STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Andrew C. Cook
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Michael C. Sanders
Assistant Attorney General
sandersmc@doj.state.wi.us
608/266-0284
FAX 608/266-9594

November 5, 2015

Diane M. Fremgen
Clerk, Wisconsin Court of Appeals
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: **State of Wisconsin v. David W. Howes**
Case No. 2014AP1870-CR
District IV

Dear Ms. Fremgen:

The State submits this supplemental letter brief pursuant to the court's order.

In *State v. Padley*, 2014 WI App 65, ¶ 40, 354 Wis. 2d 545, 849 N.W.2d 867, this court determined that Wisconsin's implied consent law "does not authorize searches," but only "authorizes police to require drivers to choose between giving actual consent to a blood draw, or withdrawing 'implied consent' and suffering implied-consent-law sanctions." This court concluded that the law authorizes a blood draw only when a person gives "actual" consent when an officer requests a sample. *Id.* ¶ 27.

If *Padley* is correct, the circuit court properly granted Howes' motion to suppress evidence because his blood was drawn when he was unconscious, and unable to give "actual" consent. And Wis. Stat. § 343.305(3)(ar) and (b), which authorize the taking of samples from persons who are incapable of giving "actual" consent, are unconstitutional.

However, *Padley's* interpretation is contrary to the statutory language, which refers to "compliance" with a request, Wis. Stat. § 343.305(3)(a), (am), (ar) 1., (ar) 2, and withdrawal of consent, § 343.305(3)(ar)1., (ar) 2., (b), but not to giving consent

when an officer requests a sample. "This statutory scheme does not contemplate a choice, but rather establishes that a defendant will suffer the consequences of revocation should he refuse to submit to the test after having given his implied consent to do so. The defendant's consent is not at issue." *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 624, 291 N.W.2d 608 (1980).

Padley's interpretation is also contrary to numerous Wisconsin cases. In *State v. Disch*, 129 Wis. 2d 225, 385 N.W.2d 140 (1986), blood was drawn from a driver who was unable to give or withdraw consent. *Id.* at 234, 236. The supreme court concluded that because the driver was unconscious, "the blood test was properly taken and that there is no justification for suppression of the test results." *Id.* at 238.

In *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, the supreme court concluded that an officer need only "use reasonable methods that reasonably convey" the information needed for a person to understand the implied consent law. *Id.* ¶ 23, Whether Piddington, who was deaf, subjectively understood the warnings, was "irrelevant." *Id.* ¶ 32 n.19.

The supreme court presumably understood the Fourth Amendment when it decided these cases, but it found blood draws proper under the consent exception to the warrant requirement even if the driver could not understand the Informing the Accused information, or was unconscious. If *Padley* is right, *Disch* and *Piddington* are wrong.

In *Proegler*, this court noted that consent "is not optional, but is an implied condition precedent to the operation of a motor vehicle on Wisconsin public highways." *Proegler*, 95 Wis. 2d at 623 (citation omitted). This court recognized that "the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions," but concluded that "the concept of an informed consent to search and seizure under the fourth amendment has been rejected." *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, (1973)).

In *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) (abrogated on other grounds by *Missouri v. McNeely*, 569 U.S. __, 133 S.Ct. 1552 (2013)), the supreme court recognized that "the Fourth Amendment warrant requirement is relaxed when the activity at issue constitutes a serious risk to public safety," and that "persons engaging in such activities have a reduced expectation of privacy."

Id. at 540 (citing *Skinner v. Railway Executives' Assn.*, 489 U.S. 602, 627). The court explained:

> Likewise, in the context of driving on public highways, public safety concerns reduce a driver's expectation of privacy. In fact, the Wisconsin legislature explicitly recognizes this reduced expectation of privacy. It has concluded that all drivers lawfully arrested for drunk driving have impliedly consented to blood sampling, sec. 343.305(2), Stats., and that warrantless blood samples may be taken from unconscious drivers based solely on probable cause. Section 343.305(3)(b), Stats.

Id. at 541 (footnotes omitted).

In *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, the defendant argued that his consent was coerced in violation of the Fourth Amendment, because the law "conditions receipt of one constitutional right (the right to travel) in return for the relinquishment of another constitutional right (the Fourth Amendment right to be free from governmental searches and seizures)." *Id.* ¶¶ 1, 8. This court concluded that a person's implied consent is sufficient to authorize a search under the Fourth Amendment. *Id.* ¶¶ 8-19.

This court rejected Wintlend's argument that consent occurs when an officer reads the Informing the Accused form to a person, as "directly contrary to the specific language found in *Neitzel*," in which "our supreme court has declared that when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests." *Id.* ¶12 (citing *State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980)).

This court concluded that "any would-be motorist applying for a motor vehicle license is not coerced, at that point in time, into making the decision to get a license conditioned on the promise that if arrested for drunk driving, the motorist agrees to take a test or lose the license. The choice is there. If the would-be motorist decides to dissent, he or she does not have to get a license to exercise the constitutional right to travel." *Id.* ¶ 13. The court noted that the same would apply if the law were interpreted as providing that "any time a person drives a motor vehicle on our highways, at that time, consent is obtained." *Id.* ¶ 16.

This court explained that the issue under the Fourth Amendment is whether the intrusion the implied consent law authorizes is independently reasonable.

Id. ¶ 10 (citing *Wyman v. James*, 400 U.S. 309, 318, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971)). This court concluded that "there is a compelling need to get intoxicated drivers off the highways," and accordingly, "[t]he implied consent law is for a compelling purpose and is not overly intrusive. It is not unreasonable." *Id.* ¶ 18.

The State is aware of three states that have squarely addressed the constitutionality of "unconscious driver" provisions after *McNeely*, in which the Supreme Court considered "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *McNeely*, S.Ct. at 1556. The Court concluded "consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances." *Id.*

Two states have found "unconscious driver" provisions unconstitutional. In *State v. Dawes*, 2015 WL 5036690 (Kan. Ct. App. Aug. 21, 2015), the court concluded that the provision creates a categorical exception to the warrant requirement, and "[u]nder *McNeely*, implied consent that was not revoked because the suspect was unconscious cannot do away with the warrant requirement for a blood draw." *Id.* at *5.

In *Ruiz v State*, 2015 WL 5626252 (Tex. App. Aug. 27, 2015), the court found the "unconscious driver" provision unconstitutional because an unconscious driver "was unable to give his consent freely and voluntarily, or have the opportunity to revoke such consent." *Id.* at *3.

This court should decline to follow *Dawes* or *Ruiz* because in each case, the court assessed "unconscious driver" provisions based in part on the courts' interpretation of *McNeely* as prohibiting all per se exceptions to the warrant requirement. *Dawes*, 2015 WL 5036690 at * 5; *Ruiz*, 2015 WL 5626252 at *4.

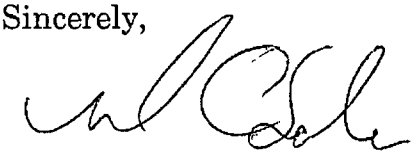
This court has recognized that "*McNeely* is [not] a consent case," and that it "say[s] nothing about the constitutionality of a statute that authorizes a law enforcement officer to require a driver to make a choice about consent." *Padley*, 354 N.W.2d at 575.

One State has upheld an "unconscious driver" provision, noting that the driver did not object to or resist a blood draw, and concluding that "[t]he fact that she was allegedly unconscious when the officer read her the advisory does not

effectively operate as a withdrawal of her consent. Therefore, [the driver's] statutorily implied consent was effective at the time of the warrantless blood draw as it was justified by Idaho's implied consent statute." *Bobeck v. Idaho Transp. Dept.*, 2015 WL 5602964 *5 (Idaho Ct. App. Sept. 24, 2015); *Sims v. State*, 2015 WL 4997391 at * 6 (Idaho Ct. App. Aug. 24, 2015).

The issue under the law is not consent, but whether a person withdraws the consent the person is deemed to have given. Because Wisconsin courts have upheld the constitutionality of the law understanding that this is the proper reading of the law, this court should reverse the circuit court's order that suppressed evidence and found § 343.305(3)(ar) and (b) unconstitutional.

Sincerely,



Michael C. Sanders
Assistant Attorney General

MCS:cjh

c: Mark Eisenberg
Counsel for Defendant-Appellant

Ismael Ozanne
Dane County District Attorney

Certificate of Compliance with Form and Length Requirements

In accord with this court's order, I certify that this memorandum, prepared using a proportional serif font, has a length of 1,500 words.

Dated this 5th day of November, 2015.

Michael C. Sanders
Assistant Attorney General