

# NORTH DAKOTA IMPAIRED DRIVING Newsletter

from the desk of the **TSRP** Kristi Pettit Venhuizen

## Why We Need a DRE Evaluation

As a prosecutor, there is little more frustrating than knowing a law enforcement officer did a good job arresting a drug-impaired driver but not being able to prove it. An officer gets to make arrest decisions based on a probable cause standard – “when the facts and circumstances within police officers’ knowledge and of which they have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing an offense has been or is being committed.” State v. Spidahl, 2004 ND 168. Prosecutors have to prove a case beyond a reasonable doubt. In other words, if the jury has a reasonable doubt, they must find the Defendant not guilty.

Your typical DUI case involving alcohol allows a prosecutor to argue that if the person has a BAC of a .08% or greater, by definition the person is “under the influence.” This gives a jury something concrete to rely on. There is little to argue about (assuming the chemical test issues are straightforward). We do not have that luxury with drugs and substances. There is no per se limit for drugs, nor will there be. We cannot tell a jury that the presence of any quantifiable amount of drugs/substances means the person is impaired to the degree they cannot safely operate a motor vehicle. We also cannot tell a jury the mere presence of a drug or substance in a person’s blood or urine means they were impaired.

The challenge is that we have to educate and convince the jury, beyond a reasonable doubt, that the drug or substance rendered the person “incapable of safely driving.” How do we do that? We do that by bringing in experts who have the training and knowledge that will help educate the jury that the drug or substance in the person’s blood or urine was psychoactive when they were driving. The best way for a prosecutor to do that is to have a DRE testify about the specific categories of drugs, how those drugs impact the body, and what evidence indicates the drug was impacting the body at the time of driving.

This requires more than the protocol of standardized field sobriety tests – HGN, WAT, and OLS. A DRE will look at a number of different indicators to help them deduce whether a drug was psychoactive including body temperature, muscle tone, pupil size and reaction to light, along with additional physical tests including lack of convergence and modified Rhomberg. A DRE can testify to how a drug or substance impacts the body and how they know it was impacting the body at the time of the evaluation. A DRE can connect the dots between the drug and its effects.

What does this mean? This means law enforcement needs to be more deliberate in contacting a DRE when there are indicia of drug impairment. This means DREs need to make themselves available to their officers when a DRE assist is requested (any maybe work some overtime). This means prosecutors need to get educated about the DRE process and be ready to go to battle. We have the tools to combat drug-impaired driving in our state and we need to use them. Let’s keep our roadways and citizens safe. ■

## Volume 1, Issue 8

Welcome to the Quarterly North Dakota Impaired Driving Newsletter.

This resource will provide training information, drug and alcohol trends, legal updates, toxicology, and more to keep you informed.

- 2 | Eval Tips
- 3 | Traffic Safety Partner Showcase
- 3 | Upcoming Training & Events
- 4 | Getting Cooperation with DRE Evaluations
- 5 | from the Desk of the SJOL
- 7 | Exigency for a Blood Draw in an Impaired Driving Case



## EVAL TIPS

Deputy Shane Rothenberger, DRE  
Grand Forks County Sheriff's Office

One of the most important factors to being successful in obtaining Drug Influence Evaluations is making yourself available to the patrol personnel in your area. Make sure patrol in your area have good contact information for you and know that they can call at any time for advice or response to a traffic stop for assistance, not just an evaluation. This can also help pique interest for future DRE candidates.

I tell the patrol units that frequently get impaired drivers to use the Drug Recognition Expert as a solution when an individual is claiming that they are not impaired. Using the individual's own motivation to prove they are not impaired is the easiest way to obtain an evaluation. They often want to prove that they are not impaired, even after being placed under arrest. I instruct the arresting officer to word it as something along the lines of "If you think you're not impaired, I have another officer that has a bit more training and experience with these things if you would like to meet with them and do some additional testing."

One of the first things I do when meeting for the evaluation is to have the arresting officer take the handcuffs off of the individual. I ask the officer to do this in an area where they can hear me requesting the handcuffs be taken off, this is my first attempt at establishing rapport with the subject subconsciously before I even speak to them about conducting the evaluation. No one likes to be in handcuffs and I am the guy that showed up and helped get the

handcuffs off of them. I always introduce myself on a first-name basis while sitting next to them. This can alleviate an authority perspective from the contact as I get down to their level and attempt to be viewed as a friend and not a cop trying to jam them up. At this point I briefly explain the process of an evaluation to them, making sure to speak about the awkwardness of the dark room, to make sure there are no surprises to them, that they are comfortable, and to ensure they still would like to participate.

I try to speak with them throughout the entire evaluation about things not related to the reason they are there; like where they grew up, if they have children, where they went to high school, work life, sports, and basically anything that can make them feel comfortable. It's important the subject is something you can relate to in order to keep the conversation going and remove their mind from the current situation they are in. The ideal place for this is when in the dark room while or while prepping your equipment prior to vital signs. In my experience, if you can get them laughing while still remaining professional in your duties, you have the evaluation pretty much locked down.

I speak in a soft non-authoritative tone with them and try to stay away from cop language. If any DRE has been through interdiction training, I correlate the way I speak to people during evaluations to the way we are taught to speak to people on roadside interviews. I play the part of the "dumb cop" to elicit information from the subject until it is time to call them out on something.

I would hope that most DREs have compassion for the people we deal with who are under the influence because most of these individuals have addiction issues. There is nothing wrong with letting that compassion show through and talking with them about their addiction and attempting to understand what got them started on that path in life. It helps to build rapport and you would be surprised by the things you learn about drug users, how they got started, and the methods they use. ■



### The Lighter Side

A traffic cop went out of his way to leave a note under my car's wipers to let me know I had recently positioned my car correctly. It said "parking fine." So, that was nice.

Q: Why does a traffic light turn red?

A: If you had to change in front of everyone, you'd turn red, too!



## Sid Mann • Jamestown Police Department

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### Please explain your position and work history.

I am currently assigned as the Lieutenant in our Detective Division. I have been in that position since the fall of 2020. Prior to that, I spent 11 years in the patrol division working 1.5 years as a patrolman, 3 years as a Corporal, 3.5 years as a Sergeant, and 3 years as a Lieutenant. I went through the DRE class in the spring of 2012 and DRE Instructor training in the winter of 2018. I have served as the Team Commander for the James-Valley Special Operations Team since the summer of 2018. I completed Northwestern University Center for Public Safety School of Police Staff and Command in March of 2022.

### What is your favorite book or podcast?

The most recommended book in my library is Fearless—The Undaunted Courage and Ultimate Sacrifice of Navy SEAL, Team SIX Operator Adam Brown. It is the only book that when I started reading, I had to finish straight through. I couldn't walk away from it until I finished reading it.

### What are the values that drive you?

Growth. The words of my college football coaches have resonated with me for my career and personal life, "If you are not getting better, you are getting worse, there is no staying the same."

### What do you enjoy doing when you are not working?

I have two children who keep me busy with archery, soccer, baseball, basketball, and volleyball. I enjoy spending time with my family at the University of Jamestown basketball, volleyball, and football games. I also have a pilot license and enjoy being able to go up and fly when I have time.

## Upcoming Training and Events

### [SFST/ARIDE Refresher](#)

December 23, 2022  
Grand Forks, ND

### **State Crime Lab Intoxilyzer Training**

January 10-11 • January 25-26  
February 7-8 • February 22-23

### [ARIDE class](#)

January 17-18, 2023  
Williston, ND

### **NDSAA/DRE Joint Conference 2023**

June 21-23, 2023  
Ramada Inn, Fargo, ND  
Keynote Speaker:  
Jermaine Galloway "Tall Cop"

### [Lifesavers National Conference on Highway Safety Priorities](#)

April 2-4, 2023  
Seattle, WA

### [IACP Impaired Driving & Traffic Safety Conference](#)

August 9-11, 2023  
Anaheim, CA

### [Governors Highway Safety Association Annual Meeting](#)

August 12-16, 2023  
New York, NY

### [IACP Annual Conference and Exposition](#)

October 14-17, 2023  
San Diego, CA

## Training Resources

TSRP Webpage • [www.ndsaa.org](http://www.ndsaa.org)  
User Name: tsrp • Password: tsrp

This website was developed to provide those invested in traffic safety with a warehouse for current information, training opportunities, case law updates, related resources, interesting and relevant news articles, etc., so we can continue to focus on our goal of making North Dakota's roadways safe. Following is a list of items available.

- Impaired Driving Training Materials & Manuals
- Memo Library
- Impaired Driving Training Video Library
- SFST Training Videos
- The Two Beer Manual and latest case law updates
- Webinars

# GETTING COOPERATION WITH DRE EVALUATIONS

Tony Burnett  
State DRE Coordinator for Tennessee

One of the greatest challenges to the Drug Recognition Expert program is getting cooperation from someone who has been arrested or is suspected of DUID. I have sought out several opinions on this and will now share some of theirs as well as my own.

This cooperation does not start when the suspect comes into contact with the DRE, but as a result of how they are treated by the arresting law enforcement officer. When an officer understands that cooperation is a choice and treats the driver with respect, he/she will probably encounter more cooperation. There are basic social needs that everyone has. When we remember this, we gain so much more ground in our profession.

We will begin with learning to listen. We have two ears and one mouth. It is vital as law enforcement that we learn to use them in that order. When we arrest someone, it takes away their freedom and we become the bad guy really fast. That will intensify, if we become commanding and argumentative. A bad impression of law enforcement is impossible to overcome in the amount of time it takes to get from the arrest, to the time they come in contact with the DRE officer.

When I am asked to do a DRE evaluation, I normally do not want the arresting officer close by. I always show empathy to the suspect by saying things such as, "I know this is not the way you planned your day." This is also a great time to offer a drink or a restroom break opportunity. I always ask about where they are from, how long they have been here, what they do for a living, and if they have family close by. The purpose for these questions is to show the suspect that I care about them as a person. Rarely do I ever get into the evaluation until I establish a rapport. Joe Abrusci, the East Region Coordinator for IACP says: "Too many times I have seen DREs talk to people as though they are below them. Simple respect and finding common ground can be very helpful in opening communications versus shutting them down."

While we use the term "rapport" loosely. Webster's dictionary defines it as follows: "a relationship, characterized by agreement, mutual understanding, or empathy, that makes communication possible or easy." This only happens when the suspect feels that they are valued by the law enforcement officer and that you really are concerned and understand their situation. It never gives an impression of guilt or innocence, but one of empathy and respect.

When possible, a DRE should never go to a DRE evaluation in uniform. Uniforms carry with them a commanding presence. I know of evaluations involving fatalities and serious bodily injury that have been aborted or declined simply because a person in uniform enters the evaluation and speaks of details about the case. Regardless of what the excuse might be, this action can very easily cause the suspect to lose all rapport that the DRE has worked hard to build. They know they have been arrested, that they are in trouble, and that they may be going to jail. The evaluation can be the main factor in an appropriate conviction or sentence.

One of the most critical parts of the evaluation is giving Miranda warnings. The Law Enforcement Officer needs to make all attempts to make this a form of communication and not something they read off a sheet of paper. While the details are important, the delivery can be the difference between getting the evaluation and not getting it. I always present it as something that is necessary in order to see what is really going on with their current situation. This is where we really have to drop the "dragnet mentality" of "just the facts".

DREs are not only trained to see drug influence, but also circumstances where medical issues could be the reason for the impairment. This is important to tell the suspect, because many do have medical issues, which sometimes lead to the use and abuse of drugs. It is important that as we advise them of this and that we let them know, if it is drug impairment, they will get a fair shake and their cooperation is vital for this to happen. ■

"This article was originally published in the *Colorado Impaired Driving* newsletter issued on November 5, 2022."



If the court deems an expert's testimony inadmissible, especially suddenly and in the middle of trial, it can have a disastrous effect on the outcome of the case. However, the governing standards of expert witness admissibility are not uniform throughout the United States. States are torn between the two primary admissibility standards: Daubert and Frye.

The two major governing standards can be found in two seminal cases—a D.C. Circuit case, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and a U.S. Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The federal court system exclusively follows Daubert while state courts are divided between the two. Interestingly, each state has taken on its own interpretation of these two benchmark cases, making the admissibility of expert testimony more variable between jurisdictions.

The general premise in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) states that an expert opinion is admissible if the scientific technique on which the opinion is based is "generally accepted" as reliable in the relevant scientific community. In *Frye*, the Circuit affirmed the trial court's decision to expert testimony concerning a lie detector test. The test, which was based on changes in systolic blood pressure, was considered to have "not yet gained such standing and scientific recognition among physiological and psychological authorities." What is now referred to as the "general acceptance" test, the Frye standard is aptly described as:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), effectively overruled Frye in federal courts, holding that the case law was inconsistent with the applicable evidentiary rules, namely, Rule 702 of the Federal Rules of Evidence. In *Daubert*, the Court held that the twin standards of Rule 702—relevance and reliability—are incompatible with the stricter "general acceptance" test.

The Court emphasized the importance of a trial judge's "gatekeeping responsibility" when admitting expert testimony and listed a non-exhaustive list of factors to consider such as: 1) whether the expert's technique or theory can be tested and assessed for reliability, 2) whether the technique or theory has been subject to peer review and publication, 3) the known or potential rate of error of the technique or

theory, 4) the existence and maintenance of standards and controls, and 5) whether the technique or theory has been generally accepted in the scientific community.

Under this new standard, the Court encouraged a more liberal approach to admitting expert testimony, stressing the importance of subjecting witnesses to vigorous cross-examination instead.

Generally, the difference between the Daubert and Frye standards is the broadened approach of the latter. While Frye essentially focuses on one question – whether the expert's opinion is generally accepted by the relevant scientific community – Daubert offers a list of factors to consider.

In North Dakota the state Supreme Court rejected adopting the Daubert standard in *State v. Hernandez*, 707 N.W.2d 449 (North Dakota, 2005).

North Dakota is rare among states in that it never formally adopted the Frye standard. However, North Dakota's approach has been generally to use the "general acceptance" standard. This has occasionally involved using as a factor in the "general acceptance" test an examination of whether the technique at issue is admissible in other states.

Why this too long (and likely boring) explanation of admissibility of expert testimony standards?

Because in November of 2019, the New Jersey Supreme Court certified the matter of *State of New Jersey vs. Michael Olenowski* on the question of a Drug Recognition Expert's (DRE) testimony admissibility in the case of a driving while impaired violation.

### The Question at Hand

Defendant Olenowski passed a breathalyzer test at two separate police encounters, meaning his blood alcohol level was under the legal limit of .08%, but a DRE deemed him impaired both times. At his trial, the defendant objected to the DRE's expert testimony detailing the evaluation process that a DRE uses to assess impairment. The defense asserted that the DRE's testimony was not based on valid scientific testing and, therefore, unreliable and inadmissible. Instead, the defendant contended that toxicology reports are scientifically reliable evidence of intoxication, of which there were none in this case. After the defendant's conviction at trial, which was affirmed on appeal, the NJ Supreme Court remanded the case for further study on the scientific reliability and acceptability of such DRE evidence at trial.

After receiving briefs from various interested associations, including the County Prosecutor's Association, The DUI Defense Lawyers Association, and the New Jersey Association of Chiefs of Police, among others, the court assigned a Special Master Judge to investigate the reliability of, and therefore admissibility of, DRE evidence before ruling on the appeal.

continued on page 6 ►

Specifically, the court ordered an evaluation of the scientific acceptability of each of the 12 steps in the DRE protocol as reliable and, therefore, valid expert testimony.

### **The Special Master's Conclusions (the good news)**

The Special Master addressed the DRE's expert testimony admissibility in the DUI case. The judge concluded in a lengthy, 332-page report that such expert testimony is reliable because the DRE training and protocol are grounded in sound medical procedures for identifying drug intoxication and intoxicating drugs. The Special Master further concluded that the state's experts proved that DRE training compares to medical technician training, and therefore, DRE's can use the protocol reliably. As for the protocol itself, the special master's findings affirmed that DRE training and protocol are similar to scientifically established medicine and toxicology protocols. Thus, they are reliable and meet the Frye standard of admissibility and reliability under N.J.R.E. 702. Quoted conclusions below.

*"I conclude for all of the reasons stated in this report that DRE testimony is reliable. The reliability is established by the expert testimony presented by the State, which establishes that the DRE protocol replicates generally accepted medical practices for identifying the presence of impairing drugs and their likely identity through a toxidrome recognition process. This testimony has also established that the DRE matrix comports with matrices designed for this purpose and generally accepted and used in the medical field. This testimony has also established that the training DREs receive is comparable to that received by medical technicians and that DREs are thus enabled to reliably apply the protocol. Therefore, by implication, the DRE protocol as a whole and its individual components are generally accepted in the scientific communities to which they belong, namely medicine and toxicology.*

*As with all evidence, and as I have stated repeatedly regarding each individual step, DRE evidence and the DRE opinion will be tested by cross-examination and the factfinder will ascribe to it such credibility assessments and weight allocations as he or she deems appropriate.*

*The State has clearly established that the Frye standard for admissibility has been met. Accordingly, based upon the evidence in this hearing, DRE evidence satisfies the reliability standard of N.J.R.E. 702 and should be admissible in evidence."*

### **What Happens Next?**

Although we don't know at this point whether the New Jersey Supreme Court will adopt the conclusions of the Special Master, I believe the report represents a significant resource for all things DRE. The thoroughness of the report explains the history of the program, its components, the research and studies undertaken to validate the protocol, the relationship between the protocol and toxicology, as well as some very interesting validation statistics from New Jersey's program.

Of course, the issue was whether the DRE testimony is admissible under the Frye standard. Whether it will impact States that have adopted Daubert remains to be seen. However, as pointed out in the Special Master's Report and in the case of *Chitwood v. State*, 369 Wis.2d 132, 879 N.W.2d 786 (2016) every reported appellate decision considering this issue under either the Frye or Daubert standard has concluded that testimony based upon the DRE protocol is admissible into evidence.

The next steps are for the New Jersey Supreme Court to schedule oral arguments and deadlines for further briefing before the court can rule. Once the court rules, the decision will impact DUI cases, how they are prosecuted, and how DUI defense lawyers can defend clients. While the Special Master stated that expert testimony is always subject to cross-examination to raise doubts about its validity and accuracy, the court's potential ruling in favor of the state may put a damper on further questioning of the scientific reliability of DRE methods for impairment assessment.

However, this by no means prevents knowledgeable and skilled DUI attorneys from calling into question the specific DRE evaluation, expert report, and testimony presented in a driving under the influence case. These matters need to be examined on a case-by-case basis to determine if appropriate protocols were followed by the DRE, the arresting officers, and any law enforcement steps in the investigation and testing of the defendant.

However, the NJ Supreme Court ultimately rules, DUI cases and those facing driving while impaired charges will be affected. This is especially significant given the passage of legal possession of marijuana for recreational use in many states. What happens next in this case and for DUI law generally? We'll have to wait and see.

Until next time, be safe out there!

Judge John Grinsteiner (retired), SJOL for North Dakota

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N.D.R.Evid. 702: <https://www.ndcourts.gov/legal-resources/rules/ndrev/702>

N.R.R.Evid. 703: <https://www.ndcourts.gov/legal-resources/rules/ndrev/703>

\*\*The article was assembled from the following sources:

- *Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony* - Written by Anjelica Cappellino, J.D.
- *The State of Judicial Gatekeeping in Idaho, Montana, North Dakota, South Dakota, and Wyoming* - Written by: Daniel S. Fridman and J. Scott Janoe
- Email exchange and summaries - Written by Honorable Neil Edward Axel, ABA National Judicial Fellow

[State v. Michael Olenowski Special Master Report \(njcourts.gov\)](https://www.njcourts.gov)

# Exigency for a Blood Draw in an Impaired Driving Case

## Constitutional Parameters and Practical Approaches

Rachel Smith  
Traffic Safety Resource Prosecutor  
Louisiana District Attorneys Association

In an impaired driving case, a blood draw and resulting toxicology results can be critical evidence for the State's case. A blood draw is a search like any other Fourth Amendment search. For this reason, it may be taken pursuant to a search warrant based on probable cause the driver was impaired OR one of the accepted exceptions to the search warrant requirement, including exigent circumstances. The United States Supreme Court has held that, "Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not."<sup>1</sup>

*Schmerber v. California* is the starting point for examining exigent circumstances for a blood draw in an impaired driving case.<sup>2</sup> In *Schmerber*, the driver was believed to be impaired and was arrested at the hospital while receiving treatment for injuries suffered in a crash. The Court held that the officer, "Might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"<sup>3</sup> The Court first ascertained that the officer had sufficient probable cause for the impaired driving arrest and then went on to assess the constitutionality of the warrantless search. In the Court's analysis, the fact that alcohol is eliminated from the blood over time, the amount of time it took the accused to reach the hospital and for officers to investigate the offense left law enforcement with "no time to seek a magistrate and secure a warrant."<sup>4</sup>

Compare this to the *Missouri v. McNeely* case in which a warrantless blood draw from an impaired driver was obtained after a routine impaired driving stop, investigation, and arrest.<sup>5</sup> The state argued that the natural dissipation of alcohol in the blood weighed in favor of finding exigent

circumstances in impaired driving cases. However, the Court held that,

While natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on a totality of the circumstances.<sup>6</sup>

Finally, the Court examined exigent circumstances for a warrantless blood draw in an impaired driving case in *Mitchell v. Wisconsin*.<sup>7</sup> In this case the Court indicated that if an impaired driver was unconscious or in a stupor which required medical treatment and which precluded a breath test, an officer may, "Almost always order a warrantless blood draw ... without offending the Fourth Amendment."<sup>8</sup>

Practically speaking, the evaluation of whether exigent circumstances exist such that a warrantless blood draw may be taken rests on three things 1) valid probable cause for an impaired driving offense being established 2) an officer's reasonable belief that he/she is confronted with an emergency which creates warrant delays and will result in the destruction of evidence 3) a "totality" determination of the prior two factors which will be undertaken on a case by case basis.

**If officers rely on exigent circumstances to order a blood draw, they should document probable cause of an impaired driving offense ... in the police report.**

## Documenting Probable Cause

If officers rely on exigent circumstances to order a blood draw, they should document probable cause of an impaired driving offense, i.e., thoroughly document evidence of operation and impairment, in the police report.

Probable cause should be documented as thoroughly in the police report after the incident as it would have been in an affidavit for warrant prior to the incident.

## Articulating Exigent Circumstances

The following represent state cases which have relied on constitutional authority in determining particular facts to be valid exigent circumstances for taking warrantless blood draws. In *Cole v. State*, a fatal crash occurred in Longview, Texas.<sup>9</sup> At least fourteen officers were needed to investigate and secure the scene, including the crash investigator who was called out from having just finished his shift. The crash was also found to have occurred near a shift change, which

caused more delays. The driver had already been taken to the hospital when the crash investigator arrived at the scene. Testimony revealed that it was only after the crash investigation occurred that law enforcement had probable cause to believe Cole was responsible. The Court highlighted that all officers working the crash scene were performing essential duties and none of them could be spared to go to the hospital and begin applying for a warrant. Further, officers testified that obtaining a warrant usually took 1–1.5 hours. Finally, officers expressed concerns that, based on defendant’s statements that he had taken methamphetamine at some point previously, and that he “had pain all over,” both the methamphetamine could be eliminated from his system and/ or he would be treated with other medication at the hospital which could interfere with blood test results. For these reasons, the Court held that obtaining a warrant was impractical.

In *State v. Tullberg*, a Wisconsin case which preceded *Mitchell v. Wisconsin*, time was of the essence.<sup>10</sup> Law enforcement was called out to a fatal crash scene. No one was available to be interviewed at the scene as one person was dead and two other occupants had secured a ride to the

**Since every case in which a warrantless blood draw is taken due to exigent circumstances will be examined on a case-by-case basis if challenged ... it is critical to always document sufficient probable cause for the impaired driving offense and all factors which might have contributed to a delay in getting a warrant, thus resulting in destruction of evidence.**

hospital which was thirty minutes away in another county. The investigating officer secured the scene, spoke to the defendant’s father, and then decided he needed to go to the hospital to investigate further. At the hospital, the defendant and other occupant of the vehicle both alleged that the victim at the scene had been the driver of the vehicle. After further investigation, it was

learned that Tullberg had misled police and evidence indicated that he had operated the vehicle. Further, Tullberg was about to undergo a CT scan which could have taken a considerable amount of time. For these reasons, the court in Wisconsin held that the officer acted reasonably in ordering a warrantless blood draw of Tullberg.

In *State v. Michael*, a Louisiana case, defendant caused a crash with another vehicle which resulted in injury to the occupants of the other vehicle. He then fled the scene and was found a few miles away.<sup>11</sup> After being transported to the hospital, a warrantless blood test was taken. The court noted the factors giving rise to urgent needs were that a crash with injury occurred, the crash had to be investigated and the defendant had to be located and brought to the hospital, ultimately creating two scenes to be investigated.

The Court held that under these circumstances, the officer could reasonably have believed he was confronted with an emergency.

## Totality Examination

Since every case in which a warrantless blood draw is taken due to exigent circumstances will be examined on a case-by-case basis if challenged, there is no silver bullet checklist to make sure there are valid exigent circumstances. For this reason, it is critical to always document sufficient probable cause for the impaired driving offense and all factors which might have contributed to a delay in getting a warrant, thus resulting in destruction of evidence. Below are examples of circumstances which, in an urgent situation, could cause a delay in obtaining a warrant and should be specifically articulated in a police report.

## Factors Related to Driver

- Unconscious
- Imminent medical treatment
- Transported to different jurisdiction for treatment
- If there is evidence of drug use, most officers will not know elimination rate for drugs as compared to alcohol, so this might be a salient factor and necessitate getting a blood draw sooner
- Alcohol use and elimination rate
- Delays caused by defendant such as: lying about operation of vehicle, faking a medical condition, etc.

## Factors Related to Law Enforcement

- Officers needed at scene of crash
- Officers available to travel for warrant
- Shift change or anything that will delay investigation
- Known circumstances for obtaining warrant, for example, if an officer must drive a long distance to reach a judge and there is no electronic warrant available

<sup>1</sup> *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184 (2016).

<sup>2</sup> *Schmerber v. California*, 86 S.Ct. 1826, 384 U.S. 757 (1966).

<sup>3</sup> *Id.* at 770.

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

<sup>5</sup> *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

<sup>6</sup> *Id.* at 1563.

<sup>7</sup> *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019).

<sup>8</sup> *Id.* at 2533.

<sup>9</sup> *Cole v. State*, 490 S.W.3d 918 (2016).

<sup>10</sup> *State v. Tullberg*, 359 Wis.2d 421 (2014).

<sup>11</sup> *State v. Michael*, 2019-01273 (La. 7/9/2020), 340 So.3d 804.

“This article was originally published in the *NTLC Between the Lines* newsletter issued in October 2022.”