2012 WL 6624222 (U.S.) (Appellate Brief)
Supreme Court of the United States.

STATE OF MISSOURI, Petitioner,
v.
Tyler G. MCNEELY, Respondent.

No. 11-1425.
October 17, 2012.

On Writ of Certiorari to the Supreme Court of Missouri

Brief of the National College for DUI Defense and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Respondent

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*1 INTEREST OF *AMICI CURIAE*

Amici curiae are the National College for DUI Defense ("NCDD") and the National Association of Criminal Defense Lawyers ("NACDL"). [1]

NCDD is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding blood alcohol tests.

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries - and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys - include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

***2** NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving the Fourth Amendment and its state analogues, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests. As relates to the issues before the Court in this case, NACDL has an interest in protecting both privacy and associational rights from unwarranted and unreasonable government intrusion.

SUMMARY OF THE ARGUMENT

Although Missouri complains that, in theory, obtaining a warrant to draw blood is a burden, the fact that at least twenty-one states regularly obtain warrants and successfully prosecute thousands of drunk driver cases each year belies that claim. Such a widespread practice indicates that a significant number of states strike the balance between privacy interests and policing efficacy differently. Missouri asks this Court not to strike a different balance, but to strike no balance at all and instead to permit a new *per se* rule that ignores privacy interests on a categorical basis.

It is undisputed that obtaining a warrant, even by email or telephone, necessarily takes some time. However, the dissipation of alcohol from the bloodstream only constitutes an exigency if substantial delay in obtaining a warrant prevents collection of a blood sample within the relevant window of time. In practice, substantial delays are not inherent to the warrant process. Anecdotal ***3** evidence demonstrates that technology has expedited and streamlined warrant procedures, such that police routinely obtain warrants in less than thirty minutes in many jurisdictions.

In the context of drunk driving, search warrants are especially important because police are under pressure to secure timely evidence of the driver's blood alcohol content. Requiring an officer to apply for and obtain a search warrant before drawing blood from a driver who has not consented ensures that a neutral and detached magistrate assesses the specific circumstances of the case, and increases the likelihood that the driver will either consent to a breath test or cooperate with the blood draw.

ARGUMENT

I. *PER SE* WARRANTLESS BLOOD DRAWS ARE UNNECESSARY

Missouri wants a new *per se* rule that ignores individual privacy interests on a categorical basis. This Court should not adopt Missouri's rule because it is unnecessary and inappropriate. *See United States v. Drayton*, 536 U.S. 194, 201 (2002) ("for the most part *per se* rules are inappropriate in the Fourth Amendment context"). Missouri suggests that a *per se* rule in this case "comports with Fourth Amendment standards of reasonableness," Pet. Br. at 15, 28, even though the Court has repeatedly rejected blanket rules.[2] *See Arizona v. Gant*, 556 U.S. 332, 343 (2009); ***4** *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Mapp v. Ohio*, 367 U.S. 643, 653 (1961).

A. States Already Successfully Prosecute Thousands of Drunk Driving Cases After Police Obtain Warrants to Draw Blood

There is no need for this Court to adopt a new *per se* rule permitting warrantless searches in all drunk driving cases. To the contrary, at least twenty-one states - including Missouri - have had little difficulty enforcing their laws even when the police have obtained search warrants before withdrawing blood for alcohol testing. These states include: Alabama, Arizona, Georgia, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming. *See* Addendum A.

In the states where obtaining warrants to draw blood has long been the norm, prosecutors have successfully obtained thousands of convictions. For example, the National Highway Traffic Safety Administration ("NHTSA") recently examined four of these states - Arizona, Michigan, Oregon, and Utah - and reported that police have obtained 2,000 warrants a year in Arizona's largest county, which includes Phoenix. NHTSA, DOT HS 810 852, Use of Warrants for Breath Test Refusal: Case Studies, (2007), at 4, 7 ("NHTSA Case Studies"). In Michigan, police reportedly obtain a warrant in almost every case where the driver refuses to submit to a breath test. *Id.* at 15. Overall, NHTSA found that judges and prosecutors strongly supported warrants for blood draws because they have increased the number of cases with blood alcohol content ("BAC") evidence, which has resulted in "more guilty pleas, fewer trials, and more convictions." *Id.* at 36.

***5** When states streamline the application process and prosecutors and judges make themselves more available, police can easily obtain search warrants to draw blood. For example, in states that are newer to the warrant process, NHTSA has been promoting "No-Refusal Weekends" where police publicize in advance that they will be getting warrants for drunk driving suspects who refuse to submit to a breath test. The NHTSA offers jurisdictions an online "No-Refusal Weekend Toolkit" with samples of simplified warrant forms that can be used to expedite the process. *See* NHTSA, No Refusal, http:// www.nhtsa.gov/ no-refusal (last visited Dec. 14, 2012). Through efforts like these, states can "build solid cases," which lead to more drunk driving convictions. *Id.*

Blood samples are obtained in a straightforward way. First, a police officer arrests the driver and asks for a breath sample. NHTSA CASE STUDIES, at 36. The officer informs the driver of the state's implied consent laws and penalties. *Id.* If the driver refuses to provide a breath sample, the officer requests a warrant for a blood sample by completing standardized affidavit and warrant forms. *Id.* The officer then either electronically transfers the forms to the judge, magistrate, or prosecutor (or even reads them over the phone) and the warrant is then sworn over the telephone. *Id.; see also* Addendum B (forms used in Phoenix, Arizona). Once the warrant is granted, the driver must submit to the blood draw.

The entire process - including completing the forms, transmitting the information, obtaining the warrant, and transporting the driver to a medical facility or using a police phlebotomist to draw the ***6** blood - ordinarily takes no more than two hours. [3] NHTSA CASE STUDIES, at 36. Police officers interviewed by NHTSA "generally supported the use of warrants" and were "willing to take the additional time … in order to obtain BAC evidence." *Id.*

On the other hand, *amici* in support of Missouri cited only a handful of cases where the police took more than two hours to obtain BAC evidence. [4] In the case with the most egregious delay, the police did not draw the driver's blood until four hours after the collision. *See Smith v. State*, 942 So. 2d 308, 313 (Miss. Ct. App. 2008). In spite of the long delay, the court *affirmed* the conviction. *Id.* at 322. In doing so, the court expressly rejected the argument that, in order for blood draw evidence to be admissible, it must be drawn "at the time of the accident." *Id.* at 314.

Here, *amici* agree that unreasonable delay in obtaining a warrant should be *a factor* in determining whether to allow a warrantless blood draw under ***7** *Schmerber v. California*, 384 U.S. 757 (1966). [5] But Missouri goes too far in arguing that "an inherent exigency always exists" solely because alcohol naturally dissipates in the bloodstream. Pet. Br. at 26. To the contrary, because of predictable rates of dissipation, police actually have a "window of opportunity" in which to seek a search warrant to draw blood. Resp. Br. at 45.

B. Technological Advances Allow Police to Obtain Warrants in Minutes

Advancements in communications technology have substantially expedited the process for obtaining search warrants, making it much easier to get a warrant within the relevant window of time. Using widespread electronic communications technology, police can obtain search warrants in minutes rather than hours. [6] Thus, whether the dissipation of alcohol from the blood stream qualifies as an exigent circumstance necessarily depends on how quickly an officer can obtain a warrant.

Several courts have accounted for the time it takes to obtain a warrant in determining whether an exigency existed. *See United States v. Cuaron*, 700 F.2d 582, 589 (10th Cir. 1983); ***8** *United States v. McEachin*, 670 F.2d 1139, 1147 (D.C. Cir. 1981); *United States v. Baker*, 520 F. Supp. 1080, 1084 (S.D. Iowa 1981); *State v. Flannigan*, 978 P.2d 127, 131 (Ariz. Ct. App. 1998). The D.C. Circuit reasoned that "the courts must consider the availability of a telephonic warrant in determining whether exigent circumstances existed, unless it is clear that the exigency in a particular case was so great that it precluded recourse to any warrant procedure, however brief." *McEachin*, 670 F.2d at 1147.

In 1966, when the Court decided *Schmerber*, no state statute allowed for the issuance of warrants by telephone or other electronic means. [7] Police officers seeking warrants had to appear personally before a judge. But today, thirty-five states have passed statutes that allow police officers to electronically submit warrant applications and judges to issue search warrants by one or more of the following methods: telephone, radio, facsimile, email, video conference, or text message. *See* Addendum C (listing statutes). Only fifteen states still specify written or in person applications or make no mention of electronic submission. *See* Addendum D (listing statutes). Moreover, even within states that have not expressly provided for electronic warrant procedures, police officers in ***9** some jurisdictions have nonetheless found ways to use technology creatively to expedite the process. [8]

C. States Have E-Warrant Procedures

Of the thirty-five states that provide for remote warrant procedures, at least four - California, New Mexico, Utah, and Vermont - explicitly allow police to use of email or text messaging to apply for and receive a warrant. *See* Cal. Penal Code § 1526(b); N.M. R. Crim. P. 5-211(f)(3), (g)(3); Utah R. Crim. P. 40(1); Vt. R. Crim. P. 41(c)(4), (g)(2). For example, in Utah, "[a]ll communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by voice, image, text, or any combination of those, or by other means." Utah R. Crim. P. 40(1)(1). Utah has implemented an e-warrants system:

> The e-warrants system allows Utah law enforcement officers to enter search warrant affidavit information. The system then electronically notifies a prosecutor and forwards the affidavit for review. After review, an officer can transfer the affidavit to a magistrate, electronically notifying him or her of the waiting request. The magistrate can then electronically review the affidavit ***10** and [electronically] generated warrant, electronically sign the warrant, or deny the request with comments, then electronically send the results back to the officer.

State of Utah, e-Warrants: Cross Border Collaboration (2008), at 1, *available at* http://www.nascio.org/awards/nominations/2008/2008UT2-e-Warrants%20Submission%6#.2.08fs1fs.pdf. Utah's e-warrants system has reduced the amount of time it takes to obtain a warrant from several hours to several minutes. Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Trib. (Dec. 26, 2008) (explaining that it took *five minutes* to obtain an "e-warrant for a forced blood draw on a man arrested for DUI") (emphasis added).

Similarly, police officers in Douglas County, Kansas, are able to obtain search warrants in fifteen minutes by emailing a request for a warrant to a judge's iPad, which the judge may sign and return via email. Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, The Kansas Prosecutor, Spring 2012, at 17-19, *available at* http:// www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf.

D. Telephonic Warrants Also May Be Granted in Minutes

At least twenty of the thirty-five states that allow remote warrants specifically allow the submission of testimony and issuance of warrants over the ***11** telephone. [9] Telephonic warrants are more widespread than email or videoconferencing, and they are

equally prompt. According to the Chief of Police in Cheyenne, Wyoming, obtaining a search warrant over the phone usually takes less than five minutes. [10] Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, Wyoming Trib. Eagle (Aug. 19, 2011); *see also* Addendum E (Wyoming affidavit for blood draw search warrant). In Billings, Montana, it takes about fifteen minutes to obtain a telephonic warrant. *Gazette Opinion: Evidence Shows Value of DUI Search Warrants*, Billings Gazette (May 30, 2012).

When an officer has not even attempted to use the procedures in place for obtaining a warrant, as is the case here, the state should not benefit from the speculation that the officer might have encountered delay if he had made any effort. *Flannigan*, 978 P.2d at 131 ("We do not know how long the delay would have been because the police made no effort whatsoever to obtain a warrant. *The mere possibility of delay does not give rise to an exigency*") (emphasis ***12** added). [11] If a jurisdiction's outmoded warrant procedures result in habitual delays, then the response should be to update the procedures, rather than dispense with the protections of the Fourth Amendment.

II. *PER SE* WARRANTLESS BLOOD DRAWS ARE UNREASONABLE AND UNCONSTITUTIONAL

Contrary to Missouri's argument, drivers do not categorically forfeit Fourth Amendment protections against unreasonable searches simply by driving on public roads. *See United States v. Jones*, 565 U.S. __, __, 132 S. Ct. 945, 950-51 (2012); *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). Even on public roads, warrantless searches and seizures are presumptively unreasonable in areas where citizens maintain an expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 357 (1967). A person has a reasonable expectation of privacy in his or her body; indeed, intrusions into the human body implicate the "most personal and deep-rooted expectations of privacy." *Lee*, 470 U.S. at 760. This Court should not adopt a new *per se* rule that gives police unchecked power to intrude upon a driver's reasonable expectation of privacy in all drunk driving cases.

A. The Warrant Requirement Checks Police Power in DUI Cases

Under the Court's Fourth Amendment cases, police officers already have substantial discretion when stopping drivers to enforce traffic laws. If a police officer ***13** has an "articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered," he may stop a vehicle to check the driver's license and registration. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). If the "license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order," the officer may stop the vehicle. *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). Police officers may ask "a moderate number of questions" to confirm or dispel suspicions, *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), and they may direct the driver to exit the vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 119 n.10 (1977). Regardless of subjective intent, if the police officer has "probable cause to believe that a traffic violation has occurred," then the officer is permitted to stop any vehicle. *Whren v. United States*, 517 U.S. 806, 810 (1996).

Petitioner wants to give police even more discretion by creating a categorical rule that would permit an officer, so long as he has probable cause, to draw blood without a warrant simply because "alcohol is naturally eliminated from the human body." [12] Pet. Br. at 13. Petitioner's rule is unreasonable and inappropriate. ***14** *Drayton*, 536 U.S. at 201 (rejecting *per se* rules in the context of the Fourth Amendment).

B. Search Warrants Protect Officers and Drivers

Requiring a search warrant before drawing blood ensures not only that a neutral and detached magistrate assesses the specific circumstances for the request, *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), but it may also increase the chances that the suspect will consent to take a breath test when informed of the warrant process, *see* NHSTA CASE STUDIES at 13, 17, or choose to cooperate with the blood draw. [13] Kroskob, *supra* (" 'Usually, once we have the warrant they go ahead and cooperate

with the blood draw,' Chief Brian Kozak said"). Additionally, search warrants protect officers from civil suits and liability. *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (the good faith standard from *United States v. Leon*, 468 U.S. 897 (1984), applies to determine the qualified immunity in § 1983 actions for police officers obtaining warrants).

Rather than adopting a new categorical rule that gives police unchecked power to intrude upon a driver's ***15** "most personal and deep-rooted expectations of privacy," *Lee*, 470 U.S. at 760, in all drunk driving cases, the Court should affirm the rule that it already has adopted. "[W]hether a warrantless blood test is unreasonable in any given case should be determined based on the totality of circumstances." Resp. Br. at 10; *see also United States v. Banks*, 540 U.S. 31, 36 (2003); *Ker v. California*, 374 U.S. 23, 33 (1963); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931).

Petitioner claims that the dissipation of alcohol in the body of a drunk driving suspect creates an exigency and that justifies dispensing with the warrant requirement in *every* case. However, anecdotal evidence shows exactly the opposite, that states are able to successfully prosecute cases using warrants to obtain blood alcohol tests in thousands of cases every year. Some states could even improve their already acceptable return times by using widely available electronic communications technology. Warrants help persuade suspects to consent to a breath test or cooperate with a non-consensual blood test, and provide some protection to officers from civil liability. Finally, under *Schmerber*, police may nevertheless draw blood without a warrant when reasonable efforts have failed to obtain the warrant and there are exigent circumstances particular to that situation. Thus, under the current totality of circumstances rule, police are able to obtain a blood sample that satisfies legal requirements in *every* case where they have probable cause to seek one.

*16 CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Supreme Court of the State of Missouri.

*1A ADDENDUM A

States Using Warrants to Draw Blood

Alabama: *Britton v. State*, 631 So. 2d 1073 (Ala. Crim. App. 1993); A. R. Crim. P. 16.2(b)(6)

Arizona: Ariz. Rev. Stat. Ann. §§ 13-3915 (D), (E), 28-1321, 28-1388

Georgia: Ga. Code Ann. § 40-5-67.1 (d.l); Rhonda Cook, *DUI Test Refusals Prompt Blood Warrant*, Atlanta J.-Const. (Dec. 23, 2011), http:// www.ajc.com/news/news/local/dui-test-refusals-prompt-blood-warrants/nQPnJ/ (last visited Dec. 14, 2012)

Illinois: *DuPage County Rolls Out 'No Refusal' Weekend Over Labor Day*, Naperville Patch (Aug. 31, 2011), http:// naperville.patch.com/articles/dupage-county-rolls-out-no-refusal-weekend-over-labor-day2 (last visited Dec. 14, 2012)

Iowa: Iowa Code §§ 321J.10, 321J.10A(1)(c); *State v. Harris*, 763 N.W.2d 269 (Iowa 2009); *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008)

Kansas: Kan. Stat. Ann. § 8-1001 (p), (t); George Diepenbrock, *With iPads, Judges In Touch Any Time, Any Place*, Lawrence J World (Feb. 5, 2012), http:// www2.ljworld.com/news/2012/feb/05/ipads-judges-touch-any-time-any-place/ (last visited Dec. 14, 2012); Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, The Kansas Prosecutor, Vol. 9, No. 1 (Spring 2012), *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Springl2.pdf

Louisiana: Mike Steele & Heather Harel, *State Police Say "No Refusal" Weekend Has Been Successful*, WBRZ.COM (Sept. 6, 2010), ***2a** http:// www.wbrz.com/news/no-refusal-weekend/ (last visited Dec. 14, 2012); Raymond Legendre & Houma Courier, *No Refusal Weekend For Those Suspected Of DWI Has Critics, Supporters*, WWLTV.com Eyewitness

News (Sept. 10, 2010), http:// www.wwltv.com/news/local/No- Refusal-weekend-for-those-suspected-of-DWI-case-critics-supporters-102228604.html (last visited Dec. 14, 2012)

Michigan: Mich. Comp. Laws § 780.651; *State v. Snyder*, 449 N.W.2d 703 (Mich. Ct. App. 1989)

Mississippi: *McDuff v. State*, 763 So.2d 850 (Miss. 2000)

Missouri: *State v. McNeely*, 358 S.W.3d 65, 68 (Mo. 2012); Dana Fields, *Mo. Supreme Court Rejects Warrantless DWI Blood Test*, Associated Press, Jan. 18, 2012, *available at* 1/18/12 AP Alert - MO (Westlaw)

Montana: Mont. Code Ann. § 61-8-402; Gwen Florio, *Judges Happily Lose Sleep Over Montana's New DUI Blood-draw Law*, The Missoulian (Dec. 18, 2011), http:// missoulian.com/news/local/judges-happily-lose-sleep-over-montana-s-new-dui-blood/article_2bbe48e0-2922-11e1-917d-001871e3ce6c.html (last visited Dec. 14, 2012)

New Mexico: N.M. Stat. Ann. § 66-8-111; *State v. Hughey*, 163 P.3d 470 (N.M. 2007); *State v. Silago*, 119 P.3d 181 (N.M. Ct. App. 2005); *State v. Montoya*, 114 P.3d 393 (N.M. Ct. App. 2005); *State v. Duquette*, 994 P.2d 776 (N.M. Ct. App. 1999)

North Carolina: N.C. Gen. Stat. Ann. § 20-139.1(b5); Nat'l Highway Safety Transp. Admin., *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina*, DOT HS 811461 ***3a** (Apr. 2011), *available at* www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf

Ohio: Ohio Rev. Code Ann., § 4511.19(D)(1)(b); Mary Beth Quirk, *Ohio Cops Implementing "No-Refusal" DUI Weekend With Blood-Draw Warrants*, The Consumerist (Feb. 3, 2012), http://consumerist.com/2012/02/03/ohio-cops-implementing-no-refusal-dui-weekend-with-blood-draw-warrants/ (last visited Dec. 14, 2012); Jennifer Feehan & Erica Blake, *Refusing DUI Test Not Option - Wood Co. Authorities Seek Blood Draws If Drivers Object*, The Toledo Blade (Feb. 2, 2012), http://www.toledoblade.com/Police-Fire/2012/02/02/Refusing-DUI-test-not-option.html (last visited Dec. 14, 2012)

Oregon: Or. Rev. Stat. 813.320(2)(b); Nat'l Highway Traffic Safety Admin., *Use of Warrants For Breath Test Refusals: Case Studies*, DOT HS 810 852 (Oct. 2007), *available at* http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury% 20Control/Articles/Associated%20Files/810852.pdf

Tennessee: Tenn. Code Ann., § 55-10-406(a)(4)(A); *New DUI Law Leads To 8 Warrants For Blood Tests*, Associated Press, July 10, 2012, *available at* 7/10/12 AP Alert - TN 19:11:38 (Westlaw); Kevin McKenzie, *'No Refusal' Labor Day Weekend To Combat DUI In Shelby, Tipton Counties*, The Commercial Appeal (Aug. 31, 2012), www.commercialappeal.com/news/2012/aug/31/no-refusal-labor-day-weekend-to-combat-dui-in/ (last visited Dec. 14, 2012)

Texas: Tex. Transp. Code Ann. § 724.011 et seq.; *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002); Nathan Koppel, *Texas Blood Test Aims At Drunk Drivers*, Wall Street Journal (Dec. 11, ***4a** 2011), *available at* http:// online.wsj.com/article/SB10001424052970204397704577070700748380

Utah: Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Tribune (Dec. 26, 2008), http://www.policeone.com/ police-products/communications/articles/1769302-Utah-cops-praise-electronic-warrant-system (last visited Dec. 14, 2012)

Vermont: Vt. Stat. Ann. Tit. 23, § 1202 (f)

Washington: Wash. Rev. Code § 46.20.308(1); *City Of Seattle v. St. John*, 215 P.3d 194 (2009); *New Washington Law For DUI Blood Draw*, Associated Press, Aug. 14, 2012, *available at* 8/14/12 AP Alert - WA 17:58:38 (Westlaw)

Wyoming: Wyo. Stat. Ann. § 31-6-102

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***1AAA ADDENDUM C**

States That Expressly Allow Electronic Submission and Reception of Warrant Applications and Search Warrants

Ala. R. Crim. P. 3.8(b)

Alaska Stat. Ann. § 12.35.015

Ariz. Rev. Stat. Ann. §§ 13-3914(C), 13-3915(D), (E)

Ark. Code Ann. § 16-82-201

Cal. Penal Code § 1526(b)

Colo. Rev. Stat. Ann. § 16-1-106(3)(b)

Ga. Code Ann. § 17-5-21.1

Idaho Code Ann. §§ 19-4404, 19-4406

725 Ill. Comp. Stat. Ann. 5/108-4(a) (search warrants may be issued electronically following written complaints)

Ind. Code. Ann. § 35-33-5-8

Iowa Code Ann. §§ 808.3, 808.4; Iowa Code Ann. § 321J.10(3) (issuance of a search warrant may be based on oral testimony communicated by telephone only in circumstances involving traffic accidents)

Kan. Stat. Ann. §§ 22-2502(a), 22-2504

La. Code Crim. Proc. Ann. art. 162.1(B), (D)

Mich. Comp. Laws Ann. § 780.651(2)-(6)

Minn. R. Crim. P. 36.01, 36.05

Mo. Ann. Stat. § 542.276(3), (7)

Mont. Code Ann. §§ 46-5-221, 46-5-222

Neb. Rev. Stat. Ann. §§ 29-814.01, 29-814.03, 29814.05

***2aaa** Nev. Rev. Stat. Ann. § 179.045(2), (4)

N.H. Rev. Stat. Ann. § 595-A:4-a

N.J. R. Crim. P. 3:5-3(b)

N.M. R. Crim. P. 5-211(F)(3), (G)(3)

N.Y. Crim. Proc. Law §§ 690.36(1), 690.40(3), 690.45(1), (2) (McKinney 2012)

N.C. Gen. Stat. Ann. § 15A-245(a)(3)

N.D. R. Crim. P. 41(c)(2)-(3)

Ohio R. Crim. P. 41(C)(1)-(2)

Okla. Stat. Ann. tit. 22 §§ 1223.1, 1225(B)

Or. Rev. Stat. Ann. § 133.545(5)-(6)

Pa. R. Crim. P. 203(A), (C)

S.D. Codified Laws §§ 23A-35-4.2, 23A-35-5, 23A-35-6

Utah R. Crim. P. 40(1)

Vt. R. Crim. P. 41(c)(4), (g)(2)

Va. Code Ann. § 19.2-54

Wash. Super. Ct. Crim. R. 2.3(c)

Wis. Stat. Ann. § 968.12(3)

***1AAAA ADDENDUM D**

States That Specify Written or In Person Applications, or Lack Mention of Electronic Submission

Conn. Gen. Stat. Ann. § 54-33a(c)

Del. Code. Ann. tit. 11 §§ 2306, 2307

Fla. Stat. Ann. §§ 933.06, 933.07(1)

Haw. Rev. Stat. § 803-34

Ky. R. Crim. P. 13.10(1)

Me. R. Crim. P. 41(c)

Md. Code Crim. P. § 1-203(a)(2)(i)

Mass. Gen. Laws Ann. ch. 276, § 2b

Miss. Code Ann. § 99-15-11

R.I. Gen. Laws Ann. § 12-5-3

S.C. Code Ann. § 17-13-140

Tenn. Code Ann. §§ 40-6-104, 40-6-105; Tenn. R. Crim. P. 41(c)

Tex. Code Crim. Proc. Ann. art. 18.01

W. Va. Code Ann. § 62-1A-3

Wyo. R. Crim. P. 41

***1AAAAA ADDENDUM E**

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Footnotes

FN

* Counsel of Record

1 Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

2 Missouri attempts to justify a *per se* rule by arguing that it "provides the best and most probative evidence," Pet. Br. at 15, even though the Court has held that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

3 Even the traditional consensual manner of obtaining BAC evidence, with a breath test, has built in delays. Police need time to read the driver an implied consent advisory, time to give the driver an opportunity to make a decision, including to consult with counsel (in the states that allow it), and police must observe a required 15 or 20 minute deprivation period where the suspect is observed and not allowed to eat, drink, belch or regurgitate before submitting to a breath test. In contrast, police in states like Michigan can easily obtain blood draw warrants so "officers will choose a blood test," depending on the circumstances, because it "will be faster." NHTSA Case Studies, at 17. In Arizona, "blood test[s] can require no more police time than a breath test if blood test faculties are readily available." *Id.* at 14.

4 *See* Brief for Nat'l Dist. Attorneys Ass'n *et al.* as *Amici Curiae* Supporting Petitioner, at 11-13 (citing *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001); *State v. Eighth Judicial Dist. Ct.*, 267 P.3d 777 (Nev. 2011); and *Smith v. State*, 942 So.2d 308 (Miss. Ct. App. 2006)).

5 Anecdotal evidence suggests that as police are able to determine when a suspect has run out of time to consent to a breath test, they are also intimately familiar with the legal requirements of their jurisdictions and aware of the time needed to obtain a blood sample that satisfies those requirements.

6 Many police cruisers have laptops with internet connections attached to their dashboards, allowing for virtually instantaneous transmission of information. *See* Patrick T. Sullivan, *Cape Police More Efficient With In-Car Laptops*, Southeast Missourian, Feb. 6, 2012, *available at* http:// www.semissourian.com/story/1812598.html.

7 In 1970, four years after *Schmerber*, California adopted one of the first statutes providing for oral submission of testimony in 1970. *See People v. Peck*, 113 Cal. Rptr. 806, 809 (Cal. Ct. App. 1974); Justin H. Smith, Note, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1607-09 (2002).

8 Even though Fla. Stat. Ann. § 933.07, does not address the use of technology to obtain a warrant, Palm Bay police officers have expedited the warrant process by emailing an affidavit to the judge and then videoconferencing with the judge via Skype. Palm Bay Police, Innovative Policing Creating a Safer Community (2011), at 10, *available at* http:// www.palmbayflorida.org/police/documents/annual_report_2011.pdf. "The process takes an average of *less than thirty minutes* in comparison to several hours it would have taken using traditional means." *Id.* (emphasis added).

9 These states include Alabama, Alaska, Arkansas, Arizona, California, Idaho, Indiana, Louisiana, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, South Dakota, Utah, Washington, and Wisconsin. *See* Addendum C.

10 Because Wyoming's rules do not address remote means for obtaining a warrant, Wyoming was not included as one of the twenty states that provides for telephonic warrants, or one of the thirty-two states that allows electronic warrants generally. *See* Wyo. R. Crim. P. 41(c).

11 The court went on to say that "if the police had attempted to obtain a warrant but had encountered difficulties in reaching a magistrate, this change in circumstances might well have created an exigency justifying the warrantless seizure of defendant's blood." *Flannigan*, 978 P.2d at 131.

12 Petitioner's categorical rule also increases the likliehood that the police will decide to draw the blood themselves rather than take the suspect to a medical medical facility. *See Schmerber*, 384 U.S. at 771-72 (allowing non-medical personnel to conduct even "the most rudimentary" medical techniques, like drawing blood, outside of the medical environment raises "serious questions"); *see generally* Holly Hinte, *Drunk Drivers and Vampire Cops: The "Gold Standard"*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159 (2011) (analyzing police phlebotomists and their "detrimental consequences").

13 Blood draw situations are potentially dangerous for the officer and the intoxicated suspect. *See* Bruce Vielmetti, *DA Reviewing Death of West Allis Man After Taser Incident*, Milwaukee J. Sentinel, Dec. 6, 2012, *available at* http://www.jsonline.com/news/crime/da-reviewing-death-of-west-allis-man-after-taser-incident-fb7udli-182445041.html (reporting how a man "resisted attempts to take a blood sample," how the police "restrained and stunned [him] with a Taser," and how he was found dead the next day). Suspects do not always cooperate with police blood draws. Undercover ABC 13, *Forced Blood Draw* (July 20, 2011) http://www.youtube.com/watch? v=ZONkSLmVUtQ (last visited Dec. 14, 2012) (showing the police forcibly drawing blood on the floor of the police station).

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