Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Search and Seizure

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Missouri v. McNeely, ___ U.S. ___ (2013)

Tyler McNeely was stopped by a Missouri police officer after the officer observed him driving erratically. The officer gave McNeely a series of field sobriety tests, which McNeely failed. McNeely was promptly driven to a local hospital, where he did not consent when asked to allow a lab technician to obtain a blood sample. A blood test was nevertheless performed without McNeely's consent and without a warrant. The test revealed that McNeely's blood alcohol concentration (BAC) was twice the legal limit. At trial, McNeely successfully moved to have the results of his blood test suppressed on the grounds that the failure of the police to obtain a warrant violated the Fourth Amendment as incorporated by the due process clause of the Fourteenth Amendment. Several appellate courts in Missouri sustained the decision to suppress. Missouri appealed to the Supreme Court of the United States.

The Supreme Court by an 8–1 vote rejected Missouri's claim that warrants were never needed when police gave blood tests to suspected drunk drivers. Justice Sotomayor and three other justices insisted that courts apply a totality of the circumstances test when determining whether a warrant was necessary. Chief Justice Roberts and two other justices maintained that a warrant was required only when the warrant could be obtained while the suspect was being transported to the site of the blood test. Justice Kennedy thought a bright line test might be appropriate but was not yet prepared to determine what that test might be. Justice Thomas, in dissent, insisted that no warrant was necessary. All nine justices recognized an "exigent circumstances" exception to the Fourth Amendment warrant requirement. What is that exception? How did the justices apply that exception to the facts in McNeely*? To what extent were the differences between the justices largely theoretical given the low likelihood that (a) a judge will deny a request for a blood test in situations similar to that presented by McNeely and (b) a court will toss evidence in circumstances where the police officer in good faith was unable to obtain a warrant before the blood test?*

JUSTICE SOTOMAYOR announced the judgment of the Court and delivered the opinion of the Court in part and an opinion in which JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE KAGAN join.

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We first considered the Fourth Amendment restrictions on such searches in *Schmerber v. California* (1966) where, as in this case, a blood sample was drawn from a defendant suspected of driving while under the influence of alcohol. Noting that "[s]earch warrants are ordinarily required for searches of dwellings," we reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned," even when the search was conducted following a lawful arrest.

[T]he warrant requirement is subject to exceptions. "One well-recognized exception," and the one at issue in this case, "applies 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." A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in "hot pursuit" of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause. As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant."

Our decision in *Schmerber* applied th[e] totality of the circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because the officer "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.'"

In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."

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[A]s a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed. . . . Regardless of the exact elimination rate, it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in *Schmerber*, as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its amici. 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 that they do so. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept the "considerable overgeneralization" that a per se rule would reflect.

The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a "'now or never'" situation. In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. This reality undermines the force of the State's contention, endorsed by the dissent, that we should recognize a categorical exception to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes." Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

The State's proposed per se rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. 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. . . .

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.

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Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. But adopting the State's per se approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement."

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[M]aking exigency completely dependent on the window of time between an arrest and a blood test produces odd consequences. Under THE CHIEF JUSTICE's rule, if a police officer serendipitously stops a suspect near an emergency room, the officer may conduct a nonconsensual warrantless blood draw even if all agree that a warrant could be obtained with very little delay under the circumstances (perhaps with far less delay than an average ride to the hospital in the jurisdiction). The rule would also distort law enforcement incentives. As with the State's per se rule, THE CHIEF JUSTICE's rule might discourage efforts to expedite the warrant process because it categorically authorizes warrantless blood draws so long as it takes more time to secure a warrant than to obtain medical assistance. . . .

. . . . While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments.

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[T]he general importance of the government's interest in [preventing drunk driving] does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. . . . As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. . . . It is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether. . . . We are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them. And in fact, field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence.

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Because this case was argued on the broad proposition that drunk-driving cases present a per se exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a

blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed.

JUSTICE KENNEDY, concurring in part.

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. . . . The repeated insistence that every case be determined by its own circumstances is correct, of course, as a general proposition; yet it ought not to be interpreted to indicate this question is not susceptible of rules and guidelines that can give important, practical instruction to arresting officers, instruction that in any number of instances would allow a warrantless blood test in order to preserve the critical evidence.

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CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER and JUSTICE ALITO join, concurring in part and dissenting in part.

A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test. I have no quarrel with the Court's "totality of the circumstances" approach as a general matter; that is what our cases require. But the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us.

In my view, the proper rule is straightforward. Our cases establish that there is an exigent circumstances exception to the warrant requirement. That exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant. The natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant.

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As an overarching principle, we have held that if there is a "compelling need for official action and no time to secure a warrant," the warrant requirement may be excused. The question here is whether and how this principle applies in the typical case of a police officer stopping a driver on suspicion of drunk driving.

The reasonable belief that critical evidence is being destroyed gives rise to a compelling need for blood draws in cases like this one. Here, in fact, there is not simply a belief that any alcohol in the bloodstream will be destroyed; it is a biological certainty. Alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour. Evidence is literally disappearing by the minute. That certainty makes this case an even stronger one than usual for application of the exigent circumstances exception.

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For exigent circumstances to justify a warrantless search, however, there must also be "no time to secure a warrant." In this respect, obtaining a blood sample from a suspected drunk driver differs from other exigent circumstances cases.

Importantly, there is typically delay between the moment a drunk driver is stopped and the time his blood can be drawn. Drunk drivers often end up in an emergency room, but they are not usually pulled over in front of one. In most exigent circumstances situations, police are just outside the door to a home. Inside, evidence is about to be destroyed, a person is about to be injured, or a fire has broken out. Police can enter promptly and must do so to respond effectively to the emergency. But when police pull a person over on suspicion of drinking and driving, they cannot test his blood right away. There is a time-consuming obstacle to their search, in the form of a trip to the hospital and perhaps a wait to see a

medical professional. In this case, for example, approximately 25 minutes elapsed between the time the police stopped McNeely and the time his blood was drawn.

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There might, therefore, be time to obtain a warrant in many cases. As the Court explains, police can often request warrants rather quickly these days. At least 30 States provide for electronic warrant applications. In many States, a police officer can call a judge, convey the necessary information, and be authorized to affix the judge's signature to a warrant. Utah has an e-warrant procedure where a police officer enters information into a system, the system notifies a prosecutor, and upon approval the officer forwards the information to a magistrate, who can electronically return a warrant to the officer. Judges have been known to issue warrants in as little as five minutes. . . .

In a case such as this, applying the exigent circumstances exception to the general warrant requirement of the Fourth Amendment seems straightforward: If there is time to secure a warrant before blood can be drawn, the police must seek one. If an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant, or he applies for one but does not receive a response before blood can be drawn, a warrantless blood draw may ensue.

Requiring police to apply for a warrant if practicable increases the likelihood that a neutral, detached judicial officer will review the case, helping to ensure that there is probable cause for any search and that any search is reasonable. . . . At the same time, permitting the police to act without a warrant to prevent the imminent destruction of evidence is well established in Fourth Amendment law. There is no reason to preclude application of that exception in drunk driving cases simply because it may take the police some time to be able to respond to the undoubted destruction of evidence, or because the destruction occurs continuously over an uncertain period.

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A plurality of the Court expresses concern that my approach will discourage state and local efforts to expedite the warrant application process. That is not plausible: Police and prosecutors need warrants in a wide variety of situations, and often need them quickly. They certainly would not prefer a slower process, just because that might obviate the need to ask for a warrant in the occasional drunk driving case in which a blood draw is necessary. The plurality's suggestion also overlooks the interest of law enforcement in the protection a warrant provides.

The Court is correct when it says that every case must be considered on its particular facts. But the pertinent facts in drunk driving cases are often the same, and the police should know how to act in recurring factual situations. Simply put, when a drunk driving suspect fails field sobriety tests and refuses a breathalyzer, whether a warrant is required for a blood draw should come down to whether there is time to secure one.

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JUSTICE THOMAS, dissenting.

. . . . Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment.

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The presence of "exigent circumstances" is [an] exception to the warrant requirement. Exigency applies when "'the needs of law enforcement [are] so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" Thus, when exigent circumstances are present, officers may take actions that would typically require a warrant, such as entering a home in hot pursuit of a fleeing suspect. As relevant in this case, officers may also conduct a warrantless search when they have probable cause to believe that failure to act would result in "'imminent destruction of evidence.'"

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. . . . [T]he natural metabolization of blood alcohol concentration (BAC) creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances.

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The majority believes that, absent special facts and circumstances, some destruction of evidence is acceptable. This belief must rest on the assumption that whatever evidence remains once a warrant is obtained will be sufficient to prosecute the suspect. But that assumption is clearly wrong. Suspects' initial levels of intoxication and the time necessary to obtain warranted blood draws will vary widely from case to case. Even a slight delay may significantly affect probative value in borderline cases of suspects who are moderately intoxicated or suspects whose BAC is near a statutory threshold that triggers a more serious offense. Similarly, the time to obtain a warrant can be expected to vary, and there is no reason to believe it will do so in a predictable fashion.

Further, the Court nowhere explains how an officer in the field is to apply the facts-and-circumstances test it adopts. First, officers do not have the facts needed to assess how much time can pass before too little evidence remains. They will never know how intoxicated a suspect is at the time of arrest. Otherwise, there would be no need for testing. Second, they will not know how long it will take to roust a magistrate from his bed, reach the hospital, or obtain a blood sample once there.

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The availability of telephonic warrant applications is not an answer to this conundrum. . . . As the majority correctly recognizes, "[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review." During that time, evidence is destroyed, and police who have probable cause to believe a crime has been committed should not have to guess how long it will take to secure a warrant.