NTLC
Between the Lines
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UPCOMING TRAININGS & CONFERENCES

- **NDAA Domestic Violence Course**
  Phoenix, AZ / September 30–October 4, 2019
- **NDAA Prosecuting Drug Cases**
  Louisville, KY / October 14–16, 2019
- **NDAA Office Administration Course**
  Savannah, GA / October 28–November 1, 2019
- **Forensic Evidence Course**
  New Orleans, LA / December 9–12, 2019
- **NDAA Capital Conference**
  Washington, DC / January 28–29, 2019

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Supreme Court Decisions and Upcoming Cases reflect the growing need for electronic search warrants in impaired driving cases[1]

By Erin Holmes and Stephen K. Talpins[2]

For more than 40 years, law enforcement officers, relying upon the U.S. Supreme Court decision in *Schmerber v. California*[3] 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 con-

fronted 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."[4] *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*[5] and *Birchfield v. North Dakota*,[6] 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 they have probable cause to believe the driver operated his or her vehicle while impaired and either (a) they obtain a warrant to seize one's blood; *or* (b) the driver voluntarily consents to a blood draw; *or* (c) one of the traditional exceptions to the warrant requirement, including 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 the existence of an exception to the warrant requirement 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 most commonly relied upon exception to the warrant requirement, the courts typically consider:

- The fact that the average person metabolizes alcohol and other drugs rapidly;
- The circumstances of the stop, seizure, and intended search;
- 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 medical 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. Some courts have ruled that implied consent laws give motorists the option to affirmatively withdraw their consent, though the laws permit the State to suspend or revoke the driving priv-

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ileges of those who 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*.[7] 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 issued a plurality opinion reaffirming that (1) officers may obtain breath samples from DUI suspects without a warrant incident to arrest; and (2) that officers may obtain blood samples from DUI suspects without a warrant if there are exigent circumstances. The plurality added that officers may obtain blood tests without a warrant when a suspected impaired driver is unconscious as a general rule, reasoning that

> *". . . when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed."*[8]

McNeely, Birchfield, and *Mitchell* 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.[9] Earlier this year, in *Elliott v. State*, for example, the Georgia Supreme Court recognized that the Fifth Amendment does not prohibit the use of one's refusal to submit to a breathalyzer test as evidence in a criminal proceeding.[10] The Court ruled, however, that the Georgia Constitution afforded the defendant a broader right against self-incrimination and that her refusal to submit to a test could not be used against her in criminal proceedings.

Similarly, the Oregon Supreme Court ruled in *State v. Banks* that a motorist has the right to refuse (or not consent to) a breath test following arrest for DUII under state Constitution, and, therefore that refusal could not be used in evidence as an inference in the resulting DUI trial.[11]

Of course, *Schmerber's* importance was not just limited to cases involving alcohol impairment. Concerns about increases in drug-impaired driving due to the opioid epidemic and increased access to cannabis[12] have led more jurisdictions to explore strategies, such as e-warrants, to facilitate timely collection of blood samples. Like alcohol, drugs metabolize rapidly within the body and this dissipation of evidence can hinder law enforcement and prosecutors in building strong impaired driving cases. While multiple testing methods are available in alcohol-impaired driving cases, most states rely solely on blood tests in drug-impaired driving cases and, therefore, unless a suspect voluntarily consents to a blood draw, a warrant may be required. In these instances, delays can lead to the destruction of evidence (and, in many instances, give rise to exigent circumstances). This can be particularly problematic in states that have passed per se laws for drugs.[13]

In order to avoid legal challenges to warrantless blood draws, many advocates recommend obtaining search warrants prior to compelling blood samples (as opposed to breath samples) in impaired driving cases when possible to eliminate the risks created by the above cases. To overcome some of the delay that traditionally has been associated with obtaining approval for search warrants, these advocates recommend that practitioners take advantage of newer technology that allows for the more efficient preparation, transmission, and approval of electronic search warrants (e-warrants).

E-warrants can 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 access an implementation guide that contains best practices and case studies from multiple jurisdictions as well as a legislative checklist and other resources on the Responsibility.org website.[14] Both the In-

ternational Association of Chiefs of Police (IACP) and the National Sheriffs' Association (NSA) have passed resolutions supporting the use of this technology in impaired driving cases.

State and Federal Constitutions have historically favored judicially-issued warrants to conduct searches and seizures. Current technology and electronic warrants now provide an opportunity to swiftly obtain evidence that may be necessary not only in impaired driving cases but in other criminal cases as well.

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[1] This article originally appeared in the Summer 2019 edition of the American Bar Association's (ABA) *Highway to Justice*. It has been updated for this publication and is printed with the permission of the ABA and the National Highway Traffic Safety Administration.

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[3] 384 U.S. 757, 86 S.Ct. 1826 (1966).

[4] 384 U.S. at 770, 86 S.Ct. at 1835-36 (1966).

[5] 569 U.S. 141, 133 S.Ct. 1552 (2013).

[6] __ U.S. __, 136 S.Ct. 2160 (2016).

[7] 914 N.W.2d 151 (Wisc. 2018).

[8] __ U.S. __, 139 S.Ct. 2525 (2019).

[9] Generally State constitutions may provide broader protections, but not less, than those set forth in the U.S. Constitution.

[10] 824 S.E.2d 265 (Ga. 2019).

[11] 364 Or. 332 (2019).

[12] At the time of writing, 33 states have passed cannabis laws that permit either medicinal or recreational use of the drug.

[13] To learn more about state impaired driving laws including per se laws for drug-impaired driving, refer to the Responsibility.org State Map: https://www.responsibility.org/alcohol-statistics/state-map/

[14] https://www.responsibility.org/end-drunk-driving/initiatives/e-warrants

NTLC WELCOMES ERIN INMAN AS NEW STAFF ATTORNEY

NDAA and NTLC are pleased to welcome former Montana TSRP Erin Inman as a new staff attorney working on our NHTSA grant. Her prior experience includes work as an Assistant Attorney General in Helena as an instructor at the Montana Law Enforcement Academy as well as being the elected prosecutor in Prairie County, Montana. For the past few years, Erin operated and managed her own legal practice as an impaired driving defense attorney in Montana City and Helena. She is passionate about traffic safety and excited to be returning to a position in which she can continue to help save lives. Her duties will include oversight of the expert witness database, work updating many of NTLC's legal compilations and responding to technical assistance requests.