***Birchfield v. North Dakota* and What It Means for Michigan**

**By Kinga Gorzelewski and Ken Stecker**

On June 23, 2016, the United States Supreme Court in *Birchfield v. North Dakota* cleared up what penalties can be imposed on impaired driving suspects who refuse evidentiary breath and blood tests. A five-justice majority struck down implied consent laws that criminalize refusals of blood tests in drunk driving arrests. *1*

**At this time, it doesn’t appear that this ruling will have an impact on Michigan’s implied consent law, which carries only administrative sanctions for breath or blood refusals. The Court stated the following, “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences to motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them. 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 that test.” *2***

The Court consolidated three cases in this opinion–*Birchfield v. North Dakota, Bernard v. Minnesota,* and *Beylund v. Levi*. The implied consent laws at issue in both North Dakota and Minnesota make it a misdemeanor to refuse an evidentiary breath or blood test. All three defendants were arrested on drunk driving charges. They each challenged the constitutionality of their state’s implied consent laws, alleging Fourth Amendment violations since no warrants were acquired in any of the three cases.

In *Birchfield*, the state trooper who arrested defendant advised him of his obligation under North Dakota law to undergo a blood test and that a refusal could lead to criminal punishment. Defendant refused a blood draw and was charged with a misdemeanor under North Dakota’s refusal statute.

Similarly in the second case, an officer read to defendant Bernard Minnesota’s implied consent law, which like North Dakota’s informs motorists that it is a crime to refuse to submit to a breath alcohol test. Bernard refused to take the breath test and was subsequently charged with a misdemeanor under the refusal statute.

Unlike in the first two cases, the third defendant Beylund actually agreed to a blood draw after an officer read him North Dakota’s implied consent law. He later argued that his consent to the blood draw was coerced by the officer’s warning that refusing the test would be a crime in itself.

At issue for the Court to decide was the constitutionality of criminalizing chemical test refusals. In determining whether the search incident to arrest doctrine applies to evidentiary breath and blood tests, the Court examined the extent to which the law infringes on an individual’s privacy rights versus the extent to which it’s needed to promote a legitimate government interest.

As to the first prong, the Court ruled that breath tests do not implicate significant privacy concerns because there is minimal physical intrusion, humans do not have a possessory interest in the air in their lungs, and the tests are only capable of revealing one bit of information—the amount of alcohol in the subject’s breath. The Court concluded that breath tests were no more intrusive than swabbing the inside of a suspect’s cheek for a DNA sample or scraping underneath a suspect’s fingernails to find evidence of a crime, both procedures having been upheld as constitutional warrantless searches.

However, the Court reached a different conclusion with respect to blood tests. Because blood tests implicate significant privacy concerns (significant physical intrusion, preservation of a sample, etc.), the Court held that their reasonableness as a search incident to arrest must be judged “in light of the availability of the less invasive alternative of a breath test.” *3* The Court found that there was no satisfactory justification in the cases before it that would justify the officers demanding a warrantless blood draw versus the less-invasive breath test.

In conclusion, the Court held that evidentiary breath tests will continue to fall under the search incident to arrest exception to the warrant requirement, officers need not acquire a search warrant before requesting a breath sample from a drunk driving suspect, and refusals can continue to be criminalized. On the other hand, the Court ruled that warrantless blood draws are in violation of the Fourth Amendment’s prohibition against unreasonable searches and therefore a person cannot be charged with a crime for refusing an illegal search in a drunk driving investigation.

It’s also important to note that even though the Court approved of implied consent laws that only impose administrative sanctions such as Michigan’s, the Court did strongly emphasize a preference for blood draw warrants, absent situations that involve consent and the exigent circumstances exception to the search warrant requirement.

1 *Birchfield v. North Dakota*, 2016 WL 3434398, \_\_\_ S.Ct.\_\_\_ (2016)

2 *Id*. at 36.

3 *Id.* at 25.