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guidelines in the near future to prevent further confusion resulting from *ad hoc* decisions by trial courts.

Suzanne Sonner Diviney

Miranda warnings not required when motorist charged with driving while intoxicated is requested to submit to chemical testing

The Constitution guarantees every individual the right to assistance of counsel¹ and the privilege against self-incrimination in criminal cases.² In *Miranda v. Arizona*,³ the United States Supreme Court held that a state has an affirmative duty to advise an individual taken into police custody of these constitutional rights.⁴

¹ U.S. CONST. amend. VI. The sixth amendment provides in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." *Id.* The accused is guaranteed the right to counsel not only at his trial but at any critical confrontation with the prosecution during pretrial proceedings where the absence of counsel might impede his right to a fair trial. *See* *United States v. Wade*, 388 U.S. 218, 224 (1967). The fourteenth amendment has extended this right to state criminal proceedings. *See* *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Therefore, the accused "need not stand alone against the State" during any critical stage of the prosecution. *Wade*, 388 U.S. at 226. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-38, at 1106-08 (1978) (discussing implications of right to counsel on criminal justice reform).

² U.S. CONST. amend. V. The fifth amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." *Id.* The fourteenth amendment precludes a state from abridging an individual's right against compulsory self-incrimination. *See* *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). Since the American system of criminal prosecution is accusatorial rather than inquisitorial, both state and federal governments are "constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Id.* at 7-8. However, the fifth amendment privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. *See* *Schmerber v. California*, 384 U.S. 757, 764 (1966). This privilege does not apply to the withdrawal of blood for chemical analysis, as this act is not considered testimonial compulsion. *Id.* at 765. *See also* *People v. Haitz*, 65 App. Div. 2d 172, 175, 411 N.Y.S.2d 57, 59-60 (4th Dep't 1978) (admission of evidence of refusal to take chemical test not violative of fifth amendment privilege against self-incrimination). *See generally* L. TRIBE, *supra* note 1, § 12-23, at 709-10 (overview of fifth amendment privilege against self-incrimination).

³ 384 U.S. 436 (1966).

⁴ *Id.* at 467-69. In *Miranda*, the Supreme Court held that an individual taken into custody or otherwise deprived of his freedom by the authorities in any significant way 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

The New York Vehicle and Traffic Law provides, however, that a motorist accused of driving while intoxicated impliedly consents to chemical testing to determine the alcoholic content of his blood,⁵ and that a refusal to take the test may be used as evidence against the defendant in a criminal trial.⁶ Furthermore, the New York Court of Appeals has concluded that the admission of a defend-

will be appointed for him prior to any questioning if he so desires.
Id. at 479.

Since the expansive *Miranda* ruling in 1966, the Supreme Court has significantly restricted the applicability of *Miranda* in criminal prosecution cases. *See, e.g.*, *United States v. Ash*, 413 U.S. 300, 321 (1973) (defendant's counsel need not be present while witness shown photographs containing defendant's picture prior to trial); *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (defendant identified by robbery victim prior to indictment and before consulting counsel); *Harris v. New York*, 401 U.S. 222, 225 (1971) (defendant's pretrial statements, made without benefit of counsel, may be used to impeach trial testimony).

⁵ N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1986 & Supp. 1987). Section 1194 provides in pertinent part:

1. Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test, of one or more of the following: his breath, blood, urine or saliva, for the purpose of determining the alcohol and/or drug content of his blood provided that such test is administered at the direction of an officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of section eleven hundred ninety-two and within two hours after such person has been placed under arrest

Id. § 1194(1). The term "chemical test" refers to any chemical analysis of breath, blood, urine or saliva which determines a subject's blood-alcohol content. *See People v. Jones*, 118 Misc. 2d 687, 693, 461 N.Y.S.2d 962, 966 (Albany County Ct. 1983). New York was the first state to enact an implied consent statute. *See New York State Joint Legislative Committee on Motor Vehicle Problems*, 3 N.Y. LEG. DOC. NO. 25, 176th N.Y. Leg. 11 (1953). *See, e.g.*, Ch. 854, [1953] N.Y. Laws 1876 (original statutory codification of current New York statute). Implied consent statutes are currently in force in all fifty states. *See generally* Lerbance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN'S L. REV. 39, 39 n.2 (1978) (discussing history of § 1194); King & Tipperman, *The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York*, 3 HOFSTRA L. REV. 541 (1975) (discussing origin of § 1194).

All breath-testing devices are based upon Henry's Law, which states that at any given temperature, the ratio between the concentration of alcohol in the blood and in the alveolar air in the lungs is constant. *See Jones*, 118 Misc. 2d at 688 n.1, 461 N.Y.S.2d at 963 n.1. It has been proven empirically that the ratio is 2,100:1; that is, 2,100 parts of deep lung air contain an amount of alcohol equal to that in one part of blood. *Id.* This ratio has been adopted by the National Highway Safety Council's Committee on Tests for Intoxication. *Id.* It has also been established that breathalyzer tests are admissible in New York courts. *See People v. Donaldson*, 36 App. Div. 2d 37, 40, 319 N.Y.S.2d 172, 176 (4th Dep't 1971).

⁶ *See* N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 1986). The statute requires that the accused driver be "informed that his license or permit to drive . . . shall be immediately suspended and subsequently revoked" upon his refusal to submit to a chemical test. *Id.* Indeed, the evidence of a refusal to submit to blood testing is admissible "in any trial, proceeding or hearing . . . only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal" *Id.* § 1194(4).

ant's refusal to submit to such testing does not violate his privilege against self-incrimination.⁷ Recently, in *People v. Sanchez*,⁸ the Criminal Court of New York County held that a motorist charged with driving while intoxicated need not be given *Miranda* warnings before being asked to undergo chemical testing.⁹

In *Sanchez*, the defendant was found in a semi-conscious state in the driver's seat of his automobile following an accident.¹⁰ A strong odor of alcohol was detected on the defendant and in the vehicle.¹¹ Consequently, he was placed under arrest for operating a motor vehicle while intoxicated.¹² Shortly before the permissible statutory period for testing was to expire, the defendant was asked to submit to a chemical test to determine the extent of his inebriation.¹³ He refused to submit to the test, although he was informed

⁷ See *People v. Thomas*, 46 N.Y.2d 100, 103, 385 N.E.2d 584, 585, 412 N.Y.S.2d 845, 846 (1978), *appeal dismissed*, 444 U.S. 891 (1980); *People v. Haitz*, 65 App. Div. 2d 172, 177, 411 N.Y.S.2d 57, 61 (4th Dep't 1978).

⁸ 134 Misc. 2d 726, 512 N.Y.S.2d 638 (N.Y.C. Crim. Ct. N.Y. County 1987).

⁹ *Id.* at 727, 512 N.Y.S.2d at 639; see *infra* notes 9-20 and accompanying text.

¹⁰ *Sanchez*, 134 Misc. 2d at 727, 512 N.Y.S.2d at 639.

¹¹ *Id.*

¹² *Id.* The defendant was charged with violating section 1192 of the New York Vehicle and Traffic Law. *Id.* Section 1192 provides in part:

1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol

2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vehicle while he is in an intoxicated condition.

N.Y. VEH. & TRAF. LAW §§ 1192(1)-(3) (McKinney 1986 & Supp. 1987). This section has withstood constitutional challenge on the grounds of being void for vagueness since the terms "intoxicated" and "impaired" afford a defendant sufficient notice of prohibited conduct. See *People v. Cruz*, 48 N.Y.2d 419, 428, 399 N.E.2d 513, 517, 423 N.Y.S.2d 625, 629 (1979), *appeal dismissed*, 446 U.S. 901 (1980). In addition the word "operating" is markedly broader than the term "driving" and may be proven by circumstantial evidence. See, e.g., *People v. Blake*, 5 N.Y.2d 118, 120, 154 N.E.2d 818, 819, 180 N.Y.S.2d 775, 776 (1958) (defendant seated alone in damaged automobile with engine running was "operating" motor vehicle).

¹³ *Sanchez*, 134 Misc. 2d at 727, 512 N.Y.S.2d at 639. See N.Y. VEH. & TRAF. LAW § 1195 (McKinney 1976). Section 1195 provides in part:

1. Upon the trial of any action proceeding . . . alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two, the court shall admit evidence of the amount of alcohol . . . in the defendant's blood as shown by a test administered pursuant to the provisions . . . of this chapter.

Id. § 1195(1).

New York accords the following evidentiary presumptions to the findings of a validly

that such refusal to take the test might result in the revocation of his license and could be introduced as evidence against him in court.¹⁴ He did, however, agree to perform a series of coordination tests.¹⁵ Subsequently, the defendant moved to suppress a videotape which had recorded both his prior refusal and performance of the coordination tests.¹⁶ After a hearing, the Judicial Hearing Officer recommended that the defendant's motion to suppress be granted on the grounds that *Miranda* warnings had not been given to the defendant prior to his refusal to take the chemical test.¹⁷

The Criminal Court of New York County disagreed with this conclusion and held that the videotape was admissible.¹⁸ Writing for the court, Justice DeGrasse relied upon prior precedent which had established that an arrested person is not entitled to *Miranda* warnings prior to the withdrawal of blood for chemical analysis,¹⁹ and that the admission of a defendant's uncoerced refusal to take a chemical test does not violate an individual's right against self-incrimination.²⁰ The *Sanchez* court additionally relied upon the de-

conducted chemical test. *See id.* § 1195(2). A test result which indicates a driver had between a .07 percent and a .10 percent alcohol level in his blood is prima facie evidence that his ability to operate a motor vehicle was impaired. *See id.* § 1195(2)(c). A blood alcohol level of between .05 percent and .07 percent is considered only relevant evidence in determining if an accused was driving while impaired. *See id.* § 1195(2)(b). A reading of .05 percent or less is prima facie evidence that the driver was not impaired by alcohol while operating a motor vehicle. *See id.* § 1195(2)(a).

¹⁴ *See Sanchez*, 134 Misc. 2d at 727, 512 N.Y.S.2d at 639; *supra* note 6 and accompanying text.

¹⁵ *Sanchez*, 134 Misc. 2d at 727, 512 N.Y.S.2d at 639.

¹⁶ *Id.* at 726, 512 N.Y.S.2d at 638.

¹⁷ *Id.* at 727, 512 N.Y.S.2d at 639.

¹⁸ *Id.* at 728, 512 N.Y.S.2d at 639.

¹⁹ *Id.* at 727, 512 N.Y.S.2d at 639; *see People v. Craft*, 28 N.Y.2d 274, 270 N.E.2d 297, 321 N.Y.S.2d 566 (1971). The *Craft* court held that withdrawal or testing of blood samples provides real or physical evidence rather than evidence of a communicative or testimonial nature. *Craft*, 28 N.Y.2d at 276, 270 N.E.2d at 299, 321 N.Y.S.2d at 568. Therefore, blood testing in the absence of a *Miranda* warning does not violate an accused's privilege against self-incrimination, as a *Miranda* warning is intended to protect a defendant against potential testimonial incrimination. *Id.* at 276-77, 270 N.E.2d at 299, 321 N.Y.S.2d at 568. *Accord Schmerber v. California*, 384 U.S. 757, 764 (1966). In addition, since one accused of driving while intoxicated may not prevent the state from conducting a blood test, the *Craft* court asserted that there is neither need nor reason for the presence of counsel at the test. *See Craft*, 28 N.Y.2d at 278, 270 N.E.2d at 299, 321 N.Y.S.2d at 569. It should be noted however, that *Miranda* was decided a month after the facts of *Craft* had occurred. *Id.* at 276, 270 N.E.2d at 298, 321 N.Y.S.2d at 567.

²⁰ *Sanchez*, 134 Misc. 2d at 727, 512 N.Y.S.2d at 639; *see People v. Thomas*, 46 N.Y.2d 100, 110, 385 N.E.2d 584, 589, 412 N.Y.S.2d 845, 849 (1978), *appeal dismissed*, 444 U.S. 891 (1980). The *Thomas* court ruled that evidence of the defendant's refusal to submit to a chemical test was admissible even though the police officer did inform the defendant of his

cisions of two appellate division courts which had concluded that the failure to inform a person of his *Miranda* rights does not preclude the admission into evidence of his refusal to take a chemical test.²¹

Although the Supreme Court has held that an individual accused of driving while intoxicated does not have a constitutional right to refuse a blood test,²² New York's implied consent statute allows the defendant to make a choice regarding his legal rights when deciding whether to submit to a chemical test.²³ It is submitted that New York courts have denied the accused his constitutional right to counsel when evaluating the ramifications of that choice.²⁴ Only when an accused drunk driver has requested counsel and been denied, has his privilege of access to counsel been vio-

Miranda rights prior to the administration of the test. *Thomas*, 46 N.Y.2d at 103, 110, 385 N.E.2d at 585, 589, 412 N.Y.S.2d at 846, 851.

²¹ *Sanchez*, 134 Misc. 2d at 727, 512 N.Y.S.2d at 639. See also *Hoffman v. Melton*, 81 App. Div. 2d 709, 439 N.Y.S.2d 449 (3rd Dep't 1981). In *Hoffman*, the petitioner had been arrested for driving while intoxicated and the police officer failed to advise him of his *Miranda* rights prior to requesting him to submit to a chemical test. *Id.* at 709, 439 N.Y.S.2d at 450. On appeal to the Appellate Division, Third Department, the court held that the failure to inform the individual of his *Miranda* rights does not preclude the admission into evidence of his refusal to take a chemical test. *Id.* at 710, 439 N.Y.S.2d at 450-51.

This case is distinguishable from *Sanchez* in that *Hoffman* involved civil proceedings as a result of the revocation of appellant's license, rather than criminal proceedings to which *Miranda* warnings apply. See *Miranda v. Arizona*, 384 U.S. 436 (1966). See, e.g., *People v. Haitz*, 65 App. Div. 2d 172, 411 N.Y.S.2d 57 (4th Dep't 1978). The *Haitz* court held that, as the defendant does not have a constitutional right to refuse a chemical test, evidence of his refusal is not violative of the fifth amendment. *Id.* at 176, 411 N.Y.S.2d at 60. The court further stated that the failure to apprise a person arrested for driving while intoxicated of his *Miranda* rights does not bar the admission of evidence that he refused to take a breathalyzer. *Id.* at 176-77, 411 N.Y.S.2d at 60. However, it is noteworthy that the defendant in *Haitz* was advised of his *Miranda* rights. *Id.* at 173, 411 N.Y.S.2d at 58. It is submitted that the *Haitz* court's statement regarding *Miranda* rights was dicta and therefore without precedential value. See generally Note, *Public Outcry v. Individual Rights: Rights to Counsel and the Drunk Driver's Dilemma*, 69 MARQ. L. REV. 278 (1986) (results of sobriety test may give rise to both criminal and civil proceedings).

²² See *Schmerber v. California*, 384 U.S. 757, 772 (1966). In *Schmerber*, the defendant was arrested for driving while intoxicated and a blood sample was withdrawn for analysis. *Id.* at 758. The defendant contended that the withdrawal and subsequent admissibility of the results violated, *inter alia*, his rights to due process of law under the fourteenth amendment, his privilege against self-incrimination under the fifth amendment and his right to counsel under the sixth amendment. *Id.* at 759. In an extensive opinion, the Court held that evidence of the analysis of defendant's blood, taken after he was arrested, could not be denied admission on fifth or fourteenth amendment grounds. *Id.* at 765, 771. It should be noted that the defendant in *Schmerber* was informed of his *Miranda* rights prior to submitting to the test. *Id.* at 769.

²³ See *supra* notes 5 and 6 and accompanying text.

²⁴ See *supra* notes 18-20 and accompanying text.

lated under New York law.²⁵ In contrast, the United States Supreme Court specifically stated in *Miranda v. Arizona* that the imposition of a requirement to request counsel would discriminate against the defendant who is not aware of his rights.²⁶ Therefore, it is suggested that the Court of Appeals and, consequently, the *Sanchez* court have erred by distinguishing between those defendants who request the assistance of an attorney and those who do not. Accordingly, it is suggested that the defendant should be entitled to consult with an attorney regarding the consequences of his choice within the allowable statutory period for performance of a valid chemical test. Furthermore, to insure that the defendant is adequately informed of his right to counsel, it is submitted that *Miranda* warnings must be given to the defendant when he is asked to submit to chemical testing.

Moreover, under the New York Vehicle and Traffic Law, a driver's refusal to submit to chemical testing constitutes potential inculpatory evidence.²⁷ The fifth amendment privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner.²⁸ However, the Supreme Court has restricted this right to a protection against providing the state

²⁵ See *People v. Gurse*, 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968). In *Gurse*, the Court of Appeals held that the denial of defendant's request for an opportunity to telephone his lawyer before submitting to a chemical test, violates his right to counsel. *Id.* at 228, 239 N.E.2d at 353, 292 N.Y.S.2d at 419. The court acknowledged that granting his request would not have substantially interfered with the investigation, since the telephone call would have been concluded in minutes. *Id.*

²⁶ See *Miranda v. Arizona*, 384 U.S. 436, 470-71 (1966). The Court stated:

The defendant who does not ask for counsel is the very defendant who needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.

Id. (quoting *People v. Dorado*, 62 Cal. 2d 338, 351, 398 P.2d 361, 369-70, 42 Cal. Rptr. 169, 177-78, cert. denied, 381 U.S. 937 (1965)).

²⁷ See, e.g., *People v. Haitz*, 65 App. Div. 2d 172, 411 N.Y.S.2d 57 (4th Dep't 1978). The *Haitz* court stated that this law gives the state the right to obtain physical evidence in the form of test results. See *id.* at 175, 411 N.Y.S.2d at 59. The defendant's right to refuse to take a chemical test, however, is a qualified statutory right rather than a constitutional right to remain silent. *Id.* Therefore, the Appellate Division concluded that since the defendant is not asserting a constitutional right when he refuses the test, a foundation does not exist upon which a fifth amendment argument may be built. See *id.* at 176, 411 N.Y.S.2d at 60.

²⁸ See *Miranda v. Arizona*, 384 U.S. at 467. The Court stated that warnings are prerequisites to the admissibility of any statement made by a defendant. *Id.* at 476. In addition, "no distinction can be drawn between statements which are direct confessions and statements which amount to admissions of part or all of an offense." *Id.*

with evidence of a testimonial or communicative nature, rather than physical evidence.²⁹ New York considers an accused a source of physical evidence when blood is extracted to perform a chemical test.³⁰ It is submitted, however, that evidence of refusal is communicative and testimonial, since "the sole purpose for introducing refusal evidence is to permit triers of fact to infer consciousness of guilt."³¹ Therefore, it is suggested that an accused be given *Miranda* warnings before a refusal is admitted as inculpatory evidence.

Despite profound and legitimate interests in reducing accidents caused by intoxicated drivers, the New York courts must strike a balance between public policy considerations and the need to protect the constitutional rights of the accused. A viable solution is to provide the accused with *Miranda* warnings which would preserve his right against self-incrimination and allow him, *inter alia*, to consult with an attorney, provided that he does so before the expiration of the statutory time limit within which a valid chemical test may be conducted. This procedure would protect the constitutional rights of the accused, while leaving intact the policies advanced by the statute.

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²⁹ See *Schmerber v. California*, 384 U.S. 757, 764 (1966).

³⁰ See *Haitz*, 65 App. Div. 2d at 174, 411 N.Y.S.2d at 59; see also *supra* note 20 and accompanying text.

³¹ *People v. Thomas*, 46 N.Y.2d 100, 111, 385 N.E.2d 584, 590, 412 N.Y.S.2d 845, 851 (1978) (Fuchsberg, J., dissenting) (citations omitted), *appeal dismissed*, 444 U.S. 891 (1980). It is submitted that the introduction of refusal evidence is detrimental to the accused, notwithstanding the fact a test, had it been conducted, would have revealed levels below the statutory presumption of intoxication. See N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1986); *supra* note 6 and accompanying text.