

MEMO

DATE: April 18, 2013
FROM: J.H.B. Wilson, General Counsel
RE: McNeely v. Missouri (SCOTUS, 2013)

This decision was released April 17, 2013. An abridged version of the Court's Syllabus can be found at the end of this memo. I read the case and did not plan to prepare a memo since I did not find anything novel or surprising about the case. The news coverage I read was pretty accurate. Then, today, I started to hear that some law enforcement officers were misreading the case (or the news coverage). *These officers believed the Supreme Court ruled that Officers can NEVER draw blood for use in a DUI case. That is NOT what the opinion said.*

Mr. McNeely was arrested for DWI (Missouri law). He refused a breath test and refused to consent to drawing blood. The officer did not get a search warrant. The officer took McNeely to the hospital and had the blood drawn.

The District Court suppressed the evidence. The Missouri appellate court agreed. The U.S. Supreme Court agreed the evidence should be suppressed.

But, significantly, *NONE of these courts said police can NEVER draw blood (or have a med tech draw blood) to use as evidence.* All of the courts said the same thing –

1. Putting a needle under someone's skin and into their vein to withdraw blood is clearly a search.
2. A search of the body is covered by the Fourth Amendment's 'reasonableness' standard ('...unreasonable searches and seizures...')
3. A search pursuant to a valid search warrant is always reasonable.
4. If there is no search warrant (as in this case) the State is required to show that one of the recognized exceptions applies.
5. Whether the search is 'reasonable' is judged by a careful scrutiny of facts that make up the 'totality of the circumstances'.

In this case, for whatever reason, the State of Missouri decided to not argue that exigent circumstances made the search reasonable. Instead, Missouri argued that the Supreme Court should adopt a *per se* rule that police can ALWAYS take a blood sample in a DUI case without a warrant. In other words, Missouri asked the Supreme Court to do away with the 'totality of the circumstances' test for DUI cases. The reasoning was that, since the blood alcohol evidence gradually

dissipates there should be a 'bright-line' and that this is sufficient reason to forego obtaining a search warrant.

The Supreme Court declined to abandon the 'totality of the circumstances' test. Here is how they disposed of the various arguments -

1. Argument: The *Schmerber* case says police don't need a warrant to draw blood. SCOTUS response: No, *Schmerber* says the decision is based on the totality of the circumstances. In *Schmerber* the Court ruled that the 'totality of the circumstances' showed that the search was reasonable under the *circumstances of that case*.
2. Argument: There should be a *per se* rule allowing drawing blood without a warrant because blood alcohol evidence dissipates over time. SCOTUS response: "Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but is a reason to decide each case on its facts, not to accept the 'considerable overgeneralization' that a *per se* rule would reflect."
3. Argument: there is not enough time to get a warrant in a DUI case. SCOTUS response: there *may* be a case where there is not enough time to get a warrant, and that *may* be a good enough basis to hold that the search is reasonable. Again, this is a case-by-case, fact-driven decision, not something for a hard-and-fast rule. They also pointed out that the process for getting search warrants is not as cumbersome as it once was.
 - many states allow for search warrants to be obtained even if the peace officer is not in the actual physical presence of the judge (In Oklahoma, see 22 O.S. § 1225) and these do not take a long time
 - the fact pattern in a DUI case is not complicated, and is often repetitive, so a search warrant affidavit does not require a long time to prepare.
4. Argument: this leaves the officer on the street with no guidance. SCOTUS response: The Fourth Amendment is based on reasonableness in subjecting a person to an invasion of the body to recover blood. We are not going to change the limitations on such an invasion because it makes it easier for the police. Since Missouri did not argue that the search was 'reasonable', the Supreme Court has no reason to consider whether the facts in THIS CASE would have added up to a 'reasonable' search.

Really, the only mystery in this case is why the State of Missouri did not argue that exigent circumstances made the search reasonable. I guess they saw this as an opportunity to get the Supreme Court to change its mind on the 'totality of the circumstances' test. That effort did not succeed.

Bottom line for law enforcement officers: No change. Unless you have a reason you can defend on the witness stand, get a search warrant. If the 'totality of the circumstances' keeps you from getting a warrant, be ready to get on the stand and explain the circumstances.

Please note: this is an abridged version of this opinion. It has been edited in the interest of brevity and clarity. All emphasis has been supplied. The serious student is encouraged to read the entire opinion.

SUPREME COURT OF THE UNITED STATES

Syllabus

MISSOURI *v.* MCNEELY

CERTIORARI TO THE SUPREME COURT OF MISSOURI

Decided April 17, 2013

*Respondent McNeely was stopped for speeding and crossing the centerline. After declining to take a breath test to measure his blood alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The officer never attempted to secure a search warrant. McNeely refused to consent, but the officer directed a lab technician to take a sample. McNeely's was charged with driving while intoxicated (DWI). He moved to suppress the blood test result, arguing that taking his blood without a warrant violated his Fourth Amendment rights. The trial court concluded that the exigency exception to the warrant requirement did not apply because, apart from the fact that McNeely's blood alcohol was dissipating, no circumstances suggested that the officer faced an emergency. The State Supreme Court affirmed, relying on *Schmerber v. California*, in which this Court upheld a DWI suspect's warrantless blood test where the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, threatened 'the destruction of evidence,' " This case, the state court found, involved a routine DWI investigation where no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, and, thus, the nonconsensual warrantless test violated Respondent's right to be free from unreasonable searches of his person.*

Held: The judgment is affirmed.

JUSTICE SOTOMAYOR delivered the opinion of the Court

The principle that a warrantless search of the person is reasonable only if it falls within a recognized exception, applies here, where the search involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a blood sample to use as evidence. One exception 'applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.' " This Court looks to the totality of circumstances in determining whether an exigency exists. Applying this approach in Schmerber, the Court found a warrantless blood test reasonable after considering all of the facts and circumstances of that case and carefully basing its holding on those specific facts, including that alcohol levels decline after drinking stops and that testing was delayed while officers transported the injured suspect to the hospital and investigated the accident scene.

The State nonetheless seeks a per se rule, contending that exigent circumstances necessarily exist when an officer has probable cause to believe a person has been driving under the influence of alcohol because BAC evidence is inherently evanescent. Although a person's blood alcohol level declines until the alcohol is eliminated, it does not follow that the Court should depart from careful case-by-case assessment of exigency. When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but that is a reason to decide each case on its facts, not to accept the "considerable overgeneralization" that a per se rule would reflect.

Blood testing is different in critical respects from other destruction-of-evidence cases. Unlike a situation where a suspect has control over easily disposable evidence, BAC evidence naturally dissipates in a gradual and relatively predictable manner. Moreover, because an officer must typically take a DWI suspect to a medical facility and obtain a trained medical professional's assistance before having a blood test conducted, some delay between the time of the arrest or accident and time of the test is inevitable regardless of whether a warrant is obtained. The State's rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence supporting probable cause is simple. *The natural dissipation*

of alcohol in the blood may support an exigency finding in a specific case, but it does not do so categorically.

Because *the State* sought a *per se* rule here, it *did not argue that there were exigent circumstances in this particular case*. The arguments and the record thus do not provide the Court with an adequate framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. *It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required.*

JUSTICE SOTOMAYOR, joined by JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE KAGAN concluded that the other arguments advanced by the State of a *per se* rule are unpersuasive. *Their concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers may make the desire for a bright-line rule understandable, but the Fourth Amendment will not tolerate adoption of an overly broad categorical approach in this context.* A fact-intensive, totality of the circumstances, approach is hardly unique within this Court's Fourth Amendment jurisprudence.

The State also contends that the privacy interest implicated here is minimal. But motorists' diminished expectation of privacy does not diminish their privacy interest in preventing a government agent from piercing their skin. And though a blood test conducted in a medical setting by trained personnel is less intrusive than other bodily invasions, *this Court has never retreated from its recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.*

Finally, *the government's general interest in combating drunk driving does not justify departing from the warrant requirement without showing exigent circumstances* that make securing a warrant impractical in a particular case.