A COMPREHENSIVE ANALYSIS OF THE IMPACT OF *MISSOURI v. McNEELY* ON FLORIDA DUI PROCEDURES

By Ben Fox, Assistant State Attorney, Seventh Judicial Circuit

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1. The holding and peculiar circumstances of *Missouri v. McNeely*

In Missouri v. McNeely, 133 S.Ct. 1552 (U.S. April 17, 2013), the United States Supreme Court held that the dissipation of alcohol in the human body – standing alone – does not establish an exigent circumstance that justifies nonconsensual blood testing in DUI investigations without a warrant. Instead, the determination of whether exigent circumstances allow for a nonconsensual blood draw without a warrant must be examined under the totality of the circumstances, on a case-by-case basis.

The immediate reaction to *McNeely* for many people in the Florida DUI law enforcement and prosecution community was shock and dismay. In fact, my reaction – before I had read the opinion – was: "What!? Did they overrule *Schmerber*?" Conversely, others concluded that *McNeely* doesn't affect Florida DUI procedures because *McNeely* can be distinguished.

It turns out that: (1) *McNeely* did not overrule *Schmerber* but it did interpret *Schmerber* differently than Florida courts had been interpreting *Schmerber*; and (2) if we want to ensure that DUI blood tests remain admissible in Florida, then we must make adjustments in our DUI procedures. In order to understand why this is so and how Florida DUI procedures are impacted by *McNeely*, a closer examination of the circumstances in *McNeely* is necessary.

The defendant in *McNeely* was stopped for speeding and crossing the center line. He demonstrated various signs of alcohol impairment. He refused a portable breath test on scene. The officer then arrested the defendant for DUI. On the way to the police station, the defendant

again indicated he would refuse a breath test. At that time, the officer changed course and took him to a hospital. Upon arrival, the officer requested a blood draw and read from Missouri's implied consent law which advised that the defendant's license would be suspended if he refused to submit.[1] The defendant refused. The officer then directed a hospital lab technician to take a blood sample. The alcohol results of the sample later proved to be well above the legal limit.

In his testimony at a suppression hearing, the officer acknowledged that he made no attempt to obtain a search warrant, even though he had previously obtained warrants in similar situations, and even though he thought that both a prosecutor and judge would have been available. The officer did not identify any factors suggesting he faced an emergency or unusual delay in obtaining a warrant. The officer simply believed that on this occasion it was not legally necessary to obtain a search warrant. [2]

Although not stated in the United States Supreme Court opinion, the Missouri Supreme Court opinion explained that the officer had recently read an article written by a traffic safety resource prosecutor that had influenced his thinking. The article suggested that due to a 2010 amendment to Missouri's implied consent statute, officers could "rely on the well settled principle that obtaining blood from an arrestee on probable cause without a warrant and without actual consent does not offend constitutional guarantees." *State v. McNeely*, 358 S.W.3d 65, 68, n. 2 (Mo. 2012).

[1] Unlike Florida's implied consent statutes, Missouri's statutes create implied consent in the ordinary traffic stop case (assuming probable cause for DUI) for up to two of the following four types of testing: blood, breath, saliva or urine. *See*, subsections 1 and 2 of Section 577.020, RSMo.

[2] Apparently, there is nothing in Missouri's statutes to prohibit an officer who is investigating a misdemeanor DUI from seeking a search warrant to obtain blood. Contrarily, Florida's search warrant statute has been interpreted to prohibit such action. *See*, *State v. Geiss*, 70 So.3d 642 (Fla. 5th DCA 2011), which is discussed later in this Memorandum at pages 23-24, and again at pages 27-28.

Both the trial court and the Missouri Supreme Court rejected the prosecutor's argument, finding that the State had failed to show justification for failing to obtain a warrant. The State of Missouri then sought review at the United States Supreme Court.

The reason the United States Supreme Court accepted review was to resolve a split of authority. Some lower courts had held that the rapid dissipation of alcohol in the bloodstream *alone* constitutes an exigent circumstance justifying an exception to the warrant requirement. Other courts had held that alcohol dissipation was but one factor and that the totality of the circumstances must be examined on a case-by-case basis. The conflict arose because of interpretations of the nearly 50 year old case of *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

In *Schmerber*, the defendant and his passenger were injured as a result of a crash and both were transported to the hospital. An officer who suspected the defendant of DUI directed a physician to withdraw a blood sample from the defendant, even though the defendant had refused consent to the test. The defendant subsequently raised several constitutional arguments to the admissibility of the blood test, all of which were rejected by the U.S. Supreme Court. As to the Fourth Amendment argument, the Court recognized that "[s]earch warrants are ordinarily required for searches of dwellings, *and absent an emergency*, no less could be required where intrusions into the human body are concerned." 384 U.S. at 770. (Emphasis added). Thereafter, the Court made the following pronouncement, which generated the disagreement of interpretation:

> 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, 84 S.Ct. 881, 883, 11 L.Ed.2d 777. We are told that *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 a hospital and to investigate the scene of the accident*, there was no 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

Id., at 770-71. (Emphasis added). The key question in this passage is whether the "special facts" that created an emergency were a) based solely on the fact that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops," or b) based on the combination of dissipating alcohol fact and the time which had to be taken to bring the accused to a hospital and to investigate the accident.

Ultimately, the U.S. Supreme Court in *McNeely* determined that the latter interpretation was correct. Because the *McNeely* case involved only an ordinary traffic stop with no "special facts," there were no emergency circumstances that justified the officer not even trying to get a warrant. In fact, the State of Missouri never contended that the particular circumstances created an exigency. Rather, the State argued only that "the fact that alcohol is naturally metabolized by the human body creates an exigent circumstance in every case." 133 S.Ct. at 1567. The U.S. Supreme Court did not even come close to accepting that argument; the Court ruled against the State of Missouri by an 8 to 1 margin.

2. How does *McNeely* apply to cases outside of its own facts?

Because *McNeely* dealt specifically with an ordinary traffic stop, it did not directly address how to apply its ruling to crash cases, let alone death or serious bodily injury cases. Indeed, Justice Sotomayer's majority opinion in *McNeely* specifically declined to provide the factors which officers should consider in determining whether a warrant will be required in order to compel a blood draw in DUI cases. The majority explained its reluctance as follows:

> 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.

McNeely, 133 S. Ct. at 1568.

Nevertheless, the majority did provide some guidance. The Court stated: "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." *Id*., at 1561.

Justice Sotomayer's statement is similar to the rule proposed in Chief Justice Roberts' concurring/dissenting opinion, which stated:

> 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*.

Id., at 1569. (Emphasis added). Justice Roberts later added the following:

> And that is so even in situations where police have requested a warrant but do not receive a timely response. An officer who reasonably concluded there was no time to secure a warrant may have blood drawn from a suspect upon arrival at a medical facility. There is no reason an officer should be in a worse position, simply because he sought a warrant prior to his arrival at the hospital.

Id., at 1473-74. [3]

Justices Sotomayer and Roberts agreed on several points. For example, both opinions emphasized the significance of technical advancements since *Schmerber* was decided in 1966 that make it easier for officers to secure warrants more quickly. Both opinions acknowledged that a majority of states allow police officers or prosecutors to apply for search warrants through

[3] Part II-C of Justice Sotomayer's opinion rejected Justice Roberts' rule; however, that part of her opinion constituted only a plurality opinion – not a majority opinion.

various modern methods, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. Justice Roberts pointed out that "[t]he police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction." *Id.*, at 1573. And based on that presumed familiarity, Justice Sotomayer stated: "we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances." *Id.*, at 1564, n.7. Nevertheless, Justice Sotomayer stated: "We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process." *Id.*, at 1562. The reason for this was explained as follows:

> Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 4.1(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest.

Id.

The bottom line is that a specific set of factors to be utilized for applying the totality of the circumstances test will have to wait for another day. In the meantime, officers should follow this maxim (in which both opinions seem to agree): **If it reasonably appears that there will be time to obtain a search warrant, officers should attempt to obtain one.**

And here are two further propositions: **If an attempt is made, but the process is taking too long, it will likely be determined that the officer can draw blood without a search warrant. Whenever an officer does have blood drawn without obtaining a warrant, he or she must document – and be prepared to testify in a suppression hearing – why it would have been unreasonable to wait for the warrant.**

While this does not provide the guidance that officers would prefer, it is not all that

unusual. For example, officers are often called upon to decide what is "reasonable" in determining "reasonable suspicion." So determining whether it "reasonably" appears that there will be time to obtain a warrant will necessarily depend on the circumstances. Nevertheless, this Memorandum will attempt to provide some additional guidance where feasible.

Given the expectations announced in *McNeely*, it is clear that law enforcement officers would be advised to learn on-call procedures for prosecutors and judges, and to familiarize themselves with the warrant application process.[4] And in those areas where there are no on-call procedures or search warrant templates in place, prosecutors, judges, and officers should work together to create them. In the meantime, **I have attached a template for a blood draw affidavit/application for search warrant and for a blood draw search warrant at the end of this Memorandum.** Officers should check with their legal advisor or their jurisdiction's State Attorney's Office before adopting the attached templates.

It is important to understand that it would not be productive for officers and prosecutors to rely on the lack of procedures in the hopes that it would increase the chances that a warrant will be unnecessary.[5] In fact, separate from her majority opinion, Justice Sotomayer suggested in her plurality opinion (i.e., not the opinion of the Court) that Justice Roberts' 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."

[4] This will soon apply particularly to the *electronic* warrant application process. As will be discussed further in part 3.g., pages 24-26, of this Memorandum, effective July 1, 2013, Fla. Stat. 933.02 will contain a provision which will authorize a judge, under specified conditions, to sign an electronic search warrant.

[5] In some jurisdictions in Florida, officers must obtain approval from prosecutors before submitting an application for search warrant. While this is a reasonable requirement for most situations requiring a search warrant, it may prove to unnecessarily delay the warrant application process in DUI blood draw situations, which could adversely impact blood test results. Consideration should be given to allow such officers to apply directly to a judge for a warrant – assuming that officers can properly utilize any templates for DUI search warrants and affidavits/applications required by prosecutors or judges.

Id., at 1563-1564. Justice Roberts responded to this claim as follows:

> A plurality of the Court also expresses concern that my approach will discourage state and local efforts to expedite the warrant application process. See *ante,* at 1563. 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.

Id., at 1574.

Thus, instead of bemoaning the U.S. Supreme Court, I think it wise for us to look at our current situation in a positive light, as indicated in the above passage from Chief Justice Roberts. *McNeely* will require effective on-call and warrant application procedures for the purpose of obtaining warrants in nonconsensual blood draw cases. These new procedures will make it easier to obtain both arrest warrants and search warrants, and are likely to help the successful prosecution of DUI blood draw cases and other cases.

3. The impact of *McNeely* on DUI law enforcement and prosecution in Florida

a. The *McNeely* result: not so surprising after all

As previously noted, the immediate reaction to *McNeely* for many people in the Florida DUI law enforcement and prosecution community was shock and dismay. Florida was one of the jurisdictions that – for many years – had interpreted *Schmerber* as allowing forced (i.e., nonconsensual) blood draws without the necessity of obtaining a warrant in DUI cases. *See, e.g, State v. Bender,* 382 So.2d 697, 698 (Fla.1980) ("There is no constitutional impediment to a blood alcohol analysis with or without consent where probable cause has been established."); *State v. Geiss,* 70 So.3d 642, 646 (Fla. 5th DCA 2011) ("the rapid diminution of blood alcohol content over time creates an exigent circumstance exception to the warrant requirement").

However, in retrospect, the result in *McNeely* was not that surprising. As previously noted, many other states had interpreted *Schmerber* differently than Florida's judges (although most Florida prosecutors – myself included – were unaware that an opposing view existed). The states that held this alternative view required a showing of additional "special facts" before the police could draw blood without a warrant. Often, those "special facts" included whether an officer was delayed by the need to investigate a crash and to transport an injured suspect to the hospital (which is what occurred in *Schmerber*). The U.S. Supreme Court simply adopted the alternative view of *Schmerber*. In fact, as previously noted, the rejection of the *per se* approach (alcohol dissipation alone creates exigent circumstances) in *McNeely* represented the view of eight of the nine justices.

Moreover, a fresh review of *Schmerber* reveals why the Supreme Court in *McNeely* adopted the alternative view. That is, in addition to addressing the passage from *Schmerber* quoted above on pages 4-5 of this Memorandum which referred to the "special facts," the Court in *McNeely* also pointed out that "in conclusion, we noted that our judgment that there had been no Fourth Amendment violation was strictly based 'on the facts of the present record.' " *McNeely*, at 133 S.Ct. 1560, *quoting Schmerber,* at 384 U.S. 772.

b. Cases now pending in which the offense date predated the *McNeely* ruling

There is almost certainly no need for any prosecutor who is currently handling DUI Manslaughter or DUI Serious Injury cases to worry that the warrantless nonconsensual blood obtained in his or cases will be ruled inadmissible as a result of *McNeely* – as long as the offense date in the case predated the *McNeely* ruling (which was decided on April 17, 2013). This is because of the "good faith exception" to the exclusionary rule.

"The primary purpose of the exclusionary rule is to deter unlawful police action." *Jarrett v. State,* 926 So.2d 429, 431 (Fla. 2d DCA 2006). "It is intended to deter police misconduct, not to remedy prior invasion of a defendant's constitutional rights." *Montgomery v. State,* 69 So.3d 1023, 1033 (Fla. 5th DCA 2011). As noted by the United States Supreme Court in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) when the Court first modified the Fourth Amendment exclusionary rule to incorporate a good faith exception, "[w]e have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment."

The United States Supreme Court was recently faced with the question of "whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent." *Davis v. United States*, 131 S.Ct. 2419, 2428 (2011). Specifically, the Court addressed the situation in which police had been relying on the federal eleventh circuit's interpretation of the "bright line rule" of *New York v. Belton,* 453 U.S. 454, 458–459, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) regarding an automobile search incident to a recent occupant's arrest. The search in *Davis* occurred two years before the Court modified this rule in *Arizona v. Gant,* 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The Supreme Court noted that "[a]lthough the search turned out to be unconstitutional under *Gant,* all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way." *Id*. Under such circumstances, "[a]bout all that exclusion would deter in this case is conscientious police work." *Id*., at 2429. Accordingly, the Court applied the good faith exception to the officer's actions, stating, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.*

As previously noted, for many years Florida courts had interpreted *Schmerber* so as not to require a search warrant in DUI cases involving serious bodily injury or death. Therefore, in pre-*McNeely* cases, as long as police were following the rule of law as announced in those Florida cases, then the good faith exception should apply. As noted by the Fifth District Court of Appeal in *Brown v. State*, 24 So.3d 671, 681 (Fla. 5th DCA 2009): "To apply the exclusionary rule in this case cannot possibly deter police because they did exactly what they were trained to do based on what we (judges) told them was appropriate."

c. Try to get voluntary consent first!

Before deciding whether a warrant is needed in order to obtain a nonconsensual blood draw, officers should always first make an attempt to obtain the blood draw consensually. That is, *McNeely* does not impose any restriction on an officer's ability to request *voluntary* consent to a blood draw. By voluntary, I mean *not* pursuant to the implied consent law and with no promises or threats, express or implied. [6]

I have always maintained that obtaining voluntary consent is the best first option. This option applies to any blood draw or breath test situation – whether serious bodily injury is involved or not – and is particularly appropriate where there is some question as to whether there is probable cause of impairment. *See, e.g., State v. Murray*, 51 So.3d 593 (Fla. 5th DCA 2011) (law enforcement officer properly asked for a voluntary blood draw where there had been a death but no signs of impairment; officer did not read from implied law and was not required to state

[6] An implied threat will likely be found where the officer tells the DUI suspect that if he or she refuses, the blood sample will be obtained by search warrant anyway. *See, Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (U.S. Supreme Court held that there can be no voluntary consent if it is given "only after the official conducting the search has asserted that he possesses a warrant."); *Smith v. State*, 904 So.2d 534, 538 (Fla. 1st DCA 2005) ("Where officers represent they have a lawful authority to search, a suspect's resulting acquiescence is not an intentional and voluntary waiver of Fourth Amendment rights.").

that blood draw was offered as an alternative to breath test; defendant simply "voluntarily consented to the blood draw"). And if you do obtain consent, please document it as best you can, i.e., written consent, audio recorded consent, have a witness to the consent, etc.

d. Non-crash cases and cases not involving death or serious injury

McNeely should have little to no effect on Florida misdemeanor DUI cases; that is, non-crash cases (i.e., breath test cases) and cases not involving death or serious bodily injury. This is because *McNeely* was concerned only with "*nonconsensual* blood testing," i.e., cases in which the driver is compelled to give blood with no option to refuse. Accordingly, *McNeely* has no direct effect on Florida breath test cases [7] or on Florida cases in which the driver has the option to give blood or face a driver's license suspension. Under Florida's implied consent statutes, an officer investigating a simple DUI or a DUI crash not involving serious injury or death is not authorized to compel the defendant to submit to a blood draw anyway. Thus, in such DUI investigations, we are no worse off than pre-*McNeely*: a breath test is still governed by the requirements of 316.1932(1)(a), and a blood draw in a non-serious injury crash case is still governed by the requirements of section 316.1932(1)(c). [8]

e. Serious bodily injury and death cases

Based on their interpretation of *Schmerber*, Florida courts have repeatedly announced that Florida's implied consent statutes are more restrictive than the Fourth Amendment because

[7] Ultimately, *McNeely* could have an *indirect* impact on Florida breath test cases, in the sense that *McNeely* could possibly give rise to legislative changes that would authorize search warrants for blood draws in breath test refusal cases. That issue is discussed in part 3.h.(2) of this Memorandum, at page 27.

[8] There is one caveat to this statement: I believe it will likely be determined that a person who appears for treatment at a hospital and is "incapable of refusal [of a blood test] by reason of unconsciousness or other mental or physical condition" and has blood drawn because such person "is deemed not to have withdrawn his or her consent" (Fla. Stat. 316.1932(1)(c)) has been subjected to "nonconsensual blood testing." That issue is considered in part 3.f. of this Memorandum, at pages 21-24.

unlike the Fourth Amendment, these statutes authorized warrantless nonconsensual blood draws only in situations involving death or serious injury. *See, State v. Slaney*, 653 So.2d 422, 425 (Fla. 3d DCA 1995) ("Florida's implied consent statutes . . . limit the power of the police to require a person who is lawfully arrested for DUI to give samples of his/her breath, urine, or blood without the person's consent"); *State v. McInnus*, 581 So.2d 1370, 1374 (Fla. 1991) (opining that "[p]erhaps the legislature did not want this group of motorists [i.e., those who do not cause serious injury or death] to be subjected to be subjected to brute force testing against their wills.").

But considering that *McNeely* has now interpreted *Schmerber* contrary to established Florida precedent, it may be somewhat inaccurate to say that Florida's implied consent statutes impose greater restrictions than the Fourth Amendment, at least as it pertains to the availability of warrantless nonconsensual blood draws. The accuracy of this statement depends largely on how one interprets *McNeely*'s effect on serious bodily injury and death cases.

Perhaps because of the perception that Florida's implied consent statutes do limit the Fourth Amendment's authority to allow warrantless nonconsensual blood draws to serious bodily injury and death cases, the immediate reaction for some people in the Florida DUI law enforcement and prosecution community was that traffic homicide investigators should conduct their business as usual notwithstanding the ruling in *McNeely*. I disagree. I do believe (after careful study) that the result in *McNeely* would likely have been different had the case involved a blood draw in a DUI Manslaughter prosecution. Nevertheless, because *McNeely* did not directly address this issue, officers should still try to obtain warrants in such cases.

My reasoning for believing that the Court would likely have ruled differently in a DUI Manslaughter scenario begins with the peculiar circumstances of *McNeely*. That is, *McNeely* involved only a routine traffic stop; the officer relied on a misinterpretation of Missouri's

implied consent law in seeking the warrantless nonconsensual blood draw; and the State of Missouri "pushed the envelope" too far regarding its *per se* exigency argument. Moreover, all of the opinions in *McNeely* appeared to focus only on the typical DUI stop.

Additionally, and more importantly, I have reviewed the other two opinions cited in *McNeely* (in addition to the Missouri Supreme Court's version of *McNeely*) that had rejected the *per se* approach to the exigency issue: *see*, *State v. Rodriguez*, 156 P.3d 771 (Utah 2007) and *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008). I was pleasantly surprised to learn that both cases had found that the totality of the circumstances justified the blood draw without a warrant in those cases, both of which involved a death. The fact that a death was involved was very important to the Utah Supreme Court in *Rodriguez*:

> . . . [T]he record reveals much about what the officers understood regarding the accident and Ms. Rodriguez's condition from the time the collision occurred until the time Ms. Rodriguez's blood was drawn. *One fact dominates all others with respect to its relevance to whether the warrantless blood draw was reasonable: that Ms. Stewart was expected to succumb to her injuries.* This fact significantly altered the warrant acquisition calculus that a reasonable law enforcement officer who has probable cause to believe an alcohol-related offense has occurred could be expected to apply. *The severity of the possible alcohol-related offense bears directly on the presence or absence of an exigency sufficient to justify a blood draw without a warrant.*
>
> In this sense, warrantless blood draws are never "routine." Without the presence of other compelling circumstances, a law enforcement official who stopped a pedestrian suspected of public intoxication would not face an exigency sufficient to justify a warrantless blood draw. In such cases, the state has a negligible interest in acquiring the quality of alcohol evidence provided by a blood test uncompromised by considerations of dissipation during the warrant application process. Where an alcohol-related offense is minor, a warrantless blood draw, however modest it may be in the spectrum of bodily intrusions, will trespass on important constitutional rights

156 P.3d at 781. (Emphasis added).

Significantly, the Utah Supreme Court's emphasis on the seriousness of the offense is consistent with previous United States Supreme Court cases addressing the determination of exigency. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732, 753, 754

(1984) (holding that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made" and applying that principle in the case before it to find the warrantless entry into and arrest in a home unreasonable despite the possibility that evidence would be lost because the "[t]he State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible."); *Illinois v. McArthur,* 531 U.S. 326, 336, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (holding that officer's detention of occupant of residence while search warrant was being obtained to present him from destroying contraband in residence was reasonable under exigent circumstances exception; Court distinguished *Welsh*, noting that "[t]he evidence at issue here was of crimes that were 'jailable,' not 'nonjailable,' " and pointing out that the class C misdemeanors involved in that case "include such widely diverse offenses as drag racing, drinking alcohol in a railroad car or on a railroad platform, bribery by a candidate for public office, and assault.")

Rodriguez also found that the fact the officer failed to even consider getting a warrant did not preclude a finding that the warrantless seizure of the blood was justified. The court did announce that "we consider the major constitutional blind spot that this incident exposed disturbing." 156 P.3d at 781. But the court stated further:

> We do not, however, agree with the court of appeals that the officers' belief that warrantless blood extractions were routine dooms the State's quest for exigency. Although we are concerned that the officers did not consider the warrant requirement, the subjective assessment about the need for a warrant is largely irrelevant to our totality of the circumstances analysis. It is an objective analysis in which the thought processes of any particular officer plays no role.

Id.

Additionally, *Rodriguez* disagreed with the lower court's announcement that a warrant could easily have been obtained in that case:

> We also have misgivings about the certainty with which the court of appeals concluded that the decision to extract Ms. Rodriguez's blood was made at a time "when courts are open and search warrants can be readily requested." *Rodriguez,* 2004 UT App 198, 93 P.3d 854. It is not clear to us that this assertion can be credibly derived from the agreed-upon fact that the accident occurred between 4:45 and 4:50 p.m. on a Wednesday.

Id.

Ultimately, *Rodriguez* concluded: "We agree with the district court that the seriousness of the accident coupled with the compelling evidence of Ms. Rodriguez's alcohol impairment is sufficient to establish that the interests of law enforcement outweighed, in this instance, Ms. Rodriguez's privacy interests." *Id*.

The ruling by the Iowa Supreme Court in *Johnson* also gives reason to believe that warrantless nonconsensual blood draws are much more likely to be approved in DUI Manslaughter cases. Initially, it should be noted that in 2004, Iowa amended its implied consent statutes so as codify Iowa's interpretation of *Schmerber* (with certain limitations). The codification pertaining to exigency appears to come close to the holding announced by Justice Sotomayer in *McNeely*. Under Iowa law, an officer investigating a DUI involving a death, or likely death, may withdraw blood from the DUI suspect without that person's consent if, among other things, "[t]he peace officer reasonably believes the officer is confronted with an emergency situation in which the delay necessary to obtain a warrant under section 321J.10 threatens the destruction of the evidence." *Johnson*, at 744 N.W.2d 342. [9]

Applying this provision for the first time, the Iowa Supreme Court in *Johnson* found that the officer had complied with the requirements of the statute:

[9] Recall that Justice Sotomayer announced that "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." 133 S.Ct. at 1561.

> Time-based considerations similar to those in *Schmerber* are present in Johnson's case. The accident occurred at approximately 4:41 p.m. Johnson left the scene. Police officers arrived, dealt with the victim's injuries, interviewed witnesses, and went looking for Johnson. They found Johnson several blocks away. A traffic officer specializing in OWI enforcement and fatality investigations was called. Johnson attempted, but failed, field sobriety tests. He was then transported to the traffic office to obtain a breath sample (which he refused), and he was ultimately transported to the hospital. There, at 7:20 p.m., his blood was drawn.
>
> *In all, more than two and a half hours passed between the time of the accident and the time Johnson's blood was drawn. During this time, his blood-alcohol concentration was continually diminishing due to the natural dissipation of alcohol*. The traffic officer testified that he believed evidence of Johnson's blood-alcohol concentration would be destroyed if he waited to draw blood until after a search warrant was obtained. We conclude that the officers complied with section 321J.10A, which requires only a reasonable belief that the delay necessary to obtain a warrant would threaten the destruction of the evidence.

Id., at 344-45. (Emphasis added).

The *Johnson* court also found that contrary to the defendant's argument, the availability of telephonic warrants under Iowa law did not change the result. The court explained that "[o]btaining a warrant by telephone is fairly complicated; an officer cannot simply call up a magistrate and make a general request for a warrant." *Id*., at 345. The court noted that the intricate requirements of the telephone warrant statute are almost identical to the requirements of a federal rule, including the requirements of preparing a "duplicate" warrant and reading the duplicate warrant, verbatim, to the magistrate. Most importantly, as the court explained: "Despite the availability of a telephone warrant, we believe the facts of this case still show the exigency required by *Schmerber* and section 321J.10A. Considerable time had elapsed following the accident before the need for any warrant – traditional or telephonic – became apparent." *Id*.

Note also that the reasoning in *Johnson* would appear to be consistent with a passage from the majority opinion in *McNeely,* previously quoted, that "[t]elephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an

adequate record, such as preparing a duplicate warrant before calling the magistrate judge." 133 S. Ct. at 1562.

Thus, in view of the "severity" (*Rodriguez*) or "gravity" (*Welch*) of the offenses of DUI Manslaughter or DUI Serious Injury, and in view of the delay often required by investigation in such cases before a decision can be made to have blood drawn (as occurred in *Johnson*), there is a fair probability that the result would have been different in *McNeely* had the case involved a crash with death or serious injury. **Nevertheless, it is too risky to simply keep doing business as usual in our death and serious bodily injury cases and depend on a favorable future appellate court ruling.** We likely won't know where we stand on this issue until, at a minimum, a Florida appellate court addresses it – and we may have to wait until the U.S. Supreme Court itself tells us. In the meantime, if we don't change our procedures, and the rulings go the other way, we will likely have lost many blood test results in very serious cases.

For example, consider that the next time the Iowa Supreme Court addressed the exigency issue after *Johnson*, the court reached a different result – even though the circumstances of both cases were similar. *See*, *State v. Harris*, 763 N.W.2d 269 (Iowa 2009). As the court in *Harris* stated:

> While factual similarities exist between this case and *Johnson*, there is one important distinguishing fact. In *Johnson*, the officer testified he believed evidence of the blood-alcohol concentration would be destroyed if he waited to draw blood until after a search warrant was obtained. Johnson, 744 N.W.2d at 344. Here, Overton repeatedly testified his reason for ordering the blood draw was that he was following the instructions of the assistant county attorney, not any specific concern or knowledge on his part that the time it would take to obtain a warrant would result in the destruction of evidence.

763 N.W.2d at 273-74. This distinction would hardly seem to be pivotal. However, this only demonstrates the uncertainty of relying on anticipated appellate court rulings.

Moreover, notwithstanding the well-reasoned emphasis in *Rodriguez* on the seriousness of the offense as a factor in determining the exigency issue, it is clear that a death or serious injury alone will not suffice as an exigent circumstance for the United States Supreme Court. How do we know this? Consider that the Minnesota Supreme Court in *State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008) held that as long as an officer has probable cause to believe a person has committed the offense of criminal vehicular homicide, then "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw." Subsequently, the Court of Appeals of Alaska in *Dale v. State*, 209 P.3d 1038 (Alaska App. 2009) agreed with *Shriner*, stating: "We believe that the Minnesota Supreme Court in *Shriner* made a strong argument for concluding that, when a case involves death or serious physical injury, exigent circumstances exist as a matter of law." Unfortunately, *Shriner* became one of the "per se" cases which were "abrogated" by the United States Supreme Court in *McNeely*. *See, McNeely*, at 133 S.Ct. 1552 and 1558.

Therefore, the more prudent approach for Florida DUI law enforcement officers to take is to seek a search warrant even in death or serious injury cases. If the result of future appellate cases proves beneficial to us, we can re-adjust our procedures.

(1) Try to obtain medical blood, as well as medical blood records

Whenever a defendant in a DUI Manslaughter or DUI Serious Injury case is treated by medical personnel at a hospital, law enforcement officers and prosecutors should always consider attempting to obtain any available blood – not just blood records – from the hospital. I have recently learned that many hospitals retain the blood that is drawn for medical purposes for several days. Therefore, where the defendant is transported to a hospital but for some reason

blood was not drawn at the direction of law enforcement, or where such blood was drawn but was obtained without a warrant, officers and prosecutors should consider applying for a search warrant for any available medical blood that the hospital has retained. This can be done during normal business hours when the urgency to obtain the blood from the defendant himself or herself is no longer an issue. It also gives a second opportunity to assure admissibility of blood test results from a defendant, even in those cases where a court determines that the blood drawn without a search warrant was obtained without sufficiently exigent circumstances.

Even where the blood itself is no longer available, hospital records of the blood test results in any felony DUI case are accessible either by search warrant or subpoena – providing that all legal prerequisites are satisfied. [10] *See, e.g., Farrall v. State,* 902 So.2d 820 (Fla. 4th DCA 2004) (the State may utilize either the search warrant method or the subpoena method when seeking to obtain a DUI defendant's hospital records, if the proper procedural requirements are met; appellate court found no impropriety in the State's starting one lawful method and then abandoning that method in favor of the other lawful method).

f. The unconscious or incapacitated DUI suspect at a medical facility

Probably the most confusing aspect of the impact of *McNeely* on Florida DUI procedures is the situation where no serious bodily injury or death occurs but the DUI suspect appears for treatment at a hospital or other medical facility and is "incapable of refusal [of a blood test] by reason of unconsciousness or other mental or physical condition." Fla. Stat. 316.1932(1)(c).

[10] Officers are reminded that they cannot directly obtain the medical blood records themselves (unless a search warrant is obtained first); rather, an officer should contact a prosecutor who could subpoena the defendant's medical records after proper notice. See, e.g., *State v. Kutik*, 914 So.2d 484 (Fla. 5th DCA 2005) (where police officer in DUI Manslaughter case did not contact state attorney to subpoena defendant's medical records after proper notice but instead went to hospital and obtained defendant's medical records himself using improper police form, records were held to be inadmissible).

Under this statute, such person "is deemed not to have withdrawn his or her consent" to a blood test as long as the statutory requirements are met. *Id*. If the word "consent" as used in the statute is taken literally, then any investigation of such unconscious or incapacitated driver should not be affected by the *McNeely* ruling – because *McNeely* was only concerned with warrantless *nonconsensual* blood testing.

However, "consent" in this context generally refers to consent which is implied by law – not to actual consent. *See, e.g., Kurecka v. State,* 67 So.2d 1052,1061 (Fla. 4th DCA 2010), *quoting, State v. Gunn,* 408 So.2d 647, 649 (Fla. 4th DCA 1981), which refers to the DUI suspect who submits to a chemical test as one "who has not affirmatively revoked the statutory consent." Moreover, the cases of *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957), *Filmon v. State*, 336 So.2d 586, 591 (Fla. 1976) and *State v. Kliphouse*, 771 So.2d 16, 18 (Fla. 4th DCA 2000) respectively refer to the withdrawal of blood from an unconscious DUI suspect as an "involuntary blood test" (*Breithaupt*), "without conscious consent" (*Filmon*), and an "involuntary blood sample" (*Kliphouse*). Accordingly, because the unconscious or incapacitated DUI suspect at the hospital has no opportunity to exercise the option to refuse consent to the blood draw, there is a reasonable probability that the U.S. Supreme Court would view a blood draw from such person as "nonconsensual blood testing."

Therefore, if the latter interpretation turns out to be the one accepted by the courts, and if an officer chooses to obtain blood in this scenario based solely on the statute without attempting to seek a warrant, then section 316.1932(1)(c) will likely be found unconstitutional as applied – because it will have authorized a blood draw without a warrant after the courts had determined that the officers must seek a warrant.

Compounding the problem is that, unlike the situation involving serious bodily injury or death under section 316.1933 (where an officer can comply with both the statute and *McNeely* simply by obtaining a warrant or demonstrating exigent circumstances for not obtaining one), Florida law does not currently authorize a Florida law enforcement officer to seek a warrant for blood in a misdemeanor DUI case. *See, State v. Geiss*, 70 So.3d 642, 649-50 (Fla. 5th DCA 2011) (court held that Florida search warrant statute, section 933.02, precludes officer from obtaining search warrant for blood in misdemeanor DUI setting; court noted that unlike requests for search warrants in felony cases, section 933.02(2)(a) only allows the state to secure a warrant to seize "property ... used as a means to commit" a misdemeanor; although court found that blood does constitute "property" for purposes of the statute, it ruled that "blood is not 'used as a means to commit' driving under the influence.").

While one could certainly take issue with the ruling in *Geiss*, it remains the law of Florida for now because it is the only Florida appellate case that has addressed this issue. This means that on the one hand, Florida law enforcement officers and prosecutors are not allowed to use a search warrant to obtain blood from a misdemeanor DUI suspect. On the other hand, the likely interpretation of *McNeely* would simulataneously *require* an officer in such situation to obtain a warrant (or demonstrate exigent circumstances for not obtaining one). Thus, the officer in such a case is truly caught in a "catch 22." [11] In fact, it appears that the unfortunate end result of the combination of *Geiss* and the likely interpretation of *McNeely* is that there is currently no

[11] Given this dilemma, an argument could be made that the legal prohibition against obtaining a warrant based on *Geiss* constitutes exigent circumstances for not obtaining a warrant under *McNeely*. However, I have not found any authority to support this argument and I am not confident that this argument will succeed. Therefore, officers in this scenario are advised that they should *not* attempt to draw blood without a warrant as a "test case" on their own. I mention this argument only for the benefit of prosecutors who are faced with a *McNeely* motion in a case involving an unconscious DUI suspect and the officer did not know about the effect of *McNeely* on this issue.

legal mechanism in place for a Florida law enforcement officer to obtain blood from the unconscious DUI suspect who appears for treatment at a hospital or other medical facility.[12]

I believe the only documentary evidence that could be legally obtained for the purpose of demonstrating an alcohol (or drug) level in such a situation would be the DUI suspect's medical blood results from the hospital – but not the medical blood itself. Although many hospitals retain the blood that is drawn for medical purposes for several days and such blood would be available by search warrant in *felony* DUI cases (as discussed in part 3.e.(1), above at pages 20-21), the *Geiss* case would still preclude officers from utilizing a search warrant to obtain blood in *misdemeanor* DUI cases. Moreover, due to *Geiss*, even the medical blood *records* would not be available by way of search warrant in misdemeanor cases. Fortunately, prosecutors can still obtain such records by subpoena after notice. [13]

g. The new Electronic Warrant Law (effective July 1, 2013)

Effective July 1, 2013, the Florida Legislature enacted a new provision in the search warrant statute which (unless vetoed by the Governor) will authorize a judge, under specified conditions, to sign an electronic search warrant. Specifically, subsections (3) and (4) are added to section 933.07, to read:

> (3) A judge may electronically sign a search warrant if the requirements of subsection (1) or subsection (2) are met and the judge, based on an examination of the application and proofs submitted, determines that the application:

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[12] This could change with legislation. See, part 3.h.(2) at page 27 of this Memorandum.

[13] Remember that officers cannot legally obtain medical records themselves – and in misdemeanor cases, officers cannot even obtain such records by search warrant. *See* footnote 10, above, at page 21, for further discussion of the consequences of officers obtaining medical records on their own.

(a) Bears the affiant's signature, or electronic signature if the application was submitted electronically.

(b) Is supported by an oath or affirmation administered by the judge or other person authorized by law to administer oaths.

(c) If submitted electronically, is submitted by reliable electronic means.

(4) A search warrant shall be deemed to be issued by a judge at the time the judge affixes the judge's signature or electronic signature to the warrant. As used in this section, the term "electronic signature" has the same meaning as provided in s. 933.40.[14]

This fortuitous act by the Legislature will have some bearing on how the requirements of *McNeely* will be effectuated. It is, of course, premature to say exactly how this will play out. But officers and prosecutors will need to learn how to make use of this new technological development; it would not be productive for officers and prosecutors to fail to take advantage of all available procedures in the hopes that it would increase the chances that a warrant will be unnecessary. In fact, the use of this new procedure should make it easier to obtain a warrant, and is likely to help the successful prosecution of DUI blood draw cases – and other cases. It certainly should be beneficial in those rural areas where officers, particularly FHP troopers, would otherwise have to travel long distances to make contact with a judge.

Of course, as Justice Sotomayer stated in *McNeely*: "We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process." 133 S.Ct., at 1562. As previously quoted on page 7 of this Memorandum, Justice Sotomayer explained:

> Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 4.1(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest.

[14] Note that the new law also contains a similar provision for electronic *arrest* warrants.

Id. Thus, the new technology does not automatically preclude a finding of exigent circumstances. Certain situations will still give rise to exigent circumstances, particularly where a lengthy investigation delays the determination of probable cause to draw blood. *See, e.g., State v. Johnson*, 744 N.W.2d 340, 345 (Iowa 2008) ("Despite the availability of a telephone warrant, we believe the facts of this case still show the exigency required by *Schmerber* and section 321J.10A. Considerable time had elapsed following the accident before the need for any warrant – traditional or telephonic – became apparent.").

h. The need for Legislation in response to *McNeely*

(1) Implied consent laws

In addition to taking the more prudent approach to *McNeely* in order to assure the admissibility of blood tests in serious bodily injury and death cases, it would also be prudent to amend Florida's implied consent statutes in order to insure that our implied consent laws will conform to the *McNeely* ruling and survive any *McNeely*-related constitutional challenges. Accomplishing such change will take time, study, and effort. But it would probably be a good idea to start by examining states which have already codified the warrant requirement/exigency exception into their implied consent statutes, such as Iowa's laws which were mentioned in part 3.c. of this Memorandum, at page 17.

Additionally, changing our implied consent laws to codify the warrant requirement/exigency exception, as did Iowa, could also help provide specific guidance for law enforcement officers trying to adjust to *McNeely*. Moreover, it could even lead to the availability of forced blood draws (by warrant) in cases *not* involving death or serious injury. This possibility is considered in the next section.

(2) Curing the *Geiss* dilemma re: search warrants

Adopting the more cautious approach to *McNeely* has other advantages. In particular, although *McNeely* will require changes to our DUI investigations and gives rise to the need to amend our implied consent statutes, *McNeely* could also result in additional legislative changes that would authorize search warrants for blood draws in misdemeanor DUI cases – something that (as noted in part 3.f., above, at pages 23-24) the Fifth DCA in *Geiss* held was not authorized under the current search warrant statute. Thus, such legislation would cure the dilemma officers currently face when they encounter the unconscious DUI suspect at a hospital (i.e., the officer is required to seek a blood draw under the likely interpretation of *McNeely* but they are prohibited from doing so by *Geiss* because it involves a misdemeanor only). This proposed legislation should be seen as a reasonable response to the *McNeely/Geiss* "catch 22," especially when it is considered that the Legislature has authorized blood draws from unconscious DUI suspects for decades.

Such legislation could also authorize blood draw warrants in breath test refusal cases – which was the scenario in *Geiss* – thereby reducing the rate of breath test refusals. Although this proposal is more ambitious than curing the *McNeely/Geiss* dilemma, it is not just a pipedream. Justice Sotomayer's plurality opinion in *McNeely* noted that "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*. See NHTSA, Use of Warrants for Breath Test Refusal: Case Studies 36–38 (No. 810852, Oct. 2007)." *McNeely*, 133 S. Ct. at 1567. (Emphasis added). Thus, any opposition to such proposed legislation could be countered by the argument

that the benefits of such legislation have already been acknowledged by the United States Supreme Court.

i. Some final tips for dealing with *McNeely*

1. Officers should always remember to first try to obtain voluntary consent in any blood draw situation. This would eliminate the need to address the *McNeely* issue. But remember also that a voluntary consent is one which is *not* pursuant to the implied consent law and which is not based on any promises or threats, express or implied. Additionally, if you do obtain consent, make sure you document it in the best manner available, e.g., written consent, audio recorded consent, have a witness to the consent, etc.

2. *McNeely* is here to stay. Accordingly, officers need to familiarize themselves with all available warrant application procedures in their particular jurisdiction. Prosecutors and law enforcement officers also need to work together to create the most user friendly, but legally acceptable, templates for search warrant applications. **I have attached a template for a blood draw affidavit/application for search warrant and for a blood draw search warrant at the end of this Memorandum.** Officers should check with their legal advisor or their jurisdiction's State Attorney's Office before adopting the attached templates. Also, prosecutors and law enforcement officers need to work together to have procedures in place to make use of the new electronic warrant statute, which goes into effect on July 1, 2013.

3. Similarly, officers should never intentionally look for ways to avoid seeking a search warrant. It's best to always make reasonable efforts to obtain one without jeopardizing the evidence; you cannot create the exigency yourself. *See, e.g.*, *Bennett v. State*, 516 So.2d 964,

965 (Fla. 5th DCA 1987) ("police cannot create the exigency that serves as an exception to Fourth Amendment requirements by their own prior unreasonable action in failing to procure a valid warrant").

4. This Memorandum cannot directly advise an officer the point at which any particular factor or circumstance obviates the need to obtain a warrant. But complicated crash scenes or unusual events that delay an investigation are more likely to justify exigent circumstances. In fact, pre-*McNeely* totality of the circumstances case law from other states recognizes that the longer it takes to investigate before the officer is in a position to make a decision that blood should be drawn, the greater the exigency – because the alcohol level has already been decreasing during the time it took to investigate. *See, e.g., State v. Johnson,* 744 N.W.2d 340, 345 (Iowa 2008) ("Despite the availability of a telephone warrant, we believe the facts of this case still show the exigency required by *Schmerber* and section 321J.10A. Considerable time had elapsed following the accident before the need for any warrant – a traditional or telephonic – became apparent.").

5. As previously noted, many hospitals retain the blood that is drawn for medical purposes for several days. Therefore, in any felony case in which the defendant is transported to a hospital but blood is drawn without a warrant, officers and prosecutors should consider applying for a search warrant for any available medical blood that the hospital has still retained. This can be done during normal business hours because the urgency to obtain the blood is no longer an issue. Even where the blood itself is no longer available, hospital records of the blood test results in felony cases are still accessible either by search warrant or subpoena – providing that all legal prerequisites are satisfied. *See, e.g., Farrall v. State,* 902 So.2d 820 (Fla. 4th DCA

2004) (the State may utilize either the search warrant method or the subpoena method when seeking to obtain a DUI defendant's hospital records, provided all procedural requirements are met; appellate court found no impropriety in the State's starting one lawful method and then abandoning that method in favor of the other lawful method). Remember, however, that search warrants cannot be used to obtain blood or blood records in misdemeanor cases because of the search warrant statute, as interpreted in *Geiss*.

6. Any time you are unable to obtain a search warrant before drawing blood, make sure to document all facts and circumstances that could justify a showing of exigency. Just as in all your cases, good report writing can make the difference between a successful prosecution and an unsuccessful one.

j. Templates for Blood Draw Search Warrants

I have suggested that prosecutors and law enforcement officers need to work together to create the most user friendly, but legally acceptable, templates for search warrant applications. In an attempt to accomplish this goal, I have worked on and reviewed several models and have prepared the attached templates for a blood draw affidavit/application and search warrant. I have primarily borrowed from the Broward County State Attorney's Office version and I wish to thank Broward Felony Chief Jeff Marcus for forwarding that version to me. I found this template to be quite "user friendly," due to its suggestions for properly executing the affidavit and warrant in both form and substance. The tips in the template can facilitate the warrant application process, particularly for those who are not experienced at obtaining search warrants. Nevertheless, officers are advised to check with their legal advisor or State Attorney's Office before making use of the templates attached here.

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____COUNTY, FLORIDA

GENERAL AFFIDAVIT AND APPLICATION FOR SEARCH WARRANT

STATE OF FLORIDA)

COUNTY OF _____)

BEFORE THE UNDERSIGNED, THE HONORABLE, (Name of Circuit Judge), Judge of the Circuit Court of the _____ Judicial Circuit in and for _____County, State of Florida, personally came (Officer/Deputy/Trooper's Name), of the (Law Enforcement Agency), who after being first duly sworn, deposes and says:

DESCRIPTION OF PERSON TO BE SEARCHED:

NAME:

RACE:

SEX:

DOB:

SS# (if known):

FL DL# (if known):

STATUTE BEING VIOLATED: ***(List statute or statutes violated. For example:***

1. *Driving under the influence manslaughter - F.S. 316.193 (3)(c)(3)*
2. *Driving under the influence serious bodily injury - F.S. 316.193(3)(c)(2)*
3. *Vehicular Homicide – F.S.782.71(1)*
4. *Reckless Driving with Serious Bodily Injury - F.S. 316.192(1)(3)(a)(b)(c)2.*
5. *Boating under influence manslaughter - F.S.327.35(3)(a)(b)(c)3*
6. *Boating under influence serious bodily injury - F.S. 327.35(3)(a)(b)(c)2*

PROPERTY SOUGHT:

1. For (name of suspect) to provide blood samples for testing for alcohol content thereof and/or the presence of chemical substances as set forth in F.S. 877.111 or any substance controlled under chapter 893.

GROUNDS FOR ISSUANCE:

F.S. 933.02(3):

- Property constitutes evidence relevant to proving that a felony has been committed.

PROBABLE CAUSE:

Your Affiant is a certified law enforcement officer with the (Law Enforcement Agency) and has been so employed for a total of _____ years. Your Affiant has been a Traffic Homicide Investigator for _____ years.

YOUR AFFIANT has probable cause to believe that the aforesaid property may be found in the above-described person and for the following reasons:

On (date)_____ at (time)_____, (location)_____, _____County, Florida.

(Describe Probable Cause)

Include evidence of elements (Delete this example section when completed):

1. ***Put suspect behind the wheel. Do not merely provide conclusory statement that "suspect was behind the wheel". Must give facts for judge to decide that suspect was behind wheel. For example: Your affiant came upon the scene and found John Smith pinned behind the steering wheel; or, Your affiant was advised by Deputy Jones that eyewitness Brenda James told Deputy Jones that she saw John Smith driving the car at the time of the accident.***
2. ***Suspect's operation of motor vehicle caused or contributed to the cause of death or serious bodily injury. Do not merely conclusory statement that suspect's operation of motor vehicle caused or contributed to the cause of death or serious bodily injury. Must give facts for judge to determine these facts. For example, your affiant spoke to witness Brenda James who stated that she observed the suspect's vehicle driving at a speed estimated by her to be at 20 mph over the speed limit when the suspect drove through a red light striking the victim's vehicle.***
3. ***Alcohol Impairment or Drug Impairment - Must state facts that establish why you suspect alcohol or drugs. For example, your affiant observed odor of alcohol, saw alcohol bottles or beer cans, saw physical signs such as bloodshot eyes, slurred speech, road-side tests, HGN, etc.; or, witnesses told your affiant that suspect was drinking at a bar, etc.***
4. ***Include facts which establish injury or death of victim(s); include trauma or airlifted to hospital.***
5. ***Other important Facts:***
   - ***A. Location of Suspect: at scene/ police station/ or at hospital***
   - ***B. Include suspect's statements related to either the crash, the consumption of alcohol or drugs, or impairment, EXCLUDING those statements made by the suspect pursuant to a privileged accident report.***

NOTE: If hospital is out of officer's jurisdiction, need Officer/Deputy/Trooper with jurisdiction to execute warrant.

Blood samples are needed from (name of suspect) for testing for alcohol content thereof and/or the presence of chemical substances as set forth in F.S. 877.111 or any substance controlled under chapter 893.

Your Affiant respectfully requests that your Honor grant the (Law Enforcement Agency) permission to use reasonable force if necessary to require (name of suspect) to submit to the administration of the blood test.

The blood samples will be withdrawn by a physician, certified paramedic, registered nurse, licensed practical nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician in a medically proper manner.

WHEREFORE, your Affiant hereby makes application for a Search Warrant authorizing the Affiant from the (Law Enforcement Agency) personnel with proper and necessary assistance, to search the above described person in the daytime/nighttime or on Sunday, and to seize any and all the aforesaid property found by virtue of such Search Warrant and to list the property seized on a return and inventory, to be filed within the Judicial Circuit within ten days of this date.

_____

AFFIANT (Officer/Deputy/Trooper)

SWORN TO AND SUBSCRIBED before me
At (city of notary signature)**,** _____ County, Florida,
this ___ Day of _____, A.D. 20___.

_____

HONORABLE JUDGE OF THE CIRCUIT COURT

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT, IN AND FOR _____ COUNTY, FLORIDA

SEARCH WARRANT

IN THE NAME OF THE STATE OF FLORIDA TO ALL AND SINGULAR THE SHERIFF AND, OR DEPUTY SHERIFFS OF _____ COUNTY, THE FLORIDA HIGHWAY PATROL, POLICE OFFICERS FROM THE FLORIDA HIGHWAY PATROL AND ALL POLICE OFFICERS IN _____COUNTY, FLORIDA TO INCLUDE THE CHIEF OF POLICE OF THE CITY OF _____ OR ANY OF HIS DULY CONSTITUTED AGENTS IN AND FOR _____ COUNTY, FLORIDA:

WHEREAS, Officer/Deputy/Trooper_____, of the (Law Enforcement Agency), County of _____, State of Florida, has this day made application before me for a Search Warrant, said application being supported by the General Affidavit and Application for Search Warrant.

STATUTE BEING VIOLATED: ***(List statute or statutes violated. For example:***

1. *Driving under the influence manslaughter - F.S. 316.193 (3) (c)(3)*
2. *Driving under the influence serious bodily injury - F.S. 316.193 (3) (c)(2)*
3. *Vehicular Homicide – F.S.782.71(1)*
4. *Reckless Driving with Serious Bodily Injury - F.S. 316.192(1)(3)(a)(b)(c)2.*
5. *Boating under influence manslaughter - F.S.327.35(3)(a)(b)(c)3*
6. *Boating under influence serious bodily injury - F.S. 327.35(3)(a)(b)(c)2*

THAT the following grounds for issuance of a Search Warrant, as required by Florida State Statute 933.02, exist, to wit: Property constitutes evidence relevant to proving that a felony has been committed.

DESCRIPTION OF PERSON TO BE SEARCHED:

NAME:

RACE:

SEX:

DOB:

SS# (if known):

FL DL# (if known):

PROPERTY SOUGHT:

For (name of suspect) to provide blood samples for testing for alcohol content thereof and/or the presence of chemical substances as set forth in F.S. 877.111 or any substance controlled under chapter 893.

NOW THEREFORE, the facts upon which the belief of said Affiant are based as set out in said General Affidavit and Application for Search Warrant, as hereby incorporated herein and expressly made a part hereof are hereby deemed sufficient to show probable cause, and I believe there is probable cause for the issuance of a Search Warrant in accordance with the application of said Affiant.

THESE ARE THEREFORE, to command you, *Office/Deputy/Trooper*_____, of the (Law Enforcement Agency), and/or law enforcement officers of the County of _____, State of Florida, with proper and necessary assistance, to search the aforesaid described (name of suspect) and to search for the aforesaid property found by virtue of such Search Warrant.

You authorized to use reasonable force if necessary to require (name of suspect) to submit to the administration of the blood test. The blood samples shall be withdrawn by a physician, certified paramedic, registered nurse, licensed practical nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician in a medically proper manner.

YOU ARE directed to deliver a duplicate copy of this Search Warrant to the following named person, to wit: (name of suspect)**.**

YOU ARE directed that if property be found and seized by virtue of this Search Warrant, you shall deliver to the above person a written inventory of the property taken and a receipt for same.

YOU ARE further directed to make return of your actions and doings by virtue hereof to the undersigned, the Magistrate, or some other Court having jurisdiction of the offense within ten (10) days from the date hereof and to do and report concerning the same as the law further directs.

AUTHORITY is hereby granted to execute this Warrant in the Daytime/Nighttime or on Sunday.

GIVEN UNDER MY HAND AND SEAL THIS _____ DAY OF _____, A.D. 20__.

HONORABLE JUDGE OF THE CIRCUIT COURT

INVENTORY AND RECEIPT

_____
_____
_____
_____
_____
_____
_____
_____
_____

RETURN

(STATE OF FLORIDA)

(COUNTY OF _____)

Received this Search Warrant on the _____day of _____, 20___, and executed the same in _____ County, Florida the _____day of _____, 20___, by searching the person described therein and by taking into custody the property described in the above Inventory and Receipt and by having read and delivered a copy of this Search Warrant and Inventory and Receipt to be left with the person.

_____
Officer/Deputy/Trooper's Name

SWORN TO AND SUBSCRIBED

Before me this ____ day of _____, 20___

_____
CIRCUIT JUDGE