

**Implied Consent Testing  
& the Fourth Amendment**

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**What exactly is an  
“implied consent offense” anyway?**

- A person charged with such an offense may be required (pursuant to G.S. 20-16.2) to undergo chemical testing for alcohol or drugs
- Refusal to participate will result in license revocation (pursuant to G.S. 20-16.2)
  - And may be used as evidence of guilt (pursuant to G.S. 20-139.1(f))

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### Which offenses are included?

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

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### Detailed Statutory Scheme

- Defendant must be taken before chemical analyst with permit from DHHS (can be arresting officer).
- Defendant must be advised orally and in writing of implied consent rights.
- G.S. 20-16.2(b) states that no notice of rights and request is required before testing if person is unconscious or otherwise capable of refusal.\*

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North Carolina Department of Health and Human Services  
**Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S. 20-16.2(a)**

\_\_\_\_\_  
*Last First MI*

\_\_\_\_\_  
*Driver License Number / State Date of Birth Citation Number*

Breath  Blood  Subsequent Test

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. The test results, or the fact of your refusal, will be admissible in evidence at trial.
3. Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or 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.
4. After you are released, you may seek your own test in addition to this test.
5. 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.

Date \_\_\_\_\_ Time \_\_\_\_\_ [ ] a.m. [ ] p.m. \_\_\_\_\_  
 Signature of Person Charged

Did defendant call an attorney and/or witness? [ ] NO [ ] YES Time \_\_\_\_\_ [ ] a.m. [ ] p.m.

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### Failure to Advise/Afford Rights

- *State v. Shadding*, 17 N.C. App. 279 (1973)
  - Failure to offer evidence that defendant was advised of implied consent rights renders breath test results inadmissible
  - Results of test admissible only if testing was delayed to give defendant opportunity to exercise rights
- *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Hatley*, 190 N.C. App. 639 (2008); *State v. Buckheit*, 735 S.E.2d 345 (N.C. App. 2012)
  - Denial of statutory right to have witness present during administration of breath test bars admission of results

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### Methods of Testing

- Prescribed by G.S. 20-139.1
- And by administrative rule
  - North Carolina Administrative Code, Title 10A, Subchapter 41B

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### Testing for Impairment & the Fourth Amendment

- The compelled intrusion into the body for blood to be analyzed for alcohol content is a Fourth Amendment search.
- A compelled breath test that requires a person to produce deep lung breath also is a Fourth Amendment search.
- And the process of collecting a urine sample and the chemical analysis of urine are Fourth Amendment searches.
- See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989).

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### Fourth Amendment searches must

- Be reasonable
  - Traditional standard of reasonableness:
    - Probable Cause + Warrant
  - Exceptions
    - Search incident to arrest (exception to both)
    - Consent search (exception to both)
      - Consent must be voluntary as determined from the totality of the circumstances.
    - Special governmental needs (exception to both)
      - These are needs beyond the ordinary needs of law enforcement.
    - Exigent circumstances (warrant exception)

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### Testing for Impairment & the Fourth Amendment

- *Schmerber v. California*, 384 U.S. 757 (1966)
  - Warrant requirement applies generally to searches that intrude into human body
  - But warrantless blood draw permissible as officer might reasonably have believed that delay necessary to obtain a warrant threatened the destruction of evidence, given the natural dissipation of alcohol from a person's blood
  - So, at least in some circumstances, an exigency exception applies

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### Exigency Analysis

- Post-*Schmerber*, courts disagreed as to whether
  - Dissipation of alcohol alone provided a sufficient exigency to excuse the Fourth Amendment's warrant requirement; or
  - Special facts of exigency were required
- *State v. Fletcher*, 202 N.C. App. 107 (2010)
  - Dissipation plus evidence regarding delay established exigency

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**Missouri v. McNeely,  
133 S. Ct. 1552 (2013)**

- **Natural dissipation of alcohol does not create a *per se* exigency**
  - If officer can obtain warrant without “significantly undermining” search, must do so
  - Whether nonconsensual warrantless blood draw is reasonable must be determined case by case on totality of circumstances
    - May have exigency without an accident
    - Warrant procedures are relevant to analysis
    - The availability of a magistrate also is relevant

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**Post-McNeely Jurisprudence**

- State v. Dahlquist, \_\_ N.C. App. \_\_, 752 S.E.2d 665 (2013)
- Four to five hour delay created exigency
- Dicta.
  - G.S. 15A-245 allows search warrant to be issued based on audiovisual transmission of oral testimony under oath
    - But it isn't being used!
  - Better to verify waiting times by calling hospital and magistrate's office than to rely on previous experiences

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**Post-McNeely Jurisprudence**

- State v. Granger, \_\_ N.C. App. \_\_, 761 S.E.2d 923 (2014)
- Exigent circumstances justified warrantless, nonconsensual blood draw
  - Blood drawn 1.5 hours after defendant drove
  - Would have taken an additional 40 minutes to get warrant
  - Lone investigating officer could not leave D at hospital

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**Post-McNeely Jurisprudence**

- *State v. McCrary*, \_\_\_ N.C. App. \_\_\_, 764 S.E.2d 477 (2014), *cert. allowed*, \_\_\_ N.C. \_\_\_, 772 S.E.2d 718 (2015)
- Court of appeals remanded case for additional factual findings regarding availability of magistrate and probable delay in seeking warrant
- Without specific findings, cannot review trial court’s conclusion that exigent circumstances existed
- Dissent: Deputy followed defendant to hospital rather than securing a warrant. No plausible justification for exception to warrant requirement

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**Are implied consent tests  
Fourth Amendment searches?**

- The compelled intrusion into the body for blood to be analyzed for alcohol content is a Fourth Amendment search.
- A compelled breath test that requires a person to produce deep lung breath also is a Fourth Amendment search.
- And the process of collecting a urine sample and the chemical analysis of urine are Fourth Amendment searches.
- **So, to the extent that implied consent tests are “compelled,” rather than voluntary, they are Fourth Amendment searches.**

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### How do implied consent searches fare under traditional analysis?

- Probable cause?
  - Generally yes
  - G.S. 20-16.2 requires probable cause for alcohol-related offenses, but not for misdemeanor death by vehicle
- Warrant?
  - No
  - What exceptions might apply?
    - Minimal intrusion? (perhaps for breath tests)
    - Incident to arrest? (*Schmerber v. California* rejected this justification for compelled blood tests)
    - Exigency? (Not always – see *McNeely v. Missouri*)
    - Consent? (Is acquiescence following threat of license revocation consent? What about acquiescence from a highly intoxicated person?)

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### PUBLIC SERVICE ANNOUNCEMENT:

You are hereby advised that anyone who walks down the streets or sidewalks of Saffcity, NC after 11 p.m. consents to a search of his or her person by a law enforcement officer.

Any person who refuses to consent to a search upon the request of a law enforcement officer will have his or her driver's license revoked for one year.

See 4 Wayne R. LaFare, Search and Seizure: A Treatise on the Fourth Amendment 164-65 (5th ed. 2012)

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### What our courts have said . . .

- “[A]nyone who accepts the privileges of driving upon our highways has already consented to the use of the breathalyzer tests and has no constitutional right to consult a lawyer to void that consent.” *Sedars v. Powell*, 298 N.C. 453, 462 (1979).
- “By driving a vehicle on a highway or public vehicular area a person consents to administration of a chemical analysis if he is charged with driving while impaired.” *State v. Howren*, 312 N.C. 454, 455 (1984).

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**Does *McNeely* Affect Implied Consent?**

- Must courts reconsider whether “consensual” blood draws, carried out under implied-consent laws, are constitutional?
  - *State v. Butler*, 302 P.3d 609 (Ariz. 2013) (en banc) (independent of state’s implied consent law, arrestee’s consent must be voluntary)
  - *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013) (determining that defendant consented based on totality of circumstances, not because state law provides that drivers consent)

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**Does *McNeely* Affect Implied Consent?**

- *Williams v. State*, 771 S.E.2d 373 (Ga. 2015)
  - Mere fact that a DUI suspect agreed to allow officers to withdraw his blood—after being told that Georgia law required him to submit to testing and that his driver’s license would be revoked for a year if he refused—did not establish the sort of voluntary consent necessary to excuse the Fourth Amendment’s warrant requirement.

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***But see . . .***

- *Wall v. Stanek*, 794 F.3d 890 (8<sup>th</sup> Cir. 2015)
  - Characterizing the county’s evidence that Wall consented to the blood draw after she was unable to produce a urine sample as undisputed, and noting that consent searches had been deemed reasonable under the Fourth Amendment.
  - Rejecting Wall’s argument that the choice she was provided between consent and punishable refusal negated the validity of her consent by placing her in an unconstitutional dilemma.

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**Is there a Different Reasonableness Test?**

- State has compelling interest in highway safety
- Safe, commonplace and relatively painless method is used
- Probable cause is required
- Advance notice is provided by implied consent statutes

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**Let's return to G.S. 20-16.2(b)**

**Unconscious Person May Be Tested.** - 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 refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

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