

No. 90419-7

SUPREME COURT
OF THE STATE OF WASHINGTON

King County Superior Court No. 14-2-11693-4 KNT
and 14-2-12557-7 SEA

STATE OF WASHINGTON,

Petitioner,

v.

DOMINIC BAIRD and
COLLETTE ADAMS,

Respondents.

BRIEF OF *AMICUS CURIAE*,
MOTHERS AGAINST DRUNK DRIVING

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A. INTRODUCTION

Mothers Against Drunk Driving (“MADD”) grew out of an avoidable tragedy. Candy Lightner founded the organization in 1980, after a drunk driver claimed the life of her 13-year old daughter, Cari Lightner.¹ During the last 30+ years, MADD has made great strides in helping to curb drunk driving by raising public awareness, sponsoring and proposing new legislation, urging local and state governments to increase law enforcement and by changing the public’s perception of this preventable crime.

MADD strongly endorses Petitioner’s position. First, and most importantly, MADD urges the Court to recognize that the implied consent statute is a constitutionally sound method of carrying out the State’s compelling interest of effectively enforcing its drunk driving laws. These laws are absolutely necessary for the State to quell the catastrophic and widespread harms and losses inflicted upon its citizens by this dangerous activity of people driving while impaired.

Second, the biological process in which alcohol is ingested and metabolized by the human body creates exigent circumstances which justify a warrantless breath test as currently authorized under the implied consent statute. The process of determining blood alcohol content by utilizing

¹ Mothers Against Drunk Driving, In Honor of Cari Lightner and Laura Lamb, available at <<http://www.madd.org/about-us/history/cari-lightner-and-laura-lamb-story.pdf>>.

“retrograde extrapolation” is only the second-best type of evidence compared to the more accurate and non-invasive breath test measurement that is available for obtaining a person’s blood-alcohol content at a specific point in time. A real-time breath-alcohol test become even more necessary when one considers that evidence of a person’s blood-alcohol content is always dissipating with the passage of time.

B. INTEREST OF AMICUS CURIAE

MADD’s interest in this case is articulated in its motion for leave to submit an amicus brief and section A, above.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the implied consent statute is a constitutionally sound method of furthering the State’s compelling interest in effectively enforcing its drunk driving laws.

2. Whether exigent circumstances justify a warrantless breath test offered pursuant to the implied consent statute.

D. STATEMENT OF THE CASE

MADD hereby adopts the Statement of the Case set forth in the brief of Petitioners.

E. SUMMARY OF ARGUMENT

Drunk driving remains one of the most persistent and pressing problems facing our society. Thousands of lives are lost every year due to drunk driving, a preventable crime. Many more victims suffer serious and life-changing injuries.

All of the deaths and injuries caused by drunk driving are easily preventable. One of the most effective methods of reducing and eliminating the crime of drunk driving is through vigorous enforcement of drunk driving laws. Implied consent laws are a proven and critical component of every state's strategy to reduce the deaths and injuries caused by drunk driving. But to obtain convictions, law enforcement and prosecutors need to timely and accurately obtain a drunk driving suspect's blood alcohol content (BAC) reading. Any delay in obtaining a suspect's BAC reading not only risks the permanent loss of important evidence, but also unnecessarily opens a window that defendants can use to poke holes in a prosecution by arguing that delayed BAC readings are flawed, inaccurate or insufficient to show actual impairment at the time of operation of the vehicle.

Additionally, there is no ready substitute for timely and immediate BAC testing. The respondents suggest that the existence of retrograde extrapolation—a scientific technique that uses BAC data from one point in

time to estimate BAC at an earlier time—obviates any exigency regarding the collection of BAC evidence. But the respondents' argument is deeply flawed. Retrograde extrapolation is a method to interpret the evidence that is available—it does not lessen the need to obtain the best and most reliable evidence available to prove that a crime has been committed. In this case, the best reliable evidence is a BAC reading that is obtained close in time to when the suspect was operating a motor vehicle. This is because any delay in obtaining a BAC reading risks losing evidence of the crime itself, may lead to inaccurate or speculative test measurements, may reduce the likelihood of a conviction, and diminish the overall effectiveness and deterrence of drunk driving laws.

F. ARGUMENT

1. PREVENTING DRUNK DRIVING IS A COMPELLING STATE INTEREST, AND ENFORCEMENT IS KEY TO PREVENTION

Drunk driving remains one of society's greatest problems. In 2012 alone, there were 10,322 fatalities in crashes involving a driver with a BAC of 0.08 or higher—31 percent of total traffic fatalities for the year in the United States.² That is one person killed by drunk driving every 51 minutes.

² National Highway Traffic Safety Administration, Fatality Analysis Reporting System (FARS) 2010, available at <<http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf>>.

Of the 1,168 traffic deaths among children ages 0 to 14 years in 2012, 239 (20%) involved an alcohol-impaired driver.³ Of the 239 child passengers ages 14 and younger who died in alcohol-impaired driving crashes in 2012, over half (124) were riding in the vehicle with the alcohol-impaired driver.⁴

During 2012 in the state of Washington, 145 people died as a result of drunk driving—accounting for 33 percent of total traffic fatalities in the state.

In 2013, there were more than 29,000 arrests for driving under the influence in the state of Washington.⁵

Yet, these alarming statistics only scratch the surface of the drunk driving epidemic that exists in the United States, including in the state of Washington. According to the Centers for Disease Control and Prevention (CDC), Americans “drank too much and got behind the wheel about 112 million times in 2010—that is almost 300,000 incidents of drinking and

³ National Highway Traffic Safety Administration, Traffic Safety Facts 2012: Alcohol-Impaired Driving, available at: <<http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf>>.

⁴ *Id.*

⁵ Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States 2013: Table 69, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-69/table_69_arrest_by_state_2013.xls>.

driving each day.”⁶ Of these drunk driving incidents, just 1.2 million arrests were made nationally.⁷

Beyond the lethal physical toll, the economic cost is substantial. In 2009 alone it is estimated that the cost of alcohol-impaired motor vehicle crashes reached \$132 billion annually nationwide⁸—and that number does not begin to measure the total economic impact of drunk driving, such as increased long-term health care costs and lost market output. When quality of life valuations are considered, the total value of societal harm from alcohol-impaired-driving crashes is more than \$206 billion annually.⁹

Indeed, the Supreme Court of the United States has long recognized the enormity of the drunk driving problem in the United States:

No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation’s roads are legion. The anecdotal is confirmed by the statistical. ‘Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million

⁶ Centers for Disease Control and Prevention, Impaired Driving: Get the Facts, available at: <http://www.cdc.gov/Motorvehiclesafety/impaired_driving/impaired-driv_factsheet.html>.

⁷ Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States 2013: Table 29, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls>.

⁸ Mothers Against Drunk Driving, Campaign to Eliminate Drunk Driving Fifth Anniversary Report to the Nation, at 3 (Nov. 2011) available at <<http://www.talklikemadd.org/books/statereport/>>.

⁹ National Highway Traffic Safety Administration, Traffic Safety Facts 2013, available at <<http://www-nrd.nhtsa.dot.gov/Pubs/912102.pdf>>.

personal injuries and more than five billion dollars in property damage.’ For decades, this Court has ‘repeatedly lamented the tragedy.’ ‘The increasing slaughter on our highways ... now reaches the astounding figures only heard of on the battlefield.’

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) (citations omitted).

Fortunately, the prevalence of drunk driving has decreased nationally from 25,000 deaths per year (as bemoaned by the *Sitz* court in 1990) to the rate of 10,000+ deaths that we experience today.

One reason for this success is the enforcement of drunk driving laws by states and local municipalities. Enforcement of these laws, including arrests and convictions, not only prevents the harmful consequences caused by drunk driving but also acts as a strong deterrent.

First, the arrest and conviction of drunk drivers removes those drivers from the road, through imprisonment, license suspensions, or other penalties that restrict the operation of vehicles while impaired (such as ignition-interlock devices, which prevent an individual from starting his or her car without breathing into the device and recording a blood alcohol reading under the legal limit). Every drunk driver off the road is one less potential source of preventable crashes, injuries, and deaths.

Second, the strict enforcement of drunk driving laws has a significant deterrent effect. Individuals who observe the consequences of

driving drunk, including convictions and the resulting penalties, are less likely to drive while impaired themselves. Indeed, a 2008 study determined that individuals were less likely to drink and drive if they perceived a higher probability of being stopped or arrested by law enforcement.¹⁰

Finally, the conviction of drunk drivers can reduce the possibility of that driver driving drunk in the future. The recidivism rate for drunk driving is extremely high. In one study 17.8% of individuals convicted of a drunk driving offense were arrested again for drunk driving within five years of their prior offense.¹¹ One reason for this high recidivism rate is that individuals who drink and drive often have problems with alcohol generally—in one study, for example, 82% of individuals who had just been convicted of drunk driving for the first time were assessed as problem drinkers or alcoholics.¹²

As a result, however, convictions for drunk driving can provide one significant benefit in preventing future instances of drunk driving: court-

¹⁰ Anthony Bertelli, *The Behavioral Impact of Drinking and Driving Laws*, *Policy Studies Journal*, 36:4, 545-569 (Nov. 19, 2008).

¹¹ Randall L. Deyle, *First offender BACs as a predictor of DUI recidivism*, Colorado Department of Human Services, at 5 (Feb. 2010), available at <<http://cospl.coalition.org/federa/repository/co:9524>>.

¹² Matthew L. Wald, *Battle Against Drunken Driving Should Shift Focus, Some Experts Assert*, *N.Y. Times* (Jan. 3, 1987), available at <<http://www.nytimes.com/1987/01/03/us/battle-against-drunken-driving-should-shift-focus-some-experts-assert.html>>.

ordered treatment. One study found that treatment for alcohol abuse can by itself reduce drunk driving recidivism by 8-9%¹³, while another found that treatment combined with license suspension or revocation can reduce recidivism by as much as 50%.¹⁴

This deterrent effect is unsurprising, as a drunk driving arrest and conviction presents individuals with a clarifying event that forces them to recognize their problem with drinking and acknowledge the consequences of their actions. As researches have noted, “[M]ost first time offenders who entered a DUI program acknowledged that they needed to change both their drinking and their drinking-and-driving behavior, and indicated that they were trying to do so.”¹⁵

In sum, the severity of the drunk driving problem in this country and this state should be underestimated. Allowing the district court’s decision below to stand will hamper efforts to combat drunk driving by interfering with the State’s ability to obtain convictions for drunk driving offenses, which is essential to the prevention of drunk driving.

¹³ Elisabeth Wells-Parker, et al., Final results from a meta-analysis of remedial interventions with drink/drive offenders, *Addiction* 90:7, 907-926 (July 1995).

¹⁴ Ralph K. Jones & John H. Lacey, *State of Knowledge of Alcohol-Impaired Driving: Research on Repeat DWI Offenders*, available at <<http://www.nhtsa.gov/people/injury/research/pub/Alcohol-ImpairedDriving.html>>.

¹⁵ Patricia L. Dill & Elisabeth Wells-Parker, *Court-Mandated Treatment for Convicted Drunk Drivers*, National Institute on Alcohol Abuse and Alcoholism (2006), available at <<http://pubs.niaaa.nih.gov/publications/arh291/41-48.htm>>.

2. THE TIMELY MEASUREMENT OF BLOOD ALCOHOL IS CRUCIAL TO THE ENFORCEMENT OF DRUNK DRIVING LAWS

The timely measurement of a suspect's BAC is necessary to increase the likelihood of obtaining a drunk driving conviction. The reason is self-evident as a person's blood-alcohol content will peak and then decline as the alcohol is metabolized and eliminated from the body. Any delay in obtaining a person's BAC reading increases the likelihood that the criminal defendant may successfully attack the measurement as invalid and unreliable and thereby jeopardize the prosecution of this deadly crime.

An exhaustive study of drunk driving cases conducted in Massachusetts identified the delay in measuring BAC as a problem in obtaining drunk driving convictions: "There was general agreement among the prosecutors, judges, and lawyers we interviewed about the factors that can make [drunk driving] cases difficult to prove... Breathalyzer test results can be attacked based on delay..."¹⁶

As the study describes it, defense attorney "tactics often focus on the impact of delay on the evaluation of the test result, seeking to convince judges to give it little weight as evidence of the defendant's blood alcohol

¹⁶ R.J. Cinquegrana & Diana K. Lloyd, Report to the Supreme Judicial Court, at 7 (Oct. 2012), available at <<http://www.mass.gov/courts/sjc/docs/report-110112.pdf>>.

level at the time of operation.”¹⁷ All of that explains one of the study’s most troubling findings: even breathalyzer results over the legal limit admitted at trial “sometimes do not result in convictions.”¹⁸

Indeed, this is also why an immediate blood test is so valuable. While defendants have achieved some success in leveling spurious attacks on breathalyzer data—including not just allegations of delay, but also unfounded attacks on the validity of breathalyzer analysis in general¹⁹—blood testing has avoided any serious legal challenge, because no one dares disputes its status as the most precise measure of BAC (after all, BAC stands for blood alcohol content).

3. RETROGRADE EXTRAPOLATION IS NOT A VALID REASON TO AFFIRM THE DECISIONS BELOW

The process of retrograde extrapolation is a technique by which a scientist can use a person’s BAC measurement from one point in time to estimate what that person’s BAC may have been at an earlier time, after taking into account other factors such as the person’s body weight, type of

¹⁷ *Id.* at 36.

¹⁸ *Id.* at 8.

¹⁹ See American Prosecutors Research Institute, *Overcoming Impaired Driving Defenses*, at 18-21 (Nov. 2003), available at <http://www.ndaa.org/pdf/overcoming_impaired_driving_defenses.pdf>.

drink consumed, and the time(s) the individual consumed the alcoholic beverages.²⁰

Retrograde extrapolation may be used in many different circumstances, but it is primarily used as evidence of a defendant's prior BAC at the time of operation of a vehicle.²¹ The respondents have suggested that the use of retrograde extrapolation obviates any exigency in securing evidence of a person's BAC. That suggestion should be rejected.

As noted above, pointing to delays in obtaining a BAC reading is a common defense tactic. Extensive reliance on retrograde extrapolation only compounds this problem, as it explicitly acknowledges the unavailability of timely BAC data, but nonetheless suggests that the best evidence is an earlier BAC measurement.

Indeed, the use of retrograde extrapolation does not prevent the need for a timely measurement of BAC—it highlights the need and importance of obtaining a timely measurement. While the extent to which BAC levels rise and fall has been drastically overstated by many defense attorneys, it is true that—as with any predictive method—the greater the amount of time between the BAC measurement and the operation of the vehicle, the less

²⁰ American Prosecutors Research Institute, *Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers* (July 2003), at 20, available at <www.ndaa.org/pdf/toxicology_final.pdf>.

²¹ *Id.*

accurate the results of a retrograde extrapolation analysis. And, conversely, by obtaining a BAC reading closer in time to the defendant's operation of the vehicle, the more accurate analysis of the suspect's BAC at the time of operation can occur.

Also related to the use of retrograde extrapolation is the concept of peak alcohol concentration.²² Essentially, alcohol takes time to be absorbed and eliminated. After one consumes alcohol, the level of alcohol in the bloodstream rises based on several variables. At some point after consumption, the blood alcohol level will "peak," and thus represent the time at which there is the greatest level of alcohol concentration in the person's blood. It then follows that a peak BAC is evidence of when the person achieved the greatest level of impairment from the alcohol consumed (in the eyes of the law, which uses BAC as an approximation of impairment). After this peak, the level of alcohol begins to decrease at a rate that is again affected by several variables, including the time of offense, time of test, test result, gender, weight, height, age, food consumption,

²² American Prosecutors Research Institute, *Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers* (July 2003), at 12-14, available at <www.ndaa.org/pdf/toxicology_final.pdf>.

drinking history, number of drinks, size of drinks, concentration of alcohol in the drinks, and the timing of consumption.²³

In the context of arresting and convicting drunk drivers, this means it is possible that someone whose blood alcohol was measured at one point in time may actually have had a lower or higher BAC at the time of operation as a result of that individual's normal metabolic process.

This potential discrepancy between BAC at time of measurement and at time of operation has led some to oddly suggest that a timely measurement of BAC is completely unnecessary, because it may not result in useful evidence. But this is non-responsive to the issue of whether a timely BAC measurement is the best available evidence, regardless of what the BAC may have been at operation.

Consider: if a BAC measurement is taken immediately after an individual is stopped for suspected drunk driving, the results of the measurement can yield three possible scenarios: (1) the BAC measurement is an accurate indication of the level of impairment at time of operation, because little to no absorption or elimination has occurred between time of operation and time of measurement; (2) the BAC measurement is understating the level of impairment, because alcohol is being eliminated

²³ American Prosecutors Research Institute, Alcohol Toxicology for Prosecutors, Targeting Hardcore Impaired Drivers (July 2003), at 20-24, available at <http://www.ndaa.org/pdf/toxicology_final.pdf>.

and thus the BAC measurement is lower at the time of measurement than at the time of operation; or (3) the BAC measurement is overstating the level of impairment, because alcohol is still being absorbed and thus the BAC measurement is greater at the time of measurement than at the time of operation.

All three scenarios reveal a need for a timely BAC measurement. In scenario (1), obviously a timely measurement has yielded valuable evidence. Indeed, that is the ideal scenario for all participants, because the State avoids the concerns of scenario (2) and the suspect avoids the potential for scenario (3). The possibility of this scenario alone warrants an immediate measurement of BAC, as any delay risks the permanent loss of compelling evidence of a crime.

But both scenarios (2) and (3) also reveal a need for a timely BAC measurement.

In scenario (2), the damage has already been done: alcohol is being eliminated from the bloodstream at a rate that is dependent on several variables. While BAC at operation may be estimated through the analysis of retrograde extrapolation, the amount of alcohol in the suspect's blood will never again be measurable for certain. Moreover, as explained above, the more time that passes between operation and measurement, the less accurate the results of retrograde extrapolation.

Similarly, in scenario (3), alcohol is already being absorbed into the bloodstream. Waiting even more time to take a measurement does not solve the problem that the measurement will be greater than it was at the time of operation (until peak is reached and BAC begins to drop again, further complicating matters).

Thus, under any scenario, there is still a critical advantage to obtaining an immediate measurement of BAC. And, of course, it is impossible to know at the time of measurement which of the three scenarios is present. For that reason, an immediate BAC measurement is the only way to ensure that evidence is properly maintained, after which its relevance and value may be ascertained.

Therefore, while absorption and measurement of blood alcohol in the bloodstream is an admittedly complicated subject, this case does not force this Court to confront any of those complications or engage in any extensive scientific inquiry. Neither retrograde extrapolation nor the existence of varying peak alcohol levels affects the compelling need for a timely measurement of BAC, because a timely measurement remains the best possible evidence to convict drunk drivers.

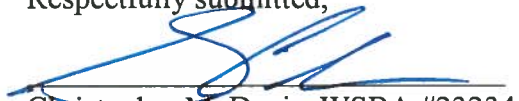
G. CONCLUSION

More than 30 years ago, Candy Lightner stood in her deceased daughter Cari's bedroom and promised herself and her daughter she would do something about the outrage of drunk driving.²⁴ Although much has been accomplished, the thousands of deaths caused each year by drunk drivers show how far we need to go as a society to prevent the tragic loss of life, including children like Cari. Upholding the State's implied consent law is a critical step in the right direction.

For the foregoing reasons, *Amicus Curiae*, Mothers Against Drunk Driving, respectfully requests that the Court reverse the district court.

DATED this 27th day of March, 2015.

Respectfully submitted,



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²⁴ Laurie Davis, *25 Years of Saving Lives*, Driven Magazine (Fall 2005), available at <<http://www.madd.org/about-us/history/madd25thhistory.pdf>>.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused a true and correct copy of this **Brief of *Amicus Curiae*, Mothers Against Drunk Driving** to be served on the following parties, in the manner indicated:

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