No. _____

IN THE SUPREME COURT OF THE UNITED STATES
2022

ALBERIC NAULT, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT

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QUESTIONS PRESENTED (Rule 14.1(a))

1. Where a driver's medical condition precludes a reasonable opportunity to administer a breath test, does the Fourth Amendment always permit a warrantless blood draw without the court's consideration of whether the police could have reasonably obtained a warrant without interfering with other pressing needs or duties?

2. Whether the California Court of Appeal's published decision interpreting this Court's decisions in *Missouri v. McNeely* (2013) 569 U.S. 141, 148 [133 S.Ct. 1552, 185 L.Ed.2d 696] ("*McNeely*"), and *Mitchell v. Wisconsin* (2019) ___U.S.___ [139 S.Ct. 2525, 204 L.Ed.2d 1040] ("*Mitchell*") as always permitting a warrantless blood draw where a driver is unconscious and needs medical aid without consideration of the totality of the circumstances of analysis, including whether there was a "compelling need for official action and no time to secure a warrant," incorrectly applies this Court's decisions in *McNeely* and *Mitchell* and reaches a result that contravenes the Fourth Amendment and conflicts with decisions of other state and federal courts.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Court of Appeal included the State of California and petitioner, Alberic Nault. There are no parties to the proceedings other than those named in the petition.

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No. _____

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PEOPLE OF THE STATE OF CALIFORNIA, Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION EIGHT

Petitioner Alberic Nault respectfully petitions for a writ of certiorari to review the judgment and published opinion of the California Court of Appeal, Second Appellate District, Division Eight, filed on December 20, 2021 or, in the alternative, to grant certiorari and remand the matter for reconsideration in light of *Mitchell v. Wisconsin* (2019) ___U.S.___ [139 S.Ct. 2525, 204 L.Ed.2d 1040].

OPINION BELOW

The published Opinion of the Court of Appeal, *People v. Nault* (2021) 72 Cal.App.5th 1144, issued on December 20, 2021, is attached as Appendix A.

The California Supreme Court's one-page order denying review, issued on March 9, 2022, is attached as Appendix B.

The relevant California Rule of Court is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, subdivision (a). The decision of the California Court of Appeal was filed on December 20, 2021, and became final on March 9, 2022. (California Rules of Court, Rule 8.532, subd. (b)(1)(B), attached in Appendix C.)

The California Supreme Court is the state court of last resort in the State of California, and this petition is filed within 90 days of the California Supreme Court's entry of judgment, which took place on March 9, 2022. This petition is timely under Rules 13.1 of this Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, 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.

STATEMENT OF CASE

Petitioner was involved in a fatal head-on collision when he tried to pass a semi-truck on a two-lane highway. He was charged and convicted of second degree murder and gross vehicular manslaughter while intoxicated and sentenced to concurrent terms of 15 years-to-life in prison. The single most compelling piece of evidence establishing petitioner's guilt was his blood alcohol level, which was obtained from blood taken without a warrant, two hours after the fatal accident when petitioner was unconscious in the hospital awaiting surgery.

On December 20, 2021, in a published opinion, attached hereto as Appendix A, the California Court of Appeal, Division Eight, affirmed petitioner's convictions. As is relevant here, the Court of Appeal found that the warrantless seizure of petitioner's blood did not violate the Fourth Amendment because, when a driver is unconscious, "the general rule is a warrant is not needed," the Fourth Amendment "almost always" permits "a warrantless blood test when police officers do not have a reasonable opportunity for a breath test before hospitalization" and this "general rule" applies since petitioner "created the exigency by injuring himself badly," was "unconscious," his situation was "dire" and "caring for [petitioner's] medical need left no time for a breath test." (Appendix A, pp. 5-6.)

Petitioner sought discretionary review of the issue in the California Supreme Court, arguing the Court of Appeal's decision misinterpreted this Court's decisions in *Missouri v. McNeely* (2013) 569 U.S. 141, 148 [133 S.Ct. 1552, 185 L.Ed.2d 696] ("*McNeely*"), and *Mitchell v. Wisconsin* (2019) ___U.S.___ [139 S.Ct. 2525, 204 L.Ed.2d 1040] ("*Mitchell*"), and created a *per se* rule that a warrantless blood draw is permissible any time a defendant suspected of driving under the influences renders himself unconscious without consideration of the totality of the circumstances, and whether police could have reasonably judged that a warrant application would interfere with other pressing needs or duties. Petitioner argued the Court of Appeal's published decision was contrary to this Court's decisions in *McNeely* and *Mitchell*, violates the Fourth Amendment and will lead to continued violations of the Fourth Amendment because published decisions provide guidance to law enforcement officers tasked with determining whether a warrant is necessary to obtain a blood sample from an intoxicated driver. On March 9, 2022, the California Supreme Court summarily denied review without opinion, and the decision of the Court of Appeal became final that day. (Appendix B.)

This timely petition for writ of certiorari follows.

STATEMENT OF FACTS

For purposes of this petition, the facts set forth in the opinion of the Court of Appeal related to the underlying conviction are adequate. (Appendix A, pp. 2-4.) The facts related to the blood draw and the motion to suppress the blood alcohol results are supplemented as follows:

During trial, defense counsel discovered that petitioner's blood was drawn at the hospital *before* officers secured a warrant for the blood draw. (4RT 1669-1671.) Petitioner's blood was drawn at 9:11 and 9:12 p.m., the warrant was sought after the blood was drawn, and the warrant was not signed until after midnight on October 28, 2017, almost 3 hours after the blood was drawn. (4RT 1669-1677.) The parties agreed a hearing was necessary to determine whether exigent circumstances justified the warrantless blood draw. (4RT 1677-1680.)

Officer Riley Beckinger testified at the hearing. (4RT 1851-1862.) At 8:55 p.m., Beckinger was notified about the fatal traffic collision, was designated as one of the investigating officers and drove to Henry Mayo Hospital, where he arrived at approximately 9:05 p.m.. (4RT 1853.) At the hospital, Beckinger saw petitioner lying on a gurney in a trauma room with a mask on, an IV in his arm, and being attended to by multiple medical personnel. (4RT 1854.) Petitioner "appeared to be unconscious." (4RT 1856.) Officer Burgos-Lopez was also present in the trauma room and advised

Beckinger that he believed petitioner was under the influence of alcohol. (4RT 1854.) Beckinger determined that he needed to obtain blood from petitioner, requested a sample from the nurse, and told the nurse that he would obtain a warrant. (4RT 1854-1855, 1857.) The blood was drawn at 9:11 and 9:12 p.m.. (4RT 1855.)

Beckinger had not requested a warrant for the blood when he asked for the draw, but felt there was an urgency to get the blood. (4RT 1855.) He believed there was urgency "due to the totality of the circumstances, and a deceased party up at the collision scene, the party at the hospital had a strong odor of alcoholic beverage emitting from his breath and person, due to how the accident happened, medical staff advising me that he is going to be going into surgery due to his injuries." (4RT 1855-1856.) Beckinger was concerned about getting the blood before petitioner went into surgery because he did not know how long surgery would last given petitioner's multiple injuries, and was advised petitioner was "going into surgery very soon." (4RT 1856.) Beckinger did not believe he had a enough time to get a warrant before requesting a blood draw because obtaining a "*McNeely*" warrant "normally takes about an hour or so to obtain." (4RT 1857.) Typically, "whenever" they need to obtain a *McNeely* warrant, they return to the office, contact the District Attorney's command post, provide a brief synopsis of the incident, the prosecutor's office then contacts an on-call judge, provides the judge's contact

information to the officer, the officer forwards the *McNeely* warrant to the on-call judge, the judge looks at the warrant, either approves or denies it, and returns the signed warrant to the officer. (4RT 1857.)

Within 30 minutes of the nurse drawing petitioner's blood, Beckinger contacted Sergeant O'Brien and asked him to draft the warrant so Beckinger could stay at the hospital to obtain the blood and "some other information" before returning to the office. (4RT 1858, 1860.) The warrant was obtained at some point after midnight and sent to Officer Carlos Burgos-Lopez. (4RT 1859.) The following day, Beckinger dropped the warrant off at the hospital. (4RT 1859.) No additional blood was collected after the warrant was signed, but the hospital had collected its own blood when petitioner first got to the hospital. (4RT 1861-1862.) The blood drawn by the hospital was also booked into evidence but was not analyzed. (4RT 1862.)

Defense counsel agreed that the court could incorporate by reference any of the testimony at trial regarding the accident to avoid calling additional witnesses at the hearing on the motion to suppress. (4RT 1860-1861.) The evidence at trial, prior to the motion, established that the accident occurred at approximately 7:09 p.m. and Officer Burgos-Lopez, the first officer at the scene, arrived at 7:28 p.m.. (4RT 1534-1535.) Fire personnel and paramedics were already at the scene and informed Burgos-Lopez that the sole occupant of the Honda was deceased. (4RT 1535.) Burgos-Lopez spoke with petitioner

within two minutes of arriving at the scene as petitioner was being treated by paramedics. (4RT 1550.) Burgos-Lopez smelled a strong odor of alcohol coming from petitioner and, although petitioner going "in and out of consciousness," Burgos-Lopez asked petitioner several questions which petitioner answered, including that he had been drinking beer. (4RT 1550.) Burgos-Lopez formed the opinion that petitioner was under the influence of alcohol based on the odor of alcohol, petitioner's statements, and the fact he had been in a collision. (4RT 1554-1555, 1562-1563, 1576, 1594.) Petitioner was taken by helicopter to Henry Mayo Hospital, and Burgos-Lopez followed him to the hospital. (4RT 1562-1563.) Other officers arrived at the scene of the crash shortly after Burgos-Lopez, those officers were tasked with investigating the crash and taking measurements, and additional officers arrived throughout the night. (3RT 1296-1311; 4RT 1612-1650.) Burgos-Lopez sat by petitioner at the hospital as doctors attended to him.

Defense counsel argued that the draw of petitioner's blood was obtained without a warrant, there was no exigency because the officers had hours to obtain a warrant before the draw was done, and the inevitable discovery doctrine was inapplicable. (4RT 1864-1866.) The prosecutor responded that there were exigent circumstances because the collision occurred at 7:08 p.m., Officer Beckinger did not arrive at the hospital until 9:05 p.m., when he arrived it was "already two hours later" and petitioner was unconscious,

being attended to by medical personnel and was "getting medication." (4RT 1867.) The prosecutor argued that the inevitable discovery doctrine applied because "there was a warrant obtained," and thus, "they would have obtained this blood at some point." (4RT 1867.)

The trial court denied the motion to suppress the results of the blood draw. (4RT 1867-1872.) The court found that the warrantless blood draw was justified based on exigent circumstances, including the dissipation of evidence, petitioner was unconscious, and was being taken to surgery that would last an undetermined amount of time. (4RT 1869.) The court stated, in relevant part:

> So, based on that, I do find there was an exigency. Although the way everything went down, certainly, is not the preferred method. That's not how it should have gone.
> What really should have happened in this case was the minute that the officer suspected the defendant was under the influence of alcohol, they should have called to the D.A. command center to try to get a search warrant. And I can tell you from personal experience now as a judge for over 13 years, I know it takes a while to get a warrant through the command center. So had they applied for the warrant and were waiting, for example, to get the warrant signed, that would have been another layer of exigency saying, basically, we've got to get the blood. We can't wait any more.
> But that's not what happened here.
> I still do find exigency, though, there were exigent circumstances.

(4RT 1869-1870.)

REASONS FOR GRANTING REVIEW

THE CALIFORNIA COURT OF APPEAL'S PUBLISHED OPINION MISAPPLIES THIS COURT'S DECISIONS IN *MCNEELY* AND *MITCHELL* AND CREATES A *PER SE* RULE THAT ALLOWS POLICE OFFICERS TO PERFORM A WARRANTLESS BLOOD DRAW ANYTIME A DEFENDANT RENDERS HIMSELF UNCONSCIOUS AND UNABLE TO PERFORM A BREATH TEST WITHOUT CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES OR WHETHER THE CIRCUMSTANCES WERE SUCH THAT A REASONABLE OFFICER COULD HAVE CONCLUDED THERE WAS NO TIME TO OBTAIN A WARRANT

The question presented in this case considers the interpretation and application of this Court's decisions in *McNeely, supra,* 569 U.S. at p. 148 ("*McNeely*"), and *Mitchell, supra,* 139 S.Ct. 2525 and whether the fact a driver involved in a vehicle accident becomes unconscious justifies a warrantless blood draw where the evidence shows that the investigating agency had two hours to obtain a warrant and plenty of available manpower to draft and secure a warrant. Here, there is no dispute that (1) police who arrived at the scene immediately believed petitioner had caused a fatal accident while driving under the influence; (2) petitioner was taken by helicopter to a hospital for medical treatment; (3) he became unconscious at some point after the accident and was, thus, unable to perform a breath test; (4) a warrantless blood draw was performed *two hours* after the accident while petitioner was awaiting surgery; and (4) no attempt to secure a warrant was made during those two hours. (Appendix A, Opinion, p. 3.) The record also shows that

there were numerous officers available at the time to draft and secure a warrant in the two hours[1] between the accident and the warrantless blood draw. (4RT 1537, 1563, 1858, 1860.) The record also suggests that officers did not fail to secure a warrant because of any pressing needs caused by the emergency petitioner created or lack of time to do so, but rather, they simply failed to secure a warrant despite plenty of time, ample manpower, and plenty of probable cause to believe petitioner had caused a fatal accident while intoxicated.

The California Court of Appeal found the warrantless blood draw did not violate the Fourth Amendment because "the general rule is a warrant is not needed" when a driver is unconscious and "[t]he Fourth Amendment 'almost always' permits a warrantless blood test when police officers do not have a reasonable opportunity for a breath test before hospitalization." (Appendix A, Opinion, p. 5, citing *Mitchell, supra*, 139 S.Ct. at pp. 2531, 2539.) According to the Court of Appeal "the general rule governs here" and exigent circumstances "justified this blood draw" because petitioner "created the exigency by injuring himself badly," he was "unconscious and had to be helicoptered to surgery" and "[c]aring for Nault's medical need left no time for a breath test." (Appendix A, Opinion, p. 66.) The Court of Appeal's

[1] It normally takes about an hour to obtain a warrant. (4RT 1857.)

interpretation of the law creates a per se rule permitting a warrantless blood draw under the Fourth Amendment where a driver is unconscious and needs medical aid, because exigent circumstances will always exist with an injured or unconscious driver who cannot perform a breath test. However, there is no *per se* rule. In fact, this Court made clear in *Mitchell* that the dissipation of blood alcohol evidence alone is not sufficient - there must be some other factor that creates pressing health safety or law enforcement needs that would take priority over the warrant application. (*Mitchell, supra*, 139 S.Ct. at p. 2537.) The Court of Appeal's published decision involves an incorrect interpretation and application of this Court's precedent and will lead to repeated violations of the Fourth Amendment in California where law enforcement decisions are guided by published appellate court decisions and trial courts considering the issue are bound by the published decisions of our intermediate appellate courts.

To be justified under the exigent circumstances exception to the warrant requirement, there must be a "compelling need for official action and no time to secure a warrant" (*Missouri v. McNeely, supra,* 569 U.S. at p. 149), or an "emergency which leaves police with insufficient time to seek a warrant" (*Birchfield v. North Dakota* (2016) ___ U.S. ___ [136 S.Ct. 2160, 2173-2174, 195 L.Ed.2d 560].) Courts look to the "totality of the circumstances" of the particular case to determine whether the warrantless

search was reasonable. (*Missouri v. McNeely, supra*, 569 U.S. at pp. 150, citing, *Brigham City v. Stuart* (2006) 547 U.S. 398, 406.) The warrantless blood draw of an intoxicated suspect must be determined on a case-by-case basis based on an examination of the totality of the circumstances. (*McNeely, supra*, 569 U.S. at p. 156.) In other words, this Court has made clear there is no *per se* rule that permits the warrantless blood draw of an unconscious suspect in a DUI homicide investigation.

It is correct that this Court, in *Mitchell*, stated that "when a driver is unconscious, the general rule is that a warrant is not needed." (*Mitchell, supra*, 139 S.Ct. at p. 2531.) The Court explained that the reason for this rule is "police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities – such as attending to other injured drivers or passengers and preventing further accidents – may be incompatible with the procedures that would be required to obtain a warrant." (*Ibid.*) Quoting *McNeely*, this Court further explained that, "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.'" (*Mitchell, supra*, 139 S.Ct. at p. 2534.) Significantly, this Court in *Mitchell* did not determine that the facts before it satisfied the exigent circumstances rule. Rather, the decision simply "address[ed] how the exception bears on the category of cases"

involving unconscious drivers. (*Id.* at pp. 2534-2535.) This Court stated that, in those cases, "an officer's duty to attend to more pressing needs *may leave no time to seek a warrant*." (*Id.* at p. 2535 [italic added].)

The plurality opinion in *Mitchell* concluded that when unconscious drivers are taken to a hospital, officers "may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to 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. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary." (*Mitchell, supra*, 139 S.Ct. at p. 2539.) Thus, while this Court has held that where a suspected DUI driver becomes unconscious, "officers may almost always" order a warrantless blood draw, there are circumstances where officers "could not have reasonably judged that a warrant application would interfere with other pressing needs or duties" such that the exigent circumstances doctrine would *not* excuse a warrantless blood draw and, in *Mitchell*, the Court specifically remanded the matter to allow the defendant to show that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." (*Id.* at p. 2539.)

The Court of Appeal's published decision in this case eviscerates the *Mitchell* decision, which created only a "general rule," and replaces it with a *per se* rule permitting warrantless blood draws in *all cases* where a driver renders himself unconscious or unable to complete a breath test, without consideration of whether the totality of the circumstances establish that obtaining a warrant would interfere with other pressing needs or duties. This is not the law and such an interpretation of this Court's ruling gives officers in California *carte blanche* to violate defendants' Fourth Amendment rights. When securing a warrant would not interfere with other pressing needs and duties of officers, this Court has made clear that a warrant is required for a blood draw, even where the defendant is rendered unconscious and incapable of providing a breath sample. The California Court of Appeal's conclusion to the contrary is wrong.

The California Court of Appeal's decision also conflicts with decisions from the First Circuit Court of Appeals, Texas, Florida, Kansas, and South Carolina. (See i.e., *United States v. Manubolu* (1st Cir. 2021) 13 F.4th 57 [unconsciousness alone does not establish exigency, rather, the court must consider whether there were other pressing needs that would have taken priority over a warrant application]; *State v. Ruiz* (Tex. App.2021) 622 S.W.2d 549, 555-556 [same]; *McGraw v. State* (Fla. 2019) 289 So.3d 836 [because *Mitchell* did not rule out the possibility an unconscious defendant could show

a Fourth Amendment violation if police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties or that the blood would not have been drawn absent the request for blood alcohol, remand was necessary to give defendant the opportunity to establish the blood draw was unlawful.]; *State v. Chavez-Majors* (Kan. 2019) 454 P.3d 600, 607 [same]; *State v. Key* (S.C. 2020) 848 S.E.2d 315, 319-321 [same, except the state bears the burden of proof].)

The question to be answered in evaluating whether a warrantless blood draw violated a defendant's Fourth Amendment rights is not whether a defendant is incapable of giving a breath sample, as the California Court of Appeal contends, but rather, is whether obtaining a warrant would interfere with other pressing needs or duties such that exigent circumstances exist. When there is time to obtain a warrant and officers are available to secure the warrant who are not consumed with other duties and obligations, the Fourth Amendment compels a warrant for a blood draw of all drivers, including those who are unconscious.

The facts in this case establish that nothing prevented officers from taking the steps to secure a warrant for petitioner's blood in the two hours between the accident, which officer Burgos-Lopez immediately attributed to petitioner's driving under the influence of alcohol, and Beckinger's arrival at the hospital, two hours later where petitioner, who was unconscious, was

receiving medical aid and was being prepared for surgery. The accident occurred at approximately 7:09 p.m. and Officer Carlos Burgos-Lopez, the first officer at the scene, arrived at 7:28 p.m.. (4RT 1534-1535.) Fire personnel and paramedics were already at the scene and informed Burgos-Lopez that the sole occupant of the Honda was deceased. (4RT 1535.) Burgos-Lopez spoke with petitioner within two minutes of arriving at the scene as he was being treated by paramedics. (4RT 1550.) Burgos-Lopez smelled a strong odor of alcohol emitting from petitioner and, although petitioner was going "in and out of consciousness," Burgos-Lopez asked him several questions which he answered, including that he had been drinking beer. (4RT 1550.) Burgos-Lopez formed the opinion that petitioner was under the influence of alcohol. (4RT 1554-1555, 1562-1563, 1576, 1594.) Petitioner was then transported by helicopter to the hospital and Burgos-Lopez followed him there. (4RT 1562-1563.) Other officers who arrived at the scene of the crash shortly after Burgos-Lopez were tasked with investigating the crash and taking measurements, and additional officers arrived throughout the night. (3RT 1296-1311; 4RT 1612-1650.)

Despite the fact that, within two minutes of arriving at the scene at 7:28 p.m., Burgos-Lopez formed the opinion that petitioner was under the influence of alcohol and was involved in a fatal accident caused by his use of alcohol, no attempt was made between that time, roughly 7:30 p.m., and 9:11

p.m. to secure a warrant for petitioner's blood. Instead, while other officers attended to the accident scene and conducted their investigation, Burgos-Lopez, one of the investigators, sat by petitioner at the hospital as doctors attended to him. The prosecution presented no evidence to establish why, during the almost two hours between Burgos-Lopez's arrival at the scene and his immediate conclusion that petitioner was under the influence of alcohol, and Beckinger's arrival at the hospital, no officer made any attempt to secure a warrant for petitioner's blood. There were no other emergencies related to the accident for Burgos-Lopez or Beckinger to attend to, and there were no witnesses to interview, investigations to conduct or victims to aid. Burgos-Lopez watched petitioner in the hospital and Beckinger was apparently on call somewhere else and directed to report to the hospital. Other officers assigned to the California Highway Patrol Office were available to draft a warrant, which is, in fact, what occurred *after* the blood was drawn.

This was not a situation where there was no time to secure a warrant. There was more than sufficient time to secure a *McNeely* warrant, which Beckinger explained takes "about an hour or so" to secure. (4RT 1857.) Burgos-Lopez was available to secure the warrant, Beckinger was apparently available to secure a warrant and there were countless other officers, including Sergeant O'Brien, who were at the station and could have assisted Burgos-Lopez and/or Beckinger in obtaining the warrant. Instead, they did

nothing, knowing that ultimately, they could secure the blood sample by claiming exigency, an exigency that the officers themselves were responsible for creating by their failure to obtain a warrant during the two hours between the accident and when Beckinger arrived at the hospital and asked for petitioner's blood to be drawn.

Under the facts of this case, where: (1) there were multiple officers at the scene of the fatal crash, (2) there was a single victim of the crash who was deceased when officers arrived, (3) there was an immediate determination that the accident was the result of petitioner driving under the influence of alcohol, (4) one of the officers [Burgos-Lopez] was sent to the hospital to observe petitioner, and (5) there were additional officers on standby and available by phone to assist in the warrant application, it cannot be reasonably judged that other pressing matters interfered with the ability to secure a warrant. As the trial court aptly noted, "what really should have happened in this case was the minute that the officer suspected the defendant was under the influence of alcohol, they should have called to the D.A. command center to try to get a search warrant." (4RT 1869-1870.) Here, the officers had two hours to do so and multiple officers available to perform the tasks required.

Petitioner's case is one of the exceptions to the general rule in *Mitchell*. To justify the warrantless blood draw in this case is to sanction warrantless

blood draws in all cases where a driver is unable to provide a breath test. That is not the law and certainly not what this Court in *Mitchell* sanctioned. Yet, this is exactly what the Court of Appeal's published decision allows. This published decision is binding on lower court's in California and guides the actions of law enforcement in the State.

This Court should grant certiorari to redress the violation of petitioner's Fourth Amendment rights, to protect the rights of future defendants in California, and ensure that courts in California are properly applying this Court's Fourth Amendment jurisprudence. Contrary to the California Court of Appeal's decision, there is no *per se* rule authorizing a warrantless blood draw of an unconscious driver suspected of driving under the influence. Rather, courts evaluating this issue must still look to the facts of the case and determine whether the general rule allowing a warrantless blood draw of an unconscious driver is overcome by evidence showing that it could not be reasonably judged that other pressing matters interfered with the ability to secure a warrant. Because the California Court of Appeal created a *per se* rule authorizing a warrantless blood draw anytime a defendant creates an exigency by driving and driving and rendering himself unconscious and thus, unable to perform a breath test, the Court of Appeal did not consider whether the officers in petitioner's case could have reasonably judged that a warrant application would interfere with other pressing needs or duties such that a

warrantless blood draw did not violate the Fourth Amendment. Had the proper test been applied, petitioner would have been able to show that no reasonable officer would believe obtaining a warrant would interfere with other pressing duties because there were two hours between the accident and the blood draw and numerous officers available to secure the warrant. Thus, the failure to secure a warrant violated petitioner's Fourth Amendment rights.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Court grant certiorari and reverse the decision of the California Court of Appeal, Second Appellate District, Division Eight. In the alternative, petitioner requests that this Court grant certiorari and remand this case to the Court of Appeal with directions to reconsider the matter in light of this Court's decisions in *McNeely* and *Mitchell*.

Dated: May 27, 2022

Respectfully submitted,

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APPENDIX A:
Court of Appeal Opinion

Filed 12/20/2021

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALBERIC ROLAND NAULT, Defendant and Appellant.	B306460 Los Angeles County Super. Ct. No. PA089854

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed as modified.

Richard B. Lennon and Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and David A. Voet, Deputy Attorney General, for Plaintiff and Respondent.

After four convictions for drunk driving, Alberic Roland Nault got drunk and tried to pass an 18-wheeler on a narrow road. His pickup hit an oncoming car and killed its driver. While Nault was unconscious from the crash, police took a warrantless sample of his blood. Nault argues this violated the Fourth Amendment. We affirm but direct the trial court to stay a second sentence under Penal Code section 654.

Nault has a history of driving under the influence. At his 2020 trial, he stipulated to four of these convictions between 2000 and 2009. As a condition of probation, in 2001 he took a morgue program designed to snap him into focus. He also completed two other court-ordered alcohol awareness programs: one in 2006 and another in 2013. These sessions described the potential consequences of drunk driving, including killing people and murder charges.

On August 11, 2017, a park ranger found Nault digging his pickup out of beach sand. Nault was stumbling about and he sounded and smelled drunk. He refused field sobriety tests and a blood test. He told the ranger to arrest him: "I'm going to fail those tests. I'm going to get a DUI." He said his blood alcohol content was over 0.08 percent because he drank a Four Loko. The ranger arrested Nault and impounded his truck. Authorities suspended Nault's license.

On October 27, 2017, Nault used deception to get his truck out of impound. The tow yard would not release it to him while his license was suspended, so Nault paid a stranger $100 to show the tow yard a valid license that did not belong to Nault. Once the stranger got the truck released, Nault drove it away.

That same day at 7:00 p.m., Laurentino Doval Carlos was driving his 18-wheeler on a two-lane road with a 55 mile-per-hour

speed limit. Doval was behind another 18-wheeler. Both were traveling about 50 miles per hour. It was dark.

In his rear view, Doval saw Nault's headlights. Nault was trying to pass Doval at 70 miles per hour. Doval slowed to let him pass. The truck ahead of Doval blocked the view.

In the opposite lane, a Honda Civic appeared, driving towards Nault. Seeing Nault's pickup coming straight at her in her lane, the Honda driver locked her brakes. Nault's pickup hit the Honda, crushing the driver to death. Both cars burst into flames.

Doval found the Honda driver dead and Nault unconscious in his driver's seat. Nault smelled strongly of alcohol. Doval pulled Nault out of the burning pickup.

California Highway Patrol Officer Carlos Burgos-Lopez arrived at the scene at 7:28 p.m. Nault now was semiconscious in an ambulance. His pants were soaked with alcohol. Burgos-Lopez asked Nault what he had been drinking and Nault said, "Beer." His speech was "thick."

Nault's injuries prevented him from giving Burgos-Lopez a complete statement. His blood pressure was very low, and medical personnel were giving him oxygen and intravenous fluids. He had injured his abdomen and leg and would be hospitalized for days.

Burgos-Lopez went to get the breathalyzer from his cruiser. When he returned, medics were moving Nault to a helicopter for emergency evacuation, which prevented Burgos-Lopez from using the breathalyzer.

Burgos-Lopez stayed at the scene to investigate. He determined the accident's cause was Nault's driving under the influence at an unsafe speed and trying to pass with too little

room. The long skid marks behind the Honda meant heavy braking. There were no skid tracks behind Nault's pickup.

Burgos-Lopez then followed Nault to the hospital.

Officer Riley Beckinger got a call at 8:55 p.m. assigning him the investigation. He arrived at the hospital at 9:05 p.m. and found the unconscious Nault. Burgos-Lopez said Nault was under the influence. Beckinger smelled alcohol on Nault, and the smell was strong. The medical staff said they would take Nault into surgery soon. Beckinger knew he had no time to get a warrant before the surgery, so he asked a nurse to draw Nault's blood straight away. Beckinger said he would get a warrant thereafter. A nurse took two blood samples, at 9:11 and 9:12 p.m.

Beckinger assigned another officer to get a warrant while he stayed at the hospital to gather information. Beckinger received the warrant that night and delivered it to the hospital the next morning.

Analysis of the blood revealed that at 9:11 p.m., about two hours after the crash, Nault's blood alcohol content was 0.14 percent. That was about twice the legal limit.

The trial court heard Nault's challenge to the blood evidence. Nault argued the analysis was inadmissible because officers got the samples without a warrant. The court held exigent circumstances justified the blood draws.

A jury convicted Nault of second degree murder (Pen. Code, § 187, subd. (a)) (count 1) and gross vehicular manslaughter while intoxicated (*id.*, § 191.5, subd. (a)) (count 2). Nault pleaded no contest to driving a vehicle with a suspended license (Veh. Code, § 14601.5, subds. (a) & (d)(2)) (count 3) and admitted four prior convictions for driving under the influence (Veh. Code, § 23152, subds. (a) & (b); see Pen. Code, § 191.5, subd. (d)).

The court sentenced Nault to 15 years to life in state prison for count 1, with a concurrent term of 15 years to life for count 2, and to one year in county jail for count 3.

Nault argues the warrantless blood draw violated his Fourth Amendment right against an unreasonable search. We independently review the constitutionality of the search. (*People v. Meza* (2018) 23 Cal.App.5th 604, 609 (*Meza*).) Federal law governs us. We are not permitted a state law departure. (See *People v. Souza* (1994) 9 Cal.4th 224, 232–233.)

A blood draw is a search governed by the Fourth Amendment. (*Birchfield v. North Dakota* (2016) 579 U.S. 438, __ [136 S.Ct 2160, 2173].) A warrantless blood draw is presumed unreasonable unless justified by a recognized exception. (U.S. Const., 4th Amend.; *Missouri v. McNeely* (2013) 569 U.S. 141, 148.) One such exception is exigent circumstances, which arise when an emergency makes law enforcement needs so compelling that a warrantless search is objectively reasonable. (*McNeely*, at pp. 148–149.)

Circumstances are exigent when blood alcohol evidence is dissipating, as it always is, and a pressing health, safety, or law enforcement need takes priority over a warrant application. (*Mitchell v. Wisconsin* (2019) __ U.S. __, __ [139 S.Ct. 2525, 2537] (plur. opn. of Alito, J.) (*Mitchell*); *Schmerber v. California* (1966) 384 U.S. 757, 770–771.) The fact the human body continuously metabolizes alcohol is not enough. (*Mitchell*, at p. 2537.)

When a driver is *unconscious*, the general rule is a warrant is not needed. (*Mitchell*, *supra*, 139 S.Ct. at p. 2531.) The Fourth Amendment "almost always" permits a warrantless blood test when police officers do not have a reasonable opportunity for a breath test before hospitalization. (*Id*. at p. 2539.)

The general rule governs here. Exigent circumstances justified this blood draw.

Nault created the exigency by injuring himself badly. He was unconscious and had to be helicoptered to surgery. Whoever called for the helicopter judged the situation dire. Nault does not suggest this decision was a manipulation. Caring for Nault's medical need left no time for a breath test.

Nault cites the *Meza* decision. (*Meza*, *supra*, 23 Cal.App.5th at pp. 611–612.) *Meza* was pre-*Mitchell*. There was no airlift of an unconscious person.

Nault also contends, and the prosecution agrees, his sentence for count 2 should be stayed pursuant to Penal Code section 654, which bars multiple punishments for the same act. We concur. (See *People v. Sanchez* (2001) 24 Cal.4th 983, 988, 992.)

DISPOSITION

We direct the trial court to stay the sentence for count 2 pursuant to Penal Code section 654 and to forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. No hearing or presence of parties is necessary. We affirm the judgment in all other respects.

WILEY, J.

We concur:

GRIMES, Acting P. J. HARUTUNIAN, J. *

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* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B:
Order Denying Petition for Review

Court of Appeal, Second Appellate District, Division Eight - No. B306460

S272711

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ALBERIC ROLAND NAULT, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX C:
California Rules of Court, Rule 8.532

Cal Rules of Court, Rule 8.532

Rules are current through April 5, 2022.

CA - California Local, State & Federal Court Rules > CALIFORNIA RULES OF COURT > Title 8. Appellate Rules > Division 1. Rules Relating to the Supreme Court and Courts of Appeal > Chapter 9. Proceedings in the Supreme Court

Rule 8.532. Filing, finality, and modification of decision

(a) Filing the decision The clerk/executive officer of the Supreme Court must promptly file all opinions and orders issued by the court and promptly send copies showing the filing date to the parties and, when relevant, to the lower court or tribunal.

(Subd (a) amended effective January 1, 2018.)

(b) Finality of decision

(1) Except as provided in (2), a Supreme Court decision is final 30 days after filing unless:

(A) The court orders a shorter period; or

(B) Before the 30-day period or any extension expires the court orders one or more extensions, not to exceed a total of 60 additional days.

(2) The following Supreme Court decisions are final on filing:

(A) The denial of a petition for review of a Court of Appeal decision;

(B) A disposition ordered under rule 8.528 (b), (d), or (e);

(C) The denial of a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause; and

(D) The denial of a petition for writ of supersedeas.

(Subd (b) amended effective January 1, 2007.)

(c) Modification of decision The Supreme Court may modify a decision as provided in rule 8.264 (c).

(Subd (c) amended effective January 1, 2007.)

History

Rule 8.532 amended effective January 1, 2018; repealed and adopted as rule 29.4 effective January 1, 2003; previously amended and renumbered effective January 1, 2007.

Annotations

Commentary

Advisory Committee Comment

Subdivision (b). Subdivision (b)(2)(A) recognizes the general rule that the denial of a petition for review of a Court of Appeal decision is final on filing. Subdivision (b)(2)(B)-(D) recognizes several additional types of Supreme Court decisions that are final on filing. Thus (b)(2)(B) recognizes that a dismissal, a transfer, and a retransfer under

(b), (d), and (e), respectively, of rule 8.528 are decisions final on filing. A remand under rule 8.528(c) is not a decision final on filing because it is not a separately filed order; rather, as part of its appellate judgment at the end of its opinion in such cases the Supreme Court simply orders the cause remanded to the Court of Appeal for disposition of the remaining issues in the appeal. Subdivision (b)(2)(C) recognizes that an order denying a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause is final on filing. The provision reflects the settled Supreme Court practice, since at least 1989, of declining to file petitions for rehearing in such matters. (See, e.g., *In re Hayes* (S004421) Minutes, Cal. Supreme Ct., July 28, 1989 ["The motion to vacate this court's order of May 18, 1989 [denying a petition for habeas corpus without opinion] is denied. Because the California Rules of Court do not authorize the filing of a petition for rehearing of such an order, the alternate request to consider the matter as a petition for rehearing is denied."].) Subdivision (b)(2)(D) recognizes that an order denying a petition for writ of supersedeas is final on filing.

Case Notes

Decisions Under Current Rule

1. Legal Effect of Filing

Habeas petitioner's argument that his state review was still pending until he received actual notice of denial was rejected. According to former Cal R of Court 29.4(b)(2), denials of habeas petitions by the California Supreme Court become final on filing; reception of the decision by the parties was not necessary. *Harper v. Clark (2007, SD Cal) 2007 US Dist LEXIS 59832*.

When petitioner filed his first state habeas petition in a California state court on January 6, 2008, he had used 190 days of the 365 days allotted by the limitations period set forth in *28 U.S.C.S. § 2244(d)*, and the limitations period was tolled from January 6, 2008, through May 14, 2008, when the California Supreme Court denied his petition for review from the denial of the state habeas petition, as the denial of the petition for review was final on filing pursuant to *Cal R of Court 8.532(b)(2)(A)*. Petitioner then had 175 days from May 14, 2008, or until November 5, 2008, in which to timely file his federal habeas petition, and because his federal instant petition was filed on July 21, 2008, it was timely. *Solorio v. Hartley (2008, CD Cal) 591 F Supp 2d 1127, 2008 US Dist LEXIS 106044*.

Because the Ninth Circuit case petitioner inmate relied upon, as grounds to assert that his habeas petition was timely under *28 U.S.C.S. § 2244(d)*, was based on a prior version of *Cal R of Court 8.532*, which was amended in 2003 to state, in Rule 8.523(b)(2)(C), that a state court's writ denial was final immediately upon filing, and the amendment was effective 2 years before the federal petition was filed, the federal petition was untimely. *Korolev v. Horel (2010, CA9 Cal) 2010 US App LEXIS 13673*.

2. Applicability

In plaintiffs' action against a City for damages stemming from the City's alleged collection of an unlawful transient occupancy tax, an ordinance became ineffective by operation of former Cal R of Court 29.4(b)(2), (Renumbered Rule 8.532), on February 3, 1998, when the California Supreme Court denied the City's petition for review of the California Court of Appeal's decision invalidating the former ordinance, and a new ordinance went into effect on

February 4, 1998, the day after it was approved by the electorate, by operation of *Cal Const Art II, § 10(a)*. Thus, the former ordinance was invalidated less than twenty-four hours before the new ordinance took effect. *Patel v. City of San Bernardino (2006, CA9 Cal) 207 Fed Appx 752, 2006 US App LEXIS 28015*, cert. denied, *(2007) 549 U.S. 1323, 127 S. Ct. 1920, 167 L. Ed. 2d 568, 2007 U.S. LEXIS 3824*.

Decisions Under Former Rules

1. Legal Effect of Filing

Because the operative act that gave legal effect to the court's opinion affirming defendant's conviction for felony-murder was the formal filing of the opinion or order by the clerk of the court, it was irrelevant that the chief justice of the court, who personally attended the oral argument of the case, was not in the state when he filed his concurring opinion. *People v. Billa (2003) 31 Cal 4th 1064, 6 Cal Rptr 3d 425, 79 P3d 542, 2003 Cal LEXIS 9113*.

Petitioner, pro se state prisoner, relying on *Bunney v. Mitchell, 262 F.3d 973, 2001 US App LEXIS 19215 (9th Cir. 2001)*, argued that the limitations period for filing his application for a writ of habeas corpus under *28 USCS § 2254* did not resume running until 30 days after the California supreme court denied his habeas corpus petition; however, because Bunney relied on former Cal R of Court 29.4 (now *Cal R of Court 8.532(b)(2)(C)*) which had since been amended, his argument was unavailing, and his application was untimely filed. *Olivo v. Yates (2008, ED Cal) 2008 US Dist LEXIS 91756*.

2. Modification

Pursuant to former Cal R of Court 29.4(c), the Supreme Court dismissed review of the appellate court's decision that a forensic blood test had to be sworn to be admissible in an administrative per se hearing and directed the Reporter of Decisions to publish the opinion in the official reports pursuant to *Cal R of Court 976(d)*. *Manning v. Department of Motor Vehicles (1998, Cal App 4th Dist) 61 Cal App 4th 273, 71 Cal Rptr 2d 647, 1998 Cal App LEXIS 115*, reh'g denied, *Manning v. DMV (1998, Cal App 4th Dist) 1998 Cal App LEXIS 154*.

Research References & Practice Aids

Cross References:

Extending time: *Cal R of Court 8.60*.

Policies and factors governing extensions of time: *Cal R of Court 8.63*.

Filing, finality, and modification of decision in the Court of Appeal: *Cal R of Court 8.264*.

Rehearing in Court of Appeal: *Cal R of Court 8.268*.

Remittitur in Court of Appeal: *Cal R of Court 8.272*.

Rehearing in Supreme Court: *Cal R of Court 8.536*.

Remittitur in Supreme Court: *Cal R of Court 8.540*.

Publication of opinions: *Gov C §§ 68902-68905*; *Cal Const Art VI § 14*.

Transfer of cases between Supreme Court and appellate courts: *Cal Const Art VI § 12*.