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Mitchell v. Wisconsin: Warrantless Blood Tests on Unconscious DWI Suspects are “Almost Always” Consistent with the Fourth Amendment

PINCHAS BALSAM*©

In *Mitchell v. Wisconsin*, the Supreme Court addressed whether police can obtain a warrantless blood sample from an unconscious driving while intoxicated (DWI) suspect.¹ The Court held that when a DWI suspect is unconscious, the police can “almost always” order a blood test without obtaining a warrant.² Nevertheless, the Court remanded the case to give Mitchell an opportunity to show that the police could have reasonably obtained a warrant in his particular case.³ The Court’s holding is correct because it is consistent with Court precedent and properly balanced the public policy need to deter drunk driving and DWI suspects’ Fourth Amendment⁴ privacy rights.

Alcohol related car collisions cause 10,000 to 20,000 fatalities per year in the United States.⁵ Accordingly, to reduce drunk driving related deaths, there is a “compelling need” for states to enforce DWI criminal statutes.⁶ To enforce DWI statutes, police rely on three technologies to measure the blood alcohol concentration (“BAC”) of DWI suspects.⁷

The first technology police use to gauge BAC is the preliminary, roadside breath test. Generally, roadside breath tests only establish probable cause to arrest a DWI suspect but are insufficient evidence to obtain a DWI conviction.⁸ To obtain

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1. 139 S. Ct. 2525 (2019).

2. *Id.* at 2530.

3. *Id.* at 2539.

4. U.S. CONST. amend. IV.

5. *Mitchell* 139 S. Ct. at 2536 (citing NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2016 (May 2018)).

6. *See Mitchell*, 139 S. Ct. at 2537.

7. *See infra* notes 7-9 and accompanying text.

8. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2191 (2016) (Sotomayor, J., dissenting) (reasoning that reliability concerns generally limit roadside breath tests to establishing probable cause).

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admissible evidence of a DWI violation, police administer an evidence grade breath test; and that test is usually administered at a police station, where the environment is “conducive to reliable testing.”⁹ Alternatively, police can conduct a blood test to obtain evidence grade BAC evidence. And if the DWI suspect is unconscious, the police can only administer a blood test to obtain BAC evidence.¹⁰ Therefore, because Mitchell was unconscious, the police could only obtain DWI evidence against him through a blood test.

I. THE CASE

Petitioner Gerald Mitchell was arrested for operating a vehicle while intoxicated, after a preliminary breath test determined that his BAC was above the legal limit.¹¹ Consistent with the standard practice, the police drove Mitchell to the police station to administer a more reliable, evidence grade breath test.¹² By the time Mitchell arrived at the police station, however, he was too lethargic for a breath test. The police therefore drove Mitchell to a nearby hospital for a blood test.¹³ When he arrived at the hospital, Mitchell was unconscious and could not consent to a blood test.¹⁴ Without Mitchell’s consent—and without obtaining a warrant—the police obtained a blood sample from Mitchell.¹⁵ The blood test showed that Mitchell’s BAC was 0.222%, above the legal limit.¹⁶

Subsequently, the state of Wisconsin (“the State”) charged Mitchell for violating two provisions of the state’s DWI statute.¹⁷ At his trial, Mitchell moved to suppress the BAC evidence and argued that the police acquired it without a warrant and in violation of his Fourth Amendment rights.¹⁸ In response, the State argued that the blood test was consensual because Wisconsin has an implied consent law.¹⁹ The trial court denied Mitchell’s motion to suppress, and a jury convicted him of the charged offenses.²⁰

Mitchell appealed his convictions, and the Wisconsin Court of Appeals certified to the Wisconsin Supreme Court the following question: “[does a] warrantless blood

9. *Id.* at 2168 (majority opinion).

10. *Id.* at 2184.

11. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2532 (2019).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Mitchell, 139 S. Ct. at 2532.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

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draw of an unconscious motorist pursuant to Wisconsin's implied consent law,²¹ where no exigent circumstances exist or have been argued, violate[] the Fourth Amendment.²² The Wisconsin Supreme Court, however, understood the intermediate appellate court to be asking two questions: First, whether Wisconsin implied consent is constitutional consent under the Fourth Amendment. And secondly, "whether a warrantless blood draw from an unconscious person pursuant to [the Wisconsin implied consent statute] violates the Fourth Amendment."²³ The Wisconsin Supreme Court concluded that under the state's implied consent law, Mitchell voluntarily consented to a blood test.²⁴ Furthermore, the Wisconsin Supreme Court held that by drinking to the point of unconsciousness, Mitchell forfeited any opportunity he had to withdraw his consent and the blood test was thus lawful under the Fourth Amendment.²⁵

Thereafter, the Supreme Court of the United States granted Mitchell's petition for certiorari to decide whether "a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment requirement."²⁶

II. LEGAL BACKGROUND

To prevent drunk driving and ensure safe roads, states have laws that prohibit motorists from driving with BAC above a specified level.²⁷ And to enforce DWI laws, states use blood test or breath test technologies to measure DWI suspects' BAC and obtain evidence of drunk driving.²⁸ Because many DWI suspects would not voluntarily submit to a DWI test, states have implied consent laws that mandate such testing. These laws present various constitutional questions and specifically raise the following Fourth Amendment question: how do states enforce DWI laws and maintain road safety without violating DWI suspects' Fourth Amendment privacy rights?

The Supreme Court has decided constitutional questions relating to the arrest and compulsory BAC testing of DWI suspects from as early as 1957.²⁹ In *Breithaupt v. Abram*, the petitioner, through a writ of habeas corpus, challenged his incarceration for manslaughter on the grounds that the BAC evidence that supported his conviction

21. See WIS. STAT. ANN. § 343.305(3)(b) (2020).

22. State v. Mitchell, No. 2015AP304-CR, 2017 WL 9803322 (Wis. Ct. App. 2017).

23. State v. Mitchell, 914 N.W. 2d 151, 155-56 (Wis. 2018), *rev'd*, Wisconsin v. Mitchell, 139 S. Ct. 2525 (2019).

24. *Id.* at 167.

25. *Id.*

26. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2532 (2019).

27. Birchfield v. North Dakota, 136 S. Ct. 2160, 2166 (2016).

28. *Id.*

29. See *Breithaupt v. Abram*, 352 U.S. 432 (1957).

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was obtained in violation of his Fourth Amendment rights.³⁰ Specifically, the petitioner claimed that drawing his blood while he was unconscious amounted to an unreasonable search and seizure and violated his Fourth Amendment right to privacy.³¹ In reaching its decision, the Court underscored that blood tests are “routine in everyday life” and required to join the military, matriculate at a university and obtain a marriage license.³² The Court therefore rejected the petitioner’s argument that the blood test was unconstitutional under the Fourth Amendment and held that even though the petitioner was unconscious, conducting a blood test neither “shock[ed] the conscience” nor violated “traditional ideas of fair play and decency.”³³

Subsequently, in *Mapp v. Ohio*,³⁴ the Court held that evidence obtained in violation of the Fourth Amendment was not admissible in state criminal prosecutions; the Court therefore re-examined the question of whether BAC blood tests require a warrant under the Fourth Amendment, so as to not be excluded under *Mapp*.³⁵ In *Schmerber v. California*, a DWI suspect was hospitalized for injuries he sustained in an alcohol related accident.³⁶ At the hospital, the police obtained a blood sample from the suspect without a warrant and without his consent; the blood sample was later admitted as evidence for a DWI conviction.³⁷ Among other constitutional challenges, Schmerber claimed that forcing him to undergo a blood test violated his Fourth Amendment rights.³⁸ The Court, however, found that even under *Mapp*, there was no Fourth Amendment violation.³⁹ The Court explained that the police may have reasonably believed that proceeding with the blood test without obtaining a warrant was necessary to prevent the destruction of evidence, since “the percentage of alcohol in the blood begins to diminish shortly after drinking stops.”⁴⁰ The Court also found that there was no Fourth Amendment violation because blood tests are “commonplace in these days of periodic physical examination” and therefore reasonable.⁴¹

30. *Id.*

31. *Id.* at 433-34.

32. *Id.* at 436; *Id.* at 439 (explaining that blood test are routine procedures “to which millions of Americans submit as a matter of course nearly every day.”).

33. *Breithaupt*, 352 U.S. at 435 (relying on *Wolf v. Colorado*, 338 U.S. 25 (1949), *rev’d Mapp v. Ohio*, 367 U.S. 643 (1961) which held that in state prosecutions for state crimes, the exclusion of evidence obtained through Fourth Amendment violations is not required).

34. *Mapp v. Ohio*, 367 U.S. 643 (1961).

35. *See Schmerber v. California*, 384 U.S. 757 (1966).

36. *Id.* at 758.

37. *Id.* at 758-59.

38. *Id.* at 759.

39. *Id.* at 772.

40. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

41. *Id.* at 771-72.

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Thereafter, the Court clarified that the natural metabolism of alcohol, discussed in *Schmerber* does not create a per se exigency exception to the Fourth Amendment warrant requirement.⁴² In *Missouri v. McNeely*, a DWI defendant moved to suppress the results from his BAC blood test on the grounds that the police obtained the evidence without his consent or a warrant and in violation of his Fourth Amendment rights.⁴³ The Court explained that even though there is the risk of alcohol metabolizing and BAC evidence being lost, warrantless blood tests are not categorically permissible under the exigency exception.⁴⁴ Instead, the Court held that whether the exigent circumstances exception the Fourth Amendment applies must be determined case by case, based on the totality of the circumstances.⁴⁵

Later, in 2016, the Supreme Court addressed whether police can administer a breath test without obtaining warrant. In *Birchfield v. North Dakota*, the Court found that BAC tests are searches that are governed by the Fourth Amendment.⁴⁶ Furthermore, the Court distinguished breath tests from blood tests. Specifically, the Court held that the “search incident to arrest” exception⁴⁷ permits warrantless breath tests that are incidental to the arrest since breath tests do not “implicate significant privacy concerns.”⁴⁸ And in contrast to breath tests, the Court found that blood tests are more intrusive because they require “piercing the skin.”⁴⁹

III. THE COURT’S REASONING

In *Mitchell v. Wisconsin*, the Court addressed whether police can obtain a warrantless blood sample from an unconscious DWI suspect.⁵⁰ Writing for the majority, Justice Alito held that when a DWI suspect is unconscious, police can “almost always” obtain a blood sample without first obtaining a warrant.⁵¹ The Court

42. *Missouri v. McNeely*, 569 U.S. 141, 145 (2013).

43. *Id.* at 146.

44. *Id.* at 152-153 (explaining that a categorical exception to the Fourth Amendment warrant requirement to conduct a blood test is not necessary; because BAC evidence dissipates over a gradual and predictable timeframe and since the police need to transport a DWI suspect to a medical facility to obtain a blood sample, in some cases, there is time to obtain a warrant).

45. *Id.* at 145.

46. 136 S. Ct. 2160, 2176 (2016).

47. *See Chimel v. California*, 395 U.S. 752, 763 (1969) (explaining that the search incident to arrest exception to the Fourth Amendment permits police to search an arrestee and the area within his immediate control).

48. *Birchfield*, 136 S. Ct. at 2176-78 (explaining breath tests involve a “negligible physical intrusion” and “minimum inconvenience.”); *Id.* (reasoning that breath tests are less intrusive because they are only capable of providing BAC information.).

49. *Id.* (noting that a blood test is more intrusive than a breath test because it places in the hands of law enforcement a sample from which it is possible to extract information beyond BAC information.).

50. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532 (2019).

51. *Id.* at 2530.

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first outlined previous aspects of DWI laws that the Court upheld as constitutional.⁵² The Court then underscored the policy need to enforce BAC limitations and thereby save lives.⁵³ Next, the Court explained the exigent circumstances exception to the Fourth Amendment and the Court's prior jurisprudence on the scope of the exigency exception.⁵⁴ Finally, applying Court precedent, the Court concluded that the exigent circumstances exception applies in "almost all" situations in which a DWI suspect is unconscious.⁵⁵

The Court first explained its previous decisions on whether state DWI laws that mandate BAC testing violate the Fourth Amendment.⁵⁶ The Court began by underscoring that BAC tests are searches under the Fourth Amendment.⁵⁷ And because BAC tests are Fourth Amendment searches, warrantless BAC tests are only constitutional when an exception to the Fourth Amendment warrant requirement exists.⁵⁸ Under this constitutional framework, the Court explained that it previously held that the search incident to the arrest exception permits warrantless breath tests on DWI suspects.⁵⁹ The Court further noted that it previously held that the exigent circumstances exception to the Fourth Amendment permits police to conduct a warrantless blood test if the police reasonably believe that delaying a blood test to obtain a warrant would lead to the destruction of evidence.⁶⁰ Finally, the Court explained that the natural metabolization of BAC evidence does not categorically establish an exigency exception to the Fourth Amendment.⁶¹

The Court also underscored the public policy need to enforce BAC limitations. The Court explained that BAC tests are necessary to save lives because drunk driving kills between 10,000 and 20,000 Americans annually.⁶² To ensure highway safety, states must prohibit motorists from driving with BAC levels above a set limit and

52. *Id.* at 2532-35.

53. *Id.* at 2535-37.

54. *Id.* at 2537-38.

55. *Mitchell*, 139 S. Ct. at 2538-39.

56. *Id.* at 2532-35.

57. *Id.* at 2533.

58. *Id.*

59. *Id.* (citing *Birchfield*, 136 S. Ct. 2160, 2185).

60. *Mitchell*, 139 S. Ct. at 2533 (citing *Schmerber*, 384 U.S. at 770). In *Schmerber*, the police had to investigate an accident and transport the DWI suspect to a hospital which led the Court to conclude that the police did not have time to obtain a warrant. 384 US at 770-71.

61. *Mitchell*, 139 S. Ct. at 2533 (citing *Missouri v. McNeely*, 569 U.S. 141, 156 (2013)).

62. *Mitchell*, 139 S. Ct. at 2535-36 (noting that The Court had "strained [its] vocal cords to give adequate expression" to the public interest of having safe roads); *See e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 17 (1979) (explaining that the states have a "paramount" interest in preserving road safety); *Breithaupt*, 352 U.S. at 439 (comparing drunk driving to "slaughter" taking place on "battlefields"); *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (describing preventable accidents as "tragic" and blaming drunk drivers for "carnage"); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackman, J., concurring) (explaining that irresponsible driving can cause "frightful carnage").

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enforce the BAC limitations through BAC tests.⁶³ BAC tests, according to the Court, seem to make a big difference in reducing drunk driving deaths; as states enacted stricter BAC limitations, DWI deaths decreased.⁶⁴ Accordingly, the Court concluded, accurate BAC tests are a necessary measure to deter drunk driving and, specifically, blood tests are necessary when a DWI suspect is unconscious and unable to take a breath test.⁶⁵

After explaining the policy need to enforce BAC limitations, the Court outlined its jurisprudence on the exigent circumstances exception to the Fourth Amendment. The Court first explained that *Schmerber* established that the police can conduct warrantless blood tests under the exigent circumstances exception to the Fourth Amendment, if the police reasonably believe that there is not sufficient time to obtain a warrant.⁶⁶ The Court then concluded that like the car accident in *Schmerber*, Mitchell's unconsciousness created "pressing needs" that may have precluded the police from obtaining a warrant.⁶⁷ Additionally, the Court held that Mitchell's unconsciousness distinguishes his case from *McNeely*, an "uncomplicated drunk driving scenario" in which there was no exigent circumstances exception to the Fourth Amendment warrant requirement.⁶⁸

The Court held that the police can "almost always" obtain a warrantless blood sample from an unconscious DWI suspect.⁶⁹ The Court, however, did not rule out the unusual possibility of an unconscious DWI suspect demonstrating that the police could not have reasonably believed that obtaining a warrant would have interfered with other pressing needs or duties.⁷⁰ Therefore, the Court remanded the case to give Mitchell an opportunity to make such a showing.⁷¹

63. *Mitchell*, 139 S. Ct. at 2535.

64. *Id.* at 2536.

65. *Id.* at 2537 (noting that there is an even greater need to conduct a BAC test on an unconscious DWI suspect because such a suspect poses a greater danger to the public and doing otherwise, would be "perverse" and a reward for "wanton behavior.").

66. *Mitchell*, 139 S. Ct. at 2537 (citing *Schmerber* 384 U.S. at 770). The Court explained that an exigency exists when BAC evidence is metabolizing and some other factor "creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." *Mitchell*, 139 S. Ct. at 2537.

67. *Mitchell*, 139 S. Ct. at 2537-39 (citing *Schmerber*, 384 U.S. at 770) (explaining that an unconscious DWI suspect will need to be transported to a hospital for urgent medical treatment and the medical treatment might delay a blood test and thus reduce its evidentiary value); *Id.* (noting that in many drunk driving cases in which the driver is unconscious, there is also an accident that further compounds the exigency); *Id.* at 2538.

68. *Mitchell*, 139 S. Ct. at 2537-38 (distinguishing *McNeely*).

69. *Mitchell*, 139 S. Ct. at 2539.

70. *Id.*

71. *Id.*

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In his concurring opinion, Justice Thomas concluded that the plurality's rule will be difficult to apply.⁷² Justice Thomas stated that the Court should have held that the natural metabolism of alcohol creates a per se exigent circumstances exception that allows the police to conduct a warrantless blood test on an unconscious DWI suspect.⁷³ According to Justice Thomas, the natural metabolism of alcohol is always an exigency because the penalty for drunk driving depends on obtaining evidence of the suspect's BAC.⁷⁴ Finally, Justice Thomas noted that the plurality is presumably creating a difficult to apply rule to avoid overturning *McNeely*.⁷⁵

In her dissent, Justice Sotomayor rejected the plurality's rule and characterized it as "a presumption of exigent circumstances that Wisconsin does not urge."⁷⁶ Justice Sotomayor explained that under *Schmerber*, there is no categorical exception that permits warrantless blood tests.⁷⁷ Additionally, Justice Sotomayor rejects the plurality opinion because it relies on the exigent circumstances exception that Wisconsin never raised.⁷⁸ And according to Justice Sotomayor, Wisconsin could not have argued for the exigent circumstances exception because police do not conduct blood tests at the arrest scene; rather, the police must first drive the suspect to a medical facility and that delay may provide time for the police to obtain a warrant.⁷⁹ Finally, Justice Sotomayor explained that in the case of an unconscious DWI suspect, there should not be a categorical exception to the warrant requirement because the suspect's BAC dissipates gradually and predictably and there is a guaranteed delay in administering a blood test because the suspect must first be transported to a medical facility.⁸⁰ Therefore, according to Justice Sotomayor, to obtain a blood sample from an unconscious DWI suspect, the police need to obtain a warrant "if possible" and there is no presumption that the police can "almost always" order a warrantless blood test.⁸¹

72. *Mitchell*, 139 S. Ct. at 2539 (Thomas, J., concurring) (reasoning that the difficult rule will "rarely be rebutted" but will burden those attempting to apply it).

73. *Id.* (citing *McNeely*, 569 U.S. 141 (Thomas, J., dissenting); *Birchfield*, 136 S. Ct. (Thomas, J., dissenting)).

74. *Mitchell*, 139 S. Ct. at 2540-41 (Thomas, J., concurring).

75. *Id.* at 2541 (Thomas, J., concurring) (stating that in contrast to the plurality's reluctance to overturn *McNeely*, that case was wrongly decided and should be overturned).

76. *Mitchell*, 139 S. Ct. at 2541-42 (Sotomayor, J., dissenting).

77. *Id.* at 2544 (Sotomayor, J., dissenting).

78. *Id.* at 2545-46 (Sotomayor, J., dissenting) (explaining that there were no facts in the record that justified the Court's presumption that exigent circumstances "most likely" existed).

79. *Mitchell*, 139 S. Ct. at 2546-48 (Sotomayor, J., dissenting) (arguing that technological advancements enable "more expeditious processing of warrant applications."); *Id.* at 2548 (Sotomayor, J., dissenting) (citing *McNeely*, 569 U.S. at 154). Specifically, in many states, police can apply for warrants remotely, through email, telephone, radio, or video conferencing communications. *Mitchell*, 139 S. Ct. at 2548 (Sotomayor, J., dissenting) (citing *McNeely*, 569 U.S. at 154).

80. *Mitchell*, 139 S. Ct. at 2549 (Sotomayor, J., dissenting).

81. *Id.* at 2550-51 (Sotomayor, J., dissenting).

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In his dissent, Justice Gorsuch stated that he “would have dismissed this case as improvidently granted.”⁸² Justice Gorsuch explained that the Court granted certiorari to decide whether Wisconsin drivers “impliedly consented” to a warrantless blood test.⁸³ While Justice Gorsuch acknowledged that the Court can reach its conclusion based on “any reason supported in the record,” he believed that applying the exigent circumstances in this case involved “complex questions” that could be better resolved at the courts below.⁸⁴ Therefore, Justice Gorsuch did not accept the Court’s conclusion that the police can “almost always” order a blood test on an unconscious DWI suspect.⁸⁵

IV. ANALYSIS

The Court’s conclusion that police can “almost always” order a warrantless blood test on an unconscious DWI suspect is correct because it is consistent with Court precedent on that issue. First, in *Breithaupt*, the Court held that blood tests are “routine in everyday life.”⁸⁶ Additionally, the Court found that blood tests neither “shock the conscience” nor violate “traditional ideas of fair play and decency.”⁸⁷ The Court therefore found that a warrantless blood test on an unconscious DWI suspect did not violate the Fourth Amendment.⁸⁸ Accordingly, the Court’s holding that the police can “almost always” conduct a warrantless blood test on an unconscious DWI suspect is consistent with the Court’s holding in *Breithaupt* that allowed a warrantless blood test on an unconscious DWI suspect.⁸⁹

The Court’s conclusion that police can “almost always” order a warrantless blood test on an unconscious DWI suspect is also consistent with *Schmerber*. In *Schmerber*, the Court reemphasized that blood tests are “common place in these days of periodic physical examination”⁹⁰ and held that warrantless blood tests are constitutional in situations in which the police could reasonably believe that a warrantless blood test was necessary to prevent the destruction of evidence.⁹¹ Likewise, in this case, since the police had to investigate the accident and transport Mitchell to a hospital, the police could have reasonably believed a warrantless blood test on Mitchell was necessary to prevent the destruction of evidence.⁹² Therefore, the Court’s conclusion

82. *Mitchell*, 139 S. Ct. at 2551 (Gorsuch, J., dissenting).

83. *Id.* (Gorsuch, J., dissenting).

84. *Id.* (Gorsuch, J., dissenting).

85. *Id.* (Gorsuch, J., dissenting).

86. 352 U.S. at 436.

87. *Id.* at 435-37.

88. *Id.* at 439-40.

89. *See Breithaupt v. Abram*, 352 U.S. 432, 436-40 (1957).

90. *See Schmerber v. California*, 384 U.S. 757, 771 (1966).

91. *Id.* at 770.

92. *See Mitchell*, 139 S. Ct. at 2532.

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that a warrantless blood test on Mitchell was most likely constitutional is consistent with the Court's holding in *Schmerber*.

The Court's conclusion that police can "almost always" order a warrantless blood test on an unconscious DWI suspect is consistent with *McNeely*. In *McNeely*, the Court held that the natural metabolism of alcohol and BAC evidence does not create a per se exigent circumstances exception to permit a warrantless blood test.⁹³ Rather, the Court held that whether exigent circumstances exist depends on the "totality of the circumstances" and the facts of the case.⁹⁴ In this case, the Court did not categorically permit warrantless blood tests on unconscious DWI suspects.⁹⁵ Instead, the Court acknowledged that Mitchell might be able to prove that the police could not have reasonably believed that obtaining a warrant would have led to the destruction of BAC evidence; and the Court remanded the case to provide Mitchell an opportunity to make such a showing.⁹⁶ Accordingly, since the Court did not categorically permit warrantless blood tests in cases of unconscious DWI suspects, the Court's conclusion is consistent with *McNeely*.

The Court's conclusion that police can "almost always" order a warrantless blood test on an unconscious DWI suspect is likewise consistent with *Birchfield*. In *Birchfield*, the Court held that blood tests are more intrusive than breath tests and are therefore not categorically permitted without a warrant.⁹⁷ However, the Court did not conclude that warrants are categorically required to conduct a blood test on every DWI suspect. To the contrary, the Court acknowledged that blood tests are necessary when the DWI suspect is unconscious and police "may apply for a warrant if need be."⁹⁸ The Court did not conclude in *Birchfield* that a warrant is categorically required to conduct a blood test on a DWI suspect, so accordingly, the Court's conclusion is consistent with *Birchfield*. Because the Court's conclusion in *Mitchell* is consistent with the Court's jurisprudence regarding administering blood tests to DWI suspects, the Court's decision is correct.

The Court's conclusion that police can "almost always" order a warrantless blood test on an unconscious DWI suspect is correct because the Court properly balanced the compelling public policy need to deter drunk driving and the defendant's Fourth Amendment privacy rights. As the Court pointed out, alcohol related car collisions cause 10,000 to 20,000 fatalities per year and there is therefore a "vital public

93. *Missouri v. McNeely*, 569 U.S. 141, 152 (2013).

94. *Id.* at 145.

95. *Mitchell*, 139 S. Ct. at 2539.

96. *Id.*

97. 136 S. Ct. at 2185.

98. *Id.* (stating that "if need be" implies that the police do not always need a warrant in such a situation and regular Fourth Amendment exceptions to the warrant requirement, such as exigent circumstances, apply).

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interest” for states to enforce DWI criminal statutes.⁹⁹ Hence, the Court has “strained [its] vocal cords to give adequate expression to the stakes.”¹⁰⁰

Drunk driving substantially increases the risk of a motor vehicle accident.¹⁰¹ For example, an increase of BAC of 0.02 percent doubles the relative risk of a motor vehicle crash among 16- to 20-year old males, and the risk of an accident increases to nearly 52 times when a driver’s BAC is between 0.08 percent and 0.10 percent, the legal limits in many states.¹⁰² The increased risk occurs because alcohol negatively affects brain function.¹⁰³

Drunk driving accidents also impose substantial economic harm. For example, in 2010, deaths and damages from DWIs costed 44 billion dollars.¹⁰⁴ And for each DWI incident, “the externality imposed on society . . . may be as high as \$8,000.”¹⁰⁵ Accordingly, to protect the public from the dangers and economic harms posed by drunk driving, states have a compelling interest in enforcing DWI criminal statutes.

To enforce DWI criminal statutes, states need to obtain blood samples from unconscious motorists. As the Supreme Court held in *Mackey v. Montrym*, effective enforcement of impaired driving laws is required for the laws to operate as a “deterrent” and remove intoxicated drivers from the road.¹⁰⁶ Put differently, the Court has stated that “no one can seriously dispute the magnitude of the drunken driving problem or the states’ interest in eradicating it.”¹⁰⁷

In addition to discouraging drunk driving, states have a compelling need to obtain blood samples from unconscious drivers to deter motorists from driving while under the influence of drugs.¹⁰⁸ Between 2006 and 2016, the number of fatally injured

99. *Mitchell*, 139 S. Ct. at 2535–36.

100. *Id.* at 2535. *See also* *Mackey v. Montrym*, 443 U.S. 1, 17 (1979) (explaining that the states have a “paramount” interest in preserving road safety); *Breithaupt*, 352 U.S. at 439 (comparing drunk driving to “slaughter” taking place on “battlefields”); *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (describing preventable accidents as “tragic” and blaming drunk drivers for “carnage”); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackman, J., concurring) (explaining that irresponsible driving can cause “frightful carnage”).

101. *Why Drunk Drivers May Get Behind the Wheel*, SCI. DAILY (Aug. 18, 2010), <https://www.sciencedaily.com/releases/2010/08/100817171607.htm>.

102. *Id.*

103. *Alcohol’s Damaging Effects on the Brain*, 63 ALCOHOL ALERT (2004).

104. *Drunk Driving Overview*, U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. <https://www.nhtsa.gov/risky-driving/drunk-driving>.

105. Miguel de Figueiredo, *Throw Away the Key or Throw Away the Jail? The Effect of Punishment on Recidivism and Social Cost*, 47 ARIZ. ST. L. J. 1017, 1043 (2015).

106. *Mackey v. Montrym*, 443 U.S. 1, 18 (1979).

107. *Mich. Dep’t of St. Police v. Sitz*, 496 U.S. 444, 451 (1990) The Court concluded that Michigan’s sobriety checkpoints were consistent with the Fourth Amendment because of the dangers posed by drunk driving); *Id.* at 455.

108. *See* Jacqueline Howard, *ER Visits For Opioid Overdose Up 30%, CDC Study Finds*, CNN (Mar. 6, 2018, 1:29 PM), <https://www.cnn.com/2018/03/06/health/opioid-overdoseemergency-departments-cdc-study/index.html>.

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drivers who tested positive for drugs rose from 27.8 percent to 43.6 percent.¹⁰⁹ Drug impaired drivers cause approximately 20 percent of car crashes, which translates into 8,600 deaths, 580,000 injuries, and \$33 billion in property damage each year in the United States.¹¹⁰ In particular, marijuana impaired driving is an increasing problem. According to the Centers for Disease Control and Prevention, 13 percent of nighttime and weekend drivers have marijuana in their system.¹¹¹ Drug impaired drivers are often unconscious, and to determine whether these motorists are under the influence of drugs, blood draws are required because breath tests cannot detect narcotics.¹¹²

The Supreme Court has repeatedly recognized that states have a compelling interest in preventing drunk driving. In *Breithaupt*, the Court compared DWI related deaths to “slaughter” on “battlefields” and underscored the need to discourage drunk driving by enforcing BAC limits.¹¹³ Similarly, in *McNeely*, the Court discussed the “compelling governmental need” to deter drunk driving.¹¹⁴ In *South Dakota v. Neville*, the Court attributed “carnage” to drunk driving.¹¹⁵ And in *Birchfield*, the Court explained that States have a “paramount interest . . . in preserving the safety of . . . public highways” and “in creating effective deterrent[s] to drunken driving.”¹¹⁶

The Court correctly balanced unconscious DWI suspects’ Fourth Amendment privacy rights and the compelling public policy need to deter drunk driving. The litmus test for whether a police search is constitutional under the Fourth Amendment is whether the search is reasonable—based on the totality of the circumstances.¹¹⁷ And 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.”¹¹⁸

Blood draws from unconscious drivers are reasonable police searches and consistent with the Fourth Amendment. Police cannot administer warrantless blood tests on DWI suspects in every scenario. Rather, DWI enforcement laws are governed like other Fourth Amendment situations in which exceptions to the warrant

109. GOVERNORS HIGHWAY SAFETY ASS’N, DRUG IMPAIRED DRIVING (2018).

110. Brief for League of Wis. Municipalities et al. as Amici Curiae Supporting Respondents, *Mitchell v. Wisconsin* 139. S. Ct. 2525 (2019).

111. CTR. FOR DISEASE CONTROL AND PREVENTION: IMPAIRED DRIVING, GET THE FACTS.

112. GOVERNORS HIGHWAY SAFETY ASS’N, DRUG IMPAIRED DRIVING (2018).

113. 352 U.S. at 439.

114. 569 U.S. at 159 (quoting *California v. Carney*, 471 U.S. 386, 392 (1985)).

115. 459 U.S. 553, 558-59 (1983); *See also* *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackman, J., concurring) (explaining that irresponsible driving can cause “frightful carnage”).

116. 136 S. Ct. at 2178-79 (quoting *Mackey v. Montrym* 443 U.S. 1, 17 (1979)).

117. *United States v. Knights*, 534 U.S. 112, 118 (2001); *Ohio v. Robinette* 519 U.S. 39 (1996).

118. *Knights*, 534 U.S. at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

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requirement may or may not apply, depending on the case.¹¹⁹ One exception to the Fourth Amendment is the exigent circumstances exception.¹²⁰ And as the Court concluded in *McNeely*, determining whether an exigency exists depends on the “totality of the circumstances” and the facts of the case.¹²¹ Regarding unconscious DWI suspects, the Court did not conclude that the police can always conduct a warrantless blood test based on the exigent circumstances exception to the Fourth Amendment.¹²² Instead, the Court held that DWI suspects must be given a chance to show that the police could have obtained a warrant.¹²³ Therefore, because the Court did not establish a categorical exception to the Fourth Amendment warrant requirement—but instead relied on the reasonable and well-established exigent circumstances exception—the Court’s conclusion is consistent with DWI suspects’ Fourth Amendment rights.

V. CONCLUSION

In *Mitchell v. Wisconsin*, the Court held that police can “almost always” order a warrantless blood test on an unconscious DWI suspect.¹²⁴ In reaching this conclusion, the Court underscored the important public policy need to maintain road safety by enforcing DWI criminal statutes that deter drunk driving.¹²⁵ Furthermore, the Court explained its prior jurisprudence on the exigent circumstances exception to the Fourth Amendment¹²⁶ and explained why the exigency exception “almost always” permits a warrantless blood test in the case of an unconscious DWI suspect.¹²⁷ The Court’s decision was correct because it is consistent with Court precedent and properly balanced the compelling public policy need to deter drunk driving and unconscious DWI suspects’ Fourth Amendment rights.¹²⁸

119. See e.g., *Schmerber*, 384 U.S. at 770-71 (holding that a warrantless blood test is permitted in a situation in which the police could have reasonably believed that a delay would have led to the destruction of BAC evidence).

120. *McNeely*, 569 U.S. at 148.

121. *Id.* at 145.

122. *Mitchell*, 139 S. Ct. at 2531.

123. *Id.* at 2539.

124. *Id.*

125. See *supra* part III.

126. See *supra* part II.

127. See *supra* part III.

128. See *supra* part IV.