Appeal No. 2015AP1113-CR **Cir. Ct. No. 2013CF318**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PHILIP J. HAWLEY,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

The facts in this case are similar to the facts in ***State v. Mitchell***, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151, and in ***State v. Howes***, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812. That is, this is a case in which police drew blood from an unresponsive OWI suspect based on statutory "implied consent." We again certify the same question we certified in ***Mitchell*** and ***Howes***: Does a warrantless blood draw from an unconscious OWI suspect pursuant to Wisconsin's implied consent law supply voluntary consent for purposes of the Fourth Amendment?

We again certify this question because of the need for a final resolution of this Fourth Amendment-implied consent issue and because we discern no principled way of deciding this case in light of the law that binds us.

In the introductory paragraphs that follow, we summarize the alternative paths that we have considered to resolving this case and issues that we believe arise from the multiple opinions in ***Mitchell***. We briefly explain why we do not view the alternatives as workable paths to resolving this appeal and why the supreme court may be interested in revisiting a holding in ***State v. Griep***, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, that seemingly blocks us from relying on the four-justice agreement in ***Mitchell*** as to why the State's implied consent argument must be rejected.

First, we have considered whether exigent circumstances justified the blood draw, as argued by the State. Based on our review and consideration to date, we think that argument should be rejected because it is not supported by the record.

Second, we have considered whether the blood draw can be justified based on the search-incident-to-arrest reasoning relied on by the concurrence in ***Mitchell***. In this regard, even if we assume Hawley was arrested prior to the blood draw, something the parties dispute, we would conclude, as does the State in briefing before us, that applying a search-incident-to-arrest justification for the blood draw here is incompatible with ***Birchfield v. North Dakota***, __ U.S. __, 136 S. Ct. 2160 (2016). The State disagrees with our view that the ***Mitchell*** concurrence relies on the search-incident-to-arrest doctrine and we explain below why we reject the State's argument in that respect.

Third, we have considered whether the two-justice concurrence and the two-justice dissent in ***Mitchell*** combine to form a binding holding rejecting the State's implied consent argument here. We conclude that those opinions show a four-justice agreement rejecting the State's implied consent argument. However,

we also acknowledge that the State appears to correctly argue that a footnote in ***Griep*** holds that the views of justices who dissent from a judgment may not be considered when determining whether there is binding law. *See* ***Griep***, 361 Wis. 2d 657, ¶37 & n.16. We discuss this topic because we believe that there are reasons why the supreme court may want to revisit the holding in its ***Griep*** footnote.

Fourth, we have considered whether we should decide this case based on a rule that appears to allow us to impose the same disposition on Hawley as was imposed on the defendant in ***Mitchell***. Under this approach, if we were to conclude that Hawley is in substantially the same position as Mitchell was, we could ignore the differing legal justifications in the lead and concurring opinions in ***Mitchell*** and look just to the agreed-on *result* and impose that same result on Hawley. If our goal here is to simply resolve the instant dispute, this might be a viable option that seemingly hinges on a disputed issue—whether Hawley was under arrest at the time of the blood draw. But we do not, at least yet, further pursue that alternative because we think this case provides a good opportunity for the supreme court to put to rest, one way or the other, the highly significant Fourth Amendment-implied consent issue that we now certify for the third time. As our discussion below indicates, we see no reason why a majority view of implied consent—which appears to exist—cannot be set forth as binding law.

In the final section below, we briefly repeat why we may not resolve the implied consent issue. We may not because, if ***Mitchell*** leaves the implied consent issue open, we are left with conflicting court of appeals opinions on the topic and a directive from the supreme court to certify when confronted with such conflicting opinions. Thus, we certify the question previously certified in ***Mitchell*** and ***Howes***: Does a warrantless blood draw from an unconscious OWI suspect

pursuant to Wisconsin's implied consent law supply voluntary consent for purposes of the Fourth Amendment?

BACKGROUND

Hawley was involved in a single-vehicle motorcycle accident in Sauk County. When police arrived at the scene, Hawley was still conscious. A short time later, after emergency medical personnel administered a sedative, Hawley became unconscious while still at the scene of the accident.

A Med Flight unit transported Hawley to the University of Wisconsin Hospital where Hawley remained unconscious. There, a UW police officer read the implied consent law's "Informing the Accused" form to the unconscious Hawley, and medical staff performed a blood draw.

At the time the officer read the unconscious Hawley the "Informing the Accused" form, there was probable cause to arrest Hawley based on the following facts. A police officer arrived on the scene of a motorcycle accident and observed a "serious traffic accident." The motorcycle was in a ditch and Hawley, who was not wearing a helmet, was lying close by. Nothing suggested that anyone else had been involved in the accident. The officer asked Hawley whether Hawley had been drinking, and Hawley responded, "Fuck you." The officer detected a strong odor of intoxicants coming from Hawley's breath and observed that Hawley's single open eye was "bloodshot." At the scene and before Hawley was transported to the hospital, the officer learned that Hawley had five prior offenses for operating while intoxicated, making Hawley subject to a legal limit of .02 blood alcohol content.

Additional evidence bearing on whether Hawley was arrested prior to the blood draw is as follows. A Sauk County deputy testified that Hawley was never handcuffed, that the officer never "verbally" told Hawley that he was under arrest, and that, because of Hawley's injuries, the officer did not take Hawley into custody. A UW police officer testified that he did not place Hawley under arrest at the hospital, did not tell Hawley that he was under arrest at the hospital, and, to his knowledge, Hawley was not in handcuffs. The UW officer testified that police arrested Hawley on a warrant at a later time, but the officer did not know the exact date. However, prior to the blood draw, and while Hawley was unconscious, an officer completed an OWI citation and placed the citation in Hawley's shirt pocket.

Hawley sought to suppress the blood test results, arguing that the blood draw was an unconstitutional warrantless search. The circuit court denied Hawley's motion, and Hawley was convicted of operating a motor vehicle while intoxicated.

Hawley appealed, renewing his challenge to the constitutionality of the warrantless blood draw. As remains true, we concluded in 2016 that the dispositive issue is whether the blood draw was justified based on Wisconsin's implied consent law. Accordingly, we placed Hawley's case on hold pending supreme court action in ***State v. Howes***, No. 2014AP1870-CR. In ***Howes***, we certified to the supreme court the question of whether provisions in Wisconsin's implied consent law authorizing a warrantless blood draw from an unconscious suspect violate the Fourth Amendment. *See* ***State v. Howes***, No. 2014AP1870-CR, unpublished certification (WI App Jan. 28, 2016). The supreme court accepted certification, but the resulting decision garnered no majority rationale on the certified question. The court upheld the blood draw from the

unconscious Howes, with 3 justices voting to uphold the blood draw based on exigent circumstances and 2 justices voting to uphold the blood draw based on consent under the implied consent law. *See* ***Howes***, 373 Wis. 2d 468, ¶3 (lead op.); ***id.***, ¶¶52, 84, 87 (Gableman, J., concurring).

The hold on Hawley's case was briefly lifted, but was reimposed when we certified the implied consent issue again in ***State v. Mitchell***, No. 2015AP304-CR, unpublished certification (WI App May 17, 2017). The supreme court accepted certification in ***Mitchell***, and upheld the blood draw from the unconscious Mitchell as constitutional, with 3 justices voting to uphold the blood draw based on consent under the implied consent law and 2 justices voting to uphold the blood draw, in our view, as a valid search incident to arrest. *See* ***Mitchell***, 383 Wis. 2d 192, ¶¶3, 66 (lead op.); ***id.***, ¶¶67, 80, 86 (Kelly, J., concurring).

DISCUSSION

As noted in our introduction, we discern no principled way of deciding Hawley's appeal based on our view of the facts and the law that binds us. Nonetheless, because the supreme court might disagree with aspects of our discussion of the preliminary issues we identify below, and because, even if the supreme court agrees with our various legal views, the supreme court is not bound by its own precedent, we first discuss alternatives to addressing the merits of the State's "implied consent" argument. We then explain, as we did in our ***Mitchell*** certification, why we may not resolve the implied consent issue.

A. Exigent Circumstances

Whether an OWI suspect is conscious or unconscious, it is beyond dispute that police may engage in a warrantless search when the exigencies of the circumstances require it. *See* ***Missouri v. McNeely***, 569 U.S. 141, 148-49 (2013). Thus, because a significant delay in testing for blood alcohol content "will negatively affect the probative value of the results," police may proceed with a warrantless blood draw if, under the circumstances, there is insufficient time to obtain a warrant without "significantly undermining the efficacy of" drawing blood for testing. *See* ***id.*** at 152-53.

Accordingly, we have considered whether exigency might justify the warrantless blood draw in this case, as argued by the State. We spend little time on the topic because, based on our consideration to date, we conclude that the State's argument should be rejected.

Of particular note, there was testimony by officers indicating that police could have reasonably begun the process of obtaining a warrant by 12:37 p.m., if not sooner; that obtaining the warrant would have taken 30 to 45 minutes; and that Hawley's blood draw did not occur until at least 1:35 p.m. Indeed, the State concedes that "if [one of the officers] began applying for an electronic warrant at 12:37 p.m., he could have obtained one around 1:07 or 1:22 p.m."

B. Search Incident to Arrest

We have considered whether the blood draw from the unconscious Hawley was justified as a search incident to arrest. We considered this question because we read Justice Kelly's concurrence in ***Mitchell*** as opining that the blood draw was proper, not based on implied consent, but as a proper search incident to

arrest. If Justice Kelly does rely on a search-incident-to-arrest approach, there is no dispute among the parties that the approach is not viable. The State tells us that Hawley's blood draw

> cannot be justified as a search incident to arrest, because in ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2185 (2016), the Supreme Court determined that "the search incident to arrest doctrine does not justify the warrantless taking of a blood sample."

We agree. The Supreme Court in ***Birchfield*** plainly considered the unconscious suspect/blood draw scenario and concluded that, when such a situation arises, "police may apply for a warrant if need be." *See* ***Birchfield***, 136 S. Ct. at 2184-85. In context, this is a statement that police can deal with unconscious suspects by obtaining a warrant, *see* ***id.***, unless the fact-based, totality-of-the-circumstances exigent circumstances exception applies. *See* ***id.*** at 2174 (discussing ***McNeely***).

What remains is an apparent dispute over *whether* Justice Kelly relied on the search-incident-to-arrest doctrine. According to the State, Justice Kelly did not. The State asserts that Justice Kelly "seemingly based his analysis on a general reasonableness exception to the warrant requirement." We disagree.

First, although the State asserts that Justice Kelly "seemingly" relied on "a general reasonableness exception" to the Fourth Amendment's warrant requirement, the State does not point to any language in Justice Kelly's concurrence in support of that assertion. For that matter, the State does not support the implicit assertion that there is such a thing as "a general reasonableness exception to the warrant requirement." It appears to us that cases that have surveyed exceptions to the warrant requirement, such as ***McNeely***, teach that there is a limited list of recognized exceptions, with no mention of an amorphous general reasonableness exception. *See* ***McNeely***, 569 U.S. at 148-50.

Second, we read Justice Kelly's concurrence to have expressly relied on the search-incident-to-arrest doctrine. In addition to other search-incident-to-arrest references, Justice Kelly wrote: "***Birchfield*** says [that Mitchell's] privacy interest in the evidence of intoxication within [Mitchell's] body is no longer a factor because the 'search incident to arrest' doctrine is a recognized exception to the warrant requirement." ***Mitchell***, 383 Wis. 2d 192, ¶80 (Kelly, J., concurring). Justice Kelly then explained that the only question remaining was whether "the search" should be a breath test or a blood test. ***Id.*** We fail to understand how this language can be read as anything other than reliance on the search-incident-to-arrest exception to the warrant requirement.

Third, Justice Kelly's unconscious suspect rule is categorical in the same way that the ***Birchfield*** search-incident-to-arrest conscious suspect rule is categorical. In ***Birchfield***, the breath test rule applies to *all* conscious persons properly arrested for OWI. *See* ***Birchfield***, 136 S. Ct. at 2179-82, 2184 (rejecting Justice Sotomayor's proposed case-by-case approach in favor of a categorical approach). So far as we can tell, Justice Kelly's blood draw rule similarly applies to *all* unconscious persons properly arrested for OWI. We acknowledge that Justice Kelly specifies that there must be "a risk of losing critical evidence through the human body's natural metabolization of alcohol," *see* ***Mitchell***, 383 Wis. 2d 192, ¶74 (Kelly, J., concurring), but he does not engage in a case-specific analysis of the particular risk in ***Mitchell***. In that regard, Justice Kelly simply states that because Mitchell was arrested for OWI, "***Schmerber*** and ***McNeely*** recognize that critical evidence of his intoxication was continually metabolizing away." ***Id.***, ¶80 (Kelly, J., concurring).

Fourth, it is true that Justice Kelly relies on ***McNeely***, 569 U.S. 141, and ***Schmerber v. California***, 384 U.S. 757 (1966), but, so far as we can tell,

Justice Kelly does so in a way that parallels the ***Birchfield*** Court's reliance on precedent, including ***Schmerber***, to justify its search-incident-to-arrest ruling. More specifically, the ***Birchfield*** Court looked to ***Schmerber*** and other prior Supreme Court cases for the proposition that a warrantless blood draw can sometimes be justified by the need to prevent "the inevitable metabolization of alcohol in the blood." *See* ***Birchfield***, 136 S. Ct. at 2173-74, 2182-83. Justice Kelly similarly wrote:

> ***Schmerber*** established the ground-rule principle that a warrantless blood draw can be constitutional. ***McNeely*** refined the ***Schmerber*** holding when it explained that, under the right circumstances, "the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test."

Mitchell, 383 Wis. 2d 192, ¶79 (Kelly, J., concurring) (citations omitted).

In sum, even if we concluded that Hawley was arrested prior to the blood draw, our reading of Justice Kelly's concurrence and our understanding of ***Birchfield*** preclude us from relying on the arrest as a justification for the blood draw.

C. Whether There is a Four-Justice Holding in ***Mitchell***

We have in ***Mitchell*** what appears to be an unusual situation. Four justices agreed on the main issue presented, but there might be no binding holding on the question. The two-justice concurrence and the two-justice dissent each rejected, for the same reason, the State's argument that "implied consent" is actual consent that satisfied the consent exception to the Fourth Amendment's warrant requirement. However, because of a footnote in the supreme court ***Griep*** opinion, we conclude that we may not look to that four-justice agreement to reject the State's implied consent argument here.

Because the supreme court might want to examine whether it makes sense for lower courts to ignore the agreement of four justices on a specific legal issue simply because the agreement is among non-lead opinion justices, we discuss the topic. We first explain why we conclude that the concurrence and the dissent agree with respect to implied consent, and then discuss the ***Griep*** rule.

The common ground between the two-justice concurrence and the two-justice dissent in ***Mitchell*** is perhaps best on display in their shared reliance on Justice Kelly's analysis of implied consent in ***State v. Brar***, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499. In his ***Mitchell*** concurrence, Justice Kelly repeated his view that "implied consent" does not satisfy the Fourth Amendment because "'implied consent' is actually consent granted *by the legislature, not the suspect*, and ... legislative consent cannot satisfy the mandates of our State and Federal Constitutions." ***Mitchell***, 383 Wis. 2d 192, ¶68 (Kelly, J., concurring) (emphasis added). Justice Kelly did not write expansively on the topic, but instead incorporated his ***Brar*** implied consent discussion "*in toto*." *See* ***Mitchell***, 383 Wis. 2d 192, ¶68 (Kelly, J., concurring).

Writing for the dissent in ***Mitchell***, Justice Ann Walsh Bradley used similar language to say that "implied consent" is not actual consent. *E.g.*, ***id.***, ¶89 (A.W. Bradley, J., dissenting) ("Contrary to the lead opinion [in ***Mitchell***], I determine that 'implied consent' is not the same as 'actual consent' for purposes of a Fourth Amendment search."). Any doubt about Justice Ann Walsh Bradley's agreement with Justice Kelly on this issue is put to rest by Justice Bradley's express approval of Justice Kelly's analysis in ***Brar***:

> The untenability of the [***Mitchell***] lead opinion's [implied consent] position is aptly illustrated by Justice Kelly's concurrence in ***Brar***, 376 Wis. 2d 685, ¶¶59-66 (Kelly, J., concurring). As Justice Kelly explains, a court's normal

> constitutional inquiry into whether consent is given involves an examination of the totality of the circumstances and a determination that the consent was voluntary and not mere acquiescence to authority. ***Id.***, ¶¶59-62. On the other hand, "[f]or 'consent' implied by law, we ask whether the driver drove his car." ***Id.***, ¶64.

Mitchell, 383 Wis. 2d 192, ¶107 (A.W. Bradley, J., dissenting).

We note that, in briefing before this court, the State disputes whether there is agreement on this issue between the ***Mitchell*** concurring and dissenting justices. When we asked the parties here whether "the four concurring and dissenting justices in ***Mitchell*** agree with each other that 'implied consent' is not consent for purposes of the consent exception to the Fourth Amendment's warrant requirement," the State responded: "Likely, no." But the State's supporting discussion is unpersuasive. That discussion consists of little more than the observation that, on this topic, although Justice Ann Walsh Bradley indicated her agreement with Justice Kelly's concurrence, Justice Kelly did not similarly express agreement with the dissent.

Because, in our view, four justices unambiguously rejected the State's implied consent argument, we think it worthwhile to at least consider whether this agreement should be binding on lower courts. Accordingly, we turn our attention to ***Griep***.

Although not free from doubt, it appears to us that a footnote in ***Griep*** precludes looking for law in agreements found in the combination of concurrences and dissents. More specifically, a footnote in ***Griep*** states: "Under [***Marks v. United States***, 430 U.S. 188 (1977)], the positions of the justices who dissented from the judgment are not counted in examining the divided opinions for holdings." ***Griep***, 361 Wis. 2d 657, ¶37 n.16 (citing ***Marks***, 430 U.S. at 193). The

footnote goes on to indicate that a holding may not be found in the combination of a one-justice concurrence and a dissent. *See* ***id.***

The ***Griep*** court makes these statements in the context of determining whether there is a majority holding in a United States Supreme Court opinion. Still, it appears to us that the ***Griep*** court means to make a broad statement of law that applies to Wisconsin Supreme Court opinions. Accordingly, we read the ***Griep*** footnote as effectively instructing us to ignore the ***Mitchell*** dissent for purposes of ascertaining whether the State's implied consent argument here must be rejected because it has been rejected by a majority of justices in ***Mitchell***.

If this is the correct reading of the ***Griep*** footnote, then the supreme court may want to consider revisiting the topic for the following reasons.

First, although the footnote cites the United States Supreme Court's 1977 ***Marks*** opinion as authority for ignoring a dissenting opinion, the ***Marks*** Court did not address the propriety of considering a dissenting opinion. *See* ***Marks***, 430 U.S. at 193-94 (explaining that the holding of the Court in ***Memoirs v. Massachusetts***, 383 U.S. 413 (1966), is gleaned from looking to the "narrowest grounds" agreed on by a lead plurality opinion and two concurring opinions). For that matter, the ***Marks*** Court's "narrowest grounds" rule comes from ***Gregg v. Georgia***, 428 U.S. 153 (1976), another case in which there was no issue regarding the propriety of looking to a dissenting opinion. *See* ***id.*** at 168-69 & n.15.

Second, even if the footnote correctly reads the United States Supreme Court's ***Marks*** decision as instructing that dissents must be ignored, that instruction is not binding with respect to state court decisions. It seems axiomatic

that it is up to the Wisconsin Supreme Court to decide whether law can be found by looking to votes in a dissenting opinion in a Wisconsin case.

Third, we are unable to discern an underlying rationale for treating lead and concurring opinions differently for purposes of whether they may be *joined in part* by an otherwise dissenting opinion. Formally, the authors of dissenting opinions that have common ground with a concurring opinion do not join the concurring opinion "in part," even though the author would routinely do so if the concurring opinion was a lead opinion. Here, for example, it would have been odd if Justice Ann Walsh Bradley had joined Justice Kelly's concurring opinion "in part." We do not question this practice. Rather, we question whether it is a sufficient reason to ignore the legal agreement of four justices.

Notably, as we understand supreme court practice, there is often no meaningful difference between lead opinions and concurring opinions. That is, so far as we can tell, there is no reason that Justice Kelly's two-justice concurrence could not have been the lead opinion in ***Mitchell***. We observe that, in just the last three terms, the supreme court has issued at least eight opinions in which there was a one-justice or two-justice lead opinion and a two-justice or three-justice concurring opinion.[1] In those cases, so far as we can tell, the two-justice and

[1] In the parentheticals in this listing, we note just the concurring opinions that garnered votes equal to or greater than the lead opinions. ***Manitowoc Co. v. Lanning***, 2018 WI 6, 379 Wis. 2d 189, 906 N.W.2d 130 (a two-justice lead opinion and a three-justice concurring opinion); ***Milewski v. Town of Dover***, 2017 WI 79, 377 Wis. 2d 38, 899 N.W.2d 303 (a two-justice lead opinion and a three-justice concurring opinion); ***Teague v. Schimel***, 2017 WI 56, 375 Wis. 2d 458, 896 N.W.2d 286 (a two-justice lead opinion and two two-justice concurring opinions); ***AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.***, 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368 (a two-justice lead opinion and a two-justice concurring opinion); ***State v. Howes***, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812 (a two-justice lead opinion and a two-justice concurring opinion); ***Seifert v. Balink***, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816 (a two-justice lead opinion and a two-justice concurring opinion); ***State ex rel. Singh v. Kemper***, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86 (a two-justice lead opinion and a two-justice (continued)

three-justice concurring opinions could have been the lead opinions. More to the point, so far as we are aware, the "lead opinion" was a lead opinion simply because of an earlier determination as to which justice was assigned to write the lead opinion. We question why the status of "lead opinion" versus "concurring" opinion should be the difference between an opinion that a dissent can join in part and an opinion that a dissent may not, in effect, join in part.

We limit the remainder of our discussion to a Seventh Circuit case, ***Gibson v. American Cyanamid Co.***, 760 F.3d 600 (7th Cir. 2014), because the State relies on ***Gibson*** as authority for the proposition that we should ignore the ***Mitchell*** dissent.

Unlike other decisions brought to our attention, the ***Gibson*** court did address the propriety of looking to a dissenting opinion. *See* ***Gibson***, 760 F.3d at 615-21. The Seventh Circuit considered whether the agreement of a one-justice concurring opinion and a four-justice dissent in ***Eastern Enterprises v. Apfel***, 524 U.S. 498 (1998), produced a "controlling principle." ***Gibson***, 760 F.3d at 615. These two opinions in ***Eastern Enterprises*** joined by five justices agreed on a due process framework for analysis, but disagreed on the result of that analysis as applied to the particular legislation at issue in ***Gibson***. *See* ***Gibson***, 760 F.3d at 616-18. The Seventh Circuit in ***Gibson*** was confronted with whether this agreement establishes "a rule," and the ***Gibson*** court concluded that the answer is no because dissenting justices "are not counted in trying to discern a governing holding from divided opinions." ***Id.*** at 618-21. We do not find ***Gibson*** persuasive

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opinion concurring in part and dissenting in part); ***Coyne v. Walker***, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 (a one-justice lead opinion and a two-justice concurring opinion).

because it fails to explain why a clear legal agreement between five concurring and dissenting justices should not be treated as law.

For example, the ***Gibson*** court wrote that disagreement over the bottom-line disposition means that a concurrence and a dissent will not otherwise produce clear guidance:

> It makes sense to exclude the dissenting opinions: by definition, the dissenters have disagreed with both the plurality and any concurring Justice on the outcome of the case, so by definition, the dissenters have disagreed with the plurality and the concurrence on how the governing standard applies to the facts and issues at hand (even if there is agreement on what constitutional provision is being interpreted). It is very likely that *if the dissenters disagree with the outcome of the case, then lower courts and (more importantly) litigants will not have a clear idea on the contours of the standard and how to apply it in future cases*. This is not the way to make binding precedent.

Id. at 620 (court's emphasis deleted; our emphasis added). We think this reasoning is incorrect. Opinions that concur in part and dissent in part often combine with lead opinions to produce law even though they disagree on the outcome of a case. Indeed, one need go no further than the ***Mitchell*** opinion itself to see the fallacy of the ***Gibson*** analysis. As explained elsewhere in this certification, there is no difficulty ascertaining, in the words of ***Gibson***, a "clear idea on the contours" of the agreement between Justice Kelly and Justice Ann Walsh Bradley with respect to whether implied consent supplies voluntary consent for purposes of the Fourth Amendment.

There is more in ***Gibson***'s discussion on this topic that we find questionable. But we will mention just one more flaw. The ***Gibson*** court cited ***Anker Energy Corp. v. Consolidation Coal Co.***, 177 F.3d 161 (3d Cir. 1999), as support for the proposition that "[o]ur colleagues in other Circuits agree that no

governing holding emerged from ***Eastern Enterprises***." ***Gibson***, 760 F.3d at 620. This reliance is misplaced. The Third Circuit in ***Anker*** did find law in ***Eastern Enterprises*** by looking to the one-justice concurrence and the four-justice dissent. *See* ***Anker Energy Corp.***, 177 F.3d at 170 n.3 ("We also recognized in [a prior Third Circuit decision] that in light of ***Eastern Enterprises***' concurrence and dissent, we are 'bound to follow the five-four vote against the takings claim....'").

In sum, we read ***Griep*** to prevent us from relying on the four-justice agreement regarding implied consent in ***Mitchell***, but we question why that agreement should not resolve the question. We do not formally certify this question, but raise the topic because the supreme court may consider it worth addressing now or in the future.

D. Whether We Should Consider the "Identical Position"/Same Result Approach

We understand the State to be arguing that a possible path for a court of appeals decision here is to affirm the propriety of the blood draw from Hawley because, even though the lead opinion and the concurring opinion in ***Mitchell*** did not share a legal rationale, the justices signing on to those opinions agreed that a blood draw from a defendant in Mitchell's position is proper and Hawley is in the same position. We agree with the State that ***State v. Deadwiller***, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362, supports this approach.

We have already touched on the idea that a binding legal rule may emerge from fractured opinions where there is analytical overlap and, taken as a whole, when there is a "narrowest ground" shared by the opinions. *See* ***Marks***, 430 U.S. at 193. But this approach to fractured majority and concurring opinions "only [applies] when 'at least two rationales for the majority disposition fit or nest

into each other like Russian dolls.'" ***Deadwiller***, 350 Wis. 2d 138, ¶30 (citation omitted). That is not true here. The legal justification for the blood draw in the lead opinion and in Justice Kelly's concurrence do not overlap.

Still, as this court explained in ***Deadwiller***, even if there is "no theoretical overlap ... between the rationales employed by [a lead opinion] and [a] concurrence," the "fractured opinion [still] mandates a specific result when the [instant] parties are in a 'substantially identical position' [as a party in the case decided by the fractured opinion]." *See* ***id.***, ¶¶30-32. Thus, if we were to conclude that Hawley is in substantially the same position as Mitchell was, we could ignore the differing legal justifications in the lead and concurring opinions in ***Mitchell*** and look only to the agreed-on *result* in that case and impose that same result on Hawley. That approach requires resolving the parties' dispute over whether Hawley, like Mitchell, was under arrest at the time of the blood draw.

While acknowledging that the State's approach might be a viable means of resolving Hawley's case, we do not further explore that possibility. Instead, we think this case provides an opportunity for the supreme court to put to rest, one way or the other, the highly significant Fourth Amendment-implied consent issue that we certify once more. As should be apparent from our discussion in the prior section, it appears to us that there is no reason why a majority view of implied consent—which appears to exist—cannot be set forth as binding law if this court accepts certification.

E. The Issue Certified: Implied Consent

Because of our view that the above alternatives do not provide a path to deciding this appeal, we are once more confronted with the issue we certified in ***Howes*** and ***Mitchell***, that is, whether a warrantless blood draw from an

unconscious OWI suspect pursuant to Wisconsin's implied consent law supplies voluntary consent for purposes of the Fourth Amendment. In light of the supreme court's deep familiarity with the topic, we limit our discussion here.

As previous certifications explained, there are conflicting court of appeals decisions as to whether "implied consent" is consent for purposes of the Fourth Amendment. In ***State v. Wintlend***, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, we concluded, in essence, that consent given in accordance with the implied consent statutes, i.e., the consent that occurs by driving on a Wisconsin highway, supplies consent for Fourth Amendment purposes. *See* ***id.***, ¶¶12-13. In contrast, in ***State v. Padley***, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, we concluded that the consent that matters for Fourth Amendment purposes is the consent that an OWI suspect does or does not give to police at the time he or she is asked to submit to blood alcohol testing. ***Id.***, ¶27. We effectively opined in ***Padley*** that "implied consent" does not suffice as voluntary consent for Fourth Amendment purposes. *See* ***id.***, ¶¶32-33, 37-39 & n.10.

In sum, if we follow the reasoning we employed in ***Wintlend***, it would conflict with our view of the implied consent statutes in ***Padley***. If we looked to ***Padley***, our approach would conflict with ***Wintlend***. Under these circumstances, we are directed to certify by the decision in ***Marks v. Houston Casualty Co.***, 2016 WI 53, ¶¶78-79, 369 Wis. 2d 547, 881 N.W.2d 309 (holding that the court of appeals should certify an issue where two of its cases conflict). We do so here.