YOU BOOZE, YOU BRUISE, YOU LOSE: ANALYZING THE CONSTITUTIONALITY OF FLORIDA’S INVOLUNTARY BLOOD DRAW STATUTE IN THE WAKE OF MISSOURI V. MCNEELY

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I. INTRODUCTION

Imagine that Kelly, a driver in Florida, is pulled over for failing to maintain a single lane. Kelly refuses to perform roadside sobriety tasks and is arrested for driving under the influence (DUI). After Kelly is arrested, she refuses to submit a breath

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sample to test her blood-alcohol content. Following standard practice in Florida, the arresting officer makes no effort to obtain a warrant for a nonconsensual sample of Kelly’s blood. Although Kelly will lose her license for at least a year, the officer cannot forcibly obtain Kelly’s blood to determine her blood alcohol content.

Now, imagine that Kelly is driving in Florida, but instead of being pulled over, she lightly crashes into a pickup truck that is stopped at a red light in front of the county courthouse. Kelly and the passengers in the pickup’s cab are unharmed, but a man who was sitting in the pickup’s bed was tossed from the truck and killed upon impacting the street. An officer arrives to the scene, smells alcohol on Kelly’s breath, and notices that her eyes are bloodshot. Additionally, the officer learns that the ejected passenger was killed. The officer arrests Kelly for DUI. Even though the officer may well be able to secure a timely warrant for Kelly’s blood, the officer makes no effort to do so and instead, directs an on-scene paramedic to draw Kelly’s blood pursuant to Florida’s involuntary blood draw statute. Kelly’s blood alcohol content tests over the legal limit, and she is convicted of DUI manslaughter. Despite the fact that the accident was a fairly minor fender-bender, the occurrence of a fatality—no matter how much of a fluke—eliminated the arresting officer’s need and incentive to obtain a warrant before drawing the nonconsensual sample of Kelly’s blood.

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2 See FLA. STAT. § 316.1932(1)(a).
3 See FLA. STAT. § 316.1932(1)(a).
4 See FLA. STAT. § 316.1933(2)(a) (2013) (“[A] . . . certified paramedic, . . . acting at the request of a law enforcement officer, may withdraw blood for the purpose of determining the alcoholic content thereof or the presence of chemical substances or controlled substances therein.”).
5 Section 316.1933, Florida Statutes, is Florida’s involuntary blood draw statute. When a DUI suspect allegedly causes a death or serious bodily injury to another human being, an officer shall order a nonconsensual sample of the suspect’s blood. See FLA. STAT. § 316.1933(1) (2013).
Warrantless searches are presumptively unreasonable under the Fourth Amendment. There are exceptions that allow police officers to overcome the presumption of unreasonableness in a variety of circumstances. The reasonableness of a warrantless blood draw in the DUI context is analyzed under the “exigency” exception to the Fourth Amendment’s warrant requirement. Under this exception, a police officer is excused from obtaining a search warrant when “there is a compelling need for official action and no time to secure a warrant.”

With respect to DUI investigations, a “compelling need for official action” typically refers to circumstances where an officer faces an emergency, in which the delay necessary to obtain a warrant threatens the imminent destruction of evidence. The fact that Florida law effectively labels circumstances in scenario one as “non-exigent” and circumstances in scenario two as “exigent” is puzzling considering that both scenarios present officers with identical opportunities to obtain timely warrants. The existence of a fatality in the second scenario, while serious, did not necessarily diminish the arresting officer’s chances of obtaining a warrant for Kelly’s blood. So what justifications are available for a statute that labels particular circumstances as “exigent” based on the existence of a death or serious bodily injury (SBI), when exigency is defined in terms of the officer’s ability to obtain a warrant? A recent United States Supreme Court case,

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8 See California v. Acevedo, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring) (acknowledging the existence of nearly twenty exceptions, including searches incident to arrest, automobile searches, border searches, administrative searches of regulated businesses, exigent circumstances, searches incident to non-arrest when there is probable cause to arrest, boat boarding for document checks, welfare searches, inventory searches, airport searches, school searches, searches of mobile homes, and searches of government employees).
11 See Schmerber, 384 U.S. at 770.
Missouri v. McNeely,\textsuperscript{12} made the answer much clearer, and states, like Florida, with statutes that condition the issuance of general warrants on the existence of a death or SBI shall expect an influx of challenges on Fourth Amendment grounds.

To fully understand the impact that McNeely will have on Florida’s involuntary blood draw statute, it is necessary to examine the state of the law regarding the Fourth Amendment in the DUI context since Schmerber. Parts II and III contain brief descriptions of Schmerber and McNeely. Part IV shows why section 316.1933, Florida Statutes, is susceptible to Fourth Amendment challenges, despite some faulty views that the statute exceeds the protections guaranteed under the Fourth Amendment. Part V contains an analysis of crime-severity’s role in calculating exigency with respect to DUIs involving death or SBI. Part VI addresses the importance of limiting nonconsensual, warrantless blood draws in DUI cases to those presenting exigent circumstances. Lastly, Part VII contains a discussion of several possible solutions that could limit future Fourth Amendment challenges while maintaining an effective policy on the prevention of drunk driving.

II. 

II. 

RINGING INVOLUNTARY BLOOD DRAWS AND DUIs INTO THE REALM OF THE FOURTH AMENDMENT

A. The Fourth Amendment and DUIs

The Fourth Amendment provides United States citizens with the following rights:

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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\textsuperscript{13}

\textsuperscript{12} 133 S. Ct. 1552 (2013).

\textsuperscript{13} U.S. CONST. amend. IV (emphasis added).
It is well established that collecting a DUI suspect’s blood sample constitutes a “search” for purposes of the Fourth Amendment’s warrant requirement.\textsuperscript{14} Crucial to the Fourth Amendment’s protection against unreasonable searches is the requirement that a search warrant be issued by a neutral and detached magistrate who has no stake in arresting or convicting the persons being searched.\textsuperscript{15} This important requirement reflects the Constitutional Framers’ desire to ensure that the decision to intrude into a citizen’s expectation of privacy—a decision with major potential ramifications—is not made in haste, or in the heat of the moment. With respect to DUI suspects, a nonconsensual, warrantless blood draw is “reasonable” within the bounds of the Fourth Amendment under one exception—the exigency exception. Outside of the exigency exception, a nonconsensual, warrantless blood draw pursuant to a DUI investigation is inadmissible as evidence at trial under the exclusionary rule.\textsuperscript{16}

B. Schmerber v. California \textit{Opens the Door}

\textit{Schmerber v. California}\textsuperscript{17} set the stage for the Fourth Amendment analysis of nonconsensual, warrantless blood draws in DUI cases. The defendant in \textit{Schmerber} was involved in a car accident, injured, and sent to the hospital.\textsuperscript{18} Once the defendant was at the hospital, he was placed under arrest for DUI.\textsuperscript{19} Despite the defendant’s refusal to submit a blood sample, the arresting officer directed a physician to obtain a sample of

\textsuperscript{14} See \textit{Schmerber}, 284 U.S. at 767.
\textsuperscript{16} See \textit{Mapp v. Ohio}, 367 U.S. 643, 649 (1961) (noting that the exclusionary rule prohibits the use of evidence against a criminal defendant when that evidence is illegally obtained without a search warrant).
\textsuperscript{17} 384 U.S. 757 (1966).
\textsuperscript{18} \textit{Id.} at 758.
\textsuperscript{19} \textit{Id.}
the defendant’s blood. The defendant’s blood alcohol content tested over the legal limit, and he was convicted of DUI.

The defendant appealed his conviction on the grounds that the warrantless blood draw was unreasonable under the Fourth Amendment. The Supreme Court held that the warrantless search was reasonable. Particularly important to the Court’s decision was the fact that the officer “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence[.]” In other words, the Supreme Court introduced the “exigency” exception to Fourth Amendment’s warrant requirement in the DUI context.

The Court noted that the circumstances were exigent because “the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.” Additionally, the Court noted that because “time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant” in that case.

Although the Court limited its holding to the facts of the particular case, states interpreted Schmerber broadly to assert the proposition that the evanescent nature of alcohol in the body always creates an exigent circumstance justifying a nonconsensual, warrantless search under the Fourth Amendment. Approximately forty-seven years later, McNeely held that such a broad interpretation of Schmerber is flawed.

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20 Id. at 758-59.
21 Id.
22 Id. at 759.
23 Id.
24 Id. at 770 (internal quotations omitted).
25 Id.
26 Id. at 770-71.
III. IN VOLUNTARY BLOOD DRAWS CROSSING THE CONSTITUTIONAL LINE: MISSOURI V. MCNEELY CLOSES THE DOOR

The defendant in McNeely was pulled over for speeding and for failing to maintain a single lane. In what appeared to be an ordinary DUI investigation, the defendant refused to submit a sample of his breath. However, instead of being taken to the jail, the defendant was taken to a hospital where the arresting officer directed a lab technician to take a nonconsensual sample of the defendant’s blood. The arresting officer did not have a warrant, and he made no effort to obtain one. The defendant’s blood alcohol content tested over the legal limit, and he was charged with driving while intoxicated.

The defendant moved to suppress the blood draw on the grounds that it violated the Fourth Amendment. The defendant claimed that his case did not present the arresting officer with exigent circumstances, making the officer’s warrantless blood draw unreasonable under the Fourth Amendment. The state claimed that the circumstances were exigent, arguing that the natural dissipation of alcohol in the bloodstream always creates exigent circumstances in DUI investigations. The trial court suppressed the blood draw, and the Missouri Supreme Court affirmed, rejecting the state’s proposed per se rule and holding that the circumstances in the defendant’s particular case did not present exigent circumstances. In petitioning for certiorari to the United States Supreme Court, the state limited its challenge to the rejection of its proposed per se

\[\text{\footnotesize\textsuperscript{28}}\text{133 S. Ct. at 1556.}\]
\[\text{\footnotesize\textsuperscript{29}}\text{Id. at 1557.}\]
\[\text{\footnotesize\textsuperscript{30}}\text{Id.}\]
\[\text{\footnotesize\textsuperscript{31}}\text{Id.}\]
\[\text{\footnotesize\textsuperscript{32}}\text{Id. Missouri’s “driving while intoxicated” offense is equivalent to Florida’s “driving under the influence” offense. Compare MO. ANN. STAT. § 577.010 (West 2011), with FLA. STAT. § 316.193 (2011).}\]
\[\text{\footnotesize\textsuperscript{33}}\text{McNeely, 133 S. Ct. at 1557.}\]
\[\text{\footnotesize\textsuperscript{34}}\text{Id.}\]
\[\text{\footnotesize\textsuperscript{35}}\text{Id.}\]
\[\text{\footnotesize\textsuperscript{36}}\text{Id.}\]
rule. The Court granted certiorari to consider the state’s proposed *per se* exception to the warrant requirement in drunk-driving cases.

In a fractured opinion, a majority of five Justices held that while the dissipation of alcohol in the bloodstream plays some role in the exigency calculation, it is not sufficient on its own to establish an emergency in which the delay necessary to obtain a warrant threatens the imminent destruction of evidence. The majority noted that exigency should be determined case by case, considering the totality of the circumstances. The majority clarified that the Court’s finding of exigency in *Schmerber* was not solely based on the evanescent nature of alcohol in the body. Instead, the Court’s holding in *Schmerber* was based on that case’s particular facts.

Of the five Justices joining the majority, a plurality of four Justices flatly rejected the notion of a *per se* rule that would eliminate the warrant requirement for blood draws in the DUI context. Writing a separate concurrence as to this point, Justice Kennedy stated that in some circumstances, certain “rules and guidelines . . . can give important

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37 *Id.* at 1568.
38 *Id.* at 1558 (“We granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations.”).
39 *Id.* at 1563.
40 *Id.*
41 *Id.* at 1560.
42 *Id.* A major distinguishing factor between the Court’s holding in *Schmerber* and facts arising from modern drunk-driving investigations is the advancement “in the 47 years since *Schmerber* was decided that allow[es] for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple.” *Id.* at 1561-62. The majority stressed that “technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge’s essential role as a check on police discretion, are relevant to an assessment of exigency.” *Id.* at 1562-63.
43 See *id.* at 1564 (“While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our jurisprudence.”).
practical instruction to arresting officers, instruction that in any number of instances would allow a warrantless blood test in order to preserve the critical evidence.”

However, Justice Kennedy maintained that the circumstances in such rules or guidelines would still have to meet the exigency exception.

In light of McNeely, in a drunk-driving investigation, the state must show more than the mere dissipation of alcohol in the bloodstream to justify a nonconsensual, warrantless blood draw under the exigency exception. Does any factor, besides the evanescent nature of alcohol in the bloodstream, present officers with difficulty in obtaining timely warrants in every DUI resulting in death or SBI? Surely in some cases, the occurrence of a death or SBI will sufficiently hamper an officer’s ability to obtain a warrant, but that is not true in every case. What other factors, then, can Florida establish to show exigency in these cases? Is crime-severity a valid factor? As explained infra Part V, crime-severity is not a valid justification for Florida’s involuntary blood draw statute under the exigency exception to the Fourth Amendment’s warrant requirement. With that in mind, it does not seem like exigency in the DUI context can be categorically premised on the occurrence of a death or SBI—an occurrence that is tenuously related to an officer’s ability to obtain a warrant in many cases. So why has this statute gone unchallenged in Florida for so many years? The answer is likely the

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44 Id. at 1569 (Kennedy, J. concurring).
45 See id. (“States and other governmental entities which enforce the driving laws can adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment and give helpful guidance to law enforcement officials.”) (emphasis added).
46 See second scenario supra Part I (although Kelly caused a death, the officer likely could have obtained a timely warrant for Kelly’s blood while preserving the opportunity to obtain reliable evidence); see also McNeely, 133 S. Ct. at 1561 (majority opinion) (“Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.”).
relatively short period of time that has passed since McNeely clarified Schmerber’s broadly interpreted holding. An assessment of Florida’s involuntary blood draw statute in light of McNeely will explain why the statute might not go unchallenged for long.

IV. SECTION 316.1933, FLORIDA STATUTES: CAN IT SURVIVE A CHALLENGE?

A. Florida’s Involuntary Blood Draw Statute in Light of McNeely: Why Death or Serious Bodily Injury Is Not a Per Se Exigent Circumstance

Florida’s involuntary blood draw statute provides police officers with the following mandate:

If a law enforcement officer has probable cause to believe that a motor vehicle driven by . . . a person under the influence of alcoholic beverages[] . . . has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving or in actual physical control of the motor vehicle to submit to a test of the person’s blood for the purpose of determining the alcoholic content thereof[.]

It is important to note that this statute does not merely limit nonconsensual, warrantless blood draws to DUI cases involving death or SBI. If the foregoing were true, then the statute would simply limit law enforcement’s ability to apply the exigency exception, and the statute would in fact protect privacy beyond the Fourth Amendment. However, the statute does not merely limit the use of warrantless blood draws to certain cases. Instead, Florida’s involuntary blood draw statute mandates that an officer investigating a DUI resulting in death or SBI shall obtain a blood sample, regardless of the officer’s ability to secure a timely warrant.

Given the fact that Florida’s involuntary blood draw statute mandates a warrantless blood draw in every DUI case resulting in death or SBI, the statute does not comply with the Fourth Amendment in every case unless it is interpreted as follows: If a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages has

caused the death or serious bodily injury of a human being, it is **categorically unreasonable for that officer to secure a warrant without significantly undermining the efficacy of the search.** This interpretation is flawed for the following reasons.

The rationale supporting Florida's *per se* rule is identical to the rationale supporting the *per se* rule that was rejected in *McNeely*. That is, the only statutory factor that categorically diminishes an officer’s ability to obtain a timely warrant is the suspect’s natural dissipation of alcohol in the bloodstream. The existence of a death or SBI, on the other hand, does not necessarily diminish an officer’s ability to obtain a timely warrant. If other on-scene personnel, such as other officers and paramedics, are tending to the wreckage, then the existence of an accident, a death, or a SBI might have no effect on the arresting officer’s ability to obtain a timely warrant.

This potentially tenuous relationship between the occurrence of a death or SBI and an officer’s ability to obtain a warrant was highlighted in the second scenario *supra* Part I. In that scenario, the arresting officer could easily have obtained a timely warrant for Kelly’s blood despite the existence of both an accident and a death. Because the existence of an obviously reasonable opportunity to obtain a timely warrant precludes circumstances from being exigent, in those circumstances, Florida’s involuntary blood draw statute is susceptible to the same challenge that succeeded in *McNeely*.

**B. The Faulty Perception that Section 316.1933 Goes Above and Beyond the Protections Required Under the U.S. Constitution**

There is a misperception among Florida courts that the involuntary blood draw statute is constitutionally permissible on the basis that the “death or SBI” limitation imposes a stricter standard than is required under the U.S. Constitution. While

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48 *McNeely*, 133 S. Ct. at 1561.
49 *See, e.g.*, State v. Langsford, 816 So. 2d 136, 139 (Fla. 4th DCA 2002) (“Indeed, it is the established law of this state that Florida’s implied consent statutes . . . impose, in certain respects, higher standards on police conduct in obtaining breath, urine, and
Florida’s implied consent statutes impose greater protections to its citizens in certain respects, in other respects those same laws fall short of the boundaries set by the Constitution.

Florida’s implied consent statutes limit the police’s power to obtain involuntary blood samples from DUI arrestees. In an ordinary DUI case, a police officer in Florida is statutorily prohibited from ordering an involuntary blood draw on a suspect, regardless of exigency. The analyses in Schmerber and McNeely made it clear that a police officer’s collection of a nonconsensual, warrantless blood sample in an ordinary DUI investigation does not violate the Fourth Amendment, so long as the circumstances are exigent. Thus, Florida’s statutory limitation with respect to ordinary DUI cases clearly imposes greater protection to its citizens than is required under the U.S. Constitution. However, the strict limitation on police power in ordinary DUI cases does not justify the liberal authorization of police power in DUI cases involving death or SBI.

As restrictive as Florida’s implied consent statutes are in ordinary DUI cases, they are equally, if not more, unrestricted in DUI cases involving death or SBI. Florida’s

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50 Florida's implied consent statutes, FLA. STAT. §§ 316.1932, 316.1933, 316.1934, establish the procedures for breath, urine, and blood tests in DUI investigations. See State v. Langsford, 816 So. 2d 136, 139 (Fla. 4th DCA 2002)

51 Under section 316.1932(1)(a), Florida Statutes, a conscious person who is lawfully arrested for an ordinary DUI is given the right to refuse any chemical testing. See State v. Slaney, 653 So. 2d 422, 426 (Fla. 3d DCA 1995)

52 Assume that an “ordinary DUI case” is a standard DUI that does not involve an accident, a death, or SBI.

53 See Slaney, 653 So. 2d at 426-27 (noting that the only circumstances where an officer may order an involuntary blood draw on a DUI suspect in Florida is in a “death or SBI” case).
Involuntary blood draw statute does not merely place a limit on when a nonconsensual, warrantless blood draw is allowed. Instead, in cases involving death or SBI, the statute requires officers to collect a suspect’s blood sample, regardless of the exigency of the circumstances. Florida’s general issuance of warrants for blood samples, without regard to the exigency requirement, clearly creates a risk that officers will perform warrantless blood draws in violation of the Fourth Amendment. The legislature’s strict constitutional standards with respect to warrantless searches in some circumstances does not give the legislature constitutional carte blanche with respect to others; constitutional standards still require the proper inquiry into the exigency of the circumstances.

The Florida legislature’s elimination of an exigency calculation with respect to nonconsensual, warrantless blood draws in DUI cases involving death or SBI highlights the fact that it relies on a crime-severity justification. As this note will reveal infra Part V, the crime’s severity in this specific context is irrelevant for purposes of assessing the statutorily mandated blood draws under the Fourth Amendment.

V. CRIME SEVERITY AND ITS ROLE IN THE EXIGENCE CALCULATION

A. The Transsubstantive Doctrine

Proponents of Florida’s involuntary blood draw statute might argue that the severity of the offense justifies the legislature’s authorization of warrantless blood draws under the Fourth Amendment. However, this argument bears little weight in the Fourth Amendment “reasonableness” context. Fourth Amendment doctrine is “transsubstantive,” meaning Fourth Amendment law generally ignores the severity of an

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54 See FLA. STAT. § 316.1933(1)(a) (2013) (“If a law enforcement officer has probable cause to believe that a motor vehicle driven by a person under the influence of alcoholic beverages has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving to submit to a test of the person’s blood for the purpose of determining the alcoholic content thereof[.]”) (emphasis added).
offense with respect to “reasonableleness.”

Although many modern academics argue that crime-severity should play some role in calculating “reasonableleness” under the Fourth Amendment, courts have routinely resisted such an expansion. While there are several exceptions to the Transsubstantive Doctrine, the exceptions, along with their respective rationales, do not apply to the context of nonconsensual, warrantless blood draws in DUI investigations involving death or SBI.

An analysis of the exceptions to the Transsubstantive Doctrine will show how they are geared toward furthering some legitimate governmental interest other than the general interest in solving crime. The analysis will also demonstrate how Florida’s involuntary blood draw statute’s primary purpose is to further the latter, illegitimate governmental interest.

B. Distinguishing DUIs Involving Death or Serious Bodily Injury from the Exceptions to the Transsubstantive Doctrine

Investigations of DUIs involving death or SBI are distinct from the cases where crime-severity plays a role in calculating reasonableness under the Fourth Amendment. There are two limited circumstances where crime severity has factored into the calculation of reasonableness with respect to warrantless searches or seizures. Each circumstance can be distinguished from DUI “death or serious bodily injury” cases.

The first, and perhaps most commonly applied crime-severity rationale, involves cases where warrantless searches or seizures are justified on the grounds that they are

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55 See Jeffrey Bellin, Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World, 97 IOWA L. REV. 1, 4 (2011); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.8(c) n.8 (3d ed. 2007) (“[D]istinction[s] between major and minor crimes are rare in the constitutional regulation of criminal procedure.”); Max Minzner, Putting Probability Back into Probable Cause, 87 TEX. L. REV. 913, 940 (2009) (“Currently, the Fourth Amendment is blind to the type of crime underlying the search.”).

56 Generally, “reasonableleness” of a search or seizure under the Fourth Amendment is measured by balancing its degree of intrusion upon an individual’s privacy, and the degree to which it is needed to promote legitimate governmental interests. See United States v. Knights, 534 U.S. 112, 118-19 (2001) (emphasis added).
protecting the public from some risk of imminent harm. For example, the Supreme Court has consistently held “that deadly force may be used ‘if necessary to prevent escape’ when the suspect is known to have ‘committed a crime involving the infliction or threatened infliction of serious physical harm,’ so that his mere being at large poses an inherent danger to society.” In each of the aforementioned cases, the crime’s severity presents some risk of imminent public harm, and protecting the public from risks of such harm is the legitimate governmental interest that justifies the warrantless search or seizure from an exigency standpoint. The severity of those crimes does not alleviate the need to find exigency in each case but rather, supplements a finding of exigency because the nature of the crime itself creates exigent circumstances. This premise, however, cannot be extrapolated to every “severe” crime because the ultimate question to ask in assessing a warrantless search or seizure in these cases is not merely whether the crime was serious enough to justify the search, but whether the circumstances were exigent.

If the former were sufficient, then warrantless searches would be uniformly upheld on the basis that they furthered the government’s interest in solving serious crimes, a basis

57 See City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (“[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”); Florida v. J.L., 529 U.S. 266, 273–74 (2000) (“[A] report of a person carrying a bomb need [not] bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.”).


59 See generally Thomas Y. Davies, How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power, 73 LAW & CONTEMP. PROBS., Summer 2010, at 1, 12 (“Warrantless-arrest authority was much broader for accusations of felon[ies] . . . than for accusations of less-serious offenses. The reasons are apparent: It was most important for public safety to catch and punish the potentially dangerous criminals who committed the set of very serious and violent crimes denoted as felonies[i]”) (emphasis added).

60 See Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) (“For this reason, warrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”) (citation omitted).
that has been uniformly rejected as a valid justification for dispensing with the warrant requirement.61

“Imminent public harm” cases are wholly distinct from DUI cases. The former involve some future and direct harm that is thwarted by law enforcement’s swift and warrantless intervention. DUI cases do not involve such infliction or threatened infliction of serious physical harm. Instead, DUIS are more akin to strict liability offenses in which the suspects have no specific intent to cause any social or public harm.62 A warrantless search in a DUI case involving death or SBI does nothing to prevent public harm because, in those cases, the harm has already occurred. Additionally, once the warrantless search at issue here is performed, the suspect is in law enforcement’s custody and thus, does not typically present any risk to the public or to the officers’ safety.

The second crime-severity rationale involves cases where the severity of the offense at issue bears some relationship to a different legitimate governmental interest; the destruction of evidence. This particular governmental interest is what justifies nonconsensual, warrantless blood draws in DUI cases.63 However, it is important to note

61 See id. at 393 (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. . . . The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that . . . privacy . . . may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.”) (citations omitted).
62 See generally Begay v. United States, 553 U.S. 137, 146 (2008) (“[C]rimes involving intentional or purposeful conduct (as in burglary and arson) are different than DUI, a strict liability crime. In both instances, the offender’s . . . crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.”).
that crime severity alone does not supplant the exigency calculation. Instead, under this rationale, the particular crime’s severity must bear some directly proportionate relationship to the imminent destruction of evidence to justify a warrantless search.

For example, in *Illinois v. McArthur*, the Supreme Court factored crime severity into its reasonableness calculation with respect to the temporary seizure of a resident from his home. The Court held that the officers in that case acted reasonably in preventing the resident, suspected of possessing illegal drugs, from re-entering his house while other officers sought a search warrant. The Court reasoned that the suspect, if let back into his residence, would have destroyed any evidence relating to the alleged illegal drugs. The defendant in *McArthur* argued that the seizure was unreasonable because the crime that he was suspected of committing was too minor to justify the warrantless action. The Court rejected the defendant’s argument and implicitly adopted the distinction set forth in *Welsh* by noting that the offense in the case at hand was “jailable” and thus, was distinct from the minor, nonjailable offense in *Welsh*. However, the Court did not suggest that the severity issue was dispositive of exigency. While crime severity played some role in the Court’s finding of exigency, there were additional factors contributing to its determination that the officers faced the imminent destruction of evidence. Additionally, the Court did not assume that the circumstances

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64 *See Mincey*, 437 U.S. at 394 (“We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.”).
66 *Id.* at 331-33.
67 *Id.* at 332.
68 The defendant relied on *Welsh v. Wisconsin*, 466 U.S. 740 (1984), in which the Court held that “police could not enter a home without a warrant in order to prevent the loss of evidence (namely, the defendant’s blood alcohol level) of the ‘nonjailable traffic offense’ of driving while intoxicated.” *See McArthur*, 531 U.S. at 335 (citing *Welsh*, 466 U.S. at 742).
69 *See McArthur*, 531 U.S. at 336.
were exigent solely because of the suspected crime’s severity.\textsuperscript{70} The loss of evidence in \textit{McArthur} shared a distinct relationship with the suspect’s alleged offense; i.e., drug suspects are more likely to destroy evidence of their crimes, given the opportunity to do so. Such a relationship does not exist between the loss of evidence and the alleged offense in DUI cases involving death or SBI.

The severity of the drug crime at issue in \textit{McArthur} directly related to the suspect’s propensity to destroy evidence. The defendant in \textit{McArthur}, suspected of possessing illegal drugs, was likely destroy any evidence of the alleged drugs, given the opportunity to do so. DUI cases, however, do not present suspects with the opportunity to destroy evidence of their intoxication, and those involving death or SBI are no different. Given the opportunity and ability to destroy evidence of their intoxication, most DUI suspects would gladly do so. However, destruction of such evidence is simply beyond a DUI suspect’s physical control. Thus, the rationale in \textit{McArthur} that justifies warrantless action in certain “serious” cases involving suspects who are more likely to destroy evidence does not extend to DUI cases. This, perhaps, explains why the Court, in \textit{McNeely}, did not focus on the severity of DUlIs in its exigency analysis.

\textbf{C. Constitutional Framers’ Concern for Crime-Severity}

In addition to the foregoing distinctions between the exceptions to the Transsubstantive Doctrine and the searches at issue under Florida’s involuntary blood draw statute, the Florida legislature’s blanket issuance of warrants contradicts the Fourth Amendment’s drafter’s intentions to prevent the legislature from setting the bounds of Fourth Amendment reasonableness.\textsuperscript{71} The Fourth Amendment’s warrant

\textsuperscript{70}See id. at 332-33 (noting several factors contributing to the finding of exigency, including the likelihood that the particular suspect would destroy evidence, and the seizure’s minimal intrusion of the defendant’s privacy interest).

\textsuperscript{71}“[T]here is no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure
requirement was meant to protect the people from the legislative branch because the latter’s interest in solving crime conflicts with the former’s interest in privacy.72 This conflict of interest is especially present in more “serious” crimes. By categorically authorizing warrantless searches for serious crimes without furthering some legitimate governmental interest, the Florida legislature is acting in the exact manner that prompted the creation of the Fourth Amendment in the first place.73

VI. EXIGENCE’S IMPORTANCE IN THE DUI CONTEXT

A. Encouraging Progressive Methods of Obtaining Search Warrants

Florida’s involuntary blood draw statute’s mandated, warrantless blood draws are likely hindering the state’s progression towards developing more innovative methods of obtaining timely warrants. A majority of U.S. states have developed and successfully implemented more efficient and innovative methods of obtaining search warrants, including methods that allow officers to obtain warrants via telephone, radio, and video-conferencing.74 Consequently, the statute’s blanket issuance of warrants may be partly responsible for Florida’s presence among the minority.75

legislatures might have enacted. Instead, the Amendment embodies the sentiment that founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.” Bellin, supra note 55, at 28 (citing Virginia v. Moore, 553 U.S. 164, 168 (2008)) (internal quotations omitted).

72 See Davies, supra note 59, at 583, 590 (“No one questions that the Framers despised and sought to ban general warrants . . . . [T]he Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants.”).


74 See ALA. R. CRIM. P. 3.8(b); ALASKA STAT. § 12.35.015 (2012); ARIZ. REV. STAT. ANN. §§ 13-3914(C), 13-3915(D)-(E) (2010) (West); ARK. CODE ANN. § 16-82-201 (West 2005); CAL. PENAL CODE § 1526(b) (West 2001); COLO. R. CRIM. P. 41(c)(3); GA. CODE ANN. § 17-5-21.1 (West 2008); HAW. R. PENAL. P. 41(h)-(i); IDAHO CODE ANN. §§ 19-44-4, 19-4406 (2004); IND. CODE §35-33-5-8 (2012); IOWA CODE §§ 321J.10(3), 462A.14D(3) (2009) (limited to specific circumstances involving accidents); KAN. STAT. ANN. §§ 22-2502(a), 22-2504 (2011); LA. CODE CRIM. PROC. ANN. arts. 162.1(B), (D) (2003); MICH. COMP. LAWS ANN. § 780.651(2)-(6) (West 2006); MINN. R. CRIM. P. 33.05, 36.01-36.08; MONT.
Improved warrant-securing methods, which preserve the protections afforded by the Constitution while furthering the government’s interest in solving crime, would be much more desirable to the state if an officer’s ability to obtain a warrantless blood sample from a DUI suspect depended on the officer’s ability to secure a warrant. However, because Florida categorically mandates the collection of warrantless blood samples in DUI cases involving death or SBI without any inquiry into the officer’s ability to secure a search warrant, the state lacks the proper incentive to develop alternative warrant-securing methods.

B. Expectation of Privacy

Exigency is particularly important in the DUI context because the intrusion into a DUI suspect’s body can have significant ramifications. Aside from one’s general interest in preventing the government from forcibly piercing one’s skin with a needle,

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75 Florida law requires that search warrants be in writing, see Fla. Stat. § 933.07(1) (2013), and, although a warrant can be electronically signed by a judge in Florida, methods, such as telephonic- or video-conferencing, are not allowed. See Fla. Stat. § 933.07(1)-(3) (2013).

76 See Missouri v. McNeely, 133 S. Ct. 1552, 1563 (2013) (“[A]dopting the State’s per se approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.”) (internal citation and quotations omitted).

77 See generally Winston v. Lee, 470 U.S. 753, 760 (1985) (“The intrusion perhaps implicated [the defendant’s] most personal and deep-rooted expectations of privacy, and the Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable.”).
blood tests can also reveal such innocent, secret information as epilepsy, pregnancy, HIV, or AIDS. Thus, a nonconsensual, warrantless blood test places substantial weight on the “privacy interests” side of the “reasonableness” scale. Because blood draws tilt the “reasonableness” scale in such a significant manner, the government must demonstrate that, in each case, some legitimate governmental interest—the exigency of the circumstances—sufficiently tilts the “reasonableness” scale in the other direction. Currently, Florida mandates warrantless blood draws with no regard to whether the exigency of the circumstances outweighs the intrusion into its citizens’ privacy interests.

XII. SOLUTIONS

A. Iowa’s Involuntary Blood Draw Statute

Iowa’s involuntary blood draw statute provides an alternative, constitutionally sound approach to nonconsensual, warrantless blood draws for DUIs resulting in death or SBI. Iowa’s statute is similar to Florida’s, but it has two caveats.

First, in DUI cases involving death or SBI, Iowa’s involuntary blood draw statute does not require an officer to obtain a nonconsensual, warrantless blood sample; it merely allows an officer to obtain such a sample. Second, an officer cannot obtain a nonconsensual, warrantless blood sample unless the officer “reasonably believes” that he or she is “confronted with an emergency situation in which the delay necessary to obtain a warrant . . . threatens the destruction of the evidence.” By building exigency into the statute, officers in Iowa are expressly prohibited from obtaining nonconsensual, warrantless blood draws in non-exigent circumstances.

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78 See case cited supra note 56.
79 See IOWA CODE § 321J.10A(1) (2013) (“[A] chemical test of blood may be administered without the consent of the person arrested to determine the amount of alcohol . . . in that person’s blood[.]”) (emphasis added).
Iowa’s approach would undoubtedly pass muster with the McNeely plurality because it emphasizes a case-by-case assessment of exigency. Iowa took the exact definition of exigency from Schmerber and implemented it directly into the statute as a requirement for nonconsensual, warrantless blood draws. While amending Florida’s involuntary blood draw statute to include a similar provision would cure the statute under the Fourth Amendment’s reasonableness standard, this option fails to address some of the concerns raised by Justice Kennedy in the McNeely concurrence.\(^8\)

Specifically, a statute similar to Iowa’s does not give much practical instruction to arresting officers. Parts VII.B and VII.C will explore some alternative approaches that address Justice Kennedy’s concerns.

B. Re-writing the Statute to Provide Guidance for Police Officers

A possible solution would be to use Iowa’s statute as a benchmark while incorporating additional factors that identify a narrow set of exigent circumstances. These factors would eliminate officers’ blanket authority to collect warrantless blood draws while offering some guidance as to what circumstances are exigent. For example, the statute could include a provision that allows an arresting officer to collect a warrantless blood draw in situations when the officer cannot attempt to secure a timely warrant because he or she is tending to the victim’s or the suspect’s injuries. Or, the statute could include a similar provision that allows a warrantless blood draw in situations when the officer cannot attempt to secure a timely warrant because he or she is handling the wreckage or its effect on the flow of traffic. The above factors do not suffer from the current statute’s vulnerability because they condition the warrantless blood draws on the presence of exigent circumstances, not merely on whether a death or SBI has occurred.

\(^8\) See supra Part III.A.
The re-written statute could also include a catchall provision that requires officers to seek search warrants before conducting warrantless blood draws in those cases that are not covered by the above factors. By conditioning warrantless blood draws on the officers’ failed attempts to secure timely warrants, officers would be certain that exigency is justifying the warrantless blood draws in every case. Placing an emphasis on the officers’ abilities to secure warrants could also promote the collection of DUI evidence through less intrusive means, improving law enforcement’s efficiency in collecting evidence for DUI cases.82 In each of the above examples, the factors are based on the officer’s ability to secure a warrant, not merely on the existence of a death or SBI.

Re-writing the statute to include such factors that unconditionally present exigent circumstances will also decrease the likelihood that warrantless blood draws will be thrown out. The statue, as currently written, is too broad, and authorizes warrantless blood draws in a large number of cases in which circumstances are not exigent. This broad language leaves the door open for many potential constitutional challenges. By drafting a more narrow and specific statute, Florida legislators can ensure that evidence obtained through nonconsensual, warrantless blood draws will be constitutional and thus, will not be susceptible to successful challenges.

Currently, if a DUI suspect is subjected to a nonconsensual, warrantless blood draw and then tests over the legal limit, the suspect could possibly evade a conviction by showing that the officer reasonably could have obtained a search warrant. If the blood test is suppressed,83 the state’s chances of mounting a successful prosecution go from strong to weak, even though the suppressed evidence could have been obtained legally

82 See McNeely, 133 S. Ct. at 1567 (plurality) (citing NHTSA, USE OF WARRANTS FOR BREATH TEST REFUSAL: CASE STUDIES 36–38 (No. 810852, Oct. 2007)) (“[F]ield studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement’s ability to recover BAC evidence.”). 83 See generally Mapp v. Ohio, 367 U.S. 643, 649 (1961).
via a search warrant. In the above example, the officer’s reliance on the use of the suspect’s blood test at trial would likely have diminished any incentive to build a successful case beyond merely obtaining the suspect’s blood sample. Because the state only has one opportunity to obtain the suspect’s blood sample, its case against the DUI suspect would be substantially weakened, and the DUI suspect would likely prevail.

C. Issuing Guidance Documents to Police Officers

Florida’s involuntary blood draw statute has been around for several decades, and many criminal defense practitioners likely will not learn of McNeely’s impact on warrantless blood draws until one is successfully challenged. Although Florida’s current involuntary blood draw statute will likely face challenges in the future, it might take a few months or years for the statute’s vulnerability to manifest itself to Florida’s legal community.

However, once the legal community learns of the statute’s vulnerability, many trial lawyers in Florida will challenge nonconsensual, warrantless blood draws on the

84 There are a number of factors that greatly decrease the state’s likelihood of securing a guilty verdict in DUI “death or SBI” cases where a defendant successfully suppresses a blood draw. Because DUI “death or SBI” investigations differ from ordinary DUI investigations in that the arresting officer ordinarily does not get the opportunity to observe the suspect’s driving pattern, the officer ordinarily cannot testify as to the defendant’s driving pattern at trial. Additionally, an officer who, upon finding an accident involving a death or SBI, is sure that he or she will obtain a sample of the DUI suspect’s blood will be less inclined to have the suspect perform routine procedures that are used to indicate the suspect’s level of impairment; e.g., field roadside sobriety tasks; request for a voluntary sample of the suspect’s breath. See generally 11 FLA. PRAC. DUI Handbook § 7, 10, & 11 (2013-14 ed.). The absence of these procedures, which are routinely utilized by officers to gather evidence in ordinary DUI cases, would diminish the state’s ability to build a successful case against a DUI defendant.

85 Section 316.1933, Florida Statutes, was enacted before 1988. See generally Act effective July 1, 1988, ch. 88-5, 1988 Fla. Laws 8E.

86 There has only been one, unsuccessful attack on a warrantless blood draw in Florida since McNeely was issued, but this attack marks the first sign of what is to come if Florida’s involuntary blood draw statute is not constrained. See Order Denying Defendant’s Motion to Suppress, State v. Aguilar, No. F08-23160 (Fla. 11th Cir. Ct. May 16, 2013) (denying a McNeely-based challenge to a warrantless blood draw on the basis that the officer in this case could not reasonably have obtained a timely warrant, making the circumstances exigent).
grounds that their clients’ cases did not present the officers with exigent circumstances. Defense attorneys in the above scenario have little to lose and much to gain by challenging the state’s evidence.\textsuperscript{87} The state, however, does not have the time or resources to combat evidentiary challenges in every DUI case involving death or SBI. The influx of claims could flood courts in Florida, regardless of the validity of those claims. The increase in evidentiary challenges will likely increase the average turnaround time for DUI prosecutions, decreasing the frequency of DUI prosecutions. Surely this decrease is not the effect that Florida legislators had in mind when they enacted the involuntary blood draw statute. Given the potential delay in evidentiary challenges, Florida legislators might not view this potential problem as a top priority. However, there are some non-legislative methods that law enforcement agencies throughout the state can adopt that would diminish the impact of future constitutional challenges.

Law enforcement agencies across the state can issue non-binding guidance documents to their field officers. These purely “executive” tools could enumerate some of the specific factors mentioned in the preceding section. The documents could also demonstrate the importance of seeking warrants in every case; even those where warrants are not required by statute. Thus, the issuance of guidance documents would make nonconsensual, warrantless blood draws obtained pursuant to section 316.1933, \textit{Florida Statutes}, less susceptible to evidentiary challenges, softening the impact of evidentiary challenges that will result if the legislature does not act.

The adoption of non-binding guidance documents might seem like wishful thinking, but there are a number of guidance documents that have helped the

\textsuperscript{87} See supra note 84 and accompanying text.
government avoid similar problems in a proactive manner.\textsuperscript{88} For example, the Civil Rights Division of the United States Department of Justice issued a guidance document to its federal agencies in 2003 to avoid potential issues concerning claims made against agents for racial profiling.\textsuperscript{89} Although this document was not binding on any agency,\textsuperscript{90} it presented an opportunity to decrease the use of race as a basis for law enforcement decision-making. Because the document stressed the importance of race-neutral law enforcement, federal agents were much more cognizant of the serious consequences that could arise from racial profiling. This cognizance likely helped protect minority citizens from racial profiling by federal agents, while also decreasing the number of valid racial profiling claims being litigated. The combined effect was meant to improve the executive branch’s efficiency in enforcing the law.\textsuperscript{91} Florida’s implementation of a guidance document with respect to exigency factors in the DUI context could have a similar impact on law enforcement’s efficiency in combatting DUIs while protecting citizens from unreasonable, warrantless searches.

\textbf{XIII. CONCLUSION}

\textsuperscript{88} See generally Hudson v. Michigan, 547 U.S. 586, 598-99 (2006) (“Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces . . . . There have been wide-ranging reforms in the education, training, and supervision of police officers . . . . Numerous sources are now available to teach officers and their supervisors what is required of them under this Court’s cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline.”) (internal citations and quotations omitted).


\textsuperscript{90} See generally id. (“[This guidance document] is not intended to, and does not, create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any person, nor does it create any right of review in an administrative, judicial or any other proceeding.”).

\textsuperscript{91} See generally id. (“This guidance [document] is intended . . . to improve the internal management of the executive branch.”).
Florida’s involuntary blood draw statute will likely face constitutional challenges in light of *McNeely’s* recent interpretation of exigency in the DUI context. The Florida legislature, however, can eliminate the statute’s vulnerability by narrowing its coverage. If the legislature does not act, then law enforcement agencies can adopt their own guidance documents to inform officers of the potential situations where the current statute falls outside the boundaries of the Constitution. Either approach will help alleviate the potential evidentiary challenges and the influx of litigation that will arise if status quo remains unchanged.