



# Between the Lines

## Mark Your Calendars

### NDA Summer Conference & Board Meeting

Boston, MA  
Committee & Board Meetings,  
July 16-17, 2016  
Summit—National Victims'  
Rights, July 17–19, 2016

### Expert Witness Project NAPC

Nashville, TN  
August 2–3, 2016

### The 22nd Annual IACP Training Conference on Drugs, Alcohol, and Impaired Driving

IACP  
Denver, CO  
August 13–15, 2016

### GHSA Annual Meeting —Crossroads:

### The Intersection of Technology & Driver Behavior

Seattle, WA  
August 27–31, 2016

## U.S. Supreme Court Approves Criminalizing Breath Refusals

By Bill Lemons and Aaron Birst

In 2013, the U.S. Supreme Court said, “states have a broad range of legal tools to enforce their drunk-driving laws and secure BAC evidence without undertaking warrantless nonconsensual blood draws.”<sup>1</sup> Recently, the Court was asked to decide how broad those legal tools are and what options exist for nonconsensual blood testing.

On June 23, 2016, the U.S. Supreme Court delivered its latest decision on impaired driving. Although the opinion focused on specific laws of North Dakota and Minnesota that criminalize a DUI suspect’s refusal to submit to chemical testing, many states have similar statutory schemes or are impacted by some of the larger Fourth Amendment pronouncements of the Court’s decision. The consolidated cases of *Birchfield v. North Dakota*<sup>2</sup> presented the question of whether a state may make it a crime for a person to refuse to take a chemical test, in the absence of a warrant, to detect the presence of alcohol in the person’s blood.

While all three of the consolidated cases revolved around the issue of

criminalized refusal, each case varied factually. The defendant in *Birchfield* was arrested for DUI, refused a *blood* test, and was charged with a violation of the North Dakota refusal law. Similarly, the defendant in *Bernard* was arrested, refused a *breath* test, and was charged with a violation of Minnesota’s refusal statute. The defendant in *Beylund* submitted to a blood test after receiving the North Dakota implied consent advisory explaining the criminal sanctions for refusal.

Justice Alito delivered the 38-page majority decision concluding a state cannot criminalize conduct for which a warrant would otherwise be required. The Court then applied the search incident to arrest exception to determine when a warrant would be required in DUI cases. After concluding refusal laws “serve a very important function,” the Court drew a distinction between breath tests and blood tests. The Court determined breath tests do not implicate significant privacy concerns in the same way blood tests do. Blood tests require piercing the skin, a surgical procedure, and removal of a part of the

body. Instead, breath is naturally and continuously exhaled from the body. Breath tests additionally only measure alcohol concentration whereas blood carries the potential extraction of additional, private information. Because of this privacy distinction the court held warrantless breath tests are constitutionally permissible while warrantless blood tests are not.

It is important to note that this is a categorical exception and, consequently, not subject to a case-by-case analysis. Breath tests are permissible based upon a valid arrest for impaired driving. This is the first time the U.S. Supreme Court has found breath testing valid as a search incident to arrest and the refusal of which can be criminally punished.

The clear implication of *Birchfield* is criminal refusal statutes can survive constitutional scrutiny in post-arrest breath cases, but not in warrantless blood test cases. For a criminal statute to survive in a blood testing case, a search warrant will be required, unless there are exigent circumstances. Under *McNeely*, exigency is a fact-specific analysis determined on a case-by-case basis. Criminal refusal statutes can still be an important tool, however, to ensure cooperation with blood testing by first obtaining a search warrant; the *Birchfield* decision makes clear that a suspect can be criminally prosecuted for failing to cooperate with the search warrant. This could be an important option in jurisdictions where hospitals typically refuse to assist law enforcement with blood draws from uncooperative suspects.

The Court also limited its ruling to criminal refusal statutes. In other words, it left unchanged the civil or administrative license suspension consequences for refusal stating, “prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply . . . and nothing we say here should be read to cast doubt on them.” That includes admissibility of the defendant’s refusal as evidence in the criminal case under *Neville*.<sup>3</sup>

Although not directly litigated, some review should be undertaken on every state’s “unconscious” driver statute upon which officers may rely to take a warrantless blood sample based on “previous” implied consent not being revoked. For unconscious drivers, the best practice is for officers to first obtain a search warrant when possible.

Additionally, for those states that rely on urine and/or saliva tests, it will be necessary to litigate whether

### **Moving Forward After *Birchfield***

By M. Kimberly Brown

Prior to *Birchfield*, a minority of states criminalized the refusal of an impaired driving suspect to submit to chemical testing. Now that the U.S. Supreme Court has validated the tool of criminalized refusal for breath testing, the remaining states may consider implementing legislation to provide law enforcement the benefit of this useful tool. Even in the absence of criminalized refusal, it may be necessary for states to redefine the language of implied consent laws in light of *Birchfield*’s view of blood testing, and the individual privacy interests surrounding it, and remove the language relating to blood tests altogether. Additionally, in jurisdictions relying on urine and/or saliva tests, prosecutors may want to be prepared to litigate issues surrounding this testing with appropriate arguments analogous to those outlined in *Birchfield* for breath.

such tests are equivalent to blood tests or a natural biological process such as breathing. Like breath testing, urine testing involves collection of waste products naturally leaving the body and does not involve a surgical procedure or piercing of the skin. It neither involves removal of a part of the body nor involves risk of infection or pain. It is possible, however, that the collection of the sample itself could cause more embarrassment than breath testing, depending upon the collection procedures. For that reason, care should be taken to ensure some degree of privacy during the collection process to minimize embarrassment while still ensuring integrity of the test. In *Vernonia*, the Court held that urine testing is not invasive based upon the way the samples were collected.<sup>4</sup>

In *Birchfield*, the Court helped to clarify the limited holding in *McNeely* that exigency must be determined by a totality of the circumstances on a case-by-case basis. In particular, it highlights the importance of the intrusiveness of the search and that blood tests are the most intrusive tests done for alcohol testing. While electronic search warrants for blood will continue to be an important tool in combating impaired driving, the broad range of legal tools that *Birchfield* provides will be important to making our roads safer.

For more information about this article, please contact Bill Lemons or Aaron Birst.

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## Endnotes

- 1 *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013).
- 2 *Birchfield v. North Dakota*, 2016 WL 3434398, \_\_\_ S. Ct. \_\_\_ (June 23, 2016).
- 3 *South Dakota v. Neville*, 103 S. Ct. 916 (1983).
- 4 *Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995).

# Why do we call it an “accident?” It’s a “crash!”

By Kenneth Stecker and Kinga Gorzelewski

**On average**, someone is killed in a drunk driving crash every 53 minutes.<sup>1</sup> Every two minutes, someone is injured because of this entirely preventable crime.<sup>2</sup> At any given point, there are potentially two million people on the roads who have three or more drunk driving offenses.<sup>3</sup> These drunk drivers intentionally choose to drive drunk, knowing that they may seriously injure or kill another innocent driver or passenger.

Newspaper headlines and articles are typically written with the following words:

“Woman who killed best friend in drunk driving accident sobs as she gets sentenced to probation.”<sup>4</sup>

“Tragedy struck last Friday evening as three people were killed in an accident on I-69 in Pike County. Initial investigation indicates that drugs played a role in the accident, in which Brian Paquette of Newport News, Virginia drove his SUV the wrong direction in both the northbound and southbound lanes of the interstate.”<sup>5</sup>

“Drunk Driving Teen Causes Accident Involving Over 14 People.”<sup>6</sup>

Even appellate court opinions commonly use the following language:

“While driving his truck in the early morning, defendant struck and killed a bicyclist. Defendant consented to a blood test after the accident, which revealed the presence of several controlled substances, including anti-depressants and cocaine.”<sup>7</sup>

“A car being driven by defendant collided with a sports utility vehicle, killing three of its passengers. The accident occurred after defendant led police on a chase at speeds in excess of ninety miles per hour. After the accident, defendant’s blood alcohol level was 0.135.”<sup>8</sup>

“Defendant’s conviction arose from his involvement in a car accident that killed one person and seriously injured another. The accident occurred when defendant, the driver of a Dodge Ram pickup truck traveling at a

high rate of speed in a residential area, while under police surveillance, disregarded a red signal at an intersection and collided with a minivan that had entered the intersection on a green light.”<sup>9</sup>

How powerful is this word “accident?” The word suggests something of the unforeseen, an event that could not have been anticipated and for which no one can be blamed.<sup>10</sup>

From reading the above-mentioned headlines and court opinions, these events were undesirable and unfortunate happenings and unintentional occurrences on the part of the intoxicated drivers. In essence, it was something that could not be predicted or avoided by the intoxicated driver; it was just something that happened.

It is clear, however, that is not the case. These events are not “Acts of God,” but predictable results of specific actions. They are “crashes!” Using the word “accident” in describing these tragedies implies the resulting injuries are unavoidable and that society should merely accept these injuries, fatalities, and damage as an inescapable or inevitable part of our daily lives.

This is not a novel idea. Distinguishing between “accident” and “crash” dates back to a 1997 campaign launched by the National Traffic Safety Administration (NHTSA).<sup>11</sup>

“Changing the way we think about events, and the words we use to describe them, affects the way we behave,” wrote Pamela Tatiana Anikeeff, Ph.D., NHTSA Senior Behavioral Scientist, on August 11, 1997, describing NHTSA’s new “crashes are not accidents” campaign:

“Motor vehicle crashes and injuries are predictable, preventable events. Continued use of the word “accident” promotes the concept that these events are outside of human influence or control...”<sup>12</sup>

Since 1997, NHTSA no longer uses the word “accident” in materials it publishes and distributes. In addition, NHTSA employees no longer use the word “accidents” in speeches or other public remarks, in communications with the news medias, individuals or

groups in the public or private sector.<sup>13</sup>

Many law enforcement agencies, including both New York and San Francisco Police Departments, abandoned use of the word “accident” recognizing it could deter the focus on traffic safety necessary to reduce death rates.<sup>14</sup>

“Words have impact, words evoke images and stir emotions.”<sup>15</sup> As law enforcement officers and prosecutors, when investigating and/or prosecuting a drunk/drugged driving crash, distracted driving crash, or a reckless driving crash, it is important to avoid using the word “accident” in police reports and in opening statements or closing arguments.

We have a responsibility for road safety in Michigan, and as we go forward, we need to continue to reassess our efforts to combat the threat to safety on our roads. One simple way we can make a difference is by eliminating the word “accident” and to use the appropriate word “crash.”

*For more information on this article and PAAM training programs, contact Kenneth Stecker or Kinga Gorzelewski, Traffic Safety Resource Prosecutors, at (517) 334-6060 or e-mail at steckerk@michigan.gov or gorzelewskik@Michigan.gov. Please consult your prosecutor before adopting practices suggested by reports in this article. Discuss your practices that relate to this article with your commanding officers, police legal advisors, and the prosecuting attorney before changing your practice.*

## Endnotes

1 <http://www.madd.org/drun-driving/about/>

2 Id.

3 Id.

4 New York Daily News, “Woman who killed best friend in drunk driving accident sobs as she gets sentenced to probation,” December 5, 2014.

5 <http://www.wagnerreese.com/blog/car-accident/wrong-way-driver-kills-three-on-i-69/>

6 <http://abcnews.go.com/2020/video/drun-driving-teen-accident-involving-14-people-34536651>

7 *People v. Reeves*, case number 315840, decided August 21, 2014 (Michigan Court of Appeals) (Unpublished).

8 *People v. Gonzalez*, case number 199230, decided August 11, 1998 (Michigan Court of Appeals) (Unpublished).

9 *People v. Darden*, case number 314562, decided June 12, 2014 (Michigan Court of Appeals) (Unpublished).

10 <http://www.motherjones.com/kevin-drum/2015/08/crash-vs-accident-doesnt-seem-it-matters-very-much>

11 <http://www.planetizen.com/node/80560/does-it-matter-if-we-call-crashes-accidents>

12 “Crashes Aren’t Accidents Campaign,” by Pamela Anikeef, NHTSA Now, V. 3, No. 11, August 11, 1997.

13 [http://www.roadpeace.org/resources/Crash\\_not\\_Accident\\_May\\_11\\_2011.pdf](http://www.roadpeace.org/resources/Crash_not_Accident_May_11_2011.pdf)

14 <http://www.h-nlaw.com/blog/accident-best-way-describe-car-crash/>

15 Hughes, Brandon (July 2008). Word Choice Matters: Crash vs. Accident. The Alabama Prosecutor.

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