STATE OF WISCONSIN
SUPREME COURT
APPEAL CASE NO. 2019AP1850-CR

State of Wisconsin,

Plaintiff-Respondent-Petitioner,
v.
Scott William 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 OF AMICUS CURIAE CITY OF EAU CLAIRE

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INTRODUCTION

The defendant's arguments contradict settled law, and accepting these arguments will create a loophole rendering thousands of drunk driving convictions void. Contrary to the Court of Appeals decision in this case, using a civil refusal revocation to enhance a future criminal penalty does not constitute a "delayed" criminal penalty for the civil refusal. Courts may use civil refusal revocations as predicate offenses to enhance future criminal OWI penalties. Penalty enhancement statutes do not change the penalty imposed for earlier convictions, but rather consider prior conduct as aggravating factors for sentencing on the subsequent charge. If a civil refusal revocation is otherwise valid its use to enhance a future criminal penalty does not criminalize the refusal.

The Court should either narrowly construe *Dalton* to apply to cases in which courts impose a criminal penalty based "solely" on a defendant's refusal, or in the alternative, the Court should overrule *Dalton*. There is no constitutional right to refuse an OWI blood draw that follows the requirements of Wisconsin's implied consent laws and does not threaten criminal penalties.

Affirming the Court of Appeals decision will result in fewer OWI suspects consenting to blood draws, more burdens on prosecutors and judges, and may impact the ability to maintain Wisconsin's current OWI penalty structure. In the alternative, the Court should apply any decision in favor of

Forrett prospectively because prosecutors and defense attorneys have entered innumerable settlement agreements in good faith reliance on Wisconsin's accelerated penalty structure in which a civil refusal revocation constitutes a valid prior OWI conviction.

1. Courts may use civil refusal revocations as predicate offenses to enhance future criminal OWI penalties.

Relying on prior civil refusal convictions as predicate offenses for OWI penalty enhancement is constitutional. It is settled law that penalty enhancement statutes do not change the penalty imposed for earlier convictions. *See United States v. Bryant*, 579 U.S.140, 136 S.Ct. 1954 (2016) (Use of valid uncounseled convictions as predicate offenses for sentencing purposes is not incompatible with the 6th Amendment's right to counsel.); *Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921 (1994) (penalty enhancement statutes "do not change the penalty imposed for the earlier conviction."); *United States v. Rodriquez*, 553 U.S. 377, 128 S.Ct. 1783 (2008) (Higher sentences under recidivism statutes does not increase penalty for prior offenses, but rather increases penalty for latest crime which is considered aggravated.); *United States v. Watts*, 519 U.S.148, 117 S.Ct. 633 (1997) ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction."). Penalty enhancement statutes do not "delay" punishment for prior conduct as the

Court of Appeals suggests, but rather consider prior conduct as aggravating factors for sentencing on the subsequent charge. *Id.*

Convictions that are valid when entered do not become invalid because they enhance a later criminal penalty. The Court of Appeals decision in this case contradicts numerous decisions from the United States Supreme Court, and calls into question a significant amount of existing sentencing case law. The Court should apply *Bryant*, *Nichols*, *Rodriquez*, and *Watts* in reversing the Court of Appeals decision in this case.

Bryant demonstrates that using prior convictions with primarily civil penalties as predicate offenses to enhance criminal penalties in future cases does not criminalize the prior conduct. *Bryant*, 579 U.S. at 154-57. In *Bryant* the United States Supreme Court examined whether a federal statute that included tribal court convictions as predicate offenses for habitual offender purposes is compatible with the 6th Amendment's right to counsel. *Id.* The federal statute, 18 U.S.C. § 117(a), was enacted by Congress in response to the high incidence of domestic violence against Native American women. Section 117(a) provides that any person who "commits domestic violence assault within…Indian Country" and who has at least two prior final convictions for domestic violence shall be fined, imprisoned for a term of not more than 5 years, or both. *Bryant*, 579 U.S. at 154-57. The 6th Amendment's right to counsel does not apply to tribal court convictions. *Id.* The defendant in *Bryant* argued that the Supreme Court should create a

hybrid category for tribal court convictions that are "good for the punishment actually imposed but not available for sentence enhancement in a later prosecution." *Id.*

Bryant determined that using valid tribal court convictions as predicate offenses did not violate the 6th Amendment's right to counsel even though the defendant lacked legal counsel for the tribal court convictions. *Id.* at 154-57. Prior valid convictions are not rendered invalid because they are used to enhance a criminal penalty in a subsequent proceeding. *Id. Bryant* recognized that creating a rule that allowed tribal court convictions to be "good for the punishment actually imposed but not available for sentence enhancement in a later prosecution" contradicted constitutional principles. *Id.* "Because a defendant convicted in tribal court suffers no 6th Amendment violation in the first instance, use of trial convictions in a subsequent prosecution cannot violate the 6th Amendment anew." *Id.* The Court should apply *Bryant* in determining that courts may use valid refusal revocations as predicate offenses to enhance future OWI criminal sentences because penalty enhancement statutes do not impose a penalty for prior conduct. *Bryant* cited *Nichols* and *Rodriquez* in support of its decision.

Nichols concluded that penalty enhancement statutes do not change or delay the penalty imposed for the earlier conviction, that sentencing considerations are broad in scope, and courts may consider a wide variety of factors including a defendant's prior convictions and prior conduct in

determining what sentence to impose. *Nichols*, 511 U.S. at 747-48; *see also State v. Verhagen*, 2013 WI App 16, ¶¶ 21-23, 346 Wis. 2d 196, 827 N.W.2d 891 (Sentencing factors include the defendant's past record of criminal offenses and history of undesirable behavior). *Nichols* demonstrates using civil refusal revocations as predicate offenses does not criminalize the prior conduct.

Rodriquez concluded that "[w]hen 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." *Rodriquez*, 553 U.S. at 385-86. *Rodriquez* determined that none of the punishment is for the prior convictions or the defendant's status as a recidivist, and the sentence is a stiffened penalty for the latest crime which is considered an aggravated offense because it is a repetitive one. *Id.* *Rodriquez* contradicts the Court of Appeals' conclusion that using a civil refusal revocation to enhance a future criminal penalty constitutes a "delayed" criminal punishment for the civil refusal because *Rodriquez* said that "100% of the punishment is for the offense of conviction."

Watts demonstrates the permissibility of using conduct which does not involve a criminal conviction to enhance a future criminal penalty. *United States v. Watts*, 519 U.S.148, 117 S.Ct. 633 (1997). In *Watts* the

Court upheld the use of acquitted conduct for sentence enhancement purposes. In so doing, the United States Supreme Court overruled a 9th Circuit Court of Appeals decision which reached a similar decision to the Court of Appeals in the present case. *Watts*, 519 U.S. at 154-55. The 9th Circuit Court of Appeals concluded that when a sentencing court considers facts underlying a charge on which the jury returned a verdict of not guilty, the defendant suffers punishment for the earlier criminal charge for which he or she was acquitted. *Id.* *Watts* said that conclusion contradicted settled law and pointed out "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Id.* If sentencing courts may consider acquitted conduct for sentencing purposes it is unreasonable to prohibit consideration of civil refusal convictions for sentencing purposes.

The Court of Appeals decision created precisely the type of hybrid category of offense the United Supreme Court warned against in *Bryant*. Under the Court of Appeals decision refusal revocations are "good for the punishment actually imposed, but not available for sentence enhancement in a later prosecution." That type of hybrid category contradicts existing sentencing law by concluding that using a prior conviction for future penalty enhancement creates additional punishment for the prior conviction. Consequently, the Court of Appeals' decision should be reversed.

2. The Court should narrowly construe *Dalton* to apply to cases in which a criminal penalty is based "solely" on a defendant's refusal, or in the alternative, the Court should overrule *Dalton*.

The Court should narrowly construe *Dalton* to prohibit courts from imposing a criminal penalty based "solely" on a defendant's refusal, or in the alternative, the Court should overrule *Dalton*. *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. There is no constitutional right to refuse an OWI blood draw that follows the requirements of Wisconsin's implied consent laws and does not threaten criminal penalties for the current refusal. This Court should clarify that *Dalton*'s holding is limited to cases in which judges explicitly impose criminal penalties solely because a defendant refused a blood draw.

Factors supporting narrowly construing or overruling *Dalton* include eliminating incoherence and inconsistency in the law, the divided nature of the decision which calls the decision into doubt, no significant reliance interests have built up around the decision, the decision produces general injustice, and less harm will result from overruling or narrowing the decision which will also harmonize the law. *See Johnson Controls, Inc. v. Employers Ins. Of Wausau*, 2003 WI 108, ¶ 97-98, 264 Wis. 2d 60, 665 N.W.2d 257; Bryan A. Garner, et al, *The Law of Judicial Precedent*, 388-403 (2016); *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991) (noting the narrow margins and spirited dissents in overruling two recently decided cases).

Courts may use otherwise valid refusal revocations to enhance criminal penalties in future OWI sentencings. The touchstone of the 4th Amendment is reasonableness. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943 (2006). If implied consent procedures are followed and the defendant is not threatened with criminal penalties for the current refusal then the revocation is valid because the requested search is reasonable. *Steve v. Levanduski*, 2020 WI App 53, 393 Wis. 2d 674, 948 N.W.2d 411 ("Because the officer correctly stated the law, Levanduski's consent to the blood draw was voluntary, and the results of the blood test may be used against her at trial."); *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) (voluntariness of consent to a search must be determined from the totality of the circumstances). Wisconsin courts have outlined a variety of defects that can render a refusal revocation invalid, and thus render a search unreasonable. *In re Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 (Failure to provide statutorily required information to defendant, or oversupply of information which materially misleads defendant may render refusal charge invalid); *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774 (Defendant's consent to blood draw is coerced where officer read statutorily required language which misrepresented the law). Contrary to the Court of Appeals' broad interpretation of *Dalton*, a valid civil refusal revocation does not become invalid because it is used to enhance a later criminal OWI sentence.

Overruling or narrowly construing *Dalton* will eliminate incoherence and inconsistency in the law while recognizing reliance interests. In *Dalton* a judge sentenced an OWI defendant to longer term of incarceration because the defendant refused to provide a blood draw. The only potential reliance interests that *Dalton* created are that sentencing judges no longer impose longer criminal sentences on OWI defendants strictly because the defendant refused a blood draw. The Court can maintain that reliance interest, and the interests of stare decisis with a narrow construction. *Dalton* was a divided decision with two spirited dissents that predicted some of the potential problems an overly broad interpretation of *Dalton* could present. *See Dalton* at ¶ 89 (*Roggensack, C.J., dissenting*) (Noting that the majority opinion could be read to conclude that *Birchfield* prohibits the misdemeanor penalty that Wisconsin law requires due to Dalton's revocation for refusing to take a requested test counting as a second OWI); *see also Dalton* at ¶ 100 (*Ziegler, J., dissenting*) (Noting that the majority decision improperly equates a sentencing factor with a criminal statute, and pointing out that circuit courts may rely on the non-criminal behavior of defendants when imposing sentence). The dissenting opinions in *Dalton* are consistent with the cases cited earlier in this brief.

The Court of Appeals' decision contradicts *Birchfield*, *McNeely*, and other United States Supreme Court cases which explicitly endorsed civil refusal charges. *Birchfield* said "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." Birchfield 136 S.Ct. at 2185. *McNeely* pointed out that all 50 states have implied consent laws that impose significant revocation and evidentiary consequences. *Missouri v. McNeely,* 569 U.S. 141, 161, 133 S.Ct. 1552, 1566 (2013). *McNeely* cited *South Dakota v. Neville*, 459 U.S. 553, 133 S.Ct. 1552 (1983), which held that there is not a constitutional right to refuse an otherwise legally requested blood draw. *McNeely*, 569 U.S. at 161.

Narrowly construing or overruling *Dalton* will help ensure that future Wisconsin cases are consistent with existing sentencing case law.

3. Affirming the Court of Appeals' decision will have unintended consequences.

A decision that precludes the use of civil refusal revocations to enhance future OWI criminal sentences will result in fewer OWI suspects consenting to blood draws, more burden on prosecutors and judges, and may impact the ability to maintain Wisconsin's current OWI penalty structure.

In Wisconsin most first offense impaired driving violations are charged as a civil forfeiture similar to a traffic ticket, an approach Justice Blackmun criticized in a concurring opinion issued in 1984. *See Welsh v. Wisconsin*, 466 U.S. 740, 755-56, 104 S.Ct. 2091 (1984) (*Blackmun, J. concurring*) (comparing Wisconsin's decision to charge first offense OWI violations as a civil violation to an "indulgent parent" hesitating to

"discipline the spoiled child."). The Wisconsin legislature crafted an approach which requires ignition interlock devices for OWI cases involving high blood alcohol concentrations and repeat OWI convictions, requires alcohol or drug abuse assessments and other addiction resources, quickly imposes administrative penalties, and often requires jail and prison sentences for repeat offenders. While reasonable minds may disagree on the best legislative approach to this serious problem, the Court should consider the impact a decision in this case may have on Wisconsin civil OWI cases.

First, a decision in favor of Forrett will result in fewer OWI suspects consenting to blood draws. The inability to use refusal revocations as predicate offenses will take away a powerful incentive to consent to blood draws. Second, a decision in favor of Forrett will unreasonably burden prosecutors and judges. After the United States Supreme Court issued the *McNeely* decision, many Wisconsin communities stopped applying for blood draw warrants on civil OWI cases in part to avoid creating more impaired driving litigation, and relying on Wisconsin's accelerated penalty structure in which a civil refusal revocation constitutes a valid prior OWI conviction. If refusal revocations do not count as a predicate offense then prosecutors will apply for more late night and early morning blood draw warrants which will burden prosecutors and judges.

Third, a decision in favor of Forrett will likely result in civil OWI defendants challenging the validity of (civil) blood draw warrants.

Defendants will likely argue that a civil traffic citation does not justify the intrusion of a blood draw. Although Wis. Stat. § 968.13 permits blood draw warrants for civil OWI offenses, the validity of search warrants in the civil context is complicated, and will likely invite further litigation. *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) (discussing when warrantless searches authorized by law are consistent with 4th Amendment requirements).

4. In the alternative, the court should apply any decision in favor of Forrett prospectively.

In the alternative, the court should apply any decision in favor of Forrett prospectively. A prospective application will allow prosecutors and defense attorneys to make informed decisions regarding settlement terms in OWI cases involving a refusal. *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 415, 147 N.W.2d 633, 637 (1967), is instructive on when courts can prospectively apply mandates of unconstitutionality. *Gottlieb* concluded that portions of Wisconsin's Urban Redevelopment Law constituted a tax rebate in violation of the state constitutional requirement of uniformity. However, *Gottlieb* recognized that numerous contracts had been entered in good faith reliance on Wisconsin's Urban Redevelopment Law and applied its decision prospectively.

Similar to *Gottlieb*, prosecutors and defense attorneys have reached innumerable OWI settlements in which defendants are found guilty of the

refusal revocation and the underlying OWI charge is dismissed or amended. These agreements were entered in good faith reliance on Wisconsin's accelerated penalty structure in which a civil refusal revocation constitutes a valid prior OWI conviction. An innumerable amount of refusal revocations will not count as valid prior convictions if this court does not apply a decision in favor of Forrett prospectively. It is bad public policy to allow so many OWI defendants to avoid responsibility for their actions and to void so many OWI settlements entered in good faith.

CONCLUSION

For all the foregoing reasons the Court should reverse the court of appeals' decision and affirm Forrett's judgment of conviction.

Dated: December 9, 2021

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a brief produced with a proportional serif font. The length of this Brief is 2919 words.

Dated this 9th day of December, 2021

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CERTIFICATION OF COMPLIANCE WITH RULE 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 s. 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 this date.

A copy of this certificate is being served with the paper copies of this filed with this court and served on all opposing parties as of this date.

Dated this 9th day of December, 2021

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