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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP308-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DAWN M. PRADO,

Defendant-Respondent-Cross Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE DAVID T. FLANAGAN, III, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

ISSUES PRESENTED

In *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), the United States Supreme Court established a "general rule" for the "category of cases" in which "the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S.Ct. at 2531. When a person suspected of impaired driving is unconscious and taken to the hospital and an evidentiary breath test cannot be administered, "a warrant is not needed" to administer a blood draw. *Id.* Instead, a blood draw is almost always justified by exigent circumstances. *Id.* at 2539.

Here, police had probable cause that Dawn M. Prado was under the influence of an intoxicant when the motor vehicle she was driving collided with another car, resulting in the death of the other driver. Prado was seriously injured and taken to the hospital with no opportunity for an evidentiary breath test. She was unconscious when a police officer ordered that her blood be drawn pursuant to the unconscious driver provision in Wisconsin's implied consent law.

1. Was the warrantless blood draw justified by exigent circumstances?

The circuit court did not answer. The Supreme Court had not yet established the new rule that warrantless blood draws are almost always justified in this category of cases, so the State did not argue that the rule applied, and the circuit court did not apply it.

The court of appeals did not answer. It found the unconscious driver provision in Wisconsin's implied consent law unconstitutional but concluded that the blood test results should not have been suppressed because the police relied in good faith on the statute. The court did not determine whether the blood draw was justified under the rule the Supreme Court established for this category of cases in

Mitchell because it concluded that its decision about good faith was dispositive.

This Court should answer "yes." Under *Mitchell*, when a suspected drunk driver is unconscious and taken to a hospital before a breath test can be administered, a warrantless blood draw is almost always justified by exigent circumstances. The Supreme Court established this rule for cases exactly like Prado's, and this Court should apply it and conclude that her blood draw was justified.

2. Is the unconscious driver provision in Wisconsin's implied consent law facially unconstitutional?

The circuit court did not answer. It concluded that the statute does not authorize warrantless blood draws, but if it did authorize them, the statute would be unconstitutional under *Missouri v. McNeely*, 569 U.S. 141 (2013).

The court of appeals answered "yes," and found the unconscious driver provision facially unconstitutional under *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016).

This Court need not resolve this issue to decide this case but should do so to correct the court of appeals' erroneous conclusion that the statute is facially unconstitutional. The Supreme Court in *Mitchell* held that blood draws conducted under the unconscious driver provision, in the circumstances of this case, are almost always constitutional. The statute is therefore not unconstitutional facially or as applied to Prado.

3. Did the police officer who ordered that Prado's blood be drawn rely 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 is unconstitutional under *McNeely*, 569 U.S. 141, so the officer could not rely on it in good faith.

The court of appeals answered "yes." It concluded that the officer could rely in good faith on the unconscious driver provision because *Birchfield*, 136 S.Ct. 2160, had not yet overruled *State v. Wintlend*, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 867.

This Court need not decide this issue to resolve this case but should do so to correct the court of appeals' erroneous application of the good faith exception. This Court should affirm that an officer can rely on a statute until the statute is found unconstitutional. And no court found the unconscious driver provision in Wisconsin's implied consent law unconstitutional until the court of appeals did so in this case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

Police officers had probable cause that Prado was under the influence of an intoxicant when a minivan she was driving collided with a car, killing the other driver. Prado was seriously injured and was taken to a hospital, where an officer requested a blood sample from her under Wisconsin's implied consent law. However, Prado was unconscious and could not affirm or withdraw the consent to a blood draw she had impliedly given by driving on a Wisconsin highway. The officer therefore had hospital personnel draw a sample of Prado's blood, which was tested for the presence and quantity of alcohol and drugs.

The primary issue in this case is whether the warrantless blood draw from Prado while she was unconscious violated the Fourth Amendment. The circuit court determined that the blood draw was not justified so it

suppressed the blood test results. The court found the unconscious driver provision in Wisconsin's implied consent law unconstitutional and concluded that the officer could not have relied on it in good faith.

The State appealed, and the court of appeals held the appeal for longer than two years, presumably for guidance on whether a warrantless blood draw from an unconscious drunk driving suspect is permissible.

In *Mitchell v. Wisconsin*, the Supreme Court provided the guidance necessary to resolve this case and almost every case like this one. The Court established a "general rule" that a blood draw from an unconscious drunk driving suspect who is taken to the hospital with no opportunity for a breath test is almost always justified by exigent circumstances. *Mitchell*, 139 S.Ct. at 2539.

This case falls squarely into the category of cases for which the Supreme Court established its rule. The court of appeals could simply have applied the rule and concluded that the blood draw from Prado was justified by exigent circumstances. But the court chose not to accept the Supreme Court's guidance and apply the *Mitchell* rule. The court of appeals had long recognized that it could not determine the constitutionality of the unconscious driver provision due to a conflict between *Wintlend*, 258 Wis.2d 875, and *State v. Padley*, 2014 WI App 65, 354 Wis.2d 545, 849 N.W.2d 867, that it could not resolve. But the court of appeals concluded in this case that the Supreme Court's *Birchfield* decision had resolved that conflict by overruling *Wintlend*. *State v. Prado*, 2020 WI App 42, ¶¶34, 36, 49, 393 Wis.2d 526, 947 N.W.2d 182. The court of appeals concluded that it now could find the statute unconstitutional, and it did just that. Then, rather than determine whether the blood draw was justified by another exception to the warrant requirement, such as exigent circumstances, the court concluded that the blood test

results should not have been suppressed because the officer relied in good faith on the statute that the court found unconstitutional in this case. *Id.* ¶66–73. The court found the good faith issue "dispositive." *Id.* ¶66.

There is no need to go to such lengths to resolve this case. The proper resolution of this case is simple and straightforward. In *Mitchell*, the Supreme Court established a clear rule for cases exactly like this one. When a suspected drunk driver is unconscious and taken to the hospital before an evidentiary breath test can be conducted, a blood draw is "almost always" justified by exigent circumstances and a warrant is not required. *Mitchell*, 139 S.Ct. at 2531, 2539. To find the warrantless blood draw from Prado constitutional, this Court need only apply the rule.

This Court need not address the constitutionality of the unconscious driver provision or the proper application of the good faith exception to resolve this case. But it should address those issues because the court of appeals erred in finding the statute unconstitutional and in limiting the application of the good faith exception.

The court of appeals concluded that it could decide the constitutionality issue because *Birchfield* overruled *Wintlend*. But *Birchfield* is materially consistent with *Wintlend* and did not overrule it. This Court should affirm that *Wintlend* remains good law.

The *Mitchell* rule for blood draws from suspected drunk drivers who are unconscious specifically applies to blood draws under the unconscious driver provision in Wisconsin's implied consent law. Since blood draws conducted pursuant to this statute are "almost always" justified, the statute is not facially unconstitutional. And Prado's blood draw, conducted under the statute, was lawful under the *Mitchell* rule, so the statute is not unconstitutional as applied to her.

Finally, this Court should confirm that a police officer can rely in good faith on a statute that has not been found unconstitutional.

STATEMENT OF THE CASE AND FACTS

A minivan Prado was driving collided with another vehicle, injuring Prado and her passenger and killing the other driver. (R.1:3–5, P-App.146–48.) A firefighter observed Prado lying in a ditch near the crash and smelled the odor of intoxicants on her breath. (R.1:5–6, P-App.148–49.) The passenger in Prado's minivan told police that Prado had been driving. (R.1:4, P-App.147.) Police officers concluded that Prado's minivan crossed the center line and struck the car. (R.1:5, P-App.148.) Officers also learned that Prado had three prior OWI convictions. (R.1:6, P-App.149.)

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

The State charged Prado with nine OWI-related crimes. (R.22.)[2] She moved to suppress her blood test results

[1] Because Prado had three prior OWI-related offenses (R.1:6, P-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.)

[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

on the ground that the unconscious driver provision in Wisconsin's implied consent law, Wis. Stat. §343.305(3)(b) and 3(ar), is unconstitutional. (R.26, P-App.161–64.) After briefing and a hearing (R.27; 29; 31; 41), the circuit court granted Prado's suppression motion (R.33, P-App.165–68). The court found that there was probable cause that Prado was the operator of a motor vehicle involved in a crash in which another person was killed. (R.33:2, P-App.166.) But it concluded that Prado's blood was drawn without a warrant or her consent, in violation of the Fourth Amendment. (R.33:3–4, P-App.167–68.) The court concluded that the unconscious driver provision in Wisconsin's implied consent law does not authorize blood draws, but that if it did authorize them, it would be unconstitutional under *Missouri v. McNeely*, 569 U.S. 141. (R.33:3, P-App.167.) The court declined to apply the good faith exception to the exclusionary rule and ordered the blood test result suppressed. (R.33:3–4, P-App.167–68.)

The State appealed, and 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

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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.)

issued its decision in *Mitchell v. Wisconsin*, the court of appeals ordered supplemental briefing. The State asserted in its brief that it did not waive or forfeit its argument that the blood draw was justified by the *Mitchell* exigent circumstances rule because that rule is "new." (State's Supp. Br.4–5, P-App.204–06.) And it asserted that the blood draw was justified by exigent circumstances under the *Mitchell* rule. (State's Supp. Br.3–6, P-App.204–06.) Prado asserted in her brief that the State had waived or forfeited its exigent circumstances argument by not raising it in the circuit court. (Prado's Supp. Br.2, P-App.216.) She claimed that the Supreme Court's exigent circumstances rule is not "new" because it is not a "brand new exception to the warrant requirement." (Prado's Supp. Br.2, P-App.216.)

The court of appeals reversed the circuit court's decision granting Prado's motion to suppress her blood test results because it determined that the officer relied in good faith on the unconscious driver provision in the statute. *Prado*, 393 Wis.2d 526, ¶73. The court also found the unconscious driver provision in Wisconsin's implied consent law unconstitutional. *Id.* ¶74. It did not apply the Supreme Court's new rule for exigent circumstances in cases involving unconscious drivers because it found the good faith issue "dispositive." *Id.* ¶66. The State petitioned for review and Prado petitioned for cross-review, and this Court granted both petitions.

STANDARD OF REVIEW

An appellate court reviews an order granting or denying a suppression motion as a question of constitutional fact that it decides in a two-step inquiry. *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis.2d 421, 857 N.W.2d 120. First, the court applies a deferential standard when it reviews the circuit court's findings of historical fact, upholding them unless they

are clearly erroneous. *Id.* Second, it independently applies the constitutional principles to the historical facts. *Id.*

A reviewing court determines whether exigent circumstances justify a warrantless blood draw under the same two-step inquiry. *State v. Howes*, 2017 WI 18, ¶17, 373 Wis.2d 468, 893 N.W.2d 812 (plurality opinion).

The constitutionality of a statute is a question of law that this Court determines independently of the circuit court and the court of appeals. *State v. Smith*, 2010 WI 16, ¶8, 323 Wis.2d 377, 780 N.W.2d 90.

The application of the good faith exception is also an issue of law that this Court reviews independently. *State v Scull*, 2015 WI 22, ¶17, 361 Wis.2d 288, 862 N.W.2d 562.

ARGUMENT

I. The warrantless blood draw from Prado was justified by exigent circumstances under the rule the United States Supreme Court established in *Mitchell v. Wisconsin*.

A. A warrantless blood draw may be justified by exigent circumstances.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Dalton*, 2018 WI 856, ¶38, 383 Wis.2d 147, 914 N.W.2d 120. Warrantless searches are presumptively unreasonable unless an exception to the warrant requirement applies. *Tullberg*, 359 Wis.2d 421, ¶30. One exception is exigent circumstances, which "allows warrantless searches 'to prevent the imminent destruction of evidence.'" *Mitchell*, 139 S.Ct. at 2533 (quoting *McNeely*, 569 U.S. at 149).

Generally, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. at 156. The dissipation of alcohol in the blood does not create a per se exigency. *Id.* at 144. But "the natural dissipation of alcohol in the bloodstream may present a risk that evidence will be destroyed and may therefore support a finding of exigency in a specific case." *Dalton*, 383 Wis.2d 147, ¶40 (citing *McNeely*, 569 U.S. at 156).

In *Schmerber v. California*, 384 U.S. 757 (1966), the Supreme Court concluded that a blood draw was justified by exigent circumstances because "a car accident heightened [the] urgency" that is "common to all drunk-driving cases." *Mitchell*, 139 S.Ct. at 2533. And in *Mitchell*, the Supreme Court concluded that a driver's unconsciousness can heighten the urgency and constitute an exigency. *Id.*

B. Under *Mitchell*, a blood draw from an unconscious drunk driving suspect who is taken to the hospital before an evidentiary breath test can be administered is almost always justified by exigent circumstances.

In *Mitchell v. Wisconsin*, the Supreme Court established a "general rule" for the "category of cases" where "the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S.Ct. at 2531. When a person suspected of impaired driving is unconscious, "a warrant is not needed" to administer a blood draw. *Id.* Instead, a blood draw is almost always justified by exigent circumstances. *Id.* at 2539. The Court's holding applies to cases in which "police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test." *Id.* Under

those circumstances, police "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.*

The Supreme Court's rule is not meant to be applied on a case-by-case basis. It applies to the entire category of cases involving unconscious drivers. *Id.* at 2531, 2534 n.2, 2535. The Court said, "we adopt a rule for an entire category of cases—those in which a motorist believed to have driven under the influence of alcohol is unconscious and thus cannot be given a breath test." *Id.* at 2534 n.2. The Court explained that its rule is based "on the circumstances generally present in cases that fall within the scope of the rule." *Id.*

The Court acknowledged that whether exigency exists is determined under the totality of the circumstances. *Mitchell*, 139 S.Ct. at 2535 n.3. But the Court said that just as it did in *McNeely*, 569 U.S. at 166, it "should be able to offer guidance on how police should handle cases like the one before us." *Mitchell*, 139 S.Ct. at 2535 n.3. The Court did exactly that in *Mitchell* by "spelling out a general rule for the police to follow." *Id.* Under that rule, when there is probable cause that a person has violated an OWI-related law, and the person is unconscious and must be taken to the hospital before a breath test can reasonably be conducted, a blood draw is almost always justified by exigent circumstances so a warrant is not required. *Id.* at 2539.

After establishing a rule that "almost always" applies to blood draws from drivers who become unconscious, the Supreme Court explained what it meant by "almost always." The Court provided an exception to the general rule for the "unusual case" in which the defendant can show *both* that (1) "his blood would not have been drawn if police had not been seeking BAC information," *and* (2) "police could not have reasonably judged that a warrant application would interfere

with other pressing needs or duties." *Mitchell*, 139 S.Ct. at 2539.

The Court made it clear that once the State satisfies its burden of showing that there was probable cause and that the person was unconscious and was taken to the hospital before an evidentiary breath test could be conducted, the defendant bears the burden of showing that his is the "unusual case" to which the general rule does not apply. *Id.*

The Court did not say that exigent circumstances would *typically* be present unless the defendant satisfies his burden. It said that unconsciousness "is *itself* a medical emergency." *Mitchell*, 139 S.Ct. at 2537. And it set forth a rule that applies to the category of cases involving unconscious drivers: When a suspected impaired driver is unconscious, and is taken to the hospital before a breath test can be conducted, exigent circumstances *are* present, unless the defendant can satisfy a two-part burden. *Id.* at 2539.

C. The court of appeals should have applied the rule the Supreme Court established in *Mitchell* for cases like Prado's.

After the Supreme Court set forth its new general rule for blood draws from unconscious drivers in *Mitchell*, the court of appeals in this case ordered supplemental briefs to address the application of the rule to the warrantless blood draw from Prado. The State acknowledged in its brief that in the circuit court it did not argue that the blood draw was justified by exigent circumstances. But the State pointed out that "[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. Therefore, the State did not waive or forfeit the exigent circumstances 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, P-App.205.)

The State also pointed out that the Supreme Court had applied the rule to Mitchell himself, even though the State had never argued that exigent circumstances justified the blood draw from Mitchell. The Court remanded the case to afford Mitchell an opportunity to show that his was the "unusual case" in which the new rule does not apply. (State's Supp. Br.5, P-App.206); *Mitchell*, 139 S.Ct. at 2539.

The State explained that the blood draw from Prado falls squarely into the category of cases governed by the Supreme Court's new rule, so the court should reverse the circuit court's order that suppressed the blood test results unless Prado meaningfully alleged that hers was the "unusual case" to which the new rule does not apply. (State's Supp. Br.4–6, P-App.205–07.) However, if Prado meaningfully alleged that her blood was only drawn at the hospital for the purpose of investigating her criminal activity, and "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties," the court of appeals should remand the case to the circuit court to give her an opportunity to make that showing. (State's Supp. Br.5–6, P-App.206–07.)

The court of appeals declined to determine whether exigent circumstances justified the blood draw from *Prado*. It gave three reasons for not applying the *Mitchell* rule. But none of those reasons warrant not applying the rule the Supreme Court established for exactly this type of case and that justified the warrantless blood draw.

The first reason the court gave for not applying the *Mitchell* exigent circumstances rule was 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*, 393 Wis.2d 526, ¶66.

However, Prado argued only that the State waived or forfeited its *Mitchell* exigency argument because *Mitchell* did not recognize a "brand-new exception to the warrant requirement" and therefore did not set forth a "new rule." (Prado's Supp. Br.2, P-App.216.)

It makes no difference that the new rule the Supreme Court established in *Mitchell* is not a "brand-new exception to the warrant requirement." It cannot reasonably matter that the Court established that blood draws from unconscious drivers are almost always justified under the "exigent circumstances" exception to the warrant requirement, rather than under a new "unconscious driver" exception to the warrant requirement. As the court of appeals has recognized, 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." *State v. Richards*, 2020 WI App 48, ¶23, 393 Wis.2d 772, 948 N.W.2d 359 (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 for the entire category of cases was plainly "new."

And the Supreme Court plainly intended for the rule to apply to cases where the State did not argue exigent circumstances. In *Mitchell*, the State did not argue that the blood draw was justified by exigent circumstances and neither the circuit court nor this Court decided the case on that ground. But the Supreme Court established a new rule under which exigent circumstances almost always justify a blood draw in situations like the one in *Mitchell*, and remanded the

case to this Court to afford Mitchell an opportunity to show that his was the "unusual" case to which the new rule did not apply. The implication is obviously that unless Mitchell could make that showing, his blood draw was justified by exigent circumstances, even though the State had not argued exigent circumstances in the circuit court, in this Court, or in the Supreme Court. Similarly, in *State v. Howes*, this Court affirmed a defendant's OWI conviction on the ground that a blood draw was justified by exigent circumstances, even though the State had not argued that it was justified on that ground. *State v. Howes*, 2017 WI 18, ¶¶2–3, 50, 373 Wis.2d 468, 893 N.W.2d 812.

The "dispute" about whether the *Mitchell* rule is new and whether the State waived or forfeited its *Mitchell* argument is easily resolved. "A litigant cannot fairly be held to have waived an argument that, at the time, a court of competent jurisdiction had not yet announced." *Rodriguez*, 306 Wis.2d 129, ¶11. The State did not waive the argument that Prado's unconsciousness constituted an exigent circumstance under the *Mitchell* rule, because the Supreme Court had not yet established the *Mitchell* rule. The Supreme Court established a new rule for the category of cases that includes this case. The court of appeals should have applied that rule.

The second reason the court of appeals gave for not applying the *Mitchell* exigent circumstances rule was 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*, 393 Wis.2d 526, ¶66.

But Prado never asserted that hers is the "unusual" case to which the *Mitchell* rule does not apply. In its supplemental brief the State explained that it is unlikely that Prado would be able to show both that her 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." (State's Supp. Br.3–5, P-App.204–06 (citing *Mitchell*, 139 S.Ct. at 2539).) In particular, Prado would likely be unable to show that her blood would not have been drawn had police not been seeking information about her blood alcohol concentration. (State's Supp. Br.5–6, P-App.206–07.)

In her supplemental brief, Prado did not dispute that her case falls into the category of cases to which the *Mitchell* rule applies. And she did not assert that she could meet her two-part burden under *Mitchell*. 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 information about her blood alcohol concentration.

Because there is no "dispute" about whether Prado can show that hers is the "unusual" case in this category of cases in which a warrantless blood draw is not justified by exigent circumstances, the court of appeals should have applied the rule the Supreme Court established for this category of cases.

The third reason the court of appeals gave for not applying the *Mitchell* exigent circumstances rule was that its "decision about the good faith exception to the exclusionary rule is dispositive." *Prado*, 393 Wis.2d 526, ¶66. The court noted that "[a]n appellate court need not address every issue raised by the parties when one issue is dispositive." *Id.* (quoting *Barrows v. Am. Fam. Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis.2d 436, 842 N.W.2d 508).

It is true that "An appellate court should decide cases on the narrowest possible grounds." *State v. Castillo*, 213 Wis.2d 488, 492, 570 N.W.2d 44 (1997). "Consistent with this rule is the recognition that a court will not reach constitutional issues where the resolution of other issues disposes of an appeal." *Id.*

But the court of appeals did not decide the case on a narrow ground rather than decide a difficult constitutional issue. For instance, the court did not say that it did not need to determine whether the unconscious driver statute is unconstitutional because even if it were unconstitutional, the officer relied on it in good faith, so the evidence need not be suppressed. Instead, the court of appeals decided the difficult constitutional issue (even though it could not properly do so because it could not resolve the conflict between *Padley* and *Wintlend*), and it declined to determine whether the blood was constitutional under the new exigent circumstances rule the Supreme Court established in *Mitchell* for exactly this type of case because another issue—good faith—was dispositive. *Prado*, 393 Wis.2d 526, ¶66.

There was no good reason to resort to the good faith exception rather than determining whether the blood draw was constitutional. Consideration of the good faith exception is appropriate when evidence is "obtained through an unconstitutional search." *Prado*, 393 Wis.2d 526, ¶67. The good faith exception "becomes germane" only when a warrant exception does not apply. *Richards*, 393 Wis.2d 772, ¶49 n.8. But the court of appeals never determined whether Prado's blood sample was obtained in an unconstitutional search. The court found that the blood draw was not justified by one exception to the warrant requirement—consent. But it did not determine whether the search was constitutional because the blood draw was justified by another warrant exception, such as exigent circumstances.

The court of appeals held this case for more than two years, presumably waiting for guidance on whether it is permissible to draw blood without a warrant from a suspected drunk driver who is unconscious and taken to a hospital before an evidentiary breath test may be administered. The United States Supreme Court provided that guidance when it set forth a clear new rule for this category of cases. The court of appeals should simply have applied the *Mitchell* rule and reversed the circuit court's decision suppressing the blood test results.

D. The blood draw from Prado was justified by exigent circumstances under the *Mitchell* rule.

In *Mitchell*, the Supreme Court "spell[ed] out a general rule for the police to follow." *Mitchell*, 139 S.Ct. at 2535 n.3. Under that rule, when there is probable cause that a person has violated an OWI-related law, and the person is unconscious and must be taken to the hospital before a breath test can reasonably be conducted, a blood draw is almost always justified by exigent circumstances so a warrant is not required. *Id.* at 2539. The *Mitchell* rule was intended as guidance in cases exactly like Prado's. This Court should accept the Supreme Court's guidance, apply the *Mitchell* rule, and conclude that the blood draw in this case did not violate the Fourth Amendment.

This case satisfies all the criteria the Supreme Court set forth in *Mitchell*.

- There was probable cause.

The circuit court found that City of Fitchburg Police Officer Jonathan Parker had probable cause that Prado was the operator of a motor vehicle involved in a crash in which another person was killed. (R.33:2, P-App.166.) And the parties stipulated that Officer Parker had probable cause to

read the Informing the Accused form to Prado and request a blood sample from her. (R.41:5, P-App.173.)

- Prado was unconscious and she was taken to a hospital.

Prado was taken to the hospital by Emergency Medical Services (EMS). (R.1:5, P-App.148.) She was unconscious when an officer arrived. (R.1:5; 33:2, P-App.148; 166.) And the circuit court found that at the hospital Prado "was unconscious and incapable of giving or withdrawing conscious consent to a blood draw." (R.33:2, P-App.166.)

- There was no opportunity to obtain an evidentiary breath test.

The circuit court did not address whether the officers had an opportunity to obtain a breath sample from Prado before she was taken to the hospital. But there plainly was no such opportunity. Prado was seriously injured and was transported to the hospital by EMS. (R.1:1–5; 33:2, P-App.144–48; 166.) She was unconscious when officers encountered her in the hospital and when her blood was drawn. (R.1:5; 33:2; 41:7–8, P-App.148; 166; 175–76.) There obviously was no opportunity to take Prado to the police station for an evidentiary breath test.

Under these circumstances a law enforcement officer "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Mitchell*, 139 S.Ct. at 2539. In this case the police did exactly what *Mitchell* said they should do under these circumstances—order a blood draw.

- Prado's case is not a rare "unusual" case to which the *Mitchell* rule does not apply.

To show that hers is the "unusual" case to which *Mitchell* does not apply, Prado would have to show that her "blood would not have been drawn if police had not been

seeking BAC information," and "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Mitchell*, 139 S.Ct. at 2539.

Although the State asserted in its supplemental brief to the court of appeals that the court should reverse the order suppressing Prado's blood test results unless she meaningfully alleged that she could show that hers was the "unusual" case *Mitchell* spoke of, Prado did not allege anything of the sort. She did not even mention the *Mitchell* rule.[3]

It is not surprising that Prado did not allege that hers is the "unusual" case to which the *Mitchell* rule does not apply. The Supreme Court in *Mitchell* observed that hospitalized "unconscious suspects will often have their skin pierced and blood drawn for diagnostic purposes." *Mitchell*, 139 S.Ct. at 2538 n.8. That observation applies here. Prado was involved in a serious crash in which another person was killed. (R.33:2, P-App.166.) When officers arrived at the scene, she was lying in a ditch. (R.1:1–5, P-App.144–48.) Prado was taken to the hospital by EMS and was unconscious when an officer arrived. (R.1:5; 33:2, P-App.144; 166.) Officer Parker testified that Prado was on a hospital bed, that she had been intubated, and that doctors and hospital staff informed him that she was unconscious. (R.41:7–8, P-App.175–76.)

[3] Prado had notice that the State was arguing that if she did not meaningfully allege that she could show hers was the "unusual" case to which the *Mitchell* rule did not apply, the court of appeals should conclude that the blood draw was justified. Prado filed her supplemental brief after the State filed its brief, and her brief quoted the State's brief. (Prado's Supp. Br.1–2, P-App.215–16.) By not alleging that she could show that the *Mitchell* rule does not apply, Prado seemingly conceded that she cannot make that showing.

Under the circumstances, it seems impossible that Prado could show that her blood would not have been drawn had police not been seeking information about her blood alcohol concentration, much less that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Mitchell*, 139 S.Ct. at 2539.

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This Supreme Court established the *Mitchell* rule for cases exactly like this one. This Court should apply that rule and conclude that the warrantless blood draw from Prado was justified by exigent circumstances.

II. The court of appeals erred in finding the unconscious driver provision in Wisconsin's implied consent law unconstitutional.

The court of appeals found the unconscious driver provision in Wisconsin's implied consent law, Wis. Stat. §343.305(3)(b)[4], facially unconstitutional.[5] *Prado*, 393 Wis.2d 56, ¶64. The court acknowledged that it had certified the issue to this Court three times because it was unable to decide the constitutionality of this provision due to a conflict between its own opinions in *Wintlend*, 258 Wis.2d 875, and *Padley*, 354 Wis.2d 545. *Prado*, 393 Wis.2d 526, ¶¶34–36. But the court of

[4] Wisconsin Stat. §343.305(3)(ar)1. and (3)(ar)2. contain similar language regarding unconscious drivers. But officers had probable cause that Prado operated a motor vehicle while under the influence of an intoxicant, and her blood draw was conducted under Wis. Stat. §343.305(3)(b), so the State will focus on that provision in this brief.

[5] The court of appeals noted that Prado did not specify whether her challenge to the statute was facial or as applied to her, so it treated her claim as a facial challenge. *State v. Prado*, 2020 WI App 42, ¶30 n.9, 393 Wis. 2d 526, 947 N.W.2d 182.

appeals determined that it now could decide the issue because that conflict was resolved in *Birchfield*, 136 S.Ct. 2160, when the Supreme Court overruled *Wintlend*. *Prado*, 393 Wis.2d 526, ¶¶37–49.

The court of appeals erred in two respects. First, *Birchfield* did not overrule *Wintlend*, so the court of appeals could not properly decide the constitutionality issue. Second, the court of appeals' conclusion that the statute is facially unconstitutional is wrong. The Supreme Court concluded that blood draws conducted under the unconscious driver provision are almost always constitutional. The statute is therefore not facially constitutional.

A. The court of appeals erred in concluding that *Birchfield* overruled *Wintlend*.

Before it addressed the constitutionality of the unconscious driver provision, the court of appeals considered "a threshold issue—whether we can even decide if the incapacitated driver provision is constitutional in light of a conflict between our prior decisions" in *Wintlend* and *Padley*. *Prado*, 393 Wis.2d 526, ¶¶33–35. The court of appeals concluded that it could decide the constitutionality issue because the conflict between *Wintlend* and *Padley* was resolved by the Supreme Court in 2016 when it decided *Birchfield*, 136 S.Ct. 2160.

Resolution of this case does not turn on whether *Birchfield* overruled *Wintlend*, or whether the unconscious driver provision is constitutional. But this Court should reject the court of appeals' incorrect conclusion that *Birchfield* overruled *Wintlend* and affirm that *Wintlend* remains good law.

1. In *Wintlend*, the court of appeals held that Wisconsin's implied consent law is constitutional as it relates to lawful requests for blood samples from drivers who are conscious.

In *Wintlend*, a defendant who submitted to a law enforcement officer's request for a blood sample under the implied consent law argued that "when he was read the Informing the Accused form by the officer following his arrest, the language of that form contained a threatened sanction of a loss of driving privileges unless he consented to taking a blood alcohol test." *Wintlend*, 258 Wis.2d 875, ¶¶1–2. The defendant claimed that "this threat constituted a coercive measure invalidating his consent for Fourth Amendment purposes." *Id.* ¶1.

The court of appeals rejected the defendant's claim. It noted that when a person "applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests." *Id.* ¶12 (quoting *State v. Neitzel*, 95 Wis.2d 191, 193, 289 N.W.2d 828 (1980)). Then, when a motorist "is stopped and arrested," and an officer reads the person the Informing the Accused form, "the motorist's plethora of choices is whittled down to one self-induced Hobson's choice—take the test or lose the license to drive." *Id.* ¶¶6, 19.

The court recognized that by conditioning the ability to drive in Wisconsin on a person's consent to submit to a request for a blood test when arrested for OWI, the statute has a "coercive nature." *Id.* ¶11. But it said that whether "the coerced event" is at the time the person obtains a license (or drives on a public road), or "at the time when the Informing the Accused form is read to" the person, *id.* ¶¶16–17, the

choice whether to submit to a blood test in order to obtain and keep a driver's license" is "an entirely reasonable form of coercion." *Id.* ¶19.

2. *Birchfield* did not overrule *Wintlend*.

In *Prado* the court of appeals said that *Wintlend* set forth three principles:

> (1) a blood test is a 'minimal' intrusion that can be coerced if there is a sufficiently compelling State purpose justifying the intrusion; (2) drivers give 'implied' consent" to chemical testing at the time they apply for a license—long before the search requested by an officer is contemplated—and this implied consent satisfies the Fourth Amendment; and (3) the implied consent statute does not violate the Fourth Amendment because even if the statute is coercive, that coercion is reasonable.

Prado, 393 Wis.2d 526, ¶41. The court of appeals concluded that these principles "cannot survive" *Birchfield*, *id.* ¶44, so *Birchfield* overruled *Wintlend* "in such clear terms" that the court of appeals no longer has to follow *Wintlend*. *Id.* ¶49.

However, the only "principle" of *Wintlend* that "cannot survive" *Birchfield* is that a blood draw is a "minimal intrusion." And that characterization was not central to *Wintlend*'s holding. *Wintlend* relied on *South Dakota v. Neville*, 459 U.S. 553, 563 (1983), for that proposition. *Birchfield* did not overrule *Neville*, and it did not overrule *Wintlend* in any meaningful way.

The court of appeals' real issues with *Wintlend* seemed to be with what it viewed as *Wintlend*'s conclusions that the consent drivers are implied to have given under the implied consent law satisfies the Fourth Amendment, and that "the implied consent statute does not violate the Fourth Amendment because even if the statute is coercive, that

coercion is reasonable." *Prado*, 393 Wis.2d 526, ¶¶46–47. But *Wintlend* is not inconsistent with *Birchfield* in these regards.

In *Birchfield*, 136 S.Ct. 2160, the Supreme Court considered the validity of implied consent laws that are very different from Wisconsin's, those that "go beyond" suspension or revocation of a motorist's license to drive, "and make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired." *Id.* at 2166. The question presented was "whether such laws violate the Fourth Amendment's prohibition against unreasonable searches." *Id.* at 2166–67.

The Court noted that "sometimes consent to a search need not be express but may be fairly inferred from context." *Id.* at 2185. 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" with a lawful request for a blood test, and "nothing we say here should be read to cast doubt on" those laws. *Id.*

Having confirmed that a State can deem a person to have consented to submit to a blood test, so long as it imposes only civil penalties and evidentiary consequences for refusal to comply, the Court said, "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." *Id.* The Court said, "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 Court explained where that limit lies: "we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

Taking the Court's statements together: (1) States may deem a person to have consented to submit to a blood draw by the person's decision to drive on a public road; (2) States may impose civil penalties and evidentiary consequences for a refusal to submit; and (3) States may not make a refusal a crime, because that goes too far.

The court of appeals' conclusion that *Birchfield* overruled *Wintlend* focused on the Supreme Court's resolution of the cases of one of the three petitioners in *Birchfield*, petitioner Beylund. The court of appeals noted that the Supreme Court remanded Beylund's case for the State court "to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory." *Prado*, 393 Wis.2d 526, ¶43 (quoting *Birchfield*, 136 S.Ct. at 2187). The court of appeals said that if Beylund's implied consent satisfied the Fourth Amendment, the Court would not have remanded the case because "The content of the implied consent advisory—like any other circumstance at the scene of the arrest—would have been inconsequential." *Id.*

However, the court of appeals overlooked that North Dakota's law made it a *crime* to refuse a blood draw. *Birchfield*, 136 S.Ct. at 2172, 2186. The law "violate[d] the Fourth Amendment's prohibition against unreasonable searches." *Id.* at 2167. The Court remanded the case to determine whether, even though Beylund consented to submit an unlawful search, and then submitted to it, his consent was nonetheless voluntary under the totality of the circumstances. *Id.* at 2186. The Court did not suggest that it would have remanded the case had Beylund been threatened with only civil penalties for refusal.

The court of appeals said *Wintlend*'s conclusion that a driver's implied consent to a future blood draw satisfies the Fourth Amendment "is plainly incompatible with *Birchfield*." *Prado*, 393 Wis.2d 526, ¶46. But *Wintlend* recognized that a

conscious driver has a choice to submit or refuse when a sample is requested. *Wintlend*, 258 Wis.2d 875, ¶19. It did not say that what happens at that point is irrelevant. And *Wintlend* did not suggest that the defendant's consent in that case would have been valid had the officer told him it would be a crime to refuse. Under both *Wintlend* and *Birchfield*, it is permissible to deem a person to have consented to a blood draw by driving on a public road, so long as a State imposes only civil penalties and evidentiary consequences for a refusal to submit. *Wintlend* is not incompatible with *Birchfield*.

The court of appeals also said that *Wintlend* incorrectly concluded that Wisconsin's implied consent law does not violate the Fourth Amendment even if it is coercive. The court said, *Birchfield* "expressly forbids the coercion that *Wintlend* says it would permit." *Prado*, 393 Wis.2d 526, ¶47.

The "coercion" *Wintlend* found reasonable is the threat of the loss of a person's driving privilege for refusing a blood test. *Wintlend*, 258 Wis.2d 875, ¶12. *Wintlend* is not alone in recognizing the validity of such a threat. For instance, in *Padley*, 354 Wis.2d 545, the court noted that a person who refuses will "suffer the penalty specified in the implied consent law." *Id.* ¶27. However, "The fact that the driver is forced to make a difficult choice does not render the consent involuntary." *Id. Birchfield* did not contradict *Wintlend* (or *Padley*). It held that a State may *not* threaten criminal penalties for a refusal to take a blood test, because doing so would "violate the Fourth Amendment's prohibition against unreasonable searches." *Birchfield*, 136 S.Ct. at 2166, 2186. But the Court expressly affirmed that a State *may* threaten and impose civil penalties for a refusal: "nothing we say here should be read to cast doubt on" implied consent laws that impose civil penalties, rather than criminal penalties, for a refusal to take a blood test. *Id.* at 2185. Under *Wintlend* and

Birchfield, the threat of civil penalties for refusal does not render a person's consent involuntary.

Birchfield is materially consistent with *Wintlend*. *Birchfield* did not overrule *Wintlend*, and there is no reason for this Court to overrule it. A court "should not overrule precedent without a compelling justification." *Howes*, 373 Wis.2d 468, ¶149 (Abrahamson, J., dissenting). Because *Wintlend* is good law, the court of appeals was required to follow it, and it could not properly find the unconscious driver provision unconstitutional.

B. The court of appeals erred in finding the unconscious driver provision facially unconstitutional.

After incorrectly determining that it did not have to follow *Wintlend* and could decide the constitutionality of the unconscious driver provision, the court of appeals found the statute facially unconstitutional. But Prado did not prove that the statute is unconstitutional facially or as applied to her.

1. To prevail on a challenge to a statute a defendant must prove the statute unconstitutional beyond a reasonable doubt.

Every legislative enactment is presumed constitutional, and if any doubt exists about a statute's constitutionality, this Court must resolve that doubt in favor of constitutionality. *State v. Ninham*, 2011 WI 33, ¶44, 333 Wis.2d 335, 797 N.W.2d 451. The presumption of constitutionality can be overcome only if the challenging party establishes that the statute is unconstitutional beyond a reasonable doubt. *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶37, 328 Wis.2d 469, 787 N.W.2d 22. This presumption of constitutionality and the defendant's steep burden apply to both as-applied challenges

and facial challenges to statutes. *State v. McGuire*, 2010 WI 91, ¶25, 328 Wis.2d 289, 786 N.W.2d 227.

A facial challenge to the constitutionality of a statute cannot succeed unless the law cannot be enforced under any circumstances. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis.2d 321, 780 N.W.2d 63. An as-applied challenge is determined on the facts of the case. *Id.* A court "assess[es] the merits of the challenge by considering the facts of the particular case" in front of it, "not hypothetical facts in other situations." *Id.* (quoting *State v. Hamdan*, 2003 WI 113, ¶43, 264 Wis.2d 433, 665 N.W.2d 785.) An as-applied challenge requires the challenger to "show that his or her constitutional rights were actually violated." *Id.*

2. Prado has not shown that the unconscious driver provision is unconstitutional facially or as applied to her.

The police officer in this case ordered that Prado's blood be drawn under the implied consent law, Wis. Stat. §343.305. The statute reads, in relevant part:

> Any person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol . . . when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Wis. Stat. §343.305(2).

The unconscious driver provision at issue here reads, in relevant part:

> A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated [an OWI-related statute] . . . one or more samples specified in par. (a) or (am) may be administered to the person.

Wis. Stat. §343.305(3)(b).

The blood draw from Prado was authorized by Wis. Stat. §343.305(3)(b). The circuit court found that there was probable cause that Prado operated a motor vehicle, involved in a crash. (R.33:2, P-App.166.) There is no dispute that the crash occurred on a public highway. The parties stipulated that Officer Parker had probable cause to read the Informing the Accused form to Prado and request a blood sample from her. (R.41:5, P-App.173.) And the court found that at the hospital Prado "was unconscious and incapable of giving or withdrawing conscious consent to a blood draw." (R.33:2). Therefore, a blood draw could be administered under section 343.305(3)(b).

To prevail on a facial challenge to section 343.305(3)(b), Prado must show that the statute cannot be enforced under any circumstance. *Wood*, 323 Wis.2d 321, ¶13. To prevail on an as-applied challenge, Prado must show that the application of the unconscious driver provision actually violated her constitutional rights. *Id.* To show that a blood draw under this statute violated her constitutional rights, Prado must show that the blood draw was an unlawful search.

The court of appeals concluded that Prado proved that the unconscious driver provision is facially unconstitutional. *Prado*, 393 Wis.2d 526, ¶64. The court said, "because the incapacitated driver provision purports to authorize

warrantless searches that do not fit within any exception to the warrant requirement, the searches it authorizes will always violate the Fourth Amendment, unless the searches are justified by a separate warrant exception." *Id.* The court noted that "a separate warrant exception may often apply in these cases." *Id.* (citing *Mitchell*, 139 S.Ct. 2525). The court said that "[i]f a court ultimately determines that such a search is constitutional in any given case, it will be on the basis of an exception such as exigent circumstances, not on the basis of anything set forth in the implied consent statute itself." *Id.*

The court concluded that even if a warrant exception other than consent, such as exigent circumstances, applies in a given case, "that does not save the constitutionality of the incapacitated driver provision." *Id.*

However, to the extent that the constitutionality of the unconscious driver provision needs saving, the fact that *Mitchell* established a rule under which a blood draw authorized by the unconscious driver provision is almost always constitutional *does* save it. It would make little sense that a statute can *never* be enforced when the blood draws it authorizes are *almost always* justified.

a. The unconstitutional driver provision is not facially unconstitutional because, under *Mitchell,* blood draws conducted pursuant to the statute are almost always permissible.

In *Mitchell*, the Supreme Court considered a blood draw administered under the unconscious driver provision in Wisconsin's implied consent law. *Mitchell*, 139 S.Ct. at 2531–32. The Court did not conclude that implied consent laws "create actual consent to all the searches they authorize." *Id.* at 2533. But the Court did not conclude that an implied consent law authorizing a blood draw from an unconscious

person is invalid or unconstitutional. Quite the opposite. The Court determined that a blood draw from an unconscious person is "almost always" justified by exigent circumstances. *Id.* at 2531, 2539.

In response to an assertion in one of the dissenting opinions that the State waived the exigent circumstances argument that the Court adopted, the plurality opinion explained what issues this Court addressed in *State v. Mitchell*, 2018 WI 84, 383 Wis.2d 192, 914 N.W.2d 151, and "the ground for [the United States Supreme Court's] decision." *Mitchell*, 139 S.Ct. at 2534 n.2. The Court said that one issue before this Court in *State v. Mitchell* was "whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. §343.305(3)(b) violates the Fourth Amendment." *Id.* at 2534 n.2. The Court did not hold that a blood draw under section 343.305(3)(b) is justified by a person's consent. *Id.* at 2533. But the Court *did* answer the question "whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. §343.305(3)(b) violates the Fourth Amendment." The Court said that "[t]his broad question easily encompasses the rationale that we adopt today." *Id.* The Court's answer was that blood draws from suspected drunk drivers who are unconscious are "almost always" justified. *Id.* at 2531, 2539. And that rule explicitly applies to a blood draw from an unconscious person pursuant to Wis. Stat. §343.305(3)(b).

The Court explained: "We adopt a rule for an entire category of cases—those in which a motorist believed to have driven under the influence of alcohol is unconscious and thus cannot be given a breath test." *Id.* Mitchell's case obviously fell into the category of cases the Court identified. He was believed to have driven drunk, and he was unconscious and thus unable to be given a breath test. *Id.* at 2532. It made no difference that the blood draw was ordered under the

unconscious driver provision in Wisconsin's implied consent law. The Court did not strike down the unconscious driver provision. Instead, it established a rule under which a blood draw under that provision is "almost always" permissible. And the Court remanded the case to this Court, not to determine whether the blood draw from Mitchell under section 343.305(3)(b) fell under the new rule, but to give Mitchell an opportunity to show that his was the "unusual" case to which the general rule did not apply. *Id.* at 2539.

In finding section 343.305(3)(b) unconstitutional, the court of appeals said that "because the incapacitated driver provision purports to authorize warrantless searches that do not fit within any exception to the warrant requirement, the searches it authorizes will always violate the Fourth Amendment, unless the searches are justified by a separate warrant exception." *Prado*, 393 Wis.2d 526, ¶64. The court of appeals' statement is directly contrary to what the Supreme Court said in *Mitchell*. The Court did *not* say that a blood draw from an unconscious person authorized by section 343.305(3)(b) "will always violate the Fourth Amendment." It said that such blood draws are "almost always" permissible. *Mitchell*, 139 S.Ct. at 2539.

The court of appeals said that "[i]f a court ultimately determines that such a search [from an unconscious person] is constitutional in any given case, it will be on the basis of an exception such as exigent circumstances, not on the basis of anything set forth in the implied consent statute itself." *Prado*, 393 Wis.2d 526, ¶64. But even assuming that is true, it does not make the statute unconstitutional. *Id.* Searches under section 343.305(3)(b) are almost always permissible. It would make little sense for a statute authorizing searches to be unconstitutional on its face when the searches it authorizes are almost always constitutional.

As the Supreme Court of Illinois has recognized, "There was no suggestion in *Mitchell* that the Supreme Court believed that the Wisconsin statute allowing for warrantless searches of unconscious drivers was facially unconstitutional, and such a conclusion would have sounded absurd given everything else the Court said in the opinion." *People v. Eubanks*, 2019 IL 123525, 2019 WL 6596704, ¶59 (P-App.220–45.)

The Illinois court is right. It would have been absurd for the Supreme Court to strike down Wisconsin's unconscious driver provision, which authorized a warrantless blood draw from Mitchell when police had probable cause that he drove drunk and he was unconscious, but conclude that the blood draw itself was constitutional because Mitchell was "believed to have driven under the influence of alcohol," and he was "unconscious and thus [could not] be given a breath test." *Mitchell*, 139 S.Ct. at 2534 n.2.

The State is not suggesting that every blood draw conducted under the unconscious driver provision will be constitutional. A particular blood draw authorized by the statute may be unconstitutional because it is one of the "unusual" cases to which the *Mitchell* rule does not apply. But that determination would be appropriate in an as-applied challenge in the "unusual" case. A statute is facially unconstitutional when it can *never* be enforced. *Wood*, 323 Wis.2d 321, ¶13. The unconscious driver provision, which can *almost always* be enforced, is not facially unconstitutional.

b. The unconscious driver provision is not unconstitutional as applied to Prado.

The court of appeals considered Prado's challenge to section 343.305(3)(b) a facial challenge. *Prado*, 393 Wis.2d 526, ¶30 n.9. As explained above, the statute is not facially unconstitutional. The statute is also not unconstitutional as applied to Prado.

Section 343.305(3)(b) would be unconstitutional as applied to Prado only if application of the unconscious driver provision actually violated her constitutional rights. *Wood*, 323 Wis.2d 321, ¶13. To prove such a violation, Prado must show that the search authorized by the statute (her blood draw) was unlawful. But Prado's constitutional right to be free from an unreasonable search was not violated, because the blood draw was justified under *Mitchell*'s general rule for blood draws from suspected drunk drivers who are unconscious. *Mitchell*, 139 S.Ct. at 2531, 2539.

There was probable cause that Prado drove drunk. (R.33:2; 41:5, P-App.166; 173.) Prado was seriously injured and was transported to the hospital by EMS. (R.1:1–5; 33:2, P-App.144–48; 166.) She was unconscious when officers encountered her in the hospital and when her blood was drawn. (R.1:5; 33:2; 41:7–8, P-App.148; 166; 175–76.) There obviously was no opportunity to take Prado to the police station for an evidentiary breath test.

Under *Mitchell*, Prado's warrantless blood draw was justified by the exigent circumstances exception to the warrant requirement unless she could show that hers was the "unusual" case in which her blood would not have been drawn had the police not been seeking information about her alcohol concentration, and a reasonable officer could not have judged that there was no time to get a warrant. Prado has not even

alleged that she can make that showing. She has not shown that application of the unconscious driver provision actually violated her constitutional rights. *Wood*, 323 Wis.2d 321, ¶13.

As explained above, if a blood-draw performed pursuant to a statute is not unconstitutional in a given case, then the statute authorizing the blood draw is not unconstitutional in that particular case. Prado therefore cannot prove that the statute is unconstitutional as applied to her.

III. Prado's blood draw was a lawful search; but even if the search had been unlawful the blood test results should not have been excluded because the officer relied in good faith on a statute that had not been found unconstitutional.

This Court need not address good faith at length because blood draw from Prado was justified by the new general rule for blood draws from suspected drunk drivers who are unconscious established in *Mitchell*, 139 S.Ct. at 2531, 2539. However, this Court should address the issue to correct the erroneous rationale set forth in the published court of appeals' opinion.

The court of appeals reversed the circuit court's order granting Prado's motion to suppress her blood test results because it concluded that the officer who ordered the blood draw did so in good faith reliance on the unconscious driver provision in Wisconsin's implied consent law, Wis. Stat. §343.305(3)(b). *Prado*, 393 Wis.2d 526, ¶73.[6] The court said the officer could rely on the statute because *Birchfield*, 136 S.Ct. 2160, had not yet overruled *Wintlend*, 258 Wis.2d 875.

[6] There was no reason for the court to resort to the good faith exception because Prado's blood sample was obtained in a constitutional search. The good faith exception "becomes germane" only when a warrant exception does not apply. *State v. Richards*, 2020 WI App 48, ¶49 n.8, 393 Wis. 2d 772, 948 N.W.2d 359.

Prado, 393 Wis.2d 526, ¶71. This holding therefore implies that officers could *not* rely on the statute in good-faith *post Birchfield*.

While the court of appeals' ultimate conclusion that the officer relied on the statute in good faith was correct, this Court should affirm that a police officer can rely in good faith on a statute that has not been found unconstitutional.

A. The good faith exception to the exclusionary rule applies when an officer acts in good faith reliance on a statute that has not been found unconstitutional.

"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). However, "The 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." *State v. Dearborn*, 2010 WI 84, ¶35, 327 Wis.2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995)). The exclusionary rule does not apply to all constitutional violations. *Id.* Instead, "exclusion is the last resort." *Id.*

The good faith exception provides that the exclusionary rule should not apply when officers act in good faith. *Id.* ¶36 (citing *Herring*, 555 U.S. at 142; *United States v. Leon*, 468 U.S. 897 (1984)). "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." *Dearborn*, 327 Wis.2d 252, ¶36 (quoting *Herring*, 555 U.S. at 144). "[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).

In *Krull*, the United States Supreme Court held that the good faith exception applies when an officer acts in good faith reliance on a statute that is later determined to be unconstitutional. The Court reasoned that "[t]he application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Krull*, 480 U.S. at 349. "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.

B. There is no need to resort to the good faith exception in this case because the blood sample was not obtained in an unconstitutional search.

The court of appeals acknowledged that consideration of the good faith exception is appropriate when evidence is "obtained through an unconstitutional search." *Prado*, 393 Wis.2d 626, ¶67. The good faith exception "becomes germane" only when a warrant exception does not apply. *Richards*, 393 Wis.2d 772, ¶49 n.8.

But in this case the court of appeals resorted to the good faith exception without first determining that Prado's blood sample was obtained in an unconstitutional search. The court concluded that the blood draw was not justified by Prado's consent. *Prado*, Wis.2d 626, ¶64. But it did not consider whether the blood draw was justified by another exception to

the warrant requirement, such as exigent circumstances. *Id.* ¶66. As the State has explained, the blood draw *was* justified by exigent circumstances. Since the blood sample was not "obtained in violation of the Fourth Amendment," the exclusionary rule did not "preclude[ ] its use in a criminal proceeding against the victim of the illegal search and seizure." *Krull*, 480 U.S. at 347. And because the blood test results were not properly subject to exclusion, there is no need to determine whether the good faith exception to the exclusionary rule should apply.

C. Contrary to the court of appeals' opinion, an officer can rely in good faith on a statute that no appellate court has found unconstitutional.

The court of appeals concluded that the blood test results should not have been suppressed because the officer acted in good faith reliance on the unconscious driver provision in Wisconsin's implied consent law. *Prado*, 393 Wis.2d 526, ¶¶67, 71. But the court did not conclude that an officer could rely on the statute until it was found unconstitutional. The court said that "[a]t 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." *Id.* ¶71. It then said that when the officer ordered that Prado's blood be drawn, "*Wintlend* was the law in Wisconsin and had not yet been overruled by *Birchfield*." *Id.*

The court of appeals' decision suggests that an officer cannot rely on a statute whose constitutionality has been challenged in a published appellate decision, but not overruled. *Id.* ¶71. However, an officer can rely on a statute until it is found unconstitutional, not just until it is challenged in court. *Krull*, 480 U.S. at 349–50.

The court of appeals' decision also suggests that an officer relying on the statute was really relying on *Wintlend* because "*Wintlend* was the law in Wisconsin." *Prado*, 393 Wis.2d 526, ¶71. But the officer who ordered a blood draw under the unconscious driver provision was relying on that provision, not on a 2002 court of appeals' decision that did not even mention the unconscious driver provision.

Finally, the court of appeals' decision suggests that once *Birchfield* was issued, a police officer should have recognized that Wisconsin's unconscious driver provision was unconstitutional. But *Birchfield* said nothing about Wisconsin's implied consent law or about any State's unconscious driver provision. And no appellate court in Wisconsin read *Birchfield* as having such sweeping effect until the court of appeals did so in this case. It makes no sense to expect a police officer to understand the supposed significance of a court decision when neither this Court nor the court of appeals had that understanding.

This Court should clarify that the court of appeals' view of the good faith exception is incorrect. It should affirm that a police officer can rely in good faith on an existing statute until the statute is found unconstitutional by an appellate court in a published opinion. *Krull*, 480 U.S. at 349–50. No appellate court had found the unconscious driver provision unconstitutional until the court of appeals did so (erroneously) in this case. *Prado*, 393 Wis.2d 526, ¶¶3, 63–64, 74. Even if the court of appeals had correctly found the statute unconstitutional, an officer would have been justified in relying on the statute until the *Prado* decision was issued.

CONCLUSION

This Court should affirm the court of appeals' decision reversing the circuit court's order that granted Prado's motion to suppress evidence. It should hold that: (1) the blood draw from Prado was justified by exigent circumstances under the general rule the Supreme Court established in *Mitchell v. Wisconsin*; (2) *State v. Wintlend* was not overruled by *Birchfield v. North Dakota*, and it remains good law; (3) the unconscious driver provision in Wisconsin's implied consent law, Wis. Stat. §343.305(3)(b), is not unconstitutional facially or as applied to Prado; and (4) a law enforcement officer can rely in good faith on a statute until it is found unconstitutional in a published appellate court decision.

Dated this 12th day of January 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,997 words.

Dated this 12th day of January 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 12th day of January 2021.

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