Case Law Update: Blood Search Warrants
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FROM THE GENERAL COUNSEL

Texas Court of Criminal Appeals: Motion for Rehearing in *Villarreal* Improvidently Granted

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Let's Recap

In *State v. Villarreal*, 2014 Tex. Crim. App. Lexus 1898 (Tex. Crim. App. November 26, 2014) the Texas Court of Criminal Appeals, in a 5-4 decision, held that nonconsensual search of blood of a DWI suspect, conducted pursuant to the mandatory blood draw and implied consent provisions in Chapter 724 of the Transportation Code, violates the 4th Amendment when undertaken in the absence of a warrant.

The holding in *Villarreal* was hardly a surprise in light of the number of state intermediate appellate courts that reached a similar conclusion, in light of the U.S. Supreme Court decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (holding that natural metabolization of alcohol does not present a per se exception to the 4th Amendment's warrant requirement for nonconsensual blood testing.) For some Texas prosecutors, the most disappointing part of *Villarreal* was that, by a single vote, the Court rejected implied consent as a possible exception to the search warrant requirement when DWI suspects refuse to consent. To those prosecutors, *Villarreal* appeared to be the beginning of the end for the validity of implied consent as a basis for justifying a warrantless blood draw.

However, there was still a glimmer of hope for advocates of the argument that implied consent was irrevocable. In December 2014, Judge Cathy Cochran, Judge Tom Price, and Judge Paul Womack, three of the judges whose votes constituted a majority, left the Court. (All three chose to not seek re-election.) Three newly elected judges, (Judge David Newell, Judge Burt Richardson, and Judge Kevin Yeary) took their place on the Court in January 2015. Some hoped that the change in the Court's make-up would result in a different decision. In February 2015, the Court granted the State's motion for rehearing. Many assumed that the granting of the motion foreshadowed a different outcome. Assuming that the other members of the Court did not change their initial votes, the outcome of the decision in *Villarreal* could be changed with only one vote from a newly elected judge.

On December 16, 2015, the glimmer of hope was dashed. In a *per curiam* opinion, an opinion in which the decision rendered is made by a majority of the court acting collectively, but

without identifying any specific judge, the Court in 40 words held that the State's motion for rehearing was improvidently granted, and that no further motions would be entertained.

Anticlimax?

This is not simply a 40 word *per curiam* opinion. The concurring opinions total 7,539 words. The dissenting opinions total 12,349 words. Contrary to what others have written, this opinion is hardly anticlimactic or a non-decision. In fact, despite what many predicted, the Court reaffirmed the holding in *Villarreal*.

The three newest members of the Court made their positions known. Judge Richardson and Judge Newell issued separate opinions concurring in the denial of the State's motion for rehearing. Judge Yeary issued a dissenting opinion.

Concurring Opinions

The pivotal plot-twist in *Villarreal* is the concurring opinion issued by Judge Meyers who dissented in *Villarreal,* but now no longer believes Section 724.012(b)(3)(B) of the Transportation Code (which applies when the DWI suspect has two prior DWI convictions) creates a valid exception to the warrant requirement for a blood draw in intoxication cases.

Judge Richardson explained that while it makes sense that a repeat DWI offender *should* have a lessened expectation of privacy, a defendant's status as a repeat offender does not fall within an exception recognized by the Supreme Court. Section 724.012(b)(3)(B) of the Transportation Code does not create an exception to the 4th Amendment's warrant requirement and the Legislature does not have the authority to create a statutory exception.

Judge Newell wrote in support of the *Villarreal* opinion. Per se rules are strongly disfavored under the 4th Amendment. Accordingly, a per se warrantless blood draw based on the criminal record of the subject and the dissipation of alcohol is impermissible. Prior convictions do not diminish the individual's 4th Amendment protections. While the State has a compelling interest in keeping the public safe from drunk drivers, to be constitutionally permissible, a warrantless search has to serve more than a general interest in crime control. He rejected arguments that the search at issue in this case is an administrative search and driving is a "closely regulated industry." Like *McNeely,* the *Villarreal* opinion is narrow and does not hold that drawing a driver's blood could be justified upon a showing of exigent circumstances or that another exception to the warrant requirement might apply. In light of Supreme Court precedent, he cannot support a holding that a felony DWI defendant has a greater expectation of privacy in the contents of his cell phone than his own blood.

Dissenting Opinions

Judge Keasler, joined by Judge Hervey, explained that although the Transportation Code does not create a per se exigency exception to the 4th Amendment and the State has failed to establish exigency in this case, given the circumstances of this case and the underlying interests at play, the blood draw was constitutionally reasonable. Villarreal's status as a recidivist DWI offender

resulted in a diminished expectation of privacy. The search of Villarreal should be considered a regulatory search and the means and procedures of the search performed on Villarreal were reasonable.

Judge Yeary, joined by Presiding Judge Keller, asserted that when dealing with incorrigible drunk drivers and the warrantless taking of blood, the touchstone is reasonableness. This requires a balancing of interests. To require a search warrant in cases involving DWI suspects with two prior convictions does not protect the privacy interests of the citizenry. It does, however, frustrate the governmental purpose behind the search (i.e., preventing the destruction of evidence) and is inconsistent with the 4th Amendment's warrant requirement. This should be the standard when evaluating the "implied consent" statutes. The criterion in the statute in question involves an *objective* determination of the known facts by peace officers. To require a magistrate to rubber stamp the determination of a peace officer's determination that there is probable cause to draw blood elevates meddlesome formality over 4th Amendment substance. Under a general balancing approach, the scope of an already existing exception—the exigent circumstances exception—to the warrant requirement properly extends to authorize automatic blood draws for incorrigible DWI offenders when the terms of the statute are satisfied.

The End?

Allow me to reiterate what I wrote exactly one year ago. "For the time being, what all Texas magistrates need to know is that the holding in *Villarreal* excises Sections 724.011(a), 724.012(b), and 724.013 from the Transportation Code. Also, municipal judges, in their roles as magistrates, should anticipate continued, concerted efforts by law enforcement to procure blood pursuant to a search warrant. This only seems all the more certain in light of *Villarreal*." "Texas Magistrates Should Anticipate More Requests for 'Blood Warrants' in Light of Court of Criminal Appeals Decision in *Villarreal," The Recorder* (February 2015) at 3.

Throughout 2015, intermediate courts of appeals in Texas have rejected the idea that a warrantless blood draw can be upheld solely on the suspect implied consent law and/or the mandatory blood draw statute of Chapter 724. There is consensus that the only way a warrantless blood draw will be upheld is with actual voluntary consent or exigent circumstances.

This brings us back to why Texas magistrates should anticipate more requests for blood warrants and why the interests of law enforcement are best served by procuring a blood warrant. This appears particularly true in light of how technology is changing the process of obtaining a search warrant and recent changes to Article 18.01 of the Code of Criminal Procedure, which allow information in support of a search warrant to be provided by electronic means. See, *The Recorder* (August 2015) at 45.

In light of how long it took for this case to reach resolution, it has been suggested that we should not expect any further guidance in the near future from the Court on the issues presented in *Villarreal*. However, when it comes to implied consent, there is a host of state law issues the Court could choose to review. Furthermore, on December 11, 2015 the U.S. Supreme Court decided it would consider whether states can make it a crime for DWI suspects

to refuse to take blood-alcohol tests when law enforcement has not secured a warrant. The court took cases from Minnesota and North Dakota, which have implied consent laws that require motorists to submit to blood, breath, or urine tests if a police officer believes they are intoxicated.[1] To paraphrase Winston Churchill, this may not be the end. It may not even be the beginning of the end. But it may perhaps be the end of the beginning.

[1] q.v. Birchfield v. North Dakota, 2016 U.S. LEXIS 4058 (June 23, 2016)

Blood Search Warrants: Case Law Summaries

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The following decisions and opinions were issued between the dates of October 1, 2015 and July 1, 2016.

Acknowledgment: The majority of the summary of *State v. Villarreal*, 475 S.W.3d 784 (Tex. Crim. App. 2015) was taken from a paper by Stacey M. Soule, Assistant State Prosecuting Attorney, *Court of Criminal Appeals Update: An Overview of Court of Criminal Appeals Decisions from the 2015 Term*. Thank you, Ben Gibbs (Baylor Law School Juris Doctor candidate), for your insightful edits.

The search incident to arrest doctrine does not apply to warrantless blood draws, but does apply to warrantless breath tests.

Birchfield v. North Dakota, 2016 U.S. LEXIS 4058 (June 23, 2016)

The Court examines three consolidated cases involving state laws criminalizing refusal to take warrantless tests measuring BAC. All three defendants were arrested for drunk driving. Defendants Birchfield (North Dakota) and Beylund (North Dakota) received warnings that they were obligated to submit to blood tests. Defendant Bernard (Minnesota) received instruction that a breath test was required. Birchfield and Bernard refused and were convicted of a criminal offense for the refusal. Beylund complied with the demand for the blood sample and his license was subsequently administratively suspended based on the test results revealing a high BAC. According to the Court's analysis, if the warrantless searches in these cases comport with the 4th Amendment, it follows that a state may criminalize the refusal to comply with a demand to submit to required testing, just as a state may make it a crime to obstruct the execution of a valid search warrant. It also follows that the test results are not inadmissible under federal law in a criminal prosecution or civil or administrative proceeding.

Because all three defendants were searched or told they were required to submit to a search after being placed under arrest, the Court considers how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests. In situations that could not have been envisioned when the 4th Amendment was adopted, like searches of data in a cell phone (*Riley v. California*, 134 S. Ct. 2473 (2014)), the Court does not have "guidance from the founding era," and therefore, determines whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

Using the same analysis as in *Riley*, the Court found that breath tests do not implicate significant privacy concerns, but that blood tests are a different matter. For breath tests, the physical intrusion is almost negligible, the tests only result in a BAC reading and no sample is left, and participation in the test does not enhance embarrassment inherent in any arrest. Blood tests, however, require piercing the skin and extracting a part of the subject's body, are significantly more intrusive than blowing into a tube, and places in the hands of law enforcement a sample that can be preserved holding information beyond a

BAC reading.[2] Weighing this against legitimate state and federal interests, the Court finds that the laws at issue in these cases making it a crime to refuse to submit to a BAC test are designed to provide an incentive to cooperate in drunk driving cases, which serves an important function.

Balancing privacy with the interests of the State, the Court concludes that the 4th Amendment permits warrantless breath tests incident to arrests for drunk driving, but not warrantless blood tests.

As for the implied consent laws at issue, the Court concludes that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense (the Court notes its prior opinions that refer approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply).

The Court notes more than once that while the exigent circumstances exception involves an evaluation of the particular facts of each case, the search-incident-to-arrest exception is categorical. It does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case.

Justice Sotomayor joined the majority's disposition of *Birchfield* and *Beylund*, in which the Court holds that the search-incident-to-arrest exception to the 4th Amendment's warrant requirement does not permit warrantless blood tests, but dissented from the Court's disposition of *Bernard*, in which the Court holds that the same exception permits warrantless breath tests. Justice Sotomayor would instead require a warrant unless exigent circumstances existed, finding the search-incident-to-arrest exception "ill-suited to breath tests." She describes the precedential framework differently, requiring an analysis of all exceptions to determine whether to apply them categorically or on a case-by-case basis.

Justice Thomas concurred in part in the judgment and dissented in part, finding that the majority contorted the search-incident-to-arrest exception to the 4th Amendment's warrant requirement. According to Thomas, the tests revealing the BAC of a driver suspected of driving drunk are constitutional under the exigent circumstances exception to the warrant requirement. The majority's "hairsplitting" between breath and blood tests makes little sense to Thomas, who finds that either the search-incident-to-arrest exception permits bodily searches to prevent the destruction of BAC evidence, or it does not.

The defendant's warrantless blood draw was not justified by exigent circumstances where the only support for exigency in the record was the defendant's own self-imposed delay and forty minutes worth of alcohol dissipation.

Weems v. State, NO. PD-0635-14, 2016 Tex. Crim. App. LEXIS 85 (Tex. Crim. App. May 25, 2016)

The defendant crashed his car around 11:30 p.m. and ran from the scene. It took law enforcement approximately forty minutes to locate him while he actively hid from law enforcement under a car approximately a half a mile away. Based on the observations of the responding deputy, he was arrested for DWI, refused a breath or blood test, and was taken to a nearby hospital ("about two minutes away") to be treated for injuries. The deputy filled out a request for blood draw, which was performed two hours

[2] Texas requires law enforcement to retain such evidence for the longer of two years or the period of the statute of limitations for the offense, or for the duration of the defendant's sentence or probation. Article 38.50, Code of Criminal Procedure.

later, the testing of which showed intoxication. The trial court denied suppression, but the court of appeals found that denial to be error and that admission was harmful. The Court agreed.

Most of the State's grounds in this case had already been considered and resolved by *Villarreal*. However, the Court points out that neither *Villarreal* nor *McNeely* presented an opportunity to address whether circumstances surrounding a warrantless blood draw satisfied the exigency exception and rendered the search constitutionally permissible. The Court, presented with such an opportunity in this case, applied an exigency analysis, which requires an objective evaluation of the facts reasonably available to the officer at the time of the search.

The Court compared the totality of the circumstances in this case to that in *Schmerber*, "where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." Here, the record is silent as to whether the deputy knew it would take over two hours for hospital personnel to draw blood, how long the procedure in the county for DWI arrestees takes, what procedures, if any, existed for obtaining a warrant when an arrestee is taken to the hospital, whether the deputy could have reasonably obtained a warrant, or how long it would have taken to do so. The deputy's testimony implied that he knew it would take a long time before the hospital would draw blood and that a magistrate was available (though the record did not reflect that definitively). Also, another officer was with the deputy throughout the investigation and while he waited at the hospital for the blood draw. According to the Court, on this record, the State did not demonstrate that practical problems existed in obtaining a warrant "within a timeframe that still preserved the opportunity to obtain reliable evidence."

A warrantless blood draw was justified under the exigency exception where law enforcement officers were confronted with the natural destruction of evidence through dissipation of meth in the blood, possible contamination of the blood test due to treatment for the defendant's injuries, logistical and practical constraints posed by the severity of the fatal crash, and the attendant duties this crash demanded.

Cole v. State, 2016 Tex. Crim. App. LEXIS 84 (Tex. Crim. App. May 25, 2016)

At 10:30 p.m., the defendant, Steven Cole, drove his large pickup truck 110 miles per hour down a city street in Longview, Texas, ran a red light, and struck another pickup truck, causing an explosion that instantly killed the driver of the truck. The fire had continued explosions. 14 officers were dispatched to the scene, which was not cleaned up and cleared until 6:00 the next morning. Officers rescued Cole from his truck and EMS transported him to the hospital. Cole was arrested at the hospital and refused a blood test after repeatedly telling the arresting officer he used "meth" and was not drunk. The officer requested hospital staff to draw his blood (pursuant to Section 724.012(b)(1)(A) of the Transportation Code when the officer reasonably believes that, as a direct result of the suspect's intoxication, someone is killed in a motor vehicle crash), the testing of which revealed intoxicating levels of amphetamine and methamphetamine. The trial court found exigent circumstances for drawing the blood without a warrant and denied Cole's motion to suppress the blood test results. The court of appeals found error in the trial court's denial of Cole's motion to suppress and found no exigent circumstances in the record.

According to the court of appeals, law enforcement could have been able to draw the defendant's blood pursuant to a warrant before 2:00 a.m.; that time line, the court suggests, demonstrates that an exigency

did not exist. The Court rejects the court of appeals' analytical approach in constructing a time line containing a hypothetical warrant obtained at a particular point followed by the potential timeliness of the search's results as an impermissible view of law enforcement action through the lens of hindsight. The proper focus of an exigency analysis is whether officers had a reasonable belief that obtaining a warrant was impractical based on the circumstances and information known at the time of the search.

To that end, the Court finds the amount of time it took the lead crash investigator, Higginbotham, to investigate the scene posed the largest obstacle to procuring a warrant, which took three hours to complete and could only be done by that particular officer. The record also showed that Higginbotham could not leave the scene and the arresting officer could not simultaneously handle the responsibility for Cole's custody and drawing up a statement regarding her belief of his intoxication. The crash scene's location and the public safety danger required a number of officers at the scene. According to the Court, it is relevant that there was no indication officers not on scene were unavailable to get a warrant; however, that does not prevent an exigency finding. Here, the record does not establish that there was a readily available officer where the number of officers necessarily on scene comprised nearly half of the minimum amount of officers the department requires for the entire city over two shifts. Additionally, the record showed procuring a warrant would have taken an hour to an hour and a half "at best." During that time, Higginbotham was reasonably concerned that both potential medical intervention performed at the hospital and the natural dissipation of methamphetamine in Cole's body would adversely affect the reliability of his blood sample. According to EMS, Cole reported having "pain all over." Higginbotham was reasonably concerned that the administration of pain medication, specifically narcotics, would affect the blood sample's integrity.

Finally, the Court finds that the lack of a known elimination rate of a substance law enforcement believes a suspect ingested does not necessarily mean that the body's natural metabolism of intoxicating substances is irrelevant to or cuts against the State's exigency argument, but instead, serves to distinguish this case from *McNeely*. Without a known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know—unlike alcohol's widely accepted elimination rate—how much evidence it was losing as time passed.

Judge Johnson dissented, finding a warrant was required and agreed with the court of appeals, based on the record, that exigent circumstances did not exist.

Isolated statements globally asserting that a blood draw was conducted without a warrant are not enough to apprise the trial court that it must consider whether there were exigent circumstances to permit a warrantless search in a DWI case, when entire record shows the only basis of the motion to suppress was that the statutory requirements for a mandatory blood draw had not been met.

Douds v. State, 472 S.W.3d 670 (Tex. Crim. App. 2015)

Judge Meyers dissented, finding it was the State's burden to prove that the draw was reasonable, therefore, Douds had no burden to show a lack of exigency and he did not abandon his claim by focusing on the statute at the hearing.

HIPAA does not affect the Court's holding in *Hardy* with respect to 4th Amendment standing to complain of the State's acquisition by a grand jury subpoena duces tecum of medical records containing BAC results from a blood test performed for medical purposes.

State v. Huse, 2016 Tex. Crim. App. LEXIS 72 (Tex. Crim. App. April 13, 2016)

The appellee was taken to a hospital after missing a curve and plowing his car into a cotton field. His blood was drawn for medical purposes. The State obtained BAC evidence by issuing a grand jury subpoena for the defendant's hospital medical records in a DWI prosecution, first when no grand jury was investigating the appellee, and subsequently after a motion to suppress the records was filed and the State moved to dismiss the information (this subpoena was based on an application signed by the foreman of the grand jury). The trial court granted the defendant's motion to suppress the medical records, finding that obtaining the medical records without a warrant violated the 4th Amendment and that a misuse of the grand jury subpoena process violated state and federal law (HIPAA), requiring suppression under the Texas exclusionary rule. The court of appeals reversed, finding that the defendant lacked standing under *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997), to raise a 4th Amendment challenge to the State's acquisition of his medical records, and that the State did not acquire the records through an unlawful grand jury subpoena, so Article 38.23 did not require suppression.

Because HIPAA compliance was mandated after the Court's decision in *Hardy*, the Court granted the appellee's petition for discretionary review to address whether the advent of HIPAA materially impacts the relevant holding in *Hardy*, and whether the State's grand jury subpoena process violated either HIPAA or state law.

Under *Hardy*, whether a person has standing to complain of the State's acquisition of the results of a blood test performed by the hospital for medical purposes depends on whether society recognizes as reasonable any expectation of privacy, not in medical records as a general rule, but in that subset of privately generated and maintained medical records that would show the result of a blood alcohol analysis in an individual that the State suspects of driving while intoxicated. The *Hardy* Court concluded that "whatever interests society may have in safeguarding the privacy of medical records [in general], they are not sufficiently strong to require protection of blood-alcohol test results taken by hospital personnel solely for medical purposes after a traffic accident." Does HIPAA undercut that analysis? The Court says no, finding that HIPAA expressly permits the disclosure of otherwise "protected health information" when it is sought by way of a grand jury subpoena, as it was in both *Hardy* and this case.

The Court also found that at least one of the grand jury subpoenas did not violate state law, and thus, did not violate HIPAA, which provides for disclosure when a grand jury subpoena exists and (perhaps) is validly issued in accordance with governing state or federal law. The Court finds that the first grand jury subpoena duces tecum was proper under state law because none of the circumstances surrounding it conflicts with any of the relevant statutory provisions. Finding an alternative ground to exist to conclude the evidence was properly obtained, the Court does not answer the question whether the second subpoena was proper.

A court of appeals' ruling that Section 724.012 of the Transportation Code requiring an arresting officer to take a blood specimen from a repeat DWI offender who is arrested for that offense, without a warrant, was not facially unconstitutional must be reconsidered in light of interim U.S. Supreme Court and Texas Court of Criminal Appeals decisions.

McGruder v. State, 483 S.W.3d 880 (Tex. Crim. App. 2016)

Here, the defendant's sole argument was that Section 724.012 of the Transportation Code (requiring a breath or blood analysis when the officer has reliable information that the driver already has two or more prior DWI offenses) violates the 4th Amendment on its face "because it requires an arresting officer to take a specimen for blood-alcohol analysis regardless of whether he either 1) first obtains a warrant, or else 2) acts upon particularized exigent circumstances that would obviate the need for a warrant." To succeed on this facial challenge, the appellant "must establish that the statute always operates unconstitutionally in all possible circumstances." Because the court of appeals did not have the benefit of the decision of the United States Supreme Court in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (determining the standard of review for facial constitutionality) or the decision of this Court in *State v. Villarreal*, 475 S.W.3d 784, 813 (Tex. Crim. App. 2014) (holding that Section 724.012(b)(3)(B) of the Texas Transportation Code does not, by itself, "form a constitutionally valid alternative to the 4th Amendment warrant requirement"), the Court remanded the cause to that court for further consideration in light of the intervening opinions in *Villarreal* and *Patel*.

The State's motion for rehearing in the *Villarreal* case was improvidently granted and denied.

State v. Villarreal, 475 S.W.3d 784 (Tex. Crim. App. 2015)

Three judges filed concurrences. Judge Meyers finds it improper to imply consent based on past convictions, and that it is no different than requiring voluntariness for a jury trial waiver.

Judge Richardson finds that a statute cannot lawfully authorize searches that fall outside the 4th Amendment or a recognized exception. The repeat offender aspect does make the statute constitutional; a DWI repeat offender status is not a recognized exception. The repeat offender status significantly lessens privacy interests so as to permit a blood draw, but that is not the law, according to recognized exceptions.

Judge Newell's concurrence states that if a new exception should be recognized, the totality of the circumstances approach should not "pick[] among the desired qualities of established exceptions while discarding the rationales that justify those exceptions." "[A] proper 4th Amendment balancing test . . . weighs the State's interest in the detection and prevention of crime against an individual's privacy interest in his own blood." A per se warrantless draw is not permissible based on a suspect's criminal status and dissipation.

Judge Newell goes on to say that the circumstances that justify a diminished privacy interest in probationers and parolees is not present in DWI repeat offenders; they are not part of a punishment continuum. Further, relapse into criminal activity does not dictate the degree of Fourth Amendment protections.

Additionally, Judge Newell finds that the Supreme Court has declined to make exigent circumstances, like seriousness of an offense, a per se exception. Blood draws have no relation to officer safety, like other recognized exigency exceptions.

The State's interest does not extend beyond crime control. BAC evidence and repeat offender status are not required for an arrest or license suspension. And pretrial release and post-conviction probation are independent of any BAC evidence. Blood draws do not further the State's compelling interest of getting drunk drivers off the road before they cause an accident but do serve a law enforcement purpose.

The search here does not have the hallmarks of an administrative search. A felony DWI suspect is not part of the closely regulated "industry" of driving, and only four industries with a history of government oversight have been recognized.

The limited nature of the majority's opinion should be noted.

Judge Keasler filed a dissent, joined by Judge Hervey, finding that reasonableness is the test, and it is satisfied by a suspect's repeat offender status, the regulatory hallmarks of the offense, the reasonableness of blood draws, and the Legislature's enactment of the repeat-offender provision. Because the search was reasonable, there's no need to consider implied consent or mistake of law. Society is not willing to recognize an expectation of privacy equal to non-repeat DWI offenders, and that status implicates the State's interest in preventing the specific act of DWI recidivism, just as the Supreme Court has recognized with probationers. Further, repeat offenders have notice that they will be subject to a draw upon a third offense, and the search is based upon an arrest supported by probable cause for DWI.

Blood drawn will also be used for the regulatory purpose of preventing recidivism, which should result in a diminished expectation of privacy as other regulatory search schemes.

The same sort of supervision applicable to railways should be applicable to vehicles, where the state has an even more compelling interest. Blood draws are reasonable and are the most accurate source for showing intoxication. Blood draws are far more reasonable than the visual body cavity search upheld by the Court previously.

Lastly, the Legislature is well-equipped to clarify the concepts of reasonableness, privacy expectations, and the nature and weight of the State's interests, even though it cannot enact legislation violating the Fourth Amendment.

Judge Yeary also filed a dissent, joined by Presiding Judge Keller, finding that repeat-offender status and probable cause of DWI may substitute for a warrant because they make it imperative to obtain the best evidence of intoxication. The presumption in favor of a warrant is not all that clear in Supreme Court precedent. The majority on original submission should have acknowledged the balancing approach. Section 724.012(b) requires an officer to obtain a sample, regardless of whether there is a warrant. The addition of a magistrate adds little practical value in repeat-offender cases; the statute is activated upon arrest for DWI and trustworthy information of two priors. A magistrate will rarely doubt that the two elements are satisfied. Blood draws are a reasonable means to obtain evidence and an arrest reduces privacy expectations. Additionally, the only information the State wants is drug and alcohol content; medical history information is not included. Repeat offender status does not minimize privacy interests but it is properly considered as an interest of the State. Personal safety, property interests, and combating

recidivism are interests of the highest order. Exigency, in combination with the seriousness of the offense, should permit obtaining the best evidence. This respects the Legislature's balance-based judgment in enacting the statute.

Exigent circumstances did not exist to justify a warrantless blood draw where an understaffed police shift was not an emergency, but a routine.

Bonsignore v. State, 2016 Tex. App. LEXIS 6986 (Tex. App.—Fort Worth June 30, 2016, no pet.)

The small size of a police department for a small municipality cannot constitute an exigent circumstance excusing failure to obtain a warrant "for the simple and obvious reason that the vast majority of municipalities outlying major cities…as well as countless other small municipalities scattered across Texas have access to modern technologies that attenuate the handicaps that small police forces might otherwise encounter." The court cites *McNeely*, 133 S. Ct. at 1561-63 (acknowledging that technological innovations and standard-form applications help to streamline the warrant process and expressing concerns about approaches that potentially discourage jurisdictions from pursuing progressive means of acquiring warrants that meet the legitimate interests of law enforcement while preserving the protections afforded by warrants).

No exigent circumstances existed to draw a defendant's blood without a warrant where the trooper did not attempt to contact one of the 13 magistrate judges in the county within the 45 minutes between arriving on scene and the blood draw, even though no judge was on duty and in one of the trooper's previous experiences, it had taken three hours to obtain a warrant.

Fears v. State, 2016 Tex. App. LEXIS 3708 (Tex. App.—Houston [1st Dist.] April 12, 2016, no pet.)

Additionally, the court also found unpersuasive the defendant's belligerence and the testimony of an assistant district attorney on the general length of time in obtaining a warrant with no testimony specific to the circumstances of this case. Finally, the trooper testified he thought he did not need a warrant.

When reviewing a magistrate's probable cause determination for a blood draw warrant under Article 18.01(c) of the Code of Criminal Procedure, the trial court properly allowed testimony to explain that the "11:59 a.m." notation on the probable cause affidavit was a typographical error, that the time the officer came into contact with defendant was really 11:59 p.m., and therefore, that the information was not stale when the magistrate issued the warrant at 2:00 a.m.

Somoza v. State, 481 S.W.3d 693 (Tex. App.—Houston [1st Dist.] 2015, no pet.)

Generally, when the trial court determines whether probable cause supported the magistrate's decision to issue a warrant, the court is constrained to the four corners of the probable cause affidavit. However, the Court of Criminal Appeals has held that "purely technical discrepancies in dates or times do not automatically vitiate the validity of search or arrest warrants." *Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990) (emphasis in original). In *Green*, the Court ruled against the State concerning a search warrant that contained an incorrect date, claimed by the State to be a clerical error, because the State offered no evidence corroborating that contention. Two Texas courts of appeals (Forth Worth and Amarillo) have, in unpublished decisions, extended the rationale in *Green* to allow for the consideration of testimony at a suppression hearing that an error in the supporting probable cause affidavit was a

typographical error. This court adopts the rationale of its sister courts and concludes that the trial court properly allowed testimony from officers at the suppression hearing to explain why the "11:59 a.m." notation on the probable cause affidavit was a typographical error.

One justice concurred in the judgment, but would find the four corners of the affidavit in this case sufficient to support the search warrant. According to the concurring opinion, allowing oral testimony to supplement the affidavit at a suppression hearing opens the door to further testimonial correction of affidavits beyond clerical errors; such a procedure could be prone to abuse.

Exigent circumstances did not exist to justify a warrantless blood draw in a prosecution under Section 49.045 of the Penal Code where the record showed four officers on scene that took care of passenger identification and CPS notification and that the arresting officer assumed the defendant would not cooperate in providing the officer retrograde extrapolation information.

Bell v. State, 485 S.W.3d 663 (Tex. App.—Eastland 2016, no pet.)

Here, the trial court found that none of the officers involved attempted to determine whether a magistrate was available to sign a warrant for a blood draw. The officer also testified that he relied on the Transportation Code's implied consent provision when he went to the hospital to obtain the blood specimen. Other arguments proffered by the State included that the warrantless blood draw was reasonable and that, regardless, the exceptions of implied consent, exigent circumstances, special needs, and search incident to arrest dispensed with the warrant requirement. The court cites *Villarreal* as holding that "warrantless blood draws are not reasonable, that implied consent that has been withdrawn or revoked cannot serve as the requisite free and voluntary consent necessary to satisfy the 4th Amendment, that the special-needs doctrine does not apply, and that the search-incident-to-arrest exception does not apply."