STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP43-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONNIE GENE RICHARDS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WAUSHARA COUNTY CIRCUIT COURT, THE HONORABLE GUY D. DUTCHER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Was Richards' warrantless blood draw based on probable cause of his operating a vehicle while under the influence of an intoxicant (OWI) permissible under exigent circumstances?

The circuit court answered yes.

2. Was Richards unconscious, or otherwise unable to affirm his consent or withdraw it subject to penalty, at the time of the blood draw?

The trial court held that Richards was unconscious, incapable of being addressed.

3. A. Was Richards, as an unconscious driver suspected of OWI, deemed to have consented to the blood test under the provisions of Wis. Stat. § 343.305(3)(b)?

The trial court found that section 343.305(3)(b), was applicable and was another justification for Richards' warrantless blood draw.

B. Is section 343.305(3)(b), providing that an unconscious driver may be tested because he has not withdrawn the implied consent he gave earlier, constitutional under the Fourth Amendment?

The trial court did not address this issue but, by implication, in finding that the statute authorized the blood draw, answered this question yes.

4. Should Richards' blood test result not be excluded, if the police, in good faith, were following a well-established state statute authorizing the blood draw?

The trial court did not consider this issue as it found the blood draw permissible under either an exigent circumstance or implied consent justification.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case. But if this Court should consider the constitutionality of section 343.305(3)(b), the provision in the implied consent statute dealing with the unconscious driver, publication is warranted.

INTRODUCTION

Richards was convicted of OWI (12th offense) and prohibited alcohol content offense (PAC) (12th offense) charges after police officers found him, severely injured in his car in a ditch. There was blood inside the vehicle and many open beer cans in front of the driver's seat, and in front and in back of the passenger seat. While Richards was able to respond to some questions, he faded in and out of consciousness. An emergency medical team (EMS) quickly arrived and transported Richards to a hospital; they reported that Richards lost consciousness while in route. Richards' blood was then drawn. Richards seeks suppression of the resulting blood evidence.

The circuit court properly denied Richards' suppression motion because the police had probable cause and exigent circumstances for the blood draw. Alternatively, the circuit court correctly found the warrantless blood draw permissible under the implied consent statute, which provides that an unconscious driver is deemed to have consented to the test.

STATEMENT OF THE CASE

At approximately 11:30 p.m., July 30, 2014, Waushara County Deputy Ryan McElroy was dispatched to a vehicle in ditch incident. (R. 46:4–6.) McElroy arrived at the scene

shortly thereafter, and observed a blue Toyota with its engine running, in the ditch facing in the wrong direction. (R. 46:5–6.) McElroy found Richards alone, sitting in the driver's seat. (R. 46:7.) McElroy observed that Richards was severely injured with a two-inch laceration on his forehead, a swollen and apparently broken arm, and the other arm so lacerated that it exposed fatty tissue within the cut. (*Id.*) There was blood in front of the passenger seat of the vehicle and many open beer cans strewn by the driver and front passenger seat. (R. 46:9.) There was a spider-web break on the car's front windshield and the vehicle's motor soon stopped running without being shut off. (R. 46:6, 8.)

McElroy attempted to talk to Richards and though Richards appeared to fade in and out of consciousness he did say that he was going home to Alabama, but he denied driving the vehicle. (R. 46:8–9.) It appeared to McElroy that Richards' injuries would prevent him from responding to a blood test request. (R. 46:28.)

Because of the extent of Richards' injuries, McElroy immediately contacted EMS. When they arrived they determined that helicopter transport would be necessary so that Richards could be treated at the Theda Clark Medical Center. (R. 46:9–10.) When EMS had arrived on the scene they stayed there for about 15 to 20 minutes before leaving to transport Richards by ambulance to the hospital. (R. 46:26.) During the time EMS was on the scene, McElroy and Deputy Bowser remained with Richards and also tried to ascertain where he had gone off the road and what could have happened to cause the accident. (*Id.*) During McElroy's contact with Richards he was not looking for evidence to support an OWI charge as his focus was on Richards' serious injuries. (R. 46:23.)

The EMS then placed Richards in an ambulance to take him to the Wild Rose Hospital, and from there a helicopter would fly him to Theda Clark. (R. 46:10.) As Richards was

placed in the ambulance and the EMS were trying to strap Richards' head to secure it, McElroy noticed that the laceration on Richards' head had grown larger, and it appeared that his entire forehead had dropped down to below his brow. (*Id.*) Once en route, the EMS soon notified McElroy that Richards' had lost consciousness while traveling to the hospital. (R. 46:13.)

After Richards was taken by ambulance, McElroy and Bowser remained at the accident site to process the scene. During this time McElroy was advised by dispatch that Richards had several prior OWI convictions. (R. 46:11–12.) Then McElroy made the 10 to 15 minute drive to the Wild Rose Hospital. During that drive he dispatched to the hospital that he was requesting a blood draw on Richards, as he believed he had probable cause that Richards had committed the offense of OWI. (R. 46:27–29.) At this time McElroy did not believe that he had much time to investigate Richards and he did not know how quickly Richards would be airlifted by helicopter to Theda Clark. (R. 46:30.) McElroy arrived at the hospital at approximately 12:45 a.m., after having been at the accident site for approximately an hour. (R. 46:15, 27.)

When McElroy arrived at the Wild Rose Hospital, he was advised that Richards had not been admitted and it was necessary, because of the extent of his injuries, to get him on the helicopter and on his way, as soon as possible. (R. 46:14.) The scene was hectic as there was concern over Richards' injuries. (R. 46:16.) McElroy asked Tricia Schaufenbuel, part of the Wild Rose Hospital staff, to perform a blood draw on Richards, and the blood was drawn at approximately 12:55 a.m. The blood draw was conducted in the ambulance, and at approximately 1:15 a.m. Richards was airlifted by helicopter to Theda Clark. (R. 46:14–15.) The blood draw showed that Richards had a blood alcohol content of .196. (R. 4:2.)

In Waushara County, search warrants for blood in OWI cases are accomplished by phone to the presiding judge. (R. 46:21.) Typically after investigation and the determination is made that a defendant is OWI, and the subject refuses the test, it takes another 20 to 30 minutes to prepare the paperwork and be prepared to answer the questions likely to be posed by the judge. (R. 46:18–22.) McElroy did not attempt to get a search warrant for Richards' blood.

The State initially charged Richards with OWI, 12th offense, and operating a vehicle while revoked, first offense. (R. 1:2–3.) After the blood test results were received the State filed an amended complaint adding the additional charge of (PAC), 12th offense, as Richards tested a .196, almost ten times his .02 threshold. (R. 4:2.)

Richards filed a motion to suppress the blood test results. After holding an evidentiary hearing, the circuit court denied the motion, finding that the blood test was justified both by exigent circumstances and the implied consent law as it relates to unconscious drivers. (R. 46:39–47.)

On August 3, 2016, Richards pled guilty to OWI (12th) with the PAC (12th) and the operating while revoked (1st) charges dismissed, but read in at sentencing. (R. 50:2, 14.) The circuit court, the Honorable Guy D. Dutcher, presiding, sentenced Richards to ten years in prison, comprised of six years' initial confinement and four years' extended supervision. (R. 50:17.) Richards now appeals this judgment of conviction.

SUMMARY OF ARGUMENT

I. There were sufficient exigent circumstances to justify a warrantless seizure of Richards' blood. Richards had been severely injured in a car accident resulting in apparent broken bones and a large head laceration, and an open wound

in one arm exposing fatty tissue. Richards lapsed in and out of consciousness before losing consciousness during his ambulance transport from the accident site to Wild Rose Hospital. Richards' injuries were so serious that the EMS determined that the safest course was to airlift him from the hospital, via helicopter, to the Theda Clark Medical Center, as soon as possible. Both the accident and the hospital scenes were hectic, with both the police and medical personnel primarily focusing on Richards' injuries. Therefore, even though Waushara County had a streamlined search warrant protocol in place for drawing blood in OWI cases, there was a compelling time issue caused by the extent of Richards' injuries and the need to take him as soon as possible first to the hospital in Wild Rose and then by helicopter to the Theda Clark Medical Center.[1] Under the totality of the circumstances, the circuit court properly found the warrantless blood draw proper because of probable cause that Richards had committed OWI, and exigent circumstances.

II. Deputy McElroy noted that when he first contacted Richards at the accident site, Richards was lapsing in and out of consciousness. During this time McElroy felt that Richards was not capable of revoking or affirming his consent to a blood test, and shortly after Richards was removed from the scene, EMS advised that Richards had lost consciousness. McElroy was present when Richards' blood was drawn in the ambulance and while he was not asked at the motion hearing as to Richards' state at that time, it is reasonable to presume that nothing had changed. In the absence of any testimony to the contrary, the trial court's finding of fact that Richards was unconscious at the time of the blood draw is supported by the record and certainly not clearly erroneous.

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[1] While the record does not show where the Theda Clark Medical Center is located, a Google search reveals that it is in Neenah, Wisconsin, about 50 miles from Wild Rose.

III. In addition to probable cause and exigent circumstances, the blood draw was permissible pursuant to the implied consent statute as it relates to unconscious drivers, Wis. Stat. § 343.305(3)(b). This statute provides that a person who is unconscious, or otherwise not capable of withdrawing consent, is deemed to have consented to the blood draw because of the consent given earlier by procurement of a Wisconsin driver's license or by the decision to drive, and this consent continues unabated when the blood is drawn.

Richards challenges the constitutionality of this statute arguing first, that the statute is rendered unconstitutional by this Court's holding in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, and second because the statute allegedly creates a per se exception to the warrant requirement prohibited by the United States Supreme Court in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013) and *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160 (2016). Richards misses the mark in both instances. *Padley* should not be interpreted to conflict with all previous Wisconsin case law holding that consent occurs before the request for submission to the test, and that there is no right to refuse the test. And neither *McNeely* nor *Birchfield* directly or indirectly contravenes Wisconsin's implied consent statute.

IV. If this Court should find that there were no exigent circumstances and that the implied consent statute, while applicable, is unconstitutional as it relates to unconscious drivers, the blood draw evidence is still admissible under the good faith exception to the exclusionary rule. The police relied on a well-established, properly structured statute that has never previously been held to be unconstitutional. It serves no deterrent purpose to punish the police for following a statutory provision with no overt flaws and that is in conformity with the extensively court-tested implied consent regime.

STANDARD OF REVIEW

A review of an order denying a motion to suppress evidence is a question of constitutional fact requiring a two-step inquiry. *State v. Howes*, 2017 WI 18, ¶ 17, 373 Wis. 2d 468, 893 N.W.2d 812. First, the circuit court findings of fact are not to be overturned unless clearly erroneous, and second, this Court independently determines whether the historical or evidentiary facts establish sufficient exigent circumstances to justify the warrantless blood draw. *Id.* ¶ 18.

ARGUMENT

I. The circuit court correctly denied Richards' suppression motion because the warrantless blood draw was justified by probable cause and exigent circumstances.

A. Controlling legal principles.

A warrantless search is presumptively unreasonable and is constitutional only if it falls under an exception to the warrant requirement. One such exception is the exigent circumstance doctrine, which holds that a warrantless search complies with the Fourth Amendment if the need for the search is urgent and the time to obtain one is short. *State v. Tullberg*, 2014 WI 134, ¶ 30, 359 Wis. 2d 421, 857 N.W.2d 120. The test for the determining of exigent circumstances is an objective one. *State v. Robinson*, 2010 WI 80, ¶ 30, 327 Wis. 2d 302, 786 N.W.2d 463. There are four well-recognized categories of exigent circumstances: (1) hot pursuit; 2) a threat to the safety of a suspect or others; (3) a risk that evidence will be destroyed; and (4) the threat of a suspect fleeing the scene. *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29. If exigent circumstances are present to justify a blood draw in an OWI case, four requirements must be met: 1) the blood draw is taken to obtain evidence from a person the police have probable cause to believe has

committed a drunk-driving related violation, 2) there is a clear indication that the blood draw will produce evidence of intoxication, 3) the method used to take the blood sample is reasonable and performed in a reasonable manner, and 4) the subject presents no reasonable objection to the blood draw. *State v. Howes*, 2017 WI 18, ¶ 25, 373 Wis. 2d 468, 893 N.W.2d 812.

In order to determine if there are sufficient exigent circumstances for a warrantless search, courts look at the totality of the circumstances, a careful case-by-case assessment of exigency. *Howes*, 373 Wis. 2d 468, ¶ 35. Key factors in finding exigency are when the defendant's injuries require transport to a hospital and the officer has to investigate the accident scene. *Schmerber v. California*, 384 U.S. 757, 770–771 (1966). The *Schmerber* court referred to the circumstances of driver injuries and the need for a police investigation of the accident as "special facts." *Id.*

While the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed, this physiological reality, by itself, is not a sufficient exigent circumstance to justify a warrantless blood draw. *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013). But the *McNeely* court looked approvingly at its earlier holding in *Schmerber*, where the exigency of alcohol dissipation was joined with the special facts of a hospitalized defendant and an accident scene investigation to form lawful exigent circumstances for a warrantless blood draw. *Id.* at 1560–1561. As is evident from the Court's analysis in *Schmerber* and *McNeely*, facts such as the defendant's medical condition and the delay inherent in investigating an accident scene, are particularly relevant to an exigent circumstance analysis in a drunk-driving case. *Howes*, 373 Wis. 2d 468, ¶ 43. And a PAC threshold of .02 percent increases the need for a prompt blood draw as compared to when the threshold is at the normal .08. *Id.* ¶ 45.

In the 47 years since *Schmerber* was decided, technological advancements have allowed search warrants for blood draws to be obtained more expeditiously. *McNeely*, 133 S. Ct. at 1561–62. But these technological advances do not eliminate the possibility of exigent circumstances; instead of any per se rule on exigency, the issue is considered under the totality of the circumstances on a case-by-case basis. *Id.* at 1562–1563. Though the dissipation of alcohol in the bloodstream of a suspected impaired driver alone does not constitute a sufficient exigency, the totality of the circumstances may justify a warrantless blood draw. *State v. Tullberg*, 359 Wis. 2d 421, ¶¶ 42–43.

B. The warrantless blood draw was permissible because the police had probable cause and exigent circumstances.

There is no dispute that Deputy McElroy had ample probable cause to believe that Richards was committing the crime of OWI. Therefore, the controversy is over whether McElroy had sufficient exigent circumstances to justify a warrantless blood draw. There were.

In a pre-McNeely world the resolution of this issue would be a simple one, as our supreme court, relying on *Schmerber*, adopted the position that the natural dissipation of alcohol evidence constituted, by itself, a *per se* exigency. *State v. Bohling*, 173 Wis. 2d 529, 539, 494 N.W.2d 399 (1993). But *McNeely*, rejected this interpretation of *Schmerber*, holding that while the dissipation of alcohol is a factor in an exigent circumstance analysis, it is not a *per se* exigency justifying a warrantless blood draw in all cases. *McNeely*, 133 S. Ct. at 1563. *McNeely* does not overrule *Schmerber*, but rather clarifies that whether a warrantless blood draw is permissible under exigent circumstances is based on a case-by-case basis, under the totality of the circumstances. *Id.* And *McNeely* looked approvingly at *Schmerber*'s finding exigent

circumstances when the fact that alcohol dissipation in the blood was combined with the "special facts" of time taken to take the accused to the hospital and to investigate the accident scene. *Id.* at 1560. The *McNeely* court made clear its support of Schmerber when it wrote, "our analysis in *Schmerber* fits comfortably within our case law applying the exigent circumstances exception." It characterized *Schmerber*'s analysis as "considering all of the facts and circumstances of the particular case and carefully based our holding on these specific facts." *Id.*

McNeely was not a death blow to the exigent circumstance doctrine in OWI cases or to *Schmerber*, but it was the abrogation of any court holdings premised on believing that *Schmerber* authorized warrantless blood draws in all OWI cases because of the exigency of alcohol dissipation.

Here, we have both of the special facts delineated in *Schmerber*, and found compelling in *McNeely* and in *Howes*, to support an exigent circumstance finding. (1) Richards was severely injured requiring not only his removal from the scene to a local hospital, but from there a helicopter air lift to a medical facility 50 miles away. (R. 46:10.) (2) Deputy McElroy remained at the accident site to investigate the scene before he could address processing an OWI arrest. (R. 46:11.) In addition to these telling circumstances Richards, based on his prior OWI record, had a .02 threshold, a reduced limit found to promote exigency in *Howes*.[2] *See Howes*, 373 Wis. 2d 468, ¶¶ 44–45.

[2] The record shows that this is Richards' 12th offense OWI, though at the motion hearing McElroy testified that he observed several OWI's on Richards driving abstract and then was told as he arrived at the hospital that Richards had three prior convictions. (R. 46:12.) Whatever the actual number, Richards had a .02 threshold. While, McElroy did not testify as to the .02 threshold being a factor in his decision making, the test for finding exigent circumstances is an objective one.

In addition to the compelling circumstances of serious injury, the investigation of the accident scene, and the reduced .02 threshold, the timeline supports a finding of exigent circumstances. Deputy McElroy was advised of a vehicle in a ditch at 11:30 p.m. (R. 46:5–6.) The record is unclear as to when McElroy arrived at the scene, but since he testified that he arrived shortly thereafter, it can be assumed he arrived at around 11:35 p.m. (R. 46:6.) Upon arrival McElroy encountered Richards in the driver's seat, with severe lacerations on his face, and arms. Based on this observation, McElroy contacted EMS right away. Again the record is unclear as to when the EMS arrived, but assuming they arrived relatively quickly, a fair guess would be that they arrived around 11:45 p.m. The EMS stayed on the scene, working on Richards, for about 15 to 20 minutes (R. 46:26), meaning they left for the hospital around 12:05 a.m. During the time the EMS tended to Richards at the scene, McElroy and Deputy Bowser, based on a concern for Richards' health, assisted in what McElroy described as a hectic scene. (R. 46:16, 26.) There was little time to investigate a possible OWI situation during this period, let alone investigate Richards for clues of intoxication.

After Richards left the scene, McElroy had investigatory responsibilities in ascertaining how the accident occurred and he checked on Richards' driving record. Presumably, then McElroy could focus on the OWI, but he knew that Richards was being transported to a hospital with the purpose of boarding a helicopter transport as soon as possible. (R. 46:10.) After clearing the accident scene at around 12:20 a.m., approximately 15 minutes after the EMS had left with Richards, McElroy had the necessary probable cause for OWI, and then notified the hospital via dispatch that he wanted a blood draw on Richards. (R. 46:11, 29.) McElroy then drove to the Wild Rose hospital, placing him there at around 12:45 a.m. (R. 46:15.)

To be sure, Waushara County, in the aftermath of *McNeely*, had developed a streamlined protocol for obtaining a search warrant for blood in OWI cases. Deputy McElroy testified that the protocol was to contact the judge by telephone and the entire process could be completed without seeing the judge. (R. 46:21.) McElroy estimated that the process of getting the paper work in order to obtain the warrant, and to prepare for questions the judge might pose, would take twenty minutes to a half an hour. (R. 46:21–22.) Of course, that time does not include the time necessary for an officer to determine if there is sufficient probable cause and does not include the time taken during the phone call between the warrant requesting officer and the judge. Within this time frame, it was reasonable for McElroy to presume he would not have the necessary time to go through the warrant process and obtain the warrant, before Richards was transported miles away, and to believe that he would not be in a position to delay medical procedures solely to provide time to obtain a warrant.

When McElroy arrived at the Wild Rose Hospital, EMS told him that Richards would not be admitted, due to the extent of his injuries, and the goal was to airlift him by helicopter as soon as possible. (R. 46:14.) Richards' blood was drawn at 12:55 a.m., in the open-doored ambulance, with McElroy standing outside the back of the ambulance. (R. 46:14–15.) Richards left the scene via helicopter around 1:15 a.m. Once EMS first told McElroy that Richards' injuries were severe and he needed to be airlifted by helicopter to Theda Clark, McElroy had no way of knowing if Richards was to stay at the hospital for a period of time, or would be airlifted right away. As our supreme court noted in *Howes*, the severity of a suspect's injury makes the officer's ability to obtain a blood draw in the future uncertain. *State v. Howes*, 373 Wis. 2d 468, ¶ 47. This was not a case where all focus could be placed on an OWI investigation, nor was it a case that the

police could be sure that Richards would be staying in one place for a period of time, or be sure of what kind of medical procedures would be necessary and when they would have to be administered. In short, this was a case of exigent circumstances.

Noting the hectic scene at both the accident site and the hospital, and that Richards' was in a dangerous state needing transport to Theda Clark, the trial judge correctly found sufficient exigent circumstances for the warrantless blood draw. The trial court observed that McElroy's early focus was properly on getting Richards to urgently needed medical treatment and not on conducting an OWI investigation. (R. 46:43–44.) The trial court was also well aware of the Waushara County procedure for getting a blood warrant, and held that even with the streamlined procedure, there was not sufficient time. (R. 46:45.) The court found that the time frame was too tight, even if one unreasonably presumed that McElroy did nothing throughout the whole process but try to obtain a search warrant. (*Id.*)

The combination of a severely injured suspect needing quick transport to a medical facility miles away, an accident to investigate, and a .02 threshold, and the exigency of alcohol dissipation, clearly supports the trial judge's holding of exigent circumstances and is consistent with *Schmerber*, *McNeely*, and *Howes*.

Richards argues that the trial court was in error and that there were no exigent circumstances. Richards alleges that the police officer could have almost immediately determined probable cause upon meeting Richards and that distinguished this case from *Tullberg* and *Howes*, (Richards' Br. 11–12) where the officers did not develop their probable cause until much later in the process. There are two flaws in Richards' argument. First, while McElroy arrived at probable cause quicker than the officers in *Tullberg* and *Howes*, he did not get there immediately. He was confronted with a severely

injured suspect and his initial focus was properly on that, and while there were beer cans on the scene and an odor, he could not realistically evaluate Richards' sobriety. And Richards even initially denied driving the vehicle. (R. 46:8.) The probable cause puzzle was completed right before McElroy drove to the hospital when McElroy found out that Richards had an extensive OWI conviction history, at approximately 12:20 a.m. (R. 46:28–29, 43.)

Second, the exigent circumstance doctrine is analyzed on a case-by-case basis, upon examination of the totality of the circumstances. Perhaps this case is weaker than *Tullberg* and *Howes*, in the sense that probable cause was more easily developed, but it is also a stronger one because Richards was more injured than Tullberg, needing emergency medical attention, and because Richards, unlike Howes, was subject to immediate helicopter transfer to a facility miles away, and the officer arrived in *Howes* after EMS were already attending to Howes' injuries. The point is that no case will have a similar set of facts, and there is no one fact that must be present as a predicate for an exigent circumstance finding.

Richards also argues that the streamlined Waushara County search warrant process undermines an exigent circumstance finding. Again Richards stresses that the officer should have developed probable cause almost immediately after arriving at the scene. Presumably Richards is arguing that the officer should have not tried to tend to his injuries, and contact EMS and work with them after their arrival to ensure a speedy departure from the scene, but instead should have placed his entire focus on processing an OWI case and filling out the necessary paperwork for a search warrant request from a judge. The trial court rejected this notion and properly stated, "Frankly, I think that the public . . . would be aghast if they were to learn that [the officer's] focus was on investigating an impaired-driving event rather than getting [Richards to] medical treatment." (R. 46:43.)

While the record is not precise concerning the relevant time line, it does clearly show that Richards was badly injured and that there was no way for McElroy to accurately predict how much time he had left from the formulation of probable cause to the helicopter transport, other than to reasonably anticipate that it would not be much time. That is not to say that the transport would necessarily end McElroy's opportunity to get a warrant but it would, as the trial court noted, take him away from Richards. There was the uncertainty as to Richards' future availability within a suitable time frame because of the medical intervention procedures he would likely need. (R. 46:46–47.)

Here, there was a seriously injured suspect and an accident scene investigation to try to determine what happened and why. EMS were involved and a helicopter transport to a medical facility 50 miles away was looming. The scenes at both the accident site and the hospital were hectic, fueled by legitimate concern over Richards. Deputy McElroy was working on a tight timeline from forming his probable cause to when it could be anticipated that Richards would be taken away. Richards, because of his extensive OWI history had a .02 threshold. Based on the totality of the circumstances, the trial court's ruling that there was sufficient exigent circumstances should be affirmed.[3]

[3] There is no dispute that if there were exigent circumstances in this case, the blood was drawn reasonably: (1) the blood draw was obtained to take evidence of intoxication from a person the officer had probable cause to believe was OWI; (2) there is a clear indication that the blood draw will produce evidence of intoxication; (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner; and (4) the subject presented no reasonable objection to the blood draw. *See State v. Howes*, 2017 WI 18, ¶ 25, 373 Wis. 2d 468, 893 N.W.2d 812.

II. The circuit court correctly found that Richards was unconscious at the time of the blood draw.

As argued above the blood draw was justified under the doctrine of probable cause and exigent circumstances. But, if this Court should find that there was an insufficient exigency for a warrantless blood draw, the draw is still permissible under section 343.305(3)(b), dealing with implied consent as it relates to the unconscious driver.

A. Standard of Review.

When reviewing an order granting or denying suppression, the circuit court's findings of historical fact are given deference; they are to be upheld unless they are clearly erroneous. *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567.

B. The circuit court finding of fact that Richards was unconscious at the time of the blood draw was not clearly erroneous.

If this Court should hold that there were not sufficient exigent circumstances, the warrantless blood draw was still authorized by the implied consent statute, as it relates to unconscious drivers.[4] This statute provides in pertinent part, "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent. . . ." Wis. Stat. § 343.305(3)(b).

So, as a condition predicate for this statute's applicability, there must be a fact finding that the subject was unconscious, or otherwise incapable of withdrawing the

[4] The trial court referenced section 343.305(3)(ar) along with section 343.305(3)(b) as authorization for the warrantless blood draw. The State limits its statutory authority to (3)(b), since there was ample probable cause of impairment and thus no need to rely on statutes allowing for a lesser standard because of the severity of the injuries involved.

consent he had given earlier by obtaining a Wisconsin driver's license, and or driving.

There is much in the record to support the trial court's holding that Richards was unconscious, incapable of being addressed. (R. 46:44.) When McElroy arrived at the accident scene he could immediately observe that Richards was badly injured, including a severe looking head wound. (R. 46:6–7.) McElroy noted that Richards was lapsing in and out of consciousness, and from this observation he felt that Richards' injuries prevented him from consenting to the blood draw.[5] (R. 46:9, 28.) After the EMS arrived, McElroy could see that the head wound he had first observed was even more serious than he thought, as it appeared that the head laceration had widened and that Richards' entire forehead had dropped down to below his brow. (R. 46:10.)

After Richards had been ambulanced from the scene, EMS advised McElroy that Richards had lost consciousness. (R. 46:13.) There is nothing in the record to show that Richards regained consciousness. McElroy was present when Richards' blood was drawn, and he did not testify to any perceived change in Richards' condition. Thus, there is ample evidence to support the trial court's factual finding that Richards was not capable of withdrawing consent at the time of the blood draw.

Richards argues that the trial court's ruling that Richards was unconscious or otherwise incapable of withdrawing consent was clearly erroneous. He supports this contention by first discussing the meaning of the term

[5] McElroy testified that he did not think Richards was capable of giving consent. The State interprets this sentence to mean that Richards was incapable of withdrawing consent. Though McElroy's words were not in precise lock step with the statute, it is clear from their context that McElroy was giving his opinion as to Richards' ability to listen to the reading of the Informing the Accused form and to respond to it.

"otherwise incapable," and then by arguing that though he was unconscious during transport to the hospital there is nothing to say he was unconscious at the time of the blood draw. While Richards is correct that the term "not capable of withdrawing consent" should not be interpreted broadly, as there is by nature a fair amount of confusion and disorientation inherent in any OWI blood draw environment, there are no such subtle concerns here. Richards was severely injured and had suffered an obvious extensive head wound. At best, and only early in the contact, he was lapsing in and out of consciousness and did not appear to McElroy to be capable of dealing with the blood draw request process. And from there Richards became unconscious, with continued injuries so severe that the decision was made to not even admit him into the hospital in favor of an immediate air lift to another medical facility. There is much in the record pointing to the fact that Richards was unconscious during the blood draw, and nothing showing or even suggesting otherwise. The trial court's holding was compatible with the facts, and certainly was not clearly erroneous.

III. Wis. Stat. § 343.305(3)(b), providing that an unconscious driver is deemed to have consented to the blood draw, is constitutional.

As argued above, the blood draw in this case is permissible as Deputy McElroy had probable cause and exigent circumstances. But, if this Court should determine that there were insufficient exigent circumstances, and that Richards was unconscious at the time of the draw, the blood draw was statutorily authorized by section 343.305(3)(b). Richards does not dispute the applicability of this statute, if this Court should uphold the circuit court's factual finding that Richards was unconscious. Rather, Richards argues that section 343.305(3)(b) is an unconstitutional violation of the Fourth Amendment.

For the reasons detailed below, section 343.305(3)(b) is constitutional and compatible with a rich history of Wisconsin implied consent jurisprudence and the United States Supreme Court recent rulings in *McNeely* and *Birchfield*.

A. Standard of review.

The constitutionality of a statutory scheme is a question of law that this Court reviews de novo. 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. *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451. The presumption of constitutionality can only be overcome if the 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 beyond a reasonable doubt burden apply to both as-applied constitutional challenges to statutes as well as to facial challenges. *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.

In interpreting whether a statute is constitutional this Court examines the plain language of the statute. *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787. 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.*

B. The statute providing that an unconscious Richards had not withdrawn his consent, and thus is deemed to be consenting to the blood test, does not violate the Fourth Amendment and is constitutional.

1. Controlling legal principles.

Wis. Stat. § 343.305(3)(b) provides, in pertinent part, "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent," and if a law enforcement officer has probable cause to believe that the person has committed an OWI-related offense, the officer may administer a blood test to the person.

Consent to testing under the implied consent law is given when a person operates a motor vehicle on a highway in Wisconsin, not when law enforcement asks for submission to a test. *State v. Zielke*, 137 Wis. 2d 39, 47–48, 403 N.W.2d 427 (1987). In Wisconsin a driver has given his implied consent to take the test and when the driver refuses to take that test, the driver has withdrawn his consent and the officer must proceed in a manner outside the statute. *State v. Krajewski*, 2002 WI 97, ¶ 36 n.15, 255 Wis. 2d 98, 648 N.W.2d 385. Under the implied consent law, the defendant is deemed to have consented to the test when the defendant decided to drive upon a Wisconsin highway. *Washburn Cty. v. Smith*, 2008 WI 23, ¶ 40 n.36, 308 Wis. 2d 65, 746 N.W.2d 243.

The entire tenor of the implied consent law is that the consent has already been given and cannot be withdrawn without penalty. *State v. Neitzel*, 95 Wis. 2d 191, 203, 289 N.W.2d 828 (1980). The implied consent law can only serve its purpose if there are penalties for unlawfully revoking consent. *State v. Brooks*, 113 Wis. 2d 347, 348–50, 335 N.W.2d 354 (1983). The legislative policy of the implied consent statute is that those who drive, consent to chemical testing. *State v. Nordness*, 128 Wis. 2d 15, 27–28, 381 N.W.2d 300 (1986).

In some cases, the Wisconsin Supreme Court has concluded that a person impliedly gives consent to testing by obtaining a driver's license. *Neitzel*, 95 Wis. 2d 191. In other cases, the supreme court has concluded that a person impliedly gives consent to testing by operating a motor vehicle on a highway in Wisconsin. *Nordness*, 128 Wis. 2d 15; *Krajewski*, 255 Wis. 2d 98; *Smith*, 308 Wis. 2d 65. But whether a person gives consent to testing by obtaining a driver's license, or by operating a vehicle a motor vehicle on a Wisconsin highway, the supreme court has made clear that under our implied consent law, a subject has already given consent authorizing a chemical test before a law enforcement requests a sample by the reading of the Informing the Accused form (the Form).

Further demonstrating that the consent occurs before the reading of the Form, the supreme court held that compliance with the implied consent law is dependent on the officer's actions and not on whether the driver understands the information in the Form. *State v. Piddington*, 2001 WI 24, ¶ 25 n.14, 241 Wis. 2d 754, 623 N.W.2d 528. The supreme court added that "[w]hether Piddington subjectively understood the warnings is irrelevant," *id.* ¶ 32 n.19, and "[w]hether the accused driver has actually comprehended the warnings is not part of the inquiry, rather the focus rests upon the conduct of the officer." *Id.* ¶ 55. The supreme court's determination that a person need not understand the implied consent warnings completely contradicts the notion that at the time of responding to the Form, the subject is giving "actual" consent to a blood draw.

In *State v. Disch*, 129 Wis. 2d 225, 231, 385 N.W.2d 140 (1986), the supreme court addressed the "unconscious driver" provision in the 1979–80 version of the implied consent law, and concluded that under that provision, additional consent at the time a law enforcement officer requests a sample is explicitly not required. The *Disch* court concluded that when

the requirements of the statute are met, an officer may administer a test to an unconscious driver without informing the accused about the implied consent law. *Id.* at 234. The supreme court's conclusion recognized that the authority to administer the test is based on the consent a person impliedly gave, before becoming unconscious, by operating a vehicle on a Wisconsin highway.

In *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, this Court dismissed a defense 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 Form, and thus the consent is coerced and invalid. *Id.* ¶¶ 2, 8. This Court explained that the 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 request that a person submit to testing. This Court explained its holding by emphasizing the "truism" that no one forces a person in this state to get a driver's license and that individuals have the freedom to choose when to drive. Thus, 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.* ¶ 12. This Court, relying on *Neitzel*, reaffirmed that consent to the test occurs when a person obtains a license. *Id.* ¶ 14.

In the face of this rich, expansive, and consistent, implied consent jurisprudence, holding that the consent to the test occurs upon obtaining a license or upon driving, this court in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, examined the implied consent law and reasoned that the law creates two types of consent: first, the "implied consent" a person gives when operating a motor vehicle in Wisconsin; and second "actual consent" given when a law

enforcement officer requests a sample. While this Court in *Padley*, not an unconscious driver case, was dealing with the constitutionality of the implied consent provisions authorizing chemical tests for less than probable cause of OWI, when there are substantial injuries or death or great bodily harm, its aside about a two-consent theory has been interpreted by some to effectively overrule all of the Wisconsin precedent dealing with the issue. *See Howes*, 373 Wis. 2d 468, ¶¶ 148–149 (Abrahamson J., dissenting). But the *Padley* two-consent approach has also been strongly criticized 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 (Roggensack. C.J., lead opinion). In any event *Padley* cannot be interpreted to overrule the court of appeals and supreme court precedent on the issue. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997).

The two most recent United States Supreme Court decisions dealing with chemical tests in the OWI context are *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 579 U.S. __, 136 S. Ct. 2160 (2016). *McNeely* is not an implied consent case at all; it was an exigent circumstance case when a defendant withdraws his consent and refuses the test. The core holding of *McNeely* is that though alcohol dissipates somewhat quickly in the blood stream, this fact alone does not create an automatic exigent circumstance justifying the blood's warrantless seizure. While the *McNeely* court vigorously repudiated a per se rule in the exigent circumstance context, it was silent as to any criticisms of State implied consent regimes, and even spoke approvingly of them. *McNeely*, 133 S. Ct. at 1566.

Birchfield, unlike *McNeely*, is an implied consent case, as it examines the issue of whether a person can be jailed for refusing a chemical test. *Birchfield* reasoned that since a search incident to arrest for breath is proper but a similar search for blood is unlawful, jail for a person refusing a breath

test would be lawful but impermissible for a person refusing a blood test. *Birchfield*, 136 S. Ct. at 2186. But, *Birchfield*, like *McNeely*, wrote approvingly of implied consent statutes in general, in essence holding that these laws are constitutional so long as they do not go as far as imprisoning a person for refusing a blood test. There is nothing in either *McNeely* or *Birchfield* that dictates that a statute providing that an unconscious person is deemed to have not withdrawn consent is unconstitutional.

2. The provision allowing for the warrantless blood draw of an unconscious person is compatible with Wisconsin law, the purposes of the implied statute, and compatible with the Fourth Amendment.

As detailed above, the overwhelming bulk of Wisconsin law supports the premise that the consent triggering the administration of the chemical test in the OWI context occurred when a person drives on the highway. When this consent is given, a subject is not unconscious, and is free to choose to drive or not. 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 OWI. It is a deal that is favorable to both sides; the subject receives a lot in the privilege to drive on Wisconsin highways, and gives very little as his consent to a test is only triggered by the remote possibility that he is arrested for OWI. The State benefits by more easily obtaining chemical tests when a subject commits OWI on its highways, while its ability to call in its marker is limited to those instances when a police officer already has probable cause to arrest the subject for OWI. It takes very little conjecture to appreciate the fairness of the statute to a citizen; it would be a very rare person indeed who would forfeit the privilege of driving

because he is not willing to commit to a test that can only be administered if he/she is arrested for OWI.

It is arguably unreasonable for the police to confront an arrested suspect with a needle intent on extracting blood, based completely on an implied consent given at 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 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 importance of the Form stage of the proceeding to a conscious driver, even though the subject had already consented. Its purpose is not to solicit consent, as it has already been given, but rather to promote the reasonableness of the seizure. The driver is reminded of what he has consented to and informed of the opportunity to refuse and face the punishments associated with that choice.

It is not idle speculation to conclude that the Form stage proceeding is not about obtaining consent. There is nothing in the Form suggesting that an officer is seeking consent. It is called the "Informing the Accused" form, a title hardly compatible with the solicitation of actual consent. It is a form full of threatening language if one refuses, ranging from triggering a countable OWI offense in the future even if acquitted of the charge, to use in court to show consciousness of guilt, to severe licensure ramifications. Tethering a refusal to submit to a test with substantial penalties is hardly an environment for the granting of actual consent. And the Form is often read 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, and the reasonableness of the process allowing for the

defendant to be reminded of what he has already agreed to and giving him 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 condition been denied the opportunity to withdraw consent and to refuse with penalties. The question is whether such deprivations render the unconscious driver statute unconstitutional. The State argues that it does not for two reasons: (1) Nothing is gained by reminding an unconscious person of what he 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 Form to guarantee 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, "We have never retreated, however, from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *McNeely*, 133 S. Ct. at 1565. 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 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 right to refuse a blood alcohol test is simply a matter of legislative grace and not a constitutional right. *See State v. Reitter*, 227 Wis. 2d 213, 239, 595 N.W.2d 646 (1999); *South Dakota v. Neville*, 459 U.S. 553, 565 (1983). The State

is aware of no case that claims otherwise. So, in effect, an unconscious person is merely deprived access to the possibility of committing an unlawful act, the refusal of a test.

An unconscious driver gave his implied consent to a chemical test when he obtained his license or chose to drive. The Legislature provides that he can be tested based on that implied consent, since he has not withdrawn it. The unconscious person is not denied the opportunity to give his actual consent, since there is no consent to be given other than the one he already gave. There is no purpose to advising the unconscious subject as to the contents of the Form, 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 is not entitled to do, to refuse the test. The statute is constitutional.

Richards argues that the implied consent statute, as it relates to the unconscious driver, is unconstitutional because it violates *Padley*, as an unconscious person cannot give actual consent, and further because it violates *McNeely* as it creates a per se exception to the warrant requirement. Richards is wrong on both counts.

Richards relies heavily on *Padley*, flatly stating that "Under *Padley*, the unconscious driver provisions are unconstitutional." (Richard's Br. 25.) Richards reasons that this is so because he was denied the opportunity to give the "actual consent" he is entitled to under *Padley*. He continues to argue that the Fourth Amendment requires the actual consent contemplated by *Padley*, and cannot be satisfied by the implied consent created by the Legislature. The problem with this is that *Padley* was not an unconscious driver case. It is not clear whether *Padley* was holding that the implied consent by driving is not sufficient consent for a warrantless blood draw of a person not able to understand the Form. And *Padley*'s two-consent approach is in conflict with all previous Wisconsin law. Indeed, its distinction between implied

consent and actual consent was severely criticized by the lead opinion in *Brar*, 376 Wis. 2d 685, stating it has no basis in law. *Id.* ¶ 19.[6] And as argued above, the whole environment during the Form phase of the proceedings is contradictory to the procurement of any consent, actual or otherwise.

Richards also argues that the unconscious driver statute runs afoul of *McNeely*, because it creates a per se rule that all unconscious drivers have consented to the test. (Richard's Br. 27.) Leaving aside that *McNeely* is an exigent circumstance, and 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 a test, it will have to find another Fourth Amendment way of doing so. It is within this context that the State wished to use the exigent circumstance justification and *McNeely* rejected any one factor, such as the dissipation of alcohol in the blood, as a per se exigency. Somehow from here, Richards postulates that *McNeely* is railing against any per se rules in other contexts. And, a statutory provision finding that an unconscious driver has consented to the test and has not refused it, is not creating a per se rule that an unconscious person has consented. The per se rule is rather that an unconscious person never can commit the unlawful act of refusing the test. This is not the type of

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[6] *Brar* was not an unconscious driver case but *Padley* was examined at some length. Three justices, in the lead opinion, severely criticized the two-consent *Padley* concept, one justice joined in the mandate but while not discussing *Padley* by name had quarrels with the whole implied consent scheme, two justices in dissent applauded *Padley*, and one justice declined to participate in the discussion. So, our supreme court presents a muddled picture, but nothing upon which can be effectively claimed that *Padley* has overruled all the Wisconsin cases that preceded it.

per se rule *McNeely* found objectionable, nor is it an unreasonable legislative determination.

To be fair, Richards is not alone in suggesting that *McNeely* created a sea change in implied consent law. Richards points to *Bailey v. State*, 790 S.E.2d 98 (Ga. Ct. App. 2016), and *State v. Romano*, 785 S.E.2d 168, 174–75 (N.C. Ct. App. 2016), holding unconscious provisions unconstitutional because of *McNeely*'s distaste for per se exceptions. Richards also cites *People v. Arredondo*, 199 Cal. Rptr. 3d 563 (Cal. Ct. App. 2016), for support, and in addition there is *State v. Ruiz*, 509 S.W.3d 451 (Tex. App. 2015), again relying on *McNeely*'s aversion to per se rules to render the unconscious provision in its OWI statute unconstitutional. *Id.* at 456. The problem with all of these cases is that the courts, in each instance, found itself bound by McNeely to hold unconscious driver provisions unconstitutional. But *McNeely*, makes no such directive. *McNeely* eschewed per se rules in an exigent circumstance 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, deemed not to commit an unlawful act.

The Colorado Supreme Court correctly noted that statutory implied consent satisfies the consent exception to the Fourth Amendment. The court continued to opine 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. While Hyde suggests that this means that all warrantless, non-exigent, forced blood draws are unconstitutional, *McNeely* was not so broad. *McNeely* concerned the exigent-circumstances exception exclusively." *People v. Hyde*, 393 P.3d 962, ¶ 24 (Colo. 2017). And 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*, 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. *Brar*, 376 Wis. 2d 685, ¶ 21.

Finally, Richards argues that section 343.305(3)(b)'s plain language proves that it is not the decision to drive on Wisconsin's roads that constitutes the actual and voluntary consent to testing. He contends that the language of the statute shows that the actual consent occurs when an individual decides to submit to testing rather than refuse testing and suffer the consequences. (Richards' Br. 23–24.) Yet the statute clearly provides that a person who drives in Wisconsin is deemed to have given consent to a chemical test(s). It does not state anywhere that this deemed consent needs the boost of actual consent before it becomes operational. The statute provides a mechanism for a refusal and the penalties that flow from this choice. The statute does not contemplate an officer soliciting a new and seemingly better consent than the one previously given. As the lead opinion in *Brar* noted in analyzing the implied consent statute, "Therefore, lest there be any doubt, consent by conduct or implication is constitutionally sufficient consent under the Fourth Amendment." *Brar*, 376 Wis. 2d 685, ¶ 23 (Roggensack. C.J., lead opinion).

Richards seeks solace in *Padley* for his argument that the plain meaning of the statute means consent occurs at the Form stage, when he writes that the purpose of the implied consent law is to obtain chemical tests and quotes *Padley* that this goal is achieved by "persuading drivers to consent to a requested chemical test by attaching a penalty for a refusal to do so." *Padley*, 354 Wis. 2d 545, ¶ 24. The *Padley* quote is followed by a *State v. Zielke* cite. *Padley* is correct to cite *Zielke* as to the legislative desire to get tests but Richards is wrong in suggesting that *Zielke* discussed persuading drivers to

consent to a requested test. There is no such language in *Zielke*. This language was *Padley*'s alone, and until Padley came on the scene, no Wisconsin case interpreted the plain meaning of the implied consent statute to mean requiring an officer to receive actual consent for the blood draw at the Form stage of the proceedings.

So, the plain meaning of the statute, the case law, and the purposes of the implied consent law, demonstrate that the provision 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 Richards has failed to show that this statute is unconstitutional beyond a reasonable doubt.

IV. Even if this Court should hold that Wis. Stat. § 343.305(3)(b) is unconstitutional, it should not suppress Richards' test results as the blood draw was administered in good faith reliance on a well-established statute.

A. Standard of review.

The trial court did not deal with this issue as it found that the blood test was properly administered because of either probable cause and exigent circumstances, or the unconscious driver provisions of the implied consent statutes. So, obviously this Court reviews this issue de novo.

B. Applicable Legal Principles.

To trigger the exclusionary rule the police conduct must be sufficiently deliberate that exclusion can meaningfully deter it. The police officer must be sufficiently culpable that the exclusionary rule's deterrent value is worth the price paid by the justice system. *State v. Dearborn*, 2010 WI 84, ¶ 36, 327 Wis. 2d 252, 788 N.W.2d 97. The good faith exception to the exclusionary rule provides that the exclusionary rule

should not apply when officers act in good faith. *United States v. Leon*, 468 U.S. 897 (1984).

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." *Illinois v. Krull*, 480 U.S. 340, 349 (1987). "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.* 349–50. The Wisconsin Supreme Court extended the *Krull* rule in holding that the good faith exception applies in cases in which law enforcement act in objective reasonable reliance on settled law, which is subsequently overruled. *Dearborn*, 327 Wis. 2d 252, ¶¶ 37, 43.

C. At the time Richards' blood was drawn the unconscious driver provision was valid and had not been found by any Wisconsin appellate court to be unconstitutional.

When Richards' blood was drawn, the unconscious driver provision of the implied consent law was well-settled law. To employ the exclusionary rule because this Court at this time finds the statute unconstitutional would serve no deterrent principle, as detailed in *Krull* and reaffirmed by our Supreme Court in *Dearborn.*

It is true, that our Supreme Court recently rejected a good faith argument based on an officer strictly following a statute. *State v. Blackman*, 2017 WI 77, ¶¶ 71–75. But this is because the statute in play gave false information and was

therefore defective on its face. *Id.* ¶ 71. Here, the statute gives no false information and unlike the statute in *Blackman* does not in any way conflict with any other statute it integrates with. And it cannot be argued that somehow *McNeely* and *Birchfield* should have tipped the officer off that the unconscious driver statute is unconstitutional as our own supreme court has not yet reached any sort of majority linking those cases to invalidate the statute.

In this case, with a well-established statute that does not conflict with other statutes and has never been held by an appellate court to be unconstitutional, there simply is no misconduct to deter, and no reason to suppress the test results.

CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the trial court's judgment of conviction.

Dated this 8th 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 10,560 words.

Dated this 8th day of September, 2017.

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DAVID H. PERLMAN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 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. § (Rule) 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 8th day of September, 2017.

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DAVID H. PERLMAN
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