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**DUI Update and
Issues**

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DUI Update and Issues

Stacie Kaylor, Misdemeanor Director

It is once again time to review some changes to the DUI law and to address issues relating to the investigation of cases involving Driving Under the Influence. Some of these issues may be nothing more than a reminder to our more seasoned law enforcement officers, but are persistent issues that continue to occur and cause problems with our DUI cases. By readdressing them, we hope to work together to ensure the successful prosecution of DUI cases.

IMPLIED CONSENT

There have been several questions regarding changes to procedures on implied consent and DUI cases that stem from the recent United States Supreme Court case *Birchfield v. North Dakota* (579 U.S. ____ (2016)). In order to ensure that we are proceeding in a manner that results in the successful prosecution of these types of cases, the following is an analysis of the *Birchfield* ruling.

The United States Supreme Court has ruled that for purposes of a breath test, the reading of implied consent is constitutional. For purposes of a blood draw, the reading of implied consent is not constitutional, as obtaining a blood sample is more intrusive. The court did not address the issue of implied consent as it relates to urine samples, however, it would appear that they would fall into the same category as a breath sample as it is not intrusive to obtain and there is no "piercing" of the skin.

Remember, *Birchfield v. North Dakota* does not make a blood draw unconstitutional. It only makes the reading of implied consent in order to obtain the blood sample unconstitutional. There may be instances where exigent circumstances are present, in which case they should be clearly documented in the report.

Therefore, for ANY case involving a blood draw, do NOT read the defendant implied consent. This pertains to blood draws only. When you are dealing with a breath sample or a urine sample, implied consent may be read. In ALL cases, ask for consent first.



Stacie Kaylor,
Misdemeanor Director

If this is a FELONY Driving Under the Influence investigation, the procedures should not change. Currently, law enforcement should be seeking a search warrant in all cases that rise to the level of a felony and a blood draw is being conducted. Again, the only change in a felony case is that you would not read implied consent. All other procedures should remain the same.

If this is a MISDEMEANOR Driving Under the Influence investigation and the Officer feels the need to obtain a blood sample, ask for consent first. If the defendant gives consent, proceed with the blood draw. If the

defendant does not give consent but you have probable cause to believe that the defendant has committed the crime of Driving Under the Influence, proceed with the investigation as a refusal. Do NOT read the defendant implied consent.

In *Birchfield*, the United States Supreme Court has further ruled that the states should obtain a search warrant for a blood draw when practical. Florida Statute 933.02 does not allow for a search warrant on a misdemeanor case for this type of evidence. Therefore, if the defendant refuses to give consent for a blood draw, document your report and treat the investigation as a refusal.

If the defendant is unconscious and law enforcement has probable cause to believe the defendant has committed the crime of Driving Under the Influence,

the State must seek the least restrictive manner to obtain a sample. In this instance, make sure that all indicators that resulted in the probable cause are listed in your report. The next step would be to determine if a breath test is feasible. If it is not, document in your report why the subject cannot complete this test. Then, determine if a urine test is feasible. If it is not, document in your report why the subject cannot complete this test. If the first two options are shown to be incapable of being performed a blood draw would become the next and final option to determine the defendant's alcohol content.

WHEEL WITNESSES

The majority of the time, law enforcement does an outstanding job in investigating our DUI cases. The one problem that seems to persist is identifying that the defendant was the person behind the wheel at the time of the crime. The majority of the time this is not an issue, as the defendant is being pulled over by an officer. The problem usually arises when law enforcement responds to a vehicle crash.



When responding to a situation in which you did not observe the defendant to be driving or in control of the vehicle, it is extremely important to identify how you know he was the person driving, or in control of the vehicle. Simply stating in your report "pursuant to my investigation, it was determined the defendant was the driver" will not get us past a Motion to Suppress and does not establish that the defendant was the driver.

Remember to spell out exactly how the determination of the defendant as the driver was made. If a witness indicated that they saw the defendant driving or in control of the vehicle, make sure to get that person's information, to include, name, address, phone number, and identifiers. This will help us to locate the witness at a

later date if they move or change their phone number. If there is no witness to the incident, make sure to include in your report every detail that would place the defendant behind the wheel of the vehicle. These may include the location the defendant was in when you arrived, if there was anyone else on scene, if the defendant had injuries consistent with being the driver of the vehicle or statements the defendant may have made.

ACCIDENT REPORT PRIVILEGE

Another reminder involves the accident report privilege. If law enforcement is arriving at a crash scene and suspects the driver of the vehicle may be intoxicated, there must be a clear "changing of the hats." This crossover from the crash investigation to a criminal investigation needs to be clear and needs to be documented in the reports. This is an issue that we are beginning to see more of and there have been many instances where admissions have been suppressed.

If the defendant made any admissions during the accident investigation, remember, those cannot be used in the criminal investigation. The questions regarding the defendant's involvement in the crash need to be asked again. Any admissions that the defendant may have made during the accident investigation need to be clarified in the criminal investigation in order for us to be able to use them against the defendant. When doing so, please make it clear in your report that the question was asked again, after the "changing of the hats" and during the criminal investigation.

By working together, the quality of our DUI cases will increase and the successful prosecution of those cases will increase. As always, if there are any questions regarding the cases or potential issues, please contact our office so that we can answer any questions.

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