HIGHWAY TO JUSTICE

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From The ABA and The National Highway Traffic Safety Administration

DISTRACTED DRIVING: TECHNOLOGY & ITS IMPACT ON THE COMPLEX TASK OF DRIVING

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As our nation focuses more attention on distracted driving and its implications for highway safety, judges are seeing an increase in the number of cases coming before them, both on the civil and criminal dockets. Not only are judges adjudicating traffic citations for texting while driving, but they are also determining issues of civil liability. In 2012, more than 3300 people were killed and 421,000 injured in distracted driving-related crashes.[1] In April 2013, Former Secretary of Transportation, Ray LaHood, called distracted driving "a deadly epidemic that has devastating consequences on our nation's roadways." At any given time, 660,000 drivers in the United States are on a cell phone or handling an electronic device.[2]

But what exactly is distracted driving? The conduct we most associate with distracted driving involves the use of a cell phone. By definition though, distracted driving is driving while engaged in *any* activity that could divert a person's attention away from the *primary* task of driving.[3] Although distracted driving can include *any* activity that diverts one's attention from operating a vehicle, there are a number of different types of distracted driving perhaps that are most common. These include using a cellphone for calls or texting, checking directions on a navigation system, eating, and adjusting music devices within the vehicle.

There are many theories as to why distracted driving has become so prevalent – culture, multi-tasking, modernization, technology, and pace of life. In addition, perhaps given the pace of today's world, we may all be feeling the need or the pressure to do more in less time. By comparison, many years ago multi-tasking behind the wheel meant simply keeping two hands on the steering wheel, checking each side mirror and rear view mirror, and taking in all of one's surroundings so to anticipate and drive defensively. One highway safety expert put it best when he wrote:

> As with anything we become use [sic] to doing, we forget how complicated driving really is—it is a complex task that requires us to remain vigilant, understand what we see, and still have the manual dexterity and coordination to act. The more interactions a driver has, the more opportunity the driver will miss something – possibly something significant![4]

There are three types of distractions that come into play: manual, visual, and cognitive. In the context of driving, manual distractions can include taking one's hands off of the steering wheel; visual distraction is taking one's eyes off the road; and cognitive distractions occur when one takes his or her mind off of driving. All distractions compromise one's ability to safely operate a motor vehicle but texting while driving involves all three.

One study noted that for every 6 seconds of texting a driver's eyes are off the road for 4.6 seconds. We know that a vehicle traveling at a constant speed will travel 15 feet for every 10 miles per hour. This means that a vehicle traveling at 50 miles per hour will travel 60 feet per second, and 275 feet over the course of the time necessary to text. Studies have also shown that taking one's eyes off the road for 2 seconds doubles one's risk of a crash.[5]

Even if drivers keep their eyes on the road while using a cell phone, the National Safety Council reported in 2012 that drivers who use cell phones may look but fail to actually see up to 50 percent of the information in their driving environment, something researchers have called "inattention blindness."[6]

"Distracted driving is not a new threat to highway safety, but new technologies both in and outside the vehicle have forced policymakers to focus attention on this issue anew."[7] To meet this challenge, last year the Department of Transportation released a list of voluntary guidelines that encourage automakers to limit the distraction risk connected to electronic devices built into their vehicles, such as communications, entertainment and navigation devices. Earlier this year, the National Highway

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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 the editor, Hon. Earl Penrod penrod26d01@msn.com with a copy to the staff liaison, Gena.Taylor@americanbar.org. Please contact Ms. Taylor for editorial guidelines.

The deadline for submission of articles for the Summer, 2014 issue is May 20, 2014.

DATES TO REMEMBER

April 27-29, Nashville, TN
Lifesavers Conference
http://www.lifesaversconference.org/

May 19 through June 1, 2014
Click It or Ticket National Seat Belt Enforcement Mobilization

DISTRACTED DRIVING: TECHNOLOGY & ITS IMPACT ON THE COMPLEX TASK OF DRIVING

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Traffic Safety Administration (NHTSA) announced that it plans to require all automakers to install systems to enable vehicles to communicate data such as distance, speed and location and to warn motorists of impending collisions.

As a result of emerging technologies and the attention given to distracted driving, policymakers have also taken a number of steps including distracted driving legislation. According to the Governors Highway Safety Association:

> 41 States and the District of Columbia ban text messaging for all drivers; an additional 6 States prohibit texting while driving by novice drivers
>
> 12 States and the District of Columbia prohibit all drivers from using hand-held cell phones while driving;
>
> Although no jurisdiction bans use of cell phone outright, 37 States and the District of Columbia ban all cell phone use by novice drivers and 20 States prohibit school bus drivers from using cell phones while driving.[8]

States are even trying to stay ahead of technology by considering new legislation to ban the use of devices not yet on the market such as Google Glass and other wearable computers with head-mounted displays. According to the National Center for State Legislatures, Wyoming is among at least seven U.S. states eyeing restrictions on the use of this technology while driving. Other states considering such measures include Delaware, Illinois, Missouri, New Jersey, New York and West Virginia. In addition, earlier this year similar legislation was introduced in the Maryland House of Delegates.

In conclusion, as noted by Kentucky Governor Steve Beshear: "Part of the challenge of highway safety is to keep ahead of technology. The cell phone is symbolic of that challenge. While it has made our lives and jobs easier in many ways, there is no question that far too often it proves to be an irresistible distraction to drivers."

For more information on distracted driving, go to http://www.distraction.gov.

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1. http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html.
2. http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html.
3. http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html.
4. David Wallace, *NTSB Announces Top 10 Most Wanted List*, Traffic Safety Guy Blog, January 20, 2013 *available at:* http://trafficsafetyguy.com/ntsb-announces-top-10-wanted -list.
5. http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html.
6. *Understanding the Distracted Brain: Why Driving While Using Hands-Free Cell Phones is Risky Behavior* at page 2. National Safety Council White Paper (April 2012) *available at:* http://www.nsc.org/safety_road/Distracted_Driving/Documents/Dstrct_Drvng_White_Paper_Fnl(2).pdf.
7. *Distracted Driving: Survey of the States*, GHSA Publication, 2013, *available at:* http://ghsa.org/html/publications/survey/distraction2013.html.
8. http://ghsa.org/html/stateinfo/laws/cellphone_laws.html. To find out what the laws are in your State regarding distracted driving, go to WWW.GHSA.ORG.

ANOTHER LOOK AT *MISSOURI V. MCNEELY*

Hon. Mary Celeste
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Hon. Earl G. Penrod
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On April 17, 2013, the United States Supreme Court provided one of the most noteworthy decisions in years relating to impaired driving enforcement when it handed down the decision of *Missouri v. McNeely*.[1] The widespread attention given this decision within the criminal justice community and the mainstream media is based in no small measure on the fact that it addresses the ongoing efforts to combat the chronic, pernicious problem of drunk driving. After all, as noted in the *McNeely* decision "while some progress has been made drunk driving continues to exact a terrible toll on our society."[2]

However, even though it is beyond dispute that society has a legitimate interest in aggressively and effectively combatting drunk driving, every defendant in the criminal justice system remains entitled to the process, protections and rights as guaranteed by the Constitution. And the *McNeely* case represents the Supreme Court's effort to properly balance society's interest in combatting drunk driving against the rights of the individual. In striking the balance, the Court held that the police could not obtain a nonconsensual blood draw without a warrant in every impaired driving case based solely on the exigent circumstance of the natural dissipation of alcohol in the blood.

In view of the prevalence of drunk driving and its impact on public safety and because the Court revisited an issue that some believed had been generally settled in 1966,[3] the case and its potential impact has generated considerable discussion and speculation among criminal justice professionals. For example, some have argued that as a result of *McNeely*, law enforcement will be required to obtain a warrant for every blood draw. Others have suggested that because of the *McNeely* decision, many more defendants will refuse to submit to a chemical test in the hopes that police will be unable to secure a warrant in a timely fashion.

Further, it has been proposed that *McNeely* may impact the validity of implied consent statutes which provide that every driver impliedly consents to submit to a chemical test for intoxication when the police have probable cause to suspect impaired driving. Implied consent statutes have been enacted in every state and as with impaired driving statutes generally, the provisions vary somewhat from state to state.[4] Generally, implied consent statutes provide that a driver who refuses a chemical test is subject to various sanctions such as immediate license suspension and in some states, the filing of a separate charge of refusing to submit to a test.

It is argued that the legitimacy of implied consent statutes is based on the fact that drivers are consenting in advance to something (chemical test result) that the police have a right to obtain, which is no longer the case based on *McNeely's* warrant requirement. Secondly, because a refusal results in extremely significant sanctions, and a nonconsensual test may be conducted in spite of the refusal, the so called consent given by an individual is involuntary and therefore, unconstitutional.

Predicting the future practical consequences of any Supreme Court decision may be a fool's errand, but judges, lawyers and others interested in impaired driving enforcement have a legitimate interest in considering the likely reach of *McNeely*. The true impact of the case will necessarily depend upon how it is interpreted and applied in relation to the varied statutory schemes across the country and some federal and state appellate court cases addressing *McNeely* are beginning to surface. However, because of the paucity of cases to date, the most worthwhile approach in considering the potential effect of *McNeely* is to carefully review the facts and specific holding of the case.

MCNEELY: FACTS AND HOLDING

At its core, *McNeely* announces a bright line rule that the dissipation of alcohol in the body is not **by itself** a sufficient exigency in every impaired driving case to relieve the police of obtaining a warrant under the Fourth Amendment for a nonconsensual blood draw. The police had advised McNeely of the Missouri implied consent provisions and when McNeely would not consent, a hospital technician was directed to take the blood sample. The police neither obtained nor sought a search warrant prior to the blood test.

The State of Missouri argued that nonconsensual blood tests of suspected drunk drivers should not be subject to the Fourth Amendment warrant requirement because of the exigent circumstances exception. The State did not present additional facts and circumstances supporting the reasonableness of the police proceeding without a warrant. Instead, the State argued that sufficient exigent circumstances necessarily exist when an officer has probable cause to suspect a person is driving under the influence because alcohol in a person's blood naturally declines with the passing of time and evidence is thereby destroyed.

In rejecting the requested per se rule for all impaired driving cases, the Supreme Court held that whether sufficient exigent circumstances exist to support an exception to the warrant requirement must be determined in each case based on the totality of circumstances and not simply on the sole exigency of the body's natural dissipation of alcohol. Specifically, if the police can reasonably obtain a warrant prior to having a blood sample drawn, the police must do so.

POTENTIAL LIMITATIONS ON SCOPE, APPLICABILITY AND IMPACT

It should be noted that the Supreme Court did not find that there could never be a warrantless, nonconsensual blood draw in those states permitting them. Instead, the Court held that a warrant would be required unless there are exigent circumstances, including the natural dissipation of alcohol, sufficient to justify the police proceeding without a warrant. Because the State of Missouri was seeking a per se rule and did not offer additional exigencies for the Court's consideration, the Court did not address the factors and circumstances that may authorize a warrantless, nonconsensual blood draw.

As noted by Justice Kennedy in his concurring opinion, even though the existence of exigent circumstances must be determined in each case, "states and other governmental entities which enforce the driving laws can adopt rules, procedures and protocols

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that meet the reasonableness requirements of the Fourth Amendment and give helpful guidance to law enforcement officials." In other words, with properly adopted procedures and protocols for various circumstances, law enforcement may not automatically be required to obtain a warrant but instead, will be able to demonstrate the reasonableness of conducting a warrantless, nonconsensual blood draw in individual cases.

Further, *McNeely* addresses the applicability of the Fourth Amendment when the police conduct a blood test which is an intrusion into the individual's body. Nothing in *McNeely* suggests that the Fourth Amendment requires a warrant for all chemical tests for alcohol and other substances. And although there can be no nonconsensual breath test, technology may in the coming years permit non-intrusive techniques to accurately measure the presence and amount of alcohol in a driver's body. A compelling argument may be made that the Fourth Amendment warrant requirement for a nonconsensual blood draw would not be applicable if the driver were merely required to briefly put a patch on an arm or place a finger on an instrument pad.

An additional limitation in some jurisdictions on the reach of *McNeely* is the potential applicability of the good faith exception to the exclusionary rule. In an unofficial opinion,[5] the Wisconsin Court of Appeals applied the good faith exception to the exclusionary rule for a warrantless, nonconsensual blood draw. In refusing to suppress blood test results, the Court noted the police were following clear and settled Wisconsin precedent in which Wisconsin Supreme Court had more than 20 years ago interpreted *Schmerber* to mean that the natural dissipation of alcohol in a person's blood established sufficiency exigency on its own to permit the police to take a warrantless, nonconsensual blood test.

CONSENT

It bears repeating that the *McNeely* decision addressed the applicability of the exigent circumstances exception to the Fourth Amendment warrant requirement in the context of impaired driving enforcement. The *McNeely* decision does not rest on nor specifically consider the issue of consent, which is a separate potential exception to the warrant requirement.

In many jurisdictions, a substantial majority of chemical testing on impaired driving suspects is performed pursuant to the consent of the defendant, whether expressly or impliedly given. It has long been held that there is no Fourth Amendment violation by the police if their actions are conducted with the consent of the individual, so long as that consent is voluntarily given. The Supreme Court has noted that the voluntariness of consent is a factual issue to be decided on the totality of the circumstances and the Court has set forth a number of relevant factors on the issue of whether consent is voluntary and not coerced.[6]

Although *McNeely* was an exigent circumstances case, references to *McNeely* are starting to appear in Appellate Court decisions in relation to consent, both express and implied. For example, the Minnesota Supreme Court rejected a defendant's claim that his consent was coerced because he was advised that the refusal to submit to the test was a crime.[7] The Court also rejected the defendant's argument that Minnesota's implied consent law was unconstitutional by noting that the *McNeely* case referred to implied consent statutes as 'legal tools' available to the states in enforcing drunk driving laws.

Also, the Texas Court of Appeals for the Sixth District rejected a defendant's claim that *McNeely* rendered Texas' implied consent statute unconstitutional by noting that *McNeely* clarified exigency and did NOT invalidate the implied consent statute under which the police had conducted the blood draw in this case.[8] A similar result was reached in two other cases from the Texas Court of Appeals, one published and the other yet to be released for publication.[9]

There are a few additional decisions from other state and federal courts referencing *McNeely* and practitioners should be prepared for many more in the coming months and years.

CONCLUSION

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it"[10] and nothing in the *McNeely* case holds otherwise. Instead, the Supreme Court in *McNeely* has endeavored to carefully balance the government's interest in combatting a serious threat to public safety with the protections and rights granted every individual under the Fourth Amendment of the Constitution of the United States. And whether one agrees with the specific balance struck by the Supreme Court in *McNeely*, all can agree that the competing interests are vitally important and will continue to receive much deserved attention in the future.

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1. *Missouri v. McNeely*, 133 S.Ct. 1552; 185 L.Ed.2d 696; 2013 U.S. LEXIS 3160 (2013)
2. *McNeely* at p. 1565.
3. *Schmerber v. California*, 384 U.S. 757 (1966)
4. http://www.nhtsa.gov/staticfiles/nti/pdf/811796.pdf
5. *State v. Reese*, 2014, Wisc. App. LEXIS 145 (filed February 20, 2014)
6. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)
7. *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013)
8. *Reeder v. State*, 2014 Tex. App. LEXIS 147 (decided January 8, 2014)
9. *Smith v. State*, 2013 Tex. App. LEXIS 13403 (filed October 31, 2013); *Douds v. State*, 2013 Tex. App. LEXIS 12725 (filed October 15, 2013)
10. *McNeely*, supra note 1 at p. 1565 (quoting *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990))

INAUGURAL VETERANS TREATMENT COURT CONFERENCE A FIVE-STAR SUCCESS

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Billings, Montana

In December of 2013, Secretary of the United States Department of Veterans Affairs Eric Shinseki stood in front of a crowded room in Washington, D.C. He wasn't there to discuss policy or debate the finer points of politics, and his message was clear and straightforward: Veterans Treatment Courts work. It was a message echoed just days later by General Martin Dempsey, Chairman of the Joint Chiefs of Staff.

The inaugural Veterans Treatment Court Conference, or Vet Court Con, as many came to refer to it, was an informative and often-inspiring event. The largest gathering of Veterans Treatment Courts on record, it was attended by an estimated 1,000 legislators, judges, law enforcement, treatment court professionals, veterans and reporters. Those present had the opportunity to learn not only how these courts work, but more importantly why they are so critical to the veteran population throughout our country.

It is true that although the majority of American servicemen and women return home and re-enter their lives without significant incident, that experience is not true for everyone. Nevertheless, some struggle with mental health disorders or traumatic brain injuries and too often they compound the problem by abusing drugs or alcohol. In turn, that leads them into contact with law enforcement as well as frequently damaging their relationships with friends and family—the very people who provided them with a support system.

As a sitting judge who presides over a Veterans Treatment Court, I have seen firsthand the realities of our veterans. Over 60 percent of those who are inducted into our CAMO –Courts Assisting Military Offenders program have a DUI or driving offense; perhaps even more startling is the fact that 63 percent of the veterans in the court over which I preside have been charged with felony DUI (four or more since leaving the service) or criminal endangerment with children in their vehicles. I have also seen the positive strides these veterans have taken by participating in this rigorous program.

I was nonetheless unprepared for the emotions felt during the National Association of Drug Court Professionals (NADCP) Vet Court Con. Those emotions were not only triggered by the stories shared by veterans now living whole and healthy

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INAUGURAL VETERANS TREATMENT COURT CONFERENCE A FIVE-STAR SUCCESS

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lives, but also by others within the legal community who are actively leading the advance to make more of these programs available.

In 2008, there were 5 veterans-specific treatment courts operating in the United States. Today there are 130, with an estimated 200 additional currently in the planning stages. These courts are gaining momentum, with federal, state and local leaders not only recognizing the needs of this unique population, but also jumping to attention to add their support.

Several weeks after Vet Court Con, U.S. Attorney General Eric Holder visited the Roanoke Virginia Veterans Treatment Court. During his remarks, he noted, "[T]his Veterans Treatment Court has shown tremendous promise in helping eligible men and women to break the destructive cycle of criminality and incarceration that traps too many people and weakens too many communities across America. By offering alternatives to incarceration —and linking participants with vital rehabilitation and treatment resources—this program provides a model for preventing recidivism, reducing relapse, and empowering veterans convicted of certain nonviolent crimes to rejoin their communities as productive, law-abiding members of society. It's also saving resources at a time when they could not be scarcer."

So why and how do these courts work, and why are they supported by so many of our leaders? Like other treatment courts, they require regular court appearances, substance abuse program attendance, and frequent and random testing for drugs and/or alcohol. Veterans entering the program may also be required to complete parenting or other life skills-oriented programs depending on their specific needs. What sets these courts apart is the camaraderie these veterans develop with others who are in the program, those who can uniquely understand what they have been through—and what they're going through now. That camaraderie is also echoed in the ever-expanding inclusion of mentors: veterans who volunteer in Veteran Treatment Courts to set an example for program participants.

One of the most stirring events during Vet Court Con, in fact, was the swearing in of 89 veteran volunteers into the Justice for Vets Mentor Corp. Each recited the following pledge:

> ***I am forever conscious of each veteran under my charge, and by example will inspire him or her to the highest standard possible.***
>
> ***I will strive to reintegrate my veteran back into society.***
>
> ***I will live by the credo "leave no veteran behind" and will give them the support only I, a veteran can give.***
>
> ***I will never forget that I am responsible to my fellow veterans, the Veterans Treatment Court program and the law.***

These mentors are important to the courts in which they serve and, in coordination with the Veterans Court team, help to make the participating veterans whole.

Being a part of this first Veterans Court Conference was not something I will not soon forget, nor will the members of my team who also attended. If you were unable to attend, I hope you will consider attending NADCP's second Vet Court Con planned for May in Anaheim, California.

VALUABLE RESOURCES CAN BE FOUND AT

National Center for State Courts
http://www.ncsc.org/

National Judicial College
http://www.judges.org/index.html

TRIBAL COURTS FELLOW CHOSEN

Judge J. Matthew Martin has been chosen to serve as the first American Bar Association (ABA)/ National Highway Traffic Safety Administration Tribal Courts Fellow. Judge Martin retired in 2013 after almost eleven years of service as an Associate Judge for the Cherokee Court, the Tribal Court for the Eastern Band of Cherokee Indians.

Judge Martin is Board Certified as a Specialist in Federal and State Criminal Law and Criminal Appellate Practice by the North Carolina State Bar. He serves as an Adjunct Professor of Law, teaching Federal Indian Law at his *alma mater*, the UNC School of Law as well as at Elon University School of Law. Judge Martin holds a Master's Degree in Judicial Studies from the University of Nevada-Reno. He is published. His most recent articles, "The Supreme Court Erects a Fence Around Indian Gaming," and "Slaying the Minotaur," will be published in the Spring of 2014 by the Oklahoma City University Law Review and the ABA Judges Journal, respectively. Judge Martin has spoken across the United States and internationally on issues involving: Indian law, criminal law and the judicial process. He is a permanent member of the Fourth Circuit Judicial Conference.

Prior to beginning private practice in the mid-1980s Judge Martin served as a Judicial Law Clerk for the Honorable Richard C. Erwin, United States District Judge for the Middle District of North Carolina. In addition to the scores of jury trials over which he has presided, Judge Martin tried numerous criminal jury trials as a lawyer, including: driving while impaired, armed robbery, bank robbery, complicated drug trafficking conspiracies and capital murder. His various civil jury trials include: medical malpractice, personal injury, premises liability, and he holds, with co-counsel, what is currently believed to be the largest verdict in Orange County, North Carolina: $2,750,000.00 on behalf of a little girl, molested by her next door neighbor. Judge Martin has appeared before and argued in all of the appellate Courts in North Carolina, as well as in the United States Court of Appeals for the Fourth Circuit. In the 1991 Term of the Supreme Court of the United States, at age 31, he argued *Wade v. United States*, 504 U.S. 181 (1992) before the Court on behalf of the Petitioner.

In addition to other judicial outreach functions, Judge Martin is very active within the Judicial Division (JD) of the ABA where he recently served as the Chair of the National Conference of Specialized Court Judges and now serves as Chair of the Conference's Native American Tribal Courts Committee and as a member of the JD Judicial Ethics Committee. He is a member of the Board of Trustees of the National Judicial College. Judge Martin is married to Catherine S. Martin and they have one child. The Martins live in Asheville, North Carolina.

The ABA Criminal Justice Section selected Judge Martin to receive the 2014 Livingston Hall Juvenile Justice Award.