SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-PETITIONER,

v. Appeal No. 2016AP308-CR

DAWN M. PRADO,

DEFENDANT-RESPONDENT-CROSS-PETITIONER.

RESPONSE BRIEF OF THE DEFENDANT-RESPONDENT-CROSS-PETITIONER

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ARGUMENT

As a preliminary matter, it bears repeating at the beginning of this Response Brief that the State is not entitled to appeal the decision of the Court of Appeals, for the reasons outlined in our Brief in Chief in Section V of our Argument. As the State's petition was improvidently granted, any response to its arguments should be unnecessary. Nonetheless, anticipating some consideration of the State's arguments on these matters as either subsidiary to the issue we raised or arising from this Court's discretion, we will endeavor to respond.

The State now at least seems to concede on the basis of *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019)(hereinafter "*Mitchell*")[1] that the pretend consent of statute is not "actual" consent (State's Brief at 31), as they've argued previously in other cases before this Court and to the Court of Appeals below in this case.[2] This much has been resolved by *Mitchell*, as the Court of Appeals noted:

> Justice Alito's plurality opinion explained that prior Court decisions approving of implied consent laws '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.' (plurality opinion of Alito, J. joined by Roberts, C.J., bryer, and Kavanaugh, JJ.) Justice Sotomayor's dissent agreed: 'The plurality does not rely on the consent exception here. . .

[1] All of the State's arguments under Argument sections I.A, I.B, I.C, I.D, and II.B.2.a.

[2] In briefing and argument to the Wisconsin Supreme Court in State v. Gerald P. Mitchell, the State wrote "By operating a vehicle on Wisconsin roads with a presumed understanding of the reasonable conditions imposed by the implied-consent statute and a presumed desire to act in accordance with that statute, Mitchell allowed a reasonable inference of consent to a suspicion-based search of his blood-alcohol content. That consent was not the product of government coercion. The State did not force him to drive. Nor did the State require him to maintain his consent once he was arrested. Indeed, at any moment before Mitchell fell unconscious, he was free to 'withdraw' his consent, subject to 'unquestionably legitimate' civil penalties. Accordingly, Mitchell's consent to the search was both actual and voluntary." State's Brief in State v. Mitchell at 26-27 (citations and parentheticals omitted).

> With that sliver of the plurality's reasoning I agree.' Sotomayor, J., dissenting, joined by Ginsburg and Kagan, JJ. Of the four separate opinions written in Mitchell, not one endorsed the State's position that implied consent, by itself, satisfies the Fourth Amendment.

Prado at ¶¶27-32; 50-64 (internal citations omitted).

To the contrary, a majority of Justices actually agreed that that pretend "implied" consent is not *actual* consent. This is fatal to the State's position. The standard of review here is not a procedural issue of whether the Court of Appeals erred, or whether we met our burden, but rather whether the statute is constitutional.[3] It plainly is not, for the reasons delineated by the Court of Appeals in its deference to the U.S. Supreme Court.

The State has traditionally argued for something like a "statutory exception" to the Fourth Amendment. That doesn't exist, for obvious reasons: If a legislature could legislate away a constitutional right, the constitution would have no meaning at all. The import is that a search must be justified, if at all, in an exception to the warrant requirement and not by statute.

I. *Mitchell v. Wisconsin* Established Very Little, and Certainly Not what the State Proposes.

The State relies heavily throughout its brief on *Mitchell*. But *Mitchell*'s bare plurality established very little—much less than the State supposes—and many of the State's arguments must be thus disregarded. *Mitchell* was a plurality decision with one

[3] This is not an error correcting Court. *State v. Schumacher*, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988).

concurrence.[4] The narrowest possible grounds under the *Marks*[5] test would be that the plurality and Justice Thomas believed an exception to the Fourth Amendment must apply to justify the unconscious blood draw of a suspected drunk driver. Justice Thomas would have a *per se* rule, whereas the plurality would have an "almost always" rule.

What *Mitchell* cannot have done was to establish some bizarre shift-the-burden-to-the-defense scheme, wherein the defense ought to show that the defendant's blood would not have been drawn anyway (having to prove a negative) and that the police officer wouldn't have other pressing duties (having to prove a negative). That nearly impossible test is not the standard, because we can't ascribe five of nine Justice's votes to it. Justice Thomas explicitly disclaimed it:

> Today, ***the plurality*** *adopts a difficult-to-administer rule*: Exigent circumstances are generally present when Police encounter a person suspected of drunk driving—except when they aren't. The plurality's presumption will rarely be rebutted, but will nevertheless *burden both officers and courts who must attempt to apply it*. . . Because I am of the view that the Wisconsin Supreme Court should apply [a *per se*] rule on remand, ***I concur only in the judgment.***
>
> *Mitchell v. Wisconsin* at 2539 (citations omitted, emphasis added).

This cannot be overstated. It is important to recognize it, lest Wisconsin courts fall into another confounding *Bohling*[6] situation. The plurality adopted a test that Justice Thomas explicitly disclaimed. It is not the rule. Who "adopts a difficult-to-administer

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[4] The plurality opinion was written by Justice Alito, joined by Chief Justice Roberts and Justices Breyer and Kavanaugh (that's four of nine justices). Justice Thomas concurred in judgment only, and Justice Sotomayor dissented, joined by Justices Bader and Kagan. Justice Gorsuch likewise dissented separately, and would have dismissed the case as improvidently granted.

[5] *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990 (1977).

[6] *State v. Bohling*, 173 Wis.2d 529, 494 N.W.2d 399 (1993), discussed below.

rule" that will "burden both officers and courts who must attempt to apply it"? *Not* Justice Thomas. There is thus no test, because it did not have enough votes. At least one Wisconsin appellate court has explicitly misinterpreted *Mitchell* to have adopted a test. *State v. Richards*, 2020 WI App 48, 939 Wis.2d 772, 948 N.W.2d 359. Circuit courts across Wisconsin are employing the test as described in *Mitchell* and *Richards*, burdening the defense with proving negatives in the context of suppression hearings. This Court should immediately correct this misapprehension of *Mitchell* in Wisconsin.

Let's not be caught in another *Bohling* situation. In *Bohling*, Wisconsin courts understood *Schmerber v. California*[7] to mean what the State says it means at page 10 of its Brief (that "a blood draw was justified by exigent circumstances because a car accident heightened the urgency that is common to all drunk-driving cases.")(internal quotations and citations omitted). But the Supreme Court clarified in *McNeely*[8] that's not what they meant, explicitly overturning *Bohling* and its progeny. (See *McNeely* at n.2). Here, the danger of drawing anything from *Mitchell* (particularly its backward inclination to burden the defense with some sort of showing at a suppression hearing) is even more evident. Justice Thomas explicitly disavowed such a scheme in joining *only* the judgment of the Court. The narrowest grounds cannot be said to include the defense-burdening scheme, and this Court should make that clear, as our Court of Appeals has already gone astray in *Richards* and circuit courts are likewise burdening defendants.

Because of this, the State's complaints about our apparent concessions and

[7] *Schmerber v. California*, 384 U.S. 757 (1966).
[8] *Missouri v. McNeely*, 133 S.Ct. 1552 (2013)

non-distinguishing of *Mitchell* and our failure to assert that ours is an unusual case as described by *Mitchell* are inapt. We didn't concede (State's Brief n.3), distinguish (*Id.* at 16), or assert (*Id.*) because there's very little in *Mitchell* that's binding: The scheme proposed by the plurality wasn't joined by Justice Thomas, so that part of *Mitchell* certainly isn't. But to be clear, if this Court somehow finds to the contrary, it is self-evident from a mere reading of the Statements of the Case that Prado would likely meet the bizarre shift-the-burden-to-the-defense-to-prove-a-couple-of-negatives *Mitchell* plurality test: There's nothing in the record to suggest her blood would have been otherwise drawn (*see* Defendant's Brief, n. 1), and there's nothing to suggest that the officer who had just come on duty and was assigned to draw her blood would have been otherwise occupied (Motion Hearing at 6). This Court cannot adopt the plurality test of *Mitchell* absent deciding that Wisconsin law means something other than federal law, but if it somehow does decide that's what *Mitchell* requires, what happens then is a remand for fact-finding.[9]

The State did not advance any argument about exigent circumstances in the circuit court or in its original appellate briefs until after *Mitchell* was decided by the U.S. Supreme Court. State's Supplemental Brief to the Court of Appeals at 4; *Prado* at ¶66, State's Brief at 12. The State asserts it should be excused from its failure to advance

[9] This Court should recognize that *Mitchell* did not establish the rule proposed by the plurality. If this Court adopts that rule notwithstanding that *Mitchell*'s plurality is not binding as to the test, then this case would have to be remanded for fact finding. The State cannot credibly claim that it was absolved from its responsibility to assert exigent circumstances because of *Mitchell* and then foreclose the opportunity for the Defendant to be heard on the very same "new rule."

exigent circumstances because *Mitchell* announced a "new rule" and a "litigant cannot fairly be held to have waived an argument that, at the time, a court of competent jurisdiction had not yet announced[,]" citing *State v. Rodriguez*, 2007 WI App 252 ¶ 11. Except *Mitchell* didn't announce a new rule. It applied an old rule (poorly, without a majority), to the facts before it. As we observed in our supplemental brief to the Court of Appeals, exigent circumstances have been used as a justification for warrantless blood draws for over 25 years. *See e.g. State v. Bohling*, 173 Wis.2d 529, 494 N.W.2d 399 (1993).

Consider what the State's position means: *Per se* exigency was the rule for 20 years, from *Bohling* in 1993 to *McNeely* in 2013, then at the end of 2014 Prado was charged, so the State didn't argue exigency until *Mitchell* in 2019, because *McNeely* meant there wasn't *automatic* exigency, but now since *Mitchell* there "almost always" is. But *McNeely* didn't exclude the possibility of warrantless, unconscious blood draws ever being justified by exigent circumstances: It merely clarified that it wasn't as automatic as *Bohling* supposed. Clearly, the State could have still argued exigent circumstances in the wake of *McNeely*. It simply didn't.

Because of this timeline, the State can neither have cake nor eat it. If exigency is a "new rule" since the events of this case its officer was wrong to act as though it was the law at the time, and if it isn't a "new rule" the State has clearly waived its chance to argue it.

II. The Court of Appeals was Right about the Unconstitutionality of Pretend Consent

Much of the State's complaint can be found in its ideations about constitutional avoidance and the order in which the Attorney General—the Executive Branch—would have courts consider exceptions to the Fourth Amendment. State's Brief at 17. The State would prefer that courts never address the constitutionality of the statute in question and instead just assume the statute unconstitutional so that they can decide what exception to it will apply, ironically (and favorably to the State) leaving a clearly unconstitutional statute on the books. *Id.* In the State's view, only after ruling out the litany of exceptions to the exclusionary rule can a court permissibly reach the constitutionality of the statute. *Id.*

Practically speaking, this is exactly what we meant when we asserted that courts had established a self-fulfilling prophesy with *Dearborn*[10] and the like, ensuring that unconstitutionality will never be found by assuring that it will never be considered. Brief in Chief at 17.

Practicality aside, the State misapprehends "constitutional avoidance" in two ways: First, because if a court is applying an exception to the exclusionary rule, it is already engaging in constitutional analysis; and second because it confuses an inapplicable judicial prudential policy with some sort of binding *stare decisis*.

[10] *State v. Dearborn*, 2010 WI 84, 327 Wis.2d 252, 786 N.W.2d 97.

A) We're already engaging in constitutional analysis.

The most cogent summary of the State's position can be found in the paragraph:

> However, to the extent that the constitutionality of the unconscious driver provision needs saving, the fact that *Mitchell* established a rule under which a blood draw authorized by the unconscious driver provision is almost always constitutional *does* save it. It would make little sense that a statute can *never* be enforced when the blood draws it authorizes are *almost always* justified.

State's Brief at 31 (emphasis in original). While it is facially sensical, this assertion falls apart when one realizes that you never get to exigent circumstances without a constitutional violation. In this regard, the State keeps wanting answers to questions that it demands not be asked.

The State asserts no argument whatsoever in support of the Legislature's ability to legislate away Wisconsin citizens' constitutional rights. In doing so, it misunderstands the posture of this case: The unconscious blood draw statute has been found unconstitutional beyond a reasonable doubt, as the circuit court and Court of Appeals cogently explained, and it's the State's job to now explain why they were wrong. Instead, the State focuses on the burden we've already met in the court below and argues that the court should have considered things in a different order more amenable to the State's liking.

"To show that a blood draw under this statute violated her constitutional rights, Prado must show that the blood draw was an unlawful search." State's Brief at 30. That's simple. It's black letter law that a warrantless search is presumed unreasonable under the

Fourth Amendment absent a few well-delineated exceptions. *State v. Williams*, 2002 WI 94, ¶ 18 255 Wis.2d 1, 646 N.W.2d 834 (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967). There was no warrant in this case. Consent is an exception to the warrant requirement. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). But consent can't be granted by the legislature. U.S. CONST. amend. IV; *State v. Roundtree*, 2021 WI 1, ¶108-116 (J. Hagedorn, dissenting).

It's really not that complicated. The statutory sleight of hand that conflates "deemed to have given consent" with "presumed not to have withdrawn consent" is ridiculously transparent to all but the intellectually dishonest. "Deemed to have consented" is not consent. There's no actual consent to be withdrawn, so the presumption that it hasn't been is nonsensical. It's concerning that this argument actually requires rebuttal.

If legislatures could legislate away constitutional rights, there would be no constitutional rights. The point of the Constitution is that the rights it protects can't be legislated away.

> The sleight of hand the State employs in this case is little better than the statute:
>
> > However, to the extent that the constitutionality of the unconscious driver provision needs saving, the fact that *Mitchell* established a rule under which a blood draw authorized by the unconscious driver provision is almost always constitutional *does* save it. It would make little sense that a statute can *never* be enforced when the blood draws it authorizes are *almost always* justified.

States Brief at 31, emphasis in original.

While a little better, this is still blatant *non sequitur*. Are "consent" and "exigent

circumstances" the same thing?

No.

So if "exigent circumstances" are "almost always justified," has "consent" occurred?

No.

Well, then, if a plurality of the U.S. Supreme Court says that "exigent circumstances" are "almost always" present, does that mean a statute purporting to grant "consent" on behalf of Wisconsin's citizens to draw their blood when they're in the most vulnerable state possible is constitutional?

No.

To be clear, this is devastating to the State's only argument. The State, to its credit, does not explicitly argue (anymore) that the legislature can consent to searches on behalf of citizens. On the other hand, its only argument here is that since a plurality in *Mitchell* said exigent circumstances will almost always be present, that the statute pretending to grant consent on behalf of Wisconsin citizens is somehow saved.

The State conflates the reasons a search might be constitutional, or fall within an exception to the constitution. A search conducted with a warrant is reasonable. In terms of warrantless searches, exigent circumstances are an exception. Good faith is an exception. Consent is an exception. A statute purporting to give consent is not an exception. The State using *Mitchell* to conflate exigent circumstances with pretend consent is the same as conflating good faith with exigent circumstances. They're different

things.

There is no getting around this. The State says that because a plurality of *Mitchell* says that exigent circumstances are almost always present when someone is unconscious, a statute can grant consent for unconscious persons. That does not follow.

A statute alone can never provide consent. This is perhaps why the State argues to save *Wintlend*[11] over *Padley*[12] - because if *Padley* is correct and if *Birchfield*[13] did overrule *Wintlend*, then there is no case that says the statute can give consent. The State admits that part of *Wintlend*, the "minimal intrusion," doesn't survive *Birchfield*, but supposes that the rest of it somehow does. The Court of Appeals succinctly explained in their decision in this case why that is not true.

B) Judicial prudential doctrines are not *stare decisis* or otherwise binding: This is too extravagant to be maintained.

As outlined above, the judicial prudential doctrine of constitutional avoidance is inapplicable here because the issues squarely presented are constitutional, so no avoidance is possible.

In support of its assertion that the Court of Appeals got it wrong by considering a constitutional issue that could have been avoided (State's brief at 17), the State cites *State v. Castillo*,[14] which cites *Grogan v. Public Service Commission*,[15] which cites *Kollasch v.*

[11] *State v. Wintelend*, 2002 WI App 314, 258 Wis.2d 875, 655 N.W.2d 745.
[12] *State v. Padley*, 2014 WI App 65, 354 Wis.2d 545, 849 N.W.2d 867.
[13] *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)
[14] *State v. Castillo*, 213 Wis.2d 488, 570 N.W.2d 44 (1997).
[15] *Grogan v. Public Serv. Comm'n*, 109 Wis.2d 75, 325 N.W.2d 82 (Ct. App. 1982).

Adamany,[16] which states "As a matter of *judicial prudence*, a court *should* not decide the constitutionality of a statute *unless* it is essential to the determination of the case before it."(emphasis added). *Kollasch* cites to *Smith v. Journal Co.*,[17] which says "We *should* not consider the question of the constitutionality of a legislative act *unless* a decision respecting its validity is essential to the determination of the controversy before us."(emphasis added). *Smith v. Journal* cites to *Estate of Zeimet*,[18] which quotes *Roesenhein v. Frear*[19] that ""Sound *judicial policy* precludes the court from considering the question of the constitutionality of a legislative act *unless* a decision respecting its validity is essential to the determination of some controversy calling for judicial solution."(emphasis added).

The point is that the prudential judicial doctrine of constitutional avoidance is rooted in respect for the separation of powers, but is merely a judicial policy and a "should" rather than a "must." In each case, the "unless" *requires* the "must" of judicial intervention. Policy cannot absolve this Court of the responsibility to say what the law is:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law;

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[16] *Kollasch v. Adamany*, 104 Wis.25 552, 313 N.W.2d 47 (1981).
[17] *Smith v. Journal Co.*, 271 Wis. 384, 73 N.W.2d 429 (1955).
[18] *Estate of Zeimet*, 259 Wis.. 619, 49 N.W.2d 924 (1951).
[19] *State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 119 N.W. 894 (1909).

the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

. . .

> It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.
>
> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.
>
> The rule must be discharged.

Marbury v. Madison, 5 U.S. 137, 177 (1803).

The State wants to be able to keep arguing that a police officer can "rely in good faith on an existing statute until the statute is found unconstitutional by an appellate court in a published opinion," so it insists that this Court leapfrog over the determination of the statute's constitutionality by assuming without finding unconstitutionality in order to then find good faith, so the State can keep arguing good faith in future like circumstances.

It's really rather brilliant. It's just not constitutional.

III. "Good Faith."

After arguing that the "court of appeals erred in finding the unconscious driver provision in Wisconsin's implied consent law unconstitutional,," the State complains that "the court of appeals resorted to the good faith exception without first determining that Prado's blood sample was obtained in an unconstitutional search." *Id.* At 36. Since the State had asserted that the warrantless seizure of Dawn's blood was justified by statute,

the Court of Appeals addressed that argument and recognized the statute was unconstitutional. The Court of Appeals clearly found that the evidence was obtained in an unconstitutional search, and thus engaged in an appropriate analysis, as it was obligated to.

The rest of the State's contentions regarding "good faith" are addressed in our Brief in Chief.

CONCLUSION

For the foregoing reasons, Dawn M. Prado respectfully requests that the court reverse the Court of Appeals as to "good faith" and affirm the circuit court's suppression of evidence.

Dated: February 22, 2021

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62(4)(a) for a petition produced using a proportional serif font: Minimum printing resolution of 200 dots per inch, 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 petition from introduction to conclusion is 4,246 words.

Dated: February 22, 2021

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that:
This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Signed

Signature