STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2021AP36-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

CHARLES L. NEEVEL,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, BRANCH I, THE HONORABLE BRIAN A. PFITZINGER PRESIDING, TRIAL COURT CASE NO. 18-CT-21

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER, SUBSEQUENT TO THE UNITED STATES SUPREME COURT'S DECISION IN *BIRCHFIELD v. NORTH DAKOTA*, 579 U.S. ____, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), A PERSON SUSPECTED OF OPERATING A MOTOR VEHICLE WHILE INTOXICATED HAS A FOURTH AMENDMENT RIGHT TO DESIGNATE A LESS-INTRUSIVE MEANS OF CHEMICAL TESTING THAN SUBMITTING TO A BLOOD WITHDRAWAL AS A PRIMARY TEST?

> **Trial Court Answered: NO.** The circuit court summarily denied this motion without setting forth specific reasons on the record.[1] R52 at 9:12-13; D-App. at 111.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a single question of constitutional law based upon a set of uncontroverted facts. The issue presented herein is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Neevel believes publication of this Court's decision is WARRANTED as the issue raised in the instant matter is one which affects literally thousands of persons in Wisconsin annually who are suspected of operating a motor vehicle while intoxicated. While the

[1]The circuit court did expend a significant amount of time discussing and analyzing whether Mr. Neevel had standing to raise the due process vagueness challenge to Wis. Stat. § 343.305(4) he raised in one of his pretrial motions, however, this related to a separate motion apart from the issue raised in the pre-trial motion which forms the basis of this appeal. It matters little that the circuit court did not express the specific reasons for its denial of his motion as the issue in the instant appeal presents a question of constitutional law which this Court reviews *de novo*, and therefore, would have reviewed without any deference to the lower court's opinion. *See* Standard of Review on Appeal, p.9, *infra*.

statewide nature of the impact of this Court's decision alone would seem to merit publication, the fact that the issue raised herein is of such a significant constitutional magnitude also merits publication of this Court's decision.

STATEMENT OF THE CASE

On September 17, 2017, while driving his motor vehicle in the Town of Oak Grove, Dodge County, the above-named Defendant-Appellant, Charles L. Neevel, was detained by Lt. Chad Enright of the Dodge County Sheriff's Office for allegedly weaving in and out of his designated lane of travel. R52 at 2:18-24; D-App. at 104. Ultimately, Mr. Neevel was charged with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Second Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle with a Prohibited Alcohol Concentration—Second Offense, contrary to Wis. Stat. § 346.63(1)(b). R1; R2; R3.

Mr. Neevel retained private counsel and entered pleas of Not Guilty to both counts of the Criminal Complaint, and shortly thereafter, filed several pretrial motions. R12; R13; R14; R25. Among the motions he filed was a motion challenging whether it was reasonable under the Fourth Amendment to the United States Constitution for a law enforcement officer to seek as the State's primary test the most intrusive form of chemical test evidence, *i.e.*, a blood test, when less-intrusive means of gathering chemical test evidence were available. R14.

A hearing at which only argument was taken was held on May 10, 2018, before the Circuit Court for Dodge County, Branch I, the Honorable Brian A. Pfitzinger presiding. R51. Ultimately, the circuit court scheduled the matter for an oral decision on September 11, 2018, at which the court denied Mr. Neevel's motions. R52; D-App. at 103-12.

Mr. Neevel entered into a plea agreement and executed a Plea Questionnaire form which was filed on February 5, 2020. R26. On November 9, 2020, Mr. Neevel was sentenced by the circuit court

and a Judgment of Conviction was filed on November 13, 2020. R38; D-App. at 101-02.

By Notice of Intent to Pursue Post-Conviction Relief entered on November 11, 2020, and Notice of Appeal filed on January 4, 2021, Mr. Neevel commenced this appeal. R37; R42, respectively.

STATEMENT OF FACTS

On September 17, 2017, while driving his motor vehicle in the Town of Oak Grove, Mr. Neevel was stopped and detained by Lt. Chad Enright of the Dodge County Sheriff's Office for allegedly weaving in and out of his designated lane of travel. Lt. Enright alleged that Mr. Neevel had bloodshot eyes, slurred speech, smelled of intoxicants, and had admitted to consuming two drinks earlier in the evening. R52 at 3:1-5; D-App. at 105.

Mr. Neevel was then asked to exit his vehicle whereupon he submitted to a battery of field sobriety tests which he ostensibly failed. R52 at 3:9-12; D-App. at 105. Thereafter, Lt. Enright's cover officer, Deputy Oblinski, placed Mr. Neevel under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant. R52 at 3:13-15; D-App. at 105. Deputy Oblinski read Mr. Neevel the information contained on the Informing the Accused form and asked him to submit to an evidentiary chemical test of his blood, to which request Mr. Neevel consented. R52 at 3:15-22; D-App. at 105. Mr. Neevel was not offered an opportunity to submit to a less-intrusive form of chemical testing. R12 at p.2, ¶ 4.

Mr. Neevel was then transported to the Beaver Dam Community Hospital for a blood withdrawal. R52 at 3:22-24; R12 at p.2, ¶ 4; D-App. at 105. Subsequent analysis of Mr. Neevel's blood specimen yielded a result above the legal limit and he was additionally charged with Operating a Motor Vehicle with a Prohibited Alcohol Concentration. R1.

STANDARD OF REVIEW ON APPEAL

This appeal presents a question of constitutional law which this Court reviews *de novo*. *State v. Lee,* 175 Wis. 2d 348, 354, 499 N.W.2d 250 (Ct. App. 1993).

ARGUMENT

I. FRAMING THE ISSUE PRESENTED.

In 1966, the United States Supreme Court issued its decision in the seminal case of *Schmerber v. California,* 384 U.S. 757 (1966). *Schmerber* addressed the issue of whether a law enforcement officer could, over the objections of the accused, order that a sample of the accused's blood be withdrawn without a warrant because evidence of the crime of which he was suspected—drunken driving—was dissipating from his system. *Id*. at 770-71. Tellingly, while the *Schmerber* Court concluded that this was permissible *under the circumstances of that case*, the Court also took great pains to note that it "need not decide whether such wishes [as the accused preferring a less-intrusive means of testing] would have to be respected." *Id*. at 771. Justice Brennan, writing for a unanimous Court, also observed that the outcome "would be a different case if the police . . . refused to respect a reasonable request to undergo a different form of testing . . . ." *Id.* at 760 n.4.

The question Mr. Neevel presents for this Court's consideration focuses on what door, if any, the *Schmerber* Court intended to open by making the foregoing observations, especially in light of its more recent pronouncements in *Birchfield v. North Dakota*, 579 U.S. ____, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). It is Mr. Neevel's position that the body of common law authority which interprets the Fourth Amendment's reasonableness requirement in the context of the seizure of a person's blood during the course of an operating while intoxicated investigation has developed to the point where it has become constitutionally *un*reasonable under the Fourth Amendment to seek a blood test as the *primary* test in a drunk driving case when other, less-intrusive forms of obtaining evidence of a person's alcohol concentration are

available. As Mr. Neevel develops his argument throughout the remainder of this Brief, he respectfully requests that the Court keep constantly mindful of the *Schmerber* Court's statement that the outcome of that case "would be different" if the accused had requested to undergo an alternative form of testing other than submitting to a blood test.

II. THE LAW UNDERLYING IMPLIED CONSENT WITHDRAWALS OF A PERSON'S BLOOD AND ITS RELATIONSHIP TO THE FOURTH AMENDMENT.

A. The Fourth Amendment's Prohibition Against Unreasonable Seizures.

Before an examination of the question Mr. Neevel presents for this Court's consideration can commence, an examination of the principles which guide the Fourth Amendment's reasonableness requirement must be undertaken because, notably, all of the cases which comment upon the purpose of the Fourth Amendment are consistently and strenuously mindful of the fact that it is designed to *protect the security of individuals* and **not** designed to facilitate government endeavors.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Wisconsin Constitution affords protections which are coextensive with the Federal Constitution. *See* Wis. Const. art. I, § 11. Wisconsin courts interpret the protections granted by Article I, § 11 of Wisconsin Constitution identically to those under the Fourth

Amendment as defined by the United States Supreme Court. *State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Phillips*, 218 Wis. 2d 180, ¶ 21, 577 N.W.2d 794 (1998).

"The Fourth Amendment's purpose is to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals" *State v. Riechl*, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983). Capricious or arbitrary police action is not tolerated under the umbrella of the Fourth Amendment. "The basic purpose of this prohibition is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The Supreme Court has steadfastly held to the position that the "security of one's privacy against arbitrary intrusion by the police is at the core of the Fourth Amendment." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

Even if one recognizes the inherent, and laudable, goal of removing drunk drivers from Wisconsin roadways, this Court must acknowledge that public policy considerations cannot be elevated over constitutional mandates such as those found in the Fourth Amendment. The U.S. Supreme Court **has expressly frowned upon** such notions as permitting public policy to carve out exceptions to the Fourth Amendment. For example, in *Mincey v. Arizona*, 437 U.S. 385 (1978), when the High Court was asked to carve out a "murder scene" exception to the Fourth Amendment, it "decline[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id*. at 394. Under *Mincey*, therefore, the State will not be able to justify that designating blood as a primary test in drunk driving cases without regard to the availability of less-intrusive means of chemical testing ought to be permitted solely on the basis of the dangers drunk drivers annually pose upon Wisconsin highways.

To pass constitutional muster under the Fourth Amendment, a search or seizure must be deemed "reasonable." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

Among the "reasonable" justifications when applying for a warrant to seize a sample of a suspected drunk driver's blood is not only the notion that the suspect's blood will contain evidence of the crime, but also that the "threat that evidence will be lost or destroyed" by the body as it metabolizes the alcohol additionally justifies the need to obtain a warrant for the seizure of a blood sample. *State v. Bohling*, 173 Wis. 2d 529, 537, 494 N.W.2d 399 (1993), *abrogated in part by Missouri v. McNeely*, 569 U.S. 141 (2013); *accord*, *State v. Peardot*, 119 Wis. 2d 400, 404, 351 N.W.2d 172 (Ct. App. 1984). As noted in the introduction to Mr. Neevel's argument, while the United States Supreme Court sanctioned warrantless seizures of blood in circumstances in which there is not time to obtain a warrant, it also qualified its opinion in this regard if a "different form of testing" was available. *Schmerber*, 384 U.S. at 760 n.4.

The notion that the *Schmerber* decision would have been different *based upon whether the suspect would have been willing to take an alternate test* is of central import to Mr. Neevel's position subsequent to the more recent decisions in *Birchfield v. North Dakota*, 579 U.S. ____, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), and *Missouri v. McNeely*, 569 U.S. 141 (2013), as will be explained below.

B. Limitations of Searches Relative to the Goals Intended to Be Accomplished.

It is a well-settled principle of Fourth Amendment jurisprudence that when applying the reasonableness standard to a search inquiry, the court examines whether "**[t]he search was more intrusive than reasonably necessary to accomplish its goals**." *Winston v. Lee*, 470 U.S. 753, 759 (1985) (emphasis added). This examination is made necessary by the fact that "the [Fourth] Amendment's 'proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.'" *Id*. at 760, quoting *Mapp v. Ohio*, 367 U.S. 643, 768 (1961).

As the foregoing admonishment demonstrates, it is the *circumstances* of the situation which dictate whether the search is to

be deemed justified. It is Mr. Neevel's position that the U.S. Supreme Court's recent decisions in *Birchfield* and *McNeely* have changed the circumstances in which a law enforcement officer is permitted to pursue a blood withdrawal as a primary test without offering the suspect an opportunity first to submit to a less intrusive means of testing such as providing a breath or urine sample.

III. THE EFFECT OF *BIRCHFIELD* ON THE REASONABLENESS OF REQUESTING THAT A SUSPECTED DRUNK DRIVER SUBMIT TO A BLOOD WITHDRAWAL AS AN INITIAL FORM OF TESTING.

Recently, in *Birchfield v. North Dakota*, 579 U.S. ____, 136 S. Ct. 2160, the United States Supreme Court examined to what extent states may criminalize a suspected drunk driver's decision to refuse blood testing in order to effectuate compliance with the particular state's implied consent law and "how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests." *Id*. at ___, 136 S. Ct. at 2174. *Birchfield* represented the consolidation of three separate cases which involved slightly different factual scenarios, but all of which required the *Birchfield* Court to assess to what extent, if any, the Fourth Amendment protected the suspect's right to be free from unreasonable searches and seizures. *Id*. at ___, 136 S. Ct. at 2170-72.

The *Birchfield* Court elected to approach the question presented to it by examining "the degree to which [the searches] intrud[e] upon an individual's privacy and . . . the degree to which [they are] needed for the promotion of legitimate governmental interests." *Id*. at ___, 136 S. Ct. at 2176 (citation omitted). In so doing, the Court reiterated an earlier finding that "breath tests do not 'implicat[e] significant privacy concerns.'" *Id*., citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989). Blood testing, according to the *Birchfield* Court, presented "a different matter. [It] 'require[s] piercing the skin' and extract[ing] a part of the subject's body.'" *Birchfield*, 579 U.S. at ____, 136 S. Ct. at 2178, citing *Skinner*, 489 U.S. at 625. The Court continued:

> [F]or many, the process is not one they relish. It is significantly more intrusive than blowing into a tube. Perhaps that is why many States' implied consent laws, . . . specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests **or give motorists a measure of choice over which test to take**.

Birchfield, 579 U.S. at ____, 136 S. Ct. at 2178 (emphasis added).

Interestingly, the *Birchfield* Court also recognized that blood tests carry with them a significant inherent danger which breath tests do not. The Court recognized that:

> a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible **to extract information beyond a simple BAC reading**. **Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested**.

Id. (emphasis added). It is thus evident from the *Birchfield* Court's observations that blood testing is, in today's jurisprudential terms, not even on the same playing field as breath testing. From the constitutional perspective of protecting the privacy and security of individuals, blood testing is orders of magnitude more concerning than breath testing yet, from an evidentiary perspective, blood tests carry the same weight and presumptions which breath tests do, so in that regard is no different.

Ultimately, the *Birchfield* Court had to come to a conclusion about the permissibility of undertaking blood withdrawals pursuant to the search-incident-to-arrest exception to the Fourth Amendment. In reaching its holding, the *Birchfield* Court stated:

> 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.***

Id. at ___, 136 S. Ct. at 2184 (emphasis added). The emphasized portion of the foregoing quote brings the issue raised by Mr. Neevel "full circle." As the *Schmerber* Court admonished, its holding would have been different if the accused had been willing to submit to a less-intrusive means of testing, such as a breath test, and here in the *Birchfield* Court's conclusions one finds the statement that the Fourth Amendment "reasonableness" of a blood seizure "***must be judged* in light of the availability of the less invasive alternative of a breath test**." It should not be lost on this Court that the *Birchfield* Court did not leave the "reasonableness question" as it relates to the withdrawal of a blood sample to the vagueries of merely *suggestive* language. Instead, the Supreme Court unambiguously stated that the reasonableness of a blood draw "**must be judged**" relative to the availability of less-intrusive means of testing.

While Mr. Neevel concedes, as he must, that the foregoing analysis was undertaken in the context of a law enforcement officer's authority to conduct a search incident to arrest as opposed to a seizure conducted pursuant to an implied consent statute, his point is nevertheless as viable and as applicable to implied consent tests. That is, a seizure under an implied consent statute still remains a cognizable seizure for Fourth Amendment purposes. It is not removed from under the rubric of the Fourth Amendment's reasonableness requirement simply because it happens to come as part and parcel of an "implied consent contract" a driver has in obtaining a license from the State or from operating a motor vehicle on State highways. Because of this, if the Supreme Court has cautioned that seizures of blood must always be examined in light of the availability of less-intrusive means of testing, then rhetorically speaking, why should an officer who is requesting a specimen from a suspected drunk driver not similarly be required to first seek a means of obtaining a sample which is less intrusive than blood testing? After all, the dangers inherent in blood testing are well outlined in the *Birchfield* decision. This is in part, if not in whole, what motivated the *Birchfield* Court to arrive at the conclusion it did

regarding blood testing. Those same concerns exist *regardless* of whether the blood sample was obtained via a search incident to arrest or via an implied consent statute. Since the same concerns are inherent in either scenario, should not the same rule be applied to both in terms of Fourth Amendment reasonableness? Decisions of countless courts throughout State and Federal judiciaries speak about maintaining "consistency" in the application of the law, and Mr. Neevel proffers that his approach maintains a more consistent application of the Fourth Amendment than does a piecemeal approach in which less-intrusive means analysis is applicable to blood seizures when examining the question as a search incident to arrest or exigent circumstances exception to the Fourth Amendment but not as an "implied consent" test.

The recognition that the seizure of a person's blood constitutes a serious invasion of an individual's personal liberty is nothing new to constitutional jurisprudence. It is a well-settled maxim of constitutional law that:

> [b]ecause any medical procedure implicates an individual's liberty interests in personal privacy and bodily integrity, the Supreme Court has indicated that there is "a general liberty interest in refusing medical treatment." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990)(citing *Vitek v. Jones*, 445 U.S. 480, 494 (1980); *Parham v. J.R.*, 442 U.S. 584, 600 (1979)); *see also Cruzan*, 497 U.S. at 309 (Brennan, J., dissenting)("The right to be free from unwanted medical attention is the right to evaluate the . . . possible consequences according to one's own values and to make a personal decision whether to subject oneself to intrusion.").

United States v. Husband, 226 F.3d 626, 632 (7th Cir. 2000). With the Supreme Court's recent commentary upon the seriousness of blood withdrawal in the context of a drunk driving case, coupled with its long-standing recognition of an individual's right to refuse medical treatment as discussed above, it is Mr. Neevel's position that before law enforcement officers are authorized to pursue a withdrawal of a person's blood as a form of testing, they must first offer the individual the opportunity to submit to a less intrusive means of testing such as submitting to an Intoximeter EC/IR test.

The State cannot argue that offering the accused a choice to submit to a breath test if they do not want to take a blood test is not an "efficient" practice for law enforcement or "too burdensome" on law enforcement because the Supreme Court has already rejected such arguments in the Fourth Amendment context. Referring again to *Mincey*, the case in which law enforcement sought to carve out a "murder scene" exception to the Fourth Amendment, the Supreme Court chided that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey*, 437 U.S. at 393.

The High Court similarly rejected an "it's easier for law enforcement" argument in *Johnson v. United States*, 333 U.S. 10 (1948), when law enforcement officers attempted to justify the warrantless search of a hotel room upon a two-pronged theory that the odor of opium—as recognized by a trained narcotics officer—coupled with the accused's ostensible consent to enter the dwelling, justified a search of the room. *Id*. at 12. In rejecting this argument, the Supreme Court noted that a balancing test which weighed the government's interest in "effective law enforcement" against the "right of privacy" was the appropriate standard to employ under the Fourth Amendment. *Id*. at 14-15. When weighing these competing interests against one another, the Court stated that "inconvenience to [law enforcement] officers and some slight delay . . . are never very convincing reasons . . . to by-pass [a] constitutional requirement." *Id*. at 15.

The United States Supreme Court concluded that the efficacy of law enforcement officers offering a breath test to a suspected drunk driver in lieu of a blood test, albeit in a different factual context, imposed no palpable burden on law enforcement officers. In *McNeely*, 569 U.S. 141, the Supreme Court addressed whether *Schmerber* created a *per se* rule that because the liver would always be metabolizing the evidence of alcohol in a suspected drunk driver's blood, warrantless withdrawals were always constitutionally reasonable. *McNeely*, 569 U.S. at 151-52. In rejecting the notion that *Schmerber* gave rise to a *per se* rule regarding the same, the *McNeely* Court noted:

> We are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them. And in fact, **field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence**. See NHTSA, Use of Warrants for Breath Test Refusal: Case Studies 36-38 (No. 810852, Oct. 2007).

McNeely, 569 U.S. at 162 (emphasis added). Thus, the imposition of a simple requirement on the part of law enforcement officers to first inquire of a suspect whether s/he would be "willing to submit to a breath test" under the Implied Consent Law instead of requesting a blood specimen as the primary test is not only a "time-saver" in the sense of not requiring the officer to have to go through the ministrations of obtaining a warrant, but that simple "restriction[] on nonconsensual blood testing . . . can ***reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence***."

Additionally, as the *Birchfield* Court commented in the majority opinion, requiring law enforcement officers to offer breath tests to suspected drunk drivers would not only best serve to protect the rights of the accused under the Fourth Amendment as Mr. Neevel contends, but would also lessen the burden on the judicial system in having to handle a large volume of applications for warrants especially in rural America. *Birchfield*, 579 U.S. at ____, 136 S. Ct. at 2181.

IV. THE COURT HAS THE INHERENT AUTHORITY TO REQUIRE THE PROCEDURE ADVOCATED BY THE DEFENDANT.

At first blush, this Court may be concerned that Mr. Neevel is asking it to act as some kind of "super-legislature," creating procedures for law enforcement officers to follow which should rightfully come from the legislative branch and not the judicial. Nothing could be further from the truth.

First, Mr. Neevel is requesting that this Court recognize that the *Federal and State Constitutions* compel that action be taken under the circumstances of this case. Simply because the legislature has not had the time, opportunity, or desire to act in order to bring procedures under the State's Implied Consent Law in line with the Supreme Court's pronouncements does not mean that the judiciary has *carte blanche* permission to be dilatory. The intrusiveness of blood testing is now subject to the constitutionally-mandated choice to be offered suspected drunk drivers, which itself is compelled by the reasonableness requirement imposed by the Fourth Amendment. Thus, this Court is no "super legislature" when it acts to require law enforcement officers to offer a breath test alternative to blood testing. Rather, it is performing the role it is mandated to perform, namely the guardian of the Constitution.

Second, since Chief Justice Marshall first set quill to paper to author *Marbury v. Madison*, 5 U.S. 137 (1803), the judiciary has always had the authority to pass judgment on the constitutionality of statutes, *and the circumstances of their enforcement*, without reprisal. The three branches of government are set up to be *co-equal* arbiters of governance and government. Therefore, if this Court determines that the arresting officer in this case should have offered Mr. Neevel an opportunity to submit to a less-intrusive means of initial testing apart from submitting to a blood test, it is simply acting consistent with precedent which traces its roots back to 1803.

Finally, asking the Court to impose such a requirement upon law enforcement is not strained given that the judiciary has done this innumerable times in the past. *Miranda v. Arizona*, 384 U.S. 436 (1966), provides a prime example of just such a circumstance. Prior to *Miranda*, there was no requirement that law enforcement officers advise suspected criminals of their Fifth Amendment rights against self-incrimination. The Supreme Court, recognizing the vital constitutional need to advise suspects of this right, formulated the present rule. The current circumstances, post-*Birchfield*, compel the same type of resolution, to wit: suspected drunk drivers should be advised that they have an opportunity to submit to a less-intrusive means of testing than a blood test.

Likewise, the Court-made rule relating to the attachment of the right to counsel at critical stages in criminal proceedings is not one which is specifically spelled out in the U.S. Constitution, but is nevertheless imposed by court-made rule under *Kirby v. Illinois*, 406 U.S. 682 (1972). Thus, Mr. Neevel is in no manner asking this Court to act outside the boundaries of the authority already granted it under our State Constitution.

V. REMEDY FOR FOURTH AMENDMENT VIOLATIONS.

When an individual is unreasonably searched or seized in violation of the Fourth Amendment, the well-settled and long-standing remedy for the violation is suppression of the ill-gotten evidence under the "exclusionary rule." *Mapp*, 367 U.S. 643. Notably, in *Hoyer v. State*, 180 Wis. 407, 193 N.W.2d 89 (1923), the Wisconsin Constitution countenanced an exclusionary remedy in the face of an unconstitutional search or seizure thirty-eight years *prior to* the U.S. Supreme Court's *Mapp* decision. The seemingly prescient Wisconsin Constitutional protections are afforded to protect personal privacy, preserve judicial integrity, and deter police misconduct. *Conrad v. State*, 63 Wis. 2d 616, 635, 218 N.W.2d 252 (1974).

Not only are the direct products of an illegal search or seizure excluded from evidence, but the indirect or secondary products of a Fourth Amendment violation are excluded as well in order to prevent police exploitation of such violations. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Anderson*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991). In what has famously become known as the "fruit of the poisonous tree" doctrine, evidence which comes to light as a result of exploiting the benefit of an unconstitutional initial search or seizure must be suppressed as well because the taint from the initial violation flows downstream to all of the subsequently gathered evidence. *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970); *Anderson*, 165 Wis. 2d 441; *see also*, *Browne v. State*, 24 Wis. 2d 491, 129 N.W.2d 175 (1964); *State ex rel. White Simpson*, 28 Wis. 2d 590, 594, 137 N.W.2d 391 (1965).

CONCLUSION

Based upon the foregoing authorities and arguments, Mr. Neevel posits that the current state of Fourth Amendment jurisprudence, in light of the pronouncements in such cases as *Schmerber v. California*, *Birchfield v. North Dakota*, and *Missouri v. McNeely*, compel law enforcement officers to provide suspected drunk drivers with the opportunity to submit to less-intrusive means of testing other than blood testing when seeking to obtain evidence of a person's alcohol concentration, and that the failure to do so violates the reasonableness requirement of the Fourth Amendment. As such, when the opportunity to submit to a primary test other than blood is not offered, the accused's Fourth Amendment rights are violated and the only viable remedy for such a violation is suppression of the State's test.

Dated this 25th day of March, 2021.

Respectfully submitted:

MELOWSKI & SINGH, LLC

By:_____

Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this Brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the Brief is 5,190 words. I also certify that filed with this Brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a Table of Contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials 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.

Finally, I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic Brief is identical in content and format to the printed form of the brief. Additionally, this Brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on March 24, 2021. I further certify that the Brief and appendix was correctly addressed and postage was pre-paid.

Dated this 25th day of March, 2021.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2019-AP-610

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

CHARLES L. NEEVEL,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT
