

# Chapter 1:

## Implied Consent Laws: Theory and Procedure

Shea Denning

© 2014 School of Government. University of North Carolina at Chapel Hill

DRAFT VERSION: January 17, 2014

### Contents

Chapter 1:.....	1
Implied Consent Laws: Theory and Procedure .....	1
I. Introduction .....	1
II. Implied Consent Testing .....	2
A. Implied Consent Rights .....	3
B. Administering a Chemical Analysis .....	5
1. Breath Tests .....	6
2. Refusal .....	7
3. Blood or Urine Tests .....	8
4. Alcohol Screening Tests .....	9
5. Pre-arrest Testing .....	11
6. Affidavit and Revocation Report .....	11
III. Theory of Implied Consent.....	11
A. Implied Consent Testing and the Fourth Amendment .....	12
B. Statutory Right to Refuse.....	17
1. Compelled Testing after Refusal.....	18
2. <i>Missouri v. McNeely</i> and the Theory of Implied Consent .....	21
3. Fifth Amendment and Refusals .....	25

### I. Introduction

Driving while impaired and several related criminal offenses involving the consumption of alcohol or other impairing substances are categorized under North Carolina law as implied consent offenses. When a person is charged with or arrested for an implied consent offense, the officer may require the person to undergo chemical testing for purposes of detecting the presence of alcohol and other impairing substances and measuring their concentration. If a

person refuses to submit to such testing, the person's license may be administratively revoked and the refusal may be considered as substantive evidence of his or her guilt of the underlying criminal charges. This chapter reviews the statutory scheme governing the chemical analysis of a person's breath or other bodily fluids in an implied consent case as well as the legal theory of implied consent.

## II. Implied Consent Testing

The following offenses are categorized as implied consent offenses<sup>1</sup>:

1. Impaired driving (G.S. 20-138.1).
2. Impaired driving in a commercial vehicle (G.S. 20-138.2).
3. Habitual impaired driving (G.S. 20-138.5).
4. Death by vehicle or serious injury by vehicle (G.S. 20-141.4).
5. First- or second-degree murder (G.S. 14-17) or involuntary manslaughter (G.S. 14-18) when based on impaired driving.
6. Driving by a person less than 21 years old after consuming alcohol or drugs (G.S. 20-138.3).
7. Violating no-alcohol condition of limited driving privilege (G.S. 20-179.3(j)).
8. Impaired instruction (G.S. 20-12.1).
9. Operating commercial motor vehicle after consuming alcohol (G.S. 20-138.2A).
10. Operating school bus, school activity bus, or child care vehicle after consuming alcohol (G.S. 20-138.2B).
11. Transporting an open container of alcohol (G.S. 20-138.7(a)).
12. Driving in violation of restriction requiring ignition interlock (G.S. 20-17.8(f)).

When a person is arrested for an implied consent offense, or if criminal process has been issued, including a citation, a law enforcement officer who has reasonable grounds to believe that the person charged has committed the offense may require that person to undergo chemical analysis.<sup>2</sup> The officer is authorized to transport the accused to any location within North Carolina for the purposes of administering one or more chemical analyses.<sup>3</sup>

North Carolina law defines "chemical analysis" as a test or tests of the breath, blood, or other bodily fluid or substance of a person performed in compliance with statutory requirements to determine the person's blood alcohol level or the presence of an impairing substance.<sup>4</sup> The concentration of alcohol in a person is expressed either as grams of alcohol per 100 milliliters of

---

<sup>1</sup> See North Carolina General Statutes (hereinafter G.S.) 20-16.2(a1); -4.01(24a).

<sup>2</sup> G.S. 20-16.2(a).

<sup>3</sup> *Id.* § 20-38.3(2).

<sup>4</sup> *Id.* § 20-4.01(3a).

blood or as grams of alcohol per 210 liters of breath.<sup>5</sup> The results of a defendant's alcohol concentration determined by a chemical analysis are reported to the hundredths, with any result between hundredths reported to the next-lower hundredth.<sup>6</sup>

While any competent evidence of a defendant's alcohol concentration that is lawfully obtained may be introduced in a defendant's trial on implied consent charges,<sup>7</sup> the State enjoys several advantages when it seeks to admit the results of a chemical analysis performed pursuant to G.S. 20-139.1. First, such results are deemed admissible by statute<sup>8</sup> without the need for further evidence as to the scientific reliability of the instrument used or the validity of the underlying scientific principles.<sup>9</sup> Second, the results of a chemical analysis are "deemed sufficient evidence to prove a person's alcohol concentration."<sup>10</sup> This means that, in the context of a case in which the defendant's alcohol concentration as reported by a chemical analysis is 0.08 or more, the introduction of the results of the chemical analysis satisfies the State's burden to present prima facie evidence of impairment.<sup>11</sup>

### A. Implied Consent Rights

Before any type of chemical analysis is administered, a person charged with an implied consent offense must be taken before a chemical analyst authorized to administer a test of the person's breath or a law enforcement officer authorized to administer a chemical analysis of the breath.<sup>12</sup> The term "chemical analyst" is defined as a person granted a permit by the Department of Health and Human Services (DHHS) under G.S. 20-139.1 to perform such analyses.<sup>13</sup> The

---

<sup>5</sup> *Id.* § 20-4.01(1b). The alcohol concentration for breath tests is based on an assumption that a breath alcohol concentration of 0.10 grams per 210 liters of breath is equivalent to a blood alcohol concentration of .10 percent, or, in other words, a 2100 to 1 blood-breath ratio. *See State v. Cothran*, 120 N.C. App. 633, 635 (1995).

<sup>6</sup> G.S. 20-4.01(1b).

<sup>7</sup> *See id.* § 20-139.1(a); *see also State v. Davis*, 142 N.C. App. 81, 87 (2001) (holding that results of blood and urine tests obtained pursuant to search warrant issued after defendant refused blood test were properly admitted at defendant's impaired driving trial, as "the General Assembly does not limit the admissibility of competent evidence lawfully obtained").

<sup>8</sup> G.S. 20-139.1(a), (b).

<sup>9</sup> *See State v. Powell*, 279 N.C. 608 (1971); *State v. George*, 77 N.C. App. 470 (1985).

<sup>10</sup> *See G.S. 20-138.1(a)(2)* ("The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration.").

<sup>11</sup> *See State v. Narron*, 193 N.C. App. 76, 84 (2008) (construing G.S. 20-138.1(a)(2) as providing that the results of a chemical analysis constitute prima facie evidence of the defendant's alcohol concentration, thereby authorizing the jury to find that the report adequately proves the defendant's alcohol concentration).

<sup>12</sup> G.S. 20-16.2(a).

<sup>13</sup> *Id.* § 20-4.01(3b). The requirements for obtaining a permit to perform an analysis of a person's breath to determine his or her alcohol concentration are set forth in Title 10A of the North Carolina Administrative Code (hereinafter N.C.A.C), Subchapter 41B, section .0301. For purposes of determining whether the person performing the analysis had a current permit, the court or administrative agency "shall take judicial notice" of the lists of persons possessing permits. G.S. 20-139.1(b), (c).

chemical analyst must first inform the person charged as to, and provide that person with notice in writing of, the following rights:

- (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
- (2) [repealed, 2006]
- (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
- (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or if the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
- (5) After you are released, you may seek your own test in addition to this test.
- (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.<sup>14</sup>

These rights are printed on a form created by the DHHS.<sup>15</sup> There is a place on the form for the signature of the person charged. Normally, the notice of rights is read to and a copy handed to a defendant, who then signs the form. Sometimes, however, handing the form to a defendant for his or her signature is not possible due to the defendant's condition. One such circumstance arose in *State v. Lovett*,<sup>16</sup> a case in which the defendant's hands were strapped down in the emergency room and needles for intravenous fluids were in both arms. The chemical analyst in *Lovett* placed the written rights form with defendant's emergency room chart. The North Carolina Court of Appeals determined that this "was tantamount to 'giving' defendant notice in writing."<sup>17</sup> Noting that "in light of the treatment defendant was receiving for his injuries, there was effectively no other means by which the notice could have been given to him," the court determined that defendant clearly was informed of his rights.<sup>18</sup>

The State does not have to prove that the defendant read the notice of rights form,<sup>19</sup> nor, apparently, that he or she understood the rights.<sup>20</sup> The court of appeals in *State v. Carpenter*<sup>21</sup>

---

<sup>14</sup> *Id.* § 20-16.2(a). The North Carolina Supreme Court in *State v. Howren*, 312 N.C. 454 (1984), held that the administration of a chemical analysis to determine if a driver is impaired by an impairing substance is not a critical stage of the prosecution; thus, the defendant has no Sixth Amendment right to have counsel present before deciding whether to take or refuse a breath test and is not entitled more than the thirty minutes provided in G.S. 20-16.2 to secure a lawyer.

<sup>15</sup> The form is designated DHHS 4081.

<sup>16</sup> 119 N.C. App. 689 (1995).

<sup>17</sup> *Id.* at 693.

<sup>18</sup> *Id.*

<sup>19</sup> *State v. Carpenter*, 34 N.C. App. 742 (1977).

<sup>20</sup> G.S. 20-16.2 is designed to "to provide scientific evidence of intoxication not only for the purpose of convicting the guilty and removing them from the public highways for the safety of others, but also to

determined that a chemical analyst fully complied with the advisement requirements in G.S. 20-16.2(a) by orally advising the defendant of his implied consent rights and placing the required information in writing before the defendant who had an opportunity to read the information.<sup>22</sup> Were the rule otherwise, the court explained, “any belligerent or uncooperative defendant” could defeat evidence of test results “by merely refusing to read the information that was placed before him.”<sup>23</sup>

If a law enforcement officer has reasonable grounds to believe that a person has committed an implied consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusing the test, the officer may direct the taking of a blood sample or the administration of any other type of chemical analysis that may be effectively performed.<sup>24</sup> There is no statutory requirement that the chemical analyst inform such a person of the implied consent rights in G.S. 20-16.2(a) or that the person be asked to submit to the analysis pursuant to G.S. 20-16.2(c).<sup>25</sup>

## **B. Administering a Chemical Analysis**

The law enforcement officer or the chemical analyst designates the type of test or tests to be administered, that is, a test of blood, breath, or urine.<sup>26</sup> The officer or chemical analyst then asks the person to submit to the designated type of chemical analysis.<sup>27</sup> If the person charged

---

protect the innocent by eliminating mistakes from objective observation such as a driver who has the odor of alcohol on his breath when in fact his consumption is little or those who appear to be intoxicated but actually suffer from some unrelated cause.” *Seders v. Powell*, 298 N.C. 453, 464 (1979). The warnings “ensure[] civil cooperation in providing scientific evidence and avoid[] incidents of violence in testing by force.” *Id.* at 465. Given that notice is provided to secure submission to a chemical analysis rather than to procure a knowing, voluntary and intelligent waiver of rights, the statutory purposes arguably are met when the person submits to testing, regardless of whether the person knew of the right to refuse testing. See *Yokoyama v. Commissioner of Public Safety*, 356 N.W.2d 830, 831 (Minn. App. 1984) (rejecting the argument of a petitioner who “willingly blew into the testing machine” that he had a statutory right to have the implied consent advisory read to him in Japanese and finding that he “understood he was being asked to take the test,” which was the only understanding required); *Martinez v. Peterson*, 322 N.W.2d 386, 388 (Neb. 1982) (holding that person is required to understand only that he or she has been asked to take a test and that “[t]here is no defense to refusal that [the person] does not understand the consequences of refusal or is not able to make a reasonable judgment as to what course of action to take”); cf. *Sermons v. Peters*, 51 N.C. App. 147, 150 (1981) (explaining that officers had no duty to explain the statutory rights relative to the granting of a limited driving privilege as “[w]hether or not the petitioner would have taken the breathalyzer test had he been aware of the law is irrelevant”).

<sup>21</sup> 34 N.C. App. 742 (1977).

<sup>22</sup> *Id.* at 744.

<sup>23</sup> *Id.*

<sup>24</sup> G.S. 20-16.2(b).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 20-16.2(c). Tests of urine are the only type of test of “other bodily fluid[s] or substances[s]” currently conducted pursuant to the implied consent procedures.

<sup>27</sup> *Id.*

“willfully refuses to submit to that chemical analysis, none may be given under [G.S. 20-16.2].”<sup>28</sup> The refusal does not, however, preclude testing pursuant to other applicable procedures of law,<sup>29</sup> such as pursuant to a search warrant or the exigency exception to the search warrant requirement of the Fourth Amendment to the United States Constitution.<sup>30</sup>

## 1. Breath Tests

Chemical analyses are most frequently obtained through utilization of a breath-testing instrument.<sup>31</sup> DHHS approves breath-testing instruments on the basis of results of evaluations by the department’s Forensic Tests for Alcohol Branch.<sup>32</sup> The breath-testing instrument currently authorized and used is the Intoximeter, Model Intox EC/IR II.<sup>33</sup> The operational procedures for the instrument are prescribed by statute and administrative regulation.<sup>34</sup> The person being tested must be observed to ensure that he or she has not ingested alcohol or other fluids or regurgitated, vomited, eaten, or smoked in the fifteen minutes before the collection of a breath specimen.<sup>35</sup> At least two sequential breath samples must be tested.<sup>36</sup> The results of the chemical analysis of all breath samples is admissible in evidence in any court or administrative

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also *State v. Davis*, 142 N.C. App. 81, 87 (2001) (holding that results of blood and urine tests obtained pursuant to search warrant issued after defendant refused blood test were properly admitted at defendant’s impaired driving trial, as “the General Assembly does not limit the admissibility of competent evidence lawfully obtained”).

<sup>30</sup> See G.S. 20-139.1(d1) (providing that if a person refuses to submit to a test, a law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine for analysis if the officer reasonably believes that the delay necessary to obtain a court order would result in the dissipation of the percentage of alcohol in the person’s blood or urine) and *State v. Fletcher*, 202 N.C. App. 107 (2010) (finding exigent circumstances warranting blood draw and upholding G.S. 20-139.1 as constitutional); see also *Missouri v. McNeely*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552 (2013) (plurality opinion) (holding that in impaired driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test over a defendant’s objection without a warrant); *Schmerber v. California*, 384 U.S. 757 (1966) (concluding that an officer’s warrantless taking of the defendant’s blood incident to his arrest for driving while impaired was constitutional under the Fourth Amendment where the officer reasonably believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the dissipation of alcohol in the defendant’s blood and where the blood was taken in a hospital environment according to accepted medical practices); *State v. Steimel*, 921 A.2d 378 (N.H. 2007) (upholding as constitutional warrantless blood draw to detect drugs incident to defendant’s arrest for aggravated driving while intoxicated and refusing to distinguish between metabolization of alcohol and controlled drugs for purposes of applying the Fourth Amendment’s exigency exception); *People v. Ritchie*, 181 Cal. Rptr. 773 (Cal. Ct. App. 1982) (upholding as constitutional warrantless blood draw to detect drugs incident to defendant’s arrest for driving under the influence of drugs).

<sup>31</sup> See 10A N.C.A.C. 41B, § .0101(2); see also G.S. 20-139.1 (chemical analysis of the breath administered pursuant to the implied consent law is admissible in court if it is performed in accordance with DHHS rules and the person performing the analysis had a current permit issued by DHHS authorizing him or her to perform a breath test using the type of instrument employed).

<sup>32</sup> 10A N.C.A.C. 41B, § .0313.

<sup>33</sup> *Id.* § .0322.

<sup>34</sup> G.S. 20-139.1; 10A N.C.A.C. 41B, § .0322.

<sup>35</sup> 10 N.C.A.C. 41B, § .0101(6).

<sup>36</sup> G.S. 20-139.1(b3).

hearing if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration of more than 0.02.<sup>37</sup> Only the lower of the two test results of the consecutively administered tests may be used to prove a particular alcohol concentration.<sup>38</sup> A person's refusal to give the sequential breath samples necessary to constitute a valid chemical analysis amounts to a refusal to submit to testing under G.S. 20-16.2(c).<sup>39</sup> A person's refusal to give the second or subsequent breath sample renders the result of the first breath sample, or the result of the sample providing the lowest alcohol concentration if more than one breath sample is provided, admissible in any judicial or administrative hearing for any relevant purpose.<sup>40</sup>

DHHS is required to perform preventative maintenance on breath-testing instruments used for chemical analysis.<sup>41</sup> A court or administrative agency "shall take judicial notice" of the Department's preventative maintenance records.<sup>42</sup> Breath test results are inadmissible if a defendant objects to their introduction and demonstrates that preventative maintenance procedures required by DHHS regulations had not been performed within the time limits required by those regulations.<sup>43</sup> Regulations for the breath testing instrument currently in use, the Intoximeter: Intox EC/IR II, require that preventative maintenance be performed at least once every four months.<sup>44</sup> These instruments, unlike their predecessors, use ethanol gas canisters to provide a control sample for testing, rather than an alcoholic breath simulator.<sup>45</sup> Ethanol gas canisters must be changed before their expiration date.<sup>46</sup> A signed original of the preventive maintenance record must be kept on file for at least three years.<sup>47</sup>

## 2. Refusal

A person's willful refusal to submit to a chemical analysis may, depending on other factors, result in the revocation of his or her driver's license for a period of twelve months—in addition to resulting in the immediate civil revocation of his or her driver's license for a period of at least thirty days.<sup>48</sup> A refusal is "the declination of a request or demand, or the omission to comply

---

<sup>37</sup> *Id.*; see also 10A N.C.A.C. 41B, § .0322 (directing the collection of two breath samples and providing that if the alcohol concentrations differ by more than 0.02, a third or fourth breath sample shall be collected).

<sup>38</sup> G.S. 20-139.1(b3).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 20-139.1(b2).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 10A N.C.A.C. 41B § .0323.

<sup>45</sup> It is possible to use alcoholic breath simulator solution with these instruments, though that is not done in practice.

<sup>46</sup> 10A N.C.A.C. 41B § .0323.

<sup>47</sup> *Id.*

<sup>48</sup> G.S. 20-16.2(d); -16.5.

with some requirement of law, as the result of a positive intention to disobey.’”<sup>49</sup> A *willful* refusal occurs when a person (1) is aware that he or she has a choice to take or refuse a test, (2) is aware of the time limit within which he or she must take the test, and (3) voluntarily elects not to take the test or knowingly permits the prescribed thirty-minute time limit to expire before electing to take the test.<sup>50</sup> In essence, a willful refusal is a refusal that occurs after the defendant is advised of his or her implied consent rights and is asked to submit to a chemical analysis.<sup>51</sup>

### 3. Blood or Urine Tests

At a law enforcement officer’s discretion, a person may be asked to submit to a chemical analysis of his or her blood or urine in addition to or in lieu of a chemical analysis of his or her breath.<sup>52</sup> If a subsequent chemical analysis is requested, the person must again be advised of the implied consent rights under G.S. 20-16.2(a).<sup>53</sup> When a law enforcement officer specifies a blood or urine test as the type of chemical analysis to be conducted, a physician, registered nurse, emergency medical technician, or other qualified person must withdraw the blood sample or obtain the urine sample.<sup>54</sup> If the person withdrawing the blood requests written confirmation of the officer’s request, the officer must furnish that request before the blood is drawn.<sup>55</sup> A medical provider may refuse to draw blood “if it reasonably appears that the procedure cannot be performed without endangering the safety of the person collecting the sample or the safety of the person from whom the sample is being collected.”<sup>56</sup> An officer may request written justification for a medical provider’s refusal to withdraw blood pursuant to his or her request. If the officer does so, the medical provider must provide the written justification at the time of the refusal.<sup>57</sup> A person’s willful refusal to submit to a blood or urine test constitutes a willful refusal to submit to testing under G.S. 20-16.2.<sup>58</sup>

---

<sup>49</sup> Joyner v. Garrett, 279 N.C. 226, 233 (1971) (quoting BLACK’S LAW DICTIONARY (4th ed. 1951)).

<sup>50</sup> Etheridge v. Peters, 301 N.C. 76, 81 (1980).

<sup>51</sup> See, e.g., Rice v. Peters, 48 N.C. App. 697, 700–01 (1980) (holding that purpose of refusal-revocation statute is “fulfilled when the petitioner is given the option to submit or refuse to submit to a breathalyzer test and his decision is made after having been advised of his rights in a manner provided by the statute”).

<sup>52</sup> G.S. 20-139.1(b5).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* § 20-139.1(c) (applicable when officer seeks withdrawal of blood from a consenting defendant or from a defendant who is unconscious or otherwise incapable of refusal; likely also applicable to withdrawal of blood in implied consent case pursuant to search warrant), (d2) (applicable to nonconsensual warrantless blood draws).

<sup>55</sup> G.S. 20-139.1(c), (d2).

<sup>56</sup> *Id.* 20-139.1(c).

<sup>57</sup> *Id.* It is unclear whether a medical provider who refuses to withdraw blood upon an officer’s request pursuant to G.S. 20-139.1(c) has committed a crime. The most likely criminal charge is resisting, delaying, or obstructing an officer in violation of G.S. 14-233. For an analysis of whether a medical provider’s refusal to assist an officer in light of this statutory duty amounts to resisting, delaying or obstructing an officer, see Shea Denning, *The Requirement that Medical Providers Withdraw Blood in Implied Consent Cases* (UNC School of Government, November 20, 2012), <http://nccriminallaw.sog.unc.edu/?p=3975>.

<sup>58</sup> *Id.* § 20-139.1(b5).



To qualify as a “chemical analysis,” and thus to be admissible under G.S. 20-139.1(a), (c1), blood and urine specimens procured under the state’s implied consent laws must be analyzed by an analyst who has a DHHS permit. Most of these analyses are blood analyses and are performed at the North Carolina State Crime laboratory. There are, however, other laboratories in the state that are approved by the Department of Health and Human Services to conduct chemical analyses. Among them is the Charlotte-Mecklenburg Police Department Laboratory.<sup>59</sup> The results must be certified by the analyst who performed the testing.<sup>60</sup>

A person charged with any of the death or serious injury by vehicle offenses codified in G.S. 20-141.4<sup>61</sup> must be requested to provide a blood sample in addition to or in lieu of a chemical analysis of his or her breath—unless the breath sample shows an alcohol concentration of 0.08 or more.<sup>62</sup> As with other defendants, such persons must again be advised of their implied consent rights before being asked to submit to a chemical analysis of their blood. If a person charged with death or serious injury by vehicle willfully refuses to provide a blood sample, then a law enforcement officer with probable cause to believe that the offense involved impaired driving or was an alcohol-related implied consent offense must seek a warrant to obtain a blood sample.<sup>63</sup>

#### 4. Alcohol Screening Tests

A law enforcement officer may require a driver to submit to an alcohol screening test within a relevant time after the driving if the officer has (1) reasonable grounds to believe that the driver had consumed alcohol and has committed a moving traffic violation or been involved in an accident or collision; or (2) an articulable and reasonable suspicion that the driver has committed an implied consent offense and the driver has been lawfully stopped or “lawfully encountered by the officer in the course” of his duties.<sup>64</sup>

---

<sup>59</sup> *Id.* § 20-139.1(c1).

<sup>60</sup> *Id.*

<sup>61</sup> With the exception of the offense of misdemeanor death by vehicle, all of the offenses codified in G.S. 20-141.4 contain, as an element, impaired driving in violation of G.S. 20-138.1 or G.S. 20-138.2 (impaired driving in a commercial vehicle). Misdemeanor death by vehicle, in contrast, consists of (1) unintentionally causing the death of another person (2) while engaged in the operation of any state law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic—other than G.S. 20-138.1—that (3) proximately causes the death. G.S. 20-141.4(a2). Notwithstanding its lack of relationship to alcohol-related offenses, misdemeanor death by vehicle also is classified as an implied consent offense.

<sup>62</sup> This requirement, which is codified in the “subsequent test[.]” provisions of G.S. 20-139.1(b5) appears to apply only if the law enforcement officer initially exercises his or her discretion under G.S. 20-16.2(a) to obtain a chemical analysis of the person.

<sup>63</sup> G.S. 20-139.1(b5) (further providing that the failure to obtain a blood sample shall not be grounds for the dismissal of a charge). *See supra* note 30 for a further discussion of these statutory provisions as they related to the Fourth Amendment’s prohibition on unreasonable searches.

<sup>64</sup> G.S. 20-16.3(a). The statute specifies that requiring a driver to submit to an alcohol screening test in accordance with its provisions does not, by itself, constitute an arrest.

DHHS approves alcohol screening devices and adopts regulations governing the manner of their use.<sup>65</sup> To be valid, alcohol screening tests must be conducted in accordance with applicable regulations.<sup>66</sup> Even then, the results of such tests are of limited evidentiary value. A law enforcement officer may use the fact that a driver showed a positive or negative result on an alcohol screening test in determining if there are reasonable grounds (in other words, probable cause) for determining that the driver committed an implied consent offense or that the driver had consumed alcohol and the driver had in his or her body previously consumed alcohol.<sup>67</sup> The result may not be used to prove a particular alcohol concentration.<sup>68</sup> Given that a result is positive at an alcohol concentration as low as 0.01, a positive result on an alcohol screening test, without more, likely does not establish reasonable grounds to believe that a person is impaired.<sup>69</sup> Similarly, the fact that a result was positive or negative, but not the actual result, is admissible in court or may be used by an administrative agency in determining reasonable grounds for the determinations referenced above.<sup>70</sup> Negative results on an alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol.<sup>71</sup>

A different rule governs the use of alcohol screening test evidence to establish a violation of the various statutes<sup>72</sup> that prohibit driving while consuming alcohol or while alcohol remains in the person's body.<sup>73</sup> In such cases, the results of an alcohol screening test or the driver's refusal to submit to an alcohol screening test, may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body.<sup>74</sup> Thus, not only are the numerical results admissible in such cases, but they also may be used to establish the

---

<sup>65</sup> *Id.* § 20-16.3(b).

<sup>66</sup> *Id.* § 20-16.3(c); *but see* State v. Rogers, 124 N.C. App. 364, 370 (1996) (determining that the fact that the law enforcement officer failed to administer a second alcohol screening test as required by G.S. 20-16.3(b) did not prevent the results from being used by the officer to form probable cause).

<sup>67</sup> *Id.* § 20-16.3(d).

<sup>68</sup> *Id.*

<sup>69</sup> See Shea Denning, You Can't Tell Just from the Smell (School of Government, August 10, 2009), <http://nccriminallaw.sog.unc.edu/?p=606>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> G.S. 20-138.2A (prohibiting the operation of a commercial vehicle while consuming alcohol or while alcohol remains in the person's body); G.S. 20-138.2B (prohibiting the operation of a school bus, school activity bus, child care vehicle, ambulance or other emergency medical services vehicle, firefighting vehicle, or a law enforcement vehicle while consuming alcohol or while alcohol remains in the person's body); G.S. 20-138.3 (prohibiting driving by person less than 21 years of age while consuming alcohol or while alcohol remains in the person's body).

<sup>73</sup> See G.S. 20-138.2A(b2); G.S. 20-138.2B(b2); G.S. 20-138.3(b2).

<sup>74</sup> *Id.*

underlying offense—not simply whether the arrest or charge was supported by probable cause.

## 5. Pre-arrest Testing

Although normally a person submits to chemical analysis only after he or she is arrested or charged with an implied consent offense, or both, a person who is stopped or questioned by a law enforcement officer who is investigating whether that person may have committed an implied consent offense may request that a chemical analysis be administered before any arrest or other charge is made.<sup>75</sup> Upon such a request, the officer must afford the person the opportunity to have a chemical analysis of his or her breath, if available, in accordance with the procedures required by G.S. 20-139.1(b).<sup>76</sup> The notice of rights required before administration of a pre-charge test is prescribed by statute and differs from the notice provided in a case in which the person already has been charged with an implied consent offense.<sup>77</sup> It does not include the right to call an attorney for advice or select a witness to view testing procedures, nor does it provide for a delay in testing for these purposes.<sup>78</sup> A pre-charge chemical analysis, like one administered after a defendant is charged, can give rise to a civil license revocation under G.S. 20-16.5.<sup>79</sup>

## 6. Affidavit and Revocation Report

In an implied consent case in which a defendant is asked to submit to a chemical analysis, the law enforcement officer and the chemical analyst (who may be the same person) complete a form created by the Administrative Office of the Courts called AOC-CVR-1A (Affidavit and Revocation Report)<sup>80</sup> averring that the implied consent testing procedures have been followed. The affidavit, which in certain cases serves also as a revocation report, typically is sworn and subscribed before a magistrate at the charged person's initial appearance.

After completing all investigatory and other specified procedures, crash reports, and chemical analyses, a law enforcement officer must take the person charged before a judicial official for an initial appearance.<sup>81</sup>

## III. Theory of Implied Consent

As previously noted, G.S. 20-16.2(a) provides that “[a]ny person who drives a vehicle on a highway or public vehicular area hereby gives consent to a chemical analysis if charged with an

---

<sup>75</sup> *Id.* § 20-16.2(i).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* § 20-16.5(b1).

<sup>80</sup> The form is available on the website for the Administrative Office of the Courts at <http://www.nccourts.org/Forms/Documents/1049.pdf>.

<sup>81</sup> *Id.* § 20-38.3(5).

implied-consent offense” and that “[a]ny law enforcement officer with reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.” Before any chemical analysis is administered the person must be advised orally and in writing of his or her implied consent rights. Among those rights is a warning: “Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.”<sup>82</sup> Suspects also are advised that “[t]he test results, or the fact of your refusal, will be admissible in evidence at trial.”<sup>83</sup> An exception to the requirement that these warnings be given applies if the person is unconscious or otherwise incapable of refusal. If a person willfully refuses to submit to the chemical analysis requested by the officer, none may be given under the provisions of G.S. 20-16.2, but the refusal does not prohibit testing under other applicable procedures of law, such as compelled blood testing pursuant to a search warrant.

### **A. Implied Consent Testing and the Fourth Amendment**

The Fourth Amendment of the United States Constitution, applicable to the states by the Fourteenth Amendment,<sup>84</sup> prohibits unreasonable searches and seizures by government actors.<sup>85</sup> What is reasonable under the Fourth Amendment “depends on the context within which a search takes place.”<sup>86</sup> Determining the standard of reasonableness “governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’”<sup>87</sup> “On one side of the balance are . . . the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.”<sup>88</sup> Moreover, the Fourth Amendment’s reasonableness requirement does not apply to all interactions government actors have with people or property.<sup>89</sup> Instead, it applies only to searches and seizures.<sup>90</sup> Government actors conduct a search when they infringe on a person’s expectation of privacy that society recognizes as reasonable or legitimate.<sup>91</sup>

---

<sup>82</sup> *Id.* § 20-16.2(a)(1).

<sup>83</sup> *Id.* § 20-16.2 (a)(3)

<sup>84</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>85</sup> U.S. Const. Amend IV.

<sup>86</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

<sup>87</sup> *Id.* (quoting *Camera v. Municipal Court* 387 U.S. 523, 536-37 (1967)).

<sup>88</sup> *Id.*

<sup>89</sup> See ROBERT L. FARB, *ARREST, SEARCH AND INVESTIGATION IN NORTH CAROLINA* 174 (UNC School of Government, 4<sup>th</sup> ed. 2011) (hereinafter *Arrest, Search and Investigation*).

<sup>90</sup> Fourth Amendment seizures are not discussed here. The law of search and seizure is thoroughly treated in Farb, *Arrest, Search and Investigation*, *supra* note 85, Ch. 3.

<sup>91</sup> *Id.* at 174; see also *T.L.O.*, 469 U.S. at 338.

Courts have long recognized that the “‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’” is a Fourth Amendment search.<sup>92</sup> The physical intrusion necessary to obtain blood, which involves penetrating beneath the skin, infringes a person’s reasonable expectation of privacy.<sup>93</sup> Moreover, the “ensuing chemical analysis of the sample to obtain physiological data” further invades a person’s privacy interests.<sup>94</sup>

The sort of breath testing performed pursuant to the State’s implied consent laws, which requires the person to produce aveolar or deep lung breath, “implicates similar concerns about bodily integrity.”<sup>95</sup> For this reason, a compelled breath test likewise constitutes a search under the Fourth Amendment.<sup>96</sup> A compulsory urine test in an implied-consent case implicates the Fourth Amendment as well.<sup>97</sup> Though the testing of urine does not require a surgical intrusion into the body, the chemical analysis of urine, like that of blood, can reveal “a host of private medical facts about [a person].”<sup>98</sup> Furthermore, the process of collecting a urine sample entails the government’s incursion into an area in which a person has a reasonable expectation of privacy.<sup>99</sup>

Because each type of test conducted pursuant to the State’s implied consent laws implicates privacy interests protected by the Fourth Amendment, to be lawful, they must satisfy the reasonableness requirement of the Fourth Amendment. The traditional Fourth Amendment standard of reasonableness for a government search requires that the search be carried out based on probable cause pursuant to a warrant.<sup>100</sup> There are, however, several exceptions to the probable cause or warrant requirement, or both, including exceptions for searches incident to arrest (exceptions to both), searches carried out pursuant to a person’s consent (exceptions to both), searches carried out pursuant to special governmental needs (sometimes exceptions to both), and searches carried out in exigent circumstances (warrant exception).<sup>101</sup>

---

<sup>92</sup> *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (quoting *Schmerber v. California*, 384 U.S. 757, 767-768 (1966)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (noting that “[t]here are few activities in our society more personal or private than the passing of urine.”) (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5<sup>th</sup> Cir. 1987)).

<sup>100</sup> *State v. Cook*, 306 N.C. 132 (1982).

<sup>101</sup> Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1473-74 (1985) (listing exceptions, noting that they are “neither few nor well-delineated,” and arguing that reasonableness should be governing analysis, rendering the warrant requirement less important).

While the United States Supreme Court has not analyzed the reasonableness of searches carried out under implied consent laws in circumstances in which a person acquiesces to the test,<sup>102</sup> many state courts have considered the constitutionality of testing carried out pursuant to their implied consent laws—laws that exist in every state.<sup>103</sup> Implied-consent statutes typically require that a law enforcement officer have probable cause to believe that the driver is under the influence of alcohol or has committed an alcohol-related offense before an officer may conduct a chemical test<sup>104</sup> since, “in the criminal context, the reasonableness of a search under the Fourth Amendment is measured with a “probable cause’ yardstick.”<sup>105</sup>

---

<sup>102</sup> The United States Supreme Court has considered the reasonableness of compelled testing in implied consent cases in which a person refuses to be tested, holding that compulsory blood testing over a defendant’s objection may be carried out based on probable cause but without a warrant when, under the circumstances, the time necessary to obtain a warrant threatens the dissipation of alcohol in the person’s body. *Schmerber v. California*, 384 U.S. 757 (1966). The court’s holding regarding nonconsensual, warrantless blood draws is discussed *infra* in section 2a. ).

<sup>103</sup> See *Missouri v. McNeely*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552, 1566 (2013) (plurality opinion) (stating that “all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense”); see also Kenneth J. Melilli, *The Consequences of Refusing Consent to A Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L. Rev. 901, 920 n.84 (2002) (citing Matthew J. Dougherty, *Casenote, Hays v. City of Jacksonville*, 518 So. 2d 892 (Ala. Crim. App. 1987), 19 Cumb. L. Rev. 177, 177 & n.3 (1988)) (citing implied consent statutes in effect in 1988 for “all fifty states and the District of Columbia”).

<sup>104</sup> See Elizabeth F. Rubin, *Trying to Be Reasonable About Drunk Driving: Individualized Suspicion and the Fourth Amendment*, 62 U. Cin. L. Rev. 1105, 1106-07 (1994) (citing Ga. Code Ann. § 40-5-55 (Michie 1992) (tests authorized after arrest and with “reasonable grounds”); Iowa Code § 321J.6 (1991) (tests authorized on “reasonable grounds” and additional condition such as arrest, injury, or death); Minn. Stat. § 169.123 (1992) (tests authorized with “probable cause” and additional condition such as arrest, property damage, injury, or death); Mont. Code Ann. § 61-8-402 (1992) (tests authorized on “reasonable grounds” and after arrest); N.D. Cent. Code § 39-20-14 (1991) (tests authorized on officer’s “opinion” of alcohol use); Vt. Stat. Ann. tit. 23, § 1202 (1991) (tests authorized on “reasonable grounds”); Wash. Rev. Code § 46.20.308 (1991) (tests authorized on “reasonable grounds”). Georgia, Illinois, Mississippi and Pennsylvania enacted implied-consent statutes that authorized chemical testing of drivers who were involved in (Georgia, Mississippi, Pennsylvania) or at fault for (Illinois) an automobile accident involving death or, in some cases, serious injury, even if the officer did not have probable cause that the driver was under the influence of alcohol. Ga. Code Ann. § 40-5-55(a) (Michie 1992); Ill. Ann. Stat. ch. 625, para. 5/11-501.6 (Smith-Hurt 1992); 75 PA. Cons. Stat. sec. 1547 (a)(2) (1992); Miss. Code Ann. 63-11-8(1) (1996). Supreme courts in those states held that those statutory provisions violated the Fourth Amendment. See *Cooper v. State*, 587 S.E.2d 605 (Ga. 2003); *King v. Ryan*, 607 N.E.2d 154 (Ill. 1992); *McDuff v. State*, 763 So.2d 850 (Miss. 2000); *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992). Compare *State v. Blank*, 90 P.3d 156 (Alaska 2004) (construing similar state statute to be constitutional in context of warrantless searches for breath or blood in accident cases when probable cause to search exists); *State v. Roche*, 681 A.2d 472, 474 (Maine 1996) (upholding similar state statute which required a showing of probable cause only when admission of the test result was sought at trial rather than before testing; holding that the justification for suspicionless testing of drivers involved in fatal accidents is linked to the gravity of the accident as well as the “evanescent nature of evidence of intoxication and the deterrent effect on drunk driving of immediate investigations of fatal accidents”). One of the offenses deemed an implied consent offense under North Carolina law, misdemeanor death by vehicle, is an offense unrelated to alcohol-consumption. See G.S. 20-16.2(a1) (defining “implied-consent offense” to include a violation of G.S. 20-141.4(a2)); G.S. 20-141.4(a2) (defining misdemeanor death by vehicle as unintentionally causing the death of another

State courts have determined on various grounds that chemical testing carried out pursuant to implied consent statutes satisfies the reasonableness requirement of the Fourth Amendment. Courts have held that (1) “the bodily intrusion the motorist is being asked to allow, in return for retaining the license to drive, is a minimal one,” and the State has a “compelling need to get intoxicated drivers off the highways,”<sup>106</sup> (2) breath testing is the type of nonintrusive search that may be carried out incident to arrest,<sup>107</sup> (3) the warrant requirement is excused by the exigencies created by the evanescent nature of alcohol;<sup>108</sup> and (4) by driving on a road within the State, the person has given his consent to evidentiary testing.<sup>109</sup> North Carolina’s appellate courts have never expressly considered whether chemical testing pursuant to the State’s implied-consent statutes satisfies the reasonableness requirement of the Fourth Amendment. Instead, the state’s appellate courts have relied upon the legal theory of implied consent in upholding such testing as lawful. In *Sedars v. Powell*,<sup>110</sup> the state supreme court explained that

---

person while engaged in the violation of a state law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving, and the commission of the law or ordinance violation is the proximate cause of death).

<sup>105</sup> *Cooper v. State*, 587 S.E.2d 605, 609 (Ga. 2003) (quoting *Adams v. State*, 498 S.E.2d 268, 271 (Ga. 1998).

<sup>106</sup> *State v. Wintlend*, 655 N.W.2d 745, 751 (Wis. Ct. App. 2002); *see also* *South Dakota v. Neville*, 459 U.S. 553, 563, 558 (1983) (characterizing a “simple blood-alcohol test” as “safe, painless, and commonplace” and noting the “well documented” “carnage caused by drunk drivers”); *Mackey v. Montrym*, 443 U.S. 1, 15 (1979) (finding that Massachusetts’ compelling interest in highway safety justifies the summary suspension of a person’s license for refusing a breath test; noting in response to petitioner’s claim that he requested to take the test after his initial refusal that the state “must have the authority, if it is to protect people from drunken drivers, to require that the breath-analysis test record the alcoholic content of the bloodstream at the earliest possible moment.”)

<sup>107</sup> *See United States v. Reid*, 929 F.2d 990 (4<sup>th</sup> Cir. 1991) (finding breath tests permissible under the exigency and search incident to arrest exceptions to the Fourth Amendment’s warrant requirement); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9<sup>th</sup> Cir. 1986) (concluding that a breath test following an arrest for impaired driving “is an appropriate and reasonable search incident to arrest” that arrestees “have no constitutional right to refuse”); *Wing v. State*, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012) (“[T]he statutory scheme that requires a DUI arrestee to take a chemical breath test is a valid search incident to arrest under either theory of DUI [the “under the influence” theory and the “blood alcohol level” theory] when there is independent evidence to charge the arrestee with driving under the influence.”); *Commonwealth v. Anderi*, 477 A.2d 1356, 1364 (Pa. Super. Ct. 1984) (“warrantless seizure of appellant’s alcohol-laden breath is valid either as a search incident to arrest . . . or a search necessitated by exigent circumstances, i.e., the evanescent nature of alcohol in the appellee’s blood stream”).

<sup>108</sup> *See United States v. Reid*, 929 F.2d 990 (4<sup>th</sup> Cir. 1991) (finding breath tests permissible under the exigency and search incident to arrest exceptions to the Fourth Amendment’s warrant requirement); *Commonwealth v. Anderi*, 477 A.2d 1356, 1364 (Pa. Super. Ct. 1984) (“warrantless seizure of appellant’s alcohol-laden breath is valid either as a search incident to arrest . . . or a search necessitated by exigent circumstances, i.e., the evanescent nature of alcohol in the appellee’s blood stream.”).

<sup>109</sup> *State v. Diaz*, 160 P.3d 739 (Idaho 2007).

<sup>110</sup> 298 N.C. 453, 462 (1979)

“anyone who accepts the privilege of driving upon our highways has already consented to the use of the breathalyzer test and has no constitutional right to consult a lawyer to void that consent.” The court later reaffirmed that principle in a criminal case, *State v. Howren*,<sup>111</sup> and has characterized the right to refuse as a matter of legislative grace, not a constitutional right.<sup>112</sup>

In his treatise on the Fourth Amendment, Professor Wayne LaFave eschews this consent justification on the basis that “[c]onsent ‘in any meaningful sense’ cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing.”<sup>113</sup> “Were it otherwise,” LaFave continues, “the police could utilize the implied consent theory to subject everyone on the streets after 11 p.m. to a search merely by making public announcements in the press, radio and television that such searches would be undertaken.”<sup>114</sup>

LaFave suggests that the better approach is to ask whether the search meets the reasonableness requirement of the Fourth Amendment, “an inquiry in which it will . . . be relevant that advance notice was given of the circumstances” in which a search might occur. He explains:

<<double indent>>

If the answer to that question is no, a statute may not produce a contrary result via the fiction of implied consent. As one court aptly put it: “‘To hold that the legislature could nonetheless pass laws stating that a person ‘impliedly’ consents to search under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment.’”

<<end double-indent>>

Adoption of LaFave’s suggested approach would require courts to extend the reasonableness analysis applied to so-called “special needs” searches, intrusions justified by purposes divorced

---

<sup>111</sup> 312 N.C. 454 (1984)

<sup>112</sup> *Id.* at 456; *Accord Neville*, 459 U.S. at 560 n.10, 565 (person has no constitutional right to refuse to take a blood-alcohol test; instead right to refuse blood-alcohol test a matter of grace bestowed by the legislature).

<sup>113</sup> 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 164-65 (5th ed. 2012).

<sup>114</sup> *Id.* Other commentators share LaFave’s skepticism. See Comment, *The Theory and Practice of Implied Consent in Colorado*, 47 U. Colo. L. Rev. 723, 762 (1976). (stating that “the state can use [the threat of license revocation] only under the same circumstances that it can use force; viz, if the search would have been a reliable one, done pursuant to a lawful arrest, in a reasonable, medically approved manner, where the arresting officer had probable cause to believe that the licensee was indeed intoxicated”); see also D. Bernard Zaleha, *Alaska’s Criminalization of Refusal to Take a Breath Test: Is It a Permissible Warrantless Search Under the Fourth Amendment*, 5 Alaska L. Rev. 263, 289 (1988); Penn Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 St. John’s L. Rev. 39, 63-64 (1978).



from the State's general interest in law enforcement, to searches in implied consent cases.<sup>115</sup> If North Carolina's courts were to apply this analysis, searches carried out pursuant to the state's implied consent laws might be deemed reasonable under this framework in light of (1) the government's compelling interest in eliminating the threat impaired drivers pose to public safety, (2) the safe, relatively painless, and commonplace methods of testing employed, (3) the requirement of probable cause to believe the person committed an alcohol-related offense<sup>116</sup> and (4) the advance notice provided by the implied consent statutes themselves.

## B. Statutory Right to Refuse

Given that a person has no constitutional right to refuse an implied-consent test, one might question why implied-consent statutes, such as North Carolina's, incorporate a statutory right of refusal. Indeed, Professor Jack Weinstein, writing about implied consent a year after New York's enactment of the first state statute requiring drivers to consent to a chemical test for intoxication noted the paradox in providing that "although the driver has constructively consented to take the test, when the chips are down and he is actually apprehended he may renege on his imputed promise and refuse."<sup>117</sup> Professor Weinstein recognized the "practical merit" of coupling free choice with mandatory consent, stating that freedom to refuse "prevents the unseemly struggle likely to arise when an intoxicated driver refuses to do what the police insist he is bound to do,"<sup>118</sup> while implied consent in advance avoids "the need for explicit consent from a heavily intoxicated person" or from someone rendered dazed or unconscious in a crash.<sup>119</sup>

Thirty years ago, one writer argued that impaired driving prosecutions would be facilitated by scrapping the notion of implied consent and resorting to compulsory testing, arguing that "[a]lthough implied consent developed as a means of facilitating the use of chemical evidence,

---

<sup>115</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

<sup>116</sup> This justification does not apply to implied consent testing carried out when probable cause exists for no other implied consent offense than misdemeanor death by vehicle. See *supra* note 100.

<sup>117</sup> Jack B. Weinstein, *Statute Compelling Submission to a Chemical Test for Intoxication*, 45 J. Crim. L. Criminology & Police Sci. 541, 543 (1954-55).

<sup>118</sup> *Id.*; see also *Neville*, 459 U.S. at 559 (noting that South Dakota permits suspects to refuse a blood-alcohol test "to avoid violent confrontations").

<sup>119</sup> *Weinstein*, 45 J. Crim. L. Criminology & Police Sci. at 545. Professor Weinstein wrote that these practical concerns were not, however, the impetus for the choice/consent dichotomy. Instead, the drafters viewed the coupling of implied consent with the ability to refuse as a method for avoiding any question about a driver's constitutional right to refuse to take the test: By accepting the privilege to drive, a person waives any constitutional right to refuse the search. Weinstein acknowledged doubts about whether, in actuality, this "indirect approach using a theory of conditions" avoids the need for constitutional analysis. *Id.* at 545.

the statutes currently constitute the primary barriers to the use of that evidence in as many as forty-five percent of potential DWI prosecutions.”<sup>120</sup>

## 1. Compelled Testing after Refusal

When a person charged with an implied consent offense refuses to participate in or acquiesce to the type of testing requested by a law enforcement officer, the person may nevertheless be compelled to provide a sample of his or her blood for analysis. Indeed, the implied consent notice set forth in G.S. 20-16.2(a)(1) informs a person that he or she may refuse any test, but an officer can compel testing under other laws. Any such compulsory test must comport with the Fourth Amendment.

The United States Supreme Court in *Schmerber v. California*<sup>121</sup> first considered the Fourth Amendment restrictions on the withdrawal of blood from an impaired driving suspect over his objection. The defendant in *Schmerber* was injured in an automobile accident and was taken to the hospital, where he subsequently was arrested for driving under the influence of alcohol. A police officer then ordered a blood test over the defendant’s objection. After explaining that the warrant requirement applied generally to searches that intrude into the human body, the court concluded that the warrantless blood draw was permissible because the officer might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence, given the natural dissipation from alcohol from a person’s blood. The court noted that “[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.”<sup>122</sup> In the decades following *Schmerber*, a split of authority developed among state courts regarding whether the dissipation of alcohol alone provided a sufficient exigency to excuse the Fourth Amendment’s warrant requirement in any impaired driving case or whether special facts of exigency beyond the evanescence of alcohol were required.<sup>123</sup> North Carolina’s courts appeared to require a showing of facts beyond the evanescence of alcohol to establish exigent

---

<sup>120</sup> Phillip T. Bruns, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 Tex. L. Rev. 935, 959 (1980). Bruns further contended that “implied consent procedures produce disparities in the treatment of drunk drivers, to the advantage of those who are aware of the benefits of refusing chemical testing. If these adverse consequences are not necessary to avoid the potential evils of physical coercion in administering the tests, then states have no reason for retaining them.”

<sup>121</sup> 384 U.S. 757 (1966).

<sup>122</sup> *Id.* at 770-71.

<sup>123</sup> See, e.g., *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009).

circumstances,<sup>124</sup> while courts in other jurisdictions considered the dissipation of alcohol sufficient to excuse the warrant requirement.<sup>125</sup>

The United States Supreme Court resolved the split among state courts in 2013, holding in *Missouri v. McNeely*<sup>126</sup> that in impaired driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant over a defendant's objection. In so holding, the high court rejected the State's call for a categorical rule authorizing nonconsensual warrantless blood draws whenever an officer has probable cause to believe a person has been driving while impaired based solely on the evanescent nature of alcohol. Thus, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case in which a defendant refuses to acquiesce to a request for chemical testing, it does not do so categorically. Whether a nonconsensual warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.<sup>127</sup>

The North Carolina Court of Appeals in *State v. Fletcher*,<sup>128</sup> a case decided before *McNeely*, employed the totality of the circumstances analysis later approved by the United States Supreme Court in considering whether exigent circumstances existed to support the nonconsensual, warrantless withdrawal of the defendant's blood in an impaired driving case. The *Fletcher* Court considered not only the dissipation of alcohol, but also the distance to the magistrate's office and the time required to obtain a warrant on a Saturday night.<sup>129</sup> The *Fletcher* court concluded that an exigency existed based on a potential delay of two to three hours.<sup>130</sup> Because the Supreme Court in *McNeely* rejected only the per se rule advocated by the State and did not define what length of delay would constitute an exigency, *McNeely* sheds no

---

<sup>124</sup> See *State v. Fletcher*, 202 N.C. App. 107 (2010) (evaluating the reasonableness of an officer's belief that the delay associated with obtaining a warrant would result in the dissipation of the percentage of alcohol in the defendant's blood in light of the two to three hours that the officer testified the process would require, and concluding that sufficient exigency existed). Accord *United States v. Chapel*, 55 F.3d 1416 (9th Cir. 1995); *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008); *State v. Rodriguez*, 156 P.3d 771 (Utah 2007).

<sup>125</sup> See, e.g., *Netland*, 762 N.W.2d at 214 (holding that the criminal test-refusal statute does not violate the Fourth Amendment "because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense"). Accord *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010); *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993).

<sup>126</sup> \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552 (2013).

<sup>127</sup> *Id.* at 1568. The court noted that exigent circumstances may exist when there is no accident. *Id.* The procedures for obtaining a warrant and the availability of a magistrate may affect whether there is time to obtain a warrant and thus may establish an exigency.

<sup>128</sup> 202 N.C. App. 107 (2010)

<sup>129</sup> *Id.* at 111.

<sup>130</sup> *Id.* at 110-111.

light on whether a delay of the sort in *Fletcher* is a “significant” delay that “negatively affect[s] the probative value of the results,”<sup>131</sup> though that seems a likely conclusion.

*Fletcher* also upheld as constitutional G.S. 20-139.1(d1), which states: “If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person’s blood or urine.” The court held that the statute required “both probable cause and an officer’s reasonable belief that a delay in testing would result in dissipation of the person’s blood alcohol content,” noting that “[i]n effect, our legislature has codified what constitutes exigent circumstances with respect to DWI’s.”<sup>132</sup> Given that *Fletcher* itself required more than dissipation to support an exigency, perhaps G.S. 20-139.1(d1), as interpreted in *Fletcher*, and because of its “under the circumstances” clause is constitutional. On the other hand, if the statute is read to authorize warrantless blood draws based on the dissipation of alcohol alone, it clearly violates the standard<sup>133</sup> announced in *McNeely*.

In its first published opinion post-*McNeely* considering whether a warrantless nonconsensual blood draw was lawful, the state court of appeals in *State v. Dahlquist*<sup>134</sup> determined that the four to five hours that the arresting officer estimated would have elapsed had he first traveled to the intake center at the jail to obtain a search warrant and then taken the defendant to the hospital for a blood draw constituted an exigency sufficient to excuse the Fourth Amendment’s warrant requirement.<sup>135</sup> Thus, the *Dahlquist* Court held that the trial court properly denied the defendant’s motion to suppress as the warrantless withdrawal of the defendant’s blood at a nearby hospital over his objection was lawful. The holding in *Dahlquist* was unsurprising as it was presaged by *Fletcher*<sup>136</sup> and *McNeely* itself. Dicta in the opinion indicates, however, that the court might evaluate the totality of the circumstances differently in future cases.<sup>137</sup> After determining that the facts in the case gave rise to an exigency that supported a warrantless search, the *Dahlquist* Court suggested that law enforcement officers consider amending their

---

<sup>131</sup> *McNeely*, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1561.

<sup>132</sup> 202 N.C. App. at 113.

<sup>133</sup> See Orin Kerr, *Missouri v. McNeely and Exigent Circumstances to Conduct Blood Tests for Drunk Driving Cases*, The Volokh Conspiracy, <http://www.volokh.com/2013/04/17/missouri-v-mcneely-and-exigent-circumstances-to-conduct-blood-tests-for-drunk-driving-cases/> (April 17, 2013) (noting Court’s adoption of a standard rather than a bright-line rule).

<sup>134</sup> \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (December 3, 2013), *temp. stay allowed*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (December 20, 2013).

<sup>135</sup> Shea Denning, *Four hour delay to obtain search warrant an exigency, at least for now* (December 4, 2013), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Dec. 4, 2013), available at <http://nccriminallaw.sog.unc.edu/?p=4556>.

<sup>136</sup> 202 N.C. App. 107 (2010).

<sup>137</sup> \_\_\_ N.C. App. at \_\_\_, \_\_\_ S.E.2d at \_\_\_.

post-arrest procedures in two respects. First, where the technology is available, officers should testify in support of search warrants by videoconference as authorized by G.S. 15A-245. Second, rather than estimating wait times based on past experience, officers should call magistrates' offices and hospitals to obtain current information about wait times.

## 2. *Missouri v. McNeely* and the Theory of Implied Consent

*McNeely* considered the reasonableness of the withdrawal of a suspect's blood over his or her objection—not the extraction and testing of blood pursuant to a suspect's acquiescence under a state's implied consent laws. Because the standard announced in *McNeely* applies only when a person refuses a request for the withdrawal of blood, its holding did not bar states from procuring blood samples without a warrant pursuant to their implied consent laws.<sup>138</sup> Indeed, the *McNeely* plurality appeared to equate implied consent with actual consent by referring to consequences when a motorist "withdraws consent."<sup>139</sup>

Yet *McNeely*'s holding that there was no per se exigency in every impaired driving case authorizing the warrantless withdrawal of blood challenged one of the rationales relied upon as rendering lawful warrantless implied consent searches. As noted earlier, some courts had reasoned that searches carried out pursuant to implied consent statutes were lawful because they were searches that law enforcement officers could have compelled in any event without the need for consent or a warrant.<sup>140</sup> In light of the *McNeely* Court's clarification that law enforcement officers cannot compel such searches in every implied consent case, that particular rationale for implied consent laws rests on shaky ground.

Recent litigation from other states indicates that this post-*McNeely* concern about the analytical framework for implied consent statutes is not just academic. Defendants have argued that *McNeely* requires more than a totality of the circumstances review of non-consensual warrantless blood draws. They contend that it also requires a court to consider whether so-called "consensual" blood draws, carried out without a warrant pursuant to a state's implied consent laws, are constitutional. In other words, they contend that *McNeely* requires reconsideration of the long-accepted theory of implied consent. Two state supreme courts have undertaken that analysis.

### a) *State v. Butler*

The Supreme Court of Arizona, sitting en banc, considered in *State v. Butler*<sup>141</sup> whether a juvenile's consent to implied consent testing under was involuntary so as to require suppression

---

<sup>138</sup> See *supra* section B.1; see also *McNeely*, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1566 (citing implied consent laws requiring motorists to consent to BAC testing as among the legal tools states have to enforce drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws).

<sup>139</sup> See 133 S.Ct. at 1556.

<sup>140</sup> See *supra* \_\_\_\_\_.

<sup>141</sup> 302 P.3d 609 (Ariz. 2013).

of the evidence. The court held that independent of the state's implied consent law, the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw.<sup>142</sup> If the arrestee is a juvenile, the youth's age and a parent's presence are relevant factors in assessing whether consent was voluntary.<sup>143</sup> The court found sufficient evidence to support a juvenile court's finding that the juvenile's consent in *Butler* was not voluntary, noting, among other facts, the juvenile's age, the fact that no parent was present, that the juvenile was detained for about two hours, and that the juvenile was informed that he was required to submit to the test.<sup>144</sup>

One justice wrote a concurring opinion noting, perhaps presciently that the opinion "might well engender dubious involuntariness claims and related suppression hearings aimed at excluding evidence derived from chemical testing of impaired drivers whose express consent was ostensibly voluntary and valid under Arizona's implied consent law."<sup>145</sup> The concurring justice opined that the "safest course of action for law enforcement might simply be to obtain search warrants . . . for obtaining blood samples in DUI investigation . . . [as] that default approach, although arguably diluting the effectiveness of the implied consent law, and not constitutionally required under *McNeely* (which neither involved nor discounted consent as a valid exception to the Fourth Amendment's warrant requirement), would certainly comport with the Fourth Amendment and alleviate many potential, foreseeable problems in this area."

#### **b) State v. Brooks**

The Minnesota State Supreme Court in *State v. Brooks*<sup>146</sup> likewise considered the voluntariness of a defendant's consent to the warrantless withdrawal of his blood and collection of his urine pursuant to the state's implied consent laws. While the Minnesota court in *Brooks*<sup>147</sup> undertook the same examination as the Arizona court in *Butler*,<sup>148</sup> it reached a different conclusion as to voluntariness.

The defendant in *Brooks* was arrested for impaired driving three times within a six month period.<sup>149</sup> Each time, he was read Minnesota's implied consent advisory, which informs drivers that Minnesota's law requires them to take a chemical test, that refusing to take a test is a crime, and that drivers have the right to talk to a lawyer before deciding whether to take a

---

<sup>142</sup> *Id.* at 613.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 613-614.

<sup>145</sup> *Id.* at 617. (Pelander, J., concurring).

<sup>146</sup> *State v. Brooks*, 838 N.W.2d 563 (Minn. October 23, 2013).

<sup>147</sup> *Id.*

<sup>148</sup> *Butler*, 302 P.3d 609 (Ariz. 2013).

<sup>149</sup> *Brooks*, 836 N.W.2d at 565-66.

test.<sup>150</sup> The defendant also was advised of his right to consult an attorney, a right that he exercised in each instance before submitting to testing.<sup>151</sup>

The defendant moved at trial to suppress evidence of the tests, arguing that the State was required to obtain a warrant before conducting these searches as there was no exigency and no voluntary consent. The defendant pointed out that he agreed to chemical testing only after the police told him that refusal to do so was a crime. He contended therefore that his consent was not voluntary but instead was coerced.

In analyzing the defendant's claim, the Minnesota Supreme Court invoked the reasoning of the United States Supreme Court in *South Dakota v. Neville*.<sup>152</sup> *Neville* held that a defendant's refusal to submit to a blood-alcohol test pursuant to an officer's lawful request was not an action protected by the Fifth Amendment privilege against self-incrimination; thus, evidence regarding a suspect's refusal to submit to chemical testing was admissible.<sup>153</sup> Central to *Neville's* analysis was its determination that no impermissible coercion was involved when the suspect refused testing.<sup>154</sup> *Neville* explained that since the "offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice."<sup>155</sup>

*Brooks* reasoned that, notwithstanding *Neville's* examination of coercion within the context of the Fifth Amendment, the question before the *Neville* Court was "whether the existence of a consequence for refusing to take a chemical test rendered the driver's choice involuntary."<sup>156</sup> *Neville's* conclusion that the consequences attendant to a refusal did not amount to impermissible coercion led the *Brooks* court to conclude that "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test."<sup>157</sup>

*Brooks* distinguished the defendant's consent from that the United States Supreme Court deemed involuntary in *Bumper v. North Carolina*.<sup>158</sup> In *Bumper*, the police sought to justify search of house based on the owner's consent, contending she consented after police told her they had a warrant.<sup>159</sup> The Court held that this sort of submission to authority was not

---

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 570 (citing *South Dakota v. Neville*, 459 U.S. 553 (1983)).

<sup>153</sup> 459 U.S. at \_\_\_\_.

<sup>154</sup> *Id.* at \_\_\_\_.

<sup>155</sup> *Id.* at \_\_\_\_.

<sup>156</sup> *Brooks*, 836 N.W.2d at 570.

<sup>157</sup> *Id.*

<sup>158</sup> 391 U.S. 543 (1968).

<sup>159</sup> *Id.* at \_\_\_\_.

consent.<sup>160</sup> *Brooks* distinguished *Bumper* on the basis that Minnesota law afforded a suspect the absolute right to refuse chemical testing.<sup>161</sup> *Brooks* further held that the defendant's arrest did not render his consent coerced as he was not confronted with repeated police questioning, nor was he asked to consent after having spent days in custody.<sup>162</sup> The defendant's consultation with an attorney reinforced the court's conclusion that his consent was not illegally coerced.<sup>163</sup> The court clarified that it did not "hold that [the defendant] consented because Minnesota law provides that anybody who drives in Minnesota 'consents . . . to a chemical test.'" Instead, it determined that the defendant consented based on a totality of the circumstances.<sup>164</sup>

### c) Limitations of Consent-Based Justification

Thus, neither *Butler*<sup>165</sup> nor *Brooks*<sup>166</sup> relied upon implied consent as vitiating Fourth Amendment concerns. It is unclear whether, if asked to reconsider its analysis, the North Carolina Supreme Court would depart from its previously expressed view that "anyone who accepts the privilege of driving upon our highways has already consented to [chemical testing for alcohol] and has no constitutional right to consult a lawyer to void that consent."<sup>167</sup>

If, however, consent is the sole justification for allowing testing under implied consent laws, then states may procure—upon threat of license revocation, use of the refusal as evidence, and, in some cases, criminal prosecution—a suspect's acquiescence to a search that, were the person to refuse, would only be lawful if carried out pursuant to a warrant or if exigent circumstances existed. Though the Minnesota Supreme Court *Brooks*<sup>168</sup> attempted to distinguish *Bumper v.*

---

<sup>160</sup> *Id.* at \_\_\_\_.

<sup>161</sup> *Brooks*, 836 N.W.2d at 571.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 572. Justice Stras concurred in the court's judgment for reasons that diverged sharply from the majority's analysis. The concurrence called the majority's conclusion that the defendant's consent was voluntary mistaken, noting that "[i]t is hard to imagine how [the defendant's] consent could be voluntary when he was advised that refusal to consent to a search is a crime." *Id.* at 573-74 (Stras, J. concurring). Justice Stras would have affirmed the decision below to admit the evidence based on *Davis v. United States*, 131 S.Ct. 2419 (2011), which held that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. *Id.* at 574 (Stras, J. concurring). Stras noted that the police gathered the samples from the defendant in accordance with *State v. Netland*, 762 SW.2d 202, 214 (Minn. 2009), which approved of the warrantless collection of blood-alcohol evidence based solely on the evanescent nature of alcohol in the bloodstream, a holding abrogated by *McNeely*. *Id.* at 576 (Stras, J. concurring). "Netland was wrongly decided," Stras wrote, "but that was our mistake, not a mistake by law-enforcement officials." *Id.* at 576 (Stras, J. concurring).

<sup>165</sup> *Butler*, 302 P.3d 609 (Ariz. 2013).

<sup>166</sup> *Brooks*, 863 N.W.2d 563.

<sup>167</sup> *Sedars v. Powell*, 298 N.C. 453, 462 (1979).

<sup>168</sup> \_\_ N.W.2d \_\_, 2013 WL 5731811 (Minn. October 23, 2013).



*North Carolina*,<sup>169</sup> *Brooks*' analysis of consent doesn't materially differ from that rejected by the *Bumper* court. In essence, *Brooks* reasons that the suspect consented to a search that would have been lawful with a warrant. The fiction of advance, implied consent (which both *Brooks*<sup>170</sup> and *Butler*<sup>171</sup> rejected) is even more problematic for the reasons noted above in Section \_\_\_\_\_.

The second problem with evaluating the voluntariness of a suspect's consent is a practical one. Persons requested to submit to implied consent testing are thought to be impaired to varying degrees. Determining whether an individual was so impaired as to render his consent not free and voluntary could prove difficult and would, at a minimum, require case-by-case evaluation by officers. As noted earlier, one of the advantages of a statute purporting to imply consent in advance is avoiding "the need for explicit consent from a heavily intoxicated person or one dazed—or indeed unconscious—from a crash."<sup>172</sup> Thus, a voluntariness standard would appear to require, notwithstanding a statutory provision to the contrary,<sup>173</sup> that a warrant be obtained before chemical testing of an unconscious suspect could be performed.

If free and voluntary consent is the test, the concurring justice in *Butler* likely is correct that the safest course of action for the police is to procure a warrant in advance of every blood draw.

### 3. Fifth Amendment and Refusals

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." North Carolina's implied consent laws, like those in other states, provide that a person's refusal to submit to a chemical analysis or to perform field sobriety tests is admissible in any criminal, civil, or administrative action against the person.<sup>174</sup> The United States Supreme Court in *South Dakota v. Neville*<sup>175</sup> held that a defendant's refusal to submit to a blood-alcohol test pursuant to a law enforcement officer's lawful request is not an act protected by the privilege against self-incrimination.<sup>176</sup> The Court explained that the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him as the "simple blood-alcohol test is so safe, painless, and commonplace . . . that the state could legitimately compel the suspect,

---

<sup>169</sup> 391 U.S. 543 (1968).

<sup>170</sup> *Brooks*, \_\_\_ N.W.2d \_\_\_\_.

<sup>171</sup> *Butler*, \_\_\_ N.W.2d \_\_\_\_.

<sup>172</sup> See Jack B. Weinstein, Statute Compelling Submission to a Chemical Test for Intoxication, 45 J. Crim. L. Criminology & Police Sci. 541, 543 (1954-55).

<sup>173</sup> See G.S. 20-16.2(b) (providing that an unconscious person may be tested without notification of rights or request).

<sup>174</sup> G.S. 20-139.1(f).

<sup>175</sup> 459 U.S. 553 (1983)

<sup>176</sup> *Id.*; See also *State v. Flannery*, 31 N.C. App. 617 (1976) (admission of evidence of defendant's refusal did not infringe right against self-incrimination).

against his will, to accede to the test.”<sup>177</sup> Given “that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice.”<sup>178</sup> Thus, the *Neville* court concluded that suppression of the defendant’s statement that “I’m too drunk, I won’t pass the test,” was not required by the U.S. Constitution.

---

<sup>177</sup> *Neville*, 459 U.S. at 563.

<sup>178</sup> *Id.*