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SUPREME COURT

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2016AP308-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DAWN M. PRADO,

Defendant-Respondent-Cross Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE DAVID T. FLANAGAN III, PRESIDING

RESPONSE BRIEF OF THE PLAINTIFF-APPELLANT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284 | (608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

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ISSUES PRESENTED

A police officer ordered that Prado's blood be drawn under Wisconsin's implied consent law when there was probable cause that she had driven while under the influence of an intoxicant and she was unconscious. The circuit court concluded that the blood draw was not authorized by the unconscious driver provision in the implied consent law, and that the good faith exception to the exclusionary rule did not apply, so it suppressed the blood test results. The court of appeals found the unconscious driver provision unconstitutional but reversed because it concluded that the officer reasonably relied in good faith on the statute.

1. Does the good faith exception apply to an officer's reliance on law that allegedly is not well-established?

The circuit court did not answer.

The court of appeals did not answer.

This Court should conclude that a statute that has not been found unconstitutional by an appellate court is well-established law, and that the officer who ordered Prado's blood draw could rely on that law in objective good faith.

2. Does the good faith exception apply when an officer allegedly is not well trained on the law he is applying?

The circuit court did not answer.

The court of appeals did not answer.

This Court need not answer because good faith is an objective determination of whether a reasonably well-trained officer would have known that the search was illegal. And the officer here followed the law that authorized the blood draw.

3. Is a circuit court's determination that an officer relied on a statute in good faith a question of law or a question of fact?

The circuit court did not answer.

The court of appeals did not answer.

This Court should answer that a good faith determination is reviewed as a matter of constitutional fact. A reviewing court defers to the circuit court's findings of historical fact, and independently applies constitutional principles to those facts.

4. Did the State have standing to petition for review of the circuit court's decision?

The circuit court did not answer.

The court of appeals did not answer.

This Court should answer "yes." Prado did not oppose the State's petition for review and this Court properly exercised its discretion when it granted the petition.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument has been scheduled, and by granting review this Court has indicated that publication is appropriate.

INTRODUCTION

Prado's blood was drawn when law enforcement officers had probable cause that she had driven while under the influence of an intoxicant, she had been taken to the hospital with no opportunity for a breath test, and she was unconscious. As the State explained in its petitioner's brief-in-chief, the blood draw was justified by exigent circumstances under the new rule the United States Supreme Court established for exactly this type of case in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

Neither the circuit court nor the court of appeals applied the *Mitchell* rule. The circuit court could not apply the rule because the rule had not yet been established. The court of appeals did not apply the *Mitchell* rule because it said its conclusion that the officer relied in objective good faith on the unconscious driver provision in the implied consent law was dispositive. As the State explained in its petitioner's brief, the court of appeals' conclusion that the officer relied on the unconscious driver provision in objective good faith was correct, even though the court's reasoning was not.

In her cross-petitioner's brief, Prado asks this Court to hold that application of the good faith exception in any case violates article 1, section 9 of the Wisconsin Constitution, because under that provision, a person is entitled to a remedy for any wrong. She also asks this Court to hold that the exclusionary rule applies even when applying it will have no deterrent effect on future police misconduct.

This Court should reject each of these arguments. First, Prado did not raise them in her cross-petition. Second, article 1, section 9 guarantees access to the courts. It does not provide for a remedy. And it is well established that the purpose of the exclusionary rule is to deter future police misconduct.

Alternatively, Prado asks this Court to conclude that the good faith exception does not extend to an officer's reliance on law that is not well established, that it applies only when officers are well trained, and that a reviewing court should defer to a circuit court's good faith determination.

But the proper application of the good faith exception is well established. It applies to illegally obtained evidence when a reasonably well-trained officer would not have known that the search was illegal under the circumstances. Whether the good faith exception applies in a particular case is a matter of constitutional fact.

Finally, Prado asks this Court to conclude that it should not have granted the State's petition for review. But the State explained in its petition why it could petition for review, Prado did not oppose the State's petition, and this Court properly exercised its discretion in granting review.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

A minivan Prado was driving collided with another vehicle, injuring Prado and her passenger and killing the other driver. (R. 1:3–5, P-App. 146–48.) A firefighter observed Prado lying in a ditch near the crash and smelled the odor of intoxicants on her breath. (R. 1:5–6, P-App. 148–49.) The passenger in Prado's minivan told police that Prado had been driving. (R. 1:4, P-App. 147.) Police officers concluded that Prado's minivan crossed the center line and struck the car. (R. 1:5, P-App. 148.) Officers also learned that Prado had three prior OWI convictions. (R. 1:6, P-App. 149.)

Prado was transported to the hospital. (R. 1:5, P-App. 148.) Officer Jonathan Parker encountered Prado in the hospital and read the Informing the Accused form to her, but she was unconscious and did not respond. (R. 1:5, P-App. 148; 41:7–8, P-App. 175–76.) The officer ordered that Prado's blood be drawn. (R. 41:9, P-App. 177.) A test revealed a blood alcohol concentration of 0.081, and the presence of Benzoylecgonine. (R. 1:17; 21:1, P-App. 160.)[1]

The State charged Prado with nine OWI-related crimes. (R. 22.) Prado moved to suppress her blood test results on the ground that the unconscious driver provision in

[1] Because Prado had three prior OWI-related offenses (R. 1:6, P-App. 149), 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.)

Wisconsin's implied consent law, Wis. Stat. § 343.305(3)(b) and 3(ar), is unconstitutional. (R. 26, P-App. 161–64.) After briefing and a hearing (R. 27; 29; 31; 41), the circuit court granted Prado's suppression motion (R. 33, P-App. 165–68). The court found that there was probable cause that Prado was the operator of a motor vehicle involved in a crash in which another person was killed. (R. 33:2, P-App. 166.) But it concluded that Prado's blood was drawn without a warrant or her consent, in violation of the Fourth Amendment. (R. 33:3–4, P-App. 167–68.) The court concluded that the unconscious driver provision in Wisconsin's implied consent law does not authorize blood draws, but that if it did authorize them, it would be unconstitutional under *Missouri v. McNeely*, 569 U.S. 141 (2013). (R. 33:3, P-App. 167.) The court declined to apply the good faith exception to the exclusionary rule and ordered the blood test result suppressed. (R. 33:3–4, P-App. 167–68.)

The State appealed, and the court of appeals held the case for more than two years pending decisions in cases involving warrantless blood draws from drivers who had become unconscious. After the United States Supreme Court issued its decision in *Mitchell v. Wisconsin*, the court of appeals ordered supplemental briefing to address application of *Mitchell* in this case.

The court of appeals reversed the circuit court's decision granting Prado's motion to suppress her blood test results, but not on the ground that the warrantless blood draw was justified under *Mitchell*. The court instead found the unconscious driver provision in Wisconsin's implied consent law unconstitutional. *State v. Prado*, 2020 WI App 42, ¶ 74, 393 Wis. 2d 526, 947 N.W.2d 182. But it determined that the officer relied in good faith on the unconscious driver provision, *id.* ¶ 73, and that its good faith determination was dispositive.

Id. ¶ 66. The State petitioned for review and Prado petitioned for cross-review, and this Court granted both petitions.

STANDARD OF REVIEW

The application of the good faith exception to the exclusionary rule is a question of constitutional fact. *State v. Dearborn*, 2010 WI 84, ¶ 13, 327 Wis. 2d 252, 786 N.W.2d 97. A reviewing court "accept[s] the circuit court's findings of fact unless they are clearly erroneous," and applies "constitutional principles to those facts" de novo. *Id.*

ARGUMENT

I. The officer who ordered Prado's blood draw relied in good faith on well-settled law—a statutory provision that had not been found unconstitutional by any appellate court.

A. When an officer relies in objective good faith on a statute that has not been found unconstitutional, evidence obtained in an unconstitutional manner need not be suppressed.

"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." *Dearborn*, 327 Wis. 2d 252, ¶ 35 (citing *Herring v. United States*, 555 U.S. 135 (2009)); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995)). exclusionary rule does not apply to all constitutional violations. *Dearborn*, 327 Wis. 2d 252, ¶ 35. Instead, "exclusion is the last resort." *Id.*

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).

This Court adopted the good faith exception in *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. The court 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). This 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.

The good faith exception also applies when an officer relies on a statute that is later found unconstitutional. *Dearborn*, 327 Wis. 2d 252, ¶ 41 (citing *Krull*, 480 U.S. at 349–50. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Krull*, 480 U.S. at 349–50. So long as the officer's reliance on a statute was objectively reasonable and in good faith, the good faith exception to the exclusionary rule applies. *Id.* at 358–60.

B. The officer who ordered Prado's blood draw reasonably relied in good faith on Wis. Stat. § 343.305(3)(b), the unconscious driver provision in Wisconsin's implied consent law.

The law enforcement officer who ordered that Prado's blood be drawn did so in reasonable reliance on Wis. Stat. § 343.305(3)(b), the unconscious driver provision in Wisconsin's implied consent law. Under that provision,

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated [an OWI-related statute] . . . one or more samples specified in par. (a) or (am) may be administered to the person.

Wis. Stat. § 343.305(3)(b).

The statute provides that when there is probable cause that a person operated a motor vehicle while under the influence of an intoxicant, and the person is unconscious or otherwise incapable of withdrawing the consent he is deemed to have given by driving on a Wisconsin highway, a blood draw may be administered. Wis. Stat. § 343.305(2), (3)(b). Here, there is no dispute that there was probable cause that Prado drove on a Wisconsin highway, that she did so while under the influence of an intoxicant, or that she was unconscious. A blood draw was therefore authorized by the statute.

The court of appeals found the unconscious driver provision unconstitutional. *Prado*, 393 Wis. 2d 526, ¶ 37 ("[W]e conclude that Prado has met her burden to prove that the incapacitated driver provision is unconstitutional beyond a reasonable doubt.") Until the court of appeals issued its decision in this case, no appellate court had found the statute unconstitutional. A reasonably well-trained officer could rely

in good faith on the statute in 2014, when the officer ordered Prado's blood draw, six years before the court of appeals found the statute unconstitutional. Exclusion of Prado's blood test results is therefore unnecessary and inappropriate.

C. The circuit court erred in concluding that the good faith exception did not apply.

The circuit court did not determine whether the officer reasonably relied on the unconscious driver provision because it concluded that Wisconsin's implied consent law does not authorize warrantless blood draws. (R. 33:3, P-App. 167.) And the court said that after the Supreme Court issued its decision in *Missouri v. McNeely*, 569 U.S. 141 (2013), if the unconscious driver provisions in Wisconsin's implied consent law *did* authorize a warrantless blood draw, those provisions would be unconstitutional (R. 33:3, P-App. 167.)

The circuit court noted that after *McNeely* was decided, Dane County created a telephonic warrant system, and that the warrant system was available when the officer ordered the blood draw in this case. (R. 33:3, P-App. 167.) The court said, "Perhaps a more limited remedy might be appropriate 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, P-App. 167.) The court said, "Indeed, in a particular situation, the dissipation of blood alcohol could still present an exigent circumstance justifying a warrantless search." (R. 33:3, P-App. 167 (citing *McNeely*, 569 U.S. at 156).) But the court said that "the claim of good faith cannot carry the day when a warrant was just a phone call away and had been available for well over a year." (R. 33:3, P-App. 167.)

Respectfully, the circuit court's analysis missed the mark entirely. As the court of appeals recognized, the unconscious driver provision in the implied consent law authorizes a blood draw from an unconscious person who has

not withdrawn the consent the person is deemed to have given by driving on a Wisconsin highway. *Prado*, 393 Wis. 2d 526 ¶ 18. The circuit court relied on *Padley*, 2014 WI App 65, ¶ 26 354 Wis. 2d 545, 849 N.W.2d 867 , for the proposition that the statute does not authorize warrantless blood draws. (R. 33:3, P-App. 167.) But *Padley* said the opposite. It said that when a driver is unconscious, the unconscious driver provision *does* authorize a blood draw. *Id.* ¶ 39 n.10.

Because the circuit court mistakenly concluded that the unconscious driver provision does not authorize warrantless blood draws from drivers who become unconscious, it did not determine whether the officer reasonably relied in good faith on the statute. Instead, the court seemingly determined that the officer could not have acted in good faith on exigent circumstances justifying a warrantless blood draw based solely on the rapid dissipation of alcohol in Prado's blood, after *McNeely*. (R. 33:3, P-App. 167.)

It is now clear that exigent circumstances *did* justify the warrantless blood draw from *Prado*, under the *Mitchell* rule. But the good faith issue in this case does not concern exigent circumstances—it concerns whether the officer's good faith reliance on the statute was reasonable. The circuit court did not address that issue.

D. The court of appeals correctly concluded that the officer reasonably relied in good faith on the unconscious driver provision in the implied consent law.

The court of appeals concluded that the officer who ordered Prado's blood draw "acted in objective good faith reliance on the incapacitated driver provision." *Prado*, 393 Wis. 2d 526, ¶ 71. Although Prado's blood draw was justified by exigent circumstances under the rule established in *Mitchell v. Wisconsin*, 139 S. Ct. 2525, the court of appeals did

not address the exigent circumstances exception to the warrant requirement. *Prado*, 393 Wis. 2d 526, ¶ 66. The court instead found the unconscious driver provision in the implied consent law unconstitutional, *id.* ¶ 64, but it concluded that Prado's blood test results should not be suppressed because the officer acted in objective good faith reliance on the statute when he ordered the blood draw. *Id.* ¶ 71.

The court of appeals reasoned that when the officer ordered Prado's blood draw, the unconscious driver provision in Wisconsin's implied consent law had been "on the books for decades and its constitutionality had not been challenged in any published opinion." *Prado*, 393 Wis. 2d 526, ¶ 71. The court rejected Prado's argument that *McNeely* rendered the unconscious driver provision unconstitutional. *Id.* ¶ 72. And the court said that when the officer ordered the blood draw from Prado, "*Wintlend* was the law in Wisconsin and had not yet been overruled by *Birchfield*." Id. ¶ 71 (citing *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745; *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

As the State explained in its petitioner's brief, *Wintlend* was not "the law," and *Birchfield* did not overrule it. And even if *Birchfield* had somehow silently overruled *Wintlend*, a reasonably well-trained officer would not have understood *Birchfield* to have rendered the unconscious driver provision in Wisconsin's implied consent law unconstitutional.

The court of appeals erred in its consideration of the supposed effect of *Birchfield* on *Wintlend*, and by not simply recognizing that an officer could rely in good faith on the statute until the court of appeals found it unconstitutional in this case. But the court's ultimate conclusion on good faith was correct. The officer who ordered Prado's blood draw reasonably relied in good faith on the unconscious driver provision because the statute had not been found unconstitutional by an appellate court.

II. Prado's arguments about why the good faith exception to the exclusionary rule should not apply in this case are unpersuasive.

Prado argues that the good faith exception should not apply in this case. She asserts that the officer could not reasonably rely on the law because the law was not "well established," and the officer was not "well trained" in the law. (Prado's Br. 5–10.) She asserts that the circuit court's conclusion that the officer did not act in good faith is entitled to deference on review. (Prado's Br. 19–20.) And she asserts that the good faith exception should never be applied because doing so violates the Wisconsin Constitution, and that the exclusionary rule should apply even when it will have no appreciable deterrent effect on future police misconduct. (Prado's Br. 10–18.) All of these arguments are incorrect.

1. A statute that has not been found unconstitutional is well-established law, and an officer can rely on it in good faith.

Prado asks this Court to conclude that an officer can only rely in good faith on a law that is "well-established." (Prado's Br. 5–7.) And she argues that the unconscious driver provision was not well-established law because it had been "called into question by" *Padley*, 354 Wis. 2d 545, and "informed by" *McNeely*, 569 U.S. 141. (Prado's Br. 5.)

However, a statute that has not been repealed or found unconstitutional *is* well-established law. As the court of appeals recognized, the unconscious driver provision in Wisconsin's implied consent law has been "on the books for decades." *Prado*, 393 Wis. 2d 526, ¶ 71. That provision has

been part of the implied consent law since at least 1969.[2] When the officer ordered Prado's blood draw in 2014, the unconscious driver provision had been established law for over four decades.

Contrary to Prado's assertion, the unconscious driver provision was not "informed by" *McNeely*. (Prado's Br. 5.) As this Court has recognized, "*McNeely* addressed only the exigent circumstances exception to the warrant requirement." *State v. Lemberger*, 2017 WI 39, ¶ 33 n.11, 374 Wis. 2d 617, 893 N.W.2d 232 (citing *Birchfield*, 136 S. Ct. at 2174.); *see also Padley*, 354 Wis. 2d 545, ¶ 47 (recognizing that *McNeely* is not "a consent case"). *McNeely* did not even address implied consent laws, much less render the unconscious driver provision in Wisconsin's implied consent law unconstitutional.

A reasonable officer who read and understood *McNeely* would have understood that "the natural dissipation of alcohol from the bloodstream does not always constitute an exigency justifying the warrantless taking of a blood sample." After all, as the Supreme Court recognized, that was what it held in *McNeely*. *Birchfield*, 136 S. Ct. 2174 (citing *McNeely*, 569 U.S. 141). But a reasonable officer would have had no

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[2] The 1969 version of the statute provided that "[a]ny person who operates a motor vehicle upon the public highways of this state . . . shall be deemed to have given consent to a chemical test of his breath, blood or urine, . . . if arrested and issued a citation for driving or operating under the influence of a motor vehicle while under the influence of an intoxicant." Wis. Stat. § 343.305(1) (1969). The statute further provided 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).

reason to even question the validity of the unconscious driver provision in Wisconsin's implied consent law because *McNeely* did not concern implied consent laws or blood draws from drivers who have become unconscious.

Prado also asserts that the unconscious driver provision was not "well established" because it was "called into question by *Padley*." (Prado's Br. 5.) However, *Padley* mentioned the unconscious driver provision only once, in a footnote. *Padley*, 354 Wis. 2d 545, ¶ 39 n.10. The court "acknowledge[d] that there may be tension between the case law we summarize here and language in the implied consent law as amended by 2009 Wisconsin Act 163, which establishes that, at least in the context of incapacitated drivers, 'implied consent' is a sufficient basis on which to proceed with a warrantless search." *Id.* (citing Wis. Stat. § 343.305(3)(ar)2.). The court recognized under the unconscious driver provision in section 343.305(3)(ar)2., (which is identical to the one in section 343.305(3)(b) at issue here), a driver "who is 'unconscious or otherwise not capable of withdrawing consent[,] is presumed not to have withdrawn consent' and a blood draw 'may be administered' to the driver." *Id.* The court concluded that "at least in the context of an incapacitated driver and in the limited context of § 343.305(3)(ar)2., implied consent is deemed the functional equivalent of actual consent." *Id.* The court concluded by saying that it "need not address this issue further." *Id.*

A reasonable officer reading *Padley* correctly would understand it to say that if there is probable cause and the person is conscious, an officer can order a blood draw under the implied consent law only if the person agrees to the officer's request for a blood sample. *Padley*, 354 Wis. 2d 545, ¶ 27. But a person who is unconscious is deemed to have consented, so the officer can simply order the blood draw. *Id.* ¶ 39 n.10. And while there may be "tension" between how the

law works depending on whether a person is conscious or unconscious, the court did not address that tension. A reasonable officer could not possibly have read *Padley* as finding the unconscious driver provision unconstitutional. At most, a reasonable officer could have read *Padley* as pointing out a possible "tension" that a court might address someday.

Prado claims that when the officer ordered her blood drawn, "The indisputable fact of the matter is that the law was in flux." (Prado's Br 5.) But the unconscious driver provision was not "in flux." It was a longstanding statute that no appellate court had found unconstitutional. One circuit court had found the statute unconstitutional. *See State v. Howes*, 2017 WI 18, ¶ 2, 373 Wis. 2d 468, 893 N.W.2d 812. But the court of appeals did not find the statute unconstitutional in *Howes*. It certified the issue to this Court. *Id.* ¶ 1. And this Court decided the case on exigent circumstances, without determining whether the statute is constitutional. *Id.* ¶ 50. No appellate court found the statute unconstitutional until the court of appeals did so in this case.

Prado asserts that given this supposed state of "flux," "An officer would be no more reasonable in drawing blood from an unconscious person without a warrant than they would in arresting someone for performing an abortion." (Prado's Br. 5.) Prado likens the unconscious driver provision to Wisconsin's statute prohibiting the performing of an abortion, a statute that is "unenforceable by virtue of binding or superseding authority." (Prado's Br. 5.) She points out that "[w]hen there is binding precedent against such a statute, the statute is nonetheless illegal." (Prado's Br. 6.)

Prado's argument might make sense if the State was arguing that an officer relied in good faith on the unconscious driver provision *after* the court of appeals found the statute unconstitutional in this case. But unlike with the abortion statute, there was no "binding precedent against" the statute.

Until the court of appeals issued its decision in this case, the statute had not been found unconstitutional by an appellate court.

Prado claims that "even in the absence of binding authority declaring [the statute] illegal," the statute was not well established because the court of appeals, this Court, and the United States Supreme Court had "either come to different conclusions or avoided deciding whether the statute was constitutional." (Prado's Br. 6.) But what courts said years after the blood draw in this case has nothing to do with whether the law was well established when Prado's blood was drawn. Statutes are presumed constitutional. *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451. And no appellate court had even suggested that the statute was unconstitutional until the court of appeals certified the issue to this Court in *Howes*, more than a year after the officer ordered Prado's blood draw. Until that point the only possible uncertainty was the court of appeals in *Padley* pointing out the possible "tension" between its opinion and the language of the unconscious driver provision. No reasonable officer would read that and believe that the law was in "flux," so he could not rely on the statute.

Prado argues that because *Padley*, 354 Wis. 2d 545, conflicted with *Wintlend*, 258 Wis. 2d 875, the law was not well established so an officer could not rely on it in good faith. (Prado's Br. 6.) But any conflict between *Padley* and *Wintlend* does not mean that the law was not well established or was unsettled. To the extent there was a conflict, *Padley* was wrong. The court of appeals cannot properly overrule its own precedent or choose not to follow it. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). When a court of appeals' opinion conflicts with a prior court of appeals' opinion, the first opinion controls. *See State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452 (citing *State v. Bolden*,

2003 WI App 155, ¶¶ 9–11, 265 Wis. 2d 853, 667 N.W.2d 364 ("[I]f two court of appeals decisions conflict, the first governs.")).

Prado also argues that the law was not well established because the court of appeals certified the issue concerning the constitutionality of the statute to this Court three times, and no majority opinion of this Court or the United States Supreme Court has decided the issue. (Prado's Br. 6–7.) But those certifications and decisions all occurred *after* the officer relied on the unconscious driver provision in this case. At the time the officer relied on that provision, the law was well established and settled. And certifications by the court of appeals, and decisions by this Court and the Supreme Court that did *not* find a statute unconstitutional cannot reasonably mean that an officer cannot rely on the statute. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Krull*, 480 U.S. at 349–50.

2. The good faith exception applies when a reasonably well-trained officer would not have known that a search was illegal.

Prado asserts that "In order for the good faith exception to apply, an officer 'must be well trained' in the matter they're supposed to be exercising 'good faith' in." (Prado's Br. 7 (quoting *Dearborn*, 327 Wis. 2d 252, ¶ 36).) She claims that the officer who ordered her blood drawn was not well trained in the law, so he could not have relied in good faith on the unconscious driver provision in Wisconsin's implied consent law. (Prado's Br. 7.)

But *Dearborn* does not provide that the officer who conducts or orders a search must be well trained in order to rely in good faith on a law. *Dearborn* simply recognized that

the United States Supreme Court had said that whether good faith applies is determined in an objective test. This Court noted that in *Herring*, the Supreme Court clarified that "[t]he test of whether the officers' reliance was reasonable is an objective one, querying 'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Dearborn*, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 703). In other words, even if a search is conducted or ordered by an officer who relies in good faith on a law about which he is not well trained, the good faith exception applies so long as an objective officer—one that is well trained—would not have known in light of the circumstances that the search was illegal.

The court of appeals concluded that the officer who ordered Prado's blood draw "acted in objective good faith reliance on the incapacitated driver provision." *Prado*, 393 Wis. 2d 526, ¶ 71. Prado claims that the court of appeals was wrong for a number of reasons that "are fatal to its conclusion." (Prado's Br. 8.) Prado's arguments are meritless.

Prado claims that the court of appeals "ignore[d] the circuit court's findings that the officer did not act in good faith and the facts supporting that ruling." (Prado's Br. 8.) However, the circuit court's conclusion that the officer did not act in objective good faith was a conclusion of law, not a finding. And it was plainly an incorrect conclusion. As explained above, the circuit court did not consider whether the officer relied in good faith on the unconscious driver provision in the implied consent law because it concluded that the statute does not authorize blood draws. (R. 33:3, P-App. 167.) The court considered good faith only as to whether the officer could rely in good faith on exigent circumstances justifying the blood draw. (R. 33.3, P-App. 167.) But as the court of appeals recognized, the good faith issue in this case is whether a reasonable officer would have known that he could

not order a warrantless blood draw under the implied consent law. *Prado*, 393 Wis. 2d 526, ¶¶ 68, 71.

Prado claims that the court of appeals erred by considering that the officer who ordered the blood draw "did not read *McNeely* to prohibit officers from relying on the implied consent" law. (Prado's Br. 8.) He asserts that "[t]he officer's subjective, erroneous understanding is not the standard." (Prado's Br. 9.) Prado is correct that whether the good faith exception applies is an objective test. But her assertion that the officer misunderstood *McNeely* is unfounded. As this Court has recognized, "*McNeely* addressed only the exigent circumstances exception to the warrant requirement." *Lemberger*, 374 Wis. 2d 617, ¶ 33 n.11 (citing *Birchfield*, 136 S. Ct. at 2174.) *McNeely* did not prohibit officers from relying on an implied consent law.

Prado claims that the court of appeals erred by ignoring the officer's testimony about "his lack of recollection regarding whether he had been trained in *Padley*." (Prado's Br. 9.) She claims that for the good faith exception to apply, the officer had to be well trained, and that to be well trained, he had to be trained in *Padley*. (Prado's Br. 9.)

However, as Prado acknowledges, good faith is an objective test. (Prado's Br. 8–9.) And *Padley* mentioned the unconscious driver provisions in the implied consent law only in a single footnote, noting a possible "tension" between its interpretation of the implied consent law as it relates to conscious drivers, and the unconscious driver provisions, and declining "to address this issue further." *Padley*, 354 Wis. 2d 545, ¶ 39 n.10. An officer who was "trained in *Padley*," would not have understood it to mean that the unconscious driver provision was unconstitutional.

Prado claims that a reasonably well-trained officer would have understood that *Padley* "had thrown *Wintlend*

into doubt." (Prado's Br. 9.) But *Padley* did not "throw[ ] *Wintlend* into doubt." *Padley* did not even mention *Wintlend*. And to the extent that *Padley* interpreted the implied consent law differently than the longstanding interpretation of the law by this Court and the court of appeals, *Padley* was wrong. *Cook*, 208 Wis. 2d at 189–90.

Finally, Prado argues that the good faith exception cannot apply when an officer has to choose between "conflicting, binding authorities." (Prado's Br. 10.) But that is hardly the case here. The officer only had to follow a law that had been in place for over four decades, had been interpreted and applied in a consistent manner, and had not been found unconstitutional. To the extent that *Padley* contradicted that longstanding authority, *Padley* was not binding or controlling. It was wrong.

3. Application of the good faith exception to the exclusionary rule does not violate article 1, section 11 of the Wisconsin Constitution.

In addition to claiming that the good faith exception to the exclusionary should not apply in this case, Prado challenges the validity of the good faith exception altogether. She claims that the Wisconsin Constitution requires the exclusion of evidence that is illegally obtained. She is incorrect.

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Herring*, 555 U.S. at 139 (quoting *Evans*, 514 U.S. at 10). However, the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Id.* (quoting *Evans*, 514 U.S. at 10).

Because the Fourth Amendment provides no remedy for a violation of the Fourth Amendment, the United States Supreme Court established an exclusionary rule that "when applicable, forbids the use of improperly obtained evidence at trial." *Id.* (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)). "[T]his judicially created rule is 'designed to safeguard Fourth Amendment rights through its deterrent effect." *Id.* at 139–40 (quoting *United States v. Calandra*, 424 U.S. 338 348 (1974)). "[T]he exclusionary rule is not an individual right and applies only where it 'results in appreciable deterrence.'" *Id.* at 141 (quoting *Leon*, 468 U.S. 897, 909 (1984)). Accordingly, the Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." *Id.*

To this end, the Supreme Court has established a good faith exception under which the exclusionary rule does not apply when police act "in objectively good faith reliance" on a "subsequently invalidated search warrant," *Herring*, 555 U.S. at 142 (citing *Leon*, 468 U.S. 922). The Supreme Court has extended the exception to good faith reliance on "a statute later declared unconstitutional," *id.* (citing *Krull*, 480 U.S. at 349–50), a mistake by a judicial employee, *id.* (citing *Evans*, 514 U.S. 1), police mistakes resulting from their own negligence, *id.* at 147–48, and "binding judicial precedent." *Davis v. United States*, 564 U.S. 229, 249–50 (2011).

"The text of Article 1, Section 11 of the Wisconsin Constitution is identical" to the text of the Fourth Amendment "but for minor variances in capitalization and punctuation." *Dearborn*, 327 Wis. 2d 252, ¶ 14 n.6. Accordingly, this Court has "historically interpreted the Wisconsin Constitution's protections in this area identically to the protections under the Fourth Amendment as defined by

the United States Supreme Court." *Id.* ¶ 14.[3] And this Court has adopted both the exclusionary rule and the good faith exception to that rule. *Id.* ¶ 37.

Prado claims that application of the good faith exception violates the Wisconsin Constitution because it "leaves a constitutional wrong unremedied." (Prado's Br. 10.) Prado does not assert that article 1, section 11 of the Wisconsin Constitution provides a remedy for a violation of a person's right to be free from an unreasonable search. Prado instead points to article 1, section 9, "Remedy for wrongs," which provides that:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

Prado argues that article 1, section 9 requires this Court to provide a remedy for Fourth Amendment violation. (Prado's Br. 11–12.) She claims that the exclusionary rule must apply to any illegally obtained evidence, and that the good faith exception cannot apply. (Prado's Br. 12.)

Prado's claim fails for two reasons. First, she did not raise this issue in her cross-petition for review, so it is not properly before this Court. *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659 (citing *Jankee v. Clark Cty.*, 2000 WI 64, ¶ 7, 235 Wis. 2d 700, 612 N.W.2d 297 ("Generally,

[3] This Court has interpreted article 1, section 11 differently that the Fourth Amendment only in the "addition of two requirements to application of the good faith exception when officers rely on defective no-knock search warrants." *State v. Dearborn*, 2010 WI 84, ¶ 14 n.7, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625).

a petitioner cannot raise or argue issues not set forth in the petition for review unless this court orders otherwise. Wis. Stat. § 809.62(6). If an issue is not raised in the petition for review or in a cross petition, 'the issue is not before us.'"). Second, Prado's reliance on article 1, section 9 as requiring a remedy for a violation of the Fourth Amendment or article 1, section 11, is misplaced. As this Court has recognized, article 1, section 9 confers no legal rights. *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 189 (1980). It "is primarily addressed to the right of persons to have access to the courts and to obtain justice on the basis of the law as it in fact exists." *Id.*

Article 1, section 9 can be traced back to the Magna Carta. *Aicher ex rel. LaBarge v. Wis. Patients Compensation Fund*, 2000 WI 98, ¶ 42, 237 Wis. 2d 99, 613 N.W.2d 849. This provision "was designed to prevent a species of official exactions made as the price of delaying or expediting justice." *Christianson v. Pioneer Furniture Co.*, 101 Wis. 343, 347–48, 77 N.W. 174, 77 N.W. 917 (1898)). This Court has explained the purpose of this provision: "[E]very subject . . . may take his remedy by the course of the law and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." *Aicher*, 237 Wis. 2d 99, ¶ 42 (quoting *Christianson*, 101 Wis. at 347–48). This provision "'do[es] not grant the right' of remedy, but rather preserve[s] remedies that existed at common law." *Id.* (quoting *Christianson*, 101 Wis. at 347–48). It "applies only when a prospective litigant seeks a remedy for . . . a legislatively *recognized right*." *Id.* ¶ 43 (citation omitted).

However, there is no legislatively recognized right to exclusion of illegally obtained evidence. "The exclusionary rule is a judicially created remedy, not a right." *Dearborn*, 327 Wis 2d 252, ¶ 35; *see also Herring*, 555 U.S. at 139 (exclusionary rule is a "judicially created rule"). Application of the good faith exception does not, as Prado argues, "simply

take away a remedy." (Prado's Br. 12.) The courts have created a remedy for a Fourth Amendment violation and have limited that remedy to cases in which exclusion of evidence will have a deterrent effect. Applying the good faith exception does not violate article 1, section 9 of the Wisconsin Constitution.

4. It is well established that the purpose of the exclusionary rule is to deter future police misconduct.

The United States Supreme Court created the exclusionary rule as a remedy for Fourth Amendment violations in order to deter future Fourth Amendment violations. *Davis*, 564 U.S. at 236. The Court has "thus limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.'" *Id.* at 237 (quoting *Calandra*, 424 U.S. at 348). But "[w]here suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'" *Id.* (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).

The same is true in Wisconsin. "[J]ust because a Fourth Amendment violation has occurred, that does not mean the exclusionary rule applies." *Dearborn*, 327 Wis. 2d 252, ¶ 35. Instead, "the exclusionary rule should be applied as a remedy to deter police misconduct and most appropriately when the deterrent benefits outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." *Id.* ¶ 38.

Prado asks this Court "to expand its view of the exclusionary rule," and to conclude that "rather than merely deterring police misconduct, it should be applied as a remedy for actual violations of Constitutional rights." (Prado's Br. 15.) She claims that not doing so "sullies the judiciary." (Prado's Br. 15.)

Prado's claim fails for two reasons. First, she did not raise this issue in her cross-petition for review, so it is not properly before this Court. *See Sulla*, 2016 WI 46, ¶ 7 n.5. Second, both this Court and the United States Supreme Court have already settled the issue. *See, e.g.*, *Davis*, 564 U.S. at 236; *Dearborn*, 327 Wis. 2d 252, ¶ 38. Prado does not ask this court to overrule *Dearborn* and all of its other opinions applying the good faith exception. And the only reason she gives supporting her assertion that this Court should apply the exclusionary rule even in the absence of a deterrent effect is article 1, section 9 of the Wisconsin Constitution. But as explained above, article 1, section 9 does not provide a remedy, and application of the good faith exception in cases in which there is no deterrent effect does not violate that constitutional provision.

Prado asserts, correctly, that this Court need not address whether suppression in this case will "have a deterrent effect on the bad behavior of police in the future." (Prado's Br. 16.) She says that the good faith exception does not matter in this case because there was no "objectively reasonable reliance on well settled law by a well trained officer." (Prado's Br. 16.) As explained above, that is not required—only that a reasonably well-trained officer would not have known that the blood draw was not constitutionally justified. And as the State explained in its petitioner's brief there is no need to resort to the good faith exception because the blood draw was justified under *Mitchell*, 139 S. Ct. 2525.

Prado all but admits that suppressing her blood test results would have no deterrent effect. She acknowledges that *Mitchell*'s broad rule that blood draws in cases like hers are almost always justified means that this Court's decision on good faith "is likely to have no practical effect on any other case." (Prado's Br. 17.) Since there would be no deterrent

effect, exclusion is unwarranted. *Davis*, 564 U.S. at 237; *Dearborn*, 327 Wis. 2d 252, ¶ 38.

5. It is well established that an appellate court independently reviews a good faith determination.

Prado asserts that "[w]hich standard of review applies to the issue of good faith in this factual context is not clear." (Prado's Br. 19.) She acknowledges that suppression issues "are regarded as a mixed question of law and fact." (Prado's Br. 19.) But she asks this Court to conclude that a reviewing court must defer to both the circuit court's findings of fact and its conclusion whether there was good faith unless they are clearly erroneous. (Prado's Br. 19.)

Prado asserts that a good faith determination is like a competency determination because "the facts are inextricably tied to the constitutional determination." (Prado's Br. 19.) Prado's assertion is based on her belief that the question in a good faith determination is "the officer's supposed reliance on a statute at odds with case law the officer admits he was trained in and other case law he either was or should have been trained in." (Prado's Br. 19.)

But that is not the correct standard. Whether the good faith exception applies is an objective determination of "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all the circumstances.'" *Dearborn*, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 145). "These circumstances frequently include a particular officer's knowledge and experience," but the test is objective. *Herring*, 555 U.S. at 145. A reviewing court accepts the circuit court's findings of historical fact unless they are clearly erroneous and independently determines what a reasonable officer would have known given those facts. *Dearborn*, 327

Wis. 2d 252, ¶ 13. A court's application of the constitutional principle to the facts is entitled no deference.

III. The State had standing to petition this Court for review because the court of appeals' decision finding the unconscious driver statute unconstitutional was adverse to the State.

Prado argues that the State lacked standing to petition for review in this case because the court of appeals' decision was not adverse to the State. She did not raise that issue in her cross-petition. Prado could have made that argument in a response to the State's petition, in which the State explained why the court of appeals' decision was adverse to the State. But Prado did not respond. And this Court was satisfied that the State could properly petition for review, as it granted the State's petition.

This Court correctly exercised its discretion in granting the State's petition. A party may appeal "an adverse decision of the court of appeals" to this Court. Wis. Stat. § 809.62(1m)(a). The Wisconsin statutes define an adverse decision as "a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review." Wis. Stat. § 809.62(1g)(a). An adverse decision "includes the court of appeals' denial of or failure to grant the full relief sought or the court of appeals' denial of the preferred form of relief." Wis. Stat. § 809.62(1g)(b). Under the statute, a court of appeals decision that is "partially adverse to the State," is "sufficient to allow the State to appeal." *State v. Bentdahl*, 2013 WI 106, ¶ 21, 351 Wis. 2d 739, 840 N.W.2d 704.

As the State explained in its petition for review, the court of appeals' decision was partially adverse to the State. The court of appeals reversed the circuit court's decision suppressing the results of Prado's blood test. But it also struck

down the unconscious driver provision in Wisconsin's implied consent law. This is not the relief requested by the State, which appealed because the circuit court suppressed the blood test and because the court found the unconscious driver provision unconstitutional.

In this case, the court of appeals struck down a statute even though it three times previously recognized it could not do so because of own conflicting cases. *Prado*, 393 Wis. 2d 526, ¶¶ 2, 36. If a decision under the circumstances presented in this case is not "adverse" to the State, the court of appeals' decision striking down a statute would be effectively insulated from review by this Court.

The State has more than an interest in the constitutionality of Wisconsin's laws. "The Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 96, 307 Wis. 2d 1, 745 N.W.2d 1 (footnote omitted). "Wis. Stat. § 806.04(11) recognizes that it is the duty of the attorney general to appear on behalf of the people of this state to show why [a] statute is constitutional." *Id.* (quoting *State v. City of Oak Creek*, 2009 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526). Service on the attorney general is therefore a jurisdictional matter "in a declaratory action attacking the constitutionality of a statute." *Id.* Even if the State ultimately prevails on the merits of a case before the court of appeals, any decision striking down a law as unconstitutional is, by definition, "partially adverse" to the State.

Here, the State clearly asked the court of appeals to reverse the circuit court's determination that the unconscious driver provision in the implied consent law is unconstitutional. The court of appeals' decision denied that relief to the State. Accordingly, the court of appeals' decision was "partially adverse to the State." It "denied the State the

full relief that it sought; therefore, the State may appeal." *Bentdahl*, 351 Wis. 2d 739, ¶ 21.

CONCLUSION

This Court should affirm the court of appeals' decision reversing the circuit court's order that granted Prado's motion to suppress evidence. It should hold that: (1) the blood draw from Prado was justified by exigent circumstances under the general rule the Supreme Court established in *Mitchell v. Wisconsin*; (2) *State v. Wintlend* was not overruled by *Birchfield v. North Dakota*, and it remains good law; (3) the unconscious driver provision in Wisconsin's implied consent law, Wis. Stat. § 343.305(3)(b), is not unconstitutional facially or as applied to Prado; and (4) a law enforcement officer can rely in good faith on a statute until it is found unconstitutional in a published appellate court decision.

Dated this 22nd day of February 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Michael C. Sanders

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284 | (608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

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 8,179 words.

Dated this 22nd day of February 2021.

Michael C. Sanders

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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of February 2021.

Michael C. Sanders

MICHAEL C. SANDERS
Assistant Attorney General