DRAWING THE BLOOD TEST FROM A DWI CASE

By: Mark Thiessen and Chris Samuelson

The era of the total-refusal DWI case is quickly coming to a close in Texas. Gone are the days of refusing a breath test without concern for something more invasive. DWI blood test trials are the future for the criminal trial attorney. On April 17, 2013, the United States Supreme Court recognized the ease of obtaining a blood search warrant in most metropolitan areas; henceforth, barring warrantless blood draws without an exigent circumstance, other than the metabolization or natural dissipation of alcohol in the body.[1] Prosecutors in Metropolitan areas are already responding by having police document any possible exigent circumstance and demanding blood warrants for every refusal.[2] The trickle down ramification is that "no-refusal" weekends are now every day of the year.[3] Regardless, the best defense to winning a DWI blood case may sometimes reveal itself before even attacking the procedures of the blood draw or the analysis of the sample. Every DWI attorney needs to be able to navigate Texas' blood laws. In doing so, a skilled DWI attorney may discover the perfect angle of attack before trial by systematically analyzing the case and asking the following questions:

1. WAS THE CLIENT UNDER ARREST AT THE TIME OF THE DRAW?

NO. If the client is not under arrest, then anyone can draw the client's blood. Implied consent laws only apply if the client is under arrest.

For example, if the client goes to the hospital voluntarily after an accident, the hospital staff may draw his blood with his consent for medical reasons. It is up to the client at that point whether he cares or wants to determine if the blood drawer is a phlebotomist, doctor, nurse, etc. A client may also have blood drawn for general health reasons. In either scenario, the client may give consent to whomever and wherever to have his blood drawn.

Another example may be where the client comes into a hospital unconscious and is left to the expertise of the hospital staff in performing the necessary course of care. If the client is not under arrest, it doesn't mean that a charge may not arise later, but it would require a Health Insurance Portability and Accountability Act (HIPAA) Grand Jury subpoena for the State to obtain the hospital records. Recently, an intoxication manslaughter client was taken to the hospital before police arrive; however, the police took a DPS blood kit to the hospital and demanded the client's blood, wondering if the client was intoxicated. The client was unconscious, but not under arrest. Accordingly, the implied consent statute is not triggered until sufficient probable cause exists and a person is placed under arrest for DWI.[4] So then, the Court must analyze whether any exigent circumstances existed to circumvent the warrant requirement, which will be discussed later.

YES. If the individual is under arrest, then figure out who is asking to draw the blood?

2. WAS THE DRAW DONE AT THE REQUEST OF THE POLICE?

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[1] *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 1555 (2013).

[2] http://www.tdcaa.com/journal/what-do-about-missouri-v-mcneely

[3] http://www.myfoxhouston.com/story/22859770/2013/07/17/year-round-no-refusal

[4] The first line of Texas Statutory Warning DIC-24 specifically states that the client is "under arrest for an offense arising out of acts alleged to have been committed while you were operating a motor vehicle in a public place, or water craft while intoxicated or an offense arising under Section 106.041, Alcoholic Beverage Code."

NO. If the client is under arrest, yet a police officer is not requesting the blood be drawn and tested, then anyone can draw the client's blood, depending on the scenario.

For example, if your client submitted to a breath test, but doesn't trust the Intoxilyzer result, the client may then make arrangements for his blood to be drawn and analyzed.[5] This also assumes the police are cooperative in this request; however, if they are not then that refusal to allow the client to submit a second sample may be admissible in trial.[6] The client can have his blood drawn by "a physician, qualified technician, chemist, or registered professional nurse" within two hours of the arrest.[7] This is a rare or unlikely scenario where the client is under arrest but the police are not asking for the blood to be drawn or tested and the client is willing to submit to a blood draw.

A second possibility may occur where the client is under arrest and taken to a hospital for medical treatment, but the police do not obtain a warrant and do not ask for the blood at the time it is drawn. Here, the hospital may need to test the client's blood before administering certain medication or for other medical reasons. The prosecutor typically sends a Grand Jury subpoena to the hospital for the client's medical records, including any blood alcohol results, at a later date, however, in this situation, the hospital will most likely use enzymatic assay testing for medical treatment rather than forensically accepted gas chromatography. Hospital enzymatic assay test results should not be forensically acceptable in a subsequent DWI prosecution.[8]

YES. If a police officer or other law enforcement official is asking for the blood to be drawn, does the client consent?

3. DID THE CLIENT CONSENT TO THE BLOOD DRAW?

YES. If the client is arrested, a police officer asks for blood under our Implied Consent statute, and the client consents, then Texas Transportation Code § 724.017 governs who may draw the blood. Section 724.017 states:

> (a) Only a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse may take a blood specimen at the request or order of a peace officer under this chapter. The blood specimen must be taken in a sanitary place.
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> (b) The person who takes the blood specimen under this chapter, or the hospital where the blood specimen is taken, is not liable for damages arising from the request or order of the peace officer to take the blood specimen as provided by this chapter if the blood specimen was taken according to recognized medical procedures. This subsection does not relieve a person from liability for negligence in the taking of a blood specimen.
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> (c) In this section, "qualified technician" does not include emergency medical services personnel.[9]

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[5] TEX. TRANSP. CODE § 724.019.

[6] TEX. TRANSP. CODE § 724.062.

[7] TEX. TRANSP. CODE § 724.019(a).

[8] *See* Thiessen, M. *Falsely Elevated Ethanol Results Using Hospital Enzymatic Assay Blood Testing;* TCDLA Voice for the Defense; Vol. 41, No. 3 (April 2012).

[9] TEX. TRANSP. CODE § 724.017 (West 2011).

Additionally, *Cavazos* requires any phlebotomist that draws the blood, without a warrant and pursuant to 724.017, must be proven up as a "qualified technician" since a phlebotomist is not specifically included in the job titles defined under 724.017.[10] It is the client's duty, however, to allege the statutory violation before the burden shifts to the State to combat a Section 38.23 suppression issue.[11] It's important to note that emergency medical services personnel (EMS/EMT/ambulance driver/paramedic) may **not** draw blood based on their title alone.[12] However, an EMT or paramedic may be proven up as a qualified technician based on training, education, and skills.[13] Additionally, beginning September 1, 2013, House Bill 434 will allow a licensed or certified EMT or paramedic to draw blood under 724.017 so long as they comply with specifications laid out in 724.017(c) as follows:

> (c) A licensed or certified emergency medical technician-intermediate or emergency medical technician-paramedic may take a blood specimen only if authorized by the medical director for the entity that employs the technician-intermediate or technician-paramedic. The specimen must be taken according to a protocol developed by the medical director that provides direction to the technician-intermediate or technician-paramedic for the taking of a blood specimen at the request or order of a peace officer. In this subsection, "medical director" means a licensed physician who supervises the provision of emergency medical services by a public or private entity that:
> (1) provides those services; and
> (2) employs one or more licensed or certified emergency medical technician- intermediates or emergency medical technician-paramedics
> (c-1) A protocol developed under Subsection (c) may address whether an emergency medical technician-intermediate or emergency medical technician-paramedic engaged in the performance of official duties is entitled to refuse to:
> (1) go to the location of a person from whom a peace officer requests or orders the taking of a blood specimen solely for the purpose of taking that blood specimen;
> (2) take a blood specimen if the technician-intermediate or technician-paramedic reasonably believes that complying with the peace officer's request or order to take the specimen would impair or interfere with the provision of patient care or the performance of other official duties; or
> (3) provide the equipment or supplies necessary to take a blood specimen.

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[10] *Cavazos v. State,* 969 S.W.2d 454, 456-57 (Tex.App. – Corpus Christi 1998, pet. ref'd); TEX. TRANSP. CODE § 724.017(a); *see also Cordero v. State,* 2009 WL 3231504 (Tex.App.—El Paso Oct. 7, 2009).

[11] *State v. Robinson,* 334 S.W.3d 776 (Tex. Crim. App. 2011); TEX. CODE OF CRIM. PROC. § 38.23 (West 2011).

[12] *See Krause v. State,* 368 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2012)(EMT); *State v. Laird,* 38 S.W.3d 707 (Tex. Crim. App. 2000)(paramedic) (emphasis added).

[13] *Krause v. State,* 2013 WL 1890731 (Tex. Crim. App. 2013)(reversing Court of Appeals and allowing EMT to be proven up as qualified technician).

> (c-2) If a licensed or certified emergency medical technician-intermediate or emergency medical technician-paramedic takes a blood specimen at the request or order of a peace officer, a peace officer must:
> (1) observe the taking of the specimen; and
> (2) immediately take possession of the specimen for purposes of establishing a chain of custody.[14]

Of course, as in any other search, consent, assuming it is truly voluntary, is always going to trump your defense challenges to the blood draw. Remember though, the State must prove voluntary consent by clear and convincing evidence or the results may be suppressed.[15] Voluntariness must be examined before any exigent circumstances to the warrant requirement.

NO. If the client is under arrest, police request a blood sample, and the client does not consent, then the blood may only be drawn pursuant to a warrant absent exigent circumstances.

4. DID THE POLICE OBTAIN A BLOOD SEARCH WARRANT?

YES. Just because your client declined a voluntary blood draw and the police obtained a sample with a search warrant doesn't mean that the state will automatically get to use that evidence. The Fourth Amendment protects your client against all unreasonable search and seizures, and any warrant must be supported by probable cause.[16]

In analyzing a warrant, the lawyer is limited to the "four corners" of the document.[17] The warrant should specifically state what is to be taken, by what means, and by whom.[18] Analyze every warrant with strict and meticulous scrutiny. Make sure the dates, times, and signatures are all in order. Read the reasonable suspicion for the stop and the probable cause for the search. If you recognize any statements as intentional deception or reckless disregard for the facts, you will need to request a *Franks* hearing on the validity of the warrant. Before any *Franks* hearing, however, make sure you have read and understand necessary case law.[19]

Section 724.017 dictates who may draw blood under the Transportation Code, but it is not an exclusive list. That being said, a judge could allow anyone to draw the blood, however, judges, like police, are constrained by the Fourth Amendment and the terms of a warrant must be reasonable. A Judge could allow an EMT or phlebotomist to draw the blood by specifically including those job titles in the warrant, so long as it is reasonable under the circumstances.

That being said, even if a warrant appears sufficient on its face, examine whether the warrant was reasonably executed? Under what conditions was the blood drawn? Did the police use force against your client? Especially in Texas, there are basic standards to be met before the

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[14] House Bill 434 (Effective September 1, 2013)
http://www.legis.state.tx.us/tlodocs/83R/billtext/html/HB00434S.htm

[15] *State v. Ibarra,* 953 S.W.2d 242, 243 (Tex. Crim. App. 1997). citing *Paprskar v. State*, 484 S.W.2d 731, 737 (Tex. Crim. App. 1972).

[16] *Hughes v. State,* 843 S.W.2d 591, 593 (Tex. Crim. App. 1992); *Keen v. State,* 626 S.W.2d 309, 312 (Tex. Crim. App. 1981); *Davis v. State,* 27 S.W.3d 664, 667 (Tex.App.-Waco 2000, pet. ref'd).

[17] *Jones v. State,* 833 S.W.2d 118, 123 (Tex. Crim. App. 1992); *Oubre v. State,* 542 S.W.2d 875, 877 (Tex. Crim. App. 1976); *Mayfield v. State,* 800 S.W.2d 932, 934 (Tex.App.-San Antonio 1990, no pet.).

[18] *Franks v. Delaware,* 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

[19] *Harris v. State,* 227 S.W.3d 83 (Tex. Crim. App. 2007); *Dancy v. State*, 728 S.W.2d 772 (Tex. Crim. App. 1987); *Cates v. State,* 120 S.W.3d 352 (Tex. Crim. App. 2003); *Jones v. State*, 907 S.W.2d 850 (Tex.App.—Houston [1st Dist] 1995).

results of your client's blood draw can be admitted into evidence. The Court of Criminal Appeals has held that the drawer of the blood must inquire into the medical history of the client before piercing the skin.[20] Additionally, the police may not use excessive force by assaulting the client in an effort to hold him down for a blood draw.[21]

5. DID THE POLICE DRAW BLOOD WITHOUT A WARRANT?

YES. On April 17, 2013, the United States Supreme Court handed down *Missouri vs. McNeely* holding the government's general interest in combating drunk driving does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case.[22] The Court did not define what factors would establish exigency generally, but left that issue open for a case-by-case analysis based on the "totality of the circumstances."[23]

Post-*McNeely*, the State is now scrambling to prove-up exigency and fight the suppression of involuntary, mandatory blood draws. Here, any argument made by a prosecutor regarding the inconvenience or impracticability of obtaining a search warrant prior to an involuntary blood draw should be attacked with *Clay*.[24] In *Clay*, the arresting officer swore to a blood warrant probable cause affidavit over the telephone and then faxed the signed affidavit to the Judge.[25] Arguably, it doesn't get much easier to obtain a blood search warrant. Regardless of technology, however, if the State is arguing that a warrantless blood draw was done pursuant to the exigency exception to the warrant requirement, you must know your adversary and the resources available to each county prior to litigating the issue. It is the State's burden to prove exigency in a particular case after Defendant proves, or the State stipulates, that a warrantless blood draw occurred.[26] In doing so, you should anticipate that the arresting officer will testify he could not obtain a warrant in a reasonable amount of time. To effectively rebut this testimony, you will need to present evidence to the contrary. While every case is different, our esteemed colleague and Dean of the National College for DUI Defense, Troy McKinney, has suggested that you should know and be able to prove the following, at a minimum, if you want any chance of overcoming an adverse ruling:

1. How many prosecutors were on duty during the relevant time frame;
2. How many magistrates were on duty during the relevant time frame and their locations relative to your officer;
3. Your minimum and maximum relevant time frames. Minimum relevant time frame being from the time of arrest to the time of the blood draw, and maximum relevant time frame being from the time of the arrest to the time of delay or circumstance which justifies the alleged exigency (which may require an expert);
4. Whether your specific officer has ever obtained a warrant in prior cases;
5. What, if any, forms were available for the warrant affidavit;

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[20] *State v. Johnston,* 336 S.W.3d 649 (Tex. Crim. App. 2011), *cert. denied,* 132 S.Ct. 212 (2011).
[21] *Hereford v. State,* 302 S.W.3d 903 (Tex.App.-Amarillo 2009, aff'd.).
[22] *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. at 1555-56 (2013).
[23] *Id.*
[24] *Clay v. State,* 382 S.W.3d 465 (Tex.App.—Waco 2012), review granted, (June 27, 2012).
[25] *Id.* at 465-466.
[26] *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986)(citing *Mattei v. State,* 455 S.W.2d 761, 765–66 (Tex. Crim. App. 1970)).

6. Whether there were other experienced officers on duty and available who were available to obtain a warrant, and
7. Evidence of how long it would have taken to obtain a warrant based upon how long it typically takes in other cases.

Under *McNeeley,* if a warrant can be objectively reasonably obtained between the time of arrest and the time of the involuntary blood draw, then no exigency exists.[27] If, on the other hand, the state alleges circumstances surrounding the arrest of your client created an exigent need to draw blood without a warrant, you will need to be able to rebut the argument and show why your specific facts do not rise to the level of exigency.

Notwithstanding, if the State manages to get around *McNeely* by proving-up exigent circumstances, then remember, at least for now, that any phlebotomist must be qualified as a "qualified technician" in order for the results of the blood test to be admitted into evidence. An EMT/paramedic may not draw blood on their title alone until September 1, 2013; and even then, the draw must occur in a sanitary place.[28]

6. WHAT TYPE OF RECORD IS THE STATE RELYING UPON?

Knowing what type of records the State intends to introduce or rely on will dictate the course of action you should take in evaluating the strengths and weaknesses of the State's case. Most DWI cases involve a blood sample that is analyzed at a police or State-owned forensic laboratory utilizing gas chromatography. The reports produced in such testing are called chromatograms, and they are used by State witnesses in an attempt to prove-up the validity of the analysis and the purported test results from your client's blood. Alternatively, if your prosecutor attempts to introduce a medical record, make sure the State has properly complied with Texas Rules of Evidence 803(6), the business record exception, and 902(10), requiring an affidavit or custodian of record. Additionally, if your client's case involves a hospital enzymatic assay test, be sure the prosecutor produces a witness that can satisfy the first prong of *Kelly*: i.e. "the underlying scientific theory must be valid."[29]

In every case, whether by State lab or by hospital test, before a prosecutor reveals the results of your client's test, or seeks to offer a chromatogram or any opinion of the result of the blood test, make sure the state has complied with *Bullcoming* and that the actual analyst that prepared the sample for testing is available for confrontation and cross-examination.[30] Never acquiesce or allow a prosecutor to substitute testimony from anyone other than the actual analyst that prepared the client's sample for testing. The procedures for proper site preparation, execution of the blood draw, preparation for analysis, maintenance of the instrument/machine, analysis of the sample, and interpretation of the results are each complex areas of attack, and are not addressed in this Article.

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[27] *McNeely,* 133 S.Ct. at 1557-60.

[28] *State v. Johnston,* 336 S.W.3d 649 (Tex. Crim. App. 2011), *cert. denied,* 132 S.Ct. 212 (2011)(sanitary); *Jackson v. State,* 2009 WL 1552890 (Tex.App –El Paso 2009); *State v. Laird,* 38 S.W.3d 707 (Tex. Crim. App. 2000)(paramedic); *Krause v. State,* 368 S.W.3d 863 (Tex. App.--Houston [14th Dist.] 2012)(EMT); *Krause v. State,* 2013 WL 1890731 (Tex. Crim. App. 2013); House Bill 434 (Effective September 1, 2013).

[29] *Kelly v. State,* 824 S.W.2d 568 (Tex. Crim. App. 1992).

[30] *Bullcoming v. New Mexico,* —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).

Without even analyzing how the blood was drawn and tested, an informed trial attorney may sometimes attack and suppress a client's blood test long before a jury is present. Texas blood tests are ripe for such challenges. The key is in knowing how to systematically navigate through the quickly developing body of law. As you evaluate each case and ask the few simple questions highlighted in this article, remember to maintain your course and keep the Judge up to speed and on course as well. Let the prosecutors know that any attempt to redirect your efforts will be met with knowledge of the law and firm insistence on justice, fairness, and the presumption of innocence.