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DO WARRANTLESS BREATHALYZER TESTS VIOLATE THE FOURTH AMENDMENT?

Paul A. Clark*

I. INTRODUCTION

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹ The Supreme Court has repeatedly held that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”² On April 17, 2013, in *Missouri v. McNeely*,³ the U.S. Supreme Court clarified that the exigent circumstances exception to the search warrant requirement requires the government to prove that there was no time to obtain a search warrant before evidence seized in a warrantless search is admissible at trial.⁴ Although the search in *McNeely* involved a search and seizure of a defendant’s blood, the rule applies to other searches, such as searches of a defendant’s breath in the form of breathalyzer tests. Indeed, in *Skinner v. Railway Labor Executives’ Association*,⁵ the Supreme Court explicitly held that breathalyzer tests are searches subject to the same Fourth Amendment limitations as blood tests. Prior to *McNeely*, courts had generally held that such breath test searches fell under the exigent circumstances exception to the warrant requirement.⁶ Although breath testing is less in-

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1. U.S. CONST. amend. IV. The Fourteenth Amendment mandates the same standards on the states, although strictly speaking the Fourth Amendment itself applies only to the federal government; *see* U.S. CONST. amend. XIV.

2. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

3. *Missouri v. McNeely*, No. 11–1425 (U.S. Apr. 17, 2013).

4. *Id.* at 8–9 (explaining that further delay securing a search warrant would compromise evidence).

5. 489 U.S. 602, 617–18 (1989) (“Subjecting a person to a breathalyzer test . . . implicates similar concerns about bodily integrity and, like the blood-alcohol test . . . should also be deemed a search.”) (internal citations omitted).

6. *See, e.g., State v. Blank*, 90 P.3d 156, 164 (Alaska 2004) (“Many courts have implicitly or explicitly held that the dissipation of alcohol always creates sufficient

trusive than blood testing, this fact does not negate the state's obligation to seek a warrant when it can do so without jeopardizing the investigation.

II. BACKGROUND

A. *Blood Testing and Search Warrants*

1. Background of *McNeely*

Before looking at *McNeely*, there are two important Supreme Court cases that deal with blood testing and form the background of *McNeely*. The most important precedent is *Schmerber v. California*,⁷ which the *McNeely* Court discussed at some length. For almost fifty years, *Schmerber* was the primary precedent involving blood testing; however, during the past few decades it has given rise to significantly different interpretations in the lower courts. These deviations are not very surprising as the Court decided *Schmerber* while Fourth Amendment law was very much in flux, before the groundbreaking decisions in *Katz v. United States* or *Terry v. Ohio*.⁸ It was only five years earlier, in *Mapp v. Ohio*,⁹ that the Supreme Court held that the Fourteenth Amendment prohibited the states from conducting unreasonable searches and seizures, thus in effect applying the Fourth Amendment to the states. Moreover, *Schmerber* did not provide any clear rules to apply in such cases and merely used an ad hoc, totality of the circumstances test. Additionally, the Court cautioned that its holding was limited to the specific facts of that case. Thus, in recent cases, courts have struggled to apply the 1966 decision.

The facts in *Schmerber* are fairly simple; the legal issues are more complicated. Mr. Schmerber was in an automobile accident and taken to

exigency to dispense with the warrant requirement, although at least one court has held that the state must prove exigency on a case-by-case basis.”) (footnotes removed). A few courts held that breath testing is permitted under a different exception to the warrant requirements, namely the “search incident to arrest” exception. *See, e.g., Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986). *But see State v. McNeely*, 358 S.W.3d 65, 72 n.5 (Mo. 2012) (en banc) (“To the extent that [prior precedents] interpret *Schmerber* to allow a nonconsensual warrantless blood draw incident to arrest in DWI cases without other exigent circumstances, they are no longer to be followed.”).

7. 384 U.S. 757 (1966).

8. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), first articulated the “reasonable expectation of privacy” standard, while *Terry v. Ohio*, 392 U.S. 1 (1968), created the now ubiquitous “Terry stop” exception to warrant requirement.

9. 367 U.S. 643, 655 (1961).

the hospital.¹⁰ Police arrested him and ordered him not to resist while medical personnel extracted a blood sample.¹¹ The government later used the blood sample to convict Mr. Schmerber of drunk driving.¹² These facts raised numerous constitutional issues, but *Schmerber* is chiefly famous for its holding on the Fourth Amendment.

The first issue, which the court disposed of quite easily, was that a forced blood draw was definitely a “search” for purposes of the Fourth Amendment.¹³ The Court next turned to whether the blood search was an unreasonable search.¹⁴ The Court examined a variety of earlier cases and discussed the search incident to arrest exception, noting that valid searches incident to arrest do not include searches beyond the body’s surface.¹⁵ The Court then explained that the officer may have believed that he was facing an emergency situation where any delay threatened to destroy evidence.¹⁶ Additionally, the Court considered the fact 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” and concluded that the threatened “destruction of evidence” made the search “appropriate incident to petitioner’s arrest.”¹⁷ Later precedents would establish that the burden was on the prosecution to prove that exigent circumstances existed.¹⁸ The Court in *Schmerber*, however, held that the search was justified based on two deferential factors: the lawfulness of the arrest and an emergency that did not permit the officer the time to obtain a warrant.¹⁹

10. *Schmerber*, 384 U.S. at 758–59.

11. *Id.* at 761.

12. *Id.* at 759.

13. *Id.* at 767 (“Such testing procedures plainly constitute searches of ‘persons’ . . .”).

14. *Id.* at 770–71.

15. *Id.* at 769.

16. *Id.* at 770–72.

17. *Id.* at 770–71 (internal citation omitted). As the Missouri Supreme Court explained, “[a]lthough *Schmerber* couched its limited exception to the warrant requirement in terms of a search incident to arrest, it has since been read as an application of the exigent circumstances exception. . . .” *State v. McNeely*, 358 S.W.3d 65, 70 (Mo. 2012) (en banc) (citing *United States v. Berry*, 866 F.2d 887, 891 (6th Cir. 1989)).

18. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (“[T]here must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.” (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948) (footnote and internal quotation marks omitted))).

19. *Schmerber*, 384 U.S. at 771–72.

The Court concluded that the search was reasonable overall.²⁰ Additionally, the Court emphasized the “commonplace” nature of the blood test:

[W]e are satisfied that the test chosen to measure petitioner’s blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examinations . . . the quantity of blood extracted is minimal, and . . . the procedure involves virtually no risk, trauma, or pain.²¹

Summarizing its holding, the Court described blood tests as minor intrusions: “That we today told that the Constitution does not forbid the States’ minor intrusions into an individual’s body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.”²²

The *Schmerber* decision did not provide rules to guide courts in Fourth Amendment cases. Instead, *Schmerber* seems to be based on the rather subjective feelings of the justices that blood draws were “minor intrusions.”²³ Despite the decision’s explicit caution that the holding does not apply “under other conditions,” lower courts relied on its holding for decades in deciding the constitutionality of blood and breath testing. Generally, lower courts applying *Schmerber* interpret it as permitting warrantless blood draws whenever the state needs to confirm the presence of alcohol in a suspect’s blood. As the Wisconsin Supreme Court wrote: “A logical analysis of the *Schmerber* decision indicates that the exigency of the situation presented was caused solely by the fact that the amount of alcohol in a person’s blood stream diminishes over time.”²⁴ A few lower courts, however, require a specific showing that police had no time to obtain a search warrant before a blood draw.²⁵

20. *Id.* at 771.

21. *Id.* (internal citation omitted).

22. *Id.* at 772.

23. *See id.*

24. *State v. Bohling*, 494 N.W.2d 399, 402 (Wis. 1993); *see also Dale v. State*, 209 P.3d 1038, 1042 (Alaska Ct. App. 2009); *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010) (en banc); *State v. Netland*, 762 N.W.2d 202, 212–13 (Minn. 2009); *State v. Shriner*, 751 N.W.2d 538, 545 (Minn. 2008).

25. *See generally State v. Rodriguez*, 156 P.3d 771, 772 (Utah 2007) (explaining dissipation of alcohol in blood without more evidence does not create exigent circumstance); *State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008) (noting that some courts reject “evanescence of blood-alcohol” as sufficient to constitute “exigent circum-

Skinner v. Railway Labor Executives' Association is the second major precedent that is an important backdrop to *McNeely*, even though *McNeely* only made two passing references to *Skinner*. *Skinner* involved a facial challenge to a federal regulation that required railroad employees to undergo blood, breath, or urine testing for alcohol or drugs. The regulations provided that the railroad must suspend employees from work for nine months if they refused.²⁶

Most importantly for our purposes, the Court held that blood, breath, and urine tests were “searches.”²⁷ The Court cited *Schmerber* for the principle that a blood test was a search and then explained: “[A] breathalyzer test . . . like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search.”²⁸ We will return to the issue of breathalyzer tests later in this article, but *Skinner* quite explicitly held that breathalyzer tests are searches.

The Court then addressed the crux of the matter: whether the search violated the Fourth Amendment. The Court explained that “a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. We have recognized exceptions to this rule. . . .”²⁹ Thus in *Skinner*, there is an immediate difference from the way that the *Schmerber* court decided the issue. In *Schmerber*, the Court looked at all of the circumstances and made a judgment about overall reasonableness. In comparison, the *Skinner* Court stated a clear rule: “Except in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”³⁰ The Court then decided if the government had established that a recognized exception applied.³¹ Additionally, *Skinner*’s statement that warrantless searches are unreasonable mirrors the Court’s language in *Katz*. In *Katz*, the Court

stance by itself”); *State v. D’Andrea*, No. 95890, 2006 WL 3411101, at *4 (Conn. Super. Ct. Nov. 8, 2006).

26. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 610–11 (1989) (suspended employees were nonetheless entitled to a hearing “concerning their refusal to take the test.”).

27. *Id.* at 617.

28. *Id.* at 616–17 (internal citations omitted); see also *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986) (“It is not disputed that the administration of a breath test is a search within the meaning of the Fourth Amendment . . .”); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3d Cir. 1986) (parties agreed daily breathalyzer amounted to search or seizure); 1 Wayne R. LaFare, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.6(b) (2d ed. 1987).

29. 489 U.S. at 619 (internal citations and quotation marks omitted).

30. *Id.* at 619.

31. *Id.*

created the fundamental rule that warrantless searches are per se unreasonable unless the state can prove that the search falls within one of the few specifically established exceptions.³² In recent years, the Court has repeatedly affirmed this basic rule.³³

Nonetheless, despite the Court's repeated statements that warrantless searches are per se unreasonable unless they fall within a specific exception, the Court has occasionally ignored the *Katz* rule and applied a more generalized reasonableness test like the one the Court used in *Schmerber*. For example, in *Ohio v. Robinette*,³⁴ the Court explained: "We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances."³⁵ Yet again, in *United States v. Knights*,³⁶ the Court concluded that "the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances.'"³⁷

The Court does not give a reason why it applies one test rather than the other.³⁸ Justice Scalia noted in a 1991 concurring opinion that the Court had "lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."³⁹ We will return to this issue later, but for the moment I want to highlight this tension because it is a potential issue in every Fourth Amendment case.⁴⁰ We

32. *Katz v. United States*, 389 U.S. 347, 357 (1967).

33. *Thompson v. Louisiana*, 469 U.S. 17, 19–20 (1984) ("In a long line of cases, this Court has stressed that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'" (quoting *Katz*, 389 U.S. at 357)).

34. 519 U.S. 33 (1996).

35. *Id.* at 39 (citation omitted).

36. 534 U.S. 112 (2001).

37. *Id.* (citation omitted). Most recently in *Maryland v. King*, No. 12–207, slip op. at 10 (U.S. June 3, 2013), the Supreme Court applied a generalized reasonableness test to DNA seizures of arrested suspects—again without any clear explanation of why they used such a test in that case.

38. See, e.g., Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Law*, 82 TUL. L. REV. 77 (2007).

39. *California v. Avcedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

40. Some lower courts use a generalized reasonableness test in drug and alcohol testing cases. For example, the Ninth Circuit, in ruling whether police could compel a suspect to submit a urine sample, did not explicitly state what exception to the warrant requirement applied in the case but simply compared the case to *Schmerber* and held: "We are persuaded that requiring an arrestee to submit to a urine test is reasonable under the Fourth Amendment. It is a less intrusive search than the withdrawal of blood from the human body." *United States v. Edmo*, 140 F.3d 1289, 1292 (9th Cir.

should also note that many jurisdictions use the two tests as a two-part test: the search must fall within an established exception and must be reasonable overall.⁴¹

Returning to the Court's decision in *Skinner*, the Court explained that the blood and breath tests fell within the "special needs" exception of the warrant requirement.⁴² The Court explained: "The Government's interest in regulating the conduct of railroad employees to ensure safety . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."⁴³ A primary reason the Court upheld the search under the special needs doctrine was that the doctrine was designed to prevent accidents, not to obtain evidence for criminal prosecutions.⁴⁴ After determining that the special needs exception applied, the Court then held that the exigent circumstances exception justified the search.⁴⁵ The Court recognized "that the Government's interest in dispensing with the warrant requirement is at its strongest when, as here, 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'"⁴⁶ The Court agreed with the Federal Railroad Administration, recognizing that "alcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible."⁴⁷ The Court's reference to the "exigent circumstances" exception as an alternate basis for their holding suggests that the need to test for drugs or alcohol "as soon as possible" gave the government wide discretion to dispense with the search warrant requirement. Moreover, the Court continued to regard *Schmerber* as good law, despite the obvious conflict between the way the Court decided *Schmerber* and the way the Court decided *Skinner*.

When the *Skinner* Court decided whether the exigent circumstances exception applied to the blood, breath, and urine tests, the Court applied

1998). *Edmo* did state (incorrectly) that *Schmerber* applied the search incident to arrest exception, and may have simply been assuming that the same exception applied in *Edmo*'s case. In general, however, lower courts start with the per se rule that warrantless searches must fall within a recognized exception.

41. See, e.g., *State v. Ravotto*, 777 A.2d 301, 316 (N.J. 2001) (holding that blood draw generally fell under exigent circumstances exception but was not reasonable under the particular circumstances it was drawn).

42. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989).

43. *Id.* at 620 (citations and quotation marks omitted).

44. *Id.* at 620–21.

45. See *id.* at 624.

46. *Id.* at 623 (citation omitted).

47. *Id.*

a very deferential balancing test, balancing the privacy interest against the state's need for evidence.⁴⁸ The Court stated that because "[o]rdinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment," the Court concluded that "additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe significant privacy interests."⁴⁹ The Court quoted *Winston v. Lee* as stating that, "[B]lood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity."⁵⁰ The *Skinner* court went on to explain:

The breath tests . . . are even less intrusive than the blood tests Breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more. Like the blood testing procedures . . . which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns.⁵¹

Finally, the Court dictated that "[b]y contrast, the Government interest in testing without a showing of individualized suspicion is compelling."⁵² This language indicates that the *Skinner* court addressed the applicability of the exigent circumstances test by balancing the privacy interests of the individuals against the government's interest. The Court did not give any per se rules about the exigent circumstances exception. For example, the Court certainly did not hold that the government must show on a case-by-case basis that there was no time to obtain a warrant. In fact, the Court's treatment suggested the opposite.⁵³

48. *See id.* at 624.

49. *Id.* at 625.

50. *Id.* (quoting *Winston v. Lee*, 470 U.S. 753, 762 (1985)).

51. *Id.* at 625–26 (citation omitted).

52. *Id.* at 628.

53. *See id.* at 642–643 (Marshall, J., dissenting) ("Although the importance of collecting blood and urine samples before drug or alcohol metabolites disappear justifies waiving the warrant requirement for those two searches under the narrow "exigent circumstances" exception . . . , no such exigency prevents railroad officials from securing a warrant before chemically testing the samples they obtain.").

It should be recalled, however, that *Skinner* involved a facial challenge to the statute.⁵⁴ There were no individual plaintiffs and no individual criminal defendants. Accordingly, the decision did not address what would happen in the context of a criminal prosecution. The fact that *Skinner* did not involve a criminal prosecution is crucial because it explains why lower courts continue to rely on *Schmerber* in the criminal context. The fact that the two most important precedents involving blood and breath testing were outdated and inconsistent gave ample reason for the Supreme Court to revisit these issues once more in 2013.

III. ANALYSIS

A. *McNeely* and the Exigent Circumstances Exception

The Supreme Court's prior precedents permitted warrantless blood tests on a fairly minimal showing of need. Accordingly, one might have thought that, in *McNeely*, the Court would find a way to permit the state to conduct warrantless searches in drunk driving cases.

Justice Sotomayor wrote the majority opinion, which only three other justices joined in its entirety. Sections II(C) and III of Sotomayor's opinion did not receive majority support; however, eight justices concurred with the basic holding of the case: the exigent circumstances exception to the warrant requirement only applies when there is no time to obtain a search warrant before the destruction of important evidence.⁵⁵

The trial court described *McNeely* as "unquestionably a routine DWI case."⁵⁶ A police officer stopped *McNeely* at 2 a.m. because they observed several signs he was drunk.⁵⁷ Police arrested *McNeely* after he refused to provide either a breath sample or a blood sample.⁵⁸ Although one officer later conceded that there was plenty of time for him to apply for a search warrant, the officer did not do so.⁵⁹ Instead, the police officer took *McNeely* to the hospital where hospital personnel forcibly drew *McNeely*'s blood.⁶⁰ The officer testified that, after reading an article in "Traffic Safety News," he believed that no warrant was needed because

54. *Id.* at 614.

55. *Missouri v. McNeely*, 133 S.Ct. 1552, 1556 (2013) (quoting *Schmerber v. United States*, 384 U.S. 757, 770 (1966)).

56. *Id.* at 1557.

57. *Id.* at 1556.

58. *Id.* at 1557.

59. *Id.*

60. *Id.*

Missouri's "implied consent law" permitted him to draw blood without a warrant.⁶¹

In *McNeely*, the Court began its analysis by explaining the well-settled law that warrantless searches are presumptively unconstitutional: "[A] warrantless search of the person is reasonable only if it falls within a recognized exception."⁶² Moreover, the Court reasoned that this principle applied to *McNeely* because the case "involved a compelled physical intrusion beneath *McNeely*'s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation."⁶³ This is a true statement of precedent, but it would have been equally true had the Court stated: "Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception and that principle applies to all searches of the person *no matter how minor*." The Court has repeatedly held that fairly minor intrusions are searches subject to the Fourth Amendment warrant requirement. For example, the Court upheld a search of a suspect's coat pocket after police arrested him for driving with a revoked license only after it found an exception to the warrant requirement applied.⁶⁴ Similarly, the Court has held that a purely external pat down of a suspect for weapons when police believe the suspect is both armed and dangerous is a search that is only constitutional if it falls within a recognized exception to the warrant requirement.⁶⁵ In *Cupp v. Murphy*,⁶⁶ the police scraped the blood from the suspect's finger and used it as evidence at trial.⁶⁷ The Court again noted that this was a search and unconstitutional unless the state could show that the search fell within an exception to the warrant requirement.⁶⁸ These cases indicate that the same legal principle—a warrantless search of the person is reasonable only if it falls within a recognized exception to the warrant requirement—applies regardless of whether the intrusion was minor. Nevertheless, the Court in *McNeely* emphasized that drawing blood was a particularly intrusive type of search: "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of

61. *State v. McNeely*, 358 S.W.3d 65, 68 (Mo. 2012).

62. *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) (citation omitted).

63. *Id.*

64. *United States v. Robinson*, 414 U.S. 218, 223–24 (1973).

65. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

66. 412 U.S. 291 (1973).

67. *Id.* at 292.

68. The Court ultimately held that the search was permissible under the exigent circumstances exception because the time needed to acquire a warrant would have permitted the suspect to rub the blood from his hand. However, two justices dissented arguing police could have arrested and restrained the suspect while they applied for a warrant. *Id.* at 295.

privacy.’”⁶⁹ It is unclear how the search’s level of intrusiveness affects the analysis because, under the per se test, there is no balancing of interests—a warrantless search (no matter how minor) is per se unreasonable unless it falls within a recognized exception. This discussion about intrusiveness suggests that a less intrusive search might have been constitutional; however this notion contradicts the per se rule that a warrantless search is unreasonable unless it falls within an exception. The Court’s view that blood draws are particularly intrusive is dictum that only confuses the legal analysis.⁷⁰

In any event, after stating the basic rule that a search must fall within an established exception, the Court noted that there is a well-recognized exception when “there is (1) compelling need for official action and (2) no time to secure a warrant.”⁷¹ With respect to the exigent circumstances exception, the rule has long been that the exception only applies when there is no time to obtain a warrant. Nonetheless, many courts interpreting *Schmerber* have held as a matter of law that there is never time to obtain a warrant for a blood alcohol test.⁷² Perhaps another view is that alcohol absorption creates an exception to the rule that police must seek a warrant if they have time.⁷³ Indeed, the *McNeely* Court characterized the issue as “whether the natural metabolization 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.”⁷⁴ The Court held that “[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn . . . the Fourth Amendment mandates that they do so.”⁷⁵

The Court was skeptical of the claim that there was never time to obtain a warrant in blood draw cases.⁷⁶ The prosecution’s argument was that, with each passing minute, the human body metabolizes alcohol, reducing the blood alcohol level.⁷⁷ Thus, the Court noted that: “the percent-

69. *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

70. *See id.* at 1565.

71. *Id.* at 1559 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

72. *See infra* section D(1).

73. This is one reason, in particular, why Fourth Amendment law is so complicated. Even when there are clear rules, there are exceptions to the rules, and there are even exceptions to the exceptions.

74. *McNeely*, 133 S.Ct. at 1556.

75. *Id.* at 1561.

76. *Id.* at 1562 (noting that “technological developments that enable police officers to secure warrants more quickly . . . are relevant to an assessment of exigency”).

77. *Id.* at 1563.

age of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed.⁷⁸ In other words, the blood alcohol content decreases by .001 every three to four minutes. Therefore, a person tested at 2:30 a.m. with a blood alcohol level of .080 might well test at 2:33 a.m. with a blood alcohol level of .079.⁷⁹ Thus, conceivably, a delay of as little as three minutes could affect a conviction. Moreover, a police officer will likely have no way of knowing how close the suspect was to the limit until after the test.

While the Court acknowledged that a delay of a few minutes could indeed harm the prosecution's case, they discussed how it takes time to transport a suspect to the hospital and arrange for a medical professional to draw blood. Therefore, there was no reason to assume that the need to get a warrant would necessarily delay the blood draw.⁸⁰ In *McNeely's* case, for example, he was stopped at 2:08 a.m., and "the sample was secured at approximately 2:35," some 27 minutes later.⁸¹ Although the Supreme Court did not emphasize this fact, the Missouri Supreme Court noted that the officer who arrested *McNeely* had regularly obtained search warrants to draw blood.⁸² Furthermore, the officer testified that the only reason he had not obtained a warrant in *McNeely's* case was his belief that warrants were no longer necessary.⁸³ The Court's opinion further notes that, given the ability to obtain search warrants through telephonic testimony, police could often obtain search warrants while they transported the suspect to the hospital.⁸⁴ Hence, there would be no delay in the blood testing.

Chief Justice Roberts wrote an opinion concurring in part and dissenting in part.⁸⁵ Justices Alito and Breyer joined his opinion. What is most interesting is that Justices Roberts, Breyer, and Alito agreed with the central holding of the majority. The Chief Justice wrote:

Our cases establish that there is an exigent circumstances exception to the warrant requirement. That exception applies when

78. *Id.* at 1561.

79. Of course, testing is not quite that simple, and even blood tests have a margin of error, but for the sake of argument let us assume the exact level of BAC can be tested.

80. *McNeely*, 133 S.Ct. at 1561 (noting that "an officer can take steps to secure a warrant while the suspect is being transported to a medical facility").

81. *Id.* at 1557.

82. *State v. McNeely*, 358 S.W.3d 65, 68 (Mo. 2012) (en banc).

83. *Id.*

84. *McNeely*, 133 S.Ct. at 1563.

85. *Id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part).

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.⁸⁶

Most of the Chief Justice's opinion is devoted to explaining in greater detail how fast and easy it is to obtain warrants through electronic means.⁸⁷ The Chief Justice's only disagreement with the majority was that he believed that the majority answered the question presented but "offer[ed] no additional guidance, merely instructing courts and police officers to consider the totality of the circumstances."⁸⁸ Chief Justice Roberts asserted that the majority could have provided "more meaningful guidance . . . about how to handle the typical [drunk-driving] cases."⁸⁹ Other than this disagreement, Justices Roberts, Breyer, and Alito agreed with the majority's main holding.

Finally, I want to look briefly at Section III of Justice Sotomayor's opinion. Section III of the opinion is interesting for three reasons. First, the section discussed the argument that the privacy interest in breath testing is minimal and the state interest is strong, and the court should therefore balance these factors when formulating a rule about warrantless blood testing.⁹⁰ As noted above, in section IIA of the opinion, the Court considered the intrusiveness of the search important.⁹¹ Nonetheless, black letter rules dictated the outcome of the case. First, any warrantless search is *per se* unconstitutional if it does not fall within an exception. Second, an exigent circumstances exception is *per se* not allowable if officers had time to seek a warrant. These two rules decided the case regardless of the intrusiveness of the search or the state interest.

Yet, instead of simply stating that the black letter rules dictate the case's outcome, section III says the state failed to persuade the court that the rules will affect the states' ability to deter drunk driving and therefore the state still would not prevail even if the court used a "totality-of-the-circumstances" test.⁹² Thus, this section simply muddies the legal waters.

86. *Id.*

87. *Id.* at 1572.

88. *Id.* at 1574.

89. *Id.*

90. *Id.* at 1564–65.

91. *Id.* at 1558–59.

92. *Id.* at 1565–66 ("To the extent that the State and its *amici* contend that applying the traditional Fourth Amendment totality-of-the-circumstances analysis to deter-

One might read section III to suggest that the ruling could be different if the privacy interest was less important and the state interest more significant. Whether one thinks the Court went too far or not far enough, the decision is open to the criticism that the ghoulish prospect of the state sucking a person's blood without a warrant influenced the decision too much.

The second reason that section III is relevant to the issue of breath testing was Justice Sotomayor's reasons for thinking that the state interest in blood testing was not that significant. Justice Sotomayor wrote:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.⁹³

One could read Justice Sotomayor's reference to implied consent to mean that states could justify forced blood draws under so-called "implied consent" statutes. This entire case resulted from the fact that the arresting officer mistakenly thought that Missouri's implied consent statute permitted him to draw blood without a warrant.⁹⁴ Missouri did not argue that a state statute could override the constitutional search requirements. Justice Sotomayor's comment does not say that states could use their "implied consent" statutes to circumvent the warrant requirement. In fact, she notes that motorists can "withdraw" their consent.⁹⁵ Justice Sotomayor's point is that the state can encourage suspects to cooperate by penalizing them either civilly or criminally.⁹⁶

mine whether an exigency justified a warrantless search will undermine the governmental interest in preventing and prosecuting drunk-driving offenses, we are not convinced.").

93. *Id.* (citations omitted).

94. *State v. McNeely*, 358 S.W.3d 65, 68 (Mo. 2012) (en banc), *aff'd*, *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

95. *McNeely*, 133 S.Ct. at 1566 (noting penalties "when a motorist withdraws consent").

96. *Compare McNeely*, 133 S.Ct. at 1565–66 (holding that the State may not forcibly draw blood without showing exigent circumstances), *with South Dakota v. Neville*,

Finally, section III is interesting for what it omits. Justice Sotomayor suggested alternative ways that the state could try to enforce drunk-driving laws other than performing warrantless searches. She notably did not include the option that states could conduct searches under a different exception to the warrant requirement such as the search incident to arrest exception.⁹⁷ *McNeely* did not explicitly say that searches incident to arrest were inapplicable, but it seemed to implicitly hold this. After all, *McNeely* never challenged the lawfulness of his arrest. Additionally, the *McNeely* Court noted that there were a variety of exceptions to the warrant requirement and, yet, only considered the exigent circumstances exception.⁹⁸ Thus, one can read *McNeely* as not permitting warrantless blood testing under the search incident to arrest exception.

The *McNeely* decision has wide ranging and significant implications for drunk driving prosecutions in the United States. In the next section I want to turn to the primary focus of this article: since the Fourth Amendment requires search warrants (or a showing that there was no time to obtain one) prior to the state requiring a blood test, does the Fourth Amendment impose the same requirement for breath tests?

B. How Does McNeely Affect Whether Police Officers Must Obtain a Warrant Before Conducting a Breathalyzer Test?

The first question to address is whether breathalyzer tests are searches under the Fourth Amendment. As noted above, in *Skinner*, the Court explicitly held that a breathalyzer test is a search.⁹⁹ To be thorough, however, I will examine recent case law since *Skinner* to see if there is any argument that the Court has overturned or weakened this holding.

What constitutes a “search” for purposes of the Fourth Amendment is not always clear. For example, the Court has held that forcing a suspect to speak is not a search because the sound of one’s voice is not normally concealed from the public, and hence no one has a reasonable expectation of privacy in the sound of one’s voice.¹⁰⁰ Is one’s breath the same as the sound of one’s voice? Like speech, the odor of a person’s breath

459 U.S. 553, 559–60 (1983) (holding that the State could forcibly draw blood without a warrant; after *McNeely*, *Neville* no longer seems to be good law).

97. See *McNeely*, 133 S.Ct. at 1566 (providing a more detailed discussion of the scope of search incident to arrest).

98. See *id.* at 1565.

99. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 603 (1989); see also *Maryland v. King*, 133 S.Ct. 1958, 1969 (2013) (noting in passing that the Court had previously described a breathalyzer test as a search, citing *Skinner*, and used this to conclude that a swab of the mouth is also a search).

100. See *United States v. Dionisio*, 410 U.S. 1, 13–14 (1973).

seems to be open to public observation and arguably no one has an expectation of privacy in one's exhalations.

A good case to illustrate this question is *Kyllo v. United States*.¹⁰¹ *Kyllo* involved thermal imaging of the suspect's home.¹⁰² Thermal imaging allowed the government to see what was going on inside the residence to a limited extent. The main issue in *Kyllo* was whether this thermal imaging constituted a search.¹⁰³ The answer was not obvious. In fact, the Court held by only a five to four vote that it was a search.¹⁰⁴ The Court reasoned that, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search—at least where (as here) the technology in question is not in general public use."¹⁰⁵ *Kyllo* supports the conclusion that breath tests are searches.

In *United States v. Jones*,¹⁰⁶ the Court returned to the question of what constitutes a "search." In *Jones*, "agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot" and then "used the device to track the vehicle's movements."¹⁰⁷ Justice Scalia wrote for the majority and explained that the Government "physically occupied private property for the purpose of obtaining information."¹⁰⁸ As such, Justice Scalia reasoned that, "such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."¹⁰⁹ As the opinion explained, Fourth Amendment jurisprudence was originally concerned with preventing the government from trespassing on private property. Justice Harlan's famous concurring opinion in *Katz*, however, announced the theory (which the Court later adopted) that violations of a person's reasonable expectation of privacy violated the Fourth Amendment.¹¹⁰ The problem was that for some time courts ignored the older trespass law and focused exclusively on the "reasonable expectation of privacy" test. *Jones* clarified that the "reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law

101. 533 U.S. 27 (2001).

102. *Id.* at 29.

103. *Id.*

104. *See id.* at 40.

105. *Id.* at 34 (internal citation and quotation marks omitted).

106. 132 S.Ct. 945 (2012).

107. *Id.* at 948.

108. *Id.* at 949.

109. *Id.*

110. *See Katz v. United States*, 389 U.S. 347, 357 (1967).

trespassory test that preceded it.”¹¹¹ Thus, in *Jones* the government argued that placing the GPS device on the vehicle was not a search as the search did not violate Jones’ privacy.¹¹² The Court rejected this argument, holding that when there is a trespass, then the expectation of privacy is irrelevant.¹¹³ Furthermore, the Court held that when the government commits a trespass against a person’s property in order to obtain information, the government violates the Fourth Amendment.¹¹⁴ *Jones* provides the bright-line rule: when government agents physically touch a person’s property, then a search occurs under the Fourth Amendment.

Under *Jones*, police officer’s actions without a warrant are limited to what “any private citizen might do.”¹¹⁵ Inserting a tube into a suspect’s mouth requires the police to physically touch the suspect. Without consent, this touching is a physical trespass or a battery at common law. It goes beyond what any private citizen might do. Under the principles set forth in *Jones*, regardless of whether a suspect has a reasonable expectation of privacy in his breath, a breath test is a search because it would be a battery at common law. Thus, under existing Supreme Court precedent, breath tests are searches.

C. Do Implied Consent Statutes Constitute a Waiver of the Right to Object to Warrantless Search?

Although government-compelled breath tests are searches for Fourth Amendment purposes, the state or federal government does not violate the Fourth Amendment if the searched person consents to the search. Sometimes courts consider consent an exception to the warrant requirement. More commonly, the court expresses the rule that the Fourth Amendment does not prohibit searches based on consent.

As Justice Sotomayor noted in *McNeely*, every state has an implied consent statute. One possible way to address breath testing is that drivers have waived their right to object to warrantless searches of their breath by voluntarily consenting to drive within a state’s jurisdiction.¹¹⁶ This

111. *Jones*, 132 S.Ct. at 955 (Sotomayor, J., concurring) (explaining that the four Justices concurring in the outcome would have reached the same result based on the view that the government violated Jones’s reasonable expectation of privacy).

112. *See id.* at 950.

113. *See id.* at 949–50.

114. *Cf. id.* at 949.

115. *Florida v. Jardines*, 133 S.Ct. 1409, 1416 (2013) (stating that “a police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen might do.’” (quoting *Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011))).

116. *E.g.*, ALASKA STAT. § 28.35.031(a) (2012) (“A person who operates or drives a motor vehicle in this state . . . shall be considered to have given consent to a chemi-

presents the basic question of whether a state may require a person to submit to a chemical test that she would normally have a right to refuse in the absence of a warrant as a condition of obtaining a license. Courts that have addressed this issue have almost uniformly held that a state may not bypass the Fourth Amendment in this way.

In 1986, the Ninth Circuit addressed a challenge to Alaska's Implied Consent statute by three defendants who had refused to submit to a breathalyzer test, arguing that they had no obligation to do so.¹¹⁷ The Ninth Circuit upheld the lower court's conviction of the three appellants for refusing to provide a breath sample, explaining that, under the Fourth Amendment, a breath test is a search.¹¹⁸ As such, the Ninth Circuit reasoned that a breath test is subject to the Fourth Amendment's requirements that the search be reasonable and that, unless an exception applies, the government must obtain a warrant before conducting such a search. Ultimately, the Ninth Circuit held that the breath test was constitutional because the search incident to arrest exception to the warrant requirement applied, not because the defendant supposedly consented to the search.¹¹⁹

Courts across the country have generally held that breath tests are justified under the exigent circumstances exception, not consent. As the Minnesota Court of Appeals explained in 2012: "[T]he statutory phrase 'implied consent' is a misnomer When the requirements of probable cause and exigent circumstances are met, *consent* is not constitutionally necessary to administer a warrantless chemical test, nor is *consent* the basis for the search."¹²⁰ More than one State Supreme Court, rather than reading in an exception based on exigent circumstances, has held that "implied consent" laws violate the Fourth Amendment.¹²¹

Scholars have written numerous articles on so-called implied consent statutes, pointing out that courts have upheld searches under these

cal test or tests of the person's breath for the purpose of determining the alcoholic content."). This statute appears typical. *See, e.g.,* NMSA 1978, § 66-8-107 (stating "[a]ny person who operates a motor vehicle within this state shall be deemed to have given consent . . . to chemical tests of his breath or blood or both . . .").

117. *See* *Burnett v. Anchorage*, 806 F.2d 1447, 1448-49 (9th Cir. 1986).

118. *See id.* at 1451.

119. *See id.* at 1449-50; this was a significant change from the ruling of the district court, *see generally* *Burnett v. Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986) (explaining that the district court apparently believed that consent could justify the search).

120. *State v. Wiseman*, 816 N.W.2d 689, 694 (Minn. Ct. App. 2012) (emphasis original).

121. *E.g.,* *Commonwealth v. Kohl*, 615 A.2d 308, 313 (Pa. 1992); *see* *McDuff v. State*, 763 So.2d 850, 856 (Miss. 2000).

statutes based on other valid exceptions to the warrant requirement.¹²² Accordingly, there is no need for this article to rehash these well-known arguments. The point worth making, however, is that courts have upheld warrantless searches, not based on consent, but based on the idea that the searches fall within an exception to the warrant requirement—typically the exigent circumstances exception. Therefore, it is unlikely the Supreme Court would find that the warrantless searches of breath are constitutional based on a driver’s implied consent to such a search.

D. Is Breath Testing Distinguishable from Blood Testing?

Because breath testing is a search, the next question is whether the government can justify it under the Fourth Amendment. As noted above, the Court has typically applied the same analysis used in *McNeely*, asking whether the warrantless search of one’s breath is constitutional under one of the specifically enumerated exceptions. Breath testing could fall under one of two exceptions: the exigent circumstances exception or the search incident to arrest exception.¹²³

1. Exigent Circumstances

State and federal courts across the country have routinely held that breath testing is permitted under the exigent circumstances exception. These cases usually cite *Schmerber* and *Skinner*. In *State v. Blank*,¹²⁴ the Alaska Supreme Court drew on earlier case law involving blood testing and articulated that blood and breath testing have identical constitutional requirements.¹²⁵ For example, the court heavily relied on *Layland v. State*,¹²⁶ a case that held that blood testing was constitutional if it fell under the exigent circumstances exception.¹²⁷ In *State v. Taylor*,¹²⁸ the

122. See B. Bernard Zaleha, *Alaska’s Criminalization of Refusal to Take a Breath Test: Is it a Permissible Warrantless Search Under the Fourth Amendment*, 5 ALASKA L. REV. 263, 291–92 (1988); Penn Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN’S L. REV. 39 (1978).

123. See *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 620 (1989) (explaining that the only other potential exception is the special needs exception, but the “special needs” exception cannot be primarily about gathering evidence to use in a criminal proceeding; thus, it is not applicable in drunk driving cases); see, e.g., *Spencer v. City of Bay City*, 292 F.Supp.2d 932, 946 (E.D. Mich. 2003) (ruling that special needs exception did not permit warrantless breath tests of criminal suspects).

124. 90 P.3d 156 (Alaska 2004).

125. *Id.* at 162.

126. 535 P.2d 1043 (Alaska 1975).

127. *Id.* at 1046 (stating blood testing is permissible under the exigent circumstances exception to warrantless searches).

128. 531 A.2d 157 (Conn. App. Ct. 1987).

Connecticut Court of Appeals held that exigent circumstance existed because of the rapid dissipation of alcohol from one's bloodstream.¹²⁹ Similarly, in *State v. Humphreys*,¹³⁰ the Tennessee Court of Criminal Appeals held that "[b]ased upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement."¹³¹ Furthermore, in *Commonwealth v. Anderl*, the Superior Court of Pennsylvania held that "the warrantless seizure of the appellant's alcohol-laden breath is valid either as a search incident to arrest . . . or a search necessitated by exigent circumstances; i.e., the evanescent nature of the alcohol in . . . [defendant's] bloodstream."¹³²

Courts across the country have held that breath tests are searches and that law enforcement officers can compel individuals to take breath tests as long as the tests fall under the exigent circumstances exception. Therefore, the question is whether the state must prove that there was no time to obtain a warrant prior to forcing a suspect to submit to a warrantless breath test when the state invokes the exigent circumstances exception. *McNeely* unambiguously answers that the state must make such a showing. In *McNeely*, eight justices agreed that the exigent circumstances exception requires the state to show that there was no time to secure a warrant.¹³³ But are there differences between blood and breath testing which make the need for breath tests more pressing? Let us examine the typical breath testing procedure.

Although police frequently carry portable breath test units, the readings from these portable units are not sufficiently accurate for use in criminal prosecutions.¹³⁴ Rather, in criminal prosecutions, the state uses a larger breath-testing device, which law enforcement personnel regularly calibrate and typically keep at police stations.¹³⁵ Thus, when police officers arrest a suspect, they must transport the suspect to a police station,

129. *Id.* at 160–61.

130. 70 S.W.3d 752 (Tenn. Crim. App. 2001).

131. *Id.* at 760–61.

132. *Commonwealth v. Anderl*, 477 A.2d 1356, 1364 (Pa. Super. Ct. 1984) (internal citations omitted).

133. *McNeely*, 133 S.Ct. at 1566.

134. *See, e.g.*, *Patrick v. State*, 750 S.W.2d 391, 394 (Ark. 1988); *Guerre-Chaley v. State*, 88 P.3d 539, 544 (Alaska Ct. App. 2004); *State v. Faust*, 682 N.W.2d 371, 374 n. 2 (Wis. 2004).

135. *See California v. Trombetta*, 467 U.S. 479, 481–82 (1984) (describing the quality control procedures used in evidentiary breath testing machines).

which could be miles away.¹³⁶ In many ways, breath testing is more complicated than blood testing. As the Court noted in *Skinner*, accurate testing depends on testing alveolar (or “deep-lung”) breath. Therefore, an accurate test requires that someone observe the subject for at least fifteen minutes prior to the test to ensure there is no regurgitation of alcohol into the mouth that could affect the test.¹³⁷ Thus, even if police pulled a suspect over in front of a police station the breath test could not take place for at least fifteen minutes. There is no observation period for blood testing, meaning that breath testing inherently takes longer than blood testing. Therefore, it is even more unlikely that the Court would say that there is no time to obtain a warrant as a matter of law or fact. Courts would still need to conduct this analysis on a case-by-case basis because individual circumstances might affect whether it is reasonable to obtain a warrant before conducting a breathalyzer test.

Courts have also held that breath testing is less intrusive than blood testing. But given the analysis of the exigent circumstances exception in *McNeely*, the level of intrusiveness does not appear to matter. *McNeely* clarified that there is a bright-line rule when the state invokes the exigent circumstances exception: the state must show there was no time to obtain a warrant.¹³⁸ Nonetheless, could a lower court ignore the bright-line rule and apply a more general reasonableness test, balancing the intrusiveness of the search with the state’s interest in the search? The strongest argument a lower court could make for getting around the apparent bright-line rule stems from Justice Scalia’s complaint that Supreme Court “jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.”¹³⁹ After all, in *Skinner*, the Supreme Court already stated that breath tests were a minor intrusion.¹⁴⁰ Moreover the state interest in drunk driving is vastly more important than the state interest in regulating railroad employees. In *Skinner*, the Court noted that in nine years there had been a grand total of 100 people killed or injured in train accidents due to alcohol or drug consumption—about 10 casualties each year. This cannot begin to com-

136. *State v. McNeely*, No. ED 96402, 2011 WL 2455571, at *2 (Mo. Ct. App. June 21, 2011) (detailing transportation following McNeely’s arrest).

137. ALASKA ADMIN. CODE tit. 13, § 60.040(a) (1989) (“The following procedure must be used to obtain and analyze a breath sample on a breath test instrument: (1) observe the person to be tested for at least 15 minutes immediately before testing, to ensure that the person does not regurgitate or place anything in his or her mouth during that period”).

138. *McNeely*, 133 S.Ct. at 1565.

139. *California v. Avcedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

140. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989).

pare to the thousands of deaths and injuries due to drunk driving each year. The question of whether the need to obtain a warrant for breath testing would interfere with the enforcement of drunk-driving laws would still exist. If a court were merely to balance the “minor intrusion” of breath tests with the state interest in trying to limit drunk driving, the state interest would prevail.

Moreover, the Court in *Maryland v. King* applied a generalized reasonableness test to uphold a swab of a suspect’s mouth to obtain a DNA sample.¹⁴¹ *King* acknowledged that any intrusion beyond the surface of the body was constitutionally significant, but the Court ultimately held that the state interest outweighed a person’s privacy interest in their DNA.¹⁴² At first glance, *King* appears to support a generalized reasonableness approach to breath testing; however, the *King* decision relied on the central premise that law enforcement officers did not take DNA samples to collect evidence but used them in the identification of suspects.¹⁴³ In fact, the majority decision explicitly distinguished DNA sampling from “a drug test” designed to gather evidence of a particular crime.¹⁴⁴ The *King* approach is inapplicable here because breath or blood samples are intended to seize evidence of a particular crime and are easily distinguishable from DNA samples used for identification purposes.

Accordingly, for a court to use a generalized balancing test approach (such as the Court used in *King*) a court would have to simply ignore the clear mandate of *McNeely*, which seems to require applying the per se rule to searches for evidence of intoxication beneath the surface of the body. Perhaps one day the Supreme Court will reverse or limit its holding in *McNeely* and somehow exempt breath tests; until that day, the lower courts have to apply the per se rule set forth in *McNeely*.

As Chief Justice Roberts discussed, Supreme Court precedent dictates that the existence of exigent circumstances is one exception to the warrant requirement. Chief Justice Roberts also explained that the “exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a war-

141. *Maryland v. King*, 133 S.Ct. 1958, 1970 (2013).

142. *Id.* at 1980.

143. *Id.* at 1977.

144. *Id.* at 1972 (“Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession.”); *see also id.* at 1983 (Scalia, J., dissenting) (distinguishing DNA collection for identification purposes from DNA collection for evidentiary purposes) (“It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form ‘reasonableness’ inquiry that the Court indulges at length today.”).

rant.”¹⁴⁵ Accordingly, if the state attempts to introduce a warrantless breath test into evidence and invokes the search incident to arrest exception then the state will need to prove that there was insufficient time to obtain a warrant before important evidence would be lost.

2. Search Incident to Arrest

The exigent circumstances exception is not the only exception that might apply to justify breath tests. Another potential exception is the search incident to arrest exception, which a few courts have used to permit warrantless blood or breath searches. As noted above, I think one must read *McNeely* to implicitly prohibit blood draws under this exception; however, because this is an implicit prohibition it is necessary to look at the exception more closely. The Supreme Court has held that the search incident to arrest exception does not extend to searches inside a suspect’s body and such searches must be relatively contemporaneous in time and place with the arrest. Either of these limitations makes blood and breath testing impermissible.

We already saw that *Schmerber* explicitly stated that the search incident to arrest exception did not extend to searches beyond the body’s surface.¹⁴⁶ The modern constitutional doctrine of search incident to arrest is rooted in *Chimel v. California*,¹⁴⁷ which the Court decided three years after *Schmerber*. In *Chimel*, police obtained an arrest warrant, went to Chimel’s home, arrested him in the living room and “the officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop” calling this a search incident to arrest.¹⁴⁸ In explaining the proper limits to a search incident to arrest, *Chimel* stated the basic principle that “it is reasonable for the arresting officer to search the person arrested in order to remove any weapons . . . [and] for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.”¹⁴⁹ The Supreme Court also explained the search incident to arrest exception, noting that the *Chimel* Court recognized “that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement. Thus, a warrantless search incident to arrest . . . must be limited to the area ‘into which an arrestee might

145. *Missouri v. McNeely*, 133 S.Ct. 1552, 1569 (2013) (Roberts, C.J., concurring in part and dissenting in part).

146. *Schmerber v. California*, 384 U.S. 757, 769–70 (1966).

147. 395 U.S. 752 (1969).

148. *Id.* at 754.

149. *Id.* at 763.

reach.’”¹⁵⁰ Furthermore, in *Robinson*, the Court explained that “[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person.”¹⁵¹

Although these decisions did not explicitly examine searches inside of a suspect’s body, they are consistent with *Schmerber*’s comment on the limits of searches incident to arrest. First, we do not normally consider a substance in a person’s blood stream to be “in his possession.” For example, if a person consumes marijuana in a country where it is legal and then flies to the United States, the person may have chemicals in his blood stream, but we do not regard this as in his possession.¹⁵² More importantly, however, the suspect in custody has no ability to “destroy” the evidence.¹⁵³ A suspect cannot “reach” into his blood stream or lungs to remove alcohol.

In *Illinois v. Lafayette*,¹⁵⁴ the Court also stated that the purpose of the search incident to arrest exception placed limits on the search of the person, noting: “the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner’s clothes before confining him, although that step would be rare.”¹⁵⁵ Lower courts have also widely held that the search incident to arrest exception does not justify strip searches, cavity searches, and other types of searches that invade an arrestee’s body.¹⁵⁶

150. *Cupp v. Murphy*, 412 U.S. 291, 295 (2000) (internal citations and footnotes omitted) (“[W]e do not hold that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant.”).

151. *United States v. Robinson*, 414 U.S. 218, 234 (1973).

152. *State v. Thronsen*, 809 P.2d 941, 943 (Alaska Ct. App. 1991) (“All of the cases we have reviewed support the conclusion that a defendant cannot be convicted for possession of cocaine in his or her body. These cases conclude that a person who has cocaine in his or her body has no control over the cocaine and therefore does not have possession.”).

153. One possibility is that a suspect could vomit and thus purge the stomach of alcohol to prevent one’s blood alcohol level from rising; however, whether we could consider this destruction of evidence is doubtful, in part because alcohol in the stomach, which has not yet been digested, does not affect a suspect’s sobriety level.

154. 462 U.S. 640 (1983).

155. *Id.* at 645. The Court held that a different exception to the warrant requirement applied once the suspect arrived at the station and his or her belongings needed to be administratively inventoried—“the inventory search.” *Id.* at 646.

156. *See, e.g., Gallagher v. United States*, 406 F.2d 102, 107 n.3 (8th Cir. 1969) (“lawful arrest will support a properly limited incidental search”); *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984) (“[I]ntrusions into the arrestee’s body, including body cavity searches as authorized by the County’s policy, are not authorized by ar-

*Arizona v. Gant*¹⁵⁷ is the most important recent Supreme Court case on searches incident to arrest. In *Gant*, police arrested the suspect for a traffic offense, “handcuffed, and locked [the suspect] in the back of a patrol car [while] police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat.”¹⁵⁸ At trial, the government sought to introduce this evidence, claiming police obtained it during a valid search incident to arrest.¹⁵⁹ The Court held that where evidence is not at risk of destruction the search incident to arrest exception does not apply.¹⁶⁰ The Court cited *Chimel* for the proposition that “a search incident to arrest may only include ‘the arrestee’s person and the area ‘within his immediate control’ . . . [that is,] the area from within which he might gain possession of a weapon or destructible evidence.”¹⁶¹ Additionally, the Court discussed how that limitation defined the boundaries of the search incident to arrest exception.¹⁶² Finally, the Court dictated that: “if there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”¹⁶³ *Gant* dictates that arrest justifies a search of the person. A breath test is a search of the person. Nonetheless, *Gant* also indicates that the search of the person and the area under his control is limited to the dual “purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.”¹⁶⁴ A suspect is unable to reach into his lungs or blood stream to remove alcohol and destroy evidence, making it unlikely that the search incident to arrest exception would apply to breath tests.

rest alone.”); *Chapman v. Nichols*, 989 F.2d 393, 395–96 (10th Cir. 1993) (holding that arrest alone does not permit police to conduct a “strip search,” which is generally not allowed prior to booking); *People v. More*, 97 N.Y.2d 209 (2002) (holding that search incident to arrest does not alone justify body cavity searches); *Smith v. State*, 557 S.W.2d 299, 302 (Tex. Crim. App. 1977) (“A search for blood cannot be based on the incident to a lawful arrest exception.”); *Moss v. Commonwealth*, 516 S.E.2d 246, 250 (Va. App. 1999) (“Even if there was a ‘clear indication’ that contraband was located in Moss’ body, there were no exigencies present in this case justifying a warrantless search. Nothing in the record suggests that Moss had a concealed weapon, nor was there a risk of destruction of evidence.”).

157. 556 U.S. 332 (2009).

158. *Id.* at 336.

159. *Id.* at 337.

160. *Id.*

161. *Id.* at 339 (quoting *Chimel*, 395 U.S. at 763).

162. *Id.*

163. *Id.*

164. *Id.*

Gant appears to have much in common with *McNeely*. The Court has repeatedly stated that courts should narrowly construe exceptions to the warrant requirement. In *Gant*, the State proposed a “broad reading of” the search incident to arrest exception, which the Court called “unfounded.”¹⁶⁵ In both *Gant* and *McNeely*, members of the Court were disturbed that courts and officers stretched the exceptions to the warrant requirement well beyond the justifications that created them. Thus, the Court felt that it needed to draw a line.

Indeed, in 1991, Justice Scalia noted in his concurring opinion in *California v. Acevedo*¹⁶⁶ that “[e]ven before today’s decision, the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable.”¹⁶⁷ Thus, I think we see a common concern in many of these recent search and seizure cases: the vast majority of searches occur under exceptions to the warrant requirement. In the United States each year, there are tens of millions of special needs searches, *Terry* searches, exigent circumstances searches, searches incident to arrest and automobile exception searches.¹⁶⁸ In contrast, there are relatively few warrants. Justice Scalia, at least, seems concerned that the exceptions have swallowed the rule.¹⁶⁹

The *Gant* Court was concerned that the search incident to arrest exception was overused. If this analysis is correct, the Court is sticking to a narrow interpretation of search incident to arrest. Therefore, it is hard to imagine that the Court would be willing to permit the stretching of the search incident to arrest exception to permit searches inside an arrestee’s body.

There is also a more general reason to think that the search incident to arrest exception does not apply to blood or breath testing. All of the exceptions to the warrant requirement are premised on the idea that a

165. *Id.* at 350.

166. *California v. Acevedo*, 500 U.S. 565 (1991) (Scalia, J., concurring).

167. Justice Scalia quoted a law review article that found “nearly 20 such exceptions, including ‘searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es]. . . .’” *Id.* at 582 (quoting Bradley, Two Models of the Fourth Amendment, 83 MICH. L. REV. 1468, 1473–74 (1985)). “Since then,” Scalia added, “we have added at least two more.” *Id.*

168. For example, in New York City between 2004 and 2009 there were 2.8 million *Terry* stops by local police. *Floyd v. City of New York*, 283 F.R.D. 153, 159 (S.D.N.Y. 2012).

169. See also Justice Scalia’s scathing dissent in *Maryland v. King*, 133 S.Ct. 1958, 1980 (arguing that the warrant requirement has been severely eroded.)

warrant is impractical in certain circumstances. The Supreme Court has repeatedly noted: “Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done . . . so that an objective mind might weigh the need to invade [the citizen’s] privacy in order to enforce the law.”¹⁷⁰ In *Terry v. Ohio*,¹⁷¹ the Court explained that “the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, [and] in most instances, failure to comply with the warrant requirement can only be excused by exigent circumstances.”¹⁷² In his concurring opinion in *McNeely*, Chief Justice Roberts quoted this proposition from *Terry* and further explained that “[r]equiring police to apply for a warrant if practicable increases the likelihood that a neutral, detached judicial officer will review the case, helping to ensure that there is probable cause for any search and that any search is reasonable.”¹⁷³ This indicates the Court’s preference that when police have time to obtain a warrant they should do so. Accordingly, if police could easily obtain a warrant in the one-hour period in which they cannot conduct a breath test it is hard to see how any exception could apply.

Finally, there is yet another potential problem in applying the search incident to arrest exception to breath searches. The case law discussing this exception holds that it is only applicable if the search is conducted “contemporaneous” to the time and place of the arrest.¹⁷⁴ In *Preston v. United States*,¹⁷⁵ the Court explained that the justifications for the search incident to arrest exception “are absent where a search is remote in time or place from the arrest.”¹⁷⁶ Similarly, in *United States v. Chadwick*,¹⁷⁷ the Supreme Court quoted *Preston*’s exact language.¹⁷⁸ The Ninth Circuit has

170. *Groh v. Ramirez*, 540 U.S. 551, 560 (2004) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)).

171. 392 U.S. 1 (1968).

172. *Id.* at 20 (internal citations omitted).

173. *Missouri v. McNeely*, 133 S.Ct. 1552, 1573 (2013) (Roberts, C.J. concurring in part and dissenting in part).

174. *United States v. Ventresca* (1965) 380 U.S. 102, 107, n.2 (1965) (“The rule allowing contemporaneous searches (incident to arrest) is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused’s person or under his immediate control.”).

175. 376 U.S. 364 (1964).

176. *Preston v. United States*, 376 U.S. 364, 367 (1964); *see also* *Chimel v. California*, 395 U.S. 752, 764 (1969) (quoting *Preston*, 376 U.S. at 367).

177. 433 U.S. 1 (1977).

178. *United States v. Chadwick*, 433 U.S. 1, 15; *see also* *Commonwealth v. Pierre*, 893 N.E.2d 378, 384 (Mass. App. Ct. 2008) (“The case law interpreting the Fourth

also made this same observation.¹⁷⁹ The Massachusetts Court of Appeals surveyed the case law and concluded that: “[t]he Federal Circuit cases . . . do purport to allow a ‘reasonable’ delay between an arrest and an otherwise permissible search, but in each instance the delay at issue was no more than a few minutes and the search was at the scene of the arrest.”¹⁸⁰ Although the precise amount of time that might constitute a reasonable delay is debatable, it is doubtful that a search of a suspect’s breath conducted an hour later and miles away from the place of the arrest would constitute a reasonable delay. This is especially true if police had time to obtain a warrant in the interim. Thus, the government generally cannot use the search incident to arrest exception to justify a search officers conducted after transporting an arrestee to another location.¹⁸¹

With respect to breath and blood searches in drunk-driving cases, a few courts have explicitly rejected the search incident to arrest exception.¹⁸² The Missouri Supreme Court did so in *McNeely*. Additionally, after analyzing *Schmerber*, the Maine Supreme Court concluded that the Supreme Court did not “sanction an involuntary blood test based on the doctrine of search incident to arrest.”¹⁸³ Furthermore, in *United States v. Berry*,¹⁸⁴ the Sixth Circuit explicitly rejected the search incident to arrest exception in drunk driving cases, stating: “[t]he rationale for a search incident to arrest exception does not directly support the taking of a blood test without the suspect’s consent.”¹⁸⁵

Most other courts have implicitly held that the search incident to arrest exception does not justify blood or breath tests. For example, in

Amendment demonstrates, however, that the contemporaneity requirement continues to have meaning. Accordingly, this case, where the search did not occur at the time or at the place of arrest, has surely crossed that line.”).

179. *U.S. v. Tarazon*, 989 F.2d 1045, 1051 (citing *United States v. Turner*, 926 F.2d 883, 887–88 (9th Cir. 1991)) (noting that the search incident to arrest exception applies “to situations in which only a short delay occurs and where the arrestee is not far removed from the area searched”).

180. *Commonwealth v. Pierre*, 893 N.E.2d 378, 383 (Mass. App. Ct. 2008) (internal citations omitted).

181. *See People v. Ingham*, 6 Cal. Rptr. 2d 756 (Cal. Ct. App. 1992) (holding that when a suspect was arrested with her purse and police failed to search the purse at the time of arrest, police cannot later search the purse without first obtaining a warrant).

182. One court has allowed a warrantless breath test under the search incident to arrest exception. In *Commonwealth v. Anderl*, 477 A.2d 1356, 1364 (Pa. Super. Ct. 1984), the Pennsylvania Superior Court held that breath tests were admissible under both the exigent circumstances and the search incident to arrest exceptions, without providing its reasoning.

183. *State v. Baker*, 502 A.2d 489, 492 (Me. 1985).

184. 866 F.2d 887 (6th Cir. 1989).

185. *Id.* at 891 (internal citation omitted).

State v. Welch,¹⁸⁶ the North Carolina Supreme Court held: “Since the withdrawal of a blood sample is subject to [F]ourth [A]mendment requirements, a search warrant must be procured before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search.”¹⁸⁷ While the Court did not explicitly reject search incident to arrest, the comment that the law requires a warrant unless there are exigent circumstances logically precludes any other exception. In *State v. Stern*,¹⁸⁸ the New Hampshire Supreme Court implicitly held that the search incident to arrest exception did not justify a warrantless search of blood when it explicitly held that the exigent circumstances exception was the only exception that could justify a blood draw in drunk driving cases.¹⁸⁹

In drunk driving cases, a handful of courts have used the search incident to arrest exception in an attempt to follow the *Schmerber* reasoning, although many of the courts that once invoked search incident to arrest in blood or breath testing have since abandoned that exception in favor of the exigent circumstances exception. In *Burnett v. Municipality of Anchorage*,¹⁹⁰ the Ninth Circuit heavily relied on *Schmerber* to invoke the search incident to arrest exception.¹⁹¹ However, in *United States v. Chapel*,¹⁹² the Ninth Circuit, sitting en banc, overruled its prior line of cases, which had required custodial arrest as a prerequisite to warrantless searches and had characterized *Schmerber* searches as searches incident to arrest.¹⁹³ *Chapel* re-characterized warrantless *Schmerber* searches as exigent circumstances searches.¹⁹⁴ *Chapel* did not explicitly say that law enforcement officers could never use the search incident to arrest exception to support a blood test, but, since *Chapel*, the Ninth Circuit has gen-

186. 342 S.E.2d 789 (N.C. 1986).

187. *Id.* at 793.

188. 846 A.2d 64 (N.H. 2004).

189. *Id.* at 68 (“To be constitutional, the exigent circumstances exception to the warrant requirement must apply.”).

190. 806 F.2d 1447 (9th Cir. 1986).

191. *Id.* at 1450 (“[T]he breath test sought by the Alaska law enforcement officials is clearly a less objectionable intrusion than the compulsory blood samples allowed under *Schmerber*. It is clear then that the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse.”).

192. 55 F.3d 1416 (9th Cir. 1995) (en banc).

193. *Id.*

194. *Id.* at 1418–19 (“We now know from the Supreme Court’s reasoning in a case decided after *Harvey* that the seizure of blood in *Schmerber* ‘fell within the exigent-circumstances exception to the warrant requirement.’”) (quoting *Winston v. Lee*, 470 U.S. 753, 759 (1985)).

erally relied on exigent circumstance to justify blood tests.¹⁹⁵ In *State v. Bohling*,¹⁹⁶ the Wisconsin Supreme Court explained that the search incident to arrest exception might justify a warrantless blood search in certain circumstances.¹⁹⁷ Similarly, in *Gregg v. State*,¹⁹⁸ the Mississippi Supreme Court also upheld blood draws as a hybrid *Schmerber* search, which they described as part incident to arrest and part exigent circumstances.¹⁹⁹ In recent years Mississippi courts, however, have relied on exigent circumstances to justify blood searches and have not applied the search incident to arrest exception.²⁰⁰ Additionally, in *United States v. Reid*,²⁰¹ the Fourth Circuit also held that breathalyzer searches are justifiable under either the search incident to arrest exception or exigent circumstances exception.²⁰² Finally, in *Wing v. State*,²⁰³ the Alaska Court of Appeals held that breath tests are permissible under the search incident to arrest doctrine; however, the court based this holding on the fact that the defendant had conceded that the exception applied and offered no other reasoning to support its decision.²⁰⁴

If one reads *McNeely* to forbid blood draws under the search incident to arrest exception because that exception does not permit searches beyond the external body of the suspect, then the same reasoning would appear to apply to searches of a suspect's breath. One could make an argument that the breath search, unlike a blood search, does not intrude beneath a suspect's skin and (perhaps) does not intrude inside the suspect's body at all. That is to say, a breathalyzer test only analyzes a sus-

195. Nonetheless, in *United States v. Edmo*, 140 F.3d 1289, 1291–92 (9th Cir. 1998), the Ninth Circuit discussed how the *Schmerber* Court relied on the search incident to arrest exception.

196. 494 N.W.2d 399 (Wis. 1993).

197. *Id.* at 400. Later Wisconsin cases, however, allow blood searches under the exigent circumstances exception, not under the search incident to arrest exception. *See, e.g., State v. Faust*, 682 N.W.2d 371, 377–78 (Wis. 2004) (requiring an emergency sufficient to justify an exigency under federal law, but continuing to require a prior lawful arrest).

198. 374 So. 2d 1301 (Miss. 1979).

199. *Id.* at 1304 (“[O]ur decision here upholds the ‘intrusion’ into Gregg’s body (extracting blood) as an incident to the officer’s lawful arrest of him and the prevailing exigencies.”).

200. *See, e.g., Holloman v. State*, 820 So. 2d 52, 55 (Miss. Ct. App. 2002) (“A warrantless search is permissible in certain exigent circumstances if it can be shown that grounds existed to conduct the search that, had time permitted, would have reasonably satisfied a disinterested magistrate that a warrant should properly issue.”).

201. 929 F.2d 990 (4th Cir. 1991).

202. *Id.*

203. 268 P.3d 1105, 1110 (Alaska Ct. App. 2012).

204. *Id.* at 1109–10.

pect's breath once it has left the suspect's body. Additionally, though the tube goes slightly into the suspect's mouth, the tube does not go down the suspect's throat. One major problem with this argument is that *Skinner* appears to have already rejected it. *Skinner* noted this was a search, in part because the test relies on testing deep lung, alveolar breath. Also, the suspect must cooperate by breathing deeply and blowing into a tube placed in her mouth. Thus, the test is about analyzing air from deep in the lungs and is not simply a passive detection of exhalations. Of course, one could use the same reasoning to argue that urine tests do not intrude beneath the body's surface because police are not collecting urine from the bladder directly but are only collecting the urine once the suspect expels it. As we have seen, courts are unlikely to accept such an argument for urine. The argument is only slightly less implausible for breath.

Thus, the argument that a breath test does not examine beneath the external surface of a suspect's body seems dubious. The other two considerations—that a search must be contemporaneous and that police officers had no time to obtain a warrant—are just as applicable to breath tests as to blood tests. Therefore, it appears difficult to provide any acceptable basis for distinguishing between blood and breath testing with respect to search incident to arrest.²⁰⁵

IV. CONCLUSION

McNeely held that, “[i]n 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.”²⁰⁶ As Chief Justice Roberts summarized in his concurring opinion: “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.”²⁰⁷ Only Justice Thomas dissented from this basic principle, and

205. One final application of *McNeely* is worth noting. The Court has yet to decide whether misdemeanors which do not occur in the presence of police require a warrant prior to arrest. See *Atwater v. City of Largo Vista*, 532 U.S. 318, 340 n.11 (2001). States have arrest statutes which explicitly exempt drunk driving arrests from the normal rule that misdemeanors not occurring in the presence of police require police to obtain a warrant. The justification for this seems to be that the exigent circumstances require immediate arrest. *McNeely* is directly relevant to this analysis. If elimination of alcohol is not necessarily sufficient to justify a warrantless search, it would also not be sufficient to justify warrantless seizure of the person.

206. *Missouri v. McNeely*, 133 S.Ct. 1552, 1555 (2013).

207. *Id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part).

endorsed a per se exception to the warrant requirement for alcohol testing.²⁰⁸ This holding seriously calls into question the practice of warrantless breathalyzer testing. If courts apply the bright-line rules the Court articulated in *McNeely*, it is hard to see how such warrantless searches of blood or breath are constitutional without a showing of particularized need. Additionally, *McNeely*'s effective overruling of *Schmerber* will undoubtedly have widespread effects on the prosecution of drunk driving cases for years to come. One of the principle results of *McNeely* is that the state will need to either establish that there was no time to apply for a warrant before conducting a blood or breath test or the state will need to obtain a warrant for blood, breath, and/or urine tests in all drunk driving cases.

208. *Id.* at 1574–78 (Thomas J., dissenting).