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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1210 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUSTIN W. PAULL,

Defendant-Appellant.

On Notice of Appeal from a Judgment
Entered in the Dane County Circuit Court,
the Honorable William E. Hanrahan, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Justin Paull was unconscious after a motorcycle accident, and police had reason to think he was intoxicated. Though there was no exigency preventing them from getting a warrant, the police did not do so. Instead, they simply took Mr. Paull's blood, relying on that portion of Wis. Stat. § 343.305 that purports to authorize warrantless blood draws from unconscious motorists. Are these statutory provisions constitutional, despite the fact that they declare a motorist to have "consented" to a warrantless search without reference to voluntariness or the totality of the circumstances?

2. If (as courts nationwide have held) such statutes cannot substitute for actual, Fourth Amendment consent, were the police nevertheless entitled to rely on their blanket authorization even after *McNeely* declared that any warrantless blood draw must be justified under the totality of the circumstances in each case?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Paull does not request oral argument but would welcome it should the court desire it. Publication may be appropriate, given that our state supreme court has yet to issue a binding decision on the constitutionality of the implied consent law.

STATEMENT OF THE CASE AND FACTS

Justin Paull pleaded guilty to operating while intoxicated as a third offense, and received a six-month jail sentence, stayed pending appeal. (41:1-2). The sole issue on appeal is whether the circuit court should have suppressed the results of his warrantless blood draw.

The Sun Prairie police officer who directed the blood draw was the only witness at the suppression hearing. (39:22; App. 122). He was dispatched to the scene of a motorcycle accident; Mr. Paull, the driver, was bleeding from the head and lapsing in and out of consciousness, and was unable to answer basic questions. (39:23-24; App. 123-24). His condition, the odor of intoxicants, and the circumstances of the accident led the officer to believe Mr. Paull was drunk. (39:24; App. 124). After consultation with a superior on scene, the officer arrested Mr. Paull. (39:25; App. 125).

Emergency medical responders took Mr. Paull to UW Hospital, where the officer also went after picking up a blood draw kit. (39:26; App. 126). At the hospital, the officer read the informing the accused form to an unconscious Mr. Paull, who could not respond, and then directed the nurse to withdraw his blood. (39:27; App. 127). The blood showed an alcohol concentration over the legal limit. (39:28; App. 128).

Mr. Paull moved to suppress the test results, alleging that Wis. Stat. §§ 343.305(3)(ar) and (b), which allow the police to conduct warrantless, non-consensual blood draws from unconscious motorists under certain circumstances, are unconstitutional. (16; App. 142-147). He served the Attorney General with his challenge, but the Attorney General declined

to participate in the litigation. (17; 18). After the evidentiary hearing and briefing by the parties, the court denied suppression. (16; 24; 25; 26; App. 142-169). It assumed that the statutes are unconstitutional, but nevertheless held the fruits of the search conducted under them admissible under the good-faith doctrine. (26; App. 168-69).

Mr. Paull pled guilty, was sentenced, and appealed. (40:3,11; 36). This court stayed briefing pending the supreme court's decision in *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151.

ARGUMENT

I. The Legislature's Enactment of a Policy of Taking Blood from Unconscious Motorists Suspected of Intoxication Does Not Establish That Those Motorists Have Given Fourth Amendment Consent; *State v. Mitchell* Did Not Set Binding Precedent to the Contrary.

A. Whether the implied-consent law satisfies the consent exception to the warrant requirement is an open question in Wisconsin

The Wisconsin Supreme Court has been asked several times in recent years to decide whether the implied-consent law supplies actual, constitutional consent, but it has not issued a binding decision on the question. In both *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, and *State v. Brar*, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499, the parties briefed whether the implied-consent statute satisfied the consent exception to the warrant requirement, but in each case, only three justices concluded that it did.

Last term, in *Mitchell*, the court again addressed the implied-consent law as applied to an unconscious motorist. Once again, only three justices—of the seven who heard the case—concluded that the statute supplied consent in the constitutional sense. 383 Wis. 2d 192, ¶¶1-66.

Two justices—Justice Kelly, who wrote in concurrence, and Justice Rebecca Bradley, who joined him—voted to uphold the blood draw as a valid search incident to arrest. *Id.*, ¶¶67-85. But, again, this conclusion was rejected by five of the seven justices.

So, there was no majority: either for the notion that implied consent is constitutional consent; or for the notion that a blood draw from an unconscious motorist is a valid search incident to arrest. In Wisconsin, where there is no "majority of the participating judges" for any "particular point," no binding law is made. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995); *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 334, 565 N.W.2d 94 (1997) (where three separate opinions gave three distinct reasons for the result "none of the opinions in that case ha[d] any precedential value").

Because the decision *Mitchell* contains no majority for any proposition of law, this court must decide the question.

B. The majority of jurisdictions considering the question have concluded that implied-consent laws cannot satisfy the "voluntary consent" exception to the warrant requirement

The Fourth Amendment generally forbids warrantless searches, and a blood draw to test for alcohol is a search. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). So, a blood draw violates the Fourth Amendment unless it falls within

one of the established exceptions to the warrant requirement. *Id.* The only exception advanced by the state in this case, and the only one even arguably applicable, is the consent exception: a warrantless search is permissible if the subject of the search consents to it.

But, to validate a search, not just any "consent" will do. The consent must be given "freely and voluntarily"—be "an essentially free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 225 (1973). Courts determine whether consent is free and voluntary by examining the totality of the circumstances. Factors the Wisconsin Supreme Court has enumerated include

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

State v. Artic, 2010 WI 83, ¶33, 327 Wis. 2d 392, 786 N.W.2d 430.

So, though "voluntary consent" is a legal term of art, its meaning is not much different from the everyday meaning of those two words: a person has voluntarily consented under the Fourth Amendment when, under all the facts and circumstances, they've made a free choice to permit, rather than refuse, a particular search.

Wisconsin Stat. § 343.305(3)(ar) and (b) are in a section of the statutes containing another provision titled "Implied Consent." But what they prescribe clearly has nothing to do with the above constitutional concept. What they say (as pertinent here) is that if the police have probable cause for OWI, or if a driver has been in an accident causing serious injury and the police detect "any presence of alcohol," and the suspected driver is unconscious, they can take his blood.[1] Far from describing a "free and unconstrained" choice to consent, the statute provides no choice at all. It is just not about consent, constitutional or otherwise. What it is, instead, is a declaration of policy: the legislature has decided that a certain group of people may be searched *without* consent.

The statute's only link to "consent" consists of a sort of legislative gesture toward the concept: a declaration that a certain class of people—motorists—are "deemed to have given consent" to having their blood taken. But, of course, a legislative enactment cannot defeat a constitutional requirement. The legislature can no more "deem" a motorist to have consented to a blood draw by driving than a city could "deem" a resident to have consented to warrantless

[1] The language that matters to this case is, in Wis. Stat. § 343.305(3)(ar), "[i]f a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm … and a law enforcement officer detects any presence of alcohol … the law enforcement officer may request … one or more samples of … blood…. A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent … and one or more samples … may be administered to the person."

In paragraph (b), the operative language says that a "person who is unconscious … 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 s. 346.63(1) … one or more samples … may be administered to the person.

home searches by connecting to the municipal water supply. The Fourth Amendment requires a particular inquiry into consent, and legislation cannot sweep that away.

For these and related reasons, courts in Arizona, California, Georgia, Kansas, North Carolina, Pennsylvania and Texas have held that statutes purporting, in the name of "implied consent," to allow warrantless blood draws from unconscious motorists are unconstitutional.

So, for example, in *People v. Arredondo*, the court said "[a] state legislature does not have the power to 'deem' into existence 'facts' operating to negate individual rights arising under the federal constitution." 199 Cal. Rptr. 3d 563, 574 (Cal. Ct. App. 2016), *rev'w granted and opinion superseded*, 371 P.3d 240 (Cal. 2016). It called "implied consent"

> a misleading, if not inaccurate, label in this context. Certainly consent sufficient to sustain a search may be 'implied' as well as explicit, but it is nonetheless *actual* consent, 'implied' only in the sense that it is manifested by *conduct* rather than words…. The mere operation of a motor vehicle is not a manifestation of *actual* consent to a later search of the driver's person. To declare otherwise is to adopt a construct contrary to fact.

Id. at 571(emphasis in original).

Likewise, in *Williams v. State*, the Supreme Court of Georgia held that "mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant." 771 S.E.2d 373, 377 (Ga. 2015).

Several courts have observed what Mr. Paull noted above: that these statutes deem searches "consensual" without

requiring any assessment of whether a motorist's supposed consent is voluntary under the "totality of all the circumstances," as the Supreme Court has long required. *See Schneckloth*, 412 U.S. at 227. Thus, the Supreme Court of North Carolina: "[t]reating [the statute] as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances." *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017).

The Texas high court employed the same reasoning in *State v. Villarreal*, saying implied consent as a warrant exception cannot "be squared with the requirement that, to be valid for Fourth Amendment purposes, consent must be freely and voluntarily given based on the totality of the circumstances, and must not have been revoked or withdrawn at the time of the search." 475 S.W.3d 784, 800 (Tex. Crim. App. 2014). (*Villareal* did not concern an unconscious motorist; but the subsequent case of *State v. Ruiz* did, and the court reached the same result. 545 S.W.3d 687, 693 (Tex. App. 2018), *review granted* (Apr. 25, 2018).) *See also State v. Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (Kan. Ct. App. Aug. 21, 2015) (under implied-consent statute, officer contemplates only certain statutory facts, rather than "the rest of what was going on … 'the totality of the circumstances'").

And, in *Commonwealth v. Myers*, the Supreme Court of Pennsylvania interpreted that state's implied-consent statute not to authorize blood draws from unconscious motorists. 164 A.3d 1162, 1172 (Pa. 2017). However, it went further, saying that if it had interpreted the statute this way, it would be unconstitutional, because such "consent" does not

satisfy the requirement that "voluntariness is evaluated under the totality of the circumstances." *Id.* at 1176.

Courts have also observed that implied-consent statutes authorizing blood draws create *per se*, categorical exceptions to the warrant requirement—a species of exception the Supreme Court has repeatedly rebuffed, most recently in *McNeely*, 569 U.S. at 158. Thus, per the North Carolina court: "[I]n *McNeely*, though [it] only specifically addressed the exigency exception to the warrant requirement, the Court spoke disapprovingly of per se categorical exceptions to the warrant requirement, *id.* ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.... [A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence."). *Romano*, 800 S.E.2d at 653; *see also Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (statutes create "a categorical exception to the warrant requirement, and they accordingly run afoul of the ruling in *McNeely*"); *State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017), ("unconscious clause" could not support a blood draw absent "case-specific exigent circumstances").

Besides the seven states above that have squarely ruled on implied-consent blood draws from unconscious motorists, seven others have concluded, in other contexts, that implied-consent statutes cannot supply the voluntary consent the Fourth Amendment requires.

For example, South Dakota's implied-consent law simply authorizes the taking of blood: conscious or not, a motorist has no opportunity under the statute to refuse. S.D. CODIFIED LAWS § 32-23-10. So in *State v. Fierro*, a

case involving a conscious motorist who did not, factually, consent to a blood draw, the Supreme Court of South Dakota held the law unconstitutional because it authorized "consent" searches where actual, "free and voluntary consent" was absent. 853 N.W.2d 235, 241 (S.D. 2014). Similar results were had in *People v. Turner*, 97 N.E.3d 140, 152 (Ill. App. Ct. 2018) and *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014).

Other courts have struck down statutory provisions authorizing implied-consent blood draws before going on to consider whether, under the totality of the circumstances, the driver actually gave voluntary consent. *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015); *State v. Pettijohn*, 899 N.W.2d 1, 26–27 (Iowa 2017) ("[T]he clear implication of the *McNeely* decision is that statutorily implied consent to submit to a warrantless blood test under threat of civil penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment."); *State v. Modlin*, 867 N.W.2d 609, 619 (Neb. 2015).

Finally, one court, faced with a statute that facially authorized blood draws without regard to actual consent, found the blood draw at issue unlawful but refrained from invalidating the statute, deciding instead that the its language could be read to authorize only *warranted* searches. *State v. Wells*, No. M2013-01145-CCA-R9CD, 2014 WL 4977356, slip op. at 13, 19 (Tenn. Crim. App. Oct. 6, 2014).

C. A small minority of jurisdictions have concluded that an implied-consent statute can supply actual, constitutional consent, but their reasoning cannot withstand scrutiny

Courts in six states have held that implied-consent laws can provide a *per se* exception to the warrant requirement. These courts' analyses have typically viewed

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), as blessing (or at least not forbidding) this conclusion.

The most cited of these decisions is *People v. Hyde*, 393 P.3d 962 (Colo. 2017), another case involving an unconscious motorist. There, the supreme court relied on *Birchfield*'s sanctioning of "the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, *and nothing we say here should be read to cast doubt on them*." *Hyde*, 393 P.3d at 968 (emphasis added by Colorado court) (citing *Birchfield*, 136 S.Ct. at 2185).

The court allowed that *Birchfield* had rejected implied-consent laws imposing criminal penalties for refusal, but noted that Colorado's imposed only civil ones. From this, the court concluded (without further explanation) that because legislatures may levy civil penalties on motorists who refuse a blood draw, they may also simply authorize such blood draws, regardless of actual consent. *Id.* (The Court of Appeals of Virginia took the same route on the way to announcing an "implied consent exception to the search warrant requirement." *Wolfe v. Commonwealth*, 793 S.E.2d 811, 814-15 (Va. Ct. App. 2016).). *See also McGraw v. State*, 245 So. 3d 760, 767 (Fla. Dist. Ct. App. 2018), *review granted*, No. SC18-792, 2018 WL 3342880 (Fla. July 9, 2018) (citing *Hyde* with approval).

Hyde (and *Wolfe* and *McGraw*) misread *Birchfield*. When *Birchfield* spoke favorably of implied-consent laws, it was talking about a particular variety: "implied-consent laws that *impose civil penalties and evidentiary consequences on motorists who refuse to comply*." 136 S. Ct. at 2185 (emphasis added). Such laws are, of course, completely

different from provisions like the one here, which permits the taking of blood without a warrant. Rather than imposing civil penalties for refusing to comply, the statute outright eliminates the ability to refuse.

And it's not at all convincing to claim that *Birchfield*'s approval of civil penalties for refusal (as opposed to criminal ones, which it held unconstitutional) means that states imposing only civil penalties for refusal (like Wisconsin) are also free to dispense altogether with the *possibility* of refusal. *Hyde*; 393 P.3d at 968. In fact, *Birchfield*'s reasoning strongly implies the opposite: if criminal penalties for refusal are unlawful because they too heavily burden the exercise of the Fourth Amendment right to refuse a blood test, can it really be that the state can outright abolish the very same right?

And *Birchfield* did more than just imply this conclusion. Addressing North Dakota's argument that blood tests were indispensible law enforcement tools (and thus valid searches incident to arrest) because they, unlike breath tests, could be performed on unconscious motorists, the Court said: "we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the *police may apply for a warrant if need be*. Id. at 2184-85 (emphasis added).

Three other courts have raised distinct rationales for allowing warrantless searches pursuant to implied-consent statutes. None is any more convincing. First, the high court of Oklahoma held that its statute—which authorized warrantless blood draws only in cases of an accident involving death or great bodily injury—created an acceptable *per se* exigency, as distinct from the *per se* exigency the Court rejected in *McNeely*. *Cripps v. State*, 387 P.3d 906, 909 (2016), *cert. denied*, 137 S. Ct. 2186 (2017). But the Supreme Court has

rejected the notion that the "the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

Meanwhile the Court of Appeals of Ohio, in *State v. Speelman*, said (like Justice Kelley's concurrence in *Mitchell*) that a blood draw from an unconscious motorist is a valid search incident to arrest, despite *Birchfield*'s holding that blood draws are not. 102 N.E.3d 1185, 1188 (Ohio Ct. App. 2017). The court opined that the *Birchfield* Court assumed the existence of the less-invasive breath test, which is unavailable when a motorist is unconscious. *Id.* But, again, *Birchfield* expressly considered this argument—and expressly said the solution was for police to get a warrant.

Finally, the Idaho Court of Appeals held that under its implied-consent law, a motorist's operation on Idaho highways supplied actual, constitutional consent. That state's supreme court had earlier applied a saving construction to the statute—it read it to permit a motorist to withdraw consent, though there was no such provision in the statute's text. *Bobeck v. Idaho Transp. Dep't.*, 363 P.3d 861, 866 (Idaho Ct. App. 2015) (citing *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014) and *State v. Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014)). The court of appeals held that, since the unconscious motorist obviously did not actually withdraw this consent, her warrantless blood draw was constitutional. *Bobeck*, 363 P.3d at 867. But, as the dissent in that case pointed out, the majority failed even to consider whether the purported consent was voluntary under the totality of the circumstances: it simply assumed that it was. *Id.* at 868 (Gutierrez, J., dissenting); *id.* at 866.

In sum, the few courts that have held that "implied-consent" laws supply Fourth Amendment consent have ignored that constitutional doctrine's long-established meaning. (When they have provided any analysis at all.) A legislature's policy choice to "deem" a class of people to have consented cannot overcome an individual's Fourth Amendment rights.

II. The Good Faith Doctrine is Not Satisfied Here Because, After *McNeely*, a Reasonable Officer Could Not Conclude a Statute's Blanket Authorization of Warrantless Searches Was Constitutional.

In *Illinois v. Krull*, 480 U.S. 340, 349 (1987), the Supreme Court held the exclusionary rule inapplicable where an officer performed an illegal search while "acting in objectively reasonable reliance on a statute." The fact that a statute purported to permit the search does not provide total absolution though: a law enforcement officer can't "be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional." *Id.* at 355.

The search in this case—the blood draw—happened in September 2015. More than two years earlier, the Supreme Court decided *McNeely*. That case abrogated what was assumed to have been the prior rule—that there was a *per se* exigency any time a driver was arrested for OWI, obviating the need for a warrant. What the Court said specifically was that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at 156.

The statute relied on by the officer here does not purport to incorporate a "case by case" determination of the reasonableness of warrantless blood tests. It is a blanket rule.

For that reason alone, after *McNeely*, a reasonable officer—one who is informed about the constitutional laws that govern him—could not have relied in good faith on Wis. Stat. § 343.305(3)(ar) or (b) as an exception to the warrant requirement.

In fact, after *McNeely* (but still before the arrest in this case) the Supreme Court confirmed as much. Nine months after its decision, it granted certiorari in, vacated, and remanded a Texas case, *Aviles v. State*, 385 S.W.3d 110 (Tx. Ct. App. 2012), in which the lower court had held that a blood test satisfied the Fourth Amendment because the state's implied consent law allowed one. The Supreme Court directed the Texas court to reconsider its decision in light of *McNeely*. *Aviles v. Texas*, 571 U.S. 1119 (2014).

On remand, the Texas court of appeals got the only message it could have from the Supreme Court's action—that an implied consent law is not an exception to the warrant requirement *McNeely* had announced. While the state argued that *McNeely* was "a very narrow decision" about exigencies in OWI cases, the court understood *McNeely*'s holding: "*McNeely* clearly proscribed what it labeled categorical or per se rules for warrantless blood testing, emphasizing over and over again that the reasonableness of a search must be judged based on the totality of the circumstances presented in each case." *Aviles v. State*, 443 S.W.3d 291, 293-94 (Tx. Ct. App. 2014). And, because implied consent statutes "do not take into account the totality of the circumstances … but only consider certain facts," treating them as a substitute for a warrant "flies in the face of *McNeely*'s repeated mandate that courts must consider the *totality* of the circumstances in each case." *Id.* at 294 (emphasis in original).

So, in September 2015, when Mr. Paull was arrested, it was quite clear that the old rule—that police could simply blood test OWI arrestees without a warrant—had given way to a new regime. It was clear that, absent some recognized exception—one which was applied case by case, by examination of the totality of the circumstances—a warrant was required. No reasonable officer could have concluded that Wis. Stat. § 343.305, which authorizes blanket, warrantless searches of the body, was in accord with that established law. The good faith exception does not apply.

CONCLUSION

Because police subjected Mr. Paull to a warrantless search and no recognized Fourth Amendment exception applied, he respectfully requests that this court vacate his conviction and sentence and remand the case to the circuit court with instructions that all evidence derived from the taking of his blood be suppressed.

Dated this 25th day of October, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,059 words.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 25th day of October, 2018.

Signed:

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of October, 2018.

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