

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 704 D.Co. 2010

**BARRY SMILEK, ERIC PICKLE, WILEY LLOYD, and GERTRUDE LLOYD
Appellants**

Vs.

**COMMONWEALTH OF PENNSYLVANIA,
Appellee**

*Order granting certiorari on an Appeal from an Order of the Superior Court of
Pennsylvania
dated November 28, 2009, Docket No. 3465 MD 2009.*

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

BARRY SMILEK, ERIC PICKLE, WILEY LLOYD, and GERTRUDE LLOYD,
Appellants

v.

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Appellee

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Supreme Court Order Granting Certiorari

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

In the Matter of)	
BARRY SMILEK, ERIC PICKLE,)	No. 704 D.Co. 2010
WILEY LLOYD,)	
and GERTRUDE LLOYD,)	Petition for Allowance
Appellants)	Appeal from the Order of the
)	Commonwealth Court
Vs.)	
)	
COMMONWEALTH OF PENNSYLVANIA,)	
Appellee)	

ORDER

And now, this 5th day of January, 2010, the Petition for Allowance of Appeal is hereby GRANTED. The Court will consider two issues: (1) whether the blood alcohol evidence should have been excluded because of relevant provisions of the United States Constitution; and (2) whether the culpability of Gertrude Lloyd should have been considered as an element of the charge of furnishing alcohol to minors pursuant to Pennsylvania law. Briefs from Appellant, Appellee, and any amicus curiae are hereby ordered to be submitted by the 20th day of March, 2010 at 5:00 pm. Oral Arguments will be scheduled in front of the Court during the Spring Term between the 22nd and 24th day of April, 2010 in the Middle District.

Hereby ordered:

HON. EMILY BESSLER
CHIEF JUSTICE

Opinion of the Superior Court

IN THE SUPERIOR COURT OF PENNSYLVANIA

In the Matter of)	
COMMONWEALTH OF PENNSYLVANIA)	
)	OPINION
Vs.)	NO. 3465 MD 2009
)	
BARRY SMILEK, ERIC PICKLE,)	
WILEY LLOYD,)	
and GERTRUDE LLOYD,)	
Defendants)	

OPINION

Thomsen, M., Judge.

I. FACTS

On Saturday September 19, 2009, Eric Pickle (3 weeks shy of 16 years old), a student at Crow Valley School District, asked his mother if he could spend the night at the house of his friend, Wiley Lloyd (age 15). Mr. Lloyd had recently moved to another school district as a result of being unhappy at Crow Valley School District. Mr. Pickle's mother agreed to the proposition and dropped Mr. Pickle off at Mr. Lloyd's house. Mr. Lloyd's mother, Gertrude, was dating a man named Barry Smilek (20 years old). Mr. Smilek was also spending the night at the Lloyd residence. Sometime before midnight, Gertrude Lloyd (age 50), went to sleep. Mr. Smilek, Mr. Lloyd, and Mr. Pickle (hereinafter The Three) decided to drink "Ice Picks" (a mixed alcoholic drink). To effectuate their plan, The Three broke into Gertrude Lloyd's liquor cabinet using a nearby crow bar. The Three then used the liquor therein to make Ice Picks, which consist of Vodka and Iced Tea according to the defendants.

Unbeknownst to Gertrude Lloyd, The Three all became drunk. At 2:30 AM, The Three, after some discussion, concurred that they were hungry. Rather than preparing and eating the food that was in the house, The Three decided that they should walk 2 miles to the nearest Sheetz store, which is located on Route 88. The Three arrived safely at Sheetz and each bought a sandwich and a non-alcoholic drink. Mr. Smilek advised both Mr. Lloyd and Mr. Pickle that, so long as they walked carefully, The Three should be fine. However, Mr. Smilek also said that if the police stopped them, that Mr. Smilek should do the talking.

The Three next decided that, rather and stay and eat the sandwiches at Sheetz, they would hang out in the parking lot of a local Harley Davidson dealership. The Three arrived at the Harley Davidson dealership at 3:00 am. At 3:15 AM, upon seeing people moving on the premises as he drove by, Deputy Davey "Little" John of the Dolphin County Sherriff's department stopped at the Harley Davidson dealership. Deputy John stopped his car and asked what The Three were doing out so late. Mr. Smilek told the Deputy that they were tired from walking back from Sheetz and had stopped to take a break. Then Mr. Pickle, for no readily apparent reason, stood up suddenly as if to say something. As Mr. Pickle stood, he appeared to become dizzy and fainted, which caused him to fall to the ground and hit his head on the pavement. The Deputy, after ascertaining that Mr. Pickle was once again conscious, helped Mr. Pickle to a sitting position and asked if The Three had been drinking. All of them denied drinking. The Deputy then asked if the boys would take a breathalyzer. Mr. Smilek and Mr. Lloyd said yes. Mr. Pickle didn't initially respond, but said yes when asked a second time. All three tested positive for alcohol (each had a blood alcohol content within .01 of 0.2 %). Due to Mr. Pickle's fainting episode, The Three were transported to the local hospital. Mr. Pickle and Mr. Lloyd were released into their parent's custody the next morning. Mr. Smilek was released at a local bus station.

II. DISCUSSION

The Three were each charged with Consumption of Alcohol by a Minor. Mr. Pickle and Mr. Lloyd, who are both under 18 years old, were also charged with Curfew Violation. Upon questioning, The Three revealed that they had obtained the alcohol at the house of Gertrude Lloyd, where they were all staying that night. The Three sought to suppress the results of the blood test and the admissions made that night on the basis that the tests and statements violated their constitutional rights in that the police lacked probable cause to order the tests and question them. The Court of Common Pleas denied the motions to suppress without writing an opinion. Additionally, as a result of the statements, Gertrude Lloyd was charged with Furnishing Alcohol to Minors.

Pennsylvania liquor law requires that no person under 21 years of age intentionally possess or consume intoxicating beer, wine, or liquor. Because each of The Three was under 21 years of age, possessed a measurable blood alcohol content, and admitted to consuming alcohol of their own volition it is evident to this Court that all the elements of Consumption of Alcohol by a Minor have been met. It will be taken into consideration during the sentencing phase that Mr. Pickle will be suspended from Crow Valley as a result of signing their Rules Handbook. Additionally, the Court will take notice of the likely loss of driving privileges for 90 days by The Three pursuant to Pennsylvania statute.

The Dolphin County curfew requires that all persons under the age of 18 years old be in-doors between the hours of midnight and 4 AM. Here, Mr. Pickle and Mr. Lloyd were both in the Harley Davidson parking lot at 3:15 AM. They are both therefore in violation of this county regulation.

Finally, Pennsylvania law forbids any person from furnishing alcoholic beverages to a person under the age of 21. Here, Mrs. Lloyd left her liquor cabinet and crow bar sufficiently unattended that The Three were able to obtain access to the liquor within its confines. This Court considers such an action to fall within the realm of “furnishing”. Additionally, all of The Three was under the age of 21 at the time of the incident. As a result, Mrs. Lloyd has committed the elements proscribed by the statute.

Upon consideration of these facts established at trial in the Court of Common Pleas of Dolphin County, the guilty verdict for all respective charges, and the applicable case law, this Court hereby enters the following ORDER:

III. ORDER

And now, this 29th day of August, 2009, seeing no Constitutional or legal basis for overturning the verdicts, the guilty verdicts entered by the Court of Common Pleas of Dolphin County is hereby

AFFIRMED,

and the Defendants are hereby ordered to stand for sentencing.

M. Thomsen
Judge, Superior Court

Federal

Constitution

Amendment IV - Search and Seizure

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.

Cases

SCHMERBER v. STATE OF CALIFORNIA

Supreme Court of the US (86 S.Ct. 1826), 1966.

Mr. Justice BRENNAN delivered the opinion of the Court.

[1] Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor.^{FN1} He had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving.^{FN2} At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital. *759 The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that in that circumstance the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction.^{FN3} In view of constitutional decisions**1830 since we last considered these issues in [Breithaupt v. Abram](#), 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448-see [Escobedo v. State of Illinois](#), 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; [Malloy v. Hogan](#), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, and [Mapp v. State of Ohio](#), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081-we granted certiorari. 382 U.S. 971, 86 S.Ct. 542, 15 L.Ed.2d 464. We affirm.

^{FN1.} [California Vehicle Code s 23102\(a\)](#) provides, in pertinent part, 'It is unlawful for any person who is under the influence of intoxicating liquor * * * to drive a vehicle upon any highway. * * *' The offense is a misdemeanor.

^{FN2.} Petitioner and a companion had been drinking at a tavern and bowling alley. There was evidence showing that petitioner was driving from the bowling alley about midnight November 12, 1964, when the car skidded, crossed the road and struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment.

^{FN3.} This was the judgment of the highest court of the State in this proceeding since certification to the California District Court of Appeal was denied. See [Edwards v. People of State of California](#), 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119.

* * *

IV.

THE SEARCH AND SEIZURE CLAIM.

In *Breithaupt*, as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful, but rejected the claim

on the basis of [Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782](#). That case had held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment's provisions. We have since overruled *Wolf* in that respect, holding in [Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081](#), that the exclusionary rule adopted for federal prosecutions in [Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652](#), must also be applied in criminal prosecutions in state courts. The question is squarely presented therefore, whether the chemical analysis*767 introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.

**1834 [15][16] The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In *Wolf* we recognized 'the security of one's privacy against arbitrary intrusion by the police' as being 'at the core of the Fourth Amendment' and 'basic to a free society.' [338 U.S., at 27, 69 S.Ct. at 1361](#). We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in *Mapp*.

[17] The values protected by the Fourth Amendment thus substantially overlap those of the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if 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. That Amendment expressly provides that '(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 * * *.' (Emphasis added.) It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.

[18] Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers-'houses, papers, and *768 effects'-we write on a clean slate. Limitations on the kinds of property which may be seized under warrant,^{FN10} as distinct from the procedures for search and the permissible scope of search,^{FN11} are not instructive in this context. We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

FN10. See, e.g., [Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647](#); [Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746](#); contra, [People v. Thayer, 63 Cal.2d 635, 47 Cal.Rptr. 780, 408 P.2d 108 \(1965\)](#); [State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 \(1965\)](#); Note, *Evidentiary Searches: The Rule and the Reason*, 54 *Geo.L.J.* 593 (1966).

FN11. See, e.g., [Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734](#); [Abel v. United States, 362 U.S. 217, 235, 80 S.Ct. 680, 695, 4 L.Ed.2d 668](#); [United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653](#).

In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor.^{FN12} The **1835 police officer who arrived *769 at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were 'bloodshot, watery, sort of a glassy appearance.' The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness. He thereupon informed petitioner 'that he

was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence.’

FN12. California law authorizes a peace officer to arrest ‘without a warrant * * * (w)henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.’ Cal. Penal Code s 836.3. Although petitioner was ultimately prosecuted for a misdemeanor he was subject to prosecution for the felony since a companion in his car was injured in the accident, which apparently was the result of traffic law violations. Cal.Vehicle Code s 23101. California’s test of probable cause follows the federal standard. People v. Cockrell, 63 Cal.2d 659, 47 Cal.Rptr. 788, 408 P.2d 116 (1965).

[19] While early cases suggest that there is an unrestricted ‘right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime,’ Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed.2d 652; People v. Chiagles, 237 N.Y. 190, 142 N.E. 583 (1923) (Cardozo, J.), the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors—first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused, United States v. Rabinowitz, 339 U.S. 56, 72-73, 70 S.Ct. 430, 437, 438, 94 L.Ed. 653 (Frankfurter, J., dissenting); second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment’s purpose to attempt to confine the search to those objects alone. People v. Chiagles, 237 N.Y., at 197-198, 142 N.E., at 584. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body’s surface. The interests in *770 human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

[20][21][22] Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner’s blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search ‘be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’ Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436; see also Aguilar v. State of Texas, 378 U.S. 108, 110-111, 84 S.Ct. 1509, 1511, 1512, 12 L.Ed.2d 723. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another’s body in search of evidence of guilt is indisputable and great.

[23] The officer in the present case, however, 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,’ **1836Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had *771 to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner’s arrest.

[24] Similarly, we are satisfied that the test chosen to measure petitioner’s blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See Breithaupt v. Abram, 352 U.S., at 436, n. 3, 77 S.Ct. at 410, 1 L.Ed.2d 448. Such tests are a commonplace in these days of periodic physical examination^{FN13} 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, see n. 9, supra. We need not decide whether such wishes would have to be respected.^{FN14}

FN13. 'The blood test procedure has become routine in our everyday life. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.' Breithaupt v. Abram, 352 U.S., at 436, 77 S.Ct. at 410.

FN14. See Karst, Legislative Facts in Constitutional Litigation, 1960 Sup.Ct.Rev. 75, 82-83.

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. 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 *772 rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today told that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

ABDELLA v. O'TOOLE

US District Court for the District of Connecticut (343 F.Supp.2d 129), 2004.

[SQUATRITO](#), District Judge.

James Abdella, Jr. ("James") and his wife Rosemary Abdella ("Rosemary") bring this action, as individuals and on behalf of their daughter Regina Abdella ("Regina"), for compensatory and punitive damages arising out of an allegedly unconstitutional entry and search of the Abdella home on July 18, 2001. Defendants Christopher O'Toole ("O'Toole") and Robert Bette ("Bette") are police officers employed by the town of Southbury, Connecticut. Defendant Joseph Froehlich ("Froehlich") is a sergeant with the Connecticut State Police serving as the resident state trooper for Southbury. Froehlich was the direct supervisor of O'Toole and Bette during the course of events underlying this suit. O'Toole and Bette have motioned for summary judgment on the grounds that there is no constitutional violation and, regardless, that they are entitled to qualified immunity. Sergeant Froehlich has motioned for summary judgment on the same grounds. The court, for the following reasons, **GRANTS in part** Froehlich's motion for summary judgment [doc. # 42]. O'Toole's and Bette's motion [doc. # 38] is also **GRANTED in part**.

FACTS

Certain general facts in this case are not disputed. On July 18, 2001, Officer Christopher O'Toole responded to a report that young men had stolen some cases of beer *132 from a Budweiser delivery truck. State Trooper Joseph Froehlich also investigated the alleged crime. O'Toole's search for the alleged thieves led him to a vehicle operated by Thomas Boiano. He learned from Boiano that James Abdella ("Jim"), son of the plaintiff, had been a passenger in the vehicle and that Boiano had recently dropped Jim off at the Abdella residence, 198 South Britain Road, Southbury. O'Toole proceeded to the Abdella residence, searching for Jim. O'Toole did not have a search warrant, and this was a fact known to all defendants throughout these events.

O'Toole arrived at the Abdella home alone, went to a door and knocked. Regina, the eleven-year old daughter of James and Rosemary, answered the door. Officer O'Toole observed that Regina was approximately 10 years of age and asked her if her parents were at home. She answered no. Officer Bette and other officers then began to arrive at the home. At this point, the parties' accounts diverge significantly.

All parties admit that Officer O'Toole asked Regina if Jim was at home. According to defendants, Regina responded that Jim was around. Plaintiffs contend that Regina told the officers that he was not in the house. O'Toole states that he asked Regina for permission to enter the home and she said yes. O'Toole then entered the home, accompanied by Froehlich and Bette.

There is a factual dispute about which defendants were present when O'Toole entered the Abdella home. O'Toole testifies that Froehlich was with him when he asked Regina if he could enter, and that Froehlich entered with him. Froehlich contends that he entered only when he saw O'Toole and Bette standing in the house talking to Regina, and O'Toole "waived him inside." Bette states in his affidavit that he was instructed by Froehlich to search the exterior of the house, and that he entered the home via the kitchen when he had completed his assignment. It is not clear from defendants' facts if Bette entered the home with O'Toole and Froehlich.

Froehlich instructed Bette to search outside for Jim. O'Toole and Froehlich stayed with Regina during Bette's search. Bette entered the kitchen, where O'Toole was then standing with Regina. Bette and O'Toole asked Regina if there was an adult or older sibling she could call, and she called her sixteen-year old sister, Leandra. Officer Bette spoke to Leandra via phone. Froehlich asked Regina if she was certain her brother was not home, since she had said he was "just there" before the police arrived. O'Toole then asked Regina's

permission to search the second floor for Jim. Regina responded “I don't care.” Froehlich and O'Toole conducted a quick search of the second floor, but did not find Jim. Froehlich admits that some closets were opened in the search, but O'Toole makes no mention of similar actions. The police left the residence shortly after Leandra arrived. Regina stayed with her sister.

Plaintiffs paint a quite different picture. Officer O'Toole, after hearing that Jim was not at home, asked Regina to look for her brother. She first searched the second floor of the home and then returned to tell O'Toole that she had not found Jim. O'Toole then asked her to search the garage attached to the house. While Regina was searching the garage, O'Toole entered the Abdella home and stood near the door. Upon Regina's return, O'Toole moved further into the home and stood with Regina while Bette entered behind him. Regina did not see Froehlich enter the home. Regina, surrounded by three police officers, told O'Toole she didn't care if he looked around the house. O'Toole and Froehlich *133 then undertook to thoroughly search the entire house. Drawers, closets and closed rooms were entered, searched and left in disarray. Officer Bette did help Regina call her sister, and police did leave when Leandra arrived. No beer was found and Jim was not discovered in the residence.

The Abdella family further claims that, after the event, they suffered emotional trauma and social ostracization. Rosemary alleges that she is suspicious, defensive and distraught and that she no longer feels safe within her home. Regina testified that as a result of this incident she has lost her faith and trust in the police, a fact the defendants admit. Plaintiffs do not claim that any member of the Abdella family was physically injured as a result of the defendants' actions.

DISCUSSION

The pending motions for summary judgment raise essentially identical issues. O'Toole and Bette have filed their motion jointly and they will be treated accordingly. Once the merits of O'Toole's and Bette's motion have been addressed, the merits of Froehlich's arguments will be considered. Qualified immunity will be discussed in the final section, first as it applies to O'Toole and Bette and then as it applies to Froehlich.

I. STANDARD OF REVIEW

A motion for summary judgment may be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#).

Summary judgment is appropriate if, after discovery, the nonmoving party “has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.” [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). “The burden is on the moving party ‘to demonstrate the absence of any material factual issue genuinely in dispute.’ ” [American Int'l Group, Inc. v. London Am. Int'l Corp.](#), 664 F.2d 348, 351 (2d Cir.1981) (quoting [Heyman v. Commerce & Indus. Ins. Co.](#), 524 F.2d 1317, 1319-20 (2d Cir.1975)).

A dispute concerning a material fact is genuine “ ‘if evidence is such that a reasonable jury could return a verdict for the nonmoving party.’ ” [Aldrich v. Randolph Cent. Sch. Dist.](#), 963 F.2d 520, 523 (2d Cir.1992) (quoting [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The court must view all inferences and ambiguities in a light most favorable to the nonmoving party. See [Bryant v. Maffucci](#), 923 F.2d 979, 982 (2d Cir.1991). “Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper.” *Id.*

II. MOTION OF DEFENDANTS O'TOOLE AND BETTE

a. Consent

Defendants, Officer O'Toole and Officer Bette, claim that they received consent from Regina, both to enter

the Abdella home and to search the home once the officers had gained entry. The consent, defendants argue, validates their warrantless search.

A warrantless search is *per se* unreasonable under the Fourth Amendment. [Katz v. United States](#), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); [Koch v. Town of Brattleboro](#), 287 F.3d 162, 166 (2d Cir.2002). There are limited exceptions to this rule. A warrantless search may be justified on the grounds of “hot pursuit,” *134 or as an incident to an arrest or where an individual consents to the search. [Katz](#), 389 U.S. at 358, 88 S.Ct. 507. Only consent is at issue in the present action.

[1] Two separate search and seizure questions are raised. First, defendants contend that they had consent to enter the Abdella home. Second, they argue that Regina gave them consent to search the second floor of the Abdella home. There is a direct and obvious issue of fact regarding Regina's alleged consent to enter the Abdella home. Regina testifies that she was not asked for, and did not give, her consent but rather that Officer O'Toole entered the Abdella home of his own accord and without permission. The court cannot grant summary judgment to the defendant on the question of unlawful entry.

The search of the second floor of the Abdella home was arguably undertaken with consent. There is no dispute of fact regarding either O'Toole's request for permission or Regina's response. It is also undisputed that Regina was not the owner of the property searched by police. The court, therefore, must address the issues of third-party authority to consent and voluntariness as they relate to the search of the second floor.

A consent to search property may be obtained from the owner of the searched property. [Illinois v. Rodriguez](#), 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). Alternately, the police may receive consent from a third-party who “possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” [United States v. Matlock](#), 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). “[F]irst, the third-party must have access to the area searched, and, second, either: (a) common authority over the area; or (b) a substantial interest in the area; or (c) permission to gain access.” [United States v. Davis](#), 967 F.2d 84, 87 (2d Cir.1992). Common authority rests on “mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection...and that the others have assumed the risk that one of their number might permit the common area to be searched.” [Matlock](#), 415 U.S. at 172, 94 S.Ct. 988.

It is also possible for the police to rely on the apparent authority of a third-party to justify a warrantless search. When the police are mistaken as to the actual authority of a third-party to grant consent, the entry will not be constitutionally unreasonable if the officers' belief in the legal capacity of the third-party to give consent is reasonable. [Rodriguez](#), 497 U.S. at 186, 110 S.Ct. 2793. [Rodriguez](#) does not, however, validate a search based on an erroneous view of the law. [United States v. Brown](#), 961 F.2d 1039, 1041 (2d Cir.1992).

Consent must be freely and voluntarily given. [Schneckloth v. Bustamonte](#), 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Voluntariness is a fact to be determined from the totality of all the circumstances. [Schneckloth](#), 412 U.S. at 227, 93 S.Ct. 2041. Consent is not demonstrated merely by a showing of acquiescence to a claim of lawful authority. [Id.](#) at 233, 93 S.Ct. 2041; *see also*, [United States v. Ruiz-Estrella](#), 481 F.2d 723, 727 (2d Cir.1973).

[2] Defendants raise Regina's consent to the second floor search as a defense to claims that the search was unconstitutional. The court assumes, *arguendo*, that Regina's statement that she did not care if the police looked around could have properly been interpreted as consent. Once consent is established, it remains to be *135 determined that the consenting third-party had the necessary authority to consent and that the consent was voluntary. Absent actual authority to consent, the search will still pass constitutional muster if the police were reasonable in assuming that the consenting party had the necessary authority.

[3][4] Courts have repeatedly held that the threshold inquiry in finding the common authority necessary for actual third-party authority to consent to a warrantless search of property is whether the owner, co-owner or

co-inhabitant of the property has assumed the risk that the third-party will permit the property to be searched. [Matlock](#), 415 U.S. at 172, 94 S.Ct. 988; [Davis](#), 967 F.2d at 88; [United States v. Chaidez](#), 919 F.2d 1193, 1202 (7th Cir.1990) (“The underpinning of third-party consent is assumption of risk.”). There is no basis, on the facts presented here, to conclude that the Abdellas assumed the risk that their eleven-year old daughter would permit the police to search their home or personal property.

[5] There is an ongoing discussion in the courts over whether a minor ever has authority to give third-party consent to a search of a parent's property. Although neither the Second Circuit nor the United States Supreme Court has ruled directly on this issue, a distinct consensus has emerged. It is clear that there is no *per se* rule that all minors lack the authority to consent to a search. Typically, the minority of the consenting party will be merely one of many factors considered when a fact-finder decides the voluntariness of the consent.

This court accepts and adopts the general rule that minority does not *per se* preclude a factual finding of actual or apparent authority. The authority of all minors to consent is not, however, equal. A ten-year old girl possesses a very different level of maturity and can be expected to have a very different level of authority regarding the home than a seventeen-year old young woman. “As a child advances in age, she acquires greater discretion to admit visitors on her own authority. In some circumstances, a teenager may possess sufficient authority to allow the police to enter and look about common areas.” [People v. Jacobs](#), 43 Cal.3d 472, 483, 233 Cal.Rptr. 323, 729 P.2d 757 (Cal.1987) (Holding that an eleven-year old child is too young to give consent to police where police lacked a reasonable basis for their entry into a home under California law). This level of maturity and responsibility directly impacts the question of actual or apparent authority. The vast majority of courts, federal and state, to hold that a child under twelve had actual authority to consent to a police search of their parent's property did so under factual circumstances very different than those presented here. Typically, an adult is present, or the child has contacted police and requested the search, or the child is a victim of, or witness to, the crime that led to the search. ^{FN1} None of those factors is found in this action.

FN1. See, [Davis v. United States](#), 327 F.2d 301 (9th Cir.1964)(Court permitted an arrest where police asked an eight-year old child for permission to enter to speak to a parent then inside the home, where police saw marijuana in plain sight upon entering the home and based the arrest on this observation); [Doyle v. State](#), 633 P.2d 306 (Alaska App.1981)(holding that a child who appeared to be between the ages of 11 and 14 could give consent in a situation where the officers asked not for permission to search but only to speak to a parent who was found in the living room of the house, a common area.); [State v. Lotton](#), 527 N.W.2d 840, 844 (Minn.App.1995) (a ten-year old child contacted police to inform them of drugs found in her apartment and then led police into the apartment, where the police received permission to search from the child's mother who was home at the time of the entry). See also, [Murphy v. State](#), 355 So.2d 1153 (Ala.Crim.App.1978)(holding that a 12-year old victim of a sexual assault could consent to a search, where her 22-year old sibling had already consented in writing); [State v. Folkens](#), 281 N.W.2d 1 (Iowa 1979)(holding that a 14-year old rape victim could consent to a police search of her home).

*136 One federal court has concluded that minority may never be a factor in finding third-party authority to consent. The Eleventh Circuit held in [Lenz v. Winburn](#) that a nine-year old girl could give consent to her guardian ad litem to enter the home she shared with her grandparents and retrieve some of the child's own belongings. [Lenz v. Winburn](#), 51 F.3d 1540, 1543 (11th Cir.1995). The [Lenz](#) court reasoned that there were four reasons why a minor could always have actual authority to give consent to a search. First, “privacy is not an intuitive interest, and legal sophistication is not required even for adults to give valid consent.” [Lenz](#), 51 F.3d at 1548. Second, the vulnerability of a minor to coercion by authority figures is part of the inquiry into voluntariness and does not impact authority. [Id.](#) at 1549. Third, consent searches are important and must be balanced against the cost of limiting a minor's ability to consent. [Id.](#) Finally, the [Lenz](#) court determined that “the rationale behind third party consent involves no notion of agency. Rather, the third party consent rule recognizes that sharing space with another lessens the expectation of privacy in that space. This compromise of the expectation of privacy is no less the case for a minor co-occupant than for

an adult.” [Lenz, 51 F.3d at 1549](#).

Obviously, consent searches are important and the threat of coercion may be addressed at places in the consent analysis other than the discussion of authority. These conclusions only justify not barring all consent by minors, however; they do not warrant a holding that minority can never be a determining factor in finding that no authority to consent exists. Further, the [Lenz](#) court's conclusions regarding the expectation of privacy and a child's understanding of that expectation are not persuasive. The issue is not if a child understands her own rights, but if a child understands the consequences of not vindicating the right to privacy held by the child's parents or older siblings.^{FN2} The court must consider if it is appropriate to permit a child, living in a home by virtue of an involuntary dependent relationship, to bind the rights of parents or older siblings. The key question is whether the parents and siblings have anticipated and accepted the binding, not if the child can bind. The [Lenz](#) analysis does not clearly address this distinction.

^{FN2}. This decision assumes that a minor child under 12-years of age is more susceptible to coercion, even inadvertent coercion, than an older child.

Although the [Lenz](#) court seemingly concludes that parents compromise their expectation of privacy simply by having children, this court does not reach the same result. The California Supreme Court provides a more persuasive analysis of this issue in [Jacobs](#) when it reasons that “[a]lthough parents may choose to grant their minor children joint access and mutual use of the home, parents normally retain control of the home as well as the power to rescind the authority they have given.” [Jacobs, 43 Cal.3d at 482, 233 Cal.Rptr. 323, 729 P.2d 757](#). It is not reasonable or realistic to assume that an eleven-year old child, home alone, has always been authorized to act as an independent co-tenant, such that the parents should be on notice that their expectation of privacy is compromised. The factual record must show some clear sign that the child had responsibility*137 for the home and the property the police desired to search.

Any assessment of the risk that parents have assumed must also consider the likelihood that young minors may be coerced by the presence of numerous authority figures such as police officers. Even when a child has some authority over the home, that authority is nearly always circumscribed to greater or lesser degree, and the presence of a police officer can easily influence a child, especially one as young as eleven, to overstep the limits set by her parents. The lack of a “trusted non-governmental adult figure” to guide a child in making the consent decision is a critical factor in determining whether consent was voluntary, and the absence of such a figure when a young child is involved should be considered a serious defect in the consent. See, [United States v. Barkovitz, 29 F.Supp.2d 411, 413 \(E.D.Mich.1998\)](#) (holding that a “small, scared” 12-year old boy, home alone, could not give consent to a police search of his entire house, including his father's bedroom.) A child is much more likely to merely acquiesce to a claim of authority than to make an independent and informed decision, especially when the parents are not home and the police officers arrived unexpectedly and in the midst of an investigation. The authority of the child to consent must consider the degree to which the particular child is likely to be overwhelmed by the police and not properly consider the limits set on her authority by her parents.

Defendants in this case argue that an eleven-year old girl (according to defendants' own observations she was only ten years old) had actual authority to permit the police to enter her parents' home and search the bedrooms and closets of her parents and older siblings. Further, police assert that it was reasonable for the police to believe that Regina had this authority, even if it did not actually exist. Defendants' contentions are not persuasive. The record does not show that Regina had responsibility for her home or that she had permission to access the private areas searched by police. There is nothing to support the argument that Regina had a substantial interest in any space investigated by the defendants. Finally, the record lacks evidence that might justify the defendants' assertion that the Abdellas shared control of their home with Regina such that they had assumed the risk she might permit the police to search it. Regina had limited permission to be home alone and no authority over the Abdella home. There are factual issues regarding her actual access to the searched property and no basis exists for a conclusion that she had common authority over her home.

The possible impact of coercion on Regina also precludes a grant of summary judgment in favor of the

defendants. Regina was obviously young and scared and she was hardly in an appropriate position to object to the police activity or rationally consider her options other than acquiescence. Drawing the facts and inferences in the light most favorable to Regina, the court finds that numerous police officers surrounded her, uninvited, in her kitchen, leaving her little choice but to accede to their requests. Further, the police failed to spell out for her the extent of their plan to “look around” which involved searching inside closets and private spaces that it is highly unlikely a child as young as Regina would have permission to enter on her own. Regina, as a minor permitted to be home alone for only a short period of time, did not have unlimited authority to permit a search of the home, even if she may have had some authority and the failure of the defendants to explain what consent they were requesting made it impossible for Regina to assess her own authority before *138 responding. Summary judgment for the second floor search is denied as there are genuine issues of fact regarding Regina's actual authority to consent.

This analysis applies equally to any claim of apparent authority that defendants might raise. The Supreme Court has determined that the issue raised when police claim that the consenting party had apparent authority to permit the challenged search is not whether the non-consenting party has waived her rights by association with the third-party, but rather whether it is unreasonable for the police to search based on the third party's consent. [*Rodriguez*, 497 U.S. at 187, 110 S.Ct. 2793](#). There is no basis in the record for a holding that the police were reasonable in thinking that a minor possibly as young as ten years old could have authority to consent to a broad search of her parent's home. Regina was not babysitting younger siblings or in any way obviously in a position of responsibility in the home. The defendants were concerned enough about Regina's youth to request that she call an older sibling, but they chose not to wait for the older and more responsible party to arrive before requesting permission to search. Inferring the facts in a light favorable to the plaintiffs, the court could conclude that the officers chose to exploit a window of opportunity when they requested Regina's permission to search the second floor. At least, the record is sufficient to deny summary judgment based on a claim that the search was reasonable and justified by the defendant's belief in Regina's apparent authority to consent.

Finally, there are clear issues of fact related to the voluntariness of Regina's consent. The facts, taken in her favor, show a young girl surrounded by a large and unwanted police presence. It is impossible to infer that her consent was purely voluntary and not at all coerced or pressured by the sheer volume of police officers in the Abdella home. Summary judgment cannot be granted on the grounds that the consent was voluntary.

There are genuine issues of material fact regarding Regina's consent for defendants to enter the Abdella home and so summary judgment is denied. Further, the evidence regarding the assumption of risk by Regina's parents that she would consent to a search of the Abdella home is insufficient to support summary judgment for defendants. Nor does the evidence permit the court to hold that defendants' assumptions regarding Regina's apparent authority to consent was reasonable. Finally, the facts are very much in doubt as to whether her consent was voluntary, assuming that she did have authority to consent. The motion for summary judgment is denied as to consent.

* * *

CONCLUSION

All three defendants are denied summary judgment on the merits of the constitutional claims. Further, taking the facts in the light most favorable to the plaintiffs' the court finds that no reasonable police officer could have believed that the actions of the three defendants, either regarding the entry or the search, were legal. Summary judgment based on qualified immunity is denied. Finally, plaintiffs have failed to show genuine issues of fact sufficient to support either a claim for intentional infliction of emotional distress or a claim for negligent infliction of emotional distress under Connecticut law. All defendants are granted summary judgment as to any such claims under Connecticut law.

This case is referred to the Hon. Thomas P. Smith, United States Magistrate Judge, for a settlement conference. The parties are ORDERED to submit a joint trial memorandum on or before December 15, 2004.

UNITED STATES v. CASTELLANOS
US Court of Appeals, Eighth Circuit (518 F.3d 965), 2008.

[RILEY](#), Circuit Judge.

Jose E. Castellanos (Castellanos) appeals the district court's denial of his motion to suppress. We affirm, in part, and reverse, in part.

I. BACKGROUND

The following relevant facts pertaining to the search of Castellanos' residence are uncontroverted. Law enforcement officers went to Castellanos' residence, a trailer, after receiving information from a confidential informant and other sources that Castellanos was in this country illegally, was selling a large quantity of drugs from his residence, and had a cousin who had *967 been kidnapped and killed. Upon arrival at about 6:15 in the morning, the officers found the door to Castellanos' residence partially open. The officers knocked on the door, but no one answered. Neighbors reported no traffic in or out of the trailer for about a week. Because the officers had information concerning a possible kidnapping offense and murder offense, the officers entered the residence to verify the welfare of the occupants. Finding no one inside, the officers left the residence. The record indicates the officers initially went to the trailer with the intent to obtain consent to search the residence. As the officers were leaving, they observed Castellanos driving a pick-up truck into the residence's parking lot, but then driving away after seeing the officers.

The officers followed Castellanos for two blocks before stopping Castellanos for weaving. Special Agent Tracy Raggs (Agent Raggs) of the Immigration and Customs Enforcement Office (ICE) conducted the traffic stop. Detective Luis Ortiz (Detective Ortiz), who was also present, stated Castellanos was "pretty drunk," stumbled out of the truck and had urinated on himself. At first, Castellanos refused to give his name and said "Just arrest me." Castellanos eventually identified himself as Guillermo Lujan, but he did not have identification with him. Castellanos stated his identification was at home. Detective Ortiz testified he requested consent to search Castellanos' home and vehicle, but Castellanos did not reply. Detective Ortiz did not push the consent issue because Castellanos was so intoxicated. When questioned about this specific incident, Detective Ortiz's testimony was as follows:

Q. Okay. So, your best guess is more than likely you had a conversation about identification first?

A. Correct.

Q. And at some point while you were discussing ID, you did request consent to search the residence?

A. Yes, it through [sic] me off because I didn't expect him to be that drunk at 6:00 in the morning.

Q. All right. And his response to your request was no response? A. It was no response.

Q. And based on his lack of response, you concluded he was too drunk to consent?

A. Correct.

The officers handcuffed Castellanos and transported him back to his residence to verify his identity. The officers testified Castellanos was never placed under arrest and handcuffs were placed on Castellanos as part of the police department's policy.

The record is not clear as to when the officers removed the handcuffs from Castellanos. However, it is undisputed: (1) Castellanos opened the unlocked door of his residence and entered; (2) Agent Raggs and Detective Ortiz followed Castellanos inside; and (3) Castellanos did not object to the officers entering the residence with him.

Once inside the residence, Castellanos sat down on a couch in the living room. Agent Raggs asked Castellanos for the location of his identification, but Castellanos did not answer. Agent Raggs specifically described the encounter in the living room as follows:

Q. And was he told to sit down on the couch?

A. He just kind of had a seat on his own.

Q. Okay. Is it fair to say he was still being uncooperative?

A. Yeah, he wasn't answering the question of who he was. He wouldn't give his name.

....

***968** Q. Well, at what point did Detective Ortiz request consent to search the trailer?

A. After he wouldn't give his name, Detective Ortiz told him again why he was there. He told him he had information that he was selling drugs, and that he had guns and stuff like that. And asked him could he have consent. He told him that it was an ongoing investigation. He asked could he have consent. And the defendant asked him did he have a warrant. Detective Ortiz said no. Then he said no.

Q. Okay. So, the defendant actually said no, you can't search the residence?

A. Yeah, he said he wouldn't give consent.

After Castellanos refused to consent to the search of his residence, Agent Raggs testified he asked Castellanos again for his identification and Castellanos "kind of flipped his hand" in the direction of his bedroom. Agent Raggs entered Castellanos' bedroom and searched a dresser and a chest of drawers, but did not find Castellanos' identification. Agent Raggs, however, saw a notebook with other papers on top of the dresser. The notebook had monetary figures written on it. Agent Raggs saw similar papers in the living room, including a paper taped to the wall with names, numbers, and monetary figures. The officers eventually noticed a wallet on a bookshelf next to Castellanos. The officers retrieved identification from the wallet bearing the name of Guillermo Lujan. Agent Raggs testified he asked Castellanos if Guillermo Lujan was his name and Castellanos repeatedly responded, "what's on the ID?" Agent Raggs also asked Castellanos about his immigration status, and Castellanos replied he was in the country illegally.

Detective Ortiz decided to apply for a search warrant because Castellanos "was too intoxicated to consent to a search of his residence." During the execution of the search warrant, the officers found evidence of drug dealing, approximately \$60,000 in cash and a receipt for a storage unit. The officers also found approximately \$1,800 in cash on Castellanos. The officers searched Castellanos' truck and found two .9mm magazines and two pistols.

The officers subsequently located Teresa Wilkerson (Wilkerson), the name listed on the storage locker receipt. Wilkerson stated she had rented the storage locker for Castellanos and Castellanos had paid the rental fee. The officers asked Wilkerson for her consent to search the storage locker because Wilkerson's name was the only name on the receipt for the locker. Wilkerson consented. In the storage locker, the officers found a stolen vehicle containing eight packages of methamphetamine.

Castellanos was charged with, among other things, possessing and conspiring to distribute methamphetamine, illegal reentry, and possessing firearms and ammunition while being in the United States illegally, in violation of [21 U.S.C. §§ 846, 841\(a\)\(1\) and \(b\)\(1\)\(A\)](#), [8 U.S.C. § 1326\(a\)](#), [18 U.S.C. §§ 922\(g\)\(5\) and 924\(a\)\(2\)](#). Claiming the search warrant was based on an unreasonable search of the residence, Castellanos filed a motion to suppress. The district court, based on the magistrate judge's report and recommendation, granted the motion to suppress with respect to the search of the truck, but denied the motion in all other respects. The government did not object to the report and recommendation regarding the suppression of the items found in the truck. Castellanos then entered a conditional guilty plea to conspiracy to distribute 500 grams or more of methamphetamine, reserving his right to appeal the denial of his motion to suppress. Castellanos was sentenced to *969 135 months imprisonment, and now appeals the denial of his motion to suppress the evidence found inside his residence.

II. DISCUSSION

[1][2][3][4] “Reviewing denial of a motion to suppress, this court examines for clear error the district court's factual findings, and we review de novo the ultimate question whether the Fourth Amendment has been violated.” [United States v. Varner, 481 F.3d 569, 571 \(8th Cir.2007\)](#) (quotation and citation omitted). We “must affirm an order denying a motion to suppress unless the decision is unsupported by substantial evidence, is based on an erroneous view of the applicable law, or in light of the entire record, we are left with a firm and definite conviction that a mistake has been made.” *Id.* (citation omitted). The “Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.” [Horton v. California, 496 U.S. 128, 133 n. 4, 110 S.Ct. 2301, 110 L.Ed.2d 112 \(1990\)](#) (citations omitted). “The Fourth Amendment generally prohibits police from entering a home without a warrant unless the circumstances fit an established exception to the warrant requirement.” [Varner, 481 F.3d at 571](#) (citation omitted). We review a Fourth Amendment challenge for reasonableness. *See Illinois v. McArthur, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001)*.

[5][6] “An individual may validly consent to an otherwise impermissible search if, in the totality of the circumstances, consent is freely and voluntarily given, and not the product of implicit or explicit coercion.” [United States v. Rambo, 789 F.2d 1289, 1296 \(8th Cir.1986\)](#) (citing [Schneckloth v. Bustamonte, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 36 L.Ed.2d 854 \(1973\)](#)). “[T]he mere fact that one has taken drugs, or is intoxicated, or mentally agitated, does not render consent involuntary.” *Id. at 1297* (citations omitted). “In each case, the question is one of mental awareness so that the act of consent was the consensual act of one who knew what he was doing and had reasonable appreciation of the nature and significance of his actions.” *Id.* (quotation and citation omitted).

[7] The government contends the district court properly denied Castellanos’ motion to suppress the evidence in his residence because the district court correctly found the officers lawfully entered Castellanos’ residence and Castellanos impliedly consented to the officers' search of his bedroom for his identification. We disagree in part. A fundamental flaw exists in the government's position that Castellanos consented to the search of the bedroom. The record indicates the officers failed twice to obtain consent from Castellanos to search his home. The first attempt occurred at the traffic stop. Castellanos did not respond, and Detective Ortiz did not push the issue because Castellanos was too intoxicated.

The second attempt occurred in Castellanos’ living room. Agent Raggs testified Detective Ortiz asked Castellanos for consent to search his home. Castellanos asked if the officers had a warrant. When told no warrant existed, Castellanos refused consent to a search. It is clear from the record Castellanos never expressly authorized the officers' search of the residence or entry into his bedroom.

[8] Keeping in mind “[t]he precise question is not whether [Castellanos] consented, but whether his conduct would have caused a reasonable person to believe *970 that he consented,” [United States v. Jones, 254 F.3d 692, 695 \(8th Cir.2001\)](#) (citation omitted), we agree with the government that the record indicates the officers reasonably believed Castellanos did not object to the officers following him into the living

room. Under the totality of the circumstances, the officers' entry into the residence's living room was reasonable. However, allowing an officer to enter one's home and allowing the officer to search the home are two very different matters. When a person permits an officer to enter the person's home, the officer does not have free reign to wander around the home and search any area of the house, without further consent. Indeed, Castellanos expressly refused consent to search his residence.

[9] Consent to search can be inferred from gestures and other conduct. See [Jones](#), 254 F.3d at 695. However, in this case, the officers admittedly believed Castellanos, who was not under arrest, "was too intoxicated to consent to a search of his residence." The record shows Detective Ortiz requested a search warrant for the residence because Castellanos was too inebriated to consent. Detective Ortiz's testimony as to Castellanos' condition is not internally inconsistent and was not contradicted by objective evidence. If Castellanos' intoxication was such that the officers believed Castellanos was incapable of giving consent to a search, it must follow that Castellanos did not possess the capacity to give implied consent. Under the facts of this case, it is simply not reasonable for the officers to infer Castellanos impliedly consented to their entry into his bedroom when Castellanos "kind of flipped his hand" in that direction.

The government contends that, under our decision in [Rambo](#), the officers' search of Castellanos' bedroom was proper.^{FN1} However, [Rambo](#) is distinguishable from the case at hand because, unlike Castellanos' case, the defendant in [Rambo](#) had been evicted from his dwelling (a hotel room) and had no standing to challenge the search. Based upon this fact, we stated:

FN1. The government also cites other cases to support its position. However, the cases cited by the government are easily distinguishable because, unlike Castellanos' case, the defendants explicitly granted permission to search the room in question, and there was no question the defendants possessed the mental capacity to consent to the search. In some cases, the defendants had been placed under arrest or the incriminating evidence was visible as soon as the officers entered the defendant's home. See [United States v. Willie](#), 462 F.3d 892, 895-96 (8th Cir.2006); [United States v. Gipp](#), 147 F.3d 680, 684, 686 (8th Cir.1998); [United States v. Turbyfill](#), 525 F.2d 57, 58-9 (8th Cir.1975). The government also cites [United States v. Winston](#), 444 F.3d 115, 118-19 (1st Cir.2006), but in that case, a protective sweep of the premises had to be conducted because the officers had information defendant was armed and dangerous, possibly with armed and dangerous cohorts, and defendant had been previously arrested by one of the officers for possession of a handgun. The government further cites [United States v. Wagner](#), 884 F.2d 1090, 1094 (8th Cir.1989), but in that case we found the officers obtained search warrants before the search in question.

Rambo was asked to leave the hotel by the officers, acting at the request of and on behalf of the hotel manager, because of his disorderly behavior.... Rambo was justifiably ejected from the hotel ... and the rental period therefore had terminated.... At that time, control over the hotel room reverted to the management. Rambo no longer had a reasonable expectation of privacy in the hotel room, and therefore is now without standing to contest the officers' entry (search) into the hotel room. Rambo cannot assert an expectation of being *971 free from police intrusion upon his solitude and privacy in a place from which he has been justifiably expelled.

[Rambo](#), 789 F.2d at 1295-96 (citations and footnote reference omitted). Furthermore, in [Rambo](#), the record did not reflect the officer's perceived defendant was too intoxicated to give consent. Rambo "responded coherently and rationally to the officers' requests for identification, and voluntarily directed them to his luggage," which was located in the same room with the defendant. [Id.](#) at 1297.

The government also relies on [United States v. Rodriguez](#), 532 F.2d 834 (2d Cir.1976) to persuade us the search of Castellanos' bedroom was proper. However, [Rodriguez](#) is also distinguishable because: (1) the mental capacity of the tenant defendants was never in question, (2) the tenants were under arrest before the officers entered their bedrooms, and (3) once the tenants were arrested, the officers followed them into their bedrooms where the tenants, not the officers, retrieved their identifications (passports). [Id.](#) at 836-37. The court concluded that maintaining custody of the tenants who were under arrest and accompanying the tenants to their bedrooms so they would procure their identification did not constitute a search. [Id.](#) at 838-

39. In contrast, Castellanos' mental capacity to consent to a search of his residence was unquestionably compromised, he was not under arrest, and he never entered his bedroom or moved from his living room couch-Agent Raggs entered the bedroom alone.

[10][11] The government further contends [8 U.S.C. § 1357](#), which applies to the immigration service, made the search of Castellanos' bedroom proper. In particular, the government points to the following language:

Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without a warrant, of the person, and of the personal effects in the possession of *any person seeking admission to the United States*, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

[8 U.S.C. § 1357\(c\)](#) (emphasis added). The search language of this statute pertains to circumstances where individuals are attempting to enter the United States, and is not authorization for the immigration service to conduct warrantless searches of homes. Section (a)(3) of this same statute specifically prohibits a search of a "dwelling" without a warrant.

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant-

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, *but not dwellings*, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States....

[8 U.S.C. § 1357\(a\)\(3\)](#) (emphasis added).

Contrary to the government's position, [8 U.S.C. § 1357](#) does not relax the Fourth Amendment prohibition against warrantless*972 entry into private dwellings.^{FN2} The Fourth Amendment provides that "[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. These rights are among the rights held "more sacred." See [Terry v. Ohio](#), 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (citation omitted).

^{FN2}. Arguing the contrary, the government cites [United States v. Nevarez-Alcantar](#), 495 F.2d 678, 679 (10th Cir.1974). [Nevarez-Alcantar](#) is distinguishable for three reasons: (1) it does not involve the search of a home, (2) the defendant was under arrest, and (3) the interview of the defendant and search of his briefcase took place at the border patrol's office. The government also cites [United States v. Villa-Velazquez](#), 282 F.3d 553, 556 (8th Cir.2002) and [United States v. Roche-Martinez](#), 467 F.3d 591, 593-94 (7th Cir.2006), but these cases are also distinguishable. In both cases, the officers had confirmed before they encountered the defendant that the defendant returned illegally to this country after having been previously deported, the defendant was placed under arrest, the mental capacity of the defendant was never in question, the officers never searched the home where they arrested the defendant, and the suppression issue was whether the district court erred in failing to suppress defendant's identity when the defendant was held at the jail or under arrest.

The testimony of Detective Ortiz that Castellanos was too intoxicated to consent to a search is undisputed. The facts surrounding the search of the bedroom are undisputed, and we are not disturbing the district court's findings either of fact or credibility. However, we find the district court's holding that Castellanos, in his diminished capacity, impliedly consented to the search of his bedroom is not fairly supported by the

record and is an erroneous application of the law. As a result, the evidence seized during the unlawful search of Castellanos' bedroom must be suppressed. See [Murray v. United States, 487 U.S. 533, 536-37, 108 S.Ct. 2529, 101 L.Ed.2d 472 \(1988\)](#).

III. CONCLUSION

Based on the foregoing, the district court's denial of Castellanos' motion to suppress is reversed with respect to the evidence seized from Castellanos' bedroom, but the district court's ruling is affirmed in all other respects. The case is remanded to the district court for further proceedings consistent with this opinion.

Pennsylvania

Constitution

Article I, Section 8

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, *165 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.

Statutes

18 Pa.C.S.A. § 302. General requirements of culpability

(a) Minimum requirements of culpability.--Except as provided in section 305 of this title (relating to limitations on scope of culpability requirements), a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(b) Kinds of culpability defined.--

(1) A person acts intentionally with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(2) A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(3) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the

circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(c) Culpability required unless otherwise provided.--When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

(d) Prescribed culpability requirement applies to all material elements.--When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(e) Substitutes for negligence, recklessness and knowledge.--When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

(f) Requirement of intent satisfied if intent is conditional.--When a particular intent is an element of an offense, the element is established although such intent is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(g) Requirement of willfulness satisfied by acting knowingly.--A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(h) Culpability as to illegality of conduct.--Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or this title so provides.

47 P.S. § 4-493. Unlawful acts relative to liquor, malt and brewed beverages and
licensees

The term "licensee," when used in this section, shall mean those persons licensed under the provisions of Article IV, unless the context clearly indicates otherwise.

It shall be unlawful--

(1) Furnishing liquor or malt or brewed beverages to certain persons. For any licensee or the board, or any employee, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to

permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any minor: Provided further, That notwithstanding any other provision of law, no cause of action will exist against a licensee or the board or any employee, servant or agent of such licensee or the board for selling, furnishing or giving any liquor or malt or brewed beverages or permitting any liquor or malt or brewed beverages to be sold, furnished or given to any insane person, any habitual drunkard or person of known intemperate habits unless the person sold, furnished or given alcohol is visibly intoxicated or is a minor.

* * *

Cases

COMMONWEALTH v. KOCZWARA Supreme Court of Pennsylvania (397 Pa. 575), 1959

COHEN, Justice.

This is an appeal from the judgment of the Court of Quarter Sessions of Lackawanna County sentencing the defendant to three months in the Lackawanna County Jail, a fine of five hundred dollars and the costs of prosecution, in a case involving violations of the Pennsylvania Liquor Code.

John Koczwar, the defendant, is the licensee and operator of an establishment on Jackson Street in the City of Scranton known as J. K.'s Tavern. At that place he had a restaurant liquor license issued by the *578 Pennsylvania Liquor Control Board. The Lackawanna County Grand Jury indicted the defendant on five counts for violations of the Liquor Code. The first and second counts averred that the defendant permitted minors, unaccompanied by parents, guardians or other supervisors, to frequent the tavern on February 1st and 8th, 1958; the third count charged the defendant with selling beer to minors on February 8th, 1958; the fourth charged the defendant with permitting beer to be sold to minors on February 8th, 1958, and the fifth or final count was an averment of a prior conviction for violations of the Liquor Code.

Prior to trial, the averment of prior convictions was removed from the consideration of the jury upon motion of counsel that submission of the same would deprive the defendant of his fundamental right to exclude evidence of former convictions.

At the conclusion of the Commonwealth's evidence, count three of the indictment, charging the sale by the defendant personally to the minors, was removed from the jury's consideration by the trial judge on the ground that there was no evidence that the defendant had personally participated in the sale or was present in the tavern when sales to the minors took place. Defense**827 counsel then demurred to the evidence as to the other three counts. The demurrer was overruled. Defendant thereupon rested without introducing any evidence and moved for a directed verdict of acquittal. The motion was denied, the case went to the jury and the jury returned a verdict of guilty as to each of the remaining three counts: two counts of permitting minors to frequent the licensed premises without parental or other supervision, and the count of permitting sales to minors.

Upon the conclusion of the trial, defendant filed a motion in arrest of judgment. After argument before the court *en banc*, the motion was overruled by Judge *579 Hoban, who sentenced the defendant to pay the costs of prosecution, a fine of five hundred dollars and to undergo imprisonment in the Lackawanna County Jail for three months.

The defendant took an appeal to the Superior Court, which, in an opinion by Judge Hirt, affirmed the judgment and sentence of the lower court. A petition for an allowance of an appeal was filed by the defendant. Because of the importance of the issues raised, the petition was allowed and an appeal granted.

Defendant raises two contentions, both of which, in effect, question whether the undisputed facts of this case support the judgment and sentence imposed by the Quarter Sessions Court. Judge Hoban found as fact that 'in every instance the purchase [by minors] was made from a bartender, not identified by name, and service to the boys was made by the bartender. There was *no* evidence that the defendant was present on any one of the occasions testified to by these witnesses, nor that he had any personal knowledge of the sales to them or to other persons on the premises.' We, therefore, must determine the criminal responsibility of a licensee of the Liquor Control Board for acts committed by his employees upon his premises, without his personal knowledge, participation, or presence, which acts violate a valid regulatory statute passed under

the Commonwealth's police power.

[1] While an employer in almost all cases is not criminally responsible for the unlawful acts of his employees, unless he consents to, approves, or participates in such acts, courts all over the nation have struggled for years in applying this rule within the framework of 'controlling the sale of intoxicating liquor.' See [Annotation, 139 A.L.R. 306 \(1942\)](#). At common law, any attempt to invoke the doctrine of *respondeat superior* in a criminal case would have run afoul of our deeply ingrained notions of criminal jurisprudence that guilt *580 must be personal and individual.^{FN1} In recent decades, however, many states have enacted detailed regulatory provisions in fields which are essentially noncriminal, e.g., pure food and drug acts, speeding ordinances, building regulations, and child labor, minimum wage and maximum hour legislation. Such statutes are generally enforceable by light penalties, and although violations are labeled crimes, the considerations applicable to them are totally different from those applicable to true crimes, which involve moral delinquency and which are punishable by imprisonment or another serious penalty. Such so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment**828 totally unrelated to questions of moral wrongdoing or guilt. It is here that the social interest in the general well-being and security of the populace has been held to outweigh the individual interest of the particular defendant. The penalty is imposed despite the defendant's lack of a criminal intent or mens rea.

^{FN1}. The distinction between *respondeat superior* in tort law and its application to the criminal law is obvious. In tort law, the doctrine is employed for the purpose of settling the incidence of loss upon the party who can best bear such loss. But the criminal law is supported by totally different concepts. We impose penal treatment upon those who injure or menace social interests, partly in order to reform, partly to prevent the continuation of the anti-social activity and partly to deter others. If a defendant has personally lived up to the social standards of the criminal law and has not menaced or injured anyone, why impose penal treatment?

[2] Not the least of the legitimate police power areas of the legislature is the control of intoxicating liquor. As Mr. Justice B. R. Jones recently stated in [In re Tahiti Bar, Inc., 1959, 395 Pa. 355, 360, 150 A.2d 112, 115](#), 'There is perhaps no other area of permissible state action within which the exercise of *581 the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages.'^{FN2} It is abundantly clear that the conduct of the liquor business is lawful only to the extent and manner permitted by statute. Individuals who embark on such an enterprise do so with knowledge of considerable peril, since their actions are rigidly circumscribed by the Liquor Code.

^{FN2}. See also [Cavanaugh v. Gelder, 1950, 364 Pa. 361, 72 A.2d 85](#), wherein this Court went to great lengths to establish the legal and constitutional bases for the state's control of the liquor trade. Such regulation is now embodied in the Liquor Code, Act of April 12, 1951, P.L. 90, 47 P.S. § 1-101 et seq.

[3] Because of the peculiar nature of this business, one who applies for and receives permission from the Commonwealth to carry on the liquor trade assumes the highest degree of responsibility to his fellow citizens. As the licensee of the Board, he is under a duty not only to regulate his own personal conduct in a manner consistent with the permit he has received, but also to control the acts and conduct of any employee to whom he entrusts the sale of liquor. Such fealty is the *quid pro quo* which the Commonwealth demands in return for the privilege of entering the highly restricted and, what is more important, the highly *dangerous* business of selling intoxicating liquor.

In the instant case, the defendant has sought to surround himself with all the safeguards provided to those within the pale of criminal sanctions. He has argued that a statute imposing criminal responsibility should be construed strictly, with all doubts resolved in his favor. While the defendant's position is entirely correct, we must remember that we are dealing with a statutory crime within the state's plenary police power. In the field of liquor regulation, the legislature has enacted a comprehensive Code aimed at regulating*582 and controlling the use and sale of alcoholic beverages. The question here raised is whether the legislature *intended* to impose vicarious criminal liability on the licensee-principal for acts committed on his premises

without his presence, participation or knowledge.

[4] This Court has stated, as long ago as [Commonwealth v. Weiss, 1891, 139 Pa. 247, 251, 21 A. 10, 11 L.R.A. 530](#), that ‘whether a criminal intent, or a guilty knowledge, is a necessary ingredient of a statutory offense * * * is a matter of construction. It is for the legislature to determine whether the public injury, threatened in any particular matter, is such, and so great as to justify an absolute and indiscriminate prohibition.’ In the Weiss case, and in [Commonwealth v. Miller, 1890, 131 Pa. 118, 18 A. 938, 6 L.R.A. 633](#), this Court construed the statute in question in the light of its letter and spirit and its manifest purpose. See also [Commonwealth v. Jackson, 146 Pa.Super. 328, 22 A.2d 299](#), affirmed per curiam by this Court in 1942, [345 Pa. 456, 28 A.2d 894](#).^{FN3}

FN3. This case is not governed by Carlson's License, 1889, [127 Pa. 330, 18 A. 8](#); [Commonwealth v. Sellers, 1889, 130 Pa. 32, 18 A. 541, 542](#); [Commonwealth v. Holstine, 1890, 132 Pa. 357, 19 A. 273](#); or [Commonwealth v. Zelt, 1891, 138 Pa. 615, 21 A. 7, 11 L.R.A. 602](#). Those cases hold persons answerable for sales made by *themselves*, and prevent them from pleading ignorance of the nonage or intemperate habits of those to whom they sell. Nor is this case governed by [Commonwealth v. Junkin, 1895, 170 Pa. 194, 32 A. 617, 31 L.R.A. 124](#), which refused to hold a principal criminally liable for the wrongful act of his agent, where the act was in positive disobedience of the principal's instructions. The Junkin case did *not* involve a comprehensive regulatory scheme which clearly evidenced a legislative purpose to hold a licensee responsible for all illegal acts conducted on the licensed premises. The Liquor Code of Pennsylvania in effect makes the act of the employee the act of the licensee for the purpose of enforcing the rigid restrictions on the sale of liquor.

****829 *583** [5] In the Liquor Code, Section 493, the legislature has set forth twenty-five specific acts which are condemned as unlawful, and for which penalties are provided in Section 494. Subsections (1) and (14) of Section 493 contain the two offenses charged here. In neither of these subsections is there any language which would require the prohibited acts to have been done either knowingly, willfully or intentionally, there being a significant absence of such words as ‘knowingly, willfully, etc.’ That the legislature intended such a requirement in other related sections of the same Code is shown by examining Section 492(15), wherein it is made unlawful to *knowingly* sell any malt beverages to a person engaged in the business of illegally selling such beverages. The omission of any such word in the subsections of Section 494 is highly significant. It indicates a legislative intent to eliminate both knowledge and criminal intent as necessary ingredients of such offenses. To bolster this conclusion, we refer back to Section 491 wherein the Code states, ‘It shall be unlawful (1) For any person, by himself *or by an employ or agent*, to expose or keep for sale, or directly or *indirectly* * * * to sell or offer to sell any liquor within this Commonwealth, except in accordance with the provisions of this act and the regulations of the board.’ The Superior Court has long placed such an interpretation on the statute. [Commonwealth v. Speer, 1945, 157 Pa.Super. 197, 42 A.2d 94](#).^{FN4}

FN4. It is established that a liquor license may be legally suspended or revoked for violations of the Code committed by employees of the licensee even though there is no evidence that the licensee knew of such violations. [McGrath v. Pennsylvania Liquor Control Board, 1958, 185 Pa.Super. 187, 137 A.2d 812](#); Southern Outing Club of Pittsburgh Liquor License Case, 1950, [166 Pa.Super. 555, 72 A.2d 600](#).

[6][7] As the defendant has pointed out, there is a distinction between the requirement of a mens rea and the ***584** imposition of vicarious absolute liability for the acts of another. It may be that the courts below, in relying on prior authority, have failed to make such a distinction.^{FN5} In any case, we fully recognize it.^{FN6} Moreover, we find that the intent of the legislature in enacting this Code was not only to eliminate the common law requirement of a mens rea, but also to place a very high degree of responsibility upon the holder of a liquor license to make certain that neither he nor anyone in his employ commit any ****830** of the prohibited acts upon the licensed premises. Such a burden of care is imposed upon the licensee in order to protect the public from the potentially noxious effects of an inherently dangerous business. We, of course, express no opinion as to the *wisdom* of the legislature's imposing vicarious responsibility under certain

sections of the Liquor Code. There may or may not be an economic-sociological justification for such liability on a theory of deterrence. Such determination is for the legislature to make, so long as the constitutional requirements are met.

[FN5](#). We must also be extremely careful to distinguish the present situation from the question of *corporate* criminal liability, such as was involved in [Commonwealth v. Liberty Products Company, 1925, 84 Pa.Super. 473](#). For a penetrating inquiry into this latter subject, see *Mens Rea And The Corporation*, 19 *U.Pitt.L.Rev.* 21 (1957).

[FN6](#). For an extremely interesting and incisive analysis of the mens rea requirement in criminal offenses, see Mueller, *On Common Law Mens Rea*, 42 *Minn.L.Rev.* 1043 (1958). While we sympathize fully with the author's eloquent plea for a return to the moral implications of criminal guilt, we await further determinations by the Supreme Court of the United States as to whether the rationale of [Lambert v. People of State of California, 1957, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228](#), will be extended to all statutory offenses which have been interpreted as not requiring a criminal mens rea. See also [Allen, Book Review, 66 Yale L.J. 1120 \(1957\)](#); Mueller, *Mens Rea And The Law Without It*, 58 *W.Va.L.Rev.* 34 (1955).

*585 [\[8\]](#) Can the legislature, consistent with the requirements of due process, thus establish absolute criminal liability? Were this the defendant's first violation of the Code, and the penalty solely a minor fine of from \$100-\$300, we would have no hesitation in upholding such a judgment. Defendant, by accepting a liquor license, must bear this financial risk. Because of a prior conviction for violations of the Code, however, the trial judge felt compelled under the mandatory language of the statute, Section 494(a), to impose not only an increased fine of five hundred dollars, but also a three month sentence of imprisonment. Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this Court consistently with the law of the land clause of Section 9, Article I of the Constitution of the Commonwealth of Pennsylvania., P.S.^{[FN7](#)}

[FN7](#). Sec. 9. '* * * nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.'

The Courts of the Commonwealth have already strained to permit the legislature to carry over the civil doctrine of *respondeat superior* and to apply it as a means of enforcing the regulatory scheme that covers the liquor trade. We have done so on the theory that the Code established petty misdemeanors involving only light monetary fines. It would be unthinkable to impose vicarious criminal responsibility in cases involving true crimes. Although to hold a principal criminally liable might possibly be an effective means of enforcing law and order, it would do violence to our more sophisticated modern-day concepts of justice. Liability for all true crimes, wherein an offense carries with it a jail sentence, must be based exclusively upon personal causation. It can be readily imagined that even a licensee who is meticulously careful in the choice of his employees cannot supervise every single act of *586 the subordinates. A man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment. See [Sayre, Criminal Responsibility For Acts of Another, 43 Harv.L.Rev. 689 \(1930\)](#).

This Court is ever mindful of its duty to maintain and establish the proper safeguards in a criminal trial. To sanction the imposition of imprisonment here would make a serious change in the substantive criminal law of the Commonwealth, one for which we find no justification. We have found *no* case in any jurisdiction which has permitted a *prison term* for a vicarious offense. The Supreme Court of the United States has had occasion only recently to impose due process limitations upon the actions of a state legislature in making unknowing conduct criminal. [Lambert v. People of State of California, 1957, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228](#). Our own courts have stepped in time and again to protect a defendant from being held criminally responsible for acts about which he had no knowledge and over which he had little control. [Commonwealth v. Unkrich, 1940, 142 Pa.Super. 591, 16 A.2d 737](#); [Commonwealth v. Schambers, 1932, 105 Pa.Super. 467, 161 A. 624](#); [Commonwealth v. Rovnianek, 1889, 12 Pa.Super. 86](#). We would be utterly remiss were we not to so act under these facts.

[9] In holding that the punishment of imprisonment deprives the defendant of due process of law under these facts, we are not declaring that Koczwarra must be treated ****831** as a first offender under the Code. He has clearly violated the law for a second time and must be punished accordingly. Therefore, we are only holding that so much of the judgment as calls for imprisonment is invalid, and we are leaving intact the five hundred dollar fine imposed by Judge Hoban under the subsequent offense section.

[10] With respect to defendant's final contention that the increased penalty was improperly meted out under ***587** the provisions of Section 494(a), we adopt the informed opinion of the Superior Court in that respect.

'Section 494, supra, enlarges the penalties on the conviction of a second offender who has violated the provisions of the Code. The indictment averred a prior conviction of the defendant * * *. On motion of *defendant's* counsel, however, the averment of the indictment was removed from the jury's consideration. And to avoid possible prejudice of the defendant by the charge of a former conviction the indictment was not sent out with the jury. In *Commonwealth v. Scott*, 1945, 54 Pa. Dist. & Co. R. 243, 252, a distinguished judge said: '1. That the indictment must contain an averment of such conviction and sentence. 2. That where there is no averment of a former conviction in the information, the grand jury may of its own motion, make such presentment in the indictment. 3. That on the trial of the substantive offense, the Commonwealth may not submit evidence of the former conviction, unless the former conviction may be put in evidence to affect his credibility or the defendant has put his character or reputation in evidence, and that the original indictment, with the averment of former conviction, should not be sent out to the jury; but that an exact copy, with the exception of such averment, may be. 4. That after conviction on the substantive averment, the district attorney should present in writing, a suggestion to show cause why the enlarged sentence should not be imposed, to which the defendant may answer.' What was done in the instant case is consistent with the above procedure suggested by Judge Hargest. The indictment was not sent out with the jury. And after verdict the district attorney filed a suggestion of the prior conviction. In his answer to the suggestion, the defendant admitted his identity as the offender previously convicted and sentenced. When by his admission, defendant was proven to be a second offender under ***588** the Liquor Code the court was bound under § 494 to impose the enlarged penalty there prescribed.' [[188 Pa. Super. 153, 146 A.2d 308](#)]

Judgment, as modified, is affirmed.

GOLDBERG v. DELTA TAU DELTA
Superior Court of PA (418 Pa. Super. 207), 1992.

TAMILIA, Judge:

Stella Goldberg takes this appeal from the April 22, 1991 Order ^{FN1} granting appellee, Brian Goldberg's, ^{FN2} motion for summary judgment. Appellant originally brought this civil suit for damages in October, 1988, against Delta Tau Delta, the Beta Chapter of Delta Tau Delta, Carnegie Mellon University (CMU) and Darrell J. Van Mastrigt as a consequence of the February 8, 1987 death of her daughter, Jeanne Goldberg, at the hands of Van Mastrigt. ^{FN3} In June, 1989, Brian Goldberg was joined as an additional defendant in this matter by defendant Delta Tau Delta who averred Brian provided Jeanne with the alcohol and marijuana which rendered her incapable of protecting or caring for herself at the time of her *210 fatal injuries. Delta argued Brian's actions were a direct and proximate cause of Jeanne's death. Appellee's initial motion for summary judgment was denied on September 17, 1990. However, appellee was granted leave to re-file his motion which, in turn, was granted April 22, 1991. This appeal followed.

^{FN1}. Although on praecipe judgment was entered for appellee on May 1, 1991, the April 22, 1991 Order granting summary judgment is the final Order from which this appeal is properly taken.

^{FN2}. Brian Goldberg is not related to Stella Goldberg or Jeanne Goldberg.

^{FN3}. None of the original defendants is party to this appeal. Delta Tau Delta, the Delta Beta Chapter of Delta Tau Delta and Carnegie Mellon University settled with appellant in return for joint tortfeasor releases. Darrell J. Van Mastrigt was convicted of first degree murder and is serving life imprisonment.

This case arises from events which occurred at CMU during the weekend of February 6-8, 1987, culminating in the death of 20-year old Jeanne Goldberg. At this time appellee was an 18-year old freshman at CMU and the decedent, who came to CMU on Friday, February 6th, to attend a fraternity party, was a student at Robert Morris College. In the early morning hours of Saturday, February 7th, Brian Goldberg met the decedent at a Theta Xi fraternity party and shortly thereafter the couple retired to Brian's room where they had consensual sexual intercourse and fell asleep. Brian and Jeanne spent Saturday together and that evening, at approximately 8:00 p.m., they went to a party held in Brian's dormitory where beer and mixed drinks were available. Brian had previously paid \$5 to attend the party. Brian and Jeanne stayed two hours, left to attend a movie and thereafter went to CMU's Tartan Grill where they met Van Mastrigt, a passing acquaintance of Brian. The three returned to the dorm party at midnight, each had one drink and then went to Brian's room where they each took five tokes on marijuana presented in a bowl and provided by Van Mastrigt. Brian defined a toke as one inhale and one exhale (N.T., 7/2/90, p. 66). ****1252** At about 3:00 a.m., the trio got in Jeanne's car and she drove them to another fraternity party where Brian had two beers and Jeanne and Van Mastrigt each had one-half of a beer. While at this particular party, Van Mastrigt and Jeanne conversed while Brian stood alone. At 4:00 a.m., Brian, Jeanne and Van Mastrigt joined a small party of 12 in an upstairs room where the decedent and Van Mastrigt consumed the bulk of a fifth of Southern Comfort whiskey. Van Mastrigt obtained the whiskey by trading marijuana with another person at the party. Everyone present also took two tokes of marijuana which was once again provided by Van Mastrigt. Brian, Jeanne and Van ***211** Mastrigt left this party at about 5:30 a.m. Because Jeanne was having difficulty walking due to the drugs and alcohol she had consumed, Brian and Van Mastrigt placed her in the back seat of her vehicle and Van Mastrigt drove them to a nearby hot dog shop. While Brian went in to get french fries, Van Mastrigt stayed in the car with Jeanne. When Brian returned, and as Jeanne slept, the two men discussed the fact Jeanne and Brian were not committed to each other and Brian would not object if she and Van Mastrigt had sex. It was Brian's testimony Van Mastrigt told him Jeanne had repeatedly voiced sexual invitations to Van Mastrigt while Brian was in the restaurant. Van Mastrigt then dropped Brian at his dormitory and drove away with Jeanne. The record reveals Van Mastrigt took Jeanne

to South Park where he stabbed her to death.

Appellant argues the court committed an error of law by granting appellee's motion for summary judgment and ruling, because he had not yet reached age 21, appellee could not be found negligent per se for providing alcohol and marijuana to another minor, herein the decedent. Appellant contends the court also erred by finding appellee's actions were not a substantial factor in causing Jeanne's death.

[1][2][3] As an appellate court, we are bound to consider certain principles when and under what circumstances a trial court may properly enter summary judgment. [Goebert v. Ondek, 384 Pa.Super. 100, 557 A.2d 1064 \(1989\)](#). The trial court must accept as true all well-pleaded facts relevant to the issues in the non-moving party's pleadings, and give to him the benefit of all reasonable inferences to be drawn there from. [Jefferson v. State Farm Insurance Co., 380 Pa.Super. 167, 551 A.2d 283 \(1988\)](#). A grant of summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits on file support the court's conclusion no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Pa.R.C.P. 1035](#); see [Penn Center House Inc. v. Hoffman, 520 Pa. 171, 553 A.2d 900 \(1989\)](#). The court must ignore controverted facts contained in the pleadings and restrict its review *212 to material filed in support of and in opposition to a motion for summary judgment and to those allegations in pleadings which are uncontroverted. [Overly v. Kass, 382 Pa.Super. 108, 554 A.2d 970 \(1989\)](#). We will overturn a trial court's entry of summary judgment only if there has been an error of law or a clear abuse of discretion. [McCain v. Pennbank, 379 Pa.Super. 313, 549 A.2d 1311 \(1988\)](#).

[4] Appellant argues the holding in [Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 \(1983\)](#), which imposed social host liability on adults who furnish alcohol to persons under the age of 21, should be extended to impose liability on persons between 18 and 21 years of age who provide liquor to persons between 18 and 21 years of age. Appellant argues two Third Circuit Court of Appeals cases suggest, if given the opportunity to address the issue, the Pennsylvania Supreme Court would hold an individual over the age of 18 can be criminally and civilly liable for the service of alcoholic beverages to those under 21 years of age. See [Macleary v. Hines, 817 F.2d 1081 \(3rd Cir., 1987\)](#), and [Fassett v. Delta Kappa Epsilon, 807 F.2d 1150 \(3rd Cir., 1986\)](#). However, in a companion decision to this appeal, this Court affirmed an Allegheny County Court of Common Pleas decision wherein it was found, for the purposes imposing social host liability a person remains a minor until he reaches age 21. **1253 [Kapres v. Heller, 417 Pa.Super. 371, 612 A.2d 987](#) (originally filed on 3/24/92 and re-filed on 6/2/92). Therefore, a minor cannot, as a matter of law, be held liable as a social host for furnishing alcoholic beverages to another minor. Accordingly, we find the trial court committed neither an error of law nor abused its discretion by granting Brian Goldberg's motion for summary judgment.

Although we find appellant's arguments persuasive, this Court is not prepared to extend social host liability to persons under the age of 21. The *Congini* case, which is the seminal case in Pennsylvania establishing a cause of action by a minor against an adult social host, specifically limited social host liability to one who is lawfully entitled to possess and consume alcohol and furnishes it to one who is not so entitled. Appellant's*213 argument that minor Brian Goldberg should be construed as an adult pursuant to [Pa.R.C.P. 76](#), and, therefore, liable for damages incurred by the minor decedent as a result of drugs and alcohol allegedly provided by appellee, was thoroughly analyzed by the trial court and we defer to its well reasoned explanation refuting appellant's argument.

“At the time of the incident, Jeanne Goldberg, Brian Goldberg, and Darrell J. Van Mastrigt were older than eighteen and less than twenty-one. The issues raised by additional defendant's motion for summary judgment are (1) whether a person between the ages of eighteen and twenty-one who furnishes alcohol to another person between the same ages can be liable as a social host and (2) whether one adult who assists a second adult in illegality procuring marijuana can be liable for injuries that the second adult sustains as a result of the use of the marijuana.

“In the case of *Kapres v. Heller* No. G.D. 88-4899, The Honorable David S. Cercone of this Court [Common Pleas Court of Allegheny County] rendered an opinion on November 30, 1990, which held that a nineteen year [old] who served alcoholic beverages to another nineteen year old cannot be held liable.

Absent compelling circumstances, I am required to follow this opinion. [Yadacufski v. Dept. of Transportation](#), [499 Pa. 605] 454 A.2d 923 (Pa.1982).

“I believe that this opinion is a correct reading of Pennsylvania law. I also believe that the rationale for the result in *Kapres v. Heller* bars a claim by one adult against another adult for injuries resulting from the first adult's use of marijuana that was obtained with the assistance of the second adult.

“Under Pennsylvania law, there is no liability on the part of a social host for serving alcohol to adult guests. [Herr v. Booten](#), [398 Pa.Super. 166] 580 A.2d 1115 (Pa.Super.1990); [Klein v. Raysinger](#), [504 Pa. 141] 470 A.2d 507 (Pa.1983). However, in the case of [Congini by Congini v. Portersville Valve Co.](#), [504 Pa. 157] 470 A.2d 515 (Pa.1983), the Pennsylvania Supreme Court held that an adult who served alcohol to a visibly intoxicated eighteen year old was liable because *214 of the provisions of the Criminal Code making it a summary offense for someone under twenty-one years of age to purchase, consume, and possess alcohol ([18 Pa.C.S. § 6308](#)) and making a person guilty of an offense if that person is an accomplice of another person in the commission of the offense ([18 Pa.C.S. § 306](#)).

“The Court's opinion specifically limited the imposition of liability to the circumstances in which a person lawfully entitled to possess alcohol furnishes the alcohol to a person who is not entitled to possess alcohol. The *Congini* opinion states that ‘an adult who furnishes liquor to a minor would be liable as an accomplice to the same extent as the offending minor’ (emphasis added) ([527 A.2d at] p. 517). Also see the opinion of Justice McDermott writing for the Court in [Matthews v. Konieczny](#), [515 Pa. 106] 527 A.2d 508 (Pa.1987), which states that ‘[t]he *Congini* decision was ground upon the *per se* negligence involved in an adult dispensing alcohol to a minor in violation of the Crimes Code’ (emphasis added) ([527 A.2d at] p. 511) and the dissenting opinion of Chief Justice Nix which states that

**1254 “ ‘In *Congini* the basis of the duty of the social host to the minor was, as stated above, predicated on [sections 306](#) and [6308 of the Crimes Code](#). Read together these sections prohibit an adult from furnishing liquor to a minor and make both the host and the minor criminally culpable.’ (emphasis added) ([527 A.2d at] p. 518)

“The term ‘adult’ as used by the Supreme Court in *Congini* means an adult within the meaning of the liquor laws.* See *Kapres v. Heller*, *supra*. Also the ‘minor’ to whom the ‘adult’ served liquor in *Congini* was eighteen years of age.

“The Supreme Court's use of the term ‘adult’ who furnishes liquor to a minor rather than ‘person’ who furnishes liquor to a minor establishes that the Court imposed liability because of the responsibility that one who is lawfully entitled to possess alcohol owes to persons who are not entitled to possess alcohol. The argument that the plaintiff raises would mean that under *Congini* whenever one of several *215 joint participants in a criminal activity sustained damages as a result of the activity, liability would be imposed against the other participants. It would create a cause of action where two adults are involved in obtaining marijuana and one of the two sustains damages from its use. By using the term ‘adult’ in *Congini*, it appears that the Supreme Court did not intend to utilize the criminal laws in this fashion.”

FN* Any person over the age of fourteen is both presumptively capable of negligence ([Kuhns v. Brugger](#), [390 Pa. 331] 135 A.2d 395 (Pa.1957)) and responsible for conduct that constitutes criminal activity. Consequently, *Congini* either extends to any person over the age of fourteen (because they are presumed capable of negligence) or is limited to persons over the age of twenty-one (because they have greater responsibilities under the liquor laws).

(Slip Op., Wettick, J., 4/22/91, pp. 30-33.)

Based on the trial court's well reasoned Opinion and the particular facts of this case, we agree with the trial court's finding appellee was entitled to judgment as a matter of law.

Having found minor Brian Goldberg cannot be held liable as a social host, our discussion of the extent his participation in providing Jeanne with drugs and alcohol will be brief and is done solely in the interest of judicial economy.

[5][6] In the case of [*Jefferis v. Commonwealth*, 371 Pa.Super. 12, 537 A.2d 355 \(1988\)](#), this Court listed various factors which would be taken into consideration when determining whether social host liability should apply. This Court articulated the following test for social host liability, based on the Restatement (Second) of Torts Section 876:

- 1) The defendant must have intended to act in such a way so as to furnish, agree to furnish or promote the furnishing of alcohol to the minor;
- 2) The defendant must have acted in a way which did furnish, agree to furnish or promote the furnishing of alcohol to a minor; and,
- 3) The defendant's act must have been a substantial factor in the furnishing, agreement to furnish, or the promotion of alcohol to the minor.

***216** [*Jefferis supra*, 371 Pa. SuperiorCt. at 17, 537 A.2d at 358](#). The *Jefferis* Court also noted the “mere presence at the scene of the crime will not establish accomplice liability.” *Id.* The trial court found Brian's involvement in obtaining and furnishing marijuana and alcohol to Jeanne was limited and not a substantial factor causing her death. We agree. Although Brian testified he paid \$5 to attend the dormitory party to which Jeanne accompanied him on the night of February 7, 1987, his payment was for his own admission and was paid before he met Jeanne. Furthermore, Brian did not purchase the alcohol, plan the party or assist in serving the beverages provided. The marijuana the three shared in Brian's room was provided by Van Mastrigt. Later that night at the Delta fraternity house, Brian handed Jeanne and Van Mastrigt each one cup of beer he had obtained from the fraternity bar. When the party moved to an upstairs room, it was Van Mastrigt who secured the Southern Comfort as well as the marijuana consumed by Jeanne.

****1255** If activities such as those described above are deemed to create a duty to protect on the part of Brian toward Jeanne, then we would indeed be opening a Pandora's Box of potential liability. We cannot believe the legislature's intent or the decisions promulgated in *Congini*, *Fassett*, *Macleary* or any of the other cases addressing social host liability was to proscribe attending parties with friends or passing alcoholic beverages to someone at a party. The record supports a finding minor Brian Goldberg's participation in furnishing alcohol and/or drugs to the minor decedent was *de minimis* and not a substantial factor contributing to Jeanne's untimely demise.

Based on the forgoing reasons of law and fact, we affirm the April 22, 1991 Order granting appellee's motion for summary judgment.

Order affirmed.

COMMONWEALTH v. KOHL
Supreme Court of PA (532 Pa. 152), 1992.

ZAPPALA, Justice.

The issue raised in the appeal of Mr. Kohl is whether the chemical tests of taken pursuant to the implied consent provision of the Motor Vehicle Code, [75 Pa.C.S.A. § 1547\(a\)\(2\)](#), violate the federal and state constitutional prohibitions against unreasonable searches and seizures. We hold that the chemical ****310** tests authorized by [§ 1547\(a\)\(2\)](#) ***156** violate the Fourth Amendment of the United States Constitution and [Article I, § 8](#) of the Pennsylvania Constitution.

Appellee Bruce Kohl was convicted of two counts of homicide by vehicle while under the influence of alcohol, two counts of homicide by vehicle, two counts of driving while under the influence of alcohol or controlled substance, and the summary offenses of reckless driving and driving a vehicle at unsafe speed. His convictions arose from a one-vehicle collision that occurred on March 30, 1985, at approximately four o'clock a.m.

While proceeding around a sharp bend in the road, Mr. Kohl's vehicle left the road, struck a pole and a retaining wall. The accident resulted in the deaths of his two passengers, Jeffrey Greb and Mark Moser. Mr. Kohl was rendered unconscious.

A patrolman arrived at the scene of the accident. He observed fire in the engine compartment that was spreading through the vehicle. Mr. Kohl and the two passengers were removed from the vehicle before it was engulfed in flames.

Mr. Kohl was transported to a hospital for treatment. He had not regained consciousness by the time he was admitted to the hospital. An emergency room doctor ordered a blood test of Mr. Kohl for basic blood work. A police officer, who arrived at the hospital from the scene of the accident, requested that a blood sample be taken for analysis as to alcohol content. The police officers who investigated the accident did not observe any signs of alcohol consumption by Mr. Kohl or any other evidence that alcohol had been consumed prior to the accident.

The analysis of the blood sample requested by the police indicated a blood alcohol level of 0.15%. At the time that the blood sample was taken from his body, the police did not have a warrant to conduct the test. No charges had been filed against Mr. Kohl, nor was he placed under arrest. Mr. Kohl was arrested upon his release from the hospital on April 29, 1985.

***157** In his pre-trial motions, Mr. Kohl sought to suppress the results of the blood test on the basis that the test violated his constitutional rights in that the police lacked probable cause to order the test and no consent was given for the test. The trial court denied the motion to suppress. Post-trial motions filed after his conviction were also denied by the trial court.

On appeal, the Superior Court held that the blood alcohol test performed on him violated his constitutional rights against unreasonable searches and seizures. [395 Pa.Super. 73, 576 A.2d 1049](#). The judgment of sentence was vacated and a new trial was ordered.

I. CONSTITUTIONALITY OF [§ 1547\(a\)\(2\)](#) UNDER THE FEDERAL CONSTITUTION

The Fourth Amendment to the United States Constitution provides that "[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, and no warrants shall issue, but upon probable cause...." The Fourth Amendment applies to the States by virtue of the Fourteenth Amendment of the Federal Constitution. [New Jersey v. T.L.O., 469 U.S. 325, 334, 105 S.Ct. 733, 738, 83 L.Ed.2d 720 \(1985\).](#)

[2] The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. [Schmerber v. State of California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 \(1966\).](#) The security afforded to personal privacy against arbitrary intrusion by the police is "at the core of the Fourth Amendment" and "basic to a free society". [Schmerber, 384 U.S. at 767, 86 S.Ct. at 1834,](#) citing [Wolf v. People of State of Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 \(1949\).](#)

In *Schmerber*, the petitioner was convicted of driving an automobile while under the influence of intoxicating liquor. He was arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile. A hospital physician drew a blood sample from the petitioner's body at the direction of a police officer. The chemical analysis of the sample indicated **312 a percent by weight of alcohol in his blood at the time of the offense and was admitted into evidence at trial. The petitioner challenged the admissibility *160 of the evidence on the ground that the blood had been withdrawn despite his refusal to consent to the test.

The U.S. Supreme Court held that the administration of a blood test is a search within the meaning of the Fourth Amendment. In analyzing the petitioner's challenge to the admissibility of the evidence, the U.S. Supreme Court identified the issues as whether the police were justified in requiring the petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness. The U.S. Supreme Court stated that, " ... **the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner**". [Schmerber, 384 U.S. at 768, 86 S.Ct. at 1834.](#)

At the time the blood sample was taken, the petitioner had been arrested. The officer had arrived at the scene of the accident and observed that the petitioner's eyes were bloodshot, watery, and had a glassy appearance. The smell of liquor was detected on the petitioner's breath. The officer had noticed similar signs of petitioner's intoxication at the hospital two hours after the accident. The petitioner was then placed under arrest and given *Miranda* warnings. Probable cause for the officer to arrest the petitioner and charge him with driving an automobile while under the influence of intoxicating liquor had been established.

The lawful arrest in itself did not justify the warrantless search, however. Indeed, the Supreme Court stated that,

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
[384 U.S. at 769-770, 86 S.Ct. at 1835.](#)

The facts established probable cause to arrest the petitioner for driving while intoxicated and gave rise to an inference that *161 a blood test would disclose the presence of alcohol. The inquiry focused then on whether the police officer was permitted to draw the inference himself, or was required to obtain a warrant before the blood sample would be taken. Noting that search warrants are ordinarily required for searches of dwellings, the U.S. Supreme Court concluded that no less could be required where intrusions into the human body are concerned, absent an emergency.

Under the special facts of the case, the attempt to secure evidence of the blood alcohol content was found to be an appropriate incident to the petitioner's arrest. The U.S. Supreme Court indicated that the arresting

officer might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence. In holding that the record disclosed no violation of the petitioner's right to be free of unreasonable searches and seizures, the U.S. Supreme Court cautioned that,

It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

[384 U.S. at 772, 86 S.Ct. at 1836.](#)

The reasonableness of a search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests". [Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 \(1979\).](#) The balance in most cases weighs in favor of the procedures ***313** described by the Warrant Clause of the Fourth Amendment. Except in limited circumstances, a search or seizure is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. [Skinner v. Railway Labor Executives Association, 489 U.S. 602, 619, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639 \(1989\).](#)

***162 [3]** The facts underlying the instant appeals do not meet the standard enunciated in *Schmerber*. Neither of the appellees was under arrest at the time the blood samples were drawn; nor did the circumstances establish probable cause to arrest the appellees. In both cases, the Commonwealth concedes that the police did not observe any signs or evidence indicating that the appellees were operating the vehicles under the influence of alcohol or a controlled substance.

The searches conducted in these cases were undertaken pursuant to the implied consent provision set forth in [75 Pa.C.S.A. § 1547\(a\)\(2\). Section 1547\(a\)\(2\)](#) provides:

[§ 1547.](#) Chemical testing to determine amount of alcohol or controlled substance

(a) General rule.--Any person who drives, operates or is in actual physical control of the movement of a motor 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 motor vehicle:

* * * * *

(2) which was involved in an accident in which the operator or passenger of any vehicle involved or a pedestrian required treatment at a medical facility or was killed.

[Section 1547\(a\)\(2\)](#) authorizes the seizure and search of an individual's blood based solely on the fact that the police officer has reasonable grounds to believe the individual was operating a vehicle that was involved in an accident in which death or an injury requiring medical treatment occurred. The statutory provision does not require any individualized suspicion of alcohol or drug use by the driver.

The Superior Court held that although the absence of a warrant requirement under [§ 1547\(a\)\(2\)](#) does not render the tests unreasonable under the Fourth Amendment, a test administered solely on the basis of the existence of the conditions ***163** set by [§ 1547\(a\)\(2\)](#) is an unreasonable search prohibited by the Fourth Amendment. We agree that a search conducted under the auspices of [§ 1547\(a\)\(2\)](#), without any independent facts to establish probable cause to believe that the operator of the vehicle was driving under the influence, violates the Fourth Amendment.

The Commonwealth contends that the search or seizure was not unreasonable because it fell within the "special needs" exception to the Fourth Amendment developed by the U.S. Supreme Court in a limited number of cases. The special needs exception to the probable cause and warrant requirements of the Fourth Amendment has been recognized in certain cases when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." [Skinner, supra, 489 U.S. at 619, 109 S.Ct. at 1414,](#) citing [Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3167, 97](#)

[L.Ed.2d 709 \(1987\)](#).

In *Skinner*, the U.S. Supreme Court upheld regulations promulgated by the Federal Railroad Administration that mandated blood and urine tests of employees who were involved in certain train accidents and who violated certain safety rules. Noting that employees governed by the regulations had long been the principal focus of regulatory concern, the U.S. Supreme Court concluded that the restrictions imposed on the employees were minimal given the employment context in which the testing was done. The purpose of the toxicological testing required by the regulations was found to be preventative in nature, rather than intended to assist in the criminal prosecution of employees.

****314 [4]** The Government's interest in regulating the conduct of railroad employees to ensure safety was the primary focus of the regulations, rather than the Government's interest in enforcing its laws through criminal prosecutions. As such, the Government's interest in regulating the employees' conduct presented a special need beyond normal law enforcement that justified departure from the usual warrant and probable cause requirements. No balancing test of the governmental and privacy interests to determine the need for a warrant and ***164** probable cause may be undertaken, however, when the governmental interest to be advanced is the normal need for law enforcement.

The Commonwealth argues that the special needs exception is applicable in the instant cases because it has a vital interest in ensuring that only those qualified are permitted to operate motor vehicles and in removing drunk drivers from the highways. The special needs exception is not applicable in the context of these cases. As the Superior Court noted, the purpose underlying [§ 1547\(a\)\(2\)](#) is to enable the police to obtain evidence of intoxication or drug use to be utilized in criminal proceedings. [75 Pa.C.S.A. § 1547\(c\)](#). The gravity of the problem of alcohol related traffic accidents was addressed in [Commonwealth v. Mikulan, 504 Pa. 244, 470 A.2d 1339 \(1983\)](#). No matter how compelling, however, the Commonwealth's interest in securing evidence that a driver is operating a vehicle under the influence of alcohol or drugs does not evince a special need that would justify departure from the probable cause requirements of the Fourth Amendment.

[Section 1547\(a\)\(2\)](#) authorizes unreasonable searches and seizures in violation of the Fourth Amendment. No probable cause existed in these cases to believe that the individuals were operating their vehicles under the influence of alcohol or drugs. The results of the blood tests were improperly admitted as evidence in the trials of the appellees.

II. CONSTITUTIONALITY OF [§ 1547\(a\)\(2\)](#) UNDER [ARTICLE I, SECTION 8 OF THE PENNSYLVANIA CONSTITUTION](#)

The constitutional protection against unreasonable searches and seizures afforded by [Article I, section 8 of the Pennsylvania Constitution](#) was in existence more than a decade before the adoption of the Federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment. [Commonwealth v. Sell, 504 Pa. 46, 470 A.2d 457 \(1983\)](#). [Article I, section 8](#) states:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, ***165** 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.

[\[5\]\[6\] Article I, section 8](#) has an identity and vitality that is separate and distinct from that of the Fourth Amendment. The decisions of the U.S. Supreme Court are not dispositive of questions regarding the rights guaranteed to citizens of the Commonwealth under the Pennsylvania Constitution. A state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution.

In [Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 \(1991\)](#), we stated:

Here in Pennsylvania, we have stated with increasing frequency that it is both important and necessary

that we undertake an independent analysis of the Pennsylvania Constitution each time a provision of that fundamental document is implicated. Although we may accord weight to federal decisions where they "are found to be logically persuasive and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees," ... we are free to reject the conclusion of the U.S. Supreme Court so long as we remain faithful to the minimum guarantees established by the U.S. Constitution. ****315** [526 Pa. at 389-390, 586 A.2d at 895-896](#) (citation omitted.) "... [W]e are not bound to interpret the two provisions [of the state and federal constitutions] as if they were mirror images, even where the text is similar or identical." [526 Pa. at 391, 586 A.2d at 896](#).

While we have held that the searches authorized by [§ 1547\(a\)\(2\)](#) violate the Federal Constitution, the constitutionality of the searches under [Article I, section 8](#) must be addressed also. We conclude that the searches are impermissible under the Pennsylvania Constitution. The analysis underlying our holding is separate and independent from the analysis undertaken under the Federal Constitution. Therefore, our holding under the Pennsylvania Constitution would ***166** remain unchanged should the U.S. Supreme Court resolve the issue contrary to our analysis of the federal constitutional question.

[\[7\]](#) There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden of rebutting the presumption of constitutionality by a clear, palpable, and plain demonstration that the statute violates a constitutional provision. [James v. Southeastern Pennsylvania Transportation Authority, 505 Pa. 137, 477 A.2d 1302 \(1984\)](#); [Commonwealth v. Mikulan, 504 Pa. 244, 470 A.2d 1339 \(1983\)](#).

[\[8\]\[9\]](#) The administration of a blood test is a search within the meaning of [Article I, section 8](#) if performed by an agent of, or at the direction of the government. [Commonwealth, Department of Transportation v. McFarren, 514 Pa. 411, 417, 525 A.2d 1185, 1188 \(1987\)](#). Generally, a search or seizure is not reasonable unless it is conducted pursuant to a search warrant issued by a magistrate upon a showing of probable cause. Probable cause exists when an officer has knowledge of sufficient facts and circumstances, gained through trustworthy information, to warrant a prudent man to believe that the person seized has committed a crime.

[\[10\]](#) The implied consent provisions of [§ 1547\(a\)\(1\)](#) and [§ 1547\(a\)\(2\)](#) dispense with the need to obtain a warrant. As the U.S. Supreme Court held in *Schmerber*, *supra*, the importance of collecting blood samples in circumstances establishing probable cause to believe that an operator was driving under the influence justified waiving the warrant requirement under the "exigent circumstances" exception to the Fourth Amendment warrant requirement. We agree that in instances in which probable cause has been established, the absence of a warrant requirement under the implied consent provisions does not render the blood, breath, and urine tests unreasonable under [Article I, § 8 of the Pennsylvania Constitution](#) due to time's dissipating effect on the evidence.

***167** The Appellees' challenge to the constitutionality of [§ 1547\(a\)\(2\)](#) must be sustained, however, because that provision impermissibly dispenses with the probable cause requirement as well. It is instructive on this point to examine the difference between [§ 1547\(a\)\(1\)](#) and [§ 1547\(a\)\(2\)](#). Under subsection (a)(1) of the implied consent provision, the officer must have reasonable grounds to believe the person to be tested has been driving while under the influence of alcohol or a controlled substance. "Reasonable grounds" is not defined in the statute, but has been construed to mean probable cause by the Superior Court in [Commonwealth v. Quarles, 229 Pa.Super. 363, 324 A.2d 452 \(1974\)](#) (plurality opinion).

In *Quarles*, the Superior Court concluded that the constitutional basis for a blood, urine, or chemical test under [§ 1547\(a\)\(1\)](#) was the existence of probable cause to believe that the suspect had been driving under the influence of alcohol or a controlled substance. The Superior Court specifically rejected an interpretation of the provision that would premise the constitutionality of the provision on the driver's implied consent alone. In adopting the construction of "reasonable grounds" to mean "probable cause", the Superior Court upheld [§ 1547\(a\)\(1\)](#) as constitutional. The construction applied to [§ 1547\(a\)\(1\)](#) was consistent with the basic principle of statutory construction that the Legislature does ****316** not intend to violate the federal or state constitutions. [1 Pa.C.S. § 1922\(3\)](#).

Under [§ 1547\(a\)\(2\)](#), however, the officer must only have reasonable grounds to believe that the operator of the vehicle was involved in an accident involving a fatality or in which treatment at a medical facility was required. No knowledge of sufficient facts and circumstances to warrant a belief that the operator has committed a crime is required. A search or seizure conducted under circumstances in which there is no probable cause to warrant a belief that a crime has been committed is constitutionally impermissible. Indeed, if the police officers had observed any signs of intoxication, the blood tests would have been authorized by [75 Pa.C.S.A. § 1547\(a\)\(1\)](#).

***168** [\[11\]\[12\]](#) The tests authorized by [§ 1547\(a\)\(2\)](#) violate [Article I, § 8 of the Pennsylvania Constitution](#). The Commonwealth does have a compelling interest in protecting its citizens from the dangers posed by drunk drivers. The criminalization of such conduct and the stringent punishment imposed for violation of the laws proscribing the conduct are permissible legislative responses to promote the Commonwealth's interest. The protections afforded to individuals under the Pennsylvania Constitution may not be diminished, however, by the Commonwealth's vigilance in promoting that interest.

The Commonwealth contends that the judgments of sentence should not be vacated if, as this Court has held, [§ 1547\(a\)\(2\)](#) is declared unconstitutional. We must reject that contention. As we stated in [Commonwealth v. Brown](#), 494 Pa. 380, 431 A.2d 905, 907 (1981),

The principle that a court does not have power to enforce a law which is no longer valid but rather must apply the law as it exists at the time of its decision has been recognized since as early as [United States v. Schooner Peggy](#), 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801).

In *Schooner Peggy*, Justice Marshall wrote:

"But if, subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.... In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

The judgments of sentence must be vacated in the instant cases and new trials must be ordered because the appellees have successfully challenged the Commonwealth's use of evidence that was illegally obtained under [§ 1547\(a\)\(2\)](#). "To do otherwise in criminal proceedings is to impose an unwarranted hardship on defendants which affects their most fundamental rights of life and liberty, while serving no legitimate societal interest in applying an offensive law no longer valid." [Commonwealth v. Brown](#), 494 Pa. at 385-386, 431 A.2d at 908.

***169** The orders of the Superior Court vacating the judgments of sentence and granting a new trial to the Appellee, Bruce A. Kohl, is affirmed.

LARSEN, Justice, dissenting.

I dissent. I would uphold the constitutionality of the "implied consent law", [75 Pa.C.S.A. § 1547\(a\)\(2\)](#), and would reverse the orders of the Superior Court vacating the judgments of sentence and granting new trials to the appellees. The majority concludes that [75 Pa.C.S.A. § 1547\(a\)\(2\)](#) is unconstitutional under the Fourth and Fourteenth Amendments to the U.S. Constitution and [Article I, Section 8](#) of the Pennsylvania Constitution. As a result, the majority holds that toxicological (blood, urine and breath) tests cannot be administered without probable cause to suspect that a driver is under the influence of alcohol ****317** or drugs. Aside from the fact that almost 50% of all fatal accidents involve alcohol, which I think is a sufficient basis to test all drivers involved in serious accidents, this statute applies to only those accidents involving the occurrence of a serious injury or fatality. Oftentimes, as in the [Commonwealth v. Kohl](#), 395 Pa.Super. 73, 576 A.2d 1049 (1990) case, the driver of an automobile will be rendered unconscious as a result of the accident, precluding the opportunity to observe behavior and to obtain the probable cause that the majority finds imperative. Should the inability of police officers to conduct a sufficient investigation in these circumstances immunize these drivers from prosecution for drunk driving? The majority believes that it should. I respectfully disagree. I believe that the magnitude of the drunk driving problem mandates an exception to the probable cause requirement and that a warrantless, suspicionless search is justified

under these circumstances.

*170 I begin by noting that legislation will not be declared unconstitutional unless it clearly, palpably and plainly violates the constitution. [Commonwealth v. Mikulan, 504 Pa. 244, 247, 470 A.2d 1339, 1340 \(1983\)](#). Hence, I begin this analysis with the strong presumption of constitutionality. *Id.*

The Fourth Amendment to the U.S. Constitution provides that "[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...." [Article I, Section 8 of the Pennsylvania Constitution](#) provides that "[t]he people shall be secure in their persons, houses, papers and possessions from *unreasonable* searches and seizures...." The touchstone of these provisions is *reasonableness*. In order to determine the reasonableness of a particular search or seizure we must balance the intrusion on the individual against the government's promotion of legitimate interests. [Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 619, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639, 661 \(1989\)](#); [Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660, 667-68 \(1979\)](#); [Commonwealth v. Blouse, 531 Pa. 167, 611 A.2d 1177 \(1992\)](#). [Commonwealth v. Tarbert, 517 Pa. 277, 535 A.2d 1035 \(1987\)](#) (plurality).

That the state's interest in maintaining highway safety by eradicating the drunk driving problem is compelling is beyond dispute. The 1988 Traffic Accident Facts and Statistics Report published by the Center for Highway Safety of the Pennsylvania Department of Transportation reveals that in 1990, there were 16,382 alcohol related traffic accidents; almost 50% of fatal accidents involved alcohol; 737 people were killed in 670 alcohol related fatal accidents; 17,216 people were injured in 11,170 alcohol related accidents. The economic loss due to alcohol related accidents in Pennsylvania was \$1,599,550,756.00.

Conversely, the degree of intrusion on the individual is minimal. First of all, all persons by virtue of driving have impliedly consented to certain restrictions. Secondly, the intrusion occasioned by a blood, breath or urine test is not significant, since these tests can be conducted with a minimum *171 of inconvenience or embarrassment. [Skinner v. Railway Labor Executives Ass'n, 489 U.S. at 624-68, 109 S.Ct. at 1417-1418, 103 L.Ed.2d at 665-66](#); [Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 \(1966\)](#).

This statute furthers the public interest by deterring chemically impaired driving, facilitating the prosecution of chemically impaired drivers, and insuring that police focus their attention on getting prompt medical attention for those who are injured, rather than concentrating on a preliminary investigation.

In sum, the State's interest in maintaining highway safety in general, and in preventing drunk driving specifically, is compelling; the degree of intrusion upon the individual is minimal; hence the balance weighs in favor of the State's program, and a warrantless, suspicionless search is justified under the circumstances.

In [Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 \(1989\)](#), the United States Supreme Court upheld against a Fourth **318 Amendment attack, a regulatory scheme similar to the Pennsylvania statute. In response to a significant number of alcohol and drug related train accidents, the Federal Railroad Administration promulgated regulations mandating blood and urine tests for railroad employees involved in major train accidents involving death, serious environmental problems, or extensive property damage.

The Court recognized exceptions to the general warrant/probable cause requirement when "special needs," beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable. [Skinner v. Railway Labor Executives Ass'n, 489 U.S. at 619, 109 S.Ct. at 1414, 103 L.Ed.2d at 661](#). The Court went on to state that "when faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context." [Skinner, 489 U.S. at 619, 109 S.Ct. at 1414, 103 L.Ed.2d at 661](#). In assessing the practicality of the *172 probable cause requirement, [\[FN1\]](#) the Court stated that "[i]n

limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." [Id. at 624, 109 S.Ct. at 1417, 103 L.Ed.2d at 664](#). After weighing the parties' respective interests, the Court concluded that a requirement of particularized suspicion of drug or alcohol use would seriously impede the ability to obtain this information, despite the compelling need, and that "it would be unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances." [Id. at 631, 109 S.Ct. at 1420, 103 L.Ed.2d at 669](#).

[FN1](#). The majority concedes that, where probable cause has been established, the exigency of the situation renders a *warrantless* search reasonable.

Subsequently, the United States Supreme Court stated, in [National Treasury Employees Union v. Von Raab](#), 489 U.S. 656, 665, 109 S.Ct. 1384, 1390, 103 L.Ed.2d 685, 702 (1989), that "our decision in *Railway Executives [Skinner]* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."

I believe that the rationale of *Skinner* should extend to the cases *sub judice*. The Pennsylvania statute, like the federal regulations, does not require toxicological testing as a condition of the mere operation of a vehicle, but is triggered only upon the occurrence of a stated event. In these cases, as in *Skinner*, the Government's interest in regulating conduct to ensure safety creates a "special need" beyond normal law enforcement that justifies departure from the usual warrant and probable cause requirements. Additionally, in both instances, the public interest in eradicating drunk driving cannot adequately be met by more traditional law enforcement procedures.

173** The cases at issue involve serious accidents where a driver, passenger, or pedestrian requires medical attention or is killed. The exigency of the situation requires investigating officers to forgo the usual investigative techniques. When an individual is dead or in need of immediate medical attention the usual opportunity to observe behavior is not available. Treatment of the individual becomes paramount. Additionally, when drugs are involved, there is usually no odor present, therefore, without alternative methods of detection, drug use will go undetected if behavior cannot be observed. The majority, by finding the Pennsylvania statute to be unconstitutional allows the most serious and egregious cases to go undetected because of the inability of investigating officers to conduct an investigation. Therefore, I believe the present situation involves an instance where a compelling state interest would be placed in jeopardy by a requirement of individualized *319** suspicion. Hence, I find the statute constitutional under the Fourth Amendment.

In Pennsylvania, this Court has also adhered to the belief that a finding of reasonableness may be predicated on less than probable cause, and has expressly approved the balancing of interests approach for determining reasonableness under [Article I, Section 8 of the Pennsylvania Constitution](#). [Commonwealth v. Blouse](#), 531 Pa. 167, 611 A.2d 1177 (1992); [Commonwealth v. Tarbert](#), 517 Pa. 277, 535 A.2d 1035 (1987) (plurality). Thus, we upheld the systematic stopping of vehicles at roadblocks without any individualized suspicion because the governmental interest in maintaining safe highways outweighed the individual's privacy interests under the circumstances. I find the same to be true of the cases *sub judice* and would uphold the constitutionality of [75 Pa.C.S.A. § 1547\(a\)\(2\)](#) under the Pennsylvania Constitution.

In conclusion, I believe that a balancing test is appropriate to determine the reasonableness of Pa.C.S.A. § 1547(a)(2) under both the Federal and State Constitutions, and that the balance weighs in favor of the government's interests in these circumstances. Hence, I believe that Pa.C.S.A. § 1547(a)(2) satisfies the constitutional requirements of both the Fourth ***174** Amendment to the United States Constitution and [Article I, Section 8](#) of the Pennsylvania Constitution. Accordingly, I would reverse the orders of the Superior Court.