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Automobiles - Refusals of Test, Admissibility: North Dakota's Privilege against Self-Incrimination as Applied to a Refusal to Submit to a Blood Alcohol Test

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AUTOMOBILES—REFUSALS OF TEST, ADMISSIBILITY: NORTH DAKOTA'S PRIVILEGE AGAINST SELF-INCRIMINATION AS APPLIED TO A REFUSAL TO SUBMIT TO A BLOOD ALCOHOL TEST

State v. Beaton, 516 N.W.2d 645 (N.D. 1994)

I. FACTS

On April 20, 1993, after receiving a call reporting a driver slumped behind the wheel of a vehicle, the North Dakota Highway Patrol dispatched Trooper Ronald Duane Stanley to Cass County Road 26, north of Gardner, North Dakota.[1] When Trooper Stanley arrived, he found a vehicle parked two–thirds of the way onto the road just before a bridge.[2] On the ground outside the driver's door, Trooper Stanley observed a beer can.[3] Trooper Stanley then proceeded towards the car where he found Daniel Beaton sleeping behind the steering wheel.[4] At this time, Trooper Stanley removed the keys from the ignition, picked up the beer can and placed both in his patrol car.[5] Upon awakening Beaton, Trooper Stanley surmised that Beaton had probably been drinking.[6] Trooper Stanley then requested Beaton to perform field sobriety tests, which

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1. State v. Beaton, 516 N.W.2d 645, 646 (N.D. 1994); Brief of Appellee at 2, State v. Beaton, 516 N.W.2d 645 (N.D. 1994) (No. 93-0322) [hereinafter Appellee's Brief].

2. Appellee's Brief at 2, *Beaton* (No. 93-0322). This bridge is on the border between North Dakota and Minnesota. Brief for Appellant at 1, State v. Beaton, 516 N.W.2d 645 (N.D. 1994) (No. 93-0322) hereinafter Appellant's Brief].

3. Appellant's Brief at 1, *Beaton* (No. 93-0322). Trooper Stanley subsequently pulled behind the suspect's vehicle and activated his take down lights. Transcript of Suppression Motion Proceedings at 5, State v. Beaton, 516 N.W.2d 645 (N.D. 1994) (No. 93-0322). Take down lights are the lights on top of a police car which shine white illuminating light to the front and yellow flashing strobes to the back. *Id.* In this case, Trooper Stanley testified that these lights are not the ones used in signaling a person to stop. *Id.*

4. *Beaton*, 516 N.W.2d at 646.

5. *Id.* The engine was not running in Beaton's car and the vehicle's lights were not on. Transcript of Suppression Motion Proceedings at 6, State v. Beaton, 516 N.W. 2d 645 (N.D. 1994) (No. 93-0322). Several factors provide an officer with reasonable grounds to believe that an individual is in actual physical control of an automobile while under the influence of intoxicating liquor. Hughes v. State, 535 P.2d 1023, 1024 (Okla. 1975) (concluding that actual physical control was present when the defendant was discovered slumped behind the wheel with the key in the ignition); State v. Schuler, 243 N.W.2d 367, 370 (N.D. 1976) (concluding that actual physical control existed when the defendant was behind the wheel, the keys were in the ignition, the ignition was turned to the "on" position, and the transmission was engaged); Cincinnati v. Kelley, 351 N.E.2d 85, 87-88 (Ohio 1976) (stating that actual physical control requires that the individual be in the driver's seat with possession of the ignition key, and in a condition which enables the individual to start the engine and move the vehicle); State v. Ghylin, 250 N.W.2d 252, 254-55 (N.D. 1977) (stating that the factors listed in *Schuler* may not be mechanically applied, rather the main consideration should be whether the conditions present demonstrate that the driver was in a position to regulate the movement of the vehicle); Buck v. North Dakota State Highway Comm'r, 425 N.W.2d 370, 371 (N.D. 1988) (determining that the location of the vehicle and keys plus the condition of the driver are all factual considerations); Fargo v. Theusch, 462 N.W.2d 162, 163-64 (N.D. 1990) (concluding that actual physical control does not depend exclusively on the location of the ignition key).

6. Transcript of Suppression Motion Proceedings at 7-8, *Beaton* (No. 93-0322). Trooper Stanley observed Beaton's red, watery, bloodshot eyes in addition to smelling alcohol on Beaton's breath. *Id.*

Beaton failed.[7] Consequently, Beaton was arrested for being in actual physical control of a motor vehicle while under the influence of intoxicating liquor.[8] After Beaton was arrested, handcuffed and placed in the back seat of the patrol car, Trooper Stanley read an implied consent advisory to Beaton and then inquired as to whether Beaton would take a blood alcohol test.[9] However, Trooper Stanley did not, and was not required, to advise Beaton that should Beaton refuse to take a blood alcohol test, such refusal could be used against him at trial.[10] In other words, Beaton failed to receive a Miranda warning prior to Trooper

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7. *Beaton*, 516 N.W.2d at 646. Beaton was asked to recite the alphabet and count backwards from sixty-five to fifty-five. Transcript of Jury Proceedings at 13, 21, State v. Beaton, 516 N.W.2d 645 (N.D. 1994) (No. 93-0322). He was also asked to perform a one leg stand test, a finger to nose test, plus a walk and turn test. *Id.* at 22-23, 25.

8. *Beaton*, 516 N.W.2d at 646. Section 39-08-01(1), of the North Dakota Century Code provides in part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway . . . in this state if any of the following apply:
>
> a. That person has an alcohol concentration of at least ten one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.
>
> b. That person is under the influence of intoxicating liquor. . . .

N.D. CENT. CODE § 39-08-01(1) (Supp. 1993). Under this statute, actual physical control has been defined as a driver having "real (not hypothetical), bodily restraining or directing influence over or domination and regulation" of a vehicle. State v. Ghylin, 250 N.W.2d 252, 254 (N.D. 1977) (quoting Commonwealth v. Kloch, 327 A.2d 375, 383 (Pa. Super. Ct. 1974)).

9. *Beaton*, 516 N.W.2d at 646. Transcript of Suppression Motion Proceedings at 17, *Beaton* (No. 93-0322). North Dakota's implied consent advisory states that:

> Any person who operates a motor vehicle on a highway . . . in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, saliva, or urine for the purpose of determining the alcoholic content . . . of the blood. . . . The law enforcement officer shall also inform the person charged that refusal of the person to submit to the test determined appropriate will result in a revocation for up to three years of the person's driving privileges. The law enforcement officer shall determine which of the tests is to be used.

N.D. CENT. CODE § 39-20-01 (Supp. 1993). Apparently Beaton was asked if he would submit to the test at least three times. Transcript of Jury Trial Proceedings at 29, *Beaton* (No. 93-0322).

10. *Beaton*, 516 N.W.2d at 646. Section 39-20-08 of the North Dakota Century Code provides that a refusal to submit to a blood alcohol test may be admitted as evidence in a civil or criminal proceeding arising out of acts committed while the person was driving or in actual physical control of a vehicle and under the influence of alcohol. N.D. CENT. CODE § 39-20-08 (1987). This statute was amended in 1983 to provide for the admissibility of refusals regardless of whether the defendant testifies at trial. 1983 N. D. Laws 415, § 30. By enacting this statute, the legislature intended that any refusal to submit to blood alcohol testing be admitted in cases involving actual physical control or driving under the influence. West Fargo v. Maring, 458 N.W.2d 318, 320 (N.D. 1990). However, title 39-20 of the North Dakota Century Code does not require a police officer to warn the arrestee that a refusal to submit to a blood alcohol test can be admitted at trial against the defendant. N.D. CENT. CODE §§ 39-20-01 to -14 (1991).

Stanley's request to take a blood alcohol test.[11] Ultimately, Beaton did refuse to take a blood alcohol test.[12]

At the suppression hearing, Beaton moved to suppress his statements of refusal and to dismiss the case, arguing that a refusal to submit to a blood alcohol test must be preceded by procedural safeguards in the form of Miranda warnings.[13] Beaton argued that such warnings were required to protect his state constitutional right against self-incrimination.[14] The motion to suppress was denied[15] and a jury subsequently convicted Beaton.[16] Beaton appealed his conviction, contending that by admitting his words of refusal as evidence, the state violated his privilege against self-incrimination as set forth in the North Dakota Constitution.[17] The North Dakota Supreme Court *held* that the fact of refusal is admissible in evidence; however the specific statements of refusal constitute testimonial evidence and are therefore inadmissible when a *Miranda* warning is not given.[18]

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11. *Beaton*, 516 N.W.2d at 646. *Miranda* warnings are procedural safeguards that consist of a two-part warning. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The first part of the warning is that an accused has the right to remain silent and any statement made may be used as evidence against the accused. *Id.* The second part states that an arrested individual has the right to the presence of an attorney, either retained or appointed. *Id.* State v. Fasching, 453 N.W.2d 761, 762 (N.D. 1990) (applying *Miranda* to a case involving statements made in a driving while under the influence case).

12. *Beaton*, 516 N.W.2d at 646. Upon being asked to take a blood alcohol test, Beaton refused simply by saying "no." *Id.* at 647. Trooper Stanley then replied that it would be recorded as a refusal. *Id.* Beaton then responded by saying "well you've been very fair. I do not want to take the test." *Id.* at 647-48.

13. *See Beaton*, 516 N.W.2d at 646 & n.3 (citing State v. Fasching, 453 N.W.2d 761 (N.D. 1990)).

14. *Id.* at 648.

15. *Id.* at 648-49. The existence of a communication that is testimonial in nature is protected by the federal and state privilege against self-incrimination. State v. Metzner, 244 N.W.2d 215, 224-25 (N.D. 1976). However, the trial court judge determined that a refusal to submit to a chemical test fails to constitute communicative or testimonial evidence. *See Beaton*, 516 N.W.2d at 646, 647. Therefore, evidence of a refusal obtained without *Miranda* warnings is admissible under either the federal or state constitution. *Id.*

16. Transcript of Jury Trial Proceedings at 117, *Beaton* (No. 93-0322).

17. *Beaton*, 516 N.W.2d at 646-47. The Constitution of North Dakota provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." N.D. CONST. art. I, § 12. Beaton supports this ground for appeal by arguing that the final draft of the state constitution affords greater protection to citizens than that of the federal constitution. Appellant's Reply Brief at 1, State v. Beaton, 516 N.W.2d 645 (N.D. 1994) (No. 93- 0322) (relying on Lynn Boughey, *An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation*, 63 N.D. L. REV. 157, 256 (1987) (stating that the language of the state constitution is more expansive than its federal counterpart)).

18. *Beaton*, 516 N.W.2d at 649. The court later clarified that the fact of refusal may be admitted at trial and considered as a factor in establishing guilt. State v. Murphy, 516 N.W.2d 285, 287 (N.D. 1994).

II. LEGAL HISTORY

The Fifth Amendment to the United States Constitution guarantees all individuals a privilege against self–incrimination.[19] Likewise, North Dakota also provides constitutional protection from self-incrimination.[20] Even though the federal and state privileges co-exist, the state privilege may be construed differently to provide enhanced protection of individual rights.[21] In construing the extent of a state constitutional privilege, the state often looks to the federal interpretation of the United States Constitution for guidance.[22] With regard to the privilege against self-incrimination, the United States Supreme Court and the North Dakota Supreme Court have both determined that the privilege protects an individual from being compelled to disclose testimonial statements.[23] In other words, two components must be met for this privilege to be applicable.[24] The first component focuses on whether the statements made by the suspect were *compelled*.[25] The second component concentrates on whether the statement was *testimonial* in nature.[26] If both of these requirements are met, then a defendant's statement will be inadmissible at trial unless *Miranda* warnings preceded the statement at issue.[27]

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19. U.S. CONST. amend. V. The Fifth Amendment provides that "no person . . . shall be compelled, in a criminal case, to be a witness against himself." *Id.*

20. N.D. CONST. art. I, § 12. *See supra* note 17 for relevant text of N.D. CONST. art. I, § 12.

21. Bismarck v. Altevogt, 353 N.W.2d 760, 766 (N.D. 1984) (concluding that the state constitution may provide greater protection to its citizens than the safeguards created by the federal constitution); Boughey, *supra* note 17, at 270-71.

22. *See, e.g.*, State v. Allesi, 216 N.W.2d 805, 817-18 (N.D. 1974) (determining that the state constitutional provision involving double jeopardy should be interpreted consistently with the federal clause); State v. Kunkel, 455 N.W.2d 208, 209 n.2 (N.D. 1990) (declining to adopt a more expansive view of the state constitutional protection against unreasonable search and seizures because defendant provided no arguments as to why the state protection should be more expansive than the federal protection); State v. Hensel, 417 N.W.2d 849, 853 n.2 (N.D. 1988) (declining to adopt a more expansive view of the state constitutional provision regarding search); State v. Orr, 375 N.W.2d 171, 178 (N.D. 1985) (utilizing federal case law to determine the judicial interpretation of N.D. CONST. art. I, § 12).

23. *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (stating that communication is testimonial when it discloses information or related to a factual assertion); State v. Newnam, 409 N.W.2d 79, 82 (N.D. 1987) (stating that the text of both the federal and state privilege against self-incrimination is worded similarly); State v. Fields, 294 N.W.2d 404, 410 (N.D. 1980) (determining that North Dakota's privilege against self-incrimination constitutes the equivalent of the federal privilege); State v. Iverson, 187 N.W.2d 1, 14 (N.D. 1971) (stating that the state privilege is the counterpart of the federal privilege against self-incrimination); State v. Miller 146 N.W.2d 159, 165 (N.D. 1966) (concluding that the state privilege is similar to the federal privilege).

24. *See, e.g.*, *Muniz*, 496 U.S. at 590; Fischer v. United States, 96 S. Ct. 1569, 1579 (1976); McNamara v. Director of North Dakota Dep't of Transp., 500 N.W.2d 585, 592 (N.D. 1993); State v. Fasching, 453 N.W.2d 761, 764 (N.D. 1990).

25. *Muniz*, 496 U.S. at 590; *Miller*, 146 N.W.2d at 165–66.

26. *Muniz*, 496 U.S. at 590; Wahpeton v. Skoog, 300 N.W.2d at 243, 244 (N.D. 1980); State v. Metzner, 244 N.W.2d 215, 225 (N.D. 1976).

27. *Muniz*, 496 U.S. at 590.

A. COMPELLED STATEMENTS

In *Miranda v. Arizona*,[28] the United States Supreme Court determined that custodial interrogation contains inherently compelling pressures which undermine the suspect's ability to speak freely.[29] The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way."[30] However, since the invocation of this definition, courts have succinctly defined the separate elements of custodial interrogation.

1. *Custody*

As stated in *Miranda*, warnings intended to protect a suspect's Fifth Amendment right are only required when *custody* and *interrogation* exist.[31] Originally, the Supreme Court explained that custody exists when there has been a significant restraint on a person's freedom of movement.[32] However, this standard's applicability is impaired because it is difficult to identify when a substantial restraint on an individual's freedom of movement actually occurs.[33] Therefore, the Court clarified the standard by stating that "the ultimate inquiry in determining the existence of custody is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest."[34]

In 1984, the Court was faced with applying the standard for determining when custody occurs to non-arrest vehicular detention.[35] The

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28. 384 U.S. 436 (1966).

29. Miranda v. Arizona, 384 U.S. 436, 467 (1966). The Court reasoned that custodial interrogation creates a police dominated atmosphere whereby suspects may be compelled to make incriminating statements. *Id.* at 458. Therefore, suspects should be warned that they have the right to remain silent and the right to an attorney before any police questioning begins. *Id.* at 478-79. The Court concluded that such warnings would dispel any compulsion inherent in the custodial interrogation process and thereby protect the suspect's Fifth Amendment right. *Id.* North Dakota has incorporated this analysis of the Fifth Amendment compulsion aspect into its application of the state constitutional privilege against self-incrimination. State v. Newnam, 409 N.W.2d 79, 82 (N. D. 1987); State v. Iverson, 187 N.W.2d 1, 13 (N.D. 1971) (discussing N.D. CONST. art. I, § 13 which is now N.D. CONST. art. I, § 12).

30. *Miranda*, 384 U.S. at 444 (footnote omitted).

31. *Id.* General on-the-scene investigatory questioning regarding facts surrounding a crime or other general questioning of citizens does not constitute custodial interrogation. *Id.* at 477-78.

32. Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam).

33. *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (stating that a totality of the circumstances test should influence the determination of whether the defendant is in custody).

34. *Id.* (quoting *Mathiason*, 429 U.S. at 495). The standard as set out in *Beheler* will be referred to in the remainder of this article as the *Mathiason-Beheler* standard. *See also* Minnesota v. Murphy, 465 U.S. 420, 430 (1984) (determining that the *Mathiason-Beheler* standard for determining custody is to be narrowly construed).

35. Berkemer v. McCarty, 468 U.S. 420 (1984).

Court stated that even though custody did not exist, restraint on the freedom of movement to a degree associated with a formal arrest may be present if a reasonable person in the suspect's position would have believed that she is no longer free to leave.[36] Therefore, formal custody or a suspect's reasonable belief of custody constitutes the first component of custodial interrogation as defined by the United States Supreme Court.

In *State v. Fields*,[37] the North Dakota Supreme Court determined when law enforcement must issue *Miranda* warnings to ensure the protection of the state privilege against self-incrimination.[38] The North Dakota Supreme Court determined that *Miranda* warnings were required once a suspect was in custody and interrogated.[39] The court defined custody as an atmosphere or physical surroundings which manifest restraint or compulsion.[40] In 1987, the North Dakota Supreme Court solidified this definition by relying on the standard utilized by the United States Supreme Court.[41] Therefore, at the state level, custody exists when there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.[42] Additionally, the court has implemented the objective test for determining when a restraint on the freedom of movement to a degree associated with arrest occurs in non-arrest vehicular detention.[43] Ultimately, custody as interpreted under the state constitution, reflects the interpretation posed by the United States Supreme Court.

2. *Interrogation*

In defining the requirement of interrogation, the United States Supreme Court determined that interrogation occurs when express questioning or the functional equivalent of questioning is initiated by law enforcement officers.[44] In applying this definition, the Court stated that the functional equivalent of questioning occurs when the police, in talking with the suspect, use words or actions which the police should

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36. *Id.* at 442.

37. 294 N.W.2d 404 (N.D. 1980).

38. State v. Fields, 294 N.W.2d 404, 408 (N.D. 1980).

39. *Id.* at 407; State v. Connery, 441 N.W.2d 651, 653-54 (N.D. 1989); State v. Pitman, 427 N.W.2d 337, 340-41 (N.D. 1988); State v. Berger, 329 N.W.2d 374, 376 (N.D. 1983).

40. *Fields*, 294 N.W.2d at 408.

41. *Newnam*, 409 N.W.2d at 83 (relying on the *Beheler-Mathiason* standard of custody identified in text accompanying footnote 34 *supra*).

42. *Id. See supra* note 34 and accompanying text (containing the *Beheler-Mathiason* standard).

43. *Connery*, 441 N.W.2d at 654; *Pitman*, 427 N.W.2d at 341. *Supra* note 36 and accompanying text (identifying the objective test as whether a reasonable person in the suspect's position would believe that she is no longer free to leave).

44. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

know are reasonably likely to elicit an incriminating response.[45] Within the parameters of this definition, the Court carved out a narrow exception to the classification of express questioning as interrogation.[46] This exception is triggered when the questions asked by law enforcement officers are normally attendant to arrest and custody.[47] In creating this exception, the Court reasoned that questions normally attendant to arrest and custody do not elicit information for investigatory purposes and therefore do not constitute the type of interrogation against which *Miranda* was designed to guard.[48] Outside of this exception, *Miranda* warnings must precede any questioning or its functional equivalent initiated by law enforcement officers to ensure the protection of a suspect's Fifth Amendment privilege against self-incrimination.

Correspondingly, North Dakota has adopted all aspects of the federal interpretation of interrogation in construing the scope of the state constitutional protection against self-incrimination.[49] Therefore, to satisfy North Dakota constitutional guarantees, *Miranda* warnings must precede any questioning, or its functional equivalent, initiated by law enforcement officers. These warnings are intended to ensure the protection of a suspect's state constitutional privilege against self-incrimination.

Ultimately, to ensure the integrity of an individual's federal and state constitutional privileges against self-incrimination, procedural safeguards, in the form of *Miranda* warnings, must be given prior to any custodial interrogation.[50] However, if these warnings are not given, a violation of a suspect's federal or state privilege against self-incrimination will only occur if the statements elicited were testimonial in nature.[51]

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45. *Innis*, 446 U.S. at 301.

46. *Id.*

47. Pennsylvania v. Muniz, 496 U.S. 582, 600 (1990) (relying on United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989), to determine that questions such as name, address, height, weight, eye color, date of birth, and current age constitute questions routine to the booking process). *Innis*, 446 U.S. at 301 (concluding that interrogation fails to exist when the police words or actions are normally attendant to arrest and custody).

48. South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983).

49. State v. Larson, 343 N.W.2d 361, 366 (N.D. 1984); *see* State v. Newnam, 409 N.W.2d 79, 83 n.2 (N.D. 1987) (stating that the court was not required to examine the police officer's conduct to determine whether interrogation as defined by *Innis* existed); State v. Metzner, 244 N.W.2d 215, 223 (N.D. 1976) (determining that the police officer's questions were not coercive and were therefore part of a routine investigation).

50. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

51. *Muniz*, 496 U.S. at 590; *Metzner*, 244 N.W.2d at 225.

B. TESTIMONIAL STATEMENTS

The United States Supreme Court has determined that the Fifth Amendment prohibits the use of physical or moral compulsion to extract a communication from the suspect.[52] However, the scope of the word "communication" does not extend to the exclusion of a suspect's physical aspects when the physical aspects are material to the case.[53] Thus, the Court created a distinction between testimonial evidence, which is protected by the privilege against self-incrimination, and real evidence,[54] which is not protected.[55] The Court defined testimonial evidence as a communication by the accused which implicitly or explicitly relates to a factual assertion or discloses information.[56] The Court has further determined that whenever a suspect is asked for a response requiring her to communicate an express or implied factual assertion or belief, the suspect confronts the cruel trilemma of silence, lying, or telling the truth; hence the response contains a testimonial component.[57] Such a response contains a testimonial component because the content of the suspect's answer allows a juror to infer a manifestation of innocence or a manifestation of guilt.[58] If the suspect answers in a manner that the juror might reasonably expect of an innocent person, then this would be construed as a manifestation of innocence.[59] If, on the other hand, the response was not what a juror would reasonably believe an innocent individual to make, then the suspect has inadvertently manifested a consciousness of guilt.[60] Therefore, whenever the suspect is asked to respond to a question which forces him/her to choose between lying,

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52. Holt v. United States, 218 U.S. 245, 252-53 (1910).

53. *Id.* The Court concluded that a suspect's privilege against self-incrimination is not threatened when physical aspects are sought to be introduced because the suspect does not disclose any knowledge or speak his guilt. United States v. Wade, 388 U.S. 218, 222-23 (1967). Additionally, it is the "extortion of information from the accused," the attempt to force him "to disclose the contents of his own mind" that implicates the privilege against self-incrimination. Doe v. United States, 487 U.S. 201, 211 (1987) (quoting Couch v. United States, 409 U.S. 322, 328 (1973) and Curcio v. United States, 354 U.S. 118, 128 (1957)).

54. *See* Black's Law Dictionary 1264 (6th ed. 1990). Real evidence is furnished by tangible things that may be viewed or inspected rather than described by a witness. *Id.* Other examples of physical evidence include participation in a "live" lineup, as well as providing handwriting or voice exemplars. *Wade*, 388 U.S. at 222 (determining that an individual could participate in a lineup because evidence of this sort was physical in nature); Gilbert v. California, 388 U.S. 263, 266-67 (1967) (determining that a handwriting exemplar is a physical characteristic outside the protection of the Fifth Amendment); United States v. Dionisio, 410 U.S. 1, 7 (1973) (determining that a voice exemplar is a physical characteristic outside the protection of the Fifth Amendment).

55. Schmerber v. California, 384 U.S. 757, 764 (1966).

56. Doe v. United States, 487 U.S. 201, 210 (1988).

57. Pennsylvania v. Muniz, 496 U.S. 582, 597 (1990).

58. State v. Beaton, 516 N.W.2d 645, 649 (N.D. 1994); *Muniz*, 496 U.S. at 598-99.

59. *Id.*

60. *Id.*

telling the truth, or remaining silent, the response is testimonial in nature.[61] Such responses are protected by the Fifth Amendment.[62]

By relying on the interpretations posed by the United States Supreme Court, North Dakota has signalled its adoption of the federal interpretation of testimonial statements to the trial courts of the state.[63]

C. APPLICATION OF THE PRINCIPLES SURROUNDING SELF-INCRIMINATION TO REFUSALS TO SUBMIT TO CHEMICAL TESTS

The United States Supreme Court, in *Schmerber v. California*[64] first applied the concepts of custodial interrogation and testimonial evidence to a case involving evidence obtained as a result of a blood alcohol test.[65] Specifically, the Court focused on whether the test results constituted testimonial evidence.[66] The Court concluded that the results of a blood alcohol test are not testimonial in nature and that the suspect's privilege against self-incrimination had not been violated.[67] The Court reasoned that the results of the blood alcohol test were not a product of petitioner's testimonial capacities; in fact the only participation petitioner had was that of a donor.[68] Therefore, the evidence was found to have been obtained by the government's independent labors through drawing the blood and testing it rather than compelling the testimony from the suspect's own mouth.[69] Additionally, the Court stated that general Fifth Amendment principles would be applicable to cases involving the admissibility of refusals to submit to chemical testing.[70]

Subsequently, the Court had occasion to apply Fifth Amendment principles to a case involving the admissibility of a refusal to submit to a

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61. *Muniz*, 496 U.S. at 597.

62. *Id.* at 599-600.

63. State v. Miller, 146 N.W.2d 159, 165-66 (N.D. 1966); State v. Gibson, 284 N.W. 218, 219 (N.D. 1938) (determining that testimonial statements given voluntarily are not violative of the state privilege against self-incrimination).

64. 384 U.S. 757 (1966).

65. Schmerber v. California, 384 U.S. 757, 758-59 (1966). In *Schmerber*, the defendant was involved in a car accident and taken to the hospital. *Id.* at 758. The police suspected alcohol to be involved and thus directed the nurse at the hospital to withdraw a blood sample from the unwilling suspect. *Id.* The results stemming from an analysis of the blood were admitted at trial. *Id.* at 759. The defense objected to the admission of the results on many constitutional grounds, one of which was the Fifth Amendment. *Id.*

66. *Id.* at 761. The Court did not address the custodial interrogation issue. *Id.* However, the Court did find that compulsion to submit to the withdrawal of blood was present. *Id.*

67. *Id.*

68. *Id.* at 765. Instead, the blood test results constituted real or physical evidence which is not protected by the Fifth Amendment. *Id.* *See supra* notes 53-54 and accompanying text (defining the difference between physical and testimonial evidence).

69. *Schmerber*, 384 U.S. at 762 (citing Miranda v. Arizona, 384 U.S. 436, 460 (1966)).

70. *Id.* at 765.

blood alcohol test.[71] In *South Dakota v. Neville*,[72] the Court determined that a refusal to submit to a blood alcohol test could constitutionally be admitted at trial as evidence.[73] The Court declined to identify whether a defendant's refusal constituted testimonial evidence.[74] Instead, the Court focused on the custodial interrogation issue and determined that a request to take a blood alcohol test fails to rise to the type of custodial interrogation *Miranda* was designed to protect.[75] In making this determination, the Court relied on the narrow exception to the definition of interrogation by concluding that a request to submit to a blood alcohol test constitutes police words or actions that are "normally attendant to arrest and custody."[76] Additionally, the Court found that blood alcohol tests are so safe, painless, and commonplace, that they would not induce a person to confess, unlike the procedures delineated in *Miranda*.[77] Therefore, the suspect's Fifth Amendment privilege against self-incrimination was not violated by admitting such refusals into evidence because the request to take the test failed to constitute interrogation which would compel a suspect to incriminate herself.[78] Additionally, the procedures utilized to effectuate the blood test were not so onerous that they would induce a suspect to incriminate herself or induce a suspect to confess rather than submit to the testing procedure.[79]

In *Pennsylvania v. Muniz*,[80] the Court applied the preceding rationale to another case involving a refusal to submit to a blood alcohol

71. South Dakota v. Neville, 459 U.S. 553, 560 (1983).

72. 459 U.S. 553 (1983).

73. Neville v. South Dakota, 459 U.S. 553, 564 (1983). In *Neville*, the police pulled over a defendant who failed to stop at a stop sign. *Id.* at 554. Pursuant to the stop, the police officer asked defendant to step out of the car. *Id.* Upon exiting the vehicle, the defendant staggered and fell against the car to support himself. *Id.* The police officer detected alcohol on defendant's breath. *Id.* Defendant then performed field sobriety tests, which he failed. *Id.* at 555. Defendant was then arrested, Mirandized, and read an implied consent advisory which included a request to submit to a blood alcohol test. *Id.* Defendant refused to submit to a blood alcohol test. *Id.* This refusal was then admitted at trial. *Id.* at 556. Defendant objected to the admission of the refusal on the grounds that such an admission would violate the defendant's privilege against self-incrimination. *Id.*

74. *Id.* at 561-62. The distinction between physical and testimonial evidence is difficult in refusal cases since the form of a refusal can be testimonial (speaking), physical (nodding), or a combination of testimonial and physical. *Id.* at 562.

75. *Id.* at 564 n.15.

76. *Id.* (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). *See supra* notes 46-48 and accompanying text (defining the exception to custodial interrogation). The police inquiry surrounding the request to take a blood alcohol test is governed extensively by state law and is presented to all suspects in essentially the same manner. *Neville*, 459 U.S. at 564 n.15.

77. *Neville*, 459 U.S. at 563; *see* Schmerber v. California, 384 U.S. 757, 765 n.9 (1966). The police action in *Miranda* focused on physically or psychologically forcing a suspect to confess. *See Miranda v. Arizona*, 384 U.S. , 436, 447-48 (1966). Examples of such police action include deceptive stratagems, relentless questioning in isolated, hostile environments, mutt and jeff routines otherwise referred to as good cop/bad cop, and humiliation. *Id.* at 453, 455.

78. *Neville*, 459 U.S. at 563.

79. *Id.*

80. 496 U.S. 582 (1990).

test.[81] However, *Muniz* entailed the obtaining of a refusal as well as other statements made prior to a *Miranda* warning.[82] The Court determined that even though a *Miranda* warning was not given, the refusal was still admissible as evidence.[83] However, as in *Neville*, the Court failed to establish whether a refusal constitutes testimonial evidence.[84] Instead, the Court focused on the custodial interrogation issue.[85] The Court relied on the narrow exception to the definition of interrogation in determining that a request to submit to a blood alcohol test constituted a limited and focused inquiry necessarily attendant to legitimate police procedure.[86] The Court reasoned that such an inquiry is not likely to be interpreted as a request for incriminating evidence.[87] Accordingly, the Court concluded that the refusal was not prompted by an interrogation within the meaning of *Miranda* and therefore, the absence of *Miranda* warnings did not require suppression.[88]

Although the federal privilege against self-incrimination does not protect a suspect's statement with regard to a refusal to submit to a blood alcohol test, a state may construe its privilege differently to provide more protection for such refusals.[89] However, in the area of refusals to submit to blood alcohol testing, a majority of states have interpreted their state constitutional privilege against self-incrimination synonymously with the

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81. Pennsylvania v. Muniz, 496 U.S. 582 (1990).

82. *Id.* In *Muniz*, a police officer spotted defendant's car parked on the shoulder of the highway. *Id.* at 585. Upon stopping to inquire if the defendant was in need of assistance, the police officer observed that defendant had red, watery, eyes and smelled of alcohol. *Id.* Defendant was then asked to perform field sobriety tests which he failed. *Id.* Muniz was then arrested and taken to the police station where he was videotaped answering questions and performing field sobriety tests. *Id.* The questions directed toward Muniz during the videotape session ranged from his name to the date of his sixth birthday. *Id.* at 586. *See also supra* note 47. Additionally, Muniz was requested to take a blood alcohol test. *Muniz*, 496 U.S. at 586. Muniz refused to take the test. *Id.* The tape, as well as Muniz's answers to the questions, were admitted at trial. *Id.* at 587. Defendant challenged the admissibility of this evidence on Fifth Amendment grounds. *Id.* The Court determined that all of the questions with the exception of the sixth birthday question constituted routine booking questions. *Id.* at 601. The sixth birthday question was classified as testimonial because the suspect was confronted with the cruel trilemma of speaking the truth, saying nothing, or lying. *Id.* at 598-99. Whenever a suspect is confronted with this trilemma in answering a question he is required to communicate an express or implied assertion of fact or belief. *Id.* at 597. Testimonial evidence has been defined as a communication by the accused which expressly or implicitly relates an assertion of fact or belief. *Id.* at 594.

83. *Muniz*, 496 U.S. at 605.

84. *Id.* at 604–05.

85. *Id.* at 604.

86. *Id.* at 605. The Court stated that the police officer had carefully limited her role to providing Muniz with relevant information about the breathalyzer test. *Id.* at 605. The only questions asked of Muniz concerning the breathalyzer were whether he would submit and whether he understood the penalty for refusing. *Id.*

87. *Id.* at 605.

88. *Muniz*, 496 U.S. at 605.

89. *See supra* note 21 and accompanying text (stating that states have the freedom to construe state constitutional provisions independently from the interpretation attached to the federal privilege).

federal position.[90] On the other hand, a minority of states have resolved that a refusal to submit to a blood alcohol test fails to fall under the protective umbrella afforded by the state privilege against self-incrimination.[91]

Previously, the North Dakota Supreme Court has not had an opportunity to interpret the state privilege against self-incrimination as applied in the arena of refusals to submit to blood alcohol testing.[92] As stated however, the North Dakota Supreme Court has otherwise interpreted the general components of the state privilege against self-incrimination by relying on the decisions proferred by the United States Supreme Court.[93] Therefore, these interpretations would likely be applicable in a state-based self-incrimination case regarding a refusal to submit to a blood alcohol test.

III. ANALYSIS

In *State v. Beaton*,[94] the North Dakota Supreme Court addressed the application of North Dakota's state constitutional privilege against self-incrimination to refusals made pursuant to a request for a blood alcohol test.[95] Previously, the court had relied on section 39-20-08[96] of

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90. *E.g.*, Cox v. People, 735 P.2d 153, 157 (Colo. 1987) (concluding that Colorado's privilege against self-incrimination is no broader than the federal constitution and that *Neville* controls); State v. Durrant, 188 A.2d 526, 528 (Del. 1963) (determining that a refusal is not obtained from a compulsory oral examination and therefore, admission of the refusal would not violate the state constitution); State v. Sowers, 442 So.2d 239, 240 (Fla. Dist. Ct. App. 1983) (relying on *Neville* in stating that a refusal is not the product of compulsion and does not violate Florida's constitution); Commonwealth v. Hager, 702 S.W.2d 431, 432 (Ky. 1986) (relying on *Neville* in stating that a refusal to submit to a blood alcohol test is admissible under the state constitution); State v. Jackson, 672 P.2d 255, 258 (Mont. 1983) (determining that a state constitution is no broader than the federal constitution regarding self-incrimination whereby *Neville* controls); State v. Cormier, 499 A.2d 986, 988 (N.H. 1985) (concluding that a state's privilege against self-incrimination is comparable in scope to the Fifth Amendment); New York v. Thomas, 412 N.Y.S.2d 845, 849 (N.Y. 1978) (stating that even though a refusal is testimonial it is not compelled and may be admitted without violating the state constitution); Dennis v. State, 725 S.W.2d 812, 816 (Tex. Ct. App. 1987) (concluding that the Texas constitutional provisions as to self-incrimination are no broader than the federal ones, therefore *Neville* applies); State v. Albright, 298 N.W.2d 196, 200 (Wis. Ct. App. 1980) (determining that evidence obtained by a breathalyzer test is not testimonial and not protected by the state privilege against self-incrimination).

91. *E.g.*, State v. Adams, 247 S.E.2d 475, 478 (W. Va 1978) (concluding that a defendant's refusal to submit to a blood alcohol test may not constitutionally be admitted); In Re Baggett, 531 P.2d 1011, 1020-21 (Okla. 1974) (stating that the Oklahoma self-incrimination privilege is broader than the federal privilege therefore a refusal is inadmissible); State v. Andrews, 212 N.W.2d 863, 864 (Minn. 1973) (determining that a refusal to submit to a blood test is both compelled and testimonial therefore it is inadmissible at trial).

92. Transcript of Suppression Proceedings at 24, State v. Beaton, 516 N.W. 2d 645 (N.D. 1994) (No. 93-0322).

93. *See supra* notes 49, 63 and accompanying text (stating that North Dakota has adopted the federal interpretations of custodial interrogation and testimonial evidence).

94. 516 N.W.2d 645.

95. State v. Beaton, 516 N.W.2d 645 (N.D. 1994).

96. N.D. CENT. CODE § 39-20-08 (1987) (amending N.D. CENT. CODE § 39-20-08 (1983)). Section 39-20-08 provides that:

the North Dakota Century Code in admitting evidence of such refusals.[97] Under this statute, a refusal to submit to a blood alcohol test was admissible in any civil or criminal proceeding.[98] However, Beaton challenged the constitutionality of this statute by relying on the state privilege against self-incrimination.[99] The court concluded that the fact of refusal is admissible but any specific statements made by the defendant in refusing to take a blood alcohol test were testimonial and thus inadmissible.[100] In reaching this decision, the North Dakota Supreme Court examined the separate components of the state privilege against self-incrimination.[101]

A. CUSTODY

As previously stated, the North Dakota Supreme Court has incorporated the federal interpretation of "custody" into the state privilege against self-incrimination.[102] This interpretation focuses on whether a formal arrest or restraint on the freedom of movement of the degree associated with a formal arrest has occurred.[103] However, in *Beaton*, the court did not identify whether this was the interpretation being applied.[104] Rather, the court simply stated that Beaton was clearly in custody when Trooper Stanley requested the blood test because Beaton was arrested, handcuffed, and seated in the back seat of the patrol car when the request was made.[105] Therefore, although the court did not

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> If the person under arrest refuses to submit to the test or tests, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle upon the public highways while under the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof.

ID. *See also supra* note 10.

97. State v. Murphy, 516 N.W.2d 285, 286 (N.D. 1994) (concluding that proof of refusal is admissible as evidence under section 39-20-08 of the North Dakota Century Code); City of West Fargo v. Maring, 458 N.W.2d 318, 319 (N.D. 1990) (stating that section 39-20-08 of the North Dakota Century Code explicitly permits any refusals may be admitted as evidence); *see* State v. Severson, 75 N.W.2d 316, 317 (N.D. 1956) (relying on an earlier version of section 39-20-08 of the North Dakota Century Code by stating that a refusal may not be admitted as evidence unless the defendant testifies in court).

98. N.D. CENT. CODE § 39-20-08 (1983), *amended by* N.D. CENT. CODE § 39-20-08 (1987). *See supra* note 96.

99. *Beaton*, 516 N.W.2d at 646-47.

100. *Id.* at 649.

101. *Id.* at 648-49.

102. *See supra* notes 40-42 and accompanying text.

103. *See supra* notes 32-34 and accompanying text (identifying the standard to be used in determining custody).

104. State v. Beaton, 516 N.W.2d 645, 649 (N.D. 1994).

105. *Id.*

identify its interpretation of custody, it did remain consistent with the standard applied in the past by determining that a formal arrest constitutes custody.[106]

B. INTERROGATION

As previously stated, the North Dakota Supreme Court has incorporated the federal interpretation of interrogation into the state privilege against self-incrimination.[107] This interpretation focuses on the existence of express questioning or its functional equivalent as identified by *Innis*.[108] However, interrogation is deemed to be nonexistent when the questions asked by the police are normally attendant to arrest and custody.[109] Federal courts have determined that interrogation fails to exist and *Miranda* warnings are not required when a request is made to submit to a blood alcohol test.[110] In making this determination, the courts have concluded that such a request constitutes questioning normally attendant to arrest and custody.[111] This type of questioning places no coercion upon the suspect to incriminate herself.[112] However, in *Beaton*, the North Dakota Supreme Court concluded that coercion does exist when a police officer requests a blood alcohol test.[113] In reaching this conclusion, the court first examined the *Miranda* decision.[114] The court relied on this decision by quoting a passage of *Miranda*.[115] This quote states that the prosecution may not use statements made by the suspect during custodial interrogation when *Miranda* warnings failed to precede such interrogation.[116] The court further relied on *Miranda*'s definition of custodial interrogation.[117] However, the court made no mention of *Neville*'s determination that custodial interrogation fails to exist when the questions asked are ones normally attendant to arrest and custody.[118] In fact, the only reference to the *Neville* decision was made

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106. *Id.*

107. State v. Larson, 343 N.W.2d 361, 366 (N.D. 1984).

108. State v. Newnam, 409 N.W. 2d 79, 83 n.2 (N.D. 1987); Rhode Island v. Innis, 446 U.S. 291, 300-01 (1990).

109. Pennsylvania v. Muniz, 496 U.S. 582, 600 (1990).

110. *Muniz*, 496 U.S. at 601. North Dakota also appears to have adopted this exception to interrogation. *See* State v. Metzner, 244 N.W.2d 215, 223 (N.D. 1976) (determining that the police officer's questions were not coercive and therefore constituted part of a routine investigation).

111. *See, Muniz*, 496 U.S. at 600-01.

112. *See* South Dakota v. Nelville, 459 U.S. 553, 564 n.15 (1983).

113. State v. Beaton, 516 N.W.2d 645, 649 n.5 (N.D. 1994).

114. *Id.* at 648.

115. *Id.*

116. *Id.* at 649.

117. *Id.*

118. *Beaton*, 516 N.W.2d at 649. The Court in *Neville* concluded that a request to submit to a blood alcohol test is questioning normally attendant to arrest and therefore not interrogation for purposes of *Miranda*. South Dakota v. Nelville, 459 U.S. 553, 564 (1983).

in a footnote.[119] In this footnote, the court distinguished the *Neville* opinion from the current case.[120] The court based this distinction on the fact that *Miranda* warnings had been given to the defendant in *Neville* which dispelled the compulsion surrounding the request to take a blood alcohol test.[121] After quoting *Miranda* and distinguishing *Neville*, the court then concluded that coercion is present when a request to submit to a blood alcohol test is made while the suspect is in custody.[122] The court then determined that Beaton was clearly in custody because he was arrested and handcuffed.[123] Therefore, Trooper Stanley's request to submit to a blood alcohol test constituted custodial interrogation and Beaton was entitled to his *Miranda* warnings.[124] However, the court did not specifically address whether a request to submit to a blood alcohol test constitutes interrogation as contemplated by *Miranda*.[125] In fact, the court did not specifically state that interrogation was present.[126] The court simply inferred it by quoting *Miranda*, distinguishing the *Neville* case, and then stating that impermissible coercion was present.[127] The North Dakota Supreme Court's classification of such a request as interrogation is surprising since the United States Supreme Court has clearly stated that such a request is not interrogation.[128] Additionally, it seems unusual for the court to deviate from the federal interpretation since the court has relied on it in the past.[129] Ultimately, the reasoning behind the court's decision to classify a request to submit to a blood alcohol test as interrogation is unclear.

Since the court expressly determined that custody existed and impliedly determined that interrogation was present, it logically follows

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119. *Beaton*, 516 N.W.2d at 649 n.5.
120. *Id.*
121. *Id.*
122. *Id.* at 649.
123. *Id.*
124. *Beaton*, 516 N.W.2d at 649.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Compare Beaton*, 516 N.W.2d at 649 (determining that compulsion exists when an officer requests a blood alcohol test without the benefit of a *Miranda* warning) *with* Pennsylvania v. Muniz, 496 U.S. 582, 604 n.19 (1990) (determining that compulsion fails to exist when an officer requests a blood alcohol test without the benefit of a *Miranda* warning). However, in *Beaton* the court did not distinguish the *Muniz* case. *Beaton*, 516 N.W.2d at 649. The *Muniz* case contains a fact pattern that is identical with the events occurring in *Beaton*. *Compare Beaton*, 516 N.W.2d at 646 (stating that the defendant was requested to take a blood alcohol test before *Miranda* warnings were given) *with Muniz*, 496 U.S. at 582 (stating that the defendant was requested to take a blood alcohol test before *Miranda* warnings were given). Therefore, it seems strange that the court makes no mention of the refusal issue decided in *Muniz* when determining the *Beaton* case.
129. *See supra* note 23 and accompanying text (discussing the similarity between the federal and state privileges against self-incrimination).

that *Miranda* warnings were required.[130] In this case, the *Miranda* warnings were not given, therefore the admission of Beaton's refusal would be unconstitutional if the refusal constituted testimonial evidence.[131]

C. TESTIMONIAL STATEMENTS

As previously stated, the North Dakota Supreme Court has incorporated the federal interpretation of the privilege against self-incrimination into the state privilege.[132] In *Beaton*, the court began its analysis of this issue by examining the United States Supreme Court's decision in *Schmerber*.[133] The court relied on *Schmerber* to establish that the reach of the privilege against self-incrimination only extends to statements that are testimonial in nature.[134] The court then reviewed the United States Supreme Court's decision in *Muniz* to define testimonial evidence as a communication by the accused which explicitly or implicitly relates a factual assertion or discloses information.[135] The court also appears to incorporate the *Muniz* determination that a response to a question relates to a factual assertion or discloses information when the suspect is confronted with the trilemma of telling the truth, remaining silent, or lying.[136] By relying on this definition, the court in *Beaton* concluded that his statements of refusal were testimonial communications because they explicitly or implicitly related a factual assertion or disclosed information.[137] In reaching this conclusion, the court did not delineate how a statement of refusal explicitly or implicitly relates a factual assertion or discloses information.[138] The court simply reviewed the decisions in *Schmerber* and *Muniz* and then concluded that a refusal relates a factual assertion or discloses information and is thereby testimonial in nature.[139] The court did state that Beaton's response would allow a juror to infer that the statement of refusal was a manifestation of guilt.[140] However, the court declined to address why such a response would allow a juror to

130. *Beaton*, 516 N.W.2d at 649.

131. *Id.* (citing Schmerber v. California, 384 U.S. 757, 761 (1966)).

132. State v. Pauley, 192 N.W. 91, 92 (N.D. 1923) (concluding that testimonial compulsion with regard to the United States Constitution is embodied within N.D. CONST. art. I, § 13, which is now contained in N.D. CONST. art. I, § 12).

133. State v. Beaton, 516 N.W.2d 645, 648-49 (N.D. 1994).

134. *Id.* at 649.

135. Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (quoting Doe v. United States, 487 U.S. 201, 210 (1988)); *Beaton*, 516 N.W.2d at 649.

136. *Id. See supra* notes 57-59 and accompanying text (defining what the cruel trilemma is and when a response to a question constitutes testimonial evidence).

137. *Beaton*, 516 N.W.2d at 649.

138. *Id.*

139. *Id.*

140. *Id.*

infer a manifestation of guilt.[141] The North Dakota Supreme Court's lack of explanation is especially interesting because the United States Supreme Court has explicitly avoided classifying a refusal as a testimonial communication.[142]

Additionally, the court in *Beaton* determined that the fact of refusal may be admissible regardless of whether *Miranda* warnings were given prior to the request for a blood alcohol test.[143] In making this determination, the court did not explain why the fact of refusal fails to constitute testimonial evidence as compared to the classification of specific statements of refusal as testimonial evidence.[144]

Finally, the court declined to decide if a simple "no" in response to a request to submit to a blood alcohol test constituted testimonial evidence.[145] In doing so, the court seemed to indicate that only some responses to a request for a blood alcohol test would be classified as testimonial.[146] However, the court did not specifically state why or how such a distinction can be made. The court simply dropped a footnote and stated that it need not determine whether a simple "no" constitutes testimonial evidence because in this case there was more.[147]

Justice Levine's dissent argued that the testimonial issue need not be addressed since a request to submit to a blood alcohol test was questioning normally attendant to arrest and custody.[148] In relying upon federal law the dissent determined that such questioning fails to rise to the type of interrogation *Miranda* was designed to protect.[149] The dissent reasoned that since the request to submit to a blood alcohol test is highly regulated by state law and is presented in virtually the same manner to all suspects it constitutes questioning normally attendant to arrest and custody.[150] Therefore, the dissent concluded, *Miranda* warnings are not required as a precondition for a defendant's statements of refusal to be admitted at trial.[151]

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141. *Id.*
142. South Dakota v. Neville, 459 U.S. 553, 561-62 (1983).
143. *Beaton*, 516 N.W.2d at 649.
144. *Id.*
145. *Id.* at 649 n.7.
146. *Id.*
147. *Id.*
148. *Beaton*, 516 N.W.2d at 650 (Levine, J., dissenting).
149. *Id.*
150. *Id.* (citing South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983)).
151. *Id.* (citing Pennsylvania v. Muniz, 496 U.S. 582, 582 (1990) and *Neville*, 459 U.S. at 564 n.15).

IV. IMPACT

The impact of this decision is unclear. For example, the North Dakota Supreme Court did not identify why a request to submit to a blood alcohol test constitutes interrogation. Therefore, police officers will not know what questions they can ask of a suspect before *Miranda* warnings must be given. Furthermore, judges will be unable to apply the supreme court's new interpretation of interrogation. This interpretation of interrogation deviates from its federal counterpart. Accordingly, judges cannot rely on the federal interpretation as a guide in determining future cases. Also, the court in *Beaton* declined to delineate the state standard being utilized in determining that a request to submit to a blood alcohol test constitutes interrogation protected by *Miranda*. Therefore, judges will be unable to rely on *Beaton* to determine whether interrogation exists under the state constitution.

Additionally, in making the determination that interrogation is present when an officer requests a blood alcohol test, the court appears to disregard the exception to interrogation created by the United States Supreme Court and mentioned by Justice Levine in the dissent. This exception provides that questions normally attendant to arrest and custody fail to constitute interrogation for *Miranda* purposes.[152] It is arguable then that the exception to interrogation, involving questions normally attendant to arrest and custody, has not been adopted by North Dakota in construing its state constitution. However, because the court declined to state why this exception did not exist in *Beaton*, judges in future cases will be unable to apply North Dakota's interpretation of interrogation.

The court's conclusion that a refusal constitutes testimonial evidence will impact North Dakota law. Prior to *Beaton* the court had incorporated the federal definition of testimonial evidence into the state's interpretation of article I, section 12 of the North Dakota Constitution.[153] However, the court in *Beaton* determined that a refusal constitutes testimonial evidence.[154] This is an issue the United States Supreme Court has expressly declined to address due to the difficulty of distinguishing evidence that is testimonial and evidence that is real.[155] Since the United State Supreme Court refuses to apply the testimonial distinction to a refusal, and *Beaton* does not state why a refusal constitutes

152. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

153. State v. Miller, 146 N.W.2d 159, 165-66 (N.D. 1966); State v. Gibson, 284 N.W. 209, 218-19 (N.D. 1938).

154. State v. Beaton, 516 N.W.2d 645, 649 (N.D. 1994).

155. *Neville*, 459 U.S. at 562.

testimonial evidence, subsequent judges and prosecutors will logically have difficulty in determining whether a statement is testimonial in nature.

After *Beaton*, prosecutors will face more of a challenge in arguing cases involving intoxication. Since a suspect's statements of refusal can no longer be admitted at trial, the prosecutor is limited to the introduction of the results surrounding the field sobriety test as well as the fact that the defendant refused. Such a limitation may result in more acquittals of drunk drivers. Additionally, the hope of acquittal may cause more suspects to refuse blood alcohol tests. If more suspects are encouraged to refuse a blood alcohol test, the purpose underlying section 39–20–08 of the North Dakota Century Code will be defeated.[156] Finally, by requiring *Miranda* warnings to be given before a request to submit to a blood alcohol test, *Beaton* may result in confusion on the part of a suspect. When a suspect is advised of his/her *Miranda* rights and then asked to submit to a blood alcohol test, confusion as to whether the suspect may truly remain silent exists.[157] This is magnified by the court's determination that silence on the part of the suspect in response to a request for a blood alcohol test constitutes a refusal,[158] the fact of which may be admitted at trial.[159]

Based on the above analysis, it appears that the impact *Beaton* will have on North Dakota law is ultimately unclear.

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156. *See* N.D. CENT. CODE § 39-20-08 (1991).

157. Hammeren v. North Dakota State Highway Comm'r, 315 N.W.2d 679, 682 (N.D. 1982) (stating that a per se confusion doctrine does not exist in North Dakota rather the existence of confusion should be determined on an ad hoc basis); State v. Fields, 294 N.W.2d 404, 410 (N.D. 1980) (stating that an arrested person does not have the constitutional right to remain silent when asked whether or not he will submit to a blood alcohol test).

158. *See Fields*, 294 N.W.2d at 410 (stating that a defendant may refuse to take a blood alcohol test by remaining silent or by giving a negative answer).

159. *Beaton*, 516 N.W.2d at 649.