Appeal No. 2014AP1870-CR **Cir. Ct. No. 2013CF1692**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

DAVID W. HOWES,

DEFENDANT-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

This appeal presents a single recurring issue: whether provisions in Wisconsin's implied consent law authorizing a warrantless blood draw from an *unconscious* suspect violate the Fourth Amendment to the United States Constitution. More specifically, the issue is whether the "implied consent," deemed to have occurred before a defendant is a suspect, is voluntary consent for purposes of the consent exception to the Fourth Amendment's warrant requirement.

As we shall see, the parties agree on how the implied consent statute operates, at least with respect to unconscious suspects. As to unconscious suspects, WIS. STAT. § 343.305 authorizes police to take blood samples without a warrant from "[a] person who is unconscious or otherwise not capable of

withdrawing consent," assuming other criteria are met indicating intoxicated driving.[1] The parties seem to agree that this statutory justification for warrantless blood draws is a categorical exception to the warrant requirement. They disagree on whether implied consent satisfies the Fourth Amendment.

If this case affected only unconscious suspects and if we were writing on a clean slate, we likely would not certify it. However, a decision here will necessarily implicate the implied consent law as it applies to conscious suspects. And, we believe, there is unclear and conflicting case law that can only be clarified and set straight by the supreme court.

To simplify this certification, we ignore some parts of the implied consent law. For example, we speak only in terms of *blood* testing for *alcohol*, even though the law also covers breath and urine testing and testing for controlled substances and other drugs. Similarly, we ignore the commercial motor vehicle portions of the law.

BACKGROUND

For purposes of the legal issue presented, very few facts matter, and they are uncontested.

Police were dispatched to the scene of an accident involving a motorcycle and a deer. When police arrived, the deer was dead and the driver of the motorcycle, Howes, was seriously injured and unconscious. Howes smelled of alcohol, and he was transported to a hospital. While at the hospital, and while

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Howes was unconscious and hooked up to a respirator, an officer directed medical personnel to draw a blood sample. The police did not obtain a warrant, but instead relied on the statutory authority for a warrantless blood draw found in WIS. STAT. § 343.305(3)(ar). That is, the police relied on Howes' "implied consent" to the blood draw. Testing revealed a blood alcohol content of .11.

Howes was charged with operating a motor vehicle while intoxicated, fourth offense, and operating a motor vehicle with a prohibited alcohol concentration, fourth offense. Howes moved to suppress, arguing that statutory implied consent is not voluntary consent within the meaning of applicable Fourth Amendment law.

The circuit court granted Howes' suppression motion. The court relied on our decision in ***State v. Padley***, 2014 WI App 65, ¶26, 354 Wis. 2d 545, 849 N.W.2d 867, *review denied*, 2014 WI 122, 358 Wis. 2d 604, 855 N.W.2d 695, where, in the context of a conscious suspect, we drew a distinction between statutory implied consent and actual voluntary consent for Fourth Amendment purposes. Looking to ***Padley***, the circuit court here seemed to reason that, because Howes was unconscious, he could not have given actual voluntary consent. The circuit court likened statutory implied consent to the sort of categorical exigent circumstances exception found unacceptable in ***Missouri v. McNeely***, 569 U.S. ____, 133 S. Ct. 1552 (2013). The circuit court opined that its rejection of the State's argument "should not undermine the prevention and prosecution of drunk driving" because police generally obtain actual consent from conscious suspects and, as to unconscious suspects, police can, with relative ease, obtain a warrant or show true exigent circumstances.

DISCUSSION

The parties dispute whether provisions in Wisconsin's implied consent law—permitting warrantless blood alcohol testing of *unconscious* persons—violates the Fourth Amendment to the United States Constitution. Before setting forth the parties' arguments and describing related issues, we pause to summarize pertinent parts of Wisconsin's implied consent law and well-established law regarding consent as an exception to the Fourth Amendment's warrant requirement.

A. The Statutory Scheme

The implied consent law provides that a person who drives a motor vehicle on a Wisconsin public highway is deemed to have consented to blood alcohol testing when specified circumstances are present:

> Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her ... blood ... for the purpose of determining the presence or quantity in his or her blood ... of alcohol ... when requested to do so by a law enforcement officer under [circumstances specified elsewhere in the implied consent statute].

WIS. STAT. § 343.305(2).

The specified circumstance applicable here is found in WIS. STAT. § 343.305(3)(ar)1. This subsection applies when a suspect has operated a motor vehicle involved in an accident causing substantial bodily harm to any person (here, Howes himself) and an officer has detected the presence of alcohol on the suspect. *See* ***id.*** ("If a person is the operator of a vehicle that is involved in an accident that causes substantial bodily harm ... to any person, and a law enforcement officer detects any presence of alcohol ....").

When these circumstances are present *and the suspect is unconscious*, the statute authorizes a warrantless blood draw. More specifically, the statute provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples ... may be administered to the person." WIS. STAT. § 343.305(3)(ar)1.

In this certification, we use the term "unconscious" as shorthand for the broader category of persons who are "unconscious or otherwise not capable of withdrawing consent."[2]

B. The Consent Exception To The Warrant Requirement

A blood draw conducted at the direction of the police is a search subject to the Fourth Amendment. ***Schmerber v. California***, 384 U.S. 757, 767 (1966). Warrantless searches are unlawful, absent certain established exceptions, including the exception for "searches conducted pursuant to voluntarily given consent." ***State v. Williams***, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834.

"To determine if the consent exception is satisfied, [courts] review, first, whether consent was given in fact ... and, second, whether the consent given was voluntary." ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430.

[2] There are two other unconscious suspect provisions, WIS. STAT. § 343.305(3)(ar)2., which applies when "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," and § 343.305(3)(b), which applies when an officer "has probable cause to believe that the person has violated [a drunk driving law]" and to certain commercial motor vehicle situations. The parties seemingly agree that a decision in this case will necessarily cover these two other unconscious suspect provisions.

Whether a suspect has given consent is, at least typically, a question of fact. *See, e.g.*, ***State v. Phillips***, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998) (upholding circuit court's factual determination that the defendant consented to the search of his bedroom). Pertinent here, perhaps, consent to a search for Fourth Amendment purposes "need not be given verbally; it may be in the form of words, gesture, or conduct." ***Id.*** at 197 (officers asked to search defendant's bedroom and defendant did not respond verbally, but rather responded by opening the bedroom door, walking in, and handing an item to police).

Whether the consent a suspect has given is voluntary is a mixed question of fact and law. ***Id.*** at 189, 195. Reviewing courts "will not upset the circuit court's findings of evidentiary or historical fact unless those findings are contrary to the great weight and clear preponderance of the evidence." ***Id.*** at 195. However, reviewing courts "independently apply the constitutional principles to the facts as found to determine whether the standard of voluntariness has been met." ***Id.***

The voluntariness of consent does not hinge on a single factor or require any particular knowledge on the part of the person giving consent. For example, voluntary consent does not require knowledge of the right to refuse. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 249 (1973).[3] Rather, the voluntariness

[3] We choose not to specify the cases here, but we note that Wisconsin cases sometimes loosely talk in terms of implied consent being *knowing*. That seems misleading. For purposes of satisfying statutory requirements, we look to the officer's actions, not the suspect's understanding. *See* ***State v. Piddington***, 2001 WI 24, ¶32 n.19, 241 Wis. 2d 754, 623 N.W.2d 528 ("Whether Piddington subjectively understood the warnings is irrelevant. Rather, whether there was compliance with § 343.305 remains focused upon the objective conduct of the law enforcement officer or officers involved."). And, for Fourth Amendment purposes, knowledge is a factor, but not a requirement. *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 222-23, 248-49 (1973) (a person's knowledge of a right to refuse to give consent is not required, but is just one factor to consider in determining the voluntariness of consent from all of the circumstances).

of consent is determined by considering the totality of the circumstances. ***Id.***; *see also* ***Artic***, 327 Wis. 2d 392, ¶32.

The voluntariness inquiry emphasizes whether consent was the product of duress or coercion:

> When a suspect is asked to make a statement or consent to a search, the suspect's response must be "an essentially free and unconstrained choice," not "the product of duress or coercion, express or implied." The determination of "voluntariness" is a mixed question of fact and law based upon an evaluation of "the totality of all the surrounding circumstances." Consent is not voluntary if the state proves "no more than acquiescence to a claim of lawful authority."

Artic, 327 Wis. 2d 392, ¶32 (quoted sources omitted).

Keeping in mind this general Fourth Amendment consent law, we turn to the parties' arguments and other topics implicated by the issue presented.

C. The Parties' Agreement As To The Meaning Of The Unconscious Suspect Provisions

The parties agree on the meaning of the implied consent law as it applies to *unconscious* suspects. The parties agree, for example, that the particular subsection at issue here, WIS. STAT. § 343.305(3)(ar)1., when read in conjunction with other portions of the implied consent law, authorizes a warrantless blood draw from an unconscious suspect when that suspect has been involved in an injury-causing vehicle accident and the officer has detected the presence of alcohol on the suspect.

The parties further agree that the statutory scheme ties implied consent to driving on a Wisconsin highway, rather than to applying for a driver's license. The State acknowledges that some prominent cases speak in terms of

implied consent occurring when a driver *applies for a license*, but the State maintains, nonetheless, that the correct view is that implied consent occurs when a driver operates a vehicle on a Wisconsin highway because this is what WIS. STAT. § 343.305(2) says. As it applies to unconscious drivers, this position seems correct. The implied consent subsection reads: "Any person who ... drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent ...." ***Id.*** Plainly, the legislature ties implied consent to operation of a vehicle, not to the license application process.

We qualify our agreement with the State on this point because WIS. STAT. § 343.305(2) also ties consent to a request when police are dealing with a conscious suspect. The subsection reads: "[A] person ... is deemed to have given consent ... *when requested to do so* by a law enforcement officer ...." (Emphasis added.) This request requirement is not applicable when a suspect is unconscious. *See* ***State v. Disch***, 129 Wis. 2d 225, 233, 385 N.W.2d 140 (1986) (holding that it would be absurd to construe the statute as requiring a request when "a person is unconscious or otherwise not capable of withdrawing consent"). The implied consent law then specifies the circumstances in which an "officer may request" blood alcohol testing. *E.g.*, § 343.305(3)(ar). We make note of this request requirement because it indicates that, when it comes to conscious drivers, there is no consent until there is a request. So far as we can tell, the State's analysis fails to take into account the request requirement.

To recap, we understand the parties to agree on the proper interpretation of the statute as applied to unconscious suspects. They agree that the unconscious suspect provisions, working in conjunction with other portions of the implied consent law, authorize a warrantless blood draw based on the legislative declaration that unconscious suspects have given "implied consent" to a

blood draw when they, at an earlier time, chose to drive on a Wisconsin highway. The parties disagree as to whether this statutory scheme is constitutional.

D. Overview Of Howes' Argument

Howes argues that the unconscious suspect provisions are inconsistent with Fourth Amendment jurisprudence governing the voluntariness of consent. Howes focuses on what appears to be a general requirement that exceptions to the warrant requirement must be identified case by case, rather than by applying categorical exceptions, sometimes referred to as per se exceptions. United States Supreme Court cases like ***Schneckloth*** and Wisconsin cases like ***Artic*** seemingly require this approach. *See* ***Schneckloth***, 412 U.S. at 246-49; ***Artic***, 327 Wis. 2d 392, ¶32.

Howes takes the position that the United States Supreme Court's decision in ***McNeely***, 133 S. Ct. 1552, is more directly on point. According to Howes, ***McNeely*** effectively controls here because, in the context of a challenge to a warrantless blood draw, ***McNeely*** stands for the proposition that the exceptions to the warrant requirement cannot be satisfied by per se formulas. Building on this theme, Howes argues that Wisconsin's implied consent law, as it applies to unconscious suspects, is unconstitutional because it contains a per se consent formula that does not look to individual circumstances.

Turning more specifically to the two-step voluntary consent inquiry, we are uncertain whether Howes contests the first step, consent in fact. Howes argues that he did not actually consent because he was unconscious. But Howes does not directly take up whether implied consent is consent in fact.

What is clear is that Howes takes on the second step, "whether the consent given was voluntary." *See* ***Artic***, 327 Wis. 2d 392, ¶30. According to Howes, the unconscious suspect provisions are "the functional equivalent of the [sort of] categorical rule" rejected in ***McNeely***.

It may be that Howes goes a step further and argues that ***McNeely*** directly controls here because it contains a broad holding prohibiting all per se exceptions to the warrant requirement. According to Howes: "If the ***McNeely*** court considered implied consent a valid per se exception to the warrant requirement, there would have been no need to draft the opinion in the first place—the Court could have just relied on Missouri's analogous 'implied consent' involved in that case."[4]

E. Overview Of The State's Argument

Clarity is served by understanding that the State does not rely on some sort of general reasonableness argument. For example, one might argue that there is a compelling public safety need to identify dangerous drunk drivers and, thus, it is simply reasonable to require blood alcohol testing when certain criteria are met, such as evidence that an intoxicated and currently unconscious driver caused an accident with resulting serious personal injury. Although such an argument might have some common-sense appeal, it does not seem to comport with Fourth Amendment jurisprudence and it is not the argument the State makes

[4] We assume Howes would acknowledge that there is "a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an [individualized] assessment." *See* ***Missouri v. McNeely***, 569 U.S. ____, 133 S. Ct. 1552, 1559 n.3 (2013) (citing automobile searches and searches of a person incident to a lawful arrest as recognized categorical exceptions). Regardless what Howes might say on this topic, the State does not argue that implied consent is this type of traditional exception.

here. Rather, the State is relying on a particular established exception to the warrant requirement: voluntary consent.

Also notable, the State does not discuss the sufficiency of implied consent in terms of the generally applicable two-step voluntary consent inquiry set forth in Fourth Amendment case law. Rather, the State seemingly takes the position that the implied consent law creates a categorical exception to the warrant requirement that has already been approved by the supreme court and the court of appeals. That is, the State takes the position that it is already settled law that *all* persons who drive on a Wisconsin highway have consented in fact and have consented voluntarily to blood alcohol testing if, later, there is evidence of specified circumstances involving intoxicated driving.

We discuss some of the case law the State relies on in greater depth below. For now, we quote just one prominent case, ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980). In the course of resolving a non-Fourth Amendment issue, the ***Neitzel*** court wrote:

> It is assumed that, at the time a driver made application for his license, he was fully cognizant of his rights and was deemed to know that, in the event he was later arrested for drunken driving, he had consented, by his operator's application, to chemical testing under the circumstances envisaged by the statute.

Id. at 201. The State reads this language as saying implied consent is always voluntary consent in fact.[5]

[5] We are uncertain whether the State would allow for unusual circumstances, such as when a person is directed at gun point to drive a vehicle.

Responding to Howes' reliance on ***McNeely***, the State asserts that "***McNeely*** does not govern this case" because it "concerns exigency, not consent." According to the State, ***McNeely*** "*does not prohibit categorical exceptions* to the warrant requirement" (emphasis added). The State points out that the question expressly resolved in ***McNeely*** was limited:

> The question presented here is 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, 133 S. Ct. at 1556. According to the State, the ***McNeely*** court seemingly cited with approval state statutory implied consent schemes like Wisconsin's. This is a reference to a comment by a four-justice plurality in ***McNeely*** that the "broad range of legal tools [states have] to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws" includes "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." ***Id.*** at 1566.

Notably, the State contends that the same "implied consent" subsection that supplies consent for unconscious suspects also supplies consent for conscious suspects. In the State's view, the very same consent rule applies to both conscious and unconscious suspects. We disagreed in ***Padley***, 354 Wis. 2d 545, and we discuss that decision further below. For now, it is sufficient to say that the State contends that ***Padley*** must be overruled or deemed void to the extent it conflicts with prior cases.

With this overview of the parties' positions and arguments in mind, we proceed to discuss what we perceive to be the most significant cases and issues.

*F. **McNeely** Set The Scene For A New Focus On Consent*

The degree to which ***McNeely*** supports Howes' Fourth Amendment argument may be debatable, and we discuss that no further. But what does seem clear is that ***McNeely*** set the scene for the present dispute over consent.

Prior to ***McNeely***, as to both conscious and unconscious suspects, the consent exception to the warrant requirement was seldom an issue because the separate *exigency* exception was easily satisfied. In Wisconsin, like most other states, the dissipation of alcohol from a person's bloodstream, by itself, had been recognized as a per se exigency justifying a warrantless blood draw, assuming other requirements were met. *See* ***State v. Bohling***, 173 Wis. 2d 529, 547-48, 494 N.W.2d 399 (1993). Thus, from a Fourth Amendment perspective, this per se exigency nearly always provided a basis to proceed with a warrantless blood draw, regardless of consent.

In 2013, ***McNeely*** overrode ***Bohling***. After ***McNeely***, exigency must be determined case by case based on the totality of the circumstances. *See* ***State v. Reese***, 2014 WI App 27, ¶¶17-18, 353 Wis. 2d 266, 844 N.W.2d 396, *review denied*, 2015 WI 47, __ Wis. 2d __, 862 N.W.2d 898. With this easily met per se exigency rule gone, attention turns to consent.

*G. **Padley** And Muddled Case Law Regarding When Consent Is Given*

As indicated, the parties' dispute implicates our 2014 ***Padley*** decision. According to the State, if ***Padley*** correctly analyzed how statutory

implied consent operates, then that analysis suggests that Howes should prevail here. But the State contends that ***Padley*** was wrongly decided because ***Padley*** conflicts with prior case law. Thus, we spend some time unpacking the relationship between ***Padley*** and the consent issue we certify.

Padley involved an injury-causing accident and a *conscious* suspect. ***Padley***, 354 Wis. 2d 545, ¶¶1, 4-5, 8, 10-11. After the accident, Padley was taken to a police department, where an officer read to her from an "Informing the Accused" form. Padley indicated to police that she would submit to a blood draw. ***Id.***, ¶¶10-11. Blood was drawn without a warrant. When Padley later challenged the warrantless blood draw, the State's proffered justification for the blood draw was consent. Consistent with its position here, the State argued in ***Padley*** that the consent that justified the warrantless blood draw was the "implied consent" Padley gave prior to the accident, rather than the consent given when Padley indicated to police that she would submit to the blood draw.

Using as a starting point the State's view, then and now, that the consent that matters is implied consent, not the consent a conscious suspect might give directly to police, Padley made much the same argument that Howes makes here. Padley argued that statutory authorization for a blood draw based on implied consent is unconstitutional because it is based on an impermissible categorical exception—that is, an exception that applies without regard to the circumstances of the particular suspect. *See* ***id.***, ¶32. We rejected this Fourth Amendment argument by rejecting Padley's assumption about how the implied consent law works with respect to conscious suspects.

The key to understanding the significance of ***Padley*** is understanding the distinction between two analytical steps: (1) interpreting how the implied

consent law operates, and (2) deciding whether the law, properly interpreted, violates the Fourth Amendment's warrant requirement. We rejected Padley's argument at the first step. We disagreed with both the State and Padley that the statute actually authorizes a warrantless blood draw from a *conscious* suspect based on the "implied consent" given by a suspect sometime before police become involved. Instead, we interpreted the implied consent statutes as setting the scene for conscious suspects like Padley to give or refuse to give police actual consent. We opined that the implied consent law gives police "the right to force a [conscious] driver to make what is for many drivers a difficult choice. [Those choices are to] (1) give consent to the blood draw, or (2) refuse the request for a blood draw and suffer the penalty specified in the implied consent law." ***Id.***, ¶27. We went on to conclude that, because Padley was conscious and gave actual consent, and because Padley did not challenge the voluntariness of that consent, the warrantless blood draw was justified.

If our take on implied consent in ***Padley*** affected only conscious suspects, it is difficult to understand why the State would care. But the clear suggestion in ***Padley*** was that there might be a problem if the State's implied consent reasoning was used to justify a warrantless blood draw from an unconscious suspect. To state the obvious, we looked to the consent Padley actually gave to police because we questioned whether Padley's "implied consent" would suffice as voluntary consent for Fourth Amendment purposes. *See* ***id.***, ¶¶32-33, 37-39 & n.10.

The State contends that our consent analysis in ***Padley*** conflicts with our prior decision in ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745. In the section below, we acknowledge that ***Padley*** appears to conflict with ***Wintlend***, but we also question our reasoning in ***Wintlend***, including

our reliance on ***Neitzel***, 95 Wis. 2d 191, and ***Village of Little Chute v. Walitalo***, 2002 WI App 211, 256 Wis. 2d 1032, 650 N.W.2d 891.

H. ***Wintlend***, ***Neitzel***, *And* ***Walitalo***

We pause to note that the following is a more detailed discussion than we would normally provide in a certification. We provide it as support for our view that there is a need for an authoritative clarifying decision from the supreme court.

The defendant in ***Wintlend*** assumed, consistent with our later ***Padley*** decision, that the consent of a *conscious* suspect that matters for Fourth Amendment purposes is the consent that he or she gives directly to police after police read from an informing the accused form. ***Wintlend***, 258 Wis. 2d 875, ¶¶1, 14-15. Wintlend argued that the consent he gave *directly to police* was not voluntary because it was procured by the threatened sanction of a loss of driving privileges. *See* ***id.***, ¶1. This argument makes no sense if Wintlend's consent occurred at a prior point in time, which is what we concluded in ***Wintlend***.

We explained in ***Wintlend*** that Wintlend's assumption about *when* he gave consent to the blood draw was wrong. Relying on ***Neitzel***, we stated: "[O]ur 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." ***Wintlend***, 258 Wis. 2d 875, ¶12. We went on to say that "the time of consent [that matters for purposes of Wintlend's Fourth Amendment argument] *is when a license is obtained*." ***Id.***, ¶13 (emphasis added).

Thus, ***Wintlend*** addresses the consent of a conscious suspect in the context of a Fourth Amendment challenge to a warrantless blood draw and holds, in effect, that the consent that justifies a warrantless seizure of blood is the implied consent that takes place when a person applies for a driver's license. Any later consent given directly to police does not matter. As we have noted, both parties here disagree with this holding, albeit for different reasons. More to the point, this holding seemingly conflicts with the statutory language and with our later ***Padley*** decision where we opined, also as to conscious suspects, that the consent that matters for purposes of satisfying the Fourth Amendment's warrant requirement is the actual consent a suspect might give to police after being informed of the sanctions for refusing to consent.

Having acknowledged that ***Padley*** appears to conflict with the prior ***Wintlend*** decision, we now discuss possible problems with ***Wintlend*** in addition to its apparent conflict with the pertinent statutory language.

We first focus on ***Wintlend***'s reliance on a prior court of appeals decision, ***Walitalo***, 256 Wis. 2d 1032. ***Wintlend***'s reliance on ***Walitalo*** is confusing because the analysis in ***Walitalo*** conflicts with ***Wintlend***'s own proposition that the consent that matters is the "implied consent" given prior to a police encounter, not the consent that a suspect might give directly to police. Let us explain.

Walitalo, referring to his interaction with police, conceded that he "in fact" consented to a blood draw. *See* ***Walitalo***, 256 Wis. 2d 1032, ¶8. Walitalo argued, however, that his consent was involuntary because the police coerced his consent. *See* ***id.*** Walitalo, like Wintlend, argued that the arresting officer "forced [him] to choose between the loss of his driving privileges and

submission to a chemical test." ***Id.***, ¶10. Responding to Walitalo's argument, we *accepted the premise that the consent that mattered was the consent Walitalo gave directly to the police*. Thus, we looked to Walitalo's interaction with police. We accepted his apparent concession that he in fact consented to police. *See* ***id.***, ¶8. But we rejected the proposition that police applied improper pressure, stating: "[T]he arresting officer ... simply stated the truth: If Walitalo refused to submit to a chemical test, his driving privileges would be revoked." ***Id.***, ¶11. We concluded that "[t]his statement did not involve any deceit or trickery, but instead accurately informed Walitalo of his precise legal situation." ***Id.***

So far as we can tell, ***Wintlend*** and ***Walitalo*** go two different directions on the same question: When does a conscious suspect consent to blood alcohol testing—when a suspect gives "implied consent" prior to a police encounter, or when a suspect informs police whether he or she will submit to or refuse testing?

This seeming confusion about when a conscious person consents to a blood draw is not isolated. For example, ten years after ***Wintlend***, in ***State v. Jacobs***, 2012 WI App 104, 344 Wis. 2d 142, 822 N.W.2d 885, the State and the court of appeals, seemingly contrary to ***Wintlend***, again focused on the voluntariness of the consent a defendant gave *directly to police*. In contesting the voluntariness of his consent, Jacobs disputed the facts. He contended that police coerced him while he was in an examining room at a hospital. ***Jacobs***, 344 Wis. 2d 142, ¶¶5-8. In keeping with the State's appellate brief in ***Jacobs***, we resolved the matter by relying on the circuit court's finding that the testifying police officers' accounts were credible. ***Id.*** ¶¶9, 19; *see* Brief of Plaintiff-Respondent at 5-7, 20-24, ***State v. Jacobs***, 2012 WI App 104, 344 Wis. 2d 142, 822 N.W.2d 885 (No. 2011AP1852-CR).

A second problem with ***Wintlend*** is its reliance on the supreme court's ***Neitzel*** decision. We do not now quibble with the fact that ***Neitzel*** uses broad language that *could* be read as the State now reads it and, for that matter, as we read it in ***Wintlend***. That is, ***Neitzel*** can be read as holding that it is statutory implied consent, given before a person becomes a suspect, that supplies voluntary consent to a blood draw, not some later consent a person might give directly to police. According to the State, ***Neitzel*** supports the view that, from a Fourth Amendment perspective, all that happens during an interaction with police is that suspects are given a chance to withdraw previously given consent.

As our following discussion demonstrates, it is reasonable to question whether this is the correct interpretation of ***Neitzel***'s broad language.

In ***Neitzel***, the defendant refused to submit to a blood draw. ***Neitzel***, 95 Wis. 2d at 195-96. Because no one drew blood from Neitzel, there was no Fourth Amendment suppression issue to decide. Rather, at stake in ***Neitzel*** was the propriety of the imposition of refusal penalties. *See, e.g.*, ***id.*** at 201, 205.

Neitzel argued, in effect, that refusal penalties could not be imposed because police denied him his right to consult with an attorney before deciding whether to refuse. *See* ***id.*** at 193. The ***Neitzel*** court concluded that there is no right to counsel for purposes of deciding whether to "take or refuse" because the constitutional privilege against self-incrimination is not implicated by this decision and the statutory right to counsel does not cover this situation. *See* ***id.*** at 193-94, 197-200.

It was in this non-Fourth Amendment context that the ***Neitzel*** court wrote the language the State relies on now and that we relied on in ***Wintlend***: "[W]hen [a driver] applies for and receives an operator's license, [the driver]

submits to the legislatively imposed condition on his license that [in specified future circumstances involving suspected intoxicated driving] he consents to submit to the prescribed chemical tests." ***Neitzel***, 95 Wis. 2d at 193. There are at least two reasons to question whether this language should be read as stating that consent to a blood draw, a Fourth Amendment seizure, occurs at the license application stage.

First, obviously, there was no Fourth Amendment issue in play in ***Neitzel***. There was no blood draw and, hence, no blood alcohol test result to suppress. Instead, the ***Neitzel*** court's attention was on the propriety of imposing refusal penalties. As the ***Neitzel*** court states in its introductory summary, "[a driver] applies for and takes his license *subject to the condition that a failure to submit to the chemical tests will result in the sixty-day revocation of his license* unless the refusal was reasonable." ***Id.*** at 193 (emphasis added).

Second, the ***Neitzel*** court's lack of focus on consent is exemplified by how loosely it speaks about *when* implied consent occurs. ***Neitzel*** says that implied consent occurs when a driver "applies for and receives an operator's license." However, the implied consent law, then and now, ties implied consent to driving on a highway. Indeed, even the State's briefing here in ***Howes*** effectively asserts that ***Neitzel*** was wrongly decided in this regard. This lack of precision is understandable in a case in which suppression was not an issue and it was undisputed that the suspect refused to take the test, thus undeniably withdrawing implied consent. However, the underpinnings of consent would matter if the topic is whether implied consent is voluntary consent for Fourth Amendment purposes.

For that matter, although we relied on the broad ***Neitzel*** language in ***Wintlend***, we simultaneously questioned it. We pointed out that ***Neitzel***'s license-

application approach to consent is problematic when applied to out-of-state drivers. We wrote: "[O]ne could assert that the [applies-for-a-license] language in ***Neitzel*** weakens when it is observed that out-of-state drivers would not fit nicely into the ***Neitzel*** court's analysis." ***Wintlend***, 258 Wis. 2d 875, ¶15. We might have also extended this observation to the problems that would arise applying ***Neitzel*** to Wisconsin residents who drive without a license because they never applied for a license or because their licenses were suspended or revoked.

Our approach in ***Wintlend***, that is, our reliance on ***Neitzel***, parallels a significant part of the State's briefing in this case. In briefing here, the State relies on general statements about implied consent found in ***Neitzel*** and several other non-Fourth Amendment cases to support its proposition that implied consent is sufficient to justify a warrantless blood draw, regardless whether a suspect gives actual consent directly to police. Representative examples of these cases include ***State v. Piddington***, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, and ***Disch***, 129 Wis. 2d 225. And, like ***Neitzel***, there is reason to question whether ***Piddington*** and ***Disch*** should be read as saying something about consent for Fourth Amendment purposes.

In the 2001 ***Piddington*** case, the issue was whether an officer complied with a statutorily imposed duty to provide implied consent warnings to a hearing-impaired suspect. *See* ***Piddington***, 241 Wis. 2d 754, ¶¶1, 12-13, 18. Piddington did not contest that he had given voluntary consent to the blood draw. *See* ***id.***, ¶¶5-6. Indeed, the word "voluntary" does not even appear in the ***Piddington*** opinion. For that matter, Piddington's ability to understand the information was not at issue. *See,* e.g., ***id.***, ¶20 ("[A]n accused driver need not comprehend the implied consent warnings for the warnings to have been reasonably conveyed."). Rather, according to the ***Piddington*** court, "the focus

rests upon the conduct of the officer," and the question was whether the means the officer used to give the implied consent warnings satisfied the legislative directive. ***Id.***, ¶¶1, 18.

Similarly, the 1986 ***Disch*** case purely involved a question of statutory compliance. Disch was injured and in a "stupor" following an automobile accident. Police directed hospital employees to take a blood sample without giving Disch informing-the-accused information. ***Disch***, 129 Wis. 2d at 229-30. Disch did not argue that the blood draw was unconstitutional. Rather, Disch complained that police failed to comply with the statutes by failing to read to her informing-the-accused information prior to a blood draw. The question was whether Disch was, as a factual matter, "unconscious or otherwise not capable of withdrawing consent," as those words appear in what is now numbered WIS. STAT. § 343.305(3)(b),[6] and, if so, whether police must provide such suspects with informing-the-accused information. The ***Disch*** court affirmed fact finding that Disch was "otherwise not capable of withdrawing consent." *See* ***Disch***, 129 Wis. 2d at 234-36. The ***Disch*** court then made clear that implied consent law does not require a request for a sample from, nor the provision of informing-the-accused information to, a suspect that is "unconscious or otherwise not capable of withdrawing consent." ***Id.*** at 233. Thus, ***Disch*** dealt with a statutory requirement placed on police, not with whether a suspect gave consent sufficient to satisfy the Fourth Amendment.

[6] The statute that was applicable in ***State v. Disch***, 129 Wis. 2d 225, 385 N.W.2d 140 (1986), was WIS. STAT. § 343.305(2)(c) (1979-80). That statute containing analogous language is now numbered WIS. STAT. § 343.305(3)(b). *See* 1987 Wis. Act 3, § 29.

There are several more cases we could discuss here, but most seem to fall into two broad categories: (1) supreme court and court of appeals cases like ***Neitzel***, ***Piddington***, and ***Disch***, where the court's focus was on topics other than the voluntariness of consent for Fourth Amendment purposes, and (2) court of appeals cases like ***Wintlend*** with problematic reasoning.[7]

Although we could issue an opinion deciding whether ***Padley*** conflicts with ***Wintlend***, we obviously lack the power to address the underlying merits of such a conflict. Moreover, addressing the merits requires an examination of cases such as ***Neitzel***, ***Piddington***, and ***Disch***, and the supreme court is uniquely situated to explain the correct meaning of those cases and similar cases, or to qualify their language.

CONCLUSION

Regarding the unconscious suspect issue presented, the parties agree on how the implied consent statute functions to supply consent as a justification for a warrantless blood draw from an unconscious suspect. The question seems to boil down to whether courts should apply the normal case-by-case totality-of-the-circumstances test, as Howes argues, or instead conclude that the scheme is, in effect, a permissible per se exception, as the State argues. If the normal totality-

[7] Examples of the two categories include: ***Washburn County v. Smith***, 2008 WI 23, ¶¶40 n.36, 72-73, 308 Wis. 2d 65, 746 N.W.2d 243 (compliance with statutes, not the Fourth Amendment); ***State v. Krajewski***, 2002 WI 97, ¶¶1-3, 27, 255 Wis. 2d 98, 648 N.W.2d 385 (warrantless blood draw constitutional based on probable cause and exigent circumstances even if suspect refuses to submit to a blood draw); ***State v. Zielke***, 137 Wis. 2d 39, 40-44, 51-52, 403 N.W.2d 427 (1987) (defendant gave actual voluntary consent to an officer justifying a blood draw, and question was whether the implied consent statute is the "exclusive means by which police may obtain chemical test evidence of driver intoxication"); and ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 623-24, 291 N.W.2d 608 (Ct. App. 1980) (simultaneously saying that "consent is not optional" and addressing the validity of the particular defendant's consent).

of-the-circumstances test is applied, it is hard to see how the test is satisfied because the statutory scheme does not take into account the individual suspect. If the scheme amounts to a permissible per se exception, such a holding should explain why this conclusion is consistent with Fourth Amendment jurisprudence.

Regarding both conscious and unconscious suspects, this case implicates the reasoning in two court of appeals decisions, ***Padley*** and ***Wintlend***, and related supreme court decisions. The State contends not only that ***Padley*** conflicts with ***Wintlend***, but more significantly that the analysis in ***Padley*** is wrong in a way that affects the merits here. According to the State, and contrary to ***Padley***, the implied consent law operates to supply consent to a warrantless blood draw for both conscious and unconscious suspects in exactly the same way.

We think it is apparent that these are issues of critical importance statewide and that they are best resolved by the supreme court.

A final note. Normally, if a certification is granted, the supreme court relies on the briefing submitted to the court of appeals. We believe that oral argument held before us and this certification help to clarify the parties' disputes beyond what is reflected in the parties' written arguments so far. Therefore, it may be that the supreme court will want to exercise its prerogative to require replacement briefing.