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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1850-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

SCOTT W. FORRETT,

Defendant-Appellant-Respondent.

RESPONSE TO PETITION FOR REVIEW

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ARGUMENT

I. Review of the State's first issue is unnecessary because this case presents a straightforward application of precedent.

The State urges this Court to grant review of a published decision of the Court of Appeals holding that Wisconsin's accelerated penalty structure for OWI offenses, which authorizes the counting of revocations for refusal of a warrantless blood test to enhance penalties for an OWI in a subsequent case, is unconstitutional. Review is necessary, the State contends, because "neither the United States Supreme Court nor this Court has even suggested that Wisconsin's OWI statutes are unconstitutional." (State's Petition at 4-5). Mr. Forrett asks this Court to deny the State's request to review this issue because this Court's review would be unnecessary.

Contrary to the State's argument, this case presents a straightforward application of precedent articulated in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) and *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. In *Birchfield*, the United States Supreme Court examined whether a law making "it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired" violated the Fourth Amendment's proscription against unreasonable searches and seizures. *Birchfield*, 136 S. Ct. at 2166-67. The Court found "that motorists cannot be deemed to have

consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

Birchfield 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.* at 2185 (emphasis added). However, *Birchfield* emphasized that *criminal penalties* may *not* be imposed for a refusal. The Court stated that "[i]t is another matter . . . for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.*

Similarly, in *Dalton* this Court addressed the constitutionality of a circuit court's decision to impose an increased sentence for the defendant's OWI "for the sole reason that he refused to submit to a blood test." *Dalton*, 383 Wis. 2d 147, ¶60. Holding that a sentence that is increased solely on this basis is unlawful, the Court noted that, under *Birchfield*, criminal penalties may not be imposed for the refusal to submit to a blood test and "[a] lengthier jail sentence is certainly a criminal penalty." *Dalton*, 383 Wis. 2d 147, ¶¶58-60 (citing *Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 141, 532 N.W.2d 432 (1995) (referring to imprisonment as a criminal penalty); *State v. Peterson*, 104 Wis. 2d 616, 621, 312 N.W.2d 784 (1981) (same)). Thus, this Court held that the circuit court's sentence criminally

punished the defendant for exercising a constitutional right, which is impermissible. *Id.* at ¶ 61.

Contrary to the arguments raised in the State's petition, Wisconsin's OWI penalty statutes do exactly what *Birchfield* and *Dalton* prohibit—they allow the imposition of criminal penalties for the refusal to submit to a blood test. As the Court of Appeals recognized:

> [I]nclusion of revocations for refusals to submit to a warrantless blood draw under Wisconsin's penalty scheme, which clearly results in an increased penalty, is a consequence which is outside the limit permitted by the Fourth Amendment. Put slightly differently, we conclude that it is unconstitutional under *Birchfield* when there is an increased criminal penalty based on the refusal of a warrantless blood test. We cannot overlook the fact that the revocation results in an increased penalty—albeit delayed.

State v. Scott William Forrett, Case No. 2019AP1850-CR (Wis. Ct. App. April 28, 2021), ¶¶ 14-15.

Additionally, in the case of Mr. Forrett, the exercise of his right to refuse was in fact used to punish him. The refusal increased his sentence from an OWI 6th offense, a Class G felony, to an OWI 7th offense, a Class F felony, with higher maximum and minimum penalties. *See* Wis. Stat. § 939.50(3).

Therefore, the Wisconsin OWI statutes which allow a warrantless blood test refusal to count as a prior offense to increase a person's sentence are

unconstitutional. The Court of Appeals applied the correct legal standard in remanding for further proceedings commuting Mr. Forrett's conviction to a 6th offense OWI and resentencing accordingly.

II. Review of the State's second issue is unnecessary to resolve Mr. Forrett's appeal or develop and clarify the law.

The State also contends that "the court of appeals' opinion is in conflict with opinions of the United States Supreme Court, this Court, and the court of appeals." (State's Petition at 5). Specifically, the State argues that the counting of a blood draw refusal revocation does not actually amount to a criminal penalty for refusal. In support, the State refers to cases which hold that criminal penalty enhancers do not result in double jeopardy and *ex post facto* constitutional violations because penalty enhancers punish recidivism. (*Id.* at 16-19).

The State's argument is unpersuasive. To begin with, refusal of a warrantless blood draw is the exercise of a constitutionally protected right, not an instance of recidivist drinking while driving. *See Forrett*, Case No. 2019AP1850-CR, ¶ 16. Moreover, as the Court of Appeals observed:

> [The] argument (that the refusal could be an aggravating factor because it is not a stand-alone crime but reflects on the character of the defendant) was not compelling in *Dalton*, as the court rejected the notion that the refusal was but an aggravating sentencing consideration which

> justified treating the OWI more seriously. *See Dalton*, 383 Wis. 2d 147, ¶62 (rejecting as "unconvincing" the state's contention that "any increase in a sentence within the statutorily prescribed range does not morph a sentencing consideration into a criminal penalty"). Indeed, in *Dalton*, the lengthier sentence was within the penalty maximum for the OWI. *See id.*, ¶¶21, 62, 65 (rejecting state's argument that Dalton's refusal to consent to a warrantless blood draw "may be taken into account [at sentencing] as long as it does not push the punishment above the statutorily allowed maximum for OWI").

Id., ¶ 17.

Based on the above, the State's analogies to case law regarding recidivism are inapposite to Mr. Forrett's case. Accordingly, review of this issue is unnecessary to resolve Mr. Forrett's appeal or develop and clarify the law.

CONCLUSION

For the reasons stated above, the Court should deny the State's petition for review.

Dated this 3rd day of June, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 1,085 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 3rd day of June, 2021.

Signed:

DAVID MALKUS
Assistant State Public Defender