***Missouri v. McNeely*, (decided April 17, 2013)**

**Issue:**

Does the inevitable dissipation of alcohol in blood alone constitute an automatic exigency to support a non-consensual, warrantless blood test during a DWI investigation?

**Holding (Sotomayor, J. with Scalia, Ginsburg, Kagan, J.J):**

No, but—depending on the “totality of the circumstances” in a particular case—an exigency may develop. Otherwise, a warrant is required.
[Read opinion](http://www.supremecourt.gov/opinions/12pdf/11-1425_cb8e.pdf)

**Concurring in Part (Kennedy, J.)**

Would limit holding to the exact facts in issue.

**Concurring and dissenting (Roberts, C.J., Breyer, & Alito, J.J.):**

The totality of the circumstances test is fine in general, but drunk-driving cases are a discrete class, and the court should provide more guidance. Specifically these Justices would hold if the officer can get a warrant faster than a phlebotomist they must, otherwise it is exigent circumstances.

**Dissenting (Thomas, J.):**

Yes. “Because the body’s natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance.”

First and foremost this case did not rule that our or any other mandatory blood draw law was unconstitutional. Justice Sotomayor in footnote 9 of the majority opinion cites the respective State’s mandatory provisions not as unconstitutional, but rather as support for her opinion that a reasonable expectation of privacy exists placing DWI blood draws under the Fourth Amendment. She notes positively implied consent statutes and reiterates the holding in *Dakota v. Neville*, 459 U.S. 553 (1983), finding they do not violate the Fifth Amendment. I am sure many defense counsel will cite this case as the end of everything DWI, but this is just not so. The opinion of court is endorsed in its entirety by only four Justices. There is no doubt that there will be subsequent opinions. Those would seem very likely to include opinions concerning mandatory draw laws.

Further, the majority opinion does not stand for the proposition that exigent circumstances cannot exist to justify a warrantless blood draw in a DWI case, but rather that they did not exist in *McNeely.* The majority opinion clearly upholds the decision in *Schmerber V. California*, 384 U.S. 757 (1966). The majority of the court found that metabolism of alcohol alone does not create exigency. The majority opinion did find that “unreasonable” delay or the inability to procure judicial review can create exigency. She simply scolded Missouri for not trying.

So how does this impact the provisions of Transportation Code 724.012(b) requiring an officer to obtain a chemical (Blood for all practical purposes) in cases of crashes, DWI with a Child, and Felony DWI? Well that statute was sited in footnote 9 without being overruled. But, since the Supreme Court rejected “per se” exigency and firmly held exigency must be found on a case by case basis, there is certain to be increased litigation.

Nothing in the opinion relieved an officer of their statutory obligation to draw blood in these circumstances. Nothing in the opinion prevents the officer from drawing blood if exigent circumstances exist in the specific investigation. The opinion simply requires the State establish exigency by showing more than the fact that the Defendant’s liver is destroying evidence with each passing moment. (Special thanks to Justice Thomas who in his dissent seems to be the only Justice that seems to get that). A crash, a child passenger, or any other complicating factor when added to metabolism can still create exigency. So can local inability to get judicial review in a reasonable amount of time. Clearly a Monday morning warrant application of a Friday afternoon arrest is worth nothing.

This puts a burden on every officer to get a blood sample, but may require more effort than we had to make before this case came down. The most conservative approach (and in these most important felony cases, why would we not take a conservative approach?) I recommend getting a search warrant, if you can, in mandatory blood draw situations. If an officer cannot get a blood search warrant in a reasonable time, then the office should explain why they were unable to get a warrant and proceed to take a blood search warrant under the Texas statute. That explanation is what prosecutors will use in suppression hearings to defend their evidence. Please remember Justice Sotomayor’s opinion clearly makes the ability of the officer to seek judicial review a factor in determining exigency. Crashes, multiple crashes, custody of minor children, multiple defendants, or high arrest numbers could all be additional factors in creating exigency.

Prosecutors will also play an important role in how officers respond. Every agency and office should speak with their local prosecutors. I will remain safely here in Austin while they fight these issues in court. I have included policy positions made by Richard Alpert and Warren Diepraam at the end of this document. They do not totally agree, and that is ok. Local prosecutors may differ, but their opinion should be followed in their jurisdictions. I am here to help, not give orders.

Prosecutors can also assist by providing protocols on how to make due diligence in obtaining blood search warrants in their own jurisdictions. Let officers know what magistrates to call, how to call, when to call whom, what forms to use, what procedures to follow. Without the involvement of prosecutors on the front end, officers will not be able to answer the now very important question, “Why did you not get a warrant?”. Consider reducing to writing what an officer should do to obtain a warrant. Include instructions for week days, nights and weekends. Go over the exigency factors as they apply to where you are.

Be prepared for a flood of appeals and writs. I will follow up with comments on how to address those. For the time being polish up your briefs on procedural default. As Bob Schneider sings, “it is not the end of everything, just the end of everything you know”. This too will pass.

Finally, there is a tendency to panic when the Supreme Court changes our world in a pen stroke. Don’t. Texas is in a very advantageous position because blood search warrants are not new to us. Our implied consent and mandatory blood draws laws have not been ruled unconstitutional and based on the dissent and concurrences very likely will not be. This new opinion may be the push we need to make Texas no refusal all the time. That would be a good thing.

W. Clay Abbott

DWI Resource Prosecutor

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Richard Alpert has advised:

*Therefore, in all mandatory blood-draw scenarios (offenses involving a death, serious bodily injury, bodily injury plus transport, DWI with a child, and felony DWI) we are asking you to obtain a blood search warrant.  Approximately a third of our local agencies have already agreed to take this approach.  While it is tempting to continue to rely on our mandatory provisions that might not even be in jeopardy, I also believe that it is our duty to protect these more serious cases from protracted litigation and outcome uncertainty.  Using a search warrant thwarts any additional litigation that might arise post-McNeely, so that is what I suggest.  Please feel free to email or call me if you have questions about this.*

Warren Diepraam has advised:

*In the meantime, I have asked MCTX prosecutors and officers to be aware of exigency factors when doing mandatory blood draws and to make sure the officers document their reports.  I have set out three guidelinies.  First, in all mandatory blood draw cases where the officer can't articulate an exigency, I am asking them to get a warrant.  Second, during No Refusal (when a judge is obviously available), I am asking law enforcement to get warrants in all DWI refusals.  Third, in Intoxication Manslaughter and Intoxication Assault cases, officers get a mandatory sample before we arrive (generally) and I am having them continue that practice but am getting a warrant an hour after the mandatory draw.*