STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2019AP1942 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant.

Appeal of a Judgment Entered in the Sheboygan County Circuit Court, the Honorable Terence T. Bourke, Presiding, and from the Order Entered in the Sheboygan County Circuit Court, the Honorable Rebecca L. Persick, presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Police arrested Gerald Mitchell for operating while intoxicated. They took him to the police station and placed him in a holding cell. After some time at the station, police decided to take Mitchell to the hospital and take his blood. On the trip to the hospital, Mitchell lost consciousness. No warrant was ever sought, and police took Mitchell's blood about an hour and a half after his arrest. The issues presented are:

1. Does Wisconsin's implied-consent statute supply consent in the constitutional sense, such that no warrant was required?

   The trial court initially held that it did and no appellate court has decided the question; this court should hold that the statute does not create an exception to the warrant requirement.

2. Did Mitchell's eventual unconsciousness create an exigency that permitted the warrantless blood draw?

   The circuit court held that it did; this court should hold that there was no exigency.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Mitchell would welcome oral argument if the court should desire it. Publication may be

merited, as neither of the constitutional questions presented have been resolved in this state.

STATEMENT OF THE CASE

A. Factual Background

In May of 2013 in Sheboygan, Gerald Mitchell's neighbor called the police. He said Mitchell's sister had called him and said Mitchell was planning to take his own life. (150:105-06). The neighbor found Mitchell in the stairwell of his apartment building. (150:94). Mitchell seemed agitated and the neighbor thought he was intoxicated; the neighbor watched Mitchell get into a van and drive off. (150:95,100-01). At his trial, Mitchell would testify that on that day he was depressed and had decided to kill himself. (150:244-45). To that end he'd mixed a half-liter of vodka with Mountain Dew in a large cup, and brought that and 40 pills to the shore of Lake Michigan. He took the pills and drank the drink. (150:247-48,254).

Police quickly located Mitchell walking near the lake; his van was found parked nearby. (150:220). He was belligerent and was having trouble staying upright. (150:197,210). The officers had Mitchell take a preliminary breath test and it revealed a BAC of .24. (147:16). The police loaded Mitchell into a squad car and took him to the police department "for further processing." (147:17). There, he was placed in a holding cell, where at some point he "began to close his eyes and sort of fall asleep or perhaps pass out,"

though he "would wake up with stimulation." (147:16-17). Police then decided to take him to the hospital for a blood draw. (150:13-14). By the time they arrived at the hospital he was unresponsive and could not be roused. (147:18).

An officer read the "Informing the Accused" form aloud in Mitchell's presence, though Mitchell remained unconscious. The officer then directed hospital personnel to take Mitchell's blood for testing. (147:19-23). The blood was drawn about an hour and a half after Mitchell's arrest. (150:177). Testing showed a .222 BAC.

B. Procedural Background

Mitchell was charged with operating while intoxicated and with a prohibited blood alcohol concentration. (17). He moved to suppress the blood test results on the ground that his blood was taken without a warrant or exigent circumstances. (25). The state agreed there was no exigency, but argued that, per the statute, Mitchell had consented to the test by driving, and had not withdrawn his consent. (147:45; 32). The trial court upheld the search, relying on the implied-consent statute. (147:50-51). The state introduced the test results at Mitchell's jury trial, and he was convicted of both counts. (150:178,315).

Mitchell appealed the suppression decision, and the court of appeals certified the case to the Supreme Court of Wisconsin, noting a single issue: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent

law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." 2015AP304-CR, Certification of May 17, 2017. (App. 135)

The state supreme court accepted certification. It ultimately upheld the search by a 5-2 vote, but there was no majority for any rationale. *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151. Mitchell petitioned the Supreme Court of the United States for certiorari, which was granted. That Court vacated the state supreme court decision and remanded for further proceedings. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

Those further proceedings were ordered so that the state courts could apply the new rule the Supreme Court announced regarding exigent circumstances: that they would typically be present in the case of an unconscious motorist, unless "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties" and the defendant's "blood would not have been drawn if police had not been seeking BAC information." *Id.* at 2359. The circuit court held a second evidentiary hearing to address these questions.

The arresting officer was the sole witness. He testified that he'd made the arrest at 4:26 p.m. (152:4; App. 104). He then drove to the police station, a journey of about five minutes. (152:5; App. 105). There, Mitchell was placed in a holding cell. (152:6;

App. 106). However, police decided to take Mitchell to the hospital with the purpose of performing an evidentiary blood draw. (152:6,8; App. 106,08). The reason for this decision, the officer testified, was that Mitchell was incapable of standing safely, and the breath-testing machine at the police station required the subject to stand during the test. (152:10; App. 110).

The officer had earlier testified that he "wasn't so concerned of medical concerns" until the ride over to the hospital, when Mitchell's "condition increasingly became worse." (142:18). He did not know, at the time, that there was reason to believe Mitchell had attempted suicide. (142:18-19). At the new hearing he added that he thought Mitchell was drunk because of his condition and symptoms and the PBT result; he had no information about Mitchell having ingested any other substances. (152:8; App. 108). He also testified that he was concerned that the jail would not hold Mitchell until he had been medically cleared. (152:22-23; App. 122-23).

To that end the officer placed Mitchell in his squad and began the eight-minute drive to the hospital. (152:6; App. 106). During the drive, Mitchell's condition declined, such that by the time they arrived the officer could not wake him, and needed the assistance of another officer to place him in a wheelchair and wheel him inside. (152:14,19-20; App. 114-20).

At the hospital, the officer testified, medical staff "monitored" and "assessed" Mitchell. (152:8; App. 108). In response to the state and the court's examination, he claimed he had seen medical staff take blood from Mitchell independent of the evidentiary blood draw, though he'd previously testified that he could recall only an attempt to collect urine, and had no recollection of other procedures. (152:21-22,26; App. 121-22,126). He testified that Mitchell didn't get out of the hospital that day, and stayed for more than one day in the ICU. (152:22; App. 122).

The officer testified that he never considered getting a warrant for the blood draw, and never asked any other officer about getting one. (152:12; App. 112). This was so though he was with Mitchell at the police station during business hours on a weekday, and other officers were present. (152:12-13; App. 112-13). He agreed that at present he "maybe" could get a warrant within 20 minutes. (152:13; App. 113)

The circuit court denied suppression, saying

> [N]ormally when someone gets to the hospital, the officer would go over the Informing the Accused form with the defendant and get the defendant's consent. And in 2013, that would certainly be -- and now -- sufficient for the officer to get a warrantless blood draw. A warrant wouldn't have been required.
>
> But the officers were denied that opportunity because your client was unconscious by the time they got to the hospital. So I don't think it's that

they decided to get a warrantless blood draw. I think that once they got there, his condition had deteriorated so drastically they weren't able to get his consent. And by that time I think a blood draw was necessary for medical reasons. Particularly in light of the information that he was suicidal, I think quick action would have been necessary.

So the United States Supreme Court in the *Mitchell* decision used some pretty strong language saying that the warrant requirement, the Fourth Amendment, the exigent circumstances exception to the Fourth Amendment warrant requirement almost always permits a blood test without a warrant where a driver suspected of drunk driving is unconscious and therefore cannot be given a breath test.

So they seem to acknowledge that it would be a very rare situation where a warrantless blood draw in that situation would not be permissible. And they did set out this two-prong test. The first prong is whether the blood would not have been drawn if police hadn't been seeking BAC information.

And I think it's clearly established that it would have because his condition was so dire by the time he arrived at the hospital.

I do want to touch on the second prong for a couple reasons. The second prong is the police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. I think that that other pressing needs clause is very relevant in this particular situation because of Mr. Mitchell's very dire medical situation.

Time would have been of the essence to treat him, especially, again, with that information that

> he was potentially suicidal and may have done something to harm himself. And I think under those circumstances, it would have been unconscionable for the police to delay the proceedings to get a warrant when lifesaving measures may have been needed and apparently were since he ended up in the Intensive Care Unit.
>
> The other thing I wanted to touch on -- and it could have been elicited through testimony by me, and I simply didn't do it because of that pressing health need which necessitated a blood draw. And that is that in 2013, the district attorney at that time was Joe DeCecco. And he was very, very vocal and got quite a bit of local press about the fact that his office was understaffed. And that is something that would have been well known to police and to the community.
>
> And it may be unique to our county and is still a problem in our county as a matter of fact. And so that certainly would have informed the police's decision to get a warrant if there had been time if there hadn't been a medical crisis. I didn't think it was necessary to get into that because there was a medical crisis in this situation, and Mr. Mitchell needed to be assessed quickly to hopefully preserve his life.

(152:30-33; App. 130-33).

ARGUMENT

I. Introduction

On its first trip through the Wisconsin courts, one issue was litigated in this case: whether Mitchell's blood draw was valid under the consent

exception to the search warrant requirement. More precisely the question was whether the existence of Wis. Stat. § 343.305(3)(b), which purports to supply consent where an OWI suspect is unconscious, supplies blanket consent in a Fourth Amendment sense.

This question was not answered by the Wisconsin Supreme Court, because its fractured decision did not contain a majority of justices for any legal conclusion. Moreover, that court's judgment was later vacated by the Supreme Court of the United States. So there's no binding state answer to this constitutional question.

There's no federal answer either, because the plurality opinion (which, with the addition of Justice Thomas's concurrence, supplies the deciding rationale) did not address the question. Instead, the Court laid out a new set of rules for unconscious OWI suspects under the doctrine of exigency. The Court simply did not address what, if any, impact the statute may have on the question of constitutional consent.

Because the consent issue has never been definitively decided, it remains live in this case. Mitchell will therefore address it first, before turning to the question of whether, in the alternative, the taking of his blood can be justified by exigency.

II. The implied-consent statute cannot supply voluntary consent so as to justify a warrantless blood draw under the Fourth Amendment.

A. There is no binding law on the question.

The Wisconsin Supreme Court has been asked several times in recent years to decide whether the implied-consent law supplies actual, constitutional consent, but it has not issued a binding decision on the question. In both *State v. Howes*, 2017 WI 18, 373 Wis. 2d 468, 893 N.W.2d 812, and *State v. Brar*, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499, the parties briefed whether the implied-consent statute satisfied the consent exception to the warrant requirement, but in each case, only three justices concluded that it did.

In this case's first journey through our court system, the state supreme court again addressed the implied-consent law as applied to an unconscious motorist. Once again, only three justices concluded that the statute supplied consent in the constitutional sense. *State v. Mitchell*, 2018 WI 84, ¶¶1-66 383 Wis. 2d 192, 914 N.W.2d 151. Two justices—Justice Kelly, who wrote in concurrence, and Justice Rebecca Bradley, who joined him—voted to uphold the blood draw as a valid search incident to arrest. *Id.*, ¶¶67-85. But, again, this conclusion was rejected by five of the seven justices.

So, there was no majority: either for the notion that implied consent is constitutional consent; or for

the notion that a blood draw from an unconscious motorist is a valid search incident to arrest. In Wisconsin, where there is no "majority of the participating judges" for any "particular point," no binding law is made. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995); *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 334, 565 N.W.2d 94 (1997) (where three separate opinions gave three distinct reasons for the result "none of the opinions in that case ha[d] any precedential value"). Because the decision in *Mitchell* contains no majority for any proposition of law, it establishes no precedent. This would be true even if it hadn't been vacated by the Supreme Court of the United States.

B. There is no conflict on the question in decisions of this Court, so the Court is free to decide it.

When this Court last had this case, it certified it, concluding that two prior decisions were in conflict. Certification of May 17, 2017. (App. 135-48). The two cases—*State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, and *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867—are not truly in conflict and do not reach the question here. This Court can and should decide the question of constitutional consent.

In *Wintlend*, the (conscious) motorist submitted to a blood test after being arrested and hearing the officer read the informing the accused form. 258 Wis. 2d 875, ¶2. The motorist contended the

choice presented by the form was coercive, such that his choice to permit the test was not voluntary in a constitutional sense. *Id.*

In rejecting this argument, this Court cited a state supreme court case, *State v. Neitzel*, 95 Wis. 2d 191, 289 N.W.2d 828 (1980) that was not about the Fourth Amendment at all. *Neitzel* said that a motorist, on obtaining a license,

> submits to the legislatively imposed condition on his license that, upon being arrested and issued a citation for driving under the influence of an intoxicant … he consents to submit to the prescribed chemical tests. He applies for and takes his license subject to the condition that a failure to submit to the chemical tests will result in the sixty-day revocation of his license unless the refusal was reasonable.

Id. at 193.

Wintlend repeated *Neitzel*'s statement that "when a would-be motorist applies for and receives an operator's license, that person submits to the legislatively imposed condition that, upon being arrested for driving while under the influence, he or she consents to submit to the prescribed chemical tests." 258 Wis. 2d 875, ¶12. But also like *Neitzel*, in the next paragraph it clarified that the "consent" it's talking about is not consent to the blood test itself: on getting a license the motorist is consenting "to take a test *or* lose the license." 258 Wis. 2d 875, ¶13. This is, (as *Padley* noted) the way the implied-consent statute operates with respect to conscious motorists. It's also

the sort of scheme the Supreme Court blessed in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). *Wintlend* just wasn't about the statute at issue here, which doesn't put the motorist to any sort of choice about submitting to a blood test: it simply declares that the test will be performed.

Padley, of course, didn't deal with this statute either: it likewise addressed the provisions applicable to conscious motorist. 354 Wis. 2d 545, ¶39 n.10. *No* Wisconsin appellate court has held that a person getting a driver's license consents not simply to being put to the choice of taking a test or losing the license, but to the actual test itself. If *Wintlend* and *Padley* conflict at all, that conflict isn't related to the question in this case. The Court is free to decide it.

C. The implied-consent statute cannot supply constitutionally sufficient consent to a blood test.

The Fourth Amendment generally forbids warrantless searches, and a blood draw to test for alcohol is a search. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). So, a blood draw violates the Fourth Amendment unless it falls within one of the established exceptions to the warrant requirement. *Id.* Consent is one exception to the warrant requirement but, to validate a search, not just any "consent" will do. The consent must be given "freely and voluntarily"—be "an essentially free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 225 (1973).

Courts determine whether consent is free and voluntary by examining the totality of the circumstances. Factors the Wisconsin Supreme Court has enumerated include (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent. *State v. Artic*, 2010 WI 83, ¶33, 327 Wis. 2d 392, 786 N.W.2d 430. So, though "voluntary consent" is a legal term of art, its meaning is not much different from the everyday meaning of those two words: a person has voluntarily consented under the Fourth Amendment when, under all the facts and circumstances, they've made a free choice to permit, rather than refuse, a particular search.

Wisconsin Stat. § 343.305(3)(ar) and (b) are in a section of the statutes containing another provision titled "Implied Consent." But what they prescribe clearly has nothing to do with the above constitutional concept. What they say (as pertinent here) is that if the police have probable cause for OWI, or if a driver has been in an accident causing

serious injury and the police detect "any presence of alcohol," and the suspected driver is unconscious, they can take his blood. Far from describing a "free and unconstrained" choice to consent, the statute provides no choice at all. It is just not about consent, constitutional or otherwise.

What it is, instead, is a declaration of *policy*: the legislature has decided that a certain group of people may be searched without consent. The statute's only link to "consent" consists of a sort of legislative gesture toward the concept: a declaration that a certain class of people—motorists—are "deemed to have given consent" to having their blood taken. But, of course, a legislative enactment cannot defeat a constitutional requirement. The legislature can no more "deem" a motorist to have consented to a blood draw by driving than a city could "deem" a resident to have consented to warrantless home searches by connecting to the municipal water supply. The Fourth Amendment requires a particular inquiry into consent, and legislation cannot sweep that away.

For these and related reasons, courts in Arizona, Georgia, Kansas, North Carolina, Pennsylvania and Texas have held that statutes purporting, in the name of "implied consent," to allow warrantless blood draws from unconscious motorists are unconstitutional. In *Williams v. State*, for example, the Supreme Court of Georgia held that "mere compliance with statutory implied consent requirements does not, per se, equate to actual, and

therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant." 771 S.E.2d 373, 377 (Ga. 2015).

Several courts have observed what Mitchell noted above: that these statutes deem searches "consensual" without requiring any assessment of whether a motorist's supposed consent is voluntary under the "totality of all the circumstances," as the Supreme Court has long required. *See Schneckloth*, 412 U.S. at 227. Thus, the Supreme Court of North Carolina: "[t]reating [the statute] as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances." *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017).

The Texas high court employed the same reasoning in *State v. Villarreal*, saying implied consent as a warrant exception cannot "be squared with the requirement that, to be valid for Fourth Amendment purposes, consent must be freely and voluntarily given based on the totality of the circumstances, and must not have been revoked or withdrawn at the time of the search." 475 S.W.3d 784, 800 (Tex. Crim. App. 2014). *See also State v. Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (Kan. Ct. App. Aug. 21, 2015) (under implied-consent statute, officer contemplates only certain statutory facts, rather than "the rest of what was going on …

'the totality of the circumstances'"). And, in *Commonwealth v. Myers*, the Supreme Court of Pennsylvania interpreted that state's implied-consent statute not to authorize blood draws from unconscious motorists. 164 A.3d 1162, 1172 (Pa. 2017). However, it went further, saying that if it had interpreted the statute this way, it would be unconstitutional, because such "consent" does not satisfy the requirement that "voluntariness is evaluated under the totality of the circumstances." *Id.* at 1176.

Other states have also concluded, in other contexts, that implied-consent statutes cannot supply the voluntary consent the Fourth Amendment requires. For example, South Dakota's implied-consent law simply authorizes the taking of blood: conscious or not, a motorist has no opportunity under the statute to refuse. S.D. CODIFIED LAWS § 32-23-10. So in *State v. Fierro*, a case involving a conscious motorist who did not, factually, consent to a blood draw, the Supreme Court of South Dakota held the law unconstitutional because it authorized "consent" searches where actual, "free and voluntary consent" was absent. 853 N.W.2d 235, 241 (S.D. 2014). Similar results were had in *People v. Turner*, 97 N.E.3d 140, 152 (Ill. App. Ct. 2018) and *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014).

Other courts have struck down statutory provisions authorizing implied-consent blood draws before going on to consider whether, under the totality of the circumstances, the driver actually gave

voluntary consent. *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015); *State v. Pettijohn*, 899 N.W.2d 1, 26–27 (Iowa 2017) ("[T]he clear implication of the *McNeely* decision is that statutorily implied consent to submit to a warrantless blood test under threat of civil penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment."); *State v. Modlin*, 867 N.W.2d 609, 619 (Neb. 2015). Finally, one court, faced with a statute that facially authorized blood draws without regard to actual consent, found the blood draw at issue unlawful but refrained from invalidating the statute, deciding instead that the its language could be read to authorize only warranted searches. *State v. Wells*, No. M2013-01145-CCA-R9CD, 2014 WL 4977356, slip op. at 13, 19 (Tenn. Crim. App. Oct. 6, 2014).

A small minority of jurisdictions have concluded that an implied-consent statute can supply actual, constitutional consent, but their reasoning cannot withstand scrutiny.

These courts' analyses have typically viewed *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), as blessing (or at least not forbidding) this conclusion. The most cited of these decisions is *People v. Hyde, 393 P.3d 962 (Colo. 2017), another case involving an unconscious motorist. The*re, the supreme court relied on *Birchfield*'s sanctioning of "the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, *and nothing we say*

here should be read to cast doubt on them." *Hyde*, 393 P.3d at 968 (emphasis added by Colorado court) (citing *Birchfield*, 136 S.Ct. at 2185).

The court allowed that *Birchfield* had rejected implied-consent laws imposing criminal penalties for refusal, but noted that Colorado's imposed only civil ones. From this, the court concluded (without further explanation) that because legislatures may levy civil penalties on motorists who refuse a blood draw, they may also simply authorize such blood draws, regardless of actual consent. *Id.* (The Court of Appeals of Virginia took the same route on the way to announcing an "implied consent exception to the search warrant requirement." *Wolfe v. Commonwealth*, 793 S.E.2d 811, 814-15 (Va. Ct. App. 2016).).

Hyde (and *Wolfe*) misread *Birchfield*. When *Birchfield* spoke favorably of implied-consent laws, it was talking about a particular variety: "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." 136 S. Ct. at 2185 (emphasis added). Such laws are, of course, completely different from provisions like the one here, which permits the taking of blood without a warrant. Rather than imposing civil penalties for refusing to comply, the statute outright eliminates the ability to refuse. And it's not at all convincing to claim that *Birchfield*'s approval of civil penalties for refusal (as opposed to criminal ones, which it held unconstitutional) means that states imposing only civil penalties for refusal

(like Wisconsin) are also free to dispense altogether with the *possibility* of refusal. *Hyde*; 393 P.3d at 968. In fact, *Birchfield*'s reasoning strongly implies the opposite: if criminal penalties for refusal are unlawful because they too heavily burden the exercise of the Fourth Amendment right to refuse a blood test, can it really be that the state can outright abolish the very same right?

In sum, the few courts that have held that "implied consent" laws supply Fourth Amendment consent have ignored that constitutional doctrine's long-established meaning. A legislature's policy choice to "deem" a class of people to have consented cannot overcome an individual's Fourth Amendment rights.

III. The warrantless taking of Mitchell's blood was not justified by the exigency doctrine.

The Supreme Court's decision in this case, while avoiding the consent issue, provided an alternative ground on which states could justify blood draws from unconscious motorists. The four-justice plurality[1] held that unconscious drunk-driving suspects typically present exigent circumstances. Specifically, the opinion said that the exception would not apply where a defendant could

[1] Justice Thomas concurred, restating his view that the natural dissipation of alcohol in a driver's blood always supplies exigent circumstances. *Mitchell*, 139 S. Ct. at 2539-41. Because the four-justice plurality relied on narrower grounds than the concurrence, it supplies the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977).

> show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

Mitchell, 139 S. Ct. at 2539.

The warrantless blood draw here was not the product of exigency. The state has never suggested that the officer could reasonably have judged that getting a warrant would interfere with other pressing needs or duties, and nothing in his testimony at either hearing would support such a conclusion. And though Mitchell's condition later deteriorated to the point that he required hospitalization, the police had no way of knowing this would happen when they opted for a warrantless blood draw. It was the decision to take him to the hospital for an evidentiary blood draw, rather than any medical need on his part, that led to the taking of Mitchell's blood.

A. The officer could not reasonably have judged that getting a warrant would have interfered with other pressing needs or duties.

The state has never claimed anything prevented the arresting officer from seeking a warrant. His testimony at the hearing on remand confirmed this. Mitchell arrived at the police station during business hours on a Thursday. (152:13; App. 113). Other on-duty officers were present. (152:13;

App. 113). The officer agreed that 20 minutes might be a reasonable amount of time for the process to take. (152:13; App. 113). The reason no warrant was sought was not because there was any obstacle to getting one; it was that the officer simply did not consider doing so. (152:12,14; App. 112,114).

There was thus no reason for the officer to think getting a warrant would prevent him from carrying out other important duties. The circuit court's comment that the previous District Attorney complained publicly about understaffing is not evidence to the contrary. (152:32-33; App. 132-33). This is particularly so given that the arrest happened at 4:26 p.m., and the test did not occur until 5:59 p.m. (152:5; 150:177; App. 105). During much of this time, Mitchell was sitting in a holding cell at the police station; nothing prevented the officer from initiating a warrant request during this delay.

B. The officer could not reasonably anticipate that Mitchell's blood would be drawn anyway.

The basic test to determine whether exigent circumstances exist is an objective one: "Whether a police officer under the circumstances known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *State v. Larson*, 2003 WI App 150, ¶17, 266 Wis. 2d 236, 668 N.W.2d 338.

To this general rule, *Mitchell* adds a wrinkle: in the context of an unconscious OWI suspect, the taking of blood for medical reasons—that is, the taking of blood that would have happened even "if police had not been seeking BAC information"—will by itself sustain a reasonable belief that the delay in seeking a warrant must be avoided. 139 S. Ct. at 2539. As the Court put it elsewhere, if police can "reasonably anticipate that [a driver's] blood may be drawn anyway, for diagnostic purposes, immediately on arrival" they need not seek a warrant. *Id.* at 2537-38.

As the officer noted, Mitchell did end up staying in the hospital for more than a day: he had swallowed a large number of pills as part of a suicide attempt. (152:22-23; App. 122-23). But as the officer testified, he did not know this fact—not when Mitchell was arrested and not when he was at the police station. (152:8; App. 108). It was only on the way to the hospital—*after* he'd made the decision to obtain Mitchell's blood without a warrant—that Mitchell lost consciousness and the officer began to develop concerns about his medical condition. (152:15; App. 115).

Thus at the time the officer elected to proceed with a warrantless blood draw, he could not "reasonably anticipate" that Mitchell's blood would be "drawn anyway" if he had not "been seeking BAC information." There was thus no exigency under *Mitchell*.

What's more, even the fact of Mitchell's unconsciousness—the fact that can, in some circumstances, make the exigency doctrine available under *Mitchell*—was not present at the time the officer decided to perform a warrantless blood draw. Mitchell was not unconscious on his arrest, or his arrival at the police station; he became unconscious only on the drive to the hospital. The drives to the police station and to the hospital were only a few minutes each; this means that for a substantial time Mitchell was sitting in a holding cell, conscious. There was no testimony about what was occupying the arresting officer (or any other officer) during this time.

Under the doctrine of "police-created exigency," "police may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police." *Kentucky v. King*, 563 U.S. 452, 461 (2011). "[T]he government cannot justify a search on the basis of exigent circumstances that are of the law enforcement officers' own making." *State v. Kiekhefer*, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997).

Here, the delay at the police station—a delay "caused by police inaction … may not be used as justification for a warrantless" search. *Com. v. Sergienko*, 503 N.E.2d 1282, 1286 (Mass. 1987). *See also State v. Dunlap*, 395 A.2d 821, 825 (Me. 1978) ("an exigency that will justify a warrantless search cannot be one which was created by unreasonable

delay on the part of the law enforcement authorities"). Any urgency arising from Mitchell's unconsciousness came about only because police did not expeditiously pursue either actual consent or a warrant to take his blood. The exigency exception does not apply.

CONCLUSION

Because the warrantless taking of Gerald Mitchell's blood was supported neither by consent nor by exigency, he respectfully requests that this Court reverse his conviction and remand with directions that the blood be excluded.

Dated this 17th day of January, 2020.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,680 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of January, 2020.

Signed:

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Assistant State Public Defender

A P P E N D I X

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