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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
APPEAL CASE NO. 2016AP308

State of Wisconsin,

Plaintiff-Appellant-Petitioner,

v.

Dawn M. Prado,

Defendant-Respondent-Cross Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS
REVERSING AN ORDER GRANTING A MOTION TO SUPPRESS
EVIDENCE ENTERED IN THE DANE COUNTY CIRCUIT COURT
THE HONORABLE DAVID T. FLANAGAN, III, PRESIDING

BRIEF OF AMICUS CURIAE CITY OF EAU CLAIRE

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INTRODUCTION

In *Mitchell v. Wisconsin*, the United States Supreme Court articulated a new rule that the exigent circumstances doctrine almost always permits a blood test without a warrant when an impaired driving suspect is unconscious. This Court should apply *Mitchell* in determining that exigent circumstances apply in this case because Prado was unconscious. The exigent circumstances doctrine allows warrantless searches to prevent the imminent destruction of evidence. Applying the exigent circumstances doctrine to cases such as this case, which involve unconscious impaired driving suspects, properly considers the importance of timely blood draws in drug impaired driving cases. Blood draw delays in drug impaired driving cases can significantly frustrate the ability to investigate, prosecute or defend impaired driving cases because most drugs are not eliminated from the human body at a linear rate similar to alcohol. In the present case, an untimely blood draw may have resulted in the destruction of Benzoyllecgonine, a metabolite of cocaine which was found in Prado's blood sample, and which constitutes a restricted controlled substance under Wisconsin law.

In the alternative, the Court should not apply the exclusionary rule to this case because the officer's conduct was reasonable, the officer's conduct was not intentional conduct that was patently unconstitutional, and because the officer's conduct was not sufficiently deliberate that deterrence is worth

the price paid by the justice system. The Court should clarify that the Court of Appeals' application of the good faith exception is incorrect, and law enforcement can generally rely on a statute until the statute is found unconstitutional.

1. Applying the exigent circumstances doctrine to cases such as this case, which involve unconscious impaired driving suspects, properly considers the importance of timely blood draws in drug impaired driving cases.

Applying the exigent circumstances doctrine to cases such as this case, which involve unconscious impaired driving suspects, properly considers the importance of timely blood draws in drug impaired driving cases.¹ *See State v. Parisi*, 2016 WI 10, 367 Wis. 2d 1, 875 N.W.2d 619 (recognizing exigent circumstances exist where critical evidence of heroin use was disappearing among other factors). In analyzing this case, the Court should consider what a typical OWI investigation looks like, the increase in drug impaired driving, and the difficulties created by untimely blood draws in drug impaired driving cases.

a. The Court should consider what typical OWI investigations look like in applying the exigent circumstances doctrine.

A typical impaired driving case involves something similar to the following facts which demonstrate the exigency in drawing blood from

¹ The City of Eau Claire strongly agrees with the State of Wisconsin that the exigent circumstances argument was not waived in this case because the new *Mitchell* rule had not yet been announced. *See State v. Rodriguez*, 2007 WI App 252, ¶ 11, 306 Wis. 2d 129, 743 N.W.2d 460 (“A litigant cannot fairly be held to have waived an argument that, at the time, a court of competent jurisdiction had not yet announced.”).

unconscious impaired driving suspects. Police officers observe a traffic violation or respond to a crash. In contacting the driver, police officers observe signs of impairment such as slurred speech, bloodshot or glassy eyes, the odor of intoxicants, slow reaction times, lack of coordination, or other behavior suggesting impairment. Police officers may observe evidence of alcohol or drugs in the motor vehicle or on the impaired driving suspect's person. Sometimes citizen witnesses observe and report bad driving or signs of impairment to the police.

Based on observations of bad driving and indicia of impairment, police officers typically ask the defendant to perform standardized field sobriety tests to observe other signs of impairment. Prior to requesting field sobriety tests, police officers typically first request a backup officer to respond to the scene. Backup officers ensure the primary officer and the impaired driving suspect's safety from oncoming traffic as most field sobriety tests are administered roadside. Depending on the traffic stop or accident's location, other officers' availability, and other variables, waiting for backup can sometimes create delays, particularly in rural areas. *See Taylor Holt, Douglas Co. Officials explain why Jayme Closs response took so long*, <https://www.weau.com/content/news/Douglas-Co-Officials-explain-why-Jayme-Closs-response-took-so-long-504430552.html> (noting it took 30 minutes for law enforcement to arrive at scene where citizen witnesses found kidnapping victim that was part of nationwide law

enforcement search despite officers traveling over 100 mph because of the location's rural nature and road conditions).

After administering field sobriety tests, police officers often request the driver submit to a roadside preliminary breath test. A roadside preliminary breath test is generally admissible for probable cause determinations, but the test result is generally not admissible at trial. Wis. Stat. § 343.303. Police officers also consider roadside preliminary breath test results to determine if impairment might be based on drug use rather than alcohol use. Significant impairment accompanied by a low blood-alcohol concentration often indicates drug use. If the totality of the circumstances demonstrates impairment the driver is placed under arrest.

After the driver is placed under arrest he or she is given the opportunity to submit to a chemical test of his or her blood, breath, or urine. Law enforcement agencies typically get to choose which test an impaired driving suspect takes first, and most law enforcement agencies have a primary test they offer most alcohol impaired driving suspects. The suspect typically has the opportunity to request another test in addition to the law enforcement agency's primary test. Some law enforcement agencies, such as the City of Eau Claire, choose blood as a primary test because it is considered the most reliable test for both drugs and alcohol, and because timely blood draws are critical to drug impaired driving investigations.

If a roadside preliminary breath test result showed a sufficiently high blood alcohol concentration, and the law enforcement agency's primary test is breath, then the police officer will typically request an evidentiary breath test (or a urine test, although urine tests are infrequently used in impaired driving cases). If there is significant impairment and the roadside preliminary breath test result is low, suggesting the impairment is drug related, or if the officer has gathered evidence suggesting drug impairment, or if the law enforcement agency's primary test is blood, then the police officer will request an evidentiary blood test.

If the impaired driving suspect refuses to submit to a test, and the impaired driving violation is not a civil violation, the police officer will attempt to obtain a warrant to obtain a blood sample from the suspect. If the impaired driving violation is a civil violation the police typically will not apply for a blood draw warrant, and will instead simply charge the defendant with a civil refusal charge. A civil refusal counts as an impaired driving conviction in Wisconsin. Not surprisingly, police officers request most blood draw warrants late at night, during early morning hours, and on weekends, which can be burdensome in rural counties with a single or few judges available. Typically, the amount of evidence supporting probable cause for arrest and the blood draw warrant is overwhelming.

Unconscious impaired driving suspects present various challenges. If an impaired driving suspect is unconscious, like Prado in the present case,

then a breath or urine test is not possible, and the only option is an evidentiary blood test. An unconscious impaired driving suspect also cannot typically provide a roadside preliminary breath test sample, perform field sobriety tests, answer questions, or provide other information which help law enforcement ascertain if the suspect's impairment is due to alcohol, drugs, or some combination of intoxicants. When probable cause to arrest a suspect for an unconscious impaired driving related offense exists, the most reasonable step for law enforcement to take is to quickly obtain a blood draw.

This case is precisely the type of situation contemplated by the United States Supreme Court when the new exigent circumstances rule was created in *Mitchell*. Prado's vehicle crossed the center line and struck another vehicle, injuring Prado and her passenger and killing the other driver. (R. 1:3-5, P-App. 146-48). A firefighter detected an odor of intoxicants on Prado's breath. (R. 1:5-6, P-App.148-49). Law enforcement also learned that Prado had three prior OWI convictions. (R.1:6, P-App. 149). The facts demonstrate probable cause to arrest Prado for an OWI related offense, and her unconsciousness precluded other alternative methods of investigating her crime other than a timely blood draw. Waiting to obtain a warrant in the present case would have resulted in the imminent destruction of evidence including Benzoylcegonine, a metabolite of cocaine which was found in Prado's blood sample, and which constitutes a restricted controlled substance under Wisconsin law. Unconscious suspects like Prado should not benefit

because her driving was so bad that she created a fatal crash which rendered her unconscious.

b. Drug impaired driving is a growing problem in the United States.

Drug impaired driving is a growing problem in the United States, and studies suggest up to 22% of drivers involved in accidents use drugs, often in combination with alcohol. *See* Sarah Kerrigan, *Drug Toxicology for Prosecutors*, American Prosecutors Research Institute, 2004, https://ndaa.org/wp-content/uploads/drug_toxicology_for_prosecutors_04.pdf; *See* Fernando A. Wilson, et al., *Fatal Crashes from Drivers Testing Positive for Drugs in the U.S., 1993-2010*, 129 Pub. Health Rep. 342 (2014); Erin Allenman, *Why Your Fourth Amendment Rights Don't Matter: How Birchfield Overlooks the Testing of Drugged Drivers*, 28 Widener Commw. L.Rev. 105 (2019); *see also* Center for Disease Control and Prevention: *Impaired Driving: Get the Facts*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-driv_factsheet.html. The Institute for Behavior and Health estimates that drugged driving causes twenty percent of automobile crashes, which translates into 8,600 deaths, 580,000 injuries, and \$33 billion in property damage each year in the United States. IBH Public Policy Statement 1 (citing Substance Abuse & Mental Health Servs. Admin., Results from the 2007

National Survey on Drug Use and Health: National Findings (2008), <http://oas.samhsa.gov/nsduh/2k7nsduh/2k7results.pdf>).

Marijuana use and marijuana impaired driving are increasing. The most recent national data found marijuana present in 12.2 percent of all fatally injured drivers tested for drugs. Allenman at 105. As states continue to legalize medical and recreational marijuana an increase in marijuana related impaired driving is likely, and the Centers for Disease Control and Prevention reports that 13% of nighttime and weekend drivers have marijuana in their system. Center for Disease Control and Prevention: *Impaired Driving: Get the Facts*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html. The National Highway Traffic Safety Administration (“NHTSA”) reported an increase in the number of drivers using marijuana or other illegal drugs from 2007 to 2015. Allenman at 117.

In addition to marijuana, increases in other impairment causing drugs exist. In 2017 the United States Department of Health and Human Services declared opioid abuse to be a “public health emergency.” U.S. Department of Health and Human Services, *What is the U.S. Opioid Epidemic?* <https://www.hhs.gov/opioids/about-the-epidemic/index.html>. Each day, ninety-one people die from opioid overdoses. *Id.* Not surprisingly, a recent study concluded that prescription opioid use is associated with increased risk of involvement in a fatal two-vehicle crash, due in large part to a failure to

stay in the proper lane. Stanford Chihuri, Guohua Li, *Use of Prescription Opioids and Initiation of Fatal 2-Vehicle Crashes*, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2724775>.

Millions of drivers in the United States take licit and illicit drugs before driving. Tina Wescott Cafaro, *Slipping Through the Cracks: Why Can't We Stop Drugged Driving*, 32 W.New. Eng. L. Rev. 33, 35 (2010); Substance Abuse & Mental Health Servs. Admin., U.S. Dept. of Health & Human Servs., Results from the 2006 National Survey on Drug Use and Health, National Findings 2 (2007), <http://oas.samhsa.gov/nsduhl/2k6nsduh/2k6results.pdf>.

Hazardous inhalants and volatile substances are another growing area of impaired driving, and chemical evidence of these substances only stay in a user's system for a short time. See R.J. Flanagan, et al, *Volatile Substance Abuse, Practical Guidelines for Analytical Investigation of Suspected Cases and Interpretation of Results*, United Nations Office on Drugs and Crime, https://www.unodc.org/pdf/technical_series_1997-01-01_1.pdf (noting an estimate that 7 to 12 percent of American high school students have used volatile substances, that about 4 percent use volatile substances regularly, that volatile substances can produce central nervous system effects similar to those of other sedatives, and that volatile substances can induce more profound effects such as delusions and hallucinations); see also Eric Lindquist, *Wisconsin Girl Scouts' crash death puts spotlights on dangers of*

'huffing', Twin Cities Pioneer Press, November 22, 2018, <https://www.twincities.com/2018/11/22/wisconsin-girl-scouts-crash-death-puts-spotlights-on-dangers-of-huffing/> (In discussing a Chippewa Falls, Wisconsin case involving a hazardous inhalant impaired driver who killed three girl scouts and a mother as they were picking up trash along a county highway, noting that chemical evidence of “huffing” volatile substances only stays in the user’s system for a short time.).

c. Blood draw delays in drug impaired driving cases create difficulties in investigating, prosecuting, and defending these cases.

Blood draw delays in drug impaired driving cases can significantly frustrate the ability to investigate, prosecute or defend the case because most drugs are not eliminated from the human body at a linear rate similar to alcohol.² The non-linear elimination of drugs makes it extremely difficult to extrapolate backwards and estimate drug concentration at the time of driving. Driving is a complex task which involves coordination, reaction time, tracking, judgment, divided attention, and perception. Kerrigan at 3. Drugs which impact mental or physical processes can impair the ability to safely operate a motor vehicle.

² Although anecdotal, this author is aware of cases in his career in which timely blood draws have exonerated drug impaired driving suspects whose signs of impairment were based on other medical conditions. Timely blood draws benefit the prosecution more often than the defense, but the focus should be on obtaining the most just results in the most cases. An approach in which more guilty suspects escape punishment and more innocent suspects are punished is not just.

Investigating, and prosecuting drug-impaired drivers is a daunting task. *Id.* at v. Drugs are often used in combination with alcohol or other drugs, and precisely diagnosing drug related impairment can be far more complicated than alcohol related impairment because different drugs and drug combinations have different signs and symptoms. *Id.* at 5. Police officers may observe clear impairment, but determining what drug, drug combination, or drug and alcohol combination a drug impaired driving suspect is under the influence of is challenging without a timely blood test.

Drug classes include depressants, stimulants, opioids (narcotics), or hallucinogens. These classes can be further subdivided, based upon the intended use of the drug. *Id.* at 11. Different drugs and drug combinations (including alcohol) have different signs and symptoms. *Id.* at 12, 23-25 (noting a variety of different signs and symptoms for various drugs). For example, some drugs such as depressants slow reflexes and slur speech similar to alcohol, while some drugs such as stimulants increase blood pressure and excitation. *Id.* The increased and prevalent use of alcohol in combination with other drugs, along with the fact that many drugs share signs and symptoms with alcohol, creates additional challenges for impaired driving investigation and prosecution, particularly without timely blood draws. *See* Kerrigan at 4. Some drugs have the potential to impair driving performance for extended periods, while others may impair during the

“crash” phase, during which time an individual’s drug concentration may be decreasing or very low. *Id.* at 4.

Different drugs and drug combinations, as well as hazardous inhalants or volatile substances, may involve different absorption, distribution, metabolism, and elimination in the human body. *Id.* at 11-20. Alcohol is typically eliminated from the human body in a *linear* rate which means that the body eliminates it at a relatively constant amount per unit of time. *Id.* at 16. Conversely, most drugs are eliminated in a non-linear rate, and are thus characterized by a variable half-life which makes it extremely difficult to extrapolate backwards from a known drug concentration to some earlier time and concentration. *Id.*

Toxicologists testifying about the effects of drugs on a particular individual often adopt a multi-strategy approach to interpretation. *Id.* at 13. Analytical test results demonstrating the presence and quantity of a drug or its metabolite in a biological sample are critically important, and often need to be supplemented by performance on psychophysical tests, values obtained in physiological assessments, unusual behaviors, statements, and other observations. *Id.* at 8.

The gold standard in testing drivers for drugs is a blood test. Allenman at 123. Blood tests are very reliable because they reflect recent use and indicate which drugs are circulating in the body at the time the blood is drawn. Allenman at 123. The closer blood is withdrawn to the time of

driving, the greater the interpretative value the test result will have. Kerrigan at 33. Blood tests are currently the least intrusive reliable method of testing what drugs are in an impaired driving suspect's body at the time of driving. *Id.* at 33-37.

Any rule that delays law enforcement's ability to obtain a blood sample leads to evidence destruction. Delays in obtaining drug related evidence are especially problematic because most drugs are not eliminated from the human body at a linear rate which makes it difficult to extrapolate backwards and estimate drug concentration at the time of driving. In some cases, delays in obtaining a blood test can result in the complete destruction of relevant drug related evidence.

Concluding that exigent circumstances exist in unconscious impaired driver cases like the present case recognizes it is not always possible for law enforcement officers observing signs of impairment to distinguish between alcohol impairment and impairment based on a combination of alcohol and drugs. The natural dissipation of drugs, the unpredictable nature of that dissipation, the challenging nature of drug impaired driving investigation and prosecution without precise drug concentrations at the time of driving, and the lack of supplementary information like field sobriety tests and preliminary breath tests all support *Mitchell's* conclusion that exigent circumstances will be present in almost all impaired driving investigations

involving unconscious suspects. Timely blood draws may also provide defendants the best evidence to defend themselves.

2. In the alternative, the Court should not apply the exclusionary rule because the police officer relied in good faith on a statute which had not been found unconstitutional.

The Court should not apply the exclusionary rule because the police officer relied in good faith on a statute which had not been found unconstitutional. The exclusionary rule is not an individual right and applies only where it results in appreciable deterrence. *Herring v. United States*, 555 U.S. 135, 140-41 (2009). The United States Supreme Court has repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. *Id.* Additionally, the benefits of deterrence must outweigh the costs. *Id.* An assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule. *Id.* Evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. *Id.* at 143.

The Court should clarify that the Court of Appeals' application of the good faith exception is incorrect, and law enforcement can generally rely on a statute until the statute is found unconstitutional. In this case the officer relied on a state statute that no court had held unconstitutional in highly dynamic circumstances that the United States Supreme Court recently

concluded would almost always constitute exigent circumstances. Applying the good faith exception so narrowly as to not cover the actions in this case provides no appreciable benefit while discouraging the type of proactive police work which helps keep Wisconsin roads safe from impaired drivers. Concluding that the good faith exception does not apply when court cases (allegedly) overrule state statutes by implication is simply not a workable approach.

CONCLUSION

For all the foregoing reasons the Court should affirm the court of appeals' decision reversing the circuit court's order that granted Prado's motion to suppress evidence.

Dated: March 6, 2021

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a brief produced with a proportional serif font. The length of this Brief is 3446 words.

Dated this 6th day of March, 2021

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as this date.

A copy of this certificate is being served with the paper copies of this filed with this court and served on all opposing parties as of this date.

Dated this 6th day of March, 2021

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