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FOURTH AMENDMENT FORUM

First Blood: Forcible Extraction of Blood From Drunken Drivers

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In recent years, law enforcement has beefed up its efforts to curb drunken driving and obtain convictions against those driving after one too many. We have witnessed an increase in use of "sobriety checkpoints," police setting up roadblocks to stop and visually examine drivers for signs of intoxication. The Supreme Court recently upheld that practice in the face of a Fourth Amendment challenge, concluding that these stops are "reasonable" weighing the minimal intrusion of the encounter against the countervailing government interest in enforcing drunken driving laws. *Michigan Dept. of State Police v. Sitz,* 110 S.Ct. 2481 (1990).

Encounters between law enforcement and drunken driving suspects routinely escalate into more than just the minimally intrusive visual examination attendant to roadblocks. When an officer has reason to believe that a driver is intoxicated, the officer will seek to have the driver submit to one of the several chemical tests that can ascertain the driver's blood alcohol content: a breathalyzer, a blood test, or a urine test. If the driver refuses to submit to one of the tests, however, what are the officer's options? Does the Fourth Amendment permit the officer to employ force to compel the driver's submission to one of the tests, and if so, how much force?

The analysis begins with the Supreme Court's seminal decision in *Schmerber v. California,* 384 U.S. 757 (1966), in which the Court cautiously carved out an exception to the Fourth Amendment's warrant requirement, upholding the non-consensual, warrantless extraction of blood from a drunken driving suspect when performed in a medically reasonable manner. *Id.* at 771. In *Schmerber,* the suspect refused to submit to a breathalyzer, but he did not offer any physical resistance to the administration of a blood test. The court was satisfied that:

> Such tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused. We need not decide whether such wishes would have to be respected.

Readily Available Alternative

In *Hammer v. Gross,* 932 F.2d 842 (9th Cir. 1991) (*en banc*), *cert. denied,* 112 S.Ct. 582 (1991), the Ninth Circuit was faced with a case presenting the question left open in *Schmerber:* what an officer must do when a drunken driving suspect prefers one form of testing procedure over another. A fractured *en banc* court held that the request for the alternate test had to be respected.

In *Hammer,* the suspect, Timothy Hammer, was arrested for driving under the influence of alcohol and initially refused to submit to any chemical testing. Handcuffed, he was transported by police to a hospital so that a blood test could be performed by medical personnel. The officers handcuffed Hammer to a chair and asked him whether he would submit to a blood test. He refused, apparently because he feared hypodermic needles. The officer then directed a laboratory technologist to extract a blood sample from Hammer's arm. The officer grabbed Hammer's shoulders from behind, the technologist swabbed the arm with iodine, and as the technologist attempted to insert the needle, Hammer jumped. The two men fell to the floor, Hammer still handcuffed to the chair. The officer then informed Hammer that they *were* going to extract the blood, "the easy way or the hard way," and

the officer called in two other officers to assist, threatening that they would pin Hammer down if necessary. On the brink of a full-scale wrestling match, Hammer declared that "if that's what it's going to come down to," he would consent to the breathalyzer. By then, however, the officer's patience had worn thin, and rather than administering the breathalyzer, he insisted that Hammer submit to a blood test. The officer held Hammer in the chair, and the laboratory technologist extracted the blood.

Hammer filed a civil rights action against the police officers and the municipality, asserting that his constitutional rights were violated when the officers used force to extract the blood from his arm. A jury returned a verdict in his favor. Upon rehearing *en banc,* a majority of the Ninth Circuit upheld the jury's finding that the force employed was unreasonable.

Judge Canby, writing for a plurality of the court, reasoned that the force used was excessive in light of the following five factors: [1] the resistance offered by the suspect; [2] the severity of the crime; [3] the threat to safety; [4] the officer's refusal to respect the suspect's reasonable request for an alternative chemical test; and [5] the state's need for the blood sample. Balancing these factors, the plurality concluded that the use of force was objectively unreasonable: though Hammer was resisting (factor [1]), the offense was only a misdemeanor (factor [2]), Hammer posed no threat to anyone's safety once arrested (factor [3]), he requested a breathalyzer—a chemical test routinely offered to drunken driving suspects—(factor [4]), and the breathalyzer results would render a blood sample superfluous (factor [5]). 932 F.2d at 846.

Judge Kozinski, in a concurring opinion joined by Judge Dorothy Nelson, thought that the "case turn[e]d on a single fact: Hammer agreed to submit to an alternate alcohol test to avoid having blood drawn from his vein, but he was nonetheless subjected to the forcible extraction of his blood." *Id.* at 851. In Judge Kozinski's view, the officer's failure to respect Hammer's request for the readily available breathalyzer alternative was objectively unreasonable. He frowned upon the majority's five factor analysis as applied to this case because, in his estimation, only two of the factors were relevant: Hammer's request for the alternate test and the state's need for the blood sample, though he observed that those two factors were essentially asking the same question (because if the suspect requests a readily available alternate to a blood test, the state does not need his blood). The other three factors–the suspect's resistance, the severity of the crime, and the threat to safety—were simply irrelevant to the calculus, Judge Kozinski wrote:

> There is, in my view, never an excuse for using a more intrusive test when a less intrusive one will do. Any other rule would invite police to harass suspects of very serious crimes by subjecting them to the most onerous test available...[W]hether the suspect resists—is certainly relevant in determining how much force the police may use in those many cases where the police have a legitimate need for the blood. But I don't see how it has any relevance in this case. Because the police had no need for the blood, they weren't entitled to use any force to obtain it.

Id. at 852-53.

Judge Kozinski commented that two of the factors—the severity of the crime and threat to safety–would seemingly favor the suspect in all cases involving the forcible extraction of blood. Judge Kozinski expressed concern that those two factors, weighing in favor of the plaintiff-suspect in virtually every civil rights case of this kind, would "probably be enough to preclude summary judgment [against the plaintiff-suspect]—just about every time the police take blood." *Id.* at 853.

Interestingly, Judge Kozinski's less intrusive alternate analysis was advanced by the ACLU Foundation of Southern California in its letter brief written in support of Hammer's petition for rehearing *en banc.* In that brief, the ACLU Foundation argued:

> [T]he only legitimate government interest is in determining, by some reliable means (not necessarily a blood test), the blood alcohol content of the suspected drunken driver.... The use of force is not reasonable where no force at all is necessary to determine blood alcohol content....Where a reasonable request for an alternate test—the breathalyzer—is ignored by police, the forcible extraction of blood is not constitutionally permissible.

Letter Brief of the ACLU Foundation of Southern California at page 3 (submitted October 11, 1989); *see also* Strosson, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Analysis,* 63 N.Y.U. L. Rev. 1173 (1988). This lesser restrictive alternate analysis, though perhaps not mandated by *Schmerber,* seems consistent with its tone. *Schmerber* teaches that the state may extract blood from a suspect without a warrant and without his consent so long as probable cause exists. One might even infer that *Schmerber* permits the state to compel a suspect to provide such evanescent evidence by using some degree of force to ensure compliance. However, *Schmerber* does not dictate the manner by which the suspect must tender that evidence. So long as the state obtains the evidence—and in drunken driving cases the relevant evidence is the suspect's blood alcohol content, not the blood itself—then the state's interest is satisfied: it has secured the evidence it needs to obtain a conviction. If that evidence can be gathered without resort to force, as in *Hammer* where the suspect belatedly consented to a readily available alternate chemical test, the application of any force would appear to be excessive and hence unreasonable. *See Graham v. Connor,* 109 S.Ct. 1865, 1872 (1989) (excessive force constitutes an unreasonable seizure within the meaning of the Fourth Amendment). In other words, the state can compel the search but may not use more force than is necessary to effectuate it.

The *Hammer* dissent, authored by Judge Fernandez, disagreed with the majority's analysis, reasoning that "the police are entitled to use some physical force in order to successfully extract the blood sample. 932 F.2d at 854 (citing *Graham v. Connor*). The dissent then concluded that the force employed by the officer was reasonable particularly because the officer "did not initiate the use of physical force nor did he use more than was minimally necessary to safely extract the blood sample...Any injury occurred as Hammer tried to jump away from the needle, for those activities caused both him and the officer to fall to the floor." Id. at 855. In response to the argument that Hammer requested a breathalyzer when push came to shove, the dissent concluded that Hammer's initial refusal to submit to any chemical test essentially constituted a waiver by Hammer of electing one form of a chemical test over another. *Id.* at 855.

Thus, the *en banc* majority of the Ninth Circuit, Judge Canby's plurality combined with Judge Kozinski's concurrence,

emphasized that the request for a readily available alternate to blood extraction affects the determination of whether the force applied is reasonable. The plurality regarded it as a factor; Judge Kozinski regarded it as the factor; the dissent, for all practical purposes, did not regard it at all. Unfortunately, the majority did not expound upon the term "readily available alternative." Commonly, officers have the breathalyzer test readily available for use on the streets, and most drivers (especially sober ones) do not find the breathalyzer too intrusive. But *Hammer* does not indicate whether officers are obliged to have this lesser intrusive alternate test readily available.

The Ninth Circuit is not alone in its division on the issue of using force in the drunken driving arena. A survey of state court decisions reflects that the states have reached no consensus either. *Compare Wisconsin v. Zielke,* 403 N.W.2d 427 (Wis. 1987) (discussing limits imposed by Schmerber) and *Cox v. Florida,* 473 So.2d 778, 781 (Fla. Ct. App. 1985) (the use of verbal threats to compel blood extraction could constitute "unreasonable force") and *Missouri v. Ickerman,* 698 S.W.2d 902, 906 (Mo. Ct. App. 1985) (suggesting that forcible extraction of blood impermissible when suspect negates consent) with *Thomas v. Texas,* 723 S.W.2d 696, 705 (Tex. Ct. Crim. App. 1986) (state may compel suspect to provide physical evidence of intoxication) and *Carelton v. Superior Court,* 170 Cal. App. 3d 1182, 1191 (Cal. App. 1985) (defendant restrained by six persons to effectuate blood extraction: did not shock the conscience) and *Marshall v. District of Columbia,* 498 A.2d 190, 192 (D.C. 1985) ("on the facts of this case, we hold that appellant's request to take breath test after twice refusing to do so...was unreasonable" after having consented to a blood test) and *New Jersey v. Woomer,* 483 A.2d 837, 838 (N.J. Super. Ct. App. Div. 1984) ("no federal constitutional right to prevent the involuntary taking of a blood sample... Indeed, a subject who resists a blood sample can be restrained in a medically acceptable way."); *see also Thomas v. Texas, supra,* 723 S.W.2d at 717 (Teague, J., dissenting) (expressing concern over the use of force on a suspect arrested for driving while intoxicated).

Like California, many of the states have enacted implied-consent statutes which sanction the suspect for refusing to submit to the chemical test. The *Hammer* court, both the majority and dissent, concluded that those laws do not affect the state's interest in obtaining the evidence of blood alcohol content. To be sure, the plurality explicitly rejected Hammer's argument that:

> [t]he existence of a state administrative scheme for the suspension or revocation of drivers' licenses [for refusing to submit to a chemical test]...render[s] the state less entitled than otherwise to prosecute drunken drivers criminally, or to gather evidence for that purpose.

Hammer, 932 F.2d at 850. That is surely a debatable point.

The existence of a state law sanctioning a suspect for refusing submission to a chemical test at the risk of criminal penalty should be considered in determining the weight of the state's interest on the Fourth Amendment scale. The state's interest is in enforcing its drunken driving laws, *i.e.,* to protect its citizens from drunken drivers. *Id.* at 855 (dissenting opinion) ("the need to protect the public from the atrocities wrought by this sort of crime—is compelling"). If state law provides for a lesser restrictive mean of "protecting the public from the atrocities wrought by" drunken driving—suspending licenses of and imprisoning those who refuse to submit to chemical testing—then the state has less of an interest in securing evidence of the blood alcohol content of the suspected drunken driver. *Cf. Hammer,* 932 F.2d at 852 (Kozinski, J., concurring) ("There is... never an excuse for using a more intrusive test when a less intrusive one will do."). In other words, when the state imposes a penalty (the same or perhaps a more severe one) for failing to submit to a chemical test, it has less of a need to obtain evidence of intoxication because the suspect's refusal to submit to a chemical test exposes the suspect to sanctions in any event. In that way, the state protects the public from drunken drivers without making necessary a potentially violent confrontation between the suspect and police. That factor should probably weigh into the Fourth Amendment balance.

Extractions At The Stationhouse

One other question left open in *Schmerber* was whether the blood extraction could be performed in a place other than a hospital environment. The Court observed:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, was made by other than medical personnel or in other than a medical environment—for example, if it was administered by police in the privacy of the stationhouse. To tolerate such searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Schmerber, 384 U.S. at 771-72. A recent case out of California approved the extraction of blood by a "licensed clinical technologist" though performed "in the privacy of the stationhouse." *See People v. Ford,* ___ Cal.Rptr.2d ___, 1992 WL 36159 (Cal. App. Feb. 28, 1992). The *Ford* court was satisfied that the procedures used were medically responsible, and therefore, that it occurred at the stationhouse was not fatal to its constitutionality:

> Although *Schmerber* was concerned about the environment in which the test took place, nothing in this record suggests that the location in which this test occurred was unsafe or unsanitary or that the personnel present would fail to respond properly in the unlikely event of a medical problem resulting from the test...[W]e cannot say the test conditions subjected appellant to "an unjustified element of personal risk of infection or pain."

Ford, 1992 WL 36159 at *3 (quoting Schmerber). The court was not inclined to impose a per se rule against extractions at the stationhouse. This may be a dangerous precedent because it "invite[s]" precisely the kind of situation that the *Schmerber* Court cautioned against. ■