

HIGHWAY TO JUSTICE

WINTER 2013

From The ABA and The National Highway Traffic Safety Administration

QUESTION BEFORE THE SUPREME COURT OF THE UNITED STATES WITH IMPACT ON TRAFFIC COURT

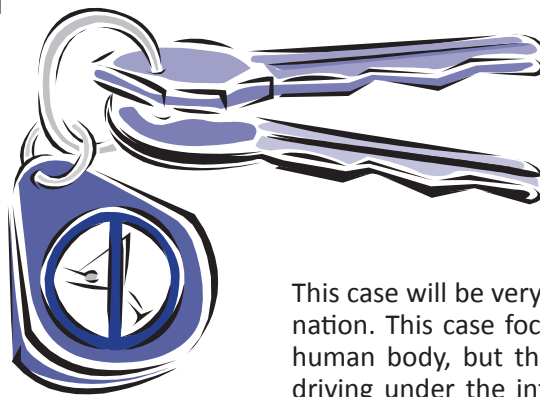
*Hon. David Keith Rutledge (Ret.)
Judicial Outreach Liaison Region 7
Bentonville, AR*

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

Certiorari was granted on September 26, 2012.

On October 3, 2010, at 2:08 A.M., Tyler G. McNeely was pulled over for exceeding the speed limit. Officer noticed signs of intoxication and administered field-sobriety tests on which respondent performed poorly. The officer then began transporting respondent to the county jail. Respondent told officer he would not provide a breath sample. The officer then drove directly to a nearby hospital in order to obtain a blood sample. Respondent refused to voluntarily consent and the officer directed hospital technician to draw blood which was collected as evidence. The test revealed alcohol content was 0.154 percent, well above the .08 percent legal limit.

This happened in Cape Girardeau County, Missouri. Since this was the Respondent's third offense of DWI he was charged with a felony and tried in Circuit Court. Respondent filed a Motion to Suppress the blood test and the same was granted. The State took an interlocutory appeal to the Missouri Court of Appeals, which sent it to the Missouri Supreme Court on the question of violation of Respondent's Fourth Amendment rights. The Missouri Supreme Court denied the state's request and affirmed the trial court, finding the following:



1. The Fourth Amendment to the U.S. Constitution requires a search warrant except in a few specifically established circumstances.
2. An exception to the general rule requiring a search warrant is when exigent circumstances are present.
3. Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence.

The Missouri Supreme Court decision turns on the “risk the destruction of evidence” exception. The case of *Schmerber v. California*, 384 U.S. 757 (1966) is the leading case on this exception as it relates to blood draws. Numerous state courts of last resort have addressed the questions found herein and have disagreed and also a number of the U.S. Courts of Appeals.

The Missouri Supreme Court and most others courts agree that alcohol dissipates from the body after a person stops drinking. The state claims this creates an exigent circumstance that allows for a nonconsensual warrantless blood draw. The Court disagreed and believes that the Fourth Amendment requires additional “special facts” to constitute an exigent circumstance.

This case will be very import for DWI and DUI cases across the nation. This case focuses on the dissipation of alcohol in the human body, but the decision could have consequences for driving under the influence of drugs. The human body does not absorb, distribute, or metabolize drugs in a predictable way like alcohol. It will be interesting to see if the court limits its decision where only alcohol is suspected. You may find the filings at: <http://www.scotusblog.com/case-files/cases/missouri-v-mcneely/>

Editor's Note

Highway to Justice is a publication of the American Bar Association ("ABA") and the National Highway Traffic Safety Administration ("NHTSA"). The views expressed in *Highway to Justice* are those of the author(s) only and not necessarily those of the ABA, the NHTSA, or the government agencies, courts, universities or law firms with whom the members are affiliated.

We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*.

To submit an article, please send it to Judge Earl Penrod, penrod26d01@msn.com.

The deadline for submission of articles for the Spring, 2013 issue is February 27.

NEWS YOU CAN USE

The Department of Justice has written a brief in support of the State of Missouri in a DWI case which involves a warrantless blood draw (Missouri v. McNeely). NHTSA assisted in the development of the brief by providing data and research on the matter. This case has the potential to substantially change the manner in which evidence is collected in DWI cases across the country. Oral arguments are scheduled for January 9, 2013. You can read the brief here: <http://www.justice.gov/osg/briefs/2012/3mer/1ami/2011-1425.mer.ami.pdf>

To find out more information about the Office of National Drug Control Policy, including the goals for reducing drugged driving, visit http://www.whitehouse.gov/sites/default/files/ondcp/2012_ndcs.pdf

The report on the Illinois DUI System Stakeholder Conference is now available here:

http://illinois.edu/1695/dui_stakeholder_report.pdf

The report represents the final report of a Summit held by the Illinois Department of Transportation, Traffic Safety Division and the University of Illinois at Springfield Institute for Legal, Legislative, and Policy Studies.

LIFESAVERS: A "HOLE" LOT OF OPPORTUNITIES



*Hon. Peggy Fulton Hora (Ret.)
Judicial Outreach Liaison Region 9
Walnut Creek, CA*

Lifesavers is much more than the familiar candy with the hole in the middle. With a 30-year history, Lifesavers is the largest traffic safety conference in America and is attended by more than 1,500 people each year. The conference has evolved into the premier opportunity to exchange information and research amongst professionals working to reduce the tragic toll of deaths and injuries on our nation's roadways. The Lifesavers Conference delivers up-to-date information from technology to effectuating behavioral changes by drivers. The 2013 Conference will be held April 14 – 16 in Denver, Colorado.

Sponsors include Allstate and AAA, General Motors and Toyota, and the Centers for Disease Control and Prevention among many others. Supporters represent the whole range of players interested in highway safety. Attendees range from judges to community activists, and police to researchers. The conference provides a unique perspective in that it is geared toward the novice as well as seasoned traffic safety practitioners.

As an attendee and presenter at the last two conferences, I have found that the workshops and panels were quite wide-ranging and I learned a lot outside of my discipline. I was quite interested in the story of a community activist who set out to change child seat laws in her state. She told of a three-year effort on the part of the community to lobby, educate and persuade her legislators until they finally changed the law requiring booster seats. I went to a workshop on graduated drivers' licenses. I was familiar with things such as learner's permits but I learned some states have graduated licenses for seniors as well. When driving skills start to diminish, research has found that safety outcomes may be increased by something as simple as restricting older drivers' ability to drive at night or keeping them off freeways.

Five Great Reasons to Attend Lifesavers*

1. *Geared for All, a Great Value*

The Lifesavers Conference is different from other highway safety conferences because it is geared towards novice as well as seasoned safety practitioners who are working at the local, state and national level to address the nation's most pressing roadway problems. Whether you're a state or local highway safety official, police officer or first responder, private or non-profit program provider, student or academician, Lifesavers' comprehensive program affords you the opportunity to expand your knowledge and network with the nation's leading traffic safety experts in just two and a half days. And all of this is offered at a highly affordable price that won't bust your budget. How is that possible? The volunteer-led Lifesavers Conference

(continued from page 2)

Board of Directors and Planning Committee control costs by soliciting sponsorships, holding the conference off-season, and co-hosting the event with the state highway safety office. An early-bird registration fee and a limited number of government-rate rooms at our conference hotels are also available to ensure you don't miss the nation's premiere safety conference.

2. *Proven Programs, Hot Topics*

The Lifesavers Planning Committee is driven to develop a workshop agenda that includes cutting-edge programs that are proven, through research and/or evaluation, to work. They also reach out to past conference attendees, monitor the headlines, and query the Transportation Resource Board, NHTSA, and other safety organizations to identify hot topics. From distracted driving and walking to impairment caused by prescription and synthetic drugs and over-the-counter medications, you can count on Lifesavers to focus on these and other emerging issues at the 2013 conference. Also on tap for Denver – workshops discussing the latest enforcement and judicial initiatives, advances in occupant protection, programs to assist vulnerable and high-risk roadway users, along with the latest research and policy developments, new technologies, and much more. Each workshop will feature a panel of knowledgeable speakers who are carefully vetted to ensure they not only know the subject, but can engage and energize an audience. Every one of the more than eighty Lifesavers workshops is designed to provide information and tools that you can immediately put into practice. Some of the workshops also offer continuing education credits, making your participation at Lifesavers an even greater value.

3. *National Leaders, Leading Experts*

The nation's top safety professionals including leaders of the U.S. Department of Transportation, NHTSA, the Federal Highway Administration, National Transportation Safety Board, Governors' Highway Safety Association (GHSA), and Mothers Against Drunk Driving (MADD), among others participate annually and send numerous members of their staff. With the passage of a new highway reauthorization bill, MAP-21, attendees at the 2013 Lifesavers Conference will learn during the opening plenary session “what's in it for them” from the leading architects of the legislation. The NHTSA Administrator will also once again keynote the annual public service

awards luncheon where dedicated individuals who are recognized as experts in their fields along with highly effective traffic safety programs will be honored.

4. *Tremendous Networking Opportunities*

Now in its 31st year, Lifesavers attracts more than 1,500 U.S. and international safety professionals who are working diligently to reduce motor vehicle crashes and the resulting injuries and fatalities that occur daily on our roadways. You'll have numerous opportunities throughout the conference for formal and informal peer exchange and networking. Every workshop also features a question and answer session that is led by a skilled moderator tasked with facilitating audience participation. Additionally, workshop presenters welcome the opportunity for one-on-one discussion following their sessions. An online attendees list is also made available to all participants so you can continue the dialogue once you return home.

5. *State-of-the-Art Products, Friendly Exhibitors*

More than 100 companies, organizations and government agencies exhibit their latest products, services, programs and/or publications annually at Lifesavers. In fact, some companies exhibit only at Lifesavers because of the number and broad cross-section of safety professionals who are drawn to the event. The exhibits are staffed by dedicated individuals who, just like you, are committed to saving lives and many come back year-after-year citing the warm welcome they receive from Lifesavers attendees and organizers.

**From the Lifesavers Conference website*

Mark Your Calendar

Lifesavers National Conference on Highway Safety Priorities

For more information, see: <http://www.lifesaversconference.org/>



NHTSA AWARDS JUDICIAL LIAISON GRANTS

In late September, the National Highway Traffic Safety Administration awarded grants to six States to assist with establishing State Judicial Outreach Liaisons. The purpose of the State Judicial Outreach Liaison (SJOL) is to establish a mutually beneficial working relationship between the judiciary and the state highway safety office. SJOLs may be sitting or retired judges with experience hearing DWI cases. One of the goals of the SJOLs will be to develop a network of contacts with judges, judicial educators, state drug court coordinators, administrative office of courts, and traffic safety allied professionals. Building such a network will allow for the dissemination of case law updates, legislative updates, research, statistics, and public policy as it relates to impaired driving.

The grants were awarded subsequent to a competitive bid process and the following agencies will be administering the grants on behalf of their respective States:

• State of Delaware Administrative Office of Courts	\$49,896
• Georgia Governor's Office of Highway Safety	\$50,000
• Indiana Criminal Justice Institute	\$50,000
• Mississippi Office of Highway Safety	\$50,000
• Montana Department of Transportation	\$50,000
• Washington Traffic Safety Commission	\$50,000

If you are interested in establishing a State Judicial Outreach Liaison in your state, contact your designated State Highway Safety Office. Click on the following link to find the contact for your state: <http://www.ghsa.org/html/links/shsos.html>.



CONTACT INFORMATION

To learn more about programs offered by NHTSA, please contact one of the following:

Judicial Fellow: Hon. Earl G. Penrod:
penrod26d01@msn.com

Judicial Outreach Liaisons:

Hon. Neil Edward Axel, Judicial Outreach Liaison, Region 3 (North Carolina, Virginia, Kentucky, West Virginia, Maryland, Delaware, District of Columbia):
NeilAxel49@gmail.com

Hon. Phyllis McMillen, Judicial Outreach Liaison, Region 5 (Minnesota, Wisconsin, Illinois, Michigan, Ohio, Indiana, Illinois):
mcmilllen008@gmail.com

Hon. Keith Rutledge, Judicial Outreach Liaison, Region 7 (Arkansas, Missouri, Kansas, Nebraska, Iowa):
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State Judicial Outreach Liaisons:

Florida: Hon. Karl Grube: kgrube@jud6.org

Texas: Hon. Mark Atkinson: matkinson@yourhonor.com

Georgia: Hon. Kent Lawrence: lawkent@gmail.com

JUDGE EARL PENROD SELECTED AS ABA/NHTSA JUDICIAL FELLOW



Judge Earl Penrod of the Gibson (IN) Superior Court has been selected as ABA/NHTSA Judicial Fellow. Judge Penrod began his work on November 1, 2012.

Judge Penrod received his B.A. degree as well as his J.D. degree from the University of Louisville, earned the Master of Judicial Studies (M.J.S.) degree from the

University of Nevada, Reno and has been awarded an honorary Doctor of Laws Degree (L.L.D.) from Oakland City University (Indiana). He is also a graduate of the Indiana Judicial College and the Graduate Program for Indiana Judges. In September of 2008, he became the first recipient of the Master's certificate from the Indiana Judicial College.

Judge Penrod first took the bench on January 1, 1983, upon his election as judge of the Gibson County Court which became the Gibson Superior Court on January 1, 1985.

Judge Penrod has been an adjunct faculty member at Oakland City University for more than 25 years where he teaches a variety of undergraduate and graduate level law-

related courses. He teaches for the National Conference of Specialized Court Judges (NCSCJ) of the American Bar Association and presently serves as Chair-Elect of the NCSCJ. Judge Penrod has served as a presenter for the National Association of Women Law Judges and the National Association of Administrative Law Judges and has been a member of the faculty at the National Judicial College since 2003.

Judge Penrod is a member of the Indiana Judicial Education Committee and served as chair of that committee from 2002-2006. He also continues to serve on the Indiana Law Enforcement Training Board, having been appointed to the position by the Governor of Indiana. This Board oversees the training and education of all law enforcement personnel in Indiana. He periodically teaches for the Indiana Continuing Legal Education Forum, the Indiana Judicial Center, and the Master's Program for the Indiana Judicial College. His article: "Judicial Education in Indiana: An Overview and a Proposal for Change" was published in the *Valparaiso Law Review* and his article "The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement" was published in the *Indiana Law Review*.

JUDGE PHYLLIS MCMILLEN NAMED JUDICIAL OUTREACH LIAISON FOR NHTSA REGION 5



Judge Phyllis McMillen has been named Judicial Outreach Liaison for NHTSA Region 5, which includes Minnesota, Wisconsin, Illinois, Indiana, Michigan and Ohio. Judge McMillen will begin her work as JOL in January, 2013.

Phyllis McMillen was appointed Judge of the State of Michigan 6th Circuit Court in August of 2010. Prior

to serving on the Circuit Court, she was a Judge of the 51st District Court in Waterford, Michigan for over fifteen years. She is currently the chair of the Michigan Association of Drug Court Professionals Annual Training Conference, the past President of the Michigan District Judges Association

and the Oakland County District Judges Association. In 2005, she received a Special Recognition Award from the Executive Office of the President, Office of National Drug Control Policy for her pioneering work in the creation of Sobriety Court as an alternative for handling drug and alcohol related offenses. She was one of the organizers of the Waterford Coalition for Youth, a community coalition targeting issues of substance abuse and violence, and is a lecturer, contributing author and faculty member for various state and national organizations. Judge McMillen serves on various executive and advisory boards, including the Oakland County Community Corrections Advisory Board. She is a 1974 graduate of Michigan State University, a 1977 graduate of the University of Detroit School of Law and formerly a member of the law firm Schmidt, Isgrigg and McMillen.

PENNSYLVANIA NAMES STATE JUDICIAL OUTREACH LIAISON

The Pennsylvania Department of Transportation, in conjunction with the North Central Highway Safety Network, announced that Judge Michael Barrasse will serve as the State Judicial Outreach Liaison. Judge Barrasse is a sitting judge with the 45th Judicial District, Court of Common Pleas, in Scranton, Pennsylvania.

Prior to taking the bench, Judge Barrasse was elected three terms as district attorney for Lackawanna County. He received his B.A. and M.A. in history from the University of Scranton and his J.D. from Dickinson School of Law. Judge Barrasse is President of the Pennsylvania Drug Court Professionals, faculty for the National Drug Court Institute, and is a member of the Board of Directors for the Drug and Alcohol Treatment Center. His present judicial responsibilities include administration of the criminal list and the handling of DUI treatment courts.

He is an alumnus of The National Judicial College and joined its faculty in 2003. The Pennsylvania Judicial Outreach Liaison position was established through a grant from the National Highway Traffic Safety Administration in Fiscal Year 2011.

JUDGE KENT LAWRENCE ACCEPTS POSITION WITH STATE OF GEORGIA

Judge Kent Lawrence has accepted the position of State Judicial Outreach Liaison (JOL) for the state of Georgia. This position is one of six recently funded by a grant from the National Highway Traffic Safety Administration.

Judge Lawrence has resigned his position as NHTSA Regional JOL for NHTSA Region 4, serving Tennessee, Alabama, Georgia, South Carolina and Florida. That region now has two state-designated JOLS. Judge Karl Grube has been state JOL for Florida since 2011.

Although the ABA/NHTSA program is sorry to lose Judge Lawrence, it is good news that he will continue to share his knowledge and expertise with those in Georgia.

THE NATIONAL HIGHWAY TRAFFIC ADMINISTRATION AND THE OFFICE OF NATIONAL DRUG CONTROL POLICY, ALONG WITH OTHER FEDERAL PARTNERS, DISCUSS DRUGGED DRIVING ISSUES

*Kent Lawrence
State Judicial Outreach Liaison
Athens, GA*

On October 26, 2012, the National Highway Traffic Safety Administration (NHTSA), the Office of National Drug Control Policy (ONDCP), and other Federal partners convened a panel to address issues related to driving under the influence of illicit and legally prescribed drugs other than alcohol. Jeff Michael, NHTSA Associate Administrator, set forth a long-term view of drug testing technology for impaired driving offenders who are abusing drugs other than alcohol. He stressed the need for an evidentiary level testing device that can be deployed in police stations and detention centers, much like alcohol breath testing devices are now. ONDCP Deputy Director Ben Tucker pointed out that the partnership between NHTSA, ONDCP and other Federal partners has been extraordinary, and that addressing this issue is a huge challenge for communities across the country. He reiterated the ONDCP commitment to reduce the prevalence of drug impaired driving offenses by ten percent (10%) by the year 2015. Additionally, ONDCP Deputy Director David Mineta suggested The Substance Abuse and Mental Health Services Administration (SAMSHA) establish clearly outlined standards for the testing of oral fluids.

NHTSA Administrator David Strickland acknowledged his support of the comments made by Mr. Tucker and Mr. Mineta. Administrator Strickland encouraged members from the drug testing industry to work with NHTSA and criminal justice practitioners to build practicable tools and technology to make drug testing solutions on par with what is available for alcohol.

All panel members expressed support for "increased per se law legislation" for driving under the influence of drugs. Currently, only seventeen (17) states have enacted per se laws across the country. Additionally, there was a discussion about extending the Administrative License Revocation (ALR) process upon a finding of a drug other than alcohol ingested by an impaired driving offender. It was pointed out that the ALR procedure is civil and administrative in nature and does not require evidential proof beyond a reasonable doubt. Approximately forty (40) states have some ALR process in place. In the absence of an ALR process in Tennessee, Kendall Poole of the Governor's Highway Safety Association indicated an increased commitment to training more Advanced Roadside Impaired Driving Enforcement (ARIDE), Standardized Field Sobriety Tests (SFST), and Drug Recognition Expert (DRE) officers in the field to detect drugged drivers.

There was a great deal of discussion regarding oral fluids being utilized to establish probable cause. Once probable cause has been established, an offender may be subject to either an alcohol and/or blood test. There are on-going efforts in the oral testing industry to increase the sensitivity and reliability of the drug saliva swipe process. It appears that an evidentiary level testing device of oral fluids for illicit drugs, deployable in the field, can be developed within the next two to five years.

The panel session ended on the note that the testing industry is committed to provide more "specificity" and "sensitivity" on oral fluid testing which will provide better products on which to establish credible and evidential based technology solutions.

GUAM DWI COURT WINS SPECIAL ACHIEVEMENT AWARD

Hon. Peggy Fulton Hora (Ret.)
Judicial Outreach Liaison Region 9
Walnut Creek, CA



The Governors Highway Safety Association (GHSA) gave the Guam DWI Court its 2012 Peter K. O'Rourke* Special Achievement Award. The award recognizes achievements in highway safety and recognized Guam for its outstanding improvement in the adjudication and treatment of DWI offenders.

Guam is a U.S. Territory since the Treaty of Paris in 1898, which ceded Guam, Puerto Rico and the Philippines to the United States.; Guam has a homogenous Pacific-Asian population of 185,000, several forward deployed U.S. military bases, and a robust Asian tourist economy. It is America in Asia.

In 2010, the Supreme Court of Guam ordered the establishment of a one-year pilot project to expedite DUI cases. Under the leadership of a single experienced therapeutic judge, the Honorable Judge Elizabeth Barrett-Anderson, the DWI Court consolidated all misdemeanor and felony cases into a single docket. Since the establishment of the court the rate of impaired driving has decreased dramatically on Guam and one-year recidivism rates are 5%.

Prior to this innovation, a DWI case could span two years between arrest and adjudication and there was no monitoring of mandated treatment or testing. There was a backlog of more than 450 DWI cases. Now a DWI offender appears before a magistrate within 48 hours, is arraigned within 14 to 30 days, and brought promptly before the DWI Court Judge for trial setting. As a consequence treatment, if indicated, begins much sooner. The total number of cases filed in the first 13 months of project was 1,040, representing 43% of the total criminal docket of the Superior Court of Guam.

A large number of DWI defendants on Guam are from the Island of Chuuk (Federated States of Micronesia) and do not speak English. The Guam Office of Highway Safety awarded a grant of \$86,000 in NHTSA funding to hire a full time court interpreter for Chuukese offenders. In the first year, over 300 defendants made use of the Chuukese interpreter. The funds were also used to create a Chuukese Alcohol Education Program (AEPCK). Completion rate of the program is now 83%. Course materials, court forms and plea agreements were also translated into Chuukese.

The grant was also used to provide professional development for the DWI Executive Committee and Probation Units. The Guam Bar Association and Guam Police Department also participated in training. Because of the DWI Court, all the island's

stakeholders were brought together for the first time.

The Guam Attorney General dedicated a team to clear the backlog of uncharged cases and the Guam Police Department implemented a new "book and confine" policy to eliminate future backlogs.

The DWI Court Probation Units have altered the negative behavior of impaired driving offenders through a strenuous process of early pre-trial drug testing and monitoring.

The DWI Court Executive Committee has streamlined and improved the system of suspension and/or revocation of driving privileges, which is immediately highlighted at the time of arraignment and resolved at time of conviction with prompt notification to the Guam Department of Motor Vehicles.

Frequent monitoring by the court is a hallmark of its success. The judge sees defendants weekly and monitors 40-50 cases at each session. Violations at first appearance are 15-20% then it drops as the participants engage in treatment and begin to respond to probation in a positive manner. In one year, 3,575 breath tests were administered and 98% were negative.

A review of Guam's impaired driving statutes is underway as well.

Partnerships among the criminal justice organizations and public health providers continue to improve overall response to highway safety issues in the field of impaired driving on Guam.

**Peter K. O'Rourke is a past GHSA chair who initially served as a California Highway Patrol Officer. He was director of the California Office for Traffic Safety and a vice president of The Century Council. This honor was named for him posthumously.*