IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI

Appellant

v.

TYLER G. MCNEELY

Respondent

NO. SC 91850

APPEAL FROM THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI
32ND JUDICIAL CIRCUIT
HONORABLE BENJAMIN F. LEWIS, DIVISION II

RESPONDENT'S SUBSTITUTE BRIEF

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SUPPLEMENTAL STATEMENT OF FACTS

Respondent offers the following supplemental statement of facts. Respondent believes that the statement of facts provided by the Appellant is accurate, but that additional information from the record is necessary for a complete statement of facts. Rule 84.04(f).

Corporal Mark Winder with the Missouri State Highway Patrol was called by the Appellant at the hearing held on Respondent's Motion to Suppress Evidence. Corporal Winder testified that he had 17½ years of experience with the Missouri State Highway Patrol (Tr. 4). Corporal Winder agreed that there were no particular exigent circumstances or emergency circumstances that dictated the need to immediately obtain blood from Respondent (Tr. 14-15). He further testified that he was "sure there was" a Prosecuting Attorney on call (Tr. 15). He acknowledged that the Prosecuting Attorney in Cape Girardeau County has prepared a form search warrant application for use in DWI cases and that such form is readily available at the Cape Girardeau County Sheriff's Department (Tr. 16). He testified that he had no reason to believe he couldn't get a warrant due to the unavailability of a Prosecuting Attorney or a Judge (Tr. 16). In 17½ years on the Missouri State Highway Patrol, he has sought a warrant for blood in a DWI arrest "probably less than ten" times (Tr. 16), and that he had never been unable to obtain a search warrant for blood. In addition, he testified that he did not have any reason to

believe he could not have gotten a search warrant because of the unavailability of a prosecutor or the unavailability of a judge on the night of Respondent's arrest (Tr. 17).

At the hearing, Respondent offered in evidence and the Court received without objection the blank form application for search warrant in cases involving driving while under the influence of alcohol. It was marked as Exhibit B (L.F. 27-33). The Respondent offered in evidence and the Court received without objection a listing of recent Cape Girardeau County search warrants for blood in driving while intoxicated cases. This exhibit was marked Defendant's Exhibit C (L.F. 34).

Respondent called Missouri State Highway Patrolman Sgt. Blaine Adams at the suppression hearing. Sgt. Adams testified that he had 23 years experience with the Missouri State Highway Patrol (Tr. 19), and he testified there is a generally accepted elimination rate for alcohol from the blood stream of approximately .015 to .020 per hour (Tr.21). He stated "usually from the blood samples I have taken, it usually falls right in that range" (Tr. 22).

Sgt. Adams in response to a subpoena, produced a Highway Patrol interoffice communication to Troop Commanders from Major J.B. Johnson dated December 27, 2010, and this was received in evidence as Defendant's Exhibit D (Tr. 23-25) (L.F. 35). In a colloquy with the Court, Sgt. Adams testified that there is a difference of opinion regarding procedures to be followed in DWI cases where

there is a refusal to submit to any chemical testing, and with regard to obtaining or not obtaining a search warrant, between the recommended procedures by the Highway Patrol and those recommended by the Cape Girardeau County Prosecuting Attorney (Tr. 28-30), Sgt. Adams agreed that Respondent's arrest constituted a "run of the mill" DWI arrest and the procedure recommended by the Highway Patrol Headquarters was that the arresting officer should get a warrant and that the recommended procedure by the Cape Girardeau Prosecuting Attorney was don't get a warrant (Tr. 30-31).

ARGUMENT

The specific question for review in this case is whether or not the trial court correctly held that Corporal Winder, with 17½ years of experience with the Missouri State Highway Patrol, was prohibited by the Fourth Amendment from obtaining a non-consensual and warrantless blood sample from Respondent when he could not identify any exigent circumstances then existing, and he had no reason to believe he could not timely obtain a search warrant. The broader and more troubling consequential question is whether this court will accept Appellant's invitation to adopt a "single factor" exigent circumstance rule and hold that any law enforcement officer in the State of Missouri may make an arrest for driving while intoxicated, and then without even considering whether to submit the facts to a disinterested judge for the issuance of a search warrant, go to the nearest hospital and forcibly cause a puncture of the arrested person's skin, draw blood from his body and thereafter use that blood in evidence. As to the first question, the trial court was correct in its ruling, and the trial court's suppression order must be sustained and affirmed. As to the second question, this Court should reject the invitation to adopt a "single factor" exigent circumstance rule.

1. The trial court correctly applied Fourth Amendment Law to the facts of this case, finding the blood withdrawal to be unreasonable.

The Fourth Amendment to the United States Constitution provides, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated …" Recognizing that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State," the United States Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966) held that the "compulsory administration of a blood test" … "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." 384 U.S. at 767. The court went on to state:

> "It could not reasonably be argued, and indeed Respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of persons, and depend antecedently upon seizures of persons within the meaning of that amendment."

384 at U.S. 767. Given the Point Relied On set forth in Appellant's Substitute Brief, page 11, it appears to Respondent as though Appellant is in fact arguing that which the Supreme Court of this country stated "could not reasonably be argued."

Respondent suggests that to properly apply *Schmerber* to this case requires a thorough understanding of the specific facts in that case, and an understanding of the Supreme Court's cautious limitation as to the extent of its ruling. In

Schmerber, the defendant had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile he had apparently been driving. 384 U.S. at 758. A police officer had arrived at the scene shortly after the accident, and smelled liquor on the defendant's breath, and testified that his eyes were bloodshot, watery, sort of a glassy appearance. The officer saw the defendant again at the hospital, within two hours of the accident, and he noticed similar symptoms of drunkenness. The officer then advised the defendant that he was under arrest, that he was entitled to the services of an attorney, and that he could remain silent and anything he told that officer would be used in evidence against him. 384 U.S. at 769. The defendant refused testing, and at the direction of the police officer, a blood sample was then drawn from the defendant's body by a physician at the hospital. 384 U.S. at 758.

The *Schmerber* court ultimately determined that the officer in that case very well may have appropriately believed he was facing an emergency circumstance where there was potential threatened destruction of the evidence by the passage of time. But in determining that, the court noted:

> "Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to 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." (Emphasis added).

384 U.S. at 770-771. However, the court did not place a blanket of permission over all blood draws arising from all DWI arrests regardless of the circumstances. Rather, the court was very careful to restrict its finding, and held as follows:

> "We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. 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 State's 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.*" 384 U.S. at 772 (Emphasis added).

Clearly, the court was holding that some emergency or exigent circumstance[1] must exist to justify the warrantless taking of blood. In the

[1] The Court in *Schmerber* did not use the terms "exigent" or "exigency." Instead, the Court discussed the issue using the term "emergency." In later cases, the United States Supreme Court has characterized *Schmerber* as representing the

Schmerber case, the court felt that the emergency circumstances existed because of the passage of time from the accident until the time when the officer made the decision to arrest the driver, and the apparent problems with seeking out a magistrate to secure a search warrant. In fact, the court refers to these as "special facts." 384 U.S. at 771. There are no "*special facts*" in this case, and none were found by the trial court (L.F. 19).

The *Schmerber* court also emphasized the requirement that the particular facts of a case justifying state intrusion upon a protected interest of a citizen should be based more often than not on the informed and detached and deliberate determinations of a judge, stating:

> "Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. 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

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"exigent circumstances" exception to the warrant requirement. *Winston v. Lee*, 470 U.S. 752, 759 (1985), *U.S. v. Dianisio*, 410 U.S. 1, 8-9 (1973).

> 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." (internal quotations and citations omitted) 384 U.S. at 770.

While the officer involved in the *Schmerber* 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, the officer in the case before this court stated that he saw no exigent or emergency circumstances (Tr. 14-15). He was, instead, acting under what he believed to be the "new rules" in effect in Missouri as referenced in the interoffice memorandum which was placed in evidence at the hearing on Respondent's Motion to Suppress (Tr. 14). There were no "special facts" as contemplated by the court in *Schmerber* in the thought process of Trooper Winder. Instead, he was dealing with a run of the mill DWI case, so he did not need to think about, much less obtain, a search warrant.

The often stated standard of review on a motion to suppress evidence is limited to determination of whether the trial court's decision is supported by

substantial evidence, and the reviewing court considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling. Moreover, the Appellate Court will reverse the trial court's ruling only if it is clearly erroneous, and deference is given to the trial court's determinations as to credibility and facts found by the trial court. *State v. Johnson*, 207 S.W.3d 24, 44 (Mo. banc 2006); *State v. Edwards,* 116 S.W.3d 511, 530 (Mo. banc 2003). Applying that standard of review to this case, the trial court had adequate and sufficient evidence that the arresting officer did not believe an emergency existed, and that there were no exigent circumstances involved, and the officer was quite satisfied that a prosecutor would be on call to pursue a warrant, and that a judge would be available to consider a search warrant application (L.F. 15). This is clearly not a case involving any exigent circumstance, and as such, respondent is entitled to the protections of the Fourth Amendment to the United States Constitution requiring a search warrant be obtained before proceeding with a non-consensual blood draw.

Respondent suggests that some exigent circumstance must exist <u>other than</u> the mere fact that blood alcohol level might dissipate with the passage of time, to justify the officer alone making the decision to compel a blood draw from a person's body, rather than submitting the facts to a disinterested and impartial judge to make the determination as to whether or not such an intrusion should be allowed. Respondent contends that the holding in *Schmerber* is controlling under

the facts of this case. In fact, given the testimony of the arresting officer in this case, namely that there were no exigent circumstances, Respondent would suggest that *Schmerber*, by implication, would mean that the blood draw in this case without consent and without a warrant was a violation of the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution. The trial court correctly found that to be the case.

Cases cited from the federal courts by Appellant do not support the position taken by Appellant. In *U.S. v. Chapel*, 55 F.3d 1416 (9th Cir. 1995), there was a single vehicle motorcycle accident, and park rangers were administering aid when they noticed the "tell tale signs that Chapel had been drinking." 55 F.3d at 1417. This included that his breath smelled of alcohol, his speech was slurred and his eyes were bloodshot. Chapel was asked to take a breathalyzer test, but he refused. The rangers then instructed the medic on scene to obtain a blood sample for later testing. The medic had already inserted the sterile needle to administer an IV, and from that source, the medic withdrew a sample of Chapel's blood. Subsequent testing reveals a blood alcohol concentration of 0.21. 55 F.3d at 1417-18. The real issue in *U.S. v. Chapel* had to with the fact that Chapel was not under arrest at the time the blood was drawn. The 9th Circuit held that the fact that the individual was not specifically under arrest did not cause the blood test to be inadmissible. In so holding, the court stated "in addition to probable to cause, the other *Schmerber*

requirements remain in place. The officer must still reasonably believe that an emergency exists in which the delay necessary to obtain a warrant would threaten the loss or destruction of evidence" and the procedures used to extract the sample must be reasonable. 55 F.3d at 1419.

The *Chapel* court also acknowledged the complexities of obtaining a warrant under the Federal Criminal Rules stating "obviously, compliance with these rules takes time." 929 F.2d at 993. A significant factor noted by the Court in *Chapel* was the acknowledgment by the court that breathalyzer tests are less intrusive than blood tests. More importantly, the court acknowledged that "blood tests may reveal personal facts other than the presence of alcohol; whereas breath tests will reveal only the level of alcohol in the blood stream." 929 F.2d at 994. Otherwise stated, a blood test can reveal DNA evidence, blood type, the presence of disease and the presence of drugs or chemicals which are not the object of the search.

In *U.S. v. Reid*, 929 F.2d 990 (4th Cir. 1991), there was a situation involving two separate defendants, and the issue was with regard to *breath tests* performed upon those defendants, and not blood tests. The court did note, however, that a breath test is the least intrusive method of obtaining a blood alcohol reading and acknowledged the difficulty and time consumed in meeting the Federal Criminal Rule requirements to obtain a warrant. 929 F.2d at 993. Respondent suggests that this case does not support the Appellant's position in this court with regard to the

issue at hand. However, the court in *Reid* did acknowledge the portion of *Schmerber* where the Supreme Court said the arresting officer "might reasonably have believed that he was confronted with an emergency" and the time to obtain the warrant would threaten the destruction of evidence.

U.S. v. Berry, 866 F.2d 887 (6th Cir. 1989) is another case inappropriately relied upon by the Appellant. Again, this case involved exigent circumstances where there was a serious and inexplicable single car accident. The defendant had been taken to a hospital, and the officer, as well as a nurse and an emergency room doctor had smelled alcohol on him over a period of time. Again, the defendant in *Berry* had been in an accident and was already at a hospital when the blood draw decision was made.

While the United States Supreme Court in *Schmerber* could have adopted a "single factor" exigent circumstance in alcohol related driving cases based upon the dissipation of alcohol from the blood, the Court chose not to do so. Other Courts applying *Schmerber* repeatedly state that some exigency or emergency is required to obtain a blood sample without a search warrant. The intrusion into the human body to obtain evidence is not something which should be taken lightly. The Supreme Court in *Winston v. Lee*, 470 U.S. 752 (1985) confirmed that *Schmerber* was an exigent circumstance case and that such an intrusion could only be based upon the "State's compelling need" for the evidence. 470 U.S. at 759.

Interestingly, the Court also noted that in many situations, the circumstances relied upon to demonstrate probable cause make the intrusion could vitiate the need to compel a search. 759 U.S. at 765. Exigent circumstances have otherwise been described as "situations where real immediate and serious consequences will certainly occur if a police officer postpones action to obtain a warrant, *U.S. v. Williams*, 354 F.3d 497, 503 (6th Cir. 2003) (quoting *Ewolski v. City of Brunswick*, 287 F.3d 493, 501 (6th Cir. 2002). In *Roaden v. Kentucky*, 413 U.S. 496 (1973), the Supreme Court described exigent circumstances as being a situation where "police action literally must be *now or never* to preserve the evidence of the crime." 413 U.S. at 505 (Emphasis added). Respondent suggests that it is only in such emergency situations that an officer may be permitted to ignore the constitutional preference for judicial review before conducting a significant search and seizure such as a non-consensual withdrawal of blood.

Missouri cases have relied upon the *Schmerber* decision in authorizing the drawing of blood without a warrant where it is determined that "exigent circumstances exist."[2] In *State v. Lerette*, 858 S.W.2d 816 (Mo. App. 1993), the

[2] Respondent's Motion to Suppress Evidence (L.F. 12-13) relied upon a violation of Respondent's rights under both the Fourth Amendment to the United States Constitution, and his right against unreasonable search and seizure under Article I, Section 15, of the Missouri Constitution. "Article I, Section 15, of the Missouri

State appealed a trial court order suppressing blood test results from use in evidence. In that case, the defendant was apparently the driver of a vehicle involved in a one car accident. When the officer arrived on the scene, the defendant was being loaded into an ambulance. The defendant appeared to be conscious, but the officer did not talk to him. However, the officer remained at the scene, spoke with witnesses, located evidence such as beer cans among the wreckage debris and took measurements at the scene. He then went to the hospital to see if he could speak with the defendant. Upon arriving at the hospital, the defendant was found by the officer with a tube down his throat, and the officer was not sure if he was conscious or unconscious, but he was unable to communicate with the defendant. The officer directed a hospital employee to draw blood, and that blood was the subject of the motion to suppress. 858 S.W.2d at 817. The court in *Lerette* relied upon *Schmerber*, indicating that *Schmerber* is accurately described as involving a "search incident to arrest," but that it also involved exigent circumstances. 858 S.W.2d at 818. While the court in *Lerette* did not

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Constitution provides the same guarantees against unreasonable search and seizures; thus, the same analysis applies to cases under the Missouri Constitution as under the United States Constitution." *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009).

specifically identify the exigent circumstances, it is significant to note that there must have been passage of time for the officer to remain at the scene while the defendant was taken to the hospital, and when the officer arrived at the hospital, he was confronted with an individual with whom he could not communicate. More importantly, the court did state that "both prongs of the exigent circumstances exception were established – probable cause that incriminating evidence would be found and exigent circumstances justifying that search." 858 S.W.2d at 819.

In *State v. Setter*, 721 S.W.2d 11 (Mo. App. 1986), the court sanctioned a warrantless blood draw upon an individual under arrest for vehicular manslaughter, and citing *Schmerber*, stated that such a person "is subject to having a sample of his blood taken without his consent or a warrant, and said blood is inadmissible in evidence." 721 S.W.2d 15. As in *Schmerber*, the defendant in *Setter* was involved in a automobile accident, and was already taken to a hospital when the blood draw was performed. However, the issue in *Setter* involved the permissibility of arresting an individual more than one and a half hours after the unlawful conduct without a warrant, and not drawing blood without consent or a warrant after a routine traffic arrest.

Respondent submits that the holdings in *Lerette* and *Setter* do not dictate finding that the trial court erred in this case. The factual circumstances are

significantly different, and notably both cases involve accidents where drivers have been taken to a hospital for treatment.

In a very recent case, *State v. Dowdy,* SD 30381, January 19, 2011, the Southern District Court of Appeals reversed a trial court order suppressing evidence of a warrantless chemical test in a criminal case. However, that opinion offers little guidance for the issue in this case. *Dowdy* involved a defendant under arrest for a homicide, and the consensual submission to a breath test at a jail facility where the defendant had been taken after his arrest. Taking a sample of a person's breath hardly compares to the intrusive nature of puncturing the body to obtain blood.

Courts in other jurisdictions have addressed this issue, some with similar factual situations, and other with varying factual situations and statutory provisions. Most recently, in *State v. Johnson,* 744 N.W.2d 340 (Iowa 2008), the Iowa Supreme Court addressed the issue of the admission of blood test results from a blood sample taken without a warrant from a driver following a serious vehicular injury accident. Peculiar to that case is the statutory setting, where the Iowa Implied Consent Law directly addresses the ability of an arresting officer to take blood without a warrant. Iowa Code Section 321J.10A(1), enacted in 2004, provides that a police officer who reasonably believes blood drawn will produce evidence of intoxication may have that blood drawn without a warrant provided the

method used to take the blood is reasonable and done in a reasonable manner by medical personnel, and "the peace officer reasonably believes the officer is confronted with an emergency situation in which the delay necessary to obtain the warrant under Section 321J.10 threatens the destruction of evidence." *State v. Johnson*, 744 N.W.2d at 342. The defendant in that case challenged the warrantless blood draw, and in its opinion, the Iowa Supreme Court rejected the idea of a "per se exigency." Rather, the court concluded that their case was more like *Schmerber*, where "time based considerations" following an automobile accident, and the time necessary to investigate the accident, deal with injuries of the victims, interview witnesses, and look for the defendant supported a finding that exigent circumstances existed in that case. 744 N.W.2d at 344-345.

The Iowa Supreme Court in *State v. Johnson*, *supra*, cited with approval and quoted at length from the Utah Supreme Court in *State v. Rodriguez*, 156 P.3d 771 (Utah 2007). In that case, the defendant was on trial in a case involving a fatal traffic accident. The lower court had denied the defendant's motion to suppress blood alcohol evidence obtained in a warrantless search following the accident. The Utah Supreme Court granted certiorari "to answer the narrow question of whether dissipation of alcohol in the blood, without more, created an exigent circumstance under the Fourth Amendment justifying the warrantless extraction of

a blood sample …" 156 P.3d at 772. The Court did a thorough review of both federal and state law, and concluded as follows:

> "In light of the foregoing, it is difficult for us to imagine that the United States Supreme Court could muster the assurance that the consequences of alcohol dissipation are so great and the prospects for prompt warrant acquisition so remote that per se exigent circumstance be awarded to seizures of blood for the purpose of gathering blood alcohol evidence. Accordingly, we decline to grant per se exigent circumstance status to warrantless seizures of blood evidence."

156 P.3d at 782.

A different result was reached in *State v. Faust*, 274 Wis.2d 183, 682 N.W.2d 371 (Wis. 2004), where the Wisconsin Supreme Court addressed this issue. In a closely divided opinion, that Court did hold that "the rapid dissipation of alcohol in the blood stream of an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless non-consensual test of that individual's blood, breath or urine. The facts distinguishing *Faust* from the present case under review are significant. In *Faust*, the court stated that the arresting officer "might have reasonably believed that it was necessary to secure additional evidence of *Faust's* level of intoxication without a warrant in order to prevent needed evidence from being destroyed. 274 Wis.2d at 200. In the case

before this court, we have direct testimony from the arresting officer that he did not sense an exigent circumstance or emergency. Further distinguishing *Faust* is the fact that the actual blood level is significant with regard to the degree of offense which could be changed. *Faust* had actually submitted to a breath test giving a specific blood alcohol level, and was subject to a significantly higher penalty if he had a blood alcohol concentration of 0.1 or higher. 274 Wis.2d 207.

2. The change to RSMo § 577.041 in 2010 cannot diminish an arrested driver's rights protected by the Fourth Amendment.

There is no question that the Missouri legislature amended RSMo § 577.041 in 2010 by removing the words "then none shall be given" from that portion of the statute which specifies what an officer is to do when a driver under arrest has refused chemical testing. Respondent suggests that the change in the statute was more along the lines of "housecleaning" following the opinion of the Eastern District in *State v. Smith*, 134 S.W.3d 35 (Mo. App. 2004). However, that case did not deal with warrantless blood draws. Rather, the issue was whether or not, given the language of the statute at the time, an officer was permitted to obtain a non-consensual blood draw after the arrested driver had refused chemical testing and after obtaining a search warrant. At best, the change in statutory language made the statute clear and in conformity with other statutes and the case law. It certainly

did not and could not diminish Respondent's rights protected by the Fourth Amendment.

However, elements of the Missouri law enforcement community have taken a more aggressive view of that statutory change. In particular, funded by the Missouri Division of Highway Safety, an article dated September, 2010 in Traffic Safety News opines that the change in the law is now justification for warrantless blood draws in DWI arrests (App. A1-A6). Respondent suggests to the court that the aggressive view taken by prosecuting authorities now in response to this change of the law is totally incorrect, and is a misreading of the purported authority, namely the United States Supreme Court's opinion in *Schmerber v. California*.

As noted above, some law enforcement and prosecution authorities in the State of Missouri have argued that the change on RSMo § 577.041 justifies the position that no search warrant is necessary to obtain blood from an individual who has been arrested for DWI, but who refuses testing. In the article referred to hereinabove, two cases are cited to support this proposition. Those cases are *State v. Machuca*, 227 P.3d 729 (Or. 2010), and *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008). Both of those cases involved situations where the arrested individual was operating a motor vehicle, believed to be intoxicated, and had been involved in a serious collision. In *Machuca*, the defendant was involved in a single

car accident, suffered injuries, and was transported to an emergency room facility. The officer involved in the blood testing was at the scene, and later reported to the hospital where the driver had been taken, and the driver there actually *consented* to the taking of the blood requested by the officer. 227 P.3d at 730. As such this case is neither authoritative nor persuasive here.

In *Shriner*, the defendant was involved in an automobile accident with another vehicle, striking that vehicle head-on, and continued driving until forced to stop by a police car. The defendant had to be forcibly removed from the vehicle by the officers after breaking a window and opening the door. The driver in the other vehicle was determined to have had and leg injuries, and the arresting officer then took the defendant to a nearby hospital for the purpose of obtaining a blood sample. 751 N.W.2d at 539-540. The court held that the warrantless drawing of blood was permissible in that case, applying what it called a "single factor exigent circumstance" with respect to loss of evidence due to dissipation of alcohol in the defendant's blood with the passage of time. However, this holding should be limited to its facts, and the particular statute under which that individual was being prosecuted. In particular, that defendant was charged with "criminal vehicular operation" under Minn. Stat. Sec. 609.21, subs. 1(4) (2006) (App. A7-A8), which among other things prohibits a person from causing the death or injury of another person as a result of operating a motor vehicle "while having an alcohol

concentration of .080 or more," or having such an alcohol concentration "as measured within two hours of the time of driving." *State v. Shriner*, 751 N.W.2d 550, fn. 4. Moreover, the court specifically limited its holding to situations where the "police have probable cause to believe that defendant committed criminal vehicular homicide or operation." 751 N.W.2d at 550-551.

Appellant appears to be asking that this court adopt a "single factor exigent circumstance" test, holding that dissipation of alcohol in the blood creates an automatic emergency, and thereby an exception to the search warrant requirement under the Fourth Amendment to the United States Constitution. No Missouri case has gone that far. The United States Supreme Court in *Schmerber v. California* recognized that alcohol dissipates from the blood over time and, could have adopted that position, but chose not to. Instead, the courts have consistently held that absent consent, a search warrant is required unless exigent circumstances or an emergency situation exists. As this court can see from the various cases, generally a warrantless taking of blood has been approved only where there is delay resulting from time required for an officer to investigate an accident scene, and then further investigate the possibility of a crime having occurred by going to the hospital to interview the defendant.

The Appellant couches its argument in terms of the "destruction of evidence" being engaged in. However, "destruction of evidence" is inaccurate

because an individual cannot "destroy" the alcohol in his blood in a manner such as one might destroy physical evidence by concealing it or flushing it down a toilet. Instead, as the cases have recognized, and as evidence in this case shows, blood alcohol will naturally dissipate through the metabolization process, and that rate of dissipation is generally predictable. Once a blood sample is obtained, and its alcohol content determined, a qualified witness through a process of extrapolation, applying the standard dissipation rate, can easily estimate the blood alcohol level at the time of operation of the motor vehicle. *See, Welch v. State of Missouri*, 326 S.W.3d 916 at 919, fn. 3.[3]

It would seem apparent that the only real concern is that the delay in obtaining a search warrant would permit all of the alcohol in the person's body to dissipate. Assuming that a properly trained law enforcement officer has made a

[3] A prosecutor need not worry that his case will be dismissed if the test result is less than .08%. While RSMo § 577.037.5 calls for dismissal of a DWI charge if the analysis shows a result less than .08%, it contains the caveat that a case will not be dismissed if there is "evidence that the chemical analysis is unreliable as evidence of the defendant's intoxication at the time of the alleged violation due to the lapse of time between the alleged violation and the obtaining of the specimen." RSMo § 577.037.5(1).

DWI arrest after administering standardized field sobriety testing, the results of that testing and the observations of the officer should lead him to reasonably believe that the person he has arrested at that time has at least a blood alcohol level in excess of .08%.[4] If that is the case, then using the accepted elimination rate, the alcohol in the blood is not going to totally dissipate for more than four hours. That does not constitute an emergency or an exigent circumstance so as to justify ignoring the protections of the Fourth Amendment prohibiting unreasonable searches and seizures.

The evidence in this case showed that Trooper Winder did not feel there was an exigent circumstance or emergency. He had no reason to believe that a

[4] Sergeant Adams testified at the suppression hearing that if the individual displays four or more clues on the horizontal gaze nystagmus test, there is a "91 percent probability that they will have a blood alcohol content of .08 % or greater." (Tr.21). In *State v. Hill,* 865 S.W.2d 702 Mo. App. 1993), the case generally recognized in Missouri as the one approving the admissibility of opinion testimony based upon the horizontal gaze nystagmus test, the State's expert witness Dr. Marcelline Burns testified that "four or more points constituting substantial evidence that a person is intoxicated." 865 S.W. 2d. 704. The court noted that "… Dr. Burns used a reading of .10 on a breathalyzer test to define intoxication for purposes of her work." 865 S.W. 2d. 705.

prosecutor or judge would not be available to pursue a search warrant. Instead, he simply elected not to even start that process. His experience shows that he could reasonably expect to obtain a search warrant in short order, and the cases collected and shown in evidence at the hearing in this case, show that generally in Cape Girardeau County it will only take about two hours to complete the process of applying for and having a search warrant granted (L.F. 34).

Although Trooper Winder knew that he would likely be able to obtain a warrant, and knew that it was likely there would be a judge and prosecutor readily available, his testimony in the suppression hearing reveals that he made a conscious decision not to seek a search warrant. The following testimony was elicited on cross examination of Trooper Winder:

> Q. *(Mr. Wilson)*… Based upon your recollection, was there some effort made to contact the prosecuting attorney to obtain a warrant to have blood drawn?
>
> A. *(Trooper Winder)* No.
>
> Q. Was that a conscious decision that you made that you would not do that?
>
> A. It was a conscious decision based on the fact that *due to the law changes and what I had been told it was not necessary*.
>
> Q. Okay. When you say what you've been told, are you talking

about in the form of a directive from the Missouri State Highway Patrol?

A. Well, we had some new laws training. I also have regular contact with Susan Glass from the Missouri Attorney General's Office and she wrote an opinion piece that her opinion was that with the changes in the law, that the warrant was not necessary.

Q. Is that the article that was published in *Traffic Safety News,* September of 2010?

A. Yes.

Q. And she's with the Missouri Attorney General's Office?

A. Yes.

(Tr.14) (Emphasis added).

It is obvious that Trooper Winder was acting in response to the interoffice communication dated December 27, 2010 to the Highway Patrol troop commanders. The communication advised the troopers that the statutory change made in RSMo. Section 577.041 permitted officers to obtain evidence of blood or bodily fluid, by force if necessary, without first obtaining a search warrant. The communication however provided the following caution:

"It is suggested after detailed legal review, this only be used in exigent circumstances and then only on manslaughter/vehicular

> assault cases with serious physical injury or disabling injuries, after expending all reasonable means to obtain a search warrant."

(L.F. 35). The communication then went on to recommend that the zone sergeants consult with the local prosecuting authorities to "determine the course of action to be followed in their assigned area…" (L.F. 35).

Zone Sergeant Blaine Adams testified at the suppression hearing that he had in fact discussed the interoffice communication with the Cape Girardeau County Prosecuting Attorney, and regarding the decision reached as to how to respond to this change of law by that local prosecuting attorney, Sergeant Adams stated: "yes what it is if it's a standard DWI arrest or if it's a motor vehicle accident with no injuries and they refuse to go ahead and draw their blood, Morley [Swingle] said if it was a vehicle accident with injuries, he would prefer to get a search warrant and I suggested, well, in that case could we go ahead and draw blood and get the warrant and he said that would be fine." (Tr. 24-25). Sergeant Adams went on to characterize the reference in the interoffice communication to "exigent circumstances" was referring to "injuries." (Tr. 25).

The trial court in this case wisely observed in the suppression order the elasticity and uncertainty of the Highway Patrol and Prosecuting Attorney's positions, stating "although the Highway Patrol and the Prosecuting Attorney maintain that a search warrant is not necessary to draw blood after a DWI arrest,

both hedge their advice to law enforcement officers about the circumstances when a warrant is not necessary. They do not have full confidence in their positions, and justly so. None of the authorities submitted on this issue have held, on their own facts, that an officer may obtain a warrantless blood draw on an ordinary driving while intoxicated arrest when a warrant could be procured in a timely manner." (L.F. 18).

The arresting officer, Trooper Winder, in this case is a highly experienced and well trained member of the Missouri State Highway Patrol. Unlike him, however, there are law enforcement officers across this state working for various counties and municipalities who may hold certifications as law enforcement officers, but nonetheless lack the experience and training of the officer in this case. As mentioned at the opening of this argument, the broader and more troubling consequential question is will this court accept Appellant's invitation to hold that any law enforcement officer in the State of Missouri, regardless of experience or level of training, should be permitted to make an arrest for driving while intoxicated and without even considering whether to submit the facts to a disinterested judge for the issuance of a search warrant, go to the nearest hospital and forcibly cause a puncture of the arrested persons skin, draw blood from his body and thereafter use that blood in evidence. The answer to this questions should be "no." The Fourth Amendment to the United States Constitution

demands more. If there are no circumstances which rise to the level of an emergency or an exigent circumstance, then the only way the physical intrusion of a forced blood draw should be permitted is after the relevant facts have been submitted to a judge to review and determine whether or not that action should be taken pursuant to a search warrant issued by that judge.

CONCLUSION

Based on the record in this case, and the foregoing authorities and arguments, Respondent suggests that there is substantial evidence to support the trial court's ruling, and that ruling is not clearly erroneous and cannot leave this court with the firm impression that any mistake has been made. The trial court's ruling should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Stephen C. Wilson, hereby certify the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2003, in Times New Roman size 14 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,317 words, which does not exceed the words allowed for a respondent's substitute brief.

The disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free.

Two true and accurate copies of the attached brief and a disk containing a copy of the brief were mailed, postage prepaid, this 9th day of August, 2011, to the attorney for Appellant:

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APPENDIX

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