No. 11-1425

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

OFFICE OF THE PROSECUTING ATTORNEY
CAPE GIRARDEAU COUNTY, MISSOURI
H. MORLEY SWINGLE, Prosecuting Attorney

JOHN N. KOESTER, JR., *Counsel of Record*
Assistant Prosecuting Attorney
100 Court Street, Suite 204
Jackson, MO 63755
(573) 243-2430
jnkoester@capecounty.us

Attorneys for Petitioner
State of Missouri

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

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A. Lower Courts Are Deeply Divided In Their Interpretations Of This Court's Decision In *Schmerber v. California*, 384 U.S. 757 (1966)

It is an undeniable fact that lower courts throughout the United States are sharply divided in their respective interpretations of this Court's decision in *Schmerber*. Although Respondent acknowledges the existence of this conflict, Respondent nonetheless attempts to dramatically minimize its size and scope (Br. in Opp. 14-23). The petition highlighted no less than twelve state courts of last resort and four federal circuits that have confronted this issue, many of which have openly discussed the conflict. Indeed, in the case under review, the Missouri Supreme Court directly addressed the existence of the widespread conflict among state courts of last resort. The Missouri Supreme Court came down on one side of the conflict, endorsing the reasoning of the Utah Supreme Court and the Iowa Supreme Court (Pet. App. 10a-13a), while explicitly disavowing the reasoning of the Wisconsin Supreme Court, the Minnesota Supreme Court, and the Oregon Supreme Court (Pet. App. 16a-19a). Clearly, the decision of the Missouri Supreme Court has deepened the division among lower courts.

The cases cited in the petition, however, do not represent an exclusive or exhaustive list of courts confronting this issue. Additionally, a considerable number of other lower courts have likewise debated how best to interpret *Schmerber*. For example, in *Dale v. State*, 209 P.3d 1038 (Alaska Ct. App. 2009),

the Court of Appeals of Alaska openly discussed the conflict:

> *Schmerber* has led to two opposing interpretations by various state supreme courts. Some states have concluded that *Schmerber* holds that investigating officers are never required to obtain a warrant when sufficient probable cause exists in suspected drunk-driving cases and the method used to extract the suspect's blood is reasonable. Other states have interpreted *Schmerber* to require a case-specific analysis, taking into consideration the totality of the circumstances in determining whether exigent circumstances exist, before the police can seize a person's blood without a warrant.

Id., at 1040-1041. The Alaska court proceeded to adopt a broad interpretation of *Schmerber*, concluding that exigent circumstances existed even if the investigating officer had time to obtain a warrant before drawing the defendant's blood. The Court found that the natural dissipation of alcohol from the defendant's blood over time created an urgency for the blood draw, and requiring the arresting officer to evaluate how much delay would be involved in obtaining a warrant would place an unreasonable burden on law enforcement. *Id.*, at 1043-1044 (endorsing the reasoning of the Minnesota Supreme Court in *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008)).

The Colorado Supreme Court reached the opposite result. Adopting a more restrictive interpretation

of *Schmerber*, the Colorado Supreme Court has held the state must first demonstrate that circumstances existed which would have made it impractical to obtain a search warrant before a warrantless blood draw may be justified. See *People v. Sutherland*, 683 P.2d 1192, 1194 (Colo. 1984); *People v. Shepherd*, 906 P.2d 607, 610 (Colo. 1995).

In contrast, the Court of Criminal Appeals of Tennessee adopted a much broader interpretation of *Schmerber* in *State v. Humphreys*, 70 S.W.3d 752 (Tenn.Crim.App. 2001). There, the defendant was convicted of a misdemeanor offense of driving under the influence of alcohol after being pulled over in a routine traffic stop. *Id.,* at 756. Relying on *Schmerber*, the Court found the warrantless blood test was reasonable under the Fourth Amendment. The Court held that "based upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement." *Id*., at 760-761.[1]

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[1] See also *State v. Fletcher*, 688 S.E.2d 94, 97-98 (N.C. Ct. App. 2010) (finding that "probable cause and the 'destruction of evidence' caused by the body's diminution of alcohol in the bloodstream together meet the Fourth Amendment's requirements for a reasonable . . . [and] warrantless search of the person" under *Schmerber*); *State v. Stern*, 846 A.2d 64, 69 (N.H. 2004) (finding that because alcohol in the blood becomes diminished with the passage of time, any significant delay in taking a blood sample may deprive the state of reliable evidence of a

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The Virginia Supreme Court reached a different conclusion in *Bristol v. Commonwealth*, 636 S.E.2d 460 (Va. 2006). Noting that the possibility that blood alcohol content may dissipate exists in every instance in which a driver has consumed alcoholic beverages, the Court held that "[t]he mere fact that a defendant's blood alcohol content might dissipate is insufficient, by itself, to support application of the 'exigent circumstances' exception." *Id*., at 464.

Without question, there is a longstanding and deep conflict among lower courts over their respective interpretations of this Court's decision in *Schmerber*. This conflict will undoubtedly continue to divide lower courts throughout the United States until this Court takes action to clarify the holding in *Schmerber*.

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defendant's condition at the time they drove an automobile); *State v. Kristy*, 528 A.2d 390, 392 (Conn.App.Ct. 1987) (finding that *Schmerber* held the search was reasonable "[o]n the basis of three considerations, namely the existence of probable cause, the evanescent nature of the evidence and the reasonableness of the intrusion"); *Commonwealth v. Anderl*, 477 A.2d 1356, 1364 (Pa.Super.Ct. 1984) (holding warrantless breath test was valid as "a search necessitated by exigent circumstances; i.e., the evanescent nature of the alcohol in [defendant's] bloodstream."); *Aliff v. State*, 627 S.W.2d 166, 170 (Tex.Crim.App. 1982) (upholding the warrantless taking of a blood sample because "alcohol in blood is quickly consumed and the evidence would be lost forever."); *DeVaney v. State*, 288 N.E.2d 732, 735 (Ind. 1972) (finding that "exigent circumstances were . . . present since the evidence might soon disappear during the time necessary to obtain the warrant.").

B. This Case Presents An Excellent Vehicle To Resolve The Conflict

Although the existence of a widespread split of authority is clear, Respondent nevertheless maintains this Court should deny certiorari because of three purported vehicle problems. (Br. in Opp. 5-14.) The purported vehicle problems identified by Respondent, however, are illusory and pose no obstacle to this Court's resolution of the question presented.

1. First, Respondent asserts this case is a poor vehicle to resolve the conflict because the arresting officer testified at the suppression hearing that his decision to take Respondent to the hospital for a blood draw was not motivated by any particular concern that an emergency situation existed. (Br. in Opp. 6-7.) Rather, the officer's decision was primarily motivated by his understanding of a recently amended state law governing nonconsensual blood draws. (Tr. 10:11-13, 14:7-22.) Respondent, therefore, strongly urges this Court to pay careful attention to the subjective motivations and intentions of the arresting officer and focus on his subjective state of mind. This Court, however, has consistently rejected such an approach. This Court has repeatedly held that a law enforcement officer's subjective motivation for conducting a search is irrelevant in the Fourth Amendment context. See *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). Instead, an action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action. *Id*. See also

Bond v. United States, 529 U.S. 334, 338, n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions"); *Kentucky v. King*, 131 S.Ct. 1849, 1859 (2011) ("Indeed, we have never held, outside limited contexts such as an 'inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment.'") (quoting *Whren v. United States*, 517 U.S. 806, 812 (1996)). When a law enforcement officer has probable cause to believe a person has committed a drunk-driving related crime, it is certainly *objectively* reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant and thus threaten the potential destruction of evidence.[2]

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[2] Although the arresting officer had never been unable to obtain a search warrant because of the unavailability of a prosecutor or a judge, there is often a significant delay involved in acquiring a warrant in the middle of the night. Indeed, the record in this case established that obtaining a search warrant in the middle of the night in Cape Girardeau County involves an average delay of approximately two hours. (Tr. 27-28.) Additionally, Respondent incorrectly suggested that the arresting officer had used telephonic warrants in the past. (Br. in Opp. 28.) Telephonic search warrants are not available in Missouri. Search warrants in Missouri are governed by Mo. Rev. Stat. § 542.276 (2010), which requires the application, the warrant, and any accompanying affidavit to be in writing. Section 542.276.3 specifically

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2. Next, Respondent claims the record in this case is insufficient for proper resolution of the Fourth Amendment issue because there was no testimony from a qualified expert to discuss the "complicated science of alcohol metabolism." (Br. in Opp. 5, 8-12.) Respondent suggests that a full understanding of a controversial scientific technique known as "retrograde extrapolation" is critical to resolving the constitutional issue presented in this case. (Br. in Opp. 10-12.) Even still, Respondent concedes that there are serious flaws with this technique, noting that there are several reasons why retrograde extrapolation may yield questionable results. (Br. in Opp. 10-11 n.6.) The simple fact remains, however, that there has never been any dispute that alcohol dissipates from the blood after consumption. It is a well-known fact,

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prohibits oral testimony from being considered. Regardless, a number of jurisdictions that authorize the use of telephonic warrants have concluded that the availability of this procedure does not diminish the exigency involved in quickly securing blood alcohol evidence. See *United States v. Reid*, 929 F.2d 990, 993 (4th Cir. 1991) (analyzing the "intricate requirements" of obtaining a telephonic warrant and finding that the availability of the procedure "does not alter the exigency of the situation."); *State v. Shriner*, 751 N.W.2d 538, 549, n.13 (Minn. 2008) (noting that a telephonic search warrant does not eliminate the need for documentation and concluding that "the officer facing the need for a telephonic search warrant cannot be expected to know how much delay will be caused by following the procedures necessary to obtain such a warrant."); *State v. Johnson*, 744 N.W.2d 340, 345 (Iowa 2008) (discussing the complicated requirements for obtaining a telephonic search warrant and finding that its availability did not reduce the exigency).

and one which this Court recognized in *Schmerber,* that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S., at 770. The record in this case accurately stated that the generally accepted rate at which alcohol is eliminated from the human body is anywhere between 0.015 and 0.020 per hour. (Tr. 21-22.) This fact has long been generally accepted in the scientific community and was never in dispute. See K.M. Dubowski, Ph.D., Human Pharmacokinetics of Alcohol, Int. Microform L. Leg. Med. 10 (1975); Yale H. Caplan, Ph.D., The Determination of Alcohol in Blood and Breath, 1 Forensic Sciences Handbook ch. 12 (1982).

3. Finally, Respondent suggests this Court should deny certiorari because the state does not necessarily need the blood test in order to secure a conviction. (Br. in Opp. 12-14.) Respondent proceeds to speculate that the state may still be able to secure a conviction based primarily on Respondent's refusal to submit to a breath or blood test and his poor performance on various field sobriety tests.[3] (Br. in Opp.

[3] Respondent correctly concedes, however, that "[n]one of this necessarily means that the prosecution will secure a conviction if the case is allowed to proceed to trial." (Br. in Opp. 14.) Furthermore, a warrantless blood draw must be supported by probable cause, i.e., probable cause to believe the accused has committed a drunk driving-related crime. Thus, in every such case, there will *always* be at least some additional evidence against the accused aside from the results of the blood test.

13.) The position taken by Respondent, however, drastically undervalues the highly probative nature of blood alcohol evidence.

This Court has repeatedly emphasized the importance of blood alcohol evidence in drunk driving prosecutions. See *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (finding that a blood test "is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an *exact* measure upon which to base a decision as to intoxication") (emphasis added). Indeed, in *Breithaupt* this Court noted that, by utilizing blood tests, "the issue of driving while under the influence of alcohol can often . . . be taken out of the confusion of conflicting contentions." *Id.*, at 439-440. Then, in *Schmerber,* this Court found that "[e]xtraction of blood samples for testing is a highly effective means of determining the *degree* to which a person is under the influence of alcohol." *Schmerber*, 384 U.S., at 771 (emphasis added). Significantly, nineteen years after writing the majority opinion of this Court in *Schmerber*, Justice Brennan reinforced just how crucial blood alcohol evidence is in drunk driving prosecutions. Writing the majority opinion in *Winston v. Lee*, 470 U.S. 753 (1985), Justice Brennan stressed that "[e]specially given the difficulty of proving drunkenness by other means, . . . results of the blood test were of vital importance if the State were to enforce its drunken driving laws." *Id.*, at 763. See also *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (noting that "the inference of intoxication arising from a positive blood-alcohol test is far

stronger than that arising from a refusal to take the test.").

In the case under review, Respondent's blood alcohol level was 0.154, nearly twice the legal limit. (Record on Appeal: Legal File p. 26; Tr. 11:21-22.) Obviously, the results of the blood test give the state a far stronger case at trial. Speculation that the state *might* be able to secure a conviction without the best and most probative evidence is not, by any means, a compelling reason for this Court to avoid resolving the important constitutional question presented in this case.

Contrary to Respondent's claims, this case presents an excellent vehicle through which to resolve the widely recognized conflict over the interpretation of *Schmerber*. The facts are undisputed and straightforward. The issue is squarely presented. Quite simply, this petition offers an ideal opportunity to finally resolve this widespread and divisive conflict.

C. Uniform And Consistent National Standards Are Important Because Drunk Driving Is A Nationwide Problem

Drunk driving is a serious problem that affects the entire nation. See *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 451 (1990); see also *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). Given the nationwide scope of the drunk driving problem, uniform and consistent standards are of vital importance. For instance, on March 3, 1998, President Clinton signed

an Executive Memorandum for the Secretary of Transportation, calling for the establishment of a national drunk driving standard. *Memorandum on Standards To Prevent Drinking and Driving,* March 3, 1998 [Public Papers of the Presidents of the United States: William J. Clinton (1998, Book I, p. 318)]. This directive called for a plan to promote the adoption of 0.08 Blood Alcohol Content (BAC) as the nationwide legal limit for impaired driving. At the time, 33 states and the District of Columbia continued to use 0.10 as the legal limit. *Id.* President Clinton noted that drunk driving remained a serious highway safety problem, costing society thousands of lives and $45 billion every year. *Id.* In an effort to "prevent the many tragic and unnecessary alcohol-related deaths and injuries that occur on our Nation's roads," President Clinton called on the Congress to pass legislation to ensure that 0.08 BAC would become the national legal limit. *Id.* The effort was successful. In October of 2000, the Congress passed, and the President signed into law, the Department of Transportation and Related Agencies Act of 2001, Pub. L. No. 106-346. Among other things, the law required states to implement a 0.08 BAC standard as the legal limit for drunk driving by 2004 or risk losing a percentage of federal highway funds. By 2004, all 50 states had enacted laws establishing 0.08 BAC as the legal limit, and a national drunk driving standard was achieved.

President Clinton and the Congress recognized that, given the nationwide scope of the drunk driving

problem, a uniform and consistent national standard was important and necessary. It is of even greater importance to have uniform and consistent application of basic constitutional principles. The intervention of this Court is imperative. Lower courts will continue to adopt conflicting interpretations of this Court's decision in *Schmerber,* and thereby continue to implement inconsistent applications of the Fourth Amendment, until this Court takes action to resolve the conflict.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

OFFICE OF THE PROSECUTING ATTORNEY
CAPE GIRARDEAU COUNTY, MISSOURI
H. MORLEY SWINGLE, Prosecuting Attorney

JOHN N. KOESTER, JR., *Counsel of Record*
Assistant Prosecuting Attorney
100 Court Street, Suite 204
Jackson, MO 63755
(573) 243-2430
jnkoester@capecounty.us

Attorneys for Petitioner
State of Missouri