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November 11, 2015

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

RE: State of Wisconsin v. David W. Howes
Circuit Court Case No. 13CF1692
Appeal No. 2014AP1870-CR, District IV

Dear Ms. Fremgen:

The defendant-respondent, David W. Howes, submits this supplemental letter brief pursuant to the Court's order.

On November 9, 2015, the Respondent received the November 5, 2015, letter from the State in which the State supplemented the record to support its position that the implied consent statute acts as an exception to the warrant requirement under the Fourth Amendment to the United States Constitution. The State cites the same cases and makes the same argument that it made at oral argument.

McNeely has already answered that question when it held that per se exceptions to the warrant requirement are prohibited, because whether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case based on the totality of circumstances. Missouri v. McNeely, 133 S.Ct. 1552, 1563, 185 L.Ed.2d 696 (2013).

In its letter of November 5th, the State ignores McNeely and cites to cases that were decided prior to McNeely. Those cases are no longer good law. The State admits that two states have recently concluded that unconscious driver provisions in state statutes authorizing implied consent are unconstitutional. It cites State v. Dawes, 2015 WL 5036690 (Kan. Ct. App. 8/21/2015), and Ruiz v. State, 2015 WL 5626252 (Tex. App. 8/27/2015).

The State then cites Bobeck v. Idaho Transp. Dept., 2015 WL 5602964 (Idaho Ct. App. 9/24/2015), that upheld an unconscious driver provision of an implied consent law because the driver did not object to or resist a blood draw at the time the blood was drawn.

Bobeck was decided in error. Prior to Bobeck, the Idaho Supreme Court ruled in Idaho v. Wulff, 157 Idaho 416 (2014), that the application of an implied consent statute as a per se exception to the warrant requirement as to blood draws violates the Fourth Amendment. It held:

> "Irrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent. Voluntariness has always been analyzed under the totality of the circumstances approach: 'Whether a consent to a search was in fact voluntary' . . . is a question of fact to be determined from the totality of all the circumstances." Id. at 422.

It continued:

> ". . . A holding that the consent implied by statute is irrevocable would be utterly inconsistent with the language in McNeely denouncing categorical rules that allow warrantless forced blood draws." Id.
>
> ". . . We read McNeely as prohibiting all per se exceptions to the warrant requirement. This conclusion is consistent with other states that have considered the issue." Id. at 423.

There are many states that have considered this issue other than Kansas and Texas. See Byars v. State, 336 P.3d 939 (Nev. Slip Op. 2014) (An irrevocable consent from implied consent statute does not make the search reasonable under the Fourth Amendment); State v. Wells, 2014 WL 497356 (Tenn. Crim. App. 2014) (Privilege of driving does not alone create a consent for forcible blood draw. The State needs a warrant or an exception to the warrant requirement for it to be reasonable); State v. Fierro, 853 N.W.2d 235 (S.D. 2014) (Implied consent standing alone is not an exception to the warrant requirement); State v. Butler, 302 P.3d 609 (Ariz. 2013) (Fourth Amendment requires arrestee's consent to be voluntary, independent of the implied consent, to justify a warrantless blood draw); Williams v. State, 167 So.3d 483, 490, 491 (Dist. Ct. App. Fla. 2015) (statutory implied consent to breath alcohol test pursuant to implied consent law was not equivalent to the Fourth Amendment consent for purposes of consent exception to the search warrant requirement. Allowing implied consent statutes to constitute a per se categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold that voluntariness must be determined based on the totality of the circumstances).

In the Court's Order of September 29, 2015, the parties were asked to address whether the "statutorily created consent of an unconscious suspect satisfies the Fourth Amendment as it relates to the voluntary consent exception to the warrant requirement." It is clear from the cases cited herein that it does not. The Wisconsin implied consent statute is unconstitutional because it makes a blanket exception to the Fourth Amendment warrant requirement which is not permissible under McNeely. Judge Markson ruled appropriately when he held that the statute was unconstitutional. This Court should uphold that decision.

Very truly yours,

EISENBERG LAW OFFICES, S.C.

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MAE/lmd
cc: AAG Michael C. Sanders
DA Ismael R. Ozanne
David W. Howes

CERTIFICATION OF COMPLIANCE WITH FORM AND LENGTH REQUIREMENTS

In accord with this Court's order, I certify that this letter brief, prepared using a proportional serif font, has a length of 836 words.

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