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The Local Government
Liability Beat

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Supreme Court Decision: *Birchfield v. North Dakota*

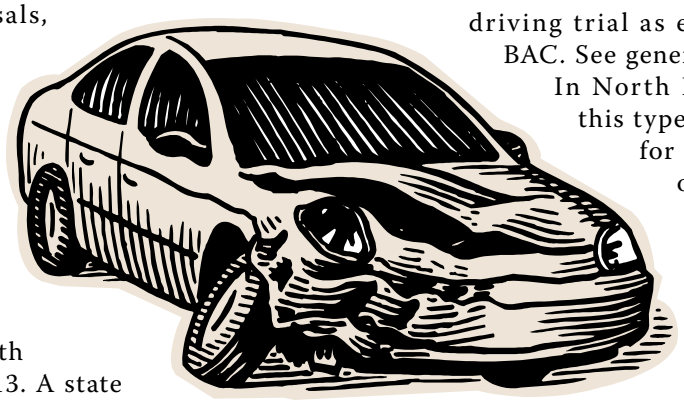
United States Supreme Court Distinguishes Breath Test from Blood Test under Implied Consent Statutes that Criminalize a Refusal – Warrantless Blood Test Violates Fourth Amendment

By Jack Ryan, Attorney, Co-Director, LLRMI

In consolidated cases, one from Minnesota and two from North Dakota, the United States Supreme Court held that a blood test is more intrusive than a breath test and therefore a warrantless blood test would violate the Fourth Amendment under Implied Consent statutes that criminalize the refusal to submit to a test.

At the outset of the case the United States Supreme Court recognized and analyzed the problem of impaired driving. In doing so, the Court noted that many states and the Federal Government, in an effort to combat impaired driving, had increased the penalties for operating while impaired as well as refusing to be tested following an arrest. The Court recognized an increase in refusals over the years due to the severity of penalties for actual drunk driving charges and cited statistics including the fact that in 2011 over one-fifth of those arrested refused to participate in testing.

As a result of the increase in refusals, many states, like Minnesota and North Dakota, criminalized the act of refusing to participate in testing.



The Court outlined the facts of the consolidated cases:

Case 1

Petitioner Danny Birchfield accidentally drove his car off a North Dakota highway on October 10, 2013. A state trooper arrived and watched as Birchfield unsuccessfully [*20] tried to drive back out of the ditch in which his car was stuck. The trooper approached, caught a strong whiff of alcohol, and saw that Birchfield's eyes were bloodshot and watery. Birchfield spoke in slurred speech and struggled to stay steady on his feet. At the trooper's request, Birchfield agreed to take several field sobriety tests and performed poorly on each. He had trouble reciting sections of the alphabet and counting backwards in compliance with the trooper's directions.

Believing that Birchfield was intoxicated, the trooper informed him of his obligation under state law to agree to a BAC test. Birchfield consented to a roadside breath test. The device used for this sort of test often differs from the machines used for breath tests administered in a police station and is intended to provide a preliminary assessment of the driver's BAC. See, e.g., Berger 1403. Because the reliability of these preliminary or screening breath tests varies, many jurisdictions do not permit their numerical results to be admitted in a drunk-driving trial as evidence of a driver's BAC. See generally 3 Erwin §24.03. [1] In North Dakota, results from this type of test are "used only for determining whether or [*21] not a further test shall be given." N. D. Cent. Code Ann. §39-20-14(3). In Birchfield's case, the screening test estimated that his

BAC was 0.254%, more than three times the legal limit of 0.08%. See §39-08-01(1)(a).

The state trooper arrested Birchfield for driving while impaired, gave the usual Miranda warnings, again advised him of his obligation under North Dakota law to undergo BAC testing, and informed him, as state law requires, see §39-20-01(3)(a), that refusing to take the test would expose him to criminal penalties. In addition to mandatory addiction treatment, sentences range from a mandatory fine of $500 (for first-time offenders) to fines of at least $2,000 and imprisonment of at least one year and one day (for serial offenders). §39-08-01(5). These criminal penalties apply to blood, breath, and urine test refusals alike. See §§39-08-01(2), 39-20-01, 39-20-14.

Although faced with the prospect of prosecution under this law, Birchfield refused to let his blood be drawn. Just three months before, Birchfield had received a citation for driving under the influence, and he ultimately pleaded guilty to that offense. *State v. Birchfield,* Crim. No. 30-2013-CR-00720 (Dist. Ct. Morton Cty., N. D., Jan. 27, 2014). This time he also pleaded guilty—to a misdemeanor violation of the refusal [*22] statute—but his plea was a conditional one: while Birchfield admitted refusing the blood test, he argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected this argument and imposed a sentence that accounted for his prior conviction.

The sentence included 30 days in jail (20 of which were suspended and 10 of which had already been served), 1 year of unsupervised probation, $1,750 in fine and fees, and mandatory participation in a sobriety program and in a substance abuse evaluation. App. to Pet. for Cert. in No. 14-1468, p. 20a.

On appeal, the North Dakota Supreme Court affirmed. 2015 ND 6, 858 N. W. 2d 302. The court found support for the test refusal statute in this Court's McNeely plurality opinion, which had spoken favorably about "acceptable 'legal tools' with 'significant consequences' for refusing to submit to testing." 858 N. W. 2d, at 307 (quoting McNeely, 569 U. S., at ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696, 724.

Case 2

On August 5, 2012, Minnesota police received a report of a problem at a South St. Paul boat launch. Three apparently intoxicated men had gotten their truck stuck in the river while attempting to pull their boat out of the water. When police arrived, witnesses informed them that a man in underwear had been driving the [*23] truck. That man proved to be William Robert Bernard, Jr., petitioner in the second of these cases. Bernard admitted that he had been drinking but denied driving the truck (though he was holding its keys) and refused to perform any field sobriety tests. After noting that Bernard's breath smelled of alcohol and that his eyes were bloodshot and watery, officers arrested Bernard for driving while impaired.

Back at the police station, officers read Bernard Minnesota's implied consent advisory, which like North Dakota's informs motorists that it is a crime under state law to refuse to submit to a legally required BAC test. See Minn. Stat. §169A.51, subd. 2 (2014). Aside from noncriminal penalties like license revocation, §169A.52, subd. 3, test refusal in Minnesota can result in criminal penalties ranging from no more than 90 days' imprisonment and up to a $1,000 fine for a misdemeanor violation to seven years' imprisonment and a $14,000 fine for repeat offenders, §169A.03, subd. 12; §169A.20, subds. 2-3; §169A.24, subd. 2; §169A.27, subd. 2.

The officers asked Bernard to take a breath test. After he refused, prosecutors charged him with test refusal in the first degree because he had four prior impaired-driving convictions. 859 N. W. 2d 762, 765, n. 1 (Minn. 2015) (case below). First-degree refusal carries the highest maximum penalties and a [*24] mandatory minimum 3-year prison sentence. §169A.276, subd. 1.

The Minnesota District Court dismissed the charges on the ground that the warrantless breath test demanded of Bernard was not permitted under the Fourth Amendment. App. to Pet. for Cert. in No. 14-1470, pp. 48a, 59a. The Minnesota Court of Appeals reversed, id., at 46a, and the State Supreme Court affirmed that judgment. Based on the longstanding doctrine that authorizes warrantless searches incident to a lawful arrest, the high court concluded that police did not need a warrant to insist on a test of Bernard's breath. 859 N. W. 2d, at 766-772. Two justices dissented. Id., at 774-780 (opinion of Page and Stras, JJ.).

Case 3

A police officer spotted our third petitioner, Steve Michael Beylund, driving the streets of Bowman, North Dakota, on the night of August 10, 2013. The officer saw Beylund try unsuccessfully to turn into a driveway. In the process, Beylund's car nearly hit a stop sign before coming to a stop still partly on the public road. The officer walked up to the car and saw that Beylund had an empty wine glass in the center console next to him. Noticing that Beylund also smelled of alcohol, the officer asked him to step out of the car. As Beylund did so, he struggled to keep his balance.

The officer [*25] arrested Beylund for driving while impaired and took him to a nearby hospital. There he read Beylund North Dakota's implied consent advisory, informing him that test refusal in these circumstances is itself a crime. See N. D. Cent. Code Ann. §39-20-01(3)(a). Unlike the other two petitioners in these cases, Beylund agreed to have his blood drawn and analyzed. A nurse took a blood sample, which revealed a blood alcohol concentration of 0.250%, more than three times the legal limit.

Given the test results, Beylund's driver's license was suspended for two years after an administrative hearing.

Beylund appealed the hearing officer's decision to a North Dakota District Court, principally arguing that his consent to the blood test was coerced by the officer's warning that refusing to consent would itself be a crime. The District Court rejected this argument, and Beylund again appealed.

The North Dakota Supreme Court affirmed. In response to Beylund's argument that his consent was insufficiently voluntary because of the announced criminal penalties for refusal, the court relied on the fact that its then-recent Birchfield decision had upheld the constitutionality of those penalties. 2015 ND 18, 14-15, 859 N. W. 2d 403, 408-409. The court also explained that it had found consent [*26] offered by a similarly situated motorist to be voluntary, *State v. Smith,* 2014 ND 152, 849 N. W. 2d 599. In that case, the court emphasized that North Dakota's implied consent advisory was not misleading because it truthfully related the penalties for refusal. Id., at 606.

We granted certiorari in all three cases and consolidated them for argument, see 577 U. S. ___, 136 S. Ct. 614, 193 L. Ed. 2d 494 (2015), in order to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.

Summary of Issue

As our summary of the facts and proceedings in these three cases reveals, the cases differ in some respects. Petitioners Birchfield and Beylund were told that they were obligated to submit to a blood test, whereas petitioner Bernard was informed that a breath test was required. Birchfield and Bernard each refused to undergo a test and was convicted of a crime for his refusal. Beylund complied with the demand for a blood sample, and his license was then suspended in an administrative proceeding based on test results that revealed a very high blood alcohol level.

Despite these differences, success for all three petitioners depends on the proposition that the criminal law ordinarily [*27] may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate. If, on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant.

In its review, the United States Supreme Court determined that since the test was a search, a determination had to be made as to whether the testing process met one of the exceptions to the warrant requirement. The Court focused its analysis on the Search Incident to Arrest exception. In doing so the Court turned to the privacy interests at stake in breath tests and in blood tests as two distinct tests.

The Court held that breath tests do not implicate a strong privacy interest reporting that the "physical intrusion is almost negligible. Breath tests 'do not require piercing the skin' and entail 'a minimum of inconvenience.'" The Court noted that breath tests gather only a single bit of information, the amount of alcohol, rather than the wide variety of information that can be obtained by blood.

The Court concluded that a breath test does not implicate a significant privacy interest and therefore these searches meet the search incident to arrest exception and the criminalization of refusal to take a breath test would not violate the Fourth Amendment's warrant requirement.

The Court held that a blood test by contrast did implicate a significant privacy interest. In doing so, the Court concluded that Search Incident to Arrest would not justify a forced blood test.

The Court then turned to the concept of Implied Consent and whether forced blood testing was justified based on a driver's implied consent under driver's licensing statutes. At the outset the Court noted that the decision in this case had nothing to do with refusals under state law using implied consent where the penalty is civil in nature.

The Court then asserted:

> It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

The Court concluded that Implied Consent "cannot be deemed to have consented to submit to a blood test" where the penalties are criminal in nature.

The Court held that Birchfield was arrested and charged for refusing a blood test. Thus in his case the case was contrary to the Fourth Amendment since neither implied consent nor search incident to arrest would justify the search.

Bernard, the second defendant in this appeal was charged for refusing to take a breath test. The Court concluded that such a test is justified under the Search Incident to Arrest exception and thus, his arrest, charging and conviction was upheld.

The Court also threw out Beyland's prosecution because he was told that he was required by law to submit to the blood test. As such his participation in the blood test was not consensual and as in the Birchfield case, the test was not justified by implied consent and did not meet the Search Incident to Arrest exception.

Bottom Line

- Forced Blood Test under implied consent statute where refusal is criminal under state law violates the Fourth Amendment and cannot be saved as a search incident to arrest.
- Forced Breath Test under implied consent statute where refusal is criminal under state law DOES NOT violate the Fourth Amendment because it is valid as a search incident to arrest.
- THIS CASE HAS NO IMPACT IN STATES WHERE REFUSAL IS CIVIL INFRACTION RATHER THAN CRIMINAL OFFENSE.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

Citations

i. *Birchfield v. North Dakota,* ___U.S.___, No. 14-1468. Argued April 20, 2016-Decided June 23, 2016

Effectively Manage Local Government's Risk through Contractual Risk Transfer

By Matt Autry, ARM-E, CIC, CSRM, Marsh & McLennan Companies

When undertaking any project or business transaction, significant risks and financial consequences are present. Those risks can be effectively managed through contractual risk transfer, which is the approach of combining the non-insurance risk transfer methods of indemnification and hold harmless clauses with insurance risk transfer. This article summarizes the basics of managing proper contractual insurance requirements for your county.

In many contract situations, insurance is the only source of funds available for another party to honor its indemnity obligations, so it is critical that the insurance requirements are properly drafted and included in each contract. Considerations for all contract situations are as follows:

- **Determine desired insurance requirements by contract type.** Construction contracts and those for professional services or special events, for example, will have differences in the types of insurance that are needed. A few different standard requirement templates will be adequate to address most contracts. The templates will detail all coverage types, limits, and special policy provisions that are required.
- **Address any special or unique risks.** Some contracts will inherently present greater exposure to frequent losses or potentially severe losses, such as those with large crowd exposures, hazardous materials, or significant construction. Those contracts involving access to sensitive data or information also present unique risks. A risk assessment checklist and limits matrix will help determine when to require additional types of insurance or higher limits.
- **Provide insurance requirements as soon as possible.** It is important that other parties are aware of the insurance requirements of the county early so that they can adequately obtain the required coverage and account for any potential increased costs. It is a best practice to include the requirements in a Request For Proposal or other solicitation process, reducing negotiation time and increasing compliance once the contract has been awarded.
- **Obtain certificates of insurance and verify.** Use a certificate checklist to easily help determine that the coverages, named insured, insurance carrier, and policy effective dates are adequate. It is important to obtain recently issued certificates prior to starting work, and it is recommended to receive the certificates directly from an authorized insurance representative to ensure authenticity. Updated certificates should be obtained at appropriate intervals such as semi-annually throughout each contract for proactive certificate management. Reserve the right to obtain full copies of the policy and/or endorsements to verify coverage is as described on the certificate of insurance.

For more information on contractual risk transfer, attend one of the Contracts for Local Governments classes offered by LGRMS during July and August. For class dates and registration, please visit the LGRMS Event Calendar. A Local Government Contracting and Risk Management Manual will be provided.

PROFILE

OF AN ACTIVE SHOOTER

An active shooter is an individual actively engaged in killing or attempting to kill people in a confined and populated area, typically through the use of firearms.

CHARACTERISTICS

OF AN ACTIVE SHOOTER SITUATION

- Victims are selected at random
- The event is unpredictable and evolves quickly
- Law enforcement is usually required to end an active shooter situation

HOW TO RESPOND

WHEN AN ACTIVE SHOOTER IS IN YOUR VICINITY

1. Evacuate

- Have an escape route and plan in mind
- Leave your belongings behind
- Keep your hands visible

2. Hide Out

- Hide in an area out of the shooter's view
- Block entry to your hiding place and lock the doors
- Silence your cell phone and/or pager

3. Take Action

- As a last resort and only when your life is in imminent danger
- Attempt to incapacitate the shooter
- Act with physical aggression and throw items at the active shooter

CALL 911 WHEN IT IS SAFE TO DO SO

COPING

WITH AN ACTIVE SHOOTER SITUATION

- Be aware of your environment and any possible dangers
- Take note of the two nearest exits in any facility you visit
- If you are in an office, stay there and secure the door
- Attempt to take the active shooter down as a last resort

Contact your building management or human resources department for more information and training on active shooter response in your workplace.

CALL 911 WHEN IT IS SAFE TO DO SO

HOW TO RESPOND

WHEN LAW ENFORCEMENT ARRIVES

- Remain calm and follow instructions
- Put down any items in your hands (i.e., bags, jackets)
- Raise hands and spread fingers
- Keep hands visible at all times
- Avoid quick movements toward officers such as holding on to them for safety
- Avoid pointing, screaming or yelling
- Do not stop to ask officers for help or direction when evacuating

INFORMATION

YOU SHOULD PROVIDE TO LAW ENFORCEMENT OR 911 OPERATOR

- Location of the active shooter
- Number of shooters
- Physical description of shooters
- Number and type of weapons held by shooters
- Number of potential victims at the location

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This Month:

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