11-1425

IN THE

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

—v.—

TYLER G. MCNEELY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

BRIEF IN OPPOSITION

Stephen Douglas Bonney
ACLU Foundation of Kansas
& Western Missouri
3601 Main Street
Kansas City, MO 64111
(816) 994-3311

Anthony E. Rothert
ACLU of Eastern Missouri
454 Whittier Street
St. Louis, MO 63108
(314) 652-3114

Steven R. Shapiro
Counsel of Record
Ezekiel R. Edwards
Hayley E. Horowitz
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Stephen C. Wilson
Wilson & Mann, L.C.
2907 Independence Street,
Suite C
P.O. Box 512
Cape Girardeau, MO 63702-0512
(573) 651-1950

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

QUESTION PRESENTED

Whether the Missouri Supreme Court correctly held that Petitioner violated the Fourth Amendment by subjecting Respondent to a nonconsensual and warrantless blood test after his arrest for driving while intoxicated when (a) the arresting officer testified that there were no exigent circumstances requiring a warrantless search, (b) both a prosecuting attorney and a judge were available to respond to any request for a search warrant, (c) Respondent's performance on multiple field sobriety tests was observed by the arresting officer and preserved on videotape, and (d) Respondent's refusal to consent to a blood test is admissible under Missouri law?

Respondent respectfully submits this brief in opposition to the petition for a writ of certiorari in this case.

COUNTER-STATEMENT OF THE CASE

At approximately 2:08 a.m. on October 3, 2010, Missouri State Highway Patrol officer Mark Winder pulled Respondent Tyler McNeely over for exceeding the speed limit by 11 miles per hour. (Tr. at 4:7-5:25, 12:17-13:2.)[1] Based on his observations during the traffic stop and Respondent's performance on four field sobriety tests, Corporal Winder suspected that Respondent was intoxicated. (*Id.* at 6:1-7:20, 8:4-7.) He asked Respondent to take a portable breath test, but Respondent declined. (*Id.* at 7:23-8:3.) Winder then placed Respondent under arrest. (*Id.* at 8:8-9.) When asked whether he would take a breath test at the police station, Respondent declined again, and Winder took him to a nearby medical laboratory to obtain a blood sample. (*Id.* at 8:10-9:4.) At the medical center, Winder asked whether Respondent would submit to a blood test.[2] (*Id.* at 8:24-10:5.) After Respondent declined the blood test, Winder directed a lab technician to take a blood sample over Respondent's objection at 2:33 a.m. (*Id.* at 10:6-13, 11:3-6.) Winder testified that he made no effort to obtain a search warrant. (*Id.* at 15:16-20.) He also

---

[1] Citations to "Tr." refer to the transcript of the suppression hearing held on January 14, 2011.

[2] Although drawing an individual's blood and testing its contents are two distinct processes, for the purposes of this brief, Respondent adopts the convention of the lower courts and uses the terms "blood draw" and "blood test" interchangeably to refer to the process of taking an individual's blood.

testified that he chose not to seek a warrant because he had been told it was unnecessary rather than because of any exigency, that he assumed a prosecuting attorney and a judge would have been available had he chosen to seek a warrant, that he had never experienced a problem obtaining warrants in the past under similar circumstances, and that he had no reason to believe he could not have obtained a warrant in this case. (*Id.* at 14:1-4, 15:21-24, 16:23-17:10.) Respondent's blood sample indicated an ethyl alcohol level of 0.154%, in excess of the legal limit of 0.08%. (Record on Appeal, Legal File [hereinafter "Record"] at 26.) He was charged with driving while intoxicated in violation of Mo. Rev. Stat. § 577.010.

Respondent filed a pretrial motion in Cape Girardeau County Circuit Court to suppress the results of the blood test taken without his consent and without a search warrant. After a hearing at which Corporal Winder and Sergeant Blaine Adams of the Missouri State Highway patrol testified, the trial court held that the blood sample was drawn in violation of the Fourth Amendment and should be suppressed. (Pet. App. at 46a.) The trial court reasoned: "None of the authorities submitted on this issue have held, on their own facts, that an officer may obtain a warrantless blood draw on an ordinary driving while intoxicated arrest when a warrant could be procured in a timely manner." (*Id.* at 45a.) Petitioner filed an interlocutory appeal in the Missouri Court of Appeals. That court transferred the case to the Missouri Supreme Court but noted

that it would find the blood draw constitutional.[3] (*Id.* at 24a, 26a, 38a.)

The Missouri Supreme Court affirmed the trial court's suppression order. (*Id.* at 1a, 3a.) Noting that warrantless searches are per se unreasonable unless they fall within certain narrow exceptions, the Missouri Supreme Court weighed society's interest in preventing drunk driving against the defendant's Fourth Amendment interest in freedom from unreasonable searches and concluded that the fact that the blood alcohol level dissipates over time does not, by itself and without regard to other factors, qualify as an exigent circumstance under *Schmerber v. California*, 384 U.S. 757 (1966). (Pet. App. at 2a, 20a-22a.) Accordingly, it held that determining whether an officer could reasonably believe that exigent circumstances exist depends on the totality of the circumstances in any given case. (*Id.* at 19a-20a.) On the facts before it, the court found no reason to fear "delay that would threaten the destruction of evidence before a warrant could be obtained" where "there was no accident to investigate[,] . . . there was no need to arrange for the medical treatment of any occupants," and "there was no evidence . . . that the patrolman would have

---

[3] In transferring the case to the state supreme court, the court of appeals explained that Respondent's suppression motion implicated not only the Fourth Amendment, but a recently amended state law governing nonconsensual blood draws in cases of suspected drunk driving. The court of appeals transferred the case in the interest of having the statute construed by the state's highest court. (Pet. App. at 38a.) Because the Missouri Supreme Court decided the issue on Fourth Amendment grounds, it did not reach the state law question. (*Id.* at 21a n.9)

been unable to obtain a warrant had he attempted to do so." (*Id*. at 3a.)

On March 6, 2012, the Missouri Supreme Court denied Petitioner's motion for rehearing. (*Id*. at 47a.)

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THE COURT TO DETERMINE WHEN EXIGENT CIRCUMSTANCES JUSTIFY A NONCONSENSUAL AND WARRANTLESS BLOOD DRAW.

This case is a poor candidate for a grant of certiorari for three reasons. First, the arresting officer acknowledged that his decision to order a nonconsensual blood test was based on the fact that he had been told warrants were unnecessary rather than on any concern that he could not obtain a warrant in timely fashion, making this a strange case in which to construe the exigency exception to the Fourth Amendment. Second, the record in this case is devoid of any testimony from a qualified expert on the complicated science of alcohol metabolism. An understanding of that science is critical to evaluating the categorical claim that any drunk driving arrest presents exigent circumstances that, in every instance, justify a warrantless blood test. Because the science is both complicated and contested, proper resolution of the constitutional issues in this case would be enhanced by a fully developed record. This case does not present one. Finally, it is by no means clear that resolution of the question presented will significantly affect the outcome of this case.

A. The Arresting Officer In This Case Did *Not* Act On The Basis Of Exigent Circumstances In Ordering A Technician To Draw Respondent's Blood Without Consent Or A Warrant.

Corporal Winder, the arresting officer, was asked during the suppression hearing in this case if his decision to forego a warrant was based on any concern that he could not obtain one in timely fashion. He said no.[4] When asked why he did not

---

[4] Q: Was there any particular exigent circumstance as you understand that from your training or emergency circumstances that dictated the need to immediately get blood from Mr. McNeely?

A: Exigent, no.

. . . .

Q: Okay. In your time as a highway patrolman, have you obtained search warrants to obtain blood from people that have been arrested for driving while intoxicated?

A: Yes.

. . . .

Q: On any of the times in your training or in your experience when you have wanted to get a search warrant, have you been unable to because of the unavailability of a prosecuting attorney?

A: No.

Q: Have you ever been unable to because of the unavailability of a judge?

A: No.

Q: On this particular night, did you have any reason to believe that you couldn't have gotten a search warrant

seek a warrant, Winder testified that his decision was based on an article he had read by a prosecutor stating that it was unnecessary to obtain a warrant before drawing blood in cases of suspected drunk driving. (Tr. at 14:1-20.)

In proceeding without a warrant, Winder disregarded a directive from a superior that warrantless blood draws in suspected drunk driving cases should be conducted "only . . . in exigent circumstances and then only on manslaughter/vehicular assault cases with serious physical or disabling injuries, after expending all reasonable means to obtain a search warrant." (Record at 35.) He also ignored his personal experience of over 17 years as a patrolman. (Tr. at 4:12-14.) Winder had never had trouble in the past obtaining search warrants for blood samples from people he had arrested for driving while intoxicated and had no reason to believe this occasion would be any different. (*Id*. at 16:17-17:10.) In assessing exigency, "the facts known to the police are what count," *United States v. Banks*, 540 U.S. 31, 39 (2003), and none of the facts testified to by Corporal Winder suggests he faced an emergency situation. A case in which the searching officer testified that he did not face exigent circumstances is a poor vehicle for deciding the scope of the exigent circumstances exception.

> because of the unavailability of a prosecutor or the unavailability of a judge?
>
> A: No.

(Tr. at 14:24-15:3, 15:25-16-3, 16:23-17:10.)

B. To The Extent That Resolution Of The Exigency Question Turns On The Science Of Alcohol Dissipation, The Record In This Case Is Insufficient For A Full And Fair Evaluation Of The Issue.

A finding of exigency requires a determination that evidence of guilt will be destroyed if time is taken to obtain a warrant. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (finding no exigent circumstances because "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant"). As it pertains to blood alcohol content ("BAC"), such a determination depends on physiological data about the process of alcohol metabolism, data that is the subject of ongoing scientific study. *See, e.g.*, Douglas Posey & Ashraf Mozayani, The Estimation of Blood Alcohol Concentration: Widmark Revisited, 3 Forensic Sci., Med. & Pathology 33 (2007). Absent robust scientific inquiry into the complex pharmacokinetic processes governing the gradual rise and eventual fall of BAC—an inquiry which the sparse record on appeal does not permit—the Court is poorly positioned to make two critical determinations: whether any blood test taken after the time of operation is probative of BAC at the earlier time when a defendant was driving, and the rapidity with which evidence of BAC is in danger of disappearing. When resolution of a critical issue depends on a full and complete record, the Court should await, before decision, the proper development of such a record. That is especially so in this case because this Court has recognized in *Schmerber* that a nonconsensual blood test raises serious Fourth Amendment issues involving

fundamental questions of "human dignity and privacy," *Schmerber*, 384 U.S. at 770.

The oversimplified portrait of alcohol metabolism painted by the minimal record glosses over important areas of complexity. BAC does not simply decrease over time; instead, alcohol is metabolized in two distinct, gradual phases: absorption and elimination. A.W. Jones, Biochemical and Physiological Research on the Disposition and Fate of Ethanol in the Body, *in* Garriott's Medicolegal Aspects of Alcohol 47, 54 (James C. Garriott ed., 5th ed. 2008). In the first phase, BAC rises as alcohol is distributed from the stomach throughout the body. *Id.* at 55-68. This absorption process does not occur at a constant rate and depends on dozens of variables; it may take anywhere from 30 minutes to two hours for BAC to reach its peak. *Id.* In the second phase, BAC drops as the alcohol is gradually converted to carbon dioxide and water. *Id.* This two-step progression is critical for understanding and evaluating the evidentiary value of BAC. For example, a blood test taken 30 minutes after a defendant has ceased operating a vehicle, revealing a .10% BAC, might mean that the defendant in fact had no measurable quantity of alcohol in his bloodstream at the time he was driving if he was still absorbing alcohol during those 30 minutes. On the other hand, if the alcohol was being eliminated during the 30-minute interval, it might indicate that the BAC at the time of operation was significantly higher than .10%. Though unlikely, it might even indicate that BAC at the time of operation was, in fact, exactly .10% if the defendant happened to finish absorption and begin elimination

during the elapsed time between operation and the blood test.

Therefore, an officer who obtains a BAC reading of .08% or higher at any time does not have the smoking-gun evidence necessary to convict a defendant. Since the amount of alcohol in a defendant's bloodstream is constantly changing, the result of a blood test taken some time after a defendant has stopped driving is not direct evidence of the defendant's BAC at the time of operation.[5] To estimate BAC at the time of operation based on a later blood test, a technique known as retrograde extrapolation is typically used. *See* Jones, *supra*, at 103. When based on a single blood sample, retrograde extrapolation generally calculates an earlier BAC by simply multiplying the time elapsed between operation and the blood draw by the average alcohol elimination rate. *See* Charles L. Winek & Kathy L. Murphy, The Rate and Kinetic Order of Ethanol Elimination, 25 Forensic Sci. Int'l 159, 159 (1984).

This record does not provide nearly enough information to properly evaluate the reliability of retrograde extrapolation and, in turn, the degree to which a blood test taken after a defendant stops driving can yield probative evidence.[6] To the extent

---

[5] In Missouri, a reading of .08% BAC or more is prima facie evidence of intoxication "*at the time the specimen was taken*," not at the time the defendant was driving. Mo. Ann. Stat. § 306.117 (emphasis added).

[6] Retrograde extrapolation may yield questionable results for several reasons. First, it ordinarily assumes that the defendant had already begun eliminating alcohol while operating the vehicle. *See, e.g.*, Jones, *supra*, at 103-04. Because alcohol

that the state intends to rely on retrograde extrapolation, however, it may do so using a blood sample taken at any time before alcohol is *completely* eliminated from the defendant's system and BAC is zero. On the basis of the generalizations presented in the record, a police officer has a *minimum* of four hours to obtain a warrant and perform a blood test.[7] Nothing in the record suggests that a blood test taken further from the time of the arrest renders retrograde extrapolation less accurate.[8]

---

absorption is less regular, and as a result less predictable than alcohol elimination, it is often difficult to determine when a defendant completed absorption. *Id.* Moreover, even if an expert knew that a defendant was still absorbing alcohol at the time he or she was driving, the relationship between time and BAC during absorption is neither constant nor consistent, making earlier BAC difficult to estimate. *Id.* Second, retrograde extrapolation is generally performed using an average elimination rate, rather than the elimination rate of the particular defendant, which is difficult to calculate. Thus, experts will over- or underestimate the BAC of a defendant with an above- or below-average alcohol elimination rate. *See, e.g.*, Winek & Murphy. *supra*, at 165.

[7] A defendant whose BAC is barely above the .08% legal limit at the time he is operating the vehicle, who has already begun eliminating alcohol, and who eliminates at .02% per hour—the maximum rate contemplated in the record—will not have a BAC of 0% until four hours after he is stopped. (*See* Tr. at 21:17-22:4.)

[8] Moreover, the record contains no information about the reliability of less intrusive means of testing BAC currently available to officers or those in development, such as passive breath tests, urinalysis, or tests that rely on saliva or hair samples—techniques that may lessen the need for blood testing. *See, e.g.*, National Highway Traffic Safety Administration, Alcohol and Highway Safety: A Review of the State of Knowledge § 3.2 (2006); Yale A. Caplan & Bruce A. Goldberger,

Petitioner presents a record that is insufficient to answer the question presented. Petitioner claims that there is "no dispute" about the probative nature of the blood test in question or about the destruction of evidence. (Pet. App. at 36-37.) Though the "level of alcohol in the bloodstream of a drunk driver" is certainly "highly probative evidence" (*Id*. at 36), the level of alcohol in the bloodstream of a defendant after he stops driving may not be. Further, while that level of alcohol is "subject to destruction by the body's natural, physiological processes" (*Id*. at 37), dissipation may not impact the probative nature of the evidence until alcohol is completely metabolized—an event whose timeframe is not discussed in this record.

In short, Petitioner seeks to justify a warrantless blood draw on the basis of imminent destruction of probative evidence, yet the record before the Court does not allow it to evaluate either whether the blood test in question is probative evidence or whether the BAC is in danger of imminent destruction. Until such a record is established, the Court should decline review of the issues presented.

C. Resolution Of The Question Presented Will At Best Have An Uncertain Impact On The Outcome Of This Case.

This is plainly not a situation in which the state's case collapses if the results of the nonconsensual and warrantless blood test are

---

Blood, Urine, and Other Fluid and Tissue Specimens for Alcohol Analyses, *in* Garriott's Medicolegal Aspects of Alcohol, *supra*, at 207-08; Jones, *supra*, at 123-26.

suppressed. Corporal Winder has been a patrolman with the Missouri State Highway Patrol for over 17 years. (Tr. at 4:12-14.) At the suppression hearing, he testified that Respondent gave the appearance of intoxication, smelled of alcohol and failed various field sobriety tests, having been unable to stand on one leg, walk in a straight line or recite the alphabet. (*Id.* at 6:1-7:22.) Respondent's efforts to perform these tests are preserved on a video recording. (Record, Ex. A.) Winder further testified that he administered a horizontal gaze nystagmus test, and Respondent exhibited six out of six possible clues of impairment.[9] (Tr. at 6:24-7:8.) Blaine Adams, a sergeant with the Missouri State Highway Patrol with 23 years' experience, testified that "studies show that if [a driver exhibits] four or more clues, there's a 91 percent probability that they will have a blood alcohol content of .08 or greater." (*Id.* at 19:15-21, 20:23-21:7.)

In addition, Mo. Ann. Stat. § 577.041 provides that if a person under arrest for suspicion of drunk driving "refuses upon the request of the officer to submit to [a blood or breath test], then evidence of the refusal shall be admissible" in a criminal proceeding for driving while intoxicated.

---

[9] Officers administering the nystagmus test are trained to observe tiny, uncontrollable eye contractions that indicate intoxication. Joseph E. Manno et al., Experimental Basis of Alcohol-Induced Psychomotor Performance Impairment, in Garriott's Medicolegal Aspects of Alcohol, *supra*, at 347, 357. Because depressant drugs such as alcohol affect motor control of the eye, intoxicated individuals are unable to smoothly move their eyes from left to right while focusing on an object. *Id.*

None of this necessarily means that the prosecution will secure a conviction if the case is allowed to proceed to trial. It does mean, however, that this is a very different case from one in which the only incriminating evidence is the subject of a suppression motion and the case is effectively over if the suppression motion is granted. Under these circumstances, discretion counsels against the grant of certiorari. "'[I]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)) (internal quotation marks omitted).

II. MOST JURISDICTIONS RECOGNIZE THAT FACTORS OTHER THAN ALCOHOL DISSIPATION ARE RELEVANT IN DETERMINING WHETHER EXIGENCY JUSTIFIES A WARRANTLESS BLOOD DRAW.

The nonconsensual, warrantless blood draw in this case would have been prohibited by statute in at least 27 states.[10] Where state law would not prohibit

---

[10] In at least 27 states, statutes governing chemical tests of those arrested on suspicion of drunk driving prohibit nonconsensual blood draws, *see* Ala. Code § 32-5-192(c)); Mass. Gen. Laws ch. 90 § 24(1)(e), (f); Or. Rev. Stat. § 813.100(2), nonconsensual warrantless blood draws, *see* Ariz. Rev. Stat. Ann. § 28-1321(D)(1); Ga. Code Ann. § 40-5-67.1(d), (d.1); Ky. Rev. Stat. Ann. § 189A.105(2); Mich. Comp. Laws Ann. § 257.625d(1); Mont. Code Ann. § 61-8-402(4), (5); N.M. Stat. Ann. § 66-8-111(A); N.Y. Veh. & Traf. Law §§ 1194(2)(a)(4)(b)(1), 1194(3); N.C. Gen. Stat. Ann. § 20-16.2 (c); R.I. Gen. Laws §§ 31-27-2.1(b), 31-27-2.9(a) (allowing for nonconsensual searches

a warrantless search, the prevailing judicial rule—reflected in decisions by state courts of last resort and federal courts of appeals—is that claims of exigency must be examined in light of all factors that would inform a reasonable officer's decision not to obtain a warrant.

In addition to the Missouri Supreme Court, the courts of last resort in at least five states have unequivocally rejected "a *per se* rule that the natural dissipation of blood-alcohol is alone sufficient to constitute exigent circumstances" (Pet. App. at 14a). *See People v. Wehmas*, 246 P.3d 642, 650-51 (Colo. 2010) ("[A]lthough BAC certainly dissipates gradually with time, this dissipation, as a general matter, does not create the urgency and imminence of loss contemplated by our governing precedent. . . . The prosecution has failed to demonstrate that the officers had insufficient time to get a warrant under

---

pursuant to warrant only in cases of death or serious injury); 23 Vt. Stat. Ann. tit. 23 § 1202(b), (f) (allowing for nonconsensual searches pursuant to warrant only in cases of death or serious injury); W. Va. Code § 17C-5-7 (as construed in *State v. Stone*, ---S.E.2d ---, 2012 WL 2369483, at *12 (W. Va. June 21, 2012)), or nonconsensual warrantless blood draws except in cases of death or serious injury, *see* Alaska Stat. Ann. §§ 28.35.032(a), 28.35.035(a); Conn. Gen. Stats. Ann. §§ 14-227b(b), 14-227c(b); Fla. Stat. Ann. § 316.1933(1)(a); Haw. Rev. Stat. §§ 291E-15, 291E-21(a); Iowa Code Ann. §§ 321J.9(1), 321J.10(1), 321J.10A(1); Kan. Stat. Ann. § 8-1001(b), (d); Md. Code Ann., Transp. § 16-205.1(b)(1), (c)(1); N.D. Cent. Code Ann. §§ 39-20-01.1, 39-20-04(1); N.H. Rev. Stat. Ann. §§ 265-A:14(I), 265-A:16; Okla. Stat. Ann. tit. 47, § 753; S.C. Code Ann. §§ 56-5-2946, 56-5-2950(B) (as construed in *State v. Mullins*, 489 S.E.2d 923, 924 (1997)); Wash. Rev. Code Ann. § 46.20.308(3), (5); Wyo. Stat. Ann. § 31-6-102(d).

the circumstances." (citation omitted)); [11] *State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008) ("the mere phenomenon of alcohol dissipation" from the bloodstream cannot by itself establish exigency); *State v. Rodriguez*, 156 P.3d 771, 776 (Utah 2007) ("*Schmerber* does not stand for the proposition that the loss of evidence of a person's blood-alcohol level through the dissipation of alcohol from the body was a sufficient exigency to justify a warrantless blood draw."); *Bristol v. Commonwealth*, 636 S.E.2d 460, 464 (Va. 2006) ("The mere fact that a defendant's blood alcohol content might dissipate is insufficient, by itself, to support application of the 'exigent circumstances' exception."); *State v. Shepherd*, 840 P.2d 644, 646 (Okla. Crim. App. 1992) (officer's "belie[f] that under the circumstances, any delay necessary to secure a warrant may result in the loss of evidence . . . must be [evaluated] on a case by case basis").

Rather than adopt the categorical rule that Petitioner has proposed, additional courts have considered, among other factors, how quickly a warrant can be obtained, whether the officer has been detained at an accident scene or has otherwise

---

[11] *Wehmas* involved a challenge to a warrantless entry into an apartment to arrest a suspected drunk driver. In cases more factually similar to this one, the Colorado Supreme Court has consistently considered factors beyond the gradual dissipation of blood alcohol content. *See*, *e.g.*, *People v. Schall*, 59 P.3d 848, 853 (Colo. 2002) ("Because alcohol dissipates quickly in the blood, exigent circumstances exist when time has elapsed while the driver is transported to a hospital and the investigating officer is detained at the accident scene." (internal quotation marks omitted)); *accord People v. MacCallum*, 925 P.2d 758, 764 (Colo. 1996)).

been unable to seek a warrant, the state's interest in obtaining the evidence, and the significance of the privacy infringement. For example, in *Deeds v. State*, 27 So.3d 1135, 1145 (Miss. 2009), the Supreme Court of Mississippi based its finding of exigent circumstances on not only the dissipation of alcohol, "but also the fact that the officers were involved in the investigation of a major vehicle accident involving serious injuries to multiple people, requiring their transportation to nearby hospitals, as well as the time that would have been required to obtain a warrant before traveling to the hospital to obtain the samples." The Supreme Court of South Dakota adopted a similar approach in *State v. Engesser*, 661 N.W.2d 739, 748 (S.D. 2003) ("Three hours had already elapsed since the accident when Engesser's blood was drawn. The more time that went by the less likely the evidence could be obtained at all. Evidence of Engesser's intoxication would have been 'forever lost' without the blood draw."). *See also State v. Lamont*, 631 N.W.2d 603, 614-15 (S.D. 2001) (finding exigency to enter hotel room of a suspected drunk driver where officers with strong probable cause to believe that a "serious offense" had occurred under "grave circumstances" were engaged in field investigation that took over three hours to locate defendant, and limiting holding to the circumstances of the case as Fourth Amendment analysis should "avoid bright-line rules").

Likewise, in *People v. Thompson*, 135 P.3d 3, 13 (Cal. 2006), the California Supreme Court considered "all of the circumstances" before concluding that exigency justified warrantless entry into the home of a suspected drunk driver where defendant had demonstrated his intent to escape and

thus where the evidence of his crime would have dissipated before the police could locate him.[12] Other jurisdictions employing a totality analysis include North Dakota, *see State v. Kimball*, 361 N.W.2d 601, 604-05 (N.D. 1985) (given the metabolism of alcohol in the bloodstream, "the unknown period of time which had elapsed since Kimball's accident presented Officer Hummel with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence"), and New Hampshire, *see State v. Wong*, 486 A.2d 262, 274-75 (N.H. 1984) (evaluating exigency with reference to the time officers spent at the accident scene as well as the amount of time it would take to obtain a warrant); *see also State v. Stern*, 846 A.2d 64, 69 (N.H. 2004) ("Whether exigent circumstances exist is judged by the totality of the circumstances" and "is largely a question of fact for the trial court.").

The federal courts of appeals have similarly looked beyond the mere fact of gradual dissipation to determine whether warrantless blood draws can be justified by claims of exigency. Contrary to Petitioner's oversimplified summary of *United States v. Eagle*, 498 F.3d 885 (8th Cir. 2007), the fact that "'the body functions to eliminate [alcohol] from the system'" (Pet. App. at 24 n.9 (quoting *Eagle*, 498 F.3d at 893) (alteration in original)) is but one element of

---

[12] Petitioner lists *People v. Thompson* among cases "holding that dissipation of alcohol in the bloodstream creates exigent circumstances" (Pet. App. at 22 n.8), but the *Thompson* court was careful to point out that in finding a warrantless search justified by the totality of circumstances then before it, it "d[id] not hold . . . that the police may enter a home without a warrant to effect an arrest of a DUI suspect in *every* case," *Thompson*, 135 P.3d at 13.

the Eighth Circuit's reasoning in assessing exigency claims. In *Eagle*, the court held that the district court's exigency finding was not plain error, noting that "[n]early two and a half hours passed between the accident and the time when the blood was drawn," and "[r]equiring the officer to get a warrant for the evidence would have resulted in a greater delay, allowing for the further dissipation of the alcohol in Mr. Eagle's blood and creating a risk that Mr. Eagle would be unavailable for having his blood drawn upon the officer's return." *Eagle*, 498 F.3d at 892.[13]

The Ninth and Tenth Circuits have also looked beyond mere dissipation to determine whether exigency justifies warrantless blood draws in drunk-driving cases. *See Marshall v. Columbia Lea Regional Hosp.*, 474 F.3d 733, 742 (10th Cir. 2007) ("When a suspect has taken an alternative test of equal evidentiary value, the risk that evidence will be lost disappears and the exigent circumstances that excused the police from obtaining a warrant likewise disappears, rendering a warrantless nonconsensual blood test in such circumstances unconstitutional." (internal quotation marks

---

[13] Petitioner also cites *United States v. Prouse*, 945 F.2d 1017 (8th Cir. 1991). (Pet. App. at 24 n.9.) In *Prouse*, the defendants did not challenge the warrantless nature of the search, but argued that the results of two sets of blood tests should be suppressed because "the first blood tests were the fruit of an unlawful arrest; . . . there was not probable cause to support the first blood tests; and . . . the results of the second blood tests were privileged." *Prouse*, 945 F.2d at 1022-23. The uncontested finding of exigency was supported by unchallenged evidence that law enforcement officers did not apprehend the defendants until 10 or 11 hours after the defendants had stopped drinking.

omitted)); *Nelson v. City of Irvine*, 143 F.3d 1196, 1205 (9th Cir. 1998) ("Whenever a DUI arrestee consents to a breath or urine test, and such tests are available, the administration of either the breath or urine test would preserve the evidence and end the exigency."); *accord Hammer v. Gross*, 932 F.2d 842, 851-52 (9th Cir. 1991) (en banc) (Kozinski, J., concurring).

Although Petitioner includes the Fourth Circuit among courts whose decisions categorically turn on the mere fact of dissipation (Pet. App. at 25-26), in *United States v. Reid*, 929 F.2d 990, 993 (4th Cir. 1991), the Fourth Circuit did not ignore evidence bearing on factors other than the metabolism of alcohol. Rather, it upheld the district court's finding of exigency only after it had carefully evaluated the defendant's arguments that the availability of telephonic warrants eliminated any exigency and determined that the "intricate requirements" of the telephonic warrant process were not fast enough to alleviate the risk of lost evidence. *Reid*, 929 F.2d at 993.[14]

---

[14] Petitioner also identifies the Sixth Circuit as a court employing a single-factor exigency test that turns solely on the fact of dissipation. (Pet. App. at 23-24.) As in *Prouse*, exigency was not challenged in *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989), which held that an arrest is not a necessary prerequisite to a warrantless blood draw. The question of exigency was similarly not challenged by defendants and therefore not squarely before courts in other cases claimed by Petitioner to hold that alcohol metabolism creates a per se exigency (*see* Pet. App. at 22 n.8). *See State v. Cocio*, 709 P.2d 1336, 1345 (Ariz. 1985) (construing a state statute limiting seizure of blood to that "drawn by medical personnel for any medical reason," and not drawn at officer's direction); *State v. Baker*, 502 A.2d 489 (Me. 1985) (defendants challenged

In the majority of these cases, the courts found that dissipation of alcohol created an exigency justifying the warrantless search at issue, but only when considered alongside other relevant factors. Like the Missouri Supreme Court, they followed an approach that would have allowed for a showing in a particular case that no true emergency existed. Even the Oregon Supreme Court, which according to petitioner has categorically ruled that the evanescent nature of blood alcohol content alone creates an exigency (Pet. App. at 18-20), has acknowledged that in the rare case where a warrant reliably can be obtained before blood alcohol content is lost, "a warrantless blood draw [will] be unconstitutional," *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010).

Similarly, the Supreme Court of Wisconsin, which in *State v. Bohling* asserted a per se rule that exigency exists in every drunk-driving case "based solely on the fact that alcohol rapidly dissipates in the bloodstream," 494 N.W.2d 399, 402 (Wis. 1993), reaffirmed that assertion in *State v. Faust*, but like the Oregon Supreme Court, did so with a caveat,

---

warrantless blood draw on basis that it did not follow arrest, was not supported by probable cause and was not done in a reasonable manner); *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) (affirming denial of motion to suppress where defendant argued the sample was taken without probable cause or consent in violation of state statute); *State v. Entrekin*, 47 P.3d 336, 348 (Haw. 2002) ("In the present matter, Entrekin does not dispute Officer Nakooka had probable cause to believe that Entrekin was DUI or that exigent circumstances were present when he requested that a sample of Entrekin's blood be obtained."). None of these cases holds that courts may ignore evidence tending to show the absence of a true emergency whenever a state points out that alcohol eventually dissipates from the bloodstream.

emphasizing that its holding was limited to "*the facts of this case*," 682 N.W.2d 371, 383 n.16 (Wis. 2004). "[W]e reiterate that the reasonableness of a warrantless nonconsensual test [for blood alcohol content] . . . will depend upon the totality of the circumstances of each individual case." *Faust*, 682 N.W.2d at 383, n.16. The court suggested, for instance, that "[t]here may well be circumstances where the police have obtained sufficient evidence of the defendant's level of intoxication that a further test would be unreasonable under the circumstances presented." *Id.* at 383. Ultimately, therefore, the Wisconsin Supreme Court, like virtually all other state courts of last resort, has acknowledged that any purportedly per se test for exigency must leave room for a case in which the record fails to establish an arguable emergency necessitating a warrantless blood draw.

The only exceptions are the Minnesota and Ohio Supreme Courts. In rejecting facial challenges to state statutes authorizing criminal penalties for refusing to submit to blood tests upon probable cause, both courts held that in every case, "exigent circumstances justify the warrantless seizure of a blood sample in a DUI case." *State v. Hoover*, 916 N.E.2d 1056, 1061 (Ohio 2009); *accord State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009) ("We hold that the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, 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."); *see also State v. Shriner*, 751 N.W.2d 538

(Minn. 2009). These cases are outliers. Notably, they were decided on records apparently containing no evidence that, despite eventual dissipation, a warrant could be obtained or the search could be foregone without risking valuable evidence.

On the other hand, in every case cited above in which the defendant presented evidence specifically undermining the state's exigency claim, the relevant court carefully considered the significance of that evidence. In many such cases, the court concluded that based on a totality of the circumstances the officer conducting the search reasonably believed he faced a true emergency, *see*, *e.g.*, *Reid*, 929 F.2d 990; *Faust*, 682 N.W.2d 371, while in others, the court concluded that the officer failed to establish he reasonably believed the search was justified, *see*, *e.g.*, *Wehmas*, 246 P.3d 642; *Nelson*, 143 F.3d 1196. These varying conclusions are based on different factual determinations applying a totality of the circumstances test, not differences in courts' willingness to consider all relevant facts. They do not reflect, as Petitioner suggests, either a profound or growing split among jurisdictions.

III. THE MISSOURI SUPREME COURT CORRECTLY CONSTRUED *SCHMERBER V. CALIFORNIA* TO REQUIRE MORE THAN THE MERE DISSIPATION OF ALCOHOL FROM THE BODY TO JUSTIFY A WARRANTLESS BLOOD DRAW UNDER THE LIMITED EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

A. Exigent Circumstances Are Traditionally Assessed Based On The Totality Of The Circumstances.

Exigent circumstances justify a warrantless, nonconsensual search only if "police action literally must be 'now or never' to preserve the evidence of the crime." *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). In evaluating the state's claim of exigency in this case, the Missouri Supreme Court followed the clear precedent of this Court in rejecting the "overlay of a categorical scheme on the general reasonableness analysis [that] threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes," *Banks*, 540 U.S. at 42 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)). It instead considered a variety of factors that might contribute to an officer's determination that failing to act without delay would result in the irretrievable loss of valuable evidence.

Petitioner argues that the Missouri Supreme Court erred when it refused to abandon a case-specific factual inquiry in favor of a single-factor categorical approach to determining exigency, but nothing in this Court's precedents recommends such an approach. In fact, much counsels against it. Over and over again, the Court has explained that "'[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case," *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)) (alteration in original); *accord*

Winston v. Lee, 470 U.S. 753, 760 (1985) ("The reasonableness of [a search] depends on a case-by-case approach . . . [and] the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.").

A fact-sensitive approach is no less appropriate in the context of exceptions to the warrant requirement. In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court rejected the Wisconsin Supreme Court's per se exception to the knock-and-announce rule in cases involving drug investigations, characterizing the per se rule as "contain[ing] considerable overgeneralization." The Court acknowledged that "drug investigation frequently does pose special risks to officer safety and the preservation of evidence," but the Court also recognized that

> not every drug investigation will pose these risks to a substantial degree. . . . [T]he fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

Id. at 393-94.

Similarly, while every drunk-driving investigation will involve the eventual dissipation of a suspect's blood alcohol content, not every case will involve a risk of losing evidence of intoxication before the police can obtain a warrant authorizing the search. To establish a "blanket rule" that blood may be drawn without a warrant regardless of consideration of the facts and circumstances of a particular case—including whether the police reasonably believed that they lacked enough time to procure a warrant before the evidence disappeared and whether the police had available and utilized other means for determining sobriety—would "untether the rule from the justifications underlying the . . . exception," *Arizona v. Gant*, 556 U.S. 332, 343 (2009), and "impermissibly insulate[]" cases in which no exigency exists from judicial review, *Richards*, 520 U.S. at 393.

B. The Missouri Supreme Court Correctly Applied *Schmerber* To The Facts Of This Case.

Against this background, the Missouri Supreme Court properly read this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), as an application of, rather than a rare exception to, the Court's usual practice of weighing all of the facts known to the officers to determine whether "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment," *Mincey*, 437 U.S. at 394. *See Winston*, 470 U.S. at 760 ("[T]he [*Schmerber*] Court recognized that Fourth Amendment analysis . . . required a discerning inquiry into the facts and circumstances

to determine whether the intrusion was justifiable."). *Schmerber*'s reasoning reflects a totality of the circumstances approach to determining "whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness," *Schmerber*, 384 U.S. at 768.

Emphasizing that a warrantless blood test impacts "interests in human dignity and privacy which the Fourth Amendment protects," *id.* at 769-70, the Court in *Schmerber* did not limit its analysis to the evanescent nature of alcohol in the bloodstream, the significant but single factor shared by *Schmerber* and the present case. Instead, it looked to the circumstances faced by the arresting officer to determine whether the facts substantiated the officer's conclusion that a warrantless search was constitutionally justified. The Court observed that "the percentage of alcohol in the blood begins to diminish shortly after the drinking stops," *id.* at 770, but was also careful to note other "special facts"—that "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident," leaving the officer "no time to seek out a magistrate and secure a warrant"—before concluding that the arresting officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at 770-71 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

The Missouri Supreme Court correctly applied *Schmerber*'s totality of the circumstances test to the

quite different facts of the present case. Unlike in *Schmerber*, there was no accident and the defendant required no medical care. With the aid of pre-prepared forms and the availability of telephonic warrants, Corporal Winder had in the past obtained warrants for blood draws in drunk driving cases and had no reason to believe he could not do so in this case. (Tr. at 15:25-17:10.) All evidence supported Winder's testimony that the circumstances presented no exigency. The court properly held, therefore, that the state failed to identify an exigency on the facts of this "run of the mill" DWI investigation (*Id.* at 30:18-20) to justify an exception to the stringent requirement that the police obtain a warrant before "'invad[ing] another's body in search of evidence'" (Pet. App. at 20a (quoting *Schmerber*, 384 U.S. at 770)).

In any event, the question of whether the Missouri Supreme Court properly balanced the relevant factors does not merit this Court's plenary review. *See Kentucky v. King*, --- U.S. ---, 131 S.Ct. 1849, 1863 (2011) ("Any question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand."); *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (reversing state-court judgment that exigent circumstances were not required for warrantless home entry and remanding for state court to determine whether exigent circumstances were present); *Mapp v. Ohio*, 367 U.S. 643, 653 (1961) ("Because there can be no fixed formula, we are admittedly met with recurring questions of the reasonableness of searches, but less is not to be expected when dealing with a Constitution, and, at any rate, reasonableness is in the first instance for

the trial court to determine." (internal quotation marks and brackets omitted)).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Steven R. Shapiro
Counsel of Record
Ezekiel R. Edwards
Hayley E. Horowitz
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Stephen C. Wilson
Wilson & Mann, L.C.
2907 Independence Street, Suite C
P.O. Box 512
Cape Girardeau, MO 63702-0512
(573) 651-1950

Stephen Douglas Bonney
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, MO 64111
(816) 994-3311

Anthony E. Rothert
ACLU of Eastern Missouri
454 Whittier Street
St. Louis, MO 63108
(314) 652-3114

Dated: July 25, 2012