

UPCOMING TRAININGS & CONFERENCES

A full list of NDAA's virtual learning sessions is available at [▶ ndaa.org/training-courses/](https://ndaa.org/training-courses/). For current information, effective best practices, and targeted resources for prosecutors, visit [▶ ndaa.org/covid-19](https://ndaa.org/covid-19).

NDAA's Mastering Masking Digital Course/ On Demand Training (CLE Available)
▶ ndaa.org/training/mastering-masking-2/

NDAA's Human Trafficking and the Impact on Commercial Driver's Licenses/On Demand Training
▶ ndaa.org/training/human-trafficking-and-the-impact-on-commercial-drivers-licenses/

NDAA's Prosecuting DUI Cases Online Course/ On Demand Training (CLE Available)
▶ ndaa.org/training/prosecuting-dui-cases/

NDAA's Investigation and Prosecution of Drug-Impaired Driving Cases Online Course/On Demand Training (CLE Available)
▶ ndaa.org/training/on-demand-learning-investigation-and-prosecution-of-drug-impaired-driving-cases/

Breaking the Cycle of Violence
October 24–28, 2022, San Diego, CA

The Ethics of Trial Advocacy and the Case of Kyle Rittenhouse (Live Webinar)
November 2, 2022 @ 2:00–3:30 pm ET

RESOURCES

Impaired Driving Resources
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Exigency for a Blood Draw in an Impaired Driving Case

Constitutional Parameters and Practical Approaches

By Rachel Smith, Traffic Safety Resource Prosecutor, Louisiana District Attorneys Association

In an impaired driving case, a blood draw and resulting toxicology results can be critical evidence for the State's case. A blood draw is a search like any other Fourth Amendment search. For this reason, it may be taken pursuant to a search warrant based on probable cause the driver was impaired OR one of the accepted exceptions to the search warrant requirement, including exigent circumstances. The United States Supreme Court has held that, "Nothing prevents the police from seeking a warrant for a blood test when there is

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sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not.”¹

Schmerber v. California is the starting point for examining exigent circumstances for a blood draw in an impaired driving case.² In *Schmerber*, the driver was believed to be impaired and was arrested at the hospital while receiving treatment for injuries suffered in a crash. The Court held that the officer, “Might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence.’”³ The Court first ascertained that the officer had sufficient probable cause for the impaired driving arrest and then went on to assess the constitutionality of the warrantless search. In the Court’s analysis, the fact that alcohol is eliminated from the blood over time, the amount of time it took the accused to reach the hospital and for officers to investigate the offense left law enforcement with “no time to seek a magistrate and secure a warrant.”⁴

Compare this to the *Missouri v. McNeely* case in which a warrantless blood draw from an impaired driver was obtained after a routine impaired driving stop, investigation, and arrest.⁵ The state argued that the natural dissipation of alcohol in the blood weighed in favor of finding exigent circumstances in impaired driving cases. However, the Court held that,

While natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on a totality of the circumstances.⁶

Finally, the Court examined exigent circumstances for a warrantless blood draw in an impaired driving case in *Mitchell v. Wisconsin*.⁷ In this case the Court indicated that if an impaired driver was unconscious or in a stupor which required medical treatment and which precluded a breath test, an officer may, “Almost always order a warrantless blood draw ... without offending the Fourth Amendment.”⁸

Practically speaking, the evaluation of whether exigent circumstances exist such that a warrantless blood draw may be taken rests on three things

- 1) valid probable cause for an impaired driving offense being established
- 2) an officer’s reasonable belief that he/she is confronted with an emergency which creates warrant delays and will result in the destruction of evidence
- 3) a “totality” determination of the prior two factors which will be undertaken on a case by case basis.

If officers rely on exigent circumstances to order a blood draw, they should document probable cause of an impaired driving offense ... in the police report.

Documenting Probable Cause

If officers rely on exigent circumstances to order a blood draw, they should document probable cause of an impaired driving offense, i.e., thoroughly document evidence of operation and impairment, in the police report. Probable cause should be documented as thoroughly in the police report after the incident as it would have been in an affidavit for warrant prior to the incident.

¹ *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184 (2016).

² *Schmerber v. California*, 86 S.Ct. 1826, 384 U.S. 757 (1966).

³ *Id.* at 770.

⁴ *Id.*

⁵ *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

⁶ *Id.* at 1563.

⁷ *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019).

⁸ *Id.* at 2533.

Articulating Exigent Circumstances

The following represent state cases which have relied on constitutional authority in determining particular facts to be valid exigent circumstances for taking warrantless blood draws. In *Cole v. State*, a fatal crash occurred in Longview, Texas.⁹ At least fourteen officers were needed to investigate and secure the scene, including the crash investigator who was called out from having just finished his shift. The crash was also found to have occurred near a shift change, which caused more delays. The driver had already been taken to the hospital when the crash investigator arrived at the scene. Testimony revealed that it was only after the crash investigation occurred that law enforcement had probable cause to believe Cole was responsible. The Court highlighted that all officers working the crash scene were performing essential duties and none of them could be spared to go to the hospital and begin applying for a warrant. Further, officers testified that obtaining a warrant usually took 1–1.5 hours. Finally, officers expressed concerns that, based on defendant's statements that he had taken methamphetamine at some point previously, and that he "had pain all over," both the methamphetamine could be eliminated from his system and/ or he would be treated with other medication at the hospital which could interfere with blood test results. For these reasons, the Court held that obtaining a warrant was impractical.

In *State v. Tullberg*, a Wisconsin case which preceded *Mitchell v. Wisconsin*, time was of the essence.¹⁰ Law enforcement was called out to a fatal crash scene. No one was available to be interviewed at the scene as one person was dead and two other occupants had secured a ride to the hospital which was thirty minutes away in another county. The investigating officer secured the scene, spoke to the defendant's father, and then decided he needed to go to the hospital to investigate further. At the hospital, the defendant and other occupant of the vehicle both alleged that the victim at the scene had been the driver of the vehicle. After further investigation, it was learned that Tullberg had misled police and evidence indicated that he had operated the vehicle. Further, Tullberg was about to undergo a CT scan which could have taken a considerable amount of time. For these reasons, the court in Wisconsin held that the officer acted reasonably in ordering a warrantless blood draw of Tullberg.

In *State v. Michael*, a Louisiana case, defendant caused a crash with another vehicle which resulted in injury to the occupants of the other vehicle. He then fled the scene and was found a few miles away.¹¹ After being transported to the hospital, a warrantless blood test was taken. The court noted the factors giving rise to urgent needs were that a crash with injury occurred, the crash had to be investigated and the defendant had to be located and brought to the hospital, ultimately creating two scenes to be investigated. The Court held that under these circumstances, the officer could reasonably have believed he was confronted with an emergency.

Totality Examination

Since every case in which a warrantless blood draw is taken due to exigent circumstances will be examined on a case-by-case basis if challenged, there is no silver bullet checklist to make sure there are valid exigent circumstances. For this reason, it is critical to always document sufficient probable cause for the impaired driving offense and all factors which might

Since every case in which a warrantless blood draw is taken due to exigent circumstances will be examined on a case-by-case basis if challenged ... it is critical to always document sufficient probable cause for the impaired driving offense and all factors which might have contributed to a delay in getting a warrant, thus resulting in destruction of evidence.

⁹ *Cole v. State*, 490 S.W.3d 918 (2016).

¹⁰ *State v. Tullberg*, 359 Wis.2d 421 (2014).

¹¹ *State v. Michael*, 2019-01273 (La. 7/9/2020), 340 So.3d 804.

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have contributed to a delay in getting a warrant, thus resulting in destruction of evidence. Below are examples of circumstances which, in an urgent situation, could cause a delay in obtaining a warrant and should be specifically articulated in a police report.

Factors Related to Driver

- Unconscious
- Imminent medical treatment
- Transported to different jurisdiction for treatment
- If there is evidence of drug use, most officers will not know elimination rate for drugs as compared to alcohol, so this might be a salient factor and necessitate getting a blood draw sooner
- Alcohol use and elimination rate
- Delays caused by defendant such as: lying about operation of vehicle, faking a medical condition, etc.



Factors Related to Law Enforcement

- Officers needed at scene of crash
- Officers available to travel for warrant
- Shift change or anything that will delay investigation
- Known circumstances for obtaining warrant, for example, if an officer must drive a long distance to reach a judge and there is no electronic warrant available

About the Author

Rachel Smith is the Traffic Safety Resource Prosecutor for Louisiana and works for the Louisiana District Attorneys Association (LDAA) in Baton Rouge, Louisiana. She has been in this position since 2015. Ms. Smith works under a highway safety grant, providing impaired driving training, education, resources, and legal assistance to prosecutors and law enforcement. Prior to LDAA, Ms. Smith clerked for the Hon. Anthony J. Marabella for six years at the 19th Judicial District Court.

