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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP1942-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

GERALD P. MITCHELL,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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INTRODUCTION

As the court of appeals recognized, "This operating-a-motor-vehicle-while-intoxicated (OWI) case has a significant history as it has already been to the United States Supreme Court and back." *State v. Mitchell*, 2022 WI App 31, ¶ 1. In *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (plurality opinion), the United States Supreme Court established a general rule for cases in which police have probable cause that a person has driven drunk, the person is unconscious and must be taken to the hospital, and there is no opportunity for an evidentiary breath test. Under those circumstances, a warrantless blood test is permissible, unless the person later shows both that (1) "his blood would not have been drawn if police had not been seeking BAC[1] information" and (2) "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.* The Court remanded this case to afford Mitchell an opportunity to make this two-part showing. *Id.* On remand, the circuit court, the Honorable Rebecca L. Persick, presiding, concluded after a hearing that Mitchell failed to satisfy either prong of the two-part test. (Pet-App. 46.) The court of appeals affirmed, concluding that Mitchell failed to prove that his blood would not have been drawn had police not been seeking information about his alcohol concentration. *Mitchell*, 2022 WI App 31, ¶ 10. The court did not address the second prong because it concluded that "Mitchell has failed to make even the first showing." *Id.* ¶ 16.

Mitchell now asks this Court to grant review and "hold that in deciding whether a suspect's blood 'would have been drawn' for medical purposes, a court should assess the facts available to the police at the time they decide to perform a warrantless blood draw." (Pet. 16.) But under *Mitchell v.*

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[1] Blood alcohol concentration.

Wisconsin, the issue is not whether the suspect's blood *would have* been drawn. Instead, the exception can apply only if the defendant proves that his blood *would not have* been drawn. *Mitchell*, 139 S. Ct. at 2539. And as the court of appeals recognized, the facts available to the police at the time they decide to perform a warrantless blood draw has no bearing on whether the defendant satisfies his burden. *Mitchell*, 2022 WI App 31, ¶ 12. Both the circuit court and court of appeals concluded that Mitchell failed to satisfy his burden, and Mitchell does not argue that he did. Instead, he asks this Court to hold that the general rule and exception that the Supreme Court established mean something very different than what the Supreme Court said they mean. This Court should deny Mitchell's petition.

THIS CASE DOES NOT SATISFY THE CRITERIA FOR REVIEW

A. Mitchell's petition does not set forth novel and important questions about the Fourth Amendment.

Mitchell asserts that review of the court of appeals decision is warranted under Wis. Stat. § (Rule) 809.62(1r)(a), (c), because this case presents "novel and important questions about the Fourth Amendment." (Pet. 5.) He claims that review by this Court is necessary to "explain how lower courts [are] to determine what 'would have' happened absent police efforts to draw blood for evidentiary purposes." (Pet. 5.)

However, there is nothing to explain or clarify. The court of appeals has applied the *Mitchell* rule and its exception in two published cases, *State v. Richards*, 2020 WI App 48, 393 Wis. 2d 772, 948 N.W.2d 359, and this one. As the court of appeals has recognized, the State has the initial burden to show that:

> (1) law enforcement has probable cause to believe that the driver has committed a "drunk-driving offense";
>
> (2) the driver is, at pertinent times, unconscious or in a stupor;
>
> (3) the driver's unconscious state or stupor requires that he or she be taken to a hospital or similar facility; and
>
> (4) the driver is taken to the hospital or similar facility before law enforcement has a "reasonable opportunity" to administer a standard evidentiary breath test.

Richards, 393 Wis. 2d 772, ¶ 29.

If the State shows that these factors are present, the defendant can show that the exception applies and a warrant was required, if he can show that: (1) his blood "would not have been drawn if police had not been seeking BAC information"; and (2) "law enforcement could not have reasonably judged that a warrant application 'would interfere with other pressing needs or duties.'" *Id.* ¶ 30 (citation omitted). The burden to satisfy these two factors is on the driver. *Mitchell*, 2022 WI App 31, ¶ 10; *Richards*, 393 Wis. 2d 772, ¶ 42.

Here, the Supreme Court remanded the case to give Mitchell an opportunity to satisfy his burden. *Mitchell*, 139 S. Ct. at 2539; *Mitchell*, 2022 WI App 31, ¶ 7. Mitchell failed to satisfy his burden. In fact, the circuit court found that he not only failed to show that his blood *would not have* been drawn, but "that it was 'clearly established' that Mitchell's blood *would have* been drawn even if police were not seeking such information 'because his condition was so dire by the time he arrived at the hospital.'" *Mitchell*, 2022 WI App 31, ¶ 10 n.3. The court of appeals agreed. *Id.* ¶ 16. Mitchell now asks this Court to accept review and hold to the contrary. (Pet. 4.) But he does not even argue that he showed that his blood would

not have been drawn had police not been seeking information about his alcohol concentration.

B. Review is not warranted for this Court to hold that the applicable test is different than the one the Supreme Court established in this case.

Although the Supreme Court established a rule in his case, Mitchell asks this Court to accept review and explain that the Supreme Court did not mean what it said, and the rule is different than the one it established. Mitchell asks this Court to hold that "in deciding whether a suspect's blood 'would have been drawn' for medical purposes, a court should assess the facts available to the police at the time they decide to perform a warrantless blood draw." (Pet. 16.)

However, under the Supreme Court rule established in this case, a court does not decide "whether a suspect's blood 'would have been drawn' for medical purposes." A court decides whether the defendant has satisfied his burden of proving that his blood would *not* have been drawn for medical purposes. *Mitchell*, 139 S. Ct. at 2539; *Mitchell*, 2022 WI App 31, ¶ 7; *Richards*, 393 Wis. 2d 772, ¶ 42. And nothing in *Mitchell v. Wisconsin* even suggests that the facts known to the police have any bearing in determining whether the defendant satisfies his burden of showing that his blood would not have been drawn if police had not been seeking information about his alcohol concentration. As the court of appeals recognized, "The *Mitchell* Court provided clear guidance related to all OWI motorists who are unconscious or in such a stupor they cannot perform a breath test—taking such motorists to the hospital and performing a warrantless blood draw is reasonable and constitutional." *Mitchell*, 2022 WI App 31, ¶ 12. The exception applies only when "the motorist later shows 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.* (quoting *Mitchell*, 139 S. Ct. at 2539.) "[W]hether or not a particular officer does in fact anticipate that a draw will occur for such reasons in a particular case is completely irrelevant to the legality of the blood draw." *Id.*

Mitchell argues that this Court should adopt his view of the *Mitchell* rule because the Supreme Court said it was offering guidance to police officers. (Pet. 16.) Mitchell is correct that the Supreme Court provided guidance to police officers by adopting a general rule for the police to follow in this entire category of cases. *Mitchell*, 139 S. Ct. at 2534 n.2, 2535 n.3. The guidance is simple—if there is probable cause that a person has driven drunk, the person is unconscious and must be taken to a hospital, and there is no opportunity for an evidentiary breath test, the officer can almost always have the person's blood drawn without a warrant. *Id.* at 2534 n.2, 2539.

Mitchell asserts that Fourth Amendment issues are objective, and a search is either reasonable or unreasonable when it is conducted. (Pet. 16.) But the Supreme Court made it clear that in this class of cases, a search is reasonable unless a defendant makes the required two-part showing. *Mitchell*, 139 S. Ct. at 2539; *Mitchell*, 2022 WI App 31, ¶ 12.

Mitchell argues that warrantless blood draws cannot be sanctioned by events occurring after the blood draw. (Pet. 16.) But under *Mitchell* a blood draw is not sanctioned by events occurring after the blood draw. The blood draw is sanctioned when there is probable cause that a person has driven drunk, the person is unconscious and must be taken to a hospital, and there is no opportunity for an evidentiary breath test. *Mitchell*, 139 S. Ct. at 2539. In any case in which those criteria are satisfied, a warrantless blood draw is legal and constitutional unless the person makes the two-part showing, including showing that his blood would not have been drawn

had police not been seeking information about his alcohol concentration. *Id.*

Finally, Mitchell argues that police delayed his blood test until he was unconscious, creating an exigency. (Pet. 16–17.) But as the court of appeals recognized, the Supreme Court understood the facts of his case, concluded that this case falls into the category of cases to which the *Mitchell* rule applies, and remanded only to give Mitchell an opportunity to show that the *Mitchell* rule does not apply to his case. *Mitchell*, 2022 WI App 31, ¶ 13.

The Supreme Court established a rule for the entire category of cases like this one and placed the burden on a defendant to prove that the rule does not apply in a specific case. The circuit court properly applied the rule and properly determined that Mitchell failed to prove that the exception applies. Therefore, the warrantless blood draw from Mitchell was legal and constitutional. The court of appeals properly affirmed. Now, Mitchell does not even argue that he satisfied his burden to show that the exception, rather than the rule, applies. He instead asks this Court to reimagine the *Mitchell* rule and the exception to the rule. Review by this Court to hold that the *Mitchell* rule and exception mean something other than what the Supreme Court established is unwarranted.

CONCLUSION

This Court should deny Mitchell's petition for review.

Dated this 16th day of August 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,794 words.

Dated this 16th day of August 2022.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response 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 response filed with the court and served on all opposing parties.

Dated this 16th day of August 2022.

MICHAEL C. SANDERS
Assistant Attorney General