STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP1144-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAWN J. LEVANDUSKI,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY VAN AKKEREN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

The defendant-respondent Dawn J. Levanduski was arrested for operating a motor vehicle while under the influence of an intoxicant (OWI), and an officer requested a blood sample from her under the implied consent law. The officer read her the Informing the Accused form which told her that if she refused, her operating privilege would be revoked, and her refusal could be used against her in court. Levanduski agreed to give a blood sample.

1. By telling a person that a refusal to submit to a request for a blood draw can be used against the person in court, does the Informing the Accused form render the person's consent to a blood draw involuntary?

The circuit court answered "yes" and granted Levanduski's motion to suppress the results of a test of her blood. The court reasoned that under *Missouri v. McNeely*, 569 U.S. 141 (2013) and *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, a person has a constitutional right to refuse a blood draw. And because a person's invocation of a constitutional right may not be used against her, Levanduski's consent to a blood draw after being told her refusal could be used against her was involuntary.

This Court should answer "no" and reverse. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) and *Dalton* make clear that a State may threaten that a person's operating privilege will be revoked and that a refusal could be used against the person in court, and it may impose those civil penalties and evidentiary consequences for refusing a blood draw. Levanduski was properly warned that a refusal could be used against her in court, and her consent to a blood draw was voluntary.

2. Is there a constitutional right to refuse a blood draw when a person is threatened with only civil penalties and evidentiary consequences, but not criminal penalties, for a refusal?

The circuit court answered "yes," concluding that under *McNeely* and *Dalton*, there is a constitutional right to refuse a blood draw.

This Court should answer "no." In *South Dakota v. Neville*, 459 U.S. 553 (1983), the Supreme Court made clear that there is no constitutional right to refuse a lawful request for a blood sample under an implied consent law. In *Birchfield*, the Court may have limited *Neville* by recognizing a right to refuse when a person is threatened with criminal penalties for refusing—because that is a threat of an unlawful search. But the Supreme Court reaffirmed that a State can threaten a person with revocation of his or her operating privilege and with use of a refusal against the person in court, and it may impose those civil penalties and evidentiary consequences for a refusal. When those are the penalties and consequences, there is no constitutional right to refuse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin, does not request oral argument. The State believes that publication of this Court's opinion is warranted, because the issues in this case have been raised in suppression motions throughout Wisconsin, and circuit courts need guidance in how to decide them.

INTRODUCTION

Levanduski submitted to an officer's request for a blood draw under Wisconsin's implied consent law after the officer read her the Informing the Accused form, telling her that if

she refused, her operating privilege would be revoked, and her refusal can be used against her in court.

The circuit court suppressed the results of a test of Levanduski's blood. Relying primarily on *McNeely*, 569 U.S. 141 and *Dalton*, 383 Wis. 2d 147, the court concluded that Levanduski had a constitutional right to refuse a blood draw, so her consent after she was told her refusal could be used against her in court was involuntary.

But the opposite is true. As the Court explained in *Birchfield*, the State may not impose criminal penalties for refusing a blood draw. A person who is threatened with criminal penalties for refusing is threatened with an unlawful search. There may be a constitutional right to refuse a blood draw under those circumstances.

But *Birchfield* confirmed that a State may threaten that the person's operating privilege will be revoked and that a refusal used against the person in court, and it may impose those civil penalties and evidentiary consequences for a refusal. And *Dalton* cited *Birchfield* for that proposition.

There is no general constitutional right to refuse a blood draw. A State may threaten that if a person refuses a test, it will revoke the person's operating privilege and use the refusal against the person in court. A person who is threatened with only those penalties and consequences for refusing is not threatened with an unlawful search. A person has no constitutional right to refuse a blood draw under those circumstances.

Levanduski was correctly informed that her refusal could be used against her in court, and she agreed to a blood draw. Her consent was not coerced or involuntary, and this Court should reverse the circuit court's order granting her motion to suppress evidence of her blood test.

STATEMENT OF THE CASE AND FACTS

Although not explicitly stated in the record, there are no factual disputes. The probable cause portion of the Amended Criminal Complaint stated

> Complainant alleges that on May 24, 2018 at approximately 5:53 p.m., Officer Caswell, Sergeant Ramthun and Officer Depies were dispatched to the Kwik Trip located at 750 East Green Bay Avenue in the Village of Saukville, Ozaukee County, Wisconsin. They were sent there for the report of an intoxicated female attempting to get gas. A description of the female and her vehicle were given. The female suspect was said to be in the store buying a hamburger and she urinated herself.
>
> When Officer Depies arrived he found the described female in the driver's seat of the described vehicle with the engine running and eating a hamburger. That female was the defendant Dawn Levanduski. She had a strong odor of intoxicants emanating from her breath, slurred speech and glassy eyes. Officer Depies asked her if she had anything to drink and the defendant ultimately said three pint size beers. She admitted to driving to Kwik Trip. Officer Caswell also obtained video surveillance recordings of the defendant arriving at Kwik Trip driving her vehicle.
>
> The defendant was asked to step out of her vehicle and walk to the rear of her vehicle. She had a lack of balance and swayed while standing. She also had a wet area in the crotch of her shorts. She performed field sobriety tests. In a horizontal gaze nystagmus test, Officer Depies observed the lack of smooth pursuit in both eyes, jerkiness at maximum deviation in both eyes and the onset of jerkiness prior to 45 degrees in both eyes. In a walk and turn test, Officer Depies observed that the defendant could not keep balance while listening to instructions, did not touch heel to toe and stepped off the line. In a one leg stand test, Officer Depies observed the defendant put her foot down three times as she lost her balance.
>
> The defendant was arrested for Operating while Intoxicated and taken to Aurora Medical Center in

> Grafton for a blood draw. She consented to the draw and a sample of her blood was taken. It was packaged for delivery to the state lab of hygiene. The Wisconsin State Lab of Hygiene analyzed the Defendant's blood and the lab report stated that the Defendant had a blood alcohol content of 0.269.

(R. 9:1-3, A-App. 101-103.)

The defendant's motion contained the facts related to the reading of the Informing the Accused form:

> At the time of the request for the evidentiary blood draw pursuant to the OWI arrest for OWI Second Offense by Officer Brandin Depies of the Saukville PD on May 24, 2018 at 6:25 p.m., Officer Depies read the defendant the Informing the Accused and asked the defendant whether she would submit to a blood draw. In the informing the accused, the officer read to the defendant that: "If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court." The defendant responded that she will consent to the blood draw after being apprised of this information by the police officer.

(R. 10:2, A-App. 105.)

The State charged Levanduski with OWI as a second offense. (R. 9:1, A-App. 101-103.) She moved to suppress the blood test results on the ground that her consent to the blood draw was involuntary. (R. 10:1-5, A-App. 104-108.) She argued that when Officer Depies read her the Informing the Accused form, he threatened that if she refused to provide a blood sample, her refusal could be used against her in court in violation of her constitutional right to refuse a blood draw. (R. 10:1-5, A-App. 104-108.)

The circuit court, Reserve Judge Timothy M. Van Akkeren presiding, granted Levanduski's motion after briefing. (R. 13:1-2, A-App. 119-120.) The court concluded that Levanduski's consent to provide a blood sample was involuntary because the officer incorrectly told her that a

refusal could be used against her in court. (R. 21:7-9, A-App. 115-117.) The court suppressed all evidence derived from the blood draw. (R. 13:1-2, A-App. 119-120.)

The State now appeals.

STANDARD OF REVIEW

This Court reviews an order granting a motion to suppress under a two-step analysis. *State v. Robinson*, 2009 WI App 97, ¶ 9, 320 Wis. 2d 689, 770 N.W.2d 721. This Court will uphold the circuit court's findings of historical fact unless those findings are clearly erroneous. *Id.* Under the clearly erroneous standard, appellate courts will uphold a circuit court's finding of fact unless the finding goes "against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (quoting *State v. Sykes*, 2005 WI 48, ¶ 21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277)). The application of constitutional principles to the facts found presents a question of law that this Court reviews de novo. *Robinson*, 320 Wis. 2d 689, ¶ 9.

A court applies the same two-step standard of review when determining whether consent to search was voluntary, *State v. Artic*, 2010 WI 83, ¶ 23, 327 Wis. 2d 392, 786 N.W.2d 430. It reviews the circuit court's findings of historical fact to determine if they are clearly erroneous, and independently applies those facts to constitutional principles. *Id.*

ARGUMENT

I. Because the Informing the Accused form did not invalidate Levanduski's consent, the circuit court erred in granting her motion to suppress her blood test results.

A. Under binding precedent of the United States Supreme Court and the Wisconsin Supreme Court, the State may use a person's refusal to submit to a lawful request for a blood sample against the person in court.

Under long-settled law, when a person refuses to submit to an officer's lawful request for a blood sample under an implied consent law like Wisconsin's—which does not criminalize refusal—the State may use the refusal against the person in court to prove the person guilty of an OWI-related offense.

In *South Dakota v. Neville*, the United States Supreme Court held that a State may use a person's refusal in court, explaining that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (footnote omitted). The Court said that a refusal can be used against a person in court because "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *Id.* at 560 n.10.

In *State v. Bolstad*, the Wisconsin Supreme Court reached the same conclusion, explaining that "[t]he state may submit the relevant and, hence, admissible evidence that Bolstad refused the test for blood alcohol content. That refusal evidence is relevant, because it makes more probable the crucial fact of intoxication." *State v. Bolstad*, 124 Wis. 2d 576, 585, 370 N.W.2d 257 (1985).

In *State v. Zielke*, the Wisconsin Supreme Court said that "the fact of the defendant's refusal to submit to a test may be introduced at trial on the substantive drunk driving offense as a means of showing consciousness of guilt," so long as the person has been advised of the information on the Informing the Accused form. *State v. Zielke*, 137 Wis. 2d 39, 49–51, 403 N.W.2d 427 (1987).

More recent United States Supreme Court and Wisconsin cases have confirmed *Neville*'s holding that a person's refusal may be used against the person in court.

In *Missouri v. McNeely*, 569 U.S. 141 (2013), the Supreme Court noted that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws," including "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013). The Court said that "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* at 161. For that proposition, the Court relied on *Neville* as "holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination." *Id.* (citing *Neville*, 459 U.S. at 563–64).

In *Birchfield v. North Dakota*, the Supreme Court again affirmed that a person's refusal can be used against him in court, 136 S. Ct. 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." *Id.* It cited *McNeely*, where the Court had noted that implied consent law

typically impose immediate suspension or revocation of a driver's license for refusal (civil penalties) and allow the refusal to be used against the person in a subsequent criminal prosecution (evidentiary consequences). *Birchfield*, 136 S. Ct. at 2185 (citing *McNeely*, 569 U.S. at 161). The opinion also cited *Neville*, where the Court spoke of implied consent laws allowing revocation of a person's license to drive for refusal (civil penalties) and the use of the refusal to be used against the defendant at trial (evidentiary consequences). *Id.* (citing *Neville*, 459 U.S at 560). The Court in *Birchfield* said that "nothing we say here should be read to cast doubt on" implied consent laws that impose only civil penalties and evidentiary consequences for refusal. *Id.* at 2185.

In *State v. Dalton*, 383 Wis. 2d 147, the Wisconsin Supreme Court recognized that a State may threaten a person with revocation and use of a refusal at trial, and it may impose those civil penalties and evidentiary consequences if the person refuses. The court quoted *Birchfield* for that proposition: "the *Birchfield* court acknowledged that 'prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.'" *Id.* ¶ 58 (quoting *Birchfield*, 136 S. Ct. at 2185.)

And in *Mitchell v. Wisconsin*, the United States Supreme Court made clear that what it said in *Neville* remains the law: a person's refusal can be used against him or her in court. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (plurality opinion). The Court noted that under Wisconsin's implied consent law, "If a driver's BAC level proves too high, his license will be suspended; but if he refuses testing, his license will be *revoked* and his refusal may be used against him in court." *Id.* at 2531 (citing Wis. Stat. § 343.305(4)). The Court said that it had considered OWI laws like Wisconsin's "[o]ver the last 50 years," and it had "approved many of the defining elements of this scheme." *Id.* at 2533. The Court explained that it had held

that "forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination." *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 765 (1966)). And it similarly had held that a person's constitutional right against self-incrimination is not violated by "using their refusal against them in court." *Id.* (citing *Neville*, 459 U.S. at 563). The Court in *Mitchell* then reiterated what it said in *Birchfield*: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at 2532 (quoting *Birchfield*, 136 S. Ct. at 2185). Like in *Birchfield*, the Court in *Mitchell* at least strongly suggested that what it said in those "prior opinions" remains the law. It said nothing that can reasonably be read as saying that it was overruling those prior opinions.

Every one of these Supreme Court opinions, from *Neville* to *Mitchell*, and these Wisconsin Supreme Court opinions, from *Bolstad* to *Dalton*, say the same thing—a State may use a person's refusal to submit to a lawful request for a blood sample against the person at trial. None of these cases has been overruled or even limited with respect to the use of a refusal at trial. There is no United States Supreme Court or Wisconsin Supreme Court case to the contrary. Under these cases, all of which are binding on the circuit court and this Court, a State is permitted to threaten and to impose evidentiary consequences (use of refusal at trial) for a refusal to submit to a request for a blood draw.

B. Levanduski was not coerced into agreeing to a blood draw—she was properly informed that if she refused, her refusal could be used against her in court.

The circuit court determined that Levanduski's consent to the blood draw was involuntary because, according to the court, the officer incorrectly warned Levanduski that a

refusal could be used against her in court. (R. 131-2, A-App. 119-120.) The court was wrong. As the previous section of this brief shows, it would have been entirely lawful for the State to introduce evidence of a refusal at trial had Levanduski declined to submit to a blood draw.

After Officer Depies arrested Levanduski for OWI, he read the Informing the Accused form to her and requested a blood sample. (R. 10:2, A-App. 105.) The form reads, as relevant here:

> If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

Wis. Stat. § 343.305(4). The most significant part of this advisement explicitly tells a person that "[t]he test results or the fact that you refused testing can be used against you in court." Wis. Stat. § 343.305(4).

That information is a correct statement of the law, and it is not coercive. Levanduski was not threatened with a criminal penalty for refusal, so she was not threatened with an unlawful search. *Cf. Birchfield*, 136 S. Ct. at 2186 (finding a request for a blood sample coercive because a refusal was a crime). She was threatened only with civil penalties (revocation of operating privilege) and evidentiary consequences (use of a refusal in court). That was permissible under the Fourth Amendment. *Id.* at 2185 (citing *McNeely*, 569 U.S. at 161; *Neville*, 459 U.S at 560); *Dalton*, 383 Wis. 2d 147, ¶ 58 (citing *Birchfield*, 136 S. Ct. at 2185).

After being properly informed of the law and her choices, Levanduski chose to submit to the officer's request for a blood draw. Her consent to the blood draw was not coerced; it was voluntary. Accordingly, the circuit court erred in granting her motion to suppress evidence of her refusal.

II. The circuit court erred in concluding that a person has a constitutional right to refuse a blood draw, and therefore a refusal may not be used against a person in court.

In its decision granting Levanduski's motion to suppress her blood test results, the circuit court concluded that a driver has a constitutional right to refuse a warrantless blood test and a right not to have the refusal used against him or her. (R. 21:7-9, A-App. 115–117.)

The court relied on *McNeely* and *Dalton* as recognizing a constitutional right to refuse a blood draw. (R. 21:7-9, A-App. 115–117.)

Simply stated, the circuit court reasoned that a person has a constitutional right to refuse a blood draw, so the State may not use the fact of refusal at trial. But the converse is true: the State may use the fact of refusal at trial, so there is no constitutional right to refuse a lawful request for a blood draw under Wisconsin's implied consent law. And, regardless of whether there is a constitutional right to refuse, the Wisconsin Supreme Court in *Dalton* recognized that a refusal is admissible evidence at trial.

A. *Neville* recognized that a person has no constitutional right to refuse a lawful request for a blood draw under an implied consent law, and that a person's refusal can be used against the person in court.

In *Neville*, the Supreme Court said that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer," *Neville*, 459 U.S. at 564, and it concluded that a refusal can be used against a person in court because "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *Id.* at 560 n.10. Instead, the "right to refuse the

blood-alcohol test" is "simply a matter of grace bestowed by" the legislature. *Id.* at 565.

The issue in *Neville* was whether the use of a refusal at trial violated the person's Fifth Amendment right against self-incrimination. *Neville*, 459 U.S. 554. But the Court's holding that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer," also applies to the Fourth Amendment. *Id.* at 564.

The Court addressed the use of a refusal at trial under the Fifth Amendment, and the reasonableness of a blood draw under both the Fourth and Fifth Amendments, in *Schmerber v. California*, 384 U.S. 757 (1966). The Court concluded in *Schmerber* that a warrantless blood draw did not violate the defendant's right to due process. *Id.* at 759–60. It then concluded that "the withdrawal of blood and use of the analysis" did not violate the defendant's right not to incriminate himself. *Id.* at 761.

After noting that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State," the Court declared that "[t]he values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect." *Id.* at 767. The Court said that "if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." *Id.* It noted that "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.* at 768.

The Court considered "whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of

reasonableness." *Id.* The Court concluded that because exigent circumstances existed, the blood draw incident to arrest was justified, *id.* at 771, and that there was "no violation of the petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures" *id.* at 772.

In total, the Court concluded in *Schmerber* that a blood draw after a refusal and without a warrant could be administered incident to arrest for OWI if exigent circumstances exist, and that use of the refusal at trial for the OWI was permissible.

In *Neville*, when the Court said that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test," and that the right to refuse is not on constitutional dimension, but "by contrast, is simply a matter of grace bestowed by the South Dakota legislature," (459 U.S. at 560 n.10, 565) the Court certainly understood that a blood draw is a search under the Fourth Amendment. It explained that in *Schmerber*, it "upheld a state-compelled blood test against a claim that it infringed the Fifth Amendment right against self-incrimination," and that the *Schmerber* Court had "also rejected arguments that the coerced blood test violated the right to due process, the right to counsel, and the prohibition against unreasonable searches and seizures." *Neville*, 459 U. S. at 559 & n.8.

In *Neville*, when the Court said that a defendant has no constitutional right to refuse a blood test, it did so with language that strongly suggests that it meant exactly what it said—"no constitutional right to refuse." The Court distinguished *Griffin v. California*, 380 U.S. 609 (1965), where it "held that a prosecutor's or trial court's comments on a defendant's refusal to take the witness stand impermissibly burdened the defendant's *Fifth Amendment right to refuse*." *Neville*, 459 U.S. at 560 n.10 (emphasis added). The Court said that the situation in *Neville* was different because "a

person suspected of drunk driving has *no constitutional right to refuse* to take a blood-alcohol test." *Id.* (emphasis added). Not, "no Fifth Amendment right to refuse." The Court said, "*no constitutional right to refuse*." That *Neville*'s holding was not limited to the Fifth Amendment makes sense because, again, "[t]he values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect." *Schmerber*, 384 U.S. at 767.

Neville explicitly stated that a person has no constitutional right to refuse a blood test, and it concluded that the State may use a person's refusal against the person at trial. The circuit court in the current case issued an opinion that suppressed evidence of Levanduski's consent because it concluded that she had a constitutional right to refuse a blood test, and that the State may not use her refusal against her at trial. The court's ruling was directly contrary to *Neville*.

The circuit court's decision is wrong, and it should be reversed. *See Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (noting that state courts may not interpret the U.S. Constitution more restrictively than the U.S. Supreme Court has done); *State v. Jennings*, 2002 WI 44, ¶ 18, 252 Wis. 2d 228, 647 N.W.2d 142 ("All state courts, of course, are bound by the decisions of the United States Supreme Court on matters of federal law.").

B. *McNeely* did not recognize a constitutional right to refuse a blood draw requested under an implied consent law or provide that the State may not use a person's refusal against the person at trial.

The circuit court mentioned "M*cNeely* and it's progeny" but the circuit court did not point to anything in *McNeely* recognizing such a right to refuse a request for a blood sample. (R. 21, A-App. 115-117.) The circuit court did not point to anything in *McNeely* recognizing such a right, because

nothing in *McNeely* supports that assertion. Whether a defendant has a constitutional right to refuse a request for a blood draw under an implied consent law was not in any way at issue in that case.

In *McNeely*, the defendant refused a request for a blood draw, but hospital staff drew the defendant's blood anyway, without a warrant, at the direction of a police officer. *McNeely*, 569 U.S. at 145–46. The defendant moved to suppress the blood test results on the ground that the warrantless nonconsensual blood draw violated his rights under the Fourth Amendment. *Id.* at 146. The Court granted review to determine whether the blood draw was justified under the exigent circumstances exception to the warrant requirement. *Id.* at 147.

Implied consent laws and refusals to submit to requests for blood samples were not at issue in *McNeely*. The Court addressed them only once—when it explained that even though warrantless blood draws are not always justified by exigent circumstances, "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 160–61. The Court explained that implied consent laws "impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* at 161. The Court cited *Neville* as "holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination." *Id.* (citing *Neville*, 459 U.S. at 554, 563–564.)

The Court's holding in *McNeely* did not require it to cite *Neville.* The Court did so in order to explain that although a State may not always be able to obtain a warrantless, nonconsensual blood draw from a person

arrested for OWI, a State may still obtain a sample under its implied consent law. And as the Court explained in *Neville*, under an implied consent law like Wisconsin's, a State can threaten to revoke a person's operating privilege and use a refusal against the person in court, and it can impose those civil penalties and evidentiary consequences for refusing a blood draw.

The circuit court's decision that a person has a constitutional right to refuse a warrantless blood test and a right to not have the refusal used against him/her is wholly unsupported and simply wrong. *McNeely* says nothing to support the circuit court's decision. What *McNeely* says about implied consent laws supports the conclusion that a State may use evidence of a refusal as evidence at trial. The circuit court was wrong to dismiss *McNeely*'s language to that effect as dicta, and it was wrong to infer the exact opposite holding from *McNeely*.

C. *Birchfield* did not recognize a constitutional right to refuse a blood draw under an implied consent law when a person is not threatened with a criminal penalty for refusing, nor did it hold that the State may not use a person's refusal against the person at trial.

Birchfield affirmed that a person's refusal can be used against the person in court. In *Birchfield*, the Supreme Court did much more than cite "dicta" from *McNeely*. 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," and that "nothing we say here should be read to cast doubt on them." *Id.* at 2185 (citing *McNeely*, 569 U.S. at 161; *Neville*, 459 U.S at 560).

The very next thing the Court said was, "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 then declared that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

What the Court meant is clear: as it said in *Neville* and *McNeely*, laws may permissibly threaten revocation of the person's operating privilege and use of a refusal against the person in court, and they may also impose those civil penalties and evidentiary consequences on a refusal. But laws that impose criminal penalties on a refusal are not. In other words, there is a constitutionally significant difference between imposing "evidentiary consequences" and "criminal" penalties for a refusal. *Id.* at 2185–86.

Wisconsin's implied consent law is not like the North Dakota and Minnesota laws at issue in *Birchfield*. North Dakota's law imposed a criminal penalty for refusing a blood test. *Birchfield*, 136 S. Ct. at 2170. Minnesota's law imposed a criminal penalty for refusing a breath test. *Id.* at 2171. Wisconsin's law does not impose a criminal penalty for refusing a blood test or a breath test. It provides only civil penalties and evidentiary consequences for refusing a lawful request for a blood draw or a breath test. Wis. Stat. § 343.305(4), (10)

Birchfield concerned three petitioners who were informed that their refusals could result in criminal penalties. Petitioner Birchfield was told that he could be criminally prosecuted if he refused a blood test. *Id.* at 2170. He refused and was criminally prosecuted. *Id.* at 2186. The Court concluded that Birchfield "was threatened with an unlawful search," so it reversed his conviction. *Id.*

Petitioner Bernard was told that he could be criminally prosecuted if he refused a breath test. *Id.* at 2171. He refused and was criminally prosecuted. *Id.* at 2186. The Court

concluded that a breath test is permissible incident to arrest, so Bernard could permissibly be prosecuted for refusing. *Id.*

Petitioner Beylund was told that he could be criminally prosecuted if he refused a blood test or a breath test. *Id.* at 2172. He agreed to have his blood drawn. *Id.* at 2172, 2186. 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 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.

The Court in *Birchfield* did not recognize a general right to refuse a warrantless blood draw under an implied consent law. It declared that a State may not threaten a criminal penalty for refusing a blood test. *Birchfield*, 136 S. Ct. at 2185–86. But it also made clear that a State may threaten to revoke a person's operating privilege and use a refusal against the person in court, and it may impose those civil penalties and evidentiary consequences for refusing a blood test. *Id.* at 2185.

If the Court in *Birchfield* recognized a right to refuse a blood draw requested under an implied consent law, it did so only in the context of a right to refuse a blood test under the threat of a criminal penalty for refusing. A person who is threatened with a criminal penalty for refusal is "threatened with an unlawful search." *Id.* at 2186.

Under the Fourth Amendment, a person has a constitutional right to be free from an unreasonable search. A blood draw is a search. *Birchfield*, 136 S. Ct. at 2173; *Schmerber*, 384 U.S. at 767–68. In *Birchfield*, the Supreme Court determined that a warrantless blood draw under an

implied consent law is an unlawful search if the person is threatened with a criminal penalty if he were to refuse. *Birchfield*, 136 S. Ct. at 2186. A person therefore may have a constitutional right to refuse if threatened with a criminal penalty.

The Court in *Birchfield*, however, did not recognize a right to refuse when the State does *not* threaten criminal penalties for a refusal. It instead made clear, as it had in *Neville* and *McNeely*, that a State may threaten to revoke a person's operating privilege and to use a refusal against the person in court, and it may impose those civil penalties and evidentiary consequences on a person who refuses. *Id.* at 2185 (citing *McNeely*, 569 U.S. at 161; *Neville*, 459 U.S at 560).

Accordingly, even if a person has a constitutional right to refuse a blood test when threatened with a criminal penalty if he were to refuse, a person has no right to refuse a blood test when not threatened with a criminal penalty for refusal.

A person has no right to refuse a lawful request for a breath test. *Birchfield*, 136 S. Ct. at 2186; *State v. Lemberger*, 2017 WI 39, ¶¶ 19, 34, 36, 374 Wis. 2d 617, 893 N.W.2d 232. And as the Wisconsin Supreme Court unanimously recognized in *Lemberger*, the State may use the refusal in court against the person.

In *Lemberger*, the court concluded that the law was settled in 2014, when Lemberger was tried for OWI, that a person arrested for drunk driving "had no constitutional or statutory right to refuse to take the breathalyzer test and that the State could comment at trial" on the refusal. *Lemberger*, 374 Wis. 2d 617, ¶ 36. The court noted that *Birchfield* later held that "the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving," *id.* ¶ 34 (quoting *Birchfield*, 136 S. Ct. at 2184), and it concluded that *Birchfield* "provides an additional reason why defendants lawfully arrested for drunk driving have "no right to refuse" a

breath test." *Id.* (quoting *Birchfield*, 136 S. Ct. at 2186). The concurring opinion in *Lemberger* agreed that a person has no right to refuse a breath test and that evidence of a refusal may be used against the person in court. *Id.* ¶ 38, Abrahamson, J., concurring ("I agree with the majority opinion that the defendant's constitutional rights were not violated by the prosecutor's comments and that the defendant did not receive ineffective assistance of counsel. I disagree with the defendant that long-standing Wisconsin law permitting comment on the defendant's refusal to submit to a breathalyzer test has been abrogated.")

The Court in *Birchfield* made clear that a State may threaten to revoke a person's operating privilege and to use a refusal against the person in court, and it may impose those civil penalties and evidentiary consequences on a person who refuses. *Birchfield*, 136 S. Ct. at 2185 (citing *McNeely*, 569 U.S. at 161; *Neville*, 459 U.S at 560). But threatening or imposing criminal penalties goes too far. *Id.* at 2185–86.

Courts in other jurisdictions have recognized that *Birchfield* confirmed that the threat or revocation of a person's operating privilege and use of a refusal against the person in court, and imposition of those civil penalties and evidentiary consequences on a person who refuses, is constitutional.

In *State v. Rajda*, 196 A.3d 1108 (Vt. 2018), the Supreme Court of Vermont noted that in *Birchfield*, "the Court went out of its way to endorse the constitutionality of implied consent laws and strongly suggested that consequences for refusing a blood test short of criminal prosecution—such as civil and evidentiary consequences—were not constitutionally infirm." *Id.* at 1118 (citing *Birchfield*, 136 S. Ct. at 2186.) The court concluded that "the Fourth Amendment does not bar admission in a criminal DUI proceeding of evidence of a refusal to submit to a warrantless blood draw." *Id.* at 1119.

In *State v. Storey*, 410 P.3d 256 (N.M. Ct. App. 2017), the New Mexico court of appeals noted that in *Birchfield*, the Court distinguished between "criminalizing the refusal to take a [blood test] (which it deemed unconstitutional as a proposed exception under the consent doctrine) and using that refusal as evidence of consciousness of guilt on the underlying driving while intoxicated offense (which it signaled is constitutional)." *Id.* at 268. The court concluded that "*Birchfield* does not prohibit the introduction of evidence of, and commentary on, evidence establishing a defendant's refusal to take a blood test." *Id.* at 269.

In *State v. LeMeunier-Fitzgerald*, 188 A.3d 183 (Me. 2018), the Supreme Judicial Court of Maine concluded that Maine's OWI law, which requires an officer to warn a person that a refusal to submit to a blood test is admissible in court, is constitutional. The court relied on *Birchfield*, stating: "As the Supreme Court has previously determined, neither the threat of evidentiary use of the refusal nor the threat of license suspension renders the consent involuntary." *Id.* at 192 (citing *Birchfield*, 136 S. Ct. at 2185).

In *Commonwealth v. Bell*, 211 A.3d 761 (Pa. 2019), the Supreme Court of Pennsylvania recognized that "the *Birchfield* Court rejected criminal prosecution as a valid consequence for refusing a warrantless blood test," but that "[a]t the same time, the Court did not back away from its prior approval of other kinds of consequences for refusal, such as "evidentiary consequences." *Id.* at 775 (citing *Birchfield*, 136 S. Ct. at 2185–86). The court also noted that the Birchfield Court cited *McNeely* and *Neville*, which approved of admitting refusal evidence at trial. *Id.* at 776 (citations omitted). The court found "ample support" in *Birchfield* to conclude that the Supreme Court would approve of the use of a refusal at trial "in the context of a Fourth Amendment challenge." *Id.* The Court held that the "evidentiary consequence" provided in its statute — "the admission of that

refusal at a subsequent trial for DUI — remains constitutionally permissible post-*Birchfield*." *Id.*

In *Fitzgerald v. People*, 394 P.3d 671 (Colo. 2017), the Supreme Court of Colorado noted that "*Birchfield* concerned the constitutionality of implied consent laws that criminalize a driver's refusal to undergo chemical testing." *Id.* at 676. The court concluded that *Birchfield* does not affect Colorado's law, which "allows a driver's refusal to submit to testing to be entered into evidence if the driver is prosecuted for DUI or DWAI," because "Colorado's law does not criminalize a driver's refusal to consent to a search." *Id.* The court concluded that *Birchfield* said that "anything short of criminalizing refusal does not impermissibly burden or penalize a defendant's Fourth Amendment right to be free from an unreasonable warrantless search," so "introducing evidence of [a person's] refusal to consent to a blood or breath test to determine his BAC did not impermissibly burden his Fourth Amendment right." *Id.*

In *State v. Hood*, 917 N.W.2d 880 (Neb. 2018), the Supreme Court of Nevada recognized that *Birchfield* "clarified that the propriety of evidentiary consequences for a driver's refusal to submit to a blood draw should not be questioned." *Id.* at 223. The court concluded that "evidence of a driver's refusal to submit to a warrantless blood draw is admissible in a DUI prosecution." *Id.*

In *Dill v. State*, No. 05-15-01204-CR, 2017 WL 105073 (Tex. App. Jan. 11, 2017) (not designated for publication),[1] the Texas Court of Appeals rejected the assertion that admission of evidence of a refusal to submit to a request for a blood draw violated the Fourth Amendment. The court concluded it was "bound by *Neville*," which held that admission of a refusal

[1] Wisconsin's rules of appellate procedure allow citations to unpublished decisions from other jurisdictions. *State v. Stenzel*, 2004 WI App 181, ¶ 18 n.6, 276 Wis. 2d 224, 688 N.W.2d 20.

does not violate the United States Constitution. *Id.* at *2. The court rejected the notion that *Birchfield* had overruled *Neville*, concluding that "in *Birchfield*, the Supreme Court acknowledged the continued validity of *Neville*." *Id.* (citing *Birchfield*, 136 S. Ct. at 2185).

In *People v. Vital*, 52 N.Y.S.3d 248 (N.Y. Crim. Ct. 2017) (unreported), the Criminal Court for the City of New York rejected the defendant's argument that the admission of evidence of his refusal to submit to a blood test was unconstitutional. The defendant relied on *McNeely* and *Birchfield*, but the court concluded that those cases "are wholly inapposite." *Id.* at *2. The court noted that "[t]he *Birchfield* Court held that no state law may criminalize an individual's refusal to submit to a warrantless blood test," but it concluded that *Birchfield* does not apply to New York's law, where the penalties for refusing a blood test are civil (license suspension) and evidentiary (admission of evidence of refusal at trial). *Id.* (citations omitted).

In every one of these cases, appellate courts have recognized that the language in *Birchfield* that the circuit court here dismissed as dicta is instead confirmation of the continued validity of what the Court said in *Neville*. *Birchfield* confirmed that a State may impose evidentiary consequences (use of a refusal at trial) on a refusal to submit to a lawful request for a blood sample. The State's research has revealed no case holding the contrary.

In short, Wisconsin's implied consent law does not threaten or impose criminal penalties for refusal. It threatens to revoke a person's operating privilege and use a person's refusal against the person in court, and it imposes only those civil penalties and evidentiary consequences. That is permissible under the Fourth Amendment. *Birchfield*, 136 S. Ct. at 2185 (citing *McNeely*, 569 U.S. at 161; *Neville*, 459 U.S at 560).

D. *Dalton* concluded that imposing a longer sentence because of a refusal to take a blood test was a violation of a person's exercise of his constitutional right, but it also acknowledged that a State may threaten to revoke a person's operating privilege and use a refusal against the person in court, and it may impose those civil penalties and evidentiary consequences for a refusal.

The circuit court here concluded that in *Dalton*, 383 Wis. 2d 147, the Wisconsin Supreme Court held that a driver has a constitutional right to refuse a warrantless blood test, and a right to not have the refusal used against her. (R. 21:7-9, A-App. 115-117.) The circuit court did not make any finding as to any criminal penalty was being threatened. The circuit court in the case before this court therefore suppressed the test result and all evidence derived from the test. (R. 21:7-9, A-App. 115-117.) (R. 13:1-2, A-App. 119-120.)

The circuit court's conclusions are wrong. As explained above, *McNeely* did not recognize a constitutional right to refuse a warrantless blood test, and at most, *Birchfield* recognized a constitutional right to refuse a warrantless blood test only if the person is threatened with a criminal penalty for refusing. Both cases confirmed what the Court said in *Neville*: a State may threaten and impose evidentiary consequences (use of refusal at trial) for refusing a blood test.

The *Dalton* court concluded that when a circuit court imposed a longer sentence because of Dalton's refusal, "Dalton was criminally punished for exercising his constitutional right." *Dalton*, 383 Wis. 2d 147, ¶ 61. But the *Dalton* court did not hold that a person has a constitutional right to refuse a blood draw when criminal penalties are not threatened or imposed. That holding would be directly contrary to *Neville*, as confirmed in *McNeely* and *Birchfield*. And *Dalton* did not hold that a State may not use evidence of refusal to take a blood test against the person at trial—it

quoted the same language in *Birchfield* that the circuit court dismissed as dicta: "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." *Dalton*, 383 Wis. 2d ¶ 58 (quoting *Birchfield*, 136 S. Ct. at 2185.) And as the Supreme Court explained, nothing in *Birchfield* "should be read to cast doubt upon them." *Birchfield*, 136 S. Ct. at 2185.

The issue in *Dalton* concerned sentencing. A law enforcement officer arrested Dalton, read him the Informing the Accused form, and quested a blood sample. *Dalton*, 383 Wis. 2d 147, ¶ 13. Dalton refused. *Id.* On the officer's instruction, a nurse drew Dalton's blood. *Id.* ¶ 14. Dalton later pled no contest to charges of OWI and operating after revocation (OAR). *Id.* ¶ 19. At sentencing, the circuit court pointed out that Dalton had refused the officer's request for a blood sample. *Id.* ¶ 21. And the court said, "that's going to result in a higher sentence for you." *Id.*

The Wisconsin Supreme Court unanimously concluded that the warrantless blood draw was justified by the exigent circumstances exception to the warrant requirement. *Id.* ¶¶ 54, 101 n.1 & 111 n.2.[2]

On the sentencing issue, the court concluded that "the circuit court violated *Birchfield* by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant." *Id.* ¶ 67. The court therefore remanded the case to the circuit court for resentencing. *Id.* ¶ 69.

The court said nothing even hinting that the use of a person's refusal at trial is impermissible. Instead, the court quoted the language from *Birchfield* confirming that the

[2] Chief Justice Roggensack's dissent did not expressly indicate agreement on the exigent circumstances issue, but it expressed disagreement only with the sentencing issue.

imposition of evidentiary consequences (the use of refusal at trial) is permissible. *Id.* ¶ 58 (quoting *Birchfield*, 136 S. Ct. at 2185.)

Here, the circuit court concluded that under *Dalton*, evidence of a refusal to submit to a request for a blood sample may not be admitted at trial. (R. 21: A-App. 115–117.) (R. 13: A-App. 119–120.) The court's conclusion is based on the *Dalton* court's statement that because the sentencing court had explicitly imposed a longer sentence because of Dalton's refusal, "Dalton was criminally punished for exercising his constitutional right." *Id.* ¶ 61. The circuit court's conclusion is wrong.

In *State v. Banks,* 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526, the Court said that use of a defendant's exercise of a constitutional right against him at trial "is a violation of the defendant's right to due process." *Banks*, 328 Wis. 2d 766, ¶ 24. The right to due process is a Fifth Amendment right. In *Neville*, the Supreme Court held that the use of a refusal to submit to a request for a blood sample does not violate a person's Fifth Amendment right against self-incrimination or his right to due process. *Neville*, 459 U.S. Bolstad at 564–66.

Since the use of a person's refusal against him at trial does not violate the person's Fifth Amendment rights, and under *Banks* the use of a person's exercise of a constitutional right at trial is a Fifth Amendment violation, it follows that a person has no constitutional right to refuse a request for a blood sample (except perhaps when criminal penalties are imposed for a refusal).

The supreme court in *Dalton* did not explain exactly what it meant when it used the words "exercising his constitutional right." *Dalton*, 383 Wis. 2d 147, ¶ 61. The dissenting opinion in *Dalton* pointed out that if the majority opinion recognized a constitutional right to refuse a blood

draw, the opinion is contrary to *Neville*, which said that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *Dalton*, 383 Wis. 2d 147, ¶ 87 (Roggensack, C.J., dissenting) (quoting *Neville*, 459 U.S. at 500 n.10).

The majority opinion termed the dissent's reliance on *Neville* "misplaced." *Id.* ¶ 61 n.10. The majority opinion pointed out that "*Neville* was decided pre-*McNeely* and pre-*Birchfield*." *Id.* It said, "Both *McNeely* and *Birchfield* have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment *Neville* case on which Chief Justice Roggensack's dissent relies." *Id.*

That footnote in the *Dalton* majority opinion, however, does not mean that a refusal is inadmissible at trial. As an initial matter, the *Dalton* court noted that the language in *Neville* "appears" to have been superseded. The court did not definitively answer that issue. In any event, *Birchfield* and *McNeely* do not help Levanduski even if they superseded part of *Neville*. "*Birchfield* dictates that criminal penalties may not be imposed for the refusal to submit to a blood test." *Id.* ¶ 59 (citing *Birchfield*, 136 S. Ct. at 2185). That holding in *Birchfield* superseded any suggestion to the contrary in *Neville*. But that holding has no application here because Levanduski did not face any criminal penalties for a refusal. The *McNeely* Court held that "[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 Court rejected the view that the natural dissipation of alcohol in the bloodstream automatically constitutes an exigent circumstance justifying a warrantless blood draw. *Id.* That

holding does not help Levanduski because her blood draw was justified by her consent, not by exigent circumstances.

While *Neville* was decided before *McNeely* and *Birchfield*, the Supreme Court in those cases did not overrule *Neville* or even hint that *Neville* does not remain good law. Instead, the Court cited *Neville* approvingly in both *McNeely* and *Birchfield*. The *Dalton* court quoted *Birchfield* as saying that the Supreme Court's "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." *Dalton*, 383 Wis. 2d ¶ 58, (quoting *Birchfield*, 136 S. Ct. at 2185). The "prior opinions" that the Court referred to in *Birchfield* are *Neville* and *McNeely*. *Birchfield*, 136 S. Ct. at 2185. So, *Dalton* recognized that a refusal may be introduced as evidence at trial in an OWI case.

The circuit court took *Dalton* out of context when it read that case as prohibiting the use of a refusal as evidence at trial. The *Dalton* court held that a sentencing court violated *Birchfield* because it gave "Dalton a longer sentence for the sole reason that he refused to submit to a blood test." *Dalton*, 383 Wis. 2d 147, ¶ 60. The supreme court noted that "the fact that refusal is not a stand-alone crime does not alter our analysis." *Id.* ¶ 63. The court reasoned that *Birchfield* "addresses the wider impermissibility of criminal *penalties* for refusal, not only criminal *charges*." *Id.* That limited holding has no application here because Levanduski has not even been sentenced yet. She did not face criminal penalties for a refusal when she consented to a blood draw.

When the *Dalton* court said that "Dalton was criminally punished for exercising his constitutional right," it was referring to his right to be free from unreasonable searches, not a (non-existent) right to refuse a blood draw. The concurrence in *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151, issued the same day as *Dalton*, confirms this

understanding of *Dalton*.[3] Two of the four justices who joined the majority opinion in *Dalton*—Justices Daniel Kelly and Rebecca Bradley—concurred in *Mitchell*. The lead opinion in *Mitchell* said that the *Dalton* majority opinion "strike[s] down, sub silentio, Wis. Stat. § 343.305(4)'s provision that the fact of refusal can be used against a drunken driver in court because they label refusal of chemical testing a constitutional right." *Mitchell*, 383 Wis. 2d 192, ¶ 53 n.13. Justice Kelly, joined by Justice Rebecca Bradley, responded to that criticism by saying that the *Dalton* court merely recognized that people may "refus[e] warrantless, unreasonable searches." *Id.* ¶ 82 (Kelly, J., concurring). Justice Kelly noted that *Dalton* "only recognize[d] what is already the law." *Id.* And, as explained above, it has long been the law in Wisconsin that a refusal is admissible evidence in an OWI prosecution.

This Court, however, need not decide what the supreme court meant in *Dalton* when it said that Dalton was punished for exercising his constitutional right. Regardless what the court meant, it quoted *Birchfield* which confirmed that a State may threaten to revoke a person's operating privilege and to use a refusal against the person in court, and it may impose those civil penalties and evidentiary consequences for a refusal to submit to a request for a blood sample or a breath test. *Dalton*, 383 Wis. 2d 147, ¶ 58. The circuit court's reliance on *Dalton* as holding that a person has a right to not have her refusal used against her in court, even when not threatened with a criminal penalty for refusing (R. 21, A-App. 115-117), is plainly wrong. *See Dalton*, 383 Wis. 2d 147, ¶ 58. *Dalton* did not overrule or even mention *Bolstad* or *Zielke*, cases where the Wisconsin Supreme Court held that a refusal is admissible at trial. To the contrary, the *Dalton* court noted

[3] *Mitchell* was vacated by the United States Supreme Court in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). It is therefore not binding or precedential. *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (citing *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988)).

Birchfield's approval of "evidentiary consequences" for a refusal. *Id.* Accordingly, the circuit court's decision granting Levanduski's motion to suppress evidence of her test result and all derivative evidence should be reversed.

If this Court addresses the issue of whether a person has a constitutional right to refuse a lawful request for a blood sample, it must follow *Neville*, which has not been overruled, and *Birchfield*, which acknowledged the fact that a refusal may be admitted at trial as a negative inference against a defendant. This Court should conclude that there is no constitutional right to refuse a request for a blood sample, at least when the person is not threatened with a criminal penalty for refusing.

CONCLUSION

This Court should reverse the circuit court's order granting Levanduski's motion to suppress evidence of her blood sample and all derivative evidence.

Dated this 29 th day of October 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10879 words.

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JEFFREY A. SISLEY
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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 ____th day of October 2019.

_____
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