APPENDIX

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 11 MAP 2018

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE

v.

THOMAS S. BELL,
APPELLANT

Submitted: Nov. 30, 2018
Decided: July 17, 2019

Appeal from the Order of the Superior Court at
No. 1490 MDA 2016, dated July 19, 2017,
Reconsideration Denied September 26, 2017,
Reversing the Order of the Court of Common Pleas
of Lycoming County, Criminal Division, at
No. CP-41-CR- 0001098-2015, dated August 19, 2016
and Remanding for Sentencing

OPINION

Before: THOMAS G. SAYLOR, CHIEF JUSTICE, MAX BAER, DEBRA TODD, CHRISTINE DONOHUE, KEVIN M. DOUGHERTY, DAVID N. WECHT, AND SALLIE UPDYKE MUNDY, Justices.

Opinion by JUSTICE DOUGHERTY.

We granted discretionary review to determine whether Section 1547(e) of the Vehicle Code, 75 Pa.C.S. § 1547(e),[1] which expressly allows the Commonwealth to introduce evidence at trial that a defendant charged with Driving Under the Influence (DUI) refused to submit to chemical testing, violates the Fourth Amendment to the United States Constitution[2] or Article I, Section 8 of the Pennsylvania

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[1] Section 1547(e) provides, "[i]n any summary proceeding or criminal proceeding in which the defendant is charged with a violation of [75 Pa.C.S. § 3802 (Driving Under the Influence)] or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by [75 Pa.C.S. § 1547(a) (deeming drivers to have given consent to chemical testing)] may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge." 75 Pa.C.S. § 1547(e).

[2] The Fourth Amendment to the United States Constitution states as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

Constitution.[3] We conclude the evidentiary consequence authorized by Section 1547(e) is constitutional. Accordingly, we affirm the order of the Superior Court.

Following his arrest on suspicion of DUI on May 16, 2015, appellant Thomas Bell was transported to the Lycoming County DUI Center. N.T. 4/28/16 at 37. At the DUI Center, Detective Douglas Litwhiler read the PennDOT DL-26 form to appellant and he refused to submit to a blood test. *Id.* at 38. Appellant was subsequently charged with DUI — general impairment, 75 Pa.C.S. § 3802(a)(1), and a summary traffic offense for failing to use required lighting,
75 Pa.C.S. § 4302(a)(1).

Appellant filed a pre-trial motion to dismiss arguing he had a constitutional right to refuse to submit to a warrantless blood test and thus evidence of his refusal should be suppressed and the DUI charge dismissed. *See* Appellant's Motion to Dismiss, 3/8/16 at 5. The trial court denied the motion on April 28, 2016, and appellant proceeded to a nonjury trial that same day. N.T. 4/28/16 at 6. During

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[3] Article I, Section 8 of the Pennsylvania Constitution states as follows: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." PA. CONST. art. I, § 8.

trial, Detective Litwhiler testified regarding appellant's refusal to submit to blood testing and his assertion he did not want a needle in his arm because he had previously contracted hepatitis from a hospital needle. *Id*. at 38. At the conclusion of trial, appellant was found guilty of all charges.

Appellant filed a motion for reconsideration. Appellant specifically argued the United States Supreme Court's decision in *Birchfield v. North Dakota*, __ U.S.__, 136 S. Ct. 2160 (2016),[4] precludes states from penalizing DUI defendants for refusing to submit to warrantless blood testing and, because he was convicted of DUI based on his refusal, his DUI charge should have been dismissed or, alternatively, he should be granted a new trial at which evidence of his refusal would be inadmissible. *See* Appellant's Motion for Reconsideration, 7/1/16 at 2. The trial court ruled the matter was "clearly controlled [by] *Birchfield*'s main point: a warrantless blood test violates a defendant's right to be free from unreasonable searches and he thus has a constitutional right to refuse it, which refusal cannot provide the basis for him to be convicted of a crime or otherwise penalized." Trial Court Op., 8/19/16 at 5 (emphasis omitted). The trial court ultimately determined appellant was entitled to a new trial because the court had relied on his refusal as a basis for the DUI conviction. *Id*.

[4] *Birchfield* was decided on June 23, 2016, after appellant's April 2016 trial and his March 2016 pre-trial motion to dismiss.

The Commonwealth filed an interlocutory appeal to the Superior Court pursuant to Pa.R.A.P. 311(a)(6) (new trial awarded and Commonwealth claims trial court committed error of law). The Commonwealth argued *Birchfield* did not alter the admissibility of refusal evidence to show consciousness of guilt. The Commonwealth noted the *Birchfield* Court explicitly stated it had previously approved of "'implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply . . . and nothing we say here should be read to cast doubt on them.'" Commonwealth's Superior Court Brief at 11 (emphasis omitted), *quoting Birchfield*, 136 S. Ct. at 2185. The Commonwealth further contended scenarios involving implied consent are warrantless search of his home, where such refusal would be inadmissible at trial. *Id*. at 13. Appellant responded that *Birchfield* created a constitutional right to refuse a warrantless blood test and the admission of his refusal was improper as it penalized him for exercising this constitutional right. Appellant's Superior Court Brief at 4.

A three-judge panel of the Superior Court reversed the trial court's order granting appellant a new trial and remanded the case for sentencing. *Commonwealth v. Bell*, 167 A.3d 744, 750 (Pa. Super. 2017). The panel reviewed Pennsylvania's implied consent statute, 75 Pa.C.S. § 1547, as well as case law in which both the United States Supreme

Court and the Superior Court stated motorists suspected of drunk driving have no constitutional right to refuse chemical testing. *Bell*, 167 A.3d at 748-49, *discussing South Dakota v. Neville*, 459 U.S. 553 (1983) and *Commonwealth v. Graham*, 703 A.2d 510 (Pa. Super. 1997). Based on this precedent, the panel held appellant had no constitutional right to refuse a blood test and it was constitutionally permissible for the Commonwealth to introduce evidence of such refusal at his trial. *Id.* at 749.

The panel further held the trial court's reliance on *Birchfield* for the opposite conclusion was misplaced, finding the decision did not support the assertion appellant had a constitutional right to refuse chemical testing and thus did not change the analysis applied by the courts in *Neville* and *Graham*.
Instead, the panel agreed with the Commonwealth, concluding although the *Birchfield* Court ultimately held it was unreasonable for implied consent laws to impose criminal penalties for refusals, the Court "express[ed] approval of the imposition of civil penalties and evidentiary consequences on motorists who refuse to comply with chemical testing upon their arrest[.]" *Id.* at 750, *citing Birchfield*, 136 S. Ct. at 2185. Based on the Supreme Court's approval of evidentiary consequences set forth in implied consent laws such as Pennsylvania's statute, the Superior Court held appellant's refusal was properly admitted into evidence and thus he was not entitled to a new trial. *Id.*

We accepted review to consider the following question raised by appellant: "Whether § 1547(e) of the Vehicle Code, 75 Pa.C.S. § 1547(e), is violative of Article 1 Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution to the extent that it permits evidence of an arrestee's refusal to submit a sample of blood for testing without a search warrant as proof of consciousness of guilt at the arrestee's trial on a charge of DUI?" *Commonwealth v. Bell*, 183 A.3d 978 (Pa. 2018) (per curiam). As we are presented with a question of law, our scope of review is plenary and non-deferential. *Commonwealth v. Ali*, 149 A.3d 29, 34 (Pa. 2016).

Appellant contends *Missouri v. McNealy*, 569 U.S. 141 (2013), which rejected a *per se* exigent circumstances exception to the warrant requirement for blood testing based on dissipation of blood alcohol content (BAC), and *Birchfield*, which rejected a search incident to arrest exception to the warrant requirement for blood testing, make clear that DUI suspects have a Fourth Amendment right to refuse warrantless blood testing. Appellant's Brief at 7-8. Appellant submits the cases relied on by the Superior Court, *Neville* and *Graham*, are inapposite as those decisions were based on a Fifth Amendment[5]

[5] The Fifth Amendment to the United States Constitution states, in relevant part, as follows: "No person shall . . . be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V

analysis and were decided when it was still viewed as constitutionally permissible to conduct blood testing without first securing a warrant. Id. at 8-9. According to appellant, since *Birchfield* declared a Fourth Amendment right to be free from warrantless blood testing, we must follow the law as stated in *Commonwealth v. Welch*, 585 A.2d 517 (Pa. Super. 1991), which held a defendant's refusal of a warrantless search of her bedroom could not be used as evidence of consciousness of guilt. Appellant's Brief at 9, *citing Welch*, 585 A.2d at 520. In further support of this proposition, appellant cites *Commonwealth v. Chapman*, 136 A.3d 126 (Pa. 2016), in which this Court held a defendant's refusal to submit to a warrantless blood test for DNA purposes was inadmissible to demonstrate consciousness of guilt. Appellant's Brief at 15, citing Chapman, 136 A.3d at 131.

Appellant further argues the language in *Birchfield* pertaining to evidentiary consequences was dicta and does not require a different result here. *Id*. at 10, *citing* Trial Court Op., 8/19/16 at 4. Appellant contends the issue in *Birchfield* was whether DUI defendants may be "'convicted of a crime or otherwise penalized'" for their refusal and it is clear that allowing the Commonwealth to introduce his refusal into evidence penalized him by providing a basis for his conviction. *Id*. (emphasis omitted), *quoting Birchfield*, 136 S. Ct. at 2172. Additionally, appellant argues our decision in *Commonwealth v. Myers*, 164 A.3d 1162 (Pa. 2017) (plurality) held the

Pennsylvania implied consent statute does not establish an exception to the warrant requirement and the Commonwealth is required to prove there was voluntary consent given prior to the extraction of blood. *Id*. at 11. Appellant requests we expand the holding in *Myers* — which involved an unconscious DUI suspect — to conscious individuals and hold there is a Fourth Amendment right to refuse warrantless blood testing. *Id*.

Appellant alternatively requests we hold there is an independent right to refuse a warrantless blood test under Article I, Section 8 of the Pennsylvania Constitution, and that Section 1547(e) violates it. *Id*. at 12-14, *citing Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). Appellant contends although the text of Article I, Section 8 is very similar to that of the Fourth Amendment, this Court has held Article I, Section 8 to be more protective. *Id*. at 12, *citing, e.g., Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1994). Relative to his claim herein, appellant maintains this Court has continuously held the search of a person involves greater intrusion upon privacy interests than the search of a thing. *Id*. at 13, *citing Theodore v. Delaware Valley Sch. Dist*., 836 A.2d 76, 89 (Pa. 2003). Appellant observes no other jurisdiction has addressed the admissibility of refusal evidence utilizing a state constitutional analysis. *Id*. Appellant argues this Court should hold, as a matter of public policy, the severity of the drunk driving problem does not outweigh individual privacy rights, and police may use breath tests or their own

observations to prove DUI cases without violating those rights. *Id.* at 13-14.[6]

In response, the Commonwealth asserts the United States Supreme Court has consistently approved of implied consent laws like Pennsylvania's statute. Commonwealth's Brief at 6-8, *citing Schmerber v. California*, 384 U.S. 757 (1966) (holding admission of blood test evidence does not violate Fifth Amendment) and *Neville, supra* (holding admission of refusal evidence does not violate Fifth Amendment). The Commonwealth further asserts Pennsylvania courts have consistently upheld Section 1547. *Id.* at 8-9, c*iting Commonwealth v. Stair*, 699 A.2d 1250 (Pa. 1997) (Opinion in Support of Affirmance) (holding no constitutional right to refuse chemical testing) and *Graham, supra* (holding admission of refusal evidence does not violate United States Constitution). Based on this precedent, the Commonwealth argues there is no constitutional right to refuse blood testing in the DUI context and the general rule proffered in *Welch* regarding a completely separate situation — *i.e.*, evidence of a refusal to consent to a warrantless search of a bedroom is inadmissible for purposes of demonstrating consciousness of guilt — does not apply here. *Id.* at 9. To bolster this argument, the Commonwealth

[6] The Defender Association of Philadelphia and the Pennsylvania Association of Criminal Defense Lawyers filed an *amicus curiae* brief in which they present arguments similar to those presented by appellant.

points to *Chapman*, where this Court specifically stated "'the admission of evidence of a refusal to consent to a warrantless search to demonstrate consciousness of guilt is problematic, as most jurisdictions hold **(outside the context of implied consent scenarios)** that such admission unacceptably burdens an accused's right to refuse consent.'" *Id.* at 9-10 (emphasis in original), *quoting Chapman*, 136 A.3d at 131.

The Commonwealth contends the implied consent law is the distinguishing factor between *Welch* and the case at hand, observing "Welch had not agreed (by undertaking to engage in a civil privilege such as operating a motor vehicle) to accept an ultimatum pursuant to which she would either consent to a search or accept non-criminal consequences of a refusal to so consent." *Id.* at 10. The Commonwealth explains "[a] motorist asked to consent to a blood test is **not** in the same position as Welch, and is **not** being penalized for exercising a constitutional right. Rather . . . the motorist is subjected to evidentiary consequences for exercising his **statutory** choice to refuse a chemical test, the non-criminal consequences of which he has already agreed to[.]" *Id.* (emphasis in original). The Commonwealth further asserts our recent decision in Myers supports this distinction as the lead opinion stated "Pennsylvania's implied consent statute 'imposes an ultimatum upon the arrestee, who must choose either to submit to a requested chemical test or to face the consequences that follow from the refusal to do

so.'" *Id*. at 11, *quoting Myers*, 164 A.3d at 1177 (plurality).

The Commonwealth additionally contends the decisions in *McNeely* and *Birchfield* support the continued validity of Section 1547(e). The Commonwealth observes the *McNeely* Court, in rejecting a *per se* exigency rule, recognized "'[s]tates have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence,' including 'allow[ing] the motorist's refusal to take a BAC test to be used as evidence against him[.]'" Id. at 12, *quoting McNeely,* 569 U.S. at 160-61. And, the Commonwealth notes the Birchfield Court "confirmed its approval of non-criminal consequences related to implied consent laws" by stating "'[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply . . . and nothing we say here should be read to cast doubt on them.'" *Id*. at 13-14 (emphasis omitted), *quoting Birchfield*, 136 S. Ct. at 2185. Accordingly, the Commonwealth asserts the evidentiary consequences for a refusal to submit to blood testing remain permissible under the Fourth Amendment post-*Birchfield*. *Id*. at 14.

With regard to appellant's alternative Article I, Section 8 argument, the Commonwealth contends it is waived because appellant never raised it in the lower courts. *Id*. at 15-19. The Commonwealth also argues appellant's Article I, Section 8 claim should

be deemed waived because he failed to adequately develop the issue in his brief to this Court. *Id*. at 19-21.

The Commonwealth nevertheless presents an *Edmunds* analysis and asks this Court to conclude Article I, Section 8 provides no greater protections than the Fourth Amendment in the context of this case. The Commonwealth agrees the text of Article I, Section 8 is similar to that of the Fourth Amendment and that this Court has found independent rights guaranteed by Article I, Section 8 on privacy grounds. *Id*. at 22-24, *citing Theodore*, 836 A.2d at 88. However, the Commonwealth maintains Pennsylvania courts have had numerous opportunities to consider implied consent in the search and seizure context and have consistently aligned with the High Court's decisions. *Id*. at 24-25. In fact, the Commonwealth contends, in no case has a Pennsylvania court suggested Article I, Section 8 provides greater protections in the implied consent context, and our courts have instead referred to "'the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution' together[,]" which suggests they are coterminous in this context. *Id*. at 25, *quoting Myers*, 164 A.3d at 1167.

The Commonwealth recognizes that no state court has ruled upon the admissibility of refusal evidence in the implied consent context using a state constitutional analysis, but points to several state

court decisions that have applied a post-*Birchfield* Fourth Amendment analysis to hold "a defendant's refusal to submit to a chemical test of blood in the implied consent context may be constitutionally admitted into evidence at trial." *Id.* at 26. Specifically, the Commonwealth cites to an *en banc* Colorado Supreme Court decision concluding *Birchfield* was distinguishable from cases involving the admissibility of refusal evidence, *id.* at 26-27, *citing Fitzgerald v. People*, 394 P.3d 671, 675-76 (Colo. 2017), and a Vermont Supreme Court decision holding "'criminalizing the revocation of implied consent crosses the line in terms of impermissibly burdening the Fourth Amendment . . . [b]ut allowing evidence of a refusal to submit to a blood test in the context of a DUI prosecution does not warrant the same constitutional protection.'" *Id.* at 28, *quoting State v. Rajda*, 196 A.3d 1108, 1121 (Vt. 2018).

Regarding public policy, the Commonwealth argues Section 1547(e) does not infringe upon privacy rights as the subsection applies only when a motorist invokes his statutory right to refuse a blood test. *Id.* at 30. Where no blood test takes place, the Commonwealth maintains, the motorist's privacy has not been invaded. *Id.* The Commonwealth further argues the inability to present refusal evidence at trial would prejudice DUI prosecutions because the jury will expect evidence of BAC or an explanation for its absence. *Id.* at 31-32. Lastly, the Commonwealth contends it is vital for it to possess

non-criminal means, such as the admissibility of refusal evidence, to encourage motorists to comply with requests for chemical testing. *Id.* at 32-34.[7]

Preliminarily, we agree with the Commonwealth that appellant's current claim Section 1547(e) violates Article I, Section 8 is waived. Although appellant stated in his pre-trial motion to dismiss "Pennsylvania's Implied Consent Law violates Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution[,]" Appellant's Motion to Dismiss, 3/8/16 at 2, he failed at that time to develop an argument that the Pennsylvania Constitution provided any independent grounds for relief. Furthermore, in his post-trial motion for reconsideration, appellant did not reference Article I, Section 8 at all, but only stated *Birchfield* provided him with a "constitutional right to refuse testing of blood[.]" Appellant's Motion for Reconsideration, 7/1/16 at 2. Although appellant includes a brief and cursory *Edmunds* analysis in his brief to this Court, it is the first time he has suggested that Article I, Section 8 provides an independent basis for relief. *See* Appellant's Brief at 12-14. As appellant failed to preserve his Article I, Section 8 claim we decline to consider it. *See Commonwealth v. Chamberlain*, 30 A.3d 381, 405 (Pa. 2011) (declining to consider whether state

[7] The Pennsylvania District Attorney's Association filed an *amicus curiae* brief in which it presents arguments similar to those presented by the Commonwealth.

constitution departed from federal counterpart where argument was not directly advanced in lower courts); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal"). We therefore limit our review to appellant's argument Section 1547(e) violates his rights under the Fourth Amendment.[8]

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[8] Neither appellant's failure to develop an *Edmunds* analysis in the trial court nor his failure to reference Article I, Section 8 in his motion for reconsideration is the basis upon which we find waiver. Instead, we find waiver on the same basis as did the Court in *Chamberlain* — appellant "did not claim before the trial court that the Pennsylvania Constitution provided an independent basis for relief." *Chamberlain*, 30 A.3d at 405; *see also id*. at 406 ("We decline to consider whether state due process should depart from federal due process with regard to missing evidence **where this argument was not directly advanced in the court below**.") (emphasis added). Although we recognize appellant stated in his motion to dismiss that "Pennsylvania's Implied Consent Law violates Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution[,]" *see* Appellant's Motion
to Dismiss, 3/8/16 at 2, appellant failed to directly advance any argument regarding whether the clauses differed. We find the current situation to be akin to cases where this Court has repeatedly stated general claims under the state and federal constitutions do not present independent questions of state constitutional law. *See e.g., Commonwealth v. Lagenella*, 83 A.3d 94, 99 n.3 (Pa. 2013); *Commonwealth v. Galvin*, 985 A.2d 783, 793 n.15 (Pa. 2009); *Commonwealth v. Starr*, 664 A.2d 1326, 1334 n.6 (Pa. 1995). Lastly, the fact that the question granted for review in this case

The Fourth Amendment to the United States Constitution provides, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend. IV. It has long been established that a blood draw for purposes of determining BAC constitutes a search under the Fourth Amendment. *Schmerber*, 384 U.S. at 767. As such, the pertinent question under a Fourth Amendment analysis is whether such a search is reasonable. *Birchfield*, 136 S. Ct. at 2173. Generally, in order for a search to be reasonable, the Fourth Amendment requires that police obtain a warrant, supported by probable cause and issued by a neutral magistrate, prior to searching an individual or his property. *Commonwealth v. Arter*, 151 A.3d 149, 153 (Pa. 2016). Although searches conducted without a warrant are presumed to be unreasonable, there are exceptions to this rule, including searches conducted with the consent of the individual whose person or property is being searched. *Commonwealth v. Wilmer*, 194 A.3d 564, 567-68 (Pa. 2018).

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included appellant's claim under Article I, Section 8, *see Commonwealth v. Bell*, 183 A.3d 978 (Pa. 2018) (*per curiam*), does not preclude us from ultimately finding the claim waived. *See Commonwealth v. Metz*, 633 A.2d 125, 126 (Pa. 1993) (declining to address an issue upon which allocatur was granted due to waiver).

In order to combat the dangers of drunk driving, states, including Pennsylvania, have enacted laws which criminalize driving with a BAC that exceeds a certain level. *Birchfield*, 136 S. Ct. at 2166. Blood testing is necessary to determine a motorist's BAC but those suspected of DUI routinely decline to submit to testing when given the option. *Id*. Accordingly, states have also enacted implied consent laws, which impose penalties on motorists who refuse to undergo BAC testing. *Id*. These laws are based on the notion that driving is a privilege rather than a fundamental right. *PennDOT v. Scott*, 684 A.2d 539, 544 (Pa. 1996). When partaking in the privilege of driving on Pennsylvania's roads, motorists must comply with Pennsylvania's implied consent statute, 75 Pa.C.S. § 1547. The version of the implied consent statute in effect at the time of appellant's arrest provided, in relevant part, as follows:

> Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:

> (1) in violation of . . . [75 Pa.C.S. §] 3802 (relating to driving under influence of alcohol or controlled substance)[.]

Former 75 Pa.C.S. § 1547(a)(1).[9]

Section 1547 also sets forth penalties for motorists who were arrested on suspicion of DUI and refused to submit to chemical testing. These penalties include requiring PennDOT to suspend the motorist's license for at least one year, *see* 75 Pa.C.S. § 1547(b)(1),[10] and the penalty at issue here: expressly allowing evidence of the motorist's refusal to

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[9] We refer in this opinion to the version of Section 1547(a) in effect at the time of appellant's arrest as *former* 75 Pa.C.S. §1547(a). The full citation for this version is as follows: Act of June 17, 1976, P.L. 162, No. 81, § 1, amended December 15, 1982, P.L. 1268, No. 289, § 5, amended February 12, 1984, P.L. 53, No. 12, § 2, amended May 30, 1990, P.L. 173, No. 42, § 5, amended December 18, 1992, P.L. 1411, No. 174, § 6, amended July 2, 1996, P.L. 535, No. 93, § 1, amended July 11, 1996, P.L. 660, No. 115, § 8, amended December 21, 1998, P.L. 1126, No. 151, § 18, amended October 4, 2002, P.L. 845, No. 123, § 3, amended September 30, 2003, P.L. 120, No. 24, § 9.1, 10, amended November 29, 2004, P.L. 1369, No. 177, § 2, amended May 11, 2006, P.L. 164, No. 40, § 2, *former* 75 Pa.C.S. § 1547(a). Subsection (a) was amended in the wake of the *Birchfield* decision. However, subsections (b) and (e) remained unchanged following the amendments.

[10] Section 1547(b) also requires police officers to inform motorists that their refusal would subject them to enhanced criminal penalties if convicted of DUI. See 75 Pa.C.S. § 1547(b)(2)(ii). Such penalties were held to be unconstitutional

be admitted at his subsequent criminal trial on DUI charges. *See* 75 Pa.C.S. § 1547(e). Section 1547(e) provides as follows:

> In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of [75 Pa.C.S. §] 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge.

75 Pa.C.S. § 1547(e).

With this statutory framework in mind, we now review the relevant jurisprudence surrounding warrantless blood testing in the context of DUI arrests. In *Schmerber*, the United States Supreme Court considered whether use of the results of a DUI defendant's warrantless blood test as evidence at his trial violated, *inter alia*, the Fourth and Fifth

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in *Birchfield*. In this case, appellant challenges the constitutionality of Section 1547(e) only and, in any event, the Commonwealth has previously conceded that appellant cannot be subject to enhanced criminal penalties based on his refusal when this case proceeds to sentencing. *See* Trial Court Op., 8/19/16 at 2.

Amendments. 384 U.S. at 759. The High Court reasoned the results of the blood test were not testimonial in nature and thus did not constitute compelled self-incrimination in violation of the Fifth Amendment. *Id.* at 760-65. The Court also denied the defendant's Fourth Amendment claim, concluding it was reasonable for the officer to conduct a warrantless blood test based on exigent circumstances, namely that the defendant was rushed to the hospital, the officer had to investigate the scene of the accident before arriving at the hospital to make the blood draw, and the amount of alcohol in the defendant's blood would have begun to dissipate had the officer first sought a warrant. *Id.* at 766-72.

The Court later decided *Neville*, which presented the question of whether the trial court's admission of a DUI defendant's refusal to submit to a warrantless blood test violated his rights under the Fifth Amendment. 459 U.S. at 554. The defendant's refusal was admitted into evidence by way of a South Dakota implied consent statute which permitted motorists to refuse the test, but penalized such refusal by revoking their driving licenses for one year and allowing evidence of their refusal to be used against them at trial. *Id.* at 559-60. The *Neville* Court ultimately held the admission of refusal evidence did not violate the Fifth Amendment because the defendant had not been coerced into refusing the test, but instead was given a choice between submitting to the test or accepting the consequences of refusing the test. *Id.* at 562-63. In doing so, the Court

recognized the state would prefer the defendant choose to submit to the test as actual BAC evidence which exceeds lawful limits is far stronger evidence of guilt than refusal evidence. *Id*. at 564. As the refusal was not coerced, the Court held its admission into evidence was not barred by the Fifth Amendment right against self-incrimination. *Id*. The Court additionally held the officer's failure to warn the defendant that his refusal could be used against him at trial did not violate his due process rights. *Id*. at 564-66.

The legal landscape regarding warrantless blood tests changed with *McNeely*, in which a DUI defendant challenged the admission of his BAC results where he had refused to submit to a breath test and was then transported to a hospital where a warrantless blood draw was performed without his consent. 569 U.S. at 145-47. The Court held suppression of the blood test results was proper because the warrantless blood test violated the defendant's Fourth Amendment rights. *Id*. at 164-65. The Court rejected Missouri's argument there should be a *per se* rule allowing warrantless blood tests in all DUI cases, based on the alleged automatic exigency arising from the natural dissipation of alcohol in the bloodstream. *Id*. at 151-56. Instead, the Court continued to follow *Schmerber* and held whether a warrantless blood test is reasonable based on exigent circumstances must be determined by viewing the totality of the circumstances of each particular case. *Id*. at 156. In support of this conclusion, a plurality

of the Court noted states have other tools to enforce drunk driving laws and to secure BAC evidence, that presumably do not implicate Fourth Amendment concerns. *Id.* at 160-61 (plurality). Included in these tools, the plurality expressly recognized, are "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 . . . on suspicion of a drunk-driving offense" and "[s]uch laws impose significant consequences when a motorist withdraws consent[,]" including "allow[ing] the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* at 161 (plurality).

The Court then decided *Birchfield*. In the introduction to its opinion, the Court noted the penalties for refusing chemical testing in early implied consent laws were suspension or revocation of a motorist's license and allowing evidence of a motorist's refusal to be admitted in a subsequent trial. 136 S. Ct. at 2169. The Court also observed that, more recently, in an effort to further strengthen drunk driving laws, states began imposing criminal penalties on motorists who refuse to submit to chemical testing. *Id.* *Birchfield* squarely presented the question of whether compelling motorists to submit to warrantless breath or blood tests on pain of criminal consequences violates the Fourth Amendment. *Id.* at 2172.

In deciding this question, the High Court first considered whether the search of a DUI suspect's blood or breath was exempted from the warrant requirement as a search incident to arrest. *Id*. at 2174-84. After an assessment of "the effect of BAC tests on privacy interests and the need for such tests," the Court concluded "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving" because "[t]he impact of breath tests on privacy is slight, and the need for BAC testing is great." *Id*. at 2184. However, the Court reached "a different conclusion with respect to blood tests[,]" concluding "[b]lood tests are significantly more intrusive," "their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test[,]" and there is no "justification for demanding the more intrusive alternative without a warrant." *Id*.

The Court next considered whether the implied consent statute at issue satisfied the consent exception to the warrant requirement. *Id*. at 2185-87. The Court recognized its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply . . . and nothing we say here should be read to cast doubt on them." *Id*. at 2185, *citing McNeely*, 569 U.S. at 160-62; *Neville*, 459 U.S. at 560. However, the High Court held "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on

public roads" and "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at 2185-86.

Following *Birchfield*, this Court decided *Myers*. In *Myers*, police officers arrested a motorist for DUI and transported him to the hospital as they believed he was so severely intoxicated he required medical attention. 164 A.3d at 1165. Notwithstanding the fact that medical treatment at the hospital rendered the DUI suspect unconscious, a police officer read out the PennDOT DL-26 form in his presence and instructed hospital personnel to draw blood from him for purposes of securing BAC evidence. *Id*. This Court affirmed suppression of the blood test results, holding a blood draw from an unconscious DUI suspect violates the dictates of Pennsylvania's implied consent law as Section 1547(b)(1) provides an absolute right to refuse chemical testing, and an unconscious individual is unable to exercise that right. *Id*. at 1172. A majority of the Court also held, albeit without complete agreement as to reasoning, that a warrantless blood draw from an unconscious DUI suspect violates the Fourth Amendment. *Id*. at 1173-82 (plurality); 1183-84 (Saylor, C.J., concurring).

The United States Supreme Court's decisions in *McNeely* and *Birchfield* and this Court's decision in *Myers* indicate a warrantless blood test, which is conducted when no exceptions to the warrant requirement apply, violates the Fourth Amendment

rights of a motorist suspected of DUI. Outside the implied consent context, such a violation would trigger the application of *Welch* and a refusal to submit to the warrantless blood test would be inadmissible at any subsequent trial on the DUI charges. *See Welch*, 585 A.2d at 520 (defendant's refusal of a warrantless search of her bedroom could not be used as evidence of consciousness of guilt). However, we agree with the Commonwealth that the Pennsylvania implied consent statute is the distinguishing factor between Welch and the case at hand. *See Chapman*, 136 A.3d at 131 ("the admission of evidence of a refusal to consent to a warrantless search to demonstrate consciousness of guilt is problematic, as most jurisdictions hold **(outside the context of implied-consent scenarios)** that such admission unacceptably burdens an accused's right to refuse consent") (emphasis added). As the Commonwealth aptly states, unlike the defendant in *Welch*, appellant "agreed (by undertaking to engage in a civil privilege such as operating a motor vehicle) to accept an ultimatum pursuant to which [he] would either consent to a search or accept non-criminal consequences of a refusal to so consent." Commonwealth's Brief at 10.

Indeed, as the *Myers* plurality recognized, implied consent laws "authorize a police officer to request a motorist's submission to a chemical test, at which point the motorist must choose either (a) to comply with the test or (b) to refuse and accept the consequences that accompany refusal." 164 A.3d at

1174 (plurality). The choice may well be a difficult one, but this alone does not invalidate the "implied consent" created by the statute. *See Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) ("the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights'"), *quoting Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973). As
implied by *Birchfield*, the pertinent question in determining the constitutionality of a statute demanding this particular choice is whether the consequence for refusing a warrantless blood test under-

mines the inference that the motorist implicitly consented to it, and suggests instead that the "search" was coerced.[11,12]

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[11] This question fully encompasses the threshold issue in *Jenkins* and *Chaffin* and our analysis below answers it. *Jenkins*, 447 U.S. at 236 ("The 'threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind therights involved.'"), *quoting Chaffin*, 412 U.S. at 32. As seen *infra*, we disagree with the dissent's assertion that "[t]he sole purpose of the implied consent law's consequences of refusal is to induce a motorist's compliance with chemical testing." Dissenting Opinion, slip op. at 21 n.6. *See also id*. at 29 ("the 'only objective' of this practice is to 'discourage the assertion' of that constitutional right"), *quoting Chaffin*, 412 U.S. at 32 n.20. Indeed, the consequence at issue here — allowing evidence of a motorist's refusal at his subsequent trial for DUI — does not solely punish a defendant but also has a legitimate purpose, just as the consequence at issue in *Jenkins*. *See Jenkins*, 447 U.S. at 238 (impeachment evidence has the legitimate purpose of "advanc[ing] the truth-finding function of the criminal trial"). As stated below, the admission of refusal evidence "furthers the reliability of the criminal process and its truth-seeking function by allowing the jurors to understand why the State is not submitting an evidentiary test in a DUI prosecution." *Rajda*, 196 A.3d at 1120. Surely, it cannot be said that the sole purpose of the admission of refusal evidence "is to induce a motorist's compliance with chemical testing." Dissenting Opinion, slip op. at 21 n.6.

[12] The dissent criticizes our decision not to address the High Court's jurisprudence regarding the unconstitutional conditions doctrine and the penalization of the exercise of constitutional rights. *See* Dissenting Opinion, slip op. at 14-15 n.4, 19 & n.5, 20. Although appellant may have raised the unconstitutional conditions doctrine in his motion to dismiss before the

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trial court, *see* Appellant's Motion to Dismiss, 3/8/16 at 2 ("Pennsylvania's Implied Consent Law violates Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution under the Unconstitutional Conditions Doctrine"), we decline to address the doctrine here because appellant himself, in his brief to this Court, does not discuss the doctrine or its potential application to his case, nor does he cite to any of the High Court's cases discussing the penalization of constitutional rights, but instead cites solely to the distinguishable cases of *Chapman* and *Welch*. Furthermore, we take considerable issue with Justice Wecht's spurious assertion that we prefer "to set a dangerous and unfounded precedent suggesting that the universe of applicable law is limited to the Table of Citations section of an appellant's brief." *See* Dissenting Opinion, slip op. at 20. Of course we are not limiting our review. Instead, we apply the longstanding principle that courts should not act as advocates at the risk of depriving the parties the opportunity to be heard. *Yount v. DOC*, 966 A.2d 1115, 1119 (Pa. 2009), *citing Luitweiler v. Northchester Corp*., 319 A.2d 899, 901 n.5 (Pa. 1974). Indeed, the Commonwealth here had no opportunity to present advocacy to this Court as to whether the unconstitutional conditions doctrine is implicated because the words "unconstitutional conditions doctrine" do not even appear in appellant's brief.

In any event, we find the unconstitutional conditions doctrine is inapplicable here as the implied consent law does not condition the privilege of driving upon a motorist's submission to future warrantless blood testing. Indeed, as stated previously, Section 1547(b)(2) provides an absolute right to refuse all chemical testing. *See Myers*, 164 A.3d at 1172. The fact that certain consequences arise from a motorist's refusal to submit to chemical testing, including the evidentiary consequence presently at issue, does not render the implied consent statute unconstitutional. The lead opinion in *Myers*, authored by Justice Wecht, who takes a dissenting position here, recognized as

Our view on this point is substantially aligned with that of the Supreme Court of Vermont. When deciding an issue identical to the one at hand, the court opined:

> As the [*Birchfield*] Court suggested . . . the admission of evidence of a refusal to submit to a blood draw is a qualitatively different consequence with respect to its burden on the Fourth Amendment. Criminalizing refusal places far more pressure on defendants to submit to the blood test — thereby impermissibly burdening the constitutionally protected right not to submit to the test — than merely allowing evidence of the refusal at a criminal DUI trial, where a defendant can explain the basis for the refusal and the jury can consider the defendant's explanation for doing so. Moreover, the admission of refusal evidence in the context of a DUI proceeding, without directly burdening the privacy interest protected by the Fourth Amendment, furthers the reliability of the criminal process and its truth-seeking function by allowing the jurors to

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much by stating: "[t]he statute does not authorize police officers to seize bodily fluids without an arrestee's permission. Instead, it imposes an ultimatum upon the arrestee, who must choose either to submit to a requested chemical test or to face the consequences that follow from the refusal to do so." *Id*. at 1177; *see also Jenkins*, 447 U.S. at 236 ("the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights'"), *quoting Chaffin*, 412 U.S. at 30.

understand why the State is not submitting an evidentiary test in a DUI prosecution.

The implied consent statute establishes a bargain in which, in exchange for the privilege of engaging in the potentially dangerous activity of operating a motor vehicle on the highway, motorists impliedly consent to testing for impaired driving to protect the public. The critical question is whether civil or criminal sanctions resulting from motorists' revocation of their implied consent unconstitutionally coerce them to submit to testing. In *Birchfield*, the U.S. Supreme Court has ruled, with respect to the more invasive blood test, that only criminalizing the revocation of implied consent crosses the line in terms of impermissibly burdening the Fourth Amendment.

But allowing evidence of a refusal to submit to a blood test in the context of a DUI prosecution does not warrant the same constitutional protection. The speculative conclusion that a citizen will consent to a search that he or she would otherwise resist solely to avoid evidentiary implications at a possible future trial seems too attenuated to meet the U.S. Supreme Court's test in practice. Indeed, as the Court in *Birchfield* pointed out, states began criminalizing refusals because the other civil and evidentiary consequences provided an insufficient incentive for motorists — most particularly repeat DUI offenders — to submit to testing.

Rajda, 196 A.3d at 1120-21 (internal footnotes, quotations, brackets, and citations omitted). Like the Vermont Supreme Court, and following *Birchfield*, we focus our analysis on the nature of the consequences permitted by Pennsylvania's implied consent statute.

Undeniably, the *Birchfield* Court rejected criminal prosecution as a valid consequence for refusing a warrantless blood test by stating "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." 136 S. Ct. at 2186. At the same time, the Court did not back away from its prior approval of other kinds of consequences for refusal, such as "evidentiary consequences." *Id*. at 2185 ("Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.") (internal citations omitted).[13] Moreover, the *Birchfield* Court

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[13] The Supreme Court of the United States recently decided the *Birchfield*-related case of *Mitchell v. Wisconsin*, ___ U.S. ___, 139 S. Ct. 2525 (2019) (plurality), in which the plurality determined a warrantless blood test is generally valid under the 4th Amendment based on exigent circumstances where a motorist suspected of DUI is unconscious. Although *Mitchell* is not
directly relevant here, the opinion signals general approval of implied consent laws and evidentiary consequences for failing

cited to the *McNeely* plurality which provided a general endorsement of the evidentiary consequence at issue in this case — evidence of a refusal being admitted at a DUI suspect's trial. *Id.* at 2185, *citing McNeely*, 569 U.S. at 161 (implied consent laws "impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most [s]tates allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution"). Finally, the *Birchfield* Court also cited *Neville*, which approved of admitting refusal evidence in a DUI trial, albeit in the context of a Fifth Amendment challenge. *Id., citing Neville*, 459 U.S. at 560. Based on the above, we find ample support to conclude the High Court would approve this particular evidentiary consequence in the context of a Fourth Amendment challenge.[14]

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to comply with such laws. *See Mitchell*, 139 S. Ct. at 2532 ("'Our prior opinions referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.'"), *quoting Birchfield*, 136 S. Ct. at 2185.

[14] Our learned colleague in dissent is deliberate in his attempt to dispute this conclusion. In doing so, Justice Wecht relies on dicta from *Birchfield* which he finds useful, *see* Dissenting Opinion, slip op. at 10-11 (quoting dicta from *Birchfield* regarding the seeking of warrants), while simultaneously criticizing our reliance on the High Court's expressed intention not to cast doubt on implied consent laws that impose civil penalties and evidentiary consequences. *Compare id.* at 23 ("As I read

Accordingly, we conclude the "evidentiary consequence" provided by Section 1547(e) for refusing to submit to a warrantless blood test — the admission of that refusal at a subsequent trial for DUI — remains constitutionally permissible post-*Birchfield*. We therefore affirm the order of the Superior Court.

Jurisdiction relinquished.

Birchfield's caveat, the Court merely declined to opine concerning matters outside the scope of the issue upon which certiorari was granted") *with Birchfield*, 136 S. Ct. at 2185 ("Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply . . . and nothing we say here should be read to cast doubt on them."). The dissent also manufactures an illusory circularity problem where one does not exist in order to reach a conclusion — invalidating all implied consent laws with respect to blood testing — that no other court has reached. *Cf. Rajda*, 196 A.3d at 1121 ("[t]he case law interpreting implied consent laws demonstrates that the judiciary overwhelmingly sanctions the use of civil penalties and evidentiary consequences against DUI suspects who refuse to comply") (citation omitted); *Fitzgerald*, 394 P.3d at 676 ("the Supreme Court has all but said that anything short of criminalizing refusal does not impermissibly burden or penalize a defendant's Fourth Amendment right to be free from an unreasonable warrantless search"). Rather than engaging in a discussion of the dissent's perceived "paradox," we need only answer one question: is the evidentiary consequence at issue so coercive that it renders a motorist's prospective consent to blood testing involuntary? As detailed above, the answer to that question is no.

Chief Justice Saylor and Justices Baer, Todd and Mundy join the opinion.

Justice Mundy files a concurring opinion in which Justice Todd joins.

Justice Wecht files a dissenting opinion in which Justice Donohue joins.

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 11 MAP 2018

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE

v.

THOMAS S. BELL,
APPELLANT

Submitted: Nov. 30, 2018
Decided: July 17, 2019

Appeal from the Order of the Superior Court at
No. 1490 MDA 2016, dated July 19, 2017,
Reconsideration Denied September 26, 2017,
Reversing the Order of the Court of Common Pleas of
Lycoming County, Criminal Division, at
No. CP-41-CR- 0001098-2015, dated August 19, 2016
and Remanding for Sentencing

CONCURRING OPINION

Opinion by JUSTICE MUNDY.

I join the Majority as I agree that the evidentiary consequences of Section 1547(e) remain constitutionally permissible post-*Birchfield*. *See* Majority Opinion at 22. I write separately to add that I would affirmatively conclude that although Appellant has the right to refuse a blood test absent a warrant or a valid exception to the warrant requirement the evidentiary consequences of that refusal are not protected by the Fourth Amendment.

As the Majority indicates, "[t]he United States Supreme Court's decisions in [*Missouri v.*] *McNeely* [, 569 U.S. 141 (2013)] and *Birchfield* [*v. North Dakota*, 136 S. Ct. 2160 (2016)], and this Court's decision in [*Commonwealth v.*] *Myers*, [164 A.3d 1162, (Pa. 2017)] indicate a warrantless blood test, which is conducted when no exceptions to the warrant requirement apply, violates the Fourth Amendment rights of a motorist suspected of DUI." Majority Op. at 18. It does not follow that the motorist's right to refuse the blood test receives the same constitutional protection, or stated differently, there is no constitutional right of refusal without consequence. To the contrary, the motorist's Fourth Amendment right to be free from a warrantless search is protected when the blood test is not administered absent a warrant, or an exception to the warrant requirement, while the motorist's implied consent subjects the motorist to certain consequences. Here,

Section 1547(e) of the implied consent statute allows for the introduction of "evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge." 75 Pa.C.S. § 1547(e).

By asserting Section 1547(e) is unconstitutional, Appellant urges extension of *Birchfield*'s holding that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense[,]" to holding any adverse consequence for refusing a blood test is a violation of the Fourth Amendment. *Birchfield*, 136 S. Ct. at 2186. As the case comes to this Court, Appellant was read the DL-26 form advising him that a refusal to submit to chemical testing could result in an enhanced penalty. Appellant was not subjected to a warrantless blood test following his refusal, no search was performed, no BAC evidence exists, and Appellant was not criminally punished for refusing to comply with the request for the blood test. Accordingly, there is no violation of the Fourth Amendment or the cases decided thus far following *Birchfield*. *Birchfield* did not render implied consent statutes constitutionally infirm. Rather, it explicitly limited implied consent statutes by prohibiting states from criminalizing the refusal to submit to a blood test. I am hesitant to extend the High Court's holding beyond the limits of circumstances addressed by the decision. Therefore, I concur.

Justice Todd joins this concurring opinion.

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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DISSENTING OPINION

Opinion by JUSTICE WECHT.

In *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, __ U.S. __, 136 S. Ct. 2160 (2016), the Supreme Court of the United States altered the Fourth Amendment paradigm in DUI investigations. The conclusions that the Court reached, particularly in *Birchfield*, have a substantial ripple effect upon numerous other question of constitutional dimension.

Although *Birchfield* answers quite clearly the question upon which the Court granted certiorari, the Court's discussion regarding the concept of "implied consent" is puzzling. The *Birchfield* Court's opacity on this point prompted substantial disagreement among the members of this Court in *Commonwealth v. Myers*, 164 A.3d 1162 (Pa. 2017), and we at that time were unable to reach a consensus regarding the impact of the *Birchfield* decision upon Pennsylvania law. This Court has resolved certain unanswered questions relating to matters such as the legality of a criminal sentence that implicates *Birchfield*. *See Commonwealth v. Monarch*, 200 A.3d 51 (Pa. 2019). However, since *Myers*, this Court has not had an opportunity to address several other legal questions that remain unresolved in *Birchfield*'s wake. These questions relate to the voluntariness of consent, driver's license suspension, and admissibility of evidence. In this case, we address the "evidentiary consequence," *Birchfield*, 136 S. Ct. at 2185, set forth in 75 Pa.C.S. § 1547(e), which allows the Commonwealth to introduce evidence at trial of a motorist's refusal to consent to a

warrantless blood draw, thus suggesting consciousness of guilt.

It is evident to me that all of these unanswered questions, including the question at bar, have the same answer. The answer is that a blood test, unlike a breath test, is an intrusive manner of Fourth Amendment search, for which there is no readily available exception to the Fourth Amendment's warrant requirement. As such, under established constitutional doctrine, an individual has a right to refuse such a warrantless search, and the exercise of that right may not be penalized, coerced, burdened, manipulated, or involuntarily bargained away by the State. The Fourth Amendment need not be strained to reach a contrary conclusion, because the evidence that is sought remains available, and the legislative measures designed to secure that evidence all remain permissible. Police officers merely must obtain search warrants for blood tests, or resort to the exigent circumstances exception when they cannot. Because, in this case, the failure to obtain a search warrant rendered the blood test unconstitutional, Thomas Bell had a constitutional right to refuse to consent to that search, and the use of his refusal as evidence of his guilt placed an impermissible burden upon the exercise of Bell's Fourth Amendment rights.

My reasoning follows.

I. Constitutional Right to Refuse Consent to an Invalid Search

The instant case implicates constitutional issues that were not before the Court in *McNeely* or *Birchfield*. These decisions nonetheless impact the question presented here, so we must survey the legal landscape as it now stands in light of the Court's analyses in these cases. When a motorist is suspected of DUI, testing of the motorist's blood alcohol concentration ("BAC") is the primary means by which police officers obtain evidence of the motorist's crime. Such testing typically requires a sample of the motorist's breath or blood. Breath tests and blood tests both indisputably constitute searches under the Fourth Amendment. *See Birchfield*, 136 S. Ct. at 2173 (citing *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 616-17 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966)).

Even in the absence of a search warrant, such tests once were viewed as constitutional pursuant to *Schmerber*, wherein the Court held that a warrantless blood test was permissible because, in light of the constant dissipation of alcohol from the bloodstream, the officer who arrested a motorist suspected of DUI "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Schmerber*, 384 U.S. at 770 (citation and quotation marks omitted). Generalized acceptance

of this theory was particularly understandable following the Court's dictum in *South Dakota v. Neville*, 459 U.S. 553 (1983), wherein the Court—addressing whether evidence of a motorist's refusal to comply is "testimonial" for purposes of the Fifth Amendment right against self-incrimination—stated broadly that "*Schmerber* . . . clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Neville*, 459 U.S. at 559.

However, in *McNeely*, the Court clarified *Schmerber*, holding that "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." *McNeely*, 569 U.S. at 165. Crucial to the *McNeely* Court's reasoning were the "advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications" such as the remote communication with a magistrate by telephone, radio, e-mail, and video-conference, as well as "other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations." *McNeely*, 569 U.S. at 154-55. In other words, when Schmerber was decided, time constraints created a greater need for an exception from the warrant requirement than exists today, with the advent of technology that makes the acquisition of a search warrant easier and more expeditious than ever before.

Following *McNeely*, although the dissipation of BAC evidence "may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically." *Id.* at 156.[1] Rather, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* A question arose: whether warrantless BAC testing may be justified categorically upon the basis of a different exception to the warrant requirement, such as consent or the search-incident-to-arrest doctrine? Enter *Birchfield*.

The *Birchfield* decision began with a discussion of the history, purpose, and operation of "implied consent" laws, which are designed to encourage a motorist's cooperation with BAC testing. "Because the cooperation of the test subject is necessary when

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[1] As discussed further below, *infra* n.9, a plurality of the Supreme Court of the United States now has concluded that, in the particular circumstance in which a motorist suspected of DUI is unconscious, the exigent circumstances exception to the warrant requirement generally will apply. *Mitchell v. Wisconsin*, __ U.S. __, 139 S. Ct. 2525 (2019) (plurality). This ruling, however, does not alter *McNeely*'s application to conscious motorists, nor does it provide any clarity with regard to the question presently at bar. Further, because we do not here consider a blood draw conducted upon an unconscious motorist, *Mitchell* does not inform the analysis with regard to the threshold question of whether the search compelled in this case was permissible under the Fourth Amendment or Article I, Section 8 of the Pennsylvania Constitution.

a breath test is administered and highly preferable when a blood sample is taken, the enactment of laws defining intoxication based on BAC made it necessary for States to find a way of securing such cooperation. So-called 'implied consent' laws were enacted to achieve this result." *Birchfield*, 136 S. Ct. at 2168-69.

Although the typical consequences of refusal include suspension or revocation of a motorist's driver's license and the admission of evidence of the motorist's refusal in a subsequent prosecution, the Court observed that "some States have begun to enact laws making it a crime to refuse to undergo testing." *Id*. at 2169. Importantly, it was the question of the constitutionality of criminal punishment for refusal to submit to a *warrantless* BAC test—and not the other consequences imposed under implied consent schemes—upon which the Court granted certiorari. *See id*. at 2172 ("We granted certiorari . . . in order to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.").

After observing the differences between the facts of the three petitioners' cases—Birchfield refused a blood test and was convicted of a crime; Bernard refused a breath test and was convicted of a crime; and Beylund submitted to a blood test and his driver's license was suspended based upon his

BAC—the Court articulated the framework for resolving the constitutional question at issue. The Court premised its *ratio decidendi* upon the following inquiry:

> Despite these differences, success for all three petitioners depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate. If, on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant.

Id. "And by the same token," the Court added, "if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding." *Id*. at 2173.

Under *Birchfield*, the validity of the search is dispositive of the lawfulness of the penalty. Accordingly, the Court began its analysis "by considering whether the searches demanded in these cases were consistent with the Fourth Amendment." *Id*. The Court spent the vast majority of its analysis upon the search-incident-to-arrest doctrine as an excep-

tion to the Fourth Amendment's warrant requirement, ultimately arriving at the critical distinction for which the *Birchfield* decision is now known: "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185. Because a breath test falls within the search-incident-to-arrest doctrine, it is a *valid search*, and a state "may criminalize the refusal to comply . . . just as a State may make it a crime for a person to obstruct the execution of a valid search warrant." *Id.* at 2172. Thus, Bernard lawfully could be punished for his refusal to comply with a warrantless breath test. "That test was a permissible search incident to Bernard's arrest for drunk driving . . . . Accordingly, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it." *Id.* at 2186 (emphasis in original).

"Blood tests are a different matter." *Id.* at 2178. The Court reasoned that, due to the necessity of piercing the skin to extract a vital bodily fluid, due to the increased expectation of privacy in blood as compared to breath, and due to the quantum of information that may be gleaned from a blood sample beyond a mere BAC reading, a blood test is qualitatively different from a breath test. *Id.* "Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of

the less invasive alternative of a breath test." *Id*. at 2184. The Court added that the government had "offered no satisfactory justification for demanding the more intrusive alternative without a warrant." *Id*. Thus, the Court held that blood tests do not qualify for categorical exception from the warrant requirement under the search-incident-to-arrest doctrine.

After concluding that blood tests are too invasive to fall within the search-incident-to-arrest exception to the warrant requirement, the *Birchfield* Court turned to the viability of "implied consent" laws as an alternative justification for warrantless blood draws. The Court's comparatively terse rejection of the proposition has engendered substantial confusion. The Court reasoned:

> Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject consents, *e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), and that sometimes consent to a search need not be express but may be fairly inferred from context, *cf. Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 1415-16 (2013); *Marshall v. Barlow's, Inc*., 436 U.S. 307, 313 (1978). Our prior opinions have referred approvingly to the

> general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. *See, e.g., McNeely*, 133 S. Ct. 1552, 1565-66 (plurality opinion); *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.
>
> It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Id. at 2185 (citations modified). Applying the Fourth Amendment's governing standard of "reasonableness," the Court held "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id*. at 2186.

An important observation must be made at this juncture. Post-*Birchfield*, this Court and many others have considered arguments suggesting that, pursuant to this passage of *Birchfield*, warrantless blood tests conducted under implied consent schemes do not violate the Fourth Amendment, so long as refusal does not trigger the imposition of criminal punishment. Such is the view of the Su-

preme Court of Vermont, upon which today's Majority relies. *See* Majority Opinion at 21 (quoting *State v. Rajda*, 196 A.3d 1108, 1121 (Vt. 2018) ("In *Birchfield*, the U.S. Supreme Court has ruled, with respect to the more invasive blood test, that only criminalizing the revocation of implied consent crosses the line in terms of impermissibly burdening the Fourth Amendment.")); *see also Fitzgerald v. People*, 394 P.3d 671, 676 (Colo. 2017) ("[T]he Supreme Court has all but said that anything short of criminalizing refusal does not impermissibly burden or penalize a defendant's Fourth Amendment right to be free from an unreasonable warrantless search.").

Accepting this position requires us to foist upon *Birchfield* an untenable reading of the Court's reasoning. Recall the *Birchfield* Court's heuristic for resolving the constitutional question upon which it granted *certiorari*: "that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test" without a warrant, *unless* "such warrantless searches comport with the Fourth Amendment," in which case, "a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant." *Birchfield*, 136 S. Ct. at 2172. That is, the *validity of the search* is dispositive of the *lawfulness of the penalty* for refusal to cooperate—not the other way around. A State may penalize the obstruction of a valid search,

but it may not penalize an individual for refusing to acquiesce to an unconstitutional search or seizure.

If we understand *Birchfield* as holding that warrantless blood draws "comport with the Fourth Amendment," *id.*, provided that no criminal penalties attend refusal, then *Birchfield* cannot be reconciled with itself. If such a search is valid, then its obstruction may be penalized, "just as a State may make it a crime for a person to obstruct the execution of a valid search warrant." *Id.* But those penalties, under this constricted understanding of *Birchfield*'s holding, would render the search invalid. Strike out the penalties, and the search again would be valid. But as a valid search, it would be permissible to penalize its obstruction. This circular exercise continues *ad infinitum*, rendering *Birchfield* incoherent by its own terms.[2]

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[2] With respect to this observation, the Majority asserts that I have "manufacture[d] an illusory circularity problem where one does not exist." Majority Opinion at 22 n.14. The problem is not of my making. Quite simply, the *Birchfield* Court determined that criminal penalties lawfully may attach to the refusal to submit to a valid search. *See Birchfield*, 136 S. Ct. at 2172. The Court then concluded (within its discussion of the government's alternative "implied consent" argument) that criminal penalties cannot attach to the refusal to submit to a warrantless blood test. *Id.* at 2186. It follows that a warrantless blood test cannot be deemed categorically valid because, otherwise, the criminal penalties that the Court forbade would be permissible by its own rationale. What the Majority characterizes as "an illusory circularity problem where one does not exist," I would call *Birchfield*'s *ratio decidendi*.

Avoiding the *Birchfield* paradox requires only that we recognize what is implicit in *Birchfield*'s reasoning: absent exigent circumstances, a warrantless blood test generally does not "comport with the Fourth Amendment." *Id.* A breath test is categorically valid without a warrant, but a blood test is not. This was the "compromise" that the Court reached. *See id.* at 2198 (Thomas, J., dissenting). The Court's thoroughly reasoned distinctions between breath and blood were all in service of that compromise. At least some consequences of that compromise are straightforward. Upon lawful arrest of a DUI suspect, police officers may demand submission to a breath test—without a search warrant—in every case. *Birchfield* holds that this manner of search "in most cases amply serve[s] law enforcement interests." *Id.* at 2185. Because a breath test is a valid search, refusal to submit may be criminally punished. *Id.* at 2186. As for blood testing, we are left with a warrantless Fourth Amendment search wanting for an exception.

Although statutorily "implied consent" may appear facially to be a viable path to a warrant exception, for all the reasons discussed in our plurality opinion in *Commonwealth v. Myers*, 164 A.3d 1162 (Pa. 2017) (plurality), and others, this theory is incompatible with the Fourth Amendment. It bears mention that the Supreme Court of the United States has never held that a motorist may be subjected to a warrantless blood draw solely upon the basis that he or she "consented" to such an intrusion

by obtaining a driver's license or by driving on public roads. *Birchfield* certainly does not stand for such a proposition. Indeed, the suggestion that the mere omission of criminal penalties renders a blood draw constitutional under "implied consent" results in the aforementioned paradox—that obstruction of a valid search may be penalized but imposing those penalties renders the search invalid.

Birchfield further undermines the "implied consent" suggestion. In discussing the different benefits that each manner of testing may provide, the Court noted that, unlike a breath test, a blood test can

detect substances other than alcohol that may impair the motorist's ability to operate a vehicle safely. The Court reasoned that "[n]othing prevents the police from *seeking a warrant for a blood test* when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Birchfield*, 136 S. Ct. at 2184 (emphasis added). Similarly, the Court noted that, unlike a breath test, a blood test may be administered to a person who is unconscious. The Court stated that it had "no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." *Id.* at 2185 (emphasis added). Finally, a blood test may be necessary where a motorist foils a breath test by failing to provide a sufficient sample. The Court noted that such conduct

may constitute a refusal to comply with breath testing and may be prosecuted as such. "And again, a warrant for a blood test may be sought." *Id.*[3] The Court did not suggest at any point that warrantless blood testing may be permissible upon the basis of

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[3] The Majority characterizes *Birchfield*'s discussions of the distinctions between breath testing and blood testing as "*dicta*" that I have found "useful." Majority Opinion at 22 n.14. I must respectfully disagree with this characterization. *Dictum* is a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Obiter dictum*, BLACK'S LAW DICTIONARY (10th ed. 2014). The distinctions between breath testing and blood testing, and the relative benefits of each manner of search, were directed toward the Court's dispositive conclusions that breath tests "in most cases amply serve law enforcement interests," *Birchfield*, 136 S. Ct. at 2185; that the necessity of a blood draw "must be judged in light of the availability of the less invasive alternative of a breath test," *id*. at 2184; that the government had "offered no satisfactory justification for demanding the more intrusive alternative without a warrant," *id*.; and, ultimately, the Court's conclusion that blood tests do not qualify for categorical exception from the warrant requirement under the search-incident-to-arrest doctrine. *Id*. at 2185. Indeed, the drawing of a constitutionally significant distinction between breath testing and blood testing was the very core of *Birchfield*'s holding. If these passages are "*dicta*," it is difficult to discern what is not.

By contrast, and by way of illustration, any suggestion in *Birchfield* regarding the continued constitutional validity of "civil penalties and evidentiary consequences" imposed upon motorists for refusal to consent to a warrantless blood test—issues that were not before the Court and not essential to its holding—is more properly characterized as *dictum*. *Id*.

a statutory implied consent provision alone. No decision of the High Court ever has so held.

It is incongruous to conclude that a blood test is too intrusive, and compromises privacy interests too much, to qualify for categorical treatment under the search-incident-to-arrest exception to the warrant requirement, yet may be given categorical treatment under the consent exception. Indeed, comparing the search-incident-to-arrest doctrine to the exception for exigent circumstances, the *Birchfield* Court noted that the exigent circumstances exception "has always been understood to involve an evaluation of the particular facts of each case." *Id.* at 2183. By contrast, the Court noted, under the search-incident-to-arrest exception, the "authority is categorical." *Id.* Like the exigent circumstances exception, the consent exception always has been understood to require an evaluation of the particular facts of each case, under the totality of the circumstances. *See Schneckloth,* 412 U.S. at 248-49 ("Voluntariness is a question of fact to be determined from all the circumstances."); *Birchfield*, 136 S. Ct. at 2186 ("voluntariness of consent to a search must be 'determined from the totality of all the circumstances'") (quoting *Schneckloth*, 412 U.S. at 227). It would seem that insulating the more intrusive blood test from such categorical treatment was the very purpose of the *Birchfield* Court's distinction between breath testing and blood testing and its decision to exclude blood testing from the search-

incident-to-arrest doctrine. If every motorist categorically may be deemed to have consented to this more intrusive form of search, then the Court's distinction serves little purpose indeed.

One might construe statutory "implied consent" to require that a motorist's Fourth Amendment rights be curtailed as a condition of exercising the privilege of driving, or that the decision to exercise that privilege establishes a motorist's consent to blood testing. *See Myers*, 164 A.3d at 1182 (Saylor, C.J., concurring) ("[I]t seems to me that the voluntary act of operating a vehicle suffices to establish the initial consent to chemical testing.") However, this understanding of "implied consent" is in tension with the unconstitutional conditions doctrine. As the Supreme Court of the United States recently explained, the unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). "[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Id.* (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)). The Supreme Court has applied the doctrine "in a variety of contexts" and to constitutional rights as varied as land ownership, freedom of speech, and the right to travel. *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593 (1972) (speech); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (travel)).

Under the unconstitutional conditions doctrine, it is immaterial that driving an automobile is a privilege rather than a fundamental right. *See* Majority Opinion at 12-13 (citing *PennDOT v. Scott*, 684 A.2d 539, 544 (Pa. 1996)). As the Supreme Court of the United States has explained:

> Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. *See, e.g., Regan*, 461 U.S. 540 (tax benefits); *Mem'l Hosp.*, 415 U.S. 250 (healthcare); *Perry*, 408 U.S. 593 (public employment); *United States v. Butler*, 297 U.S. 1, 71 (1936) (crop payments); *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583 (1926) (business license). Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. *E.g., United States v. Am. Library Assn., Inc.*, 539 U.S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" (emphasis added and internal quotation marks omitted)); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (explaining in unconstitutional conditions case that to focus on "the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue").

Koontz, 570 U.S. at 608 (citations modified). Under this doctrine, and notwithstanding that driving an automobile is a privilege or a "gratuitous government benefit," *id*., the government cannot condition the exercise of this privilege upon motorists' relinquishment of their Fourth Amendment rights. The High Court in *Frost* long ago reasoned:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost, 271 U.S. at 593-94.

For all these reasons, implied consent does not pass muster as a basis for dispensing with the warrant requirement for blood tests, or for demanding that a motorist relinquish his or her Fourth Amendment rights upon occupying the driver's seat of an automobile.[4] Absent exigent circumstances, we are

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[4] Bell placed the unconstitutional conditions doctrine at issue from the inception of this case. Although the Majority quotes from Bell's pre-trial motion to dismiss, it excises Bell's citation to the unconstitutional conditions doctrine. *Compare* Majority Opinion at 11 (quoting Motion to Dismiss, 3/8/2016, at 2) ("Pennsylvania's Implied Consent Law violates Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution[,]") *with* Motion to Dismiss, 3/8/2016, at 2 ("Pennsylvania's Implied Consent Law violates Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution *under the Unconstitutional Conditions Doctrine*.") (emphasis added). Regardless, I do not discuss the doctrine as a separate issue or independent basis for granting relief, but, rather, merely for the purpose of articulating fully my conclusion on the threshold issue that underlies the question at bar: that there is no categorical basis upon which to dispense with the warrant requirement for blood testing and, thus, no valid Fourth Amendment search as to which a motorist's cooperation lawfully may be compelled.

The Majority opines that the unconstitutional conditions doctrine is "inapplicable" because, due to the statutory right to refuse chemical testing under 75 Pa.C.S. § 1547(b), the "implied consent law does not condition the privilege of driving upon a motorist's submission to future warrantless blood testing." Majority Opinion at 20 n.12. To the contrary, this is precisely what the implied consent law does. The statute indeed provides a

left with actual, voluntary consent as the only possible justification for the failure to obtain a search warrant prior to conducting a blood draw. This is precisely the inquiry that *Birchfield* left open when remanding petitioner Beylund's case:

> The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be 'determined from the totality of all the circumstances,' *Schneckloth*, 412 U.S. at 227, we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.

Birchfield, 136 S. Ct. at 2186 (citation modified).

One observation is obvious: an individual has a constitutional right to refuse to consent to a search that is not authorized by a warrant or a valid excep-

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right of refusal, which allows a motorist to avoid the circumstance in which a blood sample is taken forcibly and against the motorist's will. Nonetheless, the statutory scheme, as written, unequivocally demands that a motorist submit to warrantless blood testing. Upon the motorist's invocation of the statutory right of refusal, the Commonwealth will "suspend the operating privilege" of the motorist. 75 Pa.C.S. § 1547(b)(1). In other words, the statute unambiguously *conditions* the privilege of operating a motor vehicle upon the motorist's submission to warrantless blood testing.

tion to the warrant requirement. Although "the subject's knowledge of a right to refuse" is not "a prerequisite to establishing a voluntary consent," *Schneckloth*, 412 U.S. at 249, it is nonetheless inherent in the request for consent that the individual retains a right to decline. For this reason, the Superior Court in the instant case patently erred in concluding that Bell "had no constitutional right to refuse a [warrantless] blood test upon his lawful arrest for DUI." *Commonwealth v. Bell*, 167 A.3d 744, 749 (Pa. Super. 2017).

For this conclusion, the Superior Court relied principally upon a statement to that effect in *Neville*. *See Neville*, 459 U.S. at 560 n.10 ("[A] person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test."). However, as noted above, *Neville* addressed only whether evidence of refusal is "testimonial" for purposes of the Fifth Amendment's right against self-incrimination. *Neville* had no Fourth Amendment component. Accordingly, any comment in *Neville* regarding the validity of a warrantless blood test under the Fourth Amendment is *dictum*. Moreover, *Neville*'s commentary on this matter was premised upon the notion that "*Schmerber* . . . clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Id*. at 559. As noted above, *McNeely* squarely rejected this categorical understanding of *Schmerber*. Accordingly, the Superior Court not only relied upon dicta for its essential legal conclusion, but outdated *dicta*

that is irreconcilable with *McNeely* and *Birchfield*. Here, there was no search warrant, no demonstration of exigent circumstances, and no other valid exception to the warrant requirement. Accordingly, Bell had a constitutional right to refuse to consent to the unconstitutional search.

II. Penalization of the Exercise of a Constitutional Right

Notwithstanding the fact that the blood test requested of Bell was unconstitutional, authorized by neither a search warrant nor a valid exception to the warrant requirement, was it permissible to introduce evidence of Bell's refusal at trial to prove his consciousness of guilt? To answer this question in the affirmative is to disregard the Supreme Court of the United States' repeated proclamations that a State may not penalize the exercise of individual constitutional rights.

"It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Harman v. Forssenius,* 380 U.S. 528, 540 (1965) (citing *Frost*, 271 U.S. 583). "'Constitutional rights would be of little value if they could be . . . indirectly denied' or 'manipulated out of existence.'" *Id.* (quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944), and *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)). Thus, in *Griffin v. California,* 380 U.S. 609 (1965), the Court held that prosecutorial commentary and trial court instructions that raise an inference of guilt based

upon a defendant's exercise of his constitutional right not to testify violate the Fifth Amendment's right against self-incrimination. The *Griffi*n Court reasoned that the use of a defendant's silence in this manner "is a penalty imposed by courts for exercising a constitutional privilege." *Id.* at 614. "It cuts down on the privilege by making its assertion costly." *Id.* The Court held that so burdening the exercise of a right is repugnant to the Constitution.

It is true that *Griffin*, like *Neville*, was a Fifth Amendment decision, not premised upon the Fourth Amendment. However, the Supreme Court has extended *Griffin*'s reasoning beyond the self-incrimination context to a wholly distinct constitutional right—the Sixth Amendment right to a jury trial. In *United States v. Jackson*, 390 U.S. 570 (1968), the Court addressed the constitutionality of a provision of the then-applicable Federal Kidnaping Act, which authorized the death penalty "if the verdict of the jury shall so recommend," but contained "no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty." *Id.* at 571. The Court reasoned that the statutory language unconstitutionally disincentivized the defendant's exercise of the right to a jury trial:

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is

> 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

Id. at 582. Citing *Griffin*, the *Jackson* Court held that, "[w]hatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." *Id*. at 583. Accordingly, the Court has not limited the rule of *Griffin* to the right against self-incrimination, but, rather, has signaled that *Griffin* embodies the High Court's broad disapproval of State action that "impose[s] a penalty upon those who exercise *a right guaranteed by the Constitution."* Harman, 380 U.S. at 540.

Both this Court and our Superior Court, as well as numerous courts of our sister states, have applied similar reasoning in the Fourth Amendment context, and have held that the use of an individual's refusal to consent to a warrantless, unjustified search cannot be used as evidence of consciousness of guilt at trial. In *Commonwealth v. Welch*, 585 A.2d 517 (Pa. Super. 1991), our Superior Court held that trial testimony regarding a defendant's refusal to consent to a search of her bedroom unduly burdened her Fourth Amendment rights. The court reasoned:

> As we read the various comments made by the courts regarding the assertion of one's Fifth Amendment right, the overriding tone is that it

> is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it. Although the cases have discussed the Fifth Amendment right we see no reason to treat one's assertion of a Fourth Amendment right any differently. It would seem just as illogical to extend protections against unreasonable searches and seizures, including the obtaining of a warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt.

Id. at 519.

This Court recently reached the same conclusion in *Commonwealth v. Chapman*, 136 A.3d 126 (Pa. 2016). In *Chapman*, a capital direct appeal, this Court addressed the defendant's claim that "his constitutionally protected refusal to voluntarily surrender a DNA sample to investigators was wrongfully used against him at trial." *Id*. at 129. We rejected the defendant's assertion that commentary upon his failure to consent to a search violated his Fifth Amendment right against self-incrimination, but noted that "the circumstances presented implicate a broader due process concern." *Id*. at 131.

"In this regard," we reasoned, "the admission of evidence of a refusal to consent to a warrantless search to demonstrate consciousness of guilt is

problematic, as most jurisdictions hold (outside the context of implied-consent scenarios) that such admission unacceptably burdens an accused's right to refuse consent." *Id.* We noted that federal appellate courts unanimously accept this proposition, as do numerous state courts. *See id.* at 131 n.4 (citing, *inter alia, United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002) ("[T]he circuit courts that have directly addressed this question have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt."); *Bargas v. State*, 489 P.2d 130, 132 (Alaska 1971) ("It would make meaningless the constitutional protection against unreasonable searches and seizures if the exercise of that right were allowed to become a badge of guilt.")). We further noted, "[a]s an aside," that "such treatment contrasts with the response in scenarios in which a defendant resists providing a sample during the execution of a duly authorized search warrant." Id. (citing *United States v. Ashburn*, 76 F.Supp.3d 401, 444-46 (E.D.N.Y. 2014)).

Today's Majority declines to address the High Court's precedents regarding the penalization of the exercise of constitutional rights.[5] To justify this

[5] The Majority's insistence to the contrary notwithstanding, I do not "criticize" the Majority for declining to address the unconstitutional conditions doctrine. Majority Opinion at 19 n.12. As I explained above, *supra* n.4, I have discussed that doctrine for the purpose of addressing the important threshold question of whether a warrantless blood test may be justified under any

omission, the Majority states that Bell does not "cite to any of the High Court's cases discussing the penalization of constitutional rights, but instead cites solely to the distinguishable cases of *Chapman* and *Welch*." Majority Opinion at 19 n.12. As I discuss below, *Chapman* and *Welch* are not so easily distinguished in light of *McNeely* and *Birchfield*. Even more problematic, however, is the Majority's perspective with regard to the scope of this Court's ability to survey applicable and controlling law. Rather than testing its reasoning against the holdings of The Supreme Court of the United States, the Major-

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of the exceptions to the Fourth Amendment's warrant requirement—here, consent. The unconstitutional conditions doctrine is one among several reasons that construing "implied consent" as a categorical exception to the warrant requirement is a legal fiction that cannot withstand constitutional scrutiny. *See supra* Part I. The doctrine does not control the narrower derivative question before us, at least not directly.

By contrast, the decisions of The Supreme Court of the United States disfavoring penalization of constitutional rights are directly relevant to the precise issue presented here. In considering this issue, it is indeed incumbent upon this Court to consult the limits that the High Court has set in this arena in cases such as *Griffin* and *Jackson*. It is not "spurious" to suggest that a court of last resort undertake such a review, Majority Opinion at 19 n.12, nor would the endeavor mean that we would "act as advocates." *Id*. at 20 n.12. Rather, addressing the High Court's precedents that bear upon the question before us is part of our duty as an appellate court to ensure conformity with governing law.

ity prefers to set a dangerous and unfounded precedent suggesting that the universe of applicable law is limited to the Table of Citations section of an appellant's brief.

Notably, the Majority recognizes that "[t]he United States Supreme Court's decisions in *McNeely* and *Birchfield* and this Court's decision in *Myers* indicate a warrantless blood test, which is conducted when no exceptions to the warrant requirement apply, violates the Fourth Amendment rights of a motorist suspected of DUI." Majority Opinion at 18. The Majority also stops short of stating that a statutory implied consent provision supplies such an exception to the warrant requirement. Faced thus with an individual's voluntary consent as the remaining potential justification for the failure to obtain a search warrant for a blood draw, the Majority declines to recognize the constitutional significance of the right *not* to consent, or the impermissibility of penalizing an individual for exercising that right.[6] Rather, the Majority avoids ap-

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[6] The Majority offers only a conclusory citation to *Jenkins v. Anderson*, 447 U.S. 231 (1980), for the proposition that "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Id.* at 236 (quoting *Chaffin v. Stynchcombe,* 412 U.S. 17, 30 (1973)); *see* Majority Opinion at 18-19. The very next sentence in *Jenkins*, however, clarifies that the "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the

rights involved." *Jenkins*, 447 U.S. at 236 (quoting *Chaffin*, 412 U.S. at 32). *Chaffin*, further, noted that the jury sentencing procedure at issue therein was "utilized for legitimate purposes and not as a means of punishing or penalizing the assertion of protected rights." *Chaffin*, 412 U.S. at 32 n.20. That is distinct, *Chaffin* reasoned, from a practice designed to discourage the exercise of constitutional rights. *Id*. ("[I]f the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'") (quoting *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969)).

The sole purpose of the implied consent law's consequences of refusal is to induce a motorist's compliance with chemical testing. Where the motorist has a constitutional right to refuse to consent—as for a blood test, but not a breath test—the "only objective" of the evidentiary consequence at issue in this case is to "discourage the assertion" of that right. *Id*. In *Chaffin*'s parlance, such a practice is "patently unconstitutional." *Id*. The practice is designed to persuade motorists into relinquishing their Fourth Amendment rights through the promise of future punishment, so that evidence which otherwise requires a search warrant may be obtained in the absence of a warrant. This is a circumvention of the warrant requirement which, thus, "impairs to an appreciable extent . . . the policies behind" the Fourth Amendment. *Jenkins*, 447 U.S. at 236; *Chaffin,* 412 U.S. at 32. Accordingly, although the Majority is correct that not every choice in the criminal process that discourages the exercise of a right is unconstitutional, the choice compelled in this circumstance bears all of the hallmarks of an unconstitutional practice.

The Majority posits that the evidentiary consequence at issue "does not *solely* punish a defendant" but also has a legitimate purpose of allowing jurors to "understand why the State is not submitting an evidentiary test in a DUI prosecution." Majority Opinion at 19 n.11 (quoting *Rajda*, 196 A.3d at 1120) (emphasis

plying these principles to the question at bar entirely through resort to dicta and nonbinding authority.

The Majority places substantial weight upon our parenthetical caveat in *Chapman*, that "the admission of evidence of a refusal to consent to a warrantless search to demonstrate consciousness of guilt is problematic, as most jurisdictions hold (outside the context of implied-consent scenarios) that such admission unacceptably burdens an accused's right to refuse consent." Majority Opinion at 18 (quoting *Chapman*, 136 A.3d at 131) (Majority's emphasis). Because *Chapman* involved no such "implied-consent scenario," this parenthetical was dictum, and, as such, has no precedential value. Even more importantly, the *Chapman dictum* pre-dates *Birchfield*. As discussed above, *Birchfield* necessarily has altered our understanding of the consequences that

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added). Satisfaction of the potential curiosity of a hypothetical future juror is no justification whatsoever for demanding the relinquishment of a fundamental constitutional right. Moreover, no such confusion ever is necessary. Police officers simply can request breath tests—which remain categorically valid under *Birchfield* even absent a warrant—and/or they can obtain search warrants for blood tests. In either circumstance, if the motorist complies, the desired evidence is obtained and may be placed before the jury. If the motorist refuses, then refusal evidence constitutionally may be introduced, and no juror will wonder about its absence. There remains no satisfactory justification for compromising the Fourth Amendment simply to make available evidence *easier* to obtain.

may attach under statutory implied consent schemes. Put simply, after *Birchfield*, there is no categorical exception to the warrant requirement for blood tests. Consequently, we must treat a request for consent to submit to a blood test no differently than a request for consent to search a bedroom, as in *Welch*, or a request for consent to a DNA test, as in *Chapman*. As with those other types of warrantless searches, admission into evidence of one's refusal to consent to a warrantless blood test to demonstrate consciousness of guilt is similarly "problematic." *Chapman*, 136 A.3d at 131. Stated otherwise, it is unconstitutional.

In addition to the *Chapman dictum*, the other central pillar of the Majority's analysis is the following passage from *Birchfield*:

> Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

Majority Opinion at 21 (quoting *Birchfield*, 136 S. Ct. at 2185) (internal citations omitted). The Majority elevates this passage to the same level as the Court's holdings on the issue granted for review, reading the Court's reservation of these questions as approval of the practice of penalizing individuals for their refusal to consent to unconstitutional

searches. *See id*. (reasoning that the *Birchfield* Court "did not back away from its prior approval of other kinds of consequences for refusal, such as 'evidentiary consequences'").

As I read *Birchfield*'s caveat, the Court merely declined to opine concerning matters outside the scope of the issue upon which *certiorari* was granted, which was limited to the constitutionality of criminal punishment for refusal to submit to warrantless BAC testing. To be sure, the Court's statement that its decision should not be "read to cast doubt on" such "civil penalties and evidentiary consequences" facially appears to exclude those consequences from the reach of the Court's holding. *Birchfield*, 136 S. Ct. at 2185. However, because the *Birchfield* Court resolved the question before it upon the basis of the *validity of the underlying search*, other constitutional doctrines discussed herein are implicated, and certain consequences of the Court's reasoning are inescapable.

Professor Wayne LaFave has addressed the incongruity that results from reading *Birchfield*'s caveat in the manner that the Majority does today:

> While it has been established as a Fifth Amendment matter that a defendant being prosecuted for driving under the influence may not object to the admission in evidence against him his refusal to submit to a sobriety test at the time of arrest, what of the claim that such evidence is inadmissible as a Fourth Amendment matter? The Court

> in *Birchfield* noted in passing (just as it did earlier in *McNeely*) that "evidence of the motorist's refusal is admitted as evidence of likely intoxication in a drunk-driving prosecution," and later cautioned that "nothing we say here should be read to cast doubt" on such "evidentiary consequences on motorists who refuse to comply." But that assertion is misleading at best, for *Birchfield's* emphasis on the distinction between when a defendant's refusal to submit is constitutionally significant (*i.e.*, for a blood test absent exigent circumstances) and when it is not (*i.e.*, for all breath tests and for other blood tests) is, by well-established pre-existing authority, also relevant to the question of whether refusal may be admitted into evidence to show defendant's guilt. What the cases indicate is that when defendant's refusal was within the context of a recognized search-warrant-required category, then the Fourth Amendment prohibits admission of that refusal into evidence. . . . But on the other hand, when it is first determined that no warrant was required in any event (*e.g.*, taking a breath sample), comment on the refusal is permissible.

4 WAYNE R. LAFAVE & DAVID C. BAUM, SEARCH & SEIZURE § 8.2(l), at 27 (5th ed. Supp. 2018) (hereinafter, "LAFAVE") (footnotes and emphasis omitted).

Either the *Birchfield* Court simultaneously, and *sub silentio*, curtailed several distinct constitutional

doctrines—including the principle that an individual may not be penalized for exercising a constitutional right, the bedrock rule that consent to a search may not be coerced, and the prohibition upon conditioning the exercise of a privilege upon the relinquishment of a constitutional right—or there is a simpler answer. I propose a rule that makes sense of *Birchfield* and does not run afoul of these other important constitutional principles. When it comes to blood testing, the rule is "simple—get a warrant." *Riley v. California*, 573 U.S. 373, 403 (2014). Once the officer has obtained a warrant for a blood test—and not a moment before—all of the penalties set forth in the implied consent law are available and constitutional.[7]

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[7] Although the consequence of driver's license suspension is not at issue herein, I note that Professor LaFave suggests that the "issue should be resolved in the same fashion" that the *Birchfield* Court resolved the issue of criminal penalties, reasoning:

> While the *Birchfield* Court stated only that the "limit to the consequences to which a motorist may be deemed to have consented by virtue of a decision to drive on public roads" is passed when "criminal penalties" of *any* magnitude are imposed, surely the driver who is thus constitutionally protected from a $10 criminal fine must likewise be protected from the more serious penalty of revocation of driving privileges.

Perhaps the most conceptually challenging consequence of the *Birchfield* decision is recognizing that "implied consent" has nothing to do with consent in the Fourth Amendment sense, as it has been defined in *Schneckloth* and a legion of other decisions.[8] BAC testing generally requires a motorist's cooperation, and implied consent laws are statutory schemes intended "to find a way of securing such cooperation." *Birchfield*, 136 S. Ct. at 2168. They do so by imposing consequences—or penalties—upon the failure to cooperate. *Id*. at 2166 ("These laws impose penalties on motorists who refuse to undergo testing.") But BAC tests are searches for purposes of the Fourth Amendment, and *Birchfield* requires that, in order to serve as a constitutional basis for the imposition of such consequences, those searches must "comport with the Fourth Amendment." *Id*. at 2172. Indeed, every time that the *Birchfield* Court

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LAFAVE, § 8.2(l), at 27 (emphasis in original). As with all of the other consequences set forth in the implied consent law, validation of this penalty is as simple as obtaining a search warrant for a blood test.

[8] Indeed, in one of the only mentions of "implied consent" in the High Court's recent plurality decision in *Mitchell v. Wisconsin*, the Court noted that its previous decisions "have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." *Mitchell*, 139 S. Ct. at 2533 (plurality). Although the Court's plurality ruled upon a different basis and this statement accordingly is not controlling, it provides insight into the Court's rationale in *Birchfield*.

spoke of "implied consent," it referred to these statutory *consequences* of refusal, not to an exception to the Fourth Amendment's warrant requirement. In this regard, statutory implied consent provisions should be regarded as mandates that a motorist cooperate with a *valid* search, not as mechanisms to allow circumvention of the requirements of the Fourth Amendment.

Importantly, where the Majority makes no attempt to recognize or resolve the manifest tension between its holding and the established constitutional doctrines that its holding compromises, my analysis of the question at bar not only is consistent with the reasoning of *Birchfield*, but provides a constitutionally permissible and jurisprudentially consistent path to the imposition of all of the consequences set forth in the implied consent law. Civil, criminal, and evidentiary consequences of refusal all *remain* constitutional. They have only one prerequisite—a valid search under the Fourth Amendment.

It is perhaps helpful to summarize the application of these principles in practice. Upon conducting a lawful arrest of a motorist suspected of DUI, a police officer may demand the motorist's submission to a breath test. As a valid search incident to arrest, no search warrant is required. The police officer may warn the motorist that the failure to cooperate with the breath test will result in criminal punishment, civil penalties, and evidentiary consequences.

If the motorist complies, then BAC evidence is obtained. If the motorist refuses, then the full complement of consequences set forth in the implied consent law may constitutionally be imposed.

If the police officer wishes to conduct a search of the motorist's blood, and the circumstances do not give rise to an exigency, then a search warrant is required. Under *McNeely*, there is no per se exigency. The search-incident-to-arrest doctrine is inapplicable pursuant to *Birchfield*. Threats of increased criminal penalties, the suspension of the motorist's driver's license, and the use of the motorist's refusal to consent as evidence of his guilt should all be regarded as coercive, and inconsistent with a conclusion "that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. "For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Id.* at 228. At the very least, to ultimately impose any of these consequences, including the one at issue in the case at bar, is to penalize the exercise of a constitutional right. Such penalization is impermissible under the well-settled precedents of the Supreme Court of the United States. *See, e.g., Harman*, 380 U.S. at 540; *Griffin*, 380 U.S. at 614.

However, once the police officer obtains a search warrant for a blood test (or establishes a true exigency), the search is valid, and the motorist has no right to refuse it. At that point, the blood test is equivalent to a breath test. If the motorist complies, the desired evidence is obtained. If the motorist refuses, then the full complement of consequences set forth in the implied consent law may constitutionally be imposed. The only distinction between these scenarios is that a blood test, but not a breath test, requires compliance with the Fourth Amendment's warrant requirement. Such was the reason that the *Birchfield* Court drew a constitutionally significant distinction between the types of testing at issue.

Things play out very differently under the Majority's approach. Under today's holding, the police officer not only may demand the motorist's submission to a warrantless blood test—an unconstitutional search—but later may testify regarding the motorist's refusal to consent to that search, so as to suggest the motorist's guilt to a fact-finder. The result is nearly absurd. The police officer is not authorized to perform the search, and the motorist is therefore constitutionally entitled to refuse consent to that search. But the motorist, by doing what he *is* allowed to do, suffers adverse consequences for refusing to allow the police officer to do what the officer is *not* allowed to do.

To take one further step into the illogical, suppose that the motorist agrees to submit to a breath

test, but not to a blood test. The motorist notes that, per the *Birchfield* decision, the breath test may be compelled, but an officer must get a search warrant for a blood test. By all appearances, the motorist is correct, inasmuch as excusing the warrant requirement for the blood test as well would defeat the purpose of the *Birchfield* Court's distinction between breath and blood. Well, replies the officer, although the motorist is correct with regard to the lawfulness of *criminal* penalties that later may attach to a conviction, and although the officer indeed would need to obtain a search warrant in order for that consequence to be permissible, the motorist nonetheless must "consent" to the warrantless blood search, or else face both a lengthy driver's license suspension and a prosecutor who will tell the judge or jury that the motorist was behaving as a guilty person would.

The Majority allows that the warrant requirement applies to blood tests, and that such a test, "which is conducted when no exceptions to the warrant requirement apply, violates the Fourth Amendment rights of a motorist suspected of DUI." Majority Opinion at 18. Yet, the Majority contrarily holds that the blood test nonetheless *must be conducted even without a warrant*, lest the motorist face the penalty at issue in this case. This can be regarded as nothing other than an end-run around the warrant requirement—a means of permitting the impermissible under the dubious fiction of "consent," where such "consent" plainly is compelled by the

threat of sanctions and thus is "no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 248. At no point does the Majority offer any reason as to why police officers cannot simply obtain search warrants for blood tests as a general matter.

With regard to a motorist's breath, the search-incident-to-arrest doctrine tethers the statutory implied consent consequences to a valid warrantless search. For a warrantless search of a motorist's blood, there is a missing link. To maintain the *Birchfield* Court's distinction between breath and blood, and to avoid compromising the bedrock constitutional doctrines discussed above, we must conclude that using a motorist's refusal to consent to a warrantless and otherwise-unjustified blood test as evidence of his consciousness of guilt unacceptably burdens the motorist's Fourth Amendment rights. Because there is no categorical basis for dispensing with the warrant requirement for blood tests, and because there is a concomitant constitutional right to refuse to consent to such a warrantless search, the introduction of a motorist's refusal to consent to a warrantless blood test as evidence of his guilt is "a penalty imposed by courts for exercising a constitutional privilege." *Griffin*, 380 U.S. at 614. "It cuts down on the privilege by making its assertion costly." *Id*. Because the "only objective" of this practice is to "discourage the assertion" of that constitutional right so as to avoid the warrant requirement,

it is "patently unconstitutional" as applied to warrantless blood testing. *Chaffin*, 412 U.S. at 32 n.20.

Moreover, because the search warrant process provides a simple, routine, and well-understood mechanism to validate a blood test, and therefore to establish a constitutional prerequisite to the imposition of penalties for refusal to comply, the admission of evidence of refusal to consent to a *warrantless* blood test not only penalizes the exercise of a constitutional right, but it does so "needlessly." *Jackson*, 390 U.S. at 583 ("Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.").

Sometimes, Fourth Amendment decisions have difficult consequences, in that they can result in the unavailability of evidence necessary to prosecute a guilty person. This is not one of those cases. The evidence that the Commonwealth seeks remains available in every circumstance, either through a categorically valid warrantless breath test or by "seeking a warrant for a blood test when there is sufficient time to do so" or "relying on the exigent circumstances exception to the warrant requirement when there is not." *Birchfield*, 136 S. Ct. at 2184. We need not and should not strain the Fourth Amendment in order to find ways for the Commonwealth to obtain blood evidence without a search warrant. Rather, for blood tests, we should simply enforce the Fourth Amendment's warrant requirement.

III. Article I, Section 8 of the Pennsylvania Constitution

For all of the foregoing, I have relied exclusively upon federal constitutional jurisprudence, which I believe clearly establishes Bell's entitlement to relief in this matter. However, as I noted at the outset, *Birchfield* and *McNeely* have left significant unanswered questions in their wake, questions that have placed the governing federal law "in a state of flux" for the past several years. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 607 (Pa. 2002). Under such circumstances, "this Court has not hesitated to render its independent judgment as a matter of distinct and enforceable Pennsylvania constitutional law." *Id*. If today's Majority is unwilling to take the short step necessary to fill in the gaps left by *Birchfield* as a matter of federal constitutional law, we should do so under our own Constitution.[9]

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[9] As noted above, since this Court undertook consideration of this appeal, the Supreme Court of the United States decided *Mitchell v. Wisconsin*. *See supra* n.1. Although the Court granted *certiorari* to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement," *Mitchell*, 139 S. Ct. at 2532, a plurality of the Court ultimately ruled upon the basis of the general applicability of the exigent circumstances exception where a motorist suspected of DUI is "unconscious and therefore cannot be given a breath test." *Id*. at 2531. *Mitchell,* thus, does not offer any clarity as to the important questions left open in *Birchfield* with regard to the contours of "implied consent" or the validity of the consequences imposed under "implied consent" statutes. Because the High Court

The Majority concludes that Bell's substantive claim under the Pennsylvania Constitution is waived because Bell failed to "develop an argument that the Pennsylvania Constitution provided any independent grounds for relief" in his pre-trial motion or in his motion for reconsideration. Majority Opinion at 11. A litigant who already has placed an issue before the trial court is not required to reassert that issue in a motion for reconsideration on pain of waiver. The Majority cites no authority for such a conclusion. *Cf*. Pa.R.Crim.P. 720(B)(1)(c) ("Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues.").

As for the contents of Bell's pre-trial motion, the Majority cites to the inapposite case of *Commonwealth v. Chamberlain*, 30 A.3d 381 (Pa. 2011). Chamberlain, however, did not involve a Pennsylvania constitutional claim that was *underdeveloped* below, but, rather, one that was *not raised at all* in the trial court. *See Chamberlain*, 30 A.3d at 404-05 (noting Commonwealth's argument that claim was waived because "Appellant did not raise a state due process claim . . . before the trial court"). Because the claim in *Chamberlain* was raised for the first time on appeal, we naturally found it waived under

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again has left these important questions unresolved, the need for independent consideration under our own Constitution is all the more acute.

Pa.R.A.P. 302(a). But Bell expressly raised an Article I, Section 8 claim before the trial court. *See* Motion to Dismiss, 3/8/2016, at 2 ("Pennsylvania's Implied Consent Law violates Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution under the Unconstitutional Conditions Doctrine."). As such, both Rule 302 and the reasoning of *Chamberlain* are inapplicable here.

All that remains, then, is the Majority's contention that Bell's claim was "general" and thus insufficient under *Commonwealth v. Lagenella*, 83 A.3d 94, 99 n.3 (Pa. 2013), *Commonwealth v. Galvin*, 985 A.2d 783, 793 n.15 (Pa. 2009), and *Commonwealth v. Starr*, 664 A.2d 1326, 1334 n.6 (Pa. 1995). *See* Majority Opinion at 11-12 n.8. The referenced footnotes contained in *Laganella*, *Galvin*, and *Starr,* however, all merely note that the respective appellants did not advance the argument in their briefs to *this Court*, such that this Court would not embark upon an independent analysis of the Pennsylvania Constitution *sua sponte*, and instead would deem the applicable constitutional provisions to be coterminous for purposes of the decision. Neither *Laganella*, *Galvin*, nor *Starr* found waiver under Rule 302 for the appellants' failure to "develop" a Pennsylvania constitutional claim before the lower court, as the Majority does today.[10]

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[10] To the extent that the Majority's opinion may be read to suggest that such "development" necessitates that a challenger

Bell raised his claim before the trial court under the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution. He was the appellee in the Superior Court, and thus bore no issue-preservation burden. Bell's Article I, Section 8 claim was included expressly within our grant of *allocatur*.[11] Bell develops his claim further before this Court, and engages in an *Edmunds* analysis. Under such circumstances, a retrospective finding of waiver based upon the absence of preferred language in a pre-trial motion is exceedingly harsh, and leaves future litigants with little guidance regarding the steps that they must take in the trial

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present to the trial court an analysis under *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991)—the form of development that this Court prefers—I emphasize that we never have required such on pain of waiver. *See, e.g., Commonwealth v. Arroyo*, 723 A.2d 162, 166 n.6 (Pa. 1999) (failure to engage in an Edmunds analysis in lower court "does not result in waiver of a state constitutional claim").

[11] We granted allowance of appeal in order to consider:

> Whether § 1547(e) of the Vehicle Code, 75 Pa.C.S. § 1547(e), is violative of *Article 1 Section 8 of the Pennsylvania Constitution* and the Fourth Amendment to the United States Constitution to the extent that it permits evidence of an arrestee's refusal to submit a sample of blood for testing without a search warrant as proof of consciousness of guilt at the arrestee's trial on a charge of DUI?

Commonwealth v. Bell, 183 A.3d 978 (Pa. 2018) (*per curiam*) (emphasis added).

court so that this Court will *not* deem their claims waived.

I would hold simply that blood tests require compliance with the warrant requirement under Article I, Section 8 of the Pennsylvania Constitution. Resolution of the remaining questions left open in *Birchfield* then falls into place.

I respectfully dissent.

Justice Donohue joins this dissenting opinion.

APPENDIX D

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1490 MDA 2016

COMMONWEALTH OF PENNSYLVANIA,
APPELLENT

v.

THOMAS S. BELL,
APPELLEE

Argued: May 3, 2017
Filed: July 17, 2019

Appeal from the Court of Common Pleas of
Lycoming County, Criminal Division
No. CP-41-CR- 0001098-2015

OPINION

Before: JACQUELINE O. SHOGAN, GEOFF MOULTON, Judges, and CORREALE F. STEVENS, President Judge Emeritus.

Opinion by President Judge Emeritus STEVENS.

The Commonwealth appeals from the order entered by the Court of Common Pleas of Lycoming

County awarding Appellee Thomas S. Bell a new trial. The Commonwealth claims the trial court erred in finding that the prosecution's admission of evidence of Appellee's refusal to submit to a blood test at his trial on driving under the influence (DUI) charges violated his Fourth Amendment right to be free from unreasonable searches.

As we conclude that it is constitutionally permissible to deem motorists to have consented to the specific provision of Pennsylvania's Implied Consent Law that sets forth evidentiary consequences for the refusal of chemical testing upon a lawful arrest for DUI, we reverse and remand for sentencing.

On May 16, 2015, officers initiated a traffic stop of Appellee's vehicle after observing that Appellee did not have his taillights properly illuminated. After approaching the vehicle, officers noticed Appellee's breath smelled of alcohol and his eyes were glossy and bloodshot. Appellee admitted to recently consuming four beers, was unsteady on his feet, and failed to perform field sobriety testing satisfactorily. Appellee's breath test revealed his blood alcohol concentration (BAC) was .127%. Officers placed Appellee under arrest for DUI and transported him to the Williamsport Hospital for blood testing. After Appellee was read the DL–26 Chemical Testing Warnings, he refused to submit to a blood sample.

On May 18, 2015, Appellee was charged with DUI—general impairment (75 Pa. C.S.A. § 3802(a)(1)) and a summary charge for required

lighting (75 Pa.C.S.A. § 4302(a)(1)). On March 8, 2016, Appellee filed a pre-trial motion to dismiss the DUI charge, specifically arguing that he had a constitutional right to refuse to submit to a warrantless blood test. Thus, Appellee claimed that his refusal to submit to a blood test should have been suppressed. On April 28, 2016, the trial court denied Appellee's motion.

On the same day, Appellee proceeded to a bench trial in which the Commonwealth was permitted to introduce testimony from the arresting officer detailing how Appellee had refused a blood test. The officer explained that Appellee had asserted that he not want a needle in his arm because he claimed that he had contracted hepatitis from a hospital needle on a prior occasion. At the conclusion of the trial, Appellee was convicted of the DUI charge and the summary traffic violation.

On July 1, 2016, Appellee filed a motion for reconsideration of the trial court's denial of his motion to dismiss, arguing that evidence of his refusal to submit to a blood test should have been deemed inadmissible at trial. Specifically, Appellee cited to the recent decision in ***Birchfield v. North Dakota***, ––– U.S. ––––, 136 S. Ct. 2160, 2186, 195 L.Ed.2d 560 (2016), in which the Supreme Court found that implied consent laws cannot deem motorists to have given consent to criminal penalties upon their refusal to submit to chemical testing. On August 19,

2016, the trial court entered an order granting Appellee a new trial at which the prosecution would not be allowed to introduce evidence of Appellee's refusal. The Commonwealth filed this timely appeal.

We review a trial court's decision to grant or deny a motion for a new trial under an abuse of discretion standard.[1] ***Czimmer v. Janssen Pharm., Inc***., 122 A.3d 1043, 1051 (Pa.Super. 2015). Moreover,

> [w]e must review the court's alleged mistake and determine whether the court erred and, if so, whether the error resulted in prejudice necessitating a new trial. If the alleged mistake concerned an error of law, we will scrutinize for legal error. Once we determine whether an error occurred, we must then determine whether the trial court abused its discretion in ruling on the request for a new trial.

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[1] We note that the trial court entered this order granting a new trial before entering a judgment of sentence. However, "[i]nterlocutory appeals as of right are permitted from orders in criminal proceedings awarding a new trial where the Commonwealth claims that the lower court committed an error of law."
Commonwealth v. MacDougall, 841 A.2d 535, 536–37 (Pa.Super. 2003) (citing Pa.R.A.P. 311). As this is the procedural posture before us, we may proceed to review the trial court's actions.

Id. (quoting ***ACE Am. Ins. Co. v. Underwriters at Lloyds and Cos***., 939 A.2d 935, 939 (Pa.Super. 2007)).

The Commonwealth argues that Appellee is not entitled to a new trial as it was constitutionally permissible for the prosecution to introduce evidence of Appellee's refusal to consent to a warrantless blood test at his trial on DUI charges to show consciousness of guilt. Appellee asserts that he had a constitutional right to refuse the warrantless blood test pursuant to ***Birchfield***; thus, Appellee argues the admission of the refusal evidence penalized him for exercising a constitutional right.

Before reaching the parties' specific arguments, we begin by discussing the statutory scheme and related decisional law governing chemical testing of individuals suspected of DUI and related traffic offenses. Our courts have established that driving is a privilege, not a fundamental right. ***Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Scott***, 546 Pa. 241, 250, 684 A.2d 539, 544 (1996); ***Commonwealth v. Jenner***, 545 Pa. 445, 681 A.2d 1266, 1273 (1996). To hold this privilege, drivers must meet necessary qualifications and comply with the terms of the Implied Consent Law (75 Pa.C.S.A. § 1547), which requires motorists to submit to chemical sobriety tests when requested to do so by an authorized law enforcement officer under the specific circumstances outlined in the

statute. As a general rule, Section 1547 provides in pertinent part:

> Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath or blood for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:
>
> (1) in violation of section . . . 3802 (relating to driving under influence of alcohol or controlled substance) . . .

75 Pa.C.S.A. § 1547(a)(1).

The Implied Consent Law sets forth penalties to be imposed upon a person who is arrested for DUI and refuses to submit to chemical testing. First, Section 1547(b) requires the Pennsylvania Department of Transportation to suspend the driver's license for at least one year. 75 Pa.C.S.A. § 1547(b). Second, Section 1547(e) allows for evidence of the motorist's refusal to submit to chemical testing to be admitted at his or her criminal trial on DUI charges:

> **(e) Refusal admissible in evidence.**—In any summary proceeding or criminal proceeding in which the defendant is charged with a violation

> of section 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge.

75 Pa.C.S.A. § 1547(e).

In addition to license suspension and evidentiary consequences in DUI prosecution for refusal of chemical testing, the Legislature also set forth criminal penalties for individuals who are convicted of DUI charges in a separate section of the Vehicle Code; Section 3804(c) provides that a motorist who is convicted of DUI under Section 3802 and refused to submit to testing shall be sentenced to enhanced penalties as delineated in that provision. 75 Pa.C.S.A. § 3804(c).

In post-trial motion, Appellee limited his argument to challenge the application of Section 1547(e) in this case as the prosecution was allowed to admit evidence of his refusal at his trial on DUI charges. As the trial court granted Appellee's post-trial motion and awarded him a new trial before Appellee was sentenced, Appellee was not subjected to the

criminal penalties set forth in Section 3804(c).[2] The trial court granted Appellee's post-trial motion as it found that the admission of evidence of Appellee's refusal to submit to a warrantless blood test penalized Appellee for refusing to waive his Fourth Amendment right to be free from warrantless searches.

The Fourth Amendment of the United States Constitution provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Blood tests and breath tests constitute searches under the Fourth Amendment as they implicate privacy concerns. ***Birchfield***, 136 S. Ct. at 2173. ***See also Commonwealth v. Ellis***, 223, 415 Pa.Super. 220, 608 A.2d 1090, 1091 (1992) (providing that "the administration of a blood test is a search within the meaning of the Fourth Amendment if it is performed by an agent of the government").

As a general rule, the Fourth Amendment requires that, in order to conduct a search of an individual or his or her property, law enforcement must obtain a warrant, supported by probable cause and issued by a neutral magistrate. ***Commonwealth v.***

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[2] In its appellate brief, the Commonwealth states that pursuant to ***Birchfield***, Appellee's sentence could not be enhanced as a result of his refusal of chemical testing

Arter, ––– Pa. ––––, 151 A.3d 149, 153 (2016). Although a warrantless search is per se unreasonable, this rule is subject to several established exceptions, which includes the consent exception. ***Commonwealth v. Evans***, 153 A.3d 323, 327–28 (Pa.Super. 2016). While trial court recognized Appellee was not subjected to a governmental search as he refused to submit to blood testing, the trial court asserted that Appellee's "exercise of his Fourth Amendment right to be free from warrantless searches cannot be used as evidence of consciousness of guilt." Trial Court Opinion, 8/22/16, at 3.

Though not expressly stated, the trial court's rationale for granting Appellee a new trial derives from principles set forth in ***Griffin v. California***, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965), in which the Supreme Court of the United States held that the commentary made by the trial court and prosecutor suggesting to the jury that the defendant's failure to testify at trial could be considered evidence of guilt impermissibly burdened the defendant's privilege against self-incrimination. The Court rejected this commentary as "a penalty imposed by courts for exercising a constitutional privilege." ***Id***. at 614, 85 S. Ct. at 1229.

Nevertheless, the Supreme Court declined to extend the penalty analysis set forth in ***Griffin*** to a case involving a defendant's refusal to submit to warrantless blood testing. In ***South Dakota v. Neville***, 459 U.S. 553, 103 S. Ct. 916, 74 L.Ed.2d

748 (1983), the Supreme Court concluded that the admission of evidence of a defendant's refusal of a warrantless blood test did not violate Appellee's Fifth Amendment right against self-incrimination or his Fourteenth Amendment right to due process. The Court acknowledged its previous decision in ***Schmerber v. California***, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966), in which it had concluded that the prosecution's admission of the results of a compelled blood test in the defendant's trial on DUI charges did not violate the defendant's Fifth Amendment right against selfincrimination as blood evidence was not testimonial, but merely physical.

In reaching its ultimate conclusion that Appellee's right against self-incrimination and right to due process had not been violated, the ***Neville*** Court observed that the specific rule set forth in ***Griffin*** forbidding commentary on a defendant's refusal to testify at trial was inapplicable as "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." ***Id***. at 560 n.10, 103 S. Ct. 916. The Court explained that the right to refuse a blood or breath test is not one of "constitutional dimension" but rather is "simply a matter of grace bestowed by the [state] legislature." ***Id***. at 565, 103 S. Ct. 916.

Consistent with this federal precedent, this Court has also emphasized that an individual sus-

pected of drunk driving does not have a constitutional right to refuse chemical testing. In ***Commonwealth v. Graham***, 703 A.2d 510 (Pa.Super. 1997), the appellant argued that trial counsel was ineffective in failing to move to suppress the results of his warrantless blood test as the appellant claimed his consent had been coerced in violation of the Fifth Amendment when he was informed that his refusal would be used as evidence of guilt in a trial on DUI charges. Thus, the appellant claimed that Section 1547(e), which sets forth the evidentiary consequences imposed on a motorist who refuses to submit to chemical testing upon a lawful arrest for DUI, was an unconstitutional penalty to the exercise of an individual's right to refuse the test.

However, the ***Graham*** Court concluded that the evidentiary consequences for the refusal of a blood test set forth in Section 1547(e) did not violate the appellant's constitutional rights, as the appellant's "right to refuse the blood test is derived only from Section 1547 itself and not from the Constitution." ***Id***. at 512. This Court emphasized that there is:

> no constitutional right to refuse chemical testing. . . . [D]riving in Pennsylvania is a civil privilege conferred on individuals who meet the necessary qualifications set forth in the Vehicle Code. . . . Under the terms of the Implied Consent Law, one of the necessary qualifications to continuing to hold that privilege is that a motorist must submit to chemical sobriety testing, when requested to

> do so by an authorized law enforcement officer in accordance with the prerequisites of the Implied Consent Law. The obligation to submit to testing is related specifically to the motorist's continued enjoyment of the privilege of maintaining his operator's license.

Commonwealth v. Graham, 703 A.2d 510, 512 (Pa.Super. 1997) (quoting ***Commonwealth v. Stair***, 548 Pa. 596, 699 A.2d 1250 (1997) (equally divided Court)). ***See also Scott***, 546 Pa. at 250, 684 A.2d at 544 (same).

Based on the reasoning set forth in ***Neville*** and ***Graham***, we find Appellee had no constitutional right to refuse a blood test upon his lawful arrest for DUI and thus, it was constitutionally permissible for the prosecution to introduce evidence of this refusal at his trial on DUI charges.

The trial court's reliance on ***Birchfield*** is misplaced; this decision does not support the trial court's assertion that Appellee had a constitutional right to refuse chemical testing. In ***Birchfield***, the Supreme Court of the United States reviewed the constitutionality of implied consent laws that *criminalize* a driver's refusal to undergo warrantless chemical testing upon a lawful arrest for drunk driving. In the course of doing so, the High Court assessed whether the search-incident-to-arrest exception to the Fourth Amendment could justify warrantless chemical testing. After analyzing the impact of blood and breath tests on individual privacy

interests as well as the need for BAC tests in criminal prosecution, the Court concluded that law enforcement may require a motorist to submit to warrantless *breath* testing as a search incident to an arrest for drunk driving; however, this exception does not justify warrantless *blood* testing, which is a more intrusive process.

Nevertheless, while the High Court rejected the application of the search-incident-to-arrest exception to compel a motorist to submit to a blood test, it expressed approval of implied consent laws that deem a motorist to have consented to be subject to certain penalties if they refuse to submit to a warrantless blood test upon his or her arrest for DUI. Acknowledging the consent exception to the warrant requirement, the Court provided as follows:

> It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context. Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose ***civil penalties and evidentiary consequences*** on motorists who refuse to comply. ***Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them***.

Birchfield, 136 S. Ct. at 2185 (emphasis added) (citations omitted). ***See also Missouri v. McNeely***, 569 U.S. 141, 133 S. Ct. 1552, 1556, 185 L.Ed.2d 696

(2013) (plurality) (acknowledging with approval that implied consent laws are employed as a tool to secure BAC evidence as "most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution").

While expressing approval of the imposition of civil penalties and evidentiary consequences on motorists who refuse to comply with chemical testing upon their arrest, the ***Birchfield*** Court concluded that it was unreasonable for implied consent laws to impose *criminal* penalties to punish a motorist for refusing consent. The Supreme Court's decision in ***Birchfield*** did not provide that the an individual has a constitutional right to refuse a warrantless blood test, but stressed that "there must be a ***limit to the consequences*** to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." ***Birchfield***, 136 S. Ct. at 2185 (emphasis added).

Based on the Supreme Court's language approving *civil* penalties set forth in implied consent laws, we conclude that it is reasonable to deem motorists to have consented to civil penalties such as license suspension and evidentiary consequences if they choose to refuse to submit to chemical testing upon a lawful arrest for DUI.

For the foregoing reasons, we conclude that Appellee was not entitled to a new trial based on the admission of evidence of his refusal to submit to a

warrantless blood test. Accordingly, we reverse the trial court's order and remand for sentencing.

Order reversed. Remand for sentencing. Jurisdiction relinquished.

APPENDIX E

IN THE COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PENNSYLVANIA

No. CR 1098 2015

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

THOMAS S. BELL,
DEFENDANT

Argued: July 15, 2016
Filed: Aug. 19, 2016

Motion for Reconsideration

OPINION AND ORDER

Before the Court is Defendant's Motion for Reconsideration, filed July 1, 2016. Argument on the motion was heard July 15, 2016, following which the Commonwealth requested and was granted a period of time in which to file a responsive brief. That brief

was filed August 15, 2016 and the matter is now ripe for decision.[1]

By Order dated April 28, 2016, this court denied Defendant's Motion to Dismiss, which sought to dismiss count 1 of the Information, driving under the influence of alcohol (refusal).[2] Defendant had argued that he had a constitutional right to refuse to submit a sample of his blood for testing without a search warrant and that the refusal should be suppressed and the charge dismissed.[3] After a non-jury trial, held that date, Defendant was convicted of the charge and sentencing was scheduled for August 29, 2016.

In the instant motion for reconsideration, Defendant points to the recent decision of the Supreme Court of the United States in Birchfield v. North Dakota, 136 S. Ct. 2160, 2172 (2016), where the Court addressed the issue of "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream". With respect to at least blood

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[1] Defendant filed a response to that brief on August 17, 2016.

[2] 75 Pa. C.S. Section 3802(a)(1).

[3] The motion was denied based on the reasoning in Commonwealth v. Altman, No. CR-2011-2013 (August 15, 2014).

tests,[4] the Court answered the question in the negative.
After holding that warrantless blood tests violate a motorist's Fourth Amendment right to be free from unreasonable searches, the Court also rejected the claim that consent (presumed under the implied-consent laws) eliminates the need for a warrant, concluding that "there must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads",[5] and that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense".[6]

The Commonwealth agrees that under Birchfield, Defendant's sentence cannot be enhanced because of the refusal in this case. The issue has thus become whether Defendant should be granted a new trial because evidence of the refusal was introduced to show consciousness of guilt,[7] and, in this case, the court in explaining its verdict indicated that that evidence was instrumental in the conviction.

Initially, the Commonwealth argues that Defendant waived his right to now raise this issue as

[4] Breath tests were held to not violate the Fourth Amendment.

[5] Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016).

[6] Id. at 2186.

[7] Defendant is not entitled to have the charge dismissed because the refusal was not an element of the crime.

he did not object at trial to the officer's testimony regarding Defendant's refusal. The court does not agree that the issue has been waived. First, at the time of trial, evidence of the refusal was necessary for later sentencing purposes, and any objection would have been futile. Moreover, Defendant did raise the issue in his motion to dismiss, which was argued and ruled on just prior to trial. The court will therefore address the merits of the issue.

In Commonwealth v. Welch, 585 A.2d 517 (Pa. Super. 1991), wherein the defendant had refused a warrantless search of her bedroom, the Superior Court held that one's exercise of his Fourth Amendment right to be free from warrantless searches cannot be sued as evidence of consciousness of guilt.[8]

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[8] In reaching this conclusion, the Court reasoned as follows: "As we read the various comments made by the courts regarding the assertion of one's Fifth Amendment right the overriding tone is that it is philosophically repugnant to the extension of constitutional rights that assertion of that right be somehow used against the individual asserting it. Although the cases have discussed the Fifth Amendment right we see no reason to treat one's assertion of a Fourth Amendment right any differently. It would seem just as illogical to extend protections against unreasonable searches and seizures, including the obtaining of a warrant prior to implementing a search and to also recognize an individual's right to refuse a warrantless search yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt. To allow such testimony essentially puts the individual in the same kind of no win situation that would exist if the above outlined decisions were to the contrary. With respect to

The Court stated: "The point of significance is that one should not be penalized for asserting a constitutional right. It is the assertion of a right that we must focus on. We believe that the assertion of a right cannot be used to infer the presence of a guilty conscience." Id. at 520. Since Birchfield has now declared that there is a Fourth Amendment right to be free from warrantless blood tests following arrest for drunken driving, it follows under Welch that evidence of a defendant's refusal to take such a test cannot be used as evidence of consciousness of guilt.

In their brief, instead of addressing Welch, the Commonwealth instead points to a recent Franklin County decision which addressed the same issue raised herein: Commonwealth v. Oliver, No. 52 of 2015 (Franklin County, Zook. J., August 5, 2016). Relying on Commonwealth v. Graham, 703 A.2d 510 (Pa. Super. 1997), which relied on Schmerber v.

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the Fifth Amendment one would be forced to choose between speaking
after arrest at the expense of possibly incriminating himself, or refusing to speak and having this fact brought up at trial thereby inferentially incriminating himself. With respect to a search, one would have to choose between allowing a search of one's possessions, or having the refusal be construed as evidence that one was hiding something. To the extent an assertion of such a right will often be construed by the lay juror as an indication of a guilty conscience, allowing testimony of the assertion of the right will essentially vitiate any benefit conferred by the extension of the right in the first instance, thus, rendering the right illusory.

California, 384 U.S. 757 (1966), the court concluded that "a defendant has no constitutional right to refuse a chemical test in the Commonwealth of Pennsylvania" and, therefore, "such evidence is admissible at trial". Commonwealth v. Oliver, supra, at 9-10. Schmerber and Graham both addressed the Fifth Amendment privilege against self-incrimination, however, and cannot control on this issue when the United States Supreme Court has just announced that there *is* a Fourth Amendment right to refuse a warrantless blood test. This court does not agree with Franklin County's dismissal of Birchfield simply because it did not address the evidentiary issue presented herein. Rather than being of "little assistance", Id. at 5, Birchfield is the foundation upon which the analysis should be built.

The court does recognize the statement in Birchfield, deemed controlling by the court in Oliver, wherein the Court noted that "[o]ur opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" and that "nothing we say here should be read to cast doubt on them." As the evidentiary issue presented herein was not before the Court, however, this court concludes that the reference to evidentiary consequences is merely dicta and does not require a different result from that

reached herein.[9] After all, the Court had framed the issue as one of "whether motorists lawfully arrested for drunk driving may be convicted of a crime or *otherwise penalized* for refusing to take a warrantless test measuring the alcohol in their bloodstream". Birchfield, *supra*, at 2172. Considering our Superior Court's determination, with which this court agrees that by allowing the use of evidence of one's exercise of a constitutional right against him, one is being "penalized", the matter is clearly controlled Birchfield's *main* point: a warrantless blood test violates a defendant's right to be free from unreasonable searches and he thus has a constitutional right to refuse it, which refusal cannot provide the basis for him to be convicted of a crime or otherwise penalized.

Accordingly, in light of this court's consideration at trial of Defendant's refusal, and the weight given that evidence by this court as factfinder, the court enters the following:

ORDER

AND NOW, this 19th day of August 2016, the matter having been reconsidered and for the foregoing reasons. Defendant's request that Count 1 be

[9] The Court may very well have been referring to *civil* evidentiary consequences.

dismissed is hereby DENIED, but the request for a new trial is hereby GRANTED. The Deputy Court Administrator is requested to list this case during the next trial term. The sentencing hearing scheduled for August 29, 2016 is hereby cancelled.

BY THE COURT

/s/ Dudley N. Anderson

Dudley N. Anderson, Judge

Cc: Eileen Dgien, DCA
DA
Peter T. Campana, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

APPENDIX F

IN THE COURT OF COMMON PLEAS
OF LYCOMING COUNTY, PENNSYLVANIA

No. CR-1098-15

COMMONWEALHTH OF PENNSYLVANIA, PLAINTIFF

v.

THOMAS BELL, DEFENDANT

Apr. 28, 2016

TRANSCRIPT OF TRIAL BEFORE THE HONORABLE DUDLEY N. ANDERSON

APPEARANCES:

FOR THE PLAINTIFF:

ANTHONY CUICA, ESQ.

FOR THE DEFENDANT:

PETER T. CAMPANA, ESQ.

[3]

THE COURT: Okay, good morning. We are here for proceedings in the matter of Commonwealth versus Thomas Bell. I understand we are scheduled for a non-jury trial. And I understand there is also recently received here a motion to dismiss, is that correct?

MR. CUICA: That's correct, Your Honor.

THE COURT: And Mr. Campana, you filed this, and I think I understand pretty much the background of the whole thing. And I understand that there is a seminal decision that is pending before, is it the Supreme Court of the United States?

MR. CAMPANA: Yes, Your Honor.

THE COURT: And that very basically the issues has been decided in Pennsylvania, but that you wish to–

MR. CAMPANA: Preserve the issue.

THE COURT: Preserve the issue.

MR. CAMPANA: Right. What happened was the Supreme Court granted certiorari in the cases from [4] North Dakota and from Minnesota on the issue after I had filed my omnibus. So that's why this was filed late. At the time that I filed the omnibus, I didn't know that the U.S. Supreme Court was going to hear the issue. It had already been decided against us, so I didn't bother filing it. But once I realized the U.S. Supreme Court was going to make a decision, I wanted to file it to preserve the record.

THE COURT: Okay.

MR. CAMPANA: So it's untimely, but I believe the interest of justice exception–the Commonwealth won't be prejudiced by the late filing.

THE COURT: Mr. Cuica, you didn't say anything about the timeliness. I assume that you are okay with it?

MR. CUICA: Judge, I am not. I was telling Mr. Campana that I thought that Your Honor would still hearing the motion. But for the record, I did want to object to untimeliness because this arraignment was July 27th of 2015. We did however, through conversations between Defendant and Commonwealth, agree that as of October 2, 2015, the Defense would have 30 days to file any motions. So the deadline would be November 2nd of 2015, which is what I am saying was the deadline, and this, you know, wasn't filed until [5] March 8th of this year, last month. So clearly that's is past the November 2, 2015 deadline. So I did want to note that it's untimely.

THE COURT: But is there any prejudice that lows to the Commonwealth?

MR. CUICA: Well my answer to that Judge is that the prejudice would be that we are on the day of trial arguing this motion. However–

THE COURT: Well you're not really.

MR. CUICA: Well not really. So in other words, what bothers me about that is the rules, the timeliness rules don't mean anything in the sense that well what do they mean, because the deadline was November 2nd of 2015, and it's filed in March. And the prejudice, the only prejudice I can show Judge is that, you know, we are at the day of trial now arguing this motion that really should be a motion decided before trial date. But I am not trying to say there is a strong prejudice, but I believe do that–

I wanted to make it clear for the record that it is an untimely filing.

MR. CAMPANA: I think this could have been raised in a motion for judgment of acquittal after the Commonwealths presentation. Actually I think that you can preserve the Constitutional issue by a demurrer or [6] a motion for judgment of acquittal.

But the reason it wasn't filed is because, as I said, the Supreme Court took these matters up after November, earlier this year.

THE COURT: How do you want me to handle it Mr. Campana? You know I am going to follow Pennsylvania law on it.

MR. CAMPANA: Right, right.

THE COURT: I am going to follow that. And I am not going to grant your motion to dismiss. And do you want me to go ahead and do that and then you preserve the reconsideration, or are you going to appeal it or what?

MR. CAMPANA: Well I don't think there is going to be an appeal of anything, because I think there is a reasonable doubt about whether or not Mr. Bell was in fact impaired here. So that I think the Court is going to find him not guilty anyway.

THE COURT: Okay.

MR. CAMPANA: So I would just like to have the Court rule on the substance of the issue, and not deny it because procedurally it was untimely. Because I don't think the Commonwealth is prejudice

at all, because the facts are the facts. Refused the blood test.

[7]

THE COURT: Right. Okay. You're right Mr. Cuica, and normally I would strike it for timeliness if it involved some kind of substantive issue where you were forced to bring in witnesses and testimony and that kind of thing. But in this particular instance, I think all the facts are stipulated to. I think the decision is a foregone conclusion. The only thing that he is asking the Court to do is to preserve the issue in the event that the Supreme Court--in the event that he loses here, and that the Supreme Court decides against North Dakota, Minnesota and Pennsylvania, okay?

MR. CUICA: Understood Your Honor.

THE COURT: Okay. So with that in mind, are you ready now to proceed to trial?

MR. CAMPANA: Yes, Your Honor.

THE COURT: With respect to the this particular matter Mr. Cuica, is there anything you would like to say by way of opening or preface your remarks in any way or are there any stipulations that you would like to present to me?

MR. CUICA: No, Your Honor.

THE COURT: Mr. Campana, is there anything as far as opening statement or anything preliminary before we take evidence that you would like to present to me?

[8]

MR. CAMPANA: No, Your Honor, I waive opening statement. It's our position that the Commonwealth will not have sufficient evidence to establish beyond a reasonable doubt of impairment required for DUI.

THE COURT: Mr. Cuica, are you ready to proceed?

MR. CUICA: We are, Your Honor.

THE COURT: Okay. Would you like to call your first witness?

MR. CUICA: Yes, Your Honor. The Commonwealth would call Sergeant David Pletz to the stand.

THE COURT: Good morning Sergeant.

DAVID PLETZ

having been duly sworn, was called as a witness and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUICA:

MR. CUICA: Your Honor, I should make this clear. I have sequestered my two witnesses that I would be calling after Sergeant Pletz. I don't know if Defense has any witnesses, but if they do, I would just request they be sequestered at this time.

THE COURT: Off the record.

(The Judge addresses a high school class that is observing the case.)

[9]

Q Would you please state your full name for the record?

A David Pletz.

Q And could you spell your last name?

A Sure, it's P-l-e-t-z.

Q And what is your current occupation?

A I am a Penn College Police Sergeant at Penn College.

Q And what is your actual rank?

A Sergeant.

Q How long have you been employed by the Penn College Police Department?

A It will be 19 years in July.

Q Now Sergeant, do you have training in the detection of impaired drivers?

A Yes, I do.

Q Can you please describe that training?

A Sure. I have been to the standard field sobriety testing class updates. There is ARIDE training that I have been to. DUI checkpoint training, DUI detection courses.

Q And over your career, approximately how many times have you stopped a driver that you believe might be impaired?

A By that question, the way I would answer that [10] is that would be if I was following a vehicle and they may do something to lead me to believe they were impaired, you know, by whatever that is that they're doing, I would say 200 times possibly.

Q And Sergeant, do you arrest everyone who you initially believe to be impaired?

A No.

Q Why not?

A There is multiple steps. There is the driving portion, you know, you see clues on the road. Then there is the initial contact phase where you're actually making face to face contact with the people on a traffic stop. There is things that you could notice there. And then there is the field sobriety testing after that.

Q And so after you have conducted personal contact with the drivers that you suspect may be driving under the influence, you made the determination that they're not actually impaired due to alcohol?

A Sure, sometimes that happens.

Q Now how many times have you actually arrested someone? Approximately how many times have you actually arrested someone for driving while impaired?

A Fifty or 60 times. I have actually been on day shift since 1999, so they're harder to come by.

[11]

Q And Sergeant, when you do arrest someone that you believe is impaired, do you arrest based on only one indication of impairment?

A No, it would be a combination of from, you know, whether it's driving, the initial contact, and then the standard field sobriety testing.

Q I am going to direct your attention to the traffic stop we are here for today. Were you working on Saturday, May 16, 2015?

A Yes, I was.

Q And what were your duties on that date?

A That was part of a saturation patrol we were working in the City of Williamsport. We were targeting high crime areas. Basically our job was to patrol those high crime areas and look for criminal activity; whether it be, you know, initiated by traffic stop or pedestrian encounter, whatever we came across.

Q And were you working by yourself or did you have a partner?

A I had a partner. Corporal Bowers from Penn College Police also, she was with me.

Q And were you in full uniform?

A Yes.

Q Were you in a marked patrol unit?

A Yes, we were.

[12]

Q And who was driving the unit?

A I was driving.

Q Is there an in-car camera recording system on that unit?

A No, there is not.

Q Where were you at approximately 11 p.m. on May 16th?

A We were on–in the 700 block of West Fourth Street traveling west.

Q And what did you observe that brings us to court here today?

A Well we had noticed a gray VW Beetle. Initially it was parked along the road on the left-hand side, like across from the Shamrock or Weightman Block area. It was facing west also. And we noticed it was–it pulled out from the curb to the red light. We had a red light. We were behind it. Once it pulled out to the red light, we noticed that it had no rear lighting. So at that point we just–we stayed behind it, you know, just pulled out, and so we thought, okay, well they're turn left, south, onto Campbell Street in the 300 block. We gave a little bit of time. They still didn't turn the lights on. And it was dark, I mean it was completely dark. And then we initiated the traffic stop there in the 300 block of Campbell Street [13] southbound.

Q And you were conducting that stop on the 300 block of Campbell. Is that within the actual direct jurisdiction of the Penn College Police Department?

A Yes, it is.

Q Were you eventually able to identify the driver of the vehicle?

A Yes, I was.

Q Is the driver of that vehicle in the courtroom here today?

A Yes. It's the Defendant, the gray polo shirt on– or button up shirt.

MR. CUICA: Your Honor, would the record identification of the Defendant?

THE COURT: It does.

BY MR. CUICA:

Q Did you approach the Defendant's vehicle on foot after conducting the stop?

A Yes, I did.

Q And what happened as you approached his vehicle?

A The driver's door popped open, and the Defendant Mr. Bell, his window didn't work, it didn't go down and that's why he opened the door.

Q But Mr. Bell was still in the car?

[14]

A He was still in the car, yes.

Q Were you able to smell any odor coming from the Defendant?

A Yes. Once I got there, I asked for his–. I told him why I stopped him. Asked for his driver's license, registration, proof or insurance. He couldn't

provide a driver's license on him at the time. So, you know, I was able to converse with him briefly, told him why we out there, why I made the stop. Noticed the odor of alcohol coming from his breath and he had glossy eyes.

Q And sir, how many people were in the vehicle?

A Two people; him and a front seat passenger, who appeared to be sleeping actually when we first stopped the vehicle.

Q And was there a male or female?

A Female.

Q Now after checking on the Defendant's information, or obtaining his information, did you go back to your patrol vehicle to check on anything?

A Yeah. I went back to run the information that he had given me for his driver's license. I am sure I checked for wants and warrants and run the registration check, the insurance card, things like that.

[15]

Q And then you returned to the Defendant's vehicle, is that correct?

A Yes, I did.

Q Did you ask him to exit the vehicle?

A Yes. I asked him how many he had to drink, because it was obvious that he was consuming alcohol. And he had mentioned that he drank four beers that night prior to driving. I asked him to step

out of the car at the rear of the car to perform field sobriety tests, which he agreed to do.

As he stepped out of the car, he seemed uneasy on his feet, kind of, I don't know, almost like somebody that was sitting for hours and hours, and then when he first gets up and gets out and just kind of shaky on the way back to the rear of the vehicle.

Q And to start, did you ask him to perform field sobriety tests?

A Yes, I did.

Q And it might be a little repetition, but have you had training in administering field sobriety tests?

A Yes, I have.

Q And what specifically was that training?

A The standard field sobriety testing, as well as ARIDE, there was a refresher for that in that class, [16] and the check point class, went over it again.

Q And what is the purpose of administering field sobriety tests?

A They're just–they're just tests you administer to the drivers who you suspect is impaired. And there are clues, there are specific clues for each test that you look for, which, you know if they had a certain number of clues on each test it would indicate impairment.

Q What test did you administer first to the Defendant?

A The walk and turn test.

Q And did you instruct the Defendant how to perform that test?

A Yes, I did.

Q And did you also demonstrate that test for him at least in part?

A I did, the entire test.

Q And did you observe the Defendant perform that test?

A Yes, I did.

Q And could you please describe how he performed on that test?

A Sure. During the walk and turn test, there is actually eight specific clues that we look for. And [17] out of those eight clues, I noticed four of the eight, which would indicate impairment with Mr. Bell as he did the test. They would be when he first started walking, the first three steps, he kind of raised his hands for balance on the first three steps out. It's nine steps out, you turn around and nine steps back basically. So on the first three steps he used his arms for balance. And after he turned around for the return steps, between the second and third steps he missed his heel to toe by more than an inch and stepped off the line, which was three clues. And then he ended it on eight steps, which is another clue, the wrong number steps. So there was four out of eight total, which based on the training would indicate impairment for that.

Q And what test did you administer next?

A The one leg stand. There is–in that test there is four specific clues that we look for. And based on the performance on that test, Mr. Bell, I was able to see three out of the four clues, two of which at a minimum would indicate impairment.

Those clues in that particular test were the ones that he showed. He raised his hands for balance, he swayed while he was standing there and he put his foot down during the test. It's a [18] timed 30 second test. And then he ended up stopping completely at 25 seconds, which isn't a specific clue, but it is a fact.

Q And prior to the Defendant performing the test, did you instruct him how to perform the test?

A Yes, I did .

Q And did you demonstrate that test for him as well?

A Yes, I did.

Q And so what did the results of that one leg stand test indicate to you?

A It indicated clear impairment in my judgment.

Q And Sergeant, based on your experience and training, and your observations of the Defendant during this stop, did you form an opinion as to whether he had imbibed in a sufficient amount of alcohol rendering him incapable of safely driving?

A Yes, I did. I would–I concluded that he was clearly impaired and incapable of safe driving.

Q And what did you do as a result of that?

A He was taken into custody for suspected DUI and transported to the Williamsport Hospital DUI Center for processing.

Q And so when you arrived at the DUI Center, what did you actually physically do with the Defendant?

[19]

A When we get there, there is like two little rooms. We were in the first room, Corporal Bowers and I. Mr. Bell was taken into the second little room where he was being processed by Officer Litwhiler, who I believe who was working the DUI Center at the time. I have paperwork that I have to fill out for the phlebotomist, and that was what I was doing in the outer room initially.

Q Did you have any additional contact with the Defendant after you transferred him to the custody of the DUI Center?

A I don't know if I consider contact. But I never went in the other room, and he never came out while I was there. Generally speaking you fill out the paperwork out there and then you just leave, you drop him off. They process them, they give the blood, read them the DL26, and then we would just leave and go back on patrol.

In this case there was some verbal communication between the three of us, Litwhiler, and Mr. Bell. There was a conversation between the two of them regarding field sobriety, I think maybe Litwhiler

asked if field sobriety was given in the field, and I indicated yes, it was.

I think Mr. Bell had actually asked [20] to do it again at the hospital, but Litwhiler was working by himself. And I guess it's their policy they don't do field sobriety at the DUI Center if they're working by their self. So Litwhiler asked me, you know, unless the officer wants to do it again. Any my opinion at that time was I have already done the field sobriety in the field, you know, he's clearly impaired based on that, so there was no point in really doing it over again.

Q Okay.

A Because it would have been the exact same test again.

MR. CUICA: Okay, thank you Sergeant. I have no other questions Your Honor.

CROSS EXAMINATION

BY MR. CAMPANA:

Q Sergeant Pletz, you stopped the vehicle at about 11 p.m., is that correct, a little after 11 p.m.?

A Yeah, that sounds right.

Q And the reason you stopped it was because the rear lighting was not operating?

A Yeah, there was no rear lighting. I think what it actually was, I think maybe the car was equipped with some kind automatic daytime running lights, and maybe they were on in the front. I am not [21] sure. But there was no rear lighting.

Q Okay, buy there was headlights, the headlights were working?

A There may have been headlights.

Q And when the vehicle pulled away from the–it was what a parked on the south side of Fourth Street between what is that, Mifflin and Campbell?

A Yes.

Q And it pulled away from the curb?

A Yes.

Q Went to the red light?

A In the left lane.

Q And it stopped?

A Right.

Q But did the vehicle, did the operator put the left turn signal on?

A I don't recall for sure. I didn't–I don't–I don't remember citing him for that, so I would imagine it was probably on.

Q All right.

A The brake lights worked.

Q The brake lights worked?

A The brake lights worked, which that is why we knew, okay, that the lights were not on on the car.

Q Okay. Now this was a Volkswagen Beetle?

[22]

A Yes.

Q And did do you tell the Defendant that you stopped him because the rear lights weren't on?

A Because the lights weren't on, yes.

Q Did he tell you that there were two switches, one for the headlights and one for the rear lights, and he wasn't used to the Volkswagen and he only turned the headlights, is that what he told you?

A I don't–I don't recall that.

Q You don't recall that.

A No.

Q All right. Okay now you said that he did open the door when you approached, and although he didn't have his driver's license, he did have the insurance card and the registration card?

A Sure.

Q Did he actually tell you his driver's license number at that time so that you could check it out?

A He would have either given me that, or more likely his name and date of birth, and I could verify it in the vehicle using JNET.

Q All right. Then once you detected an odor of alcohol and had him come out of the vehicle, at that point you performed these field sobriety tests?

A Yes.

[23]

Q And the reason for these tests is to determine whether there are reasonable grounds to place the Defendant under arrest, is that fair to say?

A That's part of it, yes.

Q All right. And you said on the walk and turn test that he kind of raised his hands on the first three steps. What do you mean by kind of?

A Is that what I said? He raised his hands for balance.

Q Well I mean how--

A Like if you are walking on a tightrope, and you raise your hands as, you know, as you go along. It was–it was was clear the instruction phase of the test tells you to keep your hands at your sides. And I demonstrated that. And so he raised them significantly.

Q Okay. How far away from his legs did his arm go?

A For me to mark that down as a clue, I mean he would have to–it would have to be clearly out here to the side at least.

Q All right. So the first three steps he did that, but then the last–I guess he only took a total of eight steps?

A On the return. He took nine steps out, [24] turned around and came back eight, yes.

Q So the first three steps he raised his hands and then the next six he didn't, and eight steps back he didn't raise his hands?

A Correct.

Q And you said he missed heel to toe between the second and third. Was that on the way–the first nine or the last eight?

A The last eight.

Q All right. So the second and third he missed the heel to toe by a little more than an inch?

A By more than an inch. That's the basis that you use. You have to miss your heel to toe by more than an inch.

Q How much more than an inch?

A It was clearly more than an inch, or I wouldn't have marked it, because that's the standard.

Q All right.

A And he stepped off the line on the same step.

Q Well there actually was no line.

A Right.

Q It's an imaginary line.

A Right.

Q And this is 11:15 at night?

A Right.

[25]

Q And it was in the middle of Campbell Street that he was doing this?

A It was on Campbell Street in front of the police car with the headlights on, with the overhead lights turned off.

Q Before you had him do the walk and turn, did you ask him whether he had any difficulty or any injury to his legs?

A I asked if he was able to perform the test.

Q Is it fair to say that there are other reasons why someone would not perform these tests other than being impaired by alcohol, such as fatigue, is that what would interfere with someone's ability to do these tests?

A I don't know that fatigue would play a part in that test.

Q How about just lack of coordination generally?

A Possibly. I mean it's a split attention test with coordination involved.

Q How about age? Would that have an affect on

A Could play a part in coordination. That's why there is more to it than just a single test.

Q Okay. If you have a physical defect in your [26] legs, would that perhaps interfere with your ability to perform the walk and turn test, as possessed to being impaired by alcohol?

A I would imagine it would depend on what that defect is.

Q All right. And the one leg stand, do you recall which leg he stood on?

A I don’t actually. It was his choice. I didn’t specify which one.

Q Now you said on the one leg stand he swayed while balancing.

A Right.

Q What do you mean by that?

A Swaying while balancing would mean like, okay, even if he did keep his hands at the side, which he didn’t, it would be like, you know, doing this kind of a number while they’re trying to balance. So that would be swaying. And then he also did raise his hands for balancing, and he put his foot down.

Q So he was able to stand on one leg for 20 seconds and then he put his foot down?

A Put his foot down at 25 seconds.

Q Twenty-five seconds?

A It’s a 30 second test, so you’re suppose to remain–it’s–.

[27]

Q So he was able to stand on one leg for 25 seconds?

A Yes.

Q Although he was somewhat unsteady?

A Right.

Q Is that fair to say?

A Right.

Q And at the time you had him doing these tests, did you know that the vehicle was not equipped with a video?

A Yes.

Q So based upon these tests, you concluded you had reasonable grounds to place him under arrest?

A Yes.

Q And then you took him to the DUI Processing Center and as far as the DL-26 and all, that was done by the operator at the center?

A Right.

Q Okay. Had you ever seen Mr. Bell before this night?

A Not that I recall, no.

Q Now you said that his speech seemed somewhat muddled or slurred?

A Yes.

Q Do you know how his speech–how he speaks [28] normally? Did you ever speak to him before that night or after that night?

A No.

Q All right. As far as you're asking him if he had anything to drink, he said four beers. Did he tell you when he last consumed one?

A No.

Q Did you ask him?

A He said he was at a party, like a cabin party or picnic or something like that if I recall.

Q Now you said that you were on saturation patrol. I take it you were not working for Penn College at the time?

A I got paid by Penn College.

Q But you were on duty under the District Attorney's request?

A That's why we were out that night, yes, initially.

Q And Penn College paid you, but they got reimbursed by the County?

A I assume they got reimbursed.

Q And did you think about the possibility that you would have to get a search warrant to seize his blood at all, or were you relying completely on the implied consent law?

[29]

A Yeah, I never considered a search warrant for blood, no.

MR. CAMPANA: That's all I have Your Honor.

THE COURT: Any redirect?

MR. CUICA: Very briefly, Judge.

REDIRECT EXAMINATION

BY MR. CUICA:

Q Sir, did the Defendant ever state that he had any kind of physical ailments to you that would preclude him from performing the field sobriety tests?

A No.

Q And you smelled an odor of alcohol from the Defendant?

A Yes.

Q Was it a relatively smooth surface where you conducted these field sobriety tests?

A Yes. It was right on the street.

MR. CUICA: I have nothing else.

THE COURT: I assume your car is not equipped with a video?

THE WITNESS: It is not. We don't have any video in any of our cars currently.

RECROSS EXAMINATION

BY MR. CAMPANA:

Q Let me ask you this in response to that.

[30] There is video at the DUI Processing Center.

A Yes.

Q So if the Defendant–if you had allowed the Defendant to do the field sobriety tests there, it would have been on videotape and you knew that, is that right?

A I didn't think about it that way, but yeah, it would have been.

MR. CAMPANA: Okay, that's all I have.

MR. CUICA: Nothing else.

THE COURT: Thank you.

MR. CUICA: Your Honor, I will call Corporal Jen Bowers.

JENNIFER BOWERS

having been duly sworn, was called as a witness and was examination and testified as follows:

DIRECT EXAMINATION

BY MR. CUICA:

Q Good morning.

A Good morning.

Q Could you please state your full name?

A Jennifer Bowers.

Q And would you spell your last name?

A B-o-w-e-r-s.

Q And what is your current occupation?

[31]

A I am a police officer at Penn College in Williamsport.

Q And how long have you been employed by that Agency?

A Sixteen years.

Q And what is your current rank?

A I am a corporal.

Q Corporal, I am going to direct your attention to Saturday, May 16th of 2015. Were you working on that date?

A I was.

Q And what were your duties on that date?

A I was working saturation patrol with Sergeant Dave Pletz.

Q And were you in full uniform?

A I was.

Q And marked patrol unit?

A Yes.

Q And was Sergeant Pletz driving?

A Yes, he was.

Q Can you tell the Court what happened at approximately 11 p.m. that brings us to court here today?

A Yes. We spotted a vehicle with a taillight out in the 700 block of West Fourth Street.

[32]

Q And did you and Sergeant Pletz conduct a traffic stop of that vehicle?

A Yes.

Q Do you remember approximately where you conducted the stop?

A 300 block of Campbell Street.

Q And was the Defendant the driver of that vehicle?

A Yes.

Q Did you approach the vehicle along with Sergeant Pletz?

A Yes.

Q And could you describe how you approached the vehicle?

A I approached the passenger side.

Q And what did you observe when you arrived at the passenger side window?

A I observed that he had a passenger in the vehicle, and he was speaking to Sergeant Pletz.

Q And was the passenger in the front seat?

A Yes.

Q Front seat passenger?

A Yes.

Q Was it a male or female?

A Female.

[33]

Q Did you notice anything unusual about the Defendant at all?

A I noticed as he was speaking he was slurring his speech.

Q And could you smell any odor when you were next to the vehicle?

A I could smell an alcoholic beverage corning from the vehicle.

Q Now Sergeant Pletz conducted field sobriety tests, is that right?

A That's correct.

Q Were you able to observe these tests at all, or were you doing something else?

A My function was backup officer, so I usually make sure our area is safe for Sergeant Pletz and the Defendant and the passenger. So I was up towards the vehicle more speaking to the passenger of the vehicle.

Q So you didn't really observe the field sobriety tests?

A No, I did not.

Q Did you say anything to Sergeant Pletz about your observations of the Defendant?

A I had mentioned when he was back at the vehicle that I noticed the odor of an alcoholic beverage and that he had slurred speech as well.

[34]

Q After Sergeant Pletz conducted the field sobriety tests, was the Defendant taken into custody?

A Yes, he was.

Q And what did you and Sergeant Pletz do with the Defendant at that point?

A Took him to the DUI Center.

MR. CUICA: Thank you Corporal, that's all I have.

THE COURT: Mr. Camera, anything?

CROSS EXAMINATION

BY MR. CAMPANA:

Q As far as the odor of alcohol, you said it was coming from the the vehicle?

A Yes.

Q Did you smell it on the passenger?

A I can't tell where it's–. My position, I could just smell the odor of alcoholic beverage coming from the vehicle.

MR. CAMPANA: These all I have.

THE COURT: Okay, thank you Ma'am.

MR. CUICA: And Judge, my final witness is Officer Douglas Litwhiler.

DOUGLAS LITWHILER

Having been duly sworn, was called as a witness and was examined and testified as follows:

[35]

DIRECT EXAMINATION

BY MR. CUICA:

Q Good morning.

A Good morning.

Q Could you state your name for the record?

A Douglas Litwhiler.

Q And could you spell your last name?

A Mr. L-i-t-w-h-i-1-e-r.

Q And what law enforcement agency do you work for?

A Rush Township Police in Schuylkill County.

Q And how long have you been employed by that agency?

A Since September.

Q Since September of?

A 2015.

Q And did you work for another law enforcement agency prior to your current position?

A Yes, Montoursville Borough.

Q And how long were you working for that borough?

A From June 2014 to October of 2015.

Q So in total how long have you worked as a police officer?

A Been four years in June.

[36]

Q Did you also work for the County of Lycoming?

A Yes.

Q Okay. In what capacity?

A Detective at the DUI Center.

Q Now Officer, do you have training in the detection of impaired drivers?

A Yes.

Q Could you please describe that training?

A Standard field sobriety testing. Couple DUI courses I took. Advanced Roadside Impairment Detection Enforcement. ARIDE they call it. It's about it.

Q And approximately how many arrests for DUI have you made during your career?

A I just hit over a hundred. I am not–not–I know it's over a hundred. I quit counting after a hundred.

Q Understood. I just want to discuss your work at the DUI Center. Could you please briefly describe how the DUI Center operates?

A Yeah. One of the departments will bring somebody in under suspicion of DUI. They come in, we read their O'onnell warnings to them, and we also wind up reading–. Everything is recorded. We read the O'Connell warnings, and then we–after they submit or don't submit to the test, then we go through and we [37] read them their Miranda warnings and ask them a series of questions on a form that is made up by the District Attorney's Office.

Q And Officer, were you working at the DUI Center on Saturday, May 16, 2015?

A Yes, I was.

Q Did you Sergeant Pletz and Corporal Bowers bring the Defendant, Mr. Thomas Bell, to the DUI Center?

A Yes.

Q Is it standard procedure–. Well you answered this question. It is standard procedure to use a video camera at the DUI Center?

A Yes, video and audio.

Q And was a video recording made of Mr. Bell's interview?

A Yes, there was.

Q And we will review that recording shortly, but I just want to go over a few things first. During your contact with the Defendant at the DUI Center, were you able to smell any odor coming from the Defendant?

A Yes, I could smell an odor of an alcoholic beverage coming from his facial area.

Q How did his eyes appear to you?

A They were glassy and blood shot and watery.

[38]

Q Did you ask the Defendant to submit to a chemical test of his blood?

A Yes, I did.

Q Did he agree to take that test?

A No, he did not. He said that he got hepatitis one time in the hospital, and didn't want a needle in his arm.

THE COURT: And Your Honor, I am providing a copy, but I will mark this Commonwealth Exhibit 1 to Defense Counsel.

BY MR. CUICA:

Q Do you recognize that document I just handed to you?

A Yes. It's the O'Connell Warning, DL26 from Penn DOT.

Q And could you explain the purpose of this from?

A It's to inform the driver of the penalties could suffer for not submitting to a chemical

Q And you would have reviewed this form with the Defendant, is that correct?

A Yes, I read it word for word.

Q And the fact that he refused is indicated by him signing this form, is that correct?

[39]

A He signed the form that he was advised.

Q And so he did refuse?

A He did refuse, yes, he did refuse.

Q And is that your handwriting on the form here at the bottom?

A At the bottom that is my handwriting, and that is my signature and his signature and the dates, and the time next to my signature.

MR. CUICA: Judge, at this time I will mark as Commonwealth Exhibit 2–

THE COURT: The video?

MR. CUICA: The video.

THE COURT: From the DUI Center?

MR. CUICA: Correct, Your Honor. And this is the first frame of that video.

BY MR. CUICA:

Q And Officer, do you recognize what we are looking at here?

A Yes, that's Mr. Bell sitting in front of the camera. I am seated to the–if you are looking at the screen I would be to the right–actually his left.

Q Thank you.

MR. CUICA: At this time I will play the tape.

(Whereupon the video tape is played for the Court)

[40]

BY MR. CUICA:

Q Officer, is that a true and accurate video of the Defendant?

A Yes.

Q Officer, based on your experience and training, your observations of the Defendant throughout your interview, did you form an opinion as to whether he had consumed a sufficient amount of alcohol rendering him incapable of safely driving?

A Well when I worked there, when they call and say we are bringing somebody in, I wait down in the hall, and I observed him when they brought him all the way down through. He was swaggered gait. I mean I could tell the difference in somebody that is under the influence. I formed the opinion that he was under the influence of alcohol, and incapable of safely driving.

Q Thank you Officer.

A You're welcome.

MR. CUICA: Your Honor, I have no other questions.

CROSS EXAMINATION

BY MR. CAMPANA:

Q Officer–

A Good morning.

Q He was requested to submit to a blood test, [41] right?

A Yes, sir.

Q Who made that decision?

A What do you mean who made the decision?

Q Well who made the decision whether it should be blood, or breath, or urine?

A I get to choose.

Q You chose blood?

A That's what we do, that's what we do at the DUI Center, everybody gets blood.

Q Nobody has ever asked for breath or urine?

A It's not their choice, it's our choice.

Q All right. And when he said I am not going to give you blood because I got Hep-C at this hospital 30 years ago, did you think maybe you could you ask him for a breath test at that point?

A We don't have a breath test there to give to him.

Q How about urine? Hospital can test urine, can't they?

A I don't work at the hospital. I have no idea.

Q All right.

A Our procedure is that it's our choice and we go with blood sir, that's the only answer I can give.

[42]

Q Okay. Now on the video, you asked the Penn College Police whether they have given the field sobriety test and they said yes?

A Yes.

Q Then you said something about that will be on the video camera in the car?

A I assume they had one.

Q And they didn't tell you they didn't have one?

A I didn't ask them.

Q Well they heard you say that, they were standing right next to you, and neither one of them said they haven't got a camera?

A They weren't right next to me. I had to roll my chair out in the hall and talk to them.

Q But you could hear their voices on the video?

A Yeah, but at times when they were on the phone calling for the cab, they were closer to me.

Q All right. So, let me ask you why wasn't Mr. Bell given the opportunity to do the field sobriety test on camera at the DUI Center, which everybody else is given that opportunity?

A Because we usually have two guys working there to do it, and I was the only one working there that night. The other guy called off.

[43]

Q Well you had the other, the police officers there. Couldn't you have asked them to wait until you had him do the tests?

A I could have asked them to wait, but I need somebody else there to run the camera and do our procedure. And they're–I never worked with them there, so I don't know if they know the procedure of the DUI Center or not. I am not going against two experienced officers, if they have him there for a reason, they gave him field sobriety or not, if there is not a reason to give it to him again.

Q So you're going along with the officers because they're fellow officers, is that what you are telling us?

A I have never seen somebody bring in someone there who was not under the influence of alcohol.

Q Never?

A Not when I worked there.

Q All right. Let me ask you, why have a DUI Center equipped with a videotape where people do field sobriety tests on a videotape and not use it, what is the point?

A I can't answer that question.

THE COURT: Let me ask you, is it possible for you to do the video by yourself?

[44]

THE WITNESS: No, I can't video and give him field sobriety at the same time.

THE COURT: It takes two guys?

THE WITNESS: It takes two people. I was the only one working there that night. The other person called off sick.

BY MR. CAMPANA:

Q But there were two Penn College Police Officers right there at the time that Mr. Bell asked for the opportunity, is that correct?

A That is correct, but they're not part of the DUI Center.

Q Well how long had--they came there and they should have dropped him off and left, but they stayed there, right?

A I asked them stay so that somebody else was there. I was unharmed and whatever else.

Q Why didn't you ask them to stay so he could do the field test?

A Because I didn't have anybody else there to help do it or run the camera.

Q Okay. Let me ask you this question. You said that you detected an odor of alcohol on the Defendant's breath. If you had a choice of writing faint, moderate, or strong, which one did you write?

[45]

A I believe moderate.

Q And his attitude, you described it as cooperative, is that correct?

A Yeah. He wasn't fighting or anything, arguing.

Q And as far as the speech, you didn't say it was thick and slurred, you said it was mumbled, low, and raspy, is that what you said?

A If that's what it says on the paper, that's–

Q Well I showed it to you.

A Yeah, I don't have the paper in front of me, so it's how long ago? I can't remember everything that I wrote.

MR. CAMPANA: That's all I have.

THE COURT: Anything else Mr. Cuica?

MR. CUICA: No Judge, I have no redirect.

THE COURT: Okay.

MR. CUICA: Judge, at this time I would just move to introduce Exhibits 1 and 2.

THE COURT: Any objection?

MR. CAMPANA: We object to the refusal coming into evidence, but I think you have already ruled on that Judge.

THE COURT: Well yeah, okay, subject to your motion. No other objections?

[46]

MR. CAMPANA No other objections.

THE COURT: Okay. All right. You rest?

MR. CUICA: Yes, sir.

THE COURT: Mr. Campana.

DIRECT EXAMINATION

Q Would you state your full name?

A Jeanine D. Fink.

Q And what is your mailing address?

A 1719 Lycoming Creek Road.

Q Williamsport?

A Williamsport.

MR. CUICA: I do have to interrupt at this point in time. I don't have a date birth, identifying

information. I don't have a rap sheet on this person or any possible crimen falsi. I mean at this point, I would need a short recess to get that information so we could get that information. Unless Mr. Campana wants to make it, you know, representation to the Court that there is no crimen falsi. I would accept that from Mr. Campana.

MR. CAMPANA: Well Your Honor, I don't have to give them a list of my witnesses before the trial. I never inquired. She's got no criminal record at all.

THE COURT: Do you want to check?

MR. CUICA: Well Judge, I know Mr. Campana, [47] and I will take his word for it she has no criminal record.

THE COURT: I am not sure that it's as critical in a case like this Mr. Cuica, as it might be in–. Well, okay, I don't know what he's going to ask though. All right, I think Mr. Campana, we are moving on.

BY MR. CAMPANA:

Q You live at that address. You live there with Mr. Bell?

A Yes.

Q And how long have you guys lived together?

A Thirty-three, 34 years.

Q All right. Now on the day in question, you were in the car, Volkswagen–

A Yes.

Q – when it was stopped by the Penn College Police, correct?

A A-huh.

Q You have to say yes or no.

A Yes.

Q And that Volkswagen is your Volkswagen?

A Yes.

Q Would you describe how you have to–how you get the lights on in that Volkswagen?

[48]

A When you turn the key on, the headlights automatically come on. The taillights don't.

Q So what–

A You have to turn the switch to get full lights, taillights come on.

Q Now on the morning of May 16th, what time did you get up that day?

A Oh eight.

Q And was Mr. Bell, did he stay there that night? club.

A Yeah.

Q You got up together that day?

A Yep.

Q And what did you do that day, you, yourself?

A Started cooking for the picnic.

Q And what picnic is that?

A It was a fundraiser picnic out at the hunting club.

Q All right. So how long did you cook the food before you went there?

A Oh, I think we left probably about 12:30 to go out there, got there about one.

Q 12:30 p.m.?

A Yes.

Q And where is the hunting camp located?

[49]

A Gander Mountain Hunting Club, Mosteller Road.

Q It's Hepburn Township?

A I am not sure, is it Hepburn Township. Gamble Township.

Q Okay. It's how far from where you live on Lycoming Creek Road to the hunting cabin, how far is it?

A Takes about 20 minutes to drive out there.

Q Okay. And you go out Warrensville Road?

A Yes.

Q And then you come to Mosteller Road?

A Yep.

Q You go up the mountain?

A Yep.

Q About 20 minute drive?

A Yeah.

Q And you say you and Mr. Bell left the house about 12:30?

A I figure, yeah.

Q Was he with you that morning?

A Yes.

Q At the house?

A Yes.

Q Did he consume any alcohol that morning?

A No.

[50]

Q Did you?

A No.

Q And you took your Volkswagen out to the hunting camp I take it?

A Yes.

Q Who drove? Who drove there?

A I think I drove there.

Q And what was the plan as far as who was going to drive back?

A Tom was going to drive back.

Q That was decided?

A Yes.

Q Based on what?

A So that I could drink some beer.

Q So he was the designated driver?

A Yes.

Q And how many people were at this party or this fundraiser?

A Gees, I don't know, 40 maybe, 30.

Q And you got there about one o'clock. What time did you leave?

A I think about 11:30.

Q All right. Right before you got stopped?

A A-huh.

Q Is that a yes?

[51]

A Yes.

Q And Mr. Bell drove from the hunting camp to the place where you were pulled over and got stopped?

A Yes.

Q How was he operating the vehicle?

A Fine.

Q And the police officers said you were sleeping in the front seat when they stopped you. Is that correct?

A No, I was awake.

Q In your opinion when you were with Mr. Bell the whole time that day, I take it you were together the whole day?

A Yes.

Q You saw him drive the vehicle?

A Yes.

Q In your opinion, was he capable of safely driving the vehicle?

A Yes.

Q And did he safely drive the vehicle?

A Yes.

MR. CAMPANA: Cross examine.

CROSS EXAMINATION

BY MR. CUICA:

Q Miss Fink, if I understood you correctly, the [52] Defendant decided that he was going to be the designated driver, correct?

A Yes.

Q But he was drinking at the party, correct?

A He might have had a couple.

Q Well let me ask you this. Do you know how many drinks he had at this party?

A No.

Q Well he's admitted to having more than a couple. So do you agree that you don't know how much he drank?

A Well he was sober to drive home.

Q Well you don't know how much alcohol he consumed, correct?

A It couldn't have been very much.

Q Well why couldn't it have been very much?

A Because he was sober. He wasn't–he wasn't impaired.

Q You were drinking at the party, correct?

A Yes.

Q So you would agree that you were impaired during the party?

A No, I don't–no.

Q How many drinks did you have at the party?

A I didn't keep track.

[53]

Q Give me an estimate.

A I don't know.

Q Well then do you feel you were impaired?

A I didn't want to drive home.

Q So you would agree that--

A To be safe, yeah.

Q You would agree that any observations you made during that day were observations made while you were impaired?

MR. CAMPANA: I am going to object. I don't think she admitted that she was impaired. She said that she didn't want to drive home.

THE COURT: Why don't you use different phraseology. Why don't we say any observations you made were after you had been drinking some amount of alcohol. Is that a fair way to do it?

MR. CUICA: That's a fair way Your Honor. Do you want me to rephrase it Your Honor?

THE COURT: I think it's probably obvious, but go ahead.

BY MR. CUICA:

Q Would you agree that any observations that you made that day were after you had consumed alcoholic beverages?

A I guess so.

[54]

Q And you agree that you don't know how many alcoholic beverages you consumed that day?

A No, it wasn't–. No, I don't know how many. I wasn't keeping track.

Q So it could have been 10 beers?

A No, no.

Q Okay, you seem very certain.

A No.

Q Okay. You know it wasn't 10 beers?

A Right.

Q Was it nine beers?

A I don't know. Probably less.

MR. CAMPANA: I think if you go down eight, seven, six, five, four, three, two, one, she will say I don't know.

THE WITNESS: Yeah.

BY MR. CUICA:

Q Your memory that day is very hazy, would you agree?

A No, it's not hazy.

Q You can't remember specifics as to what you drank.

A I didn't have that many beers. I didn't keep track and count them. We played cards, we won, so I wasn't too impaired.

[55]

Q And you don't know how many drinks the Defendant Mr. Bell consumed, is that correct?

A No.

MR. CUICA: Thank you. I have nothing else Your Honor.

THE COURT: I do have a couple questions

before you go.

EXAMINATION BY THE COURT:

Q Let me ask you about the nature of this party. I take it that–was the beer a keg?

A No.

Q So the beer was in cans or bottles?

A Yes.

Q Was it in both?

A You had to bring your own.

Q You have to bring your own?

A Yes.

Q Did you folks bring your own?

A Yes.

Q What did you bring?

A Oh probably a case of beer.

Q Okay, so you brought a case of what kind of beer? Do you remember?

A The kind? I think it's Milwaukee's Best.

Q Okay, Milwaukee's Best. Do you remember [56] whether it was bottles or cans?

A Cans.

Q Do you remember whether the cans were 12 or 16 ounces?

A Twelve.

Q Did you take the remainder of the beer home with you after you had concluded the party?

A I don't know if we left our cooler there or not. We could have left it there.

Q So all of this was in a cooler?

A A-huh.

Q And how long were you at the party?

A From about 1:00 o'clock til about 11:30 when we left.

Q 11:30 at night?

A Yes.

Q Well he was picked up at about 11:00 o'clock at night I think, so could it have been a little earlier?

A It must have been.

Q Did you stop anywhere between the party and the time that the Penn College Police Officers–

A No.

Q – stopped you?

A No. I don't–. No. We stopped to drop [57] somebody off.

Q Okay. I was wondering now–

A When he pulled out, he didn't hit the switch for lights. Headlights came out and he just made the left and–

Q Okay, so you don't think the cooler was in the car?

A No. I don't know. I don't know if we left it or not.

Q Did you eat while you were at the party?

A Yes. All day.

Q Did anybody else partake of the beer from your cooler?

A I imagine. It's there for everybody.

Q So you guys were at the party for quite awhile. You were at the party for nine or ten hours, huh?

A It was a setback tournament, fundraiser, so yeah.

Q So you played cards, ate, and drank?

A Yes.

Q Okay. All right.

THE COURT: We will come back to you Mr. Campana.

REDIRECT EXAMINATION

[58]

BY MR. CAMPANA:

Q Who were some of the people at the party? Was there a Judge there for example?

A Gary Whiteman.

Q All right. I just want to–I want the Judge to have a flavor of what kind of a party it was. It wasn't a drunken rebel party, was it?

A No, it wasn't, no.

Q It was–

A It was a fundraiser, eating and--

Q People our age that went?

A Yep.

Q On a Saturday afternoon and had a setback tournament?

A Yep.

MR. CAMPANA: That's all I have Your Honor.

THE COURT: Anything else Mr. Cuica?

MR. CUICA: I have nothing else.

THE COURT: I guess we beat this one to death. Thank you Ma'am. You can stay in the courtroom if you want.

MR. CAMPANA: We are going to call Mr. Bell.

THE COURT: Good.

THOMAS BELL

having been duly sworn, was called as a witness and was [59] examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAMPANA:

Q First thing, state your name and address.

A Thomas S. Bell, 1719 Lycoming Creek Road.

Q Do you have any physical defects to your legs?

A Yes.

Q Which legs?

A Left.

Q What happened to your left leg?

A I had a severe back injury, and the nerves got cut to my leg and my leg looks like polio.

Q Would you show the Judge your leg?

MR. CUICA: Judge, has he been sworn in?

THE COURT: Yes.

BY MR. CAMPANA:

Q Show the Judge your leg.

A This is my good leg.

Q Well show the Judge, not me.

THE COURT: Well Mr. Cuica has to see it too, so you go right in front of the table there where Mr. Cuica and I can both see it.

(Defendant displayed his leg.)

THE COURT: Okay, I see it. That is [60] significantly thinner. I am saying this because of the fact we have a record. And you have pulled your jeans up to your knees, and the calf on your left leg is less developed than the calf on your right leg.

BY MR. CAMPANA:

Q Go ahead, sit down. How long has that been that way Mr. Bell?

A Approximately 10 years.

Q Does it cause you to limp?

A Sometimes, most times.

Q All right, let me ask you this. May 16th, we already know on the video tape, you said you woke up 8:30 that morning or so. What did you do in the morning?

A Oh I did household things while she cooked.

Q Pardon me?

A Did household things while she cooked.

Q Okay. And what time did you leave to go to the hunting cabin?

A Around–we wanted to get out there by 1:00 o'clock.

Q And what all did you bring with you?

A She made a big pepper and pasta salad with cheese and a case of beer.

Q All right. And it was Milwaukee Best?

[61]

A Yes, sir.

Q Is that 12-ounce cans?

A Yes, sir.

Q And did she drive to the party?

A Yes, sir.

Q What was the plan on who was going to drive back?

A Well I am usually the one who drinks, so I said I would not drink that much and I would drive home.

Q All right.

A So she can relax. She cooked all day.

Q So you got there about one, and what did you do there?

A Played cards. Party probably over by seven or 8:00 o'clock. And since I had been drinking, I wanted to stay until I wore off the booze. And then it started raining real hard. And we sat on the porch until 10:30, 11 o'clock and come home. Enjoyed the hunting club.

Q And how much beer did you drink?

A I drank four beers. I counted.

Q And starting what time and ending what time?

A About 1:00 o'clock to six, or 2:00 o'clock to six.

[62]

Q And did you eat?

A Yes, I ate all day.

Q And when you left, who all left with you?

A Everybody was gone but the three of us. My wife and another friend, and which he was waiting for a ride home.

Q So you drove him home?

A I drove him right in front of the Shamrock. He lives behind the Shamrock. Dropped him off on Fourth Street.

Q All right. And when you dropped him off, what happened there? Well let me ask you this. Tell us the roads that you took to get from the hunting club to Fourth Street?

A Went down Warrensville Road and turned on Four Mile Drive to go over Grampian, and then Market Street to Fourth Street and Fourth Street.

Q Fourth Street to–

A Shamrock.

Q Where you–

A I was going to get on the beltway.

Q So when you pulled over, what happened then?

A I had let the gentleman out, because the back, the passenger back seat doesn't–the latch is broke. So I got out and just instinctively turned the [63] car

off, let him out. And she wanted to go home. She thought I was going into the bar. And I said no, I am going home. And we were arguing a little bit. And then I forgot to turn the lights on and started up. And the headlights come on, but the taillights don't. And we got pulled over in about 150 feet, real quick.

Q All right. And you did the field test at the scene as the described by Mr. Pletz?

A Yes.

Q Did you feel that you did them properly?

A I know I didn't do real good on walking, but I told him I think at the time that I had a bad leg. But I thought I did pretty good for my situation.

Q Where did you do the–actually where did you do the field test at the scene?

A On the street, on the street of Campbell Street.

Q Were you in front of a police vehicle?

A Yes.

Q Were you nervous at all?

A Certainly.

Q Why is that?

A Because I don't want to get arrested for drunk driving.

Q All right. And then after you did the test, [64] they placed you under arrest and took you to the DUI Center?

A Yes.

Q We have seen that. They asked you to give a blood test?

A Right.

Q Why didn't you give a blood test?

A Well when I was 19 years old, and I had a bad nose bleed. And after six pints of blood and last rites from the priest, they tied my carotid artery off and saved my life. I went home two days later. And then a couple years later I found I had hepatitis C after six blood transfusions. After then, they didn't screen for hepatitis C. They didn't know what it was.

Q So where as the transfusion, where did you get it?

A In Williamsport Hospital.

Q So when you told the police officer that you were not going to give blood because you had got Hep C, that was the truth?

A I have a distrust in Williamsport Hospital. And then here about three years ago, I took my father to the hospital. They swabbed his nose and I asked them why they did that. They said we are checking for MRSA. He was in hospital for seven days. It was [65] negative MRSA. He come home for two days. We took him back to the hospital and they tested him. He had MRSA. So that was–that–I was scared of the hospital. I didn't trust Williamsport Hospital.

Q And have you been drinking this morning?

A No.

Q Do you always speak the way you're speaking now?

A Well when I saw the video I said to you, I sound drunk, and I wasn't. And you said you always sound that way.

Q Were you impaired by the–

A No.

Q – alcohol you consumed when you got behind the wheel and drove home?

A No, that's why I waited two more hours, plus I was enjoying the day, the evening.

Q All right.

MR. CAMPANA: That's all I have Your Honor.

THE COURT: Your turn Mr. Cuica.

MR. CUICA: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. CUICA:

Q Mr. Bell, you agreed before you went to the party that you were going to drive home that day, is [66] that correct?

A That's correct.

Q So driving is something that you do as a part of your life, is that correct?

A I would say that would be a normal conclusion.

Q And so your driver's license is pretty important, correct?

A That's correct, same as yourself and everybody I image.

Q Certainly you wouldn't want to lose your driver's license for no reason?

A I suppose that's–. Is this a question?

Q You wouldn't want to lose your driver's license, is that correct?

A That's a statement. Are you asking me a question?

THE COURT: No, he's asking you a question. You would not want to lose your–

THE WITNESS: No, I would not want to lose my driver's license.

BY MR. CUICA:

Q And when we saw you at the DUI Center, the officer clearly explained to you that you were going to lose your license for 12 months when you didn't give [67] blood, do you agree?

A Would you like to get AIDS from a hospital?

MR. CUICA: Your Honor, could you–

THE COURT: Now listen Mr. Bell–

THE WITNESS: That's why–

THE COURT: You're doing fine, but just answer Mr. Cuica's question, okay?

THE WITNESS: Excuse me.

THE COURT: You saw how the police officers answered Mr. Campana's questions. They may not have liked Mr. Campana's questions, but they answered them respectfully and they answered them politely.

THE WITNESS: I apologize.

THE COURT: You do the same thing for Mr. Cuica.

THE WITNESS: I apologize.

MR. CUICA: Thank you Your Honor.

BY MR. CUICA:

Q Mr. Bell, you understood at the DUI Center that you were going to lose your license for 12 months, is that correct?

A Yes, I did.

Q And you knew that to keep your license, all you had to do was submit your blood, is that correct?

A I don't know if that's correct or not, tell [68] you truth. I was feared for other medical situations.

Q Well I understand that, but regarding the loss of your license for a year–

A Yes, that's correct.

Q And you also would agree with me that by submitting your blood, you would prove that the officers were wrong about you having alcohol in your system?

MR. CAMPANA: I am going to object Your Honor. That's not the point. Because he has alcohol

in his system, you don't prove anything by giving blood.

THE COURT: The question is a bit argumentative Mr. Campana, I will agree with you. But I think what he's asking him was, he's asking him questions about his state of mind. And I agree he's leading him, but he can do that on cross examination. So I am going to overrule your objection. I think that Mr. Cuica gets some latitude here. Go ahead Mr. Cuica. After all, you do have–. If this was a jury trial, you would have a consciousness of guilt instruction probably coming from the Court.

MR. CAMPANA: You also would have 12 people, not one.

THE COURT: You would. That doesn't change the consciousness of guilt issue. Go ahead.

[69]

MR. CUICA: Thank you.

BY MR. CUICA:

Q So Mr. Bell, do you agree with me if you had submitted your blood, it would be tested to see if there was any alcohol in your blood?

A Yes, sir.

Q And you're claiming here today that you wouldn't have had alcohol in your blood at approximately 11:30 p.m., is that correct?

A I don't think that at that–

MR. CAMPANA: I am going to object. That calls for an expert conclusion. He said he drank four beers from two to six.

THE WITNESS: I don't know whether it–

THE COURT: Okay. Why don't you rephrase the question to indicate that it was his opportunity to demonstrate his innocence, or whatever you want to do.

MR. CUICA: Certainly Judge.

THE COURT: You know what, technically Mr. Campana is right. He has never claimed that he didn't have any alcohol in his system. What he is claiming was he was not impaired, okay?

MR. CUICA: Your Honor, I will ask one last question about this blood test.

THE COURT: You can ask more than one if you [70] would like Mr. Cuica. I am not limiting you.

BY MR. CUICA:

Q Mr. Bell, do you agree with me that if you had submitted your blood, you would be able to show that you were not impaired by the amount of alcohol that you had?

MR. CAMPANA: Objection Your Honor. He could be point two oh and claim he's not impaired. The amount of alcohol doesn't prove or disprove whether you're impaired or not. Impairment is a whole different situation.

THE COURT: I guess Mr. Cuica's question Mr. Bell is that you could have definitively resolved

the issues that are before the Court by a blood test. Do you agree to that?

THE WITNESS: Yes, sir.

MR. CAMPANA I don't think he could have, but–I don't think he could have.

THE COURT: Well I doubt that they would have charged him with a point oh two.

MR. CAMPANA: What if they had a point oh eight? What if that point oh eight, he wouldn't be looking at–. All right.

THE COURT: Might not be looking at the same charge. Okay, anything else Mr. Cuica?

[71]

MR. CUICA: Judge, I will move on from the blood test.

BY MR. CUICA:

Q Mr. Bell–

THE COURT: I have a question about the blood test though, I do.

Mr. Bell, are you telling the Court that for past 30 years you have never had a needle?

THE WITNESS: Not at Williamsport Hospital. Up until when my father got MRSA, that was the final straw, two years ago. Before that I did, and in between that I did.

THE COURT: And because your father got MRSA, you're telling me you–

THE WITNESS: That was the final straw.

THE COURT: From now for the rest of your life you're not taking any kind of needles?

THE WITNESS: Not at Williamsport Hospital.

THE COURT: Okay Mr. Cuica, go ahead.

BY MR. CUICA:

Q Mr. Bell, I think I heard you state during your testimony that you're usually the person who drinks, and so on this day you wanted to give Miss Fink a break and let her drink?

A That's correct.

[72]

Q When you say you're the person that usually drinks, how often do you usually drink?

MR. CAMPANA: I am going to object, Your Honor, it's irrelevant.

MR. CUICA: Judge, I think it couldn't be more relevant. He just testified under oath that he usually is the person that drinks. I need to know what his tolerance is, I need to know his drinking habits are to show how impaired. He's the one taking the stand opening the door for all of this testimony.

THE COURT: Overruled Mr. Campana. Go ahead.

MR. CUICA: Thank you, Your Honor.

BY MR. CUICA:

Q So Mr. Bell, you said you're the one who usually drinks. How often do you drink alcohol?

MR. CAMPANA: I am going to object, Your Honor. It's irrelevant. It's how often do you drink alcohol and then drive a car? I mean if you want to ask if he drinks everyday, I mean that's–. Any probative value is far outweighed by the prejudice of this type of examination.

THE COURT: Well he's kind of right Mr. Cuica on that one, because you wouldn't be able to say how many times have you been arrested for DUI.

MR. CUICA: I am not asking him that Judge. I [73] am simply–. Mr. Bell just testified that he usually is the one who drinks, and I believe he said a lot, but I wasn't sure. But he's usually the one that drinks.

THE COURT: He said that. Okay. Now what is it that–how is this line of questioning going to help me now?

MR. CUICA: Well because Your Honor, he is stating that he wasn't impaired. He's admitting he was drinking, but he wasn't impaired. I think it's directly relevant and important for the Court to understand what his interpretation of being impaired is or not based off his drinking patterns.

MR. CAMPANA: Judge, the question is, could he drive a car safely. He says he could, and as a matter of fact, they haven't proved that he couldn't.

THE COURT: Yeah, I am going to sustain the objection. What else do we have?

BY MR. CUICA:

Q Your last beer was at 6 p.m., did I understand you correctly?

A That's the best I can remember, yes.

Q And you agree the traffic stop was little after 11 p.m.?

A Yes, sir.

Q So we are talking a little over five hours [74] after your last beer?

A Yes, sir.

Q Do you agree with me?

A That's why I thought I was not impaired. That's why I waited at the hunting club so long, so I wouldn't be in this situation.

Q And you heard the Officers testify that you had alcohol coming from your breath?

A Yes sir, I heard that.

Q Do you disagree with the Officers?

A I certainly do.

Q You disagree that you had alcohol odor coming from your breath?

A I don't see how I could at that point. But I don't know, maybe it's possible four hours later.

THE COURT: Excuse me Mr. Cuica.

(The Court confers with his Secretary.)

THE COURT: Sorry. Go ahead.

MR. CUICA: Judge, I have nothing else.

MR. CAMPANA: I don't have any further questions.

THE COURT: All right, you're done Mr. Bell. Thank you very much. I take it you rest?

MR. CAMPANA: Yes.

THE COURT: Any rebuttal?

[75]

MR. CUICA: Judge, I don't think rebuttal is necessary. No, I do not.

THE COURT: All right. Give me a few minutes here. I will take a quick break here and get back to you guys.

MR. CUICA: Are we going to do closing right now Judge or do you want–

THE COURT: No, let's do it now instead of breaking it up. Mr. Campana.

MR. CAMPANA: Your Honor, I think the main thing here is the evidence that was not presented. You know, when you instruct a jury, do you have a reasonable doubt based upon the evidence that was presented and that which was not presented. I don't know what happened to the in-car video if there was one. They're claiming there wasn't one.

THE COURT: Well I accept the Officer's testimony. So there is no in-car video.

MR. CAMPANA: Then why in the world couldn't he have been given the opportunity to do the field test at the DUI Center? And the tape says, well Lithwiler says to them, "Did you do field sobriety tests at the scene? They said "Yes." And he turns to Mr. Bell and said "Well I will have a video cam of that," Right in the presence of the Penn College Police, who don't [76] correct that situation.

So there is a lack of evidence that–. The reason we have a DUI Center is so that they can do the field test on the video, for better or for worse. The only evidence you have in this case as far as impairment is the opinion of Officer Pletz. Officer Bowers didn't give an opinion as to the impairment of the Defendant and admitted that she didn't know where the odor of alcohol was coming from when she stuck her head in the car.

THE COURT: You have two officers that gave an opinion.

MR. CAMPANA: Well the one guy, you saw what he based his opinion on, the same thing you would base your opinion on. The Defendant's statements.

THE COURT: All right.

MR. CAMPANA: He gave his driver's license number to Officer Pletz. Do you know your driver's license number? I don't. And I certainly couldn't remember it if I was drunk.

The walk and turn. The walk and turn and one leg stand are meaningless in this case. You saw

his leg. He is 65 now? 65 years old. He's been up since 8:30 in the morning. He's drank four beers. He had food all day long. He's tired, he's old. Maybe he's not coordinated either. And common [77] sense tells you that other things besides alcohol can cause someone to not perform these tests in a manner that the Officers want perfectly. All right?

THE COURT: Okay.

MR. CAMPANA: You know the battery of tests. They can't use–. There is four tests that were done. They can only use two in court, because the other two are not admissible. And it's the battery of tests that they're trained about at the DUI school, not just two of them.

You have Jeanine Fink's testimony. She says he was driving perfectly fine. You have his testimony. You don't have any objective evidence that he was impaired. You have opinions and that he refused the blood test. He gave you a reason why he refused the blood test. And he's already been punished for refusing the blood test; he lost his license for 12 months.

I think under the circumstances, Your Honor, there is at least a reasonable doubt here about whether he was impaired, at least a reasonable doubt.

You know, if we were here on a civil case, you might a preponderance, but I don't even know if you have that.

I would ask that you give yourself the [78] reasonable doubt instruction, and after you do so, you will come to the conclusion that one must hesitate in this case, and there has to be a reasonable doubt about impairment and you should find him not guilty.

THE COURT: Mr. Cuica.

MR. CUICA: Okay Judge. The Defendant admits that he was drinking alcohol prior to driving. That is his one and only true statement. He claims he had only four beers, from 2 p.m. to 6 p.m. This traffic stop is at approximately 11, 12 p.m. We are talking about more than five hours after his supposed last drink. The two police officers, Sergeant Pletz and Officer Litwhiler, clearly smell alcohol on his breath. Corporal Bowers smells it in the car. Remember she's on the passenger side, so she couldn't say for sure it was coming directly from the Defendant's mouth. But when you put that together with Sergeant Pletz, Officer Litwhiler, and Corporal Bowers, there is no question that he smelled of alcohol more than five hours after his last beer.

At the DUI Center he's asked if he believes he's under the influence. And could he states "I don't think so." However, when he's asked if he was under the influence of a controlled substance, he states emphatically, "Absolutely not." That's why he knows he [79] didn't stop drinking at six. And he knows that he didn't stop drinking–

MR. CAMPANA: Your Honor, I am going to object to this. He's calling him a liar based on no evidence whatsoever. I mean if you are going to call him a liar, at least have evidence of it.

THE COURT: Listen Mr. Campana, I can sort out the arguments, okay, I really can. I mean I know, I know you guys are about ready to farm me out, but I can still get by that test, okay.

MR. CUICA: Judge, this is my argument. He states absolutely not about a controlled substance, because he knows that there is alcohol his system, and he can't convincingly state absolutely not under the influence of alcohol, but he knows he can convinci11gly state he's not absolutely under the influence–or he's absolutely not under the influence of a controlled substance, because he hasn't been taking any controlled substances.

His refusal, it's critical. His assertion rings completely hollow Judge. You know, it's interesting that he seems concerned about losing his opportunity to perform field tests at the DUI Center because he wants to prove his innocence. Yet he refuses to have the blood test. That is the only way to definitely prove his [80] innocence.

I also think it's interesting that today we are hearing and seeing his left leg I believe that is atrophied. And the argument from the Defense is that therefore the SFST's are meaningless. Judge, it's the SFST's what would prove his innocence in that argument. You can't have it both ways Judge. You can't say that my SFST's are not good because of my bad

leg, and then you didn't videotape me at the DUI Center so I couldn't prove my innocence. You can't have it both ways Judge. It makes no sense Judge.

He refused the blood test, because he knows that he's guilty and the test will prove it. He thinks if he had a chance to maybe handle these field sobriety tests, and he might get through them, even though he was drinking. And his assertion that he can't give blood because he contracted hepatitis C at the hospital years ago is simply not credible. He's stating that he received a blood transfusion that gave him Hep C. Judge, we are talking about 30 years later for a blood test. There is no danger that he is getting blood. He knows he's not getting a blood transfusion.

And Judge, you asked a question I was thinking of. Why is it that in 30 years or more you have not had a shot, a needle, a blood test? And his answer is "Well, [81] it's only at the Williamsport Hospital that I can't give blood," which is going to get me to keep my license for 12 months, which is going to prove that I am innocent? Judge, it does not ring true, because it is not the truth.

If he knows that he's innocent Judge, if he knows that the blood test is going to prove his innocence, he can't jump at the opportunity quick enough to give his blood? A guilty man knows he has alcohol in his blood and shouldn't be driving. And he refused to provide blood for that reason.

Defense is stating oh Judge, I haven't shown you sufficient evidence to prove beyond a reasonable

doubt that he's incapable? Judge, I have shown you well more than that. Officer Pletz has 19 years of experience as a police officer. He's conducted many DUI related arrests. You heard his testimony. The Defendant was incapable of safely operating that motor vehicle based on Officer Pletz's observations, of the field sobriety test, odor of alcohol coming from the Defendant, his glossy eyes, he's unsteady on his feet.

Judge, it's not even a close call. You would have to your find Sergeant Pletz was not [82] credible, or just simply wrong, even if after his years of experience, just simply wrong. That, you know, the odor of alcohol, field sobriety test, the observations of his eyes were just all wrong.

Judge, we have an admission that he had been drinking. Clearly he's been drinking. He just needs to modify his self serving admission that it was five hours ago, and, you know, I only had four beers. Judge, that doesn't ring true as well.

Miss Fink's testimony Judge, I don't see how you can glean anything from that. This is somebody who clearly has a bias for the Defendant. Has no specific recollection. She doesn't know how much she drank, she doesn't how much he drank. I don't find anything relevant that you could take from that testimony.

We also heard from Corporal Bowers and Officer Litwhiler. Officer Litwhiler testified that based on his observations, he is the one who can smell the odor of alcohol as well. It's not just what you see on

the video, which is enough, but Officer Litwhiler is the one interviewing, and smelling the odor of alcohol, and who has experience conducting these interviews. And he believes that the Defendant was incapable. [83]

Judge, I am getting animated here because the evidence received here isn't even close. It is overwhelming. You have the professional opinion of the officers, their observations. And then you have the admissions, although very tailored and serve serving, that the Defendant was drinking. So when you put it altogether with the refusal, Judge, these are actions of a man who knows he's guilty.

So Judge I think I made my case clear. It's been proven beyond a reasonable doubt that the Defendant consumed alcohol, and that it impaired his ability to safely drive. I don't have to prove to you that he was drunk, Judge, you know the law. But he was impaired, and you cannot–nobody can keep a straight face that he was not impaired after hearing the Officers' testimony, the observations, his actions, including his refusal of a blood test. I think it's proven beyond a reasonable doubt that he was incapable of safely driving.

THE COURT: Thank you both. Let me have a few minutes.

(Whereupon a recess is held from 10:46 a.m. to 10:56 a.m.)

[84]

THE COURT: I will agree with Mr. Campana, I thought that the police officers, very frankly, and if I could give you some constructive criticism. You know, if you don't have a video in the car, and you have an opportunity to have them re-videoed at the DUI Center, take it. It really helps me, because when I am looking at this case, and I take a look at it from Mr. Campana's side, it provides him with a great deal of argument that well, okay, you know the guy is 65 years old, he has a bad leg, and what did he do to violate the test? Well on the heel to toe he raised his arms starting out, and he had more than an inch on the third step on the way back, and he did eight steps.

On the one legged stand, which I am not sure I could do, he only went for 25 seconds instead of the required 30 seconds. And so it does provide for what I think are some reasonable arguments that Mr. Bell was capable of driving a car safely. And after all, the police officers did not find any fault with his driving as far as his operation of the vehicle other than the fact that he failed to activate the rear light.

The difficulty I have though Mr. Campana is this. I have two trained officers that have both given the opinion that he was under the influence of alcohol. [85] More than that, I don't buy Mr. Bell's argument. I don't buy the fact that wait a minute, it's the Williamsport Hospital, and they are the devil incarnate. And I can't–I can't tolerate them sticking a needle critical in me because they're so incompetent. Now I am not criticizing the fact that he has a criticism of the Williamsport Hospital. What I am

concerned about is the fact that I guess maybe you get here too long, and everybody comes up with the excuse “I don’t like needles,” when they refuse a blood test. And the reason for refusing a blood test is the fact that they know what the result is going to be and there is a consciousness of guilt.

So I have the opinion of two trained police officers, and I have the refusal, I wish I had the video. I really do. That would have helped me a great deal. And you’re right about that lack of evidence, that should be against them.

But I am convinced that he was under the influence of alcohol, and therefore I am going to enter an adjudication of guilt

Let me just indicate to you that I have a sentencing date on August 29th. Will you waive the 90 days?

MR. CAMPANA: Yes.

THE COURT: Is that sufficient for you? [86] Otherwise I have to do it on May 24. I can do it on May 25th if we can get the CRN done. Would you rather we do it on May 25th?

MR. CAMPANA: I would rather have August, because I think in the meantime the Supreme Court is going to help me out.

THE COURT: Well I thought you might, okay, so I will put it in for August 25th and I will dictate an order in just a moment, okay? Thank you all.

(Whereupon an Order is dictated.)

(Whereupon the proceedings are concluded at 11:02 a.m.)