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Between the Lines

National Traffic Law Center

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UPCOMING TRAININGS & CONFERENCES

- **NHTSA's Blackout Wednesday Campaign**
  November 27, 2019
- **NHTSA's Ditch Danksgiving Campaign**
  November 28 – December 1, 2019
- **NDAA Capital Conference**
  Washington, DC / January 28–29, 2019
- **NDAA's The Digital Trial: A Hands-On Lab**
  Charleston, SC / February 17–20, 2020
- **NDAA's Securing and Protecting Your Case: Evidence for Prosecutors**
  New Orleans, LA / March 16–19, 2020

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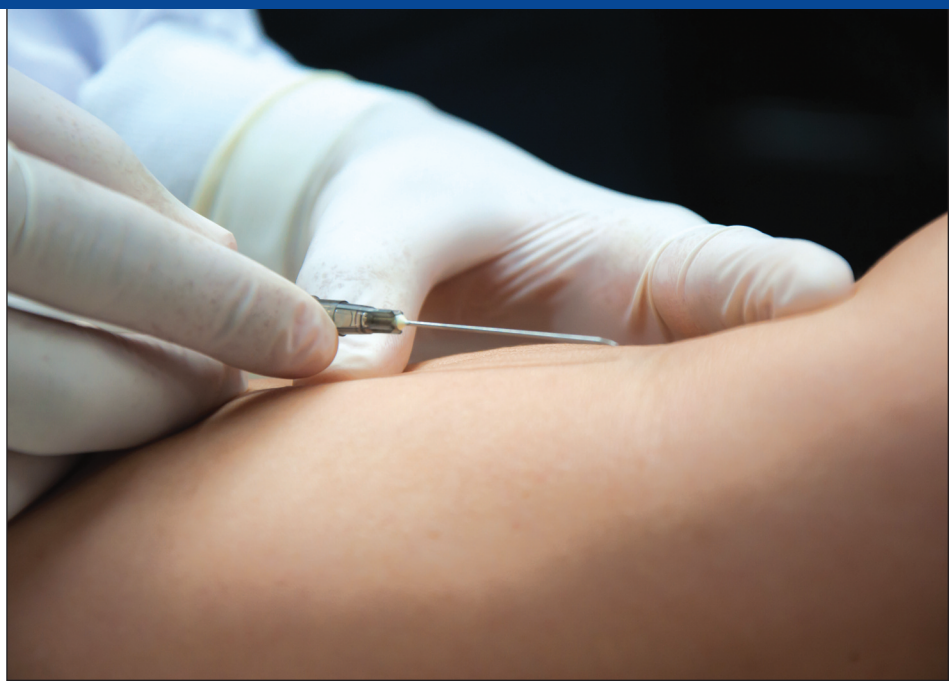

No "Second Warrant" Needed for Test Results

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Recent United States Supreme Court cases discuss the constitutional requirements for seizure of blood in DUI cases,[1] reviving a widely discredited defense argument designed to suppress blood test results obtained with consent or a warrant. Defendants argue even if a blood sample was *seized* in compliance with the Fourth Amendment, the subsequent *testing* of the blood is a separate state action within the context of Fourth Amendment constitutional scrutiny. Defense attorneys may urge courts to require the state provide a separate justification for testing (ie., a second warrant). They argue if the state failed

to secure a second warrant to permit testing, any toxicological results must be suppressed. This article discusses the evolution — and rejection — of that defense argument.

The proposition that an additional warrant is needed for testing legally seized samples appears as early as *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 616 (1989). In *Skinner*, (a workplace drug testing case challenging drug testing regulations, in which the Court found "special needs" authorized the regulations), the Court found "the collection *and subsequent analysis*

In Ferguson, the Court did not make a clear distinction between the collection of urine samples and the subsequent testing of samples nor did it identify the two as separate constitutional events.

of the requisite biological samples must be deemed Fourth Amendment searches."[2] Several years after *Skinner*, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court struck down a testing program in which a hospital, working with law enforcement and the local prosecutor, *collected and tested* urine samples of pregnant women, analyzed those samples for the presence of cocaine, and used the results to either compel substance abuse treatment or to pursue criminal charges. In *Ferguson*, the Court did not make a clear distinction between the *collection* of urine samples and the subsequent *testing* of samples nor did it identify the two as separate constitutional events. Rather, the Court considered the *Ferguson* program as a whole. The program did not satisfy a "special needs" exception to the Fourth Amendment and was not authorized by search warrants. The Court remanded the case to determine whether the participants' "consent" to the collection and testing passed constitutional muster.

The *Skinner* and *Ferguson* opinions are employed by defense attorneys offering the "second warrant" argument, a tactic that has persuaded some courts. A Washington Court of Appeals opinion accepting the argument provides its clearest articulation. In *State v. Martines*, 182 Wash.App. 519, 331 P.3d 105 (2014), the court offered the following explanatory language:

> The extraction of blood from a drunk driving suspect is a search. Testing the blood sample is a second search. It is distinct from the initial extraction because its purpose is to examine the personal information blood contains. We hold that the State may not conduct tests on a lawfully procured blood sample without first obtaining a warrant that authorizes testing and specifies the types of evidence for which the sample may be tested.[3]

While a defendant may offer the opinion in support of a motion, the *Martines* Court of Appeals decision was *reversed* by the Washington Supreme Court. In *State v. Martines*, 184 Wash.2d 83, 355 P.3d 1111 (2015) the Washington Supreme Court rejected the argument and reversed its Court of Appeals, noting the whole purpose of a DUI blood warrant is to "obtain evidence of DUI" and when considering a search warrant which authorizes the seizure of blood, it is "not sensible to read the warrant in a way that stops short of obtaining that evidence."[4]

The issue of consensual blood draws and the validity of subsequent testing was addressed by the Wisconsin Supreme Court in *State v. Randall*, 387 Wis2d 744, 930 N.W.2d 223 (2019). In *Randall*, the defendant consented to a blood draw "for the purpose of determining its alcohol concentration."[5] Later, the defendant sent a letter to authorities which purported to *revoke* the

The Wisconsin Supreme Court determined the defendant's attempt to withdraw consent was ineffective and the blood tests results were properly admitted. The Court reasoned the acts of obtaining and testing the blood sample were, collectively "only one search." [6]

consent and demanded authorities return or destroy the blood sample. Authorities did not comply with the demand, nor did they seek a warrant to test the blood. Rather, they went forward with testing, found evidence of alcohol in the blood, and the defendant was ultimately convicted of DUI. The Wisconsin Supreme Court determined the defendant's attempt to withdraw consent was ineffective and the blood tests results were properly admitted. The Court reasoned the acts of obtaining and testing the blood sample were, collectively "only one search."[6] Thus, the court determined when the defendant consented to the blood draw, consent was effective for subsequent testing, and no warrant was necessary to test the blood.

This caselaw allows prosecutors to rely generally on the proposition that if blood or urine was seized in compliance with the Fourth Amendment, subsequent testing of the sample has been authorized and test results will be admissible. However, special facts or circumstances may exist which would constitute an exception to the general rule. If the basis for the seizure was conditional consent, subsequent testing beyond the scope of that consent may require a separate warrant for admissibility. For example, if a defendant consents to testing a blood sample *for alcohol*

only, it may be necessary to seek a warrant to test the sample for other drugs. *See People v. Pickard*, 222 Cal.Rptr.3d 686 (Cal.App 2017) and *State v. Binner*, 131 Or.App. 677, 886 P.2d 1056 (1994) (consent to test was limited to alcohol testing only and subsequent testing for drugs was not authorized). Similarly, if a defendant had been assured biological specimens would not be tested for drugs, drug test results will not be admissible in a subsequent drug prosecution. *Marino v. State*, 934 P.2d 1321 (AlaskaApp. 1997).

Whether a warrant is necessary to test blood is, of course, dependent on the circumstances of the case and a state's laws and constitution. While a "second warrant" argument may be novel to a particular prosecutor, others across the nation have prevailed against similar arguments. The "second warrant" strategy is not unique and, depending on the variation, may have already been rejected by multiple courts. Traffic Safety Resource Prosecutors and the National Traffic Law Center can provide resources to help with new and well settled blood draw issues.

Editorial Note: *Additional information and annotations on how states have handled similar challenges is available upon request. This article does not discuss State laws/procedures where medical personnel are required to provide medically seized body samples to law enforcement authorities.*

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[1] *See Missouri v. McNeely* , 569 U.S. __, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013); *Birchfield v. North Dakota*, 579 U.S. _, 136 S.Ct. 2160 (2016); and *Mitchell v. Wisconsin,* 588 U.S. ___ (2019).

[2] *Id*. at 618 (Emphasis added).

[3] 182 Wash.App. at 522, 331 P.3d at 107.

[4] 184 Wash.2d at 93, 355 P.3d at 1115.

[5] 387 Wis2d at 749, 930 N.W.2d 225.

[6] 387 Wis2d at 759, 930 N.W.2d 230.