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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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court is reported as *State v. McNeely*, 358 S.W.3d 65 (Mo. banc 2012), and can be found in the Petition Appendix (hereinafter "Pet. App."), at 1a-22a. The order of the Missouri Supreme Court denying rehearing is not reported. Pet. App. 47a-48a. The opinion of the Missouri Court of Appeals is not reported, but can be found at 2011 WL 2455571 (Mo. App. E.D.). Pet. App., 23a-38a. The judgment of the trial court granting Respondent's motion to suppress evidence can be found in the Petition Appendix. Pet. App. 39a-46a.

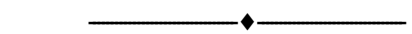
JURISDICTION

The Missouri Supreme Court entered the judgment from which relief is sought on January 17, 2012. Pet. App. 1a-22a. The Missouri Supreme Court denied petitioner's motion for rehearing on March 6, 2012. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on May 22, 2012, and certiorari was granted on September 25, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



STATEMENT OF THE CASE

Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of a blood sample taken after his arrest for driving while intoxicated. J.A. 25-26. The trial court granted the motion to suppress, holding that the blood sample was obtained in violation of Respondent's Fourth Amendment rights. Pet. App. 39a-46a. Petitioner filed an interlocutory appeal. The Missouri Court of Appeals, Eastern District, issued a written opinion that, in its view, the ruling of the trial court should be reversed. Pet. App. 23a-38a. In light of the general importance of the issue, however, the Court of Appeals transferred the case to the Missouri Supreme Court. *Id*. The Missouri Supreme Court affirmed the ruling of the trial court, holding that Respondent's Fourth Amendment rights were violated. Pet. App. 1a-22a.

Petitioner filed a motion for rehearing, which was denied. Pet. App. 47a-48a.

A. Facts

On October 3, 2010, at approximately 2:08 a.m., Corporal Mark Winder of the Missouri State Highway Patrol was on routine patrol in Cape Girardeau County, Missouri, when he noticed a Ford F-150 truck exceeding the posted speed limit. After confirming the speed with a radar unit, Cpl. Winder positioned his patrol car behind the truck and observed it cross the centerline three times. J.A. 19, 29-30. Cpl. Winder then conducted a traffic stop and identified the Respondent, Tyler G. McNeely, as the driver and sole occupant of the truck. J.A. 30. Cpl. Winder immediately noticed that Respondent displayed signs of intoxication, including bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath. J.A. 19, 31. These observations changed the nature of the investigation from a routine traffic stop to a drunk driving investigation. Pet. App. 4a. When Cpl. Winder asked Respondent if he had been drinking, Respondent replied that he was coming from "Slinger's" bar, and that he had consumed "a couple of beers." J.A. 20. Cpl. Winder then asked Respondent to step out of the truck and observed that he was unsteady on his feet. J.A. 20. Cpl. Winder proceeded to administer a series of standard field-sobriety tests, including the horizontal gaze nystagmus test, the one-leg-stand test, and the walk-and-turn test. Respondent performed poorly on all of the tests. J.A. 20, 31-33. Cpl. Winder then

asked Respondent to take a portable breath test, but he refused. J.A. 20, 33. Based upon all of his observations, Cpl. Winder formed the opinion that Respondent was under the influence of alcohol. Respondent was then placed under arrest for driving while intoxicated. J.A. 20, 31-33.

Cpl. Winder secured Respondent in his patrol car and began to transport him to the county jail. While in the patrol car, Cpl. Winder asked Respondent if he would agree to voluntarily provide a breath sample when they arrived at the jail. Respondent told Cpl. Winder that he would refuse to provide a breath sample. J.A. 20, 33-34; Pet. App. 4a-5a, 24a-25a, 39a-40a. Instead of taking Respondent to the jail, Cpl. Winder then decided to drive directly to a nearby hospital in order to obtain a blood sample to secure evidence of intoxication. *Id.* Upon arrival at the hospital, Cpl. Winder read an implied consent advisory form to Respondent and requested a blood sample. J.A. 20, 34-35, 59. Respondent refused to voluntarily consent to the blood test. *Id.* Cpl. Winder then directed a hospital lab technician to draw a blood sample, which was collected as evidence at 2:33 a.m. J.A. 35-36, 59. Cpl. Winder sent the blood sample to the Missouri State Highway Crime Laboratory in order to determine its blood alcohol content. Chemical analysis of the blood sample later revealed that Respondent's blood alcohol content was 0.154 percent, well above the legal limit of .08 percent. J.A. 20, 35-37, 60.

Cpl. Winder did not attempt to obtain a search warrant before directing the hospital lab technician to draw the sample of Respondent's blood.[1] J.A. 39-42; Pet. App. 4a-5a, 40a. Obtaining a search warrant in the middle of the night in Cape Girardeau County involves a delay, on average, of approximately two hours. J.A. 52-54, 70. The rate of elimination of alcohol in the bloodstream is generally somewhere between .015 and .020 percent per hour. J.A. 47-48.

B. Procedural History

1. Cape Girardeau County Circuit Court

Respondent was charged by Information with driving while intoxicated in the Circuit Court of Cape Girardeau County, Missouri, in violation of Mo. Rev.

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[1] Although Cpl. Winder had obtained search warrants in drunk driving cases in the past, he did not attempt to obtain one in this case because he had read an article during a training session that stated a search warrant was no longer necessary due to a recent statutory amendment to the "refusal" provision of the Missouri implied consent law. J.A. 35, 39-40; Pet. App. 4a-5a n.2. Prior to the amendment, the statute provided that if a person refused a chemical test, then "none shall be given." Mo. Rev. Stat. § 577.041.1 (Cum. Supp. 2009). Effective on August 28, 2010, the phrase "none shall be given" was deleted from the statute. § 577.041.1 (Cum. Supp. 2010). Pet. App. 34a-38a, 43a-45a. Based on his understanding of the change to the implied consent law, Cpl. Winder did not seek a warrant. Pet. App. 4a-5a. The Missouri Supreme Court found it unnecessary to address the issue of the statutory amendment because it held the Fourth Amendment was violated. Pet. App. 21a n.9.

Stat. § 577.010 (2010).[2] J.A. 22-24. Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of the blood sample taken after his arrest. Respondent claimed that the nonconsensual and warrantless blood sample was obtained in violation of his Constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.[3] J.A. 25-26.

The trial court granted Respondent's motion to suppress evidence, holding that the warrantless blood draw violated the Fourth Amendment. Pet. App. 39a-46a. Basing the ruling on its interpretation of this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), the trial court held that the natural dissipation of alcohol in the bloodstream does not constitute a sufficient exigency to justify a warrantless

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[2] Because Respondent had two prior convictions for drunk driving, he was charged with a class D felony under Missouri law, which carries a maximum term of imprisonment of four years. A first time offense for driving while intoxicated is a class B misdemeanor, carrying a maximum punishment of six months in jail. Mo. Rev. Stat. §§ 558.011, 577.010, 577.023 (Cum. Supp. 2010).

[3] Respondent also alleged his right to be free from unreasonable searches and seizures under the Missouri Constitution was violated. (V.A.M.S. Const. Art. I, § 15.) The Missouri Supreme Court has held that Article I, Section 15, provides the exact same guarantees against unreasonable searches and seizures as under the Fourth Amendment, and thus, the same analysis applies to cases under the Missouri Constitution as under the United States Constitution. See *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009).

blood draw in a routine driving while intoxicated case. Pet. App. 42a-43a. While acknowledging that *Schmerber* upheld a nonconsensual and warrantless blood draw in a drunk driving case against a Fourth Amendment challenge, the trial court found that *Schmerber* was limited to the "special facts" of that case. *Id.*

The trial court maintained that *Schmerber* requires the existence of additional "special facts," other than the dissipation of alcohol in the bloodstream, before a warrantless blood draw may be justified. These "special facts" were identified by the trial court as a motor vehicle accident resulting in physical injuries requiring emergency medical treatment. Because Respondent was not involved in an accident, and because Respondent did not suffer physical injuries requiring emergency medical treatment, the trial court concluded that *Schmerber* did not apply. The trial court concluded:

> The facts before this court are substantially different than the facts of *Schmerber*. There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a

> judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established exigent circumstances, did not exist in this case to justify the warrantless search.

Pet. App. 43a.

2. Missouri Court of Appeals, Eastern District

Petitioner filed an interlocutory appeal to the Missouri Court of Appeals, Eastern District, an intermediate appellate court. The Court of Appeals, in a unanimous 3-0 decision, issued a written opinion that, in its view, the ruling of the trial court should be reversed. Pet. App. 23a-38a.

The Missouri Court of Appeals found that, in applying the exigent circumstances exception to the warrant requirement, "special facts" are not required to justify a warrantless blood draw. Instead, the evanescent nature of blood alcohol evidence creates exigent circumstances such that no warrant is needed to conduct the search. Pet. App. 33a. In its analysis, the Court of Appeals found the interpretation of *Schmerber* from other jurisdictions to be persuasive, including the Wisconsin Supreme Court in *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005), and the Sixth Circuit in *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989). Pet.

App. 29a-31a. The Missouri Court of Appeals concluded:

> We have no reason to require 'special facts' in addition to the facts that the officer had ample cause to reasonably believe Defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

Pet. App. 33a. Citing the general interest and importance of the issue, however, the Missouri Court of Appeals transferred the case to the Missouri Supreme Court. Pet. App. 24a, 38a.

3. Missouri Supreme Court

The Missouri Supreme Court disagreed with the Court of Appeals. Affirming the ruling of the trial court in a *per curiam* opinion, the Missouri Supreme Court held that the nonconsensual and warrantless blood draw was a violation of Respondent's Fourth Amendment rights. Pet. App. 1a-22a.

The Missouri Supreme Court held that *Schmerber* was expressly limited to its facts, and, noting that the patrolman was not confronted with these same "special facts," concluded that exigent circumstances did not exist. Pet. App. 2a-3a, 8a-10a, 19a-21a. Explaining its rationale, the Court stated:

> The patrolman here, however, was not faced with the 'special facts' of *Schmerber*. Because

> there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

Pet. App. 3a. To support its view that *Schmerber* was limited to its facts, the Missouri Supreme Court found that *Schmerber* explicitly warned against expansive interpretations. Pet. App. 18a. The Court relied on the following language in *Schmerber*:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Pet. App. 18a-19a (quoting *Schmerber,* 384 U.S., at 772). The Missouri Supreme Court concluded that to allow a warrantless blood draw in the absence of

"special facts" would be to ignore this Court's cautious limitation on the holding in *Schmerber*. Pet. App. 19a.

In its analysis, the Missouri Supreme Court acknowledged that a clear and increasing split of authority has recently developed among other state courts of last resort in their respective interpretations of this Court's decision in *Schmerber*. The Missouri Supreme Court expressly disavowed the reasoning of other jurisdictions previously holding that the rapid dissipation of alcohol in the bloodstream constitutes a sufficient exigency to draw blood without a warrant, including the Wisconsin Supreme Court,[4] the Minnesota Supreme Court,[5] and the Oregon Supreme Court.[6] Pet. App. 16a-19a. Ultimately, the Missouri Supreme Court adopted the rationale of the Utah Supreme Court in *State v. Rodriguez,* 156 P.3d 771 (Utah 2007), and the Iowa Supreme Court in *State v. Johnson,* 744 N.W.2d 340 (Iowa 2008), where the courts held that *Schmerber* requires "special facts" beyond the natural dissipation of alcohol in the bloodstream in order to justify a warrantless search. Pet. App. 10a-13a.

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[4] *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993); *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005).

[5] *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009); *State v. Netland*, 762 N.W.2d 202 (Minn. 2009).

[6] *State v. Milligan*, 748 P.2d 130 (Or. 1988); *State v. Machuca*, 227 P.3d 729 (Or. 2010).

Petitioner filed a motion for rehearing, which was overruled by the Missouri Supreme Court on March 6, 2012. Pet. App. 47a-48a. The petition for a writ of certiorari was filed in this Court on May 22, 2012, and certiorari was granted on September 25, 2012.

SUMMARY OF ARGUMENT

It is a basic principle of Fourth Amendment law that searches and seizures conducted without a warrant are presumptively unreasonable. See *Katz v. United States*, 389 U.S. 347, 357 (1967). Because the ultimate touchstone of the Fourth Amendment is "reasonableness," however, the warrant requirement is subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual police officer's state of mind, as long as the circumstances, viewed objectively, justify the action. *Id.*, at 404. Although a search warrant must generally be secured before conducting a search, this Court has recognized that "the exigencies of the situation [may] make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" under the Fourth Amendment. *Michigan v. Fisher*, 130 S.Ct. 546, 548 (2009) (*per curiam*) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978)).

A well-recognized exigency is the need to prevent the imminent destruction of evidence. *Kentucky v.*

King, 131 S.Ct. 1849, 1856 (2011); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion). Indeed, in *King*, this Court stated that "[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. Thus, when a law enforcement officer has probable cause to conduct a search, a warrantless search will be justified under the exigent circumstances exception to the warrant requirement if the officer has an objectively reasonable belief there is a risk that evidence will be destroyed during the delay necessary to obtain a search warrant. This general principle applies to warrantless blood testing of drunk drivers. See *id.*, at 1857 n.3 (noting that the warrantless testing for blood alcohol content in *Schmerber* was justified based on the potential destruction of evidence).

The exigency involved in quickly securing blood alcohol evidence during a drunk driving investigation is particularly compelling because alcohol is naturally eliminated from the human body. This Court has recognized that because the alcohol level in a person's bloodstream begins to dissipate after a person stops drinking, blood samples must be obtained quickly before valuable evidence is destroyed. In *Schmerber*, this Court found that the arresting officer might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence

because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S., at 770. Later, in *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 623 (1989), this Court recognized that because alcohol is eliminated from the bloodstream at a constant rate, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."

The exigency involved in quickly securing blood alcohol evidence during a drunk driving investigation is more compelling than other situations involving a risk of potential destruction of evidence because the alcohol in the bloodstream of a drunk driver is *certain* to disappear, while other types of evidence may only be very likely to disappear. In the case under review, it was an indisputable fact that the best and most probative evidence of the crime was in the process of destruction. Nevertheless, the Missouri Supreme Court held that the warrantless blood test did not fall under the exigent circumstances exception to the warrant requirement. The decision of the Missouri Supreme Court, therefore, actually *requires* the police to stand by and allow the best and most probative evidence of the crime to be destroyed during a drunk driving investigation. Such an approach is wholly

inconsistent with core principles of the Fourth Amendment.

Proper application of the Fourth Amendment must take into account the need for the police to act quickly in order to prevent the destruction of evidence. When a law enforcement officer has probable cause to arrest a person for a drunk driving related crime, it is certainly objectively reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant. Under these circumstances, it is reasonable for an officer to direct medical personnel at a hospital to draw a blood sample from a drunk driver without first obtaining a search warrant. This comports with Fourth Amendment standards of reasonableness.

Furthermore, allowing a police officer to obtain a warrantless blood test from a drunk driver strikes a favorable balance between legitimate law enforcement interests and the privacy interests of the individual. Under a "totality of the circumstances" balancing analysis, the public interests far outweigh the privacy interests of the individual. The legitimate governmental interests, *i.e.*, the law enforcement interests in promoting public safety on our roads and highways through enforcement of drunk driving laws, is exceptionally strong. A prompt blood test, taken with as little delay as possible, provides the best and most probative evidence of intoxication. The privacy interests of the individual, on the other hand, are minimal. This Court has long-recognized

that a simple blood test, taken by a trained technician in a hospital setting, is a minor intrusion. Additionally, because driving an automobile on public highways is an activity heavily regulated by the government, motorists have a diminished expectation of privacy. The public interest in ridding the Nation's roadways of drunk drivers clearly outweighs the privacy interests of the individual in being subjected to a simple blood test. A compelled blood test taken by medical personnel at the direction of a law enforcement officer, supported by probable cause, is certainly reasonable under the Fourth Amendment. The decision of the Missouri Supreme Court should be reversed.

ARGUMENT

I. Under The Fourth Amendment It Is Objectively Reasonable For A Law Enforcement Officer To Obtain A Warrantless Blood Test From A Drunk Driver To Prevent The Destruction Of Evidence

A. This Court has recognized that the need to prevent the imminent destruction of evidence is a sufficient justification for a warrantless search under the exigent circumstances exception to the Fourth Amendment warrant requirement

The Fourth Amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." U.S. Const. Amend.

IV. It is a basic principle of Fourth Amendment law that searches and seizures conducted without a warrant are presumptively unreasonable. See *Katz v. United States*, 389 U.S. 347, 357 (1967). Because the ultimate touchstone of the Fourth Amendment is "reasonableness," however, the warrant requirement is subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual police officer's state of mind, as long as the circumstances, viewed objectively, justify the action. *Id.,* at 404.[7] Although a search warrant must generally be secured before conducting a search, this Court has recognized that "the exigencies of the situation [may] make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" under the Fourth Amendment. *Michigan v. Fisher*, 130 S.Ct. 546, 548 (2009) (*per curiam*) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394

[7] This Court has repeatedly held that a law enforcement officer's subjective motivation for conducting a search is irrelevant in the Fourth Amendment context. See, *e.g.*, *Bond v. United States*, 529 U.S. 334, 338, n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions"); *Kentucky v. King*, 131 S.Ct. 1849, 1859 (2011) ("[W]e have never held, outside limited contexts such as an 'inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment.' ") (quoting *Whren v. United States*, 517 U.S. 806, 812 (1996)).

(1978)). Probable cause remains as a minimum requirement for a reasonable search, while the existence of exigent circumstances excuses only the necessity of obtaining a warrant. See *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.").

This Court has identified several exigencies that can justify a warrantless search, including the "hot pursuit" of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-299 (1967); the need to fight a fire and investigate its cause, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); and the need to render emergency assistance or protect a person from imminent injury, *Brigham City,* 547 U.S., at 403; *Fisher,* 130 S.Ct., at 548-549. Another well-recognized exigency is the need to prevent the imminent destruction of evidence. *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion). Indeed, in *King*, this Court stated that "[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. Thus, when a law enforcement officer has probable cause to conduct a search, a warrantless search will be justified under the exigent circumstances exception to the warrant requirement if the officer has an

objectively reasonable belief there is a risk that evidence will be destroyed during the delay necessary to obtain a search warrant. This general principle applies to warrantless blood testing of drunk drivers. See *id.*, at 1857 n.3 (noting that the warrantless testing for blood alcohol content in *Schmerber* was justified based on the potential destruction of evidence).

B. The exigency in quickly securing blood alcohol evidence is compelling because alcohol naturally dissipates in the bloodstream

This Court has recognized that the level of alcohol in the bloodstream of a drunk driver is not only highly probative evidence in a drunk driving prosecution,[8] but also that this evidence is subject to rapid destruction by the body's natural processes. Because the alcohol level in a person's bloodstream begins to dissipate after a person stops drinking, this Court has recognized that blood samples must be obtained quickly before valuable evidence is destroyed. In *Schmerber*, this Court found that the arresting officer

[8] Recognizing that blood tests are exceptionally probative in drunk driving prosecutions, this Court has found that they are "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Schmerber*, 384 U.S., at 771. See also *Winston v. Lee,* 470 U.S. 753, 763 (1985) (noting that "results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S., at 770. Later, in *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 623 (1989), this Court recognized that because alcohol is eliminated from the bloodstream at a constant rate, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."

A drunk driving investigation involves a unique situation, one in which the destruction of evidence is not only imminent, but inevitable. Indeed, the exigency involved in quickly securing blood alcohol evidence is even more compelling than other situations where a risk of destruction of evidence exists because the alcohol in a suspect's blood is *certain* to disappear, while other types of evidence may only be very likely to disappear. Blood alcohol evidence is extraordinarily unique precisely because it is an indisputable fact that alcohol is naturally and quickly eliminated from the human body. While dissipation rates may vary widely among individuals, it is generally accepted in the relevant scientific community that alcohol dissipates from the human body at an average rate of

between 0.015% and .018% per hour, and, for heavy drinkers, the elimination rate may increase to as rapidly as .022% per hour. See generally K.M. Dubowski, Ph.D., Human Pharmacinetics of Alcohol, Int. Microform L. Leg. Med. 10 (1975); Yale H. Caplan, Ph.D., The Determination of Alcohol in Blood and Breath, 1 Forensic Sciences Handbook ch. 12 (1982); A.W. Jones, Disappearance Rate of Ethanol From the Blood of Human Subjects: Implications in Forensic Toxicology, 38 J. Forensic Sci. 104-118 (1993).

Although the dissipation rate will vary from person to person, one simple fact cannot be refuted – during a drunk driving investigation the best and most probative evidence of the crime is being lost at a significant rate. Because of this undeniable fact, lower courts have repeatedly upheld warrantless blood tests in drunk driving cases against Fourth Amendment challenges, and, in doing so, have emphasized the importance of securing blood alcohol evidence as quickly as possible. See, *e.g.*, *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005); *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009); *State v. Milligan*, 748 P.2d 130 (Or. 1988).

Lower courts frequently compare warrantless blood testing of drunk drivers to the situation presented in *Cupp v. Murphy*, 412 U.S. 291 (1973), where this Court approved the nonconsensual and warrantless fingernail scrapings of a murder suspect. In *Cupp*, the defendant had voluntarily appeared at the police station for questioning in connection with

the strangulation death of his estranged wife. *Id*., at 292. The police noticed a dark spot on his finger, and, suspecting that the spot might be dried blood, requested the defendant to voluntarily allow them to take a sample of scrapings from his fingernails. The defendant refused to voluntarily consent to the fingernail scrapings, and, without obtaining a search warrant, the police proceeded to take the fingernail scrapings over his protest. It was later determined that the sample contained traces of skin, blood cells, and fabric from the victim's nightgown, and the defendant was subsequently arrested and charged with the murder. The incriminating evidence from the fingernail scrapings was admitted at trial over the defendant's objection, resulting in a conviction. *Id.* On appeal, the defendant claimed that the warrantless and nonconsensual fingernail scrapings violated his Fourth Amendment rights. This Court disagreed, holding the search was necessary in order to "preserve the highly evanescent evidence they found under his fingernails." *Id.*, at 296. This Court concluded that the search was reasonable on the basis of three considerations, namely: (1) the existence of probable cause; (2) the very limited nature of the intrusion; and (3) the ready destructibility of the evidence. *Id*.

Cupp v. Murphy, as lower courts have found, illustrates that exigent circumstances may justify a search based on probable cause when the imminent destruction of evidence is likely and the intrusion is

minimal.[9] In *State v. Cocio,* 709 P.2d 1336, 1345 (Ariz. 1985), for example, the Arizona Supreme Court observed that the "highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time." The Court reasoned that, because of this fact, the exigent circumstances in a drunk driving investigation were "even more compelling than *Cupp* since alcohol in a suspect's blood is certain to disappear while the physical evidence on defendant in *Cupp* was only very likely to disappear while a search warrant was obtained." *Id.* See also *Aliff v. State*, 627 S.W.2d 166, 170 (Tex. Crim. App. 1982) (finding that the exigencies which justified the warrantless search in *Cupp* also justified the warrantless blood test because "alcohol in blood is quickly consumed and the evidence would be lost forever."); *State v. Milligan*, 748 P.2d 130, 136 (Or. 1988) (reading *Cupp* and *Schmerber* together and concluding that warrantless extraction of blood was justified because of the evanescent nature of the evidence); *United States v. Berry*, 866 F.2d 887, 891 (6th Cir. 1989) (discussing *Cupp* and finding exigent circumstances existed because "evidence of intoxication begins to dissipate promptly"); *State v. Kristy*, 528 A.2d 390, 392-394 (Conn. App. Ct. 1987); *State v. Shriner*, 751 N.W.2d

[9] This Court has recognized that blood tests are a minor intrusion, finding that they are commonplace, routine, and painless. See, *e.g.*, *Schmerber*, 384 U.S., at 771. The nature of the intrusion is more fully discussed *infra*, pp. 33-35.

538, 543-544 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009) (applying principles articulated in *Cupp* to warrantless blood tests).

Another situation where the risk of potential destruction of evidence arises with great frequency is in the context of narcotics investigations. Narcotics are easily disposable, and, because of this fact, police officers are often confronted with the risk of potential destruction of evidence. The fact that illegal drugs are easily destroyed, of course, will not always justify a warrantless search. For example, in *Vale v. Louisiana*, 399 U.S. 30 (1970), this Court held that a warrantless entry into a house to recover heroin violated the Fourth Amendment. There, police officers were conducting surveillance outside of the defendant's house when they saw him emerge and engage in a drug deal. The officers approached and arrested the defendant on the front steps of the house, after which one of the officers conducted a cursory inspection of the house to make sure nobody else was present. After satisfying themselves that no one else was inside, the officers proceeded to conduct a warrantless search of the house and discovered a quantity of heroin in a bedroom. *Id.*, at 32-33. This Court held the warrantless search of the house violated the Fourth Amendment. Citing *Schmerber*, this Court found that since "[t]he goods ultimately seized were not in the process of destruction[,]" the warrantless

search was not justified. *Vale*, 399 U.S., at 35.[10] Unlike *Schmerber*, where the blood alcohol evidence was obviously "in the process of destruction," there was no showing in *Vale* that the heroin was in the process of being destroyed. Indeed, since the officers had already satisfied themselves that nobody else was present inside the home, there was not even a remote

[10] In a dissenting opinion, Justice Black challenged the assumption that evidence must be in the *actual process* of destruction before a warrantless search may be justified: "[T]he Court suggests that the contraband was not 'in the process of destruction.' None of the cases cited by the Court supports the proposition that 'exceptional circumstances' exist only when the process of destruction has already begun. On the contrary, we implied that those circumstances did exist when 'evidence or contraband was threatened with removal or destruction.'" *Vale*, 399 U.S., at 39 (Black, J., dissenting) (quoting *Johnson v. United States*, 333 U.S. 10, 15 (1948)). Subsequent decisions of this Court have found that drugs do not need to be in the actual process of destruction before dispensing with Fourth Amendment requirements in other contexts. See, *e.g.*, *Illinois v. McArthur*, 531 U.S. 326, 333 (2001) (detention of defendant outside his home during two-hour delay to obtain search warrant was reasonable where "the police had good reason to fear that, unless restrained, [defendant] would destroy the drugs before they could return with a warrant."); *Richards v. Wisconsin,* 520 U.S. 385, 394-395 (1997) (failure to comply with the knock-and-announce requirement during execution of search warrant for drugs was justified because "the officers had a reasonable suspicion that [defendant] might destroy evidence if given further opportunity to do so."); *United States v. Banks*, 540 U.S. 31, 37-40 (2003) (interval of 15-20 seconds from officers' knock and announcement of search warrant until forced entry was reasonable given exigency of possible destruction of evidence, *i.e.*, a risk that suspect would destroy cocaine).

possibility that the heroin could have been destroyed. Thus, the claim of exigency was properly rejected.

In contrast, in the context of a drunk driving investigation an inherent exigency always exists due to the very nature of blood alcohol evidence itself. See, *e.g., State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) ("destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."); *State v. Baker*, 502 A.2d 489, 493 (Me. 1985) ("The bodily process that eliminates alcohol also provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood test."); see also 3 W. LaFave, *Search and Seizure*, § 5.4(b), at 199 (4th ed. 2004) (discussing blood alcohol evidence and noting that "the 'evanescent' character of the evidence is inherent in its nature and does not depend upon any motive of the defendant to destroy it."). Blood alcohol evidence is thus distinguishable from other situations involving a risk of potential destruction of evidence. In other situations, police officers may very well have an objectively reasonable belief that evidence might be in the process of destruction, but rarely will they be absolutely certain. Whether the police have an objectively reasonable belief that a suspect is in the process of flushing drugs down a toilet, shredding counterfeit documents, or bleaching blood-stained clothing in a washing machine, seldom will law enforcement authorities know for sure that evidence is being destroyed. With blood alcohol evidence, on the other hand, it is an indisputable fact

that the evidence is actively being destroyed with every minute that passes.

C. The approach adopted by the Missouri Supreme Court unreasonably requires police officers to allow probative evidence to be destroyed

In the case under review, the Missouri Supreme Court acknowledged that the evidence was, in fact, in the actual process of destruction. See Pet. App. 20a (recognizing that Respondent's body "was working naturally to expunge the alcohol in his system.").[11] Although it was never in dispute that the best and most probative evidence of the crime was being destroyed, the Missouri Supreme Court nevertheless concluded that the exigent circumstances exception to the warrant requirement did not apply. The decision of the Missouri Supreme Court, therefore, actually *requires* police officers to stand by and allow the best, most probative evidence to be destroyed during a drunk driving investigation. Such an approach is wholly inconsistent with core principles of the Fourth Amendment. Proper application of the Fourth Amendment must take into account the need for the police to act quickly in order to prevent the destruction of evidence. When a law enforcement officer

[11] Likewise, the trial court made the same acknowledgement in its order granting Respondent's motion to suppress. See Pet. App. 43a ("As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver.").

has probable cause to arrest a person for a drunk driving related crime, it is certainly objectively reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant.[12] Under these circumstances, it is reasonable for an officer to direct medical personnel at a hospital to draw a blood sample from a drunk driver without first obtaining a search warrant. This comports with Fourth Amendment standards of reasonableness.

II. Under The Totality Of The Circumstances, Allowing A Police Officer To Obtain A Warrantless Blood Test From A Drunk Driver Based Upon Probable Cause Strikes A Favorable Balance Between Legitimate Law Enforcement Interests And The Privacy Interests Of The Individual

The touchstone of the Fourth Amendment is reasonableness, and "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). See also *United States v. Knights*, 534

[12] There will often be a significant delay involved in acquiring a search warrant in the middle of the night. In Cape Girardeau County, obtaining a search warrant in the middle of the night involves an average delay of approximately two hours. J.A. 52-54, 70.

U.S. 112, 118-119 (2001) (examining the totality of the circumstances, "the reasonableness of a search is determined 'by 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.'") (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *Pennsylvania v. Mimms*, 434 U.S 106, 109 (1977) ("Reasonableness . . . depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'") (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). Balancing these concerns, the legitimate interests in law enforcement clearly outweigh the privacy interests of the individual.

A. Legitimate governmental interests are exceptionally strong

1. Drunk driving presents a direct and significant threat to public safety

Drunk driving is a serious and dangerous problem that affects the entire Nation. This Court summarized the dangers posed by drunk drivers on our public roads and highways over twenty years ago:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. Drunk drivers cause an annual death toll of over 25,000 and

> in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage. For decades, this Court has repeatedly lamented the tragedy. The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) (citations and internal quotation marks omitted). See also *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (noting that drunk driving "occurs with tragic frequency on our Nation's highways," and that the "carnage caused by drunk drivers is well documented and needs no detailed recitation"). Drunk driving remains a serious nationwide problem to this day. According to FBI statistics, over 1.41 million drivers were arrested in 2010 for driving under the influence of alcohol or drugs. (Federal Bureau of Investigation, "Crime in the United States: 2010"). Tragically, 10,228 people were killed in drunk driving crashes in 2010, and approximately 345,000 people were injured. (National Highway Traffic Safety Administration, Fatality Analysis Reporting System data, 2011). Additionally, it is estimated that drunk driving costs society approximately $132 billion every year. *Id.*

The State of Missouri has recognized driving while intoxicated is a very serious crime. A first time offense is punishable by up to six months in jail; a second offense is punishable by up to one year in jail; a third offense is punishable by up to four years in prison; a fourth offense is punishable by up to seven

years in prison, and a fifth or subsequent offense is punishable by up to fifteen years in prison.[13] The penalties for drunk driving proscribed by the Missouri legislature serve as a clear expression of the State's interest in enforcing drunk driving laws.[14] This public interest, to be sure, is most compelling.

2. A blood test provides the best and most probative evidence of the crime

The State obviously has a legitimate interest in enforcing its drunk driving laws. A prompt blood

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[13] The classification of Missouri's DWI offenses is set out at Mo. Rev. Stat. §§ 577.010 and 577.023 (2010).

[14] In *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984), this Court found that the classification of an offense serves as a clear indication of the State's interest. Holding that a warrantless nighttime entry into a home to arrest a suspect for driving while intoxicated was prohibited by the Fourth Amendment, this Court noted that, at the time, a first offense for drunk driving in the State of Wisconsin was classified as a noncriminal civil forfeiture offense for which no jail time was possible. This Court concluded that the Fourth Amendment prohibits the police from making a warrantless entry into the home to arrest a suspect for a nonjailable traffic offense. *Id.*, at 750-754. Later, in *Illinois v. McArthur*, 531 U.S. 326 (2001), this Court held it was reasonable to detain a suspect outside of his home while the police obtained a search warrant during an investigation of a misdemeanor marijuana offense that carried the possibility of jail time. In so holding, this Court drew a distinction between offenses which were "jailable" and those that were "nonjailable." *Id.*, at 336. See also *People v. Thompson*, 135 P.3d 3, 9 (Cal. 2006), cert. denied, 549 U.S. 980 (2006) (approving entry into the home of a drunk driving suspect without a warrant to arrest him for driving while intoxicated, and distinguishing case from *Welsh* because the crime was a *jailable* offense).

test of a drunk driver provides the best and most probative evidence of intoxication. Indeed, this Court has repeatedly emphasized the importance of blood alcohol evidence in drunk driving prosecutions. In *Breithaupt v. Abram*, 352 U.S. 432, 439-440 (1957), this Court found that 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, by utilizing blood tests, "the issue of driving while under the influence of alcohol can often . . . be taken out of the confusion of conflicting contentions." In *Schmerber,* this Court found that "[e]xtraction of blood samples for testing is a highly effective means of determining the *degree* to which a person is under the influence of alcohol." *Schmerber*, 384 U.S., at 771 (emphasis added). Significantly, nineteen years after writing the majority opinion of this Court in *Schmerber*, Justice Brennan reinforced just how crucial blood alcohol evidence is in drunk driving prosecutions. Writing the majority opinion in *Winston v. Lee*, 470 U.S. 753 (1985), Justice Brennan stressed that "[e]specially given the difficulty 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." *Id.*, at 763. See also *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (noting 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.").

The State clearly has an exceptionally strong interest in securing blood samples, with as little delay

as possible, in order to enforce drunk driving laws. See, *e.g.*, *State v. Bohling*, 494 N.W.2d 399, 405 (Wis. 1993) (finding that because the probative value of blood alcohol evidence is diminished by delayed testing, warrantless blood testing of drunk drivers facilitates the state's ability to protect this significant public interest). The governmental interests in promoting safety on our public roads and highways are not only legitimate, but vital.

B. Privacy interests are minimal

1. A blood test is a minor intrusion

This Court has long recognized that a simple blood test is a minor intrusion for constitutional purposes. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), this Court upheld the results of an involuntary and warrantless blood test taken from a defendant in a hospital after he was involved in a fatal automobile accident. A state patrolman, after noticing the smell of liquor on the defendant's breath, arranged for an attending physician to withdraw a sample of blood while the defendant was unconscious. The results of the test revealed the defendant was intoxicated, which led to a conviction for involuntary manslaughter. *Id.*, at 433. On appeal, defendant contended that the involuntary blood test was comparable to the conduct condemned by this Court in *Rochin v. California*, 342 U.S. 165 (1952), where this Court found that the warrantless and forceful removal of a suspect from his home and the subsequent forced pumping of

his stomach to extract narcotic pills involved conduct so "brutal" and "offensive" that it "shocked the conscience" and therefore violated due process. This Court rejected the comparison, holding that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done . . . under the protective eye of a physician." *Breithaupt*, 352 U.S., at 435. This Court reasoned:

> Due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. . . . The blood test procedure has become routine in our everyday life. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

Breithaupt, 352 U.S., at 436. Unlike the conduct involved in *Rochin*, which was "bound to offend even hardened sensibilities[,]" *Rochin*, 342 U.S., at 172, this Court concluded that a simple blood test "would not be considered offensive by even the most delicate." *Breithaupt*, 352 U.S., at 436.

Subsequent decisions of this Court have reaffirmed that a blood test is a minor intrusion. In

Schmerber, this Court approved the warrantless blood test taken from a drunk driving suspect, noting that the blood was drawn by a physician in a hospital environment according to accepted medical practices. This Court found that blood tests are "commonplace in these days of physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S., at 771. See also *Winston v. Lee*, 470 U.S. 753, 762 (1985) ("*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity."); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) ("The simple blood-alcohol test is so safe, painless, and commonplace . . . that the state could legitimately compel the suspect, against his will, to accede to the test."); *Skinner*, 489 U.S., at 625 (discussing *Schmerber* and noting that "the intrusion occasioned by a blood test is not significant").

2. Motorists have a diminished expectation of privacy

Driving an automobile is an activity which is heavily regulated by the government. Because of this pervasive regulation, a motorists' expectation of privacy is, at least to a certain degree, diminished. See *New York v. Class*, 475 U.S. 106, 113 (1986) (noting that because automobiles are the subject of pervasive regulation, "[e]very operator of a motor vehicle must

expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy.").

It is well-established that driving an automobile on the public roads and highways is a privilege, and not a right. See, *e.g.*, *State v. Hoover*, 916 N.E.2d 1056, 1062 (Ohio 2009), cert. denied, 130 S.Ct. 2380 (2010). Individual states set standards and criteria citizens must meet in order to obtain a driver's license and thereby avail themselves of this privilege. After acquiring a driver's license, a motorist is expected to abide by certain rules and comply with various regulations. Among other things, states require periodic renewal of those licenses, mandate that drivers purchase and maintain liability insurance, and, of course, states retain the power and authority to suspend or revoke a motorist's license if he or she has abused the privilege of driving an automobile by, for example, accumulating too many traffic tickets.

As part of the regulation of motor vehicles, all fifty states have what is known as an "implied consent" law.[15] Although these laws vary from state to state, they all share the same general concept, *i.e.*, when a motorist applies for and accepts an operator's license, he or she "impliedly consents" to submission to a chemical test of his or her blood alcohol level when arrested for driving while intoxicated. A common feature of these statutes provides for the

[15] The Missouri implied consent law, for example, is codified at Mo. Rev. Stat. §§ 570.020 through 577.041 (2010).

suspension or revocation of an arrestee's license upon refusal to submit to a chemical test.[16] Because the state has a legitimate interest in keeping dangerously intoxicated drivers off the road, the overriding purpose of an "implied consent" law is, ultimately, to remove drunk drivers from the public roadways. See, *e.g.*, *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 619 (Mo. banc 2002) (the "object and purpose of the Missouri implied consent law is to rid the highways of drunk drivers.").

Because driving a motor vehicle on the public roads and highways is a privilege, and not a right, lower courts have found that motorists have a reduced expectation of privacy. This is particularly true in cases involving drunk driving, where the activity at issue constitutes a serious risk to public safety. See, *e.g.*, *State v. Faust*, 682 N.W.2d 371, 377 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005) (discussing the serious public safety concerns involved when a driver chooses to drive under the influence of alcohol and finding that such concerns reduce a driver's expectation of privacy). Simply put, it is difficult to

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[16] It is well-settled that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *South Dakota v. Neville*, 459 U.S., at 560 n.10. Indeed, in *Neville*, this Court stated that "*Schmerber* . . . clearly allows a State to force a person suspected of driving while intoxicated 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.

imagine a greater abuse of the privilege of operating a motor vehicle on our public roads and highways than to drive an automobile while intoxicated. Such conduct endangers the lives of other motorists and presents a direct threat to public safety.

C. The search was supported by probable cause

In the case under review, probable cause clearly existed. Respondent was pulled over after Cpl. Winder observed that he was speeding and crossing over the centerline of the road. J.A. 19, 29-30. Upon his initial contact with Respondent, Cpl. Winder immediately noticed various signs of intoxication, including bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath. J.A. 19, 31. When Cpl. Winder asked Respondent to step out of his truck, he observed that Respondent was unsteady on his feet. Respondent then performed poorly on a series of standard field sobriety tests, including the horizontal gaze nystagmus test, the one-leg-stand test, and the walk-and-turn test. J.A. 20, 31-33. Additionally, Respondent refused to blow into a portable breath testing device at the scene of the stop, and further advised Cpl. Winder that he intended to refuse to provide a breath sample at the county jail. J.A. 20, 33-34.

Cpl. Winder clearly had probable cause to arrest Respondent for driving while intoxicated. The same facts establishing probable cause to arrest Respondent for driving while intoxicated also provided

probable cause for the search, *i.e.,* probable cause to believe the blood sample would reveal evidence of intoxication. See, *e.g.*, *United States v. Berry*, 866 F.2d 887, 891 (6th Cir. 1989). Under a totality of the circumstances balancing analysis, a search supported by clear probable cause cannot be said to infringe upon an "individual's right to personal security free from *arbitrary* interference by law officers." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (emphasis added).

D. The Search was conducted in a reasonable manner

When applying the totality of the circumstances analysis under the Fourth Amendment to the facts of a particular search, another factor to consider is whether the search itself was conducted in a reasonable manner. *Schmerber*, 384 U.S., at 771. In *Schmerber*, this Court found the blood test was performed in a reasonable manner in that the blood sample "was taken in a hospital environment according to accepted medical practices." *Id.* In so holding, this Court warned against procedures that might be unreasonable:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment – for example, if

> it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection or pain.

Id., at 771-772. The *Schmerber* Court thus made it clear that the manner of a blood draw search is reasonable when it is done in a hospital environment by trained medical personnel.

In the case under review, Cpl. Winder had probable cause to believe Respondent was driving drunk and rushed him to the hospital where the search itself was conducted in a reasonable manner. It was done in a hospital environment by medical personnel. This was not a blood draw performed at the station house by a police officer with no medical training. Rather, the person drawing the blood was a trained medical technician. The procedure was a simple and routine drawing of one 9-milliliter vial of blood. The amount drawn was far less than the one pint (473 milliliters) typically extracted when the Red Cross draws blood from a donor. American Red Cross, *Donation FAQs,* http://www.redcross.org/donating-blood/donation-faqs (last visited November 6, 2012). No weapons were displayed. No excessive force was used. Respondent was not injured in any way. The blood was drawn only one time. It was not a situation where the officers demanded the medical personnel to draw multiple vials of blood. The search was an intrusion limited to the minimum intrusion necessary to accomplish its purpose. Fourth Amendment cases

are always fact-specific. Under the totality of the circumstances of this case, the search conducted was reasonable in all respects. Other courts across the country have also ruled that the manner of such a blood draw is reasonable under the Fourth Amendment. See, *e.g.*, *United States v. Berry*, 866 F.2d 887, 890 (6th Cir. 1989) ("The method of testing was safe and reasonable and administered by qualified personnel."); *State v. Faust*, 682 N.W.2d 371, 382 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005) ("[T]he method used to take the blood sample is a reasonable one and performed in a reasonable manner[.]"); *State v. Kajewski*, 648 N.W.2d 385, 396 (Wis. 2002) ("[T]he blood draw was taken in a hospital by a registered nurse. Thus, the blood draw was effected in a reasonable manner.")

E. Balancing these concerns, the legitimate governmental interests far outweigh the privacy interests of the individual

Under a "totality of the circumstances" balancing analysis, the public interests far outweigh the privacy interests of the individual. No one would seriously dispute that the legitimate governmental interests, *i.e.*, the law enforcement interests in promoting public safety on our roads and highways through enforcement of drunk driving laws, is exceptionally strong. A prompt blood test, taken with as little delay as possible, provides the best and most probative evidence of intoxication. The privacy interests of the

individual, on the other hand, are minimal. This Court has long-recognized that a simple blood test, taken by a trained technician in a hospital setting, is a minor intrusion. Furthermore, because driving an automobile on public highways is an activity heavily regulated by the government, motorists have a diminished expectation of privacy. The public interest in ridding the Nation's roadways of drunk drivers clearly outweighs the privacy interests of the individual in being subjected to a simple blood test. A compelled blood test taken by medical personnel at the direction of a law enforcement officer, supported by probable cause, is certainly reasonable under the Fourth Amendment.

III. The Missouri Supreme Court Misinterpreted *Schmerber v. California*

A. Other courts have rejected the narrow and restrictive interpretation of *Schmerber* adopted by the Missouri Supreme Court

The Missouri Supreme Court, in holding that the nonconsensual and warrantless blood test violated Respondent's Fourth Amendment rights, held that *Schmerber* was limited to its "special facts." Because Cpl. Winder was not confronted with these same "special facts," the Court concluded that exigent circumstances did not exist. Pet. App. 2a-3a, 8a-10a, 19a-21a. Explaining its rationale, the Court stated:

> The patrolman here, however, was not faced with the 'special facts' of *Schmerber*. Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

Pet. App. 3a. The approach adopted by the Missouri Supreme Court is not only unnecessarily restrictive, but, more fundamentally, it misapplies Fourth Amendment principles. Other courts have rejected such a narrow interpretation of *Schmerber* and properly applied the exigent circumstances exception to the Fourth Amendment warrant requirement in the context of a drunk driving investigation.

For example, in *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993), the Wisconsin Supreme Court adopted a more reasonable interpretation of *Schmerber*. There, the Court held that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw as long as the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a

drunk driving related crime, and there is a clear indication that the blood draw will produce evidence of intoxication. *Id.,* at 406. In reaching this conclusion, the Court noted that a "well-recognized exigent circumstance is the threat that evidence will be lost or destroyed if time is taken to obtain a warrant." *Id.,* at 401. Analyzing *Schmerber*, the Court stated:

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime – as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.

Bohling, 494 N.W.2d, at 402. Unlike the restrictive approach adopted by the Missouri Supreme Court, the Wisconsin Supreme Court concluded that the most reasonable and logical interpretation of *Schmerber* was the first one set forth. The Court reasoned:

> A logical analysis of the *Schmerber* decision indicates that the exigency of the situation presented was caused solely by the fact that the amount of alcohol in a person's bloodstream diminishes over time. The fact that an accident occurred and that the defendant was taken to the hospital did not increase

> the risk that evidence of intoxication would be lost. A hospital trip to another location at which a medically qualified person is present is standard procedure for taking a blood sample in a drunk driving case, regardless of whether an accident occurred.

Bohling, 494 N.W.2d, at 402-403. The *Bohling* Court's analysis is absolutely correct. It makes no logical sense to hold that the constitutionality of a blood draw for a drunk driver depends upon whether he veered off the road and struck a tree.

Later, in *State v. Faust*, 682 N.W.2d 371, 378 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005), the Wisconsin Supreme Court reaffirmed that the exigency justifying a warrantless blood draw is the rapid metabolization and dissipation of alcohol in the bloodstream. There, the defendant was pulled over in a routine traffic stop, exhibited signs of intoxication, and was arrested for driving while intoxicated. *Id.,* at 374. The defendant consented to a breath test for chemical analysis, which revealed his blood alcohol content was slightly above the legal limit. *Id.* Believing that he needed to secure additional evidence of intoxication, the arresting officer requested the defendant to voluntarily provide a blood sample, which he refused. *Id.* Without attempting to obtain a search warrant, the officer then transported the defendant to a local hospital where a medical technician administered a blood test. *Id*.

The Wisconsin Supreme Court upheld the warrantless and nonconsensual blood test. The Court

reiterated that "*Schmerber* stands for the proposition that the fact that alcohol rapidly dissipates in the bloodstream justifies an officer's belief that he is faced with 'an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatens the destruction of evidence.'" *Faust*, at 377 (quoting *Schmerber*, 384 U.S., at 770). The Court reasoned:

> The fact that the police have obtained a presumably valid chemical sample of the defendant's breath indicating the defendant's level of intoxication does not change the fact that that the alcohol continues to dissipate from the defendant's bloodstream. The evidence sought 'remains on a course to be destroyed.'

Faust, 682 N.W.2d, at 378 (citation omitted). The Court concluded that the presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. *Id.,* at 379. Thus, "[t]he nature of the evidence sought, not the existence of other evidence, determines the exigency." *Id.*

The Oregon Supreme Court likewise held that it is the evanescent nature of the evidence sought that justifies the taking of a blood sample without a search warrant. *State v. Milligan*, 748 P.2d 130, 136 (Or. 1988). In so holding, the Court first determined that the arresting officer in that case did, in fact, have probable cause to believe that an analysis of the defendant's blood would yield evidence that he had

committed an alcohol-related crime. *Id.,* at 134. The Court then turned its attention to whether the police were required to obtain a search warrant before ordering the blood draw and ultimately concluded that the warrantless blood draw was justified under the exigent circumstances exception to the warrant requirement. *Id.* The Court observed that "[w]hen [defendant] was seized, the officers had probable cause to believe that defendant was a vessel containing evidence of a crime he had committed – evidence that was dissipating with every breath he took." *Id.* The Court noted that in order to accurately determine the level of alcohol in the suspect's blood at the time of the alleged crime, the police must obtain an initial sample of the suspect's blood with as little delay as possible. *Id.*

Analyzing *Schmerber*, the Oregon Supreme Court concluded that the "special facts" referenced in *Schmerber* were the evanescent nature of alcohol in the blood, and the fact that the blood test was reasonable in that it was performed by a physician in a hospital environment according to accepted medical practices. *Milligan*, 748 P.2d, at 135. Unlike the Missouri Supreme Court, the Oregon Supreme Court did not find that an accident resulting in physical injuries requiring emergency medical attention were "special facts" necessary to justify a warrantless blood draw. Instead, the Court found that *Schmerber* "relied on the exigency created by the evanescent nature of blood alcohol and the danger that important evidence

would disappear without an immediate search." *Milligan*, 748 P.2d, at 135.

The Minnesota Supreme Court reached a similar conclusion in *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009). After carefully reviewing *Schmerber*, the Court held that the dissipation of alcohol in a defendant's blood creates what it described as a "single-factor exigent circumstance" that will justify a warrantless and nonconsensual blood draw. The Court based its holding on the need to prevent the imminent destruction of evidence, observing that with every passing minute, the most probative evidence is subjected to destruction by the body's natural processes. *Id.,* at 545. The Court recognized that "[i]t is undisputed that as a result of the body's physiological processes, the blood-alcohol content in a defendant's blood dissipates with the passage of every minute." *Id.,* at 546.

In so holding, the Minnesota Supreme Court rejected an approach that would require law enforcement officers to consider the length of delay in obtaining a search warrant in determining whether exigent circumstances exist. *Id.* The Court found that requiring an officer in the field to speculate on a range of other factors outside of the officer's control would place an unreasonable burden on law enforcement. *Id.,* at 549. Instead, the Court simply recognized that under "single-factor exigency" it is objectively reasonable to conclude that the alcohol content in a defendant's blood dissipates with the passage of time due to the human body's natural, physiological processes.

Id., at 548. A warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant. *Id.* Since it is undisputed that the loss of the most probative evidence occurs during the time it takes to obtain a warrant, exigent circumstances are present based on the imminent destruction of evidence. *Id.,* at 549.

In a subsequent holding, the Minnesota Supreme Court reaffirmed that the evanescent nature of the evidence creates the conditions that justify a warrantless search. *State v. Netland*, 762 N.W.2d 202, 213 (Minn. 2009). In *Netland*, the defendant was charged with the misdemeanor offenses of driving while intoxicated and refusing a chemical test. *Id.,* at 205-206. The Court noted that whether the degree of the underlying offense constitutes a felony or a lesser crime is immaterial to the circumstances created by the dissipating blood alcohol evidence. *Id.,* at 213. Rather, it is the chemical reaction of alcohol in the person's body that drives the conclusion about exigency. *Id.* The Court concluded that "no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense." *Id.,* at 214.

The Ohio Supreme Court expressed a similar view in *State v. Hoover*, 916 N.E.2d 1056 (Ohio 2009), cert. denied, 130 S.Ct. 2380 (2010). Discussing *Schmerber*, the Court stated that "if an officer has probable cause to arrest a driver for DUI, the result of an analysis of a blood sample taken over the

driver's objection and without consent is admissible in evidence, even if no warrant had been obtained." *Id.,* at 1060. The Court found this is so because "delaying the test to get a warrant would result in a loss of evidence." *Id.*

The Court of Criminal Appeals of Tennessee likewise reached a similar conclusion in *State v. Humphreys*, 70 S.W.3d 752 (Tenn. Crim. App. 2001). There, the defendant was convicted of a misdemeanor offense of driving under the influence of alcohol after being pulled over in a routine traffic stop. *Id.,* at 756. Relying on *Schmerber*, the Court found a warrantless blood test was reasonable under the Fourth Amendment. The Court held that "based upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement." *Id.*, at 760-761. See also *State v. Fletcher*, 688 S.E.2d 94, 97-98 (N.C. Ct. App. 2010) (approving warrantless blood test after a routine stop at a sobriety checkpoint and finding that, under *Schmerber,* "probable cause and the 'destruction of evidence' caused by the body's diminution of alcohol in the blood stream together meet the Fourth Amendment's requirements for a reasonable . . . [and] warrantless search").

In *United States v. Berry*, 866 F.2d 887, 890 (6th Cir. 1989), the Sixth Circuit upheld a warrantless blood test against a Fourth Amendment challenge. After reviewing *Schmerber*, the Court concluded the

search was reasonable because the officer had ample cause to believe the defendant was under the influence of alcohol, and because the method of testing was safe and reasonable. *Id.*, at 890. The Court found that because evidence of intoxication begins to dissipate promptly, it was evident that there were exigent circumstances justifying the warrantless blood draw. *Id*., at 891. Although the defendant was involved in a serious accident resulting in physical injuries, the Sixth Circuit did not identify these facts as critical factors in its analysis. Instead, the Court simply concluded, "[w]e find no constitutional violation in police direction of qualified medical personnel at a medical institution or facility without a warrant to administer a blood test when the police have probable cause to suspect that the results of the blood test would be positive." *Id.*

Additionally, the Fourth Circuit has applied the exigent circumstances exception to approve warrantless breath tests in routine drunk driving cases. In *United States v. Reid*, 929 F.2d 990 (4th Cir. 1991), a consolidation of two cases involving routine traffic stops on the George Washington Memorial Parkway, both defendants showed signs of intoxication, failed field sobriety tests, and were arrested for driving while intoxicated. There were no accidents involved in either case, nor were there any physical injuries. The Fourth Circuit rejected the contention that warrantless breath tests violated the Fourth Amendment. The Court observed that "[t]he crime of DWI presents a unique situation in that the most reliable evidence of whether a person is driving while 'legally

drunk' is contained in that person's body." *Id.*, at 994. Relying on *Schmerber*, the Court held the warrantless breath tests were justified under the exigent circumstances exception to the warrant requirement. *Id.*, at 993. The Court further found that the decision of this Court in *Skinner* "reiterated the notion that time is of the essence when there is a need to test alcohol in the body when it stated that 'the delay necessary to procure a warrant may nevertheless result in the destruction of valuable evidence.'" *Id.* (quoting *Skinner*, 489 U.S., at 623).

As these courts have correctly held, an accident and physical injuries are not the "special facts" required to trigger the exigent circumstances exception to the Fourth Amendment warrant requirement in the context of a drunk driving investigation. Instead, the focus of the courts should properly be on the indisputable fact that alcohol naturally dissipates in the bloodstream, and that without an immediate search, probative evidence inevitably will be destroyed.

B. The ability of a police officer to apply for a search warrant does not diminish the exigency

The Missouri Supreme Court, holding that exigent circumstances did not exist, stated that "there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so." Pet. App. 3a. What the Missouri Supreme

Court ignored, however, is that the process of obtaining a search warrant, particularly in the middle of the night, will involve a significant delay. Obtaining a search warrant in the middle of the night in Cape Girardeau County involves an average delay of approximately two hours. J.A. 52-54, 70. During this delay, the most probative and reliable evidence is being destroyed. Obviously, the more quickly a blood sample is secured, the more accurately the results will reflect the actual level of intoxication at the time of driving. Other courts have correctly rejected the contention that the ability of the officer to apply for a search warrant diminishes the exigency in quickly securing blood alcohol evidence during a drunk driving investigation.

In *State v. Machuca*, 227 P.3d 729 (Or. 2010), for example, the Oregon Supreme Court flatly rejected an approach that would have required the State to prove it could not have obtained a search warrant without sacrificing blood alcohol evidence. Reiterating that the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw, the Court properly concluded that the focus should be on the exigency created by blood alcohol dissipation, not on the speed with which a warrant could presumably be obtained. *Id.,* at 736. While acknowledging that there may be rare instances where a search warrant could be both obtained and executed in a timely fashion, the Court found that the "mere possibility . . . that such situations may occur from time to time does not

justify ignoring the inescapable fact that, in every such case, evidence is disappearing and minutes count." *Id.* Reaffirming its prior holding in *Milligan, supra*, 748 P.2d 130, the Court concluded that "when probable cause to arrest for a crime involving the blood alcohol content of the suspect is combined with the undisputed evanescent nature of alcohol in the blood, those facts are a sufficient basis to conclude that a warrant could not have been obtained without sacrificing the evidence." *Id*.

Similarly, the Minnesota Supreme Court recognized that "a warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant." *Shriner*, 751 N.W.2d 538, 548. The Court properly rejected the contention that it is the length of delay in obtaining a search warrant that determines the exigency. *Id.* Instead, the ongoing, actual loss of blood alcohol evidence is what controls. The Court further found that requiring an officer in the field to speculate on a range of factors outside of his or her control regarding how much time it would take to obtain a search warrant would place an unreasonable burden on law enforcement. For instance, the Court noted that the officer in the field has no control over how long it would take to travel to a judge or the judge's availability, nor will the officer know the amount of alcohol the suspect consumed or the time of the suspect's last drink. Additionally, the Court pointed out that the officer will not know how long it will take to obtain the blood sample once the

suspect is brought to the hospital. *Id*., at 549. The Court concluded that it would be unreasonable to call upon the officer in the field to "speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood-alcohol level would continue to exist before a blood sample was no longer reliable." *Id.*

The Minnesota Supreme Court also rejected the contention that the availability of telephonic search warrants diminished the exigency. Noting that telephonic search warrants still require documentation, the Court found that an officer facing the need for a telephonic search warrant could not reasonably be expected to know how much delay would be caused by following the procedures necessary to obtain such a warrant.[17] The Court concluded that exigent circumstances still existed because "during the time taken to obtain a telephonic warrant, it is undisputed that the defendant's body is rapidly metabolizing and dissipating the alcohol in the defendant's blood." *Id.*, at 549.

Similarly, the Fourth Circuit rejected the argument that the availability of a procedure to obtain a search warrant over the telephone diminished the exigency in drunk driving cases. In *United States v.*

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

Reid, 929 F.2d 990 (4th Cir. 1991), the Fourth Circuit examined the intricate requirements of obtaining such a warrant and wisely concluded that the availability of this procedure did not alter the exigency of the situation. *Id.*, at 993. Among other requirements involved in obtaining a telephonic search warrant, the Court noted that the arresting officer must prepare a document before calling the magistrate judge, read the document verbatim to the judge, and then wait for the judge to enter what was just read to him verbatim onto another document. The Court observed "[o]bviously, compliance with these rules takes time. Time is what is lacking in these circumstances." *Id.* Because alcohol is eliminated from the body at a constant rate, the Court concluded exigent circumstances existed. *Id.*

Obviously, obtaining a search warrant in the middle of the night takes time. If the arresting officer had sought a search warrant in the case under review, there would have been a delay of approximately two hours. This is a delay that can reasonably be expected. Indeed, this Court has recognized that two hours is "a time period . . . reasonably necessary for the police, acting with diligence, to obtain [a] warrant." *Illinois v. McArthur,* 531 U.S. 326 (2001). During this inevitable delay, the best and most probative evidence of the crime would have continued to be destroyed with each and every minute that passed. Under these circumstances, it was reasonable for the arresting officer to secure evidence of Respondent's

intoxication without first seeking to obtain a search warrant.

C. *Schmerber* cautioned against much more invasive bodily intrusions or intrusions made in an unreasonable manner

The Missouri Supreme Court interpreted *Schmerber* to require additional facts, beyond the natural dissipation of alcohol in the bloodstream, in order to justify a warrantless blood draw. Asserting that *Schmerber* was limited to its "special facts," the Court maintained there must be an accident resulting in physical injuries in order to establish exigent circumstances in a drunk driving investigation. To support this narrow reading, the Court relied extensively on language in *Schmerber* that it understood to be an explicit warning against expansive interpretations:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Pet. App. 18a-19a (quoting *Schmerber,* 384 U.S., at 772). The Missouri Supreme Court's reliance on what

it understood to be an "explicit warning against expansive interpretations" is misplaced.[18] This "explicit warning" was directed at the nature of the bodily intrusion itself, not on the underlying facts of the drunk driving arrest. In the paragraph immediately preceding this "explicit warning," *Schmerber* emphasized that the intrusion at issue, the simple blood test, was performed in a reasonable manner. *Schmerber*, 384 U.S., at 771-772. Approving the blood test because it was taken by a physician in a hospital environment according to accepted medical practices, *Schmerber* proceeded to warn against procedures which might not be safe:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment – for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection or pain.

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[18] In contrast, the Minnesota Supreme Court, interpreting this exact same language, correctly concluded that this warning "is properly analyzed as indicating that *Schmerber* should not be viewed as authorizing the police to take warrantless blood draws in circumstances other than when they suspect a person of drunk driving." *Shriner*, 751 N.W.2d, at 547 n.9.

Id. Schmerber thus made it clear that blood tests performed by unqualified personnel in non-medical settings would not be tolerated. *Schmerber* made it equally clear that other, more invasive, bodily intrusions would likewise not be tolerated.

In *Winston v. Lee*, 470 U.S. 753 (1985), this Court was confronted with an example of the type of invasive bodily intrusion cautioned against in *Schmerber.* Holding it was unreasonable under the Fourth Amendment to compel a robbery suspect to undergo a surgical operation to recover a bullet that had lodged in his chest, this Court explained that *Schmerber* provides the appropriate framework of analysis for cases involving surgical intrusions beneath the skin. Writing the majority opinion of this Court nearly twenty years after writing the majority opinion in *Schmerber,* Justice Brennan concluded that compelling a suspect to undergo a surgical procedure to recover a bullet was precisely the sort of example of the "more substantial intrusions" cautioned against in *Schmerber. Winston,* 470 U.S., at 755. In so holding, this Court reiterated 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." *Id.,* at 762.

Schmerber clearly cautioned against much more invasive bodily intrusions or intrusions made in an unreasonable manner. As *Schmerber* plainly teaches, however, a blood test "taken in a hospital environment according to accepted medical practices" is a

search conducted in a reasonable manner. *Schmerber*, 384 U.S., at 771. In the case under review, the blood test was taken in accordance with these safeguards. The search was reasonable under the Fourth Amendment.

CONCLUSION

The judgment of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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