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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.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. APRAHAMIAN AND THE HONORABLE BRAD SCHIMEL, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

This case concerns Wisconsin's accelerated penalty structure for offenses relating to operating a motor vehicle while under the influence of an intoxicant (OWI). The issue is whether those penalty statutes are unconstitutional because they authorize the counting of a revocation for refusing a blood test in one case to enhance a conviction for an OWI-related offense in a separate subsequent case. The court of appeals concluded that using a revocation for refusing a blood test in one case to enhance the sentence for a separate subsequent OWI criminally punishes the refusal in the first case. The court concluded that using a refusal in this manner impermissibly burdens the person's Fourth Amendment right to be free from an unreasonable search, so Wisconsin's accelerated penalty statutes, which authorize such use, are facially unconstitutional. *State v. Forrett*, 2021 WI App 31, __ Wis. 2d __, 961 N.W.2d 132. (Pet-App. 101-110.). The court of appeals said that its decision was required under *Birchfield v. North Dakot*a, 136 S. Ct. 2160 (2016), and *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. But neither case supports the court of appeals' conclusion, much less compels it.

Both *Birchfield* and *Dalton* addressed the use of a person's refusal to take a blood test as a basis for a criminal penalty in the same case. In *Birchfield*, the Supreme Court held that a State may not make it a crime to refuse a blood test because a law that imposes a criminal penalty for refusing a blood test would impermissibly burden a person's Fourth Amendment right to be free from an unreasonable search. *Birchfield*, 136 S. Ct. at 2185–86. In *Dalton*, this Court held that when a circuit court explicitly imposes a longer sentence for an OWI because the person refused a blood test in the same case, it impermissibly burdens the person's Fourth Amendment right to be free from an unreasonable

search, in violation of *Birchfield*. *Dalton*, 383 Wis. 2d 147, ¶ 68.

In *Forrett*, the court of appeals extended the principles of *Birchfield* and *Dalton* to the use of a revocation for refusing a blood test to enhance the sentence for an OWI in a separate, subsequent case. The court concluded that any additional imprisonment for a subsequent offense when one of the prior offenses is a revocation for refusing a blood test is really additional criminal punishment for the refusal. *Forrett*, 2021 WI App 31, ¶¶ 14, 19. (Pet-App. 106–07, 09).

However, it is well established that an increased punishment in a subsequent case because of a person's conviction or conduct in a prior case is not additional punishment for the conviction or conduct in the prior case. It is stiffer punishment in the new case because the person is a recidivist. Under Wisconsin's accelerated penalty structure for OWI-related offenses, a person who is convicted of an OWI-related offense is subject to an enhanced penalty if he has a prior countable offense. The increased penalty for the later offense is not an additional punishment for the earlier offense, regardless of whether the earlier offense is an OWI-related conviction, a revocation for refusing a breath test, or a revocation for refusing a blood test. It is increased punishment for the subsequent offense because it is a subsequent offense. Use of refusal to prove that a person is a recidivist is a permissible evidentiary consequence of an unlawful refusal. Use of a refusal in this manner does not burden a person's right to be free from an unreasonablesearch in the prior case. It does not affect that right at all. Theuse of a refusal in this manner is a reasonable and permissible condition of driving in Wisconsin, and the statutes authorizing the counting of a refusal to take a blood test are not unconstitutional on their face or as applied to Forrett. This Court should therefore reverse the court of appeals' decision.

ISSUE PRESENTED

Is Wisconsin's accelerated penalty structure for OWI-related offenses unconstitutional?

The circuit court answered "no." It recognized that the use of a refusal as the basis of a longer sentence for an OWI in the same case is different than using a revocation for refusing in one case to enhance the sentence for an OWI in a separate subsequent case. The court therefore rejected the claim that Wisconsin's accelerated penalty structure for OWI-related offenses is unconstitutional.

The court of appeals answered "yes." It concluded that under *Birchfield* and *Dalton* it is impermissible to count a prior revocation for refusing a blood test to enhance the sentence for a separate subsequent OWI offense.

This Court should answer "no." It is well established that imposing a longer sentence for a repeat offense is not an additional punishment for the prior offense. And neither *Birchfield* nor *Dalton* even suggested that using a revocation for refusing a blood test to enhance the sentence for a separate subsequent OWI offense impermissibly burdens a person's Fourth Amendment right to be free from an unreasonable search. Wisconsin's accelerated penalty structure for OWI-related offenses is therefore not unconstitutional.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE AND FACTS

A police officer stopped a vehicle Forrett was driving after he observed the vehicle weave in its lane, cross the fog line, and cross the center line six times. (R. 7:4.) The officer smelled intoxicants on Forrett and observed that his eyes were glassy. (R. 7:4.) The officer asked if Forrett had been drinking, but Forrett did not answer. (R. 7:4.) Forrett agreed to perform field sobriety tests, but he lost his balance and fell twice before starting them. (R. 7:4.) Forrett began the tests but did not complete them. (R. 7:4–5.) He declined a request for a preliminary breath test. (R. 7:5.) The officer arrested Forrett for OWI. (R. 7:5.) The officer searched Forrett and found marijuana and a marijuana pipe. (R. 7:5.) The officer read Forrett the Informing the Accused form and requested a blood sample. (R. 7:5.) Forrett refused. (R. 7:5.)[1] The officer applied for a search warrant for a blood sample, and the circuit court issued the warrant. (R. 7:5.)

Forrett's blood was drawn at a hospital. (R. 7:5.) Analysis of the blood sample revealed an alcoholconcentration of .266. (R. 7:5.) Forrett had six prior OWI- related offenses, so the State charged him with OWI and operating a motor vehicle with a prohibited alcohol concentration above .02 (PAC), both as seventh offenses. (R. 7:1–3, 6.) The State also charged Forrett with operating a motor vehicle after revocation (OAR), failure to install an ignition interlock device (IID), possession of THC, and possession of drug paraphernalia. (R. 7:2–3.)

[1] This is *not* the refusal that resulted in an increased penalty for Forrett.

Forrett and the State reached a plea agreement where he pleaded guilty to OWI and did not contest his refusal; the charges for OAR, failure to install an IID, and possession of THC and drug paraphernalia were all dismissed but read in at sentencing. (R. 71:2–3, Pet-App. 112–13.) The PAC charge was dismissed by operation of law. (R 71:4, Pet-App. 114.)

At the plea/sentencing hearing, the circuit court[2] noted that Forrett had been convicted of six prior "OWI related offenses." (R. 71:14, Pet-App. 124.) Forrett's defense counsel told the court that one of the prior offenses—dated August 26, 1996—was for refusal to submit to a blood draw, but that there was no accompanying OWI conviction for that offense. (R. 71:14, Pet-App. 124.) Counsel acknowledged that the refusal "still counts as a prior." (R. 71:14, Pet-App. 124.) Counsel later told the court that Forrett's 1996 refusal had been accompanied by an OWI charge, but that the OWI had been "dismissed and read into a felony eluding." (R. 71:16, Pet-App. 126.) The circuit court sentenced Forrett to eleven years of imprisonment, including six years of initial confinement and five years of extended supervision, for the seventh offense OWI. (R. 71:31–32, Pet-App. 141–42.) The court entered judgment of conviction for a seventh offense. (R. 31, Pet-App. 146–48.)

Forrett moved for postconviction relief, seeking a new sentencing hearing or commutation of his sentence to the maximum allowed for OWI as a sixth offense: ten years of imprisonment, including five years of initial confinement and five years of extended supervision. (R. 51, Pet-App. 149–57.) He asserted that Wisconsin's statutes that provide that a refusal may be used to enhance the sentence for a subsequent OWI-related offense are unconstitutional because they authorize criminal penalties for refusing a blood test.

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[2] The Honorable Michael J. Aprahamian presided over the plea/sentencing hearing. (R. 71, Pet-App. 111–45.)

(R. 51:3–6, Pet-App. 151–54.) He also asserted that his trial counsel was ineffective for not raising the constitutionality issue. (R. 51:6–8, Pet-App. 154–56.)

The circuit court denied Forrett's postconviction motion after a hearing.[3] (R. 62:10–11, Pet-App. 167–68.) It concluded that while a State cannot directly punish a person criminally for refusing to provide a blood sample, a prior refusal may affect the penalty for a subsequent OWI. (R. 62:11, Pet-App. 168.) The court therefore rejected Forrett's claim that Wisconsin's OWI penalty enhancement structure is unconstitutional. (R. 58; 62:11, Pet-App. 168, 171.)

The court of appeals reversed. *Forrett*, 2019AP1850-CR (Pet-App. 101–110.) It found Wisconsin's accelerated penalty structure for OWI-related offenses facially unconstitutional under *Birchfield* and *Dalton*. *Forrett*, 2021 WI App. 31, ¶ 19 (Pet-App. 109.) The court concluded that when a revocation for a refusal to take a blood test is used to enhance a separate subsequent OWI conviction, the additional penalty imposed for the enhanced offense is actually punishment for the refusal in the prior case. *Id.* ¶¶ 16–19 (Pet-App. 107–09.) The court concluded that under *Birchfield* and *Dalton*, this impermissibly burdens a person's right to be free from an unreasonable search in the prior case. *Id.* ¶ 19 (Pet-App. 109.) The court remanded the case to the circuit court to impose judgment and sentence for a sixth offense. *Id.* The court's opinion has been published. This Court has now granted the State's petition for review.

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[3] The Honorable Brad Schimel presided over the hearing on Forrett's motion for postconviction relief. (R. 62, Pet-App. 158–170.)

STANDARD OF REVIEW

Whether a statute is unconstitutional is a matter of law that this Court reviews de novo. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. 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 facial and as-applied challenges to the constitutionality of statutes. *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

ARGUMENT

I. The court of appeals erred when it found that Wisconsin's accelerated penalty structure for OWI-related offenses, which authorizes the use of convictions, suspensions, and revocations in prior cases to enhance the sentence for an OWI in a separate subsequent case, is unconstitutional.

A. Wisconsin's accelerated penalty structure for OWI-related offenses requires the counting of revocations for refusal as prior offenses.

"The Wisconsin legislature has established an accelerated penalty structure for OWI offenses in Wis. Stat. § 346.65(2)." *State v. Carter*, 2010 WI 132, ¶ 3, 330 Wis. 2d 1, 794 N.W.2d 213. The OWI penalty statutes "generally embody a system of increased penalties depending on the number of offenses." *State v. Braunschweig*, 2018 WI 113, ¶ 15, 384

Wis. 2d 742, 921 N.W.2d 199. These statutes "provide[] for increased minimum and maximum potential penalties for defendants convicted of OWIs based upon a delineated list of prior 'suspensions, revocations, and other convictions.'" *Id.* (quoting Wis. Stat. § 346.65(2)(am)). "Wisconsin's progressive OWI penalties are mandatory directives from the legislature" designed "to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence." *City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 17, 390 Wis. 2d 109, 938 N.W.2d 463 (quoting Wis. Stat. § 967.055(1)(a)). Wisconsin's accelerated penalty structure for OWI-related offenses has been in place since 1977. Ch. 193, Laws of 1977.

Under Wisconsin's OWI penalty statutes, "a countable offense does not have to be an OWI conviction." *Hansen*, 390 Wis. 2d 109, ¶ 15. "The severity of a defendant's penalty for OWI is based on the number of prior convictions under §§ 940.09(1)[4] and 940.25[5] 'plus the total number of suspensions, revocations, and other convictions counted under Wis. Stat. § 343.307(1).'" *Carter*, 330 Wis. 2d 1, ¶ 3.[6]

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[4] Homicide by intoxicated use of a motor vehicle.

[5] Causing injury by intoxicated use of a motor vehicle.

[6] Wisconsin Stat. § 343.307(1) provides that a court imposing sentence for an OWI-related offense is to count:

> (a) Convictions for violations under s. 346.63 (1), or a local ordinance in conformity with that section.
>
> (b) Convictions for violations of a law of a federally recognized American Indian tribe or band in this state in conformity with s. 346.63 (1).
>
> (c) Convictions for violations under s. 346.63 (2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle.

A "revocation for improper refusal to take a chemical test that law enforcement has requested counts the same as an OWI conviction for purposes of increasing statutory penalties." *Hansen*, 390 Wis. 2d 109, ¶ 17 (citing Wis. Stat. § 343.307(1)(f); Wis. Stat. § 343.305(10)). Section 343.307 provides that a court is to count "Revocations under s. 343.305(10)," which are revocations for refusing under Wisconsin's implied consent law. Wis. Stat. §§ 343.307(1)(f); 343.305(10). Section 343.307(1) also requires the counting of "Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing," Wis. Stat. § 343.307(1)(d), and "Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing." Wis. Stat. § 343.307(1)(e).

> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.
>
> (e) Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.
>
> (f) Revocations under s. 343.305 (10).
>
> (g) Convictions for violations under s. 114.09 (1) (b) 1. or 1m.

This Court has applied these penalties and acknowledged that revocations for refusing blood tests are counted as prior offenses, in numerous cases, including in cases decided after the Supreme Court decided *Birchfield* and this Court decided *Dalton*. *See e.g.*, *Braunschweig*, 384 Wis. 2d 742; *Hansen*, 390 Wis. 2d at 109. Before the court of appeals' decision in the present case, neither this Court nor the court of appeals ever said anything even suggesting that it might be improper to count revocations for refusing a blood test as an offense to enhance a sentence for a separate subsequent OWI-related offense, until the court of appeals found these statutes unconstitutional in this case.

B. Forrett has not shown that Wisconsin's OWI penalty enhancement structure is unconstitutional.

To overcome the presumption that Wisconsin's OWI penalty enhancement structure is unconstitutional, Forrett is required to prove that the statutes are unconstitutional beyond a reasonable doubt. *Ninham*, 333 Wis. 2d 335, ¶ 44. In his motion for postconviction relief, Forrett argued that Wisconsin's OWI penalty enhancement statutes are unconstitutional for only one reason—that using a refusal to take a blood test in one case to enhance the sentence for a separate subsequent OWI conviction criminally punishes the refusal in the prior case. (R. 51:5–6, Pet-App. 153–54.) And the court of appeals found Wisconsin's OWI penalty enhancement statutes unconstitutional for only that same reason. *Forrett*, 2021 WI App 31, ¶ 19.

The court of appeals' decision implies that under *Birchfield* and *Dalton*, the court had no choice but to find the accelerated penalty structure unconstitutional as it relates to counting revocations for refusing a blood test as a prior offense. *Forrett*, 2021 WI App 31, ¶ 19. (Pet-App. 109.) The court of appeals said that under *Birchfield* and *Dalton*, it is

impermissible to impose a lengthier criminal sentence because a person refused a warrantless blood test, and that using a revocation for refusing a blood test to increase the penalty for a separate subsequent OWI conviction punishes the refusal in the prior case. *Id.*

However, Wisconsin's OWI penalty structure imposes only civil penalties (license revocation) and evidentiary consequences (using a refusal in court to prove an OWI) for refusing a blood test or a breath test. These penalties and consequences are permissible under *Birchfield*, 136 S. Ct. at 2185 and *Dalton*, 383 Wis. 2d 147, ¶ 58. Neither *Birchfield* nor *Dalton* addressed the situation here—the use of a revocation for refusing a blood test to enhance the sentence for a separate subsequent OWI conviction. And the premise of the court of appeals' decision—that using a revocation for refusing a blood test in one case to increase the penalty for a separate subsequent OWI conviction punishes the refusal in the prior case—is contrary to over a century of law. It is well established that increasing the criminal punishment for an offense because of something a defendant did in a prior case—even if what the defendant did in the prior case could not itself be criminally punished—is not punishment for the prior offense or conduct. Counting a revocation for refusing a blood test in one case to increase the penalty for a separate, subsequent offense results in an appropriate punishment for the new repeat offense, not additional punishment for the prior offense. Wisconsin's OWI penalty enhancement statutes do not violate the Fourth Amendment, *Birchfield*, or *Dalton*, and are constitutional.

1. *Birchfield* held that imposing a criminal punishment for refusing a warrantless blood test under an implied consent law impermissibly burdens the person's right to be free from an unreasonable search.

In *Birchfield*, the Supreme Court addressed the validity of implied consent laws that "impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws." *Birchfield*, 136 S. Ct. at 2166. The Court recognized that "[i]n the past, the typical penalty for noncompliance was suspension or revocation of the motorist's license." *Id.* The Court made it clear that its opinion did not impact the validity of those laws, stating that "nothing we say here should be read to cast doubt on" "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at 2185.

The issue in *Birchfield* was the validity of laws that "go beyond" suspension or revocation, 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 specific question for the Court was "whether such laws violate the Fourth Amendment's prohibition against unreasonable searches." *Id.* at 2166–67.

The Court held that a breath test may be conducted incident to a lawful arrest, without a warrant. *Id.* at 2184–85. Accordingly, a State may make it a crime to refuse a breath test. *Id.* at 2186. As the Court noted, if a warrantless search "comport[s] with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing." *Id.* at 2172. But the Court concluded that a blood test may *not* be conducted incident to a lawful arrest. *Id.* at 2184–85.

The Court therefore addressed the validity of warrantless blood tests under another exception to the warrant requirement, the person's consent. *Id.* at 2185. Specifically, the Court considered whether an implied consent law may condition a driver's driving privilege on his consent to a blood test when an officer with probable cause that the person has driven drunk requests a blood test. *Id.* The Court made it clear that a State *may* condition a person's driving privilege on his consent to take a lawfully requested blood test. It said that a State may "insist upon an intrusive blood test." *Id.* And the Court affirmed that a State *may* threaten and impose certain penalties and consequences for withdrawing that implied consent and refusing to take a lawfully requested blood test: "[N]othing we say here should be read to cast doubt on" "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.*

But the Court drew a line between penalties and consequences that are permissible for refusing a blood test that is not justified by a warrant or a warrant exception, and those that are impermissible: "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 said that while it is permissible to impose civil penalties and evidentiary consequences on a refusal to take a blood test, it is impermissible "also to impose criminal penalties on the refusal to submit to such a test." *Id.* The Court explained what it meant when it said that a State may not "impose criminal penalties." It said, "applying this standard, 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.

The Court applied its conclusions to the cases of three petitioners: one who refused a blood test, one who refused a breath test, and one who agreed to a blood test. Petitioner Birchfield "was criminally prosecuted for refusing a warrantless blood draw," under a North Dakota law that made it a crime to refuse a blood test. *Id.* The Supreme Court concluded that the nonconsensual warrantless blood test was not justified as a search incident to arrest or by exigent circumstances. *Id.* Because the Court was "[u]nable to see any other basis on which to justify a warrantless test of Birchfield's blood," it concluded that "Birchfield was threatened with an unlawful search" so "the judgment affirming his conviction must be reversed." *Id.*

Petitioner Bernard "was criminally prosecuted for refusing a warrantless breath test" under a Minnesota law that made it a crime to refuse a breath test. *Id.* The Supreme Court concluded that the warrantless consensual breath test was justified as a permissible search incident to Bernard's arrest for drunk driving, so he was not threatened with an unlawful search, he had no right to refuse, and he could be criminally prosecuted for refusing. *Id.*

Petitioner Beylund agreed to an officer's request for a blood test under a North Dakota law that made it a crime to refuse a breath or blood test. *Id.* The Supreme Court concluded that while it was permissible to criminalize a refusal to take a breath test, the officer inaccurately advised the defendant that it was also a crime to refuse a blood test. *Id.* The Court concluded that the defendant's consent to a blood test may not have been voluntary, so it remanded for a determination whether, "given the partial inaccuracy of the officer's advisory," Beylund's consent was voluntary. *Id.*

None of the three petitioners in *Birchfield* were in the situation Forrett is in. For each of the petitioners in *Birchfield*, the issue was whether the search—the blood or breath test—was justified under the Fourth Amendment even though it was conducted without a warrant.

Forrett was not threatened with jail if he refused a blood test or a breath test in 1996, and he was not criminally punished for refusing. He claims that he was somehow criminally punished for his 1996 refusal when the circuit court in 2018 counted his revocation for refusing in 1996—a permissible civil penalty—to make his current OWI a seventh offense and imposed a longer sentence than it could have imposed had this been Forrett's sixth offense.

The Supreme Court in *Birchfield* did not address whether it was permissible to use a civil penalty—license revocation—to enhance the sentence for a separate subsequent criminal OWI offense.

2. *Dalton* held that a court cannot explicitly impose a lengthier sentence for an OWI conviction because the person refused a blood test in the same case.

In *State v. Dalton*, this Court addressed the use of a refusal to take a blood test as the basis for imposing a longer sentence for an OWI in the same case. Dalton crashed his car, injuring himself and his passenger. *Dalton*, 383 Wis. 2d 147, ¶ 6. A police officer who suspected that Dalton was under the influence of an intoxicant arrested him and requested a blood sample, and Dalton refused. *Id.* ¶¶ 12–13. The officer instructed a nurse to draw Dalton's blood, believing that there was no time to obtain a search warrant for a blood sample. *Id.* ¶ 14. The State charged Dalton with OWI and two other crimes. *Id.* ¶ 19. Pursuant to *Birchfield*, the State could not charge Dalton with a crime for refusing a blood test. He was

subject to only revocation of his driver's license for refusing. Wis. Stat. § 343.305(10).

Dalton pleaded no contest to OWI. *Id.* ¶ 19. At sentencing, the circuit court said that it was imposing a longer sentence for the OWI, within the statutory maximum, because Dalton refused the blood test. *Id.* ¶ 21. Dalton moved to withdraw his plea and for resentencing. *Id.* ¶ 22. The circuit court denied his motions, and the court of appeals affirmed. *Id.* ¶¶ 23, 31.

This Court concluded that the blood draw from Dalton was justified by exigent circumstances, so it affirmed that he was not entitled to withdraw his plea. *Id.* ¶ 54. But this Court remanded the case for resentencing because it concluded that the sentencing court erred by imposing a longer sentence for Dalton's OWI explicitly because Dalton refused a blood test. *Id.* ¶ 68.

This Court read *Birchfield* as prohibiting a criminal punishment for refusing a blood test in the same case. *Id.* ¶ 59 ("*Birchfield* dictates that criminal penalties may not be imposed for the refusal to submit to a blood test.").[7] This Court concluded that when the circuit court said at sentencing

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[7] Courts in other jurisdictions have read *Birchfield*'s prohibition on criminal penalties for refusing a warrantless blood test more narrowly, concluding that under *Birchfield*, if a blood test is justified by exigent circumstances, a State may impose criminal penalties for refusing it. *See Commonwealth v. Olson*, 218 A.3d 863 (2019) ("*Birchfield* did not designate the act of refusing a blood test as constitutionally protected conduct under all circumstances, and thus categorically outside the reach of the criminal law. To the contrary, *Birchfield* placed a procedural obligation upon the *police* that, when satisfied, *authorizes* the demand for a blood test and thus permits criminal penalties for refusal."); *State v. Vargas*, 404 P.3d 416, 422 (2017) (citation omitted) (noting that the Supreme Court reasoned in *Birchfield* that "if the warrantless search comports with the Fourth Amendment, 'it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing.'"). The distinction does not matter here because Wisconsin's law does not make a refusal a crime.

that Dalton's refusal would "result in a higher sentence," the court criminally punished him for refusing a blood test and violated *Birchfield*. *Id.* ¶ 60.

This Court also said that by explicitly increasing Dalton's sentence because he refused a blood test, the sentencing court criminally punished Dalton "for exercising his constitutional right." *Id.* ¶ 61. In *State v. Levanduski*, the court of appeals explained that the "constitutional right" this Court referred to in *Dalton* had to be "the Fourth Amendment right to be free from unreasonable warrantless searches and seizures," and that this Court concluded that "under *Birchfield*, Dalton could not suffer a *criminal* penalty due solely to his refusal to submit to a blood draw." *State v. Levanduski*, 2020 WI App 53, ¶ 13 n.5, 393 Wis. 2d 674, 948 N.W.2d 411, (citing *Birchfield*, 136 S. Ct. at 2185–86; *Dalton*, 383 Wis. 2d 147, ¶¶ 57–66). As the court of appeals recognized in *Levanduski*, under *Birchfield*, "Criminal penalties for refusal under an implied consent law impermissibly burden and penalize that right; civil penalties and evidentiary consequences do not. Thus, criminal penalties are beyond the constitutional 'limit' of one's consent under an implied consent statute, but civil penalties and evidentiary consequences are not." *Id.* (citing *Dalton*, 383 Wis. 2d 147, ¶ 58.

In *Dalton*, this Court held that a sentencing court may not explicitly impose a longer sentence for an OWI because the person refused a blood test in the same case. *Dalton*, 383 Wis. 2d 147, ¶ 68. This Court did not address the validity of the use of a permissible civil penalty for refusing a blood test—license revocation—to enhance the sentence for a separate subsequent criminal OWI offense.

3. Here, the court of appeals erred by extending *Birchfield* and *Dalton* and holding that it is impermissible to use a revocation for refusing a blood test in one case to enhance the sentence for a separate subsequent OWI offense.

In this case, the court of appeals addressed an issue very different than the ones decided in *Birchfield* and *Dalton:* whether a revocation of a person's operating privilege, which is a permissible civil penalty for refusing a lawful request for a blood test, can be used to enhance the sentence for an OWI offense in a separate subsequent case. The court of appeals concluded that under *Birchfield* and *Dalton*, it is impermissible to do so. The court of appeals rejected the State's argument that it is permissible to use a revocation for refusing a blood test in one case to enhance the sentence for a separate subsequent OWI offense because doing so does not punish the refusal in the prior case. The court concluded that "An increased penalty for the warrantless blood draw refusal revocation is an increased penalty—regardless [of] whether it takes place in the same proceeding or a later proceeding, it impermissibly burdens or penalizes a defendant's Fourth Amendment right to be free from an unreasonable warrantless search." *Forrett*, 2021 WI App 31, ¶ 19. (Pet-App. 109.)

The court of appeals was wrong. Using a revocation in one case to enhance the charge and sentence for a separate subsequent offense is simply not the same as punishment for the revocation. As explained below, it is well established that an increased penalty for a repeat offense is not additional punishment for the prior offense. It is an increased penalty for the repeat offense because it is a repeat offense. The potential penalty for a seventh offense is longer than the potential penalty for a sixth offense because the person has six prior countable offenses rather than five. But every bit of

the punishment for a seventh offense is punishment for that specific offense, not additional punishment for any of the prior six offenses. Here, the increased penalty for Forrett's seventh OWI conviction was not a criminal penalty for his 1996 refusal.

4. An increased penalty for a repeat offense is not an additional punishment for the prior offenses.

The court of appeals concluded that the use of Forrett's 1996 revocation for refusing a lawful request for a blood test was beyond the constitutional "limit" of his consent under the implied consent law, and therefore impermissibly burdened his right to be free from an unreasonable search. *Forrett*, 2021 WI App 31, ¶ 19. (Pet-App. 109.) The court's decision rests on its conclusion that the use of a prior offense to enhance the penalty for a subsequent offense is additional criminal punishment for the prior offense. *Id.* In other words, the court of appeals reasoned that but for his refusal in the prior case, Forrett could not have received the sentence he received in his current case, so the additional imprisonment in his current case was really punishment for the prior refusal.

However, the United States Supreme Court, this Court, and the court of appeals have all recognized that enhancing the penalty for a subsequent offense because of a prior offense punishes the subsequent offense, not the prior offense. And Wisconsin's accelerated penalty structure for OWI-related offenses is "nothing more than a penalty enhancer similar to a repeater statute." *State v. McAllister*, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982).

This Court recognized more than a century ago that a longer penalty for a repeat offense, applied because it is a repeat offense, does not punish the earlier offense. In *Ingalls v. State*, 48 Wis. 647, 4 N.W. 785 (1880), this Court rejected a claim that a statute "which imposes a greater punishment

upon a person who commits a second or third offence of the same character than it imposes upon the person who is convicted of a first offence, violates the provision of our constitution which prohibits putting a person twice in jeopardy for the same offence." *Id.* at 793–94. This Court reasoned that "[t]he increased severity of the punishment for the subsequent offence is not a punishment of the person for the first offence a second time, but a severer punishment for the second offence." *Id.* at 794. This Court said it was permissible to impose an enhanced sentence for the second offense "because the commission of the second offence is evidence of the incorrigible and dangerous character of the accused, which calls for and demands a severer punishment than should be inflicted upon the person guilty of a first crime." *Id. Ingalls* has never been overruled.

The United States Supreme Court reached the same conclusion in *Gryger v. Burke*, 334 U.S. 728 (1948). The Court rejected a challenge to the use of a prior conviction to prove that the defendant was a habitual criminal. It reasoned that "[t]he sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* at 732.

The Supreme Court has repeatedly affirmed its holding in *Gryger*. For instance, in *Witte v. United States*, 515 U.S. 389, 400 (1995), the Court rejected the defendant's argument that using his conduct underlying a prior conviction to enhance the sentence for a subsequent conviction constituted double jeopardy. And in *United States v. Rodriguez*, 553 U.S. 377, 386 (2008), the Court said that "When a defendant is given a higher sentence under a recidivism statute—or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a

sentence based on the defendant's criminal history—100% of the punishment is for the offense of conviction."

In *State v. Schuman*, 186 Wis. 2d 213, 520 N.W.2d 107 (Ct. App. 1994), the court of appeals applied these principles in an OWI case. The defendant in *Schuman* was sentenced for OWI as a third offense. *Id.* at 215. One of his prior offenses used to enhance his OWI and make it a third offense was a tribal offense which had not been countable under Wis. Stat. § 343.307 at the time he committed it. *Id.* The defendant claimed that when his tribal offense was counted to make his later OWI a third offense, he was "retroactively punished more severely for his tribal OWI conviction." *Id.* at 217. The court of appeals rejected that argument, concluding that "the amendment did not increase Schuman's punishment for the tribal offense, but increased his punishment for his present offense because it was a third offense." *Id.* Relying on *Gryger*, 334 U.S. at 732, the court concluded that "Schuman's sentence as a third offender is not an additional, retroactive, penalty for the tribal court conviction, but a stiffer penalty for the latest crime." *Id.* at 218. The court said that the amended statute does not punish the prior offense again, but merely punishes the "subsequent crime more severely based on" the prior offense. *Id.* at 215.

In *Nichols v. United States*, 511 U.S. 738 (1994), the Supreme Court again affirmed that the use of a prior offense to enhance a subsequent offense is not additional punishment for the prior offense. *Nichols* is particularly instructive because—like in the case at hand—the prior offense was one for which the defendant could not have been imprisoned. The Court determined that even though the defendant could not have been imprisoned for the prior offense, it was permissible to enhance the sentence of imprisonment for a subsequent offense solely because of the prior offense.

In *Nichols*, an uncounseled defendant was convicted of a misdemeanor for driving under the influence of an intoxicant (DUI). *Id.* at 740. He was fined but not imprisoned. *Id.* The defendant had no Sixth Amendment right to counsel because he was not imprisoned. *Id.* at 743 (citing *Scott v. Illinois*, 440 U.S. 367, 373 (1979)). But because the defendant was uncounseled and he did not waive counsel, had he been required to serve even a single day in jail his Sixth Amendment right to counsel would have been violated. *Id.*

The defendant was later convicted of a felony federal drug offense in a separate case. *Id.* at 740. His uncounseled DUI conviction was considered as part of his criminal history, increasing the penalty range for his federal offense from 168 to 210 months to 188 to 235 months. *Id.* The defendant asserted that counting his DUI conviction to increase the sentence for his subsequent felony conviction would violate his Sixth Amendment right to counsel in his DUI case. *Id.* at 741. The federal district court disagreed and sentenced the defendant to 235 months, which was 25 months longer than the maximum sentence he could have received had the uncounseled misdemeanor conviction not been considered. *Id.*

The Sixth Circuit Court of Appeals affirmed. *Id.* at 742. The Supreme Court granted review and upheld the defendant's federal conviction and the enhanced sentence because of his uncounseled DUI conviction. *Id.* The Court acknowledged that since the defendant was uncounseled, he could not have been imprisoned for his DUI conviction without his Sixth Amendment right to counsel being violated. *Id.* at 743. And the Court acknowledged that if the defendant's uncounseled DUI conviction were not considered to enhance the sentence for his subsequent felony drug conviction, he could not have received a 235–month sentence. *Id.* at 741. Instead, the maximum would have been 210 months. *Id.*

But the Court rejected the argument that the additional 25 months was additional punishment for the defendant's uncounseled DUI conviction. The Court said that "Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction." *Id.* at 747. And the Court said that it "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Id.* (citation omitted).

Courts in other jurisdictions have recognized that under *Nichols*, the use of a prior offense to enhance a criminal sentence in a subsequent case does not penalize the prior offense. For instance, in *State v. King*, 251 A.3d 79 (Conn App. Ct. 2021), the court recognized that "the United States Supreme Court has consistently sustained repeat offender laws as penalizing only the last offense committed by a defendant." *Id.* at 88 (citing *Nichols*, 511 U.S. at 747). And in *State v. Young*, 863 N.W.2d 249 (IA 2015), the court recognized that in *Nichols*, "the Court held that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction in sentencing a defendant for a subsequent offense so long as the uncounseled misdemeanor conviction did not result in a sentence of imprisonment." *Id.* at 269 (citing *Nichols*, 511 U.S. at 748–49). The Iowa Supreme Court noted that the under *Nichols*, "enhancement statutes do not change the penalty for the original uncounseled misdemeanor but impose penalties only for the last offense committed by the defendant." *Id.* (citing *Nichols*, 511 U.S. 746–47).

And under *Nichols*, it makes no difference that the prior offense is one for which the person could not have been jailed. *Nichols* "held that a sentencing court may, consistent with the sixth and fourteenth amendments, consider a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense as long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment." *State v. Brooks*, 874 A.2d 280, 286 (Conn. Ct. App. 2005). And "Implicit in the *Nichols* decision is that a prior uncounseled misdemeanor conviction that is constitutional at the time of the conviction does not later become unconstitutional because it became a factor in a separate proceeding that did result in imprisonment."). *Id.*

As the Supreme Court, this Court, the court of appeals, and courts in other jurisdictions have recognized, the use of a prior offense to enhance the sentence for a subsequent offense does not punish the prior offense. And as the Supreme Court made clear in *Nichols*, the same is true when the prior offense is one for which the person could have been criminally punished. The use of a prior offense for which a person could not have been imprisoned—like Forrett's refusal which resulted in only a permissible civil penalty—to increase the criminal sentence in a subsequent case does not criminally punish the prior offense. The court of appeals' conclusion to the contrary in *Forrett* is simply wrong.

5. The court of appeals' reasoning for striking down Wisconsin's OWI penalty statutes, if correct, would seemingly invalidate Wisconsin's other statutes that increase the punishment because a person is a recidivist.

As the Wisconsin Supreme Court recognized in 2003, "For more than a century, Wisconsin laws have authorized courts to enhance the sentences of repeat offenders." *State v. Radke*, 2003 WI 7, ¶ 16, 259 Wis. 2d 13, 657 N.W.2d 66. The court of appeals in this case found Wisconsin's OWI penalty enhancement structure unconstitutional because it concluded that using a prior offense to enhance the sentence for a subsequent offense actually punishes the prior offense. *Forrett*, 2021 WI App 31, ¶¶ 16–18. (Pet-App. 107–09.) The court of appeals' reasoning, if correct, would seemingly invalidate Wisconsin's other statutes that punish a repeat offense more severely because it is a repeat offense.

For instance, the penalty for a first offense OWI is not imprisonment, but merely a civil forfeiture. Wis. Stat. § 346.65(2)(am)1. A second offense has a maximum penalty of 6 months of imprisonment. Wis. Stat. § 346.65(2)(am)2. If a 6-month sentence for a second offense is actually additional punishment for the first offense, the person is being impermissibly criminally punished for a first offense.

Similarly, the sentence for a conviction for homicide by intoxicated use of a vehicle in violation of Wis. Stat. § 940.09 is enhanced if the person has a prior conviction for an OWI-related offense. Homicide by intoxicated use of a vehicle is a Class D Felony, with a maximum penalty of 25 years of imprisonment. Wis. Stat. §§ 939.50(3)(d), 940.09(1c)(a). But if a person has a prior OWI-related offense as counted under Wis. Stat. § 343.307(2), homicide by intoxicated use of a vehicle is a Class C Felony, with a maximum penalty of 40

years of imprisonment. Wis. Stat. §§ 939.50(3)(c), 940.09(1c)(b). If a person with a prior offense is sentenced to 40 years of imprisonment, the sentence is not 25 years for OWI-homicide and an additional 15 years for the first offense OWI, which is punishable as only a civil forfeiture. The 40-year sentence is for OWI-homicide as a recidivist. The same would obviously be true if the prior offense were a revocation for refusing to take a blood test. The 40 years for homicide by intoxicated use of a vehicle would not be 25 years for the homicide and 15 years for the prior refusal. But under *Forrett*, any penalty exceeding 25 years would seemingly be impermissible.

In the same manner, a person who operates a motor vehicle after revocation (OAR) in violation of Wis. Stat. § 343.44(2)(ar)2. may be imprisoned for up to one year if the reason for the revocation is a conviction for an OWI-related offense, or a revocation for an improper refusal. But under *Forrett*'s reasoning, the one year of imprisonment would be punishment for the underlying OWI-related conviction or refusal. If the one year were actually punishment for a revocation due to a first offense OWI conviction, the penalty would exceed the maximum penalty for a first offense OWI, which is only a civil forfeiture. And if the OAR were based on a revocation for refusing a blood test, the person couldn't properly be charged with OAR under *Forrett* because OAR carries with it the potential for a criminal penalty. After all, but for the refusal, the person's operating privilege would not have been revoked. Under *Forrett*'s reasoning, any penalty would be for the refusal.

Wisconsin's two-strikes and three-strikes law, Wis. Stat. § 939.62(2m), authorize a life sentence without the possibility of parole or extended supervision for repeat offenses that would not carry a life sentence if they were first offenses. Under *Forrett*'s reasoning, the increased sentence for a second or third offense that results in a life sentence is really additional criminal punishment for the first offense. But that is obviously not how the statute works. And in *Radke*, 259 Wis. 2d 13, this Court addressed Wis. Stat. § 939.62(2m) and unanimously upheld the statute's constitutionality.

Wisconsin's drug possession statutes authorize a longer sentence for a repeat offense. Possession of THC is a misdemeanor if it is a first offense, but a felony if it is a second or subsequent offense. Wis. Stat. § 961.41(3g)(e). The same is true for possession of cocaine, Wis. Stat. § 961.41(3g)(c), and possession of LSD, Wis. Stat. § 961.41(3g)(d). The increased potential imprisonment for a second offense is obviously not additional punishment for the first offense.

The court of appeals' reasoning in striking down Wisconsin's OWI penalty enhancement statutes would call into question each of these statutes, as well as the opinions by this Court and the court of appeals upholding the validity of those statutes. But the court of appeals' reasoning is wrong. Wisconsin's accelerated OWI penalty enhancement statutes do not criminally punish a refusal to take a blood test. They merely impose a longer sentence for a person convicted of a repeat OWI-related offense because it is a repeat offense. And just like in *Nichols*, it makes no difference that the prior offense is one for which the person could not be imprisoned. Wisconsin's penalty enhancement statutes, including the OWI penalty enhancement statutes, are not unconstitutional.

II. Forrett has not shown that his trial counsel was ineffective for not objecting to the use of his 1996 refusal to enhance the sentence for his current OWI conviction.

In his motion for postconviction relief, Forrett asserted that his trial counsel was ineffective for not objecting to the use of his 1996 refusal to enhance the sentence for his current OWI conviction. (R. 51:6–8, Pet-App. 154–56.) The circuit court recognized that since it rejected Forrett's claim that Wisconsin's OWI penalty enhancement statutes are unconstitutional, it did not need to address his ineffective assistance claim. (R. 62:11, Pet-App. 168.) The court of appeals did not address Forrett's claim for the opposite reason—it concluded that it did not need to address the ineffective assistance claim because it found Wisconsin's OWI penalty enhance statutes unconstitutional. *Forrett*, 2021 WI App 31, ¶ 19 n.6. (Pet-App. 109.) This Court need not address Forrett's ineffective assistance claim because, like the circuit court recognized, Wisconsin's OWI penalty enhancement statutes are constitutional, and Forrett's counsel was not ineffective for not challenging them.

To prove that his trial counsel was ineffective, Forrett had to "prove both that his or her attorney's performance was deficient, and that the deficient performance was prejudicial." *State v. Allen*, 2004 WI 106, ¶ 26 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted). To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* (citing *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12).

Forrett has not proved that his trial counsel performed deficiently or that he suffered any prejudice. "As a general matter, '[c]ounsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective.'" *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 893 N.W.2d 232 (quoting *Basham v. United States*, 811 F.3d 1026, 1029 (8th Cir. 2016), in turn quoting *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir 2005)). "In order to constitute deficient performance, the law must be settled in the area in which trial counsel was allegedly ineffective." *State v. Hanson*, 2019 WI 63, ¶ 28, 387 Wis. 2d 233, 928 N.W.2d 607. And trial counsel cannot be constitutionally deficient for failing "to forecast changes or advances in the law," *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993), even if the issue was "percolating" at the time of the defendant's trial. *Smith v. Murray*, 477 U.S. 533, 536 (1986).

Forrett acknowledged in his brief on appeal that whether a refusal to submit to a lawful request for a blood sample is "an issue of first impression." (Forrett's Br. 1.) Forrett's trial counsel did not perform deficiently by not raising a novel argument.

And as explained above, Forrett's claim that is it unconstitutional to use a refusal to take a blood test in one case to enhance the sentence in a separate subsequent case is incorrect. *State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369. Forrett's counsel certainly did not perform deficiently by not making a losing novel argument. Because Forrett has not shown that his trial counsel performed deficiently or that he suffered any prejudice, he has not proved that counsel was ineffective.

CONCLUSION

This Court should reverse the court of appeals' decision and affirm Forrett's judgment of conviction for operating a motor vehicle while under the influence of an intoxicant as a seventh offense.

Dated: November 26, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 8343 words.

Michael C. Sanders

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 26th day of November 2021.

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