No. _____

In The

SUPREME COURT of the UNITED STATES

October Term, 2020

BRIAN SMITH,

Petitioner,

vs.

THE STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the subject of a warrant for a routine blood draw to detect alcohol indicates he is needle-phobic and has agreed to a breath test, does the Fourth Amendment permit the State to place numerous large men on the suspect, threaten him with a taser, place him in four-point restraints, and inject him with antipsychotic drugs as a general sedative to draw his blood, or does it require a breath test or a second warrant from a magistrate fully informed of the circumstances to authorize such force?

STATEMENT OF RELATED PROCEEDINGS

State v. Smith, Washington Supreme Court No. 96847-1 (Mar. 4, 2020) (denying Smith's petition for review)

State v. Smith, Washington Court of Appeals No. 76340-7-I (Dec. 3, 2018) (affirming trial court judgment)

State v. Smith, Whatcom County (Wash.) Superior Court No. 14-1-01457-3 (Oct. 27, 2015; Nov. 3, 2015; Oct. 17, 2016; Nov. 7, 2016; Nov. 14, 2016; Nov. 15, 2016; Jan. 18, 2017; March 15, 2017) (evidentiary hearings; trial; judgment and sentence; findings of fact, conclusions of law and order denying motion to suppress blood test results)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Smith petitions for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The Washington Supreme Court's decision denying a petition for review is noted at 195 Wn.2d 1002, 458 P.3d 787, 2020 WL 1061162 (Mar. 4, 2020), and reprinted in the Appendix to the Petition ("App.") at 2a. The decision of the Washington Court of Appeals is unpublished, noted at 6 Wn. App. 2d 1027, 2018 WL 6310104 (2018), and reprinted at App. 4a-31a. The Court of Appeals denied reconsideration. App. 33a. The trial court's decision is unpublished and reprinted at App. 35a-46a (judgment and sentence), and 48a-55a (findings of fact and conclusions of law re admissibility of evidence).

JURISDICTION

The Washington Supreme Court denied review on March 4, 2020. App. 2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), and its Order issued March 19, 2020, extending the time for filing Petitions for Certiorari. App. 57a-58a.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

> The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment IV.

> ... No state shall ... deprive any person of life, liberty, or property, without due process of law ....

United States Constitution, Amendment XIV, § 1.

The relevant provisions of Washington law are reproduced in the appendix. App. 442a-446a.

INTRODUCTION

The Constitution does not sanction "methods too close to the rack and the screw." *Rochin v. California*, 342 U.S. 165, 172 (1952). A threat to tase petitioner, four or five larger men piling on top of him while held in four-point restraints as others tried to take his blood with a needle, inflicting pain to distract him, and ultimately injecting him with anti-psychotic drugs to sedate him for hours in order to take his blood bears little difference. In these days of police choke holds, does a warrant *sub silentio* authorize the State to kill a suspect in order to obtain his blood to test for

alcohol?[1] Assuming not, the issue is what force the Fourth Amendment permits to execute such a warrant.

When the State seeks to draw blood from a criminal suspect to obtain evidence of alcohol, absent exigent circumstances, it must obtain a warrant. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). With or without a warrant, the police may not use unreasonable force to search or seize a person. *Graham v. Connor*, 490 U.S. 386 (1989).

An unconscious suspect incapable of providing a breath sample is an exigency that may permit a blood draw without a warrant. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019); *Breithaupt v. Abram*, 352 U.S. 432 (1957). But here the State sedated petitioner and so rendered him incapable of providing the breath sample, in order to take his blood. It injected him with Haldol, an antipsychotic drug this Court previously held unconstitutional to inject into an unconvicted person without consent if there was a less intrusive alternative. *Sell v. United States*, 539 U.S. 166, 179-82 (2003).

To date, this Court has weighed the State's interests in seizing blood against a person's privacy

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[1] The Washington Court of Appeals concluded: "[W]hen a warrant's purpose is to authorize the collection of evidence, '[i]t is not sensible to read the warrant in a way that stops short of obtaining that evidence.'" App. 19a.

interests and bodily integrity considering only "routine" blood tests administered in a routine manner:

> Such tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. **Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused ... . We need not decide whether such wishes would have to be respected.**

Schmerber v. California, 384 U.S. 757, 771 (1966) (emphasis added).

This case calls for this Court to answer whether the Fourth Amendment requires such respect for "one of the few" who did not refuse a breath test, but willingly gave one. It is a "narrow but important category of cases."[2]

> 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.

Winston v. Lee, 470 U.S. 753, 761 (1985).

The warrant here reasonably anticipated such a routine blood draw procedure. The magistrate was not informed the suspect was needle-phobic or had consented to a breath test. App. 135a-140a. When petitioner communicated his needle phobia, rather than return to the magistrate who granted the first warrant in 15-20 minutes, the police spent the next two and one-half hours

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[2] *Mitchell*, 139 S. Ct. at 2531.

using physical violence, ultimately injecting him with antipsychotic drugs as a general sedative to immobilize him and extract his blood.

The question is whether applying this physical force and chemical sedation was reasonable under the Fourth Amendment. Does Fourth Amendment reasonableness permit police officers to physically restrain, threaten, violently distract, and ultimately inject antipsychotic drugs into an individual to sedate him to extract his blood to detect alcohol, when a voluntary breath test would have provided equivalent evidence in a shorter time? Does the Constitution require police to return to the magistrate with the additional information that petitioner is needle-phobic and agreed to a breath test to see whether a fully informed magistrate would still make the same balance of interests to physically force the blood draw or approve forced sedation?

In the alternative, this Court should grant certiorari and remand the case to permit petitioner the opportunity to show he would not have been sedated if police had not been seeking blood alcohol information. *Mitchell v. Wisconsin*, 139 S. Ct. at 2539.

STATEMENT OF THE CASE

1. In December 2014, petitioner Brian Smith's vehicle collided with a motorcycle as he turned left off the highway onto his residential street. The motorcyclist died later that night. At the scene, Brian, a 31-year-old husband and father of five with no criminal record, cooperated with responding officers. He identified himself as the driver. App. 214a-215a, 254a, 256a-257a. He remained at the scene upon request. He voluntarily performed field sobriety tests. He voluntarily blew into a portable preliminary breath test machine.[3] Trooper Beattie arrested Brian for vehicular assault. App. 270a-274a, 280a-286a.

When advised of his rights, Brian asked for a lawyer. Beattie said he could call a lawyer when they got to the jail. App. 288a-289a. Medics at the scene cleared Brian. App. 140a, 431a, 252a-253a.

Rather than take Brian to the jail to perform an admissible breath test, Beattie took him to a hospital to get a blood test. They arrived at 10:41 p.m. App. 293a. Beattie obtained a telephonic search warrant to draw Brian's blood in 15-20 minutes. App. 294a-295a.

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[3] As in many states, this screening test is not admissible in court. *Mitchell*, 136 S. Ct. at 2170.

Beattie did not know, and so did not inform the magistrate, Brian was needle-phobic.[4] The warrant did not authorize sedation or force to extract the blood. App. 136a, 138a-143a.

When a phlebotomist approached, Brian explained he was afraid of needles. He would not permit a draw. Brian was not cuffed. He was calm and compliant, not combative. He expressed his concerns verbally.[5] He did not yell. He did not physically react until someone approached him with a needle. App. 294a-300a, 346a.[6]

Beattie let Brian leave the room to use the restroom. He returned without incident. Officers then placed him in a room with padded walls and a bed with restraints. Brian reiterated his fear of needles and again asked for a lawyer. Beattie told him to get on the bed to be restrained. When Brian resisted, officers

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[4] Wani, A.L., Ara, A., & Bhat, S.A., *Blood Injury and Injection Phobia: The Neglected One*, 2014 BEHAV. NEUROL. 471340 (June 24, 2014) (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4094700/, last visited 7/13/2020); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th Ed. 2013) at 197-202.

[5] Beattie testified: "He then told me that he was afraid of needles." App. 298a. "He's afraid of needles." App. 302a. "He also stated he was afraid of needles." App. 399a.

[6] "Every time the needle would get close to him, he would flex his arms and move left and right." App. 314a. Although restrained, he moved "any time the nurse or phlebotomist would get a needle close to his arm or anywhere on his body." App. 404a. He acted calmer when no one was trying to poke him with a needle. App. 414a.

forcibly put him on the bed. Beattie put his taser on Brian's chest and threatened to tase him if he didn't allow them to strap him down. Brian then complied as the officers affixed the restraints. App. 297a-308a, 401a-405a.

Four or five very large[7] officers got on top of him to hold him down, with a total of ten people trying to hold him still. Despite being strapped in four-point restraints, whenever a needle came near, Brian tensed and flailed. App. 304a, 401a-405a.

It was decided Brian would be sedated against his consent. The doctor had never sedated someone for a blood draw. While Brian was still restrained and "distracted,"[8] they injected him with the antipsychotic drug Haldol and Ativan or Benedryl at 1:00 a.m. It took about 30 minutes for the sedation to take effect. The sedation made Brian cognitively incompetent for "an hour or two." They drew his blood at 1:30 a.m. They took him to jail still sedated. App. 341a, 373a-378a, 385a.

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[7] The officers were about the size of Beattie: 6'3", 220 pounds, on top of Brian, who was 5'8" and 165 pounds. App. 401a-402a; 136a, 431a.

[8] Although not described in detail at the pretrial hearing, in addition to the people on top of him, a trooper testified at trial they struck Brian's leg with a metal baton "as a pain compliance technique" to distract him while a nurse injected him with the sedative. App. 437a-438a.

2. The State charged Brian Smith with vehicular homicide and obstructing a police officer.[9] App. 9a.

Petitioner moved pretrial to suppress the blood test result on the grounds it was obtained in violation of the Fourth Amendment. App. 60a-61a, 180a-435a.

The trial court denied the motion. App. 48a-55a, 430a-435a. It found the state patrol used a standard search warrant for blood, which was "specific enough under the circumstances." The state patrol was not required to offer a breath test. The defendant flailed about and tensed his body so any attempts to draw blood were dangerous to both the defendant and hospital staff. A doctor suggested sedating the defendant to draw his blood and the trooper concurred. The defendant was admitted to the hospital to administer the sedative and to evaluate him for injuries due to his behavior. Balancing the intrusion of the defendant's dignity and privacy interests against the community's high interest in determining guilt or innocence, the court concluded sedating defendant presented a low safety and health risk and was necessary and the only safe way the blood draw could be done. It concluded the warrant was executed

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[9] Rev. Code of Wash. 46.61.520 (App. 443a); Rev. Code of Wash. 9A.76.020 (App. 445a). The State did not charge him with resisting arrest or assaulting a police officer, which suggests his behavior caused delays but did not challenge the arrest or endanger an officer.

reasonably and the blood test was admissible. App. 53a-55a.

At trial, the court admitted evidence that petitioner's blood drawn at 1:30 a.m. contained 0.05% alcohol. Applying retrograde extrapolation, the State's expert testified his blood alcohol level would have been .08% to .11% at 10:44 p.m., within two hours of the collision, above the legal limit of 0.08%. App. 440a-441a; Rev. Code of Wash. 46.61.502, App. 443a-445a.

A jury found Brian Smith guilty of both counts charged. The court sentenced him to serve 78 months in prison, the bottom of the standard range with no criminal history. App. 35a-46a.

3. Petitioner appealed to the Washington Court of Appeals. He raised the Fourth Amendment issue. App. 63a-140a. The State opposed, but also argued any constitutional error was harmless, because even without the blood test results, the State presented sufficient evidence of intoxication that the jury would have had to reach the same verdict. App. 141a-143a.

The Washington Court of Appeals affirmed. It applied a case-by-case reasonableness analysis ostensibly based on *Schmerber* and *Winston v. Lee*. It concluded "a blood draw is a safe and common procedure" presenting little risk to petitioner, and the sedation's risk of harm to his health was also "very low." It observed he

was sedated but "not to the point of unconsciousness," and "only because of his physical resistance." Concluding he "chose" not to cooperate with the blood draw, the Court of Appeals reasoned that holding the State's use of more intrusive measures unconstitutional would "improperly incentivize[]" suspects to resist the execution of warrants.

> We conclude that the very low risks to Smith's health, and the moderate harm to Smith's dignitary interests caused solely by Smith's refusal to cooperate with less invasive procedures, were outweighed by the community's interest in obtaining the evidence resulting from the blood draw and in ensuring compliance with judicial warrants. The administration of a low risk sedative by medical personnel at a hospital, who continuously monitored Smith, was, under the circumstances, a reasonable method of executing the warrant.

App. 12a-18a.[10]

4. Petitioner filed a petition for review to the Washington Supreme Court presenting these issues. App. 144a-178a. It denied review without further comment. App. 2a.

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[10] Although the trial court found petitioner told the officer he was needle-phobic, the Court of Appeals disputed the credibility of petitioner's assertion. App. 16a at n.12. This dispute does not matter for purposes of this Petition. The Fourth Amendment "is designed to prevent, not simply to redress, unlawful police action." *Steagald v. United States*, 451 U.S. 204, 215 (1981). Whether the Fourth Amendment permits this level of force, or whether the State must offer a breath test or seek a second warrant to use force and sedation, must turn on the suspect's communication to the police, not on his ability to prove in an emergency room the truth of that assertion. Petitioner's words and behavior supported his assertion. *See* footnotes 5 and 6, *supra*.

REASONS FOR GRANTING THE WRIT

I. WHEN A BLOOD TEST FOR ALCOHOL CANNOT BE CONDUCTED ROUTINELY, WHETHER THE FOURTH AMENDMENT PERMITS THE STATE TO APPLY FORCE TO THE EXTENT OF CHEMICALLY SEDATING THE SUSPECT WHEN A BREATH TEST WAS AVAILABLE IS A CRUCIAL FEDERAL QUESTION THIS COURT SHOULD SETTLE.

A. The Washington Supreme Court's Judgment Conflicts With This Court's Fourth Amendment Jurisprudence for Blood Tests.

A police officer who arrests someone for driving while intoxicated may administer a breath test for the person's blood alcohol content (BAC) without a warrant, as a search incident to arrest. Absent exigent circumstances, the officer must get a warrant for a blood test. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The natural dissipation of alcohol is not a categorical exigency permitting a blood test without a warrant. *Missouri v. McNeely*, 569 U.S. 141 (2013).

The warrant requirement assures an informed magistrate considers the balance of an individual's privacy rights against the State's need for the evidence.

> 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.

Winston v. Lee, 470 U.S. at 761.

With or without a warrant, the police may not use unreasonable force to search or seize a person. *Graham v. Connor*, 490 U.S. 386 (1989). "Reasonableness" is the touchstone of the Fourth Amendment. It is not capable of

precise definition or mechanical application. It must be determined on a case-by-case basis considering all the facts and circumstances.

The State bears the burden of proving a search intruding into a person's body was performed in a reasonable manner. *Winston v. Lee*, 470 U.S. at 766.

> [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham v. Connor, 490 U.S. at 396-97. This Court explained that courts are to apply a balancing test, which

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id., 490 U.S. at 396. Vehicular assault and homicide are serious crimes. But petitioner was not an immediate threat to anyone's safety, he was not actively resisting arrest, and he did not attempt to evade arrest by flight. To the contrary, he cooperated in every way except submitting to a needle.

Fifty-four years ago in *Schmerber*, this Court approved the State taking a blood test against a person's privacy interests and bodily integrity, based on its

perception that the blood test was a "commonplace" procedure involving "virtually no risk, trauma, or pain." *Id.*, 384 U.S. at 771. It specifically limited its holding to the facts and circumstances in that case.

> Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused ... . We need not decide whether such wishes would have to be respected.

Schmerber, 384 U.S. at 771 (1966) (emphasis added).

This Court again considered the balance of a compulsory blood test against an individual's privacy interests in *Missouri v. McNeely*, 569 U.S. at 159. The act of drawing a person's blood, whether or not he is unconscious, "involve[s] a compelled physical intrusion beneath [the] skin and into [a person's] veins" for the purpose of extracting "a part of the subject's body" as evidence for a criminal investigation. *McNeely*, 569 U.S. at 148; *Birchfield*, 136 S. Ct. at 2178. That "invasion of bodily integrity" disturbs "an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 569 U.S. at 148.

McNeely again considered a "routine" blood test.

> [A] blood test conducted in a medical setting by trained personnel ... is concededly less intrusive than other bodily invasions we have found unreasonable.

McNeely, 569 U.S. at 159. The Court cited *Winston v. Lee*, 470 U.S. at 759-66 (surgery to remove a bullet)),

and *Rochin v. California*, 342 U.S. at 172-74 (induced vomiting to extract narcotics capsules), as examples of unreasonable searches and seizures. *McNeely* held a warrant was required if there were no exigent circumstances, although a warrant might take 90-120 minutes to obtain. *McNeely*, 569 U.S. at 163 n.11.

Here the trooper obtained a routine search warrant for a blood draw in 15-20 minutes. Yet police spent two and one-half hours[11] forcibly trying to overcome petitioner's needle-phobic resistance. This was not a "split-second judgment" police officers were forced to make. *Graham v. Connor*, 490 U.S. at 396-97.

Given the time police spent in this battle, requiring a second warrant would not "frustrate the governmental purpose behind the search." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 533 (1967).

Reasonableness of a blood test must be weighed in comparison to the availability of a breath test.

> Blood tests are significantly more intrusive [than breath tests], and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.

Birchfield, 136 S. Ct. at 2184. Breath tests are the most common and economical method of calculating BAC.

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[11] Despite this delay, the State presented the blood alcohol evidence at trial using retrograde extrapolation. App. 440a-441a.

Breath test machines are generally regarded as very reliable; federal standards require they produce accurate and reproducible results. A standard infrared device completes a breath test in only a few minutes. *Id.* at 2167-68.

Here a breath test was available. Washington statutes permitted either a breath or a blood test. Rev. Code of Wash. 46.20.308 (2014); App. 446a. As in *Birchfield*,

> There is no indication in the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against Birchfield.

Birchfield, 135 S. Ct. at 2186. Unlike *McNeely*, Brian Smith had not refused a breath test. In fact, as had Birchfield[12] and Mitchell,[13] he provided a portable breath test at the scene. There was no reason to believe he would refuse a breath test at the jail, where he could contact counsel as he requested.

In *Mitchell*, this Court considered "an entire category of cases" in which the State sought to seize blood: drivers suspected of driving under the influence of alcohol who were unconscious and could not provide a breath test. While not granting a categorical exception to the warrant requirement, nonetheless a plurality of

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[12] *Birchfield*, 136 S. Ct. at 2170.

[13] *Mitchell*, 139 S. Ct. at 2532.

the Court adopted a "general rule providing ... guidance" when faced with exigencies. 139 S. Ct. at 2535 n.3. Weighed in the balance, an unconscious suspect made a breath test unavailable, and added to the balance in the State's favor. *Id.*, 139 S. Ct. at 2535-38.

Unlike *Mitchell*, the exigency in this case was that the blood test could not be done in the routine manner. Thus the balance shifts in favor of the individual. Petitioner was completely conscious and completed the one breath test asked of him. He cooperated at all stages except when a needle approached him. He was "one of the few" for whom a blood test would not be "routine," as the magistrate and warrant anticipated. This Court should decide whether the Fourth Amendment in this situation requires additional judicial review, instead of police deciding to apply all levels of force in a hospital emergency room, up to an including sedation. It is an important question this Court has left unanswered, and now should address.

B. The Washington Supreme Court's Judgment Conflicts With This Court's Fourth Amendment Jurisprudence for Sedating a Suspect to Search His Body.

In *Winston v. Lee*, the State wanted to surgically remove a bullet from the defendant's chest as evidence of armed robbery. The State sought a court order. The defendant, represented by counsel, had a full adversarial evidentiary hearing. Advised the procedure would require

only a local anesthetic, the court ordered the procedure. The Virginia Supreme Court denied review. A federal court denied injunctive relief. 470 U.S. at 756-57.

On the eve of surgery, the surgeon recommended a general anesthesia for the procedure, concluding the bullet was deeper than earlier thought. The defendant returned to the state court with this additional information seeking to enjoin this more intrusive procedure. After an evidentiary hearing, the state court denied rehearing and the Virginia Supreme Court affirmed.

Mr. Lee returned to federal court. The District Court now enjoined the threatened surgery with a general anesthesia. The Court of Appeals affirmed. 470 U.S. at 757-58.

This Court affirmed, holding the Fourth Amendment prohibited the search under these changed circumstances. *Winston*, 470 U.S. at 755.

> When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. **In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to 'drug this citizen--not yet convicted of a criminal offense--with narcotics and barbiturates into a state of unconsciousness,' ... and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.**

Id. at 765 (emphasis added).

The alcohol evidence the State sought with this blood test naturally dissipates, thus not permitting the thorough adversarial hearings before the search that occurred in *Winston*. Yet *Winston* demonstrates the substantial difference between a procedure that requires a local anesthetic and a general one; while one might be reasonable, the second may not. This Court found the Fourth Amendment balance shifted away from the State and in the defendant's favor.

So here, with the warrant for a routine blood draw, the police learned the draw could not be routine. Otherwise cooperative, Brian Smith's needle phobia prevented him from physically complying with a routine blood draw. Rather than return to the magistrate with this new information for a warrant to address it, a process that took 15-20 minutes, the police chose to threaten him with a taser, tie him down, hold him down, and inflict pain to distract him, so to inject a general sedative -- Haldol, an antipsychotic drug, combined with a benzodiazapene or antihistamine.

Thus as in *Winston*, the State took control of petitioner's body and drugged him, a citizen not yet convicted of a criminal offense, with narcotics to search beneath his skin. The state court distinguished these cases because Brian was only rendered cognitively

incompetent, not "unconscious." App. 17a. As in *Winston*, this use of force, violence and drugs to render petitioner incompetent shifted the balance away from the State and made this search unreasonable.

> 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.

Schmerber at 772; quoted with approval, *Winston* at 755.

The state court's sanctioning of this unnecessary police violence conflicts with this Court's relevant decisions, cited above. It also is an important question of federal constitutional law that this Court has not yet settled. This Court should grant certiorari to hold that a warrant for a routine blood draw does not permit the far greater intrusion of this level of force and chemically sedating an unconvicted suspect to draw his blood, particularly if a breath test is available.

C. The Washington Supreme Court's Judgment Conflicts With This Court's Fourteenth Amendment Jurisprudence Requiring Court Approval for Injecting Haldol.

The state court chose a narrow distinction between the general sedation inflicted on petitioner rendering him cognitively incompetent, and rendering a suspect unconscious, to conclude this seizure did not offend the Fourth Amendment. App. 17a. But this Court has held the use of the very drug injected into Brian Smith on a

person not convicted of a crime violates due process even without rendering him unconscious.

Haldol is an antipsychotic medication. *Harper v. State*, 110 Wn.2d 873, 876 n.3, 759 P.2d 358 (1988), *rev'd on other grounds*, *Washington v. Harper*, 494 U.S. 210 (1990).

> The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. ... The purpose of the [antipsychotic] drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. ... While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects.

Id., 494 U.S. at 229.[14]

Harper involved forcing antipsychotic medications into a **convicted** mentally ill prison inmate. Even so, the inmate must have a serious mental illness and be a danger to himself or others, and the treatment must be in his medical interest. *Id.* at 227.

Sell v. United States, 539 U.S. 166 (2003), in contrast, required a court order to force antipsychotic medications on an **unconvicted** suspect to render him competent to stand trial. This Court held such drugs might be forced, but only if, after "taking account of

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[14] The Court examined the long list of potential side effects. *See id.* at 229-30.

less intrusive alternatives," it is "necessary." *Id.* at 179.

Applying this test, the obvious less intrusive alternative here was a breath test. Because the police did not offer petitioner a breath test instead of insisting on the blood test, it violated the Fourteenth Amendment to inject him with antipsychotic medications against his will. *Sell.* By definition, this constitutional violation made the seizure of his blood unreasonable under the Fourth Amendment.

The due process clause prohibits this use of force, even when the State claims it is part of some medical treatment. "[T]here is a general liberty interest in refusing medical treatment." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).[15] Thus even assertions of sedating petitioner for medical purposes do not resolve this issue.

This Court should grant the writ to settle the issue whether police can sedate a suspect to take his blood without approval of a magistrate fully informed of the changed circumstances - that a blood draw will not be routine.

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[15] The liberty interest also stems from the common law torts of assault and battery. *Mills v. Rogers*, 457 U.S. 291, 294, n.4 (1982).

D. This Court Should Settle Whether the Fourth Amendment Permits Sedating a Suspect to Search His Body When the Warrant Does Not Approve It.

In cases other than DUIs, the United States Courts of Appeals have condemned similar forcible intrusions into a person's body, particularly if they involved sedation.

In *United State v. Booker*, 728 F.3d 535 (9th Cir. 2013), police took a man suspected of concealing drugs in his rectum to the emergency room. Based on police information, the attending doctor decided he had a medical duty to inspect his rectum. Booker contracted his anal and rectal muscles, preventing a digital examination. Without Booker's consent, a doctor injected muscle relaxants; when that was unsuccessful, he infused a sedative and paralytic, and intubated Booker for breathing. The doctor removed a rock of cocaine, which he gave the officers for evidence. The Court of Appeals held this procedure violated the Fourth Amendment and the evidence was suppressed.

In *United States v. Cameron*, 538 F.2d 254, 258 (9th Cir. 1976), a suspect underwent a digital rectal exam and two enemas before being forced to drink a liquid laxative to expel suspected drugs. In an opinion by then-Judge Kennedy, the Court of Appeals held that search unreasonable because less intrusive means were available.

In *Ellis v. City of San Diego*, 176 F.3d 1183 (9th Cir. 1999), the Court of Appeals held the plaintiff alleged a clear Fourth Amendment violation when he claimed a doctor sedated him, took blood samples, and inserted a catheter into his penis without his consent or a warrant to test for drugs. *Id.* at 1186, 1191-92.

In *George v. Edholm*, 752 F.3d 1206, 1218-19 (9th Cir. 2014), the police took the suspect to the hospital to have a doctor remove a plastic baggy from the suspect's anus. The police restrained the suspect as the doctor penetrated his anus, sedated him intravenously, and flushed out his gastrointestinal tract. The court reversed summary judgment that was based on police immunity for the doctor's actions.

> Private action may be attributed to the state, however, if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" ... Such a nexus may exist when, for instance, private action "results from the State's exercise of 'coercive power,'" or "when the State provides 'significant encouragement, either overt or covert,'" to the private actor.

Id., 752 F.3d at 1215; *accord*: *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001). The court held a jury could find the doctor's search was unreasonable under the Fourth Amendment.

In *United States v. Husband*, 226 F.3d 626, 632 (7th Cir. 2000), police believed a drug dealing suspect hid something in his mouth. They obtained a warrant to search his "body" for illegal drugs, weapons, or contraband. The suspect refused to submit to the search at the hospital. As here, the doctor decided to sedate him. As here, the warrant did not authorize sedation. While sedated, three baggies of cocaine were removed from his mouth. The trial court denied the motion to suppress the evidence. The Court of Appeals reversed and remanded.

> Under these circumstances, it is beyond question that the police's actions in sedating the defendant and removing the drugs from his mouth constitute a serious invasion of the defendant's personal privacy and liberty interests.
>
> ...
>
> [T]he proper inquiry is whether anything about the facts and circumstances of this case made the search unreasonable. ... In this regard, **it is significant that the warrant obtained by the police only authorized a search of the defendant's body.** There is no dispute in this case that the warrant included the authority to conduct a body cavity search, but the defendant claims that the method of conducting the search--rendering the defendant unconscious--was unreasonable in light of the circumstances. That is, **the defendant argues that the police should not have rendered him unconscious for the purposes of executing the warrant for a search of his body absent prior judicial approval of the use of a general anesthesia.**

Husband, 226 F.3d at 632, 634 (emphases added). The court found the record inadequate to resolve the issue. It remanded for additional evidence.

These cases demonstrate the need for this Court to settle whether sedating a suspect to search his body is unreasonable unless approved by a fully informed magistrate with a warrant authorizing sedation.

E. The Washington Supreme Court's Judgment Conflicts With the New Jersey, Montana and Idaho Supreme Courts. This Court Should Settle the Unanswered Question Whether, When a Blood Test Will Not Be Routine, the State Must Offer a Breath Test.

As this Court has approvingly observed, many states have found legislative methods to motivate drivers to comply with blood alcohol tests, and to effectively prosecute those who refuse. *Missouri v. McNeely*, 569 U.S. at 160-63 & nn. 9, 10. Such statutes avoid the sort of violent confrontation that occurred here.

Several state supreme courts have recognized that a suspect's fear of needles and the availability of a breath test lead to a different Fourth Amendment balance for compelling a blood draw.

The New Jersey Supreme Court recognized a suspect's stated fear of needles, when a breath test was available, rendered the forced blood test unconstitutional.

> To obtain defendant's blood, Officer Sullivan and hospital personnel had to restrain defendant. Defendant's legs and his left arm were strapped to a table, and several persons ... held him down. The record is undisputed that defendant screamed and struggled to free himself as the nurse drew his blood. Defendant later testified that he had said repeatedly, "I'm afraid of needles. I have no problem giving you a Breathalyzer sample if

> that's what you want but do not take my blood."

State v. Ravotto, 169 N.J. 227, 233, 777 A.2d 301 (2001). After the municipal court denied suppression, Mr. Ravotto entered a conditional plea. The New Jersey Supreme Court reversed, holding the search was unreasonable.

> [W]e conclude that the force used by the police to extract defendant's blood was unreasonable under the totality of the circumstances. Defendant was terrified of needles and voiced his strong objection to the procedures used on him. He shouted and flailed as the nurse drew his blood. Several persons, including the police, and mechanical restraints were needed to hold defendant down.
> ...
> ... [W]e are satisfied that the forced extraction of blood in this instance offended the federal and State Constitutions.

Ravotto, 169 N.J. at 241, 243.

The Supreme Courts of Montana and Idaho also recognize that fear of needles is a compelling circumstance, an exception to the norm. *Wessell v. DOJ, Motor Vehicle Div.*, 277 Mont. 234, 921 P.2d 264 (1996) (fear of needles made defendant incapable of providing blood test; license suspension for refusing test reversed); *In re Griffiths*, 113 Idaho 364, 372, 744 P.2d 92 (1987) (fear of needles sufficient cause for refusing blood test; no suspension if suspect told officer of fear and requested another test).

In *State v. Sisler*, 114 Ohio App. 3d 337, 683 N.E.2d 106 (1996), Mr. Sisler was arrested for DUI and taken to the hospital for a head injury. He consented to a blood

draw. But when the hospital technician approached to draw the blood, although handcuffed to a bed, he struggled violently. Two police officers, two hospital security officers, a physician and a nurse held him down. "Several efforts to insert a needle into his veins were unsuccessful, but blood was finally drawn." *Id.* at 340. The Ohio court reversed the conviction, holding the search violated both due process and the Fourth Amendment.

> It offends a fundamental sense of justice, at least as this court views that concept, that an accused who has been shackled to a hospital bed is held down by six persons while a seventh jabs at his arm with a needle in order to withdraw his blood at the direction of the state's officers. Such conduct is beyond that supportable as a measure necessary for effective law enforcement.

Sisler, 683 N.E.2d at 111 (1995).

Similarly, in *People v. Kraft*, 3 Cal. App. 3d 890, 84 Cal. Rptr. 280 (1970), the defendant began to submit to a blood draw, then resisted. Two officers tried to take him to a bed, but all three men went to the floor. There the officers immobilized the defendant, face down on the floor, at least one officer on top of him. The doctor performed the blood draw while they remained in this position. The California Court of Appeals reversed the conviction, holding the blood test results were obtained in violation of the Fourth Amendment.

While none of these cases involved vehicular homicide, also none of them involved a beating with a baton and drugging with an antipsychotic medication.

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT CERTIORARI AND REMAND TO PERMIT PETITIONER THE OPPORTUNITY TO ESTABLISH THAT HE WOULD NOT HAVE BEEN SEDATED IF POLICE HAD NOT BEEN SEEKING HIS BLOOD.

Since the state Court of Appeals decision below, this Court issued its decision in *Mitchell v. Wisconsin*, *supra*. This Court did not grant a categorical exception to the warrant requirement for a blood draw for a subject's unconsciousness; it ruled unconsciousness usually is an exigent circumstance that would obviate a warrant, especially when combined with a situation that usually requires a police officer's time and attention.

Nonetheless, this Court observed in an unusual case, a suspect

> would be able to show 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. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

Mitchell, 139 S. Ct. at 2539.

Because *Mitchell* did not articulate this issue until after petitioner's trial, petitioner, like Mitchell, did not have the chance to attempt to make that showing. In this unusual case, he should have that opportunity.

CONCLUSION

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. .... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1886), *cited with approval*, *Stern v. Marshall*, 564 U.S. 462, 503 (2011).

In *Schmerber*, this Court left open the effect on the Fourth Amendment's reasonableness analysis when a blood test cannot be conducted in the routine manner, with no risk, trauma, or pain. In this vacuum, the Washington state court deviated from the Fourth Amendment's protections. This Court should grant a writ of certiorari to settle this question, particularly as to injecting a suspect with antipsychotic drugs without notice to the magistrate and against petitioner's will. Such compulsion of an otherwise cooperative suspect when a breath test was available requires this Court's guidance to protect other drivers from police violating the Fourth Amendment.

In the alternative, this Court should grant certiorari and remand for the trial court to permit petitioner the opportunity to show that he would not have been sedated if police had not been seeking blood alcohol

information. *Mitchell v. Wisconsin*, 139 S. Ct. at 2539 (2019). The medics had medically cleared petitioner at the scene; there was no medical need for him to go to the hospital. *Mitchell* was decided after petitioner's trial, and so the constitutional issue had not been delineated to permit him the opportunity to contest it. As in *Mitchell*, this Court should provide him that opportunity.

DATED this 27th day of July, 2020.

/s/Lenell Nussbaum

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