# IN THE UNITED STATES DISTRICT COURT FOR MARYLAND UNITED STATES OF AMERICA :

**-vs- : Case No. XXXXXXX**

**XXXXXXXXXX :**

**Defendant :**

**DEFENDANT’S MEMORANDUM RE: *MISSOURI V. MCNEELY***

The Court requested memoranda from both parties on the retroactivity of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). The Government wisely did not argue that *McNeely* is not retroactive, as *McNeely* did not announce a “new rule” of criminal procedure or a “clear break” with precedent. Even if it did, it would apply to all cases pending and on direct review at the time it was decided.1 Instead the Government argues that the exclusionary rule does not apply, and should not apply to *any* of the cases pending in this Court at the time that *McNeely* was decided. However, also conspicuously absent from the Government’s memorandum is any discussion of the specific situations where the Supreme Court has found that use of the exclusionary rule is inappropriate, including binding precedent which is later overruled, and for good reason, since as will be shown below none of those circumstances apply here. The Government’s effort here to expand the existing limits of the exclusionary rule is not justified by the Supreme Court’s cases or the facts here. Rather the exclusionary rule still presumptively applies, since police engaged in a pervasive practice of warrantless blood draws in DUI cases in this jurisdiction, as opposed to an isolated act of negligence. Moreover, the Government’s policy changes after *McNeely* to seek warrants before drawing blood in DUI cases show that deterrence works.2 For these reasons, as is discussed in greater depth below, this Court is required to hold that each case should be decided on its own facts

1 *See United States v. Johnson*, 457 U.S. 537, 561, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); *Griffith v.*

*Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L. Ed. 2d 649 (1987).

2 It also shows the illusory nature of any perceived exigency.

under the totality of the circumstances for the Government to shoulder its burden of proving, if it can, that exigent circumstances allowed police to dispense with even attempting to obtain a warrant before drawing blood in DUI cases.

# *McNeely* applies to cases pending or on direct review at the time it was decided

In *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court held that the Fourth Amendment permitted police to extract blood from a drunk driving suspect without a warrant, where during a motor vehicle homicide investigation, under the totality of the circumstances, the police were unable to easily and quickly obtain a search warrant before losing dissipating blood alcohol evidence. The Court permitted the withdrawal based on the existence of probable cause, exigent circumstance of dissipating blood alcohol evidence, the difficulty of timely obtaining a warrant, the reasonableness of the test and reasonable manner under which the blood was withdrawn. However, the Court carefully limited its decision and cautioned:

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today told that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.3

In the over forty years since *Schmerber* was decided, communications technology has vastly improved, allowing oral warrants, telephonic warrants, fax warrants, e-mail warrants, and other innovations. There were, prior to *McNeely*, a number of decisions and articles concluding that diminution of alcohol in the blood constitutes insufficient exigent circumstances to allow police to obtain blood without consent and without a warrant, in light

3 *Schmerber,* 384 U.S. at 772, 86 S.Ct. at 1833, 16 L.Ed.2d at 920.

of the current ability of an officer to obtain a telephonic warrant.4 Additionally, police practices in the vast majority of jurisdictions where blood was routinely drawn in DUI cases, required officers to first attempt to obtain a search warrant before obtaining a blood sample.5

4 *State v. Rodriguez,* 156 P.3d 771, 782 (Utah 2007) (“per se exigent circumstance status” denied for warrantless blood draws, but warrantless blood test valid based on the totality of the circumstances); *Spencer v. City of Bay City*, 292 F. Supp. 2d 932, 946-47 (E.D. Mich. 2003)(denying defendant’s motion for summary judgment in a § 1983 action based on an illegal breath test because “exigent circumstances do not automatically exist that justify the failure to obtain a search warrant”); *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998)(where implied consent statute allows suspect to choose blood, breath or urine test, nonconsensual warrantless blood test violates the Fourth Amendment); *see* John Henry Hingson III, *Telephonic And Electronic Search Warrants: A Fine Tonic For An Ailing Fourth Amendment*, THE CHAMPION, September/October 2005 at 38; E. John Wherry, Jr., *Vampire or Dinosaur: A Time to Revisit Schmerber v. California?,* 19 AM. J. TRIAL ADVOC. 503, 516 (1996). B*ut see State v. Shriner,* 751 N.W.2d 538 (Minn. 2008) (holding that the “rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation.”); *State v. Woolery,* 775 P.2d 1210 (Id. 1989); *State v. Bohling,* 494 N.W.2d 399, 400 (1993) (“[T]he dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw”).

1. Alabama: Britton v. State, 631 So. 2d 1073 (Ala. Crim. App. 1993); A. R. Crim. P. 16.2(b)(6); Arizona: Ariz. Rev. Stat. Ann. §§ 13-3915 (D), (E), 28-1321, 28-1388; Georgia: Ga. Code Ann. § 40-5-67.1 (d.1); Rhonda Cook, DUI Test Refusals Prompt Blood Warrant, ATLANTA J.-CONST. (Dec. 23, 2011), <http://www.ajc.com/news/news/local/dui-test-refusalsprompt-blood-warrants/nQPnJ/> (last visited Dec. 14, 2012); Illinois: DuPage County Rolls Out ‘No Refusal’ Weekend Over Labor Day, NAPERVILLE PATCH (Aug. 31, 2011), <http://naperville.patch.com/articles/dupagecounty-rolls-out-no-refusal-weekend-over-labor-> day-2 (last visited Dec. 14, 2012); Iowa: Iowa Code §§ 321J.10, 321J.10A(1)(c); State v. Harris, 763 N.W.2d 269 (Iowa 2009); State v. Johnson, 744 N.W.2d 340 (Iowa 2008) Kansas: Kan. Stat. Ann. § 8-1001 (p), (t); George Diepenbrock, With iPads, Judges In Touch Any Time, Any Place, LAWRENCE J WORLD (Feb. 5, 2012), <http://www2.ljworld.com/news/2012/feb/05/ipadsjudges-touch-any-time-any-place/>(last visited Dec. 14, 2012); Gregory T. Benefiel, DUI Search Warrants: Prosecuting DUI Refusals, THE KANSAS PROSECUTOR, Vol. 9, No. 1 (Spring 2012), available at <http://www.kcdaa.org/Resources/Documents/KSProsecutor-> Spring12.pdf Louisiana: Mike Steele & Heather Harel, State Police Say “No Refusal” Weekend Has Been Successful, WBRZ.COM (Sept. 6, 2010), <http://www.wbrz.com/news/no-refusal-weekend/> (last visited Dec. 14, 2012); Raymond Legendre & Houma Courier, No Refusal Weekend For Those Suspected Of DWI Has Critics, Supporters, WWLTV.COM EYEWITNESS NEWS (Sept. 10, 2010),<http://www.wwltv.com/news/local/No-Refusalweekend-for-those-suspected-of-DWI-case-criticssupporters-> 102228604.html (last visited Dec. 14, 2012) Michigan: Mich. Comp. Laws § 780.651; State v. Snyder, 449 N.W.2d 703 (Mich. Ct. App. 1989); Mississippi: McDuff v. State, 763 So.2d 850 (Miss. 2000); Missouri: State

v. McNeely, 358 S.W.3d 65, 68 (Mo. 2012); Dana Fields, Mo. Supreme Court Rejects Warrantless DWI Blood

Test, ASSOCIATED PRESS, Jan. 18, 2012, available at 1/18/12 AP Alert - MO (Westlaw); Montana: Mont. Code Ann. § 61-8-402; Gwen Florio, Judges Happily Lose Sleep Over Montana's New DUI Blood-draw Law, THE MISSOULIAN (Dec. 18, 2011), <http://missoulian.com/news/local/judgeshappily-lose-sleep-over-montana-> s-new-duiblood/article\_2bbe48e0-2922-11e1-917d-001871e3ce6c.html (last visited Dec. 14, 2012); New Mexico: N.M. Stat. Ann. § 66-8-111; State v. Hughey, 163 P.3d 470 (N.M. 2007); State v. Silago, 119 P.3d 181 (N.M. Ct. App. 2005); State v. Montoya, 114 P.3d 393 (N.M. Ct. App. 2005); State v. Duquette, 994 P.2d 776 (N.M. Ct. App. 1999) North Carolina: N.C. Gen. Stat. Ann. § 20-139.1(b5); Nat’l Highway Safety Transp. Admin., Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina, DOT HS 811461 (Apr. 2011), available at [www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf;](http://www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf%3B) Ohio: Ohio Rev. Code Ann., § 4511.19(D)(1)(b); Mary Beth Quirk, Ohio Cops Implementing “No-Refusal” DUI Weekend With Blood-Draw Warrants, THE CONSUMERIST (Feb. 3, 2012), <http://consumerist.com/2012/02/03/ohio-copsimplementing-> no-refusal-dui-weekend-with-blooddraw-warrants/ (last visited Dec. 14, 2012); Jennifer Feehan & Erica Blake, Refusing DUI Test Not Option - Wood Co. Authorities Seek Blood Draws If Drivers Object, THE TOLEDO BLADE (Feb. 2, 2012), <http://www.toledoblade.com/Police-Fire/2012/02/02/Refusing-DUI-test-not-option.html> (last visited Dec. 14, 2012); Oregon: Or. Rev. Stat. 813.320(2)(b); Nat’l Highway Traffic Safety Admin., Use of Warrants For Breath Test Refusals: Case Studies, DOT HS 810 852 (Oct. 2007), available at [http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810852.pdf;](http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810852.pdf%3B)

In *Missouri v. McNeely*, after a police officer arrested McNeely for DUI, and after McNeely refused to submit to an alcohol breath test, the officer transported him to a hospital for a blood test without first attempting to get a warrant. The trial court granted McNeely's motion to suppress and the Missouri Supreme Court affirmed. Missouri argued in the Supreme Court for an expansion of the rule of *Schmerber v*. *California*, that in DUI cases exigent circumstances *always* exist, such that a warrant is *never* required before obtaining a nonconsensual blood test. The Supreme Court rejected this argument and stated:

In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. *See McDonald v. United States*, 335 U. S. 451, 456 (1948) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative").

In reaffirming *Schmerber*, a five member majority of the Court held again that the totality of the circumstances governed whether the state would be able to show in a given case that exigent circumstances existed that would make it possible to the officers to legally obtain a blood sample without first getting a warrant. Three concurring and dissenting justices agreed that a warrant is required before obtaining a blood sample if one could be obtained before blood was drawn, with no delay. Only one justice dissented from the holding and opined that a warrant should never be required in DUI case.

Tennessee: Tenn. Code Ann., § 55-10-406(a)(4)(A); New DUI Law Leads To 8 Warrants For Blood Tests, ASSOCIATED PRESS, July 10, 2012, available at 7/10/12 AP Alert – TN 19:11:38 (Westlaw); Kevin McKenzie, ‘No Refusal’ Labor Day Weekend To Combat DUI In Shelby, Tipton Counties, THE COMMERCIAL APPEAL (Aug. 31, 2012), [www.commercialappeal.com/news/2012/aug/31/norefusal-labor-](http://www.commercialappeal.com/news/2012/aug/31/norefusal-labor-) day-weekend-to-combat-dui-in/ (last visited Dec. 14, 2012) Texas: Tex. Transp. Code Ann. § 724.011 et seq.; Beeman v. State, 86 S.W.3d 613 (Tex. Crim. App. 2002); Nathan Koppel, Texas Blood Test Aims At Drunk Drivers, WALL STREET JOURNAL (Dec. 11, 2011), available at <http://online.wsj.com/article/SB100014240529702043>97704577070700748380114.html; Utah: Jason Bergreen, Utah Cops Praise Electronic Warrant System, SALT LAKE TRIBUNE (Dec. 26, 2008), <http://www.policeone.com/policeproducts/communications/articles/1769302-Utahcops-praise-electronic-> warrant-system (last visited Dec. 14, 2012); Vermont: Vt. Stat. Ann. Tit. 23, § 1202 (f); Washington: Wash. Rev. Code § 46.20.308(1); City Of Seattle v. St. John, 215 P.3d 194 (2009); New Washington Law For DUI Blood Draw, ASSOCIATED PRESS, Aug. 14, 2012, available at 8/14/12 AP Alert - WA 17:58:38 (Westlaw); Wyoming: Wyo. Stat. Ann. § 31-6-102.

*McNeely* did not effect a change in law or make a “clear break” with *Schmerber*. Even if it did, “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L. Ed. 2d 649 (1987); *United States v.*

*Johnson*, 457 U.S. 537, 561, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). Therefore, *McNeely*

applies to the instant case.

# The Government has failed to show why the exclusionary rule should not apply in this case

The exclusionary rule applies in most cases involving Fourth Amendment violations, with a few carefully delineated exceptions. The Government’s memo conspicuously fails to mention the closest exception, perhaps because it falls short of the mark: objectively reasonable reliance on binding precedent that is subsequently overruled, although it does cite the case where the exception was recognized. *See Davis v. United States*, 131 S.Ct. 2419, 2426 (2011). Undaunted, the Government relies on the general language of the exclusionary rule cases stripped from their limited holdings and cites cases that have no applicability at all, and urges novel theories unsupported by any case to limit the exclusionary rule, such as the presence of probable cause alone, and the lowest common justice theory, where the vote of only one justice is required to absolve the Government of consequences for illegal police conduct. To the contrary, the practice of the U.S. Park Police to obtain blood without a warrant in at least all refusal cases, in the absence of binding precedent allowing it to do so and the subsequent change of practice by the U.S. Park Police to conform with *McNeely* illustrate why deterrence is needed and is effective here. For these reasons, this Court should reject the Government’s argument and instead require proof by the Government of exigent circumstances to justify dispensing with any attempt to obtain a warrant before drawing the defendant’s blood. If the Government’s proof fails, the defendant’s motion to suppress the

blood test results should be granted. If the Court, nonetheless holds the Government may attempt to prove objectively reasonable reliance by the officer on something that would limit the exclusionary sanction, then the Government must prove that as well, since warrantless searches are presumptively unreasonable. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The most recent pronouncement of the Supreme Court on applicability of the exclusionary rule to Fourth Amendment violations and most relevant to the instant case is *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011)*.* In that case the Court discussed the purpose of the exclusionary rule, to deter illegal police conduct. The Court stated that:

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion “var[y] with the culpability of the law enforcement conduct” at issue. *Herring*, 555 U.S., at 143, 129 S.Ct. 695. When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Id.*, at 144, 129 S.Ct. 695. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, *Leon*, supra, at 909, 104 S.Ct. 3405 (internal quotation marks omitted), or when their conduct involves only simple, “isolated” negligence, *Herring*, supra, at 137, 129 S.Ct. 695, the “ ‘deterrence rationale loses much of its force,’ ” and exclusion cannot “pay its way.” *See Leon*, *supra*, at 919, 908, n. 6, 104 S.Ct. 3405 (*quoting United States v. Peltier*, 422 U.S. 531, 539, 95

S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

However, this statement should not be read apart from its application to factual circumstances where the Court actually held that exclusionary rule should not be applied. They are extremely limited. The Court noted that in previous cases it had found the exclusionary rule should not be applied where there was objectively reasonable reliance by police: on a warrant later held invalid, *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 3411–3412, 82 L.Ed.2d 677 (1984); on a statute later held unconstitutional, *Illinois v. Krull*, 480 U.S. 340, 348, 107 S.Ct. 1160, 1166, 94 L.Ed.2d 364 (1987); on a judicial database, *Arizona v.*

*Evans,* 514 U.S. 1, 13, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995); or on an isolated police

recordkeeping error, *Herring v. United States,* 555 U.S. 135, 137, 129 S.Ct. 695, 172 L.Ed.2d

496 (2009).

In *Davis*, police conducted a search incident to arrest ultimately found to have been invalid under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). *Gant*

clarified the holding of *New York v. Belton*, 453 U.S. 454, 458–459, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), limiting vehicle searches incident to arrest of a vehicle driver to a search conducted before the driver is removed from the car or for which probable cause exists to find evidence of the crime for which the driver is arrested. However, at the time of the search in *Davis*, the search complied with a binding precedent in the Eleventh Circuit, *United States*

*v. Gonzalez,* 71 F.3d 819, 822, 824–827 (C.A.11 1996), which interpreted *New York v. Belton* to allow a vehicle search incident to arrest even when the defendant was no longer present in the car. The Supreme Court held that the exclusionary rule does not apply where the police act in objectively reasonable reliance on binding precedent that is later overruled.

The Court was careful to limit its exception to situations where the officer relied on “binding precedent” noting that such cases would be extremely rare and would likely be limited to state supreme court decisions and circuit court opinions. The two member dissent criticized the ruling, noting among other things that where the issue remained undecided police would have no incentive to comply with the Fourth Amendment and that litigants would have no incentive to litigate Fourth Amendment issues. Justice Sotomayor’s concurring opinion, responding to the dissent’s criticism, explained why the ruling applied to binding precedent only and did not extend to open issues.

This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled. As we previously recognized in deciding whether to apply a Fourth Amendment holding retroactively, when police decide to conduct a search or seizure in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations:

“If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question.” *United States v. Johnson,* 457 U.S. 537, 561, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (footnote omitted).

The Court of Appeals recognized as much in limiting its application of the good-faith exception it articulated in this case to situations where its “precedent on a given point [is] unequivocal.” 598 F.3d 1259, 1266 (CA11 2010); see *id.,* at 1266–1267 (“[W]e do not mean to encourage police to adopt a ‘ “let's-wait-until-it's-decided approach” ’ to ‘unsettled’ questions of Fourth Amendment law” (quoting *Johnson,* 457 U.S., at 561, 102 S.Ct. 2579)).

*Davis*, 131 S.Ct. at 2435 (Sotomayor, J., concurring). The Supreme Court has yet to approve a limitation of the exclusionary rule to cases where the interpretation of the law is in doubt, and in light of the limitations acknowledged by the *Davis* Court and the reasons cited by Justice Sotomayor, it appears unlikely to do so.

If the Supreme Court was inclined to extend the *Davis* rule to cases where the law was unsettled, it could have mentioned it in *McNeely* itself. The officer who arrested McNeely believed that a warrant was not required. It was arguably an open question in Missouri at the time of McNeely’s arrest. Yet the Missouri Supreme Court affirmed the trial court’s order of suppression, followed by the United States Supreme Court. None of the justices even mentioned the possibility that the exclusionary rule did not apply, or that an argument regarding application of the exclusionary rule should have been raised by Missouri and was waived.

In this case, there was no binding precedent in the Fourth Circuit on which police could rely to justify warrantless nonconsensual seizure of blood in DUI cases. When the Supreme Court accepted certiorari in *McNeely*, it was aware of a split among some courts. It cited three states that had held a warrant would normally be required, *State v. McNeely*, 358

S.W.3d 65 (Mo. 2012); *State v. Johnson,* 744 N.W.2d 340 (Iowa 2008), *State v. Rodriguez,* 2007 Ut. 15, 156 P.3d 771 (2007), and three states holding the other way. *State v. Shriner,* 751 N.W.2d 538 (Minn. 2008), *State v. Bohling,* 173 Wis.2d 529, 494 N.W.2d 399

(1993); *State v. Woolery,* 116 Idaho 368, 775 P.2d 1210 (1989). *Shriner*, *Bohling*, and *Woolery*, all overruled by *McNeely*, were not binding as to United States Park Police. Neither were the cases cited in the Government’s memo binding as to the police here. *See United States v. Chapel,* 55 F.3d 1416, 1418-19 (9th Cir. 1995); *United States v. Snyder*, 852 F.2d

471, 473 (9th Cir. 1988); *United States v. Berry,* 866 F.2d 887, 890 (6th Cir. 1989); *Spencer*

*v. Roche*, 659 F.3d 142, 146, (1st Cir. 2011); *Dale v. State*, 209 P.3d 1038, 1040, 1040

(Alaska 2009).

The other cases the Government cites are completely inapposite. In *United States v. Johnson*, 410 F.3d 137, 149 (4th Cir. 2005), the court noted that there is no exclusionary rule for violations of the Posse Comitatus Act and that widespread violations would need to be shown. *Martinez Carcamo v. Holder,* – F.3d –*,* 201 WL 1688861 (8th Cir. 2013) was an immigration (civil) proceeding, where the exclusionary rule does not apply in the absence of widespread or egregious violations. *United States v. Lee Vang Lor,* 706 F.3d 1252, 1257 (10th Cir. 2013) was a habeas proceeding involving newly discovered evidence. *United States v. Reid,* 929 F2d 990, 993 (4th Cir. 1991) held that a warrant is not required before requiring a DUI suspect to submit to a breath test.

Even under the cases cited, the Government argument here falls short. What is important to note is that the practice of taking blood without a warrant *was widespread* in this jurisdiction. It was not a rare negligent act. It was done in *all* blood cases. And it was done in disregard of the express limitation contained in the *Schmerber* opinion, and of the practices, sanctioned by the National Highway Traffic Safety Administration, and followed by the vast majority of jurisdictions that obtained blood after first getting a warrant as cited

above.6 Despite this widespread practice, the U.S. Park Police persisted in continuing to obtain warrantless blood samples in DUI cases until the day the opinion in *McNeely* was announced.

The Government here argues that the officer made an innocent mistake in his interpretation of the law. As noted above, so did the officer in *McNeely.* And the officer in *McNeely* was much more of a lone wolf than the officer in this case, who was following a widespread policy by United States Park Police that had been in place for years. The Government would like this Court to assume that the officer’s belief in the legality of a warrantless blood draw was objectively reasonable without first having the officer testify as to what exactly his or her belief was. This Court has no idea what the officer thought without first hearing testimony and cannot determine if that belief was objectively reasonable. However, it matters little, since the Government cannot show the object of the objectively reasonable belief is something approved by the Supreme Court.

The Government also argues that if the dissenting justices thought a *per se* exigency existed in all DUI cases that the officer’s belief to the same effect must have been objectively reasonable. To be clear, only one justice, Justice Thomas, wrote that a warrant should *never* be required. Justices Roberts, Alito, and Breyer, concurring and dissenting, agreed that if a warrant could be obtained with no delay on the way to the hospital that a warrant must be obtained. Under the Government’s novel theory, the least common justice theory, it requires only one vote for the Government to effectively win a Fourth Amendment case in the Supreme Court in cases pending or on direct review at the time of the decision.

1. As noted in footnote 2, 21 jurisdictions had procedures or laws in place requiring warrants before obtaining blood alcohol tests in most DUI cases prior to *McNeely*. NHTSA had warrant kits available to conduct “refusal weekends” where warrants would be obtained before obtaining blood. *See* NHTSA, NO REFUSAL, <http://www.nhtsa.gov/no-refusal>(last visited Jun. 14, 2013): NHTSA, DOT HS 810 852, USE OF WARRANTS FOR BREATH TEST REFUSAL: CASE STUDIES (2007). It appears that only California, Nevada, Idaho, and South Dakota, and this jurisdiction persisted in routinely obtaining warrantless blood draws.

For the reasons related in Justice Sotomayor’s concurring opinion in *Davis*, in the absence of objectively reasonable reliance on binding precedent which was overruled, even assuming the need for a warrant in this case was an open question, the cases pending before this Court are not appropriate for an exception to the exclusionary rule.

# CONCLUSION

For the reasons stated, this Court should grant the motion to suppress or alternatively, hold a hearing for the Government to prove why it was not required to get a warrant in this case before it obtained a blood sample.

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# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Suppress Search and Seizure was filed electronically this 24th day of June, 2013 to the Office of the United States Attorney, Greenbelt, Maryland, 20770.

LEONARD R. STAMM