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NCDD Journal

National College for DUI Defense

Editor:Paul Burglin

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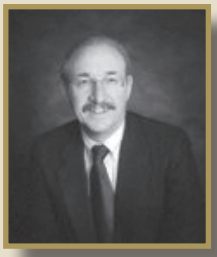
Welcome NCDD Members

SUMMER SESSION 2014

Harvard Law School
Cambridge, MA

United We Stand!

Dean's Message



Serving as your Dean, and as a Regent of the College has been one of the great privileges of my professional career. For the past 11 years, the College has been a focal point for me, my wife and the other lawyers in our firm. The opportunity to meet and learn from advocates from all over the country has changed our practice, as well as our perspective in regard to DUI defense. Personally, the College has broadened my view of life as well as the law.

DUI defense is one of the toughest and most challenging areas of the law. Our membership includes many of the best, brightest and most dedicated lawyers that this country has ever produced. In addition to receiving an outstanding education, I have been inspired by both the courage and the brilliance of the men and women who attend and teach at our programs.

While this July marks the end of my service as a Regent of the College, it begins my tenure as a Fellow of the NCDD. The College is designed so that we all continue to serve. As a Board member, I greatly appreciated the contributions that the Fellows made in active service on committees, as well as attending Board meetings, and providing the benefit of their years of experience and perspective. In becoming a Fellow, I am honored to join a group of lawyers who not only created the College, but have remained steadfast in their loyalty and dedication to this institution. Over the approximately 20 years of its existence, the NCDD has faced many challenges. Those challenges have been met by lawyers who carved out the time from busy practices and family obligations to come together and deal with these issues as they arose.

We are a very diverse and varied group geographically and culturally. We see things differently. That is our great strength because we make each other think and re-examine what we do and how we do it. The conversations on the patio at the Charles have been some of the most enjoyable and enlightening of my career. I have been introduced to Southern manners, and Texas advocacy. I've learned a great deal from lawyers who try cases under very adverse conditions. We have all benefitted from a diversity of approaches, tactics and techniques. From California to New Hampshire, our members have contributed their knowledge and acumen derived from battles won and lost in courtrooms across this country.

We are all better lawyers for having come together in this College in the common pursuit of enhanced advocacy on behalf of our accused clients. It is that common effort to achieve, and to help our fellow advocates strive for excellence that ennobles us and honors this institution, our National College for DUI Defense.

--- Peter Gerstenzang

E.D.'s Corner

I hope you have been enjoying the Daily DUI News that is sent to you each day via email from Vertical Response. The address comes from NCDD@mail.vresp.com. Please watch for it because it might be going into your "Junk File." Hunter Shepherd, NCDD Administrative Assistant, compiles new cases everyday so that you can keep up to date on the latest cases in the news. We also post other announcements so that you can easily find dates for our upcoming seminars and the registration forms for signing up! I will also occasionally send email messages to the entire membership through this vehicle. It has become difficult to send multiple emails out to everyone all at once because Yahoo and Google see email blasts as spam. So watch for NCDD@mail.vresp.com in your inbox each day!

We are looking forward to our upcoming seminars: Summer Session is here and just around the corner will be Las Vegas (September 11-13) followed by our 2015 Winter Session (January 22-23) at the Yacht and Beach Resort at Disney World! Orlando is a great place to be in January! Applications for Board Certification are due August 31, 2014, with the examination being administered on January 21 in Orlando. If you have any questions, please feel free to contact Board Certification Chairman Mike Hawkins, or myself for more information.

Don't forget to use the new NCDD website as a great tool to enhance your practice. You can login and add or change your own photo, bio and contact information. We have a great Library and Brief Bank as well as announcements for seminars and contact information for all of our members. Do you have a client that needs help in another state? Click on the "Find an Attorney" map and you will see every member in his or her respective states.

If you could not make the Summer Session in Cambridge this year, I look forward to seeing you at one of our other NCDD seminars soon!

---Rhea

McNeely Reverberations

Missouri v. McNeely has spawned a number of issues with a divergence of legal opinions from around the country. To get a sense of how different jurisdictions are dealing *McNeely* issues, the *Journal* reached out to several of our colleagues from around the country and asked them to provide feedback on some or all of the following questions:

1. Has your State invoked the "good faith" exception to the exclusionary rule for cases pending at the time McNeely was published?

2. Is consent presumed by virtue of your state's implied consent law unless it is expressly withdrawn? Or are your courts simply determining "lawful consent" under the "totality of the circumstances?"

3. Must the blood drawn be done by a nurse or physician, and/or in a hospital setting, for the procedure to be deemed medically reasonable under the Fourth Amendment?

4. Have you seen breath or urine results suppressed for lack of a warrant or lawful consent?

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5. Have you seen any decisions finding that the taking of blood was lawful as a search incident to arrest?

6. Have you seen any decisions finding exigent circumstances for excusing a warrant?

7. Has any legislation or regulations been adopted that set forth per se exceptions to the warrant requirement? (e.g., no warrant needed for blood draw if accident and probable cause to believe DUI/DWI).

California – Paul Burglin

Our trial courts have almost uniformly applied the *Davis* "objective good faith" exception to warrantless blood draws performed prior to the *McNeely* decision. The reasoning is based on several appellate court decisions that misinterpreted *Schmerber* as authorizing warrantless blood draws whenever the police had probable cause to arrest an individual on suspicion of DUI.

A couple of unpublished Superior Court Appellate Department decisions out of Santa Barbara (handled by NCDD member Darryl Genis) excluded breath-alcohol tests where the defendants were not fully admonished of the Implied Consent law (including the consequences of refusing) but were simply told they were "required to submit to breath or blood testing." These are based on the lack of lawful consent and non-compliance with the statutory mandate that suspects be advised of the consequences of refusal (so they understand refusal is an option).

People v. Harris, 2014 WL 1512444 (Riverside Superior Court Appellate Department – Case No. APP1300100) is a published decision holding that voluntary consent under the Fourth Amendment exists by virtue of the State's Implied Consent law, unless such consent is expressly withdrawn. Though Superior Court Appellate Department opinions are non-binding in California, many trial courts are relying upon *Harris* as persuasive precedent, particularly since the California Supreme denied requests for depublication of the opinion (Docket No. S218034). The *Harris* Court did condition the finding of consent on compliance with the Implied Consent law, and that law in California mandates a full reading of the consequences of refusing. It is, however, unclear from *Harris* whether the statute was actually complied with to this extent.

People v. Cuevas, 218 Cal.App.4th 1278, 160 Cal.Rptr.3d 773 (2013), holds that blood draws may be done in non-hospital settings without a doctor or nurse present, so long as they are done in an otherwise medically reasonable manner by one properly trained to draw blood.

There has not yet been any legislation introduced establishing *per se* circumstances that excuse the warrant requirement based on exigent circumstances.

Arizona – Joseph St. Louis

Some of our trial courts have reportedly invoked the "objective good-faith" exception but we have no published decisions on it.

We are getting inconsistent rulings by our trial courts as to whether our "implied consent" statute constitutes Fourth Amendment consent, but our State Supreme Court held the following in *State v. Butler*, 232 Ariz. 84, ¶ 17, 302 P.3d 609, 613 (2013) (*citing Carrillo v. Houser,* 224 Ariz. 463, 232 P.3d 1245 (2010) A.R.S.§ 28–1321):

"The State unconvincingly argues that the "consent" in § 28–1321(A) either constitutes an exception to the warrant requirement or satisfies the Fourth Amendment's requirement that consent be voluntary. We explained previously that `[t]he 'consent' by motorists referenced in subsection (A) does not always authorize warrantless testing of arrestees.' Rather, the officer is directed to ask the arrestee to submit to the test, and the arrestee may then refuse by declining to expressly agree to take the test. If the arrestee refuses, the statute specifies that a warrant is required to administer the test and the arrestee shall have his license suspended."

Blood is routinely drawn in the back of police cars by officers with just five days of classroom training. Our Appellate courts have charged the trial courts with conducting "the fact intensive analysis [that] *Schmerber* requires." *State v. Flannigan*, 194 Ariz. 150, 154 978 P.2d 127 (App. 1998). The Arizona Court of Appeals examined the increased risk associated with field blood draws in *State v. Noceo*, 223 Ariz. 222, 221 P.3d 1036 (App. 2009). Relying heavily on *Schmerber*, the *Noceo* Court held the admissibility of a blood draw should be a case by case analysis and reasonableness hinges on the means and procedures of the particular defendant's situation rather than a specific department's procedures as a whole. *Id.* at ¶13.

We have not seen any breath or urine results suppressed for lack of a warrant or lawful consent.

We have not seen any decision holding that a blood sample may be taken without a warrant based on the "search incident to arrest" exception.

As for legislation attempting to establish per se exigent circumstances, we have the following:

"A person who operates a motor vehicle within this state gives consent to a test or tests of the person's blood, breath, urine or other bodily substance for the purposes of determining alcohol concentration or drug content if the person is involved in a traffic accident resulting in death or serious physical injury as defined in § 13-105 and a law enforcement officer has probable cause to believe that the person caused the accident or the person is issued a citation for a violation of any provision of this article, article 2, 3 or 5 through 15 of this chapter or chapter 4 of this title.

Arizona Laws § 28-673. The viability of this statute after *McNeely* remains to be seen.

New York – Eric Sills

Though it was *dicta*, *People v. Heidgen*, 22 N.Y.3d 259, 980 N.Y.S.2d 320 (2013), indicates that New York's implied consent law creates a statutory presumption of consent to chemical testing. See also, *People v. Washington*, ___ N.Y.3d ___, ___ N.Y.S.2d ___, 2014 WL 1767700 (2014)("operators of motor vehicles in New York are deemed to have issued consent to chemical testing under Vehicle & Traffic Law § 1194(2)(a)."

VTL § 1194 sets forth who can withdraw the defendant's blood. VTL § 1194(4)(a)(1) provides as follows:

"4. Testing procedures. (a) Persons authorized to withdraw blood; immunity; testimony. (1) At the request of a police officer, the following persons may withdraw blood for the purpose of determining the alcoholic or drug content therein: (i) a physician, a registered professional nurse, a registered physician assistant, a certified nurse practitioner, or an advanced emergency medical technician as certified by the department of health; or (ii) under the supervision and at the direction of a physician, registered physician assistant or certified nurse practitioner acting within his or her lawful scope of practice, or upon the express consent of the person eighteen years of age or older from whom such blood is to be withdrawn: a clinical laboratory technician or clinical laboratory technologist licensed pursuant to [Education Law Article 165]; a phlebotomist; or a medical laboratory technician or medical technologist employed by a clinical laboratory approved under [Public Health Law Title 5, Article 5]. This limitation shall not apply to the taking of a urine, saliva or breath specimen."

The blood does not have to be withdrawn in a hospital setting, and no cases address the issue of whether the withdrawal was medically reasonable under the 4th Amendment.

A blood test was suppressed for lack of lawful consent in *People v. Skardinski*, 24 A.D.3d 1207, 807 N.Y.S.2d 232 (4th Dep't 2005), but that was because there was no showing she was under lawful arrest and the implied consent law was not triggered.

Alaska – Fred Slone

McNeely has not yet been addressed by any appellate courts in Alaska. I have had several breath test suppression motions denied by trial courts, but none of them have reached the "good faith" exception. Rather, the trial courts have justified the warrantless breath tests based on "search incident to arrest" theory.

We have pre-*McNeely* appellate decisions holding that breath testing is justified if there's a lawful arrest under the "search incident to arrest" exception. See, e.g., *Wing v. State*, 268 P.3d 1105, 1110 (Alaska App. 2012), citing *Svedlund v. Anchorage*, 371 P.2d 378 (Alaska App. 1983). There have not been many rulings related to blood tests, primarily because police are statutorily precluded from taking blood if there is a refusal of breath testing, except if there's an accident involving injuries or death. However, *Russell v. Municipality of Anchorage*, 706 P.2d 687 (Alaska App. 1985), indicates that a blood test conducted after defendant requested an independent test is a valid search incident to arrest. Therefore, the court did not answer the question whether there was a valid consent to a blood draw.

We have a regulation stating that "the blood sample must be collected by a physician, nurse, laboratory technician, or other qualified person."

In *Blank v. State*, 142 P.3d 1210 (Alaska App. 2006), following remand from the Supreme Court's decision in *Blank v. State*, 90 P.3d 156 (Alaska 2004]), the appellate court noted the trial court had found exigent circumstances for the breath test, but the determination of exigent circumstances was not a point on appeal and was not otherwise addressed by the appellate court.

Florida – Thomas Hudson

Florida is an unusual jurisdiction with regard to search warrants in DUI cases. Florida's procedure regarding search warrants is controlled by statute, and § 933.02 states that in a misdemeanor case, the State is able to obtain a search warrant only to seek stolen property or property which has been "used as a means to commit any crime." Blood is not "property" which is "used as a means of committing" DUI. *State v. Geiss*, 70 So.3d 642 (Fla. App., 2011). Instead, it is mere evidence of a crime.

Only in felony cases may a search warrant be issued for "mere evidence" of a crime, and because these cases are rare the police are not comfortable with the procedure and usually don't even think to even seek a warrant. Thus, litigation relating to McNeely has been seriously curtailed.

Florida's system for blood draws holds that when a death or serious bodily injury occurs and there is probable cause to believe that the responsible party is under the influence, "a law enforcement officer shall require the person driving or in actual physical control of at the motor vehicle to submit to a test of the person's blood." Florida Statutes 316.1933. In other words, implied consent does not extend to blood draws unless there is a serious bodily injury or the defendant appears for treatment at a medical facility and a breath or urine test is impractical or impossible. While consent can justify a blood draw in the absence of these statutory requirements, consent is not lightly to be inferred and it is the State's burden to prove the existence of effective consent. *Smith v. State* 753 So.2d 713 (Fla. App., 2000).

State v. Finnegan 21 Fla. L. Weekly Supp. 329a (Martin County, 10/28/13) held that *McNeely* is distinguishable because Missouri did not have a statute giving the police authority to take a nonconsensual blood draw. Finnegan was a trial court opinion in a DUI Manslaughter case, and so is not generalizable to all DUI cases.

In only one published opinion since *McNeely* has the "good faith" issue been addressed. In *State v. Usaga*, 20 Fla. L. Weekly Supp. 1194a (11th Cir., Miami-Dade County 8/29/13), the trial court refused to suppress evidence in a pre-McNeely case based on it.

Florida restricts who may draw blood for analysis for forensic purposes:

"Only a physician, certified paramedic, registered nurse, licensed practical nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician, 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."

Florida Stat. § 316.1933(2)(a)
Breath and urine results are routinely suppressed for lack of valid consent.

I am not aware of any decisions finding a blood draw lawful as a search incident to arrest.

I am unaware of any decisions finding exigent circumstances.

Michigan – Michael Nichols and Stephanie Tzafaroglou

We are unaware of any appellate cases invoking the "good faith" exception to the exclusionary rule for pre-McNeely cases.

Consent is not presumed by our Implied Consent statute because it states "if you refuse my test it will not be given without a court order…" Stat. 257.625f.

Blood draws must be in a reasonable manner. We have essentially 9 requirements under a case called *People v Perlos*. Those requirements include a medical environment under the delegation of a physician.

We have had chemical test evidence suppressed at least twice under an argument citing *Schneckloth v Bustamonte* and a state case called *People v Davis* to analyze the "traditional" constitutional consent. Whenever the officer goes outside the implied consent act - we argue that under a case called *People v Hyde*, the analysis regarding the admissibility looks to "traditional" consent - that is consent that must be express; direct; unequivocal and freely given. That is - not coerced at the inaccurate representation about what will happen upon a refusal.

The *Hyde* Court expressly rejected the "search incident to arrest" exception.

We have a system in which officers wake up an "on call" judge for purposes of reviewing search warrant affidavits and executing warrants.

There has not yet been any legislation introduced to set forth per se exigent circumstances for excusing a warrant.

Texas – Mimi Coffey

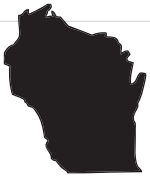
The "good faith" exception is not being applied in Texas, and pre-*McNeely* cases are being reversed upon reconsideration.

Our Implied Consent law is only applied to administrative suspension actions, and is not deemed to be consent in criminal actions. There must be express consent.

The law defines who can draw blood: paramedics, LVNs, RNs, doctors, qualified technicians. The procedure must be done in a sanitary place.

The "search incident to arrest" exception has not been applied to DUI chemical tests.

Our statute mandates warrantless blood draws if it is a felony, child in the car or someone went to the hospital on a DWI, but reliance on such statutes has discontinued in light of *Sutherland v. State*, 2014 WL 1370118 (Tex. App. April 7, 2014) and *State v. Villarreal*, 2014 WL 1257150 (Jan. 23, 2014)(statutes cannot create mandatory per se exigent circumstances based on certain facts---the "totality of the circumstances must be considered").



Wisconsin – Lauren Stuckert

The majority of jurisdictions have adopted the good faith exception; however, there are a few judges throughout the State that have allowed for good faith hearings in both criminal and civil first offense forced blood draw cases.

The Wisconsin Court of Appeals has addressed the issue in published and non-published decisions, yet still requires a case-by-case approach to a certain extent. Specifically, where a warrantless blood draw was obtained after *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993)— the Wisconsin case that ruled dissipation of alcohol in the blood constituted a per se exigency to justify a forced blood draw – but prior to *McNeely*, unless a defendant can show the officer was not following clear, well-settled Wisconsin precedent when obtaining the warrantless blood draw, the good faith exception precludes suppression of the blood draw evidence.

Consent is presumed by virtue of the law provided there is probable cause to arrest. Consent is *not* presumed if a person remains silent or does not respond when a post-arrest breath or blood test is requested following a reading of the Informing the Accused (ITA) document. If a person is unconscious, consent is presumed.

Sections 343.305(5)(b) of the Wisconsin statutes governs this issues. It allows blood draws to be performed "only by a physician, registered nurse, medical technologist, physician assistant, phlebotomist, or other medical professional who is authorized to draw blood, or person acting under the direction of a physician."

Breath and urine test results have been suppressed for lack of lawful consent if the defense can show at a motion hearing the consent was indeed unlawful, but not for lack of warrant.

Since *McNeely,* Wisconsin has adopted a warrant system. For cases prior to *McNeely,* courts have allowed the admission of the blood test results provided the officers complied with Wisconsin's Implied Consent Law and were relying on "well-settled Wisconsin precedent when obtaining the warrantless blood draw.*"*

I have not seen any decisions finding exigent circumstances for excusing a warrant post-*McNeely*.

Case law that pre-dated *McNeely* indicated that no warrant was needed for blood draw if there was an accident that involved a death or injury; however, this has issue has not been addressed since *McNeely.*

Colorado – Rhidian Orr

This June, the Supreme Court of Colorado announced its decision in *People v. Schaufele*, which affirmed a trial court's order suppressing blood-alcohol evidence obtained by a nurse's warrantless blood draw in an injury-accident case. The Court found (by a plurality of three Judges) that the trial court correctly followed *McNeely* when it considered the totality of the circumstances and decided that exigent circumstances were not present to justify the blood draw. The same three Judges also declined to adopt the modified *per se* rule proposed by Chief Justice Roberts in his concurring and dissenting opinion in *McNeely*.

C.R.S. 42-4-1301.1(3) purports to give law enforcement permission to institute a forced blood draw on a driver when they have probable cause to believe the driver committed criminally negligent homicide, vehicular homicide, assault in the third degree, or vehicular assault. In 2011, prior to *McNeely* and *Schaufele*, the Colorado Supreme Court held in *People v. Smith* that law enforcement was permitted to perform a forced blood draw on a driver when probable cause existed to charge the driver with vehicular assault-alcohol. The *Smith* Court did note that the constitutional limitations outlined in *Schmerber* still applied. Whether that will change under *McNeely* remains to be seen.

Colorado's express consent statute provides, in pertinent part, "A person who drives a motor vehicle upon the streets and highways…shall be required to take and complete… any test…of the person's breath or blood for the purpose of determining the alcoholic content of the person's blood or breath when so requested and directed by a law enforcement officer having probable cause to believe that the person was driving a motor vehicle in violation of…DUI, DUI per se, DWAI, habitual user, or UDD." C.R.S. § 42-4-1301.1(2)(a)(I). Thus, consent to a chemical test is presumed (as the express consent advisement is usually phrased as a choice between two tests) unless a driver outright refuses to complete a test. If that is the situation, law enforcement officers will politely inform the driver (if they haven't already warned him) of the consequences associated with refusing to 'choose' a test, such as the fact that a refusal will result in a driver's license being suspended for one year for a first violation, in an attempt to 'convince' a driver to 'choose' a test.

Pre-*McNeely* cases held that consent must be unambiguous and voluntarily given. *People v. O'Hearn*, 931 P.2d 1168 (Colo. 1997). Whether someone's consent to search is voluntarily given depends on whether the consent "was the product of an essentially free and unconstrained choice" and not the result of circumstances that "over[bore] the consenting party's will and critically impair[ed] his or her capacity for self-determination." *People v. Magallanes-Aragon*, 948 P.2d 528, 530-32 (Colo. 1997).

In 1971 the Colorado Supreme Court held in *People v. Brown*, that the Implied Consent law (as it was in 1971) is not so unreasonable that a search pursuant to it rises to a violation of the Fourth Amendment.

We have yet to see a case that applies the standard set in *McNeely* to a driver coerced into a blood draw/breath test via the express consent statute.

Ohio - Tim Huey

Ohio is not a particularly good petri dish for McNeely issues and, in particular, the direct application of *McNeely.* Blood draws are not typical in Ohio DUI cases. Moreover, as noted in the NCDD McNeely Amicus brief, Ohio law enforcement practice has long been to only obtain blood via consent (implied or actual) or via warrant. Faxed warrants and judges on standby are not uncommon. (Note under Ohio statutes the results of a medical draw or not covered by physician patient privilege in the face of a DUI charge or investigation and, thus, many agencies rely on that as a backup.)

Direct application of McNeely: Given the foregoing, the direct application of McNeely would only come into play under our Implied Consent statute (RC 4511.191) and the driver is either "dead or unconscious or otherwise is in a condition rendering the person incapable of refusal" and thus "shall be deemed to have consented" or under a provision that provides that "***officer may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test***" if the driver refuses and he has enough priors that the OVI charge would be his 3rd misdemeanor OVI within six (6) years or a felony.

Both these scenarios are subject to challenge, and prosecutors have offered reductions to avoid having to litigate such issues. None of them raised the "good faith reliance on the statute" argument and thus we have never briefed it.

Hospital setting: Ohio statutes do not require that the blood be drawn in a hospital setting**,** however, as per Ohio's Statutory Predicate, "Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample." Thus, the "medically reasonable" requirements under ***McNeely*** and ***Schmerber*** do not seem to arise.

Urine or Breath challenges: Urine and breath tests obtained under the coercion of the implied consent law might be subject to challenge under *McNeely* but such challenges have not been generally brought or fully litigated as yet. Since Ohio judges barely seem to acknowledge *McNeely* except as a basis for avoiding a search warrant in non-DUI cases (see below), it will be an uphill battle.

Challenge to Criminal Refusal Statute: In Ohio, under R.C. 4511.19(A)(2, if a person has a prior DUI within the past twenty years and he refuses he can be charged with a Criminal Refusal charge but the State also has to prove the DUI impaired charge. (Thus the Refusal enhances the penalties.) Obviously, prevailing on the DUI impairment charge is the primary way to defend such a charge. I believe it is the most likely indirect use of *McNeely* to have potential success. However, prior to *McNeely* the Ohio Supreme Court, in *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-499, held R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution or Section 14, Article I of the Ohio Constitution.

In addition, the Court reiterated that "this court [has] found the implied-consent statute to be constitutional" and does not "violate the search and seizure provision of the Fourth Amendment, nor the self-incrimination clause of the Fifth Amendment to the United States Constitution." However, it cites *Schmerber* for that proposition further stating:

> "The United States Supreme Court has held that if an officer has probable cause to arrest a driver for DUI, the result of an analysis of a blood sample taken over the driver's objection and without consent is admissible in evidence, even if no warrant had been obtained. *Schmerber* [cite]. The court noted that delaying the test to get a warrant would result in a loss of evidence. Id. at 770-771. Following *Schmerber*, we held that "[o]ne accused of intoxication ***has no constitutional right to refuse*** to take a reasonably reliable chemical test for intoxication." Westerville v. Cunningham (1968), 15 Ohio St.2d 121, 44 O.O.2d 119, 239 N.E.2d 40, paragraph two of the syllabus." (Emphasis added.)

Hoover was a 4-3 decision and was not a particularly logically compelling decision. It seems to blur civil implied consent sanctions and criminal sanctions and treat them equally and relies heavily on *Schmerber*, to wit:

> {¶ 21} It is crucial to note that the refusal to consent to testing is not, itself, a criminal offense. The activity prohibited under R.C. 4511.19(A)(2) is operating a motor vehicle while under the influence of drugs or alcohol. A person's refusal to take a chemical test is simply an additional element that must be proven beyond a reasonable doubt along with the person's previous DUI conviction to distinguish the offense from a violation of R.C. 4511.19(A)(1)(a). Hoover's conviction under R.C. 4511.19(A)(2) meant that the mandatory minimum jail term increased from ten days, the mandatory minimum for R.C. 4511.19(A)(1)(a), to 20 days. R.C. 4511.19(G)(1)(b)(i) and (ii).
>
> {¶ 22} Hoover contends, however, that he has a constitutional right to revoke his implied consent and that being forced by threat of punishment to submit to a chemical test violates his rights under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, which provide that persons, houses, and effects are protected against unreasonable search and seizure. However, Hoover has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication. See Cunningham, 15 Ohio St.2d 121, 44 O.O.2d 119, 239 N.E.2d 40, paragraph two of the syllabus; Schmerber, 384 U.S. at 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908. Asking a driver to comply with conduct he has no right to refuse and thereafter enhancing a later sentence upon conviction does not violate the constitution.
>
> {¶ 23} Furthermore, the request to submit to a chemical test does not occur until after probable cause to arrest exists. In this case, the arresting officer pulled Hoover over after she saw him drive across the center line. She smelled a strong odor of intoxicants as she approached his car. Hoover admitted that he had been drinking. He then performed poorly on field sobriety tests. Because R.C. 4511.19(A)(2) requires that an officer have probable cause to arrest for DUI before requesting that a driver undergo chemical testing and because the United States Supreme Court has held that exigent circumstances justify the warrantless seizure of a blood sample in DUI cases, Schmerber, it is clear that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution or Article I, Section 14 of the Ohio Constitution.
>
> {¶ 24} This court's statement in State v. Gustafson (1996), 76 Ohio St.3d 425, 439, 668 N.E.2d 435, referring to an ALS suspension for refusing to consent, also holds true under these circumstances: "[T]he act of refusing a chemical test for alcohol, standing alone, does not constitute a criminal 'offense' of any kind. Ohio police officers are not statutorily authorized to randomly demand chemical alcohol testing of Ohio drivers in the absence of an arrest for DUI, and there is no criminal charge which can be lodged for the act of refusing a chemical test. Nor does R.C. 4511.191 authorize imposition of an ALS based solely on a driver's refusal to take a chemical test. Rather, the implied consent statute authorizes a police officer to ask a driver to undergo a chemical test for alcohol only where the officer has first determined that probable cause exists for arrest for the offense of driving while intoxicated."

Given the above, and especially the reliance on *Schmerber*, we may find judges willing to view *McNeely* as a basis for not feeling bound by *Hoover*.

Ohio cases citing *McNeely*: (My thanks to NCDD member **Doug Clifford** for assembling and reviewing these cases. **DUI cases:** Only two appellate cases involving a DUI mentions *McNeely.* 1) ***State v Greer*** involved a non-consensual draw under the multiple offender provisions of the Ohio Implied Consent law. Greer argued that his counsel was ineffective for not raising *McNeely* issues (McNeely was pending in the US Supreme Court when Greer was convicted). The appellate court said that this was not ineffective assistance of counsel and neither was the failure to file a motion to suppress or challenge admissibility based upon lack of compliance with the statutory predicate. 2) ***State v. Maschke,*** 2014-Ohio-288; 2014 Ohio App. LEXIS 277, January 27, 2014, involved a vehicular homicide,. The court of appeals says the draw might be consensual or might not (record is not clear), and acknowledges *McNeely* but decides that since the driver was on probation and his probation officer was involved in the draw the search was lawful as "Ohio law permits a probation officer to conduct a warrantless search of a probationer's person or home if an officer has 'reasonable grounds' to believe the probationer failed to abide by the law or by the terms of probation." **Non DUI cases:** Ohio appellate courts seemingly like to cite McNeely for the proposition that "the determination of whether exigent circumstances exist requires examination of the factual circum-stances of each particular case,' and thereafter generally finding an exigency existed, see ***State v. Berg***, 2014-Ohio-2745; 2014 Ohio App. LEXIS 2697, June 25, 2014. However the dissent in one Ohio case cited *McNeely* in objecting to the majority adopting a rule there are "per se" exigent circumstances where officer have probable cause to believe meth is being manufactured within a building.

Case Law Roundup

Case Highlights from Donald Ramsell (Illinois) and Paul Burglin (California)

Police Need Warrant To Search Stored Data on Cell Phones, Even If Phone Seized Incident To Arrest

***Riley v. California*, ___ U.S. ___ (June 25, 2014 - Docket No. 13-132)**

Police officers examined photographs and videos found on a "smart phone" seized incident to arrest. The warrantless search led to Defendant's connection with criminal gang activity and he was convicted of multiple felonies. The trial court's denial of his motion to suppress evidence was affirmed on appeal by California's Fourth District Court of Appeal, Div. 1 (Docket No. D059840), and the California Supreme Court denied his petition for review (Docket No. S209350). The lower Courts relied upon *People v. Diaz*, 51 Cal.4th 84 (2010), a binding 5-2 California Supreme Court decision which held that a warrantless search of the text message folder of a cell phone taken incident to arrest was constitutional under binding Supreme Court of the United States (SCOTUS) precedent.

The binding precedent referred to by the *Diaz* Court was a trilogy of cases: *United States* v. *Robinson*, 414 U. S. 218 (1973) (affirming the warrantless seizure and search of a crumpled cigarette package found on the person of defendant incident to arrest); *United States* v. *Chadwick*, 433 U. S. 1, 15 (1977) (200-pound, locked footlocker could not be searched incident to arrest); and *Arizona* v. *Gant*, 556 U. S. 332, 350 (2009) (passenger compartment of vehicle may be searched incident to arrest if reasonable belief evidence connected to the crime may be found there).

Noting the nature and degree of personal information commonly stored on cell phones, coupled with the lack of any real threat to officer safety, the high Court held that absent exigent circumstances, police must obtain a warrant before searching information on cell phones.

EDITOR'S NOTES:

Cell phones can contain messages and photographs that incriminate a DUI suspect, and also have the potential of assisting police in locating potential witnesses. In some circumstances, the police may be able to persuasively claim exigent circumstances as an exception to the warrant requirement for a cell phone search, but more often than not they will need a warrant absent lawful consent.

The *Riley* case was remanded back to the California Court of Appeal for reconsideration in light of its holding, but the California Court of Appeal will likely reaffirm the conviction by relying on *Davis v. United States* (objective good faith reliance on binding appellate precedent from state court of last resort).

A helpful quote from Riley when it comes to whether police could have gotten a warrant: "Our cases have historically recognized that the warrant requirement is `an important working part of our machinery of government,' not merely `an inconvenience to be somehow "weighed" against the claims of police efficiency.' *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971)."

Defendant Caught Driving Before Administrative Suspension Order Rescinded Is Still Guilty of Driving While Suspended

People v. Elliott
2014 IL 115308, 2014 WL 268683 (Ill.)

The Illinois Supreme Court found that the word "rescind" can have either a retroactive meaning or a prospective-only meaning, but unanimously held that "in relation to the crime of driving on a suspended license, the rescission of a statutory summary suspension is of prospective effect only."

"Incredible Dubiosity" Rule Does Not Bar Consideration of Defendant's Questionable Admissions If Consistent With Other Evidence

Alvey v. State
Indiana Court of Appeals – Unpublished
No. 07A01–1307–CR–328 (2014)

Citing *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002), the Court explained the "incredible dubiosity" rule as follows: "Within the narrow limits of the `incredible dubiosity' rule, a court may impinge upon a jury's function to judge the credibility of a witness. If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it."

Defense counsel creatively sought to invoke the rule to exclude the admissions of driving (and drinking before driving) by his highly intoxicated and passed out client. While some of Defendant's statements appeared improbable, the Court affirmed the conviction because the incriminating statements were consistent with the circumstantial evidence. Noteworthy, the Court did not hold that the "incredible dubiosity" rule is always inapplicable to a defendant's own statements.

Retrograde Extrapolation Opinion Properly Excluded In Single Test Case Where Assumption of Post-Absorptive State Was Speculative

People v. Floyd

N.E.3d___, 2014 IL App (2d) 120507, 2014 WL 1267039 (Ill.App. 2 Dist.)

Defendant blew a .069 on a breath-alcohol device at 10:30 p.m., and the State's expert opined that she was between .082 and .095 at 9:10 p.m. (approximate time of driving).

The expert said his "retrograde extrapolation" calculation was possible because people burn off between 0.01 and 0.02 percent per hour. He said two conditions must be met for a valid calculation: (1) the person metabolizes alcohol at the normal rate; and (2) the person is in the post-absorption phase when the breath test is administered. He said the rate of absorption depends on many factors (e.g., type of food, type of alcohol, length of time during which drinking occurred), and that absorption can take from 15 minutes to 90 minutes or more.

On cross, he acknowledged he had no knowledge of the three factors noted above, and had simply assumed Defendant was in the post-absorptive phase at the time of the breath-alcohol test.

Held: "A retrograde extrapolation calculation based on a single breath test, and when many of the factors necessary to determine whether the defendant was in the elimination phase are unknown, is insufficient to provide a reliable calculation and invites the jury to determine guilt on an improper basis. Based on the specific circumstances presented in this case, we believe that the prejudicial effect of the retrograde extrapolation calculation substantially outweighed its probative value and that the trial court abused its discretion in admitting it."

The Court found the Nevada Supreme Court's decision in *State v. Eighth Judicial District (Armstrong)*, 267 P.3d 777 (Nev. 2011) to be persuasive. In *Armstrong*, defendant was in a car accident at 1:30 a.m. and a single blood sample was obtained at 3:51 a.m. The Court noted the following variables mentioned in *Mata v. State,* 41 S.W.3d 902, 916 (Tex. Crim.App.2001) that affect the rate of absorption and elimination: (1) gender; (2) weight; (3) age; (4) height; and (5) mental state; (6) the type and amount of food in the stomach; (7) the type and amount of alcohol consumed; (8) the time the last alcoholic drink was consumed; (9) the subject's drinking pattern at the relevant time; (10) the elapsed time between the first drink and the last drink consumed; (11) the elapsed time between the last drink and the blood draws; (12) the number of samples taken; (13) the elapsed time between the offense and the blood draws; (14) the average alcohol absorption rate; and (15) the average elimination rate. Though it held retrograde extrapolation to be relevant, *Armstrong* affirmed the trial court's exclusion of the expert testimony as unfairly prejudicial due to a lack of reliable evidence supporting the opinion:

"The admission of retrograde extrapolation evidence when a single blood draw was taken more than two hours after the accident is insufficiently tethered to individual factors necessary to achieve a reliable calculation [and] potentially invites the jury to determine [the defendant's] guilt based upon emotion or an improper ground—that the defendant had a

high blood alcohol level several hours later—rather than a meaningful evaluation of the evidence." *Armstrong*, at 783.

The Court emphasized that it was "not creating a blueprint or a bright-line rule for the admissibility of retrograde extrapolation evidence." Citing *Armstrong* again, it noted that "not every factor must be known to construct a reliable extrapolation; rather, the various factors must be balanced. Whether the State produces a reliable extrapolation will depend on the specific circumstances of each case."

Drug Conviction Affirmed Despite Chemist Annie Dookhan's Skullduggery

Wilkins v. United States

(1st Cir. 2014 – Docket No. 13-1637)

Petitioner sought to have his guilty plea and drug conviction vacated when it was discovered that Massachusetts lab chemist Annie Dookhan had deliberately contaminated evidence and engaged in "dry-labbing" specimens (i.e., identifying them by sight rather chemical analysis). Dookhan herself ultimately pled guilty to perjury, obstruction of justice, evidence tampering, and falsely claiming to hold a degree.

Petitioner was observed by law enforcement officers engaging in what appeared to be a street drug sale, and was found to be in possession of some 30 bags of suspected cocaine. Dookan submitted a certified report indicating she had tested a sample of the evidence and that it was positive for cocaine base (crack cocaine).

Petitioner faced a number of procedural hurdles because the time for direct appeal had run and he had admitted his guilt.

"The petitioner concedes, as he must, that Dookhan bears no relationship to this mass of circumstantial evidence. He focuses instead on the only point at which his case intersects with Dookhan: whether the bags seized from him actually contained crack cocaine. He theorizes that because the chemist who certified the contents of the bags as crack cocaine (Dookhan) has now been disgraced, his newfound ability to lay siege to Dookhan ought to shake our confidence in his guilty plea.

"This theory elevates hope over reason. After the petitioner moved for section 2255 relief, the government commissioned new testing by a different chemist. This second round of testing was performed exclusively on samples that the district court found were "untouched" by Dookhan. [cite] Such a supplemental evaluation was possible because Dookhan had `tested only random samples of the drugs seized,' id., leaving some thirty-one virgin bags untouched and untested, [cite]. Of these, thirteen randomly selected bags were tested by the second chemist and were found to be positive for the presence of cocaine. [cite] These uniform results set to rest any real doubt about the nature of the merchandise purveyed by the petitioner.

"Undaunted, the petitioner labors to discredit these results because, in his view, the mere presence of the virgin samples at the Hinton Lab during Dookhan's tenure corrupts the chain of custody. Dookhan's wrongdoing was so malignant, his thesis runs, that it infected everything that was at the Hinton Lab.

"This miasmic theory of evidentiary corruption has little to commend it. Critically, the petitioner has done nothing to defile the district court's factual finding that the bags involved in the second round of testing were `untouched' by Dookhan [cite]. This finding is not clearly erroneous—indeed, the record does not permit any contrary inference—and the petitioner has not explained how Dookhan could have contaminated the virgin bags without touching them.

…

"The second round of testing here was not an attempt to create a hypothetical scenario but, rather, produced test results concerning bags that nobody had previously purported to test…[T]he results of the second round of testing are concrete, definitive, and susceptible to intelligent analysis.

"The petitioner has another shot in his sling. At oral argument, his counsel offered a different slant on the effect of Dookhan's skullduggery. He speculated that he might have urged a jury to make his client's trial a referendum on Dookhan rather than a proceeding aimed at determining his client's guilt or innocence. Refined to bare essence, this importuning asks us to find materiality based on the possibility of jury nullification. But courts are duty-bound to presume that jurors will follow their instructions, see *United States v. Olano*, 507 U.S. 725, 740 (1993); *Evans v. Avery*, 100 F.3d 1033, 1041 (1st Cir.1996), and there is no principled way in which we can rely on a petitioner's hope of jury nullification to find prejudice. See, e.g., *Sorich v. United States*, 709 F.3d 670, 678 (7th Cir.2013), cert. denied, 134 S.Ct. 952 (2014); *United States v. Allen*, 406 F.3d 940, 949 (8th Cir.2005) (en banc).

"There is one last point. The petitioner, unlike the petitioner in *Ferrara*, admitted his factual guilt (including the nature of the contraband sold) in open court at the time that he changed his plea. This admission is entitled to significant (albeit not dispositive) weight when, as now, he seeks to vacate that plea through a collateral attack. See, e.g., *Campbell v. Marshall*, 769 F.2d 314, 321–22 (6th Cir.1985). And such an admission is especially compelling because the petitioner neither attempts to explain it away nor makes any assertion of factual innocence. Cf. *United States v. Parrilla–Tirado*, 22 F.3d 368, 373 (1st Cir.1994) (explaining that the absence of a claim of innocence `cuts sharply against allowing [a defendant's] motion to withdraw his guilty plea' when a fair and just reason is required for plea withdrawal).

"III. CONCLUSION

"We need go no further. We write without attempting to lay down any broad rule to govern all Dookhan-related cases. Rather, our decision rests on the facts and circumstances of the petitioner's case. To prevail, he must convince us that there is a reasonable probability that, considering the totality of the circumstances, he would not have pleaded guilty had he known of Dookhan's transgressions. See *Ferrara*, 456 F.3d at 294. Given the overwhelming evidence of the petitioner's guilt and the fact that the Dookhan scandal, though sensational, does not provide him a viable defense, the petitioner manifestly failed to cross this threshold. Thus, he is not entitled to any relief."

Howard H. Baker, Jr.
1925-2014

Tennessee lawyer Howard H. Baker, Jr., was known in the Senate as "the great conciliator," but he was thought of by many as "the great interrogator" following his questioning of witnesses in the 1973 Watergate hearings.

When Baker was selected to serve as the ranking Republican member on the special Senate Committee to investigate the Nixon White House, he was skeptical that his friend Richard Nixon was involved in anything nefarious. Yet after that skepticism grew into a deepening suspicion, he forged ahead with the mastery of a seasoned trial attorney framing questions with a theme.

Questioning Counsel to the President, John W. Dean III, on June 29, 1973, Baker intoned:

Obviously, if you have an elaboration that you wish to make on any of these points you are free to do so, but if you could answer the first and then elaborate, it would help us along. My primary thesis is still, what did the President know, and when did he know it?

Those watching saw the color drain from Dean's face.

Baker's integrity propelled him higher than his allegiance to Nixon, even though the latter had campaigned extensively for him in his successful 1966 run for the Senate and had offered Baker a nomination to the Supreme Court in 1971. Baker declined to accept Nixon's offer, and the nomination went instead to William H. Rehnquist. That, of course, was another defining moment in American history.

Trial Tip Treasure

by Paul Burglin

Ever stop by a restaurant in the early morning and observe the prep work being done? The Chef is dicing garlic and onions and making sauces. Staff people are setting tables and filling condiment containers. The hostess is taking reservations and arranging tables. Think of a trial the same way. PREPARATION.

The first thing to formulate is your closing argument---what do you ultimately want to argue to the jury and what is the theme of your defense? Without a theme you're sunk, and without a destination you're lost.

Testimony and documents are your pieces to the puzzle. Some will help, some will have to be defused, and some you must try to avoid. Motions *in limine* are a helpful tool for excluding damaging evidence (or better yet, getting a case reduced or dismissed before the prosecutor gets his horse out of the gate). Yet more subtle purposes include (a) obtaining insight into the prosecutor's strategy; (b) getting a sense of how the judge views the case and what jury instructions you might be able to get; and (c) creating appellate issues if there is ultimately a conviction.

Every witness has the potential to hurt you, so only those witnesses needed to complete your theme should be called. This is particularly true with the accused, so ask your self if there is another way to get the information before the jury other than calling the defendant to the stand.

Whatever your theme, you cannot effectively sell it without the courage to confront the prejudice of jurors and the most damaging evidence against your client. *Voir dire* is an excellent opportunity to acknowledge that all of us assume guilt when we see someone in the back of a patrol car, or to let it be known that a high alcohol result is coming in or that the defendant's driving was bad.

With witnesses, have an outline of alternative questions that are contingent upon the answers you get. Frame your questions in a manner that tells your story no matter how the questions are answered. Do not ask a question if it does not allow you to do this, and remember, the effect of a question is sometimes more powerful than the answer itself (e.g., The fact of the matter Officer Smith, is that you jumped to the conclusion Julia Jones was guilty of DUI the minute she said she had a glass of wine at the restaurant, isn't that right?).

Should something happen in the course of a trial that gives rise to a motion for a mistrial, consider whether a curative instruction is better than a mistrial. If a motion for mistrial is required to preserve the issue on appeal, but you don't really want a mistrial because you believe you are winning, then make your motion in such a way that the transcript confirms you made the motion, but make the motion without any enthusiasm so the judge is more inclined to deny it. Always preserve issues for appeal by getting things on the record and asking for curative instructions.

Roll with things and move on. Champion boxers get punched dozens of times in a fight but still prevail. Not everything is going to go your way, and sometimes it will feel like nothing is going your way. Think of yourself as an oil tanker, cutting through waves and never being deterred from your destination.

Most importantly, always maintain credibility.

Uncertainty in Measurements – A Useful Analogy

The recent defeat of House Majority Leader Eric Cantor (R-Va) prompted Pollster Frank Luntz to make the following comment in an Op-Ed piece for the *New York Times* on June 12, 2014:

"*The simple truth remains that one in 20 polls---by the simple rules of math---misses the mark. That's why there is that small but seemingly invisible `health warning' at the end of every poll, about the 95 percent confidence level. Even if every scientific approach is applied perfectly, 5 percent of all polls will end up outside the margin of error.*"

NCDD Board Certification Exam Set For January 21, 2015 – Application Deadline Is August 31, 2014.

In 2003 the American Bar Association (ABA) recognized DUI Defense Law as a legal specialty area of practice, and the following year the ABA accredited the National College for DUI Defense (NCDD) to certify lawyers in the DUI Defense Law specialty area. The NCDD is the only organization accredited by the ABA in this specialty field.

In order to be Board Certified, an applicant must satisfy certain minimum practice requirements and pass both written and oral examinations testing his or her knowledge of substantive and procedural law in this field. Specifically, the examination focuses on scientific issues, the NHTSA guidelines on field sobriety tests and drug recognition tests, as well as other legal and ethical issues applicable to the defense of drunk driving cases.

Applications are presently being accepted for the next exam which will take place on January 21, 2015, at the Yacht Club Resort in Disney World, Orlando. The deadline for submitting an application is August 31, 2014.

The NCDD does not discriminate against any lawyer seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age.

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