Two DWI Attorneys Pick:
15 DWI Cases We Would Want If We Had To Try DWI's In Virginia With Only 15 Cases

(I.E., What Would You Take to a DWI Desert Island?)

By Paul McGlone, Esq., McGlone Law Firm, P.C.
AND Gregory Beckwith, Esq., Fairfax, VA

Originally presented
To the Fairfax Bar Association
Annual DUI Law Seminar
January 30, 2008

15 DWI Cases We Would Want If We Had To Try DWI's In Virginia With Only 15 Cases

(I.E., What Would You Take to a DWI Desert Island?)

By Paul McGlone, Esq., McGlone Law Firm, P.C.
AND Gregory Beckwith, Esq., Fairfax, VA

Seizure of a Moving Vehicle
Neal v. Commonwealth, 27 Va. App. 233, 235-236, 498 S.E.2d 422, (1998)
Zimmerman v. Commonwealth 234 Va. 609, 612, 363 S.E.2d 708, (1988)

Roadblocks/Sobriety Checkpoints
Brown v. Commonwealth, 20 Va. App. 21, 454 S.E.2d 758 (1995)
Wilson v. Commonwealth, 29 Va. App. 63 (1999)

Field Sobriety Tests
Hammond v. Commonwealth, 17 Va. App. 565, 439 S.E.2d 877, (1994).

Highway Definition and Virginia Implied Consent
Roberts v. Commonwealth, 28 Va. App. 401 (1998); and
Flincham v. Commonwealth, 24 Va. App. 734 (1997).

Accident Cases
Bristol v. Commonwealth, 272 Va. 568, 636 S.E.2d 460 (2006)

Civil Refusal
Lamay v. Commonwealth, 29 Va. App. 461, 513 S.E.2d 411 (1999)

Second or Subsequent Refusal
Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969)

Miranda Rights in DWI, after Arrest
Dixon v. Commonwealth, 270 Va. 34, 613 S.E. 2d 398 (2005).

Substantially Similar Prior Convictions
Corey v. Commonwealth, 03 Vap UNP 0421024 (2003) Federal, CFR
Shinault v. Commonwealth, 228 Va. 269 (1984); North Carolina
Commonwealth v. Lowe, 46 Va. Cir. 321 (1998); Maryland
Cox v. Commonwealth, 13 Va. App. 328 (1991); West Virginia; and more:

Uncounseled Misdemeanor Conviction on Prior Offense
Griswold v. Commonwealth, 252 Va. 113;
Argersinger v.Hamlin, 407 U.S. 25 (1972).

Seizure of a Moving Vehicle
Neal v. Commonwealth, 27 Va. App. 233, 235-236, 498 S.E.2d 422, (1998)
Zimmerman v. Commonwealth 234 Va. 609, 612, 363 S.E.2d 708, (1988)

Neal might be the worst case we give you all night, but keep looking and you might find a silver lining. It's a fact pattern that you're going to see all the time, and if you ignore it, then they've got you.

This is the case that says an officer has articulable suspicion (of DWI) when a driver is driving within his lane, but "weaving" within that lane. I thought weaving involved passing cars and changing lanes, weaving through traffic. Now, courtesy of Va.App., you can "weave in your own lane".

Watch the facts of the Neal case, and try to see if your case is really the same thing. Here is the Court's recitation of the facts before the stop (disregard the hearsay lookout):

"[Trooper] Fainter was on patrol in Shenandoah County when he received a call to "be on the lookout" for a "reckless" driver southbound on Interstate 81. Fainter was in the area and proceeded south. He saw the vehicle and got "close enough" to observe it for approximately one-half mile, which he estimated took approximately twenty-five seconds. During this time, the car was traveling at sixty-five miles per hour in the right lane of two southbound traffic lanes and "[t]he vehicle, numerous times, would weave to the center of the [Page 236] highway, then back to the right, just constantly moving from side to side in its lane." Over "that half-mile distance, it kept sort of weaving inside of his lane," between five and ten times. The car crossed into the left southbound lane and it "touched, just touched the line" on the right side of the lane. After approximately twenty-five seconds of observation, Fainter, who had been involved in eighteen DUI arrests in 1996, stopped the car to investigate because he was "concerned" about the erratic driving. "

Neal v. Commonwealth, 27 Va. App. 233, 235-236, 498 S.E.2d 422, ___ (1998)

Lets also take this opportunity to note that "'Ultimate questions of reasonable suspicion and probable cause' . . . involve questions of both law and fact and are reviewed *de novo* on appeal." *Neal v. Commonwealth,* 27 Va. App. 233, 237, 498 S.E.2d 422, ___ (1998)

In reaching their conclusion, the Court noted that "Trooper Fainter had experience with intoxicated drivers, and in light of that experience, he suspected that the erratic driver was either inattentive or impaired."

So, look carefully to see if they have laid the foundation to argue Neal. Does the trooper have experience like this one? A lot of Fairfax officers only have an occasional DWI, unless they work midnights.

Were there multiple weaves? The case says that a single instance is not enough, and this case contained 5 to 10, as well as "almost touching a lane line". This case occurred on Route 81. That's a pretty straight road! The whole "weaving" thing doesn't make as much sense on a curved road, or perhaps on a road with potholes, patches or manhole covers. There might be good reasons to shift my position in a lane. What if the client is on a road that only has one lane in each direction. Can't he use the entire lane, perhaps routinely moving further to the right when another car is oncoming? That's another factual difference, so don't concede that Neal is applicable.

So, where is the silver lining? Well, it's a thin one, but all police and prosecutors know about Neal, and it has the effect of giving them a safe harbor. A feeling of comfort, and perhaps, even complacency. Ok, so all my arrests are weaving, so what? Well, if they stop for weaving, and don't gather any other evidence, then that's all they have. What if the weaving isn't sufficient? Let them rely on weaving within a lane only, and if you can convince the Court that it isn't sufficient to meet the Neal standards, you suppress the stop.

It's not going to happen often, but you have to know this case. No Foundation! I'll stand up and say that Neal case was a close call on those facts and the Commonwealth needs to be held to the same standards. Anything less should not be articulable suspicion.

Zimmerman isn't a DWI case, but the stop issue is relevant, and they provide a good analysis of the "stop" issue.

On a military base, there is a Terry stop encounter where the male passenger gets out and asks the officer for directions to a building. Then he gets in on the driver side and the other person slides over. So, he follows them a bit and makes a traffic stop.

Summarizing the facts in their ruling, the Court stated,

"Repeatedly during his testimony, he indicated that the sole reason for the stop, was because the persons in the vehicle had "switched operators." Under the circumstances of this case, such conduct, viewed either in isolation as the officer considered it or along with the other behavior as the court must examine it, is utterly insufficient to generate a reasonable suspicion that defendant was involved in criminal activity."

Zimmerman v. Commonwealth, 234 Va. 609, 612, 363 S.E.2d 708, (1988)

Roadblocks/Sobriety Checkpoints

Brown v. Commonwealth, 20 Va. App. 21, 454 S.E.2d 758 (1995)
Wilson v. Commonwealth, 29 Va. App. 63 (1999)

The statutory right of a law enforcement officer to stop a motor vehicle and the obligation of a motor vehicle operator to stop at a traffic checkpoint are circumscribed by Delaware v. Prouse, 444 US 648 (1979), in Prouse, the United States Supreme Court held unconstitutional the random stopping of motor vehicles, other than upon the basis of probable cause or reasonable suspicion of criminal activity. See Id at 662. The court ruled that a person "operating or traveling in an automobile does not lose all expectation of privacy simply because the automobile and its use are subject to government regulations." Id. However, the court went on to say:

> "This holding does not preclude the … states from developing methods for spot checks that involve less intrusion or do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at all roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public highways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers. Id at 663.

In Brown v. Texas, 443 U.S. 47 (1979), the United States Supreme Court set forth a balancing test for determining the validity of a traffic stop based on less than probable cause, or "articulable and reasonable suspicion" of criminal activity. The test involves weighing (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with the individual liberty. See Id at 50-51. Noting the central constitutional concern that "an individual's reasonable expectation of privacy is not subject to arbitrary invasion solely at the unfretted discretion of officers in the field," the Court stated, "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Id at 51. See also Lowe v. Commonwealth, 230 Va. 346, 337 S.E. 2d 273 (1985).

Lowe involved an arrest made at a license and sobriety checkpoint conducted pursuant to Charlottesville's checkpoint plan. Analyzing the plan on the criteria set forth in Brown, the Supreme Court held:

> "Balancing the state's strong interest in protecting the public from the grave risk presented by drunk drivers, against the minimal inconvenience caused motorists approaching the roadblock, we hold that the action of police in this case was not an impermissible infringement upon defendant's reasonable expectation of privacy."

In Simmons v. Commonwealth, 238 Va. 200, 380 S.E. 2d 656 (1989), the Virginia Supreme Court considered a license and registration checkpoint established and conducted by two (2) state troopers on their own initiative. The troopers stopped and inspected every vehicle passing through the checkpoint. Holding the checkpoint to be constitutionally impermissible, the Court stated:

> "We do not read Prouse to stand for the proposition that stopping at all traffic at a roadblock constitutes sufficient restraint on the exercise of discretion by police officers to transform the stop into a constitutionally valid roadblock. While this approach may eliminate the constitutional vice inherent in a random spot check or stop and therefore be a preferred practice, … the roadblock also must be undertaken pursuant to an explicit plan or practice which uses neutral criteria and limits the discretion of officers conducting the roadblock. The evidence in this case establishes that the decision to establish the roadblock, as well as its location and duration, was solely within the discretion of the troopers. No advance approval or authorization of any supervisor or superior officer was required to set up the roadblock."

Finally, in Wilson v. Commonwealth, 29 Va. App. 63 (1999), the court stated that stopping a motor vehicle and detaining its operator at a roadblock or a checkpoint constitutes a seizure within the meaning of the Fourth Amendment. To determine whether a checkpoint stop is constitutionally valid, the court applied the balancing test established in Brown. The Brown test involves the weighing of three (3) criteria: (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with the individual liberty. The court stated the Commonwealth must present some evidence establishing the method employed will be an effective tool for addressing the public concern involved. Citing Galberth v. United States, 590 A. 2d 990, 999 (D.C. App. 1991) (holding that the challenged roadblock was unconstitutional, in part, because "there was no empirical evidence that a roadblock technique itself effectively promoted the government's interest in deterring drug crimes"). Prior to implementing such intrusive methods of law enforcement, authorities should attempt to gather some empirical evidence that such methods will in fact be effective.

In Wilson, the court held where no evidence that a security checkpoint at the entrance to an apartment complex addressed concern about drug dealing or even that there existed empirical evidence that there was such a problem the roadblock stop at the defendant's vehicle was held to be unconstitutional.

For other roadblock cases, see Gilpin v. Commonwealth, 26 Va. App. 105 (1997), the court held where a roadblock for license, registration, tag and equipment violations where the defendant produced these items, which appeared to be valid, the police officers could not continue detention unless he developed reasonable suspicion of criminal activity. Commonwealth v. Bocock, Judge Duncan M. Byrd, Jr.'s Circuit Court opinion of the 25th Judicial Circuit dated February 15, 1996, the court held the roadblock failed to sufficiently limit officers' discretion where no indication or plan that a supervisor of any checkpoint need be of any graduated rank or special training, and that the time of the detail was based on "traffic conditions at the time."
Brown v. Commonwealth, 20 Va. App. 21 (1995), where the officers moved the roadblock to a different location because of light traffic and no arrests, eventhough guidelines only authorized moving it for heavy traffic or safety concerns.

Hall v. Commonwealth, 12 Va. App. 972 (1991), giving trooper a choice of fifty-four (54) different locations set up a roadblock at anytime during a given week failed to prove the necessary restraint on the trooper's discretion and thus the roadblock was held to be invalid.

Commonwealth v. Crenshaw, 7 Va. Cir. 351 (1986), a legal roadblock must be controlled by a written policy to be valid.

Field Sobriety Tests

Hammond v. Commonwealth, 17 Va. App. 565, 439 S.E.2d 877, (1994).

Quite simply, FST's are not mandatory. Likewise for a PBT, of course. Quoting dicta from Hammond:

A field sobriety test is not mandatory and is administered by an officer only with the consent of the accused. The test provides an immediate indication of whether probable cause exists to believe that the accused is under the influence. If a defendant refuses to take the test, that refusal may be evidence of guilt. *Farmer,* 12 Va. App. at 341, 404 S.E.2d at 373. Similarly, we assume *arguendo* that if a defendant readily volunteers to take a field sobriety test, the willingness may be relevant to prove innocence. *Farmer* held only that evidence of the accused's refusal to take the test or his actions in voluntarily performing the *non*-required field sobriety test may be relevant to prove the accused's guilt or innocence.

Hammond v. Commonwealth, 17 Va. App. 565, 568, 439 S.E.2d 877, (1994)

So, when you see a video and your officer starts out yelling, "PUT OUT THAT CIGARETTE!"; and "GET OUT OF THE CAR", then you want to listen carefully to see if he tames his approach when he gets to "Would you mind performing a few tests?" More likely, he will keep telling your client what to do, rather than asking. I saw this one the other day: The officer says into his radio, "We're doing Sobriety now" and starts telling my guy what to do.

However, be aware of the en banc Farmer case, quoted above, which allows an inference to be made when a person "declines" the FST's. Unfortunately for us, this inference alone, coupled with some driving, odor, and BS eyes, may be enough for a Judge to uphold the arrest.

Bonus case: United States v. Horn, 185 F. Supp. 2d 530 (D. **Md**. 2002). This case contains an excellent review of the history of NHTSA and other field sobriety tests and sets forth a roadmap for trying to contest their scientific value. Great case, but I smell $100,000 in attorneys fees and costs in there somewhere.

Highway Definition and Virginia Implied Consent

Roberts v. Commonwealth, 28 Va. App. 401 (1998); and
Flincham v. Commonwealth, 24 Va. App. 734 (1997).

Pursuant to §18.2-268.2, any person, whether licensed by Virginia or not, who operates a motor vehicle **upon a highway**, as defined in §46.2-100, in the Commonwealth, shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if he arrested for a violation of 18.2-266, 18.2-266.1, or subsection B of 18.2-272 or of a similar ordinance within three hours of the alleged offense.

So, Implied Consent law only kicks in if the person is deemed to have driven on a Highway.

46.2-100 defines highway as follows:

"Highway means the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth, including the streets and alleys, and, for law enforcement purposes, (i) the entire width between the boundary lines of all private roads or private streets that have been specifically designated "highways" by an ordinance adopted by the governing body of the county, city, or town in which such private roads or streets are located and

(ii) the entire width between the boundary lines of every way or place used for the purposes of vehicular travel on any property owned, leased, or controlled by the United States government and located in the Commonwealth."

One of the first cases to address the issue in a DWI context was Prillaman v. Commonwealth, 199 Va. 401, 100 S.E. 2d 4 (1957). Prillaman drove his car from the rear of a filling station to the front to have a tire repaired, the entire movement being on private property of the station owner. The Court held that a privately owned lot used in connection with the operation of a filling station is not a highway within the definition of the motor vehicle code since it is not open of right to the use of the public but may at will be close to the public use by the owner of the premises.

However, in Kay Management v. Creason, 220 Va. 820, 263 S.E. 2d 394 (1980) the court found that streets of an apartment complex were highways citing that the following facts were significant:

> "Uncontroverted evidence discloses that Kay serviced and managed the streets at its expenses, but posted traffic signs on the access street and elsewhere "with the direction" of the local police and fire departments. It also appears from the evidence that the streets were paved, curbed and bordered by sidewalks, and that they contain painted lines marking spaces for perpendicular parking. There is evidence that the travel section of Barcroft View Terrace was well defined, extending twenty-one (21) feet between the outer extremities of the parking space lines and thirty-one (31) feet between the parked cars on each side. A single short paved street or a roadway provided the only apparent entrance to the apartment complex from Columbia Pike. There was no evidence that the streets or roadways to the complex were restricted exclusively to the use of the apartment dwellers or those persons who visited them. There is no evidence that the access was denied to the public by security guards, gates, or warning signs. The streets contained parking spaces for the convenience of apartment occupants and they carry traffic along the traveled portions."

The Supreme Court concluded:

> "We hold that the evidence of accessibility to the public for free and unrestricted use gave rise to a *prima facia* presumption that the streets of Barcroft View Apartments were highways within the definition of 46.1-1(10)[current 46.2-100]. It thereupon became Kay's burden to rebut the presumption by showing its streets were used for vehicular travel exclusively by the owners and those having either expressed or implied permission from the owners. No such evidence appears in the record."

However, there have been a number of cases which each practitioner should be aware of in addressing whether private property constitutes a highway within the statutory definition of 46.2-100. Namely, these cases are:

White v. City of Lynchburg, Unpublished Virginia Court of Appeals 2/15/2000, the court held that a parking lot of an apartment complex which was not restricted by gates or barriers, but had no trespassing signs posted and the complex hired private security was not "highway" for purposes of the implied consent statute.

Roberts v. Commonwealth, 28 Va. App. 401 (1998), the court held that the parking lot of a 7-11 where access could be limited to invitees and not maintained by the city, was not a public highway even without no trespassing or other restricted access signs.

In Flincham v. Commonwealth, 24 Va. App. 734 (1997), the court held that the adjacent parking lots of a sporting goods store and car repair store in front of both businesses were not highways, as they were not open to the public except upon invitation and could be barred to the public at will, especially where a "no trespassing" sign was posted.

In Gray v. Commonwealth, Loudoun County Circuit Court 5/23/94, the court held that the drive thru line of a Taco Bell was not "a highway" where it was privately owned and not accessible to the public for free and unrestricted use (the parking lot was not used to get from one point to the other);

In Town of Vienna v. McIntire, Fairfax County Circuit Court 12/22/93, the parking lot of a Vienna recreational park was not a "public highway, "since the old definition under Virginia Code 46.1-1 specifically include "publicly maintained parking lots" and the new definition under 46.2-100 excluded it.

Finally, Moore v. Commonwealth, Virginia Court of Appeals, Unpublished, 10/17/89, the court held that a dirt road ten (10) to twelve (12) feet wide with ditches on each side running through farmland, serving six (6) families living in trailers, was not a "highway." The court held that the Commonwealth had the burden to show "free and unrestricted use."

DWI Accident Cases

Bristol v. Commonwealth, 272 Va. 568, 574, 636 S.E.2d 460, ___ (2006)

If the officer has not witnessed the accident or otherwise seen your client operate a motor vehicle, then it's a whole new ball game! Who is going to offer testimony in the case? Not my client! (Hopefully). Accident cases have all kinds of opportunity for the defense. Sadly, if you client is injured, there is even more

opportunity. If he is secured to a backboard or stretcher, there may be no field sobriety tests.

Look carefully for all kinds of issues in an accident case, if the officer is not a witness to the accident. Often, the cars will be moved into a parking lot. Perhaps the officer interviews and English-speaking victim, rather than seeking admissions from your client. Single-vehicle accidents present another array of issues.

In Bristol, the Virginia Supreme Court overruled the Court of Appeals' ruling to the effect that a passenger in an ambulance might be "virtually" under arrest. This case gives us the opportunity to suppress breath or blood (usually blood) that is taken from a person who hasn't been arrested. Furthermore, he hasn't given implied consent to a blood test, because that doesn't kick in until after he is arrested.

This is a big Defense case!

Citing relevant facts, the Supreme Court ruled:

> In the present case, it is undisputed that neither Officer Doyle nor Officer Eberts physically restrained Bristol at the hospital after Officer Doyle told Bristol that he was "under arrest." Therefore, Bristol was arrested at the hospital only if his consent to the blood test constituted a complete surrender of his personal liberty in submission to Officer Doyle's assertion of authority. We conclude that Bristol's consent to the blood test was not such a surrender of his personal liberty.
>
> Bristol merely agreed to submit to a blood test. He did not make any statement nor did he act in a manner demonstrating a complete surrender of his personal liberty to Officer Doyle's control.

Bristol v. Commonwealth, 272 Va. 568, 574, 636 S.E.2d 460, ___ (2006)

In this case, Mr. Bristol actually consented to the Blood test, but the Court ruled it inadmissible. It is hearsay, even if he did consent, and the consent was only given after he was invalidly read "implied consent law". Here's how that works:

> Accordingly, we hold that Bristol was not arrested within three hours of the offenses as required by the implied consent provisions of Code § 18.2-268.2. Therefore, the certificate of blood analysis obtained pursuant to that statute was inadmissible at trial. *See Overbee v. Commonwealth*, 227 Va. 238, 242-43, 315 S.E.2d 242, 243-44 (1984); *Thomas v. Town of Marion*, 226 Va. 251, 254, 308 S.E.2d 120, 122 (1983).

Bristol v. Commonwealth, 272 Va. 568, 575, 636 S.E.2d 460, ___ (2006)

Civil Refusal

Lamay v. Commonwealth, 29 Va. App. 461, 513 S.E.2d 411 (1999)

Prior to the "Albo Amendments" of 2004, all refusal was a "civil" infraction, with no fines, no jail and no misdemeanor conviction. There was a single sanction of 12 months forfeiture/loss/suspension of license.

Some folks will tell you that there is no way to win a refusal charge, and the only way to get a restricted license is to plead to the DWI and get the Refusal dismissed. In many cases, that might be the best option.

There have been many cases in Virginia that have ruled that various reasons for refusing are not "reasonable", but we have gotten little guidance on what IS reasonable.

Lamay is not really a refusal case, but it contains an excellent discussion of the refusal scheme and a description of how and why (presumably) she was able to beat the refusal charge. She was acquitted of refusal and appealed the DWI case to the Arlington County Circuit Court, which led quickly to the Court of Appeals.

In a very lengthy opinion, the Court provides a good discussion of the refusal scheme. The Court explains that if a person is physically incapable of taking a breath test, then it is not unreasonable refusal, and she should be offered a blood test. Ultimately, she should be allowed to offer evidence of why she was physically incapable, so that the Court can then consider the effect of denial of the blood test.

The net result is that the Court applies Breeden and Sullivan, ruling that the only remedy for denial of a proper test is dismissal. The Court remands, rather than dismissing, because the error below was excluding her testimony about her Asthma and the physical inability to take the test.

Lamay also tells us that the burden is on the Defense to show physical inability, while the prosecution carries the burden of proving unavailability of breath or blood test.

From the opinion:

Unavailability

Under the former DUI statute that offered drivers the choice of a blood or breath test, the Commonwealth could assert that one of the tests was unavailable when a suspected driver was not provided the test that he or she elected.

In *Breeden v. Commonwealth,* 15 Va. App. 148, 150, 421 S.E.2d 674, 675 (1992), decided under former Code § 18.2-268(C), we placed the burden on the Commonwealth to establish that a requested test was unavailable. We held that "the Commonwealth must establish the reasons for the unavailability of one of the tests before denying a driver his or her test of choice." *Id.* at 150, 421 S.E.2d at 675-76. We explained that "[o]nce the Commonwealth has elected to have a driver take a blood or breath test pursuant to Code § 18.2-268, the driver has a right to receive the benefits of the test" and that "the Commonwealth must establish the reasons for the unavailability of one of the tests before denying a driver his or her test of choice." *Id.* In light of *Breeden,* we have consistently assigned the Commonwealth the burden to explain the unavailability of a requested test. *See, e.g., Commonwealth v. Gray,* 248 Va. 633, 636, 449 S.E.2d 807, 809 (1994) (affirming refusal conviction, holding that when accused chooses particular test, "and that test cannot be administered because it allegedly is unavailable," the Commonwealth must establish a reasonable basis to support such finding); *Herring v. Commonwealth,* 28 Va. App. 588, 591, 507 S.E.2d 638, 639 (1998) (holding that the Commonwealth bears the burden of establishing that a breath test was unavailable); *Walker v. City of Lynchburg,* 22 Va. App. 197, 198, 468 S.E.2d 164, 165 (1996) (holding that Commonwealth satisfied its burden and "provided sufficient basis to determine unavailability of the [requested] blood test" under former Code § 18.2-268.2); *Snead v. Commonwealth,* 17 Va. App. 372, 374, 437 S.E.2d 239, 241 (1993) (holding that if an election is not honored because of unavailability, the Commonwealth must establish a valid reason for the lack of availability of the test requested); *Sullivan v. Commonwealth,* 17 Va. App. 376, 378, 437 S.E.2d 242, 243 (1993) (holding that Commonwealth "bears the burden of showing" that unavailability [Page 473] of requested tests was reasonable); *Mason v. Commonwealth,* 15 Va. App. 583, 585, 425 S.E.2d 544, 545 (1993) (holding that "[i]f one of the tests is unavailable the government must provide a reasonable explanation for its unavailability").

"Finally, if the unavailability of the test is found to be unreasonable, '[m]ere suppression of the result of the test not requested . . . does not cure the deprivation.' The only appropriate remedy is reversal of the conviction and dismissal of the charges." *Sullivan,* 17 Va. App. at 378, 437 S.E.2d at 243 (quoting *Breeden,* 15 Va. App. at 150, 421 S.E.2d at 676).

Physical Inability

By revising Code § 18.2-268.2, effective January 1, 1995, the legislature eliminated an accused driver's choice of tests but added language to accommodate situations where an accused is physically unable to take a breath test. These legislative

changes require us to interpret and apply the current statute in order to effect the legislature's intended purpose. In other words, we must determine how that language comes into play in a DUI case, who has the burden to establish physical inability, and what procedures are to be followed.

Because it is the accused driver whose physical inability is at issue in such situations, logic dictates that the burden should fall on the accused to establish that fact. After an accused presents evidence of his physical inability, the Commonwealth is entitled to present evidence in rebuttal, after which it rests upon the trial court to determine whether the accused satisfied his or her burden.

Here, the trial court refused to consider evidence relating to administration of the breath test, ostensibly because it was the same evidence presented in the district court trial on the refusal charge and, thus, was not relevant. As discussed below, prior case law under the former DUI statutes supports that view.

In *Cash v. Commonwealth,* 251 Va. 46, 466 S.E.2d 736 (1996), the defendant was charged with driving under the [Page 474] influence and with refusing to submit to a blood or breath test. The district court acquitted her of the DUI charge but convicted her of the refusal charge. *See id.* at 48, 466 S.E.2d at 737. She appealed the refusal conviction to the circuit court.

> Pretrial, the circuit court granted the prosecutor's motion to exclude certain evidence proffered by [Cash] on the reasonableness of her refusal to submit to the blood or breath test. The prosecutor asked the court to prohibit, for example, any evidence regarding defendant's sobriety at the time of arrest and evidence of the outcome of the DUI charge on the ground that such evidence is irrelevant to the charge of unreasonable refusal to submit to such test.

Id.

In determining whether the trial court erred in granting the Commonwealth's motion and excluding such evidence, the Supreme Court pointed out that "the declaration of refusal or the magistrate's certificate is prima facie evidence that the defendant refused to submit to testing." *Id.* at 49, 466 S.E.2d at 737. "'However, this shall not prohibit the defendant from introducing on his behalf evidence of the basis of his refusal. The court shall determine the reasonableness of such refusal.'" *Id.* at 49, 466 S.E.2d at 738 (quoting Code § 18.2-268.3(E)). The Court then provided the following comments regarding the DUI and refusal statutes:

> [T]his Court has decided that operation of a motor vehicle while under the influence of alcohol or drugs may give rise to two separate and distinct proceedings — one a criminal action for DUI and the other a civil, administrative proceeding on the refusal

charge. “Each action proceeds independently of the other and the outcome of one is of no consequence to the other.”

Id. at 49, 466 S.E.2d at 738 (quoting *Deaner v. Commonwealth,* 210 Va. 285, 289, 170 S.E.2d 199, 201 (1969)).

At her refusal trial, Cash sought to present evidence about the small amount of alcohol she allegedly consumed, witness testimony that she was not under the influence, testimony that her driving was not erratic, testimony about the police officer's [Page 475] abusive conduct, evidence about her satisfactory performance on the field sobriety tests, testimony regarding her requests to consult an attorney, and evidence relating to her expressed concern that she was being framed. *See id.* at 50-51, 466 S.E.2d at 738-39.

The Court held that “evidence about defendant's sobriety, about her driving proficiency, and about her subjective belief that she was not under the influence of alcohol, while admissible in a DUI trial, was utterly inadmissible in the refusal trial.” *Id.* at 51-52, 466 S.E.2d at 739. Moreover, the Court ruled that Cash's “desire to consult counsel ‘to see what she could do to protect her interest from being framed’ furnishes no legal basis for refusal to submit to testing.” *Id.* at 52, 466 S.E.2d at 739. In addition to detailing evidence that did not provide a reasonable basis for refusing a test, the Court also explained what type of evidence could provide a basis for refusal when it stated, “[i]llustrative of a refusal that would be deemed reasonable is when ‘a person's health would be endangered by the withdrawal of blood.’” *Id.* at 50, 466 S.E.2d at 738 (quoting *Deaner,* 210 Va. at 293, 170 S.E.2d at 204). *See also Bailey v. Commonwealth,* 215 Va. 130, 131, 207 S.E.2d 828, 829 (1974) (holding that there must be some “reasonable factual basis for the refusal,” such as, endangerment of the health of the accused by the withdrawal of blood).

The Supreme Court's explanation that DUI and refusal cases are separate and distinct, and its consistent pronouncement that evidence on one charge is usually irrelevant and inadmissible in a trial on the other charge, has overshadowed the revised portion of Code § 18.2-268.2 anticipating conditions where an accused is physically unable to take a breath test.

By including physical inability as a condition precluding the administration of the required test intended to benefit an accused driver, the legislature contemplated situations where physical inability would arise and evinced its intention to allow accused drivers to establish that fact. Under Code § 18.2-268.2, if the accused satisfies that burden before the trial [Page 476] court, he or she is entitled to a blood test. Because we hold that, under appropriate circumstances, an accused bears the burden of establishing Code § 18.2-268.2(B) physical inability, such evidence must be and is admissible in a DUI trial. In summary, whereas evidence unique to a refusal charge has

historically been precluded at a DUI trial, and vice-versa, the changes in Code § 18.2-268.2 require a different evidentiary result.

Lamay v. Commonwealth, 29 Va. App. 461, 472-476, 513 S.E.2d 411, ___ (1999)

Second or Subsequent Refusal

Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969)

Pursuant to 18.2-268.3, "Refusal": It shall be unlawful for a person who is arrested for a violation of 18.2-266, 18.2-266.1 or subsection B of 18.2-272 or of a similar ordinance to unreasonably refuse to have samples of his blood or breath or both blood and breath taken for chemical tests to determine the alcohol or drug content of his blood as required by 18.2-268.2 and any person who so unreasonably refuses is guilty of a violation of this section.

Pursuant to 18.2-268.3(D), a first violation of this section is a civil offense and subsequent violations are criminal offenses. For a first offense the court shall suspend the defendant's privilege to drive for a period of one (1) year. This suspension is in addition to the suspension period provided under 46.2-391.2.

If a person is found to have violated this section and within ten (10) years prior to the date of the refusal, he was found guilty of any of the following: a violation of this section, a violation of 18.2-266 or a violation of any offense listed in subsection E of 18.2-270, arising out of separate occurrences or incidents, he is guilty of a Class 2 misdemeanor and the court shall suspend the defendant's privilege to drive for a period of three (3) years. This suspension is in addition to the suspension period provided under 46.2-391.2.

If a person is found guilty of a violation of this section and within ten (10) years prior to the date of the refusal he was found guilty of any of the two (2) of the following: a violation of this section, a violation of 18.2-266 or violation of any offense listed in subsection E of 18.2-270 arising out of separate occurrences or incidents, he is guilty of a Class 1 misdemeanor and the court shall suspend the defendant's privilege to drive for a period of three (3) years. This suspension period is in addition to the suspension period provided under 46.2-391.2. A second or subsequent conviction for refusal within ten (10) years of a prior refusal or DWI conviction is a criminal offense.

In Deaner v. Commonwealth, 210 Va. 285, 170 S.E. 2d 199 (1969), the defendant was arrested in the City of Richmond at approximately 1:30 a.m. on January 13, 1968 and charged with operating his motor vehicle while under the influence of alcohol. He was advised by the arresting officer that, having operated a motor vehicle upon a public highway in Virginia, he was deemed to have consented to have a sample of his blood

taken for a chemical test to determine the alcohol content thereof. The defendant, while indicating a willingness to comply with the statute told the arresting officer that he would first like to consult with an attorney. He was taken to the magistrate's office and there again voiced his willingness to take a blood test provided that he was allowed to consult with his attorney. As the defendant was not able to contact his attorney until after the two (2) hour statutory period (now 3 hours) the defendant was charged with unreasonable refusal.

The court stated that "We must first determine whether the proceeding, for revocation of the license of one who refuses to submit to a blood test after having been charged with operating a motor vehicle under the influence of alcohol, is a criminal proceeding, or a civil and administrative procedure." The court held in that case the defendant was charged with a civil proceeding. The court stated "Under the statutes of Virginia, an arrest for drunk driving results in the following actions by law enforcement officers. A criminal warrant is issued charging the accused with the commission of a criminal offense – drunk driving. The accused is arrested, is taken into custody and is restrained until he gives bail for his appearance at trial. The trial is conducted as any other criminal trial with the usual safeguards and right of appeal. The accused can be fined and imprisoned – either or both. The burden of establishing his guilt is placed on the Commonwealth. The other is the action provided in the paragraphs quoted from the implied consent law. Should an accused refuse to take the blood test, after explanations of the consequences of such refusal, a "warrant" is issued charging the person with such refusal. The warrant referred to by the statute is obviously not a criminal warrant. It is in the nature of "a writ or precept from a competent authority in pursuance of law, directing the doing of an act, and addressed to the officer or person competent to do the act . . ."

The court held that the blood test prescribed is part of a civil and administrative proceeding and that Deaner had no right to condition his taking the test upon his ability to first consult with counsel. However, now that a second or subsequent offense is a criminal proceeding, the defendant's right to counsel is one of the rights guaranteed an accused under Section 8 of the Constitution of Virginia, Watkins v. Commonwealth, 174 Va. 518, 6 S.E. 2d 670 (1940) and by the Sixth Amendment to the United States Constitution, Gideon v. Wainwright, 372 US 335, 83 Sup. Ct. 792, 9 L.E. 2d 799 (1963). In fact, prior to questioning the defendant of his desire to either take or refuse the breathalyzer is tantamount to custodial interrogation. The Defendant must be read his Miranda warnings.

Miranda Rights in DWI, after Arrest

Dixon v. Commonwealth, 270 Va. 34, 613 S.E. 2d 398 (2005).

In Dixon v. Commonwealth, 270 Va. 34, 613 S.E. 2d 398 (2005), the defendant was charged with driving under the influence of alcohol, 3rd offense within the last five (5) years, driving on a suspended license and refusing to take breath or blood test. The defendant was handcuffed and placed in the front seat of a police cruiser and the court held that he was in custody for purposes of Miranda. The defendant filed a motion to suppress the statements he made to Trooper Jackson about his alcohol consumption and operation of the vehicle.

The defendant argued that was in police custody when he was handcuffed and locked in the patrol car and thus any statements he gave before being advised of his Miranda rights were obtained in violation of the Fifth Amendment. The Court of Appeals agreed as it related to the offenses of DWI and driving on a suspended license and reversed and remanded the defendant's convictions.

However, affirmed his conviction as to the refusal charge "because the charge of refusal to submit to a breath or blood alcohol test, Code 18.2-268.3 is civil, rather than criminal in nature citing Deaner v. Commonwealth. The refusal charge was prior to the "Albo Amendments" of 2004. It is obvious that had Dixon been charged with a second or subsequent offense, under the new law, that charge should have been dismissed in its entirety.

Substantially Similar Prior Convictions

Corey v. Commonwealth, 03 Vap UNP 0421024 (2003) Federal, CFR
Shinault v. Commonwealth, 228 Va. 269 (1984); North Carolina
Commonwealth v. Lowe, 46 Va. Cir. 321 (1998); Maryland
Cox v. Commonwealth, 13 Va. App. 328 (1991); West Virginia; and more:

The statutory scheme:

Pursuant to 18.2-270 B., 1. Any person convicted of a second offense committed within less than five (5) years of a prior offense under 18.2-266 shall upon conviction of the second offense be punished by a mandatory minimum fine of $500 with confinement in jail for not less than one (1) month or more than one (1) year. Twenty (20) of such days shall be a mandatory minimum sentence. 2. Any person convicted of a second offense committed within a period of five (5) to ten (10) years of a prior offense under 18.2-266 shall upon conviction of the second offense be punished by a mandatory minimum fine of $500 and by confinement in jail for not less than one (1) month. Ten (10) days of such confinement shall be a mandatory minimum sentence. C. Any person convicted of three (3) offense of 18.2-266 committed within a ten (10) year period shall upon conviction of the third offense be guilty of a Class 6 felony. The sentences of any person convicted of three (3) offenses of 18.2-266 committed within a ten (10) year period shall include a mandatory minimum sentence of ninety (90) days, unless the

three (3) offenses were committed within a five (5) year period, in which case the sentence shall include a mandatory minimum sentence of confinement for six (6) months. In addition, such person shall be fined the mandatory minimum fine of $1,000.

Pursuant to 18.2-270 E., for the purposes of determining the number of offenses committed by, and punishment appropriate for, a person under this section, an adult conviction of any person or the finding guilty in the case of a juvenile, under the following shall be considered a conviction of 18.2-266: (i) the provisions of 18.2-36.1, or the substantially similar laws of any other state or of the United States, (ii) the provisions of 18.2-51.4, 18.2-66, former 18.1-54 (formally 18-75), the ordinance of any county, city or town in this Commonwealth or the laws of any other state or of the United States **substantially similar** to the provisions of 18.2-51.4 or 18.2-266, or (iii) the provisions of section A of 46.2-341.24 or the **substantially similar laws** of any other state or of the United States.

The test to be applied to determine whether a foreign conviction may be considered by the Court as a predicate offense is whether it substantially conforms to the current statutory scheme. The panel has provided the audience with a copy of the court's unpublished opinion which held that a federal CFR conviction was not substantially similar to a conviction under 18.2-266.

Other cases of importance that the practitioner should be aware of are Commonwealth v. Lowe, 46 Va. Cir. 321 (1998), the court held that the Maryland DWI conviction was not substantially similar to Virginia law since it prohibited driving any vehicle while intoxicated including sleds, which would not be proscribed by the Virginia statute; Commonwealth v. Ayers, 17 Va. App. 401 (1993), the then current version of the North Carolina statute was not substantially similar to the Virginia statute; Cox v. Commonwealth, 13 Va. App. 328 (1991), the court found that the West Virginia DWI statute was not substantially similar to 18.2-266 since some convictions under the West Virginia law could not be the basis for convictions under 18.2-266 and therefore cannot be used in an habitual offender proceeding; Shinault v. Commonwealth, 228 Va. 269 (1984), the court held that the North Carolina conviction could not be used increase a defendant's penalty under 18.2-270 since the conclusive presumption made it dissimilar to the rebuttal presumptions afforded to the defendant under 18.2-266; Rufty v. Commonwealth, 221 Va. 836 (1981), the Commonwealth bears the burden to show that the foreign DWI is substantially similar to Virginia law in order to invoke the enhanced penalty provisions of 18.2-270 for a second or subsequent offense.

Uncounseled Misdemeanor Conviction on Prior Offense

Griswold v. Commonwealth, 252 Va. 113;
Argersinger v. Hamlin, 407 U.S. 25 (1972).

The issue of Represenation by Counsel in a prior offense is very important in defending a client accused of a 2nd or 3rd offense DWI. The burden is always on the commonwealth to prove the prior offenses, and to prove that the client was properly represented at that time or that there was a valid waiver.

In Griswold v. Commonwealth, 252 Va. 113, 472 S.E. 2d 789, the Supreme Court of Virginia held that an uncounseled misdemeanor conviction resulting in a jail or prison sentence is a violation of the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. The court further held that an uncounseled misdemeanor conviction with a suspended sentence was not constitutionally infirm.

However, in the case of Alabama v. Shelton, 535 US 654 (2002), the Supreme Court of the United States held that the Sixth Amendment does not permit activation of a suspended sentence upon a indigent defendant's violation of the terms of his probation where the state did not provide him counsel during the prosecution of the offense for which he is imprisoned. A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense.

The uncounseled conviction at that point "results in imprisonment." See Nichols v. United States, 511 US 738, 746. This is precisely what the Sixth Amendment, as interpreted in Argersinger and Scott, does not allow. Therefore, the court specifically overruled Griswold v. Commonwealth and now mandates that a prior uncounseled misdemeanor which results only in a suspended sentence is also constitutionally infirm.

THE END

BONUS ITEM: This information is pasted from the web page of Lawrence Taylor, Esquire, one of the top DWI authors and attorneys, located in California.

Top 20 U.S. Supreme Court Decisions

The following represent the 20 cases decided by the United States Supreme Court which, in Mr. Taylor's opinion, have had the greatest impact on the practice of drunk driving defense. The citations, facts and full majority opinions are set forth, along with any dissenting opinions.

Bell v. Burson

For many years, government considered a driver's license "a privilege — not a right", and thus there were few effective remedies available to a driver who wished to contest a suspension. The U.S. Supreme Court changed that, recognizing that a license's "continued possession may become essential in the pursuit of a livelihood". Because of their value, then, they "are not to be taken away without that procedural due process required by the Fourteenth Amendment". Note: Were it not for Bell, it is doubtful that the California DMV today would provide hearings to contest DUI license suspensions. See also, Mackey v. Montrym (1979) 443 U.S. 1, involving a license suspension for refusing to submit to a DUI breath test.

Benton v. Maryland

In this case, the defendant was acquitted of larceny but convicted of burglary. Successful on appeal, he was again charged with the burglary — and the larceny. The Supreme Court reversed, holding that the Double Jeopardy Clause of the U.S. Constitution applies to the states through the Fourteenth Amendment, thereby barring them from subjecting a citizen to repeated prosecutions for the same conduct. Note: Drunk driving defendants are routinely charged with both (1) DUI and (2) driving with .08% blood-alcohol; although it has been argued that this, in itself, raises related issues of "multiple prosecution" for the same conduct, it could raise issues under Benton's double jeopardy prohibition given the appropriate facts.

Berkemer v. McCarty

The Supreme Court is called upon to apply Miranda to a drunk driving case: When is a suspect "in custody" for purposes of determing whether the Miranda warnings must be given before questioning? In Miranda, the Court had held that the warning must be given when the individual is "in custody" — "or otherwise deprived of his freedom of action in any significant way". Clearly, a DUI suspect is not free to leave once he has been stopped and detained roadside — and certainly not when he is ordered to perform field sobriety tests. The Court, however, refused to provide any clear guidelines to the DUI stop/detention situation, seemingly recognizing a vague, undefined standard: "Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable..."

Blanton v. North Las Vegas

Does a defendant charged with drunk driving have a right to a jury trial? Not necessarily, according to the U.S. Supreme Court. In Blanton, the Court held that a citizen has a right to a jury trial only for "serious offenses" — not for "petty offenses". Basically, an offense punsihable by six months in jail or less is a "petty offense" — except in rare cases where additional statutory penalties indicate a legislative intent to consider the offense a "serious" one [such as license suspensions, fines, schools and ignition interlocks?]. Note: Today, a number of states, for example New Jersey, which punish fist offense DUIs with

six months jail do not provide a right to jury trial. See also, Baldwin v. New York (1970) 399 U.S. 66.

Brady v. Maryland
The landmark case requiring the prosecution to produce upon request any evidence that is "material" to the issue of guilt. Note: See also, Arizona v. Youngblood (1988) where the Court held that it is a violation of due process for the prosecution to destroy evidence "in bad faith" which although not "clearly exculpable" was nevertheless potentially useful.

California v. Trombetta
Another in the line of Brady-Youngblood "discovery" decisions (see above), this dealt with a drunk driving case. Where a breath test is given, the sample is captured in a test chanber, analyzed and purged out of the machine and into the air; nothing is saved. Since there is relatively cheap technology available to save such breath samples for later re-analysis by the defense, does the purging of the sample and the failure to preserve it constitute willful destruction of potentially exculpatroy evidence? No, said the Supreme Court, reversing the California Supreme Court: the destruction was "not a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland", and, more importantly, the defnse failed to show that the breath sample would have had an "exculpatory value that was apparent before the evidence was destroyed [Note: How would a defendant possibly accomplish that?], and also be of such a nature that the defendant would be unable to obtain comparable evidence by other available means." Note: These "other available means" referred to the right of a DUI arrestee giving a breath sample to request an additional blood sample at his expense — a right which the police rarely advise the arrestee he has.

Crawford v. Washington
Very recent case. In a prosecution of a man accused of stabbing another man who raped his wife, the prosecution played a tape recording of the wife describing the stabbing. The defendant object on the grounds that he could not cross-examine the woman, but the trial judge found the tape recording to be "reliable" since it had been taped by the police and admitted it for the jury to hear. The Supreme Court held in a 9-0 opinion that this is a violation of the U.S. Constitution's Sixth Amendment right to confrontation ("in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."). The decision specifically overruled a previous holding in Ohio v. Roberts where the Supreme Court had held that evidence could be introduced where the judge finds it to be "reliable". The Court in Crawford decided that a judicial finding of "reliability" could not substitute for the right of confrontation, and that the Framers preferred the test of cross-examination to that of a judge's finding of reliability. Note: This very recent decision is particularly important in DUI cases, where judges have commonly permitted prosecutors to introduce police reports in lieu of the testimony of the police themselves.

Gideon v. Wainwright
One of the cornerstones of our criminal justice system, this famous case dealt with a defendant charged with a felony who had no money and requested the trial judge to appoint legal counsel to defend him. The request was refused as state law provided for appointed attorneys only in capital cases, defendant had to defend himself at trial, and he was quickly convicted. Justice Black wrote the majority opinion, holding that the Sixth Amendment right to counsel applied not just to federal courts but to the states through the Fourteenth Amendment, and this "right to counsel" included the right to one even if one could not be afforded: "lawyers in criminal courts are necessitites, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Kumho Tire v. Carmichae
Federal Rules of Evidence 702 permits an expert to give his opinion "if scientific, technical, or other specialized knowledge will assist the trier of fact..." In Kumho, the trial judge excluded expert opinion testimony as to tire design because he found it unreliable. The issue on appeal was: Does Rule 702 apply only to "scientific" matters? Held, a trial judge's "gatekeeping" function is not limited by 702 to scientific matters, but applies to all expert testimony. Note: Since most states model their Evidence Codes after the Federal Rules, this decision was influential in how state courts would would limit expert testimony — including in drunk driving cases, where "expert" testimony (such as by the police officer) on such non-scientific matters as "field sobriety tests" is common. See also, Daubert v. Merrell Dow Pharmaceuticals (1993) 509 U.S. 579.

Mapp v. Ohio
Landmark case in which the U.S. Suptreme Court established the "Exclusionary Rule" by holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by [the Fourth Amendment], inadmissible in a state court." Note: In a DUI case, for example, the remedy for an officer stopping, detaining or arresting a suspect without sufficient probable cause would be suppression of all subsequently-obtained evidence: observations of appearance and behavior, field sobriety tests, breath test results, etc. See also, Wong Sun v. United States (1963) 371 U.S. 471.

Michigan v. Sitz
Do roadside sobriety checkpoints violate the 4th Amendment protection from being stopped/detained without probable cause that he may be engaged in illegal conduct? In a much-criticized 6-3 decision, the Court overlooked the Constitution, focusing instead on the drunk driving problem: "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it....the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight." Note: A few states (Michigan, for example, but not California)

have continued to prohibit DUI checkpoints by relying upon their own state constitutions.

Miranda v. Arizona
The landmark case in which the Court required that any "custodial interrogation" (questioning after arrest) must be preceded by the now-famous "Miranda warning" — including the right to remain silent and the right to have counsel present. Failure to so advise will result in suppression of any statements made in reply to such post-arrest questions. Note: In DUI cases, most questioning usually takes place during the field investigation — that is, non-custodial interrogation; it is not uncommon, however, for the police to continue asking questions in the police car or back at the police station during breath testing.

Montana v. Kurth Ranch
Defendant was both tried for selling marijuana — and then charged civilly for a failure to pay a tax on that marijuana. The Supreme Court held that it was a violation of the Constitutional prohibition against Double Jeopardy: The fact that one proceeding was criminal and the other civil did not matter, the Court said, as long as they both involved the same offense and both were intended as punishment. Note: This case has repeatedly been cited in DUI cases as authority for the proposition that the State cannot both criminally prosecute for driving with over .08% blood alcohol and civilly suspend the individual's driver's license for the same offense. Although there have been federal court decisions taking this position, to date state courts have not accepted this reasoning and the U.S. Supreme Court has not addressed the issue in a drunk driving context. See also, U.S. v. Halper (1989), 490 U.S. 435.

Morisette v. United States
Involving a theft where the intent to steal was legally presumed from the conduct of removing the property, this decision established that conclusive presumptions are a violation of the presumption of innocence and takes away from the jury the function of facutally determining the elements of the offense. Presumptions pop up constantly in DUI cases today: defendants are presumed guilty if their blood-alcohol was over .08%; the blood-alcohol level at the time of testing is presumed to be the same at the time of driving if taken within three hours (despite scientific evidence and common sense to the contrary). In each situation, however, the presumption is rebuttable — that is, the jury can disregard it in view of other evidence. Note: Were it not for Morisette, the government would undoubtedly make these presumptions conclusive — that is, the jury must follow the legal presumption even if the evidence clearly contradicts it.

Old Chief v. United States
Defendant was charged with possession of a firearm by a convicted felon. Fearful that evidence of the prior felony conviction would prejudice the jury on the present case, defendant offered to admit to the fact of the prior felony so that evidence of the nature or facts of the crime would not be necessary. The prosecution refused, saying that it

could prove the prior conviction if it so chose, and offered the facts of the prior crime. Held: the judge abuses his discretion in permitting evidence of the prior conviction where the nature of the current criminal charge raises a risk of a verdict tainted by evidence of that conviction. Note: This is a critical issue in drunk driving cases where a defendant is accused of DUI with prior convictions: evidence of the priors ("If he did it once...") almost guarantees a conviction.

Pennsylvania v. Muniz

After his arrest, a drunk driving suspect was given field sobriety tests at the police station. Some of these included tests of mental acuity, such as "Do you know what the date was of your sixth birthday?". The Supreme Court held that this constituted testimonial response to custodial interrogation and, since a Miranda warning had not been given, was inadmissible in trial. The court distinguished between questioning to determine the manner of speech (slurred) and the content (what was said) — that is, what was said rather than how it was said. Note: Applying Muniz to other DUI cases, post-arrest questions like "What time is it? Where are you?" and "divided attention" field sobriety tests ("Stand at attention with your eyes closed and tell me when 30 seconds have passed") should be similarly inadmissible without Miranda warnings.

Rochin v. California

Suspect swallowed drugs to get rid of evidence, whereupon police hit him and jumped on his stomach to make him throw up the drugs; at the hospital a physician forced an emetic through a tube into his stomach. Held, this conduct violated defendant's 14th Amendment right to Due Process. "Due Process" is a vague term, but it prohibited "conduct that shocks the conscience." Note: This is an important case in the drunk driving arena, as it is not uncommon practice for police to use violent means to obtain a blood sample from a resisting DUI arrestee.

Schmerber v. California

At officer's request and over objection, blood was withdrawn from a DUI arrestee while he was being treated at a hospital for injuries from an accident. Issue: Did evidence of the blood test results violate the defendant's 5th Amendment privielege against self-incrimination? Held, no: the privilege applies only to oral and written communication or testimony, not to physical evidence, and blood tests are not due process violations if taken under humane and medically accepted circumstances.

South Dakota v. Neville

If a DUI suspect refuses to submit to breath or blood alcohol testing, is it a violation of the 5th Amendment privilege against self-incrimination to use that refusal as evidence against him in trial? After the South Dakota Supreme Court held that it was a violation and thus inadmissible, the U.S. Supreme Court reversed, saying that a refusal was a matter of free choice, not compulsive. Note: The South Dakota Supreme Court later held that if not a violation of the U.S.

Constitution, then evidence of refusals was a violation of the South Dakota Constitution — and again reversed the conviction.