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The U.S. Supreme Court Sidetracks Idaho Implied Consent Law

Richard Seamon

When the Idaho police stop a driver reasonably suspected of driving under the influence of alcohol or drugs (DUI), Idaho's "implied consent" law authorizes them to have the driver's blood drawn (typically at a hospital) for testing.¹ Idaho case law lets these blood draws occur without the warrants that the Fourth Amendment usually requires for such "search[es]" of "person[s]."² The Idaho case law holds that these blood draws may occur without warrants because the blood draws invariably fall within the warrant exceptions for "exigent circumstances" and "consent searches."

This article explains that neither exception validates all warrantless blood draws under Idaho's implied consent law. In *Missouri v. McNeely*, the U.S. Supreme Court recently overruled Idaho case law holding that the natural dissipation of alcohol in the blood, per se, establishes exigent circumstances.³ And U.S. Supreme Court case law on consent searches undermines the Idaho case law upholding warrantless, nonconsensual blood draws under an "implied consent" theory.

Idaho's implied consent law and related case law

You can understand Idaho's implied consent law by envisioning the typical situation in which an Idaho police officer pulls over a driver reasonably suspected of DUI. First, the officer observes the driver for signs of DUI, including the driver's performance of field sobriety tests like standing on one leg. The officer may then decide to have the driver tested with a breathalyzer or a blood draw. To focus on the situation presented in *Missouri v. McNeely*, this article



assumes our Idaho police officer decides on a blood draw.

Before testing, Idaho's implied consent law requires the officer to give the driver information. The driver learns: By driving on Idaho's roads, she is "deemed to have given . . . consent" to testing for alcohol or drugs if there are reasonable grounds to believe she is driving under the influence of one or both.⁴ If she refuses to take the test or doesn't complete it, she may be fined \$250 and have her license suspended for at least one year; she can avoid those penalties only if she shows good cause at a court hearing.⁵ If — instead of refusing to take or not completing the test — she takes the test and fails it, her license will be suspended for at least 90 days, unless she shows good cause at an administrative hearing before the Department of Transportation.⁶ Having heard this advice, the driver decides whether or not to take the blood test.

Readers will notice that the driver who refuses to submit to a blood test faces stiffer administrative penalties — a \$250 civil fine and a driver's license suspension of at least one year — than the driver

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who takes the test and fails it, who faces no civil penalty and may suffer an administrative suspension that can be as short as 90 days. The stiffer administrative penalties for refusal to submit to a test reflect the legislature's intent "to discourage and civilly penalize such a refusal."⁷ The legislature wants drivers suspected of DUI to submit to blood tests so that, if they are in fact DUI, the tests yield objective evidence to prosecute them.

By administratively penalizing the refusal to submit to a blood test, Idaho's implied consent law does not create a statutory right of refusal.⁸ Indeed, once a driver has — by operation of the law — impliedly consented to a blood test by using Idaho's roads, the driver cannot revoke that consent by refusing to submit to the test if the police have reasonable grounds to believe the driver is DUI.⁹ Thus, if the driver refuses to submit to a blood test, the police can subject the driver to what is commonly called a "forced" blood draw.¹⁰

The Idaho Supreme Court has held that the police do not need a warrant for a forced blood draw. The court has held that forced blood draws fall within either of two exceptions to the warrant requirement.

First, the court held in *State v. Woolery* that forced blood draws fall within the exigent circumstances exception. The *Woolery* court reasoned that "the destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."¹¹ This "inherent exigency" theory treats the metabolism of blood as enough, standing alone, to establish exigent circumstances.

Second, the court held in *State v. Diaz* that forced blood draws are valid as consent searches. The *Diaz* court recognized that the "forced" drawing of Benito Diaz's blood was "involuntary," because it occurred despite his "continued . . . protest."¹² Still, the blood draw qualified as a consensual search because the police had reasonable grounds to believe that Mr. Diaz was DUI. In that situation, Mr. Diaz "had already given his implied consent" to the blood draw "by driving on an Idaho road."¹³ According to the court, his protests immediately before the forced blood draw did not revoke his prior (implied) consent, because under Idaho

precedent he had no right to revoke that consent.¹⁴

Thus, Idaho case law uses a belt-and-suspenders approach to reject Fourth Amendment challenges to forced, warrantless blood draws from drivers reasonably suspected of DUI: The metabolization of alcohol in the blood, per se, establishes exigent circumstances; alternatively, forced blood draws occur with the statutorily implied consent of the driver, and are thus sustainable as consent searches, even when the driver actually refuses to submit to the test.

As discussed next, the U.S. Supreme Court's decision in *McNeely v. Missouri* makes clear that the exigent circumstances belt is not large enough to uphold all forced, warrantless blood draws. And when the exigent circumstances belt does not fit, the implied consent suspenders snap under the pressure of U.S. Supreme Court precedent on consent searches. Metaphors and case law aside, warrantless, forced blood draws violate the Fourth Amendment in the absence of exigent circumstances.

McNeely v. Missouri's rejection of the per se exigent circumstances theory

The U.S. Supreme Court held in *Missouri v. McNeely* that "the natural metabolization of alcohol in the bloodstream" does *not* "presen[t] a

per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."¹⁵ Instead, courts must use a "totality of the circumstances" approach to determine exigent circumstances. The natural dissipation of alcohol in blood is just one circumstance, and it must be considered with other factors, such as the ease and speed with which the police could get a warrant in the particular case.¹⁶

McNeely rejects the state-court decisions that upheld warrantless blood draws under the "per se exigency" theory. Among the rejected state-court cases that the *McNeely* Court cited was the Idaho Supreme Court's decision in *Woolery*.¹⁷ Because of *McNeely's* rejection of the per se exigency theory, the exigent circumstances exception cannot justify all warrantless, forced blood draws authorized by Idaho's implied consent law. The question thus arises: Can the warrantless, forced blood draws that aren't justified by exigent circumstances be justified, instead, by the implied-consent theory upon which the Idaho Supreme Court relied in *Diaz*?

McNeely does not directly address that question. Justice Sotomayor did, however, address implied consent laws in a portion of her *McNeely* opinion that did not have the support of the majority of the Court.

The U.S. Supreme Court's decision in *McNeely v. Missouri* makes clear that the exigent circumstances belt is not large enough to uphold all forced, warrantless blood draws.



She wrote that implied consent laws provide an effective alternative to warrantless, nonconsensual blood draws:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC [Blood Alcohol Content] evidence without undertaking warrantless non-consensual 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.¹⁸

This statement clearly suggests that a state may encourage drivers to consent to blood draws by penalizing their refusal to consent. On the other hand, it does not address whether, if the driver refuses to give actual consent, the state can rely on their implied consent to justify a forced blood draw. The next section argues the answer is no.

The invalidity of the irrevocable-implied-consent theory

As discussed above, the Idaho Supreme Court in *Diaz* held that a warrantless, forced blood draw is a valid consent search. This author respectfully suggests that *Diaz* conflicts with U.S. Supreme Court case law holding that consent to a search must be voluntary and that the scope of consent can be restricted. This case law implies that consent, once given, can be revoked. Implied consent under Idaho's implied con-



sent law, however, is neither voluntary nor revocable. It therefore cannot justify warrantless, forced blood draws.

The leading U.S. Supreme Court case on consent searches is *Schnecko v. Bustamonte*.¹⁹ There, the Court upheld the police's warrantless search of Robert Bustamonte's car because he consented to the search. His consent was valid because it was *voluntary*. The Court explained that voluntariness is judged under the "totality of the circumstances," and that consent is not voluntary if it is "the product of duress or coercion, express or implied."²⁰

Implied consent under Idaho's implied consent law is not voluntary. Its involuntariness becomes clear if you imagine an Idaho official telling an Idaho resident applying for an Idaho driver's license: "To drive on Idaho's roads, you must consent to having your blood tested if the police stop you with reasonable grounds to believe you are DUI. Do you consent?" How many Idaho residents would say no, if they knew

Implied consent under Idaho's implied consent law, however, is neither voluntary nor revocable. It therefore cannot justify warrantless, forced blood draws.

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that doing so would bar them from driving in Idaho? For most Idaho residents, driving in Idaho is a daily necessity. The implied consent law makes them an offer they can't refuse. In turn, their acceptance of that offer is not voluntary.

But even if a driver's initial consent were voluntary, it would not

justify a forced blood draw when the driver later refuses to submit to it. Just as a person can *restrict* the scope of his or her consent to a search,²¹ a person should be able to *revoke* consent previously given.²² In a sense, voluntariness and revocability go together. The Idaho Supreme Court unwittingly proved this point when it used the implied-consent theory in *Diaz* to uphold what the Court itself characterized as an “involuntary” blood draw. A consensual, “involuntary” blood draw is an oxymoron.

In sum, a warrantless, forced blood draw from a driver suspected of DUI satisfies the Fourth Amendment if exigent circumstances exist in the particular case. But if they do not, the irrevocable-implied-consent theory cannot provide an alternative justification.

The permissibility of administratively penalizing drivers who refuse to submit to blood tests

The last section focused on drivers who, despite “implied consent,” actually refuse to submit to a blood test when stopped by police for DUI. Many drivers in this situation, however, will actually consent to a blood test, to avoid the \$250 fine and one-year suspension of their license. It is unsettled whether states can constitutionally use such administrative penalties to encourage people to consent. Justice Sotomayor suggested in *McNeely* that such administrative schemes are constitutional, a suggestion to which three other Justices subscribed. This author predicts that a majority of the Court would agree, on one of two grounds.

First, the Court might conclude that consent to a blood test can be voluntary even if given to avoid administrative penalties. The prospect of penalties arguably exerts less pressure than circumstances that, the Court has found, did not render consent to a search involuntary.²³

In *McNeely*, the Court refused to rule that the metabolization of alcohol, per se, establishes exigent circumstances, because the per se approach conflicted with the totality of circumstances analysis used to analyze exigent circumstances.



Furthermore, many drivers would rather have their licenses administratively suspended for a year (and pay a fine) than submit to a test that ensures their conviction for criminal DUI.

Even so, this author suspects the Court would not rely on a consent theory to uphold the administrative penalty schemes in implied consent laws like Idaho’s. That is because voluntariness analysis, like exigent-circumstances analysis, examines the “totality of the circumstances,” which would include, in this context, the characteristics of the individual driver and other circumstances of the traffic stop. In *McNeely*, the Court refused to rule that the metabolization of alcohol, per se, establishes exigent circumstances, because the per se approach conflicted with the totality of circumstances analysis used to analyze exigent circumstances. Likewise, the Court will probably refuse to rule as a categorical matter that the prospect of administrative penalties will never make a driver’s consent to a blood search involuntary; such a categorical ruling conflicts with the totality of circumstances analysis used to analyze voluntariness. In sum, the Court cannot easily use its case law on consent searches to give a blanket blessing to the administrative penalty schemes in implied consent laws.

A more promising approach uses Fourth Amendment reasonableness

analysis to uphold these administrative penalty schemes. The Court has said that “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’” and that “where there was no clear practice, either approving or disapproving the type of search at issue, at the time [the Fourth Amendment] was enacted, whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”²⁴ Furthermore, a leading treatise endorses reasonableness analysis for blood tests of drivers under implied consent laws.²⁵ Finally, two of the Court’s cases support using a reasonableness analysis.

In those cases, the Court used a reasonableness analysis to uphold warrantless searches of probationers and parolees. In each case, the subject of the search “consented” to them as a condition of probation or parole. But the Court expressly refused to rely on consent, and relied instead on a reasonableness analysis.²⁶ The Court might have eschewed the consent rationale so it could issue decisions generally upholding searches of probationers and parolees.

Strong arguments support the reasonableness of administrative penalties encouraging drivers suspected of DUI to submit to blood tests. The state has a huge interest in

taking impaired drivers off the roads. True, drivers have a weighty interest in avoiding the bodily intrusion of blood testing. But the intrusion is mitigated by the information that officers must give drivers before testing. It could be further mitigated by state efforts to give drivers actual, advance notice — when issuing drivers' licenses, for example — of the implied consent law.

Conclusion

U.S. Supreme Court case law sidetracks Idaho's implied consent law but does not run it entirely off the road. Exigent circumstances will often justify warrantless blood draws from drivers suspected of DUI. Alternatively, many drivers will submit to warrantless blood draws to avoid administrative penalties that the U.S. Supreme Court would likely uphold as reasonable, especially if Idaho strives to give Idaho drivers actual notice of the implied consent law. But if exigent circumstances don't exist and the driver refuses to submit, a warrantless, forced blood draw violates the Fourth Amendment.

Endnotes

1. Idaho Code §§ 18-8002 – 18-8004.
2. See *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007) ("The administration of a blood alcohol test constitutes a seizure of a person and a search for evidence under both the Fourth Amendment and Article I, § 17 of the Idaho Constitution.") (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966)).
3. 133 S.Ct. 1552 (2013).
4. Idaho Code § 18-8002(1).
5. *Id.* § 18-8002(3).
6. *Id.* § 18-8002A(2).
7. *State v. DeWitt*, 145 Idaho 709, 713, 184 P.3d 215, 219 (Ct. App. 2008).
8. *State v. Woolery*, 116 Idaho 368, 378, 775 P.2d 1210, 1215 (1989).
9. *State v. LeClercq*, 149 Idaho 905, 909, 243 P.3d 1093, 1097 (Ct. App. 2010).
10. *Diaz*, 144 Idaho at 301, 160 P.3d at 740.



11. *Woolery*, 116 Idaho at 370, 775 P.2d at 1212.
12. *Diaz*, 144 Idaho at 302, 160 P.3d at 741.
13. *Id.* at 303, 160 P.3d at 742.
14. *Woolery*, 116 Idaho at 372-373, 775 P.2d at 1214-1215; *LeClercq*, 149 Idaho at 909, 243 P.3d at 1097.
15. 133 S.Ct. at 1556.
16. *Id.* at 1562-1563.
17. *Id.* at 1558 n.2.
18. *McNeely*, 133 S. Ct. at 1566 (opinion of Sotomayor, joined by Scalia, Ginsburg, and Kagan, JJ.) (citations omitted).
19. 412 U.S. 218 (1973).
20. *Id.* at 227.
21. See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 251-252 (1991).
22. See *State v. Thorpe*, 141 Idaho 151, 106 P.3d 477 (Ct. App. 2004); *State v. Rusho*, 110 Idaho 556, 560, 716 P.2d 1328, 1332 (Ct. App. 1986); see also 4 Wayne R. LaFare, *Search and Seizure* § 8.1(c), at 58 (5th ed. 2012) (stating that the "better view" is that "a consent usually may be withdrawn or limited at any time prior to the completion of the search") (footnote omitted).
23. E.g., *United States v. Mendenhall*, 446 U.S. 544 (1980).
24. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995) (footnote and citations omitted).
25. LaFare, *supra* note __, § 8.3(l), at 165.
26. *Samson v. California*, 547 U.S. 843,

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852 n.3 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2001).

About the Author

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