No Refusal Implementation

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State of the Impaired Driving Problem

Here are some of Louisiana's latest statistics to consider. Louisiana ranks 25th in the U.S. in population. However, 41% of Louisiana's traffic fatality reports list alcohol as a contributing factor. That puts Louisiana ranking 7th in the nation in alcohol-related traffic fatalities. Partly due to our high traffic fatality rates, Louisiana ranks 4th in the nation for car insurance costs with an average premium of $1,750. Finally, Louisiana consistently ranks in the top 15 states with the highest rates of refusal to submit to a chemical test when arrested for a DWI.

This public safety problem has been recognized by the Courts, including the U.S. Supreme Court, which stated in *South Dakota v. Neville*, 103 S.Ct. 916 (1983): "The situation underlying this case-that of the drunk driver-occurs with tragic frequency on our nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy."

See *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed. 2D 448 (1957): "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield" *Tate v. Short*, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L. Ed.2d 1630 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657 and 672, 91 S.Ct. 1704, 1715 and 1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring) ("The slaughter on the highways of this nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-18, 99 S.Ct. 2612, 2620-2621, 61 L.Ed.2d 321 (1979) (recognizing the "compelling interest in highway safety").

Defining Implied Consent

Many people think the only solution for addressing a DWI suspect who refuses to provide a breath sample is to suspend their license and fine them under implied consent. But that's true. First, let's have a short lesson on implied consent. And, then we'll discuss how officers can deal with a breath test refusal.

Implied consent is defined as permission which is not explicitly granted by a person.

Implied consent is relevant to impaired driving because every motorist agrees to a test of his breath to determine its alcoholic content when an officer has probable cause to presume he is operating a vehicle under the influence. In return, the State allows a motorist to exercise the privilege of driving.

Under Louisiana law (La. R.S. 32:661(A)(1)), a person with or without a driver's license who operates a vehicle on a public highway implies consent to being tested for intoxication. The term "operating" is more broad than driving because the vehicle does not have to be in motion to operate it.

Further, when a person applies for a driver's license, his signature on the application designates certain things; one of which is providing his or her express consent to be breath tested to determine if he is under the influence while operating a vehicle on public highways.

Although every driver is deemed to give consent to a chemical test, the legislature allows the driver to refuse to submit (under La. R.S. 32:666) – meaning he/she actually withdraws implied consent – but only after being advised of the penalties for withdrawing consent.

So, the implied consent law does NOT provide an impaired driver any "right to refuse" the gathering of evidence of a crime, such as alcohol or drugs. Rather, the implied consent law does the opposite – it implies a suspect's consent to a search in certain cases. See *State of Louisiana v. Green, 47, 176 (La. App. 2 Cir. 2/9/12), 91 So.3d 315*

Why do suspects refuse testing? Many DWI suspects refuse to submit to a breath test in the hopes that they will receive a minor administrative penalty. They want to avoid the criminal sanctions associated with a DWI conviction. This is why we want law enforcement to look to No Refusal to combat DWIs and breath test refusals.

Quote from Norma DuBois: *Implied consent was created as a tool for law enforcement to help you gather the evidence. How many of you knew that? Most people have turned it around and think it's a right of a driver to refuse, but it's not. Remember when I told you about the U.S. Constitution, the fourth amendment, that you are able to…with a search warrant…search. And when we're talking about taking blood from somebody, that is a search. You are invading their body and that is a search under the 4th amendment. And Alcazar is a state case that talks about the fact that is a search of someone's body. So the 4th amendment applies. So the only way you can do a warrantless search, is if you have some sort of exception – exigent circumstances. Such as the evidence is about to be destroyed. And, remember I talked about consent. There are many more of them. But consent is one of them. And, that's what implied consent was. It was an exception to the warrant requirement by providing law enforcement the tool that if the person got pulled over, they impliedly consented to having their blood, breath, or urine tested.*

Lawful Search and Seizure Related to DWI Arrests

So now that we're clear on implied consent, let's discuss the lawfulness of search and seizure. Search and seizure is relevant in impairing driving cases for these reasons: after a DWI arrest has occurred and the defendant refused the breath test or a defendant submits to a breath test and blows under the legal limit, but the officer suspects drug impairment.

The Fourth Amendment to the U.S. Constitution provides for the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Further, it says that no warrants shall be issued for search and seizure except with probable cause. A warrantless search is considered reasonable only if it falls within one of the exceptions to the warrant requirement. For impaired driving cases, the relevant exceptions are exigency, consent, and search incident to arrest.

Under a U.S. Supreme Court ruling made in *Birchfield v. North Dakota 136 S. Ct. 2160, 195 L.Ed. 2d 560 (2016)*, it was determined that an officer is permitted to conduct a breath tests on an intoxicated driver without a warrant because breath tests quote "do not implicate significant privacy concerns" end quote.

The ruling went on to state that quote "blood tests are significantly more intrusive than breath tests, and their reasonableness must be judged in light of the availability of the less invasive alternative breath test. In cases where blood tests might be preferable, nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies." End quote.

Translation? An officer shall obtain a blood test to determine impairment, but must obtain a search warrant first, unless one of the warrant exceptions is present.

Likewise, Article 1, Section 5 of the Louisiana Constitution allows for search and seizure. It was upheld by the case *State v. Alcazar, 784 So.2d 1276 (La. 2001)* in which the choice of a person under arrest for operating a vehicle while intoxicated to refuse to submit to a chemical test is not a constitutionally protected right. A later case, *State v. Clark, 851 So.2d 1055 (La. 2003)* further confirmed that "a court ordered blood test…designed to gather evidence against a person…constitutes a search and seizure under the Fourth Amendment. Therefore, to survive constitutional scrutiny, a blood test must be conducted pursuant to a warrant based on probable cause absent a recognized exception."

Due Process, Self-Incrimination, and Right to Counsel

Additionally, various court cases have interpreted the U.S. and Louisiana Constitutions to affirm that taking blood to determine impairment of an arrestee who has refused a breath test…

does not violate the defendant's right to due process,
- *USCA 14th Amendment; La Const. Art, 1, Sec. 2*
- *Schmerber v. State of California, 86 S. Ct. 1826 (1966)*
- *Breithaupt v. Abram, 77 S. Ct. 408 (1957)*
- *State of Louisiana v. Peterson, 2003-1806 (La. App. 1 Cir. 12/31/03), 868 So.2d 786*
- *Price v. Department of Public Safety, 580 So.2d 503 (La. App. 4th Cir. 1991)*

does not violate the defendant's right against self-incrimination, and
- *USCA 14th Amendment; La Const. Art, 1, Sec. 16*
- *Schmerber, supra*
- *State of South Dakota v. Neville, 103 S. Ct. 916 (1983)*

does not violate the defendant's right to counsel during the actual blood draw.
- *USCA 6th Amendment; La Const. Art, 1, Sec. 13*
- *Schmerber, supra.*
- *State v. Spence, 418 So.2d 583 (La. 1982)*
- *State v. Carter, 664 So.2d 367 (La. 1995)*
- *State v. Broussard, 517 So.2d 1000 (La. App. 3rd Cir. 1987)*

It is important to note in *State of Louisiana v. Spence*, the court held that, while a defendant has a right to consult a lawyer, he does not have a right to wait to take a blood alcohol test until after he has consulted an attorney.

Implementing No Refusal = Getting a Search Warrant Upon Refusal of Breath Test

No Refusal ensures that law enforcement have the support in place to conduct a chemical test on an impaired driving after he refuses the officer's initial request to blow in the intoxilyzer.

Let's take a look at a typical protocol for how No Refusal should be implemented.

Think about a DWI stop. What does that typically look like? An officer has reasonable and articulable suspicion that criminal activity is or has occurred so he conducts a traffic stop. During conversation, he determines impairment and makes an arrest.

Once the individual is in custody, the officer transports him to the office and informs him about his rights related to the chemical test under implied consent.

The arrestee refuses the test. It's at this point that the "No Refusal" initiative comes into play. There's no need to make a big fuss or production. There's not even a need to inform the arrestee of your next actions. Simply step away from him and follow your department protocol for obtaining a search warrant. Typically, that starts with completing an Affidavit and Search Warrant for a blood draw.

Now, depending upon your agency's protocol for obtaining warrants, the process may vary slightly. Some agencies use an E-Warrant system while others still apply for warrants by phone and fax or in-person.

The officer has a couple of options for conducting the blood draw. He can either have medical personnel at the correctional facility draw the blood, or if none are available, he can summon an EMS provider. Only as a last resort should the officer transport the arrestee to a hospital for a blood draw. When a search warrant for blood has been issued, there are various Louisiana laws both protecting the medical personnel from liability for conducting the draw and also compelling them to do so upon request from law enforcement.

Use of Force

Once you secure a warrant and inform the suspect, it's likely that the arrestee will protest, either verbally or physically. Remember that the search warrant provides you cover to proceed with the blood draw. If the arrestee offers to blow in the intoxilyzer at this point, let him do the breath test; but still follow through with the warrant. More evidence is better for the case! If the arrestee demands an attorney, remember that while the constitution provides for a right to legal representation, it does not require that an attorney be present at the time of the blood draw.

Additionally, *Louisiana Code of Criminal Procedure Article 164* outlines provisions for the use of reasonable force in executing a search warrant in the event that the arrestee becomes physically combative. La. R.S. 14:108 makes it a criminal offense to resist an officer who is attempting to execute a search warrant. Decisions in several court cases have upheld the use of reasonable force in such situations. (*Graham v. Connor, 490 U.S. 386 (1989); McCann v. State of Delaware, 588 A.2d 1100 (1991); State of South Dakota v. Lanier, 452 NW.2d 144 (1990)*)

Breath, Blood, and Urine: A Word About Chemical Tests

As sources of evidence of DWI, breath, blood, and urine build on each other to help make a strong case. Breath is easiest to obtain due to court rulings. However, once a breath test refusal occurs we want to encourage officers to apply for a search warrant to obtain <u>blood</u>, in addition to or instead of making a request for breath or urine. There are a few simple, but important reasons why blood is considered the best evidence possible in these cases.

- The first reason is blood tests provide more detailed results. Breath tests cannot detect drugs and urine tests cannot detect alcohol that correlates to impairment.
- The second reason is illicit and prescription drugs are increasingly becoming major contributors to impairment.
- The final reason is because urine provides past history of drug use while blood is what's in the brain at the time of the blood draw.

Urine samples by themselves without accompanying blood samples from the arrestee can create obstacles during trial and are not preferred by the LSP Crime Lab.

Quote from Norma DuBois: *Now let's talk a little bit about this. I prefer to give blood anyway because, one thing Major Saizan and I are focusing on right now is drugged driving. As a prosecutor, I get to see a lot of these cases. I look at every felony DWI that comes into our office. And I can tell you that probably over 40% of those cases are not alcohol. They're some other form of drug. And so if you're only getting an intoxilyzer reading, you're not capturing every person. So, for me personally, blood is much better because then I can figure out if you have alcohol or if you have other drugs. Drugged driving is a huge problem and we really need to get a handle on it.*

Is Getting a Search Warrant Considered Coercion?

The most common question we get from police about No Refusal pertains to whether it is considered coercion if they tell a defendant who refused to blow that they are going to obtain a search warrant. The short, but final answer is "No!"

Legal experts and law enforcement officers agree that it's best not to even mention to the suspect any potential or actual intentions to obtain a search warrant if he or she doesn't blow in the intoxilyzer. Then there is absolutely no act of persuasion by force or threat occurring. Simply step away from the suspect and follow your department protocol for obtaining a search warrant.

If asked directly by a suspect about what will happen if he or she doesn't blow, reply succinctly and truthfully by describing your department protocol for applying for a warrant, but make it clear that it's ultimately up to a judge to determine whether there is sufficient cause for a court order.

As long as you do not deviate from usual department protocol or practice when dealing with a difficult suspect, you will be fine.

Cases from Other States

The following cases are from states that allow blood to be withdraw from intoxicated drivers. All of these cases can be found on the internet so they will not be discussed in this outline. They are instructive about what options are available to officers when a driver refuses to consent to a test.
They are as follows:

1) *Beeman v. Texas*, 86 SW.3d 613 (Tex Crim App. 2002)
2) *New Mexico v. Duquette*, 994 P.2d 776 (NM Crim. App. 1999)
3) *Wisconsin v. Zielke*, 403 NW.2d 427 (Wis, 1987)
4) *City of Seattle v. Robert St. John*, #81992-1, 9-10-09
5) *Missouri v. Carol Sue Smith*, #ED82604, 7-22-03
6) *Brown v. State of Indiana*, #47A05-0110-CR-464, 9-16-02
7) *State v. Clary*, #1 CA-CR 97-0307, 1-20-00