THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-15-568

STATE OF MAINE
APPELLEE

v.

MICAH DAY
APPELLANT

ON APPEAL from the Cumberland County Unified Criminal Docket

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

The parties agree that pre-trial, defendant asserted his Fourth Amendment right to be free from a warrantless blood draw. (Blue Br. 4; Red Br. 4-5; Tr. 99). The parties also agree that during the trial, both the prosecutor and the trial court invited the jurors to interpret this assertion as evidence that defendant was guilty of the crime of operating under the influence of intoxicants. (Blue Br. 4-8; Red Br. 5-6).

QUESTION PRESENTED

Whether the admission of a defendant's refusal to submit to testing for blood-alcohol content at a trial for operating under the influence (OUI) violates the Fourth Amendment, despite the holding of the Supreme Court of the United States in *South Dakota v. Neville*, 459 U.S. 553, 563-64 (1983), that the Fifth Amendment does not prohibit the admission into evidence of a defendant's refusal to submit to testing for blood-alcohol content.

ARGUMENT SUMMARY

Both the U.S. Supreme Court and this Court have already answered this question. There is no blanket prohibition on the introduction of refusal evidence at a criminal trial. Because refusal evidence could theoretically

be probative of certain ancillary facts (such as whether the defendant speaks or understands English), it could be admitted in a criminal trial for certain limited purposes. But, this does not mean that refusal evidence is admissible to prove guilt – it is not. As this Court, and every other court that has considered the issue has instructed, a defendant's refusal to submit to a warrantless search is not probative of guilt, and not admissible to prove that point. The State concedes that, in this case, the jurors were invited by the trial court to infer that defendant was guilty of OUI because he invoked his Fourth Amendment rights and refused to submit to a warrantless blood draw. Reversal is required.

STATEMENT OF AMICUS CURIAE

The American Civil Liberties Union of Maine Foundation ("ACLU of Maine") is a nonprofit, nonpartisan organization dedicated to protecting the civil rights and civil liberties of the people of Maine and extending those protections to individuals who have traditionally been denied them. The ACLU of Maine was organized (as the Maine Civil Liberties Union Foundation) in 1968 as the Maine affiliate of the American Civil Liberties Union. The ACLU of Maine has a long history of involvement, both as

amicus curiae and as direct counsel, on Fourth and Fifth Amendment issues.

ARGUMENT

I. Defendant had a right to refuse to submit to a blood test.

In *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2178 (2016), the U.S. Supreme Court reaffirmed what it has consistently held since *Schmerber v. California*, 384 U.S. 757, 767 (1966): the extraction and analysis of a person's blood constitutes both a "seizure" and a "search" for purposes of the Fourth Amendment. *See also Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 614-615 (1989) (same); *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) (same).

Like everything else in the Fourth Amendment context, the declaration that some governmental action constitutes a "search" or a "seizure" is only the starting point in the analysis because the rule that would normally attend – the police must obtain a warrant – is shot through with holes. That said, the rule that emerges from 50 years' worth of case law is that, except in unusual cases with aberrant fact patterns, the extraction and analysis of blood evidence is categorically prohibited without a warrant:

- A blood test may be justified by the exigent circumstances exception, but only in unusual cases where the totality of the circumstances suggest some exigency other than the dissipation rate of blood-alcohol evidence. *Schmerber*, 384 U.S. at 770.

- A blood test is not categorically justified by the exigent circumstances exception; the natural dissipation rate of blood-alcohol evidence does not alone give rise to exigent circumstances in every case. *McNeely*, 133 S.Ct. at 1560.

- A blood test may not be administered as a search incident to a lawful arrest for drunk driving, and a defendant who acquiesces to a blood test under an implied consent statutory regime or any other threat of criminal punishment does not truly consent for Fourth Amendment purposes. *Birchfield*, 136 S.Ct. at 2185.

In this case, the police were required to obtain a warrant in order to extract defendant's blood. Stated differently, defendant had a Fourth Amendment right to refuse to consent to a blood draw.

A. The exigent circumstances exception does not apply.

The exigent circumstances exception does not apply. The natural dissipation of blood-alcohol evidence alone does not categorically justify dispensing with a warrant, *McNeely*, 133 S.Ct. 1560, and there are no case-specific facts that suggest any other type of emergency. For example, in *Schmerber*, 384 U.S. at 770-771, the police had no time to acquire a warrant because they had to transport the defendant to the hospital and process the scene of the accident.

Here, defendant was uninjured and there was no accident. Furthermore, the bulk of the delay in obtaining blood evidence was due to Officer Hannon himself, and not some existential emergency. *Kentucky v. King*, 131 S.Ct. 1849, 1858 (2011) (police-created exigencies do not justify a warrantless search). According to the State, Hannon believed that he was authorized to take defendant's blood anytime he wanted to, and yet, Hannon doggedly insisted *for nearly an hour* that defendant submit to a breath test, and then he wasted more time by refusing to conduct a blood test even after defendant had acquiesced to one. (State's Memo 2: Defendant "asked for a blood test but Officer Hannon…saw no reason for the blood test and told [defendant] he would not offer it.").

B. The consent exception does not apply.

The consent exception to the warrant requirement does not apply. For one thing, defendant never consented *as a matter of fact*. Defendant initially suggested that the police draw his blood, but then he changed his mind and refused to submit to a blood test – all of this while being told, falsely, that his consent was "implied" and required by law. (State's Memo 2). The fight on appeal is whether evidence of defendant's *refusal* to submit to a blood test was admissible at trial. The State argues in its memorandum and in its brief that defendant consented by virtue of the implied consent statute, but if that were true, then why was a blood or breath test never administered?

When it suits the State's purposes – *e.g.* when it wants to argue that defendant's refusal is probative of his guilt – the State says that defendant refused a blood draw. *See* Red Br. 11 ("There is no dispute that the defendant refused to take a test to measure his blood-alcohol level…."). At other times, the State makes the opposite argument and says that defendant consented to a blood draw. *See* State's Memo 3 (Defendant

"requested and consented to a breath test"). Sometimes, the State even argues that defendant both refused and consented simultaneously.[1]

Which is it? The answer matters because if defendant consented, then evidence of his so-called refusal plainly would be inadmissible because it would be factually inaccurate. This alone would be a basis for this Court to reverse defendant's conviction.

At any rate, the State's consent argument should not detain this Court because defendant never consented to a blood test, *as a matter of law*. According to the State, defendant was told that he would suffer criminal consequences, including the possible loss of liberty, if he refused to provide a blood or breath sample. (Red Br. at 4; s*ee also* 23 M.R.S. § 2521 (implied consent to chemical tests)). Defendant then acquiesced to a blood

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[1] Under the sub-heading, "Admission of evidence about the defendant's *refusals* to take the tests did not violate the Fourth Amendment," the State claims, "In this case, the implied consent statute obtains valid consent from the defendant for Fourth Amendment purposes, and the defendant's *consent*, under implied consent, cannot be revoked." (Red Br. at 16-17; emphasis added). Likewise, in its Memo, the State claims both that defendant "requested and consented to a blood test" and that "evidence of [defendant's] refusal to submit to a breath test was overwhelming." Respectfully, this makes no sense, legally or factually. (Memo at 3). In actuality, defendant acquiesced to a blood test and then withdrew that acquiescence. This does not constitute a consent for purposes of the Fourth Amendment. *See* Blue Br. 28 & Gray Br. 3-4 (discussing revocability of consent). Moreover, the fact that the police dithered after defendant acquiesced and did nothing for at least 25 minutes belies any exigency argument made for the first time in the State's Memo.

test (before he finally revoked his acquiescence). This does not constitute consent for purposes of the Fourth Amendment.

In *Birchfield*, 136 S.Ct. at 2185, the Court instructed that there is "a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads," and it held that a State cannot insist on a blood test and then impose criminal penalties on the refusal to submit to such a test. The Court made clear: "[W]e conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

The State's insistence that defendant consented to a blood draw by virtue of the implied consent statute is, therefore, wrong as a matter of law. *Birchfield* rejected this argument and held that any acquiescence wrested from a person under a threat of criminal consequences for refusal is not true consent for purposes of the Fourth Amendment.

C. The search-incident-to-arrest exception does not apply.

Lastly, the search-incident-to-arrest exception does not apply, either. Insofar as this exception (and possibly others) are concerned, the U.S. Supreme Court weighs the competing privacy and law enforcement interests at stake in order to decide whether a particular search is

"categorically" reasonable without a warrant. *Birchfield*, 136 S.Ct. at 2174-2176. Once the Court has struck that balance and announced the "categorical rule," law enforcement officers and lower courts are expected to apply it uniformly, unless an unusual fact pattern dictates otherwise, like in *Schmerber.*

In *Birchfield*, 136 S.Ct. at 2185, the Court undertook that analysis and held that "the search incident to arrest doctrine does not justify the warrantless taking of a blood sample." *Id.* With some resistance, the State now appears to concede the point. (State's Memo 3).

D. Defendant had a right to refuse a warrantless blood draw.

Because none of the exceptions to the warrant requirement apply, the categorical rule announced in *Birchfield* does: the police must obtain a warrant before conducting a blood-alcohol test. Thus, defendant had a Fourth Amendment right to refuse to submit to a blood draw, and he asserted that right, as was his choice to do so.

That aligns the legal premise in this case with that in *State v. Glover*, 2014 ME 49, 89 A.3d 1077. The defendant in *Glover* refused to provide a DNA sample without a warrant. *Id.* at ¶ 4. The defendant in the instant case refused to provide a blood sample without a warrant. The question for

this Court in both cases was whether defendant's refusal evidence was admissible to prove defendant's guilt. In *Glover*, this Court held that it was not. That result follows here, too.

II. There is no blanket prohibition on the use of refusal evidence, but it is not probative of criminal culpability.

As the Court instructed in *Birchfield*, 136 S.Ct. at 2185, proof that a suspect has refused to submit to a warrantless blood draw may result in "civil penalties" and other "evidentiary consequences." But, it would be a mistake for this Court to read something into this passage of the opinion that simply is not there. At no point in the decision does the Court even so much as hint that a defendant's refusal to submit to a warrantless search is probative of whether the defendant drove drunk – dictum that would be strange indeed.

A. *Birchfield* does not hold that refusal evidence is probative of criminal culpability.

If the *Birchfield* Court intended the bizarre result that a warrantless blood draw violates the Fourth Amendment, but, notwithstanding that, a defendant's assertion of his right to be free from a warrantless blood draw constitutes admissible and probative evidence of guilt, then it would have

had to say so directly because no reader would rationally deduce that from the opinion as written. The remedy for a Fourth Amendment violation is the exclusion, not admission, of evidence. The logical schism between excluding test results, but admitting as probative evidence of guilt a defendant's refusal to submit to the search that made the test results possible, is so vast that the two concepts are simply irreconcilable.

If refusal evidence were admissible and probative of guilt, then the Fourth Amendment protection from warrantless blood draws would become utterly meaningless. *See e.g. United States v. Jackson*, 390 U.S. 570, 581 (1968) (If a statutory provision has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."); *Greenwald v. United States*, 353 U.S. 391, 425-426 (1957) (Black, J., concurring) ("It seems particularly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.").

The *Birchfield* Court's cursory treatment of *South Dakota v. Neville*, 459 U.S. 553 (1983), is all that case deserves. *Birchfield* cites *Neville* for the obvious propositions that drunk driving is bad, *id.* at 2178, and that

forcible blood extraction is difficult and distasteful, *id.* at 2184. The *Birchfield* Court also cites *Neville* and *McNeely* to demonstrate the permissible *civil* uses of refusal evidence. In *McNeely*, 133 S.Ct. at 1566, the Court observed that a defendant's refusal to submit to a blood test might result in a driver's license suspension. And the specific portion of the *Neville* opinion that the *Birchfield* Court cites to simply reiterates the same:

> 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. Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections.

Neville, 459 U.S. at 560; *see Birchfield*, 136 S.Ct. at 2185 ("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. *See e.g. McNeely* [citation omitted]; *Neville, supra,* at 560").

But there can be no doubt that the remainder of the *Neville* decision does not survive *Birchfield*. *Neville*, 459 U.S. at 564-565, holds that because a defendant has no right to refuse to submit to a blood-alcohol

test, admitting evidence of his refusal does not violate the Fifth Amendment right against self-incrimination. After *Birchfield*, this may be true insofar as a breath-alcohol test is concerned – but not a blood-alcohol test. Absent a warrant, a suspect can lawfully refuse to submit to a blood test.

The Court explained in *Neville*:

> [T]he values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test of having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace…that *the state could legitimately compel the suspect, against his will, to accede to the test*. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for that choice. *Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel*, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood alcohol test is far stronger than that arising from a refusal to take the test.

Id. at 563-564 (emphasis added). The italicized portions of the *Neville* Court's reasoning do not survive *Birchfield*. The State cannot legitimately compel a suspect to submit to a warrantless blood draw absent exigent

circumstances. *See Birchfield*, 136 S.Ct. at 2184 (a warrantless blood-alcohol test is per se unreasonable). And penalizing the invocation of one's constitutional rights is *ipso facto* coercive. Forcing a defendant to choose between surrendering his rights and asserting them, only to have the jury infer guilt from the assertion, is not a "true choice."

Birchfield does not overrule *Neville* outright because its reasoning has broad application in other contexts: whenever a suspect has no right to refuse, evidence of his refusal does not offend the Fifth Amendment. But when the opposite is true, and a suspect does have a constitutional right to refuse, the same result does not follow. At least up to now, even the State has not argued otherwise.

Instead, the State argues that *Glover* is distinguishable: whereas the defendant in *Glover* had a constitutional right to refuse to provide a DNA sample, the defendant in the instant case had no right to refuse to provide a blood sample because of the informed consent statute. (Red Br. 10-11: "In this case, however, no such constitutional right existed for the defendant because he had implicitly agreed to submit to testing when he drove on a Maine road."). But when pressed by this Court to consider the contrary holding of *Birchfield*, the State wisely backs down and its memorandum conspicuously omits any mention of *Glover* at all.

B. This Court should continue to hold that the assertion of one's constitutional rights is not probative of criminal culpability.

In *State v. Glover*, 2014 ME 49, ¶ 11, 89 A.3d 1077, this Court instructed that: "The probative value of a defendant's exercise of a constitutional right is minimal at best. There are myriad reasons that a person, whether innocent or not, may exercise a constitutional right." This Court added that [t]his is especially true in the context of the Fourth Amendment right to be free from unreasonable government intrusions" because "[t]he Fourth Amendment protects an individual's right 'to be let alone,' which is wholly independent from procedural concerns relating to the ascertainment of truth." *Id.* at ¶ 11. This Court held: "Invocation of this right has no legitimate bearing on the likelihood that a defendant is guilty of a criminal offense." *Id.* at ¶ 11.

Many courts have adopted this reasoning. *See e.g. United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978) (refusal evidence is "so ambiguous as to be irrelevant"); *United States v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) (refusal evidence is "of little probative value"); *State v. Turner*, 39 M.J. 259, 262-63 (C.M.A. 1994) ("not relevant"); *Anable v. Ford*, 653 F. Supp. 22, 36 (W.D. Ark. 1985) ("supports no inference at all"); *State v. Sellers*, 507 N.W. 2d 235, 236 (Minn. 1993) ("ambiguous");

Commonwealth v. Welch, 585 A.2d 517, 520 (Pa. 1991) (not probative of guilt); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986) ("ambiguous"); *State v. Thomas*, 766 U.S. 263, 272 (Iowa Ct. App. 2009) (refusal evidence proves the defendant knew his rights, nothing more); *Burchette v. Commonwealth*, 425 S.E.2d 81, 85 (Va. Ct. App. 1992) ("proof of nothing.").

Other courts have also held that the admission of refusal evidence itself violates the Fourth Amendment. *See e.g. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *United States v. Thame*, 846 F.2d 200, 206-207 (3d Cir. 1988); *United States v. Turner*, 39 M.J. 259, 262 (C.M.A. 1994); *Ramet v. Nevada*, 209 P.3d 268, 270 (Nev. 2009); *State v. Christiansen*, 163 P.3d 1175, 1182-83 (Idaho 2007); *Deno v. Commonwealth,* 177 S.W.3d 753, 762 (Ky. 2005); *Reeves v. State*, 969 S.W.2d 471, 493 (Tex. 1998); *State v. Palenkas*, 933 P.2d 1269 (Ariz. 1996); *State v. Jennings*, 430 S.E.2d 188, 200 (N.C. 1993); *Simmons v. State*, 419 S.E.2d 225, 226-27 (S.C. 1992); *Commonwealth v. Welch*, 585 A.2d 517, 519-21 (Pa. 1991); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986); *Elson v. State*, 659 P.2d 1195, 1198-99 (Alaska 1983); *State v. Banks*, 790 N.W.2d 526, 532-34 (Wisc. App. 2010) (admission of refusal evidence also violates defendant's right to

due process); *Mackey v. State*, 507 S.E.2d 482, 484 (Ga. App. 1998); *Gomez v. Florida*, 572 So.2d 952, 953 (Fla. Dist. Ct. App. 1991); *People v. Stephens*, 349 N.W.2d 162, 163-64 (Mich. App. 1984); *People v. Keener*, 148 Cal. App. 3d 73, 78-79 (1983).

In fact, courts in at least 20 other jurisdictions have considered the question, and *all of them* have held that a defendant's refusal to submit to a warrantless search is inadmissible to prove guilt. There is no reason for this Court to become the lone outlier now.

C. Refusal evidence may be admitted for other purposes, besides proof of guilt.

Notwithstanding all of the above, there is no blanket prohibition on the admission of refusal evidence. The refusal to submit to a warrantless search may have "evidentiary consequences" even in criminal trials. *Birchfield*, 136 S.Ct. at 2185.

This Court made the same observation in *Glover*, and on this point, the State and this Amici agree: "This Court also noted in *Glover* that the defendant's refusal to submit to a voluntary DNA test 'may be admissible for other purposes,' thus not establishing a per se rule that all refusal evidence is never admissible for any purpose." (Red Br. at 10-11). The State is correct, but it gives insufficient attention to the word "other."

Even though refusal evidence is not admissible to prove guilt, it may be admissible to prove other ancillary facts. *See e.g. United States v. Harris*, 660 F.3d 47, 52 (1st Cir. 2011) (refusal evidence admissible to rebut defendant's argument that the government's case was flawed because of a lack of DNA); *Leavitt v. Arave*, 393 F.3d 809, 828 (9th Cir. 2004) (refusal evidence admissible to rebut the defendant's claim that he cooperated with the police and their investigation); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999) (refusal evidence admissible to establish that the defendant had dominion and control over the premises); *United States v. McNatt*, 931 F.2d 251, 258 (4th Cir. 1991) (refusal evidence admissible to rebut the defendant's claim that the police planted drugs in his car). These sorts of case-specific, fact-intensive reasons for admitting refusal evidence underscore just how limited the use of refusal evidence is.

CONCLUSION

Because evidence that defendant refused to submit to a warrantless search was admitted as probative evidence of his guilt, and discussed extensively at trial by both the prosecutor and the court, the proper remedy is to vacate the conviction.

Respectfully submitted,

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Copies of this brief were served electronically and via first-class U.S. Mail on the parties designated on the Briefing Schedule.