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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP1942-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE TERENCE T. BOURKE AND THE HONORABLE REBECCA L. PERSICK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

In *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019), the United States Supreme Court held that subject to a limited exception, exigent circumstances justify a warrantless blood draw from an OWI suspect who is unconscious and taken to a hospital before a breath test can reasonably be conducted. The Supreme Court remanded this case to give Gerald P. Mitchell an opportunity to show that his is the unusual case in which that rule does not apply because (1) "his blood would not have been drawn if police had not been seeking BAC [blood alcohol concentration] information," and (2) "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.*

1. Is Mitchell entitled to suppression of his blood test result because his is the unusual case in which exigent circumstances do not justify a blood draw from an unconscious driver taken to the hospital before a breath test can be conducted?

The circuit court answered no. It concluded that Mitchell failed to show either that "his blood would not have been drawn if police had not been seeking BAC information," or that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties."

This Court should affirm because Mitchell did not meet his burden of showing that the Supreme Court's general rule does not apply to him.

2. If exigent circumstances were not present, was the blood draw nonetheless authorized under Wisconsin's implied consent law?

The circuit court initially concluded that the blood draw was justified by Mitchell's implied consent. On remand from the United States Supreme Court the circuit court concluded that the blood draw was justified by exigent circumstances, so it did not decide whether the blood draw was also justified by Mitchell's implied consent under the statute.

This Court should not address the consent issue for two reasons. As this Court previously recognized, to decide the consent issue this Court would need to resolve a conflict between its prior opinions, and this Court is unable to do so. Moreover, it is unnecessary to determine whether the blood draw was justified by Mitchell's implied consent because it was justified by exigent circumstances.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, the State of Wisconsin (State), does not request oral argument. The State believes that publication of this Court's opinion may be appropriate to provide guidance on applying the rule the Supreme Court established in *Mitchell v. Wisconsin* for blood draws from unconscious drivers and the exception to that rule.

INTRODUCTION

This case concerns a blood draw taken from Mitchell at a hospital after he was arrested for OWI and while he was unconscious. After the circuit court denied Mitchell's motion to suppress his blood test result, a jury found him guilty of OWI. This Court certified the case to the Wisconsin Supreme Court, which affirmed Mitchell's conviction. The United States Supreme Court granted review, and it established a general rule for cases like this one, where police have probable cause that a person has driven while under the influence of an intoxicant, the person is unconscious and taken to a hospital, and police do not have an opportunity to conduct a

breath test. Under those circumstances, a blood draw may be conducted without a warrant, pursuant to exigent circumstances. *Mitchell*, 139 S. Ct. at 2539.

The Supreme Court provided a limited exception to this general rule for the "unusual case" in which a defendant can show *both* 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." *Id.*

Recognizing that Mitchell was unconscious, that he had been taken to the hospital, and that police did not have an opportunity to conduct a breath test, the Supreme Court remanded the case to afford Mitchell an opportunity to show that this is the "unusual case" in which the general rule does not apply. *Id.* at 2534, 2539.

On remand, Mitchell failed to show either that (1) his blood would not have been drawn if police had not been seeking BAC information, or (2) that police could not reasonably have judged that a warrant application would interfere with other pressing needs or duties. Accordingly, the circuit court denied his motion to suppress.

On appeal, Mitchell argues that the officer could not reasonably have anticipated that Mitchell's blood would have drawn anyway. But that is not the standard. Mitchell was required to show that his blood would not have been drawn had police not been seeking BAC information, and he failed to satisfy that burden.

Mitchell also claims that police could not reasonably have judged that getting a warrant would interfere with other pressing needs or duties. But the Supreme Court concluded that officers in this case acted reasonably in seeking a breath test, and then in seeking a blood test. *Mitchell*, 139 S. Ct. at 2534. And once Mitchell became unconscious, the blood draw

was justified by exigent circumstances under the rule the Supreme Court established in this case.

Mitchell also argues that the blood draw was not justified by his implied consent. But as this Court has already determined, it cannot decide that issue due to a conflict between prior opinions of this Court. Even if this Court could properly resolve that conflict, a decision on this issue would be unnecessary because the exigent circumstances issue is dispositive. The blood draw was justified by exigent circumstances; it makes no difference whether it was also justified by Mitchell's implied consent.

STATEMENT OF THE CASE AND FACTS

Mitchell was convicted of operating a motor vehicle while under the influence of an intoxicant (OWI), as a seventh, eighth, or ninth offense after a jury found him guilty. (R. 130.)

On May 13, 2013, Mitchell's neighbor Alvin Swenson saw Mitchell leave his apartment and drive away in a minivan. (R. 150:100.) Swenson observed that Mitchell smelled of alcohol (R. 150:95), and that he had difficulty walking (R. 150:102). Officer Alex Jaeger responded to a dispatch for a welfare check on Mitchell after a call to police reporting that Mitchell had indicated he might harm himself. (R. 150:153.) Officer Jaeger spoke to Swenson, who told him that Mitchell had driven away and that he appeared to be intoxicated. (R. 150:154.)

Officer Jaeger subsequently received word that another officer had located a man who might be Mitchell. (R. 150:160.) Officer Jaeger went to the scene and observed that Mitchell "was appearing to stumble. His arms were quite, I guess, droopy and kind of bouncing as he walked." (R. 150:163.) Officer Jaeger testified that Mitchell's "words were very slurred and thick tongued," and that Mitchell had "the very

strong odor of intoxicants on his breath," and "very red, glossy, and bloodshot" eyes. (R. 150:163, 66.) He testified that Mitchell was hostile and belligerent and had difficulty in maintaining balance." (R. 150:164–65.) Another officer found Mitchell's minivan parked nearby. (R. 150:220.)

Officer Jaeger asked Mitchell to perform field sobriety tests, but Mitchell did not perform them. (R. 150:167, 171.) Officer Jaeger administered a preliminary breath test (PBT), which indicated a blood alcohol concentration of .24. (R. 147:15–16.) He then arrested Mitchell for OWI and put him in the back of his squad car to go to police headquarters. (R. 150:172.)

Officer Jaeger testified that the trip to the police station took about five minutes. (R. 147:17). Upon arrival, Mitchell had difficulty maintaining his balance, standing upright, and walking. (R. 150:173.) Mitchell was placed in a holding cell, where he "began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation." (R. 147:17.) Officer Jaeger determined that Mitchell could not perform an evidentiary breath test because he was incapable of standing, and that a blood test would be more appropriate, so officers took Mitchell to the hospital. (R. 147:17.) Officer Jaeger testified that they were at the police station for 10 to 15 minutes. (R. 150:174.)

During the approximately eight-minute trip to the hospital, Mitchell became "completely incapacitated," and would not wake up even when stimulation was applied. (R. 147:18.) He was limp and nonresponsive. (R. 150:174.) Officers took Mitchell into the hospital in a wheelchair. (R. 147:18–19.) Officer Jaeger read the Informing the Accused form to Mitchell, but Mitchell was unconscious and could not respond. (R. 150:175–76.) A medical professional obtained a blood sample from Mitchell. (R. 150:176–77.) A test of the blood revealed a blood alcohol concentration of .222. (R. 12; 150:178.)

The State charged Mitchell with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), both as a seventh, eighth, or ninth offense. Mitchell moved to suppress the blood test result on the ground that his blood was improperly drawn without a warrant. (R. 25.) The circuit court, the Honorable Terence T. Bourke presiding, denied the motion after a hearing, concluding that the blood draw was justified under Wisconsin's implied consent law. (R. 147:50–51.)

A jury found Mitchell guilty of OWI and PAC. (R. 150:315.)[1] Mitchell appealed. This Court certified the case to the Wisconsin Supreme Court on the issue of "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." (R. 109:1; A-App. 135–148.) This Court recognized a conflict between two prior opinions of this Court, *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, and concluded that "we cannot resolve this case without ignoring or modifying the differing analyses in *Padley* and *Wintlend*." (R. 109:13.)

The Wisconsin Supreme Court accepted the certification and affirmed Mitchell's conviction. *State v. Mitchell*, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151, *vacated*, 139 S. Ct. 2525 (2019). Five justices agreed that the circuit court properly denied Mitchell's motion to suppress his blood test result. But three of those justices concluded that the blood draw was justified by Mitchell's implied consent, *Mitchell*, 383 Wis. 2d 192, ¶ 66 (lead op.), while two justices

[1] The circuit court originally entered judgment of conviction for both OWI and PAC and imposed concurrent sentences on the two counts. (R. 81.) The court later issued an amended judgment convicting Mitchell of only the OWI charge. (R. 130.)

concluded that it was justified as a search incident to arrest. *Id.* ¶ 80 (Kelly, J. concurring).

Mitchell petitioned for writ of certiorari, and the United States Supreme Court granted review. In its opinion, the Supreme Court established a general rule which "almost always" applies for the category of cases involving unconscious drivers who cannot be given breath tests: "[W]hen a driver is unconscious, the general rule is that a warrant is not needed." *Mitchell*, 139 S. Ct. at 2531.

The Court explained that this general rule applies when police have probable cause to believe a person has committed an impaired-driving offense, the person's unconsciousness or stupor requires that he or she be taken to the hospital, and police do not have a reasonable opportunity to conduct a breath test. *Id.* at 2539. The Court provided an exception to this general rule for the "unusual case" where the defendant is able to show both that his or her "blood would not have been drawn if police had not been seeking BAC information," and "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* The Supreme Court vacated the Wisconsin Supreme Court's opinion and remanded the case to afford Mitchell an opportunity to show that the exception to the general rule applies. *Id.*

The Wisconsin Supreme Court then remanded the case to the circuit court, which held a new suppression hearing to give Mitchell the opportunity to show that his blood would not have been drawn had police not been seeking BAC information, and that police could not reasonably have judged that a warrant application would interfere with other pressing needs or duties. (R. 152:3.) Officer Jaeger, now Sergeant Jaeger (R. 152:4), was the only witness.

Sergeant Jaeger testified that while they were in the police station, Mitchell could not stand, and therefore could

not be given an evidentiary breath test. (R. 152:17–19.) He said police decided to take Mitchell from the police station to the hospital because of Mitchell's rapidly deteriorating condition. (R. 152:10, 17.) Police had to assist Mitchell to keep him upright on his way to a squad car for transport to the hospital. (R. 152:19.) Sergeant Jaeger went on to say that Mitchell became unconscious on the way to the hospital. (R. 152:20.) He testified that he read the Informing the Accused form to the unconscious Mitchell at the hospital and hospital staff drew his blood. (R. 152:6–7.) Sergeant Jaeger testified that by the time he read the Informing the Accused form to Mitchell, hospital staff had already drawn Mitchell's blood for medical purposes. (R. 152:21–22, 26.)

The circuit court concluded that Mitchell failed to show that his blood would not have been drawn had police not been seeking BAC information. (R. 152:31–32.) The court found that "it's clearly established" that Mitchell's blood would have been drawn for medical purposes "because his condition was so dire by the time he arrived at the hospital." (R. 152:31–32.)

The court also concluded that given Mitchell's "very dire medical situation," "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." (R. 152:32.) The court therefore denied Mitchell's suppression motion. (R. 152:33.)

Mitchell now appeals the judgment of conviction and the order denying his motion to suppress his blood test result.

STANDARD OF REVIEW

An appellate court reviews an order granting or denying a suppression motion as a question of constitutional fact. *State v. Tullberg*, 2014 WI 134, ¶ 27, 359 Wis. 2d 421, 857 N.W.2d 120. The court engages in a two-step inquiry when

deciding a question of constitutional fact. *Id.* First, it applies a deferential standard when it reviews the circuit court's findings of historical fact, upholding them unless they are clearly erroneous. *Id.* Second, the court independently applies the constitutional principles to the historical facts. *Id.*

An appellate court applies the same two-step inquiry when determining whether exigent circumstances justified a warrantless search. *Id.* ¶ 28.

ARGUMENT

I. The circuit properly denied Mitchell's motion to suppress his blood test result because Mitchell failed to meet his burden of showing that this is the "unusual case" in which a blood draw from an unconscious driver taken to the hospital before a breath test could be conducted was not justified by exigent circumstances.[2]

A. When there is probable cause that a person drove while impaired, and the person is unconscious and taken to the hospital before a breath test can reasonably be conducted, a warrantless blood draw is "almost always" justified by exigent circumstances.

1. *Mitchell* established a general rule.

In *Mitchell v. Wisconsin*, the Supreme Court established a "general rule" for the "category of cases" where "the driver is unconscious and therefore cannot be given a breath test." *Mitchell*, 139 S. Ct. at 2531. When a person

[2] The State addresses exigent circumstances first in this brief because that issue is dispositive, and it was the reason the United States Supreme Court remanded the case. In addition, this Court has already determined that it cannot decide the implied consent issue.

suspected of impaired driving is unconscious, "a warrant is not needed" to administer a blood draw. *Id.* Instead, a blood draw is almost always justified by exigent circumstances. *Id.* at 2539. The Court's holding applies to cases in which "police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test." *Id.* Under those circumstances, police "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.*

The Supreme Court made it clear that the rule it established is not meant to be applied on a case-by-case basis. The rule applies to the entire category of cases involving unconscious drivers. *Id.* at 2531, 2534 n.2, 2535. The Court said, "we adopt a rule for an entire category of cases—those in which a motorist believed to have driven under the influence of alcohol is unconscious and thus cannot be given a breath test." *Id.* at 2534 n.2. The Court explained that its rule is based "on the circumstances generally present in cases that fall within the scope of the rule." *Id.*

The Court noted that an exigent circumstances determination requires a totality of the circumstances analysis, but as it did in *Missouri v. McNeely*, 569 U.S. 141, 166 (2013), the Court "should be able to offer guidance on how police should handle cases like the one before us." *Mitchell*, 139 S. Ct. at 2535 n.3. The Court did exactly that in *Mitchell* by "spelling out a general rule for the police to follow." *Id.* That rule is simple: When police have probable cause that a person has violated an OWI-related law, and the person is unconscious and must be taken to the hospital before a breath test can reasonably be conducted, a blood draw is justified by exigent circumstances and a warrant is not required.

2. The defendant has the burden to show that the limited, "unusual case" exception applies.

Having established a general rule for cases in which a driver is unconscious and cannot be given a breath test, the Supreme Court provided a limited exception to that rule. The Court noted "the possibility" of "an unusual case" in which "a defendant would be able to 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." *Id.* at 2539. The Court made it clear that *the defendant* bears the burden of showing that his is the "unusual case" to which the general rule does not apply. *Id.*

In his brief, Mitchell asserts that the Supreme Court concluded that exigent circumstances would "typically" be present in a case involving an unconscious driver, unless the defendant can satisfy his two-part burden. (Mitchell's Br. 4, 20.) But the Court did not say that exigent circumstances would *typically* be present unless the defendant satisfies his burden. It said that unconsciousness "is *itself* a medical emergency." *Mitchell*, 139 S. Ct. at 2537. And it set forth a rule that applies to the category of cases involving unconscious drivers: When a suspected impaired driver is unconscious, and is taken to the hospital before a breath test can be conducted, exigent circumstances *are* present, unless the defendant can satisfy his two-part burden. *Id.* at 2539.

Mitchell seems to argue that in a case involving an unconscious driver, the "basic test" for exigent circumstances is applied, and then the Supreme Court rule for unconscious drivers is also applied. (Mitchell's Br. 22–23.) He claims that a court determines, objectively, "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." (Mitchell's Br. 22 (quoting *State v. Larson*, 2003 WI App 150, ¶ 17, 266 Wis. 2d 236, 668 N.W.2d 338).) He claims that the Supreme Court's opinion in *Mitchell* "add[ed] a wrinkle" to this analysis for unconscious drivers by forcing courts to consider whether the driver's blood would have been drawn anyway for medical purposes. (Mitchell's Br. 23.) He asserts that the Court said that if police can "'reasonably anticipate that [a driver's] blood may be drawn anyway, for diagnostic purposes, immediately upon arrival,' they need not seek a warrant." (Mitchell's Br. 23 (alteration in original).)

Mitchell's argument suggests that the State has the burden to show that a reasonable officer would have believed that a delay would risk the destruction of evidence or would have anticipated that the person's blood would have been drawn for medical purposes. That is not the standard the Supreme Court set forth in *Mitchell*. Under the court's general rule, the State has to show only that "police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test." *Mitchell*, 139 S. Ct. at 2539.

The *Mitchell* Court referred to police reasonably anticipating that an unconscious driver's blood might be drawn anyway as *one reason* why it was setting forth a general rule for the entire category of unconscious driver cases—not a prerequisite to applying the rule. The Court noted that unconsciousness "is *itself* a medical emergency." *Mitchell*, 139 S. Ct. at 2537. The Court then discussed circumstances often found in unconscious driver cases. It noted that often a "suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care." *Id.* The Court recognized that when

an unconscious driver is taken to the hospital, "Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital" and "that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival." *Id.* at 2537–38. In addition, police can reasonably anticipate that "immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value." *Id.* at 2538.

The Court did not hold that for exigent circumstances to justify a blood draw from an unconscious driver all or even one of these factors must be present. The Court said that because those factors are so often present when drivers are unconscious, it was establishing a general rule for all cases in which there is probable cause that the person who violated an OWI-related law is unconscious. If the "unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.* at 2539.

Contrary to what Mitchell claims (Mitchell Br. 22), the Court's general rule means that the State need not prove that police reasonably believed that a delay to seek a warrant would risk the destruction of evidence. And the State need not prove that police could "reasonably anticipate" that a driver's blood "may be drawn anyway, for diagnostic purposes, immediately on arrival." *Mitchell*, 139 S. Ct. at 2537–38.

The State need only prove that police had probable cause that a driver has violated an OWI law, the driver had to be taken to a hospital because of unconsciousness or stupor, and police did not have a reasonable opportunity to first conduct a breath test. *Id.* at 2539. Under those circumstances,

a warrantless blood draw is justified by exigent circumstances.

The only exception to the Court's general rule is the one the Court provided: For a warrantless blood draw not to be justified, a defendant must show both 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." *Mitchell*, 139 S. Ct. at 2539.

Thus, contrary to what Mitchell argues, whether an officer reasonably anticipated that the driver's blood would be drawn anyway is not part of the rule or the exception. The officer's understanding or belief or anticipation is irrelevant. The defendant must affirmatively prove that his blood would not have been drawn had police not been seeking BAC information.

Likewise, whether an officer reasonably believed that a delay to obtain a warrant would risk destruction of the evidence is a prerequisite to applying *Mitchell*'s general rule. Instead, the defendant must show that no reasonable officer could have believed that taking time to obtain a warrant would interfere with other pressing needs or duties.

B. Exigent circumstances justified the warrantless blood draw because there was probable cause that Mitchell drove while impaired, he was taken to the hospital because he was unconscious, and officers could not reasonably have conducted an evidentiary breath test.

A warrantless blood draw from an unconscious driver is justified if "police have probable cause to believe a person committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable

opportunity to administer a standard evidentiary breath test." *Mitchell*, 139 S. Ct. at 2539. Those criteria were satisfied in this case. There is no dispute that there was probable cause that Mitchell drove while under the influence of an intoxicant. As the Supreme Court recognized, Mitchell's medical condition heightened the urgency of the situation, and "Mitchell's stupor and eventual unconsciousness also deprived officials of a reasonable opportunity to administer a breath test." *Id.* at 2533. The Court added that it was reasonable for Officer Jaeger to seek an evidentiary breath test at the police station, and that the officer "acted with reasonable dispatch to procure one; and when Mitchell's condition got in the way, it was reasonable for Jaeger to pursue a blood test." *Id.* at 2534.

The Court remanded the case, but not for a determination whether the State satisfied its burden to prove that the general rule it had established applied in this case. The Court had already determined that all the criteria underlying the rule were satisfied. *Id.* at 2534, 2539. It remanded the case to afford Mitchell an opportunity to show that even though the criteria were all satisfied, the rule should not apply. *Id.*

Mitchell suggests that the officers had time to administer a breath test while they were at the police station. He notes that he was arrested at 4:26 p.m. and his blood was drawn at 5:59 p.m., and argues that "During much of this time, Mitchell was sitting in a holding cell at the police station." (Mitchell's Br. 22.)

But Officer Jaeger testified that they were at the police station for only 10 to 15 minutes. (R. 150:174.) The officers could not properly have conducted an evidentiary breath test during that time period because a breath test requires an observation period of "a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test

subject did not ingest alcohol, regurgitate, vomit or smoke." Wis. Admin. Code § 311.06(3)(a).

And during the 10 to 15 minutes they were at the police station, Mitchell could not stand and required stimulation to remain conscious. (R. 147:17; 152:17–19.) He therefore could not take an evidentiary breath test.

C. Mitchell failed to meet his burden of showing that the general rule does not apply to his blood draw.

Immediately after establishing a rule that "almost always" applies for blood draws from unconscious drivers, the Supreme Court explained what it meant by "almost always." The Court provided an exception to the general rule for the "unusual case" in which the defendant can show *both* that (1) "his blood would not have been drawn if police had not been seeking BAC information," and (2) "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Mitchell*, 139 S. Ct. at 2539. Mitchell did not satisfy his burden of showing either of these things.

1. The circuit court correctly found that Mitchell failed to show that his blood would not have been drawn if police had not been seeking BAC information.

After hearing testimony from Sergeant Jaeger, the circuit court concluded that Mitchell failed to meet his burden to show that his blood would not have been drawn had police not been seeking information about his alcohol concentration. The court found that when Mitchell arrived at the hospital, "his condition had deteriorated so drastically they weren't able to get his consent," and by that time "a blood draw was necessary for medical reasons." (R. 152:31.)

The court concluded that Mitchell failed to show that his blood would not have been drawn had police not been seeking his BAC. The court found that "it's clearly established" that Mitchell's blood would have been drawn "because his condition was so dire by the time he arrived at the hospital." (R. 152:31–32.)

Mitchell has not shown that the circuit court's findings were clearly erroneous. He does not even dispute them.

Instead, Mitchell argues that "The officer could not reasonably anticipate that Mitchell's blood would be drawn anyway." (Mitchell's Br. 22.) Mitchell claims that the officer did not know at the time he decided to take Mitchell to the hospital that Mitchell "had swallowed a large number of pills as part of a suicide attempt," so the officer could not reasonably anticipate that Mitchell's blood would be drawn anyway. (Mitchell's Br. 23.)

However, whether the officers reasonably anticipated that Mitchell's blood would be drawn anyway is irrelevant. It was Mitchell's burden to affirmatively show that his blood would not have been drawn anyway. *Mitchell*, 139 S. Ct. at 2539. He failed to meet that burden, and therefore failed to show that the general rule under which his blood draw was justified by exigent circumstances does not apply.

Even if what the officers reasonably anticipated were relevant, Mitchell failed to show that at the time officers decided to take him to the hospital they did not reasonably anticipate that his blood would be drawn anyway.

As explained above, police took Mitchell to the police station intending to conduct an evidentiary breath test. They were in the police station for only 10 to 15 minutes. (R. 152:174.) Officers were unable to conduct a breath test during that period because they had to wait for a 20-minute observation period, Wis. Admin. Code § 311.06(3)(a), and because Mitchell could not stand and needed stimulation to

even remain conscious. (R. 147:17; 152:17–19.) Then, on the way to the hospital Mitchell became unconscious, and officers had to put him in a wheelchair to take him into the hospital. (R. 147:18–19.)

As the Supreme Court recognized, "when Mitchell's condition got in the way" of a breath test, "it was reasonable for Jaeger to pursue a blood test." *Mitchell*, 139 S. Ct. at 2534. And as the circuit court recognized, when they arrived at the hospital, Mitchell's blood would have been drawn "because his condition was so dire by the time he arrived at the hospital." (R. 152:31–32.)

Mitchell argues that "at the time the officer elected to proceed with a warrantless blood draw," the officer could not reasonably anticipate that Mitchell's condition would deteriorate to the point he would require hospitalization (Mitchell's Br. 21–23.)

But it makes no difference whether Mitchell was going to be hospitalized. What matters is whether his blood was drawn at the hospital. *Mitchell*, 139 S. Ct. at 2539. It plainly was.

In addition, Mitchell does not explain why the officers' belief when they decided to take Mitchell to the hospital would govern whether the subsequent blood draw was justified. Even without the rule the Supreme Court established in *Mitchell*, the issue would not be what officers believed when they decided to take him to the hospital. It would be what they believed when they had medical personnel draw Mitchell's blood.

Under the rule the Supreme Court established in *Mitchell*, whether the officers reasonably anticipated that Mitchell's blood would be drawn at the hospital even if they were not seeking BAC information is irrelevant. It was Mitchell's burden to affirmatively show that his blood would not have been drawn anyway. *Mitchell*, 139 S. Ct. at 2539. He

failed to meet that burden, and therefore failed to show that the general rule under which his blood draw was justified by exigent circumstances does not apply. On this basis alone, this Court should affirm the circuit court's order denying Mitchell's suppression motion and the judgment of conviction.

2. The circuit court correctly found that Mitchell failed to show that officers could not reasonably have believed that a delay to seek a warrant would interfere with other pressing needs or duties.

Because Mitchell failed to show that his blood would not have been drawn had police not been seeking BAC information, he failed to satisfy his burden to show that exigent circumstances did not justify his blood draw. This Court need not address the second prong of Mitchell's burden. But Mitchell also failed to satisfy that prong.

The circuit court said that the "other pressing needs" criterion is also "very relevant in this particular situation because of Mr. Mitchell's very dire medical situation." (R. 152:32.) The court noted that "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." (R. 152:32.) The court added, "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." (R. 152:32.)

Mitchell argues that "The [S]tate has never suggested that the officer could reasonably have judged that getting a warrant would have interfered with other pressing needs or duties." (Mitchell's Br. 21.) Even if that were true, it would make no difference. The State was not required to prove that

the officer reasonably judged that getting a warrant would interfere with his other duties—Mitchell was required to prove that a reasonable officer could not have so judged. *Mitchell*, 139 S. Ct. at 2539. He failed to do so.

Mitchell argues that the officers had time between arresting him and the blood draw to obtain a warrant. (Mitchell's Br. 21–22.)

However, the officers had no reason to attempt to get a warrant when they arrested Mitchell because they intended to conduct a breath test. As the Supreme Court recognized, it was reasonable for officers to seek a breath test at the station, and they acted "with reasonable dispatch to procure one." *Mitchell*, 139 S. Ct. at 2534. However, the officers reasonably did not attempt to obtain a warrant once it became clear that Mitchell was too intoxicated for a breath test. As the circuit court found, Mitchell's "very dire medical situation" meant that "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." (R. 152:32.)

And the officers reasonably did not try to obtain a warrant after arriving at the hospital for two reasons. First, the officers sought to conduct a consensual blood draw. An officer read the Informing the Accused form to Mitchell and asked that he submit to a blood draw. (R. (150:175–76.) But Mitchell, who was unconscious by this point, did not respond. (R. 150:176.)

As the circuit court recognized, this was how officers typically proceed: "normally 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." (R. 152:30–31.) The court recognized that had Mitchell submitted to the request for a blood sample under the implied consent law, "A warrant wouldn't have been required."

(R. 152:31.) And it recognized that when Mitchell did not respond, "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." (R. 152:32.)

Second, by the time Sergeant Jaeger requested a blood sample, medical staff had already drawn Mitchell's blood. (R. 152:21–22.) The officers therefore had no need to attempt to obtain a warrant.

Mitchell also suggests that the blood draw in this case was not justified by exigent circumstances because officers created the exigency by leaving him in a cell at the police station until his condition deteriorated to the point that he could not take an evidentiary breath test. (Mitchell's Br. 24.) He claims that the delay at the jail was caused by police because they "did not expeditiously pursue either actual consent or a warrant to take his blood." (Mitchell's Br. 25.)

Mitchell's assertions are meritless. First, there is no dispute that officers took Mitchell to the police station intending to conduct an evidentiary breath test. And the Supreme Court expressly found that the officers acted reasonably in doing so. *Mitchell*, 139 S. Ct. at 2534. And the officers did not just wait around at the police station so that Mitchell would become unconscious and they could get a blood sample without a warrant. Officer Jaeger testified that they were at the police station for only 10 to 15 minutes. (R. 150:174.) Once they reasonably took Mitchell to the police station for a breath test, the officers could not properly have conducted a breath test during the 10 to 15 minutes they were at the police station. They could not properly have conducted a breath test before an observation of "a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke." Wis. Admin. Code § 311.06(3)(a). Any suggestion that police created an exigency by delaying a

breath test is unsupported by anything in the record and is wrong.

Mitchell has failed to show that "police could not have reasonably judged that a warrant application would interfere with other pressing police needs or duties," specifically tending to his medical needs. He therefore has not satisfied either prong of his two-part burden to show that exigent circumstances did not justify the blood draw. Accordingly, this Court should affirm the circuit court's order denying Mitchell's suppression motion and the judgment of conviction.

II. This Court should decline to address whether the blood draw from Mitchell was justified by his implied consent.

Mitchell devotes much of his brief to an argument that "The implied-consent statute cannot supply voluntary consent so as to justify a warrantless blood draw under the Fourth Amendment." (Mitchell's Br. 10–20.) This Court should decline to address this argument for two reasons. First, this Court has already recognized that to decide that issue this Court would have to resolve a conflict between this Court's opinions in *Wintlend* and *Padley*. (R. 109:13.) And this Court has already recognized that it cannot resolve that conflict, so it certified this case to the Wisconsin Supreme Court. (R. 109:13.)

Second, there is no need to determine whether the blood draw in this case was justified by Wisconsin's implied consent law because the United States Supreme Court remanded this case to afford Mitchell an opportunity to show that exigent circumstances did not justify the blood draw in this case. Mitchell failed to make that showing, so the blood draw was justified by exigent circumstances. It makes no difference whether the blood draw was also justified by Mitchell's consent under the implied consent law.

A. This Court correctly concluded in this case that it cannot decide whether Mitchell's implied consent justified the blood draw.

When it certified this case to the Wisconsin Supreme Court, this Court explained that it did so because of a conflict between this Court's opinions in *Wintlend* and *Padley* about whether consent under Wis. Stat. § 343.305 is "actual, Fourth Amendment consent." (R. 109:13.) This Court recognized that "***Wintlend*** implies that the 'implied consent' provided for in WIS. STAT. § 343.305 is actual, voluntary consent, at least so long as the suspect does not withdraw that consent. ***Padley***, on the other hand, explicitly rejected that position when it was offered by the State." (R. 109:13.) This Court further recognized that "The cases also disagree about when consent is given—an issue critical to whether consent is in fact given and voluntary. Neither case directly addressed our precise factual issue, but we cannot resolve this case without ignoring or modifying the differing analyses in ***Padley*** and ***Wintlend***." (R. 109:13.) This Court stated that because it is "unable to resolve conflicts in precedent, the proper course of action in this situation is to certify the question." (R. 109:13.)

The Wisconsin Supreme Court's lead opinion in this case also recognized the obvious conflict between *Wintlend* and *Padley*: "we clarify that *Padley* has no precedential effect because its holding is in direct conflict with an earlier, published court of appeals decision, *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745." *Mitchell*, 383 Wis. 2d 192, ¶ 60. The concurring and dissenting opinions, while disagreeing with the lead opinion's analysis, did not dispute the lead opinion's characterization of *Padley* and *Wintlend* as being in "direct conflict."

"The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent

proceedings in the trial court or on later appeal.'" *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620, 664 N.W.2d 82 (citation omitted).

Here, there is no while there is no binding opinion establishing that this Court cannot decide the conflict between *Wintlend* and *Padley*, this Court's certification and the Wisconsin Supreme Court's opinion make clear that there is a conflict and that this Court cannot decide it.

Mitchell now urges this Court to decide the issue this Court has recognized it cannot decide. He claims that, contrary to what this Court and the Wisconsin Supreme Court's lead opinion recognized, *Padley* and *Wintlend* "are not truly in conflict." (Mitchell's Br. 11.) Mitchell seems to argue that although this Court recognized in *Wintlend* that by obtaining a driver's license (or by driving on a Wisconsin highway), a person consents to give a sample of his breath, blood, or urine when an officer has probable cause to believe the person has violated an OWI-related law, this Court really only meant that a person consents to lose his license if he does not later consent when the officer requests a sample. (Mitchell's Br. 12–13.)

But this Court recognized in *Wintlend* that the defendant was arguing that "giving up the right to privacy to one's own body in return for keeping the right to drive is coercive." *Wintlend*, 258 Wis. 2d 875, ¶ 8. This Court concluded that a person's consent occurs either when he obtains a license, or when he drives on a highway. *Id.* ¶¶ 13–16. It concluded that under the law, by obtaining a driver's license, a person "consents to submit to the prescribed chemical tests" upon being arrested. *Id.* ¶ 12. And this Court concluded that "the bodily intrusion the motorist is being asked to allow, in return for retaining the license to drive, is a minimal one." *Id.* ¶ 17.

Mitchell asserts that "*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." (Mitchell's Br. 13.)

He is wrong. This Court has recognized that under the implied consent law, "Any person who drives or operates a motor vehicle in Wisconsin is deemed to have given consent to a test of his breath, blood or urine." *Milwaukee Cty. v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608 (Ct. App. 1980). "This consent is not optional, but is an implied condition precedent to the operation of a motor vehicle on Wisconsin public highways." *Id.* The implied consent law "does not contemplate a choice, but rather establishes that a defendant will suffer the consequences of revocation should he refuse to submit to the test after having given his implied consent to do so. The defendant's consent is not at issue." *Id.* at 624.

And the Wisconsin Supreme Court has recognized that under the implied consent law, "those who drive consent to chemical testing." *State v. Disch*, 129 Wis. 2d 225, 231, 385 N.W.2d 140 (1986) (quoting *State v. Nordness*, 128 Wis. 2d 15, 28, 381 NW.2d 300 (1986)). Therefore, when a person is unconscious or otherwise incapable of withdrawing that consent "a test may be administered to the person." *Id.* (citation omitted). *Disch* has never been overruled. *See State v. Howes*, 2017 WI 18, ¶¶ 75–76, 373 Wis. 2d 468, 893 N.W.2d 812 (Gableman, J., concurring).

In *Padley*, this Court concluded that the consent a person impliedly gives by driving on a Wisconsin highway, to give a blood sample when an officer has probable cause that the person has violated an OWI-related law, is insufficient to authorize a blood draw. *Padley*, 354 Wis. 2d 545, ¶¶ 37–39. That conclusion cannot be squared with *Wintlend*, *Proegler*, and *Disch*.

As this Court already recognized in this case, *Padley* and *Wintlend* conflict, this Court cannot resolve that conflict, and without doing so, it cannot decide the implied consent issue in this case. Mitchell has not shown this Court was wrong. Accordingly, this Court should decline to address the issue.

B. The blood draw was justified by exigent circumstances. It makes no difference whether it was also justified by Mitchell's implied consent.

Even if this Court were to conclude that it was somehow wrong when it said it could not resolve the conflict between *Wintlend* and *Padley,* and that it could decide whether the blood draw from Mitchell was justified by his implied consent, it would be unnecessary to address that issue. The blood draw in this case was justified by exigent circumstances. It makes no difference whether the blood draw was also justified by Mitchell's implied consent.

This Court certified this case to the Wisconsin Supreme Court on the issue of "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." (R. 109:1.) Under the United States Supreme Court's new rule for the category of unconscious drivers, exigent circumstances plainly existed in this case, and justified the warrantless blood draw unless a defendant can show that his is an unusual case in which a limited exception, rather than the general rule, applies. *Mitchell*, 139 S. Ct. at 2539. The Court remanded the case to afford Mitchell an opportunity to attempt to make that showing. *Id.* It did not remand so that this Court could decide whether the blood draw was justified by Wisconsin's implied consent law. Because the exigent circumstances issue is dispositive, this Court should decline to address the consent issue. *See State v. Simmelink*, 2014 WI

App 102 ¶ 7, 357 Wis. 2d 430, 855 N.W.2d 437 (citing *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis. 2d 554, 697 N.W.2d 811) (only dispositive issues need be addressed).

CONCLUSION

This Court should affirm the judgment convicting Mitchell of OWI and the order denying his motion to suppress evidence.

Dated this 3rd day of June 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,521 words.

Dated this 3rd day of June 2020.

Michael C. Sanders

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 of this date.

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 3rd day of June 2020.

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