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OF WISCONSIN

No. 2015AP304

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

GERALD P. MITCHELL,
Defendant-Appellant.

On Appeal from the Sheboygan County Circuit Court, The Honorable Terrence T. Bourke, Presiding
Case No. 2013CF365

NON-PARTY BRIEF OF MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PLAINTIFF-RESPONDENT

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I. INTRODUCTION

For a period of nine years (2003 to 2012), Wisconsin's rate of death from alcohol-related crashes exceeded the national average.[1] In fact, 2016 witnessed 5,153 alcohol-related crashes and 143 alcohol-related fatalities on Wisconsin roads alone.[2] To hold drunk drivers accountable—and to prevent further deaths and debilitating injuries—States must be able to expediently gather accurate and admissible evidence related to the crime, including the driver's blood alcohol concentration ("BAC") at or near the time of the crash. Those mandates become even more compelling in the case of a particularly dangerous (but all-too-common) class of drunk drivers: those who become unconscious after having first taken the wheel.

In this case, the State has correctly argued that a warrantless blood test of a then-unconscious drunk driver, Gerald Mitchell, did not violate the Fourth Amendment because Mr. Mitchell validly consented to the blood test by driving a motor vehicle while intoxicated on a public road in Wisconsin. Such conduct readily satisfies Wisconsin's implied consent

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[1] *Sobering Facts: Drunk Driving in Wisconsin*, Ctrs. for Disease Control and Prevention, 1, (Dec. 2014), https://www.cdc.gov/motorvehiclesafety/pdf/impaired_drivin/drunk_driving_in_wi.pdf.

[2] *Final year-end crash statistics*, Wis. Dep't of Transp., http://wisconsindot.gov/Pages/about-wisdot/newsroom/statistics/final.aspx (last visited Nov. 8, 2017).

law, and should be deemed the equivalent of actual consent for the reasons argued by the State. That alone is enough to rule in the State's favor and sustain Mr. Mitchell's conviction. But *amicus curiae* Mothers Against Drunk Driving ("MADD") submits that even if Mr. Mitchell had not provided actual consent, the blood draw was constitutional because blood draws taken in a medical setting, of drivers who were unconscious, and whom the police had probable cause to arrest for drugged or drunk driving, are per se reasonable searches. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("the ultimate measure of the constitutionality of a governmental search is [its] 'reasonableness'"). For this reason, and for those argued by the State, MADD respectfully asks the Court to affirm the judgment of conviction against Mr. Mitchell.

II. STATEMENT OF INTEREST

MADD's mission is to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. MADD is concerned that the ruling in this case will impose an unnecessary restriction on law enforcement's ability to gather reliable, admissible BAC evidence with respect to a particularly dangerous class of drunk drivers: those who choose to get behind the wheel even though they have consumed so much alcohol that they risk losing consciousness. These offenders pose an even greater threat to public safety than less intoxicated drivers, and, when they actually do lose consciousness, a blood test is the only means to gather reliable evidence to

secure a conviction for driving under the influence and to protect the public. And because these offenders often require medical treatment as a result of their elevated BAC and/or a crash they have caused, law enforcement may not have time to secure a warrant before ordering a blood draw.

III. A WARRANTLESS BLOOD DRAW IS A REASONABLE SEARCH

Courts have long held that a blood draw constitutes a search under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 770 (1966). Whether such a search is constitutional—even without a warrant—depends on whether it is "reasonable." *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013).

Reasonableness is analyzed by weighing "the promotion of legitimate government interests" against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). While the reasonableness inquiry has many facets, "special law enforcement needs," "diminished expectations of privacy," "minimal [bodily] intrusions," *King*, 133 S. Ct. at 1969, the availability of less-invasive alternatives, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016), and the difficulties in securing a warrant all play a role, *Schmerber*, 384 U.S. at 771. Collectively, these factors support a finding that the warrantless blood draw here was "reasonable" and therefore constitutionally permissible. *Cf. Breithaupt v. Abram*, 352 U.S. 432, 435 n.2 (1957).

A. States Must Protect The Public From Individuals Who Drink, Drive, And Become Unconscious

1. The U.S. Supreme Court has for decades confirmed that a State's interest in combatting drunk driving is very great indeed. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2178–79; *Missouri v. McNeely*, 569 U.S. 141, 159–60 (2013); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990); *Breithaupt*, 352 U.S. at 439. This Court, too, has described drunk driving as "indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986). Despite the "progress [that] has been made" in combatting drunk driving, *McNeely*, 133 S. Ct. at 1565, States continue to have a "'paramount interest . . . in preserving the safety of . . . public highways,'" and "in creating effective 'deterrent[s] to drunken driving,'" which remains "a leading cause of traffic fatalities and injuries," *Birchfield*, 136 S. Ct. at 2178–79 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 18 (1979)). In light of this compelling interest, the U.S. Supreme Court often upholds "anti-drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances." *Virginia v. Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari).

In furtherance of those interests, States, including Wisconsin, have engaged in rigorous enforcement of drunk driving laws, including both arrests and convictions. These enforcement efforts

operate by taking drunk drivers off the road, deterring would-be drunk drivers,[3] reducing recidivism,[4] and encouraging offenders to get treatment.[5] *See Indianapolis v. Edmond*, 531 U.S. 32, 37–38 (2000) (noting that in the Fourth Amendment context, the Court has upheld government measures "aimed at removing drunk drivers from the road"); *Nordness*, 128 Wis. 2d at 33 ("the state's interest of keeping the highways safe is best served when those who drive while intoxicated are prosecuted and others are thereby deterred from driving while intoxicated").

2. These principles apply with particular force where law enforcement officers encounter offenders who have either consumed so much alcohol that they have lost consciousness while driving, or who have become unconscious as a result of a drunk-driving crash—regrettably, an all-too-common occurrence, particularly in Wisconsin.

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[3] Benjamin Hansen, *Punishment and Deterrence: Evidence from Drunk Driving*, 105 Am. Econ. Rev. 1581, 1582 (2015).

[4] D. Paul Moberg & Daphne Kuo, *Five Year Recidivism after Arrest for Operating While Intoxicated: A Large-scale Cohort Study*, Univ. of Wis. Population Health Inst., 4–6 (Apr. 2017),https://uwphi.pophealth.wisc.edu/publications/other/IntoxicatedDriverProgramApril2017.pdf.

[5] Elisabeth Wells-Parker et al., *Final results from a meta-analysis of remedial interventions with drink/drive offenders*, 90 Addiction 907, 907–26 (1995).

By way of example, the median alcohol concentration for 2015 OWI citations was 0.16%,[6] meaning that more than half of those cited had a BAC more than twice the legal limit and beyond the threshold at which intoxicated individuals may begin to lose consciousness.[7]

Cases and news reports of arrests involving drunk drivers who are found unconscious occur with unexpected frequency. In *United States v. Dickson*, 849 F.3d 686 (7th Cir. 2017), for example, a police officer found an unconscious driver at a McDonald's drive-through lane in nearby Rockford, Illinois, with a bottle of vodka in the front seat. *Id.* at 688. In a separate incident in Maple Bluff, Wisconsin, officers witnessed an erratic driver, under the influence of alcohol, crash into a utility pole and found him unconscious shortly thereafter. *State v. Lange*, 2009 WI 49, ¶¶ 9-18, 317 Wis. 2d 383, 766 N.W.2d 551. Media reports also detail the tragic results of intoxicated driving in Wisconsin: In April 2017, for example, an intoxicated driver struck and killed a University of Wisconsin

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[6] *See Drunk Driving Arrests and Convictions*, Wis. Dep't of Transp.,http://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx (last visited Nov. 8, 2017).

[7] *Alcohol Overdose: The Dangers of Drinking Too Much*, Nat'l Inst. On Alcohol Abuse and Alcoholism, 2 (Oct. 2015), https://pubs.niaaa.nih.gov/publications/alcoholoverdosefactsheet/overdoseFact.pdf.

graduate student and became unconscious not long thereafter.[8]

3. Although all drunk drivers pose a clear and present danger to the public, the State's compelling interest in deterrence is arguably elevated in cases involving the drunk drivers who drink so excessively that they black out, struggle to remain conscious, or fully lose consciousness behind the wheel. The reason is simple and irrefutable: a drunk driver who is barely conscious or loses consciousness due to alcohol is certain to strike another vehicle, cyclist, or pedestrian, or to otherwise harm him or herself.

Restricting law enforcement officers' ability to collect evidence in the course of arresting drunk drivers who have become unconscious will have unjust and dangerous consequences with respect to deterrence and the enforcement of drunk-driving laws. Unlike the case of a conscious drunk driver, law enforcement cannot obtain express consent from an unconscious driver and may have less time to secure a warrant in the likely event that the driver requires medical care. A rule that would make it *more* difficult for the police to apprehend a *more* dangerous class of drunk drivers is not one this Court should endorse.

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[8] Ed Treleven, *Man Charged with Homicide in Traffic Death of UW Student from China*, Wis. State J. (Apr. 21, 2017), http://host.madison.com/wsj/news/local/courts/man-charged-with-homicide-in-traffic-death-of-uw-student/article_004d8153-bc41-5e3a-84a9-b1a909b1d3df.html.

4. Given the threat that drunk drivers who are or become unconscious at the time of their arrest or shortly thereafter pose to public safety, and given the injuries and loss of life on Wisconsin's roadways, law enforcement must have access to the best evidence it can lawfully obtain when investigating this violent crime. Today's blood tests are the best evidence of a driver's BAC, and it is important to administer them quickly because the level of alcohol in the blood dissipates rapidly after drinking ceases. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 623 (1989) (explaining that blood samples must be obtained "as soon as possible" so as not to "result in the destruction of valuable evidence"); *State v. Faust*, 2004 WI 99, ¶ 29, 274 Wis. 2d 183, 682 N.W.2d 371 (blood samples are "the most direct and accurate evidence of intoxication"). Obtaining a prompt and accurate reading is also important insofar as it may affect the severity of sentencing. *McNeely*, 133 S. Ct. at 1571 ("[T]he concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment.") (Roberts, C.J., concurring); *see also, e.g.*, Wis. Stat. Ann. § 346.65(2)(g) (providing different penalties depending on BAC). The U.S. Supreme Court has acknowledged and confirmed these compelling state interests by expressly making it clear that, under the right circumstances, an arresting officer is not obligated to obtain a warrant before conducting a search incident to arrest simply because there might be adequate time in the particular circumstance to do so. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2186–87.

Hindering law enforcement's ability to take a blood draw without a warrant under the limited circumstances discussed here will put the brakes on the State's fight against drunk driving and, in the immediate case, on enforcing the law against unconscious drunk drivers, whom the State may have a greater need to apprehend and deter. Moreover, the State's ability to obtain the best evidence necessary to secure convictions for drunk-driving offenses is a compelling state interest that weighs heavily against the unconscious drunk driver's diminished privacy interest, a point discussed at greater length below.

B. There Is No Less Invasive Alternative

The U.S. Supreme Court has already agreed that "medically drawn blood tests are reasonable in appropriate circumstances." *McNeely*, 133 S. Ct. at 1565; *Schmerber*, 384 U.S. at 770–72; *Skinner*, 489 U.S. at 633 (warrantless blood tests of employees justified where "the compelling Government interests served by the [regulations] . . . outweigh[ed] [employees'] privacy concerns"); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) ("*Schmerber*, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test"). Consistent with *Schmerber*, *Neville*, and *Skinner*, "appropriate circumstances" always exist in the case of unconscious individuals suspected of drunk driving because, in addition to the State's compelling interest in protecting innocent lives from drunk driving and, in the immediate case, from drunk drivers who become unconscious, a blood test is the least invasive means of

obtaining critical evidence—particularly when an unconscious drunk driver is already receiving medical attention.

This "less invasive alternative" analysis was central in *Birchfield*, in which the U.S. Supreme Court upheld warrantless breathalyzer tests as lawful searches incident to arrests for drunk driving. 136 S. Ct. at 2182. The Court's reasoning rested in part on the notion that a breath test was a relatively non-invasive means of obtaining a reading of a driver's BAC that was, in many cases, as effective as a blood test, while being superior to other more costly or less effective alternatives, such as sobriety checkpoints and ignition interlock systems. 136 S. Ct. at 2182 & n. 8. But the Court also recognized that a blood test—unlike a breath test—is unique in that it "may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries." *Id.* at 2184; *see also* 2 Richard E. Erwin, Defense of Drunk Driving Cases §§ 18.01(2)(a), 18.02, 24.02(3), 24.05 (3d ed. 2017). Thus, for suspected drunk drivers found unconscious at the scene of a crash, blood tests do not merely provide a reliable means of obtaining evidence of intoxication; they provide the *only* means of doing so, as breathalyzers are not an option. *Cf. Birchfield,* 136 S. Ct. at 2184.[9]

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[9] While the Supreme Court in *Birchfield* noted in passing that the warrant requirement should not be dispensed with in the case of blood tests involving unconscious drunk drivers, it did

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C. Obtaining A Warrant May Be Difficult

Getting a warrant, or relying on some other exception to the warrant requirement, is especially difficult in the case of unconscious drunk drivers. That is because such drivers often require medical attention—as was the case here—and are likely to cause significantly more delays than the typical arrest involving a conscious drunk driver. As the U.S. Supreme Court recognized in *Schmerber*, a warrantless blood test of a drunk driver is constitutional under the circumstances where a driver must be transported to a hospital and provided treatment. Similarly, a police 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.'" *Schmerber*, 384 U.S. at 770 (citation omitted); *see also id.* at 770–71 ("[W]here time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."); *McNeely*, 133 S. Ct. at 1559–60 (reaffirming *Schmerber*'s holding that it was reasonable

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so, in part, because the record before it provided "no reason to believe that such situations are common in drunk-driving arrests . . . ." 136 S. Ct. at 2184–85. As discussed above, however, there is evidence that such situations *are* surprisingly common in Wisconsin and elsewhere and pose risks that ordinary drunk-driving arrests do not.

to dispense with the warrant requirement under the circumstances).

D. Unconscious Drunk Drivers Have A Diminished Expectation Of Privacy

In general, a suspected drunk driver's minimal privacy interests must be balanced against the State's compelling public safety interests and the other circumstances identified above. An unconscious suspected drunk driver's minimal privacy interest is subject to the same balancing analysis. As noted above, the category of unconscious suspected drunk drivers is a narrow and readily identifiable group. And the U.S. Supreme Court has ruled that individuals who choose to drive on public roadways—intoxicated or not—already have a diminished expectation of privacy because of the "compelling governmental need for regulation." *California v. Carney*, 471 U.S. 386, 392 (1985); *see also State v. Clark*, 2003 WI App. 121,¶ 27, 265 Wis. 2d 557, 666 N.W.2d 112 (noting that "individuals generally have a lesser expectation of privacy in an automobile"). Logically, drunk drivers who become unconscious on a public roadway and who leave decisions about their health and safety to others, including law enforcement and medical personnel, have an even lesser expectation of privacy than those who do not. *Cf. Shulman v. Group W Productions, Inc.* (1996) 18 Cal. 4th 200, 213 (agreeing with the court of appeal's conclusion that an accident victim "had no reasonable expectation of privacy in the events at the accident scene itself"). Therefore, and under the circumstances, the right of an unconscious drunk driver to be free of "a properly

safeguarded blood test is far outweighed by the value of [such a test's] deterrent effect," as well as the other interests discussed above. *Breithaupt*, 352 U.S. at 439.

* * *

When the compelling state interest of ensuring the safety of innocent victims on roadways is weighed against the minimal privacy interest of the offender, it becomes clear that permitting law enforcement to conduct warrantless blood tests on a narrow category of persons—unconscious drivers whom police have probable cause to arrest for drunk driving—in a medical setting, is not only reasonable, but also essential to keep Wisconsin's roadways safe, allow the State to fight drunk driving, protect innocent lives, and ensure a nation with No More Victims. The Court should adopt such a rule in this case.

IV. CONCLUSION

MADD respectfully asks the Court to affirm the judgment of conviction against Mr. Mitchell.

Dated this 15th day of December, 2017.

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CERTIFICATIONS

A. Certification as to Form and Length: I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief, not including the caption, tables of contents and authorities, signature blocks, and certification, is 2,930 words. It is produced with a minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, and a maximum of 60 characters per line of body text.

B. Certificate of Compliance with Wis. Stat. § 809.19(12). I hereby certify that, in accordance with Wis. Stat. § 809.19(12), I have submitted an electronic copy of this brief in a text-searchable PDF format that is identical in content and format to the printed form of the brief filed on this date.

C. Certificate of Service. I hereby certify that one copy of this brief (and this Certification) has been served on all opposing parties by U.S. Mail to their counsel of record:

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