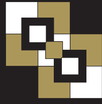
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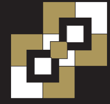
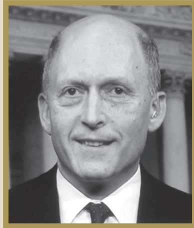


Dean's Message


Lenny Stamm

Recently, as I was walking from my car to the courthouse a woman who had seen my license plate "DUIL-WYR" said to me, "You help people, that must be rewarding." While we are caught up in our daily battles with prosecutors, cops, judges, witnesses and clients, it is easy to forget what this is all about. Ours is a noble profession and we exist to serve others. We do this by persuading prosecutors, cops, judges, witnesses, and clients to do what we want them to do, what we have determined is in the best interest of our clients.

Tyrone Moncriffe reminded us at MSE this year that while good lawyers communicate with judges and juries, great lawyers connect with them. We connect with the people that we seek to persuade by getting them to tap into their feelings and emotions. I recently saw the play "Hamilton" on Broadway. Not knowing what to expect, while I was very impressed by the music and choreography which was incredible, I was blown away by the way that the story of Hamilton's tragic life connected with the audience. Hamilton was the ultimate outsider. His parents were not married, a huge deal in those days, his dad left when he was 10 and his mom died when he was 12. Nonetheless, he showed himself to be extraordinarily intelligent, articulate, and resourceful and was sent to the mainland from St. Croix to get an education. He was an immigrant. Yet he became an invaluable asset to General and later President George Washington and the other founding fathers who were a generation older than he was. And when he suffered tragedies in his life, everyone in the audience felt his pain and was devastated.

Our clients are in pain as well. And if that pain can be communicated to the decision-makers in our cases, we increase the chances of obtaining a favorable result. If we can get our judges and jurors to root

Continued on Page 7

High Court To Rule On Constitutionality of Criminalizing Warrantless Test Refusals

The question presented in the consolidated cases of *Birchfield v. North Dakota* (Docket No. 14-1468), *Bernard v. Minnesota* (Docket No. 14-1470), and *Beylund v. Levi* (Docket No. 14-1507), is whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

Oral argument before the Supreme Court of the United States (SCOTUS) took place on April 20, 2016.

Justice Kennedy got things rolling by asking counsel for Respondents (the defendants) if a chemical test refusal may be punished by a license revocation, and if so, what is the difference between that and three days in jail?

Justice Alito quickly weighed in with what was probably more of a position statement than a question, asking if the statutes might not be viewed simply as criminalizing the reneging of a bargain (you get to drive and we get to test you) as opposed to punishment for invoking a constitutional right. He likened driving to other conditional rights, suggesting that states have a "special needs" for chemical testing of suspected drunk drivers that may foreclose any Fourth Amendment right to refuse. Chief Justice Roberts said he wasn't sure why this exception would not apply.

Justice Kagan asked why breath testing might not simply fall into the category of "search incident to arrest." Since blood evidence could be similarly categorized, her question suggests a view that breath testing is no big deal when it comes to Fourth Amendment scrutiny in drunk driving cases.

Justices Roberts, Breyer, Alito, Kennedy, and Kagan appeared to agree that breath testing, although a search, is a non-invasive search that could possibly excuse the warrant requirement. Justice Breyer

Continued on Page 2

E.D.'s Corner

Rhea Kirk

It's hard to believe that another great Summer Session is just around the corner! Dean Lenny Stamm and the curriculum committee have put together a terrific Summer Session agenda including new elective small seminars! I hope you are making plans to attend because, not only will you learn a great deal, but, you will also enjoy the great comradery among your fellow attendees. Dean Strang and Jerry Buting, from the Netflix documentary, "Makin a Murderer" will be our keynote speakers which will make for a very interesting discussion!

Our upcoming seminars: Serious Science-Alcohol Ft Collins, CO **May 9-14**; Summer Session Cambridge, MA **July 21-23**; Vegas Defending with Ingenuity Las Vegas, NV **September 22-24**; Metrology San Diego, CA **Nov 4-5**; and a brand new seminar, Serious Science Drugs Arlington, TX **Dec 10-14**.

Hopefully you have used the NCDD website and found it convenient to pay your dues online this year! We are trying to streamline things for your membership and have added new features that I think you will find helpful! If you haven't paid your dues, please do that today! I hope you all have a great summer! I look forward to seeing you at one or more of our great NCDD seminars soon!

-Rhea

(Continued from cover)

said it's less invasive than a *Terry* pat-down frisk. That Justice Thomas is of this view is a given, since he dissented in *McNeely* and opined that exigent circumstances creates a *per se* exception for even a warrantless blood draw.

All that being said, the question before the Court is whether warrantless refusals may be criminalized. Here, the government stumbled badly in oral argument, ill-advisedly and inaccurately telling the j ustices that evidentiary breath testing only takes place post-arrest at the police station, and that pre-arrest roadside breath testing is inadmissible at trial. Justice Kennedy, who hails from California where that is clearly not the case, seemed to suspect otherwise and will probably do his own research on this issue. The government's response, however, left justices to question why there isn't time to just get a telephonic warrant for it.

Justice Roberts noted that texting causes accidents and pondered why police should not have to get a warrant for breath testing if they need to get one to look at a phone (the government could have easily responded that text messages do not dissipate with time but dropped the ball).

If breath testing does not require a warrant then, Justice Breyer intimated, states may criminalize a refusal. However, Breyer noted that the Constitution leans in the other direction, and that if a warrant is required then a refusal may not be criminalized. Justices Kennedy and Roberts appeared to lean toward the view that driving is more of a right than just a conditional privilege, as being essential to daily life. Thus, the argument goes, advanced consent to chemical testing as a condition for driving is coercive. It is likely that the other justices share this view except for Justices Alito and Thomas.

What was perhaps most telling about the ideological differences and life experiences of the justices was the comment by Justice Alito and supported by Justice Roberts, that people don't blow because they're guilty. Some people, including innocent people, are simply protective of their rights and privacy and do not appreciate uniformed officers ordering them to submit to searches. Perhaps one or more justices on the less conservative wing of the Court will make note of this in their opinion.

Will the Court hold states may make it a crime to refuse a breath test but not a blood test? Will it hold that chemical test refusals may not be criminalized in the absence of a warrant, and avoid any distinction between breath and blood testing? One thing for almost certain, it will have no problem with administrative license suspension actions as a legitimate tool for encouraging submission without a warrant.

Stay tuned---a decision from the 8-member Court is due this summer.

Trial Tip Treasure

W. Troy McKinney

How issues are framed is one of the most important aspects of trial and persuasion. With that in mind, ask yourself, "Who is on trial in a criminal case?" If you think or say the defendant, then you need to reframe your thoughts and need to also reframe it for potential jurors, the prosecutors, and the judges, all of whom also default to the defendant being the party on trial.

We ought to abandon the idea that it is the Defendant who is on trial. It is not. The defendant, as she sits in the courtroom, is innocent. Contrary to popular belief, jurors should not be starting the trial with the idea that both sides are equal. Both sides do not start the trial in equal positions. Because the defendant is presumptively innocent, to be fair and follow the law, jurors must lean towards and be biased in favor of the defendant. If they cannot or will not do so, they are not qualified to sit as jurors because anything other than an abiding willingness to do so means that they have already, to some extent, rejected the presumption of innocence.

In this context, it is the State and its case that is on trial. It is not the defendant or his case that is on trial. It is the State that is making claims against a presumptively innocent person. It is their burden and duty to prove those claims beyond and to the exclusion of all reasonable doubt, if they can. It is why it is the State and its case that is on trial. If we desire and expect jurors to judge any case properly, we have to frame the focus of the case on the State and away from the defendant. Reasonable doubt is much easier to find when one changes one's perspective about who and what is on trial.

The Calf Path

By S.W. Foss

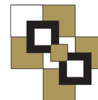
EDITOR'S NOTE: More than 40 years passed between *Schmerber* and *McNeely*, and for all that time it was generally accepted that law enforcement officers could have blood extracted from DUI suspects without a warrant. In the year of Lenny Stamm's tenure as Dean of the NCDD, the Journal reprints the *The Calf Path* by S.W. Foss in his honor. Lenny is a determined contrarian and a tireless appellate advocate. Let us not be afraid to challenge legal precedent no matter how entrenched it has become.

"One day, through the primeval wood,
A calf walked home, as good calves should;
But made a trail all bent askew,
A crooked trail as all calves do.
Since then three hundred years have fled,
And, I infer, the calf is dead.

But still he left behind his trail,
And thereby hangs my moral tale.
The trail was taken up next day,
By a lone dog that passed that way.
And then a wise bellwether sheep,
Pursued the trail o'er vale and steep;
And drew the flock behind him too,
As good bellwethers always do.
And from that day, o'er hill and glade.
Through those old woods a path was made.

And many men wound in and out,
And dodged, and turned, and bent about;
And uttered words of righteous wrath,
Because 'twas such a crooked path.
But still they followed - do not laugh -
The first migrations of that calf.
And through this winding wood-way stalked,
Because he wobbled when he walked.

This forest path became a lane,
that bent, and turned, and turned again.
This crooked lane became a road,
Where many a poor horse with his load,
Toiled on beneath the burning sun,
And traveled some three miles in one.
And thus a century and a half,
They trod the footsteps of that calf.



The years passed on in swiftness fleet,
The road became a village street;
And this, before men were aware,
A city's crowded thoroughfare;
And soon the central street was this,
Of a renowned metropolis;
And men two centuries and a half,
Trod in the footsteps of that calf.

Each day a hundred thousand rout,
Followed the zigzag calf about;
And o'er his crooked journey went,
The traffic of a continent.
A Hundred thousand men were led,
By one calf near three centuries dead.
They followed still his crooked way,
And lost one hundred years a day;
For thus such reverence is lent,
To well established precedent.

A moral lesson this might teach,
Were I ordained and called to preach;
For men are prone to go it blind,
Along the calf-paths of the mind;
And work away from sun to sun,
To do what other men have done.
They follow in the beaten track,
And out and in, and forth and back,
And still their devious course pursue,
To keep the path that others do.
They keep the path a sacred grove,
Along which all their lives they move.
But how the wise old wood gods laugh,
Who saw the first primeval calf!
Ah! many things this tale might teach
- But I am not ordained to preach."

Case Law Roundup

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

CHEMICAL TESTING AND CONSTITUTIONAL ISSUES

Consent

State v. Modlin
(2015) 291 Neb. 660

Defendant was advised by the arresting officer that he was required to submit to a chemical test and that refusal to do so is a separate crime. Defendant signed a form acknowledging his understanding of the implied consent law and voiced neither consent nor objection to the blood draw.

Held: Trial courts may not rely solely on the existence of the implied consent statute to conclude that consent to a blood draw was given for Fourth Amendment purposes. Instead, the determination of whether the consent was voluntarily given requires court's to evaluate the totality of the circumstances, including the implied consent law. Here, it was not unreasonable for the court to find actual consent based on the totality of the circumstances including Defendant's non-objection to the blood draw.

EDITOR'S NOTE: Whether a refusal may be properly charged as a separate crime is a matter pending before SCOTUS (see page 1), and the threat of being prosecuted for a separate crime is highly probative on the issue of voluntary consent.

State v. Anderson
Wisconsin Court of Appeals
2015 WL 9309167
Docket No. 2015AP1573-CR

In evaluating the totality of the circumstances concerning the issue of lawful consent to a blood draw, court is bound by prior precedent declaring that the mere threat to obtain a warrant does not vitiate consent if the threat is genuine and not a pretext to induce consent [cites].

State v. Eversole
Idaho Supreme Court – Docket No. 43277 (2016)

Defendant revoked his statutorily implied consent when he refused to submit to chemical testing, thus requiring the prosecution to establish some other exception to the warrant requirement.

The Court does not opine on whether the implied consent statute triggers lawful Fourth Amendment consent absent withdrawal or revocation of it, and notes that *McNeely* did not go that far either.

State v. Romano
North Carolina Court of Appeals – Docket No. COA15-940
___S.E.2d___ (2016)
2016WL1569452

After being medicated at the hospital the defendant became only semi-conscious. In light of *McNeely*, the State could not rely upon its implied consent statute's provision that unconscious persons are deemed to have not withdrawn their implied consent.

Court also rejects application of the "good faith" exception, simply noting that law enforcement did not even try to get a warrant.

People v. Arrendondo
California Court of Appeal (Sixth District) - Docket No. H040980
___ Cal.App.4th ___ (2016)

Court rejects notion that an unconscious person is deemed to have lawfully consented to a warrantless blood draw, notwithstanding California's implied consent law stating otherwise. "[*McNeely*] did not suggest that a statute explicitly imputing consent to drivers---as California's does---would sustain a warrantless blood draw of its own force."

Court also rejects argument that express consent given as a condition of obtaining a driver's license cannot be withdrawn.

However, "good faith" reliance on the statute trumped application of the Exclusionary Rule.

State v. Valenzuela
Arizona Supreme Court – Docket No. CR-15-0222-PR

Consent to chemical testing given in response to an admonition that "[state] law requires you to submit [to breath, blood, or other chemical test]" fails to prove that consent was freely and voluntarily given.

The record was unclear as to whether the officer had also advised Defendant of the civil consequences of refusing, but even if he had, the Court concluded this would not have dispelled the coercive nature of the purported consent.

However, "good faith" exception applied based on prior judicial precedent.

EDITOR'S NOTE: Notwithstanding the Court's invocation of the "good faith" exception, the legal precedent established by this opinion is ground-breaking. Congratulations to NCDD Member Michelle Behan of NESCI & ST. LOUIS, P.L.L.C., who wrote an amicus brief in this appeal on behalf of the NCDD.

Exigent Circumstances

State v. Perryman ___P.3d___ (2015)
Oregon Court of Appeals
2015 WL 9315576

Trial court's order denying motion to suppress blood-alcohol evidence obtained without a warrant or consent affirmed based on finding of exigent circumstances. Defendant manifested breathing problems that necessitated one hour delay for hospital visit, and officer testified that procedure to seek and obtain a warrant would have taken an additional two and half hours.

Footnotes 3 and 4 of this opinion demonstrate the need for making as complete of a record as possible to rebut claims that the procedure would have taken less time than two and half hours (e.g., telephonic warrant availability and procedure, other officers available to process defendant while warrant application prepared and sought, etc.). Of course, the hour delay alone for medical attention would probably have been enough for most courts to find an exigent circumstance, especially since he was suspected of faking a health issue. The prosecutors ended up with some gift language in this holding which will quite likely be abused in future cases.

State v. Parisi
Wisconsin Supreme Court
2016 WI 10 (Docket No. 2014AP1267CR)

Defendant appeared to have overdosed and evidence of heroin use was found in residence. Medical treatment was required which caused delay. Testimony was presented that evidence of heroin use dissipates from the blood as quickly as one hour, and that it would likely take two hours to get a warrant.

Thus, there was sufficient evidence to establish exigent circumstances (loss of blood-drug evidence) presented to excuse warrant requirement.

City of Seattle v. Pearson
Washington State Court of Appeals, Div. 1
Docket No. 72230-1-1

The car accident occurred at 3:23 p.m. and the officer arrived at 4:06 p.m. Defendant admitted smoking marijuana earlier in the day. A blood sample was drawn at 5:50 p.m. without a warrant or consent. The officer testified that warrants typically take about 60-90 minutes, but also acknowledged that telephonic warrants are available without indicating how long those take to get.

An expert for the State testified that THC detection by the lab is lost after 3-5 hours of use. Even without questioning the credibility of this statement, it was held that the State failed to establish exigent circumstances by clear and convincing evidence.

State v. Chernobieff
Idaho Court of Appeals – Docket 43122
2016WL1708538

Officer made 3-5 attempts to reach on-duty magistrate and left one voice-mail message. Unable to reach him to obtain a warrant, law enforcement proceeded with a warrantless blood draw. *Held*: Unavailability of on-duty magistrate constituted exigent circumstance.

EDITOR'S NOTE: The precedent here is a bit unnerving as one can readily see the potential for abuse. Perhaps there should be a back-up magistrate to avoid this problem, or an alternative means for contacting the on-duty judge other than a cell phone number.

Refusals

Washburn v. Levi
North Dakota Supreme Court
2015 WL 9284127
Docket No. 20150149

Defendants have a statutory right to consult with an attorney before deciding whether to submit to chemical test. Where ambiguity arises as to whether Defendant wants to speak with an attorney, officer must seek clarification before license may be suspended for chemical test refusal. Here, it was not clear whether Defendant wanted to talk to his father, a lawyer, or both, and the officer wrote him up as a refusal without clarifying Defendant's request. License erroneously suspended.

State v. Monaco
Superior Court of New Jersey Appellate Division
Docket No. A-0473-14T2 (2016)

Defendant bears the burden of proof in establishing an incapability to provide a breath-alcohol sample in defending against a refusal charge. "When no obvious inability is apparent, the driver must support a claim of inability with competent medical evidence, and failure to provide such evidence will result in a finding of refusal."

Defendant did offer expert medical testimony about her weakened ability to provide sufficient breath samples due to asthma, and had used an inhaler prior to the attempted testing in the presence of the police. It never helps in a refusal case to be belligerent and cursing though, and this case turned on a credibility of witnesses determination by the trial court.

Exclusionary Rule And Exceptions

People v. Superior Court (Katz)
Unpublished – California First Dist. Court of Appeal, Div. 3
2016WL1222876

Prosecutor filed an interlocutory appeal challenging a pretrial order suppressing blood-alcohol evidence obtained without a warrant. The appellate Court invoked the "inevitable discovery" doctrine to trump the Exclusionary Rule and reverse. This was a real reach, particularly since neither side raised the doctrine at the trial court or appellate level, nor given an opportunity to even address it with the appellate court.

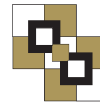
EDITOR'S NOTE: The *inevitable discovery* doctrine allows evidence seized in violation of the Fourth Amendment to be admitted "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police." *Nix v. Williams* (1984) 467 U.S. 431, 447). See also, *People v. Hughston* (2008) 168 Cal. App.4th 1062, 1071.

The burden of establishing applicability of the doctrine rests upon the government by a preponderance of the evidence. It does not require a showing of good faith or the absence of bad faith. *Nix*, at 444-445. See also, *People v. Superior Court (Tunch)* (1978) 80 Cal. App. 3d 665, 682.

The doctrine is closely related to the *independent source* doctrine. See *Murray v. United States* (1988) 487 U.S. 533, 539. "The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix*, at 443.

Importantly, the mere existence of probable cause to obtain a search warrant does not justify application of the *inevitable discovery* exception:

> **[W]e reject any assertion that the inevitable discovery doctrine applies here simply because the police had sufficient probable cause to obtain a warrant to enter the dorm room and to seize the evidence legally.**



(See *Hudson v. Michigan* (2006) [547 U.S. 586] (dis. opn. of Breyer, J.) [government may not rely on inevitable discovery doctrine to "avoid suppression of evidence seized without a warrant . . . simply by showing that it could have obtained a valid warrant had it sought one"].) Such an application of the doctrine--i.e., that the illegally seized evidence should not be excluded because the police *theoretically* could have obtained a warrant--has been rejected by our Supreme Court in *People v. Robles* [23 Cal.4th 789, 801].

People v. Superior Court (Walker) 143 Cal.App.4th 1183, 1215. See also, *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 995 ("to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the [F]ourth [A] mendment"). *Cf.*, *People v. Rich* (1988) 45 Cal.3d 1036 (doctrine applied on basis that police would have inevitably obtained a warrant for the search of defendant's vehicle and other property), which is the case cited by *Katz* for invoking the doctrine.

Either ignored or overlooked by *Katz* is the fact that *Rich* preceded both Justice Breyer's comment in *Hudson* and the *Walker* and *Reilly* cases.

Prolonged Detention / Video Tape Manipulation

People v. Litwin
2015 IL App (3d) 140429

Defendant's 12 year prison sentence for cannibis trafficking reversed based on prolonged detention.

Defendant was stopped for crossing over a fog line. The officer took at least 10 minutes to issue a warning ticket, which itself was unreasonable and made the detention unduly prolonged.

The Court of Appeal also found credibility problems with the officer's testimony and the trial court's finding otherwise to be unreasonable. In addition to conflicts in his testimony, a defense expert's opinion that the video tape evidence had been manipulated (portions missing and not an original) went unrebutted except for law enforcement claims that they had done nothing to it. "This type of malfeasance is so outrageous and morally reprehensible that it taints the entirety of the police testimony presented in this case."

Community Caretaking Exception

Byram v. State
(2015) Texas Court of Appeals – Docket No. 02-14-00343-CR

Passenger hunched over and appearing non-responsive is insufficient grounds to invoke community care-taking exception for enforcement stop of vehicle. The officer later determined that the passenger had vomited out the window but even that would not have been enough had he known it beforehand.

The dissent asserts that the officer's primary motivation for the stop is critical to the analysis, but while that may be true under Texas state law it has no bearing on Fourth Amendment analysis per *Whren*.

State v. Morales
(2015) Kansas Court of Appeals – Docket No. 113,730

A deputy stopped a vehicle he had just observed parked on the side of the road with its lights on late at night. He had not observed any vehicle code violation and as he approached the driver he asked, "Is everything okay." An odor of alcohol ultimately led to a DUI arrest.

Rejecting the contention that this was a valid "public safety stop" exception to the warrant requirement, the Court noted that public safety stops are not to be used for investigative purposes.

"The fallacy of letting officers masquerade an investigatory stop as a public safety stop is perhaps better answered by logic than by legal precedent. An example of this is a story told of President Abraham Lincoln during his days as a trial lawyer. Lincoln is credited with cross-examining a witness in the following way:

"'How many legs does a horse have?'
"'Four,' said the witness.
"'Right', said Abe.
"'Now, if you call the tail a leg, how many legs does a horse have?'
"'Five,' answered the witness.
"'Nope,' said Abe, 'callin' a tail a leg don't make it a leg.'"

Id., quoting *Lamon v. McDonnell Douglas Corp*., 19 Wash. App. 515, 534-35, 576 P.2d 426 (1978) (Andersen, J., dissenting).

"Thus, officers calling a stop a public safety stop does not make it so, especially when there is an expressed investigatory component to their stated community caretaking policy."

Brady Violations

***Buffey v. Ballard* (Warden)**
(2015) West Virginia Court of Appeals – Docket No. 14-0642

A defendant's constitutional due process rights extend to plea negotiations, and a failure to disclose *Brady* material is grounds for permitting withdrawal of guilty plea.

Other courts have taken a contrary view, contending that the purpose of *Brady* is to guarantee a fair trial and thus defendants are not entitled to exculpatory evidence at the plea stage.

DUI Checkpoints

Whalen v. State
2015 Ark. App. 707 – Docket No. CR-14-980

According to the Corporal's testimony, sometimes supervisors approve DUI checkpoints and sometimes they don't, and when they don't have any input on the plan they are just informed about it later.

This DUI checkpoint held unconstitutional where there was insufficient evidence of a written operation plan or that it was operated in a manner exhibiting explicit, neutral limitations on the officer's conduct.

People v. Timmsen
Illinois Supreme Court – 2016 IL 118181

Defendant made a U-turn across railroad tracks 50 feet before a law enforcement "safety roadblock" (sounds like a DUI checkpoint). It was the only way to avoid the roadblock. It occurred at 1:15 a.m. on a Saturday when the roadblock was not busy.

Though the U-turn itself was not illegal, the Court held that the evasive behavior at a time when drunk driving is more common than 8:00 a.m. on a weekday gave the officer sufficient grounds to make an enforcement stop. While acknowledging a citizen's right to go about his business, it added that the maneuver when the roadblock was not busy belied Defendant's claim that he was just going about his business ("[C]ontinuing eastbound on the highway would have been going about his business.").

A concurring opinion expressed the view adopted by about a dozen other States, that evasion alone is *per se* grounds for a *Terry* stop without the need to consider the totality of circumstances.

A dissenting opinion agreed with the majority view of a "totality

of circumstances" approach, but disagreed with its conclusion that the totality of circumstances in this case justified the enforcement stop.

Editor's Note: This opinion contains many cites and arguments and is a must read when briefing a roadblock evasion issue.

Tailgating Statute Not Void For Vagueness

Nolan v. State
Mississippi Court of Appeal – Docket 2014-KM-01647-COA (2016)
2016 WL 121723

Mississippi's prohibition against tailgating reads as follows: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Citing statutes from other jurisdictions containing similar or identical language, the Court rejected appellant's claim that the statute is unconstitutionally vague and subjective.

Conviction Reversed Based On Judge's Coercive Instruction To Reach Verdict

Commonwealth v. Firmin
___N.E.3d___ (2016)
Appeals Court of Massachusetts – Docket No. 14–P–1873
2015 WL 10015094

Before deliberations began, the trial court instructed the jury that (a) they should do whatever voting or whatever they need to do to reach a verdict if they see a ground swell of support in one direction or the other because, "[i]f we don't get a unanimous verdict ... we have to do this case all over again and we're booked out until May now"; (b) the court would "really appreciate it if [the jury] could resolve this"; and (c) the court would take a verdict if the jury reached one between 12:41 p. m., when they adjourned to deliberate, and 1:00 p.m,, when they recessed for lunch.

Noting that trial courts must avoid language that may coerce jurors into reaching a verdict, and finding the judge's instruction "may have led jurors to believe that they should compromise their own conscientious convictions in order to reach a verdict," the Court reversed the quickly returned conviction without even evaluating the strength of the evidence.

DUI and Speeding Does Not Constitute Reckless Endangerment Offense *Per Se*

State v. Rich
Washington State Supreme Court (en banc) – Docket No. 91623-3 (2016)
2016 WL 74919

Evidence of DUI and speeding does not constitute the separate offense of "reckless endangerment" absent additional proof that defendant engaged in conduct creating a substantial risk of death or serious physical injury to another.

The additional evidence sufficient to affirm the conviction here was the fact that defendant was more than twice the legal limit (.18 percent BAC), admitted to feeling tipsy, and drove with a young child in the front seat.

Looking At Cell Phone Not Reasonable Suspicion of Texting

U.S. v. Paniagua-Garcia (7th Cir. 2016)
Docket No. 15-2540

An Indiana statute prohibits "texting" (sending or receiving textual material on a cellphone or other handheld electronic device; also called "text messaging" or "wireless messaging") or emailing while operating a motor vehicle. All other uses of cellphones by drivers are allowed.

While passing Defendant on an interstate highway, the officer testified he saw him holding a cellphone in his right hand, that his head was bent toward the phone, and that he "appeared to be texting."

The enforcement stop was a violation of the Fourth Amendment. "What the government calls `reasonable suspicion' is just `suspicion.'" What the officer observed, held the Court, "was consistent with any one of a number of lawful uses of cellphones." It analogized the situation to an officer seeing a driver taking a sip of a drink and stopping him on suspicion of consuming alcohol.

Five pounds of heroin found suppressed. Maybe the Court had doubts about the officer's credibility given the claim of consent to search the inside of the spare tire found in the trunk.

Refusal To Perform FST's Admissible To Show Consciousness of Guilt Even Though Defendant Not Admonished Of That Potential Use

State v. Farrow
Vermont Supreme Court – Docket No. 2014-427
2016WL932894

Defendant's refusal to participate in field sobriety tests admissible to show consciousness of guilt, even absent an admonition that the refusal could be used against the accused at trial. Admissibility is still subject to the trial court's discretion in weighing probative value vs. potential for undue prejudice, but no abuse of discretion found here especially since jury was instructed that it was not required to draw any inference from evidence of refusal and defense counsel was free to argue other reasons for it.

Evidence of Intoxilyzer 5000 Errors Is Probative Even Though Accuracy Checks Immediately Before And After Subject Test Were Fine

State v. Cruz-Romero
Idaho Court of Appeals – Docket No. 42994
___P.3d.___ (2016)
2016WL1249367

Defendant was breath-alcohol tested on an Intoxilyzer 5000 on April 27. Calibration of the machine had tested within tolerance on April 8 and again on May 9. However, the machine had several inexplicable out of tolerance test results occurring on April 5, May 15, and May 16.

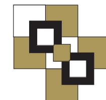
The trial court erred in excluding the "out of tolerance" test results as "non-probative" without balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Scotus Radar

Pending before the high Court is a petition for review raising the following question:

Whether a trial court must ask potential jurors who admit exposure to pretrial publicity whether they have formed opinions about the defendant's guilt based on that exposure and allow or conduct sufficient questioning to uncover bias, or whether courts may instead rely on those jurors' collective expression that they can be fair?

McDonnell v. United States (Docket No. 15-474)



(Continued from cover)

for our clients, they'll be much more predisposed to agree with our arguments. We do that by using devil words, prior inconsistent and consistent statements, and passionate and effective argument. We let them see that our clients are victims, and when this can be conveyed credibly, they will want to help.

The National College for DUI Defense has a wide array of resources and programs to help our members improve our skills to best serve our clients within the law and the rules of ethics. We have over 2300 members, an incredible website where members can blog, a virtual library, a journal, a certification program, a very active email list, an amicus committee, and some of the best training programs available anywhere. This includes public defender training all over the country and our sponsored seminars: MSE with TCDLA in New Orleans in March and April; Serious Science in Ft. Collins in May; our summer session in Cambridge, Massachusetts toward the end of July; our Las Vegas seminar with NACDL in the fall; our Drug Seminar in Arlington, Texas in December; and our winter session which will be in Tucson in January.

I am very much looking forward to our summer session which will feature some new formats and topics. Marj Russell of the National Trial Lawyer's College will teach us highly effective techniques for cross-examination – unlike anything you have done before. She says "if we understand, accept, and validate the values and beliefs on which jurors may rely to our detriment, instead of working against them, we can discover how to show that the opposing actors have not honored those elements due to compromise, failure, or betrayal. Then we weave it together with the underlying human stories - including insight into the opposing witness - that cause jurors to be moved to act for justice on our behalf." Then we will break up into small workshops where we can practice using the cross-examination techniques, featuring taping and critiques.

This past fall a driver plowed into a group of college students at an Oklahoma State University homecoming parade – killing four people, including a toddler, and was charged with second degree murder. NCDD member Tony Coleman was quickly retained and faced a national media blitz. He will explain his approach to this difficult case.

NCDD member Brad Williams practices immigration law in addition to DUI defense. The rules are changing, and we need to know how our representation of non-citizen defendants will affect their lives, and their family's lives.

Professor Byron Warnken of the University of Baltimore Law School will tell you what you need to know to successfully attack and vacate your clients' prior convictions. Trial is not always the best option for our clients. If we are going to have to plead some of them guilty, we need to know how to get the best possible result.

Professor Rishi Batra is an Assistant Professor of law at the Texas Tech University School of Law who teaches Alternative Dispute Resolution and Negotiation. He will teach us techniques to help us get better results, when our choices are limited.

This summer, for the first time, we will be introducing small elective seminars, like upper level college classes. Participants may choose two electives from the following topics: Charging document defenses; Suppression motions; Discovery, Subpoenas, FOIA; Social media; Federal DUIs; Military clients; Security clearances; Sentencing; Ignition interlock, Scram; Commercial driver's and other professional licenses; Technology; Law office, business issues; Alcohol and drug treatment; and Appeals.

To be a good trial lawyer, you must know the rules of evidence backwards and forwards. NCDD member Mary Chartier will take us through the rules we need to know to win trials, including hearsay, authentication, and other crimes evidence.

We will split into two groups for presentations on Voir Dire by NCDD Regent Doug Murphy and Bench Trials by NCDD Dean Lenny Stamm.

We will split into three groups for presentations on Bad Breath 2.0 by NCDD Assistant Dean Jim Nesci, Cross-examination of the Blood Test Chemist and Phlebotomist by NCDD Regent Andrew Mishlove for attendees with five years or less experience practicing law and Advanced Cross-examination of the Blood Test Chemist and Phlebotomist by NCDD Regent Joe St. Louis.

Many of our clients suffer from medical conditions, the symptoms of which can be confused with signs of impairment. NCDD member Andy Alpert will explain how we can use these medical conditions to defend our clients. NCDD Regent and Treasurer Bill Kirk will tell us how to steal victory from the jaws of defeat.

Before Alan Goldstein's untimely death from lung cancer in 1991 at the age of 48, he gathered in a TV studio in Washington D.C. to videotape a DUI defense CLE with NCDD Founding Members Flem Whited, John Henry Hingson, Don Nichols, and Gary Trichter. Alan's presentation on the philosophy and techniques of DUI defense continues to be an inspiration to DUI defense lawyers today.

Incoming NCDD Dean Jim Nesci will give the Dean's Address.

This year the keynote address will be delivered by Dean Strang and Jerry Buting. Dean and Jerry were two Wisconsin lawyers whose defense of Steven Avery, a DNA exoneree who served 18 years in prison for a rape he did not commit only to be convicted of murder and sentenced to life a few years later, is featured in the Netflix production, Making a Murderer.

Our growing College has a great deal to offer our members, and I hope to see you in Cambridge this July, if not before.

NCDD BOARD CERTIFICATION EXAM

Applications Due August 31, 2016

January 18, 2017
Tucson, Arizona

The Only DUI Defense Board Certification Recognized And Approved By The American Bar Association

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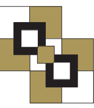

UPCOMING SEMINARS

Register Now!

www.ncdd.com

SUMMER SESSION

July 20 – 23, 2016

Held At The Harvard Law School

Cambridge, MA

METROLOGY III:

SCIENCE AS YOUR BEST DEFENSE

November 4 - 5, 2016

San Diego, CA

2016 DWI MEANS DEFEND WITH INGENUITY -

HIGH GEAR DEFENSES FOR GETTING

TO VICTORY LANE

September 22 - September 24, 2016

The Bellagio

Las Vegas, NV

California attorney Michael Kennedy and New Mexico Quality Lab Control Expert Janine Arvizu lectured at NCDD's Winter Session in Santa Monica, CA, in January.

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