**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT III**

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**Appellate Case No. 2023AP169-CR**

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

-vs-

**CHRISTOPHER A. GORE,**

Defendant-Appellant.

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**APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, BRANCH I, THE HONORABLE MARTHA J. MILANOWSKI PRESIDING, TRIAL COURT CASE NO. 20-CF-193**

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# BRIEF OF DEFENDANT-APPELLANT

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## STATEMENT OF THE ISSUE

WHETHER THE ERRONEOUS INFORMATION PROVIDED TO MR. GORE BY THE RECITATION OF THE INFORMING THE ACCUSED FORM WARRANTED SUPPRESSION OF THE BLOOD TEST IN THIS MATTER PURSUANT TO *STATE v. BLACKMAN*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774?

> Circuit Court Answered: NO. The court "assume[d] without finding that the Informing the Accused form misrepresented the consequences of the refusal to [Mr. Gore]" because "the State concede[d] that [the officer] should not have read the Informing the Accused form to Gore," however, "the blood draw results [were] still admissible pursuant to the doctrine of inevitable discovery." R44 at pp. 106; D-App at p.108.

## STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

## STATEMENT ON PUBLICATION

Mr. Gore will NOT REQUEST publication of this Court's decision as the issue raised in this appeal is one which is seemingly settled by common law authority directly on point and one which is not likely to recur with frequency.

## STATEMENT OF THE CASE

By criminal complaint filed on September 9, 2020, Mr. Gore was charged in Oneida County with Homicide by Intoxicated Use of a Motor Vehicle, contrary to Wis. Stat. § 940.09(1)(a), and Homicide by Intoxicated Use of a Motor Vehicle with a Prohibited Alcohol Concentration, contrary to Wis. Stat. § 940.09(1)(b). R2.

After retaining private counsel, Mr. Gore filed several pretrial motions, one

of which asserted that because (1) Mr. Gore was not under arrest for any impaired driving related offense at the time a sample of his blood was requested and (2) was read the same information as that found unconstitutionally coercive in *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774, the *Blackman* decision compelled suppression of the test result. R27. The State opposed Mr. Gore's pre-trial motion to suppress arguing, *inter alia*, that the "inevitable discovery doctrine" permitted it to submit evidence of Mr. Gore's blood alcohol concentration at trial despite the sanction of suppression otherwise required by the *Blackman* holding. R29.

An evidentiary hearing on Mr. Gore's motions was held on June 11, 2021. R41. At the conclusion of the hearing, the Court permitted counsel for Mr. Gore to file a supplemental brief regarding the *Blackman* issue he raised in his pretrial motion. R41 at 100:15-20.

After receiving additional briefs from the parties, the circuit court issued its decision denying Mr. Gore's motion premised upon *Blackman*. R44 at pp. 101-06; D-App at 103-08. The lower court found that the *Blackman* holding did not apply in the instant matter because the evidence sought by the State would have been inevitably discovered. R44 at pp. 105-06; D-App at 107-08. The lower court premised its belief that the blood test result was subject to inevitable discovery on the supposition that "[b]ecause probable cause existed to arrest the defendant for the OWI offense, the warrant would have been granted and the blood draw would have inevitably occurred." R44 at p.106; D-App at 108.

Based upon the court's ruling, on November 22, 2022, Mr. Gore entered a plea of no contest to the charge of Homicide by Operation of a Motor Vehicle With a Prohibited Alcohol Concentration, and a Judgment of Conviction was entered on January 18, 2023, after Mr. Gore's sentencing. R78; D-App. at 101-02.

It is from the adverse judgment of the circuit court that Mr. Gore now appeals to this Court by Notice of Appeal filed on January 24, 2023. R84.

## STATEMENT OF FACTS

On July 12, 2020, Christopher Gore was involved in a fatal motor vehicle accident in the Town of Minocqua, Oneida County. R2 at p.4. Multiple law enforcement officers arrived at the scene of the accident, including Officer Devon Gaszak of the Minocqua Police Department. R2 at p.3. Due to the severity of his injuries, Mr. Gore was initially transported to the Ascension—Howard Young Medical Center Emergency Department [hereinafter "ED"] in Woodruff. R2 at p.10.

After investigating the scene of the accident, Officer Gaszak requested that his supervising lieutenant, Jason Benbenek, make contact with Mr. Gore in the ED and ask him to submit to an evidentiary chemical test of his blood. R41 at 27:1-25; 47:20-22.

Once he arrived at the hospital, Lt. Benbenek made contact with Mr. Gore whereupon he read him the Informing the Accused form [hereinafter "ITAF"] despite the fact that "Mr. Gore was not under arrest that night . . . ." R12 at 15:10-11. Lt. Benbenek also stated that Mr. Gore had not been "placed under arrest at the scene" of the accident either. R12 at 15:6-7; R41 at 37:5-13. At no time throughout his encounter with Mr. Gore did Lt. Benbenek ever inform him that he was under arrest for operating a motor vehicle while intoxicated. R41 at 35:19 to 36:4; 57:2-5.

Even though Mr. Gore had not been placed under arrest—and despite the Wisconsin Supreme Court's decision in *Blackman* which held that in circumstances in which an individual has not been placed under arrest, the information on the ITAF is unconstitutionally coercive—Lt. Benbenek nevertheless read the ITAF to Mr. Gore prior to requesting that he submit to an evidentiary chemical test of his blood. R41 at 56:7-12.

Mr. Gore consented to a blood test after the ITAF was read, and a subsequent analysis of his blood specimen yielded a result above the prohibited limit. R2 at p.10.

## STANDARD OF REVIEW

The issue presented in this appeal is premised upon whether an undisputed set of facts rises to the level of meeting a legal standard. When assessing whether a particular set of facts satisfies a constitutional standard, this Court reviews the constitutional question *de novo*. *State v. Drogsvold*, 104 Wis. 2d 247, 256, 311 N.W.2d 243 (Ct. App. 1981).

## ARGUMENT

### I. THE CIRCUIT COURT ERRED WHEN IT APPLIED THE INEVITABLE DISCOVERY DOCTRINE TO AVOID SUPPRESSION OF THE BLOOD TEST RESULT AS REQUIRED BY *STATE v. BLACKMAN*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774.

#### *A.* State v. Blackman *Controls in the Instant Case.*

In *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774, the Wisconsin Supreme Court addressed whether the current incarnation of the Informing the Accused form misstates the consequences for refusing to submit to an implied consent test subsequent to changes made by the legislature to the implied consent statute, Wis. Stat. § 343.305. More specifically, the supreme court framed the question this way: "The issue presented is whether the consequences for refusing to submit to a blood test requested under Wis. Stat. § 343.305(3)(ar)2. were misrepresented [on the Informing the Accused form] . . . ?" *Blackman*, 2017 WI 17, ¶ 2.

The instant case is directly on point with the facts and circumstances of *Blackman* because, like the test to which Mr. Blackman was subject, Mr. Gore was also being asked to take a test pursuant to § 343.305(3)(ar)2. since he had not been taken into custody for an impaired-driving related violation. The testimonial record reflects that Mr. Gore was not in custody for an alcohol-related driving offense at the time he was asked to submit to a blood test.

Similar to the facts of *Blackman*, Lt. Benbenek testified that he obtained a

blood sample from Mr. Gore because he had been involved in an accident and told Mr. Gore the same. R41 at 79:2-9. This is precisely the same circumstance as that in *Blackman*. *Blackman*, 2017 WI 77, ¶ 16. Like Mr. Blackman, Mr. Gore was not under arrest at the time of the blood draw. R41 at 35:19 to 36:4; 57:2-5.

When the *Blackman* court examined the Informing the Accused form relative to the procedures set forth under the implied consent statute, the court concluded that the ITAF misstated the current status of the law. *Blackman*, 2017 WI 77, ¶ 51. The court specifically identified that the ITAF misrepresented that for persons who refuse to take a test requested under § 343.305(3)(ar)2., the penalty is not a revocation of the person's operating privilege, but rather, the person is subject to "arrest" for the act of refusing. *Blackman*, 2017 WI 77, ¶¶ 32-33, 38.

The supreme court found this error insurmountable for the State and concluded both that the ITAF misstated the law and that the statute itself was now conflicted. *Id*. ¶ 51. After reaching this conclusion, the *Blackman* court next examined whether this set of circumstances, *i.e.*, when the ITAF misadvises a suspect about the law, renders the suspect's consent to testing "coerced" under the Fourth Amendment to the United States Constitution. *Id.* ¶ 52.

Starting with the well-settled premise that blood draws are searches under the Fourth Amendment, the *Blackman* court observed that warrantless blood seizures are *per se* unconstitutional unless they fall within a narrow spectrum of circumstances. *Id.* ¶ 53. Included among this narrow band of circumstances are those instances in which the individual "voluntarily consents" to the blood withdrawal. *Id*. ¶¶ 54-56. Having examined the history of consent, the *Blackman* court framed the issue now before it as what effect "the 'inaccuracy' or 'misrepresentation' of the consequences [had] on the validity of [the defendant's] consent under the Fourth Amendment." *Id*. ¶ 62.

The *Blackman* court found that the misrepresentations of law in the ITAF rendered Blackman's consent involuntary, and therefore, unconstitutional under the Fourth Amendment to the United States Constitution. *Id*. ¶¶ 63-67. The *Blackman* court further held that the test result was ***not*** saved by the "good faith" exception to the exclusionary rule simply because the arresting officer had "followed procedures." *Id*. ¶ 73. Ultimately, the *Blackman* court concluded that under the

circumstances before it, suppression of the state's test was the only appropriate remedy. *Id*. ¶¶ 74-75.

Because Mr. Gore was read the same ITAF as that at issue in *Blackman*, under the same circumstances of not being arrested for any impaired-driving related violation, he proffers that the same problems for which the *Blackman* court mandated a remedy existed in his case. Clearly, therefore, there is no issue before this Court regarding the application of *Blackman*. The problem, however, lies with the lower court's circumvention of *Blackman* by misapplying the inevitable discovery doctrine to the facts of this case.

### *B. The Inevitable Discovery Doctrine Is Not Applicable to This Case.*

The lower court, relying principally upon *State v. Jackson*, 2016 WI 56, 369 Wis. 2d 673, 882 N.W.2d 422, concluded that the inevitable discovery exception to the exclusionary rule saved the blood test result in this case from suppression pursuant to *Blackman*. P-App at 104. For all of the following reasons, *Jackson* does not support the lower court's conclusion.

#### 1. The Facts of *Jackson* Are Distinguishable.

Significantly, the lower court failed to recognize that the holding in *Jackson* was only reached ***because*** an independently-based investigation would have allowed law enforcement officers to discover the evidence Ms. Jackson sought to suppress. In *Jackson*, the defendant moved for the suppression of evidence obtained during a search of her home which was conducted after her Fifth Amendment rights were violated. *Jackson*, 2016 WI 56, ¶ 34.

Notably, ***independent*** from Jackson's illegally obtained statements, the investigating officers also had evidence obtained from statements made by Jackson's son and from the hotel room in which the victim had been found. *Id*. ¶ 41. The *Jackson* court placed its imprimatur of approval on the use of this information to support probable cause to issue a warrant because it was ***not*** tainted by the ill-gotten statements from Ms. Jackson. *Id*. ¶¶ 86-87.

The circumstances in *Jackson* are wholly removed from the circumstances in

the instant case. The ***sole and only*** reason Lt. Benbenek was present in Mr. Gore's hospital room to request a blood test was because of the investigation at the scene of his accident at which time one officer learned that Mr. Gore had an odor of intoxicants about his person and had admitted to consuming intoxicants. P-App 107. The fact of the accident, the alleged odor, and the admission to drinking were the only relevant facts which precipitated the request for the blood sample from Mr. Gore. There was literally nothing ***independent*** of these facts which precipitated the request, and unlike the facts of *Jackson*, there was nothing ***independent*** of them which would have justified the issuance of a warrant. For these reasons, the lower court's reliance on *Jackson* was severely misplaced.

### 2. The Lack of an Alternate Means of Investigation Remains a Relevant Inquiry Under *Jackson*.

The foregoing analysis regarding whether law enforcement officers had an independent means by which to discover the blood test evidence in this case remains a relevant inquiry because the *Jackson* court never eliminated the examination of the third prong of the inevitable discovery test developed under *State v. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992). More specifically, the *Schwegler* court held that when law enforcement officers violate a suspect's Fourth Amendment right to be free from unreasonable searches and seizures, the ill-gotten evidence may be saved from suppression under the exclusionary rule if the unconstitutionally obtained evidence can otherwise be demonstrated by the State to have been "inevitably discoverable" upon proof of the following:

> (1) a reasonable probability that the evidence would have been discovered by lawful means but for the police misconduct;
>
> (2) the leads making the discovery inevitable were possessed by the State at the time of the misconduct; and
>
> (3) **prior to the unlawful search, the government was pursuing some alternate line of investigation independent of the misconduct.**

*Schwegler*, 170 Wis. 2d at 500 (emphasis added).

The third prong of this test remains a viable inquiry when applying the

inevitable discovery doctrine in Wisconsin because the *Jackson* court expressly stated that "requiring proof in all cases of active pursuit at the time of the constitutional violation risks exclusion of evidence that the State might demonstrate that it inevitably would have discovered." *Jackson*, 2016 WI 56, ¶ 65 (emphasis in original). It is clear from the language that the *Jackson* court chose to emphasize that proving the existence of an alternate line of investigation independent of the misconduct is not required "in all cases," however, this implies—if not expresses—that it is still a relevant inquiry in ***most*** cases. If it was no longer to be considered, the *Jackson* court would have so stated, yet it chose not to. In fact, the *Jackson* court also observed that "[d]emonstrated historical facts proving **active pursuit of an alternative line of investigation** at the time of the constitutional violation certainly help the State to substantiate its claim that discovery of otherwise excludable evidence was inevitable." *Id*. (emphasis added).

As noted above, it is clear that law enforcement officers were pursuing no line of investigation ***independent*** of Mr. Gore's alleged underlying misconduct. From moment one, the investigation in this case was about Mr. Gore's ability to safely operate his motor vehicle. The investigation pursued by the law enforcement officers was designed to look for evidence of Mr. Gore's alleged impairment. This was never a case about investigating an operating while revoked violation; a criminal kidnapping; a transportation of a scheduled substance across state lines; *etc*. **The tools, techniques, and methods employed by law enforcement officers never involved investigative techniques apart from the officers' training regarding drunk driving investigation methodologies**. This case never involved an independent search warrant on another matter, nor did it involve independent testimony of a confidential informant along some lines unrelated to the drunk driving investigation, *etc*. Every aspect of every moment of the investigation of this case was, in some form or manner, tied directly to a line of investigation involving the search for proof of Mr. Gore's operating a motor vehicle while impaired.

It is this very inseparability from that single line of investigation which causes the lower court's application of the inevitable discovery doctrine to fail. Thus, this Court should find that the inevitable discovery doctrine does not apply because the line of investigation undertaken to obtain a sample of Mr. Gore's blood was utterly indivisible from the entire line of investigation preceding its seizure. As Mr. Gore has averred all along, the clear, unequivocal, and unambiguous *Blackman*

violation present in the instant case must result in suppression of the State's blood test result.

### 3. Common Sense Dictates Mr. Gore's Approach or Evidence Would *Never* Be Suppressed Under *Blackman*.

There exists in this case a significant factor which the lower court overlooked which, when taken to its logical conclusion, would altogether eviscerate the *Blackman* holding, namely: probable cause to issue a warrant will always be able to be found in *Blackman*-like cases. If one can always conclude there will be probable cause to issue a warrant in *Blackman*-type situations, then one must rhetorically ask: What good is it to even have the *Blackman* decision "on the books"?

More specifically, § 343.305(3)(ar)2. provides:

> If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law, the officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose [of determining the presence or quantity of alcohol or drugs in their system].

Wis. Stat. § 343.305(3)(ar)2. (2021-22).

Interestingly, if a person refuses to submit to a test under the preceding statute, they may be arrested for an alcohol or drug related traffic violation, even if no signs of impairment are ever observed. *Id.* Upon such a refusal, a law enforcement officer may apply for a warrant and aver in an affidavit that the individual refused testing, from which proof of consciousness of guilt may be inferred, and a warrant may then issue based upon the fact of the accident and the refusal itself. This makes the government's obtaining of a blood sample under the circumstances of this case and those identified in *Blackman* an inevitability in *every case*. Section 343.305(3)(ar)2. creates as circuitous, bootstrapping, and twisted a path as any conundrum could ever follow. On the one hand, the person could submit to the requested test in a fashion which the *Blackman* court has already concluded is unconstitutionally coercive, or the person could refuse the test, thereby guaranteeing (if one adopts the lower court's logic in this case) that a warrant will

be issued to obtain a sample of the person's blood anyway. To borrow from an old saw, the person is "damned if he does and damned if he doesn't." Mr. Gore must ask: How is this fundamentally fair or constitutionally just? This Court should reverse the decision of the court below if for no other reason than to interrupt such an absurdly vicious circle.

#### 4. Evidence That the State Already Attempted to Avoid the *Blackman* Court's Remedy in Multiple Ways Ought to Reflect Something About the Strength of the *Blackman* Court's Holding.

Another among the considerations for preserving the integrity of the *Blackman* holding is the simple fact that the holding of the *Blackman* court is as stalwart as a holding can be made. Put another way, the State already attempted "seven ways to Sunday" (to borrow from an old adage) to avoid suppression as a remedy for a *Blackman* violation, and it failed in every instance.

As part of its argument in *Blackman*, the State proffered all of the following in an effort to preclude Blackman's blood test result from being suppressed: (1) an individual may be arrested after a refusal to submit to a test under subsec. (3)(ar)2., and then can be re-requested to submit to a test under § 343.305(3)(a), after which a warrant may be pursued; (2) the person's operating privilege may permissibly be revoked for a refusal under subsec. (3)(ar)2. itself; (3) Mr. Blackman freely and voluntarily consented to the test; (4) even if Mr. Blackman's consent was not freely and voluntarily given, the good faith exception to the exclusionary rule would save the test result from suppression; (5) the exclusionary rule was not designed to deter the legislature; and (6) the exclusionary rule's deterrent effect would not be served by suppressing the blood draw in Mr. Blackman's case. *Blackman*, 2017 WI 77, ¶¶ 46, 48, 54, 69, & 72. Without hesitation, **every one of the State's arguments was rejected** by the *Blackman* court. *Id*. at ¶¶ 83-85.

Mr. Gore's point in describing the foregoing challenges undertaken by the State in an effort to preserve its use of Blackman's blood test result is this: If so ardent an attack on Blackman's position could not survive the underlying problem inherent in tests gathered pursuant to § 343.305(3)(ar)2., is it really possible that the *Blackman* court would have addressed a seventh, inevitable discovery attack by

stating something akin to "Despite all these problems, we're going to let the test result in anyway?" Mr. Gore doubts this outcome was likely given all of the problems identified above. Trapping an individual in the Möbius loop of a statute such as § 343.305(3)(ar)2. does not serve the interests of justice and compels this Court to remedy the error made by the court below.

### 5. The Lower Court Was Not in a Position to Make a Conclusion About Whether a Warrant Would Inevitably Be Obtained.

It is remarkable that the lower court would, as part of its reasoning, make the conclusory statement that a "warrant would have been granted" in this case. P-App at 108. This assertion is problematic for several reasons. First, it makes an implied assumption that the magistrate who would have been asked to issue the warrant would have been presented with the same facts upon which it based its conclusion. The lower court in this case had the benefit of hindsight in the sense that it was faced with an extremely well-developed record in which multiple evidentiary hearings had been held (during which there had been far more extensive examination of the witnesses than any affidavit made in support of a warrant could ever hope to include), and after which multiple briefs had been filed. It is only with this hindsight that the lower court concluded that the warrant would be an inevitability.

Second, the lower court is substituting its judgment premised upon the facts of which ***it was aware*** for the judgment of another court for which no one can predict the facts of which it would be made aware. There are simply far too many variables which are unknown in this case for any court to draw an absolute conclusion that a warrant would certainly have been issued to obtain a blood sample in this matter. Not only is it unknown which of the many officers involved would have applied for the warrant, but because each of them had a different level of familiarity of the facts of the case, what each would have specifically averred is unclear because they were not all exposed to the same facts. It is equivalent to a "roll of the dice" to know what could have been averred by any one law enforcement officer. Similarly, there is also no certainty with respect to a judge drawing the same conclusion regarding probable cause to issue a warrant as the court below—with the benefit of hindsight—did. Judicial determinations regarding warrant applications are premised on the facts before a court ***at the time***, and may not later be bootstrapped

by evidence discovered subsequent to the issuance of a warrant to justify the initial determination to issue the warrant. *See, e.g., State v. Ford*, 211 Wis. 2d 741, 750, 565 N.W.2d 286 (Ct. App. 1997); *see also, State v. Swanson*, 164 Wis. 2d 437, 450-51, 475 N.W.2d 148 (1991).

## CONCLUSION

Because an irrefutable violation of *Blackman* occurred when Mr. Gore was read the information contained on the Informing the Accused form, and furthermore, because the Wisconsin Supreme Court has already deemed this information to be unconstitutionally coercive, the blood test result in his case should have been suppressed, notwithstanding the circuit court's application of the inevitable discovery doctrine since (1) there was no line of investigation pursued in this matter which was independent of the line of investigation that led to the blood seizure, and (2) the *Blackman* court did not find that the test result survived in Blackman's case despite the numerous attempts by the State to salvage the same.

Dated this 1st day of April, 2023.

Respectfully submitted,

**MELOWSKI & SINGH, LLC**

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## CERTIFICATION OF LENGTH

I hereby 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. The text is 13-point type and the length of the brief is 4,724 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 1st day of April, 2023.

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