to check to make sure. (26:26).

The EMT described the room in which blood draws occur at the Sauk County Jail. (26:11). He testified that he performed the blood draw in a small room he calls "the prebooking area." (*Id.*) He testified that the room also contains a breath test machine. (*Id.*) The EMT never said that he could see microorganisms with his naked eye. However, he testified that the room "appears clean." (26:12). There is a sign or chart on the wall indicating when jail staff does janitorial duties. (26:13). The EMT testified that the room was not sterile. (26:13).

The EMT was trained to do blood draws by individuals at Madison Area Technical College and by a former paramedic on his staff. Dr. Mendoza did not train him to do blood draws. (26:16). He admitted even a registered nurse is considered more advanced in training than an EMT. (26:19). He admitted he did not know how long the term of Dr. Mendoza's contract is, and that the letter was dated 2009. (26:22). The letter does not specifically allow EMTs to draw blood at the jail. (26:25). The EMT was never tested by Dr. Mendoza or asked to do any procedures for him. (26:25). Dr. Mendoza simply reviewed the EMT's certification. (26:25). He has

not watched him do one blood draw at the jail. (26:25). Dr. Mendoza never personally told the EMT he was permitted to draw blood at a jail facility, nor did Dr. Mendoza ever inspect the blood draw location at the jail. (26:25). The EMT did not speak with Kozel about any health issues, did not ask whether he was taking any medicines or even attempt to verify his medical status at all prior to drawing blood. (26:27). Even though the EMT said Mendoza would be available by cell phone, the point of contact would actually be the emergency room doctor. (26:17). The EMT admitted if there is a medical problem with an individual, there are specific emergency interventions that can be done in the emergency room, but not in the jail. (26:28).

The EMT admitted to playing a role in a serious mishap during a previous jail blood draw. (26:19). The EMT failed in his first attempt to draw blood from the subject. (*Id.*). Still, the EMT persisted and attempted a second blood draw. (*Id.*). The individual lost consciousness, and "one or two" jail deputies had to help the individual to the floor. (*Id.*).

On cross-examination, the EMT testified that Dr. Mendoza never personally vetted him. (26:25). Dr. Mendoza never observed the EMT perform a blood draw in the jail. (*Id.*). Dr. Mendoza never

gave his permission for jail blood draws to occur. (26:26). The EMT testified that Dr. Mendoza is aware that jail blood draws occur, but has never authorized the practice. (*Id.*).

The EMT acknowledged that some people have medical issues that would affect the safety of a blood draw. (26:27). However, he never asked Mr. Kozel about any possible health issues. (*Id.*). He never asked Mr. Kozel about whether he was on any medication. (*Id.*). The EMT acknowledged that he failed to "verify his medical status at all." (*Id.*).

Dr. Mendoza created written protocol for BDAS blood draws, but it is missing from this record because Respondent failed to introduce it. Respondent also failed to subpoena Dr. Mendoza. (26). The lower court received the letter over the defense's foundational and hearsay objections. (26:23). Therefore, this Court is left only with vague hearsay to determine whether Dr. Mendoza authorized this particular EMT to do any blood draws anywhere – let alone in a jail. Dr. Mendoza's letter does not mention, much less approve, taking blood draws at the Sauk County Jail. (*Id.*).

After oral argument, the lower court denied Mr. Kozel's motion. (26:42). The court found that there was no doctor in the room or immediate area. (26:35). The EMT never contacted a doctor

during the course of the procedure here at issue. (*Id.*). Granted, the EMT could have attempted to reach Dr. Mendoza by cell phone. (*Id.*). Dr. Mendoza wrote a letter dated August 21, 2009 authorizing EMT-intermediates to perform blood draws. (*Id.*). The court found written protocols existed, but Respondent failed to put them into the record. (26:38). Further, it is unknown whether protocols were updated since the letter was written four years ago. The court found the EMT was a medical professional. (26:39). The court found the EMT took Mr. Kozel's blood "in accordance with the preexisting authorization of Dr. Mendoza," despite its inability to consider his written protocol. (26:39–40).

Plea Hearing

Mr. Kozel appeared for plea and sentencing on January 9, 2015. (43:1). He entered a plea to OWI as a second offense, reserving his right to appeal the denial of his motion. (43:3). Pursuant to the plea agreement, the Court stayed all penalties pending appeal, pursuant to Wis. Stat. § 969.01(2)(b). (43:9). Mr. Kozel filed his Notice of Intent to Pursue Post-Conviction Relief and Notice of Appeal to the Court of Appeals. (37:45). The Court of Appeals decision was released on November 12, 2015. ***State v. Kozel***, 366 Wis. 2d 331, 873 N.W.2d 100 (Ct. App. 2015)

(unpublished). That decision reversed the trial court finding that the EMT was acting under the direction of a physician and did not reach the issue as to whether the blood was drawn in a constitutionally reasonable manner.

ARGUMENT

This Court should affirm the Court of Appeals' decision that the State failed to prove that the EMT was "a person acting under the direction of a physician" within the meaning of Wis. Stat. §343.305(5)(b). Additionally, this Court should reverse the trial court decision and find the jail blood draw unreasonable under the Fourth Amendment or article I, section 11 of the United States and Wisconsin Constitutions, respectively, as the Court of Appeals did not reach this issue.

Pursuant to the terms of his plea deal, Mr. Kozel stands convicted only of operating a motor vehicle while intoxicated, contrary to Wis. Stat. § 346.63(1)(a). (43:8). The chemical test evidence is the fruit of the "poisonous tree" with respect to both issues and should have been suppressed in the court below. ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963); *see also* ***Mapp v. Ohio***, 367 U.S. 643, 655 (1961). Mr. Kozel therefore respectfully requests that this Court reverse his conviction and remand to the circuit court for further proceedings.

I. RESPONDENT FAILED TO PROVE SUFFICIENT FACTS TO SUPPORT THE LEGAL CONCLUSION THAT THE EMT WAS A "PERSON ACTING UNDER THE DIRECTION OF A PHYSICIAN" UNDER WISCONSIN STATUTES SEC. 343.305(5)(B).

A. Standard of review.

Whether the EMT acted "under the direction of a physician" requires this Court to "construe and apply [Wisconsin Statutes sec. 343.305(5)(b)] to the facts of *this* case." ***State v. Schmidt***, 277 Wis. 2d 561, 569–70, 691 N.W.2d 379 (Ct. App. 2004) (emphasis added). This Court will set aside clearly erroneous factual findings made by the lower court. ***Schmidt***, 277 Wis. 2d at 570. Statutory interpretation itself, however, presents a question of law that appellate courts review *de novo*. ***State v. Johnson***, 318 Wis. 2d 21, 31, 767 N.W.2d 207 (2009). This Court owes no deference to the legal conclusions of the lower court. ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).

B. The Court of Appeals' decision finding the State failed to establish the EMT performed the blood draw under the direction of a physician was correct.

The trial court found that the EMT took Mr. Kozel's blood "in accordance with the preexisting authorization of Dr. Mendoza," despite the fact that the State never sought to introduce Mendoza's written protocol. (26:39–40). The parties and the Court of Appeals

assumed this finding was subject to a *de novo* review, and the State's brief does not argue otherwise.[2]

A decision by this Court as to this issue really only affects this specific case, as the statute in question has since been amended to include "other medical professionals". Thus, as of April of 2014 it is no longer necessary that a physician give direction to another medical professional drawing blood, given the statutory amendment. This is a discrete issue of whether there were sufficient facts establishing that a physician properly supervised or directed this EMT in this case.

There are no previous United States Supreme Court or Wisconsin Supreme Court decisions on this issue. There are a couple Court of Appeals decisions, but the issues and facts differed in those cases from the ones in the case at bar. Moreover, this Court of Appeals' decision is unpublished and has no precedential value.

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[2] The trial court found that the EMT is a medical professional, rather than a paraprofessional. These people provide indispensable services, but are not licensed to practice in the medical profession. The Greek prefix "para" indicates "beside" or "near." *American Heritage College Dictionary* 1007 (4th ed. 2002). Therefore, EMT's and paramedics work *alongside* a medical professional, but are not medical professionals themselves. *Id.* at 1009 ("paramedic. *n*. A person who is trained to give emergency medical treatment or *assist medical professionals*.") (emphasis added). Therefore, the lower court's finding that the EMT is a medical professional is clearly erroneous, and even if relevant to the issues in this appeal, this Court should set it aside.

It can be cited for persuasive authority, but the only takeaway from the decision is that the EMT's testimony in this specific case did not show he was properly directed under the statute. Thus, the Court of Appeals' decision does not conflict with any other case.

At the time of the blood draw at issue in the case, Wis. Stat. § 343.305(5)(b) stated in pertinent part:

> Blood may be withdrawn from the person arrested…only by a (1) physician, (2) registered nurse, (3) medical technologist, (4) physician assistant or (5) person acting under the direction of a physician. (numeration and emphasis added).

The statute in question was amended in April 2014, after the date of the blood draw at issue in this case, by 2013 Wis. Act. 224. Effective April 9, 2014, Wis. Stat. § 343.305(5)(b) permits an additional category of person to perform blood draws: "or other medical professional who is authorized to draw blood." See: 2013 Wis. Act. 224 § 3. Thus, because this specific class of people can now draw blood without being supervised and directed by a physician, this specific issue is not likely to recur. The Court of Appeals simply reviewed the facts proven at the evidentiary hearing to determine whether the State proved the EMT who drew defendant-appellant's blood was "acting under the direction of a physician" pursuant to Wis. Stat. sec. 343.305(5)(b). Because there was no

testimony that a physician ever even watched this EMT draw blood or reviewed his work, the Court of Appeals determined that the State did not meet its burden under the statute. This was the correct decision under the facts of this specific case and under the law at the time.

The cases mentioned by the State in its brief, ***State v. Osborne***, 349 Wis. 2d 527, 835 N.W.2d 292 (Ct. App. 2013) (unpublished); ***County of Sauk v. McDonald***, 2015 WI App 52, 866 N.W.2d 405 (unpublished); ***County of Fond du Lac v. Bethke***, 354 Wis. 2d 326, 847 N.W.2d 427 (Ct. App. 2014) (unpublished), were all decided on a fact intensive analysis specific to those individual cases. Each were unpublished Court of Appeals cases and may not be cited for any precedential value. Facts in all, as well as the legal challenges, were quite different. In ***McDonald***, the Court of Appeals found that the factual stipulation entered into by the defense and State established that the paramedic was supervised by a physician. The argument in that case focused on whether this level EMT should ever be allowed to draw blood in a jail and whether a jail environment is an appropriate place for a blood draw. The case was not about whether the State met its burden of proof that the paramedic in question was completing blood draws under the

direction of the doctor because the Court found that the stipulation removed that argument, and any argument to the contrary was waived. The issue was whether this type of direction stipulated to in the lower court supported the trial court's finding that the blood draw in a jail setting was reasonable. In the instant case, there was no stipulation that a doctor would say he supervised and directed the blood draw, and the State failed to subpoena a doctor to so testify.

In ***Osborne***, the State presented evidence that the physician supervised that particular EMT; that the physician "signed off" on the EMT's performance of his duties, and there was contact at least monthly between the physician and the EMT, with the ability for contact with the physician whenever needed. ***Osborne***, ***supra*** at ¶ 19. In the case at bar, there is nothing in the record to show the physician ever saw the EMT complete a blood draw. The State also failed to establish any protocols for blood draws, unlike in the other cases. The State conceded the physician in this case had not trained the EMT, had not observed the EMT doing any procedures, and had not seen the EMT perform a blood draw in the jail. (State's Petition for Review, p. 9) (26:25). Mr. Kozel's case was reversed due to a failure of proof on the part of the State. The other cases mentioned had proof in the record that there was direction by the physician of

the paramedics in those situations. The cases are not contradictory to each other—the analysis is the same. The issue was whether the State met its burden of proof that a physician supervised and directed the EMT in each case. In the current case, there was no supervision or direction. Thus, the Court of Appeals reversed.

The ***Bethke*** decision has nothing to do with the issues raised in the current case. It involved a challenge to whether the police officer can testify as to whether the person who drew blood was permitted by statute at trial. It was essentially a hearsay objection which the trial court overruled. The Court of Appeals found that the trial court did not abuse its discretion in overruling the defense objection. The case is, thus, irrelevant to the issues here.

The narrow issue here is whether Respondent proved in the lower court that the specific EMT who drew Mr. Kozel's blood in this case is a "person acting under the direction of a physician" under Wisconsin Statutes sec. 343.305(5)(b). Appellant does not ask this Court to conclude that all Sauk County Jail blood draws necessarily fall outside of sec. 343.305(5)(b)'s purview. However, the facts of this case fail to pass statutory muster.

The finding by the trial court that the EMT was acting under the direction of Dr. Mendoza was a legal conclusion subject to a *de*

novo review by this Court. The only real evidence in support of that conclusion was the letter from Dr. Mendoza written four years prior stating that these employees could draw blood. This EMT is not named personally in the letter. Further, ruling that a vague letter provided enough proof to justify a bodily search such as this is, as a matter of fact, an erroneous ruling. To the extent the trial court relied upon the EMT's following of any protocol, no reason exists in the record for a court to assume (1) the nature of the written protocol or (2) that the EMT conformed his conduct to that protocol.

The issue of whether the EMT acted under Dr. Mendoza's direction for purposes of sec. 343.305(5)(b) depends upon the specifics of Dr. Mendoza's direction, if there actually was any. One letter constitutes the only evidence in the record proving the nature of Dr. Mendoza's directions. (25:2). This letter neither mentions nor approves the practice of taking blood draws at the Sauk County Jail. (*Id*.)

Dr. Mendoza created written protocol for BDAS blood draws, but it is missing from this record because Respondent failed to introduce it. Respondent also failed to subpoena Dr. Mendoza. (26). The lower court received the letter over the defense's foundational and hearsay objections. (26:23). Therefore, this Court is left only

with vague hearsay to determine whether Dr. Mendoza authorized this particular EMT to do any blood draws anywhere – let alone in a jail. No reason exists for this Court to assume that Dr. Mendoza ever contemplated or approved the practice of jail blood draws. The EMT took Mr. Kozel's blood in the Sauk County Jail. Therefore, the record is insufficient for this Court to conclude the EMT acted under Dr. Mendoza's direction for purposes of sec. 343.305(5)(b). ***State v. Frambs***, 157 Wis. 2d 700, 705–06, 460 N.W.2d 811 (1990) (citing with approval ***Bourjaily v. United States***, 483 U.S. 171, 175 (1987) ("We are therefore guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof."). Respondent failed to establish the requisite preliminary factual nexus between the physician and the paramedic; therefore, there was no evidence for this Court to conclude that the paramedic was "acting under the direction of a physician" for purposes of Wisconsin Statutes sec. 343.305(5)(b). Without a statement in the record that Dr. Mendoza authorized jail blood draws, this Court cannot assume he did or would have done so.

The Court of Appeals' unpublished decision was decided on a simple burden of proof analysis of the facts proven at the hearing. No protocols were put into evidence as to what Dr. Mendoza may or may not have taught the personnel at the Ambulance Service. The EMT could not even remember if there were instructions or protocols from Dr. Mendoza that he was supposed to follow. He testified: "Regarding the blood draw, I would have to check. I believe there are." (26:26). Thus, if there is any actual instruction or protocols, this individual had no recollection of actually following them. Moreover, the State's assertion that Dr. Mendoza occasionally goes to the jail (State's brief p. 13) is unsupported by the record. In response to the question: "To your knowledge has Dr. Mendoza ever inspected the blood draw location at the jail?" The EMT responded: "Not to my knowledge." (26:26). Dr. Mendoza never saw this individual ever do a blood draw. This is not direction of any sort.

The State both argues that this Court should consider "the plain language of the statute" in determining whether the EMT was "a person acting under direction of a physician" and then argues that the Court of Appeals' usage of the common dictionary definition of "direction" was improper. (Petitioner's brief, pp. 7 and 13 quoting ***State v. Dinkins***, 2012 WI 24, 339 Wis. 2d 78, 810 N.W.2d 787).

The State, apparently conceding there was no guidance or direction, then asserts, "The State maintains that the exact wording of the letter makes no difference" (p. 12). Given that the only proof of the extent of Dr. Mendoza's direction was the language relied upon in that letter by the EMT, the letter makes all the difference. Just as the Court of Appeals opinion noted, "direction" means "guidance or supervision of action, conduct or operation." ***Kozel***, 2015 WL 6970484, ¶ 13 (quoting Webster's Third New International Dictionary 640 (1993)). The fact that the State argues the language of the letter makes no difference means the State is implicitly conceding there was no guidance or direction. The State's argument that direction can be provided by Dr. Mendoza's license also must fail, as a license does not provide direction; a person does.

The plain language of the statute is that a physician should actually be directing the person taking the blood. A vague letter giving indefinite authority to perform blood draws to a class of people with no direction or guidance whatsoever shows this individual did not take that blood under actual direction of any physician.

The Court of Appeals in a published decision has previously interpreted the phrase "under the direction of a physician" in the

context of sec. 343.305(5)(b). *See, e.g.*, ***State v. Penzkofer***, 184 Wis. 2d 262, 516 N.W.2d 774 (Ct. App. 1994). The ***Penzkofer*** court upheld a blood draw that was conducted by a laboratory technician *at a hospital*. 184 Wis. 2d at 265–66. The laboratory technician performed the blood draw under the general supervision of a physician, the hospital pathologist. ***Id.*** at 265. The pathologist was at the hospital at the time of the blood draw, although he was not in the immediate vicinity when the blood draw occurred. ***Id.*** The physician in ***Penzkofer*** "identified a written hospital protocol setting forth the detailed procedures that must be followed by the technician. These procedures were reviewed, revised, and the protocol was dated and signed by the physician." ***Penzkofer*** at 265. The State's assertion that ***Penzkofer*** recognized that nothing in the statute requires the following of protocols is not supported by a reading of ***Penzkofer***. That blood draw was upheld because it was done by a person who was following such protocols in a hospital setting. ***Penzkofer*** did not hold that protocols are an absolute minimum standard, but there is no assurance a person who is not covered by the statute is performing these draws accurately unless following such protocols and procedures as established by a physician, especially when not in a medical environment. Further, establishing protocols and ensuring

they are followed does indicate direction by a physician, unlike the vague letter and no follow up of any kind here.

The Court of Appeals in ***Penzkofer*** held that over-the-shoulder supervision is not necessarily required for a blood draw to be deemed "under the direction of a physician." ***Id.*** at 266. Moreover, a physician need not specifically order each individual blood draw to pass scrutiny under Wis. Stat. sec. 343.305(5)(b). ***Id.*** Still, procedures must satisfy concerns of both reliability *and* safety. ***Id.*** The ***Penzkofer*** court partially based its ruling on the strict regulatory standards to which hospitals are subjected. ***Id.*** No such safeguards apply to paramedics sticking needles into citizens' arms in jails.

The "under the direction of a physician" cases up to this point have informed trial courts and litigants about what is *not* required to bring a blood draw into the purview of sec. 343.305(5)(b). *See* ***Id.*** at 265 (holding that neither (1) over-the-shoulder supervision nor (2) a case-specific authoritative command from a physician is required); *see also* ***Osborne, supra***. The ***Osborne*** court held that ***Penzkofer*** does not establish written hospital protocols as a minimum evidentiary requirement, where the EMT testifies he is in *regular contact* with his supervising physician. 2013 WI App 94 at ¶ 13.

However, this record lacks that crucial assurance of compliance with the physician's direction. This EMT never testified that he was in regular contact with Dr. Mendoza. In fact, he admitted that he had never spoken with Dr. Mendoza about the letter. (26:8). The EMT acknowledged that if Dr. Mendoza were not available during a blood draw, he would simply consult a different physician – one who, unlike Dr. Mendoza, never even purported to authorize EMT blood draws. (26:9). Given that the EMT admitted he never consulted Dr. Mendoza about the letter, he therefore never consulted Dr. Mendoza about the scope of his direction. There was zero guidance or direction as to how blood draws should be done by either Dr. Mendoza or any doctor. There was also no observation of or confirmation this EMT properly drew blood.

Although the ***Osborne*** court held, in an unpublished decision, that the State need not produce written protocol where the EMT testifies that he is in regular contact with the physician, this EMT never testified to any such contact, much less regular contact. The record in this case does not establish that the EMT stuck a needle into Mr. Kozel's arm pursuant to Dr. Mendoza's understanding of his letters, which were (1) written years before this incident and (2) neither mentioned nor approved the possibility of a jail blood draw.

As stated above, this Court thus held that over-the-shoulder supervision is not necessarily required for a blood draw to be deemed "under the direction of a physician." ***Penzkofer***, 184 Wis. 2d at 266. Moreover, a physician need not specifically order each individual blood draw to pass scrutiny under Wis. Stat. sec. 343.305(5)(b). ***Id.*** Still, procedures must satisfy concerns of both reliability *and* safety. ***Id.*** The ***Penzkofer*** court partially based its ruling on the strict regulatory standards to which hospitals are subjected. ***Id.*** No such safeguards apply to paramedics sticking needles into citizens' arms in jails.

The blood draw in this case differs significantly from the one in ***Penzkofer***. Penzkofer's blood draw occurred in a hospital setting, where the person taking blood had direct access to her physician supervisor. Mr. Kozel's blood draw occurred in the "prebooking" room of a jail; no doctors were available or supervising in any way. Critical to the court's reasoning in ***Penzkofer*** was the idea that the hospital environment, with its clearly enforced procedures, provided reliability and sterility. Neither a sterile environment nor a similar aura of reliability is present in this case.

The defendant in ***County of Sauk v. McDonald*** argued that a physician's letter dated before the stipulated date of a paramedic's

blood draw training failed to pass muster under sec. 343.305(5)(b) because no personal nexus existed between the physician and paramedic. No. 2014AP1921, slip op. at ¶ 20 (unpublished but citable under Wis. Stat. (Rule) 809.23(3)). In affirming the lower court, the ***McDonald*** court specifically noted that the motion was heard on stipulated facts. ***Id.*** at 3 n.5. The ***McDonald*** court reasoned that the appellant lost his right to challenge the weight and reliability to be afforded those documents when he stipulated to them in the lower court. ***Id.*** In this case, however, Mendoza's letter was admittedly hearsay and put into evidence over defense counsel's objection. Because no such stipulation occurred in this case, the State has a functionally higher burden to meet.

Moreover, the ***McDonald*** court created a new test not present in any other precedential or persuasive case to date. ***Id.*** at ¶ 22. The ***McDonald*** court read in the minimum evidentiary requirement that a physician merely has to "[take] professional responsibility" for a given paramedic. ***Id.*** Equating "professional responsibility" with "direction" finds no support in the plain language of sec. 343.305(5)(b), nor in any case law cited by the court. The ***McDonald*** court thus made new law, contrary to its clearly defined role. ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985)

("The Wisconsin Court of Appeals serves the primary 'error-correcting' function in our two-tiered appellate system. *See* ***State v. Mosley***, 102 Wis.2d 636, 665-66, 307 N.W.2d 200, 216-217 (1981). The Wisconsin Supreme Court, unlike the Court of Appeals has been designated by the constitution and the legislature as a law-declaring court."). ***McDonald*** is a one-judge decision and has no precedential value. Wis. Stat. (Rule) 809.23(3)(a). This Court should therefore not rely upon the new test set forth therein. Instead, this Court should evaluate this case according to what the statute required and by actually considering the extent to which a physician *directed* a given EMT, paramedic, or other person ostensibly acting under the physician's *direction*. Wis. Stat. § 343.305(5)(b). Nothing in this record suggests that Dr. Mendoza assumes professional responsibility, that is, financial liability, for the EMTs' and paramedics' jail blood draws.

In ***People v. Gregg***, the Appellate Court of Illinois examined what actually constitutes acting under the direction of a physician in the context of blood draws in deciding whether the trial court was correct in suppressing the results of the blood draw. That court concluded "under the direction of" to be akin to the words "direct supervision." 171 Ill. App. 3d 1076, 1080 (1988). Thus, the Illinois

Court agreed with the Wisconsin Court of Appeals' definition in ***Kozel, supra*** of "direction" in the case at bar. The Court found, however, that a physician does not need to separately order each blood draw and reversed the trial court decision which had found the blood in the case could not be drawn because there was not a direct order from a physician to do so in that particular case. Thus, the Appellate Court of Illinois found as the Court of Appeals did here that there actually needs to be some supervision. That is the only meaningful conclusion to make as to what it means for a physician to direct or supervise. A doctor's letter written four years prior to the current blood draw saying the EMTs at a certain place are allowed to draw blood in perpetuity is not any type of supervision at all. It makes no logical sense. The reason the statute required direction was to protect the health and safety of arrestees. The statute, as it was written at the time, must be found to have meaning. The State simply failed to prove there was any doctor direction at all in this case.

C. Suppression is the appropriate remedy.

1. The State waived the argument that suppression cannot be the remedy in this case.

The State makes a brand new argument for the first time in this Court, that the remedy for a violation of the statute as governing who can draw blood is not suppression but loss of automatic

admissibility. That argument was not raised by the State in the trial court. The trial court proceedings were premised on the fact that if the motion was granted as to either or both arguments relating to whether this EMT was acting under the direction of a physician or whether the jail blood draw was constitutionally reasonable, the test result would be suppressed. Both parties assumed that was the remedy, as did the trial court. Mr. Kozel would not have pled no contest to the charges if any remedy had been granted to him or if his motion had been granted in any respect. Both parties below and the court presumed Mr. Kozel was convicted because the trial court found against him on both issues raised in the motion—whether the EMT was acting under the direction of a physician and the reasonableness of the blood draw itself. Of course, Kozel would still be entitled to a new trial if this Court finds that the EMT was not a person acting under the direction of a physician, because the trial court found the EMT to be a proper person under the statute and did not grant any remedy whatsoever. Kozel asserts that suppression would be the proper remedy for numerous reasons--the most obvious, that the State did not raise this issue in the trial court.

Notably, the State did not raise the argument that suppression would not be the remedy at the Court of Appeals level either. Thus,

the Court of Appeals did not reach that specific issue because it was not raised. The State has not offered any explanation or argument as to why it failed to raise this issue in either the trial court or the Court of Appeals. This Court should not permit such an argument at this level to discourage such practices by litigants in the future.

Our higher courts in Wisconsin prohibit raising issues for the first time on appeal and certainly do not permit arguments to be raised only in our highest court, where neither the trial court nor the Court of Appeals was even given a chance to address the argument. It would be fundamentally unfair and unjust to now let the State avoid its duty to raise all issues below and circumvent normal appellate process. The State has now waived any argument to effect that suppression would not have been the remedy because it implicitly conceded it in the trial court and the Court of Appeals. Issues may not be raised for the first time on appeal. See: ***In re Guardianship of Willa L.*** 338 Wis. 2d 114, 808 N.W.2d 155 (Ct. App. 2011).

The ***Willa L.*** Court further stated:

> In *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, 261 Wis.2d 769, 661 N.W.2d 476, we noted *Holland Plastics*, and went on to explain that the "fundamental" forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would

> "blindside" the circuit court. *See* Schonscheck, 261 Wis.2d 769, ¶¶ 10–11, 661 N.W.2d 476. That case and countless others after *Holland Plastics* have reaffirmed that the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general **issues** were **raised** before the circuit court. *See, e.g., State v. Rogers*, 196 Wis.2d 817, 827, 539 N.W.2d 897 (Ct.App.1995) (explaining that the forfeiture rule requires that, to preserve its arguments, a party must "make all of their arguments to the trial court"). ***Willa, supra*** at 126.

2. To the extent the State claims suppression can never be a remedy in a case such as this, the State is incorrect.

Furthermore, the instant case does not involve an issue of whether Wis. Stat. § 343.305(5)(d) was followed (the discussion of advisals under the Implied Consent Law) (emphasis supplied). In those cases, suppression is sometimes the remedy and sometimes not. See: ***State v. McCrossen***, 129 Wis. 2d 277, 385 N.W.2d 161 (1986) (suppression the remedy); ***State v. Renard***, 123 Wis. 2d 458, 367 N.W.2d 237 (Ct. App. 1985) (suppression the remedy); ***State v. Zielke***, 137 Wis. 2d 39, 49, 51, 403 N.W.2d 427 (1987) (suppression not the remedy); ***City of Waupaca v. Javorski***, 198 Wis. 2d 563, 543 N.W.2d 507 (Ct. App. 1995), (suppression not the remedy with an improper administrative review proceeding advisal). The issue here was whether the blood was taken reasonably under a different

statutory subsection, (Wis. Stat. § 343.305(5)(b)); and suppression would be the remedy if it was not.

One case mentioned by the State as to this issue (***Winnebago County v. Christenson***, No. 2012AP1189 (Dist. II, October 31, 2012) (unpublished)) was a Court of Appeals case and involved an objection to evidence at trial and did not relate at all to reasonableness of a jail blood draw. It was an argument over admissibility of evidence at trial, where a court is afforded a great deal of discretion. Moreover, no party in the current proceedings even cited to that case for persuasive authority. It was an unpublished decision relevant to a discrete issue at the trial in that case only. Another Court of Appeals case cited by the State, ***County of Dane vs. Winsand***, 2004 WI App 86, ¶ 7, 271 Wis. 2d 786, 679 N.W.2d 885, discusses suppression not being the remedy in a breath test only in dicta in a footnote. That case dealt with rule promulgation, and the Court of Appeals specifically noted the defense there did not argue a violation of 343.305(6)(b) which deals with the DOT's approval of techniques or methods of performing chemical analysis of breath tests. In the instant case, the direct challenge is to the violation of the law requiring properly guided and trained people to be the only ones who can withdraw blood from an individual. This is not a simple

issue of how a rule is promulgated or whether a person was told the issues at an administrative review hearing.

Notably, the State's brief only mentions cases where suppression was not the remedy for violations of the Implied Consent Law and does not mention those where suppression was the appropriate remedy. In ***Renard, supra***, a case involving failure of police to give a second test as permitted under the Implied Consent Law, the Court of Appeals held:

> We reject the state's argument that suppression of the blood test results is only appropriate if necessary to protect Renard's constitutional rights. The state correctly argues that admission of the blood test results does not violate due process because Renard has other means available to question the accuracy of the blood analysis. *See* *State v. Disch*, 119 Wis.2d 461, 471–72, 351 N.W.2d 492, 500–501 (1984). The legislature may adopt more rigorous safeguards, however, than those imposed by the federal or state constitution. *California v. Trombetta*, 467 U.S. 479, ——, 104 S.Ct. 2528, 2535, 81 L.Ed.2d 413 (1984). Here, the legislature requires the opportunity for an alternative test, which our supreme court has said is an assurance of due process. *Walstad*, 119 Wis.2d at 527, 351 N.W.2d at 491. Because the legislature's provision for *462 an alternative test is not based on an erroneous determination of materiality, *see* *id.* at 523, 351 N.W.2d at 489, we will enforce compliance with the requirement by excluding blood test results when an alternative test is not provided. Enforcement of the statutory right to an alternative test would otherwise be impossible. ***Renard, supra*** at 239.

Similarly, in the instant case, compliance with the statute must be enforced for it to have any meaning. This Court also held that suppression is an appropriate remedy in a case involving the denial of an alternative test in ***McCrossen, supra***, stating:

> We approve the suppression of blood alcohol test results, however, as a sanction for violating a defendant's statutory right to an alternative blood alcohol test. The right to a second test, when a reliable first test is performed, is not required by due process. But, as we stated in *Walstad*, 119 Wis.2d at 527, 351 N.W.2d 469, a second test does help assure fairness. …
>
> Because the legislature intended the second test as a check on the reliability of a first test, we consider suppression of the state's chemical test results to be an appropriate sanction, rather than dismissal….
>
> Our suppression rule is not inconsistent with sec. 343.305(2)(d), Stats., which provides that the rules regulating the taking of blood, breath or urine samples do not limit the right of a law enforcement officer to obtain evidence by any other lawful means. We construe this section to mean that law enforcement officers can secure corroborating evidence of intoxication in ways consistent with the chemical testing procedure. Any other construction would make the chemical testing procedure entirely discretionary, rather than mandatory. We will not construe a statute in such a way as to render part of it superfluous, if such construction can be avoided. *Kollasch v. Adamany*, 104 Wis.2d 552, 563, 313 N.W.2d 47 (1981). This construction recognizes that the right to a second test is the legislatively imposed *quid pro quo* for a driver's implied consent to testing for alcohol concentration. ***McCrossen, supra*** at 170.

Both the Court of Appeals and this Court have, thus, held that suppression is appropriate to ensure compliance with chemical testing procedure. This Court in ***McCrossen*** thus explained that while suppression evidence is permissible, it does not limit the right of law enforcement to obtain evidence by lawful means and "in ways consistent with the chemical testing procedure." (supra at 170). Thus, ***McCrossen*** and ***Zielke*** are not contradictory, as neither demands nor prohibits suppression as a possible remedy. In ***Zielk***e, the Court declined to suppress in a felony homicide case. Similarly, this Court stated in ***Piddington*** that had the officer improperly conveyed Implied Consent advisals, "Piddington would not necessarily be entitled to suppression of the test results." ***Supra*** at 784, emphasis added. Thus, suppression is still an appropriate remedy in some Implied Consent cases.

To find suppression is never permissible in a situation like the instant one, where an improperly supervised person drew blood contrary to the statute, would make the requirements of the statute superfluous. Although some minimal violations of the Implied Consent Law have resulted in only loss of automatic admissibility as noted in the State's brief, an improper advisal under the Implied Consent Law is a far cry from doing a bodily search with a needle.

Following the statute in this situation is the *quid pro quo* for the State's ability to use that chemical evidence at trial. The State cannot both violate the law and still get to use the evidence. It cannot have it both ways.

Moreover, the seminal cases relied upon by the parties and court in these proceedings assumed suppression as a remedy. In ***Penzkofer, supra***, the issue was whether the trial court erred in receiving test results over the defense objection that the person who drew the blood was not a proper person under the statute. The State did not argue suppression was not the remedy, and had the decision been for the defendant, the case would have been reversed due to the finding the evidence was improperly received. There was no language about lack of automatic admissibility being the only remedy. In ***State v. Daggett***, 250 Wis. 2d 112, 640 N.W.2d 546 (Ct. App. 2002), the issue was whether a physician could draw blood at a jail. Suppression would have been the remedy if he was found to have done an unreasonable blood draw, but the Court found against the defense on that issue. In both cases, the State did not argue suppression would not be the remedy. Suppression would have been the remedy had the courts found violations.

The constitutional requirement of reasonableness of searches requires that blood draws be conducted pursuant to statutory authority as a *quid pro quo* for admissibility. There is a reason the Legislature enacted this statute, and it must be followed. The requirements of the statute protect the health and safety of arrestees and permit chemical test evidence to be introduced at trial if the statutory requirements are followed. Disregard for those requirements that protect individuals from just anybody sticking a needle into their bodies necessarily raises questions of constitutional reasonableness. See: ***Penzkofer, supra***; ***Daggett, supra***.

Furthermore, the process guaranteed by statutes is oftentimes subject to a due process analysis in the context of drunken driving cases. If there is a due process violation, suppression would be the remedy. See: ***City of Lodi v. Hine***, 107 Wis. 2d 118, 318 N.W.2d 383 (1982) (suppression appropriate for destruction of breath test ampoules); ***State v. Disch***, 119 Wis.2d 461, 471–72, 351 N.W.2d 492, 500–501 (1984); ***Village of Oregon v. Bryant***, 188 Wis. 2d 680, 524 N.W.2d 635 (1994) (Court finds no due process violation because defendant properly informed under the Implied Consent Law) see also: **State v. *Nordness***, 128 Wis. 2d 15, 381 N.W.2d 300 (1986) where the Court stated:

> There is no question that the revocation of a driver's license for a statutorily defined purpose is a protectible property interest which implicates due process protections. *Illinois v. Batchelder*, 463 U.S. 1112, 1116–17, 103 S.Ct. 3513, 3515–16, 77 L.Ed.2d 1267 (1983). The only remaining inquiry is to determine "'what process is due to protect against an erroneous deprivation of that interest.'" *Id*. At 30. (quoting from *Mackey v. Montrym*, 443 U.S. 1, 10, 99 S.Ct. 2612, 2617, 61 L.Ed.2d 321 (1979);

State v. Drexler, 199 Wis. 2d 128, 544 N.W.2d 903 (Ct. App. 1995) (due process challenge raised in Implied Consent advisal context).

II. THE POLICE TOOK MR. KOZEL'S BLOOD IN A CONSTITUTIONALLY UNREASONABLE MANNER.

The next issue raised in the trial court was whether this blood draw done by a non-medical professional in a non-sterile jail setting without supervision of a physician is reasonable under the Fourth Amendment to the United States Constitution. This issue was raised in the Court of Appeals by direct appeal from the denial of the suppression motion. The Court of Appeals' decision did not reach this issue.

Of course, this Court need not reach this constitutional issue if it concludes that the paramedic was not acting under Dr. Mendoza's direction. ***Waters ex rel. Skow v. Pertzborn***, 243 Wis. 2d 703, 714, 627 N.W.2d 497 (2001) ("When a case may be resolved on non-constitutional grounds, we need not reach constitutional questions.")

(citing ***Ziegler Co. v. Rexnord, Inc.***, 139 Wis. 2d 593, 612, 407 N.W.2d 873 (1987)).

A. Standard of review.

The reasonableness of the warrantless blood draw in this case, a search under the Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution, is a question of constitutional law that receives *de novo* review by appellate courts. ***State v. Thorstad***, 238 Wis. 2d 666, 669, 618 N.W.2d 240 (Ct. App. 2000).

B. Non-medical jail blood draws raise serious questions of constitutional reasonableness that the State cannot overcome under the facts of this case.

To be constitutionally permissible, the method used in a warrantless blood draw must be reasonable, and it must be performed in a reasonable manner. ***State v. Bohling***,[3] 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993), *abrogated on other grounds by* ***Missouri v. McNeely***, 133 S.Ct. 1552 (2013). In ***Bohling***, the Court applied the same reasonableness standards that were set forth by the

[3] The State also cited ***Bohling*** in its brief at p. 10 but did not note the abrogation by ***McNeely***, ***supra***.

United States Supreme Court in ***Schmerber v. California***. 384 U.S. 757, 771 (1966). Both of those cases involved involuntary blood draws conducted in hospitals. ***Bohling***, 173 Wis. 2d at 534-35 and ***Schmerber***, 384 U.S. at 758. In ***Schmerber***, the blood draw was even performed directly by a doctor. ***Id.*** The ***Schmerber*** court distinguished its facts from "the serious questions which would arise if a search involving use of a medical technique, *even of the most rudimentary sort*, were made by other than medical personnel or in other than a medical environment." 384 U.S. at 771–72 (emphasis added). "To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain." ***Id.***

The Supreme Court has famously admonished state and federal courts on several occasions:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Scheckloth v. Bustamonte, 412 U.S. 218, 228–29 (1973) (Stewart, J.) (quoting ***Boyd v. United States***, 116 U.S. 616, 635 (1886) (Bradley, J.)).

This Court of Appeals previously applied the standards articulated in ***Bohling*** and ***Schmerber*** in a case where a doctor drew a suspect's blood in a jail booking room. ***Daggett, supra***. In ***Daggett***, the Court of Appeals concluded that the blood draw satisfied the constitutional requirements for reasonableness set forth in ***Schmerber***. ***Daggett***, 250 Wis. 2d at 119. The Court's decision in ***Daggett*** outlined a spectrum of reasonableness pertaining to blood draws:

> At one end of the spectrum is blood withdrawn by a medical professional in a medical setting, which is generally reasonable. Toward the other end of the spectrum is blood withdrawn by a non-medical professional in a non-medical setting, which would raise *"serious questions" of reasonableness*.

Id. at 119 (emphasis added). Thus, this case raises serious questions of reasonableness. This Court should also consider whether the blood draw in this case presented an unjustified risk of infection and pain for Mr. Kozel. ***Id.*** The risk of infection and pain is therefore enough; pain and infection in fact are not required to weigh in favor of a finding of constitutional unreasonableness.

Mr. Kozel's blood draw was not performed in a reasonable manner as required by ***Bohling***. No one made any special effort to ensure the area was free of contaminants – the room was unsterilized. This environment is a far cry from the hospital settings in ***Bohling*** and ***Schmerber***. The only effort made to prevent possible infection was a cleaning of the immediate area on Mr. Kozel's arm from which blood was drawn. This EMT admitted to a problem in drawing blood from a previous arrestee. (26:19). That arrestee lost consciousness. (*Id.*). The EMT never testified he received any follow-up training after this incident to prevent it from reoccurring. (*Id.*). Thus, the EMT has previously endangered the health and safety of an individual from whom he drew blood.

The ***Daggett*** court placed significant weight on the fact that a physician drew the defendant's blood. 250 Wis. 2d at 116. The only issue was the location because the physician was admittedly qualified to perform the blood draw. ***Id.*** Thus, ***Daggett*** is of little utility in justifying the blood draw in this case other than to establish that if blood is drawn at a jail, it better be drawn by a physician and not an unsupervised EMT. The ***Daggett*** court never spoke to the test for constitutional reasonableness courts should apply when a non-physician draws blood in a non-medical environment.

The United States Supreme Court was clear in ***Schmerber*** when it concluded serious questions would arise "if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel *or* in other than a medical environment." 384 U.S. at 771–72 (emphasis added). By use of the disjunctive, the ***Schmerber*** court expressed serious doubts about the constitutional reasonableness about both (1) blood draws in medical environments performed by nonmedical personnel, and (2) blood draws in nonmedical environments, even when performed by medical personnel.

The blood draw in this case was unreasonable under ***Daggett*** and ***Schmerber*** because it was conducted by a non-medical professional in a non-medical environment. 250 Wis. 2d at 119. To the extent any of the findings by the trial court are considered factual ones in this respect, they were clearly erroneous. The EMT in this case is at best a paraprofessional, rather than a medical professional. Jails are nonmedical environments. In ***Osborne***, there was apparently "no dispute that an EMT is a medical professional." ***Id.*** at ¶ 15. But Mr. Kozel disputes *this* EMT's status as a medical professional for two main reasons. First, the ***Osborne*** court, as well as the trial court below in this case, cited to Wis. Stat. § 256.15(5) for the proposition

that an EMT is a medical professional. That statute does not support that proposition.[4] The State, again for the first time on appeal, raises a new administrative code section to argue that EMTs should be considered medical professionals, Wis. Admin. Code sec. DHS 110.01(2). Again, as noted previously, arguments may not be made for the first time in the Supreme Court. See: ***Willa, supra***, etc. This code provision is not intended as a definition of what constitutes a medical professional for a constitutional reasonableness question but relates to training, fees, and the like for licensure of classes of individuals. Moreover, the amended statute (sec. 343.305(5)(b)) which now includes other medical professionals who can draw blood is irrelevant in this case, as the statute at the time required the EMT to be drawing blood only under the direction of a physician. As noted above, this EMT was not so directed. Even assuming *arguendo* that a statute includes a definition that makes all EMTs "medical professionals" for purposes of that *statute*, that fact would not

[4] That statute is mainly mere enabling legislation for the Department of Health to promulgate rules establishing a system and qualifications for the issuance of training permits. Wis. Stat. § 256.15(5)(b); *see also* Wis. Stat. §§ 256.15(5)(c)–(e) (concerning training permits); Wis. Stat. § 256.15(5)(f) (concerning training permit fees); Wis. Stat. § 256.15(g) (concerning conditions of relicensure). While sec. 256.15(a) provides that "the department shall license qualified applicants as ambulance service providers," it neither (1) concerns qualifications for drawing blood, nor (2) authorizes the taking of blood at non-medical facilities like the Sauk County Jail.

establish reasonableness in any *constitutional* sense of the word, as contemplated in ***Schmerber***.

The ***Schmerber*** court explained the basis for its conclusion that the blood draw in that case was reasonable. 384 U.S. at 771. The facts the ***Schmerber*** court relied on were:

(1) The defendant's blood was taken by a physician;

(2) The defendant's blood was taken in a hospital;

(3) The defendant's blood was taken according to accepted medical practices.

Id. However, an EMT took Mr. Kozel's blood – not a physician. He took it in the Sauk County Jail – not a hospital. And the State failed to establish that the EMT took Mr. Kozel's blood according to accepted medical practices. Dr. Mendoza may have authored protocol. However, the State deprived this Court of the ability to consider whether and to what extent the EMT followed that protocol, as well as whether the EMT ever received training on that protocol, by failing to put that protocol into evidence and by failing to subpoena Dr. Mendoza. The ***Schmerber*** court expressly relied on the above three circumstances in concluding, "We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, *even of the most rudimentary sort*, were

made by (1) other than medical personnel, *or* (2) in other than a medical environment – *for example, if it were administered by police in the privacy of the stationhouse*." ***Id.*** at 771–72 (emphasis and numeration added). Again, the ***Schmerber*** court employed the disjunctive "or." ***Id.*** at 772. The United States Supreme Court has clearly envisioned that a real question of reasonableness would arise if there was ever a situation with a blood draw in a jail. That situation has now arisen in Sauk County. Therefore, if this case involves *either* nonmedical personnel *or* a nonmedical environment, these facts run afoul of ***Schmerber***. Even assuming *arguendo* that an EMT counts as a medical professional under Wisconsin's amended statute, the EMT took Mr. Kozel's blood "in the privacy of the stationhouse." ***Id.*** Thus, this case fails to clear the constitutional benchmark described in ***Schmerber***.

The Osborne, supra court recognized that "it was the State's burden to show that the jail facility was a sterile environment that would not subject Osborne to potential risks associated with the blood draw," but also stated that there was "no evidence that the jail setting might have caused Osborne an unreasonable risk of infection or pain." 2013 WI App 94 at ¶¶ 13–14 (unpublished but citable under Wis. Stat. (Rule) 809.23(3)). The ***McDonald*** court also placed

the burden on the defendant in this regard. No. 2014AP1921, slip op. at ¶ 16 ("McDonald points to no evidence in the record . . . to suggest that the location in which the paramedic performed the blood draw contributed to an unjustified risk of infection or pain."). Both unpublished Court of Appeals' decisions thus mistook the *lack of evidence* of nonsterility for positive evidence of sterility. Positive evidence satisfies the State's burden. Missing evidence does not. This Court should not permit such a burden reversal. The State failed to meet its burden because it presented no evidence that anyone ensured sterility of that room in the jail where inmates are routinely processed.

In the instant case, not only did the State not meet its burden, there was actually testimony about the lack of sterilization. Therefore, there was a risk of infection. Moreover, any fact neither proved nor stipulated is a fact that does not exist for purposes of this record, and must be resolved against the State, as the State bears the burden of proof. The parties never stipulated the room was sterile, nor that there was no risk of infection or pain to Mr. Kozel. If no one sterilizes the room between usage for blood draws and other tests, the fact is that there is a risk of infection to anyone having blood drawn in that room. A room that merely looks clean is not sterile,

and no one is claiming this room was sterile. The EMT never said he was capable of seeing microorganisms with his naked eye – he merely testified that the room "appears clean." (26:12). He also testified it was unsterilized. (26:13). Thus, there was a risk of infection to Kozel.

The EMT acknowledged that some people have medical issues that would affect the safety of a blood draw. (26:27). However, he never asked Mr. Kozel about any possible health issues. (*Id.*). He never asked Mr. Kozel about whether he was on any medication. (*Id.*). The EMT acknowledged that he failed to "verify his medical status at all." (*Id.*). Thus, no safeguards existed to ensure that Mr. Kozel was a proper candidate for a blood draw, especially for a blood draw performed by an unsupervised individual who had previously endangered the health of a person when drawing blood. The lack of any safeguard definitionally invites the risk of pain and infection. The EMT admitted his qualifications are not a blank check to perform any procedure on a person's vein. (26:10). Insufficient evidence exists for this Court to conclude the EMT followed Dr. Mendoza's procedure because the State failed to introduce this procedure into the record. It is possible there were protocols on how to assess whether a person could be endangered by a blood draw,

especially one in the jail; however, no such protocols were proven by the State in this case.

Moreover, previous caselaw has established the importance of such safeguards in the drawing of blood. In ***Penzkofer***, the court recognized the importance of safety of the subject:

> Hospital laboratories are subject to detailed and stringent standards in almost every aspect of their facilities and services. *See* WIS.ADMIN.CODE § HSS 124.17. Penzkofer's concern for safety and accuracy are addressed by these standards as well as the procedures in place here. The certified lab assistant followed a written protocol approved and kept current by the pathologist. ***Supra*** at 266.

The officer did not sterilize the room, and there are no facts in the record that anyone else sterilizes that jail room where inmates are processed. (26:13). The EMT described the room in which blood draws occur at the Sauk County Jail. (26:11). He testified he performed the blood draw in a small room he calls "the prebooking area." (Id.). He testified the room also contains a breath test machine. (Id.). Therefore, it can be presumed this is the area where all drunk driving arrestees spend some time. The State carries the burden of proof and presented no evidence establishing the blood draw's reasonableness in this case. It, therefore, cannot prevail on this issue. Appellant requests this Court hold the State to that burden and

conclude insufficient evidence exists to find constitutional reasonableness. Unless this Court would conclude that BDAS EMTs can draw blood anywhere and without any written protocol, the blood draw in this case does not pass constitutional muster. Jails are nonmedical environments. The State failed to prove compliance with Dr. Mendoza's protocol. The EMT failed to ensure that Mr. Kozel was a proper candidate for a blood draw. The only published Wisconsin case that permitted a jail blood draw was ***Daggett***. The Court of Appeals reached the conclusion that the jail blood draw was reasonable only because a physician personally performed that blood draw. 250 Wis. 2d at 120. The ***Daggett*** court, however, even admitted that blood draws performed by *physicians* could be unconstitutional. ***Id.*** at 119. Here, however, an EMT performed the blood draw.

The ***Schmerber*** court was clear about blood draws "administered by police in the privacy of the stationhouse." 384 U.S. at 772. The Supreme Court held:

> To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain. . . . The integrity of an individual's person is a cherished value of our society. That we today [uphold] the States minor intrusions into an individual's body *under stringently limited conditions in no way indicates* that it permits more substantial intrusions, or intrusions under other conditions.

Id. (emphasis added).

The fact Mr. Kozel's blood draw was conducted by an unsupervised individual also supports a finding that the draw was conducted under unreasonable circumstances. When viewed in its full context, this blood draw falls on the impermissible side of the ***Daggett*** spectrum. It was performed in a jail's Intoximeter room, not a medical environment. Clinics either are or can be sterilized. They are vigilant in the fight against infection. The Sauk County Jail is not a sterile environment, and there is no attempt to ever make it so. No special efforts were taken to prevent infection, given the atypical setting for a blood draw. The person who conducted the blood draw was not a doctor or even following protocols established by a doctor. No reason exists for this court to assume any doctor ever contemplated the practice of jail blood draws. However, even assuming Dr. Mendoza explicitly approved jail blood draws, his protocol is absent from this record. No reason exists for this Court to assume the EMT conformed his practices to Dr. Mendoza's expectations because his expectations appear nowhere in the record. To conclude this specific blood draw was done under the supervision of a doctor and was done in a constitutionally reasonable way twists the strict requirements of sec. 343.305(5)(b), ***Penzkofer***, and ***Daggett***. The trial court's decision on this second constitutional issue

opens the doors to blood draws being performed by police in whatever location they please, without minimizing the risk of pain or infection.

CONCLUSION

This Court should reverse the lower court's orders denying Mr. Kozel's motions to suppress for two different reasons. First, Respondent failed to prove in the lower court that the EMT was "a person acting under the direction of a physician" within the meaning of Wis. Stat. § 343.305(5)(b). Second, the blood draw was not constitutionally reasonable under either the Fourth Amendment or article I, section 11 of the United States and Wisconsin Constitutions, respectively. The remaining evidence would be insufficient to convict Mr. Kozel of drunken driving.

Dated at Madison, Wisconsin, _____, 2016.

Respectfully submitted,

PATRICK KOZEL,
Defendant-Appellant
TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant-Appellant
One South Pinckney Street, Suite 950
Madison, Wisconsin 53703
(608) 661-6300

BY: _____
TRACEY A. WOOD
State Bar No. 1020766

BY: _____
SARAH SCHMEISER
State Bar No. 1037381

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 10,964 words.

I also certify I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wisconsin Statutes section 809.19(12). That electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served upon both the court and all opposing parties.

Dated this _____ day of _____, 2016.

Signed,

_____
SARAH SCHMEISER
State Bar No. 1037381

APPENDIX CERTIFICATION

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

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of _____, 2016

Signed,

_____
SARAH SCHMEISER
State Bar No. 1037381

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