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From Schmerber to McNeely to Birchfield: The Life and Death of the "Per Se" Rule

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I. Introduction

In 1966, the United States Supreme Court decided *Schmerber v. California*, therein creating an "emergency exception" to the Fourth Amendment warrant requirement.[1] Specifically, police officers had probable cause to believe that an arrestee was driving under the influence of alcohol; they also had probable cause to believe that evidence of that crime existed in his bloodstream.[2] Two hours after the automobile accident giving rise to the arrest, officers directed medical personnel to take a sample of the arrestee's blood.[3] The Court upheld this warrantless search as a "reasonable" search under the circumstances. The length of time that had elapsed since the accident, coupled with the evanescent nature of the evidence, provided ample justification for an exigency sufficient to obviate the need for a search warrant.[4]

Forty-seven years later, the High Court again addressed the "emergency exception" to the search warrant requirement in driving under the influence cases.[5] Here, however, the Court held that officers improperly seized evidence from the arrestee without a search warrant. The defendant had been stopped for speeding and refused a breathalyzer test.[6] The officer then arrested the driver and transported him to a medical facility for blood to be drawn over the driver's objection.[7] Under the circumstances of the case, the Court held that no "exigency" existed, and that the warrantless and forcible blood draw amounted to an unreasonable search under the Fourth Amendment. The Court held that the mere fragility of the evidence sought could not support a "per se" rule permitting police officers to

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[1] *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

[2] *Schmerber*, 384 U.S. at 768.

[3] *Schmerber*, 384 U.S. at 768.

[4] *Schmerber,* 384 U.S. at 771.

[5] *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

[6] *McNeely*, 133 S. Ct. at 1556–57.

[7] *McNeely*, 133 S. Ct. at 1557.

conduct warrantless searches for evidence in the arrestee's blood in every driving under the influence case.[8]

The Court's decision was based in part on the notion that advances in modern technology had both simplified and streamlined the process of obtaining a warrant.[9] According to the Court, these advances in technology expedited the process to such a degree that officers could now obtain a search warrant for a blood draw relatively quickly. Thus, the majority concluded, a "per se" rule was both inappropriate and unnecessary.[10]

This recent Supreme Court jurisprudence appears to rely on the assumptions that modernizations and advances in technology have made it relatively easy for law enforcement officers to obtain prompt and expeditious approval of search warrants even in cases where there is evidence of urgency.[11] In support of these assumptions, the Court cited federal and state rules of procedure that now permit electronic search warrant applications.[12] This is obviously a more expeditious manner of securing a warrant and a benefit to officers needing to act with haste.

The law is sometimes criticized as failing to keep up with technology. Here, however, the question is: has technology kept up with the law? The Court presumes that because there is a rule of procedure in place permitting electronic approval of search warrants, the practice has followed suit. In doing so, the Court has made assumptions of fact about the prevalence of technology, how readily available that technology is, how well that technology works, and the ease with which officers can obtain a search warrant in an expeditious manner using that technology. Those assumptions will be questioned here.

Part II provides information about driving under the influence crimes and includes the state legislative responses to this phenomenon. Particular attention will be given to the statutory basis for warrantless blood draws in Pennsylvania. Part III of this article will detail the Court's reasoning in *Schmerber v. California*, and the advent of the "per se" rule. Part IV will address various state supreme court responses to the *Schmerber* decision. With several states adopting a "per se" rule, the issue was ripe for eventual U.S. Supreme Court review. Part V will explain the Court's reasoning in *Missouri v. McNeely*, including the reservations of the Chief Justice and the dissenting view of Justice Thomas. Part VI will address

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[8] *McNeely*, 133 S. Ct. at 1568.

[9] *McNeely*, 133 S. Ct. at 1562.

[10] *McNeely*, 133 S. Ct. at 1561–62.

[11] *McNeely*, 133 S. Ct. at 1562.

[12] *McNeely,* 133 S. Ct. at 1561.

some of the High Court's assumptions of fact about the ease with which law enforcement officers may obtain search warrants. Part VII will discuss the very recent *Birchfield v. North Dakota* case reaffirming *McNeely* and going further to address breathalyzer tests conducted incident to arrest, as well as the constitutionality of imposing criminal penalties for drivers refusing testing. Parts VIII and IX will challenge the Court's conclusions and suggest a tentative avenue for states to explore in the prosecution of drunk driving cases.

II. Driving Under the Influence Statistics and State Legislative Responses

A. Statistics

The issue of impaired driving causing numerous annual injuries and fatalities came to the public light in the 1980's. A contributing factor in this evolution of the public consciousness was the founding of Mothers Against Drunk Driving (MADD) in 1980. Researchers have concluded that: "there is considerable evidence that MADD has made a difference in the United States regarding alcohol-impaired drunk driving. MADD has contributed to the public view that drunk driving is socially unacceptable. MADD has played an important role in encouraging state legislatures to enact more effective impaired-driving laws . . ."[13]

Thanks in large part to this increased public awareness, fatalities caused by drunk drivers have generally decreased in the United States. According to the National Highway Traffic Safety Administration (NHTSA), such fatalities decreased from 13,096 in 2003 to 10,322 in 2012. That's a decline of twenty-one percent.[14] While that number is encouraging, the number of such fatalities actually increased from 2011 to 2012. In 2011, 9,865 people were killed by impaired drivers. That means that 4.6 percent more people were killed by drunk drivers in 2012 than in 2011. The 10,322 people killed by drunk drivers in 2012 translates to the death of one person every fifty-one minutes.[15] One researcher calculated the rate of driving under the influence fatalities for each state. He found that Pennsylvania has one of the highest fatality rates at 3.95 deaths per

[13]J. Fell and R. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, 7 TRAFFIC INJ PREVENTION 3, 195–212 (Jan. 2007) (hereinafter "Fell").

[14]U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Data, 2012 Data* (hereinafter "NHTSA").

[15]NHTSA, supra note 8.

100,000 persons. That's higher than the United States average of 3.88 deaths per 100,000 persons.[16]

The NHTSA estimates that impaired driving is the primary cause of thirty-one percent of all traffic fatalities.[17] In addition, it is estimated that the annual cost of alcohol-related traffic accidents is fifty-nine billion dollars.[18]

What is more disturbing is the number of drunk driving arrests that occur every year. The Federal Bureau of Investigation reports that 1,166,824 arrests were made in 2013 for driving under the influence.[19] How many of those arrests prevented serious injuries or fatalities cannot be estimated. But it is highly probable that those arrests saved lives.

Concurrent with the growth of MADD, media coverage of drunk driving issues increased substantially. In response, states began to pass laws addressing the problem and increasing criminal and civil penalties.[20]

B. State Legislative Responses

All fifty states now have laws that criminalize the operation of a motor vehicle by a driver with a blood alcohol level of 0.08 percent or greater. Most states impose greater penalties for a higher blood alcohol level.

The Commonwealth of Pennsylvania, for example, provides a typical state statute. This state considers all drivers with a blood alcohol level of 0.08 percent or greater to be impaired. But it lowers the acceptable level for certain classes of drivers: commercial drivers are impaired at a blood alcohol level of 0.04 percent; school bus drivers and drivers under the age of twenty-one are impaired at a blood alcohol level of 0.02 percent.[21]

Penalties increase for second and subsequent offenders. In addition, penalties increase for higher blood alcohol levels and include mandatory prison sentences. Those drivers with a blood alcohol level of 0.10 percent up to 0.16 percent will be imprisoned for at least forty-eight hours for a first offense, thirty days for a second of-

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[16]S. Malanga, Pennsylvania: "So safe or not?", Public Sector, Inc. (June 19, 2013). http://www.publicsectorinc.org/2013/06/pennsylvania_so_safe_its_dangerous/.

[17]NHTSA, supra note 8.

[18]L. Blincoe, TA Miller, E. Zaloshnja, BA Lawrence, *The Economic Impact of Motor Vehicle Crashes*, 2010. Washington (DC): Dept. of Transportation (US), National Highway Traffic Safety Administration (NHTSA) (2014).

[19]Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States 2013*, Table 29.

[20]Fell, *supra* note 7 at 197.

[21]75 Pa.C.S.A. § 3802.

fense, ninety days for a third offense, and one year for a fourth or subsequent offense.[22] Even greater penalties are imposed if the driver has a blood alcohol level of 0.16 percent or higher. A convicted drunk driver with those blood alcohol levels must be imprisoned for at least seventy-two hours for a first offense, ninety days for a second offense, and one year for a third or subsequent offense.[23]

Given the commonality of these types of crimes, all states now have implied consent laws which are based on the notion that driving is not a right, but a privilege and therefore conditions can be attached. Under these laws, drivers impliedly consent to a testing of their blood, breath or urine upon a reasonable request by a police officer. Failure to consent results in a suspension of the driver's license for a period of time which is often one year. The hope was that this civil penalty would provide a sufficient incentive to drivers to submit to such tests. However, drivers facing the choice of a license suspension or possible criminal penalties will often opt for the license suspension. In fact, researchers have found that these refusals significantly impair enforcement of drunk driving laws.[24]

Since drivers can and do refuse to submit to such tests, law enforcement officers must choose to either forego the tests altogether or seek a different way to secure the evidence. In seeking an alternative way, invasive procedures (such as blood draws) are generally not permitted simply because the driver is being arrested.[25] The question then arises, must the officer first undergo the time-consuming task of obtaining a warrant, or may the evidence be seized under the exigent circumstances exception to the search warrant requirement?

III. *Schmerber v. California* and the "Per Se" Rule

A. Facts

Armando Schmerber and a female companion had spent the night drinking at a bowling alley and a tavern. At about midnight on November 24, 1964, Schmerber lost control of his vehicle and ran into a tree. Both Schmerber and his companion were injured.[26] Officers arrived at the scene shortly thereafter and noted an odor of alcohol on the defendant's breath and described his eyes as having

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[22]75 Pa.C.S.A. § 3804.

[23]75 Pa.C.S.A. § 3804.

[24]R.Voas, T. Kelly-Baker, E. Romano and R. Vishnuvajjala; *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J.SAFETY RES. 77–83 (2009) (hereinafter "Voas").

[25]*Schmerber,* 384 U.S. at 770; *see also* Birchfield v. North Dakota, 579 U.S. ___ (2016).

[26]*Schmerber*, 384 U.S. at 758 n.2.

a "bloodshot, watery, sort of a glassy appearance."[27] Schmerber and his companion were taken to the hospital for treatment of minor injuries.[28] Approximately two hours later, an officer arrived at the hospital and noted that Schmerber continued to exhibit signs of drunkenness.[29] The officer placed Schmerber under arrest for driving while intoxicated, a misdemeanor under California law. Schmerber was then informed of his right to counsel and right to remain silent.[30]

Schmerber refused to consent to a blood test.[31] Thereafter, a physician at the hospital performed the test at the officer's direction and over the objection of the defendant.[32] The test results provided evidence that the defendant was driving under the influence of alcohol.[33] The test results were admitted at his trial and he was convicted. He appealed his conviction to the California Supreme Court and thereafter to the United States Supreme Court.

B. Issues Raised

The defendant raised a plethora of issues. He asserted that the following Constitutional rights had been violated: Fourteenth Amendment due process, Sixth Amendment right to counsel, Fifth Amendment privilege against self-incrimination, and the Fourth Amendment right to be free from unreasonable searches and seizures.

1. Fourteenth Amendment Due Process Claim

The defendant claimed that the forcible taking of his blood was akin to the warrantless pumping of the defendant's stomach in *Rochin v. California*.[34] In that case, officers observed the defendant swallowing something as they entered his residence. They later arranged for his stomach to be pumped and discovered the evidence to be narcotic pills.[35] The Court overturned the defendant's conviction finding that the warrantless invasion of the defendant's body "shocked the conscience" and was in fact "brutal and "offensive".[36] The Court concluded that the defendant's right to fundamental fair-

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[27] *Schmerber*, 384 U.S. at 769.

[28] *Schmerber*, 384 U.S. at 758.

[29] *Schmerber,* 384 U.S. at 769.

[30] *Schmerber,* 384 U.S. at 769.

[31] *Schmerber*, 384 U.S. at 759.

[32] *Schmerber*, 384 U.S. at 758.

[33] *Schmerber*, 384 U.S. at 758–59.

[34] *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

[35] *Rochin*, 342 U.S. at 166.

[36] *Rochin*, 342 U.S. at 172.

ness under the Fourteenth Amendment due process clause had been violated.[37] Rochin's conviction was overturned.

The *Schmerber* Court found that a later case, *Breithaupt v. Abram*[38] was more applicable and relatable to the facts. In *Breithaupt* the defendant was the driver of a truck involved in a terrible accident which resulted in the deaths of three people. The defendant was also injured and unconscious.[39] He was transported to a local hospital. Officers at the hospital noted an odor of alcohol on the defendant's person and requested that the attending physician take a blood sample.[40] The test results showed that the defendant's BAC was 0.17 percent.[41] He was thereafter convicted of involuntary manslaughter.

The defendant in *Breithaupt* later appealed his conviction on the grounds that the warrantless taking of his blood while he was unconscious violated his due process rights under the Fourteenth Amendment.[42] The Court disagreed. Justice Clark, writing for the majority, said that blood tests like those administered to the defendant had become routine in society. There was nothing "offensive" or "brutal" about the simple drawing of blood, even from an unconscious defendant by a competent and careful physician under appropriate medical protocols.[43] The Court further noted that such a test is considered more scientifically reliable than human observation and may very well exonerate or incriminate an accused.[44] The defendant's conviction was affirmed.

Relying heavily on *Breithaupt*, the High Court rejected Schmerber's claim of a denial of fundamental fairness in the taking of his blood. The Court noted that, like *Breithaupt*, the police had probable cause to arrest and probable cause to believe there was evidence of a crime in the defendant's blood. According to the Court, there was, and is, nothing that "shocks the conscience" or is "brutal" or "offensive" about subjecting an arrestee to a routine medical procedure conducted by competent and qualified medical personnel in a safe and medically accepted manner.[45] Schmerber's due process claim was summarily rejected.

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[37] *Rochin*, 342 U.S. at 172.

[38] *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).

[39] *Breithaupt,* 352 U.S. at 433.

[40] *Breithaupt,* 352 U.S. at 433.

[41] *Breithaupt,* 352 U.S. at 433.

[42] *Breithaupt,* 352 U.S. at 434.

[43] *Breithaupt,* 352 U.S. at 436.

[44] *Breithaupt,* 352 U.S. at 439.

[45] *Schmerber*, 384 U.S. at 760.

2. Sixth Amendment Right to Counsel Claim

The High Court also rejected the defendant's claim under the Sixth Amendment. Schmerber claimed that because he had refused to consent to a test of his blood on the advice of his attorney, he was denied his Sixth Amendment right to the assistance of counsel.[46] He argued that the failure of the police to respect his refusal amounted to a denial of the right simply because his refusal was made on the advice of counsel. The Court rejected this argument because Schmerber had no right to counsel to assert at that point.[47]

3. Fifth Amendment Privilege Against Self-Incrimination Claim

More troubling for the Court was Schmerber's claim that the forcible taking of his blood and the subsequent admission of its written test results at trial, in essence, compelled him to be a witness against himself.[48] A similar claim had been rejected in *Breithaupt* because the Fifth Amendment proscription against self-incrimination had not yet been mandated in the states.[49] Given the now mandatory application of the self-incrimination clause in state courts, the issue was ripe for review.

The majority recognized that the taking of Schmerber's blood over his objection and at the direct order of the police amounted to "compulsion". But more important for the Court to consider was the issue of whether Schmerber was compelled "to be a witness against himself" in violation of the Fifth Amendment.[50] The Court noted that the purpose of the self-incrimination clause is to require the state to secure incriminating evidence by its own efforts, and not by forcibly extracting damning evidence from the accused.[51] It favorably referenced Justice Holmes' rationale in *Holt v. United States*.[52] In that case, the accused was forced to put on a blouse.[53] He later appealed his conviction for murder, arguing, *inter alia*, that displaying his person wearing the incriminating blouse violated the Fifth Amendment proscription against being a "witness against himself". Justice Holmes rejected this argument saying:

But the prohibition of compelling a man in a criminal court to be wit-

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[46] *Schmerber*, 384 U.S. at 759.

[47] *Schmerber,* 384 U.S. at 766.

[48] *Schmerber*, 384 U.S. at 759.

[49] It was not until 1964 that the Court selectively incorporated this clause into the Fourteenth Amendment due process clause. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

[50] *Schmerber*, 384 U.S. at 761.

[51] *Schmerber*, 384 U.S. at 769.

[52] *Holt v. U.S.*, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021 (1910).

[53] *Holt*, 218 U.S. at 253.

> ness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.[54]

Mr. Schmerber, according to the Court, was not required to testify, nor to engage in any communicative act which would trigger the privilege.[55] Thus, the defendant's Fifth Amendment claim was also rejected.[56]

It should be noted that Justices Black and Douglas filed a dissenting opinion diverging from this finding. Those Justices would have held that Schmerber's Fifth Amendment right against self-incrimination had been violated, in essence, because the testimony of the laboratory technician who analyzed the blood was both "testimonial" and "communicative" in nature and such testimony was necessarily derived directly from the forcible compulsion of the defendant.[57] Justice Fortas concurred in this dissent.[58]

4. Fourth Amendment Claim

Schmerber finally claimed that the insertion of a needle into his arm was a "search". He further asserted that the extraction of blood from his vein was a "seizure" within the meaning of the Fourth Amendment.[59]

In light of this, the Court was forced to decide, as a matter of first impression, whether such intrusion into the body by the state without a judicially approved search warrant violated the reasonableness standards of the Fourth Amendment. The Court reiterated its core principle that searches supported by judicially approved warrants are preferred: "the importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."[60]

On this point, the court has also recognized exceptions to the search warrant requirement. In this case, it considered the officer's sense of urgency not only reasonable under the Fourth Amendment,

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[54] *Holt,* 218 U.S. at 253.

[55] *Schmerber*, 384 U.S. at 765.

[56] *Schmerber*, 384 U.S. at 765.

[57] *Schmerber*, 384 U.S. at 774.

[58] *Schmerber*, 384 U.S. at 778–79.

[59] The Court was not required to consider this argument in the 1957 *Breithaupt* case, as the exclusionary rule had not yet been selectively incorporated. This was accomplished in the 1961 case of *Mapp v. Ohio*. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961).

[60] *Schmerber*, 384 U.S. at 770.

but also sufficient to obviate the warrant requirement.[61] The Court recognized the evanescent nature of the evidence and the time that had elapsed as the officers investigated the accident scene and transported the defendant to the hospital. Under the circumstances, the Court found it reasonable for the officer to conclude that he did not have time to locate a magistrate and secure a warrant.[62] The defendant's conviction was affirmed.

C. Rejection of a "Per Se" Rule

The Court based its decision upon the unique facts of the case.

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' Preston v. United States, 376 U.S. 364, 367. We are told the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was not time to seek out a magistrate and secure a warrant. **Given these special facts**, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.[63] (emphasis added)

Before concluding, Justice Brennan added an additional warning:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.[64]

In doing so, the Court essentially rejected a bright line "per se" rule that would permit nonconsensual warrantless testing of a defendant's blood in all drunk driving cases.

IV. State Responses to *Schmerber*

The Court's warning in *Schmerber* was a clear rejection of a "per se" rule that would permit law enforcement officers to order a blood draw solely upon a showing of probable cause to believe the defendant was under the influence of alcohol or drugs. But this warning was unheeded by some law enforcement professionals who assumed that the evanescent nature of alcohol in the bloodstream in and of itself posed an exigency sufficient to justify the waiver of a warrant in cases where there was probable cause to believe a driver

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[61] *Schmerber*, 384 U.S. at 771.

[62] *Schmerber*, 384 U.S. at 770–71.

[63] *Schmerber*, 384 U.S. at 770–71.

[64] *Schmerber*, 384 U.S. at 772.

was intoxicated. Predictably, the constitutionality of such warrantless blood draws was raised by defendants in state courts, providing those courts with the opportunity to review the wisdom or folly of adopting a "per se" rule.

Several state supreme courts interpreted *Schmerber* as specifically authorizing a "per se" rule. A smaller number of state supreme courts held otherwise. Those courts concluded that that the evanescent nature of the evidence was merely a factor to be considered in determining whether an exigency existed sufficient to obviate the need for a warrant.

Some state courts relied on Justice Brennan's reference to arrest in the *Schmerber* decision: "Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest."[65] These courts were ready to assume that the search of the arrestee's blood was permitted simply because the defendant had been arrested. They likened a search of the arrestee's blood with the seizure of a sample of the arrestee's hair, a clearly non-invasive procedure. Other state courts soundly rejected such reasoning.

Several state supreme courts relied on *Skinner v. Railway Labor Executives' Ass'n*[66] to provide federal heft to their positions. In that case, the U.S. Supreme Court held that blood and urine testing of railway employees involved in an accident resulting in injury or substantial property damage was constitutionally permissible. This was so even if officials did not have 1) probable cause to believe the employee was under the influence of alcohol or drugs at the time of the accident, 2) consent of the employee, or 3) a judicially approved warrant.[67] The Skinner Court cited *Schmerber's* recognition of the rapid destruction by normal metabolic processes of alcohol in the blood, and asserted that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."[68] The Court noted that requiring an official to first obtain a warrant would defeat the very purpose of the testing which is to ascertain the level of incapacitation, if any, of the employee.[69]

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[65] *Schmerber*, 384 U.S. at 771.

[66] *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639, 4 I.E.R. Cas. (BNA) 224, 130 L.R.R.M. (BNA) 2857, 13 O.S.H. Cas. (BNA) 2065, 49 Empl. Prac. Dec. (CCH) P 38791, 111 Lab. Cas. (CCH) P 11001, 1989 O.S.H. Dec. (CCH) P 28476 (1989).

[67] *Skinner*, 489 U.S. at 624, 633.

[68] *Skinner*, 489 U.S. at 623.

[69] *Skinner*, 489 U.S. at 623.

Other state supreme court justices in either majority or dissenting opinions objected to the reliance on *Skinner*.[70] They asserted that the conduct permitted in *Skinner* constituted an administrative search, not a search for criminal investigative purposes. In fact, the *Skinner* Court stressed that the normal warrant and individualized suspicion requirements for criminal search warrants were not applicable to the testing of the railway employees because the purpose of the administrative search was to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs,"[71] not to pursue a criminal prosecution.

Some courts justified the adoption of a "per se" rule on the reasoning provided by the High Court in *Cupp v. Murphy.*[72] The defendant in *Cupp* agreed to come to the police station to answer questions about the strangulation murder of his wife. Police noticed a dark substance under the defendant's fingernails which they suspected was blood, perhaps that of the victim.[73] The officer asked the defendant for permission to take a sample and the defendant refused.[74] The defendant then hid his hands behind his back and appeared to be rubbing his fingers together. Thereafter he put his hands in his pockets and seemed to be using metal (keys or coins) to destroy the evidence.[75] Alarmed, the officers then detained the defendant and forcibly secured a sample of the blood beneath his fingernails.[76] No warrant was obtained. The U.S. Supreme Court held that the search was permissible without a warrant because it was "necessary to preserve the highly evanescent evidence found under his fingernails."[77]

Still, other state supreme courts cited federal cases to support one hypothesis over another. But these cases were inapt in many respects.

United States v. Reid,[78] for example, used an exigent circumstances rationale to justify the warrantless use of a breathalyzer to ascertain blood alcohol levels of a defendant stopped for drunk driv-

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[70] *See* for example, *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) (Abrahamson dissenting).

[71] *Skinner*, 489 U.S. at 620.

[72] *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

[73] *Cupp*, 412 U.S. at 292.

[74] *Cupp*, 412 U.S. at 292.

[75] *Cupp*, 412 U.S. at 296.

[76] *Cupp*, 412 U.S. at 292.

[77] *Cupp*, 412 U.S. at 296.

[78] *U.S. v. Reid*, 929 F.2d 990 (4th Cir. 1991).

ing where no accident had occurred.[79] Because a blood draw is an invasive procedure, whereas the analysis of one's breath is not, the ensuing analysis could not logically be used to justify a warrantless blood draw.

United States v. Eagle[80] involved a fatal automobile accident. The driver was subjected to a nonconsensual warrantless blood draw two hours after the accident.[81] The defendant raised the constitutionality of the admission of the blood test results at his trial for the first time on appeal; he had not preserved the issue by raising it before the trial court. Nevertheless, the U.S. Court of Appeals for the Eight Circuit noted that the existence of sufficient probable cause to believe that evidence would be found in the defendant's blood, coupled with the two hour lapse between the accident and the blood test were sufficient facts to justify the warrantless blood draw.[82] The court did not find it necessary to discuss the "per se" rule, nor to juxtapose it against the "totality of the circumstances" approach.

United States v. Talkington[83] involved the warrantless search of a home which the prosecution attempted to justify under the exigent circumstances exception to the warrant requirement. The Court noted that where there is a question as to exigency, the prosecution has the burden of showing that a warrant could not be obtained in an expeditious manner.[84] While the discussion of the legislative purpose of rules allowing electronic warrant approvals was informative, the search of a home requires a very different legal analysis than a search which requires invasion of a defendant's body. In addition, the evidence of exigency in the case was notably weak and based upon a substantial amount of speculation by the officers. By contrast, the deterioration of alcohol in the blood is not subject to such conjecture.

A. States Adopting a "Per Se" Rule

Some state supreme courts explicitly adopted a "per se" rule after the *Schmerber* case. Others simply declined to engage in a discussion of whether the police had time to secure a warrant. In some cases, there was a clear misreading of *Schmerber*; in others, the state supreme courts simply took a liberal view of the reasoning in *Schmerber*.

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[79] *Reid*, 929 F.2d at 990.

[80] *U.S. v. Eagle*, 498 F.3d 885, 74 Fed. R. Evid. Serv. 257 (8th Cir. 2007).

[81] *Eagle*, 498 F.3d at 892.

[82] *Eagle*, 498 F.3d at 892.

[83] *U.S. v. Talkington*, 843 F.2d 1041 (7th Cir. 1988).

[84] *Talkington,* 843 F.2d at 1047.

Mississippi — Gregg v. State[85]

Thirteen years after *Schmerber*, the Mississippi Supreme Court weighed in on the issue. The defendant was driving a pickup truck when it crossed the center line and collided with an oncoming vehicle, killing the passenger in that vehicle.[86] Officers arriving at the scene noted that the defendant exhibited signs of intoxication including an odor of alcohol, a "thick tongue", and "trouble standing".[87] The defendant was arrested at the scene. One of the officers obtained a judicially approved warrant to secure a blood sample from the defendant.[88] At a local hospital, the warrant was executed and qualified medical personnel conducted the blood draw.[89] The defendant's motion to suppress was denied and he was subsequently convicted of manslaughter. On appeal, the defendant challenged the validity of the search warrant and argued that the blood test results should have been suppressed.[90]

The state Supreme Court opined that the validity, or lack thereof, of the warrant was essentially irrelevant.[91] The Court held that the officers would have been lawfully justified in securing a blood sample even without a warrant under the circumstances of the case. Specifically,

> The arrest being legal . . . the officers had the right to react reasonably to the emergency situation — which was the potential loss of the evidence caused by the fact that the percentage of alcohol in the blood begins to diminish shortly after the drinking stops. Given the legal arrest and an emergency, the officers could, without any warrant attempt to secure evidence of blood-alcohol content as an appropriate incident to that arrest.[92]

Because the officers did in fact obtain a warrant, the state court found it unnecessary to engage in a discussion of the difficulty of obtaining one. The state court concluded that a lawful arrest, coupled with an exigency were sufficient to support a warrantless blood draw.[93] Although conflating searches permitted incident to a lawful custodial arrest with those justified by exigent circumstances the

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[85] *Gregg v. State*, 374 So. 2d 1301 (Miss. 1979).

[86] *Gregg*, 374 So.2d at 1302.

[87] *Gregg*, 374 So.2d at 1302.

[88] *Gregg*, 374 So.2d at 1303.

[89] *Gregg*, 374 So.2d at 1303.

[90] *Gregg*, 374 So.2d at 1303.

[91] *Gregg*, 374 So.2d at 1304.

[92] *Gregg*, 374 So.2d at 1302 citing *Schmerber*, 384 U.S. at 770.

[93] *Gregg*, 374 So.2d at 1304.

Court had little trouble finding that fragility of the evidence was sufficient to justify the warrantless seizure of a blood sample.[94]

Maine — State v. Baker[95]

Six years later, the supreme courts of Maine and Arizona addressed the issue. In *State v. Baker* the Maine Supreme Court decided a case involving a two-car collision resulting in the death of the passenger of one of the vehicles.[96] Officers arriving at the scene were able to determine that one driver had ignored a stop sign and was obviously under the influence of alcohol.[97] The typical signs of alcohol consumption were present: a strong odor of alcohol on the defendant, bloodshot eyes, slurred speech, and unsteady gait.[98] Empty beer bottles were found in the defendant's car and near the deceased passenger lying beside the highway.[99] The defendant was transported to a local hospital where medical personnel, acting at the direction of the police, drew blood from the defendant.[100] The defendant was subsequently placed under arrest and charged with manslaughter, driving under the influence, and furnishing alcohol to minors. His motion to suppress the blood test results was granted and the state appealed.[101]

The trial court had interpreted *Schmerber* to hold that warrantless blood test results are admissible only when the blood draw occurred incident to a lawful custodial arrest.[102] The Maine Supreme Court disagreed and held that arrests were not intrinsic to the *Schmerber* reasoning. Instead, *Schmerber* relied on a straightforward analysis of probable cause and exigent circumstances.[103] The defendant had only challenged the sufficiency of probable cause in his original motion. He did not address or challenge the existence of an exigency. Nevertheless, the Maine Supreme Court, finding sufficient probable cause to arrest, and sufficient probable cause to believe evidence of intoxication would be found in the defendant's blood, concluded that exigent circumstances did indeed exist. "The bodily process that eliminates alcohol also provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood

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[94] *Gregg*, 374 So.2d at 1304.

[95] *State v. Baker*, 502 A.2d 489 (Me. 1985).

[96] *Baker*, 502 A.2d at 490.

[97] *Baker*, 502 A.2d at 490.

[98] *Baker*, 502 A.2d at 490.

[99] *Baker*, 502 A.2d at 490.

[100] *Baker*, 502 A.2d at 491.

[101] *Baker*, 502 A.2d at 491.

[102] *Baker*, 502 A.2d at 492.

[103] *Baker*, 502 A.2d at 492.

test."[104] The Court found that the evidence of probable cause itself also supported a finding of exigency.[105]

Arizona — State v. Cocio[106]

In *State v. Cocio* the Arizona Supreme Court was faced with a vehicular fatality. The defendant was driving a truck which collided with another vehicle, killing its passenger.[107] Officers arrived at the scene shortly thereafter. Three officers separately concluded that the defendant was intoxicated as he smelled of alcohol, swayed as he stood, and had bloodshot eyes as well as dilated pupils.[108] Hospital personnel took the defendant's blood for medical purposes, and police obtained some of this sample for testing.[109] The defendant was not under arrest at the time.[110] Police did not seek or obtain a search warrant before obtaining the sample.[111] Police laboratory tests revealed a blood alcohol level of 0.28 percent; hospital test results revealed a blood alcohol level of 0.29 percent.[112]

The defendant was convicted and sentenced to life imprisonment.[113] He appealed his conviction and sentencing on multiple grounds, one of which was the warrantless seizure and testing of his blood by police. The Arizona Supreme Court found it necessary to address the state's implied consent law,[114] as it commonly governed the administration of blood tests in driving under the influence cases. The implied consent law purportedly required that the defendant be under arrest before being subjected to such a test. Relying on *Schmerber*, the state supreme court held that an arrest is not a necessary prerequisite to the taking of a defendant's blood.[115]

The Arizona Supreme Court, like other state supreme courts, relied on both *Cupp* and *Schmerber* to conclude that a defendant's blood may be drawn for police testing purposes without a warrant and without the defendant's consent under specific circumstances. Those circumstances include probable cause to believe the defendant has operated a vehicle while intoxicated and the existence

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[104] *Baker*, 502 A.2d at 493.

[105] *Baker*, 502 A.2d at 493.

[106] *State v. Cocio*, 147 Ariz. 277, 709 P.2d 1336 (1985).

[107] *Cocio*, 147 Ariz. at 279.

[108] *Cocio*, 147 Ariz. at 288.

[109] *Cocio*, 147 Ariz. at 287.

[110] *Cocio*, 147 Ariz. at 285.

[111] *Cocio*, 147 Ariz. at 285.

[112] *Cocio*, 147 Ariz. at 279.

[113] *Cocio*, 147 Ariz. at 279.

[114] A.R.S. § 28-691.

[115] *Cocio*, 147 Ariz. at 285.

of exigent circumstances.[116] Even when those circumstances exist, the procedure must be conducted in a reasonable manner by competent medical personnel.[117] The Court concluded that exigent circumstances existed here because "the highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time."[118]

The defendant posed a second argument to the Court. He claimed that once the vial of blood was provided to the police by medical personnel, police had an obligation to then obtain a search warrant.[119] He argued that the exigency had passed as the blood was no longer subject to metabolic processes, and the officers had sufficient time to create the warrant and seek its approval. The defendant relied on prior U.S. Supreme Court cases that held that once police seize a closed container, they must obtain a search warrant before opening that container.[120] The Court rejected this argument stating that in the defendant's cited cases, the contents of the closed containers were unknown to the police. Law enforcement officers in those cases obtained a search warrant to ascertain the contents.[121] In the instant case, the Court opined that the vial containing the blood was not the subject of seizure; rather the content of the vial itself was the subject of the seizure. Therefore, since the seizure of the blood was valid, the subsequent testing was equally valid.[122]

Oregon — State v. Milligan[123]

In *State v. Milligan* the defendant was charged with negligent homicide after the vehicle he was driving crashed into a power pole, killing his passenger.[124] Evidence showed that the defendant had been traveling at speeds up to ninety-five miles per hour, and a witness who had been drinking with the defendant prior to the accident said the defendant was "smashed".[125] In addition, the responding of-

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[116] *Cocio*, 147 Ariz. at 285–86.

[117] *Cocio*, 147 Ariz. at 287.

[118] *Cocio,* 147 Ariz. at 286.

[119] *Cocio*, 147 Ariz. at 287.

[120] *U.S. v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *U.S. v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977) (abrogated by, California v. Acevedo, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991)).

[121] *Cocio*, 147 Ariz. at 287.

[122] *Cocio*, 147 Ariz. at 287.

[123] *State v. Milligan*, 304 Or. 659, 748 P.2d 130 (1988).

[124] *Milligan*, 304 Or. 659 at 131.

[125] *Milligan*, 304 Or. 659 at 132.

ficer noticed an odor of alcohol on the defendant's breath.[126] The defendant was subsequently transported to the hospital by police. At the hospital two blood samples were drawn, two hours apart, at the direction of the police.[127] The defendant was not under arrest at the time, nor did he consent to the blood draw. A search warrant was not sought nor obtained.[128] The defendant was convicted and appealed.

The defendant objected to the admission of the blood test results at his criminal trial on the grounds that 1) he was not arrested at the time, 2) the police did not have probable cause to search, and 3) the police did not have a search warrant.[129] The Oregon Supreme Court held that the securing of the defendant and transport to the hospital constituted a "seizure" of his person sufficient to meet constitutional requirements.[130] The Court also held that the officers had sufficient probable cause to search given the statements of the witnesses, the severity of the accident, and the odor of alcohol on the defendant's breath.[131]

The Court then concluded that the evidence was lawfully obtained as "the defendant was a vessel containing evidence of the crime he had committed . . . evidence that was dissipating with every breath he took."[132] Relying on the fragility of the evidence, and not on an examination of the ease with which a warrant could be obtained, the court stated: "warrantless search and seizure under such circumstances therefore is constitutionally justified, unless a warrant can be obtained without sacrificing the evidence."[133]

The defendant argued that even if the first blood draw could be lawfully justified under the exigent circumstances exception to the search warrant requirement, the second blood draw could not. The defendant asserted that it was incumbent upon the state to prove that obtaining a telephonic warrant was not possible within a reasonable time frame.[134] This would have been an intriguing argument had the defendant raised it at the lower court. Because he did not, the Oregon Supreme Court refused to address it.[135]

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[126] *Milligan*, 304 Or. 659 at 132.

[127] *Milligan*, 304 Or. 659 at 132.

[128] *Milligan*, 304 Or. 659 at 132.

[129] *Milligan*, 304 Or. 659 at 132.

[130] *Milligan*, 304 Or. 659 at 134.

[131] *Milligan*, 304 Or. 659 at 134.

[132] *Milligan*, 304 Or. 659 at 134.

[133] *Milligan*, 304 Or. 659 at 134.

[134] *Milligan*, 304 Or. 659 at 135.

[135] *Milligan*, 304 Or. 659 at 135.

Idaho — State v. Woolery[136]

The defendant was driving his pickup truck late in the evening of January 31, 1987.[137] At approximately 10:30pm, he ignored a stop sign, and at a high rate of speed hit an automobile killing the passenger and seriously injuring the driver.[138] Police arrived within five minutes.[139] Because the defendant had sustained both head and chest injuries, he was immediately transported to a local emergency room.[140] The treating physician indicated to the investigating officer that he believed the defendant to be intoxicated.[141] The investigating officer thereafter requested that medical personnel conduct a blood draw.[142] The defendant's blood alcohol content was 0.16 percent, well over the legal limit.[143] The defendant was charged and subsequently filed a motion to suppress the blood test results. The motion was denied and he was convicted of vehicular manslaughter and other offenses.[144]

His appeal to the Idaho Supreme Court raised multiple issues. First, the defendant argued that he had not been asked to submit to a blood test as was required under state law.[145] Idaho's implied consent law[146] presumes consent to a test for alcohol or a controlled substance as long as the officer has reasonable cause to make the request and the test is administered in a reasonable fashion. Under the law, however, the driver must first be informed of his right to refuse such test and the consequences of such refusal such as license suspension.[147] For these reasons, the defendant argued that the blood tests results should have been suppressed.

State implied consent laws have complicated these issues. Here, the defendant argued that the officer's failure to inform him of his right to refuse to consent to such testing and the consequences for such refusal should result in suppression of the blood test results.[148] But Idaho's law clearly provided that the penalty for refusal of a

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[136] *State v. Woolery*, 116 Idaho 368, 775 P.2d 1210 (1989).

[137] *Woolery*, 775 P.2d at 1210.

[138] *Woolery*, 775 P.2d at 1210.

[139] *Woolery*, 775 P.2d at 1211.

[140] *Woolery*, 775 P.2d at 1211.

[141] *Woolery*, 775 P.2d at 1211.

[142] *Woolery*, 775 P.2d at 1211.

[143] *Woolery*, 775 P.2d at 1211.

[144] *Woolery*, 775 P.2d at 1212.

[145] *Woolery*, 775 P.2d at 1212.

[146] I.C. § 18-8002.

[147] I.C. § 18-8002(3).

[148] *Woolery*, 775 P.2d at 1212.

reasonable request for the testing to be suspension of the driver's license.[149] The Idaho Supreme Court made a sharp distinction between the state legislature's intent to provide a civil penalty for refusal and the lawful gathering of evidence in a criminal investigation.[150] The Court held that there was no basis for suppression of this evidence in a criminal proceeding. The defendant's recourse under the state's implied consent law would be reinstatement of his license to drive.[151]

Second, the defendant argued that he did not consent to the blood draw, and therefore such an intrusion could only be justified by a finding of probable cause. The defendant asserted that at the time the officer requested the administration of the blood test he had not investigated the accident scene, nor had the officer questioned him or the witnesses.[152] Therefore, the defendant argued that the officer did not have the requisite probable cause to support the request for the testing.[153]

The Idaho Supreme Court concluded that the defendant's manner of driving — speeding through a stop sign, coupled with the treating physician's opinion that he was intoxicated, provided the officer with sufficient evidence to meet Fourth Amendment probable cause requirements.[154] The court further reasoned that a search warrant was not needed. Relying on *Schmerber*, the Court stated: "In the instant situation, the destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies a warrantless search".[155] Later the Court elaborated: "in Schmerber, the United States Supreme Court recognized that a warrantless seizure of the blood of a driver, as long as probable cause exists and the withdrawal of blood is done in a reasonable fashion, does comply with the provisions of the Fourth Amendment."[156]

The Idaho Supreme Court clearly interpreted *Schmerber* as adopting a "per se" rule authorizing evidentiary testing for alcohol or controlled substances in a driver's blood without a warrant, as long as the officer has probable cause to search and the testing is done in a reasonable manner. The lone dissenter did not challenge the majority's reliance on and interpretation of *Schmerber*. Justice Johnson merely contested the lack of testimony to prove that the

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[149] I.C. § 18-8002(3)(c).

[150] *Woolery*, 775 P.2d at 1213.

[151] *Woolery*, 775 P.2d at 1213–14.

[152] *Woolery*, 775 P.2d at 1212.

[153] *Woolery*, 775 P.2d at 1212.

[154] *Woolery*, 775 P.2d at 1216.

[155] *Woolery*, 775 P.2d at 1212.

[156] *Woolery*, 775 P.2d at 1216.

treating physician actually communicated his opinion of the defendant's intoxication to the officer.[157]

Wisconsin — State v. Bohling[158]

This case involved the investigation of a two-car accident. The responding officer noted that there was an odor of alcohol on the defendant's breath, his eyes were bloodshot and he had poor balance.[159] The defendant refused both breathalyzer and blood tests.[160] Consequently, he was transported to a local medical facility where a blood draw was conducted without a warrant and without his consent.[161] The test results revealed a blood alcohol level of 0.205 percent.[162] Bohling was charged with driving while intoxicated and moved to suppress the blood test results. The Dane County Circuit Court granted the motion to suppress. The Wisconsin Court of Appeals affirmed holding that the state failed to prove additional exigent circumstances beyond the fragility of blood alcohol, to justify a warrantless seizure.[163] The Wisconsin Supreme Court disagreed.

Relying specifically on *Schmerber*, the Wisconsin Supreme Court held:

> the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw under the following circumstances: 1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and 2) there is a clear indication that the blood draw will produce evidence of intoxication.[164]

The Court noted that the test to determine whether an exigency exists is an objective one.[165] That test is met if the officer reasonably believes that a delay in securing a warrant would result in destruction of evidence.[166] The Court held that because the officer had taken the time to conduct an examination of the accident scene and to transport the defendant to the hospital, it was reasonable for the

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[157] *Woolery*, 775 P.2d at 1216.

[158] *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) (abrogated by, Missouri v. McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013)).

[159] *Bohling*, 173 Wis. at 534.

[160] *Bohling*, 173 Wis. at 534–35.

[161] *Bohling*, 173 Wis. at 535.

[162] *Bohling*, 173 Wis. at 535.

[163] *Bohling*, 173 Wis. at 535.

[164] *Bohling*, 173 Wis. at 537–38.

[165] *Bohling*, 173 Wis. at 538.

[166] *Bohling*, 173 Wis. at 538.

arresting officer to conclude that taking the time to secure a warrant would compromise the integrity of the evidence.[167]

The Court reasoned that *Schmerber* could logically be interpreted either of two ways:

> the rapid dissipation of alcohol in the bloodstream alone constitutes sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for drunk driving . . . or that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.[168]

The Court rejected the second interpretation noting that even in drunk driving cases where no accident occurred, significant time is spent in the transportation of the defendant to a medical facility for a blood draw by qualified medical personnel. The Court noted that such time expenditure is necessary in all drunk driving cases.[169]

Adopting a bright line rule, the Court relied on a strong state interest in enforcing drunk driving laws. It also referenced the endorsement of such warrantless tests by the U.S. Supreme Court in *Skinner*.[170] In *Skinner*, the U.S. Supreme Court held that those engaging in an activity that involves risk of injury to the public have a reduced expectation of privacy.[171] Thus, railway employees involved in the operation of the trains may be tested for the presence of alcohol or a controlled substance after any accident involving injury or property damage. This warrantless testing may be conducted without a showing of a reasonable suspicion of alcohol consumption or drug use, nor assertion of probable cause.[172] The Wisconsin Supreme Court likened the public safety interest iterated in *Skinner* with the public safety interest a state has in keeping drunk drivers off the roads. The Court reasoned that the privacy interest asserted by a drunk driving arrestee is outweighed by the public interest in safety on the public highways. "Wisconsin's interest in enforcing its drunk driving laws . . . is vital, whereas the resulting intrusion on individual privacy is minimal."[173]

The Wisconsin Supreme Court also noted that under state law, a blood test conducted within three hours after the event is admissible

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[167] *Bohling*, 173 Wis. at 539.

[168] *Bohling*, 173 Wis. at 539.

[169] *Bohling*, 173 Wis. at 540.

[170] *Skinner*, 489 U.S. at 602.

[171] *Skinner*, 489 U.S. at 627.

[172] *Skinner*, 489 U.S. at 633.

[173] *Bohling*, 173 Wis. at 545.

in court without the need for an expert.[174] A blood test conducted more than three hours after the event is admissible only if a qualified expert provides sufficient evidence of its validity.[175] The Court recognized that evanescent evidence is most reliable when obtained expeditiously and that extrapolations of blood test results obtained after delays are speculative.[176] The Court also pointed out that because blood alcohol continues to rise even after consumption has stopped, it is in the interest of an innocent driver to have a blood test as close in time to the event as possible. A delay in testing may actually result in a finding of a higher blood alcohol level than existed at the time the defendant was driving.[177]

Hawaii — State v Entrekin[178]

The defendant was driving his vehicle at approximately 9 a.m. when it inexplicably crossed the center line, sideswiping the opposite guardrail, swerving back into the proper lane and colliding with a dirt embankment.[179] Thereafter, police arrived and observed the defendant standing outside his vehicle.[180] The defendant identified himself as the driver and sole occupant.[181] The officer immediately noticed an odor of alcohol and requested that the driver perform standard field sobriety tests.[182] The driver declined citing a neck injury from the accident.[183] Medical personnel transported the driver for treatment at a local medical center. At that facility, police directed a nurse to obtain a sample of the driver's blood.[184] The defendant did not consent to the seizure. Nor was a search warrant obtained in advance.[185] The defendant was subsequently charged with driving under the influence of alcohol.

The defendant's motion to suppress the blood test results was granted by the trial court.[186] The prosecution appealed. At issue was the correct interpretation of the state's implied consent law. This

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[174] *Bohling*, 173 Wis. at 546.

[175] *Bohling*, 173 Wis. at 546.

[176] *Bohling*, 173 Wis. at 546.

[177] *Bohling*, 173 Wis. at 547.

[178] *State v. Entrekin*, 98 Haw. 221, 47 P.3d 336 (2002), as corrected, (May 21, 2002).

[179] *Entrekin,* 47 P.3d at 338.

[180] *Entrekin,* 47 P.3d at 338.

[181] *Entrekin,* 47 P.3d at 338.

[182] *Entrekin,* 47 P.3d at 339.

[183] *Entrekin,* 47 P.3d at 339.

[184] *Entrekin,* 47 P.3d at 339.

[185] *Entrekin,* 47 P.3d at 339.

[186] *Entrekin,* 47 P.3d at 339–40.

unique law mandated the testing of a driver's blood in the event that the driver was involved in any accident that involved injury or death to any person.[187] The Supreme Court of Hawaii found that mandate to be constitutionally permissible.[188]

The defendant also raised constitutional challenges arguing that since he had not been arrested at the time of the seizure, his Fourth Amendment right to be free from unreasonable searches had been violated.[189] The state supreme court rejected this argument as well by relying heavily on *Schmerber*. The court concluded that the police had probable cause to arrest the defendant and that exigent circumstances existed justifying the warrantless seizure of the defendant's blood.[190]

While acknowledging a "totality of the circumstances" test as the appropriate one when determining whether an "exigency" exists,[191] the Court did not hesitate to conclude that one did here. Citing *Schmerber,* the court stated that "it is undisputed that 'the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from its system.' "[192] The Court did not pose any questions about the ability or inability of the police to secure a warrant in a timely fashion, instead relying solely on the fragility of the evidence to support the existence of exigent circumstances.

Minnesota — State v. Shriner[193]

The defendant caused a head-on collision with another vehicle. After pursuit by police, she refused to cooperate and was forcibly removed from her vehicle.[194] Although she was uninjured, the driver of the other vehicle sustained serious injuries.[195] Approximately forty-five minutes after her arrest, medical personnel drew a blood sample at the request of police. The test results revealed a blood alcohol level of 0.33 percent.[196] The defendant's motion to suppress was

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[187] H.R.S. § 286-163.

[188] *Entrekin*, 47 P. 3d at 341–42.

[189] *Entrekin,* 47 P.3d at 339.

[190] *Entrekin,* 47 P.3d at 348.

[191] *Entrekin,* 47 P.3d at 347.

[192] *Entrekin*, 47 P. 3d at 348 citing *Schmerber*, 384 U.S. at 770.

[193] *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008).

[194] *Shriner*, 751 N.W.2d at 539.

[195] *Shriner*, 751 N.W.2d at 539.

[196] *Shriner*, 751 N.W.2d at 540.

granted by the trial court and affirmed by the Minnesota Court of Appeals.[197] The prosecution appealed.

Interestingly, the Minnesota Supreme Court acknowledged that *Schmerber* did not delineate a bright line rule that the evanescent nature of alcohol in the bloodstream is sufficient evidence of exigency to permit a warrantless blood draw. The Court, relying on state precedent, opined that warrantless searches justified by exigent circumstances could fall into one of two categories: "(1) single factor exigent circumstances, and (2) in the absence of any of these factors, a 'totality of the circumstances' test."[198] The Court identified examples of "single factor" exigencies as hot pursuit of a fleeing felon, imminent destruction or removal of evidence, protection of human life, likely escape of the suspect, and fire."[199] The Court clarified that when a single factor constituted an exigency, the "totality of the circumstances" analysis is unnecessary.[200]

The Court relied heavily on the Schmerber Court's discussion of the fragility of the evidence. The Court then asserted that the subsequent U.S. Supreme Court case of *Cupp v. Murphy*[201] confirmed the Court's conclusion that easily destroyed evidence constitutes an exigency in and of itself.[202]

Like the Wisconsin Supreme Court, the Minnesota Supreme Court also relied on *Skinner*'s rationale. The Court in *Skinner* said that the whole purpose of securing a blood test after a railway accident involving injury or property damage would be thwarted if a warrant were required because "alcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when [an accident] occurred must be obtained as soon as possible."[203]

The Minnesota Supreme Court opined that testing of an arrestee's blood within two hours of the accident resulting in injury is important.

> With every passing minute, the most probative evidence of this crime is subjected to destruction by the body's natural processes. The rapid dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from the defendant, provided that the police

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[197] *State v. Shriner*, 739 N.W.2d 432 (Minn. Ct. App. 2007).

[198] *Shriner*, 751 N.W.2d at 541–42.

[199] *Shriner*, 751 N.W.2d at 542.

[200] *Shriner*, 751 N.W.2d at 542.

[201] *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

[202] *Shriner*, 751 N.W. 2d at 543.

[203] *Skinner,* 402 U.S. at 632.

have probable cause to believe the defendant committed criminal vehicular operation.[204]

B. States Rejecting a "Per Se" Rule

Fewer state supreme courts explicitly rejected a bright line rule. Instead, these states embraced a "totality of the circumstances" approach. Both state courts found the evidence admissible against the defendant using this test.

Utah — State v. Rodriguez[205]

The defendant was charged with vehicular homicide after she veered into the path of a school bus.[206] The crash resulted in severe injuries to her and the eventual death of her passenger.[207] The defendant and her passenger were transported to separate medical facilities for treatment.[208] Paramedics on the scene informed investigating officers that the driver smelled of alcohol.[209] An open and partially full bottle of vodka was found in the driver's purse.[210] An officer was then sent to the hospital to secure a blood sample from the driver.[211] The officer originally went to the hospital where the passenger was being treated and had to backtrack and go to the hospital where the driver was being treated.[212] The officer testified that he had to wait approximately twenty to twenty-five minutes for a technician to arrive to draw the defendant's blood.[213] The officer witnessed the blood draw and noted that the defendant smelled of alcohol, had bloodshot eyes, and slurred speech.[214] The testing revealed that defendant's blood alcohol level was 0.39 percent.[215]

The defendant's motion to suppress the blood test results was denied.[216] She was subsequently convicted and appealed. The intermediate appellate court reversed the conviction on the grounds that the officers had not first obtained a search warrant for the blood

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[204] *Shriner*, 71 N.W. 2d at 545.

[205] *State v. Rodriguez*, 2007 UT 15, 156 P.3d 771 (Utah 2007).

[206] *Rodriguez*, 156 P.3d at 772.

[207] *Rodriguez*, 156 P.3d at 772.

[208] *Rodriguez*, 156 P.3d at 772.

[209] *Rodriguez*, 156 P.3d at 772.

[210] *Rodriguez*, 156 P.3d at 772.

[211] *Rodriguez*, 156 P.3d at 772.

[212] *Rodriguez*, 156 P.3d at 772.

[213] *Rodriguez*, 156 P.3d at 772.

[214] *Rodriguez*, 156 P.3d at 772.

[215] *Rodriguez*, 156 P.3d at 772.

[216] *Rodriguez*, 156 P.3d at 772.

draw.[217] The court held that the evanescent nature of the evidence would not in and of itself create an exigency sufficient to allow the officer to forego the warrant requirement.[218] The state appealed to the Utah Supreme Court.

The state Supreme Court interpreted *Schmerber* as acknowledging exigency when evidence is fragile, but rejecting a bright line rule and instead adopting the broader "totality of the circumstances" test.[219] Thereafter, the Court spoke at length about the technological advances in law enforcement under the continuously evolving rules of Utah Criminal Procedure that permit electronic approval of search warrants. The Court noted that "as far back as 1980, the Utah Code section 77-7-10 allowed a magistrate to issue a warrant by "telegraph, telephone or other reasonable means."[220] The Court also noted that Rule 40 of the Utah Rules of Procedure states "communications between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by voice, image, text, or any combination of those, or by other means."[221]

Notwithstanding the state rules permitting more expeditious ways of securing search warrants, the Utah Supreme Court concluded that the officers acted within constitutional parameters in securing the defendant's blood without a warrant.[222] Interestingly, the Court did not address factors that might have delayed the search warrant process such as the time to transport the injured to a medical facility, the time to investigate the scene, and the officer initially going to the wrong hospital. The Court noted that the seriousness of the accident, coupled with the strong evidence that alcohol had contributed to it, were sufficient to meet the standards of the "totality of the circumstances" test.[223]

Iowa — State v. Johnson[224]

At approximately 4:41pm, the defendant caused an automobile accident which resulted in the serious injury of another.[225] He fled the

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[217] *Rodriguez*, 156 P.3d at 773.

[218] *State v. Rodriguez*, 2004 UT App 198, 93 P.3d 854 (Utah Ct. App. 2004).

[219] *Rodriguez*, 156 P.3d at 776.

[220] *Rodriguez*, 156 P.3d at 778.

[221] *Rodriguez*, 156 P.3d at 778 referencing Utah R.Civ.P. 40.

[222] *Rodriguez*, 156 P.3d at 782.

[223] *Rodriguez*, 156 P.3d at 780.

[224] *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008).

[225] *Johnson*, 744 N.W.2d at 341.

scene on foot, but police later found him several blocks away.[226] He failed several field sobriety tests and was taken to the police station where he refused a blood test at 6:25pm.[227] Thereafter he was transported to a local hospital where blood was taken from him at 7:20pm.[228] This blood draw was performed without the defendant's consent and without a warrant.[229] The test result revealed a blood alcohol level of 0.250 percent.[230] The defendant was subsequently convicted of multiple offenses, including driving while intoxicated. The defendant appealed his convictions on the grounds that his blood had been drawn without a warrant or other justification.

The Iowa implied consent law provided that a nonconsensual blood draw would be permitted when three conditions were met: 1) the officer reasonably believed that the test would show evidence of intoxication, 2) the test was performed by medical personnel in a reasonable manner, and 3) the officer reasonably believed that the integrity of the evidence would be threatened by the delay needed to obtain a warrant.[231] The sole question for the court was the third condition.

The Iowa Supreme Court rejected the notion that *Schmerber* embraced a "per se" rule.[232] Instead, the state court asserted that *Schmerber* in fact specifically rejected such a rule and concluded that "the evanescence of blood-alcohol was never special enough to create an exigent circumstance by itself."[233] Instead, a totality of the circumstances approach was adopted.

The court likened the facts in the instant case with those in *Schmerber*. Specifically, it found that the significant lapse in time caused by the defendant's actions, and the need for multiple transports was sufficient to justify the officer's reasonable belief that the time needed to obtain a warrant would result in further destruction of the evidence for which he had probable cause to seize.[234] The Court specifically rejected the notion that the availability of electronic communication with the magistrate mitigated this exigency.[235]

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[226] *Johnson*, 744 N.W.2d at 341.

[227] *Johnson*, 744 N.W.2d at 341.

[228] *Johnson*, 744 N.W.2d at 341.

[229] *Johnson*, 744 N.W.2d at 341.

[230] *Johnson*, 744 N.W.2d at 341.

[231] *Johnson*, 744 N.W.2d at 342.

[232] *Johnson*, 744 N.W.2d at 344.

[233] *Johnson*, 744 N.W.2d at 344.

[234] *Johnson*, 744 N.W.2d at 344–45.

[235] *Johnson*, 744 N.W.2d at 345.

V. Missouri v. McNeely: The Death of the "Per Se" Rule

Forty-seven years after *Schmerber*, the U.S. Supreme Court reaffirmed its essential holding in that case. In *Missouri v. McNeely*[236] the Court held that no bright line rule would be approved for warrantless blood draws, despite the uniquely and consistently evanescent nature of alcohol in a defendant's blood.

A. Facts

At approximately 2:08am on October 3, 2010, Tyler McNeely was stopped by a Missouri highway patrolman for speeding and failing to stay in his lane.[237] He failed several field sobriety tests and refused to submit to a breathalyzer test.[238] The officer then placed McNeely under arrest and transported him to a local hospital to have his blood drawn for testing.[239] The officer asked McNeely if he would consent to the blood test, warning him that a refusal would result in a suspension of his driving privileges. McNeely refused.[240] The officer then directed the lab technician to secure the blood sample.[241] The time was approximately 2:35am. At no time did the officer attempt to secure judicial authorization for the blood draw.[242]

B. Majority Opinion

Unlike *Schmerber,* McNeely did not raise Fifth, Sixth or Fourteenth Amendment issues. Instead, he argued only that his Fourth Amendment right to be free from unreasonable searches and seizures had been violated by the warrantless seizure of the evidence.[243]

The trial court granted the defendant's motion to suppress the results of the blood test; the Missouri Supreme Court affirmed.[244] The state did not proffer any testimony or facts to support the notion that exigent circumstances existed in the case. Instead, the state argued that the Court should adopt a "per se" rule that the evanescent nature of alcohol in the blood is an exigency in and of itself sufficient to obviate the need for a judicially approved warrant to secure a sample.[245]

Because lower courts were divided on this issue, the Supreme

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[236] *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

[237] *McNeely*, 133 S. Ct. at 1556.

[238] *McNeely*, 133 S. Ct. at 1556–57.

[239] *McNeely*, 133 S. Ct. at 1557.

[240] *McNeely*, 133 S. Ct. at 1557.

[241] *McNeely*, 133 S. Ct. at 1557.

[242] *McNeely*, 133 S. Ct. at 1557.

[243] *McNeely*, 133 S. Ct. at 1557.

[244] *McNeely*, 133 S. Ct. at 1557.

[245] *McNeely*, 133 S. Ct. at 1560.

Court granted certiorari to determine whether "the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations."[246]

Justice Sotomayor, writing for the majority, stated that the "importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to invade another's body in search of evidence of guilt is indisputable and great."[247] She further noted that a long-accepted exception to the search warrant requirement exists "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[248]

The Court has recognized such exigencies when a resident needs emergency assistance, when officers are in "hot pursuit" of a fleeing suspect, for the entry into a burning building to investigate the cause of the fire, and to prevent the imminent destruction of evidence.[249] However, under each of these circumstances, the Court looked to the "totality of the circumstances" to determine the extent and sufficiency of the exigency.

The Court noted that this same test was applied in the original *Schmerber* decision. In *Schmerber,* the lapse of time between the crime of drunk driving and the blood draw caused by the investigation of the accident scene and the need to transport the suspect to the hospital for treatment, amounted to approximately two hours.[250] The Court also took note of the scientific evidence establishing that blood alcohol normally dissipates at a rate of approximately 0.02 percent per hour — depending on gender, weight and individual tolerance of alcohol.[251] In the instant case, however, there was a very short period of time between the arrest (2:08am) and the blood draw (2:35am). Therefore, it would appear that the officer had sufficient time to obtain a warrant without jeopardizing the accuracy of the test results.

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[246] *McNeely,* 133 S. Ct. at 1558.

[247] *McNeely*, 133 S. Ct. at 1558, citing *Johnson v. U.S.*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 92 L. Ed. 436 (1948).

[248] *McNeely*, 133 S.Ct.at 1558 citing *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 1856, 179 L. Ed. 2d 865 (2011).

[249] *McNeely*, 133 S.Ct. at 1558 citing *Michigan v. Fisher*, 558 U.S. 45, 47–48, 130 S. Ct. 546, 175 L. Ed. 2d 410, 58 A.L.R.6th 839 (2009); *U.S. v. Santana*, 427 U.S. 38, 42–43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976); *Michigan v. Tyler*, 436 U.S. 499, 509–510, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978); and *Cupp v. Murphy*, 412 U.S. 291, 296, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

[250] *Schmerber*, 384 U.S. at 769.

[251] *McNeely*, 133 S. Ct. at 1560.

Accordingly, the Court held "in those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates they do so."[252] The Court also took note of the advances in communication that have occurred since the 1966 *Schmerber* case. The Court asserted that officers in many jurisdictions can now obtain a search warrant approval by telephone, email, or video conferencing.[253] According to the Court, these developments further support the notion that a "per se" rule is unnecessary.

It should be noted that the burden is on the state to prove (by a preponderance of the evidence) that an exception to the search warrant requirements exists. In this case, the state's argument was notoriously weak. In fact, the officer testified to facts that seriously undermined the prosecution's position that a "per se" rule was advisable. Specifically, the officer testified under oath that:

1) he had made no effort to obtain a search warrant before the blood draw;
2) he was sure that a prosecutor was on call at the time;
3) he had no reason to believe that a magistrate was unavailable to review a warrant;
4) he had obtained search warrants in the past without difficulty before taking a blood draw; and
5) he could not establish a justification for an "exigency exception" under the facts of this case, but argued that the law simply did not require him to obtain a warrant in advance of a blood draw.[254]

C. Chief Justice Dissent

Chief Justice Roberts, along with Justices Breyer and Alito, dissented in part. He argued that the known dissipation of alcohol in the bloodstream, along with disturbing statistics of drunk driving fatalities (one person died every fifty-three minutes due to drinking and driving in 2011) make a strong case for the application of the exigent circumstances exception.[255] While essentially agreeing with the majority's "totality of the circumstances" approach, Chief Justice Roberts was troubled by the fact that law enforcement officers doing their best to comply with the law had received so little guidance from

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[252] *McNeely*, 133 S. Ct. at 1561.

[253] *McNeely*, 133 S. Ct. at 1562.

[254] *McNeely*, 133 S. Ct. at 1567.

[255] *McNeely*, 133 S. Ct. at 1571 (Roberts, dissenting) citing National Highway Traffic Safety Admin. (NHTSA), Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012).

the majority.[256] The Chief Justice would instead reduce the inquiry to a single question: "was there time to secure a warrant"?[257] Accordingly, he would have remanded the case to the Missouri Supreme Court to address that specific question.

D. Justice Thomas Dissent

Justice Thomas dissented in whole. He would hold that a "per se" rule is warranted under current Fourth Amendment jurisprudence.[258] In addition, he noted that the disparities in procedures, technological capabilities, availabilities of appropriate judicial officers, transportation distances, transportation delays, hospital personnel availability, etc. among the states calls for a bright line rule.[259] The "facts-and-circumstances" approach which the majority and even the Chief Justice adopted would be, in his opinion, much too difficult to administer.[260] Justice Thomas asserted that the relentless destruction of evidence is a certainty while the ability to obtain a warrant expeditiously is not. Officers should not be required to guess how long it will take to obtain a warrant.[261]

Justice Thomas also noted that it is the prosecutor's burden to prove with relative accuracy, the BAC of the driver at the time he or she was driving the vehicle. In most states, the BAC level determines the severity of the crime and the ensuing punishment. The greater the delay between the act of driving and the drawing of the blood sample, the less accurate the test result will be.[262] In many case, experts must rely on extrapolation to "calculate back" the test results to determine the BAC at the time the defendant was driving.[263] This leads to less accurate and less reliable evidence, and to a courtroom "battle of the experts".[264] Nor, Justice Thomas argues, should the Court force the prosecution to tolerate certain destruction of some evidence simply because it will not be destroyed in its entirety.[265] Justice Thomas hypothesized a case where police witness a person throwing bundles of marijuana from a larger pile of marijuana bundles into a burning fire. Would the Court require the police to first obtain a warrant before securing the remaining bundles simply

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[256] *McNeely*, 133 S. Ct. at 1569 (Roberts, dissenting).

[257] *McNeely*, 133 S. Ct. at 1574 (Roberts, dissenting).

[258] *McNeely*, 133 S. Ct. at 1574 (Thomas, dissenting).

[259] *McNeely*, 133 S. Ct. at 1577 (Thomas, dissenting).

[260] *McNeely*, 133 S. Ct. at 1577 (Thomas, dissenting).

[261] *McNeely*, 133 S. Ct. at 1579 (Thomas, dissenting).

[262] *McNeely*, 133 S. Ct. at 1577 (Thomas, dissenting).

[263] *McNeely*, 133 S. Ct. at 1578 n. 2 (Thomas, dissenting).

[264] *McNeely*, 133 S. Ct. at 1578 n. 2 (Thomas, dissenting).

[265] *McNeely*, 133 S. Ct. at 1576 (Thomas, dissenting).

because it was feasible to do so before all of the bundles were destroyed?[266] While not well analogized to an invasion of the body, his point was well made.

VI. Evidence-based Jurisprudence?

A. The Assumptions

The *McNeely* majority grounded their ruling in part on the alleged advances in technology that facilitate warrant acquisition.

> The Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone. See 91 Stat. 319. As amended, the law now allows a federal magistrate judge to consider 'information communicated by telephone or other reliable electronic means'. Fed. Rule crim. Proc. 4.1. States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.[267]

Chief Justice Roberts, in his dissent also noted that "at least 30 States provide for electronic warrant applications."[268] (The Utah Supreme Court also relied on the notion that electronic advances authorized under state procedural rules "dramatically pared back the physical obstacles to warrant acquisition.")[269]

B. Challenging the Assumptions

But this is a simplistic approach for at least two reasons: 1) the fact that a jurisdiction "allows" electronic warrant applications does not necessarily mean that such processes are readily available, and 2) even electronic processes take time.

Justice Thomas asserted essentially that any delay in the securing of such evanescent evidence was unacceptable. The existence of electronic communication to expedite the warrant acquisition process was therefore irrelevant to the essential inquiry.[270] The Minnesota Supreme Court's reasoning tracked that of Justice Thomas. Initially finding that the evanescent nature of alcohol in the blood, in and of itself, was sufficient evidence of exigency, the Court rejected the argument that the advent of telephonic warrants supported the warrant requirement.

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[266] *McNeely*, 133 S. Ct. at 1576 (Thomas, dissenting).

[267] *McNeely*, 133 S. Ct. at 1562.

[268] *McNeely*, 133 S. Ct. at 1572 (Roberts, dissenting).

[269] *Rodriguez*, 156 P.3d at 778.

[270] *McNeely*, 133 S. Ct. at 1578 (Thomas, dissenting).

> But the officer facing the need for a telephonic warrant cannot be expected to know how much delay will be caused by following procedures necessary to obtain such a warrant. And during the time taken to obtain a telephonic warrant, it is undisputed that the defendant's body is rapidly metabolizing and dissipating the alcohol in the defendant's blood. We do not believe that the possibility of obtaining a telephonic warrant is sufficient to overcome the single-factor exigent circumstances of the rapid dissipation of the alcohol in the defendant's blood in this case.[271]

The Iowa Supreme Court found that:

> While a telephone warrant might be obtained more quickly than a traditional warrant, we do not think it would have significantly reduced the exigency in this case. Obtaining a warrant by telephone is fairly complicated; an officer cannot simply call up a magistrate and make a general request for a warrant. The officer must prepare a "duplicate" warrant and read the duplicate warrant, verbatim, to the magistrate. The magistrate then must enter, verbatim, what has been read to him on a form to be considered as the original warrant. (citation omitted) The oral application must set forth facts and information tending to establish the grounds for the issuance of the warrant and describe with reasonable specificity the person whose driving has been involved and from whom the specimen is to be withdrawn. (citation omitted) Gathering of this information, of course, requires considerable time. If a voice recording device is available to the magistrate, the magistrate may record the call, but otherwise "shall cause a stenographic or longhand memorandum to be made of the oral testimony of the person applying for the warrant." (citation omitted) If the magistrate is satisfied that the grounds for the issuance of the warrant have been established, the magistrate shall order the issuance of the warrant by directing the officer applying for it to sign the magistrate's name to the "duplicate warrant."[272]

So even in jurisdictions that allow and use electronic technology to obtain warrants, a significant amount of time is still expended to secure judicial approval.

Pennsylvania provides initial definitions of "advanced communication technology" and "advanced communication technology site" as follows:

> *ADVANCED COMMUNICATION TECHNOLOGY is any communication equipment that is used as a link between parties in physically separate locations, and includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed-circuit television; telephone and facsimile equipment; and electronic mail.*
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> *ADVANCED COMMUNICATION TECHNOLOGY SITE is any approved location within Pennsylvania designated by the president judge, or the president judge's designee, with advanced communication technology*

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[271] *Shriner*, 751 N.W.2d at 549.

[272] *Johnson,* 744 N.W.2d at 345.

equipment that is available for parties in a criminal matter to communicate with others in physically separate locations as provided in these rules.[273]

Pennsylvania permits county District Attorneys, at their discretion, to impose a rule requiring their approval of a warrant application before taking that warrant to a magisterial district judge or a judge of the Court of Common Pleas.[274]

The Pennsylvania rules further indicate that:

(A) In the discretion of the issuing authority, advanced communication technology may be used to submit a search warrant application and affidavit(s) and to issue a search warrant.

(B) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

(C) Immediately prior to submitting a search warrant application and affidavit to an issuing authority using advanced communication technology, the affiant must personally communicate with the issuing authority by any device which, at a minimum, allows for simultaneous audio-visual communication. During the communication, the issuing authority shall verify the identity of the affiant, and orally administer an oath to the affiant.[275]

The supporting comments clarifying the rule are as follows:

Paragraph (A) recognizes that an issuing authority either may issue a search warrant using advanced communication technology or order that the law enforcement officer appear in person to apply for a search warrant.

Paragraph (B) does not preclude oral testimony before the issuing authority, but it requires that such testimony be reduced to an affidavit prior to issuance of a warrant. All affidavits in support of an application for a search warrant must be sworn to before the issuing authority prior to the issuance of the warrant. "Sworn" includes "affirmed." See Rule 103. The language "sworn to before the issuing authority" contemplates, when advanced communication technology is used, that the affiant would not be in the physical presence of the issuing authority.

An affiant seeking the issuance of a search warrant, when permitted by the issuing authority, may use advanced communication technology as defined in Rule 103.

When advanced communication technology is used, the issuing authority is required by this rule to (1) determine that the evidence contained

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[273]234 Pa. Code Rule 103.

[274]"The district attorney of any county may require that search warrant applications filed in the county have the approval of an attorney for the Commonwealth prior to filing." 234 Pa. Code Rule 202.

[275]234 Pa. Code Rule 203.

> in the affidavit(s) establishes probable cause, and (2) verify the identity of the affiant. The "visual" requirement in paragraph (C) must allow, at a minimum, the issuing authority to see the affiant at the time the oath is administered and the information received.[276]

As mentioned above, the Pennsylvania rules give county District Attorneys the authority to require officers to obtain their approval before submitting a search warrant application to a judge. This requirement can add significant time to the warrant acquisition process. Further, the state rules provide judges with the option of requiring the officer applying for a warrant to appear in person or by electronic device. Even with an electronic device, simultaneous audio and visual contact between the officer and the issuing judge is required. In either case, the judge must have visual contact with the officer, verify the officer's identity, and administer the necessary oath. The officer must then be prepared to recite to the judge an affidavit supporting probable cause for the search and the affidavit must then be reduced to writing.

But does the existence of procedural rules permitting electronic technology to secure warrant approval mean that the technology is in place and readily available? In an attempt to discern the real-life ease or difficulty of obtaining a search warrant to obtain a blood sample to test for the presence of alcohol in the blood of a suspected drunk driver, a short survey was conducted through the Pennsylvania Association of Chiefs of Police in 2014. Although the response rate was low (n varied from twenty-seven to thirty-eight depending on the questions answered), more than half of Pennsylvania's sixty-seven counties were represented (Pennsylvania State Police patrol multiple counties). Jurisdictions represented ranged from fewer than 10 square miles to over 100 square miles.

The officers were asked how long it generally took to obtain a search warrant during the following times: weekdays, weeknights, weekend days and weekend nights. Not surprisingly, officers were able to obtain a search warrant more quickly during the traditional work week than during weekends. Approximately one-third of the officers reporting indicated that it took more than three hours to obtain a search warrant on weekends, when one would expect more drunk driving stops to occur. Two officers reported that it sometimes took two to three days to obtain a warrant.

When asked about the factors that affected the officers' abilities to obtain a warrant in a timely manner the following responses were noted:

- Only four percent indicated that there was an insufficient number of magisterial district justices in the jurisdiction;
- Approximately fourteen percent reported that the magisterial

[276]234 Pa. Code Rule 203 Comments.

district justices offices could be too far away from the scene of the stop to quickly travel to the office;
- Approximately seven percent indicated that the distance the hospitals were from possible crime scenes adversely affected their ability to obtain a warrant in a timely manner;
- Fifty percent reported there was no ability to obtain a warrant remotely using electronic technologies such as phone, fax, etc.;
- Approximately sixty-four percent indicated that they had to create the search warrant from scratch — there were no preprinted forms to adapt;
- Approximately sixty-four percent indicated that magisterial district justices were not available 24/7, thus hampering their ability to obtain a warrant quickly.

Included in the survey was an open-ended question about additional factors affecting the officers' ability to obtain a search warrant within a reasonable period of time. Respondents volunteered the following: limited number of officers available; crash investigation time; time for field sobriety tests; witness and suspect interviews; traffic control issues; other calls coming in; prisoner transport and monitoring; search warrant preparation; travel time to magisterial district justice office; and travel time to the hospital.

It was apparent from the survey that even though Pennsylvania has rules of procedure allowing for electronic acquisition of warrants, the technology is not in place in many parts of the state. Nor are magisterial district justices necessarily available at times when most drunk driving offenses are likely to occur. In fact, magisterial district justices are considered part-time employees, and so have no official obligation to be constantly available to police officers seeking warrant approvals. Most magisterial district justice offices are open from 8:30am to 4:30pm and sometimes one evening per week.[277] District justices are much less likely to be available at night or on weekends when drunk driving arrests more often occur.[278]

It would be difficult to extrapolate this small Pennsylvania survey to the rest of the country. But the High Court assumes that technology for electronic approval of search warrants is in place, readily available and in widespread use simply because a state has rules of procedure permitting such technology. Those assumptions are unsupported by the evidence, at least in Pennsylvania.

VII. The Most Recent Cases: A Reaffirmation of *McNeely and* Beyond

Very recently, the U.S. Supreme Court had the opportunity to

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[277] *See* for example https://www.alleghenycourts.us/district_judges/offices.aspx.

[278] U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Data, 2013 Data.*

review its *McNeely* reasoning. To address the constitutionality of both warrantless breathalyzer tests and warrantless blood tests in driving under the influence arrests. The High Court granted certiorari in three state cases: *Bernard v. Minnesota, Beylund v. North Dakota* and *Birchfield v. North Dakota*. The cases were consolidated under the case title *Birchfield v. North Dakota*.[279]

A. *Bernard v. Minnesota* - Breathalyzer Test Incident to Arrest

Police responded to a report of an incident at a local boat launch. Upon arrival they noted that three obviously intoxicated men were trying to move a truck that had become stuck in the mud as they were trying to pull a boat out of the water.[280] Witnesses pointed out the driver, who was clad only in his underwear.[281] Bernard refused field sobriety tests.[282] He was arrested and transported to the police station where he was informed of the state's implied consent law.[283] Most state implied consent laws impose a civil penalty for refusal to submit to testing upon arrest. The civil penalty is commonly a one-year license suspension. Minnesota's law is notable in that it imposes criminal penalties for refusal to submit to testing. According to state law, those penalties can range from ninety days to seven years in prison, and fines ranging from $1,000 to $14,000, the higher penalties being imposed for repeat offenders.[284] Bernard had four prior drunk driving convictions, so his incentive to refuse was high.[285]

The Minnesota District Court dismissed the charges on the grounds that warrantless breath tests violated the Fourth Amendment. The Minnesota Court of Appeals reversed, and the Minnesota Supreme Court affirmed.[286] The Minnesota Supreme Court concluded that breath tests were permitted as incident to lawful custodial arrests.[287]

The *McNeely* Court did not address the issue of breath tests, nor did it speak to searches permissible incident to lawful custodial arrests. However, because lower courts had demonstrated confusion about searches permissible incident to arrest and those requiring judicial approval, the Court felt compelled to address this issue. By

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[279] Birchfield v. North Dakota, 579 U.S. ___ (2016).

[280] *Birchfield*, 579 U.S. ___ slip op. at 10.

[281] *Birchfield*, 579 U.S. ___ slip op. at 10.

[282] *Birchfield*, 579 U.S. ___ slip op. at 10.

[283] *Birchfield*, 579 U.S. ___ slip op. at 10.

[284] Minn. Stat. § 169A.51 et. seq. (2014).

[285] *Birchfield*, 579 U.S. ___ slip op. at 11.

[286] *Birchfield*, 579 U.S. ___ slip op. at 11.

[287] *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015).

doing so, the Court clarified Fourth Amendment principles with regard to searches incident to arrest, and drew cognizable distinctions between breath tests and blood tests.

The permissible scope of a search incident to a lawful custodial arrest was promulgated initially in the 1969 case of *Chimel v. California*.[288] Mr. Chimel was arrested in his home for the burglary of a coin shop.[289] Although the officers had an arrest warrant, they did not have a search warrant.[290] As part of the arrest, the officers searched the defendant's home and retrieved coins stolen from the coin shop.[291] Mr. Chimel was convicted, in part, on the admission of that evidence at his trial. He appealed his conviction to the U.S. Supreme Court.

The Court defined the scope of the search that officers affecting an arrest may conduct. An arrestee loses Fourth Amendment protections in his person and in the area within his reach or control simply by virtue of the lawful custodial arrest.[292] For this area, officers do not need probable cause to search. To initiate this search, officers do not need to have an object, nor even a class of objects in mind. The rationale for permitting such a search was to ensure officer safety and to prevent the arrestee from destroying evidence.[293] Because the officers had conducted a search well beyond the defendant's "reach or control", the Court overturned the conviction.

Four years later, the Court held that officers conducting a search incident to a lawful custodial arrest are not required to limit their search to objects related to the charges for which the defendant is being arrested. Officers are permitted to search the arrestee and the area within his reach or control for anything.[294]

In 2014, the High Court reviewed the question of whether officers may retrieve information from an arrestee's cellphone without a warrant as a search incident to a lawful custodial arrest.[295] Answering in the negative, the High Court iterated its balancing of two competing interests: "by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy, and on the other, the

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[288] *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

[289] *Chimel,* 395 U.S. at 753.

[290] *Chimel,* 395 U.S. at 753–54.

[291] *Chimel,* 395 U.S. at 754.

[292] *Chimel,* 395 U.S. at 763.

[293] *Chimel,* 395 U.S. at 763.

[294] *U.S. v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

[295] *Riley v. California*, 134 S. Ct. 2473, 189 L. Ed. 2d 430, 42 Media L. Rep. (BNA) 1925 (2014).

degree to which it is needed for the promotion of legitimate governmental interests."[296]

Applying this balancing test to the instant case, the High Court noted that breath tests are not invasive and are generally "no more demanding than blowing up a party balloon."[297] The Court also noted that exhalation of air is a natural and essential process. Therefore, citizens have no privacy interests in expelled air. In addition, the Court had already found that fingernail scrapings[298] and DNA swabs[299] are minimal intrusions easily counterbalanced by lawful governmental interests.

Interestingly, the Court made special note of the fact that breath tests do not result in the seizure of evidence that is preservable by the government.[300] Authorities cannot use one's breath, under current scientific acumen, to assess other biological traits. Thus, the Court reasoned, the invasion of an arrestee's privacy interests is minimal. Finally, the Court reasoned that breath tests are not a particularly embarrassing or humiliating experience for arrestees.[301]

For all of those reasons, the Court held that the administration of a breathalyzer test incident to a lawful custodial arrest was permissible under the Fourth Amendment. Law enforcement officers may now administer such tests in every case where they have probable cause to believe the individual was driving under the influence of alcohol.[302] Accordingly, the officers in this case were not required to obtain a warrant to administer a breathalyzer test, and the defendant had no right to refuse it.

B. *Beylund v. North Dakota* — Criminal Penalties for Refusal

A police officer noted Beylund having difficulty trying to steer his car from the roadway into a driveway, nearly hitting a nearby stop sign.[303] The officer noted an empty wine glass in the car and an odor

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[296] *Riley*, 134 S.Ct. at 2484 citing *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

[297] *Birchfield,* 579 U.S. ___ slip op. at 20.

[298] *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

[299] *Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

[300] *Birchfield,* 579 U.S. __ slip op. at 21.

[301] *Birchfield,* 579 U.S. __ slip op. at 22.

[302] Justices Sotomayor and Ginsburg dissented from this part of the case. They would hold that officers must obtain a search warrant to administer a breathalyzer test to a suspected drunk driver, absent exigent circumstances. *Birchfield*, 579. U.S. ___ slip op at 39.

[303] *Birchfield*, 579 U.S. ___ slip op. at 11.

of alcohol on the defendant's breath.[304] The defendant staggered as he attempted to exit the vehicle.[305] The defendant was arrested and transported to a hospital. He was informed that refusal to submit to a blood test would result in criminal penalties under North Dakota law.[306] The defendant consented to the test. The results indicated that his blood alcohol level was 0.250 percent.[307] The test results triggered a two year license suspension which the defendant appealed.[308]

The defendant argued that his consent was coerced and could not be voluntary because refusal itself was a crime under state law.[309] The North Dakota District Court rejected this argument and the North Dakota Supreme Court affirmed. The state high court reasoned that the implied consent advisory simply truthfully stated the penalties for refusal.[310] The U.S. Supreme Court granted certiorari to consider the constitutionality of criminal penalties for refusal by drunk driving arrestees to submit to blood tests.

C. *Birchfield v. North Dakota* — Criminal Penalties for Refusal

A North Dakota state trooper observed the defendant attempting to extract his car from a ditch into which he had driven off the highway.[311] The trooper noted that Birchfield's eyes were bloodshot and watery and his speech was slurred.[312] In addition, the defendant emitted a strong odor of alcohol and he was unsteady on his feet.[313] Birchfield failed the field sobriety tests administered by the trooper.[314] The trooper informed the defendant of the state's implied consent law; the defendant then agreed to a roadside (preliminary) breathalyzer test used to determine whether more reliable tests should be administered. This roadside test revealed a blood alcohol level of 0.254 percent.[315]

The defendant was then arrested and advised of the penalties

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[304] *Birchfield*, 579 U.S. ___ slip op. at 11.

[305] *Birchfield*, 579 U.S. ___ slip op. at 11.

[306] *Birchfield*, 579 U.S. ___ slip op. at 11–12.

[307] *Birchfield*, 579 U.S. ___ slip op. at 12.

[308] *Birchfield*, 579 U.S. ___ slip op. at 12.

[309] *Birchfield*, 579 U.S. ___ slip op. at 12.

[310] *Beylund v. Levi*, 2015 ND 18, 859 N.W.2d 403 (N.D. 2015).

[311] *Birchfield*, 579 U.S. ___ slip op. at 8.

[312] *Birchfield*, 579 U.S. ___ slip op. at 8.

[313] *Birchfield*, 579 U.S. ___ slip op. at 8.

[314] *Birchfield*, 579 U.S. ___ slip op. at 8.

[315] *Birchfield*, 579 U.S. ___ slip op. at 8–9.

under state law for refusing further testing.[316] North Dakota law imposes criminal penalties for refusing such tests ranging from fines of $500 to $2,000 and imprisonment of one year and a day for repeat offenders.[317] The defendant had recently plead guilty to a prior drunk driving offense, and refused to consent to a blood test.[318] He entered a conditional plea to a violation of the state's refusal statute. He argued that imposing criminal penalties for refusing blood testing violated his Fourth Amendment rights.[319] The North Dakota Supreme Court denied his appeal[320] and the U.S. Supreme Court granted certiorari.

The U.S. Supreme Court reiterated its holding in *Missouri McNeely*. It reaffirmed the principle that for officers to forego the warrant requirement for blood draws in drunk driving cases, "exigent circumstances" must be proven.[321] The evanescent nature of alcohol in the bloodstream is insufficient evidence, standing alone, of an exigency.[322] Officers must prove that they did not have, under the circumstances presented to them, sufficient opportunity to obtain a warrant in a timely manner.[323]

The High Court drew a sharp distinction between testing of a driver's breath and testing of a driver's blood. Justice Alito, writing for a strong majority, opined that blood tests are not only a physical intrusion into the body but result in the extraction of biological evidence.[324] He noted that the evidence can then be retained by authorities for use in a variety of ways unrelated to the prosecution of a drunk driving charge.[325] The Court concluded that while breathalyzer tests can be administered incident to a lawful custodial arrest, the intrusive nature of blood tests must be supported by a search warrant or by provable exigencies.[326]

D. State criminal penalties for refusals

The Court acknowledged that the civil penalties mandated in the implied consent laws of many states are simply insufficient to persuade the most dangerous drunk driving offenders to consent to

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[316] *Birchfield*, 579 U.S. ___ slip op. at 9.

[317] N.D. Stat. §§ 39-08-01 et seq.

[318] *Birchfield*, 579 U.S. ___ slip op. at 9.

[319] *Birchfield*, 579 U.S. ___ slip op. at 9.

[320] *State v. Birchfield*, 2015 ND 6, 858 N.W.2d 302 (N.D. 2015).

[321] *Birchfield*, 579 U.S. ___ slip op. at 14.

[322] *Birchfield*, 579 U.S. ___ slip op. at 15.

[323] *Birchfield*, 579 U.S. ___ slip op. at 15.

[324] *Birchfield*, 579 U.S. ___ slip op. at 21–22.

[325] *Birchfield,* 579 U.S. ___ slip op. at 22.

[326] *Birchfield*, 579 U.S. ___ slip op. at 34.

proper testing.[327] The passage by state legislatures of criminal penalties for such refusal is understandable. Indeed, criminal penalties for refusals were recommended by the National Highway Traffic Safety Administration in 2013.[328]

The High Court acknowledged its oblique approval in *McNeely* of civil penalties for motorists who refuse to submit to reasonable testing upon request by a police officer.[329] But criminal penalties for such refusal are a different matter. Generally, a lawful consent must be a voluntary one. Compulsion is expressly prohibited by the Constitution.[330] According to the Court, criminal penalties for refusal are a step too far and amount to unlawful coercion. The Court stated, "there must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on the public roads."[331] Accordingly, Beylund's case was remanded to the state trial court for a determination of whether his consent to the blood test was voluntary under the long established "totality of the circumstances test."[332] Birchfield's plea was vacated and the case remanded.[333]

VIII. Going Forward

A. Did the High Court Err by Rejecting the "Per Se" Rule?

The Utah Supreme Court stated "the mere possibility of delay does not give rise to exigency."[334] But does the mere possibility of speed demand the securing of a warrant?

A rule of procedure permitting a law enforcement officer to obtain electronic approval of a search warrant does not necessarily reduce the time and effort necessary to obtain that approval. The mere existence of the rule does not mean that the technology is in place. If the technology is in place, there is no assurance that it is working properly. Even if the technology is in place, and is working properly, it does not mean that a judge will be available to hear the warrant application. There are too many variables, none of which a police officer can control or effectively measure. A diligent police officer simply does not have the means to accurately predict how long it will take to secure a warrant in any given set of circumstances.

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[327] *Birchfield*, 579 U.S. ___ slip op. at 7.

[328] NHTSA. A. Goodwin et.al. Countermeasure that Work: A highway Safety Countermeasures Guide for State Highway Safety Offices, p. 1–7 (No. 811727, 7th ed. (2013).

[329] *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

[330] U.S. Const. Amend V.

[331] *Birchfield*, 579 U.S. ___slip op. at 36.

[332] *Birchfield*, 579 U.S. ___slip op. at 38.

[333] *Birchfield*, 579 U.S. ___slip op. at 38.

[334] *Rodriguez,* 156 P.3d at 779.

The explanation of the Iowa Supreme Court bears repeating:

> Obtaining a warrant by telephone is fairly complicated; an officer cannot simply call up a magistrate and make a general request for a warrant. The officer must prepare a 'duplicate' warrant and read the duplicate warrant, verbatim to the magistrate. The magistrate then must enter, verbatim, what has been read to him on a form to be considered as the original warrant. The oral application must set forth facts and information with reasonable specificity the person or persons whose driving has been involved and from whom the specimen is to be withdrawn. Gathering of this information of course, requires considerable time. If a voice recording device is available to the magistrate, the magistrate may record on the call, but otherwise 'shall cause a stenographic or longhand memorandum to be made of the oral history of the person applying for the warrant'. If the magistrate is satisfied that the grounds for the issuance of the warrant have been established, the magistrate shall order the issuance of the warrant by directing the officer applying for it to sign the magistrate's name to the "duplicate" warrant.[335]

It would seem that in some instances, a police officer could obtain a warrant more expeditiously by completing the warrant form and taking it physically to the nearest magistrate. So the existence of electronic technology is not necessarily any assurance whatsoever that the search warrant approval process is any less complicated or time-consuming.

Justice Roberts reduced the question to simply "did the officer have time to secure a warrant"?[336] But that can be too difficult to answer. Many times the officer will not know whether he has sufficient time to secure a warrant until he has expended some significant amount of time to do so. The difficulties, many of which cannot be foreseen, often arise during the process. As the officer is dealing with those problems and issues the evidence is disappearing. As Justice Thomas stated, the ability to obtain a warrant quickly is uncertain; the destruction of the evidence is certain.[337] It is unrealistic for the High Court to place this obstacle in the path of police officers who are on the front lines protecting citizens from those who would drive while impaired. It is these officers who are so often first on accident scenes, first to see the sometimes devastating injuries that drunk drivers can cause, and first to inform families that they have so senselessly lost a loved one.

It could be argued that an inner cheek swab for DNA testing is an invasive procedure. But that has not been seriously questioned

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[335] *Johnson*, 744 N.W.2d at 345.

[336] *McNeely*, 133 S. Ct. at 1574 (Roberts, dissenting).

[337] *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

when conducted by an officer incident to a lawful custodial arrest.[338] Interestingly, this evidence is of a kind that can be preserved by authorities for use in other ways — one of the concerns that led the majority in *Birchfield* to reject warrantless blood draws. In addition the U.S. Supreme Court has held that arrestees may be strip-searched before entering prison, even when the offense giving rise to the arrest is a minor, non-violent crime, and even when there is no reason to believe that weapons, contraband, or other evidence of a crime will be found.[339] Many would consider strip searches a greater invasion of privacy than a blood draw.

The "slippery slope" argument is that allowing this invasive procedure without a warrant will inevitably lead to even more invasive and warrantless procedures. That fear is misplaced. A blood draw may be an invasive procedure, but it is only marginally so. Newborns, arguably the most vulnerable of our species, undergo the procedure in their first hours of life. Blood tests have become such a routine procedure that many citizens undergo blood draws yearly during their adult years. It seems incongruous to worry about the "insult" of a blood draw to an impaired driver when that impaired driver may cause serious injury, permanent disability, or even death to an innocent traveler on the highway. The U.S. Supreme Court should reconsider its rulings in *McNeely* and *Birchfield.*

B. Did the High Court Err by Rejecting Criminal Penalties for Refusal?

The *McNeely* majority asserted that implied consent laws provide drivers with strong incentives under civil law to submit to testing.[340] But these incentives are really not very strong. If a driver knows he is impaired, he is unlikely to risk the more severe criminal penalty resulting from a conviction that the blood tests will assure. Under those circumstances, a simple license suspension is the more attractive option.

Criminal penalties for refusal of such tests have been adopted in Great Britain, Canada,[341] Austria, and the Northern Territory of Australia.[342] Often times, those penalties are as severe as those for drunk driving. In those situations, there is less incentive for an impaired driver to refuse the test. Given the extraordinary potential for harm posed by drunk drivers, the punitive nature of such laws seems trivial by comparison. The High Court's concern that such

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[338] *Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

[339] *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012).

[340] *McNeely*, 133 S. Ct. at 1566.

[341] Criminal Code (R.S.C. 1985, c. C-46) Section 254.

[342] Voas, *supra* note 18.

biological evidence could be used by law enforcement authorities for purposes unrelated to the crime could be addressed by laws requiring disposal of the evidence upon exhaustion of appeals.

These laws may well be challenged by defendants who will assert that their due process or perhaps Fourth Amendment rights have been violated by the imposition of a criminal penalty for asserting their right to privacy.[343] But that's no reason to hesitate. Defendants will always find a way to challenge new laws. But these fortified implied consent laws are supported by the fact that some penalties, albeit civil, are already in place, and by the fact that other democratic countries have successfully deployed them in their efforts to stem drunk driving.[344]

C. What's a State to Do?

Because reconsideration of these issues is unlikely, states should consider alternative means to address the serious problems posed by drunk drivers. State courts and state and local law enforcement officers are closer to the problem of drunk driving. Most drunk driving crimes are prosecuted in state courts, not federal courts. It is interesting to note that neither *Schmerber*, nor *McNeely*, nor the *Birchfield* cases involved a vehicular fatality. Even in *Schmerber*, the injuries appeared to be relatively minor. In none of the cases was the U.S. Supreme Court dealing with tragedy. But faced with seriously injured or permanently disabled victims and those suffering from the senseless death of a loved one, it is understandable that state courts feel a greater imperative to address the problem.

New technologies permit diabetics to test blood sugar levels with only a drop of blood. Even more promising is the potential ability to perform multiple laboratory tests using only one drop of blood.[345] Perhaps such technologies could be used to test blood alcohol levels. Arrestees themselves could conduct the procedure to provide a single droplet of blood. This might still be considered to be an "invasive procedure" but it is significantly less so than a formal blood draw.

Further advances permit a diabetic to monitor blood glucose levels

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[343] *See U.S. v. Reid*, 929 F.2d 990 (4th Cir. 1991) where the Court rejected the defendant's claim that the breathalyzer results should be inadmissible because her Fourth and Fifth Amendment rights were violated. The Court held that the breathalyzer results were admissible as a "search incident to a lawful custodial arrest", and under the exigent circumstances exception to the search warrant requirement.

[344] *See* D. Ball, *The Breathalyzer and the Canadian Bill of Rights*, 40 SASK. L. REV. 147 (1976–77).

[345] C.Roper, *This Woman Invented a Way to Run 30 Lab Tests on Only One Drop of Blood*, Wired, February 18, 2014 http://www.wired.com/2014/02/elizabeth-holmes-theranos/.

throughout the day by means of a "continuous glucose monitor."[346] This device uses a skin patch to detect glucose. Currently, the monitor must be supplemented by daily finger pricks to calibrate the patch. But it's only a matter of time before blood glucose monitoring will be accomplished non-invasively. Can blood alcohol monitoring by means of a skin patch be far behind? States should track the progress of these new scientific advancements and be ready to incorporate them into their drunk driving investigations when practicable. Defendants will challenge any warrantless search, even pinpricks to extract blood. But it will be interesting to see how the High Court balances this remarkably benign procedure against the extraordinary harm that drunk drivers can and do cause.

IX. Conclusion

The U.S. Supreme Court should accord deference to state courts whenever reasonable. Eleven states considered a "per se" rule a necessary tool to address the deadly problems caused by drunk drivers. It is those courts and those law enforcement officers, witnesses, and victims who appear before them and who see first-hand the devastation an impaired driver can cause.

Defendants subjected to warrantless blood draws are not without legal recourse. Probable cause is probable cause. While searches supported by judicial approval are preferred, the same recourse is available to the defendant should that proof be found lacking. Warrantless blood draws can be challenged on the basis of a lack of probable cause whether a warrant was secured or not. A trial judge will exclude from evidence blood test results that were secured as a result of a blood draw unsupported by sufficient proof.

It should not be considered a serious invasion of Fourth Amendment privacy interests to require a driver who exhibits signs of impairment sufficient to establish probable cause to believe there are drugs or alcohol in his blood to submit to a warrantless blood draw. This is strongly supported by the fact that such minor medical procedures, when performed by qualified medical personnel, are so commonplace and considered so safe that they are performed on infants not even an hour old.

In addition, courts should facilitate the prosecution's efforts to obtain the best, most reliable, evidence of the crime, especially in circumstances where a driver's impairment can lead to loss of life. That evidence, secured as closely in time to the moment the arrestee was driving, can determine the truth of the matter and in some instances may exonerate the arrestee.

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[346]U.S. Department of Health and Human Services, National Institute of Diabetes and Digestive and Kidney Diseases, *Continuous Glucose Monitoring*, http://www.niddk.nih.gov/health-information/health-topics/Diabetes/continuous-glucose-monitoring/Documents/Continuous_Glucose_Monitoring_508.pdf.

State courts should consider using the new medical technologies on the horizon to determine blood alcohol content. In the end, the accurate determination of impairment is in everyone's best interests. The person injured or killed by a drunk driver may very well be the driver himself.