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Testimony of Brandy Axdahl

Senior Vice President Responsibility Initiatives for Responsibility.org

Before the Senate Judicial Proceedings Committee in Support of SB 559

February 25, 2021

Chairman Smith and distinguished members of the Committee, thank you for the opportunity to testify before you today in support of S.B. 559, which will allow search warrants in impaired driving cases where an offender has refused a chemical test and/or evidence supports suspicion of drug-impaired driving.

Responsibility.org is a national not-for-profit that leads the fight to eliminate impaired driving and underage drinking and is funded by the following distillers: Bacardi U.S.A., Inc.; Beam Suntory; Brown-Forman; DIAGEO; Edrington; Mast-Jägermeister US Inc.; Moët Hennessy USA; Ole Smoky LLC; and Pernod Ricard USA.

We strongly support S.B. 559 to allow a chemical test for driving under the influence (DUI) offenders with a valid search warrant. This is critically important as states bordering Maryland have legalized cannabis and as Maryland considers cannabis legalization. The search warrant is only sought after an officer has observed dangerous driving, has pulled the driver over and determined the driver's impairment likely involves alcohol and/or drugs, a standardized field sobriety test has been conducted, and a blood alcohol concentration test has been administered or refused. Only then will law enforcement seek additional chemical evidence via a search warrant in order to obtain a blood alcohol concentration level and/or levels of drugs in a suspect's body.

DUI is the only crime where the investigation stops after minimal evidence is obtained due to standard operating procedure. If a law enforcement officer observes impairment and detects a blood alcohol concentration (BAC) above the legal limit, the investigation typically ends.

As more drivers are tested for drugs, it has become apparent that many alcohol-impaired drivers are actually multiple substance impaired drivers who avoid detection (Grondel, 2018 and Bui & Reed, 2019).

Search warrants are often needed to secure additional evidence of alcohol and/or drug-impaired driving. If drug use is not identified, it cannot be monitored or treated and multiple substance impaired driving, which poses a much higher crash risk, remains significantly underreported. Every impaired driving investigation – whether it involves alcohol, drugs, or both – is a race against the clock.

When DUI cases involve drugs, time delays are significant, and the most compelling evidence (i.e., drug levels in the blood) dissipates quickly. In most states, blood tests confirm drug presence in a DUI suspect's system.

However, due to delays in obtaining blood draws, test results often do not reflect drug concentration levels at the time of driving on account of rapid metabolization. When a suspect refuses to voluntarily submit to a breath test or a blood draw, a warrant must be obtained. Additionally, in most jurisdictions, a certified healthcare professional must perform the blood draw in a medical facility. This process can add up to two additional hours, possibly more in rural areas. To guard against the loss of evidence,

officers must efficiently collect blood or other chemical samples that are then analyzed to confirm drug presence in DUI cases.

Electronic warrant systems (e-warrants) help officers quickly obtain a search warrant for blood to accurately determine BAC or toxicology results and streamline the arrest process. Other benefits of e-warrants include reduced workloads, fewer errors, stronger DUI cases, speedier case resolutions, fewer burdens on the system, reduced refusal rates, and public deterrence. Minnesota's e-Charging platform reduced error rates from 30% to nearly zero and practitioners report increased ease in obtaining warrants. With an e-warrant system, submissions can be prepared in under 10 minutes and the review, approval, and return process can be completed in 15-20 minutes. Implementation recommendations and examples of robust systems can be found in our Guide to Implementing Electronic Warrants. Delaware has had an electronic warrant system in place for many years and offers a model that Maryland can consider.

Responsibility.org supports increased rates of drug testing in impaired driving cases, including measures to improve and enhance roadside identification of impaired drivers through standardized field sobriety test (SFST) training, Advanced Roadside Impaired Driving Enforcement (ARIDE), the Drug Evaluation and Classification (DEC) program, and oral fluid drug screening. However, the ability to seek a search warrant to test for drugs (and in refusal cases alcohol as well), is one of the most important steps in building a foundation to combat drug-impaired and multiple substance impaired driving. On behalf of Responsibility.org, I urge your passage of S.B. 559. It will help save lives and sets Maryland up to successfully address the evolving impaired driving problem.

Thank you.

Written Testimony of Edwrad Coyne in Support of SB

Uploaded by: Coyne, Edward

Position: FAV

Bill Number: SB 559
Edward J. Coyne, Deputy State's Attorney for Carroll County
SUPPORT

WRITTEN TESTIMONY OF EDWARD J. COYNE,
DEPUTY STATE'S ATTORNEY FOR CARROLL COUNTY
IN SUPPORT OF SENATE BILL 559
DRUNK & DRUGGED DRIVING- TESTING- WARRANTS

I write in support SB 559 because it clarifies existing law to permit Courts to issue search warrants for the blood of suspected drunk or drugged drivers. The Fourth Amendment to the United States Constitution and case law from the U.S. Supreme Court spell out that search warrants are the preferred method of obtaining evidence. Consent is one of the widely accepted alternatives to the preference for search warrants. Transportation Article §16-205.1 and Courts Article § 10-309 cover the implied consent law for obtaining and admitting the chemical test evidence in drunk and drugged driving cases. Even though consent is a permissible alternative to a search warrant, it should not be a limitation on law enforcement that prohibits law enforcement from obtaining a search warrant from a neutral judge in drunk or drugged driving cases. The Attorney General's Office issued a confidential opinion on the matter that is consistent with this legislation but suggested this legislation to clarify the law. This bill would clarify and put to rest any confusion about whether the existing implied consent law limits the ability of law enforcement to obtain a search warrant from a Judge to get evidence from a suspected drunk or drugged driver.

The Carroll County State's Attorney's Office joins the Maryland State's Attorneys' Association in requesting that this committee give SB 559 a favorable review.

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Uploaded by: Daggett, David
Position: FAV

MARYLAND STATE'S ATTORNEYS' ASSOCIATION
3300 North Ridge Road, Suite 185
Ellicott City, Maryland 21043

David Daggett
(c) 410.979.3356

O - 410.203.9881

Steven Kroll
(c) 410.979.3354

WRITTEN TESTIMONY IN SUPPORT OF SB 559 AND HB 927

In 2013, the United States Supreme Court, in the landmark case of *Missouri vs. McNeely*, 569 U.S. 141 (2013) held that the natural dissipation of alcohol from the blood does not create a per se exigency exception permitting law enforcement to draw blood in a "garden variety" impaired driving case, absent a warrant.

The Supreme Court in *McNeely* explained and limited its prior decision in *Schmerber v. California*, 384 U.S. 757 (1966), in which it had upheld the warrantless blood draw in an impaired driving case because the officer "might reasonably have believed that he was encountered with an emergency, in which the delay in obtaining a warrant to draw blood would have threatened the destruction of evidence." That is, the alcohol in Schmerber's blood would have dissipated during the process of obtaining a warrant.

The *McNeely* court determined that the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated on a case-by-case basis, based upon the totality of the circumstances. The Court went to great lengths to explain how warrants are much more easily obtained these days, what with electronic warrants and e mails.

The Supreme Court more recently decided *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), a case involving the constitutionality of additional criminal sanctions for refusing to take BAC tests. The Court held that the physical intrusion of a breath test is negligible and entails a minimum of inconvenience and therefore said additional penalties for refusing a breath test were constitutional. The Court determined that blood tests, on the other hand, are significantly more intrusive than are breath tests and in most situations a warrant was required prior to mandating a blood test.

Finally, in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), in a case involving a driver who was unconscious and deemed to be unable to give consent, the Supreme Court held that the police may almost always order a warrantless blood test to

measure the suspect's BAC without being in conflict with the Fourth Amendment. The Court then went on to say that they did not rule out the possibility that in an unusual case the defendant would be able to show that his blood would not have been drawn if the police had not been seeking BAC information and the police could not have reasonably determined that the warrant application process would interfere with other pressing needs or duties.

What these four Supreme Court cases have in common is that, in one way or another, they all stress the importance of seeking a warrant in order to obtain blood evidence in a "run-of-the-mill" impaired driving case. By "run-of-the-mill" I am referring to cases that don't involve a fatality or life-threatening injury. In cases involving fatalities or life-threatening injuries, when an officer has a reasonable belief that the driver is impaired or under the influence, Maryland Transportation Code TA §16-205.1(c) authorizes a warrantless blood draw, using reasonable force if necessary. The Maryland Court of Special Appeals in *Colbert v. State*, 229 Md. App. 79 (2016) indicated that these are precisely the type of limited scenarios in which the Supreme Court would uphold a warrantless blood draw as explained in *Missouri. v. McNeely*.

The Maryland State's Attorneys' Association supports HB 1529 and SB 498. We believe it necessary as the §16-205.1(b) of the Maryland Transportation Article and §10-309(a)(1)(i) of the Courts and Judicial Proceedings Article have been interpreted by certain members of the judiciary to *prohibit* search warrants for blood results in run-of-the-mill impaired driving cases. Specifically, the language in TA §16-205.1(b) that reads, "Except as provided in subsection (c), a person *may not be compelled to take a test*" and in C & J §10-309(a)(1)(i) that reads, "Except as provided in Section 16-205.1(c) of the Transportation Article or Section 8-738.1 of the Natural Resources Article, *a person may not be compelled to submit to a test or tests* provided for in this subtitle" are being interpreted as prohibiting search warrants. As previously mentioned, subsection (c) of TA §16-205.1 relates to situations involving a fatality or life-threatening injury.

The Supreme Court of the United States tells us that the police must almost always seek a warrant prior to drawing blood in a garden variety impaired driving case. Some members of the Maryland judiciary have determined that law enforcement may not do so. We respectfully disagree with this judicial interpretation.

The Supreme Court stressed in all the above cases how serious they believe the nationwide scourge of impaired driving to be and opined that states should be able to develop reasonable guidelines to limit the carnage caused by impaired drivers.

Finally, as the Maryland appellate courts have consistently stated in cases involving TA §16-205.1, "this section was enacted for the **protection of the public,**

rather than the protection of the accused. The purpose of this section is to protect other drivers on the road from those who would drive while intoxicated and to deter those who would otherwise decide to drive drunk." *State v. Moon*, 291 Md. 463 (1981); *Brice v. State*, 71 Md. App. 563 (1985); *Johnson v. State*, 95 Md. App. 561 (1993).

It is also important to note that, in order to obtain a search warrant for blood, law enforcement must have probable cause to believe the driver is impaired, otherwise a warrant will not be authorized. A search warrant cannot be used for a fishing expedition!

It is for these reasons that the Maryland State's Attorneys' Association is asking that you give SB 559 a favorable review.

Respectfully Submitted,

David Daggett
MD. State's Attorneys' Association

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Uploaded by: Robin Stimson, Robin Stimson
Position: FAV

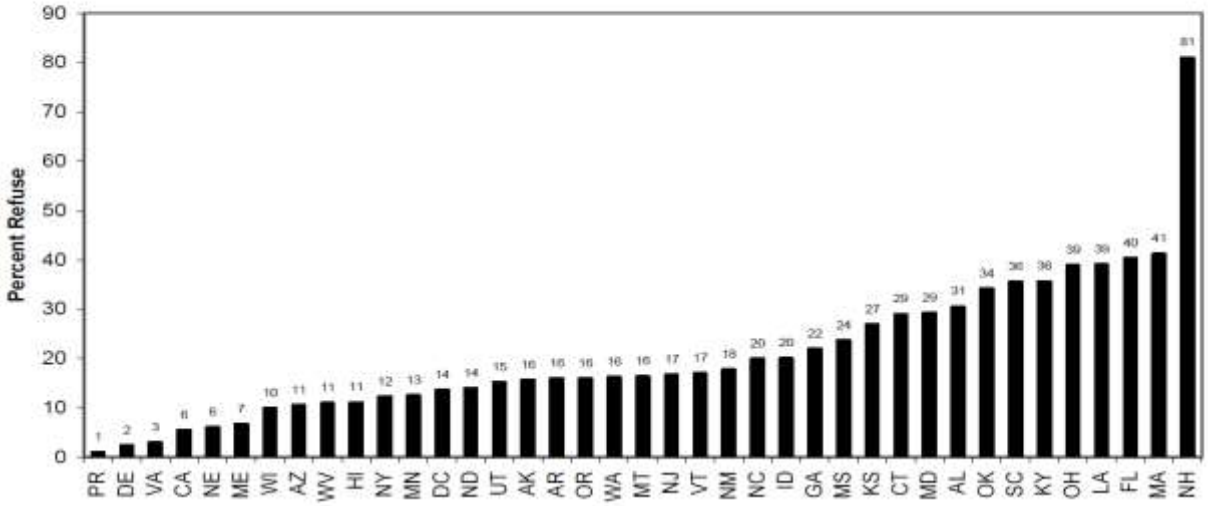
Robin Stimson
Victim Services Manager
Mothers Against Drunk Driving
Assembly Judiciary Committee
Testimony in Support of Senate Bill 559
February 25, 2021

Mr. Chairman, and distinguished members of the Committee, thank you for allowing me the opportunity to submit written testimony in support of Senate Bill 559 giving law enforcement the option to obtain search warrants suspected DWI offenders who refuse a chemical test. MADD thanks you, Senator Ready, for your sponsorship for this bill.

MADD supports SB 559 because suspected drunk and drugged drivers should not be allowed to refuse a chemical test. Conservative estimates show impaired drivers have driven drunk at least 80 times before they are first arrested. SB 559 will help enforce Maryland's impaired driving law while also holding impaired drivers accountable for the potentially deadly choice to drive drunk.

Maryland's fight against impaired driving is not over. According to the National Highway Transportation Safety Administration (NHTSA) in 2019, there were 167 people killed in crashes caused by a drunk driving representing 32 percent of all total traffic deaths. MADD supports SB 559 as this measure gives law enforcement and prosecutors the necessary tools to hold suspected impaired drivers accountable for their careless choice. The legislation ensures safer streets while protecting Constitutional Rights of all people of Maryland.

Figure 1. Breath Test Refusal Rates, 2005



Refusals to submit a chemical test is a problem in the United States. The chart above is from an enclosed 2009 report to Congress entitled "Refusal of Intoxication Testing" which shows that typically one out of every five arrested drunk drivers will refuse a chemical test. Compared to other states, more than one of every three people arrested for suspected impaired driving, refuse to submit to a test. This is above the national average. Maryland has a refusal problem as noted in the cart below.

Maryland DWI Arrests and Refusals

Table 2. Chemical Testing for §21-902 (a) and (b) Offenses, 2015-2019

	2015	2016	2017	2018	2019
Drivers Offered Test	20,089	19,326	18,954	18,762	18,983
Drivers Tested	13,440	12,661	12,421	12,123	11,979
Drivers Refused Test	6,649	6,665	6,537	6,639	7004
Refusal Rate	33.1%	34.5%	34.5%	35.4%	36.9%

Source: Compiled from Maryland State Police, *Alcohol Influence and PBT Use Summary* Reports

Without a legislative remedy, law enforcement and prosecutors remain at an extreme disadvantage in their ability to keep Maryland roadways safe. The refusal rates will continue climb in Maryland unless if lawmakers take action.

In conclusion, MADD encourages this committee to advance SB 559 and give law enforcement and prosecutors the full ability to request search warrants in order to hold suspected impaired drivers accountable for risking the lives of Maryland residents by making the choice to drive drunk. Thank you for the opportunity to submit written testimony before this distinguished committee.