STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Appeal No. 16AP308-CR
Dane County Case No.15CF859

DAWN M. PRADO,

Defendant-Respondent.

STATE'S INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE DAVID T. FLANNAGAN PRESIDING

# RESPONSE BRIEF OF THE DEFENDANT-RESPONDENT

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## Table of Contents

## Table of Authorities

### Supreme Court Opinions



### Wisconsin State Opinions



### Wisconsin State Statutes



## Issues Presented

I. Was the warrantless blood draw of an unconscious crash survivor exempt from the requirements of the Fourth Amendment because of a civil statute authorizing the imposition of penalties for failure to actually consent to a search?

The circuit court correctly decided the blood draw violated the Fourth Amendment, and should be affirmed.

II. Notwithstanding the officer's admitted knowledge of *McNeely* and training in the telephone warrant system over a year prior, was his failure to seek a warrant for the blood draw through a readily available system that he had used before "good faith."

The circuit court correctly decided that the violation of the Fourth Amendment was not in "good faith." The circuit court should be affirmed.

## Position on Oral Argument and Publication

The criteria by which the Court decides whether oral argument is necessary in light of its incredible case load are stated in Wis. Stat. § 809.22(2). As the parties have endeavored to fully present and meet the issues on appeal in these briefs, we believe oral argument is unnecessary. However, as courts sometimes decide cases on issues not briefed by the parties (*see, e.g., State v. Daley*, 2006 WI App 81, ¶19, 292 Wis. 2d 517, 716 N.W.2d 146; *State v. Alexander*, 2015 WI 6, ¶83, 360 Wis. 2d 292, 858 N.W.2d 662 (Gableman, J. concurring), oral argument is welcomed for the purpose of allowing the court to ask questions of counsel. *See* Wis. Stat. § 809.22, Judicial Council Committee's Note, 1978.

The criteria for publication are stated in Wis. Stat. §809.23. The number of cases concerning the issue on appeal make this a case of substantial and continuing public interest. It is likely that any resolution of this case will resolve conflict between prior decisions and modify or clarify existing rules. As such, a decision is likely to contribute to the legal literature. The Respondent thus believes publication would be appropriate.

## Statement of the Case

Dawn Prado was found injured and unconscious at the scene of a motor vehicle crash. Criminal Complaint, R. 1; A-App 101. She had been thrown from a vehicle registered to her, and the other occupant of Dawn's vehicle wandered about the scene, insisting unbidden that he had not been driving. *Id.* The driver of the other vehicle was dead. *Id.* Dawn was transported to a hospital, and her blood was drawn at the instruction of an officer to test for intoxication. *Id.* A warrant was not sought. Order Granting Motion To Suppress, R. 33, A-App. 122-125.

Dawn sought suppression of the warrantless blood draw. Motion Hearing, December 3, 2015, R. 41, 9-13, A-App. 134-138. Briefs were submitted, an evidentiary hearing conducted, and more briefing was ordered. *Id.* The circuit court decided that the evidence was obtained in violation of the Fourth Amendment, that the Wis. Stat. § 343.305 does not authorize drawing blood from an unconscious person, and that to the extent the statute does it is unconstitutional beyond a reasonable doubt. Order Granting Motion To Suppress, R. 33, A-App. 122-125. The court also considered the State's "good faith" argument, rejecting it on the basis that the officer admittedly knew of the warrant requirement, had been trained to use it over a year before, had used the warrant system before, and there was no reason to not use it. *Id.*

The State appeals the circuit court's order, while Dawn remains confined pending trial.

## Argument

The facts of this case are simple, and the Constitutional law is settled. To be sure, cases such as this have the highest stakes, important public policy implications, and arouse great emotion. But the solution is simple, convenient, and inexplicably unused. For all the convoluted proposals of the State, there is a simpler solution: To take the blood of an unconscious person, police must obtain a warrant. It's constitutionally required.

### I. The Warrantless Blood Draw Was Constitutionally Impermissible

A. *The Supreme Court Has Clearly Mandated That Unconscious Blood Draws Require A Warrant.*

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.
>
> *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184-85 (2016).

The State tries hard to shoehorn the legal fiction of "implied consent" into the glass slipper of constitutionally permissible warrantless searches, but those efforts must fail in light of controlling precedent from the U.S. Supreme Court. The civil penalties of "implied consent" statutes are constitutional, but that constitutionality ends at the boundaries of criminal law.[1] *See Birchfield v. North*

[1] Regarding whether "implied consent" statutes meet the Fourth Amendment standard of reasonableness, the Court wrote "applying this standard, we conclude that motorists cannot be

*Dakota*, 136 S. Ct. 2160 (2016). Actual consent is demonstrably different from the convenient fiction of implied consent. *See Birchfield* at 2185-86.

The Fourth Amendment prohibits unreasonable searches. U.S. CONST. AMEND. IV. A blood draw is a search under the Fourth Amendment. [2] *Schmerber v. California*, 384 U.S. 757 (1966). Searches absent a warrant or exigent circumstances are unreasonable. *U.S. v. Robinson*, 414 U.S. 218 (1973); *Missouri v. McNeely*, 133 S.Ct. 1552 (2013); *State v. Tulberg*, 2014 WI 134, ¶30, 857 N.W.2d 120. Unconsciousness is not an exigent circumstance. *Birchfield* at 2184-2185. There was no warrant sought in this case. Order Granting Motion to Suppress, R. 33, A-App. 122-125. The warrant system was available. *Id.* The officer knew of the warrant requirement, had sought warrants before, had never been denied a warrant when requested, and yet simply was not instructed by his supervisor to seek one. *Id.*; Motion Hearing, December 3, 2105, R. 41, 9-13, A-App. 134-138. Therefore, the search was impermissible under the Fourth Amendment, and cannot be retrospectively justified by "good faith." Order Granting Motion to Suppress, R. 33, A-App. 122-125. The argument should end there, as it did with the circuit court.

But the State is displeased with the result, and the State has good reason for its dissatisfaction: Application of the Constitution in this case will mean throwing out some very important evidence for the State in a motor vehicle homicide case.

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deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield* at 2186.

[2] A breath test, according to the Supreme Court, is not. *Birchfield* at 2177-78.

Not only is permitting officers to just take blood from any unconscious person in the vicinity of a road easier for the State in the general scheme of things, there are also the highest of possible stakes in this particular case. The important public policy questions regarding implied consent laws generally will continue to be debated, but the public policy issues underpinning these cases will be moot with clarity from our courts: A clear holding consistent with the binding precedent of the U.S. Supreme Court will occasion no doubt among police that a warrant is required for unconscious blood draws.

In *Birchfield v. North Dakota*, the U.S. Supreme Court considered "implied consent" laws and "whether such laws violate the Fourth Amendment's prohibition against unreasonable seizures." *Birchfield* at 2167. The Court decided "we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at 2186. The Court noted that where the subject is unconscious "nothing prevents the police from seeking a warrant," (*Id.* at 2165) and as indicated in the block quote above, it is expected. *Id.* at 2184-85.

The State has argued, and our Wisconsin Supreme Court has assumed for the sake of argument, that people who are unconscious are suffering the consequences of their bad decision making. *See* Supreme Court Oral Argument: State v. Gerald P. Mitchell, April 11, 2018, http://www.wiseye.org/Video-Archive/Event-Detail/evhdid/12249 at 44:00.[3] While that's an understandable hypothetical for

[3] Counsel for the State noted regarding the mayhem and slaughter that drunk drivers cause on our highways, "That detail is front and center and it's especially compelling here. Because not only

jurists considering the broad impact that a holding in an individual case will have, it's not a hypothetical based on the facts of this case. Dawn's reported BAC was 0.081. State's Brief at 5. Her unconsciousness was not caused by immoderate drinking. The other trace chemicals in her system were of stimulants. *Id.* Stimulants do not cause unconsciousness. Dawn was unconscious because she was injured in a crash that killed another person, and she suffered brain damage as a result.

It has not been established that Dawn was the driver of the vehicle: That has only been alleged by the sole conscious witness at the scene, whose assertion is self-serving. Because the witness knew that the driver of the other vehicle was dead, and that Dawn's condition was uncertain: If Dawn wasn't the driver, then it would stand to reason that he must be responsible. While a jury may eventually decide that Dawn was driving, despite her on-the-record protestations to the contrary, that is not an established fact at this point.

So this Court needs to consider whether the statute that sanctions the drawing of blood from unconscious drunks who were driving, as in *State v. Mitchell*, also sanctions the drawing of blood from any unconscious person who happens to be near a road. The Court in *Birchfield* was nuanced in this regard, calling for a police to seek a warrant "where substances other than alcohol impair the driver's ability to

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are we dealing with the especially compelling interest on the part of the State to prosecute drunk driving cases and to prevent drunk driving, we're dealing with the worst of the worst. We're dealing with people who have either drunk themselves unconscious or have intoxicated themselves so much that they're unable to operate a vehicle. The State's interests could not be higher. And you're absolutely right Your Honor that under the Fourth Amendment's general reasonableness analysis we do start with the nature and extent of the State's interest."

operate a car safely, *or* where the subject is unconscious…" *Birchfield* at 2165 (emphasis added). Again, "a person who is unconscious (perhaps as the result of a crash) *or* who is unable to do what is needed to take a breath test due to profound intoxication or injuries." *Id.* at 2184-85 (emphasis added).

The Court's twice repeated "in the alternative" nuance was not accidental in underscoring the vulnerability of an innocent citizen unconscious from a crash *or* someone passed out from intoxication. Blood tests require piercing the skin and "extract a part of the subject's body." *Birchfield* at 2178. While the State has construed the anxiety attendant a blood draw to be mitigated by unconsciousness, that's not the anxiety the Supreme Court was talking about. It's the prospect of further testing, and a wealth of additional, highly personal information beyond mere BAC. *Birchfield* at 2176-2178. In specifically anticipating that warrants apply in these cases, the Court clearly sought to empower a court to issue warrants when justified, or refuse them when an unconscious citizen's interests in human dignity and privacy may be irrevocably trampled by zealous law enforcement.

This Court needs to consider whether the Constitution affords less protection to unconscious people. There is no logical connection between an unconscious state and a person's willingness to consent to a blood draw. We know that a significant number of people, despite having their "consent" implied as a condition of driving, choose not to consent in fact when asked to furnish a breath or blood sample. *Birchfield* at 2169-70.

One objective of "implied consent" laws are to coerce drivers into consenting to testing in actuality by providing civil penalties when they refuse. *Id.* at 2165. An unconscious person cannot be coerced into anything. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973). The presumption that an unconscious person has not revoked her consent does nothing to further the purpose of the implied consent law. The legislature's effort to make it easier to prosecute impaired driving may be laudable, but good intentions cannot trump the Constitution.

The argument that the Fourth Amendment should apply differently to unconscious persons makes no sense. To suggest that, as Dawn's pre-trial counsel phrased it, "…would be analogous to allowing police to freely search a home without a search warrant so long as no one is home to answer the door in order to object to the search." Notice of Motion and Motion to Suppress Evidence, R. 26; A-App. 120. The U.S. Supreme Court has been clear that the Constitution requires a warrant before police draw blood from an unconscious person.

B. *Implied Consent Is An Important And Useful Legal Fiction, But It Is Not Actual Consent.*

Does "implied consent" happen when the question is asked of a suspect, or when the suspect gets behind the wheel of a car? The rationale behind this question is that if it's the former, consent was never given. If the latter, consent can't be revoked. Implied consent isn't actual consent: It's something we've made up, so we can say it starts whenever we want. But whatever we choose has to comport with the Constitution.

Implied consent is not actual consent. In *Birchfield*, the question presented was exactly whether "implied consent" laws violate the Fourth Amendment's prohibition against unreasonable searches. *Birchfield* at 2166-67. The Court concluded

> Motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

*Birchfield* at 2185-2186. The State persists in arguing that *McNeely* actually sanctions implied consent laws used in this context, when the *Birchfield* Court expressly rejected that rationale as used by the North Dakota Supreme Court: The very decision it was reviewing. *Compare Birchfield* at 2171[4] to *Birchfield* at 2186[5].

*Birchfield* expressly holds that warrantless breath tests are permissible under the Fourth Amendment, but that blood tests are not and require a warrant. *Birchfield* at 2184. The Court specifically addresses the need for blood testing unconscious

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[4] "The [North Dakota Supreme Court] found support for the test refusal statute in this Court's *McNeely* plurality opinion, which had spoken favorably about 'acceptable 'legal tools' with 'significant consequences' for refusing to submit to testing.'" *Birchfield* at 2171 (citations omitted).

[5] "North Dakota emphasizes that its law makes refusal a misdemeanor and suggests that laws punishing refusal more severely would present a different issue . . .Borrowing from our Fifth Amendment jurisprudence, the United States suggests that motorists could be deemed to have consented to only those conditions that are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to the severity of the violation. But in the Fourth Amendment setting, this standard does not differ in substance from the one that we apply, since reasonableness is always the touchstone of Fourth Amendment analysis. And applying this standard, we include that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield* at 2186 (citations omitted).

drivers, and anticipates that a warrant be sought. *Birchfield* at 2185. Having analyzed it in the context of "search incident to arrest" exception, they apply the same rationale to "implied consent" arguments. *Birchfield* at 2185-2186. "And applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.*

We're dealing with a fiction here: Not all drivers are licensed. The statute addresses unlicensed drivers by directing itself to anyone who "operates a motor vehicle." Wis. Stat. § 343.305. Assuming most drivers are licensed, none of them are required to affirmatively give consent at the time of licensure. There's not a document that they sign, and even if they were, it's not read. Implied consent is a legal fiction. A contract of adhesion. If you drive in Wisconsin, we're going to assume your agreement, notwithstanding the fact that you never actually agreed.

All that is fine in the civil realm, according to our courts. We can revoke the privilege of driving and charge people money for "revoking" their consent. In reality, though, they never gave it. What we choose to characterize in the legal world as "revoking" consent is in the real world refusing to give consent when it's actually asked for. *Birchfield* recognizes this: It's implicit in the Court's language that "implied consent" is not "actual consent," so apparent that it's implicit without the need for articulation. Just as all citizens are presumed to know every law, such that ignorance of the law is not a defense, they're also "deemed" to have consented. The fact of the matter is, both of those are fictions. They're not actually true. People don't know every law (even though we pretend so for the sake of social cohesion,

and to make its enforcement more palatable), and even licensed drivers do not actually consent to testing upon licensure. The answer to this question won't be found in a DMV manual that no one actually reads, regardless of whether the statement about consent is there or not.

Against that backdrop, we have to consider the admissibility of warrantless blood draws of unconscious people. It's well established that "implied consent" is a fine and enforceable fiction in the civil realm. It serves important public policy objectives. Where liberty and bodily integrity are at stake, though, things are more serious. "There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Birchfield* at 2185-2186.

C. *Instructive Analogies.*

Other areas of criminal law relating to consent are instructive.[6] If a person has sexual contact with someone they know to be unconscious, it's a class C felony. Wis. Stat. § 940.225(2)(d). It's the legal equivalent to having intercourse with someone through use of violence. Wis. Stat. § 940.225(2)(a). It's the legal equivalent of raping a mentally ill person. Wis. Stat. § 940.225(2)(c).

[6] In argument to the Wisconsin Supreme Court in *State v. Mitchell*, 15AP304, certified by this Court to address the same issue presented in this case, the State analogized the Defendant's position to that of a suspected drug dealer who gives consent to search his home but then passes out when the police are just steps from the door, arguing that the suspect's consent would survive his unconsciousness. Supreme Court Oral Argument: State v. Gerald P. Mitchell, April 11, 2018, http://www.wiseye.org/Video-Archive/Event-Detail/evhdid/12249, at 42:30.

"Consent" in the context of sex is instructive, as the legislature has taken the time to specifically define what it means. It means "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." Wis. Stat. § 940.225(4). This closely resembles language used by our courts in "consent to search" jurisprudence. *See e.g. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). As our sexual assault statutes dictate, a "person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act" is presumed incapable of consent. Wis. Stat. § 940.225(4). As the *Schneckloth* court observed "[e]xcept where a person is unconscious or drugged or otherwise lacks the capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are voluntary in the sense of representing a choice of alternatives." *Schneckloth* at 224 (internal citations and quotes omitted). Note that in this exploration of the amphibian meaning of consent, "unconscious or drugged" is self-evidently *not* consent.

To illustrate the analogy quite simply: If Jane the freshman kisses John the fraternity brother, expressing to him that she earnestly desires sexual intercourse, that is "words or overt actions" that indicate freely given agreement. If Jane is then rendered unconscious by a falling ceiling tile, should John go ahead and have sex with Jane? She did not withdraw her freely given consent. What if she's unconscious because she had too much to drink? Is John free to engage in sex then, because her

unconsciousness was brought about by her own immoderation? The law says "no." Wis. Stat. § 940.225(2)(d); Wis. Stat. § 940.225(2)(cm).

But that's the nature of the "implied consent" upon which the State would rely to sanction officers' warrantless piercing of an unconscious person's body. Actually, John would still be more justified than the average police officer executing a warrantless blood draw. If the analogy is to be accurate, we'd have to amend our scenario to say that Jane didn't actually consent through her own words or actions, but there was a note in all incoming freshmen's orientation materials telling them they're deemed to have consented to sex by virtue of their presence at a fraternity house. In the State's analysis, it doesn't matter if Jane actually read this note, or even if she's a college student. Call it "constructive notice" or "implied consent." The State has taken to calling it "actual consent."[7] It's frightening that such a

[7] In briefing and argument to the Wisconsin Supreme Court in State v. Gerald P. Mitchell, 15AP301, certified by this Court to address the issue in this case, the State wrote "By operating a vehicle on Wisconsin roads with a presumed understanding of the reasonable conditions imposed by the implied-consent statute and a presumed desire to act in accordance with that statute, Mitchell allowed a reasonable inference of consent to a suspicion-based search of his blood-alcohol content. That consent was not the product of government coercion. The State did not force him to drive. Nor did the State require him to maintain his consent once he was arrested. Indeed, at any moment before Mitchell fell unconscious, he was free to 'withdraw' his consent, subject to 'unquestionably legitimate' civil penalties. Accordingly, Mitchell's consent to the search was both actual and voluntary." State's Brief in State v. Mitchell at 26-27 (citations and parentheticals omitted).

During oral argument before the Wisconsin Supreme Court,
The Court: As I understand your main position is that implied consent equals actual consent, period.
The State: Yes, it can. That's right.
The Court: Oh, implied consent doesn't always equal actual consent?
The State: Well, as we said in our brief, the state could not pass a law that says by driving you consent to a search of your home anytime the officers show up. They couldn't do that, because that exceeds the reasonable limit of the Fourth Amendment.

characterization requires rebuttal: It's an Orwellian[8] merging of the words "actual" and "consent" to cancel each other out so that the term means the opposite of what the words themselves do.

As with all analogies, this is analogous and not identical. There's an overwhelming public interest in reducing drunk driving. Our legislature has indicated through statute that testing unconscious people is something we want to do. Notwithstanding its unconstitutionality in the criminal law setting, that's a powerful statement of social interest.

There are other analogous topics which may be instructive as well. People leave wills that the law enforces when they're dead: Inarguably no longer conscious. Surgeries are performed on unconscious people, and their lack of consciousness

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The Court: Yes, I'm talking about OWI implied consent I understand your argument to be implied consent equals actual consent in the OWI context.
The State: For the unconscious driver, properly arrested, correct.
Supreme Court Oral Argument: State v. Gerald P. Mitchell, April 11, 2018, http://www.wiseye.org/Video-Archive/Event-Detail/evhdid/12249, at 49:20.

[8] "It's a beautiful thing, the destruction of words . . . A word contains its opposite in itself. Take "good" for instance. If you have a word like "good", what need is there for a word like "bad"? "Ungood" will do just as well. . .In the end the whole notion of goodness and badness will be covered by only six words—in reality, only one word. Don't you see the beauty of that, Winston? . . . Don't you see that the whole aim of Newspeak is to narrow the range of thought? In the end, we shall make thoughtcrime literally impossible, because there will be no words in which to express it." George Orwell, 1984, Part 1, chapter 5.
https://ebooks.adelaide.edu.au/o/orwell/george/o79n/chapter1.5.html

"DOUBLETHINK means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them. . . . To tell deliberate lies while genuinely believing in them, to forget any fact that has become inconvenient, and then, when it becomes necessary again, to draw it back from oblivion for just so long as it is needed, to deny the existence of objective reality and all the while to take account of the reality which one denies—all this is indispensably necessary." *Id*., Part 2, chapter 9.
https://ebooks.adelaide.edu.au/o/orwell/george/o79n/chapter2.9.html

does not make surgeries battery.[9] People have "living wills" instructing whether life support is to be used in the event that they become brain dead. They write these based on personal principles, sometimes knowing what the risk is (in the case of a terminally ill patient who does not want extraordinary efforts undertaken to revive her), sometimes not (in the case of someone opposed to life support, or the withdrawal of it, in principle, without knowing when if ever such a situation might arise). Harvesting organs in the context of motor vehicle crashes is an apt analogy. In such a case, someone anticipates the eventuality of death and wants their organs used for the benefit of others. They consent in advance to the organs being used, without knowing whether the occasion will ever actually arise, or how in particular they will be used. They get an orange sticker on their license and sign the back, noting any exclusions.

In all of these circumstances, though, consent was actual. Actual consent required action to create an instrument to express the intent, because the intent was contrary to the status quo. We would not as a rule sanction these measures without actual consent.

The U.S. Supreme Court has already decided that the arguably coercive pressure of "implied consent" is authorized in the civil context. Consent of licensed drivers may someday be made actual, advanced consent in the same way that organ

[9] Indeed, emergency surgeries are sometimes performed without explicit consent of a patient. Those are invariably to the intended benefit of the patient, not to generate inculpatory evidence for the purposes of prosecuting the patient.

donation is: Particularly explained to each driver individually and, if they consent, indicated on their license. The legislature may even be justified someday in requiring such actual advanced consent as a condition of issuing a driver's license. Certainly that level of specificity at the DMV would help to make our legal fiction less fictitious or implied and more actual. The State's case that an unconscious individual's blood may be drawn in such an instance would be stronger.

In this case, that is not the circumstance. In this case, the U.S. Supreme Court has recognized that what can be "deemed" for civil purposes cannot be "deemed" for the purposes of the Fourth Amendment, and they anticipate that warrants must be sought to draw blood from an unconscious person.

**II. The Circuit Court's Rejection of "Good Faith" Was Correct**

Whether to apply the "good faith" exception to the Fourth Amendment is a question of constitutional fact. *State v. Kennedy*, 214 WI 132, ¶ 16, 856 N.W.2d 834. A reviewing court accepts the circuit court's findings of fact unless they are clearly erroneous. *Id.* The application of facts to constitutional principles is a question of law reviewed de novo. *Id.*

The State contends that the officer in this case was relying in good faith on the law in existence at the time of the unconstitutional search, and that suppression is therefore unwarranted. The circuit court considered that argument and, based on the facts adduced at the evidentiary hearing on the matter, properly rejected it. Order Granting Motion To Suppress, R. 33, A-App. 122-125. The officer had testified that he was aware of *McNeely* and the warrant requirement, that he had used the warrant

system before, and had never been denied a warrant when he'd sought one. Transcript at 9-13; A-App. 134-138. He specifically testified regarding the telephone warrant application system that "I was trained immediately after it—the ruling came out." Transcript at 12, A-App. 137.

The circuit court observed that as a result of *McNeely*, in 2013, the Dane County Circuit Court participated in creating a telephone warrant application procedure for use in these cases, and that the system was readily available and widely used by Dane County law enforcement agencies throughout 2014. Order Granting Motion To Suppress, R. 33, A-App. 122-125. The circuit court found that the legal impact of *McNeely* was clear and had been in place for over a year and widely recognized. *Id.* In short, the circuit court tied its rejection of the State's "good faith" argument inextricably to its findings of fact.

In fact, *McNeely* was decided on April 17, 2013. On December 12, 2014, well over a year later, Dawn Prado's blood was taken without a warrant. In this case, unlike *Kennedy* and *Dearborn*, there is no well-established precedent permitting this blood draw to be made without a warrant after *McNeely*. To the contrary. The question is whether reliance on the statute can be taken to be acting in good faith. More than a year after *McNeely*, when the officer had been trained in new warrant systems to comply with *McNeely*, it cannot.

The circuit court's findings were based on what the officer testified he knew. The State's contention that no deterrent to police violations of the Fourth

Amendment is required in these cases is belied by the four cases presently pending in regarding this issue.

The answer is very simple: Police are constitutionally required to get a warrant to extract the blood of an unconscious person. We should not have to twist ourselves in philosophical knots with various strands of legal fiction and ironic definitions of "actual consent" to accommodate officers' inexplicable reluctance to do what the Constitution requires. Warrants are not hard to get. They require one phone call. Require them to do it, and they will. Permit them not to, and they won't.

## Conclusion

For the reasons stated herein, this Court should affirm the circuit court.

Dated this 16th day of April, 2018.

Respectfully submitted,

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Anthony J. Jurek (SBN 1074255)
Attorney for the Defendant-Appellant

## CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,756 words.

Further

I hereby certify that consistent with Wis. Stat. §809.19(3)(b), a supplemental appendix is unnecessary, as all documentation required of the appeal and essential to its understanding is included in the appendix to the State's Brief.

Further

I certify that consistent with Wis. Stat. § 809.19(12)(f) the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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