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No. 11-1425

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Writ Of Certiorari To The Missouri Supreme Court

REPLY BRIEF FOR PETITIONER

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I. THE SEARCH WAS REASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES

Respondent's central contention is that the reasonableness of a search must be determined based on the totality of the circumstances. Respondent correctly observes that "[w]hen reviewing the constitutionality of warrantless searches, the Court has engaged in a balancing process, weighing the individual's privacy interests against the degree to which a warrantless search is necessary to advance legitimate governmental interests." Resp. Br. 18 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Indeed, the relevant Fourth Amendment inquiry is whether taking the blood sample was reasonable, and whether it was reasonable depends on balancing these interests after examining the totality of the circumstances. Applying this test to the case at hand, the search was reasonable.

Allowing a police officer to obtain a warrantless blood test from a drunk driver based upon probable cause strikes a favorable balance when "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-119 (2001) (quoting *Houghton*, 526 U.S., at 300). The legitimate governmental interests, *i.e.*, the law enforcement interests in protecting innocent motorists from the dangers of drunk driving, are exceptionally strong. A prompt blood test measurement, taken with as little delay as possible, provides

the most reliable evidence of intoxication. The privacy interests, on the other hand, are minimal. This Court has long held that a simple blood test, taken by a trained technician in a hospital setting, is a minor intrusion. Because driving an automobile on a public street is a highly regulated governmental activity, motorists have a diminished expectation of privacy. The vital interest in public safety clearly outweighs the individual interests of a drunk driver in being subjected to a simple blood test. Under the totality of all of the circumstances, a compelled blood test, taken at the direction of a law enforcement officer and supported by probable cause, is a reasonable warrantless search under the Fourth Amendment.

Respondent contends that this test "leaves no room to consider the actual facts of a particular case." Resp. Br. 20. This is simply not true. Examining the totality of the circumstances of the case under review, the search at issue here was reasonable in all respects. The arresting officer clearly had probable cause to believe Respondent was driving drunk. J.A. 19-21, 29-37. It is an undeniable fact that alcohol is eliminated from the bloodstream, generally at a rate of approximately .015 to .020 per hour. J.A. 47-48. Nobody would dispute that a timely blood test measurement, taken as close to the time of driving as possible, provides the best and most reliable evidence of intoxication. If the arresting officer had sought a search warrant, a delay of approximately two hours would reasonably have been expected. J.A. 54. Furthermore, the search itself was conducted in a

reasonable manner, taken in a hospital environment by a trained medical technician. J.A. 20. Under the circumstances of this case, it was objectively reasonable to conclude that Respondent's blood alcohol level would have continued to dissipate, thus destroying evidence, during the inevitable delay necessary to obtain a search warrant. The search was reasonable, therefore, in order to prevent the imminent destruction of evidence.

A. The "Totality Of The Circumstances" Test Proposed By Respondent Is Impractical And Unworkable

1. Respondent's approach would lead to inconsistent application of Fourth Amendment guarantees

Dissatisfied with the end result, Respondent proposes a different version of the totality of the circumstances test, one which focuses almost exclusively on unpredictable factors regarding the time necessary to obtain a search warrant. Resp. Br. 11, 22-23. However, this Court has never required law enforcement officers to sit idly by and attempt to apply for a search warrant while evidence is in the actual process of destruction. Moreover, Respondent's proposed test is impractical, unworkable, and would ultimately result in inconsistent and chaotic application of Fourth Amendment protections.

For example, some of the important factors to consider under Respondent's proposed test include

"whether and how the interval between time of arrest and time of testing affects the admissibility of BAC evidence under state evidentiary rules" and "what the warrant procedures are in the particular state." Resp. Br. 22-23. Notably, Respondent points out that "Missouri has chosen not to take advantage of technological developments to expedite the warrant process." Resp. Br. 38 n.16.[1] Thus, under Respondent's proposed test, this would be an important factor actually weighing in *favor* of the warrantless blood draw at issue in this case. Regardless, Respondent's proposed test is fundamentally flawed because it would create an atmosphere in which Fourth Amendment protections would vary from state to state, based upon individual state laws and evidentiary rules. To be sure, this Court has held that the meaning of the Fourth Amendment does not change with state law or local practices. See, *e.g., Virginia v. Moore*, 553 U.S. 164, 172 (2008) (noting that "[w]hile those practices 'vary from place to place and from time to time,' Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'") (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)). Moreover, such an approach would enable individual states to alter Fourth Amendment guarantees through legislation, making them susceptible to

[1] Search warrants in Missouri are governed by Mo. Rev. Stat. Sec. 542.276 (2010), which requires the application, the warrant, and any accompanying affidavit to be in writing. Telephonic search warrants are not available, as Sec. 542.276.3 specifically prohibits oral testimony from being considered.

change with each and every legislative session. Such an approach is not only misguided, but also inconsistent with basic constitutional principles.

Certainly, Fourth Amendment guarantees are not so malleable that they can change simply by crossing a state line. The inconsistency and uncertainty of Respondent's proposed test does not end there, however. Respondent asserts that another important factor to consider is "how long it typically takes to obtain a warrant in the jurisdiction." Resp. Br. 22. In the middle of the night in Cape Girardeau County, this delay is approximately two hours. J.A. 54. As Respondent concedes, local law enforcement practices and search warrant procedures will vary from jurisdiction to jurisdiction. Resp. Br. 37-43. Missouri, for instance, is comprised of 114 counties, the majority of which are in rural areas with a single prosecutor. Obviously, the length of delay from county to county may vary widely. Thus, Fourth Amendment guarantees would once again be subject to variation under Respondent's approach, this time from county to county within a state, based on the average amount of time it takes to apply for and obtain a search warrant in a particular jurisdiction.[2]

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[2] Perhaps more problematic, relying on a factor such as this has the potential of creating a perverse disincentive for police and prosecutors to promote the implementation of efficient warrant procedures. A warrant would more likely be required in a county that has made diligent efforts to implement efficient procedures to obtain warrants as expediently as possible,

(Continued on following page)

Other important factors to consider under Respondent's proposed test include "how far the police had to travel to a hospital" and "whether there was more than one officer at the scene." Resp. Br. 22. Fourth Amendment guarantees would potentially shift again, based upon such factors as the geographic location of the traffic stop and its proximity to the nearest hospital, and the number of officers who happen to be working during a given shift. The glaring practical problems with such an approach would leave police officers and reviewing courts in an impossible situation. For example, if an officer arrests a drunk driver thirty miles away from a hospital, but there is a back-up officer on the scene, is it *more* or *less* likely that a warrant would be required in that situation as opposed to a situation where an arrest is made by a single officer, working alone, but only ten miles away from the nearest hospital? The end result under Respondent's proposed test would leave police officers, not to mention the lower courts, with no clear practical guidance. Failure to consider such factors does not, by any means, mean that the totality of the circumstances inquiry is being rejected or abandoned.

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whereas a warrant would less likely be required in a jurisdiction that remained indifferent. Complacency, in a sense, would be rewarded.

2. Technological advancements have not removed the exigency in quickly securing blood alcohol evidence

Respondent further contends that advances in technology have diminished the exigency in quickly securing blood alcohol evidence. Respondent asserts that technological advancements, such as the possibility of obtaining warrants electronically, have removed the justification for a warrantless blood draw in a drunk driving case. Resp. Br. 37-43. While it is true that technological advancements may reduce the time necessary to transmit a warrant application to a judge, this comprises only a part of the process of obtaining a search warrant. As *amici* National District Attorneys Association point out, there will still be an inevitable delay involved in obtaining a search warrant in the middle of the night. *Amici* NDAA Br. 27-28. The police officer must still consult with a prosecutor, prepare the affidavit setting forth the facts establishing probable cause, contact a judge, and wait for the judge's response. And then, after it is approved, the officer still has the task of transporting the drunk driver to a medical facility and arranging for a technician to perform the blood draw. Communications technology can only affect one single part of the warrant process – transporting the warrant and supporting affidavit to the judge. This does not remove the exigency.

The experience of lower courts examining the process of obtaining telephonic search warrants is instructive. Respondent correctly notes that the

Federal Rules of Criminal Procedure were amended in 1977 to allow for telephonic search warrants. Fed. R. Crim. P. 41(d)(3). Resp. Br. 38. At the time, there was undoubtedly tremendous optimism that the days of unreasonable delays in obtaining search warrants were over. Certainly, at first glance it sounds like simply calling a judge to get a warrant approved would be simple, convenient, and instantaneous. When lower courts began examining the actual process of obtaining telephonic search warrants, however, they came to the realization that, in practical application, it was still a time consuming process. In *United v. Reid*, 929 F.2d 990 (4th. Cir. 1991), for example, the Fourth Circuit considered whether such a procedure diminished the exigency in drunk driving cases. The Court acknowledged that, "[a]t first blush, this argument sounds convincing." *Id*., at 993. After examining the rules and procedures involved in obtaining such a warrant, however, the Court recognized that the exigency, in fact, was not diminished. The Court concluded that "[o]bviously, compliance with these rules takes time" and that "[t]ime is what is lacking in these circumstances." *Id*. Other courts have reached similar conclusions. See, *e.g., State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009); *State v. Johnson*, 744 N.W.2d 340, 345 (Iowa 2008); *Dale v. State*, 209 P.3d 1038, 1044 (Alaska Ct. App. 2009).

The possibility of applying for a search warrant electronically likewise will not extinguish the exigency in quickly securing blood alcohol evidence during a

drunk driving investigation. Additionally, as Respondent concedes, even when the process is available, there will still be wide variations among jurisdictions in the amount of time necessary to obtain such a warrant. Resp. Br. 37-43. More importantly, this Court has never demanded an inquiry into how long it might take to obtain a warrant in each jurisdiction in cases involving the potential destruction of evidence. Indeed, requiring such an inquiry would be misguided, as it would lead to endless litigation and second-guessing.

Although Respondent highlights a few instances where electronic warrants seem to have been obtained expeditiously (Resp. Br. 42), the officer in the field will not be in a position to know if a search warrant will be obtained without any unanticipated delays. The Oregon Supreme Court recently observed that, although there may very well be rare instances where a search warrant could be both obtained and executed in a timely fashion, "[t]he mere possibility . . . that such situations may occur from time to time does not justify ignoring the inescapable fact that . . . evidence is disappearing and minutes count." *State v. Machuca,* 227 P.3d 729, 736 (Or. 2010). As the Oregon Supreme Court properly concluded, the focus of the courts should be on the exigency created by blood alcohol dissipation, not on the speed with which a warrant could presumably be obtained. *Id.*

The case under review only serves to highlight the inevitable delay necessary to obtain a warrant in the middle of the night. As Respondent correctly

points out, the Cape Girardeau Prosecuting Attorney's Office has made efforts to obtain warrants as quickly as possible by drafting forms that can be filled out and faxed to a judge. See J.A. 61-69. Respondent is also correct that, if requested, a prosecutor could have met the arresting officer to fill out the requisite forms so they could be submitted to a judge. Resp. Br. 55. Respondent is incorrect, however, when he asserts that the entire process "could have been completed in a matter of minutes had [the arresting officer] chosen to seek a search warrant." Resp. Br. 55. This characterization drastically minimizes the delay necessary to obtain a warrant under these circumstances. The reality is that the entire process would have involved a delay of approximately two hours. J.A. 54.

Respondent relies on Defendant's Exhibit C (reprinted at J.A. 70) to support the contention that search warrants could be obtained expeditiously. Defendant's Exhibit C outlined six cases where search warrants were obtained for blood samples in drunk driving investigations in Cape Girardeau County. The exhibit documents the time of the traffic stop, as well as the time the search warrant was issued. The exhibit does not, however, document the time the blood was actually drawn. See J.A. 52. The time the search warrant was issued only reflects the moment when the judge's signature is placed on the search warrant. Obviously, there are a number of additional time consuming steps that must be taken after the warrant is signed. The judge still needs to

get the warrant back to the prosecutor, the arresting officer still needs to transport the drunk driver to the hospital, and arrangements must still be made for a medical technician to draw the blood. The length of time it will take to accomplish these additional steps is difficult to predict. What we do know for certain is that there will be an additional delay.

Defendant's Exhibit C ultimately reveals there is, indeed, a significant delay involved in obtaining a search warrant in the middle of the night. Among the four cases occurring during nighttime hours, the time elapsed from the traffic stop to the time the search warrant was signed by the judge range from between one hour and forty minutes to one hour and fifty-seven minutes. J.A. 70. Once again, this does not reflect the time the blood was actually drawn. During this delay, reliable evidence of the drunk driver's intoxication is dissipating with every minute that passes.

3. Retrograde extrapolation does not diminish the exigency

Respondent contends that retrograde extrapolation, a process in which a scientist would work backwards from a blood test result in an attempt to calculate an individual's BAC at the time of arrest, diminishes the exigency in quickly securing blood alcohol evidence. Resp. Br. 44-46. Respondent concedes, however, that evidentiary rules governing

retrograde extrapolation vary from jurisdiction to jurisdiction.

More importantly, however, there are serious flaws with this technique. Most notably, the results of such an extrapolation are affected by numerous variables, many of which will only be known to the defendant. See, *e.g.*, *State v. Eighth Judicial District Court of the State of Nevada*, 267 P.3d 777, 783 (Nev. 2011) (outlining factors relevant to achieving a sufficiently reliable calculation, including: gender, weight, age, height, mental state, type and amount of food in stomach, type and amount of alcohol consumed, time the last drink was consumed, drinking pattern, elapsed time between first and last drink, time elapsed between last drink and blood draw, and the number of blood samples taken). There, the Court ultimately reversed the defendant's conviction for DUI because the expert did not have knowledge of many of defendant's personal characteristics and behaviors. *Id*., at 783-784. Indeed, in most cases the variables necessary for a reliable extrapolation will simply not be known to the expert. See, *e.g., Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001) (holding it was an abuse of discretion to allow expert to extrapolate defendant's blood alcohol content from a single blood test taken over two hours after the alleged offense because, among other things, the expert had no knowledge of any personal characteristics of defendant); *State v. Downey*, 195 P.3d 1244, 1251-1252 (N.M. 2008) (reversing conviction for vehicular homicide, holding it was an abuse of

discretion to allow expert to perform retrograde extrapolation calculations because the expert did not know when the defendant had consumed his last drink); *Commonwealth v. Wirth*, 936 S.W.2d 78, 84 (Ky. 1997) (noting that without the defendant's cooperation, no valid extrapolation can occur because a number of facts known only to defendant are essential to the process). See also Dominick A. Labianca, *Retrograde Extrapolation: A Scientifically Flawed Procedure (DWI)*, The Champion (NACDL Jan.-Feb. 2012) (discussing flaws with retrograde extrapolation).

During the course of a drunk driving investigation, the arresting officer simply cannot be expected to know if the prosecutor will be able to find a scientific expert who is qualified to render an opinion based on retrograde extrapolation, nor will the officer know whether the expert will actually be able to make such an extrapolation based on facts and information available in the case. Furthermore, the arresting officer in the field certainly will not be able to predict if the trial judge will allow such evidence to be presented in court, and, of course, whether a jury finds such evidence to be persuasive is another matter entirely. What the arresting officer does know for certain is that a prompt chemical test, taken as close to the time of driving as possible, will provide the most accurate evidence of a drunk driver's actual level of impairment. Requiring a police officer in the field to consider such factors as exactly how much time it will take to obtain a warrant, how much evidence will be lost during the delay, whether the

state will still be able to secure a conviction, or whether an expert witness might be available at a trial, is simply unworkable.

B. Blood Alcohol Evidence Is Important In Drunk Driving Prosecutions

Blood alcohol evidence has played a critical role in the enforcement of our drunk driving laws throughout the Nation. For instance, in 1998 President Clinton signed an Executive Memorandum for the Secretary of Transportation, calling for a plan to promote the adoption of 0.08 Blood Alcohol Content (BAC) as the nationwide legal limit for impaired driving. *Memorandum on Standards To Prevent Drinking and Driving,* March 3, 1998 [Public Papers of the Presidents of the United States: William J. Clinton, (1998, Book I, p. 318)]. President Clinton noted that drunk driving remained a serious highway safety problem, costing society thousands of lives and $45 billion every year. *Id.* In an effort to "prevent the many tragic and unnecessary alcohol-related deaths and injuries that occur on our Nation's roads," President Clinton called on the Congress to pass legislation to ensure that 0.08 BAC would become the national legal limit. *Id.* The effort was successful. In October of 2000, the Congress passed, and the President signed into law, the Department of Transportation and Related Agencies Act of 2001, Pub. L. No. 106-346. Among other things, the law required states to implement a 0.08 BAC standard as the legal limit for drunk driving by 2004. States failing to impose that standard risked losing a percentage of federal

highway funds. All 50 states complied, quickly enacting laws establishing 0.08 BAC as the legal limit for impaired driving.

Per se laws such as these were passed, in part, "in response to constant challenges by offenders" in DUI prosecutions that came down to "subjective judgments made by the judge or jury" about the "definition of impairment, being under the influence, or intoxication." National Highway Traffic Safety Administration (NHTSA), Refusal of Intoxication Testing: A Report to Congress, Publication 811098, 2 (September 2008). Indeed, blood alcohol evidence is reliable, easily measured, and does not depend on subjective police observations. The results are not arbitrary. Rather, they treat everyone equally across the board.

Respondent attempts to minimize the importance of blood alcohol evidence in drunk driving prosecutions, contending that the "state can . . . build its case around the arresting officer's observations, the results of one or more field sobriety tests, and a negative inference that can be drawn from the driver's refusal to submit to breath or blood testing." Resp. Br. 37. To support this contention, Respondent cites *South Dakota v. Neville*, 459 U.S. 553 (1983). This reliance is misplaced. In *Neville*, this Court expressly stated that "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 564. Indeed, this Court has repeatedly recognized the importance of blood alcohol evidence in drunk driving prosecutions. See, *e.g., Breithaupt v. Abram*, 352 U.S.

432, 439-440 (1957) (a blood test "is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication" and that "the issue of driving while under the influence of alcohol can often [by utilizing blood tests] be taken out of the confusion of conflicting contentions."); *Schmerber v. California*, 384 U.S. 757, 771 (1966) ("Extraction of blood samples for testing is a highly effective means of determining the *degree* to which a person is under the influence of alcohol.") (Emphasis added.); *Winston v. Lee,* 470 U.S. 753, 763 (1985) ("Especially given the difficulties of proving drunkenness by other means, . . . results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

Respondent contends there is no compelling need for chemical test results, asserting that at least half the states prohibit warrantless blood draws in "run of the mill" drunk driving cases. Resp. Br. 31-37. Respondent lists a roster of twenty-five states that are purportedly opposed to warrantless blood testing of drunk drivers. Resp. Br. 31-32 n.9. Interestingly, of the twenty-five states listed by Respondent, fifteen have joined *amici* Delaware, et al., urging this Court to reverse the decision of the Missouri Supreme Court.[3] See *amici* Delaware, et al., Brief.

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[3] These states include: Alabama, Connecticut, Florida, Iowa, Maryland, Michigan, Montana, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Washington, and Wyoming.

The implied consent law provisions of various states should not be interpreted as a signal that they do not view chemical tests as an important tool in removing drunk drivers from the road. Regardless, even assuming some states have clearly expressed a policy judgment against warrantless blood testing of drunk drivers, the question here is whether the Fourth Amendment forbids such a practice. As *Virginia v. Moore*, 553 U.S. 164 (2008) plainly teaches, state restrictions do not alter Fourth Amendment protections. The relevant inquiry is what the Constitution forbids. To be sure, in *South Dakota v. Neville*, 459 U.S., at 560 n.10, this Court stated that "a person suspected of drunk driving has no *constitutional* right to refuse to take a blood-alcohol test." (Emphasis added.) This Court plainly stated that "*Schmerber* . . . clearly allows a State to force a person suspected of drunk driving to submit to a blood alcohol test." *Id.*, at 559. The right to refuse the blood alcohol test was, as this Court put it, "simply a matter of grace bestowed by the South Dakota legislature." *Id*., at 565. Certainly, "[a] State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional." *Moore*, 553 U.S., at 174.

C. Privacy Concerns Are Relatively Minor

Respondent is correct that intrusions on bodily integrity go to the very heart of the Fourth Amendment. Resp. Br. 13, 48. To be sure, a compelled blood

test is certainly a bodily intrusion, and, without question, it implicates important privacy interests. Neither Petitioner nor its *amici* suggest otherwise. But this Court has recognized that when there is a legitimate governmental interest involved, such as a prosecution for drunk driving, a compelled blood test is a relatively minor intrusion.

Relying on *Winston v. Lee,* 470 U.S. 753 (1985), Respondent states that "having to submit to a compelled blood test 'perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy.'" Resp. Br. 48 (quoting *Winston,* 470 U.S., at 760). Respondent's reliance on *Winston* is misplaced. In *Winston,* this Court clearly and explicitly reaffirmed that blood tests are a minor intrusion, stating that "*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." Respondent further cites *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) to support the proposition that a compelled blood test implicates significant privacy interests. Resp. Br. 48. This reliance is also misplaced. In *Skinner,* this Court once again expressly reaffirmed that "the intrusion occasioned by the blood test is not significant." *Skinner*, 489 U.S., at 625.

Respondent proceeds to distinguish *Skinner* from the case under review, noting that the blood tests at issue in that case were not designed to assist in a criminal prosecution of those tested. Resp. Br. 52. Respondent is absolutely correct in that regard –

the Federal Railroad Administration employees in *Skinner* were not subject to criminal prosecution. That is precisely why the Court upheld the warrantless blood tests in the absence of probable cause. Indeed, the blood tests were upheld without even a required showing of any degree of individualized suspicion. *Skinner*, 489 U.S., at 624. If anything, a compelled blood test of a drunk driver *supported by probable cause* is far more reasonable than a suspicionless compelled blood test. Respondent's further contention that warrantless blood testing of a drunk driver is similar to the warrantless urine testing of pregnant women disapproved by this Court in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), is equally misplaced. Resp. Br. 52. The searches at issue in *Ferguson* were likewise not supported by probable cause, and thus bear no similarity to the search at issue in this case.

Further discussing privacy concerns, Respondent states that "the automobile exception to the warrant requirement does not extend to compelled blood draws of a vehicle's occupants." Resp. Br. 50-51. Petitioner has never suggested that the warrantless blood test in this case fell under the automobile exception to the warrant requirement, nor has Petitioner remotely suggested that a person is somehow stripped of all Fourth Amendment protections simply by entering a car. The fact remains, however, that driving an automobile is, unquestionably, a pervasively regulated activity. This is certainly a relevant factor to consider when examining the totality of the circumstances of the search at issue here. Such

considerations weigh against the privacy interests of the drunk driver and in favor of the law enforcement interests.

D. A Warrantless Search To Prevent The Destruction Of Evidence Is Reasonable Under The Fourth Amendment

The ultimate touchstone of the Fourth Amendment is the "reasonableness" of the police practice, *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006), and a search or seizure based on probable cause may be conducted without a warrant if the police conduct is reasonable under the circumstances. Furthermore, "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *Kentucky v. King*, 131 S.Ct. 1849, 1853-1854 (2011).

Stressing the importance of the warrant requirement, Respondent cites *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Resp. Br. 16-17. The warrant requirement, to be sure, is indeed important and essential. Neither Petitioner nor its *amici* suggest otherwise. In *Johnson*, however, the Court recognized that there are "exceptional circumstances" where the warrant requirement may be dispensed with. *Id.*, at 14-15. The Court found in that particular case that such "exceptional circumstances" did not exist, specifically noting that "[n]o evidence or contraband was *threatened* with removal or destruction."

Id. (emphasis added). Respondent proceeds to emphasize the importance of the warrant requirement, citing *Katz v. United States*, 389 U.S. 347 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Mincey v. Arizona*, 437 U.S. 385 (1978), and *Georgia v. Randolph*, 547 U.S. 103 (2006). Resp. Br. 16-17. Once again, none of these cases involved the imminent destruction of evidence.

In the case under review, everyone agrees the evidence was in the actual process of destruction. Nonetheless, Respondent contends this fact was insufficient to establish exigent circumstances, asserting that the "natural dissipation of alcohol in the blood is . . . very different than other cases where the Court has worried about destruction of evidence." Resp. Br. 13. Relying on *Roaden v. Kentucky*, 413 U.S. 496 (1973), Respondent asserts a drunk driving investigation does not present a "now or never" situation necessary to create exigent circumstances. Resp. Br. 13, 44. Respondent's reliance on *Roaden,* however, is entirely misplaced. In *Roaden* the Court held the warrantless seizure of an obscene film being exhibited to the general public was a form of prior restraint, and for that reason was unreasonable under Fourth Amendment standards. *Id.*, at 504. The Court specifically noted there was no risk of loss of evidence in the case because the films were scheduled for exhibition in a commercial theater open to the public. *Id.*, 506 n.6. Obviously, the whole point of a commercial theater is to preserve the films so that they can be shown time and time again to paying

customers. Thus, there was never even a *risk* of loss of evidence.

Respondent attempts to differentiate the situation presented *Kentucky v. King*, *supra*, contending that the destruction of evidence concept in narcotics cases is distinguishable from the case under review. Resp. Br. 44. Respondent asserts that narcotics cases are distinguishable because "once drugs are flushed down the toilet, they are gone instantly and forever" and that "the prosecution's case often disappears with them." Resp. Br. 13. Thus, if the Court were to adopt Respondent's rationale, exigent circumstances would only exist in destruction of evidence cases if the evidence will be *completely* destroyed during the delay necessary to apply for and obtain a search warrant. This Court has never endorsed such an approach.

A hypothetical example illustrates the flaw with Respondent's test. Assume law enforcement officers, in the course of a narcotics investigation, have set up surveillance on a particular house they suspect may be at the center of a major drug trafficking conspiracy. While conducting surveillance, they observe a large package being delivered to the house. Within minutes, the officers receive a text message from a reliable informant inside the house confirming what the officers suspected – the package contained a very large quantity of heroin. Unfortunately, the informant also advises the officers that the drug traffickers have been alerted to their presence and have begun flushing the heroin down a toilet. The informant

further advises the officers that the quantity of heroin is so large that it will take several hours before the traffickers can dispose of it entirely. Under the Respondent's proposed test, the officers in the field would be forced to make a prediction regarding the length of time it would take to obtain a search warrant. If, for instance, the police think there is a chance they might be able to obtain a telephonic search warrant fairly quickly, say within one hour, the police would be required to sit by and allow heroin to be destroyed while they apply for a search warrant, all the while hoping that the warrant will come through without any unanticipated delays.

The flaws inherent in Respondent's proposed test are further illustrated by examples of its practical application in the context of other crimes as well. For example, suppose that during a white collar crime investigation law enforcement officers find out that the suspect is in his office destroying evidence of a massive fraud he perpetrated. The suspect is methodically and steadily pouring over hundreds of documents and computer files so that he can get rid of evidence of the crime he has committed. Working slowly yet steadily, the suspect is burning incriminating documents and deleting incriminating computer files. Under Respondent's proposed test, law enforcement officers would be forced to evaluate the practicability of obtaining a search warrant before putting an end to the destruction of evidence. To further complicate matters, the officers might even have to consider whether a forensic computer analyst might later be able to retrieve the deleted computer files.

Once again, the ultimate touchstone of the Fourth Amendment is the "reasonableness" of the police practice. *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). A search or seizure based on probable cause may be conducted without a warrant if the police conduct is reasonable under the circumstances, and "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *King*, 131 S.Ct., at 1853-1854.

In the case under review, it was an indisputable fact that the most reliable and probative evidence of the crime was in the actual process of destruction. The arresting officer clearly had probable cause to believe Respondent was driving drunk, and the search itself was conducted in a reasonable manner. While we do not know exactly how much time it would have taken to apply for and obtain a search warrant, we know for certain that there would have been an inevitable delay. While we do not know exactly how much evidence would have been lost during this delay, we know for certain that the alcohol was being eliminated from his system.

The simple fact remains – this Court has never held that law enforcement officers must put a halt to a criminal investigation when they know, for certain, that important evidence is in the actual process of destruction. This Court has never required the police to put an investigation on hold when it is undisputed that the most reliable and probative evidence of a

crime will continue to be destroyed during the inevitable delay necessary to obtain a search warrant. The judgment of the Missouri Supreme Court should be reversed.

CONCLUSION

For the foregoing reasons and those stated in the petitioner's opening brief, the decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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