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DEPARTMENT OF JUSTICE

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Sheila T. Reiff, Clerk
Wisconsin Court of Appeals
110 East Main Street, Suite 215
Post Office Box 1688
Madison, WI 53701-1688

Re: *State of Wisconsin v. Philip J. Hawley*
Case No. 2016AP1113-CR
District IV

Dear Ms. Reiff:

On September 28, 2020, this Court ordered the parties to file supplemental letter briefs addressing whether, in light of *State v. Prado*, 2020 WI App 42, 393 Wis. 2d 526, 947 N.W.2d 182, the warrantless blood draw in this case was justified by police officers' good faith reliance on the unconscious driver provision in Wisconsin's implied consent law.

The State's position is that the good faith exception is not an exception to the warrant requirement and therefore cannot itself justify a warrantless blood draw; it can however justify non-suppression after finding a warrant requirement violation. Accordingly, if this Court finds that the blood draw in this case was not justified by an exception to the warrant requirement (exigent circumstances or consent), the good faith exception should be applied, and the blood test results should not be suppressed. The officers in this case were justified in relying on Wisconsin's implied consent law when he ordered the blood draw on August 30, 2013, because the implied consent law was not found unconstitutional until nearly seven years later, when this Court did so in *Prado*, on June 25, 2020.

Argument

Even if the blood draw in this case was not lawfully conducted pursuant to either the consent or exigent circumstances exceptions to the warrant requirement, the good faith exception applies, and the blood test results need not be suppressed.

A. Because there was probable cause that Hawley committed an OWI-related offense and he was unconscious when an officer requested a blood sample from him under the implied consent law, officers were authorized to administer a blood draw.

Under the plain language of Wisconsin's implied consent law, when there is probable cause that a person has operated a motor vehicle on a Wisconsin highway while under the influence of an intoxicant, and a law enforcement officer requests a blood sample, the person is deemed to have consented to a blood test. Wis. Stat. § 343.305(2), (3)(a); *Prado*, 393 Wis. 2d 526, ¶ 14. When such a person is unconscious or otherwise incapable of withdrawing his or her implied consent to a blood draw, the officer is authorized to administer a blood draw. Wis. Stat. § 343.305(3)(b); *Prado*, 393 Wis. 2d 526, ¶ 17.

Each of the factors under which a warrantless blood draw is authorized by the implied consent law was satisfied in this case. There is no dispute that there was probable cause that Hawley drove his motorcycle on a Wisconsin highway while he was under the influence of an intoxicant. Sergeant Hanson smelled "a strong odor of intoxicants" on Hawley's breath, Hawley had difficulty standing, his one open eye was reddish and bloodshot, and he was lying injured next to a motorcycle that had just crashed (R. 70:16, 19–21.) Furthermore, before Hawley's blood was drawn, Sergeant Hanson knew that Hawley's BAC legal limit was 0.02 due to Hawley's prior drunk-driving convictions and that it does not "take a lot of alcohol to get to .02" (R. 70:24.) Hawley's prior convictions and BAC legal limit of 0.02 strongly support the conclusion that there was probable cause to believe that he operated while under the influence or with a prohibited alcohol concentration. *See State v. Blatterman*, 2015 WI 46, ¶¶ 36–38, 362 Wis. 2d 138, 864 N.W.2d 26. Hawley did not argue in either his initial brief or reply brief that there was not probable cause he had committed an OWI-related offense.

There also is no dispute that when an officer read the Informing the Accused form to Hawley and requested a blood sample, he was unconscious. (R. 70:5-8; Hawley's Br. 4; Hawley's Reply Br. 2–3, 15.)

Because there was probable cause that Hawley committed an OWI-related offense and he was unconscious when police requested a blood sample, the implied consent law authorized police to administer a blood draw. Wis. Stat. § 343.305(3)(b).

In his reply brief, Hawley argued that he had refused a blood draw before he was unconscious and before the officer read him the Informing the Accused form. He noted that when an officer asked him whether he had been drinking, he replied "Fuck you." (R. 70:18; Hawley's Reply Br. 11.) He claimed that this constituted a withdrawal of his implied consent and demonstrated that he was refusing a blood draw. (Hawley's Reply Br. 11.)

Hawley's comment to police when asked if he had been drinking is not a withdrawal of his implied consent to a blood draw. It obviously would have been insufficient to support a refusal charge. If the officer had considered that comment a refusal, and issued a notice of intent to revoke, Hawley's operating privilege would never have been revoked after a refusal hearing, because he did not refuse a lawful request for a blood sample. First, the officer had not requested a blood sample, so Hawley did not refuse a request. Second, even if a person could preemptively refuse a subsequent request for a blood draw, Hawley's "Fuck you" did not do so. He did not say "Fuck you, you aren't taking my blood," or something along those lines. It is hardly uncommon that a person who is extremely drunk (a blood test showed that Hawley's alcohol concentration was .312) will refuse to tell an officer that he has been drinking. There is no consequence for doing so. But when an officer lawfully requests a blood sample under the implied consent law, there are civil penalties and evidentiary consequences for refusing. Among them, the person's operating privilege is revoked, and his refusal may be used against him in court. *State v. Levanduski*, 2020 WI App 53, ¶¶ 14–15. A person could very reasonably refuse to tell an officer he has been drinking, but when faced with loss of his license for refusing, agree to give a blood sample.

Here, there was probable cause that Hawley committed an OWI-related offense, and he did not withdraw his implied consent and refuse a lawful request for a blood draw. He could not do so because he was unconscious. And the officer did rely on the unconscious driver provision in the implied consent law. Officer Shaw read the Informing the Accused form to Hawley and when Hawley was "unable to revoke

consent" because he "was unconscious," the officer checked a box on the form indicating that Hawley had consented to a blood draw. (R. 70:7–8.) And a registered nurse drew Hawley's blood. (R. 1:3; 74:42.) The officer acted in good faith reliance on the unconscious driver provision in Wisconsin's implied consent law. Officers were therefore authorized to administer a blood draw.

B. In *Prado*, this Court found the unconscious driver provision in Wisconsin's implied consent law unconstitutional.

In *Prado*, this Court concluded that the unconscious driver provision in Wisconsin's implied consent law is unconstitutional. *Prado*, 393 Wis. 2d 526, ¶¶ 3, 63. This Court acknowledged that the Wisconsin Supreme Court had not previously found the unconscious driver unconstitutional. *Id.* ¶ 2. The law was declared unconstitutional by this Court in *Prado*, on June 25, 2020.[1]

C. The good faith exception to the exclusionary rule should apply to the blood sample draw in this case because Hawley's blood was drawn before this Court found the unconscious driver provision unconstitutional in *Prado*.

"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). "The 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 does not apply to all constitutional violations. *Id.* Instead, "exclusion is the last resort." *Id.* (citation omitted).

The good faith exception provides that 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)). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* (quoting *Herring*, 555 U.S. at 144). "[T]he exclusionary rule serves to deter deliberate,

[1] A petition for review and a petition for cross-review by the Wisconsin Supreme Court are pending.

reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* (quoting *Herring*, 555 U.S. at 144).

In *Krull*, the United States 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, because "[t]he application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Krull*, 480 U.S. at 349. "If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 349–50.

The Wisconsin Supreme Court adopted the good faith exception in *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. The court extended the United States Supreme Court's rule in *Krull* from statutes to case law 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, 43 (citing *Ward*, 231 Wis. 2d 723, ¶ 73).

A law enforcement officer can rely in good faith on a statute that has not been found unconstitutional. *Krull*, 480 U.S. at 349. Until this Court found the unconscious driver provision unconstitutional in *Prado*, an officer could rely on it in good faith. The blood draw in this case was performed on August 30, 2013, nearly seven years before the statute was found unconstitutional.

There is no reason to exclude evidence gathered under the statute before it was found unconstitutional. "If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Krull*, 480 U.S. at 349–50.

Suppression of evidence here is unnecessary and inappropriate because there was no officer misconduct in this case and suppressing the blood test results would have no possible deterrent effect on officers. After all, the unconscious driver provision has been found unconstitutional in *Prado*—a published opinion by this Court. Unless and until that opinion is overruled, officers cannot rely on the

unconscious driver provision. Suppressing evidence in this case would have no possible addition deterrent effect.

Finally, even if there had been officer misconduct in this case, or some conceivable possible deterrent effect in preventing officers from relying on valid statutes, suppression would be inappropriate because of the societal impact of suppression. "[T]he benefits of deterrence must outweigh the costs." *Herring*, 555 U.S. at 141 (citing *Leon*, 468 U.S. at 910). "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." *Id.* (quoting *Krull*, 480 U.S. at 352–53).

As explained above, the unconscious driver provision in the implied consent law has been found unconstitutional, so suppressing evidence in this case would have no additional deterrent effect. In contrast, the societal impact of suppression would be enormous. The seriousness and societal impact of drunk driving is well recognized. Here, Hawley drove a motorcycle on a highway until he crashed. A blood test revealed an alcohol concentration of .312. At the time. He had five prior countable OWI convictions.

A jury found Hawley guilty of OWI, and he was sentenced for a sixth offense. Hawley seeks suppression of the blood test results and vacation of conviction. It is unclear whether the State would retry Hawley if he were successful. But the result of the blood test is the best evidence that Hawley drover while under the influence of an intoxicant and with a prohibited alcohol concentration. Suppression of the blood test results would have absolutely no deterrent effect, but it would have a significant societal impact. Suppression is therefore unwarranted and inappropriate.

D. Even if an officer could not rely on the unconscious driver provision after the Supreme Court issued its decision in *Birchfield*, the good faith exception should apply here because Hawley's blood was drawn before *Birchfield* was issued.

In *Prado*, this Court applied the good faith exception and concluded that a law enforcement officer could rely in good faith on the unconscious driver provision. *Prado*, 393 Wis. 2d 526, ¶ 74. But this Court did not conclude that the officer could rely in good faith on the statute because the statute had not been found unconstitutional. Instead, this Court concluded that the good faith exception applied to a blood draw because *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), had not

yet silently overruled *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745. *Prado*, 393 Wis. 2d 526, ¶ 71.

The State maintains that while this Court was correct in concluding that the officer in *Prado* relied on the statute in good faith, the court's conclusion that the reliance was in good faith because *Birchfield* had not yet overruled *Wintlend* was incorrect. *Birchfield* did not mention *Wintlend*. Neither case involved blood draws from unconscious drivers. And even if *Birchfield* somehow had overruled *Wintlend*, it did not find unconscious driver provisions unconstitutional or even address them. In particular, *Birchfield* did not find the unconscious driver provision in Wisconsin's implied consent law unconstitutional. That provision was found unconstitutional for the first time by this Court, in *Prado*. Logically, an officer could therefore rely on the unconscious driver provision until *Prado* was decided. This Court's conclusion in *Prado* would seemingly mean that even though neither the United States Supreme Court nor Wisconsin Supreme Court has ever held that the unconscious driver provision is unconstitutional, and this Court certified the issue of the constitutionality of that provision to the Wisconsin Supreme Court three times because it recognized that it could not decide the issue,[2] a police officer should have realized that *Birchfield* had silently invalidated the statute so he could not rely on it.[3]

But even under *Prado*'s view of the good faith exception, an officer could rely on the unconscious driver provision in good faith when the blood draw was performed in this case. Hawley's blood was drawn on August 30, 2013. The Supreme Court issued its decision in *Birchfield* on June 23, 2016. Even if *Birchfield* could be read as invalidating the unconscious driver provision in Wisconsin's implied consent law, nothing before *Birchfield* had invalidated the law. The officer in this case could have relied in good faith on the law when the blood draw was performed in this case, nearly three years before *Birchfield* was decided.

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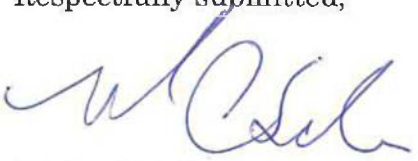
[2] This court certified the issue in 2016 in *State v. Howes*, 2017 WI 18, ¶ 1, 373 Wis. 2d 468, 893 N.W.2d 812, in 2017 in *State v. Mitchell*, 2018 WI 84, ¶ 1, 383 Wis. 2d 192, 914 N.W.2d 151 and in 2018 in this case, *State v. Hawley*.

[3] The Supreme Court accepted review in *Mitchell v. Wisconsin*, "to decide whether a statute like Wisconsin's, which allows police to draw blood from an unconscious drunk-driving suspect, provides an exception to the Fourth Amendment's warrant requirement." 139 S. Ct. at 2542–43 (Sotomayor, J., dissenting). Nothing in the Court's opinion indicates that it had already decided the issue in *Birchfield*.

Whether an officer could rely on the unconscious driver provision until *Prado* was decided in 2020, or until *Birchfield* was decided in 2016, the officer here acted in good faith reliance on the statute when he ordered a blood draw from Hawley in 2013. Suppression of the blood test results is therefore unnecessary and inappropriate.

Respectfully submitted,



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