

Nova Law Review

Volume 7, Issue 2

1983

Article 1

Florida's New "Drunk Driving" Laws: An Overview of Constitutional and Statutory Problems

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Abstract

As death and injury tolls increase, concern over "drunk driving" has become nationwide. Citizen groups have been formed,² federal legislation passed, a presidential commission appointed, and new law enforcement techniques implemented to reduce the number of drunk drivers.

KEYWORDS: drunk, driving, laws

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I. Introduction

As death and injury tolls increase, concern over "drunk driving"¹ has become nationwide. Citizen groups have been formed,² federal legislation passed,³ a presidential commission appointed,⁴ and new law enforcement techniques implemented to reduce the number of drunk drivers.⁵ Florida's situation reflects the national picture. During 1980,

1. As used herein "drunk driving" includes driving under the influence, driving with unlawful blood alcohol level and driving while intoxicated. The National Highway Traffic Safety Administration claims drinking occurs in at least 40-55% of all fatal car accidents. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 52 (1981).

2. The largest national organization is MADD (Mothers Against Drunk Driving), with eighty-three chapters in twenty-nine states. *See* Starr, *The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 34.

3. *See* Alcohol Traffic Safety - National Driver Register Act of 1982, Pub. L. No. 97-364, 96 Stat. 1738 (1982) which provides incentive grants to those states adopting specified sanctions for drunk driving offenses and establishes a National Driver Register to help states exchange information about individual driving records. *See* S. REP. NO. 360, 97th Cong., 2d Sess. (1982); H. REP. NO. 867, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3367-76.

4. On June 4, 1982 a thirty member commission, headed by former Secretary of Transportation John Volpe, was formally sworn in and directed to provide national focus on drunk driving. *See Drunken driving panel ready to go to work*, Fort Lauderdale News and Sun-Sentinel, June 5, 1982, at 7A, col. 1.

5. In Montgomery County, Maryland; police use a "Sobriety Checkpoint" procedure to detect impaired drivers. All drivers are stopped for inspection but only those smelling of alcohol must perform a "sobriety test" consisting of walking a straight line, standing on one leg and reciting the alphabet. Between November 1981 and March 1982, this procedure detected over one hundred impaired drivers. *The Drunk Blitz*, The Nat'l L.J., March 22, 1982, at 1, col. 2. *See also Death on the Road*, Wall St. J., Apr. 20, 1982, at 1, col. 4.

The American Civil Liberties Union has questioned the checkpoint's constitutionality. However, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), approved routine Border Patrol stops at permanent checkpoints to search for illegal aliens. The Court rejected arguments that reasonable suspicion was required, since traffic flow past the checkpoint would not allow "the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." *Id.* at 557. Since the checkpoints were publicly known and administrative officials fixed the location, the intrusion differed from random highway stops based on a particular officer's whim. Referral to a second inspection place based on Mexican ancestry alone was considered reasonable. The parallel to sobriety checkpoints is obvious. Traffic past the checkpoint does not allow time to study all drivers. Likewise, an objective fact, breath smell, determines who is questioned further.

drinking was the third highest factor in accidents statewide.⁶ In 1981 there were 48,084 arrests for driving under the influence of either liquor or drugs.⁷ While nationwide traffic fatalities declined in 1981, Florida's increased.⁸

Given this situation, the 1982 Florida legislature passed one of the nation's toughest "drunk driving" laws.⁹ Effective July 1, 1982, it aims at deterring drunk driving by three methods: (1) increasing penalties, (2) making evidence gathering easier, and (3) making exclusion of evidence harder. While praiseworthy in its goals, the law contains several provisions of dubious constitutionality and others which create

Officials supporting "sobriety checkpoints" may also rely on *Delaware v. Prouse*, 440 U.S. 648 (1979), which found stopping automobiles to check for driver licenses and registrations without probable cause or reasonable suspicion violated the fourth amendment when individual officers arbitrarily chose the cars. The Court indicated other methods could satisfy fourth amendment reasonableness standards: "This holding does not preclude . . . developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. *Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.*" *Id.* at 663 (emphasis added). As Maryland procedure requires *all* drivers to stop, its constitutionality should be upheld. *See United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981) (Roadblock stopping all west-bound vehicles, except semi-trucks to check licenses and registrations constitutional; *Delaware v. Prouse* distinguished.) *cert. denied*, 454 U.S. 832 (1981), *reh'g denied*, 454 U.S. 1069 (1981).

6. Drinking existed in 36,986 accidents, nine percent of the statewide total. Sixteen percent of drivers and/or pedestrians in fatal accidents had been drinking. DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, TRAFFIC ACCIDENT FACTS 6, 15 (1980).

7. This was 10.4 percent of the total statewide arrests, second only to larceny at 14.6 percent. FLA. L. ENFORCEMENT ANN. REP. 109 (1981).

8. During 1981 motor vehicle deaths declined four percent nationwide but, in Florida, they increased eight percent. *See NATIONAL SAFETY COUNCIL, TRAFFIC SAFETY MAGAZINE*, May-June 1982, at 26.

9. The 1982 legislature actually amended the drunk driving laws twice. *See* 1982 Fla. Sess. Law. Serv. 155, 403 (West). At least five other states recently changed their laws to provide for harsher penalties and/or stricter enforcement. *See* CAL. VEH. CODE §§ 23151-23229 (Deering Supp. 1982); ILL. REV. STAT. ch. 95 ½, §§ 11.501-11.501.2 (Supp. 1981); 1982 Kan. Sess. Laws. ch. 144, 619; ME. REV. STAT. ANN. tit. 29, §§ 1312-1314 (Supp. 1981); MD. ANN. CODE art. 16, §§ 205-205.2 (Supp. 1981). For discussions of Illinois's and California's new laws see Comment, *Drunk Drivers versus Implied Consent: A Sobering New Illinois Statute*, 15 J. MAR. L. REV. 479 (1982); Comment, *Driving with 0.10% Blood Alcohol: Can The State Prove It?*, 16 U.S.F.L. REV. 817 (1982).

problems of statutory interpretation. This article's purpose is to review the new law's changes in light of the constitutional and statutory interpretation problems it contains. Since some issues are new in Florida, reference is made to the case law of other jurisdictions, as well as previous Florida cases.

II. Statutory Offense Provision and Penalty Changes

A. Statutory Offenses

Former Florida law considered "drunk driving" so serious that three different criminal violations could occur: (1) driving under the influence; (2) driving while intoxicated; or (3) driving with unlawful blood alcohol¹⁰ The new law retains these offenses, merely rearranging and consolidating their statutory placement. Driving under the influence violates either of two statutory provisions. Florida Statutes section 316.193(1)¹¹ makes it unlawful: "under the influence of alcoholic beverages, model glue, or any substance controlled . . . , to the extent . . . normal faculties are impaired, . . . to drive or be in the actual physical control of any vehicle within this state."¹² Florida Statutes section 316.1934(1)¹³ substantially duplicates this provision, replacing former Florida Statutes Section 322.262(1).¹⁴ However, under section 316.1934(1) controlled substances are also included, while model glue

10. See *infra* text accompanying notes 12-22.

11. FLA. STAT. § 316.193(1) (Supp. 1982).

12. *Id.* Driving under the influence can be shown several ways. If blood alcohol content level registers 0.10 percent or more, under Florida Statutes section 316.1934(2)(c) (Supp. 1982) this is *prima facie* evidence of being under the influence. *State v. Bender*, 382 So. 2d 697, 699 (Fla. 1980) declared this a rebuttable, rather than conclusive, presumption. Field sobriety tests are often used to bolster the state's claim. These may be administered without consent, if there is "sufficient cause to believe" the driver has violated the law. *State v. Liefert*, 247 So. 2d 18, 19 (Fla. 2d Dist. Ct. App. 1971). Such tests may be protected by the Florida Accident Report Privilege. *DuVal Motor Co. v. Woodward*, 419 So. 2d 303 (Fla. 1982).

13. Florida Statutes section 316.1934(1) (Supp. 1982) makes it unlawful "for any person who is under the influence of alcoholic beverages or controlled substances when affected to the extent that his normal faculties are impaired, to drive or be in the actual physical control of any motor vehicle within this state." Controlled substances are enumerated in Florida Statutes section 893.03, schedules I through V.

14. FLA. STAT. § 322.262(1) (1981).

is omitted.

Previous Florida law made driving with blood alcohol content 0.10 or more, illegal under two provisions. The new law retains this dual prohibition. Former Florida Statutes section 316.193(3)¹⁵ has been replaced and its prohibition combined with driving under the influence in present section 316.193(1). Former Florida Statutes section 322.262(2)(c),¹⁶ has been renumbered as section 316.1934(2)(c).¹⁷

Under former Florida Statutes section 860.01(1), a person committed a separate offense when driving "intoxicated or under the influence" and deprived "of full possession of his normal faculties. . . ."¹⁸ Florida Statutes section 316.1931(1)¹⁹ replaces section 860.01(1) and also prohibits being "in actual physical control of"²⁰ a motor vehicle in this condition. When property damage or personal injury results from such condition, the offense is a first degree misdemeanor under both past and present law.²¹ If another's death results, the crime becomes D.W.I. manslaughter under both past and present law. However, former section 860.01(2) only applied to intoxication²² from alcohol. Thus

15. FLA. STAT. § 316.193(3) (1981).

16. FLA. STAT. § 322.262(2)(c) (1981).

17. FLA. STAT. § 316.1934(2)(c) (Supp. 1982).

18. FLA. STAT. § 860.01(1) (1981).

19. FLA. STAT. § 316.1931(1) (Supp. 1982).

20. "In actual physical control" exists whenever a vehicle can be operated and a driver is not too intoxicated to do so. *See* vol. — Op. Att'y Gen. 066-69 (1966).

21. *See* FLA. STAT. § 316.1931(2) (Supp. 1982) and former FLA. STAT. § 860.01(2) (1981).

22. Proof of intoxication requires more than just driving under the influence. "[T]he term, 'intoxicated', is stronger than and includes the terms 'under the influence' of intoxicating liquor." *Taylor v. State*, 46 So. 2d 725, 726 (Fla. 1950) (citing *Cannon v. State*, 91 Fla. 214, 107 So. 360, 362 (1925)).

Baker v. State, 377 So. 2d 17 (Fla. 1979), rejected the claim that former § 860.01(2), now § 316.1931(2), violated due process, because it did not require causal connection between intoxication and the resulting death, thus allowing a non-negligent driver to be found guilty of D.W.I. manslaughter. The court declared only three elements are needed to show D.W.I. manslaughter, that: "(1) a death occurred; (2) the death resulted from the operation of a vehicle by the defendant, and (3) the defendant was intoxicated at the time he operated the vehicle." *Baker*, 377 So. 2d at 18. The negligence occurred when the driver began driving while intoxicated and continued until the accident happened. Since driving while intoxicated is *per se* reckless, the legislature could rationally conclude imposing criminal sanctions without a showing of causa-

if the intoxication was from glue or controlled substances, D.W.I. manslaughter charges were not possible.²³ Present section 316.1931(2) provides that D.W.I manslaughter charges may be brought even if the intoxication occurs from these substances.

B. Penalties

One of the new law's major changes was to increase penalties for conviction. Former Florida law imposed different penalties for first offenses of driving under the influence and driving with unlawful blood alcohol.²⁴ No reason for such disparate treatment appeared in the previous statutory scheme. Under the new law, both violations are equally punishable.²⁵ The new penalty provisions raise the minimum fine for driving under the influence to two hundred fifty dollars. For a second conviction there is a minimum fine of five hundred dollars, the previous maximum for either second offense,²⁶ and a maximum of one thousand dollars. For a third or subsequent offense a minimum of a one thousand dollar and a maximum of a two thousand five hundred dollar fine is set, compared to a previous maximum of one thousand dollars for driving under the influence and five hundred dollars for driving with unlawful blood alcohol.²⁷

Like previous law, driving while intoxicated carries the same punishment as driving under the influence.²⁸ When this is a first-degree

tion between driving in such a condition and any death would act as a deterrent.

23. *But see* State v. Rafferty, 405 So. 2d 1004 (Fla. 4th Dist. Ct. App. 1981) where manslaughter charges were brought due to intoxication from a controlled substance.

24. Under former Florida Statutes section 316.193(2)(a) (1981) first offenders convicted of driving under the influence faced a fine between twenty-five dollars and five hundred dollars plus possible imprisonment up to six months. Under former Florida Statutes section 316.193(4)(a) (1981) first offenders for driving with unlawful blood alcohol faced no minimum and a maximum two hundred-fifty dollar fine, one-half the possible maximum for driving while impaired. Likewise first offenders with unlawful blood alcohol could be sentenced to only a maximum ninety days, one-half the possible maximum for driving while impaired.

25. *See* FLA. STAT. § 316.193(2)(a), (b) (Supp. 1982).

26. *See* former FLA. STAT. § 316.193(2)(b), 4(c) (1981).

27. *See* former FLA. STAT. § 316.193(2)(c), 4(c) (1981).

28. *See* FLA. STAT. § 316.1931(1) (Supp. 1982).

misdemeanor, because of personal injury or property damage, Florida Statutes section 316.193(2) continues to impose punishment under the general penalty provisions of sections 775.082 and 775.083.²⁹ However no penalty can be less than that imposable under section 316.193.³⁰ This ensures the mandatory penalty provisions for repeat offenses apply when a lesser penalty might otherwise be given.

Contrary to popular belief the new "drunk driving" law does not substantially change imprisonment penalties. First offenses may still carry no mandatory jail terms.³¹ Second and third offenses within three and five years, respectively, are punishable by minimum mandatory sentences of ten and thirty days respectively.³² However, if a driver is

29. Under FLA. STAT. § 775.082(4)(a) (1981), a first degree misdemeanor may receive up to one year imprisonment, plus a one thousand dollar (\$1,000.00) fine under FLA. STAT. § 775.083(1)(d) (1981).

30. FLA. STAT. § 316.193 (Supp. 1982).

31. According to public opinion, there is no mandatory imprisonment sentence for a first offender for any of the three offenses. *See* Fort Lauderdale News and Sun-Sentinel; Apr. 25, 1982, at 15A, col. 1. However a strict reading of FLA. STAT. § 316.193 does not support this. Section 316.193 states in part:

(2) Any person who is convicted of a violation . . . shall be punished.

(a) By a fine of:

[the various fines for first, second and third offenses are listed.]

and

(b) By imprisonment for:

1. Not more than 6 months for a first conviction.

(emphasis added).

If the legislature wished to use imprisonment to supplement fines for first offenders, the words "and/or" should have been used. Former section 316.193(2)(a) (1981) clearly indicated imprisonment for first offenders was not mandatory:

Any person who is convicted of a violation . . . shall be punished.

(a) For first conviction thereof, by imprisonment . . . or by fine . . . or by both such fine and imprisonment.

(emphasis added.)

If the legislature did not intend mandatory incarceration for first offenders, it should amend section 316.193(2) next session to clarify this.

32. FLA. STAT. § 316.193(4)(b), (c) (Supp. 1982). This also applies to repeat first degree misdemeanants under § 316.193(1) (Supp. 1982). *See supra* text accompanying notes 29-31. Under the new law's enhanced sentencing provisions, prior convictions for driving under the influence, driving while intoxicated, and/or driving with unlawful blood alcohol are considered the same offenses. *See* FLA. STAT. § 316.193(4)(c) (Supp. 1982).

convicted of a second offense more than three years after a first conviction or a third offense more than five years after a first conviction, imprisonment is governed by the first offender provisions.

Besides a fine or possible jail term, prior offenders could be required to attend alcohol education programs and undergo evaluation and treatment.³³ This is now mandatory for all first-time offenders and encompasses chemicals other than alcohol.³⁴ Considering the legislature's recognition that chemicals besides alcohol impair driving, this change is wise.³⁵

First offenders must also do fifty hours of "public service" or "community work project."³⁶ As there is no definition of "public service" or "community work project", each county can fashion its own requirements³⁷ in keeping with the differing community needs of Florida's counties. No public service is required of repeat offenders within three and five year periods. Evidently the legislature envisioned a sentencing scheme where most first offenders receive the minimum fine, required education and/or evaluation, and no incarceration unless unusual circumstances exist. The community service requirement should usually be an alternative, and not a supplement, to incarceration for

33. Former Florida Statutes section 316.193(5) (1981) stated in part: "At the discretion of the court, any person convicted . . . may be required to attend an alcohol education course specified by the court and may be referred to an authorized agency for alcoholism evaluation and treatment. . . ."

34. See FLA. STAT. § 316.193(3) (Supp. 1982).

35. A Minnesota Department of Public Safety study reports assessment and rehabilitation may be more effective than increased fines and incarceration. According to the study, "Convicted drunk drivers who went through an assessment and rehabilitation were only half as likely to be re-arrested for drunk driving as those who had no assessment and received the conventional penalties of a fine and/or jail sentence." NATIONAL SAFETY COUNCIL, TRAFFIC SAFETY MAGAZINE, Aug. 1979, at 19.

36. See FLA. STAT. § 316.193(4)(a) (Supp. 1982).

37. How widely counties may define this is shown in recent newspaper articles. In Palm Beach County, offenders donating one pint of blood receive credit for eight hours of work. See *Patrol Targets Drunk Drivers*, Miami Herald, June 13, 1982, at 6B, col. 1. Broward County created a Community Service Program to oversee the requirement. Counselors examine an offender's background and work schedules before making a public service assignment. Assignments cover a broad range of menial activities. The new Program monitors an offender's hours to make sure the full requirement is met. See *Civic Jobs Lined Up for Drunk Motorists*, Fort Lauderdale News and Sun-Sentinel, Aug. 8, 1982, at 11B, col. 1.

first offenders.³⁸ Since second and third offenders receive mandatory jail terms, the legislature apparently felt an added community service requirement would have no appreciable effect.

Statutory provisions requiring suspension or revocation of a driver's license for any "drunk driving" offense remain basically unchanged.³⁹ Like the penalty provisions, the suspension term has been lengthened and standardized.⁴⁰ Limited privileges for necessary business uses can be obtained if a convicted driver successfully completes the required substance abuse education.⁴¹ Since the course's aim is to rehabilitate and educate problem drivers, this provision will provide incentive to complete such training promptly. However, any driver twice convicted of a "drunk driving" offense or whose license has been twice suspended for refusal to comply with the implied consent law's testing provisions⁴² is ineligible for limited driving privileges.

38. State legislators commenting on the new law called this a compromise between mandatory sentencing for first offenders and previous sentencing provisions. Fear a mandatory first time sentence would further strain Florida's overcrowded jails led to the compromise. *See Drunk Driving Law May Stagger*, Fort Lauderdale News, Apr. 21, 1982, at 1B, col. 2. Even without mandatory sentencing for first time offenders, the new law has strained Florida's court system. After six months experience, jury trials in drunk driving cases have increased by 25% and guilty pleas have dropped by 12%. *See Courts feel impact of new drunk driving law*, Fort Lauderdale News and Sun-Sentinel, Jan. 23, 1983, at 1B, col. 5.

Florida is not alone in requiring community service. The new Kansas law requires either a minimum forty-eight hours incarceration or 100 hours public service. 1982 Kan. Sess. Laws. ch. 144, § 5, 624.

39. Florida Statutes section 322.28(2) (Supp. 1982) requires suspension or revocation for any of the three offenses. Former Section 322.28(2) (1981) applied only to driving under the influence of alcohol. Present Florida Statutes section 322.28(2) applies to driving under the influence of alcohol or controlled substances.

40. Florida Statutes section 322.28(2)(a) (Supp. 1982) provides a minimum suspension period of 180 days to one year for first conviction of driving with unlawful blood alcohol or driving under the influence. Former section 322.28(2)(a) (1981) provided different suspension periods for these two offenses: 30 to 90 days for unlawful blood alcohol and 90 days to one year for being under the influence. Thus the new bill again expresses the legislature's intent to treat these two offenses similarly.

Revocation periods for second and third convictions within five and ten years of a prior conviction have been substantially increased from six months to five years for second offenses, and from five years to ten years for third offenses.

41. *See* FLA. STAT. § 322.271(2) (Supp. 1982).

42. For discussion of the Implied Consent Law's required test submission pro-

The new law makes it harder for drivers whose licenses have been suspended or revoked to regain their driving privileges and impossible to do so after a certain point. When privileges are revoked, a driver must retake the examination after revocation expires.⁴³ Before re-testing, the driver must prove he has completed any required driver training or substance abuse courses.⁴⁴ However no driver's license can be re-issued to anyone convicted of four "drunk driving" offenses.⁴⁵ This provision is appropriate since after three unsuccessful attempts to rehabilitate a driver through a combination of education, fines and imprisonment, any further attempts will most likely be futile. Unlike provisions relating to fines and penalties,⁴⁶ this prohibition has no applicable time period. Thus four offenses alone, no matter how far apart, will cause permanent loss of license.

III. Miscellaneous Statutory Changes

The new law initially made six other major changes: (1) provisions for urinalysis, (2) provisions for non-forcible blood testing, (3) provisions to increase the admissibility of chemical intoxication test results, (4) provisions modifying the Accident Report Privilege, (5) provisions admitting refusals of mandatory testing, and (6) provisions for limited forcible blood testing. With the exception of the provisions modifying the Accident Report Privilege, all represent changes in the Florida Implied Consent Law which requires drivers to agree to chemical testing in return for driving privileges. However, as described below, the changes in provisions for non-forcible blood testing were subsequently amended to conform to prior law. Since the last change raises constitutional questions, it is discussed in the next section. The others are examined below.

grams *see infra* text accompanying notes 109-110.

43. *See* FLA. STAT. § 322.28(2)(d) (Supp. 1982).

44. *Id.* Like the new requirements for limited driving privileges, this should encourage convicted drivers to complete these quickly.

45. FLA. STAT. § 322.28(2)(f) (Supp. 1982). This prohibition also applies to any driver convicted of vehicular manslaughter and one other "drunk driving" offense. However at least one of the four convictions must have occurred after July 1, 1982.

46. *See supra* text accompanying notes 24-32.

A. Urinalysis Provisions

Under the former Implied Consent Law⁴⁷ drivers only consented to blood alcohol content tests. When tests were used to determine the presence of controlled substances, courts split on the admissibility of the results. In *State v. DeMoya*,⁴⁸ the driver took a requested blood test, but objected when results were used to show methaqualone. The Third District Court of Appeal suppressed the results, strictly construing the Implied Consent Law as limited to tests for alcohol. However in *State v. Rafferty*,⁴⁹ after breath tests showed no alcohol, a driver initially consented to both blood and urine testing showing methaqualone but later claimed his consent was invalid as he was not in full control of his faculties. Disregarding this argument, the Fourth District Court of Appeal decided only probable cause was needed citing *Schmerber v. California*.⁵⁰ Since the Implied Consent law only forbade non-consensual blood testing for alcohol, urine testing for controlled substances was governed by pre-law standards.⁵¹

The new law eliminates this conflict. Florida Statutes section 316.1932(1)(a)⁵² extends the implied consent provisions to both breath testing for alcohol and urine testing for controlled substances. Testing is permissible at any "detention facility or any other facility mobile or otherwise . . . equipped to administer such tests in a reasonable manner. . . ."⁵³ Breath and/or urine testing can be done if "reasonable

47. Formerly FLA. STAT. §§ 322.261-322.262 (1981), now §§ 316.1932-316.1934 (Supp. 1982).

48. 380 So. 2d 505 (Fla. 3d Dist. Ct. App. 1980).

49. 405 So. 2d 1004 (Fla. 4th. Dist. Ct. App. 1981).

50. 384 U.S. 757 (1966).

51. The result might have been different if only blood sampling for controlled substances had been done. The former Implied Consent Law could have intended to limit blood sampling to alcohol detection alone. Since urinalysis was also done, it was not necessary for the Fourth District Court of Appeal to reach this issue.

DeMoya's result might have been different had the state relied on *Schmerber*. Since this was not done, the Third District Court of Appeal found it unnecessary to confront such an issue. *DeMoya*, 380 So. 2d at 506.

52. FLA. STAT. § 316.1932(1)(a) (Supp. 1982).

53. *Id.* This contemplates use of "BAT" Mobiles, previously used by several counties for urinalysis and breath testing. See S. Gordon, "BATMOBILE": An Experience Paper Based on 100-hour Internship (1980) (unpublished M.S. Criminal Justice thesis) (Available in Nova University Library), reporting that in January, 1980, seven

cause" exists that a driver is under the influence. One type of testing does not preclude the other, but the question arises whether the same facts can supply "reasonable cause" for both tests. If so, police will routinely administer both once a driver is lawfully arrested. One source reports urinalysis is often done after breath tests fail to show blood alcohol content above the statutorily presumed level of "under the influence."⁵⁴ Indeed *Rafferty* noted "the zero readings yielded by the breathalyzer tests"⁵⁵ as one factor police could use to conclude the driver was probably under the influence of drugs.

Another question is the proper testing methods for urinalysis. Unlike breath and blood testing, the Department of Health and Rehabilitative Services has not been given responsibility to establish urine testing procedures.⁵⁶ Arguably, each county could establish separate procedures as long as the courts consider them accurate. Prior Florida case law on scientific testing is among the most liberal in the United States. Many states allow testimony concerning a scientific process only if it has "such standing and scientific recognition among . . . authorities as would justify the courts in admitting the expert testimony declared from the discovery, development, and experiments thus far made."⁵⁷ However, in *Coppolino v. State*,⁵⁸ Florida adopted a liberal standard for admitting scientific testimony: whether "the tests in question were sufficiently reliable to justify their admission."⁵⁹

out of eight urinalysis specimens for drivers who registered a .00% breathalyzer reading showed methaqualone. Methaqualone is listed as a controlled substance in Florida Statutes section 893.03(2), Schedule II.

54. Gordon, *supra* note 53, at 8-14.

55. 405 So. 2d at 1004.

56. Florida Statutes section 316.1932(2)(a) (Supp. 1982) authorizes the Department to approve "tests determining the weight of alcohol"; section 316.1933 (Supp. 1982) authorizes the Department "to approve satisfactory techniques or methods" for determining alcoholic content of blood and section 316.1934(3) (Supp. 1982) provides that blood or breath tests to be considered valid must be performed by "methods approved by the Department of Health and Rehabilitative Services." There is no mention of authority to approve urine testing methods.

57. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), disapproving use of the systolic blood pressure deception test, a precursor of the polygraph.

58. 223 So. 2d 68 (Fla. 2d Dist. Ct. App. 1968), *appeal dismissed*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970).

59. *Id.* at 71. *Coppolino* concerned admission of chemical testing for succinylcholine chloride in the body. Before *Coppolino*, experts believed this was impossi-

In counties where urine testing has not yet gained judicial acceptance,⁶⁰ either test requires expert testimony about the reliability of the

ble to determine. However, two experts testified they had devised a method whereby determination was possible. Relying on their testimony, the results were admitted and the defendant found guilty of second degree murder. For different views of *Coppolino*, see F. BAILEY, *THE DEFENSE NEVER RESTS* 227-79 (1971); M. HELPERN, *AUTOPSY* 16-45 (1977).

Since the method used had not gained recognition among the scientific community - a pre-requisite under *Frye* - several writers argue *Coppolino* rejected *Frye* in favor of a lower "relevancy" standard:

'General scientific acceptance' is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed 'requirement of general acceptance' not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances.

C. McCORMICK, *EVIDENCE* 491 (Cleary ed. 1972). See also Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980). Gianelli criticizes both standards and urges requiring the state in a criminal case to establish a new scientific technique's reliability beyond a reasonable doubt.

Gianelli also criticizes the *Coppolino* standard for appellate review: "[the judge's] ruling on admissibility of evidence will not be disturbed unless an abuse of discretion is shown." *Coppolino*, 223 So. 2d at 70. He claims this confuses the judge's traditional discretion in accepting an expert's qualification with the acceptance of a new scientific process:

The answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case. It is therefore inappropriate to view this threshold question of reliability as a matter within each trial judge's individual discretion.

Gianelli, *supra* note 59, at 1223 (citing *Reed v. State*, 283 Md. 374, 381, 391 A.2d 364, 367 (1978) (voiceprint analysis inadmissible as not having achieved general acceptance in the scientific community.)) Gianelli claims the abuse of discretion standard makes a judge's decision to submit or exclude scientific evidence practically non-reversible. Following *Coppolino*, Florida appellate courts have never reversed for admission or exclusion of scientific evidence. See *infra* cases cited in note 61.

60. Neither *DeMoya* nor *Rafferty* addressed the particular method of testing's reliability. *DeMoya* only concerned blood testing for controlled substances, thus the particular method used there is not helpful.

Under the new law, Broward County will use a three level extraction procedure to

urine testing used.⁶¹ After a method's reliability has once been established, judicial notice could be used subsequently.⁶² Absent either method of proof, evidence of urinalysis is inadmissible. The Legislature should have delegated responsibility to the Department of Health and Rehabilitative Services to determine proper urine testing procedure. Only experience will determine whether the Legislature has created a problem by not doing so.

test urine. The first level is thin line chromatography; the second is the E.M.I.T. assay test for cocaine and benzodiazepines; the third level occurs subsequent to a positive second level test and is thin line chromatography confirmed by ultra-violet spectrophotometry. Dade County plans to use only gas chromatography. Telephone interview with Gene DeTuscan, Toxicologist, Broward County Medical Examiner's Office (July 6, 1982.)

61. After *Coppolino*, Florida courts have never mentioned *Frye* and adhere to the more liberal standard. See *Worley v. State*, 263 So. 2d 613, 614 (Fla. 4th Dist. Ct. App. 1972) (admitting voiceprint, "Florida courts have long enjoyed considerable discretion in the admittance of novel or experimental evidence, if they feel certain standards of scientific reliability have been attained."); *Rodriguez v. State*, 327 So. 2d 903, 904 (Fla. 3d Dist. Ct. App. 1976) (no error to exclude defendant's statements made under hypnosis because the "court remains unconvinced of the reliability of statements procured by way of hypnosis"); *Ashley v. State*, 370 So. 2d 1191 (Fla. 3d Dist. Ct. App. 1974) (no error to exclude psychological testimony); *Jent v. State*, 408 So. 2d 1024, 1029 (Fla. 1981) (admission of microanalysis showing unknown hair samples "highly likely" those of defendant depends upon "whether scientific tests are so unreliable and scientifically unacceptable that admission [is] error.")

For a detailed discussion of *Worley v. State*, admitting voiceprints see Comment, *Criminal Law: Voiceprint Evidence is Being Heard*, 25 U. FLA. L. REV. 608 (1973); Comment, *Criminal Law - Evidence - Voiceprints Admissible to Corroborate Testimony Identifying Accused As One Who Had Made False Bomb Threats By Telephone.—Worley v. State*, 263 So. 2d 613 (Fla. 4th Dist. Ct. App. 1972), 1 FLA. ST. U.L. REV. 349 (1973).

62. Judicial notice may take three separate forms: (1) Notice of prior decisions recognizing a method as reliable or unreliable, See *Reed*, 391 A.2d at 372-76 (1978); *State v. Primm*, 4 Kan. App. 2d 314, 606 P.2d 112 (1980) (judicial notice of general reliability of radar to measure speed); *Jent*, 408 So. 2d 1024 (judicially noticing earlier decision in *Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert. denied*, 451 U.S. 964 (1981) which admitted microanalysis). Under Florida Statutes section 90.201 judicial notice would be required of previous controlling decisions concerning a method; (2) Notice of the scientific literature in the area, see *Reed*, 391 A.2d 367; (3) Notice of expert testimony in prior opinions, see Gianelli *supra* note 59, at 1218-19 for a brief critique of all three methods. For detailed discussion of judicial notice in Florida see C. EHRHARDT, FLORIDA EVIDENCE §§ 90.201-207 (1977).

B. Non-forcible Blood Testing Provisions

Former Florida Statutes section 322.261(c)⁶³ allowed blood sampling when a driver could not take a breath test because of a mental or physical condition. Consent was implied and could not be withdrawn later. Any blood test taken either without a driver's consent or pursuant to section 322.261(2)(c) was inadmissible. Generally if no consent was given, the driver had to be unconscious. However, if serious enough physical injuries existed, and a driver was hospitalized, section 322.261 allowed blood sampling, since the driver was considered "so incapacitated as to render impractical or impossible the administration"⁶⁴ of the breath test.⁶⁵

Present Florida Statute section 316.1932(2)(c) retains these requirements. As originally amended, a driver had to be "advised as soon as practicable of such blood withdrawal and the intended use thereof"⁶⁶ and given the opportunity to withdraw his consent. This provision would have given drivers more rights than they previously had to exclude evidence, and placed them in an "all win-no loss" situation.⁶⁷ This modification clearly was not constitutionally required. In *Breithaupt v. Abram*⁶⁸ an unconscious driver objected to the use of his blood sample, but the Supreme Court found no constitutional obstacles. Likewise, *Filmon v. State*⁶⁹ rejected an argument that allowing con-

63. FLA. STAT. § 322.261(2)(c) (1981).

64. *Id.*

65. *State v. Bierbaum*, 46 Fla. Supp. 163 (Palm Beach County 1977), which held the state must show a driver's condition made requesting a breath test useless. Being at a hospital was insufficient. However, since there the driver was facially bleeding, complaining of pain and receiving emergency treatment, the showing was met. Likewise any blood test performed must be done "upon request of a law enforcement officer. . . ." FLA. STAT. § 316.1932(2)(c) (Supp. 1982). See *Campbell v. State*, 423 So. 2d 488 (Fla. 1st Dist. Ct. App. 1982), declaring inadmissible results of hospital blood tests performed to administer medical treatment and not at police officer's request.

66. See 1982 Fla. Sess. Law Serv. 155, § 3(West).

67. If blood tests register low blood alcohol content few drivers would withdraw consent. If the test showed a high blood alcohol level, most would withdraw consent and accept the consequences.

68. 352 U.S. 432 (1957).

69. 336 So. 2d 586 (Fla. 1976), *cert. dismissed sub nom. Filmon v. Florida*, 430 U.S. 980 (1980). The original Implied Consent Law was criticized for not giving

scious drivers to withhold consent but not permitting unconscious or incapacitated drivers to later do so violated equal protection.

Fortunately the legislature subsequently deleted this provision.⁷⁰ Thus unconscious or incapacitated drivers still cannot withdraw their consent to blood samples and exclude the test results.

C. General Provisions Concerning Validity of Blood Alcohol Content Analysis

Defendants charged with "drunk driving" offenses frequently contend proper administrative procedure has not been followed, thus making test results inadmissible. Former Florida Statutes section 322.262(3)⁷¹ provided in part that

Chemical analyses of the person's blood or breath, in order to be considered valid under the provisions of this section, must have been performed according to methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose.⁷²

Under prior case law, the state had the burden of showing testing provisions were followed.⁷³ Any analysis violating administrative rules

"equal treatment" to all drivers and may have led to the original amendment. *See* Comment, *Florida's 'Implied Consent' Statute: Chemical Tests for Intoxicated Drivers*, 22 U. MIAMI L. REV. 698, 716 (1968), which states, "A much fairer procedure would be to inform the unconscious person after he regains consciousness of his rights and at that time gave him a choice between having the evidence used against him or having his license suspended."

70. 1982 Fla. Sess. Law Serv. 403, § 3(West).

71. FLA. STAT. § 322.262(3) (1981).

72. *Id.*

73. *See* *State v. Wills*, 359 So. 2d 566, 568 (Fla. 2d Dist. Ct. App. 1978) ("statutes like Florida's . . . expressly condition the validity of test results on compliance with health department regulations."); *State v. Bender*, 382 So. 2d 697, 699 (Fla. 1980) ("test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules"). For civil cases, at least one Florida court has decided compliance with the administrative rules and statutory implied consent laws provisions is not required for admission of blood alcohol test results used to show a driver's comparative negligence. *Grant v. Brown*, 429 So. 2d 1229 (Fla. 5th Dist. Ct. App. 1983).

was inadmissible.⁷⁴ Results were excluded for the state's failure to establish intoximeter registration,⁷⁵ operator qualifications,⁷⁶ breathalyzer equipment's non-accessibility to unauthorized personnel,⁷⁷ and equipment's working condition.⁷⁸

Whether such results will occur under the new Implied Consent Law is questionable. Florida Statutes sections 316.1932(1)(b)⁷⁹ and 316.1934(3)⁸⁰ still authorize the Department to approve breath and blood testing procedure. However both sections provide that "Any insubstantial differences between approved techniques and actual testing

74. The Department of Health and Rehabilitative Services rules are in the Florida Administrative Code, chapter 10D-42, *Implied Consent*. These supplement the Department of Highway Safety and Motor Vehicles regulations. See FLA. ADMIN. CODE, ch. 15 B-3, *Rules of Administering and Determining Chemical Tests for Intoxication*.

75. See *Turk v. State*, 403 So. 2d 1077 (Fla. 1st Dist. Ct. App. 1981) (Florida Administrative Code, rule 10D-42.23 violated; unsigned photographic copy of machine registration certificate fails to satisfy both best evidence rule, as not under seal required by Florida statutes section 92.18, and hearsay rule since witness not qualified to establish copy as Business Record exception.)

76. See *Turk*, 403 So. 2d 1077 (Florida Administrative Code, rule 10D-42.25 violated, copy of certificate establishing breathalyzer operator's qualifications not properly authenticated); *Grala v. State*, 414 So. 2d 621 (Fla. 3d Dist. Ct. App. 1982) (blood test results improperly admitted, no proof of identity or qualifications of person who withdrew blood, admission harmless, evidence still sufficient to convict.) But see *Gillman v. State*, 390 So. 2d 62 (Fla. 1980) (blood sample drawn by hospital employee who not yet completed one year's required work for permanent licensing as clinical laboratory technologist improperly excluded; letter permitting temporary work as clinical laboratory technologist sufficient authorization).

⁶ 77. See *Wills*, 359 So. 2d at 568 (former H.R.S. rule 10D-42.07 requires only "reasonable compliance" and not insuring "impossib[ility] for anyone other than authorized personnel to obtain key" to drawer where machine kept; rule violated as multiple keys of unauthorized personnel unlocked gun locker where machine was); *State v. Dixon*, 50 Fla. Supp. 110 (Orange County 1980) (Highway Safety and Motor Vehicles rule 15B-3.03 rule violated; breathalyzer kept in open locker in room accessible to uncertified personnel).

78. See *Dixon*, 50 Fla. Supp. at 110 (machine removed from service eleven days after driver tested possibly not working properly when driver tested, failure to follow monthly inspection rule requires results exclusion). Florida trial courts have also recently excluded breath tests, because police radios may interfere with the breathalyzer machine accuracy. See *Radio interference causes breath tests to be thrown out*, Fort Lauderdale News, Dec. 12, 1982, at 18A, col 3.

79. FLA. STAT. § 316.1932(1)(b) (Supp. 1982).

80. FLA. STAT. § 316.1934(3) (Supp. 1982).

procedures in individual cases shall not render the test or test results invalid.”⁸¹

Unfortunately, what the legislature considered “insubstantial difference” is unclear. When certain procedures are administratively mandated, arguably any deviation is “substantial” or else they should not have been required. But to so construe section 316.1934(3) and 316.1932(1)(b) ignores the above quoted language. Since the integrity of a scientific testing process is concerned, the state should produce expert testimony about a deviation’s possible effect.⁸² This recognizes the burden case law places upon the state. Expert testimony would not be needed in all cases - only those in which the administrative regulations have not been followed.⁸³ Initially any testing procedure should be considered valid until the defense produces evidence showing deviation. The prosecution then must prove the deviation does not effect the overall results.

Another question is whether a judge or jury initially determines whether any difference is so “insubstantial” that test results are not invalid. While the answer is not clear, strong indications exist that the initial determination on admissibility of test results lies with the judge, with the ultimate determination on their validity left to the jury. *Copolino* established that the trial judge has wide discretion in admitting scientific evidence and must determine whether any proffered tests are “so unreliable and scientifically unacceptable that their admission into evidence was error”.⁸⁴ The key word is “unreliable”. Since standard breath and blood testing procedures were established to avoid this, any

81. FLA. STAT. § 316.1932(1)(b); FLA. STAT. § 316.1934(3).

82. Who qualifies as an expert on the question of “insubstantial differences” is another issue. Generally only breathalyzer technicians appear at drunk driving trials. They may not be qualified to testify what happens when differences in administrative or statutory procedures occur: “The technician merely follows prescribed routines, and is not expected to understand their underlying fundamentals. He knows how, but not why.” Kirk, *The Interrelationship of Law and Science*, 13 BUFFALO L. REV. 393, 394 (1964), cited in Gianelli, *supra* note 59, at 1214-15. Arguably a manufacturer’s representative is necessary.

83. See *Bender v. State*, 382 So. 2d 697, 699 (Fla. 1980): “When the prosecution presents testimony in evidence concerning motor vehicle driver intoxication, which includes an approved alcohol test method by a properly licensed operator, the fact finder may presume the test procedure is reliable. . . .”

84. 223 So. 2d 68, 70 (Fla. 2d Dist. Ct. App. 1968).

deviation from them could affect the results' reliability. *Coppolino* seems to embody the procedure mandated by Florida Statutes section 90.105, *Preliminary Questions*⁸⁵ stating in part: "(1) the court shall determine preliminary questions concerning . . . the admissibility of evidence."⁸⁶

If a difference between testing procedures used and those required by regulations is not "insubstantial", the results should be excluded and not considered by the jury. If the judge determines any differences would not affect the testing results' reliability, the jury is allowed to accept them or not.

Should the judge's initial determination be made in the jury's presence? Unfortunately section 90.105 does not afford a definite answer. Section 90.105(3) requires hearings outside the jury's presence only when confessions are involved. For other preliminary matters section 90.105(3) requires them to be held outside the jury's presence

85. *Coppolino* declared that

the question is not actually one of sufficiency or weight of the evidence for there was ample evidence before the jury to support its finding as to cause of death. *Instead, the question really involves the competency of the evidence.* That is, should the trial judge have allowed into evidence testimony concerning Dr. Umberger's tests.

Id. at 70, (emphasis added).

Subsequent Florida cases recognize the initial determination on scientific evidence is the judge's alone. See *Ashley v. State*, 370 So. 2d 1191 (Fla. 3d Dist. Ct. App. 1974) (evaluating questions of relevancy, materiality and competency for judge). *Jent v. State*, 408 So. 2d 1024 (Fla. 1981) (determination for court to make on reliability).

86. FLA. STAT. § 90.105 (1981). The section states in full:

Preliminary questions-

(1) Except as provided in subsection (2), the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.

(2) When the relevancy of evidence depends upon the existence of a preliminary fact, the court shall admit the proffered evidence when there is prima facie evidence sufficient to support a finding of the preliminary fact. If prima facie evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the subsequent introduction of prima facie evidence of the preliminary fact.

(3) Hearings on the admissibility of confessions shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be similarly conducted when the interests of justice require or when an accused is a witness, if he so requests.

"when the interests of justice require or when an accused is a witness, if he so requests."⁸⁷ Arguably, a defendant's testimony may sometimes be needed to meet the initial burden of producing evidence that some difference exists.⁸⁸ In these cases, the jury cannot be present. But when the defense shows a difference only through cross-examination of prosecution witnesses, the jury may be present.⁸⁹ Indeed judicial economy may be served by having jurors present. If results are ultimately submitted for their consideration, defense counsel can be expected to emphasize on cross examination the differences involved, hoping jurors will use them to disregard test results. Thus by having jurors present when the preliminary issue is determined, needless repetition of testimony is avoided.

What happens if the jury hears testimony on this preliminary question, and the judge excludes test results because a substantial difference exists? If the state dismisses its case, no harm is done. However, if the state continues, is a mistrial necessary? The answer seems to be "it depends." If the judge determines an instruction to disregard the excluded evidence would suffice, the trial can continue. If not, then mistrial is the only remedy.⁹⁰ By adding this new language, the Legisla-

87. FLA. STAT. § 90.105(3) (1981).

88. For example, the defendant could testify that during the twenty minute required observation period he drank liquid or vomited, thus affecting test results. See FLA. ADMIN. CODE, rule 10D-42.24.

89. An analogy may be drawn to admissibility of co-conspirator statements under the Federal rules of Evidence. Even federal courts which suggest preliminary foundations for co-conspirator statements should be done outside the jury's presence do not always require this procedure.

United States v. James, 576 F.2d 1121 (5th Cir. 1978), *reh'g en banc*, 590 F.2d 575 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1979), held Federal Rule of Evidence 104 (a) requires a judge to make determinations of the admissibility of co-conspirator statements under rule 801(d)(2)(E) "whenever reasonably practicable" before admitting the statements themselves. Subsequent decisions establish this procedure is not mandatory, and judges may admit co-conspirator statements subject to later "connecting up" at trial. See United States v. Miller, 664 F.2d 826 (11th Cir. 1981); United States v. Roe, 670 F.2d 956 (11th Cir. 1982).

90. Again, experience with the federal co-conspirator exception supports this. See *James*, 590 F.2d at 583 ("the judge must decide whether the prejudice arising from the erroneous admission of the co-conspirator's statements can be cured by a cautionary instruction to disregard the statement or whether a mistrial is required"); United States v. Ocanas, 628 F.2d 353 (5th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

ture has created much uncertainty. Prosecutors may find it wiser not to bring cases where any difference exists.

D. Florida Accident Report Privilege

Florida Statutes section 316.066,⁹¹ *Written Report of Accidents*, requires every driver involved in an accident causing one hundred dollars property damage or bodily injury to another person to file a written report with the Department of Highway Safety and Motor Vehicles. Likewise police officers investigating these accidents must make a report within twenty-four hours.⁹² To insure drivers' cooperation and to preserve their fifth amendment Privilege against Self-incrimination, section 316.066(4) provides in part that: "No such report shall be used in evidence in any trial, civil or criminal, arising out of an accident. . . ."⁹³

Early case law applied this provision to drivers' statements whatever form they took. The crucial consideration was whether the statements were made to fulfill either the driver's or the investigating officer's duty. Where an investigating officer recorded a driver's version of an accident to satisfy his reporting duties, admission was prohibited.⁹⁴ Likewise, when drivers made statements to investigating officers to satisfy their statutory duty, bystanders who overheard them could not testify.⁹⁵ However, only statements forming a basis for the report were privileged - not the entire report itself. Thus police could use accident reports to refresh their memory for purposes of testifying about non-privileged matters.⁹⁶

91. FLA. STAT. § 316.066(1) (Supp. 1982).

92. FLA. STAT. § 316.066(3)(a) (Supp. 1982).

93. FLA. STAT. § 316.066(4) (Supp. 1982).

94. *Stevens v. Duke*, 42 So. 2d 361 (Fla. 1949) (driver's oral statements to officer preparing accident report and driver's signed statement prepared by officer properly excluded as privileged in civil action arising out of accident).

95. *Herbert v. Garner*, 78 So. 2d 727, 728 (Fla. 1955) ("to allow one party to establish their contents by the testimony of witnesses who may have overheard the driver . . . making an oral report to the patrolman investigating it, would defeat the purpose of the statute").

96. *Lobree v. Caporossi*, 139 So. 2d 510, 512-13 (Fla. 2d Dist. Ct. App. 1962). *See also Soler v. Kukula*, 297 So. 2d 600, 602 (Fla. 3d Dist. Ct. App. 1974) (privilege not prevent cross-examination based on report, if officer used report to testify on direct

Besides a driver's oral statements, prior case law found privileged those blood tests taken to complete an accident report and not for possible criminal charges. Where blood tests were done to complete the accident investigation, the privilege attached and results excluded.⁹⁷ However, once an officer "changed his hat" and began a criminal investigation any consensual statements or blood tests were not protected.⁹⁸ Ultimately the crucial test for deciding whether statements or blood alcohol testing were within the privilege became "whether the information sought to be excluded was taken . . . for the purpose of making [an] accident report and formed a basis for that report."⁹⁹

Mere change from a civil to criminal investigation did not make test results admissible unless a driver was clearly advised of the change. An explicit warning easily achieves this; anything else is arguably insufficient, since "to do any less simply erodes the protection which the Legislature affords drivers".¹⁰⁰ Where one officer conducted both the civil and criminal investigations, the officer's warning to the driver usually sufficed.¹⁰¹ Where different officers were involved, whether the same officer or a different one requested the blood test was often crucial.¹⁰² The report's actual completion date or time was insignificant.¹⁰³

Under these interpretations of section 316.066(4) blood tests were excluded where their results would have provided significant evidence of intoxication. Case law construing the privilege as applied to blood

examination).

97. *Cooper v. State*, 183 So. 2d 269 (Fla. 1st Dist. Ct. App. 1966). *See also State v. Thomas*, 212 So. 2d 910 (Fla. 1st Dist. Ct. App. 1968).

98. *State v. Coffey*, 212 So. 2d 632, 634 (Fla. 1968) (no doubt driver [knew] investigation phase ended and blood being taken in connection with possible manslaughter charge).

99. *State v. Mitchell*, 245 So. 2d 618, 623 (Fla. 1971).

100. *Elder v. Ackerman*, 362 So. 2d 999, 1002 (Fla. 4th Dist. Ct. App. 1978) (report excluded since unrealistic for sixteen year old driver at serious accident scene "to discern the nuances of the dichotomy existing between investigations for automobile accident reports investigations from the criminal aspects of automobile accidents").

101. *Coffey*, 212 So. 2d 632.

102. *See State v. Edge*, 397 So. 2d 939 (Fla. 5th Dist. Ct. App. 1981); *Timmons v. State*, 214 So. 2d 11, 14 (Fla. 1st Dist. Ct. App. 1968), *cert. denied*, 396 U.S. 970 (1969).

103. *Mitchell*, 245 So. 2d 618.

alcohol testing has been criticized as illogical and inconsistent.¹⁰⁴ The new law significantly changes Florida Statutes section 316.066(4). Oral statements still remain privileged. However, chemical results are explicitly excluded from the privilege's scope: "The results of breath, urine and blood tests administered . . . shall not fall within the confidential privilege afforded by this subsection, but shall be admissible into evidence in accordance with the provisions of § 316.1934(2)."¹⁰⁵

This is one of the better changes. Chemical tests are outside the fifth amendment privilege against self-incrimination. If tests are otherwise validly taken, results should be admissible without privilege problems under section 316.066.

E. Admissibility of Refusals of Testing

Some states explicitly exclude¹⁰⁶ while many explicitly admit¹⁰⁷ refusals to submit to chemical testing. What happens when the state law is silent on this issue? Unfortunately, decisions have gone both ways.¹⁰⁸ Florida's situation before the new law's passage is typical of the confu-

104. See Note, *Admissibility of the Results of Blood Test in a Criminal Case Arising Out of an Auto Accident*, 22 U. MIAMI L. REV. 973, 978 (1968) ("The statutory accident report privilege should not be used in a manner that will cause the exclusion of evidence obtained under . . . implied consent law when an accident results,"); Rumrell, Wrights & Havens, *The Case for Admissibility of Blood Alcohol Test Results in Civil and Criminal Trials*, 55 FLA. B.J. 362, 365 (May, 1981) ("The court-created privilege against noncommunicative blood alcohol tests should be eliminated.").

105. FLA. STAT. § 316.066(4).

106. See, e.g., MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West. Supp. 1981).

107. See ALA. CODE § 32-A-5-194(c) (Supp. 1981); ARIZ. REV. STAT. ANN. § 28-692(H) (Supp. 1982). Besides Florida, three other states recently amended their Implied Consent laws to explicitly admit refusals. See ILL. REV. STAT. ch. 95 ½, § 11.501.2(c) (Supp. 1982); KAN. STAT. ANN. § 8-1001(c) (Supp. 1982); OR. REV. STAT. § 487.805(4) (1979).

108. [E]ven in those states . . . , which are silent on the issue of admissibility of a refusal to submit to the test, they come to opposite conclusions as to the effect of the statute. Some hold that the option given by the statute to refuse prevents the admissibility of evidence of the refusal, while others hold that even though a person may refuse to take the test, this is not a statutory right to refuse, and the evidence of such refusal is, therefore, not precluded by statute.

State v. Wilson, 5 Kan. App. 2d 130, ___, 613 P.2d 384, 386 (1980).

sion. The first Implied Consent Law made driving a privilege in return for which drivers impliedly consented to testing. Arrested drivers were warned any refusal to submit would result in license suspension,¹⁰⁹ but no statutory language said whether such refusal was admissible. Despite the original Implied Consent Law's passage, Florida courts did not allow admission of testing refusals.¹¹⁰

The new Florida Implied Consent Law explicitly makes admission

109. Former Florida Statutes section 322.261(1)(a) (1981) stated in part

Any person who shall accept the privilege extended by the laws of this state of operating a motor vehicle within this state shall by so operating such vehicle be deemed to have given his consent to submit to an approved chemical test of his breath for the purpose of determining the alcoholic content of his blood . . . Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle. . . .

But see State v. Gunn, 408 So. 2d 647, 649 (Fla. 4th Dist. Ct. App. 1981) (absence of warning did not merit suppression of results); Pardo v. State, 429 So. 2d 1313 (Fla. 5th Dist. Ct. App. 1983) (giving of warning not a prerequisite to valid blood alcohol test in criminal case; required only for imposition of license suspension for revocation of consent to testing).

110. State v. Duke, 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979), construed former Florida Statutes section 322.261(1)(a) in light of State v. Esperti, 220 So. 2d 416 (Fla. 2d Dist. Ct. App. 1969), *cert. dismissed*, 225 So. 2d 910 (Fla. 1969) admitting a refusal of nitrate testing as circumstantial evidence of guilt. *Esperti* distinguished Gay v. Orlando, 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1967) (holding that admissibility of refusal violated privilege against self-incrimination), *cert. denied*, 390 U.S. 956 (1968), finding the driver had been incorrectly given a choice to not submit, whereas in *Esperti* there was no choice given. Gay v. Orlando's conclusion was considered dicta and a due process rather than a privilege against self-incrimination decision. Since under Florida Statutes section 322.261(1)(a), a legal choice did not exist, *Duke* found refusals admissible.

However, in *Sambrine v. State*, 386 So. 2d 546 (Fla. 1980), the Florida Supreme Court declared

[a]ny careful reading of Section 322.261 leads to the inescapable conclusion that a person is given the right to refuse testing. If this were not so, it is unclear why the legislature provided for a definite sanction [license suspension] and a detailed procedure for the enforcement of such suspension.

Id. at 548.

Sambrine admittedly did not directly deal with the issue of testing refusals admissibility. Subsequent cases have applied it to this situation and consider it as disapproving *Duke*. See *Brown v. State*, 412 So. 2d 22 (Fla. 2d Dist. Ct. App. 1982).

a consequence of refusal. Florida Statutes section 316.1932(1)(a) provides that when a driver is "lawfully arrested" and police have "reasonable cause to believe" the driver is under the influence, "[r]efusal to submit to a chemical breath or urine test upon request . . . shall be admissible into evidence in any criminal proceeding."¹¹¹

However, despite this explicit language, admitting evidence of a refusal has until recently presented constitutional questions involving the privilege against self-incrimination. While this issue seems settled in favor of a refusal's admissibility, due process problems in doing so may still be very much alive. Thus discussion of both these areas is necessary.

The Florida and United States Supreme Courts have rejected all constitutional challenges to blood alcohol testing *per se*. Even before the first Implied Consent law's enactment, Florida addressed a Privilege against Self-Incrimination objection to blood sampling in *Touchton v. State*.¹¹² A vehicular manslaughter defendant had been arrested and taken to a hospital where blood used to show intoxication was taken. Rejecting claims that this procedure violated the Florida privilege against self-incrimination,¹¹³ the court noted the blood sample had not been protested. After *Touchton*, the propriety of blood extractions arose in *Schmerber v. California*¹¹⁴ where a hospital physician, acting under police direction, withdrew blood from an arrested driver, who protested based on advice of counsel. The Court acknowledged extracting blood over protest was 'compulsion' for fifth amendment purposes. However, the main issue was whether this required the driver "to be a witness against himself."¹¹⁵ Distinguishing between physical and testimonial evidence, the Court found no violation, holding "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide . . . evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analy-

111. FLA. STAT. § 316.1932(1)(a) (Supp. 1982).

112. 154 Fla. 547, 18 So. 2d 752 (1944).

113. At that time FLA. CONST. Declaration of Rights, § 12 provided in part: "No person shall be . . . compelled in any criminal case to be a witness against himself." This provision is presently contained in section 9, FLA. CONST. Declaration of Rights, Florida Constitution.

114. 384 U.S. 757 (1966).

115. *Id.* at 761.

sis . . . did not involve compulsion to these ends."¹¹⁶

Following *Schmerber*, Florida joined a number of states passing Implied Consent laws requiring drivers to submit to chemical testing through breath or blood sampling under certain conditions.¹¹⁷ In *State v. Mitchell*,¹¹⁸ a manslaughter defendant challenged a blood sample taken pursuant to former Florida Statutes section 322.261(1)(b)¹¹⁹ without his consent and before his arrest. Agreeing, the Second District Court of Appeal relied on the absence of consent to find a Privilege against Self-Incrimination violation.¹²⁰ The Florida Supreme Court reversed citing *Schmerber* where the blood sample taken over the driver's protest was not excluded on fifth amendment grounds. Subsequent cases extended *Mitchell* to breath tests as well.¹²¹

While *Schmerber* held a blood test does not violate fifth amendment principles, the Supreme Court created uncertainty about what would happen if a driver refused testing.¹²² Generally, courts have un-

116. *Id.*

117. For discussion of problems posed by the original Implied Consent Law, see Comment, *supra* note 69.

118. 245 So. 2d 618.

119. Former Florida Statutes section 32.261(1)(c) (1981) allowed blood extractions if a driver's physical condition made it "impractical" or "impossible" to administer other testing. See text accompanying note 58 for discussion of this provision.

120. 227 So. 2d 728 (Fla. 2d Dist. Ct. App. 1969).

121. See *State v. Bender*, 382 So. 2d 697 (Fla. 1980).

122. This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test-products which would fall within the privilege.***

Petitioner has raised a similar issue . . . , in connection with a police request that he submit to a 'breathalyzer' test He refused the request, and evidence of his refusal was admitted He argues that the introduction of this evidence and a comment by the prosecutor .. upon his refusal is ground for reversal under *Griffin v. California*, We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda v. Arizona* Since trial here was conducted after our decision in *Malloy v. Hogan*, . . . making those principles applicable to the States . . . petitioner's conten-

dertaken a two-step analysis in deciding whether statutes authorizing admission of refusal against a driver are constitutional: first considering whether admission would violate the Privilege against Self-Incrimination; and then, if necessary, considering whether admission would violate Due Process because either the driver has been misled into believing a right to refuse existed or because the refusal is of low probative value and its admission would unduly pressure drivers to testify. Each of these objections to admitting refusals is briefly discussed below.

1. *Privilege against Self-Incrimination*

Shortly after *Schmerber*, the California Supreme court decided two companion cases providing the main arguments against constitutional attacks. *People v. Ellis*¹²³ held admitting a defendant's refusal to speak for voice identification was permissible since the voice tests were physical evidence rather than testimonial evidence.¹²⁴ When the defendant wrongfully refused to do so, his refusal was admissible not as testimonial evidence but circumstantial conduct from which a jury could infer guilt, much like escape.¹²⁵ *People v. Sudduth*¹²⁶ applied this reasoning to refusals of breath testing. Since under *Schmerber* no right to

tion is foreclosed by his failure to object . . .

384 U.S. at 765-66 n.9.

As could be expected, this language has received differing interpretations from courts and commentators. Compare Comment, *The Admissibility of Refusals In Drunk Driving Prosecutions: A Violation of the Fifth Amendment*, 10 PAC. L.J. 141 (1978); and Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074 (1969) with Cohen, *The Case for Admitting Evidence of Refusal to Take a Breath Test*, 6 TEX. TECH L. REV. 927 (1975); Hauser, *Admissibility of Refusal to Submit to Blood Alcohol Test*, 6 NOVA L.J. 209 (1982); Arenella, *Schmerber and the Privilege against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982).

123. 421 P.2d 393, 55 Cal. Rptr 385 (1966).

124. "[T]he speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meaning of which are unimportant." *Id.* at 395, 55 Cal. Rptr. at 387.

125. "[I]t can scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence." *Id.* at 397, 55 Cal. Rptr. at 389.

126. 421 P.2d 401, 55 Cal. Rptr. 393 (1966).

refuse testing existed, comment on such refusal violated no constitutional privilege. Any contrary result encouraged destruction of evidence and escape from convictions.

The *Ellis-Sudduth* circumstantial evidence rationale has been used by most courts to find no constitutional violation.¹²⁷ However, shortly after *Sudduth*, Florida, in *Gay v. Orlando*,¹²⁸ became the first state subscribing to a contrary minority viewpoint. There, the admission of a driver's refusal to allow a breathalyzer test resulted in reversal of his conviction. The Fourth District Court of Appeal relied on *Schmerber* to find the refusal a testimonial by-product¹²⁹ and found compulsion because of the driver's situation, "a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement."¹³⁰ Whether by design or otherwise, *Gay v. Orlando* neither mentioned *Ellis* nor explained why it disapproved the refusal as circumstantial evidence analysis. While *Gay* has been much

127. See, e.g., *Campbell v. Superior court*, 106 Ariz. 542, ___, 479 P.2d 685, 692 (1971) ("person does not have a right to refuse and because refusal is not 'testimonial communication' . . . comment . . . not improper"); *City of Westerville v. Cunningham*, 150 Ohio St. 2d 121, ___, 239 N.E.2d 40, 41 (1968) ("reasonable to infer that a refusal . . . indicates the defendant's fear of the results of the test and his consciousness of guilt"); *Commonwealth v. Robinson*, 229 Pa. Super. 131, ___, 324 A.2d 441, 450 (1979); *State v. Meints*, 189 Neb. 264, ___, 202 N.W.2d 202, 203 (1972); *State v. Wilson*, 5 Kan. App. 2d 130, ___, 613 P.2d 384, 385 (1980) ("refusal[s] . . . could each be treated as an act or conduct indicating consciousness of guilt"; however excluded per state law). Some pre-*Schmerber* cases used the same analysis to admit refusals. *Gardner v. Commonwealth*, 195 Va. 945, ___, 81 S.E.2d 614, 618 (1954) ("merely details the behavior or conduct of the accused"); *State v. Benson*, 230 Iowa 1168, 1171, 300 N.W. 275, 277 (1941) ("the refusal was merely a circumstance to be considered."); *State v. Durrant*, 55 Del. 510, ___, 188 A.2d 526, 528 (1963) ("it is proper in a criminal case to show defendant's conduct . . . The fact that defendant declined to submit to a sobriety test is such a circumstance which a jury may consider.").

For two criticisms of the *Ellis-Sudduth* circumstantial evidence rationale see Comment, *supra* note 122, at 153-57 and Arenella *supra* note 122, at 46-47.

128. 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1967), *cert. denied*, 390 U.S. 956 (1968).

129. "[P]etitioners' statement was self-incriminating and carried an inference of guilt. In fact, it is difficult to see any relevancy . . . other than providing such an inference." *Id.* at 898.

130. *Id.*

criticized,¹³¹ several courts cited it to find admission of refusals a fifth amendment violation.¹³² Other cases have reached similar results.¹³³

131. See Hauser, *supra* note 122; Cohen, *supra* note 122; Comment, *Admissibility of Testimonial By-Products of a Physical Test*, 24 U. MIAMI L. REV. 50, 58-59 (1969) ("the decision is in conflict with the growing body of legal opinion").

132. See *Johnson v. State*, 125 Ga. App. 607, 188 S.E.2d 416 (1972); *State v. Jackson*, 637 P.2d 1 (Mont. 1981), *cert. granted, vacated and remanded for reconsideration*, *Montana v. Jackson*, 103 S. Ct. 1418 (1983). Arguably, *Johnson* could have relied on a non-constitutional evidentiary basis for excluding refusals, rather than a fifth amendment one, stating "[T]he refusal to take such tests are not relevant to the question of guilt or innocence although the statute itself authorizes the results to be allowed in evidence and creates a presumption in certain situations." 188 S.E.2d at 417. *Gay* excluded refusals not because of irrelevancy, but precisely because they were relevant, testimonial and compelled.

133. See *State v. Andrews*, 297 Minn. 260, 212 N.W.2d 863 (1973), *cert. denied*, 419 U.S. 881 (1974); *State v. Adams*, 247 S.E.2d 475 (W. Va. 1978).

The clearest articulation of the minority view is *Clinard v. State*, 548 S.W.2d 716 (Tex. Crim. App. 1977). *Clinard* first decided refusals were testimonial under general fifth amendment principles:

a defendant's silence or negative reply to a demand or request by an officer made upon him while under the necessary compulsion attendant with custodial arrest, which demand or question reasonably called for an immediate reply by the defendant, is clearly a tacit or overt expression and communication of the defendant's thoughts in regard thereto.

Id. at 718.

Clinard then, unlike *Gay*, addressed the circumstantial evidence argument and concluded it was erroneous.

[I]f an accused under custodial arrest is requested or offered a chemical test for intoxication, anything he does other than affirmatively agree to same is a refusal to submit. Thus, escape and flight are not 'compelled', a necessary factor under the Fifth Amendment, but a refusal to take a chemical test by silence or negative reply to a State's request or offer is compelled.

Id. at 718-19.

Few cases finding refusals admissible did more than merely cite the *Schmerber* footnote for the proposition that the issue was left undecided there. *Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969), *cert. denied*, 397 U.S. 966 (1970), relying on *Ellis* and *Sudduth* to find no privilege violation resulted from admitting refusals attempted to deal with the usually ignored *Schmerber* language. "The first portion . . . discusses an accused who incriminates himself 'when told that he would have to be tested'. . . . In context the Court seems here to be talking of an incriminating statement by the accused which is induced by the requirement that the test be taken. . . ." *Id.* at 518.

If no such statement was made, *Newhouse* considered the first part of the *Schmer-*

Fortunately the United States Supreme Court has recently resolved any question involving admissions of refusals and the fifth amendment Privilege against Self-Incrimination.

In *South Dakota v. Neville*,¹³⁴ an arrested driver declined a blood alcohol test after being warned several times that his refusal could lead to loss of driving privileges.¹³⁵ Before trial he successfully moved to suppress all evidence of the refusal. On the state's appeal from the suppression order, the South Dakota Supreme Court, while recognizing there may be no federal constitutional right to refuse blood-alcohol testing, determined a refusal's admission violated a driver's fifth amendment rights. The court first decided a refusal was a communicative act¹³⁶ for fifth amendment purposes and also decided the evidence

ber footnote inapplicable. Refusal was not a statement but conduct indicating a guilty conscience. In a curious bit of reasoning, *Newhouse* also found the second part inapplicable.

Read together, . . . the two portions . . . indicate that a refusal to take a blood test is not a testimonial 'statement' within the Fifth Amendment; rather, it is best described as conduct indicating a consciousness of guilt. See *People v. Ellis*. Nonetheless, the reference to the *Miranda* footnote can be read to imply that where an underlying right to refuse such a blood test is present, it would be improper to draw adverse inferences from failure of the accused to respond to a request . . . because the accused would thereby be penalized for exercising his rights to refuse the test.

Id. (footnotes omitted).

Newhouse implied such "underlying right" arose from state statutes or state constitutional decisions governing refusals. Close scrutiny demonstrates that such reasoning would have eliminated all federal constitutional considerations when deciding whether a refusal is admissible. If a statute or state constitutional decision gave a right to refuse testing, cases should be decided on the basis of the statutory language or state constitutional law, not federal constitutional principles. If so, then the Court's indication that "general Fifth Amendment principles" should apply in analyzing refusals to submit to breath testing would become meaningless.

134. 103 S. Ct. 916 (1983).

135. South Dakota's Implied Consent Law originally gave drivers the right to refuse breath testing, See S.D. COMP. LAWS ANN. § 32-23-10 (1973). Admitting a driver's refusal violated this statutory right. *State v. Oswald*, 90 S.D. 342, 241 N.W.2d 566 (1976). However the South Dakota legislature subsequently changed its Implied Consent Law to provide that "such refusal may be admissible into evidence at the trial." See S.D. COMP. LAWS ANN. § 32-23-10.1 (Supp. 1982).

136. "A defendant's silence or refusal to submit to a requested blood test is a tacit or overt expression and communication of defendant's thoughts." *State v. Neville*,

was "compelled" by the arrest circumstances.¹³⁷

Accepting certiorari to resolve the conflict among the states on this question, the United States Supreme Court reversed. The Court first noted *Schmerber* would clearly permit states to force suspected drivers to give blood alcohol tests and characterized the passage of implied consent laws as means "to avoid violent confrontations".¹³⁸ While acknowledging the *Ellis-Sudduth* argument that refusals are physical acts from which evidence of guilt can be circumstantially inferred rather than communications or testimony, the Court declined to rest its decision on this basis.¹³⁹ Instead the Court found "compulsion" for the fifth amendment purposes was not present based upon two factors. First, the Court noted "the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion'".¹⁴⁰ Clearly *Neville* did not present such a situation. Indeed, since the police respected the driver's refusal of testing, there was a total lack of physical force. Second, the Court noted the driver was clearly given a choice: submit to testing or have his refusal admitted at trial. The ultimate choice between the alternatives was made by the driver, not by the state. The mere fact that the driver was compelled by law to decide between these did not involve a fifth amendment violation. While not every situation where an individual is forced to choose between two alternatives will mean there is no "compulsion",¹⁴¹ since South Dakota could have lawfully eliminated

312 N.W.2d 723, 726 (1982) (citing *Gay v. Orlando*, 202 So. 2d 896 (Fla. 4th Dist. Ct. App. (1967) as authority).

137. In essence, the court found the driver caught between two choices: cooperating and possibly incriminating himself or refusing and possibly doing the same. *State v. Neville*, 312 N.W. at 726.

138. *Neville*, 103 S. Ct. at 921.

139. The Court most likely did so in order to avoid having to re-consider in future cases when consciousness of guilt could be fairly inferred from refusals and when it could not.

While we find considerable force in the analogies to flight and suppression of evidence . . . , we decline to rest our decision on this ground. As we recognized in *Schmerber*, the distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases. The situations arising from a refusal present a difficult gradation [between various types of refusals]."

Id. at 921-22 (footnote omitted).

140. *Id.* (citing *Fisher v. United States*, 425 U.S. 391, 397 (1976)).

141. The Court gave two examples when a choice would not avoid fifth amend-

any choice whatever and forcibly obtained the evidence, the mere fact it set up an alternative with possible unpleasant ramifications did not make any constitutional difference.¹⁴² Thus the Court held "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."¹⁴³

After *Neville*, the constitutionality of Florida Statutes section 316.1932(1)(a) is no longer debatable.

2. Due Process Grounds

Due process problems with admitting refusals may exist for two reasons. First, the driver may be misled about the right to refuse or consequences of refusal. Second, courts may feel refusals lack probative value and unfairly force drivers to offer explanatory testimony.

Drivers can be misled about their rights to refuse in a number of ways. The clearest instance occurs when an arrested driver is told he has the right to refuse testing even though state law grants none. Under such circumstances admitting a refusal would be unfair since its probative value is difficult to ascertain. The driver could be refusing because of fear of failing the test or merely due to a choice to take what was represented as a legal right. Indeed, writers disagreeing with *Gay v. Orlando's* discussion argue it is more properly interpreted on due process grounds.¹⁴⁴ Likewise in *State v. Duke*,¹⁴⁵ although the court found no statutory right to refuse testing, it decided the driver could have been misled by the arresting officer into believing he had a

ment problems: First, where a criminal defendant would be given the choice of either truthfully testifying involuntarily, falsely testifying thus risking perjury charges, or declining to testify thus risking contempt charges. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) and second, where the given alternative was so unpleasant a person would almost certainly admit guilt. See *Schmerber*, 384 U.S. at 765 ("a test so painful, dangerous or severe, or so violative of religious beliefs").

142. "[T]he choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Neville*, 103 S. Ct. at 923.

143. *Id.*

144. See Hauser, *supra* note 122, at 237-38; Comment, *supra* note 131, at 56-58.

145. 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979).

legal choice.¹⁴⁶ If *Miranda* warnings are given to an arrested driver, the driver may believe a refusal is allowed. Even pre-*Neville* cases holding admission did not violate the privilege against self-incrimination have recognized this possibility.¹⁴⁷ When this happens additional admonitions are almost universally required.

Situations may occur where a person in custody does not have fair notice of the limits of his rights, and becomes confused about whether he need comply with official directions. . . . where a driver exhibits confusion as to the scope of his rights, the officers should tell him of his duty to comply with directions or alternatively elaborate on their description of his rights.¹⁴⁸

Florida case law contains no requirement that an additional admonition be given that *Miranda* warnings do not provide a legal basis for refusal. However *Duke* implies that such a warning should be required to avoid misleading drivers.¹⁴⁹ Such warnings should be required; especially since now *Neville* decided that admitting refusals does not violate fifth amendment protections more states are likely to statutorily declare that refusals should be admissible.

Additionally, after *Neville*, one Due Process issue has been settled.

146. The arresting officer told the driver, "I am now offering to give an approved test of your breath for the purpose of determining the alcoholic content of your blood." *Id.* at 98. Emphasizing the officer's use of the word "offering", the court found "a reasonable person in the defendant's position could believe he had a Legal choice as to whether to submit to the test." *Id.*

147. See *People v. Ellis*, 421 P.2d 393, 55 Cal. Rptr. 393 (1966).

148. *Newhouse v. Misterly*, 415 F.2d 514, 518 (9th Cir. 1969), relying on the following language from *Ellis*

After having given [*M*]iranda warnings, if the police direct a defendant to speak for voice identification and he refuses, they must, as a prerequisite to the use of the defendant's refusal to speak as evidence of consciousness of guilt, advise him that the right to remain silent does not include the right to refuse to participate in such a test.

421 P.2d at 398-99.

See also *State Dept. of Highways v. Beckey*, 291 Minn. 483, 192 N.W.2d 441 (1971).

149. "The defendant should have been told that the officer was prepared to give an approved chemical test; that the driver did not have a right to refuse; but that if he did refuse that his driver's license would be revoked for a period of three months." 378 So. 2d at 98.

Besides raising Privilege against Self-Incrimination arguments, the driver claimed Due Process was violated, because he was not told his refusal could be used at trial. The driver argued his situation was analogous to that in *Doyle v. Ohio*¹⁵⁰ where the Court found admitting a defendant's silence after receiving *Miranda* warning was fundamentally unfair. The Court rejected this for two reasons. First, "the right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be burdened."¹⁵¹ The driver's right to refuse did not arise from any constitutional right but from a statute existing only through legislative grace. Second, *Miranda* warnings emphasized the disadvantages of speaking, not any adverse consequences from silence. In *Neville*, the statutory warning about potential loss of driving privileges, "contained no such misleading assurances as to the relative consequences of his choice."¹⁵² Indeed, if anything, the assurances were in the opposite direction—refusal would lead to state action to suspend the driver's license.¹⁵³ Thus after *Neville*, mere failure to warn that refusal of testing is admissible against the driver at trial does not violate due process rights.

Although Florida law, like South Dakota's, provides that refusal of testing is admissible, no statute requires the driver be so informed. After *Neville*, the question still remains whether a warning should not be legislatively required although its absence is admittedly not constitutionally fatal. Why such a requirement is omitted is puzzling, considering how easy it would be to give such a warning. Police officers have found no difficulty complying with the *Miranda* warnings in similar circumstances. Moreover, whether drivers should be warned of a refusal's consequences should be considered in connection with Florida Statutes section 316.1932(a)¹⁵⁴ stating "A warning of the consent provision of this section shall be printed above the signature line on each new or renewed driver's license issued after the effective date of this

150. 426 U.S. 610 (1976).

151. *Neville*, 103 S. Ct. at 923.

152. *Id.* at 924.

153. "It is true the officers did not inform respondent of the further consequence that evidence of refusal could be used against him in court, but we think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur." *Id.*

154. FLA. STAT. § 316.1932(e) (Supp. 1982).

act."¹⁵⁵

Additional language should be included that any refusal of consent would be admissible in court. Even commentators arguing refusals should be admissible agree drivers should be so warned.¹⁵⁶ One state supreme court requires such warnings.¹⁵⁷

States viewing refusals probative of a guilty conscience see no due process problem in admitting them and possibly forcing drivers to testify. Other states have questioned the probative value of refusals. The Supreme Court in *Schmerber* recognized that some factual circumstances cast considerable doubt on a refusal's relevance, although *Schmerber* having no concerns based on fear, health or religion, did not present such a situation.¹⁵⁸

Some courts consider only these instances,¹⁵⁹ but others recognize additional circumstances when admission would be unfair.¹⁶⁰ The only empirical study examining reasons for refusals concludes they stem from unknown sources.¹⁶¹ One Florida writer argues that forcing driv-

155. *Id.*

156. See Hauser, *supra* note 122, at 236-38; Arnella, *supra* note 122, at 57, n.130. Indeed *Neville* suggests such should be done even though not constitutionally required: "Since the State wants the suspect to submit to the test, it is in its interest fully to warn suspects of the consequences of refusal. We are informed that police officers in South Dakota now warn suspects that evidence of their refusal can be used against them in court." 103 S. Ct. at 924, n.17.

157. *Puller v. Municipality of Anchorage*, 574 P.2d 1285 (Alaska 1978); See also *State v. Parker* 16 Wash. App. 632, ___, 558 P.2d 1361, 1363 (1976) ("had the statute intended evidentiary use of . . . refusal, it is logical that the arresting officer would be required to inform [a driver] refusal could be used in a criminal proceeding").

158. 384 U.S. at 771. *Neville* did not overrule this language.

159. See *Ellis*, 421 P.2d at 398.

160. See, e.g., *State v. Adams*, 247 S.E.2d 475, 478 (W. Va. 1978) ("where there is no explanation of defendant's refusal offered, the evidence is untrustworthy. . . . Defendant could have been afraid of the test itself and not the results. . ."); *State v. Jackson*, 637 P.2d 1, 3 (Mont. 1981) ("not always reliable, and is highly prejudicial to the defendant, in effect forcing him to take the witness stand to explain. . .").

161. Argeriou, *Refusal to Take Breathalyzer Test-Rebutting Adverse Presumption*, 11 CRIM. L. BULL. 350 (1975). This study of 281 drunk driving offenders using ten variables to compare test takers versus nontakers concludes there is "little support for the assumption that individuals who refused . . . did so as a result of heightened 'consciousness of guilt' and a conscious desire to avoid providing additional and specific chemical evidence of their level of intoxication." *Id.* at 353.

ers to offer explanations does not violate due process.¹⁶² However, this is predicated on the belief the defendant could only be cross-examined on the reasons for refusal, if he does not testify on other matters. Arguably Florida Statutes section 90.612(2)¹⁶³ allows for this. However this argument ignores the last sentence, "The court may, in its discretion permit inquiry into additional matters."¹⁶⁴

When discretion is exercised to allow widened cross-examination, is reversal likely? Based on one recent case, the answer must be "no". In *MaGahee v. Massey*,¹⁶⁵ the Eleventh Circuit reviewed a Florida rape conviction. MaGahee was accused of attacking the victim on October 11, 1973. To prove he was the perpetrator, the state offered testimony of another witness that the defendant exposed himself one month before at the same place the rape occurred. MaGahee testified not about the events of October 11th, but that he was elsewhere at the earlier time. When cross-examination went beyond this, defense counsel's objection was overruled. Additionally, the prosecutor commented in closing argument about McGahee's failure to testify about the October 11th events. Both the Fourth District Courts of Appeals and the Florida Supreme Court affirmed without opinions.¹⁶⁶ The Eleventh Circuit denied a habeas corpus petition which argued that extended cross-examination violated fifth amendment privileges, since it considered these waived when McGahee voluntarily chose to testify. The court distinguished this situation from instances where the defendant, by testifying on collateral matters, does not open up the cross-examination.¹⁶⁷ Once

162. Hauser, *supra* note 122, at 239.

163. Florida Statutes section 90.612(2) (1981) states in part "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness."

164. *Id.*

165. 667 F.2d 1357 (11th Cir. 1982).

166. *McGahee v. State*, 302 So. 2d 835 (Fla. 4th Dis. Ct. App. 1974), *cert. denied*, 311 So. 2d 671 (Fla. 1975).

167. *Calloway v. Wainwright*, 409 F.2d 59 (5th Cir. 1969), *cert. denied*, 395 U.S. 909 (1969) was cited as an example of a collateral matter. *Calloway* found that by testifying solely to a confession's circumstances, a defendant does not open up himself up to cross-examination or comment in closing argument on failure to testify about other matters. The line is a fine one and easily crossed. *See also United States v. Hearst*, 563 F.2d 1331, 1338-40. (9th Cir. 1977) (limiting the *Calloway* collateral matter versus merits distinction to confessions alone, defendant's testimony to post-robbery

a defendant testifies about the "merits", the cross-examination becomes full-bloom. In *McGahee* this happened once the defendant testified on the element of identity.

Refusal of chemical testing surely will not be considered a collateral matter. Since the refusal is likely to happen at the arrest scene, courts may easily surmise that by testifying about this, the defendant opens himself up to cross-examination about everything happening at the scene. Moreover, if courts consider refusal relevant to show a guilty conscience, explaining why a person refused goes directly to the "merits".

If Florida decides refusals should be admissible in certain cases, better procedure would be to utilize Florida Statutes section 90.105,¹⁶⁸ *Preliminary Questions*. Since the Supreme Court indicated admitting refusals under certain circumstances violates due process, initial screening of reasons for refusal should be done at preliminary hearings. Initial decisions about a confession's voluntariness are solely for a judge.¹⁶⁹ However, due process does not require a hearing outside the jury's presence in every case of alleged suggestive identification since determining an identification's reliability is a traditional jury role.¹⁷⁰ However such hearings are "advisable" and sometimes "constitutionally necessary".¹⁷¹ The issue of admitting testing refusal is significantly different from a suggestive identification question. Other witnesses, especially the victim, are available for examination in an identification case. However, in a refusal issue the driver is likely to be the only one knowing why he refused the test.¹⁷² Forcing drivers to testify before a jury on this would possibly subject them to extended cross-examination and unfavorable inferences from not testifying on other matters.

public admissions of participation goes to merits), *cert. denied*, 435 U.S. 1000 (1978).

168. FLA. STAT. § 90.105, *Preliminary Questions* (1981).

169. *Jackson v. Denno*, 378 U.S. 368 (1964). This is necessary since a jury might focus on the confession's reliability and not its voluntariness or be influenced in the voluntariness decision by need to use the confession in evaluating a defendant's guilt.

170. *Watkins v. Sowders*, 449 U.S. 341 (1981).

171. *Id.* at 349.

172. One exception might be where the driver refused for medical reasons. Then a doctor could supply the needed explanation.

Florida Statutes section 90.105(1)¹⁷³ obligates judges to decide “preliminary questions concerning” the admissibility of evidence. If the defendant wishes to testify concerning his reason for refusal, the second sentence of section 90.105(3)¹⁷⁴ should require a preliminary hearing. If the court finds refusal was for a valid reason, the refusal should be excluded.¹⁷⁵ If the state meets its burden of disproving this¹⁷⁶ a refusal would be submitted to a jury for consideration of its weight. Thus drivers would be given some opportunity to demonstrate valid grounds for refusal and not have to worry about waiving their fifth amendment rights not to testify at trial.¹⁷⁷

IV. CURRENT CONSTITUTIONAL ISSUES

A. Forcible Blood Sampling

Florida courts have condemned taking blood samples from protesting drivers. However all cases excluding forcible blood extractions were based on the original Implied Consent Law’s language. Former Florida Statutes’ section 322.261(1)(c)¹⁷⁸ allowed blood tests when a driver was “so incapacitated as to render impractical or impossible the administration”¹⁷⁹ of a breath test and acceptable medical standards were followed. This provision has been retained by the new law.¹⁸⁰ When blood sampling was done contrary to these provisions, the sample

173. See FLA. STAT. § 90.105(1) (1981).

174. FLA. STAT. § 90.105(3) (1981).

175. Not all courts agree reasons for refusal are a matter for courts initially. See *Commonwealth v. Robinson*, 324 A.2d 441 (Pa. 1979), considering this a jury issue.

176. See *Lego v. Twomey*, 404 U.S. 477 (1972), prosecution has burden of proving voluntariness of confession by preponderance of the evidence. Cf. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975) suggesting that for confessions, dying declarations and some declarations against interest, the beyond a reasonable doubt standard should be used for preliminary fact-finding.

177. Another alternative is to make refusals admissible only if the defendant testifies and not in the state’s case-in-chief. Two states adopt this compromise approach. See R.I. GEN. LAWS § 31-27-2 (Supp. 1981); N.D. CENT. CODE § 39-20-08 (1980).

178. FLA. STAT. § 322.261(1)(c) (1981).

179. *Id.*

180. See *supra* text accompanying notes 65-70 for discussion of temporary changes made in section 322.261(1)(c), now section 316.1932(2)(c).

results were excluded.¹⁸¹

The Supreme Court has viewed unfavorably due process and fourth amendment arguments against non-consensual blood testing. *Breithaupt v. Abram*,¹⁸² found a physician's blood extraction from an unconscious driver in a hospital emergency room "would not be considered offensive by even the most delicate."¹⁸³ However, the *Rochin v. California*¹⁸⁴ situation where police illegally broke into a suspect's home and forcibly pumped his stomach to make him regurgitate narcotics and shocked the court's conscience as "brutal"¹⁸⁵ and "offensive"¹⁸⁶ was distinguished from *Breithaupt* where no force other than puncturing the skin occurred. This intrusion was considered small when balanced against society's interest in detecting and deterring intoxicated drivers. *Breithaupt* emphasized that due process violations depend not on personal reaction to a particular procedure but on what the community considers offensive. Emphasizing the routineness of such procedures, along with the states' widespread acceptance of blood extractions,¹⁸⁷ the Court concluded they were "not such 'conduct that shocks the conscience' . . . nor such a method of obtaining evidence

181. In *State v. Riggins*, 348 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1977), *cert. dismissed*, 362 So. 2d 1056 (Fla. 1978), blood was forcibly taken from a resisting driver. The court found "the implied consent evidenced by accepting the privilege of operating a motor vehicle in this state may be revoked at the time the chemical test is suggested. . . . Otherwise the sections providing for suspension upon refusal to submit would be superfluous." *Id.* at 1210-11.

Likewise in *Sambrine v. State*, 378 So. 2d 96, blood was withdrawn from a driver who refused a breathalyzer test. Disagreeing with the state's argument that only probable cause was needed, the court noted former section 322.1262(1)(c) provided for blood sampling only when a driver was mentally or physically incapable of withdrawing the implied consent. *See also* *Brown v. State*, 371 So. 2d 161 (Fla. 2d Dist. Ct. App. 1979), *aff'd per curiam*, 386 So. 2d 549 (Fla. 1980); *Lytwyn v. State*, 353 So. 2d 222 (Fla. 1st Dist. Ct. App. 1977); *McDonald v. State*, 364 So.2d 1241 (Fla. 2d Dist. Ct. App. 1978), excluding blood tests taken in violation of the Implied Consent Law.

182. 352 U.S. 432 (1957).

183. *Id.* at 436.

184. 342 U.S. 165 (1952).

185. *Id.* at 172.

186. *Id.* at 174.

187. Forty-seven states had approved chemical intoxication testing through either caselaw or statutes. Among the cases cited was *Touchton v. State*, 18 So. 2d 752 (Fla. 1944).

that it offends a 'sense of justice.'¹⁸⁸ Subsequently *Schmerber v. California*¹⁸⁹ likewise rejected a fourteenth amendment due process objection to blood extractions taken over a conscious driver's protest. In *Schmerber*, the driver was conscious and had verbally, but not physically, protested the extraction. The Court refused to distinguish between invading the skin to secure blood samples of conscious as opposed to unconscious drivers.¹⁹⁰

Schmerber also considered fourth amendment objections to blood extractions. The Court recognized blood extractions involve a search and seizure¹⁹¹ but focused on whether they were "unreasonable" under the circumstances. Probable cause based upon the smell of Schmerber's breath and his general physical appearance supplied justification. Since delay in getting a warrant threatened loss of evidence, none was required. Likewise the procedures used were reasonable because blood sampling is generally effective in determining blood alcohol content and the procedure as performed by a doctor in a hospital, comported with standard medical practices. Fourth amendment objections to Florida's Implied Consent law fared no better than fifth amendment claims. *State v. Mitchell*¹⁹² rejected fourth amendment arguments that arrest was needed before blood could be taken, and recognized that the question was rather the "relevance and likely success" of a blood test.¹⁹³

188. 352 U.S. at 437.

189. 384 U.S. 757 (1966).

190. "We 'cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.'" *Schmerber*, 384 U.S. at 760, n.4 (citing *Breithaupt v. Abram*, 352 U.S. at 441 (Warren, J., dissenting)).

191. The seizure occurred when Schmerber was arrested at the hospital, followed by the search which occurred when blood was taken from his body.

192. 245 So. 2d 618 (Fla. 1971).

193. *Id.* at 622 (citing *Schmerber v. California*, 384 U.S. 757, 769 (1966)). See also *Filmon v. State*, 336 So. 2d 586 (Fla. 1976), *cert. dismissed sub. nom.*, *Filmon v. Florida*, 430 U.S. 980 (1980); *State v. Edge*, 397 So. 2d 939 (Fla. 5th Dist. Ct. App. 1981). *But see United States v. Harvey*, 701 F.2d 800 (9th Cir. 1983) construing blood sampling in *Schmerber* as a search incident to lawful arrest, thus requiring formal arrest before blood extraction unless consent given. Several states have upheld blood samples from unconscious drivers on a different basis. In *Aliff v. State*, 627 S.W.2d 166 (Tex. Crim. 1982), blood taken from an unconscious driver was admitted over his fourth amendment objections. The court agreed *Schmerber* was distinguishable since there the driver was both under arrest and conscious. However the court justified the

After *Breithaupt* and *Schmerber*, there is no constitutional problem with extracting blood from an unconscious or verbally protesting driver. Other situations may present difficulties however. The new "drunk driving" law adds a section on blood sampling going beyond *Breithaupt* and *Schmerber*. Florida Statutes section 316.1933,¹⁹⁴ *Blood Test for Impairment or Intoxication* states in part:

(1) Notwithstanding any recognized ability to refuse to submit to [breath or urine tests] or any recognized power to revoke the implied consent to such tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person while under the influence of alcoholic beverages or controlled substances has caused the death or serious bodily injury of a human being, such person shall submit, upon request of a law enforcement officer, to a test of his blood for the purpose of determining the alcoholic content of his blood or the presence of controlled substances. The law enforcement officer may use reasonable force, if necessary to require such person to submit to the administration of the blood test.***¹⁹⁵

Whether the provision allowing police to "use reasonable force, if necessary" constitutionally affords an arrested driver due process is questionable. As mentioned above, *Breithaupt* and *Schmerber* both rejected due process violations. However, neither case covers the situation contemplated by section 316.1933. Indeed *Schmerber* noted three situations where section 316.1933 presents problems. "It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to

sampling based on *Cupp v. Murphy*, 412 U.S. 291 (1973), which upheld taking fingerprint scrapings from an unarrested defendant. *Aliff* noted both the routiness of blood testing and the possibility evidence would be lost if delay ensued. This presented exigent circumstances justifying the warrantless search. See also *State v. Oevering*, 268 N.W.2d 68 (Minn. 1978); *DeVaney v. State*, 259 Ind. 483, 288 N.E.2d 732 (Ind. 1972); *Van Order v. State*, 600 P.2d 1056 (Wyo. 1979); *State v. Campbell*, 615 P.2d 190 (Mont. 1980); *State v. Heintz*, 286 Or. 239, 594 P.2d 385 (1979) relying on similar reasoning to uphold blood sampling from severely injured or unconscious drivers.

194. FLA. STAT. § 316.1933 (Supp. 1982).

195. *Id.* at (1). "Serious bodily injury" is defined as "a physical condition which creates a substantial risk of death or serious, personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.*

resistance with inappropriate force".¹⁹⁶

Arguably, the easiest situation to resolve occurs when a driver protests blood extraction and makes "a reasonable request to undergo a different form of testing."¹⁹⁷ *Schmerber* specifically notes several reasons a driver would do so: "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."¹⁹⁸

Does Florida Statutes section 316.1933 require arresting officers to first offer other tests or administer them if requested? The key language appears in Florida Statutes section 316.1933's beginning: "Notwithstanding any recognized ability to refuse to submit to the tests provided in Fla. Stat. § 316.1932. . . ."¹⁹⁹ Thus whether a driver is capable of giving a breath or urine sample appears irrelevant if probable cause exists and serious bodily injury to another occurred. This language clearly conflicts with the *Schmerber* dictum. Police may desire blood samples because of their recognized reliability.²⁰⁰ However when the desire to obtain blood conflicts with an individual's reasonable desire for other testing methods, the alternatives should be constitutionally required. Under such conditions, *Schmerber* implies that no amount of force, no matter how slight, is "reasonable". Several states have recognized *Schmerber's* dictum by prohibiting blood sampling in these circumstances.²⁰¹ Forcibly taking blood when these arise violates

196. 384 U.S. at 760, n.4. This language was again cited with approval in *Neville* as examples of situations which could present Due Process problems. See 103 S. Ct. at 921, n.9.

197. 384 U.S. at 760, n.4.

198. *Id.* at 771.

199. FLA. STAT. § 316.1933 (Supp. 1982).

200. Blood testing is generally considered the most reliable, followed by breath testing and then urinalysis. See Fitzgerald & Hume, *The Single Chemical Test for Intoxication: A Challenge to Admissibility*, 66 MASS. L. REV. 23 (1981); A. MOENSSENS & F. INBAU, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* §§ 2.04-2.07 (2d ed. 1978). Ironically *Perryman v. State*, 242 So. 2d 762 (Fla. 1st Dist. Ct. App. 1971), upheld the propriety of denying blood tests to a driver who previously refused breath testing.

201. See CAL. VEH. CODE § 13353(d), (e) (Deering 1972) exempting from blood testing hemophiliacs and persons taking anticoagulants for a heart condition; R.I. GEN. LAWS § 31-27-2.1 (1982) exempts religious objectors.

due process, despite Florida Statutes section 316.1933's authorization.

The remaining two situations *Schmerber* contemplates involve the same question, what is "reasonable force"? A literal reading of "if the police initiated the violence,"²⁰² could prevent use of *any* force once a driver refuses. Since *Schmerber* also used the words "or responded to resistance with inappropriate force,"²⁰³ the prior language should be read as "if the police initiated the [unnecessary] violence."²⁰⁴ Since blood extractions involve searches and seizures, some courts after *Schmerber* feel the question of "reasonable force" involves fourth amendment considerations rather than due process ones.²⁰⁵ Where force is reasonable for fourth amendment purposes, it would satisfy due process.

"Reasonableness" must be considered separately under each set of facts. As stated by one court "[t]here is no slide-rule formula yet devised for ascertaining whether specific conduct is or is not reasonable."²⁰⁶ Courts have considered searches of the body's exterior differently from searches involving invasions of the body's interior. Greater justification is required when the body is invaded and the force used to make such an invasion should be closely scrutinized.²⁰⁷ Unfortunately, after *Schmerber*, few cases address the constitutionality of forcible blood extractions. Many are decided on other issues, such as violations of state Implied consent laws. Florida can no longer consider blood sampling solely in statutory violation terms when the section 316.1933's conditions exist. Thus examination of case law dealing with other bodily invasions is needed.

Bodily invasions are common in narcotics border searches. While

202. 384 U.S. at 760, n.4.

203. *Id*

204. *Id*.

205. See *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); *People v. Bracamonte*, 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975). Even before *Rochin*, *Breithaupt* and *Schmerber*, one writer argued courts were merging due process and fourth amendment "reasonableness" standards. Bachelder, *Use of Stomach Pump as Unreasonable Search and Seizure*, 41 CRIM. L. & CRIMINOLOGY 189 (1950).

206. *Blackford*, 247 F.2d at 751.

207. See *Brent v. White*, 398 F.2d 503 (5th Cir. 1968) (penis scraping to obtain victim's menstrual blood permissible search incident to lawful arrest involving no intrusion of body's surface), *cert. denied*, 393 U.S. 1123 (1969).

there is often official force used to search the person's body, the courts have usually upheld the constitutionality of the law enforcement actions involved. Shortly after *Breithaupt*, *Blackford v. United States*²⁰⁸ challenged the forcible extraction of narcotics from a defendant's rectum. Blackford was forcibly restrained and undressed, then subjected to an unsuccessful anal probe. Following this, several forcibly given enemas resulted in recovery of narcotics. Applying a "reasonableness" test claimed to be stricter than a due process scrutiny, the Ninth Circuit found substantial factual similarity to *Breithaupt* and many differences with *Rochin*.

Rochin was subjected to a whole series of abuses and violations of his rights commencing with the unlawful entry into his dwelling, continuing with the forcible attempt by the officers to prevent him from swallowing the capsules, and culminating with the forcible stomach pumping. In contrast, Blackford was treated civilly throughout and was subjected to physical pressure only when the examinations were to be performed.²⁰⁹

The court dismissed claims the procedures used inflicted unreasonable pain. As long as the infliction was not malicious or excessive no problem existed. Numerous cases have relied on *Blackford's* interpretation of *Rochin* and upheld anal searches,²¹⁰ emetics,²¹¹ and stomach pumping²¹² to force narcotics from a suspect's body.

Like body searches at the border, operations to recover bullets from a defendant's body involve fourth amendment and due process issues. Generally, the courts have upheld such procedures. In *United States v. Crowder*,²¹³ an operation to recover a bullet from the defen-

208. 247 F.2d 745.

209. *Id.* at 752.

210. See *Denton v. United States*, 310 F.2d 129 (9th Cir. 1962); *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965).

211. See *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963), *cert. denied* 381 U.S. 920 (1965); *Barrera v. United States*, 276 F.2d 654 (5th Cir. 1960); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

212. *Belfare*, 362 F.2d 870. Cf. *People v. Bracamonte*, 540 P.2d 624 (non border search found unreasonable because no warrant obtained, unnecessary to consider due process issue).

213. 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

dant's arm was permitted. The operation was a minor surgical procedure done under acceptable medical conditions, with probable cause to believe it would produce relevant evidence.²¹⁴

Are border searches and operations distinguishable from blood sampling? All involve bodily invasion. Border searches and operations for bullets are necessary to obtain evidence which may not be obtainable otherwise. However, in regard to blood alcohol testing less intrusive breath and urine tests exist. Moreover, to some people blood sampling will be more dangerous than minor operations or border search devices. Yet since section 316.1933 gives police authority to require blood sampling as long as "reasonable force" is used the driver has no opportunity to prevent being exposed to the danger. Although in blood sampling the Supreme Court recognizes delay will result in loss of evidence, this relates only to the need for testing, not the exact method chosen. A recent New York case illustrates this important distinction. *Matter of Abe A.; Jon L. v. District Attorney*,²¹⁵ upheld an order requiring blood samples needed to connect the defendant with his business partner's murder. Blood at the scene was of two types; the victim's and a rare kind belonging to one percent of the population. After deciding probable cause existed and safe medical procedures would be used, the court noted that "no alternative means of obtaining the evidence was brought forward. . ."²¹⁶ This situation contrasts greatly with the usual drunk driving case where alternatives are available to determine blood alcohol content. Measured by this criteria, section 316.1933 cannot withstand constitutional scrutiny.

A few cases exclude blood samples because of due process violations resulting from either police initiated force or unnecessary force in

214. Before the operation, a warrant was issued approving only the recovery of a bullet in the arm. A second bullet was left undisturbed, since an operation to secure this presented danger of permanent damage. *See also* *State v. Overstreet*, 551 S.W.2d 621 (Mo. 1977); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (Ga. 1972), *cert. dismissed*, 410 U.S. 975 (1973); *State v. Allen*, 291 S.E.2d 459 (S.C. 1982); *State v. Martin*, 404 So. 2d 960 (La. 1981). *Contra* *Indiana v. Adams*, 229 N.E.2d 834 (Ind. 1973), *cert. denied sub nom.*, 415 U.S. 935 (1974), adopting *per se* rule that surgical removal of bullets violates fourth amendment.

215. 56 N.Y.2d 288, 437 N.E.2d 265 (1982).

216. *Id.* at ___, 437 N.E.2d at 271.

response to a suspect's resistance. In *People v. Kraft*,²¹⁷ while the actual procedure used to extract blood was medically safe, the surrounding circumstances made the process medically unacceptable. Police arrested Kraft after an accident and took him to a local hospital handcuffed. One officer punched Kraft to force him into the hospital, without any good reason for doing so. Once the handcuffs were removed, the driver objected to the blood extraction on morality grounds. When he resisted, his arms were grabbed and he was led to an examination room where he was pushed onto the floor and held down by two officers until blood was taken. The court found the police "were aggressive beyond all need."²¹⁸ Likewise, in *United States v. Townsend*,²¹⁹ the defendant was beaten without explanation and had his arms twisted when he resisted efforts to scrape his penis for blood samples in a rape case. Citing *Rochin*, the court found this violated due process.

Kraft and *Townsend* demonstrate the excessive police action Florida Statutes section 316.1933(1) may generate.²²⁰ Why did the legislature pass such a provision considering other sections of the new Implied Consent law? Breathalyzers show the same results as blood analysis; when a refusal occurs, the new law makes it admissible. Since the Supreme Court in *Neville* upheld admitting evidence of refusals, § 316.1933(1) will do more harm than good. Implied Consent laws were passed to prevent the very violence section 316.1933(1)(a) may cause.²²¹ Considering there were incidents of police violence under the former Implied Consent Law²²² this section will only encourage more.

217. 3 Cal. App. 3d 890, 84 Cal. Rptr. 280 (1970).

218. 3 Cal. App. 3d ___, 84 Cal. Rptr. at 286.

219. 151 F. Supp. 378 (D.D.C. 1957).

220. See also *People v. Allen*, 86 Cal. App. 3d 948, 150 Cal. Rptr. 568 (1978) police officer's putting gun to defendant's neck and threatening to shoot unless suspected heroin balloons were not swallowed, violated due process since "the officers were aggressive beyond all need." *Id.* at ___, __ P.2d ___, 150 Cal. Rptr. at 572.

221. "In general, legislatures have recognized that people under the influence of alcohol tend to be more abusive, and combative than they would be if sober. To require law enforcement officials to withdraw blood could easily lead to a pitched battle between police and the accused." Hauser, *supra* note 122, at 222.

222. See, e.g., *State v. Riggins*, 348 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1977), where police sat on a driver and twisted his broken arm to force submission. Unsuccessful, they threatened to jail him even though he was catheterized. Not surprisingly, at this point the driver gave the sample.

Hopefully section 316.1933(1)(a) will be seldom improperly utilized and soon repealed or declared unconstitutional.

B. Miranda Warnings and Drunk Driving

Another Privilege against Self-Incrimination question is whether arrested drivers must be given *Miranda* warnings. Under present Florida practices, arresting officers fill out an Alcohol Influence Report before chemical testing.²²³ The report contains not only the arresting officer's observation of the driver, but also specific questions drivers must be asked.²²⁴ The answers may affect the weight given chemical test results showing a driver's blood alcohol content. Since the statutory presumptions resulting from chemical influence are only "prima facie" evidence and not conclusive,²²⁵ a driver's trial testimony can explain why the results should be ignored.²²⁶ However, by providing the information police ask for, drivers may assist the state in building its case. *Miranda v. Arizona*²²⁷ held that whenever a person is in custody and under interrogation, certain warnings must be given prior to questioning to apprise the individual of his fifth amendment rights.²²⁸ Since by statute a driver must be "lawfully arrested" before being required to undergo chemical testing, *Miranda's* custody requirement is satisfied.²²⁹ Likewise the questions asked constitute "interrogation."²³⁰

223. Florida Highway Patrol Form No. 711.

224. For example, the driver is asked: "Have you been drinking?" and "Are you under the influence of an alcoholic beverage now?" *Id.*

225. FLA. STAT. § 316.1934(2)(c) (Supp. 1982).

226. See Fitzgerald & Hume, *supra* note 200, at 28-35 discussing factors affecting an individual's blood alcohol level.

227. 384 U.S. 436 (1966).

228. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

229. *Miranda* indicates custody exists "After a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. Courts have difficulty dealing with the second part of this definition. A narrow construction would allow more police questioning without warnings. In *State v. Roberti*, 644 P.2d 1104 (Or. 1982), a police officer admitted he intended to arrest before ques-

Only two Florida cases discuss whether drivers charged with traffic offenses should be given *Miranda* warnings. *County of Dade v. Callahan*²³¹ considered whether *Miranda* warnings should be given before field sobriety or breathalyzer tests are administered. Merely citing cases from other states finding *Miranda* warnings unnecessary in drunk driving cases, the court held that since the driver was charged with violating a city ordinance making drunk driving a petty offense, no warnings were needed. In *State v. Oliver*²³² an arrested driver refused to answer questions asked before a breath test was taken. The county court refused to suspend his license holding he was "under no obligation to answer questions or to perform physical tests. His sole duty is to blow into the breathalyzer machine."²³³ However, the Circuit Court reversed, based on *Callahan* and the additional rationale that since implied consent proceedings are civil administrative matters not criminal cases, the driver was not entitled to warnings.

The *Callahan-Oliver* reasoning is questionable at best. Neither case analyzed whether *Miranda* should apply to drunk driving arrests and were merely content to cite other cases holding it does not. The rationale that there is a distinction between criminal drunk driving proceedings and civil license suspensions has been heavily criticized by one

tioning a driver, but claimed this was not communicated. Examining whether this constituted custody, the court originally decided the definition's second part referred to "situations of greater deprivation of freedom of action than the ordinary stop of a car . . . , but short of formal arrest." *Id.* at 1109. Custody did not exist since the officer never mentioned his intentions. Justice Linde, dissenting, argued one of the majority opinion's dangers is potential misapplication in all drunk driving cases. "[I]t may be thought to stand for proposition that the crime of driving under the influence of intoxicants somehow is *sui generis* as far as *Miranda* warnings before questioning are concerned." *Id.* at 1125.

On rehearing, the court decided custody existed when the officer formed the intent to arrest. *Roberti*, 646 P.2d 1341 (1982), *petiton for cert. filed*, 51 U.S.L.W. 3208 (U.S. Sept. 28, 1982) (No. 82-315).

230. *Rhode Island v. Innis*, 446 U.S. 291 (1980), defined this as "not only . . . express questioning; but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301.

231. 259 So. 2d 504 (Fla. 3d Dist. Ct. App. 1971).

232. 47 Fla. Supp. 111 (Circuit Court, Palm Beach County, 1977).

233. *Id.* at 114 (Palm Beach County Court 1976).

recent federal court considering a "right to counsel" issue.²³⁴ Since these two cases summarily discuss *Miranda's* application a brief look at other jurisdictions is needed.

State courts are split on this issue.²³⁵ Among courts finding warnings unnecessary New Jersey's seem typical. *State v. Macuk*,²³⁶ cited by *Callahan*, found *Miranda* inapplicable to drunk driving arrest for four reasons, all debatable.²³⁷ *Macuk* noted *Miranda* and succeeding Supreme Court cases construing it all involve serious offenses. Thus until the Supreme Court acts otherwise, *Macuk* would limit its scope. This "petty offense" reasoning is wrong. There is no indication *Miranda* was intended to apply only to felonies. Indeed the opinion's language indicates otherwise.²³⁸ Likewise subsequent decisions reject the petty offense argument for sixth amendment purposes. Where incarceration results the Supreme Court has held the "right to counsel" applies.²³⁹

Secondly, *Macuk* felt *Miranda* was limited to stationhouse questioning designed to "sweat out" a confession. This reasoning misreads *Miranda* in two respects. *Miranda* was concerned with such cases but

234. *Heles v. South Dakota*, 530 F. Supp. 646 (D.S.D. 1982), *vacated and remanded on other grounds*, 682 F.2d 201 (8th Cir. 1982). As *Heles* notes, a drunk driving arrest may result in criminal charges even though chemical testing is refused. The option is not the driver's but the state's. *See also infra*, text accompanying notes 248-57 for further criticism of this distinction.

235. *See State v. Fields*, 294 N.W.2d 404 (N.D. 1980); *State v. Lawson*, 285 N.C. 320, 204 S.E.2d 843 (N.C. 1974); *Commonwealth v. Bonser*, 258 A.2d 675 (Pa. 1969), holding *Miranda* applicable *Contra*, *City of Columbus v. Hayes*, 9 Ohio App. 2d 38, 222 N.E. 829 (1967), *cert. denied*, 389 U.S. 941 (1967); *State v. Bliss*, 238 A.2d 848 (Del. 1968); *State v. Neal*, 476 S.W.2d 547 (Mo. 1972).

236. 57 N.J. 1, 268 A.2d 1 (1970).

237. *See Comment, Miranda and Misdemeanors*, 14 LAND & WATER L. REV. 521 (1979) heavily criticizing *Macuk's* rationale.

238. If the Court wished to draw a felony-misdemeanor distinction, it could easily have done so. The Court aimed at protecting a person's fifth amendment privilege against self-incrimination, whenever the need arose: "[T]here can be no doubt that the fifth Amendment privilege is available *outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way.* . ." 384 U.S. at 467 (emphasis added). This also refutes the *Callahan* criminal offense vs. civil administrative proceedings distinction.

239. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

not limited to them. The Court has indicated *Miranda* applies when custodial interrogation takes place outside a police station.²⁴⁰

Thirdly, the court in *Macuk* felt drunk driving offenses did not merit the extra time needed to inform drivers of their rights. This is a re-hash of the "petty offense" argument. The time consumed in reading a suspect the warnings is short, and many police departments have provided standard *Miranda* warnings cards to use.

Fourth, since New Jersey arrested many drivers yearly for drunken driving, to provide lawyers for all who might request them pursuant to *Miranda* would be too troublesome. This argument has been effectively eliminated in states adopting state-wide public defender systems, like Florida. The real reason for this argument is fear drivers would invoke the right to silence after being warned, thus making cessation of questioning mandatory.²⁴¹

Whether many drivers would invoke *Miranda* to remain silent and demand counsel after a drunk driving arrest is debatable.²⁴² At any rate, this argument misses the main issue. If *Miranda* warnings must be given, drivers are within their rights to remain silent notwithstanding any inconvenience this causes police.

Unfortunately the United States Supreme Court has declined all opportunities to decide this issue.²⁴³ More recent state cases have applied *Miranda* to the drunk driving situation.²⁴⁴ *State v. Fields*,²⁴⁵

240. See *Orozco v. Texas*, 394 U.S. 324 (1969) finding *Miranda* applicable to in-custody questioning in a defendant's bedroom.

241. See also *State v. Bliss*, 238 A.2d at 850 (citing large number of yearly drunk driving arrests as "practical reason why motor vehicle offenses should be treated somewhat differently . . . than most other offenses").

242. See Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967), concluding that for only eight of eighty-one suspects whose interrogations were observed did *Miranda* have any effect; Seeburger & Wettick, *Miranda in Pittsburgh - A Statistical Study*, 29 PITT. L. REV. 1 (1967) concluded *Miranda* had no appreciable effect on crime clearance rates.

243. In *State v. Lewin*, 163 N.J. Super. 439, 395 A.2d 211 (1978), cert. denied, 444 U.S. 905 (1979), Justices Brennan, White and Stewart noted the split among state courts and dissented from denial of certiorari.

244. Even states admitting refusals of testing have applied *Miranda* to drunk driving situations. See *Commonwealth v. Bonser*, 258 A.2d 675 (Pa. 1969); *Campbell v. Superior Court*, 479 P.2d 685 (Ariz. 1971).

245. 294 N.W.2d 404 (N.D. 1980). See also Note, *Criminal Law - Accusatory State of Proceedings - Custody Test Requires Miranda Warnings After DWI Arrest*,

found *Miranda* inapplicable to preliminary questions used to determine whether a person had been driving a wrecked vehicle. However, once the driver was arrested, *Miranda* protections were needed. *Fields* recognized a driver arrested for drunk driving is within custody and questioning him is interrogation. The court recognized a drunk driving arrest's implications and refused to consider it a mere traffic offense.

Florida clearly considers drunken driving a serious offense. Only a brief look at Florida Statutes Section 316.193²⁴⁶ is needed to demonstrate this. Moreover, considering drunken driving a minor violation forces police to unnecessarily distinguish instances where the offense is punishable by less than six months imprisonment and when it may result in manslaughter charges. The Florida Supreme Court has never considered whether *Miranda* applies to drunken driving offense arrests. When the time comes, it should follow the recent trend and apply *Miranda* in this context.

C. Right to Counsel and Chemical Intoxication Testing

In *Schmerber*, the Supreme Court held admitting results of a blood test, taken over the driver's objections based on incorrect advice of counsel,²⁴⁷ did not violate the sixth amendment right to counsel. Close reading shows the decision is not persuasive authority against a right to counsel claim. The driver was afforded the chance to contact his attorney. The right to counsel claim did not involve an access question but merely whether the attorney's advice was correct - a question the Court resolved in its fifth amendment discussion.

When *Schmerber* was tested, California had no Implied Consent law. Afterwards nearly every state passed one. Case law considering whether an arrested driver has a right to counsel unfortunately focuses on different standards. Most decisions discuss the difference between criminal proceedings under a state's drunk driving laws and civil license suspension proceedings under a state's implied consent law. Others consider whether the decision to submit to chemical testing is a "critical stage" requiring counsel. Additionally, a few states distinguish

57 N.D.L. REV. 673 (1981).

246. FLA. STAT. § 316.193 (Supp. 1982).

247. The attorney incorrectly advised *Schmerber* the blood sample was prohibited by the privilege against self-incrimination.

between a right to consult counsel versus the right to have counsel present when testing is done.

1. *Civil License Suspension versus Criminal Proceedings.*

If an arrested driver refuses testing, all states with implied consent laws provide administrative mechanisms for revocation or suspension of a driver's license.²⁴⁸ One recurring question is whether refusal based on a right to counsel claim constitutes refusal for revocation or suspension purposes. If a driver refuses, two possibilities arise: criminal prosecution and license suspension.²⁴⁹ Several states differentiate between the nature of these two proceeding as far as the right to counsel.²⁵⁰ Those states holding no right to counsel exists strictly construe the sixth amendment's language that: "In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel for his defense."²⁵¹

These states reason that since license suspensions are not "criminal prosecutions", no right to counsel is involved. Vermont illustrates the extremes to which such decisions go. In *State v. Dellveneri*²⁵² the Vermont Supreme Court, based upon the summary nature of the implied consent law's administrative suspension hearing, a civil proceeding, decided that a driver was not required to be informed of a right to counsel before deciding to take breathalyzer tests. However, when the proceedings became criminal the same court surprisingly found such a

248. See Florida Statutes section 316.1932(1)(d)(g) (Supp. 1982) for a description of Florida suspension procedures.

249. Indeed until testing is refused, only criminal prosecution is possible since there would be no basis for civil license suspension. When strong evidence exists, even absent test results, prosecution is a distinct possibility. See *Prideaux v. State Dept. of Public Safety*, 310 Minn. 176, ___, 247 N.W.2d 385, 389 (Minn. 1976).

250. See *Seders v. Powell*, 298 N.C. 453, 259 S.E.2d 544, 550 (1979) ("well established . . . that proceedings involving the suspension or revocation of a license . . . are civil, not criminal in nature"); *Agnew v. Hjelle*, 216 N.W.2d 291, 298 (N.D. 1974) ("proceedings under the Implied Consent Law are civil in nature"); *Gottschalk v. Sueppel*, 258 Iowa 1173, 1179, 140 N.W.2d 866, 869 (1966) ("Neither [federal or state constitution giving Right to Counsel] is applicable to this administrative proceeding. . . .").

251. U.S. CONST. amend. VI.

252. 128 Vt. 84, 258 A.2d 834 (1969).

right. *State v. Welch*²⁵³ held an accused's right to counsel was violated when police officers convinced a driver to submit to a breath test after he requested counsel. *Dellveneri* was discussed, but summarily distinguished based on the criminal nature of the proceedings in *Welch*.

This stretches the right to counsel issue to an extreme. Theoretically, under Vermont law, if the driver had continued to refuse testing and not been afforded a chance to consult counsel, the refusal could not have been admissible in a criminal trial since his sixth amendment rights were violated. However, if a civil license suspension proceeding was brought, the refusal could be admitted since the nature of those proceedings recognize no such right.

Fortunately several courts refuse to draw such illogical distinctions between the two proceedings.²⁵⁴ Such courts recognize the dual possibilities an arrest for drunk driving has and adopt a more realistic view. *Heles v. South Dakota*,²⁵⁵ the only federal court decision, recently declared

In effect the threat of a license revocation (the civil proceeding) is a tool employed at the time of arrest to gather evidence against the driver to utilize in a later criminal prosecution.*** To say that the person does not have a right to contact an attorney prior to deciding whether to take the sobriety test, because the license revocation proceeding, initiated once the test is refused, is civil in nature totally ignores the fact that the person is in custody pursuant to an arrest on a criminal charge. The proceedings are all criminal in nature until testing is actually refused.²⁵⁶

Heles correctly notes that drunk driving arrests have all the characteristics of any other criminal apprehension. The driver is formally placed under arrest, often given *Miranda* warnings, and most likely taken to jail for temporary detention. The only unusual aspect is the

253. 135 Vt. 312, 376 A.2d 351 (Vt. 1977).

254. See *Prideaux*, 310 Minn. 176, 247 N.W.2d 385; *Leopold v. Tofany*, 68 Misc. 2d 3, 325 N.Y.S.2d 24 (N.Y. Sup. Ct. 1971), *aff'd mem.*, 38 App. Div. 2d 550, 327 N.Y.S.2d 999 (1971).

255. 530 F. Supp. 646. (D.S.D. 1982).

256. *Id.* at 651-52 (footnotes omitted). Recently, the Eighth Circuit declared *Heles* moot, since the driver had died when the district court rendered its decision. The case was remanded with directions to vacate.

possibility of license suspension if refusal occurs. Especially significant are the *Miranda* warnings which include notification of a right to counsel during questioning. Given these, drivers may easily be misled into believing a right to counsel exists and should not be expected to draw a fine civil versus criminal distinction.²⁵⁷

2. Critical Stage Analysis

States refusing to use the fictitious civil-criminal distinction focus on the situation *when* an accused is asked to undergo testing - not the nature of any later proceeding. The right to counsel guaranteed in all criminal prosecutions has been extended well beyond the mere right to representation at trial. Any criminal proceeding whose nature makes it a "critical stage", is one where an accused is entitled to counsel.²⁵⁸ Courts have considered whether the decision to undergo chemical intoxication testing amounts to a critical stage under two bases: (1) whether the testing procedure itself amounts to a critical stage, (2) whether state court rule or statute makes testing a critical stage.

Most courts find that the nature of the testing process itself is not a "critical stage," where counsel is necessary. *United States v. Wade*²⁵⁹ considered whether any pre-trial proceeding is a "critical stage" by examining "whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."²⁶⁰

Wade considered a post-indictment lineup where the accused is confronted with possible eyewitnesses a critical stage since a lineup was inherently suggestive and seldom could be accurately reconstructed at trial. However *Wade* indicted that where a scientific process, like blood testing, is used to gather and evaluate evidence pre-trial, no such criti-

257. See also *State Dept. of Highways v. Beckey*, 192 N.W.2d 441, 192 N.W.2d 444 (Minn. 1971) (confusion generated by *Miranda* warnings is a reasonable ground to refuse test).

258. See *Coleman v. Alabama*, 399 U.S. 1 (1970), preliminary hearing where witnesses testify is a critical stage where counsel needed; *Hamilton v. Alabama*, 368 U.S. 52 (1961), arraignment where defenses must be asserted or lost requires counsel.

259. 388 U.S. 218 (1967).

260. *Id.* at 227.

cal stage exists.

"[K]nowledge of the techniques of science and technology is sufficiently available . . . , that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts."²⁶¹ Virtually all courts concluding chemical blood testing is not a "critical stage" rely on this language. The sole exception is *State v. Fitzsimmons*,²⁶² where the Washington Supreme court decided the right to counsel should apply to breathalyzer testing. *Fitzsimmons* termed drunk driving a unique charge. Since physical evidence would soon disappear, arrangements must be made for immediate supplemental testing and disinterested witnesses found. In this second respect, *Fitzsimmons* was misguided. Presenting disinterested witnesses is not peculiar to drunk driving but applies to any criminal charge. Some time will necessarily have passed before counsel can be contacted and arrive. Any witnesses will likely be gone. Counsel arguably will be able to use witnesses listed on an officer's accident report—something which can be obtained long afterwards.

Several states have decided that under their state laws or court rules, the right to counsel attaches to the decision whether to undergo testing. Some states explicitly guarantee such right,²⁶³ while others imply it from the decision an accused must make. Decisions finding no statutorily created right to counsel reason that since the arrested driver does not have a right under the Implied Consent law to refuse testing, counsel's advice is not required, even though the driver retains the

261. *Id.* at 227-28.

262. 93 Wash. 2d 436, 610 P.2d 893 (1980), *cert. granted, vacated and remanded*, 449 U.S. 977 (1980). The Court, remanded for consideration whether the judgment was based upon state or federal constitutional grounds or both. Justices Brennan, Stewart, Marshall and Stevens dissented. On remand, the Washington Supreme Court held its decision rested primarily on a state court rule, but declared its previous constitutional discussion "helps demonstrate the application and effect of the court rules". 620 P.2d 999, 1000 (Wash. 1980).

263. *See, e.g.*, N.C. GEN. STAT. § 20-16.2(a)(4) (Supp. 1981) which provides: "That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights."

power to refuse.²⁶⁴

Prideaux v. State Department of Public Safety,²⁶⁵ the leading case to the contrary, relied on a state statute guaranteeing arrested persons the right to consult counsel as soon practicable.²⁶⁶ The court examined the possible choices facing an arrested driver and penalties which may arise therefrom. Since Minnesota law gave drivers the power to choose between submitting or not, the driver's decision was considered important enough to afford counsel. Likewise *Heles v. South Dakota*²⁶⁷ focused partially on state law to find counsel should be afforded. "The fact that by statute, South Dakota allows the arrested driver to refuse to take the test, brings into play important legal considerations."²⁶⁸ Since state law created such a choice, it would be unfair to deny the advice of counsel in making the choice.²⁶⁹

3. Nature of the Right to Counsel

Once courts find a right to counsel exists when a person is requested to undergo blood content analysis, the extent of that right must be determined. Even if the right exists, only one court requires that an arrested driver be explicitly informed.²⁷⁰ Most decisions discuss what should happen when the driver requests counsel. In this regard the

264. See *Campbell v. Superior Court*, 479 P.2d 685, 693 (Ariz. 1971) ("person does not have a right to refuse . . . only the physical power; therefore . . . there is no issue of counsel's ability to assist"); See also *Dunn v. Petit*, 388 A.2d 809 (R.I. 1978).

265. 247 N.W. 2d 385.

266. See MIN. STAT. § 481.10 (1971).

267. 530 F. Supp. 646 (D.S.D. 1982).

268. *Id.* at 652.

269. See also *Fuller v. State Dept. of Transp.*, 275 N.W.2d 410 (Iowa 1979), state statutorily required to honor arrested driver's request to consult counsel before deciding to take chemical test; *Gooch v. Spradling*, 523 S.W.2d 861 (Mo. App. 1975), court rule requires person held in custody opportunity to consult counsel; *McNulty v. Curry*, 42 Ohio St. 2d 341, 328 N.E.2d 798 (1975), state statutes allows communication with attorney following arrest or detention; Comment, *The Right to Counsel Under Oregon's Implied Consent Law*, 10 WILLAMETTE L.J. 236 (1974) arguing that Oregon law requires the right to consult counsel before deciding to submit to chemical testing; Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935 (1980), arguing that even if counsel is not constitutionally required, states should legislatively provide for such.

270. *Prideaux*, 247 N.W.2d 385.

courts are almost uniform in finding a limited right. Only reasonable opportunity to consult counsel is needed, such as a phone call. Anything more would seem to jeopardize the opportunity to gather evidence, since alcohol metabolizes in the body rapidly.

*State v. Fitzsimmons*²⁷¹ is the only case requiring more. Most cases arise when a driver wishes to call an attorney. What happens when the driver claims indigency and requests counsel? *Fitzsimmons* requires that counsel be afforded under the circumstances. While this appears to present police officers with an unsurmountable obstacle, especially since many drunk driving arrests occur late at night, *Fitzsimmons* suggests that reasonable methods, such as having police carry lists of volunteer attorneys, could be utilized. *Fitzsimmons* rejected the state's argument that this would present problems because counsel would always want to be present at testing, since telephone consultations might often be sufficient. The suggestion is curious as the court had found the decision to submit to testing a critical stage where counsel is needed to find possible defense witnesses. No attempt was made to reconcile these apparent conflicts. Likewise, the court did not consider what happens when a telephone call alone would not suffice.

4. *Right to Counsel in Florida*

Florida courts have not acted favorably on right to counsel claims. In the earliest case, *State v. Wilson*,²⁷² an arrested driver claimed his sixth amendment rights were denied when police refused to delay breathalyzer testing until his attorney arrived. Wilson had been afforded the opportunity to consult counsel but still refused testing when his attorney had not arrived after an hour and fifteen minutes. Rather than deciding the issue on the narrow basis that Wilson had been afforded all that was constitutionally required—a reasonable opportunity to consult counsel rather than actually having an attorney present—the court focused on the civil nature of the proceedings under the Implied Consent Law, rather than a criminal prosecution. Thus *Wilson* followed those cases finding license suspensions not a “criminal prosecution” under the sixth amendment.

271. 610 P.2d 893.

272. 34 Fla. Supp. 141 (Circuit Court of Fifteenth Judicial Circuit 1970).

Subsequently, *State v. Oliver*,²⁷³ again raised the right to counsel question in connection with breath testing. There an arrested driver, given *Miranda* warnings and advised of the consequences for refusing the breathalyzer, requested an opportunity to contact counsel. Informed that an attorney's presence was not needed to administer the test, Oliver's repeated requests ended with the arresting officer certifying his refusal to submit. Relying on *Wilson*, the Circuit Court reversed a county court ruling that Oliver was entitled to consult counsel before taking the test. The court first decided that any proceedings resulting from refusal to cooperate with the police would be civil, under the Implied Consent Law, rather than criminal. Additionally, the court noted that *County of Dade v. Callahan*²⁷⁴ had declared this a petty offense not needing *Miranda* warnings and *State v. Webb*²⁷⁵ had held there was no right to counsel in petty offense cases summarily triable and punishable by less than six months imprisonment. Thus *Oliver* declared the right to counsel did not apply.

Unfortunately, no Florida Supreme Court or District Court of Appeal cases have addressed the right to counsel issue in the context of blood alcohol testing. Recent developments show *State v. Oliver* is erroneous law. First, *Oliver's* reasoning is clearly questionable. *Oliver* failed to distinguish between the different provisions the drivers were charged with violating. In *Callahan* the offense charged was violation of a municipal ordinance rather than a state-wide statute as in *Oliver*. Secondly, *State v. Webb* upon which *Oliver* heavily relied, is also questionable. *Webb* declared that offenders accused of petty traffic offenses are not entitled to a jury trial. *Webb* did not, as *Oliver* says, discuss the sixth amendment right to counsel in such proceedings. Indeed had *Webb* done so, the decision would be wrong.²⁷⁶ Why *Oliver* failed to

273. 47 Fla. Supp. 3 (Circuit Court, Palm Beach County, 1977).

274. 259 So. 2d 504 (Fla. 3rd Dist. Ct. App. 1971).

275. 335 So. 2d 826 (Fla. 1976).

276. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court rejected the petty offense-serious crime argument for right to counsel purposes twice, first noting "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone." *Id.* at 29. and secondly, forcefully declaring the distinction between the two. "While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases' there is no such support for a similar limitation on the right to assistance of counsel . . ." *Id.* at 30.

note this is unexplainable²⁷⁷ and shows its error. Thirdly, *Oliver* did not distinguish between the types of offenses before it and the *Webb* court. *Webb* did not deal with a drunk driving offense but with driving without a valid inspection sticker and with an expired driver's license. Finally, statutory changes raise further questions about the continued vitality of the *Webb-Callahan* cases. Today, defendants can have jury trials in any "drunk driving" case.²⁷⁸ This effectively does away with the *Oliver-Callahan* rationale that these can be summary proceedings. Moreover, *Oliver* never considered whether the same rationale would apply if the charge had been D.W.I. manslaughter—certainly not summarily triable and clearly not a petty offense.

At least two subsequent county court cases have not followed *Oliver*. In *State v. Roche*²⁷⁹ denial of a request to consult counsel before deciding to submit to a breath test caused reversal over the state's claim that this was a refusal. The Orange County Court agreed there is no sixth amendment right to counsel before deciding to take a breath test.²⁸⁰ Thus police were not required to inform a driver of such. However, when drivers request the chance to consult counsel, the court using a due process analysis found that a reasonable opportunity to do so was required. On appeal, merely stating its agreement with courts finding no limited right to consult counsel, the Circuit Court proceeded to do a brief *Wade* "critical stage" analysis.²⁸¹ However, the County Court never relied on this, but rather chose a due process approach. Misunderstanding and mixing the two grounds, the Circuit Court re-

277. *Oliver* is the only decision relying on a petty offense - felony distinction to find there is no right to consult counsel. Following *Argersinger*, *Scott v. Illinois*, 440 U.S. 367 (1979), held the right to counsel exists only wherever imprisonment is actually imposed. For a critical review of *Scott*, see Herman & Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine*, 17 AM. CRIM. L. REV. 71 (1979).

278. See FLA. STAT. § 316.1934(5). *Caverly v. State*, 8 Fla. L.W. 1364 (Fla. 2d Dist. Ct. App. May 13, 1983) reversed a driving under the influence conviction where a jury trial request was denied.

279. (No. T080-53470; Orange County; Dec. 19, 1980).

280. The court accepted *Wilson's* civil administrative proceeding vs. criminal prosecution analysis. Thus *Roche* never undertook the next level of sixth amendment analysis, whether a chemical test for intoxication amounted to a "critical stage" under *Wade*.

281. (Orange County Circuit Court; AP81-11; Dec. 23, 1981).

versed the lower court's decision.

State v. Formato,²⁸² without discussing *Oliver*, found that by passing Florida Statutes section 901.24²⁸³ which states: "A person arrested shall be allowed to consult with any attorney entitled to practice in this state, alone and in private at the place of custody as often and for such periods of time as is reasonable"²⁸⁴ the legislature made arrest a critical stage where the opportunity to consult counsel is required. Thus BAT Mobile videotapes taken after a refusal to let the driver call an attorney were inadmissible. If *Formato's* analysis based upon Florida Statutes section 901.24 is correct, Florida has joined states creating a statutory right to consult counsel before submitting to breath testing. Unfortunately, the case law on this point seems split as *Oliver* earlier had reversed, without discussion, the County Court's partial reliance on section 901.24 to find a right to counsel. Likewise, the Circuit Court in *Roche* rejected a section 901.24 claim. Doing so, it examined section 901.24 in conjunction with the valid excuses for refusal of testing under the Implied Consent Law. Since the law did not specifically mention whether a driver was afforded the right to counsel as an issue in a suspension hearing, the Circuit Court reasoned that the legislature by passing section 901.24 did not intend to amend the Implied Consent Law.²⁸⁵

Even without section 90.124 a right to counsel argument can still be made. As noted above, under the Implied Consent Law, Florida drivers retain the power to refuse breath testing. When testing has been previously done over such refusal, the courts consistently declared the

282. (Broward County Court; No. 80-37621TT40; June 10, 1981).

283. FLA. STAT. § 901.24 (1981).

284. *Id.*

285. *Roche* was decided under the former Implied Consent Law. The law's new version likewise does not indicate legislative intent to make section 901.24 valid grounds for refusing testing.

In *State v. Burts*, 24 Fla. Supp. 88 (Dade County Circuit Court 1964), counsel appeared and advised police he would not permit any chemical testing. When this was done anyways, the Circuit Court suppressed results. *Burts* is irrelevant to a section 901.24 right to counsel argument. At the time Florida had no Implied Consent Law giving drivers the option of testing or suspension upon refusal. *Schmerber v. California* subsequently established the driver had no fifth amendment right to refuse testing. Thus the results taken over the refusal should have been admitted since neither constitutional grounds nor state law prohibited such.

results inadmissible. While Florida Statutes section 316.1933²⁸⁶ modifies former case law in limited circumstances with respect to blood testing, most forced testing is still invalid. Given this recognized power to refuse testing, a *Heles - Prideaux* rationale could be adopted to find that a right to counsel exists. Besides obtaining witnesses' names, counsel could play an important role in advising a driver whether to submit. If death or serious bodily injury has occurred, convictions may be difficult to obtain without chemical test results. In such instances, counsel will often advise refusal. Alternatively, if counsel advises submission, the driver may request additional testing to ensure the accuracy of test results²⁸⁷ or additional breath or blood samples.²⁸⁸ Whatever the ultimate result, one thing is clear. Most decisions finding no right to consult counsel have relied on wrong analysis. Thus the right to counsel issue is still unsettled in Florida.

V. CONCLUSION

The new "drunk driving" law makes substantial changes in prior Florida statutes and case law. Like any new law, only experience can establish how effective the changes are. Given the media attention, it should have at least beneficial short term results.²⁸⁹ However, as pointed out,

286. FLA. STAT. § 316.1933 (Supp. 1982).

287. If optional testing is not afforded, suppression of other test results occurs. *City of Jasper v. Cromer*, 32 Fla. Supp. 107 (Hamilton County Circuit Court 1969) reversed a defendant's conviction where police refused a driver's reasonable request for optional testing. The Implied Consent law does not require police to inform drivers of any right to additional testing. Additional testing may be necessary to ensure the proper interpretation of the first test's results. See Fitzgerald & Hume, *supra* note 200, disputing the validity of convictions when only one test is administered.

288. Florida law does not require police to obtain or preserve breath or blood samples for later defense testing. See *State v. Cooper*, 391 So. 2d 332 (Fla. 3d Dist. Ct. App. 1980), no due process violation when blood sample lost since evidence concededly favorable to defense; *State v. Phillipe*, 402 So. 2d 33 (Fla. 2d Dist. Ct. App. 1981), failure to preserve test ampoules is a matter for Department of Highway Safety and Motor Vehicles rather than courts. *State v. Lee*, 422 So. 2d 76 (Fla. 2d Dist. Ct. App. 1982) (no due process violation in state's failure to retain sample of driver's breath). See also Thornton, *Uses and Abuses of Forensic Science*, 69 A.B.A.J. 289, 292 (March 1983), for criticism from a forensic scientist's viewpoint of those jurisdiction requiring retention of Breathalyzer test ampoules for independent testing.

289. After six months' operation under the new law, traffic fatalities were down

serious deficiencies remain. The following changes should be made during the next legislative session:

- (1) Repeal § 316.1933 allowing forcible blood sampling, or at least restrict such when it would be medically dangerous;
- (2) Provide specific authorization for the Department of Health and Rehabilitative Services, or another appropriate state agency, to adopt statewide testing procedures for urinalysis;
- (3) Amend § 316.1932(1)(c) to require police officers to notify drivers that refusal of a test will result in admission of the refusal in any trial, along with license suspension;
- (4) Amend § 316.1932(1)(h) to require law enforcement personnel to notify drivers of the right to optional testing;
- (5) Amend the law to require law enforcement personnel to obtain additional samples of blood, breath or urine for later testing within a reasonable time, e.g., thirty days, by defendant drivers.

Given passage of any, and hopefully all, of these recommendations,²⁹⁰ Florida's drunk driving law will be a more effective and fairer

12% compared to 1981. *See New law cited as fatalities decrease*, Fort Lauderdale News, Jan. 1, 1983, at 1B, col. 5.

290. During the 1983 legislative session, there were thirteen bills introduced to amend the "drunk driving" laws. Only one bill, H.B. 809, 1983 Fla. Laws ch. 83-187, which amends Fla Stat. §§ 316.193(1) (Supp. 1982) and 316.1931(1) (Supp. 1982) by replacing the words "model glue" with "chemical substances set forth in 877.11," passed. This broadens the category of chemicals, other than alcohol or controlled substances, it would be illegal to drive under the influence of. *See supra* text accompanying n. 10-14 for description of how these sections presently read.

A brief description of the twelve bills not passing follows below:

(1) S.B. 69 would have given under Fla. Stat. § 316.1931 (Supp. 1982) the Department of Highway Safety and Motor Vehicles authority to revoke the license of any driver involved in an accident causing property damage or personal injury while driving under the influence even if the trial court withheld adjudication. The revocation period runs from the date of offense rather than the date adjudication is withheld, thus still making it possible for court delays to shorten the intended revocation time.

(2) H.B. 36 would have amended Fla. Stat. § 316.1931 (Supp. 1982) to provide a minimum one year sentence for drivers convicted of manslaughter. This sentence could not be withheld nor could a driver be paroled before serving the minimum one year's time.

(3) H.B. 1202 would have amended Fla. Stat. § 316.193(4) (Supp. 1982) to require first offenders to be placed on probation for up to one year.

(4) S.B. 962 would have amended Fla. Stat. § 316.193 (Supp. 1982) to require

means of eliminating drunk drivers from the roadways.

any driver convicted of driving under the influence or with unlawful blood alcohol level to pay an additional \$10.00 fine into the prosecuting county's fine and forfeiture fund.

(5) S.B. 179 would have amended Fla. Stat. § 316.193(4)(a) (Supp. 1982) to require a minimum seven days incarceration for convicted drivers who refuse to do the "public service or community work project" required of first offenders.

(6) H.B. 942 would have amended Fla. Stat. § 316.193(4)(a) (Supp. 1982) to forbid remuneration for any required public service. However the bill also would create Fla. Stat. § 316.1936 making any person doing mandatory "public service" a state employee for Workmen's Compensation purposes.

(7) H.B. 474 required a Victim Impact Statement for sentencing use, whenever death or serious bodily injury occurs to someone else because of an offender's driving under the influence.

(8) H.B. 551 would have repealed the statutory right to jury trial under Fla. Stat. § 316.1934(4) (Supp. 1982).

(9) S.B. 246 would have increased the license suspension period for refusing a blood alcohol test from three to six months for a first refusal and from six months to one year for subsequent refusals.

(10) S.B. 224 would have required alcohol abuse education for anyone convicted of being a "disorderly or dangerous alcohol offender" under a newly created Fla. Stat. § 856.012.

(11) H.B. 550 would have provided additional sentencing alternatives for minors convicted of driving intoxicated or under the influence.

(12) S.B. 852 would have created new provisions suspending for specified time periods the registration of any vehicle whose owner drives during a license suspension due to drunk driving violations.