STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP2006-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTINA MARIE WIEDERIN,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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INTRODUCTION

Christina Wiederin drove her car the wrong way on a divided highway and crashed it into an oncoming car, killing the other driver and seriously injuring herself. The circuit court denied Wiederin's motion to suppress the results of her blood test that was taken after she was rushed to a hospital in Minnesota and fallen unconscious. The court concluded that the warrantless blood draw was justified by exigent circumstances. Wiederin then pleaded guilty to first-degree reckless endangering safety and homicide by use of a motor vehicle with a detectable presence of a restricted controlled substance in her blood.

The court of appeals agreed that exigent circumstances justified the blood draw and affirmed in an unpublished opinion. *State v. Wiederin*, No. 2020AP2006-CR, slip. op. (Wis. Ct. App. Feb. 15, 2022) (unpublished) (Pet. App. 101–12.) Wiederin now seeks review by this Court. For the following reasons, the State opposes the petition.

THIS CASE DOES NOT SATISFY THE CRITERIA FOR REVIEW.

A. Review is not warranted to develop, clarify, or harmonize the law, or to apply a new doctrine.

Wiederin asserts that review of the court of appeals decision by this Court is warranted under Wis. Stat. § (Rule) 809.62(1r)(c)1 "to develop, clarify, or harmonize the law. (Pet. 7.) She claims that "the constitutionality of warrantless blood draws of unconscious persons is uncertain" after *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), and *State v. Prado*, 2020 WI App 42, 393 Wis. 2d 526, 947 N.W.2d 182. Wiederin asserts that this Court should grant review "to establish that *Mitchell* did not announce a new rule of

jurisprudence when it comes to unconscious drivers." (Pet. 8–9.)

Review to establish that *Mitchell did not* announce a new rule for unconscious drivers is unwarranted because *Mitchell did* announce a new rule for unconscious drivers. The Supreme Court adopted 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." *State v. Richards*, 2020 WI App 48, ¶ 28, 393 Wis. 2d 772, 948 N.W.2d 359 (citing *Mitchell*, 139 S. Ct. at 2534 n.2.). The rule is that if there is probable cause to believe a person has committed a drunk-driving offense and the driver must be taken to the hospital before there is a reasonable opportunity for a breath test, police "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." *Id.* (citing *Mitchell*, 139 S. Ct. at 2539).

The court of appeals recognized *Mitchell*'s rule in *State v. Richards*, and said that under the *Mitchell* rule, the State is required to establish four factors:

> (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.

Id. ¶ 29 (citing *Mitchell*, 139 S. Ct. at 2539). Then, if the State satisfies its burden, exigent circumstances justify a warrantless blood draw except in "an unusual case" where "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.* (citing *Mitchell*, 139 S. Ct. at 2539). Since *Mitchell* plainly set forth a rule, review is unwarranted to establish that it did not do so.

Review is also not warranted to apply the *Mitchell* rule because in this case, the court of appeals did not apply that rule. The court of appeals applied the general law of exigent circumstances. The court noted that "Exigent circumstances depend on the reasonableness of an officer's belief that 'the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.'" *Wiederin*, slip op. ¶ 17 (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)). The court further noted that "An officer is not required to obtain a warrant when doing so would threaten the destruction of the evidence." *Id.* ¶ 30 (citing *Missouri v. McNeely*, 569 U.S. 141, 150 (2013); *Schmerber*, 384 U.S. at 770). The court concluded that the officer here "acted reasonably in first seeking Wiederin's consent for a blood sample," and then, when Wiederin "was unconscious or otherwise unable to consent or refuse the draw," in having her blood drawn. *Id.*

The court of appeals cited *Mitchell* only for the proposition that a car accident heightens the urgency that is common to all drunk-driving cases, and a driver's unconsciousness almost always heightens the urgency and constitutes an exigency. *State v. Wiederin*, No. 2020AP2006-CR, ¶ 18, slip. op. (Wis. Ct. App. Feb. 15, 2022) (unpublished). Since the court of appeals did not decide this case under the Mitchell rule, this case is not an appropriate vehicle in which to apply or even consider the *Mitchell* rule.

B. Review is not warranted to resolve a question of law.

Wiederin asserts that review is warranted to determine "whether it is permitted to use unconsciousness as a factor in determining exigency where the driver was not unconscious until the blood draw." (Pet. 9.). She claims that this is a question of law that is not factual in nature. (Pet. 9.)

However, there is little question that a driver who is not unconscious when officers encounter her but who becomes unconscious before she can consent to a blood draw can be a factor in determining whether exigent circumstances exist. After all, that is precisely what happened in *Mitchell*. 139 S. Ct. at 2532. Here, like in *Mitchell*, the police intended to ask Wiederin for a consensual blood test. But she became unconscious before she could either consent or refuse. *Wiederin*, slip op. ¶ 8. Here, like in *Mitchell,* the driver's unconsciousness was a factor in determining exigency even though the unconsciousness did not occur until shortly before the blood draw. There simply is nothing to resolve; *Mitchell* has already resolved it.

C. Review is not warranted to resolve a conflict with existing law because there is no conflict.

Finally, Wiederin claims that review is warranted because the court of appeals' decision "is in discord with" *State v. Hay*, 2020 WI App 35, 392 Wis. 2d 845, 946 N.W.2d 190. (Pet. 9.) However, there is no conflict to resolve. In *Hay*, an officer had reason to believe that the suspect—who was prohibited from driving with an alcohol concentration above 0.02—likely had an alcohol concentration just above 0.02 and would likely reach 0.000 in a short time. *Hay*, 392 Wis. 2d 845, ¶¶ 3, 13. Despite this, the officer undertook tasks that another

officer could have accomplished rather than requesting a blood sample from the suspect. *Id.* ¶¶ 3–4, 13, 17–19. Then, when the suspect refused to give a blood sample, it was too late to get a warrant. *Id.* ¶ 5. The court of appeals held that under those circumstances, exigent circumstances did not justify a warrantless blood draw. *Id.* ¶ 23. The court stressed that its holding related to the unique facts of the case: "It is important to point out the limited nature of our holding in this case." *Hay*, 392 Wis. 2d 845, ¶ 26. The court explained that "based upon the unique facts of this case, a reasonable officer would have known right at the time of Hay's arrest that time was of the essence and there likely would not be sufficient time to procure a warrant after a refusal at the hospital." *Id.* But if the facts of the case had been different, "it would have been reasonable for [the officer] to wait until after he requested a blood sample from Hay at the hospital before considering applying for a warrant in the event Hay refused, because with a significantly higher PBT reading, a reasonable officer would know he would still have sufficient time if Hay refused to then seek a warrant." *Id.*

The facts of the current case are very different than the ones in *Hay*. Here, as the court of appeals concluded, the officers did not have probable cause at the scene until after Wiederin was transported to the hospital by ambulance. *Wiederin*, slip op. ¶ 21. The officers could not reasonably request a blood sample from Wiederin at the scene, *Id.* ¶ 22, and they acted reasonably in performing their other urgent duties rather than seeking a warrant. *Id.* ¶¶ 23–25. The court also concluded that Sergeant Williams could not have obtained a warrant while on the way to the hospital, *Id.* ¶¶ 27–28, and that he acted reasonably in planning to ask Wiederin for a consensual blood sample, and then waiting until she was available rather than seeking a warrant. *Id.* ¶¶ 29–30. Finally, both the circuit court and court of appeals

recognized that had the officer attempted to get a warrant at the hospital, he would have unreasonably risked the destruction of the evidence. *Id.* ¶ 30.

The court of appeals' decision is not in conflict with *Hay* because Hay applies only to its "unique facts." *Hay*, 392 Wis. 2d 845, ¶ 26. Here, a reasonable officer would not have known at the scene that time was of the essence and there likely would not be sufficient time to procure a warrant after a refusal at the hospital. It was therefore reasonable for the officer to wait until after he requested a blood sample from Wiederin at the hospital before applying for a warrant in the event she refused. But by the time he could request a sample from Wiederin she fell unconscious, and there was no time to get a warrant. The court of appeals' decision is not in conflict with *Hay*—*Hay*'s holding simply does not apply.

D. Review is unwarranted because the issue in this case is factual in nature, and review would be to correct what Wiederin claim are factual errors.

Wiederin presents a single issue for review: "Was the warrantless search of Defendant-Appellant-Petitioner's blood while she was unconscious justified based on exigent circumstances?" (Pet. 2.) This is not a question of law—it is an issue inherently factual in nature. And in her petition, Wiederin makes it clear that she seeks review to argue that the circuit court and court of appeals incorrectly applied existing law on exigent circumstances.

Wiederin claims that officers "had all the information needed to apply for a warrant within five minutes of the accident," and that the circuit court's finding that the officers were "fully occupied with high-priority, time sensitive tasks that could not be reasonably postponed for a warrant application," was "not supported by the record." (Pet. 14–15.)

She argues that "none of the tasks the being undertaken by the officers on the scene were so imperative, time sensitive, or high-priority that a warrant could not have been applied for at that time." (Pet. 17.) And contrary to the conclusions of the circuit court and court of appeals, Wiederin claims that the officer at the hospital "had time to get a warrant during the hour he was sitting at the hospital." (Pet. 17.) She says that the courts' reasoning that the officer would have missed his opportunity to speak to Wiederin had he sought a warrant is "nonsensical." (Pet. 17.)

Wiederin is not really asking this Court to grant review to develop or clarify the law. She is asking this Court to grant review so that she can argue that the circuit court made erroneous findings of fact, and that, under her view of the facts, there were no exigent circumstances. Because review in this case would involve only the application of the facts found by the circuit court to well-established law, review by this Court is unwarranted.

CONCLUSION

This Court should deny Wiederin's petition for review.

Dated: April 14, 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2021 words.

Dated: April 14, 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 petition or 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 petition or 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 petition or response filed with the court and served on all opposing parties.

Dated this 14th day of April 2022.

MICHAEL C. SANDERS
Assistant Attorney General