INTRODUCTION

Defending a driving while impaired case is a daunting task in itself. When the State has a blood test establishing your client’s BAC, your job becomes even more difficult. Despite legitimate arguments about the scientific validity of a particular blood test, judges and jurors tend to give a great deal of credence to blood tests because they are a “direct measurement” of the driver’s BAC. Thus, if you have a tool to keep that blood test result out of evidence, your client has a much better chance of hearing the words “not guilty”. If the police needed to obtain a search warrant before drawing your client’s blood and failed to do so, that could be your tool.

In this paper, I will give a brief history of how the courts have dealt with whether or not a search warrant is required for a blood test in a drunk driving case. I will then discuss how the Supreme Court of the United States weighed in on this issue in Missouri v. McNeely, 569 U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). I will then look at how North Carolina courts have interpreted McNeely. Finally, we will look at several issues that should be considered in a blood test case.
**HISTORY**

The Supreme Court of the United States first dealt with warrantless blood tests when it decided *Schmerber v. California*, 384 U. S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In *Schmerber*, the Court upheld a warrantless blood test of a driver arrested for driving under the influence because 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 the evidence.” 384 U. S. at 770. Incidentally, *Schmerber* also determined that the drawing of blood did not constitute self-incrimination under the Fifth Amendment to the U. S. Constitution since it does not constitute speech.

**MCNEELY**

In *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), the Supreme Court of the United States faced the issue of whether the natural metabolism of alcohol in the blood stream 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. The Court concluded that it does not, and that exigency in these cases must by determined case by case based on the totality of the circumstances. 569 U. S. at 1.
Tyler McNeely was pulled by a Missouri police officer during the early morning at approximately 2:08 a.m. after the officer witnessed McNeely's truck exceeding the posted speed limit and repeatedly crossing the centerline. The officer observed blood shot eyes, slurred speech and the odor of alcohol. McNeely acknowledged that he had consumed “a couple of beers”. He appeared unsteady on his feet. According to the officer, McNeely performed poorly on a battery of field sobriety tests and declined to blow into a portable breath test device. After he was arrested, he again refused to provide a breath sample and was then taken to a local hospital for a blood draw. The officer read McNeely his implied consent rights, and McNeely refused to submit voluntarily to a blood test. The officer directed the lab technician to take a blood sample at approximately 2:35 a.m.

At trial, the trial court granted McNeely's motion to suppress the results of the blood test, finding that the warrantless blood draw violated the Fourth Amendment and that the metabolization of alcohol was present in all driving under the influence cases and that there were no other circumstances indicative of an exigent situation.

The Missouri Supreme Court agreed and affirmed the trial court's ruling on the motion to suppress. The court interpreted Schmerber as requiring a totality of the circumstances approach, stating that Schmerber requires more than just dissipation of blood-alcohol evidence to support a warrantless blood draw. The Supreme Court of the United States granted certiorari to resolve a split of authority on whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for
nonconsensual blood testing in driving under the influence cases. 567 U. S. ___ 2012.

The Court’s analysis of this case was fairly straight-forward. The Court first discussed the general rule that a search can only be made pursuant to a search warrant under the Fourth Amendment. The Court then recognized the usual exceptions, including exigency. Following its precedent in Schmerber, the Court reiterated that Schmerber required a totality of the circumstances approach and that exigency requires special facts. The State of Missouri, however, recognizing that rule, asked the Court to set a bright-line rule that the natural dissipation of alcohol in itself constitutes an exigency in all driving while impaired cases. Interestingly, the State did not ask the Court to consider the special facts that may have existed in the McNeely case.

In declining to create a per se rule, the Court reasoned that the natural dissipation of alcohol is different than other forms of destruction of evidence in that it is systematic and predictable. The Court also noted that there is always going to be some delay in blood test cases because of the necessity of taking the driver to a medical provider. Lastly, the Court noted that since the Schmerber case, there have been dramatic developments and improvements in technology that allow an officer to obtain a search warrant in a much quicker manner.

In analyzing a warrantless blood draw case, it would be wise to focus on those particular factors. For example, by determining how long the blood test took without the warrant and simply adding the amount of time for obtaining the warrant, instead of focusing on the total amount of time. In other words, a
combined estimated time of 90 minutes doesn’t seem as long when 60 minutes of it would have been spent in any case just getting to the hospital. It is very important to look at the technological options that the officer had at his disposal that would have helped him get a search warrant quickly.

When McNeely was decided, it was not uncommon to hear attorneys excitedly stating that search warrants were now required for blood tests. Actually, that was already the case. The reason there were not enough attacks on this front, is that we assumed that the court was considering any delay as an exigency because of the dissipation of alcohol. McNeely simply confirmed that each case must be decided based on a totality of circumstances approach and that there would be no per se rule that the natural dissipation of alcohol on its own would constitute an exigent circumstance.

**SUBSEQUENT NORTH CAROLINA CASES**

Since the McNeely decision, the North Carolina appellate courts have considered a few cases determining whether the facts constituted exigent circumstances, excusing law enforcement from obtaining a search warrant before having a driver’s blood drawn.

In State v. Dahlquist, 2013 N.C. App LEXIS 1231, review denied 367 N.C. 331 (N.C. 2014), the North Carolina Court of Appeals had its first chance to rule on a warrantless blood draw case in light of McNeely. This was a case out of
Mecklenburg County in which the defendant drove up to a checkpoint in the early morning hours. There was a BAT mobile located with an area for a magistrate but there was not magistrate on duty. The defendant refused a breath test at the BAT mobile and was transported directly to Mercy Hospital, where blood samples were drawn without his consent. Defendant was charged with driving while impaired.

The Defendant’s motion to suppress the results of the warrantless blood draw was denied, and the Defendant was subsequently convicted of driving while impaired by a jury.

On appeal, the North Carolina Court of Appeals cited the McNeely decision but held that there were sufficient exigent circumstances to justify the officer’s bypassing the warrant process. Specifically, the Court noted that the officer's experience told him that taking the Defendant directly to Mercy Hospital and obtaining a blood draw would take approximately 45 minutes to an hour; if he first went to the Intake Center at the jail to obtain a search warrant, the process would take between four and five hours.

Interestingly, the Court discussed how search warrants can be obtained electronically through video-conference and further that officer should have checked to see how long the wait would have been to get a search warrant. Nevertheless, the warrantless blood draw was upheld.

On July 14, 2014, the North Carolina Court of Appeals returned its decision in State v. Granger, 761 S.E.2d 923, 2014 N.C. App. LEXIS 745 (2014). This case came out of New Hanover County. The defendant was involved in a motor vehicle accident.
in which he rear-ended another vehicle at approximately 2:19 a.m. The officer observed that the defendant was in pain and had an odor of alcohol about him. The officer did not ask the defendant to perform any field sobriety tests, and EMS transported the defendant to the hospital. At the hospital, the officer noted that the defendant had bloodshot and glassy eyes. The defendant admitted to drinking three shots between 10 and 11 P.M. The officer administered portable breath tests at 3:04 a.m. and 3:09 a.m. which were both positive for alcohol. He also administered the horizontal gaze nystagmus test, which the defendant “failed”. The defendant passed an alphabet test and counting test. At 3:50, after having earlier read the implied consent rights to defendant, the officer requested that defendant consent to a blood draw. The defendant refused to consent. The officer directed the nurse to draw the blood, which was a .15.

The defendant moved to suppress the blood test results, and the trial court denied said motion. After a guilty plea, the defendant appealed. In affirming the trial court’s denial of the motion to suppress, the Court of Appeals found that various findings of fact supported the conclusion of law that there were exigent circumstances justifying a warrantless blood draw. In particular the Court focused on: First, that it would have been a 40 minute round-trip to the magistrate’s office to get a search warrant and this added to the time since the accident had occurred made a dissipation of alcohol more pressing; Second, the officer claimed that had he left the hospital to go get a warrant, he would have had to wait for another officer to come stay with the defendant at the hospital; and third, the officer expressed concern that while he was gone the hospital would administer pain medications
which would contaminate the blood sample. The Court concluded that these factors established an exigency sufficient to justify the warrantless blood draw.

In *State v. McRary*, 764 S.E.2d 477 (2014), the North Carolina Court of Appeals considered a case out of Chatham County in which Deputy Fyle responded to a report of suspicious activity at someone's home. Upon arrival at 7:01 p.m., the deputy found the defendant seated in the driver's side of a vehicle apparently asleep. The engine was not running. Upon awaking the defendant initially ignored the deputy. The deputy detected a strong odor of alcohol and red glassy eyes. There was an empty Vodka bottle in the seat. The deputy administered a PBT, which showed a result so high that the deputy decided that the defendant was in need of medical treatment. The owner of the home gave a statement establishing defendant as the driver and describing earlier driving. The defendant was unable to stand to perform SFSTs. Defendant was placed under arrest for DWI at 7:34 p.m. Then defendant began complaining of chest pains and the deputy contact EMS, who arrived at 7:39 p.m. Defendant became uncooperative and was yelling. He was taken to the hospital and Deputy Fyle followed. Defendant arrived at the hospital at 8:39 p.m. Prior to his discharge, the deputy asked defendant to submit to a blood test and the defendant refused. A forced blood draw was performed at 9:16 p.m. That was almost 3 hours after the initial call.

Defendant's motion to suppress the blood test results was denied and the defendant was convicted of driving while impaired. On appeal to the North Carolina Court of Appeals, the Court discussed the exigent circumstances issue but remanded it to the trial court for further findings of fact. The Court clearly stated that this was
likely a case of exigent circumstances and compared the case to Granger. The Court, however, stated it needed additional findings of fact regarding the availability of a magistrate.

On April 19, 2016, the North Carolina Court of Appeals ruled in State v. Romano, 2016 N.C. App. LEXIS 430 that the trial court had properly granted the defendant’s motion to suppress results of a blood draw collected from a nurse who was treating the defendant. The defendant appeared to be highly intoxicated and was very belligerent. An ambulance was called and the defendant was taken to the hospital. At the hospital, the defendant was sedated and once he was unconscious, the nurse drew a large vial of blood and offered some of the blood to the officer for testing. Once the officer confirmed that the defendant was unconscious, the officer advised the unconscious defendant of his rights, trying to wake him up unsuccessfully to get a verbal response from him. The defendant was never conscious to be advised of his rights, never refused the blood draw or signed an advice of rights form. The magistrate’s office was a couple miles away but none of the officers sought a search warrant.

The trial court concluded that under the totality of the circumstances, no exigency existed justifying a warrantless search and suppressed the blood draw evidence. The State relied on NCGS 20-16.2(b)(2015) which allows and unconscious person to be tested without the notification of rights. The Court of Appeals noted that although the Courts have affirmed the use of the provision, the Courts had not received the guidance of McNeely, which “sharply prohibits per se warrant
exceptions for blood draw searches. The State failed to show exigent circumstances and could not rely on that statute to relieve itself of the obligation to do so.

CONSENT

One of the exceptions to the requirement of a search warrant is that the defendant voluntarily and knowingly consented to the blood draw. This generally means that the defendant’s implied consent rights were read to them and that the defendant then consented to the blood draw. In an interesting case out of Georgia, the Georgia Supreme Court held that the fact that a driver agrees to a blood draw after being advised by an officer that his license would be revoked for a year if he refused, does not create voluntary consent that would eliminate the need to obtain a search warrant. Williams v. State, (Ga. 2015). The Court held that the State must prove that the defendant gave “actual” consent to the blood draw, and he acted freely and voluntarily under the totality of the circumstances.

Issues arise when there is a question as to whether or not the driver in fact consented, such as when the form says “unable to sign”. North Carolina case law specifically holds that if a driver is read his implied consent rights for a breath test
and refuses, he must be informed again of those rights before a blood draw is performed. *State v. Williams*, ____N.C. App.____, 759 S.E.2d 350 (2014).

In *Flonnory v. State of Delaware*, 109 A.3d 1060 (2015), the Supreme Court of Delaware considered whether the trial court had properly analyzed the consent or lack of consent of a defendant. The defendant was arrested and transported to the police station where he was advised that a phlebotomist was going to conduct a blood draw. The officer did not ask Flonnory for permission nor did he obtain a search warrant. “During the blood draw, Flonnory told the phlebotomist ‘that’s a good vein, don’t miss it.’” The blood test result was .14. The trial court denied the defendant’s motion to suppress holding that *McNeely* was inapplicable to Delaware’s implied consent statute. The Supreme Court of Delaware determined that the trial court erred in that determination and that the trial court should have made a Fourth Amendment analysis to determine if the defendant consented.

**CONCLUSION**

Contesting blood tests can be a very fruitful area of defense in driving while impaired cases. There are legal and scientific arguments that help our clients. It is important to understand the statutory and constitutional requirements for the State to be able to use a blood test result. Issues such as drawing blood when a driver is not under arrest; drawing blood without re-reading the defendant’s implied consent rights and chain of custody are always ripe for consideration.
In warrantless blood draw cases, we need to be fully aware of the specific times in our case, the distances of travel involved, the availability of a magistrate, and the technological tools that could have allowed for a search warrant being issued. We have to always hold the State to the high burden of establishing exigent circumstances. *McNeely* shows that such exigent circumstances can not be assumed just because of the dissipation of alcohol alone.