Issue Brief

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In 2010, the Missouri General Assembly amended the statutes related to obtaining blood samples in driving under the influence cases.

This change caused some confusion regarding law enforcement's obligation to seek a court order or warrant to obtain a blood sample when the individual revoked his or her consent.

The issue was addressed by the U.S. Supreme Court in its opinion in the case *Missouri v. McNeely*.

To help Missouri hospitals understand the issues and determine what are the appropriate actions for their facilities, MHA requested the law firm of Lathrop and Gage to write the accompanying brief.

4712 Country Club Drive
Jefferson City, MO 65109

P.O. Box 60
Jefferson City, MO 65102

573/893-3700
www.mhanet.com

MISSOURI HOSPITAL ASSOCIATION

Analysis of U.S. Supreme Court Decision in *Missouri v. McNeely*

Prepared for MHA by Donn H. Herring, partner, Lathrop & Gage LLP.

On April 17, 2013, the Supreme Court of the United States issued its decision in the case of *Missouri v. McNeely*. At issue in this case was whether it is permissible under the Fourth Amendment to the United States Constitution for law enforcement officers to obtain a blood sample from a person suspected of "driving under the influence" without that person's consent and without a duly authorized search warrant.

The Supreme Court had previously dealt with this issue in 1966 in the case of *Schmerber v. California*. In that case, the Supreme Court determined that it was consistent with the requirements of the Fourth Amendment for law enforcement officers to obtain a blood sample from a person suspected of a DUI without that person's consent and without a search warrant, but only if "exigent" circumstances existed. In McNeely, the State of Missouri opted not to argue that exigent circumstances existed which justified the taking of the blood sample in that case without the person's consent and without a search warrant. Instead, the State of Missouri argued that the mere fact that the amount of alcohol in a person's blood naturally dissipates with the passage of time, in and of itself, constitutes an exigent circumstance justifying the taking of a blood sample without a person's consent and without a search warrant.

In analyzing this argument, the Supreme Court first acknowledged that the Fourth Amendment provides, in relevant part, that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall be issued, but upon probable cause." Given this fact, the Supreme Court recognized that the Fourth Amendment generally requires that law enforcement officers obtain a search warrant before searching a person himself or herself, a person's home, a person's papers, or a person's effects.

The Supreme Court next discussed the exceptions to the search warrant requirement, paying special attention to the exception for exigent circumstances. In discussing this exception, the Supreme Court identified a number of circumstances which it had previously determined to be exigent circumstances which justify law enforcement to perform a search without a person's consent and without a search warrant. Those circumstances include the need for law enforcement officers to provide emergency assistance to an occupant of the home, to engage in hot pursuit of a fleeing suspect, to enter into a burning building to put out fire and investigate its cause, or to prevent the eminent destruction of evidence of a crime.

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The Supreme Court next analyzed its application of the exigent circumstances exception in the *Schmerber* case. As a starting point, the Court pointed out that in the *Schmerber* case it had examined the totality of circumstances to determine whether exigent circumstances actually existed in that case. In that case, the Court stated that the fact that the law enforcement officer in question had been delayed in obtaining a blood sample from the suspect because he/she was required to deal with an automobile accident caused by the suspect and, as a result, reasonably believed that he was confronted with a situation in which any further delay in obtaining the blood sample would potentially threatened the destruction of the blood alcohol evidence constituted exigent circumstances for purposes of the exception.

The Supreme Court went on to point out that in the *McNeely* case the State of Missouri had not argued that exigent circumstances of the type described in *Schmerber* existed.[1] Instead, the State of Missouri took the position that the mere fact that the blood alcohol content dissipates over time due to natural biological processes was, in and of itself, an exigent circumstance justifying the taking of a blood sample without a person's consent and without a search warrant.

In response to this argument, the Supreme Court concluded that "while the 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 drunken driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Based on this statement of law, the Supreme Court concluded that the taking of the blood sample in the *McNeely* case violated the Fourth Amendment given that the State of Missouri had provided no evidence of exigent circumstances justifying the taking of the blood sample without the patient's consent and without a search warrant.

While the decision in the *McNeely* case is important from the standpoint of constitutional jurisprudence, it is not, in and of itself, particularly instructive to hospitals with respect to how they respond to a request by a law enforcement officer to take a blood sample from a person who has been arrested on suspicion of DUI and who has not consented to the taking of the blood sample and with respect to which no search warrant has been issued. The Fourth Amendment itself generally applies to actions by the government and its officials in their gathering of evidence against a person, not to the actions of hospitals and their personnel in taking blood samples at the specific direction of law enforcement officers.[2] The answer to this question is found under Missouri state law.

Unfortunately, Missouri law is not as clear as it could be on this issue. This problem has only been acerbated by recent changes in the Missouri statutes

1 *In fact, the law enforcement officer admitted that the McNeely case involved an ordinary traffic stop and the only reason he had not sought a search warrant (which had been his practice in the past) was that a recent article published in the "Traffic Safety News" stated that based on a change in Missouri statutory law search warrants were no longer required for law enforcement officers to obtain blood samples from DUI suspects.*

2 *The one possible exception to this statement relates to governmental hospitals and their employees. In the case of Ferguson v. City of Charleston, the U.S. Supreme Court concluded that governmental hospitals and their employees are governmental actors and, as a result, subject to the strictures of the Fourth Amendment. In that case, however, unlike this situation, the employees of the governmental hospital performed blood tests on existing patients of the hospital and then turned that information over to law enforcement. In this situation, law enforcement officers bring persons suspected of DUI to the hospital and request that they be blood tested by hospital employees. Given that the act of testing the person's blood in this situation is initiated by law enforcement officers, not hospital employees, it would appear that the current situation is distinguishable from the situation in Ferguson.*

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which have further confused the issue. Given this fact, Missouri hospitals have tended to opt for one of two responses when requested to take a blood sample by law enforcement officers.

The first response to such a request is to comply with the request and take the blood sample. For these hospitals, this response is justified by §577.029 of the Missouri Revised Statutes which provides as follows:

> "A licensed physician, registered nurse, or trained medical technician, acting at the request and direction of the law enforcement officer, shall withdraw blood for the purpose of determining the alcohol content of the blood, unless such medical personnel, in his or her good faith medical judgment, believes such procedure would endanger the life or health of the person in custody."

These hospitals also rely on §577.031 of the Missouri Revised Statutes which provides that "no person who administers any test pursuant to the provisions of §577.020 to §577.041 upon the request of the law enforcement officer, no hospital in or with which such person is employed or is otherwise associated or in which such test is administered, and no other person, firm, or corporation by whom or with whom such person is employed or is any way associated, shall be civilly liable in damages to the person tested unless for gross negligence or by willful or wanton act or omission."

Based on these provisions, a number of Missouri hospitals have taken the position that they will take a blood sample from a person arrested on suspicion of DUI if requested by a law enforcement officer.[3]

The second response to such a request is to refuse to comply with the request unless the person consents to the taking of the blood sample or the law enforcement officer produces a search warrant authorizing the blood sample. In responding in this fashion, these hospitals rely on the basic legal and ethical principle that a patient must consent to all health care services he or she receives. While this response lacks the statutory authority supporting the first response, this response is wholly consistent with the basic principles that form part of the foundation of the patient/health care provider relationship.

Each response involves potential legal risks. On the one hand, if the hospital takes the blood sample, it faces a potential claim by the patient that its actions constitute a battery (i.e., an unauthorized touching).[4] Further, in response to a claim of statutory immunity, these patients could also argue that the act was grossly negligent (if the patient is harmed in the process) or willful or wanton (given that it involves an unauthorized touching). On the other hand, if the hospital refuses to take the blood sample, it could potentially face prosecution by law enforcement for obstructing justice. A review of cases throughout the State of Missouri, however, fails to reveal any case in which such a claim has been made.

Regardless of which response a hospital chooses, we recommend that the hospital meet with local law enforcement officials to discuss the issue and advise local law enforcement officials of its position in the event of a request by law enforcement officers for a blood sample

3 In addition, the disclosure of such information by the hospital to the law enforcement officer would generally be permissible under the HIPAA Privacy Rules as a disclosure to law enforcement.

4 In addition, if the hospital is a governmental hospital, the hospital might also face a claim under 42 USC 1983 that the hospital's actions violated the civil rights of the patient (given that Section 1983 applies to governmental entities and employees and the hospital is a part of the state or local government and, as a result, its employees are governmental employees).

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from a patient who is refusing to consent to the blood sample and with respect to which no search warrant has been issued. Based on this conversation, law enforcement officials will be forewarned of the hospital's position on this issue and should be able to prepare for such circumstances (including obtaining a search warrant if that is the hospital's requirement). It is our understanding that many member-hospitals have engaged in such dialogue with local law enforcement officials in the past and have developed effective mechanisms to deal with these issues well in advance of a potential request for a blood sample. We also recommend that the hospital develop a means of documenting exactly what took place in connection with the request for the blood sample, including (1) the name of the law enforcement officer, (2) when the request was made by the law enforcement officer, (3) that the law enforcement officer was asked whether the person was suspected of DUI and responded affirmatively to that question, (4) whether the person consented to the request, (5) whether the law enforcement officer had a search warrant, (6) that the law enforcement officer was asked if exigent circumstances existed in this case and responded in the affirmative to that question, (7) whether the person was asked about and/or articulated any potential health risk to him/her resulting from the taking of the blood sample, (8) whether the person physically resisted the taking of the blood sample (in which case we would advise the hospital against taking the blood sample), and (9) whether, in fact, the blood sample was taken at the direction of the law enforcement officer. It is our belief that through proper documentation the hospital can minimize its risks in such situations.

In conclusion, the U.S. Supreme Court's decision in *Missouri v. McNeely* is certainly an interesting development in the interpretation of the Fourth Amendment to the U.S. Constitution. At the same time, neither the Fourth Amendment itself nor the *McNeely* case provides specific guidance as to how hospitals should respond if requested by a law enforcement officer to obtain a blood sample from a DUI suspect who has not consented the blood sample and with respect to which the law enforcement officer has not obtained a search warrant. As discussed above, the answer to that question is found in Missouri state law, not the U.S. Constitution.

Donn H. Herring is a partner at Lathrop & Gage LLP, 7701 Forsyth Boulevard, Suite 500, Clayton, MO. Mr. Herring is a member in the firm's health care practice area. He advises health care clients including hospitals, physicians, home health providers, durable medical equipment companies and nursing homes on the full range of regulatory and business issues. Mr. Herring can be reached at 314/613-2808 or dherring@lathropgage.com.