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STATE OF WISCONSIN
SUPREME COURT

VILLAGE OF LOMIRA,

Plaintiff-Respondent,

-v- Appeal No. 2020-AP-000031

PHILLIP N. BENNINGHOFF,

Defendant-Appellant.

On Petition for Review of a Decision of the Wisconsin Court of Appeals, District IV, Dated October 15, 2020, Affirming the Judgment and Orders Entered in the Circuit Court for Dodge County in Case No. 2019-TR-005045, the Honorable Brian Pfitzinger

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PETITION FOR REVIEW

ATTORNEYS FOR PETITIONER, PHILLIP N. BENNINGHOFF, (DEFENDANT-APPELLANT):

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OVERVIEW

This Petition identifies fundamental constitutional infirmity in Wis. Stat. §343.305, the OWI "implied consent - refusal statute." Here Phillip N. Benninghoff was convicted by default of violating Wis. Stat. §343.305 based upon the explicit language of that statute, which denies a person, prior to imposition of statutory penalties, any opportunity for a hearing to judicially review:

a) the constitutional right to refuse a police officer's demand to have blood invasively drawn from one's body without a search warrant in the absence of "exigent circumstances" per *Mitchell v. Wisconsin*, __ U.S. __, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019);

- and -

b) the lack of subject matter jurisdiction under Wis. Stat. §343.305 to impose statutory sanctions for refusing to submit to an invasive blood/alcohol test based on a person's operation of a vehicle in an open field – not upon a public highway or other place identified in Wis. Stat. §343.305(2).

In the case of a warrantless invasive blood draw, the statutory scheme of Wis. Stat. §343.305 facially violates the guarantees of both the Fourth and Fourteenth Amendments to the Constitution of the United States. Under that scheme, refusal by an accused person to comply with the warrantless demand of a single police officer to submit to an invasive blood draw results in conviction by default of violating Wis. Stat. §343.305 without any opportunity for a hearing. The only hearing allowed to be conducted by Wis. Stat. §343.305(9)(c) and (10) is expressly limited to three narrow areas of inquiry; none of which include assertion of the Fourth Amendment requirement of a search warrant or the complete lack of subject matter jurisdiction for judicial license revocation without the predicate finding of operation of a motor vehicle on a "public highway."

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INTRODUCTION

The Defendant-Appellant Petitioner, Phillip N. Benninghoff, petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District IV, in *Village of Lomira v. Phillip N. Benninghoff*, Appeal No. 2020-AP-000031, filed on October 15, 2020, which the Court of Appeals has not recommended for publication.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER WIS. STAT. §343.305 (THE "IMPLIED CONSENT LAW") UNCONSTITUTIONALLY INFRINGES A CITIZEN'S FOURTH AMENDMENT RIGHT TO REFUSE A POLICE OFFICER'S WARRANTLESS DEMAND FOR A BODILY INVASIVE BLOOD DRAW IN THE ABSENCE OF "EXIGENT CIRCUMSTANCES".

Answered In The Negative By The Trial Court And The Court Of Appeals.

The circuit court and the Court of Appeals rejected any application of the principles and precedent set forth in the United States Supreme Court decision in *Mitchell v. Wisconsin*, __ U.S. __, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019) prohibiting the warrantless blood draw demanded of the defendant in this case pursuant to Wis. Stat. §343.305; summarily rejecting the defendant's right to a hearing on the defendant's right to refuse to submit to a warrantless invasive blood draw in the absence of exigent circumstances.

This issue was raised in the Defendant-Appellant Petitioner's Appellate Briefs.

II. WHETHER AN ACCUSED PERSON IS CONSTITUTIONALLY ENTITLED TO A DUE PROCESS HEARING ON LACK OF SUBJECT MATTER JURISDICTION UNDER WIS. STAT. §343.305 BASED UPON OPERATION OF A MOTOR VEHICLE IN AN OPEN FIELD WHICH IS NOT A PUBLIC HIGHWAY, ROADWAY OR OTHER AREA DESIGNATED IN WIS. STAT. §346.61.

Answered By The Trial Court And the Court Of Appeals In The Negative.

> The circuit court summarily rejected the defendant's motion to conduct a hearing on this jurisdictional issue by automatically entering a judgment of conviction on September 30, 2019 for violating Wis. Stat. §343.305(2). The trial court followed up by denying defense motions brought under Wis. Stat. §806.07, based on *Village of Elm Grove v. Brefka*, 348 Wis.2d 282, 832 N.W.2d 121, 2013 WI 54. The Court of Appeals affirmed the circuit court ruling that lack of jurisdiction by the circuit court cannot be raised in any fashion prior to or after conviction for refusal to submit to an invasive blood test.

This issue was raised in the Defendant-Appellant Petitioner's Appellate Briefs.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

The issues in this case meet the criteria for granting review set forth in Wis. Stat. 809.62(1r)(a), (b) and (d). This is a case decided by the Circuit Court and Court of Appeals as a matter of law. The relevant facts are not in dispute. All of the issues presented here involve the constitutional rights of an accused citizen to due process guaranteed to all citizens by the Fourth Amendment and Fourteenth Amendment to the Constitution of the United States.

In particular, Wisconsin's "Implied Consent" law (Wis. Stat. §343.305,) violates the Fourth Amendment and "due process" by punishing refusal to submit to an invasive blood draw demanded of a person suspected of intoxicated operation of a motor vehicle by a police officer acting without a warrant and in the absence of "exigent circumstances."

Wis. Stat. §343.305 compounds this substantive Fourth Amendment violation by affirmatively depriving the accused person any forum within which to raise the issue of the circuit court's jurisdiction to impose the statutory sanctions authorized by Wis. Stat. §343.305 for refusal to submit to a constitutionally prohibited warrantless invasive blood draw.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the denial by a circuit court of the right to a due process hearing requested by the defendant relating to his refusal to submit to a warrantless invasive blood draw at the time of his arrest on suspicion of intoxicated operation of a mo-ped in an open field. Technically, this case is a "special proceeding" addressing legal issues relating to the refusal to submit to a warrantless blood test requested by a police officer pursuant to Wis. Stat. §343.305. [*See*: "Notice of Intent to Revoke Operating Privilege", R-1, App. pp. 120-121, Wis. Stat. §343.305(9)(b) and *State v. Schoepp*, 204 Wis.2d 266, 270; 554 N.W.2d 236 (Ct. App. 1996) and *In Re State v. Gautschi*, 240 Wis.2d 83, 2000 WI App. 274, 622 N.W.2d 24.]

B. Procedural History.

This matter was commenced by a police officer of the Village of Lomira Police Department filing on September 10, 2019 with the Circuit Court of Dodge County a standardized Wisconsin Department of Transportation form document entitled: "Notice of Intent to Revoke Operating Privilege" dated August 31, 2019. [According to Wis. Stat. §343.305(9)(c), the legislature deems the "use" of this document by a police officer to be ". . . adequate process to give the appropriate court jurisdiction over the person." The Court of Appeals in *State v. Schoepp*, 204 Wis.2d 266 at 271, 554 N.W.2d 236 (Ct. App. 1996) characterizes the Notice of Intent to Revoke as follows: "The notice of intent to revoke . . . is akin to the summons and complaint requirements of Chapter 801 and 802 ...". *See also*: *State v. Jakubowski*, 61 Wis.2d 220, 224 N.2; 212 N.W.2d 155 (1973).]

On September 30, 2019, twenty (20) days later, the defendant, Phillip Benninghoff's attorney, Joseph F. Owens, filed a Notice of Retainer, a formal "Not Guilty Plea" document, and a due process "Motion to Conduct Hearing

and Stay Wisconsin DOT Notification." [R-6; R-7, A.App. pp. 130-131.] On the same day, September 30, 2019, the circuit court proceeded to enter by default a "Judgment of Conviction" against Phillip Benninghoff for violating Wis. Stat. §343.305, and issued a "Court Order for Intoxicated Driver Assessment." [R-5, pp. 1-2; A.App. pp. 126-127 and R-4, pp. 1-2; A.App. 128-129.]

On October 22, 2019, Benninghoff's defense counsel filed a "Motion for Relief from Judgment" pursuant to Wis. Stat. §806.07 and an Affidavit in Support. [R-9; R-10; A.App. pp. 123-125.]

On October 24, 2019, the circuit court denied the defendant's Motion for Relief from Judgment in a preemptory Order. [R-11; A.App. p. 122.]

On November 12, 2019, Benninghoff's counsel filed a "Motion to Reconsider" and an Affidavit of Phillip N. Benninghoff. [R-12; R-13; A.App. pp. 115-121 and A.App. p. 134.] This was followed on January 2, 2020 with a Memorandum of Law In Support. [R-19, pp. 1-4.]

On January 21, 2020, after hearing oral arguments on January 3, 2020, the circuit court issued an Order denying the "Motion to Reconsider." [R-23; A.App. pp. 113-114; R-33, pp. 1-18.]

The present appeal followed the circuit court's dispositive decisions.

C. Disposition In The Trial Court And Court Of Appeals.

Dispositive action by the circuit court began with entry by default of a Judgment of Conviction on September 30, 2019, 20 days after the "Notice of Intent to Revoke Operating Privilege" form was filed, specifically because a limited scope hearing provided for in Wis. Stat. §343.305(10)(a) and Wis. Stat. §343.305(9)(a) was not requested by the defendant within ten (10) days of being served with the Notice of Intent to Revoke Operating Privilege.

The next dispositive action taken by the circuit court was the entry of its Order dated October 24, 2019 denying the defendant's Motion for Relief from

Judgment filed pursuant to Wis. Stat. §806.07. [R-11; A.App. p. 122.] In this Order, the circuit court denied the defendant a hearing on this motion based upon its belief that it was without "competency" to address the relief sought per the Supreme Court's holding in *Village of Elm Grove v. Brefka*, 348 Wis.2d 282, 832 N.W.2d 121, 2013 WI 54.

The final dispositive action of the circuit court was its Order dated January 21, 2020 in which the court refused to reconsider and found the United States Supreme Court decision in *Mitchell v. Wisconsin*, __ U.S. __, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019) to have no relevance to the defendant's motion for a due process hearing on the legal efficacy of the defendant's refusal to submit to the warrantless invasive blood test for which he stands convicted.

On October 15, 2020, the Court of Appeals, District IV, issued a one-judge Opinion pursuant to Wis. Stat. §752.31(c) affirming the trial court's decisions which is not recommended for publication. [*See:* A-App. pp. 101-112.]

D. <u>Statement Of Facts.</u>

In the late afternoon of Saturday, August 31, 2019, Phillip N. Benninghoff was riding a small child size mo-ped in an open field in the Village of Lomira, Wisconsin. [R-13, p. 1-5; A.App. p. 117-121 and A.App. p. 134.] He was accosted by a municipal police officer, allegedly based upon an anonymous telephone tip and was handcuffed and arrested by 5:11 p.m. on charges of operating the mo-ped while intoxicated, among other non-operating infractions relating to the mo-ped. [R-1, p. 1; A.App. p. 132; R-13, pp. 1-5; A.App. pp. 117-121 and A.App. p. 134.] At 5:13 p.m., the arresting officer, acting in reliance upon a standard "<u>Informing The Accused</u>" Wisconsin Department of Transportation form, required that Mr. Benninghoff submit to a warrantless invasive blood withdrawal to obtain a scientific test of Mr. Benninghoff's blood for the presence of intoxicants. [R-13, pp. 1-3; A.App. pp. 117-121 and A.App. p. 134.] At 5:45

p.m., acting in conformity with Wis. Stat. §343.305 and based upon Mr. Benninghoff's refusal to submit to the officer's demand for an invasive blood withdrawal without a warrant, the arresting officer issued a "Notice Of Intent To Revoke Operating Privilege" form to him. [R-1, p. 1; A.App. p. 132.; R-13, pp. 1-5; A.App. pp. 117-121 and A.App. p. 134.]

This "Notice Of Intent To Revoke Operating Privilege" is a standard carbon pre-printed form created by the Wisconsin Department of Transportation which consists of a single sheet of paper printed on both sides. [R-13, pp. 4-5; A.App. pp. 120-121.] On the front side of the "Notice Of Intent To Revoke Operating Privilege" form, Mr. Benninghoff was informed that due to his having been accused of violating Wis. Stat. §346.63(1)(a) and his refusal to comply with the arresting officer's warrantless demand that he submit to an invasive withdrawal of blood from his body, his driving privileges were subject to being revoked. [R-13, pp. 4-5; A.App. pp. 120-121.] The "Notice Of Intent To Revoke Operating Privilege" then informed him:

> *You have 10 days from the date of this notice to file a request in writing for a hearing on the revocation with the municipal or circuit court named below. (**See reverse side for details regarding hearings**.) If you do not request a hearing, the court must revoke your operating privileges 30 days from the date of this notice.* (emphasis added.)

The reverse side of the "Notice of Intent to Revoke Operating Privilege" form, however, then informs the reader that the issues at any hearing requested are narrowly confined in scope to three specifically enumerated issues: (a) "probable cause;" (b) delivery of the "Informing the Accused" form to him; and (c) whether he refused to submit to the invasive blood testing requested of him. The language of the "Notice of Intent to Revoke Operating Privilege" form reads verbatim as follows:

If you were arrested for a violation of s.346.63(1), (2m,) or (5), Wis. Stats. or a local ordinance in conformity therewith, or for a violation of s.346.63(2) or (6), 940.09 or 940.25, Wis. Stats., ***the issues at a court hearing on your refusal revocation are limited to the following****:*

a. Whether an officer had probable cause to believe you were driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a controlled substance analog or any combination of alcohol, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders you incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders you incapable of safely driving, having restricted controlled substance in your blood, or having a prohibited alcohol concentration or, if you were driving or operating a commercial motor vehicle, an alcohol concentration of 0.04 or more and whether you were lawfully placed under arrest for violation of s.346.63(1), (2m) or (5), Wis. Stats., or a local ordinance in conformity therewith or s.346.63(2) or (6), 940.09 (1) or 940.25, Wis. Stats.

b. Whether an officer complied with s.343.305(4), Wis. Stats.

c. Whether you refused to permit the test. You shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

The arresting officer waited 10 days from the date of the arrest on August 31, 2019 and then filed the "Notice Of Intent To Revoke Operating Privilege" form with the circuit court of Dodge County on September 10, 2019. [R-1, p. 1; A.App. p. 132.]

On September 30, 2019, Phillip Benninghoff filed a "Not Guilty" plea and a "Motion to Conduct Hearing and Stay Wis. DOT Notification Pending Refusal Hearing" because the issue for which a hearing was being requested were complex and not enumerated within the three (3) limited issues set forth in the "Notice Of Intent To Revoke Operating Privilege." [R-7, p. 1; A.App. p. 130.]

On September 30, 2019, without conducting a hearing, the circuit court entered a "Judgment of Conviction" by default against Phillip Benninghoff – summarily revoking his motor vehicle operating privilege for one year and issued an Order for Intoxicated Driver Assessment. [R-5, pp. 1-2; A.App. pp. 126-127; R-4, pp. 1-2; A.App. pp. 128-129.]

On October 22, 2019, Phillip Benninghoff filed a "Motion for Relief From Judgment" pursuant to Wis. Stat. §806.07 raising procedural due process issues based upon the entry of a judgment of conviction by default, despite a requested hearing on subject matter jurisdiction and violation of Mr. Benninghoff's Fourth Amendment right to refuse a warrantless invasive blood test. [R-9, p. 1; A.App. p. 123; R-10, pp. 1-2; A.App. 124-125.]

On October 24, 2019, the Circuit Court peremptorily denied the "Motion for Relief From Judgment" based on lack of competency, relying on *Village of Elm Grove v. Brefka*, 348 Wis.2d 282, 832 N.W.2d 121, 2013 WI 54. [R-11, p. 1; A.App. p. 122.]

On November 12, 2019, Phillip Benninghoff filed a "Motion to Reconsider" reiterating that he was seeking a due process hearing on fundamental constitutional and subject matter jurisdiction issues which were outside the scope of the limited scope hearing statutorily prescribed in the "Notice Of Intent To Revoke Operating Privilege," and therefore not governed by the holding of *Village of Elm Grove v. Brefka, supra*.

On January 21, 2020, the circuit court issued its final Order denying the "Motion to Reconsider," refusing to grant Mr. Benninghoff a hearing on his Fourth Amendment right to refuse an invasive blood test without a warrant and the lack of subject matter jurisdiction under Wis. Stat. §343.305 for alleged intoxicated operation of a mo-ped on property which is not a public roadway.

ARGUMENT

I. WIS. STAT. §343.305 VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY REQUIRING CONVICTION AND ENTRY OF JUDGMENT REVOKING A PERSON'S OPERATING PRIVILEGES BASED UPON THEIR REFUSAL TO SUBMIT TO A WARRANTLESS INVASIVE BLOOD DRAW.

A. Wis. Stat. §343.305 Violates The Fourth Amendment With Respect To Warrantless Invasive Blood Testing.

The Wisconsin legislature's "implied consent" law governing tests for intoxicated operation of a motor vehicle is found at Wis. Stat. §343.305 entitled: Tests for intoxication; administrative suspension and court-ordered revocation."

Wis. Stat. §343.305(2) provides as follows:

> **(2)** *IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am), or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency*

> *or any other agency or facility, 2 of the 3 tests under sub. (3) (a), (am), or (ar), and may designate which of the tests shall be administered first.* (emphasis added.)

Wis. Stat. §343.305(3) provides as follows:

> ***(3)*** *REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or upon arrest subsequent to a refusal under par. (ar), a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample.* (emphasis added.)

Wis. Stat. §343.305(4) provides as follows:

> ***(4)*** *INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a), (am) or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:*
>
> * * * * * * * * * * *
>
> *This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended.* ***If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.*** (emphasis added.)

It is this statutory language of Wis. Stat. §343.305(4) that is folded into one of the forms given to an accused person by the officer at the scene, which is denominated: "Informing The Accused." A copy of "Informing The Accused"

form presented to Phillip Benninghoff by the arresting officer in this case is attached to his Affidavit dated November 11, 2019 as Exhibit A. [R-13, p. 3; A.App. P. 119 and A.App. p. 134.]

The "Informing The Accused" form in this case unequivocally confirms the fact that the arresting officer chose to demand that Mr. Benninghoff submit to an invasive blood test rather than a breath or urine test. [R-13, p. 3; A.App. p. 119 and A.App. p. 134.] The Affidavit of Mr. Benninghoff confirms that the "Informing The Accused" form accurately recites that he refused to consent to an invasive blood draw from his body which had been based solely upon the demand of a police officer acting without a warrant. [R-13, p. 2 ¶4; A.App. p. 118.]

These facts exemplify fundamental constitutional flaws in the legislative scheme of Wis. Stat. §343.305. It is well settled that the Due Process clause of the federal constitution applies to a person's license to operate a motor vehicle as a protected property interest and to a state's suspension or revocation of that license. *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970);. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). Wisconsin's "implied consent" statute penalizes a person with the loss of their driving privileges for one year and imposes other administrative penalties for refusing to submit to the unfettered choice of a police officer to require submission without a search warrant to a blood test for intoxication, which is both invasive of the body and carries with it the risk of infection and injury.

Use of the construct of an "implied consent" statute to pre-authorize a police officer's choice to demand an invasive blood test versus a non-invasive

chemical test of an accused person's breath or urine is violative of the Fourth Amendment. In *Birchfield v. North Dakota*, 579 U.S. __, 136 S.Ct. 2160, 2185, 195 L.Ed.2d 560, (2016) the Supreme Court opined as follows:

> *Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.*
>
> *We reach a different conclusion with respect to blood tests. Blood 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. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.* (emphasis added.)

Thus, in *Birchfield v. North Dakota*, *supra,* 136 S.Ct. 2160, 2184-85, the Supreme Court upheld the sufficiency of "probable cause" for an OWI arrest to justify warrantless "breath" testing under the "incident to arrest" exception to the Fourth Amendment warrant requirements, but not "blood" tests. *Birchfield* conclusively established that a blood draw is a search of the person protected by the Fourth Amendment which guarantees "… the right of the people to be secure in their persons … against unreasonable searches." *Birchfield v. North Dakota*, *supra*, 136 S.Ct. at 2174. The question of constitutional "reasonableness" turns on the availability of alternatives to an invasive blood draw, the opportunity to obtain a warrant and whether "exigent circumstances" exist – other than normal metabolic dissipation of alcohol within the body. *Missouri v. McNeely*, 569 U.S. 141 at 156, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

In *Mitchell v. Wisconsin*, __ U.S. __, 139 S.Ct. 2525 at 2532, 204 L.Ed.2d 1040 (2019), the United States Supreme Court recently reversed the Wisconsin Supreme Court's reliance upon the "implied consent" provisions of Wis. Stat.

§343.305 as curing any Fourth Amendment problem with a warrantless blood draw of an unconscious person accused of operating a motor vehicle while intoxicated and rejected an application of Wis. Stat. §343.305 to circumstances where no "exigent circumstances" exist.

In *Mitchell v. Wisconsin*, *supra*, 139 S.Ct. at 2532-33, the Supreme Court first noted:

> *Wisconsin chose to rest its response on the notion that its implied-consent law (together with Mitchell's free choice to drive on its highways) rendered the blood test a consensual one, thus curing any Fourth Amendment problem.*
>
> * * * * * * * * * * *
>
> *In considering Wisconsin's implied-consent law, we do not write on a blank slate. "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." Birchfield, 579 U.S., at ___, 136 S.Ct., at 2185 But our decisions have not rested on the idea that these laws do what their popular name might seem to suggest – that is, create actual consent to all the searches they authorize.*

Continuing its analysis, the Supreme Court in *Mitchell* explained:

> *The Fourth Amendment guards the "right of the people to be secure in their persons … against unreasonable searches" and provides that "no Warrants shall issue, but upon probable cause." A blood draw is a search of the person, so we must determine if its administration here without a warrant was reasonable. See Birchfield, 579 U.S. at ___, 136 S.Ct., at 2174. Though we have held that a warrant is normally required, we have also "made it clear that there are exceptions to the warrant requirements." Illinois v. McArthur, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) And under the exception for exigent circumstances, a warrantless search is allowed when "there is compelling need for official action and no time to secure a warrant."* (emphasis added.)

Mitchell v. Wisconsin, *supra,* 1395 S.Ct. at 2534.

In the present case, Mr. Benninghoff was fully conscious, there was more than sufficient time to initiate a telephonic request for a warrant in that the arrest is noted by the officer as taking place at 5:11 p.m. and the "Notice of Intent to Revoke" is noted as being issued at 5:45 p.m. There were no "exigent circumstances."

The conclusion is inescapable that the officer's demand for a blood test violated the Fourth Amendment and that Mr. Benninghoff cannot be punished by the State of Wisconsin pursuant to Wis. Stat. §343.305 for exercising his constitutional right to reasonably refuse to submit to that warrantless invasive blood test. Accordingly, at a minimum, application of the provisions of Wis. Stat. §343.305 relating to a blood test refusal case must be stricken from the statute as unconstitutionally void and unenforceable.

B. Wis. Stat. §343.305 Violates The Fourteenth Amendment "Due Process" Clause By Denying An Accused Judicial Review Of A Warrantless Blood Test Demand.

Wis. Stat. §343.305(9)(c) facially prohibits any court from judicially reviewing the constitutionality of a warrantless blood draw in the exercise of the state's police power by the arresting officer. This legislation was intentionally drafted to limit the judicial authority of a court when conducting "… ***any requested hearing to determine if the refusal was proper. The scope of the hearing shall be limited to the issues outlined in par. (a) 5. or (am) 5***." (emphasis added.) Reference to Wis. Stat. §343.305(9)(a)5. identifies these "limited" issues to be: a. "probable cause" to arrest the accused for intoxication while operating a motor vehicle; b. whether the accused has been provided with the "Informing The Accused" form; and c. whether the accused refused the test demanded. In *Mitchell v. Wisconsin*, *supra*, 139 S.Ct. at 2534, the Supreme Court emphasized that

"probable cause" to arrest was not sufficient to support a warrantless blood draw test:

> *In Birchfield, we applied precedent on the "search-incident-to-arrest" exception to BAC testing of conscious drunk-driving suspects. We held that their drunk-driving arrests, taken alone, justify warrantless "breath tests" but not blood tests, since breath tests are less intrusive, just as informative, and (in the case of conscious suspects) readily available. Id., at ___, 136 S.Ct., at 2184-85.*

The net result is deprivation of procedural due process by Wis. Stat. §343.305(9)(c) and (10) because the statute expressly bars an accused person from any opportunity or forum within which to assert their constitutional right to insist on compliance by a police officer with the Fourth Amendment's warrant requirements relative to obtaining an invasive blood draw. This is true, even if it is uncontested that: a) there was probable cause to arrest for OWI; b) the accused was provided the "Informing The Accused" form; and c) the accused person refused a warrantless blood test demand - the only three issues for which a hearing is allowed under Wis. Stat. §343.305.

In its zeal to circumscribe the judicial review power of the courts of Wisconsin with respect to the purview of Wis. Stat. §343.305, the legislature failed to sufficiently contemplate the resulting federal Fourth Amendment and Fourteenth Amendment "due process" implications of its enactment. State legislative enactments, no matter how well intentioned or pragmatic in theory, must conform to federal constitutional mandates under the "supremacy clause" of the United States Constitution. [Article VI, Clause 2, U.S. Constitution.]

The constitutional requirement of some form of "due process" hearing to contest automatic loss of a drivers license in a blood draw case is set forth in *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983).

In *Neville*, the Supreme Court carefully explained:

> *South Dakota law authorizes the department of public safety, after providing the person who has refused the test an opportunity for a hearing, to revoke for one year both the person's license to drive and any nonresident operating privileges he may possess. S.D.Comp.Laws Ann. 32-23-11. Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections.* (emphasis added.)

Wisconsin allows no such "opportunity for a hearing." There is absolutely no provision granting an accused person "appropriate procedural protections" from loss of license based on a warrantless invasive blood draw. Instead, Wis. Stat. §343.305(9)(c) handcuffs the judiciary and absolutely prohibits any judicial review of an accused's refusal to submit to a warrantless blood test demand by a police officer where no exigent circumstances are present. The statute as written and applied is void under the Fourteenth Amendment "Due Process" clause; and it is void beyond a reasonable doubt.

II. WIS. STAT. §343.305(10), AS APPLIED, DEPRIVES AN ACCUSED PERSON OF CONSTITUTIONALLY ENTITLED DUE PROCESS HEARING ON LACK OF SUBJECT MATTER JURISDICTION UNDER WIS. STAT. §343.305 BASED UPON OPERATION OF A MOTOR VEHICLE IN AN OPEN FIELD WHICH IS NOT A PUBLIC HIGHWAY, ROADWAY OR OTHER AREA DESIGNATED IN WIS. STAT. §346.61.

This matter was before the circuit court at a very preliminary stage of the proceedings on issues of law, precisely because the defendant has been prohibited from access to a forum within which to conduct any evidentiary hearing. Accordingly, the record consists of bare legal documents and the uncontroverted factual allegations contained in the Affidavit submitted by Phillip Benninghoff. The circuit court below proceeded as if the issues were being presented in the context of a defense Motion to Dismiss in a civil action in

which all factual allegations are taken as true. Viewing the case through that lens the circuit court could find no basis under the strictures of Wis. Stat. §343.305 to afford the defendant a procedural methodology to challenge the sanctions imposed by Wis. Stat. §343.305 for Mr. Benninghoff's refusal to submit to blood being drawn from his body despite lack of a warrant and in the absence of "exigent circumstances."

The lack of a warrant is a fact of record, as is the police officer's demand for blood to be drawn from Mr. Benninghoff's body, rather than breath or urine. The lack of "exigent circumstances" exists *de facto* by their absence for purposes of this appeal, and there is nothing in the documents of record filed herein to suggest otherwise. In addition, Mr. Benninghoff alleges that at all times prior to arrest, he was operating a child size mo-ped in an open field – not a public highway or other place identified in Wis. Stat. §346.61.

This latter fact has major legal significance because Wis. Stat. §343.305(2) specifically limits the reach of the entire "implied consent" statute to persons operating "… a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61 …". An "open field" as described by Mr. Benninghoff in his Affidavit is not within the purview of Wis. Stat. §343.305. Therefore, the circuit court was without subject matter jurisdiction to undertake any action whatsoever in connection with the processes and sanctions contained in Wis. Stat. §343.305.

Despite this essential open issue of subject matter jurisdiction, the circuit court viewed itself as prohibited by the statutory language of Wis. Stat. §343.305(10) from conducting any hearing on the issue of its jurisdiction. In doing so, the circuit court erroneously relied upon the Supreme Court's decision in *Village of Elm Grove v. Brefka*, 384 Wis.2d 282, 832 N.W.2d 121, 2013 WI 54. *Brefka* had nothing to do with whether the circuit court has subject matter

jurisdiction. In *Brefka*, the defendant had missed the ten (10) day deadline to request a hearing on the three (3) enumerated issues allowed to be examined in a Wis. Stat. §343.305 refusal hearing. The defendant in *Brefka* was asking the circuit court for an extension of the ten (10) day deadline to request such a hearing. The Wisconsin Supreme Court in *Brefka* clarified that the circuit courts could not extend that specific statutory deadline.

Nothing in *Brefka*, however, informs the circuit courts that they lack jurisdiction to address constitutional issues raised by a U.S. Supreme Court decision specifically rejecting the State of Wisconsin's "implied consent" statute as applied to warrantless blood draws. Nor is there anything in *Brefka* that curtails the jurisdiction of the circuit courts to determine whether the circuit court has subject matter jurisdiction to proceed in a given case under Wis. Stat. §343.305. Courts always have jurisdiction to determine whether they have jurisdiction.

In the present case, Mr. Benninghoff appropriately filed legitimate motions challenging the constitutionality of Wis. Stat. §343.305 under the Fourth Amendment relating to a warrantless blood test demand per the U.S. Supreme Court decision in *Mitchell v. Wisconsin*, *supra,* and challenging the circuit court's subject matter jurisdiction in a case where the only facts of record do not meet the jurisdictional predicate of the "implied consent" statute itself which limits its reach to public highways.

The fact that these two fundamental issues are outside the scope of the issues that can be raised in a Wis. Stat. §343.305 "refusal hearing" cannot constitutionally strip the circuit court of its ability to conduct a substantive "due process" hearing, or a subject matter jurisdiction hearing. That would violate procedural "due process" and violate the separation of powers of the Wisconsin

Constitution. *State v. Horn*, 226 Wis.2d 637, 594 N.W.2d 772 (1999); *City of Sun Prairie v. Davis*, 226 Wis.2d 738, 595 N.W.2d 635 (1999).

CONCLUSION

Wis. Stat. §343.305 violates the Fourth and Fourteenth Amendments to the Constitution of the United States, both facially and as applied. On its face, Wisconsin's "implied consent" law denies a person accused of intoxicated operation of a motor vehicle any forum or any procedural methodology whatsoever to challenge revocation of their driver's license based upon assertion of their constitutional right to refuse to submit to a warrantless blood draw in the absence of "exigent circumstances."

Furthermore, the trial courts of the State of Wisconsin are absolutely prohibited by this statute from conducting any hearing related to revocation of a driver's license under Wis. Stat. §343.305(9)(c), (a)5 and (10) for refusal to submit to an invasive blood test, or lack of subject matter jurisdiction, because those fundamental issues are not within issues enumerated therein. That is how the statute is worded and how it is applied based upon the public position espoused by the Wisconsin Attorney General's Office at prosecutorial and judicial workshops.

Those integrated sections of Wis. Stat. §343.305 which impinge upon the accused's Fourth and Fourteenth Amendment rights are void and unenforceable beyond a reasonable doubt. It is therefore respectfully submitted that the judicial orders of the Circuit Court of Dodge County entered in this matter revoking Phillip Benninghoff's motor vehicle operating privileges and imposing other penalties and obligations based upon his refusal to submit to a warrantless invasive blood draw, must be reversed and voided. In addition, this court's remand order should specify that Mr. Benninghoff's refusal to submit to chemical testing of his blood in this matter cannot be admitted into evidence or

referred to in any way in this or in future proceedings relating to his alleged intoxicated operation of a mo-ped on August 31, 2019. The remand order should also confirm to the circuit court that its authority to conduct a hearing on the issue of subject matter jurisdiction is not and cannot be legislatively circumscribed or limited by Wis. Stat. §343.305

For the foregoing reasons set forth particularly above, the Defendant-Appellant Petitioner, Phillip N. Benninghoff, requests that the Supreme Court undertake review and consideration of the issues identified herein.

Respectfully submitted this 10th day of November, 2020.

Law Offices of Joseph F. Owens, LLC
Attorneys for the Defendant-Appellant Petitioner:
Phillip N. Benninghoff

Electronically Signed By

/s/ *Joseph F. Owens*
Joseph F. Owens
State Bar No. 1016240

CERTIFICATION AS TO FORM AND LENGTH OF PETITION FOR REVIEW

I hereby certify that this Petition for Review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62()(a) for a petition produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch with an equivalent to 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 5,945 words.

Dated at New Berlin, Wisconsin on November 10, 2020.

Electronically Signed By

/s/ *Joseph F. Owens*
Attorney Joseph F. Owens
State Bar No: 1016240

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §809.19(12)(f)-ELECTRONIC FILING CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of the Defendant-Appellant's Petition for Review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12)(f).

I further certify that:

This electronic Petition for Review is identical in content and format to the printed form of the Defendant-Appellant's Petition for Review filed as of this date.

A copy of this certificate has been served with the paper copies of this Petition for Review with the court and served on all opposing parties.

Dated at New Berlin, Wisconsin on November 10, 2020.

Electronically Signed By
/s/ *Joseph F. Owens*
Attorney Joseph F. Owens
State Bar No: 1016240

APPELLANT'S PETITION FOR REVIEW APPENDIX CERTIFICATION

I hereby certify that filed with this Petition for Review, either as a separate document or as a part of this Petition for Review, is an appendix that complies with §809.19(2)(a) and that contains, at a minimum:

(1) a table of contents; (2) the findings or opinion of the circuit court and Court of Appeals; (3) a copy of any unpublished opinion cited under Wis. Stat. §809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at New Berlin, Wisconsin on November 10, 2020.

Electronically Signed By

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