No. 11-1425

In The
Supreme Court of the United States

MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Writ Of Certiorari To The Missouri Supreme Court

BRIEF OF AMICI CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS, NATIONAL ASSOCIATION OF PROSECUTOR COORDINATORS, AND STATE PROSECUTING ATTORNEY ORGANIZATIONS (TOTALING THIRTY), IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment Search and Seizure Clause is violated when, following a lawful arrest for driving under the influence of alcohol, the police take a blood sample from the defendant in a medically approved manner to obtain and preserve evidence of the defendant's blood alcohol level, without waiting to first obtain a search warrant.

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INTEREST OF AMICI CURIAE[1]

This brief is submitted by the National District Attorneys Association (NDAA), the Missouri Association of Prosecuting Attorneys (MAPA), the National Association of Prosecutor Coordinators (NAPC), and a consortium totaling thirty statewide associations or organizations representing the interests of prosecutors (the Prosecutors' Consortium), which, in addition to MAPA, includes: Alabama District Attorneys Association; Arizona Prosecuting Attorney's Advisory Council; Arkansas Prosecuting Attorneys Association; California District Attorneys Association; Colorado District Attorneys Council; Georgia Association of Solicitors-General; Idaho Prosecuting Attorneys Association; Illinois State's Attorneys Association; Iowa County Attorneys Association; Kansas County and District Attorneys Association; Kentucky County Attorneys Association; Kentucky Commonwealth's Attorneys Association; Louisiana District Attorneys Association; Prosecuting Attorneys Association of Michigan; Minnesota County Attorneys Association; Mississippi Prosecutors Association; Nevada District Attorneys Association; North Carolina Conference of

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amici, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, amici state that counsel of record for all parties have consented in writing to the filing of this brief.

District Attorneys; Ohio Prosecuting Attorneys Association; Oklahoma District Attorneys Association; Oregon District Attorneys Association; South Dakota State's Attorneys Association; Tennessee District Attorneys General Conference; The Statewide Association of Prosecutors of Utah; Virginia Association of Commonwealth's Attorneys; Washington Association of Prosecuting Attorneys; West Virginia Prosecuting Attorneys Association; Wisconsin District Attorneys Association; Wyoming County and Prosecuting Attorneys Association.

NDAA is the largest and primary professional association of prosecuting attorneys in the United States, with approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people."

MAPA is a non-profit, voluntary association of Missouri's 115 elected prosecutors, and approximately 300 assistant prosecutors and prosecutor investigators. MAPA strides to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually advocate for positions that improve the criminal justice system statewide.

The members of the Prosecutors' Consortium share goals and missions similar, if not virtually identical, to that of NDAA and MAPA. As prosecutors,

every member of amici is a minister of justice and charged with ensuring not only that the guilty are appropriately punished, but that the innocent do not suffer. All share the interest of seeing clear resolution to the issues presented in this case that touch upon the collection of evidence that not only can serve to hold offenders accountable, but also to spare innocent individuals from being charged with a crime they did not commit.

NAPC is a voluntary, professional association of the nation's prosecutor coordinators, who are those individuals or offices in each state which are charged with coordinating the actions of prosecutors in areas such as advocacy, training or technical assistance and support. NAPC has an interest in seeing a uniform approach to issues such as the collection of blood-alcohol evidence in impaired driving cases to ensure more uniformity for the constituent prosecutors its members serve.

This case raises matters of concern to prosecutors nationwide. The decision by the Court in this case will affect how evidence is collected in impaired driving cases. Because of the mobile society in which we live and the prevalent use of automobiles on our nation's interstate highway system, the public safety of our nation will be enhanced by a ruling from the Court enunciating a bright line rule applying the exigent circumstances exception to the Fourth Amendment to warrantless blood draws in impaired driving cases. Impaired driving cases are a major portion of prosecution case loads nationwide, and have a significant impact on society.

Amici have expertise in the matters pending before the Court in this case, and believe that their brief will be helpful in this Court's decisions on these matters.

SUMMARY OF ARGUMENT

Search and seizure without warrant is permitted in exigent circumstances. Blood alcohol dissipation presents such an exigent circumstance, because it continually destroys evidence with the passage of time. A non-consensual blood draw represents a minimal intrusion on the person, which is outweighed by society's significant interest in preventing impaired driving, and enforcing the laws dealing with under the influence drivers.

Respondent's arguments that there is no need for a uniform rule are based on alternatives that are impractical and unworkable. A case by case, "special facts" test provides no realistic guidance for law enforcement, prosecutors, or the courts. The use of retrograde extrapolation of blood alcohol content is not an adequate remedy for the evidence lost when a blood sample is delayed. Proposals to rely on improved communications technology to speed the warrant process cannot address all aspects of the delay, and given the wide range of variables, are an unsatisfactory basis for a national rule.

ARGUMENT

I. Alcohol Dissipation in the Body is an Exigent Circumstance Justifying Seizure of Blood Without the Delay of Obtaining a Search Warrant in an Impaired Driving Case

This case presents the question of how far the rule announced in *Schmerber v. California*, 384 U.S. 757 (1966) extends. In *Schmerber*, this Court held it did not violate the Fourth Amendment when an officer caused the defendant's blood to be drawn without a search warrant, after his arrest, in order to prevent the continuing destruction of evidence of alcohol intoxication. 384 U.S. at 770-771. *Schmerber* involved an automobile crash, where the defendant was transported to a hospital for medical treatment. The present case involved an arrest for impaired driving, not after a crash, but rather after an ordinary police traffic stop for speeding, followed by the officer's observation of the defendant's symptoms of alcohol ingestion and impairment. The question is whether that distinction merits suppression of the evidence obtained from the warrantless blood draw.

A. Search and Seizure is Permitted Without a Warrant When There is the Exigent Circumstance of Imminent Destruction of Evidence

The Fourth Amendment prohibits searches that are unreasonable. The general rule enunciated by

this Court is that a search without a warrant is per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). This rule, however, is subject to certain exceptions. One is the existence of probable cause combined with exigent circumstances. *Id.*; *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). Exigency exists – and the warrant requirement may be excused – when the circumstances present a "now or never" situation, such that if the evidence is not seized at the time, the opportunity will be lost. *Vale*, supra, 399 U.S. at 34-35; *Roaden v. Kentucky*, 413 U.S. 496, 505-506 (1973); *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970).

Thus, there are exigent circumstances when there is a compelling need to act, and no time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). Imminent destruction of evidence is one such circumstance, in which the need to obtain a search warrant (with the delay that process necessarily entails) may be excused. *Id.*; *United States v. Bartelho*, 71 F.3d 436, 442 (1st Cir. 1995); *United States v. Wilson*, 36 F.3d 205, 209-210 (1st Cir. 1994).

Applying these principles to the case at hand, it is clear that the facts involved in an impaired driving stop such as the one at bar present exigent circumstances, due to the imminent destruction of evidence, that justify seizure of the defendant's blood without the delay involved in obtaining a search warrant.

B. In an Impaired Driving Case, Blood Alcohol Dissipation is the Destruction of Evidence as to Blood Alcohol at the Time of Driving

It is a matter of common experience, pre-dating modern scientific research, that as one ingests alcohol, the effects on the body and nervous system do not remain static, but change over time.

The groundbreaking toxicological research into alcohol metabolism in the human body was done by Erik Widmark in the 1930s. See Andreasson and Jones, "The Life and Work of Erik M. P. Widmark," *The American Journal of Forensic Medicine and Pathology*, v. 17(3), Sept. 1996, pp. 177-190. Since that work, a wide variety of research has enhanced our knowledge about the various factors that may affect the rate at which the body absorbs and then eliminates alcohol. See, e.g., Jones and Jonsson, "Peak Blood-Ethanol Concentration and the Time of Its Occurrence After Rapid Drinking on an Empty Stomach," *Journal of Forensic Sciences*, Vol. 36, No. 2, March 1991, pp. 376-385; Watkins and Adler, "The Effect of Food on Alcohol Absorption and Elimination Patterns," *Journal of Forensic Sciences*, Vol. 38, No. 2, March 1993, pp. 285-291; Jones and Jonsson, "Food-Induced Lowering of Blood Ethanol Profiles and Increase Rate of Elimination Immediately After a Meal," *Journal of Forensic Sciences*, Vol. 39, No. 4, July 1994, pp. 1084-1093.

In *Mata v. State*, 46 S.W.3d 902 (Tex. 2001) (overruled on other grounds in *Bagheri v. State*, 87

S.W.3d 657 (Tex. 2002)), the Texas Court of Criminal Appeals gave a succinct summary of the significant points about how alcohol is metabolized, the variables affecting that process, and how those matters come into play when blood alcohol evidence is used in court:

> As alcohol is consumed, it passes from the stomach and intestines into the blood, a process referred to as absorption. When the alcohol reaches the brain and nervous system, the characteristic signs of intoxication begin to show. The length of time necessary for the alcohol to be absorbed depends on a variety of factors, including the presence and type of food in the stomach, the person's gender, the person's weight, the person's age, the person's mental state, the drinking pattern, the type of beverage consumed, the amount consumed, and the time period of alcohol consumption. At some point after drinking has ceased, the person's BAC [blood alcohol content] will reach a peak. After the peak, the BAC will begin to fall as alcohol is eliminated from the person's body. The body eliminates alcohol through the liver at a slow but consistent rate.
>
> In 1932, Swedish chemist E.M.P. Widmark . . . created what we know today as the "BAC curve," which represents the rise and fall of an individual's BAC as his body absorbs and eliminates alcohol. A reading from a single [blood or] breath test will not reflect where the person is on his BAC curve.

> In other words, it will not indicate whether the person is in the absorption phase, at his peak, or in the elimination phase.
>
> So if a driver is tested while in the absorption phase, his BAC at the time of the test will be higher than his BAC while driving. If tested while in the elimination phase, his BAC at the time of the test could be lower than while driving, depending on whether he had reached his peak before or after he was stopped. *Obviously, the greater the length of time between the driving and the test, the greater the potential variation between the two BACs.*

46 S.W.2d at 909-910 (emphasis added).

The significance of these principles to the case at bar is plain. If police officers must take the time to obtain a search warrant authorizing a blood draw from the arrested subject, the human body will continue to eliminate alcohol, which equates to the destruction of evidence. The need to resort to retrograde extrapolation estimates for evidence of the blood alcohol level at the time of driving confirms the exigency. Retrograde extrapolation is simply a method for estimating how much alcohol has been eliminated from the body – in other words, how much evidence has been destroyed. The longer the delay, the greater potential for variation or inaccuracy between the estimate of the blood alcohol level at the time of driving and the time the sample was taken.

The evidentiary value of any substantial delay in the taking of a blood sample has not been lost on the criminal defense bar. One leading manual on DUI defense, *Defending Drunk Drivers*, by Patrick T. Barone (James Publishing Co., Rev. 28, March 2012), states:

> In nearly every case, there is a difference between the time of driving and the time of the chemical test, and prosecutors have relied on retrograde extrapolation to argue that the subject's blood alcohol content would have been higher at the time of the arrest or driving . . . The longer the period of time between the test and the violation, the greater the likelihood of error in using retrograde extrapolation.
>
> Barone, *Defending*, § 203.

Barone's manual goes on to provide a section specifically devoted to attacking retrograde extrapolation evidence (§ 203.3), as well as two sections on how to effectively present "The Rising Blood Alcohol Defense," (§§ 204, 204.1) (also sometimes called the "last gulp" defense, referring to the contention the driver had a last, large gulp of alcoholic beverage just before driving, which had not been fully absorbed into his system at the time of driving, but had been absorbed by the later time when the blood sample was taken). Central to these attacks are the time delay between the driving and the chemical test. See also, Lawrence Taylor and Steve Oberman, *Drunk Driving Defense* (Aspen Publishers 2010), § 6.03.

The problem this situation poses for presenting accurate, reliable evidence in court is not limited to defense arguments to the jury that the prosecution has not met its burden of proof. In some instances, courts have excluded altogether evidence of the blood alcohol test, ruling that the variables that effect retrograde extrapolation estimates, highlighting the delay in taking the sample, render the evidence too speculative to pass reliability standards for purposes of admissibility. In *Mata v. State*, supra, the court observed that the delay of over two hours between the driving and the test, " . . . is a significant amount of time and seriously affects the reliability of any extrapolation." 46 S.W.3d at 917. The Court of Criminal Appeals of Texas ruled the trial court had abused its discretion in admitting the blood alcohol evidence, and reversed the conviction,

Similarly, in *State v. The Eighth Judicial District Court of the State of Nevada (RPI Bobby Armstrong)*, 267 P.3d 777 (2011), the Nevada Supreme Court affirmed a trial court order excluding retrograde extrapolation evidence offered by the prosecution, because too many variables to make evidence sufficiently reliable, including the length of time between offense and blood draw (2 hours, 20 minutes). The Court stated, "The admission of retrograde extrapolation evidence when a single blood draw was taken more than two hours after the crash and the extrapolation calculation is insufficiently tethered to individual factors necessary to achieve a reliable calculation potentially invites the jury to determine Armstrong's

guilt based on emotion or an improper ground – that the defendant had a high blood alcohol level several hours later – rather than a meaningful evaluation of the evidence." 267 P.3d at 783.

When considered against this backdrop, the delay that it takes to obtain a warrant is not inconsequential. A research study published by the U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA), examining the experience with test refusal warrants in four states (Arizona, Michigan, Oregon and Utah) found the entire process can take 90 to 120 minutes. Hedlund and Bierness, "Use of Warrants for Breath Test Refusals: Case Studies," Publication No. 810852, U.S. Department of Transportation, NHTSA, October 2007, p. vii. The additional time for the warrant component alone measured in a single state (Arizona) was reported at up to 90 minutes. *Id.*, p. 13. When put in the context described above concerning the impact that any test delay has on the evidence in court, this is not insignificant.

Delay in obtaining a warrant should also be considered in terms of the times when impaired driving offenses are most commonly committed. While impaired driving can happen any day of the week, and any time of day, most do not happen during "weekday business hours." Data from Minnesota confirms what common sense suggests. The Minnesota Office of Traffic Safety reports that in 2011, exactly 49.9% of impaired driving incidents (14,601 out of 29,257) occurred on Saturday and Sunday. See Office

of Traffic Safety, Minnesota Department of Public Safety, "Minnesota Impaired Driving Facts 2011" (publ. 2011). When one considers that at least an appreciable portion of the incidents occurring Monday through Friday must have occurred after 5:00 p.m., it is clear a majority of impaired driving incidents occur outside of weekday business hours. In many jurisdictions, this circumstance will further impact how readily a warrant can be obtained, and the delay that a warrant requirement will entail. See, e.g., *Smith v. State*, 942 So.2d 308 (Miss. 2006), where the defendant was involved in a collision shortly before 8:57 p.m. on a Saturday evening, then refused a chemical test; obtaining a warrant and transporting the defendant for the blood draw resulted in a four hour delay until the blood draw.

In summary, delay in taking a blood sample in an impaired driving case leads to the destruction of evidence, which can and does undermine not only the weight of any evidence, but even its admissibility. The time it takes to obtain a warrant to authorize a blood draw adds to this delay.

C. A Non-consensual Blood Draw is a Minimal Intrusion on the Person

As this Court noted in *Schmerber*, and reiterated in *Winston v. Lee*, 470 U.S. 753 (1985), "blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Winston*, 470 U.S. at 762. Indeed, this Court observed

that blood tests are common place in modern life for such things as medical examinations, marriage licenses, entrance to the military, entrance to some colleges, and the voluntary action millions have undertaken as blood donors. *Id. Schmerber,* supra, 384 U.S. at 771, fn. 13. A simple, everyday blood test is a far cry from the more invasive bodily intrusions that this Court and others have condemned. See *Rochin v. California*, 342 U.S. 165 (1952) (forcible administration of an emetic by way of a stomach tube, to induce vomiting in order to recover narcotics evidence); *People v. Scott*, 21 Cal.3d 284 (1978) (forcible manipulation of the prostate by digital rectal means to obtain semen sample for STD testing); *Winston v. Lee*, supra (surgical removal under general anesthetic of a bullet lodged in a robbery suspect's chest).

It is also worth noting that the use of actual force to take the blood sample, with or without a warrant, is relatively rare. Experience in states that have forced blood draw procedures has found that when a refusing subject is faced with the alternative of actual restraint and force being used to accomplish the taking of a blood sample, most offenders elect not to put up physical resistance, making actual use of force a rare occurrence. Voas, Kelley-Baker, Roman, and Vishnuvajjala, "Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes," *Journal of Safety Research*, Vol. 40(2), 2009, p. 77, at p. 82. Thus, fears about the widespread use of restraint chairs, gurneys, straps,

chains, cuffs, or multiple officers piling on to physically restrain a subject during the blood draw procedure need not be a part of any consideration of the actual imposition on the individual. Such measures are likely to be used rarely, if at all. Any measures that go beyond taking the blood in a medically approved manner, or in some unconscionable way, can be addressed on a case by case basis.

D. The Societal Interest in Obtaining and Preserving Fresh Evidence of Blood Alcohol Level is Great, Due to the Importance of Public Protection from the Danger that DUIs Represent

In addition to the importance of preserving evidence, the state's interest is also heightened due to the nature of the crime, and the serious impact it has. More than twenty years ago, this Court stated, "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. . . . For decades, this Court has 'repeatedly lamented the tragedy.' . . . [citation omitted] 'The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.'" *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Today, the statistics still tell a dreadful story. The National Highway Traffic Safety Administration reported in 2008 there are nearly 1.4 million driving under the influence arrests in the United States each year. "Blood Alcohol Concentration Test Refusal Laws," Publication 810884,

U.S. Department of Transportation, NHTSA, January 2008. NHTSA also reported that in 2010, alcohol-impaired-driving-crashes (driver with a BAC of .08% or higher) resulted in 10,228 fatalities. See "Alcohol Impaired Driving," Publication 811606, U.S. Department of Transportation, NHTSA, April 2012. While this figure is actually an improvement over those discussed in 1990 in *Michigan Department of State Police*, supra, it is still shocking – approximately one fatality every 51 minutes. Further, these statistics only include fatal crashes. They do not include the thousands of cases where the victims survive, with injuries ranging from minor to serious, sometimes involving permanent dismemberment, disfigurement, or disability. Nor do they include cases where the impaired driving was due to drugs rather than alcohol.

This major societal interest is not sufficiently vindicated by the operation of implied consent laws. All fifty states have such statutes, under which a driver is deemed to have consented to giving a blood alcohol test after being lawfully arrested for driving under the influence. See, "Digest of Impaired Driving and Selected Beverage Control Laws," 26th edition, Publication 811763, U.S. Department of Transportation, NHTSA, June 1, 2011. The sanction for refusal to comply by giving a test vary from state to state, but generally involve suspension of driving privileges; eight states have a criminal sanction for refusal. *Id.* But these laws, with their sanctions, do not sufficiently address the problem of persons who refuse to take a blood alcohol test.

A 1991 study published by NHTSA found that even though all states had implied consent laws, refusal rates state to state varied from 2% to 70%, with a mean of 19%. Jones, Joksch and Wiliszowski, "Implied Consent Refusal Impact," Publication 807765, U.S. Department of Transportation, NHTSA, September 1991, p. xvi. By 2008, NHTSA published data showing that the mathematical mean rate for refusal rates for the states was 25% in 2001 and 22% in 2005 (with one state having a refusal rate of 81%). "Refusal of Intoxication Testing: A Report to Congress," Publication 811098, U.S. Department of Transportation, NHTSA, September 2008, p. 6. See also, Voas, et al., supra, which (at p. 80) compiles a table of 14 studies from 1986 to 2007 dealing with impaired driving blood alcohol test refusal rates.

For many offenders, accepting the penalty for refusing to submit to a chemical blood test under the implied consent law is a preferable alternative to suffering a criminal conviction under the impaired driving statutes. Voas, et al., supra, at p. 78. A study of conviction rates when a defendant has given a test, compared to when a defendant refused to give a test, confirms what should seem obvious – there are fewer convictions when the defendant denies the prosecution a key piece of evidence by refusing to take a blood alcohol test. Ross, Simon, Cleary, Lewis, and Storkamp, "Causes and Consequences of Implied Consent Test Refusal," *Alcohol, Drugs and Driving*, Vol. 11, No. 1 (1995), p. 57, at p. 60. Indeed, every step of the enforcement and prosecution process is

negatively impacted by blood alcohol test refusals. Voas et al, supra, at p. 80.

Finally, it is worth noting that this case, like *Schmerber*, presents the issue of a non-consensual blood draw *after* a lawful arrest. This is significant for two reasons. First, society's interest in enforcing impaired driving laws is greater when officers have observed and gathered current facts establishing probable cause that the defendant has committed an offense. Second, if the officer has acted without probable cause, then the defendant's rights are protected through the suppression of the evidence that was obtained as a fruit of the unlawful arrest. *Florida v. Royer*, 460 U.S. 491, 501 (1983).

Sadly, driving under the influence remains a major problem in this country, with consequences that are too often tragic. Statutes which make driving under the influence a crime are not effective if defendants cannot be convicted. Implied consent laws are not a sufficient means to insure that drivers under arrest will comply with their obligation to provide a chemical blood test. When they refuse to do so, the prosecution is deprived of evidence necessary to enforce the impaired driving laws. The interest society has in preventing DUIs and protecting the public from impaired drivers, combined with the harm the state's evidence suffers when a blood alcohol chemical test is delayed, when weighed against the minimal intrusion represented by taking a blood sample, lead to the conclusion that taking such a sample without a warrant, following a lawful arrest,

is not an unreasonable search and seizure under the Fourth Amendment.

II. Respondent's Proposed Rule is Impractical and Unworkable as a National Rule of Search and Seizure

Respondent argues that there is no need for a blanket rule allowing warrantless blood draws in cases where a person under arrest for impaired driving refuses to submit to a chemical test. He argues that these cases can be examined on a case by case basis and that warrantless draws should be allowed only where "special facts" exist. He argues that warrantless draws are not necessary because retrograde extrapolation can be used to estimate a person's blood alcohol content at the time of driving. Finally, he argues that technological advances have made it easier and quicker to obtain a search warrant. For the reasons stated below, none of these arguments should succeed in limiting the application of the exigent circumstances exception in impaired driving cases.

A. Case by Case Analysis is an Unworkable, Impractical Rule

The approach taken by the Missouri Supreme Court in the case at bar, and by some other courts, is to allow a warrantless blood draw under the exigent circumstances exception only where "special facts," in addition to the rapid dissipation of alcohol from the

blood, also exist. *State v. Rodriguez*, 156 P.3d 771, 776 (Utah 2007); *State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008); see also *Bristol v. Commonwealth*, 272 Va. 568, 577, 636 S.E.2d 460, 464 (Va. 2006). The rule in these cases seems to be that every case should be evaluated on its own facts to determine whether exigent circumstances existed. This approach is unworkable and impracticable.

The opinion of the Missouri Supreme Court and the other cases employing a special facts analysis seem to hold special facts exist where a traffic crash has occurred. This approach not only improperly dismisses the significance of the exigency due to the destruction of evidence, it also leaves too many practical questions unanswered. These cases do not make it clear whether a crash is a requirement for a warrantless draw. They do not state whether a warrantless draw is authorized in every crash, or if it is, whether this effectively creates a "traffic crash" exception to the warrant requirement.

The "special facts" cases also seem to presume that efforts to secure a warrant will be delayed by the investigation of a crash. Not every crash is the same. Many variables may be involved, including:

- Whether the crash is minor
- Whether the suspect is transported to a hospital
- Whether the crash requires extensive investigation

- Whether specialized law enforcement units exist to investigate separately the crash and the impaired driving offense
- Whether the crash occurs in close proximity to a judge who can review and sign a warrant
- Whether the crash occurs in an isolated area
- Whether the crash is discovered immediately or only after some delay
- Whether an officer can determine when the crash occurred

A rule requiring a case by case analysis of whether special facts creating exigency exist gives the officer in the field no guidance as to which of these crash factors may be important, and how they are to be weighed.

The "special facts" line of cases provides little to no direction as to what other circumstances, if any, will also constitute the "special facts" necessary to authorize a warrantless draw. Again, a myriad of potential circumstances can exist which will cause a delay in securing a sample:

- Whether a suspect flees the scene and is not immediately found
- Whether it is necessary to travel a lengthy distance to secure a warrant

- Whether it is necessary to travel a lengthy distance to reach an authorized, qualified blood drawer
- Whether a suspect initially agrees to a breath test but then refuses to cooperate in providing a valid sample
- Whether an officer is able to contact a judge
- Whether an officer is required to make multiple attempts to contact a judge
- Whether an officer is required to attempt to contact multiple judges

In any given impaired driving arrest, there are simply too many potential variables which an officer may be required to analyze to determine whether he will be able to meet the showing of "special facts" required by this approach, when things have gone so far that exigency exists.

Moreover, it is undisputed that the body begins to eliminate alcohol after drinking, destroying relevant evidence of impairment almost immediately. *Schmerber*, supra, 384 U.S. at 770-771; *Skinner v. Railway Laborer Executives' Association*, 489 U.S. 602, 623 (1989). This presents a different situation than other types of cases applying the exigent circumstances exception to allow a warrantless search. In a narcotics case, for instance, officers merely *believe* that evidence may *potentially* be destroyed, through a voluntary action taken by the suspect. In an impaired driving case, once it is clear the defendant has ingested

alcohol, officers *know* that evidence is *certainly* being destroyed, through a biological process that is not a matter of choice or voluntary action on anyone's part. Questions about how long the delay must be before exigent circumstances exist to justify a warrantless blood draw are really questions about how much evidence an officer must allow to be destroyed.

The rule proposed by respondent and adopted by the Missouri Supreme Court leaves questions like these unanswered, with little guidance how to determine when a warrant is required, or when a warrantless blood draw will be acceptable. Indeed, many of the factors that might affect exigency are things an officer in the field might not even be aware of, or might not have the ability to control. *State v. Shiner*, 751 N.W.2d 538, 549 (Minn. 2008) (cert. den., 555 U.S. 1137). Requiring additional "special facts" before exigent circumstances can be found is an unworkable rule. It would effectively preclude the application of the well settled exigent circumstance/destruction of evidence exception in impaired driving cases. If this Court adopted such a rule, the only certainty is that any blood draw done without consent or a warrant will be challenged in a motion to suppress and be the subject of future appeals.

Other courts have concluded that *Schmerber* should not be read to leave officers who enforce impaired driving laws with such an unworkable, uncertain standard. *State v. Shiner*, supra, 751 N.W.2d at 549 (Minn. 2008) (cert. den., 555 U.S. 1137); *People v. Thompson*, 38 Cal.4th 811, 135 P.3d 3 (2006) (cert. den., 549 U.S. 980); *State v. Bohling*, 173 Wis.2d

529, 494 N.W.2d 399 (1993) (cert. den., 510 U.S. 836). This Court should remove the uncertainty and clarify what was alluded to in *Schmerber* – a clear rule that police may secure a timely chemical test from individuals arrested for impaired driving, without the delay of obtaining a warrant.

B. Retrograde Extrapolation is Not a Substitute for a Timely Test

Respondent also argues it is not necessary to allow warrantless blood draws in most impaired driving cases because a defendant's blood alcohol content (BAC) at the time of driving can be determined through retrograde extrapolation. In other words, it is permissible for officers to allow relevant evidence to be destroyed because an estimate of the person's BAC can be calculated from a test conducted up to several hours later. Again, this is an unworkable and impracticable solution.

Retrograde extrapolation is a method for estimating what a person's BAC may have been at an earlier time based on one or more chemical tests. As noted above, this estimation is done by using a formula that takes into account, among other things, the person's gender, age, height and weight, how much alcohol was consumed, what type of alcohol was consumed, the time period over which the alcohol was consumed, whether and when the person had consumed food, the rate at which a person eliminates alcohol from his or her system, and how much time elapsed between the last drink and the test. Much of this is information

could only be provided by the impaired driving suspect. He or she may not accurately remember these details (especially considering the level of impairment present), or may be inclined to falsify. Moreover, while an officer can ask for this information, the suspect can simply refuse to provide it.

Also, while it is generally accepted that the human body eliminates alcohol at a rate of approximately .015% per hour, various factors can affect the actual elimination rate. *Thompson*, supra, 38 Cal.4th at 826. For these reasons, a BAC calculated using retrograde extrapolation will never be as accurate as a test done in closer proximity to the driving. It will always be more of an *estimate* of alcohol concentration rather than a true *measurement,* with the amount of uncertainty increasing the longer the delay between the driving and the test.

Further, as noted in section I above, concerns about accuracy and reliability have led some courts to reject the admission into evidence of retrograde extrapolation to prove what a person's BAC was at the time of driving. See, e.g., *State v. Eighth Judicial Circuit of Nevada*, supra, 267 P.3d 777, affirming the exclusion of such evidence; likewise, *Mata v. Texas*, supra, 46 S.W.3d 902 (Texas 2001). And even when the evidence was admitted, the court in *Commonwealth v. Modaffre*, 529 Pa. 101, 601 A.2d 1233 (Pa. 1992), held that evidence of a BAC of .108% from a blood sample taken one hour and fifty minutes after the driving was insufficient to prove the defendant guilty beyond a reasonable doubt, when the threshold level for a violation was .10%.

When such evidence is admitted at trial, for all the reasons outlined above, it is subject to attack by the defense in front of the jury. Any change in one of the variables used in the analysis can lead to a different result. Because a BAC calculation using retrograde extrapolation is nothing more than an estimate, the introduction of this evidence often turns into a battle of expert witnesses. It is not unusual for defense experts to manipulate the formula to reach a result that "proves" a defendant was below the per se limit for alcohol at the time of driving, turning retrograde extrapolation into a defense weapon to create reasonable doubt. See Barone, *Defending*, supra, § 202.

Finally, although the case at bar involves a suspect who was under the influence of alcohol, driving under the influence of other drugs is also common. Retrograde extrapolation cannot generally be used to estimate how much of a particular drug may have been in a person's system at the time of driving because of the way most drugs are metabolized. Sarah Kerrigan, *Drug Toxicology for Prosecutors*, American Prosecutors Research Institute, 2004, at p. 16 (available online at http://www.ndaa.org/pdf/drug_toxicology_for_prosecutors_04.pdf). As such, when someone is suspected of being under the influence of a drug other than alcohol, any delay in securing a blood sample causes relevant evidence of impairment to be irretrievably lost, because, "it is generally not possible to extrapolate backwards from some known drug concentration to some earlier time and concentration." *Id.*

For all these reasons, the possibility of using retrograde extrapolation to estimate a person's BAC at the time of driving is simply not a viable alternative to a test taken as close in time to the driving behavior as possible. A timely test is the only thing that will provide an accurate measurement of the person's actual BAC.

C. Technology Does Not Provide an Adequate Remedy to the Delay in Obtaining a Search Warrant

Respondent also argues that improvements in technology have streamlined the process such that warrants can be easily and quickly obtained. While it is undeniable that communications ability has seen many improvements since 1966, those improvements do not provide a complete remedy to the problem of delay required to obtain a warrant.

The process of obtaining a search warrant will involve several steps – preparation of the warrant forms; preparation of the affidavit in support of the warrant; locating the judge; presenting the judge with the warrant and affidavit; the judge finding the opportunity to review the warrant application; the judge reading the search warrant affidavit and forms; the judge approving the warrant; the judge forwarding the approved warrant to the officer. Communications technology can only affect part of the warrant process – the part that would involve transporting the warrant and affidavit to the judge. It

will not affect the preparation steps, the effort to locate a judge, or the time for the judge to review the warrant and affidavit. In particular, the ability of the judge to review the warrant at that minute may well be affected by the day and even the time of day.

Next, one must recognize that the availability of communications technology will vary from state to state, and even within a state, from county to county. The simple existence of technology does not necessarily mean it is practically available as a solution for quickly securing a search warrant. Moreover, the procedures and requirements for securing a search warrant vary widely by state and even by jurisdiction within a state. Thus, while states or local jurisdictions may certainly choose to employ modern communications technology as part of the process for securing a warrant, the variables involved means this does not necessarily represent a viable solution that can be deployed nationwide.

In short, the existence of improved communications technology does not necessarily mean that technology will provide a practical means to quickly secure a warrant, in all states and counties, at any time. The number of steps in the process, the fact that several parts of the process are not at all shortened by improved communications technology, and the variables involved from one local jurisdiction to another, all counsel against relying on technology as the basis for a national rule.

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CONCLUSION

Impaired driving represents a major problem for society and law enforcement. It has a great impact on the community, with tragic consequences for many innocent victims. In response to this problem, timely blood alcohol testing of arrested suspects is a key component of enforcement efforts to hold impaired driving in check, and roll back its terrible impact. The rule that respondent urges would delay blood alcohol testing, with a negative impact. The biological processes that eliminate alcohol from the body destroy evidence, and represent an exigent circumstance. Amici urge this Court to rule that the minimal intrusion of a blood test, when conducted without a warrant, after a lawful arrest, is not unreasonable for an impaired driving suspect.

Date: November 16, 2012

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