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National College for DUI Defense

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Editor: Paul Burglin

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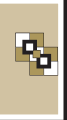


Birchfield v. North Dakota

Warrantless Breath Testing Permitted And Refusal May Be Criminalized - Not So With Blood Draws

The question presented in the consolidated cases of *Birchfield v. North Dakota* (Docket No. 14-1468), *Bernard v. Minnesota* (Docket No. 14-1470), and *Beylund v. Levi* (Docket No. 14-1507), was whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

Finding breath alcohol testing to be a *de minimus* privacy intrusion, the high Court held that warrantless breath testing may be lawfully administered and required under the *search-incident-to-arrest* exception to the Fourth Amendment. It further held that States may both criminalize and administratively sanction an arrestee's refusal to provide breath samples.

With regard to blood draws, however, the Court found the venipuncture procedure to be more invasive, and a privacy intrusion requiring a warrant in the absence of lawful consent or showing of exigent circumstances.

Birchfield's conviction for refusing to submit to a blood draw was reversed---his refusal could not be justified under either the search incident to arrest doctrine or the state's implied consent statute.

Continued on Page 5

Dean's Message

James Nesci

Congratulations are in order—for me, that is. I've just been nominated as one of the Top Ten . . . wait for it . . . *Female Personal Injury Attorneys*!

Let's put aside for the moment that I am neither female, nor have I ever tried a PI case, and focus on the two obvious issues here. First, the categories are not "Top Ten Male" and "Top Ten Female"— no, they are "Top Ten Personal Injury" and "Top Ten Female Personal Injury" attorneys as if there's a "Women's Auxiliary" of the PI Bar. According to a recent ABA Journal article, women make up 45.9% of law school graduates and 55% of staff attorney positions in the 200 largest law firms across the United States. That's pretty darn good.

It wasn't that long ago female law students were as rare as unicorns. Now the gender gap is close to equal and that's a good thing. I have attended every NCDD Summer Session since 1998 with one exception. Year after year I see the number of women attending the NCDD Summer Session grow. The NCDD Diversity Committee is making a concerted effort to reach out to the many fine female DUI defense attorneys—not just the Top Ten. While the majority of the College is male, the gap is closing.

The nomination also got me thinking that if there are "Top Ten Personal Injury" and "Top Ten Female Personal Injury" categories, there are twenty of us. I don't want to share the spotlight with nineteen others. By eliminating the "Top Ten Female" category, we would be down to only ten and I would have less competition in the PI business. This brings me to my second issue: What is the definition of "Top Ten"?

"Top Ten" is designed to mislead the public. I know I'm ruffling some feathers here, but it has to be said. The term applies to neither "top" nor "ten."

There are four attorneys in my office. One day we all received

Continued on Page 2

E.D.'S CORNER

Rhea Kirk

The NCDD is proud to present our upcoming seminar schedule! Look for MSE with a new and exciting format March 23-24 in New Orleans and don't miss our third annual "Serious Science for Serious Lawyers, Advanced Course in Blood Analysis and Trial Advocacy" May 8-14 in Ft. Collins, CO. On May 31-June 2 the NCDD is teaming up with the Mississippi College School of Law to conduct the "Master's Degree in DUI Trial Advocacy" held in Jackson, MS. Next up, Dean Jim Nesci has put together a fantastic Summer Session on July 20-22 with a new format you won't want to miss! Make sure to check the NCDD Website for all the details on these and other upcoming seminars!!

Board Certification applications are due August 31. If you have any questions, please feel free to contact Board Certification Chairperson, Mike Hawkins, or me for more information.

The NCDD Board of Regents is proud to announce the first ever annual awards in the following categories:

1. Trial Advocacy Award
2. Appellate Advocacy Award
3. Leadership Award
4. Mentor Award
5. Pro Bono Award
6. Public Defender of the Year Award

The NCDD Recognition Committee will be accepting nominations through May 1st.

One must be a member of NCDD to qualify. The formal announcement of award winners will be made at the summer session Attendee's Dinner. Nominations can be emailed to: nominations@ncdd.com.

I look forward to seeing you at an upcoming NCDD seminar soon!

-Rhea

(Continued from cover - "Dean's Message")

applications for "Top Ten DUI Attorneys." While mine is certainly deserved, I questioned whether my partner and employees are really Top Ten material (by the way—don't tell them that I said that). What were the criteria used? Who made the nominations? Could we be turned down? Just how many "Top Ten" were there?

It seems that our profession is at a breaking point. We can only cheapen the world's second-oldest profession so far without risk of serious backlash, both from the bar associations and from the public. We advertise bogus badges and awards at our own peril.

There are many legitimate rating services available to attorneys and I urge you to take notice of them. Moreover, there are many real certifications and specializations available. Most state bars have a specialization designation and the NCDD offers the only Board Certification in DUI law that is accredited by the American Bar Association. No other organization has this accreditation. The simple rule to live by is: If it's not true, don't say it.

I leave you now with a quote from the case that held attorney advertising was legal (*Bates v. State Bar of Arizona*, 433 U.S. 350, 379, 97 S. Ct. 2691, 2707, 53 L. Ed. 2d 810 (1977)). Mr. Justice Blackmun delivered the opinion of the Court and wrote:

"It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust."

Thank you for allowing me to rant and for allowing me to lead this fine organization. There are many conscientious and hard-working attorneys in our organization and each one of you are capable of achieving greatness. All it takes is dedication to the profession and a willingness to do a good job.

Trial Tip Treasure

*Thomas Hudson**

Nominate the Jury Foreperson

When I was a young lawyer, I had the privilege of spending some time with the legendary trial lawyer Richard "Racehorse" Haynes, who had come to Cleveland to give a day-long seminar in trial tactics. In addition to being a courtroom legend, he was an extraordinarily engaging speaker. I learned a lot from him about the human factors that persuade jurors.

One of the best tricks I learned from him—and one that I have used many times over the years—is to nominate the foreperson of the jury. Don't let anyone tell you that it's unimportant which juror is the foreman. We all seem to gravitate to the person holding the clipboard.

You can do it. You can nominate the foreman or forewoman of the jury.

First, you only do this if you have identified one juror who is particularly good for you. It might be a really good juror in a venire of so-so jurors, or it might be a so-so juror in a venire of terrible jurors. But it has to be someone that you really want on the final panel.

The process goes like this:

Let's say that Mrs. Smith is a teacher who you believe is skeptical of authority figures.

"Mrs. Smith, I understand that you are a teacher. Now, in the course of your duties, do you ever find yourself in the position of having to sort out any disputes?

"Well, sometimes."

"When you do that, do you make sure that you listen to all sides before you make up your mind what happened?"

"Of course."

"And you make sure that the discussions are fair and everyone gets a chance to be heard?"

"Yes."

"And besides your training as a teacher, do you have and <u>formal</u> training in the law?"

"Well, no <u>formal</u> training."

"Now Mrs. Smith, if you should be the choice of these people to be the Foreperson of this jury, do you think that you could do the same thing? Make sure the discussion is fair and everyone gets a chance to have their say before you come to a decision?"

"Yes, I think I could."

Now what have we done here? Mrs. Smith is already thinking of herself as the foreperson of this jury. And you were the one who recognized her potential. She thinks that you are very perceptive.

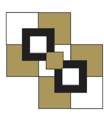
Assuming that the other side doesn't strike her (and in my experience, they often do not), Mrs. Smith is going to be expecting to be the foreperson of the jury. And she's the one that you chose.

If Mrs. Smith does not wind up being the foreperson, who is she going to resent? Not you! The other jurors.

At worst, you wind up with someone who thinks that the other jurors are jerks. And what's the next best thing to a Not Guilty? A hung jury!

Want to have some fun sometime? Nominate <u>two</u> panelists to be the foreperson.

*Tom Hudson practices in Florida and is Board-Certified in DUI Defense by the NCDD, as recognized by the American Bar Association.



Case Law Roundup

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

Warrantless Blood Draws

People v. Brooks
2016 Il App (5th) 150095-U - UNPUBLISHED

Following car accident, police physically compelled Defendant to go to hospital emergency room (ER) for treatment of injuries including broken leg. Defendant tried to bolt from ambulance and police restrained him with handcuffs and assisted paramedics with getting him into ER.

Defendant refused consent to blood draw following implied consent admonition. At least four police officers present but no warrant sought. Hospital staff drew blood sample as part of medical treatment and not at the request of law enforcement.

Held: Because the police compelled Defendant to obtain medical treatment, State action was involved in the blood draw. No showing of exigent circumstances as plenty of officers available to seek a warrant. Blood-alcohol evidence suppression order affirmed on appeal.

Commonwealth of Pennsylvania v. March
2017 PA Sup 18, ___A.3d ___

March was taken to a hospital following his involvement in an automobile accident. He was unconscious and not under arrest.

Pennsylvania's statute allows one to withhold consent to a blood draw if under arrest for DUI, but since March was not under arrest that statutory provision was deemed inapplicable to him.

Oddly, the Court held the warrantless blood draw was constitutional even in the absence of a showing of exigent circumstances, based on statutory implied consent.

NOTE: Other courts are generally going in the opposite direction on this issue, finding that unconscious persons cannot be deemed to have impliedly consented when they lack the conscious ability to withdraw it. See, e.g., *People v. Schaufele* (Colorado Supreme Court – 13SA276 (2014).

Insufficient Showing of Reasonable Medical Procedure for Blood Draw Results In Suppression Order

Trusty v. State ex. Rel. Department of Public Safety
(2016) ___P.3d ___, 2016 OK 94 (Docket No. 114208)
2016 WL 5110451

Appellant was arrested for DUI after crashing his car. He was taken to a hospital where he consented to a blood draw. The Department of Public Safety (DPS) revoked his license for one year based on a .206 blood-alcohol test result. He appealed the suspension order to the District Court of Oklahoma County and a *de novo* hearing was held. The district court vacated the license revocation because the DPS did not call the nurse or any other witness to establish the blood draw was done in compliance with the rules and regulations of the Board of Tests for Alcohol and Drug Influence.

The Supreme Court affirmed, finding that a police sergeant's testimony was devoid of any showing that he possessed the necessary medical training to meet DPS's burden of establishing the following facts:

1. That the blood was drawn in accordance with accepted medical practices;

2. That [Appellee] did not suffer from hemophilia;

3. That [Appellee] was not taking anticoagulant medications;

4. That the blood was withdrawn by venipuncture;

5. That the puncture site had been properly prepared;

6. That necessary precautions to maintain asepsis and avoid contamination of the specimens; and

7. That the puncture site preparation was performed without the use of alcohol or other volatile organic disinfectant.

NOTE: NCDD member Charles Sifers represented the Appellee.

Checkpoint Established And Operated Without Supervision Held Unreasonable

Whelan v. State
2016 Ark. 343 (2016)

"With regard to establishing checkpoints, Corporal Lee testified that if the supervisors do not assign the checkpoint, `I will make a call and say, you know, we're going to do a checkpoint.'" That's what he did.

This unfettered discretion on the part of a field officer in establishing and conducting a DUI checkpoint was held unreasonable and violated the Fourth Amendment.

Willful Inhaling Of Dust-Off Product Held Basis For Impaired Driving

State v. Carson
(2016) ___N.W.2d ___, 2016 WL 4596517
Minn. Court of Appeals - Docket A15-1678

In Minnesota it's a crime to operate a vehicle while knowingly under the influence of a hazardous substance that affects the nervous system, brain, or muscles of the person so as to substantially impair the person's ability to operate a motor vehicle. Minn. Stat. 169A.20(1)(3).

Defendant was found passed out in the drive-thru of a restaurant with a can of *Dust-Off* gas duster between her right arm and body. Gas duster is a refrigerant-based propellant cleaner used for cleaning electronic equipment by blowing particles and dust. Her blood sample showed the presence of difluoroethane (DFE) and a forensic toxicologist for the State testified that it's flammable, can cause injury if inhaled, and that the can is pressurized.

Because the statutory list of hazardous substances is not an exhaustive list, and in light of the expert's testimony about its nature, the product is deemed a hazardous substance within the scope of the impaired driving code.

NOTE: Her blood sample also showed the presence of Lorazepam and the officer found a six-pack of the dust buster including a cold one that indicated recent use! There was also ample circumstantial evidence to prove impairment.

Due Process Denied Where DMV Hearing Officer Was Convicted Of Bribery Even Though No Corruption Shown In Particular Case

Hall v. Superior Court
(2016) ___Cal.App.4th ___
(Fourth Dist., Div. 1, California Court of Appeal – Docket No. D068516)

Hall's license was suspended for refusing a chemical test. While his petition for writ of mandamus to the Superior Court was still pending, the DMV hearing officer who sustained the suspension order was charged and convicted in a U.S. District Court for accepting bribes in exchange for favorable rulings in administrative license suspension hearings. Hall amended the grounds for his writ to include a claim that he had been denied due process by virtue of the DMV hearing officer being corrupt. The Superior Court rejected Hall's claim that

the ruling was erroneous and denied the writ, but ordered the DMV to grant him a new hearing on the basis that the hearing officer's criminal conduct "raises a red flag with respect to all hearings presided by her."

Hall appealed, contending that the suspension action should be set aside. He cited Calif. Veh. Code § 13559 for the proposition that the Superior Court lacked statutory authority to order a new hearing and should have simply granted the writ.

Held: A DMV hearing officer who admits to taking bribes for nearly a decade does not meet the constitutional standard of impartiality, and thus the Superior Court correctly ordered a new hearing even though it denied the writ. [*Note*: We can probably assume the Court's inclusion of the phrase "for nearly a decade" was gratuitous, and not a necessary premise for its holding!].

On the procedural issue, the Court construed the Superior Court's order as "a remand to the administrative agency to conduct a new hearing—which is not an appealable order." [citing *Gillis v. Dental Bd. Of California* (2012) 206 Cal.App.4th 311, 318]. However, because the Superior Court order was "unclear on the question of appealability (`den[ying] the writ,' but ordering a new hearing), [the Court exercised its] discretion to treat Hall's purported appeal as a petition for a writ of mandate." [citing *Village Trailer Park, Inc. v. Santa Monica Rent Control Bd.* (2002) 101 Cal.App.4th 1133, 1139-1140].

Forfeiture Of Non-Defendant's $35,000 Motorcycle Violated 8th Amendment Prohibition On Excessive Fines.

People ex. Rel. Hartrich v. 2010 Harley-Davidson
2016 IL App (5th) 150035
Appellate Court of Illinois (Fifth Dist.)

Claimant's husband was arrested for DUI while driving her $35,000 motorcycle with her as a passenger. The trial court's finding that she knew he had a suspended license for a prior DUI conviction and nevertheless consented to his driving the bike was not disturbed on appeal. These findings constituted a lawful basis for a forfeiture of the vehicle used in the new DUI offense, but because an acquiescing owner is less culpable than an actual offender, the forfeiture in this instance was found to be excessive and in violation of the 8th Amendment.

Criminalizing Warrantless Urine Test Refusal Unconstitutional

State v. Thompson
(2016) Minn. Supreme Court – Docket No. A15-0076

Defendant was told he must provide a urine or blood sample after being arrested on suspicion of driving under the influence of a drug. He refused and was criminally charged under a chemical test refusal statute.

The State contended that urine testing of a DUI suspect is constitutional under the Fourth Amendment as a search incident to a valid arrest.

To assess the intrusion upon individual privacy, the Court considered the three factors laid out in *Birchfield*:

(1) the extent of the physical intrusion upon the individual to obtain the evidence;

(2) the extent to which the evidence extracted could be preserved and mined for additional, unrelated private information; and

(3) the extent to which participation in the search would enhance the embarrassment of the arrest.

As in *Birchfield*, the Court then proceeded to balance these considerations against the government's "great" need for alcohol concentration testing in DUI cases.

On the physical intrusion prong, the Court did not consider instances of forced catheterization which would obviously be highly invasive. It concluded that normal urine sample production does not involve the same level of physical intrusion as a venipuncture, and is really more akin to breath testing. However, in addressing the second and third factors, it noted that a urine sample can be used to extract a good deal more personal information about a suspect, and that having to perform a bodily function in front of a law enforcement officer is a much greater privacy invasion in terms of embarrassment.

It thus held that a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver, and that Defendant could not be prosecuted for his refusal to submit to a warrantless blood or urine test.

Increased Jail Sentence Based On Warrantless Blood Refusal Held Unconstitutional

Commonwealth of Pennsylvania v. Giron
2017 PA Sup 23, ___ A.3d ___ (2017)
W017 WL 410267

Statutory sentencing ranges in Pennsylvania provide for increased jail time for those who refuse a chemical test but are nevertheless convicted of DUI arising out of the same incident.

Defendant was only offered a blood draw and was not offered breath testing. Thus, his refusal to consent to a blood draw could not be constitutionally punished under *Birchfield* with an increased jail sentence in the absence of a warrant or showing of exigent circumstances.

Officer's Warrantless Entry Into Residential Garage Allowed - Hot Pursuit Deemed An Exigent Circumstance

State v. Wright
280 Ore.App. 259 (2016)

Warrantless entry into residential garage to seize motorist fleeing from suspected DUI stop was found constitutional based on hot pursuit being an exigent circumstance.

Admission of Drinking Four Beers and Having Red Eyes Found Insufficient P.C. For Arrest---FST Validity Compromised By Wet Pavement

People v. Day
2016 IL (3d) 150852
Appellate Court of Illinois

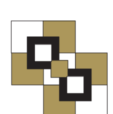
Defendant's driving was fine---he was stopped for allegedly having excessive noises emanating from his exhaust system. This was disputed by Defendant and the credibility of the officer was challenged in other respects (e.g., whether it was raining outside). This likely impacted the trial court and appellate court's ruling that the arrest was without probable cause.

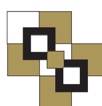
Though Defendant admitted drinking four beers from 12:30 a.m. to 3:00 a.m. and was observed driving at 3:30 a.m., and though he had a strong odor of alcohol and red/glassy eyes, the Court affirmed the trial court's ruling to quash the arrest. It gave little weight to some of Defendant's deficiencies on the the FST's because they were administered on a wet surface due to rain and the officer acknowledged that a dry surface is one of the conditions for validity of NHTSA tests (he did testify that he didn't think it compromised Defendant's ability to do them).

The opinion offers good analysis and authorities for challenging probable cause to arrest.

Conviction-Triggering License Suspension Barred By Due Process Challenge Based on 5-Year Delay And Showing Of Prejudice

Wilson v. S.C. Department of Motor Vehicles
South Carolina Court of Appeals (Opinion 5464) – Docket No. 2015-000887 (2016)





2017 WL 105019

The DMV issued a conviction-triggering license suspension action against Wilson nearly five years after her DUI conviction.

The Court found the 5-year delay to violate the Due Process guarantee of fundamental fairness. Though it appears likely from the reading of the case that prejudice would have been presumed, Wilson did make a showing of prejudice.

"Wilson testified she lost her job after her DUI arrest, and it took her two years to find new employment as an office manager. Wilson also stated that, as part of her new job, she is required to travel on behalf of the company, and a suspension of her driver's license may cause her to lose her current job. According to Wilson, losing her current job would cause severe economic hardship because she has two mortgage payments and would not have a steady stream of income to make these payments. Based on her statements, we find Wilson demonstrated a high likelihood of injury or potential prejudice if her driver's license is suspended."

The Court further observed that "Wilson did not simply "keep quiet" about her suspension, but instead, actively sought a resolution to her pending suspension."

(Continued from cover - "Birchfield v. North Dakota")

Bernard's conviction for refusing a breath test was affirmed, as he had no constitutional right to refuse it under the search-incident-to-arrest exception.

Beylund submitted to a blood draw only after the police told him he was required by law to do so under the State's implied consent law and that refusal constituted a crime. His license was administratively suspended for two years based on the test result. Because the North Dakota Supreme Court's finding of lawful consent was based on the erroneous assumption that the State could compel a warrantless blood draw, the matter was remanded with a directive that his purported consent be reevaluated in light of the partially inaccurate chemical test admonition.

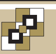
Justice Alito wrote the majority opinion. Justice Sotomayer wrote a separate opinion, both concurring and dissenting (opining that a warrant should be required for both breath and blood testing). Justice Thomas also wrote a separate opinion, both concurring and dissenting (opining that a warrant should not be required for either form of testing).

NCDD-Board Certification

The NCDD Board Certification Committee is proud to announced that the following individuals passed the 2017 Board Certification Exam:

Jonathan Goebel, Arizona
Brad Williams, Arkansas

The Board of Regents has approved their Board Certification in DUI Defense, as recognized by the American Bar Association.



SCOTUS Nominee Gorsuch on Criminal Law

The Senate hearing on President Donald J. Trump's nominee to the U.S. Supreme Court, Neil M. Gorsuch, is slated to commence on March 20, 2017. Some opinions from his tenure on the 10th Circuit Court of Appeals offer insight into his views on criminal law.

Fourth Amendment

On whether "No Trespassing" signs prominently posted on a homeowner's property effectively revoke whatever consent might be historically implied to visitors going to the front door, Gorsuch demonstrated a healthy respect for the Fourth Amendment in *United States v. Carloss*, 818 F.3d 988 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016) (J. Gorsuch, dissenting):

"The `knock and talk' has won a prominent place in today's legal lexicon. The term is used to describe situations in which police officers approach a home, knock at the front door, and seek to engage the homeowner in conversation and win permission to search inside. Because everything happens with the homeowner's consent, the theory goes, a warrant isn't needed. After all, the Fourth Amendment prohibits `unreasonable' searches, and consensual searches are rarely that. No doubt for just this reason law enforcement has found the knock and talk an increasingly attractive investigative tool and published cases approving knock and talks have grown legion. But in the constant competition between constable and quarry, officers sometimes use knock and talks in ways that test the boundaries of the consent on which they depend."

"[W]hat happens when the homeowner manifests an obvious intention to revoke the implied license to enter the curtilage and knock at the front door? … May officers still — under these circumstances — enter the curtilage to conduct an investigation without a warrant and absent an emergency?"

"No one before us disputes that a knocker or doorbell usually amounts to an implied invitation to enter the curtilage, knock or ring at the front door, and seek leave to enter the home itself. Neither do the parties dispute that the homeowner enjoys the right to revoke this implied invitation — at least when it comes to private visitors — by making it clear to groups like `the Nation's Girl Scouts and trick-or-treaters,' [cite] or `solicitors, hawkers and peddlers,' [cite], that their presence on the curtilage is unwelcome.
Still, the government says it's subject to different rules — and it's here where our dispute really begins. While a homeowner may stop others from entering his curtilage, the government contends a homeowner may never stop its agents from entering the curtilage to conduct a knock and talk. Really, then, the government's argument here isn't that it enjoys a license or invitation flowing from the homeowner, for it turns out the homeowner has nothing to do with it. In the government's telling, its agents enjoy a special and irrevocable right to invade a home's curtilage for a knock and talk — what might be more accurately called a sort of permanent easement — whatever the homeowner may say or do about it.

"This line of reasoning seems to me difficult to reconcile with the Constitution of the founders' design."

"The Fourth Amendment is, after all, supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences might be."

Good Faith

"My colleagues suggest that an investigative detention resting on an officer's mistake of law *always* violates the Fourth Amendment—even when the law at issue is deeply ambiguous and the officer's interpretation entirely reasonable. Having found a Fourth Amendment violation, they proceed to order the suppression of all evidence found during the detention and direct the dismissal of all charges. Respectfully, I have my doubts." *United States v. Nicholson*, 721 F.3d 1236 (10th Cir. 2013) (Gorsuch, J., dissenting).

Separation of Powers

"If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce." *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015).

Criminal Procedure

"Say a criminal defendant enters an involuntary guilty plea. Maybe because of improper threats. Or maybe thanks to unlawful inducements. After sentencing, he seeks to withdraw the involuntary plea without the necessity of a full appeal or a collateral lawsuit. Seeing the problem with the plea, the government agrees and joins the defendant's request. Can the district court grant the uncontested motion? Or must it grind on and gift the parties additional months and maybe years of needless judicial process to arrive at a result everyone admits the law requires? All while, most likely, the defendant sits in prison?" *United States v. Spaulding*, 802 F.3d 1110 (10th Cir. 2015), cert den., 136 S.Ct. 1206 (Gorsuch, J., dissenting).

Brady Rule

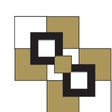
"I cannot help but conclude that the suppressed pre-October 5 email was material to Mr. Ford's entrapment defense." *United States v. Ford*, 550 F.3d 975 (10th Cir. 2008) (Gorsuch, J., dissenting).

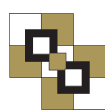
Mastering Scientific Evidence

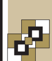
March 23 – 24, 2017

The Royal Sonesta Hotel

New Orleans, LA

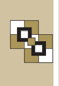






Appellate Counsel for John Brady

E. Clinton Bamberger, Jr., Dead at 90



Brady v. Maryland (1963) is a seminal case in criminal law. Writing for the majority, Justice William O. Douglas declared in *dicta* that the withholding of exculpatory evidence violates due process "where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

John Brady was convicted of first degree murder and sentenced to death under Maryland's felony-murder law (an offense punishable by life imprisonment or death). Brady had admitted his involvement in a car-jacking robbery but claimed at sentencing that it was his accomplice Donald Boblit who had garroted the victim. Copies of Boblit's extrajudicial statements were requested by defense counsel, but only four of five confessions were produced and each of them accused Brady of the actual killing. It was subsequently learned that Boblit admitted in the fifth statement to being the killer. The only reason the fifth statement was discovered is because the prosecution sought to use it against Boblit in his separate trial!

In a post-conviction proceeding, Brady's appellate lawyer, E. Clinton Bamberger, argued that a new trial on guilt and sentencing should be ordered because the due process violation tainted the entire proceeding. However, because the withheld evidence could not have exculpated Brady (his trial counsel had admitted to the jury that he was guilty of first degree murder), a new trial was only mandated by the Maryland Court of Appeals on the issue of punishment. Bamberger sought review for Brady in the United States Supreme Court by way of a petition for writ of certiorari.

The Maryland Court of Appeals ruling was affirmed, but the dicta flowing from the *Brady* opinion has since been enshrined by courts across the land as "*Brady* material."

Bamberger passed away on February 12, 2017, at the age of 90. Though he lost in the high Court, his efforts spared *Brady* the death penalty and gave the accused one of the most important due process rights in the annals of criminal law. Maryland prosecutors never sought a new sentencing trial for Brady and Brady and his lawyers were content to not push the issue until 1973. At that juncture, the Maryland Governor granted Brady clemency and he was released after serving 18 years in prison. He married and worked as a truck driver, reportedly avoiding future problems with the law.

Bamberger had been a highly paid lawyer in private practice before devoting his career to providing criminal and civil legal assistance to the poor.

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July 19 – 22, 2017

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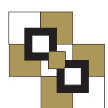
Editor's Message: Contributions to the NCDD Journal are welcome. Articles should be about 1200-1500 words and relate to DUI/DWI defense. Trial Tips should be 200-300 words. Please prepare in Word and submit as an attachment to burglin@msn.com. The NCDD reserves the right to edit or decline publication. Thank you.



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