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ONE MINUTE BRIEF

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NUMBER: 2019-15 **DATE:** 06-27-19 **BY:** Devallis Rutledge **TOPIC:** BAC from Unconscious Driver

ISSUE: Can a blood sample be taken from an unconscious DUI suspect without a warrant?

In *Schmerber v. California* (1966) 384 US 757, the US Supreme Court held that no warrant was required to draw blood from a DUI arrestee when the pressing needs of handling the involved **traffic crash** constituted an **exigency** that made a warrant application impracticable. In *Missouri v. McNeely* (2013) 569 US 141, the court said that the natural dissipation of alcohol in the body is not a *per se* exigency (to prevent the imminent destruction of evidence) that always excuses the warrant requirement. What if the DUI suspect is—or becomes—**unconscious** before a breath sample can be obtained or express consent can be given for a blood draw? Might this situation be a sufficient exigency to excuse the warrant requirement?

- Gerald Mitchell was in a drunken stupor with a PAS reading of 0.24% when arrested in Sheboygan, Wisconsin, for DUI. At the station, he was too lethargic for a breath test and lost consciousness while being taken to a hospital, where blood was drawn at the officer's request. He later moved to suppress this BAC evidence as the result of a warrantless, non-consensual search. The trial and state appellate courts denied this motion, and he was convicted. The US Supreme Court has now issued opinions in the case (4+1 to 3+1).

The plurality opinion said that *"in cases involving unconscious drivers ... the need for a blood test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant."* Taken together, the dissipation of blood-alcohol evidence in the body **and** the driver's unconsciousness will generally constitute a sufficient exigency to excuse the warrant requirement:

*“Thus, exigency exists when (1) BAC evidence is dissipating and (2) **some other factor creates pressing health, safety, or law enforcement needs** that would take priority over a warrant application. **Both conditions are met when a drunk-driving suspect is unconscious**, so *Schmerber* controls. With such suspects, too, a warrantless blood draw is lawful. ... Thus, **when a driver is unconscious, the general rule is that a warrant is not needed.**”*

Mitchell v. Wisconsin (2019) 588 US ____, No. 18-6210, Slip opn. at 12, 16, 2

- After setting out this general rule, however, the plurality added an exception:

When the driver is unconscious, police “may ***almost always*** order a warrantless blood test...” but “We do not rule out the possibility that in an **unusual** case a **defendant** would be able to show that his blood would not have been drawn if police had not been seeking BAC information, **and** that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.” *Id.*, Slip opn. at 19.

Because one justice concurred **only in the judgment** and would have held that the natural dissipation of alcohol in the blood **always** creates an exigency that excuses the warrant requirement (Thomas, concurring, Slip opn. at 21), it may be argued that the exception agreed to by the plurality does not have binding precedential effect. See *Marks v. US* (1977) 430 US 188, 193, and 1MB 2009-15. (And even under the plurality’s exception, the **defendant** would have the burden of proving **both** components.)

- To foreclose suspects from unjustifiably attempting to invoke the exception, law enforcement officers may consider documenting in arrest reports facts that show, where applicable, that medical personnel confirmed their independent need for blood samples for diagnostic or treatment purposes, and details of traffic crashes, injuries, or other exigent circumstances that prevented prompt application for a search warrant.

BOTTOM LINE: A search warrant is generally not required before taking a blood sample from an unconscious DUI suspect—especially where blood would also be taken for medical reasons, or where officers have other pressing duties to perform.

(Emphases added in quoted material.)

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