

Independent Study  
Professor Charles Mallin  
Texas Wesleyan University School of Law

**THE BLOOD WARRANT:  
A MAJOR VIOLATION TO INVESTIGATE A MINOR CRIME**  
By: David Jesse Coker

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## INTRODUCTION

It is perfectly legal for police to obtain and execute a blood warrant on anyone suspected of committing any crime, including misdemeanors, given sufficient probable cause.<sup>1</sup> However, it is important for Texas residents to be aware of the successful tactics employed by both prosecutors and the criminal courts to disregard the legislative process and the sanctity of the human body in the name of safety.

Please note that the focus of this inquiry is not to rehash the Texas “Implied Consent” law<sup>2</sup> or the issues that surround situations where a police officer need not obtain a warrant to draw a suspect’s blood.<sup>3</sup> The Texas Legislature has clearly addressed the situations in which a warrant is not required to obtain blood.<sup>4</sup> The primary focus is to review and assess situations in which a police officer may obtain a warrant to seize a blood sample from an individual who is under investigation for misdemeanor Driving While Intoxicated.<sup>5</sup>

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<sup>1</sup> *Beeman v. State*, 86 S.W.3d 613; (Tex. Crim. App. 2002)

<sup>2</sup> Tex. Transp. Code § 724.011 (2007). Consent to Taking of Specimen

<sup>3</sup> *Beeman*

<sup>4</sup> Tex. Transp. Code § 724.012 (2007). Taking of Specimen

<sup>5</sup> Tex. Penal Code § 49.04 (2007). Driving While Intoxicated

## BACKGROUND

Driving While Intoxicated is a misdemeanor crime in the State of Texas. The Texas legislature has passed laws expressly categorizing the offense as a minor crime. All non legal arguments and objections aside, this is a fact.<sup>6</sup> While opinions are strong when dealing with issues of drunk driving, the Texas legislature did not intend for drunk driving to be anything more than a minor crime, if it had, the crime would be classified as a state jail felony. To give one an idea of just what the legislature considers to be a major crime let us look at a vandal who causes over \$1500 worth of damage to property.<sup>7</sup> This is considered a state jail felony. "...an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days."<sup>8</sup>

Considering that the Texas legislature intends for someone who causes more than \$1500 in property damage to be incarcerated for no less than 180 days, it should give an idea of just how minor, in the eyes of the legislature, a simple Driving While Intoxicated is.

Until the Texas legislature states otherwise by amending our laws, the current situation is one in which police officers are obtaining warrants to draw blood while investigating misdemeanor crime and district attorneys are encouraging them to do so.<sup>9</sup> While this practice is currently legal in Texas, the practice shocks the conscience of

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<sup>6</sup> Tex. Penal Code § 49.04(b) (2007). Driving While Intoxicated (b) an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

<sup>7</sup> Tex. Penal Code § 28.03(b)(4)(A). Criminal Mischief. "...a state jail felony if the amount of pecuniary loss is greater than \$1500 but less than \$20,000."

<sup>8</sup> Tex. Penal Code § 12.35. State Jail Felony Punishment.

<sup>9</sup> "So don't make any mistake about it. It is legal. It is admissible and it is being done all over this state all the time now." *Burleson Takes DWI Blood* (WFAA-TV television broadcast, May 3, 2008) quoting Richard Alpert of the Tarrant County District Attorney's Office.

many, and is considered by some health care professionals to be assault and battery. Dr. Phil Brewer, President of the Connecticut College of Emergency Physicians and a fellow at the National Highway Traffic Safety Administration, when interviewed expressed the opinion that “Drawing blood over a patient’s objections is committing assault and battery.”<sup>10</sup>

But the law is the law, and “it is what it is,” as they say...

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<sup>10</sup> David J. Hanson, Ph.D. *DUI Defendants and Alcohol Blood Tests* (1997-2007) at <http://www2.potsdam.edu/hansondj/DrivingIssues/1083374254.html>

## BLOOD EVIDENCE AND THE FIFTH AND SIXTH AMENDMENTS

One of the first issues involving blood evidence involves questions relating to the Fifth and Fourteenth Amendments of the U.S. Constitution. Specifically, before one can assess the validity of a warrant to obtain blood evidence, one must first determine if a suspect's blood is considered evidence that would require a warrant or if a suspect's blood is a communication, and thus a statement, of the suspect.

For the sake of brevity, one need not rehash Fourteenth Amendment arguments or determine if a suspect's right against self incrimination applies to the States.<sup>11</sup>

Is a person's blood considered "witness" against himself? No. A person's blood is not considered to be evidence constituting that person being compelled to bear witness against himself.<sup>12</sup> Furthermore, the court in *Schmerber* noted that the distinction between "witness" and "evidence" is to be construed liberally to mean that even state constitutions, many of which use the term "evidence" instead of "witness" shall be interpreted to mean testimonial evidence, relying on the opinion in *Counselman v. Hitchcock*.<sup>13</sup> Thus, the court in *Schmerber* ruled that a person's blood is not considered testimonial evidence, and thus, regardless of how the evidence is obtained, an individual's right against self-incrimination, as guaranteed by the Fifth and Fourteenth amendments, is not violated. The court went on to quote Justice Holmes: "The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in

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<sup>11</sup> *Griffin v. California*, 380 U.S. 609 (1965).

<sup>12</sup> *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>13</sup> 142 U.S. 547, 584-585.

principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."<sup>14</sup>

In short, the use of a suspect's blood is no different than allowing a jury to look at a suspect. The suspect's presence, physical characteristics, etc. are not statements. They are evidence. Thus, the Fifth Amendment simply does not apply.<sup>15</sup>

Finally, compelling a suspect to give blood is similar to compelling a suspect to provide fingerprints; fingerprints are not considered testimonial evidence.<sup>16</sup>

What about the Sixth Amendment right to counsel? Does a suspect have the right to speak with counsel prior to submitting to a chemical test? No. "Since the taking of a chemical test is not a testimonial communication, there need not be any *Miranda* warnings prior to its administration."<sup>17</sup> "There is also no federal or state constitutional right to counsel before making the decision of whether to take a chemical test."<sup>18</sup>

In a case where the defendant requested counsel after being given the statutory breath test warnings, the officers informed the defendant that he did not have a right to counsel at that time and that they would regard his repeated requests for counsel in response to the request for a breath test to be a refusal. This procedure was upheld on the ground that neither Fifth Amendment rights against self-incrimination nor Sixth Amendment rights to counsel applied at this point.<sup>19</sup>

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<sup>14</sup> *Holt v. United States*, 218 U.S. 245 (1910), at 252-253. 7

<sup>15</sup> *Holt*.

<sup>16</sup> *United States v. Chibbaro*, 361 F.2d 365 (C. A. 3d Cir. 1966); *People v. Graves*, 64 Cal. 2d 208, 411 P. 2d 114, 116 (1966).

<sup>17</sup> *Rodriguez v. State*, 631 S.W.2d 515, 517 (Tex. Crim. App. 1982).

<sup>18</sup> *McCambridge v. State*, 778 S.W.2d 70, 72 (Tex. Crim. App. 1989).

<sup>19</sup> *Griffith v. State*, 55 S.W.3d 598, 603 (Tex. Crim. App. 2001)-- request for test not custodial interrogation and right to counsel not yet applicable.

Blood is not a statement, thus, neither the Fifth Amendment right against self-incrimination applies, nor does the Sixth Amendment right to counsel. Furthermore, the refusal to submit to a breath or blood test is admissible if it is made prior to an arrest.



## **BLOOD EVIDENCE AND THE FOURTH AMENDMENT**

Is the procedure for obtaining blood evidence considered a search or seizure?

Given our previous review and inquiry into testimonial evidence, it is clearly a search and a seizure. It is a search of bodily fluids to determine the presence of certain substances as well as a seizure of the blood of an individual. This then leads to questions as to the validity of the warrant (probable cause, magistrate, etc.) and the reasonableness of the search.

The Supreme Court in *Schmerber v. California*<sup>20</sup>, stated: "But if the compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment ... It could not reasonably be argued ... that the administration of the blood test in this case was free of the constraints of the Fourth Amendment."

Texas courts have come to the same conclusion as the U.S. Supreme Court. Courts have stated that: "Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment. The taking of a blood sample is a search and seizure under the Texas Constitution."<sup>21</sup>

However, before we discuss the implications of a blood warrant in the context of the Fourth Amendment, it is important to note that many courts have determined, or inferred, if you will, that the court in *Schmerber v. California*<sup>22</sup> ruled that search warrants

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<sup>20</sup> 384 U.S. 757 (1966).

<sup>21</sup> *Ferguson v. State*, 573 S.W.2d 516 (Tex. Crim. App. 1978), cert. denied 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979); *Smith v. State*, 557 S.W.2d 299 (Tex. Crim. App. 1977); *Escamilla v. State*, 556 S.W.2d 796 (Tex. Crim. App. 1977).

<sup>22</sup> *Id.*

are not required to obtain blood from an individual suspected of a misdemeanor crime. **However, this author disagrees with this interpretation of *Schmerber*. As discussed later in the analysis of these legal rules, it is important to note that the Supreme Court expressly stated that their ruling was not to be broadly applied, and in fact, their ruling applied only to the facts at bar.**<sup>23</sup> It is apparent by the wording of *Schmerber* that the Justices sought to avoid precisely the kind of misinterpretation that has occurred.

Texas courts have made clear that once a valid search warrant is obtained, consent, implied or explicit, becomes moot.<sup>24</sup>

Therefore, since compliance with the Texas implied consent statute is not necessary to satisfy the Fourth Amendment, and the implied consent statute does not offer protection greater than the Fourth Amendment,<sup>25</sup> the primary issue we are presented with hinges upon the applicability of *Schmerber* to suspected misdemeanor DWIs that do not involve an accident, coupled with the intrusiveness of a forced blood draw.

Finally, *Beeman* is the primary case relied upon by prosecutors when discussing the “100% refusal” blood warrant process. However, it is important to note that the court in *Beeman* does not address the validity of a warrant for blood evidence.

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<sup>23</sup> **“It bears repeating, however, that we reach this judgment only on the facts of the present record.”** *Schmerber* at 772.

<sup>24</sup> *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002).

<sup>25</sup> *Id.*

## **BLOOD EVIDENCE AND “IMPLIED CONSENT”**

Enter “Implied Consent.” In Texas, “Implied Consent” is a situation in which the State may imply a suspect’s consent based upon the situation being investigated.<sup>26</sup> Since consent will be implied, and therefore already given, there is no need for the State to obtain a warrant. “Without a warrant or probable cause, a search can still be reasonable under the Fourth Amendment if the police obtain consent.”<sup>27</sup>

One must be careful not to confuse the Texas implied consent law<sup>28</sup> with an officer obtaining a warrant to obtain blood evidence. Implied Consent allows officers to obtain blood evidence, under certain circumstances, without having to obtain a warrant. Implied Consent is written to ensure that Texas, unlike California and other states, may not take a person’s blood or breath without obtaining a warrant. In short, Implied Consent was actually written to *protect* Texans from situations similar to that in *Schmerber*.

Tex. Transp. Code § 724 (2007) can be summed up thus: An officer need not obtain a warrant when investigating the scene of an accident where the officer suspects that a driver is intoxicated. Arguably, any automobile accident can be considered “life-threatening.” The taking of a blood specimen without consent is also authorized by statute if there is an accident in which intoxicated driving is suspected and there is a fatality.<sup>29</sup> “For the involuntary taking of a blood specimen to be authorized, section 724.012(b) sets out three specific requirements: (1) there was a life-threatening accident; (2) the defendant was arrested for an intoxication offense under Chapter 49 of the Penal

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<sup>26</sup> Tex. Transp. Code § 724.001-.064 (2007). Implied Consent

<sup>27</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

<sup>28</sup> § 724.001-.064 (2007).

<sup>29</sup> § 724.012(b) (2007).

Code; and (3) the arresting officer reasonably believed the accident occurred as a result of the offense.”<sup>30</sup>

However, it may be of note that the State gets to take *one* sample, any additional samples obtained by the State will be suppressed.<sup>31</sup>

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<sup>30</sup> *Badgett v. State*, 42 S.W.3d 136, 138 (Tex. Crim. App. 2001).

<sup>31</sup> *State v. Neesley*, 196 S.W.3d 356, 364 (Tex. App. 2006).

## ANALYSIS

As draconian as it may seem, the State of Texas may obtain a warrant for blood evidence in cases of suspected misdemeanor DWI, *regardless of the circumstances surrounding the DWI investigation.*

As long as a warrant to obtain blood evidence is valid, the police officer can use whatever reasonable means he deems necessary to execute the warrant. In addition, if a suspect were to resist or refuse to submit to a blood draw after being presented with a valid warrant, the suspect may also be charged with “Resisting Arrest, Search, or Transportation.”<sup>32</sup>

Warrants to obtain blood, over objections of the person, are warrants to violate a human being. While this assault and battery by the State may be justified in cases of felony investigations, to grant the State *carte blanche* ability to forcibly draw blood when investigating misdemeanor crimes is an abuse of police power. In Texas, as well as the United States of America, there is a presumption of innocence. Allowing the State to forcibly draw blood in suspected misdemeanor DWI investigations, while currently a legal procedure, is allowing the State to violate the innocent based on nothing more than a suspicion that a misdemeanor crime has been committed.

Even in *Schmerber v. California*,<sup>33</sup> a case often cited by both prosecutors and courts, the court held that "...the Constitution does not forbid the State's *minor* intrusions in an individual's body under *stringently limited conditions* in no way indicates that it permits more substantial intrusions, or *intrusions under other conditions.*" The question then remains: What constitutes a “minor intrusion” and what are the conditions under

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<sup>32</sup> Tex. Penal Code § 38.03 (2007).

<sup>33</sup> 384 U.S. 757 (1966).

which intrusions are justified. Regardless of how intrusive one considers the drawing of blood, investigation of misdemeanor crime should not be a condition in which any intrusion in one's body should be permitted, even minor.

Instead of lobbying for an amendment to the Texas Implied Consent Law,<sup>34</sup> or an amendment to reclassify Driving While Intoxicated<sup>35</sup> to a state jail felony, prosecutors and criminal courts in the State of Texas have chosen to effectively bypass the Texas Legislature, by "streamlining" the process for obtaining a warrant. In effect, prosecutors have transformed the warrant process into a commodity; a product consisting of simple "fill in the blank" forms to be quickly faxed back and forth between police departments and magistrates.<sup>36</sup> An evolved and relatively simple procedure that now does nothing more than require a police officer to wait idly by a fax machine before taking a suspect to the hospital, restraining her, and letting technicians wrap a rubber hose around her arm before sticking a needle in her body. If the suspect resists, the suspect can not only be charged with resisting a search<sup>37</sup>, but can still be restrained against her will and have her blood taken.

Courts will often cite cases that compare the insertion of a needle into a human body to the scraping of material from one's fingernails and something that it is "routine in our daily lives."<sup>38 39</sup> This is akin to comparing the insertion of a penis into a woman's vagina to a kiss and then following up with the argument that inserting a penis into a vagina is something that is done quite often, is "routine in our daily lives," and therefore

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<sup>34</sup> Tex. Transp. Code § 724.001-.064 (2007). Implied Consent

<sup>35</sup> Tex. Penal Code § 49.04 (2007). Driving While Intoxicated

<sup>36</sup> Alpert, Richard, *DWI Investigation & Prosecution* pages 62-67 (Texas District & County Attorneys Ass'n 2007)

<sup>37</sup> Tex. Penal Code § 38.03 (2007).

<sup>38</sup> *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).

<sup>39</sup> *Aliff v. State*, 627 S.W.2d 166 (Tex. Crim. App. 1982).

not intrusive. Frequency, commonality, and routine have absolutely no bearing on the intrusiveness of an act.

Of course, one might be shocked by this comparison of drawing blood to that of sex. The analogy is used to not only demonstrate the illogical conclusion reached by the court in *Aliff*, but also to point out that the act of sticking a needle into someone's body and forcibly taking their fluids is a violation only when done without permission. The intrusiveness of that violation is subjective to the individual being violated, not the courts or the State. Sex without permission is called rape, a heinous violation. Sex with permission is commonly referred to as "making love." As with sex, drawing blood without permission changes the nature of the act significantly.

Just because it is legally permissible, does not mean it is appropriate. Bad law is made, and overturned, relatively often in both our State and our Country. The large majority of case law that prosecutors and Texas Courts consistently rely upon when discussing or justifying blood warrants are cases in which death, injury, or property damage have occurred. That is, courts have ruled, and thus created, case law, that has been strategically manipulated and cited to encompass minor traffic violations that do not involve any injury, death, or property damage.

Perhaps it is time we reassessed the government's power to violate our bodies while investigating misdemeanor crime.

## CONCLUSION

One can only hope that Texans are comfortable sacrificing the sanctity and privacy of their bodies in the name of misdemeanor crime prevention, because this is precisely what their police are doing and our prosecutors are encouraging.

All media reports and lobbying aside, one should question the State's power to obtain blood warrants to investigate misdemeanor crime. The U.S. Supreme Court never intended for their ruling in *Schmerber v. State* to be manipulated and twisted in such a way as to lead us to our current state of affairs.

This essay is not meant to trivialize driving while intoxicated, this paper only points out that our legislature trivializes the crime and our prosecutors use heavy handed tactics to investigate what is currently a minor crime.

“In skating over thin ice our safety is in our speed.”<sup>40</sup>

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<sup>40</sup> Waldo Emerson (25 May 1803 – 27 April 1882) American essayist, philosopher, and poet.