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CONSTITUTIONAL LAW—CRIMINAL LAW—EVIDENCE—Admissibility of a Motorist's Refusal to Take a Breath-Alcohol Test: *McKay v. Davis*

I. INTRODUCTION

Drunken drivers have received wide-spread attention in the past few years.[1] The realization that New Mexico is acutely plagued by intoxicated motorists[2] has produced initiatives from New Mexico's executive,[3] legislative,[4] and judicial branches [5] to curb drunken driving. *McKay v. Davis*[6] embodies the latest effort by New Mexico courts to "get tough" with drunken drivers.

In *McKay v. Davis*,[7] the New Mexico Supreme Court facilitated the prosecution of those accused of drunken driving.[8] The court held that a motorist's refusal to submit to a breath-alcohol test[9] is admissible evidence

1. *See, e.g.*, *The War Against Drunk Drivers*, Newsweek, Sept. 13, 1982, at 34; *Is the Party Finally Over?*, Time, Apr. 26, 1982, at 58; The New York Times, Dec. 31, 1982, at B-4, col. 3; The Albuquerque Journal, Aug. 12, 1982, at B-2, col. 5.

2. Sixteen percent (7,649) of the 47,407 traffic accidents in New Mexico during 1980 involved alcohol. Alcohol was involved in 66.9% of all fatal accidents in that year and is undoubtedly part of the reason that New Mexico's death rate from traffic accidents is 57% higher than the national average. Traffic Safety Bureau, New Mexico Department of Transportation, New Mexico Traffic Accident Data 1980 (1981) (available at the University of New Mexico Law Library).

3. *See* Recommendations of the Governor's Task Force on Driving While Intoxicated and Alcohol Abuse (December, 1982) (available from the State of New Mexico, Health and Environment Department).

4. *See* 1982 N.M. Laws ch. 102 (providing for mandatory jail sentences for offenders convicted of drunk driving within five years of a prior drunk driving conviction, limitations on plea bargaining, and mandatory charging of a motorist determined to have a blood-alcohol level of 0.15% or higher) (codified as amended in N.M. Stat. Ann. §§ 66-8-102, -102.1 (Cum. Supp. 1983) and N.M. Stat. Ann. § 66-8-110 (Cum. Supp. 1982)); 1983 N.M. Laws ch. 76 (increasing the penalty for vehicular homicide committed while driving drunk, extending the maximum probationary period for drunk driving convictions, and providing for mandatory charging of a motorist determined to have a blood-alcohol level of 0.10% or higher) (codified in N.M. Stat. Ann. §§ 66-8-101, -102, -110 (Cum. Supp. 1983)).

5. *See, e.g.*, Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982) (a tavernkeeper who supplies an obviously intoxicated patron with liquor may be liable for injuries inflicted by the patron while the patron is driving under the influence of the alcohol). The court in *Lopez* placed the burden of preventing drunk driving on those who can best prevent a person from drinking and driving.

6. 99 N.M. 29, 653 P.2d 860 (1982).

7. *Id.*

8. *Id.* at 30, 653 P.2d at 861.

9. A breath-alcohol test is a type of blood-alcohol test which indirectly tests the percentage of alcohol, by weight, in a person's blood. A device traps a specific volume of air expelled from the motorist's lower lungs and gauges the percentage of alcohol in the sample. A number of different machines are manufactured for this purpose, such as the Breathalyzer 1000, Intoxilizer 4011A and 4011AS, Auto-Intoximeter, Alco Analyzer 1000, and SM-7. *See generally* R. Erwin, Defense of Drunk Driving Cases, chs. 14-24A (3rd ed. 1982).

at trial.[10] While the result serves the legitimate public policy of aiding the conviction of drunken drivers, the opinion is overly broad and leaves doubt as to whether the rights of the accused are being adequately safeguarded.

The New Mexico Supreme Court resolved the defendant's fifth amendment claim by finding that a refusal to take a breath-alcohol test is nontestimonial as well as not compelled.[11] Each of these two determinations leads to the conclusion that a refusal is not protected by the fifth amendment. In contrast, the recent United States Supreme Court decision of *South Dakota v. Neville*[12] reaches the same result, but does so on much narrower grounds. This Note examines the New Mexico Supreme Court's reasoning in *McKay v. Davis* and compares it with the rationale of *South Dakota v. Neville.*

II. STATEMENT OF THE CASE

On February 7, 1981, Frank McKay was arrested and charged with driving while under the influence of intoxicating liquor or drugs (DWI).[13] When the arresting officer requested that McKay take a breath-alcohol test, McKay refused.[14] The case was assigned to Judge Thomas B. Davis of the Bernalillo County Metropolitan Court.[15] A pretrial conference was held and McKay informed the court that he would move to exclude any reference to his refusal to take the breath-alcohol test.[16] McKay contended that this evidence would violate his privilege under the Fifth Amendment of the United States Constitution [17] to remain silent after being arrested.[18] The trial court stated that it would permit the introduction of evidence concerning McKay's refusal.[19] McKay petitioned the Bernallilo County District Court for a writ of prohibition to prevent the prosecutor from using his refusal against him at trial.[20] The district court granted a permanent writ of prohibition barring the metropolitan court from admitting

10. *McKay,* 99 N.M. at 31, 653 P.2d at 862.
11. *Id.*
12. 103 S. Ct. 916 (1983).
13. Transcript of Record on Appeal at 39 [hereinafter cited as Record]. The Record is available at the University of New Mexico and New Mexico Supreme Court Law Libraries. Driving while under the influence of intoxicating liquor or drugs (DWI) is a violation of N.M. Stat. Ann. § 66-8-102 (Cum. Supp. 1983).
14. *McKay,* 99 N.M. at 29, 653 P.2d at 860.
15. Record at 39.
16. 99 N.M. at 30, 653 P.2d at 861.
17. U.S. Const. amend. V. The fifth amendment states, in pertinent part, that "[n]o person . . . shall . . . be compelled in any criminal case to be a witness against himself." It was made applicable to the states through the fourteenth amendment by Malloy v. Hogan, 378 U.S. 1 (1964).
18. Record at 39.
19. 99 N.M. at 30, 653 P.2d at 861.
20. Record at 1.

McKay's refusal into evidence and Judge Davis appealed.[21] The New Mexico Supreme Court reversed the district court's grant of the writ of prohibition and held that evidence of a defendant's refusal to take a breath-alcohol test is admissible at trial.[22]

III. DISCUSSION AND ANALYSIS

The New Mexico Supreme Court's determination in *McKay v. Davis* that evidence of a motorist's refusal to take a breath-alcohol test is admissible rests on three separate conclusions. First, the court held that the Implied Consent Act[23] grants a motorist accused of DWI the power to refuse to take a breath-alcohol test, but that this power does not rise to the level of a statutory right of refusal.[24] Second, the court stated that the privilege against self-incrimination provided by the fifth amendment is not violated by admitting evidence of a motorist's refusal to take a breath-alcohol test because the refusal is neither testimonial nor compelled.[25] Third, the court concluded that evidence of a defendant's refusal to take a breath-alcohol test is relevant to show his consciousness of guilt and fear of the test results.[26] Based on these three conclusions, the court held that evidence of a refusal to take a breath-alcohol test is admissible at trial on a DWI charge.[27]

A. The Power of Refusal under the Implied Consent Act

New Mexico's Implied Consent Act[28] provides that a driver of a motor vehicle in New Mexico implicitly consents to submit to a breath and/or blood test to determine the drug or alcoholic content of his blood when arrested for any offense allegedly committed while driving a motor vehicle under the influence of drugs or alcohol.[29] The implied consent exists even if the accused is dead, unconscious, or otherwise incapable of refusing to submit to the test.[30] The Implied Consent Act recognizes, however, that a motorist may refuse to submit to the test;[31] if a motorist refuses to

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21. *Id.* at 43-44.
22. 99 N.M. at 32, 653 P.2d at 863.
23. N.M. Stat. Ann. §§ 66-8-105 to -112 (1978 and Cum. Supp. 1983) (*McKay* was decided under the laws in effect in 1982, but the statutes are the same in all pertinent parts. Citations throughout this Note will be to the most recent compilations unless there have been material changes in the text of the statute).
24. 99 N.M. at 31, 653 P.2d at 862.
25. *Id.*
26. *Id.* at 32, 653 P.2d at 863.
27. *Id.*
28. N.M. Stat. Ann. §§ 66-8-105 to -112 (1978 and Cum. Supp. 1983).
29. *Id.* § 66-8-107 (Cum. Supp. 1983)
30. *Id.* § 66-8-108 (1978).
31. *Id.* § 66-8-111 (Cum. Supp. 1983).

take the test, no test will be administered.[32] The Implied Consent Act mandates, however, that refusal will result in the revocation of the motorist's license for one year, unless the motorist pleads guilty or *nolo contendre* to the charge of DWI within thirty days.[33] The motorist must be warned in advance that his refusal could result in license revocation.[34]

These statutory provisions contemplate that some motorists will refuse to submit to breath-alcohol tests. According to *Schmerber v. California*,[35] however, motorists generally have no constitutional right to refuse to submit to a blood or breath test.[36] In that case, Schmerber had been drinking and was driving an automobile when it struck a tree. While he was at the hospital obtaining treatment for injuries sustained in the accident, he was arrested for DWI. Schmerber, on advice of counsel, refused to submit to a blood-alcohol test. Ignoring Schmerber's refusal, a police officer directed a physician to draw blood from the petitioner; the blood sample indicated that Schmerber was intoxicated. The trial court admitted the blood test results into evidence at Schmerber's trial for DWI and Schmerber was convicted.[37]

On appeal, the United States Supreme Court held that the forced testing was permissible and the test results were admissible into evidence.[38] The Court found that the testing did not violate the constitutional guarantee of due process of law,[39] the privilege against self-incrimination,[40] the right to counsel,[41] or the right to be free from unreasonable searches and seizures.[42] The Court held that the Constitution provides no right of refusal and does not bar states from compelling motorists accused of DWI to take blood-alcohol tests.[43]

The New Mexico Legislature has chosen not to impose forced testing upon motorists accused of DWI. New Mexico statutes provide that if an accused refuses to take a breath-alcohol test, the police officer shall not

32. *Id.* § 66-8-111(A). If a person is arrested for an alcohol-related motor vehicle offense which results in death or the likelihood of death or which involves a felony, however, a blood or breath test may be compelled by the police after they obtain a valid search warrant authorizing the test. *Id.*

33. *Id.* § 66-8-111(B).

34. *Id.*

35. 384 U.S. 757 (1966).

36. The state is prevented, however, from obtaining the evidence by means which offend "a sense of justice." *See* Rochin v. California, 342 U.S. 165, 173 (1952).

37. 384 U.S. at 758-59.

38. *Id.* at 759.

39. *Id.* at 759-60.

40. *Id.* at 760-65.

41. *Id.* at 765-66.

42. *Id.* at 766-72.

43. In *Schmerber*, the Court concluded that "the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions. . . ." *Id.* at 772.

44. N.M. Stat. Ann. § 66-8-111(A) (Cum. Supp. 1983).

administer the test.[44] This provision prevents violent confrontations between drunken motorists and police officers.[45] The Legislature has opted not to force a refusing motorist to take a breath-alcohol test even though the United States Supreme Court in *Schmerber* found forced testing to be permissible.

The *McKay* court, in addressing the claimed statutory right not to be tested for blood-alcohol levels, examined the New Mexico Court of Appeals decision in *State v. Wilson.*[46] *Wilson* involved facts similar to *Schmerber:* the defendant was arrested for an alcohol-related motor vehicle offense and a blood-alcohol test was performed on him after he refused to consent to its administration.[47] At the time *Wilson* was decided, New Mexico law provided that no blood-alcohol test could ever be administered if the defendant refused to submit to the test.[48] The New Mexico Court of Appeals held that the trial court correctly suppressed evidence of the blood sample and its analysis, stating: "The exclusion of the blood test was appropriate. The sample was taken in violation of a statutory right."[49] The court failed, however, to identify the violated right.

McKay argued that the "statutory right" referred to in *Wilson* was the right to refuse to take a breath-alcohol test.[50] The *McKay* court, however, found it "clear" that the statutory right referred to in *Wilson* was "the right not to be forcibly tested after manifesting refusal."[51] In effect, the Implied Consent Act language, which states that "[i]f a person under arrest . . . refuses upon request . . . to submit to chemical tests . . ., none shall be administered. . .,"[52] does not mean that motorists have a right to refuse to take the test. Rather, the language indicates that the state has no right to forcibly gather the evidence against the motorist's will.

The court in *McKay* characterized the ability to refuse as a "power" rather than a "right."[53] The court cautioned, however, that a motorist

45. *See* South Dakota v. Neville, 103 S. Ct. 916, 921 (1983); *see also* Hill v. State, 366 So. 2d 318, 323 (Ala. 1979) and authorities cited therein.

46. State v. Wilson, 92 N.M. 54, 582 P.2d 826 (Ct. App. 1978).

47. *Id.* at 55, 582 P.2d at 827.

48. N.M. Stat. Ann. § 64-22-2.11(A) (1953) (now codified as N.M. Stat. Ann. § 66-8-111(A) (Cum. Supp. 1983)). Subsequent to *Wilson,* the statute was amended and the law now provides that, in certain circumstances, a blood-alcohol test may be administered after obtaining a search warrant. *See* N.M. Stat. Ann. § 66-8-111(A) (Cum. Supp. 1983).

49. 92 N.M. at 56, 582 P.2d at 828 (citation omitted).

50. *McKay,* 99 N.M. at 30, 653 P.2d at 861.

51. *Id.* at 30, 653 P.2d at 861.

52. N.M. Stat. Ann. § 66-8-111(A) (Cum.Supp. 1983).

53. 99 N.M. at 31, 653 P.2d at 862. The court stated: "What actually exists is the driver's statutory power to refuse to submit to the physical act of intrusion upon his body. To call such a power a 'right' to refuse is a misnomer." *Id.*

may be penalized for exercising the power to refuse to take a breath test because a refusal may be used in evidence against an accused.[54] If the ability to refuse were labeled as a statutory right, the admission of evidence of a refusal to submit to a breath-alcohol test would impinge upon the exercise of that right and would be inadmissible.[55] Therefore, as the court recognized, once the ability to refuse is labeled a "power" rather than a "right," evidence of a refusal clearly is admissible.[56]

B. Refusal as Self-Incrimination

The fifth amendment privilege against self-incrimination is derived from the common law.[57] The common law protection was developed to prevent the inhumane treatment of an accused and to promote a fair state-individual balance; the development also was intended to ensure that the government disturbs individuals only for good cause and proves its case without the assistance of an accused.[58] The privilege protects individuals against "testimonial compulsion,"[59] but it does not extend to the inspection of an accused's bodily condition.[60] Although these interpretations are clear, it is less obvious whether an accused's refusal to submit to an inspection of his bodily condition, in the present case by means of a breath-alcohol test, is protected by the privilege against self-incrimination.[61]

In *Schmerber v. California,*[62] the United States Supreme Court held that the introduction of the results of a blood-alcohol test into evidence

54. *Id.* at 30, 31, 653 P.2d at 861, 862.

55. *See* Duckworth v. State, 309 P.2d 1103 (Okla. Crim. App. 1957). The *Duckworth* court stated:

> It ill behooves the courts to say you have a right to refuse to do something, which may prove either beneficial or detrimental to you, and yet, notwithstanding your right so to do, we will permit your refusal to be shown and enable the state to destroy your right and achieve indirectly by innuendo what it was prevented by law from accomplishing directly.

Id. at 1105. *See also* Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969).

56. The court in *McKay* stated that, "[b]y correctly labeling the statutory power to refuse as a power rather than a right, the admissability of the refusal evidence is rendered clearly proper." 99 N.M. at 31, 653 P.2d at 862.

57. 8 J. Wigmore, Evidence § 2252 (McNaughton Rev. 1961) [hereinafter cited as Wigmore].

58. *Id.* § 2251.

59. *Id.* § 2263.

60. *Id.* § 2265.

61. Wigmore states: "Unless some attempt is made to secure a commmunication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operation of his mind in expressing it, the demand made upon him is not a testimonial one." *Id.* at § 2265. The *McKay* court's adoption of the view that a refusal is "conduct indicating a consciousness of guilt," 99 N.M. at 31, 653 P.2d at 862 (citing Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969)), may fit into Wigmore's exception because the state relies on the conduct to show that the defendant knew he was guilty; the conduct, therefore, may be deemed testimonial. The state makes no "attempt" to elicit the refusal, however, and, as a result, may avoid Wigmore's exception.

62. 384 U.S. 757.

did not violate the petitioner's fifth amendment privilege against self-incrimination.[63] The court based this holding on the determination that "the 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. . . ."[64] According to the Court, blood-alcohol test evidence, although compelled, is neither testimonial nor communicative. The Court declared in footnote 9, however, that testimonial statements which indirectly result from forcing a motorist to submit to the test may be privileged under the fifth amendment.[65] The Court noted that evidence of petitioner's refusal to submit to a breath-alcohol test was similar to such a testimonial by-product.[66] The Court further stated that general fifth amendment principles would govern whether a refusal was admissible into evidence.[67] Most jurisdictions examining the issue have decided that refusal evidence does not violate the fifth amendment and is admissible;[68] a few states, however, reach the conclusion that the evidence is inadmissible.[69]

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63. *Id.* at 761.

64. *Id.*

65. Footnote 9 of *Schmerber* states:

> 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 forego the advantage of any *testimonial* products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissability of compulsion in that case. But no such situation is presented in this case.
>
> Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument 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. . . .

Id. at 765-66 n.9 (citations omitted) (emphasis in original).

The defendant failed to object at trial to the admission of his refusal into evidence. The Supreme Court, therefore, refused to rule on the admissibility of a motorist's refusal to take a blood-alcohol test. *Id.* at 766 n.9.

66. *Id.* at 765 n.9.

67. *Id.* at 766 n.9. Various courts have pondered the import of footnote 9. The Ninth Circuit felt that "[t]he second portion of footnote 9 muddies up the waters somewhat." Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969), *cert. denied*, 397 U.S. 966 (1970). In Hill v. State, 366 So. 2d 318, 325 (Ala. 1979), the court mused that "it is unclear exactly what sort of testimonial products the Court had in mind."

68. *See* Annot. 87 A.L.R.2d 370, 378-83 (1963) and supplementary cases.

69. *Id.* at 383 and supplementary cases.

1. The Majority View

The majority view holds that evidence of a motorist's refusal to take a breath-alcohol test does not violate the privilege against self-incrimination and, therefore, is admissible.[70] This conclusion is derived from either of two different rationales: one rationale holds a refusal is non-testimonial and the other concludes that a refusal is not compelled.[71]

The Ninth Circuit's opinion in *Newhouse v. Misterly*[72] is representative of decisions holding that a refusal is non-testimonial. The court affirmed the denial of a petition for a writ of habeas corpus based on the allegation that the admission into evidence of the petitioner's refusal to take a blood-alcohol test violated her right to be free from self-incrimination.[73] The court determined that parts of footnote 9 prevent a state from using "an incriminating statement by the accused which is induced by the requirement that the test be taken."[74] In addition, the court found that other parts of footnote 9 prohibit the admission of refusal evidence where there is a constitutional or statutory right to refuse to take the test.[75]

Reading the footnote as a whole, however, the court determined that a refusal to take a blood-alcohol test is not a testimonial statement.[76] The court found the refusal to be physical evidence in the nature of "conduct indicating a consciousness of guilt."[77] Therefore, the introduction of, and comment on, evidence of the petitioner's refusal to take the test did not violate her fifth amendment privilege to be free from self-incrimination. Additionally, the court found no statutory right to refuse to take the test and the court held refusal evidence to be admissible.[78]

The same conclusion has been reached by finding that a motorist is not compelled to refuse to take the test.[79] In *People v. Thomas*,[80] the New

70. *Id.* at 378-83 and supplementary cases.

71. *Id.*

72. 415 F.2d 514 (9th Cir. 1969), *cert. denied*, 397 U.S. 966 (1970).

73. The petitioner, Betty Jane Newhouse, was arrested for drunk driving and refused to take a blood-alcohol test; this refusal was admitted into evidence at her trial for DWI, which resulted in a conviction. Newhouse filed a petition for a writ of habeas corpus in federal court alleging, *inter alia*, that the admission of evidence of her refusal to take the test violated her right to be free from self-incrimination. The district court denied the petition and the Ninth Circuit affirmed. *Id.*

74. *Id.* at 518.

75. The court declared that admission under such circumstances would be an improper penalization for exercising the right to refuse to take the test. *Id.*

76. *Id.*

77. *Id. But see infra* note 128.

78. 415 F.2d at 518. The language of the *Newhouse* court indicates, however, that if an accused makes a testimonial statement when confronted with the blood-alcohol test requirement, evidence of a refusal may be inadmissible. *Id.* at 518.

79. A good deal of confusion exists as to what is being compelled. Some cases discuss compulsion in terms of being compelled to refuse to take the test. *See, e.g.*, South Dakota v. Neville, 103 S. Ct. 916 (1983); People v. Thomas, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978). Other courts frame the argument in terms of being compelled to forfeit a right. *See, e.g.*, Welch v.

York Court of Appeals characterized a refusal as testimonial evidence, but it found that the defendant was not compelled to give that testimonial evidence.[81] The court defined compulsion as physical compulsion or "a penalty, punishment or detriment for the imposition of which no other justification exists and of which the defendant is therefore entitled to be free."[82] The only compulsion of which the *Thomas* court could conceive was the compulsion to take the test.[83] The court compared a motorist's refusal to take a blood-alcohol test to a defendant's pretrial confession of guilt made voluntarily, knowingly, and with the benefit of required warnings;[84] this type of confession is admissible because it lacks compulsion. Finding no statutory or constitutional right to refuse to take the test,[85] the court held that introduction of evidence of the defendant's refusal to take a blood-alcohol test did not violate the privilege against self-incrimination because there is no compulsion to refuse to take the test.[86]

District Court, 594 F.2d 903 (2d Cir. 1979); State v. Jackson, 637 P.2d 1 (Mont. 1981). The *McKay* court agreed with the state's contention that a refusal to take a breath-alcohol test is not compelled but also approvingly cited *Welch* for the proposition that a motorist is not compelled to forfeit a right. 99 N.M. at 31, 653 P.2d at 862.

80. 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978).

81. *Id.* at 108, 385 N.E.2d at 588, 412 N.Y.S.2d at 849. The defendant was involved in an accident while driving his automobile. When the police arrived, they noticed that the defendant's breath smelled of alcohol and that there was a half-empty wine bottle on the floor of the car. The defendant was taken to the hospital where he was requested to submit to a blood-alcohol test; he refused and was informed that his refusal could be introduced into evidence at trial. The defendant persisted in his refusal and no test was administered. Evidence of the defendant's refusal was admitted into evidence at his subsequent trial for DWI over his objection, and the defendant was found guilty of a lesser-included offense of driving while impaired. *Id.* at 103-04, 385 N.E.2d at 585-86, 412 N.Y.S.2d at 846-47.

The Appellate Term of the New York Supreme Court, First Department, reversed the conviction on the grounds that the introduction of evidence of the defendant's refusal violated his fifth amendment privilege against self-incrimination. *Id.* at 104-05, 385 N.E.2d at 586, 412 N.Y.S.2d at 847. The New York Court of Appeals, in reversing the supreme court, found a refusal to be testimonial but not compelled. It based the finding that a refusal is testimonial on the relevance of the evidence; it is relevant because it indicates fear of the test results (*i.e.*, knowledge of guilt). According to the court of appeals, a refusal, therefore, is testimonial in nature. *Id.* at 106-07, 385 N.E.2d at 587-88, 412 N.Y.S.2d at 848-49. *See also infra* text accompanying notes 130-42 (relationship between relevancy and conduct indicating a consciousness of guilt).

Note that New York, unlike New Mexico, requires a motorist to be informed that his refusal can be used in court against him. N.Y. Veh. & Traf. Law § 1194, subd. 4 (McKinney Supp. 1982-83). It is important that the motorist have that knowledge in order to make an informed choice whether to take the test or not. *See infra* text accompanying notes 148-51.

82. 46 N.Y.2d at 106, 385 N.E.2d at 587, 412 N.Y.S.2d at 848.

83. *Id.* at 108, 385 N.E.2d at 588, 412 N.Y.S.2d at 849.

84. *Id.* at 107, 385 N.E.2d at 587, 412 N.Y.S.2d at 849. The *Thomas* court identified a pretrial confession as "perhaps the ultimate in self-incriminating matter." *Id.*

85. *Id.* at 109, 385 N.E.2d at 589, 412 N.Y.S.2d at 850. The defendant, therefore, could have taken the test without forfeiting his rights. *Id.* at 108, 385 N.E.2d at 588, 412 N.Y.S.2d at 850.

86. *Id.* at 108, 385 N.E.2d at 588, 412 N.Y.S.2d at 849.

2. The Minority View

The minority view holds that evidence of a motorist's refusal to take a breath-alcohol test is not admissible because the admission would violate the privilege against self-incrimination.[87] The minority finds that a refusal is testimonial in nature and is compelled by the state.[88] Fundamental to this determination is the characterization of the statutory ability to refuse as a right.[89] These courts refuse to accept the proposition that because submission to a breath-alcohol test is non-testimonial, a refusal also is non-testimonial.[90] In addition, these courts find that admitting a refusal into evidence compels a defendant to make an unfair choice of providing evidence of one kind or another.[91]

Representative of this line of reasoning is *State v. Jackson,*[92] in which the Montana Supreme Court upheld a trial court's determination that a statute which permitted evidence of a motorist's refusal to take a breath-alcohol test violated the defendant's privilege against self-incrimination guaranteed by the fifth amendment and the Montana Constitution.[93] The *Jackson* court found that a refusal is testimonial because it indicates consciousness of guilt.[94] The court perceptively predicted that prosecutors will point out to the jury that the refusal is "circumstantial evidence of the defendant's belief that the test results would have been incriminating."[95] In addition, the court stated that an accused is compelled either

87. *See, e.g.,* People v. Rodriguez, 364 N.Y.S.2d 786 (N.Y. Sup. Ct. 1975); *see also* Annot., 87 A.L.R.2d 370, 383 (1963) and supplementary cases.

88. *See, e.g.,* People v. Rodriguez, 364 N.Y.S.2d 786 (N.Y. Sup. Ct. 1975)

89. *See, e.g.,* State v. Jackson, 637 P.2d 1, 2 (Mont. 1981).

90. *See, e.g.,* People v. Rodriguez, 364 N.Y.S.2d 786, 790 (N.Y. Sup. Ct. 1975). The *Rodriguez* court termed such a conclusion a "non-sequitur" and asserted that a "[r]efusal is, by definition, communication." *Id.*

91. *See, e.g.,* State v. Jackson, 637 P.2d 1, 2 (Mont. 1981).

92. 637 P.2d 1 (Mont. 1981).

93. Jackson was arrested for DWI and refused to take a breath-alcohol test at the police station; the police videotaped his refusal. The trial court granted the defendant's motion in limine to suppress all evidence of the refusal to submit to the breath-alcohol test. *Id.* at 2.

The Montana statute, held to violate the fifth amendment and the state constitution, stated in pertinent part:

> (2) If the person under arrest refused to submit to the test as hereinabove provided, proof of refusal *shall* be admissible in any action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor.

Mont. Code Ann. § 61-8-404 (1981) (emphasis added).

The Montana Constitution provides, in pertinent part:

> No person shall be compelled to testify against himself in a criminal proceeding.

Mont. Const. art. II, § 25.

94. 637 P.2d at 3.

95. *Id.* at 3. The court expressed concern that this evidence lacks reliability and, in effect, would force the defendant to take the stand to exculpate himself or bear the consequences of inculpation that his silence would engender. The court listed many innocent reasons for a defendant's refusal to take the test (such as asthma, distrust of the procedure or the abilities of its administrators, fear

to provide the physical evidence desired by submitting to the breath-alcohol test or to provide testimonial evidence of his consciousness of guilt by refusing to take the test.[96] The court declared, "[t]hat [choice] is no choice at all."[97] The court found that an accused's privilege against self-incrimination would be violated because the state would force the accused to chose to forfeit the statutory right to refuse the breath-alcohol test or to have "a strong inference of guilt"[98] demonstrated from the assertion of the right to refuse. The *Jackson* court, therefore, deemed that the evidence of a defendant's refusal to take a breath-alcohol test is inadmissible because the defendant is compelled to provide testimonial evidence against himself.[99]

3. *McKay v. Davis*

In *McKay,* the New Mexico Supreme Court endorsed the majority view that refusal evidence is admissible. Additionally, the court accepted both rationales underlying the majority view, finding that a motorist's "refusal to take the [breath-alcohol] test is neither compelled nor testimonial communication of the type protected by the fifth amendment."[100] Adopting the finding expressed in *Newhouse v. Misterly*[101] that a refusal is best characterized as "conduct indicating a consciousness of guilt,"[102] the supreme court concluded that a refusal is physical rather than testimonial evidence.[103] The *McKay* court stated that "[McKay's] act of refusal merely exposes him to the drawing of inferences, . . . just as does any other act."[104]

The court also embraced the view that the state does not compel the refusal.[105] The court looked to *Welch v. District Court of Vermont Unit No. 5, Washington County*[106] in reaching this conclusion. *Welch* held that

of incurring the cost of the test, doubts as to the reliability of the test, and the desire to have a doctor present) and found that the introduction of refusal evidence would be highly prejudicial in such circumstances. This is especially true when an accused cannot personally testify to his innocent motivations for refusing because he declines to take the stand for other reasons. *See* Comment, *Constitutional Limitations on the Taking of Body Evidence,* 78 Yale L.J. 1074, 1083 (1969).

96. 637 P.2d at 2.

97. *Id.*

98. *Id.* at 4.

99. *Id.* at 1.

100. 99 N.M. at 31, 653 P.2d at 862.

101. 415 F.2d 514 (9th Cir. 1969).

102. 99 N.M. at 31, 653 P.2d at 862 (quoting Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969)).

103. 99 N.M. at 31, 653 P.2d at 862. The *McKay* court conceded, however, that it was difficult to draw the line between physical and testimonial evidence in the case before it. *Id.*

104. *Id.* (citing People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966)).

105. *McKay,* 99 N.M. at 31, 653 P.2d at 862. *See also supra* note 79 (discussing the confusion that exists as to what is being compelled).

106. 594 F.2d 903 (2d Cir. 1979). The defendant was convicted of DWI after evidence of his refusal to take a breath-alcohol test was admitted into evidence at trial. The Second Circuit denied the defendant's petition for a writ of habeas corpus.

the refusal was admissible because Vermont did not compel a driver refusing to take a breath-alcohol test to surrender any constitutional right.[107] Finding no New Mexico statutory right of refusal and no constitutional right of refusal, the *McKay* court also embraced the view that the admission of evidence of a motorist's refusal fails to impinge upon the fifth amendment privilege against self-incrimination because the refusal lacks compulsion.[108]

The resolution of the fifth amendment question in *McKay* was premised on the separate findings that a motorist's refusal to take a breath-alcohol test is not compelled and is non-testimonial. Either of these determinations by itself would have been sufficient to dispose of the question. The court's decision is overly broad. The court could have ended its inquiry upon a finding that a refusal to take a breath-alcohol test is not compelled and could have omitted the discussion of whether the refusal is non-testimonial.[109]

4. *South Dakota v. Neville*

Subsequent to the New Mexico Supreme Court decision in *McKay,* the United States Supreme Court decided the fifth amendment implications of a motorist's refusal to take a breath-alcohol test. In *South Dakota v. Neville,*[110] the United States Supreme Court reversed the South Dakota Supreme Court which, even though South Dakota law permitted the admission of refusal evidence, had affirmed the suppression of all evidence of the defendant's refusal to take a breath-alcohol test.[111] The South Dakota Supreme Court had held that the introduction of refusal evidence would violate the privilege against self-incrimination, granted by the United States and South Dakota Constitutions, on the grounds that the

107. *Id.* at 905. The relevant Vermont statute stated: "If the person refuses to submit to a chemical test, it shall not be given but such a refusal may be introduced into evidence at a criminal proceeding." Vt. Stat. Ann. tit. 23, § 1205(a) (1978) (current version at Vt. Stat. Ann. tit. 23, § 1205(a) (Cum. Supp. 1983)). New Mexico does not include a similar provision in its Implied Consent Act.

108. 99 N.M. at 31, 653 P.2d at 862.

109. *See infra* text accompanying notes 125-29.

110. 103 S. Ct. 916 (1983).

111. The case involved a motorist, Mason Henry Neville, who after consuming approximately a case of beer by himself at home, was stopped by police officers after he failed to stop at a stop sign; he smelled of alcohol and staggered upon leaving his vehicle. Neville was unable to produce a driver's license as it had been revoked following a previous DWI conviction. The officers arrested Neville after he failed to perform satisfactorily two field sobriety tests. The police requested that Neville take a breath-alcohol test and informed him that a refusal to submit could lead to a revocation of his driver's license. Neville refused to take the test and declared: "I'm too drunk, I won't pass the test." He refused additional requests to take the test for the same reason. *Id.* at 918-19.

The *Neville* case reached the United States Supreme Court after the South Dakota Supreme Court affirmed a lower court's suppression of evidence of Neville's refusal. The South Dakota Supreme Court held that a provision of the South Dakota statutes that permitted admission of refusal evidence, S.D. Comp. Laws Ann. § 32-23-10.1 (Supp. 1982), was unconstitutional because it violated the defendant's privilege against self-incrimination. State v. Neville, 312 N.W.2d 723, 725 (S.D. 1981).

refusal was a testimonial act compelled by the state.[112] The United States Supreme Court determined that the admission into evidence of a motorist's refusal to submit to a breath-alcohol test does not violate the fifth amendment privilege against self-incrimination.[113] Additionally, the Court held that due process does not require states to warn motorists that a refusal can be used against them in court.[114] The United States Supreme Court and the New Mexico Supreme Court reached the same conclusion regarding the fifth amendment implications of a motorist's refusal to take a breath-alcohol test; the United States Supreme Court, however, reached its conclusion on much narrower grounds.

The Court found the argument that a refusal is physical evidence, not testimonial evidence, to have "considerable force,"[115] but also recognized that the case before the Court was one in which the distinction was not easily drawn.[116] The Court declined to rest its decision on the distinction between physical and testimonial evidence, however, because it found that the motorist was not compelled by the state to refuse to take the test.[117] The Court reserved the issue of the delineation between physical and testimonial evidence.[118] The Court noted that the fifth amendment prevents any person from being "*compelled* in any criminal case to be a witness against himself."[119] The Court held that a state does not compel a motorist to refuse to take a blood-alcohol test because the motorist has the choice of taking the test or refusing to take the test.[120] The Court held that a refusal, because it is not compelled, is not the type of evidence protected by the fifth amendment privilege against self-incrimination.[121] Therefore, evidence of a refusal to take a blood-alcohol test is admissible.[122]

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112. State v. Neville, 312 N.W.2d 723 (S.D. 1981).

113. 103 S. Ct. at 920-23. Justice Stevens, joined by Justice Marshall, dissented on the grounds that the South Dakota Supreme Court had found that the admission of refusal evidence violated the South Dakota privilege against self-incrimination. Justice Stevens argued that the United States Supreme Court was powerless to overturn the South Dakota Supreme Court decision because it rested on independent state grounds. *Id.* at 924-26.

114. *Id.* at 923-24.

115. *Id.* at 921-22.

116. *Id.* at 922.

117. *Id.* The Court was mindful of its previous decisions in which it found that tests which seemingly sought physical evidence, such as lie detector tests and court-ordered psychiatric examinations, could not be compelled because of the fifth amendment privilege against self-incrimination. *Id.* at 922 n.12.

118. *Id.* at 922.

119. *Id.* (quoting U.S. Const. amend. V) (emphasis in original).

120. *Id. But see supra* note 79 (discussing the confusion that exists as to what is being compelled). Actually, according to the Court, a state would prefer that the accused take the test because the physical evidence that results from compliance is much more probative than the inferences that can be drawn from a refusal. *Id.* at 923.

121. *Id.* at 923.

122. *Id.* at 918.

The United States Supreme Court in *South Dakota v. Neville* reinforced the New Mexico Supreme Court's determination in *McKay v. Davis* that the fifth amendment does not prevent the admission of evidence of a motorist's refusal to take a breath-alcohol test. The United States Supreme Court proceeded more cautiously than the New Mexico Supreme Court in deciding the issue of whether the admission of evidence of a motorist's refusal to take a blood-alcohol test violates the accused's privilege against self-incrimination. The United States Supreme Court recognized that, in our scientifically-advanced society, the distinction between physical and testimonial evidence sometimes can be murky.[123] Devices such as polygraphs, which simply register physiological responses, may appear to gather physical evidence, but their value lies solely in the testimonial communications gleaned from those physiological responses. The United States Supreme Court declined to determine whether a refusal to take a chemical test is testimonial in nature or whether it constitutes physical evidence.[124]

The New Mexico Supreme Court exerted no such self-restraint in *McKay*. The New Mexico court broadly stated its decision in terms of a refusal to take a "chemical test," rather than the more narrow and specific "blood-alcohol test," and made the unnecessary determination that a refusal is not testimonial evidence.[125] Once a court finds, as did the *McKay* court, that no statutory or constitutional right to refuse to take the test exists,[126] the accused faces no compulsion to refuse to take the test. The privilege against self-incrimination is not implicated. The court, therefore, was not required to determine that a refusal is non-testimonial. It can be argued that "[c]onduct indicating a consciousness of guilt"[127] *is* testimonial in nature.[128] Regardless of the ultimate resolution of that debate, it is a question that did not need to be addressed in *McKay*.

McKay constitutes a solid New Mexico precedent that the refusal to submit to a chemical test for which no right of refusal exists is admissible into evidence over fifth amendment objections. Based on the unnecessary discussion on the testimonial nature of refusal evidence, the *McKay* decision suggests that no refusal, compelled or non-compelled, to take a chemical test will ever be protected by the fifth amendment privilege

123. *Id.* at 922 n.12.
124. *Id.* at 922.
125. 99 N.M. at 31, 653 P.2d at 862.
126. *Id.*
127. *Id.* (quoting Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969)).
128. *See* State v. Esperti, 220 So. 2d 416 (Fla. Dist. Ct. App. 1969) (refusal to submit to a chemical test for the presence of powder burns to determine whether the defendant recently had fired a gun was testimonial in nature but admissible because the defendant had no right to refuse and the refusal was not compelled).

against self-incrimination.[129] In order to invoke fifth amendment protection, one must show that the chemical test to which one refused to submit is used to draw inferences about a person's state of mind to the degree that it amounts to more than mere chemical or physical testing.

C. The Relevance of Refusal

New Mexico Rule of Evidence 401 states that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[130] In essence, relevant evidence is that which tends to establish a material proposition.[131] In *McKay v. Davis,* the New Mexico Supreme Court held that a refusal to take a chemical test is relevant and admissible to show a defendant's consciousness of guilt and fear of the test results.[132] The court allowed the state to introduce evidence of McKay's refusal to take a breath-alcohol test to show McKay's consciousness of guilt and fear of the test results and to establish that McKay was under the influence of alcohol.[133]

The New Mexico Supreme Court in *McKay* rejected the district court's assertion that *State v. Chavez*[134] established that evidence of a refusal to take a chemical test is irrelevant as a matter of law.[135] In *Chavez,* the New Mexico Court of Appeals upheld the exclusion of evidence of the defendant's refusal to submit to a blood-alcohol test after his arrest for DWI. The court found the defendant's refusal to take the test was no more probative of his guilt than the policeman's failure to obtain a warrant

"Conduct indicating a consciousness of guilt" seems to indicate that proof of this conduct would be used by the state to demonstrate, by the defendant's actions, that the defendant concedes that he is guilty. It would seem, therefore, to be testimonial evidence. Indeed, when a person refuses to take a breath-alcohol test, the inference is that he is stating: "I refuse to take this test because it will prove what I already know—I am guilty." *See* Comment, *Constitutional Limitations on the Taking of Body Evidence,* 78 Yale L.J. 1074, 1082-85 (1969). If "conduct indicating a consciousness of guilt" is not testimonial in nature, no conduct can ever be testimonial. It is hard to imagine any conduct which would fall under fifth amendment protection when the *McKay* standard is applied.

129. This result is worrisome. It is not too far-fetched to imagine that a person who refuses to submit to a compulsory polygraph examination could have that refusal used as evidence against him. Such an examination is similar to chemical testing because it objectively measures physical responses. A polygraph's sole use is to draw inferences about a person's veracity or state of mind from that data. People should be able to refuse to submit to polygraph examinations without fear of being penalized because one should not be forced to disclose the workings of his mind.

130. N.M. R. Evid. 401. This language is identical to the language used in Rule 401 of the Federal Rules of Evidence.

131. State v. Thurman, 84 N.M. 5, 7, 498 P.2d 697, 699 (Ct. App. 1972).

132. 99 N.M. at 32, 653 P.2d at 863.

133. *Id.*

134. 96 N.M. 313, 629 P.2d 1242 (Ct. App.), *cert. denied,* 96 N.M. 543, 632 P.2d 1181 (1981).

135. 99 N.M. at 32, 653 P.2d at 863.

to perform the test was probative of the defendant's innocence.[136] In addition, the *Chavez* court stated that there might be innocent reasons for refusing to take a test, such as religious beliefs, unwillingness to incur expense, and distrust of the technicians or the results, which would make admission of refusal evidence misleading.[137] As a result, the court of appeals held that evidence of Chavez' refusal to take a blood-alcohol test was inadmissible because "[i]t was simply not relevant evidence."[138] The New Mexico Supreme Court in *McKay,* while not explicitly overruling *Chavez,* found that, absent special circumstances, a refusal would be relevant.[139]

The *McKay* court determined that a jury reasonably could infer that consciousness of guilt and fear of the results motivated a motorist to refuse to take the test and, therefore, evidence of a defendant's refusal to take a breath-alcohol test is relevant and admissible.[140] The court held open the possibility that, in a given case, a trial court could rule evidence of a refusal to take a chemical test irrelevant.[141] Factors such as respiratory ailments, religious objections, or extreme technophobia might lead an accused motorist to refuse to take a breath-alcohol test. A trial court could hold that such factors make the defendant's refusal irrelevant to any

136. *Chavez,* 96 N.M. 313, 314, 629 P.2d 1242, 1243. This analogy lacks persuasiveness because the statute relied upon by the *Chavez* court provides that if a motorist refuses to take the test, none shall be administered. N.M. Stat. Ann. § 66-8-111(A) (Cum. Supp. 1983). A search warrant to administer the test may be procured, however, if the motorist is believed to have been driving under the influence of alcohol or drugs *and* thereby caused the death or likelihood of death of another person or allegedly committed a felony while under the influence. Chavez was charged only with DWI and, therefore, the officer had no right to obtain a search warrant to compel Chavez to submit to a blood-alcohol test. Had the officer obtained the warrant and compelled the defendant to submit to the blood-alcohol test, the results would have been inadmissible. *See* State v. Steele, 93 N.M. 470, 601 P.2d 440 (Ct. App. 1979) (a vehicular homicide case decided under former law); State v. Wilson, 92 N.M. 54, 582 P.2d 826 (Ct. App. 1978). The officer in *Chavez* had no right to obtain a search warrant. Conclusions based upon the failure of a police officer to obtain a search warrant are unjustified.

137. 96 N.M. at 314, 629 P.2d at 1243.

138. *Id.*

139. 99 N.M. at 32, 653 P.2d at 863.

140. *Id.* The court noted several cases which held that flight, aborted flight, or escape from incarceration (State v. Trujillo, 95 N.M. 535, 541-42, 624 P.2d 44, 50-51 (1981)), resisting or avoiding arrest (State v. Nelson, 65 N.M. 403, 412, 338 P.2d 301, 307, *cert. denied,* 361 U.S. 877 (1959)), and tampering with a witness (State v. Gonzales, 93 N.M. 445, 601 P.2d 78 (Ct. App. 1979)) are relevant to show consciousness of guilt. These cases, however, deal with conduct that is unlawful *per se,* unlike a refusal to submit to a breath-alcohol test. In State v. Esperti, 220 So. 2d 416 (Fla. Dist. Ct. App. 1969), a case also cited in *McKay,* the court analogized the refusal to take a chemical test to the actions of an accused in resisting and avoiding a lawful arrest and escaping or fleeing from lawful custody. The Florida court held that a refusal to take a test for the presence of powder burns, which would indicate whether the defendant recently had fired a gun, was admissible to show consciousness of guilt. *Id.* at 418. *Esperti* involved the refusal to take a chemical test which was admissible *and* compulsory, unlike the non-compulsory breath-alcohol test involved in *McKay.* The court stated that evidence of a refusal to take a non-compulsory breath-alcohol test would be inadmissible. *Id.* at 419.

consciousness of guilt and render the evidence inadmissible. Alternatively, the trial court could admit refusal evidence and instruct the jury to weigh it along with the defendant's explanation for his refusal in order to determine whether the refusal indicated a consciousness of guilt or was the result of a valid objection on the defendant's part.[142]

The determination of the relevancy of refusal evidence flows from the court's resolution of the fifth amendment question. The court found that a refusal to take a breath-alcohol test is not testimonial but it is "conduct indicating a consciousness of guilt";[143] the evidence is admissible because evidence of one's consciousness of guilt is relevant. Had the court not invoked the physical/testimonial distinction as a basis for the resolution of the fifth amendment question, the determination of the relevancy question would not have been so obvious. The court might have been forced to hold that evidence of a motorist's refusal to take a breath-alcohol test could not be introduced as evidence of the defendant's guilt or innocence, but could be employed only to explain to the jury why the state could offer no scientific evidence of intoxication.[144] A limited use of refusal evidence may not be undesireable, however, because it would eliminate the necessity of forcing a defendant to take the stand to explain the reasons for his refusal. This limited use also would resolve the apprehension expressed by the *McKay* court that suppression of the evidence would engender the mistaken impression that no breath-alcohol test was offered.[145]

IV. CONCLUSION

In *McKay v. Davis*, the New Mexico Supreme Court found no basis on statutory, constitutional, or relevancy grounds to hold as inadmissible evidence of a motorist's refusal to take a breath-alcohol test when arrested for DWI or a related offense.[146] The court's conclusion that refusal evidence is admissible is justified on public policy grounds. The court noted that a contrary holding would hamper the purposes of the Implied Consent Act of deterring DWI and discovering drunk drivers and removing them

141. 99 N.M. at 32, 653 P.2d at 863.

142. *See* State v. Jackson, 637 P.2d 1, 6 (Mont. 1981) (Haswell, C.J., dissenting); Hill v. State, 366 So. 2d 318 (Ala. 1979).

143. 99 N.M. at 31, 653 P.2d at 862 (quoting from Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969)).

144. In Welch v. District Court, 594 F.2d 903 (2d Cir. 1979), the trial court, upon the state's request, imposed such a restriction on the use of refusal evidence.

145. 99 N.M. at 30, 653 P.2d at 861. Juries might still infer that the refusal was the result of consciousness of guilt but the effect of this inference would be lessened by an instruction limiting the relevancy of refusal evidence. The state would be forced not to build its case around a motorist's refusal to take the test.

146. *Id.* at 32, 653 P.2d at 863.

from the highways;[147] the state then would have greater difficulty obtaining a DWI conviction of a person who refused to take a breath-alcohol test. That result would defeat the intent of the Legislature when it prohibited forced testing.

The state desires compliance with the requirements of the Implied Consent Act. In addition to being informed that a refusal to submit to a breath-alcohol test may result in license revocation, a motorist who is requested to take a breath-alcohol test should be informed that the refusal may be used against him at trial.[148] The United States Supreme Court has determined that due process does not require such a warning,[149] but there is authority in New Mexico which indicates that due process requires the police to inform an accused of the consequences of refusal.[150] The additional knowledge that a refusal will be admitted into evidence against a person may encourage a recalcitrant motorist to submit to the test. In order to fulfill the purposes of the Implied Consent Act of determining the blood-alcohol level of a motorist accused of DWI, the Legislature should incorporate a warning provision into the New Mexico statutes to discourage motorists from refusing to take a blood-alcohol or breath-alcohol test.[151]

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147. *Id.* at 30, 653 P.2d at 861.

148. South Dakota began informing motorists of the admissibility of evidence of a refusal to take a breath-alcohol test subsequent to the incident involved in South Dakota v. Neville, 103 S. Ct. 916, 924 n.17 (1983).

149. *Id.* at 923-24. *See also* State v. Myers, 88 N.M. 16, 21, 536 P.2d 280, 285 (Ct. App. 1975) (a motorist has no constitutional right to be given a warning regarding the consequences of refusing to submit to a blood test).

150. In re McCain, 84 N.M. 657, 506 P.2d 1204 (1973). In *McCain*, the New Mexico Supreme Court reversed a district court's recision of an order of the Commissioner of Motor Vehicles revoking McCain's driver's license for her refusal to take a blood-alcohol test. The court held, in part, that because the New Mexico Implied Consent Act provides that a motorist be informed of the consequences of a refusal to take a blood-alcohol test, it does not violate the due process clause of either the state or federal constitutions. *Id.* at 661, 506 P.2d at 1208. The case specifically dealt with the revocation of a driver's license and not with the admissibility of a refusal; this holding, however, is broad enough to warrant its expansion to mandate that due process requires a motorist to be informed that a refusal can be used in evidence against him. There is *dicta* to the contrary in State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975). In *Myers*, the court held that there was "no overriding constitutional requirement" that an accused be forewarned of the consequences of refusing to take a blood-alcohol test. *Id.* at 21, 536 P.2d at 285.

151. N.M. Stat. Ann. §66-8-111 (Cum. Supp. 1983) could be amended to read:

> C. A person under arrest for violation of an offense enumerated in the Motor Vehicle Code who is requested by a law enforcement officer to submit to a chemical test designated by the law enforcement agency as provided in Section 66-8-107 NMSA 1978 shall be informed that a refusal to submit to the designated chemical test could result in the revocation of his privilege to drive and may be used in evidence against him at trial.