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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1850-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

SCOTT W. FORRETT,

Defendant-Appellant.

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On Review of a Decision of the Court of Appeals, District II, 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 D. Schimel, Presiding

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# RESPONSE BRIEF OF DEFENDANT-APPELLANT

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**CASES CITED**

## CONSTITUTIONAL PROVISIONS AND STATUTES CITED

## ISSUE PRESENTED

Is Wisconsin's statutory scheme permitting the use of a prior blood draw refusal to increase the criminal penalty in an operating while intoxicated case unconstitutional?

The circuit court answered no.

The court of appeals answered yes.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed this case appropriate for both oral argument and publication.

## STATEMENT OF THE CASE AND FACTS

A police officer stopped Mr. Forrett's van for weaving, crossing over the fog line, and crossing over the center line. (2:3). Subsequently, based on the officer's observations, Mr. Forrett was arrested for operating while intoxicated (OWI). (2:4). Marijuana and a marijuana pipe were found in his pocket. (*Id.*).

Mr. Forrett was charged with six counts: (1) OWI 7th, contrary to Wis. Stat. § 346.63(1)(a); (2) failure to install an ignition interlock device, contrary to Wis. Stat. § 347.413(1); (3) operating a motor vehicle while revoked (OAR), contrary to Wis. Stat. § 343.44(1)(b); (4) possession of THC, contrary to Wis.

Stat. § 961.41(3g)(e); (5) possession of drug paraphernalia, contrary to Wis. Stat. § 961.573(1); and (6) operating with a prohibited alcohol concentration (PAC) of .266, contrary to Wis. Stat. § 346.63(1)(b). (2; 7).[1]

On January 29, 2018, Mr. Forrett entered a guilty plea to the OWI 7th offense. The PAC charge was dismissed as a matter of law. (71:4).[2] The remaining four counts were dismissed and read-in. (71:2).

During the plea colloquy, the following exchange occurred:

> THE COURT: And you were previously convicted of OWI related offenses on January 22 of 1992, February 22 of 1993, August 29 of 1994, March 14 of 1995, August 26 of 1996, and March 24 of 2014?
>
> DEFENSE COUNSEL: Judge, August 26, 1996 was a refusal, there wasn't an OWI conviction but it still counts as a prior.3

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[1] Unless otherwise indicated, all of the statutes in this brief refer to the statutes in place at the time of this incident, April 26, 2017.

[2] There was also a refusal in this case, which the Court dismissed. (71:15, 32-33).

[3] On July 27, 1996, Mr. Forrett refused to submit to a blood draw. (*See* 53 (Criminal Complaint for Waukesha Co. Case No. 96-CF-504)). The OWI 5th charge that arose out of that incident was dismissed and read-in. (*See* 52 (Judgment of Conviction for Waukesha Co. Case No. 96-CF-504)).

> THE COURT: All right. And with that correction is that all true?
>
> MR. FORRETT: Yes, Your Honor.

(71:14; *see also* 71:22 (stating that the 5th offense was a refusal)).

Sentencing took place on the same date, the Honorable Michael J. Aprahamian presiding. The Court sentenced Mr. Forrett to 11 years of prison (6 years of initial confinement and 5 years of extended supervision) without early release programming. (71:31-34).

Subsequently, Mr. Forrett, by counsel, filed a postconviction motion arguing that the Wisconsin statutes allowing the use of his 1996 refusal for the purposes of penalty enhancement were unconstitutional facially and as applied. (51:6). The motion also alleged that trial counsel was ineffective for failing to object to Wisconsin's unconstitutional penalty scheme and the use of Mr. Forrett's prior refusal. (*Id.*).

The circuit court, the Honorable Brad D. Schimel presiding, denied the postconviction motion after a hearing. The court concluded that while a State cannot directly punish a person criminally for refusing to provide a blood sample, a prior refusal may be used to increase the penalty for a subsequent OWI. The court therefore rejected Mr. Forrett's claim that Wisconsin's OWI penalty scheme is unconstitutional and that his trial counsel was ineffective for failing to raise an objection. (62:10-11).

The court of appeals reversed. Pursuant to *North Dakota v. Birchfield*, 136 S. Ct. 2160 (2016) and *State v. Dalton,* 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, the court held that increased criminal penalties based on a refusal to submit to a warrantless blood draw violated Mr. Forrett's Fourth Amendment right to be free from an unreasonable warrantless search. Consequently, the court held that Wisconsin's accelerated penalty scheme for OWI-related offenses is unconstitutional and remanded the case to the circuit court to impose judgment and sentence for a 6th offense. *State v. Forrett*, 2021 WI App 31, ¶¶ 14-19, __ Wis. 2d __, 961 N.W.2d 132.[4]

## ARGUMENT

### I. Wisconsin's statutory scheme permitting the use of prior blood draw refusals to increase the criminal penalties in operating while intoxicated cases is unconstitutional.

A. Introduction.

Chapter 346 of the Wisconsin Statutes sets forth "rules of the road." Wis. Stat. § 346.63(1) provides that no person may drive or operate a motor vehicle while under the influence of an intoxicant.

[4] The court did not reach the parties' ineffective assistance of counsel arguments because its conclusion that Wisconsin's OWI penalty scheme is unconstitutional was dispositive of the appeal. *Id.*, ¶ 19 n. 6.

When an individual commits an OWI violation, Wis. Stat. § 346.65(2) provides a framework of escalating penalties. For example, if a person has 6 prior offenses, that person is guilty of a Class G felony and faces a maximum of 10 years of prison and a $25,000 fine, as well as a minimum of 6 months in jail[5] and a fine of $600. *See* Wis. Stat. § 346.65(2)(am)(5). In comparison, a person with 7 prior offenses is guilty of a Class F felony and faces a maximum of 12.5 years of prison and a $25,000 fine, as well as a minimum of 3 years of initial confinement. *See* Wis. Stat. § 346.65(2)(am)(6).

A statute in a different chapter, Wisconsin Chapter 343, provides guidance as to what qualifies as a prior offense for the purposes of the OWI penalty scheme. Pertinent to this case, Wis. Stat. §§ 343.307(1)(f) and Wis. Stat. § 343.305(10) reflect that a refusal to submit to a blood draw qualifies as a prior offense. As discussed below, the use of a prior refusal to increase an OWI penalty is unconstitutional both facially and as applied to Mr. Forrett.[6]

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[5] This minimum was recently increased to 1 year and 6 months. *See* 2019 Wisconsin Act 106.

[6] A party may challenge a statute as unconstitutional on its face. *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. "Under such a challenge, the challenger must show that the law cannot be enforced 'under any circumstances.'" *Id.* (citation omitted). In contrast, in an as-applied challenge, the challenger must show that his or her constitutional rights were actually violated. *Id.*

B. Standard of review.

Whether Wisconsin's OWI penalty scheme is unconstitutional facially or as applied presents a question of law that is reviewed *de novo*. *Winnebago Cnty. v. C.S.*, 2020 WI 33, ¶ 13, 391 Wis. 2d 35, 940 N.W.2d 875.

Under Wisconsin law, statutes are presumed constitutional. *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328. The party challenging the statute must "prove that the statute is unconstitutional beyond a reasonable doubt." *Id.*

C. Wisconsin's statutory scheme permitting the use of prior blood draw refusals to increase OWI penalties is unconstitutional.

The Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Eason*, 2001 WI 98, ¶ 16, 245 Wis. 2d 206, 629 N.W.2d 625.

In *Birchfield v. North Dakota*, the United States Supreme Court examined whether laws 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. As to breath tests, the Court noted that these tests are significantly less intrusive than blood draws and do not implicate substantial privacy concerns. *Id.* at 2184-2185. Accordingly, the Court concluded that a breath test

may be administered as a search incident to a lawful arrest for drunk driving and that states may impose criminal penalties for refusals to submit to breath tests. *Id.* at 2185-2186.

However, with regard to blood tests, the Court concluded that unlike breath tests, blood draws do not qualify for an exception from the warrant requirement under the search-incident-to-arrest doctrine because "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." *Id.* at 2184. In so doing, the Court noted the necessity of piercing the skin to extract a vital bodily fluid versus the ease of administering a breath test, the increased expectation of privacy in blood as compared to breath, and the information which may be obtained from a blood sample beyond a mere blood alcohol content (BAC) reading. *Id.* at 2178. Having determined that the search-incident-to-arrest doctrine did not justify warrantless blood draws, the Court considered whether blood draws were justified based on a driver's legally implied consent to submit to them. *Id.* at 2185.

The Court determined "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186. Acknowledging 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", the Court emphasized that *criminal penalties may not be imposed* for a blood draw refusal. *Id.* at 2185

(emphasis added). The Court stated that "it is another matter ... for a State to not only insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." *Id*. "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.*

In Wisconsin, however, refusal to submit to a blood draw counts as a prior offense for the purpose of imposing enhanced criminal penalties for OWI. *See* Wis. Stat. §§ 346.63(1), 346.65(2)(am), 343.307(1)(f), 343.305(10). Consequently, Wisconsin's OWI penalty statutes go beyond merely imposing civil penalties and evidentiary consequences for refusal to submit to a blood draw. Instead, they allow for exactly what *Birchfield* prohibits—the imposition of criminal penalties based on the refusal to submit to a blood draw.

Based on the above, Wisconsin's OWI statutes criminally penalize the exercise of a constitutional right in violation of the United States and Wisconsin constitutions. U.S. Const. Amends. 4, 5, 14; Wis. Const. Art. 1, § 1. Under established case law, a defendant may not be penalized for exercising a protected right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (it is a due process violation to punish a person for doing what the "law plainly allows"); *Buckner v. State*, 56

Wis. 2d 539, 550, 202 N.W.2d 406 (1972) (explaining that "[a] defendant cannot receive a harsher sentence solely because he availed himself of one of his constitutional rights."); *Kubart v. State*, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975) ("A defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury.").

Furthermore, Wisconsin's OWI penalty scheme permitting the counting of blood draw refusals is unconstitutional under this Court's decision in *Dalton*. In *Dalton,* the Court considered a circuit court's decision to impose a lengthier OWI sentence based on the defendant's blood draw refusal. The Court noted that under *Birchfield*, "criminal penalties may not be imposed for a refusal" and *"[a] lengthier jail sentence is certainly a criminal penalty*." *Dalton*, 383 Wis. 2d 147, ¶¶58-60 (emphasis added)(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)). Consequently, the Court held that imposing "a longer sentence for the sole reason that [Mr. Dalton] refused to submit to a blood test" is impermissible under *Birchfield*. *Dalton*, 383 Wis. 2d 147, ¶60.[7]

[7] In light of *Birchfield*, other states have also invalidated penalty-enhanced OWI sentences that were based on warrantless blood draw refusals, *see e.g., Commonwealth v. Monarch*, 200 A.3d 51, 57- 58 (Pa. 2019) (enhanced mandatory minimum sentence based on defendant's refusal to submit to

Similarly, here the circuit court imposed a longer sentence that was based upon Mr. Forrett's refusal to submit to a blood draw. Specifically, the blood draw refusal at issue in his case increased his OWI from a 6th offense Class G felony to a 7th offense Class F felony with higher maximum and minimum penalties. *See* Wis. Stat. §§ 939.50(3) and 346.65(2)(am) 5 & 6. Mr. Forrett's sentence of 11 years of imprisonment exceeds the maximum penalty he could have received for an OWI 6th, and as such he received a lengthier sentence based on his blood draw refusal and the penalty scheme that allows for the counting of these refusals.

Therefore, the Wisconsin OWI statutes which allow a blood draw refusal to count as a prior offense to increase a person's sentence are unconstitutional both facially and as applied to Mr. Forrett, because there are no circumstances in which counting a prior blood draw refusal for other defendants would be

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warrantless blood draw held unconstitutional); *State v. McCarthy*, 628 S.W.3d 18, 25 (2021) (same); *State v. Vargas*, 404 P.3d 416, 422 (N.M. 2017) (aggravation of charge for OWI based on defendant's refusal to consent to warrantless blood draw violated Fourth Amendment). *Cf. State v. LeMenuier-Fitzgerald*, 188 A.3d 183, 193 (2018) (enhanced mandatory minimum sentence based on defendant's refusal to submit to warrantless blood draw upheld in part on the grounds that the refusal increased neither the classification of the offense nor the maximum penalties).

permissible.[8] Accordingly, this Court should affirm the court of appeals and remand the case to the circuit court to impose judgment and sentence for a sixth offense.

### D. Refusal to submit to a warrantless blood draw is a constitutionally-protected right, not a prior offense of drunk driving that can be used for sentence enhancement purposes.

According to the State, "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." (State's Br. at 26). Thus, the State argues that counting a blood draw refusal as a repeat offense to enhance OWI penalties does not punish the refusal and instead simply increases the penalty for the OWI based on the defendant's recidivism. (*Id.*). However, as *Birchfield* held, refusal to submit to a warrantless blood draw is constitutionally permissible in the exercise of one's Fourth Amendment right to be free from a warrantless search—it is not a prior conviction for drunk driving. The State does not cite any case law from the United States Supreme Court, this Court, or the court of appeals supporting its claim that the exercise of one's

[8] *Cf. C.S.*, 2020 WI 33, ¶¶ 3-5 & 14 n. 6 (discussing categorical facial challenges and concluding that Wisconsin's medication statute is facially unconstitutional for any prison inmate involuntarily committed under Chapter 51 when the inmate is involuntarily medicated merely on the basis of incompetence to refuse medication).

Fourth Amendment right to refuse a warrantless blood draw may subsequently be utilized as a prior offense in order to enhance criminal penalties.

Moreover, this Court already rejected a nearly identical argument advanced by the State in *Dalton*. In that case, the Court dismissed the notion that a blood draw refusal constituted a legitimate aggravating factor that justified increasing the defendant's sentence for OWI. *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"). In so doing, the Court noted the following:

> Taken to its logical extreme, the State's argument would allow a circuit court to increase a sentence because a defendant exercised the right to a jury trial, did not consent to a search of his home, or exercised his right to remain silent, as long as the sentence is within the statutory range. Contrarily, our case law indicates that a defendant may not be punished in this manner.

*Dalton*, 383 Wis. 2d 147, ¶65.

Taking the State's argument in the present case to its logical extreme, it would be permissible to use a defendant's exercise of the right to a jury trial, refusal to consent to a search of their home, or their exercise of the right to remain silent to serve as the basis for enhanced criminal penalties in a separate and subsequent case. Under the State's reasoning, this would not actually punish the defendant for exercising their rights and would instead simply impose an

increased penalty in the subsequent case. However, an increased penalty based solely on the exercise of a constitutional right is impermissible. As noted above, "[a] defendant cannot receive a harsher sentence solely because he availed himself of one of his constitutional rights." *Buckner*, 56 Wis. 2d 539 at 550.

Furthermore, the case law the State relies on does not support its argument. For instance, the State cites *Nichols v. United States*, 511 U.S. 738 (1994), which it says "is particularly instructive because—like in the case at hand—the prior offense was one for which the defendant could not have been imprisoned." (State's Br. at 28). In that case, an uncounseled defendant was convicted of a misdemeanor OWI in state court and received a fine but no jail sentence. *Id.* at 740. The defendant was later convicted of a federal felony drug offense in a separate case, and his uncounseled OWI conviction was considered as part of his criminal history which subjected him to an enhanced penalty for the drug offense. *Id.* at 740-741. The United States Supreme Court upheld the defendant's enhanced sentence, noting that the defendant had no right to counsel in his state case because he did not receive a jail sentence in that case, and that the defendant's criminal history could therefore properly be considered at sentencing. *Id.* at 747-749.

Contrary to the State's argument, *Nichols* is distinguishable. The prior offense at issue in *Nichols* was the defendant's actual criminal conviction for drunk driving, not his exercise of the Fourth Amendment right to refuse a warrantless blood draw,

and there was nothing that prevented the court from considering that conviction as an aggravating factor in a subsequent case. In contrast, here Mr. Forrett was not convicted of OWI, but rather a refusal to submit to a warrantless blood draw, which this Court has already held may not be considered an aggravating factor at sentencing. *See Dalton*, 383 Wis. 2d 147, ¶ 65. As the court of appeals observed in its decision in this case:

> [T]he State … argues that the increased penalty simply reflects the fact that the most recent OWI is now a more "serious offense" in light of the prior refusal. This amounts to an argument that the use of a refusal to enhance penalties in a subsequent case merely punishes the offender for recidivism and does not rise to the level of a criminal penalty. More specifically, the State suggests that counting blood draw refusals results only in an increased penalty or penalty enhancer for the recidivist drinking while driving. *But the refusal is just that—a refusal to a warrantless blood draw—not another offense for drinking while driving.*

*Forrett*, 2021 WI App 31, ¶ 16 (emphasis added).

Further, all of the other recidivism cases cited by the State, like *Nichols*, involve defendants who received longer sentences based on their prior *criminal* conduct. *See Ingalls v. State*, 48 Wis. 647, 4 N.W. 785, 785 (1880) (sentence lengthened due to prior larceny offense); *Gryger v. Burke*, 334 U.S. 728, 731 (1948) (sentence lengthened due to extensive criminal history); *Witte v. United States*, 515 U.S. 389, 394 (1995) (sentence lengthened due to prior drug

trafficking offenses); *United States v. Rodriguez*, 553 U.S. 377, 381-382 (2008) (same); *State v. Schuman*, 186 Wis. 213, 215, 520 N.W.2d 107 (Ct. App. 1994) (sentence lengthened due to prior OWI offense). Accordingly, these cases are inapposite to Mr. Forrett's case, which does not involve a prior criminal conviction, but instead a civil refusal of a warrantless blood draw.

The State also claims that "[u]se of refusal to prove that a person is a recidivist is a permissible evidentiary consequence of an unlawful refusal." (State's Br. at 9). This claim is underdeveloped and, in any event, misguided. As the court of appeals correctly noted, "case law makes clear that use of a refusal for evidentiary purposes in order to establish criminal liability for OWI is within the constitutionally permissible limits, while imposing criminal penalties is not." *Forrett*, 2021 WI App 31, ¶ 18. *See also Dalton*, 383 Wis. 2d 147, ¶62 (rejecting the contention that a refusal can be considered an aggravating factor at sentencing that reflects on the defendant's character); *State v. Levanduski*, 2020 WI App 53, ¶ 15, 393 Wis. 2d 674, 948 N.W.2d 411 (holding that refusal to submit to a blood draw may be used as evidence in OWI trials).

### E. The court of appeals' decision does not invalidate Wisconsin's repeater statutes.

According to the State, 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.

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." (State's Br. at 32 (internal citations omitted)). However, this assertion misconstrues the court of appeals' reasoning and exaggerates the impact of its holding.

Nothing in the court of appeals' decision prohibits the use of penalty enhancer statutes that punish recidivism. Rather, as is discussed above in Section I.D., the court rejected the State's claim that a warrantless blood draw refusal is analogous to a prior offense of drunk driving or other conduct that may be considered an aggravating factor at sentencing. *Forrett*, 2021 WI App 31, ¶¶ 16-17. And, as the court of appeals recognized, the *Birchfield* and *Dalton* decisions do not hinge on the penalty for refusal being imposed directly or in the same case. The constitutional defect in Wisconsin's OWI penalty scheme is that the act of refusal—the act of asserting one's Fourth Amendment right to refuse—leads to greater punishment *at all*, regardless of timing:

> We see no difference as a constitutional matter, i.e., the right to be free from an unreasonable search, between the threat of a penalty at the time of the refusal, and the threat of future criminal penalties either at sentencing for a related OWI or in the event of an additional OWI conviction.

*Id.*, ¶ 15.

Based on the foregoing, there are no grounds to claim that the court of appeals' decision will invalidate

penalty enhancer statutes that punish recidivism. For instance, the State refers to Wisconsin's two- and three-strikes law, Wis. Stat. § 939.62(2m), which authorizes life sentences without the possibility of extended supervision for certain repeat child sex offenses and other serious felonies that would not carry life sentences if they were first offenses. The State claims this statute is now in jeopardy because, under the court of appeals' reasoning, "a second or third offense that results in a life sentence is really additional criminal punishment for the first offense." (State's Br. at 34). This claim is meritless. Again, nothing in court of appeals' decision prohibits the use of penalty enhancer statutes that punish recidivism based on prior *criminal convictions*. Refusal to submit to a warrantless blood draw is a constitutionally-protected right and, as such, is not analogous to a prior OWI conviction, let alone a repeat child sex offense or other serious felony.[9]

Contrary to the State's argument, the court of appeals' holding has a narrow application. Under Wis. Stat. § 346.65(2)(am), license revocations and OWI convictions "arising out of the same incident or occurrence shall be counted as one" for the purpose of determining prior offenses. Thus, the court of appeals'

[9] The State's claim that other penalty enhancer statutes are now in jeopardy fails for the same reason.

decision in this case applies only to OWI and OAR[10] offenses in which a defendant has a prior license revocation based on a warrantless blood draw refusal that did not result in an OWI conviction. Accordingly, where a person refuses to submit to a warrantless blood draw and is subsequently convicted of an OWI based on that refusal[11], the court of appeals' decision offers no basis for exclusion of the prior offense for sentence enhancement purposes in a subsequent OWI case.

F. Trial counsel was ineffective for failing to object to Wisconsin's unconstitutional penalty scheme and the use of a prior refusal as an enhancer.

The State submits that "[t]his 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." (State's Br. at 35). Since the court of appeals' holding is dispositive of the appeal, Mr. Forrett agrees that this Court need not address ineffective assistance of counsel. *See Lake Delavan Prop. Co. v. City of Delavan*, 2014 WI App 35, ¶ 14, 353

[10] As the State noted, OAR carries criminal penalties pursuant to Wis. Stat. § 343.44(2)(ar)2 if the revocation is based on a countable offense under Wis. Stat. § 343.307(2).

[11] E.g., when police officers have developed probable cause to obtain a warrant for a blood draw or when probable cause and exigent circumstances justify a warrantless blood draw which results in an OWI conviction.

Wis. 2d 173, 844 N.W.2d 632 (when one issue is dispositive on appeal, a reviewing court need not address other issues). Additionally, this issue is outside the scope of the State's petition for review. Nonetheless, in response to the State's arguments on this issue, Mr. Forrett maintains that his trial counsel was ineffective for failing to object to Wisconsin's unconstitutional penalty scheme for the following reasons.

The right to effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, section 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). *Smith*, 207 Wis. 2d at 273. To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient and (2) counsel's errors or omissions prejudiced the defendant. *Id.*

To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

*Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694). The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different. *Smith*, 207 Wis. 2d at 275.

An ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A circuit court's findings of fact are upheld unless clearly erroneous. *Id.* Whether counsel was ineffective is a question of law that is reviewed *de novo*. *Id.*

In this case, trial counsel performed deficiently by failing to apply the relevant law and object to the use of the refusal as a prior offense and Wisconsin's unconstitutional penalty scheme. At the time of plea in this case, *Birchfield*, 136 S. Ct. 2160, had been in existence for approximately 11/2 years. There can be no reasonable strategic reason for failing to object to the use of the prior refusal and Wisconsin's statutory scheme. *See generally*, *State v. Wideman*, 206 Wis. 2d 91, 108, 556 N.W.2d 737 (1996) ("Defense counsel should be prepared at sentencing to put the State to its proof when the state's allegations are incorrect or defense counsel cannot verify the existence of the prior offenses."). Without the refusal, Mr. Forrett would have been convicted of an OWI 6th with a lower maximum penalty. The maximum penalty Mr. Forrett could have received would have been 10 years of prison (5 years of initial confinement and 5 years of extended supervision).

The State cites *State v. Lemberger*, 2017 WI 39, 374 Wis. 2d 617, 893 N.W.2d 232, for the proposition that trial counsel cannot perform deficiently by failing to make a novel argument. However, in *Lemberger* there was "settled" case law and the defendant asked that several cases be "overruled and no longer followed." *Id.* ¶¶ 19, 30, 36. That is not the situation here. The State has not cited any published Wisconsin decision finding that it is proper to use a refusal to enhance an OWI sentence following *Birchfield*.

Furthermore, counsel's failure to object prejudiced Mr. Forrett. The Court sentenced Mr. Forrett to 11 years of prison (6 years of initial confinement and 5 years of extended supervision). (71:31-32; 11). This exceeds the maximum initial confinement time for an OWI 6th. Consequently, Mr. Forrett received ineffective assistance of counsel when counsel failed to object to Wisconsin's unconstitutional penalty scheme and the use of a prior refusal to increase Mr. Forrett's sentence.

## CONCLUSION

For the reasons stated above, Mr. Forrett respectfully requests that this Court affirm the court of appeals and remand the case to the circuit court for further sentencing proceedings commuting his conviction to a 6th offense OWI and resentencing accordingly.

Dated this 15th day of December, 2021.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,952 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 15th day of December, 2021.

Signed:

David Malkus

DAVID MALKUS
Assistant State Public Defender