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South Dakota v. Neville

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CFR - with view to a possible Grant - 3/22/82

Grant

5/12/82 - Resp received. GRANT. jw

PRELIMINARY MEMORANDUM

March 26, 1982 Conference
List 1, Sheet 2

No. 81-1453-CSY

SOUTH DAKOTA	Cert to South Dakota S.Ct. (Dunn, Morgan, Henderson, Fosheim; Wollman, C.J., dissenting)
v.	
NEVILLE	State/Criminal Timely

1. SUMMARY: Whether a motorist's Fifth Amendment privilege against self-incrimination is violated by admission into evidence of his refusal to take a blood alcohol test.

2. FACTS and PROCEEDINGS BELOW: Resp Neville was arrested in Madison, South Dakota for drunken driving. After giving resp his Miranda rights, the arresting officer asked him to submit to a blood alcohol test. Resp refused, allegedly stating, "I'm too drunk, I won't pass the test." Resp later moved to suppress any

CFR & then Grant refusal to take a breath test

State court held that drivers could not be admitted into evidence

and all evidence of his refusal to take the test. The prosecution argued that resp was required to take the test under SDCL §32-23-10.1, which provides:

> If a person refuses to submit to chemical analysis of his blood, urine, breath or other bodily substance, as provided in §32-23-10, and that person subsequently stands trial for driving while under the influence of alcohol or drugs, as provided in §32-23-1, such refusal may be admissible into evidence at the trial.

The circuit court (Fourth Jud. Dist.; Gerken) ordered suppression of any and all evidence of resp's refusal to take the test, finding that SDCL §32-23-10.1 was unconstitutional because it violated resp's Fourth, Fifth, and Sixth Amendment rights. The TC also concluded that the refusal was inadmissible because the arresting officers had failed to advise resp that his refusal to take the blood test could be used against him at trial.

3. DECISION BELOW: The S.D. S.Ct. affirmed, with one justice dissenting. The court held that SDCL §32-23-10.1 violates resp's privileges against self-incrimination under both the Fifth Amendment and S.D. Const. Art. VI, §9.

The majority noted that in Schmerber v. California, 384 U.S. 757 (1966), this Court had held that compelled withdrawal of blood from a criminal deft for chemical analysis does not constitute testimonial or communicative evidence, and thus, did not violate the Fifth Amendment. In footnote 9 of Schmerber, however, the Court reserved the question whether a deft's "refusal" to take a breathalyzer test violates his Fifth Amendment privilege against self-incrimination. Id., at 765-766, n. 9. Although the Schmerber Court suggested that "general Fifth Amendment principles ... would be applicable in these

situations," it did not apply those principles because petr had failed to object on Fifth Amendment grounds to the prosecutor's question. Id.

The majority decided that resp's refusal to submit to a requested blood test was a tacit or overt expression and communication of his thoughts, and thus a "communicative or testimonial" act, rather than real or physical evidence. Moreover, the inference of inability to pass the blood test was not similar to the circumstantial evidence of consciousness of guilt indicated by a deft's escape from custody or destruction of evidence, for example. Since before 1980 (when the new statute was passed), resp had an absolute statutory right under South Dakota law to refuse to take the test, see State v. Oswald, 90 S.D. 342 (1976); State v. Buckingham, 90 S.D. 198 (1976) (interpreting old SDCL §32-23-10), his refusal might have resulted from his exercise of his statutory right to refuse the test.

The majority then decided that use of resp's refusal as evidence "compelled" his testimony, relying on the Minn. S.Ct.'s reasoning in State v. Andrews, 212 N.W.2d 863, 864 (Minn. 1973). The State compelled the suspect to choose between submitting to an unpleasant examination and producing testimonial evidence against himself. Thus, the majority found that SDCL 32-23-10.1 unconstitutionally violated both the federal and state privileges against self incrimination. In the process, it overruled its own earlier ruling in State v. Maher, 272 N.W. 2d 797 (S.D. 1978), to the extent that that decision was inconsistent.

In a footnote, Pet. App. A-11 -12, n*, the majority noted that the State privilege against self-incrimination, S.D. Const. Art. VI, §9, stated that an deft shall not be compelled to give "evidence" against himself, as opposed to the Fifth Amendment, which specifies that a deft may not be compelled to be a "witness" against himself. The majority observed that Schmerber itself had mentioned that state constitutions using the word "evidence" might have a more liberal meaning than the Fifth Amendment, but that "the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation. . . . " Schmerber, 384 U.S., at 761-762, n. 6, quoting Counselman v. Hitchcock, 142 U.S. 547, 584-585 (1892). The majority concluded that "[s]ince the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S.D. Const. Art VI, §9 and the Fifth Amendment of the U.S. Constitution."

Having affirmed the suppression of resp's refusal to take the blood test, the majority remanded for further proceedings regarding the voluntariness of resp's statement.

Chief Justice Wollman, dissenting, noted that the majority's decision created a conflict with other state court decisions, including People v. Sudduth, 55 Cal. Rptr. 393 (1967) (introduction of deft's refusal to submit to breathalyzer test does not violate Fifth Amendment privilege); Hill v. State, 366

So. 2d 318 (Ala. 1979); Campbell v. Superior Court, 106 Ariz. 542 (1971); State v. Meints, 189 Neb. 264 (1971); People v. Thomas, 46 N.Y. 2d 100, appeal dismissed, 444 U.S. 891 (1979); City of Westerville v. Cunningham, 15 Ohio St. 2d 121 (1968); and Commonwealth v. Robinson, 229 Pa. Super. 131 (1974).

As an alternative holding, the dissent suggested the approach used by the Vt. S.Ct. in State v. Brean, 136 Vt. 147 (1978), namely, that the right to refuse to submit is a creature of statute, not the federal or state constitutions. Thus, the proper question is not whether the refusal evidence is testimonial or communicative and compelled under the Fifth Amendment, but whether the state legislature may condition the grant of that statutory right by permitting a deft's refusal to testify to be admitted into evidence. Because the dissent believed that resp's refusal to submit to a breathalyzer test should be treated as a manifestation of his consciousness of guilt, it argued that the majority should not have reversed State v. Maher, supra.

4. CONTENTIONS: Petr asks the Court to decide the question left open in footnote 9 of Schmerber. Schmerber's failure to answer that question has created lingering confusion among the state courts. Petr notes that cert has been denied on this issue five times. In cases from California, Louisiana, and New York, the Court denied cert when the ruling below was that a deft's refusal to take a breathalyzer test could constitutionally be admitted into evidence; in cases from Minnesota and Florida, the Court denied cert, even though the ruling below was that deft's

refusal could not be admitted. Moreover, petr notes that all of these decisions cited Schmerber, but none reached its conclusion by the same logic, suggesting that Schmerber's guidelines were ambiguous.

At Pet. 22-23, petr then cites nineteen state court decisions and one federal court ruling, Welch v. District Court, 594 F. 2d 903 (CA2 1979), holding on either statutory or constitutional grounds that refusal to submit to a blood alcohol test can be admitted. At Pet. 24-25, petr cites fifteen state court decisions and a D.C. ruling, holding on either statutory and constitutional grounds that refusal cannot be admitted. Petr argues that even within each of these two lists there is little agreement on the proper way to analyze the question. Finally, petr points to nine state statutes permitting admissibility of refusal, Pet. 26, and five prohibiting use of refusal, id., at 26-27.

Petr argues that the decision below is particularly important because the state and federal governments have begun a more intensive war on drunken driving, and that refusal to take a blood alcohol test is "an important piece of ammunition in that war." Since arrests for "driving while intoxicated" occur very frequently in this country, this Court can and should resolve the disarray left by footnote 9 of Schmerber.

5. DISCUSSION: In Thomas v. New York, 444 U.S. 891 (1979), the Court dismissed for want of a substantial federal question an appeal from a NY Ct. App. ruling upholding against Fifth Amemdment challenge the admission of petr's refusal to submit to

a blood test to determine inebriation. In Thomas, the NY Ct. App. upheld a NY state statute authorizing admission of refusal to take such a test. Justice White, joined by Justice Brennan, dissented because of the direct conflict between state supreme court rulings as to the reach of the Fifth Amendment's protection against compelled testimonial evidence.

In this case, the decision below went the opposite way, and if anything, the conflict among the state courts has intensified since Thomas. The court below expressly stated that it was invalidating the statute based on the "narrower" language of the Fifth Amendment, rather than on the possibly broader language of the state constitutional privilege against self-incrimination.

Furthermore, the petn indicates that the State preserved the constitutional issue at all stages of the proceeding. See Pet., at 4-7. This petn also involves a recently-enacted statute permitting admissibility of refusal, and would thus allow the Court to consider the "statutory right" theory which some state courts have applied to admit a deft's refusal as evidence. See, e.g., the Vt. S.Ct.'s decision in Brean, supra. Given the clear conflict among the state supreme courts and the recent passage of

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[1] The issue has also attracted attention (and controversy) in the secondary literature. See, e.g., Rumrell, "The case for admissibility of Blood Alcohol test results in civil and criminal trials," 55 Fla. Bar J. 362 (1981); Cohen, "The Case for Admitting Evidence of Refusal to Take A Breath Test," 6 Tex. Tech. L. Rev. 927 (1975); Note, "Implied Consent Laws: Some Unsettled Constitutional Questions," 12 Rutgers L.J. 99, 110-116 (1980); Note, The Admissibility of Refusals in Drunk Driving Prosecutions: A Violation of the Fifth Amendment," 10 Pacific L. J. 141 (1978).

stricter state drunken driving laws, the question seems substantial.

6. RECOMMENDATION: I recommend CFR, then grant.

03/22/82 Koh Opns in petn

May 13, 1982

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 81-1453

SOUTH DAKOTA

vs.

NEVILLE

Also motion to ~~proceed~~ ifp.

No adequate
2 Fale ground.
This was decided
on fed grounds. (But
Sandra dissented)

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.			✓										
.....													

mfs 12/03/82

Reviewed 12/6-7 Helpful

BENCH MEMORANDUM

No. 81-1453

South Dakota v. Neville

Michael F. Sturley December 3, 1982

Question Presented

At a motorist's trial on charges of driving while under the influence of alcohol, may the state constitutionally present evidence of his refusal to take a blood alcohol test at the time he was arrested?

Outline of Memorandum page

I. Background

A. Statutory Background

Under South Dakota law, a motorist is deemed to have consented to an alcohol test if arrested for driving while under the influence of alcohol, but an apparent contradiction in the statute permits the suspect to refuse to submit to the test. The version of the statute in effect at the relevant time provided:

> Any person who operates any vehicle in this state shall be deemed to have given his consent to a chemical analysis of his blood, urine, breath or other bodily substance for the purpose of determining the amount of alcohol in his blood ..., provided that such test is administered at the direction of a law enforcement officer having lawfully arrested such person for a violation of [S.D. Codified Laws Ann.] §32-23-1 [driving while under the influence of alcohol].
>
> Such person shall be requested by said officer to submit to such analysis and shall be advised by said officer of his right to refuse to submit to such analysis and the provisions of §§32-23-11 [revocation or restriction of license after refusal to submit to analysis] and 32-23-12 [court review of revocation] in the event of such refusal ....

As in effect at time of Resp arrest & trial

S.D. Codified Laws Ann. §32-23-10 (1976) (amended in 1982). In addition to the collateral consequences of §32-23-11 (revocation or restriction of license), a provision enacted in 1980 makes a suspect's refusal to submit to analysis admissible into evidence at a trial for driving while under the influence of alcohol. This section provides:

> If a person refuses to submit to chemical analysis of his blood, urine, breath or other bodily substance, as provided in §32-23-10, and that person subsequently stands trial for driving while under the influence of alcohol or drugs, as provided in §32-23-1, such refusal may be admissible into evidence at the trial.

Amend of 1982 - adm in ev.

S.D. Codified Laws Ann. §32-23-10.1 (Supp. 1982). This is the essential provision at issue here.

B. Facts

On July 19, 1980, resp ran a stop sign and was stopped by the police. The arresting officers, suspecting that resp was intoxicated, requested him to perform two field sobriety tests. When he was unable to do so, they informed him of his rights under Miranda and arrested him for driving while intoxicated ("DWI") in violation of S.D. Codified Laws Ann. §32-23-1.

At this point, the officers apparently requested resp to submit to a blood test. They informed him of his right to refuse, and the consequences of refusal under §§32-23-11 and -12. But they did not advise him that, under §32-23-10.1, his refusal (1) to take the blood test could be used against him at the trial on his DWI charges. They also did not advise him (2) that he had the right to consult with a lawyer prior to deciding whether to submit to the test. Resp refused to submit.

But not advised

C. Decisions Below

Resp moved to suppress "any and all evidence of [his] refusal to submit to a blood alcohol test" on the grounds that §32-23-10.1 violates his rights under the Fourth, Fifth, and Sixth Amendments. Petn A-24. The state TC granted the motion. Petn A-26.

TC granted motion to suppress

In a divided decision, the South Dakota Supreme Court affirmed. Petn A-1, 312 N.W.2d 723. The majority, citing Schmerber v. California, 384 U.S. 757 (1966), recognized that "a defendant does not have a federal constitutional right to refuse to take a blood test." Petn A-5. But "there is an absolute

S/C SD affirm

right under South Dakota law to refuse to submit to the blood test." Id., at A-9. Since a refusal is a communication of a suspect's thoughts, it is "'communicative or testimonial' rather than 'real or physical' evidence." Ibid. Furthermore, this testimonial evidence was "compelled" for Fifth Amendment purposes. As the Minnesota Supreme Court explained in State v. Andrews, 212 N.W.2d 863, 864 (Minn. 1973), the state compels "a suspect to choose between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself." In reaching this conclusion, the court relied solely on the Fifth Amendment, but left open the possibility that the state constitution might require the same result. Id., at A-11 n.*.

Wollman, C.J., argued in dissent that §32-23-10.1 is constitutional. Relying on People v. Ellis, 65 Cal.2d 529, 533-534, 536-538 (1966) (Traynor, C.J.), he concluded that refusal to submit to the test was not testimonial evidence. Alternatively, he accepted the reasoning of State v. Brean, 136 Vt. 147 (1978): since the right to refuse consent is merely a creature of state statute, rather than constitutional law, the state legislature may validly condition the grant of the statutory right. Here the right to refuse to submit was conditioned by the state's ability to use that refusal as evidence in a subsequent trial.

II. Discussion

A. The Right to Refuse

After Schmerber v. California, 384 U.S. 757 (1966), it is clear that a motorist, who is properly arrested on DWI charges and requested to submit to a reasonable blood alcohol test, has no constitutional right to refuse under the Self-Incrimination Clause, id., at 760-765, the Fourth Amendment, id., at 766-772, or the Due Process Clause, id., at 759-760. If a DWI suspect did have a constitutional right to refuse his consent, this would be a simple case, but the analysis could be completely different. Any admission of evidence of the refusal would be an impermissible burden on the underlying right, whatever its source. There would not necessarily be a Fifth Amendment question, unless the Fifth Amendment was the source of the underlying right. Suppose, for example, that a policeman demands a blood sample from a motorist when he does not have probable cause to believe that the motorist was under the influence of alcohol. If the motorist refuses to comply, asserting his Fourth Amendment rights, this refusal would not be admissable evidence. But this is because admitting the evidence would burden the exercise of the Fourth Amendment right, regardless of whether the refusal was compelled, self-incriminating testimony.

The arrested motorist's right to refuse to submit to the test in South Dakota is derived only from §32-23-10, the applicable state statute. In theory, it would be open to the state courts on remand to hold that resp's refusal to submit to the test was inadmissable as an impermissible burden on his statutory

right to refuse. I think that conclusion would be clearly erroneous, for the statute conditions the right to refuse by imposing certain collateral consequences, such as revocation of the suspect's license under §32-23-11 and admissibility of the refusal under §32-23-10.1. But the conclusion would be one of state law, so it should not concern this Court.

I mention these points for two reasons. First, it is important to recognize the nature of resp's "right" to refuse to submit to the test. This is particularly relevant when considering whether any compulsion was involved here. See Part II.C, infra. Second, recognition of the nature of the rights involved helps to focus the issues. The State makes two arguments that are essentially irrelevant in the present context of the case. It contends that since compulsion to submit to the test would not violate the Fifth Amendment, there can be no Fifth Amendment problem with admitting evidence of the refusal to submit. See, e.g., State's Brief 37. As explained in the first paragraph of this section, however, the burdening argument that the State answers with this contention is independent of any self-incriminating aspects of the refusal. The fact that there is no impermissible burden does not necessarily mean that there is no self-incrimination in the refusal. The State also argues that the legislature has conditioned the right to refuse here. Id., at 38-42. As explained in the second paragraph of this section, that seems to be perfectly true. But it is an argument for the state courts based on state law, which is independent of the self-incrimination argument before the Court here.

B. The Testimonial Nature of the Refusal

Schmerber held that the Self-Incrimination Clause only protects "evidence of a testimonial or communicative nature." 384 U.S., at 761. It does not protect "real or physical evidence." Id., at 764. Although Schmerber concluded that a blood test itself did not involve testimonial evidence, the Court recognized that the "compulsion to submit to the blood test might produce testimonial evidence: "If it wishes to compel persons to submit to [blood tests], the State may have to forgo the advantage of any testimonial products of administering the test--products which would fall within the privilege." Id., at 765 n.9 (emphasis in original). The bulk of the State's argument is devoted to the proposition that the refusal to submit to a blood alcohol test is not "testimonial" evidence. It is a close question, but I disagree.

The Court has not adopted a clear test for distinguishing between testimonial and physical evidence. The presence or absence of spoken words, for example, is not dispositive. "A nod or head-shake is as much a 'testimonial' or 'communicative' act ... as are spoken words." Id., at 761 n.5. A voice exemplar, on the other hand, is no more communicative than a fingerprint. See People v. Ellis, 65 Cal.2d, at 533-535. A recent article suggests that Schmerber establishes an assertive conduct test. Under this test, the Court should decide whether

> (1) the actor's conduct reflected his subjective intent to communicate his thoughts to another and (2) the state could make testimonial use of those intentionally communicated thoughts to help prove the individual's guilt at trial.

Arenella, Schmerber and the Privilege Against Self-Incrimination: A Reappraisal, 20 Am. Crim. L. Rev. 31, 43 (1982). (In the article, Prof. Arenella refines this test to deal with certain borderline cases. The refinements have no effect on the result here.) Under this test, flight, escape from custody, or destruction of evidence are not testimonial, for in none of these cases does the actor's conduct reflect an intent to communicate thoughts to another. These acts may reflect consciousness of guilt, but the actor would much prefer it if no thoughts were communicated--not even his desire to flee, escape, or destroy.

Applying this test to the present situation, resp's refusal to submit to the alcohol test does seem to be testimonial. A recalcitrant inebriate may not intend to communicate any consciousness of guilt, of course. (He may, in fact, simply be afraid of needles.) But *he does intend to communicate his desire not to submit to the test*, and the state can use that communication to help prove his guilt.

The State makes the novel argument (on the basis, it seems, of litigation fairness) that resp's refusal was not testimonial since the prosecution wished to use the fact of refusal to eliminate the jury's suspicion that no test was offered because no test results are produced. I fail to see how this use of the evidence makes the original refusal any less testimonial than it would be if it were used to create an inference that resp knew he would be unable to pass the test. Perhaps this distinction could support an argument that the testimony is not self-incriminating when used in this way, but even that is questionable. Using the

evidence to rebut an implicit (but unjustified) defense is as incriminating as using the evidence to establish an element of the crime. Furthermore, the implications of the State's argument are plainly unacceptable. Under the State's reasoning, juries should be informed about the suppression of evidence seized in violation of the Fourth Amendment, lest one think that the police failed to conduct a search, or failed to discover anything if they did search. That, of course, would defeat the entire purpose of the suppression. Similarly, the State's reasoning would require that juries be informed about the suppression of evidence obtained in violation of Miranda, lest one think that the police failed to interview the suspect. Once again, the burden on constitutional rights would be unacceptable. If resp has a Fifth Amendment right to prevent the State's use of his refusal, the State's "litigation fairness" argument is inadequate to defeat this right.

If "testimonial" did the State "compel" the refusal to submit to the test

C. Compulsion

Once the suspect's evidence has been determined to be testimonial, the next question is whether the State "compelled" this testimony. The South Dakota Supreme Court recognized that the police did not compel resp to refuse to submit to the test, but it found compulsion in the State's offering resp a choice between a "perhaps unpleasant examination" and producing testimonial evidence against himself. On the record of this case, I disagree.

As a factual matter, there was a certain pressure on resp to testify against himself. If he failed to testify (i.e., if he submitted to the test) he, at the very least, would have subjected himself to some unpleasantness. (More likely, he would have permitted the police to obtain conclusive evidence of his intoxicated condition.) But whenever a policeman asks a suspect a question there is a certain pressure to answer the question. Few people feel entirely comfortable in refusing to cooperate with authorities. If this were all that were required, however, the compulsion requirement would be meaningless. The relevant inquiry should be whether there was any improper pressure placed on the suspect to testify against himself.

Here the "pressure" placed on the resp to testify (i.e., to refuse to take the test) was the threat that the police would administer the blood test if he did not testify. Was this pressure improper? There is no indication that the test would be administered unreasonably, so as to violate the Fourth Amendment. (The pressure would, of course, be improper if the test involved extreme pain, or could result in medical complications. This case is not strictly governed by Schmerber, since the test there was administered by a doctor in a hospital. 384 U.S., at 758. But there is no claim of unreasonableness here.) It is clear that the test does not violate the Fifth Amendment. It appears that resp did not really have an absolute right to refuse to submit to the test under state law, see Part II.A, supra, so it appears that there was no improper pressure in denying resp a right guaranteed by statute. (This is, however, a state law matter.)

In short, the only pressure on resp was the threat that the police would require him to do something he was already required to do. I do not think that the threat of a lawfully imposed burden constitutes impermissible compulsion for Fifth Amendment purposes.

III. Conclusion

In Schmerber, the Court concluded that there was compulsion but no testimony. This case presents the mirror image: testimony but no compulsion. Since both testimony and compulsion are required to establish a Fifth Amendment violation, however, the judgment of the South Dakota Supreme Court should be reversed. This will leave the states with two options in dealing with DWI suspects. They can compel a suspect to submit to an alcohol test under Schmerber, or they can use the refusal to submit as evidence against him. The states, of course, are free to limit their own options with statutes like §32-23-10, but neither option offends the Self-Incrimination Clause.

81-1453 SOUTH DAKOTA v. NEVILLE Argued 12/8/82

Refusal to submit to blood test when Respondent was stopped for drunk driving. Implied consent provision.

Meierhenry (AG of S.D.)

Resp. was not advised his refusal ~~was admissible~~ would be admissable - also the amend. to statute was in effect.

We nevertheless can decide whether the Const. makes the fact ~~to~~ inadmissible ~~if~~ even if Δ had been advised.

What State wants is the results of the test.

[I DS pressed Qs ~~to~~ - he is concerned whether we have a final judg. because when can re tried the fact of refusal may be held inadmissible

Though S/Ct. of S D decided on both ~~the~~ State & Fed Const. grounds, the AG says ~~State~~ State will follow Fed Const

State needs the ev. of ~~to~~ blood test as it is essential for ~~cont~~ conviction in drunk-driving cases. Thus Const. issue is here.

urgent need | Back of every license to drive exists the implied consent law.

Mecenheny (cont)

If one refuses to take test, he loses license for year.

Cites "handwriting" case as compelling authority for holding Const. does not prevent a "blood test". Test protects driver as well as aids State.

In a drunk driving case, jury expects blood test to be introduced. This is a physical fact - real ev. (not testimonial)

A ~~s~~ suspect is given the "power" to refuse. When one does, the jury must be told of refusal. Otherwise it will blame State for not introducing test.

~~&~~ Const. doesn't require consent any more than it does w/r to handwriting. ~~S/Statute~~ S/D has elected to give a refusal right. But if one elects to refuse, he must take the consequence - i.e. refusal may be ~~is introduced~~ introduced at trial.

Gienapp (Resp)

Appeal to 5/D Sup Ct was made only on Const. ground. Did it appeal on the issue of failure to advise D of admissibility of refusal

Question presented here because the two other grounds remain undecided, & therefore no final judg.

x x x

Argues on basis of Sch. in Schmerber that the ev. compelled is testimonial ev. & not physical or real ev. [5/Ct of S.D. so held. See Pet A9]

(WJB notes statute doesn't compel D to say anything. He was free to stand "mute")

(WJB asked how there was compulsion when statute confers right to decline. In Schmerber Court held the D could be forced to submit to submit to blood sample)

Atty Gen. of S D (Reply)

If we agree S.D. statute is valid, the TC's finding of law (as to need to advise the D, etc) would no longer be the law of case.

Rev - 7
DIG - 2

No. 81-1453, South Dakota v. Neville Conf. 12/10/82

The Chief Justice Rev.

There is a final judg. under Cox.

Schmerber controls on merits.

The ~~one~~ right to refuse given by state was on condition that fact of refusal be admitted in ev.

Justice Brennan Rev.

Schmerber makes clear that refusal is not ~~a~~ testimonial:

But then Resp. was ~~told~~ told - this presents a problem we must confront.

Asked me about Doyle v. Ohio

Justice White Rev.

Case is here. Two of grounds are Fed. Const. grounds. State S/Ct decided one of them & didn't have to go further. Under S. D. statute, its S/Ct may decide all issues present ~~in~~ on remand.

~~#~~ Resp. was not in fact warned.

See Calif v Stewart as to finality of decision below.

BRW says the statute doesn't say the prosecution must be advised the evidence will be used against him. (I must assume I understand this.) This Q before trial court was whether the Court required the advice.

Justice Marshall DIG

I see no whether a Miranda warning must be given to a drunk.

A "pre-me" case

Justice Blackmun Rev.

Case was decided on fed. const.

No Doyle quest. No obligation to advise of revocation. Was told license could be revoked.

Justice Powell Rev.

See W H R's memo in my file as to whether Const. issue is held.

Schember essentially controls.

(Note ~~exemple~~ incomplete)

Justice Rehnquist Rev.

Case is here.

Schmerber controls.

No Doyle issue

Justice Stevens D16

If we reach merits, Schmerber controls. S D statute is valid.

But there were independent state grounds. St. S/Ct framed Q whether statute violates State & Fed Constitutions.

The failure to require with "advice" provision of statute. This a state Q.

The provision is mandatory. (But see Byron's answer to this)

If PS says the "advice" Q is not a Doyle issue. If is a related issue.

Justice O'Connor Rev.

No violation of 5th because defendant had not been advised.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: JAN 24 1983

Recirculated: _____

1st DRAFT

Reviewed

SUPREME COURT OF THE UNITED STATES

No. 81–1453

SOUTH DAKOTA, PETITIONER *v.*
MASON HENRY NEVILLE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

[January ——, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

Schmerber v. *California*, 384 U. S. 757 (1966), held that a State could force a defendant to submit to a blood-alcohol test without violating the defendant's Fifth Amendment right against self-incrimination. We now address a question left open in *Schmerber*, *id.*, at 765, n. 9, and hold that the admission into evidence of a defendant's refusal to submit to such a test likewise does not offend the right against self-incrimination.

I

Two Madison, South Dakota police officers stopped respondent's car after they saw him fail to stop at a stop sign. The officers asked respondent for his driver's license and asked him to get out of the car. As he left the car, respondent staggered and fell against the car to support himself. The officers smelled alcohol on his breath. Respondent did not have a driver's license, and informed the officers that it was revoked after a previous driving-while-intoxicated conviction. The officers asked respondent to touch his finger to his nose and to walk a straight line. When respondent failed these field sobriety tests, he was placed under arrest and read his *Miranda* rights.[1] Respondent acknowledged that

[1] The officer read the Miranda warning from a printed card. He read:

he understood his rights and agreed to talk without a lawyer present. App. 11. Reading from a printed card, the officers then asked respondent to submit to a blood-alcohol test and warned him that he could lose his license if he refused.[2] Respondent refused to take the test, stating "I'm too drunk, I won't pass the test." The officers again read the request to submit to a test, and then took respondent to the police station, where they read the request to submit a third time. Respondent continued to refuse to take the test, again saying he was too drunk to pass it.[3]

South Dakota law specifically declares that refusal to submit to a blood-alcohol test "may be admissible into evidence

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"You have the right to remain silent. You don't have to talk to me unless you want to do so. If you want to talk to me I must advise you whatever you say can and will be used as evidence against you in court. You have the right to confer with a lawyer, and to have a lawyer present with you while you're being questioned. If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you. Knowing these rights, do you want to talk to me without having a lawyer present? You may stop talking to me at any time. You may also demand a lawyer at any time." App. 8. See *Miranda* v. *Arizona*, 384 U. S. 436, 467–473 (1966).

[2] The card read: "I have arrested you for driving or being in actual physical control of a vehicle while under the influence of alcohol or drugs, a violation of S.D.C.L. 32–23–1. I request that you submit to a chemical test of your blood to determine your blood alcohol concentration. You have the right to refuse to submit to such a test and if you do refuse no test will be given. You have the right to a chemical test by a person of your own choosing at your own expense in addition to the test I have requested. You have the right to know the results of any chemical test. If you refuse the test I have requested, your driver's license and any non-residence driving privilege may be revoked for one year after an opportunity to appear before a hearing officer to determine if your driver's license or non-residence driving privilege shall be revoked. If your driver's license or non-residence driving privileges are revoked by the hearing officer, you have the right to appeal to Circuit Court. Do you understand what I told you? Do you wish to submit to the chemical test I have requested?" App. 8–9.

[3] Responding to other questions, respondent informed the officers that he had been drinking "close to one case" by himself at home, and that his last drink was "about ten minutes ago." Tr. of Preliminary Hearing 8.

at the trial." S.D. Comp. Laws Ann. § 32–23–10.1.[4] Nevertheless, respondent sought to suppress all evidence of his refusal to take the blood-alcohol test. The circuit court granted the suppression motion for three reasons: the South Dakota statute allowing evidence of refusal was unconstitutional; the officers failed to advise respondent that the refusal could be used against him at trial; and the refusal was irrelevant to the issues before the court. The State appealed from the entire order. The South Dakota Supreme Court affirmed the suppression of the act of refusal on the grounds that § 32–23–10.1, which allows the introduction of this evidence, violated the federal and state privilege against self-incrimination.[5] The court reasoned that the refusal was a

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[4] S.D. Comp. Laws Ann. § 19–13–28.1 likewise declares that, notwithstanding the general rule in South Dakota that the claim of a privilege is not a proper subject of comment by judge or counsel, evidence of refusal to submit to a chemical analysis of blood, urine, breath or other bodily substance, "is admissible into evidence" at a trial for driving under the influence of alcohol. A person "may not claim privilege against self-incrimination with regard to admission of refusal to submit to chemical analysis." *Ibid.*

[5] In a footnote, the South Dakota Supreme Court recognized that the federal constitution prohibits compelling a person to be a *witness* against himself, while the South Dakota constitution prohibits compelling a person to give *evidence* against himself. 312 N. W. 2d, at 726, n. ——. The court noted, however, that this Court in *Schmerber* had interpreted the Fifth Amendment prohibition "in light of the more liberal definition of 'evidence' as used in our state constitution." *Ibid.* Therefore, the court concluded, "[s]ince the Fifth Amendment of the U. S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S.D. Const. art. VI, § 9 and the Fifth Amendment of the U. S. Constitution." *Ibid.* Since the state court held without further analysis that a violation of the federal privilege also violates the state privilege, this Court has jurisdiction to hear the case and decide the federal constitutional issue. See *Delaware* v. *Prouse*, 440 U. S. 648, 651–653 (1979).

The South Dakota Supreme Court also remanded for a determination whether respondent's statement that he was too drunk to pass the test was made after a voluntary waiver of his right to remain silent. As yet, of course, there has been no final judgment in this case. This Court nevertheless has jurisdiction under 28 U. S. C. § 1257(3) to review the federal

communicative act involving respondent's testimonial capacities and that the State compelled this communication by forcing respondent "'to choose between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself,'" 312 N. W. 2d at 726 (quoting *State* v. *Andrews*, 297 Minn. 260, 262, 212 N. W. 2d 863, 864 (1973), cert. denied, 419 U. S. 881 (1974)).

Since other jurisdictions have found no Fifth Amendment violation from the admission of evidence of refusal to submit to blood-alcohol tests,[6] we granted certiorari to resolve the conflict. 456 U. S. 971 (1982).

II

The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate* v. *Short*, 401 U. S. 395, 401 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Mackey* v. *Montrym*, 443 U. S. 1, 17–18 (1979) (recognizing the "compelling interest in highway safety").

As part of its program to deter drinkers from driving,

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constitutional issue which has been finally determined, because if the state ultimately prevails at trial, the federal issue will be mooted; and if the state loses at trial, governing state law, S.D. Laws. Ann. §§ 23A-32–4 and 23A-32–5, prevents it from again presenting the federal claim for review. See *California* v. *Stewart*, 384 U. S. 436, 498, n. 71 (1966) (decided with *Miranda* v. *Arizona*); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 481 (1975).

[6] See, *e. g.*, cases cited at notes 10 and 12, *infra*.

South Dakota has enacted an "implied consent" law. S.D. Comp. Laws Ann. §32–23–10. This statute declares that any person operating a vehicle in South Dakota is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated. In *Schmerber* v. *California*, 384 U. S. 757 (1966), this Court upheld a state-compelled blood test against a claim that it infringed the Fifth Amendment right against self-incrimination, made applicable to the States through the Fourteenth Amendment.[7] We recognized that a coerced blood test infringed to some degree the "inviolability of the human personality" and the "requirement that the State procure the evidence against an accused 'by its own independent labors,'" but noted the privilege has never been given the full scope suggested by the values it helps to protect. We therefore held that the privilege bars the State only from compelling "communications" or "testimony." Since a blood test was "physical or real" evidence rather than testimonial evidence, we found it unprotected by the Fifth Amendment privilege.

Schmerber, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test.[8] South Dakota, however, has declined to authorize its police officers to administer a blood-alcohol test against the suspect's will. Rather, to avoid violent confrontations, the South Dakota statute permits a suspect to refuse the test, and indeed requires police officers to inform the suspect of his right to refuse. S.D. Comp. Laws Ann. §32–23–10. This permission is not without a price, however. South Dakota law authorizes the department of public safety, after

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[7] *Schmerber* also rejected arguments that the coerced blood test violated the right to due process, the right to counsel, and the prohibition against unreasonable searches and seizures.

[8] *Schmerber* did caution that due process concerns could be involved if the police initiated physical violence while administering the test, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. 384 U. S., at 760, n. 4.

providing the person who has refused the test an opportunity for a hearing, to revoke for one year both the person's license to drive and any nonresident operating privileges he may possess. S.D. Comp. Laws Ann. §32–23–11. Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections. See *Mackey* v. *Montrym*, 443 U. S. 1 (1979).

South Dakota further discourages the choice of refusal by allowing the refusal to be used against the defendant at trial. S.D. Comp. Laws. Ann. §§32–23–10.1 and §19–13–28.1. *Schmerber* expressly reserved the question of whether evidence of refusal violated the privilege against self-incrimination. 384 U. S., at 765, n. 9. The Court did indicate that general Fifth Amendment principles, rather than the particular holding of *Griffin* v. *California*, 380 U. S. 609 (1965), should control the inquiry. *Ibid.*[9]

Most courts applying general Fifth Amendment principles to the refusal to take a blood test have found no violation of the privilege against self-incrimination. Many courts, following the lead of Justice Traynor's opinion for the California Supreme Court in *People* v. *Suddah*, 65 Cal. 2d 543, 421 P. 2d 401 (1966), cert. denied, 389 U. S. 850 (1967), have reasoned that refusal to submit is a physical act rather than a communication and for this reason is not protected by the privilege.[10] As Justice Traynor explained more fully in the

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[9] *Griffin* held that a prosecutor's or trial court's comments on a defendant's refusal to take the witness stand impermissibly burdened the defendant's Fifth Amendment right to refuse. Unlike the defendant's situation in *Griffin*, a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable.

[10] See, *e. g.*, *Newhouse* v. *Misterly*, 415 F. 2d 514 (CA9 1969); *Hill* v. *State*, 366 So. 2d 318, 324–325 (Ala. 1979); *Campbell* v. *Superior Ct*, 106 Ariz. 542, 479 P. 2d 685 (1971); *State* v. *Haze*, 218 Kan. 60, 542 P. 2d 720 (1975) (refusal to give handwriting exemplar); *City of Westerville* v. *Cunningham*, 15 Ohio St. 2d 121, 239 N. E. 2d 40 (1968).

companion case of *People* v. *Ellis*, 65 Cal. 2d 529, 421 P. 2d 393 (1966) (refusal to display voice not testimonial), evidence of refusal to take a potentially incriminating test is similar to other circumstantial evidence of consciousness of guilt, such as escape from custody and suppression of evidence. The court below, relying on *Dudley* v. *State*, 548 S.W. 2d 706 (Tex. Crim. App. 1977), and *State* v. *Andrews*, 297 Minn. 260, 212 N. W. 2d 863 (1973), cert. denied, 419 U. S. 881 (1974), rejected this view. This minority view emphasizes that the refusal is "a tacit or overt expression and communication of defendant's thoughts," *State* v. *Neville*, 312 N. W. 2d at 726, and that the Constitution "simply forbids any compulsory revealing or communication of an accused person's thoughts or mental processes, whether it is by acts, failure to act, words spoken or failure to speak." *Dudley*, 548 S.W. 2d at 708.

While we find considerable force in the analogies to flight and suppression of evidence suggested by Justice Traynor, 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. 384 U. S. at 764.[11] The situations arising from a refusal present a diffi-

[11] The Court in *Schmerber* pointed to the lie detector test as an example of evidence that is difficult to characterize as testimonial or real. Even though the test may seek to obtain physical evidence, we reasoned that to compel a person to submit to such testing "is to evoke the spirit and history of the Fifth Amendment." 384 U. S., at 764. See also *People* v. *Ellis*, 65 Cal. 2d, at 537 and n. 9, 421 P. 2d, at 397 and n. 9 (analyzing lie detector tests as within the Fifth Amendment privilege). A second example of seemingly physical evidence that nevertheless invokes Fifth Amendment protection was presented in *Estelle* v. *Smith*, 451 U. S. 454 (1981). There, we held that the Fifth Amendment privilege protected compelled disclosures during a court-ordered psychiatric examination. We specifically rejected the claim that the psychiatrist was observing the patient's communications simply to infer facts of his mind, rather than to examine the truth of the patient's statements.

cult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states "I refuse to take the test," to the respondent here, who stated "I'm too drunk, I won't pass the test." Since no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal, we prefer to rest our decision on this ground, and draw possible distinctions when necessary for decision in other circumstances.[12]

As we stated in *Fisher* v. *United States*, 425 U. S. 391, 397 (1976), "[T]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." This coercion requirement comes directly from the constitutional language directing that no person "shall be *compelled* in any criminal case to be a witness against himself." U. S. Const., Amdt. 5 (emphasis added). And as Professor Levy concluded in his history of the privilege, "[t]he element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incriminating interrogatories." W. Levy, Origins of the Fifth Amendment 328 (1968).

Here, the state did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing. Of course, the fact the government gives a defendant or suspect a "choice" does not always resolve the compulsion inquiry. The classic Fifth Amendment violation—telling a defendant at trial to testify—does not, under an extreme view, compel the defendant to incriminate himself. He could submit to self accusation, or testify falsely

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[12] Many courts have found no self-incrimination problem on the ground of no coercion, or on the analytically related ground that the state, if it can compel submission to the test, can qualify the right to refuse the test. See, *e. g.*, *Welch* v. *District Court*, 594 F. 2d 903 (CA2 1979); *State* v. *Meints*, 189 Neb. 264, 202 N. W. 2d 202 (1972); *State* v. *Gardner*, 52 Ore. App. 663, 629 P. 2d 412 (1981); *State* v. *Brean*, 136 Vt. 147, 385 A. 2d 1085 (1978).

(risking perjury) or decline to testify (risking contempt). But the Court has long recognized that the Fifth Amendment prevents the state from forcing the choice of this "cruel trilemma" on the defendant. See *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 55 (1964). See also *New Jersey* v. *Portash*, 440 U. S. 450, 459 (1979) (telling a witness under a grant of legislative immunity to testify or face contempt sanctions is "the essence of coerced testimony."). Similarly, *Schmerber* cautioned that the Fifth Amendment may bar the use of testimony obtained when the proferred alternative was to submit to a test so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer "confession." *Schmerber*, 384 U. S., at 765, n. 9. Cf. *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966) (unless compulsion inherent in custodial surroundings is dispelled, no statement is truly a product of free choice).

In contrast to these prohibited choices, the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. The simple blood-alcohol test is so safe, painless, and commonplace, see *Schmerber*, 384 U. S., at 771, that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.

We recognize, of course, that the 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 re-

quires suspects and defendants to make difficult choices. See, *e. g.*, *Crampton* v. *Ohio*, decided with *McGautha* v. *California*, 402 U. S. 183, 213–217 (1971). We hold, therefore, that 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.[13]

III

Relying on *Doyle* v. *Ohio*, 426 U. S. 610 (1976), respondent also suggests that admission at trial of his refusal violates the Due Process Clause because respondent was not fully warned of the consequences of refusal. *Doyle* held that the Due Process Clause forbids a prosecutor from using a defendant's silence after *Miranda* warnings to impeach his testimony at trial. Just a Term before, in *United States* v. *Hale*, 422 U. S. 171 (1975), we had determined under our supervisory power that the federal courts could not use such silence for impeachment because of its dubious probative value. Although *Doyle* mentioned this rationale in applying the rule to the states, 426 U. S., at 617, the Court relied on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial. *Id.*, at 618.

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[13] In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*. As we stated in *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980), police words or actions "normally attendant to arrest and custody" do not constitute interrogation. The police inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects. It is similar to a police request to submit to fingerprinting or photography. Respondent's choice of refusal thus enjoys no prophylactic *Miranda* protection outside the basic Fifth Amendment protection. See generally Arenella, Schmerber *and the Privilege Against Self-Incrimination: A Reappraisal*, 20 Am. Crim. L. Rev. 31, 56–58 (1982).

Unlike the situation in *Doyle*, we do not think it fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial. First, the right to silence underlying the *Miranda* warnings is one of constitutional dimension, and thus cannot be unduly burdened. See *Miranda*, 384 U. S., at 468, n. 37. Cf. *Fletcher* v. *Weir*, 455 U. S. 603 (1982) (post-arrest silence without *Miranda* warnings may be used to impeach trial testimony). Respondent's right to refuse the blood-alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota legislature.

Moreover, the *Miranda* warnings emphasize the dangers of choosing to speak ("whatever you say can and will be used as evidence against you in court"), but give no warning of adverse consequences from choosing to remain silent. This imbalance in the delivery of *Miranda* warnings, we recognized in *Doyle*, implicitly assures the suspect that his silence will not be used against him. The warnings challenged here, by contrast, did not mislead respondent as to the relative consequences of his choice. The officers explained that, if respondent chose to submit to the test, he had the right to know the results and could choose to take an additional test by a person chosen by him. The officers did not specifically warn respondent that the test results could be used against him at trial.[14] Explaining the consequences of the other option, the officers specifically warned respondent that failure to take the test could lead to loss of driving privileges for one year. It is true the officers did not inform respondent of the

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[14] Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that this failure to warn would make the test results inadmissible, had respondent chosen to submit to the test. Cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1972) (knowledge of right to refuse not an essential part of proving effective consent to a search).

further consequence that evidence of refusal could be used against him in court,[15] 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. Importantly, the warning that he could lose his driver's license made it clear that refusing the test was not a "safe harbor," free of adverse consequences.

Since the State has not implicitly promised to forego use of evidence of refusal, it has not unfairly "tricked" respondent by later seeking to use the evidence against him at trial. We therefore conclude that the use of evidence of refusal after these warnings comported with the fundamental fairness required by Due Process.

IV

The judgment of the South Dakota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[15] 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. Tr. of Oral Arg. 16.

January 24, 1983

81-1453 South Dakota v. Neville

Dear Sandra:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 25, 1983

No. 81-1453 South Dakota v. Neville

Dear Harry,

I will incorporate in the next circulation a footnote indicating that nothing in the record suggests that respondent made any claim of objection based on religious grounds or the use of extraordinary procedures.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 25, 1983

RE: No. 81-1453 South Dakota v. Neville

Dear Sandra:

I agree.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 31, 1983

Re: No. 81-1453 South Dakota v. Neville

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 4, 1983

Re: No. 81-1453 - South Dakota v. Neville

Dear Sandra:

I join.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 9, 1983

Re: 81-1453 -

South Dakota v. Neville

Dear Sandra,

Please join me.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 10, 1983

Re: 81-1453-South Dakota v. Neville

Dear John:

Please join me in your dissent.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 15, 1983

Re: No. 81-1453 -- South Dakota
v. Neville

Dear Sandra,

Please join me.

Sincerely,

Byron

Justice O'Connor
Copies to the Conference

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
								12/20/82
Join SOC 2/14/83	agree 1/25/83	Join SOC 2/15/83	Join JPS 2/10/83	Join SOC 1/25/83	Join SOC 1/24/83	Join SOC 1/31/83	1st draft dissent 2/9/83	1st draft 1/24/83
							2nd draft 2/16/83	3rd draft 2/11/83
							~~3rd draft~~ 2/18/83	

81-1453 South Dakota v. Neville