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INTERPLAY OF THE FOURTH AMENDMENT IN IMPLIED CONSENT STATUTES AND WARRANTLESS CHEMICAL TESTING IN IMPAIRED DRIVING CASES

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Impaired driving laws are dynamic. "[O]ver time… states have toughened their drunk- driving statutes, imposing harsher penalties on recidivists and drivers with particularly high BAC [blood alcohol content] levels."[1] We have also seen BAC levels that constitute *per se* alcohol driving impairment change over the years, including the most recent change in Utah.[2] Utah went from .08 BAC like the rest of the country to .05 BAC *per*

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[1] *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2162 (2016).

[2] Nicole Nixon, *Utah First In The Nation To Lower Its DUI Limit To .05 Percent,* NATIONAL PUBLIC RADIO, INC. (Dec. 26, 2018), https://www.npr.org/2018/12/26/679833767/utah-first-in-the-nation-to-lower-its-dui-limit-to-05- percent.

se alcohol driving impairment. There is also the implementation of new *per se* drugged driving statutes[3] with the increase in drugged driving fatalities.[4] In fact, in a 2017 study drugged driving fatalities surpassed alcohol driving fatality for the first time.[5]

As with the changes in impaired driving laws comes too changes in Fourth Amendment issues in impaired driving cases. Implied consent statutes and warrantless chemical testing are prevalent themes in impaired driving cases. They are intricately intertwined with both being creatures of statute and both implicating the Fourth Amendment. Within the last several years, there have been major U.S. Supreme Court rulings and state appellate cases addressing Fourth Amendment issues in impaired driving cases. Law enforcement, attorneys and the courts are continually faced with these Fourth Amendment search and seizure issues. This article will explore the current status of those cases and discuss the interplay between implied consent statutes and warrantless chemical testing as they relate to Fourth Amendment search and seizure in impaired driving cases.

The impaired driving case obviously commences with someone driving on the roadways. It develops into a potential impaired driving case when law enforcement finds probable cause for a stop[6] followed by probable cause for any search of the driver and auto[7] and ultimately the arrest of the driver.[8] Probable cause is a Fourth Amendment requirement that must be met before law enforcement may conduct a search, arrest or secure a warrant.[9]

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[3] *Drugged Driving Marijuana-Impaired Driving,* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (Mar. 8, 2019),
http://www.ncsl.org/research/transportation/drugged-driving-overview.aspx.

[4] Edward C. Wood, DUID Victim Voices, Candace Lightner, Founder MADD and We Save Lives, and Stephen K. Talpins, Institute for Behavior and Health, *Drunk vs Drugged Driving is Not a Contest,* WE SAVE LIVES (2017), https://wesavelives.org/drunk-vs-drugged-driving-not-contest/.

[5] *Drug-Impaired Driving: A Guide For States,* GOVERNORS HIGHWAY SAFETY ASSOCIATION (April 2017),
https://www.ghsa.org/sites/default/files/201704/GHSA_DruggedDriving2017_FINAL.pdf.

[6] *Byrd v. United States,* 584 U.S. 1518, 1531 (2018).

[7] *Arizona v. Gant,* 566 U.S. 332 (2009).

[8] *Terry v. Ohio,* 392 U.S. 1, 24 (1968).

[9] *Id.*

The Fourth Amendment states as follows: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[10]

The U.S. Supreme Court addressed the meaning of the operative term "probable cause" in *Illinois v. Gates*, where they favored a flexible approach, viewing probable cause as a "practical, non-technical" standard that calls upon the "factual and practical considerations of everyday life on which reasonable prudent men [...] act".[11] Whether or not there is probable cause typically depends on the totality of the circumstances.[12] What constitutes the "totality of the circumstances" often depends on how the court interprets the reasonableness standard.[13] Both implied consent statutes and warrantless chemical testing include these Fourth Amendment constructs.

WARRANTLESS CHEMICAL TESTING

Implied consent statutes address what happens if a driver, who is suspected of driving while impaired, refuses chemical testing that is requested by law enforcement. This scenario implicates the Fourth Amendment along with the type of chemical testing used. Chemical testing in impaired driving cases like implied consent statutes is dictated by state statutes. These statutes include the methods of breath, blood, urine, and in some states, oral fluid testing.[14] Oral fluid testing seems to be trending with many states conducting pilot roadside testing with various devices[15] and as a result several states are now amending their chemical testing statute to include this type of testing.[16] Some states even give the driver an option to choose which test they want.[17] It is becoming apparent that how the courts

[10] *Fourth Amendment*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/fourth_amendment. ©

[11] *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

[12] *United States v. Humphries*, 372 F.3d 653, 657 (4th Cir. 2004).

[13] Prosecutor, *Prosecutor's Manual for Arrest, Search and Seizure*, § 6-6(b) (2004).

[14] California Drunk Driving, *The Implied Consent Advisement*, §8:13 (2019).

[15] *Id.*

[16] *Id.*

[17] *Id.*

are approaching their decisions on warrantless chemical testing is dependent on the method of testing itself, whether it be blood, urine etc. There are typically no Fourth Amendment issues related to taking a chemical test if there is an uncontested consent or law enforcement establishes probable cause for a warrant and the warrant is appropriately issued. There may be other potential issues related to the protocol for taking the test along with the chain of custody of the sample and its admissibility,[18] but Fourth Amendment issues typically arise when a chemical test ensues without a warrant.

Warrantless blood draws as the chemical test in traffic cases was not an unusual practice under the 1966 U.S. Supreme Court case of *Schmerber v. California*.[19] In *Schmerber* the driver was hospitalized following an accident where he was the apparent driver. The police officer smelled alcohol on the driver's breath and requested a blood draw, which was refused. However, at the hospital a physician took the draw under the officer's order. The defendant made several constitutional arguments including a violation of his Fourth Amendment rights against an illegal search and seizure of his blood. The Court stated that "in view of the substantial interests in privacy involved, petitioner's right to be free of unreasonable searches and seizures applies to the withdrawal of his blood, *but*, under the facts in this case, there was no violation of that right."[20] [*emphasis added*] The Court's rationale was based upon the fact that there was exigency in obtaining a sample before alcohol dissipated in petitioner's blood. In addition to actual or express consent, exigency is one of the few exceptions to the general warrant requirement which includes plain view,[21] hot pursuit,[22] searches conducted incident to a lawful arrest[23]and good faith.[24] Many years after *Schmerber*, in 2013, a warrantless blood chemical test in an impaired driving case again became the subject of the U.S. Supreme Court with its

[18] *See e.g. Williams v. Illinois*, 567 U.S. 50, 59 (2012).

[19] *Schmerber v. California*, 384 U.S. 757, 758 (1966).

[20] *Id.* at pp. 766-72. ©

[21] *Id.* at pp. 770-72.

[22] *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).

[23] *United States v. Robinson*, 414 U.S. 218 (1973); *But see Riley v. California*, 573 U.S. 373, 374 (2014).

[24] *United States v. Robinson*, *supra* note 23 at p. 231.

holding and rationale in *McNeely v. Missouri*.[25] *McNeeley*, albeit not directly addressing implied consent statutes, did have a fact scenario whereby the driver refused to blow into a breathalyzer at the roadside and continued with his refusal to a blood draw at a medical center.[26] The officer nonetheless proceeded to instruct the lab technician to draw the blood specimen.[27] The involuntary blood draw was challenged as an illegal search and seizure under the Fourth Amendment.[28] The Court did not address the implied consent statute and instead held that "[w]hen officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but that is a reason to decide each case on its facts"[29] The Court left open the issue of "exigency" in *McNeely* and did not hold that a search warrant is required in every case; rather, the Court held that whether there are exigent circumstances justifying a warrantless blood draw must be determined on a case-by-case basis.[30]

Three years after *McNeely*, the U.S. Supreme Court again focused on warrantless chemical testing but unlike *McNeely* that settled on the exigency rationale, *Birchfield* focused on chemical testing as a search incident to arrest as an exception to the warrant requirement. "The search-incident-to-arrest doctrine has an ancient pedigree that predates the Nation's founding, and no historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches. The mere "fact of the lawful arrest" justifies 'a full search of the person.'"[31] In *Birchfield* the driver was criminally prosecuted for refusing a warrantless *breath test*. "Because that test was a permissible search incident to his arrest…, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test." The Court stated that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement

[25] *Missouri v. McNeely*, *supra* note 22 at p. 141.
[26] *Id.* at p. 146.
[27] *Id.*
[28] *Id.* at 145.
[29] *Id.* at 142.
[30] *Id.* at 153.
[31] *United States v. Robinson*, *supra* note 23 at p. 218.

interests, a breath test, *but not a blood test*, may be administered as a search incident to a lawful arrest for drunk driving."[32] [*emphasis added*] Inherent in the Court's *dicta* is support for the need for a warrant for blood draws.

This approach to the support for breath test without a warrant is consistent with the *Skinner* case that stated that breath tests do not "implicat[e] significant privacy concerns."[33] The rationale in *Skinner* was based on the notion that requiring an arrestee to insert the machine's mouthpiece into his or her mouth and to exhale "deep lung" air is no more intrusive than collecting a DNA sample by rubbing a swab on the inside of a person's cheek which was permissible in *Maryland v. King*.[34] In *Maryland v. King* the U.S. Supreme Court decided that "when officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."[35]

A North Dakota Supreme Court case relying on *Birchfield* went even further and held that warrantless *urine* tests are not permissible as a search incident to a valid arrest of a suspected drunk driver.[36] The basis being that urine tests implicate the same privacy concerns and potential for abuse with the retention of the sample as blood tests.[37] That Court held urine tests are similar to blood tests and an individual cannot be prosecuted for refusing to submit to a warrantless urine test.[38] The Minnesota Supreme Court in *State v. Thompson* stated that "[b]ecause a urine test can tell the police much more about you than just whether you have alcohol in your system…the test is much more comparable to a blood draw than it is to a breath sample…*Birchfield* logic should apply to warrantless urine tests."[39] The

[32] *Birchfield v. North Dakota*, *supra* note 1, p. 2185. ©

[33] *Skinner v. Railway Lab. Execs. Ass'n*, 489 U.S. 602, 626 (1989).

[34] *Maryland v. King*, 569 U.S. 435, 446 (2013).

[35] *Maryland v. King*, *supra* note 34, p. 435.

[36] *State v. Thompson*, 886 N.W.2d 224, 230-33 (Minn. 2016)*; see also State v. Helm*, 901 N.W.2d 57, 60 (N.D. 2017).

[37] *State v. Thompson*, *supra* note 36, pp. 230-31.

[38] *State v. Helm*, *supra* note 36, p. 63.

[39] *State v. Thompson*, *supra* note 36, p. 233.

U.S. Supreme Court has not yet addressed the issue of warrantless urine testing but given this *Thompson* case rationale, it may be likely that urine chemical testing may join the ranks of blood chemical testing as needing a warrant. This approach may differ in outcome if the rationale of exigency is applied instead as seen below in the *Mitchell* case.

IMPLIED CONSENT STATUTES

In regards to the Fourth Amendment, consent means "that a person has agreed to allow the police to do something that they might otherwise need a warrant or probable cause or some other justification to do."[40] "Implied consent essentially means that the law is going to treat something as amounting to consent even when no one has actually consented."[41] This is similar to "constructive consent."[42] The legal theory of implied consent was developed in *Hess v. Pawloski*,[43] where the court reasoned that cars are dangerous, and that states have the power to regulate their operation in order to make highways safe. Here, the implied consent was narrowly limited to proceedings related to accidents on highways in which the non-resident is involved.[44]

Every state has implied consent statutes that require all drivers on their roadways to consent to some type of law enforcement chemical testing upon probable cause for an arrest for impaired driving.[45] Some states give the driver the option on the type of testing (typically breath, urine or blood)[46] and some mandate a blood test only.[47] All states require that law enforcement give the driver a proper warning about the consequences of a

[40] Sherry F. Colb, *"Implied Consent" and the Fourth Amendment Go To the US Supreme Court,* VERDICT (Jan. 30, 2019), *https*://verdict.justia.com/2019/01/30/implied-consent-and-the-fourth-amendment-go-to-the-us-supreme- court.

[41] *Id.*

[42] *Id.*

[43] *Hess v. Pawloski,* 274 U.S. 352, 356 (1927).

[44] *Id.* ©

[45] *Implied Consent Laws,* IMPLIEDCONSENT.ORG, http://www.impliedconsent.org/impliedconsentlaws.html

[46] *Nelson v. City of Irvine*, 143 F.3d 1196, 1201 (1998).

[47] *Id.* at p. 1205.

refusal to the testing.[48] In the event that the driver declines the chemical test, all states have stated consequences within their statutory schemes. Some schemes automatically suspend the driver's license,[49] some impose severe fines and costs,[50] some an enhanced sentence[51] and some had a provision that sought an additional criminal charge beyond driving under the influence for said refusal.[52]

Some statutes and case law have both allowed or disallowed for the refusal to be admitted as evidence during the trial. For example, Connecticut's implied consent statute holds that if a person refuses to submit to a blood, breath, or urine test, "…that evidence of any such refusal shall be admissible in accordance with subsection (e) of section 14-227a and may be used against such person in any criminal prosecution…."[53] Unlike Connecticut, the Georgia Constitution states, "…no person shall be compelled to give testimony tending in any manner to be self-incriminating." [54] As a case, the Court in *Elliot v. State* also concluded that a defendant's refusal to submit to a breathalyzer test cannot be held as admissible evidence in a criminal trial.[55] The Court held that "…unlike the Fifth Amendment – the Georgia Constitution's right against compelled self-incrimination prevents the State from forcing someone to submit to a chemical breath test."[56]

THE INTERPLAY

The analysis regarding implied consent statutes interplay with the analysis regarding warrantless chemical testing is best illustrated in the

[48] *Id.* at p. 1203.

[49] *Birchfield v. North Dakota*, *supra* note 1, p. 2169.

[50] *Id.* at 2169; *see also Implied Consent Refusal Penalties*, IMPLIEDCONSENT.ORG, http://www.impliedconsent.org/impliedconsentrefusalpenalties.html

[51] *Birchfield v. North Dakota*, *supra* note 1, p. 2169; *see also Implied Consent Refusal Penalties*, *supra* note 50.

[52] *Birchfield v. North Dakota*, *supra* note 1, p. 2164.

[53] Connecticut General Statutes § 14-227b.

[54] Ga. Const. art. I, §1, para. XVI.

[55] *Elliot v. State*, 824 S.E.2d. 265, 296 (2019).

[56] *Id.* at 267.

holding and discussion in *Birchfield.*[57] *Birchfield* is typically addressed in the context of an implied consent statute but moves into a discussion about warrantless chemical testing. In *Birchfield* the facts involved three consolidated cases addressing refusal of chemical testing that resulted in additional criminal penalties under both the North Dakota and Minnesota implied consent statutes. Both statutes informed motorists that it is was a crime under state law to refuse to submit to a legally required BAC test.[58] Aside from noncriminal penalties like license revocation, test refusal in those states resulted in criminal penalties. The court in *Birchfield* stated that "[m]otorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent statutes that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit to it. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."[59]

The Court moved on to distinguish between breath and blood testing and referred to the *Skinner* case the Court stated that "[t]he analysis begins by considering the impact of breath and blood tests on individual privacy interests. (1) Breath tests do not "implicat[e] significant privacy concerns."[60] *Skinner*, 489 U. S., at 626, 109 S.Ct. 1402. The physical intrusion is almost negligible. …The same cannot be said about blood tests. They "require piercing the skin" and extract a part of the subject's body, *Skinner*, *supra*, at 625, 109 S.Ct. 1402 and thus are significantly more intrusive than blowing into a tube. A blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading."[61]

Prior to *Birchfield,* thirteen states criminalized a driver's refusal to submit to a warrantless chemical test.[62] This decision had a cascading

[57] *Id.* at 2186-87.
[58] *See* Minn. Stat. §169A.51, subd. 2 (2014). N.D. ©
[59] *Birchfield v. North Dakota*, *supra* note 1, p. 2165.
[60] *Id.* at 2164.

[61] *Id.*
[62] *Id.* at 2172; *see also Implied Consent Refusal Penalties, supra* note 50.

impact on those states imposing those criminal sanctions. For example, New Mexico had an implied consent statute that was substantially similar to the one addressed in North Dakota in *Birchfield*.[63] In *State of New Mexico v. Vargas,*[64] the New Mexico appeals court stated in analyzing whether a given type of search is exempt from the warrant requirement the Court assesses "on the one hand the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[65] It held that in light of the United States Supreme Court's recent holding in *Birchfield v. North Dakota*, the defendant may not be held criminally liable for refusing to submit to a warrantless blood test based on implied consent.[66]

Kentucky also allowed for enhanced penalties for refusing a warrantless blood test.[67] But unlike North Dakota's and New Mexico's statutory scheme, Kentucky doubles the minimum jail sentence for refusing, rather than creating a new criminal charge for refusing to submit to testing. In *Brown*, the Kentucky Court of Appeals held that the doubling provision lacks the coercive force in *Birchfield*.[68] In *LaRue v. Commonwealth*[69]*,* this same Kentucky Court also concluded that *Birchfield* only applied to new criminal charge for failure to consent to a blood draw. *Brown* and *LaRue* were not being prosecuted for a new criminal charge but instead applied to the doubling of their minimum jail sentence under the state's impaired driving statutes where the person has been convicted of a second or more impaired driving offense in the last 10 years.

In another post *Birchfield* case, the Court of Appeal of the State of California decided *People v. Gutierrez*.[70] Mr. Gutierrez was arrested for DUI and told he had the option of submitting to either a breath test or a

[63] *Implied Consent Act,* NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2015).

[64] *Riley v. California, supra* note 22, p. 374. *State of New Mexico v. Laressa Vargas*, 389 P.3d 1080, 1082 (2016).

[65] *State of New Mexico v. Laressa Vargas*, *supra* note 64, p. 1085.

[66] *Id.* at 1082.

[67] *Commonwealth of Kentucky v. Julia A. Brown*, 560 S.W.3d 873, 878 (2018); *see also LaRue v. Commonwealth*, WL 103959 (Westlaw, 2019).

[68] *Commonwealth v. Brown*, *supra* note 67 p. 878.

[69] *LaRue v. Commonwealt*h, *supra* note 67 p. 10. ©

[70] *People v. Gutierrez*, 27 Cal. App. 5th 1155, 1157 (2018).

blood test. He opted for the blood test. The trial judge determined that Mr. Gutierrez was never told the consequences of his choice so from his perspective he was being compelled to take a test. On appeal, he argued that the state should have obtained a search warrant before extracting blood and he cited to *Birchfield*. The Court reasoned that "although Mr. Gutierrez's blood draw was effectively non-consensual because he was not told he could refuse testing altogether; he was given the option of a breath test which law enforcement can constitutionally require without a warrant. As he was given this option, this situation is fundamentally different than the situation addressed in *Birchfield.*[71] The appellate court held that the "element of choice is dispositive, and that if a DUI suspect freely and voluntarily chooses a blood test over a breath test then the arresting officer does not need a warrant to have the suspect's blood drawn."[72]

The blurred lines of implied consent statutes and a warrantless chemical testing analysis becomes even more evident in the *Mitchell* case. In 2019, the U.S. Supreme Court ruled on yet another implied consent law.[73] This time the Court had to decide whether a statute authorizing a warrantless blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.[74] The facts were as follows: after some preliminary roadside breath testing and arrest, "…the arresting officer drove Mitchell to a police station for a more reliable breath test using evidence-grade equipment. By the time Mitchell reached the police station, he was too lethargic for a breath test, so the officer drove him to a nearby hospital for a blood test. Mitchell was unconscious by the time he arrived at the hospital, but his blood was drawn anyway under a state law that presumes that a person incapable of withdrawing implied consent to BAC testing has not done so."[75] "The law of Wisconsin provided that anyone who drives a car in that state thereby 'consents' to the police drawing his blood if he is unconscious and they have probable cause to believe that he was driving while intoxicated."[76] No test will be administered if a driver refuses— or, as the State would put it, "withdraws" his statutorily presumed

[71] *Id.*
[72] *Id.*
[73] *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2528, (2019).
[74] *Id.* at 2532.
[75] *Id.* at 2529.
[76] Sherry F. Colb, *supra* note 40.

consent. But [a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have" withdrawn it. §343.305(3)(b). See also §§343.305(3)(ar)1–2.[77] The Wisconsin Court ultimately decided that Wisconsin's statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment requirement because consent given when driving on roads and incapacitation obviates need to consent.

The U.S. Supreme Court *Mitchell* analysis started from the premise as established in *Birchfield* that "[a] blood draw is a search of the person, so we must determine if its administration here without a warrant was reasonable."[78] The Court held that these facts provides an exception to the Fourth Amendment warrant requirement. The Court reasoned in *dicta* that "[l]ike *Schmerber*, this case sits much higher than *McNeely* on the exigency spectrum. *McNeely* was about the minimum degree of urgency common to all drunk driving cases. In *Schmerber*, a car accident heightened that urgency. And here Mitchell's medical condition did just the same."[79] The Court stated that "…exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* controls."[80] With such suspects, too, a warrantless blood draw is lawful. "We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary."[81]

This decision may impact more than half the States that have provisions like Wisconsin regarding unconscious drivers.[82] Prior to *Mitchell* "[s]even

[77] *Mitchell v. Wisconsin*, *supra* note 73 pp. 2531-32. ©

[78] *Id.* at 2534.

[79] *Id.* at 2533.

[80] *Id.* at 2537.

[81] *Id.* at 2539.

[82] *See* ALA.CODE 1975 § 32-5-192 (b); ALASKA STAT. § 28.35.035 (b); ARIZ. REV. STAT. ANN. § 28-1321 C; ARK. CODE ANN. § 5-65-202 (b); CAL. VEH. CODE § 23612(a)(5); COLO. REV. STAT. § 42-4-1301.1(8); FLA. STAT. § 316.1932(1)(c);

state appellate courts had held that provisions for warrantless blood draws of unconscious motorists are unconstitutional… Courts in Arizona, California, Georgia, Kansas, North Carolina, Pennsylvania and Texas had issued decisions that would have compelled a different result than the one the Wisconsin court reached."[83] Unlike Wisconsin, the Philadelphia Municipal Court, the Court of Common Pleas, and the Superior Court of Pennsylvania are all in agreement about limiting state statutes that authorize blood draw from unconscious motorists, as seen in *Commonwealth v. Myers*. On December 29, 2012, Darrell Myers was placed under arrest for DUI.[84] About an hour after Officer Bragg arrested and then transported Myers to the hospital, Officer Matthew Domenic arrived. However, Officer Domenic showed up just a few minutes before the hospital staff administered four milligrams of Haldol to the defendant, rendering him unconscious and unresponsive.[85] Even though Officer Domenic observed Myers in his unresponsive state he still attempted to make contact by speaking his name several times to no avail.[86] Still, Officer Domenic requested the Registered Nurse to perform a warrantless blood draw.[87] The Philadelphia Municipal Court, the Court of Common Pleas, and the Superior

GA. CODE ANN. § 40-5-55 (b); 625 ILL. COMP. STAT. 5/11-501.1 (b); IOWA CODE § 321J.7; KY. REV. STAT. ANN. § 189A.103(2); LA. REV. STAT. ANN. § 32:661 B; MD. CODE ANN., CTS & JUD. PROC. § 10-305 (c); MO. REV. STAT. § 577.033; MONT. CODE. ANN. 61-8-402 (3); NEV. REV. STAT. § 484C.160; N.H. REV. STAT. ANN. § 265-A:13; , N.M. STAT. ANN. § 66-8-108; N.C. GEN. STAT. § 20-16.2(b); OHIO REV. CODE ANN. § 4511.191 (4); OKLA. STAT. TIT. 47, §751; ORE. REV. STAT. § 813.140; S.C. CODE ANN. § 56-52950 (H); TEX. TRANSP. CODE ANN. § 724.014 (WEST); UTAH CODE ANN. § 41- 6a-522; VT. STAT. ANN. § 1202 (a) (2); W. VA. CODE, § 17C-5-7 (a); WIS. STAT. § 343.305(3)(b); WYO. STAT. ANN. 1977 § 31-6-102 (c).

[83] *Mitchell v. Wisconsin, supra* note 73 pp. 2532; *see i.e. People v. Arredondo, 199 Cal. Rptr. 3d 563, 574, (Cal. Ct. App. 2016), rev'w granted and opinion superseded, 371 P.3d 240 (Cal. 2016); Williams v. State*, 771 S.E.2d 373, 377 (Ga. 2015); *Bailey v. State, 790 S.E.2d 98, 104 (Ga. Ct. App. 2016), overruled on other grounds by Welbon v. State, 799 S.E.2d 793 (Ga. 2017; Helton v. Commonwealth of Kentucky*, 299 S.W.3d 555 (2014).

[84] *Commonwealth of Pennsylvania v. Darrell Myers*, 118 A.3d 1122, 1124 (2015), at https://cases.justia.com/pennsylvania/supreme-court/2017-7-eap 2016.pdf?ts=1500471190.

[85] *Id.* at 1124. ©

[86] *Id.*

[87] *Id.*

Court all held that a blood draw conducted under these circumstances is impermissible and that the results of the derivative blood test are accordingly inadmissible at trial.[88] Since the seizure of blood violated Pennsylvania's implied consent statute, 75 Pa.C.S. section 1547, and since no other circumstances justified the failure to obtain a search warrant, the state high court affirmed.[89] Six states (excluding Wisconsin) have held that implied-consent statutes constitute an exception to the warrant requirement, at least with respect to unconscious drivers.[90]

While the U.S. Supreme Court has addressed an implied consent provision related to an unconscious driver, it has not yet addressed whether an implied consent statute that allows for a warrantless blood draw in the event of an accident with serious bodily injury or a fatality is enough exigency to not violate the Fourth Amendment. Several states have implied consent statutes inclusive of this provision. For example the Arizona implied consent statute reads as follow: "A person who operates a motor vehicle within this state gives consent to a test or tests of the person's blood, breath, urine or other bodily substance for the purposes of determining alcohol concentration or drug content if the person is involved in a traffic accident resulting in death or serious physical injury as defined in section 13-105 and a law enforcement officer has probable cause to believe that the person caused the accident or the person is issued a citation for a violation of any provision of this article, article 2, 3 or 5 through 15 of this chapter or chapter 4 of this title."[91] Some states go further and allow for law enforcement to use reasonable force to secure the blood draw. The Florida statute reads in pertinent part: "If a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages, any chemical substances, or any controlled substances has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving or in actual physical control of the motor vehicle to submit to a test of the person's blood for the purpose of determining the alcoholic

[88] *Id.* at 1130.

[89] *Id.; see also* 75 Pa. C.S. §1547.

[90] *Mitchell v. Wisconsin, supra* note 73 pp. 2532-34.

[91] Arizona Revised Statutes Title 28 Transportation 28-673 Traffic accidents; implied consent; tests

content thereof or the presence of chemical substances as set forth in section 877.111 or any substance controlled under chapter 893. The law enforcement officer may use reasonable force if necessary to require such person to submit to the administration of the blood test."[92]

In 2016, in *Cripps v. State*,[93] the Oklahoma Court of Criminal Appeals upheld the constitutionality of this type statute and concluded that this was not violative of either *McNeely* or the Fourth Amendment. Cripps argued that the Oklahoma Implied Consent provision § 10-104(B) was invalid under *McNeely*. The Court said that the Cripps was "mistaken."[94] In *McNeely* the implied consent statute provided for a nonconsensual blood draw whenever an officer reasonably believed an arrested person committed an offense while intoxicated or drugged. In this case "[t]he exigent circumstance justifying the per se rule in § 10-104(B) is the existence of great bodily injury or a fatality to persons including the driver. Put another way, § 10-104(B) does not depend solely on the dissipation of alcohol in the bloodstream over time as an exigent circumstance."[95]

CHEMICAL TESTING AND DRUGGED DRIVING

The U.S. Supreme Court and state appellate cases addressing warrantless chemical testing and implied consent statutes in impaired driving cases thus far have only discussed alcohol impaired driving. As drug impaired driving continues to grow,[96] these same Fourth Amendment privacy concerns will transfer to drugged driving. Will the fact that marijuana stays in the blood for much shorter periods than alcohol[97]

[92] Florida 316.1933(1)(a)

[93] *Cripps v. State*, 387 P.3d 906 (2016); *See* Timothy Andrea, *The Exigencies of Drunk Driving: Cripps v. State and the Issues with Taking Drivers' Blood Without a Warrant*. This Comment discusses how the decision in Cripps represents a significant departure from established Fourth Amendment law that has always required a case-by-case approach to exigent circumstances. ©

[94] *Cripps v. State, supra* note 93, p. 909.

[95] *Id.*

[96] *Drug-Impaired Driving: A Guide For States*, *supra* note 5.

[97] Matt Gonzales, *How Long Does Marijuana Stay in Your System?,* DRUG REHAB (June 1, 2018), https://www.drugrehab.com/addiction/drugs/marijuana/how-long-does-marijuana-stay-in-your-system/.

influence the exigency rationale under *McNeeley* and *Mitchell*? Will the development of a drug breathalyzer[98] be treated the same as an alcohol breathalyzer? We are seeing some states starting to address drugged driving chemical testing. Charlie Baker the Governor of Massachusetts is seeking to pass his proposed legislation that will treat refusal in drugged driving cases with the same penalty imposed on alcohol impaired drivers who refuse a Breathalyzer test.[99]

CONCLUSION

Implied consent and a warrantless chemical testing trigger Fourth Amendment search and seizure privacy rights. Both subjects involve the taking of a something from the body without express consent, including but not limited to bodily fluids, urine, breath and oral fluid. The numerous U.S. Supreme Court and state appellate cases addressing warrantless chemical testing and implied consent statutes as it relates to the Fourth Amendment, are raising more questions than they answer.

Is it safe to conclude that warrants that were once required for a blood draw under *McNeeley* may now *not* be needed under a *Mitchell* analysis? Does the *Mitchell* case revert the analysis back to *Schmerber*? Will the new standard established in *Mitchell* now require law enforcement to demonstrate that seeking a warrant would have interfered with other pressing duties under an exigent exception to securing a warrant? Will appeals courts establish additional exigency standards under *Mitchell*? Will the *Mitchell* decision dictate how implied consent statutes should be drafted with respect to the unconscious driver? Will the *Birchfield* decision dictate how implied consent statutes should be drafted with respect to criminal

[98] Eric Westervelt, *The Pot Breathalyzer Is Here. Maybe*, NATIONAL PUBLIC RADIO (August 4, 2018), https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe.

[99] Clarence Fanto, *Clarence Fanto: Maybe Baker's views are right about stoned drivers,* THE BERKSHIRE EAGLE (Mar. 23, 2019), https://www.berkshireeagle.com/stories/clarence-fanto-maybe-bakers-views-is-right-about-stoned- drivers,568442. ©

penalties? Will appellate courts continue to distinguish *Birchfield* as was done in the Kentucky appellate cases in *Brown* and *La Rue*?

Will urine chemical tests be treated as blood tests under a privacy rights analysis like that addressed in *Thompson*? Will the growth of oral fluid devices and oral fluid chemical testing pilots[100] and chemical testing be treated like an oral swab test under *Thompson* and *Maryland*? Will the use of newly developing breathalyzers for drugs be treated like breathalyzers for alcohol and be deemed not violative of the Fourth Amendment under a *Birchfield* and/or *Skinner* analysis? Will those existing state appellate cases like *Cripps* regarding an accident with serious bodily injuries or fatality remain safe from a Fourth Amendment challenge? What other exigencies under an implied consent statute will meet a Fourth Amendment challenge? Will drugged drivers be treated similarly to alcohol drivers under implied consent statutes and warrantless chemical testing?

Like all other constitutional rights, Fourth Amendment privacy rights in all contexts including impaired driving cases, will continue to be dynamic. Law enforcement, attorneys and the courts must stay abreast of this growing body of law and continue to be educated whenever and wherever possible.

[100] *State v. Thompson*, *supra* note 36, pp. 227-28; *see also Maryland v. King*, *supra* note 34, p. 446. ©