



Local Government Update

by Caroline Johnson Levine

A *Per Se* Rule's Result for State and Local Governments

There is a fascinating interplay between federal, state, and local governments once the U.S. Supreme Court issues a decision. Federal decisions often significantly affect the rights, obligations, and financial burdens of state and local governments. These issues can be demonstrated by following the natural result of the recent U.S. Supreme Court decision, *Missouri v. McNeely*.¹

A police officer pulled over Tyler McNeely for a driving while intoxicated (DWI) investigation. The officer observed McNeely at 2:08 a.m., speeding and crossing the centerline of the roadway several times, as well as several other "signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath."² McNeely admitted to drinking alcohol at a local bar earlier in the evening. "After McNeely performed poorly on a battery of field sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC), the officer placed him under arrest."³

The police officer drove McNeely to a local hospital to obtain a blood sample, however, the officer did not obtain a search warrant. McNeely's blood was obtained by a lab technician at 2:35 a.m., and the "laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent."⁴

McNeely moved to suppress the blood alcohol evidence against him, which established his guilt of the crime. The trial court suppressed the blood alcohol results, and "the Missouri Court of Appeals stated an intention to reverse but transferred the case directly to the Missouri Supreme Court."⁵ The Missouri Supreme Court affirmed the trial court's decision and relied on the U.S. Supreme Court's holding in *Schmerber v. California*⁶ to find that lower courts should engage in a "totality of the circumstances analysis when determining whether exigency permits a nonconsensual, warrantless blood draw."⁷ The Missouri Supreme Court held that the state's argument that a blood draw is necessary to prevent the "dissipation of blood-alcohol evidence" in a DWI investigation is not enough to sustain the exigency exception to the Fourth Amendment's mandate against unreasonable searches and seizures.⁸

Schmerber involved an alcohol-impaired driver who sustained injuries in a single motor vehicle accident and had to be transported

to a hospital. A police officer directed the hospital staff to draw the suspect's blood without obtaining a warrant issued by a neutral magistrate. The U.S. Supreme Court found that the time incurred in investigating the traffic crash and transporting the suspect to the hospital created an exigency exception to the Fourth Amendment's requirement to be free from unreasonable searches and seizures.⁹

Since the *Schmerber* decision in 1966, states have issued conflicting opinions regarding the application of the exigency rule in warrantless blood draws for DWI investigations. Therefore, in *McNeely*, the U.S. Supreme Court recently "granted *certiorari* to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations."¹⁰

The U.S. Supreme Court has previously "held that a warrantless search of a person is reasonable only if it falls within a recognized exception."¹¹ One such exception is an exigent circumstance, which grants police officers the ability to take swift action to prevent the destruction of evidence. In *McNeely*, the state requested a *per se* rule that as "long as the officer has probable cause [that a DWI occurred] and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant."¹² However, the Court asserted that obtaining a warrant is a fairly expeditious matter, as the Federal Rules of Criminal Procedure permits "federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone" or other electronic means and that the "majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing."¹³ Nonetheless, the Court recognized that while "experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation,"¹⁴ and an occasion may arise to justify an officer's warrantless draw of a DWI suspect's blood.

Caroline Johnson Levine is the chair of the Federal Bar Association's State and Local Government Relations Section and a member of The Federal Lawyer Editorial Board. She is also an appointed member of The Florida Bar's Committee on Professionalism and the Senior Lawyers Committee. This article was submitted on behalf of the FBA State and Local Government Section; for more information about this section, please visit www.fedbar.org.

The Court held in *McNeely* that it would not create a *per se* rule that the police may take involuntary blood draws from DWI suspects in routine¹⁵ DWI investigations to prevent the destruction of evidence of alcohol impairment, without additional factors to establish exigent circumstances (e.g., injuries to persons or damage to property). Rather, each case necessarily requires a totality of the circumstances analysis to determine whether a police officer who obtains a warrantless blood draw has violated a DWI suspect's Fourth Amendment right to be free from unreasonable searches and seizures.

Justice Clarence Thomas wrote the dissent in *McNeely* and found that each passing moment in a DWI investigation "eliminates probative evidence of the crime"¹⁶ and because the "body's natural metabolism of alcohol inevitably destroys evidence of the crime,

his performance of the field sobriety tests, and his refusal to submit to a blood alcohol breath or blood test. They may need to hire an expert to extrapolate and estimate what the suspect's blood alcohol level was at the time he was pulled over by the police. Further, if a trial court suppresses or grants the evidentiary use of a warrantless blood draw, the states may have to litigate the totality of the circumstances analysis through superior levels of appellate courts. When the case completes its appellate journey and results in a new trial with or without the blood alcohol evidence from the warrantless blood draw, witnesses to the crime may be unavailable and the criminal charge could be dismissed.

Additional costs for state and local governments may result if the criminal case creates greater civil liability risks for the county or city police officer. If the lengthy criminal litigation results in a final

"The question presented here is whether the natural metabolism of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances."

—U.S. Supreme Court Justice Sonia Sotomayor, *Missouri v. McNeely*¹⁷

it constitutes an exigent circumstance. As a result, [the dissent held] that a warrantless blood draw does not violate the Fourth Amendment."¹⁸

The apparent effect on state and local government's actors and resources is captured by Chief Justice John Roberts' assertion in his concurrence and dissent that a "police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test. I have no quarrel with the Court's 'totality of the circumstances' approach as a general matter; that is what our cases require. But the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us."¹⁹ Further, the Chief Justice asserted that an officer should seek a warrant for DWI blood draws, however, if "an officer could reasonably conclude that there is not [time and the evidence is being destroyed], the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant."²⁰

State and local governments must comply with U.S. Supreme Court decisions. It is interesting to consider that without clarity granting or denying a *per se* rule for warrantless blood draws, the financial and litigation burden may exponentially grow as state budgets routinely struggle. Some states will have to upgrade their technological capabilities regarding warrants, as the dissent notes that even "Missouri still requires written warrant applications and affidavits."²¹

County and city police officers currently have to engage in a totality of the circumstances analysis regarding exigent circumstances at the scene of an arrest. State prosecutors may have to prove the crime without a blood alcohol result and use lesser evidence and rely on inferences, such as the suspect's driving pattern,

determination that the police officer violated the suspect's Fourth Amendment rights against search and seizure by drawing the suspect's blood against his will, the suspect may believe he has a civil case against the police officer and his employing agency under 42 U.S.C. § 1983.

The determination that a police officer violated a criminal suspect's (plaintiff's) Fourth Amendment right when the officer seized the blood sample, a civil totality of the circumstances analysis may result, and the journey of lengthy litigation will begin again. Further, if the plaintiff prevails in his § 1983 litigation, plaintiff's counsel may obtain attorney's fees from the employing governmental agencies as "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."²²

The county or city police officer and agency may raise the defense of qualified immunity and claim the officer was performing a discretionary function in a reasonable manner. However, pursuant to a previous criminal court finding that the officer violated the plaintiff's Fourth Amendment rights, will the plaintiff easily proceed past a defense motion to dismiss or a motion for summary judgment and continue on to discovery and trial?²³

A *per se* rule delineating when and in which cases an officer may draw blood may reduce the impact on state and local government resources and provide clarity to every citizen or state and local government actor as to each party's rights and responsibilities in this particular circumstance. However, state and local lawmakers, police officers, prosecutors, defense attorneys, and judges considering the totality of the circumstances analysis for DWI warrantless blood draws may wish to consider developing a systematic legal approach. It appears that the

Local Government continued on page 10



Death of a Trial Lawyer

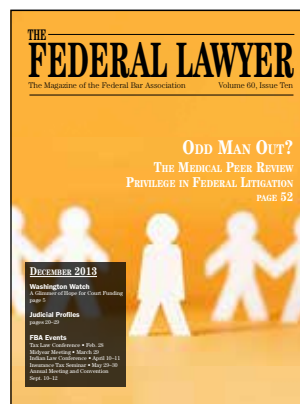
I write to respond to the excellent article "Death of a Trial Lawyer" by Joseph C. Sullivan in Vol. 60 Issue Ten (December 2013). I believe his prediction is correct. Even so, I think, perhaps, that the main reason for the sharp decline has more to do with the district judges who, over the years, have increased the pressure to settle.

I was appointed by President Carter in 1979 at age 50, having spent most of my time (after service in the Air Force JAG) doing trial work—civil, a fair bit of criminal, and maritime personal injury, death, and ship collisions. I came from the Korean Conflict in late '53 and by '54-'55 was fully involved in trial work. The offshore personal injury business was thriving—Jones Act cases filled the docket. We were setting jury trials by the dozens! From that time onward—at least in the Eastern District of Louisiana—jury trials thrived. The percent of cases actually being tried to conclusion was probably 10 to 14 percent.

Thus began the great settlement push. Not so much from the bar, but from the bench. I will not go into the detail of stating names, but I will state that several U.S. district judges became famous for the various ways that they sought to build pressure to settle. Some were downright bizarre! It built and built, and those of us who pretty much stuck to our guns were outlanders, hard heads, troublemakers, etc. More (much more) than once, I was actually locked into the judges' conference room—with several other lawyers—and essentially ordered to negotiate a settlement.

The percentage did, of course, go down, down, down. By the time I came to the bench, it was around five percent. As diplomatically as I could, I let the lawyers know that I encouraged careful and skillful settlement discussions but did NOT insist that they be fruitful. I still feel that way after 34 years.

Too much affirmative action in total support of settlements took place and is still



pretty much the order of the day. Mr. Sullivan's dire predictions are, indeed, likely.

Hon. Peter Beer
U.S. District Judge for the
District of Louisiana
New Orleans, La.

LOCAL GOVERNMENT continued from page 9

most efficient and least expensive option, if a suspect refuses to provide a BAC sample, could be to have a well-organized system whereby an officer arrests and immediately transports a DWI suspect to the nearest hospital while verbally dictating to a fellow officer the facts justifying probable cause for the purposes of a blood draw. If probable cause exists, a warrant could be electronically submitted to a judge for authorization, and litigation may be potentially lessened. ☉

Endnotes

¹*Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 1556, 185 L.Ed.2d 696 (2013).

²*Id.* at 1556.

³*Id.* at 1557.

⁴*Id.*

⁵*Id.*

⁶*Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1825, 16 L.Ed.2d 908 (1966).

⁷*State v. McNeely*, 358 S.W. 3d 65, 69, 74 (Mo. 2012).

⁸*Id.* at 70.

⁹*Schmerber v. California*, 384 U.S. at 771, 86 S.Ct. at 1836.

¹⁰*Missouri v. McNeely*, 133 S.Ct. at 1558.

¹¹*Id.*; see e.g., *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467 (1973).

¹²*Missouri v. McNeely*, 133 S.Ct. at 1560.

¹³*Id.* at 1562.

¹⁴*Id.* at 1563.

¹⁵*Id.* at 1565; the Court acknowledged the importance of eradicating DWI crimes and cited the U.S. Department of Transportation National Highway Traffic Safety Administration's (NHTSA) report released in 2011, which stated that 9,878 people were killed from drunk drivers. The current 2013 NHTSA report indicates that fatalities related to driving while intoxicated account for 31 percent of all traffic deaths and that 10,322 people were killed by drunk drivers in 2012. The 2013 NHTSA report may be located at www-nrd.nhtsa.dot.gov/Pubs/811856.pdf.

¹⁶*Id.* at 1575.

¹⁷*Id.* at 1552, 1556.

¹⁸*Id.* at 1574.

¹⁹*Id.* at 1569.

²⁰*Id.*

²¹*Id.* at 1578.

²²42 U.S.C. § 1988(b).

²³*Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)(The U.S. Supreme Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")