

No. _____

In The
Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

AKIM SHARIF JONES-WILLIAMS,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Pennsylvania Supreme Court issue a decision in conflict with, and fail to properly apply and follow, binding legal precedent from the United States Supreme Court in *Mitchell v. Wisconsin*, ___ U.S. ___, 130 S.Ct. 2525 (2019) and in conflict with *Mitchell*'s application in other jurisdictions by finding that exigent circumstances did not exist to support a warrantless request by police of hospital personnel to test Defendant/motorist's blood drawn from him while unconscious or stuporous and after Defendant drove and caused his vehicle to collide with a Train, which killed his paramour and seriously injured his infant daughter, and where there was probable cause to believe that Defendant did so while and due to being under the influence of marijuana?

RELATED CASES

- *Commonwealth v. Akim Jones Williams*, CP-67-CR-0002824-2015, Court of Common Pleas for York County, Pennsylvania. Judgment entered April 5, 2017.
- *Commonwealth v. Akim Jones Williams*, 1428 MDA 2017, Superior Court of Pennsylvania. Judgment entered August 11, 2020.
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JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on July 20, 2022. (App. 1). This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution 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.” U.S. Const. Amend. IV.

STATEMENT OF THE CASE

Factual Background

On July 5, 2014, at approximately 4:48p.m., emergency personnel were dispatched to Slonnekers Landing in the area of the 1100 block of Cly Road, York Haven, Pennsylvania, for a collision between a red 2014 Mitsubishi Outlander (hereafter “SUV”) and a Norfolk Southern Train (hereafter “Train”) at approximately 4:42p.m. Defendant was driving his fiancée, Cori Sisti (hereafter “Cori”), and their two-year-old daughter, S.J., so they could spend time with Cori’s mother, who was at a bungalow by the Susquehanna River, for Cori’s birthday. Defendant caused this crash, killing Cori and seriously injuring S.J.

The weather conditions were sunny and clear at the time of the crash. Defendant did not have visual obstructions approaching the railroad tracks and could see south of the crash site down the railroad tracks in the direction of the oncoming Train as far as a bend in the tracks, which was well beyond an initial railroad crossing prior to the crash site. Additionally, Defendant and his passengers approached an “X” railroad crossing sign posted prior to the track crossing at the crash location as an additional warning of the potential hazard of an approaching Train. Pursuant to a database of crashes kept by the Federal Railroad Administration

and accessible to the police, no other Train collisions occurred at that location.

There are numerous bungalows and campgrounds to the east of the railroad crossing as it is located by the Susquehanna River. Numerous people were at the bungalows by the crash site when it occurred due to it being a holiday weekend.

Around 4:40p.m., Train was crossing through York County, Pennsylvania, heading north from Lancaster to Enola. Virgil Weaver was a Train conductor for Norfolk Southern and had an unobstructed view through the front of Train from his vantage point on the left side of the engine.

From approximately 350 feet south of the crash site, Weaver observed Defendant's red SUV crossing the railroad tracks at approximately 2m.p.h. About fifteen seconds before the road crossing, Train rang its bell and blew its horn several times—two long, one short, and one long—in accordance with regulations for trains in emergencies. While approaching SUV on the railroad tracks approximately 100 feet away, Weaver saw a Caucasian passenger with long hair in the passenger seat flailing their arms as if indicating to SUV driver "to get by the track before the vehicle got struck," to which SUV driver had no reaction or response to passenger. An additional engineer and the road foreman working on Train activated its emergency brakes, but could not slow down sufficiently enough to prevent Train from hitting SUV. Weaver observed SUV come to rest on the right side of the tracks

after being dragged by Train for 1/4 mile after impact, held up by trees on its passenger side.

Once the Train came to a stop, Weaver exited Train and approached SUV to see if it was leaking gasoline. As Weaver approached SUV, he observed its occupants. Weaver saw Defendant, Cori, whose hair and complexion were consistent with the Caucasian individual with long hair Weaver observed flailing their arms in the passenger seat, and S.J. The occupants were positioned such that Cori was on the bottom against the passenger side door, with Defendant on top of Cori. S.J. was toward the middle of SUV.

As Weaver approached SUV and inspected the occupants, he smelled a very strong odor of burnt marijuana coming from inside SUV. Weaver noted this odor was not outside of SUV and did not come from any bystanders who subsequently gathered. While at the crash scene, Weaver provided this information, including the very strong odor of burnt marijuana, to Officer Kevin Romine of the Newberry Township Police Department.

Newberry Township Police Officer Michael Briar was the first officer to arrive at the crash scene. People from the campground, of which there were many, directed Officer Briar and other emergency personnel to SUV, wherein they climbed over Train to approach SUV. Officer Briar observed SUV lying on its passenger side facing north on the east side of the railroad tracks, with its undercarriage facing toward the

railroad tracks and roof resting against trees and brush, facing toward the tree line and river.

As Officer Briar approached SUV, he observed Defendant lying on the ground. Paramedic Leslie Garner with the Newberry Township Fire Department and her partner, EMT Lisa Gottschall, also arrived at this area and triaged the three SUV occupants. Garner and Gottschall also saw Defendant lying on the ground in front of SUV. The three observed Cori on the passenger side toward the front of SUV and S.J. positioned face down by Cori's head at the back of the passenger side. Officer Briar specifically noted Cori was lying with her back against the passenger side door and her feet under the front passenger side dashboard toward the front of SUV, where a seated front passenger would have their legs positioned. Officer Briar spoke to two people who witnessed the collision, who told Officer Briar that, before Defendant was outside of SUV, he was lying on top of the woman.

Officer Briar observed firefighters, police officers, and other emergency personnel around the collision site, in addition to the numerous amounts of individuals present at the campground that was near the crash site. Officer Briar briefed eventual lead investigator Lieutenant Steven Lutz with updates on the telephone prior to arrival and while at the scene, wherein he also assisted Lieutenant Lutz with crash reconstruction.

As part of the occupant triage, Garner first examined S.J. S.J. was unresponsive to anything other than painful stimuli. Garner reached past S.J. to detect a

pulse from Cori, but was unable to find one, as Cori was not breathing and appeared cyanotic. Garner next turned her attention to Defendant, who was lying outside the vehicle approximately five feet away. Although Defendant initially was not responsive to verbal stimuli, he was breathing without life-threatening injuries.¹ Emergency personnel removed S.J. from the rear of SUV and secured her on a backboard with C-collar before transporting S.J. on the backboard past the Train and into an ambulance.

Emergency personnel next removed Cori from SUV through the windshield area and placed her on a backboard as well to assess her injuries, but Cori was declared dead at the scene. Specifically, Gottschall, with assistance from a firefighter, removed the shattered windshield from SUV. Gottschall then entered SUV to assess Cori, who was lying on her back against the passenger side window and door with her legs under the dashboard. When Gottschall determined Cori did not have a pulse, she and a firefighter extricated Cori from SUV.

At that time, Garner returned to Defendant. Defendant was combative and not responding to any verbal commands or questions, was flailing his arms, and “basically just hollering.” Due to the mechanism of injury, Garner was concerned Defendant had a spinal

¹ Garner’s observations concerning the condition of SUV occupants were corroborated by Susan Curry, a registered nurse who was at the campground by the crash site at the time of the collision. Curry’s priority was to stabilize S.J. and she did not approach the front of SUV or Defendant.

injury. Defendant was placed in a C-collar and on a backboard to prevent further injury. Defendant was ultimately transported to York Hospital for emergency medical attention.

Garner did not notice any odor of marijuana inside SUV at the time in which Defendant was not an occupant. Upon exiting SUV and approaching Defendant, Garner began to notice an odor of marijuana. Specifically, Garner noted a strong odor of marijuana in the general area near the front exterior of SUV, where Defendant was lying on the ground, which was especially strong around Defendant's person. Garner identified the smell emanating from Defendant as burnt marijuana.

Gottschall then went to Garner to help tend to Defendant. Like Garner, Gottschall began to smell the odor of marijuana directly in front of SUV in the area of Defendant. Gottschall noted Defendant had a strong smell of marijuana on his breath and body. Garner and Gottschall discussed the smell of marijuana emanating from Defendant because it was so potent.

During her entire time at the scene, Garner did not detect an odor of marijuana from anyone other than Defendant, which included being in the presence of several bystanders. Before leaving the scene, Garner informed Officer Romine of the strong odor of marijuana emanating from Defendant.

Officer Romine began his shift at 6:00p.m. and arrived at the scene around 6:15p.m. Officer Romine responded to the crash site with Lieutenant Lutz, who

was lead investigator, and Officer Keith Farren to assist Sergeant Rocco and Officer Briar at their request. These officers were unable to respond until after 6:00p.m., approximately 1 1/2 hours after the crash occurred.

Officer Romine spoke on-scene with numerous individuals, including Weaver and Garner. Weaver informed Officer Romine that the odor of marijuana was observed around the front of the vehicle. Additionally, Garner informed Officer Romine that she detected an odor of marijuana coming from Defendant.

Lieutenant Lutz arrived and took charge of the scene as the collision reconstructionist. Lieutenant Lutz received information at the scene from various emergency personnel. Officer Briar relayed information about the crash to Lieutenant Lutz, including the identities and locations of SUV occupants, the speed and approach of the SUV, and that Train blew its warning horns. Lieutenant Lutz observed SUV in its post-crash position on the right side of the tracks, on its passenger side, supported by trees, including Cori's legs being pinned under the dashboard on the passenger side. Lieutenant Lutz also inspected Train and concluded how Train impacted SUV. Officer Romine also provided to Lieutenant Lutz the information he received concerning the odor of marijuana around Defendant's person.

Based upon his observations and information from other officers, which included the collision dynamics, identity of Defendant as driver, and the odor of marijuana around Defendant's person, Lieutenant

Lutz determined at the scene that Defendant was the driver of SUV that caused the crash and Cori was its front seat passenger.

Officers described the crime scene as being chaotic, consisting of numerous victims, witnesses, emergency personnel, and bystanders from the campground at the river. All officers possessed a vast array of duties at the crash scene, which originally consisted of two officers until three additional ones arrived 1 1/2 hours later. Officer Briar, noted the communication difficulties at the scene:

...there was a lot of chaos going on. You still have two victims inside a car. My main concern—[Paramedic Garner's] was him, the Defendant. And then you still have two other people inside the car. And me being trained in first aid and former EMT myself, we were trying to provide the help for the remaining victims.

So the point I'm getting at is, no, we weren't communicating too much. She's dealing with one person. We're worried about two more inside the car. There was no really time to talk until after everything calmed down. At what point she had a conversation with what officer [about Defendant's strong odor of marijuana], I don't know. I didn't have it at that time because there was so much going on.

Lieutenant Lutz explained the difficulties of investigating this crash scene:

When the officers were collecting data, they would come up and brief me and tell me, hey, so and so said this, so and so said that. But I wasn't documenting who said what as they were telling me. *I was dealing with a chaotic situation*, trying to make sure that all the pieces of the puzzle get put together at the time. So I was not taking notes. But they were telling me names of individuals of what they heard, saw, observed.

Given the strong odor of marijuana emanating from Defendant, Lieutenant Lutz directed Officer Farren in the midst of this chaos to respond to York Hospital to both interview Defendant and obtain a legal blood draw from him due to probable cause of this being a marijuana DUI fatality. When Officer Farren went to York Hospital he was only aware of Defendant's first name being "Akim"; he did not know Defendant's last name. Additionally, Officer Farren possessed information regarding Defendant being the driver and source of the odor of marijuana.

Officer Farren attempted to speak with Defendant in his bed at York Hospital, but Defendant was unable to answer even basic questions, as Defendant was in-and-out of consciousness, his eyes were closed, and he would thrash about every couple of minutes. Given Defendant's medical condition, Officer Farren could not communicate with Defendant at the hospital to obtain consent for a blood draw or test. Officer Farren did not arrest Defendant in the hospital; Defendant was not arrested until April 2, 2015, by Lieutenant Lutz.

Officer Farren went to the York Hospital laboratory to request personnel perform a blood draw from Defendant based upon probable cause to test for impairing substances, specifically marijuana. York Hospital requires officers to specifically express to them that the testing is being requested pursuant to a police investigation. Prior to Officer Farren's request for a blood draw and test, at 5:56p.m. on July 5th phlebotomist Tasha Byrd drew Defendant's blood at York Hospital after he arrived for emergency medical treatment. York Hospital laboratory personnel did not redraw Defendant's blood and instead relinquished the blood from Defendant previously drawn and preserved in grey top test tubes by Ms. Byrd for toxicological testing pursuant to Officer Farren's request for a blood draw and test. At 7:30p.m., Officer Farren completed the required paperwork from York Hospital to have Defendant's blood to NMS Labs, which is an approved facility in Pennsylvania for forensic toxicology testing, to specifically include testing for marijuana. Phlebotomist Renee Cluck from York Hospital packaged Defendant's blood in the presence of Officer Farren and sent it to NMS Labs via Fed-Ex.

On July 7, 2014, Dr. Rameen Starling-Roney, an expert in forensic pathology, performed an autopsy on Cori. Dr. Starling-Roney determined Cori's cause of death was multiple blunt force injuries. He documented numerous internal and external injuries to Cori's head, spine, and torso areas. As part of the autopsy, Dr. Starling-Roney submitted a blood sample from Cori for toxicological examination by Health

Network Laboratories, who detected no drugs or ethanol in Cori's blood.

Following the crash, S.J. received medical attention at the Penn State Hershey Milton S. Hershey Medical Center. S.J. was treated for multiple injuries caused by the motor vehicle collision, including: a Grade 3-4 liver laceration; a collection of blood in the space between the chest wall and the lung; a collapsed lung; multiple rib fractures; multiple C2 and C3 fractures, which refers to fractures at the second and third vertebrae in the spinal column at the neck; and a non-displaced distal clavicle fracture. S.J. required intubation, the placement of bilateral chest tubes, spinal immobilizations, and extensive physical therapy as part of her treatment.

Corporal Gary Mainzer, a collision analyst and reconstruction specialist working for the Pennsylvania State Police, inspected the red SUV involved in the crash and analyzed any data he could recover from the computer systems. Mainzer did not find evidence of environmental factors, weather conditions, or preexisting mechanical failure of SUV or Train that contributed to the crash. Mainzer received the electronic data report from the vehicle through the manufacturer.

Corporal Mainzer did not find evidence in the EDR data of any evasive or hard steering or acceleration by the SUV to avoid the Train. At no point was the accelerator ever fully engaged to the floor during the measured time frame. Other than the slight acceleration from 5 to 6.2m.p.h. between 1 and 0.5 seconds prior to

the crash, there was no EDR evidence of acceleration to avoid the collision. The average steering input of SUV was thirty degrees, which is only a slight turn of the steering wheel, or approximately 11 o'clock, which is a movement **toward** Train, not away from Train, prior to impact. Additionally, the brake pedal switch was off for the entire duration of the crash, indicating that the brakes were not employed during the entire pre-crash through crash sequence. Corporal Mainzer concluded that leading up to this crash, Defendant did not take any evasive action and engaged in no emergency maneuvering, such as hard acceleration, hard steering, or braking, to avoid being struck by an obvious oncoming Train.

Amanda Gibson, a coworker of Defendant who also knew Cori, became sexually involved with Defendant shortly after the fatal crash for approximately two months. During that time, Defendant told Gibson that on the day of the crash he smoked marijuana just before he and the victims left their house to drive to the river. Defendant stated he drove eighteen miles "high as a kite," but that the crash was Train's fault and did not occur because he was smoking weed. Defendant was "nonchalant" and stating that "people make mistakes" when speaking about the crash with Gibson.

On July 8, 2014, Defendant's blood arrived at NMS Labs for toxicological testing. NMS Labs used testing methods that were generally accepted in the scientific community as reliable methods for testing blood for the presence and quantitative analysis of drugs. Forensic toxicologist Ayako Chan-Hosokawa authored an

initial report certifying and offering her opinion and analysis regarding the toxicology results from Defendant's blood, as well as a supplemental reports regarding Defendant's impairment from marijuana during the crash.

Regarding Chan-Hosokawa's toxicological findings concerning marijuana in Defendant's blood sample, she concluded it contained Delta-9 THC at a concentration of 1.8 ng/ml and Delta-9 Carboxy THC at 15 ng/ml. Delta-9 THC is the active psychoactive constituent of marijuana, which impairs a marijuana user.

Delta-9 Carboxy THC, while not an actively impairing substance, is the inactive metabolite of Delta-9 THC and occurs following the ingestion or inhalation of marijuana. As time passes, Delta-9 Carboxy THC begins to appear in the blood as the active components dissipate. Delta-9 Carboxy THC is an easier form for the human body to excrete, which typically occurs by kidney in the form of urine.

11-Hydroxy Delta-9 THC is another metabolite of Delta-9 THC. This compound is a psychoactive intermediate metabolite, meaning it is an impairing substance, which occurs between the appearance of Delta-9 THC and its breakdown into Delta-9 Carboxy THC. Chan-Hosokawa determined Defendant's blood contained an unquantifiable amount (less than 5 ng/ml) of 11-Hydroxy Delta-9 THC.

Chan-Hosokawa explained the process of and how the active impairing ingredients within marijuana rapidly dissipate within blood. The level of Delta-9 THC will be very high while the user is actively smoking, which is the user-preferred method of ingesting marijuana due to it reaching the bloodstream quicker through absorption into the lungs' membranes and ultimately the brain. After the user finishes smoking, 11-Hydroxy Delta-9 THC begins to appear in the blood.

Generally, 11-Hydroxy Delta-9 THC dissipates quickly from the bloodstream, as its prime purpose is to convert to Delta-9 Carboxy THC. A blood sample containing a concentration of 11-Hydroxy THC indicates marijuana was recently ingested.

Delta-9 THC is usually detectable in the bloodstream up to approximately three hours from the time marijuana is first inhaled. Within 1/2 to 1 hour of smoking marijuana, the concentration of Delta-9 THC in the bloodstream can drop to between 1 and 5 ng/ml.

Despite low concentrations within the blood, Delta-9 THC remains in the user's brain and continues to act upon it. This is due to marijuana being a substance that attaches to fat and the brain being primarily comprised of fatty tissue. Because marijuana is fat soluble, as opposed to water soluble like alcohol, impairment is not determined from raw toxicological data alone. Furthermore, because it attaches to fat, Delta-9 THC may still be present and influencing the brain and functions within the brain despite its

concentration within the blood may be low or dissipating. Delta-9 THC affects the entire brain, including the hippocampus, the neocortex, cerebellum, and basal ganglia.

Chan-Hosokawa further opined regarding how marijuana impairs driving. Although a common daily task, driving is a complex one; it requires an individual at a minimum to multi-task, make judgment decisions, utilize muscle coordination, make unconscious muscle movements, plan when and what to do in order to stop a vehicle, and to be alert. Marijuana use impairs all of these functions and prevents an individual from safely operating a vehicle. Marijuana also impairs the ability to track movement with your eyes, manage divided attention tasks, engage in signal detection, perceive hazards, pay attention, and utilize hand-eye coordination. Additionally, marijuana can cause relaxation, distorted perception, euphoria, feeling of well-being, confusion, dizziness, somnolence, ataxia, speech difficulties, lethargy, and muscular weakness.

Because raw toxicological data, standing on its own, is insufficient to conclusively show that an individual was actively under the influence of marijuana, analysts also review the behaviors of the individual around the time the blood sample is collected. Consistent with practices in her field, Chan-Hosokawa reviewed various materials regarding collision dynamics and Defendant's behaviors around the time of the crash, including statements made by Defendant about using marijuana immediately before operating SUV and driving 18 miles while "high as a kite."

Chan-Hosokawa noted that the presence of 11-Hydroxy Delta-9 THC in Defendant's blood was consistent with Defendant's statement of ingesting marijuana immediately before driving, as well as admitting he traveled 18 miles while high from marijuana. Furthermore, she noted the lack of evidence of emergency or evasive action taken by Defendant was consistent with an individual not having awareness of or paying attention to an oncoming potentially hazardous event, such as Train approaching SUV; this was consistent with marijuana's impact on the ability to judge the appropriate reaction to such a situation.

While it is impossible to conduct retrograde extrapolation on Delta-9 THC like occurs with alcohol, Chan-Hosokawa opined that Defendant's Delta-9 THC concentration would likely be higher at the time of the crash than the time of the blood draw. Furthermore, based upon a review of all materials regarding the crash, as well as Defendant's statements and behaviors, Chan-Hosokawa concluded the concentration of Delta-9 THC contained within Defendant's blood is consistent with marijuana actively impairing Defendant's brain at the time of the crash; Defendant drove SUV while impaired from marijuana when he collided with Train, causing Cori's death and serious bodily injury to S.J.

Procedural Posture

On June 9, 2015, the Commonwealth filed a bill of information against Defendant charging Defendant

with one count each of the following offenses: homicide by vehicle while driving under the influence (“DUI”); homicide by vehicle; endangering the welfare of a child (“EWOC”); recklessly endangering another person (“REAP”); DUI: controlled substance—schedule I; DUI: controlled substance—schedule I, II, or III; DUI: general impairment; careless driving; careless driving—unintentional death; aggravated assault while DUI; and aggravated assault by vehicle.

On October 26, 2015, Defendant filed an omnibus pre-trial motion. In his motion, Defendant moved to suppress the blood test results obtained by police. As part of this suppression motion, Defendant argued that the police violated his constitutional rights by requesting to test his blood sample without a warrant claiming that if the police “can obtain a warrant . . . without affecting the efficacy of the investigation,” the Fourth Amendment of the United States’ Constitution and Article I, Section 8 of Pennsylvania’s Constitution require them to do so.

The trial court held a suppression hearing on December 21, 2015, and subsequently denied Defendant’s motion to suppress the blood test results on April 27, 2016. The trial court held that Defendant’s blood test results were admissible because exigent circumstances existed and, as such, the warrantless search did not violate Defendant’s constitutional rights.

Defendant's jury trial commenced January 9, 2017. On January 13, 2017, the jury convicted Defendant of homicide by vehicle while DUI, homicide by vehicle, EWOC, REAP, DUI: controlled substance—schedule 1, DUI: controlled substance—metabolite, aggravated assault while DUI, aggravated assault by vehicle, and careless driving. On April 5, 2017, the trial court sentenced Defendant to four to eight years imprisonment followed by 12 months probation.

On April 17, 2017, Defendant filed a post-sentence motion alleging that the trial court erred in denying suppression of his blood test results and that the trial court erred in finding that the weight of the evidence was met in 5 [five] of the 9 [nine] counts. Through oversight, the trial court granted the motion on May 10, 2017. On May 19, 2017, the trial court vacated its May 10, 2017 order, and ordered the parties to schedule a hearing on the post-sentence motion.

A hearing on Defendant's petition occurred on June 16, 2017. At that time, the trial court allowed Defendant to file a supplemental post-sentence motion. A subsequent hearing on the post-sentence motions occurred on July 25, 2017. Defendant's post-sentence motion was denied by operation of law on September 11, 2017.

On September 14, 2017, Defendant filed a Notice of Appeal to the Superior Court. On October 5, 2017, the trial court entered an order directing Defendant to

file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b)(1). The defendant timely complied. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 13, 2018, wherein the trial court asserted that it erred in finding exigent circumstances existed for the warrantless testing of Defendant's blood. The trial court further held that police properly obtained Defendant's warrantless blood test pursuant to 75 Pa.C.S. §3755, but questioned whether the statute would remain constitutional under the evolving case law.

On August 11, 2020, the Pennsylvania Superior Court issued its opinion reversing the trial court's denial of suppression and remanding the case to the Court of Common Pleas. The Pennsylvania Superior Court agreed with the trial court's new position that exigent circumstances did not exist to have a warrantless test of Defendant's blood drawn by hospital personnel prior to the request by police. The Superior Court also agreed with the trial court that Defendant's blood was lawfully tested under Section 3755, but found that statute to now be unconstitutional. On August 24, 2020, the Commonwealth filed its Application for Reargument with the Superior Court; the application was subsequently denied on October 14, 2020. The Commonwealth petitioned the Supreme Court of Pennsylvania for allocatur on November 13, 2020, and allocatur was granted on April 28, 2021.

On July 20, 2022, the Pennsylvania Supreme Court issued its opinion affirming the Pennsylvania Superior Court's determination that exigent circumstances did not exist to support a warrantless test of Defendant's blood. The Pennsylvania Supreme Court secondarily vacated the portion of the Pennsylvania Superior Court's holding deeming Section 3755 unconstitutional, finding instead and contrary to the trial court and the Pennsylvania Superior Court that the Commonwealth did not establish the statute's requirements and thus negating the need to assess the constitutionality of the statute.² The Commonwealth files this Petition for Writ of Certiorari challenging the determination of the Pennsylvania Supreme Court that exigent circumstances did not exist to support the warrantless toxicological testing of Defendant's blood.

² The Commonwealth solely seeks a Writ of Certiorari on the question of exigent circumstances as: (1) that is the initial and controlling question in this case; and (2) that is the question over which this Court has jurisdiction. The Commonwealth does note its thorough disagreement with the characterization of both the facts of record and lack of meaningful discussion and review of controlling precedent in determining that the warrantless exception under Section 3755 was not met. Both the trial court and Pennsylvania Superior Court found the Section 3755 exception was established through more thorough and precise discussion of the record and governing case law. In any event, factual and legal discussions by the Pennsylvania Supreme Court are not relevant to the exigent circumstances analysis at issue in this case.

REASONS FOR GRANTING THE PETITION

A. The Pennsylvania Supreme Court issued a decision in conflict with and failed to properly apply and follow binding legal precedent from the United States Supreme Court in *Mitchell v. Wisconsin*, ___ U.S. ___, 130 S.Ct. 2525 (2019) and in conflict with *Mitchell*'s application in other jurisdictions by finding that exigent circumstances did not exist to support a warrantless request by police of hospital personnel to test Defendant/motorist's blood while unconscious or stuporous and after Defendant drove and caused his vehicle to collide with a Train, which killed his paramour and seriously injured his infant daughter, and where there was probable cause to believe that Defendant did so while and due to being under the influence of marijuana.

In *Mitchell v. Wisconsin*, 130 S.Ct. 2525 (2019), the United States Supreme Court authored its latest detailed analysis regarding when exigent circumstances exist to justify a warrantless blood test in a case involving driving while under the influence of an impairing substance.³ Since that holding, jurisdictions across

³ The lead opinion in *Mitchell* is a four-Justice plurality opinion. As discussed *infra*, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977), quoting *Gregg v. Georgia*, 428 U.S. 153 169, n.15 (1976). The Pennsylvania Supreme Court, like other jurisdictions, followed this doctrine and recognized the

the United States have assessed the warrantless blood draw from an unconscious motorist suspected of DUI under the exigency standard announced in *Mitchell* in finding the existence of the exigent circumstances to allow a blood test without a warrant. Although the facts at hand established the requisite exigency to support a warrantless toxicological test of Defendant's blood, the Pennsylvania Supreme Court differed from its sister jurisdictions and failed to properly analyze and apply *Mitchell*, creating a constitutionally infirm exigency standard for blood tests in Pennsylvania. We urge this Court to accept this Petition for Writ of Certiorari and mandate application of the exigent circumstances standards articulated in *Mitchell* by reversing the order of the Pennsylvania Supreme Court.

The Fourth Amendment of the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,” and that “no Warrants shall issue, but upon probable cause.” U.S. Const. Amend. IV. The United States Supreme Court (SCOTUS) recognized that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Kentucky v. King*, 563 U.S. 452, 459 (2011), quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

While a search warrant must usually be obtained to satisfy the Fourth Amendment, the warrant requirement is subject to a number of exceptions. *Birchfield v.*

precedential authority of the *Mitchell* plurality opinion. See *Commonwealth v. Trahey*, 228 A.3d 520, 534, n.11 (Pa. 2020).

North Dakota, 136 S.Ct. 2160, 2173 (2016). Those exceptions include the exigent circumstances exception, search incident to arrest exception, and consent exception. *Birchfield* at 2173-76, 2185-86. Regarding the consent exception, “[i]t is well established that a search is reasonable when the subject consents . . . and that sometimes consent to a search need not be express but may be fairly inferred from context.” *Birchfield* at 2185. The taking of a blood sample is a search under the Fourth Amendment. *Birchfield* at 2173. The operative question under the Fourth Amendment when a warrantless blood draw occurs is whether the warrantless search was reasonable. *Id.*

Exigent circumstance constitutes one of the exceptions to the search warrant requirement. In *Mitchell v. Wisconsin*, this Court provided its most recent articulation of what constitutes exigent circumstances that constitutionally support a warrantless blood test in a DUI setting, specifically regarding the “narrow but important category of cases” involving unconscious or stuporous drivers who require medical attention at a hospital before police have a reasonable opportunity to administer standard breath evidentiary tests and have probable cause of an impaired driving offense to do so. *Mitchell* at 2531, 2539.

In *Mitchell*, the defendant was so impaired from alcohol that he was unable to perform a breath test at the police station and lost consciousness while being transported to the hospital and had to be wheeled inside. Rather than merely determine if the warrantless blood draw pursuant to the Wisconsin implied-consent

statute was constitutional, this Court addressed “how the exception bears on the category of cases encompassed by the question on which we granted certiorari—those involving unconscious drivers.” *Id.* at 2535.

In answering this question, this Court compared *McNeely* and *Schmerber*, noting that the *Schmerber* holding demonstrated that the dissipation of BAC evidence can create an exigency when combined with other pressing needs. *Mitchell* at 2537. Detailing the emergency scenarios created by the car crash in *Schmerber* and the driver’s unconsciousness in *Mitchell*, as well as noting that better technology has not eliminated emergency scenarios, SCOTUS stated that:

. . . exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* controls: With such suspects, too, a warrantless blood draw is lawful.

Mitchell at 2537.

This Court concluded by establishing the following: “When police have **probable cause** to believe a person has committed a drunk-driving offense and the **driver’s unconsciousness or stupor** requires him to be taken to the hospital or similar facility **before** police have a reasonable opportunity to administer a standard evidentiary breath test, they **may almost always order a warrantless blood test** to measure

the driver's BAC without offending the Fourth Amendment." *Id.* at 2539. "Thus, when a driver is unconscious, the general rule is that a warrant is not needed." *Id.* at 2531.

Since this Court issued its *Mitchell* decision, courts in sister jurisdictions have evaluated how *Mitchell* applies to warrantless blood draws in DUI crash scenarios involving stupor or unconsciousness by defendant drivers. In *State v. Miller*, 295 So.3d 443 (La.App.2Cir. 2020), defendant crossed a yellow dividing line and crashed into oncoming traffic, killing another individual. Police took 45-60 minutes in time to respond to the rural collision site, wherein the observed defendant was unconscious and then airlifted to the hospital. Police developed information from witnesses that led them to believe defendant was operating his vehicle while impaired. Two officers were dispatched to the hospital to obtain a blood draw pursuant to Louisiana's implied consent statute. Blood was drawn from defendant shortly before going into surgery. The Louisiana Court of Appeals for the Second Circuit held that the facts of that case established the exigency concerns that the *Mitchell* court expressed. The Court accordingly found that the warrantless blood draw was constitutional under the exigency exception and pursuant to *Mitchell*. 295 So.3d at 460-61. *See also State v. Richards*, 948 N.W.2d 359 (Wis.App. 2020) (pursuant to *Mitchell*, warrantless blood draw supported by exigent circumstances; court found state established all *Mitchell* exigency factors, including stupor or unconsciousness requiring medical attention

post-crash, and no factors presented by defendant to show “unusual case”); *State v. Gray*, 591 S.W.3d 65 (Mo.App.E.D. 2019) (warrantless blood draw was constitutional under *Mitchell*; defendant was unconscious from a single-car crash, taken to a hospital, his blood was drawn while he remained unconscious, and officer had probable cause for DWI); *United States v. Manubolu*, 13 F.4th 57, 75 (1st Cir. 2021) (“Given the totality of the circumstances, the government has met its burden to show it was reasonable for Ranger Dominy to think exigent circumstances existed when pressing investigative responsibilities took his and other officers’ attention, when he could not reach the on-call AUSAs to begin the telephonic warrant process, when the federal and state warrant procedures were protracted, when he reasonably estimated that the evidentiary reliability of Manubolu’s BAC decreased as time wore on, and when health needs and other resource limitations prevented officers from immediately applying for a warrant.”).

In *McGraw v. State*, 289 So.3d 836 (Fla. 2019), defendant was involved in a single-car rollover crash that rendered him injured and unconscious, requiring defendant to be taken to the hospital. The officer investigating the collision smelled alcohol on defendant’s skin, clothing, and car. At the hospital, the officer requested a blood draw once medical personnel finished initial treatment because the officer was investigating a DUI and defendant remained unconscious. The officer did not seek a search warrant or request assistance from other officers to obtain one. *Id.* at 837.

On appeal, the intermediate appellate court found that the blood draw was valid pursuant to the Florida implied-consent statute and was constitutional under the Fourth Amendment. *Id.* at 838. In reviewing that decision, the Florida Supreme Court did not base its ruling upon the implied-consent statute but instead found the case fell squarely within the rule articulated in *Mitchell*. *Id.* at 839. In doing so, the Florida Supreme Court found that the blood draw appeared to be legal, but pursuant to *Mitchell*, remanded the matter to the lower court to give defendant the opportunity to establish the “unusual case” scenario. *Id.* See also *State v. Chavez-Majors*, 454 P.3d 600 (Kan. 2019) (warrantless blood draw of defendant injured and unconscious from motorcycle crash supported by probable cause; case remanded for an evidentiary hearing pursuant to *Mitchell* so defendant may attempt to make “unusual case” showing).

Here, as in all the cases previously discussed, *Mitchell* controls the outcome of this case. Police possessed probable cause to believe Defendant operated his vehicle at the time of the fatal Train crash while under the influence of marijuana. Defendant was transported to the hospital by emergency personnel for treatment due to his injuries suffered in the crash. Defendant was in-and-out of consciousness from the crash scene to the emergency room, and, due to his mental state, was unable to communicate with police at the hospital. Based upon *Mitchell*, police properly requested a blood test from the injured and

uncommunicative Defendant without a warrant while he was being treated for his injuries.

Additionally, Defendant cannot meet the “unusual case” exception to this general rule. Hospital personnel drew Defendant’s blood prior to police making the warrantless blood draw and test request. The nature of the crash being between an SUV and a Train at a scene containing numerous witnesses, emergency personnel, and bystanders, resulting in one deceased and two seriously injured individuals, show that the limited number of police at the scene were dealing with a chaotic situation far removed from even a typical crash scenario. At the point of the warrantless blood test request, with their pressing duties because of the crash and medical emergencies caused from it, police reasonably did not seek a search warrant and instead sought a warrantless blood draw and test of the unconscious and stuporous Defendant at the hospital. Accordingly, this is not the unusual case referred to by this Court and the exception to the general rule allowing warrantless blood tests of unconscious drivers does not apply here.

Despite being fully dispositive of this case, the Pennsylvania Supreme Court failed to apply the edicts of *Mitchell* in its assessment of exigency by determining that the exigency police possessed for the warrantless blood draw and test ended due to the hospital already having drawn blood on its own prior to police making their request and submitting that blood for toxicological testing. This conclusion, however, directly contradicts the plain language of the *Mitchell* decision,

which this Court authored to allow warrantless tests of blood already drawn by hospital personnel of driver's receiving medical treatment who are unconscious or in a stupor, where probable cause of impaired driving exists.

This Court directly addressed how *Mitchell* covered situations like in this case where blood was drawn by hospital personnel prior to the police request. After noting that unconsciousness is a medical emergency that will require urgent medical care at a hospital, this Court noted: "Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; **that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival**; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing evidentiary value." *Mitchell* at 2537-38 (emphasis added).

The fact that this case involves a Defendant under the influence of marijuana rather than alcohol as in *Mitchell* does not impact the application of the exigency standard. The case at hand established under the totality of circumstances analysis at least an equal, if not more, compelling reason for a warrantless blood test due to the rapid dissipation of the active impairing ingredients in marijuana.

While the level of the active impairing Delta-9 THC will be very high while the user is actively smoking marijuana, the concentration of Delta-9 THC in the

bloodstream can drop to between 1 and 5 ng/ml within 1/2 to 1 hour of smoking marijuana and is usually only detectable in the bloodstream up to approximately 3 hours from the time marijuana is first inhaled. Also, the active metabolite 11-Hydroxy Delta-9 THC begins to appear in the blood after the user finishes smoking marijuana, but dissipates quickly from the bloodstream. A blood sample containing a concentration of 11-Hydroxy Delta-9 THC is important because it indicates recent marijuana ingestion.

In this case involving homicide by vehicle while DUI and aggravated assault by vehicle while DUI, a greater need existed than in a standard DUI case for both a quantitative and qualitative analysis of the active Delta-9 THC and 11-Hydroxy Delta-9 THC to establish that Defendant was the direct and substantial cause of death or serious bodily injury and did so with criminal negligence. The rapid dissipation of these active ingredients in marijuana and the impact it has on proving the elements of the charges raises at least the equivalent consideration here as it would in an alcohol DUI case.

The application of *Mitchell* and the exigent circumstances analysis regarding drug impairment was directly at issue in *State v. McCall*, 839 S.E.2d 91 (S.C. 2020). In that case, the South Carolina Supreme Court found the warrantless collection of blood and urine from defendant was constitutionally valid due to exigent circumstances in a felony DUI resulting in great bodily injury case. The defendant crossed a center turn lane and struck a pickup truck head on,

causing life-threatening injuries to the driver of the pickup truck. Troopers interviewed defendant at the scene and noted that defendant appeared to be impaired by a substance other than alcohol; defendant also denied consuming alcohol. The primary investigator remained at the scene with nine other Troopers investigating the crash while defendant was transported to the hospital. Approximately two hours after the crash, the lead investigator responded to the hospital and requested blood and urine be drawn pursuant to the South Carolina implied consent law that mandated compliance. Defendant's blood and urine sample was positive for methamphetamine and benzodiazepines.

Defendant challenged the constitutionality of South Carolina's implied consent law. The South Carolina Supreme Court did not address that issue, as it found that exigent circumstances existed to support the warrantless blood and urine collection. Citing to *Mitchell*, the Court found that, like *Schmerber*, the seriousness of the crash in this case placed this case "much higher on the 'exigency spectrum'" than the mere natural dissipation of drugs, which pursuant to *McNeely* cannot by itself qualify as exigency. *McCall* at 95. Additionally, the unknown substances causing impairment gave rise to an increased urgency, as some drugs like cocaine and marijuana metabolize rapidly while alcohol dissipates at a steadier rate. *Id.* at 95, n.2. Viewing the totality of circumstances, exigent circumstances justified the warrantless obtaining of blood and urine samples. As in *McCall*, the seriousness of the crash here and the chaos that naturally arose

from it also place it “much higher on the ‘exigency spectrum,’” thereby supporting the warrantless testing of Defendant’s blood.

In summary, pursuant to *Mitchell*, police here possessed the required probable cause and exigent circumstances to have a warrantless blood test be performed on the blood from an unconscious or stuporous Defendant that was drawn by hospital personnel while undergoing medical treatment. Accordingly, this matter falls squarely into the “narrow but important category of cases” governed by *Mitchell* and followed by sister jurisdictions. The Pennsylvania Supreme Court committed an error of law in failing to follow the plain language of this controlling authority and should be reversed by this Court.

B. If allowed to stand, the Pennsylvania Supreme Court’s Decision is a realization of the absurd results cautioned against in *Mitchell*.

The Pennsylvania Supreme Court’s determination that medical personnel at the hospital drawing Defendant’s blood prior to the police asking for a blood draw and test negated the existing exigent circumstances when the police made their request is in direct, absolute, and unavoidable conflict with the plain language of *Mitchell*. Specifically, this decision will constitutionally mandate the very absurd results against which the *Mitchell* decision expressly cautioned in

situations where blood was drawn by hospital personnel prior to the police request.

This Court emphasized that the warrantless seizure of blood already drawn from the driver by medical personnel is less of a violation than performing a new blood draw for testing:

... In this respect, the case for allowing a blood draw is stronger here than in [*Schmerber*]. In the latter, it gave us pause that blood draws involve piercing a person's skin. But since unconscious suspects will often have their skin pierced and blood drawn for diagnostic purposes, allowing for law enforcement to use blood taken from that initial piercing would not increase the bodily intrusion. In fact, dispensing with the warrant rule could lessen the intrusion. It could enable authorities to use blood obtained by hospital staff when the suspect is admitted rather than having to wait to hear back about a warrant and then order what might be a second blood draw.

Id. at 2538, n.8 (internal citation omitted) (emphasis in original).

The Pennsylvania Supreme Court's decision creates the absurd situation where an officer could constitutionally have new blood drawn from a driver based upon exigent circumstances, creating an additional intrusion into the skin, but violate the constitution through the warrantless seizure of blood already drawn without requiring an additional intrusion into

the individual. This second bodily intrusion would yield blood collected further in time from the point of the collision, allowing for further dissipation of drugs or alcohol, which would be present through testing blood drawn immediately at the time of hospital admittance.

Moreover, the Pennsylvania Supreme Court now prevents law enforcement from seizing and mandating that DUI blood evidence be toxicologically tested despite possessing exigent circumstances to do so solely because of the timing when medical personnel conducted the blood draw. This carves out a heightened constitutional exigency standard for DUI related offenses than other crimes, despite the well-acknowledged deadly conditions created by impaired driving. This decision also now mandates that police must allow the blood evidence to remain in the custody and control of the medical personnel and their decisions regarding how to handle and dispose of blood evidence despite police having probable cause and exigency to seize the evidence until police return with a search warrant.

All of the aforementioned scenarios are absurd but very real and the law in Pennsylvania due to the decision of the Pennsylvania Supreme Court in this case. The Commonwealth respectfully urges this Court to apply its well-reasoned analysis in *Mitchell* and reverse the Pennsylvania Supreme Court's decision in this case, thereby preventing any further absurd and unsupported restrictions on warrantless blood tests

in DUI fatalities where probable cause and exigent circumstances exist.

CONCLUSION

For the forgoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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