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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

**UNITED STATES OF Al\1ERICA**

**v.**



**Defendant**

**Criminal Case**

**... 0000000...**

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS AND EXCLUDE**

* Tue United States of America, by and through Rod J. Rosenstein, United States Attorney for the District of Maryland, and Jane F. Nathan, Assistant United States Attorney, submits the following Response to Defendant's Motion to Suppress the Results of Chemical Test. ***ARGUMENT***

The defendant alleges that the blood test in the above case should be excluded from trial on the ground that the police did not obtain a search warrant before taking the defendant to the hospital for the blood sample, which was later analyzed by the District of Columbia toxicologist's office. The government acknowledges that no search warrant was obtained for the blood sample. However, "The warrant requirement is subject to exceptions. One well-recognized exception, and the one at issue in this case, applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely,* -- U.S.--, 133 S. Ct. 1552, 1558 (2013) (internal citations,

quotation marks and brackets omitted). In this case, the exigencies made a search warrant

impractical and therefore unnecessary .

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1. *A11y alcohol in the defe11da11t's body was quickly 111etabolizi11g.*

The government expects to present expert evidence from a toxicologist to show that the human body immediately tries to rid itself of ethyl alcohol, because alcohol is a toxin. It is poisonous to humans. When a person drinks alcohol, it is rapidly absorbed into the bloodstream where it can be distributed throughout the body. Most of time, particularly when alcohol is consumed successively over time during social drinking, peak concentration is generally attained within 30 minutes after drinking stops. In such circumstances, peak concentration can even occur before the last drink is finished.

The government expects the toxicologist will testify that the body eliminates alcohol already consumed even as it is absorbing new alcohol. In very general terms, the elimination rate ranges from .01 to .025 percent per hour. The actual elimination and absorption rates depend on the individual's metabolism; the rate of drinking the alcoholic beverages; the rate of eating, if any; and myriad other factors.

The record does not disclose that any such evidence was presented to the trial court in *McNeely.* Although the various opinions did mention the "biological ce1tainly" that alcohol in the human body dissipates, there was nothing before the trial court - or appellate court - to show how quickly such dissipation occurs.

1. *Signijic<mt delay was inevitable under the circumstances.*

The government expects the evidence to show that at about 4:36 a.m. on November 25, 2012, Officer Tomasiello of the United States Park Police saw a dark Nissan speeding on the Baltimore-Washington Parkway. Using his radar, he determined that the car was traveling at 71 miles per hour in a posted 55 mile-per-hour zone. As he caught up to the car, he saw is changing

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lane unsafely, tailgating other cars, and driving in an unsafe manner. The car went into an exit lane, then continued on the highway when the exit lane was replaced by the shoulder. It finally moved left, into the right lane of the roadway. Tomasiello made a traffic stop.

The defendant's movements were slow and lethargic. His speech was so slurred that Tomasiello had trouble understanding him. Tomasiello had him step out of the car for field sobriety tests. A strong odor of an alcoholic beverage emanated from him. His eyes were bloodshot, watery and glassy.

On a horizontal gaze nystagmus test, the defendant displayed all six clues, leading

Tomnsiello to believe he was under the influence of alcohol. On a walk and turn test, defendant demonstrated difficulty with his balance and could not follow the officer's instructions.

Tomasiello then placed the defendant under arrest. When the police searched the defendant's car for the impound, they found a cold half-full can of Yuengling beer on the passenger floorboard.

Tomasiello took the defendant to Prince George's Hospital Center. An emergency room technician took two vials of blood at 5:36 a.m. using a kit provided by the police. The blood was analyzed at the District of Columbia toxicologist's office, and was found to contain a .20% ethyl alcohol level.

1. *No procedures for an oral warrant existed in the District of Mwylwul.*

Technology has changed the procedures for obtaining search or seizure warrants during the past 200 years. Only recently has the possibility of a telephone warrant become practical. It was

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not until 2006 that Fed. Rule Crim. P. 41 established a procedure for recording the oral probable cause testified to by the law enforcement officer and the issuance of a warrant "based on information communicated by telephone or other reliable electronic means."

The government expects testimony to show that neither Officer Tomasiello nor any other member of the United States Park Police knew of a procedure to obtain a search warrant from a magistrate judge in the middle of the night. In fact, testimony will show that the Park Police had never obtained oral search warrants before at any time of day or night. Furthermore, prior to April 17, 2013, the day of the *McNeely* decision, law enforcement officers did not know whether United States magistrate judges even had the capacity to record oral affidavits and issue oral search and seizure warrants.

Unlike the practice in Missouri at the time ofMcNeely's arrest, the procedure for obtaining a search or seizure warrant in Maryland was cumbersome and time-consuming. Law enforcement agents and officers had to contact an assistant United States attorney, prepare a written affidavit, and get the various forms prepared: an application for the warrant, the affidavit, and the actual warrant. Then, they had to show up to swear to the affidavit in the presence of the magistrate judge.

Until April 17, 2013, moreover, there was no reason for a U.S. Park Police officer to expect that procedures for an oral, expedited warrant even existed. In good faith, Officer Tomasiello relied on 36 C.F.R. *§* 4.23, which provided that with appropriate probable cause, "the operator shall submit to one of more tests of the blood, breath, saliva or urine for the purpose of determining blood alcohol and drug content." The regulations contained no distinction among the different

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types of forensic tests. Similarly, 18 U.S.C. *§* 3118 established that on lands within the special maritime and territorial jurisdiction of the United States, a driver "consents thereby to a chemical test or tests of such person's blood, breath, or urine" if arrested upon probable cause. Again, there is no mention of a warrant, and no distinction among the tests. Therefore, police officers were acting reasonably when they expected the tests would prescribe their course of conduct and when they anticipated that breath- and blood-alcohol samples would receive the same treatment under the Constitution.

The reasonableness ofTomasiello belief that an exigency existed, moreover, was echoed by the Chief Justice in *lvfcNeely.* In dissent, Chief Justice Roberts noted, "Here, in fact, there is not simply a belief that any alcohol in the bloodstream will be destroyed; it is a biological ce1iainty." *Id* at 1570. Justice Roberts's opinion explained that it was reasonable for a police officer to believe that such destruction constituted an exigency. Certainly, it is reasonable for a police officer, who lacks the extensive legal background of the chief justice of the United States, to hold the same belief.

In fact, the Supreme Court in its earlier opinions signaled that a blood-alcohol test did not require a search or seizure warrant. In *Pennsylvania v. Muniz,* 496 U.S. 582,593 (1990), Justice Brennan wrote for the plurality opinion, "In *Schmerber,* for example, we held that the police could compel a suspect to provide a blood sample in order to determine the physical makeup of his blood and thereby draw an inference about whether he was intoxicated." Justice Brennan pointedly did not say the police could "obtain a warrant" to compel the blood sample.

The Fourth Circuit made a similar observation in *United States v. Reid,* 929 F2d 990, 993 (4th Cir. 1991) when it held,

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The officer in the present case, however, 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. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking, as the body functions to eliminate it from the system.

The 9th Circuit came to the same conclusion that no warrant was required in *United States*

*v. Snyder,* 852 F.2d 471,473 (9th Cir. 1988), in which it held, "In *Schmerber,* the Supreme Comt recognized that the administration of a blood test incident to a lawful arrest constituted a search, but held that the search could be conducted without a warrant because of the need to act before the level of alcohol in the blood was significantly diminished by metabolic processes." The Sixth Circuit agreed no warrant wns required in *United States v. Beny,* 866 F.2d 887, 890 (6th Cir. 1989), and the First Circuit agreed in *Spencer v. Roche,* 659 F.3d 142, 146, (1st Cir. 2011).

The defendant, apparently, held the same belief. Although the defendant obtained counsel and waived the initial appearance scheduled for March I, 2013, it was not until April 24, 2013, a week after the *McNeely* decision and well past the April 4 , 2013, deadline set by the comt for motions, that the defendant filed a motion to suppress under *McNeely 's* reasoning. *McNeely* apparently surprised the defendant as much as it surprised the Park Police.

In fact, had Officer Tomasiello located a telephone number to call a magistrate judge at 5:30 a.m. that Sunday morning, the government submits that it is likely that the magistrate judge would have advised the officer, based on the cases cited above and precedent in this Coutt, that no warrant was needed. The misunderstanding that such a seizure could be made without a warrant was widely held.

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1. *Excluding the blood test results would serve 110 purpose.*

Evidence will show that the Park Police have acted in good faith concerning the taking of blood samples. The day of the *McNeely* decision, the depmtment worked out procedures with the United States District Court in Maryland to obtain oral search warrants, and the magistrate judges have recorded the oral testimony and issuance of the oral warrants. Excluding the blood test results would not serve the ends of justice.

The Supreme Court has explained that the exclusionary rule is a "prudential doctrine." "Exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Davis v. United States,* 131 S. Ct. 2419, 2426 (2011), (Internal quotation marks and citations omitted.) "The rule's sole purpose... is to deter future Fomth Amendment violations." *Id.* "Where suppression fails to yield appreciable deterrence, exclusion is clearly ... unwarranted." *Id.* at 2426-27. (Citing *United States v. Janis,* 428 U.S. 433,454, n. 29 (1976). (Internal quotation marks omitted).

***CONCLUSION***

For the reasons cited above, this Honorable Court should deny the defendant's Motion to Suppress Evidence.

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Respectfully submitted, Rod J. Rosenstein

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