

## UPCOMING TRAININGS & CONFERENCES

- **NDAА Trying the Child Abuse Case**  
Tampa, FL / April 15–18, 2019
- **National TSRP Conference**  
Williamsburg, VA / April 29–May 1, 2019
- **NDAА Prosecuting Homicide Cases**  
Scottsdale, AZ / May 6–10, 2019
- **NDAА Career Prosecutor Course**  
Cambridge, MA / May 13–22, 2019
- **NDAА / NCJA Grants Management Training**  
Atlanta, GA / May 14–15, 2019
- **NDAА / NTLC CDL Basic Course**  
Orlando, FL / June 18–20, 2019
- **IACP Drugs, Alcohol and Impaired Driving**  
Anaheim, CA / August 10–12, 2019



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## *Mitchell vs. Wisconsin* ANOTHER CHALLENGE TO IMPLIED CONSENT

This spring, the United States Supreme Court will hear the next challenge to implied consent laws. This case, *Mitchell v. Wisconsin*, involves the warrantless blood draw of an unconscious person suspected of impaired driving.

### Facts of *Mitchell v. Wisconsin*<sup>1</sup>

In this case, police received a phone call from a person reporting to have seen an intoxicated Mitchell get into a vehicle and drive away. A police officer contacted Mitchell a short time later at an area beach. He admitted to drink-

<sup>1</sup> *State v. Mitchell*, 914 N.W.2d 151 (2018).

ing alcohol prior to driving and to continuing to drink alcohol after arriving at the beach. His speech was slurred, and he had difficulty maintaining his balance.<sup>2</sup> Out of concern for Mitchell's safety, the police officer did not administer field sobriety tests. Mitchell submitted to a preliminary breath test with a result of .24.<sup>3</sup> The officer arrested Mitchell for operating while intoxicated. After arrest and on the way to the police station, Mitchell's condition deteriorated as he became more "lethargic." Upon arrival at the station, it became clear that an evidential breath test would not be possible, so the officer took Mitchell to a hospital for a blood draw.

On the drive to the hospital, Mitchell appeared to the officer to be "completely incapacitated, [and] would not wake with any type of stimulation."<sup>4</sup> Upon arrival at the hospital, Mitchell was unable to maintain an upright position in his wheelchair and sat "slumped over."<sup>5</sup>

In the emergency room, the officer read to Mitchell the Informing the Accused form, thereby providing him the opportunity to withdraw his consent.<sup>6</sup> He was too incapacitated to respond. The officer directed the hospital staff to withdraw a sample of Mitchell's blood. His blood was withdrawn; Mitchell did not wake during the process. The sample was tested, and the result was .222.<sup>7</sup>

Mitchell was charged with driving with a prohibited alcohol concentration and operating a motor vehicle while intoxicated, as a 7th offense.<sup>8</sup> Mitchell filed a motion to suppress the blood results, arguing the warrantless blood draw violated his rights under the United States and Wisconsin Constitutions. The State argued the implied consent law meant (1) Mitchell consented to the blood draw when he drove on Wisconsin highways<sup>9</sup> and (2) as an unconscious person, Mitchell was presumed not to have withdrawn his consent.<sup>10,11</sup> The State expressly stated it was not relying on exigent circumstances to justify the warrantless blood draw.<sup>12</sup>

The trial court denied Mitchell's motion and a jury convicted him of both offenses. Mitchell appealed on the basis that the warrantless blood draw violated his 4th Amendment right to be free from "unreasonable searches and seizures."<sup>13</sup>

On appeal, the Wisconsin Supreme Court found Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and "drinking to a point evidencing probable cause of impairment."<sup>14</sup> By drinking to the point of unconsciousness, Mitchell forfeited all op-

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<sup>2</sup> *Id.* at 154.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 155.

<sup>5</sup> *Id.*

<sup>6</sup> Wisc. Stat. § 343.305(4)

<sup>7</sup> *Mitchell* at 155.

<sup>8</sup> Wisc. Stat. § 346.63 (1)(a) and (1)(b).

<sup>9</sup> Wisc. Stat. § 343.305(2).

<sup>10</sup> Wisc. Stat. § 343.305(3)(b).

<sup>11</sup> *Mitchell* at 155.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

portunity to withdraw his consent previously given, including the statutory opportunity under Wisc. Stat. § 343.305(4). Wisc. Stat. § 343.305(b) applied which reasonably permitted Mitchell's blood draw under the totality of circumstances of his case. His convictions were affirmed.<sup>15</sup>

The United States Supreme Court granted Mitchell's petition.<sup>16</sup> The question presented is whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the 4th Amendment warrant requirement.

## Review of SCOTUS Rulings Involving 4th Amendment & Implied Consent

The last major case considered by the court involving a warrantless blood draw was *Schmerber v. California*.<sup>17</sup> In the 1960's, an impaired driving suspect (Schmerber) was in the hospital being treated for injuries sustained in an automobile crash. Without a search warrant and despite Schmerber's refusal, police directed hospital personnel to draw the Schmerber's blood. The blood evidence was admitted at trial over Schmerber's objection and he was convicted at trial of impaired driving. The United States Supreme Court agreed to hear Schmerber's case based on several constitutional challenges, including an argument that the search violated his 4th Amendment right to be free from unreasonable searches and seizures. The Supreme Court ruled a blood test indeed is a search and seizure of a person within the meaning of the 4th Amendment. In this case, however, the Court decided that it was reasonable for the officer to believe he faced an emergency destruction of evidence based on the dissipation of alcohol from Schmerber's body and that exigency justified the warrantless blood draw. This decision was based on the facts of the case alone and did not promulgate a bright line rule.

Many years later in 2013, the Supreme Court heard another case involving the warrantless, nonconsensual blood draw in *Missouri v. McNeely*.<sup>18</sup> Police initiated a traffic stop of the suspect (McNeely) after observing him speed and repeatedly cross the center line of the road. He

### Amicus support by NDAA

Occasionally, a criminal justice issue—including those related to traffic safety—may arise in a jurisdiction that ultimately winds up before the United States Supreme Court. The National District Attorneys Association (NDAA) may be asked to lend support by way of an amicus curiae brief. NDAA has an Amicus Working Group that reviews any requests brought to the organization. Generally, NDAA considers this support after such time as cert is granted by the Court. Consideration prior to that time may be made on a case-by-case basis.

<sup>14</sup> *Id.* at 167.

<sup>15</sup> *Id.* at 167.

<sup>16</sup> *Mitchell v. Wisconsin*, 914 N.W.2d 151 (WI 2018), cert. granted, 2019 U.S. LEXIS 576 (U.S. Jan. 21, 2019) (No. 18-6210).

<sup>17</sup> *Schmerber v. California*, 86 S.Ct. 1826 (1966).

<sup>18</sup> *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

smelled of alcohol, his speech slurred, and his eyes bloodshot. He performed poorly on the Standardized Field Sobriety Tests and admitted drinking alcohol. He refused a preliminary breath test and was arrested for impaired driving. During transport to the police station, McNeely indicated he would not consent to a breath test. Without a warrant, the officer redirected to the hospital for a blood draw. After being advised of his rights and refusing to submit, McNeely's blood was taken. Missouri argued that the natural dissipation of alcohol in all impaired driving cases created a per se exigency justifying the seizure of a motorist's blood without a warrant. The Court declined to set a per se exigency rule for all impaired driving cases based on the natural dissipation of alcohol from the body but acknowledged it could certainly be a considered factor.

*Recognizing the evidence lost by a suspect's refusal to submit to chemical testing, some States chose to create new criminal offenses for the refusal with penalties equal to the underlying impaired driving offense.*

When deciding issues related to chemical testing in impaired driving cases, the Court has recognized the danger posed by impaired driving and that it "...continues to exact a terrible toll on our society."<sup>19</sup> In fact, the *McNeely* Court referred favorably to implied consent laws as one of a "broad range of legal tools to enforce [States']...drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws[]" presumably condoning these laws "that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense."<sup>20</sup>

Recognizing the evidence lost by a suspect's refusal to submit to chemical testing, some States chose to create new criminal offenses for the refusal with penalties equal to the underlying impaired driving offense. In *Birchfield v. North Dakota*, the Supreme Court considered whether this scheme ran afoul of 4th Amendment jurisprudence.<sup>21</sup> In the case, the Court again recognized the important State interest to protect the public from the dangers of impaired driving as well as the importance of obtaining the blood-alcohol content as evidence. The Court also analyzed the impact of breath tests and blood tests on the individual privacy interests. In so doing, the Court concluded that breath tests have a slight impact on privacy compared to the great need to obtain the evidence. It concluded that a warrantless breath test was a permissible search in-

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<sup>19</sup> *McNeely* at 1565.

<sup>20</sup> *Id.* at 160-161.

<sup>21</sup> *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016).

cident to arrest. With regard to warrantless blood tests, however, the Court held that “[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.”<sup>22</sup> The Court concluded, therefore, that a state cannot criminalize a person’s refusal to submit to a blood test but could criminalize a person’s refusal to submit to a breath test.

The *Birchfield* Court based its ruling on the privacy interests related to each test, not on implied consent, but the Court did consider implied consent laws. “It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrest, and when they arise, the police may apply for a warrant if need be.”<sup>23</sup> Nothing in the *Birchfield* opinion “casts doubt” on the Court’s approval of implied consent laws imposing “civil penalties and evidentiary consequences on motorists who refuse to comply...” with a request for a chemical test.<sup>24</sup> With respect to the criminalization of the refusal, however, the Court opined that “[t]here 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.”<sup>25</sup>

## Conclusion

The United States Supreme Court is now confronted with *Mitchell* and the part of an implied consent law that provides for the warrantless blood test on an unconscious person suspected of impaired driving.<sup>26</sup> The Court must decide whether a statute authorizing a blood draw from an unconscious motorist is reasonable and provides an exception to the 4th Amendment warrant requirement.

Will the United States Supreme Court stretch a statutory consent to justify the warrantless blood draw of an unconscious impaired driver, given language used in *Birchfield*?<sup>27</sup> Will the Court determine a warrantless blood draw is reasonable considering the impossibility of obtaining a breath sample from an unconscious person, given language used in *Birchfield*?<sup>28</sup> We will learn the outcome this summer; oral arguments for the *Mitchell* case are scheduled to occur on April 23, 2019, at the United States Supreme Court in Washington, D.C.

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<sup>22</sup> *Id.* at 2184.

<sup>23</sup> *Id.* at 2184-2185.

<sup>24</sup> *Id.* at 2185.

<sup>25</sup> *Id.*

<sup>26</sup> For example, Wis. Stat. 343.305(3)(b).

<sup>27</sup> When disallowing a criminal penalty to result from the refusal to submit to an “intrusive blood test,” the Court said, “[t]here 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.” *Birchfield* at 2185.

<sup>28</sup> “It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrest, and when they arise, the police may apply for a warrant if need be.” *Birchfield* at 2184-2185.

# REINVENTING THE PROSECUTION OF DUI'S CASES: A PARTNERSHIP FOR SAFE AND SOUND POLICIES

By Fiscal Rosaura González Vélez<sup>1</sup>

The primary mission of the Puerto Rico Department of Justice (PRDOJ)<sup>2</sup> is to enforce the law and defend the interests of the Government of Puerto Rico in both criminal and civil matters using the highest professional and ethical standards. The PRDOJ serves all residents through the impartial and strong enforcement of the laws of Puerto Rico. In doing so, we actively participate in protecting the citizens of Puerto Rico and improve the quality of life in our communities. With this purpose of improving the quality of life in Puerto Rico, the PRDOJ contributes and promotes an accessible, sensitive, efficient and reliable justice system that works in close collaboration with the community in response to their needs and highest aspirations. The safety of our roadways is not the exception. In Puerto Rico, as well as in the continental United States, driving under the influence (DUI) is the most frequently committed crime that not only creates a financial burden, but also a security problem considering the fatal crashes that were alcohol-related.



DUI is a common occurrence on Puerto Rico streets. The legal and social responsibility of the PRDOJ to achieve justice in DUI cases required the resources, logistics and initiatives for the effective deterrence and strategies for the prosecution of cases. Given these challenges, one of the goals of the PRDOJ was to put in place mechanisms to place a barrier to driving under the influence and to reinforce the case management of DUI cases. As a result, we wanted to achieve a higher rate of conviction.

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<sup>1</sup> Fiscal Rosaura González Vélez is the Traffic Safety Resource Prosecutor for the Government of Puerto Rico, Department of Justice.

<sup>2</sup> The section 6 of Article IV of the Constitution of the Commonwealth of Puerto Rico of July 25, 1952, creates The Department of Justice. The “Organic Law of the Department of Justice” of August 9, 2004, describes the duties and responsibilities of the Secretary of Justice and other public officials and employees.

The Governor of Puerto Rico, the Honorable Ricardo Rosselló-Nevarés, and the Secretary of Justice, Wanda Vázquez-Garced, have set the priorities to be followed by all PRDOJ employees. As we implement the government’s public policy and priority initiatives of the PRDOJ, we also focus our efforts on the specific problems and needs of our communities. In 2017, Secretary Vazquez created a specialized DUI Special Unit. The DUI Special Unit is responsible for monitoring all public policies that relate to DUI cases. This Unit also coordinates the investigation and prosecution of DUI cases throughout the thirteen (13) judiciary districts, as each DUI case is handled in the place of occurrence. By centralizing the DUI Prosecution Unit and re-assigning it under the Office of the Chief Prosecutor of the PRDOJ, the Secretary of Justice, Wanda Vázquez-Garced, gave uniformity to the prosecution of these cases throughout the Island. Also, the Unit’s personnel is responsible for data collection, identification of significant cases, reporting and development of training for all other prosecutors throughout the island.

The Unit is accountable for maintaining updated policies and procedures to be followed by prosecutors. Under this proposal, and in collaboration with the Puerto Rico Traffic Safety Commission (PRTSC), the PRDOJ has been able increase the number of DUI conviction’s rate numbers and assure that we continue all federal government’s policies that could have affected federal funds to enhance public safety in our jurisdiction. The PRDOJ proposal to PRTSC was a partnership for an alliance and as-

## DUI CASES PROSECUTED

<i><b>Jurisdiction</b></i>	<i><b>Cases</b></i>
Aibonito	36
Aguadilla	522
Arecibo	356
Bayamón	651
Caguas	487
Carolina	670
Fajardo	105
Guayama	192
Humacao	79
Mayaguez	574
Ponce	848
San Juan	427
Utua	337
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<b>Total</b>	<b>5,284</b>



signment of financial resources from the PRTSC. Our collaborative work was directed to following general objectives:

1. Work in conjunction with law enforcement agencies, crime laboratories, and prosecutors to update the TSRP program in order to increase conviction rates resulting from prosecution of alcohol and/or drug impaired driving and vehicular homicide in Puerto Rico.
2. Schedule regular meetings with the Chief Prosecutor on matters concerning the administration and operation of the TSRP Program and the services provided for the initiative.
3. Attend and participate in DUI related conferences, roundtables, meetings, task forces and development of DUI policies.
4. Responsible for creating a professional talent's bank and network of experts for its use in in DUI, DUID, vehicle homicide, and other traffic related crimes.
5. Serves as a liaison between the PRDOJ and the PR Supreme Court's Judicial Academy to exchange information, and training resources to improve knowledge between all judicial components in charge of handling DUI cases.
6. Establish a voluntary, professional statewide mentoring program with experienced DUI/DUID prosecutors.



*Puerto Rico State Police Highway Patrol car on the PR-22 ( Jose de Diego Expressway).*



7. Available 24/7 to provide assistance in the investigation and/or handling of DUI, vehicular homicide, and other traffic crimes. The TSRP provides assistance in identifying and hiring of experts needed in special cases.
8. Assist in the preparation and update of a DUI's Prosecution Manual that will serve as a first source of reference for the DUI Special Prosecutor.
9. Any other duty that the Secretary of Justice deems appropriate to delegate in the Traffic Safety Resources Prosecutor associated with its position.

The PRDOJ's proposal to the PRTSC facilitated the funding through a grant to train and hire specialized DUI's prosecutors to be assigned to all our thirteen (13) District Attorney offices. The DUI Unit project started with six (6) special prosecutors that were hired after a thorough selection process. One of the main goals of the project was the technical and legal training for the DUI's prosecutors. At no expense, the Puerto Rico Convention Center offered us a meeting room where we held the training for a month. The training academy was held in February 2018 with six prosecutors who had 120 hours of intensive trainings associated to DUI cases such as instrumentation used in alcohol-related cases—Alco Sensor and Intoxilyzer 9000, alcohol metabolism in blood, litigation skills, and legal controversies and issues. The courses were given by judges, prosecutors, psychiatrists, police officers, expert witnesses from the Department of Health, and others. Also, as part of the training, the prosecutors interacted with drunk drivers' victims, and the impact on their lives, how it affected them physically, economically and mentally. Finally, the training closing was a "moot court" that allowed the prosecutors to put in practice the skills needed for the prosecution of DUI cases. At present, there are 13 prosecutors who have been trained for the prosecution of DUI cases in every judicial district of Puerto Rico.

The prosecution of DUI cases is complex and challenging. We firmly believe that this is the beginning of a long and successful cooperation between two agencies to one ultimate goal: "To bring justice to victims and families through criminal prosecution, in particular in cases where there are injuries and/or death related to vehicular traffic accidents."

**Editor's Note:** We are excited to have Rosaura Gonzalez join our traffic safety community as Puerto Rico's TSRP. In this issue of *Between the Lines*, we profile the program she has helped develop and celebrate its first anniversary this month. We congratulate Rosaura and her colleagues for all they have accomplished since the devastation of Hurricane Maria. Well done!