Fourth Amendment — Search and Seizure — Warrantless Blood Draws — Mitchell v. Wisconsin

Drunk driving, as the Supreme Court has repeatedly, emphatically made clear, poses a significant threat to public safety.[1] To punish those who do drive drunk and deter those who would, states have enacted laws that impose criminal penalties on drivers with blood alcohol content (BAC) over a set amount.[2] In these cases, proof of the driver's BAC is a crucial piece of evidence, but one that is continuously disappearing as the alcohol in the driver's bloodstream dissipates. Officers who seek to enforce drunk driving laws therefore face a dilemma: though blood draws, which provide proof of BAC, are searches subject to the Fourth Amendment's warrant requirement,[3] BAC evidence might vanish in the time it takes to secure a warrant. Last Term, in *Mitchell v. Wisconsin*,[4] the Court addressed this dilemma, holding that when a suspected drunk driver falls unconscious, requiring officers to take the driver to a hospital before administering a breath test, the officers may "almost always" order a warrantless blood test to measure BAC.[5] In its focus on unconscious drunk drivers unable to perform breath tests, *Mitchell* seems quite narrow. But that narrowness is illusory. By embracing broad health and safety language and reconstructing past cases, its reasoning introduces a potentially broad expansion of the exigency exception to the warrant requirement. *Mitchell* thus serves as an example of the Court undermining Fourth Amendment protections even as it seems to issue limited, precedent-bound opinions.

On May 30, 2013, the City of Sheboygan Police Department received a 911 call reporting that petitioner Gerald Mitchell had entered a van and driven away while visibly intoxicated.[6] An officer later found Mitchell walking near a lake, stumbling and slurring his speech, with his van parked nearby.[7] The officer administered a preliminary breath test, which registered a BAC of 0.24%, and arrested Mitchell for operating a vehicle while intoxicated.[8] En route to the station, Mitchell's condition deteriorated.[9] Determining that an evidentiary breath test would not be possible, the officer drove Mitchell to a nearby hospital

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[1] *See, e.g.*, Birchfield v. North Dakota, 136 S. Ct. 2160, 2166 (2016) ("Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year.").

[2] *See, e.g.*, CAL. VEH. CODE § 23152(b) (West 2019) (prohibiting a person with a 0.08% BAC or over from driving a vehicle); N.C. GEN. STAT. § 20-138.1(a)(2) (2019) (same).

[3] *See* Schmerber v. California, 384 U.S. 757, 767 (1966).

[4] 139 S. Ct. 2525 (2019).

[5] *Id.* at 2539 (plurality opinion).

[6] State v. Mitchell, 914 N.W.2d 151, 154 (Wis. 2018).

[7] *Mitchell*, 139 S. Ct. at 2542 (Sotomayor, J., dissenting).

[8] *Id.* at 2532 (plurality opinion).

[9] *Id.*

for a blood test.[10] By the time they arrived, Mitchell was fully unconscious, and the officer directed hospital staff to draw a blood sample.[11] By this point, about ninety minutes had passed since Mitchell's arrest, and the test revealed a BAC of 0.222%.[12] Prosecutors charged Mitchell with violating two Wisconsin drunk driving laws.[13]

Mitchell moved to suppress the blood test results, arguing that the warrantless blood draw constituted an unreasonable search under the Fourth Amendment.[14] Wisconsin responded that its implied-consent law establishes that unconscious drivers are presumed to have consented to blood draws.[15] Accordingly, the state argued, Mitchell's blood draw "pass[ed] constitutional muster."[16] The trial court denied Mitchell's motion to suppress, and a jury convicted him.[17] The state court of appeals then certified the case to the Wisconsin Supreme Court,[18] which upheld the warrantless blood draw and affirmed Mitchell's convictions.[19]

The U.S. Supreme Court vacated the judgment and remanded the case.[20] Writing for the plurality, Justice Alito[21] situated the case within the Court's Fourth Amendment jurisprudence on warrantless BAC tests.[22] Because blood draws are searches,[23] officers can administer them only with a warrant or when an exception to the warrant requirement applies.[24] He noted that in prior cases, the Court has found that the exigency exception can justify warrantless blood draws, with the exigency at issue being the destruction of BAC evidence.[25] In *Missouri v. McNeely*,[26] the Court concluded that "the fleeting quality of BAC evidence alone is not enough" to allow warrantless blood draws in all drunk driving cases.[27] However, *Schmerber v. California*[28] suggests that circumstances that prevent the police from immediately seeking a warrant heighten the

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[10] *Mitchell*, 914 N.W.2d at 155.
[11] *Mitchell*, 139 S. Ct. at 2532 (plurality opinion).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See Mitchell*, 914 N.W.2d at 155. Under this law, drivers who operate vehicles on Wisconsin public highways are "deemed to have given consent" to blood, urine, and breath testing, and unconscious drivers "are presumed not to have withdrawn consent." WIS. STAT. § 343.305 (2019).
[16] State v. Mitchell, No. 2015AP304-CR, 2017 WL 9803322, at *4 (Wis. Ct. App. May 17, 2017).
[17] *Mitchell*, 139 S. Ct. at 2532 (plurality opinion).
[18] *Mitchell*, 2017 WL 9803322, at *1.
[19] *Mitchell*, 914 N.W.2d at 167.
[20] *Mitchell*, 139 S. Ct. at 2539 (plurality opinion).
[21] Justice Alito was joined by Chief Justice Roberts and Justices Breyer and Kavanaugh.
[22] *See Mitchell*, 139 S. Ct. at 2532–34 (plurality opinion).
[23] *Id.* at 2533 (citing Birchfield v. North Dakota, 136 S. Ct. 2160, 2173 (2016)).
[24] *Id.*
[25] *Id.* (citing Missouri v. McNeely, 569 U.S. 141, 152 (2013)).
[26] 569 U.S. 141.
[27] *Mitchell*, 139 S. Ct. at 2533 (plurality opinion) (citing *McNeely*, 569 U.S. at 156).
[28] 384 U.S. 757 (1966).

"degree of urgency" and can justify warrantless blood testing.[29]

Justice Alito proceeded to lay out the general standard for the exigency exception. As he explained, "under the exception for exigent circumstances, a warrantless search is allowed when 'there is compelling need for official action and no time to secure a warrant.'"[30] The question, then, was whether the exception applied to blood tests of unconscious drivers who appear to have driven under the influence of alcohol.[31]

Addressing the first requirement, Justice Alito found the "importance of the needs served by BAC testing . . . hard to overstate."[32] But over the years the Court has made a good effort, "strain[ing its] vocal chords to give adequate expression"[33] to the importance of highway safety and to the "'slaughter' comparable to the ravages of war"[34] caused by irresponsible driving. The passage of laws punishing those who drive with BACs over set limits has correlated with a drop in highway deaths and injuries.[35] To enforce these laws, police must be able to accurately and promptly test the BAC of suspected drunk drivers, since alcohol dissipates in the bloodstream over time.[36] When evidentiary breath tests are unavailable, as in the case of unconscious drivers, blood draws become necessary.[37] Thus, Justice Alito concluded, "there clearly is a 'compelling need'" for blood tests of suspected drunk drivers unable to perform evidentiary breath tests.[38]

He then turned to the second exigency requirement: that officers have no time to secure a warrant. Citing *Schmerber* and *McNeely*,[39] he argued that "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application."[40] In *Mitchell*, that extra factor was the driver's unconsciousness. Unconsciousness, Justice Alito pressed, creates an immediate medical emergency, and the time it might take to secure medical care could prevent officers from obtaining a warrant while BAC evidence is still present.[41] Further, if an unconscious driver were to crash, officers might face the additional burdens of acting as first

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[29] *Mitchell*, 139 S. Ct. at 2533 (plurality opinion).

[30] *Id.* at 2534 (quoting *McNeely*, 569 U.S. at 149).

[31] *Id.* at 2534–35, 2535 n.2.

[32] *Id.* at 2535.

[33] *Id.*

[34] *Id.* (quoting Perez v. Campbell, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring in result in part and dissenting in part); and quoting Breithaupt v. Abram, 352 U.S. 432, 439 (1957)).

[35] *Id.* at 2536 (quoting Birchfield v. North Dakota, 136 S. Ct. 2160, 2169 (2016)).

[36] *Id.* (quoting Missouri v. McNeely, 569 U.S. 141, 169 (2013) (Roberts, C.J., concurring in part and dissenting in part)).

[37] *Id.* at 2536–37 (quoting *McNeely*, 569 U.S. at 170 (Roberts, C.J., concurring in part and dissenting in part)).

[38] *Id.* at 2537 (quoting *McNeely*, 569 U.S. at 149).

[39] *See id.* (quoting Schmerber v. California, 384 U.S. 757, 770–71 (1966)).

[40] *Id.*

[41] *Id.* at 2537–38.

responders for those injured, preserving evidence at the scene, and redirecting traffic.[42] Justice Alito acknowledged that technological developments have streamlined the process of obtaining a warrant, but maintained that "forcing police to put off other tasks [in favor of seeking a warrant] for even a relatively short period of time may have terrible collateral costs."[43]

The plurality concluded that the exigency exception "almost always" covers instances in which a suspected drunk driver's "unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test."[44] However, in "unusual case[s]" in which a driver can show that his blood "would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties," a warrantless blood draw of an unconscious driver might violate the Fourth Amendment.[45] Because Mitchell did not have a chance to make this showing, the Court remanded the case.[46]

Justice Thomas concurred in the judgment. Characterizing the plurality's holding as burdensome to both officers and courts, he instead advocated for a per se rule, in which police would always be permitted to order warrantless blood testing of suspected drunk drivers.[47] In drunk driving cases, he explained, the imminent destruction of evidence is always a risk, regardless of whether the additional factors that the plurality pointed to are present.[48] Accordingly, he argued that once police have probable cause to believe a driver is drunk, "[t]he destruction of evidence alone is sufficient to justify a warrantless search based on exigent circumstances."[49]

Justice Sotomayor dissented.[50] Like Justice Alito, she sought to situate *Mitchell* within established precedent on warrantless blood tests.[51] Across these cases, she noted, the Court has maintained "that there is no categorical exigency exception for blood draws."[52] Rather, lower courts must determine in each case whether officers have actually faced circumstances that

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[42] *Id.* at 2538.
[43] *Id.* at 2539.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* (Thomas, J., concurring) (citing Birchfield v. North Dakota, 136 S. Ct. 2160, 2197–98 (2016) (Thomas, J., concurring in judgment in part and dissenting in part)).
[48] *Id.* at 2540 (quoting Missouri v. McNeely, 569 U.S. 141, 178 (2013) (Thomas, J., dissenting)).
[49] *Id.* (citing *McNeely*, 569 U.S. at 176–79 (Thomas, J., dissenting)). For an analysis of the tension between Fourth Amendment rules and standards underlying *Mitchell*, see Orin S. Kerr, *Drunk Driving, Blood Draws, and the Fourth Amendment After* Mitchell v. Wisconsin, VOLOKH CONSPIRACY (July 1, 2019, 11:23 PM), https://reason.com/2019/07/01/drunk-driving-blood-draws-and-the-fourth-amendment-after-mitchell-v-wisconsin [https://perma.cc/68MB-CAYU].
[50] Justice Sotomayor was joined by Justices Ginsburg and Kagan.
[51] *See Mitchell*, 139 S. Ct. at 2543–44, 2547 (Sotomayor, J., dissenting).
[52] *Id.* at 2544.

would have prevented a timely warrant application.[53] "[I]f the police have time to secure a warrant before the blood draw, 'the Fourth Amendment mandates that they do so.'"[54]

Justice Sotomayor pointed to specific factors suggesting that, in many drunk driving cases, officers do have time to secure a warrant. First, when officers suspect someone of driving drunk, they typically must transport her to a medical facility in order to gather BAC evidence — in this "built-in delay," there may be time to seek a warrant.[55] Further, alcohol dissipates in the bloodstream gradually and predictably, meaning that BAC tests done some time after an initial arrest can still provide reliable evidence of what the driver's BAC was.[56] Finally, new technology has allowed officers to obtain warrants faster and more easily than ever before.[57] These factors apply with equal force when a driver is unconscious.[58]

The dissent rejected the plurality's contention that because unconscious drivers invariably need medical attention, the exigency exception will almost always apply in this context. Justice Sotomayor disagreed that a driver's unconsciousness poses a unique crisis for police officers.[59] As she pointed out, most drunk drivers need medical attention,[60] but the Court has refused to extend the exigency exception to all drunk driving cases.[61] Moreover, the necessity of a medical response, she emphasized, does not always interfere with officers' ability to get a warrant.[62] Though officers may in some instances be "truly confronted with a 'now or never' situation,"[63] she argued that courts should decide each case on its own facts and avoid the kind of "*de facto* categorical exigency exception" advocated by the plurality.[64]

Justice Gorsuch also dissented. In his view, the Court granted certiorari to decide whether Wisconsin's implied-consent statute means that

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[53] *Id.* at 2547.

[54] *Id.* (quoting *McNeely*, 569 U.S. at 152).

[55] *Id.* at 2548.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 2548–49.

[59] *Id.* at 2549–50.

[60] *Id.* at 2549 (quoting Missouri v. McNeely, 569 U.S. 141, 171 (2013) (Roberts, C.J., concurring in part and dissenting in part)).

[61] *Id.*

[62] *Id.* (first citing *McNeely*, 569 U.S. at 153–54; and then citing *id.* at 171–72 (Roberts, C.J., concurring in part and dissenting in part)).

[63] *Id.* at 2550 (quoting *McNeely*, 569 U.S. at 153).

[64] *Id.* Justice Sotomayor also addressed and rejected the State's implied-consent argument, concluding that a statute "cannot itself create the actual and informed consent that the Fourth Amendment requires." *Id.* at 2545. She criticized the plurality for instead focusing on the exigency exception, as the State waived its exigency argument. *Id.* at 2545–46. Justice Alito disagreed that the issue was waived. As the Wisconsin Supreme Court addressed whether a warrantless blood draw from an unconscious person pursuant to Wisconsin's presumed consent statute violated the Fourth Amendment, "[t]his broad question easily encompass[ed]" the plurality's approach. *Id.* at 2534 n.2 (plurality opinion).

"Wisconsin drivers impliedly consent to blood alcohol tests."[65] Because the Court decided the case under the exigency doctrine, which "neither the parties nor the courts below discussed," he would have dismissed the case as "improvidently granted."[66]

At first glance, *Mitchell* seems like a narrow opinion,[67] and it is not difficult to see why. By basing its holding on the exigency exception, the Court declined to give constitutional recognition to Wisconsin's theory of implied consent — a theory that could significantly expand the Fourth Amendment's consent exception,[68] but that the Court seems reluctant to fully endorse.[69] Instead, the plurality drew on established precedent and put forward a rule limited to cases just like Mitchell's, in which police have probable cause to believe that a driver is drunk, and the driver is unconscious, unable to complete a breath test, and heading to a medical facility anyway. But *Mitchell* also contains broader reasoning establishing the exigency exception's role in blood-testing cases in general. Its articulation of the exception departs from the Court's precedent in the area and threatens to justify warrantless blood draws in a much larger class of cases, both within and beyond the context of drunk driving. *Mitchell*, then, appears to be an example of the Court's subtle weakening of Fourth Amendment protections through unannounced expansions of existing exceptions.

Particularly given the jurisprudential road not taken, *Mitchell*'s holding seems quite limited. Justice Alito announced as much, claiming that the Court was addressing a "narrow but important category of cases: those in which [a driver who seems to be under the influence of alcohol] is unconscious and therefore cannot be given a breath test."[70] In line with this framing, his holding purports to apply only to cases in which a number of specific factors are present — those in which: (1) police have probable cause that someone has committed a drunk driving offense; (2) the driver's unconsciousness requires that he be taken to a medical facility before police can administer an evidentiary breath test; (3) the driver's

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[65] *Id.* at 2551 (Gorsuch, J., dissenting).

[66] *Id.*

[67] *See* Kerr, *supra* note 49 (referring to the plurality decision as "relatively narrow").

[68] The question of whether someone has given legally valid consent to a search is one "of fact to be determined from the totality of all the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). Had the Court endorsed the theory of implied consent, it would have eliminated the requirement of a contextual inquiry and suggested that consent can be presumed solely by one's choice to participate in a given activity — here, driving. *See* Brief for the Petitioner at 29–30, *Mitchell*, 139 S. Ct. 2525 (No. 18-6210); *see also* Kerr, *supra* note 49 (describing the implied-consent theory as "an easy way to eliminate Fourth Amendment rights").

[69] The Court's avoidance of the implied-consent arguments was unusual, as nearly every brief focused on that issue. *See, e.g.*, Brief of the Respondent, State of Wisconsin, *Mitchell*, 139 S. Ct. 2525 (No. 18-6210). That it decided the case on completely different grounds might signal that the Court is unwilling to validate the theory of implied consent.

[70] *Mitchell*, 139 S. Ct. at 2531 (plurality opinion).

blood will be drawn anyway; and (4) police reasonably judge that a warrant application will interfere with other pressing needs.[71] In addition to depicting the decision's impact as small, Justice Alito framed it as a small step from existing doctrine: *Schmerber* and *McNeely*, he explained, create a "spectrum" of exigent circumstances and essentially decide *Mitchell*, whose facts position it closer to *Schmerber*, in which a warrantless blood draw was justified, than *McNeely*, in which it was not.[72]

However, within this apparently narrow holding is much broader language on when the exigency exception applies in all blood-test cases. In his discussion of the role of the exigency exception in drunk driving cases in general, Justice Alito set out a rule, which ostensibly comes from his analysis of *Schmerber*: "Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application."[73] In other words, in almost every case with potential BAC evidence,[74] police are entitled to order a warrantless blood draw so long as they can demonstrate the existence of some health, safety, or law enforcement need when they encounter a suspect.[75] What exactly constitutes a health, safety, or law enforcement need is left vague — and potentially expansive.[76]

Nestled in the middle of the opinion, this declaration of the Court's approach to BAC evidence marks a subtle but significant shift from previous cases. As the plurality explained, the Court's two previous cases on when the exigency exception can justify a warrantless blood draw are *Schmerber* and *McNeely*. In *Schmerber*, the Court focused on that case's particular

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[71] *See id.* at 2539; *see also* Kerr, *supra* note 49 (unpacking this rule).

[72] *Mitchell*, 139 S. Ct. at 2533 (plurality opinion); *see also id.* at 2537–38.

[73] *Id.* at 2537.

[74] Since BAC evidence is always dissipating, prong one of this rule will always be satisfied when a suspect is intoxicated.

[75] *Mitchell* does impose some limitations on officers. Even if a health, safety, or law enforcement need is present, a defendant still might suppress BAC evidence if she can show both that her blood would not have been drawn had police not been seeking BAC information *and* that police could not have reasonably judged that a warrant application would have interfered with other pressing needs. *Mitchell*, 139 S. Ct. at 2539 (plurality opinion). However, the plurality notes that such cases will be "unusual" and puts the burden on the defendant to establish these factors. *Id.* Further, this concession comes when Justice Alito states the narrow holding about unconscious drivers, distancing it rhetorically (and perhaps legally) from his articulation of the exigency rule. These features suggest that the carveout that *Mitchell* offers will rarely apply, especially when considering the judicial instinct to defer to police on the reasonableness of in-the-moment decisionmaking. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 301 ("Far more often than not, federal judges find the inferences drawn and actions taken by law enforcement officers reasonable, and deny suppression motions challenging those inferences and actions.").

[76] *Cf.* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992) (arguing that "special needs" is a vague term that "turns out to be no more than a label that indicates when a lax standard will apply").

facts and the amount of "time [that] *had* to be taken" by the officer in pursuit of his other responsibilities.[77] *Mitchell*, which purports to rely on *Schmerber* in its articulation of the exigency test, departs from it by holding that the mere existence of other factors competing for an officer's attention can justify a warrantless search. *McNeely* reaffirmed *Schmerber*'s fact-specific inquiry, holding that "[i]n those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn . . . the Fourth Amendment mandates that they do so."[78] The Court maintained that lower courts must inquire whether "in [a] particular case . . . a warrant *could not* have been obtained within a reasonable amount of time."[79] This focus on whether there are specific factors that prevent an officer from getting a warrant in time is a far cry from *Mitchell*'s emphasis on whether there are any health, safety, or law enforcement needs that might take priority over a warrant application. Where *McNeely* mandates an inquiry into whether a timely warrant application is actually possible, *Mitchell* requires just that there be *some* other demand on the officers' attention to justify a warrantless blood draw. *Mitchell* therefore subtly but meaningfully expands the rule for when the state can invoke the exigency exception to justify a warrantless blood test.[80]

Mitchell's broadening of the exigency test means that officers will likely have an easier time justifying warrantless blood draws of all intoxicated drivers. Though *Mitchell*'s holding is limited to unconscious drivers, and though *McNeely*'s rejection of a per se rule for drunk driving remains, the plurality's language effectively opens the door that *McNeely* purports to shut, allowing warrantless blood draws of almost any drunk driver. In many instances, an officer encountering a suspected drunk driver might conclude that the driver has pressing health needs, either because the driver is injured or because the driver's apparent intoxication itself requires treatment.[81] Otherwise, the officer could easily find that there are safety or law enforcement needs present, such as diverting traffic, conducting a field sobriety test, searching the driver's car, interviewing witnesses, or attending

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[77] Schmerber v. California, 384 U.S. 757, 770–71 (1966) (emphasis added).

[78] Missouri v. McNeely, 569 U.S. 141, 152 (2013).

[79] *Id.* at 163 (emphasis added); *see also id.* at 152–56.

[80] A number of states have already cited *Mitchell*'s broader language, rather than that of *Schmerber* or *McNeely*, in their definitions of when the exigency exception applies in blood-draw cases — including in cases where the driver was not unconscious. *See, e.g.*, Answer Brief of Appellee at 19–20, Burrell v. Florida, No. 2D18-1108 (Fla. Dist. Ct. App. July 25, 2019); Reply Brief of Plaintiff-Appellant at 2–3, State v. Hay, No. 2018AP2240-CR (Wis. Ct. App. July 12, 2019).

[81] If, for example, a driver exhibits signs of alcohol poisoning, including "[c]onfusion," experts recommend immediate medical treatment. *Alcohol Poisoning*, MAYO CLINIC (Jan. 19, 2018), https://www.mayoclinic.org/diseases-conditions/alcohol-poisoning/symptoms-causes/syc-20354386 [https://perma.cc/Z5KB-GWZC]. Chief Justice Roberts has also noted that, in general, "[d]runk drivers often end up in an emergency room," *McNeely*, 569 U.S. at 171 (Roberts, C.J., concurring in part and dissenting in part), suggesting that many drunk drivers have some health needs.

to anyone harmed by the driver.[82] Though these routine tasks might not prevent officers from filing a timely warrant application, as *McNeely* would require, they could very well "take priority over a warrant application" under *Mitchell*. So long as an officer "reasonably judge[s]"[83] — or, more cynically, is willing to testify[84] — that a health, safety, or law enforcement need was present and took priority over a warrant application, that officer will be entitled to order a blood draw of a suspect without a warrant. Thus, *Mitchell* may swallow the *McNeely* rule it claims to follow, creating a "presumption of exigent circumstances,"[85] as Justice Sotomayor put it, and providing justification for warrantless blood draws in a much larger category of cases than those involving unconscious defendants.[86]

In this quiet curtailment of established Fourth Amendment protections, *Mitchell* finds company in other recent Supreme Court cases. The *Mitchell* plurality purported to rely on precedent on warrantless blood draws, simply positioning its holding along an already-existing "spectrum." But its reasoning has the effect of expanding the exigency exception in this area, in ways broader and more expansive than may initially be evident.

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[82] Indeed, in one vehicular manslaughter case in Texas, the court found that there were so many "important law enforcement [and] public-safety duties" that *fourteen* officers were too busy to secure a warrant. Cole v. State, 490 S.W.3d 918, 926 (Tex. Crim. App. 2016).

[83] *Mitchell*, 139 S. Ct. at 2539 (plurality opinion).

[84] The practice of police committing perjury in order to support a warrantless search after the fact is well-documented and persistent. *See* Morgan Cloud, Essay, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1311–21 (1994). But even beyond intentional lies, officers sometimes deploy "scripts," in which they emphasize certain facts or narratives that they know will establish probable cause or reasonable suspicion. *See* Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 55 (2015). It is not difficult to imagine such scripts for drunk driving stops.

[85] *Mitchell*, 139 S. Ct. at 2541 (Sotomayor, J., dissenting).

[86] *Mitchell* could also provide justification for warrantless blood draws in cases where someone is suspected of driving under the influence of drugs, which also present a continuous risk that evidence is being destroyed through the suspect's metabolic processes. Indeed, the one brief in *Mitchell* that focused on the exigency exception contained an entire section discussing the importance of timely blood draws in cases with drug-impaired drivers. *See* Brief of Amici Curiae League of Wis. Municipalities, Wis. Towns Ass'n, and City of Eau Claire in Support of Respondent at 12–19, *Mitchell*, 139 S. Ct. 2525 (No. 18-6210). Lower courts have already applied *McNeely* in this context, *see, e.g.*, *Cole*, 490 S.W.3d at 921, 923–27; City of Seattle v. Pearson, 369 P.3d 194, 199–201 (Wash. Ct. App. 2016), and *Mitchell* will likely play a role in future cases with drivers who are under the influence of drugs, which present similar, if not elevated, potential health, safety, and law enforcement needs.

At its most extreme, *Mitchell* might even extend to warrantless blood draws in drug-use and drug-possession cases where the police believe that a suspect's blood contains drug evidence. In a number of jurisdictions, evidence of drugs in one's bloodstream can provide circumstantial proof of prior drug use or possession. *See, e.g.*, State v. Vorm, 570 N.E.2d 109, 110 (Ind. Ct. App. 1991); State v. Flinchpaugh, 659 P.2d 208, 212 (Kan. 1983); *In re* R.L.H., 116 P.3d 791, 795–96 (Mont. 2005); *see also* United States v. Blackston, 940 F.2d 877, 891 (3d Cir. 1991) (holding that urine sample testing positive for cocaine could be used as circumstantial evidence in a drug-possession case). If officers believe a suspect's blood contains evidence of illegal drug use, the exigency exception could justify a warrantless blood draw — and at least one court has already applied *McNeely* to uphold evidence from a blood draw in these conditions. *See* State v. Parisi, 875 N.W.2d 619, 624, 628–30 (Wis. 2016).

Mitchell therefore fits into a trend of the Court weakening protections for criminal defendants by subtly but meaningfully expanding the scope of its established exceptions. In cases involving the reliability of anonymous tips,[87] the good faith exception to the warrant requirement,[88] and the elements of reasonable suspicion,[89] the Court did not announce a dramatic departure from precedent and, indeed, claimed to be simply applying rules from previous cases. But on its way to each holding, it recharacterized or extended the limits of these prior cases, weakening their protective force. *Mitchell* follows a similar path, providing another example of the Court quietly limiting the scope of existing Fourth Amendment doctrine.[90]

After *Mitchell*, all people suspected of driving drunk, as well as those who have not entered cars at all, are left more vulnerable to the possibility that police, without a warrant, might collect sensitive, personal information about them through blood draws.[91] Perhaps this outcome is preferable to one entering new Fourth Amendment territory by validating implied-consent laws. But by both applying and expanding the exigency exception in one breath, the *Mitchell* plurality may have done lasting damage to constitutional protections that criminal defendants have already fought for and won.

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[87] *See* Navarette v. California, 572 U.S. 393, 397–401 (2014) (citing precedent on the role of anonymous tips in reasonable suspicion determinations, but relying on different qualities of the tip at issue to come to the new conclusion that an anonymous tip alone, with few corroborated facts, "can demonstrate 'sufficient indicia of reliability to [authorize an] investigatory stop,'" *id.* at 397 (quoting Alabama v. White, 496 U.S. 325, 327 (1990))); *see also The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 191, 237–40 (2014) (explaining how the Court "sought guidance" from previous cases on anonymous tips, but "focused on facts not attended to in its existing . . . jurisprudence," *id.* at 237, with the result being an "unwarranted curtailment of Fourth Amendment protections," *id.* at 240).

[88] *See* Herring v. United States, 555 U.S. 135, 137–38, 140–48 (2009) (applying the logic of the Court's precedent on the good faith exception to the warrant requirement, but allowing for the first time that police personnel themselves be the source of the warrant deficiency); *see also* Jennifer E. Laurin, Essay, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 677, 679–88 (2011) (highlighting "three aspects of [*Herring*] that depart from the precedents to which the Court claim[ed] deference," *id.* at 677).

[89] *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (relying on *Terry v. Ohio*, 392 U.S. 1 (1968), to support the contention that an officer can stop someone based on "reasonable suspicion," and allowing that the person's presence in a "high crime area" can be a determining factor supporting that suspicion). Though framed as a simple application of *Terry*'s contextual approach to reasonable suspicion, *Wardlow* has made the fact that a stop occurred in a high-crime area "dispositive" in many cases, Andrew Manuel Crespo*, Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2050, 2078 (2016), and has opened the door to stops justified in large part by unchallenged assertions that the area in which they occurred was high crime, *see id.* & n.125.

[90] Another moment of quietly but significantly expansive reasoning in *Mitchell* comes when Justice Alito suggests that the fact that a driver's blood will be drawn for medical reasons anyway means that a blood draw ordered by the police is less of an intrusion. *See Mitchell*, 139 S. Ct. at 2538 & n.8 (plurality opinion). This consideration of the relative intrusiveness of different blood draws seems to challenge *Schmerber*'s clear holding that police-ordered blood draws are searches — no matter what other medical procedures might take place around them. *See id.* at 2549–50, 2549 n.6 (Sotomayor, J., dissenting).

[91] *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2178 (2016) (explaining that a blood test "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading").