STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP308-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAWN M. PRADO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING
A MOTION TO SUPPRESS EVIDENCE, ENTERED IN
THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE DAVID T. FLANAGAN, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

1. The "unconscious driver" provisions in Wisconsin's implied consent law, Wis. Stat. §§ 343.305(3)(ar) and (b), state that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent . . . and one or more samples . . . may be administered to the person." Do these provisions authorize a law enforcement officer to order that blood be drawn from an unconscious person who has not withdrawn his or her consent?

   The circuit court concluded that the unconscious driver provisions do not authorize a law enforcement officer to order that blood be drawn from an unconscious person.

   This Court should conclude that the unconscious driver provisions in Wis. Stat. §§ 343.305(3)(ar) and (b) authorize a law enforcement officer to order that blood be drawn from an unconscious person who has not withdrawn his or her consent.

2. Are Wis. Stat. §§ 343.305(3)(ar) and (b), which authorize a law enforcement officer to order that blood be drawn from an unconscious person who has not withdrawn his or her consent, unconstitutional?

   The circuit court did not explicitly determine the constitutionality of the unconscious driver provisions because it interpreted them as not authorizing a blood draw. But the court concluded that if the unconscious driver provisions authorized a blood draw, they would be unconstitutional.

   This Court should conclude that Wis. Stat. §§ 343.305(3)(ar) and (b) are constitutional.

3. If Wis. Stat. §§ 343.305(3)(ar) and (b) were to be found unconstitutional, would suppression of the blood sample in this case be required, or would the good faith exception to the exclusionary rule apply?

   The circuit court declined to apply the good faith exception.

   This Court should conclude that even if the unconscious driver provisions are found unconstitutional, the good faith exception applies because the police relied in good faith on a statutory provision that has been in place since 1969, and that has not yet been found unconstitutional.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin, does not request oral argument. The State believes that publication of this Court's opinion may be appropriate because of the third issue in this case, concerning the application of the good faith exception to the exclusionary rule.

INTRODUCTION

This case concerns the unconscious driver provisions in Wisconsin's implied consent law, Wis. Stat. §§ 343.305(3)(ar) and (b). Blood was drawn from Dawn M. Prado under the implied consent law after a car she was driving struck another car, killing the other driver. Prado was taken to the hospital, and when an officer requested a blood sample from her, she was unconscious, and did not withdraw the consent to a blood draw she had impliedly given by driving on a Wisconsin highway. The officer therefore administered a blood draw.

The circuit court granted Prado's motion to suppress the blood test results. The court concluded that the implied consent law did not authorize a blood draw from an unconscious person, and that if it did, the law would be unconstitutional. The court declined to apply the good faith exception to the exclusionary rule, and suppressed the blood test results.

This Court should reverse the circuit court's order suppressing the blood test results because Wis. Stat. §§ 343.305(3)(ar) and (b) authorized the blood draw. And even if the unconscious driver provisions in the implied consent law were to be found unconstitutional, the officer acted in good faith reliance on a statute which had been in place for decades, and which no appellate court has found unconstitutional. Suppression of the test results is therefore unnecessary and inappropriate.

The State recognizes that this Court will likely be unable to determine the constitutionality of the unconscious driver provisions in the implied consent law, as it was unable to do so when it certified the issue to the supreme court in *State v. Howes*. The supreme court accepted the certification, but decided the case without deciding the certified issue. *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812. In *State v. Mitchell*, 2015AP304-CR, this Court was again unable to decide the constitutionality of the unconscious driver provisions, and certified to the supreme court the issue: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." On September 11, 2017, the supreme court granted the certification. The same issue is before this Court in this case and at least two others, *State v. Richards*, 2017AP43-CR; and *State v. Will*, 2016AP1700-CR.

The State respectfully suggests that, in the interest of not further delaying the resolution of this case, rather than waiting for the supreme court to decide the constitutional issue, this Court might consider deciding this case on the applicability of the good faith exception to the exclusionary rule.[1] The State's position is that, even if the unconscious driver provisions are someday found unconstitutional, they had not been found unconstitutional when the officer here relied on them in good faith. Suppression would therefore be unnecessary and inappropriate.

STATEMENT OF THE CASE AND FACTS

A minivan that Prado was driving collided with a car, injuring Prado and the passenger in Prado's minivan, and killing the other driver. (R. 1:3–5.) After their initial investigation, officers concluded that Prado's minivan had crossed the center line and collided with the car. (R. 1:5.) The passenger in Prado's minivan told police that Prado had been driving. (R. 1:4.) A firefighter at the scene told police that he observed Prado lying in a ditch near the crash and smelled the odor of intoxicants on her breath. (R. 1:5–6.)

Prado was transported to the hospital. (R. 1:5.) When Officer Jonathan Parker encountered her in the hospital, Prado was unconscious. (R. 1:5; 41:7.) Officer Parker read the Informing the Accused form to Prado, but she did not respond. (R. 1:5; 41:7–8.) The officer ordered that Prado's blood be drawn. (R. 41:9.) A test revealed a blood alcohol

[1] The crimes the State has charged Prado with committing occurred on December 12, 2014, and this pre-trial appeal has been pending in this Court since it was filed on February 8, 2016.

concentration of 0.081, and the presence of Benzoylecgonine. (R. 1:17; 21:1.)[2]

Prado was charged with nine OWI-related crimes. (R. 22.)[3] She moved to suppress the blood test result, on the ground that the statutory provisions that authorized the blood draw, Wis. Stat. §§ 343.305(3)(ar) and (b), are unconstitutional. (R. 26.) After briefing and a hearing (R. 27; 29; 31; 41), the circuit court, the Honorable David T. Flanagan, presiding, granted Prado's suppression motion (R. 33). The court concluded that the unconscious driver provisions at issue do not authorize blood draws, but that if they did, they would be unconstitutional under *Missouri v. McNeely*, 569 U.S. 141 (2013). (R. 33:3.) The court concluded that Prado's blood was drawn without a warrant or her consent, in violation of the

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[2] Because Prado had three prior OWI-related offenses (R. 1:6), she was prohibited from driving with an alcohol concentration in excess of 0.02. Wis. Stat. § 340.01(46m)(c). Benzoylecgonine is a metabolite of cocaine, and a restricted controlled substance. (R. 21:1.)

[3] The State charged Prado with: (1) homicide by intoxicated use of a motor vehicle while having a prior OWI-related offense; (2) homicide by use of a motor vehicle with a prohibited alcohol concentration while having a prior OWI-related offense; (3) homicide by use of a motor vehicle with a detectable amount of a restricted controlled substance, while having a prior OWI-related offense; (4) causing injury by operating a motor vehicle while intoxicated as a second or subsequent offense; (5) causing injury by use of a motor vehicle with a prohibited alcohol concentration as a second or subsequent offense; (6) causing injury by operating a motor vehicle with a detectable amount of a restricted controlled substance as a second or subsequent offense; (7) OWI as a 4th offense; (8) PAC as a 4th offense; and (9) operating with detectable amount of a restricted controlled substance as a 4th offense. (R. 22.)

Fourth Amendment. (R. 33:3–4.) The court declined to apply the good faith exception to the exclusionary rule, and ordered the blood test result suppressed. (R. 33:3–4.) The State now appeals the circuit court's order suppressing the test result.

SUMMARY OF ARGUMENT

The unconscious driver provisions in the implied consent law, Wis. Stat. §§ 343.305(3)(ar) and (b), authorize law enforcement to order that blood be drawn from a person who has impliedly consented to a blood draw by operating a motor vehicle on a Wisconsin highway, who has not withdrawn that consent, and who is unconscious or otherwise incapable of withdrawing consent when an officer requires a sample. The circuit court's interpretation of these provisions as not authorizing a blood draw under these circumstances was plainly incorrect.

The unconscious driver provisions in Wisconsin's implied consent law, properly interpreted, are constitutional. Contrary to the circuit court's conclusion, *McNeely* concerned only nonconsensual blood draws. Nothing in *McNeely* or in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), renders implied consent laws that do not criminalize refusal unconstitutional. And although dicta from *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, seems to require actual or contemporaneous consent when the officer requests a blood draw, that case could not overturn binding Wisconsin precedent, and is not controlling.

Finally, even if this Court or the Supreme Court of Wisconsin were to find the unconscious driver provisions unconstitutional, suppression of the blood test results would be unnecessary and inappropriate. The officer who administered the blood draw did so in good faith reliance on

a statute that has been in place for decades, and which has not been found unconstitutional by any appellate court in Wisconsin. Suppression is the last resort for a Fourth Amendment violation, and in this case it would not deter any misconduct by police because there was no misconduct to deter. The circuit court's conclusion that suppression is required because of the "clear legal impact" of *McNeely* was incorrect, because *McNeely* said nothing that negatively impacts the validity of implied consent laws.

STANDARD OF REVIEW

The first issue in this case concerns the interpretation of the implied consent law. The proper interpretation of a statute is a question of law, reviewed de novo. *State v. Quintana*, 2008 WI 33, ¶ 11, 308 Wis. 2d 615, 748 N.W.2d 447.

The second issue concerns the constitutionality of the unconscious driver provisions in the implied consent law. The constitutionality of a statutory scheme is a question of law that this Court reviews de novo. *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451.

The third issue concerns whether, if the statute were to be declared unconstitutional, the good faith exception to the exclusionary rule would apply so that the resulting evidence need not be suppressed. Application of the good faith exception is a matter of constitutional fact. A reviewing court accepts the circuit court's finding of fact unless they are clearly erroneous. The circuit court's application of constitutional principles to those facts is reviewed de novo. *State v. Kennedy*, 2014 WI 132, ¶ 16, 359 Wis. 2d 454, 856 N.W.2d 834 (citations omitted).

ARGUMENT

I. Wisconsin Stat. §§ 343.305(3)(ar) and (b) authorize the taking of a sample from a person who is unconscious or otherwise incapable of withdrawing his or her implied consent when an officer requires a sample.

A. Applicable legal principles.

The first issue in this case requires the interpretation of Wis. Stat. §§ 343.305(3)(ar) and (b). "The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State v. Buchanan*, 2013 WI 31, ¶ 23, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238) (additional citations omitted).

When it interprets a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

B. By their plain language, the unconscious driver provisions in Wisconsin's implied consent law authorize a blood draw from a driver who is unconscious or otherwise not capable of withdrawing consent when an officer requires a sample.

The general unconscious driver provision in the implied consent law states in relevant part that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection," and that if an officer has probable cause to believe the person has committed an OWI-related offense, "one or more samples specified in par. (a) or (am) may be administered to the person." Wis. Stat. § 343.305(3)(b).[4]

The Supreme Court of Wisconsin has recognized that the unconscious driver provision authorizes an officer to obtain a sample, and in fact "obviates the necessity of an officer's request for a test or a blood sample." *State v. Disch*, 129 Wis. 2d 225, 233, 385 N.W.2d 140 (1986). The supreme court concluded that "when the requirements of sec. 343.305(2)(c) are met, an officer may administer a test without complying with sec. 343.305(3)(a)," by informing the accused about the implied consent law. *Id.* at 234.[5] The court reasoned that "[i]f a person is unconscious or otherwise not

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[4] The unconscious driver provisions in Wis. Stat. §§ 343.305(3)(ar)1 and 2 similarly state that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person."

[5] The unconscious driver provision at issue in *Disch* was then codified as Wis. Stat. § 343.305(2)(c). The provision is materially unchanged, but is now located in Wis. Stat. § 343.305(3)(b).

capable of withdrawing consent, it would be useless for the officer to request the person to take a test or to give a sample." *Id.* at 233. The court added that "[i]t would be just as useless for the officer to inform an unconscious person or one who is otherwise not capable of withdrawing consent that he or she is deemed to have consented to tests." *Id.* No Wisconsin or United States Supreme Court case has overruled *Disch*, and it remains good law that binds this Court. *See Howes*, 373 Wis. 2d 468, ¶ 75 (Gableman, J., concurring).

The circuit court concluded that the unconscious driver provisions in Wisconsin's implied consent law "do not expressly authorize a warrantless seizure of a blood sample." (R. 33:3.) The court's interpretation of the unconscious driver provisions was plainly wrong.

The circuit court did not analyze the words of the statute, or even address the supreme court's interpretation of the unconscious driver provision in *Disch*. The circuit court instead relied on *Padley*, 354 Wis. 2d 545, ¶ 26, for the proposition that Wis. Stat. §§ 343.305(3)(ar)2 and (3)(b) "create only a penalty for refusal, not an authorization for a per se exception to the warrant requirement." (R. 33:4.)

But in *Padley*, this Court limited its analysis to the provisions in the implied consent law that pertain to *conscious* drivers who are capable of withdrawing their consent to a blood draw. This Court concluded that those provisions relating to conscious drivers do not authorize police "to take an evidentiary blood sample," but only authorize police "to require drivers to choose between consenting to a blood draw or, instead, refusing to give consent and being penalized for the refusal." *Padley*, 354 Wis. 2d 545, ¶ 33.

This Court concluded that the same is not true for unconscious drivers, noting that "at least in the context of

incapacitated drivers, 'implied consent' is a sufficient basis on which to proceed with a warrantless search." *Id.* ¶ 39 n.10. This Court recognized that in the context of an incapacitated driver, "implied consent is deemed the functional equivalent of actual consent." *Id.*[6]

This Court expressed a similar understanding of the unconscious driver provisions in its recent certification of an appeal in *State v. Gerald P. Mitchell*, No. 2015AP304-CR. This Court noted that the unconscious driver provision in Wis. Stat. § 343.305(3)(b) "operates in a simple, straightforward manner." *Mitchell*, certification at 7. This Court explained that "by choosing to drive on public roads prior to losing consciousness, an unconscious person is 'deemed to have given consent' to his or her blood being tested. That consent is 'presumed' not to have been withdrawn." *Id.* at 7–8. Accordingly, "an officer may act on this 'implied consent' and conduct a warrantless blood draw provided that the officer 'has probable cause to believe' the unconscious person has violated WIS. STAT. § 346.63(1)." *Id.* at 8.

The circuit court's conclusion that the unconscious driver provisions in Wisconsin's implied consent law do not authorize officers to administer a blood draw was incorrect. The court's conclusion that Prado's blood was drawn "without consent" was also incorrect. Because she drove on a Wisconsin highway, Prado is deemed to have consented to a blood draw when an officer had probable cause to believe she was driving while under the influence of an intoxicant, and

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[6] In *Padley*, this Court specifically addressed the unconscious driver provision in Wis. Stat. § 343.305(3)(ar)2, but the unconscious driver provisions in Wis. Stat. § 343.305(3)(ar)1 and Wis. Stat. § 343.305(3)(b) are identical to the provision in Wis. Stat. § 343.305(3)(ar)2. *Padley*, 354 Wis. 2d 545, ¶ 39 n.10.

she did not withdraw her consent. The circuit court's order suppressing the results of a test of Prado's blood was based on its incorrect conclusions. This Court should therefore reverse the circuit court's order.

II. The unconscious driver provisions in Wisconsin's implied consent law are constitutional.

A. Applicable legal principles.

In determining the constitutionality of a statute, a court begins by examining the plain language of the statute. *Dinkins*, 339 Wis. 2d 78, ¶ 29. A court "generally give[s] words and phrases their common, ordinary and accepted meaning." *Id.* The reviewing court is to interpret the statutory language reasonably, seeking to avoid absurd or unreasonable results. *Id.*

Every legislative enactment is presumed constitutional, and if any doubt exists about a statute's constitutionality, this Court must resolve that doubt in favor of constitutionality. *Ninham*, 333 Wis. 2d 335, ¶ 44. The presumption of constitutionality can be overcome only if the challenging party establishes that the statute is unconstitutional beyond a reasonable doubt. *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22. This presumption of constitutionality and the defendant's steep burden apply to both as-applied and facial challenges to the constitutionality of statutes. *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227. A facial challenge to the constitutionality of a statute cannot succeed unless the law cannot be enforced under any circumstances. *State v Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63.

B. Overview of the implied consent law.

Wisconsin's implied consent law states 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. Wis. Stat. § 343.305(2).[7] The law provides that upon arrest for an OWI-related offense, a law enforcement officer must read the Informing the Accused form to the person, and "may request the person to provide a blood, breath, or urine sample for chemical testing. Wis. Stat. § 343.305(3)(a)." *State v. Anagnos*, 2012 WI 64, ¶ 22, 341 Wis. 2d 576, 815 N.W.2d 675 (footnote omitted).

"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)." *Id.* ¶ 23. "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.* ¶ 24.

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[7] 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 courts have 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), the supreme court concluded that the implied consent law "requires that a licensed driver, by applying for an[d] receiving a license, consents 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), the supreme 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." The 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 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 more recent cases, Wisconsin courts have recognized that the time of consent is when a person drives on a Wisconsin highway. In *State v. Nordness*, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986), the supreme 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), the supreme 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.

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*, 569 U.S. 141 (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 *Washburn Cty. v. Smith*, 2008 WI 23, ¶ 40 n.36, 308 Wis. 2d 65, 746 N.W.2d 243, the supreme court recognized that a defendant was deemed to have consented to a requested test "when the defendant decided to drive upon a Wisconsin highway."

In *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, this Court rejected the argument that the consent that authorizes a chemical test under the implied consent law is the consent given when a law enforcement officer reads the Informing the Accused form to the driver, and thus the driver's consent is coerced and invalid. *Id.* ¶¶ 2, 8. This Court explained that consent to the test is given at the time a person operates a motor vehicle on a Wisconsin highway or when a person obtains a driver's license, and that additional consent is not required when a law enforcement officer requests that a person submit to testing. *Id.* ¶ 16. This Court emphasized the "truism" that no one forces a person to get a driver's license and that individuals have the freedom to choose when to drive. *Id.* ¶ 12. This Court reasoned that when a would-be motorist applies for and receives a driver's license, that person consents to the legislatively imposed condition that upon

being arrested for OWI, he or she consents to submit to the prescribed chemical test. *Id.* This Court, relying on *Neitzel,* reaffirmed that consent to the test occurs when a person obtains a license. *Id.* ¶ 14.

In these and many more cases, this Court has recognized that drivers in Wisconsin consent to have their blood drawn for chemical testing by their conduct of driving on a Wisconsin highway, long before a law enforcement officer requests a sample.[8] 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." *Howes*, 373 Wis. 2d 468, ¶ 75 (Gableman, J., concurring).

Padley did not overrule decisions of this Court and the Supreme Court of Wisconsin, nor did it establish that "actual" consent at the time an officer requests a sample, rather than implied consent that is not withdrawn, is required to authorize the taking of a blood sample under the implied consent law.

In the circuit court, Prado argued that the unconscious driver provisions in the implied consent law are unconstitutional under *Padley*. (R. 26.) In *Padley*, this Court

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[8] Some earlier cases spoke of consent occurring when a person receives a driver's license. *See e.g.*, *Scales*, 64 Wis. 2d at 494; *Neitzel*, 95 Wis. 2d at 201. More recent cases have recognized that consent occurs when a person operates a motor vehicle on a Wisconsin highway. *See e.g.*, *Nordness*, 128 Wis. 2d at 28; *Zielke*, 137 Wis. 2d at 39. But every case before *Padley* recognized that consent occurs before a law enforcement officer requests a sample.

interpreted the implied consent law very differently than the supreme court or this Court had previously interpreted it. This Court interpreted the law as creating two types of consent: the "implied consent" a person gives when operating a motor vehicle in Wisconsin; and then "actual consent" given when a law enforcement officer requests a sample. *Padley*, 354 Wis. 2d 545, ¶ 26.

This 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 "the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions." *Id.* ¶ 39. This Court added that "choosing the 'yes' option affirms the driver's implied consent and constitutes actual consent for the blood draw. *Id.* "Choosing the 'no' option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent." *Id.* This Court noted that "[w]ithdrawing 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.*

This Court's explanation of the implied consent law in *Padley* contradicts the plain language of the implied consent statute, which provides that "[a]ny 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 also contradicts the numerous cases in which this Court and the supreme court have recognized that by operating a motor

vehicle on a Wisconsin highway, a person consents to an officer's request for a sample when he or she is later arrested for a drunk-driving related offense. As this Court has noted, consent "is not optional, but is an implied condition precedent to the operation of a motor vehicle on Wisconsin public highways." *Milwaukee Cty. v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608 (Ct. App. 1980). "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.

A requirement of "actual" voluntary consent when an officer requests a sample would mean that every Wisconsin case on the issue before *Padley* was 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*, 373 Wis. 2d 468, ¶ 75 n.10 (Gableman, J., concurring) (citing *Birchfield*, 136 S. Ct. at 2185).

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.

This Court 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.

This Court recognized that *Padley* contradicts prior binding precedent in Wisconsin when it certified the

"unconscious driver" issue to the Supreme Court of Wisconsin in *State v. Gerald P. Mitchell*, No. 2015AP304-CR. The certification focused on this Court's decision in *Wintlend*, 258 Wis. 2d 875. This Court noted that *Wintlend* and *Padley* "disagree about when consent is given—an issue critical to whether consent is in fact given and voluntary." *Mitchell*, certification at 13.

Padley has been interpreted by some to effectively overrule all of the Wisconsin precedent—including the numerous opinions of the Supreme Court of Wisconsin—discussed above. *See Howes*, 373 Wis. 2d 468, ¶¶ 148–49 (Abrahamson, J. dissenting). But the *Padley* two-consent approach was also strongly criticized in the lead opinion in *State v. Brar* as creating a distinction that is "incorrect as a matter of law." *See State v. Brar*, 2017 WI 73, ¶¶ 19–20, 376 Wis. 2d 685, 898 N.W.2d 499.[9] This Court could not properly overrule precedent of the court of appeals and supreme court, *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). Therefore, *Padley* is not controlling.

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[9] *Brar* was not an unconscious driver case, but it examined *Padley* at some length. In the lead opinion, three justices severely criticized *Padley*'s interpretation of the implied consent law as requiring two consents, concluding that "[s]uch a distinction is incorrect as a matter of law." *Brar*, 376 Wis. 2d 685, ¶ 19. One justice concurred in the mandate, but did not address the working of the implied consent law. *Id.* ¶ 43 (Grassl Bradley, J. concurring). One justice joined in the mandate but had quarrels with the whole implied consent scheme. *Id.* ¶ 51 (Kelly, J. concurring). Two justices dissented and embraced *Padley*'s interpretation of the implied consent law. *Id.* ¶ 117 (Abrahamson, J. dissenting). *Brar* cannot properly be read as concluding that *Padley* has overruled all the Wisconsin cases that preceded it.

C. Neither *McNeely* nor *Birchfield* renders the unconscious driver provisions in the implied consent law unconstitutional.

Prado moved to suppress the blood test results on the ground that the unconscious driver provisions in Wis. Stat. §§ 343.305(3)(ar) and (b) are unconstitutional under *McNeely* and *Padley*. (R. 26.) The circuit court granted Prado's motion to suppress the results of a test of her blood because it concluded that the unconscious driver provision in the implied consent law did not authorize the blood draw. (R. 33:3.) As explained above, the court's conclusion was plainly wrong. The circuit court did not address at any length the constitutionality of the unconscious driver provision. It stated only that to the extent that the unconscious driver provision authorizes a blood draw, it is "clearly beyond any reasonable doubt, in violation of the Fourth Amendment as interpreted in the McNeely decision." (R. 33:3.) Again, the court was incorrect.

McNeely concerned the exigent circumstances exception to the warrant requirement—not the consent exception. This Court recognized in *Padley*, 354 Wis. 2d 545, ¶ 47, that *McNeely* is not a consent case. The Supreme Court of Wisconsin recognized the same thing in another implied consent case, stating: "McNeely addressed only the exigent circumstances exception to the warrant requirement, which is not at issue here." *State v. Lemberger*, 2017 WI 39, ¶ 33 n.11, 374 Wis. 2d 617, 893 N.W.2d 232.

The issue in *McNeely* was "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for *nonconsensual* blood testing in all drunk-driving cases." *McNeely*, 569 U.S. at 145 (emphasis added). The Court held that "exigency in this context must be determined case by case based on the totality of the circumstances." *Id.*

The Court in *McNeely* stated that it "granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for *nonconsensual* blood testing in drunk-driving investigations." *Id.* at 147 (emphasis added) (citation omitted).

The Court in *McNeely* noted that the State of Missouri's position was "that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a *nonconsensual* blood test without any precondition for a warrant." *Id.* at 164 (emphasis added). The Court rejected that argument, holding that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 143.

In *McNeely*, the Court dealt with implied consent only in affirming the validity of such laws. The Court noted that states have a "broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence." *Id.* at 160–61. It specifically noted that "all 50 States have adopted implied consent laws," which "impose significant consequences when a motorist withdraws consent." *Id.* at 161. The Court observed that under implied consent laws, "typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* The Supreme Court did not address an unconscious driver provision, or the constitutionality of an implied consent law. "So, put simply, McNeely is inapplicable to the question before us, that is, whether the unconscious-driver provisions of Wisconsin's implied consent law are unconstitutional." *Howes*, 373 Wis. 2d 468, ¶ 72 (Gableman, J., concurring).

In *Birchfield*, 136 S. Ct. 2160, the Supreme Court affirmed that it did not address implied consent laws in *McNeely*, stating that it "pointedly did not address any potential justification for warrantless testing of drunk-driving suspects except for the exception 'at issue in th[e] case,' namely, the exception for exigent circumstances." *Id.* at 2174 (citing *McNeely*, 569 U.S. at 150 n.3). The *Birchfield* Court further noted that in *McNeely* it had "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at 2185 (citing *McNeely*, 569 U.S. at 160; *South Dakota v. Neville*, 459 U.S. 533, 559 (1983)).

Birchfield was a consent case. But the Supreme Court said nothing in *Birchfield* that negatively impacts the validity of implied consent laws like Wisconsin's. In *Birchfield*, the 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 2166–67. 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*, 373 Wis. 2d 468, ¶ 74 (Gableman, J., concurring).

D. The provision in the implied consent law allowing for warrantless blood draws from an unconscious person complies with Wisconsin law, the purposes of the implied consent statute, and the Fourth Amendment.

Under the plain language of the implied consent law, the consent that triggers the drawing of a blood sample for chemical testing occurs when a person drives on a Wisconsin highway. Wis. Stat. § 343.305(2). Every appellate decision on the issue before *Padley* recognized this premise. When a driver gives consent, he or she is conscious, and is free to choose whether to drive. This consent, though created by the Legislature, incorporates the basic consent precept of voluntariness. It is in effect a deal: in exchange for driving in Wisconsin, a person impliedly consents to take a chemical test if arrested for an OWI-related offense.[10] It is a deal that is favorable to both sides. The person receives the significant privilege to drive on Wisconsin highways, and gives very little as his or her consent to give a sample is triggered only by the remote possibility that he or she is arrested for an OWI-related offense. On the other hand, the State gets a lot in the ability to more easily obtain samples for chemical testing when a subject operates while under the influence on its highways, but intrudes very little as its ability to obtain

[10] Or, under Wis. Stat. § 343.305(3)(ar), when the person is involved in a serious accident and either the officer detects the presence of alcohol or drugs, or has reason to believe the person violated a traffic law.

those samples is limited to those instances when a police officer already has probable cause to arrest the subject for an OWI-related offense. The statute is fair to citizens; few people would choose not to obtain a license or drive on Wisconsin highways because he or she is unwilling to commit to giving a sample if he or she is arrested for an OWI-related offense, or is involved in a serious accident involving death or serious bodily harm, and either an officer detects alcohol or drugs or the person violated a traffic law.

Blood draws of conscious drivers present different reasonableness concerns than those of unconscious drivers. It would be arguably unreasonable for the police to confront an arrested suspect with a needle, intent on extracting blood, based completely on an implied consent given in a different time and space. It is perhaps this issue that led the *Padley* court to explore the two-consent theory. But by using the term "actual consent," *Padley* is suggesting that what happens during the reading of the Informing the Accused form is more important in a Fourth Amendment sense than the implied consent given earlier. The State theorizes that by "actual consent," *Padley* really meant "real time" affirmance. But in any event the State has no quarrel with the necessity of the Informing the Accused stage of the proceeding, even though the subject has already consented. The Legislature has required that an officer read the Informing the Accused form to a conscious driver from whom the officer is requesting a sample not for added consent, or for the solicitation of "actual consent," but rather to promote the reasonableness of the seizure. Reading the Informing the Accused form to a conscious driver allows for a blood draw to be performed in a more reasonable manner. The officer reminds the conscious person that he or she has consented to give a sample, informs him or her of the procedure, and provides a person who is capable of withdrawing consent the

opportunity to refuse to submit to chemical testing, and face the punishments associated with that choice.

Nothing in the Informing the Accused form that an officer reads to an OWI suspect is about obtaining consent. The form is titled "Informing the Accused." It is a form full of threatening language if one refuses, including license revocation and "other penalties." These "other penalties" include use of the refusal as a prior countable offense in the future even if acquitted of the OWI, and use in court to show consciousness of guilt. Tethering a refusal to submit to a test with substantial penalties is hardly an environment for the granting of actual consent. And officers often read the Informing the Accused form to severely impaired people, again a situation not compatible with the giving of actual consent. The Fourth Amendment is satisfied by the voluntary implied consent given by the subject long before being stopped by the police, *Wintlend*, 258 Wis. 2d 875, ¶ 14, and by the reasonableness of the process allowing for the defendant to be reminded of what he or she has already agreed to and giving him or her the opportunity, though admittedly not an attractive one, of withdrawing the consent and refusing the test.

To be sure, the unconscious driver is not reminded at the time of seizure as to what he has consented to, and has by his or her condition been denied the opportunity to withdraw consent and to refuse with penalties. But that does not render the unconscious driver statute unconstitutional, for two reasons: 1) Nothing is gained by reminding an unconscious person of what he or she has already consented to; and 2) It is unreasonable to presume that an unconscious person would want to violate a lawful statute.

First, an unconscious person is not in a position to be confused or overwhelmed by the moment, necessitating a reading of the Informing the Accused form to guarantee the reasonableness of the process. Nor is an unconscious person

vulnerable to the pain, embarrassment, or indignities of a compelled blood draw. As the *McNeely* Court noted, "[A]ny compelled intrusion into the human body implicates significant, constitutionally protected privacy interest." *McNeely*, 569 U.S. at 144. This eloquent description of the intrusive nature of a blood test has far less meaning in the unconscious person framework, where the subject has no appreciation of the scope of the intrusion and is likely undergoing far more probing procedures in dealing with his or her medical condition.

Second, the legislature reasonably presumed that an unconscious driver would not wish to violate a lawful statute. Wisconsin cases and the United States Supreme Court have held that the opportunity to refuse a blood alcohol test is simply a matter of legislative grace and not a constitutional right. *Neville*, 459 U.S. at 565; *Lemberger*, 374 Wis. 2d 617, ¶ 36; *State v. Reitter*, 227 Wis. 2d 213, 239, 595 N.W.2d 646 (1999). An unconscious person is not denied a right, but merely deprived access to the possibility of committing an unlawful act: the refusal of a test.

Drivers give implied consent to a chemical test by choosing to drive on a Wisconsin highway. The Legislature provides that the person can be tested based on that implied consent, unless it is withdrawn. The unconscious person is not denied the opportunity to give his or her actual consent, since there is no consent to be given other than the one he or she already gave. There is no purpose to advising the unconscious subject as to the contents of the Informing the Accused form. *Disch*, 129 Wis. 2d at 233–34. And the subject is not exposed to the pain, shame, or the *McNeely*-characterized privacy assault of a compelled blood test. The unconscious person is only deprived of doing what he or she is not entitled to do— refuse the test. The statute is constitutional.

In the circuit court, Prado argued that the implied consent statute, as it relates to the unconscious driver, is unconstitutional because (1) it violates *Padley*, as an unconscious person cannot give actual consent; and (2) it violates *McNeely* by creating a per se exception to the warrant requirement. (R. 26:2–3.) Prado was wrong on both counts.

Padley was not an unconscious driver case. It is not clear from its holding whether it was stating that the implied consent by driving is not consent sufficient for a warrantless draw of a person not capable of withdrawing consent. *See Padley*, 354 Wis. 2d 545, ¶ 39 n.10 (in regards to unconscious drivers, "implied consent is deemed the functional equivalent of actual consent"). And *Padley's* two-consent approach is in conflict with all previous Wisconsin law on the issue. Indeed, its distinction between implied consent and actual consent was severely criticized by the lead opinion in *Brar*, which stated that it has no basis in law. *Brar*, 376 Wis. 2d 685, ¶ 19. And, as argued above, the whole environment during the Informing the Accused phase of the proceedings is contradictory to the procurement of any consent, actual or otherwise.

Prado also argued that the unconscious driver statute runs afoul of *McNeely* because it creates a per se rule, or "de facto exception," that all unconscious drivers have consented to the test. (R. 26:2–3.) Leaving aside the fact that *McNeely* is an exigent circumstances case, not an implied consent case, there is nothing in the opinion that directly or indirectly takes aim at implied consent statutes. *McNeely* is only about what can be done after a subject refuses the test and accepts his penalties. Naturally, at this point the implied consent statute has been exhausted, and if the State wishes to obtain a sample for testing, it will have to find another Fourth Amendment method of doing so. It is within this context that the State wished to use the exigent

circumstances justification and *McNeely* rejected any one factor, such as the dissipation of alcohol in the blood, as a per se exigency. A statutory provision that an unconscious driver has consented to the test and has not refused, therefore is not creating a per se rule that an unconscious person has consented. The per se rule is that an unconscious person can never commit the unlawful act of refusing the test. This is not the type of per se rule *McNeely* found objectionable, nor is it an unreasonable legislative determination.

Prado based her argument on a single statement in *McNeely*, "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. at 156. In context, it is clear that the Court was referring to the exigent circumstances exception to the warrant requirement, not to all exceptions. After all, the sentence at issue was immediately preceded by a sentence that explained the Court's holding: "In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically." *Id.* "So, put simply, McNeely is inapplicable to the question before us, that is, whether the unconscious-driver provisions of Wisconsin's implied consent law are unconstitutional." *Howes*, 373 Wis. 2d 468, ¶ 72 (Gableman, J., concurring).

Prado is not alone in suggesting that *McNeely* created a sea change in implied consent laws. Courts in some other states have found unconscious driver provisions unconstitutional because of *McNeely*'s distaste for per se exceptions. *See*, *e.g.*, *Bailey v. State*, 790 S.E.2d 98 (Ga. Ct. App. 2016); *State v. Romano*, 785 S.E.2d 168 (N.C. Ct. App. 2016); *People v. Arredondo*, 199 Cal. Rptr.3d 563 (Cal. Ct. App. 2016); *State v. Ruiz*, 509 S.W.3d 451 (Tex. Crim. App. 2017). In all of these cases the courts believed themselves

bound by *McNeely* to hold unconscious driver provisions unconstitutional. But *McNeely* makes no such directive. As the Supreme Court of Wisconsin has recognized, "McNeely addressed only the exigent circumstances exception to the warrant requirement," not the consent exception. *Lemberger*, 374 Wis. 2d 617, ¶ 33 n.11. *McNeely* eschewed per se rules in an exigent circumstances analysis; it did nothing to invalidate existing implied consent laws. Again, it is difficult to see how *McNeely* prohibits a legislative per se rule that unconscious drivers are deemed not to have refused the test, and deemed not to have committed an unlawful act.

In *People v. Hyde*, 2017 CO 24, ¶ 24, 393 P.3d 962, the Colorado Supreme Court correctly noted that statutory implied consent satisfies the consent exception to the Fourth Amendment. The court noted that under *McNeely*, "there is no categorical, per se exigency exception to the warrant requirement based on the natural dissipation of alcohol in the bloodstream." *Id.* But the court rejected the assertion that "this means all warrantless, non-exigent, forced blood draws are unconstitutional." *Id.* It observed that "McNeely was not so broad. McNeely concerned the exigent circumstance exception exclusively." *Id.* The *Hyde* court continued to note that the *McNeely* plurality underscored the utility of implied consent laws. *Id.* These words were echoed by our supreme court, where the lead opinion in *Brar*, 376 Wis. 2d 685, ¶ 21, noted *McNeely's* approval of implied consent statutes and cited *Hyde* to support its contention that statutory implied consent satisfies the consent exception to the Fourth Amendment warrant requirement.

So, the plain meaning of the statute, the case law, and the purposes of the implied consent law demonstrate that the sections of the statute providing that an unconscious person is subject to a blood draw, since he has not withdrawn his consent, is constitutional. At the very least,

in the circuit court Prado failed to demonstrate that this statute is unconstitutional beyond a reasonable doubt.

III. Even if the unconscious driver provisions in Wisconsin's implied consent law are found to be unconstitutional, the good faith exception should apply in this case and the results of a test of Prado's blood should not be suppressed.

A. Applicable legal principles.

"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). "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.* (citation omitted). 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, 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 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, 43 (citing *Ward*, 231 Wis. 2d 723, ¶ 73).

In *Dearborn*, the supreme court affirmed that the good faith exception applies in Wisconsin when officers reasonably rely on clear and settled precedent, 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.

B. The officer in this case relied in good faith on the unconscious driver provision in the implied consent law, a longstanding provision that no appellate court has found unconstitutional.

In this case, the circuit court declined to apply the good faith exception, and suppressed the results of Prado's blood test. (R. 33:3–4.) The court stated that suppression might not be required "if the legal impact of the McNeely decision was not so clear or had not been in place for so long or had not been so widely recognized." (R. 33:3.) The court added that under *McNeely*, "in a particular situation, the dissipation of blood alcohol could still present an exigent circumstance justifying a warrantless search," but the officer was not acting in good faith "when a warrant was just a phone call away and had been so available for well over a year." (R. 33:3.)

The circuit court erred in not finding that the officer acted in good faith, and that suppression of the blood test results was unnecessary and inappropriate. The court referred to the "clear and widely recognized impact" of *McNeely* on blood drawn under the exigent circumstances exception to the warrant requirement. But the blood draw here was justified by a different exception to the warrant requirement—consent. But as the supreme court has recognized, "McNeely addressed only the exigent circumstances exception to the warrant requirement," not the consent exception. *Lemberger*, 374 Wis. 2d 617, ¶ 33 n.11.

An officer who was aware of and understood *McNeely* might have doubted whether a warrantless blood draw based on exigent circumstances would be permissible. But a reasonable officer would have had no reason to doubt the validity of Wisconsin's implied consent law, because *McNeely* did not invalidate, cast doubt on, or even meaningfully

address implied consent laws. An officer would have had no reason to doubt the validity of the provision in the law authorizing a blood draw from a person who gave consent by driving on a Wisconsin highway, and then did not withdraw that consent when the officer had probable cause that the person operated while under the influence of an intoxicant.

The circuit court's reasoning regarding the availability of a warrant is similarly flawed. The officer in this case may have been able to obtain a warrant authorizing a blood draw. But that is beside the point. The issue is whether one of the exceptions to the warrant requirement applied so that the officer could legally obtain a blood sample without procuring a warrant. The officer obtained a sample of Prado's blood with her consent under the implied consent law. Consent is one of the well-recognized exceptions to the warrant requirement.

As discussed above, the unconscious driver provision in Wisconsin's implied consent law authorized the officer in this case to obtain a blood sample from Prado. Wisconsin enacted its implied consent law in 1969. *See Howes*, 373 Wis. 2d 468, ¶ 75 (Gableman, J., concurring). The 1969 version of the law stated that "[a] person who is unconscious or otherwise incapacitated is presumed not to have withdrawn his consent under this subsection." Wis. Stat. § 343.305(1) (1969). While the unconscious driver provision has been renumbered, it has remained in the implied consent law since 1969. And it is been utilized by law enforcement officers for decades. *See e.g., Disch*, 129 Wis. 2d 225, 233. No appellate court has found the unconscious driver provision unconstitutional.

The State acknowledges that in *State v. Blackman*, 2017 WI 77, __ Wis. 2d. __, 898 N.W.2d 774, the Supreme Court of Wisconsin declined to apply the good faith exception and concluded that blood test results that were obtained in reliance on a different provision of the implied consent law

should be suppressed. In *Blackman*, the supreme court concluded that an officer properly read the Informing the Accused form to a driver, but that the form gave the driver incorrect information, which rendered the consent the driver gave by driving on a Wisconsin highway involuntary. *Id.* ¶¶ 71, 73. The court concluded that suppression was required, reasoning that "[u]nless the evidence in the instant case is suppressed, law enforcement officers across the state will continue to read the Informing the Accused form to accuseds in the same situation as Blackman without providing correct information to provide the basis for the accused's voluntary consent." *Id.* ¶ 73. The court further concluded that "[t]he exclusionary rule's deterrent effect will be served if the evidence in the instant case is suppressed." *Id.* ¶ 74.

The *Blackman* court's reasoning does not apply to the unconscious driver provisions in the implied consent law. Here, the statute gives no false information, and, unlike the portion of the statute at issue in *Blackman*, does not in any way conflict with another portion of the implied consent law or any other statue. The law—at the time and now—authorized the officer to administer a draw of Prado's blood because she consented to a blood draw by driving on a Wisconsin highway, and did not withdraw that consent. The unconscious driver provision in the statute has been well-settled law since 1969. To employ the exclusionary rule because this Court or the supreme court might someday find the statute unconstitutional would serve no deterrent principle, as explained by the United States Supreme Court in *Krull* and reaffirmed by the Supreme Court of Wisconsin in *Dearborn*.

As discussed above, nothing in *McNeely*—which concerned only the exigent circumstances exception to the warrant requirement—should have tipped the officer off that the unconscious driver statute might be unconstitutional.

The same is true of *Birchfield*, which also was decided after the blood draw in this case. Even now, no appellate court has found the unconscious driver provision in Wisconsin's implied consent law invalid. Unless and until an appellate court does so, officers are justified in relying on this provision, just as they are justified in relying on any other Wisconsin statute that has not been found invalid or unconstitutional. There is simply no reason to exclude evidence gathered under the statute. "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.

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).

In this case, suppressing evidence would have no appreciable deterrent effect on officers. If the unconscious driver provisions in the implied consent law were to be declared unconstitutional by an appellate court, officers will, of course, stop relying on those provisions to obtain warrantless blood draws. Suppressing evidence in this case, if this Court or the supreme court were to declare the provisions unconstitutional, would have no additional deterrent effect.

In contrast, the societal impact of suppression would be enormous. Prado has been charged with nine crimes, including homicide. Suppression of crucial evidence demonstrating that her blood alcohol concentration was more than four times the limit at which she could legally drive, and contained a detectable amount of a restricted controlled substance, would greatly affect the State's prosecution. Suppression would have no appreciable deterrent effect, but it would have a significant societal impact. Suppression is therefore unwarranted and inappropriate.[11]

[11] In the event this Court does not agree with the State's argument on good faith, and cannot reverse on the basis of the implied consent law, it would be reasonable and would promote judicial economy to hold this case in abeyance until the supreme court decides *Mitchell*.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court reverse the circuit court's order granting Prado's motion to suppress evidence.

Dated this 21st day of September, 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 10,181 words.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 21st day of September, 2017.

_____
MICHAEL C. SANDERS
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Dawn M. Prado
Case No. 2016AP308-CR

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

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MICHAEL C. SANDERS
Assistant Attorney General

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I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

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This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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MICHAEL C. SANDERS
Assistant Attorney General