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# Warrantless Blood Draws and the Fourth Amendment: A Chronological Look at U.S. Supreme Court and State Supreme Court Cases from *Missouri v. McNeely* to *Commonwealth v. Bell*

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The National Highway Traffic Safety Administration (NHTSA) reports in the United States 30 people die every day in drunk-driving crashes.[1] Crashes involving alcohol-impaired drivers cost the United States $44 billion in 2010 (the most recent year for which cost data are available).[2] The issue of impaired driving is not limited to alcohol; the NHTSA's data show the number of drivers killed in crashes who test positive for marijuana doubling between 2007 and 2015.[3] As states create laws to try and crackdown on the rates of impaired driving those finding themselves facing criminal prosecution have raised constitutional challenges. Warrantless blood draws have received a fair amount of attention in the top courts both federally and in states across the country. This paper provides an overview of the facts and holdings of these top court cases starting with *Missouri v. McNeely*, a U.S. Supreme Court case, the case which spurred the recent rash of warrantless blood draw cases, and concluding with *Commonwealth v. Bell*, the most recent case on the topic at the time of this paper, out of the Supreme Court of Pennsylvania.

### *MISSOURI V. MCNEELY* (U.S. SUPREME COURT, APRIL 17, 2013)

HOLDING: IN DRUNK-DRIVING INVESTIGATIONS, THE NATURAL DISSIPATION OF ALCOHOL IN THE BLOODSTREAM DOES NOT CONSTITUTE AN EXIGENCY IN EVERY CASE SUFFICIENT TO JUSTIFY CONDUCTING A BLOOD TEST WITHOUT A WARRANT.[4]

McNeely was arrested after he was observed crossing the center line and declining to take a BAC test.[5] Following his arrest McNeely was taken to the hospital where he refused to consent to a blood test; without obtaining a warrant the officer directed a lab tech to withdraw McNeely's blood.[6]

To be reasonable, a warrantless search of a person must fall within a recognized exception; exigent circumstances is one such exception.[7] You must look at the totality of the circumstances to determine if exigency exists.[8] With this in mind the Court rejected a *per se* rule that exigent circumstances exist if there is probable cause to believe a person has been driving under the influence, saying despite the fact that alcohol dissipates in the bloodstream until there is none, the Court should not depart from a case-by-case assessment.[9] The Court distinguished *McNeely* from *Schmerber v. California*, noting that while the alcohol content in blood does dissipate, it does so at a gradual and predictable rate, thus a delay in performing the blood draw would need to be significant to affect its probative value.[10]

In rejecting the *per se* rule the Court noted that advances in technology and changes to the Federal Rules of Civil Procedure have streamlined the warrant process.[11] The dissipation of alcohol may be a factor that supports a finding of exigency but is not in and of itself enough.[12] The Court also noted that while there is less privacy in automobiles, that "does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin," and "intrusion into the human body implicates significant, constitutionally protected privacy interests."[13]

The Court also rejected the Missouri Supreme Court's notion that the case was a routine DUI case, stating "relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case," but the record of the present case did not afford them the details necessary for a detailed discussion of the relevant factors in determining the reasonableness of a warrantless blood draw.[14]

### *BYARS V. STATE* (NEVADA, OCTOBER 16, 2014)

HOLDINGS: (1) THE NATURAL DISSIPATION OF MARIJUANA IN THE BLOODSTREAM DOES NOT CONSTITUTE A *PER SE* EXIGENT CIRCUMSTANCE

**Footnotes**

1. Drunk Driving, https://www.nhtsa.gov/risky-driving/drunk-driving (last visited Sept. 18, 2019).
2. *Id.*
3. Drug-Impaired Driving is Impaired Driving, https://www.nhtsa.gov/drunk-driving/drug-impaired-driving-impaired-driving (last visited Sept. 18, 2019).
4. Missouri v. McNeely, 569 U.S. 141, 165, 133 S. Ct. 1552, 1568, 185 L. Ed. 2d 696 (2013).
5. *Id.* at 145.
6. *Id.* at 145-46.
7. *Id.* at 148-49.
8. *Id.* at 151.
9. *Id.* at 151-53.
10. *Id.* at 152; *see also* Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)(Petitioner was transported to the hospital following at automobile accident. At the hospital the officer noticed signs of intoxication and had a blood draw performed against the petitioner's objections. The Court ruled the blood draw was not a violation of the petitioner's Fourth Amendment rights because exigent circumstances existed that supported a warrantless search due to the time elapsed in transporting the petitioner to the hospital and investigating the scene coupled with the rate at which the alcohol was dissipating in the petitioner's blood stream.).
11. *McNeely,* 569 U.S. at 154-155.
12. *Id.* at 156.
13. *Id.* at 159.
14. *Id.* at 165.

JUSTIFYING A WARRANTLESS SEARCH.[15] (2) A WARRANTLESS BLOOD DRAW MADE UNDER AN IMPLIED-CONSENT STATUTE WHERE THE INDIVIDUAL DOES NOT SUBMIT TO THE BLOOD DRAW IS UNLAWFUL.[16]

Byars was pulled over for speeding, the officer noticed the aroma of marijuana, and Byars admitted to having smoked five hours earlier; suspecting intoxication, the officer had Byars complete field sobriety tests.[17] Byars was subjected to field sobriety test and placed under arrest; the officer read Byars the implied-consent law.[18] Byars refused the test but cooperated until he arrived at the hospital where he struggled against the blood draw.[19] Byers argued the blood draw violated his Fourth Amendment rights as set forth in *McNeely*.[20]

The court, acknowledging that this case dealt with marijuana and not alcohol, as in *McNeely,* extended *McNeely* to cases involving marijuana, stating "the natural dissipation of THC from the blood does not create a *per se* exigency," which would overrule the normal protections of the Fourth Amendment.[21] Noting time seemed not to be a factor in the case, as the officers making the traffic stop would have had time to obtain a warrant in the time it took them to search the petitioner's car and transport him to a hospital, the court ruled the state failed to demonstrate waiting for a warrant would result in the loss of evidence, thus not proving exigent circumstances.[22] The court also rejected the implied-consent law, ruling the Nevada law, NRS 484C.160(7) "allows a police officer to engage in a warrantless, nonconsensual search in violation of the Fourth Amendment."[23] However, the court ultimately allowed the warrantless blood draw, stating the officers relied on the implied-consent law in good faith as exclusion would not act as a deterrent to unconstitutional police conduct.[24]

### *STATE V. BERNARD* (MINNESOTA, FEBRUARY 11, 2015)

HOLDING: A WARRANTLESS BREATH TEST IS NOT MATERIALLY DIFFERENT FROM OTHER WARRANTLESS SEARCHES OF AN ARRESTED PERSON THAT HAVE BEEN UPHELD, AND AS SUCH WOULD NOT VIOLATE THE FOURTH AMENDMENT.[25]

Responding to a call of intoxicated men trying to remove a boat from the water, police encountered Bernard in his underwear, with the strong odor of alcohol coming from the group.[26] Witnesses identified Bernard as the driver of the truck and Bernard was holding the vehicle's keys, but he denied driving, although he did admit to drinking.[27] Bernard refused to perform field sobriety tests, after which he was taken to the police station and informed that Minnesota's implied-consent law required him to consent to a chemical test, in the form of a breathalyzer, and that failing to do so was a crime.[28] Bernard refused the test.[29]

Bernard was convicted of refusing the test, and on appeal argued the test constituted a warrantless search of a driver's breath in violation of the Fourth Amendment.[30] The court noted that the court of appeals wrongly upheld the legality of the required chemical test on the grounds the officer had probable cause to believe Bernard was drinking, noting a warrantless search is only reasonable if it falls under one of four exceptions, one of which is not probable cause.[31] The state argued to the Minnesota Supreme Court that a warrantless-search incident to a valid arrest is reasonable.[32] The court agreed holding a warrantless breath test is not materially different from other warrantless searches of an arrested person that have been upheld, and as such would not violate the Fourth Amendment.[33] The court also distinguished Bernard from *Missouri v. McNeely*, saying *McNeely* did not address the search-incident-to-arrest exception because the issue was not raised in that case, thus *McNeely* did not foreclose their decision.[34]

**". . . a warrantless breath test is not materially different from other warrantless searches of an arrested person . . . and . . . would not violate the 4th Amendment."**

### *STATE V. STAVISH* (MINNESOTA, AUGUST 19, 2015)

HOLDING: "THE SERIOUSNESS AND UNCERTAINTY OF STAVISH'S MEDICAL CONDITION, COUPLED WITH THE POSSIBILITY OF TRANSPORT TO ANOTHER HOSPITAL, MADE IT IMPOSSIBLE FOR SERGEANT MARTENS TO KNOW HOW LONG STAVISH WOULD BE AVAILABLE FOR A BLOOD DRAW. THUS, SERGEANT MARTENS WAS FACED WITH AN EMERGENCY SITUATION IN WHICH IT WAS REASONABLE TO CONCLUDE THAT ANY DELAY NECESSARY TO OBTAIN A WARRANT WOULD 'SIGNIFICANTLY UNDERMIN[E] THE EFFICACY OF THE SEARCH THE EXISTENCE OF EXIGENT' CIRCUMSTANCES JUSTIFYING THE WARRANTLESS BLOOD DRAW."

*Stavish* involves events that took place before *McNeely* was decided. Following a single-vehicle accident, responding officers noted a strong smell of alcohol and proceeded to obtain a warrantless, nonconsensual blood sample under the authority of Minnesota's implied-consent law.[35] After some back-and-forth rulings in the lower courts on whether Stavish's BAC results were permissible under Minnesota law via a good-faith exception or exigent circumstances, Stavish's conviction, based in part on the blood results, was upheld.[36] Stavish appealed to the Minnesota Supreme Court.[37]

15. Byars v. State, 130 Nev. 848, 852, 336 P.3d 939, 942 (2014).
16. *Id.* at 582.
17. *Id.*
18. *Id.*
19. *Id.* at 852-53.
20. *Id.* at 853.
21. *Id.* at 855.
22. *Id.* at 855-59, 943-45.
23. *Id.*
24. *Id.* at 859-60.
25. State v. Bernard, 859 N.W.2d 762, 766-767 (Minn. 2015), *aff'd sub nom*. Birchfield v. North Dakota, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).
26. *Bernard,* 859 N.W.2d at 764.
27. *Id.*
28. *Id.*
29. *Id.* at 765.
30. *Id.*
31. *Id.* at 766.
32. *Id.*
33. *Id.* at 766-67.
34. *Id.* at 771-72.
35. State v. Stavish, 868 N.W.2d 670, 680 (Minn. 2015).
36. *Id.*
37. *Id.*

**". . . .because police were unsure that he would even be available for the blood draw, time was of the essence, thus exigent circumstances existed."**

The Minnesota Supreme Court turned to the Fourth Amendment issues at play in Stavish's case but determined that the pretrial suppression of the defendant's blood alcohol test results was a "critical issue" of the case.[38] The court acknowledged that a blood draw is clearly a search subject to Fourth Amendment protections, and it also pointed out that the exigent circumstances exception to a warrant was the applicable exception in this case.[39] The court concluded that the relevant inquiry as to whether Stavish's Fourth Amendment rights had been violated was "whether, under all of the facts reasonably available to the officer at the time of the search, it was objectively reasonable for the officer to conclude that he or she was faced with an emergency, in which the delay necessary to obtain a warrant would significantly undermine the efficacy of the search."[40]

The Minnesota Supreme Court looked at the circumstances surrounding the blood draw and ultimately determined that there were exigent circumstances in this case that met the high standard for the exception. In this case, Stavish had suffered serious injuries, which required extensive medical treatment, and there was some concern on the part of law enforcement that Stavish would have to be taken to another medical facility for continued treatment, which would have seriously inhibited the ability of law enforcement to take a blood sample from him. The defense argued that law enforcement could have simply asked the medical personnel treating Stavish if they foresaw a need to move him to a different medical facility, but the court reasoned that state and federal privacy laws would have prevented law enforcement from being able to obtain that information without Stavish's consent. Additionally, the defense stated that the prosecution failed to prove exigent circumstances because it did not prove that law enforcement could not have obtained a blood sample within the two-hour time limit required by Minnesota law. However, the court referred to Stavish's condition and said that because the police were unsure that he would even be available for the blood draw, time was of the essence, thus exigent circumstances existed.[41]

Although the Minnesota Supreme Court agreed the warrantless blood draw was permissible under the facts of *Stavish*, the Court pointed out two errors made by the appellate court. First, referring to the United States Supreme Court's decision in *Mincey v. Arizona,* the Minnesota Supreme Court stated that the seriousness of an offense did not create exigency or reduce the state's burden in proving that it met the exigent circumstances requirement.[42] Second, that the defendant had to cross county lines to obtain medical treatment was not an appropriate consideration; rather, the relevant consideration was the time required to transport the defendant to the hospital and whether that inhibited the police's efforts to secure a blood sample from the defendant.[43]

### *BIRCHFIELD V. NORTH DAKOTA* (U.S. SUPREME COURT, JUNE 23, 2016)

HOLDINGS: (1) BREATH TESTS, WHICH ARE SIGNIFICANTLY LESS INTRUSIVE THAN BLOOD TESTS, BUT NOT BLOOD TESTS, MAY BE ADMINISTERED WITHOUT A WARRANT AS A SEARCH INCIDENT TO A LAWFUL ARREST FOR DRUNK DRIVING.[44] (2) A MOTORIST CANNOT BE DEEMED TO HAVE CONSENTED TO SUBMIT TO A BLOOD TEST ON PAIN OF COMMITTING A CRIMINAL OFFENSE.[45]

The Supreme Court returned to the issue of warrantless blood searches just three years after *McNeely* in *Birchfield v. North Dakota*, granting certiorari and consolidating three cases involving a BAC search incident to arrest, the petitioners being Birchfield, Bernard, and Beylund.[46]

Birchfield drove his car off a highway; an officer watched as Birchfield tried unsuccessfully to back out of a ditch before the officer approached and caught a strong whiff of alcohol, along with noticing other signs of intoxication. Birchfield failed sobriety field tests and a breath test, was arrested for driving while impaired, and refused a blood test despite being informed refusing to do so would expose him to criminal penalties.[47]

Police encountered Bernard when responding to reports three men got a truck stuck in the river while removing their boat.[48] Witnesses identified a man in his underwear driving the truck; upon arriving, officers found Bernard in his underwear, and he appeared intoxicated. Bernard admitted to drinking but denied driving; he refused to submit to a breath test despite being read Minnesota's implied-consent advisory.[49]

Officers observed Beylund unsuccessfully turn into a driveway and narrowly miss a stop sign before bringing his vehicle to rest partially on a public road; Beylund had an empty wine glass in the center console, smelled of alcohol, and had balance problems.[50] He was arrested for driving while impaired and consented to a blood draw after being read North Dakota's implied-consent advisory.[51]

The Fourth Amendment prohibits unreasonable searches; as "the taking of a blood sample or the administration of a breath test is a search, the Court in *Birchfield* was faced with the issue of whether a warrantless breath test or blood draw was unreasonable in drunk-driving cases."[52] An exception to the Fourth Amendment's warrant requirement, specific to drunk-driving cases, is the exigent-circumstances exception, which "allows a warrantless

38. *Id.*
39. *Id.* at 675.
40. *Id.* at 676-77.
41. *Id.* at 677-80.
42. *Id.* at 680, *citing* Mincey v. Arizona, 437 U.S. 385 (1978).
43. *Stavish,* 868 N.W.2d at 680.
44. Birchfield v. North Dakota, 136 S. Ct. 2160, 2185, 195 L. Ed. 2d 560 (2016).
45. *Id.* at 2186.
46. *Id.* at 2172.
47. *Id.* at 2170-171.
48. *Id.* at 2171.
49. *Id.*
50. *Id.*
51. *Id.* at 2171-172.
52. *Id.* at 2173.

search when an emergency leaves police insufficient time to seek a warrant."[53] To be clear, that the case involves drunk driving does not mean an exigent-circumstances exception exists, just that under the totality of the facts specific to that case an exception to the warrant requirement *may* exist.[54] The Court reminded us of its ruling in *McNeely* that "the natural dissipation of alcohol from the bloodstream does not *always* constitute an exigency justifying the warrantless taking of a blood sample."[55] In other words, there is no *per se* rule that creates an exception; whether a warrant is necessary required a case-specific analysis of the totality of the facts.[56] The Court's opinion in *McNeely* recognized that a warrantless search may be conducted incident to arrest; *Birchfield* considered "how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrest."[57]

The Court went through a thorough analysis of the development of the search-incident-to-arrest rule (SIAR) and how it has been clarified with advances in technology. To begin with, SIAR permits the search of the person of the arrestee who has been lawfully arrested.[58] This right to search is not dependent upon whether a court might later decide the probability the arrestee was, in fact, carrying weapons or evidence and said items would, in fact, be found on the person; rather, the mere fact of lawful arrest justifies the search of the person.[59] However, the exemption to the warrant requirement is determined by assessing the degree of intrusion upon an individual's privacy against the promotion of a legitimate government interest.[60]

Reiterating its ruling from *Skinner v. Railway Labor Executives' Assn*, the Court concluded "breath tests do not implicate significant privacy concerns."[61] Breath tests do not pierce the skin and require a minimum of inconvenience, humans do not have a possessory interest or emotional attachment to the air in the lungs, the only information revealed by breath tests is a person's BAC, no sample is left in the possession of the police, and participation in a breath test does not cause any additional embarrassment in excess of the embarrassment of being arrested.[62] Conversely, the Court noted, blood tests require piercing the skin, people do not continually shed blood, even if giving blood is common it is not a task people generally look forward to or enjoy, "it is significantly more intrusive than blowing into a tube," and a sample of blood can be preserved and remain in the possession of authorities, which may cause a person anxiety.[63]

In explaining its position the Court stated as "alcohol consumption is the leading cause of traffic fatalities and injuries," the government has "a paramount interest in preserving the safety of the public," not only in neutralizing the threat but also in creating effective deterrents.[64] BAC levels and implied-consent laws were enacted to address this interest, but the most dangerous offenders are likely unpersuaded by a mere license suspension, so states made it a crime to refuse to submit to BAC testing.[65] Requiring a search warrant for every BAC would have significant impact on the court, particularly in sparsely populated areas.[66] The Court also noted that the intent of search warrants, to protect privacy through an independent determination of a neutral magistrate and limit the scope of intrusion, were not met in the case of BAC warrants in that a magistrate would "be in a poor position to challenge . . . the facts that establish probable cause," and "in every case the scope of the warrant would simply be the BAC test of the arrestee."[67] Thus, the Court found "requiring the police to obtain a warrant in every case would impose a substantial burden but no commensurate benefit."[68]

**". . . the [U.S. Supreme] Court then held that the 4th Amendment permitted warrantless breath tests incident to arrests . . . however blood testing still requires a warrant . . . "**

Taking the above into consideration, the Court then held that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving; however, blood testing still requires a warrant as it is significantly more intrusive.[69] In arriving at this conclusion the Court considered, but was unpersuaded by, that a person could attempt to prevent an accurate reading of a breathalyzer by blowing improperly, observing courts have held such attempts to qualify as a refusal to submit.[70] Similarly, the Court was unpersuaded by the fact blood tests can be administered to an unconscious person or those too intoxicated or injured to complete a breath test, noting "we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be."[71]

The Court next turned to whether warrantless taking of a blood sample is justified by a driver's legally implied consent.[72] Remarking that they approve of the general "concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply," the Court stated "there must be a limit to the consequences to which a motorist may be deemed to have consented by virtue of a decision to drive on public roads."[73] Thus, the Court held "motorist cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."[74]

53. *Id.*
54. *Id.* (emphasis in original).
55. *Id.* at 2174 (emphasis in original).
56. *Id.* at 2174.
57. *Id.*
58. *Id.* at 2175.
59. *Id.* at 2176.
60. *Id.*
61. *Id.*, citing Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616–17, 109 S.Ct. 1402, 103 L.Ed.2d 639
62. *Birchfield*, 136 S. Ct. at 2176-177.
63. *Id.* at 2178.
64. *Id.* at 2178-179.
65. *Id.* at 2179.
66. *Id.* at 2180.
67. *Id.* at 2180-181.
68. *Id.* at 2181-182.
69. *Id.* at 2184.
70. *Id.* at 2185.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 2186.

**"A warrantless blood search is permissible under . . . exigent circumstances . . . when the totality of circumstance include a suspect who is seriously injured . . and where . . PAC is 0.02 %"**

### *STATE V. HAVATONE* (ARIZONA, MARCH 2017)

HOLDING: THE UNCONSCIOUS CLAUSE OF A.R.S. § 28–1321(C), WHICH ALLOWS LAW ENFORCEMENT OFFICIALS TO MAKE OR DIRECT NONCONSENSUAL BLOOD DRAWS FROM UNCONSCIOUS DUI SUSPECTS, IS UNCONSTITUTIONAL WHERE THERE IS NOT A SHOWING OF CASE-SPECIFIC EXIGENT CIRCUMSTANCES THAT PREVENT LAW ENFORCEMENT FROM OBTAINING A WARRANT.

Officers, arriving at a scene of an accident, detected an odor of alcohol emanating from the defendant's vehicle and its occupants; officers also found numerous open containers of alcohol in the defendant's vehicle.[75] A blood sample was extracted from an unconscious Havatone as he was being airlifted to the hospital, without seeking a warrant, under the "unconscious clause" of Arizona's implied-consent law; the sample was used to convict him.[76] The State conceded the blood draw was performed without a warrant, not because of exigent circumstances but "following department practice to procure a blood draw anytime a DUI suspect was sent out of state for emergency treatment."[77]

Relying on *Missouri v. McNeely*, the Arizona Supreme Court found the "unconscious clause" of the state's implied consent statute could only be applied when "case-specific exigent circumstances prevent law enforcement officers from obtaining a warrant."[78] The court went on to rule that because the decision to draw Havatone's blood was pursuant to a blanket policy rather than a case-specific determination, the draw violated Havatone's Fourth Amendment rights.[79] Furthermore, the good-faith exception did not apply because the police "should have known that routinely directing blood draws from DUI suspects who were sent out of state for emergency treatment, without making a case-specific determination whether a warrant could be timely secured, was either impermissible or at least constitutionally suspect."[80]

### *STATE V. HOWES* (WISCONSIN MARCH 1, 2017)

HOLDING: A WARRANTLESS BLOOD SEARCH IS PERMISSIBLE UNDER THE EXIGENT-CIRCUMSTANCES EXCEPTION TO THE FOURTH AMENDMENT WHERE THE TOTALITY OF THE CIRCUMSTANCES INCLUDE A SUSPECT WHO IS SERIOUSLY INJURED, UNCONSCIOUS, BEING SUBJECTED TO MEDICAL TREATMENTS FOR THEIR INJURIES, AND WHOSE PROHIBITED ALCOHOL CONCENTRATION (PAC) IS 0.02 PERCENT.

The police encountered Howes when responding to a motorcycle versus deer incident; upon arriving on the scene the deer was dead, and Howes was 40 feet away seriously injured and unconscious.[81] While confirming Howes's identity, the officer discovered Howes was subject to a lower permitted alcohol concentration (PAC) of 0.02 percent.[82] A witness on the scene, the EMT positioned at Howes's head in the ambulance, and numerous medical staff at the hospital told the responding officer that Howes smelled of alcohol.[83] The still unconscious Howes was arrested for operating a motor vehicle with a PAC, read his rights, an asked to submit to a chemical blood test; the unconscious Howes did not respond and the deputy instructed hospital staff to proceed with a blood draw.[84]

Under Wisconsin law, for a warrantless blood draw to be constitutional exigent circumstances alone are not sufficient. Four additional requirements must be met:

> (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw.[85]

The court observed a warrantless blood draw is justified "if delaying the blood draw would significantly undermine its efficacy."[86] Noting *McNeely*, the court addressed the significance of the natural dissipation of alcohol in the bloodstream and how this results in the destruction of evidence such that an officer could reasonably believe an emergency exists.[87]

The court concluded certain facts are relevant to determining whether exigent circumstances exist, including the defendant's medical condition and whether the officer was delayed because of the need to investigate the accident scene.[88] Howes's lower permissible alcohol threshold and the small window of time alcohol would still be present in Howes's system if he was just at that threshold at time of discovery, coupled with the possible brain damage, were critical factors for the court, along with the fact the officer did not have probable cause to arrest Howes until the officer arrived at the hospital almost an hour after the accident and at the rough expiration of the ability to detect alcohol in Howes's system if he was at 0.02 percent at the time of the accident.[89] All of these factors combined amounted to sufficient exigent circumstances so as to permit a warrantless blood search.

75. State v. Havatone, 241 Ariz. 506, 508, 51065, 389 P.3d 1251, 1253 (2017).
76. *Id.*
77. *Id.* at 510.
78. *Id.*
79. *Id.*
80. *Id.* at 511.
81. State v. Howes, 2017 WI 18, ¶ 4, 373 Wis. 2d 468, 480, 893 N.W.2d 812, 817, *cert. denied*, 138 S. Ct. 138, 199 L. Ed. 2d 82 (2017).
82. *Id.* at ¶ 7.
83. *Id.* at ¶ 5, 8-9.
84. *Id.* at ¶ 11-12.
85. *Id.* at ¶ 25, *citing* State v. Kennedy, 2014 WI 132, ¶17, 359 Wis.2d 454, 856 N.W.2d 834 (quoting State v. Bohling, 173 Wis.2d 529, 534, 494 N.W.2d 399 (1993) *abrogated in part by* Missouri v. McNeely, —— U.S. ——, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013)).
86. *Howes,* 2017 WI at ¶ 37.
87. *Id.* at ¶ 39-40.
88. *Id.* at ¶ 43.
89. *Id.* at ¶ 45, 48-49

### *STATE V. ROMANO* (NORTH CAROLINA, JUNE 9, 2017)

HOLDING: THE STATUTE DID NOT CREATE A *PER SE* EXCEPTION TO THE WARRANT REQUIREMENT AND THE STATE FAILED TO SHOW, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THAT ROMANO CONSENTED TO THE BLOOD DRAW, THUS THE BLOOD DRAW WAS ILLEGAL.[90]

*Romano* involved a statute that permitted law enforcement to obtain a warrantless blood sample from an unconscious person suspected of driving under the influence.[91] Police encountered Romano when responding to a call of a man stopping his vehicle in the middle of a public road and stumbling across a multilane highway while wearing his sweater backwards and carrying a bottle of liquor.[92] The police officer found Romano close to the abandoned vehicle and matching the description provided by witnesses.[93] Romano, visibly extremely intoxicated, was arrested and transported to the hospital where medical personnel decided due to his combative nature it would be necessary to medicate Romano to calm him down.[94] The police officer told the nurse she would need Romano's blood but did not inform Romano of his rights, obtain consent, or obtain a warrant.[95] The nurse drew blood for medical treatment but drew more than was necessary and offered it to the officer who then tried, but failed, to wake Romano to consent to the blood draw before accepting the sample.[96] The court notes that there were multiple officers involved in the investigation, the magistrates' office was nearby, and the process for obtaining a warrant was simple and well known to the officers.[97]

Romano was convicted and his appeal put on hold while *Birchfield v. North Dakota* was decided. The North Carolina Supreme Court held *Birchfield* and *McNeely* bar the warrantless blood draw from a defendant for the purpose of determining blood alcohol content, and that allowing such a search would violate the Fourth Amendment.[98] The court also held that, following *McNeely,* exigency would not have permitted the police officer's warrantless blood draw.[99]

As to implied-consent statutes, the court distinguished the present case from *Birchfield,* which held the Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving and motorists cannot be deemed to have consented under implied-consent laws, which would impose criminal penalty for denying to grant consent, stating the statute in question did not impose a criminal penalty for refusal to submit to a blood draw; nonetheless, the blood draw was not justified.[100] The court reasoned that consent may be determined from the totality of the circumstances and must be voluntary.[101] The court then held that the statute did not create a *per se* exception to the warrant requirement and the state failed to show under the totality of the circumstances Romano consented to the blood draw; thus, the blood draw was illegal.[102]

**"As to implied-consent statutes . . . The court reasoned that consent may be determined from the totality of circumstance and must be voluntary."**

### *COMMONWEALTH V. MYERS,* (PENNSYLVANIA, JULY 19, 2017)

HOLDING: A CHEMICAL TEST CONDUCTED UNDER THE IMPLIED-CONSENT STATUTE IS EXEMPT FROM THE WARRANT REQUIREMENT ONLY IF CONSENT IS GIVEN VOLUNTARILY UNDER THE TOTALITY OF THE CIRCUMSTANCES; WHERE A PERSON HAS BEEN RENDERED PHARMACOLOGICALLY UNCONSCIOUS, THEY CANNOT VOLUNTARILY GIVE CONSENT AND A WARRANT MUST BE ACQUIRED IF NO OTHER EXCEPTION EXISTS.[103]

A police officer, responding to reports of a man in a maroon SUV screaming, came across Myers sitting in a maroon SUV, the vehicle running and the brake lights flickering.[104] Upon approaching Myers the officer noted that Myers smelled strongly of alcohol, had a significant slur, and an open bottle of liquor was visible; Myers was placed under arrest and transported to a medical center.[105] Approximately an hour later a second officer arrived at the medical center to discover Myers had been administered Haldol and was unconscious.[106] The officer unsuccessfully attempted to rouse Myers, then proceeded to read the unconscious Myers his O'Connell warning, the unconscious Meyer did not object, and the officer instructed a nurse to draw Myers's blood.[107] At no time did either officer attempt to obtain a warrant for the blood draw.[108]

The Commonwealth argued that an exception to the Fourth Amendment's warrant requirement is implied-consent statutes, and an unconscious arrestee does not have the statutory right to refuse chemical testing.[109] In its analysis, the court noted that Pennsylvania's implied-consent statute did not distinguish between the conscious and unconscious motorist in its unambiguous language about the right of refusal.[110] The court then held that:

> Myers had an absolute right to refuse chemical testing pursuant to the implied consent statute, that his unconscious state prevented him from making a knowing and conscious choice as to whether to exercise that right, and that the implied consent statute does not authorize a blood test conducted under such circumstances.[111]

90. State v. Romano, 369 N.C. 678, 692, 800 S.E.2d 644, 646 (2017).
91. *Id.* at 680.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id*.
96. *Id.*
97. *Id.* at 646.
98. *Id.* at 684.
99. *Id.* at 687.
100. *Id.* at 689-90.
101. *Id.* at 691.
102. *Id.* at 692.
103. Commonwealth v. Myers, 640 Pa. 653, 684, 164 A.3d 1162, 1180 (2017).
104. *Id.* at 659.
105. *Id.* at 659-60.
106. *Id.* at 660.
107. *Id.*
108. *Id.*
109. *Id.* at 663.
110. *Id.* at 671.
111. *Id.* at 672.

**"When probable cause exists, a warrantless blood test is not unreasonable when a driver has consented . . . after being warned . . ."**

The court went on to say that implied-consent statutes do not circumvent the Fourth Amendment; rather, they allow police to request a driver to submit to a chemical test, a request the driver can comply with or refuse, the voluntariness of the consent being central to the analysis.[112] The voluntariness of the consent is determined by the totality of the circumstances.[113]

The court held "[o]ur implied consent statute is not an ipso facto authorization to conduct a chemical test," it is a means for an officer to request a chemical test, something the suspect can decline and the test will not be conducted; in other words, the statute does not authorize an involuntary taking but rather penalizes the refusal to allow the taking.[114] In so reaching this conclusion, the court reasoned *Birchfield* in no way suggested voluntary consent could be overridden by statutorily implied consent, that a person "must give actual, voluntary consent at the time the testing is requested," a point that was driven home by the Court's statement that if a person is unconscious police may apply for a warrant.[115] Furthermore, because "Myers was pharmacologically rendered unconscious by medical personnel prior to the time that Officer Domenic read O'Connell warnings to his unresponsive arrestee, no credible assertion can be made that Myers" voluntarily submitted to the testing.[116]

### *STATE V. LEMEUNIER-FITZGERALD* (MAINE, JULY 3, 2018)

HOLDING: WHEN PROBABLE CAUSE EXISTS, A WARRANTLESS BLOOD TEST IS NOT UNREASONABLE WHEN A DRIVER HAS CONSENTED TO TESTING AFTER BEING WARNED THAT THE LOWER LIMIT OF A COURT'S SENTENCING RANGE WILL INCREASE IF THE DRIVER REFUSES TO SUBMIT TO TESTING AND IS ULTIMATELY CONVICTED OF DUI.[117]

LeMeunier-Fitzgerald was arrested after police observed her in a parking lot. Suspecting intoxication, an officer approached and saw physical indications of intoxication, in addition to watching LeMeunier-Fitzgerald swallow a bottle of pills upon noticing the officer's approach.[118] LeMeunier-Fitzgerald was placed in handcuffs until a rescue team arrived; she was then taken to the hospital.[119] At the hospital, the officer informed LeMeunier-Fitzgerald she was suspected of attempting to operate a motor vehicle while under the influence; he read Maine's implied-consent law to her, which included that if she refused to consent to a chemical test and was convicted, she would face harsher penalties, including a mandatory minimum period of incarceration.[120] LeMeunier-Fitzgerald consented to a blood draw but later moved to suppress on the grounds that it violated her Fourth Amendment rights.[121] The parties stipulated there was probable cause to believe LeMeunier-Fitzgerald was operating a vehicle while intoxicated, her blood was drawn without a warrant, and no exigent circumstances existed.[122]

Noting that the statute in question created a duty to submit to testing, but did not mandate testing, rather it required a driver choose between testing or having their license suspended, evidence of their testing refusal submitted in court, and the refusal considered an aggravating factor at sentencing, the court considered whether under such circumstances was LeMeunier-Fitzgerald's consent was voluntary or coerced.[123] Distinguishing Maine's law from the one considered in *Birchfield,* the court pointed out that Maine's law included no threat of independent criminal charges nor did it create any new threat of immediate incarceration, but rather made the driver aware of the consequences of the failure to comply with their duty to submit for testing.[124] The court then considered whether the increased minimum penalty was coercive, finding that because the mandatory minimum imposed when a driver refuses to submit for testing did not exceed the maximum that could be imposed on a driver who did submit for testing, there was no coercion.[125]

### *STATE V. RAJDA* (VERMONT, JULY 20, 2018)

HOLDING: THAT THE ADMISSION OF EVIDENCE OF A REFUSAL TO SUBMIT TO A BLOOD TEST IN THE CONTEXT OF A DUI CRIMINAL PROCEEDING DOES NOT VIOLATE THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION.[126]

In *State v. Rajda*, decided after *Birchfield*, the Supreme Court of Vermont, in two consolidated cases, held that *Birchfield* did not preclude evidence of a defendant's refusal to submit to warrantless blood tests pursuant to an implied-consent law.[127] In both cases a drug recognition expert found the defendant to be impaired, the defendant refused to submit to a drug test, and evidence of this refusal was submitted at trial.[128] Both defendants were charged with criminal refusal. The state dismissed the criminal-refusal charges after the *Birchfield* decision; defendants argued to the Supreme Court of Vermont that *Birchfield* also held admission of evidence showing their refusal to submit to a drug test was unconstitutional.[129]

The court observed that in deciding *McNeely* the Supreme Court noted that states have a broad range of legal tools to enforce drunk-driving laws, including implied-consent laws and allowing refusal to take a BAC test to be used as evidence against a defendant, which supported barring a warrantless blood draw

112. *Id.* at 674.
113. *Id.* at 674-77.
114. *Id.* at 678-79.
115. *Id.* at 681.
116. *Id.* at 686.
117. State v. LeMeunier-Fitzgerald, 2018 ME 85, ¶ 31, 188 A.3d 183, 193, *modified* (July 17, 2018), *cert. denied*, 139 S. Ct. 917, 202 L. Ed. 2d 648 (2019).
118. *Id.* at 188.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 189-91.
124. *Id.* at 191-92.
125. *Id.* at 192-93.
126. State v. Rajda, 2018 VT 72, ¶ 39, 196 A.3d 1108, 1121 (Vt. 2018), *re-argument denied* (Sept. 4, 2018).
127. *Id.*
128. *Id.*
129. *Id.* at ¶ 7.

absent exigent circumstances.[130] Next, the court analyzed the *Birchfield* decision, finding the Supreme Court "went out of its way to endorse the constitutionality of implied consent laws and strongly suggested that consequences for refusing a blood test short of criminal prosecution—such as civil and evidentiary consequences—were not constitutionally infirm."[131]

After reviewing other states post-*Birchfield* decisions, the court held the "Fourth Amendment does not bar admission in a criminal DUI proceeding of evidence of a refusal to submit to a warrantless blood draw."[132] The court reasoned criminalizing the refusal to submit to a blood draw places far more pressure on a person, burdening their constitutionally protected right not to submit to the test, whereas a defendant has the opportunity to explain the reason for their refusal to a jury, thus not directly burdening the Fourth Amendment's protected privacy interest.[133] In reaching this conclusion the court noted that the implied-consent statute established a bargain where in a person had the privilege of driving on a highway in exchange for implied consent for impaired-driving testing.[134]

### *JOHNSON V. STATE* (MINNESOTA, AUGUST 22, 2018)

HOLDING: *BIRCHFIELD V. NORTH DAKOTA* IS SUBSTANTIVE AND RETROACTIVE.

This appeal involves two consolidated cases against Johnson. In the first case, Johnson was pulled over on suspicion of DWI, admitted to drinking, was arrested, refused to give a blood sample, and was found guilty under Minnesota's test-refusal law.[135] In the second case, Johnson was stopped for an improper turn signal, admitted to drinking, failed field sobriety tests, was arrested, spoke to his attorney, and refused to consent to a chemical test on advice of counsel; he pled guilty to test refusal.[136] Following the Supreme Court's decision in *Birchfield v. North Dakota*, Johnson petitioned for post-conviction relief.[137] Ruling on his cases separately, two different district courts both concluded *Birchfield* was procedural and denied Johnson's petitions.[138] Johnson appealed.

Interpreting *Birchfield* and *State v. Tran*, the Minnesota Supreme Court concluded "the State may not criminalize refusal of a blood or a urine test absent a search warrant or a showing that a valid exception to the warrant requirement applies."[139] The court noted that both parties agreed *Birchfield* set forth a new rule, and generally speaking new rules have no retroactive effect unless, "it: (1) is substantive, as compared to procedural, or (2) is a new 'watershed' rule of criminal procedure."[140] A substantive, and thus retroactively applied, decision is one that "narrow[s] the scope of a criminal statute," as well as a constitutional determination that "place[s] particular conduct or persons covered by the statute beyond the State's power to punish."[141] *Birchfield* changes who can be prosecuted for test refusal, excluding a category of conduct from a state's power to punish, and is thus retroactive. [142]

**"When a driver is unconscious and cannot give a breath test, 'exigent circumstances almost always permit a blood test without a warrant.'"**

### *MITCHELL V. WISCONSIN* (U.S. SUPREME COURT, JUNE 27, 2019)

HOLDING: WHEN A DRIVER IS UNCONSCIOUS AND CANNOT GIVE A BREATH TEST, "EXIGENT CIRCUMSTANCES ALMOST ALWAYS PERMIT A BLOOD TEST WITHOUT A WARRANT."[143]

Officers responded to a call that Mitchell, appearing drunk, had driven off in a van.[144] When officers encountered Mitchell, he was wandering near a lake, stumbling and slurring his words, with difficultly standing.[145] Mitchell was given a preliminary breath test, which was over the legal limit, then arrested and driven to the station for a more reliable test.[146] Before the second test could be taken, Mitchell fell unconscious and was transported to the hospital for a blood test.[147] Mitchell challenged the legality of the breath test, arguing it violated his Fourth Amendment right against illegal search and seizure; the state countered that the implied-consent law coupled with Mitchell's free choice to drive on the highway made the blood test consensual.[148]

Noting that they had addressed the issue of warrantless blood draws in two recent cases, the Court summed up those decisions, stating:

> First, an officer may conduct a BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant. Second, if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest.[149]

The Court distinguished this case from *McNeely*, where there was a minimum degree of urgency common to all drunk-driving cases, likening it more to *Schmerber v. California*, where a car accident heightened the urgency.[150]

The Court then noted that states have a compelling interest to enforce BAC limits from a public-safety-interest standpoint, and

130. *Id.* at ¶ 25-26.
131. *Id.* at ¶ 30.
132. *Id.* at ¶ 32.
133. *Id.* at ¶ 35.
134. *Id.* at ¶ 36.
135. Johnson v. State, 916 N.W.2d 674, 677 (Minn. 2018), cert. denied, 139 S. Ct. 2745 (2019).
136. *Id.* at 678.
137. *Id.*
138. *Id.*
139. Johnson v. State, 916 N.W.2d at 679; State v. Trahan, 886 N.W.2d 216 (Minn. 2016).
140. *Johnson,* 916 N.W.2d at 681.
141. *Id.* at 682.
142. *Id.* at 682-83.
143. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531, 204 L. Ed. 2d 1040 (2019).
144. *Id.* at 2532.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 2531.
150. *Id.* at 2533.

enforcing BACs has proven effective; thus where a breath test is unavailable due to unconsciousness, the blood test is essential for achieving compelling state interests.[151] Furthermore drivers who pass out at the wheel or soon after present a greater risk and they should not be rewarded by being able to thwart a state's compelling need for a blood test by their state of unconsciousness.[152]

The Court then moved on to consider whether exigency existed so as to justify a warrantless search, holding:

> exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so Schmerber controls: With such suspects, too, a warrantless blood draw is lawful.[153]

Because an unconscious suspect will require medical treatment and that medical treatment could delay or distort a blood draw conducted later, after a warrant is obtained, the facts push the scenario into that of exigency supporting a warrantless search.[154]

The Court also rejected the argument that technology has advanced to the point making the failure to obtain a warrant inexcusable.[155] While agreeing that technology has sped the process up, the Court noted there is still time required to complete the formality of a warrant, requires a judge be available, and has not managed to make the procurement of a warrant instant.[156] The Court declined to rule on possibility of a case where an unconscious defendant could show his blood would not have been drawn but for the BAC information.[157]

### *COMMONWEALTH V. BELL* (PENNSYLVANIA, JULY 17, 2019)

HOLDING: EVIDENTIARY CONSEQUENCE FOR REFUSING TO SUBMIT TO A WARRANTLESS BLOOD TEST—THE ADMISSION OF THAT REFUSAL AT A SUBSEQUENT TRIAL FOR DUI—REMAINS CONSTITUTIONALLY PERMISSIBLE POST-*BIRCHFIELD*.[158]

Bell was arrested for suspicion of DUI; the facts leading up to that arrest are not included in the Supreme Court of Pennsylvania's opinion.[159] Bell refused to submit to a blood test and was convicted on his refusal; Bell challenged that conviction relying on *Birchfield* as arguing DUI suspects have a right to refuse warrantless blood testing and *McNeely* by rejecting a *per se* exigent circumstance, taken together equate to a Fourth Amendment right to refuse.[160]

The Supreme Court of Pennsylvania undertook a lengthy analysis of the cases involving warrantless blood tests of DUI suspects, noting drivers, by driving on public roadways, agree to accept the ultimatum of consent to a search or accept non-criminal charges.[161] The court, relying on *Birchfield*, stated that while criminal sanction for refusing to submit to testing is not a valid consequence, the Supreme Court approves of other kids of consequences for refusal.[162] The court also agreed with the Supreme Court of Vermont's opinion:

> . . . the admission of evidence of a refusal to submit to a blood draw is a qualitatively different consequence with respect to its burden on the Fourth Amendment. Criminalizing refusal places far more pressure on defendants to submit to the blood test—thereby impermissibly burdening the constitutionally protected right not to submit to the test—than merely allowing evidence of the refusal at a criminal DUI trial, where a defendant can explain the basis for the refusal and the jury can consider the defendant's explanation for doing so. Moreover, the admission of refusal evidence in the context of a DUI proceeding, without directly burdening the privacy interest protected by the Fourth Amendment, furthers the reliability of the criminal process and its truth-seeking function by allowing the jurors to understand why the State is not submitting an evidentiary test in a DUI prosecution.[163]

The court then noted that the *Birchfield* opinion cited to the *McNeely* plurality's endorsement of evidentiary in deciding the Fourth Amendment did not bar the introduction of a refusal to take a warrantless drug test at a criminal trial. [164]

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151. *Id.* at 2535-537.
152. *Id.* at 2537.
153. *Id.*
154. *Id.* at 2538.
155. *Id.* at 2538-539.
156. *Id.* at 2539.
157. *Id.*
158. Commonwealth v. Bell, 211 A.3d 761, 776 (Pa. 2019).
159. *Id.* at 764.
160. *Id.* at 764-67.
161. *Id.* at 773.
162. *Id.* at 775.
163. *Id.* at 775.
164. *Id.* at 176.