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**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT IV**

**Appeal No. 2018AP839 - CR**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**LONNIE P. AYOTTE, JR.,**

**Defendant-Appellant.**

---

**ON APPEAL FROM A FINAL ORDER ENTERED ON DECEMBER 15, 2017, IN THE CIRCUIT COURT FOR MARQUETTE COUNTY, THE HONORABLE BERNARD BULT PRESIDING**

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# BRIEF OF PLAINTIFF-RESPONDENT

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**Respectfully Submitted,**

**STATE OF WISCONSIN**
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## STATEMENT OF ISSUE FOR REVIEW

Was Ayotte entitled to suppression of the results of a test of a blood sample that he voluntarily gave to law enforcement under the implied consent law, because he informed the lab that he was withdrawing his consent before the lab had analyzed the blood to determine the presence and quantity of drugs and alcohol?

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State recognizes that this appeal, as a one judge appeal, does not qualify under this Court's operating procedures for publication. Hence,

publication is not sought. The State does not seek oral argument as the briefs should adequately present the issues on appeal.

## STATEMENT OF CASE

### I. PROCEDURAL BACKGROUND

Ayotte appeals the circuit court's decision denying his motion to suppress that was filed on June 30, 2016. (R.17.) There was an evidentiary hearing on a separate motion to suppress related to the expansion of the scope of the stop on October 4, 2016. (R. 21.) The parties later briefed both motions including the one that is at issue in this case and on March 14, 2017, the circuit court, the Honorable Bernard N. Bult denied the defendant's motions. (R. 32.) Subsequently, the case was tried on December 14, 2017, Ayotte was found guilty by a jury. (R. 44.) This appeal followed.

### II. FACTUAL BACKGROUND

On April 12, 2016, Deputy Michael Ciezadlo the Marquette County Sheriff's Department arrested Lonnie Ayotte for operating with a prohibited alcohol concentration. (R. 6.) After Deputy Ciezadlo read Ayotte the Informing the Accused form, Ayotte consented to and submitted to the blood draw. (R.71 at 85–86; R.46.) A medical technician drew Ayotte's blood. (R.71 at 88; R.47.) Deputy Ciezadlo mailed the samples to the State Crime Laboratory. (R.71 at 90; R.47.) On April 20, 2016, Ayotte sent a letter to the State Crime Laboratory attempting to withdrawn

his consent to have the blood sample analyzed without a warrant. (R.17.) On April 28, 2016, the blood sample taken from Ayotte was analyzed by the State Crime Laboratory. (R.71 at 112.) The Laboratory issued a report, showing a blood alcohol concentration of 0.032 g/mL. (R.71 at 119.)

## ARGUMENT

This very issue has been dealt with recently by this Court in two cases exactly on point with very different results. There are presently two conflicting holdings and both cases are unpublished: *State v. Sumnicht*, 2018 WI App 8, 909 N.W.2d 210, decided December 20, 2017, by Judge Neubauer in District 2 (A-1); and *State v. Randall*, 2018 WI App 45, 383 Wis.2d 602, decided June 14, 2018, by Judge Kloppenburg in this District (A-6). Both deal with the same issue before the Court here. *Sumnicht* held that the defendant could not withdraw his/her previously-given consent; *Randall* held that the defendant could do so. On July 16, 2018, the State petitioned the Wisconsin Supreme Court for review in *Randall* for this very question that is now unsettled given the conflicting opinions. That petition is still pending as of the filing of this brief.

### I. THE SEARCH ENDED WHEN AYOTTE VOLUNTARILY GAVE A BLOOD SAMPLE, AND A WARRANT OR CONSENT WAS NOT REQUIRED FOR THE LAB TO ANALYZE THE BLOOD

One of the main questions before this Court is what constitutes "the search." Ayotte argues and this Court in *Randall* found that the search is a

continuous action from the moment the needle enters a person's skin to draw the blood to the time when an analyst finishes the testing of that sample in a laboratory days later. However, the search for Fourth Amendment purposes ends at the time the blood is drawn from someone in Ayotte's position. This is supported by this Court in *State v. VanLaarhoven*, which stated that once "the blood sample was lawfully taken," a warrant was not required to analyze the blood. The Court concluded that "law enforcement was permitted to conduct an analysis of VanLaarhoven's blood to determine if it contained evidence of a blood alcohol concentration in excess of the legal limit." *State v. VanLaarhoven*, 2001 WI App 275 ¶ 17, 248 Wis.2d 881, 637 N.W.2d. 411.

The Court in *VanLaarhoven* recognized that "the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16. The Court relied on *State v. Petrone, 161 Wis.2d 530, 545, 468 N.W.2d 676 (1991),* in which the Wisconsin Supreme Court rejected the proposition that the State needed a warrant to develop film that it had lawfully seized. The supreme court concluded that "Developing the film did not constitute, as the defendant asserts, a separate, subsequent unauthorized search having an intrusive impact on the defendant's rights wholly independent of the execution of the search warrant." *Id.*

The Court in *VanLaarhoven* also relied on *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988). In *Snyder*, the defendant moved to suppress the results of a test of blood taken from him after he was arrested for operating while intoxicated, asserting that "the warrantless analysis of the blood sample was an unreasonable search." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 12 (citing *Snyder*, 852 F.2d at 472). The Ninth Circuit Court of Appeals rejected the defendant's assertion, concluding that:

> The only justification for the seizure of defendant's blood was the need to obtain evidence of alcohol content. The Court therefore necessarily viewed the right to seize the blood as encompassing the right to conduct a blood-alcohol test at some later time. Accordingly, we are bound to conclude that under *Schmerber*, so long as blood is extracted incident to a valid arrest based on probable cause to believe that the suspect was driving under the influence of alcohol, the subsequent performance of a blood-alcohol test has no independent significance for fourth amendment purposes, regardless of how promptly the test is conducted.

*Snyder*, 852 F.2d at 473–74 (citing *Schmerber v. California*, 384 U.S. 757, 768 (1966)).

The *VanLaarhoven* Court stated that "*Petrone* and *Snyder* teach that the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16. The court added that "Both decisions refuse to permit a defendant to parse the lawful seizure of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement" *Id.*

This Court took two very different interpretations of *VanLaarhoven* and *Petrone* in *Randall* and *Sumnicht*. In *Sumnicht* the Court concluded that under *VanLaarhoven*, "the search and seizure of the blood was completed at the time of the lawful blood draw." *Sumnicht*, 2018 WI App, ¶ 22. And it concluded that under *Petrone*, "analysis of Sumnicht's blood was simply a method of examining lawfully seized evidence." *Id*.

The *Randall* court's reading of VanLaarhoven would have precisely the opposite effect that the courts intended in *VanLaarhoven*, *Petrone*, *Snyder*, and *State v. Reidel*, 2003 WI App 18, 259 Wis. 2d 921, 656 N.w.2d 789. In each of those cases, the State was not required to obtain a search warrant, or some exception to the warrant requirement, in order to analyze lawfully seized evidence.

*Randall's* application of *VanLaarhoven* would have the opposite effect. Whenever a person attempted to withdraw consent to a blood draw after the blood draw but before analysis of the sample, the State would be required to obtain a warrant. And because the implied consent law does not contemplate a need for consent to analyze a blood sample that was lawfully obtained, it does not provide a sanction for refusal to allow analysis. The result would likely be the necessity of a search warrant in every case in which a person consents to give a blood sample under the implied consent law. No case cited by this Court in *Randall* compels or even contemplates that result.

The analysis of Ayotte's blood in this case was not a separate search requiring either judicial authorization or an exception to the warrant requirement. It was simply the analysis of evidence gathered pursuant to Randall's consent when she submitted a blood sample under the implied consent law.

## II. AYOTTE DOES NOT HAVE A PRIVACY INTEREST IN THE BLOOD ONCE IT LEAVES HIS BODY.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment prohibits "unreasonable searches." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). But "a search conducted pursuant to a valid consent is constitutionally permissible." *State v. Wantland*, 2014 WI 58, ¶20, 355 Wis. 2d 135, 848 N.W.2d 810 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 22 (1973)). Under Wisconsin's implied consent law, a person who submits to a request for a sample for testing has consented to the implied consent procedure. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 8.

"[T]he taking of a blood sample or the administration of a breath test is a search." *Birchfield*, 136 S.Ct. at 2173 (citing *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616–617, 109 S.Ct. 1402, 103 L.Ed.2d 639

(1989); *Schmerber v. California*, 384 U.S. 757, 767–768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)).

But the analysis of a sample that is lawfully obtained is not a constitutional search. As Justice Scalia has stated "it is not even arguable that the testing of urine that has been lawfully obtained is a Fourth Amendment search." *Ferguson v. City of Charleston*, 532 U.S. 67, 92 (2001) (Scalia, J. dissenting).

And in *Petrone*, the Wisconsin Supreme Court concluded that law enforcement officers were entitled to analyze evidence that had been lawfully seized, without the need for a warrant or an exception to the warrant requirement. *Petrone*, 161 Wis. 2d at 545.

Ayotte argues that *Riley v. California*, 134 S.Ct. 2473 (2014) requires that "even though a piece of evidence is already in police custody, when there is no legal basis for a search, the search is unlawful" (Defendant-Appellant Brief, p. 20) But *Riley* does not apply to the analysis of blood and is distinguishable.

*Riley* concerned a search of cell phones seized from defendants by police incident to an arrest for traffic violations, and an arrest for an apparent drug sale. *Id.* at 2480–82. The Supreme Court noted that when faced with deciding "whether to exempt a given type of search from the warrant requirement" without "more precise guidance from the founding era," it generally makes the determination "by assessing, on the one hand,

the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 2484. The Court noted that in *United States v. Robinson,* 414 U.S. 218, 94 S. Ct. 467 (1973), it held that an officer who conducted a patdown search of a person the officer had arrested found a crumpled cigarette pack in the person's pocket, the officers was entitled to search it. *Riley*, 134 S.Ct. at 2483, 2488. But the Court concluded that a search of a cell phone discovered incident to arrest was different because cell phones "place vast quantities of personal information literally in the hands of individuals." *Id.* at 2485. It added that "A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*." *Id.* The Supreme Court concluded that the contents of a cell phone carry a significant privacy interest: "With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Id*. at 2495 (quoted source omitted.) The Court concluded that if police officers want to search a cell phone incident to arrest they must "get a warrant." *Id*.

Ayotte argues that "a staggering amount of personal information can be acquired by the analysis of a sample of blood" including genetic information, even if this type of deep search could be conducted at a later time. (*See* Defendant-Appellant's Brief, p. 12, 14.) However, this doesn't apply here as the labs don't test the blood for any other thing without

additional probable cause and a warrant. Wisconsin Statute § 343.305 only allows for the testing the blood for the presence of alcohol and drugs.[1]

The circumstances in this implied consent case are entirely different from those in *Riley*. First, this is a consent case, not a search incident to arrest case. Second, unlike the privacy interest in a cell phone, the privacy interest in blood after it has been drawn from a person for testing under the implied consent law, with the person's consent, is insignificant. A person has no reasonable privacy interest in the blood.

In *Birchfield*, the Supreme Court recognized that blood tests involve a more significant intrusion on a person's privacy interests that do breath tests. The Court noted that blood tests "require piercing the skin," and extraction of a part of the subject's body." The Court also noted that

> a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

*Birchfield*, 136 S. Ct. at 2178.

But the privacy interests that the Court recognized in regard to blood tests apply only to the blood draw, not to analysis of the blood by a lab. The first privacy interest—the intrusion of a needle into a person's arm—

[1] Wis. Stat. § 343.305(2) reads in part, "…is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of **alcohol, controlled substances, controlled substance analogs or other drugs**, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer…" (emphasis added)

obviously applies only to the blood draw, not to analysis of the sample. The second privacy interest—anxiety about how a law enforcement may use the blood after it has been drawn—concerns what will happen to the blood after it is drawn. But the anxiety a person may feel is at issue in determining whether a law enforcement officer needs a warrant to conduct a blood draw. It is not concerned with whether law enforcement needs a warrant to analyze the sample. Analysis of the blood for the purpose for which it was drawn cannot reasonably result in undue anxiety for the person who submitted to the blood draw.

In a case like this one, a defendant who has submitted to a request for a blood draw, and consented to the implied consent procedure, has no privacy interest in the blood he or she has submitted, at least insofar as it is going to be used for the purpose for which it was drawn—determining the alcohol concentration or presence of illegal drugs in the blood. The person has consented to chemical testing by operating a motor vehicle on a Wisconsin highway. The person has submitted to a blood draw. The blood has been taken. The person no longer has a privacy interest in that blood.

Even if Ayotte could somehow claim that he had a subjective privacy interest in his blood after he submitted the sample, society would not recognize that interest as reasonable. Deputy Ciezadlo lawfully obtained a sample of Ayotte's blood under the implied consent law, so that the concentration of drugs or alcohol in his system could be determined.

This is the bargain Ayotte struck when he drove on a Wisconsin highway, and then, after he was arrested for Operating With a Prohibited Alcohol Content, when he chose not to withdraw his consent, but instead to submit to the deputy's request for a sample for testing. It would be entirely unreasonable for Ayotte to have a privacy interest sufficient to withdraw his consent, not to the Fourth Amendment event—the extraction of his blood—but to the testing and analysis of the sample days later.

In contrast, there is a legitimate governmental interest in analyzing blood that has been lawfully drawn under the implied consent law. As the Supreme Court recognized in *Birchfield*, "The States and the Federal Government have a "paramount interest ... in preserving the safety of ... public highways." *Birchfield*, 136 S. Ct. at 2178 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979)). This must include analyzing blood drawn from a person arrested for operating while under the influence of alcohol or drugs in order to gather evidence.

The requirement of a warrant to analyze blood for alcohol or drugs after a person has consented to the blood draw for testing and analysis, would serve no real purpose. After all, as the Court recognized in *Birchfield*, "In order to persuade a magistrate that there is probable cause for a search warrant, the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the

motorist's blood alcohol level is over the limit." *Id.* at 2181. In a case like this one, a magistrate would have to find only that there is probable cause that blood a person consented to give after being arrested for an OWI-related offense, based on probable cause, contains evidence of alcohol or illegal drugs. It is difficult to envision a scenario where a magistrate would not issue a warrant to analyze blood that a person gave consensually, under the implied consent law, after a proper request form a law enforcement officer.

In summary, there is a significant governmental interest in testing the blood sample that Ayotte gave when he consented to the implied consent procedure. Ayotte had no reasonable privacy interest in the blood sample that he gave when it was to be tested for the purpose for which he gave it—to determine the concentration of alcohol in his blood when he drove on a Wisconsin highway. The Fourth Amendment therefore does not require a warrant or an exception to the warrant requirement to test and analyze the blood. Accordingly, suppression of the results of the blood test was unnecessary and unwarranted.

## III. THE PURPOSE OF AND PUBLIC POLICY BEHIND THE IMPLIED CONSENT LAW ARE DEFEATED IF A PERSON IS ALLOWED TO WITHDRAW CONSENT AFTER FIRST GIVING IT UNDER THE IMPLIED CONSENT LAW

The Wisconsin Legislature enacted the implied consent statute to combat drunk driving. *State v. Reitter*, 227 Wis. 2d 213, 223-25, 595

N.W.2d 646 (1999), citing *State v. Zielke*, 137 Wis. 2d 39, 46, 403 N.W.2d 427 (1987), in turn citing *State v. Brooks*, 113 Wis. 2d 347, 355-56, 335 N.W.2d 354 (1983). The law was not created to enhance the rights of drunk drivers, but "to facilitate the collection of evidence." *Reitter*, 227 Wis. 2d at 224, citing *Zielke*, 137 Wis. 2d at 46; *State v. Neitzel*, 95 Wis. 2d 191, 203-04, 289 N.W.2d 828 (1980). The purpose of the law "is to obtain the blood alcohol content in order to obtain evidence to prosecute drunk drivers." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986) citing *Brooks*, 113 Wis. 2d at 355 (additional citation omitted). Courts construe the implied consent law liberally in order to effectuate the legislative purpose behind the statute. *Reitter*, 227 Wis. 2d at 224-25, citing Zielke, 137 Wis. 2d at 47.

The "clear policy of the statute is to facilitate the identification of drunken drivers and their removal from the highways." *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 31, 348 Wis. 2d 282, 832 N.W.2d 121 (citing *Neitzel*, 95 Wis. 2d at 193. "More pointedly, its purpose is 'to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar.'" *Id.* (quoting *Brooks*, 113 Wis. 2d at 359, 335 N.W.2d 354.) (additional citation omitted).

A requirement of a warrant for analysis of blood samples submitted under the implied consent law would be contrary to the policy behind implied consent laws. In *Birchfield*, the Court noted the large number of

arrests for driving while under the influence of drugs or alcohol, and concluded that requiring a warrant "in every case would impose a substantial burden but no commensurate benefit." *Birchfield*, 136 S. Ct. at 2181–82. If law enforcement were required to obtain a warrant whenever a person withdrew consent after the blood draw, but before analysis of the sample, law enforcement and judicial officials would be unnecessarily bogged down in order to protect a privacy interest that is non-existent—or at most minimal—against a legitimate and important governmental interest. Under the implied consent law, a person can withdraw his or consent to the implied consent procedure before the procedure begins, by refusing to provide a sample for testing. But once the person submits to a request for a sample, there is no opportunity or ability to withdraw consent to analysis of the blood.

The implied consent law provides that a person who operates a motor vehicle on a Wisconsin highway "is deemed to have consented to a one or more tests of his or her blood, breath, or urine for the purpose of determining the presence or quantity of in his or her blood or breath," of alcohol or drugs, when an officer requests one or more samples. Wis. Stat. § 343.305(2). When an officer places a person under arrest for an OWI-related offense and requests a sample, the officer is required to read the Informing the Accused form to the person. The officer informs the person that he or she has been arrested for an offense that involves driving or

operating a motor vehicle while under the influence of alcohol or drugs, and that:

> This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

Wis. Stat. § 343.305(4).

The implied consent law, and the Informing the Accused form, speak of the testing of samples. As this Court recognized in *VanLaarhoven*, this is a "testing procedure" that includes the giving of a sample and the testing and analysis required for a determination of the concentration of alcohol or drugs in the person's system. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 8. As the Court put it, "by operation of law and by submitting to the tests, *VanLaarhoven* consented to a taking of a sample of his blood and the chemical analysis of that sample." *Id.*

When an officer reads the form to the person, the person has an opportunity to withdraw the consent he or she impliedly gave to provide sample when he or she drove on a Wisconsin highway. By submitting to a blood draw under the implied consent law a person affirms his or consent to the implied consent procedure, including analysis of the blood. The law authorizes withdrawal of consent before submission to a request for a sample, but not after.

The implied consent law also governs what happens after a person submits or refuses to submit to a request for a sample for testing. If the person submits, the officer directs the administration of a test. Wis. Stat. § 343.305(5)(a). This obviously does not mean that the officer administers the analysis of a sample. It means that the officer administers the taking of one or more samples of blood, breath, or urine. A person who submits to a request for a sample for testing has a right to an alternative test and additional testing. Wis. Stat. § 343.305(5)(a). Again, this does not mean the person has the right to further analysis of the sample he or she has given. In the case of a breath sample this would be impossible. The statute instead grants a right to give additional samples for testing.

The statute also governs who may draw blood, Wis. Stat. § 343.305(5)(b), who may analyze samples and how the analysis is conducted. Wis. Stat. § 343.305(6). The statute mandates administrative suspension when analysis of a person's blood, breath, or urine indicates the presence of a restricted controlled substance, or a prohibited alcohol concentration, Wis. Stat. § 343.305(7), and provides for judicial review of such suspensions. Wis. Stat. § 343.305(8). The statue also mandates that if a person who is operating a commercial motor vehicle or is on duty time submits to a test that shows an alcohol concentration above 0.0, the officer must issue an out-of-service order for the 24 hours after the testing. Wis.

Stat. § 343.305(7)(b). Logically, this does not mean the 24 hours after the lab analyzes the blood. It means the 24 hours after the person submitted the sample.

Once the person submits to the implied consent procedure, what happens to the sample the person gives is governed by the statute, and is entirely out of the person's hands. The statute does not authorize a person who has submitted to a request for a sample, and who has chosen not to withdraw his or her consent to the procedure, to do anything after submitting, except take an alternative or additional test and challenge an administrative suspension. Nothing in the statute authorizes a person who has affirmed his or her consent to the implied consent procedure to withdraw that consent after submitting the sample. And nothing in the statutes requires that a lab can analyze evidence in the form of a blood sample only if it has a search warrant or consent.

The statute also provides for penalties when a person withdraws his or her consent to the implied consent procedure by refusing a request for a sample. When a person "refuses to take a test," the officer is required to "immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege." Wis. Stat. § 343.305(9)(a). The officer is required to "issue a copy of the notice of intent to revoke the privilege to the person." Id. The officer is then required to submit or mail a

copy to the circuit court or municipal court in the county or municipality in which the arrest was made. Id.

The refusal subsection of the statute applies when a person "refuses to take test." This cannot mean when a person "refuses to allow the lab to analyze a sample the person has given." A refusal occurs when a person refuses to give a sample.

That a refusal occurs when a person refuses a request for a sample, not when a person later withdraws consent for analysis of the sample, is evident from the procedures that the implied consent statute sets forth. The notice of intent to revoke that an officer is required to issue upon a refusal must contain information including that prior to the arrest, the officer had probable cause to arrest for an OWI-related offense, the officer complied with sub. (4) by properly reading the Informing the Accused form to the person, and "That the person refused a request under sub. (3)(a)." Wis. Stat. § 343.305(9)(a)1.-4.

If the person timely requests a refusal hearing, the issues at the hearing are limited to "Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol [or illegal drugs]," and lawfully arrested the person; "Whether the officer complied with sub. (4)" by properly reading the Informing the accused form to the person; and "Whether the person refused to permit the test." Wis. Stat. § 343.305(9)(a)5.

The final issue, "Whether the person refused to permit the test," plainly corresponds to the information on the notice of intent to revoke, "That the person refused a request under sub. (3)(a)." In other words, whether a person refused to permit a test is the same as whether the person refused a request for a sample.

The statute provides that a person's withdrawal of consent to the implied consent procedure is not considered a refusal "if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease." Wis. Stat. § 343.305(9)(a)5.c. This cannot possibly apply to a person who attempts to withdraw consent to the analysis of a sample that he or she has given. After all, that would mean that such a withdrawal of consent would not be a refusal if the person was physically unable to allow analysis of his or her sample.

The implied consent law also mandates that if a person is operating a commercial motor vehicle or is on duty time "refuses a test," the officer must issue an out-of-service order for the 24 hours after the refusal. Wis. Stat. § 343.305(9)(am). Logically, this does not mean the 24 hours after a person writes to the lab and attempts to stop the analysis of his or her blood sample. It means the 24 hours after the person refused the request for a sample.

The statute provides no mechanism for penalizing a person who attempts to withdraw consent to the analysis of a sample that he or she gave under the implied consent law. There is no need for such a mechanism, because the statute does not authorize a person to withdraw consent to the analysis of a sample that he or she gave under the law after giving a sample. The statute provides a person an opportunity to refuse an officer's request for a sample, and withdraw consent to the implied consent procedure. A person who utilizes that opportunity is subject to penalties including revocation of his or her operating privilege.

The statute does not give a person who submits to a request for a sample, affirming his or her consent to the implied consent procedure, an opportunity to thwart the procedure by refusing to allow analysis of the sample. Accordingly, the statute provides no penalties for withdrawal of consent to analyze the sample. As this Court recognized in *Sumnicht*, it "is simply too late" to withdraw consent to the implied consent procedure. *Sumnicht*, 2017 WL 6520961, ¶ 21.

## CONCLUSION

For the above stated reasons the State of Wisconsin requests that the court find that the trial court correctly denied Ayotte's Motion to Suppress and affirm its ruling.

Respectfully Submitted this 21th of September, 2018.

STATE OF WISCONSIN

By _____
Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.18(8)(b) and (c) for a document produced with a proportional serif font. The length of this entire document is 5232 words.

Dated this 21st day of September, 2018.

By: _____

Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138

**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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 21st day of September, 2018.

By: _____

Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138

**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § 809.19(2)**

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; and (2) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b);

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 first names and last initials 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 21st day of September, 2018.

By: _____
Chad A. Hendee
District Attorney
Marquette County, Wisconsin
State Bar No. 1036138

**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § 809.19(13)**

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated this 21st day of September, 2018.

By: _____

Chad A. Hendee
District Attorney
Marquette County, Wisconsin
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## APPENDIX TABLE OF CONTENTS

### Unpublished Cases Cited