STATE OF WISCONSIN

IN SUPREME COURT

No. 2016AP308-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DAWN M. PRADO,

Defendant-Respondent.

PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

TABLE OF CONTENTS

INTRODUCTION

The State of Wisconsin petitions this Court to review the court of appeals' decision in *State v. Dawn M. Prado*, 2020 WI App 42, (Pet-App. 101–43.) The court of appeals' opinion has been ordered published. The court of appeals reversed a decision of the circuit court suppressing the results of a blood test. But in doing so, the court of appeals found that the unconscious driver provision in Wisconsin's implied consent law, Wis. Stat. §§ 343.305(3)(ar)1., (3)(ar)2., and (3)(b) is unconstitutional.

The court of appeals struck down the unconscious driver provision even though it had three times previously certified the issue regarding the constitutionality of that provision to this Court. The court of appeals had recognized that it could not properly decide the issue due to a conflict between the court of appeals' opinions in *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W2d 745, and *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867. But the court of appeals concluded in *Prado* that it now could decide the issue because the United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), overruled *Wintlend* "in such clear terms" that the court of appeals is no longer bound by *Wintlend*.

Of course, the court of appeals certified the issue to this Court twice after the *Birchfield* decision was released, and this Court did not recognize *Birchfield*'s supposed silent overruling of *Wintlend* or its invalidation of Wisconsin's law in cases it decided after *Birchfield* was issued. *See State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812; *State v. Brar*, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499; *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151, *vacated by Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). And

the United States Supreme Court granted review in *Mitchell v. Wisconsin*, "to decide whether a statute like Wisconsin's, which allows police to draw blood from an unconscious drunk-driving suspect, provides an exception to the Fourth Amendment's warrant requirement." 139 S. Ct. at 2542–43 (Sotomayor, J., dissenting). The Court did not decide that issue. *See id.* at 2551 (Gorsuch, J., dissenting) ("[T]he Court today declines to answer the question presented."). But the Court did *not* say that it had no reason to decide that issue because it had already decided it in *Birchfield*. Instead, the Supreme Court set forth a rule for the category of cases involving unconscious drunk driving suspects. Under those circumstances, a blood draw is almost always justified by exigent circumstances. *Id.* at 2539.

Here, although the blood draw from Prado was justified by exigent circumstances under the new rule the Supreme Court set forth in *Mitchell v. Wisconsin* for this category of cases, the court of appeals declined to apply the rule. Instead, the court struck down the unconscious driver provision in Wisconsin's implied consent law even though it had previously recognized that it could not properly do so.

The court of appeals correctly reversed the decision of the circuit court suppressing the blood test results by applying the good faith exception to the exclusionary rule. But the court only had to resort to good faith because it declined to apply the *Mitchell* rule. It resorted to good faith without even finding that the evidence was obtained through unconstitutional means. And the court did not apply the good faith exception in a logical manner. The court concluded that the officer could rely on the statute in good faith because he ordered the blood draw before *Birchfield* silently overruled *Wintlend*. That implies that an officer could not have relied on the law after *Birchfield*, because an officer should have

realized that the unconscious driver provision in Wisconsin's implied consent law was found unconstitutional by *Birchfield*. But the court of appeals, this Court, and the Supreme Court itself did not even recognize *Birchfield*'s supposed effect. Contrary to the court of appeals' opinion, an officer could rely on the statute in good faith because no appellate court had found the unconscious driver provision unconstitutional until the court of appeals did so in this case.

Review by this Court is warranted because the court of appeals' decision is inconsistent with established law, and clarification is needed from this Court on an issue of statewide importance—the constitutionality of the unconscious driver provision in Wisconsin's implied consent law, and the workings of the implied consent law for both conscious and unconscious persons. This Court should grant review, vacate the court of appeals' opinion (including the portion declaring the unconscious driver statute unconstitutional), and apply the new rule the Supreme Court established in *Mitchell v. Wisconsin* for this category of cases. Under that rule the blood draw from Prado was justified by exigent circumstances.

ISSUES PRESENTED FOR REVIEW

A police officer who had probable cause that Dawn M. Prado had driven while under the influence of an intoxicant and caused the death of another driver ordered her blood drawn when she was unconscious and had been taken to a hospital with no opportunity for an evidentiary breath test.

1. Was the blood draw justified under *Mitchell v. Wisconsin*, which established that for the category of cases involving suspected drunk drivers who are unconscious and taken to the hospital before a breath test can be administered, a warrantless blood draw is almost always justified by exigent circumstances?

The circuit court did not answer. *Mitchell v. Wisconsin* had not yet set forth its rule for this category of cases, so the State did not argue that exigent circumstances justified the blood draw.

The court of appeals did not answer. The court said it did not need to determine whether the new rule that exigent circumstances almost always justify a warrantless blood draw under the circumstances presented in this case applied, because the good faith issue was dispositive.

This Court should grant review and decide this case on exigent circumstances. *Mitchell v. Wisconsin* set forth a new rule that applies to the entire category of cases involving unconscious suspected drunk drivers who are taken to the hospital before a breath test can be administered. Blood draws are justified under those circumstances unless the person can make a two-part showing, including proving that their blood would not have been drawn for diagnostic purposes. Here, an officer had probable cause that Prado drove while under the influence of an intoxicant, she was unconscious and taken to the hospital with no opportunity for a breath test, and her blood was drawn for diagnostic purposes. The blood draw was therefore justified by exigent circumstances.

2. Was the blood draw from Prado justified by her consent under the implied consent law?

The circuit court answered "No," and found the unconscious driver provision in the implied consent law unconstitutional.

The court of appeals answered "No," and found the unconscious driver provision in the implied consent law unconstitutional.

This Court should grant review. The blood draw was justified by exigent circumstances, so this Court need not decide whether it was also justified by Prado's consent. But contrary to the court of appeals' opinion, *Birchfield* did not overrule *Wintlend* or invalidate the unconscious driver provision. The court of appeals could not properly choose not to follow *Wintlend* and find the unconscious driver unconstitutional. It is for this Court to determine whether that provision is unconstitutional.

3. Was suppression of the blood test results improper because the police officer who ordered the blood draw relied in good faith on the unconscious driver provision in Wisconsin's implied consent law?

The circuit court answered "No." It concluded that the unconscious driver provision was unconstitutional under *Missouri v. McNeely*, 569 U.S. 141 (2103), so the officer could not rely on it in good faith.

The court of appeals answered "Yes." The court concluded that the blood test results need not be suppressed because the officer relied in good faith on the unconscious driver provision, which had not yet been invalidated when *Birchfield* supposedly silently overruled *Wintlend*.

This Court should grant review. It need not decide the good faith issue because the blood draw was justified by exigent circumstances. If it considers the good faith exception, the court should conclude that the officer could rely on the unconscious driver provision in good faith because no

appellate court had found the provision unconstitutional until the court of appeals did so in this case.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

This case warrants review because it satisfies the criteria set forth in Wis. Stat. § 809.62(1r).

First, review is appropriate because real and significant questions of federal or state constitutional law are presented. Wis. Stat. § 809.62(1r)(a). This case offers this Court an opportunity to apply the rule that the United States Supreme Court established in *Mitchell v. Wisconsin* for the category of cases in which a suspected drunk driver is unconscious and taken to the hospital before a breath test can be administered. Under those circumstances, a warrantless blood draw is justified by exigent circumstances unless the defendant can make a two-part showing, one that Prado has never even claimed she can make.

This case also offers this Court an opportunity to determine whether the unconscious driver provision in Wisconsin's implied consent law is constitutional. Although it was unnecessary to decide this issue because the blood draw was justified by exigent circumstances, the court of appeals struck down the statute. It concluded that *Birchfield* somehow resolved the conflicts between Wisconsin cases that the court of appeals had recognized three times previously that it could not resolve. This Court should grant review because *Birchfield* did not resolve the conflicts between Wisconsin cases, and it did not invalidate the unconscious driver provision in Wisconsin's law. Only this Court can determine whether that provision is unconstitutional.

Finally, this case offers this Court an opportunity to clarify the proper application of the good faith exception. It was unnecessary for the court of appeals to resort to good faith since the blood draw was justified by exigent circumstances. But the court did resort to good faith, and it applied the good faith exception incorrectly. This Court should clarify that police officers could rely on the statute in good faith until the *Prado* opinion was released, because until then no appellate court had found the statute unconstitutional.

Second, review is appropriate to develop and clarify the law regarding a question of law that is likely to recur. Wis. Stat. § 809.62(1r)(c)1, 3. As this Court is well aware, cases involving blood draws from unconscious drivers are not uncommon in Wisconsin. Application of the new *Mitchell v. Wisconsin* rule in an opinion by this Court will make it clear that blood draws from unconscious drivers who are taken to the hospital before a breath test can be administered are almost always justified by exigent circumstances, so there is no need to determine if they are also justified by the driver's consent.

Third, the court of appeals' opinion is in conflict with opinions of both this Court and of the court of appeals. Wis. Stat. § 809.62(1r)(d). The court of appeals certified the issue concerning the constitutionality of the unconscious driver provision to this Court three times, because it recognized that it could not decide whether the statute was constitutional due to a conflict between the court of appeals' opinions in *Wintlend* and *Padley*. Nothing has changed. Neither this Court nor the United States Supreme Court has resolved that conflict. But the court of appeals has now determined that it can decide the issue, because *Wintlend* was supposedly overruled by *Birchfield* in 2016. The court of appeals is simply wrong. Nether this Court nor the United States Supreme Court has

recognized that *Birchfield* overruled *Wintlend*, because it did not do so. The court of appeals was bound by *Wintlend* and this Court's prior cases and it could not strike down the unconscious driver provision. Only this Court can decide whether that provision is constitutional.

STATEMENT OF THE CASE

A minivan Prado was driving hit another vehicle, injuring Prado and her passenger and killing the other driver. (R. 1:3–5, Pet-App. 146–48.) After their initial investigation, officers concluded that Prado crossed the center line and collided with the car. (R. 1:5, Pet-App. 148.) The passenger in Prado's minivan told police that Prado had been driving. (R. 1:4, Pet-App. 147.) A firefighter at the scene told police that he observed Prado lying in a ditch near the crash and smelled the odor of intoxicants on her breath. (R. 1:5–6, Pet-App. 148–49.)

Prado was transported to the hospital. (R. 1:5, Pet-App. 148.) When Officer Jonathan Parker encountered Prado in the hospital, she was unconscious. (R. 1:5; 41:7, Pet-App. 148, 175.) Officer Parker read the Informing the Accused form to Prado, but she did not respond. (R. 1:5; 41:7–8, Pet-App. 148, 175–76.) The officer ordered that Prado's blood be drawn. (R. 41:9, Pet-App. 177.) A test revealed a blood alcohol concentration of 0.081, and the presence of Benzoylecgonine. (R. 1:17; 21:1, Pet-App. 160.)[1]

[1] Because Prado had three prior OWI-related offenses (R. 1:6, Pet-App. 149), she was prohibited from driving with an alcohol concentration in excess of 0.02. Wis. Stat. § 340.01(46m)(c). Benzoylecgonine is a metabolite of cocaine, and a restricted controlled substance. (R. 21:1.)

Prado was charged with nine OWI-related crimes. (R. 22.)[2] She moved to suppress the blood test result, on the ground that the statutory provisions that authorized the blood draw, Wis. Stat. §§ 343.305(3)(ar) and (b), are unconstitutional. (R. 26, Pet-App. 161–64.) After briefing and a hearing (R. 27; 29; 31; 41), the circuit court, the Honorable David T. Flanagan, presiding, granted Prado's suppression motion (R. 33, Pet-App. 165–68). The court concluded that the unconscious driver provisions at issue do not authorize blood draws, but that if they did, they would be unconstitutional under *Missouri v. McNeely*, 569 U.S. 141 (2013). (R. 33:3, Pet-App. 167.) The court concluded that Prado's blood was drawn without a warrant or her consent, in violation of the Fourth Amendment. (R. 33:3–4, Pet-App. 167–68.) The court declined to apply the good faith exception to the exclusionary rule and ordered the blood test result suppressed. (R. 33:3–4, Pet-App. 167–68.) The State appealed the circuit court's order suppressing the test result and finding the unconscious driver provision unconstitutional.

[2] The State charged Prado with: (1) homicide by intoxicated use of a motor vehicle while having a prior OWI-related offense; (2) homicide by use of a motor vehicle with a prohibited alcohol concentration while having a prior OWI-related offense; (3) homicide by use of a motor vehicle with a detectable amount of a restricted controlled substance, while having a prior OWI-related offense; (4) causing injury by operating a motor vehicle while intoxicated as a second or subsequent offense; (5) causing injury by use of a motor vehicle with a prohibited alcohol concentration as a second or subsequent offense; (6) causing injury by operating a motor vehicle with a detectable amount of a restricted controlled substance as a second or subsequent offense; (7) operating a motor vehicle while under the influence of an intoxicant as a 4th offense; (8) operating a motor vehicle with a prohibited alcohol concentration as a 4th offense; and (9) operating a motor vehicle with a detectable amount of a restricted controlled substance as a 4th offense. (R. 22.)

The court of appeals held the case for more than two years, pending decisions in cases involving warrantless blood draws from drivers who had become unconscious. After the United States Supreme Court issued its decision in *Mitchell v. Wisconsin*, the court of appeals ordered supplemental briefing. The court of appeals then reversed the circuit court's decision granting Prado's motion to suppress her blood test results, but also finding the unconscious driver provisions in Wisconsin's implied consent law unconstitutional. The court declined to apply the Supreme Court's new rule for exigent circumstances in cases involving unconscious drivers, instead determining that the officer relied in good faith on the unconscious driver provision in the statute. The court concluded that the good faith issue was dispositive. Prado moved for reconsideration, but the court denied her motion. The State now petitions for review.

ARGUMENT

I. The State can properly petition this Court for review because the court of appeals' decision is adverse to the State.

A party may appeal "an adverse decision of the court of appeals" to this Court. Wis. Stat. § 809.62(1m)(a). The Wisconsin statutes define an adverse decision as "a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review." Wis. Stat. § 806.62(1g)(a). An adverse decision "includes the court of appeals' denial of or failure to grant the full relief sought or the court of appeals' denial of the preferred form of relief." Wis. Stat. § 806.62(1g)(b). Under the statute, a court of appeals decision that is "partially adverse to the State," is "sufficient to allow the State to appeal." *State v. Bentdahl*, 2013 WI 106, ¶ 21, 351 Wis. 2d 739, 840 N.W.2d 704.

The court of appeals reversed the circuit court's decision suppressing the results of Prado's blood test. But it also struck down the unconscious driver provision in Wisconsin's implied consent law. This is not the relief requested by the State, which appealed because the circuit court suppressed the blood test and because the court found the unconscious driver provision unconstitutional. The court of appeals' decision "denied the State the full relief that it sought; therefore, the State may appeal." *Bentdahl*, 351 Wis. 2d, ¶ 21.

II. This Court should grant review so that it can apply the new exigent circumstances rule that the Supreme Court established in *Mitchell v. Wisconsin* for this category of cases.

A. Under *Mitchell v. Wisconsin*, a blood draw from a drunk driving suspect who has become unconscious and who is taken to the hospital is almost always justified by exigent circumstances.

In *Mitchell v. Wisconsin*, the Supreme Court set forth a new rule for the category of cases in which police have probable cause that a person has committed a drunk-driving offense, the person is unconscious and must be taken to a hospital, and there is no opportunity to obtain a breath test. In such a case a blood test is almost always justified by exigent circumstances. 139 S. Ct. at 2531.

The *Mitchell* Court "d[id] not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* at 2539. But unless a defendant makes both showings, "when a driver is

unconscious, the general rule is that a warrant is not needed." *Id.* at 2531.[3]

B. The blood draw in this case was justified by exigent circumstances under the new rule the Supreme Court set forth in *Mitchell v. Wisconsin*.

After the Supreme Court set forth its new exigent circumstances rule for unconscious drivers in *Mitchell*, the court of appeals ordered supplemental briefs in this case to address the application of the rule to the warrantless blood draw from Prado. The State acknowledged that it did not argue in the circuit court that the blood draw was justified by exigent circumstances, but it pointed out that it did not waive or forfeit that argument because *Mitchell* had not yet established the rule that exigent circumstances almost always justify blood draws in this category of cases. (State's Supp. Br. 4, Pet-App. 202). "A litigant cannot fairly be held to have waived an argument that, at the time, a court of competent jurisdiction had not yet announced." *State v. Rodriguez*, 2007 WI App 252, ¶ 11, 306 Wis. 2d 129, 743 N.W.2d 460.

The State also pointed out that the Supreme Court had applied its new rule to Mitchell and remanded his case to afford him an opportunity to show that his was the "unusual case" in which the rule does not apply. (State's Supp. Br. at 5, Pet-App. 203); *Mitchell*, 139 S. Ct. at 2539. And it did so even

[3] *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) is a plurality opinion joined by four Justices. Justice Thomas's concurring opinion is broader than the plurality opinion so the plurality opinion is the opinion of the Court. *See State v. Donnie Gene Richards*, No. 2017AP43-CR, 2019 WL 4045400, ¶ 28 n.3 (Wis. Ct. App. July 16, 2020) (recommended for publication) (Pet-App. 220–238).

though the State had never argued that exigent circumstances justified the blood draw from Mitchell.

The State explained that the blood draw from Prado falls squarely into the category of cases governed by the Supreme Court's new rule. (State's Supp. Br. 4–5, Pet-App. 201–02.) Therefore, unless Prado meaningfully alleged that the rule should not apply to her because her blood was not drawn at the hospital for purposes other than investigating her criminal activity, it should apply the rule and reverse the circuit court's order that suppressed the blood test results. (State's Supp. Br. at 5–6, Pet-App. 202–03.)

The court of appeals declined to apply the Supreme Court's new rule. It said that the parties disputed "whether the *Mitchell* plurality announced a new exigent circumstances rule, and if so, whether the State should be excused from its failure to argue exigent circumstances in light of the new rule *Mitchell* announced." *Prado*, 2020 WI App 42, ¶ 66.

However, Prado argued only that the State waived or forfeited its *Mitchell* exigency argument because *Mitchell* did not recognize a new exception to the warrant requirement and therefore did not set forth a new rule. (Prado's Supp. Br. 2, Pet-App. 200.) As the court of appeals recognized in *State v. Donnie Gene Richards*, No. 2017AP43-CR, 2019 WL 4045400 (Wis. Ct. App. July 16, 2020) (recommended for publication) (Pet-App. 220–238), in *Mitchell*, the Supreme Court "set[ ] forth a 'rule' in the 'narrow but important category' of cases in which a driver suspected of an OWI offense is unconscious." *Id.* ¶ 23 (quoting *Mitchell*, 139 S. Ct. at 2531, 2534 n.2). No court had previously established such a rule. The Supreme Court set forth the rule "to offer guidance on how police should handle cases like the one before us." *Mitchell*, 139 S. Ct. at 2535 n.3. The rule that the Court set forth was plainly "new."

The court of appeals said that "[t]he parties also appear to dispute whether Prado would be able to demonstrate a lack of exigent circumstances under the test set forth by the *Mitchell* plurality." *Prado*, 2020 WI App 42, ¶ 66. The court's statement is puzzling, because Prado has never argued that hers is the unusual case involving a suspected drunk driver who was unconscious and taken to the hospital before an opportunity for a breath test in which the *Mitchell* rule does not justify a blood draw. Prado did not even mention the *Mitchell* rule, much less claim that her blood would not have been drawn at the hospital had police not been seeking a sample for evidence. She could not make that claim because her blood was drawn for medical purposes. Prado's only argument was that *Mitchell* did not set forth a new rule. And that argument is wrong.

The court of appeals held this case for more than two years, seeking guidance on whether a blood draw from a driver who police have probable cause to believe drove while under the influence of an intoxicant, and who is unconscious, is permissible. The United States Supreme Court provided that guidance. It set forth a clear new rule for this category of cases. But the court of appeals declined to simply apply *Mitchell* and reverse the circuit court's decision suppressing the blood test results. Instead, the court of appeals addressed the constitutionality issue it had three times recognized it could not decide, and decided that issue incorrectly. And then, without applying the rule under which the blood draw was justified, the court of appeals reversed the order suppressing the evidence by resorting to the good faith exception, which it misapplied. This Court should grant review, apply the *Mitchell* rule, and conclude that the test results should not have been suppressed because the blood draw was justified by exigent circumstances.

III. This Court should grant review because the court of appeals erred in finding the unconscious driver provision in Wisconsin's implied consent law unconstitutional.

A. As the court of appeals recognized three times previously when it certified the issue regarding the constitutionality of the unconscious driver provision to this Court, it could not properly decide this issue.

The court of appeals found the unconscious driver provision in Wisconsin's implied consent law unconstitutional even though it had certified the issue to this Court three times because it recognized that it could not properly decide the issue due to a conflict between *Padley* and *Wintlend*. The court certified the issue in 2016 in *State v. Howes*, 2017 WI 18, ¶ 1, 373 Wis. 2d 468, 893 N.W.2d 812. This Court decided the case after the United States Supreme Court decided *Birchfield*. But it did not determine whether the unconscious driver provision is unconstitutional, instead deciding that the blood draw was justified by exigent circumstances. *Id.* ¶ 3.

The court of appeals certified the issue again in 2017, in *State v. Mitchell*, 2018 WI 84, ¶ 1, 383 Wis. 2d 192, 914 N.W.2d 151. This Court again did not decide the issue but instead concluded that the warrantless blood draw was constitutional. *Id.* ¶¶ 66, 85, 86. In 2018, the court of appeals certified the issue again in *State v. Hawley*. This Court denied the certification after the United States Supreme Court decided *Mitchell v. Wisconsin*.

The court of appeals certified the constitutionality issue three times, twice after the Supreme Court decided *Birchfield*. Each time, the court of appeals recognized that it could not decide the issue. But it concluded in this case that it could decide the issue, and that the statute is

unconstitutional. The court concluded that *Birchfield* silently overruled *Wintlend* "in such clear terms," that it no longer has to follow *Wintlend*. *Prado*, 2020 WI App 42, ¶ 49.

The court of appeals reached that conclusion even though this Court did not recognize that in any of its post-Birchfield cases that *Birchfield* had somehow silently overruled *Wintlend*. To the contrary, in *Mitchell*, this Court's lead opinion relied on *Wintlend*, and concluded that *Padley*, which was "in direct conflict" with *Wintlend*, should be overruled. *Mitchell*, 383 Wis. 2d 192, ¶ 60 (lead opinion).

The United States Supreme Court has also never stated that it invalidated unconscious driver provisions like Wisconsin's in its *Birchfield* decision. The Court granted certiorari in *Mitchell v. Wisconsin* on the issue "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." 139 S. Ct. at 2542–43 (Sotomayor, J., dissenting). The Court "took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute. That law says that anyone driving in Wisconsin agrees—by the very act of driving—to testing under certain circumstances." *Id.* at 2551 (Gorsuch, J., dissenting). The Court's granting of review on that issue demonstrates that the Court had not already decided the issue.

The Supreme Court did not decide the issue upon which it granted certiorari in *Mitchell*. The Court did not say that it had no reason to decide that issue because it had already decided it in *Birchfield*. Instead, the Supreme Court offered guidance on how cases involving blood draws from unconscious drunk driving suspects should be resolved. *Id.* at

2535 n.3. In such cases, a blood draw is almost always justified by exigent circumstances. *Id.* at 2539.

If the Court had decided that issue in *Birchfield*, it would have had no reason to grant certiorari on that issue in *Mitchell*. And if it *had* granted certiorari to decide an issue it had already decided in *Birchfield*, its opinion could have simply said "As we said in *Birchfield*, a statute authorizing a blood draw from an unconscious motorist cannot provide an exception to the Fourth Amendment warrant requirement." But the Court did not do that. It decided the case without deciding the certified issue, setting forth a new rule for this category of cases.

The court of appeals' conclusion that it could now properly decide an issue that it recognized it could not decide on three separate occasions, because that issue was decided by the Supreme Court in *Birchfield*, is wrong. The court of appeals certified the constitutionality issue to this Court twice after *Birchfield* was decided, in *Mitchell* and *Hawley*. The court of appeals did not assert that *Birchfield* had overruled *Wintlend*. It said that it could not resolve the conflict between *Wintlend* and *Padley*. The court of appeals could not properly determine the constitutionality issue in this case, and it had no need to do so. It should simply have applied the *Mitchell* rule and reversed the circuit court's decision suppressing evidence because the blood draw was justified by exigent circumstances.

B. *Birchfield* did not overrule *Wintlend* or invalidate the unconscious driver provision in Wisconsin's implied consent law.

The court of appeals concluded in this case that it could now decide the issue that it could not decide previously, and that neither this Court nor the Supreme Court did decide,

because it now believes that *Birchfield* silently overruled *Wintlend*. *Prado*, 2020 WI App 42, ¶ 49. And the court seems to have concluded that by overruling *Wintlend*, the Supreme Court in *Birchfield* invalidated the unconscious driver provision in Wisconsin's implied consent law. "*Wintlend* was the law in Wisconsin." *Id.* ¶ 71. The court is wrong on both counts. *Birchfield* did not overrule *Wintlend*. And it did not invalidate the unconscious driver provision.

The court of appeals said that *Wintlend* stands for three principles: (1) a blood test is a minimal intrusion; (2) a driver's implied consent satisfies the Fourth Amendment; and (3) the implied consent law, even if coercive, does not violate the Fourth Amendment because the coercion is reasonable. *Prado*, 2020 WI App 42, ¶ 23. The court said that those principles "cannot survive" after *Birchfield*. *Id.* ¶ 44.

The court of appeals' conclusion that these three principles in *Wintlend* cannot survive *Birchfield* is based on the Supreme Court's discussion of the blood draw from one of the petitioners in *Birchfield*, petitioner Beylund. *Prado*, 2020 WI App 42, ¶¶ 42–43, 46, 55, 60–61. However, *Birchfield*'s analysis of Beylund's case neither explicitly nor implicitly overruled *Wintlend* or invalidated the unconscious driver provision in Wisconsin's implied consent law.

A police officer arrested Beylund for OWI and requested an evidentiary sample from him. *Birchfield*, 136 S. Ct. at 2172. The officer told Beylund that he could be criminally prosecuted if he refused a blood test or a breath test. *Id.* Beylund agreed to have his blood drawn. *Id.* at 2172, 2186. On appeal, he argued that his consent was involuntary because he was told he could be criminally prosecuted if he refused. *Id.* at 2172. The North Dakota Supreme Court held

that Beylund's consent was voluntary because the State could compel both blood tests and breath tests. *Id.* at 2186.

The United States Supreme Court concluded that it is permissible to administer a breath test incident to arrest, so it is permissible to threaten and impose criminal penalties for a refusal to submit to a lawful request for a breath test. *Id.* at 2185. And the Court concluded that it is permissible to threaten and impose civil penalties and evidentiary consequences for a refusal to submit to a lawful request for a blood test. *Id.* at 2185–86. But it is impermissible to impose criminal penalties for a refusal to submit to a lawful request for a blood test. *Id.*

The Supreme Court vacated the judgment of the North Dakota Supreme Court because of the "partial inaccuracy of the officer's advisory." *Id.* In other words, the officer accurately advised Beylund that he could be criminally prosecuted for refusing a breath test. But the officer inaccurately advised Beylund that he could be criminally prosecuted for refusing a blood test. *Id.* at 2186. The Court remanded the case for a determination of whether, notwithstanding that the officer incorrectly told Beylund he could be criminally prosecuted for refusing a blood test, his consent to a blood test was voluntary under the totality of the circumstances. *Id.*

The court of appeals concluded that the discussion of Beylund's case in *Birchfield* overruled *Wintlend*. It did not. First, while *Wintlend* said that a blood draw is a minimal bodily intrusion, it said that as part of its determination that a person's choice of submitting to a request for a blood draw in order to not lose his or her operating privilege, "is not a hard, unconscionable choice the motorist is being asked to make." *Wintlend*, 258 Wis. 2d 875, ¶ 17. While *Birchfield*

viewed a blood draw as more than a "minimal" intrusion, 136 S. Ct. at 2184, it said nothing that invalidated *Wintlend*'s conclusion that the choice whether to submit to a blood draw on the threat of losing one's operating privilege is neither hard nor unconscionable. Instead, by noting its approval of implied consent laws that threaten and impose civil penalties and evidentiary consequences for refusal to submit to a lawful request for a blood draw, the Court affirmed that putting a person to a difficult choice is permissible. *Id.* at 2185.

Second, *Wintlend* said that a driver's implied consent to a blood draw is sufficient to satisfy the Fourth Amendment. Contrary to the court of appeals' opinion, *Birchfield* did not hold that a driver's implied consent cannot satisfy the Fourth Amendment. As explained above, had the Court so held in *Birchfield*, it would have had no reason to grant certiorari in *Mitchell* to decide that issue.

Third, *Wintlend* concluded that even if a person's consent to a blood draw is coerced because the officer threatens the person with revocation of his or her operating privilege for a refusal, that coercion is permissible. Contrary to the court of appeals' conclusion in this case, nothing in *Birchfield* forbids that type of "coercion." *Birchfield* expressly approves exactly the "coercion" to which *Wintlend* referred.

The Court said in *Birchfield* that a state may properly threaten and impose both civil penalties and evidentiary consequences for a refusal to submit to a lawful request for a blood draw. What it may not do is threaten *criminal* penalties for a refusal to submit to a lawful request for a blood draw. As the Court said, "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." *Birchfield*, 136 S. Ct. 2160, 2185 (citing

Missouri v. McNeely, 569 U.S. 141, 161 (2014); *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). The Court said, "Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.* at 2185.

Having affirmed that a state *may* threaten and impose civil penalties and evidentiary consequences for a refusal to submit to a lawful request for a blood sample, the Court explained what a state *may not* do. "It is another matter, however, for a state not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There 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.* The limit is no criminal penalties. But threatening and imposing civil penalties and evidentiary consequences are perfectly acceptable.

The court of appeals' conclusion that *Birchfield* overruled *Wintlend* "in such clear terms that the Supremacy Clause compels" the court of appeals not to follow *Wintlend*, is simply wrong. As described above, *Birchfield* did not overrule *Wintlend*. Accordingly, as the court of appeals had recognized three times previously, it still could not resolve the conflict between *Wintlend* and *Padley*, and it could not properly find the unconscious driver provision unconstitutional in this case.

The court of appeals also seemed to conclude that *Birchfield* invalidated the unconscious driver provision in Wisconsin's law. The court said that under *Birchfield*, whether consent under an implied consent law is valid must be determined based on the totality of the circumstances, including the characteristics of the defendant, and that an

implied consent law cannot coerce a defendant's consent in any way. *Prado*, 2020 WI App 42, ¶¶ 47, 54. The court based its conclusion on *Birchfield*'s remand of petitioner Beylund's case for consideration of whether Beylund's consent was voluntary under the totality of the circumstances. *Prado*, 2020 WI App 42, ¶¶ 43, 55.

But the Supreme Court remanded Beylund's case because the officer had inaccurately advised him that it was a crime to refuse. *Birchfield*, 136 S. Ct. at 2172, 2186. The Court said nothing even suggesting that if North Dakota's law had provided only civil penalties for refusal, it would have remanded the case for a consent determination. As the Court's express approval of implied consent laws that threaten and impose only civil penalties and evidentiary consequences for refusal demonstrates, had Beylund been advised that he would be subject to only those penalties and consequences if he refused, the Court would not have remanded the case. It would simply have affirmed Beylund's conviction. And even if correctly informing a person of the civil penalties and evidentiary consequences for a refusal were somehow coercive, *Birchfield* expressly endorsed that coercion.

The court of appeals did not limit its discussion of consent and coercion to unconscious drivers. The court's conclusions would also seemingly apply to conscious drivers. This would suggest that the validity of a correctly informed conscious person's submission to a lawful request for a blood draw under the implied consent law would depend on his personal characteristics, and that the blood draw might be invalid because the person was properly informed of the penalties and consequences he faced if he were to refuse.

The court of appeals' published opinion will significantly impact all blood draws under the implied

consent law, from both conscious and unconscious drivers. And it is incorrect. This Court should therefore grant review.

IV. The court of appeals applied the good faith exception without determining whether the blood test evidence was obtained in violation of the Fourth Amendment, and it applied the exception incorrectly.

After finding that the consent exception to the warrant requirement did not justify the drawing of Prado's blood, and striking down the unconscious driver provision, the court of appeals concluded that the good faith exception applies, so the blood test results need not be suppressed. *Prado*, 2020 WI App 42, ¶¶ 64, 67–73. The court resorted to the good faith exception, under which evidence obtained in violation of the Fourth Amendment need not be suppressed, without even considering whether the blood draw was justified by exigent circumstances. And while the officer obviously could rely in good faith on the statute, the court of appeals' application of the good faith exception, and specifically its limitation of the exception, was incorrect.

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citations omitted). However, the exclusionary rule does not apply to all constitutional violations. *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97. Instead, "exclusion is the last resort." *Id.* (citation omitted). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* ¶ 36 (quoting *Herring v. United States*, 555 U.S. 135, 144

(2009)). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* (quoting *Herring*, 555 U.S. at 144).

The good faith exception provides that the exclusionary rule should not apply when officers act in good faith. *Id.* ¶ 36. The good faith exception to "[t]he exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *Id.* ¶ 35.

The good faith exception applies when evidence is obtained in violation of the Fourth Amendment. *Krull*, 480 U.S. at 347. If there is no Fourth Amendment violation, there is no need to resort to the good faith exception. In *State v. Richards*, 2020 WL 4045400, the court of appeals properly declined to apply the good faith exception in a case involving a blood draw from an unconscious driver. The court applied the new rule the Supreme Court established in *Mitchell* for exactly this category of cases. *Richards*, 2020 WL 4045400, ¶ 49. The court explained that it was not addressing Richards' argument that the unconscious driver provision is unconstitutional "because that argument becomes germane only if there is no warrant exception based on exigent circumstances." *Id.* ¶ 49 n.8. The court added that "[f]or similar reasons we need not discuss the State's argument that the good faith exception to the warrant requirement applies in these circumstances." *Id.*

The court of appeals' decision in *Richards* makes sense. The court concluded that the blood draw was justified by one exception to the warrant requirement (exigent circumstances), so it had no need to determine if it was also justified by another exception (consent). And because the

blood was justified by one exception to the warrant requirement, and was therefore lawfully obtained, the court had no need to determine if the good faith exception applied.

In this case, the court of appeals did the opposite. It did not determine whether the blood draw from Prado violated the Fourth Amendment. It considered only one warrant exception, determining that the blood draw was not justified by Prado's consent. But rather than determining whether another exception justified the blood draw, the court resorted to a good faith analysis. The court said it did not need to address exigent circumstances because its "decision about the good faith exception to the exclusionary rule is dispositive." *Prado*, 2020 WI App 42, ¶ 66. Of course, under that reasoning, the court also should have declined to address the consent exception, and just said that it had no need to determine whether the blood sample was obtained in violation of the Fourth Amendment because even if it was, the good faith exception applies so the evidence need not be suppressed.

As *Prado* recognized, resorting to good faith means that issues may remain unresolved "unless courts become willing to render what amount to advisory opinions on Fourth Amendment issues not needed to decide the case." *Id.* ¶ 70 (Abrahamson, C.J., dissenting) (quoting *Dearborn*, 327 Wis. 2d 252, ¶ 94). In this case, the court of appeals rendered what amounts to an advisory opinion on the constitutionality of the unconscious driver provision, without determining whether the blood draw was justified by another exception to the warrant requirement.

The court of appeals recognized that the officer acted in good faith reliance on the implied consent law when he ordered the blood draw. However, the court limited the scope of the good faith exception in an unreasonable manner.

The court of appeals concluded that the officer could rely in good faith on the unconscious driver provision because "At the time that Prado's blood was drawn, the incapacitated driver provision had been on the books for decades, and its constitutionality had not been challenged in any published appellate decision. *Wintlend* was the law in Wisconsin and had not yet been overruled by *Birchfield*." *Prado*, 2020 WI App 42, ¶ 71.

The good faith analysis should not depend on whether the statutory provision had been challenged, or on whether *Wintlend* had supposedly been silently overruled by *Birchfield*. An officer is entitled to rely on a statutory provision that is not "clearly unconstitutional." *Krull*, 480 U.S. at 349. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Id.* at 349–50. "If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350.

The court of appeals' decision limits an officer's good faith reliance on the statute to the date on which *Birchfield* was released. It implies that on that date, police officers should have recognized that the unconscious driver provision was unconstitutional, even though *Birchfield* said nothing about unconscious driver provisions, and even though the court of appeals, this Court, and the Supreme Court itself did not later recognize that *Birchfield* had supposedly invalidated Wisconsin's unconscious deriver provision.

A police officer is entitled to rely on a statutory provision that is not "clearly unconstitutional." *Krull*, 480

U.S. at 349. No appellate court had found the unconscious driver provision in Wisconsin's law unconstitutional until the court of appeals did so in this case. Until *Prado* was released, an officer could rely on the statute in good faith.

CONCLUSION

This Court should grant this petition for review.

Dated this 17th day of August 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Michael C. Sanders

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 7,632 words.

Dated this 17th day of August, 2020.

Michael C. Sanders

MICAHEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b)and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 17th day of August, 2020.

Michael C. Sanders

MICAHEL C. SANDERS
Assistant Attorney General