University of Miami Law Review

Volume 24 | Number 1 Article 4

10-1-1969

Admissibility of Testimonial By-Products of a Physical Test

Alan S. Becker

COMMENTS

ADMISSIBILITY OF TESTIMONIAL BY-PRODUCTS OF A PHYSICAL TEST

ALAN S. BECKER*

I. INTRODUCTION

Frequently, modern technology can come in conflict with constitutional rights, and when such a situation arises it becomes necessary to strike a balance between the safety of society at large and the protection of individual rights. Examples of this conflict are readily apparent, *e.g.*, when a person suspected of drunken driving is required to submit to a breathalyzer or blood test, or when a suspect in the investigation of a violent crime is forced to undergo a dermal nitrate (paraffin) test to determine the presence of gun powder on his hands.

The principle that suspects have no constitutional right to refuse a test designed to produce physical evidence appears to be well established.[1] However, admissibility into evidence is governed by a number of criteria, the first of which is, necessarily, the reliability of the test itself.[2] Once the burden of establishing reliability is met, certain constitutional standards must likewise be met before the test results will be admitted.

II. CONSTITUTIONAL ISSUES

A. *Search and Seizure*

In 1914 the Supreme Court departed from the common-law rule and established a rule for federal courts which excludes any evidence which is a product of unreasonable search and seizure.[3] Subsequently, the Court

* Member of the Editorial Board, *University of Miami Law Review.*

1. Schmerber v. California, 384 U.S. 757 (1966); People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966).

2. *Cf.* Brooke v. People, 139 Colo. 388, 339 P.2d 993 (1959); Commonwealth v. Westwood, 324 Pa. 289, 188 A. 304 (1936); Clarke v. State, 218 Tenn. 259, 402 S.W.2d 863 (1966).

These cases and numerous others indicate that test results will be held inadmissible when deemed to be unreliable. The determination of reliability is also of importance in considering the problem of the testimonial by-product of any physical test that is administered.

See United States v. Wade, 388 U.S. 218, 227-28 (1967).

3. Weeks v. United States, 232 U.S. 383 (1914).

imposed this exclusionary rule upon state courts and held the provisions of the fourth amendment applicable to the states through the fourteenth amendment.[4]

There have been comparatively few cases in which courts have had to decide whether the imposition of a chemical test constituted a reasonable search and seizure. Generally, the problems that have arisen are to be found in cases where there is a lack of actual consent to the taking of the test.

It has generally been held that the government may "search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."[5] There is no requirement of a warrant for a search incidental to a lawful arrest.[6] In *Schmerber v. California*[7] the Court recognized that this principle is modified and a warrant could be required "where intrusions into the human body" are involved.[8] However, at the same time the Court indicated that an exception to the requirement exists in the case of emergency or special circumstances, as in situations where the evidence is likely to be destroyed.[9] Where there is no intrusion or the exception is met, the test need only meet the criterion of reasonableness.[10] The position taken by Florida courts appears to be in accord with these general principles.[11]

---

4. Mapp v. Ohio, 367 U.S. 643 (1961).

5. Weeks v. United States, 232 U.S. 383, 392 (1914). The immunity of the fourth amendment is not an immunity from all search and seizure, but rather from search and seizure unreasonable in the light of common-law traditions. *See* People v. Chigales, 237 N.Y. 193, 142 N.E. 583 (1923), where the court, speaking through Justice Cardozo, said:

> The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation . . . . Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion. *Id.* at 584.

See also People v. Duroncelay, 48 Cal. 2d 766, 771, 312 P.2d 690, 693 (1957), wherein the court stated:

> Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest.

6. Weeks v. United States, 232 U.S. 383 (1914); People v. Chigales, 237 N.Y. 193, 142 N.E. 583 (1923). It should be noted that an unlawful arrest does not affect admissibility when there has been express and voluntary consent to the test. *See* City of Sioux Falls v. Ugland, 79 S.D. 134, 109 N.W.2d 144 (1961) (blood test).

7. 384 U.S. 757 (1966).

8. *Id.* at 767.

9. For example, alcohol in the blood stream is absorbed within a few hours, so an attempt to secure it as evidence of a driver's intoxication would not necessitate a search warrant where the search is incident to arrest. This exception virtually opens the door to admissibility of blood tests, and since all the other physical or chemical tests now in general use do not entail any like "intrusion," the limitation would appear to be of little value. As a further example, a paraffin test merely requires a cotton swab to be wiped across the suspect's hands, a procedure no more brutal than any prescribed in Dr. Spock's manual for baby care.

10. In Brent v. White, 398 F.2d 503 (5th Cir. 1968), a penis scraping revealing menstrual blood of the rape victim's type was held not to have violated the defendant's fourth-amendment rights since:

B. *Due Process*

Following *Rochin v. California*,[12] defendants in many cases have attempted to have courts exclude chemical test evidence on the basis that obtaining such evidence is brutal and therefore constitutes a denial of due process of law under the fourteenth amendment. In *Rochin* police invaded the defendant's home without a warrant, and saw him put something in his mouth. They kicked and beat him, then carried him to a hospital where his stomach was pumped. As a result, narcotics were found which were introduced in evidence at his trial.

It is true that *Rochin* prohibits the use of "brutal methods" to obtain evidence. However, what "shocked the judicial conscience" in that case was that the procedures were "too close to the rack and the screw to permit constitutional differentiation."[13] A reasonable search incident to a lawful arrest is a far different situation, and certainly compulsion by itself cannot be equated with violence or brutality.

This issue was considered in *Schmerber*.[14] The Court, while indicating that it would be a different case if the police used inappropriate force or violence, concluded that the withdrawing of the blood without consent did not under the circumstances offend "that 'sense of justice' of which we spoke in *Rochin v. California*."[15] It would seem that the requirement of due process has little vitality when applied to the more common physical or chemical tests.[16]

"[T]he scraping constituted a permissible search of the person incident to a lawful arrest and involved no intrusion of the body surface." *Id.* at 505.

Similarly, where a suspect's hands were examined by police under ultra-violet light without a warrant, it was held not to be a violation of the fourth amendment since the defendant was under lawful arrest. United States v. Richardson, 388 F.2d 842 (6th Cir. 1968). Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), held that a physical examination of the defendant and removal of narcotics from his rectum was not an unreasonable search and seizure. The tests more commonly employed may be more aesthetic but certainly not more suspect than those noted herein.

11. The Second District Court of Appeals, in Carter v. State, 199 So.2d 324 (Fla. 2d Dist. 1967), seemed to say that it was "required procedure" for officers to obtain a warrant (where there was reasonable opportunity to previously apply for one) prior to conducting any test. However, it is clear that this case turned upon a search and seizure of personal articles pursuant to an *illegal* arrest. *See* Outten v. State, 197 So.2d 594 (Fla. 2d Dist. 1967), *rev'd on other grounds*, 206 So.2d 392 (Fla. 1968), limiting the holding in Carter, *supra*.

12. 342 U.S. 165 (1952).

13. *Id. See* Annot., 25 A.L.R.2d 1407, 1411 (1952):

> It should be emphasized that it was the totality of the picture of violence, compulsion and illegality which moved the Court to interfere in the Rochin case, and that the majority opinion does not indicate that any of the components of that picture, standing alone, would necessarily transgress against the traditional notions of fair play which the federal courts must apply as a yardstick of due process.

14. Schmerber v. California, 384 U.S. 757 (1966).

15. *Id. See also* Blefore v. United States, 362 F.2d 870 (9th Cir. 1966); United States v. Lamb Baking Co., 283 F. Supp. 217 (N.D. Ohio 1968).

16. *See* Breithaupt v. Abram, 352 U.S. 432 (1957); State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953); People v. Haeussler, 41 Cal. 2d 252, 260 P.2d 8 (1953).

C. *Self-Incrimination*

Questions most frequently arise regarding the applicability of the privilege against self-incrimination to the obtaining of specimens of body fluids or breath for chemical analysis, and use of the results as evidence at trial.[17] Although it would seem logical that the forced extraction of a suspect's blood or other use of the suspect's own body to provide evidence against him in court would have the unavoidable effect of causing him "to bear witness" against himself, this interpretation is, perhaps unfortunately, not in accord with the historical understanding of the privilege.[18]

It is generally held that the privilege applies only to testimonial compulsion, *i.e.*, disclosure by utterance. Modern judicial thought, apparently consonant with the common-law history of the privilege, holds that it does not apply to physical evidence, such as objects or substances taken from an accused or from his possession and control, even by the use of reasonable force.[19] Accordingly, it has long been held that a defendant can be compelled in court to expose parts of his body to aid in identification,[20] to submit to examination of his private parts,[21] and to submit to the removal of substances from the exterior of his body.[22] Likewise, it has been held that a defendant's fifth-amendment rights were not violated by the taking of his fingerprints for the specific purpose of using them against him in a criminal trial,[23] nor by compelling a defendant to speak in a lineup.[24] The prevailing law is best summed up in the words of Justice Holmes in *Holt v. United States*:[25]

> But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of phys-

17. The privilege against self-incrimination established in the fifth amendment is applicable to the states as well as to the Federal Government through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

18. Inbau, *Self-Incrimination—What Can An Accused Person Be Compelled To Do?*, 28 J. CRIM. L. & C. 261, 263 (1950):

> Although some of the details concerning the English and early American history of the privilege are obscure, it is perfectly clear that the primary purpose of the privilege was to put an end to the practice of employing legal process *to extract from a person's lips an admission of his guilt.* (Emphasis supplied.)

19. *Id. See also* 8 J. WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961); R. DONIGAN, CHEMICAL TESTS AND THE LAW (1966).

20. Grays v. State, 217 So.2d 133 (Fla. 3d Dist. 1969); State v. Ah Chuey, 14 Nev. 79 (1879). *Cf.* State v. Robinson, 221 La. 19, 30-31, 58 So.2d 408, 411 (1952):

> [T]he prevailing rule throughout this country is to the effect that this constitutional guarantee has reference to testimonial compulsion, whether oral or written, only bodily exhibitions and muscular exertions not being within its protecting scope.

21. *See* State v. Green, 227 S.C. 1, 86 S.E.2d 598 (1955).

22. Brent v. White, 398 F.2d 503 (5th Cir. 1968); *cf.* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957); State v. Hagan, 180 Neb. 564, 143 N.W.2d 904 (1966).

23. Gentille v. State, 190 So.2d 200 (Fla. 3d Dist. 1966).

24. Boyer v. State, 182 So.2d 18 (Fla. 4th Dist. 1966). *See generally* State v. Stelzriede, 101 Ariz. 385, 420 P.2d 170 (1966); Williams v. State, 239 Ark. 686, 396 S.W.2d 834 (1965); People v. Lopez, 59 Cal. 2d 653, 384 P.2d 16, 32 Cal. Rptr. 424 (1963).

25. 218 U.S. 245 (1910).

> ical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.[26]

Only a few states have extended the scope of the privilege against self-incrimination beyond the limit of testimonial compulsion and applied it to obtaining specimens of blood, urine, or breath, etc., for the purpose of chemical analysis, establishing a rule of consent as the basis for admissibility.[27] The majority view is the one that was accepted by the United States Supreme Court in *Schmerber v. California*.[28] The Court took the position that withdrawal of blood and admission in evidence of the analysis does not violate an individual's privilege against self-incrimination.[29] As noted by the majority in *Schmerber*:

> Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis .... Indeed, his participation ... was irrelevant to the results of the test, which depend on chemical analysis and on that alone.[30]

III. Testimonial By-Product

Having considered the conditions under which the results of a chemical test may be admitted into evidence, it is necessary to consider an area of the law that is far less clearly defined: the admissibility of a defendant's refusal to take a test, or evasive conduct just prior to the test being administered. It is reasonably well-established that such conduct or refusal is not admissible if the test result would be inadmissible.[31] But what of such tests as that administered in *Schmerber*, *i.e.*, is evidence of refusal to take a test admissible where the test results would themselves be admissible?[32] Would a suspect who refused to take a paraffin test and

---

26. *Id.* at 252-53.

27. State v. Merrow, 161 Me. 11, 208 A.2d 659 (1965); Spencer v. State, 404 P.2d 46 (Okla. Crim. Ct. 1965); Fletcher v. State, 382 S.W.2d 931 (Tex. Crim. Ct. 1964).

28. 384 U.S. 757 (1966).

29. *Id.* at 761:

> [T]he 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, and . . . the withdrawal of blood and use of the analysis in question . . . did not involve compulsion to these ends.

As indicated in the vigorous dissenting opinions of Justices Black, Douglas and Fortas, this is probably too restrictive an interpretation of the constitutional protection.

30. *Id.* at 765.

31. For example, lie detector tests are not admissible; therefore, it is generally held that evidence tending to establish that an accused was unwilling to take such a test is not admissible. Such is the rule in Florida. Johnson v. State, 166 So.2d 798 (Fla. 2d Dist. 1964) (which stated the general rule, but held defendant to have waived the right by placing a polygraph expert on the stand).

32. Whatever the decision regarding admissibility of such evidence, it is clear that it is not dependent on the reason for refusal, even if that reason is advice of counsel. As was said in People v. Sudduth, 65 Cal. 2d 543, 548, 421 P.2d 401, 404, 55 Cal. Rptr. 393, 396 (1966):

then started to spit on his hands and rub them when the police began to administer the test without his consent be able to keep evidence of his conduct out of the trial?[33]

A number of courts have been confronted with this problem. Some have permitted the introduction of such evidence, holding that a refusal to submit to a chemical test is a circumstance indicating consciousness of guilt, but the use of the refusal in evidence does not compel the defendant to incriminate himself.[34] Other appellate courts have likened evidence of a refusal to submit to a chemical test to evidence of silence on the part of an accused after his arrest or his failure to testify in his own behalf. Because such evidence is not admissible in their jurisdiction or cannot be commented upon before a jury, these courts reject evidence of refusals to submit to chemical tests.[35] A number of these latter courts have, however, held that this privilege of exclusion can be waived.[36]

Although the issue was not directly presented in *Schmerber*, the Supreme Court did consider the problem of the by-product of an admissible physical test. In a footnote they stated:

> This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told 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

"Counsel has the right to argue reasons alternative to consciousness of guilt to explain defendant's refusal."
The defendant's reason for refusing to take the test, if such refusal is admissible evidence, bears on the weight the trier of fact should assign to such refusal. It should be considered a question of probative value, not admissibility.

33. Brooke v. People, 139 Colo. 388, 339 P.2d 993 (1959), held that a defendant's refusal to submit to a paraffin test was not admissible into evidence. However, the court did not suppress such evidence on the theory of "testimonial by-product;" rather, it did so on the basis that the test results were not admissible because of the unreliability of the test.

34. *See* People v. Conterno, 170 Cal. App. 2d 817, 339 P.2d 968 (1959); State v. Durrant, 55 Del. 510, 188 A.2d 526 (1963); State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958); Alldredge v. State, 239 Ind. 256, 156 N.E.2d 888 (1959); State v. Benson, 230 Iowa 1168, 300 N.W. 275 (1941); State v. Fields, 74 N.M. 560, 395 P.2d 908 (1964); State v. Nutt, 78 Ohio App. 336, 65 N.E.2d 675 (1946); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956); City of Barron v. Covey, 271 Wis. 10, 72 N.W.2d 387 (1955).

This was also the view adopted in Virginia prior to the enactment of a statute specifically providing that such evidence shall not be admissible. VA. CODE ANN. § 18.1-55 (1960). *See* Gardner v. Commonwealth, 195 Va. 945, 81 S.E.2d 614 (1954).

35. *See* State v. Sullivan, 17 Ill. App. 2d 251, 149 N.E.2d 461 (1958); Cupp v. State, 373 P.2d 260 (Okla. Crim. Ct. 1962); Watts v. State, 167 Tex. Crim. 63, 318 S.W.2d 77 (1958).

36. *E.g.*, Gilley v. City of Anchorage, 376 P.2d 484 (Alas. 1962) (no objection); Barnhart v. State, 302 P.2d 793 (Okla. Crim. Ct. 1956) (accused opened the door); City of Sioux Falls v. Johnson, 78 S.D. 272, 100 N.W.2d 750 (1960) (direct examination of a defense witness).

> of administering the test — products which would fall within the privilege.[37]

If the Court had concluded its statement here, the question of the admissibility of the refusal to take a test may have been foreclosed in favor of inadmissibility. However, the note continued:

> Indeed, there may be circumstances in which the pain, danger, and the 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 permissibility of compulsion in that case.[38]

Apparently it is only in the extreme situations mentioned, *e.g.*, pain, danger, etc., that the limitation on the use of a testimonial by-product applies.[39]

Subsequent to the *Schmerber* decision, several jurisdictions have considered the problem of testimonial by-products of physical tests. The highest courts of California,[40] Ohio,[41] and New Jersey,[42] have recently held that a defendant's refusal to take such tests is admissible evidence and does not violate the privilege against self-incrimination. The sole case to the contrary appears to be *Gay v. City of Orlando*.[43]

The leading case on the subject is *People v. Sudduth*.[44] The court was concerned with the prosecution's comment upon the refusal of the defendant to submit to a breathalyzer test in light of recent constitutional cases. After analyzing *Schmerber* and other pertinent decisions, the court, in a well-reasoned opinion by Justice Traynor, held that the defendant's refusal to take the test was admissible since the test results would be admissible.[45] Unlike *Griffin v. California*[46] the admission of a defendant's

37. 384 U.S. 757, 765 n.9 (1966).

The inference created by that language standing alone is that if the petitioner in that case had properly raised the objection, such testimonial by-products would have been inadmissible as a violation of the Fifth Amendment. Quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892), the Court said:

> Such situations call to mind the principle that the protection of the privilege is as broad as the mischief against which it seeks to guard . . . . *Id.* at 764.

38. *Id.* at 765 n.9.

39. *See* People v. Ellis, 538 Cal. 2d 529, 538, 421 P.2d 393, 398, 55 Cal. Rptr. 393 (1966) (Traynor, C. J.) for a similar interpretation of the Schmerber footnote.

40. People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966), *cert. denied*, 389 U.S. 996 (1967).

41. City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968).

42. State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967).

43. 202 So.2d 896 (Fla. 4th Dist. 1967).

44. 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966), *cert. denied*, 389 U.S. 996 (1967).

45. *Id.* at 403-04. Justice Traynor recognized that:

> The disparate results found in other jurisdictions may be ascribed to the presence of an underlying constitutional or statutory right to refuse to produce the physical evidence sought. States that recognize a right to refuse to take such tests exclude evidence of a refusal. States that recognize no right to refuse allow testimony and comment on the refusal.

46. 380 U.S. 609 (1965).

refusal to take a chemical test and comment by counsel thereon would not dilute any constitutional right.[47]

The rule in Florida dealing with conduct of an accused upon being requested to take a scientific test is not yet settled, but in *Gay v. City of Orlando*[48] the Fourth District Court of Appeals appears to have adopted what may be deemed the minority position:

> [R]esults of a breathalyzer are not self-incriminating. The court [in Schmerber] appears to imply that because there is no privilege as to the breathalyzer, refusal to submit to the test is not an invocation of the privilege such as refusing to take the stand would be. It follows that comment or evidence of the refusal to take a breathalyzer or blood test does not fall within the rule in Griffin.
>
> The admissibility of petitioner's refusal must be measured by general self-incrimination principles. It seems obvious that petitioner's statement was self-incriminating and carried an inference of guilt. In fact it is difficult to see any relevancy in his statement other than providing such an inference.
>
> The Supreme Court noted that if an accused incriminates himself when faced with the prospect of taking a test, the testimony may be a product of compulsion and inadmissible.[49]

This holding is, however, not absolute, since the case is clearly distinguishable from most of the cases that have held the other way on the question of admissibility.[50] In *Gay* the defendant was told by the police that he had a right not to take a breathalyzer test, and the defendant relied upon this advice. Nevertheless, the prosecution introduced his refusal in evidence against him. As stated by the court:

> In the case before us petitioner was confronted with a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement. While the results of a properly administered breathalyzer test are not within the privilege, self-incriminating testimonial by-products are.[51]

A distinction obviously exists where the defendant has a *choice* of submitting or not submitting to a test. In such a situation, the testimony may, in fact, be a product of compulsion and therefore inadmissible.[52]

47. City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968). *See also* State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967), wherein the defendant refused to submit to a recording of his voice. The court held, citing People v. Sudduth, that comment on a defendant's willful refusal to permit the obtaining of a sample of his voice did not infringe upon the defendant's fifth-amendment rights.

48. 202 So.2d 896 (Fla. 4th Dist. 1967).

49. *Id.* at 898.

50. *See* note 45 *supra.*

51. 202 So.2d 896, 898 (Fla. 4th Dist. 1967).

52. Some states' courts have held that the fact of refusal cannot be used to create any

This distinction was recently recognized by the Second District Court of Appeals in *State v. Esperti.*[53] The court in that case was faced with the question of the admissibility of refusal and evasive conduct prior to administering a paraffin test. *Gay v. City of Orlando*[54] was considered but distinguished on the basis of the choice, and the court noted that the defendant's "actions were a direct by-product, not of the administration of the test, but the wrongful refusal to submit thereto; and wrongful conduct poisons its own fruit."[55]

In *Esperti* the defendant was arrested within a few hours after a homicide. At the police station the officers told the defendant that they were going to administer a dermal nitrate test. As soon as the defendant's attorney left the station[56] the officers attempted to administer the chemical test. The defendant refused to submit, spat on his hands, wiped them, and tried to rub tobacco ashes on them. The court, in a less than clear decision, analogized the actions to those of an accused in resisting lawful arrest, in escaping or fleeing from lawful custody or remaining silent in the face of an accusatory statement — all of which are admissible. The defendant's actions were "susceptible of no *prima facie* explanation except consciousness of guilt . . . ."[57]

The opinion would appear to clearly confront and resolve the issue of admissibility of refusal to take the test. Unfortunately, the court left the door open to further confusion by stating that the defendant's refusal was not conditional.[58] In fact, the refusal was conditioned, *i.e.*, on the officers' obtaining a warrant. The court failed to direct its attention to this point. What effect, if any, this omission will have on the ultimate resolution of "by-product" questions is purely a matter of speculation. As has been noted,[59] it is unlikely that a warrant would be required for the administration of such tests and hence should have no bearing on the admissibility of the refusal to submit.

IV. Conclusion

To the extent that *Gay* holds a refusal to submit to a test to be a "testimonial by-product" and inadmissible per se, the decision is in con-

unfavorable inference against a defendant, on the premise that under their chemical test or implied consent laws a defendant is given an absolute right to refuse a test. *E.g.*, People v. Stratton, 286 App. Div. 323, 143 N.Y.S.2d 362 (1955), *aff'd*, 1 N.Y.2d 664, 113 N.E.2d 516, 150 N.Y.S.2d 29 (1956) (reversed a conviction of motor vehicle homicide where evidence of such a refusal by the defendant had been admitted by the trial court).

53. 220 So.2d 416 (Fla. 2d Dist. 1969).

54. 202 So.2d 896 (Fla. 4th Dist. 1967).

55. State v. Esperti, 220 So.2d 416 (Fla. 2d Dist. 1969).

56. It would seem that a sixth-amendment argument might have been effectively raised. *See* United States v. Wade, 388 U.S. 218 (1967). The recent controversial release of Detroit Black Activists who were suspected of murder was based on this principle. TIME, April 11, 1969, at 43.

57. State v. Esperti, 220 So.2d 416 (Fla. 2d Dist. 1969).

58. *Id.* at 418.

59. Note 5 *supra* and accompanying text.

flict with the growing body of legal opinion, and, it is submitted, does not reflect the final solution of the issue by the Florida courts. The *Esperti* decision appears to be in accord with the more prevalent view allowing such testimony into evidence once the constitutional standards have been met. It is likely that this is the view which will ultimately be adopted by the Florida Supreme Court.[60]

60. There now appears to be sufficient conflict to give the Florida Supreme Court certiorari jurisdiction.