STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE, PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED FOR REVIEW

The question addressed in this case is whether implied consent, as outlined in ***Wis. Stat***. ¶ 343.305(3)(b), constitutes voluntary consent to a search such that a blood sample may be taken from an unconscious driver under the Fourth Amendment.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Through its grant of review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

The State of Wisconsin violated Gerald Mitchell's right to protection from unreasonable search and seizure under the Fourth Amendment to the United States Constitution on May 30, 2013. On that date, he was subjected to a nonconsensual, warrantless blood draw on the occasion of arrest on suspicion of driving while intoxicated. A blood sample was taken without Mitchell's consent, without any other exception to the warrant requirement of the

Fourth Amendment, and without a warrant. The question before this court is nothing more, or less, than whether or not Mitchell gave his consent to the blood draw that was performed on him on May 30, 2013.

This Court should reverse the trial court's decision denying Mitchell's suppression motion and remand the matter to the trial court with instructions to grant Mitchell's suppression motion for two reasons:

First, Mitchell did not give actual consent to the blood draw. Law enforcement officers could not reasonably conclude that Mitchell made any meaningful response to the "Informing the Accused" form when it was only read to him after he became unconscious.

Second, any consent that the state may have imputed to Mitchell was not voluntary because it was not based on the totality of the circumstances surrounding Mitchell's arrest.

Third, there were no other exceptions, such as the existence of exigent circumstances, to the Fourth Amendment

warrant requirement that justified law enforcement officers' taking of Mitchell's blood without his consent or a search warrant.

STATEMENT OF THE CASE

On May 30, 2013, Gerald Mitchell was arrested on suspicion of Operating While Intoxicated (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a) and Operating with a Prohibited Alcohol Concentration (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a). (1.) The State filed a criminal complaint on July 1, 2013, when Mitchell made his initial appearance and bond was set, (1.) and a preliminary hearing occurred on July 17, 2013. (81.)

Mitchell filed a Motion to Suppress Evidence of Bodily Intrusion, which was heard on October 16, 2013. (23:1.) The Motion was denied. (23:52.) The case then proceeded to a jury trial on December 17, 2013, in Sheboygan County Circuit Court, Branch IV, the Honorable Terence T. Bourke presiding. (89.) Mitchell was convicted of Operating While Intoxicated (7th, 8th, or 9th), contrary to ***Wis. Stat.*** §346.63(1)(a) and Operating with a Prohibited Alcohol

Concentration (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a). (89:317.)

On February 28, 2014, Mitchell was sentenced to six years (three years of initial confinement followed by three years of extended supervision) in the Wisconsin Prison System on each of the two counts, to run concurrently to each other. (70:1.) Mitchell was originally granted 274 days of credit for time served, but on June 4, 2014 his Judgment of Conviction was amended to reflect 247 days of credit for time served. (69:1; 70:1.)

Mitchell filed a Notice of Intent to Pursue Post Conviction Relief on June 2, 2014, and this appeal ensued. (66:1-2.) Mitchell filed his Notice of Appeal on February 10, 2015, followed by his Brief of Defendant-Appellant on May 11, 2015. After submission on briefs to the Court of Appeals, Mitchell's case was held in abeyance pending the decision in ***State v. Howes,*** 2017 WI 18. Ultimately, the Court of Appeals filed a Petition for Certification to the Wisconsin Supreme Court on May 17, 2017, which was granted on September 11, 2017.

STATEMENT OF FACTS

During the afternoon of May 30, 2013 at approximately 3:17 pm, Officer Alex Jaeger [henceforth "Jaeger"] of the City of Sheboygan Police Department was dispatched to 1127 North Eighth Street in the City of Sheboygan in response to a call from a resident, a Mr. Alvin Swenson. (81:3-5; 86:5.) Swenson reported to Jaeger that he had seen Gerald Mitchell [henceforth "Mitchell"] leave Mitchell's residence and that Mitchell stumbled and seemed intoxicated as he got into a gray van. (81:6-7.)

Jaeger testified that approximately half an hour to forty five minutes passed between his first contact with Swenson and his eventual contact with Mitchell. (81:11.) Jaeger testified that, a short time later when he arrested Mitchell, Mitchell was able to perform a preliminary breath test, but that he did not ask Mitchell to attempt any standardized field sobriety tests due to his condition. (86:14-15.) Jaeger arrested Mitchell at 4:26 pm on May 30, 2013, immediately after Jaeger administered the preliminary breath test to Mitchell.

(86:15, 21.) Although two officers were required to place Mitchell in the squad car due to Mitchell's instability and behavior, Jaeger nevertheless took Mitchell to the police station rather than to the hospital for medical clearance. (81:13.)

Jaeger testified that it would take "about five minutes maybe" to travel from the initial contact with Mitchell to the Police Department. (86:17.) It is approximately a four minute drive from the location of the arrest to the hospital, and approximately a two minute drive from the arrest location to the Police Department. (23:2.)

Upon arrival at the police department Mitchell became somewhat unresponsive, although Jaeger testified that he did not know if it was because Mitchell "was so intoxicated or under the influence of something or having some type of a medical concern that he could no longer stand." (81:13.) Mitchell was lethargic and fell asleep, but would wake up with stimulation. (86:17.) At that time, Jaeger and his supervisor decided it was appropriate to take Mitchell to the

hospital for a blood draw. (86:38-40) Under oath, Jaeger testified as follows:

> Q: You testified when you got back to the station you spoke with your supervisor, and you decided a blood draw would be more appropriate. You remember that?
>
> A: Yes.
>
> Q: Why?
>
> A: Because of his current condition.
>
> Q: That being that he was unconscious?
>
> A: He was not unconscious quite. I mean, he was closing his eyes, and I mean, he was arousable.
>
> Q: Okay. If he was going progressively downhill in front of you, why didn't you read him the Informing the Accused at that time?
>
> A: I don't know.
>
> Q: Were you at that time concerned that he was going to pass out?
>
> A: It was a concern.

(86:38-40.)

Approximately one hour elapsed from the time of arrest to the time Mitchell arrived at the hospital. (86:22.) Upon his arrival at the hospital, Mitchell was losing consciousness and could not respond to "Informing the Accused" when Jaeger finally read it to him. (81:14; 86:18-

19.) Jaeger signed and dated the form on May 30, 2013 at 1724 hours. (86:19.) Mitchell's blood was eventually drawn at 1759 hours. (81:14; 86:28.)

Jaeger testified at the hearing on Mitchell's Motion to Suppress Evidence of Warrantless Bodily Intrusion regarding Jaeger's failure to apply for a warrant to draw Mitchell's blood. (86:37-40.) Jaeger testified as follows:

> Q: You could have gotten a warrant to draw Mr. Mitchell's blood at the hospital, couldn't you have?
>
> A: I could have applied.
>
> Q: I'm sorry. Yes. You could have applied, correct?
>
> A: I suppose.
>
> Q: Police do that on a fairly regular basis, don't they?
>
> A: Now yes.
>
> Q: How long does it typically take?
>
> A: I don't know. I haven't done a warrant blood draw yet. We just started doing those.
>
> Q: It's fair to say that you watched Mr. Mitchell's condition deteriorate in front of you, right?
>
> A: Yes.

(86:37-38.)

At the end of the suppression hearing, Attorney Haberman, for the State, argued that the blood draw in this case was done pursuant to the implied consent law found in Wis. Stat. § 343.305(3)(b), and that ***Missouri v. McNeely***, 133 S.Ct. 1552, 81 USLW 4250, 185 L.Ed.2d 696 (2013) did not apply. (86:44.) He conceded that there were no other exigent circumstances surrounding the blood draw in the case. (86:44.) Attorney Wingrove, for Mitchell, argued that there was a warrantless blood draw, and that the officer could have gotten a warrant but did not do so. (86:47.) Attorney Wingrove further discussed issues raised by the manner in which implied consent was applied in this case. (86:47-48.) Wingrove pointed out to the court that Jaeger could have given Mitchell the "Informing the Accused" when Jaeger first asked Mitchell to do field sobriety. (86:48.)

Judge Bourke, in his decision, concluded that the State was correct in their position. (86:50.) The judge commented that "[t]his is a simple OWI investigation. Nothing more, nothing less. … They go through the regular procedure.

Blood is drawn." (86:52.) Judge Bourke denied Mitchell's Motion to Suppress. (86:52.)

The case continued to trial on December 17, 2013, at which a jury found Mitchell guilty of Operating While Intoxicated (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a) and one count of Operating with a Prohibited Alcohol Concentration (7th, 8th, or 9th), contrary to Wis. Stat. § 346.63(1)(a). (89:317.)

Mitchell now appeals.

STANDARD OF REVIEW

An appellate court reviews a motion to suppress under a two-step analysis. ***State v. Padley***, 2014 WI App 65, ¶¶ 15-16, 354 Wis.2d 545, 849 N.W.2d 867, review denied, 2014 WI 122, 855 N.W.2d 695 (citing ***State v. Robinson***, 2009 WI App 97, 320 Wis.2d 689, 779 N.W.2d 721). First, the appellate court will uphold the factual findings of the circuit court unless they are clearly erroneous. ***Padley,*** 2014 WI App 65, ¶ 15. Second, the constitutionality of a statute is a question that an appellate court will review de novo. ***Padley,***

2014 WI App 65, ¶ 16, (citing ***State v. Cole***, 2003 WI 112, ¶ 10, 264 Wis.2d 520, 665 N.W.2d 328). The appellate court presumes that a statute is constitutional, and the challenger must prove beyond a reasonable doubt that it is unconstitutional. ***Padley,*** 2014 WI App 65, ¶ 16.

ARGUMENT

I. IMPLIED CONSENT AS OUTLINED IN WIS. STAT. § 343.305(3)(b) DOES NOT CONSTITUTE CONSENT TO A SEARCH UNDER THE FOURTH AMENDMENT.

Both the United States Supreme Court and the Wisconsin Supreme Court have held that a warrantless search of a person is unreasonable absent exigent circumstances or another exception to the Fourth Amendment. ***Katz v. United States***, 389 U.S. 347, 357, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); ***State v. Murdock*****,** 155 Wis.2d 217, 227, 455 N.W.2d 618 (1990). Although unreasonable, warrantless searches conducted pursuant to "voluntarily given consent" nevertheless do fall within a well-established exception to the Fourth

Amendment's warrant requirement. ***State v. Williams***, 2002 WI 94, ¶ 18, 255 Wis.2d 1, 646 N.W.2d 834; ***State v. Artic***, 2010 WI 83, ¶ 29, 327 Wi.2d 392, 786 N.W.2d 430 ("Warrantless searches are *per se* unreasonable, subject to several clearly delineated exceptions.").

Wisconsin, like all states, has an implied consent statute. Wis.Stat. § 343.305 (relevant excerpts in Appendix E) provides a basis for law enforcement to request a blood, breath, or urine sample from a driver under certain circumstances. Two sections of the statute permit a law enforcement officer to request a breath, blood or urine sample from a conscious person suspected of driving while intoxicated. Wis.Stat. § 343.305(a), (am). Further, when the person is unconscious, samples of breath, blood, or urine may be administered, because the person did not withdraw his implied consent. Wis.Stat. § 343.305(3)(b). If a person should refuse to provide a sample of breath, blood, or urine, that conduct is punishable. Wis.Stat. § 343.305(4). All of this information comes to the driver when the law enforcement

officer, as required, reads to him "Informing the Accused," which is provided in Wis.Stat. § 343.305(4).[1]

Law enforcement officers may request a sample of breath, blood, or urine. The act of requesting implies the possibility that the person may refuse the request, and in fact that possibility is addressed in "Informing the Accused," a specific statement to the person from whom a sample is requested. That statement describes the penalties that devolve upon refusal to give consent to the blood sample. Importantly for this discussion, law enforcement officers *"shall"* read the required statement. Wis. Stat. § 343.305(4).

Wisconsin courts distinguish between implied consent and actual consent. Actual consent to a blood draw is not "implied consent." ***Padley***, 2014 WI App 65, ¶ 25 ("…actual consent to a blood draw is not "implied consent," but rather a possible result of requiring the driver to choose whether to consent under the implied consent law.").

[1]Mitchell's "Informing the Accused" is found at Appendix E.

Thus, the ***Padley*** court concluded that the implied consent law by itself does not permit law enforcement officers to require a driver to provide a blood sample, but rather the statute permits law enforcement officers to request a blood sample from a driver who has previously agreed that the law allows an officer to ask for such a sample. ***Padley***, 2014 WI App 65, ¶¶ 26-27. ("[A] proper implied consent law authorizes law enforcement to present drivers with a difficult, but permissible, choice between consent or penalties for violating the implied consent law,…".). ***Padley***, 2014 WI App 65, ¶ 28. "The purpose of the implied consent statute is to "persuad[e] drivers to consent to a requested chemical test by attaching a penalty for refusal to do so." ***Padley***, 2014 WI App 65, ¶ 24, "The implied consent law does not compel a blood sample as a driver has the right to refuse to give a sample. …the choice is solely with the driver." ***State v. Blackman,*** 371 Wis.2d 635, ¶ 11, 886 N.W.2d 94 (Wis. App. 2016). ***Padley*** also provides that actual consent is given after being read the "Informing the 'Accused" form and giving affirmative consent to the blood draw. ***Padley***, 2014 WI App

65, ¶ 39. ("…the implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. … choosing the "yes" option [to the "Informing the Accused" Form] affirms the driver's implied consent and constitutes actual consent for the blood draw.") If the driver refuses to consent, he or she thereby withdraws "implied consent" and accepts the consequences of that choice." ***Padley***, 2014 WI App 65, ¶ 39. The consequence for refusal to submit to a chemical test of breath, blood, or urine is significant: it leads to a separate criminal offense. ***State v. Zielke***, 137 Wis.2d 39, 41, 403 N.W.2d 427 (1987). ("the implied consent law…creates a separate offense that is triggered upon a driver's refusal to submit to a chemical test of his breath, blood, or urine.")

Logic demands that if there is a provision for an alternative, then the alternative must exist. When alternatives exist, a choice exists. Therefore, since refusal is a statutory

alternative for a driver faced with a request by law enforcement for a blood sample, then that driver may make a choice between the alternatives. Since consent or withdrawal of consent are the only two alternatives contemplated in Wisconsin's implied consent statute, the prior "implied" consent can logically be denied or revoked. The choice is meaningless without some mechanism by which a person may reasonably assert his choice. The mechanism by which a person confirms their consent (or withdraws their consent) to a blood draw is through the use of the "Informing the Accused" Form.

Clearly, then, law enforcement officers may not assume that, at some time in the past, a driver irrevocably consented to having his blood taken. By its own provisions the implied consent law is revocable and establishes a mechanism for a person to revoke that consent and refuse the blood draw at the time law enforcement requests the sample. Because implied consent is revocable, and can thus be withdrawn, it cannot function as an automatic consent for a

blood sample. Actual consent is a different kind of consent and happens at the time of the blood test.

Here, Mitchell was conscious when he was taken into custody. He was conscious upon arrival at the police station. He was still conscious when he arrived at the hospital after being detained at the police station. During this entire time, a period of almost two hours, provisions of Wis. Stat. § 343.305(3)(a) or (am) applied because Mitchell was conscious and capable of consenting to the blood draw, yet law enforcement made no attempt to inform Mitchell of his right to withdraw his consent. Mitchell had no opportunity to give or withdraw his consent.

Once Mitchell lost consciousness, law enforcement applied a different subsection of the Wisconsin implied consent statute, namely the "unconscious driver provision."| Wis. Stat. § 343.305(3)(b). Under this provision, the driver's actual consent is not needed because his consent deemed not withdrawn. The blood sample may be taken without further consent or warrant. In Mitchell's case, law enforcement

waited until he lost consciousness, and only then read him "Informing the Accused." Mitchell was unable to withdraw his consent to the blood sample at that point, and law enforcement obtained a sample of his blood with his "consent" because failure to withdraw consent amounts to consent under Wis. Stat. § 343.305(3)(b).

"[T]he Fourth Amendment does not allow such per se rules [regarding exigency] in the context of warrantless investigatory blood draws." ***State v. Kennedy,*** 2014 WI 132, ¶ 29, 359 Wis.2d 454, 856 N.W.2d 834. It is not a long jump from a prohibition against categorical rules regarding exigency to categorical rules regarding consent. However, Wis. Stat. § 343.305(3)(b) presents just such a categorical rule as it permits warrantless blood draws on a *per se* basis from unconscious persons, while consent or a warrant is required to take the same sample from a conscious person. The law presumes that all unconscious persons, unable by definition to provide actual consent to a blood sample, have impliedly given actual and voluntary consent to blood testing, while conscious drivers may choose whether or not to

consent. By virtue of his physical situation, regardless of the reason for that situation, an unconscious person has apparently lost the protection against unreasonable search and seizure that is guaranteed to all citizens under the Fourth Amendment.[2]

The unconscious driver provisions of Wis. Stat. § 343.305(b) do not further any legitimate state interest and offer no compelling reason why an unconscious driver should be afforded less constitutional protection than another driver simply on the basis of his state of consciousness. The process of taking a blood sample is effectively the same in either case. The process of obtaining a warrant is the same in either case. The Wisconsin implied consent law creates an unreasonable situation in which a person who actively violates the law, e.g. refuses to submit to a blood sample, has greater constitutional protection via the warrant requirement than does a person

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[2] Although the Fourth Amendment does not contain specific language requiring the government to obtain search warrants, ***McNeely*** teaches that "warrants must generally be obtained." ***Missouri v. McNeely,*** 133 S.Ct. 1552, 1569.

who is unconscious and unable to respond, and who does not have the protection of the warrant requirement. The state thus imposes a greater burden on the person who cannot comply with the law than it imposes upon the person who affirmatively violates the law. There is simply no compelling reason for the Fourth Amendment rights of an unconscious person to be respected any less than the Fourth Amendment rights of a conscious person.

It is unreasonable to conclude that an unconscious Mitchell gave actual consent to the blood draw. Law enforcement used a legal fiction to assert consent given not by Mitchell but rather through a statutory construction essentially dispensing with Mitchell's Fourth Amendment protection against unreasonable search and seizure. Mitchell did not give consent to the warrantless blood draw performed on his person on May 30, 2013.

II. "IMPLIED CONSENT" DEEMED TO HAVE OCCURRED BEFORE A DEFENDANT IS A SUSPECT IS NOT VOLUNTARY CONSENT FOR PURPOSES OF THE CONSENT EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT BECAUSE IMPLIED CONSENT DOES NOT ADDRESS THE TOTALITY OF THE CIRCUMSTANCES AT THE TIME OF ARREST.

Even if the State can demonstrate that consent was given in fact, it must also prove that consent was given freely and voluntarily. ***Schneckloth v. Bustamonte,*** 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854. The voluntariness of a person's consent to a search is "to be determined from the totality of all the circumstances." ***Schneckloth v. Bustamonte,*** 412 U.S. 218, 248. In determining voluntariness of consent, the court will consider the totality of the circumstances, including the circumstances surrounding consent and the characteristics of the defendant. ***Artic***, 2010 WI 83, ¶¶ 32-33.

Well before the ***McNeely*** decision, holding that the totality of circumstances in each situation must be considered, ***Missouri v. McNeely***, 133 S.Ct. 1552, 1556, the Wisconsin Supreme Court held that "the reasonableness of a warrantless nonconsensual test [for blood alcohol content] . . . will depend upon the *totality of the circumstances* [emphasis added] of each individual case." ***State v. Faust,*** 2004 WI 99, 274 Wis.2d 183, 682 N.W.2d 371, n. 16.

The "totality of the circumstances" as a determining factor in consent represents a somewhat flexible concept. ***Schneckloth v. Bustamonte*** provides one list of factors that together make up the "totality of the circumstances," including, among others: mental illness or intoxication of the person; that the person was under arrest at the time of consent; that the person was subject to physical restriction. ***Schneckloth v. Bustamonte,*** 412 U.S. 218, 226-227.

Since the totality of the circumstances is a determinant of the voluntariness of a person's consent to a search, it is necessary then to consider Mitchell's circumstances during

his time in police custody on May 30, 2013. At trial, the state proved to the jury's satisfaction that Mitchell was intoxicated at the time of his arrest. Mitchell was certainly in custody, as he was not free to leave and go about his business; law enforcement officers restrained Mitchell and controlled his movements. Although Mitchell maintained consciousness for most of the period of time while he was in custody and before being taken to the hospital, he lost consciousness at some point after arriving at the hospital.

Significantly, Officer Jaeger failed to read Mitchell the "Informing the Accused" form until after Mitchell lost consciousness. Obviously, Mitchell could not respond at that time, due to his unconscious state, even though he could have responded earlier; to infer that his consent to the blood draw was voluntary when in fact he was unconscious is an unreasonable conclusion. It is equally unreasonable to conclude that, while unconscious, Mitchell gave voluntary consent to the blood sample because he did not (could not) withdraw his implied consent.

Mitchell was intoxicated, he was in custody and his freedom of movement was restricted by law enforcement, and the police officer did not inform him of his right to withdraw his consent to a blood sample until after he became functionally unable to hear or respond to the officer's request. The totality of the circumstances surrounding Mitchell's situation leads to the inescapable conclusion that his "consent" to the blood draw was not voluntary.

III. THE RESULTS OF MITCHELL'S BLOOD TEST SHOULD BE SUPPRESSED BECAUSE NO EXCEPTION JUSTIFIED A WARRANTLESS BLOOD DRAW.

The Fourth Amendment to the Constitution of the United States, as well as Article I, Section 11 of the Wisconsin Constitution, protect against "unreasonable searches and seizures." ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794 (1998). "[T]he 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…". U.S. Const. amend. IV.

The U.S. Supreme Court has held that "[t]he integrity of an individual's person is a cherished value of our society." ***United States v. Schmerber*****,** 384 U.S. 757, 772, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). ***Schmerber*** established that "[s]earches that intrude beyond the surface of the body require more than mere probable cause to arrest in order to pass constitutional muster." ***Schmerber***, 384 U.S. 757, 770. And, finally, "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." ***Schmerber***, 384 U.S. 757, 772. From Wisconsin case law, "[a] warrantless search is presumptively unreasonable" unless the search falls within an exception to the warrant requirement. ***State v. Tullberg***, 2014 WI 134, ¶ 30, 359 Wis.2d 421, 857 N.W.2d 120.

Early case law in Wisconsin permitted warrantless blood draws in cases where officers believed that the dissipation of alcohol from the blood created an exigent circumstance that did not allow time for a search warrant to

be obtained, and the dissipation of alcohol was specifically noted as an exigent circumstance that allowed for warrantless blood draws. ***State v. Bohling***, 173 Wis.2d 529, 533, 494 N.W.2d 399 (1993). ***Bohling,*** however, is no longer good law in Wisconsin following the U.S. Supreme Court decision in ***Missouri v. McNeely,*** 133 S.Ct. 155. ***State v. Reese*****,** 2014 WI App 27, ¶ 18, 353 Wis.2d 266, 844 N.W.2d 396.

As recently as March 1, 2017, in ***State v. Howes***, the Wisconsin Supreme Court addressed the exigent circumstances exception to the general Fourth Amendment warrant requirement. ***State v. Howes***, 2017 WI 18. In ***Howes***, the circuit court granted a defense motion to suppress the report of the blood test taken at the hospital from an unconscious Howes. ***Howes***, 2017 WI 18, ¶ 15. The trial court concluded that the unconscious driver provision of Wisconsin's Implied Consent law is unconstitutional when the blood draw is done without a warrant or the presence of exigent circumstances. ***Howes***, 2017 WI 18, ¶ 15. The state appealed, and this Court reversed the circuit court***.*** ***Howes***, 2017 WI 18, ¶ 16.

Under the specific facts of ***Howes,*** the Wisconsin Supreme Court decided that exigent circumstances justified the search (blood draw) without reaching the question of consent. In reversing the circuit court, the Wisconsin Supreme Court concluded that because Howes was unconscious and seriously injured, and because his PAC threshold was .02%, a reasonable officer could have concluded that further delay would result in destruction of necessary evidence. ***Howes***, 2017 WI 18, ¶ 3. Therefore, the Fourth Amendment exception for exigent circumstances permitted Howe's blood to be taken without consent and without a warrant.

Mitchell's situation is clearly distinguishable from that of Howes. Mitchell only became unconscious after a significant period of time in police custody. In fact, it was not until he arrived at the hospital that he lost consciousness. Howes was unconscious during the entire time that he was in the control of law enforcement leading up to the blood draw. The officer who had custody and control of Mitchell, on the

other hand, had a conscious suspect and plenty of time to obtain either Mitchell's consent or a warrant before taking Mitchell's blood sample. Ultimately, though, both situations resulted in warrantless blood draws from unconscious persons.

While exigent circumstances ultimately led to Howes' blood draw being found constitutional, no exigencies existed in Mitchell's case. The location of the arrest, the police station, and the hospital are all within short distances of each other. No situation caused an unexpected or overly long delay that might have led to undue dissipation of alcohol from Mitchell's blood. There was no investigation requiring the officer's attention before he could get around to Mitchell's blood draw. No injured people needed immediate assistance. No traffic blockages existed. In short, exigent circumstances did not exist to prevent law enforcement from complying with the requirements of the Fourth Amendment, Wisconsin Statutes, and federal and state case law.

Officer Jaeger contacted Mitchell on the street at approximately 3:17 pm (1517 in the afternoon). Testimony shows that this contact occurred approximately 30-45 minutes after the initial call to law enforcement. Jaeger testified that he believed Mitchell was either intoxicated or had some other medical concern. Jaeger did not attempt to obtain Mitchell's consent for a blood sample at this point in the stop.

Both testimony and other unchallenged information in the record indicate that it was a matter of only a few minutes' drive from the location of the arrest either to the hospital or to the police station, but rather than take Mitchell to the hospital, Jaeger instead took Mitchell, still conscious, to the police station. Eventually, at a point approximately one hour after taking Mitchell into custody (one and a half to two hours after the initial call to police), Jaeger took Mitchell to the hospital to have his blood drawn. By the time Mitchell arrived at the hospital, he could no longer respond appropriately when Jaeger attempted to obtain Mitchell's consent by reading "Informing the Accused" to him. Jaeger was aware that Mitchell was losing consciousness; he testified that he

watched Mitchell's condition deteriorate visibly. Once Mitchell lost consciousness, law enforcement caused a sample of his blood to be taken.

At least two hours passed while Jaeger held Mitchell in custody and before Mitchell became unconscious. Jaeger took no steps during that time to apply for a search warrant to draw Mitchell's blood or to obtain his consent/refusal for the blood sample. No other exigent circumstances existed that would negate the need for a warrant before the blood draw. In total, less than three hours passed from the time that law enforcement personnel received the call concerning Mitchell until Mitchell became unconscious; had Jaeger obtained consent or a warrant, Mitchell's blood would still have been drawn within the three hour window of automatic admissibility established in the Wisconsin Statutes.[3]

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[3] "evidence of the amount of alcohol in the person's blood at the time in question … is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved." Wis. Stat. § 885.235(1g).

The totality of the circumstances is the proper test of whether the State must obtain a search warrant. Mitchell's situation embodied circumstances that weigh in favor of the need for a warrant, including Mitchell's conscious state and the lack of timely use of "Informing the Accused." The only factor that may favor a warrantless search is that Mitchell eventually lost consciousness, and this factor must be tempered with the knowledge that law enforcement had time to either obtain his consent or a warrant for the blood sample before Mitchell became unconscious. The totality of the circumstances supports Mitchell's position: he did not reasonably give either actual or voluntary consent to the blood sample that was taken, that no other exception to the warrant requirement of the Fourth Amendment was present, and that no warrant was obtained. Evidence obtained from the blood sample taken from Mitchell should have been excluded from the jury at trial.

CONCLUSION

For all the reasons discussed above, Mitchell requests that this Supreme Court of Wisconsin find that the Fourth Amendment to the United States Constitution should have protected him from a nonconsensual, nonexigent, and warrantless blood test. Mitchell further requests that the Circuit Court of Sheboygan County's decision to deny his Motion to Suppress the Evidence of Warrantless Blood Draw be reversed and his case remanded to the circuit court with an Order suppressing the results of the warrantless blood draw.

Dated this 23rd day of October, 2017.

Signed:

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,261 words.

Dated this 23rd day of October, 2017.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 23rd day of October, 2017.

Signed:

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A P P E N D I X

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2015AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant-Petitioner.

APPENDIX

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

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No. 2015AP304

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

GERALD P. MITCHELL,
DEFENDANT-APPELLANT

On Appeal from the Sheboygan County Circuit Court,
The Honorable Terence T. Bourke, Presiding,
Case No. 2013CF365

BRIEF OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

Under Wisconsin's implied-consent law, is a warrantless blood draw of an unconscious driver who properly has been arrested for an intoxicated-driving offense an unreasonable search under the Fourth Amendment?

The circuit court answered no, and the Court of Appeals certified the case to this Court.

INTRODUCTION

Wisconsin's implied-consent law offers drivers a deal: In exchange for the privilege of operating dangerous, four-ton machines on state roads, motorists agree that, by voluntarily sitting behind the wheel, they allow an inference that they presently consent to a search of their blood-alcohol content if they are arrested for an intoxicated-driving offense. For Fourth Amendment purposes, there is nothing fictitious about this agreement. "[B]ecause we presume that Wisconsin's citizens know the law," *State v. Weber*, 2016 WI 96, ¶ 78 & n.9, 372 Wis. 2d 202, 887 N.W.2d 554 (Kelly, J., concurring), it may "be fairly inferred from context" that voluntary conduct undertaken against the backdrop of a legal rule is presumptively meant to accord with that rule, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016).

Hence, the blood draw performed on Gerald P. Mitchell, the unconscious drunk driver in this case, was reasonable. By operating a vehicle on Wisconsin roads with a presumed understanding of the reasonable conditions imposed by the implied-consent statute and a presumed desire to act in accordance with that statute, Mitchell conveyed his consent to a suspicion-based search of his blood-alcohol content. That consent was not the fruit of government coercion. The State did not force him to drive. Nor did the State require him to maintain his consent once he was arrested. Indeed, in the near hour that elapsed between the time he was arrested and the moment he fell unconscious, Mitchell was free to

withdraw at any second the consent implied by his conduct, subject of course to "unquestionably legitimate" civil penalties. *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). Even if Mitchell had been found unconscious, his last word, communicated by his conduct, would have been consent. *See, e.g.*, *Colorado v. Hyde*, 393 P.3d 962 (Colo. 2017) (holding that warrantless implied-consent blood draws of unconscious drivers are constitutional); *id.* at 970 (Eid, J., concurring in the judgment) (agreeing).

This is not to say that legislatures are free to devise, and impose upon drivers, any kind of implied-consent condition that they think desirable. Plainly, "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Birchfield*, 136 S. Ct. at 2185. But, for a number of reasons, the unconscious-driver provisions of the implied-consent statute do not exceed that limit, including because the intrusion of an authorized blood draw for unconscious intoxicated drivers—already under arrest and often already undergoing medical treatment—is slight. Hence the U.S. Supreme Court, time and again, "ha[s] referred approvingly to the general concept of implied-consent laws" like Wisconsin's. *Id.*

Although both sides benefit from the statute's reasonable bargain—hopeful motorists gain access to the driving "privilege" (it is not a "right"), *Steeno v. State*, 85 Wis. 2d 663, 671, 271 N.W.2d 396 (1978), while the State obtains

an effective means to promote its "paramount" interest in "enforcing drunk-driving laws and, thus, protecting public safety," *Milewski v. Town of Dover*, 2017 WI 79, ¶¶ 203–07, 377 Wis. 2d 38, 899 N.W.2d 303 (Abrahamson, J., dissenting)—the agreement, like any contract, can be "breach[ed]," *State v. Lemberger*, 2017 WI 39, ¶ 47 n.4, 374 Wis. 2d 617, 893 N.W.2d 232 (Abrahamson, J., concurring). The statute itself implicitly recognizes that consent can be "withdrawn" by one "capable" of that act. Wis. Stat. § 343.305(3)(b). But then the deal contains a damages clause: a person who revokes consent, thereby reneging on his end of the fair bargain, is subject to "civil penalties and evidentiary consequences." *Birchfield*, 136 S. Ct. at 2185; *see* Wis. Stat. § 343.305(9)(a). Once arrested, Mitchell could have breached his agreement with Wisconsin by revoking his implied consent before falling unconscious. That he did not hardly diminished the consent conveyed by his earlier conduct. Nor did it somehow render it insufficient. There is no constitutional right to be given an affirmative opportunity to revoke consent already given.

ORAL ARGUMENT AND PUBLICATION

By granting certification, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The Scourge Of Intoxicated Driving In Wisconsin

"Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield*, 136 S. Ct. at 2166. On average, drunk driving takes one life in the United States every 53 minutes. *See* National Highway Traffic Safety Administration ("NHTSA"), *Traffic Safety Facts: Alcohol-Impaired Driving*, at 1 (Dec. 2015) ("*NHTSA Facts*"), https://goo.gl/6V9Mjq.[1] "[T]he statistics are . . . staggering." *Birchfield*, 136 S. Ct. at 2178.

Wisconsin in particular "has long experienced a dismal level of carnage due to drunken driving." Bill Lueders, *Why Wisconsin Has Weak Laws on Drunken Driving,* Urban Milwaukee (2014), https://goo.gl/rmoFVB. Between 2003 and 2012, 2,577 people died in Wisconsin in crashes involving a drunk driver. *See* Center for Disease Control, *Sobering Facts: Drunk Driving in Wisconsin* (2014), https://goo.gl/tshOv9. And the fatality rate for all age groups—and, in particular, the 20-and-under and the 35-and-up categories—exceeded the national average. *Id.* The percentage of adults in Wisconsin who report intoxicated driving is a considerable 3.1 percent, far exceeding the national rate of 1.9 percent. *Id*.

[1] All URLs in this Brief were last visited on November 17, 2017.

Meanwhile, incidents of "drugged" driving have been on the rise, fueled in part by the nationwide opioid epidemic. One recent study "found a large increase in the number of drivers" using illegal drugs; "nearly one in four drivers tested positive for at least one drug that could affect safety." NHTSA, *Drugged Driving: Understanding The Challenge*, https://goo.gl/73QMt8. In 2015, for example, "drugs were present in 43% of the fatally-injured drivers with a known test result, more frequently than alcohol." Governors Highway Safety Association, *Drug-Impaired Driving: A Guide For States*, at 2 (Apr. 2017), https://goo.gl/MAHHXK. One possible reason for this disturbing trend is that "addicts aren't waiting to get home to get high"—"they have to keep to a fixed schedule." Corky Siemaszko, *Opioid Crisis: Driving While Drugged Is More Common Than You Think*, NBC News (Apr. 1, 2017), https://goo.gl/Nofc9r (quoting a drug-addiction specialist). More and more, users are ingesting powerful, mind-altering drugs before getting behind the wheel.

B. Wisconsin's Implied-Consent Statute

States promote highway safety by drawing on "a broad range of legal tools to enforce their [intoxicated]-driving laws and to secure BAC [blood-alcohol content] evidence without undertaking warrantless nonconsensual blood draws." *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013) (plurality). "For example, all 50 States have adopted 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 [an intoxicated-driving] offense." *Id.*; *see* Wis. Stat. § 343.305.

In Wisconsin, as in other States, "consent is implied as a condition of the privilege of operating a motor vehicle upon state highways," *State v. Zielke*, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987), and "[a]ny analysis of a driver's consent under Wisconsin's implied consent law must begin with this presumption," *State v. Brar*, 2017 WI 73, ¶ 29, 376 Wis. 2d 685, 898 N.W.2d 499 (lead op.). The statute states that "[a]ny 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 breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath" of alcohol or other controlled substances "when requested to do so by a law enforcement officer" under certain subsections or "when required to do so" under certain others. Wis. Stat. § 343.305(2). Under the subsection relevant here, the statute permits testing "if a law enforcement officer has probable cause to believe that" the suspect has committed an intoxicated-driving offense, such as operating a motor vehicle under the influence of an intoxicant or controlled substance. *Id.* § 343.305(3)(b); *see id.* § 346.63(1)(a). The law enforcement agency "may designate which of the tests shall be administered first." *Id.* § 343.305(2).

The statute applies differently depending on whether suspects, having created a presumption of consent under the statute by voluntarily driving on the State's roads, are physically "capable" of withdrawing that consent when the police wish to administer the test. *Id.* § 343.305(3)(b). If they are, then the statute affords them an opportunity to do so. The police must advise conscious suspects of "the nature of the driver's implied consent." *State v. Reitter*, 227 Wis. 2d 213, ¶ 15, 595 N.W.2d 646 (1999). Reading from the "Informing the Accused" form, the police usually convey (among other facts) that (1) the suspect has been arrested or detained for an intoxicated-driving offense; (2) the officer "now wants to test one or more samples of [the suspect's] breath, blood or urine to determine the concentration of alcohol or drugs in [the suspect's] system"; (3) if the test shows intoxication, the suspect's "operating privilege will be suspended"; (4) "[i]f [the suspect] refuse[s] to take any test that this [officer] requests, [the suspect's] operating privilege will be revoked and [the suspect] will be subject to other penalties"; (5) "[t]he test results or the fact that [the suspect] refused testing can be used" against the suspect in court; and (6) the suspect may take alternative tests if he takes "all the requested tests." Wis. Stat. § 343.305(4).

If instead the suspect is found "unconscious or otherwise not capable of withdrawing consent," then he generally "is presumed not to have withdrawn consent," and the relevant subsections state that "one or more samples" may

be taken. *Id.* § 343.305(3)(b). Two features of this text are significant. First, the law acknowledges that implied consent under Section 343.305(2) may conceivably be withdrawn. Second, and relatedly, the statute does not conclusively establish that drivers found unconscious have not in fact withdrawn their consent; it simply presumes it—which suggests that the fact of consent, like most statutory presumptions under Wisconsin law, is in principle rebuttable. *See id.* §§ 903.01; 903.03(3).

Implied-consent laws impose "consequences when a motorist withdraws consent" and thereby reneges on his commitment under the statute, made in exchange for the privilege of driving. *McNeely*, 569 U.S. at 160–61 (plurality). An implied-consent law can "serve its purpose [only] if there are penalties for [ ] revoking consent." *State v. Brooks*, 113 Wis. 2d 347, 356, 335 N.W.2d 354 (1983). In some States, before *Birchfield*, those consequences were "significant," *McNeely*, 569 U.S. at 160–61 (plurality), and resulted in criminal liability. But the Supreme Court in *Birchfield* invalidated those criminal implied-consent penalties, while at the same time "cast[ing] [no] doubt" on "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. 2160, 2185. Wisconsin's implied-consent law falls in the second category, "attempt[ing] to overcome the possibility of refusal" merely "by the threat of . . . license revocation" and

evidentiary inferences. *Zielke*, 137 Wis. 2d at 48.[2] Specifically, if a motorist has been arrested for an intoxicated-driving offense and "refuses to take a test," the officer must prepare a "notice of intent to revoke . . . the person's operating privilege," Wis. Stat. § 343.305(9)(a), the filing of which begins a suspension proceeding in court.

C. Facts

One afternoon in late May 2013, Alvin Swenson called the Sheboygan County police to report that Mitchell had been driving and appeared to be intoxicated. Officer Alex Jaeger responded to dispatch's request that an officer "check[ ] the welfare of a male subject" near the intersection of North Eighth Street and St. Clair Avenue. Supplemental Appendix ("SA") 20. When he arrived, Officer Jaeger spoke to Swenson, who said that he knew Mitchell and "received a telephone call from [ ] Mitchell's mother concerned about his safety." SA20. (Later, Officer Jaeger also spoke with Mitchell's mother, who confirmed the account. SA24.) Swenson observed Mitchell leaving his apartment. Mitchell was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty in maintaining balance, nearly falling several times before getting into a gray minivan and driving

[2] Mitchell states that refusing to submit to a test "leads to a separate criminal offense." Opening Br. 15. As explained, that is incorrect.

away." SA21. The van belonged to Mitchell's mother, who gave Officer Jaeger the plate number. SA24.

About a half hour later, the police found Mitchell. A community-services officer with the Sheboygan County Police Department had "located a male subject matching the physical description" that Officer Jaeger had provided. SA23. Officer Jaeger observed Mitchell walking down St. Clair Avenue. His "state was consistent with what Swenson described." SA2. He was shirtless, wet, and covered in sand, as if "had gone swimming in the lake." SA25. He "was slurring his words" and "had great difficulty in maintaining balance," nearly falling over "several times," requiring the officers' help to keep upright. SA26. As they crossed a street, Mitchell "nearly fell after stepping up and over the curb." SA26.

Mitchell admitted that "he had been drinking." SA26. First, he stated that he had been drinking "in his apartment," but then he said "that he was drinking down at the beach" and had parked his vehicle "because he felt he was too drunk to drive." SA27. In the meantime, another officer located the van nearby on Michigan Avenue. SA28; SA57. That officer relayed to Officer Jaeger "that there was some minor damage [to the van] that appeared to be fresh." SA28. Officer Jaeger learned that Mitchell had "prior convictions" for "operating while intoxicated." SA27. Officer Jaeger concluded that Mitchell's condition "made administration of the standard field sobriety tests unsafe, so he declined to administer them."

SA3. Officer Jaeger administered a preliminary breath test, which showed an alcohol concentration of .24. He arrested Mitchell for operating while intoxicated. SA3.

On the way to the police station, Mitchell's condition began "declining," and he became more "lethargic." SA31. When they arrived, Mitchell had to be "helped out of the squad car." SA31. "[O]nce he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation." SA31. Officer Jaeger concluded that, in light of Mitchell's condition, a breath test would not be appropriate, and so he took Mitchell from the station to the hospital for a blood test. SA31. The drive to the hospital took approximately eight minutes. SA32. During it, Mitchell "appeared to be completely incapacitated, would not wake up with any type of stimulation," including "shak[ing] his arm, lift[ing] up his hands, shak[ing] his hands, [and] rub[bing] the top of his head." SA32. Mitchell "had to be escorted into the hospital by wheelchair," where he sat "slumped over" unable to "lift himself up" into a normal sitting position. SA32–33. Mitchell was admitted to the hospital and moved to the emergency room. SA36. Soon thereafter, Officer Jaeger read the "Informing the Accused form verbatim" to Mitchell, but Mitchell was "so incapacitated [that] he could not answer." SA33.

Officer Jaeger recalled that, as he waited for the phlebotomist to draw blood, "medical efforts were being

attempted," SA37, and Mitchell was being "monitored" by hospital staff, SA42. The unconscious Mitchell, however, "couldn't answer any hospital staff . . . and did not awake[n] while they placed catheters or any other type of medical instruments on him." SA37–38; SA43 (recalling again "specifically" that one nurse had inserted a catheter). The test was administered about one hour after arrest. SA35. It revealed a blood-alcohol concentration of .222g/100mL. SA4. Mitchell was eventually admitted to the hospital's intensive-care unit. SA52.

Officer Jaeger stated on cross-examination that he could have applied for a warrant but that he did not. He did not know how long it would have taken to secure a warrant. He explained that his office had only recently started seeking warrants in cases like this one. SA52.

D. Procedural History

The State charged Mitchell with driving a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited alcohol concentration (PAC). SA2 n.1.[3] He moved to suppress the warrantless blood test, arguing that it violated the Fourth Amendment.[4] The State responded that

[3] He had been convicted of six prior intoxicated-driving offenses. SA2 n.1.

[4] Mitchell also raised a claim under Article I, Section 11 of the Wisconsin Constitution. This Court "generally interpret[s]" that language "consistent with the United States Supreme Court's interpretation of the Fourth Amendment." *Lemberger*, 2017 WI 39, ¶ 34.

Mitchell had consented to the blood draw under Wisconsin's "implied consent" law. Wis. Stat. § 343.305. The circuit court denied Mitchell's motion. SA4. The only other question was whether probable cause supported the blood draw, and the court held that it plainly did. SA4.

The State tried Mitchell before a jury, which convicted him on both the OWI count and the PAC count. He was concurrently sentenced to three years' initial confinement and three years' extended supervision on each count. Mitchell appealed the denial of his suppression motion. SA4.

The Court of Appeals certified the appeal to this Court, noting that this case "raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." SA1.

This Court granted certification.

STANDARD OF REVIEW

This Court "independently appl[ies] the constitutional principles to the facts as found to determine" whether the Fourth Amendment has been violated. *State v. Phillips,* 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). The unconstitutionality of a state statute must be proven "beyond

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n.13 (citation omitted). For convenience, this brief will use "Fourth Amendment" as shorthand for both provisions.

a reasonable doubt." *In re Gwenevere T.*, 2011 WI 30, ¶ 47, 333 Wis. 2d 273, 797 N.W.2d 854 (citation omitted).

SUMMARY OF ARGUMENT

I. Suspicion-based blood-alcohol tests of consenting motorists arrested for intoxicated driving, including unconscious drivers, are reasonable under the Fourth Amendment. Basic search-and-seizure doctrine provides that a defendant may imply consent to a search by conduct. In particular, "because we presume that Wisconsin's citizens know the law," *Weber*, 2016 WI 96, ¶ 78 & n.9 (Kelly, J., concurring), it may "be fairly inferred from context" that voluntary conduct undertaken against the backdrop of a legal rule is best understood as according with that rule, *Birchfield*, 136 S. Ct. at 2185. Those exercising the privilege of driving on Wisconsin highways are on notice that their conduct implies consent. And, like the activity of driving itself, that consent is entirely voluntary, and it may be withdrawn by one so capable.

Precedent confirms the statute's validity. This Court already has indicated in a number of cases that a motorist effectively consents to searches under the statute by driving, including in a decision implicitly holding that, upon arrest, a driver has already "consent[ed] . . . to submit" to BAC testing under the statute, *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980)—contrary to dicta in *State v. Padley*, 2014 WI App 65, ¶¶ 26, 39 n.10, 354 Wis. 2d 545, 849 N.W.2d 867.

Likewise, the U.S. Supreme Court has concluded that implied consent laws are "unquestionably legitimate," *Neville*, 459 U.S. at 560, that they are effective "legal tools" for securing evidence of intoxication "without undertaking warrantless *nonconsensual* blood draws," *McNeely*, 569 U.S. at 160–61 (plurality) (emphasis added), and that none of its cases should be read to "cast doubt" on them, *Birchfield*, 136 S. Ct. at 2185.

II. While there is "a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads" under a statute, *id.*, the law challenged here is well within the Fourth Amendment's general rule of reasonableness. The statute's search conditions bear a close nexus to the privilege of driving and entail penalties that are proportional to the severity of the violation. The search authorized by the implied-consent condition is clear and specific. A vital government interest justifies the tests. The "intrusiveness" of implied-consent blood draws, especially for unconscious drivers who have been arrested for intoxicated driving and who (like Mitchell) often can expect to receive equally invasive medical treatment, do not "exceed[ ] that required to serve the legitimate security concerns." *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1182 (7th Cir. 1993). Finally, imposing a categorical warrant requirement in these cases would not further the ends of the Fourth Amendment. *See Birchfield*, 136 S. Ct. at 2181.

ARGUMENT

I. When Authorized By The Implied-Consent Statute, Suspicion-Based Searches Of Unconscious Drivers' Blood-Alcohol Content Satisfy The Consent Exception To The Fourth Amendment's Warrant Requirement

A. By Voluntarily Driving On Wisconsin's Roads, Motorists Allow A Rebuttable Presumption Of Consent To Blood-Alcohol Testing Where There Is Probable Cause Of Intoxication

The question in this case is whether the warrantless testing of Mitchell's blood under the implied-consent statute violated the Fourth Amendment. That Amendment codifies "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures" and provides that warrants shall not issue without probable cause. U.S. Const. amend. IV. But "the text of the Fourth Amendment does not specify when a search warrant must be obtained." *Kentucky v. King*, 563 U.S. 452, 459 (2011). Although a warrant is generally required for a search of a person, *McNeely*, 569 U.S. at 148 (plurality), "[t]he touchstone of the Fourth Amendment is reasonableness," *State v. Purtell*, 2014 WI 101, ¶ 21, 358 Wis. 2d 212, 851 N.W.2d 417 (citation omitted). "[C]ertain categories of permissible warrantless searches have long been recognized" as reasonable, and "[c]onsent searches" are "one of the[m]." *Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014).

"The practice of making searches based on consent is by no means a disfavored one." 2 Wayne R. LaFave, et al., *Crim. Proc.* § 3.10(a) (4th ed.). Indeed, "[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States v. Drayton*, 536 U.S. 194, 207 (2002). Accordingly, "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 231–32 (1973).

"To determine if the consent exception is satisfied," this Court asks (1) "whether consent was given in fact by words, gestures, or conduct" and (2) "whether the consent given was voluntary." *State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430.

1. Consent to a search may be implied by conduct.

Just as a person may express consent to a request through words or gestures, he may also "manifest[ ]" agreement "by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given." *State v. Douglas*, 123 Wis. 2d 13, 14–15 n.1, 365 N.W.2d 580 (1985) (quoting definition of "implied consent" in *Black's Law Dictionary* 276 (rev. 5th ed. 1979)). This consent is conveyed by "conduct," which alone "provides a sufficient basis" for a warrantless search. *Phillips*, 218 Wis. 2d at 197; *Brar*, 2017 WI 73, ¶¶ 17–18 (lead op.). Consent by conduct

can arise simply from "the person's . . . engaging in a certain activity" or from other "circumstantial evidence." 4 Wayne R. LaFave, et al., *Search & Seizure: A Treatise on the Fourth Amendment* § 8.2(l) (5th ed. 2015). Police officers "may . . . fairly infer[ ]" such consent "from context." *Birchfield*, 136 S. Ct. at 2185. "Th[is] principle of consent by conduct is neither new nor infrequently applied." *State v. Howes*, 2017 WI 18, ¶ 68, 373 Wis. 2d 468, 893 N.W.2d 812 (Gableman, J., concurring in the judgment).

The U.S. Supreme Court's recent decision in *Birchfield v. North Dakota*, *see infra* pp. 36–37, which looks favorably upon non-criminal implied-consent laws, cites two helpful examples of consent by conduct. 136 S. Ct. at 2185; *see also Brar*, 2017 WI 73, ¶ 20 (lead op.) (citing the same cases). The first is *Florida v. Jardines*, 569 U.S. 1 (2013). The detective in that case had entered "the constitutionally protected extensions of Jardines' home" without a warrant and without Jardines' express consent. *Id.* at 8. One of the questions presented was "whether [Jardines] had given his leave . . . *implicitly* . . . for them to do so." *Id.* (emphasis added). Invoking the principle of property law that front paths and door knockers are "treated as an invitation . . . to attempt an entry, justifying ingress to the home," the Court held that the defendant in that case had granted to police an "implicit license" to enter the curtilage by virtue of residing in a home with a front path. *Id.*; *see also* 1 LaFave, *Search & Seizure*, *supra*, § 2.3(c) ("[C]ourts have held that police with legitimate

business may enter the areas of the curtilage which are impliedly open to use by the public . . . ." (citation omitted)). It did not matter whether Jardines even had *known* of this common law–derived "customary invitation" or had meant to observe it. 569 U.S. at 9. So the Court saw no need to inquire whether Jardines subjectively had intended to open his curtilage to passers-by. For the Court, it was enough that he had voluntarily engaged in conduct—residing in a home with a front path and a door knocker—that the law deemed to convey consent. *Id.* at 8–9.[5]

Another line of cases in which "consent to a search . . . may be fairly inferred from context," according to *Birchfield*, 136 S. Ct. at 2185, governs "closely regulated" activities with "a history of government oversight," *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313–14 (1978). Those precedents hold that when a person "embarks upon" such an activity, "he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id.* at 313. In particular, by "accept[ing] the burdens as well as the benefits" of such an activity, a person in "a regulated industry in effect *consents* to the restrictions placed upon him," *id.* (emphasis added; citation omitted), including possible warrantless searches.

[5] Drawing upon similar logic, Justice Kelly has concluded that there is yet another setting in which law enforcement reasonably may infer consent from conduct undertaken against the backdrop of an established legal rule: traffic stops that take place in a suspect's garage. *See Weber*, 2016 WI 96, ¶¶ 77–81 (Kelly, J., concurring); *compare id.* ¶ 3 (lead op.) (deciding the case under the hot-pursuit doctrine).

Thus one who enters the firearms business, for example, "does so with the knowledge" that his records and goods "will be subject to effective inspection." *United States v. Biswell*, 406 U.S. 311, 316 (1972); *see Marshall*, 436 U.S. at 313 (citing *Biswell*).

As members of this Court have pointed out, the consent-by-conduct framework also applies in sensitive public settings where risks to the safety of others are especially salient. For instance, "[e]ven in the absence of an express indication, implied consent to an airport security search may be imputed from posted notices." *Brar*, 2017 WI 73, ¶ 17 (lead op.) (quoting *Hawaii v. Hanson*, 34 P.3d 1, 5 (Haw. 2001)); *see also Howes*, 2017 WI 18, ¶ 68 (Gableman, J., concurring in the judgment) (citing *United States v. DeAngelo*, 584 F.2d 46, 47–48 (4th Cir. 1978)); *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973). Likewise, "a warrantless search of a person seeking to enter a military base may be deemed reasonable based on the [consent] implied . . . from the act of driving past the guard shack and onto the base and imputed from the posted notice indicating that entry onto the base constituted consent to a search," *Howes*, 2017 WI 18, ¶ 68 (Gableman, J., concurring in the judgment) (quoting *Morgan v. United States*, 323 F.3d 776, 778 (9th Cir. 2003), and *Hawaii v. Torres*, 262 P.3d 1006, 1022 (Haw. 2011)).

2. Implied consent is voluntary if not coerced.

To be valid under the Fourth Amendment, consent also must be voluntary. *Phillips*, 218 Wis. 2d 180, ¶ 26; *Brar*, 2017 WI 73, ¶ 24 (lead op.). Consent is voluntary if "given in the absence of duress or coercion, either express or implied." *Phillips*, 218 Wis. 2d 180, ¶ 26. "Coercive [government] activity is a necessary predicate" to deeming an act not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *see, e.g.*, *Colorado v. Magallanes-Aragon*, 948 P.2d 528, 531 n.6 (Colo. 1997). In other words, so long as the State has not coerced a person into consenting, his or her consent is constitutionally sufficient.

In the context of consent implied by a "person's . . . engaging in a certain activity," 4 LaFave, *Search & Seizure*, *supra*, § 8.2(1), the coercion inquiry is simple. In *Jardines*, for example, it was enough that the suspect had not been forced to live in a home with a front path or a door knocker. 569 U.S. at 7–8. Likewise, in the airport context, the government does not coerce passengers into taking "hand luggage on board a commercial aircraft"; they "chose to engage in th[at] regulated activity" themselves. *Doran*, 482 F.2d at 932.

3. Motorists like Mitchell imply real, uncoerced consent to suspicion-based blood-alcohol testing by driving on Wisconsin's roads, and by not revoking that consent when capable.

a. Like the homeowner with a front path and the luggage-toting airline passenger, the Wisconsin motorist

creates by his or her conduct a presumption of real consent to a certain kind of limited, predefined search. This follows from two premises.

First, Wisconsin motorists are on notice of the implied-consent statute's provisions. In *Doran*, for example, posted signs notified passers-by of the inference that the law would draw from their conduct, whether or not they actually read and understood them. *See* 482 F.2d at 932. The implied-consent statute performs the same function as the sign—except more directly. That is "because we presume that Wisconsin's citizens know the law." *Weber*, 2016 WI 96, ¶ 78 & n.9 (Kelly, J., concurring); *State v. Neumann*, 2013 WI 58, ¶ 50 n.29, 348 Wis. 2d 455, 832 N.W.2d 560. Thus, just as the homeowner in *Jardines* was presumed to know the common-law principle that to have a front path is to invite outsiders to enter the curtilage without express consent, motorists are presumed to understand that driving in Wisconsin will signal consent to suspicion-based blood-alcohol tests per the terms of the statute, unless and until the driver "withdraw[s]" that consent when "capable" of doing so. Wis. Stat. § 343.305(3)(b).

Second, just as drivers in Wisconsin are presumed to know the law, they are also presumed to want to comply with it by holding up their end of the reasonable implied-consent bargain. As *Jardines* shows, for purposes of Fourth Amendment consent analysis, a person's voluntary conduct is presumed to reflect not only *knowledge* of the law but also (absent evidence showing otherwise) an intention to *act in*

accordance with the law. So, in *Jardines*, the Court seemed to conclude not only that the homeowner was aware of the common-law "customary invitation" rule but also that he must have intended, by his conduct, to assent to that rule, thereby conveying to the public a license to certain warrantless entries into his curtilage. 569 U.S. at 7–8.

Bolstering the reasonableness of inferring consent under the statute is the reality that operating a motor vehicle on state roads is a "closely regulated" activity with "a history of government oversight." *Marshall*, 436 U.S. at 313–14 (1978); *Birchfield*, 136 S. Ct. at 2185 (citing *Marshall* approvingly); *South Dakota v. Opperman*, 428 U.S. 364, 367–68 (1976) ("Automobiles . . . are subject to pervasive and continuing governmental regulation[ ] and control[ ]."). Operating a multi-ton vehicle at high speeds "is a privilege and not an inherent right." *Steeno*, 85 Wis. 2d at 671; *see Buck v. Kuykendall*, 267 U.S. 307, 314 (1925). As the many restrictions on driving reflect, "[m]otor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property"—which is why driving is the classic example of a privilege to which governments may attach reasonable conditions, including ones that could not constitutionally be imposed on the public at large. *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (upholding rule that motorist give "implied consent" to appointment of state registrar as representative for service of process in cases arising from accidents). By

taking "the benefits" of that privileged activity, a driver accepts "the burdens as well" and "consents to the restrictions placed upon him." *Marshall,* 436 U.S. at 313 (citation omitted).

b. Second, like the consent of the homeowner with the front path and the airline passenger with luggage, the consent implied under the statute is voluntary. Driving, though important to many, is plainly not the product of "coercive [government] activity." *Connelly*, 479 U.S. at 167. As the Court of Appeals has noted, "[i]t is the motorist who has voluntarily asserted his or her autonomy" in getting behind the wheel. *State v. Wintlend*, 2002 WI App 314, ¶ 19, 258 Wis. 2d 875, 655 N.W.2d 745; *see also Howes*, 2017 WI 18, ¶ 84 (Gableman, J., concurring in the judgment). Similarly, no "implied threat or covert force" compels motorists to keep their end of the implied-consent bargain. *Schneckloth*, 412 U.S. at 228. Indeed, the law even recognizes that drivers may breach the bargain, either by directly "refus[ing]" a "request" to perform the test or by otherwise "withdrawing consent" when "capable." Wis. Stat. § 343.305(3)(b), (9); *Lemberger*, 2017 WI 39, ¶ 47 n.4 (Abrahamson, J., concurring).

Although the prospect of privilege revocation for reneging on the statutory bargain may encourage a motorist not to withdraw his consent, *Neville* holds (and *Birchfield* confirms) that a State does not coerce a motorist simply by putting him to the choice of either consenting or losing the privilege. *Neville*, 459 U.S. at 564 ("We hold . . . [that it] is

not an act coerced by the officer."); *Birchfield*, 136 S. Ct. at 2185–86. The Supreme Court could not be clearer on this point: imposing the "penalty [of revocation] for refusing to take a blood-alcohol test is unquestionably legitimate." *Neville*, 459 U.S. at 560. Breaching the implied-consent bargain simply puts a motorist like Mitchell where he would have been had he not accepted the deal in the first place: unable to drive. As Justice Abrahamson has explained, that is hardly coercive: "Tough choices, even choices that discourage the exercise of a Fourth Amendment right, are common in the law and are viewed as voluntary and constitutionally valid." *Milewski*, 2017 WI 79, ¶ 203 (Abrahamson, J., dissenting) (describing the implied-consent law). That is because, "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.* ¶¶ 203–04.

c. Applying those principles here is straightforward. By operating a vehicle on Wisconsin roads with a presumed understanding of the reasonable conditions imposed by the implied-consent statute and a presumed desire to act in accordance with that statute, Mitchell allowed a reasonable inference of consent to a suspicion-based search of his blood-alcohol content. That consent was not the product of government coercion. The State did not force him to drive. Nor did the State require him to maintain his consent once he was arrested. Indeed, at any moment before Mitchell fell

unconscious, he was free to "withdraw" that consent, subject to "unquestionably legitimate" civil penalties. *Neville*, 459 U.S. at 560; *compare* Opening Br. 17 (incorrectly stating that "Mitchell had no opportunity to . . . withdraw his consent"). Accordingly, Mitchell's consent to the search was both actual and voluntary. The test was therefore reasonable.

Several out-of-state courts, having upheld the unconscious-driver provisions of their own implied-consent laws from constitutional challenges, would agree. Just this year, for instance, the Colorado Supreme Court held that, "[b]y driving in Colorado," a motorist found unconscious could be deemed to have "consented to the terms of the Expressed Consent Statute, including its requirement that he submit to blood-alcohol testing under the circumstances present here." *Hyde*, 393 P.3d at 964; *id.* at 970 (Eid, J., concurring in the judgment). Courts in Idaho, Virginia, and Minnesota have concluded likewise. *See, e.g.*, *Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 867 (Idaho Ct. App. 2015); *Goodman v. Virginia*, 558 S.E.2d 555, 560 (Va. Ct. App. 2002) (same); *Minn. Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979).

d. Mitchell errs when he contends that because consent under the statute is revocable, it "cannot function" as "[a]ctual" consent under the Fourth Amendment. Opening Br. 16–17. This assertion is unsupportable. Whether consent is revocable simply has no bearing on whether an act of consent has occurred. More to the point, it is well established

that in principle a suspect's consent is *always* revocable. If a homeowner tells a police officer to proceed with a warrantless search of her garage, but then, while the officer is walking up the driveway, announces that she has changed her mind, the officer no longer has consent to search. *See, e.g.*, *United States v. Zamora-Garcia*, 831 F.3d 979, 982 (8th Cir. 2016); *United States v. McWeeney*, 454 F.3d 1030, 1035 (9th Cir. 2006).

Mitchell's concept of "actual consent" seems to rely upon the unconvincing contrast drawn between supposedly real consent and allegedly insufficient "'consent' implied by law." *Brar*, 2017 WI 73, ¶ 59 (Kelly, J., concurring). On that view, "[i]t is a metaphysical impossibility" for a person "to freely and voluntarily give 'consent' implied by law," including under the implied-consent statute. *Id.* Whether or not that proposition is true, it misunderstands the source of consent here: consent under the statute is not consent implied by *law*; it is a *presumption* of consent implied by a person's voluntary *conduct* undertaken against the *backdrop* of law, which the person is presumed to know. The same is true of implied consent in other contexts. The homeowner's implicit license in *Jardines* and the consent of the airline passenger with luggage are hardly "legal fiction[s]." *Id.* They are reasonable inferences from conduct that "did . . . really happen." *Id.* That the conduct in those cases was susceptible of alternative inferences does not make the inference of consent unreasonable. Hence, courts have concluded that implied consent is not at all a "second-tier form of consent" and is no

less "sufficient . . . than consent given by other means." *Id.* ¶¶ 20, 23 (lead op.).

Relatedly, Mitchell seems to object that the State's approach to the voluntariness analysis for implied consent short-circuits the usual "exhaustive inquiry into virtually every conceivable circumstance that could possibly have some bearing on whether the defendant's consent was the product of the State's influence." *Id.* (Kelly, J., concurring); Opening Br. 21. To begin, this critique fundamentally misunderstands the voluntariness analysis. Although the test looks to the totality of circumstances, not *all* circumstances in the totality are always relevant. That is true even in the context of express police-to-suspect consent requests. Where, for example, a person opens the door to his home, holds the door open, and "wave[s]" the police "into his home," courts routinely conclude that, unless the officer made some show of force, the consent was uncoerced. *E.g.*, *Kaminsky v. Schriro*, 243 F. Supp. 3d 221, 228 (D. Conn. 2017). Because the person's conduct so clearly conveys voluntary permission to the objective observer, courts in those cases perceive no need to consider the person's "age," "intelligence," "education," "physical and emotional condition," or "whether he had prior experience with law enforcement," *Brar*, 2017 WI 73, ¶ 61 (Kelly, J., concurring); *e.g.*, *Minnesota v. Mallett*, No. A09-627, 2010 WL 2362284, at *3 (Minn. Ct. App. June 15, 2010) (unpublished).

In any event, the reason an exhaustive, circumstance-by-circumstance analysis of the totality of particular facts in these cases is unnecessary is that "the circumstances in drunk driving cases are often typical," *McNeely*, 569 U.S. at 166 (Roberts, C.J., concurring in part and dissenting in part). Here, as in most cases, there is no dispute that the defendant voluntarily drove a vehicle on Wisconsin's roads. In so doing, he implied his consent to a chemical test under the statute. And because Mitchell was unconscious, he was "presumed" not to have withdrawn that consent—subject of course to a possible showing that when he had been conscious minutes before, he had in fact manifested an intent to revoke his implied consent. To obtain that implied consent in the first place, here and in all other cases, the State does not "use[ ] deception, trickery, or misrepresentation" to persuade drivers to consent or otherwise "threaten[ ] or physically intimidate[ ]" them. *Artic*, 2010 WI 83, ¶ 33. Implied consent is not the "opposite" of "congenial, non-threatening, and cooperative." *Id.* The unconscious driver has "responded to the request to search" by unequivocally manifesting consent by conduct. *Id.* And the statute itself, which the drivers are presumed to know, informs them that they can "refuse consent." *Id.* Although the remaining factor—the suspect's "characteristics"—would seem to call for a defendant-specific inquiry in unconscious-suspect cases, this Court has clarified (consistent with the out-of-state cases cited above) that this factor is relevant only if there has first been "improper

influence, duress, intimidation, or trickery," *id.* ¶ 59 (quoting *Phillips*, 218 Wis. 2d at 202–03), and under the implied-consent law there is none, *see supra* pp. 24–26.

Mitchell's suggestion that the implied-consent law unfairly "imposes a greater burden" on unconscious arrestees also misses the mark. Opening Br. 20. In an important sense, the statute applies equally to all drivers: consent can always be withdrawn (subject to penalty) by those "capable of withdrawing consent." Wis. Stat. § 343.305(3)(b). Although a person found "unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent," Wis. Stat. § 343.305(3)(b), nothing prevents that driver from withdrawing consent when able. Here, for example, Mitchell—who, again, is presumed to have understood the implied-consent statute even before the officers reminded him of it—could have withdrawn his consent at any moment during the "[a]pproximately one hour [that] elapsed from the time of arrest" to his arriving at the hospital. Opening Br. 7. And while other drivers will lack that opportunity because, by choosing to become intoxicated, they have rendered themselves unconscious before the police even arrive, it would be entirely unreasonable to presume that those drivers—in contrast to all other drivers—did *not* impliedly consent by voluntarily getting behind the wheel. The far more sensible assumption is that when the formerly conscious intoxicated motorist is found unconscious, he or she knew the law and meant to comply with it, absent evidence to

the contrary. If the rule were otherwise, unconscious intoxicated drivers would receive a windfall: by the happy accident that they have knocked themselves out by their drug use, the best evidence of their intoxicated state—a blood-alcohol test—might well be suppressed.

Finally, Mitchell suggests that, under the State's view, reading the "Informing the Accused" form to a conscious suspect would be superfluous because the driver would have already consented to the search by driving. Opening Br. 13–15. Mitchell is mistaken. Under both the unconscious- and conscious-driver provisions, a motorist is presumed to consent by his or her voluntary conduct of driving. But as the statute's conscious-driver provisions reflect, the best way to find out whether a motorist consents *presently*, at the moment of the search, is simply to ask. Hence a conscious suspect's present consent is not conclusively presumed from his or her past conduct but rather is discerned principally from the suspect's contemporaneous response to the "Informing the Accused" form. That it makes sense to double-check with a conscious driver when that is possible ("Do you mean to continue your consent?") does not suggest, however, that the consent implied by the driver's earlier conduct is somehow insufficient. Nor does it support an argument that drivers have a constitutional right to be given an affirmative opportunity, just before a search is to be performed, to revoke consent. Fourth Amendment law contains no such requirement. *Hyde*, 393 P.3d at 972 (Eid, J., concurring in the

judgment) ("[N]othing more [is] necessary to comport with the Fourth Amendment.").

B. Precedents Of This Court And The U.S. Supreme Court Confirm The Constitutionality Of Wisconsin's Implied-Consent Law

Constitutional challenges to implied-consent statutes are nothing new. Both this Court and the U.S. Supreme Court have rejected several. As those decisions and others show, both courts have concluded that, by voluntarily operating a motor vehicle on a State's roads, motorists effectively imply consent to warrantless chemical testing on suspicion of intoxicated driving.

1. This Court consistently has made clear that motorists on Wisconsin's roads impliedly consent to blood-alcohol testing if detained for intoxicated driving. In *State v. Neitzel*, this Court held that a suspect is not "entitled to consult counsel before deciding to take or refuse to take a chemical [BAC] test." 95 Wis. 2d at 193. An explicit premise of this holding is that by the time a suspect may wish to confer with an attorney, his or her consent is a *fait accompli*: "By reason of the implied consent law, a driver . . . submits to the legislatively imposed condition . . . that, upon being arrested . . . he consents to submit to the prescribed chemical tests." *Id.*; *see also id.* at 194. As this Court put the point in a related case, "[b]ecause the driver *already has consented to the test*, it is unnecessary to secure the advice of an attorney about the

decision to submit." *Reitter*, 227 Wis. 2d 213, ¶ 45 (emphasis added); *Brar*, 2017 WI 73, ¶ 21 n.9 (lead op.) (relying on *Neitzel* and *Reitter*).

This Court's decision in *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, follows the same reasoning. *Brar*, 2017 WI 73, ¶ 21 n.9 (lead op.) (relying on *Piddington*). *Piddington* addressed what methods the Due Process Clause and an earlier version of the statute prescribe for "convey[ing] the implied consent warnings" to conscious arrestees. *Id.* ¶ 1. The defendant, "severely deaf since birth," argued that he needed a certified interpreter to "inform[ ]" him of the nature of the search request. *Id.* ¶¶ 1–2, 32. But this Court held that whether the suspect had understood the warnings was not the measure of their legality (or the test's admissibility). It was not even "part of the inquiry." *Id.* ¶ 55. The test was instead whether the officer "reasonably convey[ed] the implied consent warnings under the circumstances existing at the time of the arrest," regardless of whether the suspect understood them. *Id.* Since the officer in that case had done so, there was no violation "warrant[ing] suppression" of the test results. *Id.* ¶ 36. This would have been a radical holding indeed if the "severely deaf" defendant had not been understood to have consented to the search by driving on Wisconsin highways.[6]

[6] Other cases in which this Court has suggested that Wisconsin drivers effectively consent by conduct to searches under the statute

2. The U.S. Supreme Court also has confirmed the effectiveness of civil implied-consent laws in at least three cases. It first endorsed implied-consent laws in *South Dakota v. Neville*, 459 U.S. 553, showing that the consent derived from those laws is indeed valid. *Neville* concerned a Fifth Amendment challenge to South Dakota's implied-consent law, which provided that drivers consented to testing by driving and penalized consent-revoking drivers by allowing their refusals to be used against them in court. 459 U.S. at 559–60. The Court rejected the defendant's constitutional challenge because penalizing a driver for revoking consent was "unquestionably legitimate." *Id.* at 560. The implication of that holding for the implied-consent question here is plain: The unquestionable legitimacy of punishing drivers' failure to keep their end of the bargain assumes that drivers can and do meet that obligation by engaging in the conduct that implies consent (driving). *Id.* at 560; *see also Mackey v. Montrym*, 443 U.S. 1, 18 (1979).

The lead opinion in *McNeely* also praised the effectiveness of implied-consent statutes. It indicated that implied-consent statutes belong to "a broad range of *legal tools* to enforce drunk-driving laws and to secure BAC evidence *without* undertaking warrantless *nonconsensual*

include *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974); *State v. Disch*, 129 Wis. 2d 225, 236, 385 N.W.2d 140 (1986); *State v. Crandall*, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986); *Zielke*, 137 Wis. 2d at 48–49; and *State v. Krajewski*, 2002 WI 97, ¶¶ 19–23, 255 Wis. 2d 98, 648 N.W.2d 385.

blood draws." 569 U.S. at 160–61 (plurality) (emphases added). Of course, calling implied-consent laws "legal tools" suggests that they are lawful. And describing searches premised on consent derived from those statutes as *not* "nonconsensual" indicates, of course, that the consent derived therefrom is anything but fictional. No Justice disagreed with the plurality on this point.

Most recently, the Supreme Court's decision in *Birchfield* also fortified the validity of civil implied-consent laws. Although Wisconsin's implied-consent law imposes only civil penalties on revocations of consent, other States had gone further, providing that "motorists lawfully arrested for drunk driving may be convicted of a crime . . . for refusing to take" a warrantless chemical test. 136 S. Ct. at 2172. The Court considered the constitutionality of those criminal laws, giving a two-part answer to the question of whether the Fourth Amendment permits the police to "*compel* a motorist to submit" to warrantless blood and breath tests on penalty of criminal punishment. *Id.* (emphasis added). First, because the search-incident-to-arrest doctrine categorically justifies breath tests, States can criminalize the refusal to undergo one. *Id.* at 2186. But since neither the search-incident-to-arrest doctrine nor the exigent-circumstances doctrine categorically authorizes blood draws, the Court had to consider whether an implied-consent law threatening criminal sanctions could justify a blood draw. *Id.* at 2185–86.

Critically, in the paragraph distinguishing that question from the one in this case, the Court telegraphed unmistakable approval for laws like Wisconsin's. *See Hyde*, 393 P.3d at 970 (Eid, J., concurring in the judgment). Citing *Jardines* and *Marshall*, the Court explained that "consent to a search need not be express but may be fairly inferred from context." *Birchfield*, 136 S. Ct. at 2185. Citing *McNeely* and *Neville*, the Court added, "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* The Court then cautioned that "Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.*

Yet "[i]t is another matter . . . to impose *criminal penalties* on the refusal to submit to such a test." *Id.* (emphasis added). After all, "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads," as the "[r]espondents and their *amici* all but concede[d]." *Id.* at 2185–86. Applying a general reasonableness standard, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

3. Although Mitchell does not discuss nearly any of these numerous authorities, he does assert that certain case law—presumably *McNeely*—forbids "per se" or "categorical

rules regarding consent." Opening Br. 18. But *McNeely* had nothing to do with consent. On this point, *Birchfield* has removed any possible doubt: "the [*McNeely*] Court pointedly did not address any potential justification for warrantless testing of drunk-driving suspects" other than exigency. 136 S. Ct. at 2174. This Court agrees, having stated unequivocally that *McNeely* can have no negative effect on the "the [implied-consent] law." *Lemberger*, 2017 WI 39, ¶ 33 n.11.

Mitchell does discuss one case at length, and he rests his theory almost entirely upon its reasoning: *State v. Padley,* 2014 WI App 65. But any discussion in *Padley* of the statute's unconscious-driver provisions is pure dicta. To the extent that this Court truly owes deference to lower-court analysis of the constitutionality of a state statute, it is only a *holding* of the Court of Appeals that could possibly carry any precedential weight. *See Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997). Yet, as the *Padley* opinion makes clear, the court in that case made no holding whatsoever on the validity of the implied-consent law's unconscious-driver provisions. 2014 WI App 65, ¶ 39 & n.10. Rather, *Padley* held that a conscious defendant's contemporaneous consent to a search is voluntary, notwithstanding that she is told that "the alternative" to consent is "a [civil] penalty." *Id.* ¶ 72. The court also rejected a facial attack "premised on the inaccurate view that Wisconsin's implied consent law," like the laws of some other States, "*require[s]* a driver to submit to a search."

Id. ¶ 44 (emphasis added). As the court recognized, the statute gives all motorists a choice between consenting "or withdrawing 'implied consent' and suffering implied-consent-law sanctions." *Id.* ¶ 42. Those holdings are entirely consistent with the State's argument here.

Nevertheless, Mitchell clings to three dicta-ridden paragraphs from *Padley* that describe how implied consent works in conscious-driver cases. Opening Br. 14–15 (citing *Padley*, 2014 WI App 65, ¶¶ 37–39). But that description does not conflict with the State's argument, especially if one reads *Padley*'s use of the term "actual consent" reasonably to mean simply "contemporaneous, express consent." As the State has explained, *supra* pp. 31–32, when the conscious driver is arrested, the best indication of whether he or she continues to consent *presently* to a search is not whether the driver consented at some prior time but whether the driver continues that consents *now*. So if the conscious driver agrees to a search, his consent is no longer "implied"; in a sense, it is now, according to *Padley*, "actual," meaning *contemporaneous* and *express*. 2014 WI App 65, ¶ 38. But that does not mean that the driver's earlier implied consent (even though no longer especially probative of his present intentions) simply is, or was, a fiction. If so, it would make no sense to say that when a conscious driver contemporaneously refuses to be tested, he "*withdraws* 'implied consent.'" *Id.* (emphasis added). Yet, that is precisely how *Padley* put it.

In a footnote, the court wondered whether "there *may be* tension" between its understanding of consent and the text of the unconscious-driver provisions. *Id.* ¶ 39 n.10 (emphasis added). But it did not "address this tension further." *Id.* So, whether or not the State is correct to perceive no necessary "tension" at all, *Padley*'s dicta remain dicta. They do not bind this Court. To the extent this Court instead reads *Padley*'s footnote to adopt a holding that the implied-consent law's unconscious-driver provisions are unconstitutional, this Court should withdraw that language from the Court of Appeals' opinion—just as the lead opinion in *Brar* did to other erroneous parts of *Padley*. *See Brar*, 2017 WI 73, ¶ 27 (lead op.); *see also Lemberger*, 2017 WI 39, ¶ 33.

II. Although The Fourth Amendment Imposes Certain Limits On Any Statutory Implied-Consent Regime, Suspicion-Based Blood Draws Under Wisconsin's Law Do Not Exceed Those Limits

"[S]ince reasonableness is always the touchstone of Fourth Amendment analysis," it is obvious that the State is not free to impose simply *any* kind of implied-consent condition, no matter how expansive, on voluntary activities such as driving. *Birchfield*, 136 S. Ct. at 2186. It could not, for example, deem motorists stopped for a traffic infraction to have consented to surrender their smartphones for warrantless inspection. Nor could the State make motorists, if stopped for intoxicated driving, agree implicitly and preemptively to waive their right to counsel in any future

intoxicated-driving proceeding brought against them. Nor, as *Birchfield* squarely holds, can "motorists . . . be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* After all, "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* at 2185; *see also Brar*, 2017 WI 73, ¶ 83 (Kelly, J., concurring). The application of the implied-consent law to unconscious intoxicated drivers, however, falls well within those limits for at least five reasons.

First, the implied-consent law's search conditions "are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to severity of the violation." *Birchfield*, 136 S. Ct. at 2186 (explaining that this formulation accords with the Fourth Amendment's reasonableness standard). The statute's consent provisions, plainly tailored to discourage intoxicated driving, bear an obvious nexus to the State's interest in regulating the safety of the driving privilege, with all of its manifest dangers to public safety. The statute also entails penalties that are proportional to the severity of the offense. Hence the Supreme Court has "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185.

Second, the search authorized by the implied-consent condition is "clear[ ]" and "specific." *Howes*, 2017 WI 18, ¶ 82

(Gableman, J., concurring in the judgment). As Justice Gableman has explained, courts have held that "*generic* 'subject to search' notices d[o] not provide fair notice of the extensive searches actually performed, and it [is] therefore unreasonable to deem individuals to have consented to those searches." *Id.* (emphasis added) (citing *McGann*, 8 F.3d at 1176, 1182–83); *Florida v. Iaccarino*, 767 So. 2d 470, 477 (Fla. Dist. Ct. App. 2000)). Here, by contrast, "the statute explicitly notifies all drivers that they will be deemed to have consented" to tests in "particular circumstances specifically tailored to combating the dangers of intoxicated driving," and so is "[u]nlike the parking lot in *McGann*, where unwarned and unprecedented searches were . . . based on a vague notice." *Howes*, 2017 WI 18, ¶ 82 (Gableman, J., concurring in the judgment).

Third, a "compelling security concern" and a "vital" government interest justify searches under the statute. *McGann*, 8 F.3d at 1181–82. "No one can seriously dispute the magnitude of the drunken driving problem." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). "For decades," the U.S. Supreme Court "has repeatedly lamented the tragedy." *Id.* (citation omitted). So has this Court: "Drunk driving is indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986). A "scourge on society," it "exacts a heavy toll in terms of increased health care and insurance costs, diminished

economic resources, and lost worker productivity," and it "destroys and demoralizes personal lives and shocks society's conscience." *Id.* at 33–34. "No one can seriously dispute . . . the States' interest in eradicating" it. *Sitz*, 496 U.S. at 451. Few state interests are more "paramount." *Birchfield*, 136 S. Ct. at 2178 (citation omitted). This Court gives these concerns "considerable weight." *Nordness*, 128 Wis. 2d at 34.

The implied-consent law "serve[s] the paramount governmental interest of enforcing drunk-driving laws and, thus, protecting public safety," *Milewski*, 2017 WI 79, ¶¶ 203–07 (Abrahamson, J., dissenting), by permitting the State to secure evidence of intoxication "as soon as possible," *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 623 (1989). With each second, "the body functions to eliminate [alcohol] from the system." *Schmerber v. California*, 384 U.S. 757, 770 (1966); *see also Krajewski,* 2002 WI 97, ¶ 27. Samples "must be obtained as soon as possible," lest the delay "result in the destruction of valuable evidence." *Skinner*, 489 U.S. at 623. Securing a warrant is not always an effective alternative, since that "may take some time and may often be impracticable." *State v. Faust*, 2004 WI 99, ¶ 29, 274 Wis. 2d 183, 682 N.W.2d 371; *see also Krajewski*, 2002 WI 97, ¶ 42 n.19. Relying instead on the exigent-circumstances doctrine can be risky, since it can be difficult for officers to assess in the moment whether there is a true exigency under the *McNeely* standard. *Compare McNeely*, 569 U.S. at 152–53 (requiring "careful case-by-case assessment of exigency"

based on the totality of the circumstances), *with id.* at 166 (Roberts, C.J., concurring in part and dissenting in part) ("A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him."). Consensual searches are by far the State's most promising means of collecting, as expeditiously as the circumstances permit, undiminished evidence of intoxication.

Fourth, "the intrusiveness" of implied-consent blood draws, especially for drivers who have been arrested for intoxicated driving and who can expect to receive medical attention, do not "exceed[ ] that required to serve the legitimate security concerns." *McGann*, 8 F.3d at 1182. On the state-interest side of that equation, it is clear that blood draws are the narrowest possible means of collecting the best evidence of an unconscious driver's intoxication. *Compare id.* at 1182 (unreasonable to conclude person "impliedly consent[s] to a strip search upon seeking access to a prison," since such an "intrusion" is "excessive"). As for intrusiveness, there are a number of reasons to conclude that, for an unconscious driver arrested for intoxicated driving, a blood draw, while certainly an "invasion of bodily integrity," *McNeely*, 541 U.S. at 148 (plurality), is a relatively "minimal intrusion," *Syring v. Tucker*, 174 Wis. 2d 787, 811, 498 N.W.2d 370 (1993).

The first few reasons relate to the context of the arrest. To begin, because of the implied-consent statute, motorists are "on notice . . . that some reasonable police intrusion on

[their] privacy is to be expected." *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013). That reduces any expectation of privacy. *Id.* Second, in cases like this one, the police administer the test only after the suspect has been arrested on suspicion of a intoxicated-driving offense. *See McNeely*, 569 U.S. at 160–61 (plurality). That is important because, after detention, a suspect's "expectations of privacy" and "freedom from police scrutiny" are "necessarily . . . of a diminished scope." *King*, 133 S. Ct. at 1978 (citation omitted). And those expectations of privacy are further diminished by the established principle that motorists have a "reduced privacy interest" on the roads. *State v. Parisi*, 2016 WI 10, ¶ 55, 367 Wis. 2d 1, 875 N.W.2d 619. In any event, because accurate chemical testing will sometimes disclose a suspect's *sobriety*, it sometimes serves to promote privacy interests by "lead[ing] to [the] prompt release of" an unimpaired driver, *Mackey*, 443 U.S. at 19, who otherwise would face the far more invasive extended seizure that a criminal charge would bring, *see King*, 133 S. Ct. at 1978.

Likewise, the intrusiveness of the blood draw itself in these cases is "slight." *Krajewski*, 2002 WI 97, ¶ 60. That is especially so for unconscious arrestees, who do not experience any immediate discomfort from the procedure and who, at any rate, often can be expected to undergo blood draws and other invasive treatments as part of their emergency medical treatment. Here, for example, around the same time as the search, medical staff monitored the unconscious Mitchell,

inserted a catheter, and later transferred him to the ICU. Further, a medically administered blood draw "does not threaten the individual's safety or health." *Id.* ¶ 60. It involves "virtually no risk, trauma, or pain." *Syring*, 174 Wis. 2d at 811 (quoting *Skinner,* 489 U.S. at 625); *see also Schmerber*, 384 U.S. at 771 (same); *Krajewski*, 2002 WI 97, ¶ 57.

Fifth, although the warrant requirement serves important ends in other contexts, *Birchfield* makes clear that requiring magistrate approval for all blood-alcohol tests of intoxicated drivers makes little sense. The warrant requirement has two functions: (1) it provides "an independent determination" of probable cause, and (2) it "limits the intrusion on privacy by specifying the scope of the search." 136 S. Ct. at 2181. Here, as in *Birchfield*, a warrant would serve neither end. First, "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 . . . probable cause for arrest," and "[a] magistrate would be in a poor position to challenge such characterizations." *Id.* Second, "[i]n every case the scope of the warrant would simply be a BAC test of the arrestee"; a warrant would not limit the search's scope "at all." Thus, "requiring the police to obtain a warrant in every case would impose a substantial burden but no commensurate benefit." *Id.* at 2181–82.

CONCLUSION

The decision of the circuit court should be affirmed.

Dated this 21st day of November, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,945 words.

Dated this 21st day of November, 2017.

_____

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant

ON APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE, PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. MITCHELL DID NOT CONSENT TO THE BLOOD DRAW PERFORMED ON HIM.

A. Actual Consent To A Blood Draw Occurs When Law Enforcement Reads "Informing The Accused" To The Suspect And Obtains The Suspect's Consent or Refusal of Consent.

The State argues that by driving on Wisconsin's public roads, Mitchell had impliedly given consent for law enforcement officials to take a blood sample from him should he be suspected of driving while intoxicated. State's Response Brief at p. 28. This interpretation is not correct. Reference to the right to refuse to give a sample is found in **Wis. Stat.** §343.305(4).[1] The Wisconsin Court of Appeals has interpreted this statute to mean that "the implied consent law does not compel a blood sample as a driver has the right to refuse to give a sample. …the choice is solely with the

[1] "At the time that a chemical test specimen is requested … , the law enforcement officer shall read the following to the person from whom the test specimen is requested: …" (then follows the text of "Informing the Accused.") **Wis. Stat.** §343.305(4).

driver." ***State v. Blackman,*** 371 Wis.2d 635, 643, 886 N.W.2d 94 (Wis. App. 2016).

Wis. Stat. §343.305(4) requires that a law enforcement officer read the suspect a document called "Informing The Accused," which contains statutorily specified language advising the accused person of the consequences of refusing the request for a blood sample. The Court of Appeals in ***State v. Padley*** takes this analysis a step further, stating that "a proper implied consent law authorizes law enforcement to present drivers with a difficult, but permissible, choice between consent or penalties for violating the implied consent law…". ***State v. Padley,*** 2014 WI App 65, ¶28, 354 Wis.2d 545, 849 N.W.2d 867, review denied, 2014 WI 122, 855 N.W.2d 695.

Since the implied consent statute explicitly states that the law enforcement officer "may request" a blood sample, then implied consent really means that citizens driving on Wisconsin public roads have consented, by their conduct, to make a choice in the event they are suspected of driving while intoxicated: either they will provide actual consent by an

affirmative response to "Informing the Accused," or, should they refuse to give actual consent, they will face the penalties described in **Wis. Stat.** §343.305(4). ***State v. Blackman,*** 371 Wis.2d 635, 642, 886 N.W.2d 94 (Wis. App. 2016).

The suspect provides actual consent at the point where a law enforcement officer meets his or her statutory obligation by reading him or her "Informing the Accused." It is at this point that the individual, by the nature of his response, either consents to or refuses to permit the taking of the requested blood sample. The consent implied in statute, then, is consent to the premise that a person will make a decision at some time in the future as to whether the person will provide a blood sample or face specified penalties. Statutory implied consent does not replace actual consent to an invasive, intrusive, and warrantless seizure of material from inside an individual's body.

Mitchell had no opportunity to give actual consent or to withdraw his consent to the blood draw that was eventually performed. The State argues that Mitchell always had the

opportunity to either consent or to withdraw his consent to the requested blood draw, at any time leading up to the procedure. The State is not correct. While the ability to speak may imply on some level that a person could make a statement consenting to a blood draw, nevertheless Wisconsin Statutes provide a required process by which consent is either confirmed or withdrawn. **Wis. Stat.** §343.305(4). The process is not discretionary, but is mandated. This process requires that a law enforcement officer read specific language to the accused and ascertain his consent or non-consent through the use of a written form. Mitchell asserts that he was not provided with this required opportunity to consent or withdraw his consent to the request for a blood sample during the time he was held in custody and was physically conscious and able to respond; thus, he did not have a statutory opportunity to declare his consent or refusal.

The State correctly points out that implied consent must be voluntary to be valid. ***State v. Phillips***, 218 Wis.2d 180, ¶26, 577 N.W.2d 794; ***State v. Brar,*** 2017 WI 73, ¶24

(lead op.), 376 Wis.2d 685, 898 N.W.2d 499. Consent is voluntary if "given in the absence of duress or coercion, either express or implied." ***State v. Phillips,*** 218 Wis.2d 180, ¶26. In Mitchell's case, the State failed to perform according to the statutory mandate of the implied consent law when it did not read him "Informing the Accused" during the time when he was conscious and could have responded. Officer Jaeger and his supervisor selectively decided to wait until Mitchell was nearly unconscious before attempting to obtain a blood sample. By not providing him the required opportunity to consent or to refuse the request before he lost consciousness, when he could have reasonably responded, they assumed Mitchell's fictional consent. Law enforcement certainly employed trickery, if not implied or outright coercion, in manipulating Mitchell's situation in order to avoid the necessity of obtaining a warrant before taking a forced blood sample.

A forced blood draw conducted by law enforcement, such as Mitchell experienced, falls within the definition of a

"search" under the Fourth Amendment and therefore must be reasonable. ***State v. Padley,*** 2014 WI App 65, ¶23, 354 WIs.2d at 562. Further, the U.S. Supreme Court established in ***United States v. Schmerber*** that a nonconsensual blood draw constitutes a search subject to the requirements of the Fourth Amendment. ***United States v. Schmerber***, 384 U.S. 757, 767-68, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and, "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." ***United States v. Schmerber***, 384 U.S. at 772. "A warrantless search is presumptively unreasonable" unless the search falls within an exception to the warrant requirement. ***State v. Tullberg***, 2014 WI 134, ¶30, 359 Wis.2d 421, 857 N.W.2d 120. Finally, the Wisconsin Supreme Court held that "the reasonableness of a warrantless nonconsensual test [for blood alcohol content] . . . will depend upon the *totality of the circumstances* [emphasis added] of each individual case." ***State v. Faust,*** 274 Wis.2d 183, 682 N.W.2d 371, 383 (2004), n. 16.

After Mitchell was taken into custody, at least an hour passed during which Mitchell was conscious and before he became unconscious. Law enforcement had more than enough time to comply with the statutory requirement either to obtain Mitchell's statutory consent or to obtain a search warrant should he refuse. Not until Mitchell was essentially unconscious did Officer Jaeger finally read "Informing the Accused" to Mitchell. It is patently unreasonable, first of all, to read "Informing the Accused" to an unconscious person and to believe that this act fulfills the statutory mandate; second, and even more unreasonable, is the presumption that because an unconscious person did not respond either giving or refusing consent, that he therefore somehow gave actual consent to an intrusive internal search and seizure within his body. In fact, by "refusing" consent (through his loss of consciousness), Mitchell may well be presumed to have withdrawn his consent. ***State v. Blackman,*** 371 Wis.2d at 642, citing ***State v. Padley*** 354 Wis.2d 545, ¶38 and ***State v. Neitzel,*** 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980). Under

this interpretation, Mitchell's "refusal" should have triggered the warrant process before his blood sample was taken.

In any event, and under any interpretation of Mitchell's conduct and situation, the totality of the circumstances indicate that he did not give actual consent to the request for a blood sample. Therefore, since Mitchell did not give consent to the request for a blood sample and because there were no other exceptions to the fourth amendment warrant requirement, Mitchell's blood was improperly taken and the results of the alcohol testing done on that blood sample must be suppressed.

The State points out that "consent under the statute is not consent implied by law; it is a presumption of consent implied by a person's voluntary conduct undertaken against the backdrop of law…" State's Response Brief at p. 28. Mitchell denies that the presumption of consent is sufficient to create actual consent. If the presumption of consent were truly sufficient to allow such an intrusive search as a warrantless and unconsented blood draw, then there would be

no need for an implied consent statute, since the statutory construct of "presumed consent" would be sufficient to overcome any obstacles, including the warrant requirement of the Fourth Amendment.

Mitchell agrees with the State that "the best way to find out whether a motorist consents *presently*, at the moment of the search, is simply to ask." State's Response Brief at p. 32. "Informing the Accused" is the statutory vehicle through which law enforcement asks this question. Confirming a suspect's consent in this manner creates actual consent to the request for a blood sample, and is a necessary component to find the existence of a consent exception to the Fourth Amendment's warrant requirement. Importantly, Mitchell asserts that Officer Jaeger failed to "simply ask" whether Mitchell consented to the blood sample, and thus, by that omission, failed to obtain Mitchell's actual consent to the request for a blood sample. Without consent, and without any other exception to the Fourth Amendment warrant

requirement, the search and seizure of Mitchell's blood should have been suppressed.

B. Officer Jaeger Did Not Reasonably Convey The Implied Consent Warnings At The Time Mitchell Was Taken Into Custody.

In ***State v. Piddington***, the Court held that an accused driver is to be advised of the implied consent warnings by law enforcement officers who are required to use reasonable methods that reasonably convey the warnings. Whether the driver actually comprehends the warnings is not part of the inquiry, rather the focus rests upon the conduct of the officer. ***State v. Piddington,*** 2001 WI 24 ¶55, 241 Wis.2d 754, 623 N.W.2d 528. Piddington is easily distinguished from Mitchell because the suspect in Piddington was deaf, and wanted an interpreter to help him understand the warnings. The Court found that explaining the warning was not within the responsibility of the officer; the officer's responsibility was simply to convey the warning in a reasonable manner. In Mitchell's situation, there was no reasonable conveyance of "Informing the Accused," because Officer Jaeger knew that

Mitchell was unconscious and any person should have known that because Mitchell was unconscious, he could not reasonably receive the information being presented.

CONCLUSION

The decision of the Circuit Court of Sheboygan County to deny his Motion to Suppress the Evidence of Warrantless Blood Draw should be reversed and his case be remanded to the circuit court with an Order suppressing the results of the warrantless blood draw.

Dated this 13th day of December, 2017.

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CERTIFICATION AS TO FORM/LENGTH

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No. 2015AP304

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

GERALD P. MITCHELL,
Defendant-Appellant.

On Appeal from the Sheboygan County Circuit Court, The Honorable Terrence T. Bourke, Presiding
Case No. 2013CF365

NON-PARTY BRIEF OF MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PLAINTIFF-RESPONDENT

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I. INTRODUCTION

For a period of nine years (2003 to 2012), Wisconsin's rate of death from alcohol-related crashes exceeded the national average.[1] In fact, 2016 witnessed 5,153 alcohol-related crashes and 143 alcohol-related fatalities on Wisconsin roads alone.[2] To hold drunk drivers accountable—and to prevent further deaths and debilitating injuries—States must be able to expediently gather accurate and admissible evidence related to the crime, including the driver's blood alcohol concentration ("BAC") at or near the time of the crash. Those mandates become even more compelling in the case of a particularly dangerous (but all-too-common) class of drunk drivers: those who become unconscious after having first taken the wheel.

In this case, the State has correctly argued that a warrantless blood test of a then-unconscious drunk driver, Gerald Mitchell, did not violate the Fourth Amendment because Mr. Mitchell validly consented to the blood test by driving a motor vehicle while intoxicated on a public road in Wisconsin. Such conduct readily satisfies Wisconsin's implied consent

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[1] *Sobering Facts: Drunk Driving in Wisconsin*, Ctrs. for Disease Control and Prevention, 1, (Dec. 2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_drivin/drunk_driving_in_wi.pdf.

[2] *Final year-end crash statistics*, Wis. Dep't of Transp., http://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx (last visited Nov. 8, 2017).

law, and should be deemed the equivalent of actual consent for the reasons argued by the State. That alone is enough to rule in the State's favor and sustain Mr. Mitchell's conviction. But *amicus curiae* Mothers Against Drunk Driving ("MADD") submits that even if Mr. Mitchell had not provided actual consent, the blood draw was constitutional because blood draws taken in a medical setting, of drivers who were unconscious, and whom the police had probable cause to arrest for drugged or drunk driving, are per se reasonable searches. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("the ultimate measure of the constitutionality of a governmental search is [its] 'reasonableness'"). For this reason, and for those argued by the State, MADD respectfully asks the Court to affirm the judgment of conviction against Mr. Mitchell.

II. STATEMENT OF INTEREST

MADD's mission is to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. MADD is concerned that the ruling in this case will impose an unnecessary restriction on law enforcement's ability to gather reliable, admissible BAC evidence with respect to a particularly dangerous class of drunk drivers: those who choose to get behind the wheel even though they have consumed so much alcohol that they risk losing consciousness. These offenders pose an even greater threat to public safety than less intoxicated drivers, and, when they actually do lose consciousness, a blood test is the only means to gather reliable evidence to

secure a conviction for driving under the influence and to protect the public. And because these offenders often require medical treatment as a result of their elevated BAC and/or a crash they have caused, law enforcement may not have time to secure a warrant before ordering a blood draw.

III. A WARRANTLESS BLOOD DRAW IS A REASONABLE SEARCH

Courts have long held that a blood draw constitutes a search under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 770 (1966). Whether such a search is constitutional—even without a warrant—depends on whether it is "reasonable." *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013).

Reasonableness is analyzed by weighing "the promotion of legitimate government interests" against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). While the reasonableness inquiry has many facets, "special law enforcement needs," "diminished expectations of privacy," "minimal [bodily] intrusions," *King*, 133 S. Ct. at 1969, the availability of less-invasive alternatives, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016), and the difficulties in securing a warrant all play a role, *Schmerber*, 384 U.S. at 771. Collectively, these factors support a finding that the warrantless blood draw here was "reasonable" and therefore constitutionally permissible. *Cf. Breithaupt v. Abram*, 352 U.S. 432, 435 n.2 (1957).

A. States Must Protect The Public From Individuals Who Drink, Drive, And Become Unconscious

1. The U.S. Supreme Court has for decades confirmed that a State's interest in combatting drunk driving is very great indeed. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2178–79; *Missouri v. McNeely*, 569 U.S. 141, 159–60 (2013); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990); *Breithaupt*, 352 U.S. at 439. This Court, too, has described drunk driving as "indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986). Despite the "progress [that] has been made" in combatting drunk driving, *McNeely*, 133 S. Ct. at 1565, States continue to have a "'paramount interest . . . in preserving the safety of . . . public highways,'" and "in creating effective 'deterrent[s] to drunken driving,'" which remains "a leading cause of traffic fatalities and injuries," *Birchfield*, 136 S. Ct. at 2178–79 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 18 (1979)). In light of this compelling interest, the U.S. Supreme Court often upholds "anti-drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances." *Virginia v. Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari).

In furtherance of those interests, States, including Wisconsin, have engaged in rigorous enforcement of drunk driving laws, including both arrests and convictions. These enforcement efforts

operate by taking drunk drivers off the road, deterring would-be drunk drivers,[3] reducing recidivism,[4] and encouraging offenders to get treatment.[5] *See Indianapolis v. Edmond*, 531 U.S. 32, 37–38 (2000) (noting that in the Fourth Amendment context, the Court has upheld government measures "aimed at removing drunk drivers from the road"); *Nordness*, 128 Wis. 2d at 33 ("the state's interest of keeping the highways safe is best served when those who drive while intoxicated are prosecuted and others are thereby deterred from driving while intoxicated").

2. These principles apply with particular force where law enforcement officers encounter offenders who have either consumed so much alcohol that they have lost consciousness while driving, or who have become unconscious as a result of a drunk-driving crash—regrettably, an all-too-common occurrence, particularly in Wisconsin.

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[3] Benjamin Hansen, *Punishment and Deterrence: Evidence from Drunk Driving*, 105 Am. Econ. Rev. 1581, 1582 (2015).

[4] D. Paul Moberg & Daphne Kuo, *Five Year Recidivism after Arrest for Operating While Intoxicated: A Large-scale Cohort Study*, Univ. of Wis. Population Health Inst., 4–6 (Apr. 2017),https://uwphi.pophealth.wisc.edu/publications/other/IntoxicatedDriverProgramApril2017.pdf.

[5] Elisabeth Wells-Parker et al., *Final results from a meta-analysis of remedial interventions with drink/drive offenders*, 90 Addiction 907, 907–26 (1995).

By way of example, the median alcohol concentration for 2015 OWI citations was 0.16%,[6] meaning that more than half of those cited had a BAC more than twice the legal limit and beyond the threshold at which intoxicated individuals may begin to lose consciousness.[7]

Cases and news reports of arrests involving drunk drivers who are found unconscious occur with unexpected frequency. In *United States v. Dickson*, 849 F.3d 686 (7th Cir. 2017), for example, a police officer found an unconscious driver at a McDonald's drive-through lane in nearby Rockford, Illinois, with a bottle of vodka in the front seat. *Id.* at 688. In a separate incident in Maple Bluff, Wisconsin, officers witnessed an erratic driver, under the influence of alcohol, crash into a utility pole and found him unconscious shortly thereafter. *State v. Lange*, 2009 WI 49, ¶¶ 9-18, 317 Wis. 2d 383, 766 N.W.2d 551. Media reports also detail the tragic results of intoxicated driving in Wisconsin: In April 2017, for example, an intoxicated driver struck and killed a University of Wisconsin

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[6] *See Drunk Driving Arrests and Convictions*, Wis. Dep't of Transp.,http://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx (last visited Nov. 8, 2017).

[7] *Alcohol Overdose: The Dangers of Drinking Too Much*, Nat'l Inst. On Alcohol Abuse and Alcoholism, 2 (Oct. 2015), https://pubs.niaaa.nih.gov/publications/alcoholoverdosefactsheet/overdoseFact.pdf.

graduate student and became unconscious not long thereafter.[8]

3. Although all drunk drivers pose a clear and present danger to the public, the State's compelling interest in deterrence is arguably elevated in cases involving the drunk drivers who drink so excessively that they black out, struggle to remain conscious, or fully lose consciousness behind the wheel. The reason is simple and irrefutable: a drunk driver who is barely conscious or loses consciousness due to alcohol is certain to strike another vehicle, cyclist, or pedestrian, or to otherwise harm him or herself.

Restricting law enforcement officers' ability to collect evidence in the course of arresting drunk drivers who have become unconscious will have unjust and dangerous consequences with respect to deterrence and the enforcement of drunk-driving laws. Unlike the case of a conscious drunk driver, law enforcement cannot obtain express consent from an unconscious driver and may have less time to secure a warrant in the likely event that the driver requires medical care. A rule that would make it *more* difficult for the police to apprehend a *more* dangerous class of drunk drivers is not one this Court should endorse.

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[8] Ed Treleven, *Man Charged with Homicide in Traffic Death of UW Student from China*, Wis. State J. (Apr. 21, 2017), http://host.madison.com/wsj/news/local/courts/man-charged-with-homicide-in-traffic-death-of-uw-student/article_004d8153-bc41-5e3a-84a9-b1a909b1d3df.html.

4. Given the threat that drunk drivers who are or become unconscious at the time of their arrest or shortly thereafter pose to public safety, and given the injuries and loss of life on Wisconsin's roadways, law enforcement must have access to the best evidence it can lawfully obtain when investigating this violent crime. Today's blood tests are the best evidence of a driver's BAC, and it is important to administer them quickly because the level of alcohol in the blood dissipates rapidly after drinking ceases. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 623 (1989) (explaining that blood samples must be obtained "as soon as possible" so as not to "result in the destruction of valuable evidence"); *State v. Faust*, 2004 WI 99, ¶ 29, 274 Wis. 2d 183, 682 N.W.2d 371 (blood samples are "the most direct and accurate evidence of intoxication"). Obtaining a prompt and accurate reading is also important insofar as it may affect the severity of sentencing. *McNeely*, 133 S. Ct. at 1571 ("[T]he concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment.") (Roberts, C.J., concurring); *see also, e.g.*, Wis. Stat. Ann. § 346.65(2)(g) (providing different penalties depending on BAC). The U.S. Supreme Court has acknowledged and confirmed these compelling state interests by expressly making it clear that, under the right circumstances, an arresting officer is not obligated to obtain a warrant before conducting a search incident to arrest simply because there might be adequate time in the particular circumstance to do so. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2186–87.

Hindering law enforcement's ability to take a blood draw without a warrant under the limited circumstances discussed here will put the brakes on the State's fight against drunk driving and, in the immediate case, on enforcing the law against unconscious drunk drivers, whom the State may have a greater need to apprehend and deter. Moreover, the State's ability to obtain the best evidence necessary to secure convictions for drunk-driving offenses is a compelling state interest that weighs heavily against the unconscious drunk driver's diminished privacy interest, a point discussed at greater length below.

B. There Is No Less Invasive Alternative

The U.S. Supreme Court has already agreed that "medically drawn blood tests are reasonable in appropriate circumstances." *McNeely*, 133 S. Ct. at 1565; *Schmerber*, 384 U.S. at 770–72; *Skinner*, 489 U.S. at 633 (warrantless blood tests of employees justified where "the compelling Government interests served by the [regulations] . . . outweigh[ed] [employees'] privacy concerns"); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) ("*Schmerber*, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test"). Consistent with *Schmerber*, *Neville*, and *Skinner*, "appropriate circumstances" always exist in the case of unconscious individuals suspected of drunk driving because, in addition to the State's compelling interest in protecting innocent lives from drunk driving and, in the immediate case, from drunk drivers who become unconscious, a blood test is the least invasive means of

obtaining critical evidence—particularly when an unconscious drunk driver is already receiving medical attention.

This "less invasive alternative" analysis was central in *Birchfield*, in which the U.S. Supreme Court upheld warrantless breathalyzer tests as lawful searches incident to arrests for drunk driving. 136 S. Ct. at 2182. The Court's reasoning rested in part on the notion that a breath test was a relatively non-invasive means of obtaining a reading of a driver's BAC that was, in many cases, as effective as a blood test, while being superior to other more costly or less effective alternatives, such as sobriety checkpoints and ignition interlock systems. 136 S. Ct. at 2182 & n. 8. But the Court also recognized that a blood test—unlike a breath test—is unique in that it "may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries." *Id.* at 2184; *see also* 2 Richard E. Erwin, Defense of Drunk Driving Cases §§ 18.01(2)(a), 18.02, 24.02(3), 24.05 (3d ed. 2017). Thus, for suspected drunk drivers found unconscious at the scene of a crash, blood tests do not merely provide a reliable means of obtaining evidence of intoxication; they provide the *only* means of doing so, as breathalyzers are not an option. *Cf. Birchfield,* 136 S. Ct. at 2184.[9]

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[9] While the Supreme Court in *Birchfield* noted in passing that the warrant requirement should not be dispensed with in the case of blood tests involving unconscious drunk drivers, it did

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C. Obtaining A Warrant May Be Difficult

Getting a warrant, or relying on some other exception to the warrant requirement, is especially difficult in the case of unconscious drunk drivers. That is because such drivers often require medical attention—as was the case here—and are likely to cause significantly more delays than the typical arrest involving a conscious drunk driver. As the U.S. Supreme Court recognized in *Schmerber*, a warrantless blood test of a drunk driver is constitutional under the circumstances where a driver must be transported to a hospital and provided treatment. Similarly, a police officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Schmerber*, 384 U.S. at 770 (citation omitted); *see also id.* at 770–71 ("[W]here time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."); *McNeely*, 133 S. Ct. at 1559–60 (reaffirming *Schmerber*'s holding that it was reasonable

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so, in part, because the record before it provided "no reason to believe that such situations are common in drunk-driving arrests . . . ." 136 S. Ct. at 2184–85. As discussed above, however, there is evidence that such situations *are* surprisingly common in Wisconsin and elsewhere and pose risks that ordinary drunk-driving arrests do not.

to dispense with the warrant requirement under the circumstances).

D. Unconscious Drunk Drivers Have A Diminished Expectation Of Privacy

In general, a suspected drunk driver's minimal privacy interests must be balanced against the State's compelling public safety interests and the other circumstances identified above. An unconscious suspected drunk driver's minimal privacy interest is subject to the same balancing analysis. As noted above, the category of unconscious suspected drunk drivers is a narrow and readily identifiable group. And the U.S. Supreme Court has ruled that individuals who choose to drive on public roadways—intoxicated or not—already have a diminished expectation of privacy because of the "compelling governmental need for regulation." *California v. Carney*, 471 U.S. 386, 392 (1985); *see also State v. Clark*, 2003 WI App. 121,¶ 27, 265 Wis. 2d 557, 666 N.W.2d 112 (noting that "individuals generally have a lesser expectation of privacy in an automobile"). Logically, drunk drivers who become unconscious on a public roadway and who leave decisions about their health and safety to others, including law enforcement and medical personnel, have an even lesser expectation of privacy than those who do not. *Cf. Shulman v. Group W Productions, Inc.* (1996) 18 Cal. 4th 200, 213 (agreeing with the court of appeal's conclusion that an accident victim "had no reasonable expectation of privacy in the events at the accident scene itself"). Therefore, and under the circumstances, the right of an unconscious drunk driver to be free of "a properly

safeguarded blood test is far outweighed by the value of [such a test's] deterrent effect," as well as the other interests discussed above. *Breithaupt*, 352 U.S. at 439.

* * *

When the compelling state interest of ensuring the safety of innocent victims on roadways is weighed against the minimal privacy interest of the offender, it becomes clear that permitting law enforcement to conduct warrantless blood tests on a narrow category of persons—unconscious drivers whom police have probable cause to arrest for drunk driving—in a medical setting, is not only reasonable, but also essential to keep Wisconsin's roadways safe, allow the State to fight drunk driving, protect innocent lives, and ensure a nation with No More Victims. The Court should adopt such a rule in this case.

IV. CONCLUSION

MADD respectfully asks the Court to affirm the judgment of conviction against Mr. Mitchell.

Dated this 15th day of December, 2017.

Respectfully submitted,

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CERTIFICATIONS

A. Certification as to Form and Length: I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief, not including the caption, tables of contents and authorities, signature blocks, and certification, is 2,930 words. It is produced with a minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, and a maximum of 60 characters per line of body text.

B. Certificate of Compliance with Wis. Stat. § 809.19(12). I hereby certify that, in accordance with Wis. Stat. § 809.19(12), I have submitted an electronic copy of this brief in a text-searchable PDF format that is identical in content and format to the printed form of the brief filed on this date.

C. Certificate of Service. I hereby certify that one copy of this brief (and this Certification) has been served on all opposing parties by U.S. Mail to their counsel of record:

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