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NCDD Journal

National College for DUI Defense

Editor:Paul Burglin

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Dean's Message

ALAN DERSHOWITZ KEYNOTE SPEAKER FOR NCDD'S 20TH ANNIVERSARY SUMMER SESSION

Steve Jones

As the National College for DUI Defense (NCDD) prepares to celebrate its 20th Anniversary in Cambridge, MA, once again on the campus of Harvard Law School, we are honored to have the distinguished Professor Emeritus Alan Dershowitz as our keynote speaker for the Summer Session 2015.

I am deeply honored and humbled to be your Dean as NCDD enters its third decade of educating lawyers in the challenging field of DUI/DWI defense work. Our mission, as always, remains "Justice Through Knowledge."

Membership in the College continues to grow and our strength and collegiality has never been stronger. With hard work and dedication, our Board of Regents has added two new training programs to our Core-Four annual seminars---one on *Metrology* (Program Director Joe St. Louis) and the other on *Gas-Chromatography Lab Training and Trial Advocacy* (Program Director Andrew Mishlove). Mike Hawkins heads our elite Board Certification program (approved and recognized by the ABA), while Mimi Coffey highlights the achievements of our members with her NCDD Warrior Profiles and Bill Kirk keeps us connected to the public with social media and our vastly improved website.

One of the great assets of NCDD is the exchange of ideas and networking that takes place at our seminars, so I urge you to try and attend at least one of them annually. I look forward to seeing each of you soon!

Editor's Note: Dershowitz's autobiography, *Taking the Stand: My Life in the Law*, was published in October 2013, by Crown (a division of Random House). That same year he retired from his Felix Frankfurter professorship at Harvard Law School but remains an active and renown criminal appellate lawyer and foremost scholar on constitutional and criminal law.

- Steve Jones

NCDD LAUNCHES SPECIALTY SCIENCE SEMINARS

Two new seminars have been added to the NCDD's offering of legal education in the field of DUI/DWI defense. ***Trial Advocacy and the Science of Measurement***, first presented last November in Phoenix, Arizona, was highly rated by attendees and will be offered again on the East Coast next fall with dates and the city to be announced by early summer. The chairpersons for this seminar are Joe St. Louis and Ted Vosk, and the presentation in Phoenix included the following topics and speakers:

Lauren McLane & Ted Vosk - "Do your state's breath and blood tests even measure what the law requires? The Measurand"

Peter Johnson & Janine Arvizu - "What Does it Take to Ensure that Blood and Breath Controls are Accurate? Traceability"

Joe St. Louis & Chester Flaxmayer - "Do Laboratory Accreditation and Standards Guarantee Accurate Test Results?"

Mike Nichols & Dr. Andreas Stoltz - "How Accurate are Blood and Breath Test Results? Uncertainty"

Howard Stein & Ed Fitzgerald - "Navigating the Legal Landscape"

The other seminar is the ***Advanced Course In Blood Analysis And Trial Advocacy***, slated for an inaugural presentation June 7- 12 in Fort Collins, CO. The first two days will include hands-on training in the Rocky Mountain Clinical Laboratory---the only course of its kind in the United States that utilizes a functioning commercial analytic laboratory. Advanced trial advocacy will follow the science. This seminar is limited to 18 students.

Editor's Note: Chairman of this new blood analysis/trial advocacy seminar, Andrew Mishlove, has written a more in depth article on this seminar on page 3.

SAVE THE DATE!

SUMMER SESSION 2015
July 22 - 25
Harvard Law School
Cambridge, MA
Register Now • www.ncdd.com

E.D.'s Corner

The NCDD has a lot of excitement going on with our upcoming seminars: MSE is just around the corner on March 26-28 in New Orleans and then our new seminar "Serious Science for Serious Lawyers, Advanced Course in Blood Analysis and Trial Advocacy" June 7-12 in Ft. Collins, CO. Next up will be our fantastic 20th Anniversary Summer Session celebration July 23-25 with very special speakers you won't want to miss! Vegas will be October 1-3 and we are going to have the Second Annual Metrology Seminar on November 6-7. I am happy to announce our 2016 Winter Session program being held at the beautiful Ritz Carlton in Marina del Rey, CA. on January 21-22! What a line-up! Make sure to check the NCDD Website for all of the details!!

For those interested in Board Certification, the application is due August 31 with the examination being administered on January 20, 2016 in Marina del Rey. If you have any questions, please feel free to contact Board Certification Chairperson, Mike Hawkins, or me for more information.

I hope you have noticed some great changes in our website! Please be sure to use it as a great tool to enhance your practice. Bill Kirk is doing a great job with our social media so make sure to check us out on Twitter and Face Book!

I look forward to seeing you at an NCDD seminar soon!

- Rhea Kirk

Trial Tip Treasure

Bad Facts and Going on the Offensive During Trial

*by Drew Carroll**

Trials are often compared to combat. While one could never equate the horrors and devastation of actual combat to a trial, we understand that this notion is derived from the fact that we have an adversarial system of criminal justice in the United States. Within our adversarial system there is a fight between two sides to a controversy, each represented by a zealous advocate; a warrior, presenting their case to a neutral and fair fact finder.

In addition to the combat warrior analogy, principals of military strategy and tactics are effectively used to illustrate how best to litigate a legal controversy in a courtroom. Perhaps the most commonly relied upon resource for such comparisons is Sun Tzu's *The Art of War*[1]. Chapter 6 of that work provides the backdrop for this trial tip.

In Chapter 6 of *The Art of War*, Sun Tzu discusses going on the offensive in battle. The idea that the military theorist is promoting is one of being in control, rather than being controlled. The foundation for this bold course of action is preparation, knowledge and skill. In his book *Sun Tzu For Success*, Gerald Michaelson quotes Sun Tzu as saying "[t]he possibility of victory lies in the attack. Generally, he who occupies the field of battle first and awaits his enemy is at ease."[2] Simply put, the one most prepared to do battle has the advantage.

While the facts and issues in a case may, at times, dictate a wait and see approach where it is not wise to go on the offensive, this can't be a default trial strategy. Why? Because cases that go to trial almost always have bad facts. Ignoring the bad facts is not an option. A smart prosecutor is going to identify the bad facts and spend a great deal of time focusing on those facts during every phase of her case. Jurors are going to recognize these facts and give great weight to the prosecutor's spin, unless the defense disarms the prosecutor by going on the offensive.

For jurors, trials are a search for the truth. And while we, as criminal defense lawyers, are programmed to challenge this ill-informed and "erroneous" perspective with eloquent pronouncements of the presumption of innocence and the burden of proof, there is validity to that belief. Trials are about "legal truth"; truth we, as trial lawyers, develop within the rules of ethics, the rules of evidence, and the law. That truth is the story we tell from beginning of the opening statement to end of the closing argument, and that truth explains the bad facts. Of paramount importance during the telling of the story, is the lawyer's credibility.

The use of the term develop does not imply something untoward. It identifies much of what we do during the term of our representation. Our job is to be the client's zealous advocate; their warrior in the arena. We must start preparing to credibly tell the client's story during the initial interview, but it can't stop with that snapshot. We've got to know the person inside and out. We accomplish that with follow up questionnaires probing about physical ailments, medical conditions, and mental health issues, both diagnosed and undiagnosed. We've got to know every fact. We accomplish that by visiting the scene, talking to the witnesses, and personally examining all of the evidence.

We know that in a DUI prosecution, the government is almost always going to offer evidence of bad driving, slurred speech, and problems with balance. When we know about the mechanical defects, we can go on the offensive about the driving; when we know about the dental procedure, we can go on the offensive about the speech; when we know about the knee replacement, we can go on the offensive about the balance. When dealing with more serious problems, it is advisable to get the objective opinions and feedback of others. In serious cases, the use of a mock jury could provide invaluable insight on how to go on the offensive with bad facts.

Finally, the way we present the bad facts to the jury can have a tremendous impact. In some instances simply telling the jury may be the best approach, while in others, a video clip, a photo or an excerpt from a medical record projected on a screen may be more effective. When dealing with bad facts at trial, going on the offensive with the jury will give you the best shot at winning the battle.

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[1] A Chinese military treatise written during the 6th century BC.
[2] Michaelson, Gerald. *Sun Tzu For Success*. Avon, MA: Adams Media Corporation, 2003.

*Drew Carroll is a DUI defense attorney in South Carolina. He formerly worked with the late Reese Joye, former Dean of the NCDD and legendary trial lawyer. He is Board-Certified in DUI Defense by the NCDD (as approved by the American Bar Assocation).

Serious Science for Serious Lawyers

by Andrew Mishlove

Has something like this ever happened to you?

You discover a major flaw in the blood test protocol in your case (for example, unexplained and unresolved peaks in the chromatograms). The rest of the case is also very defensible. You go to trial and do all the right things: minimize the bad driving, deal with the field sobriety tests, show that your client appeared normal, and eviscerate the lab analyst on the defective blood test.

Then you lose. Afterward, a juror says to you, "Well, maybe there were problems with the blood test, but you didn't prove it was wrong." How infuriating! What about the burden of proof? What about the burden of scientific validation and qualification? Be honest now, has something like this ever happened to you?

If you try a lot of DUI cases, it's very likely. The number that the machine spits out has a mystical, talismanic quality with the jury. Even when we are right on the science, it's hard to win. Why? Because, although we may be learned in the science and the law, we need to improve our skills in communicating scientific concepts to the jury.

I've been at this for 34 years. I've tried over 300 jury cases, and I've won far more than my share. But even at age 60, I still feel like a student of my craft, with a lot to learn. It keeps me feeling young (that, and the mountain biking).

I've attended many DUI seminars over the decades, including in-depth trial advocacy courses, such as the Gerry Spence Trial Lawyers College, and the ACS forensic science courses; and they are excellent. When it comes to DUI-specific seminars, the NCDD leads the field. I've been to many MSE's and I haven't missed an NCDD Summer Session in 15 years. Every MSE and Summer Session was extraordinary (and this summer's 20th anniversary edition promises to be the best yet). Until now though, there has not been an in-depth science course that focuses on how to persuasively communicate scientific concepts to juries. In Fort Collins, CO, from June 7-12, the NCDD will present its inaugural ***Advanced Course In Blood Analysis And Trial Advocacy***---it is limited to just 18 students and is already sold out, but there is a waiting list you can access at www.ncdd.com under the seminars link.

Our trial advocacy faculty is being led by Marjorie Russell and Francisco "Paco" Duarte, renowned for their work at the *Gerry Spence Trial Lawyers College*. The faculty also includes Don Ramsell, Barton Morris, Tim Huey and myself.

Our scientific faculty includes Jimmie Valentine, Carrie Valentine, Robert Lantz, Patricia Sulik, and Janine Arvizu.

Websites & Blogging - *Staying Within Ethical Rules*

Now that social media use to attract potential clients is widespread amongst lawyers, State Bar licensing authorities are increasingly flexing their muscles to prevent advertisements they deem misleading to the public.

Communications (which include websites and blogs) that contain guarantees or predictions concerning the result of representation are generally prohibited, and testimonials or endorsements of a lawyer without an adequate disclaimer can also be grounds for discipline in many jurisdictions. An example of a proper disclaimer is "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter." California Professional Rule of Conduct 1-400(E)(2).

The California State Bar periodically publishes advisory opinions on hypothetical scenarios involving potential attorney misconduct. Though not legally binding, they are frequently cited in published decisions relating to lawyer discipline. An Opinion currently proposed by the California State Bar (No. 12-0006) states that attorney blogging is subject to the same rules if it indicates, expressly or impliedly, an attorney's availability for employment, even the blog just has a link to the attorney's website.

Statements that are technically true may still run afoul of professional rules of conduct if they are misleading. "An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case." *Model Rule of Professional Conduct*, Rule 7.1, Comment 3. A Virginia lawyer became the subject of regulation when he wrote about his victories on a non-interactive weekly blog without any kind of a disclaimer. *Hunter v. Virginia State Bar ex rel. Third District Committee*, 285 Va. 485, 744 S.E.2d 611, cert. den., ___ U.S. ___, 133 S.Ct. 2871 (2013). (Note that interactive blogs are less likely to come under fire because they allow public commentary). California Business & Professions Code section 6158 mandates that "the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated."

TED'S WORLD
DUI KUNG FU

*by Ted Vosk**

> *To be victorious, first determine the conditions necessary for victory and then seek to engage in battle."* – Sun-tzu, *The Art Of War*.

Defending an individual charged with driving under the influence of alcohol can be a challenging affair. Only those accused of sex offenses seem to be viewed with more disgust. The hysteria created by special interest groups has led to the adoption of ill conceived and unfair laws. Moreover, the spasmodic response to the proclaimed "carnage on the highways" has created a DUI exception to the Constitution so that citizens are now expected to check their rights at the ignition. Thus, one thing an attorney in a DUI case must focus on is how to overcome the myth, bias and propaganda each player on the stage brings as baggage into the courtroom. In this context, jury selection and education of both judge and jury are critical.

The availability of scientific and other specialized evidence, including breath, blood and roadside field sobriety tests, only confounds the problem. To many jurors, the aura of reliability this evidence conveys is overpowering and may even be determinative. Presented with such evidence, jurors often look to the accused to disprove the evidence as opposed to requiring the State to demonstrate its correctness beyond a reasonable doubt. This results in what has been termed "verdict by machine" and the abandonment of the presumption of innocence in DUI cases.

These technologies are not the magical purveyors of truth that judges and jurors often presume them to be. Like all other technologies, they have inherent limitations based in both principal and practice. Care must be taken to distinguish between the reported result of a test and what the meaning of that result actually is. One must also insure that the particular methodology used to collect the evidence was capable of producing reliable results. Moreover, the ever present sources of error must be identified. This is especially so where the evidence is being collected by police officers with little background in science or the basis of the technologies being utilized. A thorough understanding of these ideas is critical.

Nor do these considerations exhaust the complexities and challenges presented by the typical DUI case. Unique conditions of pretrial release, unlawful and unjustified, are often imposed. Overcharging, in combination with both criminal and civil penalties, is commonly engaged in to overcome an accused's will and obtain a guilty plea to some "lesser" offense, innocent or not. A mandatory minimum sentencing scheme requiring a matrix to present clearly and which can be used and misused in many ways. The interplay of alcoholism with the legislative scheme and the availability of treatment alternatives such as deferred prosecution. Incentive programs for officers to make DUI arrests and training programs which educate them in how to purposefully turn a routine traffic stop into a *Terry* investigation. And the list goes on.

This is the morass we must sift through to determine not only the conditions necessary for victory, but what victory even means in the context of a given DUI. Although it may appear daunting, it is a morass that can be mastered. The goal in this process is twofold: 1) to gain an understanding of how to place ourselves in a position of advantage in a given case; and 2) learn how to recognize, or get the state to reveal, its weaknesses. This is the basis of our kung fu.

> *In Battle one engages with the orthodox and gains victory through the unorthodox."* – Sun-tzu, *The Art Of War*.

As with other areas of defense practice, there are many common strategies used in DUI cases. For example, common orthodoxy often dictates that the technical basis underlying the state's forensic evidence be challenged. The reason is that impugning a forensic technology in this manner can be, and has been, used successfully. The hallmark of this approach is a head on attack against the soundness of a particular forensic methodology. If the attack is successful, it may not only permit judge and jury to choose to ignore certain aspects of the evidence presented, but it may result in suppression of the evidence itself.

Remember, though, that every technology has it own inherent limitations. Those limitations are typically established by the science and research underlying each forensic methodology. They spell out what the technology is incapable of doing. Accordingly, depending on the facts of a particular case, those limitations may help create doubt as to the technologies ability to demonstrate what the state is seeking to utilize it for. This means that the very technology the state is using to convict an accused may actually be the key to gaining his acquittal.

The danger lurking in the orthodox approach, then, is that if our attack against a technology's foundation is strong enough to permit a judge or jury to choose to ignore certain aspects of it, we run the risk that it is the limitations that will be ignored. In fact, this is not an uncommon occurrence. And, where those limitations contain the most robust seeds of victory, our "successful" attack may actually lead to our defeat. On the other hand, if a court or jury accepts the technical basis that underpins a particular forensic methodology, they are bound by those limitations. Thus, depending on the facts of a particular case, we may actually want to bolster the state's evidence and use it to obtain victory.

Seeking to bolster the state's evidence is certainly unorthodox. Our initial reaction is usually attack, attack, attack. The state knows this as well, though. If it perceives us as trying to bolster its evidence it may catch on and cut us off. To conceal our designs, we may engage with the orthodox and attack the evidence's basis. We attack to get a response, though, not to win the issue. Moreover, we design our attack to focus on the area in which the limitations we want to exploit lie. In response, the state will likely seek to establish the soundness of the technology's scientific foundation. If our attack is skillful and focused, the state may lay the foundation for our exploitation of the technology's limitations for us. Thus, by engaging with the orthodox and relying upon the unorthodox, we can use the state to put us in a position of advantage. In this way, we have turned each block into a strike and each strike into a block. This is how we practice our kung fu.

> *Configuration of terrain is an aid to the army [and] is the Tao of the superior general."* – Sun-tzu, *The Art Of War*.

Our terrain is, at least in part, the law. But what is the law? Certainly there are statutes and cases and rules and regulations. But these are little more than words on a page until given life by a judge or jury in a particular case. It is true that we may understand these words to have a given meaning and that that understanding is shared. But if a judge or jury decides differently, what are we to say? If we claim that the decision maker is wrong, we may appeal and then be vindicated. But vindicated in what manner? The vindication is simply the proclamation of another court itself subject to the determinations of the future. And if we are not vindicated does it mean that we were wrong? What if a future decision maker finds in our favor?

One way to look at the question is to acknowledge that while we play on a field with pre-fabricated guidelines, the law, in its truest sense, is exactly what a court or jury says it is every time a decision is made. That means that every time we walk into a courtroom, we have an opportunity to mold, if not create, the law. Although we do not start from scratch, we have an opportunity to configure the terrain upon which the accused will be tried. This releases us from the strict confines of predetermined outcomes we often feel confronted by and frees us to construct new paradigms for judge and jury to measure each particular case by. In essence, we have the freedom to attempt to transform the law to its most just configuration in each particular case. By so doing, our actions upon the law begin to play the same role as water, wind and flame upon the face of the earth. This is the zenith of our kung fu.

These are the principles of DUI Kung Fu. In future columns I will use examples of my own and from other DUI practitioners to illustrate how they can be applied.

* Ted Vosk is a criminal defense attorney and legal/forensic consultant. Ted Vosk graduated with honors in Theoretical Physics and Mathematics from Eastern Michigan University, and later studied in the PhD program for physics at Cornell University before obtaining his J.D. from Harvard Law School. He is member of the American Academy of Forensic Sciences.

Case Law Roundup

Case Highlights from Donald Ramsell (Illinois) and Paul Burglin (California)

High Court Holds Objectively Reasonable Mistake of Law Makes Detention Reasonable Under Fourth Amendment

Heien v. North Carolina
___ U.S. ___ (Docket No. 13-604), 134 S.Ct. 1872 (2014)

Defendant was purportedly stopped because one of the two brake lights on his car was not working. [We say "purportedly" because the stop for a mere "fix-it ticket" included questioning of both the driver and passenger about their destination, a claim of nervousness, and ultimately a claim of consensual search of the vehicle that resulted in a finding of drugs].

Although the North Carolina statute only requires a single stop lamp for automobiles, the Supreme Court held the officer's mistaken understanding of the law was reasonable and the enforcement stop therefore valid. [Note: The Court did not even get to whether an "objective good-faith" exception to the exclusionary rule applied---it simply held that the detention did not constitution a violation of the Fourth Amendment because it was reasonable.]

However, the Court could have simply concluded that the officer was *not* mistaken about the law, and even intimated as much when it stated "*if* [the officer mistakenly interpreted the statute]." [emphasis added]. Although N.C. Gen. Stat. Ann. § 20-129(g) only requires a vehicle to have "a stop lamp" [singular], a separate subsection of the statute mandates that "all originally equipped rear lamps" be functional. N.C. Gen. Stat. Ann. § 20-129(d).

Nevertheless, the Court used this case as a basis to hold that reasonable suspicion for a detention may rest on an objectively reasonable, though mistaken, understanding of what a law prohibits. It noted that the North Carolina appellate courts had never previously interpreted the statute.

J. Kagan (joined by J. Ginsburg) noted in her concurring opinion that an officer's reliance on incorrect training or memorandums from a police department can not be the basis for a finding of objective reasonableness because subjective understandings of the law are irrelevant. The majority agreed that the officer's subjective belief about the subject statute was not at issue, citing *Whren* v. *United States*, 517 U. S. 806, 813 (1996).

J. Sotomayer offered the following prediction in her lone dissent: "I fear the Court's unwillingness to sketch a fuller view of what makes a mistake of law reasonable only presages the likely difficulty that courts will have applying the Court's decision in this case."

Ineffective Assistance of Counsel

Failure of Defense Counsel to Confirm Breath-Alcohol Device Properly Certified Before Guilty Plea May Warrant Reversal of Conviction Based On Ineffective Assistance of Counsel

State v. Devore
(Iowa Court of Appeals – Docket No. 13-1967 – February 15, 2015)
2015 WL 568401

Defendant appealed his conviction following a guilty plea to the *per se* charge of driving with a .08 percent or higher alcohol content. He contended that his guilty plea was entered without knowledge that the certification on the DataMaster was 13 months old (an Iowa regulation for admissibility of breath-alcohol results requires certification within one year).

"Although this assertion arguably may not implicate the voluntariness of the guilty plea, it does implicate the issue of whether the plea was knowingly and intelligently given…[A] defendant may, after entry of a guilty plea, attack the voluntary and intelligent character of the plea by showing the advice received from counsel was not within the range of competence demanded of attorneys in criminal cases."

Defendant's conviction was affirmed, but the Court held post-conviction relief is preserved (probably in the form of a habeas petition) depending on clarification of the following, inter alia, factors: "whether defense counsel was aware the DataMaster certification was outdated, and if so, whether counsel informed Devore of that fact; whether a later valid certification of the DataMaster was in existence, and if so, whether defense counsel, Devore, both of them, and/or the prosecuting attorney, were aware of that fact; whether there were discussions between Devore and defense counsel regarding the strength of the "under the influence" evidence; and whether there was any agreement that Devore would plead guilty under that alternative if not under the "eight hundredths 0.08 or more alcohol concentration" alternative."

All Evidence Suppressed For Non-Compliance With Video Recording Requirement

State v. Sawyer
(Supreme Court of South Carolina – Docket No. 27393 – June 14, 2014)
2014 WL 2516051

South Carolina has a unique statute requiring, absent a medical emergency, the videotaping of a DUI suspect that includes the entire breath test procedure (showing suspect and test operator, and including the 20-minute observation period), an advisement to the suspect that he or she is being videotaped, and a further advisement to the suspect that he or she has the right to refuse the test. Prior to 2008, and at the time of this incident, the statute additionally required inclusion of Miranda warnings on the tape.

The video portion of the tape complied with the statute, but the separate audiotaping device malfunctioned. Defense counsel moved for suppression of all evidence for non-compliance with the statute since the videotape did not adequately establish full compliance regarding Miranda admonitions to the suspect (the officer's lips could be seen moving but no audible sounds could be heard).

Significantly, the Court rejected the State's assertion that the lack of full compliance went to the weight of the evidence as opposed to the admissibility of it. It also rejected the State's attempt to argue a "totality of the circumstances" exception in the statute because it was not preserved below.

HGN Limitation

State v. Quaale

Washington State Supreme Court – Docket No. 89666-6 (en banc)

HGN was the only field sobriety test administered to driver, and driver refused a chemical test. Trooper testified he had "no doubt" that Defendant was impaired based solely on the HGN test.

The opinion was inadmissible under the Court's earlier decision in State v. Baity, 140 Wn2d 1, 991 P.2d 1151 (2000). *Baity* held that HGN is admissible, but that an officer may not testify about it in a manner that casts an "aura of scientific certainty to it. He may say it is consistent with alcohol consumption, but not equate it to a specific level of intoxication or a numerical number.

Rebutting .08 Or Higher Presumption In Administrative Suspension Hearing

Editor's Note: The following two appellate cases were handled by NCDD member and California attorney Chad Maddox. The same Court issued both opinions but with different results on whether testimony by expert witness, Darrell Clardy, rebutted a presumption that the driver had a .08 percent or higher alcohol content at the time of driving.

Lewis v. Shiomoto

California Fourth District Court of Appeal, Div. 3 (2015) – UNPUBLISHED

No. G049264

California's *per se* DUI offense (.08 or higher) includes a rebuttable presumption that if a person has a .08 or higher BAC within three hours of driving then there BAC at the time of driving was .08 percent or more. Though the language expressly applies to prosecutions under the subject statute, California appellate courts have assumed it applies in administrative suspension actions as well.

The evidence admitted in the hearing showed the following:

11:52 p.m. ……..… Driving
12:17 a.m. …… .084 BrAC
12:19 a.m. …… .082 BrAC
12:25 a.m. …… .091 BrAC
12:28 a.m. …… .088 BrAC
1:08 a.m. …….. .094 BAC

The licensee's expert witness, Darrell Clardy, opined that Lewis was likely no higher than .07 percent at the time of driving because his alcohol level was essentially rising throughout the testing sequence and, further, breath-alcohol test results are falsely high in the absorptive state.

The DMV hearing officer rejected Clardy's testimony as "subjective" (another word for "speculative" in California DMV hearing officer jargon), and defended the ruling on appeal by pointing out the descending test result numbers on the second and fourth breath test samples.

The Superior Court reversed the DMV's suspension order, identifying the "second set" of breath test results (the third and fourth test results) as "the key" evidence of a rising BAC.

The Court of Appeal affirmed the Superior Court's ruling, stating that the DMV's attempt to construct "gotcha" arguments by misconstruing the Superior Court's Order and the expert's opinion as "badly misplaced." The slight drop in the third

digit on the second and fourth test results were deemed scientifically insignificant.

Kishida v. Shiomoto

California Fourth District Court of Appeal, Div. 3 (2015) – UNPUBLISHED

No. G049242

The evidence admitted in this hearing showed the following:

9:42 p.m. …… Driving
9:58 p.m. …… .090 BrAC (preliminary alcohol screening device - PAS)
10:00 p.m. …….. .092 BrAC (preliminary alcohol screening device)
10:58 p.m. …….. .084 and .082 BAC (blood sample tested twice by State)

The licensee's expert witness, Darrell Clardy, opined that Kishida's BAC was between .06 and .07 percent at the time of driving---basing it on his contention that the driver was still absorbing alcohol at the time of the breath testing and the numbers were higher than the true BAC.

The Court of Appeal reversed the Superior Court, ruling that its decision overruling the DMV was unsupported by substantial evidence. It declared that common sense rejected the expert's conclusion since the opinion was admittedly based on the measured results. It also rejected the Clardy's partition ratio variability argument, declaring it irrelevant on the .08 or higher per se allegation.

***McNEELY* CASES**

Officer's Belief "There's Not Enough Time To Get A Warrant"

Not A Categorical Exception To The Warrant Requirement.

People v. Schaufele

___ P.3d. ___, 2014 WL 2446142 (Colo), 2014 CO 43

Colorado Supreme Court – Docket No. 13SA276 – June 2, 2014

This opinion from the Colorado Supreme Court provides a brilliant analysis of the various opinions expressed in *McNeely*, and explains why lower courts are duty bound to follow the "totality of circumstances" holding in *McNeely* and reject any categorical exception suggested in the concurring and dissenting opinion by Justice Roberts. The dissent is good read as well, as it provides a logical analysis for a different conclusion and could well be followed by sister-state courts.

Schaufele was involved in a car accident resulting in injury to himself and others. 64 minutes later an officer instructed a nurse to draw a sample of his blood. She had first attempted to speak with Schaufele to provide an advisement under Colorado's express consent law (similar to Missouri's implied consent law), but was unable to do so because he was either unconscious or sleeping. The police officers did not even attempt to get a warrant. Established procedures had been set in place for doing so, but none of them had experience in doing it and they speculated in the suppression hearing that it would have taken one to four hours to get a warrant.

The People urged the Court to adopt the modified *per se* rule proposed by Roberts in *McNeely* that "a warrantless blood draw may ensue" if "an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant."

The *Schaufele* Court rejected the invitation, concluding that "[a] majority of the [McNeely] Court expressly rejected a categorical rule and held, `consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.'"

Colorado's express consent statute provides that an unconscious DUI suspect shall be tested to determine his blood alcohol content, but the Court held the statute does not abrogate constitutional requirements. It affirmed the trial court's ruling that the People failed to establish under the totality of the circumstances that the police could not have used the warrant process in sufficient time to obtain evidence of inculpatory value.

The Court noted its duty to follow SCOTUS instructions concerning federal constitutional law, citing *United States v. Howard,* 742 F.3d 1334, 1343 n. 3 (11th Cir. 2014) ("As we hope our decision in this case shows, we scrupulously follow Supreme Court decisions. It is not our role to critique their reasoning or to criticize their holdings, and we do not intend to do so here. To borrow a metaphor in vogue, we don't grade the Justices' papers, they grade ours.... The [Supreme Court's decision] is the law of the land, which must be and will be followed unless and until the Supreme Court decides it should not be.").

"The People assert that the majority opinion in *McNeely* does not preclude adoption of Chief Justice Roberts's proposal because only four justices expressly rejected his proposal. *See* 133 S.Ct. at 1563–67 (parts II.C, III). But Justice Kennedy's refusal to join the plurality opinion critiquing Chief Justice Roberts's proposal cannot be interpreted to constitute affirmative support for that proposal. Justice Kennedy's position is more appropriately measured by the legal principles he embraced. In the end, he joined a majority opinion that does far more than simply reject Missouri's argument that warrantless blood draws should be permitted in every case. Justice Kennedy united with the rest of the majority on critical concepts that are inherently inconsistent with Chief Justice Roberts's proposal."

"The holding in the majority opinion that Justice Kennedy joined thus directly conflicts with the approach advocated by Chief Justice Roberts, which singles out only one circumstance—the amount of time it takes to seek and receive a warrant—to the exclusion of all others."

"The People seek to exploit some discord among the justices in *McNeely* to implement a fundamental change in Fourth Amendment jurisprudence in Colorado. But a majority of the Supreme Court has spoken, and has spoken clearly. We are duty-bound to follow that precedent."

"[T]he Fourth Amendment requires officers in drunk-driving investigations to obtain a warrant before drawing a blood sample when they can do so without significantly undermining the efficacy of the search…"

Implied Consent vs. Fourth Amendment Consent

Flonnory v. State of Delaware

Docket No. 156,2014 January 28, 2015

Officer told motorist that a phlebotomist was going to take his blood. He did not ask for consent and did not seek a warrant.

The trial court ruled that *McNeely* was inapplicable to Delaware's implied consent statute.

Though *McNeely* did not expressly address consent, its reasoning (as derived from *Schmerber*) is directly applicable to the facts. Whether a warrantless blood draw is reasonable must be determined on the totality of the circumstances.

Dissent: Implied consent amounts to Fourth Amendment consent. "[T]he person giving consent need not have made a knowing and intelligent decision to consent, and there is no duty on the part of the police to inform a suspect of the right to refuse or revoke consent." [citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-37].

State v. Padley

(Wis.Ct.App. 2014), 849 N.W.2d 867, 876

Actual consent is not implied consent, but rather a possible result of requiring a driver to choose whether or not to consent to a chemical test. The question is whether submission to a test after the implied consent advisement, is freely and voluntarily given and is thus actual consent.

People v. Harris

___ Cal.App.4th ___ (Fourth Dist., Div. Two – Docket No. E060962) (2015)

Based on his belief that Defendant had been driving under the influence of a drug, a deputy told Defendant he was required to submit to a chemical blood test. He further told him he did not have the right to talk to a lawyer before deciding whether to submit, and that refusal to submit would result in the suspension of his license and could be used against him in court (all of which is specified in California's implied consent statute). Defendant responded, "okay," and the deputy testified in an evidentiary hearing that at no time did Defendant appear unwilling to provide a blood sample. A sample of blood was taken from Defendant without verbal or physical resistance, and prior to the *McNeely* decision.

Following he *McNeely* decision, the Court of Appeal concluded it does not apply because Defendant freely and voluntary consented to the blood draw and the sample was obtained in a medically approved manner (it was drawn by a phlebotomist at a police station with no indication that a nurse or physician was in attendance). Even if *McNeely* did require a warrant or showing of exigent circumstances, said the Court, the blood-drug evidence was not subject to suppression by reason of the objective good-faith exception to the exclusionary rule because the officer was acting under binding and uniform appellate precedent of California courts at the time (said cases erroneously holding that the natural dissipation of alcohol and/or drugs constitutes a categorical exception to the warrant requirement where there is probable cause for a DUI arrest).

McCoy v. North Dakota Dept. of Trans.
(N.D. 2014), 848 N.W.2d 659, 667-668

[Same as *Harris*]

Donjuan v. State of Texas

Court of Appeals (Houston, 14th Dist.)

2015 WL 732640 (February 19, 2015)

Defendant refused field sobriety tests and, following an implied consent admonition, he produced only "deficient" results on the breath-alcohol instrument. The arresting officer transported him to a hospital and directed a physician to draw a mandatory blood sample from him. Before drawing the sample, the physician asked Defendant if he consented to the blood draw and Defendant agreed without verbal or physical resistance.

Held: The implied consent admonition did not make the consent coerced under the totality of circumstances. Trial court's finding of consent affirmed, and no need to address constitutionality of Texas's implied consent statute.

State v. Wells
In the Court of Criminal Appeals (Tennessee)
No. M2013-01145-CCA-R9-CD (2014)

Implied consent may be withdrawn, and notwithstanding statute permitting forcible blood draw, actual consent or exigent circumstances are required for it. "While the State may attempt to persuade the accused to submit to a search by providing consequences for a failure to submit to a test ordered upon probable cause, we hold that the privilege of driving does not alone create consent for a forcible blood draw. Given the gravity of the intrusion into privacy inherent in a forcible blood draw, we conclude that such a search is not reasonable unless performed pursuant to a warrant or to an exception to the warrant requirement. The implied consent law does not, in itself, create such an exception."

State v. Brooks
(Minn. 2013), 838 N.W.2d 563

Driver consented to a chemical test after speaking with an attorney. Consent is not coerced just because the implied consent statute imposes criminal penalties for refusing.

State v. Moore
(Or. 2013), 318 P.3d 1133

Implied Consent advisory read to driver about penalties for refusing chemical test does not render consent involuntary. The failure to disclose accurate information would be a more logical basis to claim consent was coerced or involuntary.

State v. Wulff
(Idaho 2014), 337 P.d 575

Voluntariness of consent hinges on the totality of the circumstances.

Texas v. Villarreal
(Texas.Crim.App. 2014),___ S.W.3d ___, 2014WL6734178

Warrantless blood draw not admissible where consent based solely on compliance with Texas implied consent statute and violated *McNeely*.

Aviles v. State
(Tex.App. 2014), 443 S.W.3d 291

Mandatory blood draw without consideration of the totality of the circumstances violated the Fourth Amendment.

Weens v. State
(Tex.App. 2014), 434 S.W.3d 655

In accord with *Aviles*.

Byars v. State
336 P.3d 939, 945-946 (2014)(en banc)

Portion of implied consent statute allowing forced blood draw is unconstitutional.

State v. Halseth
(Idaho Supreme Court), 339 P.3d 368 (2014)

An Idaho police officer detained the driver of a stolen truck. Defendant drove away with the officer in pursuit until his patrol car was struck by another vehicle. Defendant was later stopped by a Washington state trooper and arrested on various charges including DUI. Upon being taken to a hospital for a blood draw, Defendant said, "You can't take my blood! I refused! How can you just take it without permission?" Blood was drawn without a warrant.

Both Washington and Idaho have implied consent statutes, and Defendant was prosecuted in Idaho.

The trial court granted his motion to suppress the blood-alcohol evidence. The Idaho Supreme Court affirmed, holding Defendant withdrew his implied consent by objecting to the blood draw.

The State myopically did not argue exigent circumstances as an exception to the warrant requirement, and did not raise "objective good faith" reliance on binding appellate precedent as a possible exception to the exclusionary rule. It likely would have prevailed on either of those fronts, given the time lost in pursuing the fleeing felon and the Idaho Supreme Court's characterization of *McNeely* as a "change of mind" from *Schmerber* (plus earlier Idaho appellate decisions affirming forced blood draws).

State v. Fierro
(2014 SD 62), 853 N.W.2d 235

No consent where driver verbally and physically refused.

Objective Good Faith Reliance On Binding Appellate Precedent

State v. Foster
Wisconsin Supreme Court – Docket No. 2011AP1673-CRNM – 2014

Exclusionary rule does not apply by reason of implied good faith reliance by police on Court's earlier holding in *State v. Bohling* [cite], wherein Court held the natural dissipation of alcohol from the human body constitutes a *per se* exigency and exception to the Fourth Amendment warrant requirement.

Editor's Note: Like other state appellate courts that have applied the *Davis* "objective good faith" exception to the exclusionary rule, the *Foster* Court asserts that *McNeely* created a new constitutional rule of law (as opposed to acknowledging that it failed to recognize, accept and apply the limitations clearly expressed in *Schmerber*).

People v. Harris
___ Cal.App.4th ___ (Fourth Dist., Div. Two – Docket No. E060962) (2015)

[Implied Consent and Actual Consent discussed above]

Court declared that SCOTUS has not addressed the "objective good-faith" exception to pre-*McNeely* blood draw cases where consent withdrawn and blood sample drawn by threat of force or actual force. It sidesteps the fact that SCOTUS did not invoke as it did in *Davis*, even though the officer in McNeely had every reason to believe he was authorized to do it based on an amendment to Missouri's implied consent statute that earlier barred forced blood draws.

Finding that a split of authority on the issue was what had prompted SCOTUS to accept the *McNeely* case, and that California Courts had uniformly interpreted *Schmerber* as authorizing warrantless blood draws based solely on the natural dissipation of alcohol in the blood, the Court held that "objective good-faith" on the part of the officer would bar application of the exclusionary rule even if Defendant had not consented. The Court cited three other California appellate court decisions invoking the "objective good-faith" exception in pre-*McNeely* cases: *People v. Youn* (2014) 229 Cal.App.4th 571, 579; *People v. Rossetti* (2014) 230 Cal.App.4th 1070, 1076-1077; and *People v. Jones* (2014) 231 Cal.App.4th 1257, 1263-1265.

Criminal Penalty For Breath Refusal Does Not Implicate A Fundamental Right

State v. Bernard
Minnesota Supreme Court – Docket No. A13-1245 (February 11, 2015)

Police advised Bernard that he was required by law to take a chemical test, that refusing is a crime, and that he had the right to consult with an attorney so long as it did not unreasonably delay testing. He called his mother instead and then refused.

The trial court ruled the test refusal statute is constitutional on its face, but dismissed the charges after concluding the police lacked a basis to search Bernard without a warrant. The Court of Appeals reversed, holding that prosecution for the refusal did not violate Bernard's due process rights because the police had probable cause and could have gotten a warrant.

It never helps to have an appellant with four prior DUI convictions. After referencing that fact in Footnote 1, the Court went on to state in Footnote 2 that it would not entertain a facial challenge to the statute because appellate counsel did not argue the point in his brief even though it was argued below. The Court could have requested additional briefing on the issue since it was ruling on the constitutionality of a statute affecting thousands of motorists in Minnesota, but unsympathetic clients do not get procedural gratuities.

The Court found the Court of Appeals analysis flawed on the basis that probable cause alone does not excuse the warrant requirement. However, it affirmed the reversal of the trial court's dismissal on the basis that a breath testing was authorized as a search incident to lawful arrest.

The Court determined that breath-alcohol testing is no more invasive than a number of other SCOTUS decisions permitting the taking of biological material from an arrestee, and that *McNeely* "does not foreclose our decision regarding the search-incident-to arrest-exception to the warrant requirement.

Having determined that Bernard had no constitutional right to refuse breath-alcohol testing after being lawfully arrested on suspicion of driving under the influence, it held that the criminal offense statute was not unconstitutionally applied to him.

DISSENT: Two members of the Court joined in dissent. One of them, Justice David R. Stras, formerly clerked for SCOTUS Justice Clarence Thomas and Ret. Fourth Circuit Court of Appeals Justice J. Michael Luttig (33 of the latter's 40 clerks went on to clerk for either Thomas, J. or Scalia, J.). The dissent opens with "[w]e respectfully dissent[,]" before quickly delivering some blistering blows:

"The Court apparently wishes that we lived in a world without *Missouri v. McNeely* [cite], and one in which there are no limits to the search-incident-to-arrest doctrine…Even though the court's opinion strikes a confident tone, the truth of the matter is that its decision is borne of obstinance, not law…In the end, the court ultimately arrives at a decision that is as notable for its disregard of Supreme Court precedent as it is for its defective logic."

It rejected the majority's "assumptions" that (a) the search-incident-to-arrest exception extends to the forcible removal of substances *within* the body; and (b) that the rationales for the same exception---officer safety and preventing destruction of evidence---do not apply to searches of a person.

"It strains credulity to suppose that, after the Supreme Court carefully examined the exigent-circumstances exception in *McNeely*, it would conclude in some future case that the search would have been justified anyway under the search-incident-to-arrest doctrine, which according to *Chimel* and *Riley* turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*."

Noting that there are surely instances where it would be constitutional to apply the refusal statute to impose criminal penalties, the dissenters said not so here because a chemical search without a warrant was not valid here.

Scotus Radar

Oral argument was heard by the United States Supreme Court on March 2, 2015, on whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause.

In a 4-3 decision, the Ohio State Supreme Court reversed a conviction and ordered a new trial after statements attributed to a 3-year-old by school officials were admitted into evidence over *Confrontation* objections.

Stanford Law Professor Jeffrey L. Fisher argued on behalf of Respondent.

Ohio v. Clark (No. 13-1352)

NCDD BOARD CERTIFICATION EXAM

Application Deadline:

August 31, 2015

Examination: January 20, 2016

Location: Marina Del Rey, California

NCDD Memorial Wall

In The Year Of Our 20th Anniversary We Remember With Fondness Our Many Colleagues Who Fought The Good Fight And Were Called Home Too Soon!

Alexander, Charles J. II
Crumbley, Russell W.
Essen, Richard J. (Founder)
Joye, Reese I. Jr. (Dean, Fellow, Regent, Founder)
Kinard, Stuart
Lewis, Paul E.
Light, Steven M.
Loss, Edward A. III (AZ State Delegate)
Lyden, Dennis J.
Mike Fox ("DUI Mike")
Pellegrino, Victor J. (Dean, Fellow, Regent)
Rafferty, Owen P. (Founder)
Russell W. Crumbley (AL State Delegate)
Siirtola, Jeffrey S. (AZ State Delegate)
Smith, David B.
Stauffer, Phil
Strauss, Jerry (Founder)
Thompson Daryl B.
Tootle, Clyde L. (Founder)
Wines, Lawrence E.
Yavitch, Eric