IN THE SUPREME COURT OF MISSOURI
No. SC 91850

STATE OF MISSOURI,
Appellant,

v.

TYLER G. MCNEELY,
Respondent.

On Appeal From Circuit Court of Cape Girardeau County, Missouri
Case No. 10CG-CR01849

BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS & WESTERN MISSOURI AND OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF RESPONDENT AS *AMICI CURIAE*

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STATEMENT OF JURISDICTION

Amicus adopts the jurisdictional statement as set forth in Respondent's brief filed with the Court in this case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU Foundation of Kansas and Western Missouri is an affiliate of the ACLU based in Kansas City, Missouri, with approximately 1500 members in Western Missouri. The ACLU of Eastern Missouri is an affiliate of the ACLU based in St. Louis with over 2500 members in Eastern Missouri. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. Because the Missouri Supreme Court has not yet addressed the issue of whether, and if so, when a blood draw may be taken without a warrant, the ACLU Foundation of Kansas and Western Missouri and the ACLU of Eastern Missouri file this brief to highlight the significant constitutional issues implicated by the Court of Appeals' disposition in this case.

STATEMENT OF FACTS

On October 3, 2010, Corporal Mark Winder ("Winder") of the Missouri State Highway Patrol was on patrol on northbound U.S. Highway 61 in the city of

Cape Girardeau at 2:08 A.M. (Tr. 4–5) (L.F. 14). At that time Winder observed the vehicle of Tyler McNeely ("Respondent") travelling in excess of the speed limit. (Tr. 5) (L.F. 14). Winder made a U-turn and stopped Respondent after observing the vehicle cross the centerline three times. (Tr. 5: 16) (L.F. 14).

After making contact with Respondent, Winder observed several signs of intoxication. (Tr. 6: 4–5) (L.F. 14). Winder then conducted field sobriety tests on which Respondent performed poorly. (Tr. 6-7) (L.F. 14). Winder asked Respondent to submit a breath sample into a portable breathalyzer. (Tr. 7: 23–8: 1) (L.F. 14). Respondent refused and was placed under arrest at 2:18 A.M. (Tr. 8: 8–9) (L.F. 14).

Winder began transporting Respondent to the Cape Girardeau County Sheriff's Office and inquired whether Respondent would submit to a breath test at the sheriff's office. (Tr. 8: 12–16) (L.F. 14). Respondent stated that he would not do so, and Winder instead transported Respondent to St. Francis Medical Center in order to obtain a blood sample. (Tr. 8: 18–23) (L.F. 14).

At 2:33 A.M., Winder read Respondent the Missouri Implied Consent forms. (Tr. 9: 3–4) (L.F. 14). Respondent stated that he would not consent to having his blood drawn for an alcohol test. (Tr. 10: 8) (L.F. 14). Winder noted the refusal and told Respondent that the blood would be drawn without his consent pursuant to Missouri law. (Tr. 10: 11–13) (L.F. 15). A lab technician then drew the blood sample from Respondent's arm. (Tr. 10: 14-15) (L.F. 15). The blood was

tested and revealed Respondent to have had a blood alcohol content of 0.154%. (Tr. 11) (L.F. 26).

At the hearing on Respondent's Motion to Suppress Evidence, Winder testified that he did not believe there were any exigent circumstances at the time of Respondent's stop. (Tr. 15: 3). Winder further testified that no attempt was ever made to acquire a warrant to draw respondent's blood because he had been informed in "new laws training" that a warrant was no longer necessary. (Tr. 14: 1–13) (L.F. 15). Winder stated that the Cape Girardeau County Prosecutor had prepared an affidavit form for officers to use to obtain warrants for blood samples from DWI suspects (Tr. 16: 4–7) (L.F. 15, 27–33 Defendant's Exhibit B). While Winder had used these forms fewer than ten times, he had never had a problem obtaining a warrant in the past and had no reason to believe he could not have obtained one on the night he stopped Respondent. (Tr. 16–17) (L.F. 15). Additionally, there have been at least six cases in which search warrants for a blood sample were obtained in Cape Girardeau County after normal business hours. (L.F. 15, 34 Defendant's Exhibit C).

Sergeant Blaine Adams ("Adams") of the Missouri Highway Patrol testified regarding various elements of DUI cases and conflicting instructions the Highway Patrol had been given on when a warrantless blood draw was recommended. (Tr. 19–31). Sgt. Adams testified that alcohol is eliminated from the blood stream at a constant rate and that a person's BAC dissipates at a generally accepted rate of .015 to .020 per hour. (Tr. 21: 17–25). Adams stated

that an interoffice communication from Major J.B. Johnson to all troop commanders on December 27, 2010 informed him that officers could obtain warrantless blood draws but should only use that procedure in exigent circumstances involving manslaughter/vehicular assault cases and that officers should expend "all reasonable means to obtain a search warrant." (Tr. 22–23, 29) (L.F. 15). Yet this communication also encouraged zone sergeants, such as Adams, to meet with local prosecutors to discuss when warrantless blood draws were appropriate. (Tr. 23: 6–11) (L.F. 15).

Adams testified that he met with the Cape Girardeau County Prosecuting Attorney who advised that warrants were unnecessary for typical DUI stops but a warrant for a blood draw should be obtained when accidents with injuries were involved. (Tr. 24–25, 29–30) (L.F. 16). Evidence adduced at the suppression hearing indicated that warrants for blood draws have been obtained in as little as forty minutes and in no more than two hours. (L.F. 34 Defendant's Exhibit C). Finally, Adams testified that he would classify Respondent's stop as a run of the mill DUI case. (Tr. 30: 18-20) (L.F. 16).

SUMMARY OF ARGUMENT

The Fourth Amendment to the United States Constitution and Article I, § 15 of the Missouri Constitution protect individuals from arbitrary and warrantless searches absent one of several narrow exceptions to the warrant requirement. The United States Supreme Court has held that blood testing is a form of search subject to constitutional protection. One exception to the warrant requirement involves

exigent circumstances such as when evidence would likely be destroyed if the time were taken to obtain a warrant.

Neither the United States Supreme Court nor this Court has ever held that exigent circumstances exist merely because of the evanescence of blood alcohol concentrations ("BACs"). In fact, the Supreme Court's decision in *Schmerber v. California* requires a case-by-case totality of the circumstances inquiry to determine whether exigent circumstances exist.

The Court of Appeals' holding that the evanescence of BACs alone creates exigency eviscerates the Constitution's warrant requirement in the context of DUI stops, regardless of each situation's facts and the ease with which a warrant might be obtained. The exigent circumstances *exception* cannot swallow the rule merely for the sake of executive ease.

The warrantless blood draw in this case violated Respondent's rights under the United States and Missouri constitutions. There are no facts to indicate that exigent circumstances existed to allow a warrantless blood draw once Respondent refused to consent to having his blood drawn. In fact, the testimony of Cpl. Winder and Sgt. Adams establishes that this was a run of the mill DUI stop rather than an emergency situation and that there was no indication that a warrant could not have been obtained in a timely fashion. As such, this Court should affirm the order of the Cape Girardeau Circuit Court to suppress the evidence obtained by the warrantless blood draw.

ARGUMENT

I. Blood draws are searches within the meaning of the Fourth Amendment and may not be administered without consent or a warrant absent some exception to the warrant requirement.

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. U.S. Const. Amend. IV. The United States Supreme Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). In *Schmerber v. California* the Supreme Court considered the warrantless blood draw taken from a defendant in a DUI case at a hospital several hours after an accident. The Court held that blood draws are searches within the meaning of the Fourth Amendment and therefore subject to its restrictions. 384 U.S. 757, 767 (1966). The Court went on to discuss the importance of the interest at stake:

> Search warrants are ordinarily required for searches of dwellings, and, *absent an emergency*, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. The importance of

> informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt *is indisputable and great.*

Id. at 770 (internal quotations and citations omitted) (emphasis added).

Ultimately, the *Schmerber* Court determined that, despite the importance of obtaining a warrant, the officer in that case "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." 384 U.S. at 770 (internal citation omitted). Based on the totality of the factual circumstances, the Court upheld the warrantless search. *Id.*

Thus, the Supreme Court has made clear that blood draws, such as the one Respondent was subjected to, are searches and must comply with the Fourth Amendment "*absent an emergency*." Furthermore, the language of *Schmerber* shows that such intrusions into a person's body represent a significant invasion for which a warrant should generally be obtained. As such, Respondent should not have been subjected to a warrantless blood draw unless the circumstances surrounding his arrest represented an emergency threatening the destruction of evidence.

II. The Court of Appeals erred in holding that the evanescence of alcohol in the bloodstream, without more, creates exigency.

The Court of Appeals held that exigent circumstances supporting a warrantless blood draw exist merely due to the evanescence of BACs. *State v.*

McNeely, 2011 WL 2455571, at *1, *4 (Mo. App., E.D. June 21, 2011). As such, the court found that no "special facts," other than Winder's reasonable belief that Respondent was intoxicated and that his BAC would continue to decrease, needed to exist. *Id.* This conclusion renders nugatory much of the language in *Schmerber* which carefully limited the holding to the facts of that case. The holding of the Court of Appeals ignores better-reasoned case law and would establish a *per se* exigency test which would transform the exigent circumstances exception into the rule of thumb in DUI cases.

A. *Schmerber* requires a totality of the circumstances approach to determining exigency.

"Exigent circumstances exist if the time to obtain a warrant 'would endanger life, allow a suspect to escape, or risk the destruction of evidence because of an imminent police presence.'" *State v. Wright*, 30 S.W.3d 906, 910 (Mo. App. E.D. 2000) (internal citation omitted). In *Schmerber*, the Court carefully couched its finding that exigent circumstances existed in terms of the precise facts of that case. The Court stated:

> Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these *special facts*, we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest.

384 U.S. at 770-71 (emphasis added).[1] This alone cautions that the Court was engaging in a totality of the circumstances analysis to determine exigency. But the Court did not stop there but, instead, went on to state:

> It bears repeating, however that we reach this judgment *only on the facts of the present record*. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772 (emphasis added). The Court thus reaffirmed that warrantless intrusions of the body were not to be undertaken lightly and that exigency is to be determined by the unique facts and circumstances of each case.

Well-reasoned opinions from the supreme courts of other states support this reading of *Schmerber*. In *State v. Johnson*, the Supreme Court of Iowa unanimously held that *Schmerber* did not create a *per se* exigency rule in DUI cases. 744 N.W.2d 340, 343 (Iowa 2008). In *Johnson*, the court noted that Iowa

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[1] While the language of *Schmerber* left it somewhat unclear whether the Court analyzed the case as a search incident to arrest or under the exigent circumstances exception, the Court subsequently clarified that it should be viewed as an application of the exigent circumstances exception. *Winston v. Lee*, 470 U.S. 753, 759 (1985).

courts have followed the rationale of *Schmerber* that the dissipation of alcohol in the bloodstream "*may* be an exigent circumstance making it constitutionally permissible to obtain a blood sample without a search warrant." *Id.* (emphasis added). The Iowa court found that the Court in *Schmerber* based its decision on the specific facts of that case and that more than "the mere phenomenon of alcohol dissipation" was needed to create the exigency. *Id*. at 344. Applying a totality of the circumstances approach, the *Johnson* court ultimately found that exigent circumstances did exist because the defendant had caused a serious accident and fled on foot, police had to take time to deal with injuries, interview witnesses and find the defendant, and the defendant was first taken to the traffic office where he refused a breathalyzer. *Id.* More than two and a half hours had passed before the defendant's blood was drawn. *Id.*

In *State v. Rodriguez*, the Supreme Court of Utah dealt directly with the question of whether the dissipation of alcohol in the bloodstream, without more, creates an exigency. In *Rodriguez*, a unanimous court found that *Schmerber* did not create a *per se* rule of exigency but, rather, read *Schmerber*'s holding as dependent on the existence of three "special facts": (1) the evanescence of alcohol in the blood, (2) the large delay caused by investigating the accident scene, and (3) the additional time required to obtain a warrant. 156 P.3d 771, 776 (Utah 2007). The court then examined the deliberate and cautious language of *Schmerber* and determined that the holding could not be read as creating a *per se* rule of exigency. *Id.* The Utah court rejected the Wisconsin Supreme Court's holding in *State v.*

Bohling, 494 N.W.2d 399 (Wis. 1993), finding that it was based upon "a flawed reading of *Schmerber* and a misapplication of *Skinner* [*v. Ry. Lab. Exec. Assn.*, 489 U.S. 602 (1989)][.]"*Rodriguez*, 156 F.3d at 777. The Utah court adopted, verbatim, the dissenting opinion from *State v. Bohling* and found that *Skinner* was based upon principles not applicable to the investigation of crimes:

> "The Court emphasized [in *Skinner*] that the usual warrant and individualized suspicion rules in criminal cases were inapplicable to the administrative testing of railroad employees because the testing of railroad employees was not mandated to assist in the prosecution of employees but rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."

Id. at 777 n.3 (quoting *State v. Bohling*, 494 N.W.2d 399, 408 n.9 (1993) (Abrahamson, J., dissenting)). Unlike *Skinner*, this case involves a search in aid of a criminal prosecution, which is at the core of the Fourth Amendment's protections. *See Adams v. New York*, 192 U.S. 585 (1904) (Fourth Amendment "designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction.").

Furthermore, the Utah court found that, as a policy matter, creating a *per se* exigency rule in cases involving alcohol-related blood seizures "would remove much of the incentive to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate

interests of law enforcement." *Id.* at 779. The court was particularly troubled by the fact that the officer in *Rodriguez* never considered the availability of a warrant. The *Rodriguez* court rejected the notion that requiring officers to consider the totality of the circumstances and availability of a warrant would put too much of a burden on police and was confident that officers were "suitably equipped with the talent, training, and experience to permit them to exercise sound judgment when they conclude that an investigation would benefit from the acquisition of blood-alcohol evidence." *Id.* at 780.

In *Schmerber*, the Court did not find that exigency existed merely because alcohol dissipates from the bloodstream at a constant rate but, rather, considered the substantial time that had elapsed before it was determined that a blood draw was necessary and the effect further delay in obtaining a warrant would have had on the BAC evidence. Both the Iowa and Utah supreme courts considered and rejected a *per se* approach to exigency based on a careful reading of *Schmerber*. The *Schmerber* Court could simply have announced a *per se* rule had that been the Court's intent. Instead, the Court looked carefully at the facts in announcing the decision. This choice was a directive to lower courts to engage in a totality of the circumstances analysis in determining whether exigency permits a warrantless blood draw. As such, the Court of Appeals erred when it held that the mere evanescence of alcohol in the blood establishes exigency *per se*.

B. Missouri case law does not require holding that evanescence is sufficient to create exigency.

The State relies extensively on five Missouri appellate court decisions in support of its argument that the evanescence of BACs is alone sufficient to create an exigent circumstance that sanctions warrantless blood draws in all DUI cases. *State v. Ikerman*, 698 S.W.2d 902, 904-05 (Mo. App. E.D. 1985); *State v. Setter*, 721 S.W.2d 11, 12-13 (Mo. App. W.D. 1986); *State v. Trice*, 747 S.W.2d 243, 246 (Mo. App. W.D. 1988); *State v. Trumble*, 844 S.W.2d 22, 23 (Mo. App. W.D. 1992); *State v. Lerette*, 858 S.W.2d 816, 817 (Mo. App. W.D. 1993). None of these cases supports a *per se* rule that the evanescence of BACs is alone sufficient to constitute an exigent circumstance that would permit officers in every DUI case to take a blood draw from a suspect without consent or a search warrant.

The facts of *Lerette* and *Setter* are remarkably similar to the "special facts" that the Supreme Court found to justify a warrantless blood draw in *Schmerber*. Specifically, both cases involved car accidents and investigatory work that caused significant delays before the involved law enforcement officers arrived at the hospital to observe the suspect. Thus, while neither case referenced "special facts" explicitly, both embody a straightforward application of *Schmerber* and no language in either case states that the dissipation of blood alcohol concentrations alone was the basis for the holding.

Ikerman incorrectly viewed *Schmerber* as applying the search incident to arrest exception to the warrant requirement and provides no analysis of exigency.

As such, the opinion does not provide reasoned support for the State's argument for a *per se* rule of exigency. *Trice* and *Trumble* are unhelpful because the language in those cases about when a warrantless blood draw may be taken were dicta since, in *Trice*, a search warrant had been issued and, in *Trumble*, the defendant had consented.

None of these cases dealt directly with the issue of whether the mere dissipation of blood alcohol concentrations creates exigency; nor did these cases consider in any reasoned and analytical way the language of *Schmerber* calling for a totality of the circumstances approach to Fourth Amendment warrant issues in DUI blood draw cases. Thus, Missouri case law simply supports the conclusion that warrantless blood draws are permissible *in some circumstances*, but no Missouri court has held that exigency exists *per se* in every DUI case.

C. Other jurisdictions holding that evanescence creates exigency misapply *Schmerber.*

The State also relies on several cases from other jurisdictions to support its claim that *Schmerber* created a rule of *per se* exigency in DUI cases. In *U.S. v. Berry*, an officer took a warrantless blood sample from a suspect at a hospital after investigating the accident scene and spending significant time monitoring the suspect. 866 F.2d 887, 888 (6th Cir. 1989). The court found that because "evidence of intoxication begins to dissipate promptly, it is evident *in this case* that there were exigent circumstances indicating the need to take such action." *Id.* at 891 (emphasis added). The facts of *Berry* are similar to those of *Schmerber*, and

the above-quoted language indicates that the exigency was based on the specific facts of the case. Thus, *Berry* does not support a rule of *per se* exigency.

In *State v. Bohling*, the Wisconsin Supreme Court read *Schmerber* as holding that exigent circumstances exist "based solely on the rapid dissipation of alcohol from a person's bloodstream." 494 N.W.2d 399, 402 (Wis. 1993). In so holding, the Wisconsin Supreme Court misread *Schmerber*. Specifically, *Bohling* completely ignored the Supreme Court's careful attention to the precise factual details involved in *Schmerber*. Thus, the court's view that mere dissipation of BAC automatically creates an exigency is flawed and ignores *Schmerber*'s totality of the circumstances approach. In *Bohling*, moreover, three justices joined a well-reasoned dissent which argued that *Schmerber* required courts to determine, case-by-case, whether obtaining a warrant would hamper the procurement of evidence. *Id*. at 407 (Abrahamson, J., dissenting). The dissent's analysis was correct and should guide this Court's decision.

Further, *Bohling*'s reliance on *Skinner v. Ry. Lab. Exec. Assn.*, 489 U.S. 602, 621 (1989), is misplaced. *Bohling* ignores the Supreme Court's statement in *Skinner* that it was assessing "the FRA's [Federal Railroad Administration's] scheme in light of its obvious administrative purpose." *Skinner*, 489 U.S. at 621. Additionally, in *Skinner*, the Court found that, because the FRA's scheme relied on private railroads to initiate the testing process, "insistence on a warrant requirement would impede the achievement of the Government's objective." *Id.* at 623. Unlike the situation in *Skinner*, the investigation and arrest of Respondent

were not made as part of an administrative scheme, and the warrant at issue in this case would have been sought by trained law enforcement officers rather than by private employers. Finally, while *Skinner* does mention *Schmerber* briefly, *Skinner* upheld the warrantless tests based on the "special needs" exception rather than exigent circumstances exception to the Fourth Amendment's warrant requirement. The fact that alcohol and drugs dissipate from the blood was a single factor in the Court's analysis. For all of these reasons, *Skinner* provides no support for a rule of *per se* exigency in criminal investigations of DUI cases.

The State also relies on *State v. Shriner* in which a divided Minnesota Supreme Court found that the evanescence of BACs alone was enough to create exigency: "Because it is undisputed that this loss of the most probative evidence of criminal vehicular operation occurs during the time it takes to obtain a warrant, exigent circumstances are present based on the imminent destruction of evidence." 751 N.W.2d 538, 549 (Minn. 2008). *Shriner* relies heavily on *Skinner* as well as *Bohling*. Thus, *Shriner* is problematic for the reasons just noted. Like *Bohling*, the *Shriner* court does not convincingly explain why it failed to consider the Supreme Court's reliance on the existence of "special facts" and its weighing of the totality of the circumstances in reaching its conclusion that a warrant was not required with respect to the blood draw taken in *Schmerber*. The *Shriner* dissent provides a detailed analysis of *Schmerber* and other precedents and concludes that the Fourth Amendment continues to require a totality of the circumstances

analysis in determining exigency. *Id.* at 550-58 (Meyer, J., dissenting). The *Shriner* dissent supplies the proper analysis and should guide this Court.

The State also relies on *State v. Machuca*, in which the Supreme Court of Oregon concluded that evanescence was sufficient to create exigency. 227 P.3d 729, 736 (Or. 2010). *Machuca* is entirely irrelevant to this case because its holding relies exclusively on the Oregon Constitution and addresses neither the Fourth Amendment issue nor *Schmerber*.

The State also relies on *U.S. v. Reid*, in which the Fourth Circuit considered whether exigent circumstances justified the warrantless administration of a breathalyzer test. The court found that the evanescence of BACs creates an exigency which is sufficient to allow police to administer breath tests without a warrant. 929 F.2d 990, 994 (4th Cir. 1991). In doing so, however, the court noted that breath tests are a less severe intrusion than blood tests. *Id.* As *Reid* deals with breath tests rather than a bodily intrusion, the holding is immaterial to this case.

As the foregoing illustrates, the cases from other jurisdictions relied on by the State either fit neatly into a *Schmerber* totality of the circumstances analysis or are poorly reasoned. As such, those cases offer no persuasive support for the State's argument that a *per se* rule of exigency exists in DUI cases. Therefore, the trial court did not err when it applied a totality of the circumstances approach and determined that no exigency existed on the facts of this case.

III. Advances in science and technology since *Schmerber* further undermine the need for a *per se* rule of exigency in DUI blood draw cases.

Improvements in both communications technology and scientific understanding of the rate at which alcohol dissipates from the blood provide officers with a clearer picture of whether a warrant can be obtained in time. E. John Wherry Jr., *Vampire or Dinosaur: A Time to Revisit* Schmerber v. California*?*, 19 Am. J. Trial Advoc. 503 (1996). The vast breadth of these developments – particularly the quantum leap in communications technology – in the forty-five years since the Court decided *Schmerber* merit a new look at the warrant issue in DUI blood draw cases. Other courts have already revisited the issue in light of these changes.

A. The speed with which a warrant may be obtained reduces the level of exigency.

Exigency is based, in part, upon the delay that would be caused by the need to obtain a warrant. *Cf. Wright*, 30 S.W.3d at 910 (finding defendant was likely to destroy evidence if officers left scene to obtain warrant). "The astonishing advances that have marked communications and information technology over recent decades have dramatically pared back the physical obstacles to warrant acquisition." *Rodriguez*, 156 P.3d at 778. The *Rodriguez* court also found that "were law enforcement officials to take advantage of available technology to apply for warrants, the significance of delay in the exigency analysis would

markedly diminish." *Rodriguez,* 156 P.3d at 778. "'The mere possibility of delay does not give rise to an exigency.'" *Id.* at 779 (quoting *State v. Flannigan*, 978 P.2d 127 (Ariz. Ct. App. 1998)).

In this case, Cpl. Winder testified that he had not had problems obtaining warrants in the past and had no reason to believe he would have had a problem obtaining a warrant on this particular occasion. Additionally, Sgt. Adams testified that acquiring a search warrant typically adds no more than an hour and a half to two hours onto the time of a DUI stop. (Tr. 28: 11–12). Furthermore, the record of recent applications for DUI blood draw search warrants in Cape County shows that warrants have been issued in as little as forty minutes. And, perhaps most importantly, the Cape Girardeau County Prosecuting Attorney has written that the Cape Girardeau County prosecutor's office "has standard forms to use in this situation [seeking warrants for blood draws in DUI cases] with blanks to fill in so the warrant may be obtained in minutes since time is always of the essence in these cases." *Search and Seizure Law in Missouri,* H. Morley Swingle, Missouri Association of Prosecuting Attorneys: Spring Statewide Training, April 8, 2009, at 19 (*available at* http://www.capecounty.us/files/ProsecutingAttorneySEARCH&SEIZURE_BOOK.pdf (last visited July 14, 2011)). The fact that there is a process in place to expedite the acquisition of a warrant in these cases reduces any claim that a *per se* rule of exigency is necessary. The record here demonstrates that officers know how long obtaining a warrant will typically take and that they can make an informed judgment about the effect of that delay under various factual

scenarios. These facts undermine the State's argument in favor of a *per se* rule of exigency in DUI blood draw cases.

B. The ability to apply retrograde extrapolation to BAC tests reduces the level of exigency.

The Utah Supreme Court found that the evanescence of alcohol in the blood presented a less compelling case for exigency than other types of destruction of evidence such as the flushing of drugs down a toilet. *Rodriguez*, 156 P.3d at 780. In the classic loss of evidence case, exigent circumstances typically exist because officers are presented with a situation in which a suspect might quickly destroy or dispose of evidence *in its entirety*. *See Kentucky v. King*, 563 U.S. ___, 131 S. Ct. 1849 (2011) (assuming exigency existed where police had reason to believe illegal drugs would be destroyed almost immediately). In DUI blood draw cases, however, a process known as retrograde extrapolation allows scientists to determine a suspect's BAC at the time of vehicle operation based on BAC at the time of the test so long as the alcohol has not entirely dissipated. *Vampire or Dinosaur*, 19 Am. J. Trial Advoc. at 517; *see Welch v. State*, 326 S.W.2d 916, 919 n.3 (Mo. App. W.D. 2010) (chemist for the State used retrograde extrapolation to determine defendant's BAC at time of collision).

Alcohol concentrations in the blood peak roughly an hour after consumption and then decrease at a constant rate of roughly .015% per hour. Alex Paton, *ABC of Alcohol: Alcohol in the Body*, 330 Brit. Med. J. 85, 86 (2005), *available at* http://www.bmj.com /content/330/7482/85.full.pdf. (last visited July

24, 2011). However, this rate of elimination does vary slightly among individuals. *Vampire or Dinosaur*, 19 Am. J. Trial Advoc. at 516. Missouri has chosen to criminalize driving with a BAC at or above .08%. Mo. Rev. Stat. § 577.012. Further, Missouri recognizes that BACs are rarely measured at the moment an officer determines probable cause exists. *See Hieger v. Director of Revenue*, 733 S.W.2d 491, 493 (1987) (legislature knew some period of time would exist between determination of probable cause and test).

The availability of this retrograde extrapolation process drastically increases the time available to obtain a warrant and thereby reduces the exigency. Applying the above rates to Missouri's law shows that warrants can, in fact, be obtained without the destruction of evidence. If a person was driving with the prohibited BAC of .08 and has a normal elimination rate of .015, a five hour window to obtain a blood draw exists. Even with a higher elimination rate of .02, officers will still have over three hours to obtain a blood sample. The timeframe is greater for a suspect who has consumed more alcohol and thus has a BAC higher than .08 when stopped by the police. Thus, when procedures, such as those in Cape County, are in place to allow police to expeditiously obtain warrants for blood draws, such warrants may be obtained without sacrificing valuable evidence. This too undermines the State's position that a *per se* rule of exigency is necessary in all DUI cases. In this case, Respondent's BAC was .154% when his blood was drawn. Even at the highest elimination rate of .02 per hour, Trooper

Winder would have had well over seven hours to obtain a warrant and have the blood drawn.

IV. Under a totality of the circumstances approach, no exigent circumstances existed in Respondent's case.

Applying a totality of the circumstances approach in an alcohol-related case, the Utah Court of Appeals stated:

> Relevant facts may include the distance to the nearest magistrate, the availability of a telephonic warrant, the feasibility of a stake-out or other form of surveillance while a warrant is being obtained, the seriousness of the underlying alcohol-related offense, the commission of another offense such as fleeing the scene, the ongoing and continuing nature of an investigation, the extent of probable cause, and the conduct of the investigating officers.

City of Orem v. Henrie, 868 P.2d 1384, 1392 (Utah Ct. App. 1994). The "special facts" of *Schmerber* included the time that had passed while the police searched the accident scene, the time spent transporting the defendant to the hospital, and the additional time that would have been needed to obtain a warrant. *Schmerber*, 384 U.S. at 770-721.

Considering the totality of the circumstances, no exigency existed in this case because Cpl. Winder had ample time to obtain a search warrant without losing valuable evidence of drunk driving. As noted above, the stop of Respondent's vehicle was a run of the mill DUI stop. There was no traffic accident. After Cpl. Winder finished administering the field sobriety tests, no other

investigation was undertaken or needed. Respondent was in Cpl. Winder's custody the entire time and did not have to be transported to a hospital for treatment. The absence of unusual delays associated with a traffic accident, an extensive on-scene investigation, or hospital transport and treatment of injuries distinguishes this case from *Schmerber*, *Berry*, *Lerette*, *Setter* and *Johnson*. Finally, Cpl. Winder testified that he had no reason to believe he would have had any trouble obtaining a warrant and that warrants have been regularly and expeditiously obtained after business hours in Cape County. The only reason Cpl. Winder did not obtain a warrant was that he had been instructed that he need not do so.

Applying the totality of the circumstances analysis required by *Schmerber*, it is clear that the record in this case does not support a finding of exigency and that the trial court correctly held that none existed. Because no exigent circumstances existed, the warrantless blood draw violated Respondent's Fourth Amendment rights. Regardless of what the change in language of Section 577.041, RSMo 2000 may have been intended to accomplish, the warrantless taking of Respondent's blood, on these facts, remains unconstitutional under the Fourth Amendment.

CONCLUSION

Based on the foregoing and the reasons provided in Respondent's brief, *amici* ACLU Foundation of Kansas & Western Missouri and the ACLU of Eastern Missouri urge this Court to affirm the circuit court's order suppressing the evidence of the defendant's blood alcohol level.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 6636 words, as determined using the word-count feature of Microsoft Office Word 2003. The undersigned further certifies that the accompanying disk has been scanned and was found to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief on disk were served upon the counsel identified below by United States Mail, postage prepaid, on July 29, 2011:

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