SUPREME COURT DECISIONS AND UPCOMING CASES REFLECT THE GROWING NEED FOR ELECTRONIC SEARCH WARRANTS IN IMPAIRED DRIVING CASES

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For more than 40 years, law enforcement officers, relying upon the U.S. Supreme Court decision in *Schmerber v. California* 1 were able to obtain breath, blood, and urine samples for testing from DUI suspects without obtaining a search warrant. In *Schmerber*, an officer compelled a DUI subject to provide a blood sample without a warrant. The Court ruled that the officer properly obtained the sample because he “might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence’ since ‘the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.’” 2 *Schmerber*’s clear and specific language led practitioners to believe that the case created a ‘DUI exception’ to the warrant requirement. Accordingly, officers compelled DUI subjects to provide breath, blood, and/or urine samples for decades.

By 2016, as a result of the Supreme Court’s decisions in *Missouri v. McNeely* 3 and *Birchfield v. North Dakota*, 4 the judicial landscape changed significantly. In these cases, the Court noted that advancements in technology made it far easier for law enforcement officers to obtain warrants expeditiously and ruled that the natural dissipation of alcohol in one’s blood did not create a *per se* exception to the Fourth Amendment’s warrant requirement based on exigent circumstances. The Court held that officers could compel blood samples from DUI suspects only if (1) they have probable cause to believe the driver operated his or her vehicle while impaired; and (2) they obtain a warrant to seize one’s blood or the driver voluntarily consents to a blood draw or one of the traditional*

exceptions to the warrant requirement, like exigent circumstances, exists.*

The Court ruled that officers could continue compelling breath tests without a warrant because breath testing is non-invasive.

As in any other case, courts determine the voluntariness of a person’s consent and exigent circumstances on a case-by-case basis and the totality of the circumstances. When courts examine voluntariness, they routinely consider factors such as the defendant’s age, intelligence, education, mental and physical condition, and environment. In assessing exigency, the courts commonly consider:

- The fact that the average person metabolizes alcohol and other drugs rapidly;
- The circumstances;
- The investigating officer’s ability to contact a judge;
- Traffic conditions that may have prevented the officer from accessing a judge in person;
- E-mail or internet challenges if the officer sought an electronic warrant;
- The length of time necessary for a judge to have received, reviewed, and approved a warrant; and
- Any treatment the driver was undergoing or may have needed to undergo.

Now, defendants in impaired driving cases are using the *McNeely* and *Birchfield* rulings to attack the nation’s ‘implied consent’ laws. These laws essentially provide that a motorist ‘consents’ to a blood or breath test by obtaining a driver’s license and/or driving on the state’s roadways. Many implied consent laws give motorists the option to affirmatively withdraw their consent, though they permit the State to

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suspend or revoke the driving privileges of those that do so. Additionally, a motorist’s withdrawal of consent may, in some jurisdictions, also lead to evidentiary inferences, enhanced penalties, or even additional civil or criminal charges.

On January 11, 2019, the U.S. Supreme Court granted certiorari to review the Wisconsin Supreme Court decision in Mitchell v. State.6 In Mitchell, police obtained a blood sample from an unconscious driver without a warrant pursuant to the Wisconsin implied consent law. The driver moved to suppress the results, suggesting that the only consent that matters is the one given at the time of the test. The court denied his motion and the driver was convicted of DUI. The Supreme Court will now address the issues on the merits. The precise issue presented in Mitchell is: “Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.” The Court heard oral arguments on April 23rd, and a decision is expected before the end of the current term. Although the majority opinions in McNeely and Birchfield spoke favorably about implied consent laws and their validity in addressing highway fatalities and injuries, this new opportunity to address the interplay of the Fourth Amendment and implied consent may lead to new requirements and new procedures.

McNeely and Birchfield do not, of course, present the only legal threat practitioners face in obtaining breath, blood, and urine samples for testing. Impaired driving defendants have also sought to argue that some State Constitutions provide even greater protection than the Federal Constitution.6 Earlier this year, in Elliott v. State, for example, the Georgia Supreme Court recognized that under U.S. Supreme Court precedent, the Fifth Amendment does not prohibit the use of one’s refusal to submit to a breathalyzer test as evidence in a criminal proceeding.7 The Court ruled, however, that the Georgia Constitution afforded the defendant a broader right against self-incrimination and her refusal to submit to a test could not be used against her.

Similarly, the Oregon Supreme Court ruled that under Oregon’s State Constitution, a motorist has the right to refuse (or not consent to) a breath test following his arrest for DUll and that his refusal could not be used in evidence as an inference in the resulting DUll trial.8

In light of recent case law, and in order to avoid legal challenges to warrantless blood draws, there is a strong preference for the use of search warrants to obtain blood samples in impaired driving cases when possible. To overcome some of the delay that traditionally has been associated with obtaining approval for search warrants, new technology now allows for the more efficient preparation, transmission, and approval of electronic search warrants (a.k.a. e-warrants) in many cases.

E-warrants have now become an important tool to help law enforcement expeditiously obtain judicial approval. The development of a system for e-warrants often requires the collaborative effort of all three branches of government and may include legislative action, new Court Rules of Procedure, court approval, and hardware/software improvements to existing computer systems. To help meet these needs Responsibility.org has collaborated with law enforcement officers, prosecutors, judges, and highway safety personnel to identify best practices for implementing electronic warrant systems. Practitioners and court personnel who are not familiar with this solution can find an implementation guide and legislative checklist on the Responsibility.org website.9

State and Federal Constitutions have historically favored judicially issued warrants to conduct searches and seizures. Current technology and electronic warrants now provide

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an opportunity to expeditiously obtain evidence that may be necessary not only in impaired driving cases but in other criminal cases as well.

[Editor’s Note: After submission of this article, the U.S. Supreme Court handed down its 5-4 plurality decision in Mitchell v. Wisconsin. The Court held that when an alcohol-impaired driver is unconscious and cannot be given a breath test, exigent circumstances generally permit a warrantless blood test to determine blood alcohol level. Although the Court found that there was a compelling need for a blood test where the suspect’s condition deprives officials of a reasonable opportunity to conduct a breath test, Justice Alito, in his opinion for the Court, commented that the time needed to secure a search warrant may have shortened over the years, but it has not disappeared. For the reasons set forth above, electronic warrants will continue to play an important role in obtaining crucial evidence in impaired driving cases.]

Endnotes:

2. 384 U.S. at 770, 86 S.Ct. at 1835-36 (1966)
3. 569 U.S. 141, 133 S.Ct. 1552 (2013)
5. 914 N.W.2d 151 (Wisc. 2018)
6. Generally State constitutions may provide broader protections, but not less, than those set forth in the U.S. Constitution.
7. 824 S.E.2d 265 (Ga. 2019)
9. https://www.responsibility.org/end-drunk-driving/initiatives/e-warrants/
with the approval of the Secretary of the Interior according to Indian land conveyance provisions and limitations found in the Code of Federal Regulations. . . . 3

This confusing pastiche of titles is the result of an activist colonial policy of the United States known as the allotment era. The government used this policy to break up collectively held Tribal lands. It assigned tracts of land to individual native people and to families to hold in fee simple under the naive illusion that they might become yeoman farmers as their white counterparts. As time passed, the obvious pressure to open Oklahoma up for development became notorious. Lands not distributed to individual natives were declared to be “surplus” and deeded by government fiat to white settlers and railroad concerns. Rampant swindling of the indigenous population was the norm. As a result, a massive amount of land reserved by treaty to the Tribe in exchange for being forced west on the “Trail of Tears” passed out of native hands, leaving in its place the “checkerboard.”

From a traffic court perspective, this state of affairs means that enforcement is compromised, and both jurisdictional and logistical questions arise. Are the police officers cross-deputized, so that in case the perpetrator is apprehended on state lands the prosecution can proceed seamlessly that evening? Is a more complicated “hand-off” required, where one jurisdiction must hail another and await a prisoner transfer? The state and Tribal officers involved have to know the geography intimately. Even then, the potential for error is significant.

In a recent case, the Ninth Circuit held that a Tribal officer on the Crow reservation in Montana exceeded his authority in searching a truck on US Route 212, a public right of way crossing the reservation, because he did not ascertain whether the defendant was an Indian before finding methamphetamine. 4 “Indianness”—whether for Tribal, state, or federal jurisdiction—is ultimately a judicial determination, not a law enforcement one. In federal prosecutions it is an essential element of offenses under the Major Crimes Act. 5 Considering this opinion within the confines of the Crow reservation is one thing but attempting to apply it in a “checkerboard” jurisdiction such as the Cherokee Nation is another matter entirely.

Regardless of the difficulty, the Cherokee Nation has an obligation to exercise sovereignty over its lands to protect its citizens and its visitors. The judicial expression of sovereignty is jurisdiction. The Nation has been doing it for decades and the oldest public building in Oklahoma is the Cherokee Nation’s venerable courthouse.

Today’s courthouse is modern in every way; it is beautifully designed and appointed. The District Court bench is made up of bar-licensed lawyers, who are also Tribal members. Traffic safety offenses, including impaired driving, do not make up a huge portion of the docket, because many of the roads are not within the “checkerboard.” Nonetheless, the sheer size of the Cherokee Nation guarantees these cases and their attendant issues will continue to come before the Tribal Court. The annual uncertainty, as practitioners and judges await the latest federal Indian law pronouncements from the Supreme Court of the United States, guarantees these cases will continue to be complex. 6

Endnotes:

1. https://www.cherokee.org/Portals/cherokeeorg/Documents/3308014_County_At_A_Glance.pdf
3. https://cherokee.org/Services/Real-Estate-Services/What-is-Restricted-Land
5. 18 U.S. Code § 1153.

FOOD FOR THOUGHT

By Honorable Neil Edward Axel
Senior Judge, District Court of Maryland
ABA Judicial Fellow
Columbia, Maryland

As car manufacturers and technology companies continue to develop driverless, autonomous and connected vehicles, our legislatures and courts may be faced with a number of policy and legal issues that may change the historical approach to issues of civil and criminal liability. Although the legal implications may depend upon the vehicle’s level of automation and autonomy, here are some questions to think about:

• Who will be considered “at fault” when an autonomous vehicle causes a crash? Is the driver at fault? Is the vehicle manufacturer at fault? Is the software designer or system developer at fault?
• Who will bear the social and economic cost of motor vehicle crashes? Will traditional notions of negligence govern civil liability for a crash, or will a litigant be required to prove liability under product liability standards? Or, will States adopt a strict liability standard?

• Will victims of vehicle crashes be required to present expert testimony on the design or manufacture of autonomous vehicles involved in a crash in order to recover damages in a civil lawsuit?
• How will the insurance industry respond? Will automobile liability policies cover only the negligent operation of the vehicle, or will they also cover crashes caused by a computer glitch?
• Will a driver be considered in “actual physical control” of the vehicle for purposes of driving while suspended, or driving while impaired?
• Will drivers still be liable for strict liability traffic offenses such as speeding?
• Will distracted driving statutes still apply when one is using an electronic device while the vehicle is an autonomous mode?

We know that our laws evolve over time, and often respond to the technological developments that each new decade brings. Time will tell how our communities respond to the emerging technology of autonomous and driverless vehicles. In the meantime, these questions raise some very interesting and complex issues.
To learn more about programs offered by NHTSA, please contact one of the following:

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**WELCOME TO HON. RICHARD A. VLAVIANOS**

Hon. Richard A. Vlavianos  
Region 9 Regional Judicial Outreach Liaison  
(AZ, CA, HI, Pacific Territories)

Richard A. Vlavianos is a Judge of the Superior Court of California, County of San Joaquin. He was appointed by Governor Pete Wilson in 1999. He serves by appointment of the Chief Justice of California as Chair of the Judicial Council’s Collaborative Justice Advisory Committee. He also serves as an Judicial Advisory Panel member for the Foundation for Advancing Alcohol Responsibility (FAAR).

He has served as faculty for: Lifesavers, Transportation Research Board; National Judicial College; Judicial Council of California, Center for Judicial Education and Research; and multiple state courts.

He currently oversees a multi-track DUI Court system of court supervision in high risk DUI cases that has documented a 32% reduction in recidivism and 50% reduction in collisions with repeat offenders, over 4,000, in nine years. He has also implemented a DUI prevention program that involves court proceedings inside of schools, using prisoners and collaborative court clients to educate students on the dangers of alcohol and drugs, and an outreach program into the Hispanic community for DUI prevention.

He has received the 2018 Judicial Officer of the Year Award from the Chief Probation Officers of California; 2017 Public Service Award from the National Highway Traffic Safety Administration for implementing the multi-track DUI Court; the 2015 Child Prevention and Intervention Award from The Children’s Services Coordinating Commission; the 2012 Kevin E. Quinlan Award from the Century Council (now FAAR) for excellence in traffic safety; and the 2007 Law Day Award from the San Joaquin County Bar Association.

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**WELCOME TO HON. JOHN “KEVIN” HOLBROOK, KENTUCKY’S NEW STATE JUDICIAL OUTREACH LIAISON**

Judge Kevin Holbrook served as a Kentucky District Judge, in the 24th Judicial District (which consists of Johnson, Lawrence and Martin Counties in rural Appalachia) from 2000 until retirement in January 2019. Prior, he served as Assistant Johnson County Attorney (as a lead prosecutor) as well as being in private practice, from 1994 until first being elected District Judge in 2000. He is a graduate of the University of Kentucky School of Accountancy, B.S. 1989, and the Salmon P. Chase College of Law, J.D. 1994. Judge Holbrook has served for several years as a faculty member for the Kentucky District Judge's College teaching Commercial Driver’s Licensing (CDL) Issues, DUI Sentencing Issues/Alternatives, Ignition Interlock Device Law, 4th Amendment, Evidence, Mental Health/Guardianship.

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and other courses for the Kentucky District Judge Colleges. Judge Holbrook is an active member (retired) of the Education Committee, served on the Chief Justice’s Medication Assisted Treatment (MAT) Task Force, the Chief Justice’s Regional Summit on Opioid Abuse for a seven-state region, the Chief Justice’s Pretrial Task Force, KY CJPAC (Pretrial Subcommittee), and is presently serving on the Chief Justice’s Civil Rules Revision Committee. He served as a faculty member at the National Judicial College from 2006 thru 2009.

As a prosecutor in Appalachia, he was faced with the influx of the opioid crisis during the mid to late 1990’s. This issue quickly became prevalent in DUI/DWI cases. Upon taking the bench, the crisis worsened, so an alternative approach to these cases was implemented. In 2003, Judge Holbrook (along with his former colleague) started a pilot DUI/DWI Drug Court which was one of the first drug courts in Kentucky. What began with three participants evolved into a three-county program that has graduated hundreds, seen many drug-free babies born, recidivism of traffic and drug crimes vastly reduced, many obtain GED & college degrees, employment and most importantly, many changed lives! Today, the program averages 60-65 participants. The program ranks consistently among the top drug courts in Kentucky despite its rural, Appalachian obstacles. It is Judge Holbrook’s proudest accomplishment during his judicial career and he prides himself on the innovative/evolving approach that was taken to make the Drug Court succeed.

UPCOMING NATIONAL JUDICIAL COLLEGE COURSES

Co-Occurring Disorders in Impaired Driving Cases
Thursday, August 8, 2019
Noon PST | Online Webcast | Tuition: Free

More and more, judges are seeing a high rate of co-occurring psychiatric and substance related disorders in defendants appearing on impaired driving charges. These defendants have a more complicated course of treatment, and may require extra time and different sentencing choices. This 60-minute webcast is designed to allow the participants to discuss mental illness and its interaction with substance abuse; and recognize the impact of co-occurring disorders on impaired driving cases.

Drugged Driving Update
Thursday, August 22, 2019
Noon PST | Online Webcast | Tuition: Free

Drugged driving cases present unique problems to judges as there are no per se limits to indicate impairment. This 60-minute webcast will update judges on new trends in drug use and impaired driving cases.

Self-Represented Litigants in Traffic Court
Thursday, October 10, 2019
Noon PST | Online Webcast | Tuition: Free

In this 60-minute, highly interactive webinar, judges will work together at how to explain to self-represented litigants of their rights and responsibilities in plain and simple language. The participants will collaborate on putting together and opening statement for the traffic courtroom. Without compromising the neutrality of traffic court proceedings, we will work together to formulate techniques ensure that all self-represented litigant get their day in court and the facts of the case are adequately presented. Using principles of procedural fairness in traffic court proceedings, we will strategize how to prevent disruptive or disrespectful behavior.

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DON’T FORGET

Valuable resources can be found at:

- National Highway Traffic Safety Administration
  http://www.nhtsa.gov/Impaired

- American Bar Association/Judicial Division/NCSCJ
  http://www.americanbar.org/groups/judicial/conferences/
  specialized_court_judges/NHTSA.html

- Highway to Justice - Archives
  http://www.americanbar.org/publications/judicial_division_
  record_home/judicial_division_record_archive.html

- National Judicial College
  www.judges.org

- Governors Highway Safety Association: Alcohol Impaired Driving
  https://www.ghsa.org/issues/alcohol-impaired-driving

- AAA Foundation for Traffic Safety
  https://www.aaafoundation.org/

- National Center for State Courts
  http://www.trafficresourcecenter.org/

- National Center for DWI Courts
  http://www.dwicourts.org

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