

STATE OF SOUTH DAKOTA



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April 26, 2013

TO: All State's Attorneys
All Chiefs of Police
All Sheriffs
Trevor Jones, Secretary, Department of Public Safety
Colonel Craig Price, SDHP
Yvonne Taylor, SD Municipal League/Chiefs Association
Paul Bachand, South Dakota State's Attorneys Association
Staci Eggert, South Dakota Sheriff's Association

FROM: Marty J. Jackley
ATTORNEY GENERAL

RE: *Missouri v. McNeely* – Blood Testing Guidelines

The Attorney General and State's Attorney's Executive Board are providing the following guidance in response to the recent Supreme Court decision addressing warrantless blood tests. A divided United States Supreme Court in *Missouri v. McNeely* has determined that the natural dissipation of alcohol in the bloodstream does not automatically constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. Through no fault of law enforcement, the below guidance has been prompted by Chief Justice Roberts' observation that "A police officer reading this Court's opinion would have no idea – no idea – what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test."

The ramifications of the *McNeely* decision, if any, on South Dakota DUI law and procedure will ultimately be determined by the Courts of our state and our duly elected Legislature. Until any dispositive rulings are issued, the procedures set for in SDCL 32-23-10 (current advisement)

remain the law of this state, and the Attorney General will carry out his statutory obligation to defend it.¹

In the event a jurisdiction, **AFTER CONSULTATION WITH THE COUNTY STATE'S ATTORNEY**, determines to modify its current practice from SDCL 32-23-10, we are proposing the following guidelines and procedures. These guidelines and procedures are just that, and are not binding on any State's Attorney or law enforcement agency.

1. A law enforcement officer should attempt to obtain consent. A revised DUI advisement is attached for your consideration. Attempts to obtain consent should be documented in the law enforcement officer's report.
2. If consent is not obtained, the law enforcement officer should determine whether there are exigent circumstances. It appears that under the recent *McNeely* decision, courts will examine an officer's reasonable belief in order to determine whether that officer is faced with exigent circumstances that do not allow for the delay required to obtain a search warrant. If there is a finding of exigent circumstances, the basis should be documented in the law enforcement officer's report. Each situation is case specific and will be evaluated based upon the totality of the circumstances, including but not necessarily limited to:
 - a. The length of time that has already passed from the stop until the point of refusal to the requested test plus the time it would take to obtain a search warrant;
 - b. The availability of a magistrate or on-call judge to approve a search warrant;

¹ The *McNeely* decision has limited application by its own terms to a *per se* rule premised upon only the natural dissipation of alcohol. The decision did not address a statutory framework such as SDCL 32-23-10, that provides any person who operates a vehicle in the state is considered to have given consent to the withdrawal of blood and chemical analysis of the person's blood or breath to determine the amount of alcohol in the person's blood; and as such that the arresting officer may, subsequent to the arrest of an operator in violation of South Dakota's DUI laws, require the operator to submit to the withdrawal of blood. The *McNeely* decision does not address the legality of the withdrawal of blood incident to a lawful arrest nor does it address, beyond the limited facts of *Schmerber v. California*, what would constitute exigent circumstances to justify proceeding without a warrant.

The South Dakota Supreme Court has issued opinions that have upheld the warrantless withdrawal of blood from individuals lawfully arrested for violation of the state DUI and associated laws. By its limited scope, *McNeely* does not require the reversal of these decisions, nor the declaring of SDCL 32-23-10 unconstitutional. Indeed, it is well-settled that a statute is presumed constitutional and must not be overruled by the judiciary unless its infringement of constitutional restrictions is plainly, clearly and unmistakably proven beyond a reasonable doubt to be unconstitutional.

- c. The reasonable efforts an officer has made to contact a judge in order to obtain a search warrant;
- d. Whether the officer is physically located in an area with cell phone coverage;
- e. The length of time that has lapsed from the time of the reported incident and when the officer arrives on the scene;
- f. The length of time involved in any investigation being undertaken by the officer(s) on the scene;
- g. If a crash is involved, the time it takes to investigate the scene and transport the suspect to the hospital;
- h. Whether or not the defendant is conscious;
- i. If the warrant process has started and there are factors that are causing delay in obtaining the warrant;
- j. Any other facts necessitating an officer to act immediately in order to preserve evidence.

3. If consent is not obtained and the law enforcement officer does not believe sufficient exigent circumstances exist, a search warrant application should be made. A copy of the Affidavit in Support of Request for Search Warrant and the Search Warrant should be attached to the law enforcement officer's report. A copy of the Search Warrant must also be given to the defendant once received.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

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DUI ADVISEMENT CARD

1. I have arrested you for a violation of SDCL 32-23-1.
2. SDCL 32-23-10 provides that any person who operates any vehicle in this state has consented to the withdrawal of blood or other bodily substance and chemical analysis.
3. I **request** that you submit to the withdrawal of your _____ (blood, breath, bodily substance).
4. You have the right to an additional chemical analysis by a technician of your own choosing, at your own expense.
5. If you refuse to voluntarily submit to a withdrawal of blood or other bodily substance, be advised of the following consequences: (a) Your South Dakota driver's license is subject to revocation; (b) Your refusal may be admissible into evidence at trial; and (c) A sample of your _____ (blood, breath, bodily substance) may be obtained pursuant to South Dakota law.
6. Do you consent to the withdrawal of your _____ (blood, breath, bodily substance)?

Defendant _____

Date _____ 20 ____ Time _____ AM ____ PM ____

Officer _____