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## The Exigencies of Drunk Driving: *Cripps v. State* and the Issues with Taking Drivers' Blood Without a Warrant

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# THE EXIGENCIES OF DRUNK DRIVING: *CRIPPS v. STATE* AND THE ISSUES WITH TAKING DRIVERS' BLOOD WITHOUT A WARRANT

**Abstract:** Few of the government's investigatory techniques implicate individual privacy concerns more than the taking and testing of a suspect's blood. These blood draws are a common tool used to fight drunk driving. In 2013, in *Missouri v. McNeely*, the U.S. Supreme Court reiterated the need for case-by-case review when considering whether exigent circumstances justify warrantless blood testing of drunk driving suspects. An Oklahoma statute takes a different approach by categorically abdicating the warrant requirement and authorizing law enforcement to draw blood from any driver involved in an accident that results in serious bodily injury. In 2016, in *Cripps v. State*, the Oklahoma Court of Criminal Appeals affirmed the constitutionality of this statute, concluding that this categorical exigency did not run afoul of either *McNeely* or the Fourth Amendment. This Comment discusses how the decision in *Cripps* represents a significant departure from established Fourth Amendment law that has always required a case-by-case approach to exigent circumstances. Accordingly, this Comment argues that when done without a warrant under the guise of an exigency, blood draws require a high degree of judicial scrutiny to ensure that law enforcement officials are not encroaching on fundamental civil liberties.

## INTRODUCTION

In 2016, over 10,000 Americans were killed in accidents involving drunk driving.<sup>1</sup> As a result, states have implemented various law enforcement techniques in an effort to combat the effects of this serious issue.<sup>2</sup> Every state now criminalizes driving a motor vehicle with a blood alcohol content ("BAC")

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<sup>1</sup> *Drunk Driving*, NAT'L HIGHWAY TRAFFIC SAFETY AGENCY, <https://www.nhtsa.gov/risky-driving/drunk-driving> [https://perma.cc/4C5P-5VC6] (noting that there were 10,497 deaths in 2016 from crashes involving alcohol).

<sup>2</sup> See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (analyzing a checkpoint program and finding that although the program implicated the Fourth Amendment, the checkpoint stops were not unreasonable searches in violation of the Amendment); David C. Crosby, *The Constitutionality of Sobriety Checkpoints in Alaska*, 8 ALASKA L. REV. 227, 227 (1991) (identifying sobriety checkpoints as a method used to prevent drunk driving); Justin Ferguson, *The Constitutionality of Passive Alcohol Sensors Under the Fourth Amendment in the Wake of Kyllo v. United States*, 34 TEX. TECH L. REV. 129, 129-30 (2002) (identifying passive alcohol sensors as a method used to combat drunk-driving); Rick M. Grams, *Walking the Line of Admissibility: Why Maryland Courts Should Reexamine the Admissibility of Field Sobriety Tests*, 34 U. BALT. L. REV. 365, 365-66 (2005) (presenting the legal issues surrounding field sobriety tests).

above a certain statutory level, usually .08.<sup>3</sup> In enforcing these criminal codes, law enforcement officials are required collect and measure a suspect's BAC.<sup>4</sup> Generally, this evidence is obtained through testing the suspect's breath or blood.<sup>5</sup> Such searches and seizures invariably raise constitutional issues, forcing legislatures and courts to optimize the investigatory powers of the police while also respecting individual rights.<sup>6</sup>

Chapter 10, Section 104(B) of Title 47 of Oklahoma's statutory code (the "Oklahoma statute") authorizes law enforcement to obtain blood samples without a warrant from drivers of motor vehicles involved in car accidents that result in a fatality or serious injury.<sup>7</sup> Brian Cripps was subjected to a warrantless blood draw authorized by the Oklahoma statute after he drove a car that was involved in a fatal accident in Oklahoma.<sup>8</sup> The prosecution used the evidence obtained from the blood draw against Cripps at trial, and he was subsequently convicted of manslaughter.<sup>9</sup> Cripps appealed his conviction, but the Oklahoma Court of Criminal Appeals rejected his appeal and affirmed the conviction.<sup>10</sup>

This Comment explores the legal implications of warrantless blood draws by examining the Oklahoma Court of Criminal Appeals' 2016 decision in *Cripps v. State*.<sup>11</sup> Part I examines the legal framework for determining when law enforcement is required to obtain a search warrant and under what circumstances a warrantless blood draw may be taken.<sup>12</sup> Part II explores the facts in *Cripps* and explains the reasoning used by the Oklahoma Court of Criminal Appeals in considering the validity of the warrantless blood draw in this case.<sup>13</sup> Part III challenges the *Cripps* court's holding on two separate grounds and argues that statutory or court-made rules that establish categorical exigent circumstances are unconstitutional.<sup>14</sup>

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<sup>3</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166 (2016); *see, e.g.*, CAL. VEH. CODE § 23152(b) (West Supp. 2018) (identifying .08 as the legal blood-alcohol limit in California); MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) (Supp. 2018) (identifying .08 as the legal blood-alcohol limit in Massachusetts); MO. REV. STAT. § 577.012(1) (2016 & Supp. 2017) (identifying .08 as the legal blood-alcohol limit in Missouri).

<sup>4</sup> *Birchfield*, 136 S. Ct. at 2167.

<sup>5</sup> *Id.*

<sup>6</sup> *See infra* notes 61–86 and accompanying text.

<sup>7</sup> OKLA. STAT. tit. 47, § 10-104(B) (2011).

<sup>8</sup> Petition for a Writ of Certiorari at 3–4, *Cripps v. Oklahoma*, 137 S. Ct. 2186 (2017) (No. 16-423), 2016 WL 5673292, at \*3–4 [hereinafter *Petitioner's Brief*].

<sup>9</sup> *Id.* at 5–6.

<sup>10</sup> *Cripps v. State*, 387 P.3d 906, 908 (Okla. Crim. App. 2016).

<sup>11</sup> *Id.*

<sup>12</sup> *See infra* notes 15–66 and accompanying text.

<sup>13</sup> *See infra* notes 68–116 and accompanying text.

<sup>14</sup> *See infra* notes 117–139 and accompanying text.

## I. LEGAL FRAMEWORK FOR WARRANTLESS SEARCHES

Blood draws implicate substantial Fourth Amendment concerns, particularly when conducted without a warrant.<sup>15</sup> Section A provides a brief introduction to the Fourth Amendment and how it governs searches conducted by law enforcement as well as warrants.<sup>16</sup> Section B discusses how the U.S. Supreme Court has applied the Fourth Amendment in the context of warrantless blood draws.<sup>17</sup> Finally, Section C discusses the Oklahoma statute at issue in *Cripps*.<sup>18</sup>

*A. Searches and Seizures Under the Fourth Amendment*

The U.S. Supreme Court has repeatedly recognized the importance of limiting state intrusions on personal privacy in a free society.<sup>19</sup> The Fourth Amendment to the U.S. Constitution protects the people's privacy interests by prohibiting unreasonable intrusions on personal privacy by the government.<sup>20</sup>

For an intrusion to be reasonable, the Fourth Amendment generally requires law enforcement to obtain a warrant prior to executing a search or a seizure.<sup>21</sup> Searches done without a warrant are presumed to be unreasonable and must fall under a recognized exception to warrant requirement for the search to be constitutional.<sup>22</sup> Searches of the physical person are scrutinized closely because of the impact they have on a person's expectation of privacy.<sup>23</sup>

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<sup>15</sup> *Birchfield*, 136 S. Ct. at 2178.

<sup>16</sup> See *infra* notes 19–32 and accompanying text.

<sup>17</sup> See *infra* notes 33–60 and accompanying text.

<sup>18</sup> See *infra* notes 61–66 and accompanying text.

<sup>19</sup> *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Schmerber v. California*, 384 U.S. 757, 767 (1966).

<sup>20</sup> U.S. CONST. amend. IV (establishing that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”); *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam) (holding that the use of satellite tracking was a search of personal information under the Fourth Amendment and therefore is only permitted if reasonable); *Schmerber*, 384 U.S. at 767 (noting that the function of the Fourth Amendment is to prevent intrusions by the government when they are either unjustified or done by improper means).

<sup>21</sup> *Birchfield*, 136 S. Ct. at 2173 (noting that, subject to exceptions, a warrant must be obtained prior to a search); *Kentucky v. King*, 563 U.S. 452, 459 (2011) (“[T]his Court has inferred that a warrant must generally be secured.”).

<sup>22</sup> *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015). One such exception is for searches incident to an arrest. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). Once a police officer arrests someone, the police officer is generally permitted to search that person without a warrant. *Id.* This is known as a search incident to arrest. *Id.* These warrantless searches are permitted because it is reasonable for a police officer to search the arrestee for any weapons or for any evidence that the arrestee could potentially destroy. *Id.*

<sup>23</sup> See *Winston*, 470 U.S. at 760 (recognizing that any search that involves comprising an individual's “bodily integrity” necessarily implicates serious concerns of personal privacy).

The Supreme Court has interpreted the text of the Fourth Amendment to require three things for a search warrant to be valid.<sup>24</sup> First, a neutral magistrate must issue the warrant.<sup>25</sup> Second, law enforcement must have probable cause that evidence of a particular crime will be discovered from the search.<sup>26</sup> Finally, the warrant must clearly identify the places or people that will be searched and the items that will be seized.<sup>27</sup>

A well-recognized exception to the warrant requirement, the exigent circumstances exception, applies when the particular circumstances of the situation make the needs of law enforcement compelling enough that a warrantless search is objectively reasonable.<sup>28</sup> Exigency differs from other exceptions to the warrant requirement in that exigent circumstances are determined on a case-by-case basis while other exceptions apply categorically.<sup>29</sup> If there is probable cause that a crime has been committed, and law enforcement officers believe that the delay required to obtain a warrant would hinder their interests in preventing or investigating criminal activity, exigent circumstances exist and a warrant is not required.<sup>30</sup> To determine whether an exigency exists in a

<sup>24</sup> *Dalia v. United States*, 441 U.S. 238, 255 (1979).

<sup>25</sup> *Id.* In the narrow context of bodily searches, the Supreme Court has emphasized the importance of a neutral assessment of probable cause because of the substantial stakes of forcibly infringing on an individual's bodily integrity. *Schmerber*, 384 U.S. at 770.

<sup>26</sup> *Dalia*, 441 U.S. at 255. The Supreme Court has explained that the probable cause standard looks at "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that a crime was being committed or had been committed by the arrestee. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); see also *Gomez v. State*, 168 P.3d 1139, 1142–43 (Okla. Crim. App. 2007) (finding probable cause existed for a warrantless search of a vehicle where the car crossed the center line, the driver smelled of alcohol, and there was a missing bottle from a six-pack of alcohol in the vehicle); *State v. Paul*, 62 P.3d 389, 390 (Okla. Crim. App. 2003) (holding that an alert signal from a drug-sniffing dog gives the police probable cause to search a vehicle without a warrant); *Lozoya v. State*, 932 P.2d 22, 33 (Okla. Crim. App. 1996) (finding probable cause existed for a warrantless search of a vehicle where the officer detected a strong odor of marijuana emanating from the vehicle).

<sup>27</sup> *Dalia*, 441 U.S. at 255. The warrant must clearly identify the places to be searched and items to be seized to prevent police officers from discretionarily searching or seizing once they have a warrant. *Marron v. United States*, 275 U.S. 192, 195–96 (1927).

<sup>28</sup> *King*, 563 U.S. at 460. An example of a recognized exigency occurs when the police enter a private home in pursuit of a suspect where they have probable cause that the suspect recently entered the home. See *United States v. Santana*, 427 U.S. 38, 42–43 (1976) (holding that the police did not violate the Fourth Amendment when they pursued an individual, whom they had probable cause to believe was distributing narcotics, into her home without a warrant and arrested her).

<sup>29</sup> *Birchfield*, 136 S. Ct. at 2174. To say that an exception applies "categorically" means that once the specified conditions of the exception are met, the police do not need to make an additional showing using facts from the case. See, e.g., *United States v. Robinson*, 414 U.S. 218, 235 (1973) (explaining that the search incident to arrest exception authorizes a warrantless search in every instance where a custodial arrest is made).

<sup>30</sup> *King*, 563 U.S. at 460 (discussing the probable cause standard); see also Alexander Porter, "Time Works Changes": *Modernizing Fourth Amendment Law to Protect Cell Site Location Information*, 57 B.C. L. REV. 1781, 1810 (2016) (describing the exigent circumstances exception as

particular case, courts examine whether the search was reasonable in light of the totality of the circumstances.<sup>31</sup> The exigent circumstance that often applies to warrantless blood draws of suspected drunk-drivers is when law enforcement believes that a warrantless search is necessary to prevent the imminent destruction of evidence resulting from the natural dissipation of alcohol in the bloodstream.<sup>32</sup>

### *B. Relevant U.S. Supreme Court Case Law*

The U.S. Supreme Court has addressed the specific issue of warrantless blood draws of motor vehicle operators in several cases.<sup>33</sup> In 1966, in *Schmerber v. California*, the Court considered several constitutional claims related to warrantless blood draws of suspected drunk drivers for the first time.<sup>34</sup> In *Schmerber*, the defendant was involved in an automobile accident

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a “safety valve” that enables law enforcement to act when their needs and the need to protect the public are greatest). The U.S. Court of Appeals for the Second Circuit has a formulation of the exigent circumstances exception that is helpful in understanding the concept. *See* *United States v. Caraballo*, 831 F.3d 95, 102 (2d Cir. 2016). The *Caraballo* court held that an exigency exists when a reasonable police officer, when confronted with the same facts as existed at the time of the search or seizure, would determine that there was an “urgent need to take action or render aid.” *Id.*

<sup>31</sup> *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (plurality opinion); *see also* *Coffey v. State*, 99 P.3d 249, 252 (Okla. Crim. App. 2004) (finding exigent circumstances for a warrantless entry of a home where the police officer knew that an individual was inside and the officer suspected that the home was a drug lab because of the familiar smell of a volatile and dangerous chemical); *Fisher v. State*, 668 P.2d 1152, 1156 (Okla. Crim. App. 1983) (finding exigent circumstances existed for an officer to search a suspect’s pockets for identifying information where the suspect was involved in a high speed collision and had to be taken to the hospital). *But see* *Burton v. State*, 204 P.3d 772, 775 (Okla. Crim. App. 2009) (holding that there were no exigent circumstances to enter a dwelling when the police knew that a suspect was inside but had no additional evidence indicating that the suspect would attempt to escape or destroy evidence).

<sup>32</sup> *See Schmerber*, 384 U.S. at 770–71 (considering whether the potential destruction of evidence justified the warrantless blood draw taken by the police). To further illustrate the exigent circumstances analysis, the Tenth Circuit has developed a four-factor test when considering whether the imminent destruction of evidence exigency exists. *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir. 1988). The test considers whether (1) there is clear evidence of probable cause; (2) the case involves a serious crime and in circumstances in which the destruction of evidence is likely; (3) the search was limited to what was necessary to protect the evidence from destruction; and (4) the presence of clear indicators of exigency not subject to police manipulation. *Id.*

<sup>33</sup> *See McNeely*, 569 U.S. at 147 (considering warrantless blood draws of suspected drunk drivers under the exigent circumstances exception); *Schmerber*, 384 U.S. at 759 (examining various constitutional claims, including a Fourth Amendment claim, when police took a suspect’s blood without a warrant). The Supreme Court has also considered warrantless blood draws in the context of the search incident to arrest exception. *See Birchfield*, 136 S. Ct. at 2172 (considering the constitutionality of warrantless breath-tests and blood draws of suspected drunk drivers in light of the search incident to arrest exception).

<sup>34</sup> *Schmerber*, 384 U.S. at 759; *see McNeely*, 569 U.S. at 148. The defendant in *Schmerber* alleged that the warrantless blood draw violated his rights under the Fourth (right to be free from unreasonable searches and seizures), Fifth (right against self-incrimination), Sixth (right to coun-

and was taken to the hospital.<sup>35</sup> The responding police officer observed signs of intoxication both at the scene of the accident and at the hospital.<sup>36</sup> Without a warrant, the officer instructed medical personnel at the hospital to conduct a blood draw.<sup>37</sup> At trial, the defendant unsuccessfully objected to the use of evidence obtained by the blood draw against him and was convicted of driving under the influence.<sup>38</sup>

On appeal, the Supreme Court affirmed the conviction, holding that the warrantless search and seizure did not violate the defendant's Fourth Amendment rights.<sup>39</sup> Accordingly, the Court determined that the warrantless blood draw was constitutional.<sup>40</sup> In the Court's view, the officer reasonably believed that the delay necessary to obtain a warrant would lead to the destruction of evidence because alcohol dissipates from the bloodstream and it would take time to get the defendant to the hospital to be tested.<sup>41</sup> Furthermore, in assessing the reasonableness of the search, the Court highlighted that the defendant had a reduced expectation of privacy because medically trained personnel conducted the draw in a hospital and used a common medical technique to take the defendant's blood.<sup>42</sup> The Court therefore found that an exigency existed and the warrantless search was reasonable.<sup>43</sup>

More recently in 2013, in *McNeely v. Missouri*, the Court considered whether the natural dissipation of alcohol in the bloodstream constitutes a categorical exigency resulting in an exception the warrant requirement.<sup>44</sup> In *McNeely*, a police officer pulled the defendant over and observed several signs of intoxication, such as bloodshot eyes, slurred speech, and the smell of alcohol.<sup>45</sup> The police officer arrested the defendant, who later refused to take a breath-test.<sup>46</sup> The officer drove the defendant to a hospital to take a blood sample.<sup>47</sup> When the defendant refused to consent to the blood sample, the

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sel), and Fourteenth (right to due process). *Schmerber*, 384 U.S. at 759; see also U.S. CONST. amend. IV; *id.* amend. V; *id.* amend. VI; *id.* amend. XIV.

<sup>35</sup> *Schmerber*, 384 U.S. at 758.

<sup>36</sup> *Id.* at 768–69.

<sup>37</sup> *Id.* at 758.

<sup>38</sup> *Id.* at 759.

<sup>39</sup> *Id.* at 759, 772.

<sup>40</sup> *Id.* at 770.

<sup>41</sup> *Id.* at 770–71.

<sup>42</sup> *Id.* at 771–72. The Supreme Court suggested, without explicitly holding, that blood draws done with less precise, riskier methods, or by people without medical training may alter the reasonableness of the search. See *id.* (using the example of a blood draw being done in a police station by an officer to illustrate a situation where more serious privacy concerns may be raised by a warrantless blood draw).

<sup>43</sup> *Id.*

<sup>44</sup> *McNeely*, 569 U.S. at 147.

<sup>45</sup> *Id.* at 145.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 145–46.

officer ordered an employee of the hospital to take the sample under a Missouri statute that authorized the conducting of a blood test of any individual arrested for driving while intoxicated.<sup>48</sup> From the time that the officer stopped the defendant until the blood was taken, the officer made no attempt to procure a warrant.<sup>49</sup> The defendant moved to exclude the results of the blood test from trial, arguing that the warrantless blood sample was taken in violation of the Fourth Amendment.<sup>50</sup> The trial court granted the motion to suppress the evidence and the Missouri Supreme Court affirmed the trial court's decision on appeal.<sup>51</sup> The Missouri Supreme Court held that the fact that alcohol will dissipate in the bloodstream as time passes does not constitute a categorical exigency for the purposes of the warrant requirement because there may be cases in which a warrant can be obtained without the risk of the destruction of evidence.<sup>52</sup> The Missouri Supreme Court concluded that there were no "special facts of exigency" that indicated that the police could not obtain a warrant before conducting the blood draw and highlighted the fact that there was nothing that would delay the officer's efforts to obtain a warrant such as an accident or injuries that would require the officer's time and attention.<sup>53</sup>

The Supreme Court affirmed, holding that the dissipation of alcohol does not create a categorical exigent circumstance that functions as an exception to the warrant requirement.<sup>54</sup> The Court rejected the categorical approach and reaffirmed the approach taken in *Schmerber* requiring a case-by-case analysis.<sup>55</sup> The *McNeely* Court recognized that, depending on the facts of each particular case, the dissipation of alcohol in the bloodstream could support a finding of exigent circumstances justifying a warrantless blood draw.<sup>56</sup> Ultimately, however, the Court held that the Fourth Amendment requires a case-specific analysis that examines the totality of the circumstances when

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<sup>48</sup> *Id.* at 146; see MO. REV. STAT. § 577.020(1) (2016 & Supp. 2017) (authorizing, *inter alia*, the blood testing of anyone arrested for operating a vehicle in an intoxicated condition). Upon analysis, *McNeely*'s blood alcohol content ("BAC") was .154, which was above Missouri's legal limit of .08. *McNeely*, 569 U.S. at 146; see also MO. REV. STAT. § 577.012(1) (identifying .08 as the legal blood-alcohol limit in Missouri). *McNeely* was then charged with driving while intoxicated under MO. REV. STAT. § 577.010 (MO. REV. STAT. § 577.010). *McNeely*, 569 U.S. at 146.

<sup>49</sup> *McNeely*, 569 U.S. at 145.

<sup>50</sup> *Id.* at 146.

<sup>51</sup> *State v. McNeely (McNeely I)*, 358 S.W.3d 65, 67 (Mo. 2012).

<sup>52</sup> *Id.* at 74.

<sup>53</sup> *Id.* at 74–75.

<sup>54</sup> *McNeely*, 569 U.S. at 164–65.

<sup>55</sup> *Id.* at 149–50; see also *McNeely I*, 358 S.W.3d at 74–75 (rejecting a categorical exigency).

<sup>56</sup> *McNeely*, 569 U.S. at 156 (highlighting *Schmerber* as an example where the facts of the case create a situation where an exigency exists and a warrant is not required to take a blood sample).



determining whether a warrantless blood draw violates the Fourth Amendment.<sup>57</sup>

Finally, in 2016, in *Birchfield v. North Dakota*, the Supreme Court found a warrantless blood draw was too intrusive to be permitted under the search incident to arrest exception to the Fourth Amendment, another categorical exception.<sup>58</sup> In assessing the intrusiveness of blood draws, the Court pointed to the physical penetration of the skin as well as the wealth of personal information that is potentially accessible through a blood sample as important factors.<sup>59</sup> In its holding, the Court recognized the availability of less intrusive methods for obtaining the required evidence while rejecting a categorical authorization of warrantless blood draws under the search incident to arrest exception.<sup>60</sup>

### C. Oklahoma Law Authorizing Warrantless Blood Draws

Against the backdrop of these constitutional principles, the Oklahoma statute authorizes warrantless blood draws from drivers of vehicles involved in accidents that result in a fatality or great bodily injury where the driver could be cited for a traffic offense as a result of the accident.<sup>61</sup> This statute contains several elements, with the first element requiring the existence of an accident that results in death or great bodily injury.<sup>62</sup> Second, the suspect must have been a driver of one of the vehicles involved in the accident.<sup>63</sup> Finally, the suspect must have been able to be cited for a traffic offense for his or her involvement in the accident.<sup>64</sup> The statute provides that the fact that the suspect's actions could constitute a traffic offense serves as probable cause.<sup>65</sup>

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<sup>57</sup> *Id.*; see *supra* note 28–32 and accompanying text (explaining the exigent circumstance exception to the warrant requirement).

<sup>58</sup> *Birchfield*, 136 S. Ct. at 2185; see also *supra* note 29 (explaining that the search incident to arrest exception to the warrant requirement is a categorical exception).

<sup>59</sup> *Birchfield*, 136 S. Ct. at 2178. Another factor considered by the Court was that blood cells are not actively given off in the same manner as breaths or skin cells. *Id.* That an individual's blood is not collected without the bodily invasion was a significant factor distinguishing breath tests from blood tests. *Id.*

<sup>60</sup> *Id.* at 2185. The Supreme Court specifically pointed to breath tests, commonly known as “breathalyzers,” as an available less-intrusive method. *Id.*

<sup>61</sup> OKLA. STAT. tit. 47, § 10-104(B); see OKLA. STAT. tit. 21, § 646 (2011) (defining “great bodily injury” as “bone fracture, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part, organ or mental faculty, or substantial risk of death”); see also *Guest v. State*, 42 P.3d 289, 291 (Okla. Crim. App. 2002) (holding that, for purposes of section 10-104(B) (the “Oklahoma statute”), it is enough that the subject of the search was the driver of a vehicle involved in an accident, that he could be cited for a traffic offense, and that the accident resulted in the immediate death of a person).

<sup>62</sup> OKLA. STAT. tit. 47, § 10-104(B).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

The driver need not actually be arrested or issued a citation at the scene of the accident; the mere fact that the driver could have been is enough.<sup>66</sup>

## II. THE OKLAHOMA COURT OF CRIMINAL APPEALS' APPROVAL OF WARRANTLESS BLOOD DRAWS IN *CRIPPS V. STATE*

Against this backdrop, the Oklahoma Court of Criminal Appeals considered the permissibility of a warrantless blood draw in *Cripps v. State*.<sup>67</sup> Section A discusses the facts underlying the 2016 decision in *Cripps v. State*.<sup>68</sup> Section B presents the procedural history behind the conviction and appeal.<sup>69</sup> Section C examines the various issues and explains the holdings on each.<sup>70</sup>

### A. The Facts of *Cripps v. State*

On the night of March 25, 2012, Brian Cripps, Justin Gibson, and Samuel Dash were drinking at a bar in Tulsa, Oklahoma.<sup>71</sup> The three men eventually left the bar in Gibson's SUV with Cripps driving.<sup>72</sup> The SUV was involved in a single-car roll-over after speeding on an exit ramp.<sup>73</sup> Officers first arrived at the scene around 1:40 A.M. and saw Dash's dead body on the ground.<sup>74</sup> Gibson was unharmed and found walking around outside of the

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<sup>66</sup> *Id.*; see *Bemo v. State*, 298 P.3d 1190, 1191 (Okla. Crim. App. 2013) (holding that the Oklahoma statute does not require an arrest or citation at the scene of the accident). In *McNeely*, the Supreme Court considered the implications of warrantless blood draws after the subject of the search had been arrested. See *McNeely*, 569 U.S. at 145–46 (explaining that the defendant's failure to take a breath test after being pulled over for erratic driving led to him being arrested and subjected to a warrantless blood draw). A warrantless arrest is valid where the police officer has probable cause that the person being arrested committed a felony. *Davis v. State*, 792 P.2d 76, 84 (Okla. Crim. App. 1990). Therefore, there will presumably always be probable cause whenever a warrantless blood draw is done on an individual that has been lawfully arrested. See *id.* The rule created by the Oklahoma statute, however, authorizes warrantless searches prior to any arrest being made. See *Guest*, 42 P.3d at 291 (holding that, for the purposes of the Oklahoma statute, all that is required for a warrantless blood draw is that the individual was driving a vehicle in the accident and could be cited for a traffic offense).

<sup>67</sup> *Cripps v. State*, 387 P.3d 906, 909 (Okla. Crim. App. 2016).

<sup>68</sup> See *infra* notes 71–89 and accompanying text.

<sup>69</sup> See *infra* notes 90–101 and accompanying text.

<sup>70</sup> See *infra* notes 102–116 and accompanying text.

<sup>71</sup> Brief in Opposition at 3–4, *Cripps v. Oklahoma*, 137 S. Ct. 2186 (2017) (No. 16-423), 2016 WL 7451279, at \*3–4. The Oklahoma Court of Criminal Appeals omitted any discussion of the facts of the case in its opinion. See *Cripps v. State*, 387 P.3d 906, 908 (Okla. Crim. App. 2016) (omitting facts and proceeding to the discussion of legal issues presented on appeal). The recited facts are drawn from Cripps's brief in support of his petition for certiorari from the U.S. Supreme Court and the respondent's brief in opposition to certiorari. See *infra* notes 73–102 and accompanying text (reciting the facts and procedural history of *Cripps* and citing to the parties' briefs).

<sup>72</sup> Brief in Opposition, *supra* note 71, at 2.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

wreckage.<sup>75</sup> The fire department had to extract an unconscious Cripps from the vehicle.<sup>76</sup> Immediately thereafter, Cripps was taken to the hospital in an ambulance.<sup>77</sup> While in the ambulance, the paramedics smelled alcohol on his breath.<sup>78</sup>

Around 1:52 A.M., Tulsa Police Department Officer Mark Ohnesorge arrived at the scene of the accident.<sup>79</sup> Officer Ohnesorge's supervisor told him to go to the hospital to speak with Cripps there.<sup>80</sup> After approximately fifty-five minutes, Officer Ohnesorge saw Cripps at the hospital but was unable to speak with him because Cripps was still unconscious.<sup>81</sup> At that time, Officer Ohnesorge observed that Cripps smelled of alcohol.<sup>82</sup> Meanwhile, officers investigating the accident scene informed Officer Ohnesorge that the car also smelled of alcohol.<sup>83</sup>

Officer Ohnesorge later testified that he believed a blood draw was necessary at that time because Cripps was unconscious, smelled of alcohol, and was in critical condition with serious head trauma at the hospital.<sup>84</sup> Officer Ohnesorge did not obtain a warrant prior to the blood draw.<sup>85</sup> Officer Ohnesorge further testified that it would have taken approximately ninety minutes to obtain a warrant so early in the morning.<sup>86</sup> Moreover, Cripps would be unavailable for an extended period of time due to emergency surgery or possible death.<sup>87</sup> At around 3:15 a.m., a nurse drew blood from an unconscious Cripps using a kit provided by Officer Ohnesorge.<sup>88</sup> The analysis of the blood sample revealed that Cripps's BAC was 0.249, more than three times Oklahoma's legal limit of .08.<sup>89</sup>

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<sup>75</sup> *Id.* Gibson told the police that Cripps was the driver of the vehicle after initially identifying himself as the driver. Petitioner's Brief, *supra* note 8, at 4.

<sup>76</sup> Brief in Opposition, *supra* note 71, at 2–3.

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* Officer Ohnesorge testified that it took him about fifteen minutes to reach the hospital and another forty minutes before he was allowed to access Cripps. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 3–4.

<sup>84</sup> *Id.* at 4–5.

<sup>85</sup> Petitioner's Brief, *supra* note 8, at 4.

<sup>86</sup> Brief in Opposition, *supra* note 71, at 5.

<sup>87</sup> *Id.* at 4.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see OKLA. STAT. tit. 47, § 11-902(A)(1) (2011 & Supp. 2017) (identifying .08 as the legal limit for BAC in Oklahoma).

### B. Procedural History of *Cripps v. State*

Cripps was eventually charged with first-degree manslaughter.<sup>90</sup> Prior to his trial in the District Court of Tulsa County, Cripps moved to exclude the evidence of his BAC on the grounds that it had been obtained without a warrant and in the absence of any exigent circumstances.<sup>91</sup> The exigent circumstances exception to the warrant requirement allows for searches and seizures without a warrant where there is probable cause that a crime has been committed and the officers are confronted with an emergency.<sup>92</sup> The Oklahoma District Court found that exigent circumstances existed and denied Cripps's motion to suppress the evidence related to BAC.<sup>93</sup> Looking at the totality of the circumstances, the judge found that Officer Ohnesorge reasonably believed that, in the immediate future, Cripps would either die or go into surgery.<sup>94</sup> The judge therefore found that it was reasonable for Officer Ohnesorge to believe that the blood draw was necessary under the circumstances to preserve evidence of Cripps's BAC.<sup>95</sup> A second judge also found that exigent circumstances existed and denied Cripps's renewed motion to exclude the BAC evidence.<sup>96</sup>

At trial, an accident reconstruction expert testified that his analysis found that Cripps was likely on the left side of the vehicle, leading to the conclusion that he was the driver responsible for the accident.<sup>97</sup> Cripps was convicted of second-degree manslaughter and sentenced to a four year imprisonment and a \$1,000 fine.<sup>98</sup> Cripps appealed his conviction to the Oklahoma

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<sup>90</sup> Petitioner's Brief, *supra* note 8, at 5 (stating that Cripps was charged with "Manslaughter-First Degree—Automobile"); Brief in Opposition, *supra* note 71, at 4 (stating that Cripps was charged with vehicular manslaughter). Although the statute under which Cripps was convicted is not explicitly clear, both parties state in their briefs that Cripps was charged with manslaughter and convicted by a jury of the lesser-included offense of second degree manslaughter. Petitioner's Brief, *supra* note 8, at 5–6; Brief in Opposition, *supra* note 71, at 7. In Oklahoma, a person commits first-degree manslaughter when they commit a homicide during the commission of a misdemeanor. OKLA. STAT. tit. 21, § 711(1) (2011). The predicate misdemeanor can be any misdemeanor. *State v. Haworth*, 283 P.3d 311, 318 (Okla. Crim. App. 2012); *see also id.* at 317 (recognizing that driving while impaired is an applicable misdemeanor for the purposes of § 711(1)).

<sup>91</sup> Petitioner's Brief, *supra* note 8, at 5; Brief in Opposition, *supra* note 71, at 4.

<sup>92</sup> *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

<sup>93</sup> Brief in Opposition, *supra* note 71, at 5.

<sup>94</sup> *Id.* at 5–6. When applying a totality of the circumstances standard, a court looks to "the whole picture." *See United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (framing the totality of the circumstances standard in the context of determining whether an officer had probable cause to arrest).

<sup>95</sup> Brief in Opposition, *supra* note 71, at 5.

<sup>96</sup> *Id.* at 6.

<sup>97</sup> *Cripps*, 387 P.3d at 908.

<sup>98</sup> Petitioner's Brief, *supra* note 8, at 5; Brief in Opposition, *supra* note 71, at 7. In Oklahoma, second-degree manslaughter is defined in "catch-all" terms as an unlawful killing that does not meet the definition of either murder or first-degree manslaughter. *Walters v. State*, 48 P.2d 875, 876 (Okla. Crim. App. 1935); *see* OKLA. STAT. tit. 21, § 701.7 (2011 & Supp. 2017) (defining first

Court of Criminal Appeals.<sup>99</sup> The Court of Criminal Appeals affirmed the conviction.<sup>100</sup> Cripps then appealed to the U.S. Supreme Court, but the Court denied review.<sup>101</sup>

*C. The Cripps Court's Consideration of the Admissibility of Expert Opinion Testimony and Evidence from the Warrantless Blood Draw*

On appeal to the Oklahoma Court of Criminal Appeals, Cripps challenged his conviction on three separate grounds.<sup>102</sup> The court first considered whether the trial court mistakenly admitted the opinion testimony of an accident reconstruction expert.<sup>103</sup> To be admissible, an expert's opinion testimony must be the result of the application of recognized techniques based on sufficient facts.<sup>104</sup> If the expert's opinion goes to the ultimate issue of the case, it is admissible as long as the expert does not tell or instruct the jury what result to reach on the ultimate issue.<sup>105</sup> The *Cripps* court found that the testimony was admissible because the expert simply testified that the reconstruction analysis led him to believe that Cripps was on the left side of the vehicle and did not instruct the jury to conclude that Cripps was driving.<sup>106</sup>

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degree murder as a homicide done with malice aforethought, homicide during certain felonies, certain homicides in connection with drug crimes, and intentional homicide of a law enforcement officer); OKLA. STAT. tit. 21, § 701.8 (2011) (defining second degree murder as homicide “[w]hen perpetrated by an act imminently dangerous to another person and evincing a depraved mind” or when committed during felonies not listed in section 701.7); *id.* § 711 (defining first degree manslaughter as a homicide committed during a misdemeanor or a homicide that is legally excusable or justifiable).

<sup>99</sup> Brief in Opposition, *supra* note 71, at 7.

<sup>100</sup> *Cripps*, 387 P.3d at 908.

<sup>101</sup> *Cripps v. Oklahoma*, 137 S. Ct. 2186 (denying review).

<sup>102</sup> *Cripps*, 387 P.3d at 908.

<sup>103</sup> *Id.* An “accident reconstruction expert” is a witness who attempts to describe how the accident occurred based on a forensic review of the available physical evidence and eyewitness reports. James T. Clancy, Jr., *Computer Generated Accident Reenactments: The Case for Their Admissibility and Use*, 15 REV. LITIG. 203, 206 (1996).

<sup>104</sup> *Cripps*, 387 P.3d at 908.

<sup>105</sup> *Id.*; *see, e.g.*, *Day v. State*, 303 P.3d 291, 297–98 (Okla. Crim. App. 2013) (holding that an expert's opinion testimony was admissible where the ultimate issue was whether the defendant abused the victim and the expert testimony in the case provided support for the conclusion that the defendant abused the victim but did not directly tell the jury that the evidence proved that the defendant abused the victim); *see also* OKLA. STAT. tit. 12, § 2704 (2011) (stating that a party cannot object to the opinion testimony of an expert witness solely because it speaks to the ultimate issue of the case). An “ultimate issue” is an unresolved matter that can decide a case either on its own, or as part of a more comprehensive theory. *Ultimate Issue*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>106</sup> *Cripps*, 387 P.3d at 908. The ultimate issue in this case was whether Cripps was driving the vehicle. *See id.* The expert also testified that his analysis supported the conclusion that the passenger who died was in the back seat and the third person in the vehicle was on the right side of the vehicle. *Id.* By testifying that his analysis revealed that Cripps was the only passenger on the left side of the vehicle, the expert provided evidence that Cripps was driving the vehicle. *Id.*

The *Cripps* court next considered whether the trial court erred in denying Cripps's motion to suppress the evidence recovered from the warrantless blood draw.<sup>107</sup> Prior to trial, Cripps argued that the blood draw violated his rights under the Fourth and Fourteenth Amendments of the U.S. Constitution.<sup>108</sup> On appeal, Cripps contended that the U.S. Supreme Court's 2013 decision in *Missouri v. McNeely* rendered the Oklahoma statute unconstitutional.<sup>109</sup> Under Oklahoma law, appellate courts review trial court findings of fact for clear error, but review rulings of law *de novo*.<sup>110</sup> This standard of review is referred to as abuse of discretion.<sup>111</sup>

The *Cripps* court rejected Cripps's argument, holding that the decision in *McNeely* was distinguishable and therefore did not govern this case.<sup>112</sup> Specifically, the *Cripps* court distinguished the Oklahoma statute from the statute at issue in *McNeely* because it only applies to suspects involved in serious accidents whereas the statute in *McNeely* authorizes blood draws from all drivers who have been arrested on suspicion of driving under the influence.<sup>113</sup> Furthermore, the court reasoned that the two statutes address different issues and that this difference is dispositive.<sup>114</sup> The *Cripps* court reasoned that the Oklahoma statute focused on the death or great bodily injury caused

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<sup>107</sup> *Id.* at 909.

<sup>108</sup> Petitioner's Brief, *supra* note 8, at 5. Although the *Cripps* court focused its analysis on Cripps's argument that the Oklahoma statute was invalidated by the U.S. Supreme Court's decision in *McNeely*, Cripps's original argument for suppression of the evidence at the pre-trial suppression hearing did not raise a challenge under *McNeely* because the hearing pre-dated the *McNeely* decision. *Compare id.* (noting that the suppression hearing was held in January 2013), with *Missouri v. McNeely*, 569 U.S. 141, 141 (2013) (plurality opinion) (noting that the case was decided in April 2013). It is also important to note that both of the judges who considered Cripps's motion to suppress the evidence obtained from the blood draw applied a totality of the circumstances analysis to their findings of fact and ruled that exigent circumstances existed. *See* Brief in Opposition, *supra* note 71, at 5–6 (discussing the two judge's orders on Cripps's motions to suppress). On appeal, the *Cripps* court did not review the trial court's findings under the totality test. *Cripps*, 387 P.3d at 909. Instead, the court focused on Cripps's claim that *McNeely* rendered the Oklahoma statute unconstitutional. *Id.*

<sup>109</sup> *Cripps*, 387 P.3d at 909.

<sup>110</sup> *Id.* These two standards of review, *de novo* and clearly error, differ in the level of deference given to the findings of the trial court. *Compare State ex rel. Okla. Bar Ass'n v. Spradling*, 213 P.3d 570, 573 (Okla. 2009) (explaining that the *de novo* standard requires a reviewing court to reconsider the lower court's conclusions with no deference to the lower court's determinations), with *Neloms v. State*, 274 P.3d 161, 170 (Okla. Crim. App. 2012) (explaining that a lower court's findings should only be overturned when it is clear that the facts before the court do not support the findings).

<sup>111</sup> *Cripps*, 387 P.3d at 909.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; compare MO. REV. STAT. § 577.020(1) (2016 & Supp. 2017) (applying to all drivers who have been arrested on suspicion of driving under the influence), with OKLA. STAT. tit. 47, § 10-104(B) (2011) (applying only to drivers who are involved in accidents that result in death or great bodily injury).

<sup>114</sup> *Cripps*, 387 P.3d at 909.

by the accident whereas the Missouri law focused on the natural dissipation of alcohol.<sup>115</sup> For that reason, the *Cripps* court determined that the holding of the Supreme Court in *McNeely* did not invalidate the Oklahoma statute.<sup>116</sup>

### III. THE *CRIPPS* COURT DEPARTED FROM WELL-ESTABLISHED PRINCIPLES WHEN DETERMINING WHETHER EXIGENT CIRCUMSTANCES JUSTIFIES WARRANTLESS BLOOD DRAWS

The Oklahoma Court of Criminal Appeals' 2016 decision in *Cripps v. State* establishing a categorical rule that deals with the admissibility of evidence obtained from a warrantless blood draw is likely unconstitutional for two reasons.<sup>117</sup> Section A explains how the *Cripps* court failed to recognize that warrantless blood draws, because of their intrusiveness, are impermissible where less intrusive alternatives are available.<sup>118</sup> Section B argues that, as the U.S. Supreme Court made clear in *Missouri v. McNeely*, to find that exigent circumstances exist, a court must examine the totality of the circumstances in each case, making any categorical exigent circumstance unconstitutional.<sup>119</sup>

#### *A. The Cripps Court's Assessment of the Level of Intrusion Created by Oklahoma's Categorical Rule and the Fourth Amendment Consequences*

The *Cripps* court's analysis does not properly characterize the privacy concerns implicated by warrantless blood draws.<sup>120</sup> The *Cripps* court distinguished the U.S. Supreme Court's 2013 decision in *McNeely v. Missouri* on two grounds: (1) the scope of the rules created; and (2) the proffered exigent circumstance in each case.<sup>121</sup> The U.S. Supreme Court has recognized the centrality of reasonableness in questions involving the Fourth Amendment.<sup>122</sup> The level of privacy interests implicated by warrantless blood draws illustrates why courts have taken a careful approach when structuring the rules

<sup>115</sup> *Id.*; see also *McNeely*, 569 U.S. at 151–52 (discussing the state's argument that a warrantless search is proper when there is probable cause that a suspect is operating under the influence of alcohol because the alcohol is constantly dissipating from the bloodstream).

<sup>116</sup> See *Cripps*, 387 P.3d at 909.

<sup>117</sup> See *Cripps v. State*, 387 P.3d 906, 909–10 (Okla. Crim. App. 2016) (discussing the categorical rule for warrantless blood draws created by the Oklahoma statute).

<sup>118</sup> See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016) (recognizing that the availability of less-intrusive methods will generally make warrantless blood draws unreasonable).

<sup>119</sup> See *Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (plurality opinion) (holding that a case-by-case analysis is required for exigent circumstances).

<sup>120</sup> See *Cripps*, 387 P.3d at 909 (remaining silent on the intrusiveness of blood draws).

<sup>121</sup> *Id.*

<sup>122</sup> *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)) (“As the text makes clear, ‘the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”).

that govern these searches.<sup>123</sup> The need for thoughtful balancing may be at its zenith when the courts are considering rules that apply categorically and thus shield government action from meaningful individualized judicial review.<sup>124</sup> Therefore, it is important to address the intrusion caused by warrantless blood draws so that individual privacy interests can be properly weighed against the state's interests.<sup>125</sup>

As discussed *supra*, the Supreme Court has recently addressed the intrusiveness of blood draws.<sup>126</sup> In contrast to the interest-balancing approach taken by the Supreme Court in 2016 in *Birchfield v. North Dakota*, the *Cripps* court simply held that the categorical rule authorizing warrantless blood draws was permissible because it was distinguishable from the rule in *McNeely*.<sup>127</sup> It is true that the rule that was struck down in *McNeely* likely would have applied in a greater number of cases than the rule considered in *Cripps* because it applied in every instance where a driver was suspected of a DUI.<sup>128</sup> This difference alone, however, does not render the reasoning of the *McNeely* Court inapplicable or mean that the rule is consistent with the Fourth Amendment.<sup>129</sup>

The Supreme Court's holding in *Birchfield* and its analysis of the intrusiveness of blood draws indicate that categorical rules authorizing warrantless blood draws are likely unconstitutional because of the level of intrusion represented by these searches.<sup>130</sup> Moreover, the categorical rule adopted in *Cripps* is flawed because circumstances may arise where there are other methods for obtaining the evidence and the warrantless blood draw is likely unreasonable in light of the ruling in *Birchfield*.<sup>131</sup>

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<sup>123</sup> *Birchfield*, 136 S. Ct. at 2178; see also *McNeely*, 569 U.S. at 159 (plurality opinion) (reaffirming that forced blood draws result in substantial encroachments on individual privacy).

<sup>124</sup> See *McNeely*, 569 U.S. at 156 (recognizing the importance of case-by-case analysis when assessing the reasonableness of a search conducted outside of the normal warrant procedures).

<sup>125</sup> See *Birchfield*, 136 S. Ct. at 2176.

<sup>126</sup> *Id.*

<sup>127</sup> Compare *id.* at 2178 (analyzing impact of warrantless blood draws on privacy interests), with *Cripps*, 387 P.3d at 909 (distinguishing *McNeely* on the grounds that there was a significant enough difference between the rules).

<sup>128</sup> See *McNeely*, 569 U.S. at 146–47 (describing the scope of the categorical rule adopted by the lower court in that case); *Cripps*, 387 P.3d at 909.

<sup>129</sup> See *Cripps*, 387 P.3d at 909 (concluding that *McNeely* was distinguishable because the statute at issue in *McNeely* was different than the Oklahoma statute being addressed in this case); see also *McNeely*, 569 U.S. at 149–53, 156 (emphasizing importance of a case-by-case approach to exigent circumstances).

<sup>130</sup> *Birchfield*, 136 S. Ct. at 2184.

<sup>131</sup> *Id.* at 2185. In most investigations, if not all, where evidence of intoxication or operating under the influence is sought, breath tests will be a less-intrusive and available as an alternative to blood draws. See *id.* at 2167 (observing that testing an individual's breath is "the most common and economical method" of determining whether the individual is intoxicated or under the influence).



*B. Reading McNeely to Hold That Statutes Creating Categorical Exigent Circumstances Are Unconstitutional*

Additionally, the Oklahoma Court of Criminal Appeals erred in *Cripps* in its application of *McNeely* because it failed to follow the U.S. Supreme Court's direction on the applicability of categorical rules to the determination of exigent circumstances.<sup>132</sup> In *McNeely*, the Court reaffirmed the need for individualized judicial review when considering whether exigent circumstances justified a warrantless blood draw because there will invariably be cases where the police could obtain a warrant before conducting the blood draws, which the Fourth Amendment mandates whenever possible.<sup>133</sup> The *Cripps* court explicitly recognized this portion of the *McNeely* opinion.<sup>134</sup> But in the very next paragraph of its opinion, the *Cripps* court approved of the categorical exigency created by the Oklahoma statute instead of applying the case-by-case approach that it just described.<sup>135</sup>

Although the *McNeely* holding concentrated on whether the dissipation of alcohol is a categorical exigent circumstance, the Court's reasoning strongly suggests that any rule that creates a categorical exigency is unconstitutional.<sup>136</sup> As the *McNeely* Court noted, overbroad categorical exigencies are simply incompatible with the Fourth Amendment, particularly in situations involving warrantless blood where substantial individual privacy interests are at stake.<sup>137</sup> Furthermore, the purpose of the exigency exception is incompatible with categorical rules because exigencies are inherently fact-specific.<sup>138</sup>

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<sup>132</sup> Compare *McNeely*, 569 U.S. at 149–153, 156 (discussing the need for case-specific analysis when determining whether exigent circumstances existed), with *Cripps*, 387 P.3d at 909 (approving a categorical exigency).

<sup>133</sup> *McNeely*, 569 U.S. at 149–153, 156; see also *United States v. Drayton*, 536 U.S. 194, 201 (2002) (explaining that categorical rules are “inappropriate” for cases arising under the Fourth Amendment).

<sup>134</sup> *Cripps*, 387 P.3d at 909 (noting that “[t]he [Supreme] Court found that exigency must be determined case by case, based on the totality of the circumstances”).

<sup>135</sup> See *id.* (determining that “[t]he exigent circumstance justifying the categorical rule in [the Oklahoma statute] is the existence of great bodily injury or a fatality to persons including the driver”).

<sup>136</sup> Compare *McNeely*, 569 U.S. at 149–153, 156 (discussing the need for a case-specific analysis when determining whether exigent circumstances exist), with *Cripps*, 387 P.3d at 909 (approving a categorical exigency standard).

<sup>137</sup> *McNeely*, 569 U.S. at 158.

<sup>138</sup> *Drayton*, 536 U.S. at 201; see *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (recognizing that the exigent circumstance exception to the warrant requirement exists because the Court recognizes that there are occasions where the particular situation confronting the police make it reasonable for the police to conduct a search or seizure without a warrant). The Court has consistently required a case-by-case analysis is required in the context of exigencies because the factual variance between cases naturally makes it difficult, if not impossible, to tailor categorical rules that fit every factual scenario in which exigencies may arise. See *McNeely*, 569 U.S. at 149–53, 156 (discussing the need for case-specific analysis when determining whether exigent circumstances existed).

Accordingly, the Supreme Court's reasoning in *McNeely* and its development of the exigent circumstances exception to the warrant requirement lead to the conclusion that a categorical rule applying to any exigent circumstance exception is unconstitutional.<sup>139</sup>

### CONCLUSION

The inherent tension between individual liberty and the role of the state in providing collective security is borne out in legal challenges to the policies and procedures used to combat drunk driving. This gives the courts a solemn responsibility to balance these ever-competing interests. Although the ends were certainly legitimate, the means to those ends authorized by the Oklahoma Court of Criminal Appeals crosses the line separating the reasonable from the unreasonable. Going forward, the best way for courts to balance individual and state interests when considering the validity of warrantless blood draws is a careful case-by-case approach. This properly balances the competing interests because it permits the government to conduct invasive warrantless searches only in limited situations where the needs of law enforcement make the searches necessary. Most importantly, a case-by-case approach ensures that every warrantless blood draw will be subjected to judicial oversight.

TIMOTHY ANDREA

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<sup>139</sup> Compare *McNeely*, 569 U.S. at 149–153, 156 (discussing the need for case-specific analysis when determining whether exigent circumstances existed), with *Cripps*, 387 P.3d at 909 (approving a categorical exigency standard).